No. 24-2070

United States Court of Appeals for the Tenth Circuit

RIO GRANDE FOUNDATION,
Plaintiff-Appellant,

v.

MAGGIE TOULOUSE OLIVER, *in her official capacity as Secretary of State of New Mexico*,
Defendant-Appellee.

Appeal from the United States District Court
for the District of New Mexico,
No. 19-Cv-01174, Hon. Judith C. Herrera, Presiding

APPENDIX

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*ORAL ARGUMENT REQUESTED

Appendix Table of Contents

APPEAL

U.S. District Court
United States District Court − District of New Mexico (Albuquerque)
CIVIL DOCKET FOR CASE #: 1:19−cv−01174−JCH−JFR

Rio Grande Foundation et al v. Toulouse Oliver
Assigned to: District Judge Judith C. Herrera
Referred to: Magistrate Judge John F. Robbenhaar
Case in other court: Tenth Circuit, 24−02070
Tenth Circuit Court of Appeals, USCA 22−02004
Cause: 42:1983 Civil Rights Act

Date Filed: 12/13/2019
Date Terminated: 03/29/2024
Jury Demand: None
Nature of Suit: 950 Constitutional − State Statute
Jurisdiction: Federal Question

Plaintiff

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Plaintiff

Illinois Opportunity Project represented by

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LEAD ATTORNEY
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Colin Lambert Hunter
(See above for address)
TERMINATED: 08/08/2023

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(See above for address)
ATTORNEY TO BE NOTICED

V.

Defendant

Maggie Toulouse Oliver
in her official capacity as Secretary of State of New Mexico

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TERMINATED: 09/13/2023

Date Filed	#	Docket Text
12/13/2019	1	COMPLAINT *For Civil Rights Violations* against All Defendants (Filing Fee − Online Payment), filed by Rio Grande Foundation. (Attachments: # 1 Civil Cover Sheet)(Hunter, Colin) (Entered: 12/13/2019)
12/13/2019	2	Corporate Disclosure Statement by Rio Grande Foundation identifying Corporate Parent Rio Grande Foundation for Rio Grande Foundation. (Hunter, Colin) (Entered: 12/13/2019)

12/13/2019	3	NOTICE by Rio Grande Foundation *CERTIFICATE OF GOODSTANDING* (Hunter, Colin) (Entered: 12/13/2019)
12/13/2019		United States Magistrate Judge Laura Fashing and United States Magistrate Judge John F. Robbenhaar assigned. (arp) (Entered: 12/13/2019)
12/13/2019	4	PLEASE TAKE NOTICE that this case has been randomly assigned to United States Magistrate Judge Laura Fashing to conduct dispositive proceedings in this matter, including motions and trial. Appeal from a judgment entered by a Magistrate Judge will be to the United States Court of Appeals for the Tenth Circuit. **It is the responsibility of the case filer to serve a copy of this Notice upon all parties with the summons and complaint.** *Consent is strictly voluntary, and a party is free to withhold consent without adverse consequences. Should a party choose to consent, notice should be made no later than 21 days after entry of the Order setting the Rule 16 Initial Scheduling Conference.* For e−filers, visit our Web site at www.nmd.uscourts.gov for more information and instructions. [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (arp) (Entered: 12/13/2019)
12/13/2019		Filing and Administrative Fees Received: $ 400 receipt number 1084−6853371 re 1 Complaint filed by Rio Grande Foundation (Payment made via Pay.gov)(Hunter, Colin) (Entered: 12/13/2019)
12/13/2019		Summons Issued as to Maggie Toulouse Oliver. (arp) (Entered: 12/13/2019)
12/17/2019	5	ASSOCIATION of Attorney Licensed Outside the District for Plaintiff Rio Grande Foundation by Colin Lambert Hunter on behalf of: Daniel R. Suhr Liberty Justice Center 190 S. LaSalle St., Suite 1500 Chicago 3122637668 dsuhr@libertyjusticecenter.org (Association Dues − Online Payment) (Hunter, Colin) [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 12/17/2019)
12/17/2019	6	ASSOCIATION of Attorney Licensed Outside the District for Plaintiff Rio Grande Foundation by Colin Lambert Hunter on behalf of: Jeffrey M. Schwab Liberty Justice Center 190 S. LaSalle St., Suite 1500 Chicago 3122637668 jschwab@libertyjusticecenter.org (Association Dues − Online Payment) (Hunter, Colin) [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 12/17/2019)
12/17/2019		Association Dues Received: $ 100 receipt number 1084−6858040 re: # 5 Association of Attorney Licensed Outside the District, filed by Rio Grande Foundation (Payment made via Pay.gov)(Hunter, Colin) (Entered: 12/17/2019)
12/17/2019		Association Dues Received: $ 100 receipt number 1084−6858056 re: # 6 Association of Attorney Licensed Outside the District, filed by Rio Grande Foundation (Payment made via Pay.gov)(Hunter, Colin) (Entered: 12/17/2019)
01/21/2020	7	ANSWER to 1 Complaint by Maggie Toulouse Oliver. Related document: 1 Complaint filed by Rio Grande Foundation.(Sydow, Nicholas) (Entered: 01/21/2020)
01/21/2020	8	NOTICE of Appearance by Nicholas M Sydow on behalf of Maggie Toulouse Oliver (Sydow, Nicholas) (Entered: 01/21/2020)
01/23/2020	9	INITIAL SCHEDULING ORDER: by Magistrate Judge John F. Robbenhaar. Rule 16(c) Hearing set for 2/25/2020 at 01:00 PM in Albuquerque − 730 Judge John F. Robbenhaar Chambers before Magistrate Judge John F. Robbenhaar. The parties have the option of appearing telephonically by calling Judge Robbenhaars AT&T Conference line at 888−363−4735, Access Code: 2387395, to connect to the

		proceedings. Any party wishing to appear by telephone should inform chambers within twenty−four hours of the scheduling conference by calling (505) 348−2370 or emailing robbenhaarchambers@nmd.uscourts.gov. Unless otherwise notified by the Clerk or the Court a notice of consent or non−consent for this case to proceed before the trial Magistrate Judge should be submitted by each party no later than 2/13/2020. JSR due 2/11/2020. (smd) (Entered: 01/23/2020)
01/24/2020		Set Deadlines/Hearings: Joint Status Report due by 2/11/2020. (aek) (Entered: 01/24/2020)
02/11/2020	11	Joint Status Report by Maggie Toulouse Oliver (Sydow, Nicholas) (Entered: 02/11/2020)
02/14/2020	12	PLEASE TAKE NOTICE that this case has been reassigned to United States District Judge James A. Parker as the trial judge. Under D.N.M.LR−Civ. 10.1, the first page of each document must have the case file number and initials of the assigned judges. ***Accordingly, further documents filed in this matter must bear the case number and the judges' initials shown in the case caption and the NEF for this document.*** Kindly reflect this change in your filings. United States Magistrate Judge Laura Fashing no longer assigned to this case. [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (arp) (Entered: 02/14/2020)
02/14/2020	13	AMENDED COMPLAINT against Maggie Toulouse Oliver., filed by Rio Grande Foundation. (Hunter, Colin) (Entered: 02/14/2020)
02/19/2020	14	NOTICE REGARDING DOCUMENT ENTRIES: Because this case has been reassigned to a district judge, please be advised that any documents filed by the parties under Rule 73(b) have been permanently removed from the docket. Document(s) removed: No. 10. [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (kg) (Entered: 02/19/2020)
02/26/2020	15	Clerk's Minutes for proceedings held before Magistrate Judge John F. Robbenhaar: Rule 16 Scheduling Conference held on 2/25/2020. (smd) Modified on 2/27/2020 to reflect correct date of proceeding (cmm). (Entered: 02/26/2020)
02/26/2020	16	ORDER ADOPTING JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN WITH CHANGES AND SETTING CASE MANAGEMENT DEADLINES by Magistrate Judge John F. Robbenhaar. Amended Pleadings due by 2/28/2020. Fact Discovery due 6/1/2020. Disclosure of Experts due 6/15/2020. Expert Reports due 7/6/2020. Discovery due by 8/24/2020. Discovery Motions due 9/14/2020. Dispositive Motions due by 9/24/2020. Proposed Pretrial Order Plaintiff to Defendant due by 11/9/2020, and from Defendant to the Court due by 11/23/2020. (smd) (Entered: 02/26/2020)
02/27/2020	17	NOTICE of Hearings before District Judge James A. Parker : Pretrial Conference set for 12/3/2020 at 11:00 AM in Albuquerque − 421 Gold, 6th Floor Courtroom; Call of the Calendar set for 1/28/2021 at 11:00 AM in Albuquerque − 421 Gold, 6th Floor Courtroom; Trial set for 2/1/2021 at 09:30 AM in Albuquerque − 421 Gold, 6th Floor Courtroom. (snn) (Entered: 02/27/2020)
02/28/2020	18	ANSWER to 13 Amended Complaint by Maggie Toulouse Oliver.(Sydow, Nicholas) (Entered: 02/28/2020)
02/28/2020	19	CERTIFICATE OF SERVICE by Maggie Toulouse Oliver *for Defendant's Rule 26(a)(1) Disclosures* (Sydow, Nicholas) (Entered: 02/28/2020)
02/28/2020	20	MOTION to Dismiss for Lack of Jurisdiction *Count III of Plaintiffs' Amended Complaint* by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 02/28/2020)
03/12/2020	21	PLEASE TAKE NOTICE that this case has been reassigned to United States District Judge Judith C. Herrera as the trial judge.

		Under D.N.M.LR−Civ. 10.1, the first page of each document must have the case file number and initials of the assigned judges. ***Accordingly, further documents filed in this matter must bear the case number and the judges' initials shown in the case caption and the NEF for this document.*** Kindly reflect this change in your filings. United States District Judge James A. Parker no longer assigned to this case. [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (arp) (Entered: 03/12/2020)
03/13/2020	22	Unopposed MOTION to Dismiss *Count III* by Rio Grande Foundation. (Hunter, Colin) (Entered: 03/13/2020)
05/15/2020	23	ORDER by District Judge Judith C. Herrera finding as moot 20 Defendant's Motion to Dismiss Count III Challenge to Secretary's Rulemaking as Ultra Vires and granting 22 Stipulation to Voluntarily Dismiss Count III of the Amended Complaint. (baw) (Entered: 05/15/2020)
05/15/2020	24	Unopposed MOTION to Amend/Correct 16 Order Adopting Joint Status Report,,, Set Scheduling Order Deadlines,, by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 05/15/2020)
05/18/2020	25	ORDER GRANTING MOTION TO AMEND CASE MANAGEMENT DEADLINES by Magistrate Judge John F. Robbenhaar. Defendant's Unopposed Motion 24 to Extend Deadlines is GRANTED. Fact Discovery deadline is 8/3/2020. Expert Witness Identities due by 8/17/2020. Expert Witness Reports due by 9/8/2020. Discovery due by 10/26/2020. Discovery Motions due by 11/16/2020. Dispositive Motions due by 11/30/2020. Pretrial Order Plaintiffs to Defendant due by 1/11/2021, and Defendants to the Court due by 1/25/2021. IT IS FURTHER ORDERED THAT ALL TRIAL−RELATED DATES ARE VACATED. The 2/1/2021 Trial, and all associated dates set on 2/27/2020 17 are VACATED, and will be reset at a later date. (smd) (Entered: 05/18/2020)
07/02/2020	26	CERTIFICATE OF SERVICE by Maggie Toulouse Oliver *for Defendant's First Set of Discovery* (Sydow, Nicholas) (Entered: 07/02/2020)
08/05/2020	27	Joint MOTION to Amend/Correct 25 Order,,, Set Deadlines,, 16 Order Adopting Joint Status Report,,, Set Scheduling Order Deadlines,, *to Stay or Postpone Discovery Deadlines* by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 08/05/2020)
08/06/2020	28	ORDER by Magistrate Judge John F. Robbenhaar granting 27 Joint Motion to Amend Case Management Order to Stay or Postpone Discovery Deadlines. The Court stays the existing deadlines in the Case Management Order (Doc. 25) until a ruling on Plaintiffs' anticipated motion for preliminary injunction. THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED. (kc) (Entered: 08/06/2020)
08/07/2020	29	NOTICE of Hearing: Status Conference set for 8/18/2020 at 10:00 AM in Remote via Zoom before District Judge Judith C. Herrera. (emr) NOTE: 1. This proceeding will be held via Zoom Video/Web Conferencing with all participants appearing remotely; the Zoom ID and Passcode will be provided separately to the participants email address of record. 2. Participants should connect to the proceeding 15 minutes prior its scheduled start time to allow time for trouble−shooting of any connectivity issues. 3. To ensure the record is of the best quality participants are encouraged to utilize a headset to reduce static and background noise; if not using a headset participants must ensure the audio feed at their location is muted when not speaking. *** REMINDER: Recording or broadcasting of this hearing is prohibited. ***

