IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RIO GRANDE FOUNDATION,

Plaintiff,

v. **Case No: 1:19-cv-1174-JCH-JFR**

MAGGIE TOULOUSE OLIVER, in her official capacity as Secretary of State of New Mexico,

Defendant.

SECRETARY OF STATE'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Nicholas M. Sydow
Deputy Solicitor General
201 Third Street NW, Suite 300
Albuquerque, NM 87102
Tel.: (505) 717-3571
Fax: (505) 490-4881
nsydow@nmag.gov

Counsel for Defendant Secretary of State Maggie Toulouse Oliver

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENTS OF MATERIAL FACTS 3

The Secretary of State's Statement of Material Facts 3

Response to Plaintiff's Proposed Statement of Material Facts 9

STANDARDS OF REVIEW 13

ARGUMENT 19

I. New Mexico's Disclosure Requirement for Independent Expenditures Serves an Important Informational Interest for Voters. 20

II. New Mexico's Disclosure Requirement Is Narrowly Tailored and Not Overbroad. 26

III. Similar Disclosure Laws Have Been Repeatedly Upheld. 30

IV. RGF's Generalized Assertions of Retaliation and Harassment Cannot Support Facial Invalidation of the CRA. 32

CONCLUSION 36

INTRODUCTION

Rio Grande Foundation's (RGF) remaining claim after remand from the Tenth Circuit cannot succeed as a matter of law, warranting summary judgment for the Secretary of State. Abandoning its as-applied challenge that was unsuccessful on preliminary injunction, RGF now seeks to have New Mexico's disclosure requirements for independent expenditures held facially unconstitutional. Yet, as the Court recognized on preliminary injunction, New Mexico's disclosure laws are narrowly tailored to serve the State's important interest in informing voters about who is making large election-related advertisements in the days before an election. Indeed, a number of similar laws—including the Federal Election Campaign Act (FECA)—have been upheld by the Supreme Court and Tenth Circuit.

In this round of briefing, RGF focuses its challenge on part of the definition of "independent expenditure" in New Mexico's Campaign Reporting Act (CRA) that encompasses sizeable advertisements referencing candidates or ballot measures during the 30 or 60 days before an election. Disclosure laws applicable to such electioneering communications have been repeatedly upheld. This includes laws that extend to some "issue advocacy"—advertising mentioning candidates or ballot measures but not directly advocating for their election or defeat—before an election.[1] That is because the State has a

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[1] A near-identical First Amendment overbreadth challenge to the CRA's definition of "independent expenditure" on the grounds that it reaches "issue advocacy" is awaiting decision at a trial on the written record in *Republican Party of N.M. v. Torrez*, 1:11-cv-900-WJ-KBM.

well-established interest in informing New Mexicans who is spending thousands of dollars to advertise to them regarding candidates and constitutional amendments in the days before an election. The proposed, but unsent, communications here illustrate this interest. RGF would have mailed "report cards" rating candidates for the Legislature, while former Plaintiff Illinois Opportunity Project (IOP) would have opposed a constitutional amendment ending the election of public utility regulators. Who is rating candidates and whether mailers opposing changes to utility regulators are funded by a regulated entity is crucial information for public debate and deliberation before an election.

RGF has not met the high standard for establishing that New Mexico's disclosure laws are facially unconstitutional. RGF does not identify a substantial number of overbroad applications of the laws needed to find the laws facially unconstitutional. Contrary to RGF's contention, the CRA does not require disclosure by "any person who engages in speech that happens to mention a candidate or ballot initiative within a certain period before an election" (Pls.' Combined Mot. Summ. J. & Memo. Law ("Plaintiff's MSJ"), ECF No. 76, at 1), but only of expenditures for advertisements over a significant monetary threshold in the days before an election. Even then, not all "names and addresses who donated to the person making the speech" need be disclosed (Plaintiff's MSJ at 1), but only people who donated $200 or more earmarked for the advertisement. Or, as in RGF's case, when advertisements are funded from a general fund, only the entities' largest donors of $5,000 or more need be disclosed. Even this requirement has an opt-out provision where if donors do not want their donation to fund an expenditure, they are not identified.

All told, New Mexico's disclosure laws are carefully tailored to target only significant expenditures to advertise to the public concerning an upcoming election. And to avoid donors being needlessly identified, the disclosure law excludes small donations, allows entities to fund expenditures from a segregated fund and only identify donors to that fund, and includes an option for donors to not fund an advertisement and remain anonymous. These provisions are hallmarks of the narrowly tailored laws that have been upheld by the Supreme Court and Tenth Circuit.

Therefore, the Secretary of State moves for summary judgment in her favor and respectfully requests that the Court deny Plaintiff's motion for summary judgment.

STATEMENTS OF MATERIAL FACTS

The Secretary of State's Statement of Material Facts

Procedural History

A. RGF and IOP brought this action in advance of the 2020 election, challenging the CRA's requirements that entities making independent expenditures of a certain size for advertisements mentioning candidates or ballot measures before an election register with the Secretary of State, disclose the advertisements' major funders, and place disclaimers on their advertisements identifying the person or entity authorizing and paying for the advertisement. *See generally* 1st Am. Compl., ECF No. 11.[2]

[2] Plaintiffs also brought an ultra vires challenge to the Secretary's rulemaking under the CRA that they voluntarily dismissed after the Secretary filed a motion to dismiss the claim. Order of Dismissal of Count III, ECF No. 23.

B. RGF and IOP moved for a preliminary injunction seeking relief permitting them to send mailers before the 2020 election without complying with the CRA's disclosure and disclaimer requirements. *See generally* Pls.' Mot. Prelim. Inj. & Memo. Support Thereof, ECF No. 28. The Court denied Plaintiffs' motion for preliminary injunction. Mem. Op. & Order ("PI Order"), ECF No. 33. It concluded that RGF and IOP had not shown a substantial likelihood of success on the merits. *Id.* at 33. Rejecting the argument RGF raises on summary judgment that disclosure laws reaching issue advocacy are overbroad, the Court observed that the Supreme Court "rejected the contention that disclosure requirements for independent expenditures should be limited to express advocacy and its functional equivalent." *Id.* at 12 (citing *Citizens United v. FEC*, 558 U.S. 310, 368–69 (2010)). The Court further concluded that Plaintiffs' "concerns about chilled speech [were] general and unsupported" and that Plaintiffs had not presented "enough evidence to establish a reasonable probability that [their] donors have been or would be subject to threats, harassment, and reprisals." *Id.* at 23. Finally, the Court, after discussing the various limitations and conditions on the CRA's disclosure requirements, concluded that, "[b]ased on the current record, the law is tailored so that there is a substantial relationship between the informational interest and the information sought to be disclosed." *Id.* at 27.

