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HOUSE OF REPRESENTATIVES

STATE GOVERNMENT COMMITTEE HEARING

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HARRISBURG, PA

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WEDNESDAY, FEBRUARY 7, 2022
10 A.M.

PRESENTATION ON DONOR DISCLOSURE AND CAMPAIGN REGULATIONS:
REVIEWING RECENT LEGAL PRECEDENTS

BEFORE:

HONORABLE SETH GROVE, MAJORITY CHAIRMAN
HONORABLE RUSS DIAMOND
HONORABLE DAWN KEEFER
HONORABLE BRETT MILLER
HONORABLE ERIC NELSON
HONORABLE FRANK RYAN
HONORABLE PAUL SCHEMEL
HONORABLE LOUIS SCHMITT
HONORABLE CRAIG STAATS
HONORABLE JEFF WHEELAND
HONORABLE SCOTT CONKLIN, DEMOCRATIC CHAIRMAN
HONORABLE ISABELLA FITZGERALD
HONORABLE KRISTINE HOWARD
HONORABLE MALCOLM KENYATTA
HONORABLE MAUREEN MADDEN
HONORABLE BENJAMIN SANCHEZ
HONORABLE JARED SOLOMON
HONORABLE JOE WEBSTER
HONORABLE REGINA YOUNG

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SUBMITTED WRITTEN TESTIMONY

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P R O C E E D I N G S

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MAJORITY CHAIRMAN GROVE: Good morning, welcome to this public hearing of the Pennsylvania House State Government Committee on donor disclosure and campaign finance. I'm the committee's chairman, Seth Grove from York County.

We have a number of testifiers here today to provide input regarding the impact of recent court precedents on our ability as policymakers to enact donor disclosure and campaign finance regulations, should we be inclined to do so. I want to thank each of our testifiers for their participation and insight on this important topic.

I also want to note that we have sought testimony from individuals in groups across the political spectrum in order to gain the broadest possible understanding of this still new legal precedent.

Lastly, I want to thank the Department of State which has submitted written testimony as part of this hearing.

Chairman Conklin, any opening remarks?

DEMOCRATIC CHAIRMAN CONKLIN: As the other chairman, I'm very excited to go through these hearings. As we all know, the amount of unregulated campaign funds has been a hindrance within the political system, and I'm really

1 happy to hear from the testifiers, and hopefully, we can
2 move forward to make our election process more transparent.

3 MAJORITY CHAIRMAN GROVE: Excellent.

4 We have members and testifiers in attendance
5 virtually as well as the public viewing via livestream due
6 to sunshine law requirements. If any of these platforms
7 experience technical difficulties, we will pause the meeting
8 in order to correct the issues.

9 For the members participating virtually,
10 please mute your microphones. Please know when you speak,
11 we all hear you. If you want to be recognized for comments,
12 please use the "raise hand" function. After being
13 recognized, prior to speaking, please turn on your camera
14 and unmute your microphone. After you have completed your
15 question, please remute your microphone.

16 And for members in attendance, please mute
17 your cell phones.

18 We are on a very tight schedule this morning.
19 So, members, please keep your questions short and,
20 testifiers, please keep your answers on point.

21 We do have five testifiers in two hours. So
22 do not get offended if I cut anybody off and move on to
23 another member who has a question.

24 With that, we'll move to committee member
25 introductions. We'll start with committee members in the

1 room.

2 For members attending virtually, I will call
3 on you one by one to prevent everyone from talking at once
4 or no one talking at all, which is always a fun little
5 standoff that happens with virtual hearings.

6 With that, we'll start with Frank.

7 REPRESENTATIVE RYAN: Representative Frank
8 Ryan, Lebanon County, Pennsylvania.

9 DEMOCRATIC CHAIRMAN CONKLIN: Scott Conklin,
10 Centre County, Pennsylvania.

11 REPRESENTATIVE WHEELAND: Representative Jeff
12 Wheeland, Lycoming County.

13 REPRESENTATIVE SCHMITT: Representative Lou
14 Schmitt, Blair County.

15 REPRESENTATIVE NELSON: Representative Eric
16 Nelson, Westmoreland County.

17 REPRESENTATIVE HOWARD: Kristine Howard,
18 167th in Chester County.

19 REPRESENTATIVE MILLER: Brett Miller, 41st
20 district, Lancaster County.

21 REPRESENTATIVE DIAMOND: Russ Diamond, 102nd
22 district, Lebanon County.

23 REPRESENTATIVE YOUNG: Regina Young,
24 Philadelphia, Delaware Counties, District 185.

25 REPRESENTATIVE MADDEN: Good morning, Maureen

1 Madden, 115th district, Monroe County.

2 REPRESENTATIVE WEBSTER: Good morning, Joe
3 Webster, I represent the 150th in Montgomery County.

4 MAJORITY CHAIRMAN GROVE: Representative
5 Fitzgerald.

6 REPRESENTATIVE FITZGERALD: Good morning,
7 Isabella Fitzgerald, representing the 203rd Legislative
8 District, down West Oak Lane, East Oak Lane, and the lower
9 northeast. Good morning.

10 MAJORITY CHAIRMAN GROVE: Representative
11 Kenyatta.

12 REPRESENTATIVE KENYATTA: Good morning,
13 Representative Malcolm Kenyatta, the 181st district,
14 Harden (phonetic) and North Philadelphia. Thank you.

15 MAJORITY CHAIRMAN GROVE: Representative
16 Sanchez.

17 (No response.)

18 MAJORITY CHAIRMAN GROVE: Representative
19 Solomon.

20 REPRESENTATIVE SOLOMON: Jared Solomon
21 representing northeast Philly, 202nd Legislative District.
22 Good morning.

23 MAJORITY CHAIRMAN GROVE: All right.

24 With that, before we get to our first
25 testifier, if I can have all the testifiers please kick on

1 your video and unmute. I'm just going to swear all of you
2 in right now so we don't have to worry about it later.

3 Mr. Hauenschild, can you just stand up for us
4 real quick.

5 You guys -- virtually, you guys don't need to
6 stand up, so just raise your right hands.

7 Do you swear or affirm that the testimony
8 you're about to give is true to the best of your knowledge,
9 information, and belief?

10 If so, please indicate by saying, "I do."

11 (Affirmative answers.)

12

13 JONATHON P. HAUENSCHILD, J.D., DANIEL I.
14 WEINER, BRADLEY A. SMITH, DAVID KEATING, KHALIF ALI, and
15 PHILIP HACKNEY, called as witnesses, being duly sworn,
16 testified as follows:

17

18 MAJORITY CHAIRMAN GROVE: Congratulations.
19 You're all married. I'm just kidding.

20 Thank you, all. You guys can remute and turn
21 off your video and then when we get to you, just click on
22 your video and unmute.

23 With that, our first testifier is Jonathon
24 Hauenschild, with American Legislative Exchange Council,
25 also filed an amicus brief to the Bonta case.

1 I appreciate your time this morning and the
2 floor is yours, sir.

3 MR. HAUENSCHILD: Representative Grove --
4 Chairman Grove, Chairman Conklin, members of the
5 committee, thank you for the opportunity -- yeah, it's on.
6 Maybe I just need to get closer. Yeah, there we go.

7 All right. We'll start again.

8 Chairman Grove, Chairman Conklin, members of
9 the committee, I greatly appreciate the opportunity to come
10 on behalf of the American Legislative Exchange Council and
11 share our thoughts and observations regarding donor
12 disclosure and campaign finance. I will hopefully briefly
13 summarize the written testimony I submitted earlier, but as
14 a former practicing lawyer, to say "summarize" and "brief"
15 often do not work together. They are paradigms that lawyers
16 don't understand, but we will do our best.

17 I also know that it is good to kind of
18 outline what I would like to say before I say it, and then
19 to say it, and then to remind you what I said when I am
20 done -- good keys of public speaking.

21 So with that, the introduction -- would
22 really like to kind of discuss the difference between
23 campaign finance and donor disclosure, where the line is,
24 what it means, and especially what it means for state
25 legislators. And then I would kind of like to move from the

1 esoteric to the practical, what this actually means for
2 organizations like ALEC and nonprofits on all sides of the
3 political spectrum.

4 But before I begin, there's really three
5 themes that I would like to weave throughout the testimony.

6 The first is that privacy is for people;
7 transparency is for the government. The second is that
8 compelled disclosure, especially compelled disclosure in a
9 nonelection setting -- compelled disclosure harms society by
10 chilling speech and public participation in civil discourse.
11 And third, that protecting donor disclosure, protecting
12 donor privacy protects individuals on all sides of the
13 political spectrum. And that's important enough to repeat.
14 Donor privacy protects individuals on all sides of the
15 political spectrum.

16 So donor disclosure and campaign finance --
17 what's the difference? Where's the line?

18 I have read through a number of the
19 testimonies submitted in writing, and I think a lot of them
20 nail it. It's within an election setting. So state law
21 requires disclosure, requires reports when speech seeks to
22 influence the outcome of an election. And Pennsylvania law
23 further clarifies that an election is any retention,
24 primary, special, general, or municipal elections where
25 candidates appear on the ballot for nomination or election.

1 So when we're looking at campaign finance, we
2 are specifically referring to speech regarding the election
3 of or opposition to candidates, particularly. When we're
4 referring to donor disclosure, we're referring to speech
5 that is outside of an election setting. Whether that's
6 education -- educational such as testimony like this,
7 whether it is issue advocacy, whether it is religious or
8 cultural -- promoting religious or cultural values, the
9 Court in *AFP v. Bonta* kind of drew that similar line. And
10 when it comes to campaign finance, states have a little more
11 leeway to compel disclosure, particularly again, when
12 seeking to influence the outcome of an election.

13 When you're talking about donor privacy,
14 you're really talking about the First Amendment to the
15 United States Constitution. And of course, Pennsylvania
16 also has a very robust free speech in Article I, Section 7
17 of the Pennsylvania Constitution. The Pennsylvania Supreme
18 Court generally interprets and applies Article I, Section 7
19 in the same way and consistent with Supreme Court
20 jurisprudence on the First Amendment.

21 When you're looking at what type of standard
22 the courts will apply when evaluating campaign disclosure,
23 they will apply a standard called exacting scrutiny.

24 Now, as a quick aside for any nonlawyers in
25 the room who are not familiar, there's four levels of

1 scrutiny the federal courts will apply: Rational basis,
2 intermediate, exacting scrutiny, and strict scrutiny.
3 Strict scrutiny being, well, of course, the most strict by
4 its name, and exacting scrutiny being just underneath. And
5 exacting scrutiny requires a government to narrowly tailor a
6 law or regulation to achieve a significant government
7 interest.

8 In the context of compelled disclosure, this
9 means that any compelled disclosure regime must be narrowly
10 tailored and must connect the dots between the tailoring and
11 the government interest that it seeks to achieve.

12 A number of the testimonies in the particular
13 AFP case noted that the California Attorney General,
14 starting in 2010 or '11, require nonprofits registered with
15 the state to submit their Schedule Bs for the 990s. And the
16 Schedule Bs include donations above a certain amount, the
17 donors, and very identifiable personal information.

18 The Supreme Court said that that regime was
19 not narrowly tailored and could, in fact, result in a
20 chilling of speech and participation due to the fear of
21 reprisals. And the case specifically cited that the parties
22 had suffered and the donors related to the parties had
23 suffered, among other things, threats of physical violence,
24 harassment, and so on.

