

No. 21-1271

IN THE

Supreme Court of the United States

REPRESENTATIVE TIMOTHY K. MOORE, ET AL.,
Petitioners,

v.

REBECCA HARPER, ET AL.,
Respondents.

**On Writ of Certiorari to the
Supreme Court of North Carolina**

**BRIEF OF AMICI CURIAE U.S. SENATOR
SHELDON WHITEHOUSE AND
REPRESENTATIVE HENRY “HANK”
JOHNSON, JR.
IN SUPPORT OF RESPONDENTS**

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STATEMENT OF INTEREST¹

Amici curiae are U.S. Senator Sheldon Whitehouse of Rhode Island and Congressman Henry “Hank” Johnson, Jr. of Georgia. Amici share with this Court a strong interest in ensuring free and fair elections, as well as preventing corrupting influences from undermining our democracy and our independent judiciary.

Additionally, undersigned amici are chairmen of the subcommittees of the Senate and House Committees on the Judiciary with jurisdiction over the federal judiciary. Accordingly, amici are charged with oversight of the federal judiciary, including contributing to the protection of the judiciary’s integrity and the Constitution’s guarantee of equal justice under the law for all Americans.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case comes before this Court at a precarious time in American history. In poll after poll, majorities of Americans say they have lost faith in our democracy and institutions;² indeed, nearly two-

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund this brief’s preparation or submission. All parties consented to the filing of this brief.

² See, e.g., Reid J. Epstein, *As Faith Flags in U.S. Government, Many Voters Want to Upend the System*, N.Y. Times (July 13, 2022), <https://www.nytimes.com/>

thirds of Americans believe that “U.S. democracy ‘is in crisis and at risk of failing,’”³ and big majorities say that some form of significant overhaul is needed.⁴ Polls regarding the Supreme Court reflect this confidence collapse, with public approval of the Court at its lowest point in the history of polling.⁵ Undersigned amici believe lack of transparency in Supreme Court amicus curiae briefs contributes to

2022/07/13/us/politics/government-trust-voting-poll.html; Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, Gallup (July 5, 2022), <https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx>; Joel Rose & Liz Baker, *6 in 10 Americans Say U.S. Democracy Is In Crisis as the ‘Big Lie’ Takes Root*, NPR (Jan. 3, 2022), <https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6>; Quinnipiac Univ., *Political Instability Not U.S. Adversaries, Seen as Bigger Threat, Quinnipiac University National Poll Finds; Nearly 6 in 10 Think Nation’s Democracy Is in Danger of Collapse* (Jan. 12, 2022), <https://poll.qu.edu/poll-release?releaseid=3831>.

³ Rose & Baker, *supra* note 2.

⁴ Ben Winck, *Most Americans Want Major Overhauls to the US Economy, Political System, and Healthcare, Survey Finds*, Bus. Insider (Oct. 24, 2021), <https://www.businessinsider.com/americans-want-overhaul-economy-political-systems-pew-research-survey-2021-10>.

⁵ Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, Gallup (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>; Pew Rsch. Ctr., *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling* (Sept. 1, 2022), <https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/>.

these public concerns. We believe that secrecy poses several particular dangers to the Court in this case.

I. This case swarms with amicus briefs supporting Petitioners that elide a salient fact: the doctrine they encourage this Court to adopt—the “independent state legislature” theory—is one of the fringe legal theories deployed in a failed legal plot to overturn the results of the 2020 presidential election. Many of Petitioners’ amici actually attempted to undermine the 2020 election by relying on this theory. Other amici share connections with groups and individuals who played a role in those attempts. Still others are presently engaged in voter-suppression and election-subversion efforts. Rarely has such a noxious assemblage of amici appeared before this Court, and their secrecy about their funders and connections does this Court a grave disservice.

II. Some of Petitioners’ amici share undisclosed connections to each other through common funders, counsel, and personnel, as well as to the dark-money funders of the often-gerrymandered legislatures pivotal to the implementation of the “independent state legislature” doctrine. Their lack of transparency makes it hard to assess motives and coordination of an arguably orchestrated effort.

Some amici also share undisclosed connections to a network that has operated behind the scenes to reshape the federal judiciary—including this Court—raising due process and ethics issues hard to evaluate without adequate disclosure. One amicus, the “Honest Elections Project,” fails even to use its true name before the Court, and exemplifies added

dangers to this Court of amicus anonymity. The Court is denied information necessary to evaluate recusal and ethics issues raised by the group's (and its coordinated allies') massive funding of judicial nomination and confirmation campaigns.

To illuminate the full story of these groups' histories and funding sources would require far better disclosure than the Court now requires. In this brief, Member amici here seek to fill in, at least partially, information that should have been made available by Petitioners' amici to Respondents, the public, and the Court—but was not disclosed.

ARGUMENT

I. THE FLOTILLA OF PETITIONERS' AMICI WITH A HISTORY OF ELECTION DENIAL AND VOTER SUPPRESSION ILLUSTRATES THE DANGERS OF ACCEPTING PETITIONERS' STRAINED ARGUMENT

Amicus curiae briefs should provide the Court with new information, perspectives, and insights that assist the Court's deliberations. Amicus curiae briefs now too often push ulterior projects—and often those projects are not disclosed to the Court. Adopting the arguments presented in such briefs, without full knowledge of their context and connections, threatens to enmire the Court in the political schemes of self-interested amici curiae and interests lurking undisclosed behind them. In essence, they plant reputational traps before the Court in pursuit of their own gain, buttressed by not providing the Court the disclosure necessary to fully evaluate the motives and machinations behind their briefing.

This case poses precisely this threat. Many of Petitioners’ amici ask the Court to usher in a new, dangerous era for our democracy by endorsing the “independent state legislature” doctrine, but fail to reveal the role of this extreme argument—and even of certain amici—in attempts to subvert our most recent presidential election. The Court should tread carefully before giving credibility to these theories of election subverters and vote suppressors.

A. Many Of Petitioners’ Amici Have Been And Are Still Involved In Election Denial And Voter Suppression Efforts

Many groups and individuals comprising Petitioners’ amici have deployed the “independent state legislature” doctrine in recent attempts to undermine an American election. We will try to penetrate at least some of their veils of secrecy as best as we can in order to give an accounting of certain amici’s connections and history. We urge this Court to approach the fringe arguments advanced by such amici with grave caution.

1. The “independent state legislature” doctrine would give state legislatures, as opposed to state courts, dominant authority over states’ conduct of federal elections. This theory was deployed in legally dubious attempts to suppress the vote and challenge the outcome of the 2020 election. First, the theory was used to challenge election procedures designed to accommodate voting during the COVID-19 pandemic

to help more people safely vote.⁶ Then, the theory was used as a purported basis for overturning the 2020 presidential election results, at least in states with legislatures controlled by the losing candidate's party.

