

PEOPLE UNITED *for* PRIVACY

May 11, 2023

The Honorable Bryan Steil
United States House of Representatives
Washington, DC 20515

The Honorable Joe Morelle
United States House of Representatives
Washington, DC 20515

RE: Support for the ACE Act's Robust Protections for Personal Privacy for Nonprofits and their Supporters

Dear Chairman Steil, Ranking Member Morelle, and Members of the House Committee on House Administration:

On behalf of People United for Privacy,¹ I submit the following comments for the hearing record related to the May 11, 2023 hearing in the United States House Committee on House Administration to discuss "American Confidence in Elections: Protecting Political Speech." PUFPP stands in strong support of the donor privacy protections for nonprofits and their supporters in the "American Confidence in Elections (ACE) Act." The ACE Act was introduced in the 117th Congress as H.R. 8528, and we urge members of the Committee to reintroduce this bill and prioritize its swift passage through the U.S. House of Representatives.

Freedom of speech is essential for Americans to have confidence in our elections, and privacy is just as essential to protect Americans' willingness to exercise their First Amendment rights. We cannot have a government of, by, and for the people if the people are not free to speak to each other and the public about the government. Our pervasive cancel culture and attacks on nonprofit donor privacy represent one of the most serious threats to free speech and democracy today.

It only takes one person to use disclosure data to cause harm to their opponents. Consider two examples:

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."²

Last 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 the attack, but the building sustained heavy damage. Graffiti

¹ People United for Privacy (PUFPP) believes every American has the right to support causes they believe in without fear of harassment or intimidation. We are a nonprofit, nonpartisan organization that works to protect the rights of individuals to come together in support of their shared values, and we also protect the resources organizations need to make their voices heard. PUFPP provides information and resources to policymakers, media, and the public about the need to protect freedom of speech and freedom of association through preserving citizen privacy.

² 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/> (Apr. 11, 2016).

on the building included the ominous warning, “if abortions aren’t safe, neither are you.”³ To compound the threat, an extremist group shared a map of pro-life crisis pregnancy centers on social media with threatening messages.

Without strong protections for donor privacy, what might have happened if 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? The Planned Parenthood shooter could have attacked donors at their homes or places of business, and the Life Choices arsonists could have taken their rage to the doorsteps of those supporters’ homes. Should Americans be subject to such danger simply for supporting a cause they believe in?

When Americans can be silenced through harassment and intimidation, our elections are transformed from contests over ideas into battles for raw power. Americans deserve confidence that elections are decided based on their views about who offers the best path forward for the country, not which side’s partisans are the most ruthless and effective at silencing their opposition. Americans deserve to trust that when they participate in civic discourse by supporting nonprofits, they will not lose their jobs or face protests – or worse – at their homes.

While donors to candidates and political committees are required to be publicly disclosed, Americans generally possess strong First Amendment rights to keep their beliefs and affiliations private if they so choose. The Supreme Court has repeatedly emphasized the importance of limiting the reach of laws that mandate donor disclosure because of the chilling effect this policy has on freedom of speech. Maintaining privacy in association is essential for all Americans to be free to exercise their rights and feel confident in the integrity of our constitutional system of government.

While other issues may be addressed during the hearing, our comments are focused on PUPF’s support for four donor privacy-protective provisions that were included in the previous iteration of the ACE Act:

- **Speech Privacy Act of 2022.** This vital and commonsense measure codifies the Supreme Court decisions in *NAACP v. Alabama* and *Americans for Prosperity Foundation (AFPF) v. Bonta* by prohibiting federal agencies from collecting or disclosing the names of nonprofit supporters. Agencies that are required by law to collect this information are exempted, and penalties for government officials that illegally reveal this sensitive information are specified. (*Sec. 307*)⁴
- **Don’t Weaponize the IRS Act.** Enshrines into law reforms issued by rulemaking in 2020 that prevent the IRS from collecting and warehousing nonprofit donor information that the IRS has explicitly acknowledged it does not use or need. (*Sec. 308*)
- **IRS Protections.** Prevents the Internal Revenue Service from drafting or promulgating new regulations to limit political speech by nonprofits. (*Sec. 309*)
- **SEC Protections.** Prohibits the Securities and Exchange Commission from requiring businesses to disclose their giving to nonprofits and membership in trade associations. (*Sec. 341*)

³ 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).

