Constitutional Validity of Public Donor Disclosure Requirements for Dark Money Organizations with a Focus on 501(C)(4)s

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INTRODUCTION

In today's political environment, running a winning campaign requires an exorbitant amount of money. Nearly $9 billion was spent in the 2022 congressional

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elections alone.[1] There is no shortage of private donors readily available to fill the coffers.[2] In the United States, private contributions to political campaigns are made to get sympathetic candidates elected, who, once elected, will theoretically accommodate their financial supporters.[3]

In the U.S., the outright purchase of favors is minimal, but there is an abundance of concern about undue influence.[4] Undue influence can lead to policy capture over public decision-making.[5] For example, one prominent Republican donor outraged at Congress's lack of inaction told a fundraiser, "[t]he GOP leaders should know, no movement on remaining agenda: tax reform, infrastructure, deregulation, etc. means no funding from supporters like me."[6] Money in politics "is not bad per se."[7] However, when sources of campaign funding lack transparency, there can be serious implications for the integrity of a country's political system.[8]

In 2010, the Supreme Court's monumental *Citizens United* decision exacerbated the risk of undue influence and policy capture in the United States' political system. For one, it unleashed unlimited corporate spending in our elections. Second, it curtailed the understanding of corruption in campaign finance to solely *quid pro quo* transactions, making it harder to regulate in this realm without infringing on First Amendment rights. Finally, and the principal focus of this paper, *Citizens United* elevated "dark money" organizations to a level of unforeseeable prominence. As will be explained in more detail below, dark money organizations are those that do not, or are not required to, disclose the sources of their funding.

The rising prominence of dark money organizations in our elections has been matched with rising levels of concern. It is argued that these dark money organizations are essentially shadow parties.[9] They "raise money, [] push candidates and issues, and their leadership is often the mirror image of the leadership of the parties themselves," all of which is done without even one donor's name available for public scrutiny.[10]

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1. *Cost of Election*, OPEN SECRETS (Nov. 11, 2023). https://www.opensecrets.org/elections-overview/cost-of-election?cycle=2020&display=T&infl=N [https://perma.cc/X4DJ-XK49].

2. SUSAN ROSE-ACKERMAN & BONNIE J. PALIFKA, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 352 (2d ed. 2016).

3. *Id.*

4. *Id.*

5. Lucas Amin & José Maria Marin, RECOMMENDATIONS ON POLITICAL FINANCING FOR OGP ACTION PLANS, 5 (Feb. 2020).

6. Alex Isenstadt & Gabriel Debenedetti, *Angry GOP donors close their wallet*, POLITICO (Oct. 5, 2017), https://www.politico.com/story/2017/10/05/republican-donors-trump-mcconnell-anger-243449 [https://perma.cc/MG6G-3DGE].

7. AMIN & MARIN, *supra* note 5.

8. *Id.*

9. Heather K. Gerken, *The Real Problem with "Citizens United": Campaign Finance, Dark Money, and Shadow Parties*, 159 PROC. OF THE AM. PHIL. SOC'Y 5, 13 (2015).

10. *Id.*

Obscure players in a democracy, like dark money organizations, are concerning for a democracy's integrity. The electorate does not know who or what is influencing election messaging. The OECD calls transparency around the sources of funding a "cornerstone," because transparency serves to mitigate the risks of undue influence and it allows for the requisite level of public scrutiny.[11]

The scope of this paper is to show that there is a constitutional path forward to compel the disclosure of donations to dark money organizations, with a focus on 501(c)(4) organizations. Part I of this paper will explore the current regulatory landscape in the United States election system. A particular emphasis will be on the disclosures which Federal Election Commission ("FEC") regulated entities must make. Additionally, I will explain the contours of dark money organizations and why apprehension about their involvement in the U.S. election system is warranted. Part II will explore the international community's best practices regulating democratic elections. This Part will also explore Congress's recent attempt to compel disclosure of dark money organizations' funding sources—an effort that aligns with international standards. Finally, Part III will set forth a roadmap for compelled disclosure legislation that would survive constitutional review. This primarily includes re-aligning the Supreme Court's understanding of corruption with the Founders' notion of corruption.

I. CURRENT LANDSCAPE OF THE U.S. CAMPAIGN FINANCE SYSTEM

This Part begins with an overview of the current disclosure requirements in the U.S. campaign finance system. It then explains the concept of "dark money" and explains how "dark money" enters our campaign process outside the grasp of the current legislative and regulatory framework.

A. Overview of Required Disclosures

Congress's approach to regulating campaign finance in U.S. elections has targeted two broad policy objectives: (1) "limiting sources and amounts of financial contributions" and (2) requiring disclosure about contributions and expenditures."[12]

"Modern campaign finance law was largely shaped in the 1970s, particularly through FECA."[13] FECA, or the Federal Election Campaign Act Amendments of 1974, was enacted amidst the Watergate scandal, when there was broad public support for campaign finance reform. The Act was reformed in five major ways: it (1) limited individual contribution to campaigns and limited an individual's aggregate annual contributions; (2) provided for expenditure limits on presidential candidates; (3) provided public financing for presidential nominating conventions;

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11. *See* Organisation for Economic Co-operation and Development, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*, 66, https://www.oecd.org/corruption-integrity/reports/financing-democracy-9789264249455-en.html [https://perma.cc/72KK-C9XB].

12. R. SAM GARRETT, CONG. RSCH. SERV., R41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 2 (2023).

13. *Id.* at 3.

(4) established the FEC to enforce federal election laws; and (5) reinforced reporting and disclosure requirements.[14] In signing FECA into law, President Ford stated that he "[had] reservations about the [F]irst [A]mendment implications inherent in the limits on individual contributions and candidate expenditures" but also that "such issues [could] be resolved in the courts."[15]

In 1975 the opportunity to resolve the First Amendment issues arrived. Plaintiffs, including Senator James Buckley, sued Francis Valeo, the secretary of the U.S. Senate, challenging several FECA provisions as infringements on their First Amendment rights. Specifically, plaintiffs challenged the limits placed on individual campaign donations, and on campaign expenditures.[16] In light of the First Amendment concerns, the Court drew a distinction between limiting contributions and expenditures. The Court upheld the contribution limitations on the grounds "the actuality and appearance of corruption resulting from large individual financial contributions" as a sufficient constitutional justification.[17] The Court did not uphold the expenditure limits, since these provisions placed direct and substantial restrictions on candidates and citizens to engage in protected political expression.[18] The 1976 Amendments were passed in response to *Buckley*, and "established new contribution limits, and addressed various PAC and presidential public financing issues."[19] FECA governed largely "uninterrupted for the next 20 years."[20]

In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA"), which, among other things, "banned national parties, federal candidates, and officeholders from raising soft money in federal elections; increased most contribution limits; and placed additional restrictions on pre-election issue advocacy."[21] "Soft money" is a term for donations made to a political party not for the purpose of supporting a federal candidate, but for generic party building activities.[22] An important disclosure provision of BCRA concerns electioneering communications.[23] Electioneering communications are "any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office; is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary . . ., and is targeted to the relevant electorate . . . ."[24] BCRA required that any produced

14. Gerald R. Ford, President, United States of America, The President's Remarks at the Bill Signing Ceremony at the White House (Oct. 15, 1974).

15. *Id*.

16. *See* Buckley v. Valeo, 424 U.S. 1, 11 (1976).

17. *Id*. at 26.

18. *Id*. at 59.

19. GARRETT, *supra* note 12.

20. *Id*.

21. *Id*.

22. Rachel Condon, *Paying for America's Elections: The Bipartisan Campaign Reform Act of 2002 and Information Access*, 47 DOCUMENTS TO THE PEOPLE (Ser. No. 1) 21, 22, 23 (2019).

23. *Id*.

