



June 15, 2021

The Honorable Destin Hall, Chair
House Committee on Rules, Calendar, and Operations
North Carolina General Assembly

RE: Opposition to Senate Bill 636

Dear Representative Hall and Members of the Committee,

The Campaign Legal Center (CLC) respectfully submits this letter to the Committee in opposition to S.B. 636. If the bill becomes law, S.B. 636 will undermine governmental transparency and integrity in North Carolina, an outcome directly contrary to the public's overarching desire for more disclosure and accountability in the political process.¹ Moreover, the bill is unnecessary because, as long recognized by the United States Supreme Court, there are already protections for donors that actually face threats, harassment, or reprisals from public disclosure. We respectfully urge the Committee to oppose S.B. 636.

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy across all levels of government. Since the organization's founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, as well as in numerous other federal and state court cases. Our work promotes every citizen's right to participate in the democratic process.

Senate Bill 636 would undermine transparency and accountability in North Carolina government. The bill mandates secrecy for 29 different types of nonprofit organizations by making donor records confidential and broadly barring section 501(c) nonprofit organizations from disclosing—and therefore preventing government agencies from obtaining outside of specific, legally required disclosures—information about their members, donors, and supporters, including when the disclosure filings would not be made available to the public at large.² This mandatory concealment of nonprofits' information is not limited to charities and religious organizations established under section 501(c)(3) of the Internal Revenue Code, but extends to section 501(c)(4) “social welfare” organizations, section 501(c)(5) labor unions, and section 501(c)(6) trade associations, all of which engage

¹ For example, polling shows that over 85% of Americans believe political advertising on TV and online should identify who paid for the ad. *Americans report a bipartisan desire for transparent political financing laws*, IPSOS (Feb. 18, 2019), <https://www.ipsos.com/en-us/news-polls/americans-report-a-bipartisan-desire-for-transparent-political-financing-laws>.

² I.R.S. Publication 557 (revised Jan. 2018), <https://www.irs.gov/pub/irs-pdf/p557.pdf>.

in extensive amounts of political campaigning and lobbying activity. Transparency regarding the financing of these nonprofits' activities is crucial to a functioning democracy.

Even when the U.S. Supreme Court opened the door to unlimited corporate spending in federal elections in its 2010 *Citizens United* decision, a key aspect of that decision was the Justices' nearly unanimous agreement that such spending should be publicly disclosed, because "providing the electorate with information about the sources of election-related spending helps citizens "make informed choices in the political marketplace."³ Justice Kennedy thus declared that the *Citizens United* decision would establish a new federal regime "that pairs corporate campaign spending with effective disclosure."⁴ In affirming the First Amendment values underlying public disclosure of electoral spending, the Supreme Court recognized the public's right to receive information regarding "those who for hire attempt to influence legislation or who collect or spend funds for that purpose."⁵ Even when information regarding nonprofit activities is not made available to the public at large, disclosure requirements allow law enforcement authorities to identify and prevent fraud and self-dealing among tax-exempt organizations.

In the years since *Citizens United* was decided, courts around the country have upheld federal and state disclosure laws in recognition that political transparency advances First Amendment principles by facilitating citizens' informed participation in the electoral process. At the same time, secretive election spending, largely through the use of nonprofit organizations, has been on the rise.⁶ While some states have been working to close loopholes that have allowed for the increasing role of dark money in election campaigns, S.B. 636 would codify those loopholes as enforceable law in North Carolina.

According to one North Carolina legislator, S.B. 636 ostensibly is intended to "totally protect these [donor] lists from going into the wrong hands."⁷ But the pursuit of this objective through a far-reaching ban on nonprofit disclosure impedes the "First Amendment interests of individual citizens seeking to make informed choice in the political marketplace."⁸ It also ignores that statutory privacy protection is unnecessary, because U.S. courts have long recognized that exemptions from disclosure rules are available where there is an actual, demonstrated probability that an organization's members will face threats, harassment, or reprisals as a result of their public identification.⁹

³ *Citizens United v. FEC*, 558 U.S. 310, 367 (2010).

⁴ *Id.* at 370.

⁵ *Id.* at 369 (quoting *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

⁶ See AUSTIN GRAHAM, CAMPAIGN LEGAL CENTER, TRANSPARENCY AND THE FIRST AMENDMENT: HOW DISCLOSURE LAWS ADVANCE THE CONSTITUTION'S PROMISE OF SELF-GOVERNMENT 8 (2018), <https://campaignlegal.org/document/transparency-and-first-amendment-how-disclosure-laws-advance-constitutions-promise-self>.

⁷ Travis Fain, *Donor privacy bill clears Senate over 'dark money' concerns from Democrats*, WRAL (May 11, 2021) <https://www.wral.com/donor-privacy-bill-clears-senate-over-dark-money-concerns-from-democrats/19673286/>.

⁸ *McConnell v. FEC*, 540 U.S. 93, 197 (2003).

