



## **Litigation Backgrounder**

### ***Utah Taxpayers Association, et al. v. Cox, et al.***

#### **The Issue in Brief**

When the state decides to regulate the speech of citizen groups, it must specify in an understandable way what speech triggers regulation and detailed reporting to the government. Even if the state does this correctly, does it have the power to force groups that spend only a small portion of their funding advocating for or against ballot initiatives to file reports in the same manner as it regulates candidate committees, political parties, and PACs? That is the danger posed by Utah's expansive new donor disclosure law, and the question at issue in a recently filed federal lawsuit.

#### **Background**

Utah Taxpayers Association, Utah Taxpayers Legal Foundation, and Libertas Institute are nonprofit organizations dedicated to analyzing public policy issues and educating the public. As part of that mission, they would like to spend a small part of their budgets encouraging citizens to vote for or against ballot questions. These groups have never registered as political committees because urging citizens how to vote on ballot issues is not their primary purpose. However, a new Utah law requires nonprofit groups to abide by reporting requirements similar to those required of candidates and PACs and identify their donors to the Lieutenant Governor for publication in an online database if they conduct activities "with the intent to or in a way to influence or tend to influence, directly or indirectly, any person to refrain from voting or to vote for or against any..." candidate or ballot question. This vague standard could be interpreted to regulate issue advocacy activities routinely conducted by many nonprofit groups, or to give state officials broad investigatory authority to pry into an organization's internal communications.

Many forms of speech on legislative or policy issues may indirectly influence how some person might vote, but it is far from clear what speech would trigger regulation. This ambiguity could greatly chill speech about any public policy matter whether the speech is intended to affect an election or not. The possibilities for partisan or otherwise politically-motivated enforcement, which would impose high costs on targeted organizations, are also obvious and highly troubling. Activism about pending legislation or policy issues might be construed as indirectly influencing votes for candidates, especially if strongly critical language is used to critique the legislation or promote an issue. The law is a legal minefield.

The United States Supreme Court has recognized that the First Amendment generally protects the anonymity of contributors to nonprofit educational organizations, lest an individual be subject to retaliation

for supporting an organization that works on a controversial or unpopular topic. Utah's law violates that tradition – and the Constitution – by attempting to force nonprofits to identify their contributors.

In addition to granting government broad authority to regulate speech and violate the privacy of donors to nonprofits, Utah's new law includes a compelled speech regime forcing corporations to warn contributors that their donation may be used to make a political expenditure. And it regulates corporate speakers more strictly than unions, who are required to file fewer reports, are not forced to reveal the names and addresses of their donors to the Lieutenant Governor, and are not subject to the compelled speech regime applied to corporations.

By violating the privacy of contributors to nonprofits, by requiring nonprofits to meet the same rigorous reporting standards as PACs and political candidates, by imposing vague and arbitrary burdens on nonprofit speakers, by compelling groups to speak, and by favoring labor unions over corporations, the regulations governing nonprofit political activity imposed by House Bill 43 are unconstitutional.

Consequently, Utah Taxpayers Association, Utah Taxpayers Legal Foundation, and Libertas Institute have filed suit to defend their rights and the rights of their contributors.

### **Facts of the Case**

Utah Taxpayers Association (“UTA”) is a 501(c)(4) organization whose mission is “to enhance efficient, economical government by advocating for a tax code that is fair and equitable, a state education system that prepares the next generation of Utahns to succeed in the 21st century global economy, and a regulatory environment that limits the burdens on business.” Founded in 1922, the Association has over 1,000 members and carries out its mission by holding events and conferences, hosting debates, operating an organizational Facebook and Twitter account, publishing the *Utah Taxpayer*, a monthly newsletter, lobbying, publishing reports analyzing the budgets of Utah's school districts, cities, and counties, and intervening in political campaigns – local and statewide – in the state of Utah. Its President is Howard Stephenson.

In 2014, UTA spent funds to encourage citizens to vote on two ballot issues, expending 16% of its budget on that activity. It wishes to carry out similar activities and communications in 2015 and 2016. The Association is not under the control of any candidate or political party.

Utah Taxpayers Legal Foundation (“the Legal Foundation”) is a 501(c)(3) organization whose mission is to “educate the citizens of the state of Utah as to their privileges and rights under the Constitution and laws of the United States and the state of Utah to secure equal protection and defend the human and civil rights of those citizens.” As a 501(c)(3) organization, the Legal Foundation is prohibited from intervening in any campaign for office and may engage in only limited lobbying.

