

**Written Testimony of Daniel I. Weiner**

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**Pennsylvania House State Government Committee Hearing on Donor Disclosure and  
Campaign Finance Regulations: Reviewing Recent Legal Precedents**

**Monday, February 7, 2022**

Chairman Grove, Chairman Conklin, and Members of the Committee, thank you for the opportunity to testify on the importance of reasonable campaign transparency rules and their constitutional foundation. The Brennan Center for Justice has long supported such rules, which are critical to fostering a more informed electorate and help counter corruption.<sup>1</sup> Campaign finance rules that require political groups to disclose their donors have repeatedly been upheld by the Supreme Court, including by an 8-1 vote in *Citizens United v. FEC*.<sup>2</sup> In a decision last term, *Americans for Prosperity Foundation v. Bonta*,<sup>3</sup> the Court clarified its approach to donor disclosure requirements more generally, but that decision did not invalidate any campaign disclosure rule or otherwise abrogate the long line of precedents holding that such rules are constitutional.

Benefits of Campaign Disclosure: Rules requiring donor disclosure from candidates, parties and other groups engaging in electoral spending serve several important purposes. First, and most importantly, they help foster a more informed electorate, which is a critical component of

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<sup>1</sup> The Brennan Center is a nonpartisan public policy and law institute working to revitalize and defend our country's systems of democracy and justice. The Brennan Center has studied campaign finance issues for more than 20 years, working to develop effective, constitutionally sound policies to ensure that all Americans have a voice in our government. This work is housed in our Elections and Government program, which I co-lead. Prior to coming to the Brennan Center, I was senior counsel to a commissioner at the Federal Election Commission, which administers federal campaign disclosure and other campaign finance rules. Brennan Center research and program associate Mira Ortegon and legal intern Corina Scott assisted with the preparation of this testimony. This testimony does not represent the views, if any, of the NYU School of Law.

<sup>2</sup> 558 U.S. 310 (2010).

<sup>3</sup> 141 S.Ct. 2373 (2021).

enlightened self-government. As the Supreme Court noted in *Citizens United*, campaign disclosure helps voters make “informed choices in the political marketplace.”<sup>4</sup>

Indeed, social science research has demonstrated that information about the funders behind campaign spending provides voters with a critical informational shortcut that helps them to interpret political messages and make decisions that better align with their interests and preferences.<sup>5</sup> A message about healthcare, for instance, is likely to land differently if a voter knows it was funded by groups fighting for patient rights versus large insurance companies. A message about the local economy will have different resonance if a voter knows it was funded by local business owners versus national lobbying groups.

Donor transparency is also an important means of deterring corruption. “Sunlight,” the Supreme Court has long observed, “is the best of disinfectants,” because the possibility of exposure helps “discourage those who would use money for improper purposes....”<sup>6</sup> Regular reporting of campaign donors also makes evasion of other rules, like restrictions on who may contribute directly to a campaign, more difficult.<sup>7</sup>

Disclosure Laws in Pennsylvania and Around the Country: For these reasons, most states require candidates for public office, ballot campaigns, and political action committees to disclose the donors who fund their electoral advocacy.<sup>8</sup> Pennsylvania is no exception. In this state, any candidate or political committee that receives contributions in an aggregate amount of \$250 or more must register with the Pennsylvania Department of State and file reports on receipts and expenditures.<sup>9</sup> The Election Code prohibits any candidate or political committee from disbursing money received from an anonymous source.<sup>10</sup>

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<sup>4</sup> *Citizens United*, 558 U.S. at 369.

<sup>5</sup> See Elizabeth Garrett and Daniel A. Smith, “Veiled Political Actors and Campaign Finance Disclosure Laws in Direct Democracy,” *Election Law Journal* 4 (2005): 298; Michael Kang, “Campaign Disclosure in Direct Democracy,” *Minnesota Law Review* 97 (2013): 1702–04; Elizabeth R. Gerber and Arthur Lupia, “Campaign Competition and Policy Responsiveness in Direct Legislation Elections,” *Political Behavior* 17 (1995): 289–90; Jennifer A. Heerwig and Katherine Shaw, “Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure,” *Georgetown Law Journal* 102 (2014): 1443, 1471–72; and Cheryl Boudreau, “Making Citizens Smart: When do Institutions Improve Unsophisticated Citizens’ Decisions?” *Political Behavior* 31 (2008): 292–94, 303–04.

<sup>6</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Louis Brandeis, *Other People’s Money* 62 (1933)).

<sup>7</sup> In Pennsylvania, for instance, contributions by corporations and unincorporated associations (including labor unions) are prohibited, Pa. Stat. and Cons. Stat. Ann. § 3253 (West 2006), but such donations would be difficult to detect without required disclosure. Federal law also prohibits direct contributions by foreign nationals to state as well as federal candidates. 52 U.S.C. § 30121 (2002). The lack of complete disclosure at the federal level and in many states creates one of the principal vulnerabilities to foreign interference in U.S. elections. See Lawrence Norden and Ian Vandewalker, *Getting Foreign Funds Out of America’s Elections*, Brennan Center for Justice, 14, 2018, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Foreign\\_Funds.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Foreign_Funds.pdf).

<sup>8</sup> *State Campaign Finance Disclosure Requirements*, National Conference of State Legislatures, 2015, <https://www.ncsl.org/Portals/1/documents/legismgt/elect/StateCampaignFinanceDisclosureRequirementsChart201.pdf>.

<sup>9</sup> Pa. Stat. and Cons. Stat. Ann. §§ 3244, 3246 (West 1979).