24. 11 C.F.R. § 100.29.

electioneering communication be reported to the FEC, and prohibited corporations from funding such communications.[25]

After numerous legal challenges, BCRA has been substantially weakened from the version that was initially enacted. But notwithstanding the legal challenges, the disclosure and reporting requirements as "enacted in FECA and BCRA" have remained intact.[26] The FEC regulates a variety of entities: candidates and their authorized committees, political party committees (RNC, DNC, etc.), corporation- and labor organization-sponsored "separate segregated funds", nonconnected committees (including hybrid PACs, leadership PACs, and super PACs).[27] Political party committees must file reports with the FEC containing "receipts and expenditures, particularly those exceeding an aggregate of $200; the identity of those making contributions of more than $200, . . . and the purpose of the expense."[28] For each contribution over $200, a political party committee is required to report the donor's name, address, occupation, and employer.[29] For nonconnected committees (i.e., super PACs), they must report to the FEC the name, mailing address, occupation, and employer of an individual or entity that they received $200 or more from.

Outside of these groups, the FEC also requires every "person" or organization making "independent expenditures" to file reports disclosing certain information.[30] "Person" is broadly defined to include not just an individual but "any other organization, or group of persons, but does not include the Federal government . . . ."[31] An "independent expenditure" is an expenditure made for the purpose of communication, such as an advertisement through a website, digital device, application, advertising platform, newspaper, TV or direct mail that: (1) expressly advocates the election or defeat of a clearly identified candidate; and (2) is not made in consultation or cooperation with, or at the request or suggestion of an candidate, or his or her authorized committees or agents, or a political party committee or its agents.[32] Persons making independent expenditures have to report the sources of their contributions to the FEC if a donor contributed over $200 for the purpose of enabling the independent expenditure. Information reported to the FEC must include the name, mailing address, occupation, and employer.[33]

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25. Condon, *supra* note 22.

26. GARRETT, *supra* note 12, at 12.

27. FED. ELECTION COMM'N, GUIDES, https://www.fec.gov/help-candidates-and-committees/guides/?tab=candidates-and-their-authorized-committees [https://perma.cc/K9EQ-37XZ].

28. GARRETT, *supra* note 12, at 12.

29. Greg J. Scott & Zainab S. Smith, Federal Election Commission Campaign Guide: Political Party Committees 67 (Aug. 2013), https://www.fec.gov/resources/cms-content/documents/policy-guidance/partygui.pdf [https://perma.cc/PJ7J-Y3JZ].

30. FED. ELECTION COMM'N, OTHER FILERS, https://www.fec.gov/help-candidates-and-committees/other-filers/#independent-expenditures-by-persons-other-than-political-committees [https://perma.cc/W335-3AU8].

31. 11 C.F.R. § 100.10.

32. 11 C.F.R. § 100.16; 52 U.S.C. § 30101(17).

33. 51 U.S.C. § 30104(a)(5)(C); 52 U.S.C. § 30101(13); 11 C.F.R. § 109.10.

B. Dark Money: Finding a Loophole So Private Interests Can Influence Democratic Elections Free From Public Scrutiny

Since *Citizens United*, there has been a proliferation of so called "dark money" organizations engaging in political activity. In the 2020 elections, at least $750 million was spent by "dark money" organizations.[34] "Dark money" organizations are entities that participate in elections, but do not have to disclose their donors or any accompanying donor information to the FEC. Hence, there is no publicly available paper trail to "provid[e] the electorate with information about the sources of election-related spending."[35]

Dark money organizations participate in elections in two primary ways. First, they spend money on direct political advocacy—in technical terms, they make independent expenditures. For example, Americans for Prosperity—a Charles and David Koch aligned 501(c)(4) dark money organization—ran an ad in 2014 targeting North Carolinians: "Families are losing their doctor. . .. Tell Senator Hagan, Obamacare isn't working."[36] Second, dark money organizations contribute directly to super PACs, which are allowed to accept unlimited sums of money. For example, American Action Network, another 501(c)(4), spent nearly $12 million in the 2012 election in conjunction with Congressional Leadership Fund, a super PAC.[37]

One particularly concerning type of dark money organization is a "social welfare organizations," named "501(c)(4)s" after the provision that regulates them in the Internal Revenue Code ("IRC").[38] Organizations under IRC section 501(c)(4) are tax-exempt when they operate "exclusively for the promotion of social welfare."[39] "[A]n organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the community."[40] The 501(c)(4) tax-exempt status is seen as a catchall for activities that do not fit within the more conventional understanding of non-profits.[41] 501(c)(4)s differ from the typical non-profit, tax-exempt corporations organized under IRC section 501(c)(3) in two major ways: (a) 501(c)(4)s are allowed to devote a larger amount of their activities to non-exempt

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34. CAMPAIGN LEGAL CENTER, THE FOR THE PEOPLE ACT: HOW KEY H.R. 1 PROVISIONS WOULD FIX DEMOCRACY PROBLEMS, 11 (Dec. 2020).

35. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 367 (2010) (internal citations omitted).

36. Americans for Prosperity, *Best Friends*, POLITICO (Feb. 12, 2014), https://www.politico.com/video/2014/02/americans-for-prosperity-ad-best-friends-004119?filterVideo=1201016315 [https://perma.cc/4R9L-U2A4].

37. Open Secrets, *Top Election Spenders*, https://www.opensecrets.org/dark-money/top-election-spenders?cycle=2012#spenders, [https://perma.cc/3YHL-437W] (last visited Nov. 26, 2023).

38. *See generally* Open Secrets, *Dark Money Basics*, https://www.opensecrets.org/dark-money/basics (last visited Nov. 11, 2023) [https://perma.cc/Q9YS-VZAE].

39. 26 U.S.C. § 501(c)(4).

40. 26 C.F.R. § 1.501(c)(4)-1.

41. Traditional notions of non-profit organizations include "[c]orporations. . . . organized and operated exclusively for religious, charitable, scientific, . . . or education purposes. . . . ." 26 U.S.C. § 501(c)(3). Groups such as NAACP, Humane Society of the United States, etc., fall into this category.

purposes, including political activity; and (b) contributions to 501(c)(4)s are not tax deductible for the donor.[42] For the social welfare organization to maintain its tax-exempt status, political activity must not constitute the organization's "primary purpose," a rule interpreted to mean that the 501(c)(4) organization's political expenditures can't be more than 50% of its total spending.[43]

Citizens United presented an opportunity for 501(c)(4)s and their political aspirations. In *Citizens United*, the Supreme Court held that corporations were allowed to spend unlimited sums of money from their general treasuries on political activity—so long as it was not coordinated with the candidate or their campaign.[44] Coordinating with the candidate or the campaign would encompass activities such as strategizing on an advertisement's messaging or timing, sharing financial resources and staff, and similar activities. In other words, corporations of all forms now have free rein to make independent expenditures.[45] As such, "the number of groups applying for 501(c)(4) status [] dramatically increased, more than doubling in the years following" *Citizens United*.[46] Some examples of high-profile, politically active 501(c)(4)s capitalizing on this decision include the National Rifle Association ("NRA"), the American Civil Liberties Union ("ACLU"), and the Sierra Club.

One problem with 501(c)(4)s participating in our political system is that they are regulated by the Internal Revenue Service ("IRS")—our tax collecting agency—not the FEC—our campaign finance law enforcement agency. Yes, 501(c)(4)s must file reports with the FEC when they make independent expenditures advocating for a candidate's election or defeat; however, these reports do not require any detail about the sources of their funding if the money was *not* earmarked for political purposes.[47] In addition, a 501(c)(4) is "not required to disclose publicly the names or addresses of its contributors" on the annual form it

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42. Raymond Chick & Amy Henchey, *Political Organizations and IRC 501(c)(4)*, INTERNAL REVENUE SERVICE (1995), https://www.irs.gov/pub/irs-tege/eotopicm95.pdf [https://perma.cc/PF6H-LXCL]. For comparison, a donation to the American Cancer Society, a 501(c)(3), would allow for the donor to take a deduction on their taxes; whereas, a donation to Americans for Prosperity, a 501(c)(4), would not allow for a tax deduction.

