

WHAT IS “DARK MONEY” AND SHOULD SOMETHING BE DONE ABOUT IT?

Politicians from both parties have redefined a traditional American liberty – so they can strip it away.

THE BASICS

“Dark money” is not an official, legal, or technical term. It is a pejorative label used to smear any group that keeps the personal information of its members and supporters – such as their names, home addresses, and employers – private.

Nonprofit causes across the ideological spectrum depend on private donations to carry out their missions while protecting their supporters from harassment and retaliation at the hands of corrupt government officials, partisan media outlets, extremists, and their philosophical opponents. Donor privacy is a longstanding tenet of philanthropic giving and an essential shield for Americans to comfortably exercise their First Amendment right to support the causes they believe in.

THE HISTORY OF “DARK MONEY”

The term “dark money” was pioneered by the now-defunct Sunlight Foundation in 2010 after the U.S. Supreme Court upheld the First Amendment rights of nonprofits and other entities to occasionally advocate independently for the election or defeat of federal candidates.¹ Initially, “dark money” referred to these groups’ newfound ability to spend a limited portion of their funds on political messages while keeping their general donors private. **The initial hysteria over “dark money” fizzled, however, when nonprofits continually accounted for less than five percent of campaign spending in subsequent election cycles.²**

Today, it is well established that donors who wish to influence elections prefer giving directly to candidates and super PACs – entities that can put all of their funds into campaigning. The “dark money” smear, however, has not gone away. Instead, it has been repurposed by politicians, media, and activists on both sides of the aisle to attack virtually any act of advocacy or speech that nonprofits engage in. **The result is a dangerous movement to impose nonprofit donor disclosure laws that threaten America’s tradition of respect for personal privacy and free speech and the nonprofit sector as a whole.**

LONGSTANDING NONPROFIT ACTIVITIES NOW COMMONLY LABELED “DARK MONEY”

- » Filing Amicus Briefs in Federal Court
- » Submitting Comments to Government Agencies
- » Advocating For or Against Legislation
- » Supporting Voter Registration Drives
- » Attempting to Sway Public Opinion on Social Issues
- » Praising or Criticizing Elected Officials

THE PROBLEM: A COVERT CAMPAIGN TO UNDERMINE FREE SPEECH

Americans join and donate to nonprofits in part to amplify their voices on the issues that matter to them. Countless causes – civil rights, religious liberty, environmental protection, gun rights, good government, tax policy, and more – have benefited from the freedom to speak about government and public policy without exposing their supporters to harm.

But today, politicians are deliberately using the “dark money” smear to advance new threats to Americans’ long held freedom to privately support nonprofits. In Congress, legislation like the AMICUS Act, DISCLOSE Act, Freedom to Vote Act, and Honest Ads Act all propose to force nonprofits to publicly expose the personal information of their supporters when speaking on issues of public concern. In the states, activist groups use the “dark money” smear to pass ballot measures like Arizona’s Prop 211, which regulate nonprofits the same as political action committees.

In our current cancel culture era, these proposals would silence millions of Americans through politically motivated attacks on nonprofit donors. If enacted into law, **anyone who dares to challenge the status quo** through a nonprofit organization would have to place themselves – and their supporters – directly in the crosshairs of the political establishment and incumbent politicians. Causes on both the right and the left will suffer as conversations about government and politics spiral into personal conflict and potential violence.

THE SOLUTION: UNITING AMERICA AROUND THE FIRST AMENDMENT AND PERSONAL PRIVACY

While “dark money” has become a buzzword in both parties, the American people have grown worried about the state of free speech in this country. Nearly two-thirds of Americans say they have political views they are afraid to share,³ and only one-third say they believe all Americans enjoy full freedom of speech.⁴ Donor privacy protections can be part of the solution.

In 2021, the U.S. Supreme Court reiterated in its *Americans for Prosperity Foundation v. Bonta* decision that Americans have a First Amendment right to support nonprofit causes without being reported to state officials. Since that ruling, 17 states have passed new protections for donor privacy.⁵ Both the decision and the state laws received strong support from nonprofit causes across the ideological spectrum.

Instead of buying in to the “dark money” myth, the future of free speech depends on a principled defense of donor privacy. All Americans have the right to support causes they believe in without fear of harassment or intimidation.

“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.”

– NAACP v. Alabama (1958)

“The gravity of the privacy concerns in [the disclosure] context is further underscored by the filings of hundreds of organizations as amici curiae in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno...”

– *Americans for Prosperity Foundation v. Bonta* (2021)

1 Bill Allison, “Daily Disclosures,” Sunlight Foundation. Available at: <https://sunlightfoundation.com/2010/10/18/daily-disclosures-10/> (Oct. 18, 2010).

2 Luke Wachob, “Putting ‘Dark Money’ in Context: Total Campaign Spending by Political Committees and Nonprofits per Election Cycle,” Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2017/10/2017-05-08_IFS-Issue-Brief_Wachob_Putting-Dark-Money-In-Context.pdf (May 16, 2017).

3 Emily Ekins, “Poll: 62% of Americans Say They Have Political Views They’re Afraid to Share,” Cato Institute. Available at: <https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share> (July 22, 2020).

4 The Editorial Board, “America Has a Free Speech Problem,” *The New York Times*. Available at: <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html> (Mar. 18, 2022).

5 Luke Wachob, “Surveying the Landscape on Donor Privacy Two Years After *AFPF v. Bonta*,” People United for Privacy. Available at: <https://unitedforprivacy.com/surveying-the-landscape-on-donor-privacy-two-years-after-afpf-v-bonta/> (June 28, 2023).

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