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S. 443, THE DISCLOSE ACT

HEARING

BEFORE THE

COMMITTEE ON RULES AND ADMINISTRATION UNITED STATES SENATE

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

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SECOND SESSION

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C O N T E N T S

S. 443, THE DISCLOSE ACT

TUESDAY, JULY 19, 2022

UNITED STATES SENATE
COMMITTEE ON RULES AND ADMINISTRATION
Washington, DC

The Committee met, pursuant to notice, at 3:03 p.m., in Room 301, Russell Senate Office Building, Hon. Amy Klobuchar, Chairwoman of the Committee, presiding.

Present: Senators Klobuchar, Hagerty, Schumer, Warner, King, Merkley, Padilla, Ossoff, Cruz, Fischer, and Hyde-Smith.

OPENING STATEMENT OF HONORABLE AMY KLOBUCHAR, CHAIRWOMAN, A UNITED STATES SENATOR FROM THE STATE OF MINNESOTA

Chairwoman KLOBUCHAR. We will call the hearing to order. Good afternoon. I want to thank Senator Whitehouse for being with us today. I think we know how important it is and how critical it is to take action to get secret money out of our elections.

Again, I want to thank Senator Whitehouse, also Senator Hagerty, who is going to be the Ranking Member for this hearing today. Senator Blunt could not be here, but I am pleased to have Senator Hagerty with us, our colleagues, and our witnesses for being here as well.

When were you going to leave, Senator Padilla? Are you okay for doing the statement first? You wanted to say something.

Senator PADILLA. Actually, I will be super brief, real quick.

Chairwoman KLOBUCHAR. Okay.

OPENING STATEMENT OF HONORABLE ALEX PADILLA, A UNITED STATES SENATOR FROM THE STATE OF CALIFORNIA

Senator PADILLA. Thank you, Madam Chair. I know we are here to talk about the DISCLOSE Act, and I am looking forward to the important hearing and discussion. But as a point of personal privilege, just want to acknowledge that another element of the functioning of our democracy is taking care of the Capitol complex and the people who work in it.

Those of us on the Committee, other Members of the Senate, are fully aware of the issues going on with this food service workers and their efforts to organize, avoid layoffs, and seek proper compensation and working conditions and staffing levels.

I just wanted to take a moment and, Madam Chair, to thank you for your leadership in working to resolve the issues that they are facing right now because it is important. Thank you, Madam Chair.

Chairwoman KLOBUCHAR. Well, thank you very much. I am going to get us focused here again on the DISCLOSE Act. As Senator Blunt and I work with the Architect of the Capitol on the worker issue, so important. But this hearing could not come at a more important time as we are seeing an unprecedented flood of money into our elections.

Over $14 billion was spent during the 2020 elections, the most expensive in our country's history. With the 2022 election cycle now underway, we have already seen huge sums of money being spent and are on track for the most expensive midterm elections ever, in large part because of the rise in unaccountable, secret, dark money. This surge of outside money shows no signs of slowing down, and those dollars are less accountable than ever before.

One investigation found that more than $1 billion was spent on the 2020 elections by groups that do not disclose their donors at all. Think about that amount of money. No disclosure at all for $1 billion in 2020. Americans know there is way too much money in our elections, and for our democracy to work, we need strong rules to make sure the American people know who is spending the money on the campaigns.

But since the Supreme Court decisions in Citizens United, which opened up the flood of outside money, no significant improvements have been made to our disclosure laws or our regulations. Unlimited anonymous spending in our elections does not encourage free speech, it actually drowns out the voices of American people who are seeking to participate.

That is why we are here to discuss the DISCLOSE Act, and we thank Senator Whitehouse, who has championed this legislation since 2012, for joining us. I have been proud to support his bill and work with him in every way possible to get this done. The DISCLOSE Act would address secret money in our politics by requiring outside groups, no matter what the group is, that spend in our elections to disclose their large donors, those that contribute more than $10,000, to the public.

Importantly, the bill also makes it harder for wealthy special interests to hide their contributions or cloak the identity of their donors, and cracks down on the use of shell companies to conceal donations from foreign nationals. Together, these reforms would shine a light on secret spending in our election and bring much needed transparency to our system of Government.

The American people know what is at stake. It is no surprise that campaign finance disclosure laws have overwhelming support. One poll from 2022 found that in swing states, 91 percent of likely voters, Republican and Democrat, support ending secret money by making political contributions fully transparent.

Another poll from 2019 found that across America, 83 percent of likely voters support public disclosure of contributions to groups involved in elections. A strong bipartisan majority of Americans support reforms to reduce the influence of money in elections. As we begin today's discussion, it is important to remember that there is a history, a long, long history of bipartisan support for these measures.

In fact, it was Republican President Theodore Roosevelt who signed the first limits on corporate campaign contributions, the

Tillman Act, into law in 1907. In 1972, the landmark Federal Election Campaign Act overwhelmingly passed the Senate 88 to 2 and was signed into law by a Republican President. In 2002, our friend and former colleague, Senators John McCain, who we miss dearly, and Russ Feingold, joined together to pass the Bipartisan Campaign Reform Act, which was signed into law by George W. Bush.

While the Supreme Court has rolled back key protections aimed at reducing money in politics from these bills, time and time again, the Court has held that disclaimer and disclosure requirements are Constitutional, as Trevor Potter, former Republican chair of the Federal Elections Commission, confirmed before this Committee last year when he testified in favor of these measures.

Former Supreme Court Justice Scalia, never one to hide his opinions, was also a staunch supporter of campaign finance disclosure. In a 2010 case, *Doe* v. *Reed*, he wrote, "For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously. . .hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."

These are cries from the other side of the aisle, Republicans, for doing something when it comes to disclosure. At a time when threats to our democracy are clearer than ever and the public's confidence in government has been badly undermined, it is vitally important that we know who is attempting to influence our elections.

I look forward to hearing from our witnesses and having a productive conversation about how to address secret money in our elections so that we are hearing the voices of the people, not just the powerful.

With that, I want to thank the Senators for joining us. I will turn it over to Senator Hagerty and then we will hear from Senator Whitehouse.

OPENING STATEMENT OF HONORABLE BILL HAGERTY, A UNITED STATES SENATOR FROM THE STATE OF TENNESSEE

Senator HAGERTY. Thank you, Chairwoman Klobuchar. Thanks to all the witnesses that will be joining us here today. I think that we all share the goals of ensuring that our elections are transparent and fair, but these goals are not served by limiting Americans' First Amendment rights, which is exactly what the DISCLOSE Act would do.

First, this bill would require virtually any entity that engages in political speech, including nonprofits, to publicly disclose the names and addresses of its significant contributors. This is a thinly veiled attempt to send the message that if you support an organization that happens to support causes with which some people disagree, you become a target for criticism, harassment, and intimidation, even if your support has nothing to do with the organization's position on a certain issue.

I am concerned it would fuel new frontiers of cancel culture and the personalization of politics. This tactic is not new. In 1957, in unanimously striking down an attempt to compel the NAACP to disclose its members, the Supreme Court held that government-compelled disclosure of group affiliation violates the First Amendment.

The Court recognized the "vital relationship between freedom to associate and privacy in one's associations." Just last year, the Supreme Court reaffirmed this principle by holding that California's attempt to compel nonprofits to disclose donor names and addresses was unconstitutional.

Noting that advocacy groups from the ACLU to Americans for Prosperity opposed California's compelled disclosure requirement, the Court found that it chilled speech and created a real risk of threats, violence, and harassment. In recent weeks, we have seen how personal information can be weaponized, with groups organizing protests at the homes of Supreme Court Justices and even at their children's schools. One group is even offering bounties to anyone who sights a Justice and reports it so that protesters can swarm that location.

For those who choose to engage in political advocacy, the DISCLOSE Act would open the floodgates to this sort of dangerous behavior. It would require a choice between silence and harassment. As a result, many would choose not to speak. The First Amendment is expressly intended to prevent this sort of silencing.

The bill also creates new, unworkable, and subjective constraints on speech. It would subject virtually any communication by virtually any entity that even mentions a candidate or public official to FEC regulations and donor disclosure requirements.

This legislation would also require speakers to declare whether communications that simply mention a Federal official are made in support or opposition to the official, even if the communication is not made in support or opposition to that official. This would force inaccurate and unconstitutional declarations of allegiance.

The bill also includes oppressive new disclosure requirements in order to communicate. These include requiring nonprofit entities and other groups to name in each political communication their top donors and how much money each donated to the organization. Unbelievably, it requires showing a full screen image of the person who leads the entity that is making the communication.

All of this would infringe upon and discourage free speech. As a 2021 op-ed from two ACLU lawyers put it, "we know from history that people engaged in politically charged issues become political targets and are often subject to threats of harassment and even violence."

The First Amendment is based on the principle that the remedy for speech with which you disagree is more speech, not forced silence. Our Constitution creates a free market of ideas. If you disagree with someone's views, the remedy is to express your own views, not to silence theirs. Because the DISCLOSE Act promotes intimidation rather than free speech, I cannot support this legislation. I look forward to hearing the testimony from the witnesses that are joining us today.

Finally, I understand that Leader McConnell is no longer able to join us today, so I ask unanimous consent that his floor remarks from this morning and prepared remarks for this hearing be entered into the hearing record.

Chairwoman KLOBUCHAR. They will be.

[The information referred to was submitted for the record.]

Senator HAGERTY. Thank you, Chairwoman Klobuchar.

Chairwoman KLOBUCHAR. Thank you very much, Senator Hagerty. Next up, we are honored to have a visitor, a visiting Senator to our Committee. Senator King and Senator Hyde-Smith, I do not think we have had many Senators visit the Committee, so we are very excited. That is Senator Sheldon Whitehouse from Rhode Island.

Senator Whitehouse is the sponsor of the DISCLOSE Act and has long been a champion on the need to eliminate secret, dark, unaccountable money in our elections. Senator Whitehouse, thank you for joining us and you are recognized for your testimony.

OPENING STATEMENT OF HONORABLE SHELDON WHITEHOUSE, A UNITED STATES SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. Thank you, Chair Klobuchar and Ranking Member Hagerty for inviting me to testify on the DISCLOSE Act. Twelve years after Citizens United, Americans know something is deeply amiss in our democracy. Huge majorities see America headed in the wrong direction. Fifty-eight percent of voters say our Government needs major reforms or a complete overhaul.

Only 25 percent of Americans say they have confidence in the Supreme Court. They see Government actually erasing rights on which generations of Americans relied. Is all of this some weird collective phase we are going through, or are the people actually right that something is wrong?

I submit to you that the distress in our Republic has much to do with corrupting political influence acquired via unlimited, anonymous dark money. That dark money influence has created a disconnect between what Americans want their Government to do and what it actually does.

Dark money by design can be impossible to trace, but people instinctively know it when their voices are being drowned out and big corporations always seem to come out on top. They can tell when the ad on their television was put up by some fake front group they have never heard of.

Floods of dark money caused this mess, so we can fix it. The DISCLOSE Act, first introduced by Leader Schumer in 2010 and reintroduced by me in every Congress since, will fix this. Even the Citizens United Justices recognized that unlimited political spending without transparency would be corrupting. That, they got right.

We have seen a tsunami of slime distort our politics and corrode our democracy since. What the Justices got wrong, indisputably, factually wrong, is their unlimited money tsunami being either transparent or independent.

The wreckage from the dark money aftermath of Citizens United is staggering. Dark money political spending went from under $5 million in 2006 to more than $1 billion in 2020. Mega-donors and special interests had a bonanza. Billionaire political spending increased by a factor of 70, from $17 million for the 2008 election to $1.2 billion for 2020.

In 2018, super PACs and other dark money groups collectively outspent even candidates' own campaigns in 16 Federal races. If you think things are different, well, they are. Academic studies found that economic elites and business interests have huge influ-

ence on Government policy, while average citizens have little or none.

Whatever the American people want, the big donor interests now win nearly every time. Look at climate change. Before Citizens United, there was a steady heartbeat in the Senate of bipartisan climate bills. John McCain ran for President with a solid climate platform. With Citizens United, that heartbeat flatlined. The fossil fuel industry used its unlimited dark money weaponry to stamp out bipartisanship, creating a lost decade of legislative failure for which I fear we will pay very dearly.

Far right special interests even turned their dark money guns on the Federal judiciary. They funded a $580 million secretive network to pack the Courts with judges selected to greenlight donor friendly policies and to run multi-million dollar ad campaigns to keep those confirmations on track. This network involves dozens of front groups, some of which are mere fictitious names for other secretive front groups.

Now we have a Court gone wild. In a matter of days, the newly radicalized Court overturned *Roe* v. *Wade*, manufactured new polluter friendly legal doctrines, and threw out centuries old gun safety regulations, all of it wildly unpopular with most people.

Dark money groups funded and organized the rally before the January 6th attack on the Capitol and perpetuate the big lie today. Bad enough. But behind and beside the Trump mob's violent insurrection attempt has run a slow motion coup d'état by secretive special interests, surreptitiously, incrementally taking over Government power.

Madam Chair, left to rot—left to fester, dark money will rot the very foundation of our Republic. Remember, Justices who signed off on Citizens United conceded dark money was corrupting. That part was 8 to 1. We need to pass the DISCLOSE Act so citizens can see who is spending big money in politics. Donors who spend over $10,000. Even foreign enemies can now try to corrupt us through dark money channels. After all, secret is secret. By the way, the American people love this idea. Poll after poll shows Americans overwhelmingly by margins of 85 to 90 percent want this.

Even Republicans criticized dark money. Well, we should all have a chance. The Republicans should have a chance to join us in ending it. If we get rid of the damned stuff, this horrible decade of dark money corruption can come to an end, and Congress can begin to serve America again. Thank you very much.

[The prepared statement of Senator Whitehouse was submitted for the record.]

Chairwoman KLOBUCHAR. Thank you very much, Senator Whitehouse. Thank you for reminding us that actually that the Justices anticipated that we would do something on disclosure and disclaimers. Sadly, that has not happened when it comes to the dark money.

But one day we will get this done, and this hearing is the beginning of that. I want to thank you for your long advocacy to get it done.

All right. Senator Schumer is on his way. I know he is going to give a statement, but in the meantime, I am going to call up the witnesses. If you want to come up and when Senator Schumer

comes, we will have him give a statement. But for now, why don't we swear everyone in and get started.

Okay. Senator Hagerty, will introduce one of the witnesses and I will introduce three. I think two are remote, and two are here. Before I do this, I want to ask unanimous consent to enter into the record a statement from Senator Van Hollen, as well as a few letters of support from democracy reform groups and others in support of the DISCLOSE Act, including from the Campaign Legal Center, Public Citizen and End Citizens United. Without objection, the documents will be entered into the record.

[The information referred to was submitted for the record.]

Chairwoman KLOBUCHAR. Before we introduce the witnesses, I am going to let Senator Schumer come in—he has a lot going on—and say a few words. Senator Whitehouse just spoke, Senator Schumer. Did a very, very good job. We will—we appreciate you joining us today as a Member of the Committee. I think I am correct that this is the only Committee that you and Senator McConnell are on.

Senator SCHUMER. That is correct. I think he may still be on Approps, but this is my only one.

Chairwoman KLOBUCHAR. All right.

Senator SCHUMER. Well, thank you, Senator Klobuchar. Thank you not only for holding this hearing, but the Rules Committee has been a great beacon on campaign finance and cleaning up so much of the politics in America that needs cleaning up. I thank you for your great leadership on this issue.

I also do want to thank Senator Whitehouse. I saw him in the hallway. He said, you missed my speech. I said; I hope mine is half as good.

Why are we here today? Because across our democracy, the disease of dark money has spread unchecked like a cancer. Today, I am proud to join with my colleagues to support the DISCLOSE Act, which I have long championed, and I promised to bring on the floor for a vote. In free and fair elections—one person, one vote—American voters alone should have the power to determine our Nation's leaders without fear that their voices will be drowned out by powerful elites or special interests.

Whether someone is rich or poor, young or old, well-connected or otherwise, none of that should have any bearing on their ability to affect the final outcome of the democratic process.

But we all know that today that ideal is not reality in America from the moment Chief Justice Roberts and the radical conservative majority on the Supreme Court handed down their opinion in Citizens United, one of the most awful decisions that we have ever had from the Court, taking and twisting the First Amendment into an argument to help special interests and powerful moneyed interests, which it was never intended to be.

Billions of dollars in dark money spending has poured into our elections, and Senate Republicans, particularly the Republican Senate leader who I wish had come today, I thought he might, have blocked practically every attempt to get rid of dark money at great expense to our democracy. Over a decade later, trust in our democracy is eroded.

Dark money groups have taken advantage of a megaphone that has drown out the voices of everyday Americans. The problem is not just limited to our elections. Dark money is corroding the judicial nomination process as special interest groups spend tens of millions to push extremist judges onto the Federal bench.

The worst part? Much of this money is raised in secret. The DISCLOSE Act operated off a simple premise, a healthy democracy is a transparent democracy, one where billionaires and mega-corporations do not have a free pass to exploit loopholes in campaign finance in order to spend billions in anonymous, underlying anonymous campaign contributions. That is the antithesis of democracy, someone having unequal power because they have huge amounts of money and no one even knowing what they are doing.

The bill asserts very plainly that Americans deserve to know who is trying to influence our election. It pays tribute to the words of Justice Louis Brandeis, "Sunlight is said to be the greatest disinfectant". This should not be a Democratic or Republican view. It did not use to be early on. It should be bipartisan through and through. Sadly, it is not.

When was the last time any of us heard voters cheering on dark money in our elections? Who here honestly thinks it is better for billionaires and special interests to buy elections in secret rather than face the healthy scrutiny of the American people? Passing this bill has never been more important than it is today.

As MAGA Republicans pass sweeping voter suppression laws, it is more urgent than ever to tilt the playing field back in favor of the American people and restore faith in the democratic process. If you agree that the American people have a right to know who is trying to influence their elections, support the DISCLOSE Act.

If you agree that billions of dollars in anonymous campaign contributions every year is not a function of a healthy democracy, support the DISCLOSE Act. If you agree that Americans' representatives should have only one boss, the people and not special interests then support the DISCLOSE Act.

Democracy cannot prosper without transparency. I strongly support this legislation so we can safeguard our electoral process and keep the dream of our founders alive in this century. I thank the Chair, the Ranking Member, and all the other Members for their time and letting me speak now. Thank you.

Chairwoman KLOBUCHAR. Thank you very much, Leader Schumer. Now, next up, our witnesses. First, Commissioner Jeff Mangan, who is with us remotely. He has served as Montana's Commissioner of Political Practices since 2017, overseeing the integrity and transparency of elections in the state. He was confirmed to that position by a bipartisan 48 to 1 vote of the Montana State Senate. Sounds pretty good. Previously, Mr. Mangan served for four years as a State Representative and four years as a State Senator in Montana. He holds a bachelor's degree from Montana State University.

Second, Ms. Virginia Kase Solomón. She is the Chief Executive Officer of the League of Women Voters of the United States and has held that position since 2018. Previously, she worked at CASA, helping to manage a national immigrant rights organization. She

holds a bachelor's degree from the University of Maryland. We thank you for joining us here.

Next up, Dan Weiner, who is the Director of the Elections and Government Program at the Brennan Center for Justice at NYU School of Law, where he has worked since 2014. Previously, he served as a Senior Counsel to Commissioner Ellen Weintraub at the Federal Election Commission. He holds a bachelor's degree with honors from Brown and a law degree from Harvard.

Next, Senator Hagerty, please introduce the next witness.

Senator HAGERTY. Thank you, Chairwoman Klobuchar. Our next witness is going to appear remotely as well. David Keating is the President of the Institute for Free Speech. The Institute for Free Speech is the Nation's largest organization dedicated solely to protecting First Amendment political speech rights.

In leading numerous nonprofit groups throughout his career, Mr. Keating has been a tireless advocate for Americans' First Amendment rights to freely speak, to freely assemble, to publish and petition the Government.

He has also been a leader in protecting the rights of Americans to associate and join together in political advocacy. Thank you for joining us today, Mr. Keating.

Chairwoman KLOBUCHAR. Okay. Thank you. If our witnesses could now stand and raise their right hand. Do you swear that the testimony you will give before the Committee shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MANGAN. Yes.

Ms. SOLOMÓN. Yes.

Mr. WEINER. Yes.

Mr. KEATING. Yes.

Chairwoman KLOBUCHAR. Thank you. You can be seated. We will begin—I heard that. Very good, remote people. We are going to begin with Commissioner Mangan, you are recognized for your testimony for five minutes.

OPENING STATEMENT OF HONORABLE JEFF MANGAN, COMMISSIONER OF POLITICAL PRACTICES, STATE OF MONTANA, HELENA, MONTANA

Mr. MANGAN. Thank you, Chairwoman Klobuchar, Ranking Member Hagerty, Members of the Committee. I am honored to participate in today's hearing. I appear to discuss one state's experience with campaign finance transparency and disclosure as you consider legislation to provide additional disclosure requirements to the Federal Election Campaign Act.

I will briefly describe the role of Montana's COPP specific to campaign finance disclosure against the backdrop of my state's unique and storied past. Common threads of fierce independence, bipartisan traditions, and citizen driven reform have profoundly influenced and shaped state law and continue to do so.

Transparency and accountability have become part of the fabric of Montana's state institutions and elections. First and foremost, the office I represent is and always has been an independent and nonpartisan office.

Following passage of the Federal Election Campaign Act and ratification of the 72 Montana Constitution, a 1975 citizen legisla-

ture established the Office of Commissioner of Campaign Finance and Practices, now the COPP. Its establishment enforced disclosure and reporting of money used to influence Montana elections.

Montana's Governor appoints the Commissioner from a list submitted by a bipartisan legislative nomination committee, and the state Senate confirms the nominee. In 2017, when I was appointed by then Governor Steve Bullock, a Democrat, the Senate consisted of 32 Republicans and 18 Democrats, the second largest Republican majority in decades. The Senate confirmed my nomination by a vote of 49 to 1, testament once again to Montana's bipartisan approach to campaign finance reporting and disclosure.

The written testimony I have submitted provides additional details on how the COPP carries out its statutory responsibility. Convergence of events during the turn of the century helps illustrate how Montana started down the path, which it still walks, to regulate spending in elections and ensure that spending is public information. That path is paved with copper.

Expensive deposits of copper unearthed in the late 1800's in Butte became increasingly valuable as industrialization and the widespread use of electricity swept the Nation. Even today, Butte is often called the richest hill on earth.

Three prominent figures who would become known as the Copper Kings, capitalized on and controlled that wealth. While Montana achieved statehood in 1889, two of the copper kings, William A. Clark and Marcus Daly, fought ferociously for the new United States Senate seat, spared no expense bribing politicians and judges and purchasing newspapers to propagate scandalous stories about each other.

Clark emerged the victor, and as the United States Senate was on the verge of rejecting his nomination, he resigned only to run again in 1901. Having failed to fulfill campaign promises, it was said of him among his colleagues in Washington, if you took away the whiskers and the scandal, there would be nothing left.

Clark, Daly scandals and other schemes to purchase public office led 1912 to the passage by a 3 to 1 margin of the Citizens Initiated Corrupt Practices Act, prohibiting corporate contributions to and expenditures on candidate elections.

Subsequent citizen initiated measures to limit campaign contributions and expenditures would follow in 1994, 1996, and 2012, all passing by significant margins.

Through the years, the 1912 Corrupt Practices Act had remained largely intact. Withstanding a challenge in 2011, in which the Montana Supreme Court held that unlimited corporate donations creates a dominating impact on the Montana political process and inevitably minimizes the impact of individual Montana citizens. United States Supreme Court decisions, however, would significantly alter the landscape of campaign finance law and ultimately result in the demise of that portion of Montana's Corrupt Practices Act.

In 2010, the United States Supreme Court held in Citizens United that corporations and other outside groups can spend unlimited money on elections. Two years later, in *American Tradition, Partnership, Inc.* v. *Bullock*, the Court held, there can be no serious doubt that its decision in Citizens United that political speech does

not lose First Amendment protections simply because a source is a corporation, applied to Montana State law.

Three years after the Supreme Court's ruling, the 2015 Montana legislature enacted, and Governor Steve Bullock signed the Montana Disclose Act. The Act has been lauded as one of the most robust campaign finance laws in the country.

Notably, the legislation requires disclosure reports by entities participating in Montana's elections regardless of their tax status. The state had again flashed its bipartisan stripes with the measure sponsored by a Republican Senator, enacted by a Republican controlled legislature, and signed by a Democratic Governor.

Since statehood, Montana's citizens have grappled with the ramifications of money in elections, while holding fiercely to protecting the public's Constitutional right to know. Campaign finance reporting and disclosure laws—excuse me, campaign finance and disclosure laws will continue to evolve as they should through legislation and in the Courts.

But regardless of which political party holds sway in the Executive and Legislative branches of Montana, the state's history has shown that its citizens will continue to expect no less than absolute transparency from its candidates and those who seek to help place them in positions of public trust.

Thank you, and I look forward to your questions.

[The prepared statement of Mr. Mangan was submitted for the record.]

Chairwoman KLOBUCHAR. Thank you very much. I appreciate your testimony. Then we have, next up we have Mr. Keating. If you want to——

Mr. KEATING. Sorry.

Chairwoman KLOBUCHAR. That is okay.

Mr. KEATING. Chair, can you hear me now?

Chairwoman KLOBUCHAR. We can hear you now. In fact, we might want to turn down a little bit. Yes.

Mr. KEATING. Well, I will let the tech—do that——

Chairwoman KLOBUCHAR. Yes, exactly. You do not have to worry.

OPENING STATEMENT OF DAVID KEATING, PRESIDENT, INSTITUTE FOR FREE SPEECH, WASHINGTON, DC

Mr. KEATING. Okay. Chairwoman Klobuchar, Ranking Member Hagerty, and Members of the Committee, thank you for the opportunity to speak today. First, before I get started, I want to commend the Committee for the quick action that you did both, in 2020 I believe, and this year to confirm or recommend confirmation of nominees to the Federal Election Commission.

I really commend you for acting promptly on that. Thank you very much. I do want to speak about free speech. It is obviously fundamental to American democracy. The First Amendment says we have the right to freely speak——

Chairwoman KLOBUCHAR. Oh, he just turned—you just turned yourself off there. Now, it was on the words freely speak. If we are going to—just go back to that sentence. That was really, that was an interesting thing to make us focus, so it was very good.

Mr. KEATING. Well, it is very important. Government and society cannot be improved without free speech, of course. As we have seen

around the world, free speech can mean the difference between liberty and tyranny.

S. 443 would harm our free speech rights and harm our democracy. It would suppress speech about Government and candidates, threaten our privacy if we speak or join groups, and impose heavy burdens for organizing.

Now, among the effects of S. 443: it would force groups and the FEC to publish misinformation. It would compel groups to say they support or oppose Members of Congress, even if they do neither. It would make some disclaimers longer than the time or space available for the ad.

It would publicize—it would publicly expose the names and addresses of many supporters of nonprofit causes, putting Americans at risk of harassment and retaliation for their beliefs. Now, these legal and compliance costs will force many smaller groups to self-censor. It would definitely increase the cost of criticizing the Government. Let me give you one example of the many absurd requirements in this bill.

Let us assume an environmental group, let us call it Americans for the Environment, wants to sponsor a 30 second radio ad calling on Senators in a certain state to take action on climate change. Here is a disclaimer that would have to be read: paid for by Americans for the Environment, cleanenvironment.org, not authorized by any candidate or candidate's committee.

I am John Doe, the President of Americans for the Environment and Americans for the Environment approves this message. Top two funders are first name one, last name one and first name two, last name two.

Now that disclaimer took about 18 of the 30 seconds, and it takes away from the group's climate change message. Radio ads are 30 seconds, so the Government in this case would be taking over half the ad.

Now, to justify passage, we have heard a lot today about dark money, but no one really knows exactly what that term means here, and it is not shining much light. Let's start with a few basic facts. There are currently more laws mandating public disclosure of politically related spending than any time in our Nation's history.

Candidates, political parties, and PACs disclose all their donors beyond the most deminimis amounts. Federal law also requires reporting of independent expenditures over $250. Given this extensive disclosure, it is a misnomer to speak of undisclosed spending.

Really what we have is a system in which some of the spending—some of the spending occurs with less information about spenders, members, donors, and internal operations than some people would like to see. But how big an issue is this?

Well, in fact, in 2020, we saw less so-called dark money than in any election since Citizens United. It peaked in 2012 with $312 million spent, which was 5 percent of that year's total campaign spending. This past election, dark money was just $102 million, and that is under 1 percent of the $14 billion price tag spent by all candidates, PACs, and parties.

Even that overstates the issue because many of the largest spenders are well known like NARAL Pro-Choice America and Na-

tional Association of Realtors. The question may be, why not seek still more information?

The answer is with almost everything else, even good things, that after a point you have rising costs and diminishing returns. Few people argue, for example, that we should turn our Nation into a police state to try to stamp out the last 5 percent of crime.

Finally, I would like to say we cannot overlook the costs in privacy that come with excessive compulsory disclosure. The Supreme Court has repeatedly struck down excessive disclosure laws in cases involving union organizers like Thomas E. Collins, civil rights organizations like *NAACP* v. *Alabama*, *NAACP* v. *Button*, *Bates* v. *Little Rock*, picketers, pamphleteers, missionaries, charities, and yes, even organizations making partisan express advocacy communications to voters in the *Buckley* v. *Valeo* case.

S. 443, if enacted, will certainly be challenged on Constitutional grounds. But I hope that the Committee will instead show consideration for the Constitutional rights at stake, and the privacy and other interests at stake that would justify such a challenge.

Let us keep in mind the purpose of disclosure is to allow citizens to monitor the Government. That is why we have disclosure of contributions to candidates and political parties controlled by the candidates. It is not to allow the Government to monitor the political activity of its citizens.

Please recognize the real costs that compulsory disclosure has for unpopular speakers and new, often unpopular, ideas. These are ideas that may in the future become quite popular. This was the case with many causes throughout history, including the civil rights movement and relatively recently, the movement for same sex marriage.

We cannot seriously discuss this issue today without recognizing the tremendous cost of the excessive zeal for full disclosure is already having on public confidence in Government. Rightly or wrongly, millions of Americans already believe their Government is inappropriately spying on them.

Millions believe the IRS is being used as a tool to harass critics. In fact, just in the last few weeks, we have seen headlines in The New York Times expressing concern about the audits of former FBI Director James Comey and his colleague.

The best way to give people a voice and to protect democracy is to protect and enhance the rights to free speech, free press, assembly, and petition guaranteed by the First Amendment. Thank you very much.

[The prepared statement of Mr. Keating was submitted for the record.]

Chairwoman KLOBUCHAR. Thank you very much, Mr. Keating. Next up, Ms. Virginia Kase Solomón.

OPENING STATEMENT OF VIRGINIA KASE SOLOMÓN, CEO, LEAGUE OF WOMEN VOTERS, WASHINGTON, DC

Ms. SOLOMÓN. Chairwoman Klobuchar, Ranking Member Hagerty, and Members of the Senate Committee on Rules and Administration, thank you so much for the opportunity to testify today on the DISCLOSE Act. The League of Women Voters is a

nonpartisan organization that was founded over 100 years ago by leaders of the Women's Suffrage Movement.

We are an issue focused, activist and grassroots organization that believes voters must play a critical role in our democracy. Since 1920, the League has worked to deliver on our mission to empower voters and defend democracy.

Today, the League has a presence in nearly every community across the country, with more than 750 chapters spread across 50 states and the District of Columbia. The League has supported the DISCLOSE Act for more than a decade because we believe that our democracy is strengthened when Americans are encouraged to engage in civic participation.

We believe Americans deserve to know who is trying to influence their vote. As an organization, the League has fought for nearly five decades to combat the influences of money on politics. Our work reflects our ongoing priority to promote open and honest elections and maximize participation in the political process.

Voters have the right to know who is making large campaign contributions to influence elections and when contributions are made, we believe it must be done with transparency. The DISCLOSE Act accomplishes this fundamental purpose by requiring expenditures and donations of $10,000 and above to be reported.

Every day the League works to inform voters about the issues they care about by providing critical voter services to the public. In the last two years, almost 6.5 million users came to VOTE411.org, the League's award winning nonpartisan website for election information that voters need.

The site provides registration tools, candidate guides, and resources about what they need to take with them when they go to vote. As an organization, we work to simplify the voting process for voters to make their individual voting plans. These actions make the voting process understandable and accessible, which breaks down barriers to participation.

However, it should not fall to organizations such as the League to provide information and ensure transparency in our elections. The law should require public disclosure when it comes to dark money groups seeking to influence elections. Transparency is a baseline requirement for a healthy democracy.

According to a nationwide study conducted by the Campaign Legal Center, about 60 percent of voters believe that major changes are needed to our country's campaign finance system. The majority of voters surveyed also believe that the money spent by special interest groups has a direct impact on their personal lives.