		[THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 08/07/2020)
08/07/2020	30	NOTICE of Appearance by Neil R Bell on behalf of Maggie Toulouse Oliver (Bell, Neil) (Entered: 08/07/2020)
08/07/2020	31	ORDER by District Judge Judith C. Herrera regarding deadline for Preliminary Injunction. (baw) (Entered: 08/07/2020)
08/14/2020	32	ORDER vacating status conference by District Judge Judith C. Herrera. Given that the Court has entered a briefing schedule and there were no objections filed thereto, the Court finds no need for a status conference at this time. [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (emr) (Entered: 08/14/2020)
08/25/2020	33	MOTION for Preliminary Injunction *And Memorandum of Law In Support Thereof* by Rio Grande Foundation. (Attachments: # 1 Declaration of Matthew Besler, # 2 Declaration of Paul Gessing) (Hunter, Colin) (Entered: 08/25/2020)
08/26/2020	34	ORDER by District Judge Judith C. Herrera. Plaintiff filed a Motion for Preliminary Injunction 33 on August 25, 2020. If either party desires to present evidence in support or opposition to this motion, the party must file a written request for an evidentiary hearing on or before September 1, 2020. The Court will interpret the parties failure to submit a request by that deadline as an admission that no evidentiary hearing is necessary and that the Court may decide the motion on the briefs. In light of health concerns arising from the COVID−19 pandemic, the Court is prepared to host any evidentiary hearing via ZOOM to prevent the spread of COVID−19. All counsel, parties, and witnesses who will attend any hearing must make efforts to have access to a device with ZOOM capabilities by the time of any hearing date. [THIS IS A TEXT ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (baw) (Entered: 08/26/2020)
09/08/2020	35	RESPONSE in Opposition re 33 MOTION for Preliminary Injunction *And Memorandum of Law In Support Thereof* filed by Maggie Toulouse Oliver. (Attachments: # 1 Exhibit A (The Gaspee Project v. Mederos)) (Sydow, Nicholas) (Entered: 09/08/2020)
09/23/2020	36	**FILED IN ERROR** RESPONSE in Support re 33 MOTION for Preliminary Injunction *And Memorandum of Law In Support Thereof* filed by Rio Grande Foundation. (Hunter, Colin) Modified on 9/23/2020 per call on help desk(meq). (Entered: 09/23/2020)
09/23/2020	37	REPLY to Response to Motion re 33 MOTION for Preliminary Injunction *And Memorandum of Law In Support Thereof* filed by Rio Grande Foundation. (Hunter, Colin) (Entered: 09/23/2020)
10/14/2020	38	MEMORANDUM OPINION AND ORDER by District Judge Judith C. Herrera denying Plaintiffs' Motion for Preliminary Injunction and Memorandum of Law in Support Thereof 33 . (baw) (Entered: 10/14/2020)
10/15/2020	39	ORDER SETTING TELEPHONIC STATUS CONFERENCE by Magistrate Judge John F. Robbenhaar. Telephonic Status Conference set for 10/20/2020 at 11:00 AM before Magistrate Judge John F. Robbenhaar. Counsel are to call Judge Robbenhaar's AT&T conference line five minutes before the conference begins at (888) 363 4735 and enter the code 2387395 to connect to the proceedings. THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED. (smd) (Entered: 10/15/2020)
10/21/2020	40	Clerk's Minutes for proceedings held before Magistrate Judge John F. Robbenhaar: Status Conference held on 10/20/2020. Plaintiffs shall submit the parties proposed discovery parameters and case management deadlines by Friday, October 23, 2020. (smd) (Entered: 10/21/2020)
10/23/2020	41	Joint Status Report *and Updated Discovery Plan* by Maggie Toulouse Oliver (Sydow, Nicholas) (Entered: 10/23/2020)

10/26/2020	42	ORDER AMENDING CASE MANAGEMENT DEADLINES by Magistrate Judge John F. Robbenhaar. Plaintiffs' responses to Defendant's First Set of Discovery: November 23, 2020; All fact discovery completed: February 23, 2021; Parties' disclosure of expert witness identities: March 9, 2021; Parties' disclosure of expert witness reports: April 6, 2021; Termination date for all discovery: May 4, 2021; Motions related to discovery to be filed: May 18, 2021; Pretrial motions other than discovery motions: June 1, 2021; Pretrial order, Plaintiffs to Defendants: July 1, 2021; Pretrial order, Defendants to Plaintiffs: July 15, 2021. (smd) (Entered: 10/26/2020)
10/29/2020	43	REVISED AMENDED ORDER SETTING CASE MANAGEMENT DEADLINES by Magistrate Judge John F. Robbenhaar. The prior Amended Order Setting Case Management Deadlines 42 is revised in the following manner: Pretrial Order due from Defendant to the Court by 7/15/2021. (smd) (Entered: 10/29/2020)
10/29/2020	44	NOTICE of Hearing: Call of the Calendar set for 8/5/2021 at 01:30 PM and Bench Trial set for 8/16/2021 at 09:00 AM in Albuquerque − 420 Mimbres Courtroom before District Judge Judith C. Herrera. (Attachments: # 1 Supplement) (emr) (Entered: 10/29/2020)
02/23/2021	45	Joint MOTION to Amend/Correct 43 Order,, Set Deadlines, *to Extend Discovery Deadline by 45 Days* by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 02/23/2021)
02/24/2021	46	ORDER by Magistrate Judge John F. Robbenhaar granting 45 Motion to Amend/Correct Case Management Deadlines. Deadlines are amended as follows: (a) Depositions of fact witnesses complete: April 9, 2021; (b) Parties disclosure of expert witness identities: April 23, 2021; (c) Parties disclosure of expert witness reports: May 21, 2021; (d) Termination date for all discovery: June 18, 2021; (e) Motions related to discovery to be filed: July 2, 2021; (f) Pretrial motions other than discovery motions: July 16, 2021; (g) Pretrial order, Plaintiffs to Defendants: August 16, 2021; (h) Pretrial order, Defendants to Plaintiffs: August 30, 2021. (smd) (Entered: 02/24/2021)
02/24/2021		Set/Reset Scheduling Order Deadlines: Discovery due by 6/18/2021. Motions due by 7/16/2021. Proposed Pretrial Order due by 8/30/2021. (smd) (Entered: 02/24/2021)
04/02/2021	47	CERTIFICATE OF SERVICE by Maggie Toulouse Oliver *for Notices of Deposition* (Sydow, Nicholas) (Entered: 04/02/2021)
05/11/2021	48	NOTICE of Hearing: Call of the Calendar reset for 1/6/2022 at 01:30 PM and Jury Selection/Jury Trial reset for 1/24/2022 at 09:00 AM in Albuquerque − 420 Mimbres Courtroom before District Judge Judith C. Herrera. (Attachments: # 1 Supplement) (emr) (Entered: 05/11/2021)
07/15/2021	49	Joint MOTION to Amend/Correct 46 Order on Motion to Amend/Correct,, *to Adopt Briefing Schedule for Parties' Summary Judgment Briefing* by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 07/15/2021)
07/16/2021	50	ORDER by District Judge Judith C. Herrera granting 49 Joint Motion to Amend Briefing Schedule for Parties' Summary Judgment Briefing. [THIS IS A TEXT ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (baw) (Entered: 07/16/2021)
07/16/2021	51	NOTICE of Appearance by Diego R Esquibel on behalf of Illinois Opportunity Project, Rio Grande Foundation (Esquibel, Diego) (Entered: 07/16/2021)
07/16/2021	52	MOTION for Summary Judgment by Illinois Opportunity Project, Rio Grande Foundation. (Esquibel, Diego) (Entered: 07/16/2021)
07/26/2021	53	Amended MOTION for Summary Judgment by Illinois Opportunity Project, Rio Grande Foundation. (Stern, Jordy) (Entered: 07/26/2021)
08/26/2021	54	Unopposed MOTION to Amend/Correct 50 Order on Motion to Amend/Correct *Summary Judgment Briefing Schedule* by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 08/26/2021)
08/27/2021	55	ORDER by District Judge Judith C. Herrera granting 54 Defendant's Unopposed Motion to Amend Summary Judgment Briefing Schedule. Defendant's Response due 09/03/21, Plaintiff's Reply due 09/28/21, Defendants Reply due 10/22/21.[THIS IS A TEXT ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (baw) (Entered: 08/27/2021)

09/03/2021	56	Cross MOTION for Summary Judgment *and Response to Plaintiffs' Motion for Summary Judgment* by Maggie Toulouse Oliver. (Attachments: # 1 Exhibit 1 (Gessing Dep.), # 2 Exhibit 2 (Besler Dep.), # 3 Exhibit 3 (RGF Postcard), # 4 Exhibit 4 (RGF Printing Invoice), # 5 Exhibit 5 (RGF Mailing Invoice)) (Sydow, Nicholas) (Entered: 09/03/2021)
09/28/2021	57	REPLY to Response to Motion re 53 Amended MOTION for Summary Judgment *and Response in Opposition to Defendant's Cross Motion for Summary Judgment* filed by Illinois Opportunity Project, Rio Grande Foundation. (Stern, Jordy) (Entered: 09/28/2021)
10/22/2021	58	REPLY to Response to Motion re 56 Cross MOTION for Summary Judgment *and Response to Plaintiffs' Motion for Summary Judgment* filed by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 10/22/2021)
11/08/2021	59	NOTICE of Briefing Complete by All Defendants re 53 Amended MOTION for Summary Judgment filed by Illinois Opportunity Project, Rio Grande Foundation, 56 Cross MOTION for Summary Judgment *and Response to Plaintiffs' Motion for Summary Judgment* filed by Maggie Toulouse Oliver (Sydow, Nicholas) (Entered: 11/08/2021)
12/09/2021	60	MEMORANDUM OPINION AND ORDER by District Judge Judith C. Herrera denying as moot 52 Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support Thereof, denying 53 Plaintiffs' Amended Motion for Summary Judgment and Memorandum of Law in Support Thereof for lack of standing and granting 56 Defendant's Response to Plaintiffs Motion for Summary Judgment and Cross−Motion for Summary Judgment. The remaining claims in this case are dismissed based on Plaintiff's lack of Article III standing. (baw) (Entered: 12/09/2021)
12/09/2021	61	FINAL ORDER OF DISMISSAL by District Judge Judith C. Herrera. (baw) (Entered: 12/09/2021)
01/07/2022	62	NOTICE OF APPEAL by Illinois Opportunity Project, Rio Grande Foundation. (Filing Fee − Online Payment) (Stern, Jordy) (Entered: 01/07/2022)
01/08/2022	63	USCA Appeal Fees received Online $ 505 receipt number ANMDC−8064720 re 62 Notice of Appeal filed by Illinois Opportunity Project, Rio Grande Foundation (bap) [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 01/10/2022)
01/10/2022	64	Transmission of Preliminary Record to US Court of Appeals re 62 Notice of Appeal (Attachments: # 1 PROA) (mjr) (Entered: 01/10/2022)
01/11/2022	65	USCA Information Letter with Case Number USCA 22−2004 for 62 Notice of Appeal filed by Illinois Opportunity Project, Rio Grande Foundation. (gr) (Entered: 01/11/2022)
01/25/2022	66	TRANSCRIPT ORDER FORM by Illinois Opportunity Project, Rio Grande Foundation for the 62 Notice of Appeal (Stern, Jordy) (Entered: 01/25/2022)
01/26/2022	67	NOTICE TO USCA that Record is Complete re 62 Notice of Appeal. (mjr) (Entered: 01/26/2022)
02/09/2023	68	MANDATE of USCA as to 62 Notice of Appeal filed by Illinois Opportunity Project, Rio Grande Foundation. The judgment of that court is affirmed in part and reversed in part. 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. We accordingly REVERSE the dismissal of RGF's challenge to the disclosure requirement and REMAND to the district court. We otherwise AFFIRM the decision of the district court. (Attachments: # 1 Opinion, # 2 Judgment) (gr) (Entered: 02/10/2023)
03/02/2023	69	ORDER SETTING STATUS CONFERENCE by Magistrate Judge John F. Robbenhaar. Telephone Status Conference set for 3/14/2023 at 09:30 AM before Magistrate Judge John F. Robbenhaar. Counsel will call Judge Robbenhaar's AT&T Teleconference Line at (888) 363−4735, Access Code 2387395, to connect to the proceedings. [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (ajp)

		(Entered: 03/02/2023)
03/02/2023	70	NOTICE by Maggie Toulouse Oliver *of Withdrawal of Counsel (Neil Bell)* (Sydow, Nicholas) (Entered: 03/02/2023)
03/06/2023	71	NOTICE by Illinois Opportunity Project, Rio Grande Foundation (Stern, Jordy) (Entered: 03/06/2023)
03/15/2023	72	Clerk's Minutes for proceedings held before Magistrate Judge John F. Robbenhaar: Telephone Status Conference held on 3/14/2023 at 9:30 a.m. (ajp) (Entered: 03/15/2023)
03/17/2023	73	ORDER SETTING DEADLINES AND PAGE LIMITS ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT by Magistrate Judge John F. Robbenhaar. (ajp) (Entered: 03/17/2023)
04/13/2023	74	MOTION for Extension of Time to File by Rio Grande Foundation. (Stern, Jordy) (Entered: 04/13/2023)
04/18/2023	75	ORDER GRANTING 74 Unopposed Motion for an Extension of Time to File Motion for Summary Judgment by Magistrate Judge John F. Robbenhaar (ajp) (Entered: 04/18/2023)
05/05/2023	76	MOTION for Summary Judgment by Rio Grande Foundation. (Schwab, Jeffrey) (Entered: 05/05/2023)
05/31/2023	77	Unopposed MOTION to Amend/Correct 75 Order on Motion for Extension of Time to File *to Provide Extension for Defendant's Opening Summary Judgment Brief* by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 05/31/2023)
06/01/2023	78	ORDER by District Judge Judith C. Herrera granting 77 Unopposed Motion to Amend Summary Judgment Briefing Schedule. Defendant's principal brief and opposition (including statement of material facts) to be filed by June 26, 2023; Plaintiff's reply and opposition to be filed by July 21, 2023; and Defendant's reply to be filed by August 11, 2023. (baw) [THIS IS A TEXT ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (Entered: 06/01/2023)
06/26/2023	79	*Cross−Motion for Summary Judgment and* RESPONSE re 76 MOTION for Summary Judgment filed by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 06/26/2023)
07/21/2023	80	REPLY to Response to Motion re 76 MOTION for Summary Judgment *and Response re 79 Motion for summary judgment* filed by Rio Grande Foundation. (Schwab, Jeffrey) (Entered: 07/21/2023)
08/02/2023	81	Unopposed MOTION to Amend/Correct 78 Order on Motion to Amend/Correct, *Briefing Schedule to Extend Deadline to File Defendant's Summary Judgment Reply by 7 Days Until August 18, 2023* by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 08/02/2023)
08/07/2023	82	ORDER by Magistrate Judge John F. Robbenhaar GRANTING 81 Unopposed Motion to Amend Briefing Schedule for Defendant's Summary Judgment Reply. Reply due 08/18/2023. [THIS IS A TEXT−ONLY ENTRY. THERE ARE NO DOCUMENTS ATTACHED.] (ajp) (Entered: 08/07/2023)
08/18/2023	83	REPLY *in Support of Secretary of State's Cross−Motion for Summary Judgment* re 80 Reply to Response to Motion filed by Maggie Toulouse Oliver. (Sydow, Nicholas) (Entered: 08/18/2023)
09/06/2023	84	NOTICE by Maggie Toulouse Oliver re 79 Response *of Supplemental Authority* (Sydow, Nicholas) (Entered: 09/06/2023)
09/07/2023	85	NOTICE of Briefing Complete by Maggie Toulouse Oliver re 76 MOTION for Summary Judgment filed by Rio Grande Foundation (Sydow, Nicholas) (Entered: 09/07/2023)
09/12/2023	86	NOTICE of Attorney Substitution: Aletheia Allen substituted for Nicholas M. Sydow (Allen, Aletheia) (Entered: 09/12/2023)

03/29/2024	87	MEMORANDUM OPINION AND ORDER by District Judge Judith C. Herrera DENYING 76 Plaintiff's Combined MOTION for Summary Judgment ; GRANTING 79 Defendant's Response to 76 MOTION for Summary Judgment . Count I, the last remaining count in this case, is DISMISSED. (cmm) (Entered: 03/29/2024)
03/29/2024	88	FINAL JUDGMENT by District Judge Judith C. Herrera. (cmm) (Entered: 03/29/2024)
04/24/2024	89	NOTICE OF APPEAL as to 87 Memorandum Opinion and Order, 88 Judgment by Rio Grande Foundation. (Filing Fee − Online Payment) (Schwab, Jeffrey) (Entered: 04/24/2024)
04/24/2024		Filing Fee Received: $ 605 receipt number ANMDC−9326768 re 89 Notice of Appeal filed by Rio Grande Foundation (Payment made via Pay.gov)(Schwab, Jeffrey) (Entered: 04/24/2024)
04/25/2024	90	Transmission of Preliminary Record to US Court of Appeals re 89 Notice of Appeal (Attachments: # 1 Preliminary Record) (fs) (Entered: 04/25/2024)
04/25/2024	91	USCA Information Letter with Case Number 24−2070 for 89 Notice of Appeal filed by Rio Grande Foundation. (cmm) (Entered: 04/25/2024)
05/02/2024	92	TRANSCRIPT ORDER FORM by Rio Grande Foundation for the 89 Notice of Appeal (Schwab, Jeffrey) (Entered: 05/02/2024)
05/02/2024		Appeal Remark re 89 Notice of Appeal : Minute order filed − Notice due that record is complete by 05/09/2024 for Mitchell R. Elfers, Clerk of Court (oclk). (Text Only − No Attachment) (fs) (Entered: 05/02/2024)
05/02/2024	93	NOTICE TO USCA that Record is Complete re 89 Notice of Appeal. (fs) (Entered: 05/02/2024)

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

RIO GRANDE FOUNDATION and **ILLINOIS OPPORTUNITY PROJECT**,

Plaintiffs,

v.