Deniers of the indisputable results of the 2020 election repeatedly invoked the doctrine in litigation across the country: in attempts to toss out votes or completely invalidate election results;⁷ in public appearances calling for the overturning of the election results;⁸ in campaigns to convince state

⁶ See Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1752-54 (2021); Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59, 77-79 (2021).

⁷ See e.g., Application for Stay Pending Disposition of a Petition for a Writ of Certiorari, *Republican Party v. Degraffenreid*, 141 S. Ct. 643 2020, No. 20A54, *cert. denied*, 131 S. Ct. 732 (2021); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1327-28 (N.D. Ga. 2020), *aff'd*, 981 F.3d 1307 (11th Cir. 2020); *Wis. Voters All. v. Pence*, 514 F. Supp. 3d 117, 120-21 (D.D.C. 2021); *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620, 630 (E.D. Wis. 2020), *aff'd*, 983 F.3d 919 (7th Cir. 2020); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 709 (D. Ariz. 2020), *appeal dismissed*, No. 20-17399, 2021 U.S. App. LEXIS 10585 (9th Cir. 2021); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 602 (E.D. Wis. 2020), *appeal dismissed*, No. 20-3448, 2020 U.S. App. LEXIS 42442 (7th Cir. 2020); *King v. Whitmer*, 505 F. Supp. 3d 720, 737 (E.D. Mich. 2020).

⁸ *Transcript of Trump's Speech at Rally Before US Capitol Riot*, AP News (Jan. 13, 2021), <https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27> ("In every single swing state, local officials, state officials, almost all Democrats, made illegal and unconstitutional changes to election procedures without the mandated approvals by the state legislatures.").

legislators to “decertify” the election results;⁹ and as part of a conspiracy to pressure the Vice President of the United States into refusing to certify the election results on January 6.¹⁰ More than two years later, efforts to overturn the 2020 election still sputter on, and election deniers still push the “independent state legislature” doctrine as a pretext for overturning the 2020 election and subverting future elections.¹¹

2. Although they do not disclose it, many of Petitioners’ amici and their counsel have contributed to these and other election-subversion efforts. One of the most publicly visible of these election deniers has been John Eastman, the counsel of record for amicus

⁹ Nick Corasaniti et al., *How Trump’s 2020 Election Lies Have Grippled State Legislatures*, N.Y. Times (May 22, 2022), <https://www.nytimes.com/interactive/2022/05/22/us/politics/state-legislators-election-denial.html>.

¹⁰ See *READ: Trump Lawyers’ Full Memo on Plan for Pence to Overturn the Election*, CNN (Sept. 21, 2021), <https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html>; Josh Dawsey et al., *During Jan. 6 Riot, Trump Attorney Told Pence Team the Vice President’s Inaction Caused Attack on Capitol*, Wash. Post (Oct. 29, 2021), https://www.washingtonpost.com/investigations/eastman-pence-email-riot-trump/2021/10/29/59373016-38c1-11ec-91dc-551d44733e2d_story.html.

¹¹ See, e.g., Corasaniti, *supra* note 9; *Trump Calls Crowd During January 6 Speech a ‘Loving Crowd’*, CNN, <https://www.cnn.com/videos/politics/2021/07/22/trump-capitol-riot-audio-interview-philip-rucker-carol-leonnig-ac360-vpx.cnn>; News Release, Rep. Mark Finchem, *Representative Finchem Introduces Resolution to Set Aside & Decertify Three 2020 County Elections* (Feb. 7, 2022), <https://www.azleg.gov/press/house/55LEG/2R/220207FINCHEMHCR2033.pdf>.

Claremont Institute’s Center for Constitutional Jurisprudence (Claremont Institute). Eastman is under criminal investigation for his role in attempting to overturn the 2020 election.¹² In one of two memoranda to the Vice President of the United States, Eastman invoked the “independent state legislature” theory as one reason the Vice President should exercise his purported authority to refuse to recognize slates of electors submitted by seven states. According to the Eastman memorandum, “state and local election officials []and, in some cases, judicial officers,” induced voter fraud by illegally “alter[ing] or dispens[ing] with” “important state election laws” without approval from their state legislatures.¹³ These allegations were asserted to justify state legislators overriding the popular vote and submitting “dual slates of electors,” purportedly under the authority of the United States Constitution’s Electors Clause.¹⁴ This aligned with efforts (also now under criminal investigation) to pressure Georgia officials to “find the votes” to reverse the election outcome and to use the Department of Justice to challenge the Georgia presidential election outcome.¹⁵

Here, Claremont Institute urges the Court to overturn longstanding precedent and adopt a

¹² Summer Concepcion, *John Eastman Invokes the Fifth in Georgia Election Probe*, NBC News (Aug. 31, 2022), <https://www.nbcnews.com/politics/2020-election/john-eastman-pleads-5th-georgia-election-probe-rcna45715>.

¹³ *READ: Trump Lawyers’ Full Memo on Plan for Pence to Overturn the Election*, *supra* note 10.

¹⁴ *Id.*

¹⁵ *Infra* note 20 and accompanying text.

maximalist version of the doctrine—disallowing even gubernatorial vetoes of relevant state laws.¹⁶ The strategic benefit to future election subversion attempts is clear: the more extreme the theory that amici and Petitioners can convince the Court to recognize, the easier it will be for election subverters to convince legislators and others that their schemes are not patently unlawful.

Undisclosed too are the connections Eastman shares with other amici involved in election denial and voter suppression here pushing the “independent state legislature” doctrine. Eastman has been a board member of amicus Public Interest Legal Foundation (PILF),¹⁷ which helps “lead a larger movement in the Republican Party that has seen states pass restrictions on voting, including strict voter identification laws” and “purges of voter rolls that could disproportionately affect minority voters, who tend to vote for the Democratic Party.”¹⁸

¹⁶ See Br. of Amicus Curiae Claremont Inst.’s Ctr. for Const. Juris. in Supp. of Pet’rs at 2, 23.

¹⁷ Notably, Eastman was listed as a board member for amicus Public Interest Legal Foundation when the Court granted certiorari in this case, but his name was removed on the Public Interest Law Foundation’s website at some point between then and now. Archive, *Board of Directors*, Pub. Int. Legal Found., archived at <https://web.archive.org/web/20220717163748/https://publicinterestlegal.org/about/board-of-directors/>. It is unclear whether he remains a board member, and, if so, whether the removal of his name was intended to obscure the connection between him and amicus Public Interest Legal Foundation.

¹⁸ Simon Lewis & Joseph Tanfani, *Special Report: How a Small Group of U.S. Lawyers Pushed Voter Fraud Fears into the*

PILF’s board chairman is Cleta Mitchell, at whose behest Eastman’s memoranda to the Vice President were initially written, and who, as detailed below, is in turn connected to other amici in this case.¹⁹ Mitchell participated in the call to Georgia election officials during which the loser of the 2020 election in Georgia, the then-President of the United States, asked officials to “find” enough votes to overturn Georgia’s presidential election results.²⁰ Mitchell justified her initial request for memoranda from Eastman on the basis of the “independent state legislature” theory.²¹

Over the past two years, Mitchell has used her position as the chair of something called the “Election Integrity Network” to spread disinformation about purported “cheat[ing]” in the 2020 election.²² She has apparently been recruiting a “volunteer army of

Mainstream, Reuters (Sept. 9, 2020), <https://www.reuters.com/article/uk-usa-election-voter-fraud-specialreport/idINKBN2601GR>.