C. After the 2020 election had passed, the parties filed cross-motions for summary judgment. Pls.' Am. Mot. Summ. J. & Memo. Law Support Thereof, ECF No. 53; Sec'y State's Resp. Pls.' Mot. Summ. J. & Cross-Mot. Summ. J., ECF No. 56. The Court

granted the Secretary's cross-motion for summary judgment on standing grounds, and therefore did not reach the merits of Plaintiffs' claims. Mem. Op. & Order, ECF No. 60.

D. RGF and IOP appealed the Court's summary judgment. Notice of Appeal, ECF No. 62. The Tenth Circuit affirmed the dismissal of IOP. It also affirmed the dismissal of RGF's challenge to the CRA's disclaimer laws. The Tenth Circuit, however, reversed the dismissal of RGF's disclosure law challenge for lack of standing. Opinion, No. 22-2004, ECF No. 68-1, at 32. The parties now both move for summary judgment on the merits of RGF's remaining claim. *See generally* Plaintiff's MSJ.

The Challenged Laws

E. In 2019, New Mexico adopted Senate Bill 3, which amended the CRA to include disclaimer and disclosure requirements for large independent expenditures for electioneering communications. S.B. 3 (N.M. 2019), codified at N.M. Stat. Ann. §§ 1-19-26 through -36.

F. Under the CRA, an "independent expenditure" is defined as encompassing "an advertisement that 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)(3)(C).[3] This definition is similar to the FECA's definition of "electioneering communication" which encompasses:

[3] Independent expenditures also include advertisements that "expressly advocate" for the election or defeat of candidates or the passage or defeat of ballot questions, as well as

> any broadcast, cable, or satellite communication which—**(I)** refers to a clearly identified candidate for Federal office; **(II)** is made within—**(aa)** 60 days before a general, special, or runoff election for the office sought by the candidate; or **(bb)** 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and **(III)** in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

52 U.S.C. § 30104(f)(3)(A)(i) (2007).

G. The CRA requires entities making independent expenditures over certain amounts to disclose major funders of those expenditures.

(1) For expenditures of more than $3,000 but less than $9,000 in a statewide election, or more than $1,000 but less than $3,000 in a non-statewide election, the person who makes an independent expenditure required to be reported "shall report the name and address of each person who has made contributions of more than a total of two hundred dollars ($200) in the election cycle that were earmarked or made in response to a solicitation to fund independent expenditures and shall report the amount of each such contribution made by that person." N.M. Stat. Ann. 1-19-27.3(C).[4]

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advertisements that are "susceptible to no other reasonable interpretation than as an appeal to vote[.]" N.M. Stat. Ann. § 1-19-26(N)(3)(A), (B). RGF does not challenge these components of the definition. Plaintiff's MSJ at 9.

[4] RGF did not challenge this provision on preliminary injunction, presumably because its proposed activities involved larger expenditures and would not have been governed by this section. *See* Pls.' Mot. Prelim. Inj. & Mem. Law Support Thereof, ECF No. 28, at 4. Nor would any proposed activities by RGF be governed by this provision as RGF does not earmark funds and only uses a general fund. *See* Gessing Dep., attached in relevant parts as ECF No. 56-1, at 43:6-44:13, 44:25-45:18, 63:20-64:9; Plaintiff's MSJ, Fact 15.

(2) For expenditures of more than $9,000 in a statewide election or more than $3,000 in a non-statewide election, the person making independent expenditures required to be reported shall also report either: (i) if the expenditures were made exclusively from a segregated account for independent expenditures, "the name and address of, and amount of each contribution made by, each contributor who contributed more than two hundred dollars ($200) to that account in the election cycle; or (2) if the expenditures were" not made entirely from a segregated account for independent expenditures, "the name and address of, and amount of each contribution made by, each contributor who contributed more than a total of five thousand dollars ($5,000) during the election cycle to the person making the expenditures[.]" *Id.*, § (D)(1), (2).

(3) The disclosure requirement contains an exemption for reporting contributions "if the contributor requested in writing that the contribution [to a general fund] not be used to fund independent or coordinated expenditures or to make contributions to a candidate, campaign committee or political committee." *Id.*, § (D)(2).

(4) FECA's disclosure requirements are similar, albeit with mostly higher thresholds reflecting the larger nature of federal elections. 52 U.S.C. § 30104(f)(1), (2)(E)-(F) (disclosure for expenditures of more than $10,000 of contributions more than $1,000).

<u>RGF's Alleged Harassment and Retaliation</u>

H. "RGF has been an established nonprofit speaking out in state and local matters since 2000." *Rio Grande Found. v. City of Santa Fe*, 437 F. Supp. 3d 1051, 1073 (D.N.M. 2020).

I. RGF and its officers have prominent public presences. RGF and its president have public Twitter accounts where they make political statements.[5] RGF's website lists its staff, including photographs and information about their families. https://riograndefoundation.org/about/staff/ (checked June 25, 2023).

J. RGF is not aware of any harassment or retaliation of its employees or donors. Gessing Dep. at 64:21-25, 65:17-66:4, 66:9-14, 90:14-18 (no direct threats), ECF No. 56-1.[6] Although RGF's president stated in his declaration that he was aware "of at least one past instance where individuals … in New Mexico were threatened with or experienced retaliation," at deposition he could not recall any details regarding this instance. Gessing Dep. at 78:25-79:11.

K. In fact, RGF's president testified that "New Mexico is a little bit unique" and because of the constitutional amendment process, "we don't have as many of those volatile issues" that attract harassment. Gessing Dep. at 68:14-69:7. Moreover, RGF has not made and does not have any plans to make expenditures on the hot-button issues—labor, the Second Amendment, or the environment and energy—that it flagged as raising a risk of retaliation. Gessing Dep. at 83:3-84:18.

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[5] https://twitter.com/RioGrandeFndn; https://twitter.com/pgessing.

[6] This exhibit was attached to the Secretary's prior summary judgment briefing and is cited by ECF number. Should the Court wish for the Secretary to resubmit or reattach this or any other exhibit, she would be pleased to do so.

L. Although donors have told RGF that they fear the disclosure of their identity, donors have not stated that they would not donate if their information were public. Gessing Dep. at 69:10-16.

Response to Plaintiff's Proposed Statement of Material Facts

1. The Secretary of State (SOS) admits for the purpose of Plaintiff's motion that RGF is a 501(c)(3) organization and that Fact 1 summarizes RGF's stated mission. The SOS admits that RGF publishes the Freedom Index on its website.