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

Defendant.

Case No. 1:19-cv-01174-LF-JFR

FIRST AMENDED COMPLAINT

Pursuant to Fed. Rule of Civ. Pro. 15(a)(1)(B), Plaintiffs file this first amended complaint as of right within the window of time provided by the Rule.

INTRODUCTION

1. Stretching back to the founding era and *The Federalist Papers*, the freedom of speech has included the right to engage in anonymous issue advocacy concerning important public issues. *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995).

2. Similarly, the freedom of association includes the right of private individuals to band together for common purposes without government prying in to those associations' membership or donor lists. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

3. A core insight of the founding era was the necessity of separated powers, wherein each branch of government respected its appropriate role. The founders of the State of New Mexico incorporated this principle into their state constitution. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015 (interpreting N.M. Const. art. III, § 1).

4. Defendant Maggie Toulouse Oliver, secretary of state of New Mexico, is responsible for implementing New Mexico's campaign finance regime, including New Mexico Admin. Code 1.10.13 ("the Rule") and 2019 Senate Bill 3 ("the Bill"). The Rule and the Bill both require groups that engage in issue advocacy at times proximate to an election to register with Oliver's agency, disclose their members and contributors, and place a sponsorship disclaimer on their materials.

5. Plaintiffs Rio Grande Foundation (RGF) and Illinois Opportunity Project (IOP) intend to engage in issue advocacy in New Mexico during the window of time designated in the Rule and the Bill. Thus, if Plaintiffs were to engage in their planned issue advocacy, they would be required to register, disclose their donors, and place sponsorship disclaimers on their materials.

6. In order to protect the privacy of and on behalf of themselves and their donors, Plaintiffs bring this suit under 42 U.S.C. § 1983, seeking declaratory

and injunctive relief to protect the core First Amendment rights to free speech and association.

PARTIES

7. Plaintiff Rio Grande Foundation (RGF) is a 501(c)(3) charitable organization based in Santa Fe, Santa Fe County, New Mexico. It is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens. It does this by informing New Mexicans of the importance of individual freedom, limited government, and economic opportunity. It engages in issue advocacy around topics central to its mission and publishes the "Freedom Index," a real-time vote scorecard tracking legislators' positions on free-market issues.

8. Plaintiff Illinois Opportunity Project (IOP) is a 501(c)(4) social-welfare organization based in Chicago, Cook County, Illinois. It seeks to promote the social good and common welfare by educating the public about policy that is driven by the principles of liberty and free enterprise. Increasingly, it is engaging in issue advocacy in states beyond Illinois. Member disclosure laws are one policy of great concern to IOP.

9. Maggie Toulouse Oliver is secretary of state of New Mexico. She works in Santa Fe, Santa Fe County, New Mexico. She is sued in her official capacity.

JURISDICTION AND VENUE

10. This case raises claims under the First and Fourteenth Amendments of the United State Constitution and 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

11. Venue is appropriate under 28 U.S.C. § 1391(b)(1) and (2) because Defendants are located in and a substantial portion of the events giving rise to the claims occurred in the District of New Mexico, Santa Fe Division.

FACTUAL ALLEGATIONS

12. In March 2017, the New Mexico State Legislature adopted 2017 Senate Bill 96 (SB 96), which would have amended New Mexico's campaign finance statutes to, among other things, require reporting of independent expenditures. Secretary Toulouse Oliver enthusiastically supported SB 96, but Governor Susana Martinez vetoed the bill on April 7, 2017. S. Exec. Mess. No. 56 (Apr. 7, 2017). The Governor was concerned that "[t]he requirements in this bill would likely discourage charities and other groups that are primarily non-political from advocating for their cause and could also discourage individuals from giving to charities." *Id*.

13. That same day, Secretary Toulouse Oliver declared her office's policy priority: "Campaign finance reform and transparency continue to be *a top priority for me* and my office." Press Release, Sec. of State, Secretary Disappointed by Vetoes (Apr. 7, 2017) (emphasis added). The Secretary drew one conclusion from the Governor's SB96 veto: "I'm left with no other choice then to go forward utilizing my rulemaking authority to address many of these much needed reforms before the next statewide election." *Id*.

14. The Secretary ultimately adopted the Rule on September 8, 2017, as 1.10.13 NMAC (10/10/2017). Sec. of State, Notice of Adoption Campaign Finance R. (Sept. 8, 2017). She acknowledged that the "rule contain[ed] some features of Senate Bill 96, which passed both chambers of the New Mexico state legislature … but was vetoed by Governor Susana Martinez." Press Release, Sec. of State, Final Campaign Finance Rule (Sept. 8, 2017). The Rule marked a substantial evolution beyond the text of New Mexico's existing campaign finance statutes.

15. The Rule expanded the definition of "independent expenditure" to include any advertisement which "refers to a clearly identified candidate or ballot measure and is published and disseminated to the relevant electorate in New Mexico within 30 days before the primary election or 60 days before the general election in which the candidate or ballot measure is on the ballot." 1.10.13.7(Q)(3)(c) NMAC. This has the practical effect of automatically

categorizing all issue advocacy referring to candidates, including incumbents seeking reelection, or ballot measures as an electioneering activity as long as it is done proximate in time to an election.

16. The Rule requires disclosure of all donors of $5,000 or more in the previous twelve months to an organization's general fund if the organization uses the general fund to spend at least $3,000 on a non-statewide race or ballot measure and $7,500 on a statewide race or ballot measure. 1.10.13.11(D)(2) NMAC. Failure of an organization sponsoring such independent expenditures to register and report can result in fines of $50 per day up to $5,000. 1.10.13.15(E) NMAC.

17. In March 2019, the New Mexico State Legislature adopted and the governor signed into law 2019 Senate Bill 3 (the Bill), an act related to campaign finance. In relevant part, the Bill significantly expanded the definition of "independent expenditure" under New Mexico state law to include any advertisement or other communication 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). Like the Rule's new definition, this has the practical effect of automatically categorizing all issue advocacy referring to

candidates, including incumbents seeking reelection, or ballot measures as an electioneering activity as long as it is done proximate in time to an election.

18. The Bill became effective July 1, 2019. 2019 Senate Bill 3, Section 18. Though the Bill authorizes the Secretary of State to promulgate rules to implement its provisions, Toulouse Oliver has not done so, instead leaving the 2017 Rule on the books.

19. Because of the Bill, Plaintiffs and all other groups that engage in issue advocacy valued above certain thresholds are now required to register with Oliver as political committees. N.M. Stat. Ann. § 1-19-26.1(C).

20. Because of the Bill, Plaintiffs and similar groups will be required to disclose their members and contributors to Oliver. In the case of smaller expenditures, i.e., those worth under $3,000 in a nonstatewide election or under $9,000 in a statewide election, committees must disclose the name, address, and amount given of any person who has made contributions over $200 in the election cycle that were earmarked for or in response to a solicitation to fund independent expenditures. N.M. Stat. Ann. § 1-19-27.3(C).

21. In the case of larger expenditures, worth more than $3,000 (nonstatewide) or $9,000 (statewide), where those expenditures are funded by the committee's general fund, the committee must also disclose the name, address, and

amount given of donors of over $5,000 during the election cycle to the organization's general fund. N.M. Stat. Ann. § 1-19-27.3(D)(2).

22. Oliver posts the independent expenditure reports filed by committees on her agency's website, https://portal.sos.state.nm.us/IESearch/, so that anyone will be able to see donors' information.

23. The new definition of independent expenditure also means that when Plaintiffs engage in issue advocacy close in time to an election, they must include a sponsorship disclaimer identifying their sponsorship of the advertisement. N.M. Stat. Ann. § 1-19-26.4.

24. New Mexico is holding a general election on November 3, 2020. The ballot will include the races for the State Senate and State House, including incumbents who voted on the Bill. It will also include a referendum vote on a ballot measure to make the Public Regulation Commission an appointed rather than elected body. The PRC regulates utility companies, transportation companies, infrastructure companies, insurance companies and other public companies.

25. Plaintiffs engage in issue advocacy on issues that relate to their mission. They feel strongly that issue advocacy is a protected right under the First Amendment.

26. RGF wishes to share its legislator scorecard with thousands of New Mexico voters in advance of the November 2020 election. In particular, it plans to

make paid communications by mail to thousands of voters within 60 days of the 2020 general election. These mailings will include names and pictures of incumbent legislators who are candidates for reelection, along with information on their voting record in the legislature. These mailings will cost over $3,000 in any particular legislative district. They will be funded from RGF's general fund. RGF will also continue to host the scorecard on its website.

27. IOP wishes to communicate its views on the nature of accountable, democratic government to thousands of New Mexico voters in advance of the November 3, 2020 general election. In particular, it plans to make paid communications by mail to thousands of voters within 60 days of the 2020 general election. These mailings will provide information about the ballot proposition but will not tell voters how IOP believes they should vote. These mailings will cost over $9,000 statewide. They will be funded from IOP's general fund.

28. Plaintiffs intend to engage in substantially similar speech in future New Mexico elections.

29. RGF and IOP receive support from a variety of sources, including from donors of more than $5,000 per year. RGF raises money from New Mexico donors to support its mission, and IOP desires to solicit financial support from donors within New Mexico to support its mission.

30. RGF and IOP sometime solicit funds to support a specific issue advocacy initiative, and other times each raises general funds to support their general operations, and then the general fund pays for their issue advocacy efforts.

31. Both Plaintiffs are concerned that compelled disclosure of their donors could lead to substantial personal and economic repercussions for their supporters. Across the country, individual and corporate donors to political candidates and issue causes are being subject to boycotts, harassment, protests, career damage, and even death threats for publicly engaging in the public square. Plaintiffs fear that their donors may also encounter similar reprisals from activists if their donations are made public. Oliver's posting of all donor information on the Internet makes this fear of harassment and retaliation all the more real, as it exposes national or multinational donors to harassment from anywhere in the world.

32. Both Plaintiffs are also concerned that if their donors are disclosed, their membership and revenue will decline as donors prioritize their anonymity over supporting Plaintiffs' work.

33. If Plaintiffs engage in this issue advocacy but fail to register, file the required reports, or include the required disclaimers, their officers will be subject to punishment as a misdemeanor with a $1,000 fine or one year in jail or both. N.M. Stat. Ann. § 1-19-36. Plaintiffs as corporate entities may also be subject to

civil penalties of $1,000 for each violation not to exceed a total of $20,000. N.M. Stat. Ann. § 1-19-34.6(B). They may also be subject to fines up to $5,000 from the Secretary of State's office. 1.10.13.15(E) NMAC.

34. Plaintiffs therefore bring this pre-enforcement challenge on behalf of themselves and their donors to vindicate their First Amendment rights. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (setting the standard for pre-enforcement challenges). Plaintiffs intend to engage in a course of conduct affected with constitutional interest (namely its issue advocacy). If they moved forward with their course of conduct, their sponsorship and their donors would be subject to disclosure.

35. Because of these potential harms, Plaintiffs will be forced to silence their own speech and not engage in their desired communications so long as these provisions of the Bill are in force.

36. Plaintiffs have no remedy at law.

COUNT I

By requiring Plaintiffs to disclose their members and supporters, Oliver violates the First and Fourteenth Amendments.

37. The allegations contained in all preceding paragraphs are incorporated herein by reference.

38. Plaintiffs and their donors enjoy a right to privacy in their association for free speech about issues. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Gibson v. Fla. Legislative Investigation Comm*., 372 U.S. 539 (1963). This right to privacy in association for free speech is protected by the First Amendment as incorporated against the states. *Id*. The Rule and the Bill violate that right by requiring disclosure of donations, ending the privacy of the speech-oriented association.

39. The Rule and the Bill cannot meet the required level of scrutiny. The U.S. Supreme Court has only found a compelling interest in membership-disclosure regulations when the association was engaged in or advocating for illegal activity. *Familias Unidas v. Briscoe*, 619 F.2d 391, 401 (5th Cir. 1980) ("The disclosure requirements in [*Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961)] and [*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928)] attached only to organizations either having a demonstrated track record of illicit conduct or explicitly embracing, as doctrine, plainly unlawful means and ends."). Plaintiffs have no track record of illicit conduct nor have they embraced plainly unlawful means and ends; each is a legitimate non-profit organization engaged in issue advocacy. The government lacks a compelling interest in forcing them to disclose their members and supporters.

40. Plaintiffs and their members and supporters are entitled to an injunction under 42 U.S.C. § 1983 enjoining the continued enforcement of N.M. Stat. Ann. §§ 1-19-27.3(C) and (D)(2) and 1.10.13.11 NMAC as applied to Plaintiffs and other organizations engaged in issue advocacy.

COUNT II

By requiring Plaintiffs to register and disclose their sponsorship of issue advocacy, Oliver violates the First and Fourteenth Amendments.

