Nos. 19-251, 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CONGRESSMAN JOHN SARBANES AND DEMOCRACY 21 AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

Congressman John Sarbanes represents Maryland's Third Congressional District. He chairs the Democracy Reform Task Force, a working group in the House of Representatives dedicated to advancing reforms that will improve accountability and transparency in government, put the public interest ahead of special interests, and end corruption. To that end, Congressman Sarbanes sponsored H.R. 1, known as the For the People Act of 2021, which would expand Americans' access to the ballot box, reduce the influence of big money in politics, strengthen ethics rules for public servants, and implement other anti-corruption measures. H.R. 1 includes the DISCLOSE Act, which would amend federal election laws to tighten restrictions on foreign money in U.S. elections and strengthen requirements for corporations, labor unions, trade associations, and advocacy groups to disclose to the public their campaign-related expenditures and the donors who fund those expenditures. For the People Act of 2021, H.R. 1, 117th Cong. §§ 4111 *et seq*. Drafted to be consistent with this Court's precedent concerning election-related disclosures, the DISCLOSE Act would require disclosure only of the largest donors to the biggest spenders, *see id.* § 4111(a)(1), and would not apply where disclosure would subject the donor to serious threats, harassment, or reprisals *see id.* § 4111(a)(3)(C).

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this amicus brief.

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics and to ensure the integrity and fairness of our democracy. It supports campaign-finance and other political reforms, conducts public-education efforts, participates in litigation involving the constitutionality and interpretation of campaign-finance laws, and works for the proper and effective implementation and enforcement of those laws. Democracy 21 has participated as counsel or amicus curiae in many cases before this Court involving the constitutionality of campaign-finance laws.

Amici take no position on the constitutionality of the California disclosure requirements at issue in this case. Amici submit this brief instead to respond to the suggestion (made by other amici at the certiorari stage) that the Court should use this case as an occasion to retreat from its precedent upholding disclosure requirements in the election context. Doing so would not only improperly address issues that are not before the Court, but would also undermine the anti-corruption interests that support election-related disclosure laws. For decades, this Court has consistently upheld disclosure requirements in the campaign context against First Amendment challenge, recognizing that they serve substantial governmental interests in informing voters, deterring corruption, and enforcing other campaign-finance regulations. Casting doubt on that precedent now would create significant uncertainty, threaten the integrity of the electoral system, and make it more difficult for Congress and state legislatures to safeguard the transparency of U.S. elections through measures such as the DISCLOSE Act.

SUMMARY OF ARGUMENT

This Court has consistently upheld election-related disclosure requirements against First Amendment challenge, and it should take care to cast no doubt on those precedents in this case. Laws requiring disclosure of the identities of the people and organizations that pay for election-related expenditures "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United* v. *FEC*, 558 U.S. 310, 366 (2010) (quotation marks and citation omitted). Where groups would otherwise inject money and influence into elections "while hiding behind dubious and misleading names," disclosure requirements ensure that citizens can "'make informed choices in the political marketplace.'" *McConnell* v. *FEC*, 540 U.S. 93, 197 (2003). Transparency in election spending thus promotes First Amendment values: "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way." *Citizens United*, 558 U.S. at 371. For decades, this Court has therefore held that election-related disclosure requirements satisfy "exacting scrutiny" and that disclosure, by definition, is a less restrictive alternative to more comprehensive regulations of speech. *Id.* at 366-367.

This case provides no warrant for revisiting these holdings. This case concerns only whether the Attorney General of California may require 501(c)(3) charitable organizations to disclose information to the State about their significant donors. As petitioners repeatedly acknowledge, "[t]his case has nothing to do with elections," and the 501(c)(3) organizations subject to the Attorney General's policy are prohibited from making any election-related expenditures. Americans for Prosperity Found. Pet. 2-3; *see also* Pet'r Americans

For Prosperity Found. Br. 2; Pet'r Thomas More Law Ctr. Br. 29-31. The substantial government interests that disclosure requirements serve in the election context are not at issue in this case—indeed, the Attorney General has "disavowed the traditional interest in public disclosures that has been credited in election cases." Americans for Prosperity Found. Pet. 33.

