

Speaker 1:

... the chief justice, if it please the court. It's an old joke, but when a man argues against two beautiful ladies like this, they're going to have the last word.

Speaker 2:

She spoke, not elegantly, but with unmistakable clarity. She said, "I ask no favor for my sex. All I ask of our brethren is that they take their feet off our legs."

Kate Shaw:

Welcome back to a special episode of Strict Scrutiny, your podcast about the Supreme court and the legal culture that surrounds it. We are your hosts today. I'm Kate Shaw.

Leah Litman:

And I'm Leah Litman. So we have a very special episode for you today. Just simply by keeping up with the court's docket, we haven't had that much time or space for court culture episodes or segments, but this episode should make up for it in spades. And since we have been inviting back our favorite guests as of late, we of course had to do another episode with Senator Sheldon Whiteboard Whitehouse, the new chair of the judiciary committee subcommittee on the federal courts. Welcome back to the show senator.

Sen. Whitehouse:

Thank you professor, it's wonderful to be with you again.

Leah Litman:

We're glad we convinced you we're not actually scary, such that you were willing to come back.

Sen. Whitehouse:

Professors are always scary. I'm sorry, you're just stuck with that.

Kate Shaw:

So the subcommittee on the federal courts had its first hearing under Senator Whitehouse's leadership on March 10th. The topic of the hearing was what's wrong with the Supreme court? The big money assault on our judiciary. Senator, I gather this is the first in a series of hearings that you're planning on this topic or related topics. And particularly since this issue ties in with a case that the court is slated to hear this term, which you predicted or warned that they would the last time you were on the podcast, we were really happy when your staff reached out about coming back on the show.

Leah Litman:

I believe you also called this hearing one of the livelier hearings, Senator, in your closing remarks. So why don't we play that clip here?

Sen. Whitehouse:

This was one of the livelier hearings that I've had the pleasure to be at. And I hope that it begins some of the conversations for which the Senate is famous. If I had to use an analogy to my colleagues, I would

use the analogy of a football game in which under the rules, the football players have been allowed to bring a baseball bat out onto the field and whale away at the members of the other team. And we have the chance to actually get rid of that rule, that the baseball bats have to go to the baseball field and used to hit baseballs instead of on the football field and used to hit other players. But while that's the rule to ask one team to say, "Well if you were serious about changing the rule you'd put down your baseball bats and let us whale on you undefended," makes no sense at all. Makes no practical political sense at all.

Leah Litman:

So maybe we can do some recapping of this livelier hearing for our listeners. And we'll focus on two things about the hearing, first the scope of the dark money issue that the hearing was focused on. And second, the reform that was the topic or subject of interest of the hearing, the DISCLOSE Act.

Leah Litman:

So maybe we can just begin by talking a little bit about the scope of dark money influence on the federal courts. Senator, I know this is a topic near and dear to your heart, so maybe you can give our listeners a brief introductory lesson about this topic?

Sen. Whitehouse:

Sure. It comes in a two and possibly three phases. The first phase has to do with the appointment of justices to the Supreme Court. Which, for the first time in American history and I think uniquely anywhere in the world, was farmed out to a private interest group. The Federalist society and Leonard Leo, that crew has managed the last three Supreme Court nominations. And that's bad enough, but when you add in the fact that at the same time they were overseeing the process of nomination and selection they were also taking huge, huge, huge donations. And refusing to disclose who the donations were coming from and refusing to disclose what they were doing, what their process was for getting the nominees into the white house to be formally nominated by the president. So all of that reeks of danger.

Sen. Whitehouse:

And then you throw in the fact that these days you have a practice I guess you'd say now, of advertising. TV ad campaigns, political ads for the nominee to try to push the nomination along. And that program too, which is run out of the office next to the judicial selection office, also funded by huge anonymous donations. So if you wanted to influence the Supreme court in the way that lawyers would want to influence say jury selection, by picking favorable jurors in and screening unfavorable jurors out, you'd pay pretty big money to do that. And the fact that it's secret is a real problem. So that's phase one.

Sen. Whitehouse:

Phase two is the amicus problem of this Armada of, I think, largely front group of Amici Curiae, friends of the court who turn up to advise the court on what people want. And they tend to be funded by the same donors who funded the selection operation. So the whole thing, unfortunately, looks like it ties together and it's all screened behind secrecy. And all of that is very undemocratic and fraught with risk for the integrity of the court.

Leah Litman:

And just to give our listeners some sense about the amount of money that we're talking about here, so the Washington post reporting on Leonard Leo who was the head of the Federalist society for a while, revealed that between 2014 and 2017 Leonard Leo's family of groups raised around \$250 million. And an individual organization in that network, the judicial crisis network, spent something like \$10 million on the Gorsuch nomination, they pledged to spend something like 20 million together between the Gorsuch and Kavanaugh confirmations. They also spent almost \$7 million to work against the Garland nomination, during which time they received a single donation of almost \$18 million. And we just have no idea who was so invested

Sen. Whitehouse:

And what business they had before the court.

