



## **BACKGROUND**

### ***COLORADO UNION OF TAXPAYERS V. CITY OF DENVER***

#### Executive Summary

Everyone has the right to educate others and promote a position on political and social controversies. Indeed, this is one of the definitive freedoms of our constitutional system. And no one should fear retaliation, or have to give up their right to privacy, simply because they choose to support a group that speaks about public controversies. That’s why in the 1950s, the Supreme Court held that government officials can’t force advocacy groups to turn over the identities of their supporters to public officials. “Compelled disclosure of affiliation with groups engaged in advocacy,” the Court ruled in a case in which Alabama tried to force the NAACP to disclose the names and addresses of its supporters, “may constitute as effective a restraint on freedom of association” as direct censorship.<sup>i</sup>

Yet recent years have witnessed a growing trend of state and local governments forcing non-profit groups to turn their donor lists over to the government whenever those groups communicate with voters about local ballot initiatives. One of these governments is Denver, Colorado, which mandates that even groups that spend as little as \$500 to talk about political campaigns must give the government personal information about their donors—including their occupations and employers. This law chills the speech of charities and other non-profit organizations, and exposes their donors to potential harassment and retribution. The Goldwater Institute filed this lawsuit to protect the vital rights of free speech and association in our constitutional democracy.

#### The Problem

America is full of non-profit groups—over 1.5 million of them at last count<sup>ii</sup>—and their rights to free speech and free association are under assault. This landscape of non-profits includes schools, churches, art centers, public radio stations, research foundations and other groups. Many charities work to change laws and public policies on an array of issues, from something as local as a new sales tax to something as broad as national healthcare policy. Charities often feel compelled to add their voice to the public debate on a given topic.

Unfortunately, cities and states are implementing laws designed to make it harder for non-profits to participate in policy debates, robbing the public of these important voices. That is exactly

what happened in New Mexico, where the non-profit Rio Grande Foundation ran a YouTube video, website, and Facebook posts that opposed a proposed city soda tax.<sup>iii</sup> This speech drew the attention of the Santa Fe City Attorney, who alleged that the speech cost more than \$250 and thus required disclosure of the Foundation's donors under a 2015 city ordinance. After a mini-trial, the city's campaign board issued the Foundation a public reprimand and demanded the names of its donors.<sup>iv</sup>

What happened in Santa Fe is not unique. The past decade has seen an increasing trend of harassment toward individuals and non-profit groups that take controversial political opinions—on both the left and the right.

- In New Hampshire, Gigi Brienza's name was put on a "target list" by a radical animal-rights group, just because she worked for a pharmaceutical company that tested some products on animals. Even though she herself did not work on animal testing, the group targeted her after it found her name based on government report that listed her as a \$500 donor to Democratic presidential candidate John Edwards.<sup>v</sup>
- In Texas, Catherine Engelbrecht was twice audited by the IRS, the FBI, ATF, and OSHA showed up at her business and home demanding records, after she attempted to start a small organization to educate the public about voter fraud.<sup>vi</sup>
- In Oregon, Erious Johnson, an attorney who heads the state Department of Justice Civil Rights Division, was put on a government watch list of potential threats to police after he was identified as supporting Black Lives Matter.<sup>vii</sup>
- In California, Margie Christofferson was a waitress who gave \$100 to a group that supported a proposal to ban gay marriage. After her name was made public, the restaurant where she worked was boycotted and picketed and she ultimately lost her job.<sup>viii</sup>
- One U.S. Senator even lauded the idea of forcing nonprofit organizations to disclose the identities of their donors because it would have "a deterrent effect."<sup>ix</sup>

Charitable donors are thus finding that the donations they thought were private have become part an official government record—one that is available to anyone with a computer and web browser. If those charities happen to be unpopular or to support controversial causes, then families that chose to send a contribution might find themselves targeted for harassment and intimidation by opponents of those causes.

Donors have all kinds of reasons for wishing to remain anonymous, from a simple desire for privacy, to religious conviction, to concern about retaliation.<sup>x</sup> Increasingly, research shows that compelled disclosure discourages people from donating to charities that take unpopular positions on public issues, thereby diminishing or silencing the voices of those charities in the public debate.<sup>xi</sup> Knowing this, a charity might reasonably decide to remain silent on a particular topic, rather than be forced to turn its donor lists over to the government. But this is why our Constitution protects freedom of speech: to protect people against retaliation when people and groups support political causes—especially controversial ones.

## The Denver Ordinance

The latest battleground for free speech and association is Denver, Colorado. Denver requires 501(c) non-profits to disclose their donors to the government when those groups communicate with voters about municipal ballot questions.<sup>xii</sup> This presents those groups with two equally unconstitutional choices: remain silent and violate their right to free speech, or disclose their donors and violate their freedom of association.

