

PEOPLE UNITED *for* PRIVACY

July 25, 2022

The Honorable Amy Klobuchar
United States Senate
Washington, DC 20510

The Honorable Roy Blunt
United States Senate
Washington, DC 20510

Re: Opposition to the DISCLOSE Act and its Destructive Impact on Nonprofit Advocacy and Citizen Privacy

Dear Chairwoman Klobuchar, Ranking Member Blunt, and Members of the Senate Committee on Rules and Administration:

On behalf of People United for Privacy (PUFP),¹ I submit the following letter for the hearing record responding to several inaccurate and misleading arguments discussed in the United States Senate Committee on Rules and Administration's July 19, 2022 hearing on "The DISCLOSE Act," introduced as S. 443 in the 117th Congress. Associational privacy is an enduring First Amendment right that has been repeatedly affirmed by the United States Supreme Court for decades and shares widespread support among Americans regardless of their political leanings. PUFP exists to safeguard the freedom of speech and association rights of nonprofits and their supporters in America – regardless of their beliefs or the level of an individual's financial support for the causes of their choice.

During the hearing, proponents of the so-called "DISCLOSE Act" positioned it as a campaign finance bill that impacts only political advocacy surrounding election campaigns. Make no mistake: **The DISCLOSE Act is not a campaign finance bill. It's an attack on issue advocacy and the ability for nonprofits of all persuasions to engage on policy issues central to their mission.** Further, it is an unprecedented assault on the long-held right of Americans to support the nonprofit causes of their choice privately if they so choose. This draconian bill gives the government power its never held to surveil the caused-based giving of American citizens, and the legislation is intended to dry up such giving. As now-Senator Majority Leader Chuck Schumer (D-NY) boasted when first debuting the DISCLOSE Act in 2010, "[t]he deterrent effect" of the bill's nonprofit donor disclosure provisions "should not be underestimated."²

The DISCLOSE Act will require nonprofits to publicly report their supporters to the Federal Election Commission (FEC) for common types of policy communications, including on the internet, and further require organizations to declare whether they support or oppose a political candidate, even if their message is about a legislative issue and not related to any campaign. Among the many issues:

¹ People United for Privacy (PUFP) defends the rights of all Americans – regardless of their beliefs – to come together in support of their shared values. Nonprofit organizations perform important work in communities across the United States, and we protect the ability of nonprofit donors to support causes and exercise their First Amendment rights privately.

² T.W. Farnam, "The Influence Industry: Disclose Act could deter involvement in elections," *The Washington Post*. Available at: <https://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051205094.html> (May 13, 2010).

- The bill creates a new category of expenditure called “campaign-related disbursements” that includes speech common for nonprofits, such as mentioning a federal candidate in the context of pending legislation or current policy debates.
- Organizations making “campaign-related disbursements” totaling more than \$10,000 during a two-year “election reporting cycle” (or calendar year for a “Federal judicial nomination communication”) must publicly report the names and addresses of all donors giving \$10,000 or more during that period to the FEC.
- In effect, groups speaking about issues in Congress (or federal judicial nominees) will be forced to report the names and addresses of their supporters to the government for inclusion in a publicly searchable database.
- Inexplicably, any speech that mentions a federal candidate will trigger a filing requirement to report whether that speech advocates for or against the elected official – even if the message has nothing to do with their campaign.
- Additionally, the bill expands existing disclaimer requirements to mandate the listing of an organization’s “top funders” in lengthy statements accompanying a group’s message on communications about public policy. This chilling provision would mislead the public by associating individuals with a message they may be unaware of and with which they may disagree. In effect, the disclaimer will shift the public’s focus onto a nonprofit’s supporters rather than the substance of a group’s message, accelerating the erosion of quality public discourse about the issues of the day.
- The Act would also harm philanthropy by requiring nonprofits that make grants or payments to another organization to disclose their donors to the FEC, if the receiving organization plans to make “campaign-related disbursements” totaling \$50,000 or more *within the next two years*. Granting organizations will then be placed in the impossible position of predicting what the recipient may do in the future.

