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 REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Faced with controlling authority upholding disclosure laws like New Mexico's, Rio Grande Foundation (RGF) bases almost the entirety of its Response to the Secretary's Cross-Motion for Summary Judgment on the contention the challenged provision of New Mexico's definition of "independent expenditure" only covers advertisements that are not campaign advocacy. This argument fails for several, fundamental reasons.

First, it misreads New Mexico law. The challenged definition applies to large advertisements that mention candidates or ballot measures in the 30 or 60 days before an election irrespective of whether or not they advocate for electoral defeat or success. Although other components of the "independent expenditure" definition cover ads containing "express advocacy" or indisputable "appeals to vote," there is a wide range of campaign-related advertising that does not meet these other narrow definitions yet still constitutes campaign advocacy and is covered by the challenged provision during the narrow window of time before an election. The challenged definition does not only apply to ads that merely mention candidates and contain no advocacy.

As well, RGF's argument is contrary to controlling authority upholding similar definitions that apply disclosure laws to pre-election ads mentioning candidates without adding an advocacy requirement. The Supreme Court has recognized that the vast majority of such ads are election-related and that the government has an interest in disclosing their major funders. In fact, RGF's Freedom Index, the proposed ad at issue in this litigation, illustrates that even if ads do not contain express advocacy, most such communications are

at least implied support or criticism of candidates or ballot measures likely to affect an election. RGF contends that "[b]y definition ads under Section 1-19-26(N)(3)(c) are not trying to persuade voters." Pls.' Combined Reply Support Its Mot. Summ. J. & Resp. Opp. Def.'s Mot. Summ. J. (the "Response") (ECF No. 80), at 2. But as the Freedom Index illustrates, while such ads may not expressly advocate the election or defeat of a candidate or be "susceptible to no other reasonable interpretation than as an appeal to vote," large, pre-election ads mentioning candidates may still be designed to persuade voters more implicitly or indirectly. As the Supreme Court and Tenth Circuit have held, disclosure laws may constitutionally extend to such "electioneering communications."

The Secretary of State respectfully requests that, here too, the Court hold that New Mexico's disclosure requirements for pre-election advertisements are constitutional.

STANDARDS OF REVIEW

To begin, although RGF articulates the general standard for facial challenges, it does not refute that its facial challenge to New Mexico's independent expenditure disclosure law is disfavored. Response at 5–6; Sec'y State's Resp. Pls.' Mot. Summ. J. & Cross-Mot. Summ. J. (the "Cross-Motion") (ECF No. 79), at 15. Nor does RGF contest that overbreadth challenges are "employed sparingly and only as a last resort." Cross-Motion at 15 (quoting *United States v. Brune*, 767 F.3d 1009, 1019 (10th Cir. 2014)).

Instead, RGF reasserts its argument based on *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), that because the disclosure law is a content-based regulation of speech, it is subject to strict scrutiny. Response at 6–7. This argument does not refute the wealth of authority

provided in the Secretary's Cross-Motion that disclosure laws are not subject to strict scrutiny—including controlling authority from the Tenth Circuit and Supreme Court. Cross-Motion at 16–18 (discussing, among other cases, *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (plurality op.); *Free Speech v. FEC*, 720 F.3d 788, 792-93 (10th Cir. 2013)). RGF does not offer any contrary authority from the election law context, and in fact recognizes that "courts have tended to apply exacting scrutiny to compelled disclosure requirements." Response at 6. Such laws, which "impose no ceiling on campaign-related activities, and do not prevent anyone from speaking," *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (internal quotation marks and citations omitted), consistently have been analyzed with less scrutiny than speech bans like that in *City of Gilbert*. *See* Cross-Motion at 17–18.

RGF's citation to the Tenth Circuit's opinions in *Initiative & Referendum Institute v. Walker* and *Semple v. Griswold* do not alter this analysis, because those cases do not involve disclosure laws. Response at 7. In *Walker*, the court considered whether a higher-percentage vote requirement for wildlife-related initiatives compared with other initiatives violated the First Amendment. 450 F.3d 1082, 1099 (2006). In concluding that the First Amendment did not apply at all, the court noted in dicta that strict scrutiny applied to regulation of "political speech incident to an initiative campaign." *Id.* at 1099–1100. *Semple* just recapitulated the court's opinion (and dicta) from *Walker*, again rejecting a First Amendment challenge to procedural requirements for initiatives. 934 F.3d 1134, 1142 (2019).

