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 Reply in Support of its Motion for Summary Judgment and Response in Opposition to Defendant's Motion for Summary Judgment

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INTRODUCTION

In this case, Plaintiff challenges one provision of New Mexico's Campaign Reporting Act, ("CRA"), N.M. Stat. Ann. § 1-19-26(N)(3)(c), which imposes disclosure requirements on expenditures for communications that simply mention, but do not advocate for or against, a candidate or ballot question within 30 days before a primary or 60 days before a general election. Section 1-19-26(N)(3)(c) violates the First Amendment on its face.

Section 1-19-26(N)(3)(c)'s disclosure requirement cannot survive either strict scrutiny—the test Plaintiff says applies—or exacting scrutiny—the test Defendant asserts applies. New Mexico does not have an important or compelling government interest in informing voters of donors of ads that simply mention, but do not advocate for or against, a candidate or ballot question. Even if New Mexico has an interest in informing voters of the funders of ads that advocate for or against a candidate or ballot initiative, ads covered by Section 1-19-26(N)(3)(c)—which simply *mention* a candidate or ballot initiative, and do not expressly or implicitly advocate for or against a candidate or ballot initiative—do not further that interest at all. Finally, Defendant does not have an important or compelling government interest in informing the public of the donors of "issue advocacy."

Even assuming New Mexico has an important or compelling interest in the disclosure of funders of ads about candidates or ballot measures, or of issue advocacy, Section 1-19-26(N)(3)(c)'s disclosure requirement is not narrowly tailored to those interests. While voters may have an interest in knowing who is funding ads that try to persuade them to vote for or against a candidate or ballot question, ads

that don't advocate for or against a candidate or ballot question, but simply mention them within a certain period before an election do not implicate this interest. By definition ads under Section 1-19-26(N)(3)(c) are not trying to persuade voters. And the inclusion of such ads in the disclosure regime is clearly not narrowly tailored because they don't further that interest at all. Further, if Defendant asserts that its purported interest in informing the public of donors of "issue advocacy" justifies the disclosure requires applied to Section 1-19-26(N)(3)(c), then the law is underinclusive, and therefore does not further Defendant's alleged interest, and is not narrowly tailored, because except for Section 1-19-26(N)(3)(c), Defendant does not require the disclosure of donors of issue advocacy.

For the reasons set forth in this brief and in Plaintiff's memorandum in support of its motion for summary judgment, this Court should grant Plaintiff's motion for summary judgment, deny Defendant's motion, and enjoin Defendant's application of the disclosure requirements to Section 1-19-26(N)(3)(c)—expenditures for ads that simply mention a candidate or ballot question within 30 days of a primary and 60 days of a general election.

RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS

Procedural History

A. Admit.

B. Plaintiff admits the 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 and that

the Court denied Plaintiffs' motion for preliminary injunction. Plaintiff denies that the Court rejected the argument Plaintiff now raises on summary judgment. Further, Plaintiff states that the Court's Mem. Op. & Order, ECF No. 33, speaks for itself.

C. Admit.

D. Admit.

The Challenged Laws

E. Admit, although Plaintiff disputes the characterization of the law as applying only to "large" independent expenditures.

F. Plaintiff states that the statutes speak for themselves. Plaintiff denies that the definition of "independent expenditure" in N.M. Stat. Ann. § 1-19-26(N)(3)(C) is similar to the definition of "electioneering communication" in 52 U.S.C. § 30104(f)(3)(A)(i).

G. The statute speaks for itself, although Plaintiff disputes the characterization of the law as applying only to "major" funders.

RGF's Alleged Harassment and Retaliation

H. Admit.

I. Plaintiff admits that RGF and its president have public Twitter accounts where they make political statements and that RGF's website lists its staff, including photographs. Plaintiff disputes Defendant's characterization of RGF and its officers of having "prominent public presences." Plaintiff further disputes Defendant's statement that RGF's website lists information about

its staff's families. Only two of the staff biographies contain information about that staff member's family. President Paul Gessing's profile on RGF's website names his wife and children. One other profile of a staff member of RGF's website mentions his family but does not name them. No other staff profiles include any mention of family.

