United States Senate
WASHINGTON, DC 20510

February 8, 2021

Hon. Elizabeth Prelogar
Acting Solicitor General
Office of the Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Acting Solicitor General Prelogar,

We write to urge the Department of Justice to reverse the United States' position in *Americans for Prosperity Foundation (AFPF) v. Becerra*, Nos. 19-251 and 19-255, currently pending before the Supreme Court of the United States. On November 24, 2020, in response to the Court's call for the views of the Solicitor General, the Trump Administration filed an *amicus* brief recommending that the Court grant certiorari, and endorsing petitioners' effort to dramatically expand constitutional protections for anonymous spending and activity. The Court granted certiorari on January 8. The Trump Administration's position in this case was wrong on the merits, imperils the United States' interests, and, if adopted by the Court, would result in a further flood of anonymous money—or "dark money"—into our political system, causing great harm to our democracy.

Notwithstanding the flippancy with which the Trump DOJ abandoned prior litigating positions, we understand that the Department does not take lightly the decision to reverse its past positions. We appreciate the important institutional reasons for such caution. At the same time, we agree with former Deputy Solicitor General Michael Dreeben, who has argued that while it should engage in a rigorous and thoughtful process of internal debate, the Office of the Solicitor General should operate with a "presumption in favor of providing the court with its current view of the law."[1] We trust that a close review of this matter will make clear that a change of course is warranted in this highly important case. To the extent it would be helpful to discuss Congress's equities in this case, we would welcome the opportunity to meet with you.

1) <u>The Trump Administration's position was wrong on the merits, and the judgment of the court of appeals should be affirmed.</u>

California requires charitable organizations that fundraise in the State to confidentially disclose to the State Attorney General's office the identities of their substantial contributors. This case presents the question whether this requirement violates the First Amendment's freedom of association. The Ninth Circuit held that it does not. *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1020 (9th Cir. 2018). In arguing for a grant of certiorari and reversal, the Trump

[1] Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 Yale L.J. Forum 541, 556-59 (2021).

Administration stretches the Court's First Amendment compelled disclosure precedents well past their breaking point.

The Trump Administration argued that the court of appeals misapplied the "exacting scrutiny" standard by failing to require "narrow tailoring," which requires a "reasonable" fit between the government interest and the means used to achieve its objective. Br. for United States as *Amicus Curiae* 16. But the Trump Administration failed to articulate any difference between its requested standard and the one used by the court of appeals. The court of appeals observed as much, noting that the "narrow tailoring" sought by the plaintiffs was indistinguishable from the ordinary "substantial relation" standard consistently employed by the Supreme Court in disclosure cases. Pet. App. 16. It proceeded to apply exacting scrutiny, recognizing that the "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights," and considering whether the disclosure regulation swept too broadly. *Id.* In other words, it applied the exact "reasonable fit" analysis the plaintiffs requested. The Trump Administration was simply wrong when it told the Court the court of appeals had "erred in dispensing with that requirement altogether." U.S. Br. 16.

The court of appeals also properly determined that California's Schedule B requirement passes exacting scrutiny. As the Trump Administration acknowledged, California has a compelling interest in regulating charities operating within its borders. That interest is all the more compelling given the proliferation of fraud and self-dealing among anonymously funded charities.[2] And the Trump Administration overlooked the extensive record evidence showing how Schedule B information allows the State to determine whether charitable entities are misusing charitable assets or otherwise violating the law. See. Resp. Supp. Br. 3.

Most troubling is the Trump Administration's attempt to extend the holding of *NAACP v. Alabama ex rel. Patterson* 357 U.S. 449 (1958) and its progeny to the plaintiffs and facts here. In that seminal case, the Supreme Court refused to allow compelled disclosure of the identities of NAACP members who faced significant threats to their physical safety during the civil rights era. But granting such sweeping anonymity protections to *all* organizations, including industry-funded "charitable" front groups like plaintiff Americans for Prosperity Foundation, whose corporate funders have demonstrated no comparable threat of reprisal for the expression of their views, simply does not follow. Indeed, "applying *NAACP v. Alabama*'s holding in a formally symmetrical manner to the relatively powerful . . . without regard to context may undermine rather than affirm the values underlying that decision."[3] But more to the point, California keeps petitioners' Schedule B forms entirely confidential, and there is no evidence to suggest that California's regime could lead to public harassment or other negative consequences. The central factors counseling the *NAACP* Court to shield NAACP member identities from compelled disclosure are therefore absent here.

