Allen Dickerson, pro hac vice
adickerson@campaignfreedom.org
Owen D. Yeates, Utah Bar No. 13901
oyeates@campaignfreedom.org
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Phone: 703-894-6800

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTAH TAXPAYERS ASSOCIATION, et al, *Plaintiffs*, v. SPENCER COX, et al, *Defendants*.	Case No. 2:15-cv-0805-DAK **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** District Judge Dale A. Kimball

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs Utah Taxpayers Association ("Association"), Utah Taxpayers Legal Foundation ("Foundation"), and Libertas Institute ("Institute") (collectively "Plaintiffs") submit this Motion for Summary Judgment and Memorandum in Support.

I. INTRODUCTION

> This is true liberty, when free-born men,
> Having to advise the public, may speak free.[1]

Utah has created a constitutionally infirm corporate disclosure regime riddled with vagueness, contradiction, and complexity. Corporations, including the non-profit organizations here, cannot know which expenditures will trigger their reporting obligations, how often they must report, and which expenditures and donations must be reported. They are navigating the shoals of vagueness without a rudder and on a cloudy night.

And if the law's uncertainty and the costs to understand it were not burden enough, Utah rewards a corporation's attempt to engage with the community and exercise its First Amendment rights with the full panoply of status-related disclosure burdens. But while the Supreme Court has allowed such burdens on PACs and PICs when advocacy is their major purpose, Utah has imposed reporting entity status and all its burdens on corporations even when advocacy is not. And, some of the burdens imposed on corporations are greater than those Utah imposes on political action committees ("PACs") and political issues committees ("PICs"), and certainly much greater than those it imposes on unions engaged in similar candidate- and ballot-related advocacy.

[1] Euripides, *Epigraph to* John Milton, *Areopagitica and Other Political Writings* 3 (Liberty Fund, 1999).

Plaintiffs are nonprofit entities that have dedicated themselves to serving the community. They fulfill their missions in part by raising their voices about pressing issues, including important ballot and legislative measures, and by representing the voices of donors who would otherwise feel too weak and insignificant, individually, to become civically engaged. But Plaintiffs have silenced themselves, and will continue to silence themselves, because they cannot tell what conduct is illegal and because they do not want to violate their supporters' privacy rights by submitting to the disclosure regime's unconstitutional donor disclosure provisions.

Accordingly, Plaintiffs ask that the Court hold that 1) the definitions of "political issues expenditures" and "political purposes" at Utah Code Ann. § 20A-11-101(39) and -101(40) are unconstitutionally vague, as are §§ 20A-11-701 and -702 to the extent they rely on those definitions; 2) the corporate disclosure regime at §§ 20A-11-701 and -702 violates exacting scrutiny, both by failing to include a major purpose requirement and because it is insufficiently tailored; 3) the proration requirements in those sections fail exacting scrutiny because they violate donor privacy while misleading the electorate; 4) the disclosure regime in those sections violates both the First and Fourteenth Amendments by discriminating against corporations; and 5) the donor disclosure warnings in those sections do not—as is necessary for compelled speech—serve a compelling interest and are not narrowly tailored. Plaintiffs also ask that the Court permanently enjoin enforcement of the law.

II. BACKGROUND

A. Plaintiffs' Social Welfare and Community Education Activities

Plaintiffs brought this suit because Utah's corporate disclosure regime has chilled their speech. They wished to engage in advocacy regarding Proposition 1 in 2015, and they would

similarly like to engage in advocacy in 2016 and future years, but they have silenced themselves to avoid triggering the regime's requirements. Stipulated Undisputed Facts ("Statement") ¶¶ 5-8, 15-18, 23-26 (Ex. A; originally filed at ECF No. 37); Verified Complaint for Declaratory and Injunctive Relief ("Complaint") ¶¶ 35, 41, 51, *Utah Taxpayers Association v. Cox*, No. 2:15-cv-805-DAK (D. Utah Nov. 17, 2015) (Ex. T; originally filed at ECF No. 2).

The Association is a nonprofit, 501(c)(4) tax-exempt corporation operated exclusively for the promotion of social welfare. Statement ¶ 1; 26 U.S.C. § 501(c)(4). Its efforts to achieve efficient, economical government, a strong education system, and limited regulatory burdens on businesses include conferences and debates, newsletters and reports, and lobbying. Complaint ¶¶ 13, 25. In particular, it publishes press releases and scorecards analyzing legislation and scoring legislators' votes. Statement ¶¶ 9-10; Complaint ¶ 30.[2]

The Foundation and the Institute are nonprofit, 501(c)(3) tax-exempt corporations operated exclusively for charitable and educational purposes. Statement ¶¶ 13, 21; 26 U.S.C. § 501(c)(3). The Foundation works to educate citizens about their constitutional rights and privileges and to defend the rights of Utah's citizens. Complaint, ¶ 14. The Institute works "to advance the cause of

[2] *See also Vote NO on HB 246*, http://www.utahtaxpayers.org/wp-content/uploads/2013/02/VOTE-NO-on-HB-246.pdf (last visited Nov. 10, 2015) (Ex. U); *Vote NO on SB 267*, http://www.utahtaxpayers.org/wp-content/uploads/2013/03/VOTE-NO-on-SB-267.pdf (last visited Nov. 10, 2015) (Ex. V); *Vote YES on SB 27*, http://www.utahtaxpayers.org/wp-content/uploads/2012/02/VOTE-YES-on-SB-27.pdf (last visited Nov. 10, 2015) (Ex. W); *2015 Utah Taxpayers Association Legislative Watchlist*, http://www.utahtaxpayers.org/wp-content/uploads/2015/03/2015-Watchlist-FINAL.pdf (last visited Nov. 10, 2015) (Ex. X); *Utah Taxpayers Association – 2015 Legislative Scorecard*, http://www.utahtaxpayers.org/wp-content/uploads/2015/04/2015-Scorecard-Website.pdf (last visited Nov. 10, 2015) (Ex. Y).

liberty in Utah by holding public events, producing original literature, [and] offering model legislation." Complaint ¶ 15; *see also id*. ¶ 46.

While advocacy like promoting or opposing Proposition 1 is one of the ways Plaintiffs fulfill their missions, it is not their major purpose. In 2014, the Association spent only 16% of its budget on advocacy regarding the 2014 UTOPIA Campaign and privatization of the Eagle Mountain City Electric System. Statement ¶¶ 3-4. None of the Plaintiffs intend to "spend[ ] more than 20% of [their] budget[s] in connection with political or political issues advocacy" "in 2016 and future years." *Id*. ¶¶ 5, 17, 25.

In particular, Plaintiffs intend to engage in advocacy regarding Proposition 1 in 2016. Statement ¶¶ 6, 18, 26. Plaintiffs will not do so, however, if they must violate their donors' free association and privacy rights as a condition of speaking. Complaint ¶¶ 35, 40-41, 50-51; *see also* Statement ¶¶ 11-12, 19-20, 27-28.

B. Utah's Donor Disclosure Law

Because of the vague definitions and requirements in the status-related regulatory regime at Utah Code Ann. §§ 20A-11-701–705 (Ex. F), there are multiple reasonable interpretations of the disclosure requirements it imposes on corporations.[3] Thus, confusion arises throughout the process a corporation must follow in attempting to comply with the law.

[3] This case arises from corporate disclosure provisions in Title 20A, Chapter 11 of the Utah Code, as amended by House Bill 43 ("H.B. 43"). 2013 Utah Laws 318 (Ex. J). The Governor signed H.B. 43 into law on April 1, 2013, and it went into effect on May 14, 2013, amending definitions at Utah Code Ann. § 20A-11-101 and adding donor disclosure demands to Utah Code Ann. §§ 20A-11-701 and -702. *Id*.; House Bill 43 (Ex. K). Minor amendments to the requirements created by H.B. 43 were signed into law in March 2015 and went into effect on May 12, 2015. *See* 2015 Utah Laws 204 (Ex. L), House Bill 120 (Ex. M), 2015 Utah Laws 296 (Ex. N), and Senate Bill 207 (Ex. O).

1. Disclosure regime trigger

First, a corporation must figure out when it has triggered the disclosure regime. The law states that a corporation must file a "verified financial statement" once it "has made expenditures for political purposes [or political issues expenditures] that total at least $750 during a calendar year." Utah Code Ann. §§ 20A-11-701(a) and -702(a).

But, to know whether it has hit that $750 trigger, a corporation must know whether its spending qualifies as expenditures for political purposes or political issues expenditures. Determining whether a payment is an expenditure or political issues expenditure is difficult, however, because of those terms' vague definitions.

An expenditure for "political purposes" is one done "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. Utah Code Ann. § 20A-11-101(40) (Ex. D).[4] Under the requirements for political issues advocacy, a "political issues expenditure" includes any "payment . . . made for the express purpose of influencing the approval or the defeat of . . . a ballot proposition." Utah Code Ann. § 20A-11-101(39)(a)(ii). As this Court and the Supreme Court have already recognized, however, language such as "for the purpose of . . . influencing" is unconstitutionally vague because it fails to guide parties as to what they may or may not say without exposing themselves to criminal liability. *See Buckley v. Valeo*, 424 U.S. 1, 77 (1976); *Nat'l Right to Work Legal Def. and Educ. Found. v. Herbert* ("*NRTW*"), 581 F. Supp. 2d 1132, 1149 (D. Utah 2008).

[4] Throughout this motion, the phrase "political purposes" is used in its technical sense under Utah law, i.e., purposes specifically related to candidate elections, and not in its more colloquial sense of any purpose related to the political sphere.

A corporation attempting to figure out whether its spending constitutes political issues expenditures would be confused further by the definition's intent requirement—that a corporation have an "express purpose." Case law has created objective definitions for "express advocacy" or its functional equivalent, but a corporation would be left to wonder what actions or conversations would be necessary to turn "a purpose to influence" into an "express purpose," and what conduct the State might use to infer such an express purpose. The State might choose to include anything that hinted at a purpose of influencing a ballot proposition, the "express" qualifier notwithstanding. Regardless, a corporation must grapple with the meaning of "express purpose" before it can know whether its spending triggers the political issues disclosure requirements.

