Docket No. 24-2933

In the

United States Court of Appeals

For the

Ninth Circuit

AMERICANS FOR PROSPERITY, et al.,

Plaintiffs-Appellants,

v.

DAMIEN R. MEYER, in his official capacity as Chairman of the Citizens Clean Commission, et al.,

Defendants-Appellees,

VOTERS' RIGHT TO KNOW, et al.,

Intervenor-Defendants-Appellees,

Appeal from a Decision of the United States District Court for the District of Arizona, No. 2:23-cv-00470-ROS · Honorable Roslyn O. Silver

BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29, Citizens for Responsibility and Ethics in Washington ("CREW") submits its corporate disclosure statement.

(a) CREW has no parent company, and no publicly-held company has a ten percent or greater ownership interest in CREW.

(b) CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW files complaints with the Federal Election Commission to ensure enforcement of federal campaign finance laws and to ensure its and voters' access to information about campaign financing to which CREW and voters are legally entitled. CREW disseminates, through its website and other media, information it learns in the process of those complaints to the wider public.

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STATEMENT OF INTEREST[1]

CREW is a nonpartisan, section 501(c)(3) nonprofit corporation that seeks to combat corrupting influences in government and protect citizens' right to know the sources of influence on public officials. CREW uses materials disclosed by federal and state authorities identifying officials' financial supporters to monitor for potential corruption and to publish reports. Accordingly, disclosure such as that contemplated by the Voters' Right to Know Act is essential to CREW's work and the exercise of CREW's and Americans' First Amendment rights to critique those in power. Further, CREW litigates the scope of disclosure under federal law and can correct misrepresentations about them and opine on federal law's inability to effectively achieve the interests that justify disclosure.

ARGUMENT

In 2022, Arizonans approved the Voters' Right to Know Act (the "Act") by overwhelming margins to ensure Arizonans know the actual sources of influence on them and their officials, the information necessary to "live[] up to the promise of self-government." *The Voters' Right to Know Act—Frequently Asked Questions*,

[1] All parties to this matter have consented to this amicus. No counsel for a party authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief, and no person other than CREW or its counsel contributed money that was intended to fund the preparation or submission of this brief.

Voters' Right to Know's "Stop Dark Money" website, https://www.stopdarkmoney.com/faq (last visited Dec. 2, 2024). In upholding the constitutionality of the Act, the court below recognized there was a "reasonable fit between the Act's burdens and the governmental interest," in part, because disclosure of the "actual funders of communications cannot be achieved in any other way." R. at 29, 32.

Nonetheless, Appellants assert Arizonans are limited to regimes that require far less disclosure, like that under federal law. *See* Appellants' Br. 34–38, ECF No. 12.1. But even while understating the scope of those laws, Appellants overstate their success. Unfortunately, the federal disclosure laws, even with lower thresholds than the Act, have failed to expose those who wield influence over our nation's policies by means of their largess. Billions of dollars in dark money, and the officials that money supports and favors it buys, escape public scrutiny while bending public policies to their donors' wills.[2]

Although Appellants would prefer Arizona adopt a similarly loophole-ridden, superficial, and easily evadable regime, the Constitution does not require that. Disclosure serves substantial, and indeed compelling, interests, like the

[2] This brief focuses on the limits of federal law, leaving aside problems resulting from its anemic enforcement.

disclosure of all the "interests to which a candidate is most likely to be responsive" because of their financial support. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). The First Amendment's narrow tailoring requirement permits states to adopt policies actually capable of "achiev[ing] the desired objective[s]" of disclosure, *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 609 (2021), rather than confining them to repeating federal law's mistakes.

Further, while Appellants laud free speech, they notably seek through this lawsuit to silence others. The relief they seek—an injunction against the public disclosure of campaign financing, sought for the purpose of censoring their and their donors' critics—is both unprecedented and unconstitutional. More than chilling speech, the relief sought here would "necessarily reduce[] the quantity of expression" of Arizonans and other Americans by depriving them of the facts necessary to formulate their own speech to critique those in power, and the financial interests that stand behind them. *Buckley*, 424 U.S. at 19.

CREW urges the Court to turn away Appellants' attempt to use the courts to tilt public debate in their favor and to deprive Arizonans of laws more up to the task than the federal laws that all too often fall short.

I. Arizonans Are Not Limited to the Inadequate Disclosure Imposed by Federal Law

The Constitution permits states to enact campaign finance disclosure regimes capable of meeting the public's substantial interests in transparency. Unfortunately, federal law—even when its scope is not understated, as Appellants do here—has proven inadequate. Billions in dark money have flooded federal elections by taking advantage of the limits of the federal regime, leaving American voters in the dark about who is buying influence over their lives.

a. Arizonans Are Entitled to Laws Adequate to Achieve Their Substantial and Compelling Interests in Disclosure