⁹ See, e.g., *Citizens United v. FEC*, 558 U.S. at 367 (recognizing that as-applied challenges to disclosure rules are available where a group can show a "reasonable probability" that disclosure of its contributors' names "will subject them to threats, harassment, or reprisals from either

We recognize that Section 4 of S.B. 636 provides that the bill's mandates "shall not apply to any disclosure of donor information" required by North Carolina campaign finance statutes. But this narrow exception does not prevent the bill from further entrenching dark money practices that already affect North Carolina elections.¹⁰ Dark money spenders use shell games to hide the original sources of money used to influence an election, passing money from one organization to the next before it gets to the ultimate spender, and 501(c) groups are the "primary source of dark money spending."¹¹ While current law ostensibly requires disclosure by groups that spend in North Carolina elections, the law does not extend to dark money groups that are three or four or more transactions removed from the entity that directly pays for an election ad. In other words, existing law makes it easy to influence North Carolina elections in secret by funneling money intended to influence an election through one or more intermediary entities. While not barring current statutorily required disclosures, S.B. 636 stymies further disclosure of donor information from groups that hide their political spending in dark money shell games to avoid the reach of such statutorily required disclosures. That is to say, S.B. 636 will make dark money darker.

In addition to amplifying a dark money loophole for nonprofit spending in elections, S.B. 636 will make it easier for North Carolina officials to hide conflicts of interest, including when lawmakers solicit money to affiliated nonprofits from a person or entities seeking government action. North Carolina has seen its share of corruption and scandals, even in the last two years.¹² In 2015, the Center for Public Integrity gave the state low grades for "weak ethics enforcement" and "poor monitoring of lobbyists."¹³ Senate Bill 636 includes broad prohibitions on disclosing nonprofit donors, including against government employees who may see donor information as part of their job, with potential criminal penalties for violations. These provisions would not only hinder the ability to identify possible wrongdoing involving nonprofits but would also have a chilling effect on whistleblowers.

Government officials or private parties") (quoting *McConnell*, 540 U.S. at 231; *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)).

¹⁰ See, e.g., Travis Fain, *Dark money group targets six NC Senate races*, WRAL (July 22, 2020), <https://www.wral.com/dark-money-group-targets-six-nc-senate-races/19199592/>.

¹¹ Ctr. For Responsive Politics, *Follow the Shadow of Dark Money*, <https://www.opensecrets.org/dark-money/shadow-infographic> (last visited May 13, 2021).

¹² See e.g., Ames Alexander and Michael Gordon, *A shouting jury, then a verdict: Billionaire Greg Lindberg guilty of political bribery*, CHARLOTTE OBSERVER (May 5, 2020) <https://www.charlotteobserver.com/news/politics-government/article240808661.html> and Will Doran, *Powerful NC lawmaker took donors' money for his own use, prosecutors say*, News & Observer (Aug. 20, 2020) <https://www.newsobserver.com/news/politics-government/article245118325.html>.

¹³ *North Carolina Gets D Grade in 2015 State Integrity Investigation*, Ctr. For Public Integrity (Nov. 12, 2015) <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/north-carolina-gets-d-grade-in-2015-state-integrity-investigation/>.

In late December 2018, former Michigan Governor Rick Snyder, a two-term Republican, vetoed a similar bill, S.B. 1176,¹⁴ after it was hastily passed by Michigan’s legislature.¹⁵ In his veto statement, Governor Snyder characterized S.B. 1176 as “a solution in search of a problem,” explaining the bill could, in practice, actually “impair the executive branch’s ability to effectively protect the donors of organizations.”¹⁶ Moreover, Governor Snyder noted longstanding U.S. Supreme Court precedent, *NAACP v. Alabama*, already provides protection to any nonprofit group facing a genuine prospect of harm stemming from disclosure.¹⁷ In vetoing S.B. 1176, Governor Snyder recognized that codifying a sweeping anti-transparency mandate into law was both unnecessary and potentially harmful to the interests the bill purported to protect.

The people of North Carolina deserve more transparency and accountability in state government. Senate Bill 636 will undermine both interests and is contrary to core principles of our democracy. We respectfully urge you to oppose S.B. 636.

Respectfully submitted,

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¹⁴ Personal Privacy Protection Act, S. 1176, 99th Leg., Reg. Sess. (Mich. 2018),

<http://www.legislature.mi.gov/documents/2017-2018/billenrolled/Senate/pdf/2018-SNB-1176.pdf>.

¹⁵ Jim Malewitz, Opinion, *Snyder vetoes bill criticized as ‘power grabs’*, RECORD EAGLE (Jan. 4, 2019), https://www.record-eagle.com/opinion/opinion-snyder-vetoes-bills-criticized-as-power-grabs/article_f6335061-4889-5c5f-ae09-fd8edae6ceb6.html.

¹⁶ Veto Statement for SB 1176, Gov. Rick Snyder (Dec. 28, 2018), S. Journal, 99th Leg., Reg. Sess., at 2637 (Mich. 2018), [http://www.legislature.mi.gov/\(S\(yvybvzsl35tcqf0nvozbp4h2\)\)/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-31-085.pdf](http://www.legislature.mi.gov/(S(yvybvzsl35tcqf0nvozbp4h2))/documents/2017-2018/Journal/Senate/pdf/2018-SJ-12-31-085.pdf).

¹⁷ *Id.*