25 So when we're looking at the authority that a

1 state legislator has, it's much broader when it comes to
2 campaign finance and it's a little narrower -- a lot
3 narrower when it comes to donor disclosure.

4 Now the Supreme Court is going to apply
5 exacting scrutiny regarding -- regardless, whether it's
6 campaign finance or it's donor disclosure. But the outcome
7 may be different because the government interest and the
8 narrow tailoring are very different when it comes to speech
9 regarding the outcome of an election.

10 Now moving a little bit to the ALEC story
11 itself. So the American Legislative Exchange Council has
12 been around since 1973, so we're on year number 49. We are
13 the nation's largest, nonpartisan, voluntary membership
14 association of state legislators. And we like to consider
15 ourself a place where legislators can come and freely
16 exchange ideas and where we can judge the ideas based off
17 the content of the ideas.

18 We existed for quite some time without much
19 problem, and we had a really good ratio of Republican to
20 Democratic members. But starting in two thousand -- well,
21 starting about, a little over a decade ago, ideological
22 opponents began a campaign of intimidation and harassment
23 against ALEC, against our state legislative members, and
24 against our corporate supporters.

25 The purpose of the intimidation tactics was

1 to push ALEC from the public square, to silence ALEC, and to
2 make sure that we were completely gone.

3 On the one hand, it did not work. We're
4 still here. We're still seeking to educate state
5 legislators, and we're still seeking to operate as an
6 exchange where legislators can come and share ideas. But
7 on the other hand, it really harmed public participation,
8 and it really harmed the participation of our legislative
9 members. Between 2011 and 2013, ALEC lost nearly 400
10 legislators. Most of those were Democrats, but they were
11 from both parties.

12 And today, while we still have a decent ratio
13 of Republican to Democratic members, that ratio is
14 substantially reduced, whereas before the intimidation
15 tactics, we were able to alternate between Republican
16 national chairs and Democratic national chairs.

17 And so we see from the ALEC story that
18 compelled disclosure can have a chilling effect on public
19 participation. We see that donor privacy is important and a
20 critical aspect for state governments to protect.

21 So in summary, the First Amendment protects
22 individuals' freedom of expression, including their freedom
23 of association. *Americans for Prosperity v. Bonta* stands
24 for the proposition that any compelled disclosure regime
25 will be subject to exacting scrutiny, meaning that any

1 government action must be narrowly tailored to serve an
2 important government interest and that the chilling effect
3 on public participation is very real and very palpable.

4 And I thank you for your time, and I look
5 forward to your questions.

6 MAJORITY CHAIRMAN GROVE: Thank you very
7 much.

8 We'll start with Representative Schmitt.

9 REPRESENTATIVE SCHMITT: Thank you, Mr.
10 Chairman.

11 Welcome, Mr. Hauenschild, and thank you very
12 much for being here and participating and exercising your
13 right to free speech here today with us.

14 Your testimony makes particular mention of
15 the negative view that courts have held for what are called
16 dragnet policies. Could you explain a little bit to us all
17 what a dragnet policy is and where those policies have been
18 previously enacted and how courts have reacted to these
19 so-called dragnet policies?

20 MR. HAUENSCHILD: Yeah. It's a really good
21 question.

22 Generally speaking, a dragnet policy is a
23 policy that collects more information than is really
24 necessary to serve an important government interest. In the
25 case of *Americans for Prosperity v. Bonta*, the Attorney

1 General required all charities in California -- so I think
2 the number was 60,000 according to the record -- to submit
3 their Schedule Bs along with their 990s, unredacted Schedule
4 Bs. The interest that they claim was preventing charitable
5 fraud and self-dealing -- obviously, very important goals.
6 But the dragnet was to collect that much information from
7 60,000 charities when the enforcement and the number of
8 charities that were actually prosecuted for fraud and
9 self-dealing were minuscule.

10 So a dragnet captures more information than
11 is necessary or captures it in advance just because it may.
12 And courts, when it comes to compelled disclosure, have
13 almost universally found those to have a chilling effect.

14 And perhaps the best example, other than
15 Americans for Prosperity, is the case on which it relied
16 which was *NAACP v. Alabama*, where the state of Alabama
17 wanted the NAACP to disclose its entire member list in the
18 state of Alabama. And again, the Courts said that's a
19 dragnet approach -- you cannot have a dragnet approach. You
20 have to narrowly tailor -- when it comes to speech and
21 disclosure, you have to narrowly tailor your solution.

22 REPRESENTATIVE SCHMITT: Thank you very much.
23 I appreciate your answer.

24 MAJORITY CHAIRMAN GROVE: Representative
25 Webster.

1 REPRESENTATIVE WEBSTER: Thanks, Mr.
2 Chairman.

3 My question -- let me see if I can frame it
4 correctly. I'm over -- hiding behind the podium over here.

5 When we were talking about the exacting and
6 strict scrutiny of what impacts an election, has there been
7 court cases or maybe just legal opinions around when certain
8 nonprofits are engaged, you know -- and maybe you can look
9 at their expenditures and you find out that while it appears
10 to be an educational statement, it seems to occur, you know,
11 30 days before an election. You know, for us, we have a
12 blackout period, where we're -- even though we might be
13 speaking on a policy issue, it appears to be a campaign or
14 an election discussion. And those same kind of things apply
15 when -- or how you would view that in the case of the
16 nonprofits themselves who may have, you know, large donors
17 over time, but it's applied very specifically in time
18 frames.

19 MR. HAUENSCHILD: Yeah, again, a good
20 question.

21 Regardless of whether it's campaign finance
22 or donor disclosure, the court is going to apply exacting
23 scrutiny. It will still have to be narrowly tailored to
24 serve an important government interest. And we know on the
25 one side that campaign finance be -- compelled disclosure

1 particularly of candidates, parties, and committees is an
2 important government interest, and most campaign finance
3 laws have been narrowly tailored to include that.

4 And then on the other side, go back to that
5 distinction, you have nonelection speech. And the compelled
6 disclosure, again, is going to be subject to exacting
7 scrutiny, but the legislative prerogative is going to be a
8 little bit narrow. That's not to say you cannot narrowly
9 tailor a disclosure regime, you cannot -- it's not to say
10 that the evaluation would change, so to speak.

11 But I would emphasize that when it comes to,
12 you know, issues, when it comes to education, the court is
13 going to apply a much more strict standard. And if you're
14 interested in reading -- it's kind of like the difference
15 between the original cases, *Buckley v. Valeo*, on which a lot
16 of this is based, and then *NAACP and AFP v. Bonta*. It's
17 hard to give a direct answer because you have to kind of see
18 the type of -- the general language that would be introduced
19 to actually evaluate it.

20 MAJORITY CHAIRMAN GROVE: Representative
21 Wheeland.

22 REPRESENTATIVE WHEELAND: Thank you, sir, for
23 testifying today. I appreciate the information that you
24 have brought forward.

25 Two-part question, and some of this you hit

1 on in your opening statement. But you noted the twin
2 dangers of policy failing to be narrowly tailored or having
3 a chilling effect -- how do each of these standards interact
4 with one another? And more importantly, can you provide an
5 example of a disclosure requirement that you view as both
6 sufficiently narrow, narrowly tailored, and avoiding any
7 chilling effect?

8 MR. HAUENSCHILD: Yeah, and again, a really
9 good question.

10 You know, when you're looking at the test,
11 the way courts tend to evaluate these is to examine the
12 individual parts. They're going to ask, "Is the law
13 narrowly tailored?" And then, "Does it seek to achieve an
14 important government interest?" And often the first
15 examination is going to be, is this an important government
16 interest?

17 So in the case of *AFP v. Bonta*, the
18 government's stated interest in protecting against
19 charitable fraud and self-dealing is a very important
20 government interest. The problem was the connection between
21 the narrow tailored and this -- or the dragnet, for asking
22 for donors in advance was not a narrow tailored. Where,
23 hypothetically speaking, I could see a donor disclosure
24 aspect passing muster, would be an instance where the State
25 successfully prosecutes a specific charity for fraud, and

1 they want to let the donors to that charity know that
2 there's been a conviction after a court proceeding on fraud
3 that they could then compel disclosure of the donors after a
4 guilty plea, or a guilty verdict. So that would be -- you
5 know, if the State decides to have that, that could be an
6 option.

7 REPRESENTATIVE WHEELAND: Thank you.

8 MAJORITY CHAIRMAN GROVE: Representative
9 Diamond.

10 REPRESENTATIVE DIAMOND: Thank you, Mr.
11 Chairman.

12 Thank you, sir, for your testimony. I read
13 in -- you know, twice last night -- before we came, I read
14 your testimony. I just find this -- quite frankly, the
15 different levels of scrutiny that the courts apply to be
16 fascinating as a nonlawyer.

17 So I did want to ask -- turning it to you,
18 that portion of the exacting scrutiny standard that you
19 reference, what do courts seem to tolerate as a sufficiently
20 compelling governmental interest?

21 I mean, your description of the background at
22 Bonta seemed to focus on the mismatch between the
23 government-stated interest and its policy to achieve that
24 interest. But more generally, what types of governmental
25 interests have courts seen to be compelling in this context?

1 MR. HAUENSCHILD: That's a really good
2 question, because I actually looked at both Americans for
3 Prosperity, as well as the *NAACP v. Alabama* -- and there's a
4 tactic lawyers use when they are researching called
5 Shepardizing, and Shepardizing means to look at every single
6 time that that case has been cited. And I haven't -- I
7 don't really have a good answer for you --

8 REPRESENTATIVE DIAMOND: Yeah.

9 MR. HAUENSCHILD: -- because generally
10 speaking, the problem is between the narrow tailoring and
11 the government interest. It almost seems that courts are
12 willing to say -- for example, again, going back to the
13 Americans for Prosperity -- that preventing charitable fraud
14 and self-dealing is an important interest. The exception
15 may be *NAACP v. Alabama* where they said, "Alabama doesn't
16 have an important government interest knowing the members of
17 the NAACP."

18 REPRESENTATIVE DIAMOND: Yeah.

19 So if I could just follow up on that. In a
20 compelling governmental interest, is to -- are the rights --
21 protecting the rights of individuals part of a compelling
22 governmental interest?

23 I mean, we think of governmental interest of,
24 oh, okay, government running elections, governments
25 regulating what candidates can do, but is, you know, just

1 basic individual rights, First Amendment rights, the right
2 of free association, I mean, is that a compelling
3 governmental interest as well?

4 MR. HAUENSCHILD: I actually think it would.

5 So if you adopted some sort of donor privacy
6 regime to ensure that the State can only go after donors to
7 organizations, for example, when there's been an actual
8 conviction for charitable fraud -- because you want to
9 protect individuals' freedom of association -- that, in
10 fact, would be a compelling government interest.

11 REPRESENTATIVE DIAMOND: So just one more
12 follow-up question, Mr. Chairman.

13 So as I'm thinking about this entire concept
14 of what the governmental interest is here, you know, I
15 couldn't help but be reminded of Pennsylvania's campaign
16 finance law where we actually prohibit contributions, direct
17 contributions from corporations, banks, and foreign
18 nationals, and that is a compelling governmental interest.
19 Why? Because those organizations, I believe, are not
20 individuals who have -- you know, an individual has a right
21 to association, an individual has a right to free speech.