2. Filing frequency

Assuming that a corporation has figured how to measure whether its spending will contribute to the disclosure threshold, it must still determine how often it must meet this threshold. That is, a corporation must figure out whether it must hit the threshold each year to be subject to disclosure requirements for that year, or if it is perpetually subject to multiple yearly reporting requirements. The law states, "Each corporation that has made expenditures for political purposes [or made political issues expenditures] that total at least $750 during a calendar year shall file a verified financial statement." Utah Code Ann. §§ 20A-11-701(1)(a) and -702(1)(a). Under the best case scenario for the corporation, this would mean that, beginning on January 1 of a given year, the corporation has no disclosure obligations until it has hit $750 for that year. This is the interpretation advanced by the State in its 2015 guide to financial disclosure dates. *See* State of Utah 2015 Financial Disclosure Dates (Ex. S). It states, "A corporation is required to report when it has made expenditures totaling $750 for the calendar year." *Id*. at n.*. Thus, for example, if 2015

had been a regular election year and a corporation had not made $750 in expenditures until just before the regular general election, it would not have to meet the state political convention, primary election, and September 30 filing deadlines. *See* Utah Code Ann. §§ 20A-11-701(1)(a) and -702(1)(a).[5]

Vagueness in the law, however, makes this interpretation uncertain. This is because the law itself excuses a corporation from meeting a filing deadline only "if the corporation made *no* expenditures during the reporting period." Utah Code Ann. § 20A-11-701(1)(c) (emphasis added); *see id.* at 702(1)(c). This provision makes no sense unless a corporation has a continual filing requirement to report year after year once it has ever made $750 in expenditures or political issues expenditures.[6]

Should a corporation decide that it must file a statement even during a period in which it has made no expenditures, it must keep track of whether it is a regular election year or a municipal

[5] Because 2015 was a municipal election year, the State's 2015 chart lacks entries for the state political conventions, the primary election, and the regular general election.

[6] Should a corporation decide that the law in fact imposes a perpetual filing requirement, it must still decide if it can safely take advantage of the provision that excuses a corporation from filing a statement if it "made no expenditures during the [concomitant] reporting period." Utah Code Ann. §§ 20A-11-701(1)(c) and -702(1)(c). Taking advantage of that respite could expose the corporation to fines and even more onerous reporting requirements. The law states that the lieutenant governor *must* fine the corporation and demand a correcting statement if the lieutenant governor does not receive *any* report, without any further investigation required. The law states, "If it *appears* that any corporation has failed to file *any* statement . . . the lieutenant governor *shall* . . . impose a fine . . . and direct the corporation to file a statement correcting the problem." Utah Code Ann. § 20A-11-703(2) (emphasis added). Furthermore, there is no escape for a corporation once it has ever spent $750 in a single year—there is no provision to terminate an organization's status as a reporting entity, except perhaps dissolving altogether. *Compare* Utah Code Ann. §§ 20A-11-601(4)(a) and -801(4)(a), *with id*. at §§ 20A-11-701–702.

election year. In municipal election years, the corporation only needs to file reports on January 10 and September 30—a corporation has no deadlines related to municipal general election expenditures, even if the corporation was advocating for a municipal candidate. Utah Code Ann. §§ 20A-11-701(1)(a) and -702(1)(a). In regular election years, even if the corporation was only advocating for a ballot issue, it must meet at least three additional filing deadlines related to state and national candidate elections. Thus, in regular election years, a corporation must file on January 10, before each major party's state political convention, before the primary election, on September 30, and before the regular general election. Utah Code Ann. §§ 20A-11-701(1)(a) and -702(1)(a).

3. Content of verified financial statements

Having tracked whether it is a year with municipal or regular elections, even if those elections are irrelevant to the corporation's expenditures, the corporation must determine the content it is required to include in each report. The law requires that each of the verified financial statements include "a detailed listing of *all expenditures* made since the last" report. Utah Code Ann. §§ 20A-11-701(1)(b)(i) and -702(1)(b)(i) (emphasis added). But a corporation must determine whether the "expenditures" required by those sections include only "expenditures for political purposes" and "political issues expenditures," or whether "expenditures" means any money spent.

The term "expenditure" is defined at Utah Code Ann. § 20A-11-101(15) as a "purchase . . . made for political purposes." *Id*. The word "expenditure" in § 20A-11-702(1)(b)(i), the section on political issues expenditures, cannot be used in the technical sense required by the Code's definition, however. It would be nonsensical for the law on political issues advocacy to require

that a corporation report only "purchases . . . for political purposes"—those related to candidate elections—and not any political issues expenditures.

Given the contradictions inherent to the way the State uses the term "expenditures" at §§ 20A-11-101(15), -701(1)(b)(i), and -702(1)(b)(i), a reasonable interpretation of the law would require corporations to report any money spent. This means that a corporation might, for example, need to account for its electric bill and the postage stamp it uses to send its utility payments.

Having wrestled with the ambiguities inherent in Utah's broad expenditure reporting requirement, the corporation must turn to the really difficult issue: what donor disclosure is required. The law states that, as with PACs and PICs—but not unions—a corporation's statement must include "the name and address of each donor," the amount donated by each of those donors, and the date the money was received. Utah Code Ann. §§ 20A-11-701(3)(a) and -702(3)(a).[7]

While §§ 20A-11-701(3)(e) and -702(3)(e) exempt from individual reporting only those donors who gave $50 or less, the identity of donors who must be reported by corporations, and the donations attributed to those individuals, is far from clear. In creating the new corporate disclosure regime, H.B. 43 added a new classification for "donors." Utah Code Ann. § 20A-11-101(12); *see also* 2013 Utah Laws 318, at *1. A "donor" is "a person that gives money . . . to a corporation without receiving full and adequate consideration for the money." Utah Code Ann. § 20A-11-101(12)(a). Utah's law fails to specify, however, what "full and adequate consideration" means.[8]

[7] PACs and PICs must report the name and address of contributors and the amounts of their contributions. Utah Code Ann. §§ 20A-11-602(2)(a)(i)-(iii) and -802(2)(a)(i)-(iv). Labor unions are not required to give any contributor information, however. *See id*. at § 20A-11-1502.

[8] Given that a corporation's advocacy could be consideration for a donor's money, any money given might not be a reportable "donation" under the law. *See Derma Pen, LLC v. 4EverYoung Ltd.*, 76 F. Supp. 3d 1308, 1328 (D. Utah 2014) ("[T]here is consideration whenever

The law then requires a particular order in which the donors are to be reported, with concomitant tracking burdens on the corporation. First, in chronological order, the corporation must report all donors who requested that their contributions be used to make an expenditure or political issues expenditure. Utah Code Ann. §§ 20A-11-701(3)(b)(i) and -702(3)(b)(i). Second, it must report all donors who donated in response to a solicitation for aid in making an expenditure or political issues expenditure. *Id*. Third, it must report all donors who knew—however such intent is to be ascertained—that "the corporation [could] use the money to make" an expenditure or political issues expenditure. *Id*. Fourth, it must report donors who had no knowledge that their contributions could be used for advocacy. Utah Code Ann. §§ 20A-11-701(3)(b)(ii) and -702(3)(b)(ii).

Any corporation would find it difficult to distinguish the third and fourth categories of contributors. The third category encompasses any donors who knew that the corporation "may" use their contributions for advocacy. This requirement forces corporations to divine the inner workings of their contributors' minds, to somehow read their unspoken, unwritten thoughts, unless the corporation explicitly asks donors whether they know that the contributions might be used for

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a promisor receives a benefit or where a promisee suffers a detriment, however, slight." (quoting *Healthcare Servs. Grp. v. Utah Dep't of Health*, 40 P.3d 591, 596 (Utah 2002))). This interpretation of "donor," however, would gut the provisions at §§ 20A-11-701(3)(b)(i) and -702(3)(b)(i) that explicitly require disclosure of earmarked donations—because all earmarked contributions would have "full and adequate consideration."

Utah's law similarly creates confusion as to non-earmarking donors. The definition of "donor" explicitly excludes those who sign statements that their contributions may not be used for expenditures or political issues expenditures. *See* Utah Code Ann. § 20A-11-101(12)(b). Sections 701 and 702, however, state that corporations must report non-earmarking donors and attribute a "proration" estimate of expenditures to them. Utah Code Ann. §§ 20A-11-701(3)(b)(ii) and -702(3)(b)(ii).

advocacy. In the latter case, all contributors automatically become donors who know that their funds might be used for advocacy. Indeed, the law explicitly requires such notice in the disclaimer requirements at §§ 20A-11-701(4) and -702(4), which state that "the corporation shall notify a person giving money to the corporation that . . . the corporation may use the money" for advocacy.

Even assuming that the fourth, non-earmarking donor category continues to exist after the law's disclaimer provisions, a corporation would face an intricate scheme for attributing expenditures or political issues expenditures to such donors. The corporation is required to take the difference between expenditures (or political issues expenditures) for the reporting period and the sum of all the money from the earmarking or pseudo-earmarking donors who gave at least $50 during that period. Utah Code Ann. §§ 20A-11-701(3)(b)(ii) and -702(3)(b)(ii). That difference is divided by the number of non-earmarking donors who gave at least $50 during that or the previous calendar year, *id*.—even though those donors may have given $0.50, $50, or even $5,000 during the reporting period. The corporation attributes this average to each of those non-earmarking donors, reporting the donors and their "donations" while acknowledging that the amount "is only an estimate." *Id*. and *id*. at §§ 20A-11-701(3)(d) and -702(3)(d).

As noted above, the law requires this detailed reporting for only those donors who gave more than $50. Donations of $50 or less may be reported in "a single aggregate figure without separate detailed listings." *Id*. at §§ 20A-11-701(3)(e)(i) and -702(3)(e)(i).[9] This aggregate reporting provides little relief from the burden of complying with the law, however. A corporation

[9] PACs and PICs simply list the names and addresses of all contributors (individuals, classes of individuals, and groups) who gave more than $50 and the aggregate total of all donations less than $50—without the categorization of donors or prorationing scheme. Utah Code Ann. §§ 20A-11-602(2) and -802(2).

is still required to separately report any donation less than $50, even if it is somebody's $0.02, if the sum of a donor's contributions would eventually exceed $50. *Id*. at §§ 20A-11-701(3)(e)(ii) and -702(3)(e)(ii). Thus, a corporation must still keep detailed records of every contribution, no matter how small, and continually review donor lists to verify that each donor's name is being used consistently.

While perhaps not the most complicated part of the law, the point of the disclaimer provision mentioned above is nonetheless confusing. The law requires that a corporation "notify a person giving money to the corporation that . . . the corporation may use the money to make an expenditure [or political issues expenditure and that] the person's name and address may be disclosed." Utah Code Ann. §§ 20A-11-701(4) and -702(4). The practical effect of this provision is to either turn all contributors into earmarking donors, as discussed above, or to scare away contributors altogether. Many contributors, including the Plaintiffs' donors, have a desire to remain anonymous and will balk at disclosing their information.

