

No. 19-251

In The Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

MATTHEW RODRIQUEZ, IN HIS OFFICIAL CAPACITY AS
THE ACTING ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

**On Writ of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF U.S. SENATORS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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STATEMENT OF INTEREST¹

Amici Curiae are United States Senators Sheldon Whitehouse of Rhode Island, Patrick Leahy of Vermont, Ron Wyden of Oregon, Richard J. Durbin of Illinois, Amy Klobuchar of Minnesota, Jeffrey A. Merkley of Oregon, Christopher A. Coons of Delaware, Richard Blumenthal of Connecticut, Tammy Baldwin of Wisconsin, Mazie Hirono of Hawaii, Elizabeth Warren of Massachusetts, Edward J. Markey of Massachusetts, Cory A. Booker of New Jersey, Chris Van Hollen of Maryland, and Tammy Duckworth of Illinois. *Amici* Senators' careers in public service collectively include decades of political engagement at the local, state, and national level, spanning numerous elections.

As officeholders and candidates, *amici* Senators have had a front row seat to money's corrupting influence in our democratic process, and the resulting erosion of public confidence in our government. *Amici* Senators have watched this situation dramatically worsen as effective campaign finance oversight has collapsed. Political spending by opaque entities with hidden funders has come to dominate the public sphere, unchecked by the scrutiny that transparency once provided.

¹ No counsel for a party authored any part of this brief or made a monetary contribution toward its preparation or submission. Only the *amici* and their counsel have paid for its filing and submission. Pursuant to Rule 37.3(a), all parties consented to this brief's filing. Petitioner's blanket consent is filed with the Court, and Respondent consented individually in writing.

Amici Senators submit this brief to (a) highlight the deleterious effect that anonymous spending — or “dark money” — has on our elections and public discourse, and (b) explain how 501(c) organizations have been used by powerful interests to exert political influence under the cloak of anonymity. *Amici* Senators caution that every expansion of dark money’s reach — particularly the broad expansion of dark money rights sought by Petitioner and numerous *amici* here — will further degrade our already troubled politics and public discourse.

SUMMARY OF ARGUMENT

Petitioner frames this case as a stark contest between the overweening power of the state and the First Amendment right of ordinary citizens to freely associate. But it is no less crucial that citizens enjoy transparency into how the policies that shape their lives come into being.

Citizenship confers responsibilities, including voting to elect and remove public officials. To discharge these responsibilities effectively, citizens must possess basic information. That basic information includes knowing who is seeking to influence their votes, and who is supporting or opposing the candidates and policies at issue in our elections. In short, citizens need to know who the true players are on the political stage, so as to identify motives, conflicts of interest, and possible coordinated schemes to manipulate public opinion.

This “informational interest”² of the public is an essential component of a healthy democracy.

The core concern ostensibly at issue in this case is California’s requirement that 501(c) organizations disclose their largest financial donors to state tax officials in order to operate legally in California. Nonprofits fulfill this mandate by submitting Schedule B of their Form 990, which they are already required to prepare and submit to the Internal Revenue Service (IRS). The State requires no more information than the IRS has required in the past and, like the IRS, keeps that information confidential from the public. California has a clear and substantial government interest — namely, preventing fraud, self-dealing and criminal tax evasion — for requiring this limited confidential

² See Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1465 (2014) (“Beginning in *Buckley*, the Supreme Court has recognized an important informational interest in disclosure. According to the Court, the content of disclosure may aid the electorate by informing an analysis of candidate positions that goes beyond explicit party labels and campaign speeches.”); James Madison, Letter to W.T. Barry (Aug. 4, 1822), *available at* <https://founders.archives.gov/documents/Madison/04-02-02-0480> (“[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”); Thomas Jefferson, Letter to Charles Yancey (Jan. 6, 1816), *available at* <https://founders.archives.gov/documents/Jefferson/03-09-02-0209> (“[T]he functionaries of every government have propensities to command at will the liberty & property of their constituents. There is no safe deposit for these but with the people themselves; nor can they be safe with them without information.”).

disclosure, just as other states have. So this would seem to be a reasonably modest and straightforward case.

The chorus of opposition says otherwise. Not only has California’s mandate elicited a facial constitutional challenge by Petitioner; it has drawn rebuke from a veritable flotilla of industry-aligned nonprofits and “think tanks” acting as *amici curiae* — a number of whose funding sources overlap with Petitioner’s and/or one another’s. It is among the largest such assemblages ever presented to the Court.³ Their number and their arguments suggest a much bigger game is afoot.

Amici Senators submit that this appeal is just the latest move in the steady and methodical campaign pursued by powerful interests to both cement and obscure their influence over the public sphere since this Court’s decision in *Citizens United v. Fed. Elec. Comm’n*.⁴ The effect of these efforts has been to deprive the citizenry of information and make our democracy less representative.

³ At the cert stage alone, more than 60 organizations with ties to Petitioners filed *amicus* briefs in their support, with even more joining in at the merits stage. In fact, the *amicus* activity in this case greatly exceeds the activity in cases with evidently massive national implications, including cases involving the Affordable Care Act (*King v. Burwell* and *NFIB v. Sibelius*), labor rights (*Janus v. AFSCME*), and the Consumer Financial Protection Bureau (*Seila Law v. CFPB*). This should give the Court pause that there may be more to this case than meets the eye.

⁴ *Citizens United v. Fed. Elec. Comm’n*, 558 U.S. 310 (2010).

The trajectory over the last ten years has been stark and unrelenting. *Citizens United* opened the door to unlimited political spending by powerful influencers. Rampant violation of that decision’s transparency predicate has allowed such influencers to wield that power anonymously, through dark-money expenditures. The next goal, as the arguments by Petitioner and many *amici* make plain, is for dark-money contributors to secure broad constitutional protection of their anonymous influence,⁵ so they can attack any and all disclosure requirements in other contexts — a “moon shot” to lock in dark money’s hold on our politics and policy-making, possibly forever.

