PEOPLE UNITED *for* PRIVACY FOUNDATION

March 26, 2025

The Honorable Jim Guthrie
Idaho State Senate
P.O. Box 83720
Boise, ID 83720-0081

The Honorable Treg A. Bernt
Idaho State Senate
P.O. Box 83720
Boise, ID 83720-0081

RE: Opposition to S. 1186: An Unconstitutional and Intolerable Attack on Idahoans' Privacy

Dear Chair Guthrie, Vice Chair Bernt, and Members of the Senate State Affairs Committee:

On behalf of People United for Privacy Foundation,[1] we write in strong opposition to S. 1186. This slapdash bill would require organizations exercising their First Amendment rights to "trace" the sources of their funding not only to their immediate donors, but also to their donors' donors, *ad infinitum* on campaign finance reports.

S. 1186 poses substantial constitutional issues and would significantly burden Idahoans' free speech and privacy rights and the vital nonprofit causes they support. It's especially risky for Idaho to pursue this measure, given the certainty of costly and complex litigation that would follow.

I. S. 1186 would massively expand already legally dubious reporting provisions in existing Idaho law to force the public exposure of nonprofit donors' sensitive personal information in a virtually limitless and incomprehensible manner.

The focus of S. 1186 is on expanding Idaho's already excessively broad reporting requirements for nonprofit organizations that make expenditures in connection with Idaho public officials and elections. Under existing Idaho law, nonprofits must already expose on political expenditure reports the names and addresses of all their donors who have given the organization more than $500 during the prior two calendar years or who have given or pledged more than $500 to the organization during the current calendar year.[2]

As it stands, Idaho law is already on shaky legal ground because the existing donor reporting requirement is not narrowly tailored to sources of campaign funding. Rather, it requires organizations to indiscriminately report their donors regardless of whether they gave to support political expenditures or for some other entirely unrelated purpose.

Moreover, the types of "expenditures" that trigger reporting are vaguely defined to include not just spending "furthering or opposing any election campaign" but also any spending "for the purpose of assisting, benefiting or honoring any public official or candidate."[3] These are vague and subjective terms and could include issue ads that simply ask members of the public to thank their

[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] Idaho Code § 67-6606(b).
[3] *Id.* § 67-6602(10).

elected officials for supporting or opposing legislation[4] – not the types of "electioneering campaigns" that the "legislative intent and findings" section of S. 1186 purports to address.

S. 1186 would add considerably to the state's existing burden on issue advocacy and intrusion on donor privacy. The bill would require nonprofit organizations making "expenditures," and that receive grants from other nonprofit organizations of $1,000 or more during the prior 12 months, to further report the grantor organization's own donors (by full name and complete address) of $1,000 or more during the prior 12 months. Such "tracing back" of other donor organizations' own donors must continue until no additional nonprofit organizations up the funding chain can be identified pursuant to the $1,000 threshold.

Moreover, S. 1186 would apply this sprawling "tracing back" requirement to political committees (PACs) and organizations paying signature gatherers to qualify measures for the ballot.

II. S. 1186 fails the U.S. Supreme Court's "exacting scrutiny" standard and portends a lengthy and costly legal battle in Idaho.

The U.S. Supreme Court has held that donor exposure laws like S. 1186 must meet "exacting scrutiny": They must "be narrowly tailored to the government's asserted interest" in disclosure.[5] This is because "'compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.'"[6] The "exacting scrutiny"/"narrowly tailored" standard imposes an exceptionally high bar for measures like S. 1186 that require groups to expose their donors: The government must go "beyond proving a balanced relationship between the disclosure scheme's burdens and the government's interests[; rather], the government must 'demonstrate its need' for the disclosure regime 'in light of any less intrusive alternatives.'"[7]

Crucially, the government is not free to assert whatever justification it wishes. Rather, the reporting requirements must serve a "sufficiently important government interest."[8]

S. 1186 fails the Court's exacting scrutiny standard on both fronts.

A. Quid pro quo corruption is not a valid governmental interest for regulating independent expenditures or ballot measure spending.

