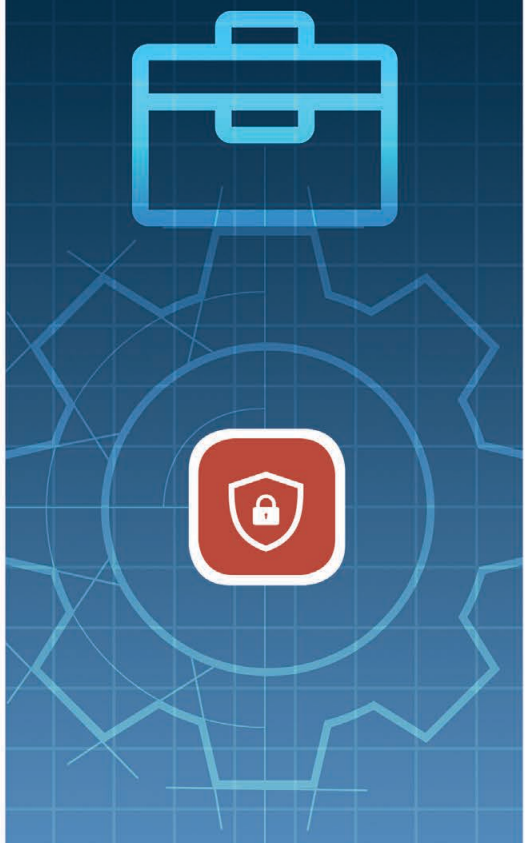
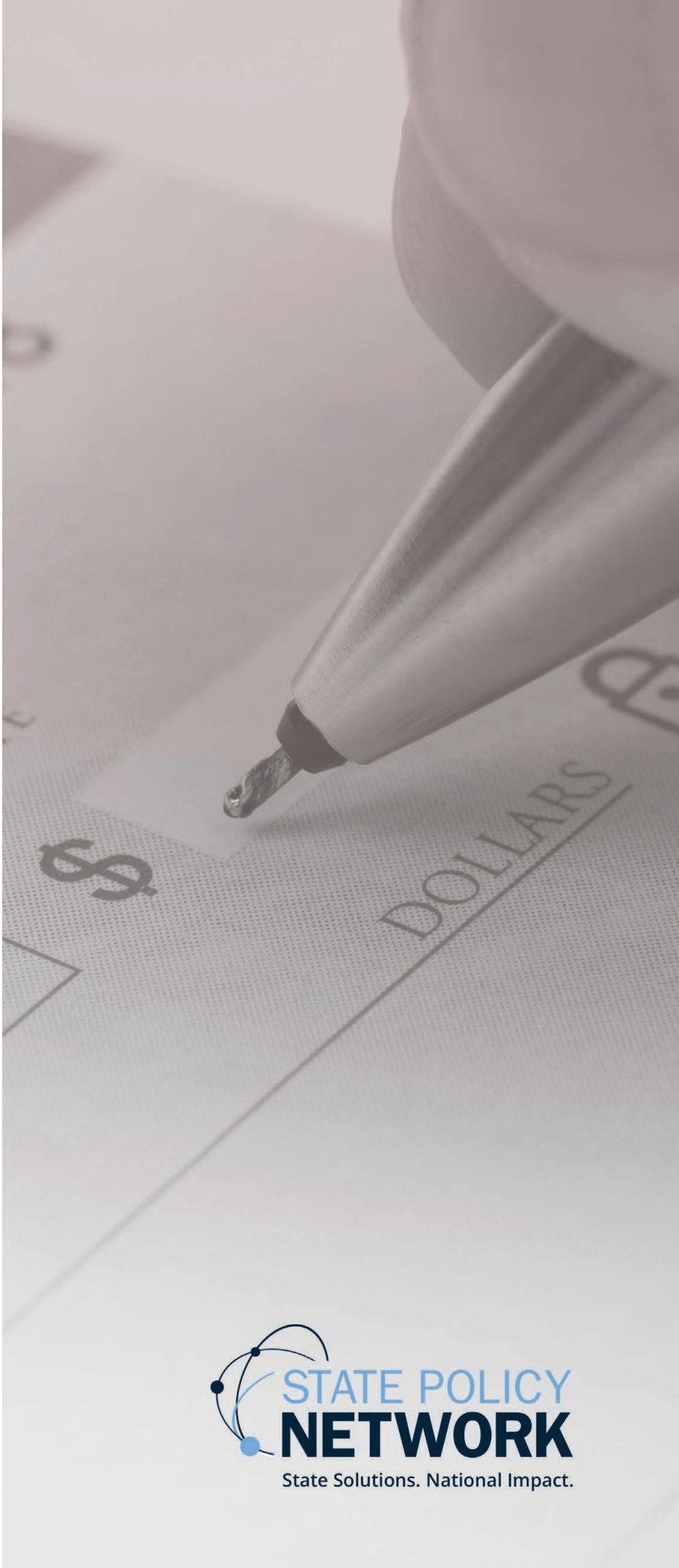
Donor Privacy

TOOLKIT





STATE POLICY NETWORK

State Solutions. National Impact.

Donor Privacy Toolkit

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STATE POLICY NETWORK
State Solutions. National Impact.

Executive Summary

Imagine being seated at your Rotary or Kiwanis Club—or your church—according to your beliefs on controversial issues like gay marriage, gun control, abortion, or climate change. People who support the issue on one side, people who oppose on the other. With everyone in the room knowing your private, personal political views.

Think this sounds Orwellian? It's closer to reality in some states than you might think. In Montana, Delaware, and a handful of other states, nonprofit groups that are working on these sensitive issues are required to report the names and addresses of their financial supporters to the government.

In the past three years, dozens of other states have faced similar proposed laws to require nonprofit groups engaging in public policy debates to report the names and addresses of their donors to the government. The types of groups that would be impacted by these laws range from charities like the Boys & Girls Club, nonprofit art museums, Sierra Club, NRA, and other causes that advance the beliefs held by millions of Americans.

Requiring political campaigns to report their donors is an entirely different matter than requiring charities and causes to report theirs. In the 1950s, the US Supreme Court affirmed that the supporter lists of charities and causes should be kept private not only to protect people who support controversial issues and causes from retribution and intimidation, but also simply because we have a First Amendment right to associate freely with the people and groups of our choosing. Requiring charities and causes to report their donor lists to the government would both violate principles and put people at risk—especially in today's highly-charged political climate.

Requiring charities and causes to report their donor lists to the government would both violate principles and put people at risk—especially in today's highly-charged political climate.

This issue guide provides the legal background and philosophical underpinnings for allowing charities and causes to keep their donor lists private, explains what lawmakers need to know about the growing movement to force these private charitable organizations to report their donors, and offers broad ideas for protecting nonprofit donor privacy.

Every American has the right to support causes he or she believes in without fear of harassment or intimidation, and it's up to nonprofit groups and policymakers to work together to protect this right.