The Court should decline the invitation. The greatest beneficiaries of *Citizens United* were the powerful interests who have the means and motive to spend unlimited sums to influence our elections. The theory undergirding that decision was that the potentially overwhelming and even distorting effect of such spending on our politics would be blunted by voters’ ability to see who and what interests were behind the explosion of messages designed to influence them. But that hasn’t happened. Instead, the undermining of *Citizens United*’s transparency predicate has been deliberate and systematic,⁶

⁵ See Matt Ford, *How Far Will the Roberts Court Go to Protect Shadowy Political Donors?*, THE NEW REPUBLIC (Jan. 10, 2020) (“A coalition of conservative political organizations is asking the Supreme Court to weaponize the First Amendment in the service of dark money.”).

⁶ See Anna Massoglia, *State of Money in Politics: Billion-Dollar ‘Dark Money’ Spending Is Just the Tip of the Iceberg*, OpenSecrets.org (Feb. 21, 2019),

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significantly hollowing the rationale for lifting campaign finance limitations in the first place.

Amici Senators urge the Court to recognize the long game that has brought our democracy to this point, and which underlies the facial constitutional challenge being made here. The Court should firmly resist a broad ruling that can be used by Petitioner and its ilk to tighten dark money's hold over our politics, policy, and public discourse. America faces enough challenges without further eroding the public's confidence in government's ability to perform an essential function: to represent the people fairly, regardless of their influence or net worth.

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<https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg/> (“Secret donor-funded ‘dark money’ spending reported to the Federal Election Commission has officially exceeded \$1 billion according to a new analysis by the Center for Responsive Politics, and that barely begins to scratch the surface of political spending by groups that don’t fully disclose their donors.”).

ARGUMENT

I. THE BROAD HISTORICAL STRUGGLE BETWEEN SPECIAL INTERESTS AND THE PUBLIC INTEREST PROVIDES THE NECESSARY CONTEXT FOR THIS CASE.

A. Secrecy Strengthens the Power of the Influencer Class.

Tension has always existed in our government between an influencer class, which occupies itself with aggregating power and favor-seeking from those in elected office, and the general population, which merely wants a government that will not too readily yield to the influencers.⁷ This tension — an

⁷ See, e.g., Theodore Roosevelt, *The New Nationalism*, Speech at Osawatomie, Kansas (Aug. 31, 1910), *reprinted in* THEODORE ROOSEVELT, 3 *THE NEW NATIONALISM* 17 (1910) (“The absence of effective State, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power.”); Andrew Jackson, *Veto Message Regarding the Bank of the United States* (July 10, 1832), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 590 (James D. Richardson ed., Washington Gov’t Printing Office 1896) (“It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes . . . to make the rich richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government.”); James Madison, *Federalist No. 62* (Feb. 27, 1788) (observing the “unreasonable advantage” of the “sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass

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elemental political fact — has been observed in societies everywhere, for centuries.⁸

The Court has on occasion recognized this tension, and the threat that unchecked influence by secretive powers can pose to the polity. “Influences secretly urged under false and covert pretences must necessarily operate deleteriously,” subjecting “government[] to the combined capital of wealthy corporations, and produc[ing] universal corruption[.]”⁹ See also *McCutcheon v. Fed. Elec. Comm’n*, 572 U.S. 185, 237 (2014) (Breyer, J., dissenting) (“Where enough money calls the tune, the general public will not be heard”).

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of the people” to enjoy “a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens.”).

⁸ See DAVID HUME, 3 THE PHILOSOPHICAL WORKS OF DAVID HUME 298-99 (1st ed. 1826) (“[w]here the riches are in few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry.”); NICCOLO MACHIAVELLI, THE PRINCE, ch. IX, 62 (1532) (“[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.”); CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS, Book V, 63 (1748) (“To men of overgrown estates, everything which does not contribute to advance their power and honour is considered by them as an injury.”).

⁹ *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 335 (1853), *overruled by statute on other grounds*, 72 Stat. 415 (codified at 28 U.S.C. § 1332(c)).

*Citizens United*¹⁰ removed limitations that had existed, in one form or another, for more than a century on spending by powerful political interests.¹¹ The Court stood its decision on two predicates: independence and transparency. The Court reasoned that “independent” expenditures, while creating “ingratiation and access” for the largest spenders, would nevertheless not lead to “undue influence” or corruption absent an explicit *quid pro quo*.¹² The Court also reasoned that transparency would safeguard political integrity, notwithstanding the unfettered spending that was to ensue: “With the advent of the Internet,” the Court stated, “prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable.”¹³

Citizens United triggered a general collapse of limits both on outside spending and on contributions to groups that engage in such spending.¹⁴ The

¹⁰ *Citizens United*, 558 U.S. at 320; *see also* 2 U.S.C. § 441(b) (2000).

¹¹ *Citizens United*, 558 U.S. at 432-33 (2010) (Stevens, J., dissenting) (“At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates.”).

¹² *Id.* at 360.

¹³ *Id.* at 370.

¹⁴ *See SpeechNow.org v. Fed. Elec. Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc); FEC Advisory Opinion No. 2010-11 (Commonsense Ten), July 22, 2010, *available at* <http://saos.fec.gov/aodocs/AO%202010-11.pdf> (recognizing that

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result was an explosion in political spending by deep-pocketed interests. Non-party independent groups spent **\$4.5 billion** on elections between 2010 and 2020, after having spent just \$750 million during the two decades prior.¹⁵

The spending has also been remarkably concentrated. The ten most generous donors and their spouses injected \$1.2 billion into federal elections over the last decade — enough to dwarf the contributions made by millions of ordinary citizens.¹⁶ In one instance, a 501(c)(4) organization — the American Action Network — raised \$41.9 million in one year, \$24.6 million of which came from a single anonymous donor.¹⁷ In 2014, the top 100 donors to super PACs¹⁸ spent almost as much as

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political committees that do not make direct contributions to candidates can raise unlimited funds).

¹⁵ Karl Evers-Hillstrom, *More Money, Less Transparency: A Decade Under Citizens United*, OpenSecrets.org (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united>.