Taken together, the aggressive mandates in this bill would violate Americans’ privacy, facilitate harassment, and decrease civic engagement.

On multiple occasions, including as recently as last year in *Americans for Prosperity Foundation (AFPF) v. Bonta*, the Supreme Court has recognized that forcing an organization to release its member and donor lists to the government not only divulges the First Amendment activities of individual members and donors but may also deter such activities in the first place. Individuals may legitimately fear any number of damaging consequences from disclosure, including harassment, adverse governmental action, and reprisals by an employer, neighbor, or community member. Or they may simply prefer not to have their affiliations disclosed publicly – or subjected to the possibility of disclosure – for a variety of reasons rooted in religious practice, modesty, or a desire to avoid unwanted solicitations. For nonprofits, privacy is especially important for organizations that challenge the practices and policies of the very governments that seek the identities of their members and supporters. The DISCLOSE Act takes a strong stand in opposition to the Court’s respect for citizen privacy rights and, for those reasons, it is of dubious constitutionality.

Beyond the myriad of practical issues with this measure, several arguments were made at the hearing that obscure the true impact of the bill and its devastating impact on all nonprofit causes.

- 1) **Support for citizen privacy – and opposition to DISCLOSE Act-style reporting mandates – is robustly bipartisan.** Despite claims by the measure’s supporters at the

hearing that nonprofit donor disclosure is popular, actions from the nonprofit community and recent polling reveal the opposite. In last year's *AFPF v. Bonta* ruling, over 280 groups signed 43 amicus briefs in support of citizen privacy.³ These signers represent a wide range of causes and political preferences, including progressive advocacy groups, conservative think tanks, religious organizations, trade associations, animal and human welfare advocates, educational institutions, community services, and arts and culture-focused organizations. As Chief Justice Roberts wrote in the Court's majority opinion, "[t]he gravity of the privacy concerns in [the disclosure] context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect [of disclosure] feared by these organizations is real and pervasive...."

Beyond widespread support for this First Amendment right in the nonprofit community, polling confirms strong support for citizen privacy – and fear of disclosure – among Americans as well. A Harvard CAPS-Harris poll released in March 2021 found that 64% of respondents believe a "growing cancel culture" threatens their freedom while 36% of those surveyed agreed that cancel culture is a "big problem."⁴ A paltry 13% percent of participants replied that "cancel culture" is "not a problem." Additionally, the poll found that 54% of respondents were "concerned" that voicing their opinions online could result in lost employment or the shuttering of their social media accounts. These worrying findings reinforce the conclusions of a summer 2020 poll from the Cato Institute, which verified that 62% of Americans across the political spectrum and various identity groups have political views that they are afraid to share in our current political climate.⁵ Further, 32% of respondents in that poll were worried about being passed by for job opportunities solely because of their political views. If Americans were forced to publicize the nonprofit causes they support, it is clear many would refrain from giving at all, something DISCLOSE supporters seem to realize too.

If there's any doubt remaining about bipartisan opposition to the DISCLOSE Act's disclosure mandates, consider this warning from two ACLU attorneys expressing serious concerns about the impact of the measure's donor exposure policies: The bill "contains significant flaws that are detrimental to the health of our democracy and will likely have unintended consequences on the political rights of noncitizen immigrants as well as many nonprofits, including civil rights organizations and other civil liberties movement builders." They continue: "Why should [the bill's] sponsors and supporters care? Because it could directly interfere with the ability of many to engage in political speech about causes that they care about and that impact their lives by imposing new and onerous

³ See "Free speech case attracts support from nearly 300 diverse groups," Americans for Prosperity. Available at: <https://americansforprosperity.org/wp-content/uploads/2021/04/AFPF-v-Becerra-Amici.pdf> (April 2021).

⁴ Brittany Bernstein, "POLL: Majority of Americans See Cancel Culture as Threat to Freedom," Aol. Available at: <https://www.aol.com/news/poll-majority-americans-see-cancel-213920486.html> (March 29, 2021).