We have seen that—we have seen that without transparency, candidates and election officials fall into the trap of valuing donors and their priorities above the needs of voters and everyday citizens. Such de-prioritization of voters only breeds distrust in the Republic and those who lead it.

There should be little question that this runs counter to the spirit of our democracy and a Government of, by, and for the people. Dark money spans the political spectrum and is used by both Democrats and Republicans to boost candidates. In fact, in 2020, a majority of outside funding was spent to promote Democratic candidates.

Open Secrets, the Nation's premiere research group tracking money in United States politics estimates that $1 billion in dark money was spent in the 2020 elections. Shell companies, outside groups, and political nonprofits funneled millions of dollars to super PACs, which help to hide the individual source of donations.

Secret campaign money, no matter the party, promotes unbridled power and has no place in American democracy. It undermines the rule of the voter and corrupts the election process. The League will continue to fight to ensure that voters can make decisions free from influence of dark money and special interest groups.

We strongly support the DISCLOSE Act and urge this Committee to take up this legislation and advance it to the full Senate for a vote as quickly as possible. Thank you again for the opportunity to testify on this important legislation, and I look forward to taking your questions.

[The prepared statement of Ms. Solomón was submitted for the record.]

Chairwoman KLOBUCHAR. Thank you very much. Mr. Weiner.

OPENING STATEMENT OF DANIEL WEINER, DIRECTOR, BRENNAN CENTER FOR JUSTICE ELECTIONS AND GOVERNMENT PROGRAM, WASHINGTON, DC

Mr. WEINER. Thank you, Chair Klobuchar—excuse me. Thank you, Chair Klobuchar, Ranking Member Hagerty, and Senators. I appreciate the opportunity to testify today in support of S. 443, the DISCLOSE Act of 2021. I co-direct the elections and Government program at the Brennan Center for Justice at NYU School of Law.

The Brennan Center is an independent, nonpartisan law and policy institute that works to strengthen democracy for all Americans. Prior to coming to the Brennan Center, I served as a Senior Counsel to a Commissioner at the Federal Election Commission and as a lawyer at a major DC law firm. Altogether, I have well over a decade of experience working in the fields of campaign finance and election law.

In Citizens United, the Supreme Court swept aside century old restrictions on corporate campaign spending and ushered in the era of super PACs. I, like many, have been highly critical of the decision. But the Court did embrace at least one type of regulation in that ruling, campaign transparency. In fact, the Court appears to have assumed that the sources of all the new corporate spending it permitted would be fully disclosed, proclaiming that, and I quote, "a campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today."

Now, of course, the Court's assumption that transparency already existed, and I must say, like many of its assumptions about the effects of its decisions on American democracy, was wrong.

Although an 8 to 1 majority in Citizens United resoundingly endorsed the Constitutionality of campaign finance disclosure rules, the Court's action in permitting many unregulated entities to spend money on campaigns, of course, ushered—unleashed a wave of new secret spending in United States elections, what today, we often refer to as dark money.

Dark money groups who keep their donors secret have reported spending well over $1 billion on Federal elections since 2010. Criti-

cally, most of that spending is concentrated in a few specific races where, as has been noted already, it can sometimes account for a third or more of total money spent.

As the Chair noted, reported dark money spending is really only the tip of the iceberg. It does not include funds that dark money groups funnel to super PACs that nominally disclose their donors, nor the many types of election spending that are simply not subject to any reporting requirements, such as most online campaign ads.

As we noted, the Nonpartisan Center for Responsive Politics has estimated that total dark money spending in just the 2020 election cycle exceeded $1 billion.

The proposed legislation offers a tailored response to this problem. It requires organizations spending $10,000 or more on Federal campaign activities to disclose donors who themselves gave $10,000 or more. I want to note that $10,000 is 50 times the threshold we have for disclosure to candidate campaigns, 50 times.

The Act also contains a variety of other exceptions, including for donors who do not want their money used for campaign spending and for those for whom disclosure poses a genuine safety risk. This is a commonsense approach, and it is one that will bring important benefits.

It will arm the voting public with knowledge about who is seeking to influence their votes and what those interests want from the Government, allowing voters to make, as Citizens United put it, "informed choices in the political marketplace."

Greater electoral transparency is also an important safeguard against corruption, and it will help prevent evasion of other rules, including curbs on foreign interference, which I hope we will talk about today, because that is the other piece of this bill.

It shores up protections against meddling in the United States political process by foreign Governments, wealthy corporations, and oligarchs. Here too, while purporting not to undermine these safeguards, the Supreme Court has actually made them far easier to evade. For example, through shell corporations that can be used to funnel illicit money to super PACs.

In a time of resurgent authoritarianism around the world, with hostile actors looking to benefit from instability and division in the United States, reinforcing guardrails to prevent manipulation of our political process could not be more critical.

In conclusion, I just want to emphasize that these are not partisan issues. Overwhelming majorities of Americans across party and ideological persuasion support campaign transparency.

Nor will closing dark money loopholes benefit one party or the other. Indeed, as my co-panelist noted, while Republicans benefited more from dark money in some past election cycles, in 2020, left leaning dark money groups outspent their conservative counterparts by more than a 2 to 1 margin.

Ultimately, this is not about helping Democrats or Republicans. It is about making sure that all Americans have the means to hold political leaders and those working to elect them accountable.

This is far from the only step we believe that Congress must take to safeguard American democracy. But truly, I believe it should be one of the easiest. We urge you to pass this important bill, and I, of course, look forward to your questions.

[The prepared statement of Mr. Weiner was submitted for the record.]

Chairwoman KLOBUCHAR. Very good. Thank you. Thank you, all of you. I am going to cede my first five minutes here to Senator King, who has been diligently here from the beginning. Thank you.

Senator KING. Thank you, Madam Chair. I first want to clear up a factual question with Mr. Keating. The testimony we have had from our other witnesses is that over $1 billion of dark money—that is, unaccounted money, undisclosed money—was contributed in the 2020 election. You had a much lower number.

What is the difference? Groups are disclosed, you know, "Americans for Greener Grass", but there is not disclosure of the donors and that is really the issue here. Mr. Keating, is there a factual problem here? Give me a brief explanation of the difference between your figure, which was much lower and $1 billion.

Mr. KEATING. Well, I do not know where the other numbers are coming from. I can just tell you where we get our numbers. These are groups, according to Open Secrets, that are not PACs and are not disclosing their donors when they are making independent expenditures or electioneering communications.

Now, I know the Wesleyan—there is some Wesleyan project that has put out numbers, and they are counting things that are not campaign related, in my view. They are counting ads that talk about legislation pending before Congress during an election year.

If you expand the amount of time that you are going to cover communications about policy issues, it may mention Members of Congress in them, you can come up with different numbers.

I think one of the things that would be useful is to have everyone agree on what numbers work we are all talking about here.

Senator KING. Well, I think that would be useful. But the fundamental point that you are making is that disclosure would be a dampening or chilling of free speech.

Every day I have to go over and vote. It is very interesting how the Senate voting process works. The first half of the people that vote, the clerk gets up and reads all their names. Then everybody that votes after that period, after they have gone through the alphabet, the clerk reads their name aloud when they vote.

The whole idea is that the public knows exactly who votes. I am subject to criticism for some of my votes. It might even chill my free speech. Do you think the Senate vote should be secret?

Mr. KEATING. No. Absolutely, not. But——

Senator KING. What is the difference? What is the difference? What is the difference between—because I voluntarily entered the political sphere, I understand that. But a person who contributes $1 million to a political campaign to try to defeat or seat a Senator is also voluntarily entering the political arena. Why are their tender feelings any more worth protecting than the feelings of my $200 donor who has to be disclosed?

Mr. KEATING. Well, a couple of things here——

Senator KING. I am very worried about billionaires' feelings here, I got to tell you, because it is really touching.

Mr. KEATING. Sure. A couple of things. First, we have a secret ballot here in the United States. When people go to vote, their ballot——

Senator KING. Nobody is talking about voting. We are talking about people entering the political arena by making a political contribution. If they give me $200, their name, address, and occupation is disclosed. If they give $200 million to a PAC, a super PAC that has a name that nobody knows what it means, they can be hidden.

What is the difference? How do I tell my person—that they are there have to be disclosed, but a billionaire in California who is trying to buy a Maine Senate seat does not have to be disclosed. How do I explain that?

Mr. KEATING. Well, there is—first of all, if a billionaire is giving money to a super PAC, it is disclosed.

Senator KING. Not if it is through a 501(c)(4) or one of these other phony baloney.

Mr. KEATING. That is illegal. You cannot give money to a third party and say, give it to this organization. That is a contribution in name of another. That is barred and that is a criminal offense. That is the sort of thing that I think the Justice Department would go after. But what I am talking about here, and I think——

Senator KING. But the nub of your argument seems—nub of your argument, and Senator Hagerty mentioned this, this fear of harassment of people because they are disclosed. The point is, if you take a public position in this country, there is no First Amendment right to anonymity.

I once was—my highest political position before being Governor of Maine, was moderator of the Topsham, Maine Town Meeting. Nobody can go to a Town Meeting in Maine with a bag over their head.

The person who is making the statement, the identity of that person is part of the information that the voters need in order to assess the information and that is what you are denying them.

Mr. KEATING. Well, look, we are not talking—the bill goes far beyond election expenditures, for independent expenditures and so-called electioneering communications. It would cover 365 days a year, whether it is an election year or not. It would cover expenditures that talk about important issues. I think——

Senator KING. Don't you think the American people have a right to know who is trying to influence their position on policy or on elections? Isn't that part of the information that they should have?

Mr. KEATING. No, in fact, I do not. I think it is pretty clear during the civil rights movement, it was clear if people were behind the civil rights movement in the South, whether they were black or white or any other color, they were going to be subject to harassment or many, many, many worse things.

Senator KING. It seems to me there is a difference——

Mr. KEATING. Senator—let me finish answering, if I might. Just think back to, and even today, in some states, if you are a member of an organization that fights for LGBTQ rights, you do not want to be disclosed necessarily in some of these very conservative states because you will face discrimination in hiring or you may lose the job that you are at or you may not get a job.

This is still very sensitive in some areas of the country. I think it is very important that we have to consider there are going to be some very unpopular causes. It could be, say, for example, during

the Vietnam War when people were first against that, it was very unpopular.

I think we have to keep in mind that we have to protect minority viewpoints that may become majority viewpoints. We cannot try to suppress the ability for people to get their message across. That is what this bill would do.

Senator KING. I understand the argument. I understand the argument. I understand the NAACP case. But it seems to be there is a line where if you enter the political process by engagement in candidate advocacy, that that is a place where the right of the public for the information contained by who is contributing overcomes the danger of harassment or intimidation. My time is up, Madam Chairman. Thank you.

Chairwoman KLOBUCHAR. Excellent. I think I will be ceding my time to you more often, Senator King. Very good job. Senator Hagerty.

Senator HAGERTY. Thank you—get my microphone on here. Mr. Keating, can I stay with you, please. I want to talk about the chilling effects of donor disclosure that actually occur under the DISCLOSE Act.

As I understand it, the DISCLOSE Act would require groups engaged in political speech, like nonprofit groups, to disclose the names and addresses of their significant donors and their administrators. Is that correct?

Mr. KEATING. Yes.

Senator HAGERTY. Then, what would be the likely effect of requiring nonprofits and other groups to disclose the names and addresses of their supporters as this unfolds?

Mr. KEATING. Well, look, I think for the popular groups, they probably will not have much impact if they are concentrated in a particular geographic location. But even there, they may see an impact. But I think for many, many groups, what we will see is groups will choose a combination of two different things.

One is their public communications will become far less effective because they will not inform people who their Members of Congress are or their Senators, you know, to call on them, to take action, whether it is, passing something to restore abortion rights or to advocate for lower taxes, whatever issue it may be.

They will either make their communications less effective or what they will find is, they will find that donors are just simply not going to be willing to give money. Now, we are not talking here—you know, as Senator King mentioned, where do we draw the line? The answer is, I think, the Supreme Court drew the line.

The line is when you are expressly advocating for a candidate or against a candidate, urging the election or defeat of a candidate, that is where the line should be drawn.

I think that when groups are advocating on policy for social change, for improving the United States through passing legislation or repealing bad laws, we have to protect the people that are advocating for these changes that are not the majority view yet. That is why this bill is so overreaching in its impact.

That is why the ACLU has expressed concerns. That is why the Alliance for Justice has expressed concerns. There is a lot of concern about this across the spectrum. A lot of the liberal groups, un-

fortunately, are not willing to speak out on this, but I can tell you that a number of them are quite concerned about this legislation.

Senator HAGERTY. Well, some of the aspects of the legislation I would like to dig into a little bit more closely, because the regulations themselves, I think, that would come from this legislation can be confusing and chill speech.

First, I would like to go to the PASO standard that determines whether the speech promotes, attacks, supports, or opposes the figure that is being either criticized or talked about, which is vague. It is impossible to objectively administer.

Think about the deceptive and coercive requirements, like forcing groups to declare whether they support or oppose public officials, even if they do neither. You think about the oppressive disclosure requirements that are required in order to even engage in political speech.

You went through an example where 18 seconds of a 30 second ad would be eaten up just to meet the disclosure requirements. Wholly impractical. Let's take another example. We could take another real life scenario like the one you proposed.

But let's assume that a nonprofit, nonpartisan group were to spend $15,000 to run just 15 second local television ads urging their Senators to do more to stand up for crime victims and tougher sentences for violent criminals.

Let's say the groups are funded mostly by family members of violent crime victims, and some of them may have made donations more than $10,000. Such an ad might be determined to fall under the new definition of applicable public communication, which incorporates today's PASO standard. Is that correct?

Mr. KEATING. Absolutely. That is definitely correct.

Senator HAGERTY. If it is considered an applicable public communication, then this nonprofit group would have to declare whether it supports or opposes the Senators it mentions, even if it does not, in fact, support or oppose them, and instead is just advocating for crime victims. Isn't that correct?

Mr. KEATING. That is correct. I think one of the problems with this legislation is it would force organizations and the Federal Government to publish misinformation. We have heard a lot of concern publicly about misinformation, including from this body in the Senate, the United States Senate, about misinformation.

Here is a piece of legislation requiring groups to report misinformation on public forums, which would then be carried by the media. That is not the only element of misinformation.

A lot of the donors, so-called donors that would be reported and associated with these ads, in fact, had never seen the ads, may not agree with the ads, yet would be either published on the basis of the ad itself or in public reports saying they financed it, which would be totally false in some instances.

Senator HAGERTY. Very troublesome. Thank you, Mr. Keating.

Chairwoman KLOBUCHAR. Thank you very much. Next up, Senator Padilla.

Senator PADILLA. Thank you, Madam Chair. From following the train of thought in the previous answer to the previous question, but let's move forward here. Now, under the DISCLOSE Act, organizations spending more than $10,000 on campaign related activity

would be required to disclose any donor who contributed more than $10,000, which is, in my opinion, a large sum of money to fund that activity.

Donors who give less than that amount would not need to be disclosed. This sort of basic transparency would not affect small dollar donors but would reveal the small segments of society that is spending tens of thousands or hundreds of thousands, in some cases even millions of dollars to influence the outcome of elections and by extension, public policy.

I think disclosure would also help voters and citizens broadly understand who is trying to influence and why. Sounds like common sense policy. Those that seek to use their outsized wealth to gain an outsized voice in elections and policy should not be able to do so anonymously. Yet critics claim that forcing disclosure of these large donors will subject those individuals to harassment or danger. Mr. Weiner, I know we touched on this a few minutes ago, but can you respond to the specific criticism that donor disclosure will lead to donor harassment?

Mr. WEINER. Of course. Thank you, Senator. I think that we should start with a common premise, which is that everybody in our society deserves to be safe when they engage with the political process. But I am mindful of Justice Scalia's admonition that requiring people to stand up in public for their political acts fosters civic courage without which democracy is doomed.

Yes, it is not acceptable to harass donors. It is not acceptable—violence is not acceptable. But the right to speak is not the right to speak free from criticism. You know, we have had millions upon millions of Americans who have been subject to disclosure at the threshold for candidates and actual harassment and reprisals are rare.

There is also, I would like to note, an exception in this legislation for donors who face a real threat to their safety as a result of donation. I think in the vast majority of cases, no, this is not actually a serious concern and a good objection to disclosure.

Senator PADILLA. Okay. Thank you for that. You know, before I ask my next question, which is specific to the Citizens United case. I sort of take a step back and look at the impact not just the Citizens United but *Shelby* v. *Holder*.

Right, it seems that in the last decade the Supreme Court has specifically made it harder for some people to vote and easier for the wealthy to influence elections. Bad combination. Now in Citizens United, specifically, the Supreme Court unleashed a torrent of unlimited political spending, billions of dollars in the last 10 years, on the basis of two assumptions. Correct me if I am wrong, this analysis.

Number one, that spending would be accompanied by both independence and transparency. The Court reasoned that if expenditures were independent, that they would not necessarily lead to the undue influence or corruption.

The Court also reasoned that transparency would safeguard political integrity. Mr. Weiner, also for you, in the decades since the Citizens United decision, how have these two assumptions underlying the Court's holding fared? Are independent expenditures actually independent and transparent?

Mr. WEINER. Well, thank you, Senator. No, they are not. Many, many, many independent expenditures are actually, of course, carried out by groups that have close, close ties to candidates.

What you see is also, obviously, fundraising for these groups with candidates and elected officials attending and even donors being able to lobby for their favored policies. Then, of course, as we have been discussing, neither are many of these expenditures transparent.

I think neither of those predictions, as sadly with many of the predictions in Shelby County, have proved to come to pass.

Senator PADILLA. Thank you. Thank you, Madam Chair.

Chairwoman KLOBUCHAR. Okay. Thank you very much, Senator Padilla. Senator Hyde-Smith is next.

Senator HYDE-SMITH. Thank you, Chairwoman. I also want to thank the panelists for being here today. Certainly appreciate that. My question is directed to Mr. Keating. In your testimony, you stated that the DISCLOSE Act would harm the rights of Americans guaranteed by the First Amendment to freely speak, publish, organize into groups, and petition.

How significant are the risks to our First Amendment rights of free speech and association under the disclosure requirements in this legislation?

Mr. KEATING. Well, I think they are very significant. We would see a real atrophy of national organizations being able to influence policy. I think there is a great deal of confusion about what is actually in this proposal.

Just calling something a campaign related disbursement does not make it a campaign related disbursement. We are talking about expenditures on communications to the public that could be even a year or more away from election. It does not do anything to urge anyone to vote for or against any particular candidate.

Yet this bill would sweep that in. It is really a form of not only a campaign finance law, but it would be the first ever legislation to require disclosure for grassroots lobbying efforts. This was tried in the 1970's, and it generated a huge amount of opposition across the political spectrum.

I think if there was understanding about that today, and in fact I think if there is a danger of this actually becoming law, I think a lot of groups would emerge and say, look, we are all in favor of disclosure for actual campaigning for or against candidates, but we are not in favor of disclosure for advocating on important public issues.

Whether you are on the left or on the right, there are going to be causes that are minority viewpoints where people are simply not going to be willing to write a check or make a donation to support an unpopular cause.

That could be because where they live, it is unpopular, or it could be unpopular throughout the country. I think, I really fear if this bill becomes law, over time, over decades, it will make it far more difficult for minority viewpoints to appeal to our fellow Americans to say, look, rethink things, we need to make these changes nationally.

I would encourage the supporters of this to take a look at the bill and to try to draw a better line between what is actually campaign

related and what is actually pushing for improving our Government.

Senator HYDE-SMITH. Thank you. Also, Mr. Keating, what are the risks associated with publicly disclosing the names and all of this personal information on donors to super PACs, considering the growing risk associated with the cancel culture in this country in which individuals, businesses, or organizations are targeted with protests or threats for the positions that they might take.

Mr. KEATING. Well, look, I think it is already a problem right now. I think there are many people who—I mean, look, there are millions of people that give to candidates, but I think there are millions more that do not.

A reason why they do not is because they are smart enough to know if they give over $200 or if they give through ActBlue or WinRed, even like $1, their name will be on the internet forever and associated with that candidate, and if that candidate becomes an elected official, possibly everything good or bad that candidate has ever done. I think we are already seeing some suppression.

I think a lot of small donors are simply not willing to step forward to support candidates and parties. But I really fear that if we expand this to advocacy on issues, as this proposal would do, we are going to see it very difficult to push for legislation to improve our Government over time, over many years, and many decades.

Senator HYDE-SMITH. Thank you. I think everybody agrees we all want fair and free elections. But other members of the panel seem more than willing to embrace a broad expansion of complex financial disclosure requirements outlined in the DISCLOSE Act. In your view, could the goals of this legislation be accomplished without infringing on First Amendment rights and a tangle of new bureaucratic mandates?

Mr. KEATING. Well, look, I—there are many different goals that have been expressed, so I am not really sure what the goals are. I think if the goals were more clearly and narrowly stated, such as if money is given for independent expenditures, that should be disclosed.

If that is the goal, then yes, I think you could do some things that would come a lot closer to that goal without infringing on First Amendment rights, as this bill does. But the bill does not do that.

You know, it does not do the other things. It does not address the other things that are about so called independence that one of my colleagues on the panel have spoken about.

Senator HYDE-SMITH. Thank you. My time has expired.

Chairwoman KLOBUCHAR. Thank you, Senator. I am going to ask my questions now. Then I am going to turn over the hearing to Senator Merkley. I thank him for his leadership in this area.

I am going to start with asking you, Mr. Weiner, that question that Senator Hyde-Smith asked of Mr. Keating, and that is, are the goals being accomplished here?

I just kind of look at it a very different way, and that is that the goals are not being accomplished if there is over $1 billion in secret money and we do not know who is spending it and who the donors are. Go ahead.

Mr. WEINER. Thank you, Senator. I would say the goals are being accomplished and I would actually say this is quite tailored legislation.

Chairwoman KLOBUCHAR. No, I mean, without the legislation. That was the question. Like, are we finding out enough information about this?

Mr. WEINER. Yes, I understand. Apologies.

Chairwoman KLOBUCHAR. No, I was not clear.

Mr. WEINER. I would say we are not. Again, we have seen more than $1 billion in secret spending just in the last election cycle. I want to address one thing that Senator King raised.

Chairwoman KLOBUCHAR. Yes.

Mr. WEINER. The FEC data about dark money is grossly under conclusive. It does not include transfers to other organizations, which is the increasing trend to sort of do donations to super PACs.

Nor does it include a lot of undisclosed electoral spending, like on the internet. Without this legislation, no, we are not addressing these goals. We are seeing large and growing amounts of spending not being disclosed.

Chairwoman KLOBUCHAR. To clarify again, something that Mr. Keating talked about, the focus of this bill is related to campaigns and candidates. If there are issue ads, it is related to candidates, is that correct?

Mr. WEINER. Yes, Senator. I would note that the standard that Mr. Keating was referring to is about promoting, supporting, attacking or opposing the election of a candidate. My position, and I am not a member of the FEC, is that this bill would not cover it.

I think it is pretty clear issue advocacy that mentions a candidate. There would have to be an electoral reference. It is about the election, not just about the individual officeholder.

Chairwoman KLOBUCHAR. Thank you. Ms. Solomón, time and time again, I think about and see the numbers on how people have been losing trust in elected officials and in institutions involved in government. I think it is really disturbing for a democracy, no matter what political party you belong to.

The League of Women Voters' mission has always been to support our democracy, hold debates, and support civility in our politics. When people see outside groups drowning out the voices of voters, how does that impact their desire to vote and participate in our democracy?

Ms. SOLOMÓN. Well, thank you, Senator. I would say that the influx of big and secret money makes it hard for voters to feel like they can compete, quite frankly, when their voice is not necessarily being heard, it is being drowned out by special interests.

I would say another thing that is quite frustrating we hear from voters is that most people do not even have $400 to get to the next paycheck if some kind of an emergency arrives, right.

But yet, some can contribute more than $10,000, have a contribution to what decisions are being made, who is being elected to office, and they do not have the ability to know who those individuals are who are influencing their votes.

There is so much confusion that has been created as a result of non-disclosure that it only furthers the mis- and distrust that exists now today among many average American voters.

Chairwoman KLOBUCHAR. Okay, very good. Thank you. Good answer. Commissioner Mangan, there you are out in Montana where we all wish we were right now. Could you address that legislation that you passed in 2015 with bipartisan support, which actually requires the disclosure of donors to outside groups spending money in Montana's state and local elections?

I just find this so interesting because, you know, I have a feeling that the world did not fall down there when you did that. You got bipartisan support. As I pointed out, in our own country, traditionally we have had bipartisan support for disclosure.

Even these incredibly conservative Supreme Court Justices in the Citizens United opinion voiced their belief that it is Constitutional to have this kind of disclosure. Could you talk about how Montana was able to find bipartisan agreement to address this secret money in elections? How have Montanans responded to that?

Mr. MANGAN. Well, thank you, Senator. Of course, you are always welcome to come visit Montana.

Chairwoman KLOBUCHAR. I can see the sun. Maybe that sun coming in. All right, keep going.

Mr. MANGAN. You know, I can only speak to Montana. During that time for the DISCLOSE Act, Citizens United and a number of local issues in Montana, where there were unattributed ads attacking candidates of both parties, they had—enough is enough. The Montana legislators got together, worked together, and crafted the DISCLOSE Act with both Republicans and Democrats.

It has been successful in Montana because Montanans want that disclosure, and they want to be able to know who is spending money and influencing their democracy. We have just come to expect that I think. While it is only, of course, from local to statewide races, we hear those questions about Federal races as well. Of course, we cannot answer.

Chairwoman KLOBUCHAR. Exactly. Probably a good last question from me is about that, that your Act, of course, because of your jurisdiction, only applies to state and local elections. It seems to me that leaves a major gap in the disclosure requirements for any kind of ads or other activity related to elections in Federal elections.

Could you talk about that complete, I think, absurd disparity because of the amount of money that is spent in Federal elections. How you believe that should be closed as a loophole for your citizens no matter what party they are in. They get to find out how people are spending money on state and local elections, but, oops, not for the Federal Government. Those elections can be, anyone can donate to anything and spend money, and you are never going to know what it is.

Mr. MANGAN. Right. Thank you, Senator. We are fortunate in Montana that I get to talk to candidates, committees, and citizens every day on this very subject.

While a committee or a candidate for a local school election or a school library, for example, would have to disclose those over $50 contributions, those folks do ask about why we do not see that in Federal races, when folks are spending thousands and millions of

dollars, yet on a small local race, the stuff that they want to see, they want to know who is involved in their community's elections, they do not see that on a larger scale, it is a question that we cannot answer, unfortunately.

Chairwoman KLOBUCHAR. Okay. Very good. Thank you very much. Senator Cruz is up next. I will turn the gavel over to Senator Merkley.

Senator MERKLEY. Senator Cruz.

Senator CRUZ. Thank you, Madam Chair. Thank you, Mr. Chair. There was a time when Democrats supported free speech. There was a time when Members across the aisle actually believed in the First Amendment. Unfortunately, that time has long since passed. In 2014, Congress considered an amendment from Democrats to repeal the free speech provisions of the First Amendment.

I was at the time the Ranking Member on the Senate Constitution subcommittee, the Judiciary Committee. I led the fight against it. Ultimately, that amendment came to a vote on the Senate floor and every single Senate Democrat voted to repeal the free speech protections of the First Amendment.

[Technical problems.]

Senator CRUZ. Sure. It was a vote that would have given Congress plenary power to regulate—the initial version was to regulate any and all political speech by anyone. It literally would have said any expenditure of money for political speech.

It would have said that if a little old lady went to a Home Depot and spent $5 to buy a cardboard sign and a stick to say vote the bums out, that Congress could make it a felony and put her in jail. It also could have given Congress the ability to criminalize union organizing.

The Democrats realized that that version of the amendment was too extreme, even for them, so there was a second version that Senator Durbin offered that limited its restrictions only to corporations. However, it had plenary authority to any political speech by a corporation.

Now, I will point out Paramount Pictures is a corporation. Simon and Schuster is a corporation. NBC is a corporation. The NAACP is a corporation. Planned Parenthood is a corporation. The Brennan Center is a corporation.

Under the proposed amendment, Congress would have had blanket authority to regulate any and all political speech by any corporation in America. It was blatantly unconstitutional, and every single Democrat voted for it when it was voted on the floor.

There was a time, by the way, previously when Democrats tried to repeal the First Amendment to the Constitution, the free speech protections, there were a handful of lions of the Senate that spoke out against it.

Russ Feingold courageously spoke out against. Ted Kennedy gave a floor speech saying we have not amended the Bill of Rights in over 200 years and now is no time to start. I gave a floor speech with a picture of Ted Kennedy behind me, nearly scared my father to death when he saw me on TV with Ted Kennedy behind me.

But I pleaded, is there not one Ted Kennedy on the Democratic side who believes in free speech? There was not a single one. Unfortunately with this bill that is combined by the recent willingness

of the left to engage in threats of violence and intimidation against speech that they do not like.

We saw that with Antifa and Black Lives Matter riots all across this country, with Democrat politicians turning a blind eye that culminated in the current Vice President of the United States, Kamala Harris, raising money to bail out of jail violent rioters threatening fellow citizens.

We saw it just recently with a leak of a draft decision of the Supreme Court and then left wing groups publishing the addresses of Supreme Court Justices and violent rioters going to the homes of Supreme Court Justices and the Biden Department of Justice refusing to enforce Federal criminal law that makes it a crime to protest at the home of a Justice.

But our Attorney General, Merrick Garland, refuses to enforce that law. The result of that, as we saw just weeks ago, a deranged man arrested for the attempted murder of Justice Brett Kavanaugh. That is truly a toxic stew.

Of the current Democrats' unwillingness to protect free speech and willingness to engage in violence and threats of violence against their political enemies, what does that mean for something like the DISCLOSE Act?

What we saw in California in 2008 when there was a referendum on the ballot in support of traditional marriage and a majority of Californians, bright blue, California, voted in support of traditional marriage, and the names of those contributors were outed and left wing groups published their home addresses and people got fired for their job for, by the way, contributing to what was then the political position of people like Barack Obama and Hillary Clinton.

Yet people got fired for their jobs for daring to speak out. Look, the landmark case on this is *NAACP* v. *Patterson*. In that case, the State of Alabama, run by Democrats, wanted to target the people that were members of the NAACP. They wanted to go after them and persecute them. Sadly, it was the Democrats that founded the Klan and they wanted to go after the NAACP.

That case went to the Supreme Court in 1958, and the Supreme Court unanimously ruled that the NAACP, you could not force them to hand over their membership list because it violates their First Amendment right to free association.

This DISCLOSE Act is designed to target and harass speech that the left does not like. It is blazingly unconstitutional. I will mention something though to my Democratic colleagues. My time has expired, but I will say, if you want to see more disclosure, and if you think the current system is idiotic, and I think the current system of super PACs is idiotic, every year in Congress I have introduced legislation called the Super PAC Elimination Act.

It would do two very simple things. It would, number one, allow unlimited individual contributions to campaigns, not corporations, not unions, individuals. Number two, it would require immediate 24 hour disclosure of any contributions.

It does not ban super PACs, but as a practical matter, they would fade away because every candidate would rather control their own message rather than some other group. Yet I have yet to get a Democrat willing to support it.

I want to ask. I apologize, one question if I could ask, Mr. Weiner. The Brennan Center supports transparency and disclosure. Over the existence of the Brennan Center, how much money has been given to the Brennan Center specifically by George Soros?

Mr. WEINER. Senator, I do not know how much money specifically, but I will say that——

Senator CRUZ. Will you answer it when I ask you in writing?

Mr. WEINER. Senator we will be happy to respond. But I just want to say that. I will happily acknowledge that Open Society Foundation is a Brennan Center donor, and we are proud that they have donated.

Senator CRUZ. But will you answer the question or give me a lawyerly dodge? Because we both know how to do both of those.

Mr. WEINER. Senator, we will be happy to respond to a request.

Senator CRUZ. Thank you.

Senator MERKLEY. Thank you very much, Senator Cruz. I want to turn to you, Ms. Solomón. We heard earlier that the current climate has, if you will, intimidated small donors from participation. If we look at the participation of small donors over the last decade, has participation grown or declined?

Ms. SOLOMÓN. Small dollar donors, I would say, has slightly increased over the past decade. I do not think that it necessarily excludes small dollar donors. What I would like to say is that small dollar donors feel that they do not have the same level of impact.

If you are contributing $25 or $75 or $100 and as opposed to somebody who is contributing $25,000, $50,000, $1 million, who do you think people feel that their elected officials will pay more attention to?

The question, I think is important, but it is also the fact that these large donations drown out the small dollar donors as individuals, and they feel like they have less power in deciding what happens to our country.

Senator MERKLEY. Ms. Solomón, I think you have stated it very well. I think the numbers of small donors have actually increased very significantly over the last decade. It is not that they are reluctant to participate, they are participating in significant numbers.