4. Criminal penalties

Perhaps the clearest part of this law is the penalties for violating it. The disclosure regime enforces the above requirements—however they are interpreted—by requiring that the lieutenant governor verify after each filing deadline that "each corporation that is required to file a statement has filed one" and that "each statement contains the information required." Utah Code Ann. § 20A-11-703(1). The lieutenant governor is required to "impose a [$100] fine . . . and direct the corporation to file a statement correcting the problem" in any of three circumstances: "If it appears that any corporation has failed to file *any* statement, if it appears that a filed statement does not conform to the law, or if the lieutenant governor has received a written complaint alleging a

violation of the law or the falsity of any statement." *Id.* at §§ 20A-11-703(2) and -1005(1) (Ex. H) (emphasis added). In the third situation, a complaint by any third party, including from political opponents, triggers a mandatory fine and additional reporting burdens, without any investigation required by the lieutenant governor. Indeed, as discussed above, the criminal penalty provisions state that the lieutenant governor "shall" impose a fine and additional reporting burdens for failing to file a statement—leaving no room for discretion or consideration of motive when a corporation may have a valid reason for not filing.

Furthermore, without making any exception for those circumstances where corporations are excused from filing a statement, the criminal penalties section states that the lieutenant governor "shall" report the corporation to the attorney general for class B misdemeanor charges and impose an additional $1,000 civil fine if the corporation fails to file a correcting statement within seven days. *Id.* at § 20A-11-703(3).[10]

In sum, the law's penalties will require corporations to file reports and bear the statute's many burdens, even in highly ambiguous or marginal circumstances.

C. Plaintiffs' Lawsuit

On November 17, 2015, Plaintiffs filed a complaint arguing that the definition of "political purposes" under § 20A-11-101(40) is unconstitutionally vague; that the definition of "political issues expenditures" at § 20A-11-101(39) is unconstitutionally vague; that the disclosure regime at §§ 20A-11-701 and 702 fails to comply with *Buckley*'s major purpose test and with exacting

[10] The entire section is titled, "20A-11-703 Criminal penalties — Fines," but the provision nonetheless specifies that the $1,000 fine—but not the $100 fine—is a civil one. Utah Code Ann. § 20A-11-703.

scrutiny's tailoring requirements; that the system of prorated disclosure reporting at §§ 20A-11-701(3) and -702(3) fails to meet *Buckley*'s exacting scrutiny test; that the compelled warnings to potential donors at §§ 20A-11-701(4) and -702(4) violate the First Amendment protection against compelled speech; and that §§ 20A-11-701 and -702 unconstitutionally discriminate against corporations, including nonprofit corporations.

On April 19, 2016, the parties agreed to a statement of Stipulated Undisputed Facts. Based on this record, they agree that the case is ripe for summary adjudication. Plaintiffs hereby request summary judgment that Utah Code Ann. §§ 20A-11-101(39); 20A-11-101(40); 20A-11-701; and 20A-11-702 are unconstitutional and an injunction barring enforcement of those provisions.

III. STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

A. Unconstitutional Vagueness

Count 1 of the Complaint argues that the phrase "way to influence or tend to influence, directly or indirectly" in the definition of "political purposes" at § 20A-11-101(40) is unconstitutionally vague, and Count 2 argues that the phrase "made for the express purpose of influencing" in the definition of "political issues expenditures" at Utah Code Ann. § 20A-11-101(39) is unconstitutionally vague. Furthermore, because Utah Code Ann. §§ 20A-11-701 and -702 incorporate those definitions, Utah's corporate disclosure regime is unconstitutionally vague.

Laws whose "prohibitions are not clearly defined" are "void for vagueness" because they "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws in the campaign finance context are unconstitutional unless their reach is judicially limited to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" or ballot issue. *Buckley*, 424 U.S. at 79-80.

1. The Supreme Court has held that the phrases "purpose of . . . influencing" and "relative to" are unconstitutionally vague absent narrowing constructions. *Buckley*, 424 U.S. at 41-42, 76-77, 79-80.

2. This Court has held that the phrase "for the purpose of influencing" is unconstitutionally vague absent a narrowing construction. *NRTW*, 581 F. Supp. 2d at 1149.

3. Utah's corporate disclosure regime fails to require that "funds [be] used for communications that expressly advocate." *Buckley*, 424 U.S. at 80. *See* Utah Code Ann. §§ 20A-11-701–702.

4. The Association issues press releases and documents listing the chief sponsors of bills it supports or opposes. Statement ¶ 9.

Laws that incorporate unconstitutionally vague definitions are also unconstitutionally vague absent any narrowing constructions that would make the underlying definitions constitutional. *Cf. Buckley*, 424 U.S. at 78-79.

5. Utah Code Ann. §§ 20A-11-701 and -702 incorporate and rely on the definitions at § 20A-11-101(39) and -101(40).

B. Major Purpose and Tailoring Under Exacting Scrutiny

Count 3 argues that Utah Code Ann. §§ 20A-11-701 and -702 fail exacting scrutiny both because they create a new category of reporting entity that need not meet *Buckley*'s major purpose test and because they are insufficiently tailored.

1. Major purpose test for status-related disclosure regimes

The government can impose status-related regulatory regimes on organizations only when those regimes limit their reach to "organizations that are under the control of a candidate or the

major purpose of which is the nomination or election of a candidate" or passage of a ballot issue. *Buckley*, 424 U.S. at 79. Otherwise, disclosure is limited to event-related disclosure regimes whose requirements must be "less restrictive than imposing the full panoply of [status-related] regulations." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*") (Brennan, J., plurality op.).

6. Utah law specifically creates the category of "corporation" as a "[r]eporting entity." *See* Utah Code Ann. § 20A-11-101(8) and -101(52).

7. Utah's law does not restrict reporting entity status to those corporations under the control of a candidate or whose major purpose is the approval or defeat of a candidate or ballot issue. *See* Utah Code Ann. §§ 20A-11-701–705.

8. Utah imposes substantially similar reporting regimes on corporations, political action committees, and political issue committees, as reporting entities. *See* Utah Code Ann. § 20A-11-101(52); *compare* Utah Code Ann. §§ 20A-11-601–603 (Ex. E), *with id*. at §§ 20A-11-701–705 and *id*. at §§ 20A-11-801–803 (Ex. G); *see also* Table A (Ex. B).

In particular, the major purpose test requires: "(1) examination of the organization's central organizational purpose; or (2) comparison of the organization's [advocacy-related] spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *N.M. Youth Organized v. Herrera* ("*NMYO*"), 611 F.3d 669, 678 (10th Cir. 2010). Imposing status-related disclosure burdens on organizations based solely on a spending threshold "is incompatible with [the] 'major purpose' test." *Id*.

9. Utah's corporate disclosure regime nowhere requires examination of a corporation's central organizational purpose or comparison of its advocacy-related spending to overall

spending before imposing the regime's full burdens. *See* Utah Code Ann. §§ 20A-11-701–705.

10. The full weight of Utah's corporate disclosure regime is imposed on organizations based on whether they have hit a $750 trigger. Utah Code Ann. §§ 20A-11-701(1)(a) and -702(1)(a).

11. None of the Plaintiffs have political or political issues advocacy as their central organizational purposes. Complaint ¶¶ 13, 14, 15.

12. As 501(c)(3) and 501(c)(4) organizations, Plaintiffs are not allowed to have political or political issues advocacy as their central organizational purposes. Statement ¶¶ 1, 13, 21; 26 U.S.C. § 501(c)(3); 26 C.F.R. 1.501(c)(3)-1(c)(3); 26 U.S.C. § 501(c)(4); 26 C.F.R. 1.501(c)(4)-1(a)(2).

13. In 2014, the Association spent 16% of its budget on advocacy. Statement ¶¶ 3-4.

14. In 2016 and future years, none of the Plaintiffs intend to spend more than 20% of their budgets on political or political issues advocacy. Statement ¶¶ 5, 17, 25.

2. Tailoring for event-related disclosure regimes

Under exacting scrutiny, the "one-time, event-driven disclosure rule[s]" of event-related disclosure regimes must be "far less burdensome than the comprehensive registration and reporting system imposed on" status-related regimes. *Wis. Right to Life, Inc. v. Barland* ("*WRTL*"), 751 F.3d 804, 824 (7th Cir. 2014). Furthermore, under Tenth Circuit law, even event-related regimes must be "sufficiently tailored." *Indep. Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016).

15. Utah's corporate disclosure regime does not require earmarking. *See* Utah Code Ann. §§ 20A-11-701–705; *cf. Indep. Inst.*, 812 F.3d at 797 (noting importance of earmarking).

16. Utah has not established an informational interest in non-earmarked donations.

C. Proration Requirements

The State must also show that the proration requirements at §§ 20A-11-701(3)(b) and -702(3)(b) can "survive exacting scrutiny." *Buckley*, 424 U.S. at 64. The State must show "a substantial relation between the disclosure requirement and" the State's informational interest. *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010). To demonstrate such a substantial relation, the disclosure requirements must be "sufficiently tailored" to the State's "legitimate interests." *Indep. Inst.*, 812 F.3d at 789, 792, 796. Earmarking requirements are important to avoid "mislead[ing] voters as to who really supports . . . communications" and to ensure that disclosure requirements "address . . . concerns regarding individual donor privacy." *Van Hollen v. FEC*, 811 F.3d 486, 497, 499 (D.C. Cir. 2016) (quoting 72 Fed. Reg. 72899, 72901, 72911). In addition, whether there is an earmarking requirement is an "important" consideration in deciding whether disclosure requirements are sufficiently tailored. *Indep. Inst.*, 812 F.3d at 797.

17. The Plaintiffs' donors desire to remain anonymous. *See* Statement ¶¶ 12, 20, 28.

18. Utah's disclosure laws lack an earmarking provision. *See* Utah Code Ann. §§ 20A-11-701–705.

19. Utah's disclosure laws explicitly require corporations to attribute a prorationed share of advocacy expenditures to donors who did not earmark their donations and who had no knowledge that money might be used to make expenditures. Utah Code Ann. §§ 20A-11-701(3) and -702(3).

D. Unconstitutional Discrimination

1. First Amendment violation

The First Amendment prohibits "restrictions [that] distinguish[] among different speakers, allowing speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

20. Utah's law explicitly imposes requirements on corporations, including an entire regime of contributor reporting, a prorationing regime, and an extra reporting period, that it does not impose on unions. *Compare* §§ 20A-11-701(1)(a) and -702(1)(a) (reporting periods), §§ 20A-11-701(1)(b)–(3) and -702(1)(b)–(3) (donor reporting requirements), §§ 20A-11-701(3)(b) and (d) and -702(3)(b) and (d) (proration requirements), *with* § 20A-11-1502(1)(a) (reporting periods) (Ex. I), § 20A-11-1502(1)(b)–(2) (reporting requirements).

2. Equal Protection violation

"'[T]raditional' class-based equal protection jurisprudence generally proceeds in two steps." *Secsys, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012). First, a court must "ask whether the challenged state action intentionally discriminates between groups of persons." *Id*. Such "intent to discriminate is presumed and no further examination of legislative purpose is required" where the "distinction between groups of persons appears on the face of a state law." *Id*.