⁴ This section reference and the ensuing references correspond to the version of the American Confidence in Elections Act that was introduced as H.R. 8528 in the 117th Congress. Bill text is available at: <https://www.congress.gov/117/bills/hr8528/BILLS-117hr8528ih.pdf>.

Taken together, these reforms ensure freedom of speech is not chilled or trampled by federal agencies violating privacy in association. Just as every American deserves the right to vote privately with confidence their vote will count, those same Americans deserve the right to privately support causes they believe in without fear of harassment and intimidation.

A Brief Legal History of Nonprofit Donor Privacy Rights

In the landmark 1958 case, *NAACP v. Alabama*, the Supreme Court was asked to affirm the right to privacy in association. At that time, Alabama Attorney General John Patterson endeavored to obstruct the NAACP's activities in the state and nationally by demanding the organization report the names and addresses of their supporters to state officials. During the height of the Civil Rights Movement in a segregated southern state, it's not difficult to imagine how dangerous the release of this information would have been to those Alabamians who belonged to or supported the organization. The NAACP's members and supporters – in Alabama and elsewhere – would have been targeted for harassment, intimidation, violence, or worse.

The NAACP fought the demand for their membership information to the Supreme Court and won a unanimous victory. In an opinion authored by Justice John Marshall Harlan II, he wrote: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective [] restraint on freedom of association.... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs...."⁵ The right to privacy in association has been repeatedly reaffirmed by the Court in numerous cases that followed.⁶

Despite the Court's strong holding in *NAACP v. Alabama*, attacks on donor privacy have persisted across the country. In 2021, as a response to one such attack, the Supreme Court reaffirmed in *AFFP v. Bonta* that all Americans have the ability to exercise their First Amendment rights privately.⁷ In that case, AFPF and the Thomas More Law Center challenged the California Attorney General's sweeping demand for nonprofit donor information in annual filings, arguing that the disclosure requirement violated their freedom of association under the First Amendment. In a 6-3 decision, the Court offered its strongest defense of privacy in association in a generation.

There was no state law requiring AFPF to file donor information with state officials, but, in 2014, California began requiring nonprofits to do so anyway by including their IRS Form 990, Schedule B in their annual registration with the Attorney General's office. That sensitive form lists information about a nonprofit organization's significant supporters. The state claimed it needed this information, which included donors' names and home addresses, for enforcement purposes and promised to keep the information confidential. However, it was revealed during the litigation that the confidential Schedule B forms of nearly 2,000 nonprofit organizations were posted online and made publicly

⁵ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Opinion available at: <https://supreme.justia.com/cases/federal/us/357/449/>.

⁶ Other prominent cases supporting a right to maintain privacy in one's affiliations and memberships include, but are not limited to, *Bates v. Little Rock*, 361 U.S. 516 (1960) (holding unconstitutional a city tax ordinance requiring nonprofit groups to publicly disclose donors); *Shelton v. Tucker*, 364 U.S. 479 (1960) (holding facially unconstitutional a state requirement that public school teachers list all organizations to which they belonged or contributed to in the past five years, even though the list was not public); and *Talley v. California*, 362 U.S. 60 (1960) (holding facially unconstitutional a city ordinance requiring handbills to identify financial supporters). For more information, see FN 7 in Bradley A. Smith, "Americans for Prosperity Foundation v. Bonta: Questions and Answers," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2021/08/2021-08-30_Explainer_Smith_Americans-For-Prosperity-Foundation-v.-Bonta-QA.pdf (Aug. 30, 2021).

⁷ 594 U.S. at __ (2021). Opinion available at https://www.supremecourt.gov/opinions/20pdf/19-251_p86b.pdf.

accessible. Moreover, the state failed to demonstrate any legitimate need for annual collection of this sensitive information.