Leah Litman:

Right. In ensuring Merrick Garland would be on the Supreme court to hear some possible cases in which they were involved.

Sen. Whitehouse:

The analogy here is to jury selection. If you, as a lawyer in a case, have the ability to select the jury, you can dramatically increase your chances of winning that case. There's a reason we have a very robust jury selection process and protections. You don't have to say that an individual judge is corrupt or is taking a bribe to understand that there's a real problem when a private interest controls the turnstile onto the court and is selecting favorably minded judges, some of whom have auditioned for that role with the big donors.

Kate Shaw:

Can I ask you, Senator, to respond to some of the concerns that were raised by your GOP colleagues on the committee and the Republican witnesses, that this is really a type of activity that both sides engage in and that sort of big dark money flows on both the left and the right?

Sen. Whitehouse:

Yeah, that's kind of a red herring argument. First because it's not entirely true. Nobody is suggesting that any left wing organization has orchestrated three United States Supreme Court justices being ushered onto the court. That just ain't so. And more to the point, the purpose of this exercise is to clean up the whole mess, and the legislation that we're supporting would clean up the whole mess. It doesn't distinguish between right-wing or left-wing efforts to manipulate this, all of it has to be disclosed. So there's something a little bit less than fully logical, let's just say, about saying, "Yeah, but both of us do it and therefore we're going to oppose your legislation that would make both of us stop it."

Leah Litman:

Yeah. During that segment in which some of the senators were suggesting both left and right groups take dark money, one of the organizations they pointed to on the left, just to give our listeners some sense of the disparity, was the People's Parity Project and organization that was founded last year by a group of four women in law school with one, literally one, full-time employee. And they're equating this to the \$250 million family of organizations run by Leonard Leo. And it's like these things are just... They're not the same.

Sen. Whitehouse:

They also equated the Ford Foundation, which is an amazingly well-established public interest foundation that doesn't seem to have much in the way of a political motive or purpose. And they equate that with the Judicial Crisis Network, which is basically a sham operation run right next door to the Federalist Society with very interchanging donors and leadership. And I think that if you put the two side-by-side it's easy to tell which is the legit, robust, real organization, and which is the front group

Leah Litman:

Are we're going to be focused primarily on the role of dark money in the courts in this episode, but I did want to note during the opening remarks Senator Durbin noted that as of late a lot of this dark money, including from the same groups that have been involved in funding campaigns for justices, have been funneling this money toward voter suppression and projects that are designed to legitimate restrictive voting laws.

Sen. Whitehouse:

Same guy. Leonard Leo. Once the Washington Post exposed him with the \$250 million exposé he jumped out of the Federalist Society court packing scheme and into the so-called Honest Elections Project voter suppression scheme. And of course with Joe Biden as president they're not exactly going to be able to control judicial selection, so while they hibernate until their next Republican president they've moved to their other priority which is voter suppression. And the money and the groups and the people have all pivoted.

Kate Shaw:

We thought maybe at this point it'd be helpful to hear you talk a bit about what this legislative reform proposal would do, right? So what would the DISCLOSE Act do broadly speaking? And then just what purposes would disclosure serve in your mind?

Sen. Whitehouse:

So there are two pieces to this. The DISCLOSE Act would require anybody who gives more than \$10,000 into political elections to disclose that it's them. And it's designed in such a way that when you try to hide behind the Russian nesting dolls of a donation laundered through donor's trust into a 501c4 to a Shell corporation, ultimately to the super pack, yet we can drill all through all that stuff and find out who it really is. So it's going to be effective for people donating over \$10,000.

Sen. Whitehouse:

And then we add to it judicial nomination, televised advertising campaigns, because those, I think, are analogous and should also be covered. So we would know who that person was, Professor Litman, who gave the \$17 million plus contribution to Judicial Crisis Network to fund the anti-Garland, pro-Gorsuch TV campaigns.

Leah Litman:

Spoiler alert, it wasn't me.

Sen. Whitehouse:

It's a shame to have unlimited money in politics because it gives undue influence to people who have unlimited money. But at least if who it is the citizenry, the ordinary citizen can get the joke. They can see the motive, they can see the conflict of interest and they can do the appropriate discounting. If it's, "Hi, I'm Koch Industries and I approve this message," or, "Hi, I'm ExxonMobil and I approve this message." If it's, "Hi, we're Americans for peace and puppies and prosperity," and you go and look them up and it's a mail drop or a front corporation, you don't know the story. You're being deprived of basic citizenship information.

Kate Shaw:

And what you're describing is what the Supreme Court has talked about in these disclosure cases as the informational interest in disclosure, right? It arms the populous with the kind of tools to make meaningful choices at the ballot box, but it also provides information intermediaries with a lot more meaningful data that they can use to track influence in politics. Right? So even if people aren't necessarily casting votes on the basis of this additional information, journalists and watchdogs and other organizations and Congress can actually follow the money and track influence and figure out whose interests elected officials are actually responding to. So I do think it's important this informational interest is pretty expansive, right? And it can sort of have meaningful impact at a lot of parts of the electoral process.