The "legislative intent and findings" section of S. 1186 states the bill's intent "to identify and discourage quid pro quo corruption" and "the appearance of quid pro quo corruption" allegedly created by the spending of "significant amounts" on "electioneering campaigns." However, the bill's expanded donor reporting requirements apply to nonprofit organizations independently making expenditures[9] (*i.e.*, expenditures not coordinated with any candidates) and groups spending on ballot

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[4] This is especially apparent when the "expenditure" definition is juxtaposed with the "independent expenditure" definition. *Compare id*. *with id*. § 67-6602(11). The latter is based on a narrower and more precise "express advocacy" standard. However, both existing Idaho Code § 67-6606 and S. 1186 subject nonprofit organizations to broad and indiscriminate donor reporting requirements simply for making "expenditures."

[5] *Americans for Prosperity Found. v. Bonta* (*AFPF*), 141 S. Ct. 2373, 2383 (2021).

[6] *Id*. at 2382 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)).

[7] *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023) (quoting *AFPF*, 141 S. Ct. at 2386).

[8] *AFPF*, 141 S. Ct. at 2396 (internal quotation marks and citation omitted).

[9] Again, Idaho law regulates "expenditures" made independently by nonprofit organizations as well as a narrower universe of activities specifically called "independent expenditures." *See* note 4, *supra*. S. 1186's reporting requirements would apply to both types of activities.

measures. The bill's purported justifications are invalid as to the former and wholly inapplicable to the latter.

First, the U.S. Supreme Court has already categorically held that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption."[10] Therefore, insofar as the legislative intent of S. 1186 is a premise that the Supreme Court has already rejected, it advances no legitimate governmental interest at all – let alone one that is "sufficiently important." On this basis alone, the bill would be declared unconstitutional if it were enacted into law.

Second, the issue of quid pro quo corruption simply cannot apply to spending on ballot measures. The concept refers to "something given or received for something else."[11] The U.S. Supreme Court has recognized the obvious: "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."[12] In other words, a ballot measure is incapable of giving something in return for spending on its behalf. Therefore, the reporting requirements that S. 1186 would impose on groups spending on ballot measures are not "narrowly tailored" to a "sufficiently important government interest" because the purported interest in "identify[ing] and discourag[ing] quid pro quo corruption" simply does not apply to ballot measures. Again, the bill would be declared unconstitutional on this basis alone if it were enacted into law.

Furthermore, as noted above, Idaho's definition of regulated "expenditures" triggering the expanded reporting requirements in S. 1186 is so vague and broad that it could cover spending on pure issue advocacy. The bill's purported legislative intent to address "quid pro quo corruption" and "electioneering campaigns" also fails to apply to such activity and is yet another basis for courts to invalidate the bill.[13]

B. S. 1186 is not "narrowly tailored."

S. 1186 doubles down on the overly broad approach of Idaho's existing donor reporting requirement and exacerbates the constitutional infirmity of the state's law. It is bad enough that, under existing Idaho law, nonprofits must expose their donors under the guise of addressing "quid pro quo corruption," even if those donors did not earmark their funds for any political activity. But S. 1186 would require nonprofits (and PACs) to also expose the donors of third-, fourth-, and fifth-party organizations, etc. The nexus between the political activity triggering these reporting requirements and the intent of donors to those third-, fourth-, and fifth-party organizations to fund the reported political activity is even more attenuated in such instances. S. 1186 represents the very opposite of "narrow tailoring"; the bill intentionally casts a wider dragnet to expose donors who have even less to do with the measure's purported interest in addressing quid pro quo corruption (which, again, is not a valid interest in this context).

The U.S. Court of Appeals for the Tenth Circuit recently held that Wyoming's attempt to require organizations making independent expenditures to broadly report all their donors was unconstitutional because it failed "exacting scrutiny" and "narrow tailoring."[14] The Tenth Circuit held that this type of indiscriminate donor reporting requirement would result in "overdisclosure" that

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[10] *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).
[11] *See* "quid pro quo," Merriam-Webster. Available at: https://www.merriam-webster.com/dictionary/quid%20pro%20quo.
[12] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).
[13] *See, e.g.*, *Americans for Prosperity v. Grewal*, 2019 WL 4855853 (D.N.J. 2019) at *19 (enjoining the enforcement of New Jersey's reporting requirements triggered by making "communications containing any fact or opinion about a candidate or public question").
[14] *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1247-48 (10th Cir. 2023).