The Denver ordinance was signed by the mayor on September 12, 2017.<sup>xiii</sup> Starting January 1, 2018, the law requires groups spending more than \$500 “supporting or opposing one or more ballot issues or ballot questions” to disclose almost all of their donors to the government. Whether a donor agrees with the ballot issue or not, anyone giving \$50 or more—including in-kind contributions—will have their name and address included in a report to the city.<sup>xiv</sup> Anyone giving \$200 or more will additionally have their occupation and employer handed over.<sup>xv</sup> For ballot-question elections, the ordinance defines the “election cycle” as the entire year—meaning any group that exceeds these thresholds in a one-year period will have to disclose all their donors, even those who gave *before* the group decided to speak out about a ballot issue. The only groups exempt from these requirements are media organizations.

A group must also disclose its ballot-related expenditures in detail. When it spends \$500 or more to communicate with voters about a ballot question, a non-profit must file a pre-election report, post-election report, and year-end report with the city.<sup>xvi</sup> Those reports must detail the “name and address of each person to whom an expenditure” of more than \$50 is made, “together with the date, amount, and types of goods or services purchased.”<sup>xvii</sup> They must include the name and address of the bank used for such funds. They must include any loans or lines of credit related to the funds, as well as the terms of those loans. And the reports must include any in-kind contributions the organization makes to another individual or organization to further the speech in question.<sup>xviii</sup>

## The Plaintiffs

Concerned that what happened to the Rio Grande Foundation in Santa Fe could happen to them in Denver, two Colorado non-profits have challenged the new Denver ordinance in court. The first is the Colorado Union of Taxpayers Foundation (CUT).<sup>xix</sup> Any tax that gets presented to voters as a ballot question is an issue CUT would want to speak about. This law directly threatens their ability to engage in such speech, and it will strongly discourage them from speaking about new city taxes until it is overturned in court. The TABOR Committee<sup>xx</sup> has joined with CUT in its constitutional challenge. TABOR is an acronym for the Colorado Taxpayer’s Bill of Rights—a constitutional measure that requires voter approval for new taxes and limits the annual growth in state (and sometimes local) revenues and spending. The TABOR Committee seeks to ensure that the state and municipalities follow this law. Like CUT, the TABOR Committee would want to speak about any Denver ballot question that proposed new taxes in the city. The new Denver ordinance forces them to choose between remaining silent or disclosing their donors to the City.

## The Denver Law is Unconstitutional

Denver’s donor-disclosure law isn’t just detrimental to charities and their donors, it’s also illegal under the United States and Colorado constitutions. The rights to speak and associate freely are fundamental human rights. They are essential to the functioning of a healthy democratic republic. That’s why those rights are enshrined in the First Amendment to the Bill of Rights and the Colorado Constitution.<sup>xxi</sup>

Nevertheless, Denver has joined other cities, like Santa Fe, and states, like Montana and South Dakota, in restricting people’s rights to speak and associate freely—especially when those rights are exercised to influence elections. These anti-privacy laws benefit politicians. It is easier to pass laws without comment and criticism. Laws like Denver’s mean that fewer organizations will speak about proposed legislation.

Many politicians want fewer voices in the political process, not more, and so they invoke scary sounding phrases like “dark money” to justify restricting speech. But there is nothing scary about speech. Speech might be true or false, accurate or misleading, persuasive or ineffective, but those are judgments for the listener to make—not the government. Likewise, a non-profit might *choose* to make its donor list public in an effort to persuade people to listen to its message, but that too is a decision for private groups to make—not the government.

That is why the right to speak about proposed laws, and the right to associate with charities and other groups that speak about proposed laws, is protected by both the U.S. and Colorado constitutions. Ever since the civil-rights battles of the 1950s, the Supreme Court has held that laws requiring charities to disclose their donors to the government violate the First Amendment. “This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”<sup>xxii</sup>

As the Court acknowledged, compelled disclosure laws hurt both charities and their donors. Charities have their speech chilled because they are less likely to engage in public debate about important issues. Donors have their right to free association violated by being exposed to potential harassment and intimidation as a result of their giving.

## Case Logistics

The plaintiffs in this case are the Colorado Union of Taxpayers Foundation and the TABOR Committee. Both are non-profit 501(c)(3) organizations based in Colorado. The defendant is the City of Denver, Colorado.

The case was filed in the Denver District Court for the Second Judicial District of Colorado on December 13, 2017.