Introduction

It's no secret that conservative and libertarian-leaning organizations and their supporters are under attack. There is an orchestrated effort to harass and intimidate people who support these causes. Part of this attack is to force charities and causes to report the names and addresses of their donors to the government, and then post those names and addresses on government websites for anyone to see.

What the IRS could not accomplish by targeting free market groups, private groups are increasingly pressuring state legislatures and state attorneys general to do. And when they can't get lawmakers to force donor disclosure, they go straight to voters with misleading and deceptive ballot initiatives, such as "anti-corruption" initiatives to promote "transparency," like those we've seen in proposed in Arizona, Arkansas, California, South Dakota, and at the city level.

Those who advocate for conservative and libertarian ideas are bullied to either conform or suffer retribution, such as public shaming or having their customer base antagonized. If you're outted for donating to what some would consider the "wrong side" of an issue, you may get fired, as we saw with Brendan Eich of Mozilla for his support of traditional marriage. Or you may have your door bashed in with a battering ram in the middle of the night, as we know happened to people associated with the Club for Growth in Wisconsin, in the infamous "John Doe" cases.

This well-coordinated, well-funded effort to require free market nonprofits to divulge the names and addresses of their donors is all part of a plan to choke off their air supply of funding. One group bluntly told the *New York Times* they "planned to confront donors to conservative groups, hoping to create a ***chilling effect*** that will dry up contributions" by exposing donors to "legal trouble, public exposure, and watchdog groups digging through their lives."

What's worse is that these groups have managed to turn the transparency concept on its head and are using it to recruit conservative and libertarian-leaning advocates to join their ranks. In many cases, conservative state lawmakers are proposing these disclosure measures. In 2014, Tallahassee voters adopted a city-level initiative that could force donor disclosure, co-sponsored by the local tea party group. Let's be perfectly clear: ***transparency is for government; privacy is for people!*** All of us will do well to understand this fundamental difference.

This is an affront to the deeply held values that are enshrined in the First Amendment. Every American has the right to support causes they believe in. To keep that right a reality, we must protect individual privacy. We must protect people's ability to come together, to freely associate, in support of each other. We must protect the resources they need to make their voices heard.

That's why we must heed this growing effort in the states to "ban dark money." "Dark money" is a pejorative term for private giving, and it was coined by a left-leaning organization after the *Citizen's United* decision. But we need to stop and think about this term before we continue to use it ourselves.

Calling private donations "dark money" is like saying your right to a private ballot is "dark voting." Just as the right to pull the

curtain closed behind us as we vote for our chosen candidates is sacrosanct, so too is our right to support charities and interest groups without the government standing over our shoulder and sharing the information with the wider world.

TRENDS IN THE STATES

Since State Policy Network began tracking legislation around the country to force charities and causes to report the names and addresses of their donors to state governments, we've seen a wave of state legislation to force disclosure, state regulators taking unilateral action to force disclosure, and ballot measures to force disclosure.

In at least two dozen states since 2015, lawmakers have considered bills written so broadly and vaguely that everyday activities of charities and causes, like communicating with supporters about proposed laws that impact their missions, would have been reclassified as "electioneering communications" and the groups re-termed "political committees" and therefore subject to donor disclosure requirements that are meant for candidate campaign committees.

> Calling private donations "dark money" is like saying your right to a private ballot is "dark voting."

We have also seen several "ethics" bills aimed at rooting out corruption among state officials, but instead of shining a light where it matters—on the elected officials themselves—the focus becomes forcing private organizations with a perspective on policy issues to report the names and addresses of their supporters to the government.

There is also an effort to redefine "coordination." In the campaign finance context, coordination means a nonprofit group can't join up with a candidate campaign to try to skirt campaign contribution disclosure laws. But now the push is to broaden this definition to prevent two private organizations that share a mission from working together to advance an idea. In other words, they want to use the law to prevent free market groups from sharing information and resources, from *freely associating*.

Another disturbing trend is that some state regulators are taking on these issues unilaterally. Already in a handful of states nonprofits can be forced to hand over their list of top supporters before they can even do business in the state. The problem with this is that once a document is given to a state agency, it can become subject to public records law. For example, if a charity or cause was forced to turn over its supporter list to the state of New York in order to fundraise there, and an opposing group wanted to get that list, they could send a public records request to the state attorney general who regulates charities, and there is no mechanism in state law to decline the request. This is a backdoor way to expose donors.

We're also witnessing state ethics commissions and campaign finance regulators unilaterally deciding certain groups must reveal their donors before they can testify at the state legislature or do other activities protected by the First Amendment.

When activists supporting these laws can't get lawmakers or regulators to force donor disclosure, they go straight to voters with misleading and deceptive ballot initiatives.

These troubling trends must be confronted, and the consequences of forced disclosure must be shared. If we want to understand why publishing the names and addresses of people who support controversial issues is dangerous, we should ask the victims of these laws.

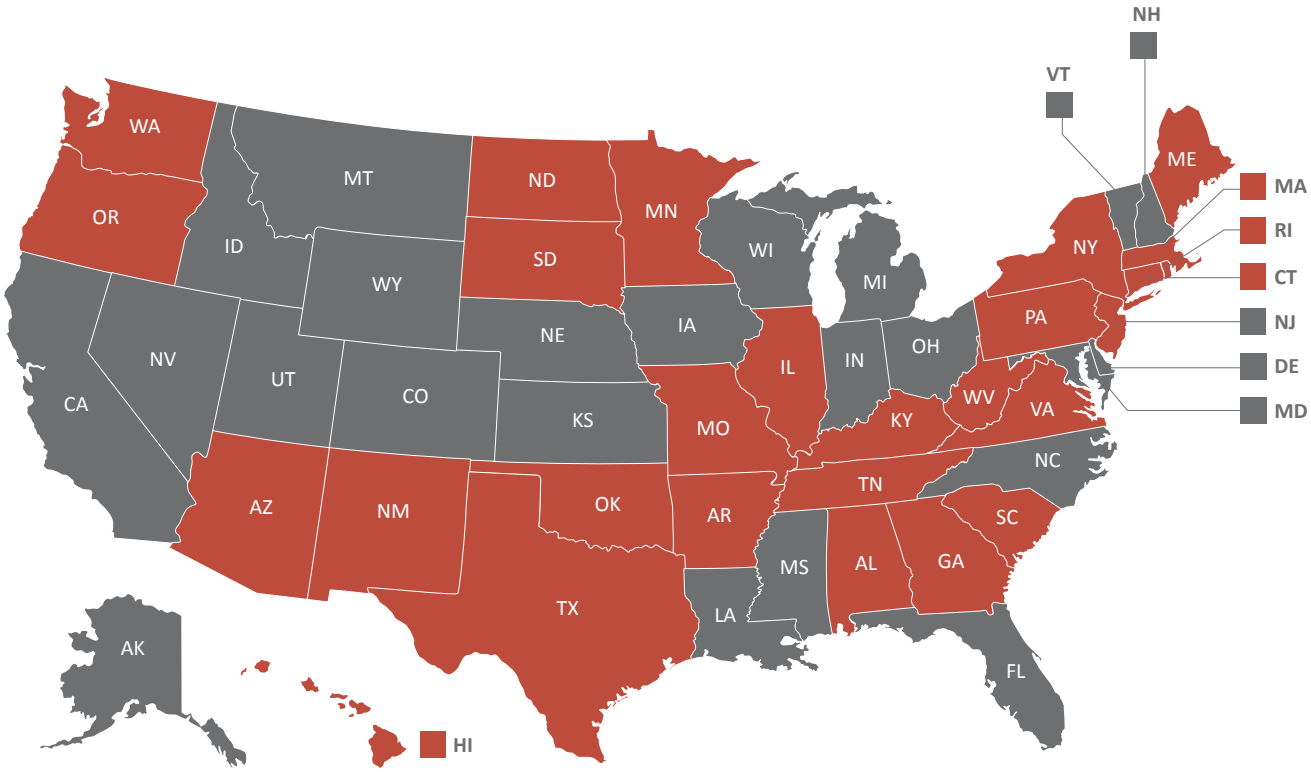
Real people like Margie Christofferson, a waitress in California who lost her job after her $100 donation to support traditional marriage became public. The restaurant where she worked was picketed by gay marriage advocates. Eventually the pro-