But they are concerned that whereas they might be able to donate $25 or $100 or maybe $200 and be disclosed, that there are groups out there that contribute millions of dollars, and that those folks are going to get a lot more attention from Members of Congress.

Ms. Solomón, as we think about the principle of Government, of, by and for the people, the whole idea that power flows up from the people, having power flow down from massive corporations in massive donations, is that a conflict with the fundamental premise of our Democratic Republic?

Ms. SOLOMÓN. I believe that it does. It is a huge conflict. I think part of the challenge that we face as a country, quite honestly, is that the lack of trust in Government has increased so, so significantly because of a lack of transparency. People question the motivations behind decisions that are being made by their elected leaders, and that is concerning.

When elected leaders, their integrity is questioned—we can all agree that we are going to disagree, right. We know that happens

in this building every single day. But the lack of trust is so great at this point that people are actually questioning the integrity of their elected leaders.

Are they good people? Are they bad people? How are they influencing the election? They believe that oligarchs and corporations are influencing your decisions. That does not feel good.

Senator MERKLEY. Yes. Thank you. Mr. Weiner, we heard before that it is easy to draw a distinction between ads that advocate for a policy and ads that are campaign involved. This ad broadens—this Act, DISCLOSE Act broadens communications set to—broadens the communications for disclosure that promote, attack, support, or oppose a candidate. It does not broaden it to, as I understand it, to policy advocacy. Am I correct in that reading?

Mr. WEINER. Yes, Senator, you are correct. In fact, it is the election of a candidate. I would say that there has to be a reference to an election and there has to be the promotion of electoral results. I do think that that is a crucial distinction that narrows the scope of the bill.

Senator MERKLEY. Why is it, why is it legitimate, Mr. Weiner, for us to ask for disclosure when an ordinary citizen donates more than $200?

Mr. WEINER. Well, I think, Senator, that, you know, disclosure arms the voting public with information, and that we have long understood that candidates and others should disclose the sources of their funding and that that was an appropriate threshold for that.

I think that, and again, you know, I come back to the words of Justice Scalia that "requiring people to stand up for their public acts fosters civic courage, without which democracy is doomed." I think that is a well-established norm in our political process and one that has become very important to the integrity of our elections.

Senator MERKLEY. Mr. Mangan, Montana, I recall at one point was controlled by the, I believe the proper term was the Copper Kings, and the citizens of the state said this is wrong. We need to have our Government, our state Government controlled by the people. It is a particular example.

Does it therefore make sense that, if you will, candidates in Montana, the individual donations for a campaign over $200 are disclosed, but if an independent campaign receives massive donations, that those donations can come directly from a very, very powerful corporation.

Mr. MANGAN. Well, in my tenure, of course, citizens have, you know, voiced their feelings very strongly. You know, we have not seen the type of backlash that has been discussed here today. We have had disclosure a number of years on post-election and election communications.

But as far as any local races or statewide races, all donors are required, over $250 or more, required for committees to file and report contributions and expenditure. It is as simple as that. Montanans have embraced that.

Again, we have not seen any backlash as far as, you know, things that we have heard today in Montana. It is just the opposite. Montana has come to expect and want that disclosure.

Senator MERKLEY. Thank you. Senator King.

Senator KING. Just want to followup very briefly with Senator Cruz. I think he makes an interesting proposal. I would argue that we have what he proposed, except we do not have the disclosure. We have unlimited contributions.

The system we have now, you can give an unlimited contribution through one of these dark money vehicles, but the only thing we do not have is disclosure. It is his position. I remember him stating at some years ago, unlimited individual contributions and full disclosure. I think we have unlimited—we have unlimited contributions, we just do not have disclosure.

Mr. Keating, I think we have more agreement than might appear because as I read the bill, and I would hope you will supply perhaps after the hearing more detail, but this bill is very narrowly targeted to candidate elections. It is not about issue advocacy.

The principal provisions, Section 324, any covered organization that makes campaign related disbursements.

Then you go back several sections later and it defines campaign related disbursements, and it says, an independent expenditure which expressly advocates the election or defeat of a clearly identified candidate for election for Federal office or is the functional equivalent of express advocacy because when taken as a whole, it can be interpreted by a reasonable person only as advocating the election or defeat of a candidate in an election for Federal office.

That is what we are talking about here. We are not talking about an LGBTQ group putting an ad on TV, generally talking about gender equality. We are talking about advocacy of candidates. Am I reading the statute wrong? Is there a provision that also talks, I know about an applicable public communication, but that is also defined.

It refers to a clearly identified candidate for election for Federal office and which promotes or supports the election of a candidate for that office. It looks like what you are arguing against, which is issue advocacy, is not covered by this bill. Am I misreading the bill?

Mr. KEATING. Yes, I think you are. I think—I will give you an example. I am going to read you an actual ad that a three-judge panel of the District of Columbia, District Court ruled that the ad could be interpreted as taking a position, I am quoting from the Court's ruling, taking a position against the identified candidate.

Here's the ad. "Let the punishment fit the crime. But for many Federal crimes, that is no longer true. Unfair laws tie the hands of judges with huge increases in prison costs that help drive up the debt. For what purpose? Studies show that these laws do not cut crime. In fact, soaring costs from these laws make it harder to prosecute and lock up violent felons. Fortunately, there is a bipartisan bill to help fix this problem.

The Justice Safety Valve Act, bill number 619. It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes. Call Senators Michael Bennet and Mark Udall at (202) 224–3121. Tell them to support S. 619, the Justice Safety Valve Act. Tell them it is time to let the punishment fit the crime."

Now that Court looked at that bill and said—that advertisement and said it could be construed as taking a position against a can-

didate because presumably the group would not have run the ad asking the two Senators from Colorado to come out in support of the bill or support the bill.

Senator KING. Well, it seems to me——

Mr. KEATING [continuing]. If we are talking about express advocacy for a candidate, we do not need the PASO standard. The standard that you read, no other reasonable interpretation, is sufficient. The question would be, what does this PASO standard mean if it does not mean that? That is the problem. No one knows what it means. No one knows where the line is.

Senator KING. If we can better draw the line, if we can make the definition tighter, do I understand you to say that you have no objection to the revelation of the identity of donors, to clearly what we would all agree would be political advocacy of a particular candidate for or against?

Mr. KEATING. Well, again, it depends on the details, and, you know, the exact language and the rest of the structure to——

Senator KING. Assume for a moment, we could draft a language that would narrowly tailor it strictly to elections and political candidates. Would that be satisfactory to you?

Mr. KEATING. Well, look, we are not going to come out in favor of it. But I can tell you, it is certainly possible to draw this in a more narrow fashion that I think will find broader support and have less impact on First Amendment rights to join groups and speak to fellow Americans.

Senator KING. Thank you. Thank you, Mr. Chairman. Thank you. I think that is an important point.

Senator MERKLEY. It is, indeed. We did not hear that that he would necessarily, his organization would not support it, even if it was narrowly drafted. But he would see it as an improvement, is what I gathered. While I have you all here as experts, I wanted to ask a little bit about the corporate role in our campaigns.

A few years ago, I asked my team to look at the form of corporations of when our Nation was founded, when our Constitution was written, and whether there was anything resembling the modern corporation.

They reported there were chartered corporations for specific purposes, but nothing resembling the structure of the modern corporation. Would you all agree with that, Ms. Solomón and Mr. Weiner?

Ms. SOLOMÓN. Yes, sir.

Mr. WEINER. Yes.

Senator MERKLEY. I found it very interesting. The Court said, you know, a corporation is a person. Now, they also often talk about explicit words in the Constitution when they are holding an originalist conversation. Does the word corporation appear in the free speech clause of the Constitution?

Mr. WEINER. No, Senator.

Senator MERKLEY. Is there any kind of an indication anywhere in the discussion about freedom of speech in the Federal papers, for example, Federalist Papers, that a chartered corporation, even of that type that existed in 1787, is the equivalent of a person or should have free speech powers?

Ms. SOLOMÓN. Not that I am aware of, sir.

Mr. WEINER. Not that I am aware of.

Senator MERKLEY. The Court says that the Supreme Court has said, so this group of individuals represented by this corporation has an interest in expressing its viewpoint in our society and should have the full protection to do so.

I assume they are referring to the group of the owners of the corporation. Those are stockholders. Do stockholders have complete power over what the group says? Do they vote on what the group says in public discourse? Is it their speech, the stockholder speech, or is it simply speech chosen by the corporate officers?

Mr. WEINER. Well, Senator, very often stockholders have very little control over the speech. It is their money, but it is not actually speech that they can control.

Senator MERKLEY. Is it not the case that stockholders sometimes ask the corporation, as an owner, I should have the right to know how you are spending money, and the corporation officers say, hell no.

Mr. WEINER. In fact, often corporations spend money diametrically opposed to the views and the values of their stockholders.

Senator MERKLEY. How can this be the speech of the corporation if it is actually speech in which the owners disagree and are not even given the privilege of knowing what is being said?

Mr. WEINER. Well, Senator, I think what you are getting at is that the framers of the Constitution could not have envisioned the form of corporations have taken. The fiction that a corporation is speaking for its stockholders is just that, it is often a fiction.

Senator MERKLEY. I think about——

Mr. KEATING. Can I say something about this?

Senator MERKLEY. Well, if I ask you a question, you can.

Mr. KEATING. Okay. I figured you were asking a question of the panel. I am sorry.

Senator MERKLEY. No, I am not. I am asking Mr. Weiner and Ms. Solomón, because they know something about this. I struggle with the point that you made, Ms. Solomón, that ordinary citizens feel like their modest donations are outweighed by an extraordinary ability of companies, corporations that have billions of dollars of assets, not the millions or tens of millions, billions, sometimes their corporate profits are in the multi digit billions.

That that type of concentration of power, and then it is not even the owners of the corporation, it is simply the officers who are deciding what has been said—so they are kind of stealing the speech from the owners, that this amplification and you I think you use the word drowns out the advocacy of ordinary Americans. Have I captured your sentiment?

Ms. SOLOMÓN. Yes, sir. I would add that it also creates a chilling effect on voters who think that their vote does not matter.

Senator MERKLEY. In fact, if an individual has an independent campaign on their behalf that is spending tens of millions of dollars, and the rest of their donors are spending $25, $100, who is that elected leader going to pay the most attention to?

Ms. SOLOMÓN. Those who are making the greatest investment in their success, and that would be in getting elected.

Senator MERKLEY. We just had a race in Oregon where a PAC decided to put $10 million into a primary for a Member of Congress, an individual who has not served in any local office. But it

was a Bitcoin billionaire that decided, I want this guy elected and it certainly seemed to me like citizens had the right to know where that millions of dollars of campaign ads were coming from to understand who was behind it.

They should have the right to know that a Bitcoin billionaire was trying to get somebody elected with no political experience because they thought that person would be a bitcoin advocate. Doesn't—isn't that relevant to the debate in the public square where you have an exchange of ideas and people have to stand up and own their advocacy?

Shouldn't the citizens of Oregon get to know? In this case, they did know, but because it was publicized. But shouldn't they have the right to know who is behind these massive sums in our campaign?

Ms. SOLOMÓN. Absolutely. I think one of the things, I know there was a comment earlier, I believe, from Senator Cruz who talked about cancel culture and people fearing being canceled. I would say there is a huge difference between canceling somebody and accountability.

You just cannot say or do anything without being held accountable for the results of those words, actions, investments. I think it continues to sit upon those of us who are voters who maybe do not work on the Hill, who are not elected officials, who just really care about knowing who is investing in our elections, who is making decisions on our behalf. We do not want it to be corporations.

We want to be able to have voice over our vote. I think Shirley Chisholm says it best when she spoke about being unbossed and unbought. The American people want elected leaders who are unbossed and unbought.

Senator MERKLEY. You know, I think about that difference you are describing and going back to this example in Oregon. The voters who found out that this massive ads were being funded by a Bitcoin billionaire, that did not cancel the Bitcoin billionaire's voice. That voice was expressed like every single ad break on every single channel.

There was no cancellation at all. But there was accountability and that the people then knew, because of the publicity through newspapers, not because the ad said this has been funded by this Bitcoin billionaire, but because fortunately the newspapers explained that, and people were like, oh, that explains where that is coming from. Mr. Weiner, did you want to weigh in on this?

Mr. WEINER. Well, Senator, I really just want to echo Ms. Solomón's point and say that, you know, these are always questions of balance. We have also heard a lot about the NAACP today, which was, of course, the victim of a campaign of racial terrorism in the South, in the Jim Crow South.

The reality is, like this law, this proposed legislation, there will always be situations where we need to balance privacy with the public's right to know. But the legislation here and the general principle that the people who fund campaign spending should be disclosed to the public is well accepted in our law and in our traditions and is really integral, I think, to what it means to have a political system with integrity.

Senator MERKLEY. You know, earlier there was an implication that it is unconstitutional to require disclosure, but did not the Supreme Court say in what I think was an extraordinarily corrupt decision of Citizens United that favors Government by the powerful over representative Government by the people, a complete inversion of the design of our Constitution—nonetheless, even in that case, did not the majority assume that there would be disclosure?

Mr. WEINER. I would say that the disclosure holding was integral to the ruling in Citizens United. It was integral to, whatever, however flawed it may have been, the Court's vision of how our campaign finance system should be structured. The fact that we have yet to make good on the Court's promise of, you know, meaningful disclosure is really a grave problem for our political system.

Senator MERKLEY. I want to thank all of you for coming to testify and share your experiences and your knowledge before the Senate. This is such an important discussion to the future of our democracy. Such an important question as to the integrity of our elections and the vision of Government, of, by and for the people, not the powerful. The hearing record will remain open for one week and we are adjourned. Thank you.

[Whereupon, at 4:54 p.m., the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

Senator Sheldon Whitehouse
Rules Committee Hearing
The DISCLOSE Act
July 19, 2022

Chair Klobuchar, Ranking Member Hagerty, thank you for inviting me to testify on the DISCLOSE Act.

Twelve years after *Citizens United*, Americans know something is deeply amiss in our democracy. Huge majorities see America headed in the wrong direction. Fifty-eight percent of voters say our government needs major reforms or a complete overhaul. Only 25% of Americans say they have confidence in the Supreme Court, down 11% from just last year. They see government actually erasing rights on which generations of Americans relied.

Is all of this some weird collective phase, or are the people actually right that something is wrong?

I submit to you that the distress in our Republic has much to do with corrupting political influence acquired via unlimited anonymous dark money; that dark-money influence has created a disconnect between what Americans want their government to do and what it actually does.

Dark money by design can be impossible to trace. But people instinctively know it when their voices are being drowned out and big corporations always seem to come out on top. They can tell when the ad on their television was put up by some fake front group.

Floods of dark money caused this, so we can fix it. The DISCLOSE Act, first introduced by Leader Schumer in 2010 and reintroduced by me in every Congress since, will fix this.

Even the *Citizens United* justices recognized that unlimited political spending without transparency would be corrupting. *That* they got right: we've seen a tsunami of slime distort our politics and corrode our democracy. What the justices got wrong — indisputably, factually wrong — is their unlimited-money tsunami being either transparent or independent.

The wreckage from the dark-money aftermath of *Citizens United* is staggering.

Dark money political spending went from under $5 million in 2006 to more than $1 billion in 2020. Megadonors and special interests had a bonanza. Billionaire political spending increased by a factor of 70, from $17 million for the 2008 election to $1.2 billion for 2020. In 2018, super PACs and other dark-money groups collectively outspent even candidates' own campaigns in 16 federal races.

Think things are different? They are. Academic studies found that economic elites and business interests have huge influence on government policy, while average citizens have little or none. Whatever the American people want, the big donor interests now win nearly every time.

Look at climate change. Before *Citizens United*, there was a steady heartbeat in the Senate of bipartisan climate bills. John McCain ran for President with a solid climate platform. With *Citizens United*, that heartbeat flatlined. The fossil fuel industry used its unlimited dark-money weaponry to stamp out bipartisanship, creating a lost decade of legislative failure, for which I fear we will all pay dearly.

Far-right special interests even turned their dark-money guns on the federal judiciary. They funded a secretive $580 million network to pack the courts with judges selected to greenlight donor-friendly policies, and to run multi-million-dollar ad campaigns to keep their confirmations on track. Their network involves dozens of front groups, some of which are mere "fictitious names" for other secretive front groups.

Now, we have a Court gone wild. In a matter of days, the newly-radicalized Court overturned *Roe v. Wade*, manufactured new polluter-friendly legal doctrines, and threw out centuries-old gun safety regulations—all of it wildly unpopular with most people.

Dark-money groups funded and organized the rally before the January 6 attack on the Capitol, and perpetuate the Big Lie. Bad enough. But behind and beside the Trump mob's violent insurrection attempt, has run a slow-motion coup d'etat by secretive special interests surreptitiously, incrementally, taking over government power. Left to fester, dark money will rot the very foundation of our Republic. Remember, justices who signed off on *Citizens United* conceded dark money was corrupting. That part was 8-1.

We need to pass the DISCLOSE Act so citizens can see who is spending the big money in politics — donors who spend over $10,000. Even foreign enemies can try to corrupt us through dark money channels — after all, secret is secret.

The American people love this idea. Poll after poll shows Americans overwhelmingly, by margins of 85 to 90%, want this. Even Republicans criticize dark money. Well, Republicans should have a chance to join us in ending it. If we get rid of the damned stuff, this horrible decade of dark-money corruption comes to an end, and Congress can begin to serve America again.

Jeff Mangan – Testimony S.433 'Disclose Act of 2021' - Senate Rules Committee

I. Introduction

Thank you Chairperson Klobuchar, Ranking member Blunt, and members of the committee. I am honored to participate in today's hearing.

I appear today to discuss one state's experience with campaign finance transparency and disclosure as you consider legislation to provide additional disclosure requirements to the Federal Election Campaign Act.

I will briefly describe the role of Montana's Commissioner of Political Practices (COPP) specific to campaign finance transparency and disclosure against the backdrop of my state's unique and storied past, which continues to influence its citizens' expectations for their government, their candidates, and their elected officials.

Common threads running through Montana's colorful history since its statehood in 1889 include fierce independence, bipartisan traditions, and citizen-driven reform. Montanans' persistent demands for transparency and accountability in government, in elections, and in campaign finance disclosure have profoundly influenced and shaped state law and continue to do so.

The COPP is no exception; its very existence and statutory duties are based on the transparency and accountability that have become part of the fabric of Montana's state institutions and elections.

a. COPP Creation

First and foremost, the office I represent is and has always been an independent and nonpartisan office. Coming on the heels of passage of the 1971 Federal Election Campaign Act and Montana's ratification in 1972 of its state Constitution enshrining Montanans' right to know about and participate in government, the state's citizen legislature in 1975 established the Office of the Commissioner of Campaign Finance and Practices. The intent of the 1975 Legislature, to establish disclosure and reporting of money used to influence Montana elections and to enforce Montana's election laws, continues to guide the office's operations. State laws and court decisions alter the landscape, but the COPP's overarching goals remain the same.

b. COPP Appointment and Confirmation

Montana's governor appoints the COPP from a list submitted by a bipartisan legislative nomination committee, and the state Senate confirms the nominee. With certain limitations for individuals who have engaged in recent political activity, any Montana resident may apply for the position. The application process is transparent and open to the public.

In 2017, when I was appointed by then-Governor Steve Bullock, a Democrat, the Senate consisted of 32 Republicans and 18 Democrats—the second-largest Republican majority in decades. The Senate confirmed my nomination by a vote of 49-1, a testament once again to Montana's bipartisan approach to campaign finance reporting and disclosure.

c. COPP Duties

Montana campaign finance law specifically requires that the Commissioner monitor and enforce Montana's campaign finance reporting and disclosure laws. COPP handles this statutory responsibility in a variety of ways. Montana's COPP works tirelessly to provide information regarding Montana's campaign finance reporting and disclosure requirements directly to candidates, committees, and citizens of Montana.

First, COPP compliance staff and I work to compile and distribute educational materials and trainings intended to familiarize candidates and political committees with Montana's reporting and disclosure requirements. Examples

include training manuals outlining how to access and utilize Montana's electronic filing system (the Campaign Electronic Reporting System or CERS); in-person campaign finance reporting and disclosure trainings conducted across the state by myself and COPP compliance specialists; and general reporting and disclosure tips, including reminders of upcoming finance reports, sent by COPP compliance specialists via email to all registered candidates and committees. COPP staff consider it a core mission of the agency to provide education and guidance to candidates and political committees participating in Montana's elections.

Second, COPP staff, including myself, serve as a direct resource to answer questions about Montana's campaign finance reporting and disclosure requirements. COPP receives questions pertaining to Montana's campaign finance and disclosure laws on a daily basis, be they from candidates, political committees, or citizens of Montana.

Finally, COPP compliance specialists inspect all campaign finance reports filed by candidates and political committees. If a compliance specialist notices an area where a candidate or committee may not have fully complied with Montana's reporting and disclosure requirements, they will work directly with that candidate or committee to address the matter and, if necessary, rectify the problem. I consider this formal inspection process to be an integral part of the office's the education and guidance mission.

II. Montana History as Background for Corrupt Practices Act

A convergence of events during the turn of the century helps illustrate how Montana started down the path, which it still walks, to regulate spending in elections and ensure that spending is public information. That path is paved with copper.

a. Copper Kings

Expansive deposits of copper, unearthed in the late 1800s in Butte, Montana, became increasingly valuable as industrialization and the widespread use of electricity swept the nation. Butte's copper mining industry developed into one of the first centralized and industrialized businesses in the world, and even today, Butte is often called "The Richest Hill on Earth."

Three prominent figures who would become known as the "Copper Kings" capitalized on and controlled that wealth. When Montana achieved statehood in 1889, two of the Copper Kings, William A. Clark and Marcus Daly, vied ferociously for the new U.S. Senate seat and spared no expense bribing politicians and judges and purchasing newspapers to propagate negative and scandalous stories about each other.

Clark emerged the victor, having spent over a million dollars in bribes and other expenses. The U.S. Senate investigated and found Clark guilty of his schemes to buy the seat and was on the verge of denying it when he resigned. Clark ran again in 1901 and won on the platform of improved working conditions for miners. He failed to fulfill his campaign promises, and it was said of him among his colleagues in Washington "If you took away the whiskers and the scandal there would be nothing left."

b. Corrupt Practices Act

The Clark-Daly scandal and other schemes to purchase public offices led in 1912 to passage by a 3-1 margin of the citizen-initiated Corrupt Practices Act, the first of its kind in the state, prohibiting corporate contributions to, and expenditures on, candidate elections. Subsequent citizen-initiated measures to limit campaign contributions and expenditures would follow.

i. 1994; I-118

In 1994, voters overwhelmingly approved I-118, a citizen-initiated proposal to limit contributions to candidates and political parties. It is worth noting that in 1994, Montana's Governor was a Republican; its legislative bodies were

split between the two parties; a Republican won re-election to the U.S. Senate; and a Democrat won re-election to the U.S. House.

ii. 1996; I-125

In 1996, Montana voters approved I-125, another ground-up proposal prohibiting corporations from using corporate funds to make contributions to or expenditures on ballot issue campaigns.

iii. 2012: I-166

In 2012, passage of I-166 with 75% of the vote, codified an initiative to prohibit corporate contributions and expenditures in state and national elections. Although this measure was quickly struck down by a state district court, its passage by such a large margin again demonstrates the passion Montana voters have with regard to campaign finance matters.

c. Citizens United/American Tradition Partnerships

Through the years, the 1912 Corrupt Practices Act had remained largely intact, withstanding a challenge in 2011 in which the Montana Supreme court held that unlimited corporate donations creates a dominating impact on the Montana political process and inevitably minimizes the impact of individual Montana citizens.

Two U.S. Supreme Court decisions would significantly alter the landscape of campaign finance law and ultimately result in the demise of that portion of Montana's Corrupt Practices Act.

In 2010, the U.S. Supreme Court held in *Citizens United v. Federal Election Commission* that corporations and other outside groups can spend unlimited money on elections. Montana stood alone against the decision, citing the state's extensive history with political corruption and corporations in our electoral processes. Two years later, in *American Tradition Partnership, Inc. v. Bullock*, the court held "[t]here can be no serious doubt" that its decision in *Citizens United* that "political speech does not lose First Amendment protection simply because its source is a corporation" applied to Montana state law.

d. Montana Disclose Act

Three years after the Supreme Court's ruling, the 2015 Montana Legislature enacted and Governor Steve Bullock signed the Montana Disclose Act, a sweeping revision of the state's campaign finance laws. The act has been lauded as one of the most robust campaign finance laws in the country. Its many reforms included increasing reporting and disclosure requirements for political committees and candidates and modifying laws governing campaign contributions, expenditures, attribution requirements. Notably, the legislation required disclosure reports by entities regardless of their tax status.

The state had again flashed its bipartisan stripes with the measure sponsored by a Republican Senator, enacted by a Republican-controlled legislature, and signed by a Democratic Governor.

In 2018, the 9th U.S. Circuit Court of Appeals upheld the constitutionality of the Montana Disclose Act, and in early 2019, the U.S. Supreme Court declined to hear the appeal.

e. Prohibition on campaign contributions and expenditures by foreign nationals (SB 326, 2019)

Directly related to the measure you are considering today and demonstrating again that state and federal campaign finance and disclosure issues are inextricably linked, in 2019, the Montana Legislature enacted SB 326, prohibiting foreign nationals from making contributions or expenditures or promising contributions or expenditures in connection with any candidate election. The bill incorporates references to the sections of the Federal Election

Campaign Act that the proposal in front of you seeks to amend, and Montana relies on the Federal government in shouldering its responsibilities to enforce violations of the law.

III. Conclusion

Since statehood, Montana's citizens have grappled with the ramifications of money in elections while holding fiercely to protecting the public's constitutional right to know. It is an immutable fact that campaign finance reporting and disclosure laws will continue to evolve, as they should, through legislation and in the courts, but regardless of which political party holds sway in the executive and legislative branches of Montana state government, the state's history has shown that its citizens will continue to expect no less than absolute transparency from its candidates and those who seek to help place them in positions of public trust.

Respectfully submitted,

Jeff Mangan

INSTITUTE FOR FREE SPEECH

STATEMENT OF
DAVID KEATING
PRESIDENT
INSTITUTE FOR FREE SPEECH
ON S.443, THE DISCLOSE ACT
BEFORE THE
COMMITTEE ON RULES AND ADMINISTRATION
UNITED STATES SENATE
JULY 19, 2022

Chairwoman Klobuchar, Ranking Member Blunt, and members of the Committee:

On behalf of the Institute for Free Speech,[1] thank you for the opportunity to appear before the Committee today.

S. 443, the DISCLOSE Act, would harm the rights of Americans guaranteed by the First Amendment to freely speak, publish, organize into groups, and petition. These rights are vitally important to Americans who work to advocate for better government.

Significant portions of the bill would violate the privacy of advocacy groups and their supporters – including those groups who do nothing more than speak about policy issues before Congress or express views on federal judicial nominees. Other key provisions would compel speakers to recite lengthy government-mandated messages in their communications, instead of their own speech. The bill would also compel the publication of misleading or false information to the public.

S. 443 would impose onerous and unworkable standards on the ability of Americans and groups of Americans to discuss the policy issues of the day with elected officials and the public.

S. 443's substance would help incumbents and expensive campaign finance attorneys while harming the public. The bill would greatly increase the already onerous legal and administrative compliance costs, liability risk, and costs to donor and associational privacy for civic groups that speak about policy issues and politicians. Organizations and their supporters will be further deterred from speaking or be forced to divert additional resources away from their advocacy activities to pay for compliance staff and lawyers.

Some groups will not be able to afford these costs or will violate the law unwittingly. Less speech by private citizens and organizations means public officials will be able to act with less accountability to the public. Consequently, citizens who would have otherwise heard their speech or read publications will have less information about their government.

[1] Founded in 2005, the Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, publish, assemble, and petition the government.

Much of my statement is drawn from portions of an analysis of H.R. 1 by Institute for Free Speech Senior Fellow Eric Wang. That bill contains subtitles labeled as the "DISCLOSE" Act and "Stand by Every Ad" and those portions of that legislation are nearly identical to S. 443.

Executive Summary

Numerous components of S. 443 would harm our democracy and our First Amendment rights. Specifically, these provisions in S. 443 would:

- Unconstitutionally regulate speech that mentions a federal candidate or elected official at any time under a vague, subjective, and dangerously broad standard that asks whether the speech "promotes," "attacks," "supports," or "opposes" ("PASO") the candidate or official. This standard is impossible to understand and would likely regulate any mention of an elected official who hasn't announced their retirement.

- Force groups to file burdensome and likely duplicative reports with the Federal Election Commission ("FEC") if they sponsor ads that are deemed to PASO the president or members of Congress in an attempt to persuade those officials to support or oppose policy issues, including legislation.

- Compel groups to declare on new, publicly filed "campaign-related disbursement" reports that their ads are either "in support of or in opposition" to the elected official mentioned, even if their ads are neither. This form of compulsory speech forces organizations to declare their allegiance or opposition to public officials, provides false information to the public, and is unconstitutional.

- Force groups to publicly identify certain donors on reports for issue ads and on the face of the ads themselves. In many instances, the donors being identified will have provided no funding for the ads. Faced with the prospect of being inaccurately associated with what, by law, would be considered (unjustifiably, in many or most instances) "campaign" ads in FEC reports and disclaimers, many donors will stop giving to nonprofits, or these groups will self-censor.

- Subject far more issue ads to lengthy disclaimer requirements, which will coerce groups into truncating their substantive message and make some advertising, especially online, practically impossible.

- Focus public attention on the individuals and donors associated with the sponsoring organizations rather than on the communications' message, exacerbating the politics of personal destruction and further coarsening political discourse.

- For the first time, subject groups that sponsor communications about judicial nominees to burdensome campaign finance reporting, donor exposure, and disclaimer requirements without any sound policy justification or recognized constitutional basis for doing so.

- Force organizations that make grants to file reports and publicly identify their own donors if an organization is deemed to have "reason to know" that a donee entity has made or will make so-called "campaign-related disbursements." This new, vague, and subjective standard will greatly increase the legal costs of vetting grants, and many groups will end grant-making programs.

- Impose inflexible disclaimer requirements on online ads from American speakers that may make many forms of small, popular, and cost-effective ads advocating government policy changes or the election or defeat of candidates effectively impossible.

I. S. 443 Would Impose Unconstitutionally Overbroad Regulations on Speech About Policy Issues and Judicial Nominees. It Would Subject Many Organizations' Donors to Excessive and Irrelevant Reporting Requirements, Thereby Inviting Retaliation and Harassment, Chilling Speech, and Deterring Financial Support.

A) Overbroad Definition of "Campaign-Related Disbursements"

S. 443 creates a new category of highly regulated speech it calls "campaign-related disbursements." But much, if not most, of the regulated speech would not be campaign-related at all. Specifically, the following four types of speech would be classified as "campaign-related disbursements":

(1) Generally, any public communications at any time that mention a federal candidate or elected official who is subject to re-election and that "promote[] or support[]" or "attack[] or oppose[]" the election of a candidate or official, "without regard to whether the communication expressly advocates a vote for or against" that candidate;

(2) Generally, any public communications that are "susceptible to no reasonable interpretation other than promoting, supporting, attacking, or opposing the nomination or Senate confirmation" of a federal judicial nominee.

(3) So-called "electioneering communications." This includes the current law definition – *i.e.*, television and radio ads that so much as mention a federal candidate or elected official who is subject to re-election, if the ads are disseminated within the jurisdiction the official or candidate represents or seeks to represent within certain pre-election time windows; and

(4) Independent expenditures that expressly advocate the election or defeat of a federal candidate or that are "the functional equivalent of express advocacy."[2]

Of these four categories, the U.S. Supreme Court has only determined that the last – express advocacy independent expenditures – sets forth a bright-line category for regulating speech that is "unambiguously" campaign-related.[3] While some "electioneering communications" may be intended to influence elections, the purpose of many (if not most) of these ads is to call public and

[2] S. 443 § 201 (to be codified at 52 U.S.C. § 30126(d)); *see also* 52 U.S.C. § 30104(f) (defining "electioneering communication").
[3] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *see also FEC v. Wis. Right to Life*, 551 U.S. 449, 469-470 (2007).

official attention to various policy issues and positions. As discussed more below, S. 443 would make an already bad law even worse by expanding the types of speech that can be regulated under the new terminology of "campaign-related disbursements."

B) A New and Dangerously Broad Standard That Threatens Free Speech and a Free Press

S. 443 would regulate a dangerously and unconstitutionally overbroad universe of speech about public officials and their policies under the "promote," "support," "attack," or "oppose" content standard. This standard, known to campaign finance attorneys as "PASO," is hopelessly subjective, vague, and overbroad. It cannot be applied with any consistency and would regulate speech that has nothing to do with elections.

