



**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 democracy²—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

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 safeguards³—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

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

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

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:

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

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

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_\(2021\)](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 themselves 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

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.

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

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.

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 extolled “[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>.