PEOPLE UNITED *for* PRIVACY

February 9, 2024

*Via Electronic Mail*

Oklahoma Ethics Commission
ATTN: Chairman Jarred Brejcha
2300 N. Lincoln Boulevard
Room G-27
Oklahoma City, OK 73105

**RE: Rulemaking Request R-24-01's Dubious Constitutionality and Harm to Nonprofit Advocacy and Associational Privacy**

Dear Chairman Brejcha and Commissioners of the Oklahoma Ethics Commission:

People United for Privacy[1] submits the following comments on Rulemaking Request R-24-01, which is scheduled for consideration at the Oklahoma Ethics Commission's regular meeting on February 9, 2024. The proposal, modeled after Arizona's Proposition 211 statute,[2] misleadingly dubbed the "Voters' Right to Know Act," contains substantial constitutional issues, faces several ongoing legal challenges in Arizona, and would significantly burden the free speech and privacy rights of Oklahomans and the important nonprofit causes they support. It's especially risky for Oklahoma to pursue this measure, given the certainty of costly and complex litigation that would follow.

Representative Cody Maynard, who requested the rulemaking prior to seeking a delay in consideration on February 6, 2024,[3] suggests that Arizona's "Voters' Right to Know Act" (the "Act") is presumptively constitutional due to a recent court ruling.[4] However, the ruling the requestor references by the Maricopa County Superior Court dismissing a challenge to the Act provides little assurance of the Act's constitutionality.[5] To the contrary, the court failed to properly apply the "exacting scrutiny" standard, as

[1] People United for Privacy Foundation's vision is an America where all people can freely and privately support ideas and nonprofits they believe in so that all sides of a debate will be heard, individuals will not face retribution for supporting important causes, and all organizations have the ability to advance their missions because the privacy of their donors is protected.

[2] *See* "An Initiative Measure Amending Title 16, Arizona Revised Statutes by Adding Chapter 6.1; Relating to the Disclosure of the Original Source of Monies Used for Campaign Media Spending," Arizona Secretary of State. Available at: https://apps.arizona.vote/electioninfo/assets/33/0/BallotMeasures/Certificate%20and%20Title.pdf (Aug. 26, 2022).

[3] *See* "Notice of Regular Meeting Agenda," Oklahoma Ethics Commission. Available at: https://www.ok.gov/ethics/documents/20240209%20Agenda%20FINALv.2024.1.pdf (Feb. 9, 2024) *at* 5.

[4] *See* "Notice of Regular Meeting DRAFT Agenda," Oklahoma Ethics Commission. Available at: https://www.ok.gov/ethics/documents/20240209%20Agenda%20%20and%20R-24-01%20DRAFTv.2024.2%20(002)%20(003).pdf (Feb. 9, 2024) *at* 4.

[5] *See* Matt Nese and Eric Wang, "Comments on Notice of Proposed Rulemaking; 'Voters' Right to Know Act' (Proposition 211)," People United for Privacy. Available at: https://storageccec.blob.core.usgovcloudapi.net/public/docs/933-Commission-Meeting-Packet-9-21-23.pdf (Sept. 19, 2023) *at* 67-74.

recently refined by the U.S. Supreme Court in *Americans for Prosperity Foundation* (*AFPF*) *v. Bonta*,[6] against the Act's unconstitutionally broad donor exposure requirements and failed to adequately address the Act's unconstitutionally vague terminology.

The Arizona Superior Court decision fails to explain how the Act's requirement for organizations to indiscriminately report their donors – and donors to those donors – is "narrowly tailored" to the state's interest in disclosure of "who supports and opposes ballot measures" and candidates.[7] Donors give to nonprofit organizations for a wide variety of charitable, educational, and issue advocacy purposes. Those donors, by definition, are not giving to "support[] and oppose[] ballot measures" or candidates. The Superior Court decision fails to explain why such donors should have to be publicly exposed on an organization's so-called "campaign media spending" reports.

Further, as even the Arizona Superior Court acknowledged, the Act "burden[s] the ability to speak" by virtue of its reporting and disclaimer requirements.[8] Accordingly, a "greater degree of specificity is required" of the content standards triggering these speech regulations, so as not to render the entire Act unconstitutionally vague.[9]

The Superior Court also failed to properly address the claim that the term "campaign media spending," as used in the Act, is unconstitutionally vague. The court merely reasoned that "Plaintiffs' challenge to three portions of the Act do not support a facial challenge of the *entire* measure based on vagueness."[10] The Superior Court missed the mark by a mile: The entire Act relies upon vague terminology. The Act's twin pillars – that organizations must report donors and identify themselves and their donors on disclaimers – are both triggered by "campaign media spending,"[11] and this foundational term is vague in several critical respects.

The Act defines "campaign media spending" to include "partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity" but does not further define these activities.[12] The Act also defines "campaign media spending" to include various types of public communications that "promote[], support[], attack[] or oppose[]" candidates, ballot measures, and the recall of elected officials.[13] The Act's reliance upon what is commonly known as the "PASO" standard is deeply problematic. Like the Act's regulation of "partisan" activities, the PASO standard is vague and inherently subjective.