Despite that, the bill characterizes such ads as "campaign-related disbursements," even though the election may be nearly two years away for representatives, four years away for the president, six years away for senators, or, in the case of judicial nominees, where there are no elections at all – *because the federal judiciary is not elected*.[4]

This analysis addresses the application of the PASO standard to judicial nomination communications in S. 443 separately below. For now, the focus is on how the PASO standard in S. 443 would apply to communications about elected officials. Suppose that President Biden (or another future president) files for and begins fundraising for re-election soon after winning election, as former President Trump did.[5] Under the campaign finance law that S. 443 would amend, Biden would be considered a "candidate."[6] As such, nearly all ads by advocacy groups that seek to prioritize issues with the administration or to oppose administration policies or positions would be subject to onerous reporting and donor exposure requirements.

For example:

- A left-leaning organization sponsors a social media campaign calling on President Biden to support the "Bernie Sanders single-payer healthcare plan" – a policy that Biden pointedly disavowed during the 2020 campaign.[7]

- An environmental advocacy organization sponsors a television ad campaign urging Biden to adopt "AOC's Green New Deal" climate policy – a program that Biden said during one of the presidential debates "is not my plan."[8]

- An abortion rights organization running digital ads calling on President Biden to take action to protect abortion access in the wake of the recent Supreme Court ruling in *Dobbs v. Jackson Women's Health Organization*.

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[4] *See* U.S. CONST., Art. III.
[5] *See* FEC Form 99, Donald J. Trump (filed Jan. 20, 2017), *at* https://docquery.fec.gov/pdf/569/201701209041436569/201701209041436569.pdf.
[6] *See* 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3.
[7] Jacob Knutson, *Biden: "I am the Democratic Party right now,"* AXIOS (Sept. 30, 2020), *at* https://www.axios.com/biden-democratic-party-trump-a8a71bfc-945d-4e27-9241-cc2accc1cf6a.html.
[8] David Roberts, *What Joe Biden was trying to say about the Green New Deal*, VOX (Oct. 7, 2020), *at* https://www.vox.com/energy-and-environment/21498236/joe-biden-green-new-deal-debate.

All these examples could be said to "oppose" President Biden under the vague standard in the bill. The first two examples could be said to implicitly oppose Biden because they advocate policies that he did not support during the 2020 campaign and presumably still does not support as president. They could also be said to oppose Biden by perpetuating rifts within the Democratic coalition and make it more difficult for Biden to govern. The last example could be alleged to show discontent with the actions President Biden has taken to date to protect abortion access. Moreover, the first example could be said to "support" Senator Bernie Sanders, while the second example could be said to "support" Representative Alexandria Ocasio-Cortez, both of whom are currently candidates for re-election.

S. 443 purports to tether the PASO standard to whether a communication "promotes or supports… or attacks or opposes *the election*" of a named candidate. But this attempt at narrowing the scope of regulation only to supposedly election-related communications is misleading. The bill otherwise says that speech may be regulated as PASO "without regard to whether the communication expressly advocates a vote for or against a candidate." In other words, the PASO regulatory standard in S. 443 seeks to determine what is *implied* by a communication and how others might perceive it. This will vary from person to person based on his or her subjective interpretation and perception. Moreover, as all of the examples above may sway public opinion against Biden's policies or make his job more difficult, they could all be said to undermine his chances at re-election in some way (*i.e.*, "oppose" his re-election). In short, PASO is an arbitrary "know it when I see it"[9] standard that is incapable of being applied consistently or fairly.

If these concerns seem speculative and alarmist, consider how courts have, in practice, upheld regulation of pure issue speech as election campaign activity. In *Independence Institute v. FEC*, a Section 501(c)(3) think tank (prohibited by federal tax law from political campaign intervention) wished to run the following ad that focused entirely on advocating for a criminal justice reform bill pending in Congress:

> Let the punishment fit the crime. But for many federal crimes, that's no longer true. Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt. And for what purpose? Studies show that these laws don't cut crime. In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons. Fortunately, there is a bipartisan bill to help fix the problem – the Justice Safety Valve Act, bill number S. 619. It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes. Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act. Tell them it's time to let the punishment fit the crime.

Incredibly, a federal three-judge panel upheld the regulation of the ad as an "electioneering communication" under existing law. The judges reasoned that the ad could be interpreted as "tak[ing] a position [] against the identified Senate candidate" (*i.e.*, Senator Udall, who was up for re-election at the time), and "if the Senate candidate has already taken a position against the bill, the advertisement could very well be understood by [voters] as criticizing the Senate candidate's

[9] *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see also Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 752 (2013) (Sotomayor and Kennedy, JJ., dissenting) (repudiating a "know it when I see it" regulatory standard).

position."[10] (In fact, like most senators, Udall had not yet taken a position on the bill.) Under this reasoning, any issue ad that merely urges an elected official to change their position (*e.g.*, on single-payer healthcare or the "Green New Deal") – even without saying anything about the official's existing position – could certainly be said to "attack" or "oppose" the official's re-election under the PASO standard. Even if the official has yet to take a position, an ad could be interpreted to "oppose" the official's re-election.

Notably, the PASO standard comes from the provision in the 2002 Bipartisan Campaign Reform Act (a.k.a. "McCain-Feingold") that regulates the funds state and local party committees may use to pay for communications that PASO federal candidates.[11] The Supreme Court upheld the PASO standard against a challenge that it is unconstitutionally vague on the basis that it "clearly set[s] forth the confines within which potential *party speakers* must act" because "actions taken by *political parties* are presumed to be in connection with election campaigns."[12]

However, S. 443 would expand the PASO standard to *all* speakers. Everyone knows why a political party speaks about candidates – its purpose is to support its candidates. Unlike political parties, it is *not* reasonable to presume that all the policy advocacy activities of groups like those in the examples above are "in connection with election campaigns."

Moreover, while the Supreme Court initially suggested that speakers could seek advisory opinions from the FEC to clarify what the PASO standard means,[13] the Court has subsequently denounced vague campaign finance laws that effectively force speakers to seek FEC advisory opinions as "the equivalent of" an unconstitutional "prior restraint" on speech.[14] In short, S. 443's reliance on the PASO standard to regulate "campaign-related disbursements" not only is unwise, it is very likely unconstitutional.

It is important to keep in mind that "public communications" cover not just broadcast ads, but any form of paid communications, including mailings and Internet ads. Many groups raise money, identify supporters of a cause, and build their brand through such communications and are not attempting to elect or defeat a candidate.

C) Compulsory Declarations of Allegiance

S. 443 would impose a binary choice on sponsors of "campaign-related disbursements" that are public communications to declare on campaign finance reports "whether such communication[s] [are] in support of or in opposition to" the candidate referenced in the communication.[15] Under current law, only reports for independent expenditures that expressly advocate the election or defeat of candidates are required to state whether the communication supports or opposes the

[10] *Independence Institute v. FEC*, 216 F.Supp.3d 176, 188-89 (D.D.C. 2016), *aff'd per curiam*, 137 S. Ct. 1204 (2017).
[11] *See* 52 U.S.C. §§ 30101(20)(A)(iii), 30125(b)(1).
[12] *McConnell v. FEC*, 540 U.S. 93, 169-170 and 170 n.64 (emphasis added).
[13] *Id.* at 170 n.64.
[14] *Citizens United v. FEC*, 558 U.S. 310, 335 (2010).
[15] S. 443 § 201 (to be codified at 52 U.S.C. § 30126(a)(2)(C)).

candidate involved[16] since, as discussed above, only such communications are unambiguously campaign-related.[17]

Given S. 443's overbroad regulation of "campaign-related disbursements," using the examples from before, left-leaning organizations calling on President Biden to adopt a more left-leaning agenda could be required to affirmatively and publicly declare to the FEC that their ads "oppose" Biden, even if they are otherwise agnostic to or may even support his re-election. This type of compelled speech is obnoxious to its core and goes beyond "mere disclosure," thereby making it especially likely to be held unconstitutional.[18] There is no government interest in publishing false or misleading information.

D) Overbroad Reporting and Donor Identification Requirements

As an initial matter, S. 443's reporting requirements for "campaign-related disbursements" appear to be largely duplicative of the existing reporting requirements for independent expenditures and electioneering communications,[19] since the latter two categories of speech are encompassed within the former category. If the bill's intent is to create additional and duplicative reporting requirements, the added administrative burden for speakers is unconstitutional, as it serves no public interest, would clutter the FEC's website with redundant and confusing reports, and may mislead some into thinking the reports cover different activities and thus lead some to conclude groups spent more on reported communications than was actually the case.

Additionally, S. 443 departs from existing law by imposing additional donor identification requirements on campaign finance reports.[20] Organizations that make "campaign-related disbursements" totaling more than $10,000 during a two-year "election reporting cycle"[21] (or during a calendar year, for so-called "federal judicial nomination communications," which are discussed more below) would have to publicly report all of their donors (including their addresses) who have given $10,000 or more during that same period, unless such communications are paid for using a segregated account (the donors to which must be reported), or if donors affirmatively restrict their donations from being used for such purposes and those donations are deposited "in an account which is segregated from any account used to make campaign-related disbursements" (in which case the other donors still must be reported).[22] Both of these so-called options are impractical for many, if not most, groups. They would significantly impede fundraising (particularly for most donors who do not wish to be publicly reported) and would still result in many donors being included on campaign finance reports with the implication they are financing "campaign-related disbursements" that they knew nothing about and may not even agree with.

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[16] *See* 52 U.S.C. § 30104(c)(2)(A); *compare id. with id.* § 30104(f)(2)(D) (reporting requirement for electioneering communications).
[17] *See Buckley*, 424 U.S. at 80.
[18] *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).
[19] *See* 52 U.S.C. § 30104(c), (f); S. 443 § 201(a) ("Nothing in this section shall be construed to waive or otherwise affect any other requirement of this Act which relates to the reporting of campaign-related disbursements.").
[20] The bill could easily expand the existing independent expenditure ("IE") and electioneering communication ("EC") reporting requirements to include additional donor identification, thereby alleviating speakers from filing two separate sets of reports (*i.e.*, both IE/EC *and* "campaign-related disbursement" reports) for each communication. However, the bill does not take this more streamlined approach.
[21] An "election reporting cycle" is defined as being coterminous with the two-year congressional election cycle. S. 443 § 201 (to be codified at 52 U.S.C. § 30126(a)(4)(C)).
[22] *Id.* (to be codified at 52 U.S.C. § 30126(a)(1)-(3)).

Moreover, while sources of business revenues are exempt from reporting, dues-paying members are not.[23]

The right to associate oneself with a nonprofit group's mission and to support the group financially in private is a bedrock principle of the First Amendment that the government may not abridge casually.[24] This is particularly true when the cause is contentious – as with abortion, gun control, LGBTQ rights, or civil rights – and association with either side on such issues may subject a member or donor to retaliation, harassment, threats, and even physical attack, as recent events have tragically reminded us. The potential divisiveness of these issues does not diminish their social importance and the need to hash out these debates in public while preserving donors' privacy. Even when a group's cause is not controversial, there are many important and legitimate reasons why donors may wish to remain anonymous, such as altruism, religious obligations, a desire to avoid solicitations by others, and a wish to remain out of the public spotlight.[25]

It is wholly inappropriate, for example, for donors to an environmental organization, an ideological nonprofit action group, or social issues advocacy organization to be publicly identified on campaign finance reports as "supporting" or "opposing" the president, if the organization sponsors an ad urging the president to support their view on government policies. These reporting scenarios likely would result from the passage and enactment of S. 443. Faced with the prospect of these public reporting consequences, many potential donors will simply choose not to give. And many advocacy groups would choose silence or ads that are far less effective.[26] Either way, the public would lose the right to hear the strong voices needed for robust public debate.

Importantly, S. 443's gratuitous reporting requirements are not limited to organizations that sponsor public communications. An organization that makes payments or grants to other organizations also would be deemed to be making "campaign-related disbursements" and would have to file the same reports and publicize its own donors, if:

(1) the organization making the payments or grants has itself made "campaign-related disbursements" other than in the form of certain "covered transfers" totaling $50,000 or more during the prior two years;

(2) the organization making the payments or grants "knew or had reason to know" that the recipient has made "campaign-related disbursements" totaling $50,000 or more in the previous two years; or

[23] *Id*. (to be codified at 52 U.S.C. § 30126(a)(3)(A), (4)(D)).
[24] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958).
[25] *See* Sean Parnell, *Protecting Donor Privacy: Philanthropic Freedom, Anonymity and the First Amendment*, Philanthropy Roundtable, *at* https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy_white_paper.pdf?sfvrsn=566a740_6.
[26] *Buckley*, 424 U.S. at 68 (noting that reporting "will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights…").

(3) the organization making the payments or grants "knew or had reason to know" that the recipient will make "campaign-related disbursements" totaling $50,000 or more in the two years from the date of the payment or grant.[27]

Grant-making institutions that wish to protect their donors' privacy would need to research a recipient group's past activities to determine if the group has engaged in any "campaign-related disbursements." It is unclear whether it would be sufficient under S. 443 to rely on any FEC reports that a recipient group has filed within the previous two years. For example, if a group made "campaign-related disbursements" but inadvertently did not report them, would the provider of a grant to that group still be on the hook for having to file its own "campaign-related disbursement" reports and publicly report its own donors? The types of investigations donor organizations would have to conduct on donees may go far beyond the standard due diligence that is currently performed in the grant-making community, especially among charities. While attorneys will certainly benefit from the thousands of dollars in additional fees that it will cost to vet any donation or grant to a nonprofit organization, there is little other apparent upside to this reporting burden.

The bill's vague and subjective "had reason to know" standard is even worse when applied prospectively. Grant-making organizations effectively will need to consult a crystal ball in order to know whether a group they are giving to will, within the next two years, make "campaign-related disbursements" that would require the donor organization to report its own donors.

Lastly, S. 443 purports to allow the FEC to exempt donors' names and addresses from reporting "if the inclusion of the information would subject the person to serious threats, harassment, or reprisals."[28] In practice, the FEC and similar agencies have been unable to agree on when such exemptions should apply or to grant exemptions consistently and objectively, and very few exemptions have ever been granted without a court order.[29]

E) Expansion of Disclaimer Requirements

Existing law already requires lengthy disclaimers for independent expenditures and electioneering communications.[30] These disclaimers often force speakers to truncate their substantive message or render the advertising impracticable.[31] The Supreme Court specifically has recognized that these disclaimer requirements "burden the ability to speak" and therefore are subject to "'exacting

[27] S. 443 § 201 (to be codified at 52 U.S.C. § 30126(a)(1)-(2), (d), (f)(1)(D) & (E)). Donor organizations must affirmatively restrict their payments or grants in writing from being used by donees for "campaign-related disbursements" in order to avoid having to file reports on the donor side. But note that, if the donee organization deposits that donation into an account later used to finance a "campaign-related disbursement," the exemption would no longer apply. *Id.* (to be codified at 52 U.S.C. § 30126(f)(2)(B)). Either scenario typically will function as a trap for the unwary for organizations that do not retain one of the select few campaign finance attorneys steeped in the nuances of this law. As the Supreme Court has noted, "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day," *Citizens United*, 558 U.S. at 324, and the same principle should hold true for groups providing grants to enable other groups to speak about political issues.

[28] S. 443 (to be codified at 52 U.S.C. § 30126(a)(3)(C)).

[29] *See, e.g.*, FEC Adv. Op. No. 2016-23 (Socialist Workers Party); Casey Seiler, *JCOPE rejects three source-of-funding disclosure exemptions*, TIMES UNION (Aug. 4, 2015), *at* https://blog.timesunion.com/capitol/archives/239408/jcope-rejects-three-source-of-funding-disclosure-exemptions/.

[30] 52 U.S.C. § 30120.

[31] *See* FEC Adv. Op. No. 2007-33 (Club for Growth PAC) (although this advisory opinion specifically addressed disclaimers for express advocacy independent expenditures, the disclaimer requirements for electioneering communications are the same; *see* 52 U.S.C. § 30120).

scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[32] Additionally, the U.S. Supreme Court's 2021 ruling in *Americans for Prosperity Foundation v. Bonta* held that exacting scrutiny also required "narrow tailoring." Narrow tailoring requires that a statute or policy must not infringe on First Amendment rights in a large number of situations, where doing so does not serve the "important" government interest at stake. In short, "exacting scrutiny" is now much closer to "strict scrutiny."

S. 443 would expand the existing disclaimer requirements to apply to all "campaign-related disbursements" in the form of a public communication.[33] As discussed above, many of these communications would merely mention elected officials in the context of discussing policies and treating them as campaign ads subject to the campaign finance disclaimer requirements is likely unconstitutional.

In addition to expanding the scope of speech covered by the disclaimer requirements, S. 443 also would expand the information that must be included in the disclaimers, specifically the "stand by your ad" portion of the disclaimer. Organizations – other than candidates, certain PACs, and political party committees – that sponsor such ads would have to include in the ads' disclaimers certain donor information.[34] Ads containing video content or that are in the form of "an internet or digital communication which is transmitted in a text or graphic format" would have to identify the organization's top five donors of $10,000 or more during the prior 12 months.[35] Ads containing only audio content (including telephone calls) would have to identify the organization's top two donors at or exceeding the same threshold.[36]

The bill purports to shield certain donors from being identified in the disclaimers,[37] but the exemption in the disclaimer provision is illogical. It also fails to track the donor identification requirement in the reporting provisions. This mismatch will cause enormous confusion for organizations seeking to comply with the law and those trying to understand who supposedly paid for the regulated communications.

Part of the confusion stems from S. 443's use of the term "*segregated* bank account" to describe two different concepts. For "campaign-related disbursement" reports, an organization may choose to pay for such disbursements using one type of "*segregated* bank account." Donors to this account *would* be publicly reported. Donors whose funds are not deposited in this account would not be reported.[38] However, S. 443 also provides that donors may be shielded from public identification on reports if they give to another form of a segregated account. This would be "an account which is *segregated* from any account used to make campaign-related disbursements."[39]

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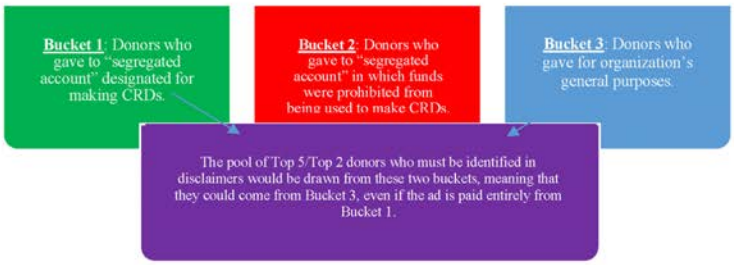
[32] *Citizens United*, 558 U.S. at 366.
[33] S. 443 § 302 (to be codified at 52 U.S.C. § 30120(e)).
[34] S. 443 § 302 (to be codified at 52 U.S.C. § 30120(e)). The bill exempts "certain political committees" from the donor identification disclaimer requirement, but it is unclear which "certain political committees" are being referenced. *See id.* (To be codified at 52 U.S.C. § 30120(e)(6)). It is possible that super PACs would be subject to the disclaimer requirement, while conventional PACs that accept contributions subject to amount limitations and source prohibitions would be exempt. *See* S. 443 § 201 (to be codified at 52 U.S.C. § 30126(e)(6)).
[35] *Id.* § 302 (to be codified at 52 U.S.C. § 30120(e)(1)(B), (5)(A) & (C)).
[36] *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(C), (5)(B) & (C)); *id.* § 303.
[37] *Id.* § 302 (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).
[38] *Id.* § 201 (to be codified at 52 U.S.C. § 30126(a)(2)(E)) (emphasis added).
[39] *Id.* (to be codified at 52 U.S.C. § 30126(a)(3)(B)) (emphasis added).

As if that were not confusing enough, S. 443 only shields donors from being identified in disclaimers for campaign-related disbursements as the top five or top two donors if they give to the "segregated" account that cannot be used for campaign-related disbursements.[40] Incredibly, communications *paid for only from* the segregated account used to pay for regulated communications must list the organization's top donors, even if their funds were *never* deposited in the account used to fund the communication.

That means a communication paid for by one set of donors (and only those donors) will often list donors in a disclaimer who *did not give any funds* to distribute the communication. In other words, the law would often require advertising disclaimers with false information. That will, in turn, lead to news stories that have false information about who paid for the communications.

The following diagram illustrates this donor identification paradox in S. 443's disclaimer requirement:



In addition, the disclaimers would have to include a statement by an organization's CEO or highest-ranking officer identifying himself or herself and his or her title and stating that he or she "approves this message."[41] (Current law allows announcers to read disclaimers for organizations.) Ads containing video content would have to include "an unobscured, full-screen view" of the CEO or highest-ranking officer reading the disclaimer or a photo of the individual.[42] "Campaign-related disbursements" sponsored by individuals would have to include disclaimers featuring the individual.[43]

These disclaimer requirements, especially the requirement to include an image or picture of a sponsoring individual or a sponsoring organization's CEO or highest-ranking officer, do not appear to have any relation – let alone a "substantial relation" – to any important governmental interest, or any governmental interest other than deterring speech.[44] Rather, the bill compels speakers to call attention to certain individuals associated with the sponsoring organizations, thereby detracting from the substance of the groups' message. One can easily imagine circumstances where the required individual might not want to or be physically able to deliver

[40] *Id.* § 302 (to be codified at 52 U.S.C. § 30120(e)(5)(C)(ii)).
[41] *Id.* (to be codified at 52 U.S.C. § 30120(e)(2)(B), (4)(B)).
[42] *Id.* (to be codified at 52 U.S.C. § 30120(e)(3)(C)(ii)).
[43] *Id.* (to be codified at 52 U.S.C. § 30120(e)(1)(A), (2)(A) & (4)(a)).
[44] *See Citizens United*, 558 U.S. at 366.

such a message, such as those who are mute, battling a serious illness, or recuperating from surgery or an injury from an accident or attack. Ironically, while the original (and dubious) purpose of the "stand by your ad" disclaimer was to improve the quality of political ads, S. 443 would personalize political discourse and may further contribute to the politics of personal destruction.[45]

Moreover, S. 443 would expand the "stand by your ad" disclaimer requirement beyond the television and radio ads it currently covers to also apply to Internet ads.[46] Internet advertisers already struggle often to fit the FEC disclaimers in their ads. Internet video "pre-roll" ads, for example, "are usually short, often 10 seconds or 15 seconds long so as not to unduly annoy viewers who don't wish to wait long for the clip."[47] Podcast ads are often short as well. Expanding the "stand by your ad" disclaimer requirement to Internet ads would require substantial portions of ads to be devoted to the disclaimer and would threaten the very viability of the Internet as a medium for advocacy or political communication.[48] One of the requirements for video ads mandates display of a disclaimer for "at least 6 seconds,"[49] making it illegal to use 5 second video ads.

II. For the First Time, S. 443 Would Subject Groups That Sponsor Communications About Judicial Nominees to Burdensome Campaign Finance Reporting, Donor Exposure, and Disclaimer Requirements, Despite Lacking Any Acceptable Policy Rationale or Legitimate Constitutional Justification.

As noted above, ads that PASO a federal judicial nominee would fall under S. 443's "campaign-related disbursement" reporting and donor exposure requirements. These new burdens suffer from the same unconstitutional vagueness problems with the PASO standard already discussed. Furthermore, the regulation of communications discussing judicial nominees under the campaign finance laws is extraordinary, unprecedented, and without any recognized constitutional basis.

A) U.S. Supreme Court Precedents on Campaign Finance Regulation in Judicial Elections

The U.S. Supreme Court has upheld campaign finance regulation over the judicial selection process only in the context of state judicial elections.

In *Williams-Yulee v. The Florida Bar*, the Court upheld a state canon of judicial conduct prohibiting judicial candidates and incumbent judges running for re-election from personally

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[45] In any event, the "stand by your ad" disclaimer requirement has not reduced the amount of negative ads, as it was intended. *See* Bradley A. Smith, THE MYTH OF CAMPAIGN FINANCE REFORM, NATIONAL AFFAIRS (Winter 2010), *at* https://nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform.

[46] S. 443 § 302 (to be codified at 52 U.S.C. § 30120(e)(1)).

[47] FEC Adv. Op. No. 2007-33 (Club for Growth PAC), Comments of Sierra Club *at* 3.

[48] While the bill purports to allow the FEC to adopt regulations to exempt certain ads from the top five or top two funders portion of the disclaimer when the disclaimer would take up a "disproportionate amount" of the ad, the bill also increases the amount of time that the disclaimer must be displayed in video ads to at least six seconds (up from four seconds under the current requirements for television ads). *Compare* S. 433 § 302 (to be codified at 52 U.S.C. § 30120(e)(1)(B), (C)) *with id.* (To be codified at 52 U.S.C. § 30120(e)(3)(C)(i)); *see also* 52 U.S.C. § 30120(d)(1)(B)(ii). The bill's contrary directives raise serious questions about how much discretion the FEC would have to exempt ads from the expanded disclaimer requirement. The FEC already has struggled for a decade over when disclaimer exemptions should apply to digital ads, and S. 443 fails to give the agency any more legislative clarity on this issue. *See, e.g.*, FEC Adv. Op. Nos. 2010-19 (Google), 2011-09 (Facebook), 2013-18 (Revolution Messaging LLC), and 2017-12 (Take Back Action Fund).

[49] *See* note 54, *supra*.

soliciting campaign contributions (while still allowing them to establish campaign committees to solicit contributions on their behalf).[50] The Court reasoned that "[j]udges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity."[51]

In *Caperton v. A.T. Massey Coal Co.*, the Court held that a justice of the West Virginia Supreme Court of Appeals was required to recuse from a case where the CEO of the appellant in the case had: (1) contributed $2.5 million to a Section 527 political organization to intervene in the justice's race; and (2) spent another $500,000 on independent expenditures of his own in connection with the race.[52] The Court "conclude[d] that there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign."[53] The Court noted that *Caperton* was "an exceptional case" where the "temporal relationship between the campaign [spending], the justice's election, and the pendency of the [appellant's] case" before the West Virginia state court were "critical" to the Court's ruling.[54]

B) U.S. Supreme Court Precedents on Campaign Finance Reporting Requirements

The U.S. Supreme Court has recognized that campaign finance reporting requirements "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and therefore may not be imposed indiscriminately or without sufficient justification.[55] Rather, laws requiring organizations to publicly report their donors, such as S. 443, are subject to "exacting scrutiny."[56] This means the law must further "governmental interests sufficiently important to outweigh the possibility of infringement," and there must be a "substantial relation between the governmental interest and the information required to be disclosed."[57] Last year the Court noted that, "[w]here exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes."[58]

The Court has articulated three "sufficiently important" governmental interests for campaign finance reporting laws:

First, the Court has reasoned that identifying a candidate's sources of financial support "allows voters to place each candidate in the political spectrum more precisely" and "alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office."[59]

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[50] 575 U.S. 433, 437, 439 (2015).
[51] *Id.* at 445.
[52] 556 U.S. 868, 872, 873 (2009) (Technically, *Caperton* was not strictly a case about campaign finance regulation *per se*, but rather about the standards for judicial recusal. However, the case centered on campaign finance activity and therefore is directly relevant to questions about the constitutionality of S. 443's regulation of ads about judicial nominees.).
[53] *Id.* at 884.
[54] *Id.* at 883, 886.
[55] *Buckley*, 424 U.S. at 64.
[56] *Id.*
[57] *Id.* (internal quotation marks and citations omitted) at 66.
[58] *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021).
[59] *Id.* at 66-67; *see also Citizens United*, 558 U.S. at 367 (noting that the Court upheld the Bipartisan Campaign Reform Act amendments to the FECA in *McConnell v. FEC*, 540 U.S. 93 (2003), "on the ground that they would help citizens 'make informed choices in the political marketplace.'") (quoting *McConnell*, 540 U.S. at 197).

Second, campaign finance reporting requirements "deter actual corruption and avoid the appearance of corruption" by allowing the public "to detect any post-election special favors that may be given in return" for campaign contributions.[60]

Third, campaign finance reporting requirements aid in "detect[ing] violations of the contribution limitations" that apply to contributions to candidates.[61]

Taking these three justifications in reverse order: The third rationale – detecting violations of the contribution limits – clearly does not apply. Federal judicial nominees do not raise campaign funds and are not subject to contribution limits.

The second rationale – deterring corruption and the appearance of corruption – also is weak or nonexistent for federal judicial nominations. Since federal judicial nominees do not receive campaign contributions, the only potential source of corruption is the independent spending of groups advocating for or against the nominees.

As a matter of law, the U.S. Supreme Court has held that "independent expenditures . . . do not give rise to corruption or the appearance of corruption."[62] There do not appear to be any allegations that the organizations advocating on federal judicial nominations targeted by S. 443 or their donors are coordinating with the nominees or that the nominees are raising funds for such communications. While S. 443 itself contains no legislative findings regarding this provision, the provision is based on the "Judicial Ads Act,"[63] which, in turn, appears to have been an outgrowth of the "Captured Courts" report issued by the Senate Democratic Policy and Communications Committee.[64] That report also does not allege any coordination between independent groups and federal judicial nominees.

Even if, as the Court found in *Caperton*, it is asserted that *elected* judges may feel beholden to supporters for their independent campaign spending on judges' behalf, there is still a fundamental difference between state elected judges with fixed terms of office and federal appointed judges with lifetime tenure.

IFS takes no position on the long-running debate over having elected or appointed judges. However, the entire rationale for an independent federal judiciary with lifetime tenure is that the judges are independent.[65] By design, federal judges are independent of the presidents that nominate them, the Senators who vote to confirm them, and any groups that may support their nominations. Indeed, from Justice David Souter's liberal rulings to Justice Neil Gorsuch's recent majority opinion on Title VII's protection of employees' sexual orientation, members of the federal

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[60] *Buckley*, 424 U.S. at 67.
[61] *Id.* at 67-68.
[62] *Citizens United*, 558 U.S. at 357.
[63] S. 4183 (116th Cong.). *See* Eric Wang, *Analysis of the "Judicial Ads Act" (S. 4183): Bill Appears to Be Aimed Solely at Exposing Independent Groups' Donors to Public Disfavor and Serves No Apparent Legitimate "Disclosure" Interest*, Institute for Free Speech (July 2020), *at* https://www.ifs.org/wp-content/uploads/2020/07/2020-07-29_IFS-Analysis_S-4183_Judicial-Ads-Act.pdf.
[64] *See Captured Courts*, Democratic Policy & Communications Committee (May 2020), *at* https://www.democrats.senate.gov/imo/media/doc/Courts%20Report%20-%20FINAL.pdf, at 47. ("Over the coming months, Democrats in the Senate . . . will propose legislative reforms" to address the issues raised in the report.).
[65] *See* U.S. CONST., Art. III, § 1.

judiciary have often and famously bucked the expectations of the presidents that nominated them and their supporters.[66]

In short, the independent federal judiciary is already a "prophylactic measure"[67] against judicial bias that is fundamental to and baked into our constitutional structure. Therefore, any pretense S. 443 may have of further protecting federal judges from feeling beholden to groups supporting their nominations (and those groups' donors) is the type of "prophylaxis-upon-prophylaxis approach" that is strongly disfavored for campaign finance laws.[68]

Indeed, reporting laws like S. 443 may actually enhance the risk of corruption and bias rather than alleviate such concerns. There are no apparent indications or allegations that federal judicial nominees are even aware of who is donating to groups supporting their nominations. This is in contrast to the situation in *Caperton*, where the West Virginia judge would know or could easily find out that a litigant appearing before him had spent millions supporting the judge's election, because that information was required to be publicly reported.[69]

This illustrates the double-edged sword of "disclosure." Where donors to groups supporting or opposing government decisionmakers would otherwise remain anonymous, the donor exposure laws essentially create lists of "friends" and "enemies" that aid government officials in rewarding and retaliating against those who ponied up and those who didn't.[70] Indeed, while congressional Democrats[71] are proposing S. 443 now, some prominent Democrats have made this very point in the past in opposing such disclosure requirements.[72]

This leaves us with the first and only remaining rationale the U.S. Supreme Court has recognized for campaign finance reporting requirements – helping voters identify candidates' place "in the political spectrum" and identify the interests to which they are likely to be responsive. Again,

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[66] *See, e.g.*, David Von Drehle, *George Herbert Walker Bush, the 41st President of the United States and the Father of the 43rd, Dies at 94*, TIME (Dec. 1, 2018), *at* https://time.com/longform/president-george-hw-bush-dead/ ("Believing that he was getting a pragmatic conservative, [President George H.W.] Bush was disappointed to see Souter move steadily to the left during his 20 terms on the high court."); Howard Kurtz, *Gorsuch draws personal attacks for breaking ranks on gay rights*, FOXNEWS.COM (Jun. 17, 2020), *at* https://www.foxnews.com/media/gorsuch-draws-personal-attacks-for-breaking-ranks-on-gay-rights ("Carrie Severino, president of the Judicial Crisis Network, which spent millions to help confirm Gorsuch and Brett Kavanaugh, said Gorsuch had acted 'for the sake of appealing to college campuses and editorial boards. This was not judging, this was legislating – a brute force attack on our constitutional system.'"); Brett Samuels, *Trump says 'we live' with SCOTUS decision on LGBTQ worker rights*, THE HILL (Jun. 15, 2020), *at* https://thehill.com/homenews/administration/502812-trump-says-we-live-with-scotus-decision-on-lgbtq-worker-rights ("'I've read the decision, and some people were surprised,' [President] Trump said.").

