Bloomberg Tax

Tax Management Memorandum™

Charities' Schedule B Disclosure After Americans for Prosperity Foundation v. Bonta

By Marina Vishnepolskaya[*]
Marina Vishnepolskaya, P.C.
New York, NY

INTRODUCTION

After a decade of litigation, the California Attorney General's (AG's) Schedule B disclosure requirement was struck down by the U.S. Supreme Court (or SCOTUS) in *Americans for Prosperity Foundation v. Bonta* (concisely referenced in this article as *Bonta*).[1] In *Bonta*, the majority noted a lower court finding that California was unable to ensure the confidentiality of donors' information, whereas a concurrence was not willing to impose a blanket ban on any similar disclosure and dissent found no actual threat from the law to donors.

The SCOTUS opinion in *Bonta* impacts charitable solicitation laws of U.S. jurisdictions that require charities to disclose Schedule B to the state attorney general (AG). The executive branches, respectively, of such U.S. states may change course in promulgating or enforcing the current Schedule B disclosure rules. In addition, state legislatures may consider amending or repealing current laws or revisit pending legislation on contributor reporting.

In particular, the charitable solicitation laws of New York State (NYS) in Article 7-A of NYS Executive Law recently were amended with respect to annual filing requirements for charities. Additional legislation under Article 7-A, senate bill S4817A, presently is pending to become law in the NYS Assembly. This article analyzes the scope of the SCOTUS opinion and examines the impact of *Bonta* on NYS current and proposed Schedule B filing requirements.

IRS FORM 990 SCHEDULE B

In *Bonta*, petitioners were tax-exempt charities that solicited contributions in California, and therefore, were subject to that state's charitable solicitation laws, including the AG registration and annual renewal requirements.[2] California AG regulations required registrants to file copies of their IRS Forms 990, *Return of Organization Exempt from Income Tax*, or equivalents, along with any attachments and schedules.[3] IRS Form 990 includes Schedule B, on which certain tax-exempt organizations report annually the names, addresses, total contributions, and types of contributions of contributors who donate the greater of $5,000 or 2% of total contributions in a tax year (substantial contributors).[4]

In 2018, the IRS sought to limit the Schedule B requirement by exempting organizations other than §501(c)(3) public charities or political organizations described in §527[5] from stating the names and addresses of substantial contributors, in light of limited confidentiality protections in the I.R.C.,[6] and requiring such filers only to collect the contributor data and

---

[*]Marina Vishnepolskaya is principal of Marina Vishnepolskaya, Esq., P.C., an international law firm that represents business entities and exempt organizations in a broad range of domestic and cross-border tax planning, compliance and transactional matters.

[1] *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

[2] *See Bonta*, 141 S. Ct. 2373 at BL *1; Cal. Govt. Code Ann. §12585, §12586.

[3] *Bonta*, 141 S. Ct. 2373 at BL *5; Cal. Code Regs., tit. 11, §30.1.

[4] *See* §6033(b); Reg. §1.6033-2(a)(2)(ii)(f), §1.6033-2(a)(2)(iii). All section references herein are to the Internal Revenue Code of 1986, as amended (''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated. IRS Schedule B (Form 990, Form 990-EZ, Form 990-PF), *Schedule of Contributors* (2020), https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.

[5] *See, e.g.,* §501(c)(3); §501(c)(4); §527.

[6] *See generally* §6033, §6103, §6104. Section 501(c)(4) social welfare organizations and private foundations under §501(c)(3) and §509(a) previously had to make the donor disclosures on Schedule B public in addition to filing the Schedule B with the

retain the records.[7] Following litigation initiated seeking to block the rule, in which the Montana District Court set aside the revenue procedure for failure to provide a notice and comment period, the IRS issued proposed regulations and Notice 2019-47 providing penalty relief for organizations that relied on the 2018 revenue procedure.[8] Treasury and the IRS finalized the §6033 regulations narrowing required Schedule B disclosure in May 2020.[9]

MAJORITY

Facts

In *Bonta*, petitioner, Americans for Prosperity Foundation, is a charity devoted to education and training about free society and free market principles, civil liberties, immigration reform, and limits on government.[10] Thomas More Law Center, the other petitioner, is a public interest law firm with a mission of protecting religious freedom, free speech, family values, and the sanctity of human life.[11] Petitioners filed suit in the Central District of California against California AG office when the office began enforcing the Schedule B disclosure requirement in 2010 by threatening to revoke registration of charities to solicit funds in California.[12]