tests took their toll on the business, and several people lost their jobs.

Or Cindy Archer, whose house was trashed in a pre-dawn raid by police in paramilitary gear. Her crime? She worked for a group that supported Wisconsin Governor Scott Walker's labor union reforms.

But it's not just groups on the right who have something to fear. In 2015, a man went to a Planned Parenthood clinic in Colorado Springs and went on a shooting rampage. He shot and tragically killed three people and wounded nine others because of his views against abortion. If the law in Colorado required the name and addresses of all donors to that Planned Parenthood be made public, that man would have known where others who supported the organization lived in the community, and the tragedy could have been much worse.

Free Speech Under Attack: States Where Forced Disclosure Laws Have Been Introduced 2015-2017



Forced Disclosure Laws Introduced 2015-2017

5 Places to Look for Unconstitutional Efforts to Stifle Free Speech

Here are five places to look for unconstitutional requirements to force nonprofit charities and causes to report the names and addresses of their supporters to the government or otherwise restrict their free speech rights.

1. **"Ethics" bills**. Several states have grappled with legislation aimed at giving lawmakers a new code of ethics that regulates how they interact with their campaign supporters. While ethics standards are important, tucked into these bills have been provisions requiring nonprofits to disclose their donors, even though current law already dictates that nonprofits can't spend money on candidate campaigns. Violating donor privacy raises more ethical concerns than it solves.

2. **Bills that appoint an "Ethics Commissioner."** Like ethics bills, some states have passed legislation that gives broad and sweeping power to an appointed government Ethics Commissioner, allowing this unelected person to subpoena the names and addresses of a nonprofit's supporters. How this person would be held accountable if he or she used the office to punish political opponents is a looming concern.

3. **Bills that redefine "coordination."** Federal law prohibits nonprofit organizations from coordinating with candidate campaigns. The current legal definition is clear-cut which helps nonprofits remain compliant with the law. Several states have considered bills to more broadly define coordination to include two nonprofit groups with similar missions communicating with each other about policy issues. Muddying the definition will confuse and ensnare nonprofits and create a much greater compliance burden.

4. **"Anti-corruption" legislation**. Anti-corruption legislation sounds appealing, but it can open the door to unconstitutional regulation of speech and association. It could require people who want to speak out on political issues to register with the government and share the names and addresses of their supporters before they testify before a legislative committee. Needless to say, this heavy-handed suppression of ordinary citizens' opinions does little to address corruption.

5. **Bills that redefine "electioneering communications" and "political committees."** More than a dozen states have considered or passed legislation that changes the definition of electioneering communications to include the everyday activity of many nonprofit groups, such as issuing a non-partisan voter guide or sending a message to their email list about a bill being considered by the legislature. The definition of political committee has been similarly broadened and complicated to include any organization, business, group of people, and even individuals who speak out on political issues.

If you have questions about whether or not a bill would have an impact on nonprofit groups, the Institute for Free Speech or the Goldwater Institute can help.

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5 Reasons to Protect Nonprofit Donor Privacy

1. **Every American has the right to support causes he or she believes in without fear of harassment and intimidation**. Privately supporting causes, and the organizations advancing those causes, is a fundamental freedom that is protected by the First Amendment. Our Founding Fathers used pen names to encourage independence from England. Nearly 200 years later, the US Supreme Court blocked the state of Alabama from demanding the supporter list of the National Association for the Advancement of Colored People (NAACP), citing concerns about retribution against the group's members and financial backers. This protection is just as relevant today.

> Every American has the right to support causes he or she believes in without fear of harassment and intimidation.

2. **Calling private donations "dark money" is like saying your right to a private ballot is "dark voting."** Just as the right to pull the curtain closed behind us as we vote for our chosen candidates is sacrosanct, so too is our right to support charities and interest groups without the government standing over our shoulder and sharing the information with the wider world. Americans have a right to keep their political opinions private.

3. **73% of registered voters agree the government has no right to know what groups or causes they support**. If lawmakers require nonprofit groups to report the names and addresses of their supporters to a government agency to be posted in an online database that will be available for anyone to see, they will be on the wrong side of public opinion.

4. **If we allow the government to create a database of the causes that individuals support, it's only a matter of time before someone gets hurt**. In 2015, a man went on a shooting rampage at a Planned Parenthood clinic in Colorado Springs. He shot and tragically killed three people and wounded nine others because of his views against Planned Parenthood. If the law in Colorado required the name and addresses of all donors to that Planned Parenthood be made public, that man would have known where others who supported the organization lived in the community, and the tragedy could have been much worse. No lawmaker wants to be responsible for creating a law that facilitates violence.

5. **When political donations are made public, bad things can happen. Just imagine what will happen when charitable giving is also reported to the government**. Margie Christofferson lost her job as a restaurant manager after her $100 donation to the campaign to ban gay marriage in California became public and protesters picketed her workplace. If charitable giving follows suit, the government will have a database of people who support the NRA, pro-family groups, and even churches. Regular citizens could be targeted by activists based on their beliefs.

What Lawmakers Can Do to Protect Nonprofit Donor Privacy

Lawmakers have several options available to protect the privacy of donors to nonprofit charities and causes.

1. **Ensure that campaign finance regulations do not apply to 501(c)(3) groups**. Because 501(c)(3) groups cannot engage in campaigns to support or oppose a candidate, campaign finance regulations that are aimed at exposing donors to candidate campaigns should not apply to these groups. This can be accomplished in law by a simple "notwithstanding" clause inserted into your state code section dealing with campaign finance.