2. Admits.

3. For the reasons raised in the SOS's prior motion for summary judgment, *see* ECF No. 56, the SOS denies that RGF has standing, and therefore that the Court has jurisdiction over this matter. Given the Tenth Circuit's ruling that the "evidence construed in the light most favorable to RGF shows that RGF had a personal stake in a case or controversy about the disclosure requirement at the time it filed its complaint and maintained that interest thereafter," the SOS does not contend that the Court should enter summary judgment on standing grounds. If this case were to go to trial where RGF would bear the burden of establishing standing, the SOS may contest RGF's standing at that stage.

4. Admits.

5. The SOS admits that New Mexico enacted Senate Bill 3 in 2019. *See also* Fact E. The CRA, including its requirement for disclosures of independent expenditures in N.M. Stat. Ann. § 1-19-27.3, speaks for itself.

6. The SOS admits that Senate Bill 3 included a definition of "independent expenditure" that has been codified in the CRA. The statute, Section 1-19-26(N), speaks for itself. *See also* Fact F.

7. The SOS admits that the CRA contains a definition of the term "expenditure." That definition, which is contained at N.M. Stat. Ann. § 1-19-26(M), speaks for itself.

8. The SOS admits that the CRA contains a definition of the phrase "political purpose." That definition, which is contained at N.M. Stat. Ann. § 1-19-26(S), speaks for itself.

9. The SOS admits that the CRA defines "independent expenditure" as including expenditures over certain monetary thresholds that are made to pay for an advertisement that "refer to a clearly identified candidate or ballot question" published and disseminated to the relevant electorate within 30 days before the primary election or 60 days before the general election. The provision containing this definition, N.M. Stat. Ann. § 1-19-26(N)(3)(c), speaks for itself. The SOS denies that this definition reaches expenditures that are not for "political purposes" because "independent expenditures" are defined as "expenditures" meeting various criteria, and the definition of "expenditure" in the CRA includes a "political purpose."

The SOS further denies that even absent this limitation, the definition of "independent expenditure" would reach significant numbers of advertisements that are not made for a political purpose. In *McConnell v. FEC*, the Supreme Court concluded that FECA's similar definition of "electioneering communication" was "easily understood and

objectively determinable[,]" and thus not vague. 540 U.S. 93, 194 (2003), *reversed on other grounds by Citizens United*, 558 U.S. 310). The *McConnell* court further rejected the argument that this definition reached a significant quantity of speech that may not be regulated, because the "vast majority of ads" meeting the definition "clearly had [an electioneering] purpose." *Id.* at 206.

Lastly, the SOS denies any implication that there is a relevant distinction between express advocacy and the issue advocacy defined as an "independent expenditure" for the purpose of RGF's constitutional challenge. *See Citizens United*, 558 U.S. at 368–69 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."); *Yamada v. Snipes*, 786 F.3d 1182, 1203 (9th Cir. 2015) (recognizing *Citizens United's* rejection of this distinction).

10. Admits. Sections 1-19-26(P) and -27.3(A) of the CRA speak for themselves.

11. Section 1-19-27.3 speaks for itself. It is summarized in Fact G above. RGF's summary of this reporting requirement omits that donors who "reverse earmark" their donations to the general fund as not for campaign contributions, coordinated expenditures, or independent expenditures, need not be reported. N.M. Stat. Ann. § 1-19-27.3(D)(2); *see also* Fact G(3).

12. Section 1-19-32(C) speaks for itself. The SOS admits that independent expenditure reports are public and accessible in searchable format by internet. The website identified in Fact 12 is out-of-date; it is now https://login.cfis.sos.state.nm.us/.

13. The cited statutes speak for themselves. The SOS admits that knowing and willful violations of the CRA are subject to civil and criminal penalties.

14. The SOS admits for the purpose of this motion that RGF engages in issue advocacy in New Mexico, but denies that this advocacy is subject to the challenged reporting requirements for independent expenditures. As noted in Fact 3 above, the SOS recognizes that the Tenth Circuit has held that viewed in the light most favorable to RGF, it has standing to challenge the CRA's disclosure requirement. The SOS contests RGF's ability to establish standing needed for summary judgment in its favor, however, and may re-raise standing if the case reaches trial. As more fully detailed in the parties' previous summary judgment briefing, the SOS admits that RGF develops a "Freedom Index" that is published on its website, but denies that RGF has made independent expenditures to circulate the Freedom Index that would be subject to the challenged requirements, or that RGF has future plans to "engage in substantially similar issue speech in future New Mexico elections." *See* Sec'y State's Resp. Pls.' Mot. Summ. J. & Cross-Mot. Summ. J., ECF No. 56, Facts E, F, I, L, & M.

15. The SOS admits for the purposes of this motion that RGF receives contributions to its general fund of over $5,000 during an election cycle.

16. The SOS admits for the purposes of this motion that RGF did not take action in 2020 that would have subjected it to the challenged disclosure requirements. The SOS denies that RGF cancelled any plan to send advertisements because of SB 3's requirements. As the Tenth Circuit noted, "RGF's president did not explicitly blame SB3 for abandoning

the original mailers and cited other factors as relevant to the decision." Opinion, 22-2004, ECF No. 68-1, at 24. Although the court noted that it is "reasonable to infer that the disclosure requirement played some part" in not sending mailers given testimony that RGF may tailor its advertisements to avoid disclosure requirements, *id.*; *see also* Gessing Dep. at 74:6–11, RGF's testimony does not establish that SB 3 was the but-for cause of not sending mailers in 2020.

17. The SOS admits for the purposes of this motion that RGF alleges a fear of harassment of its donors if their identity is disclosed (it's unclear, who RGF's "members" or "supporters" are, if any). The SOS denies that there is a record of any significant retaliation or harassment of RGF. *See* Facts J, K.

18. The SOS admits for the purposes of this motion that RGF alleges a fear of lost donations if its donors are disclosed. The SOS denies that any donors have told RGF that they will stop donating if their identity is made public. *See* Fact L. The SOS further denies that there is a record of retaliation or harassment against RGF that would substantiate such a fear. *See* Facts J, K.

STANDARDS OF REVIEW

<u>Summary Judgment</u>

The Court "shall grant summary judgment 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." Fed. R. Civ. P. 56(a). "The party moving for summary judgment bears the initial burden of showing an absence of any issues of material fact." *Tesone v. Empire Mktg.*

Strategies, 942 F.3d 979, 994 (10th Cir. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986)). "If the movant makes this showing, the burden then shifts to the nonmovant to 'set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

Where, as here, both sides "move for summary judgment, the court must analyze each motion individually and on its own merits." *G.M. ex rel. B.M. v. Casalduc*, 982 F. Supp. 2d 1235, 1241 (D.N.M. 2013) (citing *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir. 1979)). "[T]he denial of one does not require the grant of another." *Buell Cabinet*, 608 F.2d at 433. "Cross-motions for summary judgment, however, do authorize a court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." *Castaneda v. City of Albuquerque*, 276 F. Supp. 3d 1152, 1164 (D.N.M. 2016) (internal quotation marks and citations omitted).