¹⁶ *Id.*

¹⁷ Scott Bland, *Ryan-linked Group Raised \$24.6M From an Anonymous Donor*, POLITICO (May 18, 2018).

¹⁸ Super PACs are powerful dark-money weapons that came into being after *Citizens United*. While they nominally must disclose their donors, that requirement is met by disclosing only the screening entity through which the true donor channeled the money, not the true donor itself. See Tim Lau, *Citizens United Explained*, Brennan Center for Law and Justice (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>.

all 4.75 million small donors (*i.e.*, those giving \$200 or less) *combined*.¹⁹

Doubly worrying is that, notwithstanding *Citizens United*'s faith in transparency, much of this spending is cloaked in secrecy. The largest percentage increase in campaign expenditures has come from organizations that do not disclose their donors, such as 501(c) organizations. Such groups spent nearly \$1 billion on elections during the last ten years, more than seven times what they spent during the preceding decade.²⁰ In 2016 alone, ninety-five 501(c)(4) and 501(c)(6) trade associations made independent expenditures of \$50,000 or more, totaling more than \$185 million.²¹ The 10 largest

¹⁹ See Daniel I. Wiener, *Citizens United Five Years Later*, Brennan Center for Justice at New York University School of Law, at 5 (2015), *available at* https://www.brennancenter.org/sites/default/files/2019-08/Report_Citizens_United_%205_%20Years_%20Later.pdf.

²⁰ See Evers-Hillstrom, *supra* note 15. These figures do not take into account money that 501(c)(4) organizations and other non-transparent groups themselves contribute to super PACs, which need not disclose the original source of the funding. According to one analysis, only 30% of all outside spending in the 2020 election was fully disclosed, an all-time low. See *2020 Election to Cost \$14 Billion, Blowing Away Spending Records*, OpenSecrets.org (Oct. 28, 2020), <https://www.opensecrets.org/news/2020/10/cost-of-2020-election-14billion-update/>.

²¹ *Political Nonprofits: Top Election Spenders*, OpenSecrets.org, https://www.opensecrets.org/outsidespending/nonprof_elec.php?cycle=2016.

were responsible for 77% of this total, and the top three were responsible for nearly half.²²

These numbers do not capture vast additional sums of money anonymously contributed to and spent by 501(c) groups on advocacy that is closely adjacent to and often linked with the donors' express political advocacy. This includes "issue ads" (often just thinly-veiled political attack ads), lobbying expenditures, research and public relations efforts, retreats in exotic locations to "educate" policymakers, and impact litigation and *amicus* briefs that have become a burgeoning legal industry.²³ None of this is subject to Federal Election Commission (FEC) disclosure.

Indeed, the same dark money that flows into a 501(c)(4) "social welfare" organization for campaign ads frequently funds a sister 501(c)(3) organization. Through industry-funded research papers, legal and academic conferences, "alternative" science, and public relations messaging, dark-money 501(c)(3)s can provide a veneer of scholarship and high-mindedness to the bluntly pecuniary self-interest of the special interests behind them, forming an essential part of a sophisticated, coordinated political influence operation.²⁴

²² *Id.*

²³ See, e.g., Mary Bottari, *Behind Janus: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018).

²⁴ *Id.*

Dark-money influence operations, not unlike covert operations in the intelligence world, are multi-faceted activities.²⁵ The facet of the scheme that spends directly on political campaigns is just part of it. A 501(c)(4) can be little more than a mail drop, existing as a mere formality,²⁶ with the

²⁵ In a recent podcast, David Robarge, the chief historian at the Central Intelligence Agency, defined what “covert action” means in the intelligence context. With minimal word changes, Robarge could just as well have described dark-money operations in the United States:

“[Covert] action is secret only in the sense that the U.S. hand is hidden, but because it’s action, you are supposed to, if the program is working properly, cause change that is detectable. You want to influence activities in a foreign target, whether it’s helping a political party, supporting an insurgency, assisting a government in suppressing an insurgency, sending propaganda or as we call it covert influence messages into that country. The whole point of that range of activity is to make things different in that target in that target than they were before. And you want people to notice that influence. You want a political party to be more active. You want that insurgency to be more aggressive . . . And that’s what we mean by influence. But whose doing the influence is the secret, or in our definition, more precise(ly) ‘covert’ part of covert action.”

See, Covert Action: Interview with David Robarge, LAWFARE, at 10:00 (Mar. 17, 2021),

<https://www.lawfareblog.com/lawfare-podcast-covert-action>.

²⁶ *See, e.g.,* Anna Massoglia, *Tax Returns Reveal One Six-Figure Donor Accounts For Entirety of “Dark Money” Funding Whitaker’s Nonprofit*, OpenSecrets.org (Nov. 21, 2018), <https://www.opensecrets.org/news/2018/11/one-donor-accounts->

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associated 501(c)(3) providing the communications and operational heft for the overall political effort. In these operations, the funding constituting the bulk of the proverbial iceberg lies beneath the surface,²⁷ while even the visible tip is masked.

The result is that our democracy suffers. With anonymity, conflicts of interest are hidden, confusing citizens and undermining the public's ability to evaluate motive, messenger and message.²⁸ With anonymity, coordination between ostensibly distinct entities is obscured, tricking citizens into believing that "consensus" support exists for what are, in fact, relatively narrow special interests.²⁹ With anonymity, powerful organizations

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for-all-dark-money-funding-whitakers-nonprofit/ (describing multiple connected dark-money groups sharing a single mailing address at a UPS store); Michael Biesecker and Brian Slodysko, *Barrett Ads Tied to Interest Groups Funded by Unnamed Donors*, ASSOCIATED PRESS (Oct. 26, 2020) (identifying the mailing address of another dark-money 501(c)(4) group as "a UPS store in Washington's Georgetown neighborhood").

²⁷ See, e.g., Massoglia, *supra* note 6 ("The vast majority of ads airing under the guise of issue advocacy fall outside of the FEC's reporting requirements — meaning the actual amount of dark money spending in 2018 elections was likely much higher.").

²⁸ See Heerwig & Shaw, *supra* note 2, at 1472-74.