   Example: Notwithstanding any other provision of the law, any entity with a charitable tax exemption under Section 501(c)(3) of the Internal Revenue Code (or any successor provision of federal tax law) shall not be a political committee and shall not be required to file any reports or follow reporting requirements set forth in this chapter.

2. **Do not request copies of a charity or causes' "Schedule B."** All nonprofit charities and causes are required to file a form 990 with the IRS annually. Included in the 990 is a list of the organization's top supporters in the Schedule B section of the form. The IRS protects these names from public disclosure. States should not request copies of Schedule B's as a precondition for doing business in a state. This can be accomplished in law by preventing regulatory agencies from requesting these documents. At the very least, states should exempt them from public records law.

   Example: Notwithstanding any other law, this state and any agency or political subdivision of this state shall not require any organization organized under Section 501(c) of the Internal Revenue Code (or any successor provisions of federal tax law) to file with this state or any agency or political subdivision of this state an unredacted version of the 501(c) entity's Internal Revenue Schedule B Form (Form 990 or 990-EZ), any successor federal tax form, or any other document that includes the names or addresses of the 501(c) entity's donors or contributors. This section shall not be interpreted as (a) superseding any reports required to be filed by political committees if a 501(c) entity (other than a 501(c)(3) entity) otherwise meets the definition of a political committee, (b) or otherwise precluding any lawful warrant for information issued by a court of competent jurisdiction.

   (A) The documents, forms, and reports described in this section are not subject to public disclosure under this state's public records laws.

3. **Include donor privacy protections in ethics reform updates**. If your state's ethics regulations need a refresh, including protections for individual donors to nonprofit charities and causes will keep the focus of the regulations where it belongs: on lawmakers and their behavior. You can draw on federal ethics regulations for ideas and inspiration, which are much stronger than most state-level ethics requirements.

For additional ideas and model legislation, please contact **Starlee Coleman** at coleman@spn.org.

What Voters Think About Nonprofit Donor Privacy

State Policy Network has conducted numerous scientific public opinion polls on donor privacy and these are some of the key results.

Do you agree with the following statements?	Total	Progressive	Conservative
Every American has the right to support causes they believe in.	**94%**	91%	96%
We must protect the ability of Americans to come together in support of each other and the causes they believe in.	**93%**	90%	96%
Americans should be allowed to support specific groups or positions without fear or harassment or retaliation from the government.	**92%**	87%	96%
We need to strengthen our democracy by protecting our right to free speech and personal privacy.	**91%**	89%	95%
Making a donation to support an organization or group you believe in is a way to express your personal views and exercise your Constitutional right to freedom of speech.	**89%**	86%	93%
The government has no business knowing what I support or make donations to.	**73%**	53%	85%

More Opinions of Self-Identified Conservative Voters

Do you agree with the following statements?	Yes
We must protect the ability to raise resources that like-minded Americans need to make their voices heard.	**92%**
The privacy of Americans is being invaded, exposing them to harassment for what they believe.	**79%**
The right of every American to support causes they believe in is under attack.	**76%**
The government is restricting the ability of Americans to work together as a group.	**72%**
Americans who support organizations are being intimidated and their voices silenced.	**70%**

More Opinions of Self-Identified Progressive Voters

Do you agree with the following statements?	Yes
Many of us fear the unfair influence of the wealthy and powerful and want laws to protect us. These concerns should be addressed, but not by compromising freedom of speech, personal privacy, and free will.	82%
We expect transparency from government because government works for the people. But government doesn't have any right to transparency into the lives of Americans or the right to invade their privacy.	79%
While openness and transparency is desirable in our country, it cannot come at the cost of personal safety that may be threatened by making donors' names and addresses public.	76%
We live in a cruel world where people walk into churches, shoot and kill innocent people just because they don't like the color of their skin. Imagine what a person who disagrees on an issue would do if they knew the names and address of the donors and supporters of the issue.	75%
It is my right to keep my donations private. I vote privately, and I should be able to give privately.	75%
If the law changes, and the names and addresses of donors to Planned Parenthood are forced to be made public, it is just a matter of time before someone gets hurt.	75%
The size of a donation should not matter—everyone should be treated the same. Safety and privacy should be protected equally for everyone, rich or poor.	73%
Making donors' names and addresses public could really hurt organizations fighting for worthy causes. Many donors would simply stop donating if they were no longer anonymous.	73%
The government has no business knowing what groups I support or make donations to.	65%

True Stories of Harassment and Intimidation

Cindy Archer

Cindy Archer's home was raided by state police in riot gear in the early morning hours. Her crime? She donated to an organization that supported Wisconsin Governor Scott Walker's union reforms. After years of being investigated, Cindy was never charged with a crime. Ultimately, the Wisconsin Supreme Court ruled the investigation was ordered by an opponent of Governor Walker who wanted to punish people who supported the union reforms. But the damage was done: Cindy lost her job and her privacy—she couldn't even let her dogs outside by themselves for fear they would be poisoned. Just imagine what could have happened if the partisan prosecutor would have had a list of every single person who donated to support the union reforms? How many people's homes would have been raided? How many people would have lost their jobs?

Catherine Englebrecht

Catherine Englebrecht, a Texas mother and small business owner, wanted to start an organization to educate the public about voter fraud. After filing paperwork with the government, she was targeted and harassed by federal agencies. She was audited by the IRS twice; and the FBI, ATF, and OSHA showed up at her business and home demanding records and making it difficult to continue business operations. Catherine sued the IRS, and a judge ruled that the IRS must hand over records detailing how the agency targeted her and her family because of their beliefs. What if the government had a list of every donor to every group that opposes the president's policies?

Margie Christofferson

Margie is a waitress in California. After she gave $100 to a group that supported Proposition 8, a proposal in 2008 to ban gay marriage, her name was made public, and the restaurant where she worked was boycotted and picketed by people who support gay marriage. Ultimately, the protests took their toll on the restaurant, and she lost her job. People who support candidates and ballot measures are already reported to the government. Do we want to open up people who support causes and organizations to this kind of harassment too?

Darcy Olsen

Darcy Olsen and her colleagues at the Goldwater Institute fought a taxpayer subsidy to a hockey team in Phoenix, Arizona. That put her in the crosshairs of angry hockey fans. Literally. Darcy began receiving death threats at work. Someone even followed her home. The next morning, she stepped onto her front porch and into a puddle of blood and the mutilated body of a rabbit at her feet. Darcy had to hire 24-hour security to protect her home and children. And the Institute had to have 24-hour police protection at their office. If all the organization's financial supporters were posted on a public website, do you think the death threats would have stopped with Darcy and her colleagues?