<u>Facial Challenges</u>

"Normally a plaintiff bringing a facial challenge must establish that no set of circumstances exists under which the law would be valid, or show that the law lacks a plainly legitimate sweep." *Americans for Prosperity Found. v. Bonta* ("*AFPF*"), 141 S. Ct. 2373, 2387 (2021) (plurality op.) (cleaned up). "In the First Amendment context, however," the Supreme Court has "recognized 'a second type of 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.'" *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

Regardless of the type of challenge, "[f]acial challenges are disfavored for several reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008); *see also United States v. Brune*, 767 F.3d 1009, 1019 (10th Cir. 2014) (same). These reasons include that "[c]laims of facial invalidity often rest on speculation." *Washington State Grange*, 552 U.S. at 450. Thus, a court in "determining whether a law is facially invalid … must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449-50.

"The overbreadth doctrine authorizes 'the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep.'" *United States v. Bandy*, No. 17-CR-3402-MV, 2021 WL 876980, at *2 (D.N.M. Mar. 9, 2021) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). "The Supreme Court has 'vigorously enforced the requirement that a statute's overbreadth be *substantial*' in both absolute and relative terms." *Brune*, 767 F.3d at 1018 (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis in original)). Given the limitations and hazards inherent in the overbreadth doctrine, this "'strong medicine'" has "'been employed sparingly and only as a last resort.'" *Brune*, 767 F.3d at 1019 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)) (ellipsis omitted). "The bottom line is that successful 'facial challenges are best when infrequent.'" *Brune*, 767 F.3d at 1019 (quoting *Sabri v. United States*, 541 U.S. 600, 608 (2004)).

Level of Scrutiny

RGF argues that donor disclosure requirements for electioneering communications are subject to strict scrutiny. It contends that the challenged donor disclosure requirements are subject to strict scrutiny because "they are triggered based on the *content* of an organization's speech." Plaintiff's MSJ at 13. The CRA's definition of "independent expenditure" is a content-based law, RGF contends, "because it applies only to" ads that "mention[] a candidate or ballot question close to an election." *Id.*

Controlling law forecloses this argument and dictates that disclosure laws are subject to exacting scrutiny, not strict scrutiny. "Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United v. FEC*, 558 U.S. at 366 (internal citations and quotation marks omitted). "Accordingly, the Supreme Court has subjected those requirements to 'exacting scrutiny'…." *Free Speech v. FEC*, 720 F.3d 788, 792-93 (10th Cir. 2013); *see also AFPF*, 141 S. Ct. at 2383 (after *NAACP v. Alabama*, the Court has "settled on a standard referred to as 'exacting scrutiny'" for "First Amendment challenges to compelled disclosure," including in challenges to campaign finance laws (internal quotation marks and citation omitted)); *No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu*, 62 F.4th 529, 538 (9th Cir. 2023) (collecting authorities that exacting scrutiny applies to election disclosure laws); *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1112 (9th Cir. 2019), *cert. den.*, 140 S. Ct. 2825 (2020) ("Recognizing the important information-enhancing role that disclosure laws play, the Supreme Court …

ha[s] subjected laws requiring speakers to disclose information in the electoral context to … 'exacting scrutiny.'"); *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014) (applying exacting scrutiny in challenge to Colorado's disclosure law); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1244 (11th Cir. 2013) ("[E]very one of our sister Circuits who have considered the question … have applied exacting scrutiny to disclosure schemes").

RGF's argument to the contrary relies on *Reed v. Town of Gilbert*, a case addressing laws that "restrict expression because of its message, its ideas, its subject matter, or its content." 576 U.S. 155, 163 (2015) (internal quotation marks and citation omitted). By contrast, courts "view disclosure rules far less skeptically than [they] do bans on speech." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 507 (D.C. Cir. 2016). "To decide whether a law is a disclosure requirement or a ban on speech, we ask a simple question: does the law require the speaker to provide more information to the audience than he otherwise would?" *Id.* As opposed to speech bans, "[d]isclosure requirements are not inherently content-based nor do they inherently discriminate among speakers. In most circumstances they will be a less burdensome alternative to more restrictive speech regulations. For this reason, they are not only reviewed using a lower degree of scrutiny, they are routinely upheld." *Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) (citing *Citizens United*, 558 U.S. at 366-67).

The First Circuit turned aside former-Plaintiff IOP's identical argument that Rhode Island's disclosure laws for independent expenditures were content-based and thus subject to strict scrutiny. *See* Aplts.' Principal Br., *Gaspee Project v. Mederos*, No. 20-1944 (1st Cir.

Dec. 10, 2020), 2020 WL 7333546, at *18–*19. The court noted that exacting scrutiny "has been infused in the [Supreme] Court's approach to disclosure and disclaimer regimes for decades." *Gaspee Project v. Mederos*, 13 F.4th 79, 85 (1st Cir. 2021). "Under Plaintiff's argument, every law that touches upon campaign finance, even viewpoint-neutral laws, would be subject to strict scrutiny; such a conclusion is not compatible with Supreme Court precedent." *Iowa Right to Life Comm., Inc. v. Tooker*, 133 F. Supp. 3d 1179, 1192 (S.D. Iowa 2015).[7]

Exacting scrutiny "requires 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" *Free Speech*, 720 F.3d at 792–93 (quoting *Citizens United*, 558 U.S. at 366–67). It "does not require that disclosure regimes be the least restrictive means of achieving their ends, [but] it does require that they be narrowly tailored to the government's asserted interest." *AFPF*, 141 S. Ct. at 2383. That is, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1 v. Reed,* 561 U.S. 186, 196 (2010) (internal quotation marks and citation omitted).

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[7] In a case predating *Citizens United*, the Tenth Circuit applied strict scrutiny to Colorado's disclosure and disclaimer laws. *Citizens for Responsible Government State PAC v. Davidson*, 236 F.3d 1174 (2000). The court has since recognized, however, that *Citizens United* made clear that exacting scrutiny applies instead to such laws. *Free Speech v. FEC*, 720 F.3d at 792-93; *see also Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 398 (D. Vt. 2012), *aff'd* 758 F.3d 118 (2d Cir. 2014) (*Davidson* relied on strict scrutiny that doesn't apply post-*Citizens United*); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010) (noting that *Citizens United* overruled prior precedent applying strict scrutiny to disclosure laws).

