

PEOPLE UNITED *for* PRIVACY

May 23, 2024

The Honorable Bryan Steil
Chair, U.S. House Committee on House
Administration
1309 Longworth House Office Building
Washington, DC 20515

The Honorable Joseph D. Morelle
Ranking Member, U.S. House Committee on
House Administration
1216 Longworth House Office Building
Washington, DC 20515

RE: Support for Robust Privacy Protections for Nonprofits and their Supporters and Observations Regarding H.R. 8399, the “Preventing Foreign Interference in American Elections Act”

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

On behalf of People United for Privacy (PUFP),¹ I submit the following comments concerning the May 23, 2024 Full Committee Markup in the U.S. House Committee on House Administration of the “Preventing Foreign Interference in American Elections Act,” introduced as H.R. 8399. These comments build on a prior Statement for the Record from PUFP regarding a May 16, 2024 Full Committee Hearing on “American Confidence in Elections: Preventing Noncitizen Voting and Other Foreign Interference.”² While other measures are scheduled for consideration at the Full Committee Markup on May 23, 2024, PUFP’s comments respond solely to H.R. 8399 and the implications of legislation targeting foreign election interference more broadly on nonprofit donor and member privacy protections and the ability of nonprofits to advocate on issues central to their mission.

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 interference in elections as a pretense for pursuing broader and unrelated political goals. President Barack 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,³ prompting Justice Alito to mouth the words “not true” in response to the sensational and misleading claim. More recently, Democrats in

¹ People United for Privacy’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 won’t face retribution for supporting important causes, and all organizations maintain the ability to advance their missions because the privacy of their supporters is protected.

² See Matt Nese, “Support for Robust Privacy Protections for Nonprofits and their Supporters and Caution About Harmful Policy Impacts of Foreign Donor Reporting Schemes,” People United for Privacy. Available at: https://unitedforprivacy.com/wp-content/uploads/2024/05/Letter_US-House-Administration-Committee_Foreign-Interference-Hearing.pdf (May 16, 2024).

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).

Congress have sought to justify privacy intrusions in the so-called “For the People Act”⁴ and the “DISCLOSE Act”⁵ by pointing to alleged Russian interference in the 2016 election in support of former President Donald Trump.

Nonprofits are the backbone of civil society in America and play an essential role in our civic discourse. 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 nonprofit members and supporters poses a particular threat to organizations’ willingness to engage on issues core to their mission and risks violating free speech and privacy protections guaranteed by the U.S. Constitution. Our pervasive cancel culture coupled with attacks on nonprofit donor privacy represent one of the gravest threats to free speech and democracy today.

Whatever the motivation for bills targeting allegations of foreign donors to nonprofits engaged in issue and political advocacy, haphazard proposals aimed at tackling such fears will violate hard-earned donor privacy rights while simultaneously chilling speech, making compliance difficult or impossible, and incentivizing weaponized and selective enforcement. H.R. 8399 is a more carefully considered measure that generally avoids these concerns and includes proactive protections for nonprofit donor privacy through the “Speech Privacy Act of 2023,”⁶ language included in the “American Confidence in Elections (ACE) Act”⁷ and two measures intended to address concerns about alleged foreign electoral interference.⁸ While PUFPP does not endorse H.R. 8399, it embodies a more thoughtful and narrowly tailored alternative to similar proposals that have advanced elsewhere in Congress.⁹

I. The Speech Privacy Act of 2023 protects the privacy of Americans who wish to join and support the nonprofit causes of their choice free from harassment and intimidation.

Individuals may legitimately fear any number of damaging consequences from disclosure, including harassment, adverse governmental action, and reprisals by an employer, neighbor, or community

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 Speech Privacy Act of 2023, H.R. 4471, 118th Cong. (1st Sess.) (2023) Available at: <https://www.congress.gov/118/bills/hr4471/BILLS-118hr4471ih.pdf>. In H.R. 8399, the Speech Privacy Act is located in Sec. 3.

⁷ American Confidence in Elections Act, H.R. 4563, 118th Cong. (1st Sess.) (2023). Available at: <https://www.congress.gov/118/bills/hr4563/BILLS-118hr4563ih.pdf>. The Speech Privacy Act of 2023 is located in Sec. 308.

⁸ See American Donor Privacy and Foreign Funding Transparency Act, H.R. 8293, 118th Cong. (2d Sess.) (2024). Available at: <https://www.congress.gov/118/bills/hr8293/BILLS-118hr8293ih.pdf>. The Speech Privacy Act is located in Sec. 3. See also, Preventing Foreign Interference in American Elections Act, S. 4145, 118th Cong. (2d Sess.) (2024). Available at: <https://www.congress.gov/118/bills/s4145/BILLS-118s4145is.pdf>. The Speech Privacy Act is located in Sec. 3.