Planned Parenthood

In 2015, a man went on a shooting rampage in a Planned Parenthood clinic in Colorado Springs. He shot and tragically killed three people and wounded nine others because of his views against Planned Parenthood. If the law in Colorado required the name and addresses of all donors to that Planned Parenthood be made public, that man would have known where others who supported the organization lived in the community, and the tragedy could have been much worse.

Gigi Brienza

Gigi Brienza's home address was published on an online "target list" by a radical and violent animal rights group. Why was Gigi a target? Because she worked for a pharmaceutical company that tested some products on animals, even though Gigi's job had nothing to do with animal testing. The leaders of this group—most of whom are now in jail—found her by combing through reports posted online of donors to political candidates and looking for people who worked for pharmaceutical companies. Gigi's donation to Democratic Presidential candidate John Edwards made her a target for violence—and it was all possible because her name and home address were reported online. Just imagine what will happen when charitable donations are also posted online.

Erious Johnson

Erious Johnson, an Oregon attorney who heads the state Department of Justice Civil Rights Division, was put on a government watch list of potential threats to police for supporting the Black Lives Matter movement. They found him because he used the #BlackLivesMatter hashtag in a tweet. If the government had a list of every supporter of Black Lives Matter, they could have all been put on a government watch list.

Beware of Anti-Speech Ballot Measures

FORCING NONPROFITS TO SUBMIT DONOR LISTS TO GOVERNMENT OFFICIALS IS UNCONSTITUTIONAL

By Tracie Sharp and Darcy Olsen

When voters in Missouri, South Dakota, Washington, and Oregon go to the polls in November [2016], they will vote on ballot measures that are cleverly marketed as legislation aimed at reducing "big money" and "outside influence" in local elections. If passed, what these measures would really do is limit the ability of nonprofits like ours to weigh in on policy matters we care about. This is an infringement of our First Amendment rights.

The South Dakota Government Accountability and Anti-Corruption Act is a good example. Also known as Measure 22, it would force nonprofit organizations to report the names and addresses of their donors to the state government, subjecting them to possible investigation by an unelected ethics board that is given the power to subpoena private documents and overrule decisions made by the state attorney general if the board disagrees.

Nonprofit organizations—like the Sierra Club, Planned Parenthood, National Rifle Association, churches, Boys and Girls Clubs, and art museums—are legally allowed under federal law to take positions on legislative matters that impact their missions, as long as they do not financially or otherwise support candidates for office. Because they are not engaging in candidate campaigns, they are allowed to protect the privacy of their financial supporters. The South Dakota measure and others like it would overrule these protections.

The South Dakota legislation is part of a growing national trend. Since 2013, 17 states have considered, and five have passed, state laws to require donors to charitable groups and nonprofits working on issues—not campaigns—to report the names and addresses of their donors to the government.

Once collected, this information is posted on a public website for anyone to access. This might not sound like a big deal in today's era of living our lives online, but some historical context is in order.

> Do we want America to be a country where government keeps public lists of law-abiding citizens because they dare to support causes they believe in?

In the 1950s the state of Alabama tried to force the NAACP to turn over its membership list, with the result that segregationists could show up on the front lawns of those who supported the civil-rights movement. In *NAACP v. Alabama* (1958) the US Supreme Court recognized the physical dangers this invited, and the threat to the First Amendment, which guarantees our right as Americans to express ourselves not only with words, but with actions and dollars as well.

Things have certainly changed since then, but we know from personal experience that violence directed at people who support controversial issues is still a real threat.

In 2011 the Goldwater Institute was engaged in a high-profile public dispute with local officials and the National Hockey League over the legality of a multimillion-dollar subsidy to Arizona's hockey team. During that fight, hockey fans used property tax records to find the home address of the institute's president, Ms. Olsen, and post it online. The next day a gutted rabbit was found on her porch, and the animal's blood smeared over her house.

In 2012, the Arlington, Va., office of Ms. Sharp's nonprofit organization, the State Policy Network, was broken into and trashed. In 2013 the homes of our colleagues at the Wisconsin Club for Growth were raided in pre-dawn, paramilitary-style assaults by the police who were looking for evidence that the group was illegally coordinating with the campaign opposing the recall of Governor Scott Walker. But the group had not run one ad in support of Mr. Walker, sent one piece of mail, or made any phone calls; it simply spoke out in support of his union reforms. Staff at the Freedom Foundation in Washington state had their car tires slashed; an attorney at the Mackinac Center in Michigan was spat upon; the home of Illinois Policy Institute's CEO was vandalized, and so on.

Non-conservatives are also targeted. Last Thanksgiving, a man went on a shooting rampage in a Colorado Springs Planned Parenthood clinic, tragically killing three and wounding nine others. What if the state had forced Planned Parenthood to post a list of its donors online? How much worse and widespread could that tragedy have been?

Do we want America to be a country where government keeps public lists of law-abiding citizens because they dare to support causes they believe in? Every American has the right to support a cause or a group without fear of harassment or intimidation. Protecting donor privacy is essential to safeguarding that right.

Ms. Sharp is president of the State Policy Network. Ms. Olsen is the former president of the Goldwater Institute. This article originally appeared in the September 23, 2016, print edition of the Wall Street Journal.

Transparency Is for Government, Privacy Is for People

By Jon Caldara

On Nov. 27, 2015, Robert Lewis Dear Jr., a self-described "warrior for the babies," arrived at the Colorado Springs Planned Parenthood armed with a semi-automatic rifle. By the time the police had him in custody, he had killed three and injured nine.

So, here's a question worth pondering. How much worse could it have been if before this violent mad man decided to kill, he knew the names and addresses of the donors to the clinic?

Is it possible that being able to anonymously support a cause, particularly a controversial one, saves lives? History shows it's not a hypothetical question.

The National Association for the Advancement of Colored People (NAACP) is one of the nation's oldest civil rights organizations. Founded in 1909, they called for federal anti-lynching laws, set the case for the *Brown v. Board of Education* decision, and lobbied for the 1964 Civil Rights Act.

They also have been targets of violent threats and attacks. Stories like that of Medgar Evers, the famed civil rights activist and field secretary for the NAACP who was murdered after his fight to desegregate the University of Mississippi, is just one of too many examples.

It doesn't take a lot to imagine why the NAACP has always fought to keep its donors, those who make their very work possible, private. If segregationists could scare away the NAACP's supporters by the threat of intimidation and violence, their operations would be ripped away at its root.

In the mid-1950s the state government of Alabama hoped to intimidate and frighten away the NAACP by forcing them to make public their list of donors. The NAACP fought it all the way to the US Supreme Court and won, letting them keep their donors private, and safe, and therefore keeping their movement alive.

It doesn't take a lot to imagine why the NAACP has always fought to keep its donors, those who make their very work possible, private.

Organizations across the political spectrum, including Planned Parenthood, owe them for their bravery and the safety that has grown out of it.

