First Amendment Freedoms Diluted:

The Impact of Disclosure Requirements on Nonprofit Charities

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INTRODUCTION

Since the birth of the Bill of Rights in 1791, the freedoms protected by the First Amendment have been cherished by all members of this nation. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[1] Over time, courts have acknowledged that the freedom to speak freely means very little if the guarantee is not protected by an additional right: the freedom to associate.[2] Thus, the freedom of expressive association stands as an essential component of an individual's free speech rights and state infringement on associative rights has the power of potentially chilling speech, especially from an organizational standpoint.

Throughout the relatively short history of the right to associate, the courts traditionally applied strict scrutiny to governmental attempts to intervene in organizations, whether such intervention be via imposing penalties on disfavored groups, requiring disclosure of membership groups, or attempting to interfere with a group's internal organization or affairs.[3] However, in two recent cases, *Citizens United v. Schneiderman* and *Americans for Prosperity Foundation v. Becerra*, two different appellate courts found the freedom of expressive association of either organization was not infringed upon when applying intermediate, exacting scrutiny to state laws mandating the disclosure of nonprofit organizations' annual Form 990s.[4] These forms, filed yearly with the IRS to maintain tax-exempt status, include a Schedule B that contains a list of the names and addresses of all significant donors to the organization.[5] The plaintiffs in both cases argued the forced disclosure of these donors would chill the organization's freedom of speech rights by making it more difficult to secure donations from individuals who feared being publicly associated

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1. U.S. Const. amend. I.

2. *See* Roberts v. United States Jaycees, 468 U.S. 609 (1984) ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.").

3. See *infra* Part I.

4. Citizens United v. Schneiderman, 882 F.3d 374, 382 (2d Cir. 2018); Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1009 (9th Cir. 2018).

5. A model Schedule B form can be found at https://www.irs.gov/pub/irs-pdf/f990ezb.pdf [https://perma.cc/H4Z8-ZYAF]. *See also infra* notes 57–61 and accompanying text.

with organizations promoting various minority viewpoints.[6] Ultimately, both appellate courts found these arguments to be unpersuasive and upheld the state laws.[7]

Part I of this Note briefly discusses the history and evolution of the freedom of association before articulating what the doctrine looks like today. Part II summarizes the decisions in *Citizens United* and *Americans for Prosperity Foundation* while analyzing the reasoning used by both courts in reaching their decisions. Finally, Part III weighs the merits of this decision by considering the arguments raised by both sides both during and in the wake of the decisions. This Note concludes that the appellate courts veered away from traditional preferences of protecting First Amendment rights by upholding a state-sanctioned, non-political disclosure requirement for non-profit charities. Both appellate courts reached this conclusion by applying a less rigorous scrutiny test than that normally applied to statutes with the potential of affecting First Amendment freedoms.

PART I: THE HISTORY OF THE FREEDOM OF ASSOCIATION

Understanding the history of the expansion of First Amendment rights to include the freedom of association, especially the standard of review the courts tend to apply to this right, is beneficial in understanding how the recent decisions in *Schneiderman* and *Becerra* veer from usual decisions pertinent to First Amendment law.[8] Since the 1950's, it has been "beyond debate that [the] freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . 'liberty.'"[9] This right is enshrined in the First Amendment freedom of speech and incorporated to the states via the Due Process Clause of the Fourteenth Amendment.[10]

Freedom of association was first clearly articulated in the landmark case *NAACP v. Alabama ex rel. Patterson*. In that case, the state of Alabama passed a statute compelling foreign corporations, including the NAACP, to disclose to the state's Attorney General the names and addresses of all its members and agents, regardless of their position or prominence within the organization.[11] Individuals living in Alabama in the 1950s were likely reluctant to publicly associate themselves with the NAACP for fear of retaliatory actions, or even physical harm, from others living in the state who strongly opposed the civil rights movement and racial equality.[12] Accordingly, in order to protect themselves and their families, many people would no longer want to be associated with the organization if the state was going to be informed about that association. In light of these considerations, the Supreme Court found the statute equated to state action that might curtail the freedom of associating

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6. *Schneiderman,* 882 F.3d at 381; *Becerra*, 903 F.3d at 1013.

7. *Schneiderman,* 882 F.3d at 390; *Becerra*, 903 F.3d at 1020.

8. *See Schneiderman,* 882 F.3d 374 (applying exacting scrutiny to an a-political disclosure law targeting nonprofit charities); *Becerra*, 903 F.3d 1000 (same).

9. NAACP v. Ala. ex. rel. Patterson, 357 U.S. 449, 460 (1958).

10. *Id.*

11. *Patterson*, 357 U.S. at 451.

12. *Id.* at 462 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.").

by instilling fear, harassment, or other harms in potential members, and, therefore, subjected the statute to the "closest scrutiny."[13] In doing so, the Court noted the "vital relationship" between the freedom to associate and the privacy of an individual's associations,[14] before ultimately determining the state's interest in using the membership lists was not compelling.[15] Thus, the NAACP's judicial fine and contempt charge for refusal to comply with the law were overturned.[16]

Throughout the next few years, the Court continually found that the freedom to associate, as well as the right to associate privately, was extremely important, which resulted in the Court striking down several state statutes attempting to infringe upon those rights.[17] Subsequent decades saw the rise of the doctrine of substantive due process accompanied by an expansion of the concept of the right to associate in a social, legal, and economic sense.[18] At the end of this era, the courts saw association as a "form of expression of opinion" whose "existence is necessary in making the express guarantees [of the First Amendment] meaningful."[19]

The next major freedom of association case, *Roberts v. United States Jaycees*, came in 1984.[20] This case was the first to define the two distinct ways in which the freedom of association had been applied throughout its history.[21] In one sense, as seen in *Griswold* and other substantive due process cases, the freedom of association represents a fundamental element of personal liberty that allows individuals to be secure in their relationships;[22] this is known as the freedom of "intimate association."[23] The other, more pertinent, application of the freedom of association is as a mechanism to engage in activity protected by the First Amendment[24]—also

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13. *Id.* at 460–61.

14. *Id.* at 462.

15. *Id.* at 464. The State argued that the membership lists could serve as evidence of organizations violating Alabama's intrastate commerce law. *Id.*

16. *Id.* at 466.

17. *See, e.g.,* Bates v. City of Little Rock, 361 U.S. 516 (1960) (determining that the power to tax was not a controlling justification for the deterrence of free association caused by compulsory disclosure of membership lists); Shelton v. Tucker, 364 U.S. 479 (1960) (finding that while the state has a compelling interest in inquiring as to the fitness and competence of teachers, the unlimited scope of the statute requiring association disclosure, as well as the lack of required confidentiality, results in an overbroad and intrusive statute).

18. Griswold v. Connecticut., 381 US. 479, 483 (1965) ("[W]e have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members."). *See also*, Wayne Batchis, Article, *Citizens United and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of the Association*, 36 N.Y.U. Rev. L. & Soc. Change 5, 16 (2012) ("[T]he Court had issued numerous decisions addressing associational rights through the prism of substantive due process cases . . . .").

19. *Griswold*, 381 U.S. at 483.

20. *Roberts,* 468 U.S. 609.

21. *Id.* at 617 ("Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses.").

22. *Id.* at 617–18 ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State . . . .").

23. *Id.* at 618.

24. *Id.* (recognizing "a right to associate for the purpose of engaging in those activities

known as "expressive association."[25] The Court noted that, in some instances, both aspects of association might be implicated, and the degree of constitutional protection awarded by the freedom varies with the type of association in question.[26]

In *Roberts*, the U.S. Jaycees, an organization dedicated to the growth of young men's civic groups throughout the country,[27] sought an injunction, as well as declaratory relief, from a Minnesota statute that would require the group to admit women as members.[28] The Court quickly determined the relationships among members were not personal enough to qualify for protection under the freedom of intimate association before moving to the more difficult question of expressive association.[29] The Court acknowledged that the Minnesota statute infringes on the expressive rights of the Jaycees because it attempts to "interfere with the internal organization or affairs of the group"[30] by forcing the organization to admit women, despite a universally recognized freedom *not* to associate with women, if so desired.[31] Despite this significant organizational interest, the Court found that the freedom of expressive association was not absolute, and the state's compelling interest in preventing gender discrimination within its society justified the infringement on the rights of the male Jaycees.[32]

For the next fifteen years, the Court continued to identify the right to expressive association as a fundamental right protected by the First Amendment, subject to limitations in the presence of a compelling state interest.[33] It was not until 2000, in

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protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion").

25. *Id.*

26. *Id.* ("[W]hen the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated . . . . [T]he nature and degree of association may vary depending on the extent wo which one or the other aspect of the constitutionally protected liberty is at stake in a given case.").

