

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

RIO GRANDE FOUNDATION,

Plaintiff,

v.

CITY OF SANTA FE, et al.,

Defendants.

Civil No. 1:17-cv-00768-JCH-CG

**BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE,  
CHAINBREAKER, COMMON CAUSE NEW MEXICO, FAIRVOTE NEW MEXICO,  
THE LEAGUE OF WOMEN VOTERS OF SANTA FE COUNTY,  
NEW MEXICO ETHICS WATCH, NEW MEXICANS FOR MONEY OUT OF  
POLITICS, THE SANTA FE GREEN CHAMBER OF COMMERCE, THE SANTA FE  
HISPANIC CHAMBER OF COMMERCE, THE SANTA FE NEIGHBORHOOD LAW  
CENTER, AND RETAKE OUR DEMOCRACY**

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## **CORPORATE DISCLOSURE STATEMENT**

*Amici* certify that none has a parent corporation or issues stock, and therefore that no publicly held company owns 10% or more of any of their stock.

### **INTEREST OF *AMICI CURIAE***

The Brennan Center for Justice at New York University School of Law (“Brennan Center”)<sup>1</sup> is a non-partisan law and public policy institute that focuses on the fundamental issues of democracy and justice. Through the work of its Democracy Program, the Brennan Center seeks to bring the ideal of self-government closer to reality by working to eliminate barriers to full participation, and to ensure that public policy and institutions reflect diverse voices and interests that make for a rich and energetic democracy. In keeping with these goals, the Brennan Center collaborates with legal academics, civil society, and the private bar to contribute legal strategy, innovative policy development, and empirical research to promote reasonable campaign finance reforms and other policy objectives that are central to its mission. The Brennan Center submitted testimony in support of the 2015 amendments to the Santa Fe Campaign Code, which included amendments to the section that is at issue here.

Chainbreaker is a membership-based economic and environmental justice organization. Chainbreaker works to expand access to affordable transportation and sustainable communities for working people in the Santa Fe, New Mexico region. Chainbreaker believes that all people have a right to have full access to the city in which they live, work and play, including the right to know who is engaging in political expenditures to support or oppose ballot initiatives. Accordingly, Chainbreaker has an interest in supporting the City of Santa Fe’s disclosure ordinance.

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<sup>1</sup> This brief does not purport to convey the position, if any, of the NYU School of Law.

Common Cause New Mexico is a nonprofit organization that promotes reform of government ethics and campaign finance at the national, state and local levels. It has been instrumental in the adoption of campaign finance laws, including disclosure laws, in the State of New Mexico and the cities of Albuquerque, Las Cruces, and Santa Fe. Its representative in Santa Fe was directly and personally involved in drafting and advocating for the 2005 ordinance that became Santa Fe Campaign Code § 9-2.6 (Ord. No. 2005-14, § 29) and the amendments to that section that were enacted in 2007, 2013, and 2015 (Ord No. 2007-11, § 7; Ord. No. 2013-28, § 3; Ord. No. 2015-23, § 3). Common Cause New Mexico therefore has an interest in the administration and enforcement of that law, which is the matter at issue in this case.

FairVote New Mexico is a project of FairVote, a nonprofit organization that champions electoral reforms that give voters greater choice, a stronger voice, and a representative democracy that works for all Americans. FairVote New Mexico believes that voters deserve to have as much information about candidates and ballot initiatives as possible, including information about what individuals or entities are contributing financially to candidate or ballot initiative campaigns, so that they can make informed decisions. Accordingly, FairVote New Mexico has an interest in supporting the City of Santa Fe's disclosure ordinance.

The League of Women Voters of Santa Fe County believes that methods of financing political campaigns and public offices should ensure the public's right to know, combat corruption and undue influence, maximize fiscal accountability and transparency, and allow maximum citizen participation in the political process. The more transparency there is about campaign financing for all types of campaigns, the more informed the electorate. Fostering an informed electorate is the mission of the League of Women Voters at all levels. Accordingly, the League of Women Voters of Santa Fe County has an interest in supporting the City of Santa Fe's disclosure ordinance.