¹⁹ *Board of Directors*, Pub. Int. Legal Found., <https://publicinterestlegal.org/about/board-of-directors/>.

²⁰ Amy Gardner & Paulina Firozi, *Here’s the Full Transcript and Audio of the Call Between Trump and Raffensperger*, Wash. Post (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html.

²¹ Exhibit I, *Eastman v. Thompson*, 2022 US Dist. LEXIS 87770 (C.D. Cal. Mar. 4, 2022).

²² Alexandra Berzon, *Lawyer Who Plotted to Overturn Trump Loss Recruits Election Deniers to Watch Over the Vote*, N.Y. Times (May 30, 2022), <https://www.nytimes.com/2022/05/30/us/politics/republican-poll-monitors-election-activists.html>.

citizens” to monitor state election officials to determine whether “each is a ‘friend or foe.’”²³ Mitchell’s “Election Integrity Network” is a “project of the Conservative Partnership Institute,”²⁴ which also helped “launch” and shares board members with amicus America First Legal Foundation.²⁵

The Conservative Partnership Institute has been described as a “hub” for “at least twenty key operatives reportedly involved in [the] failed effort to subvert the 2020 election.”²⁶ In addition to its connection to Mitchell, the Conservative Partnership Institute is home to a former Department of Justice lawyer now under congressional and criminal investigation; a former White House Chief of Staff who promoted Mitchell’s voter-subversion efforts and participated on the call with Georgia officials; and a former senior adviser to the President who reportedly helped draft the losing incumbent’s remarks on January 6, 2021²⁷—remarks that invoked the

²³ *Id.*

²⁴ *Id.*

²⁵ See Conservative P’ship Inst., *2021 Annual Report* at 12, 14-15, <https://whoscounting.us/wp-content/uploads/2022/03/CPIAnnualReport.pdf>; Gabby Orr, *Stephen Miller to Launch a New Legal Group to Give Biden Fits*, Politico (Mar. 26, 2021), <https://www.politico.com/news/2021/03/26/stephen-miller-legal-group-478167>.

²⁶ Maggie Severns et al., *The Insurrectionists’ Clubhouse: Former Trump Aides Find a Home at a Little-known MAGA Hub*, Grid News (Jul. 5, 2022), <https://www.grid.news/story/politics/2022/07/05/the-insurrectionists-clubhouse-former-trump-aides-find-a-home-at-a-little-known-maga-hub/>.

²⁷ *Id.*

“independent state legislature” doctrine as a justification for overturning the 2020 election results.²⁸ These latter two individuals, Mark Meadows and Stephen Miller, are board member and president, respectively, of amicus America First Legal Foundation, which here asks this Court to adopt the “independent state legislature” doctrine in this case after its leaders tried and failed to subvert the 2020 election.²⁹

Mitchell also has links to another of Petitioners’ amici, American Legislative Exchange Council (ALEC). Mitchell led ALEC’s “political process working group,” which facilitated ALEC’s work to entrench far-right political power by promoting partisan gerrymandering and new barriers to voting.³⁰ ALEC events have also served as a forum for Mitchell to promote her work at the “Election Integrity Network.”³¹ Mitchell is also the chair of

²⁸ See *Transcript of Trump’s Speech at Rally Before US Capitol Riot*, *supra* note 8 (quoting the former President arguing that “you can’t make a change or voting for a federal election unless the state legislature approves it” and “[i]n every single swing state, local officials, state officials ... made illegal and unconstitutional changes to election procedures without the mandated approvals by the state legislatures”).

²⁹ *Leadership*, Am. First Legal, <https://aflegal.org/about/#leadership>.

³⁰ Jamie Corey, *Corporate-backed ALEC Creates Secret Internal Project to Work on Redistricting and Election Issues*, Documented (June 5, 2020), <https://documented.net/reporting/corporate-backed-alec-creates-secret-internal-project-to-work-on-redistricting-and-election-issues>.

³¹ See *Exclusive: Documented Obtains Recording of 3 Hour Long Voter Suppression Strategy Session Hosted by ALEC*,

still another “project” called the “Election Protection Initiative” that has ties to ALEC.³² The Election Protection Initiative exists to “change voting laws to curb potential but unproven election fraud.”³³ Many legal experts view this project “as aimed at limiting minority votes.”³⁴ This Initiative is itself a project of FreedomWorks, which is a member of a coalition of right-wing groups that “push a cookie-cutter agenda at the state level.”³⁵ That coalition has been described as ALEC’s “sister organization.”³⁶

3. The above amici are not alone; the flotilla of amici supporting Petitioners includes additional groups with histories of voter suppression and election denial. The counsel of record for amicus APA Watch, Joseph Lawrence, was hired as Special Counsel to the Attorney General of Texas in *Texas v.*

Documented (Dec. 2, 2021), <https://documented.net/investigations/exclusive-documented-obtains-recording-of-3-hour-long-voter-suppression-strategy-session-hosted-by-alec>.

³² *Election Protection Initiative*, FreedomWorks, <https://www.electionprotectioninitiative.com/>.

³³ Peter Stone, *Republican Lawyer Is Key Player in Voter Suppression Drive Across US*, The Guardian (Apr. 25, 2021), <https://www.theguardian.com/us-news/2021/apr/25/cleta-mitchell-lawyer-us-voter-suppression>.

³⁴ *Id.*

³⁵ Tal Kopan, *Report: Think Tanks Tied to Kochs*, Politico (Nov. 13, 2013), <https://www.politico.com/story/2013/11/koch-brothers-think-tank-report-099791>.

³⁶ Ed Pilkington & Suzanne Goldenberg, *State Conservative Groups Plan US-wide Assault on Education, Health and Tax*, The Guardian (Dec. 5, 2013), <https://www.theguardian.com/world/2013/dec/05/state-conservative-groups-assault-education-health-tax>.

Pennsylvania,³⁷ which was still another attempt to overturn the 2020 election results³⁸ by invoking the independent state legislature doctrine.³⁹ That lawsuit was filed by a Republican attorney general here supporting Petitioners as an amicus.⁴⁰ Lawrence also represented the plaintiff in *Gohmert v. Pence*, yet another lawsuit attempting to overturn the 2020 election results by relying on the “independent state legislature” doctrine⁴¹—a lawsuit described by a group of former Republican officials and conservative scholars as “a mockery of federalism” that “would violate the most fundamental constitutional principles.”⁴²

The chairman of the board for amicus America’s Future, Inc., former national security adviser

³⁷ Motion for Leave to File Bill of Complaint & Bill of Complaint, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (Mem.) (No. 22O155) *mot. denied*.