The court below recognized disclosure laws like the Act that "do not prevent anyone from speaking," *Citizens United v. FEC*, 558 U.S. 310, 366 (2010), are subject to "exacting scrutiny," which requires only a "'reasonable fit' between the burdens [imposed] and the governmental interest" vindicated. R. at 24. Those interests include "fully inform[ing]" the public about "[t]he sources of a candidate's financial support," *Buckley*, 424 U.S. at 67, 76, including those who may have officials "in [their] pocket," *Citizens United*, 558 U.S. at 370; *see also Buckley*, 424 U.S. at 67 (disclosure "allows voters to place each candidate in the political spectrum more precisely" and "alert[s] the voter to the interests to which a candidate is most likely to be responsive"). Disclosure also "deter[s] actual

corruption and avoid[s] the appearance of corruption" because "a public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 67. Disclosure also serves as an "essential means of gathering the data necessary to detect" other violations of law. *Id.* at 68; *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) ("disclosure … deters and helps expose violations"); *see also Smith v. Helzer*, 95 F.4th 1207, 1215 (9th Cir. 2024) (public's informational interest in ballot initiatives "'sufficiently important' … to warrant disclosure"), *cert. denied*, *Smith v. Stillie*, No. 23-1316, 2024 WL 4805897 (U.S. Nov. 18, 2024).

Given these important, and indeed "compelling," interests the Act serves, *see Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010), narrow tailoring does not obligate Arizonans to pursue inadequate half-measures. "[T]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved *less effectively* absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) (emphasis added) (internal quotation marks omitted). While mere "administrative convenience" is insufficient, if alternatives are "inadequate" and the "end can [not] be more narrowly achieved," the law will survive exacting

scrutiny. *Bonta*, 594 U.S. at 609, 615; *see also id.* at 613 (rejecting collection regime as insufficiently tailored where "there was not 'a single, concrete instance in which'" collection "did anything to advance" the government's interest beyond narrower regime and government "had not even considered alternatives"); *see also John Doe #1 v. Reed*, 561 U.S. 186, 198, 199 (2010) (holding law satisfied exacting scrutiny because alternative methods "will not catch *all* invalid signatures" and "[p]ublic disclosure also promotes transparency and accountability in the electoral process *to an extent other measures cannot*" (emphasis added)); *Helzer*, 95 F.4th at 1216, 1220 (finding law narrowly tailored because, in part, it "covers donations outside the limited reach" of proposed alternative and "more effectively serves the government's informational interest"); *No on E v. Chiu*, 85 F.4th 493, 509 (9th Cir. 2023) (law sufficiently tailored where it is "a more effective method of informing voters" than proffered alternative), *cert. denied* No. 23-926, 2024 WL 4426534, at *1 (U.S. Oct. 7, 2024) (Mem.).

Accordingly, although Appellants claim that the existence of other more limited disclosure provisions, like those in federal law, demonstrates that the Act is not narrowly tailored, *see* Appellants' Br. 36–38, those laws can only serve to justify Arizona's laws if they are inadequate to fully advance the public's interests in disclosure. Unfortunately, federal law's disclosure provisions—even when its

scope is not understated as Appellants do here—have proven inadequate to the task.

b. Appellants Understate Scope of Federal Disclosure

Before addressing its inadequacies, it is important to clarify the scope of the federal disclosure laws that have been upheld time-and-time-again. Appellants contend these laws only impose disclosure on those who "specifically earmarked [their funds] to support campaign-related advocacy." Appellants' Br. 36; *id.* at 35 (stating "*Citizens United* upheld disclosures evidencing a close nexus to electoral advocacy" and "funders who knowingly earmarked their contributions for electioneering"). Specifically, Appellants claim federal law only requires disclosure where donors' contributions are "precisely tied to those [reported] communications." *Id.* at 35. Accordingly, reading federal law to require donors to know about and fund individual specific ads before triggering disclosure, Appellants contend federal law never requires disclosure of donors to organizations supporting candidates or messages "those donors may not support at all." *Id.* at 43. Appellants, however, misstate federal law.

First, federal law requires all those who contribute over $200 annually to certain entities, termed political committees, to be disclosed. *See* 52 U.S.C. § 30104(b)(3). This includes national parties, candidate committees, and super

PACs. Although the Supreme Court limited this category of groups to those "that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate," *Buckley*, 424 U.S. at 79, the Court upheld the broad sweep of disclosure imposed once a group qualified, *id.* at 79, 84 n.113. Notably, because these groups "are, by definition, campaign related," *id.* at 79, all sums provided to them are deemed to be contributions and subject to reporting.

In practice, this means groups subject to political committee reporting will often be those entities that devote a majority—but not necessarily an entirety—of their funds to electioneering. Political Committee Status, 72 Fed. Reg. 5595, 5605 (Feb. 7, 2007) (groups spending "50-75%" of funds on electioneering are political committees). Moreover, a single political committee can support any candidate or candidates it wishes, in any race, even if the support appears to be contradictory. Similarly, a political committee can support any cause or advance any issue it wishes, even if its actions were entirely unpredicted by its donors.

Thus, where the political committee supports more than one candidate—a common occurrence—a donor who gives to the group will be disclosed as funding all of those candidates, even if that donor's real purpose was only to support a single candidate or even to only support the group's work unrelated to elections. A political committee, moreover, may transfer its funds to another entity.

Accordingly, though donors may, for example, only wish to support a local candidate, their contribution could be forwarded to another group to support candidates in an entirely different location, including candidates the donor actively opposes. Public reporting would permit voters to trace the money back to the original source.

