IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

RIO GRANDE FOUNDATION, Plaintiff, v. MAGGIE TOULOUSE OLIVER, *in her official capacity as Secretary of State of New Mexico*, Defendant.	Case No: 1:19-cv-1174 JCH/JFR

Plaintiff's Combined Motion for Summary Judgment and Memorandum of Law

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MOTION

Plaintiff Rio Grande Foundation ("RGF") respectfully moves the Court to issue summary judgment against Defendant Secretary of State of New Mexico Maggie Toulouse Oliver, to enjoin her from applying provisions of 2019 Senate Bill 3 that require organizations to disclose their members and supporters, as described in Count I of the Amended Complaint.[1]

INTRODUCTION

Under a 2019 amendment to New Mexico's Campaign Reporting Act, Senate Bill 3, any person who engages in speech that happens to mention a candidate or ballot initiative within a certain period before an election must publicly disclose their name and address, the name and address of anyone receiving money from the expenditures on the speech, the amount spent, and the names and addresses of persons who donated to the person making the speech. Senate Bill 3 applies to more than just electioneering speech; it significantly infringes on speech that is pure issue advocacy. The Supreme Court has long distinguished between electioneering speech—which governments may regulate—and issue advocacy—which governments may not regulate. Plaintiff RGF brings this First Amendment challenge to New Mexico's significant infringement on citizen's speech. Because the

[1] This Court granted summary judgment to Defendant on Count II, finding that Plaintiff and former Plaintiff, Illinois Opportunity Project ("IOP"), lacked standing to challenge the disclaimer requirement set forth in Count II. The appellate court affirmed that decision. IOP also was found by this Court and the appellate court to lack standing as to Count I. This Court subsequently removed IOP from the caption of this case by agreement of the parties. Count III of the Amended Complaint was previously voluntarily dismissed by Plaintiff.

state's disclosure requirement for issue advocacy cannot survive constitutional scrutiny, as explained in this memorandum, this Court should grant summary judgment to Plaintiff and enjoin Defendant from enforcing the disclosure requirement.

PROPOSED STATEMENT OF MATERIAL FACTS

1. Plaintiff Rio Grande Foundation is a 501(c)(3) charitable organization based in Santa Fe, Santa Fe County, New Mexico. Gessing Decl. at ¶ 1 (ECF 33-2, 08/25/2020). It is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens. *Id.* It does this by informing New Mexicans of the importance of individual freedom, limited government, and economic opportunity. *Id.* RGF engages in issue advocacy around topics central to its mission and publishes the "Freedom Index," a real-time vote scorecard tracking legislators' positions on free-market issues. *Id.* at ¶¶ 3, 5.
2. Maggie Toulouse Oliver is Secretary of State of New Mexico. Her office is in Santa Fe, Santa Fe County, New Mexico.
3. The Court has subject-matter jurisdiction under 28 U.S.C § 1331 and 28 U.S.C. § 1343 because this case raises claims under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.
4. Venue is appropriate under 28 U.S.C. § 1391(b)(1) and (2) because Defendant is located in and a substantial portion of the events giving rise to the claims occurred in the District of New Mexico, Santa Fe Division.

5. In 2019, New Mexico adopted Senate Bill 3 ("SB 3"), which became effective July 1, 2019, and which amended the Campaign Reporting Act to require, among other things, disclosure of donors to groups that make "independent expenditure" as defined by the Act.

6. SB 3 defines "independent expenditure" as an expenditure that is (1) "made by someone other than a candidate or campaign committee;" (2) "not a coordinated expenditure as defined in the Campaign Reporting Act; and" (3) "made to pay for an advertisement that:" (a) expressly advocates the election or defeat of a clearly identified candidate or the passage or defeat of a clearly identified ballot question; (b) is susceptible to no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or ballot question; or (c) refers to a clearly identified candidate or ballot question and is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary election or sixty days before the general election at which the candidate or ballot question is on the ballot. N.M. Stat. Ann. § 1-19-26(N).

7. The Campaign Reporting Act defines the term "expenditure" as "a payment, transfer or distribution or obligation or promise to pay, transfer or distribute any money or other thing of value for a political purpose, including payment of a debt incurred in an election campaign or pre-primary convention." N.M. Stat. Ann. § 1-19-26(M).