[67] *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014).

[68] *Id.*

[69] *Caperton*, 556 U.S. at 884; *see also* 26 U.S.C. § 527(j)(3)(B) (requiring Section 527 political organizations, such as the one the litigant in *Caperton* had contributed to, to report their donors); *Caperton*, 556 U.S. at 873 (noting that the litigant also was required to file "state campaign finance disclosure filings" for his own independent expenditures in support of the judge).

[70] *See, e.g.*, *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., *dubitante*) (noting that campaign finance reporting requirements "make[] it easier to see who has not done his bit for the incumbents, so that arms may be twisted and pockets tapped."); *Akins v. FEC*, 66 F.3d 348, 356 (D.C. Cir. 1995) (noting that when a contribution made to a candidate is reported, "the recipient's competitor will notice, and if the competitor should win the spender will not be among his favorite constituents.").

[71] The Institute for Free Speech is a nonpartisan organization. By identifying the political affiliation of S. 443's sponsors, IFS does not mean to impugn their political affiliation in any way, but merely notes that members of their party previously have taken the opposite (and what IFS believes to be the correct) position on the pitfalls of such "disclosure."

[72] Alexander Bolton and Mike Lillis, *Opposition to contractors disclosure rule grows among Dems*, THE HILL (May 13, 2011), *at* https://thehill.com/homenews/senate/161007-opposition-to-disclosure-rule-grows-among-dems (reporting that former Senators Joe Lieberman and Claire McCaskill wrote at the time, "The requirement that businesses disclose political expenditures as part of the offer process creates the appearance that this type of information could become a factor in the award of federal contracts.").

federal judges are not elected. Therefore, this rationale would have to be applied by analogy to informing the Senators voting to confirm nominees about the sources of the nominees' support.

However, this is decidedly not the rationale that appears to be underlying S. 443's regulation of judicial ads. Rather, to the extent the aforementioned Senate Democratic Policy and Communications Committee report appears to articulate the provision's rationale, the goal is to expose the donors to groups: (1) supporting "judges [who] were chosen not for their qualifications or experience – which are often lacking – but for their demonstrated allegiance to Republican Party political goals"; and (2) "work[ing] to ensure that corporate America, the ultra-rich, and the Republican Party would succeed in the courts."[73]

Putting aside the partisan attacks, at a macro level, the rationale is simply to expose what is already plainly obvious: that nominees put forward by each administration will have a certain judicial philosophy and will be inclined to rule a certain way. Indeed, former President Trump made his intention to nominate certain types of federal judges a mainstay of his campaign, including a list of potential Supreme Court nominees, and it was no secret what type of judicial philosophy those nominees would have.[74]

Therefore, to the extent that: (1) federal judicial nominees' approach to the law is already generally well-known; and (2) the congressional Democrats supporting S. 443 and Senators voting on nominees appear to have already made up their minds on the nominees' (a) judicial philosophies, (b) ideological leanings, and (c) affinity toward certain interests,[75] there does not appear to be any serious argument that exposing the finances of the groups supporting those nominees would add any value to the nomination process.

Instead, the sole goal of S. 443's judicial ads provision appears to be exposing the donors of groups supporting federal judicial nominees that the bill's sponsors oppose for the purpose of suppressing speech about the nominees and ginning up public disfavor. This is decidedly not a legitimate justification for campaign finance reporting requirements. Indeed, it is precisely why the Supreme Court and lower courts (all of the tribunals with future nominations that this bill would impact) have recognized that such laws infringe on core First Amendment rights.[76]

C) U.S. Supreme Court Precedent on Lobbying Reporting Requirements

While S. 443 proposes to amend federal campaign finance law, the judicial ads provision nonetheless might be defended as a measure to regulate so-called "grassroots lobbying," insofar

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[73] *Captured Courts*, *supra* note 70 at 3-4.

[74] *See*, *e.g.*, Nick Gass, *Trump unveils 11 potential Supreme Court nominees*, POLITICO (May 18, 2016), *at* https://www.politico.com/story/2016/05/trumps-supreme-court-nominees-223331.

[75] *Captured Courts*, *supra* note 70 at 3-4.

[76] *See Buckley*, 424 U.S. at 64; *see also*, *e.g.*, *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016) ("'public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute' and 'expose contributors to harassment or retaliation.' [] Ironically, these two values the *Buckley* Court acknowledged would be harmed by the disclosure requirements were the very same values the *McIntyre* Court later believed 'exemplified the purpose behind the Bill of Rights and of the First Amendment in particular' – namely, 'protecting unpopular ideas from suppression' and 'individuals from retaliation.'") (quoting *Buckley*, 424 U.S. at 68 and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)) (brackets and ellipses in the original omitted).

as it would regulate activity directed at the U.S. Senate's role in confirming judicial nominees. Even when analyzed under the rubric of the federal lobbying laws, however, the bill fares no better.

In *U.S. v. Harriss*, the U.S. Supreme Court upheld the federal lobbying reporting laws on the grounds that members of Congress have the prerogative to evaluate "the myriad pressures to which they are regularly subjected" in the form of lobbying.[77] The Court explained that Congress may require "information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose" so as "to know who is being hired, who is putting up the money, and how much."[78]

The lobbying law that *Harriss* upheld was quite "narrow," as the Court emphasized multiple times.[79] Specifically, under the law the Court upheld:

(1) the person must have solicited, collected, or received contributions; (2) *one of the main purposes of such person, or one of the main purposes of such contributions*, must have been to influence the passage or defeat of legislation by Congress; [and] (3) the intended method of accomplishing this purpose must have been through *direct communication* with members of Congress.[80]

The Judicial Ads Act provision in S. 443 is materially different from the lobbying law upheld in *Harriss*. The bill would indiscriminately apply to all groups speaking about judicial nominations, regardless of whether their advocacy on such nominations is "one of the[ir] main purposes." The bill also would require such groups to indiscriminately report their donors, regardless of whether "one of the main purposes of such contributions" was to advocate on judicial nominations.

These differences are significant. With respect to the bill's failure to target only those groups whose "main purpose" is to advocate on judicial nominations, the Court has cautioned that "the relation of the information sought to the purposes of the [law] may be too remote" in such circumstances.[81] Similarly, "[t]o insure that the reach of [the law] is not impermissibly broad," the Court has required contributor reporting mandates to apply only to "contributions earmarked" for the purposes the law purports to regulate.[82]

This type of narrowing not only is good law, but it is also sound policy and common sense. As we have explained many times before, to indiscriminately require groups to report donors who had nothing to do with the communications being regulated would result in "junk disclosure" that spreads misinformation and thus serves no public interest.[83]

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[77] 347 U.S. 612, 625 (1954).
[78] *Id*.
[79] *Id*. at 623.
[80] *Id*. (internal quotation marks omitted, emphasis added).
[81] *Buckley*, 424 U.S. at 80.
[82] *Id*.
[83] *See, e.g.*, Matt Nese, *House Floor Amendment 1 to Kentucky Senate Bill 75: A Threat to Nonprofit Groups' Speech and Kentuckians' Privacy*, Institute for Free Speech (Mar. 7, 2017), *at* https://www.ifs.org/wp-content/uploads/2017/04/2017-03-07_House-Talking-Points_KY_HFA-1-To-SB-75_EC-Disclosure.pdf; Matt Nese, *Constitutional Issues with California Assembly Bill 45*, Institute for Free Speech (Apr. 23, 2013), *at* https://www.ifs.org/wp-content/uploads/2013/04/2013-04-23_Assembly-ER-Comments_CA_AB-45_Multipurpose-Organization-Donor-Disclosure.pdf.

Equally fatal to S. 443's Judicial Ads provision is its singling out of judicial nomination communications for regulation of so-called "grassroots lobbying" – *i.e.*, ads disseminated openly and widely to influence public opinion, as opposed to one-on-one direct communications with members of Congress and their staff. For the 75 years that federal lobbying has been regulated,[84] only direct lobbying has been regulated. Proposals to regulate federal grassroots lobbying have been proposed numerous times in Congress throughout the years and rejected.[85]

While the Senate's role in confirming federal judges is an important, constitutionally prescribed function, it is only one of the innumerable issues that Congress votes on. The Judicial Ads Act's singular and unprecedented focus on grassroots lobbying on judicial nominations is therefore peculiarly underinclusive. When a law that regulates First Amendment activity is underinclusive in this manner, it "raises a red flag" and creates "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."[86] As discussed previously, that appears to be precisely the case here: congressional Democrats have minced no words in expressing their disapproval of the groups advocating on federal judicial nominations that this bill would regulate.[87]

III. S. 443 Would Impose Inflexible and Impractical Disclaimer Mandates on Speakers.

In addition to the disclaimer requirements discussed above that S. 443 would impose on Internet ads containing video and audio content, the bill would impose other general and inflexible disclaimer burdens on all Internet ads. Many of these rules are written for broadcast ads and are impractical for many online ad formats – not just small-sized display ads.

The existing FEC disclaimer requirements that S. 443 would extend to online ads are already unwieldy, especially for space-limited ads. For independent expenditures and electioneering communications, the disclaimer must provide the sponsor's name; street address, telephone number, or website URL; and state that the ad is not authorized by any candidate or candidate's committee.[88] In addition, TV and radio ads must include an audio disclaimer declaring that "[Sponsor's name] is responsible for the content of this advertising," and video ads must also contain a similar text disclaimer. As discussed above, S. 443 also would require additional donor information to be included in this existing disclaimer language for video and audio ads.

For candidate-sponsored ads, the disclaimer must state, "Paid for by [name of candidate's campaign committee]."[89] In addition, TV and radio ads must include an audio disclaimer spoken by the candidate stating his or her name, and that he or she has approved the message, and TV ads also must contain a full-screen view of the candidate making the statement or a photo of the

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[84] *See* Federal Regulation of Lobbying Act of 1946, 2 U.S.C. § 261 *et seq.*; Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.*

[85] *See, e.g.*, R. Eric Petersen, *Lobbying Disclosure and Ethics Proposals Related to Lobbying Introduced in the 109th Congress: A Comparative Analysis*, Congressional Research Service (Mar. 23, 2006), *at* https://fas.org/sgp/crs/misc/RL33234.pdf, at 9-11.

[86] *Williams-Yulee*, 575 U.S. at 448-49 (internal quotation marks and citation omitted).

[87] *See Captured Courts*, *supra* note 70 at 3-4.

[88] 11 C.F.R. § 110.11(a)(2) and (4), (b)(3).

[89] 11 C.F.R. § 110.11(b)(1).

candidate that appears during the voice-over statement.[90] TV ads also must contain an on-screen text disclaimer containing "a similar statement" of candidate approval.[91]

The current radio ad disclaimers – which S. 443 would make even lengthier – often run for as long as 10 to 15 seconds, depending on the name of the group and contact information provided, but many online radio or podcast ad formats are limited to only 10 to 15 seconds.[92] Online video ads also are commonly much shorter than broadcast TV ads.[93]

The FEC's existing disclaimer requirements exempt "small items" and communications where it is "impracticable" to include a disclaimer.[94] Such small items include pens, buttons, and bumper stickers, but also include Google search ads and presumably other small online ads.[95]

S. 443 appears to make small internet ads ineligible for these exemptions from the disclaimer requirements. At a minimum, a digital ad would have to contain on its face the name of the ad's sponsor.[96] This information could not be displayed by alternative means, such as "clicking through" the ad. The ad also would have to provide some means for recipients to obtain the complete required disclaimer, thus barring the use of formats where this is technically impossible or impractical or if the vendor does not allow for it. Notably, it also appears that the complete disclaimer also could not be provided by linking to the advertiser's website where all of the remaining information would be available. Thus, S. 443 may make many forms of small, popular, and low-cost Internet and digital ads off-limits for political advertisers.

IV. S. 443's Court Picking Provision Would Shut Courthouse Doors Nationwide.

Tucked at the end of the bill is a provision that would force Americans who want to challenge the constitutionality of any part of S. 443 or the Federal Election Campaign Act to file a lawsuit in the District of Columbia.

This is a horrible idea that will drive up the costs of litigation for those seeking to vindicate their First Amendment rights. Many people and organizations would not be able to afford their day in court as it would necessitate a trip from potentially thousands of miles away. Likewise, attorney billing rates in the nation's capital are among the highest in the country.

Attached to my written statement is an article written by Alan Gura, the Vice President for Litigation at the Institute for Free Speech, critiquing this provision in more detail.

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[90] *Id.* § 110.11(c)(3).
[91] *Id.*
[92] *See Personalization of Audio: Shorter Audio Ads*, PANDORAFORBRANDS.COM (Aug. 24, 2017), *at* http://pandoraforbrands.com/insight/personalization-of-audio-shorter-audio-ads/ and Martin Luenendonk, *Everything You Need to Know about Podcast Advertising*, CLEVERISM.COM (Oct. 10, 2020), *at* https://www.cleverism.com/everything-about-podcast-advertising/.
[93] *See, e.g.*, Garett Sloane, *Facebook Gets Brands Ready for 6-Second Video Ads*, ADAGE (Jul. 26, 2017), *at* http://adage.com/article/digital/facebook-brands-ready-6-video-ads/309929/.
[94] 11 C.F.R. § 110.11(f)(1)(i), (ii).
[95] *See* FEC Adv. Op. No. 2010-19 (Google).
[96] *See* S. 443 § 302 (to be codified at 52 U.S.C. § 30120(e)); *but see id.* § 304 ("Nothing in this title or the amendments made by this title may be construed to require any person who is not required under section 318 of the Federal Election Campaign Act of 1971 to include a disclaimer on communications made by the person through the internet to include any disclaimer on any such communications.").

Conclusion

S. 443's provisions are so complex and open to so many possible interpretations that our analysis of the provisions may well understate the chill this legislation might place on the exercise of our First Amendment rights.

The best way to give the people a voice and to protect democracy is to protect and enhance the rights to free speech, a free press, assembly, and petition guaranteed by the First Amendment.

THE WALL STREET JOURNAL.

May 11, 2021

Congressional Democrats' Court-Picking (Not Packing) Scheme

By Alan Gura

Congress probably won't pack the Supreme Court. But court picking poses a real threat to Americans' rights.

Court picking is when Congress uses its authority over federal-court jurisdiction to stuff politically sensitive cases from throughout the country into one court that leans its way, to be buried there for as long as possible. Court-picking's evil genius is its stealth. Americans would notice four new justices, but not changes to technocratic statutes that excite only civil-procedure professors. Despite featuring in Congress's most radioactive bill—the so-called For the People Act, or H.R.1, which would transform elections and limit Americans' rights to speak about them—court-picking has escaped notice.

It shouldn't. H.R.1's court-picking provision would shut courthouse doors throughout the country, attempt to game the outcome in critical cases, deny the Supreme Court the benefit of the federal judiciary's broad and diverse perspectives, and repeal measures that expedite important lawsuits questioning government power.

In one neat court-picking trick, the bill would strip 93 of 94 local federal district courts, and 11 of the 12 regional appellate courts that review their decisions, of their power to hear First Amendment challenges to Congress's regulation of political speech. All such claims—by Alaskans, Floridians or anyone in between—would be confined to the District of Columbia. Appeals would be heard only in the D.C. Circuit—the court over which Senate Democrats exercised the "nuclear option" in 2013, ramming through three judges who shifted its ideological balance. Imagine if Republicans had passed a voting-rights bill that forced Californians wishing to challenge it to sue in Louisiana, and appeal to some of the country's most conservative judges.

Some complex and discrete legal fields are best assigned to specialized courts. The D.C. Circuit has some unique authority to review administrative cases involving federal agencies, and Congress created the Federal Circuit in 1982 to hear appeals in patent cases nationwide. But all federal judges should be conversant in the Constitution, and Washington-based judges are no better than those elsewhere at interpreting the First Amendment.

While historical quirks once made Washington the only place where Americans could sue to stop federal violations of their rights, Congress ended that restriction in 1962. The Senate Judiciary Committee called the limit "an unfair imposition upon citizens who seek no more than lawful treatment from their Government" and noted that it caused substantial delays as cases from far and wide clogged the D.C. District Court. Court-picking Washington for all federal political-speech claims is a remarkable step backward.

Ensuring Americans' right to access local courts isn't good only for litigants. It's also good for the law. The Supreme Court prefers to let the law "percolate" among the various courts before deciding who's right. Stuffing all the most important cases into the D.C. courts deprives the justices of the benefit of the diverse perspectives held by federal judges from all 50 states.

The Supreme Court would eventually have a chance to review the cases that lawmakers direct to Washington. But the court-pickers try to stretch out "eventually" in the hope of running as many elections as possible under their new, constitutionally dubious rules.

Understanding that election speech cases are time-sensitive, Congress designed a system in 1974 to speed them along. Ordinary federal cases can drag on for years, decided up to three times (by a district judge, a three-judge appellate panel and an en banc hearing by a larger appellate panel or the full court) before reaching the justices. But when voters file election speech cases, the district judge only gathers facts and, if the issues are significant, certifies the matter for an en banc decision by the appellate court. That means the case is decided only once before going to the Supreme Court. Plaintiffs challenging the 2002 McCain-Feingold campaign finance law have another one-stop option on their way to the Supreme Court: a panel of three D.C. judges.

The speech-control bill would repeal these fast-track rules, leaving only a note advising courts that they have a "duty" to "advance" and "expedite" campaign speech cases "to the greatest possible extent." But federal law already instructs judges that good cause exists to expedite urgent constitutional claims. And time often appears differently to judges and litigants. In 2013 the D.C. Circuit refused to expedite an important Second Amendment case that had languished undecided for more than four years because the delay wasn't "so egregious or unreasonable" to merit relief. (The challengers, whom I represented, won seven months later.)

Congress knew what it was doing when it streamlined election speech cases. And the court-pickers know what they're doing by proposing to repeal these measures. The only value of the court-picking gambit is that it exposes the cynicism of would-be speech regulators, who fear exposing their schemes to rapid constitutional scrutiny by the nation's federal courts.

Mr. Gura is the vice president for litigation at the Institute for Free Speech.

LEAGUE OF WOMEN VOTERS® OF THE UNITED STATES

Statement for Virginia Kase Solomón, Chief Executive Officer, LWVUS
U.S. Senate Committee on Rules and Administration
July 19, 2022

Chairwoman Klobuchar, Ranking Member Blunt, and Members of the Senate Committee on Rules and Administration, my name is Virginia Kase Solomón and I serve as the Chief Executive Officer at the League of Women Voters of the United States, ("The League"). Thank you for the opportunity to testify today on the *DISCLOSE Act*.

The League of Women Voters is a nonpartisan organization that was founded over one hundred years ago by leaders of the women's suffragist movement. We are an issue-focused, activist, and grassroots organization that believes voters must play a critical role in our democracy. Since 1920, the League has worked to deliver on our mission to empower voters and defend democracy. Today, the League has a presence in nearly every community across the country with more than 750 chapters spread across all 50 states and the District of Columbia.

The League has supported the *DISCLOSE Act* for more than a decade because we believe that our democracy is strengthened when Americans are encouraged to engage in civic participation, and we believe Americans deserve to know who is trying to influence their votes. As an organization, the League has fought for nearly five decades to combat the pejorative influences of money in politics. Our work reflects our ongoing priority to promote open and honest elections and maximize participation in the political process. Voters have the right to know who is making large campaign contributions to influence elections and when contributions are made, we believe it must be done with transparency. The *DISCLOSE Act* accomplishes this fundamental purpose by requiring expenditures and donations of $10,000 and above to be reported. It also works to address the vulnerabilities that allow foreign actors to meddle in our elections, an occurrence which happened in both the 2016 and 2020 elections.

Every day the League works to inform voters about the issues they care about by providing critical voter services to the public, including providing up-to-date information to voters through our award-winning voter education website Vote411. In the last two years, almost 6.5 million users[i] came to Vote411 for information about voter registration, to view candidate information, or to find out what they need to take with them when they go to vote. As an organization, we work to simplify the voting process and provide the necessary information that voters need to make their individual voting plan. These actions make the voting process understandable and accessible which breaks down barriers to participation.

However, it should not fall to organizations such as the League to provide information and ensure transparency in our election process. Federal law should require public disclosure when it comes to dark money groups seeking to influence elections.

Transparency is a baseline requirement for a healthy democracy. It is a concept that the majority of Americans support. According to a nationwide study conducted by the Campaign Legal Center[ii], about 60% of voters believe that major changes are needed to our country's campaign finance system. The majority of voters surveyed also believe that the money spent by special interest groups has a direct impact on their lives. And we have seen that without transparency, candidates and election officials fall into the trap of valuing donors and their priorities above the needs of voters. Such de-prioritization of voters only breeds distrust in the republic and those who lead it. There should be little question that this runs counter to the spirit of our democracy and a government of, by, and for the people.

In the 12 years since the Supreme Court decision in *Citizens United,* we have seen the flood gates of money in elections open wide. Enacting legislation like the *DISCLOSE Act* will ensure that donations of $10,000 or more during an election cycle are reported. Voters want to know who is trying to influence their voices and their votes and who is seeking to influence our elected officials.

Dark money spans the political spectrum and is used by both Democrats and Republicans to boost candidates. In fact, in 2020, a majority of outside funding was spent to promote democratic candidates. Open Secrets, the nation's premier research group tracking money in US politics, estimates that $1 billion dollars in dark money was spent in the 2020 election.[iii] Shell companies, outside groups, and political non-profits funneled millions of dollars to Super PACs which help to hide the individual source of donations. Secret campaign money, no matter the party, promotes unbridled power and has no place in American democracy. It undermines the role of the voter and corrupts the election process.

Here is the reality: funding is necessary to run for office and we know that. But it is the dark, undisclosed money that opens the door for elected officials to take office without the public knowing which organizations helped them get elected and the willingness to influence elected officials against the will of the public. When a dark money group spends money in an election, with the intentional purpose to undermine the public, then we start to see the fracturing of America and the fabric of our country begins to unravel. Without disclosure, voters will never fully understand how the issues important to them are impacted by dark money.

At the end of the day, money in politics has an agenda. The dark money groups pouring money into elections have an agenda. Having an agenda becomes harmful when the American people who deserve to know the sources of all money used to influence our politics are opaque.

If we truly wish to make progress on the issues that Americans care most about such as health care, racial justice, reproductive rights, and environmental justice, we must build a system that serves the people, rather than focusing primarily on those with special interests of those with the means and power to influence against the will of the people.

The League will continue to fight to ensure that voters can make decisions free from the influence of dark money and special interest groups. We strongly support the *DISCLOSE Act*, and urge this committee to take up this legislation and advance it to the full Senate for a vote as quickly as possible.

Thank you again for the opportunity to testify on this important legislation. I can take your questions today and I look forward to finding ways that the League of Women Voters can continue working with you on this important issue moving forward.

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[i] https://www.lwv.org/sites/default/files/2022-06/2020%E2%80%9322%20Biennium_Impact%20Report_FINAL_0.pdf

[ii] https://campaignlegal.org/sites/default/files/2019-11/CLC%20FEC%20MEMO.pdf

[iii] https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/

BRENNAN CENTER FOR JUSTICE

TESTIMONY OF
DANIEL I. WEINER

DIRECTOR, ELECTIONS AND GOVERNMENT AT THE
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

HEARING ON
THE DISCLOSE ACT

UNITED STATES SENATE COMMITTEE ON RULES AND ADMINISTRATION

JULY 19, 2022

Chairwoman Klobuchar, Ranking Member Blunt, and members of the Committee:

Thank you for the opportunity to testify in support of S. 443, the DISCLOSE Act of 2021. The Brennan Center strongly supports this legislation and urges its swift passage.[1]

In the wake of the Supreme Court's decision in *Citizen United v. FEC*, secret money has become one of the biggest challenges for our campaign finance system. That decision made it possible for new types of entities to spend limitless funds on electoral advocacy—including many organizations that are not subject to most federal campaign disclosure rules, allowing them to conceal their sources of funding. These so-called "dark money" groups have spent billions to elect federal candidates, either themselves or by funneling money to super PACs and other groups. And their spending is not evenly spread. Much of it is concentrated in the most competitive races, where it can rival the total amount spent by winning candidates. This deprives voters of crucial information that helps them make informed decisions in the political marketplace, removes a crucial safeguard against *quid pro quo* corruption, and makes other laws—like restrictions on foreign money in U.S. elections—easier to evade.

Although its decision supercharged secret money in American elections, *Citizens United* actually held by an 8-1 vote that campaign disclosure rules are constitutionally permitted, and even preferred to many other forms of regulation. Indeed, the Court appears to have presumed that the new entities it permitted to spend unlimited amounts on electoral advocacy would be required to operate transparently. That assumption—like so many other predictions the Court has made about the impact of its decisions on American democracy[2]—was wrong.

Passage of the DISCLOSE Act would respond to the Court's decision and make good on its promise of transparent elections. The central provisions of the Act would require any organization spending $10,000 or more on a range of campaign-related activities to disclose donors who gave $10,000 or more to fund those activities. This tailored approach would make our campaigns more transparent and deter corruption and other malfeasance, while allowing smaller donors, donors who give for non-electoral purposes, and others entitled to exemptions to remain anonymous.

The Act would also shore up protections against foreign interference in the U.S. political process. Here too, the Court has disclaimed any intent to stop the government from enforcing

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[1] The Brennan Center for Justice at New York University School of Law is a nonpartisan public policy and law institute that works to strengthen the systems of democracy and justice for all Americans. I serve as a director of the Brennan Center's Elections and Government Program, working to ensure the political process is free, fair, and accessible to all voters. Prior to coming to the Brennan Center, I served as senior counsel to a commissioner at the Federal Election Commission and as a litigator at a major D.C. law firm. In total I have well over a decade of experience working in the fields of campaign finance and election law. Brennan Center staff who contributed to the preparation of this written testimony include John Martin, Katherine Scotnicki, Mariana Paez, Mira Ortegon, and Matt Choi. This testimony does not purport to convey the views, if any, of the New York University School of Law.

[2] Lawrence Norden and Iris Zhang, "Fact Check: What the Supreme Court Got Wrong in its Money in Politics Decisions," Brennan Center for Justice, January 30, 2017, https://www.brennancenter.org/our-work/research-reports/fact-check-what-supreme-court-got-wrong-its-money-politics-decisions; Tomas Lopez, "'Shelby County': One Year Later," Brennan Center for Justice, June 24, 2014, https://www.brennancenter.org/our-work/research-reports/shelby-county-one-year-later; and Brennan Center for Justice, "The Effects of Shelby County v. Holder," August 6, 2018, https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder.

reasonable restrictions. But significant loopholes—some exacerbated by *Citizens United* and related decisions—have allowed foreign governments, corporations, and oligarchs to inject money into American elections to serve their own ends, sometimes with the explicit goal of undermining our democratic institutions. The Act would forcefully address this problem.

Congress has clear authority to enact this legislation. Its key provisions are overwhelmingly popular with the American people across partisan divisions. All American voters—Republicans, Democrats, and Independents—deserve access to the information they need to hold political leaders and those working to elect them accountable, which they do not currently have. We hope Congress will pass this important legislation without delay.

I. Background: Campaign Spending After *Citizens United*

Citizens United—one of a series of Supreme Court decisions dismantling many longstanding campaign finance safeguards[3]–allowed corporations, PACs, and other entities to raise and spend unlimited funds on U.S. elections.[4] While in theory these entities are required to be "independent"[5] of candidates and political parties, in practice many of them have close ties with elected officials in ways that skirt the edges of the law.[6]

As a result of the Court's ruling, outside spending in federal elections has skyrocketed. Reported outside campaign spending (which is only a subset of the total outside groups spend to elect candidates) has gone from approximately $163 million in 2010 to $546 million in 2018 and more

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[3] See, e.g., FEC v. Cruz, 142 S Ct. 1638, 1656–57 (2022) (striking down personal loan repayment limit for congressional candidates); McCutcheon v. FEC, 572 U.S. 185, 227 (2014) (plurality opinion) (striking down federal aggregate contribution limits); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 747 (2011) (striking down Arizona law that awarded additional funding to publicly financed candidates facing high-spending opponents); Citizens United v. FEC, 558 U.S. 310, 365–66 (2010) (striking down McCain–Feingold's limits on corporate and labor union election spending); Davis v. FEC, 554 U.S. 724, 743–44 (2008) (striking down the "Millionaires' Amendment" of the Bipartisan Campaign Reform Act that raised contribution limits for opponents of self-financed candidates who spent more than $350,000 in a campaign); and FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469–470 (2007) (narrowing definition of regulable "electioneering communications") (controlling opinion). These campaign finance cases are part of a larger trend of Supreme Court cases undermining safeguards for democracy. *See* Campaign Legal Center, *The Supreme Court's Role in the Degradation of U.S. Democracy*, July 13, 2022, https://campaignlegal.org/document/supreme-courts-role-degradation-us-democracy.

[4] The *Citizens United* Court ruled that corporations and other outside groups have the right to spend unlimited sums of money in our elections. 558 U.S. at 365. Following this decision, the federal appellate court in D.C. held that federal law could not impose limits on donations to political committees that do not coordinate with candidates (i.e., "Super PACs"). SpeechNow.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc).

[5] See *Citizens United*, 558 U.S. at 365.

[6] See Kaveri Sharma, "Voters Need to Know: Assessing the Legality of Redboxing in Federal Elections," *Yale Law Journal* 130, (2021): 1898 (detailing the phenomenon of "redboxing," through which candidates are able to coordinate with super PACs engaging in independent expenditures); Samir Sheth, "Super PACs, Personal Data, and Campaign Finance Loopholes," *Virginia Law Review* 105 (2019): 655, 696 (discussing how super PACs share information on supporters with campaign committees); and Ian Vandewalker, "10 Years of Super PACs Show Courts Were Wrong on Corruption Risks," Brennan Center for Justice, March 25, 2020, https://www.brennancenter.org/our-work/analysis-opinion/10-years-super-pacs-show-courts-were-wrong-corruption-risks.

than $2 billion in 2020.[7] To the extent we know the sources of this money, data shows that it has come primarily from a tiny handful of the very wealthiest individuals and entities. For instance, about 66 percent of super PAC funding in the 2016 election came from donors who gave more than $1 million—this rose to 68 percent in 2018.[8] As of 2018, roughly $1 billion had come from just 11 people.[9] These trends have driven a broader and unprecedented imbalance in favor of the very wealthiest donors, with the small number of donors known to have spent $100,000 or more on federal elections easily outspending the millions of individuals who gave small donations in cycle after cycle.[10]

II. The Rise of Dark Money

Citizens United did not sweep aside all campaign finance regulation, however. Most importantly for present purposes, the Court reaffirmed by an 8-1 vote that Congress and states may require those engaging in election spending to disclose the sources of their funds.[11] Indeed, the Court appears to have assumed that all the new outside campaign spending it was permitting would be subject to full disclosure, stating in its opinion that "[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed *before today*."[12] But this assumption was wrong.

The reality the Court elided in *Citizens United* and with which it has never subsequently reckoned is that many of the corporations and other entities now allowed to raise and spend unlimited funds on electoral advocacy simply are not subject to the same federal disclosure rules as candidates, parties, and PACs.[13] While they may sometimes be required to file limited

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[7] "2010 Outside Spending, By Group," OpenSecrets, last accessed July 15, 2022, https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=D&disp=O&type=A; "2018 Outside Spending, by Group," OpenSecrets, last accessed July 15, 2022, https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=D&disp=O&type=A; and "2020 Outside Spending, by Group," OpenSecrets, last accessed July 15, 2022, https://www.opensecrets.org/outsidespending/summ.php?cycle=2020&chrt=D&disp=O&type=A.

[8] Ian Vandewalker, "Since Citizens United, a Decade of Super PACs," Brennan Center for Justice, January 14, 2020, https://www.brennancenter.org/our-work/analysis-opinion/citizens-united-decade-super-pacs.

[9] Michelle Ye Hee Lee, "Eleven Donors Have Plowed $1 Billion into Super PACs Since They Were Created," *Washington Post*, October 26, 2018, https://www.washingtonpost.com/politics/eleven-donors-plowed-1-billion-into-super-pacs-since-2010/2018/10/26/31a07510-d70a-11e8-aeb7-ddcad4a0a54e_story.html.