[2] *See, e.g.* Mike Spies, Secrecy, Self-Dealing, and Greed at the N.R.A., THE NEW YORKER (Apr. 17, 2019), https://www.newyorker.com/news/news-desk/secrecy-self-dealing-and-greed-atthe-nra.
[3] Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. Legis. & Pub. Pol'y 405 (2012).

2) The Trump Administration's position imperils the interests of the United States.

It is (or was once) rare that the United States files a brief in the Supreme Court that is so transparently hostile to its own interests, but that is what happened here. For the reasons advanced by the California Attorney General, Resp. Supp. Br. 5-7, the Trump Administration failed in its halfhearted attempt to distinguish its own IRS Schedule B requirement from the California requirement it says violates the Constitution. There is no question that the broad constitutional ruling petitioners seek would jeopardize the IRS's ability to collect Schedule B information from nonprofit organizations.

Flanked by an unprecedented volume of certiorari-stage *amici*, including over 60 dark-money organizations with ties to petitioner AFPF's known industry funders,[4] the United States urges a result that directly undercuts its ability to protect citizens against fraud and abuse in the nonprofit sector. Again, the Trump Administration *acknowledged* a government's compelling interest in regulating charities operating within its borders. U.S. Br. 20. And as California explained, "by identifying the donor, the amount of the contribution, and the type of donation received (cash or in-kind), [Schedule B] provides information that can indicate misappropriation or misuse of charitable funds and can help . . . investigators determine whether the organization and its donors are engaging in self-dealing." Resp. Supp. Br. 3. But the Trump Administration's urged outcome here would shackle the United States' ability to do just that, rendering the Internal Revenue Service's confidential collection of Schedule B information presumptively unconstitutional.

Meanwhile, here in Congress, many of the dark money groups that have flocked to the Court in this case have already begun to resist congressional oversight by pleading a First Amendment right to anonymous spending and association. Take for example the U.S. Chamber of Commerce, the anonymously funded trade organization and corporate lobbying behemoth that enjoys, by far, the highest winning percentage in cases before the U.S. Supreme Court.[5] In response to questions for the record in the Senate's Environment and Public Works Committee last Congress, the Chamber altogether refused to answer questions, claiming seventeen times that a "question seeks information clearly protected by the fundamental right of freedom of association guaranteed to the Chamber and its members . . . by the First Amendment to the Constitution," and that "[t]herefore, on behalf of itself and its members, the Chamber respectfully declines to provide information in response to this question."[6] The Chamber doubles down on this extreme constitutional theory in its *amicus* brief to the Court in *Becerra*,

[4] Several of these funders have now been linked to dark money groups that organized the January 6, 2021 "Stop the Steal" rally that led to the violent attack on our democracy and the death of five individuals, including Capitol Police Officer Brian Sicknick. *See* Brian Schwartz, *Pro-Trump dark money groups organized the rally that led to deadly Capitol Hill riot*, NBC NEWS (Jan. 9, 2021); David Corn, *Sponsors of the pre-attack rally have taken down their websites. Don't forget who they were*, MOTHER JONES (Jan. 12, 2021) (naming Turning Point Action and Rule of Law Defense Fund); *see also* David Armiak and Alex Kotch, *Republican AGs forever tied to violent pro-Trump insurrection*, PR WATCH, https://www.exposedbycmd.org/2021/01/11/republican-ags-forever-tied-to-violent-pro-trump-insurrection/ (showing donations to the Rule of Law Defense Fund from dark money groups.).

[5] Constitutional Accountability Center, Corporations and the Supreme Court, https://www.theusconstitution.org/series/chamber-study/.

[6] U.S. Chamber of Commerce, Questions for the Record for Mr. Durbin, *Reducing Emissions while Driving Economic Growth: Industry-led Initiatives*, Hearing before the Subcomm. on Clean Air and Nuclear Safety of the S. Comm. on Environment and Public Works, 116th Cong. (Oct. 17, 2019).

arguing that *NAACP v. Alabama* should apply "whenever associational privacy rights are threatened."[7]

3) A broad constitutional ruling would lead to a further flood of corrupting financial influence on our democracy.

The United States must view this case in the context of an elemental tension we live with in politics and government between two classes of citizens. One is an insider influencer class, which occupies itself with rent-seeking from government, and desires rules of political engagement that make government more and more amenable to its power and influence. The second class is the general population, which has an abiding institutional interest in a government with the capacity to resist that special-interest influence. This is a centuries-old tension.[8]

This case marks a continuation of a long effort to entrench corporate America's stranglehold on American government, to the detriment of its people. The furtive architects of this campaign use the Supreme Court to obtain constitutional rulings that reliably elevate private over public interests, and to allow unlimited, and now anonymous, spending.[9] The United States has a vital interest in reversing this dangerous course, which has brought our democracy to the brink of destruction.