As Chief Justice Roberts explained in the opinion of the Court, “We are left to conclude that the Attorney General’s disclosure requirement imposes a widespread burden on donors’ associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing...”⁸

In a sign of enduring and widespread support for personal privacy, the Court’s holding was supported by a bipartisan coalition of nonprofits across the country. **Nearly 300 groups** from across the political spectrum filed amicus briefs in support of robust privacy protections for nonprofits and their supporters,⁹ a phenomenon that was noted in the Court’s majority opinion:

“The gravity of the privacy concerns in [the disclosure] context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect [of disclosure] feared by these organizations is real and pervasive.”¹⁰

Importantly, legal protections for *nonprofit* donor privacy do not conflict with laws requiring campaigns and political committees to report their spending and contributors. A separate line of Supreme Court precedent, beginning with 1976’s *Buckley v. Valeo* decision,¹¹ has upheld some limited campaign finance disclosure laws for groups with a primary purpose of influencing election campaigns. Efforts to expand these laws to cover nonprofits that speak about public policy issues, however, violate the precedents established in *NAACP v. Alabama* and *AFPP v. Bonta*.

Bipartisan Concern Over Cancel Culture and Support for the ACE Act’s Solutions

Americans are concerned about their rights to free speech and the possibility of being “canceled.” 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.”¹² A paltry 13% 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 they are afraid to share in our current political climate.¹³ Further, 32% of respondents

⁸ *Id.* at 18.

⁹ See “Free speech case attracts support from nearly 300 diverse groups,” Americans for Prosperity Foundation. Available at: <https://americansforprosperity.org/wp-content/uploads/2021/04/AFPP-v-Becerra-Amici.pdf> (Apr. 2021).

¹⁰ *AFPP*, 594 U.S. at 17-18.

¹¹ *Buckley v. Valeo*, 424 U.S. 1. Opinion available at: <https://www.fec.gov/resources/legal-resources/litigation/Buckley.pdf>.

¹² Julia Manchester, “64 percent view ‘cancel culture’ as threat to freedom: poll,” *The Hill*. Available at: <https://thehill.com/homenews/campaign/545387-64-percent-say-they-view-cancel-culture-as-a-threat-to-their-freedom-poll/> (Mar. 29, 2021). See also Alec Greven, “Cancel Culture Is a Threat to Everyone,” Institute for Free Speech. Available at: <https://www.ifs.org/blog/cancel-culture-threat-to-everyone/> (Sept. 22, 2021).

¹³ 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).

in that poll were worried about being passed by for job opportunities solely because of their political views.

Voters also strongly believe nonprofits have an important role to play in advocating for issues supported by their members and engaging in public education activities. 70% of registered voters agree that the role of nonprofits in encouraging free speech and the free exchange of ideas is “absolutely essential” or “very important.” 69% believe nonprofits have a role to play in keeping voters informed on issues, and 67% believe they are indispensable to educating the public on current issues. Voters overwhelmingly support private giving as well. **Nine out of ten voters say the right to privacy is absolutely essential or very important.** Seven out of ten voters believe that no one has a right to know about a person’s donations to non-political organizations.¹⁴

Another example of widespread support for donor privacy can be found in the *AFPF v. Bonta* ruling. **Over 280 groups signed 43 amicus briefs in support of citizen privacy.** The signers represented a wide range of causes and political preferences, including conservative think tanks, progressive advocacy groups, religious organizations, trade associations, animal and human welfare advocates, educational institutions, and community service and arts and culture-focused organizations.

It's not surprising, then, that the nonprofit community is united in supporting the ACE Act’s robust donor privacy protections. **In 2022, a coalition of nearly 70 nonprofits signed a letter to House leaders organized by People United for Privacy in support of the ACE Act’s strong protections for citizen privacy.** As the letter explains:

“The free speech provisions in the ACE Act would defend the vital role nonprofit organizations serve in encouraging free speech and the free exchange of ideas. Privately supporting causes – and the organizations advancing those causes – is a fundamental freedom protected by the First Amendment... These reforms will protect millions of Americans across the country, who cherish and rely on the right to privately support causes they believe in without fear of harassment and intimidation, as well as the diverse causes they support, including the undersigned individuals and organizations.”¹⁵

While debates about citizen privacy may often appear partisan in Congress, there’s no partisan divide on this topic in communities around the country. Nonprofits and the Americans who support them may disagree sharply on various policy issues, but they’re united in agreement on protecting their privacy.