[10] Ian Vandewalker, "The 2018 Small Donor Boom Was Drowned Out by Big Donors, Thanks to Citizens United," Brennan Center for Justice, January 10, 2020, https://www.brennancenter.org/our-work/analysis-opinion/2018-small-donor-boom-was-drowned-out-big-donors-thanks-citizens-united; OpenSecrets, "Most Expensive Midterm Ever: Cost of 2018 Election Surpasses $5.7 Billion," February 6, 2019, https://www.opensecrets.org/news/2019/02/cost-of-2018-election-5pnt7bil/; and OpenSecrets, "2020 Election to Cost $14 Billion, Blowing Away Spending Records," October 28, 2020, https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/.

[11] See Citizens United v. FEC, 558 U.S. 310, 366–67 (2010). This decision fell in line with many previous ones also upholding disclosure requirements. See, e.g., McConnell v. FEC, 540 U.S. 93, 201–02 (2003); Buckley v. Valeo, 424 U.S. 1, 64–68 (1976).

[12] *Citizens United*, 558 U.S. at 370 (emphasis added).

[13] Indeed, even before *Citizens United* was decided, federal campaign transparency had begun to erode thanks to earlier court decisions and shoddy rulemaking by the Federal Election Commission. Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, 2015, 7, https://www.brennancenter.org/our-work/research-reports/citizens-united-five-years-later. In the years since *Citizens United* was decided the FEC has repeatedly

campaign finance reports reflecting the money they have spent, they often are not obligated to disclose the sources that funded their electoral advocacy.[14] Dark money groups who do not disclose their donors have reported spending well over a billion dollars on federal elections since 2010.[15] But their actual spending is much higher, and includes donations to super PACs and campaign advertising that is not currently subject to any federal reporting requirement, such as most online advertising.[16] The nonpartisan Center for Responsive Politics has estimated that dark money groups spent over $1 billion just in connection to the 2020 election, more than half of which—$660 million—was donated to other organizations.[17]

Importantly, dark money is not spread evenly across all federal elections. One Brennan Center study of reported spending by dark money groups in 2014 Senate contests, for instance, showed that more than 90 percent was concentrated in the eleven most competitive races.[18] Across those contests dark money accounted for almost 30 percent of all reported money spent.[19] Analysis of more recent cycles indicates that dark money continues to be concentrated in specific races. In

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deadlocked on proposals to close loopholes in its regulations that would mitigate some of the effects of the Court's decision. Office of Commissioner Ann M. Ravel, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp*, Federal Election Commission, 2017, 2, 13–15, https://shpr.legislature.ca.gov/sites/shpr.legislature.ca.gov/files/Ravel%20-%20FEC%20Dysfunction.pdf. The Commission has also failed to enforce its PAC registration requirements, allowing many nonprofits primarily focused on electoral advocacy to avoid registration and disclosure. Ravel, *Dysfunction and Deadlock*, 2, 13–15. Congress has repeatedly attempted to address these problems. The House passed earlier versions of the DISCLOSE Act that would have closed these loopholes four different times, but all four times the legislation, though it had majority support in the Senate, either never received consideration or was blocked by a filibuster. See Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (2022); For the People Act of 2021, H.R. 1, 117th Cong. (2021); For the People Act of 2019, H.R. 1, 116th Cong. (2019); DISCLOSE Act, H.R. 5175, 111th Cong. (2010); 168 Cong. Rec. S340 (2022) (Freedom to Vote: John R. Lewis Act) (cloture motion rejected by 49-51 vote); 167 Cong. Rec. S4685 (2021) (For the People Act of 2021) (cloture motion rejected by 50-50 vote); 156 Cong. Rec. S7388 (2010) (DISCLOSE Act) (cloture motion rejected by 59-39 vote); and Marianne Levine, "McConnell Won't Allow Vote on Election Reform Bill," *POLITICO*, March 6, 2019, https://www.politico.com/story/2019/03/06/mcconnell-election-reform-bill-1207702 (describing failure of For the People Act of 2019 to obtain consideration on the Senate floor).

[14] See 52 U.S.C. §§ 30101(4)–(6), 30104(b), 30114 (2018); 11 C.F.R. §§ 100.5, 104.3 (2022); and "Dark Money Basics," OpenSecrets, accessed July 14, 2022, https://www.opensecrets.org/dark-money/basics.

[15] "Dark Money Basics."

[16] Dark money groups are required to report spending for a very limited range of activities, including independent expenditures (communications that contain express language calling for the election or defeat of a candidate) and electioneering communications (broadcast cable or satellite communications that mention a candidate in the run-up to an election). 11 C.F.R. §§ 104.20(b), 109.10(b)–(e); "Making Independent Expenditures," Federal Election Commission, accessed July 14, 2022, https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures; and "Making Electioneering Communications," Federal Election Commission, accessed July 14, 2022, https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures. They are not required to disclose donations to other groups (although donations to super PACs need to be reported by the recipient) or many types of campaign advertising, such as most online ads. 11 C.F.R. § 104.8(a); and "Dark Money Basics." For that reason, reported dark money spending represents only a subset, at times a quite small one, of the total that dark money groups spend on electoral advocacy.

[17] Anna Massoglia and Karl Evers-Hillstrom, "'Dark Money' Topped $1 Billion in 2020, Largely Boosting Democrats," OpenSecrets, March 17, 2021, https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle.

[18] Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since 'Citizens United,'* Brennan Center for Justice, 2015, https://www.brennancenter.org/our-work/research-reports/election-spending-2014-outside-spending-senate-races-citizens-united.

[19] Vandewalker, *Election Spending 2014*.

Tennessee's 2018 Senate contest, for instance, dark money groups reported spending almost as much as the winning candidate did on her own campaign.[20] In North Carolina's 2016 Senate contest, dark money groups actually *outspent* the winning candidate.[21]

Dark money campaign spending has had a tangible impact on numerous policy issues of concern to Americans across the political spectrum. For instance, dark money groups that have spent millions to elect candidates have also wielded their clout to help block increases to the minimum wage,[22] fight efforts to lower prescription drug costs,[23] oppose action to address climate change,[24] stymie tax reform,[25] and either confirm or defeat judicial nominations from both the current and previous presidents.[26]

III. Loopholes for Foreign Campaign Spending

Citizens United and subsequent cases also left in place the longstanding prohibition on campaign spending by foreign nationals.[27] The constitutionality of that provision was subsequently reaffirmed by a lower court, in a decision authored by then-Judge Brett Kavanaugh that the Supreme Court summarily affirmed.[28]

Gaps in disclosure and other rules, however—including those created by *Citizens United* and related cases—have provided multiple avenues for foreign governments, corporations, and oligarchs to spend money trying to influence the U.S. electorate. Among the most significant problems:

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[20] "Political Nonprofits: Races," OpenSecrets, accessed July 15, 2022, https://www.opensecrets.org/outsidespending/nonprof_races.php?cycle=2018; and "Tennessee Senate 2018 Race," OpenSecrets, accessed July 15, 2022, https://www.opensecrets.org/races/summary?cycle=2018&id=TNS1&spec=N.
[21] "Political Nonprofits: Races;" and "North Carolina Senate 2016 Race," OpenSecrets, accessed July 15, 2022, https://www.opensecrets.org/races/summary?cycle=2016&id=NCS2&spec=N.
[22] Alex Gangitano, "Business Groups Prepare for Lobbying Push Against $15 Minimum Wage," *The Hill*, January 26, 2021, https://thehill.com/business-a-lobbying/535957-business-groups-prepare-for-lobbying-effort-against-raising-the-minimum/.
[23] Krystal Hur, "Pharma-Backed 'Dark Money' Group Hits House Dems on Drug Pricing Plan," *OpenSecrets*, May 13, 2021, https://www.opensecrets.org/news/2021/05/american-action-network-hits-house-dems/.
[24] John Geary, "The Dark Money of Climate Change," *ESSAI* 17 (2019): 36-40, https://dc.cod.edu/essai/vol17/iss1/17/.
[25] Scott Bland, "Liberal 'Dark-Money' Behemoth Funneled More Than $400M in 2020," POLITICO, November 17, 2021, https://www.politico.com/news/2021/11/17/dark-money-sixteen-thirty-fund-522781.
[26] Anna Massoglia, "Breyer's Supreme Court Vacancy Opens the Door to Even More 'Dark Money' in 2022 Midterm Elections," OpenSecrets, January 27, 2022, https://www.opensecrets.org/news/2022/01/breyers-supreme-court-vacancy-even-more-dark-money-2022-midterm-elections/; and Bland, "Liberal 'Dark-Money' Behemoth."
[27] See 52 U.S.C. § 30121(a) (2018); Citizens United v. FEC, 558 U.S. 310, 362 (2010) ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."). Some justices at the time appeared to have explicitly assumed that the *Citizens United* decision would not create avenues for foreign interference in U.S. elections. See, e.g., "Justice Openly Disagrees with Obama in Speech," *NBC News*, January 28, 2010, https://www.nbcnews.com/id/wbna35117174 (noting how Justice Alito expressed disagreement after Obama stated *Citizens United* would allow "foreign corporations . . . to spend without limit in our elections").
[28] Bluman v. FEC, 800 F. Supp. 2d 281, 284 (D.D.C. 2011) (upholding 52 U.S.C. § 30121(a) (2018)), *summarily aff'd*, 565 U.S. 1104 (2012).

Super PACs and dark money groups serving as conduits for foreign spending. While federal law prohibits foreign nationals from giving money to influence U.S. elections,[29] the rise of super PACs and dark money groups, many devoted to electing single candidates, has made foreign spending difficult to detect in practice. One favored method is the use of shell companies to donate money to super PACs, like the scheme disgraced businessmen Lev Parnas and Igor Fruman used to funnel $325,000 from a Russian oligarch to American First Action, a super PAC focused on reelecting former President Donald Trump.[30] Canadian steel magnate Barry Zekelman likewise directed one of his American subsidiary companies to donate $1.75 million to the same pro-Trump super PAC, allowing him to attend a fundraiser at the president's Washington, D.C. hotel where he was captured on tape lobbying the president on U.S. trade policies.[31] In another instance, Malaysian financier Jho Low used shell companies and straw donors to donate more than $1 million to a pro-Obama super PAC in an attempt to buy political influence.[32] These specific examples came to light because they were linked to broader, high-profile scandals, but there are likely many other instances that have escaped detection. As now-President Biden wrote in 2018, "lack of transparency in our campaign finance system combined with extensive foreign money laundering creates a significant vulnerability for our democracy."[33]

Foreign Government Online Influence Campaigns. With social media being ubiquitous, foreign state actors have started directly spending money on online ad campaigns to influence U.S. elections. During the 2016 election, Kremlin-linked companies purchased thousands of ads on websites like Facebook seeking to influence votes.[34] Other ads sought to more generally divide Americans and to suppress voter turnout, especially in Black communities.[35] The Russian government, among others, continued engaging in similar online efforts in the 2020 election.[36]

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[29] See 52 U.S.C. § 30121(a).
[30] U.S. Department of Justice, "Lev Parnas Sentenced to 20 Months in Prison for Campaign Finance, Wire Fraud, and False Statements Offenses," press release, June 29, 2022, https://www.justice.gov/usao-sdny/pr/lev-parnas-sentenced-20-months-prison-campaign-finance-wire-fraud-and-false-statements.
[31] Eric Lipton, "Donations Steered to Trump Super PAC by Canadian Are Found to Be Illegal," *New York Times*, April 8, 2022, https://www.nytimes.com/2022/04/08/us/politics/trump-super-pac-illegal-donations.html.
[32] Anna Massoglia and Karl Evers-Hillstrom, "Malaysian Fugitive and Ex-Fugees Rapper Indicted for Funneling Foreign Money to Back Obama," *OpenSecrets*, May 10, 2019, https://www.opensecrets.org/news/2019/05/malaysian-fugitive-funneling-foreign-money-to-back-obama.
[33] Joseph Biden and Michael Carpenter, "Foreign Dark Money Is Threatening American Democracy," POLITICO Magazine, November 27, 2018, https://www.politico.com/magazine/story/2018/11/27/foreign-dark-money-joe-biden-222690.
[34] Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Vol. 1, U.S. Department of Justice, 2019, https://www.justice.gov/archives/sco/file/1373816/download.
[35] Select Committee on Intelligence, U.S. Senate, "Russian Active Measures Campaigns and Interference In The 2016 U.S. Election," Senate Report 116-290, 105, https://www.congress.gov/congressional-report/116th-congress/senate-report/290/1 ("Voter suppression narratives were in [the data], both on Twitter . . . and within Facebook, where it was specifically targeting the Black audiences.").
[36] See Young Mie Kim, "New Evidence Shows How Russia's Election Interference Has Gotten More Brazen," Brennan Center for Justice, March 5, 2020, https://www.brennancenter.org/our-work/analysis-opinion/new-evidence-shows-how-russias-election-interference-has-gotten-more.

Because very few Internet ads are subject to any disclosure requirements, ads sponsored by foreign governments are difficult to detect and hard for ordinary voters to recognize.[37]

Foreign Corporations Intervening in State and Local Ballot Elections. Finally, because the FEC has interpreted the prohibition on foreign national campaign spending to exempt state ballot campaigns,[38] foreign corporations and other wealthy individuals can spend unlimited money to impact state and local ballot races in the United States. Foreign corporations with direct financial interests in various state and local races have taken advantage of this loophole. For example, Canadian-owned corporation Hydro-Québec spent millions to oppose a 2021 Maine referendum on the construction of a new energy pipeline,[39] outspending all but one group that opposed the pipeline.[40] Similarly, a Luxembourg-based adult film company spent $300,000 to oppose a 2012 Los Angeles ballot measure improving safety standards for adult film actors.[41] And last year the FEC affirmed that an Australian mining company was permitted to spend money opposing a Montana environmental initiative.[42] These are only three of many possible instances of foreign companies and wealthy individuals seeking to influence state and local ballot races.

IV. Key Provisions of the DISCLOSE ACT

The DISCLOSE Act effectively addresses gaps in the law that have allowed both dark money and foreign spending in our elections.

Most importantly, the Act requires any organization that spends $10,000 or more on a range of campaign-related disbursements, including transfers to other organizations, to disclose donors who gave $10,000 or more for the purpose of funding the covered activities.[43] The $10,000 threshold, which is *50 times* the threshold for disclosure of individual contributions to candidates, provides transparency for the major funders of electoral advocacy while allowing donors who give less to remain anonymous. There are also multiple ways to avoid disclosing the name of any donor who does not intend for their funds to be used for electoral advocacy. For example, the recipient organization can establish a segregated bank account from which to pay

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[37] Ian Vandewalker and Lawrence Norden, *Getting Foreign Funds Out of America's Elections,* Brennan Center for Justice, 2018, 6, https://www.brennancenter.org/our-work/policy-solutions/getting-foreign-funds-out-americas-elections.

[38] See Bryan Metzger, "The FEC Affirmed that Foreigners Can Fund US Ballot Measures Because They're Technically Not Elections," *Business Insider* November 2, 2021, https://www.businessinsider.com/fec-affirms-legal-foreign-entities-fund-referendums-ballot-measures-interference-2021-11.

[39] Adrian Morrow, "Hydro-Québec Spends Millions to Influence Maine Referendum, Sparking Questions of Election Interference," *Globe and Mail*, October 12, 2020, https://www.theglobeandmail.com/world/us-politics/article-hydro-quebecs-high-stakes-campaign-to-bring-energy-to-maine-raises.

[40] See "Maine Question 1, Electric Transmission Line Restrictions and Legislative Approval Initiative (2021)," Ballotpedia, last accessed July 15, 2022, https://ballotpedia.org/Maine_Question_1,_Electric_Transmission_Line_Restrictions_and_Legislative_Approval_Initiative_(2021).

[41] Ciara Torres-Spelliscy, "Adult Film Industry Receives Campaign Finance Fine," Brennan Center for Justice, December 11, 2015, https://www.brennancenter.org/our-work/analysis-opinion/adult-film-industry-receives-campaign-finance-fine.

[42] Tom Kuglin, "Montana Ballot Initiative at Center of Controversial FEC Decision," *Bozeman Daily Chronicle*, Nov. 15, 2021, https://www.bozemandailychronicle.com/news/politics/montana-ballot-initiative-at-center-of-controversial-fec-decision/article_c3afd086-9a91-5e29-a92d-e49991e1462c.html.

[43] S. 443, 117th Cong. sec. 201(a), § 324(a)(1), (a)(2)(E)(i) (2021).

for electoral communications, in which case disclosure obligations are limited to that account.[44] Or a donor themself can specify that their funds may not be used for electoral advocacy.[45] The Act also provides for a robust exception where disclosure might subject a donor to "serious threats, harassment, or reprisals."[46]

The Act also expands disclaimer requirements for campaign ads to require them to include information on the top donors who paid for the ad where feasible.[47] And it requires donor disclosure for organizations that spend $10,000 or more on advertising that expressly advocates for or against federal judicial nominations (though again, only donors who give $10,000 or more in a year need to be disclosed).[48]

The Act also plugs significant loopholes in the ban on foreign national campaign spending that have been exploited by foreign governments and other wealthy foreign interests. In particular, it codifies the existing FEC interpretation of the ban as applying to contributions to super PACs and dark money groups, and also explicitly outlaws establishing a shell corporation for the purpose of concealing a foreign donation.[49] It also expands the range of campaign communications that the ban reaches, including to the sort of paid online communications the Kremlin and others have used to manipulate the U.S. electorate.[50] Finally, it expands the ban to include foreign corporations and other wealthy interests outside the United States spending on state ballot campaigns.[51]

V. Constitutional Considerations

Disclosure. Even as it has expressed skepticism towards many types of campaign finance limits, the Supreme Court has consistently reaffirmed that requiring campaign spenders to disclose the

[44] S. 443, 117th Cong. sec. 201(a), § 324(a)(2)(E)(i).
[45] S. 443, 117th Cong. sec. 201(a), § 324(a)(3)(B).
[46] S. 443, 117th Cong. sec. 201(a), § 324(a)(3)(C). A mere desire to avoid harsh criticism, however, should not be sufficient to evade disclosure. As the late Justice Antonin Scalia famously put it: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." Doe v. Reed, 561 U.S. 186, 228 (2010) (Scalia, J., concurring in the judgment).
[47] S. 443, 117th Cong. sec. 302(a), § 318(e)(1).
[48] This provision presents a more novel set of issues than the Act's core campaign disclosure provisions, although spending for or against federal judicial nominations is in many respects analogous to spending on state judicial elections, which the Supreme Court has repeatedly held can give rise to significant ethical issues. See Williams-Yulee v. Fla. Bar, 575 U.S. 433, 456–57 (2015); and Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009). As with campaign spending, spending from organizations that do not disclose their donors has played a prominent role in many recent judicial nomination fights. See, e.g., Brennan Center for Justice, "Follow the Money: Tracking TV Spending on the Kavanaugh Nomination," July 26, 2018, https://www.brennancenter.org/our-work/research-reports/follow-money-tracking-tv-spending-kavanaugh-nomination.
[49] S. 443, 117th Cong. secs. 101(a)(3) & 106(a), § 612(a). See, e.g., MUR #7122, Right to Rise USA, Fed. Elec. Comm'n, https ://www.fec.gov/data/legal/matter-under-review/7122.
[50] S. 443, 117th Cong. sec. 105(a)(2), § 319(a)(1)(F)–(J). See also id. sec. 105(b), § 319(b)(4)(A).
[51] S. 443, 117th Cong. sec. 104(a), § 319(b)(3). We recommend that the language of this provision and the other provisions of the Act dealing with foreign nationals be amended to conform with the most recent version of the Act passed by the House. See Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. secs. 6003, 6005–07 (2022).

donors who fund their electoral advocacy is constitutional.[52] As the Court stated in *Citizens United*, disclosure requirements "may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking."[53] For this reason, the Court has continued to emphasize the importance of disclosure as a means to prevent "abuse of the campaign finance system."[54]

As the Court has acknowledged, campaign transparency provides many benefits to a democratic society. First, it helps voters to make "informed choices in the political marketplace."[55] Indeed, social science research confirms that knowing the funders behind campaign spending provides voters with an important informational shortcut that helps them to interpret political messages and make decisions that better align with their interests and values.[56]

Disclosure is also an important deterrent against *quid quo pro* corruption, "discourag[ing] those who would use money for improper purposes" and helping law enforcement, the media, and watchdogs uncover illicit conduct that does occur.[57] Likewise, regular reporting of campaign donors makes evasion of other campaign finance rules much more difficult.[58]

The Supreme Court's decision last year in *Americans for Prosperity Foundation v. Bonta* did not alter this basic reality. *Bonta* was not a campaign finance case. The California rule at issue required *all* charities operating in the state to turn over IRS schedules listing the names of their donors to state authorities.[59] While these schedules contained information that might have been useful to detect and prosecute charity fraud in certain cases, the Court found a "dramatic mismatch" between the state's fraud prevention goal and the means it employed.[60]

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[52] See, e.g., Citizens United v. FEC, 558 U.S. 310, 366–67 (2010); McConnell v. FEC, 540 U.S. 93, 201–02 (2003); Buckley v. Valeo, 424 U.S. 1, 64–68 (1976).
[53] *Citizens United*, 558 U.S. at 366 (citations omitted) (internal quotation marks omitted).
[54] McCutcheon v. FEC, 572 U.S. 185, 223 (2014) (plurality opinion).
[55] *Citizens United*, 558 U.S. at 369.
[56] See, e.g., Cheryl Boudreau, "Making Citizens Smart: When Do Institutions Improve Unsophisticated Citizens' Decisions?", *Political Behavior* 31 (2009): 287, 292-294, 303-304.
[57] *Buckley*, 424 U.S. at 67; and *McCutcheon*, 572 U.S. at 223 ("[D]isclosure . . . minimizes the potential for abuse of the campaign finance system."). See also Michael D. Gilbert, "Transparency and Corruption: A General Analysis," *University of Chicago Legal Forum* 117 (2018): 124-126 (noting that "[t]he light of disclosure surely deters corruption" and that "[s]ome corrupt deals get canceled because the parties fear detection" despite transparency reducing transactional costs for corrupt actors); and Richard L. Hasen, "Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age," *Journal of Law and Politics* 27 (2012): 557, 560 (explaining how "[w]ithout mandated disclosure, it will often be impossible for anyone—rival campaigns, the press, or the public—to connect the dots" in quid pro quo exchanges).
[58] *Buckley*, 424 U.S. at 67–68 ("[D]isclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above."); and U.S. Library of Congress, Congressional Research Service, *Campaign Finance Law: Disclosure and Disclaimer Requirements for Political Campaign Advertising*, by L. Paige Whitaker, IF11398 (2019), 1, https://crsreports.congress.gov/product/pdf/IF/IF11398 (noting how disclosure requirements "facilitat[e] enforcement of the law"). Most notably, as discussed, lack of transparency for many outside spenders in federal elections has allowed wealthy foreign interests to illegally funnel money into the U.S. political process. See notes 29–32 and accompanying text.
[59] See Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2379–80 (2021).
[60] *Bonta*, 141 S. Ct. at 2386.

Under *Bonta*, to be upheld, disclosure rules must have a "legitimate and substantial" justification and be "narrowly tailored" to serve that intended purpose.[61] Narrow tailoring does not require that a particular rule be the least restrictive means to accomplish the government's objective—the fit need not be perfect, only "reasonable."[62] Whatever shift *Bonta* may portend in marginal cases, the Court has never suggested that fighting corruption, informing voters, or preventing the evasion of other rules are anything less than "legitimate and substantial" goals, and has repeatedly described campaign disclosure requirements as the least burdensome type of regulation.[63] In fact, *Bonta*'s author, Chief Justice Roberts, has continually voted to uphold political disclosure requirements.[64] The DISCLOSE Act's transparency provisions easily meet the standard he and other justices have set.

Foreign interference. Restrictions on foreign spending in U.S. elections also stand on firm constitutional ground. In a 2011 three-judge district court decision, *Bluman v. FEC*, then-Judge Kavanaugh upheld the federal ban on foreign nationals contributing or spending money in connection with a federal, state, or local election,[65] citing numerous Supreme Court rulings emphasizing the government's special interest in protecting "the process of democratic self-government."[66] The Supreme Court summarily upheld this decision.[67] In the years since *Bluman*, the need for robust, targeted safeguards to prevent foreign governments and other wealthy foreign interests from seeking to manipulate the U.S. electorate have only become more apparent. There is no basis to question the constitutional validity of the DISCLOSE Act's provisions in this regard.

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In short, while in our view the Court bears significant responsibility for the prevalence of dark money in federal elections and the vulnerability of our campaigns to foreign interference, the failure to deal with these problems ultimately rests with the other branches of government. And while the Executive Branch could do much more to address these issues,[68] Congress is also responsible for developing the law to meet contemporary problems.

Historically, fostering greater transparency in campaign finance has been a point of common ground among political leaders.[69] And today the prevalence of dark money does not necessarily

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[61] *Bonta*, 141 S. Ct. at 2383.
[62] *Bonta*, 141 S. Ct. at 2384 (quoting *McCutcheon*, 572 U.S. at 218).
[63] See *McCutcheon*, 572 U.S. at 223; and *Citizens United*, 558 U.S. at 370.
[64] See *McCutcheon*, 572 U.S. at 223; *Citizens United*, 558 U.S. at 369; and Doe v. Reed, 561 U.S. 186, 202 (2010). Justice Kavanaugh also voted to uphold campaign disclosure requirements as a circuit court judge. See SpeechNow.org v. FEC, 599 F.3d 686, 697 (D.C. Cir. 2010).
[65] Bluman v. FEC, 800 F. Supp. 2d 281, 284 (D.D.C. 2011) (citing 52 U.S.C. § 30121(a) (2018)).
[66] *Bluman*, 800 F. Supp. 2d at 287 (quoting Bernal v. Fainter, 467 U.S. 216, 220 (1984)).
[67] See Bluman v. FEC, 132 S. Ct. 1087, 1087 (2012).
[68] See, e.g., Sen. Sheldon Whitehouse, "Bicameral Call for Greater Transparency in Political Spending," press release, June 23, 2015, https://www.whitehouse.senate.gov/news/release/bicameral-call-for-greater-transparency-in-political-spending (noting how the President could issue an executive order requiring federal contractors to disclose political contributions); and Weiner, *Citizens United Five Years Later*, 8 (overviewing the FEC's failure to update its rules and guidance to address dark money).
[69] Three of the past four Republican president have been strong proponents of robust campaign disclosure rules. President Reagan advocated for "full disclosure of all campaign contributions, including in-kind contributions, and

favor one party or ideological persuasion over the other. While in some past election cycles Republican and conservative-leaning dark money groups outspent their Democratic and other left-leaning counterparts, in 2020 it was the reverse, with Democratic and other left-leaning groups swamping Republican and conservative spenders by a more than 2-1 ratio.[70] The issue is not whether one side or the other is advantaged, but whether all Americans can have the benefit of a transparent electoral process.

Unsurprisingly, overwhelmingly majorities across the political spectrum support increased campaign transparency. One nonpartisan survey specifically found 82 percent of respondents in favor of the DISCLOSE Act's central provision, requiring organizations that spend $10,000 or more on electoral advocacy to disclose their donors—including 88 percent of Democrats and 77 percent of both Republicans and Independents.[71]

Passage of the DISCLOSE Act is far from the only reform needed to repair and secure American democracy. But of the many steps Congress needs to take, shoring up campaign transparency and protections against foreign interference should be one of the easiest. The time to act is now.

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expenditures on behalf of any electoral activities." President Ronald Reagan, *1988 Legislative and Administrative Message: A Union of Individuals*, January 25, 1988, https://www.presidency.ucsb.edu/documents/1988-legislative-and-administrative-message-union-individuals. President George H.W. Bush extoled "[d]isclosure -- full disclosure" for all donors funding independent political groups. President George H.W. Bush, *Remarks to Congressional and Administrative Interns Announcing Campaign Finance Reform Proposals*, June 29, 1989, https://bush41library.tamu.edu/archives/public-papers/616. And when President George W. Bush signed the Bipartisan Campaign Reform Act of 2002, he called for "complete and immediate disclosure of the source" of all campaign contributions." Office of the Press Secretary, *President Signs Campaign Finance Reform Act*, March 27, 2002, https://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020327.html.

[70] Massoglia and Evers-Hillstrom, "'Dark Money'".

[71] Steven Kull et al., *Americans Evaluate Campaign Finance Reform: A Survey of Voters Nationwide*, Voice Of the People and Program for Public Consultation, 2018, 10, https://americanpromise.net/wp-content/uploads/2020/02/May-2018-Maryland-Campaign-Finance-Report-anchor-p8.pdf. See also Center for Public Integrity, "Center for Public Integrity/Ipsos poll: How Should Presidential Campaigns Be Regulated?", February 18, 2019, https://publicintegrity.org/politics/elections/center-for-public-integrity-ipsos-poll-elections-2019/ (88 percent of Americans believe that political groups should have to disclose all their funders in a timely fashion, including 92 percent of Democrats, 88 percent of Republicans, and 87 percent of Independents). Measures to curb foreign spending in U.S. elections enjoy similarly broad support. Program for Public Consultation, "Nearly 80% of Voters Support Prohibiting Foreign Entities from Funding Ballot Measures," April 4, 2022, https://publicconsultation.org/united-states/foreign-funding-of-ballot-initiatives.

Opening Remarks of Senate Republican Leader Mitch McConnell
July 19, 2022
For submission to the hearing record for July 19, 2022 Senate Rules & Administration Committee hearing on The DISCLOSE Act

MITCH McCONNELL
REPUBLICAN LEADER
U.S. SENATOR for KENTUCKY

Opening Remarks of Senate Republican Leader Mitch McConnell

"Today, with our country facing an inflation crisis, a violent crime crisis, and a functionally open southern border, our Democratic colleagues are choosing to focus on chilling Americans' First Amendment rights and enabling more harassment of citizens for their private views.

"Back in 1958, the NAACP fought Alabama's Attorney General, a segregationist Democrat, all the way to the Supreme Court to defend the bedrock American liberty of associational privacy.

"Here is what Justice Harlan said for the majority back then. 'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'

"As the majority opinion put it, this was, 'hardly a novel perception,' even back in 1958. And yet, for most of my career, I have had to push back against Democrats' repeated attempts to unlearn this fundamental Constitutional lesson. I have repeatedly defended Americans' right to join together and voice opinions.

"Prior to McCain-Feingold, almost all money in politics ran through candidates and party committees. I warned that placing unconstitutional restrictions on speech in that bill was like putting a rock on Jell-O – it would not quash political speech, it would just displace it. And the Supreme Court has consistently reaffirmed that point, in case after case upholding free speech.

"Our Democratic colleagues' obsession with regulating political speech is what created the environment they now disapprove of. It is what drove support for McCain-Feingold. And it is what spawned this perennial bill in 2010.

"Democrats want to pass a law that put discourse in the hands of the mob. But, needless to say, they have not always been very concerned with compelling disclosure using laws on the books.

"Existing law already requires disclosure of donations to PACs and other outside groups with the intention of influencing federal elections.

"But even as our colleagues have introduced successive versions of this DISCLOSE Act, enterprising activist liberals have taken it upon themselves to 'name and shame' conservatives by 'outing' their private contributions illegally. It was practically Administration policy under the Obama-Biden IRS!

"And for those keeping score, Washington Democrats never seem as eager to publicize the donor rolls of groups whose political views they share.

"Somehow, donor privacy for organizations pursuing liberal causes is sacrosanct, but donor privacy for groups with conservative beliefs is a threat to democracy.

"Somehow, working for outside groups is practically a prerequisite for a West Wing job under a Democratic president, but association with groups Democrats don't like is a one-way ticket to picketing and harassment.

"64 years ago, the Supreme Court said the link between the freedom of association and the freedom of speech was "beyond debate". But today's Democratic Party wants to make sure the threat to associational privacy is every bit as real as it was back in 1958.

"The stakes are so clear, even liberal groups like the ACLU have joined the NAACP and Senate Republicans in continuing to sound the alarm. They have been working together to fight state-level public disclosure laws all the way to the Supreme Court.

"Last year, the Court sided with these advocates to strike down predatory disclosure practices in California. Earlier this month, the Ninth Circuit did the same to an unconstitutionally vague disclosure law in Montana.

"Meanwhile, the federal judiciary itself is contending with particularly outrageous threats from the radical left to the privacy and security of judges and their families.

"The same liberal groups stoking mob intimidation outside the homes of Supreme Court justices are the ones most eager to "out" private citizens' political speech records.

"The same Democrats who refused to condemn naked threats against public officials earlier this summer once again want to expand the federal government's power to threaten private citizens.

"That's not a trade the American people or their Constitution can afford to make."

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MITCH McCONNELL
REPUBLICAN LEADER

07.19.22

McConnell: Freedoms of Speech and Association Are Bedrock American Liberties

WASHINGTON, D.C. – *U.S. Senate Republican Leader Mitch McConnell (R-KY) submitted the following remarks for the record at today's Senate Rules Committee hearing on the DISCLOSE Act:*

"Today, with our country facing an inflation crisis, a violent crime crisis, and a functionally open southern border, our Democratic colleagues are choosing to focus on chilling Americans' First Amendment rights and enabling more harassment of citizens for their private views.