The Supreme Court's 2010 decision in *Citizens United*, 558 U.S. 310 (2010), unleashed a torrent of political spending. That decision was a boon to those with money to spend and incentive to spend it, and it added to the already extant imbalance in our political system. While on paper *Citizens United* upheld disclosure requirements, in practice the proliferation of shell corporations and the lack of judicial insistence on proper disclosure has meant there is no accountability for lies, smears, and disinformation. The "tsunami of slime" unleashed by *Citizens United* has

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[7] *Americans for Prosperity Foundation v. Becerra*, Nos. 19-251 and 19-255, Br. of the Chamber of Commerce of the United States of America et al. as *Amici Curiae* in Support of Petitioners (Sept. 25, 2019), at 15.

[8] *See* David Hume, *Philosophical Works of David Hume* 290 (1854) ("Where the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . to make the richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government."); Niccolo Machiavelli, *The Prince* ch. IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed."); Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* Book V (1748) ("To men of overgrown estates, everything which does not contribute to advance their power and honor is considered by them as an injury."); Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an effective state, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power.").

[9] *See, generally*, *Captured Courts*, DPCC Senate Democrats report (May 2020), https://www.hsdl.org/?view&did=839500; *see also What's at Stake: Democracy*, DPCC Senate Democrats report (Oct. 2020), https://www.democrats.senate.gov/imo/media/doc/DPCC%20Captured%20courts%20Democracy%20Report.pdf.

fundamentally eroded trust in our political system.[10] A 2020 Gallup poll found that trust in the federal government to solve domestic problems was down ten points since 2009, from 51% to 41%.[11]

As we recently warned Secretary Yellen, America's influencer class—empowered to spend unlimitedly by *Citizens United*, and enabled by their sophisticated lawyers and advisors— have effectively identified and exploited the IRS's weak and outdated regulations. They began funneling money into organizations created under sections 501(c)(3) and c(4) of the Internal Revenue Code precisely because these organizations did not have to publicly disclose their contributors. After *Citizens United*, political spending by 501(c)(4) groups exploded. Since 2010, 501(c)(4) organizations have spent over $800 million on political expenditures, compared to $103 million in the previous decade.[12] In one representative case, the American Action Network, a 501(c)(4), raised $41.9 million in one year, $24.6 million of which came from a single anonymous donor.[13] According to an analysis of the 2020 election, only 30% of outside spending came from groups that fully disclose their donors. And 501(c)(3) "charitable" groups, such as the Federalist Society, routinely engage behind the scenes in partisan political activity that at the very least skirts the line of prohibited lobbying and political activity.[14]

It is currently within the capacity of the United States government to police this mess, but a broad constitutional ruling for petitioners in *AFPF v. Becerra* would destroy that ability, permanently entrenching the power of this influence network. In light of these stakes, we urge you to address this matter with the utmost urgency.

As Justice Scalia wrote: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave." *Doe v. Reed*, 561 U.S. 186 (2010) (Scalia, J., concurring). We could not agree more.

Sincerely,

Sheldon Whitehouse
United States Senator

Richard J. Durbin
United States Senator

[10] Joe Hagan, *The Coming Tsunami of Slime*, NEW YORK MAGAZINE (Jan. 20, 2012).
[11] Lydia Saad, *Trust in Federal Government's Competence Remains Low*, GALLUP (Sep. 29, 2020), https://news.gallup.com/poll/321119/trust-federal-government-competence-remains-low.aspx.
[12] *Outside Spending*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/index.php?type=A&filter=N (last visited Dec. 3, 2019).
[13] Scott Bland, *Ryan-linked group Raised $24.6M From an Anonymous Donor*, POLITICO (May 18, 2018), https://www.politico.com/story/2018/05/18/american-action-network-24-6-million-anonymous-donor-554680.
[14] *See, e.g.*, *Trump Judges or Federalist Society Judges? Try Both*, NEW YORK TIMES (May 20, 2020) (describing the Federalist Society's leading role in Trump judicial selection).

Patrick J. Leahy
United States Senator

Dianne Feinstein
United States Senator

Amy Klobuchar
United States Senator

Christopher A. Coons
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Richard Blumenthal
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Mazie K. Hirono
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