ARGUMENT

New Mexico's law requiring the disclosure of major funders of candidate or ballot measure-related ads in the days before an election is constitutional. This provision of the CRA is similar to other laws that have been upheld in First Amendment challenges, including in controlling authority from the Supreme Court and Tenth Circuit. The CRA's disclosure requirements further New Mexico's important interest of providing information to voters and are narrowly tailored to that interest by a suite of limiting provisions.

Transparency laws for electioneering communications—like the disclosure law challenged here—are subject to lesser scrutiny than other campaign finance regulations because they "in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption…." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam). "Disclaimer and disclosure requirements" are less restrictive than other campaign finance laws because while they "may burden the ability to speak, … they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United v. FEC*, 558 U.S. at 366 (internal quotation marks and citations omitted). Because disclosure laws are less burdensome than other restrictions on election-related speech, they have regularly been upheld—particularly laws similar to New Mexico's. The Secretary of State respectfully requests that the Court hold so again here, grant summary judgment in her favor, and deny RGF's motion for summary judgment.

I. New Mexico's Disclosure Requirement for Independent Expenditures Serves an Important Informational Interest for Voters.[8]

There is a well-established governmental—and public—interest in disclosing the funders of large advertisements about candidates and ballot measures before an election. Knowing who is criticizing or praising candidates or ballot measures can help voters assess what weight to place on the message, including whether the advertisement is being funded by an entity with a direct stake in the outcome of the election, such as regulated entities. As the Supreme Court explained in *Citizens United*, "the public has an interest in knowing who is speaking about a candidate shortly before an election." 588 U.S. at 368; *see also id.* at 371 ("[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *First Nat. Bank of Boston v. Belotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."). This interest is particularly salient, the Tenth Circuit recognized, "following *Citizen[s] United's* change to the political campaign landscape with the removal of the limit on corporate expenditures." *Free Speech*, 720 F.3d at 798.

[8] As explained above, disclaimer and disclosure requirements in campaign finance laws are subject to exacting scrutiny, not strict scrutiny. Nonetheless, if the Court were to hold—in a break from this authority—that strict scrutiny applies to RGF's claims, the Secretary requests that the Court deny the parties' cross-motions for summary judgment and permit further discovery and briefing concerning the State's interest and the law's tailoring under this standard.

This informational interest extends to "issue advocacy." As the Court noted in its preliminary injunction order, "Numerous circuit courts have extended *Citizens United* to some forms of issue advocacy before an election." PI Order at 13. That is, the governmental interest does not only include advertisements for or against a candidate or ballot measure, but "reach[es] beyond express advocacy to at least some forms of issue speech." *Indep. Inst. v. Williams*, 812 F.3d 787, 795 (10th Cir. 2016). As well, the "Supreme Court has indicated there is a governmental interest in knowing where ballot initiative advocacy money comes from and how it is spent, so citizens have more information about whether special interests are attempting to influence the election." *Rio Grande Found. v. City of Santa Fe*, 437 F. Supp. 3d 1051, 1069 (D.N.M. 2020).

The proposed mailings by RGF and IOP exemplify these interests. RGF's "Freedom Index" grades candidates with numerical scores and red or green indicators. *See* *https://riograndefoundation.org/freedom-index/#/* (checked June 25, 2023). If mailed to households in the days before an election, the ratings undoubtedly would shape—and very likely, would be intended to affect—whether New Mexicans vote for the graded candidates. Former Plaintiff IOP sought to mail, without disclosing its funders, advertisements regarding a constitutional amendment to decide whether the Public Regulation Commission, New Mexico's public utility regulator, should be an appointed or elected body. *See* Pls.' Mot. Prelim. Inj. & Memo. Law Support Thereof, ECF No. 28, at 5. Whether mailers opposing changes to utility regulators are being funded by a regulated entity is crucial information for public debate and deliberation before an election.

Although New Mexico's legislative history is limited, what there is suggests that Senate Bill 3 was designed to further this informational interest. When the bill was before the State's Senate Rules Committee, a senator explained that the law was designed to inform the public about who was seeking to influence elections while remaining within constitutional strictures. *See* Sen. Ortiz y Pino, Sen. Rules Cmte., S.B. 3 (N.M. 2019), Jan. 28, 2019, at 10:31:50-10:32:17 ("[T]he thrust of this bill is really reporting of independent expenditure committees. And that's the one tool we have. This is the one thing we might be able to use to at least let the public know who are behind these dark-money ads.")[9]

RGF's efforts to distinguish this well-established interest in the disclosure of major funders of election-related ads are unavailing.[10] First, RGF points to *Citizens for Responsible Government State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), as an instance where a law extending disclosure requirements to issue advocacy was invalidated. Plaintiff's MSJ at 16. As discussed above, *see supra* p. 18 n.7, *Davidson* pre-dates *Citizens United* and its clarification that challenges to disclosure laws are not subject to strict scrutiny. Colorado "essentially concede[d] that the statute" in *Davidson* could not "withstand strict scrutiny"

[9] http://sg001-harmony.sliq.net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20190128/-1/61872 (checked June 25, 2023)

[10] RGF argues that New Mexico lacks any anti-corruption interest in disclosure laws because independent expenditures are not corrupting. Plaintiff's MSJ at 17. Although given the well-established informational interest in disclosure laws, this question need not be reached, disclosure laws can still serve an anti-corruption purpose when they help identify expenditures that are coordinated with a candidate—and therefore not independent expenditures at all.

and "offer[ed] no compelling reason for the disclaimer requirement, stating only that 'it is hardly *unreasonable*...." 236 F.3d at 1199. *Citizens United* further held, in contravention of the holding in *Davidson*, that disclosure laws could constitutionally extend to issue advocacy. 558 U.S. 310, 368–69.[11]

Second, RGF argues that *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), stands for the proposition that states lack "a compelling interest in providing the electorate with information about [a] speaker." Plaintiff's MSJ at 17–18. *McIntyre* is inapposite in several respects. It is applying strict scrutiny, which the Supreme Court would later clarify in *Citizens United* does not apply to disclosure laws like that here. It also concerned one person's distribution of handbills at school meetings, rather than the pre-election expenditures over a sizeable monetary threshold regulated by the CRA. 514 U.S. at 337–38. In rejecting a similar argument based on *McIntyre* as applied to independent expenditure laws, the First Circuit observed that "the appellants in *Citizens United* made a *McIntyre*-based argument in their brief. The fact that the Court did not adopt the *McIntyre* framework in the election-law context speaks eloquently to its inapplicability." *Gaspee Project*, 13 F.4th at 93 (citations omitted).

[11] RGF's citation to *Buckley v. Valeo* for the proposition that "[o]nly the funding of express advocacy may be subject to restraint" and "all other speech must remain free of regulation," Plaintiff's MSJ at 16, does not support the limitation of disclosure laws to express advocacy. The cited passage in *Buckley* does not state that regulation beyond express advocacy is impermissible. And more importantly, it is discussing *expenditure* limitations, not disclosure laws. 424 U.S. at 45.