Beyond political committee reporting, federal law also requires disclosure from persons or entities engaging in certain types of electioneering. *See* 52 U.S.C. § 30104(c), (f). Notwithstanding their exclusion from federal law's political committee provisions, these entities can be quite large. *See, e.g.*, *CREW v. FEC*, 971 F.3d 340, 345 (D.C. Cir. 2020) (considering non-political committee that spent over $175 million on advocacy over a decade). These persons must disclose the sources of their funds. *See* 52 U.S.C. § 30104(b)(3)(A) (incorporated by reference by 52 U.S.C. § 30104(c)); 11 C.F.R. § 104.20; *McConnell v. FEC*, 540 U.S. 93, 194 (2003) (discussing electioneering communications disclosure covering "all persons who contributed"). There is no obligation that the reported donors seek to fund a particular communication or even support the particular benefited candidate. Rather, contributors are subject to reporting, for example, if the "funds [were] intended to influence elections" generally, even if not "earmarked to support a particular" communication. *CREW*, 971 F.3d at 345, 353, 355 (discussing

contributions made "to support the election" of a specific candidate in addition to those made after watching "examples" of ads regarding other candidates).

Under these federal provisions, a donor may be revealed as the source of funds for "unforeseeable actions that organizations later undertake." Appellants' Br. 42. A donor may wish to support a group's efforts to support one candidate, only to find out that the recipient used, and disclosed, their funds to support another candidate. Or a donor who wishes to support an organization's ads praising a candidate may nevertheless be associated with the group's ads falsely slandering their opponent in objectionable terms. Or, to use Appellants' example, a "devout Catholic" donor intending to support a group's gun-control-focused express advocacy will be revealed as the funder of the group's "abortion rights" express advocacy to which the donor vehemently objects. Appellants' Br. 43.

Accordingly, it is incorrect to say federal law never "compel[s] donors publicly to associate with causes they have no interest in and may even oppose." Appellants' Br. 75. Yet federal courts have consistently upheld federal disclosure requirements.

c. Nevertheless, Federal Law Has Proven Inadequate to Achieve Americans' Interests in Disclosure

Unfortunately, even correcting for Appellants' misimpression, federal law has still proven inadequate to "fully inform[]" the public about "the interests to

which a candidate is most likely to be responsive" or to arm them with the ability "to detect any post-election special favors that may be given in return." *Buckley*, 424 U.S. at 67, 76.

For example, a recent analysis found that the 2024 election was the most expensive election to date, with over $4.5 billion being spent by outside groups. Anna Massoglia, *Outside spending on 2024 elections shatter records, fueled by billion-dollar 'dark money' infusion*, OpenSecrets (Nov. 5, 2024), https://www.opensecrets.org/news/2024/11/outside-spending-on-2024-elections-shatters-records-fueled-by-billion-dollar-dark-money-infusion/. Of that, more than half came from groups that did not fully disclose the source of their funding notwithstanding federal law's disclosure requirements. *Id.* Another analysis found that between October 1 and October 16 of this year—just over two weeks—about $240 million was donated to super PACs from unknown sources. Theodore Schleifer & Kenneth Vogel, *In Election's Final Days, Dark Money and 'Gray Money' Fund Hidden Agendas*, N.Y. Times (Oct. 30, 2024), https://www.nytimes.com/2024/10/30/us/politics/dark-money-presidential-campaign.html.

The sources of these funds were able to hide their identities from the public by taking advantage of loopholes in federal law. For example, they may utilize a

dark money group, typically an LLC or a 501(c) nonprofit, to launder funds intended to influence elections, using the otherwise unknown and anodyne sounding group to be reported as the "source." Or they may disclaim the electioneering purposes that would trigger disclosure, even while all parties understand the purpose to which funds will in fact be used.

Federal law prohibits at least some of these attempts to use pass throughs, *see* 52 U.S.C. § 30122 (barring contributions "in the name of another"), but it "reach[es] only the most clumsy attempts to pass contributions through," *FEC v. Colo. Republican Fed. Campaign Com.*, 533 U.S. 431, 462–63 (2001): it is currently interpreted to only capture those who earmark their funds to the ultimate recipient. It would not require, therefore, the disclosure of everyone who donates intending their funds to influence an election, even where those funds eventually do so, as long as the donor remains ambivalent about which super PAC, political committee, or other entity eventually turns those funds into electioneering.