J. Admit.

K. Plaintiff admits RGF's president's deposition testimony but points out that at the time of the deposition, the next general election for statewide offices was nearly two years away.

L. Plaintiff admits the deposition testimony, but points out that RGF's president has also testified that: "Based on my experience fundraising in my current role and based on my previous experience in public affairs, I and RGF believe that if its members, supporters, and donors are disclosed, individuals, organizations, and corporations will be less likely to contribute to its mission, and it will experience greater difficulty fundraising. I know that several donors who support RGF would not continue to do so if they were subject to disclosure." Gessing Decl. at ¶ 11 (ECF 33-2, 08/25/2020).

LEGAL STANDARD

Summary Judgment

Cross-motions for summary judgment authorize a court to assume that there is no evidence that needs to be considered other than that which the parties have filed. *Castaneda v. City of Albuquerque*, 276 F. Supp. 3d 1152, 1164 (D.N.M. 2016). Courts should construe evidence liberally in the nonmovant's favor when deciding a

motion for summary judgment. *Florom v. Elliott Mfg.,* 867 F.2d 570, 574 (10th Cir. 1989).

Facial Challenges

"[T]o prevail on a facial attack the plaintiff must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.'" *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)). The first kind of facial challenge requires that the court finds that "every application of the statute created an impermissible risk of suppression of ideas," and the second kind of facial challenge requires that "the statute is 'substantially' overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* (citation omitted). Under an overbreadth challenge, "a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). The crux of an overbreadth claim is that the fit between the State's means and its ends is poor. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

A facial challenge exists "not primarily for the benefit of the litigant, but . . . to prevent the statute from chilling the First Amendment rights of other parties not

before the court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984); *see also City of Chicago v. Morales*, 527 U.S. 41, 55–56 n.22 (1999) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question."); *Aptheker v. Sec'y of State*, 378 U.S. 500, 516 (1964) (recognizing that, in evaluating a facial challenge, "this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar"). Facial challenges are permissible "especially where speech protected by the First Amendment is at stake." *Faustin v. City & Cty. of Denver*, 269 F.3d 942, 948 (10th Cir. 2001) (citing *N.Y. State Club Ass'n*, 487 U.S. at 11).

The disclosure requirements for expenditures for ads covered by Section 1-19-26(N)(3)(c) is facially unconstitutional under both traditional facial analysis and the overbreadth doctrine.

Strict Scrutiny or Exacting Scrutiny

Defendant argues that disclosure laws are subject to exacting, not strict, scrutiny. Def's MSJ, at 16–18. While it's true enough that courts have tended to apply exacting scrutiny to compelled disclosure requirements, doing so here would conflict with the Supreme Court's jurisprudence in two other First Amendment areas. The Supreme Court has held that both content-based restrictions on speech—*see Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional" and "subject to strict scrutiny")—and compelled speech are subject

to strict scrutiny—*see 303 Creative LLC v. Elenis*, 2023 U.S. LEXIS 2794, *25 (June 30, 2023); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

And here the contested disclosure requirements are both content-based speech and compelled speech. The law requires disclosure based on the subject of the ads, specifically ads that mention a candidate or ballot question. N.M. Stat. Ann. § 1-19-26(N)(3)(c). *See Reed*, 576 U.S. at 163 ("A law is content based when it applies to particular speech because of the topic discussed or the idea or message expressed."). And the law compels a person to speak by disclosing certain information, including information about one's donors. *See 303 Creative LLC*, 2023 U.S. LEXIS 2794, *22 ("Generally, too, the government may not compel a person to speak its own preferred messages.").