8. The Campaign Reporting Act defines the term "political purpose" as "for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate." N.M. Stat. Ann. § 1-19-26(S).

9. SB 3's definition of "independent expenditure" expands the Campaign Reporting Act's reach to include spending of money on speech that is not for a "political purpose." An independent expenditure can include spending of money on speech that "refers to a clearly identified candidate or ballot question" within 30 days of a primary election or 60 days of a general election. N.M. Stat. Ann. § 1-19-26(N)(3)(c). In other words, it includes issue advocacy that refers to candidates or ballot measures.

10. SB 3 requires any person—defined as any individual or entity, N.M. Stat. Ann. § 1-19-26(P)—that makes an independent expenditure or aggregated independent expenditures in an election cycle that exceed $1,000 in a nonstatewide election or $3,000 in a statewide election to file a report with the Secretary of State. N.M. Stat. Ann. § 1-19-27.3(A).

11. That report must include: 1) the name and address of the person who made the independent expenditure, N.M. Stat. Ann. § 1-19-27.3(B)(1); 2) the name and address of the person to whom the independent expenditure was made and the amount, date, and purpose of the independent expenditure, N.M. Stat. Ann. § 1-19-27.3(B)(2); 3) the name, address, and amount of contributions of each person who has made contributions of more than a total of $200 in the election cycle that were earmarked or made in response to a

solicitation to fund independent expenditures, N.M. Stat. Ann. § 1-19-27.3(C); and 4) if the amount of the independent expenditures by a person exceeds $3,000 in a nonstatewide election or $9,000 in a statewide election, then the person must either a) if the expenditures were made exclusively from a segregated bank account consisting only of funds contributed to the account by individuals to be used for making independent expenditures, report the name, address, and amount of each contribution made by each contributor who contributed more than $200 to that account in the election cycle, N.M. Stat. Ann. § 1-19-27.3(D)(1); or b) if the expenditures were made in whole or part from funds other than from a segregated bank account, report the name, address, and amount of each contribution made by each contributor who contributed more than a total of $5,000 during the election cycle to the person making the expenditures, N.M. Stat. Ann. § 1-19-27.3(D)(2).

12. The independent expenditure reports filed by persons making independent expenditures are posted on the Secretary of State's website, https://portal.sos.state.nm.us/IESearch/, so that anyone can access donors' information. N.M. Stat. Ann. § 1-19-32(c).

13. Anyone who fails to comply with these reporting requirements violates the Campaign Reporting Act and thus commits a misdemeanor carrying a fine of up to $1,000 or up to one year imprisonment or both. N.M. Stat. Ann. § 1-19-36. In addition, the attorney general or district attorney may institute a civil action in district court for any violation of the Campaign Reporting Act

seeking civil penalties of $1,000 for each violation not to exceed a total of $20,000. N.M. Stat. Ann. § 1-19-34.6(B).

14. Plaintiff RGF engages in issue advocacy in New Mexico on issues that relate to its mission. Gessing Decl. at ¶ 3. RGF publishes a "Freedom Index" which tracks New Mexico state legislators' floor votes on bills that are important to RGF. *Id.* at ¶ 5. RGF planned to publicize the results of the Freedom Index in advance of the November 2020 general election. *Id.* RGF planned to spend over $3,000 in individual legislative districts making paid communications by mail to thousands of New Mexico voters within 60 days of that general election. *Id.* These mailings would mention the name of the incumbent legislator and provide information about their votes and score on the Freedom Index. *Id.* RGF intends to engage in substantially similar issue speech during future New Mexico election cycles. *Id.* at ¶ 6; Gessing Dep. 59:6—60:9, 74:15-20 (ECF 56-1, 09/03/2021).

15. RGF receives general-fund support from a variety of sources, including from multiple donors over $5,000. Some donors give over $5,000 in a single election contribution, and others may give over $5,000 total in a two-year cycle. Gessing Decl. at ¶ 7; Gessing Dep. 60:10—61:9.

16. RGF cancelled its plans to spread its views in advance of the November 3, 2020, general election because of SB 3's requirements. Because of SB 3's requirements, RGF will probably withhold spending above the $3,000 threshold for the foreseeable future. Gessing Dep. 74:6-11.