⁵ Emily Ekins, "Poll: 62% of Americans Say They Have Political Views They're Afraid to Share," Cato Institute. Available at: <https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share> (July 22, 2020).

disclosure requirements on nonprofits committed to advancing those causes. We know from history that people engaged in politically charged issues become political targets and are often subject to threats of harassment or even violence.”⁶

One thing the nonprofit community can agree on is the importance of defending the right to engage in free speech and to debate issues that we may disagree on. Nonprofits of all stripes are united in support of donor privacy and the right of individuals to exercise their First Amendment rights privately.

- 2) The DISCLOSE Act’s unprecedented disclosure mandates would impact all organizations, not only those promoting controversial or minority viewpoints.** It was noted several times during the hearing that the donor exposure demands in the Act would harm minority or controversial viewpoints. This is undeniably true, but it ignores the reality that disclosure can be weaponized against mainstream viewpoints as well. Especially in today’s hyperpartisan and volatile political climate, it only takes one person to use disclosure data to cause harm to their opponents.

In 2015, a shooting at a Colorado Springs Planned Parenthood clinic tragically led to the deaths of three people and injuries to nine others. The standoff finally ended when police crashed armored vehicles into the lobby of the building to rescue people locked in a protected room. During courtroom appearances, the attacker made multiple statements about his anti-abortion views and called himself a “warrior for the babies.”⁷

This June, a Life Choices pregnancy center in Colorado was vandalized and set on fire following the Supreme Court’s ruling in *Dobbs v. Jackson Women’s Health Organization*. Fortunately, no one was killed in that attack, but the building sustained heavy damage. Graffiti on the building included the warning, “if abortions aren’t safe, neither are you.”⁸ To compound the threat, an extremist group shared a map of pro-life crisis pregnancy centers on social media with threatening messages.

If the DISCLOSE Act was law and either Planned Parenthood or Life Choices were forced to report the names and home addresses of their supporters to the government for inclusion in a publicly accessible database, these attacks could have been even more devastating. The Planned Parenthood shooter could have targeted donors at their homes or places of business, and the Life Choices arsonists could have taken their anger to the doorsteps of those supporters’ homes. Should Americans with pro-life and pro-abortion views be subject to such danger?

⁶ Kate Ruane and Sonia Gill, “H.R. 1 could restore our democracy. As it’s written now, it could hurt it, too.” *The Washington Post*. Available at: <https://www.washingtonpost.com/opinions/2021/03/03/aclu-lawyers-hr1-flaws-nonprofits/> (March 3, 2021). The text of the DISCLOSE Act was included in H.R. 1 and S. 1 in the 117th Congress.

⁷ Trevor Hughes, “Planned Parenthood shooter ‘happy’ with his attack,” *USA Today*. Available at: <https://www.usatoday.com/story/news/2016/04/11/planned-parenthood-shooter-happy-his-attack/32579921/> (April 11, 2016).

⁸ Alberto Luperon, “Someone Set Fire to ‘Christ-Centered Ministry,’ Vandalized Premises After Supreme Court’s Abortion Ruling,” *Law & Crime*. Available at: <https://lawandcrime.com/crime/someone-set-fire-to-christ-centered-ministry-vandalized-premises-after-supreme-courts-abortion-ruling/> (June 26, 2022).

Consider another example. Many Americans support a transition to Democracy in China, but donor disclosure in the manner contemplated by the DISCLOSE Act would cripple this movement. The Founder and President of Citizen Power Initiatives for China, a U.S.-based nonprofit organization advocating for democracy in his native China, explains why: “Most people who want to support us, including those living in the U.S., have some connection to China through their family, friends, or business. China has a long arm to harass and surveil. Public exposure of our supporters’ identities by federal or state agencies in the United States would enable the Chinese government and others acting on its behalf to more easily threaten and harass our supporters. Many people in the U.S. have demurred from supporting our cause because of these fears. Our story should give pause to politicians in the United States who seek to force nonprofits to publicly expose their supporters when speaking on matters of public concern... It is no exaggeration to say that privacy is a matter of life and death for our members and donors as well as for our organization itself. Our work would be unsustainable without the ability to shield our supporters. The same is true for many other important causes supported by nonprofits throughout the United States.”⁹

- 3) A healthy First Amendment culture promotes transparency in government but privacy for citizens.** During the hearing, Senator Angus King (I-ME) questioned why he and other elected officials must be transparent about their roll call votes while Americans who support nonprofit causes can do so privately. The question was regrettable, but the answer is very simple: Transparency is for government. Privacy is for citizens.