43. Ki P. Hong et al., *Complying With the Rules Governing 501(c)(4) Organizations: Key Issues*, SKADDEN (Mar. 20, 2023), https://www.skadden.com/insights/publications/2023/03/complying-with-the-rules-governing-501c4-organizations-key-issues [https://perma.cc/KGA2-JJ4T].

44. *Citizens United*, 558 U.S. at 372.

45. An independent expenditure expressly advocates the election or defeat of a clearly identified candidate without coordinating the messaging of the advertisement or resources with the candidate or their campaign.

46. Open Secrets, *Frequently Asked Questions About 501(c)(4) Groups*, https://www.opensecrets.org/outside-spending/faq (last visited Nov. 26, 2023) [https://perma.cc/26CA-BY2A].

47. 11 C.F.R. § 109.10(e)(1). "Earmarked for political purposes" is a flexible standard. For example, "if a donor provides funds for get-out-the vote activities, is that donation 'earmarked for political purposes'?" Zachary Parks et al., *FEC Commissioners Issue New Guidance on Donor Disclosure for Groups Paying for Political Advertisements*, (June 10, 2022), https://www.insidepoliticallaw.com/2022/06/10/fec-commissioners-issue-new-guidance-on-donor-disclosure-for-groups-paying-for-political-advertisements/ [https://perma.cc/F625-3AUH].

must file with the IRS.[48] For these reasons, 501(c)(4)s are a highly attractive option for political donors that wish to maintain anonymity, because there is no public disclosure of their information to either the FEC or the IRS.[49] As a bonus, the IRS recently passed regulations that no longer require 501(c)(4) organizations to disclose their high-dollar donors.[50] Prior to this regulation, these organizations had to disclose donors who contributed more than $5,000 annually.[51] And with no legal obligation to disclose funding sources, nobody but the 501(c)(4)s themselves know who is propping up the organization.

But 501(c)(4)s do not anonymously influence elections alone. They operate closely with FEC regulated super PACs.[52] Super PACs—in technical speak, "nonconnected, independent-expenditure-only political committees"—are allowed to accept *unlimited* sums of money from individuals, corporations, labor organizations, and other political committees. They can then use this *unlimited* money to spend *unlimited* money, independent of a candidate's campaign, advocating for or against a candidate.[53]

Here's how this intimate relationship between a 501(c)(4) and a super PAC works: (1) 501(c)(4)s can accept unlimited contributions from any source; (2) 501(c)(4)s are allowed to contribute unlimited sums to super PACs (staying below the 50% of the 501(c)(4)'s total revenue threshold); and (3) super PACs can spend unlimited sums on independent expenditures advocating for or against a candidate.[54] Super PACs, as FEC regulated entities, are required to publicly disclose their donor information, which is available on the FEC's website; but, when the contribution comes from another organization (i.e., a 501(c)(4)), all that will show up on its FEC filings will be an obscure 501(c)(4) entity name that does not shed light on its underlying donors. In sum, 501(c)(4)s are a conduit vis-à-vis super PACs that allow unlimited sums of money to enter our election system without any publicly available information to trace any of the money back to its sources.[55] This arrangement raises serious concerns about undue influence of wealthy individuals and basic notions of fairness, in addition to the very real

48. Internal Revenue Service, *Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors' Identities Not Subject to Disclosure*, https://irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organizations-returns-and-applications-contributors-identities-not-subject-to-disclosure (last updated December 4, 2023) [https://perma.cc/D8TQ-M4NT].

49. Hong et al., *supra* note 43.

50. Tory Eckert, *'Dark money' groups dodge reporting requirement in new regulations*, POLITICO (May 26, 2020), https://www.politico.com/news/2020/05/26/dark-money-tax-283044 [permalink]; James P. Joseph et al., *IRS Issues Final Regulation on Donor Reporting Requirements for Tax-Exempt Organizations*, ARNOLD & PORTER (June 12, 2020) https://www.arnoldporter.com/en/perspectives/advisories/2020/06/irs-issues-final-regulations-on-donor-reporting [https://perma.cc/5BN9-V5AA].

51. Eckert, *supra* note 50.

52. Tim Lau, *Citizens United Explained*, BRENNAN CENTER FOR JUSTICE (Dec. 12, 2019), https://www.brennancenter.org/our-work/research-reports/citizens-united-explained [https://perma.cc/L958-6GFN].

53. *Id*.

54. Open Secrets, *Follow the Shadow of Dark Money*, https://www.opensecrets.org/dark-money/shadow-infographic (last visited on Nov. 11, 2023) [https://perma.cc/F92S-ATB3].

55. Hong et al., *supra* note 43.

concerns about illegal foreign national contributions influencing our elections in the shadow of anonymity.[56] Conduits for dark money, like 501(c)(4)s, are the antithesis of the transparency and integrity which a democratic election system demands.

II. A TRANSPARENCY FRAMEWORK FOR POLITICALLY ACTIVE ENTITIES

This Part begins with a discussion of international best practices to ensure transparency and disclosure of the sources of private funding in democratic elections. It then transitions into an analysis of the key provisions of Congress's most recent attempt to compel disclosure of dark money organizations' funding sources.

A. International Best Practices

In 1960, the United States "signed the Convention founding the Organisation for Economic Co-Operation and Development ('OECD')."[57] As such, the United States "pledged its full dedication to achieving the Organisation's fundamental aims." The OECD established key principles that form the underpinning of any system regulating campaign finance.[58] While acknowledging that money is a necessary component of a democracy, the OECD warns that without an effective regulatory system in place there is a "risk of policy capture through political finance."[59]

"Policy capture occurs when the interest of a narrow group dominate those of other stakeholders to the benefit of that group."[60] The risk of policy capture is that the policies adopted will "counter the public interest."[61] When policy capture occurs, this can lead to low levels of trust in government and the government's institutions.[62] The OECD's *Framework on Financing Democracy* has four pillars: (1) promoting a level playing field; (2) ensuring transparency and accountability; (3) fostering a culture of integrity; and (4) ensuring compliance and review.[63]

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56. Organisation for Economic Co-operation and Development, *Greece-OECD Project: Technical Support on Anti-Corruption, Training Manual on Political Finance Regulation*, 15, https://web-archive.oecd.org/2019-08-14/527564-training-manual-political-finance-regulation-greece-en.pdf [https://perma.cc/K5RY-6FHT]. ROSE-ACKERMAN, *supra* note 2, at 355, states that "it is not difficult to imagine ways in which a candidate might learn of specific donations made to a Super-PAC that has produced a media campaign on his or her behalf" even though these unlimited donations are from anonymous donors.

57. The United States and the OECD, https://www.oecd.org/unitedstates/united-states-and-oecd.htm#:~:text=The%20United%20States%2C%20along%20with,US%20work%20with%20the%20OECD%3F (last visited Nov. 26, 2023) [https://perma.cc/BY9W-KYDR].

58. Organisation for Economic Co-operation and Development, *supra* note 56, at 15.

59. Organisation for Economic Co-operation and Development, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*, 23, https://read.oecd-ilibrary.org/governance/financing-democracy_9789264249455-en#page1 [https://perma.cc/MVR2-F4P4].

60. *Id.*

61. *Id.*

62. *Id.* at 24–25.

63. *Id.* at 27.

For this paper, I will focus solely on the second pillar—transparency and accountability—because dark money and 501(c)(4)s as they exist today do not comport with international best practices.