17. Plaintiff fears that if its members, supporters, and donors are disclosed, they may be subject to retaliation and harassment by intolerant members of society. Gessing Decl. at ¶ 10; Gessing Dep. 85:18-22.

18. Plaintiff fears that if its members, supporters, and donors are disclosed, they may stop contributing to Plaintiff out of fear of retaliation and harassment by intolerant members of society. Gessing Decl. at ¶ 22; Gessing Dep. 90:2-19.

LEGAL STANDARD

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *United States v. 16 Mounts, Rugs & Horns Protected by the Endangered Species Act*, 124 F. Supp. 3d 1174, 1176 (D.N.M. 2015) (quoting Fed. R. Civ. P. 56(a)). "For these purposes, an issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way, and a fact is material if under the substantive law it is essential to the proper disposition of the claim." *Id.* (cleaned up). "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014).

ARGUMENT

Plaintiff RGF has and wishes to continue to publish and circulate "Freedom Index," a report card that tracks the votes of New Mexico legislators on relevant bills. But recently enacted state law requires RGF to publicly disclose its organization's donors' names and addresses if RGF happens to publish its report within a certain period before an election, even if RGF and its publications do not

advocate for or against a candidate in an election. As a result, RGF's donors might be subjected to retaliation or harassment (or worse) from people who disagree with RGF's mission or positions on issues. RGF, in turn, fears that if its donors are disclosed, they may stop donating to RGF because of fear of retaliation or harassment. As a result, RGF has, and may continue, to limit its publications to avoid the disclosure requirement. New Mexico's disclosure requirement significantly infringe on RGF's First Amendment rights to issue advocacy. Thus, RGF asks this Court to enjoin the disclosure requirement.

New Mexico's Campaign Reporting Act requires that any persons making "independent expenditures" over $1,000 in the aggregate in a nonstatewide race or $3,000 in a statewide race during an election cycle, file a report with the Secretary of State, which will be made public, and requires that person to disclose their name and address, the name and address of the person to whom the expenditure was made and the amount of the expenditure, date, and purpose, and, the name, address, and amount of contributions made by anyone to the person making the expenditure, depending on the amount. N.M. Stat. Ann. § 1-19-27.3.

The Campaign Reporting Act definition of "independent expenditure" encompasses three different categories of such expenditures. Every "independent expenditure"—regardless of category—must be made by someone other than a political candidate committee or ballot committee, N.M. Stat. Ann. § 1-19-26 (N)(1), and without coordinating with a candidate committee or ballot committee, N.M. Stat. Ann. § 1-19-26(N)(2). Section § 1-19-26(N)(3) describes the three different

kinds of independent expenditures. First, there are payments for advertisements that expressly advocates the election or defeat of a clearly identified candidate or the passage or defeat of a clearly identified ballot question. N.M. Stat. Ann. § 1-19-26(N)(3)(a). Second, there are payments for advertisements that are susceptible to no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or ballot question. N.M. Stat. Ann. § 1-19-26(N)(3)(b). Finally, there are payments for advertisements that refer to a clearly identified candidate or ballot question and is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary election or sixty days before the general election at which the candidate or ballot question is on the ballot. N.M. Stat. Ann. § 1-19-26(N)(3)(c).

It is the disclosure requirement for this third category of "independent expenditures" set forth in Section 1-19-26(N)(3)(c) that Plaintiff challenges in this case. But for this expansive definition of "independent expenditure" that includes simply mentioning a candidate or ballot initiative within a certain period before an election, *see id*., Plaintiff's speech would almost certainly not be implicated and Plaintiff would almost certainly not be subject to the disclosure requirements. Plaintiff does not make "independent expenditures" as that term is defined under N.M. Stat. Ann. § 1-19-26 (N)(3)(a) and (b).

Because the disclosure requirement for "independent expenditures" as defined in Section 1-19-26(N)(3)(c) cannot survive strict or exacting scrutiny, this Court should

find that the disclosure requirement for such "independent expenditures" is an unconstitutional violation of the First Amendment.

I. New Mexico's disclosure requirements for persons who make "independent expenditures" as defined by N.M. Stat. Ann. § 1-19-26(N)(3)(c) significantly burden First Amendment rights.