27. *Id.* at 612.

28. *Id.* at 615.

29. *Id.* at 619–21 ("[S]everal features of the Jaycees clearly place the organization outside of the category of relationships worthy of this kind of protection."). These 'factors' included the size and lack of selectivity within the groups, no restrictions beyond age and sex, and the participation of strangers in group membership. *Id.*

30. *Id.* at 623.

31. *Id.*

32. *Id.* at 624 ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.").

33. In chronological order, s*ee, e.g.,* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987) ("[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."); N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988) (finding the rights of a nonprofit club's members were not affected in a "significant way" by a local law forbidding membership admission solely based on race or sex); Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (finding the act of minors coming together to engage in recreational dancing is not protected by the First Amendment) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

Boy Scouts of America v. Dale, that the Supreme Court again significantly added to the Freedom of Association doctrine.[34] Respondent James Dale was a former Eagle Scout whose Boy Scout membership was revoked when the organization discovered that Dale was a homosexual and a gay rights activist.[35] The New Jersey Supreme Court held that, under the state's public accommodations law, the organization could not exclude Dale on the basis of sexual orientation.[36] The United States Supreme Court, however, found that the law violated the First Amendment right to expressive association.[37] In doing so, the Court held that when determining the availability of this First Amendment protection to a certain group, it must first be demonstrated that the "group engages in 'expressive association.'"[38] This requirement can be satisfied by "some" sort of expression, public or private.[39] If such expression can be proven, as it was for the Boy Scouts, then the Court must analyze the impact of compliance with the statute on an organization's ability to advocate public or private viewpoints.[40]

In *Dale*, the Court found that, as an organization, the Boy Scouts had both publicly and privately disavowed homosexuality.[41] The Court first reasoned that forcing the organization to reinstate Dale would significantly affect the Boy Scouts' expression,[42] before debating which tier of scrutiny should be applied to the New Jersey public accommodation statute,[43] and ultimately determining the same test used in *Roberts* should be applied—balancing the state's compelling interest with the burden on an organization's expressive association rights.[44] Unlike *Roberts*, however, the state's interest was not compelling enough to justify such a "severe intrusion" on the Boy Scouts, and therefore the organization did not have to reinstate Dale.[45]

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34. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

35. *Id.* at 644.

36. *Id.* at 646.

37. *Id.* at 644.

38. *Id.* at 648.

39. *Id.* ("[T[o come within [First Amendment protection], a group must engage in some form of expression, whether it is public or private.").

40. *Id.* at 650 ("It seems indisputable that an association that seeks to transmit . . . a system of values engages in expressive activity.").

41. *Id.* at 651–52 (summarizing the historical teachings of the Boy Scouts, convincing the Court that the organization believes "homosexual conduct is not morally straight").

42. *Id.* at 656 (concluding the forced inclusion of the petitioner in the organization would "significantly affect [the Boy Scout's] expression").

43. *Id.* at 658–59 ("[I]n [past associational freedom] cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.").

44. *Id.* ("New Jersey's public accommodations law directly and immediately affects associational rights . . . associational rights that enjoy First Amendment protection.").

45. *Id.* at 661 (quoting Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., 515 U.S. 557, 579 (1995)) ("'While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.'").

Just six years later, the Supreme Court again addressed the freedom of expressive association in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[46] In this case, the Supreme Court found that compelling law schools to host military recruiters on their campuses in order to receive federal funding did not violate the freedom of speech either directly, by compelling speech, or indirectly, by violating expressive association rights.[47] When comparing the situation with that in *Dale*, the Court found that the law schools' associational rights were not affected in the same way because both students and faculty are free to voice their disapproval of the military's Don't Ask Don't Tell policies.[48] Therefore, the Court upheld the congressional statute requiring military recruiting on campuses.[49]

Finally, in 2010, the Supreme Court addressed a variety of speech and associational issues in the seminal case, *Citizens United v. FEC*.[50] In regard to the First Amendment speech and association rights, the Court noted that "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'"[51] The Court ultimately found that a statute criminalizing corporate advocacy of an election candidate within thirty days of a primary election was an unconstitutional infringement on the freedom of speech[52] under a strict scrutiny analysis.[53] The statute also required annual filings of disclosure statements with the FEC by any individual spending greater than $10,000 on election communications within that year.[54] Citing to previous campaign finance cases, including *Buckley v. Valeo* and *McConnell v. FEC,* the Court found this portion of the statute was only subject to "exacting scrutiny," and thus required only a "substantial relation between the disclosure requirement and a 'sufficiently important' government interest."[55] While holding the disclosure statutes valid in this situation, the Court noted that if a group can demonstrate a "reasonable probability" that disclosure of donors' names would "subject them to threats, harassment, or reprisals from either Government officials or private parties," then the relevant statute is deemed unconstitutional as applied.[56]

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46. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47 (2006).

47. *Id.* at 69 ("Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association.").

48. *Id.* ("Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school to 'accept members it does not desire.'") (quoting *Dale,* 530 U.S.at 648).

49. *Id.* at 70 (reversing and remanding "[b]ecause Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association . . .").

50. 558 U.S. 310 (2010).

51. *Id.* at 327 (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007)).

52. *Id.* at 337.

53. *Id.* at 340 ("Laws that burden political speech are 'subject to strict scrutiny . . . .'") (quoting *WRTL*, 551 U.S. at 464).

54. *Id.* at 366. *See also* 52 U.S.C. § 30104 (f)(1).

55. *Id.* at 366–67 (citing Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976)).

56. *Id.* at 367 (citing McConnell v. FEC, 540 U.S. 93, 198 (2003)).

This background set the groundwork for two 2018 First Amendment cases, *Citizens United v. Schneiderman* and *Americans for Prosperity Foundation v. Becerra,* that could potentially impact nonprofit organizations across the country.

PART II: THE NONPROFIT CASES – SCHNEIDERMAN AND BECERRA

There are approximately 1.6 million tax-exempt organizations in the United States that received a combined $390 billion as a result of charitable giving in 2016.[57] Many of these organizations promote education or public awareness about various issues, including, in some instances, controversial topics.[58] These organizations allow individuals the opportunity to associate with others who have similar beliefs and present these views to the public. Just as was seen in *NAACP v. Alabama ex rel. Patterson*, it is possible that public association with these organizations could chill speech.[59] In recent years, however, states have begun requiring more and more disclosures from nonprofit organizations pertaining to individual membership and charitable giving. The Second and Ninth Circuits were the first appellate courts to be presented with the question this Part analyzes: does compelled disclosure of a nonprofit organization's Schedule B form to a state official a violation of First Amendment rights?

Organizations that qualify under IRC § 501(a) are exempt from being taxed by the IRS.[60] Despite their tax-exempt status, however, these organizations are required to file an annual informational return, known as an Annual Form 990.[61] The purpose of such a return is to assist the IRS in ensuring tax-exempt organizations are conducting themselves appropriately to maintain their exempt status.[62] One mandatory component of the Annual Form 990 is the Schedule B. This form requires nonprofit organizations to disclose the names, addresses, and total yearly contributions of significant donors.[63] While this information must be provided to the IRS, the IRS is, in turn, prohibited from publicly disclosing donor information from the Schedule B,[64] in conformity with the ideals of the freedom of expressive association.

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57. The Charitable Sector, THE INDEP. SECTOR, https://independentsector.org/about/the-charitable-sector/ [https://perma.cc/VJ74-D98J].

58. For example, in 2016 the Southern Poverty Law Center (SPLC) identified fifty-five organizations with charitable, tax-exempt status that the SPLC classified as "hate groups." Eden Stiffman, *Dozens of 'Hate Groups' Have Charity Status, Chronicle Study Finds*, THE CHRON. OF PHILANTHROPY (Dec. 22, 2016), https://www.philanthropy.com/article/Dozens-of-Hate-Groups-/238748 [https://perma.cc/QBL2-RTVC].

59. *See supra* notes 9–16 and accompanying text.

60. I.R.C. § 501(a).

61. I.R.C. § 6033(a)(1) (requiring Annual Form 990).

62. *Schneiderman*, 882 F.3d at 382. *See also About Schedule B (Form 990, 990-EZ, 990-PF), Schedule of Contributors*, INTERNAL REVENUE SERV., https://www.irs.gov/forms-pubs/about-schedule-b-form-990-990-ez-or-990-pf [https://perma.cc/M4P3-7AMM] (explaining the purpose and use of the Schedule B).

63. *See* 26 C.F.R. 1.6033-2(a)(2)(ii)(F); *see also supra* note 5.