21. Utah's law explicitly imposes requirements on corporations, including an entire regime of contributor reporting, a prorationing regime, and an extra reporting period, that it does not impose on unions. *Compare* §§ 20A-11-701(1)(a) and -702(1)(a) (reporting periods), §§ 20A-11-701(1)(b)–(3) and -702(1)(b)–(3) (donor reporting requirements), §§ 20A-11-701(3)(b) and (d) and -702(3)(b) and (d) (proration requirements), *with* § 20A-11-1502(1)(a) (reporting periods), § 20A-11-1502(1)(b)–(2) (reporting requirements).

"Second, . . . courts ask whether the state's intentional decision to discriminate can be justified by reference to some upright government purpose." *Secsys*, 666 F.3d at 686. Under exacting scrutiny, the state must prove that the statutory classification is "closely drawn to a sufficiently important governmental interest." *Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014).[11] "[T]he Supreme Court has recognized three proper justifications for" disclosure laws: the anti-circumvention, anti-corruption, and informational interests. *Sampson*, 625 F.3d at 1256.

22. As 501(c)(3) organizations, the Foundation and the Institute can only engage in political issues advocacy. 26 U.S.C. § 501(c)(3); 26 C.F.R. 1.501(c)(3)-1(c)(3).

23. The anti-circumvention and anti-corruption interests do not apply to political issues advocacy. *See Sampson*, 625 F.3d at 1256.

24. As a 501(c)(4) organization, the Association may not engage in political advocacy as its major purpose. 26 U.S.C. § 501(c)(4); 26 C.F.R. 1.501(c)(4)-1(a)(2).

25. The State has failed to demonstrate why the anti-circumvention and anti-corruption interests would justify the differences between the corporate and union disclosure regimes.

26. The State has failed to demonstrate why the informational interest would justify the differences between the corporate and union disclosure regimes.

The only interest that could possibly justify such discrimination is the anti-distortion interest—"preventing 'the corrosive and distorting effects of immense aggregations of wealth.'" *Citizens United*, 558 U.S. at 348 (quoting *Austin*, 494 U.S. at 660); *id*. at 365 (overruling *Austin*). The Supreme Court has rejected the anti-distortion interest, however, stating that "differential

[11] The Tenth Circuit has not decided whether strict scrutiny or exacting scrutiny applies to equal protection challenges in the First Amendment context. *Riddle*, 742 F.3d at 927-28.

treatment cannot be squared with the First Amendment." *Id*. at 353; *see also id*. at 347 (rejecting "political speech restrictions based on a speaker's corporate identity"); *id*. at 346, 349-50, 365. And, even under the discredited anti-distortion interest, there had to be some threat of distortion. That is, the speakers here would have to be able to "distort[]" the political process by wielding disproportionate economic power. *See Citizens United*, 558 U.S. at 354.

27. In 2014, the Association spent only $85,515 out of a total budget of $552,594 on advocacy. *See* Statement ¶ 4.

E. Compelled Speech

"[T]he 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) (emphasis in original). Plaintiffs argue that the provision requiring corporations to warn donors about potential disclosure unconstitutionally "discourage[s] the listener from making a political donation." *Riley*, 487 U.S. at 798. Exacting scrutiny requires that laws restricting charitable solicitations be "narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664-65 (2015) (citing *Riley*, 487 U.S. at 798).

28. Once a corporation has triggered the reporting requirements, it must warn all potential donors "that: (a) the corporation may use the money to make an expenditure [or political issues expenditure]; and (b) the person's name and address may be disclosed on the corporation's financial statement." Utah Code Ann. §§ 20A-11-701(4) and -702(4).

29. Utah has failed to demonstrate that any of the government interests applied to charitable donation regulations are applicable here.

30. Utah has failed to demonstrate that any of the government interests traditionally applied to campaign finance are applicable here.

31. Utah has not shown that the donor warning is narrowly tailored to any compelling state interest.

F. Request for Injunction

To obtain a permanent injunction, a party must show: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009) (quoting *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007)); *see also Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1164 (10th Cir. 2013).

Should the Court find H.B. 43 unconstitutional under any of Counts 1 to 6, the actual success on the merits requirement will be satisfied. No material facts are necessary for this element.

The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Verlo v. Martinez*, 2016 U.S. App. LEXIS 6463, at *23 (10th Cir. Colo. Apr. 8, 2016). Thus, a court must "assume that plaintiffs have suffered irreparable injury when a government deprives plaintiffs of [First Amendment] speech rights." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005).

32. Plaintiffs refrained from spending any money on protected speech activity in 2015 because they feared triggering H.B. 43. *See* Statement ¶¶ 7-8, 15-16, 23-24.

33. Absent an injunction prohibiting enforcement of H.B. 43 in 2016 and future years, Plaintiffs will not engage in protected speech activity that could trigger enforcement of the law. *See* Complaint ¶¶ 35, 41, 51.

If the State fails to show that a law "materially advance[s] its interests," then it cannot "be seriously injured through the issuance of an injunction," and "the threatened injury to plaintiffs' First Amendment rights outweighs any harm that [the State] would suffer through the issuance of an injunction." *Pac. Frontier*, 414 F.3d at 1236.

34. Only one entity has ever complied with H.B. 43. *See* Statement ¶ 31.

35. "Neither the Office of the Utah Lieutenant Governor nor the Office of the Utah Attorney General has ever conducted an investigation or enforcement action pursuant to Utah Code Ann. § 20A-11-701, *et seq*." *See* Statement ¶ 32.

A state "does not have an interest in enforcing a law that is . . . constitutionally infirm." *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010); *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) ("Because we have held that Utah's challenged statutes also unconstitutionally limit free speech, we conclude that enjoining their enforcement is an appropriate remedy not adverse to the public interest."). Moreover, "[v]indicating First Amendment freedoms is clearly in the public interest." *Pac. Frontier*, 414 F.3d at 1237; *see also Elam Constr., Inc. v. Reg'l Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest also favors plaintiffs' assertion of their First Amendment rights."). No material facts are necessary for this element.

IV. ARGUMENT

Utah's donor disclosure law violates the "vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Ala.*, 357 U.S. 449, 462 (1958). Laws compelling disclosure must meet "exacting scrutiny" because of their "significant encroachments on [the] First Amendment right[]" of free association. *Buckley*, 424 U.S. at 64; *see also Coal. for Secular Gov't v. Williams* ("*Coalition*"), 815 F.3d 1267, 1275-76 (10th Cir. 2016).

Exacting scrutiny is a "strict test," *Buckley*, 424 U.S. at 66, and courts must "'rigorous[ly]' review" the government's abridgement of fundamental liberties and "assess the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1445, 1446 (2014); *see also id*. at 1456-57 (requiring "narrowly tailored" means). In particular, the State must demonstrate "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66); *see also Free Speech v. FEC*, 720 F.3d 788, 793 (10th Cir. 2013); *Sampson*, 625 F.3d at 1261.

"Summary judgment is appropriate [here because] the pleadings and the record establish that there is no genuine issue of material fact and that the [Plaintiffs are] entitled to judgment as a matter of law." *Schanzenbach v. Town of Opal*, 706 F.3d 1269, 1272 (10th Cir. 2013).

First, the definitions of "political issues expenditures" and "political purposes" at Utah Code Ann. § 20A-11-101(39) and -101(40) are unconstitutionally vague. Second, the corporate disclosure regimes at §§ 20A-11-701 and -702 create multiple violations of *Buckley*'s exacting scrutiny test. Third, the proration requirements at §§ 20A-11-701 and -702 fail exacting scrutiny because they violate donor privacy while misleading the electorate. Fourth, Utah's disclosure

regime violates both the First and Fourteenth Amendments by discriminating against corporations. Fifth, Utah's donor disclosure warnings serve no compelling interest and are not narrowly tailored.

A. Sections 101(39), 101(40), 701, and 702 Are Unconstitutionally Vague

The definitions of "political issues expenditures" and "political purposes" at Utah Code Ann. § 20A-11-101(39) and (40) are unconstitutionally vague because they fail to "provide adequate notice to a person of ordinary intelligence" whether spending will trigger Utah's disclosure laws and thus whether "contemplated conduct is illegal." *Buckley*, 424 U.S. at 77.[12] Such laws are "void for vagueness" because they "trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108. And "vague statute[s that] 'abut[] upon sensitive areas of basic First Amendment freedoms,'" *id*. at 109, are "particularly treacherous," *Buckley*, 424 U.S. at 76-77. Such uncertainty "inevitably lead[s] citizens to steer far wider of the unlawful zone," cutting into protected speech, "than if the boundaries . . . were clearly marked." *Grayned*, 408 U.S. at 109 (internal quotation marks omitted).

1. Vagueness in "purpose of influencing" and "influence or tend to influence, directly or indirectly"

Utah law defines a "political issues expenditure" as a "payment . . . made for the express purpose of influencing the approval or the defeat of . . . a ballot proposition." Utah Code Ann. § 20A-11-101(39)(a)(ii). Similarly, Utah defines an "expenditure" as a "payment . . . made for political purposes," Utah Code Ann. § 20A-11-101(15)(ii), and "'[p]olitical purposes' [as] an act

[12] As noted above, Utah's law is enforced by a criminal penalties section at § 20A-11-703.

done with the intent 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," *id*. at § 20A-11-101(40)(a).[13]

The *Buckley* court said that the phrase "for the purpose of . . . influencing" "raise[d] serious problems of vagueness" "[i]n its effort to be all-inclusive." 424 U.S. at 76-77. Whether a corporation's purpose is express or not, the "purpose of influencing" language here "shares the same potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79; *see also id*. at 39-40, 43 (holding "relative to a clearly identified candidate" unconstitutionally vague). And the definition of political purposes has a greater—and thus more "serious" and "treacherous," *id.* at 76—potential to encompass non-advocacy speech. It is not limited even to the purpose of influencing an election. Rather, it covers speech done "in a way to influence or tend to influence" voting, and that whether done directly or indirectly. Utah Code Ann. § 20A-11-101(40).

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[13] Indeed, Utah is already precluded from enforcing the original, and very similar, definition of political issues expenditures—a "payment . . . made for the purpose of influencing"—absent a narrowing construction restricting the definition to unambiguously campaign- or ballot-related expenditures. *See NRTW*, 581 F. Supp. 2d at 1149; *see also Buckley*, 424 U.S. at 80.