Transparency is "a central component in virtually every political finance regulatory system," because information about the sources of money shines light on corruption. In the words of Justice Louis Brandeis, "sunlight is said to be the best of disinfectants."[64] Additionally, transparency dovetails with accountability, another key principle cited by the OECD. When information is publicly available, it is easier to hold political actors accountable when they act based on influence.[65] Publicly available disclosures also enable public scrutiny from the media and watch dogs should there be undue influence on policy that runs counter to the public's interest.[66] Increasing accountability, anti-corruption scholar Robert Klitgaard has argued, can play a role in reducing corruption in a system.[67] Additionally, "[c]omprehensive disclosure of financial information can serve as a deterrent to minimize the impact of undue influence."[68] The optimal amount of disclosure is all donors. However, the OECD notes that where this is not feasible, a proper balance can be struck between transparency and privacy by requiring disclosure of donors who contribute above a certain amount.[69]

Disclosure requirements also increase public confidence in the integrity of the electoral process. Compelled disclosure is useless if it doesn't enable the public to identify the donor with specific, identifying information. Transparency International's best practices include "preventing donations from anonymous, illicit, and foreign sources," and "publishing sufficient information about donations, include date, donor name, recipient name, and amount of each donation on a timely basis."[70] Compare this standard with dark money organization donors who currently engage with our political system *anonymously*. Transparency International also notes that effective transparency regulations require accountability and regulatory bodies to deter breaches of law. An oversight body is recommended to investigate and "sanction those guilty of wrongdoing."[71] Note how 501(c)(4)s are regulated by the IRS—the governmental agency tasked with ensuring that the organization's activities maintain its tax-exempt status—not the FEC.

By way of summary, 501(c)(4)s directly and indirectly influence our elections in the gray area beyond the reach of the FEC. First, 501(c)(4)s act as a conduit for money to enter our election system vis-à-vis FEC regulated entities, like super PACs. Second, 501(c)(4)s directly manipulate our elections when they themselves make independent expenditures. International best practices recommend

64. Organisation for Economic Co-operation and Development, *supra* note 56, at 15.
65. *Id*.
66. Organisation for Economic Co-operation and Development, *supra* note 59, at 75.
67. ROBERT KLITGAARD, CONTROLLING CORRUPTION 75 (1988).
68. Organisation for Economic Co-operation and Development, *supra* note 59, at 66.
69. *Id*. at 68.
70. AMIN, *supra* note 5, at 5–6.
71. *Id*. at 6.

that the body tasked with regulating a country's election system have the needed powers to provide effective oversight. As our system is currently structured, dark money organizations do not align with these best practices.

B. H.R. 1

In 2021, the For the People Act, or H.R. 1, was introduced in the 117th Congress with new disclosure requirements directed at dark money. H.R. 1 targeted dark money's two principal ways of anonymously influencing our elections. First, to combat dark money organizations that make independent expenditures, H.R. 1 introduced reporting requirements for donors above a threshold amount. Second, H.R. 1 proposed trace-back requirements for contributions that were given to a dark money non-profit (i.e., 501(c)(4)s), with a super PAC ultimately being the final recipient of the money.

H.R. 1 proposed adding a new section 324 to the FECA of 1971 to require "any covered organization that makes campaign-related disbursements aggregating more than $10,000 in an election reporting cycle" to file a disclosure report within 24 hours of this disbursement.[72] A "covered organization," as a newly defined term, would include "[a]n organization described in section 501(c) of [the Internal Revenue Code]" excluding 501(c)(3) organizations (i.e., conventional non-profits).[73] A "disclosure statement" would be required to contain "the name and address of every donor and date of every donation of more than $10,000" if the disbursement was made from a segregated bank account; if the covered organization made the disbursement from an un-segregated bank account, then the same information would have to be disclosed "for all payments to the covered organization."[74] A donor to a non-profit "covered organization" can avoid disclosure if they state, in writing, that their funds should not be used for "campaign related disbursements," and if the "covered organization" agreed and deposited the funds in a segregated account.[75] Seemingly aware of the Supreme Court's jurisprudence on compelled disclosures laws for nonprofits, H.R. 1 provides that the name or address of any person does not have to be reported if the donor would be subject to "serious threats, harassment, or reprisals."[76]

Additionally, for the first time ever, H.R. 1 attempted "to prevent evasion of these disclosure requirements by running contributions through intermediary dark money groups" by creating a "trace-back requirement."[77] H.R. 1 calls this a

72. H.R. 1, 117th Cong. § 4111(a) (2021).
73. *Id*. at § 4111(a)(3)(B).
74. COMM. ON H. ADMIN, 117TH CONG., REP. ON H.R. 1, THE FOR THE PEOPLE ACT, AS INTRODUCED IN THE 117TH CONGRESS, 104 (Mar. 2, 2021).
75. COMM. ON H. ADMIN, 117TH CONG., REP. ON H.R. 1, THE FOR THE PEOPLE ACT, AS INTRODUCED IN THE 117TH CONGRESS, 104 (Mar. 2, 2021); H.R. 1, 117th Cong., §4111(a) (2021).
76. H.R. 1, 117th Cong. § 4111(a)(3)(C) (2021).
77. CAMPAIGN LEGAL CENTER, *supra* note 34, at 12.

"covered transfer."[78] A covered transfer occurs when a "covered organization" makes a transfer to another person under five specific conditions:

> (1) the transferor requests the money be used for campaign-related disbursements (or to make a transfer to another person for that purpose), (2) the transfer is made in response to a solicitation for a donation for the purpose of making "campaign-related disbursements" (or for a transfer to another person for that purpose), (3) the transferor engaged in discussions with the recipient about using the money for "campaign-related disbursements" (or for making a transfer to another person for that purpose), (4) the transferor spent, or knew that the recipient had spent, $50,000 or more for "campaign-related disbursements" in the prior two years, or (5) the transferor knew or had reason to know that the recipient would spend $50,000 or more for "campaign-related disbursements" in the two years after the transfer.[79]

H.R. 1 attempted to prevent donors from hiding behind conduit dark money organizations. For example, the actual names and addresses of donors behind the $62 million that the dark money group One Nation gave to Senate Leadership Fund (a Mitch McConnell aligned super PAC) would have to be disclosed.[80] On the political left, the 501(c)(4) organization Majority Forward's donors would have to be disclosed because it contributed $40 million to Senate Majority PAC (a Chuck Schumer aligned super PAC).[81]

Ultimately, H.R. 1 passed the House, but the companion Senate bill failed to garner enough votes. Even so, the above discussion of H.R. 1's provisions serve as a model for legislation compelling disclosure of donors to politically active dark money organizations.

III. ARGUMENT

This Part will show that there are certain pieces to the constitutional puzzle that need some reconfiguring for a law, like H.R. 1, to pass constitutional scrutiny when an almost guaranteed legal challenge arises. First, this Part will explore the exacting scrutiny standard of review as applied to advocacy groups. Second, this Part will explore the Supreme Court's corruption jurisprudence. Third, this Part will explore different scholars who argue for a broader, more historically accurate understanding of corruption. And finally, this Part will examine a potential *stare decisis* hurdle.

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78. H.R. 1, 117th Cong. § 4111(f) (2021).

79. COMM. ON H. ADMIN, 117TH CONG., REP. ON H.R. 1, THE FOR THE PEOPLE ACT, AS INTRODUCED IN THE 117TH CONGRESS, 102 (Mar. 2, 2021). Under the statute as enacted, "person" is not limited to physical human. It includes "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 52 U.S.C. § 30101(11).

80. CAMPAIGN LEGAL CENTER, *supra* note 34, at 11.

81. Individual Contributions from Majority Forward to HMP, https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=majority+forward [https://perma.cc/72T6-4E4X].