Sen. Whitehouse:

And there's an accountability interest as well that we all see. Let's just hypothesize that ExxonMobil is going to spend \$10 million against a candidate and they have to say, "We're ExxonMobil," well first of all they might not get into that race because it might actually help the candidate to know that they're the candidates standing up against ExxonMobil. And second of all, ExxonMobil is going to be a little bit careful what it says to try to keep it truthful. Because there is a reputational harm if you're lying and smearing in ways that the public takes offense to. But again hypothetically, if you're ExxonMobil and you set up a phony front group like Americans for peace and puppies and prosperity, and they're dumping the poison and the smear into the political ecosystem, you walk away with your hands free. People still hate it, it's still poisonous and toxic, it's still lies and nonsense, but the accountability for those lies and nonsense doesn't land anywhere real. And therefore you get what has been referred to as the tsunami of slime in our politics.

Leah Litman:

I thought one of the witnesses, Michael Klarman, explained the informational interest that Kate you were alluding to and Senator you were discussing, really well in response to a question from Senator Hirono.

Sen. Hirono:

What role can disclosure play in addressing the dark money problem?

Michael Klarman:

I think the case that was made by the other witnesses was a good argument for requiring the left to disclose dark money as well as the right. If you just asked an ordinary citizen their opinion, "Somebody's giving you advice, your doctor is giving you advice about what medications to take. Do you not think everybody would agree that they would want to know whether the doctor had a financial interest with a pharmaceutical company in prescribing a certain drug?" Well of course the answer is yes. Everybody

would like to know if the Koch network is spending money opposing a light rail transportation that's up for a referendum in Nashville, and their argument is simply, "Oh, this is going to raise your taxes." Do you not think the ordinary citizen would want to know that the Koch brothers depend entirely on people continuing to use fossil fuel and drive their cars, thus they have an exoteric, they regard light rail as an existential threat to their business. And the answer is of course everybody would want to know that.

Leah Litman:

So something else I wanted to turn to is one theme that was emerging from your GOP colleagues, Senator, was wanting to know exactly what we're talking about when we say the system is rigged. So Senator Kennedy in particular wanted to know if the allegation was these groups were giving money to the justices, and the justices were exchanging votes for that money. That seemed to be Senator Kennedy's understanding about what a rigged system would mean.

Sen. Whitehouse:

The quid pro quo corruption theory.

Leah Litman:

Right. I'd love to hear you talk more about this, but in my mind this is missing the point a little bit. Because what I understand part of the problem to be is not only the informational interests that we're talking about, but the point is these groups are paying to put on candidates or judges who they know or they think will advance their interests not because they're paying them, but because they share their worldview, even if they justify it in different terms. And it's relevant that we all know that these groups think these judges or justices share their worldview and advance their interests. That helps us understand what the stakes of these disputes are. So maybe, Senator, if you wouldn't mind just elaborating a little bit on what we mean when we say, "This dark money system is rigged," if we're not talking about just the quid pro quo aspect of corruption?

Sen. Whitehouse:

Sure. I think there are three models. One is the quid pro quo aspect, and I do think that we need to clear that up by having the court disclose gifts and travel and hospitality the way the circuit courts do, the way members of Congress do, the way cabinet officials do. There's a pretty robust standard for disclosure, and the Supreme Court has just not held itself to that standard. So we don't know if justice Scalia's all expenses paid hunting vacation on which he passed away would have been disclosed had he not passed away on it and made news that way. But I don't think that's the core of the problem, I think it's something that you need to run down and look at and need to sort out the disclosure problem.

Sen. Whitehouse:

But the second is what I would call team bias. Which is that what team brought you, you go and you speak at their team fundraising dinners, you associate yourself with the groups that are trying to influence the court. And I think that team bias problem is very, very real.

Sen. Whitehouse:

And the third is what I call the jury selection problem, that if you can pick the judges you can pick the outcome. And they're going out of their way to pick judges. And it's so obvious right now that I had circuit court judges bemoan to me what they see as colleagues who are auditioning for advancement to

the Supreme Court by signaling to this operation that they'll be good boys and girls when it comes to dark money, when it comes to deregulation, when it comes to unitary executive. And if you're a fellow circuit judge and you see a decision that suddenly it goes off on a tangent to audition, you recognize that kind of behavior. So I think that jury selection problem has an auditioning component to that makes it even worse. It's like if you're going to be paid to be on the jury and people are auditioning to get on the jury, it's not just a jury selection problem. But that's, I think, the rubric you put it under.