"Back in 1958, the NAACP fought Alabama's Attorney General, a segregationist Democrat, all the way to the Supreme Court to defend the bedrock American liberty of associational privacy.

"Here's what Justice Harlan said for the majority back then. 'Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'

"As the majority opinion put it, this was, 'hardly a novel perception,' even back in 1958. And yet, for most of my career, I have had to push back against Democrats' repeated attempts to unlearn this fundamental Constitutional

lesson. I have repeatedly defended Americans' right to join together and voice opinions.

"Prior to McCain-Feingold, almost all money in politics ran through candidates and party committees. I warned that placing unconstitutional restrictions on speech in that bill was like putting a rock on Jell-O – it wouldn't quash political speech, it would just displace it. And the Supreme Court has consistently reaffirmed that point, in case after case upholding free speech.

"Our Democratic colleagues' obsession with regulating political speech is what created the environment they now disapprove of. It's what drove support for McCain-Feingold. And it's what spawned this perennial bill in 2010.

"Democrats want to pass a law that put discourse in the hands of the mob. But, needless to say, they haven't always been very concerned with compelling disclosure using laws on the books.

"Existing law already requires disclosure of donations to PACs and other outside groups with the intention of influencing federal elections.

"But even as our colleagues have introduced successive versions of this DISCLOSE Act, enterprising activist liberals have taken it upon themselves to 'name and shame' conservatives

by 'outing' their private contributions illegally. It was practically Administration policy under the Obama-Biden IRS!

"And for those keeping score, Washington Democrats never seem as eager to publicize the donor rolls of groups whose political views they share.

"Somehow, donor privacy for organizations pursuing liberal causes is sacrosanct, but donor privacy for groups with conservative beliefs is a threat to democracy.

"Somehow, working for outside groups is practically a prerequisite for a West Wing job under a Democratic president, but association with groups Democrats don't like is a one-way ticket to picketing and harassment.

"64 years ago, the Supreme Court said the link between the freedom of association and the freedom of speech was 'beyond debate'. But today's Democratic Party wants to make sure the threat to associational privacy is every bit as real as it was back in 1958.

"The stakes are so clear, even liberal groups like the ACLU have joined the NAACP and Senate Republicans in continuing to sound the alarm. They have been working together to fight state-level public disclosure laws all the way to the Supreme Court.

"Last year, the Court sided with these advocates to strike down predatory disclosure practices in California. Earlier this month, the Ninth Circuit did the same to an unconstitutionally vague disclosure law in Montana.

"Meanwhile, the federal judiciary itself is contending with particularly outrageous threats from the radical left to the privacy and security of judges and their families.

"The same liberal groups stoking mob intimidation outside the homes of Supreme Court justices are the ones most eager to 'out' private citizens' political speech records.

"The same Democrats who refused to condemn naked threats against public officials earlier this summer once again want to expand the federal government's power to threaten private citizens.

"That's not a trade the American people or their Constitution can afford to make."

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Van Hollen DISCLOSE Act Statement for the Record

I want to thank the Chair and the Ranking Member for organizing this important hearing on the DISCLOSE Act. And I want to give a special salute to Chair Klobuchar, not just for her leadership in today's hearing but also for her constant and robust stewardship of this important legislation – which is designed to get secret money out of our politics. I'm proud to have been the original author of this bill when it was first introduced in the House of Representatives in 2010 – and proud to join Senator Whitehouse and colleagues here as an original cosponsor since I was elected to the Senate.

Our bill is guided by a straightforward idea: voters have a right to know who is bankrolling elections. That includes all of the political advertisements they're seeing on television, on social media, and elsewhere. This challenge isn't new – but the urgency of tackling this problem continues to grow with each passing year. It started in 2010, when the Supreme Court opened the floodgates for secret money through its notorious 5-4 ruling in *Citizens United.* But that decision was just the beginning of this problem, not the end.

Today, huge political donors and corporations have taken advantage of the ruling in *Citizens United* to unload billions of dollars into the political arena and hide their identities behind opaque Super PACs and secretive front groups. Dark money in elections has skyrocketed: secret political spending has increased from roughly $6 million in 2006, before *Citizens United,* to more than $1 billion in 2020, after *Citizens United.* These dark dollars are being used to tip the scales of elections, pack our courts, and lobby for major policy change in Washington. And as the public hearings of the Select Committee to Investigate the January 6th Attack on the United States Capitol unfold, we are reminded that in the lead-up to January 6th, 2021, groups backed by anonymous donors stoked the lie of a stolen election and organized the rally then-President Trump used to spur the riot.

These are just a few examples of how dark money is used to hijack our democracy, and this issue will only worsen if we don't act. We have a long way to go to restore faith in our elections, especially as Republican-controlled state legislatures try to erect new barriers to the ballot box. But as a first step, we must focus on transparency. The American people have a right to know who is spending all of this money to try to influence their vote.

That's why the centerpiece of the DISCLOSE Act is a provision requiring organizations spending money in elections – including super PACs and 501(c)(4) dark money groups – to promptly disclose donors who give $10,000 or more during an election cycle. This will permit Americans to see who is really spending to influence elections. The DISCLOSE Act contains a number of other important safeguards against special interest influence, including measures to prevent political operatives from using shell corporations and layers of front groups to hide donor identities and a "stand by your ad" provision requiring corporations and other organizations to identify those behind political ads – including disclosing an organization's top five funders at the end of television ads.

We've tried to pass this measure before. In 2010, when I served in the House of Representatives, we passed the original version of the DISCLOSE Act by a vote of 219-to-206. While our bill was

overwhelmingly popular in the country and supported by a majority of Senators at the time, a twist of history stopped the Senate from securing the 60 votes necessary to overcome a Republican filibuster. Senator Ted Kennedy, who supported this legislation, passed away; his replacement was a Republican; and while the Senate had 59 votes to pass this legislation, it wasn't enough to overcome the filibuster hurdle.

Democrats have continued to push forward in our efforts to pass this bill – most recently the DISCLOSE Act provisions were included in the Freedom to Vote: John R. Lewis Act. Meanwhile, Republicans have continued to block our efforts, mainly by using the Senate's current undemocratic, supermajority filibuster rule. This past year alone, Republicans have blocked our legislation five times.

We cannot give in to the status quo of obstruction and disruption. The health of our republic cannot wait. We must act quickly to return American democracy to the hands of the American people, and sunlight is the best disinfectant. I urge my colleagues to pass this bill by any means necessary, including ending or amending the Senate filibuster rule.

I thank the members of this committee for their consideration.

CLC
ADVANCING DEMOCRACY THROUGH LAW

On behalf of Campaign Legal Center (CLC), I write to thank you for holding a vital hearing on July 19th to discuss the *Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act* (S. 443)[i].

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels, fighting for every American's right to responsive government and a fair opportunity to participate in and affect the democratic process. Among our mission areas, CLC advocates for reforms to strengthen and ensure the consistent and robust enforcement of campaign finance laws in the United States. In advance of your committee's hearing, we respectfully submit this letter expressing CLC's strong support for the *DISCLOSE Act* and presenting our views on why passage of this important legislation is essential.

Voters have a fundamental right to know who is spending money to influence our elections. Indeed, transparency about the true sources of election spending is essential to the right of self-government and necessary to hold officeholders accountable to the public, both of which are core First Amendment values. Untraced political spending undermines these values, and voters' right to meaningfully participate in the democratic process is impeded without information about who financially supports which candidates and positions. Disclosure of the true sources of election spending is also essential to securing elections against corruption and the increasing threat of foreign interference.

Unfortunately, since the Supreme Court's 2010 decision in *Citizens United v. FEC*, a growing shroud of "dark money" has spread across our electoral system. To make matters worse, dark money is often only "dark" when it comes to the public's knowledge, as elected officials who benefit from this secret political spending frequently know which wealthy special interests footed the bill and to whom they owe a debt of gratitude. Dark money thereby enables these special interests to buy political access and influence without accountability or transparency. It can also allow foreign nationals to influence U.S. elections without detection.

Citizens United opened the floodgate to dark money by allowing for corporate independent expenditures and paving the way for super PACs that can spend unlimited amounts on campaigns.[ii] As a result of this decision, outside groups who do not disclose their donors—including mysterious LLC corporations and opaque nonprofits operating under section 501(c) of the tax code—can contribute unlimited amounts to super PACs, in addition to

spending directly on elections. These special interest groups have since used their unlimited, secret spending to rig the political system in their favor.

Since 2010, 501(c) nonprofits have spent and contributed more than $2 billion to influence federal elections—the majority of which was financed by undisclosed donors.[iii] The growth of such activity is now accelerating, with dark money groups spending more than $1 billion to influence the 2020 election alone.[iv] This figure includes an estimated $660 million in contributions from secretive nonprofits and shell companies to other outside entities like super PACs,[v] a practice that creates a chain of obfuscation to hide the true sources of election spending. Even when these recipient super PACs are required to disclose their contributors, their reports often only reveal the names of dark money intermediaries that conceal the real, original donors. Existing transparency laws are increasingly undermined by these tactics.

The *DISCLOSE Act* presents a commonsense and comprehensive solution to these growing problems.

First, this vital legislation requires all entities that spend $10,000 or more on campaign-related ads in an election cycle to disclose each donor who has given $10,000 or more during the cycle.

Second, to prevent the evasion of disclosure requirements by running contributions through intermediary dark money groups, the *DISCLOSE Act* creates a trace-back requirement. If over $10,000 is passed from one entity to another before it is spent on campaign activity, each entity must track and report these transfers.

Third, the bill makes it harder for dark money groups to evade reporting and disclosure with carefully worded or timed ads by requiring reporting and disclosure when groups spend over $10,000 running ads at any time that promote, attack, support, or oppose a candidate.

Fourth, the *DISCLOSE Act* also shines a spotlight on secretive donations from LLCs and shell corporations, by requiring that companies publicly disclose their beneficial owners if they spend money in elections.

Finally, the *DISCLOSE Act* enhances protections against foreign interference by strengthening prohibitions against foreign nationals' participation in domestic election-related activities, including spending on ballot initiatives and referenda. It would also prohibit the establishment of corporations to conceal election contributions and donations by foreign nationals, as well as expand the existing foreign money ban to include disbursements for paid web-based or digital communications.

Proposals like the *DISCLOSE Act* have historically had strong bipartisan support. For example, a 2019 poll by CLC found that more than four out of five voters (83%) support the public disclosure of donations to politically active groups.[vi] At the state level, bills analogous to the *DISCLOSE Act* have been introduced on a bipartisan basis and passed with large bipartisan majorities.[vii]

Similarly, the Supreme Court's support for political disclosure has been strong across the ideological spectrum, and it has repeatedly rejected First Amendment challenges to laws requiring disclosure of the sources of election-related spending. In fact, the Court has explicitly acknowledged that political transparency is essential for meaningful participation in our system of democratic self-governance,[viii] and it envisioned that robust disclosure would be used to prevent corruption stemming from unlimited political spending after *Citizens United*.[ix]

For these reasons, **CLC strongly supports the *DISCLOSE Act* and urges the Senate Rules Committee to advance this legislation to a floor vote.** Real transparency about political spending will mean more government accountability and public trust, as well as less corruption and influence for wealthy special interests. Prompt enactment of this legislation would protect voters' right to know ahead of the next election, as well as represent a significant step toward the promise of a democracy that works for us all.

Respectfully submitted,

/s/ Jo Deutsch
Jo Deutsch
Director, Legislative Strategy
Campaign Legal Center

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[i] *Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act*, S.443, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/443.
[ii] *Citizens United v. FEC*, 558 U.S. 310 (2010).
[iii] Anna Massoglia, *Dark money gets darker with less disclosure in the 2022 election*, OpenSecrets.org (May 19, 2022), https://www.opensecrets.org/news/2022/05/dark-money-gets-darker-with-less-disclosure-in-the-2022-election.
[iv] Anna Massoglia and Karl Evers-Hillstrom, *'Dark money' topped $1 billion in 2020, largely boosting Democrats*, OpenSecrets.org (March 17, 2021), https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle.
[v] *Id.*
[vi] *CLC Disclosure Polling Memo*, CampaignLegal.org (Nov. 18, 2019), https://campaignlegal.org/document/clc-disclosure-polling-memo.
[vii] *See e.g.*, Paul Blumenthal, *Montana Republicans and Democrats Unite to Ban Dark Money*, Huff. Post (April 16, 2015), https://www.huffpost.com/entry/montana-dark-money_n_7074084.
[viii] *See Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.")
[ix] *See Citizens United*, 558 U.S. at 352 ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.").

Common Cause
Holding Power Accountable

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Common Cause Letter of Support for the DISCLOSE Act, S. 443

July 18, 2022

Dear Chairwoman Klobuchar and Ranking Member Blunt:

Americans deserve to know who is trying to influence their voices and their votes. On behalf of Common Cause's more than 1.5 million members, thank you for holding a hearing this week on the DISCLOSE Act (S 443). We strongly support this common-sense legislation, which will go a long way toward bringing more much-needed sunlight and transparency to our federal elections.

Disclosure allows voters to evaluate the strength, content and agenda of political messages, and is a crucial tool for holding people accountable to the voters. In *Citizens United v FEC*, the Supreme Court reaffirmed the importance of disclosure of political spending, ruling 8-1 that transparency in political spending empowers the electorate with the tools needed to make informed decisions about speakers and messages.

At the same time, however, the Supreme Court opened loopholes in federal disclosure rules which have since been exploited by powerful secret money groups spending over $1 billion in federal elections without adequate transparency. Simply put, federal law has not kept pace with the new jurisprudence that unleashed new avenues of special interest spending, despite the Court's reasoning that disclosure provides an important anti-corruption check on the influence of money in politics.

Shadowy political operatives leading Super PACs, anonymous LLCs, and some non-profit groups should not be able to circumvent the constitutionally-sound bedrock policy of disclosure. To protect voters' right to make informed decisions in elections, we need better disclosure laws that improve transparency as to which wealthy special interests are spending big money to influence voters. Disclosure is also important to enforce existing campaign finance laws, including spending by prohibited sources or to circumvent contribution limits.

Since *Citizens United*, Common Cause has led successful campaigns to pass money in politics transparency laws in California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Montana, Rhode Island, and many other states and localities. However, we need strong federal disclosure laws to ensure the integrity of our democratic elections including by protecting them from any foreign influence. Legislation to eliminate secret money is broadly popular with the American people–just last summer, a poll showed that 74% of voters–including strong majorities of Republicans, Independents, and Democrats–favor legislative provisions to provide new disclosure requirements like the DISCLOSE Act.

We hope that the full Senate will soon vote on the DISCLOSE Act so all Americans can see who in Congress is trying to shine a light on secret, special interest money. Anonymous

political spending is harmful to our democracy. This ongoing scandal threatens the integrity of our elections and undermines confidence in our democracy.

Sincerely,

Karen Hobert Flynn
President
Common Cause

Cc: All Members of the Senate Committee on Rules and Administration

July 18, 2022

The Honorable Amy Klobuchar
Chair, U.S. Senate Committee on Rules and Administration
425 Dirksen Senate Building
Washington, D.C. 20510

The Honorable Roy Blunt
Ranking Member, U.S. Senate Committee on Rules and Administration
260 Russell Senate Office Building
Washington, D.C. 20510

Chair Klobuchar and Ranking Member Blunt,

We applaud the Senate Committee on Rules and Administration's upcoming hearing on the DISCLOSE Act, and Senate Democrats' tireless commitment to giving all Americans a voice in the political process. Transparency is essential to a democracy that's open and accountable to the people, which is why we fully support this hearing and passage of this important legislation.

Our current system allows the elite donor class and corporate special interests to spend unlimited money in secret, and the consequences of that are felt every day. Since the *Citizens United* decision in 2010, there has been an unprecedented explosion of undisclosed spending by billionaires and special interests. Election spending by groups that don't disclose their donors increased from roughly $6 million in 2006 to more than $1 billion in 2020. This flood of secret money has been used to undermine faith in our elections, promote the "Big Lie," make it harder to vote, and impede much-needed progress on major issues so many Americans care about, whether that's protecting women's reproductive rights, tackling climate change, or lowering prescription drug prices.

The DISCLOSE Act would start to put an end to this corrupt system in several key ways. First, it would require organizations that spend money to influence our elections and federal judicial nominations to publicly disclose their largest donors, so Americans know which wealthy special interests are trying to influence their voice and vote. The DISCLOSE Act also addresses serious vulnerabilities in our system that currently allow foreign actors to meddle in our elections.

These common sense reforms are overwhelmingly popular with, and desired by, the public, with polling finding their support among 84% of voters, including 81% of Republican voters.[1] As is too often the case, the only place where this issue is partisan is in the halls of Congress.

On behalf of End Citizens United // Let America Vote Action Fund and our more than four million members around the country, we unequivocally support the DISCLOSE Act and all efforts to make it federal law.

Sincerely,

Tiffany Muller
President
End Citizens United // Let America Vote Action Fund

[1] Nationwide survey of 1,001 registered voters conducted June 10-June 14, 2021, conducted by Global Strategy Group. Available online at https://navigatorresearch.org/wp-content/uploads/2021/06/Navigator-Update-06.17.2021.pdf.

Working for the will of the people, not the power of money

July 15, 2022

Dear Chairwoman Klobuchar and Ranking Member Blunt,

Fix Democracy First, a statewide nonpartisan pro-democracy organization in Washington state, would like to express our strong support of the DISCLOSE Act (S. 443) to help end dark money and ensure voters know who's trying to influence their elections.

Here in Washington state, we have already passed similar statewide legislation including the **Washington State DISCLOSE Act of 2018** that requires 501(c)(4) and other organizations to disclose donors if participating in a WA state political campaign, and **PAC to PAC Disclosure of Campaign Donations** in 2019 that requires disclosure of contributions from political committees to other political committees.

We need similar legislation on a federal level. The DISCLOSE Act (S. 443) would stop anonymous spending in our elections by requiring entities trying to influence our elections to disclose their largest political donors and would require disclosure of major donors who underwrite advertisements supporting or attacking judicial nominees.

We know that Americans across the political spectrum support legislation to bring more transparency and accountability to politics. We believe voters have a right to know who is trying to influence our elections and elected representatives. In the current out-of-balance system, wealthy special interests and big-money donors hold way too much power, and utilize various political loopholes to hide their spending on lobbying, elections, and judicial nominations. It's time to stop this.

We urge the Senate to pass the DISCLOSE Act as soon as possible to ensure Americans know exactly who's trying to influence their elections and vote.

Sincerely,

Cindy Black
Executive Director
Fix Democracy First

Cc: All Members of the Senate Rules Committee

Fix Democracy First ~ fixdemocracyfirst.org ~ info@fixdemocracyfirst.org ~ 206-552-3287 ~ 1402 3rd Ave #500, Seattle WA 98101

INDIVISIBLE

santa fe

July 16, 2022

Dear Senate Rules and Administration Committee Members,

I am writing to express the very strong support of Individual Santa Fe and its members for **S.443, the DISLOSE Act of 2021**, sponsored by Senator Sheldon Whitehouse, scheduled to be heard before you on Tuesday, July 19, 2022, at 3pm EDT.

The bill, when enacted into law, would strengthen our ability as a nation to limit the unwanted influence of foreign persons, groups and states upon our elections. It will also help enlighten and educate American voters by identifying to them the identity of donors who contribute to political campaigns through PACs, limited liability companies and other organizations, and the amounts of their donations. As you know, disclosure of this kind was championed by the U.S. Supreme Court in Citizens United v. FEC (2010) as the correct and favored way for the People to address the influence of money in politics as opposed to limiting First Amendment rights.

The People have a right to know who is contributing money to candidates for election and how much they are spending. Such knowledge is absolutely crucial to the understanding of candidates' positions on the issues and thus integral to their ability to make knowledgeable decisions at the polls.

Therefore, we strongly urge you to **PASS S.443, the Disclose Act of 2021** without amendment and without delay.

Sincerely,

John L. House, Steering Committee Member
Indivisible Santa Fe

July 18, 2022

To Chair Klobuchar and Ranking Member Blunt, and to all attending the hearing:

I want to add my individual name in support of the Disclose Act (S. 443) since I personally believe this Act will bring fresh interest in, and support for, integrity of communication. Disclosing large donations of money and other support or influence when any kind of election or decision is being made, however small (and especially when an election or a decision is going to affect many people) is an important contemporary action. The Disclose Act is part of reestablishing some of the trust in our national government that we need now.

Also, I am part of a venerable association called the Old Santa Fe Association, which is involved in historic preservation. Obviously, we are concerned with ordinances and actions that impact the functioning and respect for our old city, specifically through preservation of our shared culture and certain aspects

of the historic architectural environment, and we aim to do this while promoting the positive welfare of our city's inhabitants by actively supporting our shared heritage. You may know that Santa Fe is a popular tourist destination spot partly because of this visual and sensitive cultural, architectural and historic integrity. Respect for doing the right thing is something our association is working toward.

I serve as Secretary of this nearly 100-year-old association, but today I am representing myself, with my personal comments, regarding the Disclose Act, although what you will be hearing will impact us as an association. I welcome this.

I believe that by encouraging more transparency and by discouraging anonymous influential spending, which this legislation will help to do, we will all feel better about our world, our country, each other and ourselves. This would be one much-needed result.

Thank you for permitting this message of support for the Disclose Act (S. 443) to be included as part of the record.

Sincerely yours,
Elizabeth West
318 Sena Street
Santa Fe, NM 87505

July 14, 2022

Washington, DC 20510

Dear Senator,

We, the undersigned members of the Declaration for American Democracy (DFAD) coalition, which includes organizations from the labor, civil rights, environmental, faith, social justice, reproductive rights, and many other communities, representing tens of millions of Americans, write to urge your active support of the DISCLOSE Act (S.443). This critically important legislation, spearheaded by Sen. Sheldon Whitehouse (D-RI), would take crucial steps toward protecting democracy by shining a bright light on the secret money that corrupts our political system. As Leader Charles Schumer (D-NY) has indicated, he hopes to schedule a debate and vote on this people-powered bill in the coming weeks.

Over the past several years, the DFAD coalition has fought for passage of transformative federal legislation designed to fortify free and fair elections and strengthen the right of voters to have their voices heard in a truly multi-racial democracy. The DISCLOSE Act was a key component of that legislation. As you know, the Freedom to Vote: John R. Lewis Act was shamefully filibustered in the Senate earlier this year, at a time when our country is under unprecedented attack. It is not surprising that Americans of all political stripes were dismayed at the blocking of that legislation – and that they continue to call on Congress to take decisive action.

The Senate now has the opportunity to take a smaller yet significant step toward ensuring that special interests, corporations, billionaires, and foreign interests do not sway our elections and gain control over our government – by passing the DISCLOSE Act. At its foundation, the DISCLOSE Act would stop anonymous spending in our elections by requiring entities trying to influence our elections to disclose their major political donors. Among other provisions, this legislation would also require disclosure of major donors who underwrite advertisements supporting or attacking judicial nominees.

The conservative majority of the U.S. Supreme Court opened the floodgates of unlimited, secret, dark money spending in the disastrous 2010 decision in *Citizens United*. Since then, super PACs and dark money non-profits have dumped huge sums of money into elections. Over $1 billion of dark money was spent in the 2020 election cycle alone, according to the non-partisan, non-profit Open Secrets. Major corporations and wealthy donors are spending this undisclosed money without being linked to their toxic advertisements, with some organizations backed by anonymous donors helping to fund and organize the pro-Trump rally on the morning of the January 6th insurrection at the U.S. Capitol.

Voters have a right to know who is trying to influence our views and our elected representatives. However, in the current, out-of-balance system, wealthy special interests and big-money donors hold too much power, and they use political loopholes to hide their spending on lobbying, elections, and judicial confirmation hearings. It is time for the Senate to make the promise of democracy realized by taking the imperative step of shining a bright light on secret, dark money spending. We urge you to actively support the DISCLOSE Act, pass it, and move it to President Biden's desk.

Signed,

Action Together Florida

American Sustainable Business Network

Baltimore Nonviolence Center

Blue Wave Postcard Movement

BOLD ReThink

Bolton Street Synagogue Baltimore Maryland

Broward for Progress

Business for America

Cameron Consulting

Campaign for Accountability

Center for American Progress

Center for Common Ground

Center for Media and Democracy

Citizen Action of New York

Citizens for Responsibility and Ethics in Washington (CREW)

Clean Elections Texas

Coalition for Open Democracy

Common Cause

Communications Workers of America

Defend Democracy

DemCast USA

Democracy 21

Democracy Initiative

DoTheMostGood

End Citizens United / Let America Vote Action Fund

Endangered Species Coalition

Face the Music Collective

Fix Democracy First

For All

Friends of the Earth

Get Money Out - Maryland

Government Accountability Project

Greenpeace USA

Indivisible

Indivisible Central Maryland

Indivisible Hawaii

Indivisible Howard County

Indivisible Marin

Indivisible Santa Fe

Indivisible Ulster

International Corporate Accountability Roundtable (ICAR)

League of Conservation Voters

League of Women Voters of the United States

Maine Citizens for Clean Elections

Mainers for Accountable Leadership Action

March On / Future Coalition

Maryland United for Peace and Justice

NETWORK Lobby for Catholic Social Justice

North Carolina Voters for Clean Elections

Open Democracy Action

Open The Government

Our Revolution

People For the American Way

Poligon Education Fund

Poor People's Campaign

Progressive Democrats of America

Public Citizen

Represent Maryland

Rise Up WV

Secure Elections Network

Sierra Club

Stand Up America

The Climate Reality Project

The Workers Circle

Transparency International U.S.

True North Research

Un-PAC

Unitarian Universalists for Social Justice

URGE: Unite for Reproductive & Gender Equity

Voices for Progress

STATEMENT OF SENATOR PATRICK LEAHY (D-VT.),
ON THE DEMOCRACY IS STRENGTHENED BY CASTING LIGHT ON SPENDING IN ELECTIONS ACT (DISCLOSE ACT)
JULY 19, 2022

For the past 12 years, the Supreme Court's misguided ruling in *Citizens United v. Federal Election Commission* has undermined our democracy, gutting campaign finance laws and releasing a flood of dark money into U.S. elections, at every level of government. Since that decision, shell companies and anonymous special interests have funneled billions of dollars into our elections, leaving the public unaware of who is really behind campaign ads aimed at influencing voters. I have long said that a government of, by, and for the people cannot be one that is hidden from them. The American people deserve better.

Since it was first introduced in 2010 in the wake of the *Citizens United* decision, I have supported every iteration of the DISCLOSE Act, which requires organizations engaging in political spending to report donors who have contributed $10,000 or more during an election cycle. The bill focuses on restoring transparency and accountability to the campaign finance system. Sunshine, it has been said, is the best disinfectant, and it is long past time that we know which corporate and special interests are influencing outcomes in our democratic elections.

Grassroots campaigns for local candidates, like in my home state of Vermont, stand little chance against candidates backed by an army of dark money donors. These shadowy corporations inundate the airwaves with attack ads and influence campaigns, drowning out the voices of Vermonters and Americans.

Transparency in elections is fundamental to any functioning democracy, yet every Congress, Republicans block this commonsense legislation. There is simply no justification for preventing voters from knowing who is behind election advertisements.

Americans deserve to have their interests heard in their elections so they can elect representatives who truly represent their values. Since the *Citizen's United* decision, voters' values have routinely been cast aside by politicians who would rather cater to special interest groups pumping millions into their reelection efforts. This is why we are seeing initiatives the public overwhelmingly supports – such as efforts to fight climate change and protect women's rights over their own bodies – blocked by elected officials who prioritize power over their constituents' demands.

Americans are paying the price for congressional inaction to curb dark money in U.S. elections. Enough is enough. I have dedicated a large part of my Senate career to advocating for government transparency and accountability. Americans are entitled to know who is influencing campaigns when they go to the ballot box this November – and every election going forward. I urge my fellow Senators to restore some basic transparency in our elections and pass the DISCLOSE Act. Our country and our precious democracy will be better for it.

# # # # #

July 15, 2022

Chairwoman Klobuchar and Ranking Member Blunt,

We write in strong support of the DISCLOSE Act (S. 443), legislation that will help end dark money and ensure voters know who's trying to influence their elections.

The bill would stop anonymous spending in our elections by requiring entities trying to influence our elections to disclose their largest political donors and would require disclosure of major donors who underwrite advertisements supporting or attacking judicial nominees.

Poll after poll has shown that Americans across the political spectrum support legislation to bring more transparency and accountability to politics. In Maine, voters in 2015 strongly supported a ballot initiative that increased disclosure requirements for state campaigns.

Voters have a right to know who is trying to influence our views and our elected representatives. However, in the current, out-of-balance system, wealthy special interests and big-money donors hold too much power, and they use political loopholes to hide their spending on lobbying, elections, and judicial nominations. This secrecy weakens voters' trust in our democracy.

We urge the Senate to take up and pass the DISCLOSE Act as soon as possible to ensure Americans know exactly who's trying to influence their vote.

Sincerely,

Jamie Kilbreth
President
Maine Citizens for Clean Elections Action

Jill Ward
President
League of Women Voters of Maine

Cc: All Members of the Senate Rules Committee

Michiganders For Fair & Transparent Elections

July 15, 2022

Dear Chairwoman Klobuchar and Ranking Member Blunt,

We write in strong support of the DISCLOSE Act (S. 443), legislation that will help end dark money and ensure voters know who's trying to influence their elections.

The bill would stop anonymous spending in our elections by requiring entities trying to influence our elections to disclose their largest political donors and would require disclosure of major donors who underwrite advertisements supporting or attacking judicial nominees.

Poll after poll has shown that Americans across the political spectrum support legislation to bring more transparency and accountability to politics. Voters have a right to know who is trying to influence their views and our elected representatives. At election time, this information is essential to discerning what candidate will actually represent voter needs and views. However, in the current, out-of-balance system, the views of wealthy special interests totally drown out the voices and needs of regular voters. With their outsized influence in the election, big-money donors gain too much power in the halls of Congress. All of this is enabled by their use of political loopholes to hide their spending on lobbying, elections, and judicial nominations.

The damage this situation has done to our Congress was bad enough. It is now clear that this dark/secret money game has substantially impaired the essential impartiality of our Supreme Court.

We urge the Senate to take up and pass the DISCLOSE Act as soon as possible to ensure Americans know exactly who's trying to influence their vote and the subsequent decisions/actions of their elected representatives.

Sincerely,

Henry L Mayers
President
Michiganders for Fair & Transparent Elections

Cc: All Members of the Senate Rules Committee

PUBLICCITIZEN

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

July 19, 2022

The Hon. Amy Klobuchar, Chairman
The Hon. Roy Blunt, Ranking Member
Committee on Rules and Administration
U.S. Senate
Washington, D.C. 20510

Testimony Submitted on Behalf of Public Citizen

Before the Senate Committee on Rules and Administration

Hearing on the DISCLOSE Act of 2021 (S. 443)

Public Citizen is pleased that the Senate Committee on Rules and Administration has decided to hold a hearing on the "Democracy Is Strengthened by Casting Light on Spending in Elections" (DISCLOSE) Act of 2021, which has been reintroduced by Sen. Sheldon Whitehouse (D-R.I.). As of this writing, the legislation has already been endorsed by 48 cosponsors in the Senate and 197 cosponsors of companion legislation in the House (H.R. 1334).

Public Citizen respectfully submits testimony to the Committee on behalf of our more than 500,000 members and activists in strong support of this newest version of the DISCLOSE Act and applauds this effort to lift the veil of secrecy cloaking who is funding our elections.

The DISCLOSE Act is an important legislative response to the gravely unfortunate 2010 Supreme Court decision, *Citizens United v. Federal Election Commission*. The Court's decision to roll back a century of American political tradition banning corporate treasury money in elections has created severe challenges to our democracy. In the electoral arena, this decision has brought a flood of new money into elections, crowding out the television airwaves near elections, ratcheting up the cost of campaigns and increasing the time and resources needed for candidate fundraising. In the legislative arena, the mere threat of corporate political spending gives corporate lobbyists a larger club to wield when negotiating with lawmakers.

The DISCLOSE Act is a desperately-needed step to repair some of the damage caused by the *Citizens United* decision and subsequent political developments over the last decade. It can provide voters with the means to decipher campaign messages by casting light on the true funding sources behind those messages. The legislative proposal also closes major loopholes in

the current disclosure laws – loopholes that have become all the more problematic as foreign entities, corporations and wealthy individuals seek ways to influence elections and pressure lawmakers by funneling money through innocuous-sounding outside groups to handle their advertising campaigns secretly on their behalf.

This legislation is a transparency-only measure. The DISCLOSE Act of 2021 would require all entities that make campaign expenditures to disclose the true sources of those funds. It would require organizations spending money in elections – including super PACs and 501(c)(4) dark money groups – to promptly disclose the true sources of all large donations during an election cycle. The legislation would prevent political operatives from hiding donors behind layers of front groups and explicitly mandates that such operatives certify they are not using foreign money for electioneering purposes. It would also require campaign ads to list the top donors in the ad itself. These measures will help Americans to easily discern who is really spending to influence our elections.