22 So I guess trying -- what I'm trying to get
23 at here is there are certain organizations, whether it's a
24 nonprofit, whether it's a corporation, whether it's a public
25 sector union, all of those entities only exist because the

1 government, through statute, allows them to exist. So
2 they're almost a government grant of privilege of sorts.

3 Is there any court that differentiates that
4 between the natural individual entity and kind of weighs
5 that balance when they're talking about these different
6 levels of scrutiny that we're talking about here? Because I
7 do see a difference between a government grant of liability
8 protection through a corporation and an individual who can
9 be sued, you know, for every reason possible under the sun.

10 So is there a differentiation between those
11 kinds of entities, a natural entity of an individual and a
12 government-created entity of whatever it is -- whether it's
13 a political action committee or what have you?

14 MR. HAUENSCHILD: Yeah. There's actually
15 some really good robust discussions in federal cases. And I
16 can get the citations to you, but I'll get you the titles.

17 And the first one is actually somewhat
18 well-known, and that's *Citizens United v. FEC*. And then you
19 also have *McConnell v. FEC* that kind of goes into the issue
20 that you're talking about.

21 And again, the line of demarcation actually
22 is regarding seeking to influence elections. So when we're
23 talking donor privacy versus campaign finance, you're
24 looking at whether they're trying to influence the outcome
25 of an election.

1 And my area of expertise is less on the
2 campaign finance side and more on the donor privacy, but
3 again, I can get you -- if you need them -- the citations
4 for those cases, and you can read them through. They're
5 actually really good reads, especially from the historical
6 perspective.

7 REPRESENTATIVE DIAMOND: Yeah. And then
8 superseding a lot of this is the 1995 *McIntyre v. Ohio* where
9 the Supreme Court said that anonymity, or anonymous
10 pamphleteering -- I mean, even in elections -- is protected
11 by the First Amendment.

12 So it's a very, very fascinating topic, and I
13 thank you so much for your testimony and answers today.

14 Thank you, Mr. Chairman.

15 MAJORITY CHAIRMAN GROVE: Thank you.

16 Last question for this testifier is from
17 Representative Kenyatta.

18 REPRESENTATIVE KENYATTA: Thank you so much,
19 Mr. Chairman.

20 And thank you, Mr. Hauenschild. I'm sorry,
21 I'm having an issue with my camera here.

22 But I really want to pick up where the
23 gentleman from Lebanon just dropped off, because I'm hearing
24 this consistent theme in your testimony about protecting
25 speech and a chilling effect. And I'm trying to understand

1 from you how attributable speech is chilling in any way.
2 And I'm also trying to understand where you see the line in
3 terms of folks who are spending millions and millions of
4 dollars trying to impact public decision-making whether or
5 not individual citizens should be aware of who is footing
6 the bill for money that is going to change the outcome of
7 policy decisions.

8 And so, I see this consistent equating of
9 anonymizing speech as with not protecting free speech.
10 Because you can say what you want, but we should be able to
11 know who's saying what and to what end they are saying it.
12 And so, I just want to understand what you're thinking about
13 that.

14 MR. HAUENSCHILD: Yeah, and a great question.
15 And I think you're introducing kind of a third concept
16 there.

17 So let's start with the basic concept. And
18 again, to reiterate the testimony, when it comes to donor
19 disclosure and when it comes to campaign finance, the line
20 is seeking to influence the outcome of an election, not
21 seeking to educate on issues of policy.

22 The third one that you're kind of introducing
23 that was really outside of this testimony and which there
24 are different disclosure regimes, happens when you are
25 advocating for or against the passage or defeat of a

1 specific bill. So that would be, you know, coming alongside
2 and saying that we support or oppose HB 123. That's a
3 lobbying expense, and there are different reporting
4 requirements that the State has for disclosing interests.

5 And again, that's outside of this testimony.
6 That's outside of my expertise area. And that, you know,
7 the State has set that out.

8 Where the First Amendment exists to
9 protect -- it protects both individuals and associations.
10 It protects the right of the individual to speak and even to
11 speak anonymously, and the right of the association to
12 protect its members and its supporters. And in that
13 respect, it is to protect the anonymity.

14 And one of my favorite things that was kind
15 of mentioned is there is a long history of anonymous speech
16 in the United States, and that does not necessarily mean
17 it's hidden from public view. And that starts with one of
18 my favorite pamphlets, which was *Common Sense*. We now know
19 that Thomas Paine wrote it. But at the time, he wrote it,
20 published it, he did anonymously. And another one of my
21 favorites, the *Federalist Papers*, stirring the ratification
22 debates. John Jay, Alexander Hamilton, and James Madison
23 published them under a pseudonym, Publius. We have a very
24 rich tradition in this country of anonymous speech on
25 issues, on critical issues.

1 And again, just to conclude, this is so
2 important that it is an issue that crosses party lines.

3 When we filed an amicus brief, we were not
4 the only ones to file in support of Americans for
5 Prosperity. We were also joined by amicus briefs from the
6 ACLU, from the Human Rights Campaign, from the Electronic
7 Frontier Foundation. The protections that exist in the
8 First Amendment protect organizations like AFP, like ALEC,
9 and also protect organizations like Planned Parenthood, the
10 Sierra Club, Keystone Progress, or Pennsylvanians United.

11 MAJORITY CHAIRMAN GROVE: All right.

12 Thank you, Jonathon, so much for your
13 testimony. We greatly appreciate it.

14 We will move on to our next testifier,
15 Mr. Daniel Weiner, director of elections and government for
16 the Brennan Center for Justice.

17 You can hear us good? All right.

18 MR. WEINER: Yes, I can, Mr. Chairman.

19 MAJORITY CHAIRMAN GROVE: All right. Thank
20 you so much, and the floor is yours, sir.

21 MR. WEINER: Thank you so much, sir.

22 Chairman Grove, Chairman Conklin, and members
23 of the committee, thank you for giving me the opportunity to
24 testify before you today about the importance of campaign
25 disclosure and its constitutional foundation.

1 I serve as codirector of the program on
2 elections and governance at the Brennan Center for Justice
3 at NYU School of Law. We've been working for more than 20
4 years to understand and advance commonsense policies with
5 bipartisan support across the spectrum.

6 And as a point of personal note, I'm the
7 husband of a proud graduate of Millersville University in
8 Lancaster, so it's a particular pleasure to be here with you
9 to talk about the law today.

10 Campaign transparency rules, including rules
11 requiring disclosure of those who fund electoral advocacy,
12 serve several essential purposes. First and most
13 importantly, they help to foster a more informed electorate.
14 Ample social science research demonstrates that knowing
15 who's funding electoral messages is an important
16 informational cue that helps voters make decisions that
17 better align with their interests and their preferences.

18 If you see an ad that talks about the
19 candidate's support for, quote, "good jobs in Pennsylvania,"
20 for instance, it's relevant probably whether that ad was
21 paid for by a labor union or a business group. Now, they
22 both have valid perspectives, but do voters deserve to have
23 that information?

24 Transparency also helps deter corruption.
25 One of our most famous Supreme Court Justices, Louis

1 Brandeis, famously said, "Sunlight is the best
2 disinfectant," because that threat of transparency helps to
3 deter illicit conduct.

4 And then finally, transparency helps prevent
5 evasion of other campaign finance rules. Pennsylvania, for
6 example, prohibits direct corporate contributions to most
7 candidates. That rule would be very, very difficult to
8 enforce if you didn't have donor transparency. Federal and
9 state law also prohibit contributions from foreign
10 nationals. And again, without transparency, as we do not
11 have at the federal level, that requirement is somewhat easy
12 to evade.

13 So I want to be clear, these benefits
14 affirmatively advance core First Amendment values. The
15 entire premise of the First Amendment is that free,
16 wide-open debate is an essential precondition for
17 self-government. But the light of self-government depends
18 on an informed citizenry and a government free from
19 corruption and responsive to the public.

20 That's why Pennsylvania, like most states,
21 requires campaign donations to candidates, parties, and PACs
22 to be disclosed. And it's also why we, at the Brennan
23 Center and many other organizations -- including Common
24 Cause who are here testifying also before you today --
25 continue to advocate for gaps in the law that have so-called

1 dark money spending from undisclosed sources to be
2 addressed.

3 And these policies, I need to be clear, enjoy
4 broad bipartisan support across the political spectrum. If
5 you poll the American people, transparency is always
6 supported by double-digit margins.

7 Now, I want to acknowledge that disclosure is
8 not always cost-free. Now, I've worked on these issues for
9 over a decade, including at our nation's federal campaign
10 finance regulator, the Federal Election Commission, and I've
11 always argued that the benefits of transparency need to be
12 weighed against their cause. But I also always wanted to
13 make clear that, you know, we need to remember that while
14 Americans have the right to speak out and associate with one
15 another, they don't have the right to be free from
16 disapproval and criticism from their fellow citizens for
17 their public political acts. And really, you know, the late
18 Justice, Antonin Scalia, put it best: "Requiring people to
19 stand up to the public for their political acts requires
20 civic courage without which democracy is doomed."

21 In the still relatively rare cases where
22 disapprobation turns into something, you know, worse like
23 actual threats, harassment, or reprisals. All well-crafted
24 disclosure laws need to have, allow for exemptions which
25 protect people's safety and privacy, and the Constitution

1 actually requires that. But the basic principle of standing
2 up in public for your political acts is one that we, at the
3 Brennan Center, support.

4 This is the careful balance that the Supreme
5 Court has adhered to for decades. The seminal case of
6 *Citizens United v. FEC*, which the previous gentleman
7 referenced, was one of the most controversial in the Court's
8 history, but one area of common ground was the
9 permissibility of campaign disclosure rules. That actually
10 was upheld at the federal level by an eight-to-one vote in
11 *Citizens United*. And indeed, even as the Court has grown
12 more skeptical of other restrictions on electoral spending,
13 it has often extolled transparency as a viable alternative,
14 a less burdensome way to prevent what Chief Justice Roberts
15 described as abuse of the campaign finance system in the
16 case *McCutcheon v. FEC*.

17 So that brings us -- and I'll wrap this up
18 pretty quickly -- to the Court's decision in *Americans for*
19 *Prosperity Foundation v. Bonta*. And in our view, at the
20 Brennan Center, Bonta did not fundamentally change this
21 calculus. It was not a campaign finance case, as the
22 previous testifier noted. It involved a California rule
23 that required all charities operating in the state to turn
24 over IRS schedules with donor information. And while that
25 provided information that might have been relevant in

1 certain fraud inquiries, the Court found a, quote, "dramatic
2 mismatch" between the State's legitimate objectives and the
3 means it chose. And the Court made clear the disclosure
4 requirements must not only serve a legitimate purpose, but
5 they must be narrowly tailored, and that means there must be
6 a reasonable fit for the legitimate purpose that the
7 government has articulated.

8 So there's a legitimate debate about whether
9 Bonta represents a shift in the Court's broader approach to
10 compel donor disclosure, but I, you know, I think -- and
11 this may be a subject of some agreement here, even -- you
12 know, I know with the previous witness, again -- I believe
13 the effect on campaign finance disclosure law is likely to
14 be marginal.