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[6] *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

[7] *Center for Arizona Policy, Inc., et al. v. Arizona Secretary of State, et al.*, Case No. CV 2022-016564 (Super. Ct. of Ariz., Maricopa County), Under Advisement Ruling at 8-9 (June 21, 2023) (quoting *No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu*, 62 F.4th 529, 540-41 (9th Cir. 2023)) (internal brackets and italics omitted).

[8] *Id*. at 7 (internal quotation marks and citation omitted).

[9] *See Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (internal quotation marks and citations omitted); *see also*, *id*. at 43 (discussing how a vague speech law impermissibly "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.").

[10] *Center for Arizona Policy, Inc.*, Under Advisement Ruling at 10 (emphasis in the original).

[11] *See* Ariz. Rev. Stat. §§ 16-973, -974(C).

[12] *Id*. § 16-971(2)(a)(vi).

[13] *Id*. § 16-971(2)(a)(ii), (iv), (v).

Importantly, two additional legal challenges to the Act's constitutionality are ongoing.[14] The Commission would be wise to wait for the outcome of those challenges before pursuing an identical proposal almost certain to invite litigation from affected speakers in Oklahoma.

In addition to serious concerns about the Act's constitutionality, the havoc it would wreak on the nonprofit community is severe. Many common communications from nonprofits about public policy could, in the eyes of an unfriendly regulator, be deemed to "promote, support, attack, or oppose" an elected official. Is a public thank-you to a legislator for sponsoring a bill an effort to "promote" their campaign? Is criticism of an elected official's handling of a hot-button topic an "attack" on their re-election? Groups won't know until the government comes after them. That's a powerful incentive to stay silent.

For nonprofits, the choice between self-censoring or exposing their supporters to potential harm isn't the end of the ordeal. Complying with the inordinately complex measure is not just a question of if, but how. Most notably, in calling for groups to report the "original sources" of funds, the Act saddles nonprofits with a potentially massive and insurmountable administrative burden.

Under the measure, nonprofits that engage in so-called "campaign media spending" would not only be required to maintain records for five years of donors who give over $2,500 in a two-year period, but groups would also be required to go back through at least three layers of contributions. In other words, if an organization's donors include individuals or organizations who themselves received money from other sources, those sources and their sources' sources must also be logged and reported. There's virtually no limiting principle on this look-back provision.

Ultimately, many nonprofits will decide that the hassle of compliance, the potential for errors and costly penalties, and the risk to their supporters and other organizations is simply too much to bear. Most groups will choose to sit on the sidelines and not represent the voices of their supporters, denying the public and elected officials the ability to benefit from their views on important issues. Worst of all, the measure's complexity will be most harmful to small and volunteer-run organizations as well as those groups advocating for causes disfavored by those in power. No organization or cause is safe from this measure's reach – and neither are the citizens who support their missions.

Protecting the privacy of Americans who join and contribute to nonprofit causes has bipartisan support. That's why nearly 300 groups representing Americans of all beliefs asked the Supreme Court to protect citizen privacy in the 2021 case, *AFPF v. Bonta*.[15] As the U.S. Supreme Court noted in its decision, "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

[14] *See* "Arizona's Prop 211 Faces a Second Legal Challenge," People United for Privacy. Available at: https://unitedforprivacy.com/arizonas-prop-211-faces-a-second-legal-challenge/ (Mar. 17, 2023) *and* Howard Fischer, "Petersen and Toma in court filing aim to quash Prop 211," *Arizona Capitol Times*. Available at: https://azcapitoltimes.com/news/2023/08/07/petersen-and-toma-in-court-filing-aim-to-quash-prop-211/ (Aug. 7, 2023).

[15] *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/AFPF-v-Becerra-Amici.pdf (Apr. 2021).

America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect [of disclosure] feared by these organizations is real and pervasive…"[16]

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There are significant constitutional problems with Rulemaking Request R-24-01's vague and overbroad terminology and its unjustified encroachments on nonprofit donor privacy. The proposal's broad language would dramatically expand the types of speech that triggers privacy-invasive donor exposure mandates. The target of those requirements is not candidates and political committees but nonprofits – like the many organizations on both sides of the abortion, immigration, and Second Amendment debates – that voice opinions on elected officials' policy views, discuss the issues of the day, and speak truth to power.

The Act's vague rules would leave nonprofits unable to avoid triggering donor exposure requirements with any degree of certainty, making silence the safest option for many organizations that have historically protected the privacy of their supporters. If adopted, the submitted proposal would impose an undue burden on donor privacy and nonprofit advocacy and would almost certainly face a constitutional challenge. For these reasons, People United for Privacy urges the Commission to reject Rulemaking Request R-24-01.

Sincerely,

Matt Nese

Matt Nese
Vice President
People United for Privacy

[16] *AFPF*, 141 S. Ct. at 2388 (2021).