PEOPLE UNITED for PRIVACY

December 13, 2023

The Honorable David Schweikert Chairman, Oversight Subcommittee 1139 Longworth House Office Building Washington, DC 20515 The Honorable Bill Pascrell Ranking Member, Oversight Subcommittee 1129 Longworth House Office Building Washington, DC 20515

RE: The Crucial Importance of Nonprofit Donor Privacy Protections Amidst Overblown Fears and Rhetoric Alleging Foreign Interference in American Politics

Dear Chairman Schweikert, Ranking Member Pascrell, and Members of the House Ways and Means Committee's Oversight Subcommittee:

People United for Privacy¹ submits the following comments for the hearing record concerning the December 13, 2023 hearing in the U.S. House Committee on Ways and Means Subcommittee on Oversight to discuss the "Growth of the Tax-Exempt Sector and the Impact on the American Political Landscape." The comments in this statement build upon our recommendations to the full House Ways and Means Committee in our response to its recent Request for Information on the alleged improper political activities of Section 501(c) organizations.²

Nonprofits are the backbone of civil society in America and play an essential role in our democracy. Increased regulation of the nonprofit sector risks a panoply of unintended consequences that will dampen civic engagement and threaten Americans' First Amendment rights. Legislative or regulatory action aimed at exposing the names and addresses of organizations' members and supporters poses a particular threat to nonprofits' willingness to engage on issues core to their mission and risks violating free speech and privacy protections guaranteed by the U.S. Constitution.

I. Allegations that foreigners are covertly donating to nonprofits for political advocacy are overblown, existing laws adequately address perceived concerns, and there are serious pitfalls to additional regulation in this sensitive area.

¹ People United for Privacy (PUFP) 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. PUFP 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 See Matt Nese and Eric Wang, "Request for Information on Political Activities of Section 501(c) Organizations," People United for Privacy. Available at: https://unitedforprivacy.com/wp-content/uploads/2023/09/2023-09-04 Comments PUFP Response-To-House-WM-Nonprofit-Political-Activity-RFI.pdf (Sept. 4, 2023).

To the extent Subcommittee members intend to focus this hearing on allegations of foreigners donating to American nonprofits that then engage in political activity, some important reminders and clarifications are essential to an informed discussion of this topic.

A. Hysteria about foreign influence in American elections is unfounded.

Fears of foreign involvement in American elections are not new, especially in recent political history. Members of both political parties have seized on anxiety about foreign influence in elections as a pretense for pursuing broader and unrelated political goals. President Obama famously protested in his 2010 State of the Union Address that the Supreme Court's *Citizens United* decision would "open the floodgates" for unfettered foreign interference in American elections, prompting Justice Alito to mouth the words "not true" in response to the hyperbolic and misleading claim. More recently, Democrats in Congress have sought to justify privacy intrusions in the so-called "For the People Act" and the "DISCLOSE Act" by pointing to alleged Russian interference in the 2016 election in support of former President Trump. Earlier this year, the House Ways and Means Committee's August 2023 Request for Information, which underlies this hearing, echoed these efforts in expressing "significant concern" about foreign actors funding American nonprofits that speak about politics.

While *Citizens United* affirmed the First Amendment rights of incorporated entities, including nonprofits, to independently support political causes, the Supreme Court has since unanimously affirmed a lower court ruling upholding a ban on foreign spending in U.S. elections.⁷ Quite simply: It is illegal for foreign citizens who are not permanent residents to spend money in U.S. elections. While nonprofits may legally accept contributions from foreign sources, they may <u>not</u> use those donations to influence elections and must be able to demonstrate that any activities are funded by U.S. citizens and permanent residents.⁸

According to calculations from the Institute for Free Speech, political spending by nonprofits, often referred to pejoratively as "dark money," constitutes a minute percentage of overall political spending – typically about 3.5% of total spending. Even this statistic overstates the situation, as high-profile nonprofit

³ Bradley A. Smith, "Celebrate the *Citizens United* Decade," *The Wall Street Journal*. Available at: https://www.wsj.com/articles/celebrate-the-citizens-united-decade-11579553962 (Jan. 20, 2020).