"would bear no relation to the government's informational interest; it would necessarily sweep in [donors] who may have been interested in supporting a different candidate or no candidate at all or perhaps wished to preserve their privacy or anonymity."[15]

Instead, the Tenth Circuit held that:

> the statute could have outlined an earmarking system. We have already recognized the role earmarking can play in tailoring a disclosure law. In *Independence Institute* [*v. Williams*, 812 F.3d 787 (10th Cir. 2016)], we reasoned that a Colorado law's requirement that organizations "need only disclose those donors who have specifically earmarked their contributions for electioneering purposes," helped render the statute's scope "sufficiently tailored." 812 F.3d at 797. It is no surprise that at least one of our district courts has found the absence of an earmarking provision central to concluding that a disclosure regime fails exacting scrutiny. *See*, *e.g.*, *Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-CV-01488-PAB, 2021 WL 4060630, at *12 (D. Colo. Sept. 7, 2021). Instituting an earmarking system better serves the state's informational interest; it directly links speaker to content, whereas the Secretary [of State]'s solution dilutes the statutory mission.[16]

Other courts, including the Ninth Circuit (where Idaho resides), have similarly upheld donor reporting requirements where:

- organizations need only report "contributions [that] were solicited or *earmarked* for a particular candidate, ballot issue, or petition for nomination";[17] and

- organizations "must disclose only those donors whose contributions are *earmarked* for political purposes and are tied to a[n] election. *Absent such an earmark* and tie, the donor need not be disclosed."[18]

The even broader and more indiscriminate reporting of donors that S. 1186 would require of organizations is precisely the type of reporting requirement that courts have rejected for failing "exacting scrutiny" and for being unconstitutionally overbroad.[19]

The portion of the bill's "legislative intent and findings" addressing the state's elected judiciary also warrants particular discussion. According to the bill, the concern about independent campaign spending affecting judicial elections "demonstrates a greater need for disclosure in Idaho than in federal elections." Even taking this premise as true, this still does not make S. 1186 "narrowly tailored." Instead, it demonstrates the opposite.

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[15] *Id*. at 1248.
[16] *Id*.
[17] *National Association for Gun Rights v. Mangan*, 933 F.3d 1102, 1117 (9th Cir. 2019) (emphasis added).
[18] *Wisconsin Family Action v. FEC*, 2022 WL 844436 at *10 (E.D. Wis. March 22, 2022) (emphasis added) (internal citation omitted).
[19] The U.S. Court of Appeals for the Ninth Circuit's decision in *No on E v. Chiu*, 85 F.4th 493 (9th Cir. 2023) is not to the contrary. In that case, the Ninth Circuit upheld a San Francisco requirement that "primarily formed committees" broadly identify donors in advertising disclaimers, regardless of whether those donors' funds were "earmarked for electioneering." *Id*. at 510. However, the Ninth Circuit emphasized that the requirement applied only to ads run by "primarily formed committees," which are committees "formed or [that] exist[] primarily to support candidates or ballot measures." *Id.* (citing Cal. Gov't Code § 82047.5). As the Ninth Circuit explained, "[b]y donating to a primarily formed committee," donors are "necessarily . . . making an affirmative choice to engage in election-related activity" and therefore are fair game for disclosure. *Id*. This is <u>not</u> the case with S. 1186, which applies to any type of organization, regardless of whether they are formed or exist primarily to support candidates. Therefore, donors cannot be presumed to have given for an election-related purpose warranting their disclosure on campaign finance reports.

