



Privacy in Association is the Free Speech Issue of Our Time

Heather Lauer

In January, a man who stole and leaked the confidential tax returns of thousands of Americans, including President-elect Donald Trump, was sentenced to five years in prison.

“Any disclosure of taxpayer information is unacceptable,” commented IRS Commissioner Danny Werfel when the charges were brought last fall.

Werfel should know. A decade ago, he served as the IRS’s interim commissioner after multiple senior personnel were forced to resign in the wake of the Tea Party targeting scandal. That black eye for the agency saw IRS bureaucrats launch hundreds of intrusive and unfounded investigations into conservative nonprofits and their donors.

In 2014, a year after that scandal was

exposed, the IRS settled a lawsuit from the National Organization for Marriage (NOM) after an employee illegally leaked its supporter list to an individual who then shared the sensitive information with one of NOM's fiercest critics, the Human Rights Campaign. Then, just last year, the IRS announced that over 120,000 confidential tax forms had been accidentally exposed on a public website.

The IRS's privacy problems are so severe that the agency took the rare step of relinquishing some power over Americans' confidential nonprofit donation records in 2020. Agency officials admitted they did not use the donor lists collected annually from these groups and that safeguarding such sensitive information was an unnecessary burden. In response, a widely supported agency rulemaking dramatically reduced the number of nonprofits subjected to annual donor reporting.

Yet in legislatures across the country and in Congress, some politicians are pushing hard in the opposite direction. They want to expose Americans' nonprofit donations in hopes of chilling support for groups that speak out about their agendas or voting records. Their efforts strike at the heart of one of the most important but least celebrated First Amendment rights in our democracy: freedom of association.

"I need to know who my enemies are," said North Dakota State Senator Jeff Magrum. After a group supported by private donations criticized Senator Magrum's record on crime and public safety, he sponsored unsuccessful legislation to force certain nonprofits to expose their supporters. His words echo U.S. Senate Majority

Leader Chuck Schumer, who infamously predicted that "the deterrent effect" of disclosing a group's donors "should not be underestimated."

Today's political leaders are keenly aware that when censorship is impossible, retaliation against a group's financial supporters is the next best weapon. Now, in Washington, D.C. and in states across America, the battle for the right to privately support causes is raging. It is also making strange bedfellows on both sides of the issue.

The Origins of Private Association

Privacy in association was an American value before there was a United States of America. Our founding fathers funded anonymous political pamphlets, wrote under pen names, and formed private organizations to shield themselves from retaliation for their revolutionary ideas. The focus was on the message, not the messenger. The Constitution later enshrined in the First Amendment the freedom of all Americans to speak, publish, assemble in groups, and petition the government.

Modern protections for freedom of association developed significantly in the 20th century, as courts grappled with repeated attempts by government officials to silence burgeoning social movements by targeting their financial supporters. Most famously, at the height of the Civil Rights Movement, Alabama attempted to compel the NAACP to reveal its members and donors to officials in the state. The case reached the Supreme Court, which ruled unanimously in favor of Americans' right to privately support nonprofit causes and

advocacy groups.

“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other unconstitutional] forms of governmental action,” the Court observed.¹

The dangers faced by NAACP supporters in the Jim Crow South were extreme and unlike those faced by most causes today. Yet, the Court expressed concern about threats to donors that still exist today, such as “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” Americans’ giving records can never be made private again once they are exposed, even if societal attitudes change or political tensions and threats to donors were to rise dramatically in the future.

NAACP v. Alabama stands today as the best-known precedent on privacy in association. Its reasoning, however, has been reinforced in numerous cases that followed. The Supreme Court has since struck down laws requiring nonprofits to publicly reveal their donors, forcing fliers to list their sponsor, and compelling public-school teachers to report what organizations they were members of. The right to privately join and support advocacy groups has been firmly established under the First Amendment.

A New Wave of Threats

Things began to change, however, in the 1970s with the development of campaign finance law. Congress and most states began requiring candidates, political parties, and political action committees to publicly report the donations they received, including

each donor’s name, home address, and employer. While these laws were never intended to affect nonprofits, opportunistic politicians seized on the opportunity to argue that groups that merely speak about public officials or political issues should be forced to expose their donors, too.