The Supreme Court reminds us that it is hardly a novel observation that "compelled disclosure of affiliation with groups engaged in advocacy" is "a restraint on freedom of association" protected by the First Amendment. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958)) (cleaned up). That is because "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and there exists a "vital relationship between freedom to associate and privacy in one's associations." *Bonta,* 141 S. Ct. at 2382 (cleaned up).

Time and experience have proven over and again that "disclosure can be used as a weapon to silence voices." Hon. Neil Gorsuch, Transcript of Confirmation Hearing, U.S. Senate Comm. on the Judiciary (Mar. 20-23, 2017).[2] As this Court has seen before, "evidence of threats, harassment, and retaliation against other persons affiliated with nonprofit free enterprise groups and media accounts of public persons encouraging reprisals for speech by those with opposing views is alarming." *Rio Grande Found. v. City of Santa Fe,* 437 F. Supp. 3d 1051, 1073 (D.N.M. 2020). The Supreme Court has recognized that these risks are "real and pervasive" and are

[2] *Available at* https://www.congress.gov/115/chrg/CHRG-115shrg28638/CHRG-115shrg28638.htm.

"heightened" and "seem to grow with each passing year, as 'anyone with access to a computer [can] compile a wealth of information about" anyone else, including such sensitive details as a person's home address or the school attended by his children.'" *Bonta*, 141 S. Ct. at 2388 (quoting *Reed*, 561 U. S. at 208 (Alito, J., concurring)).

Similarly, the disclosure requirements of SB 3 impose a substantial burden on Plaintiff's First Amendment rights because the loss of donor support is real. SOMF ¶¶ 17, 18; *see In re Heartland Inst.*, No. 11 C 2240, 2011 U.S. Dist. LEXIS 51304, at *13-14 (N.D. Ill. May 13, 2011) (crediting affidavit of institute's president that organization's donors have been subject to retaliation in the past and that the institute would lose donors if exposed to disclosure); *see also City of Santa Fe,* 437 F. Supp. 3d at 1070 *(*quoting *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)) ("Disclosure of contributions 'will deter some individuals who otherwise might contribute'").

Why would donors forgo continuing to support organizations they believe in if their support were exposed to the government and the public? As for an anonymous speaker, so too for an anonymous supporter: "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). Moreover, today's donors live in "a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers

to cyber harassment of others." *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM, 2019 U.S. Dist. LEXIS 170793, *61 (D.N.J. Oct. 2, 2019).

In this case, Plaintiff challenges the disclosure requirements for persons making "independent expenditures" as defined by N.M. Stat. Ann. § 1-19-26(N)(3)(c) on their face. The Supreme Court has recognized that in the First Amendment context, one may bring a facial challenge whereby a law may be invalidated as overbroad if a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Bonta*, 141 S. Ct. at 2387 (citing *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted)).

Plaintiff and its donors need not suffer actual harassment before Plaintiff may bring a facial First Amendment challenge. Where a disclosure requirement is not "narrowly tailored to an important government interest," a plaintiff does not have the "burden" of showing that "donors to a substantial number of organizations will be subjected to harassment and reprisals." *Bonta*, 141 S. Ct. at 2389. Where a disclosure statute is overbroad, the harm is categorical—present in every case—and "[e]very disclosure demand that might chill association therefore fails exacting scrutiny." *Bonta*, 141 S. Ct. at 2387.

It is enough that a disclosure requirement "*may* have the effect of curtailing the freedom to associate," and by the "*possible* deterrent effect" of disclosure. *Bonta*, 141 S. Ct. at 2388 (quoting *NAACP v. Alabama*, 357 U. S. 449, 460-61 (1958)) (emphasis in original). Further, it is "irrelevant" that "some donors might not mind—or might even prefer—the disclosure." *Bonta*, 141 S. Ct. at 2388 (cleaned up).

Here, as in *Bonta*, the disclosure requirements "create[] an unnecessary risk of chilling in violation of the First Amendment, indiscriminately sweeping up the information of [many] donor[s] with reason to remain anonymous." *Id.* (cleaned up). "The risk of a chilling effect on association is enough" to invalidate the regime, "because First Amendment freedoms need breathing space to survive." *Id.* at 2389 (cleaned up).