After *NRTW*, Utah slightly altered the definition of "political issues expenditures"—to be a "payment . . . made for the *express* purpose of influencing," Utah Code Ann. § 20A-11-101(39)(a)(ii) (emphasis added)—but the constitutional issues with the definition remain the same. The problem with the original definition was not whether an organization's purpose was express or implied, but rather that "influencing" an election was too uncertain a concept. It is for that reason that this Court limited the statute to *express advocacy*. *See NRTW*, 581 F. Supp. 2d at 1149 (noting that phrase must be interpreted as in *Buckley*); *Buckley*, 424 U.S. at 80 (noting that campaign finance laws may "reach only funds used for communications that expressly advocate"). As discussed above, that vagueness issue remains in the new definition.

The remaining requirements for issue preclusion are also met here. The State was the party in *NRTW*, it had a full and fair opportunity to litigate, and the action was decided on the merits. *See Williams v. Henderson*, 626 F. App'x 761, 763 (10th Cir. 2015). But, even if issue preclusion does not apply to the new definition, it would be proper to give deference to this Court's prior analysis. *See TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990); *Brumbelow v. Law Offices of Bennett & Deloney, P.C.*, 372 F. Supp. 2d 615, 622 (D. Utah 2005).

Because these provisions "suffer[] from the 'shoals of vagueness,'" "*Buckley*'s express advocacy standard" prohibits the statute from restricting any speech beyond express advocacy or its functional equivalent. *NRTW*, 581 F. Supp. 2d at 1150-51 (quoting *Buckley*, 424 U.S. at 78); *see also Buckley*, 424 U.S. at 44 (limiting to "communications that in express terms advocate"); *id*. at 80 (limiting to "unambiguously related" spending); *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 665 (5th Cir. 2006) (line-drawing applies when confronted with vague statute). Thus, § 20A-11-101(39) and -101(40) are facially invalid on vagueness grounds absent a construction limiting their "reach [to] funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" or ballot issue. *Buckley*, 424 U.S. at 80.[14]

2. Sections 701 and 702 incorporate unconstitutionally vague definitions

Sections 701 and 702 incorporate and rely on the phrases "express purpose of influencing" and "in a way to influence or tend to influence, directly or indirectly," through the terms "expenditures for political purposes" and "political issues expenditures." And, as discussed below, Sections 701 and 702 trigger the full panoply of PAC and PIC burdens—with the possibility of criminal penalties, *see NRTW*, 581 F. Supp. 2d at 1149—whenever a corporation makes $750 in

[14] Absent a narrowing construction, § 20A-11-101(40) is also unconstitutional as-applied to the Plaintiffs. Utah's law could treat their ballot and legislative advocacy speech that merely mentions candidates—*see, e.g.*, Statement ¶ 9; Exs. U–W—as "act[s] done . . . in a way to influence or tend to influence, directly or indirectly, any person to . . . vote for or against" any legislators mentioned. Utah Code Ann. § 20A-11-101(40).

Applying the Supreme Court's objective standard from *Buckley* and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007), *see NRTW*, 581 F. Supp. 2d at 1150-51, Utah's law would reach speech that is not the functional equivalent of express advocacy. "The most reasonable interpretation of [Plaintiffs' speech] is not as an appeal to vote for [or against particular candidates], but rather as an appeal to contact" legislators to urge them to act. *NRTW*, 581 F. Supp. 2d at 1151. "Because [the releases] may reasonably be interpreted as something other than as an appeal to vote for" a candidate, they are not the functional equivalent of express advocacy. *Id*.

expenditures or political issues expenditures. But because the terms in Sections 701 and 702 incorporate vague definitions, innocent parties will either be trapped without "fair warning" of criminal prohibitions, or they will "steer far wider of the unlawful zone" than necessary and silence their protected speech. *Grayned*, 408 U.S. at 108-09 (internal quotation marks omitted).

Because §§ 20A-11-701 and -702 incorporate these unconstitutionally vague phrases, they are facially invalid absent a narrowing construction. *See Buckley*, 424 U.S. at 74-75, 78-79 (§ 434(e) unconstitutional unless narrowly construed because it incorporated vague definition).

B. Utah's Law Fails Exacting Scrutiny's Major Purpose and Tailoring Requirements

The disclosure regime at §§ 20A-11-701 and -702 would fail exacting scrutiny even if the definitions at § 20A-11-101(39) and -101(40) were narrowly construed to unambiguously related campaign or ballot activity. The disclosure regime turns corporations' exercise of "protected speech [into] a severely demanding task," forcing them "to assume a more sophisticated organizational form, to adopt specific accounting procedures, [and] to file periodic detailed reports." *MCFL*, 479 U.S. at 255, 256 (Brennan, J., plurality op.). Thus, Utah "create[d] a disincentive for [corporations] to engage in political speech." *Id*. at 254; *see also id*. at 265 (O'Connor, J., concurring) (noting "potential burden" on group's own speech, as well as donors).

Utah's donor disclosure regime fails to survive the exacting scrutiny imposed on such laws. *See Buckley*, 424 U.S. at 44-45, 64-65 (exacting scrutiny). First, the regime creates a new category of reporting entity that need not meet *Buckley*'s major purpose test. Second, if intended as an event-driven reporting regime, it fails to meet exacting scrutiny's tailoring requirements.[15]

[15] "Whether campaign finance laws regulate candidate elections or noncandidate elections, the constitutional analysis does not change. Courts have consistently applied the standards articulated in *Buckley* to all types of campaign finance regulations and have not distinguished

1. Utah's law is facially unconstitutional because it imposes PAC and PIC status on corporations without requiring that express advocacy be their major purpose

Under exacting scrutiny, courts have allowed two types of disclosure regimes: comprehensive, status-related regulatory regimes controlling entities like PACs, and event-related regulatory regimes imposing one-time disclosure related to individual instances of independent expenditure or electioneering communications speech. Utah unconstitutionally regulates corporations under a status-related regulatory regime: the regime imposes the full panoply of reporting entity burdens on corporations without requiring that they meet the major purpose test.

A "full panoply of regulations . . . accompany status as a" reporting entity like political committees. *MCFL*, 479 U.S. at 262 (plurality op.). Accordingly, "courts have construed [reporting entities like] 'political committee[s]' more narrowly," holding that status-related regulatory regimes can "only encompass organizations" whose "major purpose" is advocacy. *Buckley*, 424 U.S. at 79. That is, only entities whose "'*major purpose* . . . is the . . . election of a candidate" or passage of a ballot issue can be designated and regulated as PACs or PICs. *NRTW*, 581 F. Supp. 2d at 1153 (quoting *Buckley*, 424 U.S. at 79) (emphasis in *NRTW*); *see also NMYO*, 611 F.3d at 677. A law that does not "comply with *Buckley's* 'major purpose' requirement" is unconstitutional. *NRTW*, 581 F. Supp. 2d at 1153; *see also Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876-77 (8th Cir. 2012) (requiring "relevant correlation"). Otherwise, an organization should not be "treat[ed to disclosure requirements] any differently than other organizations that only occasionally engage in" advocacy speech. *MCFL*, 479 U.S. at 262 (plurality op.).

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between ballot measure elections and candidate elections in their rationales." *NRTW*, 581 F. Supp. 2d at 1145 (compiling cases). Unless otherwise noted, authorities cited apply to both candidate- and ballot-related speech.

a. Full panoply of status-related burdens on corporations

Utah imposes the full weight of status-related disclosure burdens on corporations.[16] First and foremost, as shown in Table A (Ex. B), PACs, PICs, and corporations must provide the names and addresses of all their donors and the amounts they have given. Utah Code Ann. §§ 20A-11-602(2)(a)(i)–(iii), -701(3)(a), -702(3)(a), and -802(2)(a)(i)–(iv).[17]

In addition to the burdensome name, address, and amount tracking and reporting imposed on all three reporting entities, the State singled out corporations to track and report each donation's date. Utah Code Ann. §§ 20A-11-701(3)(a)(iii) and -702(3)(a)(iii). And corporations must track and categorize donors according to a particular scheme. They must record and report whether donors asked that money be used for particular expenditures, Utah Code Ann. §§ 20A-11-701(3)(b) and -702(3)(b)—which tracking and reporting is a near-impossibility given the odd

[16] Of course, the first burden a corporation faces is figuring out to whom Utah's law applies and what it requires. There are so many contradictions and ambiguities in the law that anyone would have a difficult time understanding its requirements, much less a small organization that cannot employ a full-time attorney. *See Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney" before speaking). As in *Sampson*, "[t]he average citizen cannot be expected to master" Utah's many requirements. *Sampson*, 625 F.3d at 1259. And, as the Tenth Circuit noted in overturning Colorado's law and as "the Supreme Court . . . observed in rejecting a proposed intricate interpretation of the term *electioneering communication*[,] . . . [p]rolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning.'" *Sampson*, 625 F.3d at 1260 (alteration in original) (quoting *Citizens United*, 558 U.S. at 324). Indeed, Colorado's law imposed "a substantial burden" because the financial burdens of attempting to understand the law easily exceeded the $782.02 the parties had raised. *Sampson*, 625 F.3d at 1260. Utah's law triggers full status-related regulatory burdens at $750.

[17] In *MCFL*, the Supreme Court held that the government could not "impos[e] the full panoply of regulations that accompany status as a political committee" as a condition of engaging in protected speech. 479 U.S. at 262 (plurality op.). Table A (Ex. B) also shows that Utah's requirements are more burdensome than those declared unconstitutional in *MCFL*.

choice to define contributions on the basis of the "consideration" received in exchange, Utah Code Ann. § 20A-11-101(12)(a). Then they must track and report whether donors gave money in response to particular types of solicitations. Utah Code Ann. §§ 20A-11-701(3)(b) and -702(3)(b). Then they must track and report whether donors knew that money could be used for any expenditures. *Id*. Finally, they must track and report whether donors lacked any such knowledge ("non-earmarking donors"). *Id*.

The State added prorationing requirements that have further complicated the reporting of the latter, non-earmarking donors. Rather than simply let corporations list the amount each of those donors gave, corporations must create and attribute to them a complicated estimate of advocacy expenditures. The corporation is required to take the difference between expenditures since the last financial statement and the sum of all the donations during that reporting period from donors who had some intent to fund political or political issues advocacy (and gave more than $50). Utah Code Ann. §§ 20A-11-701(3)(b)(ii) and (e) and -702(3)(b)(ii) and (e). That difference is divided by the number of non-earmarking donors who gave at least $50 total during that or the previous calendar year—even though they may have given $50, $0.50, or even nothing during that reporting period—and attribute this average to those non-earmarking donors. *Id*. The corporation must then attribute this estimate of funded expenditures to each of those non-earmarking donors. *Id*. and §§ 701(3)(d) and 702(3)(d). Finally, corporations must report an aggregate total of all the donations of $50 or less, even though the corporation may have already included those donations in the estimate attributed to the non-earmarking donors. *Id*. at §§ 701(3)(e)(i) and 702(3)(e)(i).[18]

[18] PACs and PICs also report this total. Utah Code Ann. §§ 20A-11-602(2)(b)(i) and -802(2)(b)(i).