Compelled speech and content-based claims are still subject to strict scrutiny, even when they arise in a campaign context. There is no reason to treat laws that are content-based and that compel speech with less scrutiny because they concern election-related or campaign speech. *See Initiative & Referendum Institute v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006) (emphasizing that laws which "regulate or restrict the communicative conduct of persons advocating a position in a referendum . . . warrant strict scrutiny"); *Semple v. Griswold*, 934 F.3d 1134, 1142 (10th Cir. 2019) (citing *Walker's* strict scrutiny requirement).

Even so, the disclosure requirements for expenditures for ads covered by Section 1-19-26(N)(3)(c) are unconstitutional under either level of scrutiny.

Defendant requests that, if this Court applies strict scrutiny to the disclosure requirements at issue, 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. Def's MSJ, at 20, n.8. Plaintiff objects to this request as baseless and unnecessary. Plaintiff's motion for summary judgment, as Defendant acknowledges, clearly requests that this Court apply strict scrutiny, and argues why the contested disclosure requirement does not meet the test under strict scrutiny. Defendant, in turn, argues that strict scrutiny does not apply. While Defendant had the opportunity to explain why she believes the contested disclosure requirements would withstand strict scrutiny, she chose, for whatever reason, not to make such arguments in her combined motion/response to Plaintiff's motion. Defendant provides no reason why she could not do so. Thus, Defendant has waived any such argument. *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 n.7 (10th Cir. 2009) ("[T]he general rule in this circuit is that a party waives issues and arguments raised for the first time in a reply brief.").

Further, Defendant's assertion that she needs "further discovery" to determine the state's interest under strict scrutiny is absurd. If Defendant is unaware of any compelling interest *the government* has for the contested disclosure requirements, she surely will not ascertain such an interest by obtaining further discovery *from Plaintiff*. It is not Plaintiff's obligation to provide a compelling government interest; it is the State's. Defendant's footnote should be treated by the Court as a concession

that the State has no compelling interest to justify the content disclosure requirements.

ARGUMENT

Plaintiff RGF facially challenges a provision of New Mexico's Campaign Reporting Act that forces speakers to disclose their donors if they make expenditures for communications that simply *mention* a candidate or a ballot question—even if they do not expressly or implicitly advocate for or against a candidate or ballot question—within 30 days of a primary, or 60 days of a general election. N.M. Stat. Ann. § 1-19-26(N)(3)(c). But for this provision, Plaintiff would be able to publish and circulate "Freedom Index," a report card that tracks the votes of New Mexico legislators on relevant bills, within 30 days of a primary or 60 days of a general election, without having to publicly disclose its organization's donors' names and addresses. If RGF is required to publicly disclose its donors' names and addresses, 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.

I. Plaintiff challenges N.M. Stat. Ann. § 1-19-26(N)(3)(c), which applies to communications that simply mention, but do not expressly or implicitly advocate for or against, a candidate or ballot question.

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 defines "independent expenditure" as an expenditure that is:

1. made by someone other than a candidate or campaign committee; and
2. not a coordinated expenditure (as defined by the Act), and
3. made to pay for an ad that:

    a. expressly advocates the election or defeat of a clearly identified candidate or the passage or defeat of a clearly identified ballot question; or

    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).

Here Plaintiff challenges the disclosure requirement for this third category of "independent expenditures," which includes *only* expenditures for ads that refer to—but do *not* expressly or tacitly advocate for or against—a clearly identified candidate or ballot question. That is because subsections 1-19-26(N)(3)(a) and (b) cover any expenditure of an ad that either "(a) expressly advocates the election or

defeat of a clearly identified candidate or the passage or defeat of a clearly identified ballot question;" or (b) "is 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). Put simply, Section 1-19-26(N)(3)(c) requires disclosures for expenditures for ads that simply mention, but do not expressly or tacitly advocate for or against, a candidate or ballot question within a set period before an election.

In response to Plaintiff's Statement of Material Facts no. 9, Defendant points out, Def's Mot. 10, that the term "independent expenditure" is limited by the statute's definition of the term "expenditure": "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). And Defendant further states that, under this definition, an "expenditure" must be "for a political purpose." Def's Mot. 10. But Defendant fails to note that the term "political purpose" is also defined by the Campaign Reporting Act. "Political purpose" is defined 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). Thus, an independent expenditure is one that is limited by a political purpose, which requires that the expenditure be for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate.