A. Donors' First Amendment Rights: Striking the Proper Balance to Survive Exacting Scrutiny

A 501(c)(4) is an advocacy group. Advocacy groups' activities are protected by the First Amendment, which prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[82] Implicit in the First Amendment's guaranteed rights is "a corresponding right to associate with others."[83] Because of the implied right of association, the Supreme Court more closely scrutinizes any governmental action that would chill an individual's right to associate with an advocacy group.

The Supreme Court is particularly wary of government compelled disclosure of donors and members of advocacy groups pertaining to political, economic, religious, or cultural matters.[84] The concern is that the sacredness of privacy in associating with a certain group, particularly dissident groups, "may. . .. in many circumstances be indispensable to the preservation of the freedom of association."[85] Because of this serious potential impediment to First Amendment rights, the Court has used a heightened standard of review for compelled disclosure requirements called "exacting scrutiny."[86] Under exacting scrutiny, there must be a substantial relationship between the governmental interest and the donor information disclosed.[87] If the compelling governmental interest outweighs First Amendment burdens, the disclosure regime must then be narrowly tailored to that interest. Any compelled disclosure legislation targeting 501(c)(4)s' donor information would have to pass this judicial scrutiny.

Most recently, California's compelled disclosure requirements for charitable organizations were before the Supreme Court in a non-campaign finance context in a case called *Americans For Prosperity Foundation V. Bonta*, 141 S. Ct. 2373 (2021).[88] The issue before the court was "whether the First Amendment prohibits a State from requiring tax-exempt organizations to submit, on a confidential basis and for regulatory oversight purposes, the same schedule identifying their donors that they provide to the [IRS]."[89] The California Attorney General's regulations required charities renewing their state registrations to file copies of IRS Form 990, including attachments and schedules, such as Schedule B (the IRS document that requires organizations to disclose the name and addresses of donors who give more than $5,000 in a year). California argued that reporting donor information to the State "help[ed] to protect the public from fraud" while furthering "the State's

82. U.S. CONST. amend. I.
83. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).
84. NAACP v. Alabama, 357 U.S. 449, 460 (1958).
85. *Id*. at 462.
86. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021).
87. *Id*. at 2381 (2021).
88. *Id*.
89. Respondent's Br. i.

interest in preventing organizations that receive special tax treatment from abusing that privilege."[90]

The Supreme Court held California's upfront collection of Schedule Bs to be unconstitutional because of the burden on donors' associational rights.[91] The Court did not find a compelling governmental interest, and noted that California's interest in this information was for "ease of administration."[92] California could not justify its compelled disclosure requirements on "administrative convenience" grounds.[93] The Court in *Bonta*, in applying exacting scrutiny to compelled disclosures, stressed that the law must be narrowly tailored to the governmental interest, even if it is not "the least restrictive means of achieving" the government's goal.[94]

After *Bonta*, plaintiffs would seemingly have an easier path forward when challenging compelled donor disclosure requirements in non-campaign finance contexts. However, despite the Court holding that a narrowing tailoring approach applies to disclosure laws, lower courts applying the exacting scrutiny standard since *Bonta* have yielded mixed results.[95] These divergent outcomes post-*Bonta* may be due to the potential exacting scrutiny has for giving courts greater flexibility when balancing rights and harms with the government's interest. One scholar has observed that the Court's exacting scrutiny test "offers the flexibility . . . of a broad, multi-dimensional sliding scale test," describing this standard as a "nearly open constitutional test."[96] Justice Sotomayor's fear that the Court's "narrow tailoring" approach "marks . . . disclosure requirements with a bulls-eye" is only being partially confirmed by subsequent lower court opinions.[97] Lower courts since *Bonta* may still be applying the exacting scrutiny standard Justice Sotomayor argued the Court should not have strayed from. On top of this, exacting scrutiny's balancing analysis considers the fact that donor privacy may or may not be that important depending on whether the group promotes mainstream or fringe goals and ideas.[98]

For example, in the 9th Circuit, plaintiffs brought a challenge to San Francisco's secondary-contributor disclaimer requirement. The ordinance required that "[i]f any of the top three major contributors [to independent expenditure committees or ballot measure committees] is a committee, the disclaimer must also disclose both the name of and the dollar amount contributed by each of the top two major contributors of $5,000 or more to that committee," and tell voters that "[f]inancial

90. Respondent's Br. 7.
91. *Ams. for Prosperity Found.*, 141 S. Ct. at 2389.
92. *Id.* at 2387.
93. *Id.* at 2389.
94. *Id.* at 2384.
95. L. PAIGE WHITAKER & WHITNEY K. NOVAK, CONG. RSCH. SERV., IF12388, First Amendment Limitations on Disclosure Requirements (2023).
96. R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UNIV. MO. KANSAS CITY L. REV. 207, 214 (2016).
97. *Ams. for Prosperity Found.*, 141 S.Ct. at 2392 (Sotomayor, J., dissenting).
98. *Id.* at 2394.

disclosures are available at sfethics.org."[99] Applying exacting scrutiny review, the 9th Circuit found that the ordinance served an important governmental interest "in the disclosure of the sources of campaign funding."[100] The secondary-contributor requirement was substantially related to this interest because it "[was] designed to go beyond the ad hoc organizations with creative but misleading names and instead expose the actual contributors to such groups."[101] The 9th Circuit also found that the ordinance was narrowly-tailored to San Francisco's government interest; the court reasoned that amongst the onslaught of electoral communications, voters deserve to know a communication's supporting donors simultaneously with the communication itself.[102]

In light of *Bonta*, the 1st Circuit has also found that a state's law passed constitutional muster. It found that Rhode Island's "interest in an informed electorate vis-à-vis the source of election-related spending" was sufficient to survive exacting scrutiny.[103] Further, the court held that the law was narrowly tailored because it was time-limited, because it provided an off-ramp for donors who wished to avoid disclosure (contribute less than $1,000), and because it only required a rather modest quantity of donor information.[104]

Conversely, the 10th Circuit has found that a state's compelled disclosure law did not survive the new exacting scrutiny standard because, while the statute did have a substantial relation to an important governmental interest, it did not meet the new standard that *Bonta* imposed on governments.[105] At issue was Wyoming's campaign finance law, which required organizations to disclose donor information when the organization spent over $1,000 on an electioneering communication.[106] The court agreed with Wyoming's asserted governmental interest in compelled disclosure for anticorruption and informational purposes.[107] The 10th Circuit found that the public has "an interest in knowing who speaks through" the organization, and it found that voters need to be alert to the "[t]he sources of a candidate's financial support," which will show who the candidate is likely to be responsive to.[108] However, the court found that Wyoming's statute was not narrowly tailored to this interest, because the statute was ambiguous.[109] A "flexible [disclosure] statute" does not meet the Supreme Court's narrowly tailored requirement and forcing an advocacy group to "muddl[e] through ambiguous

99. No on E v. Chiu, 85 F.4th 493, 519 (9th Cir. 2023).
100. *Id*. at 504.
101. *Id*. at 499 (cleaned up).
102. *Id*. at 510.
103. Gaspee Project v. Mederos, 13 F.4th 79, 86 (1st Cir. 2021).
104. *Id*. at 88–90.
105. Wyo. Gun Owners v. Gray, 83 F.4th 1224 (10th Cir. 2023).
106. *Id*. at 1230.
107. *Id*. at 1244.
108. *Id*. at 1245 (citing *Buckley*, 424 U.S. at 67) (internal citations omitted).
109. *Id*. at 1248.

statutory text that fails to offer guidance on compliance" does not meet the precision that the narrowly tailored standard demands.[110]

In sum, any legislative attempt to prevent donors from hiding behind conduit dark money organizations will have to survive exacting scrutiny. While the above circuit court decisions hinged on the government's informational interest, the Supreme Court has recognized three compelling governmental interests for disclosure requirements: (1) information purposes, (2) deterring actual or apparent corruption, and (3) detecting violations of law.[111] Given that exacting scrutiny is a flexible standard of review (note, the mixed outcomes of circuit decision post-*Bonta* with similar facts), corruption is arguably the most compelling governmental interest that could survive exacting scrutiny. Corruption is the sufficient governmental interest that courts rely on to uphold contribution limits in the campaign finance context.[112] Further, any legislation must be narrowly tailored to this governmental interest. Vaguely written statutes will not survive, but disclosure regimes that strike a balance between excluding lower dollar donors and reporting donors above a certain threshold likely will.