Procedural History

The district court granted preliminary injunctive relief against compelled Schedule B reporting in both cases, which subsequently were joined at Supreme Court level.[13] The Ninth Circuit Court of Appeals (Ninth Circuit) vacated and remanded back to district court.[14] The district court held bench trials, entered judgment for petitioner charities, and permanently enjoined the AG from collecting Schedule B.[15] The AG office appealed, and the Ninth Circuit again vacated the district court decision in favor of the AG.[16] The Ninth Circuit denied petitioners hearing *en banc*. The cases were granted certiorari by the Supreme Court.[17]

Exacting Scrutiny

The majority in *Bonta* applied exacting scrutiny as the legal standard for balancing compelled disclosure of affiliation with charities against donors' First Amendment right of freedom of association via donations to groups engaged in advocacy.[18] In distinction to prior jurisprudence, the Supreme Court phased the exacting scrutiny standard in this case as one that ''requires that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest, . . . and that the disclosure requirement be narrowly tailored to the interest it promotes.''[19] The Supreme Court found that the Ninth Circuit, in reversing the district court, erroneously failed to apply the narrow tailoring requirement.[20] The Supreme Court held that the proper requirement was not satisfied by the California AG's Schedule B disclosure regime.[21]

In particular, the Supreme Court found a ''dramatic mismatch'' between AG's interest to prevent fraud resulting from charitable donations and up-front collection of sensitive donor information from tens of thousands of charities, which will become relevant in only a few cases.[22] The Supreme Court noted that ''there was not a 'single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance [AG's] investigative, regulatory or enforcement efforts.' ''[23] The Supreme Court found that blanket collection of Schedule B information fell short of satisfying the means-end fit that exacting scrutiny as formulated in this opinion required.[24] The Court noted that the record showed that California AG's office had not even considered alternatives to the current disclosure requirement.[25] Thus, the Court concluded that, ''California's interest is less in investigating fraud and more in ease of administration.''[26]

Overbreadth Doctrine

The Supreme Court also applied the standard for a facial challenge to a law in the First Amendment con-

IRS.

[7] Rev. Proc. 2018-38.

[8] *See Bullock, et al. v. IRS*, 401 F. Supp. 3d 1144, 1154, 1159 (D. Mont. 2019) (noting IRS discretion to promulgate reporting rules); Notice 2019-47; REG-102508-16 (Sept. 10, 2019).

[9] T.D. 9898, 85 Fed. Reg. 31,959 (May 28, 2020).

[10] *Bonta*, 141 S. Ct. 2373 at BL *5.

[11] *Bonta*, 141 S. Ct. 2373 at BL *5.

[12] *See Bonta*, 141 S. Ct. 2373, BL *5.

[13] *See Bonta*, 141 S. Ct. 2373, BL *5.

[14] *Bonta*, 141 S. Ct. 2373 at BL *5.

[15] *Bonta*, 141 S. Ct. 2373 at BL *5.

[16] *Bonta*, 141 S. Ct. 2373 at BL 6*- *7.

[17] *Bonta*, 141 S. Ct. 2373 at BL *6.

[18] *See Bonta*, 141 S. Ct. 2373 at BL *7, *10, *14.

[19] *Bonta*, 141 S. Ct. 2373 at BL *10.

[20] *Bonta*, 141 S. Ct. 2373 at BL *10.

[21] *Bonta*, 141 S. Ct. 2373 at BL *10.

[22] *Bonta*, 141 S. Ct. 2373 at BL *10-11.

[23] *Bonta*, 141 S. Ct. 2373 at BL*11.

[24] *Bonta*, 141 S. Ct. 2373 at BL *11.

[25] *Bonta*, 141 S. Ct. 2373 at BL *11.

[26] *Bonta*, 141 S. Ct. 2373 at BL *12.