New Mexico Ethics Watch (“NMEW”) is a nonpartisan New Mexico nonprofit organization dedicated to promoting ethics and accountability in government and public life in New Mexico. NMEW advances its mission through research, public reports, policy advocacy, compliance actions, and media outreach. Central to NMEW operations is the principle that in order to have ethical governance, the public must have transparent elections and government operations, free of conflicts of interest and unknown financial supporters. Part of that transparency requires the disclosure of the sources of support for advertising in elections for candidates and ballot initiatives. NMEW believes the City of Santa Fe has passed and implemented a strong, but reasonable, mechanism that mandates disclosure of contributions to political associations under certain conditions. NMEW has a fundamental interest in upholding the city’s disclosure requirements because transparency is an essential element on the road to a more ethical government. Accordingly, NMEW has an interest in supporting the City of Santa Fe’s disclosure ordinance.

New Mexicans for Money Out of Politics (“NMMOP”) is a nonprofit, non-partisan organization based in Santa Fe, New Mexico. NMMOP believes that disclosure requirements like those that the City of Santa Fe has enacted in § 9-2.6 are in the public interest as they help voters make informed choices, further the core goals of the First Amendment, and help combat the threat of dark money. Accordingly, NMMOP has an interest in supporting the City of Santa Fe’s disclosure ordinance.

The Santa Fe Green Chamber of Commerce (“SFGCC”) advocates for green public policy and issues that support sustainable business. SFGCC is involved at the city, county and state levels promoting legislation that benefits our community and our membership. SFGCC asks for continued clarity about who is spending money to influence elections so that the City’s



elections remain fair and transparent. Accordingly, SFGCC has an interest in supporting the City of Santa Fe's disclosure ordinance.

The Santa Fe Hispanic Chamber of Commerce ("SFHCC") serves as a catalyst and promotes organizational leadership that focuses on Hispanic entrepreneurship. It secures and leverages resources to advance the cause and promotes change by improving the economic well-being and vitality of Hispanics in the regional area, thereby empowering this community and enhancing economic status and other societal factors. The SFHCC believes that disclosure of political spending is critical to facilitating healthy and unbiased business growth that benefits our entire community.

The Santa Fe Neighborhood Law Center ("NLC") is a New Mexico nonprofit public-interest organization that participates in legal and legislative proceedings and provides legal resources to individuals and neighborhood associations to protect and preserve neighborhoods' quality of life. In order to protect Santa Fe's neighborhoods, Santa Fe's campaigns and elections need to be as transparent as possible so the residents of Santa Fe know who is saying what about candidates and ballot initiatives. The City of Santa Fe passed and implemented, with the strong support of the City's voters, a disclosure regimen that does this. Supporting the City's disclosure requirements is of great interest to the NLC in order to ensure that Santa Fe voters are informed about the context and sources of campaign advertising in elections and ballot initiatives. The work of the NLC and the choices of Santa Fe's voters will be severely hindered if these Santa Fe disclosure requirements are overturned. Accordingly, NLC has an interest in supporting the City of Santa Fe's disclosure ordinance.

Retake Our Democracy ("ROD") is a volunteer-based organization committed to making personal and collective activism easier. ROD's goal is to build power in the community to

ultimately create social, racial, environmental and economic justice at local, state and national levels. ROD engages, educates, activates, and organizes through trainings, actions, town halls, and educational events, and produces a blog with information, resources, tools and upcoming events. ROD believes that disclosure of political spending is critical to the vitality of democracy. ROD supports protecting and defending local ordinances that ensure that people are able to know who is supporting or opposing ballot initiatives and candidates. Accordingly, ROD has an interest in supporting the City of Santa Fe's disclosure ordinance.

*Amici* submit the instant brief to provide the Court with additional information concerning the value of campaign finance disclosure laws. This brief highlights relevant social science research substantiating why disclosure is important, provides an overview of Supreme Court and circuit court jurisprudence concerning the informational interest that disclosure serves in ballot elections and how that interest advances core First Amendment values, and discusses trends in campaign spending over the past decade that prompted passage of the challenged law and make strong transparency rules especially important now.

All parties have consented to the filing of this brief. Counsel for *amici* affirm that no counsel from a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* made such a monetary contribution.

## SUMMARY OF ARGUMENT

*Amici*—a diverse coalition of organizations, many with close ties to New Mexico and the City of Santa Fe—respectfully submit this brief in support of Defendants, the City of Santa Fe and the Santa Fe Ethics and Campaign Review Board (collectively, “the City”).

