AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights/Free Speech/Campaign Finance

**Americans for Prosperity Foundation v. Bonta, \_\_\_ U.S. \_\_\_** (2021)

*The Americans for Prosperity Foundation (APF) is a libertarian organization that promotes what they believe is a “free and open society.” Under California law, the APF had to fill out Form 990, which requires tax-exempt charities to state their mission and finances, and Schedule B, which requires those charities to list all donors who have given more than $5,000 that tax year. The ABF had refrained from submitting schedule B, but was not sanctioned for a long time. In 2010, however, California began enforcing that disclosure obligation. The APF filed a lawsuit against the attorney general of California, who was Rob Bonta when the case reached the Supreme Court, claiming that disclosing donors violated their First Amendment rights as incorporated by the due process clause of the Fourteenth Amendment. After years of litigation, the lawsuit was dismissed by the Court of Appeals for the Ninth Circuit. The APF appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States by a 6-3 vote declared the California disclosure law unconstitutional. Chief Justice John Roberts’s majority opinion held that the law failed to satisfy the exacting scrutiny standard. What is the exacting scrutiny standard? How do the various opinions in this case understanding that standard? Which is correct? Why does the California law not satisfy that standard? Why does Justice Sonya Sotomayor disagree? Justice Clarence Thomas would apply strict scrutiny to all disclosure requirements. Is* Bonta *the first step on that path? If not, where does the court get off? Many precedents the majority cites in favor of the decision concerned the rights of civil rights organizations. Does APF demonstrate neutral principles or a failure to recognize vital distinctions between the groups in question?*

Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I7d565adeda6711eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7d565adeda6711eb850ac132f535d1eb) delivered the opinion of the Court.

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The First Amendment prohibits government from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” This Court has “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.” . . . We have also noted that “[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.” *NAACP* v. *Alabama ex rel*.*Patterson* (1958). . . .

*NAACP* v. *Alabama* did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure. We have since settled on a standard referred to as “exacting scrutiny.” Under that standard, there must be “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” . . . It is true that we first enunciated the exacting scrutiny standard in a campaign finance case. But exacting scrutiny is not unique to electoral disclosure regimes. . . . While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.

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*McCutcheon* v. *Federal Election Commission* (2014) is instructive here. A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters. Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.

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. . . . The “government may regulate in the [First Amendment] area only with narrow specificity”  and compelled disclosure regimes are no exception. When it comes to “a person's beliefs and associations,” “[b]road and sweeping state inquiries into these protected areas ... discourage citizens from exercising rights protected by the Constitution Contrary to the dissent, we understand this Court's discussion of rules that are “broad” and “broadly stifle” First Amendment freedoms to refer to the scope of challenged restrictions—their breadth—rather than the severity of any demonstrated burden. . . . The point is that a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.

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We do not doubt that California has an important interest in preventing wrongdoing by charitable organizations. It goes without saying that there is a “substantial governmental interest[ ] in protecting the public from fraud.” . . . There is a dramatic mismatch, however, between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end. . . . Given the amount and sensitivity of this information harvested by the State, one would expect Schedule B collection to form an integral part of California's fraud detection efforts. It does not. To the contrary, the record amply supports the District Court's finding that there was not “a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts.”

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The Attorney General and the dissent contend that alternative means of obtaining Schedule B information—such as a subpoena or audit letter—are inefficient and ineffective compared to up-front collection. It became clear at trial, however, that the Office had not even considered alternatives to the current disclosure requirement. The Attorney General and the dissent also argue that a targeted request for Schedule B information could tip a charity off, causing it to “hide or tamper with evidence.”  But again, the States’ witnesses failed to substantiate that concern. . . .

The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints. California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation. The need for up-front collection is particularly dubious given that California—one of only three States to impose such a requirement. did not rigorously enforce the disclosure obligation until 2010. Certainly, this is not a regime “whose scope is in proportion to the interest served.”

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Normally, a plaintiff bringing a facial challenge must “establish that no set of circumstances exists under which the [law] would be valid,” or show that the law lacks “a plainly legitimate sweep,”  In the First Amendment context, however, we have recognized “a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.”  We have no trouble concluding here that the Attorney General's disclosure requirement is overbroad. The lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny.