ISSN 0148-8295

text that ''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.''[27] The Court stated that that applicable standard is whether the disclosure requirement would have a possible deterrent effect, even if the information were not actually made public.[28] Thus, assurances of confidentiality on part of the AG's office may reduce the burden of disclosure, but do not eliminate it, the Court found.[29]

The Court underscored the conclusion by district court that ''donors and potential donors would be reasonably justified in a fear of disclosure.''[30]

SCOTUS Ruling and Dissent

Therefore, the Supreme Court ruled that ''the upfront collection of Schedule Bs is facially unconstitutional, because it fails exacting scrutiny in a 'substantial number of its applications . . . judged in relation to [its] plainly legitimate sweep.' ''[31] In a 25-page dissent, Justice Sotomayor, joined by Justices Breyer and Kagan, opined, among other matters, that potential threats to donors whose information was disclosed on Schedule B was an insufficient burden on petitioners' First Amendment rights for purposes of a facial challenge to constitutionality of the California reporting requirement.[32] A dissent generally has limited impact on the precedential effect of a court's holding.

CONCURRENCE

Justice Thomas and Justice Alito, joined by Justice Gorsuch issued concurring opinions, with Justice Thomas' concurrence arguably limiting the scope of the Supreme Court holding in *Bonta* and its effect on state Schedule B disclosure requirements.[33] Each of the two Justices concurred in judgment that the California Schedule B disclosure standard failed exacting scrutiny and was unconstitutional.[34] Justice Alito, joined by Justice Gorsuch, diverged from the majority on the applicability of the exacting scrutiny standard, as opposed to strict scrutiny, but acknowledged that under either constitutional standard, the Schedule B disclosure regulation would fail.[35] Similarly, Justice Thomas opined that strict scrutiny was the appropriate standard of review with respect to the California law.[36]

However, Justice Thomas, while concurring in the holding, also opined that the Schedule B disclosure rule was not necessarily invalid in all circumstances.[37] Justice Thomas, questioning the ''overbreadth'' doctrine, stated, ''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.''[38] Thus, Justice Thomas opined that a federal court has no power to strike down statutory text as facially unconstitutional as to every future application of that law.[39] But Justice Thomas found that the majority opinion did not seek to provide relief beyond the litigants to the case.[40] Thus, he concurred in enjoining the Schedule B requirement solely as applied to the petitioners in *Bonta*.[41]

S4817A

The purpose of New York Senate bill S4817A currently pending in NYS legislature is, ''To eliminate the requirement for charitable 501(c) (3) organizations that file an annual financial statement with the New York Attorney General's Charities Bureau to file the same financial statement with the Department of State, and to ensure that personal and private data such as names, addresses and telephone numbers of those who choose to contribute to 501(c)3 not-for-profits are protected from unnecessary disclosure.''[42]

S4817A passed the NYS legislature and, as of this writing, is pending to be delivered to NYS governor for signature. The bill could become law, since there is no direct conflict with the holding in *Bonta*. S4817A merely eliminates a duplicate requirement to report the same information to two different government agencies.[43] The bill does not amend the NYS requirement to disclose Schedule B to the Charities Bureau under Exec. L. §172-b or under §172-e relating

---

[27] *Bonta*, 141 S. Ct. 2373 at BL *12.

[28] *Bonta*, 141 S. Ct. 2373 at BL *12.

[29] *Bonta*, 141 S. Ct. 2373 at BL *12.

[30] *Bonta*, 141 S. Ct. 2373 at BL *12, n.*

[31] *Bonta*, 141 S. Ct. 2373 at BL *13.

[32] *Bonta*, 141 S. Ct. 2373, BL *26-27 (Sotomayor, J., dissenting).

[33] *See Bonta*, 141 S. Ct. 2373, BL *15-16 (Thomas, J., concurring in judgment) (Alito, J., concurring in judgment).

[34] *Bonta*, 141 S. Ct. 2373 at BL *15-16 (Alito, J., concurring).

[35] *Bonta*, 141 S. Ct. 2373 at BL *15-16 (Alito, J., concurring).

[36] *Bonta*, 141 S. Ct. 2373 at BL *14-15 (Thomas, J., concurring).

[37] *Bonta*, 141 S. Ct. 2373 at BL *15 (Thomas, J., concurring).

[38] *Bonta*, 141 S. Ct. 2373 at BL *15 (Thomas, J., concurring) (citations omitted).

[39] *Bonta*, 141 S. Ct. 2373 at *15 (Thomas, J., concurring).