41. The allegations contained in all preceding paragraphs are incorporated herein by reference.

42. Plaintiffs enjoy a right to anonymity in its free speech about issues, a right protected by the First Amendment as incorporated against the states. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). The Rule and the Bill violate that right by requiring Plaintiffs to first register with Oliver before engaging in issue speech and to put a disclaimer announcing their sponsorship on all of their issue-advocacy.

43. The Rule and the Bill affect direct issue speech, not express advocacy concerning candidates or ballot measures. *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-37 (7th Cir. 2014) (government does not have "a green light to

impose political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate.").

44. Plaintiffs are entitled to an injunction under 42 U.S.C. § 1983 enjoining the continued enforcement of N.M. Stat. Ann. § 1-19-26.1(C) (registration) and § 1-19-26.4 (disclaimer) and 1.10.13.11 NMAC as applied to Plaintiffs and other persons or organizations engaged solely in issue advocacy.

COUNT III

The Rule is ultra vires because Oliver acted beyond her constitutional authority to promulgate it.

45. The allegations contained in all preceding paragraphs are incorporated herein by reference.

46. The Rule violates Article III, Section 1 of the New Mexico Constitution by disrupting the proper balance between legislative and executive branches in two principal ways, either one of which would suffice to entitle the Petitioners to relief. First, the Rule arrogated the Legislature's exclusive Article IV prerogatives to establish public policy and to make law. Second, the Rule nullified the Governor's exclusive Article IV, Section 22 prerogative of veto and preempted the Legislature's exclusive Article IV, Section 22 prerogative of veto override. To date the Secretary has never issued rules pursuant to the authority purportedly advanced by the legislature under the Bill. Thus, all the Rule continues to violate

the New Mexico Constitution subsequent to the Bill's passage and that Rule must be struck as *ultra vires.*

47. The Secretary of State may not enact her policy preferences into law. Administrative agency policymaking violates the separation of powers when an executive department agency assumes the authority to modify existing law or to create new law. *See State ex rel. Sandel*, 1999-NMSC-019. The Secretary arrogated legislative prerogatives unto her executive department office by unconstitutionally amending the fundamental standards and vital policy choices of the New Mexico's then-extant campaign finance act.

48. The Supreme Court of New Mexico in the seminal case of *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, prohibited the type of assertion of authority the Rule attempts. It affirmed the application of these principles to the Secretary of State in *Unite N.M. v. Oliver*, 2019-NMSC-009.

49. The Rule reflects Oliver's attempt to circumvent the lawmaking process, the governor's veto, and constitutional requirements of bicameralism and presentment. It ignores the fundamental limits of Oliver's role, which only includes the authority to promulgate rules implementing statutes, not to make major policy decisions out of whole cloth and threaten fines on anyone who fails to comply with her policy preferences.

50. The passage of the Bill does not cure the infirmities with the Rule. As the Bill is unconstitutional as earlier alleged, it cannot support these rules. The Secretary did not and could not rely on a future piece of legislation that came after her usurpation of the legislative function. She has not issued new regulations in accord with the Bill and those in the Rule hang in air unsupported by statutory or constitutional scaffolding. Acts that offend the New Mexico Constitution are void *ab initio*. It is important to specifically analyze and enjoin the Rule separate from the Bill, as the Rule in some instances sets lower thresholds for reporting and disclosure than the Bill.

PRAYER FOR RELIEF

Plaintiffs Rio Grande Foundation and Illinois Opportunity Project respectfully requests that this Court:

a. Declare that the independent expenditure provisions of 2019 Senate Bill 3 and 1.10.13 NMAC as applied to issue advocacy such as Plaintiffs' compel member and supporter disclosure in violation the right to freedom of speech and association under the First and Fourteenth Amendments;

b. Declare that the independent expenditure provisions of 2019 Senate Bill 3 and 1.10.13 NMAC as applied to issue advocacy such as

Plaintiffs' compel sponsor registration and disclaimer in violation of the right to anonymous speech under the First and Fourteenth Amendments;

c. Enjoin the application of the independent expenditure provisions of 2019 Senate Bill 3 and 1.10.13.11 NMAC as applied to organizations engaged in issue advocacy such as Plaintiffs'; and

d. Vacate 1.10.13 NMAC (10/10/2017), as unconstitutional pursuant to Article III, Section 1 of the New Mexico Constitution; and

e. Award Plaintiffs their costs and attorneys' fees under 42 U.S.C. § 1988; and

f. Award any further relief to which Plaintiffs may be entitled.

Dated: February 13, 2020

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*Pro hac vice

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

RIO GRANDE FOUNDATION and **ILLINOIS OPPORTUNITY PROJECT**, Plaintiffs, v. **MAGGIE TOLOUSE OLIVER**, in her official capacity as Secretary of State of New Mexico, Defendant.	Case No. 1:19-cv-01174 DECLARATION OF PAUL GESSING

DECLARATION OF PAUL GESSING

Pursuant to 28 U.S.C. § 1746, I declare that the following facts are true, to the best of my knowledge, information, and belief:

1. Plaintiff Rio Grande Foundation (RGF) is a 501(c)(3) charitable and educational organization based in Santa Fe, Santa Fe County, New Mexico. It is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens. It does this by informing New Mexicans of the importance of individual freedom, limited government, and economic opportunity.
2. I am president of RGF and its chief executive officer. As president, I am responsible for overseeing the organization's fundraising efforts and its

advocacy efforts. I personally engage in substantial fundraising and oversee our director of giving.

3. RGF engages in issue advocacy in New Mexico on issues that relate to its mission.
4. RGF feels strongly that issue advocacy and citizen privacy are protected rights under the First Amendment.
5. RGF publishes a "Freedom Index" which tracks New Mexico state legislators' floor votes on bills important to RGF. In advance of the November 2020 general election, RGF plans to publicize the results of its "Freedom Index." In particular, IOP plans to spend over $3,000 in individual legislative districts making paid communications by mail to thousands of New Mexico voters within 60 days of the 2020 general election. These mailings will mention the name of an incumbent legislator and provide information about their votes and score on the Freedom Index.
6. RGF intends to engage in substantially similar issue speech in future New Mexico elections.
7. RGF receives general-fund support from a variety of sources, including from multiple donors over $5,000. Some donors give over $5,000 in a single contribution, and others may give over $5,000 total in a two-year cycle.

8. Currently, besides direct donors to RGF's express advocacy efforts in the City of Santa Fe, RGF's list of members, supporters, and donors is private. RGF promises its donors privacy when they make their contributions. RGF has in place policies and practices to educate staff about the importance of protecting donor privacy.

9. RGF fears that if its members, supporters, and donors are disclosed, they may be subject to official retaliation. I am personally aware of at least one past instance where individuals or organizations affiliated with certain causes or candidates in New Mexico were threatened with or experienced retaliation from other leaders in the public square.

10. RGF fears that if its members, supporters, and donors are disclosed, they may be subject to retaliation and harassment by intolerant elements in society. I am personally aware of instances where donors to organizations with similar views were subject to retaliation and harassment, including boycotts, online harassment, and social ostracism.

11. 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 in fundraising. I know that several donors who support RGF would not continue to do so if they were subject to disclosure.

12. RGF fears that that if its members, supporters, and donors are disclosed, the target audiences for its advocacy messages may focus on who is paying for the messages rather than on the ideas presented in the messages themselves.

13. RGF believes that the focus of our conversation in the public square should be on ideas and principles rather than sources of funding and sponsors.

14. RGF works on several issues that directly impact public-employee unions, including collective-bargaining reform, pension reform, and school choice. RGF has been extremely active on labor issues including providing "expert witness" testimony on Right to Work legislation in both 2015 and 2016. The Foundation has long been an advocate for worker freedom.

15. RGF works on Second Amendment issues; one of the bills on its Freedom Index was a so-called "red flag" law that would limit Second Amendment freedoms.

16. RGF works on environmental and energy issues, including a recent event RGF hosted featuring a "climate change skeptic." RGF has worked extensively in opposition to "renewable portfolio mandates" on electricity production/consumption (including SB 489, which passed in 2019). We have

also hosted events featuring skeptics of climate change, including James Taylor of Heartland Institute and Peter Singer of the University of Virginia.

17. RGF is directly critical of some public officials, including the governor and members of the New Mexico Legislature. For instance, RGF has been active in questioning the COVID-19 mandates that the government of New Mexico has imposed

18. Based on my observation of the experiences of other leaders and organizations that have taken on public-employee unions so directly, RGF fears that its donors may be subject to retaliation by union interests.

19. Based on the experiences of other organizations that have supported economic-liberty candidates who are also supporters of traditional marriage, RGF fears that its donors may be subject to harassment by activists.

20. Based on the experiences of other organizations that have supported Second Amendment rights and have questioned climate-change policy, RGF fears that its donors may be subject to harassment by activists.

21. Based on the experiences of others, RGF fears that its donors may be subject to negative responses by government officials whom RGF criticizes.

22. Based on the experiences of other organizations, RGF fears that if its donors are disclosed, some of its donors will stop giving under pressure from activists who virulently disagree with RGF's work on controversial issues.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 19, 2020

Paul Gessing

Paul Gessing, declarant

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

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

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MOTION

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

INTRODUCTION

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

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

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

PROPOSED STATEMENT OF MATERIAL FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL STANDARD

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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Certificate of Service

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

/s/ Jordy L. Stern
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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

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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

[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).

RGF's Alleged Harassment and Retaliation

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.

[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

Summary Judgment

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).

Facial Challenges

"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).

[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

[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

[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.

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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

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
Jeffrey M. Schwab

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

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

RIO GRANDE FOUNDATION,

Plaintiff,

v. No. Civ. 1:19-cv-01174-JCH-JFR

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

Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court are cross motions for summary judgment: *Plaintiff's Combined Motion for Summary Judgment and Memorandum of Law* (ECF No. 76), filed by Plaintiff Rio Grande Foundation ("Plaintiff" or "RGF"), and the *Secretary of State's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment* (ECF No. 79), filed by Defendant Maggie Toulouse Oliver, in her capacity as Secretary of State of New Mexico ("Defendant" or "the Secretary"). Plaintiff seeks summary judgment on Count I of the Amended Complaint, the only remaining count in the case, to enjoin the Secretary from enforcing certain disclosure provisions of 2019 New Mexico Senate Bill 3 ("SB 3"). More specifically, RGF asserts that Section 1-19-26(N)(3)(c) violates the First Amendment by unconstitutionally infringing on speech that amounts to issue advocacy, not electioneering speech. Defendant, in urging the Court to deny RGF's motion, argues that New Mexico's disclosure laws are substantially related and narrowly tailored to the public interest in knowing who is making large election-related advertisements about a candidate or ballot measure shortly before an election. For the same reasons, Defendant seeks summary judgment in her favor on Count I. In considering the Secretary's motion first, and viewing the facts in favor of RGF, the Court

concludes that Section 1-19-26(N)(3)(c) satisfies exacting scrutiny and does not violate the First Amendment. Accordingly, Defendant's cross-motion for summary judgment will be granted. Turning then to RGF's motion for summary judgment, and viewing the facts in favor of the Secretary, the Court will deny RGF's motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. SB 3

Effective July 1, 2019, SB 3 became law, which amended the New Mexico Campaign Reporting Act ("CRA") to include disclaimer and disclosure requirements for certain electioneering communications. Campaign Reporting Act, ch. 262, 2019 N.M. Laws § 1 (codified as amended at N.M. Stat. Ann. §§ 1-19-26.4, 27.3; *id.* at § 2-21-1).[1] A person who knowingly or willfully violates the CRA shall be punished by a fine of not more than $1,000 or by imprisonment for not more than a year or both. N.M. Stat. Ann. § 1-19-36(A). The state ethics commission may also institute an action for relief for violations of the CRA, including a civil penalty of up to $1,000 for each violation, not to exceed a total of $20,000. *Id.* § 1-19-34.6(B).

The CRA, as amended, requires political committees to register with the Secretary and to disclose (1) the name of the committee, including any sponsoring organization, and its address; (2) a statement of the committee's purpose; (3) the names and addresses of the officers of the committee; and (4) an identification of any bank account used for contributions or expenditures. N.M. Stat. § 1-19-26.1(B) and (C). The parties here do not dispute that RGF is a political committee within the meaning of the CRA.

[1] RGF and former Plaintiff Illinois Opportunity Project ("IOP") challenged the disclaimers in advertisements provision of SB 3 in Count II. This Court granted summary judgment to Defendant on Count II, concluding that both Plaintiffs lacked standing to challenge the disclaimer provision. (Mem. Op. and Order 13-14, 18-19, ECF No. 60.) The Tenth Circuit affirmed that portion of the decision, so the disclaimer provisions are no longer at issue. *See Rio Grande Foundation v. Oliver*, 57 F.4th 1147, 1162 (10th Cir. 2023). The Court will thus only set forth the relevant provisions of SB 3 that pertain to the disclosure requirements.

SB 3 also amended the CRA to require that any person making an independent expenditure or an aggregated independent expenditure during an election cycle that exceeds $1,000 in a nonstatewide election or $3,000 in a statewide election to file a report with the Secretary. *Id.* § 1-19-27.3(A)(1). The report must include: (1) the name and address of the person making the independent expenditure; (2) the name and address of the person to whom the independent expenditure was made and the amount, date, and purpose of the independent expenditure; and (3) the source of the contributions used to fund the independent expenditure, as set forth in Subsections C and D. *Id.* § 1-19-27.3(B).

According to Subsection C, for independent expenditures of $3,000 or less in a nonstatewide election or $9,000 or less in a statewide election, the person making the independent expenditure must disclose in the report to the Secretary "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 the amount of each such contribution. *Id.* § 1-19-27.3(C). For independent expenditures of more than $3,000 in a nonstatewide election or more than $9,000 in a statewide election, Subsection D provides that the person making such independent expenditures must either:

> (1) if the expenditures were made exclusively from a segregated bank account consisting only of funds contributed to the account by individuals to be used for making independent expenditures, report the name 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 made in whole or part from funds other than those described in Paragraph (1) of this subsection, report 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; provided, however, that a contribution is exempt from reporting pursuant to this paragraph 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).

Under the CRA, an "independent expenditure" is "an expenditure" that is:

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

N.M. Stat. Ann. § 1-19-26(N). The CRA defines an "expenditure" as "a payment, transfer or distribution or obligation or promise to pay, transfer or distribute any money or other thing of value for a political purpose." N.M. Stat. Ann. § 1-19-26(M). A "political purpose" under the CRA "means for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate." *Id.* § 1-19-26(S).

According to the CRA, the Secretary must make the disclosures electronically searchable by the public via the internet. *See* N.M. Stat. Ann. § 1-19-32(C). Independent expenditure reports

are posted on the Secretary of State's website and are publicly searchable. (Pl.'s UF ¶ 12, ECF No. 76.)