ACE Act Provisions Protecting Donor Privacy

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 following four provisions of the ACE Act respond to and resolve these concerns.

¹⁴ Poll conducted December 4-10, 2020 by Heart + Mind Strategies through a 23-minute online survey. The audience was a nationally representative sample of registered voters, ages 18+ (n=1,004).

¹⁵ “Support for the ACE Act’s Critical Free Speech and Privacy Protections,” People United for Privacy. Available at: https://unitedforprivacy.com/wp-content/uploads/2022/09/ACE_Act_Coalition_Letter.pdf (Sept. 15, 2022).

Speech Privacy Act of 2022

Since 2018, **17 states** have acted to uphold the Supreme Court's *AFPP v. Bonta* decision by passing new protections against the unlawful collection and disclosure of Americans' personal information when giving to nonprofits.¹⁶ The Speech Privacy Act of 2022 represents Congress' intent to prohibit federal agencies from arbitrarily collecting or releasing Americans' nonprofit membership or donation records. Agencies that are required by law to collect this information, like the Federal Election Commission, are exempted, and penalties for government officials that illegally reveal this sensitive information are specified.

Safeguarding Americans' giving history provides an important defense against the rising trends of doxing and cancel culture, wherein malicious actors weaponize public records and target Americans for harassment based on their beliefs and associations. These actions undermine free speech and jeopardize the ability and willingness of citizens to support the causes of their choice. In today's increasingly tense political atmosphere, greater protections for privacy and free speech are vital.

Despite more than six decades of rulings from the Supreme Court upholding the privacy rights of donors to nonprofit causes, efforts to violate personal privacy rights continue unabated in Congress, at regulatory agencies, and in states across the country.¹⁷ The lesson is clear: Precedent alone is not enough to safeguard Americans' personal privacy. Proactive legislation is needed.

The Speech Privacy Act provides that proactive protection and safeguards Americans' freedom to join together with their fellow citizens in support of a cause. It empowers all Americans to support the nonprofits of their choice without looking over their shoulder to scan for threats on the horizon. It also protects nonprofit groups that speak about public policy from having their members targeted for retaliation by government officials or groups that oppose their views. In this way, the legislation is both a salve for free speech and a much-needed shield for nonprofits and their members.

State equivalents of the Speech Privacy Act have become law in 17 states to date: **Arizona** in 2018; **Mississippi** in 2019; **Louisiana, Oklahoma, Utah,** and **West Virginia** in 2020; **Arkansas, Iowa, South Dakota,** and **Tennessee** in 2021; **Kansas, Missouri, New Hampshire,** and **Virginia** in 2022; and **Alabama, Indiana,** and **Kentucky** so far in 2023.

Support for these privacy protections is routinely bipartisan. State privacy protection legislation has been signed into law by both Republican and Democratic governors and been sponsored by both Republican and Democratic lawmakers. Measures have passed *unanimously* in both Democratic-controlled (Virginia) and Republican-controlled (Indiana) legislative chambers and by voice vote

¹⁶ Luke Wachob, "Bipartisan Privacy Reform Passes in Kentucky and Indiana," People United for Privacy. Available at: <https://unitedforprivacy.com/bipartisan-privacy-reform-passes-in-kentucky-and-indiana/> (May 5, 2023). Alabama became the 17th state to pass legislation strengthening nonprofit donor privacy protections on May 9, 2023. See Alabama Act #2023-128 at <https://arc-sos.state.al.us/ucp/L1254856.A11.pdf> (May 9, 2023).

¹⁷ In Congress, see, e.g., Eric Wang, "Analysis of H.R. 1 (Part One): 'For the People Act' Is Replete with Provisions for the Politicians," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2021/02/2021-02-22_IFS-Analysis_HR-1_DISCLOSE-Honest-Ads-And-Stand-By-Every-Ad.pdf (Feb. 2021). At the state level, see, e.g., Luke Wachob, "New Mexico House Rejects Anti-Privacy Bill Amid Ongoing Lawsuit," People United for Privacy. Available at: <https://unitedforprivacy.com/new-mexico-house-rejects-anti-privacy-bill-amid-ongoing-lawsuit/> (Apr. 26, 2023); Luke Wachob, "Virginia Holds Firm on Personal Privacy," People United for Privacy. Available at: <https://unitedforprivacy.com/virginia-holds-firm-on-personal-privacy/> (Mar. 27, 2023); and Luke Wachob, "More Bills Threatening Citizen Privacy Bite the Dust," People United for Privacy. Available at: <https://unitedforprivacy.com/more-bills-threatening-citizen-privacy-bite-the-dust/> (Feb. 23, 2023).