The plaintiffs are asking the Colorado state court to permanently enjoin the City’s enforcement of its donor-disclosure requirement, so that the plaintiffs and other non-profits may freely

participate in public debates about city ballot initiatives without being forced to turn their donor lists over to the government.

### The Legal Team

**Matt Miller** is a Senior Attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, where he heads up the Institute's free-speech litigation. Prior to joining the Goldwater Institute, Matt served as the Managing Attorney of the Texas Office of the Institute for Justice, which he opened in 2008. Early in his legal career, he was an attorney at a large Dallas law firm.

**Jim Manley** is a Senior Attorney at the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. Jim litigates Goldwater Institute cases nationwide, in the areas of free speech, economic liberty, and taxpayer protections. For more than a decade, he has been fighting to protect and expand freedom.

The **Goldwater Institute** opened in 1998, with the blessing of its namesake. Its early years focused on defending liberty in Barry Goldwater's home state of Arizona. Today, the Goldwater Institute is a national leader for constitutionally limited government, with hundreds of legislative and court victories to its name.

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<sup>i</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

<sup>ii</sup> *Quick facts about nonprofits*, National Center for Charitable Statistics, <http://nccs.urban.org/data-statistics/quick-facts-about-nonprofits>.

<sup>iii</sup> T.S. Last, *Rio Grande Foundation sues Santa Fe over campaign disclosure rule*, (Albuquerque Journal, July 26, 2017), <https://www.abqjournal.com/1038877/rio-grande-foundation-sues-over-santa-fe-campaign-disclosure-rule.html>

<sup>iv</sup> See Santa Fe Ethics & Campaign Review Board, April 24, 2017 Meeting Minutes, Item 2-b, available at [http://www.santafenm.gov/document\\_center/document/6731](http://www.santafenm.gov/document_center/document/6731)

<sup>v</sup> Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared* (Washington Post, July 1, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/29/AR2007062902264.html>.

<sup>vi</sup> U.S. House of Representatives, *The Internal Revenue Service's Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress* (Dec. 23, 2014), pp. i-ii, <http://oversight.house.gov/wp-content/uploads/2014/12/>.

<sup>vii</sup> Eric Dorn, *Johnson Says Oregon DOJ Didn't Show 'Loyalty' In Civil Rights Case* (Oregon Public Broadcasting, October 17, 2017), <https://www.opb.org/radio/programs/thinkoutloud/segment/oregon-civil-rights-attorney-settlement-erious-johnson-interview/>.

<sup>viii</sup> Thomas M. Messner, *The Price of Prop. 8*, Heritage Foundation Backgrounder No. 2328 (Oct. 22, 2009), [http://s3.amazonaws.com/thf\\_media/2009/pdf/bg2328.pdf](http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf).

<sup>ix</sup> Remarks of Sen. Chuck Schumer regarding the DISCLOSE ACT (Senate Rules and Administration Committee Hearing, July 17, 2012), [https://www.youtube.com/watch?v=NHX\\_EGH0qbM](https://www.youtube.com/watch?v=NHX_EGH0qbM).

<sup>x</sup> Sean Parnell, *Protecting Donor Privacy: Philanthropic Freedom, Anonymity, and the First Amendment*, Philanthropy Roundtable (2017), [http://www.philanthropyroundtable.org/file\\_uploads/Protecting\\_Donor\\_Privacy.pdf](http://www.philanthropyroundtable.org/file_uploads/Protecting_Donor_Privacy.pdf).

<sup>xi</sup> Dick M. Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, Institute for Justice (March 2007), <http://ij.org/wp-content/uploads/2015/03/DisclosureCosts.pdf>.

<sup>xii</sup> Denver Revised Municipal Code Sec. 15-35(d).

<sup>xiii</sup> See <https://denver.legistar.com/LegislationDetail.aspx?ID=3138098&GUID=53C3A3C0-2988-4C10-9212-AAB9DC7D788C>.

<sup>xiv</sup> Denver Revised Municipal Code Sec. 15-35(d)(3).

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- <sup>xv</sup> Denver Revised Municipal Code Sec. 15-35(d)(4).  
<sup>xvi</sup> Denver Revised Municipal Code Sec. 15-35(d).  
<sup>xvii</sup> Denver Revised Municipal Code Sec. 15-35(d)(6).  
<sup>xviii</sup> Denver Revised Municipal Code Sec. 15-35(d)(3)-(4).  
<sup>xix</sup> <http://www.coloradotaxpayer.org/>.  
<sup>xx</sup> <http://thetaborfoundation.org/>  
<sup>xxi</sup> United States Const. Amend. I and Colorado Constitution, Art. II, Sec. 10.  
<sup>xxii</sup> *Patterson*, 357 U.S. at 462.