B. RGF and the Freedom Index

1. Undisputed Facts

Rio Grande Foundation is an established 501(c)(3) charitable organization and research institute based in New Mexico. (Pl.'s Combined Mot. for Summ. J. ("Pl.'s MSJ"), Undisputed Fact (hereinafter "Pl.'s UF") ¶ 1, ECF No. 76.) Dedicated to increasing liberty and prosperity for all New Mexico's citizens, RGF informs New Mexicans of the importance of individual freedom, limited government, and economic opportunity. (*Id.*) RGF engages in issue advocacy on topics central to its mission. (*Id.*) It has been speaking out in state and local matters since 2000. (Def.'s UF ¶ H, ECF No. 79.)

RGF publishes an online "Freedom Index" that tracks legislators' floor votes on bills that are important to RGF. (Pl.'s UF ¶ 1, ECF No. 76; Def.'s Resp. 12, ECF No. 79 at 14 of 39 (admitting RGF publishes its Freedom Index on its website); Gessing Decl. ¶ 5, ECF No. 33-2; Gessing Dep. 38:10-21, ECF No. 56-1.) RGF's publication of the Freedom Index has to date been online. (Gessing Dep. 38:10-21). RGF did not mail any postcards with Freedom Index results. (Gessing Dep. 53:20-54:8, ECF No. 56-1.) Instead, RGF mailed a taxpayer pledge card and did some social media advertising at a lower expense. (*Id.*)

RGF receives financial support for its general fund from a variety of sources, including multiple donors over $5,000. (Pl.'s UF ¶ 15, ECF No. 76.) Some donors give over $5,000 in a single-election contribution, while others give over $5,000 total in a two-year cycle. (*Id.*)

RGF subjectively fears that if its donors are disclosed, they may be subject to retaliation and harassment by intolerant members of society. (*See* Pl.s' UF ¶ 17, ECF No. 76; Def.'s Resp. ¶

17, ECF No. 79 (admitting for purposes of this motion that RGF alleges a fear of harassment of its donors if their identities are disclosed).) RGF also subjectively fears that if its donors are disclosed, some donors may stop contributing to RGF out of fear of retaliation and harassment by intolerant members of society. (*See* Pl.s' UF ¶ 18, ECF No. 76; Def.'s Resp. ¶ 18, ECF No. 79 (admitting for purposes of this motion that RGF alleges a fear of lost donations if its donors' identities are disclosed).) RGF admits that it is not aware of any harassment or retaliation of its employees or donors. (Defs.' UF ¶ J, ECF No. 79.)

2. Disputed facts

The parties dispute the extent to which RGF made or would make independent expenditures to circulate the Freedom Index via mail. According to RGF's president, RGF planned to mail its Freedom Index to thousands of New Mexico voters within 60 days of the November 2020 general election. (*See* Gessing Decl. ¶¶ 2, 5, ECF No. 33-2.) The mailed communication would have named the incumbent legislator and provided information on the legislator's votes and score on the Freedom Index. (*Id.*) RGF's president stated that RGF intended to spend over $3,000 in individual legislative districts on the mail campaign, and that it intends to engage in substantially similar issue speech in future New Mexico elections. (*Id.* ¶ 6.) But he testified that, because of SB 3's disclosure requirements, RGF will withhold spending above the $3,000 threshold per legislative district for the foreseeable future. (Gessing Dep. 74:5-20, ECF No. 56-1.)

The Secretary disputes the facts in the foregoing paragraph, relying on evidence from RGF's president that, prior to 2020, RGF did not make independent expenditures in amounts great enough to trigger SB 3's reporting obligations. (*See* Gessing Dep. 34:3-35:7, ECF No. 56-1.) The Secretary contends that RGF's failure to engage in expenditures prior to 2020 in amounts

sufficient to trigger the disclosure requirements of SB 3 suggests the opposite inference can be made – that RGF does not have future plans to engage in substantially similar issue speech in future New Mexico elections. As additional support, the Secretary cites the following testimony from RGF's president: when asked about specific contemplated mailings that would cost more than $3,000 in any legislative district, he admitted that "the only thing that we have kind of even contemplated," was on a mailing for a special federal election that is "outside of the scope of this direct lawsuit." (*Id.* at 75:2-77:2.)

Additionally, the parties dispute the objective reasonableness of RGF's fear of donor harassment and retaliation and fear of loss of donors' financial contributions resulting from disclosure of their identities. According to RGF's president, he is personally aware of instances where donors to organizations with similar views were subject to retaliation and harassment, including boycotts, online harassment, and social ostracism. (Gessing Decl. ¶ 10, ECF No. 33-2.) Based on Mr. Gessing's fundraising experience, he and RGF believe that RGF's members, supporters, and potential donors will be less likely to contribute to its mission if their identities are disclosed. (Gessing Decl. ¶ 11, ECF No. 33-2.) RGF's president knows of several donors who support RGF that would not continue to do so if they were subject to disclosure. (*Id.*)

The Secretary, however, denies that there is a record of any significant retaliation or harassment of RGF that would substantiate the fears. Even though RGF's president said 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 his deposition, he could not recall any details regarding this instance. (*Id.*) RGF's president testified in his April 2021 deposition 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. (*See* Def.'s UF ¶ K, ECF No. 79.)

In April 2021, RGF had not made and did not have any plans to make expenditures on the hot-button issues – labor, the Second Amendment, the environment, or energy—that it flagged as raising a risk of retaliation. (*Id.*) RGF's president testified that, 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 made public. (Defs.' UF ¶ L, ECF No. 79.)

C. Procedural History

Plaintiff RGF and former Plaintiff IOP filed suit against the Secretary in December 2019. In their amended complaint filed in February 2020, they asserted that, by requiring them to disclose their financial supporters and identify themselves in the mailings they intended to make shortly before the November 3, 2020, general election, Defendant violated their First and Fourteenth Amendment rights. (*See* Am. Compl. ¶¶ 26-27, 37-44, ECF No. 13.) Plaintiffs requested injunctive and declaratory relief that would enjoin the enforcement of the disclosure provisions in SB 3 (Count I) and of the registration and disclaimer provisions in SB 3 (Count II). (*See id.* ¶¶ 37-44.)[2]

Plaintiffs then moved the Court for a preliminary injunction, based on how SB 3 "applied to Plaintiffs and other issue advocacy organizations." (Pls.' Mot. for Preliminary Injunction 6, ECF No. 33 at 11 of 31.) This Court denied the motion, concluding that Plaintiffs had not shown a substantial likelihood of success on the merits. (Mem. Op. and Order 1, 27, ECF No. 38.)

After the 2020 election passed, the parties filed cross-motions for summary judgment. This time, Plaintiffs made a facial challenge to SB 3. (*See* Pl.'s Am. Mot. for Summ. J. 6, ECF No. 53 at 8 of 30.) In response and in cross-motion, the Secretary argued Plaintiffs lacked standing to bring a facial challenge to SB 3 because they were not injured by the challenged

[2] Plaintiffs previously voluntarily dismissed Count III of the Amended Complaint, an ultra vires challenge to the Secretary's rulemaking under the CRA. (*See* Stipulation to Voluntarily Dismiss Count III, ECF No. 22.)

laws, and alternatively, that the laws were constitutional because they were narrowly tailored to serve important informational interests. (*See* Def.'s Resp. and Cross-Mot. for Summ. J. 1-2, ECF No. 56 at 3-4 of 39.) This Court granted the Secretary's motion for summary judgment based on lack of Article III standing, and thus, did not address the merits of Plaintiffs' claims. (*See* Mem. Op. and Order 2, 18, ECF No. 60.) On appeal, the Tenth Circuit reversed this Court's dismissal of RGF's challenge to the disclosure requirement (Count I), but it affirmed this Court's decisions to dismiss IOP for lack of standing and to dismiss RGF's challenge to the disclaimer provisions (Count II) for lack of standing. *See Rio Grande Foundation v. Oliver*, 57 F.4th 1147, 1167 (10th Cir. 2023).

After remand, RGF and the Secretary filed cross-motions for summary judgment on the merits of RGF's only remaining claim, Count I. The Court will first address the Secretary's motion before turning to RGF's motion.[3]

II. SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the moving party initially bears the burden of showing that no genuine issue of material fact exists. *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993). Once the moving party meets its burden, the nonmoving party must show that genuine issues remain for trial. *Id.* The nonmoving party must go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and

[3] The Secretary argued in her cross-motion that RGF lacks standing to challenge the CRA's disclosure requirements for independent expenditures for advertisements referring to ballot measures, because its proposed ads do not discuss ballot measures. (Def.'s Cross Mot. 24, ECF No. 79 at 26 of 39.) The Secretary, however, does not contend the Court should enter summary judgment based on standing, but notes that the Secretary may contest RGF's standing at trial. (*See* Def.'s Cross-Mot. 9, ECF No. 79 at 9 of 11; Def.'s Reply 14, ECF No. 83 at 16 of 18.) Indeed, the Tenth Circuit previously ruled on the summary judgment record that RGF has standing to mount a facial challenge to SB3 based on RGF's past engagement of issue advocacy in New Mexico, its intent to engage in substantially similar issue speech in future elections in New Mexico, and its tailoring of its speech to avoid triggering SB3's donor disclosure requirements. *See Rio Grande Foundation v. Oliver*, 57 F.4th 1147, 1158-59, 1163-65 (10th Cir. 2023). Given the Tenth Circuit's failure to limit the type of facial challenge RGF can make, the Court will consider each of RGF's arguments in support of its facial challenge to SB3 that are in its summary judgment briefs.

admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1527 (10th Cir. 1995).

Cross-motions for summary judgment must be treated separately, and the denial of one does not require the grant of the other. *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000) (quoting *Buell Cabinet Co. v. Sudduth*, 608 F.2d 431, 433 (10th Cir.1979)). When considering cross-motions for summary judgment, a court may assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is inappropriate if material factual disputes nevertheless exist. *Id.* When, as here, the government restricts speech, "the Government bears the burden of proving the constitutionality of its actions." *McCutcheon v. Federal Election Com'n*, 572 U.S. 185, 210 (2014) (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000)).

III. ANALYSIS

The First Amendment prohibits the government from abridging the freedom of speech and assembly and protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Effective advocacy is enhanced by group association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). "[P]rivacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462. Consequently, as long recognized by the Supreme Court, "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental

action." *Americans for Prosperity Foundation v. Bonta*, 594 U.S. __, 141 S.Ct. 2373, 2382 (2021) (quoting *NAACP*, 357 U.S. at 462). *See also Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"). The CRA's disclosure requirements implicate these First Amendment speech and associational rights for RGF and its financial supporters.

A. Defendant's Cross-Motion for Summary Judgment

RGF in Count I of the Amended Complaint seeks the issuance of an injunction enjoining Defendant from enforcing the disclosure requirement for persons making independent expenditures as defined by N.M. Stat. Ann. § 1-19-26(N)(3)(c). The parties agree that RGF brings a facial challenge to § 1-19-26(N)(3)(c).

1. Standard for facial challenges

Generally, on a facial challenge to a law, the plaintiff must "establish that no set of circumstances exists under which the [law] would be valid," or must show that the law lacks "a plainly legitimate sweep." *Bonta*, 141 S.Ct. at 2387 (quoting, respectively, *United States v. Salerno*, 481 U.S. 739, 745, (1987), and *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)). The Supreme Court recognizes another type of facial challenge in First Amendment cases: "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.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange*, 552 U.S. at 449, n.6). "To succeed in an overbreadth challenge, thereby invalidating *all* enforcement of the law, a challenger must show that the potential chilling effect on protected expression is both real and substantial." *United States v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014) (internal quotations omitted). The plaintiff must show from the

text of the law and from actual fact that substantial overbreadth exists. *Harmon v. City of Norman*, 981 F.3d 1141, 1153 (10th Cir. 2020).

Facial challenges, however, are disfavored because they often rely on speculation, run contrary to the principle of judicial restraint, and frustrate the intent of elected representatives. *Washington State Grange*, 552 U.S. at 450-51. The Tenth Circuit has said that a facial challenge "is best understood as a challenge to the terms of the statute, not hypothetical applications," and is resolved "by applying the relevant constitutional test to the challenged statute without attempting to conjure up whether or not there is a hypothetical situation in which application of the statute might be valid." *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 917 (10th Cir. 2016) (internal quotations omitted).

RGF argues that the disclosure requirements for ad expenditures covered by Section 1-19-26(N)(3)(c) are facially unconstitutional under both traditional facial analysis and the overbreadth doctrine. (Pl.'s Combined Reply 6, ECF No. 80.) The Court's analysis of the Secretary's motion for summary judgment begins with determining the relevant constitutional test for First Amendment challenges to electoral disclosure laws. *See Bonta*, 141 S.Ct. at 2385-87. After setting forth the reasons why exacting scrutiny applies, rather than strict scrutiny, and what the exacting scrutiny standard entails, the Court turns to an explanation of why the Secretary has met the State's burden of showing that Section 1-19-26(N)(3)(c) survives that level of scrutiny. Finally, the Court summarizes why the record before it, construed in RGF's favor, does not support its facial challenge.

2. Exacting scrutiny, not strict scrutiny, applies to the CRA's campaign disclosure requirements

Relying on *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), RGF urges the Court to use strict scrutiny, arguing that the disclosure law is a content-based restriction. "Content-based

laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163. A content-based regulation is one that "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* According to RGF, Section 1-19-26(N)(3)(c) is content-based because it targets speech due to the topic discussed – mentioning a candidate or ballot question close to an election.

Reed, however, is not a disclosure law case. Using strict scrutiny, the Supreme Court in *Reed* struck down an ordinance that imposed more stringent restrictions on signs directing the public to meetings of a nonprofit group than on signs conveying other messages. *Reed*, 576 U.S. at 159. In the specific context of electoral disclosure laws, Supreme Court and Tenth Circuit precedent forecloses RGF's argument that strict scrutiny applies.

The Supreme Court first enunciated the exacting scrutiny standard in *Buckley*, a campaign finance case, and it continued to invoke it in other election-related settings, such as in *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 366-67 (2010). *Bonta*, 141 S.Ct. at 2383. The Tenth Circuit likewise adheres to this precedent in applying exacting scrutiny to campaign disclosure requirements. *See*, *e.g.*, *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1243 (10th Cir. 2023) ("Reflecting disclosure laws' lighter touch, we review their constitutionality under the 'exacting scrutiny' standard of review."); *Independent Institute v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016) (as to challenges to laws compelling disclosure of donors who make political contributions or expenditures, the government must satisfy exacting scrutiny); *Free Speech v. Federal Election Com'n*, 720 F.3d 788, 792-93 (10th Cir. 2013) (applying exacting scrutiny when analyzing plaintiff's First Amendment challenge to FEC rules and policies implementing disclosure requirements). This Court is not at liberty to buck precedent by

determining that this electoral disclosure law is a content-based restriction requiring strict scrutiny review, so the Court must reject RGF's invitation to do so.