At the certiorari stage, certain amici nevertheless suggested that the Court should use this case to undercut the validity of election-related disclosure requirements. *See* Chamber of Commerce Br. 6; National Ass'n of Mfrs Br. 8-10. The Court should decline that invitation. Election-related disclosure requirements have repeatedly been upheld under the "exacting scrutiny" test set forth in *Buckley* v. *Valeo*, 424 U.S. 1, 68 (1976) (per curiam), because transparency regarding the true sources of campaign-related spending serves the substantial governmental interests in informing the electorate, deterring corruption, and enabling enforcement of campaign-finance laws. *See, e.g.*, *Doe* v. *Reed*, 561 U.S. 186, 196 (2010); *Citizens United*, 558 U.S. at 367; *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 68. The Court has recognized that disclosure is the least restrictive means of achieving those ends. *See, e.g.*, *McCutcheon* v. *FEC*, 572 U.S. 185, 223 (2014) (plurality). While Congress is "entitled to conclude that disclosure [is] only a partial measure," and that contribution limits ceilings may be necessary "even when the identities of the contributors and the amounts of their contributions are fully disclosed," *Buckley*, 424 U.S. at 28, the Court's jurisprudence limiting other forms of campaign-finance restrictions has taken the backstop disclosure provides as an essential premise. *See, e.g.*, *McCutcheon*, 572 U.S. at 224 (plurality).

Calling this Court's uniform treatment of election-related disclosure laws into question would undermine the "robust protections against corruption" that disclosure provides, *McCutcheon*, 572 U.S. at 224 (plurality), while leaving Congress and state legislatures without clear guidance on how to ensure transparency through measures such as the DISCLOSE Act. Whatever the Court concludes in regard to the California requirements at issue in this case in a non-election-related context—and amici take no position on that question—it should not undercut its consistent holdings regarding election-related disclosure requirements.

ARGUMENT

I. DISCLOSURE REQUIREMENTS IN THE ELECTIONS CONTEXT SATISFY "EXACTING SCRUTINY"

A. This Court Has Consistently Upheld Election-Related Disclosure Requirements

Disclosure requirements have been a cornerstone of federal campaign-finance law for more than a century. *See Buckley* v. *Valeo*, 424 U.S. 1, 61 (1976) (per curiam) (discussing Act of June 25, 1910, c. 392, 36 Stat. 822). As long ago as *Burroughs* v. *United States*, 290 U.S. 534 (1934), this Court unanimously held that Congress "undoubtedly possesses [the] power" to safeguard presidential elections by requiring public disclosure of political contributions. *Id.* at 545, 548.

This Court again upheld the constitutionality of disclosure requirements in the context of federal elections in *Buckley*. Applying the "same strict standard of scrutiny" the Court had articulated in *NAACP* v. *Alabama*, *see Buckley*, 424 U.S. at 75 (citing *NAACP*, 357 U.S. 449, 458, 460 (1958)), and despite striking down several expenditure restrictions, the Court in *Buckley*

held that disclosure requirements—even for independent election-related expenditures—bore "a sufficient relationship to a substantial governmental interest" to survive "exacting scrutiny," *id.* at 64, 80. In particular, the Court emphasized the role of such requirements in stemming corruption or its appearance and providing crucial information to "help[] voters to define more of the candidates' constituencies." *Id.* at 81. The Court thus concluded that disclosure requirements imposed "no prior restraint," but instead constituted a "minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82.