<sup>10</sup> Pa. Stat. and Cons. Stat. Ann. § 3254 (West 1978).

Yet as in too many other states, Pennsylvania law also contains loopholes that allow significant amounts of campaign spending by corporations, nonprofits and other groups who keep their donors hidden—often called “dark money” groups.<sup>11</sup> In response to the problem of dark money, a growing number of states have passed laws requiring any group that spends above a certain amount on electoral advocacy to disclose at least their largest donors.<sup>12</sup>

Constitutional Considerations: The weight of the Court’s recent precedents indicates that maintaining existing campaign transparency rules, and even expanding them, is constitutional. While these rules do indirectly burden First Amendment rights, they “impose no ceiling on campaign related activities and do not prevent anyone from speaking,” and so have generally been upheld.<sup>13</sup> Indeed, even as the Court has become more skeptical of other restrictions on campaign money, it has continued to emphasize the importance of disclosure as a means to prevent “abuse of the campaign finance system.”<sup>14</sup> As Pennsylvania courts have similarly explained: “Campaign reporting requirements exist to ensure a fair election and to advise the electorate of the manner in which campaign money is received and spent.... The importance of [these] requirements is obvious: by preserving public access to the manner in which campaign money is received and spent, public confidence in the election process is maintained.”<sup>15</sup>

The Supreme Court’s decision in *Bonta* does not alter this basic reality. *Bonta* was not a campaign finance case. It involved a California rule requiring any charity operating in the state to turn over tax return schedules listing the names of donors to state authorities. While these schedules contain information that the state might need 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.<sup>16</sup>

Under *Bonta*, to be upheld, disclosure rules must have a “legitimate and substantial” justification and be “narrowly tailored” to serve that intended purpose.<sup>17</sup> Narrow tailoring does not require

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<sup>11</sup> See, e.g., Andrew Seidman, “‘Dark money’ groups spent \$517,000 against two Philly-area candidates who oppose the Mariner East pipeline,” *Philadelphia Inquirer*, July 20, 2020, <https://www.inquirer.com/news/dark-money-mariner-east-pennsylvania-elections-20200720.html>; and An-Li Herring and Chris Potter, “‘Dark Money’ Playing Role In North Hills Senate Race, And Contests Statewide,” *90.5 WESA*, October 31, 2018, <https://www.wesa.fm/politics-government/2018-10-31/dark-money-playing-role-in-north-hills-senate-race-and-contests-statewide>.

<sup>12</sup> See Chisun Lee, et. al, *Secret Spending in the States*, Brennan Center for Justice, 2016, 23–28, <https://www.brennancenter.org/our-work/research-reports/secret-spending-states>.

<sup>13</sup> *Citizens United*, 558 U.S. at 366-67 (quotations omitted).

<sup>14</sup> *McCutcheon v. FEC*, 572 U.S. 185, 223 (plurality opinion).

<sup>15</sup> *Pennsylvanians for Union Reform v. Pennsylvania Office of Administration*, 129 A.3d 1246, 1262 n.22 (Pa. Cmwlth 2015) (quoting *Commonwealth v. Beck*, 810 A.2d 736, 746 (Pa. Cmwlth 2002)). Importantly, generally permissible disclosure rules may require exceptions if there is evidence that individuals whose names would be disclosed could be subject to “threats, harassment or reprisals” as a result. *Citizens United*, 558 U.S. at 370.

<sup>16</sup> *Bonta*, 141 S.Ct. at 2386.

<sup>17</sup> *Bonta*, 141 S.Ct. at 2383.

that a particular rule be the least restrictive means to accomplish the government’s objective—the fit need not be perfect, only “reasonable.”<sup>18</sup>

*Bonta* arguably represents a shift away from the very deferential approach the Court previously took in evaluating less burdensome disclosure requirements, as the dissent noted.<sup>19</sup> But the effect of this change on campaign finance rules is likely to be marginal. The Court has never suggested that broadly informing voters about who is trying to influence them, fighting corruption, and preventing evasion of other rules are anything less than “legitimate and substantial” goals, or that there might be less burdensome means to achieve these goals—to the contrary, as noted, the Court has usually described reasonable disclosure rules as the least burdensome form of regulation.<sup>20</sup> Indeed, *Bonta*’s author, Chief Justice Roberts, has repeatedly voted to uphold these and other types of political disclosure rules.<sup>21</sup>

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In short, whatever *Bonta*’s impact on other areas of law, it does not seriously call into question Pennsylvania’s existing campaign disclosure rules or eliminate the state’s ability to expand these rules to ensure even greater transparency. The benefits of such laws are clear, and we would welcome the opportunity to discuss them further with the legislature.

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<sup>18</sup>*Bonta*, 141 S.Ct. at 2384 (quoting *McCutcheon*, 572 U.S. at 185).

<sup>19</sup> *Bonta*, 141 S.Ct. at 2392 (Sotomayor, J., dissenting).

<sup>20</sup> *McCutcheon*, 572 U.S. at 223; and *Citizens United*, 558 U.S. at 370.

<sup>21</sup> *Citizens United*, 558 U.S. at 369; *Doe v. Reed*, 561 U.S. 186, 187 (2010); and *McCutcheon*, 572 U.S. at 223. Another member of the majority, Justice Kavanaugh, also voted to uphold campaign disclosure rules as a circuit court judge. See *SpeechNow.Org v. FEC*, 599 F.3d 686, 697 (D.C. Cir. 2010).