All the same, before compelled disclosure regimes can survive exacting scrutiny based on an anti-corruption governmental interest, the Supreme Court's understanding of corruption needs to be reattached to its historical underpinnings.

B. The Supreme Court's Gradual Narrowing of the Definition of "Corruption"

In 1976, the Supreme Court made an illogical distinction between contributions and expenditures, upholding limitations on the former and striking down limits on the latter. Professors Pam Karlan and Samuel Issacharoff described the odd situation in colorful language: "The effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption."[113] In upholding the limit on contributions, the Court worried about "the integrity of our system of democracy" in the face of large contributions made with the intention of "secur[ing] a political *quid pro quo* from current and potential office holders."[114] Appellants argued that there was no need for contribution limits because bribery laws would effectively cover any *quid pro quo* arrangements.[115] For the Court, criminal bribery laws were not enough because they dealt "with only the most blatant and specific attempts of those with money to influence government action"; or in other words, bribery laws dealt only with *actual* corruption, and the need to regulate contribution limits was based on a compelling interest in regulating both *actual* or *apparent*

110. *Id.* at 1247–48.

111. *Buckley,* 424 U.S. at 76 (1976).

112. SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 692 (D.C. Cir. 2010).

113. LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT, 95 (2011).

114. *Buckley*, 424 U.S. at 26–27.

115. *Id.* at 27.

corruption.[116] By entertaining appellant's bribery argument, it was evident that the Supreme Court had "focused on the potential for the corruption of the candidates who aimed to ingratiate themselves to their wealthy backers."[117]

The two highwater marks for the broadest definitions of corruption that the Supreme Court has endorsed came in *Austin v. Michigan Chamber of Commerce* and *McConnell v. Fed. Election Comm'n*. In *Austin*, the Michigan Campaign Finance Act prohibited corporations from using treasury funds to make independent expenditures in the state's elections.[118] The Supreme Court upheld these limitations, finding that they were narrowly tailored to the serious danger of undermining Michigan's election system.[119] In finding that preventing corruption was a compelling state interest, the Court reasoned that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures."[120] Further, the corporate form gives corporations an advantage in aggregating wealth, and this aggregation of wealth "[has] little or no correlation to the public's support for the corporation's political ideas."[121] In sum, the Court's corruption definition boiled down to fairness: state law creates a corporate form that "enjoys limited liability, perpetual life, and favorable treatment of the accumulation . . . of assets" enabling it to amass a "political war chest" that has a larger impact on political speech than others are able to have.[122] I note, however, that the *Austin* opinion "has been understood by most commentators to be driven by equality considerations, albeit disguised in the language of 'political corruption.'"[123]

Justice Kennedy, who dissented in *Austin*, set forth the framework of corruption which was solidified and adopted by the Supreme Court in *Citizens United*. In his opinion, political corruption was purely a transactional arrangement between a politician and an entity, whereby politicians "act contrary to their obligations of office by the prospect of financial gain."[124] The Supreme Court's broad understanding of corruption enjoyed one more day in the sun when challenges to BCRA arose.

Corruption, as *McConnell* held, is access that creates undue influence on politicians. This undue influence has the same legal implications as a "simple cash-for-votes" arrangement.[125] The Supreme Court feared that politicians would legislate based on the "wishes of those who have made large financial contributions," and

116. *Id.* at 28.
117. Samuel Issacharoff, *On Political Corruption*, 125 HARV. L. REV. 118, 121–22 (2010).
118. Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990).
119. *Id.* at 669.
120. *Id.* at 660.
121. *Id.*
122. *Id.* at 658–59, 666.
123. Issacharoff, *supra* note 117, at 121–23 n.25 (internal quotation marks omitted).
124. Austin v. Mich. Chamber of Com., 494 U.S. 652, 703 (1990) (Kennedy, J. dissenting) (internal quotation marks omitted).
125. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 143 (2003).

not based on the will of their constituents.[126] The danger, the Supreme Court feared, was that if you "take away Congress' authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune," individual voters will not be as willing to participate in our democracy.[127] In arriving at an undue influence definition of corruption, the Court refers to the "deeply disturbing examples of corruption" referenced in *Buckley*, including for example "evidence that various corporate interests had given substantial donations to gain access to high-level officials."[128] If this were the Supreme Court's current definition of corruption, legislation compelling disclosure of 501(c)(4) donors would fare much better, as *McConnell* "adopted a highly deferential view of congressional authority and allowed disproportionate influence on officeholders' judgement to stand in for corruption."[129]

Justice Kennedy, concurring in part, again critiqued the majority's expansive corruption definition. He argued that it "ignores the constitutional bounds and . . . interprets the anticorruption rationale to allow regulation . . . of any conduct that wins goodwill from or influences a Member of Congress."[130] For him, there is only one definition that can identify political corruption: a *quid pro quo* transaction. He goes even further to argue that in a representative democracy, favoritism and influence are simply unavoidable. To find corruption, one needs to explicitly "point to a relationship between an official and a quid."[131] Ultimately, Justice Kennedy's very limited conception of corruption won the day when the Supreme Court next opined on campaign finance legislation.

In 2010, the Supreme Court "comprehensively redefined corruption" while, in the words of President Obama, simultaneously "opened the floodgates for special interests—including foreign corporations—to spend without limit in our elections."[132] Citizens United, a nonprofit organization, challenged BCRA's provision which prohibited corporations "from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate for the election or defeat of a candidate."[133] The Government argued that its interest in banning corporate political speech vis-à-vis independent expenditures was to prevent corruption or the appearance of corruption.[134] The majority opinion written by Justice Kennedy—who had been arduously trying to narrow the definition of corruption for years—did not buy this argument. For the Court, corruption or the appearance thereof is strictly limited to *quid pro quo* corruption.

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126. *Id*. at 153.
127. *Id*. at 144.
128. *Id*. at 150.
129. Issacharoff, *supra* note 117, at 124.
130. *McConnell*, 540 U.S. at 294 (Kennedy, J., concurring in part, dissenting in part).
131. *Id*. at 297.
132. ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZEN'S United 232 (2014); Barack Obama, President, United States of America, State of the Union Address (Jan. 27, 2010).
133. *Citizens United* v. Fed. Election Comm'n, 558 U.S. 310, 320 (2010).
134. *Id*. at 349.