The U.S. Supreme Court has recognized that independent campaign spending can present unique concerns about the impartiality of elected judges that do not exist for elected officials in the legislative and executive branches.[20] However, the remedy for that concern is for: (a) particular elected judges to recuse themselves in matters, if (b) they are subject to disproportionate campaign spending by litigants coming before them.[21] And, insofar as some type of disclosure is required for judges to determine whether they need to recuse, the requirement should be limited to the litigants in each particular case.[22] Such a targeted disclosure requirement would be the type of "less intrusive alternative[]" and "narrow tailoring" that the First Amendment demands.[23] Again, S. 1186 takes the opposite approach of "narrow tailoring" by requiring all organizations engaged in Idaho elections to broadly report their donors, donors of donors, donors of donors' donors, etc., regardless of whether: (i) those organizations are involved in any judicial elections at all; and (ii) regardless of whether those organizations or their donors (or donors' donors, or donors' donors' donors, etc.) have any matters before the Idaho judiciary.

III. S. 1186 would wreak havoc on the Idaho nonprofit community, violating the long-held privacy rights of Idaho residents and chilling the speech of valuable nonprofit causes across the spectrum.

Serious constitutional issues aside, S. 1186's convoluted mandate will compel nonprofits that have always protected the privacy of their supporters to expose the names and addresses of their donors to another group they contribute to in order for the recipient entity to include that information in its own reports. As a result, an individual could find herself being very publicly associated with the policy and political activities of a group she has never actually supported.

For nonprofits, the choice between withholding grants to other organizations 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 demanding that groups "trace back" the sources of their funding, S. 1186 saddles nonprofits with a potentially massive and insurmountable administrative burden.

Because of the measure's complexity, many nonprofits will be coerced into silence, unable to afford an attorney to sort through and comply with the requisite reporting mandates. In Arizona, the vague language of Proposition 211 – S. 1186's equivalent – has predictably caused confusion and forced nonprofits to muzzle their voices in important debates.[24]

If enacted, many nonprofits will decide that the hassle of compliance, the potential for errors and costly penalties, and the risk to their supporters and other aligned organizations is simply too much to bear. Most groups will feel forced to sit on the sidelines, unable to offer a voice for their supporters and denying the public and elected officials the ability to benefit from their views and expertise on important issues. Worst of all, S. 1186's complexity will be most harmful to small and volunteer-run organizations as well as those groups advocating for causes disfavored by those in

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[20] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).
[21] *See id*.
[22] *See*, *e.g.*, Fed. R. Civ. P. 7.1 (corporate disclosure requirement); Fed. R. App. P. 26.1 (same).
[23] *See AFPF*, 141 S. Ct. at 2384, 2386; *Wyoming Gun Owners*, 83 F.4th at 1247.
[24] *See* Brian Hawkins, "Arizona 'Transparency' Law Leaves Nonprofits in the Dark," People United for Privacy. Available at: https://unitedforprivacy.com/arizona-transparency-law-leaves-nonprofits-in-the-dark/ (April 16, 2024). *See also*, Luke Wachob, "Arizona Nonprofits Face Chaos Under 'Dark Money' Law as 2024 Elections Near," People United for Privacy. Available at: https://unitedforprivacy.com/arizona-nonprofits-face-chaos-2024-nears/ (Jan. 4, 2024).

power. But make no mistake: No organization or cause is safe from the reach of S. 1186 – and neither are the citizens of Idaho who support their missions.

Protecting the privacy of Americans who join and contribute to nonprofit causes is a value with 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*.[25] As the U.S. Supreme Court noted in its decision: "The gravity of the privacy concerns in this 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…"[26]

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There are significant constitutional problems with S. 1186's sweeping provisions and its unjustified encroachments on nonprofit donor privacy. Much like its equivalent in Arizona, the target of this legislation is not candidates and political committees, but nonprofits – like the many organizations on both sides of the abortion, education, energy, Second Amendment, and tax debates – that advocate on behalf of Idaho residents, voice opinions on elected officials' policy views, discuss the issues of the day, and speak truth to power.

The bill's tortuous provisions 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. With litigation a near certainty if S. 1186 becomes law, lawmakers should reject this draconian scheme out of respect for their constituents' First Amendment-protected speech and association rights. **For these reasons, People United for Privacy Foundation urges the Committee to vote "Do Not Pass" on S. 1186.**

Sincerely,

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Chief Executive Officer
People United for Privacy Foundation

Eric Wang
Counsel
People United for Privacy Foundation

[25] *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).
[26] *AFPF*, 141 S. Ct. at 2388 (2021).