Applying "political purpose" to Section 1-19-26(N)(3)(c), however, would make the statute self-contradictory. As stated above, Section 1-19-26(N)(3)(c) covers independent expenditures for ads that simply mention, but do not explicitly or implicitly advocate for or against, a candidate or ballot question. Expenditures under Section 1-19-26(N)(3)(c) are therefore *not* for a "political purpose"—for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate. Section 1-19-26(N)(3)(c) cannot both apply to expenditures for the purpose of supporting or opposing a candidate or ballot question, while also applying only to expenditures that simply mention, but do not expressly or tacitly advocate for or against, a candidate or ballot question.

Defendant, however, seeks to enforce Section 1-19-26(N)(3)(c) against Plaintiff as if that section is not contradicted by the definition of "political purpose." Further, this Court may follow the canon of statutory construction that specific controls over general: "'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *United States v. Wesley*, 60 F.4th 1277, 1284 (10th Cir. 2023) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).[1]

Thus, Defendant's assertion, in response to Plaintiff's Statement of Material Facts no. 9, that Defendant denies that Section 1-19-26(N)(3)(c) "reaches

[1] Plaintiff recognizes that the Court must also respect the canon of statutory construction that seeks to avoid an unconstitutional interpretation. In that case, the Court should find Section 1-19-26(N)(3)(c) void by definition and enjoin Defendant from enforcing it.

expenditures that are not for 'political purposes'" is wrong. If Defendant's assertion were accepted, then Section 1-19-26(N)(3)(c) would be meaningless, since any independent expenditures defined under that section would be redundant with Sections 1-19-26(N)(3)(a) and (b). The only reasonable interpretation of Section 1-19-26(N)(3)(c) is that it applies to all ads, regardless of purpose, that simply mention, but do not advocate and cannot reasonably be interpreted as advocating for or against, a candidate or ballot initiative within 30 days before a primary and 60 days before a general election.

The disclosure requirement for "independent expenditures" as defined in Section 1-19-26(N)(3)(c) cannot survive either strict or exacting scrutiny. Defendant cannot provide a compelling or important government interest that justifies requiring disclosure for expenditures on ads that simply mention, but do not expressly or implicitly advocate for or against, a candidate or ballot question within a certain time before an election. Nor is the disclosure requirement narrowly tailored to any possible government interest. Thus, this Court should find that the disclosure requirement for such "independent expenditures" is an unconstitutional violation of the First Amendment.

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) do not implicate a "compelling" or "significantly important" government interest.

Defendant does not offer any compelling interest that justifies the disclosure requirements of N.M. Stat. Ann. § 1-19-26(N)(3)(c) under strict scrutiny. *See supra* pp. 8-9.

Instead, Defendant asserts that there is an important government interest in "disclosing the funders of large advertisements about candidates and ballot measures before an election." Def's Mot. 20. Defendant asserts that "[k]nowing 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." Def's Mot. 20.

Plaintiff doesn't dispute that courts have accepted that governments have an important government interest in knowing who is criticizing or praising candidates or ballot measures. The problem with Defendant's asserted interest is that N.M. Stat. Ann. § 1-19-26(N)(3)(c) does not apply to ads that criticize or praise candidates or ballot questions. Therefore, any informational interest that Defendant may have in informing voters of who is publishing ads that praise or criticize a candidate or ballot question does not apply to this case, where Plaintiff challenges a provision of law that by definition does not apply to ads that praise or criticize a candidate or ballot question, and instead applies to ads that simply mention a candidate or ballot question.