Leah Litman:

Yeah. And so again Professor Michael Klarman, not to go total fan girl here, but I just think he was a really great witness because he really, I think, brought home how it's relevant or would inform people's views about a nominee if, for example, they think that big oil believes that this nominee shares the same worldview as them. So here we're just saying what people think about someone else, the nominee can be good evidence about that person's character or hear the decisions they might reach. In a lot of cases these groups are right. We can think about what's happening now for example, where a lot of the groups that we're paying money to support President Trump's nominees are funded by the same people that are now bringing the lawsuits to challenge things like the Center for Disease Control's eviction moratorium. And so they were correct in thinking that these judges who President Trump was going to appoint were going to advance their interests in at least some cases

Sen. Whitehouse:

That would be their intention. You don't spend \$250 million just to roll the dice.

Leah Litman:

Right. And that's not to say this happens all the time or that judges don't occasionally throw in a ruling that surprises you or a group. But as, again, Michael Klarman suggested, this happens in a lot of the big cases affecting our democracy in particular.

Sen. Whitehouse:

A lot of cases. We've targeted 80 cases that were five to four partisan decisions with an obvious donor interest in which the Republican donor interest won. The big flagrant ones are obviously Citizens United, Shelby County Heller, ones like that. But the difference between the two cases, the ones in which they don't particularly care and the court can just do its thing and the ones in which they care a lot, that difference is very often signaled by these amicus groups who turn up in little orchestrated flocks and have, I think, a rather coral effort to send the concerted message to the judges on the court. This is what our team wants, guys.

Kate Shaw:

We'll turn now to the key constitutional objection to the extent there really is one, or there was one that emerged during the hearing. And that's that there is some first amendment problem, on encroachment upon first amendment associational interest is typically how it's framed in requiring the disclosure of the identity of donors. Let's start by playing a clip between Senator Hirono and, again, Michael Klarman about the 1958 case NAACP vs Alabama that is often a case that is invoked in these debates.

Michael Klarman:

The only question here is whether there's some constitutional constraint, and I imagine we're going to talk more about-

Sen. Hirono:

Is there?

Michael Klarman:

Well there's NAACP versus Alabama, which is a very, very different case. So in 1958-

Sen. Hirono:

There's a very specific case. I'm somewhat familiar with the facts of that 1958 case. And for to use that to protect the disclosure of dark money because some people might get hurt or whatever, I'd like to see the evidence. It's like there's no evidence that there was fraud in the elections, but that doesn't stop certain people from continuing to push out those kinds of positions. So yes, if that's the only case that ain't much.

Kate Shaw:

So there was that exchange. It was also the case of the witness from the Becket Fund invoked exactly the same case when Senator Blumenthal asked if he supported the disclosure requirements. Then Jealous later in the hearing, very, I think, effectively responded to the suggestion that this case has any relevance to a legislative proposal like this one. Which is to say that in 1958, the state chapter of the NAACP was subject to harassment, and in which the Supreme court said there was basically no question that the disclosure of membership lists, which is what the state officials in Alabama were seeking, would have led to economic reprisal, loss of employment, threats of physical coercion, real, mortal danger for members of the NAACP state chapter in 1958 in Alabama. But it is a case in which the Supreme Court did sustain a first amendment objection to a compelled disclosure requirement. So at a very high level of abstraction or generality, it's not an irrelevant case but it is so distinguishable from proposals today to require the kinds of disclosure that you were contemplating here that it is always kind of maddening to see it invoked in these kinds of debates.

Kate Shaw:

So I guess if you talk just in general about what you view as the constitutional landscape here? And then Senator Kennedy also, sort of kind of less in the realm of constitutional discourse but you kind of likened this to cancel culture, right? So we're going to get these names disclosed and then people are going to be subject to not physical reprisal, as was the case in the Alabama case, but being canceled on social media or elsewhere, and that this was in some ways the problem with a proposal like this. So what's your response to all of that?

Sen. Whitehouse:

It's kind of the wolves in sheep's clothing analogy. Wolves and lambs are both mammals, but most people understand that there's a difference between the two. And that's the difference that exists between a powerless, very much discriminated against, deeply threatened, I mean lynchings, beatings, bombings, burnings were a regular occurrence in the Jim Crow South, and an ordinary NAACP member was truly at risk of real physical violence. And so I think it's really hard for secretive billionaires who are trying to manipulate their country's politics from behind a very expensive array of complicated front

groups and are basically running a massive covert operation against their own countries to try to get them their wolf-y, lupine selves into the skins of those lambs. That's the fundamental distinction that I think is the operative one.

Sen. Whitehouse:

From a constitutional point of view you begin to run into... Every constitutional doctrine ends when it hits the boundaries of other doctrines, and the doctrine of Citizens United, the only one that I agree with at least eight to one, was that when you stand up in what is public discourse in a Republic yeah, there is going to be criticism back. That's part of public discourse. You don't get to hide. And if you do get a threat, we've got a law enforcement community that knows very well how to address those threats, and a legal system that will prosecute them. very different from Alabama in the '50S when the law enforcement establishment was very much on the side of the Jim Crow operation, and conspicuously failed to prosecute lynchings, beatings, burnings, and bombings. and when they tried they got an all white jury and boom, nobody got convicted. The comparison between the two is actually really kind of morally offensive. I get that their lawyers think that it's cute, but if you can't tell the difference between an ordinary NAACP member in the Jim Crow South and the Koch huge multi-hundred million dollar dark money operation, I don't know how you can be helped.