³⁸ Jim Rutenberg et al., *77 Days: Trump’s Campaign to Subvert the Election*, N.Y. Times (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html>.

³⁹ Motion for Leave to File Bill of Complaint & Bill of Complaint at 4, 7, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (Mem.) (No. 22O155), *mot. denied*.

⁴⁰ *Id.*; Br. of Ark. et al. as Amici Curiae in Supp. of Pet’rs.

⁴¹ 510 F. Supp. 3d 435 (E.D. Tex.), *aff’d*, 832 F. App’x 349 (5th Cir. 2021).

⁴² Motion for Leave to File & Brief of Carter Phillips et al. as Amici Curiae in Support of Defendants & in Opposition to (1) Motion for Leave to File Bill of Complaint & (2) Motion for Preliminary Injunction & Temporary Restraining Order or, Alternatively, for Stay & Administrative Stay at 3, *Texas v. Pennsylvania*, 141 S. Ct. 1230 (Mem.) (No. 22O155).

Michael Flynn,⁴³ was present at the meeting in the Oval Office in December 2020 during which participants encouraged President Trump to deploy the military to seize voting machines.⁴⁴ America's Future, Inc.'s counsel of record, William Olson, presented the former President with several plans for subverting the 2020 election results,⁴⁵ plans that Olson admitted would "create what the press could call a 'constitutional crisis.'"⁴⁶

Amicus Wisconsin Voter Alliance filed a lawsuit intended to subvert the 2020 election results in Wisconsin. The judge in that case described the lawsuit as "risible were its target not so grave: the

⁴³ *Leadership Team*, Am.'s Future, <https://www.americasfuture.net/leadership/>.

⁴⁴ Robert Draper, *Michael Flynn Is Still at War*, N.Y. Times Mag. (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/magazine/michael-flynn-2020-election.html>. This is the same Michael Flynn who was pardoned by the former President after pleading guilty to lying to the FBI. Charlie Savage, *Trump Pardons Michael Flynn, Ending Case His Justice Dept. Sought to Shut Down*, N.Y. Times (Nov. 25, 2020), <https://www.nytimes.com/2020/11/25/us/politics/michael-flynn-pardon.html>.

⁴⁵ Maggie Haberman & Luke Broadwater, *Little-Known Lawyer Pitched Trump on Extreme Plans to Subvert Election*, N.Y. Times (July 16, 2022), <https://www.nytimes.com/2022/07/16/us/politics/trump-olson-lindell-election.html>.

⁴⁶ *Read William J. Olson's Memo to Trump*, N.Y. Times (July 16, 2022), <https://www.nytimes.com/interactive/2022/07/16/us/politics/olson-memo-trump-election.html>.

undermining of a democratic election for President of the United States.”⁴⁷

That court was not alone in rejecting these election-subversion lawsuits. Lawsuits brought to challenge the 2020 presidential election failed massively, in multiple jurisdictions, and even led to disciplinary investigation of lawyers bringing the lawsuits.⁴⁸ Now, participants in those efforts appear here as amici, unabashed, but also undisclosed.

This Court may be startled by undersigned amici calling this group a “noxious assemblage,” but bear in mind that this is only what we know so far of their efforts to overturn an American election—state and federal criminal investigations and congressional investigations, as well as continued investigative efforts by the Fourth Estate, are still under way.

⁴⁷ *Wis. Voters All. v. Pence*, 514 F. Supp. 3d 117, 119 (D.D.C. 2021).

⁴⁸ See, e.g., Jan Wolfe, *‘Profound Abuse’: Judge Disciplines Pro-Trump Lawyers Over Election Lawsuit*, Reuters (Aug. 26, 2021), <https://www.reuters.com/world/us/judge-sanctions-sidney-powell-other-pro-trump-lawyers-who-claimed-voter-fraud-2021-08-25/>; Jonathan Stempl, *Giuliani’s Law Licence Suspended Over False Trump Election Claims*, Reuters (June 24, 2021), <https://www.reuters.com/world/us/rudolph-giuliani-is-suspended-law-practice-new-york-state-2021-06-24/>; Alison Durkee, *Sidney Powell Could Still Be Disbarred As Court Lets Case Against Her Move Forward*, Forbes (June 23, 2022), <https://www.forbes.com/sites/alisondurkee/2022/06/23/sidney-powell-could-still-be-disbarred-as-court-lets-case-against-her-move-forward/?sh=6007c52125df>.

B. The Court Should Not Give Credibility To Groups That Plot To Subvert American Elections

Given this context, undersigned amici urge the Court to remain clear-eyed about the implications of its decision in this case. No, a decision favoring Petitioners will *not* grant election deniers unbridled legal authority to use state legislative majorities to overturn future elections. The Constitution and federal legislation would still constrain state legislatures' treatment of federal elections.⁴⁹ However, the campaign to attack American elections from within does not require conclusively binding legal weaponry to damage our election security. The "Big Lie" has succeeded remarkably well at creating distrust, division, and discord based on propaganda alone.⁵⁰ For the Supreme Court to adopt election deniers' fringe theory to any degree would lend a gloss of credibility to this dangerous propaganda

⁴⁹ See Genevieve Nadeau & Helen White, *Independent State Legislatures and Presidential Election: Addressing Misconceptions About Current Law and Prospects for Reform*, Just Security (Aug. 16, 2022), <https://www.justsecurity.org/82685/independent-state-legislatures-and-presidential-elections-addressing-misconceptions-about-current-law-and-prospects-for-reform/>.

⁵⁰ Doug Bock Clark et al., *Building the "Big Lie": Inside the Creation of Trump's Stolen Election Myth*, ProPublica (Apr. 26, 2022), <https://www.propublica.org/article/big-lie-trump-stolen-election-inside-creation>; Nathaniel Rakich & Kaleigh Rogers, *At Least 120 Republican Nominees Deny the Results of the 2020 Election*, FiveThirtyEight (July 18, 2022), <https://fivethirtyeight.com/features/at-least-120-republicans-who-deny-the-2020-election-results-will-be-on-the-ballot-in-november/>.

campaign. Any supportive statements by this Court will likely be used to feed the campaign. And with a veneer of legitimacy, their propaganda campaign can be kicked into hyperdrive—thereby increasing the chaos through which election deniers hope their preferred candidates could defy the will of the electorate.

We as members of Congress have seen this before. This Court’s *Heller* decision (as much as undersigned amici disagree with it) left robust authority to enact commonsense gun-safety laws.⁵¹ The Court made clear that the Second Amendment does not provide “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁵² Yet, for years we witnessed the National Rifle Association, the gun lobby, and Republican legislators weaponize that decision rhetorically against virtually any new gun-safety law.⁵³ In the propaganda wars over gun-safety laws, the gun industry and its lobbyists created a façade of

⁵¹ *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (“The Constitution leaves the District of Columbia a variety of tools for combating the problem, including some measures regulating handguns.”).