These efforts gained significant steam after the Supreme Court ruled in 2010 that certain nonprofits and other groups of Americans have a First Amendment right to independently voice their support or opposition to candidates for federal office. Senate Democrats responded with legislation they called the DISCLOSE Act to dox supporters of advocacy groups. Although unsuccessful to date, the DISCLOSE Act has been introduced in every Congress since 2010 and has featured prominently in multiple voting and elections reform packages championed by Democrats. At the 2024 Democratic National Convention, Schumer reiterated that passing those reforms was “one of the first things we want to do” if Democrats made gains in the elections.

Unfortunately, many states have already seen similar legislation, and some of those bills have become law. Others have seen efforts to place misleading measures on the ballot suggesting that eliminating privacy for nonprofit supporters is necessary to fight “dark money” in politics. The rise of the emotionally charged term “dark money” as a smear for any organization that protects the privacy of its members has manipulated some voters into turning against longstanding protections for privacy and freedom of association.

“Dark money” is not an official, legal, or technical term. It brings to mind images of

powerful entities working in the shadows to undermine our system of government. In reality, however, “dark money” can describe any group of Americans who attempt to persuade their fellow citizens about policy or social issues without submitting a list of their supporters’ names and addresses to the federal government. Far from a threat to democracy, Americans depend on these organizations to advocate for their beliefs and interests, serve as watchdogs, and provide protection from doxing and harassment.

As politicians demand more disclosure, the dangers have grown. The internet and social media have made it easier than ever before to turn donor records into ammunition to attack Americans for their beliefs. At the same time, our political climate has become nastier and more divisive. Today, a majority of Americans hold political views they do not feel comfortable sharing, and most people believe that this chill on speech is a problem for our society.²

The ability to privately give to nonprofits offers Americans a way to continue participating in civic debates without putting their livelihoods or their safety in danger. Yet the statistics on charitable donations are worrying, too. In 2022, for the first time this century, fewer than half of Americans donated to a nonprofit organization. In inflation-adjusted terms, charitable donations fell by nearly 11%, marking just the fourth time giving has declined in the past four decades.³

Predictably, nonprofit leaders are feeling the heat. A 2023 survey found a significant decline in engagement on public policy issues by nonprofit groups.⁴ Among the main reasons cited: fear of the IRS and backlash

in the current political environment. Better protections for privacy in association could help reverse this trend and improve the state of free speech in America.

Prospects for Privacy Reform

In 2021, the Supreme Court decided the most important associational privacy case in a generation. In the 2010s, a handful of states, led by then-California Attorney General Kamala Harris, had begun openly defying *NAACP v. Alabama* by requiring nonprofits to submit their donor lists to state bureaucrats. California even carelessly exposed those confidential records on a state website where anyone could access them. The Ninth Circuit initially upheld the state’s sweeping demand, but the Supreme Court overruled that decision in *Americans for Prosperity Foundation v. Bonta*.

“We are left to conclude that the Attorney General’s disclosure requirement imposes a widespread burden on donors’ associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing...” Chief Justice John Roberts wrote for the majority.

In striking down state dragnets of nonprofit donor information, the Court made clear that freedom of association still matters. It also sparked a wave of pro-privacy reforms around the country. Since 2018, 20 states have passed new laws protecting the privacy of Americans’ membership in or support for nonprofit organizations.⁵

Colorado, a state that has witnessed rapid political change in recent years, became the latest state to pass a law protecting donor privacy in May 2024. It did so

unanimously, with both Democratic and Republican lawmakers co-sponsoring the legislation. The bill also earned widespread support across the state's diverse spectrum of nonprofit organizations. Donor privacy is an issue that appeals to groups on opposite ends of controversial and topical issues, such as pro-life and pro-choice groups that share a belief in the importance of protecting their members' privacy.

One state – West Virginia– has gone a step further and reviewed its existing laws for violations of associational privacy. State lawmakers ultimately passed a reform bill to remove unconstitutional provisions and clarify key parts of the law that previously violated privacy rights for nonprofits that voice opinions on policy issues.⁶ Lawmakers in Alabama, Kansas, and Oklahoma are contemplating similar privacy and speech-protective reforms in preparation for the 2025 session. In states like Maine, Nebraska, Oklahoma, Ohio, and Virginia, bills threatening privacy in association in the 2024 session met strong opposition and either failed to become law or were amended to neutralize or eliminate the threat.