Defendant cites *Citizens United v. FEC*, 558 U.S. 310, 369 (2010), for the proposition that "the public has an interest in knowing who is speaking about a candidate shortly before an election." Def's Mot. 20. But the definition of "electioneering communications" in the federal statute at issue in that case did not differentiate between communications that expressly and implicitly advocated for or

against a candidate and those that simply mentioned a candidate. Here, Section 1-19-26(N)(3)(c) applies only to expenditures for ads that mention a candidate or ballot initiative and do not expressly advocate or can only reasonably be read as advocating for or against a candidate or ballot initiative. That distinction is important because the government's interest in informing voters about who is advocating for or against a candidate would apply to a statute that defines expenditures that include communications that expressly advocate for or against a candidate. But here, where the statute differentiates expenditures that only mention, and do not expressly or tacitly, advocate for or against a candidate or ballot question, no such interest exists. Indeed, Defendant can cite no case where a court found an important government interest in disclosure for a statute that only applies to speech that mentions a candidate or ballot question but does not expressly or implicitly advocate for or against a candidate or ballot question.

Defendant attempts to dismiss Plaintiff's reliance on *Citizens for Responsible Government State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000) and *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) by asserting that those cases are inapposite because they applied strict scrutiny. Def's Mot. 22-23. But Defendant misses Plaintiff's point: those cases serve only to support Plaintiff's contention that any government interest in informing voters of who is advocating for or against a candidate or ballot question does not apply to disclosure requirements for speech that simply mentions, but does not advocate for or against, a candidate or political committee.

Indeed, in *Davidson*, while the Tenth Circuit did apply strict scrutiny to certain challenged statutory provisions, 236 F.3d at 1197, Plaintiff does not cite *Davidson* for its analysis of those provisions. Rather, Plaintiff cites *Davidson* for its analysis addressing the constitutionality of statutory definitions that applied only to speech that "unambiguously refer[s] to any specific public office or candidate for such office" and finding those restrictions on speech unconstitutional under the framework set forth in *Buckley v. Valeo*, 424 U.S. 1. *Id*. at 1193-94.

Importantly, *Buckley* recognized a "substantial government interest" in information that would "shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors." *Id.* at 80-81. But *Buckley* recognized this interest only for "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80; *see also Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986); *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 387 (2000) (finding that a regulation of communications that "impliedly advocate for or against a candidate" would run afoul of the *Buckley* test). Thus, even under exacting scrutiny, New Mexico's informational interest simply isn't applicable to speech that does not seek to advocate for or against a candidate or ballot question.

Similarly, Defendant's attempt to distinguish *McIntyre* ignores Plaintiff's purpose for citing it. First, Defendant asserts that the Court in *McIntyre* applied

strict scrutiny and therefore the case is inapposite here. Def's Mot. 23. But the Court in *McIntyre* described the scrutiny applied in that case as the exacting scrutiny Defendant urges the Court to adopt here: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." 514 U.S. at 347; *see* Def's Mot. 18 (asserting exacting scrutiny applies, which requires that a restriction be "narrowly tailored" to a "sufficiently important government interest").

Defendant also attempts to dismiss *McIntyre* because it "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." Def's Mot. 23. But Defendant's distinction doesn't adequately explain the issues in the cases, nor does it explain why they should be treated differently. In *McIntyre*, the plaintiff was subject to an Ohio statute that required disclosure of one's name and address when distributing handbills that advocating for or against a candidate or a ballot issue, and plaintiff admittedly distributed handbills without such information to seek the defeat of a ballot initiative. 514 U.S. at 338, n.3. Defendant seems to imply that the relevant difference between this case and *McIntyre* was the amount of money spent on speech. But nothing in *McIntyre* indicates that the disclosure requirements were unconstitutional because of the small amount of speech that plaintiff was engaged in or because her handbill distribution was inexpensive. In any event, the Court points out in *McIntyre* that the purported information interest asserted by the government in that case was not really served because the

disclosure of the name and address of the author of a handbill would "add little, if anything, to the reader's ability to evaluate the document's message." 514 U.S. at 348-49. So too here. The purported informational interest in knowing who is funding an ad advocating for or against a candidate or ballot question is not served by forcing disclosure of funders of ads that simply mention, but do not advocate for or against a candidate or ballot question.