While exacting scrutiny applies based on long-standing precedent, the contours of exacting scrutiny in compelled disclosure cases under the First Amendment was recently clarified by the Supreme Court in *Bonta*. Pre-*Bonta*, under the exacting scrutiny standard, to uphold a disclosure law, there had to be a substantial relation between the sufficiently important governmental interest and the information that must be disclosed. *See Buckley*, 424 U.S. at 64; *Citizens United*, 558 U.S. at 366-67. "To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 561 U.S. 186, 196 (2010) (internal quotations omitted). The Supreme Court in *Bonta* toughened the exacting scrutiny review by adding a narrow tailoring requirement, but it did so with split opinions on the proper standard of review. *See Bonta*, 141 S.Ct. at 2383-84. A closer look at *Bonta* is useful to the analysis here.

In the *Bonta* case, the Supreme Court reviewed a California law that demanded charitable organizations file with the state Attorney General their Schedule B to IRS Form 990, a document that discloses the names and addresses of donors who contributed more than $5,000 in a tax year, or in some cases, who gave more than 2% of an organization's total contributions. *Id.* at 2380. The petitioners, tax-exempt charities subject to the California law, declined to file their Schedule Bs with the State, fearing the risk of reprisals and a drop in contributions caused by donors' loss of anonymity. *See id.* They challenged the disclosure requirement on its face and as applied to them on First Amendment grounds. *Id.* A majority of the Supreme Court concluded that California's blanket demand for Schedule Bs from charitable organizations was facially unconstitutional. *Id.* at 2385, 2391.

In so holding, the three-Justice plurality of Justices Roberts, Kavanaugh, and Barrett confirmed once more that the standard of review for First Amendment challenges to compelled disclosure is "exacting scrutiny." *Bonta*, 141 S.Ct. at 2383. They clarified, however, that exacting scrutiny review in this context requires not only a substantial relation between the law and a sufficiently important government interest, but also that the disclosure regime must "be narrowly tailored to the government's asserted interest." *Id.* Justice Thomas concurred that California's disclosure requirement violated the First Amendment, but he would have used strict scrutiny review. *Id.* at 2389-90. Justices Alito and Gorsuch concluded that California's law failed both exacting scrutiny and strict scrutiny, so it was unnecessary to decide which standard should be applied in the case or whether the same level of scrutiny should apply in all First Amendment compelled disclosure cases. *Id.* at 2391-92. Although they declined to decide which standard, Justices Alito and Gorsuch agreed "that the exacting scrutiny standard drawn from our election-law jurisprudence has real teeth" and "requires both narrow tailoring and consideration of alternative means of obtaining the sought-after information." *Id.* at 2391. Consequently, a majority agreed that the standard for disclosure laws in the election-law context requires narrowly tailoring. *See id.* at 2385, 2390-91.

Following *Bonta*, the Tenth Circuit in *Wyoming Gun Owners* determined that the Supreme Court, having declined to overturn precedent, continues to apply the exacting scrutiny standard to campaign disclosure laws, but with a more stringent review. *Wyoming Gun Owners*, 83 F.4th at 1244. Accordingly, the government must demonstrate a substantial relation between a disclosure law's burden and an important governmental interest, and that the law is "narrowly tailored to the government's asserted interest." *Id.* (quoting *Bonta*, 141 S. Ct. at 2383). This inquiry requires a court to consider "the extent to which the burdens are unnecessary," *id.*

(quoting *Bonta*, 141 S. Ct. at 2385), viewing whether less drastic means may achieve the same basic purpose, *id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

Applying exacting scrutiny here, this Court explains in Subsection (a) how the Secretary demonstrated a substantial relation between the CRA's disclosure burdens and an important governmental interest. Subsection (b) lays out how the CRA is narrowly tailored to the informational interest.

a. The Secretary has shown a substantial relation to an important governmental interest

RGF argues that the State does not have an important interest in informing the public of the donors of issue advocacy. According to RGF, there is no important informational interest in the disclosure of donors funding ads that simply mention, but do not advocate for or against, a candidate or ballot question. RGF further asserts that, even if the State has such an interest, Section 1-19-26(N)(3)(c) does not further that interest. In this subsection, the Court will first address the strength of the informational interest before turning to the fit between the CRA and the interest.

1) New Mexico has a sufficiently important interest in Section 1-19-26(N)(3)(c)

Section 1-19-26(N)(3)(c) defines an "independent expenditure" as an expenditure that pays for an advertisement that "refers to a clearly identified candidate or ballot question." Communications that do not expressly advocate for the election or defeat of a clearly identified candidate or ballot issue are issue advocacy, not express advocacy. *See Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 456-57, 469-71 (2007) (describing campaign speech or its functional equivalent as express advocacy while speech about public issues or speech that mention a candidate for office is issue advocacy). RGF's Freedom Index, a scorecard

about specific legislators' votes, mentions incumbent legislators by name, but does not exhort the public to vote for or against a specific candidate. The scorecard thus constitutes issue advocacy. Consequently, RGF's ads and other ads Section 1-19-26(N)(3)(c) targets constitute informational issue advocacy. *Cf. id.* at 470, 476 (discussing how ads that support or oppose legislation and urging citizens to contact their representative are issue advocacy, because the ads are something other than an appeal to vote for or against a specific candidate); *Delaware Strong Families v. Attorney Gen. of Delaware*, 793 F.3d 304, 309 (3d Cir. 2015) ("By selecting issues on which to focus, a voter guide that mentions candidates by name and is distributed close to an election is, at a minimum, issue advocacy.").

The Secretary asserts that the State has an important interest in disclosing the funders of large advertisements about candidates and ballot measures shortly before an election, even when those advertisements constitute issue advocacy, because it helps the electorate make informed decisions and give proper weight to different speakers and messages that are trying to influence an election. RGF asserts that the informational interest does not reach issue advocacy that is not advocating for or against a candidate or ballot question. Relying on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), RGF contends disclosure of donors funding issue advocacy "adds little, if anything, to the reader's ability to evaluate the document's message," *id.* at 348-49. RGF's reliance on *McIntyre*, however, is misplaced, as a review of the case law reveals.

In *McIntyre*, the Supreme Court considered an Ohio elections law that prohibited the distribution of anonymous campaign documents designed to influence voters in an election and that required written documents covered by the statute to contain "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." *Id.* at 336, 338 n.3, 344-45 (quoting

Ohio Rev. Code Ann. § 3599.09(A) (1988)). Applying exacting scrutiny, the Court said that the law would be valid "only if it is narrowly tailored to serve an overriding state interest." *Id.* at 347. In analyzing the interest in informing the electorate of the required information, the *McIntyre* Court found the stated interest "plainly insufficient to support the constitutionality of its disclosure requirement" because the "simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *Id.* at 348. As the Supreme Court further explained, "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message." *Id.* at 348-49.

The context of *McIntyre* – the in-person distribution of a handbill – is distinct from the expenditure disclosures implicated in this case. The Supreme Court has repeatedly indicated, pre- and post-*McIntyre*, that the government has an interest in disclosures of contributions designed to influence elections. *See Citizens United*, 558 U.S. at 371 (stating that transparency through disclosures of expenditures "enables the electorate to make informed decisions and give proper weight to different speakers and messages"); *First Nat. Bank of Boston v. Bellotti*, 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"). In *Citizens United*, the Supreme Court recognized a governmental interest in providing "the electorate with information about the sources of election-related spending" to "help citizens make informed choices in the political marketplace." 558 U.S. at 367 (internal quotation marks omitted).

The Supreme Court's reasoning in *Citizens United* is instructive as to the reach of the informational interest to issue advocacy. There, the plaintiff, a nonprofit corporation who released a documentary about then-Senator Hillary Clinton (who was a candidate in the Democratic Party's 2008 Presidential primary elections) intended to release broadcast and cable television advertisements for the movie, including a short and pejorative statement about Senator Clinton. 558 U.S. at 319-20. Citizens United challenged the constitutionality of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), arguing that the prohibition on corporations from using general treasury funds to make independent expenditures that expressly advocate the election or defeat of a candidate was unconstitutional as applied to the *Hillary* movie, and that BCRA's disclaimer and disclosure requirements were unconstitutional as applied to the movie and its advertisements. *See id.* at 320-21. After concluding that the Government cannot suppress political speech based on the speaker's corporate identity, the Supreme Court struck down BCRA's restrictions on corporate independent expenditures. *Id.* at 365. It then turned to the as-applied challenges to the disclaimer and disclosure requirements, the latter of which required any person spending more than $10,000 on electioneering communications in a calendar year to file a disclosure statement with the FEC that identified the person making the expenditure, the expenditure amount, the election to which the communications were directed, and the names of certain contributors. *See id.* at 366.

Because disclaimer and disclosure requirements do not impose a ceiling on campaign-related activities, the Supreme Court said such requirements are subject "to 'exacting scrutiny,' which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest." *Id.* at 366-67 (quoting *Buckley*, 424 U.S. at 64). *Citizens United* thus clarified that in the electoral disclosure context, the exacting scrutiny standard this

Court must use in analyzing compelled disclosure regimes requires that the informational interest be sufficiently important, not "overriding", as in *McIntyre*. Notably, the *Citizens United* Court did not analyze *McIntyre* when discussing the disclaimer and disclosure provisions, suggesting the *McIntyre* analysis has limited application to compelled disclosure laws. *See id.* at 368-69. *See also Gaspee Project v. Mederos*, 13 F.4th 79, 93 (1st Cir. 2021) ("The fact that the Court did not adopt the *McIntyre* framework in the election-law context speaks eloquently to its inapplicability.").

With respect to its as-applied challenge to BCRA's compelled disclosure requirements, Citizens United disputed that an informational interest justified the required disclosures for its commercial advertisements, which attempted to persuade viewers to see the film. *See Citizens United*, 558 U.S. at 367-69. The Supreme Court rejected Citizens United's argument and upheld the disclosure provisions. *See id.* at 368-70. It concluded that "the public has an interest in knowing who is speaking about a candidate shortly before an election," an interest that alone was sufficient to justify the application of the disclosure provision to the ads. *Id.* at 369. Significantly for purposes here, although the ads fell within the federal definition of an "electioneering communication," *see id.* at 368, the Supreme Court "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.

Circuit courts have construed this language in *Citizens United* as signifying that its holding is not limited to political advertising that is the functional equivalent of a federal electioneering communication and have extended *Citizens United* to some forms of issue advocacy before an election. *See*, *e.g.*, *Gaspee Project v. Mederos*, 13 F.4th 79, 86 (1st Cir. 2021) ("In the election context, the Supreme Court has rejected the attempt to distinguish

between express advocacy and issue advocacy when evaluating disclosure laws — even though the Court has deemed such a distinction relevant when evaluating limits on expenditures.") (citing *Citizens United*, 558 U.S. at 368-69); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 480 (7th Cir. 2012) (explaining that educating voters on the source of messages promoting or opposing ballot measures is important to help average citizens figure out which interest groups pose the greatest threats to their self-interest). As the First Circuit explained, there is a sufficiently important interest in identifying the speakers behind politically oriented messages, to give the public information on identifying whether and how money is talking in elections. *See Gaspee Project*, 13 F.4th at 87-88.

Where issue speech mentions a candidate shortly before an election, the Tenth Circuit has upheld disclosure requirements when they are sufficiently well-tailored. *See Independence Institute v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016). In *Independence Institute*, within sixty days of the gubernatorial election, the plaintiff intended to run a television advertisement supporting an audit of the state's health care exchange and urging voters to call the governor to tell him to support legislation for the audit. *Id.* at 790. The Institute was concerned that the ad qualified as an "electioneering communication" under the Colorado Constitution, subjecting it to reporting requirements. *Id.* at 789. Colorado requires any person who spends $1,000 per year on "electioneering communications" to disclose the name, address, and occupation of any person who donated $250 or more when the person specifically earmarked the donations for electioneering communications. *See id.* at 789 & n.1. According to the Colorado Constitution, "'electioneering communication' is defined as 'any communication broadcasted by television or radio' that 'unambiguously refers to any candidate' 'sixty days before a general election' and targets 'an audience that includes members of the electorate for such public office.'" *Id.* at 789-

90 (quoting Colo. Const. art. XXVIII, §2(7)(a)). The Institute argued that the State cannot subject genuine issue advocacy to disclosure requirements, even ads which mention a candidate during a campaign season. *Id.* at 792. The Tenth Circuit rejected the Institute's position based on Supreme Court case law: "the cases hold that television advertisements that mention candidates shortly before elections *can be* considered sufficiently related to campaigns to fall under permissible disclosure regimes—regimes whose precise requirements are cabined within the bounds of exacting scrutiny." *Id.* (italics in original). It further explained: "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." *Id.* at 796. The Tenth Circuit upheld Colorado's disclosure requirements, concluding they were sufficiently drawn to serve the public's informational interest in knowing who is speaking about a candidate shortly before an election. *Id.* at 798-99.

In light of *Citizens United* and *Independence Institute*, there is an important informational interest in the disclosure of donors who fund ads that mention a candidate shortly before an election.

RGF nevertheless points out that the Tenth Circuit treats the public interest in knowing who is spending and receiving money to support or oppose a ballot issue differently. Relying on *Sampson v. Buescher*, RGF argues that the informational interest in disclosure with respect to ballot-issue campaigns has "some value, but not that much," *see Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010).

The Tenth Circuit's analysis for disclosure laws in the ballot-question context is somewhat different from the candidate context, as a comparison of the Tenth Circuit's approach in *Independence Institute* (ad mentioning candidate) versus *Sampson* (speech mentioning ballot

initiative) reveals. In *Sampson*, the plaintiffs were residents of a neighborhood who raised money to oppose an annexation initiative of their neighborhood into the Town of Parker. *Sampson*, 625 F.3d at 1249. They challenged Colorado's disclosure requirements, arguing that they unconstitutionally burdened their First Amendment right to association. *Id.* The Tenth Circuit determined that the State's informational interest in knowing who was spending money to oppose a ballot measure was minimal where the group received $782.02 in nonmonetary contributions (and a total of $2,239.55 in monetary and non-monetary contributions) and spent $1,992.37 to oppose the annexation initiative. *See Sampson*, 625 F.3d at 1252, 1260 n.5; *accord Coalition for Secular Government v. Williams*, 815 F.3d 1267, 1276 (10th Cir. 2016). According to the Tenth Circuit, the informational interest diminishes substantially as the amount of monetary support a donor gives falls to a negligible level. *Sampson*, 625 F.3d at 1259-60. It explained that "this interest is significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight." *Id.* at 1259. In finding a violation of the First Amendment, the Tenth Circuit explained: "the financial burden of state regulation on Plaintiffs' freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions." *Sampson*, 625 F.3d at 1261.