²⁹ Indeed, a number of the *amici* supporting Petitioner (including the Pacific Legal Foundation, the Center for Constitutional Jurisprudence (Claremont Institute), the Southeastern Legal Foundation, the Cato Institute, and the Buckeye Institute, to name just a few) are repeat players on the issue of protecting and expanding dark-money influence in our politics, having appeared previously in cases such as *Seila*

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can support policies harmful to citizens who are their shareholders, members, employees, business partners or customers, thus dodging accountability; and even put shareholder funds covertly to uses that shareholders would not support.³⁰

Citizens United also ignored the fact (obvious to those who run for office) that the mere *threat* of anonymous, unlimited political spending is itself a potent form of influence. This form of leverage can be deployed unseen, increasing the danger of corruption exponentially. While a candidate may dare a special interest to smear him or her *publicly*, trusting citizens to understand the motive of the attacker, the threat of an attack from one or more anodyne-sounding front groups completely tilts the playing field — these groups know they can proceed with substantial impunity, free to make false claims and smears, with little or no public accountability

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Law LLC v. CFPB, and share major funding sources, such as Donors Trust (funded in part by the Koch Family), with Petitioner and one another. See *DonorsTrust and Donors Capital Fund Grant Recipients* (March 26, 2021), https://www.sourcewatch.org/index.php?title=DonorsTrust_and_Donors_Capital_Fund_Grant_Recipients. The Rule 37.6 certifications by these and other dark-money *amici* obscure rather than reveal the full interrelation and commonality among them.

³⁰ When for-profit companies “choose to ‘speak’ through political advocacy, that speech typically reflects not the views and priorities of the shareholders, but those of high-level corporate managers.” Wiener, *supra* note 19, at 10 (citing John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. OF EMPIRICAL LEGAL STUD. 657, 667 (2012)).

because the true proponent is hidden.³¹ When such threats succeed, dark-money interests win without actually having to spend anything, leaving no fingerprints.

All of this makes anonymity potentially attractive to big-money interests — and explains their ceaseless efforts to secure more of it. In recent years, as the political use of 501(c) organizations exploded, the IRS Commissioner endured a merciless political battering from dark-money spenders and their allies in Congress, effectively suppressing enforcement of IRS disclosure rules from that point onwards — even after the accusations of political “bias” on the part of the IRS were revealed to be a sham.³² Dark-money interests were able to secure “riders” to must-pass

³¹ See, e.g., *High Percent of Presidential Ad Dollars of Top Four 501(c)(4)s Backed Ads Containing Deception, Annenberg Study Finds*, Annenberg Pub. Pol’y Ctr. (June 20, 2012), <https://www.annenbergpublicpolicycenter.org/high-percent-of-presidential-ad-dollars-of-top-four-501c4s-backed-ads-containing-deception-annenberg-study-finds/> (“[F]rom December 1, 2011 through June 1, 2012, 85% of the dollars spent on presidential ads by four top-spending third party groups . . . were spent on ads containing at least one claim ruled deceptive by fact-checkers . . .”).

³² See Letter from Senators to Department of Treasury and IRS (Dec. 9, 2019) at 5 (citing Treasury Inspector Gen. For Tax Admin., Review of Selected Criteria Used to Identity Tax-Exempt Applications for Review (Sept. 28, 2017) *available at* <https://www.treasury.gov/tigta/auditreports/2017reports/201710054fr.pdf>); see also, e.g., Katy O’Donnell & Bernie Becker, *House Rebukes Freedom Caucus Effort to Oust IRS Chief*, POLITICO (Dec. 6, 2016) (detailing Congressional efforts to impeach the IRS commissioner).

Congressional appropriations rules preventing the IRS from strengthening 501(c)(4) regulations.³³ Dark-money interests also defeated proposed SEC rules requiring public companies and trade groups to disclose their political activity, and defeated passage of the Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act, which would have (consistent with *Citizens United*) expanded and accelerated election-spending disclosures.³⁴ And recently, after a concerted lobbying effort by Petitioner’s sister-501(c)(4) organization Americans for Prosperity and its dark-money cohorts,³⁵ the IRS eliminated the

³³ See, Josh Keefe, *Dark Money Gets Protection in Congressional Spending Bill, Yet Again*, NEWSWEEK (Mar. 22, 2018).

³⁴ The connection of the Koch-backed political operation to the so-called “donor privacy” movement was demonstrated recently in reporting highlighting the Koch network’s opposition to the For the People Act (S.1). See Jane Mayer, *Inside the Koch-Backed Effort to Block the Largest Election-Reform Bill in Half a Century*, THE NEW YORKER (Mar. 29, 2021); see also Russ Choma, *Koch Industries, Business Groups Lobby Against Donor Disclosure*, OpenSecrets.org (Apr. 25, 2013), <https://www.opensecrets.org/news/2013/04/koch-industries-and-business-groups/>; U.S. Chamber of Commerce, *U.S. Chamber: DISCLOSE Act is Partisan Effort to Silence Critics and Gain Political Advantage* (May 19, 2010), <https://www.uschamber.com/press-release/us-chamber-disclose-act-partisan-effort-silence-critics-and-gain-political-advantage/>; U.S. Chamber of Commerce, *Multi-industry Letter Opposing H.R. 5175 (the “DISCLOSE Act,” or “Schumer – Van Hollen”)*, (May 19, 2010), <https://www.uschamber.com/letter/multi-industry-letter-opposing-hr-5175-disclose-act-or-schumer-van-hollen>.

³⁵ See Coalition Letter to President Trump and Secretary Mnuchin (May 15, 2018), available at <https://sbecouncil.org/wp-content/uploads/2018/07/CFIF->

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confidential donor reporting requirement for 501(c)(4) organizations.³⁶

This case accordingly is just one episode in a long and systematic campaign by big-money interests to secure secret influence in our politics. On the losing end stand Americans of all political stripes, who see the increase in secret money in our elections as an indicator that our government is corrupted and unrepresentative.³⁷ 88% of Americans think it is important to reduce the influence of big donors on the federal government.³⁸ 84% of Americans think money has too much influence in politics.³⁹ 75% of U.S. adults perceive corruption as “widespread” in the country’s

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Coalition-Letter-to-WH-and-Treasury-Schedule-B-FINAL-5.2018.pdf.