Since *Buckley*, this Court has continually reaffirmed the value of disclosure to informing the electorate, deterring corruption, and aiding enforcement of applicable campaign-finance limits. In *McConnell* v. *FEC*, 540 U.S. 93 (2003), eight justices agreed to uphold the disclosure provisions of the Bipartisan Campaign Reform Act (BCRA) against a facial challenge, again emphasizing the governmental interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *Id.* at 196. In *Citizens United*, eight justices again upheld BCRA's disclosure requirements against an as-applied challenge, noting that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." 558 U.S. at 366-367 (quotation marks and citations omitted); *see also McCutcheon* v. *FEC*, 572 U.S. 185, 223-224 (2014) (plurality) (similar); *Doe* v. *Reed*, 561 U.S. 186, 196 (2010) (upholding state law requiring disclosure of referendum petition signers

under "exacting scrutiny" as substantially related to the state's important interest in preserving the integrity of the electoral process).

The Court has thus repeatedly "foreclose[d] … facial attack[s]" on election-related disclosure requirements, *McConnell*, 540 U.S. at 197, while recognizing that "identified persons" may succeed in as-applied challenges if they can establish a "'reasonable probability'" that disclosure in a particular case would result in "threats, harassment, and reprisals," *id.* at 198; *see Reed*, 561 U.S. at 200-202.

B. In Upholding Election-Related Disclosure Requirements, This Court Has Applied The "Exacting Scrutiny" Test And Found It Satisfied In Light Of The Government's Interests In Deterring Corruption And Fostering Open And Informed Elections

Buckley set forth the "exacting scrutiny" test for disclosure requirements in the election context:

> That standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." … To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."

Reed, 561 U.S. at 196 (quoting *Citizens United*, 558 U.S. at 366-367, and *Davis* v. *FEC*, 554 U.S. 724, 744 (2008)).

Buckley derived that standard from *NAACP* v. *Alabama*, 357 U.S. 449 (1958), in which this Court recognized that forced disclosure of an organization's

membership rolls may "entail[] the likelihood of a substantial restraint … of [the] right to freedom of association." *Id.* at 462. When such a likelihood exists, the Court asks "whether [the State] has demonstrated an interest … sufficient to justify the deterrent effect" of compelled disclosure. *Id.* at 463. As the Court has made clear, the central inquiry is whether the scope of the restraint "is in proportion to the interest served." *McCutcheon*, 572 U.S. at 218 (plurality).

Applying that test, the Court has conclusively established that the governmental interests served by disclosure in the election context are "sufficiently important" to satisfy the "exacting scrutiny" test and to outweigh any "possibility of infringement" on the right to anonymity in association. *Buckley*, 424 U.S. at 66. Those interests include informing the electorate, deterring corruption, and gathering data necessary for enforcement of applicable campaign-finance laws. *Id.* at 66-67. *Buckley* further held—and this Court has consistently reaffirmed—that in the election context, "disclosure requirements, as a general matter, directly serve [those] substantial governmental interests." *Id.* at 68. The Court has continued to rely on those interests in upholding disclosure requirements in subsequent cases.

First, "disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent." *Buckley*, 424 U.S. at 66-67 (quoting H.R. Rep. No. 92-564, at 4 (1971)). This information "'insure[s] that voters are fully informed' about the person or group who is speaking." *Citizens United*, 558 U.S. at 368 (quoting *Buckley* 424 U.S. at 76). "'Identification of the source of advertising'" through disclosure requirements permits people "'to evaluate the arguments to which they are being subjected.'" *Id.*

(quoting *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 792 n.32 (1978)). Indeed, this interest has only grown in importance as a justification for election-related disclosures as the Internet has made "disclosure … effective to a degree not possible at the time *Buckley* … was decided." *McCutcheon*, 572 U.S. at 224 (plurality). As the Court in *Citizens United* explained:

> With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interests in making profits, and citizens can see whether elected officials are in the pocket of so-called moneyed interests.

558 U.S. at 370 (quotation marks omitted).

Second, "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 67. Disclosure arms the public "with information about a candidate's most generous supporters" and assists the public in "detect[ing] any post-election special favors that may be given in return." *Id.* And third, disclosure requirements "are an essential means of gathering the data necessary to detect violations of … contribution limitations." *Id.* at 67-68.