Subsequently, in *Coalition for Secular Government v. Williams*, decided by the Tenth Circuit after *Independence Institute*, the Circuit once again used *Sampson*'s sliding-scale approach. *See Williams*, 815 F.3d at 1277-78. *Williams* involved an appeal of a district court order enjoining Colorado's Secretary of State from enforcing Colorado's issue-committee registration and disclosure requirements against a nonprofit corporation that was planning to

advocate against a statewide ballot initiative in the upcoming election. *Id.* at 1269. The Tenth Circuit determined that "the governmental interest in issue-committee disclosures remains minimal where an issue committee raises or spends $3,500" for a statewide ballot initiative. *Id.* at 1278.

Why does the Tenth Circuit use the sliding-scale approach in *Sampson/Williams* but not *Independence Institute*? Because of the absence of any risk of quid pro quo corruption in the ballot initiative context, the "legitimate reasons for regulating candidate campaigns apply only partially (or perhaps not at all) to ballot-issue campaigns." *Sampson*, 625 F.3d at 1255. In contrast to a ballot initiative, where the issue is the approval or disapproval of discrete governmental action, candidate elections require a voter to "evaluate a human being, deciding what the candidate's personal beliefs are and what influences are likely to be brought to bear when he or she must decide on the advisability of future governmental action." *Id.* at 1256-57.

Nevertheless, *Sampson* and *Williams* do not take RGF as far as it needs to go to succeed on its facial challenge. The Tenth Circuit did not find that no informational interest exists in the ballot context; rather, it assumed "that there is a legitimate public interest in financial disclosure from campaign organizations." *Id.* at 1259. In ballot-initiative disclosure cases in the Tenth Circuit, the strength of the government's informational interest in issue speech increases as the amount of monetary spending on the advertising increases. *See Williams*, 815 F.3d at 1278 ("the strength of the public's interest in issue-committee disclosure depends, in part, on how much money the issue committee has raised or spent"). The Tenth Circuit in *Sampson* and *Williams* acknowledged an informational interest in the identities of donors supporting or opposing ballot initiatives close to an election for cases involving larger scale committees and expenditures. *See Williams*, 815 F.3d at 1280 (recognizing Colorado's issue-committee framework "is much more

justifiable for large-scale, bigger-money issue committees"); *Sampson*, 625 F.3d at 1261 (after saying that it would "not attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures," the Tenth Circuit noted that the case before it was quite different from "ones involving the expenditure of tens of millions of dollars on ballot issues"). Consequently, the Secretary has shown an important State interest in informing voters about who is making large expenditures on ballot-initiative advertisements close in time to an election. The Court therefore rejects RGF's argument that that there is no important governmental interest in informing the public of the donors of issue advocacy in the ballot initiative context.

RGF next argues that, even assuming an informational interest exists generally for issue advocacy, there is no important interest in the disclosure of donors funding ads covered by Section 1-19-26(N)(3)(c), which merely mention a candidate or ballot initiative. RGF argues that *Citizens United* does not extend to the issue advocacy implicated in this case, because the CRA's definitional structure limits the scope of Section 1-19-26(N)(3)(c) to ads that are not for a "political purpose" and that simply mention, but do not explicitly or implicitly advocate for or against, a candidate or ballot question. The Court disagrees with RGF's reading of the statute and of *Citizens United*.

The CRA defines an "expenditure" as a "payment, transfer or distribution … for a political purpose." N.M. Stat. Ann. § 1-19-26(M). "Political purpose" under the Act "means for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate." *Id.* § 1-19-26(S). According to RGF, applying "political purpose" to Section 1-19-26(N)(3)(c) would be self-contradictory, because it covers independent expenditures for ads that only mention a candidate or ballot question. The Secretary disagrees, asserting that the

"independent expenditure" definition contains a "political purpose" requirement incorporated through the definition of expenditure.

Turning, then, to the CRA's definition of "independent expenditure," it is an expenditure that pays for ads that expressly advocate for the election or defeat of a clearly identified candidate or ballot question, N.M. Stat. Ann. § 1-19-26(N)(3)(a); or that are susceptible of no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or ballot question, *id.* § 1-19-26(N)(3)(b); or that refer to a clearly identified candidate or ballot question and are published "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," *id.* § 1-19-26(N)(3)(c). The Court disagrees with RGF that this latter subsection is contradictory to the "political purpose" definition, precluding its incorporation thereof. An ad may refer to a candidate or ballot question, without being so overt as to constitute express advocacy or its functional equivalent, but still have been published for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate. The Court therefore agrees with the Secretary that the most logical way of interpreting the CRA is that the "independent expenditure" definition incorporates the meaning of an "expenditure," i.e., a payment "for a political purpose."

The timing of the expenditures on ads shortly before an election indicate the political purpose of such ads. Relying on *Citizens United*, the Tenth Circuit explained that advertisements such as those in Section 1-19-26(N)(3)(c), which mention a candidate shortly before an election, are sufficiently campaign-related to implicate the government's interests in disclosure. *See Independence Institute*, 812 F.3d at 796. RGF nonetheless argues that *Independence Institute* is distinguishable because the communications at issue there specifically urged voters to support an

audit of Colorado's health benefits exchange, whereas here, the communications cover expenditures that merely mention a candidate or ballot initiative. While acknowledging that the ad advanced an opinion about a public policy issue, the Tenth Circuit explained that "Supreme Court precedent allows limited disclosure requirements for certain types of ads prior to an election *even if the ads make no obvious reference to a campaign*." *Id.* at 791 (emphasis added). The informational issue supporting the disclosure regime in *Independence Institute* was the public's interest in knowing who is speaking about a candidate shortly before an election, and that same interest is applicable here where the CRA applies to ads mentioning a candidate or ballot question shortly before an election. *See id.* at 798.

For all the foregoing reasons, the Secretary has demonstrated a sufficiently important interest in the disclosure of donors spending large amounts funding ads covered by Section 1-19-26(N)(3)(c). *See Citizens United*, 558 U.S. at 371 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."). The Court now turns to the question of the fit between the important interest and the burdens.

2) Section 1-19-26(N)(3)(c) is substantially related to New Mexico's important informational interest

To withstand exacting scrutiny, the strength of New Mexico's interest must reflect the seriousness of the actual burden on First Amendment rights. *Reed*, 561 U.S. at 196. The Court thus must measure the State's informational interest against the CRA's disclosure burdens. *Williams*, 815 F.3d at 1278. RGF asserts that Section 1-19-26(N)(3)(c) is not substantially related to the State's interest in informing the electorate as to who is spending money to influence an election. RGF additionally argues that the burdens of the risk of chilled speech outweigh the

legislative interests. The Court addresses the fit between the interest and disclosure burdens before turning to the arguments regarding chilled speech.

a) The strength of New Mexico's informational interest reflects the seriousness of the disclosure burdens

RGF contends that the fact that CRA covers general fund donors is problematic because there is a weak fit between the disclosure burdens for those donors and the informational interest. RGF asserts that donors to the general fund may not actually support the ad, but the law scoops them into disclosure anyway. The Tenth Circuit in *Independence Institute* found it important to the substantial relation inquiry that Colorado law required the disclosure only of donors who specifically earmarked their contributions for electioneering purposes. *See Independence Institute*, 812 F.3d at 797. The Court is not convinced, however, that there is a weak fit between the disclosure requirements for the general fund and the informational interest, because other provisions in the CRA tighten the fit.

Under the CRA, only donors who gave more than $5,000 during the election cycle must be reported, thus targeting only large donors. While alone such disclosures may not capture those donors with a financial interest in the ads themselves, the CRA also has an opt-out provision whereby donors of more than $5,000 to the general fund can avoid their disclosure by submitting a written request that their contribution not be used for independent expenditures. *See* N.M. Stat. Ann. § 1-19-27.3(D)(2). The opt-out provision enhances the fit between the disclosures of general-fund donors and the public's informational interest.

RGF next asserts that the CRA "does not have any floor," burdening small organizations making minimal independent expenditures by exposing the private information of their supporters. The CRA, however, does have a minimum monetary threshold: Section 1-19-27.3(A)(1) imposes reporting obligations for organizations only when independent expenditures

exceed $3,000 in a statewide election or $1,000 in a non-statewide election. N.M. Stat. Ann. § 1-19-27.3(A). For groups meeting the $3,000/$1,000 threshold but spending less than $9,000 in a statewide election or $3,000 in a non-statewide election, the groups must disclose the name, address, and amount of contribution for each person who contributed more than $200 in an election cycle "that were earmarked or made in response to a solicitation to fund independent expenditures." N.M. Stat. Ann. § 1-19-27.3(C). For groups spending over the $9,000/$3,000 levels, the disclosures of donors of over $5,000 to the general fund, discussed above, apply. *See id.* § 1-19-27.3(D)(2).

RGF nevertheless argues that these levels capture organizations making minimal independent expenditures, so the informational interest is too low to justify the burdens. The minimum levels, however, roughly correspond to levels set in Colorado's Constitution (requiring persons who annually spend $1000 or more to disclose donors of $250 or more), which the Tenth Circuit upheld in *Independence Institute*. 812 F.3d at 789, 798-99. As the Tenth Circuit explained:

> It is not surprising, however, that a disclosure threshold for state elections is lower than an otherwise comparable federal threshold. Smaller elections can be influenced by less expensive communications. The Secretary has thus shown that Colorado's spending requirements are sufficiently tailored to the public's informational interests.

Id. at 798-99. The Tenth Circuit has rejected like arguments that a state disclosure statute operating at these amounts is supported by a minimal informational interest. *See id.* at 797-99; *Wyoming Gun Owners*, 83 F.4th at 1246-47 (concluding that Secretary demonstrated substantial relation between Wyoming's disclosure requirements and informational interest, as applied to plaintiff, where plaintiff reported annual budget somewhere between $50,000 and $100,000, and Wyoming law did not set terribly low disclosure trigger (unlike the $20 amount in *Sampson*)

where it required reporting donors whose contributions exceed $100). *See also Gaspee Project*, 13 F.4th at 82, 88 (reviewing Rhode Island's disclosure regime in its Independent Expenditures and Electioneering Communications Act and concluding that its spending threshold of $1000 or more on independent expenditures within one calendar year "tailors the Act to reach only larger spenders in the election arena and at the same time shapes the Act's coverage to capture organizations involved in election-related spending as opposed to those engaged in more general political speech").

RGF asserts, nonetheless, that the same analysis cannot support disclosures for donors funding ads mentioning a ballot question, because the informational interest is even weaker. Unlike in *Bonta*, where the Supreme Court found that the weakness of the State's interest in administrative convenience was present in every case, the Tenth Circuit has said "there is an informational interest" in issue-committee financial disclosures, but it applies a sliding-scale to determine the strength of that informational interest. *See Williams*, 815 F.3d at 1278; *Sampson*, 625 F.3d at 1261. The monetary thresholds in the CRA exceed those at issue in *Williams*, where the Tenth Circuit declined an invitation to rule on the facial validity of the threshold. *See Williams*, 815 F.3d at 1271, 1275, 1280 ($200 threshold for issue-committee registration and reporting, and once registered, issue committee must report contributions received, including name and address of each person who has contributed $20 or more). The Tenth Circuit has not said that the State categorically has a negligible interest at the minimum thresholds set in the CRA. But even if the State's informational interest is low at the $3,000/$1,000 and $9,000/$3,000 ends of the scale, the interest increases as independent expenditures increase. The Secretary has thus shown an important informational interest in the disclosure of donors who

fund large-dollar expenditures on ballot issues, and that the minimum expenditure amounts further that interest.

Additionally, temporal limitations in the CRA tighten the fit to the informational interest. Section 1-19-26(N)(3)(c) requires disclosure for communications that refer to a "clearly identified candidate or ballot question" within 30 days of a primary election and 60 days of a general election. These limitations create a substantial fit between the disclosures and the governmental interest. *Cf. Independence Institute*, 812 F.3d at 797 (concluding that Colorado's disclosure requirements were sufficiently tailored to meet exacting scrutiny where they applied only to communications referring to a candidate within 30 days of a primary election or 60 days of a general election); *Gaspee Project*, 13 F.4th at 88 ("The fact that the Act only applies when an organization crosses the spending threshold and spends that money in a particular time frame — within one year of an election for independent expenditures and, for electioneering communications, within either thirty or sixty days of an election (depending on the type) — links the challenged requirements neatly to the Board's objective of securing an informed electorate.").

Also serving to create a close fit to the interest is the limitation in the CRA targeting ads that are "published and disseminated to the relevant electorate in New Mexico." N.M. Stat. Ann. § 1-19-26(N)(3)(c). This limitation thus focuses disclosures on those funders of expenditures designed to influence the relevant electorate. Covered organizations are thus "free to speak without disclosure when addressing audiences disconnected from the upcoming election." *Gaspee Project*, 13 F.4th at 89.

In sum, the aforementioned provisions in the CRA serve to match the burdens with New Mexico's informational interest. RGF nonetheless argues that SB 3 creates an unnecessary risk

of chilling in violation of the First Amendment. The Court turns to that argument in the next subsection.

b) There is too little evidence of chilled speech to overcome New Mexico's informational interest in Section 1-19-26(N)(3)(c)

Disclosure requirements may deter contributions or expenditures from persons who prefer to remain anonymous, and they can chill donations to an organization by exposing donors to retaliation. *See Madigan*, 697 F.3d at 482. General concerns, however, do not de facto invalidate every disclosure law; rather, a court must carefully consider the evidence of chilled speech and weigh the burdens against the legislative interests. *See Buckley*, 424 U.S. at 68-74. To show such a risk of chilled speech, a party need only show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74.