Furthermore, implicit in the reporting requirements is a very burdensome tracking requirement. The law states that PICs, PACs, and corporations must list all donations individually when any single donation is less than $50 but the donor's total contributions would exceed $50. Utah Code Ann. §§ 20A-11-602(2)(b)(ii), -701(3)(e)(ii), -702(3)(e)(ii), and -802(2)(b)(ii). This means that corporations—like PACs and PICs—must keep track of name, address, and amount for every single donation, no matter how small.

Turning to expenditures, PICs, PACs, and corporations must report total expenditures and political issues expenditures. Utah Code Ann. §§ 20A-11-602(2)(a)(vii), -701(2)(b), -702(2)(b), and -802(2)(a)(viii). But they must also go into detail, tracking and reporting all expenditures made since the last report, including the names and addresses of anyone receiving political issues expenditures greater than $50 and of reporting entities receiving any expenditure for political purposes. Utah Code Ann. §§ 20A-11-602(2)(a)(v)–(vi), -701(2)(a), -702(2)(a), and -802(2)(a)(vi)–(vii). And when a corporation has hit the threshold for political issues expenditures, it may have a far broader reporting requirement than PACs or PICs, as § 20A-11-702(1)(b) states that it must report "all expenditures made," not just all "political issues expenditures" made.[19]

[19] The *Coalition* court noted that Colorado's law required detailed disclosure about even the most mundane expenditures, such as the purchase of postage stamps. *Coalition*, 815 F.3d at 1279. Utah's law may similarly require such information from corporations hitting the political issues expenditure threshold. *See* § 20A-11-702(1)(b)(i). The word "expenditure" is defined at § 20A-11-101(15)(a)(ii) to cover only spending for "political purposes," *i.e.*, candidate activity. It would be nonsensical for corporations that have triggered political issues reporting obligations (that is, for speech about ballot measures and *not* candidates) to report only spending for candidate-related activity. And this is recognized at § 20A-11-702(2)(a), which states that political issues spending reports must "include" the information of all those who received $50 or more in political issues expenditures. *Id*. But this means that the "detailed listing of *all expenditures*," § 20A-11-702(1)(b) (emphasis added), must refer to "expenditures" in a more general sense, one that would require reporting of even the most mundane information. This is further supported by § 20A-11-

Utah's law also burdens all three types of reporting entities with multiple annual filing deadlines. Corporations must file at least five times in regular election years: on January 10, before each major party's state political convention, before the primary election, on September 30, and before the general election. Utah Code Ann. §§ 20A-11-701(1)(a) and -702(1)(a).[20]

Moreover, corporations are subject to "[c]riminal penalties" similar to those imposed on PACs and PICs, Utah Code Ann. §§ 20A-11-603, -703, and -803, although several provisions are even harsher on corporations. Both corporations and PACs are subject to an automatic $100 fine for failure to report by any deadline. Utah Code Ann. §§ 20A-11-603(1)(a), -703(2)(a), and -1005(1). But corporations must file a correcting statement for failure to file *any* report, as well as for any error in a report or a third party complaint. Utah Code Ann. §§ 20A-11-703(2)(b). PACs and PICs must file correcting statements for errors or third party complaints, but they only have to file a correcting statement for failing to file their January 10 statements. *Id*. at §§ 20A-11-603(3) and -803(3). And, as with PACs and PICs, if a corporation fails to file a correcting statement, Utah's law states that the lieutenant governor "shall" impose a $1,000 civil fine and report the organization for class B misdemeanor charges. Utah Code Ann. §§ 20A-11-603(4), -703(3), and -803(4).[21]

101(15)(a)(i), which defines an expenditure as any disbursement by a reporting entity from contributions, *id*., where reporting entities include corporations, *id*. at § 20A-11-101(52).

[20] PACs have one additional filing deadline—before the municipal general election—and PICs have two or three additional deadlines, depending on the type of advocacy. Utah Code Ann. §§ 20A-11-602(1)(a)(v)(A) and -802(1)(a)(iv)–(vi) and (viii)(A).

[21] Without waiting for a correcting statement, the lieutenant governor refers PACs and PICs to the attorney general to consider class B misdemeanor charges for failure to file on several dates. *See* Utah Code Ann. §§ 20A-11-603(1)(b) and -803(1). But § 20A-11-603(3) does not require a correcting statement from PACs if they fail to file on at least four dates: before each major political

Finally, although Utah's status-related regulatory regimes for PACs and PICs have provisions under which PACs and PICs may cease reporting, there is no provision under which a corporation can terminate its status as a reporting entity and escape the burden of continual tracking and multiple yearly filings. *See* Utah Code Ann. §§ 20A-11-601(4)(a), -701–705, and -801(4)(a).

b. Utah's law fails exacting scrutiny under the major purpose test

Utah's corporate disclosure regime violates exacting scrutiny because it imposes the burdens of a status-related regulatory regime without requiring express advocacy as a corporation's major purpose. *See NRTW*, 581 F. Supp. 2d at 1153-54. "There are two methods to determine an organization's 'major purpose': (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates." *NMYO*, 611 F.3d at 678. That is, an organization may be subjected to comprehensive, status-related disclosure burdens only if express advocacy is its central organizational purpose or the majority of its spending is on express advocacy, *see id*., and even then the law may not meet exacting scrutiny, *cf. Coalition*, 815 F.3d at 1277-80.

Utah law fails to require that a corporation meet the requirements of the major purpose test before imposing the full panoply of reporting entity burdens on it. It does not require that express political or political issues advocacy be an organization's central organizational purpose or that a

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party's state political convention, before the regular primary election, on September 30, or before either general election. The law for PICs is even more lenient, imposing neither a fine nor a requirement that organizations file correcting statements for failing to file on at least five dates: before each major political party's state political convention, before the regular primary election, before an incorporation election, before the first public hearing on an initiative petition, or when initiative and referendum sponsors submit their packets *Id*. at § 20A-11-803(1)(a) and -803(3).

majority of a corporation's spending be on such advocacy. Rather, the law imposes reporting status on a corporation once it has made any expenditure for political purposes or any political issues expenditure, Utah Code Ann. § 20A-11-101(8) and (52), and it brings down the full weight of the reporting regime as soon as a corporation makes $750 in expenditures or political issues expenditures, *id*. at 20A-11-701(1)(a) and -702(1)(a).[22] Imposing such burdens based solely on a spending threshold "is incompatible with [the] 'major purpose' test." *NMYO*, 611 F.3d at 678.

Thus, like the PIC requirements in *NRTW*, 581 F. Supp. 2d at 1153-54, Utah's status-related corporate disclosure regime is unconstitutional under the major purpose test.[23]

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[22] Indeed, as in *NRTW*, Utah's law unconstitutionally treats corporations as reporting entities for making "*any* disbursement." *See NRTW*, 581 F. Supp. 2d. at 1153 (emphasis in original). The Utah Code at the time of *NRTW* defined a "political issues committee as an entity that 'makes disbursements to influence, or to intend to influence, directly or indirectly,' a ballot proposition." *Id*. (quoting former § 20A-11-101(28)(a)(i)). An organization became a PIC reporting entity as soon as it made "*any* such disbursements." *Id*. (emphasis in original); *see* Utah Code Ann. § 20A-11-101(52). This Court held that "Utah's attempt to regulate entities making *any* such disbursements cannot be saved" and that former § 20A-11-101(28)(a) was "unconstitutional on its face." *Id*. at 1153-54 (emphasis in original).

Utah corrected its definitions of PAC and PIC to incorporate the major purpose test, *see* Utah Code Ann. § 20A-11-101(34)(a) and 37(a), but it did not correct the definition of corporation. Corporations as reporting entities, Utah Code Ann. § 20A-11-101(52), include any "nonprofit[] business organization that is registered as a corporation . . . and makes *any* expenditure" for express political or political issues advocacy. *Id*. at § 20A-11-101(8)(a) (emphasis added).

Thus, as with the former definition of political issues committee, Utah has created "such a broad definition" for a corporate reporting entity that it "does not even attempt to comply with *Buckley's* 'major purpose' requirement." *NRTW*, 581 F. Supp. 2d at 1153. Therefore, Utah's definition of "corporation" is "unconstitutional on its face," *id*. at 1154, as are any sections of the code relying on it, including §§ 20A-11-701–705. *Cf*. *Buckley*, 424 U.S. at 78-79 (holding section unconstitutional absent narrowing construction because it incorporated vague definition).

[23] Even if the Court read the major purpose test into Utah's corporate disclosure requirements, the law would still fail exacting scrutiny as applied to Plaintiffs. First, none of the Plaintiffs' central organizational purposes meet either of the requirements of the major purpose test. *See NMYO*, 611 F.3d at 678. Plaintiffs' missions include a broad range of educational and charitable activities, but none have advocacy as a central purpose. *See* Complaint ¶¶ 13, 14, 15. Indeed, Plaintiffs are prohibited from activities that would turn participation in political campaigns

2. Utah's corporate disclosure laws are too burdensome for an event-related regulatory regime and are insufficiently tailored

Even if the Court could save the corporate regulatory regime by interpreting it as an event-related rather than a status-related regime,[24] it would still fail exacting scrutiny. Courts have permitted event-related disclosure laws, but only when they are "less restrictive than imposing the full panoply of [status-related] regulations." *MCFL*, 479 U.S. at 262 (plurality op.). Such laws must create "one-time, event-driven disclosure rule[s that are] far less burdensome than . . . comprehensive [status-driven] registration and reporting system[s]." *WRTL*, 751 F.3d at 824; *see also Citizens United*, 558 U.S. at 369 (noting "that disclosure [for electioneering communications] is a less restrictive alternative to more comprehensive regulations of speech"); *Minn. Citizens*, 692 F.3d at 876-77 (rejecting "ongoing reporting requirement" and permitting only event-related disclosure burdens). Furthermore, even event-related regimes must impose "sufficiently tailored disclosure requirements." *Indep. Inst.*, 812 F.3d at 792.

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into their major purposes, and the Foundation and the Institute are prohibited entirely from candidate activity. Complaint ¶¶ 37-38, 52-53; *see* 26 U.S.C. § 501(c)(3) and (4); 26 C.F.R. 1.501(c)(3)-1(c)(3); 26 C.F.R. 1.501(c)(4)-1(a)(2).