⁴ 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. 22, 2021).

⁵ Matt Nese, "Opposition to the DISCLOSE Act and its Destructive Impact on Nonprofit Advocacy and Citizen Privacy," People United for Privacy. Available at: https://unitedforprivacy.com/wp-content/uploads/2022/07/2022-07-25 PUFP-Letter US Senate-Rules-Committee DISCLOSE-Act-Hearing.pdf (July 25, 2022).

⁶ "Request for Information: Understanding and Examining the Political Activities of Tax-Exempt Organizations under Section 501 of the Internal Revenue Code," U.S. House Committee on Ways and Means. Available at: https://gop-waysandmeans.house.gov/wp-content/uploads/2023/09/UPDATED-RFI-on-501c3-and-c4-Activities-FINAL.docx87.pdf (Aug. 14, 2023).

⁷ Bluman v. Federal Election Commission, 565 U.S. 1104 (2012).

⁸ See, e.g., Federal Election Commission MUR 7081 (Floridians for a Strong Middle Class). Available at: https://www.fec.gov/files/legal/murs/7081/17044430866.pdf (Sept. 25, 2017).

⁹ See Luke Wachob, "Putting 'Dark Money' In Context: Total Campaign Spending by Political Committees and Nonprofits per Election Cycle," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2017/10/2017-05-08 IFS-Issue-

political spenders like the League of Conservation Voters, National Association of Realtors, National Rifle Association, and Planned Parenthood Action Fund cannot be credibly accused of being pass-through entities funded entirely or even substantially by foreign interests. Though rogue actors will always be willing to break the law, a robust framework of laws and regulations exists to police and punish such illicit activity.

From the Cold War to today, Americans have steadfastly refused to sacrifice their First Amendment rights in response to actual or perceived short-term political threats. We must not let anxieties about nefarious actions by China, Iran, Russia, or any other rogue state actor scare Congress into passing laws that unduly burden the rights of Americans to support causes they believe in securely and privately. This is especially true in the present circumstance, where evidence of an actual problem is lacking and confidence in a proposed solution to deter or eliminate foreign influence is low.

B. The Federal Election Campaign Act already requires robust disclosure by groups engaged in political campaign activity and prohibits foreign contributions to fund such activity while the Bank Secrecy Act provides a mechanism for monitoring suspicious transactions involving foreign funds.

The Federal Election Campaign Act (FECA) and regulations enforced by the Federal Election Commission (FEC) require organizations, including Section 501(c) nonprofits, that report spending on "independent expenditures" and "electioneering communications" to identify donors who earmark their contributions for such activities. ¹⁰ The FEC's regulations also address partisan and nonpartisan voter registration, get-out-the-vote drives, voter guides, and candidate forums. ¹¹

The FECA already prohibits foreign nationals from making contributions and expenditures in connection with U.S. elections.¹² This prohibition is broad and covers contributions made "directly or indirectly," such as routing money to an independent expenditure-only political committee (known informally as a "Super PAC") through a nonprofit organization.¹³ Section 501(c) organizations are also prohibited from soliciting, accepting, or receiving a contribution from a foreign national to influence U.S. elections.¹⁴

Brief Wachob Putting-Dark-Money-In-Context.pdf (May 8, 2017) and Bradley A. Smith, "Citizens United at 10: The Consequences for Democracy and Potential Responses by Congress," Institute for Free Speech. Available at: https://www.ifs.org/wp-content/uploads/2020/02/2020-02-06 Smith-Written-Testimony US CU-At-10 House-Judiciary-Subcommittee.pdf (Feb. 6, 2020) at 4-6.

 $^{^{10}}$ 52 U.S.C. § 30104(c)(2)(C); 11 C.F.R. § 104.20(c)(10). An "independent expenditure" is an expenditure "expressly advocating the election or defeat of a clearly identified candidate" and that is not coordinated with the candidate, candidate's campaign, or a political party committee. 52 U.S.C. § 30101(17). An "electioneering communication" is a television or radio advertisement that references a clearly identified candidate within 30 days before the primary or 60 days before the general election and that is "targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3).