⁹ See Matt Nese, “Support for Nonprofit Donor Privacy Protections and Concerns with Harmful Privacy, Speech, Compliance, and Enforcement Impacts of Proposed Bills Targeting Alleged Foreign Electoral Interference,” People United for Privacy. Available at: https://unitedforprivacy.com/wp-content/uploads/2024/05/Letter_US-House-Ways-And-Means-Committee_Foreign-Influence-Legislation-Mark-Up.pdf (May 15, 2024).

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 government officials that seek the identities of their members and supporters. The Speech Privacy Act responds to and resolves these concerns.

Since 2018, **19 states** have acted to uphold the U.S. Supreme Court’s *Americans for Prosperity Foundation v. Bonta* decision, which reaffirmed legal protections for nonprofit donor privacy,¹⁰ by passing new protections against the unlawful collection and disclosure of Americans’ personal information when giving to nonprofits.¹¹ The Speech Privacy Act prohibits federal agencies from arbitrarily collecting or releasing Americans’ nonprofit membership or donation records. Agencies that are required by law to collect this information in certain circumstances, like the Federal Election Commission (FEC), are exempted, and penalties for government officials that illegally expose 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 venomous 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.¹² Indeed, in 2024 alone, People United for Privacy forecasted legislative threats to nonprofit advocacy and donor privacy in **31 states** across the country.¹³ The lesson is clear: Precedent alone is not enough to safeguard Americans’ personal privacy. Proactive legislation is needed.

¹⁰ *Americans for Prosperity Foundation v. Bonta*, 594 U.S. at __ (2021).

¹¹ Luke Wachob, “Privacy Prevails in the Peach State: Georgia Becomes 19th State to Pass the PPPA,” People United for Privacy. Available at: <https://unitedforprivacy.com/privacy-prevails-in-the-peach-state/> (May 7, 2024). Georgia became the 19th state to pass legislation strengthening nonprofit donor privacy protections on May 6, 2024. See Georgia Act 613 at <https://www.legis.ga.gov/api/legislation/document/20232024/229599> (May 6, 2024).

¹² In Congress, see, e.g., Alex Baiocco, “Congress Seeks ‘Common Ground’ in Attacking Nonprofits. Let’s Hope They Don’t Find It.” People United for Privacy. Available at: <https://unitedforprivacy.com/congress-seeks-common-ground-in-attacking-nonprofits-lets-hope-they-dont-find-it/> (Dec. 19, 2023) and 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). At the state level, see, e.g., Alex Baiocco, “Unlikely Allies Thwart Privacy Threat in Oregon,” People United for Privacy. Available at: <https://unitedforprivacy.com/unlikely-allies-thwart-privacy-threat-in-oregon/> (April 24, 2024); Alex Baiocco, “Bipartisan Opposition Sinks Multi-Year Crusade to Violate Mainers’ Privacy,” People United for Privacy. Available at: <https://unitedforprivacy.com/bipartisan-opposition-sinks-multi-year-crusade-to-violate-mainers-privacy/> (March 4, 2024); and Alex Baiocco, “Oklahoma Lawmaker Asks Ethics Commission to Dox Nonprofit Donors,” People United for Privacy. Available at: <https://unitedforprivacy.com/oklahoma-lawmaker-asks-ethics-commission-to-dox-nonprofit-donors/> (Feb. 14, 2024).

¹³ Matt Nese and Alex Baiocco, “Forecasting 2024 State Threats to Nonprofit Advocacy and Donor Privacy,” People United for Privacy. Available at: https://unitedforprivacy.com/wp-content/uploads/2024/02/2024-02-12_PUFP-Memo_Forecasting-2024-State-Threats-To-Nonprofit-Advocacy-And-Donor-Privacy.pdf (Feb. 12, 2024).

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 groups that speak about public policy, whatever their views, from having their members targeted for retaliation by government officials or groups that oppose their beliefs. 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 19 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; **Alabama, Indiana, and Kentucky** in 2023; and **Georgia and Nebraska** so far in 2024. In early May, **Colorado** lawmakers *unanimously* passed a version of the Speech Privacy Act – introduced with bipartisan support – that currently awaits the Governor's signature.¹⁴

Importantly, 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* – without a single dissenting vote at any point in the legislative process – in both Alabama and Nebraska as well as in Democratic-controlled (Virginia) and Republican-controlled (Indiana) legislative chambers and by voice vote (New Hampshire). 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 is the importance of protecting the privacy of Americans who support nonprofit causes.

Every American, regardless of their beliefs, will benefit from the Speech Privacy Act's protections for free speech and personal privacy and its strengthening of nonprofit causes throughout the country. People United for Privacy urges Members of Congress to advance this policy to protect the privacy rights of all Americans and the nonprofit causes they support.