64. I.R.C. § 6104(d)(3)(A) (outlining exceptions to the public disclosure requirement and stating that unless the organization is a private foundation or a political organization, the organization is not required to publicly disclose the name or address of any contributors to the

State governments are similarly concerned with ensuring the honest actions of nonprofit, tax-exempt organizations.[65] In an effort to combat this fear, two states, California and New York, passed laws requiring organizations seeking to solicit tax-deductible donations within the state to provide an annual submission of their Form 990s, including the organization's Schedule B, to a state official.[66] Organizations within both states that are subject to these disclosure requirements exist to promote viewpoints that express the opinions of the minority or are otherwise controversial.[67] These types of organizations fear the additional disclosure requirements will result in an intimidation of donors, leading to a subsequent decrease in donations and, consequently, a chilling of the organizations' speech.[68] To better understand both sides of the issue, it is necessary to take a more-in-depth look at the opinions and decisions in both *Schneiderman* and *Becerra.*

A. The First Challenge to State Disclosure Laws – New York: Citizens United v. Schneiderman

In *Schneiderman*, the plaintiffs consisted of two branches of the Citizens United organization; one branch is a 501(c)(3) organization, and the other a 501(c)(4).[69]

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organization).

65. *See Schneiderman*, 882 F.3d at 378; *see also Becerra*, 903 F.3d at 1009.

66. *See* Cal. Gov't Code § 12584 (mandating the Attorney General to "establish and maintain a register of charitable corporations . . ." and allowing the Attorney General to "conduct whatever investigation is necessary"); N.Y. Exec. Law § 172(1) ("Every charitable organization . . . which intends to solicit contributions from persons in this state or from any governmental agency shall . . . file with the attorney general a prescribed registration form . . . .").

67. For example, Citizens United, the plaintiff in *Schneiderman*, is a largely conservative organization based in Judeo-Christian values that champions a belief in God and the family as the center of society. *What is Citizens United*, Citizens United, http://www.citizensunited.org/what-we-do.aspx [https://perma.cc/KTF4-TEGW]. Similarly, the plaintiff in *Becerra*, the Americans for Prosperity Foundation is a strongly conservative organization with significant political influence. *See* Alexander Hertel-Fernandez, Caroline Tervo & Theda Skocpol, *How the Koch Brothers Built the Most Powerful Rightwing Group You've Never Heard of,* The Guardian (Sept. 26, 2018), https://www.theguardian.com/us-news/2018/sep/26/koch-brothers-americans-for-prosperity-rightwing-political-group [https://perma.cc/EC2D-BU7Y].

68. *Schneiderman*, 882 F.3d at 381 (summarizing the appellants' argument that "donors . . . fear having their names associated with [] controversial beliefs . . .").

69. *Id.* at 378. 501(c)(3) organizations are tax exempt due to the nature of their charitable purpose. This purpose can broadly be encompassed to include religious, educational, or scientific goals and cannot substantially be associated with a political agenda. On the other hand, 501(c)(4) organizations include social welfare organizations; these entities are permitted to engage in political speech and lobbying. Lincoln Arneal, *The Differences Between a 501(c)(3), 501(c)(4), and Other Tax Exemptions,* Nonprofit Hub (Sept. 8, 2015), https://nonprofithub.org/starting-a-nonprofit/differences-501c3-501c4-tax-exemptions/ [https://perma.cc/KY99-4L7N]. While both the political and the educational sectors of Citizen's United argued against the disclosure requirements, the key argument of this Note is that 501(c)(3)—charitable organizations—should not be subject to these disclosure requirements.

Both are subject to the Schedule B requirements from the IRS[70] as well as the state of New York disclosure requirements.[71] For nearly twenty years, both Citizens United branches submitted only the first page of their Schedule B to the state, redacting the information containing personal information of members, and did not hear a complaint from New York state officials.[72] In 2013, however, the Attorney General notified both organizations of their failure to comply with the disclosure requirements and that this failure, if not corrected, had the potential to result in a revocation of solicitation rights within the state.[73] In response, Citizens United filed a lawsuit in the Southern District of New York, where the motion to dismiss was granted to the defendant state for the plaintiffs' failure to state a First Amendment claim and a consequential lack of subject matter jurisdiction in the federal court.[74] The case then made its way on appeal to the Second Circuit, where the First Amendment claims drew more attention and a deeper analysis.

At the Second Circuit, Citizens United made two key First Amendment claims: that (1) the regulation intimidated potential donors from contributing, undermining the organization's ability to speak, and that (2) the disclosure requirement was an unconstitutional prior restraint on the nonprofit organizations' ability to solicit donations.[75] The court reviewed both claims in turn.

Regarding the fear of chilling speech and expression claim, the plaintiffs argued this case was similar to *NAACP v. Alabama ex rel. Patterson* as both statutes would result in the intimidation, and subsequent reduction, of their donors.[76] Therefore, the plaintiffs sought a strict scrutiny application that would result in the New York statute being struck down.[77] The Second Circuit, however, was not persuaded by this argument and stated that strict scrutiny is only pertinent in First Amendment cases when "a law 'applies to particular speech because of the topic discussed or the idea or message expressed' or [when] 'facially neutral content . . . cannot be justified without reference to the content of the regulated speech,' including preventing expression from disfavored speakers."[78] Relying on *Citizens United v. FEC*, the court instead decided to apply "exacting scrutiny," as they saw this statute as a content-neutral disclosure requirement.[79] The court noted that *Citizens United v. FEC* used exacting scrutiny to uphold a disclosure requirement in the realm of election law and

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70. *Schneiderman*, 882 F.3d at 379; *see also* I.R.C. § 6033(a)(1) ("[E]very organization exempt from taxation under section 501(a) shall file an annual return . . ..").

71. *Id.* at 379; *see also* N.Y.COMP. CODES R. & REGS. tit. 13 § 91.5(c)(3)(i)(a) (requiring a charitable organization's annual disclosures to include the Schedule B).

72. *Id.* at 379.

73. *Id.* at 379–80.

74. *Id.*

75. *Id.* at 381.

76. *Id.* ("The basis of the Appellants' first challenge is an analogy to the landmark decision in *National Association for the Advancement of Colored People v. State of Alabama ex re. Patterson*.").

77. *Id.* (arguing that Citizen United's political advocacy has resulted in societal notoriety and threats from opponents that resulted in donors fearing public association with the organization).

78. *Id.* at 381–82 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015)).

79. *Id.* at 382 ("Disclosure requirements are not inherently content-based nor do they inherently discriminate among speakers.").

political speech, which the court indicated it saw as an area of speech with greater protections than charitable giving; since political speech should be awarded higher protections than nonprofit speech, in the eyes of this court, this situation thus required the use of exacting scrutiny.[80] Therefore, the standard of review that applied to the New York disclosure statute required a "'substantial relation between the disclosure requirement and a sufficiently important governmental interest' where 'the strength of the governmental interest' is commensurate with 'the seriousness of the actual burden on First Amendment rights.'"[81] This intermediate, or exacting, standard, while still a form of heightened scrutiny, is much more deferential to the states than strict scrutiny but still requires a more significant governmental interest than one that is merely "legitimate."[82]

With the test identified, the Second Circuit next weighed the required factors.[83] The state argued that an important government interest exists in protecting the public from "fraud and self-dealing among tax-exempt organizations."[84] The mandatory requirements helped achieve this goal by providing a "complete picture of [the] charities' operations."[85] The appellate court agreed this was an important state interest, and therefore proceeded to assess the sufficiency of the important interest by balancing the state's interest with the First Amendment burdens felt by the nonprofits subject to the statute.[86]

Despite acknowledging that a reasonable person might hesitate before donating to an organization with these disclosure requirements,[87] the court found that the "First Amendment[-] shield" will only be raised when an organization "presents well pleaded facts" demonstrating the "likelihood of a substantial restraint upon the exercise by [its] members of their right to freedom of association."[88] Under this standard, the Second Circuit found that the plaintiffs had failed to prove that a substantial number of nonprofits were likely to experience chilled speech from this disclosure requirement to satisfy a facial challenge.[89] The court placed special

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80. *Id.* ("If disclosure requirements receive only exacting scrutiny in *that* circumstance, we cannot see why they would receive closer scrutiny elsewhere") (emphasis in original).

81. *Id.* (quoting Doe v. Reed, 561 U.S. 186, 196 (2010)).

82. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) (finding "compelled disclosure in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and therefore "cannot be justified by a mere showing of some legitimate governmental interest").

83. *See Schneiderman*, 882 F.3d at 382 (balancing the strength of the governmental interest with the seriousness of the burden on First Amendment rights).