Disclosure laws are also not subject to strict scrutiny under a compelled speech theory. Response at 6–7. This argument, a seeming relic of RGF's dismissed challenge to New Mexico's advertising *disclaimer* law, has even less applicability to a disclosure law. The Campaign Reporting Act's (CRA) requirement that entities that make election-related ads disclose their donors does not "compel a person to speak [the government's] own preferred messages," *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023), but simply requires entities to report information to the State. RGF does not offer authority that extends compelled speech theories to disclosure laws. Were RGF's theory adopted, it would encompass—and subject to strict scrutiny—all governmental reporting requirements as compelled speech. Under clearly controlling precedent, disclaimer laws are subject to exacting scrutiny instead. *See* Cross-Motion at 16–17.

Notwithstanding this authority, if the Court applies strict scrutiny, the Secretary requested that the Court reopen discovery for further litigation under this higher standard. Cross-Motion at 20 n.8. RGF calls this request "baseless and unnecessary," Response at 8, but given that a strict scrutiny standard would be an unprecedented departure from other challenges to disclosure laws, it is warranted. The Secretary believes that New Mexico's disclosure law would survive strict scrutiny as it does exacting scrutiny, but she should be permitted to develop and present additional evidence regarding the strength of the State's interest and the law's narrow tailoring if the Court were to apply this new, higher standard. Additional discovery would not necessarily be from Plaintiff, Response at 8, but the gathering of additional witnesses and documents—including from third parties—to bolster

the State's presentation of its interests. Regardless, the Court need not reach this question, as exacting scrutiny has repeatedly and consistently been applied to challenges like RGF's here.

ARGUMENT

I. RGF's Arguments Rest on a Flawed Reading of the CRA's "Electioneering Communication" Definition as Unrelated to Election Advocacy

The vast majority of RGF's response rests on the mistaken argument that the Section 1-19-26(N)(3)(c)—the challenged provision of the CRA's definition of "independent expenditure"—"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." Response at 10. To the contrary, this definition (the "Electioneering Communication" definition) encompasses large expenditures for advertisements mentioning candidates or ballot measures in the days before an election, regardless of whether the ads expressly advocate, tacitly advocate, implicitly advocate, or just happen to be a sizeable ad about a candidate shortly before an election. N.M. Stat. § 1-19-26(N)(3)(C). To be sure, some of these advertisements *also* fall under the definitions of independent expenditure in Section 1-19-26(N)(3)(1) and (2) if they meet those provisions' narrow definitions of express advocacy or appeals to vote. Even where there isn't overlap and only subsection (3) applies, however, there is a substantial scope of advertising that doesn't expressly advocate election or defeat or "is susceptible to no other reasonable interpretation than as an appeal to vote," but still implicitly or indirectly supports or opposes candidates. Subsection (3) does not exclusively

"require[] disclosures for expenditures that simply mention, but do not expressly or tacitly advocate for or against, a candidate or ballot question…." Response at 11. It covers a range of less explicit advertising about candidates before an election that is still designed to influence voters.

In fact, the CRA's Electioneering Communication definition is very similar to that in federal law. The Bipartisan Campaign Reform Act (BCRA) defines an "electioneering communication" as one which "refers to a clearly identified candidate for Federal office;" is made within 60 days of a general election or 30 days of a primary election; and "is targeted to the relevant electorate." 52 U.S.C. § 30104(f)(3). Like the CRA, BCRA also requires that entities making advertisements "expressly advocating the election or defeat of a clearly identified candidate," 52 U.S.C. § 30101(17) (defining "independent expenditure"), disclose their major funders. 52 U.S.C. § 30104(c). That New Mexico folds its definition of "electioneering communication" into the definition of "independent expenditure"—rather than as two subsections of the same statutory section, as in federal law—does not alter any constitutional analysis. In both laws, both advertisements containing express advocacy and those mentioning candidates before an election have disclosure requirements.