A recent CREW complaint to the FEC provides an illustrative example. CREW identified an apparent straw donor scheme sending funds through an LLC to a federally registered super PAC to influence Ohio elections. *See* Matt Corley, *FEC investigation spurred by CREW complaint reveals Ohio dark money secrets*, CREW (Oct. 17, 2023), https://perma.cc/ZJL7-UK8F. The super PAC reported the

LLC as the source, but an investigation by the FEC found that was false. In relevant part, the FEC staff found that part of the funds, about $150,000, originated with a nonprofit associated with an Ohio utility. It was laundered through another "mysterious" nonprofit called Ohio Works,[3] and then sent on to an LLC, then to its wholly owned subsidiary, and finally to the super PAC that eventually turned the money into campaign ads. *Id.* The donating nonprofit knew its donation was going to be used to support a specific candidate, and it was in fact used for that purpose. *Id.* Nevertheless, the FEC would eventually decide that neither the utility nor its associated nonprofit needed to be disclosed. Second General Counsel's Report 17, MUR 7464 (Ohio Works) (May 5, 2023), https://perma.cc/4FTM-S59Y; Certification, MUR7464 (Ohio Works) (June 7, 2023), https://perma.cc/4ZUZ-HQGY (adopting FEC counsel's recommendations). It rested that conclusion on its finding that, despite knowing "Ohio Works was supportive" of a specific candidate and funds donated to it would be used for that purpose, there wasn't evidence that either the utility or its associated nonprofit knew "that their funds would be

[3] Ohio Works took steps to maintain its mystique. For example, it ensured the individuals who purportedly ran the nonprofit were not listed on its corporate filings. *See id.* Similarly, the LLC and its wholly owned subsidiary, as well as the recipient super PAC, were created and operated by two long-time political operatives whose names appeared nowhere in public filings. *Compare id. with* Appellants' Br. 40 (suggesting voters can use corporate filings to learn needed information).

contributed to" the specific super PAC that received them "or to a federal political committee more generally" on its way to that eventual use. Second General Counsel's Report 13, 17, MUR 7464 (Ohio Works).

In another example, a super PAC opposing Ted Strickland in the U.S. Senate election in 2016 reported that it received almost $2 million from a 501(c) entity called Freedom Vote. First General Counsel's Report 8, MUR 7465 (Freedom Vote) (July 1, 2019), https://perma.cc/8A8D-3D34. Unreported by either entity was the source of $500,000 given that year to Freedom Vote, in the words of the donor, "for the reelection of Rob Portman," Strickland's opponent in the 2016 Senate race. General Counsel's Brief 16, MUR 7465 (Freedom Vote) (Sept. 20, 2021), https://perma.cc/4AAV-M9MJ. Presumably, Freedom Vote and the super PAC felt comfortable omitting the source of those funds because the donor—while expressly earmarking his funds to benefit a single candidate—did not specify which entity he wanted to convert his $500,000 into campaign ads. They could thus plausibly deny that the donor earmarked funds for the super PAC that eventually received them. First General Counsel's Report 23, MUR 7465 (Freedom Vote) (FEC staff rejecting conduit claim because "there is no additional information indicating that any donor sought to funnel funds through [Freedom Vote] for the purpose of making contributions [to the specific super PAC

recipient]"). Accordingly, the super PAC could declare to the FEC that it did not "receive … any contributions in the name of another or any contributions through conduit donors, including from Freedom Vote," Declaration of Christopher Marston ¶ 4, MUR7465 (Freedom Vote) (Nov. 26, 2018), https://perma.cc/LMT8-6X2Q, all the while taking the funds and spending them as earmarked.

The rules applicable to entities other than political committees are similarly subject to evasion. Despite a requirement for those making express advocacy ads to report contributors over $200, the need to link donors to an intent to influence elections leaves the rule easily gamed. For example, in addition to donating to the super PAC, Freedom Vote also made its own express advocacy ad attacking Ted Strickland. *See* First General Counsel's Report 15–16, MUR 7465 (Freedom Vote). Although Freedom Vote failed to report the ad, it's likely it wouldn't have reported its contributors even if it did. That's because Freedom Vote sent the donor seeking to help Strickland's opponent a letter stating that, notwithstanding the expressed intentions and the understanding Freedom Vote would use the funds as requested, Freedom Vote did not "accept contributions earmarked to support or oppose candidates for public office" as a matter of policy, even as it cashed the donor's check. General Counsel's Brief 16, MUR 7465 (Freedom Vote). Ohio Works sent a similar letter to its nonprofit donor. Corley, *FEC investigation spurred by CREW*

complaints reveals Ohio dark money secrets (quoting letter as disclaiming purpose of solicited funds "to promote, support, oppose, or attack any clearly identified federal, state, or local candidate"). These letters are used to claim to the FEC that an entity has a policy against accepting contributions earmarked for political purposes and thus need not report contributors, even while taking the money. *See, e.g.*, Patriot Majority USA, *FEC Form 5, Report of Independent Expenditures Made and Contributions Received, January 31 Year-End Report* (Jan. 23, 2019), https://perma.cc/34U3-QJYT (reporting no contributions for over $4 million in independent expenditure electioneering, citing "[a]s a matter of policy, Patriot Majority USA does not accept funds earmarked for independent expenditure activity or for other political purposes in support or opposition to federal candidates"). By relying on express earmarking, federal law makes disclosure vulnerable to these types of claims of hypothetical but reliably unexercised discretion on behalf of the recipient entities. That deprives voters of the information to which they are entitled while ensuring money is used for its intended purposes; events that make the donor a "generous supporter[]" to which "special favors" may be returned. *See Buckley*, 424 U.S. at 67.