Plaintiff contends that Santa Fe Campaign Code § 9-2.6 violates the First Amendment and its state corollary, Article II, § 17 of the New Mexico Constitution. Section 9-2.6 requires individuals and entities to file disclosure reports with the Santa Fe city clerk when they make expenditures of \$250 or more to pay for certain public communications that reach 100 or more eligible voters in a single election cycle. Santa Fe, N.M., Campaign Code § 9-2.6(A). These reports must include the names of contributors who gave for the purpose of paying for the recipient’s campaign communications. *See id.* In certain situations, the law also requires that campaign communications contain disclaimer statements.<sup>2</sup> *Id.* § 9-2.6(B).

*Amici* agree with Defendants that § 9-2.6 is constitutional under governing Supreme Court and Tenth Circuit precedents. We write separately to underscore three important points that might assist the Court in resolving this case.

*First*, a substantial body of social science research confirms that robust disclosure requirements help voters make informed choices that align with their policy preferences. This is especially so for ballot questions. By their very nature, ballot questions often raise complex policy issues about which voters have incomplete information. Knowing who supports or opposes an

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<sup>2</sup> Plaintiff does not explicitly challenge the disclaimer requirement, which is plainly constitutional. *See, e.g., Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 122-23, 133-34 (2d Cir. 2014) (upholding constitutionality of law requiring disclaimers on electioneering communications), *cert. denied*, 135 S. Ct. 949 (2015); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Confidence Through Heuristic Cues and “Disclosure Plus”*, 50 U.C.L.A. L. REV. 1141, 1167-68, 1179-80 (2003) (hereinafter *Democratizing Direct Democracy*) (discussing importance of disclaimer requirements).

initiative, even at modest levels, is often an effective proxy for a deeper understanding of the initiative's expected policy effects. Social science research demonstrates that voters with this information are more likely to make the same choices they would have made if they had had a more complete understanding of the issue at hand.

*Second*, in light of disclosure's documented value, the Supreme Court and lower courts across this country have long recognized that common sense transparency rules like § 9-2.6 are not only permissible under the First Amendment, but actually further the First Amendment's core objective to foster a more informed electorate capable of self-government. The advent of the Internet has only enhanced such democratic benefits by making campaign finance information immediately available to voters.

*Third*, the City did not enact § 9-2.6 in a vacuum. Over the past decade, "dark money" from undisclosed sources has flooded into U.S. elections. Dark money poses a particular threat at the state and local levels, where lower campaign costs allow even modest expenditures to have a significant and distorting effect. Ballot initiative races are especially popular targets for dark money, because they often have a direct impact on the bottom lines of wealthy individuals and entities, who frequently funnel spending to pass or defeat their chosen initiatives through nonprofit organizations with innocuous community-minded names that disguise their real interests. Section 9-2.6 is a reasonable measure to help Santa Fe voters filter and discern the messages intended to influence them and thereby make informed choices.

For these reasons, in addition to those set forth by the City, this Court should hold that § 9-2.6 is constitutional.

## ARGUMENT

### I. The Benefits of Campaign Transparency are Well-Documented

#### a. Voters Use Informational Shortcuts to Make Decisions at the Polls

Incomplete information on the part of voters is an enduring feature of the electoral process. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 296 (2015) (hereinafter *Veiled Political Actors*). A sizeable body of research has shown, however, that even voters with limited information can use certain shortcuts—also referred to as heuristics or cues—to make reasoned choices that align with their policy preferences. See Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1471 (2014) (hereinafter *Rhetoric and Reality*). Voters can “learn much of what they need to know . . . by referring to simple heuristics that boil down a lot of information into crude but useful voting cues.” Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1714 (2013) (hereinafter *Direct Democracy*).

Knowing who is spending money to influence a race is a “particularly credible” informational cue. See Garrett & Smith, *Veiled Political Actors*, at 298. For candidate races, scholars have observed that the names of donors and other campaign spenders provide “trustworthy cues about the candidate’s substance,” given that “only sincere supporters would invest significant amounts of money in a candidate’s campaign, and only sincere opponents would invest significant money against a candidate[.]” Kang, *Direct Democracy*, at 1703. Such information is “more credible than cheap talk, and it allows voters a sense of how important the election of a particular candidate is for [an] interest group.” Elizabeth Garrett, *The William J.*

*Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 680 (2002).