RGF also contests the Secretary's interpretation that the Electioneering Communication definition contains a "political purpose" requirement incorporated through the definition of expenditure. As a result, RGF claims, the definition reaches ads that mention candidates but lack a political purpose. Response at 11–13. First, this interpretive question is immaterial, because even if the definition did not contain a

"political purpose" element, the Supreme Court has recognized that the vast majority of "electioneering communication" ads have a political purpose. *See* Cross-Motion at 11. It noted that "the vast majority of ads" broadcast during the 30- and 60-day periods "clearly had … a purpose" of "influenc[ing] the voters' decisions…." *McConnell v. FEC*, 540 U.S. 93, 206 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310.

Additionally, incorporating a "political purpose" requirement into the CRA's definition of "independent expenditure" does not "make the statute self-contradictory." Response at 12. The challenged, Electioneering Communication definition does not, as VRF contends, only "cover[] independent expenditures that simply mention, but do not explicitly or implicitly advocate for or against, a candidate or ballot measure." *Id.* As discussed above, it also reaches implicit and other non-express advocacy that has a political purpose. Consider the Freedom Index at issue in this litigation. The Freedom Index scores candidates and assigns them red-or-green indicators. *See* Cross-Motion at 21 (describing Freedom Index). These ads praising or criticizing candidates, circulated shortly before an election, may well have a political purpose and constitute independent expenditures, even though they are not "express advocacy" or "appeals to vote" under 1-19-26(N)(1) or (2).[1]

All told, RGF's Response rests on a misapprehension that the CRA's Electioneering Communication definition only encompasses advertisements that do not constitute

[1] RGF contends that "Defendant … 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'" but does not offer any authority for this contention. Response at 12.

advocacy or are campaign related at all. But this definition, like that under federal law, includes major advertisements about candidates or ballot measures before an election regardless of whether they express are advocacy, implied advocacy, or other commentary about candidates or ballot measures. Such a definition is squarely aligned with other disclosure laws that have been upheld by the Supreme Court and Tenth Circuit.

II. New Mexico's Interest in Identifying the Funders of Major Ads About Candidates or Ballot Measures in the Days Before an Election is Well Established, Even Where Such Ads Are Not "Express Advocacy" or "Appeals to Vote"

RGF acknowledges that courts have recognized "an important government interest in knowing who is criticizing or praising candidates or ballot measures." Response at 14. RGF contends that this interest does not apply to the Electioneering Communication definition, however, because "N.M. Stat. Ann. § 1-19-26(N)(3)(c) does not apply to ads that criticize or praise candidates or ballot questions." *Id.* This argument—that is central to RGF's response to the Secretary's Cross-Motion—is flawed in several respects. First, as discussed above, this misinterprets the definition which does apply to ads containing advocacy concerning candidates and ballot measures—including advocacy not covered by the narrow provisions in Section 1-19-26(N)(1) and (2).

Furthermore, the Supreme Court has recognized a governmental interest in identifying the funders of ads mentioning candidates before an election. *See* Cross-Motion at 20–21. RGF's distinction between ads that support or oppose candidates and those that discuss candidates with less clear advocacy is not found in the controlling authority. The

Court in *Citizens United* expressly rejected the contention that "electioneering communication" definitions need only reach express advocacy. 558 U.S. at 368–69. And RGF's contention that such definitions may only reach some undefined scope of implied or tacit advocacy is contrary to the Court's statement that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 368. Given this interest, the Supreme Court and Tenth Circuit have rejected overbreadth challenges to disclosure laws applicable to ads mentioning candidates in the days before an election. *See McConnell v. FEC*, 540 U.S. at 206–07 (rejecting overbreadth challenge to federal definition of "electioneering communication"); *Williams*, 812 F.3d at 798 (holding that Colorado requirements, "given their close similarity to" federal law, "are not overbroad").

RGF's efforts to distinguish this authority are unpersuasive. First, RGF contends that "the federal statute at issue in [*Citizens United*] did not differentiate between communications that expressly and implicitly advocated for or against a candidate and those that simply mentioned a candidate." Response at 14–15. RGF offers no citation for this contention, and as detailed above, *see supra* p. 6, federal law requires disclosures both for express advocacy and "electioneering communications" that are defined similarly to New Mexico law. Case law upholding this federal definition refutes RGF's argument that disclosure laws may only reach speech that advocates for or against a candidate or ballot measure.