You'd think this issue would be clear and settled by now, but there seems to be a basic misunderstanding of what transparency is in a system like ours.

Transparency is for government. Privacy is for people.

For 18 years, I have run that beacon of political incorrectness, the free-market-loving Independence Institute. And it is near sinful how much fun we have working to make Colorado a place where we are free to make our own decisions. While I can't imagine what groups like the NAACP went through, we too never disclose our supporters, even though we've been brought to court several times by political foes who think they have a right "get at" our donors.

From public school teachers who fear retribution from the teachers' unions to businesspeople who need to survive their dealings with Colorado's 3,700 governments, we believe our supporters should be guaranteed privacy.

We also feel that groups like ours shouldn't lose our right to free speech because of it. But sadly, that's what campaign finance laws do.

In 2014, we wanted to run a radio ad asking both of Colorado's US senators to support a bill reforming federal sentencing laws. But because it was "too close" to the election, and one of those senators, Mark Udall, happened to be on the ballot, campaign finance laws stopped us, even though we weren't weighing in on the election in the slightest. According to the McCain-Feingold Act, if we ran the ad, we'd have to disclose our donors.

No one's right to speak should be subservient to a calendar. If we have a right to say something on Monday, without making our supporters vulnerable, shouldn't we have the same right to say the same thing on Tuesday? So off to court we went.

Sadly, the US Supreme Court recently refused to hear our case, that one empty seat on the court almost certainly being the reason the court didn't have the votes to consider it. Hopefully, with a full court, the issue will be resolved in the future.

From *Cato's Letters* to pamphlets written under pen names, anonymous speech played a key role in our nation's birth. It is no less important today.

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The Victims of "Dark Money" Disclosure

By Jon Riches

"Anonymity is a shield from the tyranny of the majority."
—*McIntyre v. Ohio Elections Commission*, 1995

The following cautionary tale is a true story. It reveals how endangered political speech is in America.

"Anne" was alarmed when she heard an early morning pounding on her front door. "It was so hard. I'd never heard anything like it. I thought someone was dying outside." When she ran to open the door, armed police came pouring into every room of the house, yelling orders, cornering her family, and seizing Anne's private property. The police verbally abused Anne and her family, instructing them not to contact a lawyer or tell anyone about the early morning raid.

Anne's crime? She had supported Wisconsin's Act 10—Governor Scott Walker's public union reform bill that passed in 2011. Anne's story is one of several incidents of harassment and intimidation that occurred in Wisconsin's "John Doe" investigations, so named because of the extraordinary powers granted to law enforcement to maintain the secrecy of their investigations. The investigators didn't have to reveal the names of their targets, and even when those targets, including Anne, had their homes publicly raided, they were put under gag orders and required not to reveal they were under investigation, even as government agents compelled the targets to disclose their personal information *(Wall Street Journal*, Nov. 18, 2013).

The investigation began as a probe into the activities of Walker and his staff, and it expanded to reach nonprofits nationwide that had made independent political expenditures in Wisconsin, including the League of American Voters, Americans for Prosperity, and the Republican Governors Association (*Milwaukee Journal Sentinel*, Sept. 14, 2011).

This John Doe probe serves as a chilling example of one state's attempt to criminalize political speech. It shows the danger to free speech when regulators use their authority to silence political expression with which they disagree.

The apparently politically motivated attempts to suppress speech in Wisconsin and invade Anne's privacy led her to protest that this was not the America she recognized. Nor is it consistent with this country's long tradition of respecting the right to free association and private speech of all kinds.

Indeed, when Americans were debating whether to ratify the US Constitution, much of the public discussion occurred through anonymous essays and pamphlets. The most famous of these were the *Federalist Papers*, written with great secrecy under the pen name "Publius" by Alexander Hamilton, James Madison, and John Jay, in hopes of persuading citizens—especially in the critical state of New York—to ratify the Constitution.

It was years after ratification before the authors were revealed, and the essays themselves are now universally acknowledged as the greatest guide to our Constitution. The US Supreme Court has cited the essays hundreds of times, from the landmark 1819 decision *McCulloch v. Maryland* down to the present day. Considering the personalities involved, regional rival-

ries at the time, and the importance of focusing the debate on the message rather than the messenger, it is unlikely that the *Federalist Papers* would have been as effective had their authors been forced to disclose their identities (see "Publius Was Not A PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure," 14 *Wyoming Law Review* 253).

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At the time of ratification, Alexander Hamilton in particular was subject to personal attacks because of his foreign birth and perceived links to the British Crown. Similarly, although a less controversial character, James Madison's Virginian roots would have made New Yorkers suspicious of his arguments, had they been penned in his own name. Simply put, the Constitution may never have been ratified had it not been for anonymous political speech.

Yet, under some present-day state laws requiring disclosure of individuals and groups speaking on political issues, Publius's great essays would likely be considered publications authored by a "political committee," which would then be forced to disclose its authors or cease its publications. Broad disclosure laws now empower government to silence dissenting opinions. If the authors of the *Federalist Papers* had been subject to compulsory disclosure under current campaign finance laws, then so would other issue advocacy groups, including charitable organizations established under section 501(c)(3) of the US tax code.

Funded largely by the Ford Foundation and radical left-wing philanthropist George Soros, the proponents of so-called "dark money" disclosure have already swept today's nonprofit organizations into the ambit of laws designed to regulate candidate campaign financing.

WHAT IS "DARK MONEY"?

The wide use of the phrase "dark money" is itself a major propaganda victory for advocates of government reporting by private civic groups. The expression is, in essence, a political smear. Absurdly equating a lack of regulation—otherwise known as freedom—with sinister darkness, the phrase conjures images of shady political operatives greasing the palms of politicians in dark, smoked-filled rooms. But should the concept of "dark money" be applied to traditional political activities, like you and your neighbor contributing your time and money to civic and social activities that you support? Is that really a threat to democracy, or are those who seek to silence the voice of opposition and limit speech the real menace?

So-called "dark money" generally refers to funds spent for political activities by businesses, unions, nonprofit groups, and individuals who are not required by law to disclose the identities of their donors. Depending on where supporters of government disclosure draw the inherently arbitrary line, "dark money" could refer to donations made to the American Civil Liberties Union (ACLU) or to your local church or soup kitchen.

Already, as a general rule, any spending which calls for the election or defeat of a political candidate constitutes what the law calls "electioneering communications" and requires some disclosure to the government. In fact, our laws today have more disclosure obligations than at any other time in our nation's history. (See http://www.ifs.org/wp-content/uploads/2013/12/2014-08-19_IFS-Policy-Primer_Disclosure.pdf.)

Nevertheless, some anti-speech activists claim the current laws do not go far enough. They say certain charitable and social welfare organizations, including those organized under section 501(c) of the federal tax code, should be forced to disclose the identities of their individual donors when those organizations engage in political activity, even if that is not their primary

function. Those calling for the elimination of "dark money" are thus attempting to dramatically extend the reach of government-mandated disclosure to a wide variety of organizations, activities, and communications.