In candidate elections, financial backers are one of a number of cues voters can use; they also commonly have the benefit of knowing the candidate's party affiliation, life and work experience, and scandals, and the ability to observe her self-presentation and demeanor. *See* Heerwig & Shaw, *Rhetoric and Reality*, at 1471-72. In the ballot context, however, many of these candidate-dependent cues are unavailable. *See* Kang, *Direct Democracy*, at 1714-15; Elizabeth R. Gerber & Arthur Lupia, *Campaign Competition and Policy Responsiveness in Direct Legislation Elections*, 17:3 POL. BEHAV. 287, 290 (Sept. 1995) (hereinafter *Campaign Competition*). Ballot measures are "typically accompanied by only their titles and a brief description of their substance." Kang, *Direct Democracy*, at 1714. They often lack any type of partisan endorsement or other similar prompts. *Id.* The relative complexity or obscurity of many ballot questions can further exacerbate voter confusion. *See* Garrett & Smith, *Veiled Political Actors*, at 296-97. Even diligent and attentive voters might find that ballot questions are technically challenging and difficult to understand, or they may not be informed about all of the salient aspects of the measures. *See id.* at 296-97; Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88:1 AM. POLI. SCI. REV. 63, 63 (Mar. 1994) (hereinafter *Shortcuts*).

Campaign finance disclosure is a particularly useful tool to fill in the informational gap that voters face in ballot measure races.<sup>3</sup> Disclosure of ballot election spending assists voters in

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<sup>3</sup> Indeed, even skeptics of disclosure requirements have conceded their utility in the ballot context. *See, e.g.,* Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 265 (2010) ("Studies that have shown the greatest positive effect from contributor or other supporter information has been in the context of ballot initiatives, where party affiliation and other candidate-

understanding the overall interests at stake in a race and where they stand in relation to those interests:

Knowing that the oil and gas industry spent substantial sums to support or oppose a ballot initiative affecting the environment provides a credible signal of the industry's views on the initiative and of the intensity with which its members hold such views. A voter can then determine, perhaps also with information about the Sierra Club's spending behavior, whether passage of the ballot question is likely to be in her interest, without knowing more about the details of the proposal.

Garrett & Smith, *Veiled Political Actors* at 298; *see also id.* (noting that the positions of groups including the National Rifle Association, the American Federation of Teachers, and the National Organization for Women can also provide key cues to voters that support or oppose them). Campaign finance disclosure also enables voters to better assess the credibility of a particular message. *See Gerber & Lupia, Campaign Competition*, at 290 (“[T]he inference that a person draws from the statement ‘Trust me’ is likely to differ depending on whether it is made by her mother or a used car salesman. Similarly, how campaign statements affect a voter’s beliefs depends on her assessment of the campaigner’s incentive to tell the truth.”).

Empirical data substantiates these common-sense conclusions. For example, a frequently cited study of voter behavior on a series of California ballot measures dealing with tort reform found that the single largest determinant of a low-knowledge respondent’s voting behavior was “whether they knew the insurance industry’s preferred electoral outcome.” *See Lupia, Shortcuts*, at 70. Another study, intended to replicate the choices that voters make in both candidate and ballot elections, found that unsophisticated subjects were more likely to make decisions consistent with their personal interests when they received information from speakers that they knew shared those interests. *See Cheryl Boudreau, Making Citizens Smart: When do Institutions Improve*

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related heuristic cues are often lacking. Here, contributor information may be one of the few, if not the only, heuristic cues available to voters.”).

*Unsophisticated Citizens' Decisions?* 31 POL. BEHAV. 287, 292-94, 303 (2009). That study also found that under some circumstances the subjects made choices consistent with their interests when they received information from speakers they knew had *contrary* interests. *Id.* at 294, 303. The study ultimately concluded that these results “largely support[ed] scholars in the information shortcuts camp.” *Id.* at 304.

**b. Voters Glean Key Information from Disclosure of Even Relatively Modest Campaign Spending**

It is important to note that voters can benefit from disclosure of even comparatively modest contributions and expenditures. For one thing, having the full picture of who is backing a particular measure helps voters discern whether the measure truly has broad popular support, or whether just one or two wealthy individuals have manufactured the appearance of popularity—i.e., whether a few wealthy spenders have “AstroTurfed” a seemingly grassroots campaign. *See* Garrett & Smith, *Veiled Political Actors*, at 325 (it is helpful to voters to understand when “a group that sounds as though thousands of Americans in favor of education reform have bankrolled a movement is really controlled and funded by one multi-millionaire with his own, possibly idiosyncratic vision of reform”). Even in instances where many individual donors support or oppose an initiative, moreover, knowing who they are can still provide voters with valuable information. To take just one example, voters could find it helpful to know whether an initiative “was funded by the citizens it is intended to affect or by out-of-state . . . individuals.” *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 948 n.16 (E.D. Cal. 2011), *dismissed in part on other grounds*, 752 F.3d 827 (9th Cir. 2014). *See also* Part III, *infra*. This information, like the names of donors who give larger



sums, enables voters to understand who is trying to influence them, and how those interests align with their own.