Next, RGF backs away from defending the general applicability of *Government State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), and *McIntyre v. Ohio Elections Commission*,

514 U.S. 334 (1995), to this action. Instead, RGF states that the cases "serve only to support Plaintiff's contention that any government interest in informing voters 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 ballot measure." Response at 15. Any such language in these cases, as well as *Buckley v. Valeo's* limitation of a government interest to "express advocacy," to which RGF points next, Response at 16 (citing 424 U.S. 1, 80), has been superseded by the Supreme Court's recognition in *McConnell* and *Citizens United* of a government interest in requiring disclosures of entities funding sizable ads simply *mentioning* candidates in the days before an election.

As the Tenth Circuit has recognized, *Citizens United* rejected the argument that *Buckley* limited disclosure laws to express advocacy. Rather, *Citizens United* upheld the application of such laws to "electioneering communications" that "would be broadcasted within thirty days before primary elections" even though they "did not amount to express advocacy" because disclosure laws can "reach speech that was less explicit in conveying a message about a campaign." *Williams*, 812 F.3d at 794–95. Indeed, RGF does not rebut the Secretary's point that the Supreme Court rejected an invitation in *Citizens United* to extend *McIntyre*'s holding to disclosure laws. Cross-Motion at 23; *see also Gaspee Project v. Mederos*, 13 F.4th 79, 93–94 (1st Cir. 2021) (noting that *McIntyre's* "outright ban on anonymous literature" is "at a considerable remove from a disclosure requirement" and the

"*McIntyre* Court itself distinguished between election-related disclosures and political pamphlets").[2]

Again, RGF's efforts to distinguish the controlling authority in *Citizens United* and *Williams* upholding similar disclosure laws reaching ads mentioning candidates and ballot measures in the days before an election, rests on an incorrect reading of the CRA's Electioneering Communication definition as only reaching "speech that simply mentions but is not expressly or tacitly advocacy." Response at 18. But the CRA, like federal and Colorado law, reaches large advertisements mentioning candidates before an election, whether express advocacy, tacit advocacy, or otherwise. All three laws "reach beyond express advocacy to at least some forms of issue speech," *Williams*, 812 F.3d at 795, and are constitutional under controlling precedent.

The court in *Williams* expressly rejected the plaintiff's argument that a law needs to or can distinguish between "campaign-related" speech and all speech that mentions a candidate before an election. The court's conclusion wasn't that the challenged, Colorado law was permissible because it did not distinguish between campaign-related and non-campaign related speech (a distinction New Mexico law also does not make). Response at

[2] RGF contests whether *McIntyre* applied exacting scrutiny or strict scrutiny. Response at 16–17. Although the Court in *McIntyre* called its standard exacting scrutiny, it also required stricter tailoring and a stronger state interest than that deemed "exacting scrutiny" in disclosure law cases. 514 U.S. 347; *cf. Free Speech v. FEC*, 720 F.3d at 792–93 (requiring "a substantial relation between the disclosure requirement and a sufficiently important governmental interest"); *see also McIntyre*, 514 U.S. at 348 (noting that the state argues the law meets "the strictest standard of review"); *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000) (describing *McIntyre* as a strict scrutiny case).

19. Rather, the court recognized that the general regulation of pre-election ads mentioning candidates serves an important state interest. The Tenth Circuit's discussion, in full, unequivocally supports New Mexico's similar law:

> "[T]he Institute urges that we craft a distinction between what it calls 'campaign-related' issue speech and speech that 'is unambiguously *not* campaign-related.' The latter would be exempt from disclosure requirements even if the former would not. But the reasoning in *Citizens United* precludes that distinction. The Court did not rest its holding on the ground that the public only has an interest in who *references a campaign* shortly before an election. Rather, the Court upheld the application of the statute because of the public's interest 'in knowing who is *speaking about a candidate* shortly before an election.' Thus, in insisting that its ad is not 'related to' a campaign, the Institute begs the question. The logic of *Citizens United* is that advertisements that mention a candidate shortly before an election *are* deemed sufficiently campaign-related to implicate the government's interests in disclosure. While this is obviously an expansion of *Buckley's* disclosure regime, the Court in *Citizens United* was nearly unanimous in applying BCRA's disclosure requirements both to Citizens United's express advocacy *and* to ads that did not take a position on a candidacy."

812 F.3d at 796 (citations omitted). New Mexico's disclosure requirements for ads mentioning candidates and ballot measures before elections, regardless of their degree of advocacy, supports the well-established interest of informing the public of "who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 368.