II. New Mexico's disclosure requirements for persons who make "independent expenditures" as defined by N.M. Stat. Ann. § 1-19-26(N)(3)(c) are subject to "strict" or "exacting" scrutiny.

The disclosure provisions here must receive strict scrutiny because they are triggered based on the *content* of an organization's speech. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Such "facial distinctions based on a message are obvious, defining regulated speech by particular subject matter." *Id.* The definition of "independent expenditures" under Section 1-19-26(N)(3)(c) of the Campaign Reporting Act is clearly content based because it applies only because of the topic discussed: if the message mentions a candidate or ballot question close to an election.

As an example of a content-based restriction on speech, the Supreme Court in *Reed* held that "a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* at 169. Similarly, in this case SB 3 sets forth disclosure requirements only for persons spending on messages that mention a candidate or ballot initiative within a certain time period before an

election. Like the restriction on sound trucks *only for political speech*, the disclosure requirement is content-based because it applies only to messages with certain subjects.

It does not matter if the State's justification for the restriction on speech is benign. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed,* 756 U.S. at 165; *see id.* at 166 ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral."). And it does not matter if the restriction is viewpoint neutral. "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 169.

Content-based regulations of speech "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests," *Reed,* 756 U.S. at 169, *i.e.*, strict scrutiny.

Although the Supreme Court has a long history of subjecting content-based restrictions of speech to strict scrutiny, it also has long held that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). "[S]ignificant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. *Id*. In such cases, courts apply "exacting scrutiny,"

upholding a restriction only if it is narrowly tailored to serve a sufficiently important state interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Bonta*, 141 S. Ct. at 2383 ("Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.").

Under exacting scrutiny, "there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" *Bonta,* 141 S. Ct. at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). "A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters." *Bonta,* 141 S. Ct. at 2383. Therefore, the state's law must also "be narrowly tailored to the government's asserted interest." *Id.*

The tests for strict and exacting scrutiny overlap. While strict scrutiny requires that the restriction serve a *compelling* government interest, exacting scrutiny requires that there be a substantial relation between the restriction and a *sufficiently important* governmental interest. Further, strict scrutiny requires that the restriction be the *least restrictive means* of achieving the government's interest, while exacting scrutiny requires that restriction be *narrowly tailored* to the government's asserted interest. *Bonta,* 141 S. Ct. at 2383.

While compelled disclosure requirements are generally reviewed under exacting scrutiny, *Bonta*, 141 S. Ct. at 2383, in this case the Court should review the disclosure requirements for persons making "independent expenditures," as defined

by N.M. Stat. Ann. § 1-19-26(N)(3)(c), under strict scrutiny because they have the additional defect of being content-based. The question of which standard applies should not determine the outcome of this case, however, because the disclosure rule Plaintiff challenges cannot pass muster under either strict or exacting scrutiny.

III. New Mexico's disclosure requirements for persons who make "independent expenditures" as defined by N.M. Stat. Ann. § 1-19-26(N)(3)(c) cannot survive "strict" or "exacting" scrutiny.

The Tenth Circuit has already invalidated as unconstitutional a Colorado statute requiring disclosure for "independent expenditures" where the statutes broadly defined the term to include not simply expenditures in support or in opposition to a candidate for office, but also any expenditure that simply refers to a political office or candidate for political office. *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1194 (10th Cir. 2000). The Tenth Circuit held that such an expansive definition of "independent expenditures" requiring disclosure crossed the line from permissible restrictions on "express advocacy" into impermissible restrictions on "issue advocacy." *Id.* at 1187, 1194 (citing *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000)). The Supreme Court in *Buckley* distinguished "express advocacy" requirement—that which advocates for the election or defeat of a clearly-identified candidate—from other kinds of speech, including issue advocacy. 424 U.S. at 45. Only the funding of express advocacy may be subject to restraint; all other speech must remain free of regulation. *Id.*

For the same reasons, this Court must find that New Mexico's disclosure requirements applying to "independent expenditures" that simply mention a

candidate or ballot initiative within 30 days of a primary election or 60 days from a general election impermissibly restricts issue advocacy and thus violates the rule set forth by the Supreme Court in *Buckley*.