³⁶ See Press Release, U.S. Dept. of Treasury (July 16, 2018), <https://home.treasury.gov/news/press-releases/sm426>.

³⁷ See Abby K. Wood, *Citizens United Turns 10 Today: Here’s What We’ve Learned About Dark Money*, WASH. POST (Jan. 21, 2020) (survey shows that “both Republicans and Democrats were more likely to vote for candidates that discourage dark money than those [who] accepted it.”).

³⁸ Steven Kull et al., *Americans Evaluate Campaign Finance Reform: A Survey of Voters Nationwide*, Univ. Md. Program for Pub. Consultation, at 4 (May 2018), available at https://www.publicconsultation.org/wp-content/uploads/2018/05/Campaign_Finance_Report.pdf.

³⁹ *Americans’ Views on Money in Politics*, N.Y. TIMES & CBS NEWS (June 2, 2015) (reporting that 75% of Americans believe that outside groups should be required to publicly disclose contributors); see also Wiener, *supra* note 19, at 2 (“An astounding 80 percent [of Americans] disapproved of *Citizens United*.”).

government.⁴⁰ 72% think that ours is a country where people who give a lot of money to elected officials have more influence.⁴¹ 65% of Americans named money in politics as having “a lot” of blame for the dysfunction of our political system.⁴² In fact, this was the most common response when asked what is “causing dysfunction in the U.S. political system.”⁴³ The second most frequent answer, at 56%, was “wealthy political donors.”⁴⁴

These responses reflect the justifiable sense across the electorate that our democracy serves the interests of the wealthiest, and that “democratic participation for the vast majority of citizens is of relatively little value.”⁴⁵ Big special interests wielding unlimited influence from behind anonymizing front groups are helping drive this loss of confidence in our system of government. While it is a satisfactory system for them, it fails the general public — and ultimately weakens our democracy.⁴⁶

⁴⁰ 75% in U.S. See *Widespread Government Corruption*, Gallup (Sept. 19, 2015), <https://news.gallup.com/poll/185759/widespread-government-corruption.aspx>.

⁴¹ *The Public, the Political System and American Democracy*, Pew Research Ctr., at 26 (Apr. 26, 2018), available at <https://www.people-press.org/wp-content/uploads/sites/4/2018/04/4-26-2018-Democracy-release-1.pdf>.

⁴² John Wagner & Scott Clement, *‘It’s Just Messed Up’: Most Think Political Divisions as Bad as Vietnam Era*, *New Poll Shows*, WASH. POST (Oct. 28, 2017).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Wiener, *supra* note 19, at 1.

⁴⁶ See MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC*
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**B. Today’s Influencers Hide Behind
Nonprofit Entities to Spread
Political Influence in Secret.**

The vision that the Court presented in *Citizens United* — of a public discerning in real time the identities of the individuals or industries influencing our politics — has not come to pass.⁴⁷ Instead, dark-money interests have weaponized tax-exempt 501(c) organizations, turning them into opaque “influence shelters” to magnify extreme wealth’s impact on our public discourse while shielding the players from public attention.⁴⁸ An entire infrastructure of deception has emerged, comprised of shell entities, 501(c)s, donor-advised trusts, and super PACs. To protect that infrastructure, dark-money interests have fought tooth and nail (as in the instant case) to roll back

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INEQUALITY AND POLITICAL POWER IN AMERICA (2012) (explaining that the country’s policymakers respond almost exclusively to the preferences of the economically advantaged); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS-AND A PLAN TO STOP IT, 143-47 (2011) (noting that dependency on donors causes Congress to spend more time on issues that matter to their funders than to the general public).

⁴⁷ *Citizens United*, 558 U.S. at 370 (“effective disclosure” will “provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”).

⁴⁸ See, e.g., Trevor Potter & B. B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the Dark Money Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POLY 383, 463-64 (2013) (discussing the formation of Crossroads GPS, a 501(c)(4) spin-off of super PAC American Crossroads, formed to protect donors from disclosure).

even the most modest incursions against the secrecy enhancing their power.

The explosion in use of 501(c)s for political purposes began shortly after *Citizens United* made anonymity in political giving so salient and advantageous. It is not worth much to shroud a \$5,000 political donation in anonymity. Change this to a \$50 million expenditure, however, and anonymity becomes strategically far more important; the power of the investment is maximized when the identity and motives behind it are shielded from view and criticism.

Section 501(c)(4) of the Internal Revenue Code establishes tax-exempt status for nonprofits “operated exclusively for the promotion of social welfare,”⁴⁹ which according to the IRS’s own regulations “does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”⁵⁰ That seems clear enough, yet Treasury regulations allow 501(c)(4) organizations to engage in political campaign activity so long as the “primary” activity of the organization is social welfare.⁵¹ Dark-money spenders have interpreted the word “primary” to mean that anonymously-funded 501(c)(4)s may devote the barest majority of their activities to “social welfare,” with the remaining 49.999% devoted to express political campaign activities. In this way, big donors can

⁴⁹ 26 U.S.C. § 501(c)(4)-1(a)(1)(ii).

⁵⁰ Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (emphasis added).

⁵¹ Treas. Reg. § 1.501(c)(4)-1(a)(2)(i).

effectively pay a 50.001% “secrecy surcharge” to get their 49.999% in express political spending anonymized.

It doesn’t end there, however. Dark money-controlled 501(c)(4)s are able to send their 50.001% in “social welfare” funds downstream to other politically-aligned 501(c)(4)s, who then can spend up to half of those funds on direct campaign influence and “donate” the remainder further downstream to yet other groups within the dark-money network.⁵² In this manner, dark-money donors can create a cascade of downstream entities, effectively spending far more than 50% of their secret political funding on express campaign influence, all free from disclosure and subject to tax benefits.⁵³ Thus influencers maximize their impact on our politics while minimizing their visible footprint.⁵⁴

⁵² See Robert Maguire and Viveca Novak, *Shadow Money Magic: Five Easy Steps That Let You Play Big in Politics, Keep Your Donors Hidden and Game the IRS*, OpenSecrets.org (April 15, 2013), <https://www.opensecrets.org/news/2013/04/shadow-money-magic-five-easy-steps.html>.