⁵² *Id.* at 626.

⁵³ See Patrick J. Charles, *The Second Amendment in the Twenty-First Century: What Hath Heller Wrought*, 23 Wm. & Mary Bill Rts. J. 1143, 1148-49, 1156, 1159, 1167, 1171-72 (2015); see also Kate Shaw & John Bash, Opinion, *We Clerked for Justices Scalia and Stevens. America Is Getting Heller Wrong.*, N.Y. Times (May 31, 2022), <https://www.nytimes.com/2022/05/31/opinion/supreme-court-heller-guns.html>.

constitutional authority well beyond *Heller's* actual holding.

Election-denial extremists will have every motive to exaggerate this case too in their campaign to undermine American democracy, and the Court must be ready for it. Bipartisan efforts in Congress are underway to reduce the risk of successful subversion of presidential elections, but we urge that this Court do its part by denying these actors rhetorical ammunition for their unlawful, authoritarian schemes. The Court is being dragged into a dangerous mess, and it certainly deserves far better disclosure to navigate this treacherous terrain.

II. THE LACK OF TRANSPARENCY REGARDING WHO FUNDS PETITIONERS' AMICI CURIAE SHOULD CAUSE THE COURT TO REGARD THEIR PARTICIPATION WITH GREAT SKEPTICISM—A FACT MADE APPARENT WHEN AN AMICUS IS AFFILIATED WITH A MASSIVE DARK-MONEY EFFORT TO CONTROL COURT APPOINTMENTS

Legitimacy for a fringe theory pushed by groups with a history of election denial and voter suppression is not the only risk posed by the lack of transparency among amici in this case. The flotilla of election-denialist amici illustrates an important new phenomenon to which the Court must adapt: coordinated, orchestrated amicus briefs, filed by front groups whose primary function is to obscure the true interests lurking behind the anonymized briefs.

The two concerns amplify each other. Bad enough to adopt fringe arguments from election deniers; the Court would further undermine its credibility were it to adopt fringe arguments at the

urging of an armada of amici curiae hiding the true interests behind their arguments. One day the full story may emerge. Even the cursory look we provide in the previous section of this brief reveals an interlinked network of voter-suppression and election-denial groups which obscure the real (and likely common) sources of their funding.

The Court bears responsibility for the interpretations of Rule 37.6 that it permits; there is no one else to blame for this mess. Undersigned amici have submitted previous briefs to this Court warning of the potential conflicts of interest and dangers to the Court arising when orchestrated flotillas of amici curiae appear before the Court without sufficient disclosure.⁵⁴ In one instance, we cross-referenced in an appendix the common funders of nominally independent amicus filers, arguing that this barrage of briefs was likely coordinated by anonymous political and financial interests.⁵⁵ We have warned that this is just one element in a larger hazard to the Court of dark-money influence.

Secrecy obscures certainty about these connections, because the Supreme Court's rule

⁵⁴ See Brief of U.S. Senators as Amici Curiae in Support of Respondent at 14, *Americans for Prosperity Found. v. Bonta*, 141 U.S. 2373 (No. 19-251); Brief of Senators Sheldon Whitehouse et al. in Support of Respondents at 11-12, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (No. 20-107); Brief of Amicus Curiae Senator Sheldon Whitehouse in Support of Respondent at n. 18, 28, *Kisor v. Wilkie*, 139 S. Ct. 2400 (No. 18-15).

⁵⁵ See Brief of Amici Curiae U.S. Senators Sheldon Whitehouse et al. in Support of Court-Appointed Amicus Curiae, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (No. 19-7).

governing amicus disclosure, Rule 37.6, does not guarantee sufficient transparency. The transparency intended by this rule can be circumvented by amici construing it so narrowly as to require the disclosure only of funds dedicated to printing, binding, and filing costs—not real disclosure of the real funders at whose behest or for whose benefit the brief was written. Member amici are encouraged that the Judicial Conference takes this concern seriously enough to have appointed a subcommittee to consider necessary disclosure reforms.⁵⁶ We urge the Court to require such disclosures, in its own defense, as soon as possible.

We regret to say, however, that it gets still worse. For instance, amicus Honest Elections Project—a voter-suppression group with dark-money ties to longtime Federalist Society operative Leonard Leo—presents further, different dangers that inadequate disclosure rules pose. That group’s participation here underscores the need for the Court to ensure that parties, the public, and the Court itself can see who is actually behind arguments and briefs presented to the Court.

Not much good is ever done from behind masks. As discussed above, this case presents transparency problems from amici linked in clandestine fashion to one another and to a failed plot to overturn an American presidential election. Particularly in this context the presence of the misnomered “Honest

⁵⁶ See Nate Raymond, *U.S. Judicial Panel Zeroes in on Tougher Amicus Disclosure Rules*, Reuters (Oct. 13, 2022), <https://www.reuters.com/legal/legalindustry/us-judicial-panel-zeroes-tougher-amicus-disclosure-rules-2022-10-13/>.

Elections Project” raises additional, separate, and significant dangers.

Like other amici supporting Petitioners, the Honest Elections Project urges the Court to adopt the “independent state legislature” doctrine to “vindicate” constitutional principles behind the “plain meaning of the Elections and Electors Clauses.”⁵⁷ Like other amici, it does not disclose its links to dark-money funders of partisan gerrymandering operations and to other amici who seek to weaponize these gerrymandered legislatures using the “independent state legislature” doctrine. However, the Honest Elections Project brief also fails to reveal something quite different. The Honest Elections Project obscures its intertwined connections: to Leonard Leo.

Leonard Leo has worked behind the scenes to secure the overarching influence of the Federalist Society, widely reputed to have controlled (or provided the secretive forum for undisclosed donors to control) the selection of numerous sitting members of the federal bench, including this Court. He is behind the Judicial Crisis Network, which spent tens of millions of anonymous dollars supporting the confirmations of sitting members of the Court. The Honest Elections Project’s connection to Leonard Leo and its secrecy regarding its role in the appointment and confirmation process presents distinct dangers to the Court and its reputation.

⁵⁷ Br. of Amicus Curiae Honest Elections Project in Supp. of Pet’rs at 2-3.

1. The Honest Elections Project is anything but what its name states. For starters, that is not even its true name. “Honest Elections Project” is instead the “fictitious name” of another entity, the “85 Fund”—and it is only one of multiple “fictitious names” under which the 85 Fund operates, as can be seen in Appendix A. The 85 Fund, in turn, is the virtual corporate twin of another entity, the Concord Fund. The 85 Fund and Concord Fund are a twinned 501(c)(3)/501(c)(4) pair,⁵⁸ and accordingly this brief will refer to them hereon as the 85/Concord Fund.⁵⁹ But filing an amicus brief under a “fictitious name” without reference to the groups behind it is only the beginning of the problem.