Kate Shaw:

Yeah, I think that's well said. And there's one other Supreme Court case that I wish would be raised more in these debates, which is Doe versus Reed, right? The same year as Citizens United the Supreme court rejects a first amendment challenge to a Washington State disclosure requirement that gave branded public access to certain public records, and here there were signatures on a petition for a ballot initiative that were being sought pursuant to this public records request. And the ballot sponsors and some of the signatories didn't want their identities becoming public, and so raised a first amendment challenge to this compelled disclosure under state law. And the Supreme court, like in Citizens United, eight one rejected the first amendment challenge. Now it was a little bit more of a fractured decision on the disclosure point than the eight one vote count suggests, but I love the Scalia concurrence in that case. And I think the people who raised the NAACP case here should be required to respond to it.

Kate Shaw:

So if you'll indulge me for a minute, Scalia basically says... And I want to read a couple of sentences from the quote. He says, "Short of unlawful action, harsh criticism is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage without which democracy is doomed." So he basically says you have to stand by your views, and if that means owning up publicly to the money that you spend in our political process or judicial process, or taking responsibility for the signatures that you provide to get initiatives on the ballot, that's democracy. And I just think it's such a powerful point that I'm just not sure I've heard on the other side a very effective response to. Apart from this kind of vague invocation of cancel culture which Scalia, I think, was really kind of unsympathetic toward. He sort of said fine, so that's scary? You're going to be unpopular on the internet?

Sen. Whitehouse:

Yeah. I mean the whole cancel culture idea is ridiculous. You're going to have a bad day on the internet? Give me a break. You're going to get shunned and somebody turn their back on you at your country club because they think you're an awful person for what you're doing to try to manipulate our politics? Too

damn bad. Give me a break. That doesn't count in all of this. And the idea that these Republicans are all excited about cancel culture when they basically canceled cultured climate change, climate science, science generally when it offended their fossil fuel donors. The selectiveness of this cancel culture theory and the blindness to their own. I mean these guys were the ones who invented cancel culture by canceling out the science of climate change.

Leah Litman:

Merrick Garland was also canceled, but...

Sen. Whitehouse:

Oh yeah, he was totally canceled. No, we're not going to have you, we're not even going to meet with you we're so canceling you. You can't even come into our office. Who are you? You don't exist.

Kate Shaw:

Two other small points to make. I mean one, so even if, I think, as all of us are pretty unsympathetic to these kinds of broad cancel culture concerns, if there's genuine evidence that real harassment or reprisals are a live possibility or have actually occurred, courts post Citizens United and in the decades before that, courts decades have been sustaining on occasion as applied challenges to various kinds of disclosure requirements when there's strong evidence that there's a need to do so in discrete cases. So I think it's important to make clear that even if they reposeful like yours were to become the law and in States that already have various kinds of disclosure requirements, courts aren't disabled from, in individual cases, occasionally being responsive to real concerns. Most of these concerns go nowhere, but very occasionally they do get sustained.

Kate Shaw:

So that's one thing I wanted to flag, and the other thing is I do think it's interesting that you've set the disclosure level at \$10,000, which seems to me to reflect some responsiveness to this concern that maybe if you do care a lot about anonymity, just keep your donations low. And \$9,999 is also still a significant amount of money, but it does seem to allow the possibility that for people who may really prefer to stay out of the public eye for whatever reason, they can still be active in participating in this piece of the process of money and politics, it's just the really big donors who are going to be captured by a proposal like this one.

Sen. Whitehouse:

Yeah. The other point, Professor Shaw, that I've mentioned with respect to courts in this space is that if in fact you are the victim of a public campaign of lying and of verbal harassment that has actually harmed you, that's a cause of action. And we saw the parents of the young man who was murdered in Washington who the right accused of having been killed by Hillary Clinton's operatives win enormous judgment against the propagators of that lie. We saw info wars lose a big case about their very harmful false pretense that the Sandy Hook massacre was staged and that the parents of those murdered children were faking it. And just now we've got dominion coming in and going after the big lie that they had something to do with Donald Trump losing the election. So if in fact there is evil afoot in the public sphere and you're the victim of it, courtrooms are there for you. Even without having to go to law enforcement if it's the kind of threat that is prosecutable,

Leah Litman:

The only other thing I would add to this first amendment discussion before we turn to the actual Supreme Court case that is presenting this precise question, is that short of circumstances where disclosure actually leads to harassment, retaliation, threats of physical harm, the conduct that opponents of disclosure requirements are trying to shield themselves from is itself oftentimes first amendment protected activity. Like the ability to criticize someone on the internet, the ability to decide I'm not going to buy this product because I don't support the company's stance, that's first amendment activity. And so you can't just say well you have a right to be immune from criticism or people exercising their ability to express their view.

Sen. Whitehouse:

It's a one way ratchet that goes only their way.