84. *Id.* (arguing the Schedule B allows government to note if the charity is doing business with a major donor).

85. *Id.* (citing Brief for Appellee at 46–48) (reasoning that investigative efficiency is facilitated with this information).

86. *Id.* at 382–83 ("We agree with the importance of the government's interests in ensuring organizations that receive special tax treatment do not abuse that privilege and . . . preventing those organizations from using donations for [other] purposes . . . .").

87. *Id.* at 383 ("An individual who seeks to advance a cause might reasonably hesitate knowing that an officer of the state will see that they have done so.").

88. *Id.* (quoting *Patterson*, 357 U.S. at 462).

89. *Id.* at 384 ("While we think it plausible that some donors will find it intolerable for law enforcement officers to know where they have made donations, we see no reason to

emphasis on the fact that the statute did not require any additional information beyond that which is being submitted to the IRS as well as the statute's requirement that donor information could not be made public by the state.[90] Furthermore, the plaintiffs had failed to demonstrate they had experienced the requisite impact necessary for a successful as-applied challenge.[91] Thus, the court remained unconvinced that New York's disclosure requirement would "impermissibly chill" the speech of the organization or of its donors.[92]

The Second Circuit then turned to the second theory raised by the plaintiffs: that the statue imposed an unconstitutional prior restraint on the entities' ability to solicit donations.[93] The court began their analysis by noting the seriousness with which courts have regarded prior restraints pertaining to First Amendment rights[94] and identifying two traditional types, of which only one is relevant to the case at hand: a "facially neutral law that sets up an administrative apparatus with the power and discretion to weed out disfavored expression before it occurs."[95] Such laws are only prior restraints when they (1) forbid expression without permission of a government official and (2) vest discretionary power with the individual to an extent it could be abused.[96] In this case, the plaintiffs were only contesting the annual filing requirements and the state's authority to remove solicitation rights if the disclosure mandates are not satisfied.[97] The appellate court did not see this as a prior restraint, but rather a remedial measure, necessary for enforcement purposes, only imposed if the nonprofit does not follow the law.[98] Thus, since there was no reason to doubt the statute was being applied in a uniform and content neutral fashion, the plaintiff's prior restraint claim also fell short.[99] Accordingly, the Second Circuit affirmed the District Court's dismissal of the case and the statute was deemed permissible.[100]

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believe that this risk of speech chilling is more than that which comes with any disclosure regulation.").

90. *Id.* ("We would be dealing with a more difficult question if these disclosures went beyond the officials in the Attorney General's office charged with enforcing New York's charity regulations.").

91. *Id.* at 385 ("[A]ll we have to go on is a bare assertion that the Attorney General has a vendetta against the Appellants . . . That is a far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s.").

92. *Id.*

93. *Id.* (arguing that being forced to register with the state and to file an annual donor list will restrain their ability to solicit donations).

94. *Id.* at 386 ("[P]rior restraints constitute 'the most serious and the least tolerable infringement' on our freedoms of speech . . . .") (citing Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)).

95. *Id.* at 387.

96. *Id.* (internal citations omitted).

97. *Id.*

98. *Id.* at 388 ("Prevention of [the Appellants'] solicitation can only arise if they fail to comply with content-neutral, unambiguous, and narrowly drawn standards for disclosure . . . and then only after warning and opportunity to cure.").

99. *Id.*

100. *Id.* at 390.

B. The Second Challenge - California: Americans for Prosperity Foundation v. Becerra

Less than a year later, a nearly identical case arose in the Ninth Circuit in relation to California's nonprofit disclosure law.[101] The plaintiffs were two 501(c)(3) organizations, Americans for Prosperity Foundation and the Thomas More Law Center, who contested the imposition of California's Supervision of Trustees and Charitable Trusts Act. [102] The Act requires nonprofits wanting to solicit tax-deductible donations within the state to submit their annual Form 990's, including the Schedule B, to the state Attorney General.[103] Like the state of New York and the IRS, California makes nonprofits' Form 990 publicly available[104] but withholds the Schedule B from public inspection.[105] For over ten years, both plaintiffs had either filed redacted versions of their Schedule B Forms or excluded the form from their annual submissions to the state entirely.[106] In 2012 and 2013, the two plaintiffs were respectively notified of their disclosure deficiencies, resulting in both plaintiffs bringing suit.[107]

While these separately filed cases were ongoing in the district court[108], the Ninth Circuit heard and decided another case related to nonprofit disclosures, *Center for Competitive Politics v. Harris*.[109] There, the appellate court held that the Schedule B requirement satisfies exacting scrutiny while leaving open the possibility for an as-applied challenge in the future by plaintiffs who could show a reasonable probability that the disclosure would subject the organization or its members to "threats, harassments, or reprisals."[110] Despite this ruling, the district courts in both the *Americans for Prosperity Foundation* and the *Thomas More Law Center* cases found the plaintiffs had proved an ample risk of harm if their information became public and therefore enjoined the state from mandating the Schedule B requirement on the plaintiff organizations.[111] The cases were then combined, under the name *Americans for Prosperity Foundation v. Becerra*, to be heard in front of the Ninth Circuit.[112]

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101. *Becerra,* 903 F.3d at 1009.

102. *Id.* at 1004.

103. *Id. See also* CAL. GOV'T CODE § 12584 (requiring the Attorney General to maintain a registry of charitable corporations and to obtain whatever information needed for the registry's maintenance).

104. CAL. GOV'T CODE § 12590.

105. CAL. CODE REGS. Tit. 11, § 310 (July 8, 2016). *See also Becerra*, 903 F.3d at 1005.

106. *Becerra*, 903 F.3d at 1006.

107. *Id.* (arguing the Schedule B requirement in an unconstitutional burden on First Amendment rights).

108. *See* Thomas More Law Ctr. v. Harris, 2016 U.S. Dist. LEXIS 158851 (D.C.C.D.C. Nov. 16, 2016); Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049 (C.C.C.D. Ca. 2016).

109. 784 F.3d 1307 (9th Cir. 2015).

110. *Id.* at 1317 (citing Buckley v. Valeo, 424 U.S. 1 at 74).

111. Thomas More Law Ctr. v. Harris, 2016 U.S. Dist. LEXIS 158851, at *1 (D.C.C.D. Ca. Nov. 16, 2016); Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d at 1059.

112. *Becerra*, 903 F.3d at 1007.

With much less consideration of strict scrutiny than the Second Circuit, the Ninth Circuit chose to apply exacting scrutiny to the disclosure requirement.[113] In doing so, the court first looked at the strength of the governmental interest.[114] The plaintiffs argued that the Attorney General does not use the information provided on the Schedule B often enough to justify requiring it from all charities, and instead should request it from those under investigation.[115] The Ninth Circuit found that requiring all charities to submit their Schedule B aided in investigative efficiency.[116] With additional support from the Second Circuit's *Schneiderman* opinion, the court reached the conclusion that the disclosure requirement serves an important governmental interest[117] by assisting the state in ensuring charities are not "engaging in self-dealing, improper loans, or other unfair business practices."[118]

The appellate court then analyzed the severity of the First Amendment burden imposed by the statute's enforcement.[119] The plaintiffs argued that mandated Schedule B disclosure will impose a First Amendment burden in two ways: (1) by deterring contributors and (2) by subjecting donors to "threats, harassment, and reprisals."[120] In regards to a deterrence of contributors, the court held that the evidence both plaintiffs offered only showed that "*some* individuals who have or would support the plaintiffs *may* be deterred from contributing if the plaintiffs are required to submit their Schedule Bs to the Attorney General."[121] The court again referenced *Schneiderman* before determining this remote possibility of deterrence was not a "substantial burden" on First Amendment rights[122] and noted this requirement is not a "sweeping one" as it only pertains to the organizations' largest contributors—many of whom are required to publicize their expenditures under federal private foundation law.[123]

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113. *Id.* at 1008 (requiring "a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (internal citations omitted).

114. *Id.* at 1009 ("It is clear that the disclosure requirement serves an important governmental interest.").

115. *Id.* at 1010 (arguing the Schedule B requirement is unnecessary in most instances and can be obtained via subpoenas and audits in other instances).

116. *Id.* (reasoning that sufficient donor information increases investigative efficiency by allowing the Attorney General to flag suspicious activity).

117. *Id.* ("We agree with the Second Circuit that disclosure requirement 'clearly further[s]' the state's 'important government interests' in 'preventing fraud and self-dealing in charities . . . by making it easier to police for such fraud.'") (quoting Schneiderman, 882 F.3d at 384).

118. *Id.* at 1009 (quoting Ctr. for Competitive Politics v. Harris, 784 F.3d 1307, 1317 (9th Cir. 2015)).

