PEOPLE UNITED *for* PRIVACY

February 23, 2024

Via Electronic Submission

The Honorable Julie Fahey
Chair, House Rules Cmte.
900 Court Street, NE
Room H-295
Salem, OR 97301

The Honorable Jeffrey Helfrich
Vice-Chair, House Rules Cmte.
900 Court Street, NE
Room H-395
Salem, OR 97301

The Honorable Jason Kropf
Vice-Chair, House Rules Cmte.
900 Court Street, NE
Room H-491
Salem, OR 97301

RE: Amendment -3 to House Bill 4024's Dubious Constitutionality and Harm to Nonprofit Advocacy and Associational Privacy

Dear Leader Fahey, Leader Helfrich, Representative Kropf, and Members of the House Rules Committee:

People United for Privacy[1] submits the following comments opposing Amendment -3 to H.B. 4024, which is scheduled for consideration by the House Rules Committee on February 23, 2024. The Amendment's language, specifically in Sections 12-17 – much of which appears to be 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 Oregonians and the important nonprofit causes they support. It is especially risky for Oregon to pursue this measure as costly and complex litigation is certain to follow.

While multiple legal challenges to Arizona's "Voters' Right to Know Act" (the "Act") are ongoing, a recent court ruling by the Maricopa County Superior Court dismissing a challenge to the Act provides little assurance of the Act's constitutionality.[3] To the contrary, the court failed to properly apply the "exacting scrutiny" standard, as recently refined by the U.S. Supreme Court in *Americans for Prosperity Foundation* (*AFPF*) *v. Bonta*,[4] 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

[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* 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.

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

interest in disclosure of "who supports and opposes" measures or candidates.[5] 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[]" measures or candidates. The Superior Court decision fails to explain why such donors should have to be publicly exposed on reports with state officials.

Further, as even the Arizona Superior Court acknowledged, the Act "burden[s] the ability to speak" by virtue of its reporting and disclaimer requirements.[6] 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.[7]

Importantly, two additional legal challenges to the Act's constitutionality are ongoing.[8] The Oregon State Legislature would be wise to wait for the outcome of those challenges before pursuing a substantially similar proposal almost certain to invite litigation from affected speakers in Oregon.

In addition to serious concerns about Amendment -3's constitutionality, the havoc it would wreak on the nonprofit community in Oregon is severe. Many common communications from nonprofits about public policy could, in the eyes of an unfriendly regulator, fall under the Act's reach. Would a public thank-you to a legislator for sponsoring a bill be understood by a "reasonable person" as "advocacy" supporting the official's re-election? Would a "reasonable person" determine criticism of an elected official's handling of a hot-button topic as "advocacy" towards their "defeat" in an upcoming 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 Amendment saddles nonprofits with a potentially massive and insurmountable administrative burden.

Under the measure, nonprofits that engage in subjective standards of advocacy would not only be required to maintain records of donors who give $5,000 or more in a two-year period, but groups would also be required to determine the "business income or personal funds" comprising each donation. 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.

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[5] *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).

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

[7] *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.").

[8] *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).

Ultimately, many nonprofits will decide that the hassle of compliance, the potential for errors and costly penalties as well as complaints, and the risk to the privacy and safety of 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 Amendment'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*.[9] 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 America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect [of disclosure] feared by these organizations is real and pervasive…"[10]

* * *

There are significant constitutional problems with Amendment -3 to H.B. 4024's vague and overbroad terminology and its unjustified encroachments on nonprofit donor privacy. The Amendment's broad language would dramatically expand the type 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 Amendment's vague standards 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, H.B. 4024 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 Committee to reject Amendment -3 to H.B. 4024.**

Sincerely,

Matt Nese
Vice President
People United for Privacy

[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/AFPF-v-Becerra-Amici.pdf (Apr. 2021).
[10] *AFPF*, 141 S. Ct. at 2388 (2021).