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. . . . Our cases have said that disclosure requirements can chill association “[e]ven if there [is] no disclosure to the general public.” . . . Exacting scrutiny is triggered by “state action which *may* have the effect of curtailing the freedom to associate,” and by the “*possible* deterrent effect” of disclosure.  While assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it. It is irrelevant, moreover, that some donors might not mind—or might even prefer—the disclosure of their identities to the State. The disclosure requirement “creates an unnecessary risk of chilling” in violation of the First Amendment,  indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous. The petitioners here, for example, introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence. . . .

The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California.

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The dissent concludes by saying that it would be “sympathetic” if we “had simply granted as-applied relief to petitioners based on [our] reading of the facts.” But the pertinent facts in these cases are the same across the board: Schedule Bs are not used to initiate investigations. That is true in every case. California has not considered alternatives to indiscriminate up-front disclosure. That is true in every case. And the State's interest in amassing sensitive information for its own convenience is weak. That is true in every case. When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, “[b]ecause First Amendment freedoms need breathing space to survive.”

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I7d565adeda6711eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7d565adeda6711eb850ac132f535d1eb) concurring in the judgment.

. . . . [W]hile I agree with much of the Court's opinion, I would approach three issues differently. First, the bulk of “our precedents ... require application of strict scrutiny to laws that compel disclosure of protected First Amendment association.” . . . The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously. Laws directly burdening the right to associate anonymously, including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights.

Second, the Court holds the law “overbroad” and, thus, invalid in all circumstances.  But I continue to have “doubts about [the] origins and application” of our “overbreadth doctrine.” . . . [T]the Court has no power to enjoin the *lawful* application of a statute just because that statute might be unlawful as-applied in other circumstances.

Third, and relatedly, this Court also lacks the power “to ‘pronounce that the statute is unconstitutional in *all*applications,’ ” even if the Court suspects that the law will likely be unconstitutional in every future application as opposed to just a substantial number of its applications.  A declaration that the law is “facially” unconstitutional “seems to me no more than an advisory opinion—which a federal court should never issue at all.” . . .

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Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I7d565adeda6711eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7d565adeda6711eb850ac132f535d1eb), with whom Justice [Gorsuch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I7d565adeda6711eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7d565adeda6711eb850ac132f535d1eb) joins, concurring in the judgment.

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. . . . I am not prepared at this time to hold that a single standard applies to all disclosure requirements. And I do not read our cases to have broadly resolved the question in favor of exacting scrutiny. This Court decided its seminal compelled disclosure cases before it developed modern strict scrutiny doctrine. Accordingly, nothing in those cases can be understood as rejecting strict scrutiny. If anything, their language and reasoning—requiring a compelling interest and a minimally intrusive means of advancing that interest—anticipated and is fully in accord with contemporary strict scrutiny doctrine. . . .

Because the choice between exacting and strict scrutiny has no effect on the decision in these cases, I see no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment.

Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I7d565adeda6711eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7d565adeda6711eb850ac132f535d1eb), with whom Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I7d565adeda6711eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7d565adeda6711eb850ac132f535d1eb) and Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I7d565adeda6711eb850ac132f535d1eb&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7d565adeda6711eb850ac132f535d1eb) join, dissenting.

Although this Court is protective of First Amendment rights, it typically requires that plaintiffs demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored to the government's interests, never mind striking the law down in its entirety. Not so today. Today, the Court holds that reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no burden at all. The same scrutiny the Court applied when NAACP members in the Jim Crow South did not want to disclose their membership for fear of reprisals and violence now applies equally in the case of donors only too happy to publicize their names across the websites and walls of the organizations they support.

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. . . . [T]he Court discards its decades-long requirement that, to establish a cognizable burden on their associational rights, plaintiffs must plead and prove that disclosure will likely expose them to objective harms, such as threats, harassment, or reprisals. It also departs from the traditional, nuanced approach to First Amendment challenges, whereby the degree of means-end tailoring required is commensurate to the actual burdens on associational rights. Finally, it recklessly holds a state regulation facially invalid despite petitioners’ failure to show that a substantial proportion of those affected would prefer anonymity, much less that they are objectively burdened by the loss of it.

Today's analysis marks reporting and disclosure requirements with a bull's-eye. Regulated entities who wish to avoid their obligations can do so by vaguely waving toward First Amendment “privacy concerns.”  It does not matter if not a single individual risks experiencing a single reprisal from disclosure, or if the vast majority of those affected would happily comply. . . . Neither precedent nor common sense supports such a result. I respectfully dissent.

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Because the freedom to associate needs “breathing space to survive,” *NAACP* v. *Button* (1963), this Court has recognized that associational rights must be “protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.”  Publicizing individuals’ association with particular groups might expose members to harassment, threats, and reprisals by opponents of those organizations. Individuals may choose to disassociate themselves from a group altogether rather than face such backlash.