(New Hampshire). The Alabama law passed both chambers of the Legislature unanimously. These protections have been supported by groups as diverse as state right to life organizations *and* Planned Parenthood chapters, chambers of commerce *and* labor unions, and organizations on both sides of debates about our civil liberties. If there's one issue everyone can agree on in our divided age, it's the importance of protecting the privacy of Americans who support nonprofit causes.

Don't Weaponize the IRS Act

Politics has no place in federal tax compliance. Unfortunately, the Internal Revenue Service has a stained history of using information it collects to target groups and individuals for their beliefs. The large-scale collection and storage of nonprofit donor information is a risky endeavor with potentially serious consequences. Even though donor information is required to be held confidentially by the IRS, there is always the potential for private details to be leaked – either unintentionally by a careless employee or intentionally by a rogue individual. For example, it took the IRS nearly a year – following a failed legal fight – to apologize and pay a penalty for the leaking of a nonprofit's donor list by a rogue employee to that organization's primary policy opponent.¹⁸ More recently, the IRS has yet to be held accountable for a June 2021 leak in which the outlet *ProPublica* reported on private tax returns it obtained for thousands of Americans spanning over 15 years.¹⁹

Partially as a result of these actions, the Treasury Department adopted a final rule during the Trump administration – that was initiated in the Obama administration – to prevent the IRS from collecting the names and home addresses of donors to certain nonprofit organizations via Form 990, Schedule B.²⁰ Before the rule was even finalized, there were efforts by privacy opponents in Congress to block it.²¹ The Don't Weaponize the IRS Act provision in the ACE Act codifies this important rule into law to nullify such efforts. It also increases from \$5,000 to \$50,000 the gross receipts threshold used to determine if tax-exempt groups have to file certain disclosures and reports, a commonsense change that's long overdue.

The hyperbolic claims of privacy enemies that this reform will cloud necessary transparency are misleading. The IRS has always been required to keep contributor information on Schedule B private, so the public still has access to the same information about tax-exempt organizations that was previously available. Further, as the IRS has noted, the agency does not need the donor information on Schedule B to enforce the tax laws and has not made systematic use of this information.²² Organizations are still required to retain this information in case it is needed for enforcement purposes.

¹⁸ Jonathan H. Adler, "IRS agrees to pay non-profit group \$50,000 for unauthorized release of tax return," *The Washington Post*. Available at: <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/24/irs-agrees-to-pay-non-profit-group-50000-for-unauthorized-release-of-tax-return/> (June 24, 2014).

¹⁹ Casey Harper, "IRS leaked thousands of Americans' tax filings; Congress demands answers," *The Center Square*. Available at: https://www.thecentersquare.com/national/article_9095efca-aef4-11ed-b262-0f5b58d9346b.html (Feb. 19, 2023).

²⁰ Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959 (May 28, 2020) (amending 26 C.F.R. Part 1 and 56). Available at: <https://www.federalregister.gov/documents/2020/05/28/2020-11465/guidance-under-section-6033-regarding-the-reporting-requirements-of-exempt-organizations>.

²¹ See, e.g., "S. J. Res. 64 Seeks to Undo IRS Protections for Privacy in Association," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2018/12/2018-12-10_Two-Pager_IFS_SJR-64_Undoing-IRS-Protections-For-Privacy-In-Association.pdf (Dec. 11, 2018).

²² 84 Fed. Reg. at 47451 ("[T]he Treasury Department and the IRS seek to balance the IRS's need for the information against the costs and risks associated with reporting of the information... The IRS does not need the names and addresses of substantial contributors to tax-exempt organizations not described in section 501(c)(3) to be reported annually on Schedule B of Form 990 or Form 990-EZ in order to carry out the internal revenue laws....").