Third, RGF notes that the Tenth Circuit has stated that there is "not that much" interest in disclosing the funders of ads regarding ballot measures. Plaintiff's MSJ at 18 (quoting *Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010)). As an initial note, RGF lacks standing to challenge the CRA's disclosure for ballot measures, as its proposed advertisements concern candidates, not ballot measures. Thus, RGF is not harmed by the CRA's disclosure requirements for ballot measure advertisements. *See Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956, 961 (10th Cir. 2021) (plaintiff in facial challenge must still suffer injury-in-fact). Also, the Tenth Circuit's observation that the interest in identifying sponsors of ads regarding ballot measures is attenuated was made in the context of "when the contributions and expenditures are slight." *Sampson*, 625 F.3d at 1259. By contrast, New Mexico's disclosure laws only apply to both expenditures and contributions over a monetary threshold. There is a well-established interest in identifying who is making larger expenditures to support ballot measures. *See Rio Grande Found.*, 437 F. Supp. 3d at 1069 ("The Supreme Court has indicated there is a governmental interest in knowing where ballot initiative advocacy money comes from and how it is spent, so citizens have more information about whether special interests are attempting to influence the election"); *Ctr. for Indiv. Freedom v. Madigan*, 697 F.3d 464, 480 (7th Cir. 2012) (upholding disclosure laws for ballot referenda).

Lastly, RGF argues that the interest in disclosing the major funders of election ads is limited to "advocacy for or against a candidate or ballot initiative" rather than "expenditures that simply mention a candidate or ballot initiative." Plaintiff's MSJ at 19. The

case that RGF discusses for this contention, however, *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016), is actually dispositive in recognizing an important interest in the disclosure of donors for so-called "issue advocacy," or ads that don't expressly advocate for or against a candidate or ballot measure.[12] In *Independence Institute*, the advertisement at issue was an "electioneering communication" because it mentioned Governor John Hickenlooper and would be made within 60 days of an election. *Id.* at 790–91. The ad did not expressly support or oppose the governor's re-election, but encouraged listeners to "[c]all Governor Hickenlooper and tell him to support legislation to audit the state's health care exchange." *Id.* at 790; *see also id.* at 792–93 (noting that the ad "does not explicitly reference any campaign or state any facts or opinions about Governor Hickenlooper"). In rejecting an overbreadth challenge to Colorado's law that reached such issue advocacy, the Tenth Circuit explained that "the same considerations that justify applying BCRA[13] to ads mentioning a candidate prior to an election justify applying Colorado's disclosure requirements to an ad mentioning a candidate prior to an election. … [G]iven their close similarity to BCRA, they are not overbroad. … [T]hey concern the public's 'interest in

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[12] RGF also contends that *Independence Institute* does not support an interest in disclosing donors to an advertiser's general fund, as opposed to earmarked contributions. As discussed *infra* pp. 29–30, New Mexico's disclosure of the largest donors to a general fund with an opt-out provision is a narrowly tailored effort to ensure that the actual funders of election ads are disclosed. Otherwise, entities could make all expenditures from a general fund and avoid disclosing the identity of any donors.

[13] The similar federal, Bipartisan Campaign Reform Act of 2002.

knowing who is speaking about a candidate shortly before an election.'" *Id.* at 798 (quoting *Citizens United*, 558 U.S. at 369).

The governmental interest in disclosing the major funders of election-related ads is well established. The CRA furthers that interest by ensuring that the public knows who is making sizeable advertisements regarding candidates and ballot measures in the days before an election.

II. New Mexico's Disclosure Requirement Is Narrowly Tailored and Not Overbroad.

New Mexico's requirement for the reporting of major donors for independent expenditures is narrowly tailored in a number of ways that ensure the law targets important information about who is funding large advertisements before an election. First, despite RGF's assertion that "the disclosure statute does not have any floor" (Plaintiff's MSJ at 22), the law only requires reporting of independent expenditures that exceed $3,000 in a statewide election and $1,000 in a non-statewide election. N.M. Stat. Ann. § 1-19-27.3(A)(1); Fact G(1). Even then, unless expenditures exceed $9,000 in a statewide election or $3,000 in a non-statewide election, only contributions of more than $200 "that were earmarked or made in response to a solicitation to fund independent expenditures" need be reported. N.M. Stat. Ann. § 1-19-27.3(C); Fact G(1); *cf. Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1279–80 (10th Cir. 2016) (finding $20 contribution disclosure as-applied to small-scale issue committee invalid while "recogniz[ing] that … framework is much more justifiable for

large-scale, bigger-money issue committees"). Because RGF does not earmark funds and uses only a general fund, this provision would not apply to it. Fact G(1), n.4.

If donors to RGF or another entity's general fund do not want their identity to be disclosed, the law also contains a "reverse earmark" provision whereby contributions are "exempt from reporting … if the contributor requested in writing that the contribution not be used to fund independent or coordinated expenditures or to make contributions to a candidate, campaign committee or political committee." N.M. Stat. Ann. § 1-19-27.3(D)(2); Fact G(3). And even if a donor does not take advantage of this provision, only the largest donors—of over $5,000 in an election cycle—to a general fund are disclosed. The First Circuit described a lower, $1,000 threshold for donor disclosure with a similar opt-out provision as "off-ramps for individuals who wish to engage in some form of political speech but prefer to avoid attribution." *Gaspee Project*, 13 F. 4th at 89. These "limitations on the Act's reach only require disclosure of relatively large donors who choose to engage in election-related speech." *Id.* Thus, the CRA's disclosure requirement does not, as RGF contends, "sweep[] in a huge number of supporters even at the smallest contribution levels." Plaintiff's MSJ at 21. This is particularly true given New Mexico's relatively small population, where smaller amounts of spending can influence elections. *See Williams*, 812 F.3d at 797–98 ("It is not surprising … that a disclosure threshold for state elections is lower than an otherwise comparable federal threshold. Smaller elections can be influenced by less expensive communications."); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 41 (1st Cir. 2012) (finding $100 threshold in Maine elections to be narrowly tailored).