Leah Litman:

Right. So maybe now we can turn to the Supreme court's case that is actually going to be deciding these issues in the context of a challenge to a California disclosure requirement. Senator, last time you were on the podcast you actually warned about the possibility that the Supreme Court would take this case. Congratulations, you're now officially a Cassandra, able to predict the truth but not always be believed.

Leah Litman:

So the case is Americans for Prosperity Foundation versus Becerra, also consolidated with Thomas Moore Law Center versus Becerra. And it involves a California law that requires tax exempt organizations to submit to the state attorney general on a confidential basis for regulatory oversight. The documents they give to the IRS identifying their major donors, so not all the donors, just major donors. And California says they use this information to detect or investigate fraud, self-Dealing, abusive tax exempt status and other regulatory matters.

Leah Litman:

So Americans for Prosperity Foundation and Thomas Moore Law Center are arguing they don't want to disclose their donors, and so they brought a first amendment challenge arguing that the requirement burdens their freedom of association. They are arguing, again, that this disclosure requirement will place some donors at risk of harassment. And the specific question that the court is answering is whether this disclosure requirement is substantially related enough to a legitimate government interest, or whether it has to be narrowly tailored to achieve that government interest. So Senator, I know you have filed a terrific amicus brief in the case, maybe you could tell us a little bit about the amicus brief? Which I feel the need to give a content warning about to justice Alito and his law clerks. Might want to eat your Wheaties for breakfast before you read the brief.

Sen. Whitehouse:

So let's start by just taking a quick look at this case. This is perhaps the tiniest disclosure that you could imagine. This is a disclosure of information that the IRS already has, providing the exact same form that they provide to the IRS also to the California taxing authorities to be held confidential also by the California taxing authorities. That's the sum and substance of the disclosure at stake. And as you pointed out Professor Litman, the scam checking function of California to make sure these things aren't being abused is an obvious governmental purpose here, set against that tiny disclosure of essentially no cost to the disclosing entity because it's already on their 990, it's just mail them a copy of it. So there's really almost nothing going on in this case, which makes one wonder why the Supreme court would bother to

take it up? Except for the fact that it opens this door. And at the cert stage, at the certiorari stage when the pitch was being made to the Supreme court to take this case, more than 50 of these funny, dark-money-funded front groups turned up as amicus curiae, friends of the court.

Sen. Whitehouse:

We've been tracking this, and usually they arrive in little flotillas of 10 or 12, even in pretty sexy cases for the right wing. Like the Consumer Financial Protection Board, I think we targeted about a dozen of them in that case in an appendix we filed with the court. This was over 50. This was the biggest thing ever for them. So when you see this tiny little hook and you see this enormous appearance, you know that they're hunting bigger game. And we know in Congress that they're hunting bigger game because we're already being told by those groups, "We have a first amendment right not to answer any questions at all about anonymous funding because of the first amendment." So clearly this is the effort with those groups to go to the court on this tiniest of hooks, get their now six member majority to speak very broadly well beyond the frame of this case, and give them the constitutional right that they are actually already asserting in Congress. There's really very little mystery to this once you connect the dots.

Leah Litman:

One of the odd parts about this case to me is that it requires almost a somewhat conspiratorial mindset to believe that this information that these entities would be disclosing to the California regulatory bodies would get out. Right? It reminds me of a moment from the oral argument in the Trump versus Vans case involving the grand jury subpoena for president Trump's financial records in the custody of the third party where justice Alito was noting that while the grand jury rules require the grand jury to keep that material confidential. But he suggested, "Well, we all know that these New York DA's are going to be leaking information to the New York Times." But it just reflects a real lack of faith and a real rush to kind of assume the worst about these governments and regulatory bodies if you think they're not actually trying to keep the information confidential. And so that's one aspect of the case that I find a little bit strange.

Sen. Whitehouse:

It's not as if the confidentiality requirement of the California Attorney General isn't enforceable. I mean if in fact the California Attorney General leaked information that it was obliged to keep confidential and an entity actually suffered any actual harm, they have a cause of action even if the California Attorney General was only negligent in not keeping the information secure for whatever harm they suffered. So it's a little bit of a theoretical point without much of a footing in real life practice. And what it really is overlooking is the fact that there's not going to be any harm from the leakage, even if it were to happen, there's actually probably going to be public benefit from it happening. And if there is harm, it's harm to tricky interests that are up to no good. So they have multiple, multiple layers of protection behind the nondisclosure requirement that California imposes.