Acknowledging that risk, this Court has observed that “privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *NAACP*v. *Alabama ex rel. Patterson* (1958). That observation places special emphasis on the risks actually resulting from disclosure. . . . [P]rivacy can be particularly important to “dissident” groups because the risk of retaliation against their supporters may be greater. For groups that promote mainstream goals and ideas, on the other hand, privacy may not be all that important. Not only might their supporters feel agnostic about disclosing their association, they might actively seek to do so.

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Before today, to demonstrate that a reporting or disclosure requirement would chill association, litigants had to show “a reasonable probability that the compelled disclosure of ... contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” . . . Consistent with this approach, the Court has carefully scrutinized record evidence to determine whether a disclosure requirement actually risks exposing supporters to backlash.

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Today, the Court abandons the requirement that plain-tiffs demonstrate that they are chilled, much less that they are reasonably chilled. Instead, it presumes (contrary to the evidence, precedent, and common sense) that all disclosure requirements impose associational burdens. . . . At best, then, a subjective preference for privacy, which previously did not confer standing, now subjects disclosure requirements to close scrutiny. . . .

A reasonable assessment of the burdens imposed by disclosure should begin by determining whether those burdens even exist. If a disclosure requirement imposes no burdens at all, then of course there are no “unnecessary” burdens. Likewise, if a disclosure requirement imposes no burden for the Court to remedy, there is no need for it to be closely scrutinized. By forgoing the requirement that plaintiffs adduce evidence of tangible burdens, such as increased vulnerability to harassment or reprisals, the Court gives itself license to substitute its own policy preferences for those of politically accountable actors.

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Disclosure requirements burden associational rights only indirectly and only in certain contexts. For that reason, this Court has never necessarily demanded such requirements to be narrowly tailored. Rather, it has reserved such automatic tailoring for state action that “directly and immediately affects associational rights.”  When it comes to reporting and disclosure requirements, the Court has instead employed a more flexible approach, which it has named “exacting scrutiny.”

Exacting scrutiny requires two things: first, there must be “ ‘a “substantial relation” between the disclosure requirement and a “sufficiently important” government interest,’ ” and second, “ ‘the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.’ ”  Exacting scrutiny thus incorporates a degree of flexibility into the means-end analysis. The more serious the burden on First Amendment rights, the more compelling the government's interest must be, and the tighter must be the fit between that interest and the government's means of pursuing it. By contrast, a less substantial interest and looser fit will suffice where the burden on First Amendment rights is weaker (or nonexistent). In other words, to decide how closely tailored a disclosure requirement must be, courts must ask an antecedent question: How much does the disclosure requirement actually burden the freedom to associate?

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Under a First Amendment analysis that is faithful to this Court's precedents, California's Schedule B requirement is constitutional. Begin with the burden it imposes on associational rights. Petitioners have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are made public. California's Schedule B regulation, however, is a nonpublic reporting requirement, and California has implemented security measures to ensure that Schedule B information remains confidential.

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Given the modesty of the First Amendment burden, California may justify its Schedule B requirement with a correspondingly modest showing that the means achieve its ends.

California collects Schedule Bs to facilitate supervision of charities that operate in the State. As the Court acknowledges, this is undoubtedly a significant governmental interest. In the United States, responsibility for overseeing charities has historically been vested in States’ attorneys general, who are tasked with prosecuting charitable fraud, self-dealing, and misappropriation of charitable funds. Effective policing is critical to maintaining public confidence in, and continued giving to, charitable organizations. California's interest in exercising such oversight is especially compelling given the size of its charitable sector. Nearly a quarter of the country's charitable assets are held by charities registered in California.

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The Schedule B reporting requirement is properly tailored to further California's efforts to police charitable fraud. . . . . As a former head of the Section described it, Schedule B combined with the rest of Form 990 provides “[a] roadmap to the rest of the investigation that follows.” Indeed, having Schedule Bs on hand is important to attorneys’ decisions regarding whether to advance an investigation at all. One of the first things an auditor or lawyer does upon receiving a complaint is review the entire Form 990, including Schedule B.  One Section leader testified that she used Schedule Bs “[a]ll the time” for this purpose.

In sum, the evidence shows that California's confidential reporting requirement imposes trivial burdens on petitioners’ associational rights and plays a meaningful role in Section attorneys’ ability to identify and prosecute charities engaged in malfeasance. That is more than enough to satisfy the First Amendment here.