These shortcomings have left voters with precious little information about where campaign funds come from when the donors of those funds wish to remain

secret. Tens of millions of dollars flow through multi-million-dollar entities each election cycle to influence elections without voters having any insight into the sources of those funds. For example, the Senate Leadership Fund and SMP, the two principal outside entities supporting and connected with each party in the Senate, reported receiving over $53 million and $70 million so far this cycle, respectively, each from their own associated non-disclosing entity.[4] *See also* Massoglia, *Outside spending on 2024 elections shatter records, fueled by billion-dollar 'dark money' infusion*; Ian Vandewalker, *Dark Money from Shadow Parties is Booming in Congressional Elections*, Brennan Ctr. for Just. (Oct. 28, 2024), https://perma.cc/H44B-7WKS. The House's outside groups, Congressional Leadership Fund and HMP, similarly have received $40 million and $42 million so far this election cycle, respectively, from their own associated non-disclosing

[4] *See* Senate Leadership Fund, *FEC Form 3X, Report of Receipts and Disbursements, October 15 Quarterly Report* 54 (Oct. 15, 2024), https://perma.cc/RHD9-HV9Q (reported 2024 contributions from One Nation so far); Senate Leadership Fund, *FEC Form 3X, Reports of Receipts and Disbursements, January 31 Year-End Report* 33 (Feb. 3, 2024), https://perma.cc/WB9U-HNP9 (2023 contributions from One Nation); SMP, *FEC Form 3X, Report of Receipts and Disbursements, Pre-Election Report* 514 (Oct. 24, 2024), https://perma.cc/WF8P-UYTN (reported 2024 contributions from Majority Forward so far); SMP, *FEC Form 3X, Report of Receipts and Disbursements, January 31 Year-End Report* 514 (Jan. 31, 2024), https://perma.cc/69NE-H9N9 (2023 contributions form Majority Forward).

entity.[5] Similar schemes channel money through intermediaries to outside groups supporting presidential candidates while avoiding disclosure. *See, e.g.*, Dana Mattioli, Joe Palazzolo, & Khadeeja Safdar, *Elon Musk Gave Tens of Millions to Republican Causes Far Earlier Than Previously Known*, Wall St. J. (Oct. 2, 2024), https://www.wsj.com/politics/policy/elon-musk-political-donations-stephen-miller-desantis-39464294 (reporting Elon Musk spent approximately $10 million to help a presidential candidate but avoided disclosure by routing funds through an LLC and a nonprofit before going to a super PAC, which did not disclose Musk as a contributor).[6] In fact, Appellants' partner political committee, Americans for Prosperity Action, is itself the beneficiary of a single $25 million check from a

[5] Congressional Leadership Fund, *FEC Form 3X, Report of Receipts and Disbursements, October 15 Quarterly Report* 135 (Oct. 15, 2024), https://perma.cc/T4HB-JW3W (2024 contributions from American Action Network so far); Congressional Leadership Fund, *FEC Form 3X, Report of Receipts and Disbursements, January 31 Year-End Report* 644 (Jan. 31, 2024), https://perma.cc/Z2BM-GBQK (2023 contributions from American Action Network); HMP, *FEC Form 3X, Report of Receipts and Disbursements, Pre-Election Report* 11786 (Oct. 25, 2024), https://perma.cc/X7N7-HCKQ (2024 contributions from House Majority Forward so far); HMP, *FEC Form 3X, Report of Receipts and Disbursements, January 31 Year-End Report* 13749 (Jan. 31, 2024), https://perma.cc/59WS-QHKK (2023 contributions from House Majority Forward).

[6] *See, e.g.,* FF PAC, *FEC Form 3X, Report of Receipts and Disbursements, Pre-Election Report* 24 (Oct. 24, 2024), https://perma.cc/GR7S-36LA (showing $128 million received in 2024 from Future Forward USA Action, group which does not disclose donors).

dark money entity. Americans for Prosperity Action, Inc., *FEC Receipts from Stand Together Chamber of Commerce*, https://perma.cc/VGJ3-JCXQ (last visited Dec. 2, 2024) (showing receipts from Stand Together Chamber of Commerce, a 501(c)(6) entity that does not disclose its donors); *see also* Ian Vandewalker et al., *Online Political Spending in 2024*, Brennan Ctr. for Just. (Oct. 16, 2024), https://perma.cc/NT5G-LMA7 (detailing Americans for Prosperity Action "one of the top online spenders" on electioneering).

These intermediary entities barely hide their singular purpose to launder campaign funds and hide their sources. For example, a common feature of federal campaign finance is super PACs that are singularly funded or almost so by nearly identically named entities, organized at nearly the same time and associated with the same individuals. *See, e.g.*, Tennesseans for a Better Tomorrow, *FEC Receipts from A Better Tomorrow for Tennessee*, https://perma.cc/6PX5-H745 (last visited Dec. 2, 2024) (showing nonprofit gave $700,000 to nearly identically named super PAC); Americans 4 Security PAC, *FEC Receipts from Americans 4 Security Inc*, https://perma.cc/PEU5-B2D4 (last visited Dec. 2, 2024) (super PAC reported receiving more than $2.2 million from similarly named nonprofit so far); Georgians for Strong Families, Inc., *FEC Receipts from Georgians for Strong Families Action, Inc.*, https://perma.cc/KJB6-WGMC (last visited Dec. 2, 2024)

(Georgians for Strong Families super PAC funded entirely by $160,000 contribution from Georgians for Strong Families Action, Inc., an entity which does not disclose its donors). The super PACs can then spend freely on elections, fulfilling their disclosure obligation by reporting the nearly identically named intermediary as their contributors without disclosing the sources of those funds.