Allegations that the IRS reform will enable foreign donors to illegally funnel money into U.S. political campaigns are similarly unfounded and misleading. The most important safeguard against foreign money entering federal elections is the Currency and Foreign Transactions Reporting Act of 1970.²³ Better known as the “Bank Secrecy Act,” this law requires every bank to alert the Treasury Department to any suspicious transaction that may be connected to a possible violation of law or regulation. Beyond this safeguard, the IRS has no authority or responsibility for enforcing campaign finance laws. Except in very limited circumstances in which there is already evidence of a criminal act, the tax privacy laws prevent the IRS from sharing the donor information in Schedule B with the two agencies that do enforce campaign finance laws, the Federal Election Commission and the Department of Justice.

The Don’t Weaponize the IRS Act merely enacts another safeguard to protect the privacy of nonprofit supporters by preventing the agency from collecting sensitive information it does not want or need.

Internal Revenue Service Protections

This hearing occurs a decade and a day after a shameful anniversary for the IRS. On May 10, 2013, the IRS Tea Party harassment scandal came to light, and Lois Lerner became a household name. For more than two years leading up to the 2012 election, the Internal Revenue Service under President Obama targeted nonprofits holding conservative viewpoints with baseless investigations, probing inquiries about their donors, demands for internal communications, and lengthy delays in processing routine paperwork. These Orwellian practices, overseen by then-IRS Director of Exempt Organizations Lois Lerner, transformed the IRS from a tax collection agency into the speech police. IRS agents trampled on the constitutional rights of Americans – particularly those with conservative viewpoints – and inflicted lasting damage to the agency’s reputation. Just prior to the release of an explosive Inspector General’s report, the IRS announced and meekly apologized for these targeting practices, initially through a planted question at a conference on May 10, 2013.²⁴

Months after being caught red-handed, the IRS brazenly proposed new rules that would have codified many of these improper targeting practices in official regulations governing the permissible activities of 501(c)(4) advocacy nonprofits.²⁵ The agency also considered expanding the proposed regulations to other types of nonprofits, such as charities and trade associations. If successful, these proposed restrictions would have severely chilled nonprofits’ ability to speak out about government officials and public policy and forced many nonprofits to re-register as political committees, compelling the exposure of their supporters’ names and home addresses.²⁶

For that reason, **the rule was opposed by a diverse array of groups across the spectrum and with different tax statuses:** from 501(c)(4)s, such as the American Conservative Union and the National Council of La Raza Action Fund, to 501(c)(3) charities, like the Alliance for Justice and Judicial Watch, 501(c)(5) labor unions, like the American Farm Bureau Federation and a coalition of

²³ “Overview of the Bank Records and Foreign Transactions Act,” U.S. Department of Justice. Available at <https://www.justice.gov/archives/jm/criminal-resource-manual-2029-overview-bank-records-and-foreign-transactions-act> (Jan. 17, 2020).

²⁴ Corey Boles, “IRS Apologizes for Scrutiny of Conservative Groups,” *The Wall Street Journal*. Available at: <https://www.wsj.com/articles/SB10001424127887323744604578474983310370360> (May 10, 2013).

²⁵ “Treasury, IRS Will Issue Proposed Guidance For Tax-Exempt Social Welfare Organizations,” U.S. Department of the Treasury. Available at: <https://home.treasury.gov/news/press-releases/jl2225> (Nov. 26, 2013).

²⁶ Matt Nese and Kelsey Drapkin, “Overwhelmingly Opposed: An Analysis of Public and 955 Organization, Expert, and Public Official Comments on the IRS’s 501(c)(4) Rulemaking,” Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2014/07/2014-07-08_Issue-Review_Nese-And-Drapkin_Overwhelmingly-Opposed.pdf (July 21, 2014).

major labor unions, and 501(c)(6) trade associations, such as the American Petroleum Institute and the Solar Energy Industries Association.²⁷

In response, Congress adopted a budget rider that prevents the IRS from writing new regulations to limit political speech by nonprofit groups. The ACE Act would codify this longstanding budget rider into law, ensuring that the IRS is prohibited from carrying out politically motivated targeting and speech chilling proposals that would silence nonprofit groups and invade their supporters' privacy.