⁵³ See, e.g., Matea Gold, *Koch-Backed Political Coalition, Designed to Shield Donors, Raised \$400 million in 2012*, WASH. POST (Jan. 5, 2014) (Describing the Koch-backed coalition: “Tracing the flow of the money is particularly challenging because many of the advocacy groups swapped funds back and forth. The tactic not only provides multiple layers of protection for the original donors but also allows the groups to claim they are spending the money on ‘social welfare’ activities to qualify for 501(c)(4) tax-exempt status.”).

⁵⁴ On rare occasions, the veil is lifted — as when California uncovered an illicit campaign donation routing scheme,
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501(c)(3) organizations and think tanks paid for with the same dark money that funds 501(c)(4) organizations also play an important role in spreading dark-money's influence. This case itself provides an illustration. The scores of *amici* appearing in support of Petitioner both here and at the *certiorari* stage would seem to suggest a broad consensus. However, a number of them represent a small group of very large special interests and donors, including the Koch family itself, Petitioner's principal support.⁵⁵ The calls for absolute protection of dark money from disclosure are, as in the horror film, "coming from inside the house."⁵⁶

II. THE GOVERNMENT HAS A STRONG INTEREST IN REGULATING NONPROFITS, AND DISCLOSURE IS AN IMPORTANT TOOL.

A. The Circumstances of This Case Plainly Set It Apart from Civil-Rights Era Decisions Protecting the Freedom to Associate.

Dark-money interests frequently cite, as do many of Petitioner's *amici* here, our polarized political climate as the basis for their need for

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 designed to evade state regulators, involving the Koch network. See Chris Megerian and Anthony York, *California Probe of Campaign Donations Sheds Light on 'Dark Money'*, L.A. TIMES (Nov. 3, 2013).

⁵⁵ See *supra* note 29.

⁵⁶ WHEN A STRANGER CALLS (Columbia Pictures 1979).

anonymity.⁵⁷ But the simple truth is that dark money has played an enormous role in creating the poisonous climate that its practitioners and allies tout as justification for making our politics even less transparent.

Accountability in politics is not a danger; it is a virtue, with real social value. Accountability creates and enhances speech rather than suppressing it, because it generates debate, discussion, and, yes, criticism — all expected features of a robust functioning democracy — about the incentives and agendas, the motives and conflicts of interest, and the true identities behind the policy-influencing messages paid for by private interests.⁵⁸

Anonymity, on the other hand, opens the door to anti-social behavior.⁵⁹ Political advertisements reflect this phenomenon. Advertisements funded with dark money are consistently more negative and

⁵⁷ See, e.g., Br. of the American Center for Law and Justice as *Amici Curiae* in Support of Petitioners (Mar 1, 2021), at 9 (“Toxic polarization and the mushrooming of ‘cancel culture’ has catapulted the value of political anonymity to its apex.”).

⁵⁸ See Lear Jiang, Note, *Disclosure’s Last Stand? The Need to Clarify the “Informational Interest” Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 523 (2019) (arguing that disclosure of dark money sources may “facilitate greater discourse around which private actors are attempting to influence policy.”).

⁵⁹ Daniel E. Chand, “Dark Money” and “Dirty Politics”: *Are Anonymous Ads More Negative?*, 19 BUS. AND POL. 454, 454-57 (2017) (“Outside of politics, it is well established that the potential for negative attacks is increased when one’s identity is concealed.”).

false than those sponsored by identifiable sources.⁶⁰ Candidates are often complicit, because they benefit when attacks on their opponents are launched by outside groups.⁶¹ They enjoy the competitive benefits from the negative attacks, while avoiding public disapprobation for “slinging mud.” As illusive as the transparency predicate of *Citizens United* was, so was its independence predicate.⁶² The resulting situation is thus the worst of all worlds for an informed democracy: candidate, campaign, funder and front group can work in harmony, while the public is left completely in the dark.

Even so, citizens sense something is wrong, justifiably believing that their voices are swamped by big money interests. The “tsunami of slime”⁶³ injected by dark money into the public discourse poisons the public mood, erodes confidence in our government, and prompts civic disengagement (including reduced small-donor participation).⁶⁴

⁶⁰ *Id.* at 464 (data shows that “dark money is a clear predictor of negative advertising.”).

⁶¹ *Id.* at 456.

⁶² In fact, coordination between campaigns, dark money groups and super PACs is so rampant, Issue One, a bipartisan campaign finance watchdog group, has an ongoing oversight project dedicated to documenting coordination. *See, Oversight Watch*, ISSUE ONE, <https://www.coordinationwatch.org/>; *see also*, Matea Gold, *It’s Bold, But It’s Legal: How Campaigns and their Super PAC Backers Work Together*, WASH. POST (July 6, 2015) (detailing various ways candidates and super PACs coordinate election spending and campaign activity).

⁶³ Joe Hagan, *The Coming Tsunami of Slime*, N.Y. MAG. (Jan 22, 2012).

⁶⁴ *See, e.g.*, Wiener, *supra* note 19, at 5 (noting declines in
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This disengagement, sadly, widens the chasm for dark money to fill: a corrosive feedback loop. The sense that democracy is out of the public's control creates frustration, spurs anger and resentment, and drives polarization in the electorate — which dark-money spenders can then tout in support of even deeper anonymity.⁶⁵

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individual reported contributions to candidates and parties within the legal limits, as well as the total contributions by small donors (giving \$200 or less)).