¹¹ See 11 C.F.R. § 114.4(b), (c)(2)-(5).

¹² See 52 U.S.C. § 30121.

¹³ *Id.* § 30121(a)(1).

¹⁴ *Id*. § 30121(a)(2).

Additionally, the FECA prohibits contributions from being made "in the name of another person." As the U.S. Department of Justice explains, ¹⁶ "violations occur when a person gives money to straw donors, or conduits, for the purpose of having the conduits pass the funds on to a specific federal candidate [or PAC] as their own contributions." Routing a foreign national's political contribution through a Section 501(c) organization would further violate the FECA's conduit contribution ban.

In addition to guardrails against foreign funding of election activity bolstered by the FECA and FEC regulations, the Currency and Foreign Transactions Reporting Act of 1970, better known as the Bank Secrecy Act, acts as another powerful safeguard against foreign money entering federal elections. Federal regulations under the Bank Secrecy Act broadly require that "[e]very bank shall file with the Treasury Department ... a report of *any suspicious transaction* relevant to a possible violation of law or regulation." ¹⁸

Tax-exempt organizations may legally accept foreign money, as long as they don't use the funds to influence federal elections. Between the Bank Secrecy Act and FECA, a federal regulatory scheme exists to block foreign nationals from making contributions to affect U.S. elections, whether directly or indirectly.

C. Rushing to respond to an overblown concern with new legislation or regulations could result in serious harm to the First Amendment and important voices in our policy debates.

Many Americans – including most, if not all, Members of Congress – support a transition to democracy in China, but donor disclosure along the lines contemplated by the Committee's recent Request for Information would cripple this burgeoning movement. The Founder and President of Citizen Power Initiatives for China (CPIC), a U.S.-based nonprofit organization advocating for democracy in his native China, explains why:

Most people who want to support [CPIC], 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

13 1a. § 30122

¹⁵ *Id.* § 30122.

¹⁶ While the FEC has authority over civil FECA violations, the Department of Justice has authority over criminal FECA violations. ¹⁷ Craig C. Donsanto and Nancy L. Simmons, "Federal Prosecution of Election Offenses, 7th Ed.," U.S. Department of Justice. Available at: https://www.justice.gov/sites/default/files/criminal/legacv/2013/09/30/electbook-rvs0807.pdf (rev. Aug. 2007) at 166.

¹⁸ See 31 C.F.R. § 1020.320 (reports by banks of suspicious transactions) (emphasis added).

unsustainable without the ability to shield our supporters. The same is true for many other important causes supported by nonprofits throughout the United States.¹⁹

Consider another contemporary example. Rising tensions over the Israel-Hamas war are challenging First Amendment rights Americans have long taken for granted. People on both sides of the conflict are facing intimidation, censorship, and even harm for expressing their views.

University professors have targeted pro-Israel students²⁰ and even encouraged violent attacks on "Zionist" journalists.²¹ Meanwhile, a conservative group sent a "doxing truck" to target individual students associated with groups that signed a controversial anti-Israel statement following the October 7 attack by Hamas.²² Numerous Americans have lost their jobs for speaking out about the conflict, including a magazine editor who was fired for sharing an article from *The Onion* satirizing reactions to the war as indifferent to Palestinian deaths.²³ Posters have been put up and torn down; protests on both sides have swelled in size and at times turned ugly; and divisions seem to deepen with each passing day.

In today's heated political climate, Americans face potential violence and attempts to destroy their livelihood for their views or identity. Efforts to expose citizens' membership in or donations to nonprofit groups would exacerbate this problem and put Americans at greater risk of retaliation for their beliefs. Tolerance for opposing views is the only way for a country of 330 million people to coexist while debating controversial issues. Yet privacy invasions put free speech in peril.

Speech cannot be free if government officials, powerful actors, or unruly in-person or online mobs can easily uncover an individual and punish them for their beliefs and associations. Freedom of expression is unnecessary to protect the right to discuss the weather or share views held by most Americans. It is most important precisely when people wish to voice dissenting, unpopular, or even grossly offensive ideas. If we fail to protect fundamental First Amendment rights for every important debate playing out in the United States, Americans will quickly find themselves without shelter for their views.