Arizonans are not immune from these phenomena. For example, one super PAC that spent to influence the 2020 Arizona Senate race raised $3 million from American Exceptionalism Institute Inc., an entity that does not disclose its donors and whose filings reveal nothing about the interests that its spending support. *See* Saving Arizona PAC, *FEC Receipts for American Exceptionalism Institute Inc*, https://perma.cc/8ZQB-5X96 (last visited Dec. 2, 2024). In another example, a super PAC named Defend US PAC that spent to influence federal elections in Arizona raised $4 million from nonprofits that do not report the source of their funds. Defend US PAC, *Raising*, https://perma.cc/7K6P-PTK3 (last visited Dec. 2, 2024); Defend US PAC, *Independent Expenditures in Arizona*, https://perma.cc/V97B-99Q4 (last visited Dec. 2, 2024).

Utilizing these methods, consultants can promise donors the ability to influence federal elections while remaining secret by abusing the limitations of federal disclosure. For example, consultants connected with the "ghost candidate"

scandal in Florida pitched a plan to a Florida Utility to launder funds intended to influence federal elections through a series of entities to "minimize[e] all public reporting." *See* First General Counsel's Report 6–8, MUR 8082 (Unknown Respondents) (Sept. 29, 2023), https://perma.cc/3QB7-A3AQ. They recognized that the nonprofit's spending money on its own electioneering could trigger disclosure that might reveal the utility as the source of its funds, but touted the nonprofit "would not have to disclose its donors if it [instead] gave money to a … super PAC" which "then spent money supporting the candidate." *Id.* at 8–9. In another example, a consultant solicited funds for "independent efforts to support" a candidate, stating a "501c4" is "[t]he vehicle for these efforts" and promising "no disclosure." @CleanTechFacts, X (Oct. 22, 2024), https://perma.cc/4FPZ-HVEU. The 501(c)(4) does not run its own advertisements but rather contributes to super PACs. American Policy Coalition, *FEC Receipts*, https://perma.cc/NDY4-S6SD (last visited Dec. 2, 2024).

While voters are entitled to the disclosure of all "interests to which a candidate is most likely to be responsive" due to the financial largess, *Buckley*, 424 U.S. at 67, and not just those who may engage in quid-pro-quo bribery, federal law can notably fail to even capture this smaller extreme category. For example, the prosecution of a former Ohio House speaker, Larry Householder, revealed a

bribery scheme that used dark money intermediaries to hide the source of funds used to benefit the officeholder and his allies. *See* Pl.-Appellee U.S. Br., *United States v. Householder* 4–31, No. 23-3565 (6th Cir. Aug. 26, 2024), https://perma.cc/XX8L-QA8H. As part of the scheme, in return for official acts, an Ohio utility sent funds to a nonprofit it controlled and then had the funds transferred over to another nonprofit which distributed the funds to yet more entities. These entities eventually spent the funds on electioneering to support the races of candidates supported by Householder and oppose a ballot initiative he opposed. *Id.* at 11, 24, 26, 29. Because the utility had not directly transferred the funds to the spending entities and the intermediary entities were not themselves registered as political committees, federal law would only have required the disclosure of the utility as the source of the funds if the utility earmarked the funds to the ultimate recipients that spent them. *See* 52 U.S.C. § 30122. No such earmarking was necessary, however, to carry out the quid-pro-quo scheme. It was enough that the utility put the funds in the hands of those it knew would distribute the sums to others to spend to benefit Householder, earn his favor, and achieve their corrupt aims.

Of course, secret contributors need not go so far as an explicit quid-pro-quo bribe to purchase plenty of influence. For example, criminal proceedings against

Sam Bankman-Fried revealed that he gave about $10 million to a dark money entity, One Nation. Matt Corley & Robert Maguire, *Mitch McConnell-tied dark money group bolstered by millions from FTX fraudsters*, CREW (Nov. 16, 2023), https://perma.cc/GW2T-9DNZ. One Nation supports Republican Senate races, including by funding a super PAC associated with Republican Senate leadership, Senate Leadership Fund. *See, e.g.*, Kristina Peterson & Lindsay Wise, *John Thune Mends Breach with Donald Trump in Bid to Lead Senate*, Wall St. J. (Oct. 11, 2024), https://www.wsj.com/politics/elections/john-thune-mends-breach-with-donald-trump-in-bid-to-lead-senate-9e229d76?st=zqVPiN (calling One Nation "a politically active nonprofit also aligned with McConnell"). Shortly after the donation, Mr. Bankman-Fried enjoyed a private dinner with Mitch McConnell, then-Senate Majority leader and a close ally of One Nation. Corley & Maguire, *Mitch McConnell-tied dark money group bolstered by millions from FTX fraudsters*.