⁶⁵ It bears noting that this polarization is not symmetric, however, as illustrated by the ideological slant and tactics employed by most dark-money expenditures. “As an increasing body of political science and historical scholarship has documented, the Republican Party has grown substantially more conservative than Democrats have grown liberal. Conservative ideological extremism is present in both the substance of the issues that right-leaning politicians prioritize, as well as the tactics with which they pursue those policy goals.” Alexander Hertel-Fernandez, *Asymmetric Partisan Polarization, Labor Policy, and Cross-State Political Power-Building*, 685 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 64, 64-79 (September 2019), available at <https://journals.sagepub.com/doi/pdf/10.1177/0002716219862524> (citation omitted); see also Chand, *supra* note 59, at 455 (concluding that “[c]onservative groups were far more likely to purchase negative ads with dark money than with expenditures where donor information was disclosed,” attributable in part to the particular desire for secrecy by corporate spenders); Jeff John Roberts, *5 Surprising Consequences from a Decade of Citizens United*, FORTUNE (Jan. 23, 2020) (“[C]onservative groups, including Karl Rove’s Crossroads GPS and the National Rifle Association, have been the most active in deploying dark money tactics”); Massoglia, *supra* note 6 (“In total, conservative groups that do not fully disclose their donors outspent liberal groups by hundreds of millions of dollars during the 2018 election cycle.”).

The facts of the case before the Court, and the context in which it arises, are grotesquely different from the Civil Rights Era precedent behind which Petitioner and its dark-money *amici* seek shelter. In *NAACP v. Alabama*, the disclosure mandated by the State was far more sweeping, capturing all members of the organization for their mere act of membership.⁶⁶

NAACP members in the Jim Crow South also faced real and immediate threats of physical violence, including state-sponsored violence. The NAACP estimates that there were over 4,700 lynchings in the United States between 1882 and 1968.⁶⁷ A comprehensive study from the Alabama Museum on Peace and Violence documented nearly 4,100 racial terror lynchings in 12 Southern states, including nearly 400 in Alabama alone.⁶⁸ It showed that local officials and law enforcement largely tolerated racial lynchings, beatings, burnings and bombings. The threat of lynching and racial violence was severe enough to prompt the “Great

⁶⁶ See *NAACP v. Alabama*, 357 U.S. 449, 453 (1958) (“The State moved for the production of a large number of the Association’s records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama ‘members’ and ‘agents’ of the Association.”).

⁶⁷ *History of Lynching*, NAACP, <https://www.naacp.org/history-of-lynchings/> (last visited March 25, 2021).

⁶⁸ See Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* (3d Ed., 2017), <https://lynchinginamerica.eji.org/report/>.

Migration” of thousands of African Americans out of the South.⁶⁹

There is simply no comparison between the violent oppression faced by individual members of groups supporting racial justice in the South in the Jim Crow 1950s and the lofty power enjoyed by the country’s secretive donor elite today.⁷⁰ Alabama NAACP members were among the least powerful citizens among us, fighting for the most basic of all American rights: the right to safely cast their votes.

Contrast this with billionaires, massive trade associations and giant corporations seeking maximal constitutional shelter from public criticism for their quintessentially public acts of influencing public debate and public policy. The balance of interests here is not remotely comparable to that in *NAACP*. It is, indeed, a crass and cynical

⁶⁹ *Id.*

⁷⁰ The Koch family, Petitioner’s principal benefactor, owns the largest private company in the United States and has made billions in the fossil fuel industry. *See America’s Largest Private Companies*, FORBES (2020), <https://www.forbes.com/largest-private-companies/list/> (last accessed March 25, 2021); *see generally* Larry M. Bartels, *Economic Inequality and Political Representation*, Princeton Univ. Dep. of Politics (2002, rev. Aug. 2005), *available at* <http://princeton.edu/~piirs/events/PU%20comparative%20Conf%20May%202007/20Gilnes.pdf> (“In almost every instance, senators appear to be considerably more responsive to the opinions of affluent constituents than to the opinions of middle-class constituents, while the opinions of constituents in the bottom third of the income distribution have no apparent statistical effect on their senators’ roll call votes.”).

comparison⁷¹ to make — particularly at a moment when dark money is fueling efforts to *suppress* voter participation across the South and elsewhere in the country.⁷²

As for the criticism and personal risk that may come with taking a stand on issues of public importance, *amici* Senators have all received threats to their safety. It comes with the job. The fear and resentment fomented by dark-money politics have, in fact, often been responsible. Most recently, dark money helped sponsor a rally that prompted a violent insurrection at our Capitol.⁷³ As

⁷¹ See, e.g., Br. of the American Center for Law and Justice, *supra* note 57, at 9 (“The threat to First Amendment associational rights from compelled disclosure equals the threat experienced by NAACP members in the civil rights era.”) and 30 (“During the reconstruction era, Blacks and Republicans were targets. . . . Today it is conservatives.”); see also Br. of the Cato Institute, et al. as *Amici Curiae* in Support of Petitioners (Mar 1, 2021), at 24 (“[F]ew would blame donors who felt as though the compelled disclosures were ‘of the same order’ as a requirement that they wear ‘identifying arm-bands,’ exposing them to threats, harassment, and boycotts.”). And to the extent the argument is “we won’t be able to keep up our lies and smears once people know who’s behind the lying and smearing,” it is beneath rebuttal.

⁷² Brian Schwartz, *Dark-Money GOP Fund Funneled Millions of Dollars to Groups that Pushed Voter Fraud Claims*, CNBC (Jan. 13, 2021), <https://www.cnbc.com/2021/01/13/dark-money-gop-fund-funneled-millions-groups-that-pushed-voter-fraud-claims.html>; Franziska Barczyk, *Revealed: Conservative Group Fighting to Restrict Voting Tied to Powerful Dark Money Network*, THE GUARDIAN (May 27, 2020) (discussing Koch family funding of voting restriction efforts); see also Mayer, *supra* note 34.

⁷³ Brian Schwartz, *Pro-Trump Dark Money Groups Organized*
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extreme as that episode was, *amici* Senators continue to place trust in law enforcement to effectively address whatever threats politically-active individuals may face as a result of their public stances.⁷⁴ If it is good enough for politicians who are far more visible and vulnerable, it should be good enough for the extraordinarily wealthy dark-money influencers dominating our public sphere from the shadows.