From China's growing surveillance state to the rapid escalation of attacks and hate in response to divergent views on the Israel-Hamas war, American commitments to free speech and privacy in association

¹⁹ 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).

²⁰ Beth Harpaz, "Stanford instructor removed for targeting Jewish students as 'colonizers' after Hamas attack on Israel," *Forward*. Available at: https://forward.com/news/564587/stanford-university-jewish-students-instructor-hamas/ (Oct. 12, 2023).

²¹ Jeremy Childs, "UC Davis condemns post apparently by professor threatening 'zionist journalists,'" *Los Angeles Times*. Available at: https://www.latimes.com/california/story/2023-10-21/uc-davis-condemns-post-apparently-by-professor-threatening-zionist-journalists (Oct. 21, 2023).

²² Anemona Hartocollis, "After Writing an Anti-Israel Letter, Harvard Students Are Doxxed," *The New York Times*. Available at: https://www.nytimes.com/2023/10/18/us/harvard-students-israel-hamas-doxxing.html (Oct. 18, 2023).

²³ "Prominent journal editor fired for endorsing satirical article about Israel-Hamas conflict," *Science*. Available at: https://www.science.org/content/article/prominent-journal-editor-fired-endorsing-satirical-article-israel-hamas (Oct. 23, 2023).

are desperately needed today. The Subcommittee must proceed cautiously as it examines these issues and potential proposals that would harm or possibly eviscerate these rights.

II. Increased regulation of nonprofit advocacy and additional reporting requirements would exacerbate the risk of uneven or biased enforcement and invoke serious compliance costs, particularly when greater power is granted to a non-expert agency like the IRS.

Enforcing regulations on speech and advocacy is inherently complex and often involves making difficult determinations along unclear lines. For example, to enforce current political speech regulations, the IRS relies on a multi-step "facts and circumstances" test that leaves ample room for interpretation. The vague nature of such regulations not only makes it difficult for groups to have a clear understanding of regulatory lines but also leaves room for biased or uneven enforcement.

After the House Committee on Oversight and Government Reform investigated the IRS Tea Party targeting scandal in the 113th Congress, the Committee issued a scathing report concluding that:

The solution is obvious and ought to be noncontroversial: Congress must disentangle politics from the IRS. To regain the trust of American taxpayers, the IRS must return to its traditional role as a dispassionate administrator of the federal tax code. The IRS must not be an agency that determines what is and what is not political speech and, correspondingly, whether a social-welfare group receives a tax-exemption for making political speech. Political speech can help advance the social welfare and social-welfare groups should be allowed to advance the debate about issues important to the nation. Other federal regulators exist to oversee political campaigns and elections. That duty has never belonged – and should not belong – to the IRS.²⁴

From an enforcement standpoint, use by the IRS of a donor's surname or foreign address to question whether he or she is an American citizen raises serious concerns. Many Americans live abroad. Enforcing tax laws based upon the perceived ethnic or geographical origin of a person's name elicits constitutional objections that reach far beyond the First Amendment.

Likewise, compliance burdens for nonprofits must not be overlooked. Nonprofits routinely receive donations without the ability or time to verify the citizenship status of the donor. In many cases, it is not possible to obtain such information without expending significant time and effort. The potential compliance costs of a foreign donor reporting regime will bankrupt many volunteer-led or grassroots organizations and will certainly divert precious funds that would otherwise be used in furtherance of nonprofit missions.

New laws aimed specifically at the advocacy activities of the tax-exempt sector will inevitably increase the power of the IRS over political speech and create an environment for more scandals and

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²⁴ Staff Report, "Making Sure Targeting Never Happens: Getting Politics Out of the IRS and Other Solutions," U.S. House of Representatives Committee on Oversight and Government Reform. Available at: https://oversight.house.gov/wp-content/uploads/2014/07/2014-07-29-Getting-Politics-Out-of-the-IRS-and-Other-Solutions.pdf (July 29, 2014) (emphasis added).

less speech. Instead of pursuing new schemes to regulate speech through the tax code, Congress should remove such matters from the IRS's jurisdiction altogether and shift regulation to the Federal Election Commission and the Federal Election Campaign Act. Quite simply, the IRS lacks the FEC's regulatory focus, bipartisan structure, and internal expertise to regulate political activity.