Some government-disclosure advocates claim that so-called "dark money" expenditures constitute a significant portion of political spending in the United States, but that assertion is false. In the 2014 election cycle, the Federal Elections Commission reported approximately $5.9 billion in total spending on federal elections. Of that sum, roughly $173 million came from groups that are not required by law to disclose donors.

This represents a mere 2.9 percent of all spending on federal elections—hardly a significant portion. As the Institute for Free Speech observed from the 2012 election cycle, "Nearly all of the organizations that financed such independent expenditures … were well-known entities, including the US Chamber of Commerce, the League of Conservation Voters, the National Rifle Association, Planned Parenthood, the National Association of Realtors, the National Federation of Independent Business, NARAL Pro-Choice America, and the Humane Society." As a result, it is not a secret what causes and issues those groups support.

Claims that "dark money" is distorting American politics are even more tenuous when leveled at 501(c)(3)s, considering that these nonprofit organizations are prohibited from participating in any partisan political activity.

WHAT ARE 501(C)(3) NONPROFITS?

There are nearly one million tax-exempt charities in the United States organized under section 501(c)(3) of the federal tax code. These organizations include schools, churches, hospitals, art centers, public radio stations, research foundations, and other groups dedicated to a range of issues from improving the environment to providing legal services to the poor. These groups run the entire political spectrum. The ACLU, the National Rifle Association, Focus on the Family, and the Cato Institute, for example, are all 501(c)(3) public charities. While all types of 501(c) groups are tax-exempt or "nonprofit," meaning that they do not normally owe taxes on their revenues, only contributions to the (c)(3)s are tax-deductible for donors.

Another important distinction between (c)(3) groups and other 501(c) organizations is that (c)(3) groups are *prohibited* from engaging in any express political activity involving political candidates. Other 501(c) organizations, notably 501(c)(4) social welfare groups, can advocate for the election or defeat of political candidates, so long as those activities are not the organization's primary activity. Organizations recognized under 501(c)(4) can also engage in unlimited lobbying to further the purpose of the organization. By contrast, 501(c)(3) public charities can only engage in limited lobbying under certain circumstances.

Of course, the entire point of a public or social benefit organization is to advance an issue or set of issues through public dialogue, including political dialogue. According to government disclosure advocates, however, people should not be able to donate privately to the charities of their choice if those entities engage in any political dialogue. What would this mean in practice? A donation to Planned Parenthood would cease to be your private business and become a public record. Member dues to the NRA or Greenpeace would be reported to the government and disclosed to the public. Even donors to a theater group that engaged in political activity on an issue affecting the arts would be made public.

TRENDS

Advocates of greater government reporting have engaged in a multi-pronged attack on anonymous speech to force more organizations, including 501(c)(3) nonprofits, to reveal their private donors. After a federal disclosure bill failed by a single vote on a procedural motion in the US Senate, government reporting advocates have largely focused their attention on state legislatures, where several proposals have recently passed or nearly passed that would require a wide range of mandatory public disclosure.

Worse, some anti-speech activists have put aside the need to trouble themselves with actually passing laws and instead have persuaded state regulators to demand private donor information as part of their oversight of charitable fundraising. Many of these new mandates have been sweeping; for example, by expanding the definition of an "electioneering communication" or a "political committee." In many instances, these efforts

have resulted in compelled disclosure of transactions by both private individuals and nonprofit entities whose purpose is not primarily political.

The legislative proposals have generally come in one of two forms: dramatically expanding the definition of what constitutes either (1) a "political committee" or (2) an "electioneering communication." Many of these efforts have direct implications for 501(c)(3) organizations, particularly those that engage in limited lobbying. Additionally, the broad sweep of these proposals and statutes have ensnared private citizens engaging in grassroots political activity.

For example, in 2013, Nevada amended its campaign finance laws to expand the definition of a "committee for political action," so that any group that receives or spends more than $5,000 on an election or ballot question is deemed a political committee, regardless of the overarching nature or purpose of the organization. Under this law, 501(c)(3) organizations that, for example, support a ballot measure, would almost certainly have to disclose the identities of all their donors, even if that organization by no means has political activity as its primary purpose.

Such a broad definition of "political committee" even ensnared a concerned individual in Arizona. In 2011, Dina Galassini opposed a bond proposal set to appear on the Town of Fountain Hills' November ballot. One month before the election, she sent a personal email to 23 friends and neighbors asking them to join her in opposing the bond by writing letters and attending a protest where they would hold signs on a street corner. Shortly after sending her email, town officials sent Galassini a "cease and desist letter," claiming that she must register as a political committee. Galassini was frightened by the letter and cancelled her two planned protests. This is exactly what town officials were hoping for and a chilling example of how thoroughly anti-speech activists hope to muzzle even the simplest, neighbor-to-neighbor engagement in public policy.

Some left-wing activist organizations take it further, engaging in what community organizers euphemistically label "accountability" actions. Tom Matzzie, a former organizer for the liberal pressure group MoveOn, created a group called Accountable America whose mission was to intimidate donors planning to give money to conservative groups. Here is the group's self-description from its website:

> "The warning letter is intended as a first step, alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure, and watchdog groups digging through their lives," the *New York Times* reported.

> "Accountable America works to stop the outrageous policies of right-wing and special interests in Washington especially in the areas of economic policy, energy policy, national security policy, and government reform. Our first project seeks to discourage groups and right-wing donors trying to 'swiftboat' progressives."

Matzzie told the *New York Times* that he planned to send "warning letters" to big-money donors to the Republican Party. "The warning letter is intended as a first step, alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure, and watchdog groups digging through their lives," the newspaper reported.

Imagine what these activist groups, who are more interested in muscling their opponents than throwing sunlight on campaign finance, might do if all "dark money" contributions were available in the public square.

The disclose-everything movement is making inroads at the state level across the nation. State legislatures have been seeking to expand the definition of "electioneering communication" to require 501(c)(3) nonprofits and other small groups to disclose their donors simply for speaking about political issues. For example, the Minnesota legislature recently considered two bills that greatly expanded the definition of "electioneering communication" to include any communication that (1) refers to a candidate, (2) is distributed within 30 days of a primary election or 60 days of a general election, and (3) "can be received by more than 1,500 persons." These bills would have forced the organization to turn over the "name, address, and amount attributable to each person" who donated more than $1,000 used for these so-called "electioneering communications." Given the broad scope of this definition of "electioneering communications," these bills would likely affect 501(c)(3) nonprofits, that published a nonpartisan voter guide, for example, and require that such groups disclose their donors.

