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March 19, 2013

Governor Gary R. Herbert
Utah State Capitol Complex
350 North State Street, Suite 200
P.O. Box 142220
Salt Lake City, UT 84114-2220
Fax: 801-538-1344

Re: First Substitute H.B. 44, "Election Polling"

Dear Governor Herbert:

On behalf of the American Civil Liberties Union of Utah, we urge you to veto First Substitute H.B. 44 "Election Polling." While proponents of First Substitute H.B. 44 assert that it is meant to inform the public about sources of "push polling," the bill is not well designed to do so. To clarify, we understand "push polls" to be communications in which a person contacts potential voters purporting to be conducting a neutral poll, but then asks questions, often misleading, designed to sway opinions about a candidate or issue. As written, the bill raises serious constitutional concerns because it is overly broad and covers far too much protected speech.

Our primary concern is that First Substitute H.B. 44 violates the First Amendment because it compels disclosures that chill political speech. While we have not located any federal cases that have considered the question of whether it is constitutional to require those who carry out "push polls" to disclose the source of funding for that activity, we believe that cases addressing political advertising are analogous. Courts have, in some instances, upheld disclosure requirements applied to paid political advertisement after submitting those requirements to exacting scrutiny. Under exacting scrutiny, the disclosure requirement must bear a substantial relation to a sufficiently important government interest. Considering this precedent, it is conceivable that a carefully crafted bill aiming to require disclosure of the funding source of a paid "push poll" could survive a constitutional challenge. First Substitute H.B. 44 is not such a bill.

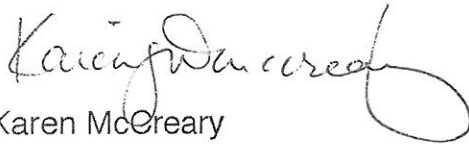
First, the bill's definition of "poll" is not limited to paid "push polls." Instead, "poll" is defined as a "survey of a person regarding the person's opinion or knowledge of an individual who has filed a declaration of candidacy for public office, of a ballot proposition that has legally qualified for placement on the ballot, which is conducted in person or by telephone, facsimile, Internet, postal mail, or email." As written, this bill would apply to every survey about an election, even one of a single person. If two people were at lunch and one asked the other her opinion about a candidate, that communication would be covered and failure to disclose who paid the questioner to ask the question would result in a fine. Likewise, if a teacher asked his students about what

they thought about a ballot issue, that "poll" would be covered and the teacher would be subject to a fine if he did not disclose who pays him. Accordingly, innumerable completely neutral surveys would be covered, even though they bear no relation to "push polling" and certainly cannot be said to affect any important government interest. That result is not constitutional.

Moreover, even if the bill were limited to "push polling," you would need to show a sufficient connection between the effects of that practice and an important government interest, such as integrity of elections. Since "push polling" is an incredibly inefficient means of advertising, requiring a call to each person you are trying to influence, it is highly questionable that there is a sufficient nexus to the overall integrity of the electoral process to justify infringing on the First Amendment right to anonymous speech.

For all of these reasons, we urge you to protect the speech rights of Utahns and veto First Substitute H.B. 44.

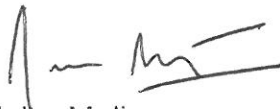
Sincere regards,



Karen McCreary
Executive Director



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Legislative & Policy Counsel



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Legal Director

cc: John Pearce, Esq.
General Counsel