"[I]nfluence over or access to elected officials" is not corruption.[135] Citing his opinion in *McConnell*, Justice Kennedy emphasized that representative politics creates an environment where favoritism and influence are unavoidable, and this simply cannot be deemed corruption. It is inherent in a democracy for a candidate to be responsive to voters and donors because there is a mutual understanding between the parties that the voter will only vote or contribute to a candidate that produces the favored political outcome.[136] Here, the Court, in my opinion, naively assumed that politicians give equal weight to both donors' and voters' policy preferences. Anecdotally, we know in reality that these two groups are not given equal attention.[137] Ultimately, the Court returned its definition of corruption to align with its *Buckley* definition, for it "proved not as malleable as *Austin* might have indicated."[138]

Justice Stevens understood the reality of modern politics: "Corruption can take many forms. . .. the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf."[139] Corruption, Justice Stevens argues, operates on a spectrum and the majority's narrowed understanding is divorced from our history.[140] Most strikingly, Justice Stevens counters the majority's argument that "ingratiation and access . . . are not corruption" with the simple point that "they are necessary prerequisites to it."[141] Ingratiation and access create opportunities for actual and apparent *quid pro quo* transactions and it is not hard to imagine the scenario Justice Stevens was imagining when he penned those words.[142]

The Supreme Court revisited political corruption one more time in *McCutcheon v. Fed. Election Comm'n*. Justice Roberts writing for the plurality plainly stated that laws and regulations in the campaign finance context must target *quid pro quo* corruption, full stop.[143] Any other justification—such as "level[ing] the playing field" or "equaliz[ing] the financial resources of candidates"—is prohibited by the First Amendment and does not fall under corruption.[144] This narrow definition struck a nerve of the Court's liberal block, which argued that the anticorruption

135. *Id*. at 359.
136. *Id*.
137. President Obama remarked—at a private fundraiser for his reelection campaign, where tickets ran $17,900 a head to attend—"You now have the potential of 200 people deciding who ends up being elected president every single time." KENNETH P. VOGEL, BIG MONEY: 2.5 BILLION DOLLARS, ONE SUSPICIOUS VEHICLE, AND A PIMP—ON THE TRAIL OF THE ULTRA-RICH HIJACKING AMERICAN POLITICS viii (2014).
138. Issacharoff, *supra* note 117, at 126.
139. *Citizens United*, 558 U.S. at 447–48 (Stevens, J., concurring in part, dissenting in part).
140. *Id*. at 448.
141. *Id*. at 455.
142. *Id*.
143. McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 206 (2014).
144. *Id*. at 207.

interest "is a far broader, more important interest than the plurality acknowledges."[145]

The problem with 501(c)(4)s is that they will never be encompassed by the Supreme Court's current *quid pro quo* understanding of corruption. They do not contribute money directly to candidates. Instead, they make independent expenditures themselves, or funnel money through super PACs, who in turn make independent expenditures conveying messaging that influences elections. *Citizens United's* "critical holding [regarding] independent expenditures" found that "'[t]he absence of prearrangement and coordination" relieved basic *quid pro quo* corruption concerns. [146] This currently adopted definition expressly forecloses regulating dark money. Even so, in order for legislation mandating disclosure of a 501(c)(4)'s donors to survive constitutional review, it "must use the vocabulary of corruption if it is to have any [fighting] chance."[147] The following section argues that the historically accurate understanding of corruption is much broader than the Court's currently crabbed definition.

C. The Supreme Court's Narrowed Understanding of Corruption is Ahistorical

In order for legislation disclosing dark money to be upheld in the face of almost certain legal challenge(s), the scope of the Supreme Court's corruption definition must be expanded to align with the Founders' understanding of corruption. Remember, legislating in realms that infringe on First Amendment rights requires that the legislation survive exacting scrutiny. Exacting scrutiny demands that the government show a substantial relationship between the government's compelling interest and the legislation at hand. The Supreme Court has approved three compelling governmental interests, including corruption or the appearance thereof.[148] The next piece of the puzzle is to expand the Supreme Court's understanding of corruption beyond a narrowed, transactional one.

For Professor Lawrence Lessig, a more historically accurate definition of corruption includes not only *quid pro quo* corruption, but also "dependence corruption.[149] His argument goes like this: Article IV of the Constitution guarantees a "Republican Form of Government." "By a 'Republic,' our Framers meant a 'representative democracy' . . . directly elected by the people."[150] A "representative democracy" is supposed to be "dependent on the people alone," and dependencies that draw Congress's attention away from the people "would be 'corrupt.'"[151]

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145. *McCutcheon*, 572 U.S. at 236 (Breyer, J., dissenting).

146. Issacharoff, *supra* note 117, at 125 (quoting *Citizens United*, 588 U.S. at 357).

147. DARON R. SHAW ET AL., THE APPEARANCE OF CORRUPTION: TEST THE SUPREME COURT'S ASSUMPTIONS ABOUT CAMPAIGN FINANCE REFORM 9 (2021).

148. *Buckley*, 424 U.S. at 64.

149. Lawrence Lessig, *What an Originalist Would Understand Corruption to Mean*, 102 CALIF. L. REV. 1, 11 (2014).

150. LESSIG, *supra* note 113, at 127.

151. Lessig, *supra* note 149, at 7; LESSIG, *supra* note 113, at 128.

The Framers thought Parliament to be corrupt because they were all dependent upon the King for their positions, not the people.[152]

With Great Britain's corrupting environment at the forefront, the "sophisticated constitutional architects" "weakened the possibility of competing dependencies by blocking other corrupting ties."[153] The Framers were concerned that the country's institutions would not be solely dependent on the people, and conflicting dependencies would undermine our new country's institutions.[154] Professor Lessing goes as far to argue that "many of the central features of our republican government were, in fact, significant anti-corruption measures."[155] For example, at the core of the "Constitution's text, history, and structure" are anti-corruption principles.[156] Our systems of checks and balances was a response to "the fear that it would be possible to purchase the guardians of the people," making it necessary for overlapping branches.[157]

Professor Lessig takes issue with the fact that today we have "a system in which a tiny proportion of citizens are 'the funders' within the money election" and this is "dependence corruption"—in direct conflict with the Founders' intentions that Congress would be dependent on "the people *alone*."[158] Given our country's history, Professor Lessig argues that only a non-originalist could possibly embrace the Court's "*quid pro quo*" definition of corruption as "the only constitutionally relevant sense of the word."[159] The Founders' were "unquestionably and primarily worried about 'dependence corruption,'" in addition to the obvious concerns about *quid pro quo* corruption.[160]

Professor Zephyr Teachout, in her play "to out-original the originalists," similarly argues that the Supreme Court's *quid pro quo* corruption definition has strayed far from the Founders' corruption fears.[161] The Constitution was designed to protect against corruption more broadly conceived and *quid pro quo* corruption is not the only constitutionally relevant sense of the word corruption.[162] For the Framers, corruption encompassed "inappropriate dependencies and self-serving behaviors," as they feared that representatives would work for powerful patrons like in the rotten borough system that had corroded Britain.[163] Corruption had

152. Lessig, *supra* note 149, at 7.

153. LESSIG, *supra* note 113, at 95.

154. Brief for Lawrence Lessig as Amici Curiae Supporting Appellee, McCutcheon v. Fed. Election Comm'n, 527 U.S. 185 (2014).

155. *Id*.

156. *Id*.

157. *Id*. (internal citations omitted).

158. Lessig, *supra* note 149, at 18.

159. Lessig, *supra* note 149, at 11.

160. *Id*.

161. Jill Lepore, *The Crooked and The Dead*, THE NEW YORKER, Aug. 18, 2014, https://www.newyorker.com/magazine/2014/08/25/crooked-dead [perma.cc/8H68-MQXH].