2. Another “fictitious name” through which the 85/Concord Fund operates is the “Judicial Crisis Network”—a vehicle through which funds were anonymized and spent to pay for tens of millions of dollars of television advertisement campaigns for and against judicial nominees.⁶⁰ In addition to the \$7

⁵⁸ See Tyler J. Kassner, *Bringing Dark Money into the Light: 501(c)(4) Organization, Gift Tax, and Disclosure*, 10 *Hastings Bus. L.J.* 471, 476 (2014). The Court was recently presented with a case brought by another such twin, the Americans for Prosperity Foundation, which is the 501(c)(3) pair to the 501(c)(4), Americans for Prosperity—the primary political battleship of the Koch dark-money political influence operation. See *Ams. for Prosperity Found. v. Bonta*, 141 U.S. 2373 (2021).

⁵⁹ A graphic illustration used to illustrate the virtual identity of these two twinned groups is appended to this brief.

⁶⁰ The Judicial Crisis Network was once itself the paired 501(c)(4) twin to a 501(c)(3) organization, the Judicial Education Project. In 2019, these organizations changed their official names to the Concord Fund and 85 Fund, respectively, and

million it spent opposing then-Judge Merrick Garland’s confirmation to the Supreme Court,⁶¹ the Judicial Crisis Network pledged a total of \$30 million in spending to bolster the confirmations of former President Trump’s Supreme Court nominees⁶²—including spending \$10 million in under two months to support Justice Barrett’s confirmation.⁶³

Individual donations run through the Judicial Crisis Network for these confirmations ran as high as

adopted their previous monikers as “fictitious names” instead. Anna Massoglia, *Conservative ‘Dark Money’ Group Raised Record \$50M in 2020 After Election Rebranding*, Open Secrets (Dec. 16, 2021), <https://www.opensecrets.org/news/2021/12/conservative-dark-money-group-raised-record-50m-in-2020-after-election-rebranding/>; Lisa Riordan Seville, *These Lawyers Remade the Supreme Court. Now They’re Fighting to Limit Voting.*, NBC News (Nov. 1, 2020), <https://www.nbcnews.com/politics/2020-election/these-attorneys-remade-supreme-court-now-they-re-fighting-limit-n1245469>.

⁶¹ Press Release, Jud. Crisis Network, *Judicial Crisis Network Launches \$10 Million Campaign to Preserve Justice Scalia’s Legacy, Support President-Elect Trump Nominee* (Jan. 9, 2017), <https://judicialnetwork.com/jcn-press-release/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/>.

⁶² Anna Massoglia, *Kavanaugh Confirmation Battle Further Mystifies ‘Dark Money’ Spending*, Open Secrets (Sept. 27, 2018), <https://www.opensecrets.org/news/2018/09/kavanaugh-confirmation-dark-money/>.

⁶³ Press Release, Jud. Crisis Network, *Judge Amy Coney Barrett Confirmed* (Oct. 27, 2020), <https://judicialnetwork.com/in-the-news/judge-amy-coney-barrett-confirmed/>.

\$15 million, \$17 million, and \$23.5 million.⁶⁴ Because the donations were anonymized, we do not know whether they were all made by the same donor, but, in any case, almost \$75 million was donated to influence the makeup of the present Court—without a way for the public or the Court to understand who the donor or donors may have been or what matters or interests they may have before the Court.

3. But that is not all. The confusing organization of these entities helps mask the involvement of the person central to this dark-money network: Leonard Leo. Leo was instrumental in the preparation of the Federalist Society “short lists” of Supreme Court nominees used by then-candidate Trump as part of his commitment to appointing Federalist Society judges. He also advised on, and sometimes led, Supreme Court confirmation efforts under Donald Trump.⁶⁵ Before that, he had “served as the leader of

⁶⁴ Anna Massoglia & Andrew Perez, *Secretive Conservative Legal Group Funded by \$17 Million Mystery Donor Before Kavanaugh Fight*, Open Secrets (May 17, 2019), <https://www.opensecrets.org/news/2019/05/dark-money-group-funded-by-17million-mystery-donor-before-kavanaugh/>; John Kruzell, *It's True: Millions in Dark Money Has Been Spent to Tilt Courts Right*, PolitiFact (Sept. 11, 2019), <https://www.politifact.com/factchecks/2019/sep/11/sheldon-whitehouse/its-true-millions-dark-money-has-been-spent-tilt-c/>.

⁶⁵ Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, The New Yorker (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>; Seung Min Kim, *Gorsuch questionnaire reveals selection process details for SCOTUS nominee*, Politico (Feb. 11, 2017), <https://www.politico.com/story/2017/02/gorsuch-trump-selection-process-supreme-court-nominee-234932>; John T.

the campaigns supporting” the nominations of the Chief Justice and Justice Alito, during which time “[h]e and other members of an advocacy coalition spent about \$15 million in donations from undisclosed donors on ads, telemarketing and the mobilization of ‘grass roots’ groups.”⁶⁶

Leo was instrumental to the formation of the 85/Concord Fund, and he relied heavily on its node of front groups to further the confirmation of his preferred judicial nominees during the Trump administration, including those on the Federalist Society’s evolving short lists.⁶⁷ In particular, Leo indirectly oversaw the “Judicial Crisis Network”—as Leo’s former media director stated, the Judicial Crisis Network “is Leonard Leo’s [public relations] organization—nothing more and nothing less.”⁶⁸ The

Bennett, *Trump Taps Brett Kavanaugh for Supreme Court, Rightward Shift in Mind*, Roll Call (July 9, 2018), <https://rollcall.com/2018/07/09/trump-taps-brett-kavanaugh-for-supreme-court-rightward-shift-in-mind/>; Zeke Miller et al., *How It Happened: From Law Professor to High Court in 4 Years*, Wash. Post (Sept. 26, 2020), https://www.washingtonpost.com/politics/how-it-happened-from-law-professor-to-high-court-in-4-years/2020/09/26/fd5ab69a-0055-11eb-b0e4-350e4e60cc91_story.html.

⁶⁶ Robert O’Harrow Jr. & Shawn Boburg, *A Conservative Activist’s Behind-the-scenes Campaign to Remake the Nation’s Courts*, Wash. Post (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/>.

⁶⁷ See *supra* notes 58-63 and accompanying text.

⁶⁸ Jay Michaelson, *The Secrets of Leonard Leo, the Man Behind Trump’s Supreme Court Pick*, The Daily Beast (July 24, 2018), <https://www.thedailybeast.com/the-secrets-of-leonard-leo-the-man-behind-trumps-supreme-court-pick?ref=scroll>.

“CRC” entities shown in the appendix provide services to the 85/Concord Fund front-group array and are a means by which Leo extracts payment to himself from the apparatus.⁶⁹ None of this has been disclosed.