The appropriate threshold for disclosure requirements is a fact and context-specific inquiry. In a small jurisdiction like Santa Fe, however, where even comparatively modest sums can have a substantial impact, it is appropriate to require such spending to be disclosed. *See* Part III.b., *infra*.<sup>4</sup>

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In sum, research demonstrates that voters can reliably compensate for limited information when they know who is trying to influence them to vote for or against a particular outcome and how they stand in relation to those interests. Campaign disclosure rules provide an essential means for voters to obtain such information. *See, e.g., Center for Individual Freedom v. Madigan*, 697 F.3d 464, 480-81 & n.14 (7th Cir. 2012) (upholding disclosure rules in part because “[r]esearch shows that one of the most useful heuristic cues influencing voter behavior in initiatives and referenda is knowing who favors or opposes a measure”) (citing Garrett & Smith, *Veiled Political Actors*, at 296-98; Kang, *Democratizing Direct Democracy*, at 1157; and Lupia, *Shortcuts*, at 71-72). This basic reality should play a central role in the Court’s analysis of § 9-2.6’s constitutionality.

## **II. Disclosure Furthers Core First Amendment Values**

### **a. Providing the Electorate with Critical Information Furthers the First Amendment Goal of Enlightened Self-Government**

Because they provide the electorate with critical information, campaign finance disclosure requirements like those enacted in § 9-2.6 are routinely upheld. In a long line of cases spanning

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<sup>4</sup> If particular contributors fear they will be subject to threats, harassment, or reprisals they are free to seek an exemption from disclosure, which under some circumstances the City would be obligated to grant. *See, e.g., FEC. v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 422-24 (2d Cir. 1982).

over three decades—from *Buckley v. Valeo* to *Citizens United v. Federal Election Commission* and beyond—the Supreme Court has consistently and repeatedly reaffirmed the constitutionality of disclosure. Indeed, the Court has resoundingly upheld disclosure’s constitutionality (e.g., by an 8-1 majority in *Citizens United*), even as it has invalidated other campaign finance laws. *See Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010).<sup>5</sup>

These decisions are premised on the understanding that “facilitat[ing] and enlarg[ing] public discussion and participation in the electoral process” are “goals vital to a self-governing people.” *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976). “In a republic where the people are sovereign, the ability of the citizenry to make informed choices [in elections] is essential.” *Id.* at 14-15. Fostering enlightened self-government is in fact the basic objective of the First Amendment’s protections for political speech. *Citizens United*, 558 U.S. at 339-40. Transparency rules advance that objective, offering a “reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our . . . election system to public view.” *Buckley*, 424 U.S. at 82; *see also Citizens United*, 558 U.S. at 369 (disclosure helps voters make “informed choices in the political marketplace”). As the *Citizens United* Court observed in upholding disclosure rules for corporate political spending, “[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.” *Id.* at 371; *see also McConnell v. FEC*, 540 U.S. 93, 197 (2003)

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<sup>5</sup> *See also, e.g., Doe v. Reed*, 561 U.S. 186, 199 (2010) (“Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.”). The Court has also repeatedly denied certiorari when asked to review lower court decisions upholding disclosure rules. *See, e.g., Vermont Right to Life*, 758 F.3d at 122-23, 133-34 (rejecting 501(c)(4) organization’s challenge to constitutionality of Vermont’s disclosure and political advertising disclaimer requirements), *cert. denied*, 135 S. Ct. 949 (2015); *McKee*, 649 F.3d at 43-44, 61 (upholding Maine’s disclosure and reporting requirements for ballot question committees), *cert. denied*, 565 U.S. 1234 (2012).

(recognizing the “First Amendment interests of individual citizens seeking to make informed choices in the political marketplace”) (internal quotations omitted). In short, reasonable disclosure rules, like other speech-enhancing policies, serve to “further[], not abridge[], pertinent First Amendment values.” *Buckley*, 424 U.S. at 93.