162. TEACHOUT, *supra* note 132, at 295; *see* Lessig, *supra* note 149, at 11.

163. As explained by Professor Teachout: "A rotten borough existed in England when a disproportionately small number of voters had outsized political power, which they often sold." TEACHOUT, *supra* note 132, at 73.

corroded British society as the culture was self-serving and wealth-hungry.[164] Against this backdrop, Professor Teachout argues that the Famers sought to structure the U.S. Constitution to "fight against corruption."[165] At the drafting of the Constitution, the delegates understood political corruption to mean "self-serving use of public power for private ends, including without limitation, bribery, public decisions to serve private wealth made because of dependent relationships, public decisions made to service executive power made because of dependent relationships, and use by public officials of their positions of power to become wealthy."[166] To combat these moral failings, the Constitution contains prophylactic measures in many of the clauses. For example, the Constitution's inhabitancy requirement for the House was established to prevent wealthy nonresidents from buying their seat.[167] As George Mason stated, without this requirement "a rich man may send down to the Districts of a state in which he does not reside and purchase an Election . . . We shall have the Engl. Borough corruption."[168]

Finally, Professor Teachout argues that "for the idea of constitutional fidelity to mean anything at all" one must engage with the Founders' concern about political corruption.[169] Failing to do this "leads to unstable jurisprudence."[170] Pre-*Buckley*, corruption was broadly understood as a type of moral failure and its danger to our democracy was well understood. And while corruption may be a "disputed concept at the margins," the rule of law cannot exist without anti-corruption principles. She concludes her argument by stating that we should be okay with the imprecise concept of corruption. Corruption 'does not need to be defined in a statute because the most effective anti-corruption statutes will go at effects, not the root cause."[171] After all, the Founders put in place structural measures to prevent the potential *effects* of corruption on the young democracy, not to root out temptations that create these moral shortcomings.

D. The Stare Decisis Hurdle

Any expansion beyond *quid pro quo* corruption would be in direct tension with *Citizens United*. *Citizens United* held that "[i]ngratiation and access" were not corruption, and therefore any limit on corporate independent expenditures is invalid because the very nature of these expenditures do not entail the *quid pro quo* sale of political action for donations. Dark money organizations, by their nature, participate in elections in ways which ensure that their transactions will never be classified as a direct *quid pro quo* arrangement. Thus, adopting Professor

164. Zephyr Teachout, *The Anti-Corruption Principle*, 91 CORNELL L. REV. 341, 349–50 (2009).
165. *Id*. at 347.
166. *Id*. at 373–374.
167. TEACHOUT, *supra* note 132, at 75.
168. *Id*.
169. Teachout, *supra* note 164, at 398.
170. *Id*. at 408. Talking about instability in the jurisprudence, Professor Teachout notes that there have been five modern concepts of corruption: (1) criminal bribery, (2) inequality, (3) suppression of speech, (4) dispirited public, and (5) loss of political integrity.
171. TEACHOUT, *supra* note 132, at 298.

Lessing's dependence corruption definition or Professor Teachout's broadly conceived, disputed at the margins definition of corruption would require the Court to consider overruling its *Citizens United* decision—which by implication might call into question *Buckley's* holding. I qualify the implications for *Buckley* because one scholar, Professor Galston, has argued that "quid pro quo meant something more expansive for *Buckley* than the meaning adopted by *Citizens United*."[172] *Buckley* used a variety of descriptive words such as "'improper influence,' 'undue influence,' the 'appearance of impropriety,' and 'buy[ing] influence' repeatedly to describe the evils that Congress sought to counter with FECA."[173] Thus, as it is argued, this implies that the Court understood "'corruption' in the campaign finance context" to encompass situations beyond explicit quid pro quo transactions.[174]

Notwithstanding Professor Galston's expansive reading of the *Buckley* opinion, compelling dark money organizations' donors based on the government's anticorruption rationale presents a *stare decisis* hurdle for any legislation of the sort. However, the Court's adherence to precedent is "neither an 'inexorable command' nor a 'mechanical formula of adherence to the latest decision,' especially in constitutional cases."[175] And given some of the Court's recent decisions, particularly *Dobbs v. Jackson Women's Health Organization*,[176] it "is bound by precedent only to the extent is chooses to be."[177] After all, the Court is "expounding" the Constitution which is "intended to endure for ages to come, and consequently, to be *adapted* to the various crises of human affairs."[178] It is time for the Court to reevaluate whether our Nation's history and the reality of modern-day campaign finance supports such a narrowed definition of corruption.

CONCLUSION

Some may be left wondering, why all the fuss about dark money organizations? Those opposed to compelled donor disclosure laws argue that because a dark money organization's donors remain anonymous, candidates can't succumb to their influence. However, this ignores two realities of modern campaign finance. First, political donors are often repeat players who have long-term relationships with political operatives and politicians. Anecdotally, political fundraisers' projections for the year often start with individuals who have lengthy giving histories and established relationships with the principals (operatives, candidates,

172. Miriam Glaston, *Buckley 2.0: Would the Buckley Court Overturn Citizens United*?, 22 U. PA. J. CONST. L. 687, 732–33 (2020).

173. *Id*. at 731.

174. *Id*.

175. *Citizens United*, 558 U.S. at 377 (Roberts, J., concurring) (internal citations omitted).

176. 597 U.S. 215 (2022).

177. William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson, and the Consequences of Pragmatic Adjudication*, 1 UTAH L. REV. 53, 55 (2002).

178. *The Court and Constitutional Interpretation*, Supreme Court of the United States, https://supremecourt.gov/about/constitutional.aspx [perma.cc/4KQU-LNHE] (last visited Nov. 26, 2023) (emphasis added).

political party, etc.). Second, staffers frequently rotate through these organizations and these organizations share common vendors. For example, in the 2012 presidential election season, super PAC Priorities USA Action "was formed by two former White House aides, and Obama administration officials" helped fundraise for it.[179] Super PACs are often so closely tied to the candidate—despite legally being required to be "independent" —that they will sometimes even share the same office.[180]

Point being, the various flavors of political organizations are so intertwined from the staff to the office space, to the vendors, that the sources of funding are never truly anonymous to those in charge of spending the money and those who benefit from the money. Thus, it is not hard to imagine that if Senator X wondered who was propping up the 501(c)(4), which was in turn contributing millions to a Senator X-aligned super PAC, Senator X could easily trace the interconnected network of staff, vendors, and the like, to arrive at the "anonymous" source of funding. Or the more likely scenario, the dark money donor could obtain their wanted access to Senator X by navigating in the opposite direction through the same interconnected network.

This paper assumes that there is political will for Congress to pass legislation targeting dark money organizations that work to ultimately benefit their own private interests. As an aside, campaign finance reform is traditionally a Democrat-led effort, but there has been some movement on the right.[181]

Notwithstanding the necessary political will, I believe the pieces of the puzzle are on hand for legislation of this sort to pass constitutional muster. First, in the face of a legal challenge courts will apply exacting scrutiny. As explained above, this standard is flexible, so long as the disclosure requirements are narrowly tailored; the Court, loosely speaking, is sympathetic to disclosure requirements because "they impose no ceiling on campaign-related activities."[182] The second piece of the puzzle requires that the Court return to the historically accurate, broader understanding of corruption. With a Court full of originalists, there should be the needed number of justices to move the Court away from the current, narrow *quid pro quo* understanding of political corruption. Lastly, *stare decisis* is only an obstacle to the Court to the extent the Court allows it to be one.

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179. Mike McIntire & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. Times (Feb. 25, 2012) https://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html [perma.cc/4ALB-QYLH].

180. Gerken, *supra* note 9, at 12.

181. *See, e.g., Hawley Introduces Bill to Keep Corporate America's Dollars Out of U.S. Politics*, (Oct. 31, 2023), https://www.hawley.senate.gov/hawley-introduces-bill-keep-corporate-americas-dollars-out-us-politics [perma.cc/5XJF-22VE].

182. Buckley v. Valeo, 424 U.S. 1, at 64 (1976).

The proper way to end this Note is to return Justice Brandeis: "Sunlight is said to be the best of disinfectants."[183] We should all be seriously concerned about the cloud of secrecy surrounding dark money organizations' sources of funding and the influential role that private, anonymous interests play in our elections. Should there be political will to legislate, there is a constitutionally valid path forward.

183. Organisation for Economic Co-operation and Development, *Greece-OECD Project: Technical Support on Anti-Corruption, Training Manual on Political Finance Regulation*, 24, https://www.oecd.org/governance/ethics/training-manual-political-finance-regulation-greece-en.pdf [perma.cc/267Y-Z3EP].