Securities and Exchange Commission Protections

The SEC's mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation"²⁸ – not to monitor the giving choices of American businesses. Just weeks before the IRS targeting scandal came to light, the Securities and Exchange Commission seriously considered issuing regulations during the Obama administration that would have publicly exposed supporters of nonprofit groups.²⁹ During his confirmation hearing in 2021, now-SEC Chairman Gary Gensler indicated a renewed interest in issuing such regulations, if permitted by Congress.³⁰

Federal law already requires businesses to publicly report detailed information about their political expenditures and corporate PAC activities. Privacy opponents seek to expand such reporting to compel businesses to report their membership in trade associations and giving to nonprofit causes. Such reporting is a direct attempt to facilitate cancel culture and expose businesses to targeted harassment campaigns for giving to causes and organizations that some Americans may oppose.

In addition to adopting a budget rider restricting IRS activities to police political speech, Congress also adopted a rider to prohibit the SEC from using funding to require businesses to disclose contributions to political causes, tax-exempt organizations, and trade associations. The ACE Act would codify this routine rider into law, eliminating the need for Congress to ensure these protections are included in the federal budget every year. This sensible policy would restrict the SEC from discouraging businesses from joining trade associations and supporting nonprofits that defend their rights and interests.

* * *

Every American has the First Amendment right to support causes he or she believes in without fear of harassment and intimidation, regardless of their beliefs. Laws that invade Americans' privacy and chill their participation in public life do not belong in any democracy, let alone the United States. Due to today's highly charged political climate, Americans are increasingly concerned about their private giving being made public and weaponized against them by those who disagree with their views. Unfortunately, their concerns are well-founded, thanks to a growing push for unconstitutional and harmful disclosures in Congress, at federal agencies, and in states around the country. Efforts to force

²⁷ For a list of organizations opposed to the rule, see "Analysis: 97% of Comments from 955 Organizations, Experts, and Public Officials Oppose IRS's Proposed 501(c)(4) Rulemaking in its Current Form," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2014/07/2014-07-08_IFS-One-Pager_Drapkin_IRS-Rulemaking-Organizational-Expert-And-Public-Official-Comment-Analysis.pdf (July 8, 2014) at 3.

²⁸ "About the SEC," U.S. Securities and Exchange Commission. Available at: <https://www.sec.gov/strategic-plan/about> (Apr. 6, 2023).

²⁹ Nicholas Confessore, "S.E.C. Is Asked to Require Disclosure of Donations," *The New York Times*. Available at: <https://www.nytimes.com/2013/04/24/us/politics/sec-is-asked-to-make-companies-disclose-donations.html> (Apr. 23, 2013).

³⁰ Zachary Warmbrodt, "Gensler: SEC should consider corporate political spending disclosures," *Politico*. Available at: <https://www.politico.com/news/2021/03/02/gensler-sec-corporate-political-spending-472607> (Mar. 2, 2021).

nonprofits to disclose their membership or donor information are among today's leading threats to the First Amendment rights to freely speak, publish, and support groups that advocate for causes supported by Americans across the country and the ideological spectrum.

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. While some donors may prefer their name to be listed publicly as a supporter of a cause, many prefer to keep their donations private due to religious reasons. Others fear such attention because they value their privacy or are worried about being targeted by those that might oppose an organization they support.

The ACE Act includes thoughtful provisions that protect and strengthen important First Amendment rights that Americans have enjoyed since the founding of our country. Our Founding Fathers used pen names to encourage independence from Great Britain. Nearly 200 years later, the U.S. Supreme Court blocked the state of Alabama from demanding the supporter list of the NAACP, citing concerns about retribution against the group's members and financial backers. And just two years ago, the Supreme Court ruled in *AFPP v. Bonta* that nonprofits cannot be forced to hand over their supporter lists to state governments absent a compelling justification.

Sadly, 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.

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. **We strongly urge all Members of Congress to support the robust free speech and citizen privacy provisions in the "American Confidence in Elections Act."** These reforms will protect millions of Americans across the country with diverse views, all of whom cherish and rely on the right to privately support causes they believe in.

Sincerely,



Matt Nese
Vice President
People United for Privacy