Defendant asserts that *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016), is "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." Def's Mot. 25. But the Tenth Circuit in *Independent Institute* did not find a blanket important informational interest justifying disclosure for all "issue advocacy." 812 F.3d at 795 ("disclosure requirements can, if cabined within the bounds of exacting scrutiny, reach beyond express advocacy to *at least some forms of issue speech*") (emphasis added). Defendant cites *Independence Institute* and *Citizens United* as dispositive in this case. Def's Mot. 31-32. But the statutes at issue in both *Independent Institute* and *Citizens United* involved disclosure laws that applied to speech that did not distinguish between express advocacy, implicit advocacy, or speech that simply mentions but is not expressly or tacitly advocacy, as the law does here. N.M. Stat. Ann. § 1-19-26(N)(3); *see Independence Inst.*, 812 F.3d at 790 (applying to speech that "unambiguously refers to any candidate"); *see also Citizens United*, 558 U.S. at 321 (applying to speech that "refers to a clearly identified candidate for Federal

office"). In those cases, the Supreme Court and the Tenth Circuit upheld the application of the disclosure requirements to "reach beyond express advocacy to at least some forms of issue speech." *Independence Inst.*, 812 F.3d at 795. But that does not mean that the Supreme Court or the Tenth Circuit would uphold the application of disclosure requirements that apply *only* to speech that is outside of express advocacy. Both statutes in *Independent Institute* and *Citizens United* did not distinguish between express advocacy and issue advocacy. Because the statutes did not distinguish between such speech, the Supreme Court and the Tenth Circuit were hesitant to attempt to disentangle them. *See Independence Inst.*, 812 F.3d at 796 (finding "no principled mechanism for distinguishing between campaign-related issue speech and speech that is not campaign-related"); *Citizens United*, 558 U.S. at 358 ("the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application") (quoting *Buckley*, 424 U.S. at 42. "The difficulty of reliably distinguishing between campaign-related speech and non-campaign-related speech is why courts must look only to whether the specific statutory definitions before them are sufficiently tailored to the government's legitimate interests." *Independence Inst.*, 812 F.3d at 796. Thus, the courts will not make a distinction between campaign-related speech and non-campaign-related speech if the statute does not do so.

But in this case, N.M. Stat. Ann. § 1-19-26(N)(3)(c) *does* distinguish itself from express (or even implied) advocacy. Because subsections (a) and (b) cover speech that either expressly or tacitly advocates for or against a candidate or ballot

question, subsection (c) clearly does *not* involve such express or tacit advocacy. Thus, while *Citizens United* and *Independence Institute* upheld disclosure requirements that applied to speech that included express or implied advocacy and some issue advocacy, the challenged provision at issue here applies to speech that does not include express or tacit advocacy of a candidate or ballot question at all. Therefore, the informational governmental interest set forth in *Citizens United* and *Independence Institute* cannot justify the disclosure requirements in this case.

Thus, while Defendant asserts that its informational interest extends to "issue advocacy," Def's Mot. 21, it does not and cannot cite any cases extending that informational interest to disclosure requirements that only apply to "issue advocacy" like Section 1-19-26(N)(3)(c) does here.

Therefore, this Court should enter summary judgment for Plaintiff finding that the disclosure requirements for expenditure for ads set forth in N.M. Stat. Ann. § 1-19-26(N)(3)(c) is unconstitutional because even under exacting scrutiny, Defendant has not set forth an important governmental interest that justifies the disclosure requirements for speech that does not advocate for or against a candidate or ballot initiative.

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) are not narrowly tailored.

Section 1-19-26(N)(3)(c) is not narrowly tailored to serve any of Defendant's purported interests.

Section 1-19-26(N)(3)(c) is not narrowly tailored to serve Defendant's purported informational interest in having voters know who is funding ads that criticize or

praise a candidate or ballot measure because that section does not apply to ads that criticize or praise candidates or ballot measures. Defendant's purported informational interest simply does not apply to the ads covered by Section 1-19-26(N)(3)(c). Thus, Section 1-19-26(N)(3)(c) cannot further this purported government interest, and thus, is not narrowly tailored to serve that interest.