15 These rules clearly serve many multiple
16 legitimate goals, as I explained, and the Court has
17 generally presented them as the least restrictive means to
18 achieve those goals. And indeed, (inaudible) Bonta was
19 actually authored by Chief Justice Roberts who has
20 articulated broad support for political disclosure in other
21 contexts, as has at least one other Justice in the majority,
22 Justice Kavanaugh, when he was a lower court judge.

23 So in short, Pennsylvania's existing campaign
24 disclosure rules are constitutional. And we agree, as
25 Common Cause, I know, noted in its testimony, that if

1 anything, they should be expanded to ensure all large
2 campaign expenditures are fully transparent.

3 And with that, I'll stop, and I look forward
4 to answering your questions.

5 MAJORITY CHAIRMAN GROVE: Will do. Thank you
6 so much, Mr. Weiner.

7 Let me start off with, can you define dark
8 money for us so we have an understanding of that ominous
9 term? You know, when you hear dark money, right? Can you
10 just give us a quick definition and maybe an example of
11 that?

12 MR. WEINER: Sure. Well, you know, the
13 reality is the term dark money means different things in
14 different contexts. It's obviously, it's a -- it's not a,
15 lawyers sometimes call it, term of art.

16 When I'm talking about dark money here, I
17 mean electoral advocacy from organizations that are not
18 transparent about who is funding that electoral advocacy.

19 So, you know, an example, of course, is a
20 political nonprofit that might run an ad in support of a
21 candidate, and while the nonprofit may disclose its own
22 identity, usually, you know, there's a kind of sort of
23 generic name -- Americans for Good Government -- and the
24 folks actually funding those ads are not disclosed.

25 MAJORITY CHAIRMAN GROVE: Thank you.

1 We'll move on to Representative Miller.

2 REPRESENTATIVE MILLER: Thank you.

3 And I appreciate your testimony, and
4 Millersville is right up the road from where I live, so glad
5 to have you.

6 MR. WEINER: (Inaudible.) Thank you so much,
7 sir.

8 REPRESENTATIVE MILLER: I have a question.
9 Your testimony references that the laws passed by some
10 states to require disclosure of large donors to groups that
11 undertake substantial political spending. Can you give us
12 an overview of the states that have taken this approach and
13 how the regulations have been designed?

14 MR. WEINER: Sure. I mean --

15 I'm hearing a little echo there.

16 But the -- I don't have an exhaustive list
17 handy. But, you know, often -- for instance, the typical
18 way you would do this -- and, you know, states like
19 California, Montana, and New York have these rules -- is
20 that an organization that spends a certain amount on
21 political advocacy -- let's just say that this isn't drawn
22 from an actual state, but I can send you a concrete
23 example -- say, \$10,000, must then disclose all, you know,
24 donors who gave to that organization at a certain amount --
25 say \$1,000. You know, one challenge is always that many

1 organizations -- I'm sure you'll hear that from some other
2 witnesses, may engage in both electoral advocacy and other
3 types of advocacy. If it's your desire to only, you know,
4 require transparency for electoral advocacy, I think, you
5 know, one approach is to say, "Okay, if you want to buy
6 campaign ads, you have to do that from a segregated
7 account," and the donors to that account need to be
8 disclosed, and then you can engage in your other activities
9 with your charitable funds.

10 So that's basic structure of how a law like
11 that would be crafted.

12 REPRESENTATIVE MILLER: Just as a follow-up,
13 curious, do you see any -- we're talking about disclosure,
14 but do you see any limits to donations relevant to
15 disclosure or not? Do you see any limits to donations?

16 MR. WEINER: Well, if an organization -- I
17 might not be understanding your question.

18 If an organization doesn't itself coordinate
19 with, you know, working close collaboration with candidates
20 or political parties or itself donate to candidates, then
21 under Citizens United and lower courts' decisions, it can't
22 be subject to campaign donations limits. It's a D.C.
23 Circuit case called *SpeechNow.org v. FEC*. So that's not --

24 We do support, you know, direct contribution
25 limits to candidates and PACs. You know, I'm going to be

1 honest with you, we've been critical of Citizens United, but
2 I think transparency is important whether or not we limit
3 donations.

4 So I might not have understood your question.

5 REPRESENTATIVE MILLER: No, that -- I was
6 just curious your take on that side of limits, so appreciate
7 that.

8 And we welcome you back to Millersville
9 anytime.

10 MR. WEINER: Thank you so much.

11 MAJORITY CHAIRMAN GROVE: Representative
12 Nelson.

13 REPRESENTATIVE NELSON: Thank you. Thank
14 you, Mr. Chair.

15 My question, kind of following up on the
16 earlier discussion, trying to dig a little bit deeper in
17 your perspective of balance. You know, the previous
18 testifier talked about the dichotomy that exists in trying
19 to maintain member privacy versus donor privacy.

20 Specifically, as you were addressing the PACs
21 or the super PACs, how do you balance transparency if we do
22 have nonprofits that are heavily influencing or attempting
23 to influence elections with large dollars? But in your
24 example, it was only given accounts that achieve disclosure.
25 So it would seem like it would almost create an umbrella

1 of -- you would still maintain that same dark money approach
2 if only certain accounts were going to be disclosed if those
3 moneys were used for political purposes almost -- you could
4 create a banking end-around.

5 Can you, you know, dig a little bit deeper on
6 how we maintain the -- specifically because of -- you know,
7 we're seeing this PAC mentality where, you know,
8 organizations are looking to attack members or funders of
9 competing organizations. It's almost like a backyard brawl.

10 MR. WEINER: That's a great question, and
11 it's not always an easy one.

12 So when I think of PACs, first of all, you
13 know, usually you would think of those (inaudible) tech
14 organizations whose major purpose is actually, you know,
15 electoral advocacy, whether attacking members or supporting
16 them. And those organizations generally are required to
17 disclose all their donors. And at the federal level, which
18 is my greatest expertise, you know, a PAC whose major
19 purpose is electoral advocacy has to disclose all its donors
20 and a lot of other information.

21 The real challenge comes -- and I want to be
22 honest, I recognize this is a challenge, where you have an
23 organization, say the Sierra Club, which both is very active
24 electorally, but then also engages in a wide variety of
25 other, you know, activities. If you, as the policymakers,

1 want to, you know, avoid what some would say chilling --
2 that sort of just general civic engagement, but you want
3 that accountability for folks who are actually spending
4 money on electoral advocacy, that's where I, you know, tend
5 to think a segregated account makes sense. It's not
6 perfect, but, you know, one of the hallmarks of our approach
7 at the Brennan Center is recognizing that there are
8 trade-offs. And I think that that one is a respectable one
9 to make, and certainly one that, you know, is the approach
10 that has been advocated at the federal level.

11 REPRESENTATIVE NELSON: And just as a quick
12 follow-up, your definition for -- if we were looking at
13 legislation to space that large-dollar threshold? You know,
14 in Pennsylvania, there's a \$250 campaign reporting, but it
15 seems like major influence is happening well above
16 \$10,000 -- it's in the millions.

17 What do you see as a realistic...

18 MR. WEINER: I -- so my -- contribution
19 thresholds, which, legally, are sort of committed to the
20 discretion of the policymakers, which is obviously you, are
21 a tough one. I believe there is some value in requiring
22 donations of \$200, \$250 to be disclosed. At the same time,
23 you know, I actually -- this might be some common ground --
24 think that it's not cost-free.

25 My biggest actual argument is that whatever

1 threshold you set should be indexed to inflation.

2 One of the legitimate criticisms of the
3 federal disclosure regime, for instance, is that they set
4 the threshold at \$200 in the '70s and never indexed it to
5 inflation. And we've said in other contexts, you know, we
6 would like to plug a lot of other loopholes in the regime,
7 but it would certainly be reasonable to also index that to
8 inflation.

9 REPRESENTATIVE NELSON: Thank you, Mr. Chair.

10 MAJORITY CHAIRMAN GROVE: Last question,
11 Representative Ryan.

12 REPRESENTATIVE RYAN: Thank you so much.

13 And, Mr. Weiner, I appreciate your testimony.

14 This is kind of an unusual question in this
15 context. I'm a former congressional candidate, back in '04.
16 And the federal FEC guidelines for misuse of FEC filings is
17 pretty specific, but seldom, if ever, enforced. It really
18 has no teeth. I'm a CPA as well and, quite candidly, it's a
19 joke.

20 And so the question I have for you is have
21 the courts and the legal precedents been able to keep pace
22 with the changes in technology, with data mining, with the
23 ability to -- as an example, specifically as has happened
24 with Facebook this past week, with having so many additional
25 platforms where there have been calls on both the left and

1 right to break them up.

2 Has this type of an environment created a
3 different set of scenarios for you where the release of
4 donor information is important? I truly understand the need
5 for us as candidates and legislators and people in
6 government service to release that, but I'm concerned about
7 the chilling effect it has on those under an environment
8 that might be different than might have existed in the
9 1970s.

10 MR. WEINER: Well, that is a really
11 interesting and great question.

12 I think that the FEC in a variety respects --
13 and I've written this publicly -- has not kept up with
14 developing technology. And I think, you know, the FEC has
15 some unique problems that I and others have written about.

16 I do continue to believe that, you know, in
17 disclosure of individual donor information at appropriate
18 thresholds, even with the sort of changing technological
19 environment, is helpful for our democracy.

20 And I make political donations. I've been
21 criticized about them on occasion, you know, even in this
22 space. And that -- I accept that because, again, I see that
23 as a public or political act.

24 But I do think we need to take seriously the
25 still, thankfully, rare instances where public criticism or

1 public accountability translates into something uglier. And
2 that's an issue across our society.

3 But, you know, while there is a tradition of,
4 in certain contexts, anonymity in this country, I do
5 believe, you know, again, that sunlight is important. And
6 that whatever solutions we come up with -- and I do agree
7 that this requires serious consideration -- needs to
8 preserve, again, this basic principle that Justice Scalia
9 articulated so well, that, you know, standing up for your
10 public or political acts is an aspect of civic courage --

11 (Inaudible.)

12 REPRESENTATIVE RYAN: Let me just very
13 quickly make the comment, the case referencing sunlight was
14 referencing government sunlight, not necessarily on the
15 individual, and I want to caution about that.

16 I'm a retired Marine, so I don't mind
17 scrutiny, but there are people who don't necessarily feel
18 the same way and haven't been in seven nations where we had
19 to restore a republic or a democracy in their particular
20 case. In our case, we're trying to preserve a republic.
21 It's people few and far between on the private sector side
22 that are willing to accept that same level of scrutiny.

23 Because thank you so much for your answer.

24 MAJORITY CHAIRMAN GROVE: Representative
25 Madden.

1 REPRESENTATIVE MADDEN: Thank you, Mr.
2 Chairman.

3 And thank you for your testimony, sir.

4 I'm looking to, for you to help me clarify a
5 distinction between an individual donor like yourself, who
6 donated money to a political campaign, and then, you know,
7 super wealthy people, think like George Soros or the Koch
8 brothers. Now shouldn't there be greater scrutiny over
9 organizations like ALEC or any other organization that
10 really, really influences legislation?