Although the Court has long recognized the salutary effects of disclosure, digital age technology has only increased these benefits. “With the advent of the Internet,” the *Citizens United* Court observed, “prompt disclosure of expenditures” allows voters to see in real time “whether elected officials are ‘in the pocket’ of so-called moneyed interests.” 558 U.S. at 370 (internal citations and quotations omitted). Writing for a plurality of the Court several years later, Chief Justice Roberts noted that “[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information. . . . Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (plurality opinion). Greater access to such information empowers everyday citizens to better assess the messages they receive and make decisions that are truly consistent with their preferences, further enhancing disclosure’s democratic benefits and the ultimate objectives of the First Amendment.

**b. Courts Recognize that Disclosure is Vital in the Ballot Context**

The Supreme Court and the federal circuit courts have long held that disclosure is just as important, if not more so, in ballot races as it is in candidate elections. *See First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (noting that “[i]dentification of the source of advertising” for ballot measures enables the public “to evaluate the arguments to which they are being subjected”). In *Human Life of Washington Inc. v. Brumsickle*, for example, the Ninth Circuit concluded that “[p]roviding information to the electorate is vital to the efficient functioning of the

marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment.” 624 F.3d 990, 1005 (9th Cir. 2010). The court observed the value of disclosure to be especially pertinent in the ballot context, where “average citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threats to their self-interest.” *Id.* at 1006 (quoting *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105-06 (9th Cir. 2003) (internal citations omitted)). Similarly, in *Justice v. Hosemann*, the Fifth Circuit observed that the informational interest in disclosure was “at least as strong” in the ballot context as in candidate elections, emphasizing that “the initiatives on a ballot are often numerous, written in legalese, and subject to the modern penchant for labelling laws with terms embodying universally-accepted values.” 771 F.3d 285, 298 (5th Cir. 2014). And in *Center for Individual Freedom v. Madigan*, the Seventh Circuit noted that “[e]ducating voters is at least as important, if not more so, in the context of initiatives and referenda as in candidate elections.” 697 F.3d at 480.<sup>6</sup>

Consistent with these views, the federal circuit courts repeatedly have upheld laws requiring disclosure even of relatively small contributors. As the Eleventh Circuit explained in *Worley v. Florida Secretary of State*, “knowing the source of even small donations is informative in the aggregate and prevents evasion of disclosure.” 717 F.3d 1238, 1251 (11th Cir. 2013). *See also, e.g., Nat’l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 41 (1st Cir. 2012) (recognizing

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<sup>6</sup> Tenth Circuit precedents are not to the contrary. Although the Tenth Circuit has invalidated certain disclosure regimes as applied to specific plaintiffs, it has acknowledged the value of reasonable disclosure rules for ballot races and the reality that such rules are generally constitutional. *See Coalition for Secular Government v. Williams*, 815 F.3d 1267, 1280 (10th Cir. 2016) (recognizing that “[v]oters certainly have an interest in knowing who finances support [for] or opposition to a given ballot initiative”); *Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010) (acknowledging that “on three occasions [the Supreme Court] has spoken favorably of such [ballot-campaign disclosure] requirements”).

that the public has an interest in knowing that a ballot measure has been supported by “even small gifts” because the “cumulative effect of disclosure ensures that the electorate will have access to information regarding the driving forces backing and opposing each bill”) (internal quotations omitted); *Family PAC v. McKenna*, 685 F.3d 800, 810 (9th Cir. 2012) (same). Moreover, as noted above, given the significantly lower costs of campaigning in local elections, disclosure of relatively smaller contributions and expenditures is critical to inform voters’ decisions in that context. *See* Part III, *infra*.

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In sum, by providing voters with critical information to enhance their ability to participate knowledgeably in direct democracy, § 9-2.6, far from violating the First Amendment, actually advances core First Amendment values. This consideration should also weigh heavily in the Court’s analysis.