III. RGF's Efforts to Show That New Mexico's Definition of Independent Expenditure Is Not Narrowly Tailored Are Unavailing

As with RGF's argument about New Mexico's state interest, RGF's narrow tailoring argument similarly rests on a flawed interpretation of the Electioneering Communication definition that *only* reaches communications that are neither express nor implicit advocacy about candidates or ballot measures. Response at 20-21. RGF contends that "[b]ecause

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." Response at 21. As discussed above, this argument rests on both a misreading of the Electioneering Communication definition and controlling authority upholding similar laws. *See supra* Parts I, II. For the same reasons that RGF's arguments attacking the State's interest in its disclosure law fail, its narrow tailoring contention based on those arguments fails too.

RGF makes the additional argument that, if the State is asserting an interest in disclosing the funders of *all* issue advocacy, the CRA is "laughably underinclusive." Response at 22. The Secretary's argument, however, isn't that there should be a disclosure of major funders of all issue advocacy, regardless of its disconnect from an election, but that the State and public have an interest in disclosing the sponsors of ads discussing candidates and ballot measures in the days before an election. Such ads are largely campaign or election-related speech, but may also include some issue advocacy because a narrower definition would permit entities to dodge disclosure laws by avoiding express language. *See McConnell*, 540 U.S. at 206 (vast majority of "electioneering communication" ads have a political purpose); *Williams*, 812 F.3d at 796 ("The logic of *Citizens United* is that advertisements that mention a candidate shortly before an election *are* deemed sufficiently campaign-related to implicate the government's interests in disclosure."); Cross-Motion at 29.

New Mexico's regulation of large advertisements about candidates and ballot measures in a short window of time before an election is narrowly targeted to reach ads

designed and likely to affect the election. The disclosure of who is making and sponsoring such ads provides useful information to voters, promoting the democratic process. Because similar definitions in federal law and Colorado law have been upheld, VRF's argument that New Mexico's Electioneering Communication is not narrowly tailored necessarily fails. *See* Cross-Motion at 28–29 (discussing authority rejecting vagueness and overbreadth challenges to similar laws).

IV. The Secretary Does Not Contest Standing for the Purposes of Summary Judgment, But Points Out That VRF Has Not Established Particularized Harm Undermining the State's Well-Recognized Interest in Disclosure Laws or Meriting an As-Applied Exception

As a final matter, the Secretary does not contest standing for the purpose of summary judgment. Although VRF criticizes the Secretary's denial of its proposed facts regarding standing, Response at 24, these denials simply note that the Secretary is preserving the argument (even though standing is partly jurisdictional) that VRF lacks standing in the event the case goes to trial. This preservation is appropriate, as the Tenth Circuit's ruling was based on the facts viewed in the light most favorable to VRF, Cross Motion at 9, ¶ 3, and VRF's burden to establish standing increases as the litigation proceeds. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (greater burden on summary judgment than at pleadings stage, and "at the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial'" (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)); *Hobby Lobby Stores, Inc. v. Sibelius*, 723 F.3d

1114, 1184–85 (10th Cir. 2013) (evidentiary burden for standing differs based on stage of litigation).

As well, the Secretary's arguments that RGF has not presented specific evidence of retaliation and harassment is not a standing argument. Response at 24–25. Rather, this section of the Secretary's Cross-Motion makes three points. First, that if there is any balancing of interests against the State's interest in informing the electorate, RGF's privacy interests do not undermine that recognized governmental interest. Cross-Motion at 32–33. Second, RGF has not presented any evidence that would warrant an as-applied exception to New Mexico's generally valid law. Cross-Motion at 35–36. Lastly, even if some narrow, as-applied exceptions could be supported based on the harassment of third parties, RGF's facial challenge fails because the vast majority of applications of the law remain constitutional. *See* Cross-Motion at 34, 36.

CONCLUSION

RGF's Response to the Secretary's Cross-Motion for Summary Judgment rests, almost entirely, on the contention that the challenged, Electioneering Communication definition only regulates speech that is not election-related advocacy. This misunderstands the definition, which like federal law, reaches large pre-election ads about candidates irrespective of specific campaign advocacy. The argument also departs from controlling law, which has upheld disclosure laws that define their applicability to ads that mention candidates in the 30 or 60 days before an election. 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.

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CERTIFICATE OF SERVICE

I certify that on August 18, 2023, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ Nicholas M. Sydow
Nicholas M. Sydow