11 And, you know, Newt Gingrich called ALEC the
12 most important organization for conservatives. So when we
13 have super wealthy people giving ridiculous amounts of money
14 to influence stand your ground laws or immigration laws,
15 shouldn't they be held to higher scrutiny? Shouldn't we
16 know who those people are?

17 And the previous testifier referenced
18 *NAACP v. Alabama*, and I don't know that I believe that's a
19 fair case because in Alabama -- they were trying to protect
20 people who were trying to pursue civil rights and equality
21 from having crosses burned on their lawns or their homes
22 burnt to the ground.

23 So where do you see the scrutiny and the
24 transparency in terms of these amounts of money and the
25 amounts of influence on policymaking?

1 MR. WEINER: Thank you, Representative.

2 A couple of points in response to your
3 question. I do agree that more scrutiny is warranted for
4 those who spend more money in our political system.

5 Again, as I have said, I do think there is
6 value in transparency for donations at lower thresholds,
7 particularly at the state and local level. Some of the
8 research my colleagues have done, whether it is state and
9 local ballot referendum or election, it doesn't take
10 millions of dollars to have a real impact on policy.

11 I will say two things. One, you know, the
12 sunlight point again, while Justice Brandeis was talking
13 about government, the Supreme Court has adopted that as also
14 a sort of motto for campaign disclosure. And I will say he
15 illustrated why it is so important because the folks who
16 send those large amounts of money in or on electoral
17 advocacy do wield tremendous influence in our society, and
18 accountability is important.

19 Like you, I am -- and I say this with the
20 utmost respect -- I am somewhat troubled by analogies to the
21 NAACP in the Jim Crow South where you were really dealing
22 with a fundamental campaign of state-sponsored terrorism
23 against people who were advocating for their rights. That
24 is not to say that I take lightly, you know, any harassment
25 or reprisals, et cetera, that happens today against folks

1 speaking out. I just think that analogy should be used with
2 care.

3 But again, I do agree with your basic point
4 that the larger campaign expenditures ought to be subject to
5 the most transparency.

6 REPRESENTATIVE MADDEN: Thank you.

7 MAJORITY CHAIRMAN GROVE: And to clarify your
8 last statement, you're not saying a conservative group
9 should have more scrutiny than a liberal group.

10 MR. WEINER: Oh, of course not. I think it's
11 very important -- and again, across the ideological partisan
12 spectrum, donor transparency and electoral context has broad
13 support from conservatives (inaudible) and I think it's a
14 value to be shared and to continue to share amongst regular
15 Americans.

16 MAJORITY CHAIRMAN GROVE: Thank you so much.
17 We are out of questions. We greatly appreciate your time.
18 Thank you.

19 MR. WEINER: Thank you so much.

20 MAJORITY CHAIRMAN GROVE: We do have some
21 members who did come in, Representative Sanchez,
22 Representative Keefer, and Representative Schemel. They are
23 here in person.

24 And we will move on to our next panel,
25 Bradley Smith and David Keating from the Institute for Free

1 Speech.

2 Gentlemen, you can turn on your monitors, and
3 whoever wants to go first. The floor is yours, gentlemen.

4 MR. SMITH: All right. Thank you very much,
5 Mr. Chairman, Representative Conklin. I appreciate you
6 inviting us to come here today and talk to you all.

7 Just as a way of background, I'm a professor
8 of election law at Capital University, former chairman of
9 the Federal Election Commission, author of three books on
10 campaign finance disclosure, voting rights, and at one point
11 was ranked as one of the ten most cited election law
12 scholars in the country.

13 So having tooted my own horn in that way,
14 let's get down to some serious stuff. First, I think
15 Mr. Hauenschild got it exactly right describing in detail
16 AFPPF and the legal implications of that case and how it
17 works. There's not a lot of point in going back into the
18 detail. But I will just note the high points very quickly
19 because as an educator, I know that repetition is important.

20 The first, there has to be a substantial
21 relationship between an important government interest and
22 the disclosure that is required. Next, the disclosure has
23 to be narrowly tailored, and it must account for not only
24 actual specific (inaudible), but one of the key things in
25 AFPPF (inaudible) a number of precedents, like (inaudible)

1 California and so on, plausible harms have to be considered.
2 In other words, if it's plausible to think that this could
3 lead to harm or retaliation, then the state has to consider
4 that. And you can't pass a law, wait for people to get beat
5 up or whatever, and then say, "Oh, well, maybe we shouldn't
6 have passed that law," right? So you have to look at the
7 plausible harms.

8 Now, what are the interests that the
9 government can consider here? Well, there really are two in
10 disclosure. The first is, as Mr. Weiner mentioned, the
11 anticorruption interest. And what's very important to note
12 is that the Court has always limited the contributions to
13 candidates. The Court has held, quite clearly, that, say, a
14 matter of certain constitutional law, the corrupting impact
15 of independent expenditures -- assuming there is some at
16 whatever level one thinks it might be -- is insufficient to
17 override First Amendment liberties. It's contributions to
18 candidates that we're worried about, the anticorruption
19 rationale -- a candidate or his campaign is getting funds
20 and might take official positions in response.

21 The second interest is what's called
22 (inaudible) informational interest, and this is largely
23 misunderstood. It's very clear if you read *Buckley v. Valeo*
24 closely, or as one of the members noted earlier, *McIntyre v.*
25 *Ohio Elections Commission*, that the informational interest

1 is not general public curiosity. It's not helping the
2 public evaluate the credibility of the message that they're
3 receiving, and it certainly is not about trying to hold
4 speakers, quote, "accountable" in some way. I never know
5 quite what that means other than we're going to ruin your
6 life if you say things we don't like. It's limited to
7 helping voters understand the constituencies to which a
8 member is likely to be, or a candidate is likely to be
9 responsive once in office, all right?

10 So it's helpful to kind of predict how a
11 person will perform in office, not to evaluate the
12 credibility of the argument made. You can read the
13 argument, listen to the argument, and make a decision; and
14 yet, certainly not to try to hold people, quote,
15 "accountable" for voicing their First Amendment views.

16 Now, when we look at that, then as we get to
17 independent expenditures, we find that there are two
18 problems in requiring disclosure beyond that of the person
19 that's actually speaking. By the person actually speaking,
20 I mean, it could be a group that's actually speaking. One
21 is that you get what might be known as junk disclosure,
22 information that is not at all helpful.

23 Suppose, for example, that a person is an
24 ardent Democrat, strong believer in abortion rights, gay
25 rights, for example, but also contributes to his trade

1 association on a regular basis, and the trade association
2 then runs an ad in favor of a candidate in a race, let's say
3 a Republican candidate in the race, because of that
4 candidate's positions on taxes and regulation and spending.

5 If you insist that we can't just have -- now,
6 you have to have disclosure of the group doing the spending.
7 So it would say the trade association has spent this much
8 money. The public knows that and they know who the trade
9 association is, or they can readily find out. If we
10 attached it to the name of donors to the trade association,
11 we have our hypothetical Democratic businessman exposed as a
12 donor to this ad supporting a Republican for Congress or
13 state rep, and that's clearly not what's going on.

14 So you get this kind of junk disclosure which
15 is not helpful to voters, and note that that actually then
16 crushes the value the disclosure has because once you
17 understand that the mere fact that someone is listed as
18 supporting an ad doesn't mean they actually support that
19 candidate. You're getting no information whatsoever and
20 even when the information is correct, you don't, as the
21 viewer, you can't be sure of it.

22 Now, the other thing that we then get to
23 is -- whenever I hear talk of First Amendment values, I have
24 to say -- I mean, there are First Amendment values to be
25 sure. But whenever I hear people start justifying the law

1 in terms of First Amendment values, I have a sneaking
2 suspicion that the law they want can't be harmonized with
3 the actual language of the First Amendment. If it could,
4 they would talk about the First Amendment and not First
5 Amendment values that might somehow supersede the First
6 Amendment.

7 The second point I want to make here is when
8 we talk a little bit --

9 You know, Justice Scalia's language has come
10 up about, people need to have a civic courage. Well, you
11 know, I admire Justice Scalia. I knew him slightly. I knew
12 members of his family quite well. One of his sons actually
13 flew out to Ohio to perform the wedding ceremony for my
14 daughter. I have great respect for the man, but he spent
15 the majority, the heavy majority of his adult life in jobs
16 with tenures, a majority of it in jobs with life tenure. He
17 had a very outgoing personality. He loved that verbal
18 thrust and parry, you know, he loved that give and take. He
19 would get an opinion slamming him and he'd say, "Boy, that
20 Justice -- you know, Justice Ginsburg really handed it to me
21 on this one." He enjoyed it. That was good for him. And
22 of course, he also had Secret Service protection and so on.
23 Many people don't have that.

24 And one of the questions we need to think
25 about if we are thinking about compelled disclosure is do

1 the meek have something to say? Do people who are more shy
2 or maybe more reclusive have important ideas to add to the
3 public debate? In fact, maybe they have the ideas that are
4 most important because maybe we're less likely to hear them,
5 they're less likely to go leaping into the fray of public
6 debate.

7 And so I think when we think about the First
8 Amendment, if we're going to get into First Amendment
9 values, we should probably start thinking about what is our
10 purpose here. And our purpose is to expand the scope of
11 discussion and to allow people to participate in the debate.
12 And I think we should consider the idea that many people who
13 don't want to be disclosed and who will leave the debate --
14 and the empirical evidence on this is quite clear that
15 people do need the debate when they know that they are going
16 to be disclosed -- that we lose something as a society and
17 that we maybe lose quite a bit.

18 So let me close, then, just this opening by
19 saying a couple of things. First, the problem is -- there
20 are a couple of problems I think that you need to be careful
21 about, one is overly broad rules. You can clearly require
22 somebody who's doing independent expenditures to disclose
23 that they're doing independent expenditures. But if they
24 are not a political committee, that is, if they do not have
25 a major purpose of electing candidates to office, then you

1 cannot require the disclosure of all of their donors or
2 donors who did not earmark their contributions to the
3 organization for the purpose of making those political
4 expenditures. You get the junk disclosure, and you get the
5 harm to privacy that the Supreme Court warned about.

6 Secondly, we have to be concerned with low
7 thresholds. Pennsylvania now, for certain lobbying
8 expenditures, can be as low as \$250, and by that I mean
9 grassroots lobbying messaging to the public. And after
10 Bonta, after Americans for Prosperity, I think we really
11 need to consider whether laws with that low an amount can be
12 considered narrowly tailored.

13 And I'll add finally a word just on this idea
14 of dark money and people who don't know who's spending the
15 money and so on. We monitor this at the Institute for Free
16 Speech, consistently. And since 2010, when Citizens United
17 was decided, dark money has never been more than 5 percent
18 of total political spending. In the last election, it was
19 down below 1 percent.

20 What are the groups that are, quote, "dark
21 money" groups? Well, the largest dark money spenders
22 include US Chamber of Commerce, the National Association of
23 REALTORS, the Black Progressive Action committee. Those are
24 coalitions. Those are three of the five largest. I'm sure
25 people are like, "Oh, the US Chamber of Commerce, what do

1 they stand for? Who are they? I don't know how to evaluate
2 that ad." That's wrong. No, they do. You know, so when we
3 start talking about dark money, we need to hold both its
4 total in perspective and what it is.