The Court claims that the collection of Schedule Bs does not form an “integral” part of California's fraud detection efforts and has never done “ ‘anything’ ” to advance investigative efforts.[8](https://1.next.westlaw.com/Document/I7d565adeda6711eb850ac132f535d1eb/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740120000017a6314b2028e1cf962%3Fppcid%3D640b34672953463ab0e4169ffe28642b%26Nav%3DCASE%26fragmentIdentifier%3DI7d565adeda6711eb850ac132f535d1eb%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c41694f6dc8ea8d94b3d9a826fee9c8e&list=CASE&rank=1&sessionScopeId=2b1f0718041117c7f4f9cefc877f35fa0b9cf69fa83404dfdb3e7913a30c6d76&ppcid=640b34672953463ab0e4169ffe28642b&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00112053934032)*Ante,*at 13. The record reveals otherwise. As discussed, Section leaders report that they use Schedule Bs “[a]ll the time” and rely on them to create roadmaps for their investigations. . . . The Court next insists that California can rely on alternative mechanisms, such as audit letters or subpoenas, to obtain Schedule B information. But the Section receives as many as 100 charity-related complaints a monthIt is not feasible for the Section, which has limited staff and resources, to conduct that many audits. . . .

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In a final coup de grâce, the Court concludes that California's reporting requirement is unconstitutional not just as applied to petitioners, but on its very face. “In the First Amendment context,” such broad relief requires proof that the requirement is unconstitutional in “ ‘a substantial number of ... applications ... , judged in relation to the statute's plainly legitimate sweep.’ ”  “Facial challenges are disfavored for several reasons,” prime among them because they “often rest on speculation.”  Speculation is all the Court has. The Court points to not a single piece of record evidence showing that California's reporting requirement will chill “a substantial number” of top donors from giving to their charities of choice. Yet it strikes the requirement down in every application.

The average donor is probably at most agnostic about having their information confidentially reported to California's attorney general. A significant number of the charities registered in California engage in uncontroversial pursuits. They include hospitals and clinics; educational institutions; orchestras, operas, choirs, and theatrical groups; museums and art exhibition spaces; food banks and other organizations providing services to the needy, the elderly, and the disabled; animal shelters; and organizations that help maintain parks and gardens. It is somewhat hard to fathom that donors to the Anderson Elementary School PTA, the Loomis-Eureka Lakeside Little League, or the Santa Barbara County Horticultural Society (“[c]elebrating plants since 1880”) are less likely to give because their donations are confidentially reported to California's Charitable Trusts Section.[12](https://1.next.westlaw.com/Document/I7d565adeda6711eb850ac132f535d1eb/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad740120000017a6314b2028e1cf962%3Fppcid%3D640b34672953463ab0e4169ffe28642b%26Nav%3DCASE%26fragmentIdentifier%3DI7d565adeda6711eb850ac132f535d1eb%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c41694f6dc8ea8d94b3d9a826fee9c8e&list=CASE&rank=1&sessionScopeId=2b1f0718041117c7f4f9cefc877f35fa0b9cf69fa83404dfdb3e7913a30c6d76&ppcid=640b34672953463ab0e4169ffe28642b&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00152053934032)

In fact, research shows that the vast majority of donors prefer to publicize their charitable contributions. . . . . Of course, it is always possible that an organization is inherently controversial or for an apparently innocuous organization to explode into controversy. The answer, however, is to ensure that confidentiality measures are sound or, in the case of public disclosures, to require a procedure for governments to address requests for exemptions in a timely manner. It is not to hamper all government law enforcement efforts by forbidding confidential disclosures en masse.

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. . . . There is no question that petitioners have shown that their donors reasonably fear reprisals if their identities are publicly exposed. The Court and I, however, disagree about the likelihood of that happening and the role Schedule Bs play in the investigation of charitable malfeasance. If the Court had simply granted as-applied relief to petitioners based on its reading of the facts, I would be sympathetic, although my own views diverge. But the Court's decision is not nearly so narrow or modest. Instead, the Court jettisons completely the longstanding requirement that plaintiffs demonstrate an actual First Amendment burden before the Court will subject government action to close scrutiny. It then invalidates a regulation in its entirety, even though it can point to no record evidence demonstrating that the regulation is likely to chill a substantial proportion of donors. These moves are wholly inconsistent with the Court's precedents and our Court's long-held view that disclosure requirements only indirectly burden First Amendment rights. . . .