Second, "comparison of the organization[s'] electioneering [and political issues] spending with overall spending" shows that "the preponderance of [their] expenditures is [not] for express advocacy or contributions to candidates." *NMYO*, 611 F.3d at 678. In 2014, the Association spent 16% of its budget on advocacy. Statement ¶¶ 3-4. And, in 2016 and future years, Plaintiffs will spend no "more than 20% of [their] budget[s]" on advocacy. Statement ¶¶ 5, 17, 25.

[24] Doing so, of course, would ignore Utah's explicit definition of corporations as reporting entities, Utah Code Ann. § 20A-11-101(8) and (52), and that Utah subjects corporations, PACs, and PICs to similar status-related regulatory regimes, *id.* at §§ 20A-11-601–803. By definition, Utah's regime is neither one-time nor event-driven—it is a comprehensive regulatory regime imposed on corporations based on their status as reporting entities, including the duty to file multiple reports.

Utah's corporate disclosure regime exceeds the "less restrictive" disclosure requirements permitted for event-related disclosure regimes. *MCFL*, 479 U.S. at 262 (plurality op.). As shown above, Utah's law "impos[es] the full panoply of [status-related] regulations" on corporations, *id*., exceeding even some of the burdens imposed on PACs and PICs.

Utah's law also fails tailoring because it does not require earmarking, or any relation whatsoever between disclosure and the informational interest. In reviewing tailoring in *Independence Institute*, the Tenth Circuit stated that it was "important" that the law required disclosure of only "those donors who have specifically earmarked their contributions for electioneering purposes." 812 F.3d at 797. There is no earmarking provision in Utah's corporate disclosure regime. *See* Utah Code Ann. §§ 20A-11-701–705.

Moreover, there is no relation between the corporate disclosure requirements and "the public's 'interest in knowing who is speaking . . . shortly before an election.'" *Indep. Inst.*, 812 F.3d at 798 (quoting *Citizens United*, 558 U.S. at 369). Utah's law pulls in all donor information, regardless of whether donations are earmarked for advocacy, regardless of whether the organization generally focuses on non-advocacy (as Plaintiffs are required to do), and regardless of whether the organization is supporting a measure in one place and opposing it in others (as the Association and Foundation would do with Proposition 1). Thus, rather than inform the electorate, Utah's corporate disclosure requirements are more likely to confuse and mislead the electorate as to who is supporting candidates and ballot issues.

Thus, because it imposes status-related disclosure burdens and lacks sufficient tailoring, Utah's law fails exacting scrutiny even interpreted as an event-related regulatory regime.[25]

C. The Proration Requirements Violate Donor Privacy and Mislead the Electorate

In addition to the minimal or nonexistent informational interest and complex administrative burdens discussed above, one finds in the proration requirements at §§ 20A-11-701(3)(b) and -702(3)(b) a purposeless violation of donor privacy snarled with a complete lack of tailoring.

Nonprofit corporations receive "donations from persons who support the corporation's mission" but "do not necessarily support the corporation's" political or political issues advocacy speech. *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016) (quoting 72 Fed. Reg. 72899,

[25] The issues with § 20A-11-701 apply with special force to 501(c)(3) organizations like the Foundation and the Institute. The law's overly inclusive definitions can treat speech as political advocacy even though it merely mentions a candidate. As 501(c)(3) organizations, however, the Foundation and the Institute are forbidden from—and would be heavily penalized for—engaging in political advocacy. *See* Statement ¶¶ 13, 21; Complaint ¶¶ 37-38, 52-53; 26 U.S.C. § 501(c)(3); 26 C.F.R. 1.501(c)(3)-1(c)(3); 26 U.S.C. § 504(a)(2)(B). Moreover, the State has an interest in encouraging such organizations' charitable activity, rather than discouraging it by attempting to regulate activity they cannot do. Indeed, the State has a minimal interest even in the political issues activity they can do. *See Sampson*, 625 F.3d at 1249, 1256. And, Utah has shown it is not interested in such disclosure: it has never "conducted an investigation or enforcement action" despite a dearth of reporting, Statement ¶¶ 31, 32, and it does not collect donor information from unions, *see* Utah Code Ann. § 20A-11-1501–1503.

Given the onerous burdens described above and the State's minimal interest in 501(c)(3) corporations, the State cannot show "a substantial relation" between its corporate disclosure regime and a "sufficiently important" interest. *Sampson*, 625 F.3d at 1261; *cf. Coalition*, 815 F.3d at 1270-72 (holding as-applied burdens unconstitutional even though lesser fines than here; tracking burdens that did not include donation date, donor intent, and prorationing requirements; and ability to end reporting status with termination report). Moreover, Utah's law misleads the electorate because of its insufficient tailoring, including the lack of earmarking and the prorationing regime that falsely attributes support to donors. *Cf. Sampson*, 625 F.3d at 1251, 1259 (law unconstitutional even though only one issue contributions could support); *Indep. Inst.*, 812 F.3d at 797 (noting importance of earmarking to establish relationship to informational interest).

72911) (emphasis removed). In such situations, absent an earmarking requirement, "robust disclosure rule[s] would thus mislead voters as to who really supports . . . communications." *Id*.

On the other hand, an earmarking requirement ensures that disclosure requirements are sufficiently "tailored to address . . . concerns regarding individual donor privacy." *Id*. at 499 (quoting 72 Fed. Reg. at 72901). Indeed, the Tenth Circuit has indicated that an important consideration in analyzing whether there is "a substantial relation between the disclosure requirement and" the informational interest, *Sampson*, 625 F.3d at 1255, is whether a reporting entity "need only disclose those donors who have specifically earmarked their contributions" for the type of activities that trigger and justify disclosure, *Indep. Inst.*, 812 F.3d at 797. *See also Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 58 (1st Cir. 2011) (requiring "identifying information for any contributors [giving money] to *support or oppose*" (emphasis added)).

Rather than requiring earmarking, however, Utah's proration requirements fly in its face. The law requires that a corporation attribute an estimated share of expenditures and political issues expenditures to non-earmarking donors. Utah Code Ann. §§ 20A-11-701(3)(b) and (d) and -702(3)(b) and (d). But, as an estimate, there can be only a strained relationship between the information disclosed to the electorate and actual support for candidates or ballot measures. Indeed, there can be no relationship whatsoever here: the proration disclosure requirement covers only the donors who demonstrated no desire to support advocacy. *See* §§ 20A-11-701(3)(b)(i) and -702(3)(b)(i) (segregating donors who intended to support advocacy or who had knowledge of advocacy for separate reporting). Thus, the prorationing requirements force corporations to mislead the electorate by declaring that non-earmarking donors are supporting candidates or ballot measures and affixing an amount to indicate the extent of that support.

At the same time, Utah's law intrudes on donors' rights to solitude and anonymity. *See NAACP*, 357 U.S. at 462 (noting that the First Amendment protects "privacy in one's associations"). But Utah's law is more than a mere invasion of privacy: it invades donors' privacy by falsely portraying them as supporting individuals and issues they do not support.

For these reasons, the proration requirements at §§ 20A-11-701(3) and -702(3) cannot survive exacting scrutiny.

D. Utah's Discrimination against Corporations Violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment

Utah's corporate disclosure law violates the First Amendment by imposing "restrictions [that] distinguish[] among different speakers, allowing speech by some but not others." *Citizens United*, 558 U.S. at 340. Utah's law also violates the Equal Protection Clause, which "directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920)).

1. First Amendment violation

Utah's law violates the First Amendment by imposing requirements on corporations that it does not impose on unions—including an entire regime of contributor reporting, a prorationing regime, and an extra reporting period. *Compare* §§ 20A-11-701(1)(a) and -702(1)(a) (reporting periods), §§ 20A-11-701(1)(b)–(3) and -702(1)(b)–(3) (donor reporting requirements), and §§ 20A-11-701(3)(b)–(d) and -702(3)(b)–(d) (proration requirements), *with* § 20A-11-1502(1)(a) (reporting periods) and § 20A-11-1502(1)(b)–(2) (reporting requirements). The prorationing requirements and the extra reporting period are burdensome, but the donor reporting regime strikes at the heart of an organization's ability to engage in protected speech. "[M]odest individuals who'd prefer the amount of their charitable donations remain private lose that privilege the minute their

nonprofit of choice decides to run an issue ad." *Van Hollen*, 811 F.3d at 501. Thus, one must "expect some prospective contributors to balk at producing" their information for public disclosure. *Coalition*, 815 F.3d at 1279. Indeed, as described below, the donor disclaimer provisions deliberately target and scare off corporate donors.

Thus, Utah's law imposes burdensome administrative requirements, violates donor privacy rights, and forces corporations to choose between exercising their First Amendment rights and fulfilling any of their organizational missions. *Cf. Van Hollen*, 811 F.3d at 501 (noting that "[t]he Supreme Court routinely invalidates laws that chill speech far less than a disclosure rule that might scare away charitable donors"). By chilling "speech by some but not others," Utah's law violates the First Amendment. *Citizens United*, 558 U.S. at 340; *see also McCutcheon*, 134 S. Ct. at 1441.

2. Equal Protection violation

Utah's law violates the Equal Protection Clause because it "intentionally discriminates between groups of persons" by imposing heavier burdens on corporations than on unions. *Secsys*, 666 F.3d at 685; *see* Table A (Ex. B).[26] Indeed, Utah's "intent to discriminate is presumed and no

[26] Whether under strict scrutiny or exacting scrutiny, Utah must demonstrate that its discriminatory treatment is not unconstitutional. *See Riddle*, 742 F.3d at 927-28 (declining to decide standard for First Amendment related Equal Protection challenges). The Supreme Court and other courts, however, have indicated that strict scrutiny is proper. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 666 (1990) (overruled on other grounds) ("statutory classifications impinging upon [political speech] must be narrowly tailored to serve a compelling governmental interest"); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 410 (6th Cir. 1999) (subjecting law "to strict scrutiny review - because it implicates [the] fundamental right[of] freedom of speech"); *Protect My Check, Inc. v. Dilger*, No. 15-cv-42-GFVT, 2016 U.S. Dist. LEXIS 43384, at *12-13 (E.D. Ky. Mar. 31, 2016) (unpublished). Under either standard, however, Utah's law is unconstitutional.

further examination . . . is required" because the "distinction between [corporations and unions] appears on the face of [the] law," *Secsys*, 666 F.3d at 685.

Moreover, Utah cannot show that the statutory classification is "closely drawn to a sufficiently important governmental interest," *Riddle*, 742 F.3d at 928, or that it is "narrowly tailored to achieve the desired objective," *McCutcheon*, 134 S. Ct. at 1456-57 (internal quotation marks omitted). "[T]he Supreme Court has recognized three proper justifications for" disclosure. *Sampson*, 625 F.3d at 1256. The anti-circumvention interest supports "disclosure requirements [as] an essential means of gathering the data necessary to detect violations of . . . contribution limitations," and the anti-corruption interest supports the "public[ation of] large contributions and expenditures [to] deter actual corruption and avoid the appearance of corruption." *Id*. (internal quotation marks omitted).