It certainly should have been disclosed. Due process and ethics concerns are raised when groups and individuals heavily involved in getting judges onto courts, or who have contractual promotional agreements with judges, then appear before those very judges.⁷⁰ It is not our point now to delve into the question of recusals or other measures. The

⁶⁹ 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>. A member of this Court, Justice Thomas, also employed CRC Advisors to promote a re-release of his memoirs last year. In the process, CRC’s press release advised the media that one of the officials they could contact with questions was the current listed Director of the 85 Fund, and longtime counsel to the Concord Fund, Carrie Severino. Roger Sollenberger, *Clarence Thomas’ Strange Pick to Promote His Book Says It All*, The Daily Beast (Mar. 8, 2022), <https://www.thedailybeast.com/supreme-court-justice-clarence-thomas-strange-pick-to-promote-his-book-says-it-all>.

⁷⁰ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87 (2009); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 434, 460-61 (2015); see Committee on Codes of Conduct, *Guide to Judiciary Policy*, Vol. 2B, Ch. 2 at 160-61, Jud. Conf. of U.S., https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf (“We have said that a judge’s impartiality might reasonably be questioned in a variety of situations where a judge is asked to hear a case involving a party with whom the judge does business. ... We have also said that it would create an appearance of impropriety for a judge who contracts with a party for the use of a service mark to hear cases involving that party.”).

disclosure question presented here is whether the parties and the Court should be aware of the extent of that activity, so that appropriate arguments and decisions can then be made.

The delegation of judicial nominations to a private organization that keeps its donors secret—and whose process for assembling and amending the Trump lists of Supreme Court nominees was also secret—is unprecedented in United States history. Undersigned amici are aware of no democratic country that has ever countenanced such a scheme. The danger of donor influence over the lists and the selections is obvious and profound. But the secrecy protecting that donor influence has made the situation even worse. It has kept the public and the Court from understanding what matters before the Court may have spurred the interest of big donors to the Federalist Society, the Judicial Crisis Network, and other groups in the effort—and what those donors hoped to gain from the Court’s decisions.

The connections between Leo’s role in the Trump Supreme Court nomination process, his dark-money entities that supported those nominees publicly, and his use of the Federalist Society in the nominations efforts suggest a single, sprawling operation. Present research values the expenditure on that operation at more than \$580 million.⁷¹ This is no small thing.

⁷¹ *Id.*; see also Vogel, *supra* note 69 (noting that the “nine core groups” in Leo’s network “have spent nearly \$504 million on policy and political fights, including grants to about 150 allied groups, between mid-2015 and last year). The pot of dollars and the complexity of the web keep growing. A recently disclosed

There are practical as well as financial links. As of 2019, the Judicial Crisis Network and the Federalist Society operated out of the same hallway in the same building in Washington, D.C., apparently sharing access to one another's offices.⁷² Several weeks ago, a news outlet reported that, after it submitted a request for comment from the Federalist Society on Leo's and the Federalist Society's connection to the Honest Election Project's filing in this case, the Federalist Society response was a statement from the executive director of the Honest Elections Project.⁷³

The Honest Elections Project is separated by the most diaphanous of veils from entities involved in orchestrating President Trump's selection of Supreme Court nominees. The veil separating the Honest Elections Project from the Judicial Crisis Network—the primary entity for turning anonymous donors' money into multi-million-dollar campaigns to urge the confirmation of the selected nominees—is nearly nonexistent: as noted above, both are “fictitious names” of the same twinned 85/Concord

\$1.6 billion contribution went to an apparently new front group in the Leo-managed network called Marble Freedom Trust. That entity then siphoned over \$16 million straight into the Concord Fund. Kenneth P. Vogel & Shane Goldmacher, *An Unusual \$1.6 Billion Donation Bolsters Conservatives*, N.Y. Times (Aug. 22, 2022), <https://www.nytimes.com/2022/08/22/us/politics/republican-dark-money.html>.

⁷² O'Harrow Jr. & Boburg, *supra* note 65.

⁷³ PBS NewsHour Weekend, *How the Outcome of Moore v. Harper Could Impact Federal Elections*, PBS (Sept. 11, 2022), <https://www.pbs.org/newshour/show/how-the-outcome-of-moore-v-harper-could-impact-federal-elections>.

Fund run by Leonard Leo. For Leo's organization now to come before this Court as an amicus, pretending to offer "nonpartisan" advocacy, without revealing any of the above connections and identities, presents an unfortunate hazard for the Court. Worse still is the Honest Elections Project's failure to disclose its major funders, disclosure which would no doubt shed light on the Honest Election Project's true interest in this case and illuminate its financial ties to other amici. Again, it is a hazard to the Court when the true dark-money interests behind a petition or a pleading are obscured.

We do know that most of the funding to the 85/Concord Fund over the past decade has come via two groups: DonorsTrust and the Wellspring Committee. Through donations as large as \$48.5 million, these groups routinely transited more than 80% of the 85/Concord Fund's revenue each year.⁷⁴ And this is not the only overlap. Both DonorsTrust and the Wellspring Committee have been dark-money conduits for partisan efforts to keep state

⁷⁴ See, e.g., Sam Levine & Anna Massoglia, *Revealed: conservative group fighting to restrict voting tied to powerful dark money network*, The Guardian (May 27, 2020), <https://www.theguardian.com/us-news/2020/may/27/honest-elections-project-conservative-voting-restrictions> (discussing donations from the Wellspring Committee and DonorsTrust to the 85/Concord Fund); Evan Vorpahl, *Leonard Leo's Court Capture Web Raised Nearly \$600 Million Before Biden Won: Now It's Spending Untold Millions from Secret Sources to Attack Judge Ketanji Brown Jackson*, TrueNorth Rsch. (Mar. 22, 2022), <https://truenorthresearch.org/2022/03/leonard-leos-court-capture-web-raised-nearly-600-million-before-biden-won-now-its-spending-untold-millions-from-secret-sources-to-attack-judge-ketanji-brown-jackson/>.

legislatures gerrymandered in order to favor Republicans, an essential building block to the misuse of the “independent state legislature” theory.⁷⁵ At the same time, the 85/Concord Fund has also funneled money into groups working to gerrymander state legislatures in favor of Republicans.⁷⁶

The Honest Elections Project shares funding and personnel connections with other of Petitioners’ amici. Amicus PILF received \$400,000 from the 85/Concord Fund in 2020⁷⁷—more than 10% of the

⁷⁵ David Armiak, *GOP Megadonor Art Pope Plays Leading Role in GOP Gerrymandering Operation*, Ctr. for Media & Democracy (Sept. 28, 2021), <https://www.exposedbycmd.org/2021/09/28/gop-megadonor-art-pope-plays-leading-role-in-gop-gerrymandering-operation/>; David Armiak, *“Dark Money ATM” Pumped over \$137 Million into Right-Wing Groups in 2020*, Ctr. for Media & Democracy (Nov. 19, 2021), <https://www.exposedbycmd.org/2021/11/19/dark-money-atm-pumped-over-137-million-into-right-wing-groups-in-2020/>; David Armiak, *Donor Trust and Donors Capital Pumped at Least \$90 Million into Right-Wing Causes in 2019*, Ctr. for Media & Democracy (Dec. 3, 2020), <https://www.exposedbycmd.org/2020/12/03/donor-trust-and-donors-capital-pumped-at-least-90-million-into-right-wing-causes-in-2019/>.