5 By the way, what is the largest group that
6 might have that kind of generic name? It's a group called
7 Defending Democracy again. Okay, you might look at that and
8 say, "Well, I don't know what that is," right, "I don't know
9 them." But you can go to their website, which is
10 defendingdemocracytogether.com, and there you will find in
11 big bold letters right at the top of the page, quote, "We
12 are Republicans, former Republicans, and conservatives." It
13 says, "Our programs: Republicans for voting rights,
14 Republican voters against Trump." And then it says, if you
15 are a conservative or Republican who values free trade, the
16 rule of law, and welcoming legal immigrant policies, then
17 sign up, right? I don't think voters are really left in the
18 dark about what Defending Democracy Together stands for.

19 So those cautionary notes and quick review of
20 a couple of the -- what counts as interest, something that
21 you asked about.

22 I'd be delighted to take questions. And
23 again, thank you for inviting me (inaudible) to appear
24 before you today.

25 MAJORITY CHAIRMAN GROVE: Mr. Keating, any

1 comments?

2 MR. KEATING: No, I don't have anything
3 further to add.

4 MAJORITY CHAIRMAN GROVE: All right. We'll
5 go to questions.

6 Representative Staats.

7 (No response.)

8 MAJORITY CHAIRMAN GROVE: All right, he's not
9 here.

10 Representative Schmitt.

11 REPRESENTATIVE SCHMITT: Thank you, Mr.
12 Chairman.

13 It's nice to know that when Mr. Staats isn't
14 available, I get to pinch-hit for him. I appreciate that.

15 Thank you, Mr. Smith, for being here and,
16 Mr. Keating, even though it's only virtually. It's nice to
17 meet both of you.

18 I have a question for you. I'm looking at
19 page 5 of your written testimony. And there you mention
20 that "except when dealing with political committees,
21 organizations whose major purpose is the election or defeat
22 of candidates, essentially PACs, political parties, and
23 candidate campaigns, the Court has only upheld compulsory
24 disclosure laws that are closely and directly tied to
25 candidate campaigns." And you mention in particular that

1 those include independent expenditures, which are ads made
2 independently from a candidate or a political party that
3 expressly advocates the election or defeat of a candidate
4 using phrases such as vote for, vote against, elect, defeat,
5 Smith for Congress, and so forth.

6 My question is what's the legal background of
7 this type of requirement, and why do these independent
8 expenditures seem to create a case where such reporting
9 requirements have been found permissible by the Court?

10 MR. SMITH: Well, I would note that the
11 reporting requirements that are found permissible by the
12 Court, again, for an organization that does not have a major
13 purpose of electing candidates has been limited to
14 disclosure of the spending by the organization doing the
15 spending or an individual, of course, if it's an individual,
16 you know, spending directly, but that's not very common.
17 And so it's limited to the organization doing the spending
18 and to donors to the organization who earmarked their
19 contributions for those independent expenditures.

20 The Court, for reasons I've suggested -- the
21 concern about junk disclosure, the concern about privacy --
22 someone has not endorsed broad disclosure of all the donors
23 to these organizations, because again, it doesn't
24 necessarily achieve the purpose of informing the public and
25 it does have a higher cost of violating the privacy of the

1 individuals involved and forcing some of them out of the
2 public square.

3 So we need to be clear what we're talking
4 about when we say disclosure of independent expenditures.
5 It's just -- who is the spender? The Sierra Club or, you
6 know, whomever it might be, not all of the people who might
7 have given them money.

8 And the history for that is -- by the way, if
9 we go way back -- is the -- the Federal Election Campaign
10 Act at one point, as passed by Congress, would have required
11 the expenditure of any funds spent for the purpose of
12 influencing an election. And the Supreme Court said that,
13 you know, that's so broad, I mean, that could be anything,
14 right? Anytime anybody speaks almost, you're trying to, at
15 some level, influence an election. If you talk about an
16 idea, you know, you expect ideas to be acted on.

17 And so the Court narrowed it down very much
18 to say that of -- for the purpose of influencing an election
19 has to be this idea of expressly advocating for the election
20 or defeat of a candidate or coming from a group like a
21 political party whose purpose is to elect candidates.
22 That's why they exist.

23 REPRESENTATIVE SCHMITT: So it's two
24 different groups. You've got, like, a PAC who exists only
25 to advocate for the election, let's say -- of a candidate or

1 to support submission. And then you've got these
2 independent expenditures from these groups that don't
3 necessarily exist solely to support elections or candidates
4 or issues, but in a certain instance are devoting their
5 resources to that. And in that situation, they have to --
6 it has to be disclosed.

7 Am I paraphrasing that correctly?

8 MR. SMITH: You've got it exactly right.

9 REPRESENTATIVE SCHMITT: Thank you very much.
10 I appreciate that.

11 And thank you, Mr. Chairman, for calling on
12 me. I appreciate it.

13 MAJORITY CHAIRMAN GROVE: Representative
14 Wheeland.

15 REPRESENTATIVE WHEELAND: Thank you,
16 gentlemen, for your time today, very interesting.

17 Your testimony runs through a number of types
18 of regulations that you view as suspect in light of the
19 Bonta case. Can you give us a broad overview of where these
20 regulations are in effect? And are there any federal
21 regulations that fall into these categories that you view as
22 suspect?

23 MR. SMITH: David, do you want to take that?

24 MR. KEATING: Well, first of all, I would say
25 there's a lot of state laws that are very poorly worded,

1 broadly -- I'm getting a tremendous echo over here for some
2 reason -- but the laws are very broadly worded. And it's
3 not clear what is an expenditure that might count, for
4 example, toward a group being a political committee. That's
5 one example. Another example is very low thresholds, as we
6 outline in the testimony and what Brad spoke of earlier.

7 If there is a -- what is -- if we have to
8 balance the interest, what is the real interest, for
9 example, of finding the name of a donor who has given \$50
10 over the course of the entire election period? What is the
11 informational interest in an organization that spends only
12 \$250 on an independent expenditure?

13 There was a Tenth Circuit case where a ballot
14 measuring committee was proposing to spend \$3,500, and under
15 state law in Colorado, for example, the threshold, I think,
16 was \$250 or \$500. And the Tenth Circuit said, "For a
17 statewide campaign, there just wasn't sufficient
18 informational interest to force disclosure of donors to a
19 group that was planning on spending \$3,500 or less.

20 So there are a number of -- I think there are
21 a number of laws all across the country that are quite
22 vulnerable, especially under this new precedent of *Americans*
23 *for Prosperity Foundation v. Bonta*, because the Court I
24 think has indicated its (inaudible) and is trying to send a
25 message to the lower courts that you have to apply real

1 scrutiny to these laws.

2 REPRESENTATIVE WHEELAND: Okay. So are you
3 aware, then, of any new or recent litigation seeking
4 clarification?

5 MR. KEATING: Well, we just -- our
6 organization just did a case in Colorado against the City of
7 Lakewood. They passed a -- we represented a nonprofit
8 organization that published a newsletter distributed freely
9 and widely in the community, I think 10- to 20,000 copies of
10 the newsletter. And this newsletter was not popular with
11 the city council, so they passed a donor disclosure
12 requirement that if any publication or communication
13 mentioned the name of a candidate within a certain period of
14 time before an election, then the organization had to
15 disclose essentially all of its donors. I forget what the
16 threshold was, whether it was 50 or \$100. There was no
17 media exemption either.

18 And the Court went through and struck down
19 that requirement, as applied to that nonprofit organization.

20 MR. SMITH: Another -- if I may cut in --
21 another area that is a common problem is states that tend to
22 try to define what is influencing election in broad terms,
23 either they leave in a term like influencing election, where
24 the Supreme Court has held that it's unconstitutionally
25 vague when applied to groups that are not these political

1 committees, political parties, PACs. And it's -- or
2 they'll --

3 There's litigation going on right now, for
4 example, in the Seventh Circuit -- in fact, our
5 organization, Institute for Free Speech, is representing the
6 plaintiffs (inaudible) -- that would require disclosure of
7 people who give for, quote, "political purposes," which we
8 think would be constitutional if it were tied to express
9 advocacy of election or defeat of a candidate, the Supreme
10 Court standard, but otherwise, is just as vague, perhaps
11 even more vague than for the purpose of influencing an
12 election, the standard the Court has already found
13 unconstitutional.

14 So this is a common area, is to try to get at
15 ads that are not directly advocating for election or defeat
16 of a candidate in an election.

17 REPRESENTATIVE WHEELAND: Thank you very
18 much.

19 MAJORITY CHAIRMAN GROVE: Thank you,
20 gentlemen.

21 We're going to have to move on to the next
22 panel. Thank you so much for your time this morning. We
23 greatly appreciate it. Thank you.

24 MR. SMITH: Thank you.

25 MR. KEATING: You're welcome.

1 MAJORITY CHAIRMAN GROVE: Thank you.

2 Our next testifier is Mr. Khalif Ali from
3 Common Cause Pennsylvania.

4 MR. ALI: Good morning.

5 MAJORITY CHAIRMAN GROVE: Good morning. We
6 can hear you. We do have technical issues with some of the
7 testifiers.

8 Oh, there you are. Now we can see you. The
9 floor is yours, Mr. Ali. Thank you so much.

10 MR. ALI: All right. Thank you.

11 Let me begin by thanking Chairman Grove,
12 Chairman Conklin, and the members of this committee for
13 introducing this topic at a critical time in our democracy.

14 I, very similar to Mr. Smith, hope to
15 continue this conversation. This isn't the last
16 conversation, but we can continue to build on this and
17 expand the scope of discussion, as Mr. Smith mentioned.

18 So Common Cause has long advocated against
19 the dark money in politics and for additional transparency
20 and disclosure requirements for campaign finance. In order
21 for us to truly have a government of We The People, then we
22 must be able to know who funds campaigns, who provides
23 candidates the money they need to be elected.

24 Of course, reasonable people can and do
25 debate the level at which disclosure is appropriate. We do

1 not advocate for a system in which all small-dollar donors
2 must be disclosed. Rather when donations are substantial
3 enough, such that there is an appearance of potential undue
4 influence, those donors are the ones that must be made
5 public. Given the events of 2021, it is more important than
6 ever that Pennsylvanians have the protection of some type of
7 legislation and be similar to the DISCLOSE Act that's been
8 introduced.

9 On July 1st, 2021, the United States Supreme
10 Court made a ruling in the case of *Americans for Prosperity*
11 *Foundation v. Bonta*. We've heard a number of references to
12 that case today. And it struck down a California law that
13 required charitable organizations that raise tax-deductible
14 funds to disclose their larger donors to the State Attorney
15 General.

16 The result of these decisions is (inaudible)
17 reasonable disclosure requirements in legal privacy, passing
18 legislation such as the Pennsylvania version of the
19 disclosure act, will mitigate the impact of dark money on
20 our democracy by respecting the Supreme Court's decision.

21 To be clear, the Supreme Court's decision in
22 *Americans for Prosperity* is a narrow decision finding a
23 specific and unique California law was unconstitutional does
24 not affect disclosure regulations that have been repeatedly
25 upheld by the Supreme Court. Nothing in that decision

1 should be read to include states like Pennsylvania from
2 passing legislation that would require that major donors to
3 political campaigns be disclosed.