This Court has not questioned that these substantial governmental interests are sufficient to support election-related disclosures. Where the Court has invalidated disclosure requirements, it has done so only because those interests were not advanced at all by the

requirement at issue. *See Davis*, 554 U.S. at 744 (striking down disclosure requirement that was justified only as a means to enforce asymmetrical contribution limits that were held to be unconstitutional). And in applying the "exacting scrutiny" test to election-related disclosure requirements, the Court has not proceeded to ask whether the specific required disclosures were narrowly tailored. The *Buckley* Court instead "note[d] and agree[d] with appellants' concession that disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68; *see also Citizens United*, 558 U.S. at 369 ("The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech."). In other words, the Court has held, disclosure by definition is the least restrictive means of achieving the government's substantial anti-corruption interests relative to direct restrictions of speech in contribution and expenditure limits. The Court has not undertaken or required any further inquiry—for example, scrutinizing the dollar thresholds or timeframes in which disclosure must be made. And it has never held that a particular disclosure requirement must be as narrow as possible to survive a constitutional challenge.

One amicus brief supporting the petition for certiorari cited *Buckley's* holding allowing minor political parties to bring as-applied challenges to disclosure rules as evidence of a narrow-tailoring requirement, *see* Chamber of Commerce Br. 11 (citing *Buckley*, 424 U.S. at 68-69), but that misunderstands the Court's discussion. The Court there merely recognized that, in some cases, "the threat to the exercise of First Amendment rights is so serious and the state interest furthered by

disclosure so insubstantial" that a disclosure requirement cannot be constitutionally applied. 424 U.S. at 71. In such cases, an as-applied challenge can be brought if the challenger can muster evidence that compelled disclosure would subject them to threats, harassment, or reprisals. *Id.* at 71-74; *see also Reed*, 561 U.S. at 200-202. The possibility of such challenges, however—in which the challenger bears the burden to prove that the harms caused by compelled disclosure in a particular case "outweigh[]" the "substantial public interest in disclosure," *Buckley*, 424 U.S. at 72—in no way imposes a burden on the government in the context of a facial challenge to demonstrate that a particular disclosure requirement is as narrowly drawn as possible. Rather, the Court has repeatedly made clear that "exacting scrutiny" requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest, [which requires that] the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Reed*, 561 U.S. at 196 (quotation marks and citations omitted); *see also McCutcheon*, 572 U.S. at 196-197 (plurality); *Citizens United*, 558 U.S. at 366-367; *Davis*, 554 U.S. at 744; *McConnell*, 540 U.S. at 201. No further inquiry into narrow tailoring is necessary because, as the Court has repeatedly acknowledged, disclosure requirements are the least restrictive means of achieving important governmental anti-corruption interests. *Citizens United*, 558 U.S. at 369.

II. UNDERMINING THE CONSTITUTIONAL BASIS OF DISCLOSURE REQUIREMENTS FOR ELECTION-RELATED EXPENDITURES WOULD CREATE CONFUSION AND HARM IMPORTANT GOVERNMENTAL INTERESTS

This case provides no occasion for reconsidering any aspect of the Court's precedent regarding election-related disclosure laws. As Petitioners acknowledge, the requirement at issue here has nothing to do with elections; the charitable organizations affected by the disclosure requirement at issue in this case are prohibited from engaging in election spending; and none of the interests the Court has relied on to uphold election-related disclosure requirements is implicated. *See* Americans for Prosperity Found. Pet. 2-3; Pet'r Americans For Prosperity Found. Br. 2; Pet'r Thomas More Law Ctr. Br. 29-31. For example, whereas *Buckley* and its progeny have repeatedly relied on the government's important interest in ensuring that voters are well informed and not misled by groups hiding behind anodyne names, that interest has no bearing here because the Schedule B forms provided under the policy challenged in this case are maintained as confidential and not disclosed to the public. Accordingly, this is not an appropriate case in which to opine on election-related disclosure requirements.