The State has failed to demonstrate why it would have greater anti-circumvention and anti-corruption interests in corporate speech than in union speech. *See Riddle*, 742 F.3d at 928 (burden on state). Furthermore, because there are no contribution limits and no one with whom to make quid pro quo deals in the ballot issue context, *cf. Coalition*, 815 F.3d at 1276-77, the State cannot have anti-circumvention and anti-corruption interests in Plaintiffs' political issues advocacy.

"The third justification is an informational interest," *Sampson*, 625 F.3d at 1256, but the State has failed to demonstrate how that interest could justify the discrimination here. In particular, there is no reason why the electorate has an interest in who is speaking before an election only if the speakers are corporations and corporate donors.

The only interest that could possibly justify such discrimination is the anti-distortion interest—"preventing 'the corrosive and distorting effects of immense aggregations of wealth.'"

Citizens United, 558 U.S. at 348 (quoting *Austin*, 494 U.S. at 660); *id*. at 365 (overruling *Austin*). The Supreme Court has rejected the anti-distortion interest, however, stating that "differential treatment cannot be squared with the First Amendment." *Id*. at 353; *see also id*. at 347 (rejecting "political speech restrictions based on a speaker's corporate identity"); *id*. at 346, 349-50, 365.

And, even under the discredited anti-distortion interest, Utah's law is not closely drawn to that interest because there is no threat of distortion. Utah's law fails to recognize that most corporations "are small . . . without large amounts of wealth." *Id*. at 354. Moreover, the record demonstrates that Plaintiffs do not wield large amounts of wealth in comparison to other speakers. *See*, *e.g.*, Statement ¶ 4.

Thus, Utah Code Ann. §§ 20A-11-701 and -702 are unconstitutional because the State has failed to demonstrate that its discriminatory disclosure regime is "closely drawn to [any] sufficiently important governmental interest." *Riddle,* 742 F.3d at 928.

E. Utah's Compelled Speech Requirements Are Unconstitutional

Utah requires that corporations warn potential donors that "the corporation may use the money to make an expenditure [or political issues expenditure]; and [that] the person's name and address may be disclosed on the corporation's financial statement." Utah Code Ann. §§ 20A-11-701(4) and -702(4). This compelled speech—which serves no legitimate governmental interest and is not narrowly tailored—will discourage donors from giving to organizations that represent their values and pressure nonprofits to stay silent for fear of losing their donor base.

The First Amendment abhors compelled speech. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. Accordingly, the Supreme Court has held that "freedom of speech prohibits the government from

telling people what they must say." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (collecting cases); *see also Riley*, 487 U.S. at 797 (collecting cases); *Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013) (noting right of silence even as to facts).

Furthermore, the solicitation of funds for a nonprofit corporation is "fully protected speech." *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989). Because "noncommercial solicitation is characteristically intertwined with informative and perhaps persuasive speech," the Supreme Court has "applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest." *Williams-Yulee*, 135 S. Ct. at 1664-65 (citing *Riley*, 487 U.S. at 798) (internal quotation marks omitted).

1. Utah asserts no legitimate interest in its compelled donor warnings

Utah has not shown a legitimate interest in its compelled donor warnings. The interests justifying charitable donation regulations cannot uphold Utah's law, and none of the governmental interests traditionally applied to campaign finance regulation—and particularly to disclaimers directed to and informing the electorate—apply to a compelled warning to donors.

As shown by the Supreme Court's decision in *Riley*, Utah cannot claim a compelling interest to coerce speech under the guise of regulating charitable solicitations. *Riley* considered a North Carolina law requiring professional fundraisers "to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations." *Riley*, 487 U.S. at 784. The Court held that the First Amendment protects citizens from being forced to speak for the government, regardless of whether the compelled speech regarded statements of fact or opinion. *Id.* at 797-98. The Supreme Court also rejected the state's argument that solicitations could be more heavily

regulated as "commercial speech," noting that speech loses its "commercial character" when "intertwined with otherwise fully protected speech" and the need to protect the latter. *Id*. at 796.

The *Riley* Court also held that the interest in protecting against "donor misconception" was insufficient to warrant a "prophylactic" compelled speech requirement. *Id*. at 800-01. Indeed, the Supreme Court elsewhere warned that a "'prophylaxis-upon-prophylaxis approach' requires that [courts] be particularly diligent in scrutinizing [a] law's fit." *McCutcheon*, 134 S. Ct. at 1458. Here, other protections under Utah law undermine any donor protection interest Utah might assert. *See*, *e.g.*, Utah Code Ann. § 13-22-13(3) (Ex. C) (prohibiting "making any untrue statement of a material fact or failing to state a material fact necessary to make statements . . . not misleading"). In addition, Utah cannot impose a burdensome regulation to cure donor misconception it has created through its complex disclosure requirements. *See Riley*, 487 U.S. at 800 (noting that state could cure misconception). Thus, Utah lacks a sufficiently important interest for the donor warning under the guise of regulating charitable solicitations.

Utah's donor warning is part of its campaign disclosure laws, however, and the lack of a legitimate governmental interest is even more pronounced when looking at the interests traditionally applied to campaign finance disclosure, particularly disclaimers. As noted above, there are three possible governmental interests: the anti-corruption, anti-circumvention, and informational interests. *Sampson*, 625 F.3d at 1256 (citing *Buckley*, 424 U.S. at 67-68).

The Supreme Court has held that the informational interest can sustain disclaimer requirements in campaign advertisements that identify the speaker, but only to "'insure that the voters are fully informed' about the person or group *who is speaking.*" *Citizens United*, 558 U.S. at 368 (quoting *Buckley*, 424 U.S. at 76) (emphasis added). Utah's donor warning gives no

information whatsoever to the electorate about who is speaking, however. Instead, it is directed to potential donors, and then only to warn them that they will be publicly outed as supporting candidate or ballot issue advocacy for their charitable donations.

And neither the anti-circumvention nor the anti-corruption interest supports Utah's donor warning. The warning contributes nothing to "gathering the data necessary to detect violations of . . . contribution limitations," because it provides no information about who is donating to candidates or ballot campaigns. *Sampson*, 625 F.3d at 1256 (internal quotation marks omitted). It similarly fails to "deter actual corruption and avoid the appearance of corruption," because it does not "publiciz[e] large contributions and expenditures." *Id*. (internal quotation marks omitted).

Having no legitimate state interest, much less a compelling one, Utah Code Ann. §§ 20A-11-701(4) and -702(4) fail exacting scrutiny.

2. Utah's law is insufficiently tailored because less burdensome alternatives exist

Even assuming a compelling state interest, Utah's law is not narrowly tailored. "In the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456. If the State were interested in informing the electorate, it could use earmarking so that disclosure would not mislead the public by falsely attributing support to a candidate or a ballot measure. If Utah were interested in protecting donors from the negative repercussions of donor disclosure, it could get rid of the donor disclosure provisions. If the State were interested in protecting donors from some type of fraud, it could enforce the existing fraud laws. *See Riley*, 487 U.S. at 800. If the State wanted donors to know about the donor disclosure law, it could publish the information itself. *See id*. Indeed, the public is presumed to know the law, *Quigley v. Rosenthal*, 327 F.3d 1044, 1072 (10th Cir. 2003), including whether they are subject to public disclosure. And any interest Utah might have in

informing potential donors about organizations' occasional advocacy would have been satisfied by enforcement of the previous law—donors could have simply looked up the reports about expenditures or political issues expenditures that corporations were required to file even before H.B. 43. *See Riley*, 487 U.S. at 800.

Having ignored all these less burdensome options, ones that in fact inform the electorate and protect donors rather than scare them away, Utah's compelled donor warning fails exacting scrutiny. *See Riley*, 487 U.S. at 800-01 (holding that compelled speech failed exacting scrutiny where less burdensome options available).

In sum, Utah's donor disclosure warnings serve no compelling interest and are not narrowly tailored. Instead, they operate as a scare tactic to dissuade donors from giving to organizations that represent their values, chilling nonprofit speech and activity. Therefore, Utah's disclaimer provisions are unconstitutional.

F. A Permanent Injunction Is Necessary to Prevent Irreparable Harm

Plaintiffs' claims meet the four factors necessary for a permanent injunction. *See Sw. Stainless*, 582 F.3d at 1191; *Klein-Becker*, 711 F.3d at 1164. First, Plaintiffs have shown "actual success on the merits," *Sw. Stainless*, 582 F.3d at 1191, by demonstrating multiple violations of the First Amendment and a violation of the Equal Protection Clause.

Second, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *see also Pac. Frontier*, 414 F.3d at 1235-36. Plaintiffs refrained from exercising their First Amendment rights in 2015 because they feared triggering H.B. 43, Statement ¶¶ 7-8, 15-16, 23-24, and they will continue to refrain from protected speech activity as long as the law is in place, *see* Complaint ¶¶ 35, 41, 51.

Third, the State has failed to show that the corporate donor disclosure law "materially advance[s] its interests" or that the State would "be seriously injured [by] an injunction." *Pac. Frontier*, 414 F.3d at 1236. The State has never "conducted an investigation or enforcement action pursuant to" H.B. 43 despite a dearth of compliance with the law. *See* Statement ¶¶ 31-32.

Fourth, an injunction will not adversely affect the public interest because the State "does not have an interest in enforcing . . . constitutionally infirm" laws. *Edmondson*, 594 F.3d at 771; see also *Utah Licensed Bev.*, 256 F.3d at 1076 (enjoining unconstitutional laws "not adverse to the public interest"). Moreover, "[v]indicating First Amendment freedoms is clearly in the public interest." *Pac. Frontier*, 414 F.3d at 1237; *see also Elam Constr.*, 129 F.3d at 1347 (public interest favors assertion of rights).

V. CONCLUSION

For the reasons above, Plaintiffs respectfully ask that the Court grant summary judgment on all Counts, holding that Utah Code Ann. §§ 20A-11-101(39), -101(40), -702, and -703 are unconstitutional under the First and Fourteenth Amendments and enjoining enforcement of Utah's corporate disclosure regime.

Respectfully submitted May 31, 2016

/s/ Allen Dickerson

Allen Dickerson
Owen Yeates
CENTER FOR COMPETITIVE POLITICS
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** with the Clerk of the Court for the United States District Court for the District of Utah using the CM/ECF system, on May 31, 2016.

All participants in the case are represented by counsel of record who are registered CM/ECF users and will be served by the CM/ECF system.

Respectfully submitted May 31, 2016

/s/ Owen Yeates

Owen Yeates
CENTER FOR COMPETITIVE POLITICS
Attorney for Plaintiffs