[40] *Bonta*, 141 S. Ct. 2373 at *15 (Thomas, J., concurring).

[41] *Bonta*, 141 S. Ct. 2373 at *14-15 (Thomas, J., concurring).

[42] S4817A (amending Exec. L. §172-b).

[43] S4817A (amending Exec. L. §172-b).

ISSN 0148-8295

to transfers from a §501(c)(3) charity to a §501(c)(4) political organization.[44]

NYS CHARITABLE SOLICITATION FILING REQUIREMENTS

The annual filing requirement applies only to organizations that must register under the NYS charitable solicitation laws, Exec. L. Article 7-A, and which are not exempt from the filing requirement.[45] Religious organizations or their affiliates are not subject to NYS charitable solicitation laws.[46] Additional organizations, including certain educational institutions, organizations for the relief of specifically named individuals, contributions to which are not deducted, and organizations that raise not more than $25,000 annually are among the entities exempt from registration.[47]

Exec. L. §172-b was amended in 2020 as part of the 2020-2021 NYS budget legislation. Effective as of July 1, 2021, section 172-b requires generally the filing of an annual financial disclosure report with audited financials signed and certified by the president and a chief fiscal officer, who could be a CFO or treasurer of organizations that receive annual gross revenues and support in excess of $1 million.[48] Organizations with annual revenues in excess of $250,000 but less than $1 million must file annual reports with financial statements reviewed by independent certified public accountants and prepared in accordance with GAAP.[49]

The AG has discretion to require organizations with annual receipts above $250,000 and not exceeding $1 million instead to file audited financial statements.[50] Registered charities with annual revenues not exceeding $250,000 may submit unaudited financial reports to meet the annual filing requirement under §172-b.[51] The unaudited financials are not required to be reviewed by an independent CPA or be prepared in accordance with GAAP, but must be signed and certified by the president and the chief fiscal officer of the organization.[52]

In turn, Exec. L. §172-e, likewise amended in 2020, requires in general the filing of a Funding Disclosure Report setting forth in-kind support above $10,000 within a six-month reporting period by §501(c)(3) charities to §501(c)(4) social welfare organizations that engage in lobbying activities.[53] Finally, Exec. L. §172-f, also amended as part of the 2020-2021 NYS budget bill, requires the filing of a Financial Disclosure Report by §501(c)(4) with respect to issue-based advocacy spending exceeding $10,000 per calendar year.[54]

Under current version of the New York Code of Rules and Regulations (NYCRR), an organization that solicits charitable funds in NYS must file annual reports with the Charities Bureau.[55] If a charity does not claim an exemption from registration laws, the annual filing must include a copy of the complete IRS Form 990, or alternative, together with schedules. The NYS reporting requirement applies regardless of whether such forms are submitted or required to be submitted by the charity to the IRS.[56]

The NYS Department of State (DOS) issued proposed regulations under NYS Exec. L. §91, §172-e, and §172-f to implement the financial report filing, review and publication requirements.[57] The proposed regulations followed NY AG guidance issued in November 2019 confirming the Schedule B filing requirement in light of the litigation discussed above.[58] Significantly, the proposed regulations allow a qualifying entity, which includes §501(c)(3) and §501(c)(4) organizations depending on disclosure, to include a statement of relevant facts supporting an assertion of disclosure-related harm, as defined in the proposed regulations.[59] Submission to the NYS DOS of such a statement may lend support in upholding the regulations in proposed form under the narrow tailoring requirement in the exacting scrutiny test under *Bonta* and also their facial validity in applying the overbreadth doctrine under *Bonta*. In light of potential effect of the SCOTUS decision on enforceability of the NYS reporting rules, it is unclear whether the DOS would finalize, withdraw, or reissue the proposed regulations.

---

[44] §501(c)(3), §501(c)(4); Exec. L. §172-b, §172-e.

[45] Exec. L. §172, 172-a, 172-b(1).

[46] Exec. L. §172-a(1).

[47] Exec. L. §172-a(2).

[48] Exec. L. §172-b(1). N.Y.S. Dept. of State, *Frequently Asked Questions* (Feb. 2021), https://dos.ny.gov/system/files/documents/2021/02/faq-financial-reports-final-draft-for-review-003.pdf.