RGF asserts that SB 3's disclosure requirements impose a substantial burden on its First Amendment rights "because the loss of donor support is real." (Pl.'s Mot. 11, ECF No. 76.) RGF's cited record evidence for the loss of donor support is that RGF fears that if its donors are disclosed, they may be subject to retaliation and harassment by intolerant members of society, or some donors may stop contributing to RGF out of fear of retaliation and harassment by intolerant members of society. (*See* Gessing Decl. ¶¶ 10, 22, ECF No. 33-2.). RGF's president is personally aware of instances where donors to organizations with similar views were subject to retaliation and harassment, including boycotts, online harassment, and social ostracism. (Gessing Decl. ¶ 10, ECF No. 33-2.) Based on Mr. Gessing's fundraising experience, he believes that RGF's potential donors will be less likely to contribute to its mission if their identities are disclosed. (Gessing Decl. ¶ 11, ECF No. 33-2.) RGF's president knows of several donors who support RGF that would not continue to do so if they were subject to disclosure. (*Id.*) RGF admits, however,

that it is not aware of any harassment or retaliation of its employees or donors in its over 20-year history. (*See* Pl.'s Combined Reply 4, ECF No. 80.)

Even viewing the evidence in RGF's favor, this evidence is insufficient to establish a reasonable probability that the compelled disclosures required by SB 3 will subject RGF and similar organizations to threats, harassment, or reprisals from either Government officials or private parties to justify invalidating the law in this facial challenge. *See Madigan*, 697 F.3d at 482-83 (treating burdens of potential loss of donors and chilling effect as "modest" where plaintiff provided scant evidence, beyond bare speculation, that disclosure law would be at all likely to precipitate threats, harassment, or reprisals against it or other similarly situated advocacy groups). *Cf. Citizens United*, 558 U.S. at 370 ("Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation….The examples cited by *amici* are cause for concern. Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation."); *Buckley*, 424 U.S. at 69-72 (explaining that substantial public interest in disclosure identified by legislative history of Act outweighed harm generally alleged by minor parties where they relied on clearly articulated fears of individuals and testimony of several minor-party officials that one or two persons refused to make contributions because of possibility of disclosure).

Nevertheless, RGF asserts that, in accordance with *Bonta*, the unnecessary risk of chilling effect on associations is enough to invalidate Section 1-19-26(N)(3)(c). To the contrary, a comparison of *Bonta* highlights the insufficiency of the record in this case to invalidate the law.

The Supreme Court in *Bonta* had a developed record of the burdens the law placed on 60,000 charities and the failure of the Attorney General's office to use the collected information in California's fraud detection efforts. *See Bonta*, 141 S.Ct. at 2386. The record showed specific threats and harassment to the plaintiff as well as fears from hundreds of organizations that filed amicus briefs. *See id.* at 2381, 2388. Additionally, based on the record evidence, the district court found that there was not a single, concrete instance where the disclosures were used by the State to enhance its purported interest in protecting the public from fraud through investigative, regulatory, or enforcement efforts. *Id.* at 2386.

In contrast, the Court here does not have a comparable record, even construing the evidence in RGF's favor, from which a trier of fact could find that there is a reasonable probability that RGF or other advocacy groups in New Mexico would face threats, harassment, or reprisals from CRA's disclosure requirements that would outweigh the State's important interest in disclosure. Moreover, here, it is undisputed that the independent expenditure reports are public and accessible in searchable format on the internet. (*See* Pl.'s UF ¶ 12, ECF No. 76; Def.'s Resp. ¶ 12, ECF No. 79 at 13 of 39.) Consequently, the record shows, unlike in *Bonta*, that the State is using the disclosures to enhance its asserted interest.

For all the foregoing reasons, the Secretary has shown a substantial relation between SB 3's disclosure provisions and New Mexico's important informational interest.

b. Narrow tailoring

Next, the Secretary must show that the CRA's disclosure requirements are narrowly tailored to serve the informational interest. *See Wyoming Gun Owners*, 83 F.4th at 1247. To establish that the disclosure law is narrowly tailored, "the government must 'demonstrate its need' for the disclosure regime 'in light of any less intrusive alternatives.'" *Id.* (quoting *Bonta*,

141 S. Ct. at 2386). A court must "consider 'the extent to which the burdens are unnecessary.'" *Id.* at 1244 (quoting *Bonta*, 141 S. Ct. at 2385).

RGF argues that the law is not narrowly tailored to the interest in knowing who is supporting or opposing a candidate or ballot issue, because it covers ads that merely mention a candidate or ballot question. The Secretary relies on multiple features of the CRA – temporal limitations, monetary thresholds, and opt-out provisions – to demonstrate that the law is narrowly tailored to the informational interest of knowing who is funding large advertisements for candidates or ballot initiatives before an election. As discussed *supra*, the Court agrees that the monetary thresholds avoid targeting small-scale organizations spending too little and having too little influence to support a public informational interest. Contrary to RGF's contention, the temporal limitations and the targeting of ads that are disseminated to the relevant electorate tailor the law to ads that are intended to influence an election.

With respect to the opt-out provision, RGF argues it is not enough to overcome the lack of tailoring that occurs by requiring the disclosure of the donors to the general fund. It is true that the Tenth Circuit recently said that "[i]nstituting an earmarking system better serves the state's informational interest; it directly links speaker to content…." *Wyoming Gun Owners*, 83 F.4th at 1248. But the Tenth Circuit has not held that only donors of earmarked funds may be subject to disclosure for a disclosure law to survive exacting scrutiny. A closer look at *Wyoming Gun Owners* reveals that the Tenth Circuit finds opt-out features to be an acceptable means of tailoring general fund disclosures to the informational interest.

In *Wyoming Gun Owners*, the Tenth Circuit examined Wyoming's campaign finance disclosure requirements as applied to the Wyoming Gun Owners ("WyGO"), a "mom-and-pop style" nonprofit gun rights advocacy group that aired a radio ad extolling the pro-gun credentials

of a candidate, while criticizing the opposing candidate, in the run-up to Wyoming's 2020 primary election. 83 F.4th at 1229, 1231. Wyoming's campaign finance law requires organizations spending over $1,000 on an electioneering communication (defined essentially as a message aimed at advocating for or against a candidate or ballot proposition) to "list those expenditures and contributions which *relate to* an independent expenditure or electioneering communication." *See id.* at 1229-31 (quoting Wyo. Stat. § 22-25-106(h)(iv) (emphasis added by Tenth Circuit)). The organization also had to file a statement identifying the name of whoever made the relevant contribution if it exceeded $100. *Id.* at 1247 (citing § 22-25-106(h)(v)).

The Tenth Circuit first concluded that the phrase "relate to" was impermissibly vague and invited arbitrary enforcement as applied to an organization like WyGO that pooled all its donations and whose accounting practices did not allow for earmarking or tracking each dollar spent. *See id.* at 1237-38. Examining the same language to determine if the statute met exacting scrutiny, the Tenth Circuit explained that it burdened advocacy groups like WyGO, which had unsophisticated bookkeeping systems, by creating confusion when they attempted to determine which donor contributions "relate to" a particular payment. *Id.* at 1247. After rejecting the Secretary's solution of requiring the disclosure of all contributions over $100 because it would result in over-disclosure, the Tenth Circuit discussed how an earmarking system could tailor the law to the informational interest and noted that the defendant failed to explain why Wyoming could not institute such a system. *Id.* at 1247-48. Importantly for the analysis here, the Tenth Circuit examined the First Circuit case of *Gaspee Project v. Mederos*, which in turn analyzed a Rhode Island law similar to the CRA:

> Consider *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021). There, the First Circuit found a similar disclosure law narrowly tailored despite the lack of an earmarking provision. And it observed that any donor who wanted to avoid

> disclosure could just "contribute less than $1,000" in the covered time frame. *Id.* at 89. That, the Secretary argues, is also an option for Wyoming donors.
>
> We do not understand *Gaspee Project* to be in tension with our analysis. The First Circuit plainly acknowledged the importance of allowing donors to "opt out" of a disclosure scheme while maintaining the ability to speak. *Id*. The absence of an earmarking provision did not matter because "the Act provides ample opportunity for donors to opt out from having their donations used for ... electioneering communications, even if the entity to which they contribute has not created a segregated fund." *Id.* For example, the statute provided guidance for following a specific carve-out procedure so donors could "opt out of having their monies used for ... electioneering communications" and avoid disclosure. *Id.* The Wyoming statute does not offer similar guidance. Furthermore, the First Circuit's suggestion that wary donors should just contribute less than $1,000 strikes us as an unacceptable ask here, where the disclosure requirements trigger at a *$100* donation. § 22-25-106(h)(v).

*Wyoming Gun Owner*s, 83 F.4th at 1249 (internal footnote omitted).

The CRA contains the type of "appropriate and precise guidance" that the Tenth Circuit said was missing in the Wyoming law. Under the CRA, if an organization spends money on independent expenditures for a campaign from a general bank account (not segregated by earmarked donations), the organization is only required to report the name and address of any donor who gave more than $5,000 during an election cycle, thus only targeting large donors. Significantly, contributors of over $5,000 can opt out of this requirement by sending a written notice that the funds should not be used towards independent expenditures. The purpose of the general-fund provision is to help close a loophole whereby large donors could avoid all disclosure by donating only to the general fund. The CRA's opt-out provision creates a tighter fit between donors to the general fund and New Mexico's important informational interest and is narrowly tailored to that interest.

Finally, RGF contends that that the law is underinclusive, because New Mexico does not otherwise require disclosure of donors for issue advocacy except near an election. According to RGF, this underinclusiveness casts doubt on whether the Secretary is pursuing the interest she

invokes and shows a failure to narrowly tailor the law to that interest. The informational interest that the Secretary pursues, however, is the public interest in knowing who is speaking about a candidate or ballot question shortly before an election. Tying the disclosure of donors of ads mentioning a candidate or ballot question close to the election is targeted to that interest to enable voters to have information about who may be attempting to influence the election.

Disclosure requirements are "even more essential and necessary to enable informed choice in the political marketplace following *Citizen United*'s change to the political campaign landscape with the removal of the limit on corporate expenditures." *Free Speech*, 720 F.3d at 798. Generally, "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369. Here, the CRA contains provisions that narrowly tailor the law to the public's informational interest. The Secretary has therefore shown that Section 1-19-26(N)(3)(c) satisfies exacting scrutiny.

c. The Secretary is entitled to summary judgment on RGF's facial challenge

The Secretary has shown that an important informational interest exists for disclosure of donors for large expenditures on candidate and ballot issues near an election, and that the CRA is substantially related to and narrowly tailored to that interest. Consequently, the Secretary has shown on the record construed in favor of RGF that there are circumstances in which the CRA is valid and that it has a legitimate sweep.

To succeed on an overbreadth challenge, RGF may show that a substantial number of Section 1-19-26(N)(3)(c)'s applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. RGF, however, failed to produce evidence from which the trier of fact could find that facial overbreadth standard met. For example, RGF did not present evidence that most of the organizations engaging in issue advocacy in the 30- to 60-day lead up to New

Mexico elections are small, grassroots organizations who spend near the minimum thresholds. Nor does the Court have before it evidence that there is a reasonable probability that the compelled disclosure of contributors' names to most such small organizations will subject them to threats, harassment, or reprisals from either Government officials or private parties. Accordingly, even construing the record favorably to RGF, RGF cannot succeed on its facial challenge to enjoin enforcement of Section 1-19-26(N)(3)(c). *Cf. Republican Party of New Mexico v. Torrez*, No. 1:11-cv-00900-WJ-KBM, __ F.Supp.3d __, 2023 WL 5310645, at *33 (D.N.M. Aug. 17, 2023) (concluding that CRA's "electioneering communication" definition is neither overbroad nor vague based on *Independence Institute* and *Citizens United*). *See also Madigan*, 697 F.3d at 482-83 (concluding that plaintiff failed to meet burden on facial challenge to Illinois's disclosure regime related to ballot initiatives where plaintiff was national advocacy organization seeking to spread its political messages on a broad scale, which is "the sort of campaign-related advertising about which Illinois has a substantial interest in providing information to its public," and where plaintiff provided "scant evidence" beyond speculation that the law would precipitate threats, harassment, or reprisals against it or other similarly situated advocacy groups). The Secretary is therefore entitled to summary judgment on Count I.

B. Plaintiff's Combined Motion for Summary Judgment

On Plaintiff's motion for summary judgment, the Court must construe all facts and reasonable inferences in the light most favorable to the Secretary as the nonmoving party. RGF asserts in its motion for summary judgment that Section 1-19-26(N)(3)(c)'s disclosure requirements fail exacting or strict scrutiny. As discussed *supra*, exacting scrutiny applies to the claim, and to survive exacting scrutiny, the government must demonstrate a substantial relation between a disclosure law's burden and an important governmental interest, and that the law is

narrowly tailored to the government's asserted interest. The Secretary has satisfied that burden when viewing the factual record favorably to RGF. It stands to reason that, in viewing factual inferences favorably to the Secretary, she likewise satisfies the burden to avoid summary judgment. The Secretary has shown, based on the undisputed facts and the factual inferences construed in her favor, that New Mexico has an important interest in informing voters about who is making large contributions to pay for advertisements about candidates and ballot measures shortly before elections; the CRA's disclosure requirements are carefully drafted to fit closely with that interest; and the CRA is narrowly tailored to the important informational interest. RGF failed to produce evidence to support its overbreadth challenge to Section 1-19-26(N)(3)(c). Consequently, RGF is not entitled to summary judgment on Count I.

IT IS THEREFORE ORDERED that:

1. Plaintiff's *Combined Motion for Summary Judgment and Memorandum of Law* (**ECF No. 76**) is **DENIED**.
2. Defendant's *Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment* (**ECF No. 79**) is **GRANTED**.
3. Count I, the last remaining count in this case, is **DISMISSED**.

SENIOR UNITED STATES DISTRICT JUDGE

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

RIO GRANDE FOUNDATION and
ILLINOIS OPPORTUNITY
PROJECT,

Plaintiffs,

v. No. Civ. 1:19-cv-01174-JCH-JFR

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

Defendant.

FINAL JUDGMENT

This Court has entered contemporaneously a Memorandum Opinion and Order granting summary judgment to Defendant on the last remaining claim in this case. This Final Judgment, in compliance with Rule 58 of the Federal Rules of Civil Procedure, adjudicates all existing claims and liabilities of the parties.

IT IS HEREBY ORDERED that final judgment is entered in favor of Defendant on Plaintiffs' claims, which are **DISMISSED** in their entirety.

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE 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

Notice of Appeal

Plaintiff Rio Grande Foundation appeals to the United States Court of Appeals for the Tenth Circuit from the Memorandum Opinion and Order (Doc. 87) entered March 29, 2024, and the Final Judgment (Doc. 88) entered March 29, 2024.

April 24, 2024

/s/ Jeffrey M. Schwab

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Certificate of Service

I certify that on April 24, 2024, I electronically filed the notice of appeal by using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users, and that service will be accomplished via the CM/ECF system.

/s/ Jeffrey M. Schwab