### **III. Section 9-2.6 Was an Appropriate Response to the Emergence of Secret Political Spending as a Force in U.S. Elections**

#### **a. Dark Money is a Growing Problem in U.S. Elections**

Finally, the Court should evaluate § 9-2.6 against the background of the wave of secret election spending in the wake of the Supreme Court’s ruling in *Citizens United*. While it reaffirmed the constitutionality of disclosure, *Citizens United* and its progeny allowed a range of new outside actors (of which super PACs are the most well-known) to raise unlimited funds to spend on elections. These groups have raised and spent several billion dollars in federal and state races. *See* Chisun Lee et al., *Secret Spending in the States* 9, BRENNAN CTR. FOR JUSTICE (2016), <https://goo.gl/cSQXR> (hereinafter *Secret Spending*); Robert Maguire, *\$1.4 billion and counting in spending by super PACs, dark money groups*, CTR. FOR RESPONSIVE POLITICS, (Nov. 9, 2016), <https://goo.gl/y5fVhu>.

A significant portion of this unconstrained spending has come from dark money groups that do not disclose their donors. Lee et al., *Secret Spending* at 5.<sup>7</sup> These groups often hide behind innocuous names designed to make them appear grassroots-oriented and community-minded, like “Californians for Good Schools and Good Jobs” (funded by a Texas oil company), “American Family Voices” (funded by unions, environmental interests, and retail lobbying groups), and “Proper Role of Government Education Association” (a front for payday lenders). *Id.* at 4; Dave Levinthal, *Liberal ‘dark money’ group rails against ‘dark money,’* CENTER FOR PUBLIC INTEGRITY (Nov. 20, 2015), <https://goo.gl/HpP3so>.

Dark money plays an especially prominent role at the state and local levels, where it “frequently flows from special interests with a direct and immediate economic stake in the outcome of a contest.” Lee et al., *Secret Spending*, at 3. The Brennan Center’s study of dark money spending in six states before and after *Citizens United* found that only 29 percent of outside spending in those states was fully transparent in 2014, sharply down from 76 percent in 2006. *Id.* at 2. The impact of dark money is enormously significant in state and local elections, which are relatively low-cost, as compared to federal elections. *See id.* at 10.

Dark money at the state and local level is not limited to candidate races, but also frequently flows to ballot contests. *Id.* at 14. And unlike candidate elections, 501(c)(3) organizations that raise tax-deductible funds are allowed to participate in ballot contests, which they do frequently. *See* Garrett & Smith, *Veiled Political Actors*, at 309 (noting prevalence of 501(c)(3) organizations as conduits for election spending with the “added benefit” of tax deductibility). These races often have direct economic consequences for the individuals and groups who spend money on them.

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<sup>7</sup>A related phenomenon of “gray money”—spending by entities that disclose their donors in a manner that makes the original source of funds difficult, if not impossible, to identify—is responsible for even more unaccountable spending. *See id.*

Donor anonymity in this context can help to mask the self-interest underlying certain messages that seek to influence voters. *See* Lee, et al., *Secret Spending*, at 10.

Examples of high-profile dark money spending from around the country include:

- A 2013 ballot proposal to require labeling of genetically modified foods in Washington State prompted record spending from outside groups, including \$11 million from household-brand companies like PepsiCo and Coca-Cola that was revealed to have been funneled through the Washington D.C.-based Grocery Manufacturer's Association, a 501(c)(6) trade organization. *Id.* at 15. The measure narrowly failed. *Id.* at 16.
- A 2012 California ballot proposal to raise taxes on oil companies prompted a mail campaign funded by a group called "Californians for Good Schools and Good Jobs," which was subsequently revealed to be a front for a Texas oil company, Phillips 66. *Id.* at 17 (quoting Phillips 66, No. 16/111 (Cal. Fair Political Practices Comm'n Mar. 17, 2016)). That measure also narrowly failed. *Id.*
- A 2012 Idaho ballot election to decide whether the online component of the state's high school education requirements should be expanded prompted a nonprofit called "Education Voters of Idaho" to spend heavily. *Id.* at 20. The nonprofit's largest funder was later revealed to be an investor in online educational services. *Id.*

These are just a few examples of the powerful role that dark money can play in shaping ballot contests. In response, jurisdictions across the country have strengthened their disclosure laws to ensure greater transparency in elections. *E.g.*, Washington DISCLOSE Act, 2018 Wash. Sess. Laws 648; Cal. Gov't Code § 82025 (West 2017); Denver Rev. Mun. Code § 15-35 (2017). It was more than reasonable for the City of Santa Fe to do the same.