B. The Court Should Resist a Broad Ruling Establishing a New Constitutional Right to Anonymous Unlimited Spending.

The flotilla of anonymously-funded and largely industry-aligned nonprofit organizations filing *amicus* briefs in support of Petitioner should set off alarm bells that something bigger than California’s tax disclosure law is at issue. The dots are not hard to connect. The bigger prize being sought is blanket constitutional protection of dark money and secret influence.

Indeed, a number of *amici* explicitly urge the

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the Rally That Led to the Capitol Hill Riot, CNBC (Jan. 9, 2021), <https://www.cnbc.com/2021/01/09/pro-trump-dark-money-groups-organized-the-rally-that-led-to-deadly-capitol-hill-riot.html>.

⁷⁴ See, e.g., *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) (“There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance.”).

Court to use this case to undo long-established precedent upholding political and electoral disclosure laws.⁷⁵ Senator McConnell’s brief, for example, argues that the Court “ought to revisit its campaign finance disclosure precedents.”⁷⁶ Setting aside that Senator McConnell was once a strong advocate for robust disclosure,⁷⁷ his request signals that he and his allies hope this case will pave the way for more secrecy and more special-interest influence.

⁷⁵ See, e.g., Br. of American Legislative Exchange Council as *Amici Curiae* in Support of Petitioners (Mar 1, 2021), at 14 (“The Court should take the present opportunity to instruct the lower courts that the associational right to privacy is an important right in all cases, compelled disclosure is *per se* harm, and it is always the government’s burden to justify infringement of that right.”) and 19-20 (“[T]he Court should . . . restore a high bar for courts to uphold government invasions of associational privacy in all contexts. One way to do that . . . would be for the Court to clarify that “exacting scrutiny” and “strict scrutiny” require the government to satisfy the same proof requirements.”); Br. of the Legacy Foundation as *Amici Curiae* in Support of Petitioners (Mar 1, 2021), at 25 (because of the risks of “disclosure in the age of the Internet,” “the scrutiny applied to disclosure statutes must be higher”).

⁷⁶ See Br. of Sen. Mitch McConnell As *Amicus Curiae* in Support of Petitioners (Mar. 1, 2021), at 12-13.

⁷⁷ See, e.g., Mitch McConnell, NPR, Talk of the Nation, (2003) (“Money is essential in politics, and not something that we should feel squeamish about, provided the donations are limited and disclosed, everyone knows who’s supporting everyone else.”); Mitch McConnell, Senate Floor Speech (June 2000) (“Virtually everybody in the Senate is in favor of enhanced disclosure, greater disclosure, that’s really hardly a controversial subject.”).

Amici Senators have also witnessed firsthand dark-money influencers actually asserting a constitutional right to wield their political power anonymously. The U.S. Chamber of Commerce, an anonymously-funded trade organization and corporate lobbying behemoth, refused to answer congressional questions for the record on grounds that all of its donor information is “protected by the fundamental right of freedom of association guaranteed to the Chamber and its members . . . by the First Amendment to the Constitution.”⁷⁸ The Chamber doubled down on this extreme constitutional theory in its *amicus* brief to the Court in this case, arguing that *NAACP v. Alabama* should protect its huge anonymous corporate donors from any disclosure “whenever associational privacy rights are threatened.”⁷⁹

⁷⁸ U.S. Chamber of Commerce, Questions for the Record for Mr. Durbin, *Reducing Emissions while Driving Economic Growth: Industry-led Initiatives*, Hearing before the Subcomm. on Clean Air and Nuclear Safety of the S. Comm. on Environment and Public Works, 116th Cong. (Oct. 17, 2019) available at <https://www.govinfo.gov/content/pkg/CHRG-116shrg38868/pdf/CHRG-116shrg38868.pdf>. In its response, the Chamber asserted a categorical refusal to provide the requested information, irrespective of how commanding the donation might have been, with no individualized assertion of risk of harm or First Amendment burden as contemplated by this Court’s precedent. *E.g., Reed*, 561 U.S. at 199-202 (describing the types or burden or harms a plaintiff must show to prevail on a First Amendment challenge to disclosure requirements).

⁷⁹ Br. of the Chamber of Commerce of the United States of America et al. as *Amici Curiae* in Support of Petitioners (Mar 1, 2021), at 16-19.

Elected legislators ought to know who is appearing before them and what interests they represent. So should courts. Most importantly, so should citizens when that knowledge has a direct bearing on the policies impacting their lives. Yet special interest organizations like the Chamber know that obscuring this information is critical to maximizing their influence, and now invite this Court to upend decades of precedent in furtherance of that mission. The Court should firmly decline their invitation.

As aptly described in Representative Sarbanes's *amicus* brief, the Court has a long history of upholding disclosure rules, especially in election cases, and of recognizing the value of transparency in our democracy.⁸⁰ While this case does not involve public disclosures, dark-money forces have made explicit their desire to create an opening to further undo election-related disclosure laws.⁸¹

⁸⁰ Br. for Congressman John Sarbanes and Democracy 21 As *Amici Curiae* In Support of Neither Party, at 5 *et seq.* (detailing how “this Court has consistently upheld election-related disclosure requirements”); *see also* LOUIS D. BRANDEIS, WHAT PUBLICITY CAN DO (1914) (“Sunlight is said to be the best of disinfectants”).

⁸¹ *See* Br. of Sen. Mitch McConnell, *supra* note 76, at 12 (arguing that *Buckley* was “misguided” and that the Court “frankly, ought to revisit its campaign finance disclosure precedents.”), and 10 (describing this Court’s electoral disclosure jurisprudence as “wrong-headed deference to campaign finance disclosure requirements”).

Amici Senators urge the Court to resist this. Further erosion of transparency and accountability in our politics can only do more harm, as Justice Scalia himself stated:

Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. 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.⁸²

CONCLUSION

The Court should recognize the important government interest served by California's limited donor disclosure requirements, but more importantly should firmly decline the invitation by Petitioner and its *amici* to broadly undermine the transparency necessary for citizens to perform their role in our government.

⁸² *Reed*, 561 U.S. at 228 (Scalia, J., concurring).

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