119. *Id.* at 1012.

120. *Id.* at 1013.

121. *Id.* at 1014 (emphasis in original).

122. *Id.* ("'While we think it plausible that some donors will find it intolerable for law enforcement officials to know where they have made donations, we see no reason to believe that this risk of speech chilling is more than that which comes with any disclosure regulation.'") (quoting Schneiderman, 882 F.3d at 384).

123. *Id.* at 1015 ("[T]he Schedule B requirement is a far cry from the broad and indiscriminate disclosure laws passed in the 1950s to harass and intimidate members of unpopular organizations.").

When it came to the question of whether there was a reasonable probability the Schedule B disclosures to the Attorney General would subject the organization's contributors to harm, the court asked, first, what was the risk of public disclosure, and second, if public disclosure occurred, whether it would lead to threats or harassment.[124]

While acknowledging that public disclosure of Schedule B information was prohibited under the 2016 statute,[125] the plaintiffs argued that the state tended to frequently violate this law due to a lack of security.[126] The Ninth Circuit conceded this point but recognized that the state had begun to make significant internal changes to mitigate this issue.[127] After again citing to *Schneiderman*[128], the court held that the possibility of error, without proof of deficient or substandard security protocols, did not equate to enough evidence to conclude the existence of a high risk of public disclosure.[129]

The failure to prove a likelihood of public disclosures renders the question of retaliation moot.[130] While not reaching any conclusions, the court did note that while there is a possibility of retaliation, the plaintiffs' argument was weakened by a recent media exposé of the America for Prosperity Foundation's Schedule Bs.[131] The organization failed to introduce into evidence anything to suggest that retaliation had

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124. *Id.* (determining that finding a reasonable probability of danger from compelled disclosure entails two separate questions).

125. *See* CAL. CODE REGS. Tit. 11, § 310 (July 8, 2016) ("Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General."); *see also* Becerra*,* 903 F.3d at 1017 (discussing the legality of public disclosure).

126. *Becerra*, 903 F.3d at 1018 (identifying two types of error (human error and software vulnerability) historically made by the California Attorney General resulting in insecure information).

127. *Id.* (noting that the Attorney General's office has made efforts to fix software vulnerabilities when they are identified, but maintaining an ongoing concern about the possibility of human error despite the implementation of new procedural quality checks).

128. *Id.* at 1019 ("'Any form of disclosure based regulation — indeed, any regulation at all — comes with some risk of abuse. This background risk does not present constitutional problems.'") (quoting Schneiderman, 882 F.3d at 383).

129. *Id.* ("'[T]here is always a risk somebody in the Attorney General's office will let information slip notwithstanding an express prohibition. But if the sheer possibility that a government agent will fail to live up to her duties were enough for us to assume those duties were not binding, hardly any government action would withstand our positively philosophical skepticism.'") (quoting Schneiderman, 882 F.3d at 384).

130. *Id*. at 1017 ("[W]e are not persuaded that there exists a reasonable probability that the plaintiffs' Schedule B information will become public . . . Thus, the plaintiffs have not established a reasonable probability of retaliation.").

131. *Id. See also* Alex Seitz-Wald, *David Koch Provided Seed Money for Americans for Prosperity*, THE ATLANTIC (Sept. 24, 2013), https://www.theatlantic.com/politics/archive/2013/09/david-koch-seeded-major-tea-party-group-private-donor-list-reveals/310700/ [https://perma.cc/ALV9-QYMF] ("[A] donor list filed with the IRS labeled 'not open for public inspection' from 2003, the year of AFP's first filing, lists David Koch as by far the single largest contributor to its foundations, donating $85,000.").

occurred after the media published the forms, suggesting the retaliation concern was not as significant as the plaintiffs insisted.[132]

This holistic analysis led the Ninth Circuit to the conclusion that the Schedule B requirements satisfied exacting scrutiny and did not impose a significant enough First Amendment burden on the plaintiff organizations to justify enjoining the state from demanding the organizations' Schedule Bs in the future.[133] Thus, the district court decisions were reversed, and the statute was upheld both facially and as applied to both the Americans for Prosperity Foundation and the Thomas More Law Center.[134]

PART III: WAS THIS THE RIGHT OUTCOME IN EITHER OF THESE CASES?

In the wake of the *Schneiderman* and *Becerra* decisions, nonprofits have suffered from a reduction of their First Amendment rights[135]—a reduction that might result in negative, long-term impacts to those organizations attempting to promote and express controversial or minority opinions in society. Many have expressed the view that these cases were wrongly decided, citing First Amendment concerns and a lack of necessity for these types of laws as major reasons why.[136] In fact, the *Becerra* plaintiffs filed a petition for a writ of certiorari to the Supreme Court of the United States on August 26, 2019.[137] Ultimately, this Part argues that the Circuit Courts' analyses put too little emphasis on the sacred First Amendment rights to speech and association when upholding these nondisclosure laws.

A. Scrutiny Analysis: Should the Courts use Strict or Exacting Scrutiny?

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132. *Id.* ("[W]e would expect the Foundation to present evidence to show that, following the National Journal's unauthorized Schedule B disclose, its contributors were harassed or threatened.").

133. *Id.* at 1019 ("As applied to the plaintiffs . . . the Attorney General's Schedule B requirements survives exacting First Amendment scrutiny.").

134. *Id.* at 1020.

135. As indicated in Parts I and II of this Note, providing disclosure statements to more governmental officials than necessary could result in a number of consequences to the organization, including a loss of members. Furthermore, the individuals who were previously a part of the organization would no longer have a safe place to express their views.

136. *See, e.g.*, Hans Van Spakovsky, *California Violating First Amendment with Charitable Donations Disclosure Mandate*, CNS NEWS (Sept. 17, 2018), https://www.cnsnews.com/commentary/hans-von-spakovsky/california-violating-americans-first-amendment-rights-disclosure [https://perma.cc/VS38-PWYF] ("The 9th Circuit is going against the spirit of one of the most famous and important decision of the Supreme Court during the height of the civil rights era, *NAACP v. Alabama* . . . ."); Luke Wachob, *Four Constitutional Red Flags in State Disclosure Laws*, INSTITUTE FOR FREE SPEECH (Aug. 7, 2018) https://www.ifs.org/research/four-constitutional-red-flags-in-state-disclosure-laws/ [https://perma.cc/3L64-SSNH] ("[N]umerous state legislatures have considered constitutionally-dubious proposals to force [nonprofit] organizations to publicly expose their supporters' names and home addresses.").

137. Americans for Prosperity Foundation v. Becerra, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/americans-for-prosperity-foundation-v-becerra/ [https://perma.cc/Z2LD-6BWP]. On February 24, 2020, the Supreme Court of the United States invited the Solicitor General to file a brief expressing the views of the United States, and on January 8, 2021, the petition was granted. To date, the litigation is still pending. *Id.*

Both the Second and the Ninth Circuits applied an exacting level of scrutiny, as opposed to conducting a strict scrutiny analysis. The Supreme Court in *NAACP v. Alabama ex rel. Patterson* clearly instructed that "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[138] While the term "closest scrutiny" has never been specifically defined, a majority of the freedom of association cases that came before the 1976 *Buckley v. Valeo* decision reference a "compelling interest," indicating that "closest scrutiny" can be equated with "strict."[139] The *Buckley* court misconstrued the term "closest scrutiny," stating "[s]ince *NAACP v. Alabama ex rel. Patterson* we have required that the subordinating interests of the State must survive exacting scrutiny."[140] Precedent cases both before and after *Buckley* indicate rather than adhering to *Buckley's* proposition, the Court has instead equated "closest" scrutiny to "strict."[141] Case law not only supports the use of strict scrutiny, but also suggests strict scrutiny is the best option to ensure the enforcement of the ideals and protections of the First Amendment.

The need for the "closest" scrutiny is two-fold: the freedom to associate provides minority groups a forum to express their ideas, and allows an individual the opportunity to express themselves as part of a collective, thereby generating more power to their cause.[142] Instead of relying on this traditional line of reasoning, the courts in *Schneiderman* and *Becerra* looked to the disclosure requirement doctrine used in campaign financing cases, such as *Buckley v. Valeo* and *Citizens United v. FEC*, and determined that if strict scrutiny did not apply in the realm of campaign finance law then it certainly should not apply to nonprofit charities.[143] This view incorrectly analogizes the two types of organizations and their purposes.

Firstly, and most importantly, the governmental need for information regarding the election process strongly outweighs an individual's interest in keeping their campaign contributions confidential. Disclosures in the campaign finance context are necessary in preventing campaign corruption and ensuring voters are fully informed

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138. Patterson, 357 U.S. at 460–61.