A. New Mexico's disclosure requirements for persons who make "independent expenditures" as defined by N.M. Stat. Ann. § 1-19-26(N)(3)(c) does not implicate a "compelling" or "significantly important" government interest.

The disclosure requirement Plaintiff challenges is not substantially related to any important government interest, nor does it serve a compelling government interest.

As this Court has already acknowledged, the state cannot justify a restriction on independent expenditures by citing a government interest in preventing corruption. ECF No. 38, at 11 (finding that the relevant statute "does not involve the risk of quid pro quo corruption"); *see also, Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010) ("Limits on contributions to ballot-issue committees, in contrast, are unconstitutional because of the absence of any risk of quid pro quo corruption"). Nor does the disclosure statute implicate an interest in enforcing campaign contribution limits. *See Republican Party v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013) ("independent expenditures do not invoke the anti-corruption rationale").

Thus, the state is left to rely on a vague interest in providing the public with information related to independent expenditures. But the Supreme Court has already found that interest insufficient to justify a disclosure requirement. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995). "The simple interest in providing voters with additional relevant information does not justify a state

requirement that a writer make statements or disclosures she would otherwise omit"). *Id*. Importantly, the Supreme Court in *McIntyre* rejected the state's argument that it had a compelling interest in providing the electorate with information about the speaker. *Id*.

The Tenth Circuit has held that it is not obvious that there is a public interest in knowing who is spending and receiving money to support or oppose a ballot issue. *Sampson*, 625 F.3d at 1256. "Nondisclosure could require the debate to actually be about the merits of the" issues, rather than "ad hominem arguments." *Id.* at 1257. The Tenth Circuit summarized the Supreme Court's view of the government's informational interest in disclosure with respect to ballot-issue campaigns as having "some value, but not that much." *Id.*

Further, even if New Mexico had an interest in the disclosure of donors to groups that make independent expenditures advocating *for or against* a candidate or ballot initiative, that is *not* what is at issue here. The statute Plaintiff challenges defines independent expenditures to include communications that only *mention* a candidate or ballot question within a certain time period before an election. N.M. Stat. Ann. § 1-19-26(N)(3)(c). Section 1-19-26(N)(3)(a) and (b) apply to independent expenditures explicitly or implicitly advocating for or against a candidate or ballot initiative. In contrast, the independent expenditures challenged by Plaintiff here are, by definition, not trying advocating for a vote for or against a candidate or ballot initiative. So any interest New Mexico might have in the disclosure of donors to

groups that make independent expenditures advocating *for or against* a candidate or ballot initiative does not apply to this case.

Independence Institute v. Williams does not change this conclusion. 812 F.3d 787 (10th Cir. 2016). In that case, which came between the Tenth Circuit's decisions in *Sampson* and *Coalition for Secular Government*, the court "concluded that Colorado's electioneering-communications disclosure framework was constitutional as applied to a television advertisement urging Colorado voters to support an audit of Colorado's Health Benefit Exchange." *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1280 n.6 (10th Cir. 2016). *Independence Institute* did "not change" the Tenth Circuit's "exacting-scrutiny analysis," *id.*, and the Court there found it particularly "important to remember" that the Colorado statute only required the Institute to "disclose those donors who have specifically earmarked their contributions for electioneering purposes," *Independence Institute*, 812 F.3d at 797. Here, by contrast, the default rule is that any qualifying donor to a covered non-profit organization must be disclosed, including donors to the organization's general fund. Further, *Independence Institute* involved communications specifically urging voters to support an audit of Colorado's Health Benefit Exchange. Here, by contrast, the disclosure rule for "independent expenditures" encompasses not only independent expenditures for advocacy for or against a candidate or ballot initiative but also expenditures that simply mention a candidate or ballot initiative.

That rule does not support a compelling government interest and is not substantially related to a sufficiently important governmental interest, and it

therefore cannot survive either strict or exactly scrutiny. Thus, the Court may find the disclosure requirement for such independent expenditures unconstitutional without having to reach whether there is narrow tailoring.

B. New Mexico's disclosure requirements for persons who make "independent expenditures" as defined by N.M. Stat. Ann. § 1-19-26(N)(3)(c) are not narrowly tailored.

Even assuming that the state has a compelling or substantially important interest, the law is not narrowly tailored to serve that interest.