Kate Shaw:

Yeah, it's such a quirky little case to have attracted so much attention at the cert stage and I wonder whether... I mean I think what we'll go deeper, I think, in a preview episode, Leah, so we won't sort of get too in the weeds on it. But there are what, I think, when you clerk at the Supreme Court you sometimes described as these vehicle problems. It's sort of an odd case because they did what was originally, I believe, an informal confidentiality norm regarding these reports was then formalized in

2016, something like that. And there's some questions about, I think, how the confidentiality, how the records are kept, things like that. So it's also kind of interesting to me that the... So in the late days of a Trump administration the solicitor General's office, after having been asked for its views by the Supreme Court, filed a brief encouraging the court to take the case, suggesting that the lower court had erred and should have more stringently reviewed this disclosure requirement and has thankfully changed positions in it's more recent filing, but still suggests vacatur and remand so that the lower court can actually take a good look at these as applied arguments that we were just talking about, even though clearly the federal government now believes that there's no facial constitutional problem with this disclosure requirement.

Kate Shaw:

But I kind of hold out the hope that because it's sort of got this quirky background there's a possibility maybe of a remand. And also because when you're doing this interest balancing, so there's the argument that there's some encroachment on first amendment associational rights on the challenger side and then the government interest can look different ways, right? We talked about the information interest earlier. Here it's something like an enforcement interest, right? Sort of just to make sure that other laws are being complied with, but not an interest that actually implicates the public because, as we've just been saying, these records are by design non-Public.

Kate Shaw:

So maybe there's a way in which the court sort of Dodges a big confrontation between the government interest, that disclosure advances and the first know interest that are offered against these compelled disclosure regimes. But it does feel to me like it's coming basically since Citizens United or a couple of months later, and disclosure became sort of the next big front and sort of the battles over money and politics. It's been 10 years in the making, and I do think that the number of amicus briefs on the side of the challengers in this case make clear that they'd been developing the intellectual architecture of these first amendment arguments for a lot of years. And I think I said this the last time we had you on the podcast Senator, I worry that there hasn't been a symmetrical development of the importance of the government interests that are advanced by disclosure. And I do think that the work your subcommittee is doing is an important corrective to that, but I think there needs to be more scholarship and nonprofit organization attention to developing these arguments. Because whether this big confrontation is happening this year, or whether it happens in a year or two, it does feel like it's.

Sen. Whitehouse:

Yeah. I mean there's nothing like equivalence on our side. The Washington Post reported the \$250 million operation over just a few years to fill the court with suitable justices. This one case somebody has rounded up 50. 50 separate amici to do this. As you pointed out, this is an argument whose architecture has been carefully constructed for some time. And the plaintiff is the 501c3 associated with the Koch brothers huge political operation, which has been described in the press as actually being a more powerful political operation than the Republican party itself. So you can look at this as a case with parties, but you got to... You can't overlook the big guy in the dark raincoat with a club in his hand in the corner who is overlooking this whole scenario.

Sen. Whitehouse:

And the fact that this is a tiny case nominally is not very reassuring, because Citizens United was a tiny case nominally. It was a case about a movie. And the Supreme court used a case about one movie to upend the entire political structure, the entire financing of campaigns, the entire power balance of the

United States democracy over that. So their willingness to take big leaps off tiny platforms is established particularly in this space, and the trick is going to be how you reconcile the eight who said transparency was the only defense between big money and corruption, and now letting big money go forward without transparency and pretending somehow that that's not going to be corrupting. And by the way, they were wrong about big money plus transparency equals no corruption, that just wasn't true. But even their nominal argument fails in this matter.

Leah Litman:

Kate, it was so interesting hearing you say that because that made me think of two things. One is that when we're thinking about what possible interest this disclosure might serve, one thing that comes to mind, I think this is actually from your amicus brief Senator, is the suggestion that part of what this dark money influence does is it actually contributes to the kind of polarization, political polarization, that can then cause some of the harassment that the groups fear. Whereas if you remove know the groups that are funding these efforts to paint the other side as these dangerous people who need to be resisted at all costs, then perhaps disagreement in politics could be a little bit more sane and a little bit less concerning.

Sen. Whitehouse:

Yeah, I mean the argument is, "I'm spending so much money anonymously in politics that your voice doesn't matter anymore, and you're mad as hell about it so you're starting to get really agitated. And your agitation is really inconvenient and unkind to me, and therefore I should be able to continue my dark money operation." It's just kind of an odd circular argument.

Kate Shaw:

Just one question that Leah's polarization point, made me want to ask something that I should have asked we were talking about the hearing. But I wonder whether coming out of that hearing you felt like there was any hope for some kind of bipartisan support, for some version of the effort? Ted Cruz seemed to signal a degree of sympathy for the undertaking, seemed to sort of want to talk about it only in the context of also removing the remaining limits on direct spending or direct contributions to campaigns which I imagine you're not on board with. But I wonder why-

Sen. Whitehouse:

And without providing actually real transparency either, So it's kind of the worst of both worlds.

Kate Shaw:

Right. So I guess that does that mean no, you don't feel like there would be a real way forward? It does feel to me as though once upon a time disclosure was a regulatory technique that actually had a decent amount of bipartisan support, could we get there again or are the sort of polarization dynamics you were just describing too great to allow for any kind of genuine cooperation?