4 Passing the Pennsylvania version of the
5 DISCLOSE Act requiring disclosure of any significant
6 donation to organizations spending money on elections,
7 including judicial elections, and requiring top file funder
8 disclosures in advertisements is essential to removing the
9 impact of dark money from our politics.

10 We strongly urge the general assembly to take
11 concrete steps towards a more transparent future for
12 Pennsylvanians.

13 Again, I want to thank the committee for the
14 opportunity to testify today and for coming together in a
15 bipartisan effort to improve our election systems.

16 Thank you. And I'll take questions.

17 MAJORITY CHAIRMAN GROVE: Thank you so much.

18 First, kind of first question, you quote a
19 portion of Citizens United, which states that, quote, "the
20 public has an interest in knowing who is speaking about a
21 candidate shortly before an election," end quote.

22 Does a disclosure-type act apply only to
23 these type of independent expenditures which either support
24 or target a political candidate or ballot issue?

25 MR. ALI: No. It's all entities that, based

1 on the determinations of law, have made a donation that
2 could have potentially have some impact on that election.

3 MAJORITY CHAIRMAN GROVE: Chairman Conklin.

4 DEMOCRATIC CHAIRMAN CONKLIN: I want to thank
5 you, Mr. Ali, for coming in.

6 You know, I tell folks all the time, I
7 believe in the NASCAR way. See, if you drive NASCAR or
8 watch it, you know who the sponsor is, you know who owns the
9 machine, you know who's there, and the driver drives it with
10 great pride, or if he doesn't like it, he doesn't drive it.
11 But it doesn't say that the sponsor owns the driver, it just
12 says we all know who's gotten the ship down the highway.

13 So as we look at full disclosure, I'm a big
14 proponent of open government, full disclosure, that everyone
15 should know exactly where the money is coming from, why it's
16 spent. If I give a donation, I do it with great pride, and
17 I can explain why I gave the donation.

18 One of the things I fear is that by using all
19 this dark money, which we see much of it, it gives
20 individuals the ability much like a child bullying on a
21 media site, to try to stay anonymous with a fictitious name,
22 which I really don't believe that's the way that government
23 should be done. In fact, when you look -- I believe, it was
24 David Bossie from Citizens United was part of the campaign
25 to get Trump elected. I had no problem with that. I, you

1 know, understood where he stood, and I was fine with that.

2 So in your research -- and I've heard you
3 talk about certain sections of the law -- and one of the
4 other presenters earlier was talking about different states.
5 Is there any template you could give us to actually give the
6 citizens that open and transparent look into where all the
7 money is coming from that you know of? Because I always say
8 copy and paste is one of the best ways to move forward with
9 any type of good legislation.

10 MR. ALI: Sure. I mean, so we're big
11 proponents of the DISCLOSE Act. We know it's a
12 federal (inaudible) -- if we continue to have these type of
13 conversations amongst one another and use these
14 conversations as (inaudible) -- legislation, I think we can
15 get there.

16 So I'm referring to the DISCLOSE Act which
17 was introduced by US Senator Sheldon Whitehouse and US
18 Representative Cicilline. And the DISCLOSE Act, there's a
19 number of provisions in there that I think would give us the
20 type of transparency that would make -- would allow voters
21 to feel informed as they walk into the voting booth and also
22 to restore some confidence in our democracy and to ensure
23 that people really understand that our democracy works in
24 this country as well as in the Commonwealth.

25 And really quick, I list them in my written

1 testimony, but, you know, the DISCLOSE Act requires
2 organizations spending money in elections to promptly
3 disclose donors that have given \$10,000 or more. It also
4 includes -- prevents political operatives from using layers
5 of front groups to hack owner identities. It includes
6 provisions to crack down on the use of shell corporations to
7 hide the identity of the donor by requiring companies
8 spending money in elections to disclose their true owners.

9 So there's a number of provisions that just
10 open up the disclosure process and allow for voters to
11 understand exactly where those donations are coming from, so
12 they're more informed as they walk into the polls.

13 MAJORITY CHAIRMAN GROVE: Thank you.

14 Representative Wheeland.

15 REPRESENTATIVE WHEELAND: Thank you, sir.

16 You kind of hit on that, but let me try and
17 get clarification.

18 Given the increased availability of online
19 funding platforms, there's been an enormous increase in the
20 scale of small-dollar donations for candidates across both
21 political parties. You mention that you do not advocate for
22 all such small donations to be disclosed, but couldn't a PAC
23 or a political group utilize these fundraising platforms in
24 order to finance its independent expenditure and retaining
25 large-dollar donations for other purposes and avoid the

1 disclosure which you wish to see?

2 MR. ALI: So I'm not sure of the technical
3 response for your question.

4 REPRESENTATIVE WHEELAND: It's right pocket
5 or left pocket, I guess is what it really comes down to for
6 these organizations.

7 MR. ALI: Right. Sure, sure.

8 One of the things I think is critical now is
9 that we're having this conversation. I think we can bring
10 in the individuals who can tailor legislation that makes
11 sense here in Pennsylvania as it relates to advances in
12 technology, as it relates to scale, or the federal
13 legislation as I mentioned earlier.

14 I'm not saying I'm not in favor. I'm not
15 saying that, you know, I'm totally against it, per se. I'm
16 saying that that's not -- we don't feel it's as necessary.

17 My \$50 to a candidate of choice I don't think
18 has as much impact as hundreds or thousands of dollars that
19 may be given in a donation.

20 REPRESENTATIVE WHEELAND: Okay.

21 Again, my question is towards the modern way
22 of raising funds via social media, \$5 donations -- lately I
23 think it's \$22 as, you know, the year 2022. These small
24 dollars that pour into a much larger group, but yet, you
25 advocate that those \$22 should not be disclosed who gave

1 that.

2 I mean, how are we going to fix this problem?
3 It's just like I said earlier, right pocket, left pocket.
4 Where is the transparency?

5 MR. ALI: Again, if that was the decision to
6 make small-dollar donations transparent, I mean, I don't
7 think Common Cause would have an issue with that. I think
8 the issue is with us and the reason that we're here and
9 advocating is that the larger dollar donations are the ones
10 that have potential influence and impact on the outcomes of
11 elections. And so that, that's what we're -- that's the
12 advocacy that we're advancing.

13 REPRESENTATIVE WHEELAND: Okay.

14 And I do agree with you that that is an
15 issue, these very large donations. But if yet those large
16 donors contribute to an organization that creates the
17 structure for those small dollars coming in, it creates a
18 real problem. It's going to be a difficult nut to crack.

19 But thank you.

20 MR. ALI: Yeah.

21 MAJORITY CHAIRMAN GROVE: I'm just looking
22 around, any further questions?

23 (No response.)

24 MAJORITY CHAIRMAN GROVE: Seeing none, thank
25 you very much for your time and willingness to testify,

1 Mr. Ali. Thank you.

2 And we'll move on to our last panel, Phil
3 Hackney, associate professor of law for the University of
4 Pittsburgh School of Law.

5 MR. HACKNEY: All right. Thank you.

6 Can everybody hear me?

7 MAJORITY CHAIRMAN GROVE: Yeah. We can hear
8 you fine.

9 MR. HACKNEY: So thank you, Chair Grove,
10 Chair Conklin, members of the committee, for inviting me
11 here today to speak about a matter of great importance to
12 the operation of our shared Commonwealth: Disclosure of
13 donors in the campaign finance context.

14 So I'm from the District 36, Jessica Benham's
15 district. I live in the South Side of Pittsburgh. And I
16 understand you're hoping to have testimony about donor
17 disclosure related to campaign finance, and particularly,
18 consideration of how the recent United States Supreme Court
19 case, *Americans for Prosperity Foundation v. Bonta* impacts
20 that regulatory landscape, and you've heard much about that.
21 I'm not going to try and repeat. You've gotten good
22 information regarding how the various scrutiny works, the
23 exacting scrutiny.

24 So I'm going to first tell you a little bit
25 about myself and my expertise because I think it's relevant

1 how I can best help this committee.

2 So I'm an associate professor of law at the
3 University of Pittsburgh where I write and research and
4 teach about tax law, specifically nonprofit organizations.
5 You might wonder why that has anything to do with campaign
6 finance, and it just turns out that the IRS happens to have
7 a range of (inaudible) organizations that end up being
8 engaged in the influencing of politics.

9 So I have worked at the office of the chief
10 counsel of the IRS for five years, overseeing the nonprofit
11 sector in Washington, D.C., and I got to experience
12 firsthand writing regulations and overseeing the audit and
13 overseeing litigation regarding these organizations.

14 Additionally, I filed a brief in *Americans*
15 *for Prosperity Foundation v. Bonta* with 11 or 12 other
16 nonprofit scholars trying to support the State of California
17 in its collection because we believed it was important to
18 the regulation of nonprofit organizations and charities in
19 particular for the State to have awareness of who these
20 donors were.

21 This is kind of a different issue than the
22 campaign finance, right? In campaign finance, those donors
23 are being disclosed to the public. In *Americans for*
24 *Prosperity*, technically they weren't. Part of California's
25 problem in this case is that occasionally California leaked

1 that information, and that subjected some donors to real
2 problems that were mentioned earlier.

3 So what's my too long, didn't read -- so
4 first, I hope to give you information about tax and
5 nonprofit and its relationship to campaign finance. How
6 does the overall regulatory regime work together to have
7 sort of a coherent hold?

8 I want to emphasize that donor disclosure
9 matters in each of these realms, protect the revenue and the
10 tax sphere, to prevent fraud on charity and the state
11 government AG sphere, and finally to prevent corruption in
12 electoral politics, and additionally create an open world
13 where we have an understanding of one another in the same
14 way that we're having here about where the speech is coming
15 from and how to take that speech into consideration. It's
16 important information as people consider elections.

17 Finally, any law that gets developed now as a
18 result of Americans for Prosperity, I believe it's incumbent
19 upon you as legislators, each of you as legislators, to take
20 into consideration narrowly tailoring any disclosure regime
21 to an important (inaudible) governmental interest. I think
22 that can be done, but that's the key thing as you consider
23 maintaining or implementing new -- it's got to be focused on
24 making sure that the information collected is carrying out
25 some important purpose.

1 So I write about democracy and freedom a lot.
2 And freedom of speech and freedom of association are
3 paramount values. No one here on this panel disagrees on
4 that. I think the focus is on how best to ensure a good
5 governance within that realm and whether donor disclosure
6 accomplishes that result without chilling speech too much.

7 So Americans for Prosperity collected not
8 just information about campaign finance, but instead for the
9 purpose of regulating charities and ensuring there was no
10 fraud on the public in the operation of charities. It's a
11 very different concept than the requiring of disclosure
12 related to the very narrow context of an election. So it
13 was a different situation that they were looking at.

14 California failed to show that it used that
15 information. And it also managed to leak that information,
16 even though in this context, this broad gathering of
17 information was supposed to be not disclosed to the broad
18 public. It was supposed to be used by the regulator. I
19 think that was the major failing in the State of California
20 in that case.

21 So let's discuss quickly what organizations
22 potentially are involved in this space, and I'm going to
23 talk about it from the perspective of Internal Revenue Code
24 sections, which I know kind of turns off ears sometimes, but
25 it's kind of easiest to show the regulatory landscape that

1 we're talking about here to do it that way.