II. Ill-conceived and slapdash proposals to muzzle alleged foreign interference in the nonprofit sector threaten donor privacy rights and valuable nonprofit advocacy while drowning nonprofits in red tape and incentivizing weaponized enforcement.

Empowering government agencies with new power to collect information about nonprofit donors creates new opportunities to abuse that authority and new risks to Americans' speech and privacy rights. Even if foreign donors to nonprofits are the target, such measures can be expanded over time in a manner that is detrimental to the privacy of American donors to American nonprofits. Compliance with foreign donor reporting mandates necessarily authorizes agencies to demand information on nonprofit donor lists for verification purposes. And, of course, expanded nonprofit reporting requirements increase the

¹⁴ See S.B. 24-129, 74th Gen. Ass., 2nd Reg. Sess. (Colo. 2024). Available at: <https://leg.colorado.gov/bills/sb24-129>.

likelihood that overzealous or biased bureaucrats will find new justifications for fishing expeditions that expose the identities of American donors and the causes they support to public scrutiny.

The act of contributing to political action committees or disseminating political messages is protected speech and association under the First Amendment. Nonprofits that do not accept tax-deductible donations may engage in limited political activity, so long as that is not their primary purpose. While nonprofits may not contribute to candidates' campaigns or traditional PACs, First Amendment precedent protects the right of nonprofits to contribute to independent expenditure-only committees, known informally as "super PACs," which operate independent of candidates and political parties. Legislation that bans protected speech because an organization may have received a foreign donation is contrary to the First Amendment and constitutes a prior restraint on speech. Furthermore, such prohibitions rely on dangerous theories hostile to speech and privacy rights that have been used to justify proposals meant to undermine First Amendment protections.

Likewise, compliance burdens for nonprofits imposed by such policies must not be ignored. Nonprofits routinely receive donations without the time, resources, or ability to verify the citizenship status of the donor. These issues are exacerbated when a nonprofit receives an anonymous gift with no capacity or opportunity to verify the donor's identity and citizenship status. In many cases, it is not possible to obtain such information at all or without expending significant time and effort. The potential compliance costs of a foreign donor reporting regime will ruin many volunteer-led or grassroots organizations, especially those with a robust online presence, and will certainly divert precious funds that would otherwise be used in furtherance of nonprofit missions.

The dangers of biased and selective enforcement loom large as well. Given the partisan animations frequently underlying disclosure crusades, it is not a stretch to envision enforcement of such laws occurring on an uneven basis, heavily dependent on the whims of the party in power. Would reproductive rights activists be comforted by enforcement of such laws under a conservative administration? Are pro-life advocates likely to be treated fairly by a liberal administration empowered to assess the veracity of nonprofit filings about an organization's sources of foreign support?

Abuse by government regulators is hardly the only concern in the enforcement context. Proposals requiring public reporting of foreign donors to nonprofits risk emboldening an organization's ideological opponents with a powerful weapon if a third-party complaint process is authorized. Regardless of whether a complaint has merit, it will paralyze the targeted nonprofit, drowning the organization in legal costs, diverting resources from its mission, and sully the group's reputation while the complaint process plays out. In this scenario, the process is the punishment.

Many U.S.-based nonprofits do important work in countries around the globe. Likewise, many American nonprofits have deep ties to communities abroad. Certain nonprofit missions lend themselves naturally to international work – organizations working on human rights, global healthcare, poverty and hunger issues, or immigration, for instance – or support by foreign donors. Likewise, American nonprofits engaged in support of or opposition to Israel-related foreign policy and groups working on tourism or tax

reform are equally likely to attract broad-based support. Far-reaching disclosure requirements are likely to have a global impact that wreaks havoc on a sizable portion of the American nonprofit sector.

III. Because of the privacy, speech, compliance, and enforcement concerns inherent in legislation targeting alleged foreign election interference in the nonprofit sector, such measures must abide by several bright-line rules that safeguard First Amendment freedoms.

Legislative proposals that seek to impose donor reporting or prohibitions on the political and issue-based engagement of nonprofits that receive foreign donations must be carefully considered and narrowly tailored to avoid unintended consequences and the trampling of vital speech and privacy rights. While PUFPP does not endorse any such legislation, we believe the following considerations are crucial to minimizing the harms such proposals are likely to invite:

- (1) Proposals targeting foreign donors to nonprofits must avoid generalized donor reporting.** 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. A sweeping disclosure mandate would violate the privacy rights of American donors to American nonprofits in direct violation of established Supreme Court precedent to the detriment of many valuable causes. 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.¹⁵ 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. Any such policy would achieve little more than undermining decades of First Amendment precedent while enabling misleading smear campaigns against all donors, including Americans, to U.S.-based nonprofit organizations.
- (2) The mere existence of a foreign donor to a nonprofit should not result in an organization being prohibited from engaging in protected speech.** Banning American nonprofits from engaging in political or issue advocacy simply because the organization received a single donation from a foreign individual or entity advances the extreme theory that every donor to a nonprofit should be treated as a contributor to an entity that receives a contribution from that nonprofit. This same theory underlies many of the most significant threats to donor privacy that have been proposed in Congress of late, such as the so-called “DISCLOSE Act.”¹⁶

¹⁵ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Americans for Prosperity Foundation v. Bonta*, 594 U.S. at ___ (2021). 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).