There is no reason to assume this influence is limited to donors who "knowingly earmark their contributions for electioneering." Appellants' Br. 35. An officeholder who learns that a donor is the but-for cause of spending in their support is as likely to feel as beholden to that donor as if the donor had directed the funds in the first place. That officeholder knows that catering to that donor is the

only way to ensure they make those funds available again in the future. Rather, the fact that these individuals were "a candidate's most generous supporters," whether or not they had planned so, makes them targets for "post-election special favors that may be given in return." *Buckley*, 424 U.S. at 67.

As millions of dollars are spent on elections capable of putting candidates "in the pocket" of big "moneyed interests," *Citizens United*, 558 U.S. at 370, the "free functioning" of our democracy, *Buckley*, 424 U.S. at 66, at least demands that the voting public has complete insight into the identities of those turning elected officials' ears through financial remuneration. Unfortunately, federal law has too often fallen woefully short. The substantial and compelling interests behind full disclosure permit Arizonans to go further.

II. Appellants' Requested Relief Infringes on CREW's and Americans' First Amendment Rights

Appellants seek an extraordinary and heretofore unprecedented order: a bar on the public dissemination of vital information to all Americans, designed to quiet Appellants' "fierce critics." Appellants' Br. 21. The First Amendment does not command such relief but rather stands in its way.

Appellants cite no precedent for the extraordinary relief they seek. Although they rely extensively on their victory in *Bonta*, that decision did address a viewpoint-neutral public disclosure law like the one here, and thus did not have as

either its effect or its purpose the silencing of one side of a political debate solely to favor the other. *See Helzer*, 95 F.4th at 1217 n.7 (distinguishing *Bonta* from challenge to public disclosure regime). For the same reason *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), is of no assistance to Appellants. That case did not involve a viewpoint-neutral and generally applicable disclosure regime designed to foster public debate. Rather, it involved discriminatory targeting of a single organization because of its disfavored civil rights work, with no legitimate purpose. *See id.* at 462, 464 (finding "disclosure of the names of petitioner's rank-and-file members" had no "substantial bearing" on any claimed purpose). Similarly, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), is unavailing as the challenge there to a ban on anonymous but self-funded hand-billing did not stymie public discussion on potential corruption, *see id.* at 355–56 (distinguishing *Buckley*); *see also Helzer* 95 F.4th at 1219 n.10.

Rather, Appellants lack supportive authority because the First Amendment bars judicial relief designed to tilt a public debate in their favor. No doubt, Appellants would prefer that political debates happen on their terms. It would be easier for them if critics could not use disclosures capable of identifying special-pleading, hypocrisy, untrustworthiness, and self-interested positions. *See, e.g.*, Anna Massoglia, *Pro-Trump dark money network tied to Elon Musk behind fake*

pro-Harris campaign scheme, OpenSecrets (Oct. 16, 2024), https://www.opensecrets.org/news/2024/10/pro-trump-dark-money-network-tied-to-elon-musk-behind-fake-pro-harris-campaign-scheme/; Report of the Select Comm. on Intelligence, U.S. Senate, on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election Vol. II (Nov. 10, 2020), https://perma.cc/HCT8-FPAC (detailing Russians were source of communications that appeared to be from U.S. citizens); Jason Garcia & Annie Martin, *Florida Power & Light execs worked closely with consultants behind 'ghost' candidate scheme, records reveal*, Orlando Sentinel (Dec. 2, 2021), https://perma.cc/PQJ4-MHRA (revealing backers to purported democrats were in fact not democrats); Amanda Garret, *Part 4: Householder directs dirty campaign to save bailout as millions flow*, Cincinnati Enquirer (Aug. 4, 2020), https://perma.cc/F8LA-M5JX (revealing utility that benefited from ballot initiative defeat was behind purported neutral citizen-led campaign to defeat it). But that is what makes the information vital. Indeed, even one of the Appellants has demonstrated their own understanding of the relevance of a position's backer. *Taxpayer-Minute-2010-42-RGGI-Soros*, Ams. for Prosperity Found. (Jan. 28, 2016), https://perma.cc/ZSK6-6JRW (attacking proposal as funded by "George Soros and Moveon.org"). Information about financial patrons is not only useful but also essential to combatting abuses

and permitting reasoned decision-making,[7] and that has made it a target for censorship.

The First Amendment does not block the distribution of such vital information, but rather its dissemination is protected by "the competing First Amendment interests of individual citizens seeking to make informed choices." *McConnell*, 540 U.S. at 197; *Brumsickle*, 624 F.3d at 1005, 1022 ("[D]isclosure requirements have become an important part of our First Amendment tradition."). Accordingly, a court order reducing disclosure infringes on those First Amendment rights because it "necessarily reduces the quantity of expression," *Buckley*, 424 U.S. at 19, by depriving speakers of the "facts" that are "the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see*

[7] *See also Citizens United*, 558 U.S. at 330–71; *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011) ("Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin."); Abby K. Wood, *Campaign Finance Disclosure*, 14 Ann. Rev. L. & Soc. Sci. 11, 19 (2018) ("Voters use heuristics, or informational shortcuts, to help them make the vote choice most aligned with their priorities without requiring encyclopedic knowledge … on every issue); Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 Election L.J. 295, 296 (2005) (finding that knowing the sources of election messaging is a "particularly credible" informational cue for voters).

also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986) (recognizing component of free speech is readers' rights to receive information).