139. Brief for Liberty Justice Center as Amicus Curiae Supporting Petitioners for Writ of Certiorari, Ams. for Prosperity Found. v. Becerra, 4 (2019). *See also* NAACP v. Button, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("[T]he State may prevail only upon showing a subordinating interest which is compelling."). *Accord with* Gibson v. Fla. Legislative Investigation Comm., 371 U.S. 539, 546 (1963) ("[T]he State convincingly [must] show a substantial relation between the information sought and a subject of overriding and compelling state interest.").

140. Buckley v. Valeo, 424 U.S. 1, 64 (1976).

141. *See supra* notes 17, 139 and accompanying text.

142. Randall P. Bexanson, Sheila A. Bentzen & C. Michale Judd, *Mapping the Forms of Expressive Association*, 40 PEPP. L. REV. 23, 28–29 (2012) ("The collective voice formed by expressive association is often more powerful than an individual voice, warranting greater protection.").

143. *See supra* notes 79–80, 113 and accompanying text (offering the opinion that political speech should be awarded some of the greatest First Amendment protections).

when deciding who to elect into office.[144] Government officials are especially concerned with the risk of *quid pro quo* corruption and misappropriation of public assets by elected officeholders.[145] Thus, the Supreme Court carved out an exception to applying strict scrutiny to an expressive association right in the realm of campaign finance because public need demanded it.[146] In contrast, an individual's decision to contribute to a nonprofit charity has minimal, if any, necessity to be known by the public.[147] Therefore, it stands to reason that the interest of the individual is much stronger than that of the government. Furthermore, there is no concern of *quid pro quo* corruption in the realm of charities, as elected board members of 501(c)(3) organizations do not require substantial monetary assets to win an oversight position within the charity.[148] Additionally, there is no risk of denying the public essential information, as both state statutes, as well as the IRS regulation, require the Schedule B donor information to be kept confidential by the government.[149]

While there are some who believe the reduced scrutiny standard should be inapplicable even in the context of campaign finance,[150] that debate is outside the scope of this Note. Instead, the central argument of this Part is that the interests at stake in *Schneiderman* and *Becerra* are much more comparable to that in *NAACP v. Alabama ex rel. Patterson* than the interests at stake in *Citizens United v. FEC*. By compelling charities to disclose personal information about their donors, there is a

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144. Brief for The Institute for Free Speech as Amicus Curiae Supporting Petitioners for Writ of Certiorari, Ams. for Prosperity Found. v. Becerra, 6 (2019).

145. *Id.* ("[The] risk [of quid pro quo corruption] is *sui generis*, grounded in the specific fear that officeholders will sell public acts for private gain.") (citing Buckley v. Valeo, 424 U.S. 1, 27 (1976)).

146. *Id.* ("[T]he *Buckley* Court accepted limited donor disclosure in the campaign context only after it was presented with a substantial record that suggested that such a disclosure was essential to preventing official corruption and providing the electorate with information when casting ballots."). *See also* Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976).

147. *See* Brief of the Philanthropy Roundtable et al. as Amici Curiae Supporting Petitioners for Writ of Certiorari, Ams. for Prosperity Found. v. Beccerra, 18–19 (2019) ("There is no statute specifically authorizing bulk collection by the State and certainly no legislative finding of a relation between the bulk-disclosure requirement and a compelling state interest."). *See also id.* at 20 ("The IRS recognizes that requiring disclosure as needed on a case-by-case basis . . . preserves IRS resources otherwise dedicated to the statutorily required redaction of certain information . . . .").

148. *See* "Board Recruitment Process," BoardSource, https://boardsource.org/resources/board-recruitment-process/ [https://perma.cc/CD58-PUDS]. (suggesting that creating a nonprofit board requires a recruitment process and extension of invitations, as opposed to the cost of actively campaigning for the position often seen in the political context).

149. *See* 26 U.S.C. § 6104(d)(3)(A), N.Y. COMP. CODES R. & REGS. tit. 13 § 96.2, CAL. CODE REGS. tit. 11, § 310. *See also* Brief for The Institute for Free Speech as Amicus Curiae Supporting Petitioners for Writ of Certiorari, Ams. for Prosperity Found. v. Becerra, 4 (2019) ("There is no public informational interest at issue, as the Attorney General claims that he will keep the information confidential.").

150. *See, e.g.,* Nicole L. Jones, Comment, *Citizens United Round II: Campaign Finance Disclosure, the First Amendment, and Expanding Exemptions and Loopholes for Corporate Influence on Elections*, 93 DENV. L. REV. 749, 763–65 (identifying recent challenges to campaign finance disclosure in the Tenth Circuit).

risk of chilling the speech of both the affected charitable organizations who are losing contributors, as well as the individuals who no longer feel they have access to a forum where they are free to express their beliefs. These freedoms to voice an opinion, especially one with which many do not agree, and to associate oneself with others of a similar mind, whether it be publicly or privately, should be subject to the protection of a strict scrutiny analysis by the courts.

One argument against changing the standard from exacting to strict scrutiny is that the Supreme Court, in *McConnell v. FEC*, inserted a safeguard into the exacting scrutiny analysis when they emphasized that as-applied challenges to disclosure requirements would continue to be permissible.[151] Putting aside the fact that *McConnell* is a campaign finance case, allowing for a case-by-case analysis of the disclosure application has the possibility of unfairly situating unpopular nonprofit charities. The plaintiffs in *Schneiderman* and *Becerra*, Citizens United and the Americans for Prosperity Foundation respectively, have no shortage of assets to expend on litigating these statutes.[152] If they are only allowed to bring as-applied cases, and not facially challenge the statute, these types of more lucrative organizations are prevented from speaking for other, smaller interest groups who express controversial, minority views but do not have the funds to litigate for themselves. Thus, these charities face an even higher risk of having their speech chilled and have no way to fight for their First Amendment protections. This argument also falls short from another perspective: In today's polarized society, allowing every nonprofit charity with the monetary capacity to litigate the opportunity to do so has the potential of creating a logistical, inefficient mess within the court system. To avoid the shortcomings with as-applied challenges, it is best to simply restore the strict scrutiny requirement and prohibit the state from compelling private information that violates the right to expressive association.

Even in the wake of *Buckley*, many lower courts continued to adhere to the stricter standard outlined in *NAACP v. Alabama ex rel. Patterson*.[153] Furthermore, outside of the realm of campaign finance, the few instances in which the Supreme Court has identified a compelling enough interest to justify membership disclosure have pertained to concerns of violent and illegal activities.[154] These precedents, which extend further back in time than the campaign finance cases, demonstrate the need

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151. *See supra* note 56 and accompanying text.

152. In 2017, Americans For Prosperity reported total net assets of over $4.9 million on the organization's annual Form 990. That same year, Citizens United reported total net assets of over $1.1 million, as well as a net income of greater than $677,000. NONPROFIT EXPLORER, https://projects.propublica.org/nonprofits/organizations/911433368 [https://perma.cc/XK8K-CLY2].

153. *See, e.g.,* Fed. Election Comm'n. v. Fla. For Kennedy Comm., 681 F.2d 1281, 1294 n.7 (11th Cir. 1982) ("NAACP v. Alabama . . . made clear that any state action infringing upon associational rights was subject to strict scrutiny.").

154. *See, e.g.,* Uphaus v. Wyman, 360 U.S. 72 (1959) (determining a New Hampshire subpoena requiring the revelation of members at a Communist camp was allowed because of the dangers the Communist movement posed to society); Bryant v. Zimmerman, 278 U.S. 63 (1928) (finding a New York statute requiring organizations known for violence and intimidation, such as the Ku Klux Klan, to submit a copy of its organizational rules and member oaths to the state was constitutional).

for a higher level of scrutiny. Ultimately, because the statutes in question should fail exacting scrutiny,[155] they would certainly fail strict scrutiny. Thus, the re-elevation of these cases to a heightened level of court scrutiny is largely symbolic but necessary to demonstrate the fundamental commitment this country should hold to protecting vitally important First Amendment freedoms.

B. A Re-Evaluation of Schneiderman and Becerra Under an Exacting Scrutiny Analysis

Should the courts decline to re-extend strict scrutiny protections to disclosure requirements of nonprofit charities, it is not entirely clear that an exacting scrutiny analysis should have resulted in striking down laws like those at issue in *Schneiderman* and *Becerra.* Exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest' where 'the strength of the governmental interest' is commensurate with 'the seriousness of the actual burden on First Amendment rights.'"[156] Section III.B.1 argues that a closer look at the evidence in each case suggests that the actual First Amendment burden is larger than the opinions suggest. Section III.B.2 argues that the governmental interest is not as great as the appellate courts believed, or at least that such an interest is not substantially related to disclosure requirement.