⁷⁶ Nick Surgey, *Corporate-backed Group Launches Multi-million Dollar 2020 Republican Gerrymandering Project*, Documented (Sept. 6, 2019), <https://documented.net/reporting/corporate-backed-group-launches-multi-million-dollar-2020-republican-gerrymandering-project>.

⁷⁷ The 85 Fund, IRS Form 990 (2020), <https://s3.documentcloud.org/documents/21165175/the-85-fund-2020-990.pdf>. Because the public does not yet have access to the 85/Concord Fund’s most recent IRS tax forms, we do not know whether it continues to fund PILF.

total grants that PILF received that year.⁷⁸ Furthermore, one of PILF’s longtime board members and treasurer also helped Leo found and run the day-to-day operations of the 85/Concord Fund, as well as other groups in Leo’s network.⁷⁹

Two other amici received large amounts of funding in recent years from the 85/Concord Fund’s primary donor: DonorsTrust. In 2019 and 2020, DonorsTrust contributed more than \$223,000 to amicus Claremont Institute.⁸⁰ And DonorsTrust has sent almost \$2 million to amicus ALEC since 2017,⁸¹

⁷⁸ See Public Interest Legal Foundation, IRS Form 990 (2020), <https://s3.documentcloud.org/documents/21268337/public-interest-legal-foundation-2020-990.pdf>.

⁷⁹ Alex Kasprak, *How to ‘Weaponize’ Misleading Narratives About Voting: Lessons from Trump-Linked PILF Playbook*, Snopes (Oct. 15, 2020), <https://www.snopes.com/news/2020/10/15/the-fog-of-war/> (“Neil Corkery has served as president of the Judicial Education Project and treasurer of the Judicial Crisis Network and is also the current treasurer of PILF.”); Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo—Federalist Society Leader, Promoter of Amy Barrett*, TrueNorth Rsch. (Oct. 9, 2020), <https://truenorthresearch.org/2020/10/snapshot-of-secret-funding-of-amicus-briefs-tied-to-leonard-leo-federalist-society-leader-promoter-amy-coney-barrett> (noting that the Judicial Crisis Network “was created at a small dinner party Leo attended with Corkery after the 2004 election” and documenting Corkery’s other ties to Leo groups).

⁸⁰ DonorsTrust, IRS Form 990 (2019), <https://www.documentcloud.org/documents/20419320-donorstrust-2019-990>; DonorsTrust, IRS Form 990 (2020), <https://www.documentcloud.org/documents/21114255-donorstrust-2020-990>.

⁸¹ David Armiak, *DonorsTrust Bankrolled Right-Wing Judicial Appointments, Trump’s Acting AG, and Lobbying Front Groups*

in addition to providing more than 16% of the total funding in 2020 to FreedomWorks⁸²—a member of the aforementioned ALEC “sister organization” and home of Cleta Mitchell’s “Election Integrity Initiative.”⁸³

The Court is thus presented here with an extraordinary circumstance. The Honest Elections Project joins Petitioners and other amici asking this Court to change the rules governing federal elections, transferring unprecedented power to many of the same state legislatures that have been distorted by partisan gerrymandering, which in turn the 85/Concord Fund and its major donor conduits have facilitated. In this light, it can clearly be seen that the “independent state legislature” doctrine is weaponry to further enable their effort to manipulate presidential elections outside the discipline and accountability of a true popular vote. The Court should steer well clear.

In addition, the Court should act to protect itself. Opaque veils of secrecy obscure any complete understanding of this whole \$580 million operation,

in 2017, Ctr. for Media & Democracy (Feb. 19, 2019), <https://www.exposedbycmd.org/2019/02/19/donorstrust-bankrolled-right-wing-judicial-appointments-trumps-acting-ag-and-lobbying-front-groups-in-2017/>; DonorsTrust, IRS Form 990 (2018), <https://www.documentcloud.org/documents/6591977-DonorsTrust-2018-990.html>; DonorsTrust, IRS Form 990 (2019), *supra* note 80, IRS Form 990 (2020), *supra* note 80.

⁸² DonorsTrust, IRS Form 990 (2020), *supra* note 80; FreedomWorks, IRS Form 990 (2020), <https://www.documentcloud.org/documents/21269178-freedomworks-2020-990>.

⁸³ *See supra* note 35 and accompanying text.

the dark-money funders behind it, or their business or interests before the Court. But even the shreds of information we can see implicate the Court's precedents about both the appearance of impropriety and the dangers of actual impropriety regarding the funding of judicial candidates' ascension to the bench. \$580 million is a lot of money, and checks for \$15 million and more are very big checks; they indisputably fall in the *Caperton* range.⁸⁴

Transparency is necessary both to preserve the public's trust and to ensure that the Court avoids undisclosed pitfalls at the hands of self-serving anonymous, dark-money amici. Democracy is not well served by a Court disclosure regime that depends on other amici like us to alert the Court to these threats—it should not be our job as members of Congress to bring these matters to the Court's or the parties' attention, especially when the Court could be doing so much more to safeguard itself.

* * *

The dark-money influence mess in which the Court is now enmired—from the dark-money donations to the Federalist Society as it assembled

⁸⁴ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009). Set aside the propriety *vel non* of multi-million dollar donors advocating before the Court in plain view; the failure to disclose as they advocate here is a separate danger and disservice to the Court. At the end of the day, the Court might decide that there is no risk of impropriety from groups advocating before the Court who profoundly influenced with tens of millions of dollars the selection and confirmation of sitting justices. But the question here and now is whether such groups should be able to dodge that inquiry by failing to disclose the influence, and by operating through “fictitious names.”

and amended the Trump Supreme Court lists; to the dark-money political spending on television advertisements by the Judicial Crisis Network; to as-yet unknown dark-money spending into political campaign funds, SuperPACs and “independent” campaign efforts for the politicians involved in nominations and confirmations; to the dark-money-funded flotillas of amici like those present here—is unprecedented and unhealthy. This case provides yet another opportunity for the Court to begin cleaning up the mess. This should start with the Court rejecting the radical arguments of the dark-money anti-democratic election-denial network that has gathered in this case. But the Court should go on to recognize the persistent danger of interconnected webs of entities that flout proper disclosure. True amicus transparency is required.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of North Carolina for the reasons expressed here and in Respondents’ briefs, and use the lessons of this episode to prevent further covert appearances in its cases by interests hiding behind non-disclosing amici.

Respectfully submitted.

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APPENDIX A