Doing so anyway—particularly in a manner that would cast doubt on the Court's prior decisions—would cause significant harm. The Court has recognized since *Buckley* that disclosure requirements are the least restrictive means of achieving the paramount interests in ensuring transparency and accountability and preventing political corruption from overtaking elections without restricting any party's speech. *See* 424 U.S. at 68; *see also McCutcheon*, 572 U.S. at 223 (plurality); *Citizens United*, 558 U.S. at 369. Indeed, the Court has

expressly relied on the enhanced effectiveness of disclosure in the Internet age as a rationale for striking down more restrictive means of combatting corruption or the appearance of corruption. As the plurality explained in *McCutcheon*, "massive quantities of information can be accessed at the click of a mouse, [and] disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided." 572 U.S. at 224. And while a legislature might fairly conclude that disclosure is "only a partial measure" for addressing "the reality or appearance of corruption," *Buckley*, 424 U.S. at 28, the Court's precedents concerning other regulations of campaign spending have rested on the premise that robust disclosure requirements would continue to operate, *see, e.g.*, *Citizens United*, 558 U.S. at 370. Undercutting the constitutional basis of that assumption would thus threaten to hamstring an effective and "minimally restrictive" method of ensuring an informed electorate and battling corruption in elections. *Buckley*, 424 U.S. at 82.

Retreating from the Court's consistent precedent upholding election-related disclosure requirements would also sow confusion for lawmakers. Under current law, Congress and the state legislatures can rely on *Buckley* and its progeny as clear guideposts to model new and improved disclosure requirements. For example, Congress is now considering the DISCLOSE Act, which would strengthen requirements for corporations, labor unions, trade associations, and advocacy groups to disclose the sources of their campaign-related expenditures on express advocacy, electioneering communications, and ads that promote, support, attack, or oppose the election of a candidate. *See* For the People Act of 2021, H.R. 1, 117th Cong. § 4111 (2021). The legislation builds on the disclosure provisions of BCRA

that this Court upheld in *McConnell*. *See* 540 U.S. at 194-199; *see also id.* at 170 n.64 (upholding against vagueness challenge the application of regulations to ads that promote, oppose, attack or support a clearly identified candidate). The DISCLOSE Act would require disclosure only of donors who gave $10,000 or more in a two-year election cycle to an organization that engages in campaign-related spending—and only if that organization spent more than $10,000 in the aggregate in the election cycle. *See* For the People Act of 2021, H.R. 1, 117th Cong. § 4111(a)(1). If the organization establishes a segregated bank account from which it makes all of its electioneering expenditures, then only those who have donated $10,000 or more to that account must be disclosed, *see id.*; and if the donor designates a donation as not to be used for election spending (and the organization agrees), the donation is also not subject to disclosure. *See id.* The DISCLOSE Act also includes an exemption from disclosure for any donor who may be subject to "serious threats, harassment or reprisals." *See id.* § 4111(a)(3)(C).

Under this Court's settled precedent, these provisions are constitutional. Revisiting or casting doubt upon that jurisprudence now could cause significant uncertainty and make it more difficult for Congress to combat corruption and ensure transparency and integrity in elections. As a result, groups "hiding behind dubious and misleading names" would once again have free rein to inject unlimited amounts of money into elections with no accountability to voters or shareholders. *Citizens United*, 558 U.S. at 367 (quotation marks omitted). Far from advancing First Amendment interests, that result would thwart the First Amendment values of "opening the basic processes of our federal

election system to public view." *Buckley*, 424 U.S. at 82; *see also Citizens United*, 558 U.S. at 370.

CONCLUSION

The Court should avoid an unnecessarily broad ruling that casts doubt on its consistent precedent upholding election-related disclosure laws.

Respectfully submitted.

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MARCH 2021