Not to be outdone, Republicans in Congress have introduced legislation to limit the ability of federal agencies to meddle with Americans' ability to privately support social causes. That bill, the American Confidence in Elections (ACE) Act, addresses many policy areas but contains four separate provisions that would protect and strengthen associational privacy. One prevents the IRS – whose agents endorsed Kamala Harris for president in 2024 – from imposing new rules on nonprofits' speech to prevent a repeat of the targeting scandal.

The Next Big Fight

In spite of the progress cited above, the news is not all good. Politicians from both parties increasingly use cheap “dark money” rhetoric to attack groups who protect their supporters' privacy. This is especially notable in the clumsy accusations common in an election year. These smears recast the traditional American value of privacy in association as a nefarious force threatening our democracy.

Some Republicans in Congress, despite otherwise supporting nonprofit donor privacy legislation, have also proposed multiple bills that would expand the IRS's authority to surveil nonprofits and their donors in ways that could ultimately be weaponized against Americans for their beliefs and giving choices.⁷ Concerns about the role of foreign donors to progressive nonprofits have been exploited to open the possibility of re-arming federal agencies with tools that could pierce historical safeguards and undo recent victories for privacy in association. If successful, these efforts would mark a major about-face for Republicans, who have fought for over a decade to limit the IRS's power over nonprofits.

In Arizona, a former state Attorney General – who blamed “dark money” for his loss in a campaign for secretary of state – finally succeeded on his fourth try in passing a ballot measure [called the “Voters' Right to Know Act”](#) that forces many nonprofits to expose their donors. The law attempts to evade *NAACP v. Alabama* and *AFPF v. Bonta* by listing certain activities and speech that trigger disclosure, but the list is intentionally expansive, not to mention vague, and the law empowers bureaucrats to make

the final call. Any nonprofit that values the privacy of its members will be chilled by the law's invasive and far-reaching provisions.

Arizona's law serves as a reminder that threats to privacy in association will never disappear, no matter how many times courts reinforce the principle. Nonprofits have no choice but to fight on. Arizona's law has already been challenged in both state and federal court on constitutional grounds. Those cases will go a long way in shaping how privacy opponents in other states craft their proposals to undermine *AFPP v. Bon-ta*, just like they once undermined *NAACP v. Alabama*.

In the meantime, lawmakers should not be complacent. They must keep pressing forward to ensure that every American is free to exercise their First Amendment right to support a cause without fear of harassment or intimidation. Legal victories are not enough. We need to defend privacy in association everywhere it is threatened and work to restore it where it has been degraded.

If freedom of speech is suffering under a chill, a blanket of privacy is just what we need.

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ENDNOTES

- 1 *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).
- 2 See Cato Institute, "Poll: 62% of Americans Say They Have Political Views They're Afraid to Share," (<https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share>) and *The New York Times*, "America Has a Free Speech Problem," (<https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html>).
- 3 Gamboa, Glenn. "Charitable giving in 2022 drops for only the fourth time in 40 years: Giving USA report." *Associated Press*, June 20, 2023. <https://apnews.com/article/charitable-giving-decline-givingusa-report-becaca47cae4bc4f55063cc9f1c5865a>
- 4 Daniels, Alex. "Nonprofits are lobbying a lot less than two decades ago, according to new research." *Associated Press*, August 8, 2023. <https://apnews.com/article/nonprofits-lobbying-less-survey-155e63395a03edbfe7c53cf9c932e274>
- 5 People United for Privacy, "20 States Pass Bipartisan Privacy Law to Protect Americans From Doxing and Harassment." May 29, 2024. <https://unitedforprivacy.com/20-states-pass-bipartisan-privacy-law-to-protect-americans-from-doxing-and-harassment/>
- 6 Wachob, Luke, "West Virginia Cleans Up Campaign Laws, Provides Roadmap for Other States." People United for Privacy, April 5, 2023 <https://unitedforprivacy.com/west-virginia-cleans-up-campaign-laws-provides-roadmap-for-other-states/>
- 7 See the "No Foreign Election Interference Act" (H.R. 8314) and the "American Donor Privacy and Foreign Funding Transparency Act" (H.R. 8293).