The Influx of New Money

On January 21, 2010, the U.S. Supreme Court startled the American public when it ruled in *Citizens United v. Federal Election Commission*, contrary to long-standing precedent, that corporations have a constitutional right to spend unlimited amounts of money to elect or defeat candidates for public office.

The impact on our elections was felt almost immediately. In just the first year following the decision, campaign spending by outside groups in the 2010 election soared 427 percent over spending levels in the previous midterm election. Spending by outside groups jumped to $294.2 million in the 2010 election cycle from just $68.9 million in 2006, the previous mid-term election cycle. The 2010 figures nearly matched the $301.7 million spent by outside groups in the 2008 presidential cycle. Nearly half of the money spent ($138.5 million, or 47.1 percent) came from only 10 groups.[1]

As we enter the 2022 election, estimates of the growth of campaign spending, especially by outside groups and super PACs, suggest that it will shatter all previous records. As of July 13 in the upcoming 2022 midterm election, more than $400 million has already been spent by outside groups to influence our vote choices.[2]

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[1] Public Citizen, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (January 2011) at 9, available at: https://www.citizen.org/article/12-months-after/

[2] Open Secrets, "Total Outside Spending by Election Cycle," available at: https://www.opensecrets.org/outsidespending/cycle_tots.php

Fading Disclosure

Perhaps even more alarming than the flood of new money into elections is the dramatic decline in transparency as to where all this money is coming from.

Before the Roberts Court reversed the precedents of two earlier landmark campaign finance decisions of previous Supreme Courts, the public was able to learn the identities of the sponsors of major campaign advertisements broadcast near federal elections. In the years following passage of the Bipartisan Campaign Reform Act (BCRA) of 2002, the public received nearly complete disclosure of funding sources behind electioneering communications and independent expenditures in the 2004 and 2006 elections. In the 2010 elections, with the sudden rise of corporate campaign money, donor disclosure fell to 34 percent for electioneering communications (ads that depict candidates very near an election but do not use the magic words of express advocacy, such as "vote for" or "vote against") and fell to 70 percent for express advocacy independent expenditures – marking a collapse of overall donor disclosure from nearly 100 percent in 2004 and 2006 to about 50 percent in 2010.[3]

Today, dark money has become overwhelming. Hand-in-hand with the dramatic increase in outside spending came a dramatic increase in "dark money" – money used in our elections from secret sources, including from well-disguised foreign interests. And dark money does not play party favorites. Dark money topped a staggering $1 billion in the 2020 elections, much of it boosting Democratic candidates.[4]

This fading disclosure cannot be entirely blamed on the *Citizens United* decision. In fact, the Court voted 8-1 upholding the disclosure requirements in the same ruling. The Court stated:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[5]

What the Court failed to understand was that in allowing corporate money to flow into our elections, the Court triggered a collapse of the disclosure rules. Following the 2007 *Wisconsin Right to Life v. FEC* decision, in which the Roberts Court ruled that corporations and unions may make electioneering communications so long as the ads could be interpreted as something other than an appeal to support or oppose candidates, the Federal Election Commission (FEC) modified its regulation implementing the disclosure requirement of BCRA.

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[3] Public Citizen, Disclosure Eclipse (Nov. 18, 2010) at 4-5, available at: https://www.citizen.org/wp-content/uploads/eclipsed_disclosure111820102.pdf

[4] Open Secrets, "Dark Money Topped $1 Billion in 2020, Largely Boosting Democrats," available at: https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/

[5] Citizens United v. Federal Election Commission, 558 U.S. 310 (Jan. 21, 2010).

The FEC reasoned that since corporations and labor unions could make electioneering communications, they should not be required to disclose the names of everyone who provides them with $1,000 or more for purposes unrelated to electioneering. The agency added a separate section to that effect, requiring a corporation or labor organization that makes electioneering communications to disclose "the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, *which was made for the purpose of furthering electioneering communications*." BCRA makes no such qualification; all donors must be disclosed under the plain language of the law.[6]

The new FEC rule, however, has been interpreted by a growing number of outside groups to mean that only those donors who specifically "earmark" funds for a campaign ad need be disclosed. The problem is that very, very few donors earmark their contributions for a specific purpose. Donors simply give chunks of money to outside groups whose political leanings they favor, and let the outside group determine how to spend the money. Since donations to outside groups that are not earmarked for a specific purpose – which is almost all donations – the money need not be disclosed under the new disclosure rules.

Through deregulation and lack of enforcement, very little is left of BCRA, which by all rights should be a very robust transparency law. Couple this lack of transparency with a flood of new money flowing into our elections from the *Citizens United* decision, and it becomes evident that financing campaigns in our country today is returning to the days of old when "Robber Barons" dominated government through secret corporate slush funds.

Americans Want More Transparency

A recent survey found that 92 percent of Americans overwhelmingly agree that the activities of our largest companies have an impact on society and that 86 percent of Americans think companies should be transparent about their societal impacts. The same survey found that 70 percent of Americans agree that companies have a responsibility to protect the democratic process and that 81 percent think it's important that companies disclose data about their political spending and lobbying.[7] Further, nearly all voters – 94 percent – support making nearly all political contributions fully transparent, 93 percent support providing more transparency into

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[6] 11 C.F.R. § 104.20(c)(9) (emphasis added)

[7] Jennifer Tonti, "SURVEY ANALYSIS: Americans Want to See Greater Transparency on ESG Issues and View Federal Requirements as a Key Lever for Increasing Disclosure," JUST CAPITAL (February 2022), available at: https://bit.ly/3Qt8e2g.

lobbyist fundraising, and 92 percent support prohibiting political candidates from benefiting from unlimited secret corporate money to boost their campaigns.[8]

Shareholders- the owners of Corporate America's money- are concerned about the erosion of democracy and the risks posed by corporations spending undisclosed amounts of shareholder money in politics. Our capital markets need a robust and fully functioning democracy to thrive. Additionally, a company's political spending is relevant to its shareholders because it can present significant reputational risk if not disclosed and managed properly. Many customers and the purchasing public are paying close attention to whether a company's political activity lines up with its corporate values. If there is a disconnect, companies can face bad press, boycotts, or targeted social media campaigns, all things that can impact the bottom line and hurt investors.

Absent clear disclosure around 501(c)4 "dark money" groups, companies can risk additional scandal. For example, FirstEnergy came under fire for funneling $60 million through nonprofit groups to support the Ohio Speaker of the House, Larry Householder, allegedly in exchange for a bailout of its nuclear power plants.[9] In addition to the scandalous fallout, shareholders have brought a lawsuit against the company that could end up costing $180 million.[10]

The history of shareholder proposals on political activity demonstrates the intense investor interest in this information. Shareholder proposals asking companies to fully disclose their political activity have been one of the most filed categories of ESG-related proposals since 2013. As of late February, 101 political activity proposals were filed for the 2022 proxy season, up from 89 in 2021.[11] The DISCLOSE Act would make such corporate political spending transparent to both shareholders and the public.

Conclusion: The DISCLOSE Act Reinstates Full Transparency, All the While Protecting Non-Electioneering Political Speech

It is a well-established norm of American politics that voters have a right to know who is paying, and how much they are paying, for campaign ads. The Supreme Court has upheld the

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[8] Global Strategy Group and ALG Research, "NEW POLL: For the People Act is Popular with Voters," NEWSLETTER (March 15, 2021), available at: https://endcitizensunited.org/wp-content/uploads/2021/03/ECU-For-the-People-Act-Matching-Funds-Memo-F03.15.21.pdf.

[9] Associated Press, "Angry Shareholders Pile into Lawsuits That Could Cost FirstEnergy Millions of Dollars," *Pittsburg-Post Gazette* (January 1, 2021), available at: https://bit.ly/3zIwvv0.

[10] FirstEnergy, "FirstEnergy Agrees on Terms to Resolve Shareholder Derivative Litigation," News release (February 10, 2022), available at: https://bit.ly/3HzkrOF.

[11] ProxyPreview, "Corporate Political Influence," ESG PROXY VOTE ALERTS (viewed on June 17, 2022), available at: https://bit.ly/3HBu931.

principle of disclosure in election spending over and over again – including most recently in the *Citizen United* ruling 8 to 1 – recognizing that who is paying for campaign advertising is valuable information that helps voters judge the merits of the barrage of ads that overwhelm the airwaves every election. The DISCLOSE Act of 2021 will provide voters with exactly that information.

At the same time, the DISCLOSE Act is not overly burdensome for groups that conduct both electioneering activity and activity unrelated to elections, such as genuine issue advocacy. The measure allows any group that wants to get involved in elections to set up a separate electioneering fund and only disclose the sources of money going into that electioneering fund. If a group decides to spend general treasury revenues, then it must disclose all its donors as required under BCRA.

To ensure that groups take some responsibility for the tone and content of their ads, the legislation also would require electioneering groups to list their top five funders. The head of such an organization must also appear in the ad itself and declare that he or she approves of the message.

The DISCLOSE Act also addresses the relatively new but growing problem of foreign sources spending to influence our elections through front groups or on social media platforms. Political operatives must certify they are not using foreign money for electioneering purposes – a certification enforced by the comprehensive disclosure requirements – and large social media platforms must also document and disclose the sources of political spending and strictly abide by the ban on foreign money in our elections.

The DISCLOSE Act of 2021 is commonsense, straightforward legislation that would reinstate full transparency of electioneering spending and go a long way toward reining in some of the damage caused by the *Citizens United* decision. Public Citizen enthusiastically supports passage of the DISCLOSE Act.

Respectfully Submitted,

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PEOPLE UNITED *for* PRIVACY

July 25, 2022

The Honorable Amy Klobuchar
United States Senate
Washington, DC 20510

The Honorable Roy Blunt
United States Senate
Washington, DC 20510

Re: Opposition to the DISCLOSE Act and its Destructive Impact on Nonprofit Advocacy and Citizen Privacy

Dear Chairwoman Klobuchar, Ranking Member Blunt, and Members of the Senate Committee on Rules and Administration:

On behalf of People United for Privacy (PUFP),[1] I submit the following letter for the hearing record responding to several inaccurate and misleading arguments discussed in the United States Senate Committee on Rules and Administration's July 19, 2022 hearing on "The DISCLOSE Act," introduced as S. 443 in the 117th Congress. Associational privacy is an enduring First Amendment right that has been repeatedly affirmed by the United States Supreme Court for decades and shares widespread support among Americans regardless of their political leanings. PUFP exists to safeguard the freedom of speech and association rights of nonprofits and their supporters in America – regardless of their beliefs or the level of an individual's financial support for the causes of their choice.

During the hearing, proponents of the so-called "DISCLOSE Act" positioned it as a campaign finance bill that impacts only political advocacy surrounding election campaigns. Make no mistake: **The DISCLOSE Act is not a campaign finance bill. It's an attack on issue advocacy and the ability for nonprofits of all persuasions to engage on policy issues central to their mission.** Further, it is an unprecedented assault on the long-held right of Americans to support the nonprofit causes of their choice privately if they so choose. This draconian bill gives the government power its never held to surveil the caused-based giving of American citizens, and the legislation is intended to dry up such giving. As now-Senator Majority Leader Chuck Schumer (D-NY) boasted when first debuting the DISCLOSE Act in 2010, "[t]he deterrent effect" of the bill's nonprofit donor disclosure provisions "should not be underestimated."[2]

The DISCLOSE Act will require nonprofits to publicly report their supporters to the Federal Election Commission (FEC) for common types of policy communications, including on the internet, and further require organizations to declare whether they support or oppose a political candidate, even if their message is about a legislative issue and not related to any campaign. Among the many issues:

[1] People United for Privacy (PUFP) defends the rights of all Americans – regardless of their beliefs – to come together in support of their shared values. Nonprofit organizations perform important work in communities across the United States, and we protect the ability of nonprofit donors to support causes and exercise their First Amendment rights privately.
[2] T.W. Farnam, "The Influence Industry: Disclose Act could deter involvement in elections," *The Washington Post*. Available at: https://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051205094.html (May 13, 2010).

- The bill creates a new category of expenditure called "campaign-related disbursements" that includes speech common for nonprofits, such as mentioning a federal candidate in the context of pending legislation or current policy debates.
- Organizations making "campaign-related disbursements" totaling more than $10,000 during a two-year "election reporting cycle" (or calendar year for a "Federal judicial nomination communication") must publicly report the names and addresses of all donors giving $10,000 or more during that period to the FEC.
- In effect, groups speaking about issues in Congress (or federal judicial nominees) will be forced to report the names and addresses of their supporters to the government for inclusion in a publicly searchable database.
- Inexplicably, any speech that mentions a federal candidate will trigger a filing requirement to report whether that speech advocates for or against the elected official – even if the message has nothing to do with their campaign.
- Additionally, the bill expands existing disclaimer requirements to mandate the listing of an organization's "top funders" in lengthy statements accompanying a group's message on communications about public policy. This chilling provision would mislead the public by associating individuals with a message they may be unaware of and with which they may disagree. In effect, the disclaimer will shift the public's focus onto a nonprofit's supporters rather than the substance of a group's message, accelerating the erosion of quality public discourse about the issues of the day.
- The Act would also harm philanthropy by requiring nonprofits that make grants or payments to another organization to disclose their donors to the FEC, if the receiving organization plans to make "campaign-related disbursements" totaling $50,000 or more *within the next two years*. Granting organizations will then be placed in the impossible position of predicting what the recipient may do in the future.

Taken together, the aggressive mandates in this bill would violate Americans' privacy, facilitate harassment, and decrease civic engagement.

On multiple occasions, including as recently as last year in *Americans for Prosperity Foundation* (*AFPF*) *v. Bonta*, the Supreme Court has recognized that forcing an organization to release its member and donor lists to the government not only divulges the First Amendment activities of individual members and donors but may also deter such activities in the first place. Individuals may legitimately fear any number of damaging consequences from disclosure, including harassment, adverse governmental action, and reprisals by an employer, neighbor, or community member. Or they may simply prefer not to have their affiliations disclosed publicly – or subjected to the possibility of disclosure – for a variety of reasons rooted in religious practice, modesty, or a desire to avoid unwanted solicitations. For nonprofits, privacy is especially important for organizations that challenge the practices and policies of the very governments that seek the identities of their members and supporters. The DISCLOSE Act takes a strong stand in opposition to the Court's respect for citizen privacy rights and, for those reasons, it is of dubious constitutionality.

Beyond the myriad of practical issues with this measure, several arguments were made at the hearing that obscure the true impact of the bill and its devastating impact on all nonprofit causes.

1) **Support for citizen privacy – and opposition to DISCLOSE Act-style reporting mandates – is robustly bipartisan.** Despite claims by the measure's supporters at the

hearing that nonprofit donor disclosure is popular, actions from the nonprofit community and recent polling reveal the opposite. In last year's *AFPF v. Bonta* ruling, over 280 groups signed 43 amicus briefs in support of citizen privacy.[3] These signers represent a wide range of causes and political preferences, including progressive advocacy groups, conservative think tanks, religious organizations, trade associations, animal and human welfare advocates, educational institutions, community services, and arts and culture-focused organizations. As Chief Justice Roberts wrote in the Court's majority opinion, "[t]he gravity of the privacy concerns in [the disclosure] context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect [of disclosure] feared by these organizations is real and pervasive…."

Beyond widespread support for this First Amendment right in the nonprofit community, polling confirms strong support for citizen privacy – and fear of disclosure – among Americans as well. A Harvard CAPS-Harris poll released in March 2021 found that 64% of respondents believe a "growing cancel culture" threatens their freedom while 36% of those surveyed agreed that cancel culture is a "big problem."[4] A paltry 13% percent of participants replied that "cancel culture" is "not a problem." Additionally, the poll found that 54% of respondents were "concerned" that voicing their opinions online could result in lost employment or the shuttering of their social media accounts. These worrying findings reinforce the conclusions of a summer 2020 poll from the Cato Institute, which verified that 62% of Americans across the political spectrum and various identity groups have political views that they are afraid to share in our current political climate.[5] Further, 32% of respondents in that poll were worried about being passed by for job opportunities solely because of their political views. If Americans were forced to publicize the nonprofit causes they support, it is clear many would refrain from giving at all, something DISCLOSE supporters seem to realize too.

If there's any doubt remaining about bipartisan opposition to the DISCLOSE Act's disclosure mandates, consider this warning from two ACLU attorneys expressing serious concerns about the impact of the measure's donor exposure policies: The bill "contains significant flaws that are detrimental to the health of our democracy and will likely have unintended consequences on the political rights of noncitizen immigrants as well as many nonprofits, including civil rights organizations and other civil liberties movement builders." They continue: "Why should [the bill's] sponsors and supporters care? Because it could directly interfere with the ability of many to engage in political speech about causes that they care about and that impact their lives by imposing new and onerous

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[3] *See* "Free speech case attracts support from nearly 300 diverse groups," Americans for Prosperity. Available at: https://americansforprosperity.org/wp-content/uploads/2021/04/AFPF-v-Becerra-Amici.pdf (April 2021).
[4] Brittany Bernstein, "POLL: Majority of Americans See Cancel Culture as Threat to Freedom," Aol. Available at: https://www.aol.com/news/poll-majority-americans-see-cancel-213920486.html (March 29, 2021).
[5] Emily Ekins, "Poll: 62% of Americans Say They Have Political Views They're Afraid to Share," Cato Institute. Available at: https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share (July 22, 2020).

disclosure requirements on nonprofits committed to advancing those causes. We know from history that people engaged in politically charged issues become political targets and are often subject to threats of harassment or even violence."[6]

One thing the nonprofit community can agree on is the importance of defending the right to engage in free speech and to debate issues that we may disagree on. Nonprofits of all stripes are united in support of donor privacy and the right of individuals to exercise their First Amendment rights privately.

2) **The DISCLOSE Act's unprecedented disclosure mandates would impact <u>all</u> organizations, not only those promoting controversial or minority viewpoints.** It was noted several times during the hearing that the donor exposure demands in the Act would harm minority or controversial viewpoints. This is undeniably true, but it ignores the reality that disclosure can be weaponized against mainstream viewpoints as well. Especially in today's hyperpartisan and volatile political climate, it only takes one person to use disclosure data to cause harm to their opponents.

In 2015, a shooting at a Colorado Springs Planned Parenthood clinic tragically led to the deaths of three people and injuries to nine others. The standoff finally ended when police crashed armored vehicles into the lobby of the building to rescue people locked in a protected room. During courtroom appearances, the attacker made multiple statements about his anti-abortion views and called himself a "warrior for the babies."[7]

This June, a Life Choices pregnancy center in Colorado was vandalized and set on fire following the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*. Fortunately, no one was killed in that attack, but the building sustained heavy damage. Graffiti on the building included the warning, "if abortions aren't safe, neither are you."[8] To compound the threat, an extremist group shared a map of pro-life crisis pregnancy centers on social media with threatening messages.

If the DISCLOSE Act was law and either Planned Parenthood or Life Choices were forced to report the names and home addresses of their supporters to the government for inclusion in a publicly accessible database, these attacks could have been even more devastating. The Planned Parenthood shooter could have targeted donors at their homes or places of business, and the Life Choices arsonists could have taken their anger to the doorsteps of those supporters' homes. Should Americans with pro-life and pro-abortion views be subject to such danger?

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[6] Kate Ruane and Sonia Gill, "H.R. 1 could restore our democracy. As it's written now, it could hurt it, too." *The Washington Post*. Available at: https://www.washingtonpost.com/opinions/2021/03/03/aclu-lawyers-hr1-flaws-nonprofits/ (March 3, 2021). The text of the DISCLOSE Act was included in H.R. 1 and S. 1 in the 117th Congress.

[7] Trevor Hughes, "Planned Parenthood shooter 'happy' with his attack," *USA Today*. Available at: https://www.usatoday.com/story/news/2016/04/11/planned-parenthood-shooter-happy-his-attack/32579921/ (April 11, 2016).

[8] Alberto Luperon, "Someone Set Fire to 'Christ-Centered Ministry,' Vandalized Premises After Supreme Court's Abortion Ruling," *Law & Crime*. Available at: https://lawandcrime.com/crime/someone-set-fire-to-christ-centered-ministry-vandalized-premises-after-supreme-courts-abortion-ruling/ (June 26, 2022).

Consider another example. Many Americans support a transition to Democracy in China, but donor disclosure in the manner contemplated by the DISCLOSE Act would cripple this movement. The Founder and President of Citizen Power Initiatives for China, a U.S.-based nonprofit organization advocating for democracy in his native China, explains why: "Most people who want to support us, including those living in the U.S., have some connection to China through their family, friends, or business. China has a long arm to harass and surveil. Public exposure of our supporters' identities by federal or state agencies in the United States would enable the Chinese government and others acting on its behalf to more easily threaten and harass our supporters. Many people in the U.S. have demurred from supporting our cause because of these fears. Our story should give pause to politicians in the United States who seek to force nonprofits to publicly expose their supporters when speaking on matters of public concern… It is no exaggeration to say that privacy is a matter of life and death for our members and donors as well as for our organization itself. Our work would be unsustainable without the ability to shield our supporters. The same is true for many other important causes supported by nonprofits throughout the United States."[9]

3) **A healthy First Amendment culture promotes transparency in government but privacy for citizens.** During the hearing, Senator Angus King (I-ME) questioned why he and other elected officials must be transparent about their roll call votes while Americans who support nonprofit causes can do so privately. The question was regrettable, but the answer is very simple: Transparency is for government. Privacy is for citizens.

   When individuals run for and win elected office, they do so to represent the interests of the American people. This is markedly different than private citizens who owe no duty to publicize their personal beliefs to their peers. Americans who choose to give to nonprofit causes do so with the understanding that those organizations will more effectively and efficiently communicate their views. This isn't a new phenomenon. American citizens have supported causes since the country's founding era and have done so privately for just as long. What's new is the expectation of some elected officials that they can pry into the private beliefs of their constituents by forcing disclosure of those views through measures like the DISCLOSE Act.

4) **Privacy rights guaranteed under the First Amendment don't disappear at an arbitrary threshold.** Throughout the hearing, arguments were made that nonprofit supporters had no expectation to privacy if they donated over a certain threshold. In the DISCLOSE Act, that exposure threshold is currently set at $10,000. While a relatively small number of Americans will ever donate that much to a nonprofit organization, the passage of a bill like DISCLOSE will inevitably result in fewer such donations, limiting speech, harming impacted nonprofits' ability to fulfill their mission, and discouraging future donations, including those *under* the threshold. These outcomes harm *all* supporters of a nonprofit, not just those individuals whose name and home address are publicly disclosed.

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[9] Jianli Yang, "When Donor Privacy is a Life or Death Matter," *RealClearPolicy*. Available at: https://www.realclearpolicy.com/articles/2022/07/15/when_donor_privacy_is_a_life_or_death_matter_842585.html (July 15, 2022).

> The downstream chilling effects of this threshold are real. Once exposed, a nonprofit's significant donors are likely to receive media scrutiny or worse from the organization's issue opponents. We can be sure other supporters, who currently remain private, will cease their donations for fear of the same outcome. There will be other lower-level supporters who don't understand the complexity of the law and who will mistakenly assume that their identity will be outed as well. Again, the result will be that the individual chooses not to donate, and the nonprofit and all its supporters will suffer. And, of course, there is no guarantee that Members of Congress won't lower the threshold over time. If the goal of some lawmakers is to expose donors to nonprofits, and the threshold motivates many to give just under the $10,000 trigger to protect their privacy, it's inevitable there will be calls to lower the amount further.[10] This vicious cycle will harm Americans' privacy and chill nonprofit advocacy on every issue imaginable, to the detriment of civil society.

* * *

Nonprofit organizations are forces for good and have long played a role in educating Americans and policymakers about complex issues. Nonprofits also serve as a shield for people who are uncomfortable or unable to speak publicly about an issue on their own, a vital societal function. While some donors may prefer their name to be listed publicly as a supporter of a cause, many donors fear such attention because they value their privacy. If anything, today's highly charged political climate gives Americans even more reason to keep their beliefs and giving private.

It is not difficult to imagine a nonstop wave of targeting and harassment campaigns across the country if donor information is routinely published in a searchable government database. The First Amendment would effectively be a dead letter as Americans would sacrifice their free speech rights to preserve their privacy and save themselves from lost employment, physical harm, and other forms of harassment and intimidation. Lamentably, this silencing of debate appears to be exactly what nonprofit donor disclosure proponents hope to accomplish.

On behalf of the millions of American citizens represented by organizations that speak on their behalf, we strongly urge you to protect nonprofit donor privacy and reject the DISCLOSE Act.

Sincerely,

Matt Nese
Vice President
People United for Privacy

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[10] For additional discussion of this issue, *see* Alex Baiocco, "A Threshold for Violating Your Rights Still Violates Your Rights," Institute for Free Speech. Available at: https://www.ifs.org/blog/hr1-disclosure-threshold-violates-your-rights/ (April 29, 2021).

July 18, 2022

The Honorable Amy Klobuchar
Chair, U.S. Senate Committee on Rules and Administration
425 Dirksen Senate Building
Washington, D.C. 20510

The Honorable Roy Blunt
Ranking Member, U.S. Senate Committee on Rules and Administration
260 Russell Senate Office Building
Washington, D.C. 20510

Chair Klobuchar and Ranking Member Blunt,

On behalf of Stand Up America and our two million members around the country, we write in strong support of the DISCLOSE Act (S. 443), legislation that will help end dark money and ensure voters know who's trying to influence their elections.

The DISCLOSE Act would stop anonymous spending in our elections by requiring entities trying to influence our elections to disclose their largest political donors and would require disclosure of major donors who underwrite advertisements supporting or attacking judicial nominees. The bill would also address serious vulnerabilities that currently allow foreign actors to meddle in our elections.

Poll after poll has shown that Americans across the political spectrum support legislation to bring more transparency and accountability to politics. Voters have a right to know who is trying to influence our views and our elected representatives. However, in the current, out-of-balance system, dark money spending has skyrocketed from roughly $6 million in 2006, to more than $1 billion in 2020. Wealthy special interests and big-money donors hold too much power, and they use political loopholes to hide their spending on lobbying, elections, and judicial nominations.

We applaud the Senate Committee on Rules and Administration's upcoming hearing on the DISCLOSE Act, and we urge the Senate to take up and pass this legislation as soon as possible to ensure Americans know exactly who's trying to influence their vote.

Sincerely,

Christina Harvey
Executive Director
Stand Up America

Cc: All Members of the Senate Rules Committee

Senate Committee on Rules and Administration
S. 443, the DISCLOSE Act
July 19, 2022
Questions for the Record
Ms. Kase Solomón

Chairwoman Klobuchar

One provision in the *DISCLOSE Act* requires the leaders of organizations engaging in political activity to read brief disclosure statements in their ads, similar to the rules currently in effect for ads from political candidates.

- As the leader of an organization that engages in political advocacy, why do you think this requirement is important to help the public understand who is trying to influence their vote?

As an organization supporting the rights of voters to participate in our democracy, the League of Women Voters of the United States supports the *DISCLOSE Act*'s goal to help the public understand who is trying to influence their vote. As you note in your question, Madame Chair, the bill's provision requiring leaders of organizations engaging in political activity to read brief disclosure statements in their ads is consistent with disclosure requirements for other political advertising. The organizations producing political advertising, both those directly connected with political candidates and those outside of political campaigns, are engaging in an activity with the same end- to further a political agenda. When two organizations- one connected to a campaign and another independent of the campaign, are taking the same action, they should be subject to the same rules.

These rules are critical to equip voters with information about the source of a political position spread by an advertisement. Voters can then make their own conclusion about the trustworthiness of the content presented in the advertisement when they have a clear understanding of the special interests who want them to support a certain political position or candidate. As it stands currently, money can flow into our elections without voters having any information more specific than the name of a shell company or an ambiguously named foundation that accepted dark money to fund an advertisement. This disclosure requirement is incredibly important for fair elections, but it is not radical, it only closes a loophole that has allowed dark money to spread untraceable political positions from huge donors to the general public.

Senate Committee on Rules and Administration
S. 443, the DISCLOSE Act
July 19, 2022
Questions for the Record
Mr. Weiner

Chairwoman Klobuchar

During the hearing, you testified about the flood of unaccountable dark money that has flooded out elections since the Supreme Court's decision in Citizens United. Another witness, Mr. Keating, suggested that the impact of secret money is diminishing, saying "in 2020 we saw less so-called dark money than in any election since Citizens United."

- **How would you respond to Mr. Keating's statement?**

What Mr. Keating characterizes as a decrease in dark money in 2020 appears primarily attributable to shifts in spending strategy as opposed to an actual diminishment in the use of campaign money from undisclosed sources. Mr. Keating appears to be referring to direct spending on certain political ads that groups are required to report to the FEC (without disclosing the names of the donors who paid for it).[1] But as I explained in my testimony, this reported spending is a subset—sometimes a very small subset—of total electoral spending by dark money groups.

For instance, many dark money groups are now donating millions of dollars to super PACs rather than directly purchasing ads themselves.[2] Such donations topped $660 million in just the 2020 cycle.[3] While recipient super PACs must disclose these donations, the dark money groups themselves have no obligation to include this spending on their reports,[4] and no obligation to disclose the underlying sources for this money. Dark money groups, like all political spenders, also appear to increasingly be spending money on online ads,[5] which are subject to almost no transparency requirements unless they contain so-called "express advocacy"— language explicitly calling for the election or defeat of a candidate—or the functional equivalent.[6] Since very few ads include such specific language, this electoral spending also goes largely unreported.[7]

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[1] See Brad Smith, "The 2020 Election Could See Record Lows for 'Dark Money' Influence," Institute for Free Speech, September 2, 2020, https://www.ifs.org/news/the-2020-election-could-see-record-lows-for-dark-money-influence (basing conclusions on dark money spending in 2020 off FEC data).
[2] See Eliana Miller, "Top Presidential Super PACs Boosted by 'Dark Money' Donations," Open Secrets, September 22, 2020, https://www.opensecrets.org/news/2020/09/super-pacs-boost-dark-money-920.
[3] Anna Massoglia and Karl Evers-Hillstrom, "'Dark Money Topped $1 Billion in 2020, Largely Boosting Democrats," Open Secrets, March 17, 2021, https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle.
[4] See 11 C.F.R. §§ 104.20(b), 109.10(b)–(e) (2022).
[5] Massoglia and Evers-Hillstrom, "Dark Money Topped $1 Billion" (reporting that dark money groups spent $132 million on digital ads in 2020).
[6] See 11 C.F.R. §§ 104.20, 100.16; Karl Evers-Hillstrom, "Shining a Light on 'Dark Money' and Online Ad Spending," Open Secrets, March 14, 2019, https://www.opensecrets.org/news/2019/03/shining-a-light-on-dark-money-ssw.
[7] See Erika Franklin Fowler et al., "Online Political Advertising in the United States," in *Social Media and Democracy: The State of the Field and Prospects for Reform*, by Nathaniel Persily and Joshua A. Tucker (Cambridge: Cambridge University Press, 2020), 114–15.

Neither of these categories of spending are included in Mr. Keating's analysis. Adding them in brings total dark money spending in the 2020 election cycle to approximately $1 billion, according to the nonpartisan Center for Responsive Politics.[8] There is no indication that this level of spending represents a decrease relative to previous cycles. While we have not found precise numbers, given the overall exponential increase in federal election spending in 2020, the opposite is far more likely to be true.[9]

Senator Cruz

- **How much money has George Soros donated to the Brennan Center for Justice since its founding in 1995? Please err on the side of overinclusion.**

A review of our records has uncovered no personal donation from George Soros to the Brennan Center for Justice.

- **Collectively, how much money has the Brennan Center received from George Soros-funded or affiliated groups, including, but not limited, to the Open Society Foundations, New America, and Arabella Advisors (including its affiliated New Venture Fund, Windward Fund, North Fund, Hopewell Fund, and Sixteen Thirty Fund), since its founding in 1995? Please err on the side of overinclusion.**

According to the review we conducted of our records, of the eight listed entities identified in this question, we have received donations from the Open Society Foundations (as I noted in our exchange at the July 19 hearing) and the New Venture Fund. Information about these and other donors in the last decade is publicly available in our Annual Reports (previously titled our Annual Journal of Collected Writings). Our 2021 annual report is included with this response. Our annual reports and journals for the years 2012 through 2020 can be found at the following links: 2020 Annual Report, 2019 Annual Report, 2018 Annual Report, 2017 Annual Writings, 2016 Annual Writings, 2015 Annual Writings, 2014 Annual Writings, 2013 Annual Writings, 2012 Annual Writings.

[8] Massoglia and Evers-Hillstrom, "Dark Money Topped $1 Billion".
[9] See Karl Evers-Hillstrom, "Most Expensive Ever: 2020 Election Cost $14.4 Billion," Open Secrets, February 11, 2021, https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16.

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