These provisions that would force private organizations to report the names and addresses of their supporters to the government are often tucked into bills that are billed as "ethics" legislation, "anti-corruption" measures, or laws aimed at creating more "transparency." Who could oppose ethics, anti-corruption, or transparency laws? But these laws turn the concept of transparency on its head. Transparency laws are supposed to make the government transparent to citizens, not to make citizens and our private political preferences transparent to the government.

REGULATORY EFFORTS TO COMPEL DISCLOSURE

Government reporting advocates also have been using the power of regulatory agencies to force nonprofit organizations to reveal their donors. These efforts attack the lifeblood of 501(c)(3) organizations—the ability to fundraise—giving nonprofit organizations the untenable choice between ceasing fundraising activities or invading the privacy of the organization's donors. The most aggressive such efforts are underway in the cultural bellwethers of California and New York.

In order to solicit charitable contributions in California, nonprofits, including 501(c)(3) organizations, must register with the California Registry of Charitable Trusts. As part of the registration process, 501(c)(3) nonprofits have historically submitted a redacted IRS Form 990 to state regulators. That form excluded names or other identifying information of donors. In 2014, however, California Attorney General Kamala Harris (D) began demanding that 501(c)(3) nonprofits submit an unredacted IRS Form 990 that includes the names, addresses, and contribution levels of donors (*Wall Street Journal*, Dec. 19, 2014). Even worse, once this donor information is turned over to the state government, California freedom of information laws arguably require government officials to make these records available to anyone who makes a public records request. In other words, the chief law enforcement officer in the state of California intends to unilaterally coerce private charities into disclosing their private donors as a precondition to engage in constitutionally protected speech and association.

New York Attorney General Eric Schneiderman has demanded the same information from 501(c)(3) nonprofits. He and his California counterpart are defending lawsuits against their demands for information.

THE DANGER OF DISCLOSURE

Proponents of government-mandated disclosure make several arguments for compelling charitable organizations to disclose their donors. Those arguments range from the wrong but perhaps well-intentioned, to the nefarious. On the soft end of the spectrum are those who claim they are not seeking to prevent speech, but only to inform the public of who is speaking.

Daniel I. Weiner of the far-left Brennan Center for Justice is typical of this school of thought. He laments that the *Citizens United* decision and the economic freedom that flows from it are somehow unjust and empowering the rich at the expense of everyone else. It is "deeply disheartening to Americans who believe in transparency and think that all citizens, regardless of wealth, should be heard."

On the hard end of the spectrum are partisan political operatives who wish to use disclosure mandates to silence opposing views. As Arshad Hasan, executive director of ProgressNow put it, "The next step for us is to take down this network of [conser-

vative and libertarian] institutions that are state-based in each and every one of our states." (Ricochet, July 22, 2014)

One of the most significant challenges is protecting speakers who choose to remain private, particularly when speaking truth to power. Political actors have routinely sought the identities of anonymous speakers with whom they disagree in order to harass, humiliate, and ultimately silence them. During the Civil Rights era, for example, the Alabama attorney general sought to compel the National Association for the Advancement of Colored People (NAACP) to turn over the names and addresses of all of its members to the state. Fortunately, this attempt at intimidation was rebuffed by the US Supreme Court as a violation of the First Amendment rights of the NAACP and its members. (*NAACP v. Alabama ex rel. Patterson*, 1958)

Similar efforts to silence critics through forced disclosure continue today. These include threats from government bureaucrats, like we saw when Dina Galassini tried to organize some friends and neighbors to oppose a local bond measure in Arizona. They include threats from other citizens, such as when Margie Christoffersen lost her job as a restaurant manager after her $100 donation to support a California ballot initiative defining marriage as the union of one man and one woman became public ("Prop. 8 Stance Upends Her Life," *Los Angeles Times*, Dec. 14, 2008). And perhaps most ominously, these include threats from those wielding law enforcement authority, like the controversial Arizona Sheriff, Joe Arpaio, who has jailed journalists critical of his office as well as political opponents. ("Maricopa County supervisors settle lawsuits filed by 'New Times' founders, Stapley," *Arizona Republic*, Dec. 20, 2013)

In this sense, mandatory disclosure laws do what many government reporting advocates want—they silence opposing views. In his concurring opinion in *Citizens United*, Justice Clarence Thomas cited a *New York Times* article that described a new nonprofit group formed in the run-up to the 2008 elections that "plan[ned] to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions … [by exposing donors to] legal trouble, public exposure, and watchdog groups digging through their lives." This organization's leader described his donor disclosure efforts simply as "going for the jugular."

CONCLUSION

Cloaked as advocates of greater information and transparency, the enemies of free speech are at the gate. Defenders of the First Amendment must be ready to identify the dangers of donor disclosure and challenge efforts to compel government reporting whenever they occur.

Cloaked as advocates of greater information and transparency, the enemies of free speech are at the gate.

The nearly one million nonprofits—whose activities range from civil rights advocacy to equestrian therapy—should not fall victim to politically-driven efforts to silence their views and curtail their activities. All Americans have the right to support causes they believe in.

At the same time, the disrespect shown for anonymity in political dialogue and association disregards our nation's rich history and tradition of protecting these rights and demeans Americans who cherish freedom of thought and speech. As the New York Supreme Court admonished in *People v. Duryea*, a First Amendment decision more 40 years ago:

> Do not underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.

This essay was originally published by the Capital Research Center in Organization Trends, September 2015. PDF here and online text here: https://capitalresearch.org/article/the-victims-of-dark-money-disclosure/.

Video Resources

PEOPLE UNITED FOR PRIVACY

SPN has produced several videos that are available to share on social media, in blog posts, and on websites. These videos help explain the consequences of donor disclosure and can all be found on PeopleUnitedforPrivacy.com/Videos

Darcy's True Story: Death Threats, Violence, and...

True Story: Wisconsin John Doe Victims

Keep Donors Safe

Catherine's True Story: I Lost My Privacy

Transparency is for Government, Privacy is for People

Blacklisted

What If?

What's the Worst that Could Happen?

PRAGERU VIDEOS

PragerU also has tackled the importance of maintaining donor privacy in two videos, one featuring David French from *National Review*, and another featuring Kim Strassel from the *Wall Street Journal.*

https://www.prageru.com/courses/political-science/when-transparency-really-means-tyranny

https://www.prageru.com/courses/political-science/dark-art-political-intimidation

LEARN LIBERTY

For a video aimed at a younger audience, such as high school or college-aged students, we recommend this one from Learn Liberty.

https://www.learnliberty.org/videos/anonymity-the-greatest-weapon-against-oppression/

Who to Contact for Help

If you need help crafting a donor privacy policy for your state, analyzing a bill and its potential impact on donor privacy, or if you just want to talk through how to change the narrative on donor privacy, the following people can help:

Starlee Coleman
State Policy Network
coleman@spn.org

Shelby Emmett
American Legislative Exchange Council
semmett@alec.org

Matt Miller
Goldwater Institute
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Matt Nese
Institute for Free Speech
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