When individuals run for and win elected office, they do so to represent the interests of the American people. This is markedly different than private citizens who owe no duty to publicize their personal beliefs to their peers. Americans who choose to give to nonprofit causes do so with the understanding that those organizations will more effectively and efficiently communicate their views. This isn’t a new phenomenon. American citizens have supported causes since the country’s founding era and have done so privately for just as long. What’s new is the expectation of some elected officials that they can pry into the private beliefs of their constituents by forcing disclosure of those views through measures like the DISCLOSE Act.

- 4) Privacy rights guaranteed under the First Amendment don’t disappear at an arbitrary threshold.** Throughout the hearing, arguments were made that nonprofit supporters had no expectation to privacy if they donated over a certain threshold. In the DISCLOSE Act, that exposure threshold is currently set at \$10,000. While a relatively small number of Americans will ever donate that much to a nonprofit organization, the passage of a bill like DISCLOSE will inevitably result in fewer such donations, limiting speech, harming impacted nonprofits’ ability to fulfill their mission, and discouraging future donations, including those *under* the threshold. These outcomes harm *all* supporters of a nonprofit, not just those individuals whose name and home address are publicly disclosed.

⁹ Jianli Yang, “When Donor Privacy is a Life or Death Matter,” *RealClearPolicy*. Available at: https://www.realclearpolicy.com/articles/2022/07/15/when_donor_privacy_is_a_life_or_death_matter_842585.html (July 15, 2022).

The downstream chilling effects of this threshold are real. Once exposed, a nonprofit's significant donors are likely to receive media scrutiny or worse from the organization's issue opponents. We can be sure other supporters, who currently remain private, will cease their donations for fear of the same outcome. There will be other lower-level supporters who don't understand the complexity of the law and who will mistakenly assume that their identity will be outed as well. Again, the result will be that the individual chooses not to donate, and the nonprofit and all its supporters will suffer. And, of course, there is no guarantee that Members of Congress won't lower the threshold over time. If the goal of some lawmakers is to expose donors to nonprofits, and the threshold motivates many to give just under the \$10,000 trigger to protect their privacy, it's inevitable there will be calls to lower the amount further.¹⁰ This vicious cycle will harm Americans' privacy and chill nonprofit advocacy on every issue imaginable, to the detriment of civil society.

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Nonprofit organizations are forces for good and have long played a role in educating Americans and policymakers about complex issues. Nonprofits also serve as a shield for people who are uncomfortable or unable to speak publicly about an issue on their own, a vital societal function. While some donors may prefer their name to be listed publicly as a supporter of a cause, many donors fear such attention because they value their privacy. If anything, today's highly charged political climate gives Americans even more reason to keep their beliefs and giving private.

It is not difficult to imagine a nonstop wave of targeting and harassment campaigns across the country if donor information is routinely published in a searchable government database. The First Amendment would effectively be a dead letter as Americans would sacrifice their free speech rights to preserve their privacy and save themselves from lost employment, physical harm, and other forms of harassment and intimidation. Lamentably, this silencing of debate appears to be exactly what nonprofit donor disclosure proponents hope to accomplish.

On behalf of the millions of American citizens represented by organizations that speak on their behalf, we strongly urge you to protect nonprofit donor privacy and reject the DISCLOSE Act.

Sincerely,



Matt Nese
Vice President
People United for Privacy

¹⁰ For additional discussion of this issue, see Alex Baiocco, "A Threshold for Violating Your Rights Still Violates Your Rights," Institute for Free Speech. Available at: <https://www.ifs.org/blog/hr1-disclosure-threshold-violates-your-rights/> (April 29, 2021).