¹⁶ See note 5, *supra*.

Nonprofits cannot be forced to sacrifice their right to engage in First Amendment-protected activity as a condition of accepting an otherwise legal donation.

- (3) **Compliance with regulations surrounding the existence of foreign donors cannot be so extensive or inflexible as to make adherence to the law impossible.** For example, such restrictions cannot have the impact of criminalizing the receipt of anonymous donations. Anonymous giving is not only a time-honored tradition in American philanthropy but a protected constitutional right. Nonprofits routinely receive donations without the ability or resources to verify the citizenship status of the donor. In many cases, it is not possible to obtain such information without consuming significant time and effort, and in some cases, attaining an answer may be impossible.
- (4) **Policies must be included that prohibit a weaponized enforcement process.** This necessarily involves special protections that allow nonprofits accused of violations to defend themselves from frivolous complaints lodged by their ideological opponents. The burden of proof must be on the actor lodging the complaint, not the accused, and cost-shifting penalties for frivolous complaints should be included in any such legislation.

Adherence to these guidelines will not guarantee that a proposal poses minimal or non-existent concerns with respect to the First Amendment, but faithfulness to these recommendations will go a long way towards limiting the damage to the nonprofit sector and the privacy rights of nonprofit supporters.

IV. H.R. 8399 generally embodies the aforementioned guidelines, limiting – but not nullifying – the risk to nonprofit privacy and advocacy rights and minimizing – though not eliminating – the associated compliance and enforcement concerns.

No measure that deliberately imposes additional restrictions on the nonprofit sector can be devoid of problematic provisions for donor privacy rights and nonprofit advocacy freedoms. Consequently, it is incumbent on Members of Congress to proceed cautiously before engaging in this deeply sensitive area, where pitfalls and unintended consequences lurk around every policy consideration.

To its credit, H.R. 8399 avoids many of the most egregious problems inherent in such legislation and demonstrates a serious concern for protecting Americans’ hard-earned donor privacy rights as well as potential nonprofit speakers from falling victim to frivolous and costly allegations from unscrupulous ideological opponents. While PUFPP does not endorse this legislation, we note that it functions as a far less harmful alternative than several competing legislative proposals.¹⁷

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In today’s hyperpolarized political climate, Americans are increasingly concerned about their private giving being made public and weaponized against them by those who disagree with their views, a

¹⁷ See note 9, *supra*.

reality recently acknowledged with bipartisan support at the Federal Election Commission.¹⁸ Unfortunately, those 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 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. 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.

Legislative efforts to police allegations of foreign electoral interference risk such an outcome, especially if pursued in a rushed or reckless manner. Dangers lurk to freedom of speech and longstanding and hard-earned privacy rights. Support for nonprofit donor privacy protections, like those in the Speech Privacy Act of 2023, is bipartisan and widespread, but legislation aimed at exposing foreign donors to nonprofits directly contradicts such safeguards. Important bright lines must be respected to avoid the worst consequences of such policies. H.R. 8399, the Preventing Foreign Interference in American Elections Act, is a measured effort to address foreign interference concerns that, while imperfect, avoids many of the most dangerous outcomes of such legislation.

Associational privacy is an enduring First Amendment right that has been repeatedly affirmed by the U.S. Supreme Court for decades and shares widespread support among Americans regardless of their political leanings. We encourage Members of the Committee to proceed cautiously with respect to H.R. 8399 and any related legislation, always remaining vigilant, cognizant, and protective of constitutional protections for privacy in association and nonprofit advocacy.

Sincerely,



Matt Nese
Vice President
People United for Privacy

¹⁸ Recent proposals from two FEC commissioners, an agency overseen by the U.S. House Committee on House Administration, substantiate this concern. See Brian Hawkins, “FEC Commissioner Proposes Redaction Process for Vulnerable Donors,” People United for Privacy. Available at: <https://unitedforprivacy.com/fec-commissioner-proposes-redaction-process-for-vulnerable-donors/> (May 13, 2024). See also, Brian Hawkins, “Bipartisan Support for Privacy Reform Gains Traction at FEC,” People United for Privacy. Available at: <https://unitedforprivacy.com/bipartisan-support-for-privacy-reform-gains-traction-at-fec/> (May 22, 2024).