Lastly, the requirement to report these large donors is "temporally cabined." PI Order at 25. It only applies to independent expenditures made within 30 days of a primary election or 60 days of a general election. N.M. Stat. Ann. § 1-19-26(N); Fact F; *cf.* 52 U.S.C. § 30104(f)(3) (containing very similar definition of "electioneering communication" under federal law). This limitation targets only speech about candidates and ballot measures during the time when it is most likely to influence a voter's decisions on election day and the State's interest in informing voters about the source of that speech is at its apex. *Cf. Citizens United*, 558 U.S. at 371 (transparency helps electorate to make informed decisions). Altogether, the CRA's monetary thresholds, temporal limitations, and opt-out provisions comprise a narrowly tailored disclosure law. *See Gaspee Project*, 13 F.4th at 88 (noting that "spending threshold" and identical "temporal limitations" of 30/60 days pre-election for electioneering communications "link[] the challenged requirements neatly to the … objective of securing an informed electorate").

RGF contends that, despite all these limitations, the CRA's definition of independent expenditure is overbroad because it reaches issue advocacy. Plaintiff's MSJ at 20. As noted above, *supra* p. 1, n.1, this same challenge is pending decision in another case before this court. The challenge is also foreclosed by controlling authority. The Supreme Court in *Citizens United* upheld BCRA's "electioneering communication" definition, which is very similar to the CRA's independent expenditure definition in Section 1-19-26(N)(3), holding that it did not impermissibly reach issue advocacy. 558 U.S. at 368–69. The Court expressly "reject[ed] Citizens United's contention that the disclosure requirements must be limited

to speech that is the functional equivalent of express advocacy." *Id.* at 369. Following *Citizens United*, the Tenth Circuit in *Independence Institute v. Williams* held that a similar definition in Colorado law was neither vague nor overbroad, given its similarity to BCRA. 812 F.3d at 798; *see also Yamada*, 786 F.3d at 1203 (disclosure laws can encompass "issue advocacy" electioneering). If disclosure laws could only reach express advocacy, there would be a ready loophole where candidates and ballot measures are criticized or praised in election ads that avoided the magic words constituting express advocacy. *See Gaspee Project*, 13 F.4th at 86 n.2 ("Communications … which subtly advocate for a position even though not including express directives on how to vote[] illustrate why federal courts regularly have spurned rigid distinctions between express advocacy and issue advocacy in the election-law disclosure context."). Whether express advocacy or not, the state and public have an interest in disclosing who is funding large ads regarding candidates and ballot measures in the days before an election.

RGF's argument that the disclosure requirement encompasses general fund contributions even where the donation is not spent on an independent expenditure ignores the fungibility of money. Plaintiff's MSJ at 21.[14] Once a dollar is donated, it is generally

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[14] RGF's cites to *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), for the proposition that donors to a general fund may not support an organization's specific advocacy. But as the Ninth Circuit noted, *Van Hollen* "did not consider whether a campaign finance law violated the First Amendment," but was a FEC rulemaking challenge to a rule excluding general fund donations. As a result, the Ninth Circuit did "not find its analysis to be persuasive" in the context of a First Amendment challenge to an independent expenditure disclosure law. *No on E*, 62 F.4th at 545 n.8.

impossible to know whether that particular dollar is spent for an independent expenditure. In reality, unless they are earmarked, dollars in an account are interchangeable. Furthermore, the CRA's tailoring includes several measures to help entities avoid unnecessary disclosures. Entities may create segregated accounts for independent expenditures and limit reporting to those accounts. N.M. Stat. Ann. § 1-19-27.3(D)(1); Fact G(2). And even where an entity funds independent expenditures from its general fund, it may have donors who do not wish to fund independent expenditures opt out their contributions. N.M. Stat. Ann. § 1-19-27.3(D)(2); Fact G(3). The disclosure of general fund contributions is then limited to large contributions of more than $5,000. N.M. Stat. Ann. § 1-19-27.3(D)(2); Fact G(2). Although these provisions contain a number of safeguards and limitations, some disclosure of general fund contributions is needed to ensure that entities do not circumvent disclosure requirements by funding all advertisements from their general funds. *Cf. Delaware Strong Fams. v. Att'y Gen. of Delaware*, 793 F.3d 304, 311-12 (3d Cir. 2015) (rejecting contention that disclosure requirement need to only apply to earmarked funds to survive constitutional scrutiny). New Mexico's disclosure law is narrowly tailored to require the disclosure of major funders of significant election ads while closing loopholes that would leave the law toothless.

III. Similar Disclosure Laws Have Been Repeatedly Upheld.

Laws like New Mexico's disclosure requirement that target significant pre-election communications about candidates and ballot measures have been repeatedly upheld. Perhaps most significantly, the Supreme Court has upheld FECA's similar requirements for

the disclosure of contributors for communications mentioning candidates within 60 days of an election. *See* Fact F (illustrating similarities between definition of reportable "independent expenditures" and "electioneering communications").

First, in *Buckley v. Valeo*, the Supreme Court rejected a challenge, relying on *NAACP v. Alabama*, to FECA's requirement that political committees disclose contributors over $10. 424 U.S. at 64–68. The Court found that the disclosure requirements served three purposes: providing the electorate with information; deterring corruption and its appearance; and detecting violations of contribution limits. *Id.* at 66–68. Following amendments to FECA in the Bipartisan Campaign Reform Act, the Court in *McConnell v. FEC* again upheld the constitutionality of FECA's disclosure requirements (containing the current, $10,000/$1,000 expenditure and contribution thresholds). 540 U.S. 93, 194–99 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310. In *Citizens United*, the Court considered a challenge to FECA's disclosure and disclaimer requirements as applied to a film about a candidate and advertisements for that film. Rejecting the argument the laws could only target express advocacy, the Court upheld the requirements, concluding that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." 558 U.S. at 371. Finally, the Court affirmed a three-judge panel's ruling declining to find an issue-advocacy exemption to FECA's disclosure rules for a radio ad mentioning candidates. *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016), *aff'd* 137 S. Ct. 2104 (2017).

Following in these cases' footsteps, the Tenth Circuit in *Independence Institute v. Williams* upheld Colorado's law requiring any person who spends at least $1,000 on "electioneering communications" to disclose donors of $250 or more for such communications. 812 F.3d at 789–90. The court noted that the "only marked difference between BCRA and Colorado's constitutional provision is that the latter is triggered at lower spending thresholds." *Id.* at 797. And in a case by former Plaintiff IOP, the First Circuit affirmed the district court's dismissal of a First Amendment challenge to a disclosure law significantly more restrictive than New Mexico's. *Gaspee Project*, 13 F.4th at 83 (describing Rhode Island law as requiring disclosure of all donors to general fund of $1,000 or more and listing five largest donors on advertisements, among other requirements). RGF offers no contrary authority facially invalidating a similar disclosure law.