Defendant mentions three reasons why she believes Section 1-19-26(N)(3)(c) is narrowly tailored. First, Defendant says "the law only requires reporting of independent expenditures that exceed $3,000 in a statewide election and $1,000 in a non-statewide election." Def's Mot. 26. Second, Defendant asserts that "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.'" Def's Mot. 27, quoting N.M. Stat. Ann. § 1-19-27.3(D)(2). Third, Defendant says that the reporting requirement "only applies to independent expenditures made within 30 days of a primary election or 60 days of a general election." Def's Mot. 28.

The problem is that Defendant doesn't explain how or why Section 1-19-26(N)(3)(c) is narrowly tailored to serve its purported interest. Again, Section 1-19-26(N)(3)(c) does not serve the purported interest in informing voters of who is funding ads that criticize or praise a candidate or ballot measure. Because Section 1-19-26(N)(3)(c) doesn't serve the purported government interest, the reasons Defendant gives for why the statute is narrowly tailored are irrelevant.

Again, no court has found an important government interest in disclosure for a statute that *only* applies to speech that mentions a candidate or ballot question but does not expressly or implicitly advocate for or against a candidate or ballot question. And Defendant cannot explain why disclosure of the funders of ads that mention, but do not expressly or implicitly advocate for or against a candidate or ballot question is important. Even if the government has an interest in informing voters about who is trying to persuade them how to vote in an election, that interest doesn't apply to Section 1-19-26(N)(3)(c), which by definition excludes ads that are expressly or tacitly trying to persuade voters how to vote. So, again, the reasons Defendant gives for why the statute is narrowly tailored are irrelevant because the statute doesn't serve an important government interest.

And, as mentioned, Defendant asserts an informational interest for broad "issue advocacy," Def's Mot. 21, but can cite no authority for a general informational interest that covers disclosure requirement that only apply to "issue advocacy" and do not apply also to "campaign advocacy." Thus, Defendant has no important interest in disclosing the funders of ads that apply to "issue advocacy" and never apply to "campaign advocacy."

But even if Defendant could assert such an interest, it would not be narrowly tailored. That is because Defendant's law compelling the disclosure of the donors of ads that are considered "issue advocacy" is laughably underinclusive *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011). ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes,

rather than disfavoring a particular speaker or viewpoint."); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 543-47 (1993) (invalidating a city's ban on ritual animal sacrifices because the city failed to regulate vast swaths of conduct that similarly diminished its asserted interests in public health and animal welfare). Here, New Mexico does not require disclosure of donors for "issue advocacy" *at all*, except when those "issue advocacy" ads simply mention, but do not advocacy for or against, a candidate or ballot question within 30 days of a primary or 60 days of a general election. N.M. Stat. Ann. § 1-19-26(N)(3)(c). Even if New Mexico had an interest in requiring the disclosure of donors for "issue advocacy"—which Plaintiff disputes—that interest is not advanced, and therefore not narrowly tailored, since New Mexico does not require disclosure for "issue advocacy" at all, unless it is covered by Section 1-19-26(N)(3)(c). *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 ("Underinclusiveness can . . . reveal that a law does not actually advance a compelling interest.").

For these reasons, Section 1-19-26(N)(3)(c) is not narrowly tailored to serve any of the purported government interests asserted by Defendant. Therefore, this Court should enter summary judgment in favor of Plaintiff, finding Section 1-19-26(N)(3)(c) unconstitutional on its face and enjoining Defendant from enforcing that section.