1. Exacting Scrutiny: The Actual Burden on First Amendment Rights

For some charitable organizations, the burden imposed by requiring personal information about contributors to be disclosed may be crippling. Such a requirement also infringes on the rights of the individuals who wish to privately contribute to charitable causes they support. Some donors, especially those who donate high-dollar amounts and would thus be subject to Schedule B disclosure, find anonymity to be essential to their willingness to donate.[157] The reasons for anonymity vary by donor but can include religious or philosophical purposes[158] or for procedural reasons, such as wishing to hide the fact an individual is wealthy or to shield the donor from incessant requests from other charitable causes.[159] There are also countless moral

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155. *See infra* Part III.B.

156. *See supra* note 81 and accompanying text (citing to Citizens United v. Schneiderman, 882 F.3d 374 (2018)).

157. Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 167 (2002) ("The decision to favor anonymity may be motivated out of fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible") (quoting McIntyre v. Ohio Elections Comm'n*,* 514 U.S. 334, 34–42 (1995)).

158. Brief for Philanthropy Roundtable et al as Amici Curiae Supporting Petitioners for Writ of Certiorari, Ams. for Prosperity Found. v. Becerra, 9, 11 (2019) ("Many donors who desire to remain anonymous are motivated by deeply held religious or moral beliefs that have made anonymous philanthropic giving the norm when it comes to charity over the past two millennia.") ("[S]ome donors choose to give anonymously for philosophical or personal concerns that the revelation of their identify might overshadow the efforts of charity.").

159. Paul G. Schervish, *"The Sound of One Hand Clapping: The Case For and Against*

purposes for not wanting to donate publicly, including the promotion of selflessness in giving or even to shield the contributor from public embarrassment.[160] For any combination of these reasons, public disclosure requirements of charitable donation information creates a possibility that these donors will no longer contribute to their preferred organizations.

There is also the fear that for highly polarized organizations, such as the plaintiffs in *Becerra*, public association could subject donors to threats or harassment. In their brief challenging the disclosure requirement in California, The Americans for Prosperity Foundation described a variety of harms targeted at their members, such as extreme threats and attacks on the organization including a bomb threat, as well as acts of violence including death threats or business boycotts towards individuals identified as members of the organization.[161] The Ninth Circuit acknowledged the possibility that the risk of harm may deter some individuals from supporting charitable organizations such as the plaintiff entities but found this does not satisfy the threshold "substantial burden" on First Amendment rights.[162]

When combining the risk of obstruction on the rights of both the charitable organizations, as well as the individuals who may now be precluded from contributing or associating with such entities, there is an apparent, and substantial, First Amendment burden. In fact, some individuals who place a high value on the privacy of their charitable dollars may lose their expressive association and speech rights entirely.[163] The circuit courts in reaching their decisions put forth two logical and convincing arguments with significant merit to aid the government: (1) that the risk of privacy intrusion, or subsequent harm from donor disclosures, is drastically reduced because state officials are prohibited from publicly releasing Schedule B information and (2) only very large donors, which constitute very few individuals, are impacted by the disclosure requirements.[164] Addressing each in turn, however, reveals each of their shortcomings.

Facially, charitable organizations and their contributors are protected from public harassment or disdain because the state is supposedly prohibited from publicly disclosing donor information. As emphasized in *Becerra*, however, a promise to keep

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Anonymous Giving," 5 VOLUNTAS: INT'L J. OF VOLUNTARY AND NONPROFIT ORGS. 1, 4, 6 (1994) ("The . . . rationale for anonymity includes . . . circumventing feelings of embarrassment about being wealthy or philanthropic; . . . empowering recipients by granting them leeway in how they may use donations; shielding the giver from subsequent requests; and fulfilling the donor's desire to lead a private lifestyle.").

160. *Id.* at 8–10 "([R]emaining hidden helps donors *transcend the corrupting lures of wealth and philanthropy*.") (emphasis in original).

161. Brief of Plaintiff-Appellee/Cross-Appellant at 29–30, Ams. for Prosperity Found. v. Harris, Nos. 16-55727 & 16-55786 (9th Cir. Jan. 20, 2017).

162. *See supra* note 122 and accompanying text.

163. Should the desire to remain anonymous trump the willingness to donate, the donor has now lost their opportunity to associate with other like-minded individuals. *See* Brief for Philanthropy Roundtable et al as Amici Curiae Supporting Petitioners for Writ of Certiorari, Ams. for Prosperity Found. v. Becerra, 16–17 (2019) ("Revelation of private donations to right-leaning and left-leaning causes alike have led to harassment and threats of boycotts. It is no wonder donors across the political spectrum, especially supporters of politically unpopular causes, prefer to exercise their First Amendment right to give anonymously.").

164. *See supra* notes 65, 90, 126 and accompanying test.

information private means little if the information somehow still becomes publicly available after being disclosed to the state.[165] The plaintiffs in *Becerra* thoroughly demonstrated that the state of California has systematically failed to protect donor information that it is mandated by statute to remain confidential.[166] In fact, over 1770 Schedule Bs were available on the State of California's website at the time the plaintiffs were preparing for trial at the district court level, including those of polarizing organizations such as Planned Parenthood.[167] The Ninth Circuit cast this concern aside by acknowledging the new protocols the state had in place to prevent future disclosure mistakes.[168] The court, however, had no solution for the human error component of these disclosure violations and, instead, blindly trusted the state to act less negligently in the future.[169] The states thus far have not proven themselves to be worthy of such trust. Accordingly, the courts unreasonably trivialized the risks nonprofit charities face with mandated disclosure requirements of sensitive contributor information.

The appellate courts also relied on the fact that very few donors are affected by these disclosure requirements to explain away the First Amendment burden on the plaintiffs in *Schneiderman* and *Becerra*.[170] While it is true that only donors meeting certain contribution thresholds must be disclosed, these are the donors on which charitable organizations rely most heavily for funding.[171] Furthermore, those with significant wealth are more likely to exhibit many of the attitudes and opinions that lead to donors wanting to remain anonymous.[172] Those organizations promoting minority or controversial opinions, and who accordingly have a smaller pool of supporters from which to garner funds, will certainly be "substantially burdened" if

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165. *See* Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1018 (2018) ("We agree that, in the past, the Attorney General's office has not maintained Schedule B information as securely as it should have, and we agree with the plaintiffs that this history raises a serious concern.").

166. Brief of Plaintiff-Appellee/Cross-Appellant at 18–19, Ams. v. Harris, Nos. 16-55727 & 16-55786 (9th Cir. Jan. 20, 2017). *See also* Becerra, 903 F.3d at 1018 (describing the plaintiffs' ability to demonstrate flaws in the Attorney General's server and access Schedule Bs during trial as well as the misclassification of over 1800 Schedule Bs as public information).

167. Brief of Plaintiff-Appellee/Cross-Appellant at 19, Ams. v. Harris, Nos. 16-55727 & 16-55786 (9th Cir. Jan. 20, 2017) ("[The Plaintiffs] discovered 1778 Schedule Bs posted on the Registry's website, hundreds of which had been publicly available for years and dozens of which were posted during the pendency of this litigation.").

168. *See supra* notes 126, 127 and accompanying text.

169. *Becerra*, 903 F.3d at 1018–19 ("Nothing is perfectly secure on the internet in 2018 . . . but this factor alone does not establish a significant risk of public disclosure.").

170. *Becerra*, 903 F.3d at 1015 ("The Schedule B requirement . . . is not a sweeping one. It requires the [plaintiffs] to disclose only their dozen or so largest contributors.").

171. Ellie Buteau & Hannah Martin, *Nonprofits Increasingly Reliant on Major Donors, Study Finds*, CTR. FOR EFFECTIVE PHILANTHROPY (Sept. 26, 2019), https://philanthropynewsdigest.org/news/nonprofits-increasingly-reliant-on-major-donors-study-finds [https://perma.cc/6CZB-8GM6] ("[N]onprofit leaders are spending more time building personal relationships with major donors as those gifts become larger and . . . [these leaders] expect the trend to continue.").

172. *See supra* note 159 and accompanying text.

they were to lose even one significant donor because of these disclosure requirements.[173]

Thus, the additional taxing burden placed on First Amendment rights by these disclosure requirements on both individuals wanting to associate with certain organizations and those organizations wanting to promote their viewpoints is large enough to be considered "substantial." If more fully analyzed by other courts, this burden could change the outcome of the interest-weighing analysis conducted under exacting scrutiny.