Most obviously, the disclosure requirement that Plaintiff challenges here—for those making independent expenditures that simply *mention* a candidate or ballot question within 30 days of a primary election or 60 days of a general election—is not narrowly tailored to a government interest in informing voters about who is spending and receiving money to *support or oppose* a candidate or a ballot issue. By definition, the independent expenditures under N.M. Stat. Ann. § 1-19-26(N)(3)(c) are not being used to support or oppose a candidate or a ballot initiative. Independent expenditures that explicitly or implicitly support or oppose a candidate or ballot initiative are covered by N.M. Stat. Ann. § 1-19-26(N)(3)(a) and (b), which are not challenged by Plaintiff here. Because the disclosure requirements that Plaintiff challenges here do not apply to independent expenditures that support or oppose a candidate or ballot initiative, such disclosure requirements cannot be narrowly tailored to serve an interest in providing information to voters about who is supporting or opposing a candidate or ballot issue.

In *Americans for Prosperity Found. v. Bonta*, although the Supreme Court found that the state had a substantial interest in preventing nonprofit organizations from

committing fraud, it found that its donor disclosure requirement was not narrowly tailored to serve that interest because the record showed no instances of any investigation or enforcement effort that relied on a pre-investigation disclosure. 141 S. Ct. at 2386. In this case, there is nothing in the record that shows how the state has used the disclosure requirements for independent expenditures under N.M. Stat. Ann. § 1-19-26(N)(3)(c) to advance any government interest either.

The fact that New Mexico covers general fund donors is especially problematic. As the D.C. Circuit has pointed out, donors to a general fund for an issue organization may not support the organization's specific advocacy even if they support the totality of the organization's activities. *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016). This reflects both the weakness of the governmental interest (because the government is providing voters with poor quality information, as many of the donors may not actually support the particular ad) and the weakness of the fit (because many of the donors being disclosed may not actually support the ad, but the law scoops them into disclosure anyway).

In addition, the disclosure requirement is not narrowly tailored because it sweeps in a huge number of supporters even at the smallest contribution levels. For instance, groups that make small expenditures (less than $3,000 in a non-statewide election or less than $9,000 in a statewide one) must disclose the names, personal addresses, and contribution(s) of every supporter who gave at least $200 in funds "earmarked or made in response to a solicitation to fund independent expenditures." N.M. Stat. Ann. § 1-19-27.3(C). Groups with larger expenditures (more than $3,000

in a non-statewide election or $9,000 in a statewide one) must report all supporters who have given over $200 to their independent expenditure fund. Supporters to their general fund must be reported if they contributed over $5,000, unless the individual supporter expressly requests that the contribution not be used to fund independent expenditures. *Id.* § 1-19-27.3(D). All this personal information is made publicly available on the Internet. SOMF ¶ 12.

In addition, the disclosure statute does not have any floor: a tiny organization making minimal independent expenditures must still expose the private information of its supporters. Because the statute operates at such low levels, any informational interest is minimal. Indeed, social science shows that donor information is substantially less useful information for voters than party affiliation and major endorsements. Dick Carpenter and Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us about the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 Fordham Urban. L.J. 603, 618-23 (2012).

Because the disclosure requirement burdens the First Amendment right to association and is not narrowly tailored to any important government interest, it is unconstitutional.

CONCLUSION

The Court should grant this motion and declare that New Mexico's disclosure requirement for persons making independent expenditures as defined by N.M. Stat. Ann. § 1-19-26(N)(3)(c)—those that mention a candidate or ballot question within 30

days of a primary election or 60 days of a general election—violate the First Amendment.

/s/ Jeffrey M. Schwab

Jeffrey M. Schwab
Liberty Justice Center
440 N. Wells Street
Suite 200
Chicago, Illinois 60654
Telephone: 312-637-2280
Fax: 312-263-7702
jschwab@libertyjusticecenter.org

Jordy L. Stern
Diego R. Esquibel
Esquibel Law Firm, P.A.
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
Telephone: 505-275-3200
Fax: 505-275-3837
jordy@esquibel.law
diego@esquibel.law

Attorneys for Plaintiffs

Certificate of Service

I certify that on September 3, 2021, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Jordy L. Stern
Jordy L. Stern