IV. Plaintiff has standing to support its facial challenge to N.M. Stat. Ann. § 1-19-26(N)(3)(c).

The Tenth Circuit in this case held that Plaintiff RGF has standing to challenge the disclosure requirement under its test set forth in *Initiative & Referendum Inst.*

v. Walker, 450 F.3d 1082. *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1162 (10th Cir. 2023). The Tenth Circuit found that RGF showed a plausible chill and therefore showed an injury-in-fact. "The subjective chill here is obvious: evidence shows that donor privacy is important to RGF and it tailors its speech to avoid triggering donor disclosure requirements. The objective chill is equally obvious: the law punishes violations with penalties including a fine or imprisonment." *Id.* at 1164.

Defendant appears to not be willing to acknowledge or accept the Tenth Circuit's ruling finding that RGF has standing. In response to Plaintiff's Statement of Material Fact no. 3, Defendant asserts that "the SOS denies that RGF has standing, and therefore that the Court has jurisdiction over this matter." Def's Mot. 9. Although Defendant further states that "the SOS does not contend that the Court should enter summary judgment on standing grounds," Def's Mot. 9, Defendant later states that "[i]f 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." Def's Mot. 9. And then: "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." Def's Mot. 12. And these aren't the only places in Defendant's motion where she asserts that Plaintiff lacks standing. *See* Def's Mot. 24 ("RGF lacks standing to challenge the CRA's disclosure for ballot measures, as its proposed advertisements concern candidates, not ballot measures."). Indeed, Section IV of Defendant's motion is entitled "RGF's Generalized Assertions of Retaliation and Harassment Cannot Support Facial Invalidation of the CRA" and effectively argues

that Plaintiff lacks standing to bring a facial challenge to N.M. Stat. Ann. § 1-19-26(N)(3)(c) because "RGF has not offered substantial 'evidence of chilled speech' to be weighed 'against the legislative interests.'" Def's Mot. 32. Because the Tenth Circuit was clear that Plaintiff RGF has shown that its speech was plausibly chilled and that Plaintiff had shown an injury-in-fact, all these arguments by Defendant should be rejected.

Defendant's argument in Section IV of her motion is that Plaintiff does not have standing to challenge the contested statute on its face because Plaintiff cannot bring an overbroad challenge since Plaintiff cannot show that a substantial number of the contested statute's applications are unconstitutional. Defendant further argues that "[t]he 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." Def's Mot. 34. Defendant's circular logic amounts to asserting that Plaintiff cannot bring a facial challenge because Plaintiff is not successful on the merits. Whether a plaintiff had standing to bring a facial challenge is a separate question than whether Plaintiff has a meritorious claim. Defendant is wrong to try to confuse the two separate issues. Further, Defendant's argument in Section IV that Plaintiff cannot bring a facial challenge is contradicted by the Tenth Circuit's holding. And to the extent that Defendant's argument is that Plaintiff's facial challenge is invalid because Plaintiff's argument on the merits fails, then Section IV is simply

repetitive[2] of its arguments on the merits set forth in Sections I and II of its brief, and for the reasons stated in Sections II and III above, those arguments should be rejected.

The remainder of Section IV asserts that Plaintiff does not have standing to bring an as-applied challenge (despite the title of Section IV referring on to Plaintiff's facial challenge). *See* Def's Mot. 32-36. But that argument is irrelevant because Plaintiff has plainly sought relief as a facial challenge, not an as-applied challenge.

CONCLUSION

The Court should grant Plaintiff's motion for summary judgment, deny Defendant's motion for summary judgment, and declare that N.M. Stat. Ann. § 1-19-26(N)(3)(c)—requiring disclosure for persons making independent expenditures that mention a candidate or ballot question within 30 days of a primary election or 60 days of a general election, but do not expressly implicitly advocate for or against a candidate or ballot question—violates the First Amendment.

July 21, 2023

/s/ Jeffrey M. Schwab

[2] The fact that Defendant found space in her motion to make repetitive arguments belies any possible argument that Defendant simply didn't have space to respond to Plaintiff's arguments that the contested statute does not survive strict scrutiny. *See supra* pp. 8-9.

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Certificate of Service

I certify that on July 21, 2023, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Jeffrey M. Schwab
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