Appellants seek not merely to chill their critics but to disarm them entirely of the knowledge they require to reply. Any critic who then dared to speak would risk a ruinous defamation suit or worse, as they often cannot afford the luxury of the anonymity that Appellants seek to claim for themselves. *See, e.g.,* Kenneth P. Vogel, *Leonard Leo Pushed the Courts Right. Now He's Aiming at American Society.*, N.Y. Times (Oct. 12, 2022), https://www.nytimes.com/2022/10/12/us/politics/leonard-leo-courts-dark-money.html (reporting major contributor to dark money groups had individual arrested for protesting him); Patrick Svitek, *Beto O'Rourke gets $2 million, his largest campaign donation yet, from Austin couple*, Tex. Trib. (July 16, 2022), https://perma.cc/6QKP-PNVF (reporting donor sued for defamation over claim of possible corrupt purposes).

Any government action taken, however, including a court injunction, *see Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976), premised on a party's express desires to suppress disfavored speech is "presumed to be unconstitutional," *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Indeed, even when speech is a result of the government's "own creation," the

government may not act to suppress it. *Id.* at 829. Rather, "the government violates the First Amendment when it denies access to a speaker" to a benefit, even if gratuitously given, "solely to suppress the point of view he espouses." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *cf. Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 487 (2020) (court order invalidating entire program was unconstitutional when purpose is to exclude beneficiaries based on First Amendment protected activity); *Sorrell*, 564 U.S. at 567–68 (law suppressing speech arising from "information … generated in compliance with a legal mandate" violated First Amendment).

That Appellants believe the speech fostered by the Act would "mislead voters," Appellants' Br. 6, 43, does not support the relief they seek. Appellants' belief that voters are better off "being kept in ignorance" is not constitutionally cognizable, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976), particularly where the stated goal is to censor disfavored criticism, *see* Appellants' Br. 21. One cannot "enhanc[e] the ability of [a State's] citizenry to make wise decisions by restricting the flow of information to them." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989). The "best means" of addressing any confusion "is to open the channels of communication rather than to close them." *Va. State Bd. of Pharmacy*, 425 U.S. at

770*; cf. McConnell*, 540 U.S. at 197 ("Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public."). If Appellants or their donors are concerned about being mis-designated, then the remedy is "more speech," *Citizens United*, 558 U.S. at 361: to declare which candidates or causes their contributors supported.

Appellants also complain their opponents engage in unwarranted "character attacks." Appellants' Br. 21. When a "person responds" to speech, however, "by saying something derogatory about the first person, … nobody's free speech rights are violated." Tr. 28:10– 15 (Alito, J.), *Houston Cmty. College Sys. v. Wilson*, No. 20-804 (U.S. Nov. 2, 2021), https://perma.cc/64WY-CQCH. There is no constitutional basis to restrain speech because it is deemed "offensive," *Cohen v. California*, 403 U.S. 15, 25 (1971), or "hurtful," *Snyder v. Phelps*, 562 U.S. 443, 454, 456 (2011), or even "aggressive," *McCullen v. Coakley*, 573 U.S. 464, 472 (2014); *see also John Doe No. #1.*, 561 U.S. at 228 (Scalia, J., concurring) ("[H]arsh criticism … is a price our people have traditionally been willing to pay for self-governance."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and [] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.").

Even if Appellants and their donors would feel freer to speak in the absence of critics, "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Citizens United*, 558 U.S. at 349–50 (quoting *Buckley*, 424 U.S. at 48–49).

On the other hand, any violence and true threats Appellants and their donors fear are not protected. But "[t]here are laws against *threats* and intimidation." *John Doe No. 1*, 561 U.S. at 228 (Scalia, J., concurring). "If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech." *Meineck v. City of Seattle*, 99 F.4th 514, 518, 522, 525 (9th Cir. 2024) ("Listeners' reaction to speech is not a content-neutral basis for regulation" (quoting *Forsyth Cnty v. Nationalist Movement*, 505 U.S. 123, 134 (1992)). The possible abuse of information by others is no basis to restrain access to it. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (permitting the publication of the Pentagon Papers). So, too, here; any regrettable actions of third parties cannot suffice to suppress the speech that CREW, Arizonans, and other Americans are constitutionally entitled to receive and create.

Indeed, any court order crediting Appellants' fears would need to overcome heavy First Amendment obstacles to protect the speech rights of others. But Appellants do not seek narrowly tailored relief that might avoid violence but permit robust dialogue. For example, Appellants seek to block the disclosure of all donors reported under the Act without regard to whether those individuals face credible fears, including corporations who cannot suffer violence. Nor do appellants show why any less burdensome alternative, such as withholding only the addresses of donors, would not be sufficient to achieve their interests.

In short, the relief Appellants seek would cause irreparable and unconstitutional harm to CREW, Arizonans, and countless other Americans who rely on information Appellants seek to suppress. Accordingly, even if Appellants' claim had merit, which it does not, the relief of censorship is not warranted.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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