2. Exacting Scrutiny: The Governmental Interest at Play

Not only is the First Amendment burden to nonprofit charities larger than it initially appears, it is also not clear that the governmental interest is as strongly related to the disclosure requirements as the Second and Ninth Circuit courts presumed. Both courts found that the state had a sufficiently important governmental interest in the information provided in the Schedule B disclosures because that information helped the states efficiently identify and put a stop to charitable fraud.[174] They further reasoned that the state's desire to inspect these records was acceptable because the same exact information is required to be submitted to the IRS on an annual basis.[175] This is perhaps the most compelling argument the courts presented in determining that the state disclosure requirements were acceptable. However, since the 2018 decisions were reached in *Schneiderman* and *Becerra*, the federal government has reevaluated its own tax-exempt procedures and mandated disclosures.[176] As a result, the strength of the appellate courts' reasoning has sufficiently diminished.

In early 2018, the IRS released Rev. Proc. 2018-38, with the following stated purpose: "[Organizations exempt from tax under § 501(s) of the Internal Revenue Code, other than § 501(c)(3) organizations] are no longer required to report the names and addresses of their contributors on the Schedule B of their Forms 990 or 990-EZ."[177] 501(c)(3) organizations were excluded from this change because the Schedule B information is explicitly listed as a disclosure requirement under another portion of the Internal Revenue Code.[178]

In evaluating this change, the Journal of Accountancy noted:

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173. *See Becerra*, 903 F.3d at 1014 (requiring a substantial burden on First Amendment rights to be present before the First Amendment shield can be raised).

174. *See supra* notes 84–86, 116–18 and accompanying text (summarizing the Second and Ninth circuits' analysis of the governmental interest in collecting Schedule B forms).

175. *See supra* note 90 and accompanying text.

176. *See infra* notes 177–179 and accompanying text.

177. 26 C.F.R. § 1.6033-2 (2018).

178. *See* I.R.C. § 6033(b)(5). Many suspect that 501(c)(3) organizations would be included "but for the statutory impediments in doing so." Brief for Philanthropy Roundtable et al as Amici Curiae Supporting Petitioners for Writ of Certiorari, Ams. for Prosperity Found. v. Becerra, 9, 11 (2019) (citing Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47447, 47452 (Sept. 10, 2019) https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-19501.pdf [https://perma.cc/22WQ-WYAE]).

> The IRS has determined that it does not need the personally identifiable information of donors to be reported on Schedule B to carry out its duties, and the requirement increases tax-exempt organizations' compliance costs, takes up the IRS's time to redact the information, and poses a risk of inadvertent disclosure of donor information that is not supposed to be open to public inspection.[179]

It is important to note that some of the states were not happy with this change, which resulted in several states suing the IRS. In *Bullock v. IRS*, a federal district court temporarily struck down the change to the code, holding that the IRS could only make a final decision after the appropriate notice-and-comment procedure, which would allow the states and other interested parties to weigh in and provide data and statistics for and against the IRS's proposed decision.[180] Nevertheless, the final regulations went into effect on May 28, 2020.[181]

While this federal change does not directly apply to 501(c)(3) organizations,, it certainly provides powerful evidence that the information gained by the government from the Schedule Bs is not nearly as useful to the government as the states suggested. Furthermore, despite retaining the disclosure requirement for 501(c)(3) organizations federally, there is nothing to suggest that the Schedule B information is any more useful in a 501(c)(3) context than it is for other 501 organizations. Thus, a more detailed analysis into how the states are using the information from the Schedule B's could possibly reveal such information to be insufficiently related to the government's interest in preventing charitable fraud.

One method of strengthening the relationship between the government's interest and the Schedule B disclosures is to only request or subpoena the information from specific charities after investigations into the charities have begun, as the plaintiffs in *Becerra* suggested.[182] The state argued this was inefficient and would likely tip the charity off that the entity was being investigated.[183] While the investigation may be slightly more inefficient, the state will be saving time that it no longer needs to redact Schedule B information from other charitable disclosures that must be made

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179. Sally P. Schreiber, *Many Tax-Exempt Organizations No Longer Need to List Donor Information*, JOURNALOFACCOUNTANCY.COM (July 17, 2018), https://www.journalofaccountancy.com/news/2018/jul/tax-exempt-organizations-donor-information-201819335.html [https://perma.cc/U3NC-8UK4].

180. No. CV-18-103-GF-BMM, 2019 U.S. Dist. LEXIS 126921, at *32 (D. Mont. July 30, 2019). Following the order, the IRS properly reissued the proposed regulations and opened a comments period to last through December 9, 2019. Alexander Reid & Chelsea Rubin, *IRS Reissues Donor Disclosure Relief as Proposed Regulations*, MORGAN LEWIS: LAW FLASH ALERT (Sept. 26, 2019), https://www.jdsupra.com/legalnews/irs-reissues-donor-disclosure-relief-as-89495/ [https://perma.cc/KSS8-VP4G].

181 James J. Joyce et. al, *IRS Issues Final Regulations on Donor Reporting Requirements for Tax-Exempt Organizations*, ARNOLD & PORTER (JUNE 12, 2020), https://www.arnoldporter.com/en/perspectives/publications/2020/06/irs-issues-final-regulations-on-donor-reporting [https://perma.cc/VU4J-UZZ8].

182. *Becerra*, 903 F.3d at 1010.

183. *Id.* at 1010–11 (quoting many witnesses who testified for the state about their concerns regarding limited Schedule B collection).

public.[184] This time can instead be used for conducting more investigations and obtaining additional information. Thus, changing the point in time in which the Schedule B is requested is one way to combat the expansive breadth of the disclosure statutes without eliminating the disclosure completely.

Ultimately, even under an exacting scrutiny analysis as opposed to a strict scrutiny analysis, there is still ample evidence to suggest that disclosure requirements, even content neutral ones, in the context of nonprofit entities, including 501(c)(3) organizations, should not be upheld and the decisions reached in *Becerra* and *Schneiderman* should be reconsidered.

CONCLUSION

The Freedom of Association has become an essential aspect of protecting First Amendment Free Speech rights. These rights belong to all individuals and should not be infringed upon except in the most extreme of circumstances. Throughout history, with the exception of the realm of campaign finance laws, courts have almost exclusively applied strict scrutiny to statutes that appear to be infringing on associative rights or chilling free speech. In regard to nonprofit disclosure laws, however, two appellate courts upheld the statutes under an exacting scrutiny analysis, despite their potential to chill speech for individuals and organizations that promote more controversial opinions and ideas. In order to maintain a reverence for the ideals enshrined in the First Amendment, the courts should restore a strict scrutiny analysis to these types of disclosures.

By forcing nonprofit organizations to disclose personal information about their most prominent and high-dollar donors, there is a risk that some of these donors will no longer wish to contribute, whether it be because of a desire to remain anonymous or due to a fear of public backlash and retaliation. Not only are these organizations running the risk of losing a significant income stream, it is possible this will greatly reduce these entities' ability to educate, raise awareness, or otherwise meet their charitable goals. Furthermore, individuals have now lost the ability to associate privately with others who share similar ideals, which also has the effect of chilling speech. Accordingly, these rights should be awarded strict scrutiny protection to avoid being infringed upon.

Even if the courts decide to apply an exacting scrutiny analysis, the disclosure requirements should not stand. These types of statutes place a significant burden on the organizations and their donors, and at this point in time, it is unclear if the information obtained from Schedule Bs is beneficial in preventing charitable fraud. Thus, it is best to avoid compelling disclosure on nonprofit organizations that are properly complying with other mandated procedures and taking honest steps towards reaching their charitable goals.

Should the current law, as established in *Becerra* and *Schneiderman*, continue as legitimate precedent, it is possible that the position of smaller charitable

184. *See* Brief for Philanthropy Roundtable et al as Amici Curiae Supporting Petitioners for Writ of Certiorari, Ams. for Prosperity Found. v. Becerra, 20 (2019) ("The IRS recognizes that requiring disclosure as needed on a case-by-case basis . . . preserves IRS resources otherwise dedicated to the statutorily required redaction of certain information, and reduces the inadvertent risk of individuals' private information.").

organizations promoting controversial opinions may continue to deteriorate. Should major donors decide they no longer wish to be involved, the organization will lose a significant source of funding. Furthermore, they will not have the resources to bring an as-applied challenge to the disclosure statutes. Thus, if an entity becomes insolvent, it will be forced to cease operations, removing its opinions from the marketplace of ideas and eliminating the opportunity for like-minded individuals to bond. It will ultimately be for the Supreme Court to decide what tier of scrutiny should be applied and what exactly will withstand such analysis. Whatever decision they reach has the potential to affect thousands of nonprofits across the nation.