Sen. Whitehouse:

The political dynamics of this are actually pretty strong. If you look at public polling over a considerable period of time, the public is totally fed up with big money in politics, has no sympathy for dark money in politics, cleaning it up polls in the 80s and in the 90s. And it doesn't matter if you're a Bernie bro or a Tea Partier, across the board Americans are sick to death of this nonsense. So the Republicans are in a tough

position because the public is wildly against them. So there's that one force. The other force is that Mitch McConnell and the Republican dark money operation is more or less entirely funded by groups who don't want to be outed. I think it's largely the fossil fuel industry, I think at this point the fossil fuel industry owns the Republican Party as its political wing.

Sen. Whitehouse:

And so Mitch McConnell has told his caucus nobody is going to get onto these reform bills. Period and end of story, it's just not going to happen. So there's an immense political pressure and conflict between the enormous support for this and the public and the absolutely remorseless insistence in the politics of this that the Republicans not budge. And when two enormously powerful forces conflict like that there is the possibility that something bursts, and you do get people who feel that they just have to, to save their own skins, get out in front of this problem. And so I think there's a real chance of it, but the intermediate step is to come up with pretense arguments to try to dodge your accountability for being against disclosure. And I think we're in pretest land right now, but that doesn't mean it won't move and it is a good sign that they feel they have to come up with pretexts.

Leah Litman:

So the second thing, Kate, I wanted to say, is you were noting about how we were maybe trying to avoid the big confrontation between disclosure requirements and what the court proceeds as the First Amendment issue, and perhaps in this case it might just send the case back down to the lower courts or maybe adopt some additional language clarifying what the legal standard is. And perhaps that would be a slight win in the sense of dodging a bullet, but I guess my fear is if the court even tweaks the legal standard a little or suggests these challenges have any legs, given who's on the federal courts now, 25% of the lower federal court judges who are active and not senior status were appointed by Donald Trump, I am concerned about what those judges would do in these challenges and whether they would say, "Yes, there is a real risk of harassment anytime you're dealing with, again, disclosure requirements to these kinds of interests." Just seeing what they have done with, for example, challenges to the CDC eviction moratorium.

Sen. Whitehouse:

And remember how Judge Alito signaled to these groups the pathway that led to Friedrichs and then Janus, for instance. So even if they don't win in this particular case, this could be a huge signaling opportunity for the judges that want to move in this direction encouraging them how to tee up the next case that would let them close the deal. And although Citizens United was only eight to one, there's one and it's Thomas so he's still there. You add three judges who have all been cleared by this dark money apparatus to get on the court, and God knows what the understandings were that led to that. So now you're at four presumably. And it's highly plausible that Alito would flip and make a five. So you can readily see how you get to a five four. And if this is not the case for it, the prospect that this becomes the case that signals to this operation how you get there is a pretty dangerous one. And the operation is in it for the long game, they don't think that they... I don't think they even expect to win this day one, but this is a campaign and they're going to work the court until they get what they want, which is the United States of America in which covert operations can be run by big special interests against our government with the citizens none the wiser.

Kate Shaw:

It's sort of a downer note to end on. I feel like can we ask, Senator, slightly off topic, whether we should be clearing our calendars for anytime in the next few weeks for all of the judicial nominees the Biden White House is about to be sending the Senate Judiciary Committee?

Sen. Whitehouse:

I hope so. They got a bunch of vacancies, and I hope we can move them through with something resembling the enthusiasm with which the Republicans went about that task when they had a similar opportunity. And I hope that we're going to be sending qualified judges who will pass scrutiny and aren't quite as bad as some of the Trump judges who have been through our machine.

Sen. Whitehouse:

But I'm sorry if that was ending on a downer note, but it's always darkest before the dawn. And if we're not sounding out these downer notes and warning people about what is coming, then that will make it much more likely. This operation will go as far as it can get away with. And if we're not standing up against it, then it's going to be a lot worse than if we do stand up and if people really get that this affects them and we need to solve this problem. And sunlight is the best disinfectant, and it's the best disinfectant about the court, and it's the best disinfectant about political donations, and it's the best disinfectant about the machinery that was allowed to put three United States Supreme Court justices on the court.

Leah Litman:

I think the endorsement of sounding the alarm is perhaps the best endorsement of the Cassandra-style podcast that we are trying to make. So thank you Senator.

Sen. Whitehouse:

Thank you Professor Shaw, thank you Professor Litman.

Leah Litman:

Thank you so much for joining us. Thank you to our producer Melody Rowell, thanks to Eddie Cooper for making your music, and thanks to all of our listeners for tuning in. And we hope to have you back at some point in the future, Senator. Perhaps on a happier note.

Sen. Whitehouse:

Perhaps on a happier note. But I'm afraid there are not going to be a whole lot of happy notes as we call out this beast. But thanks for shining the light on it, I mean it's really been torture trying to get even some of our progressive active lawyers to take an interest and dig in on this stuff. So, this matters and I'm grateful.

Leah Litman:

That's what the podcast is for and we'll be sure to make a TikTok about this case too.

Sen. Whitehouse:

All right. Signing off then. Thank you both.