[49] Exec. L. §172-b(2).

[50] Exec. L. §172-b(2).

[51] Exec. L. §172-b(2)(a).

[52] Exec. L. §172-b(2)(a).

[53] Exec. L. §172-e. See Note 48, above.

[54] Exec. L. §172-f; NYS Dept. of State, Frequently Asked Questions (Feb. 2021).

[55] NYCRR §91.5(b).

[56] *See* NYCRR §91.5(c)(3)(i)(a); Form CHAR500, *NYS Annual Filing for Charitable Organizations* (2020), https://www.charitiesnys.com/pdfs/CHAR500_2020.pdf.

[57] N.Y. Dept. of State, 38 N.Y. Reg., No. 5, 14 (Feb. 3, 2021).

[58] N.Y. Office of Att. Gen., Charities Bureau, ''Organizations Registered With the Charities Bureau Must File Complete Schedule B to IRS Form 990, Including Names and Addresses of Contributors'' (Nov. 2019), https://www.charitiesnys.com/pdfs/guidance-schedule-b.pdf.

[59] *See* Prop. NYCRR tit. 19 §146.1(g); §146.4(b); §146.5(b), N.Y. Dep't of State, 38 N.Y. Reg., No. 5, 14 – 15 (Feb. 3, 2021).

ISSN 0148-8295

NYS SCHEDULE B REQUIREMENT AFTER BONTA

The majority in *Bonta* struck down the California Schedule B disclosure requirement on two grounds. First, the upfront disclosure of donor information was not narrowly tailored to the AG's interest in preventing fraud and self-dealing, and therefore, failed exacting scrutiny. Second, the blanket demand for Schedule B was overbroad, given that the law failed exacting scrutiny, AG's interest in administrative convenience was not sufficiently important, and the law had deterrent effect on contributors even without public disclosure and despite IRS reporting. But the majority underscored failure by the AG actually to preserve confidentiality and a lower court finding of reasonable threat to donors. Moreover, Justice Thomas limited his concurrence to relief for litigants and did not find the statute facially invalid based on the overbreadth doctrine.

The SCOTUS ruling has potential impact on ability of NYS AG to enforce Exec. L. §172-b and §172-e with respect to Schedule B disclosure. S4817-A attempts to impose confidentiality treatment on required submissions by charities to NY AG, including Schedule B information. Thus, Exec. L. §172-b in part and §172-e(4) could become subject to further legal challenge by charities in light of *Bonta*. In a more remote scenario, in light of *Bonta*, the NYS Schedule B requirements preemptively could get repealed by the NYS legislature. As a third possibility, the NYS AG may issue a pronouncement declining to enforce the Schedule B requirements under Exec. L. §172-b or §172-e(4) in light of the majority opinion in *Bonta*.[60]

However, because of a potentially limiting concurrence and emphasis by the majority on actual failure by the California AG to protect confidentiality and on threat to donors, the NYS legislature and the NYS AG instead may opt to monitor compliance with the NYS Schedule B requirements. As of July 23, 2021, NYS Senate bill S4817A, the purported confidentiality safeguard, had passed the NYS Assembly and was pending to be delivered to the NYS Governor for signature into law. The NYS AG may argue in any additional facial challenge to the NYS Schedule B disclosure statutes[61] that, S4817A, if enacted, actually ensured confidentiality of substantial contributor information so as to justify the validity of laws under the First Amendment.

CONCLUSION AND ACTION ITEMS FOR NYS-REGISTERED CHARITIES

Accordingly, following *Bonta*, NYS-registered charities should consult with counsel to ensure continued compliance with current Schedule B disclosure rules. Concurrently, NYS-registered nonprofits should monitor related developments at AG office and NYS legislature. Finally, organizations subject to NYS charitable solicitation laws should consult with counsel on implementing any changes to substantial contributor disclosure to conform with any further AG guidance, Executive Law amendments or DOS final regulations concerning filing of Schedule B.

---

[60] Exec. L. §172-e(4).

[61] *See Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018) (Second Circuit Court of Appeals, *inter alia*, rejecting a facial challenge to NYS Schedule B filing requirement on First Amendment grounds based on prior federal court jurisprudence; affirming district court's grant of motion to dismiss appellant organizations' claims).

ISSN 0148-8295