2 So there are five Section 527s. And many of
3 you might have heard that term, but this is the place that
4 political campaigns essentially fall under. If you operate
5 a campaign, you have a committee, they're regulated by the
6 IRS under 527 and have income tax obligations but also have
7 certain disclosure obligations. These are organizations
8 that are directly engaged in electoral politics. That
9 information is disclosed to the public either through the
10 FEC or in some cases, as a result of work in the early
11 2000s, to the IRS if it's not covered by the FEC.

12 Additionally, we have charitable
13 organizations. Why would charitable organizations get into
14 this mix? Well, sometimes they actually advocate for
15 candidates. This is technically in violation of the tax
16 law. IRS, as a result of enforcement capacity and other
17 matters, is not always enforced in that space, but
18 charitable organizations are completely prohibited from
19 intervening in that space.

20 Additionally, charitable organizations matter
21 and donor disclosure matters in that space because sometimes
22 substantial donors misuse charities and the IRS needs to
23 know that information in order to properly protect the
24 revenue and properly carry out co-sections like 4958 that
25 prohibit individuals who have contributed a lot and might

1 control the organization from taking money from it.

2 We also have dark money organizations. And I
3 tend to think of these as social welfare organizations and
4 business leagues, just to give a context into which these
5 fit. Social welfare organizations are not prohibited from
6 intervening in a political campaign. Doesn't really further
7 their social welfare purpose to meet their standard, but
8 they can probably do up to about 50 percent of activities
9 that actually intervene in a campaign. They probably come
10 under FEC disclosure, but they might also do some other
11 things called issue advocacy where organizations don't
12 expressly advocate for a candidate and still manage to
13 advocate for a candidate by not mentioning that candidate,
14 by not using magic words associated with that activity.
15 Business leagues are there as well, they're under 501(c)(6)
16 of the code. This is Chamber of Commerce and a range, broad
17 range of industry groups that support industry around the
18 country, but that also get actively politically engaged.

19 The IRS needs information regarding donors in
20 these cases, I argue, because, again, the IRS is there to
21 enforce rules trying to prevent individuals from misusing
22 nonprofits to their own devices. But additionally, they run
23 into spaces where these organizations can become directly
24 engaged in campaign politics, but there's typically no
25 disclosure to the FEC, assuming that they haven't intervened

1 directly. And today there's no disclosure to the IRS either
2 because IRS ended collecting that information. It makes for
3 an interesting space to look at.

4 I will stop there. I think the key is, in
5 enforcing any of these regimes, it's important to get this
6 information to prevent fraud, to collect revenue, and to
7 have a robust democracy. But I think you, as legislators, I
8 strongly encourage you to think clearly in the way that
9 you're doing here by inviting us to have this conversation
10 about how to ensure it's narrowly tailored to accomplish
11 those purposes that might be raising the dollar amounts.

12 So for instance, I proposed recently that the
13 IRS probably should up its amount that it requires
14 disclosure from 5,000 to maybe 25,000. But there's got to
15 be probably a larger number. It's more likely that you're
16 going to get into corruption as those dollar amounts go up.

17 With that, I'll end my testimony. Thank you
18 for having me here today, and I invite your questions.

19 MAJORITY CHAIRMAN GROVE: Thank you so much.

20 Let me start with, you know, we're kind of at
21 an intersection of donor disclosure. Obviously, Bonta
22 handled kind of nonprofits, we've gotten into elections a
23 little bit.

24 What about lobbying, lobbying disclosure --

25 MR. HACKNEY: Yeah.

1 MAJORITY CHAIRMAN GROVE: -- and its impact?
2 How does, kind of, Bonta and Citizens United come together
3 with kind of, like, that third rail, I'll call it, on
4 lobbying disclosure?

5 MR. HACKNEY: Yeah. It's a great question.

6 So I'll focus on the IRS angle on that which
7 is, you know -- go ahead. What's that?

8 MAJORITY CHAIRMAN GROVE: No, no one said
9 anything. Please continue.

10 MR. HACKNEY: Sorry about that.

11 So in the IRS, charities are only allowed to
12 do a certain amount of lobbying. You don't get disclosure
13 from them regarding that lobbying, but they do engage in it.
14 So we have many charitable organizations, social welfare
15 organizations, and business leagues actively engaged in
16 lobbying without any real public disclosure regarding the
17 lobbying.

18 Now, I'm not an expert on lobbying
19 disclosure. I mean, if somebody comes before the US
20 government or before your office, I know regarding the US
21 government, there's a range of laws requiring lobbying
22 disclosure on that front. But I don't want to talk to that.

23 What is lobbying, though? From an IRS
24 perspective, lobbying is when someone goes before the
25 legislature to advocate for a particular bill. You might

1 encourage your members to advocate for a particular bill, or
2 you might do it yourself.

3 Where it concerns me the most, perhaps, is
4 where that lobbying moves into a space called issue advocacy
5 where that lobbying looks a lot more like advocating for or
6 against a candidate. And it can be a really effective way
7 of moving audiences to vote for people without coming under
8 the FEC regime or getting any disclosure to the public.

9 It's a place of real concern to me. It's
10 kind of where that dark money space comes to rest. And
11 Citizens United made it quite possible for corporations who
12 used to be prohibited from intervening in a campaign without
13 creating a separate PAC, which is a 527 organization. Today
14 they can do it through that arm and additionally have really
15 no disclosure out to the public.

16 MAJORITY CHAIRMAN GROVE: Thank you.

17 Representative Schemel.

18 REPRESENTATIVE SCHEMEL: Thank you, Mr.
19 Chair.

20 And, Professor, I'm sure that your students
21 would agree that no subject could be more stimulating on a
22 Monday morning than the Internal Revenue Code.

23 So I'm curious of -- you talk about
24 legitimate government interest. What would be a legitimate
25 government interest in this case, and what would not?

1 Examples might be helpful to us. And how do we
2 differentiate under the law, or put another way, is there
3 another state or regulation that perhaps gets this balance
4 correct that you could point to as guidance to us as
5 legislators?

6 MR. HACKNEY: Sure. That's a great question.
7 And I don't have a final answer for it, but I'll try and do
8 the best I can.

9 So places that have been compelling
10 governmental interest have had to collect the revenue and
11 things needed to collect the revenue within the IRS context
12 have often risen to that level. Additionally, *Buckley v.*
13 *Valeo* recognized the potential for corruption to be a
14 significant aspect of campaign finance regimes that
15 supported the contribution limits. Additionally, when
16 thinking about the disclosure regime, they thought directly
17 about the importance of the public being aware of that
18 information.

19 So I think thinking about ways in which money
20 would be likely to be a corrupting influence is going to be
21 sort of the talisman within the campaign finance regime. I
22 think it's harder to go down the path of people needing the
23 information today, though, I am not an expert in the
24 campaign finance First Amendment law. That has been my
25 sense of the space.

1 Within the tax realm, I think collecting the
2 revenue. I think the IRS and other units to collect that
3 type of information, to be a backstop to campaign finance,
4 the way I think of it, has to show that it has a real
5 relationship to the collection of revenue.

6 I think that can be shown pretty clearly in
7 the charitable context. I think there's a strong case for
8 it, and I wrote about this recently in an article called
9 dark democracy -- I mean, *Dark Money Darker*, in the social
10 welfare organization and business league context. But I
11 think you really have to show the ways in which the IRS
12 needs that information and then ensure that the
13 organization, whichever government is collecting it, knows
14 how that information is going to further that purpose. And
15 then, probably, be able to show that information is indeed
16 used to carry out those governmental purposes.

17 I don't have any specific state laws to
18 support that, but that's my kind of rough conception of the
19 question. It's a great question, and I think that's a place
20 that needs more conversation.

21 MAJORITY CHAIRMAN GROVE: So let me ask you
22 this last one, what's that line for nonprofits under the
23 IR -- because we get this now and then, since you're here, I
24 thought I'd ask.

25 MR. HACKNEY: Yeah.

1 MAJORITY CHAIRMAN GROVE: What's that line in
2 the sand between nonprofits and crossing it for
3 electioneering? Because sometimes you hear, "Oh, Church XYZ
4 brought in Candidate XYZ to speak, and someone should file a
5 complaint with the IRS and take away their nonprofit
6 status." What is that line in the sand for nonprofits?

7 MR. HACKNEY: It's a really difficult space.

8 So this is the space that ended up getting
9 the IRS into trouble years ago in 2013 when the IRS was
10 trying to examine the tea party-related groups. Many of
11 them were forming as social welfare organizations, but there
12 was an indication that some of them might be engaged in
13 political campaigns. And I have to talk about what that
14 means. What is intervening in a political campaign? Those
15 are the words you have to focus upon to figure out when
16 you've crossed that line.

17 Clearly where you do express advocacy, "don't
18 vote for Thor, don't vote for Thor," and you put that out
19 into the universe and you put the, say, letterhead of the
20 nonprofit on that organization, on that communication, or
21 somebody is a member who is actively speaking as a member of
22 that organization expressly states that you should vote for
23 or against such and such a person.

24 It is possible in the context of the Internal
25 Revenue Code, though, to do it in a broader space,

1 theoretically at least.

2 Then campaign finance was approved in
3 *Buckley v. Valeo*. *Buckley v. Valeo* has a very narrow
4 conception. You have to use the magic words to get there.
5 It's got to be expressed advocacy.

6 Within the IRS, you can do it directly or
7 indirectly. So if a charity puts up a link, for instance,
8 to a candidate's web page, indicating support of that, even
9 those they don't expressly advocate in some expressed words,
10 they have likely crossed the line.

11 It's a very tough spot for the IRS to be in.
12 I think it's an important one. Personally, I think
13 charities are better off not being corrupted by that
14 political influence, but it's a difficult space for the IRS
15 to be in. It's tried to give things, suggesting when that
16 happens, but it's a hard space to know exactly when because
17 it involves the indirectly.

18 Clearly, when you use the magic words, you've
19 intervened, but you can intervene through context. And
20 that's the tough space for the IRS to make a decision and
21 for candidates and their supporters often to make that
22 decision as well.

23 MAJORITY CHAIRMAN GROVE: I think that's all
24 the questions we have, looking around -- yeah. That's all
25 the questions we have. Thank you so much for your time this

1 morning.

2 And I noticed you have a little book back
3 there, "If I Ran the Circus," by Dr. Seuss. I may get that
4 for our House Speaker because sometimes I think the floor is
5 a circus.

6 MR. HACKNEY: It's my favorite Dr. Seuss
7 book. It's fabulous, and it has a lot of implications on a
8 wide range of these things.

9 MAJORITY CHAIRMAN GROVE: Will do. Thank you
10 so much. I appreciate your time.

11 MR. HACKNEY: Thank you.

12 MAJORITY CHAIRMAN GROVE: Thank you.

13 MR. HACKNEY: Thank you.

14 DEMOCRATIC CHAIRMAN CONKLIN: Closing
15 remarks?

16 (No response.)

17 MAJORITY CHAIRMAN GROVE: I don't have
18 anything and we are adjourned. Thank you.

19 (The hearing concluded at 11:47 a.m.)

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C E R T I F I C A T I O N

I hereby certify that the proceedings are contained fully and accurately in the notes taken by me on the within proceedings, and that this copy is a correct transcript of the same.

Summer Miller

Summer A. Miller, Court Reporter
Notary Public