III. Donor privacy is an enduring and foundational First Amendment right.

Associational privacy is a lasting First Amendment right that has been repeatedly affirmed by the Supreme Court for more than six decades²⁵ and shares widespread support among Americans and the nonprofit community, regardless of political leanings.²⁶ Any serious discussion of the issues raised by this hearing must involve a strong grasp of the serious First Amendment protections at stake and Americans' resolute desire to protect their hard-earned privacy 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 actions and choices of government officials. Though debates about citizen privacy may often appear partisan in Congress, there is 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 are united in agreement on protecting their privacy. The logic is simple: A threat to the privacy of one organization or cause is a threat to that right for all others. Privacy rights are not guaranteed in a vacuum.

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. 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 to organizations that challenge the practices and policies of the very government officials that seek the identities of their members and supporters.

²⁵ Prominent Supreme Court cases supporting a right to maintain privacy in one's affiliations and memberships include, but are not limited to, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (holding unconstitutional a demand by government officials for the membership list of a nonprofit organization); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (holding unconstitutional a city tax ordinance requiring nonprofit groups to publicly disclose donors); *Talley v. California*, 362 U.S. 60 (1960) (holding facially unconstitutional a city ordinance requiring handbills to identify financial supporters); *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 Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) (holding facially unconstitutional a California regulation requiring charities and other nonprofits to submit an annual list of donors to state officials).

²⁶ See, e.g., "Free speech case attracts support from nearly 300 diverse groups," Americans for Prosperity Foundation. Available at: https://americansforprosperity.org/wp-content/uploads/2021/04/AFPF-v-Becerra-Amici.pdf (Apr. 2021).

Every American has a 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. In 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.²⁷ 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.²⁸ Efforts to force 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.

Sadly, it is easy to imagine an endless wave of targeting and harassment campaigns if nonprofit 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.

* * *

The growth of the nonprofit sector should be celebrated as an indication of increased civic engagement. In a democracy, civil society groups *should* impact the social and political landscape. Nevertheless, nonprofits continue to play a very limited role in elections, and concerns about foreign donors using tax-exempt entities to influence American politics remain largely unfounded. New legislation or regulations for nonprofits would inevitably affect their American supporters. Consequently, any further policing of foreign donations to charities must be undertaken with extreme caution to prevent infringements on the rights of American donors to support American nonprofits.

²⁷ See, e.g., 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); 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); and The Editorial Board, "America Has a Free Speech Problem," *The New York Times*. Available at: https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html (Mar. 18, 2022).

²⁸ 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. 22, 2021) and "The AMICUS Act Is an Assault on First Amendment Rights," People United for Privacy. Available at: https://unitedforprivacy.com/the-amicus-act-is-an-assault-on-first-amendment-rights/ (July 13, 2023). At the state level, see, e.g., 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); Luke Wachob, "Virginia Holds Firm on Personal Privacy," People United for Privacy. Available at: https://unitedforprivacy.com/riginia-holds-firm-on-personal-privacy/ (Mar. 27, 2023); 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); and Luke Wachob, "Has New Jersey Learned Its Lesson on Nonprofit Donor Privacy?" People United for Privacy. Available at: https://unitedforprivacy.com/has-new-jersey-learned-its-lesson-on-nonprofit-donor-privacy/ (May 2, 2023).

While there is certainly room to improve the current regulatory environment, recent congressional attention on nonprofit activity is largely focused on increasing regulatory burdens and, as a consequence, decreasing Americans' willingness to engage. Unfortunately, such congressional attention has historically been marked by political interest in hampering the activity of specific groups. PUFP encourages members of Congress to consider the long-term impact on nonprofits and American donors across the ideological spectrum before pursuing legislation that hands more power to federal bureaucrats within the highly sensitive realm of speech and association rights.

Sincerely,

Heather Lauer

CEO

People United for Privacy

Matt Nese

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People United for Privacy