IV. RGF's Generalized Assertions of Retaliation and Harassment Cannot Support Facial Invalidation of the CRA.

Given the established interests in the disclosure of large contributors for election-related advertisements and New Mexico's narrow tailoring of its law to target those contributions, New Mexico's disclosure requirement should be upheld. Although "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights[,]" *Citizens United v. Gessler*, 773 F.3d at 209-10 (internal quotation marks and citation omitted), RGF has not offered substantial "evidence of chilled speech" to be weighed "against the legislative interests." *Rio Grande Found.*, 437 F. Supp. 3d at 1070;

see also Buckley, 424 U.S. at 68. Instead, RGF seems to rely upon the argument that because it has brought a facial challenge, it does not need to establish a risk of retaliation or harassment. Plaintiff's MSJ at 12.

This argument presupposes that the challenged statute is overbroad. *RGF* cites *AFPF v. Bonta* for the propositions that "[w]here a disclosure requirement is not 'narrowly tailored…,' a plaintiff does not have the burden of showing that 'donors to a substantial number of organizations will be subject to harassment and reprisals" and that where "a disclosure statute is overbroad, the harm is categorical." Plaintiff's MSJ at 12 (quoting *AFPF*, 141 S. Ct. at 2389). This presumes, of course, that the challenged law is overbroad—which as discussed in the preceding sections—it is not. Given the CRA's close alignment with federal law and Colorado law that has been upheld in controlling cases, RGF cannot show that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *AFPF*, 141 S. Ct. at 2387 (internal quotation marks and citation omitted).

Indeed, considering the governmental interest at stake in *AFPF v. Bonta* and the evidence of burdened and chilled speech presented there demonstrates why RGF's facial challenge fails.[15] In *AFPF*, the government presented an "efficiency interest," unlike the recognized important government interest in informing voters before an election. *Id.* ("ease of administration … cannot justify the disclosure requirement"). Nor was it clear error, the

[15] Of course, also unlike *AFPF*, RGF's claims face controlling precedent upholding similar laws as constitutional. *See supra* Part III.

Court determined, to find that the law in *AFPF* was not narrowly tailored given that there was no evidence of "a single, concrete instance in which pre-investigation collection" of almost 60,000 disclosed donor information forms "did anything to advance the Attorney General's investigative regulatory or enforcement efforts." *Id.* at 2386 (internal quotation marks and citation omitted). Moreover, AFPF and its amici presented evidence of harassment both to itself and other groups affected by the disclosure law. *Id.* at 2381, 2388. Given these facts, the Court concluded that facial invalidation was warranted because the government's interest "is weak" "in every case" and "pertinent facts in these cases are the same across the board." *Id.* at 2389.

The factors here all differ and RGF cannot show that a substantial number of applications of New Mexico's disclosure laws are unconstitutional. The State's interest in informing voters as to the funders of election-related advertisements is well-established, and New Mexico's law is narrowly tailored to further that interest without unduly burdening First Amendment rights. Facing such a law, RGF cannot avoid its application—let alone invalidate the Act on facial grounds—where it has not offered any evidence of harassment or retaliation to the organization or its donors. *See Citizens United v. FEC*, 558 U.S. at 370 (examples of donors to other entities being "blacklisted, threatened, or otherwise targeted for retaliation," while "cause for concern" did not offer a basis for Citizens United to avoid disclosure laws where it had not identified any instance of harassment or retaliation to itself or its donors).

Indeed, RGF has not even established an as-applied exception to the CRA's disclosure laws by establishing a substantial burden on its First Amendment rights. Although RGF asserts general concerns with the loss of donor support[16] and "cancel or call-out culture" (Plaintiff's MSJ at 11), they offer no significant evidence of harassment or repercussions targeted at their organizations. Despite a twenty-plus-year history and a significant public presence including personal information about its leadership, Facts H & I, RGF testified that it is not aware of any harassment or retaliation of their employees or donors. Fact J; *see also Rio Grande Found.*, 473 F. Supp. 3d at 1073 ("RGF has been an established nonprofit speaking out in state and local matters since 2000. It thus has a history upon which to draw that does not show reprisals and threats directed against it or its donors, speakers, or affiliates during the time it has advocated for and against legislation in New Mexico."). Although RGF's president stated in his declaration that he was aware of at least one instance where a person in New Mexico was threatened with or experienced retaliation, he could not remember this incident at deposition. Fact J. To the contrary, RGF testified that "New Mexico is a little bit unique" and because of the constitutional amendment process, "we don't have as many of those volatile issues" that attract harassment. Fact K. RGF also has no plans to make expenditures on the issues—labor

[16] Also, while the First Amendment may guarantee RGF a right to solicit donations, it does not guarantee a right to receive donations or to maintain donations at a particular level. *See, e.g.*, *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 891 (9th Cir. 2018) ("[T]here exists no standalone right to receive the funds necessary to finance one's own speech." (citing *Regan v. Tax'n with Rep'n of Wash.*, 461 U.S. 540, 550 (1983)).

rights, gun rights, and environmental rights—that it identified as likely to attract retaliation. Fact K.

This absence of harassment and retaliation contrasts with extreme examples like the NAACP during the civil rights movement, of course. *See* Erin Chlopak, "One of These Things Is Not Like the Other: NAACP v. Alabama Is Not A Manual for Powerful, Wealthy Spenders to Pour Unlimited Secret Money into Our Political Process," 69 Am. U. L. Rev. 1395, 1405-07 & n.53 (2020) (detailing history, including bombings and shootings, presented by NAACP). But it also contrasts with *AFPF*, on which RGF relies for its argument that it need not show retaliation. In that case, AFPF presented evidence of bomb threats, protests, stalking, and physical violence. 141 S. Ct. at 2388.

Indeed, were RGF's generalized concerns with donor privacy and harassment sufficient to invalidate disclosure provisions in campaign finance laws, all such similar laws—from BCRA to the Colorado law upheld in *Independence Institute*—would be unconstitutional. Controlling authority, however, reaches the opposite conclusion. As in those cases, New Mexico's well-crafted requirements to disclose donors for major election advertisements does not violate the First Amendment.

CONCLUSION

RGF asks the Court to facially invalidate New Mexico's disclosure laws for large independent expenditures before an election. These laws are narrowly tailored to serve an important government interest in informing the electorate before it votes and are constitutionally indistinguishable from BCRA and other similar laws that have been

repeatedly upheld. The Secretary of State respectfully requests that the Court follow this authority, enter summary judgment in her favor, and deny RGF's motion for summary judgment.

By: /s/ Nicholas M. Sydow
Nicholas M. Sydow
Deputy Solicitor General
201 Third Street NW, Suite 300
Albuquerque, NM 87102
Tel.: (505) 717-3571
Fax: (505) 490-4881
nsydow@nmag.gov

Counsel for Defendant Secretary of State Maggie Toulouse Oliver

CERTIFICATE OF SERVICE

I certify that on June 26, 2023, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Nicholas M. Sydow
Nicholas M. Sydow