Libertas Institute is a 501(c)(3) organization whose mission is “to advance the cause of liberty in Utah by holding public events, producing original literature, offering model legislation, and advocating for the principles of individual liberty, private property, and free enterprise.” Like the Association and the Legal Foundation, Libertas is not under the control of any candidate or political party. The President of Libertas Institute is Connor Boyack. In 2015 and 2016, Libertas intends to spend approximately 20% of its budget engaging in advocacy and communications regarding ballot issues.

Absent an injunction prohibiting enforcement of the law against them in future elections, the Association, the Legal Foundation, and Libertas will be forced to either violate the privacy of their donors or refrain from engaging in any speech or activity that would trigger the law.

The defendants in the lawsuit are Utah Lieutenant Governor Spencer Cox, Utah Attorney General Sean Reyes, Utah County Attorney Jeff Buhman, and Salt Lake County District Attorney Sim Gill. They are sued in their official capacities as the state officers charged with the law's enforcement.

### **House Bill 43's Disclosure Regime**

House Bill 43 created new disclosure regimes that apply to any corporation making expenditures for political purposes, or on ballot issues, that total at least \$750 during a calendar year. Corporations must comply with these regulations even if they do not have a primary purpose of intervening in campaigns.

To comply, corporations must report the names and addresses of any person who gives money, including a fee, due, or assessment for membership in the group. They must file an annual verified financial statement with the Lieutenant Governor. Throughout the course of a calendar year, triggering events require the filing of multiple additional statements with the state. The reports, which include the names and addresses of a group's supporters, are then made public on the Internet.

The law's burdens are compounded by vague requirements that encourage even more burdensome disclosure and efforts at compliance to avoid penalties for errors. Failure to comply with Utah's myriad reporting requirements triggers a \$100 fine, and failure to amend a report that is discovered to contain errors within seven days of notification is a class B misdemeanor. Beyond criminal liability, the Lieutenant Governor is empowered to levy a \$1,000 fine on corporations that do not file reports.

### **The First Amendment Protects the Right to Associate Privately**

During the civil rights era, the Supreme Court defended the right of nonprofit groups to speak about public policy without being forced to report the identities of their members or supporters. These cases, the best known of which is *NAACP v. Alabama*, clarified that governments could not violate nonprofit groups' privacy without a compelling justification.

Further, the Court has been clear that chilling effects from disclosure merit deep consideration, observing that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective... restraint on freedom of association." (*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958)). It has stated that "regulatory measures [], no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." (*Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961)).

### **Compelled Speech**

Whereas simple disclaimers identifying the organization behind a particular public political communication have survived judicial review, Utah's law goes further to require that groups forewarn contributors that their money may be used to make a political expenditure and that contributors' names and addresses may be disclosed on the group's financial statement. Rather than identifying a solicitor, Utah's law compels speech.

Compelling speech is little different from compelling silence. “There is certainly some difference between compelled speech and compelled silence . . . [but] in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees . . . the decision of both what to say and what not to say.” (*Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 796-97 (1988)). The state may only compel speech if doing so advances a sufficiently important rationale and requirements are tailored to a recognizable government interest. Utah has met neither standard.

### **Union Speech vs. Corporate Speech**

Utah’s law governing the speech of corporations is far stricter than its treatment of similar activities by labor unions. Labor organizations are required to file fewer reports, are not forced to reveal the names and addresses of their donors to the Lieutenant Governor, and are not subject to the compelled speech regime applied to corporations. Treating the same speech differently on the basis of the speaker’s identity as a corporation or union makes no sense and violates the Equal Protection Clause of the Fourteenth Amendment.

### **Legal Team**

The plaintiffs are represented by Center for Competitive Politics Legal Director Allen Dickerson and Staff Attorney Owen Yeates.

### **About the Center for Competitive Politics**

The Center for Competitive Politics (“CCP”) is one of the nation’s premier centers of public interest litigation. It is the only public interest organization with in-house litigation staff solely focused on the defense of First Amendment rights to free political speech, assembly, and petition. CCP was co-counsel in *SpeechNow.org v. Federal Election Commission*, which held that there can be no limits on contributions to independent expenditure committees. In addition to its strategic litigation, CCP works to promote and defend First Amendment rights to free political speech, assembly, and petition through communication, activism, training, research, and education.