**b. Section 9-2.6 Is a Reasonable Response to the Dark Money Problem**

The State of New Mexico and its cities have not been immune from the dark money trend. Spending by nonprofits and independent groups in statewide contests more than doubled between 2006 and 2012, reflecting a “big jump in dark money.” Geoff Mulvihill, *‘Dark Money’ grows in politics even as states try to stop it*, THE ASSOCIATED PRESS, Dec. 19, 2015, <https://goo.gl/tQf2LQ>. Dark money was an especially prominent concern during the 2014 Mayoral elections, with respect to which Santa Fe residents expressed frustration about candidates coordinating with outside groups and noted the lack of transparency in who was funding those groups. Declaration of Justin Miller ¶ 22 (hereinafter Miller Decl.), ECF No. 39-1. Dark money is also a concern in local ballot contests in New Mexico. *See, e.g.,* Melorie Begay, *Dark Money rearing its head in ABQ elections*, NEW MEXICO IN DEPTH, Sept. 14, 2017, <https://goo.gl/BYk29D> (discussing dark money spending in Albuquerque ballot initiatives concerning paid sick leave and public safety).

In this context, it was reasonable for the City to take careful measures to counter dark money in its elections by strengthening § 9-2.6 in 2015. The record of hearings before the Santa Fe Ethics and Campaign Review Board (“ECRB”) demonstrates that residents were concerned about “the unchecked power of special interest [sic] dominating our politics,” and wanted to have “as much disclosure as possible.” *See* Declaration of Megan McAllen Ex. A at 38, ECF No. 39-5 (hereinafter McAllen Decl.) (statement of Reverend Holly Beaumont); *id.* at 38-39 (statement of Stefanie Beninato); Defs.’ Mot. Summ. J. 5, ECF No. 39. The Board chose to leave the existing \$250 monetary threshold in place for the new safeguards it was enacting given the small size of the jurisdiction. Miller Decl. ¶ 32 & Ex. A at 54, ECF No. 39-2. At the same time, to ensure that the law’s reach was not over-inclusive, the ECRB incorporated a new “earmarking” limitation, which required groups spending on covered communications to report only those donors who



explicitly gave for electoral purposes. Miller Decl. ¶ 30. This careful process appropriately sought to balance the public’s interest in disclosure with legitimate free speech concerns.

This case perfectly illustrates why it is important for § 9-2.6 to be upheld. “Soda tax” measures like the one Plaintiff opposed have prompted a flood of special interest spending across the country. These measures often feature a showdown between the beverage industry on one side and proponents of soda taxes—most notably the billionaire former Mayor of New York City, Michael Bloomberg—on the other. *See* Jonathan J. Cooper, *California Bows to Beverage Industry, Blocks Soda Taxes*, THE ASSOCIATED PRESS, June 28, 2018, <https://goo.gl/RY9wGz>. Just recently, an “aggressive” push in California by the beverage industry resulted in localities being banned from imposing local taxes on soda for the next twelve years. *See id.*

The 2017 soda tax measure in Santa Fe likewise featured heavy spending by Mayor Bloomberg and the beverage industry. *See* McAllen Decl. Ex. L. at 1, 3. Disclosures revealed that Bloomberg channeled funds through “Pre-K for Santa Fe,” and a Washington, D.C.-based beverage industry group was responsible for almost all of the funds coming from a group called “Better Way for Santa Fe and Pre-K.” *Id.* at 2, 4. Both groups used local-sounding, education-oriented names to conceal that they were almost entirely funded by out-of-state donors. It was only because of the required donor disclosure that voters knew the true interests behind them. The record indicates that Plaintiff’s “No Way Santa Fe” group also accepted out-of-state contributions, including from the CEO of the Coca-Cola Bottling Co. McAllen Decl. Ex. N. That information would not have come to light but for the ECRB’s enforcement action.

Soda tax measures provide an extreme example of outside spending, with deep pockets spending aggressively on both sides, but not all local contests attract such high sums. Some ballot elections may be swayed by much more modest expenditures—particularly in a small jurisdiction

like Santa Fe. *See* McAllen Decl. Ex. B (estimating Santa Fe’s total population to be approximately 82,927). The record demonstrates that a mere outlay of \$500 could fall within the top one percent of contributions in some Santa Fe contests. Miller Decl. Ex. A at 60 (Mar. 18 Minutes of the ECRB at 10). Individuals making independent expenditures of \$250 or more may very well be some of the most significant spenders in a given campaign.

On these facts, the requirements of § 9-2.6 are more than reasonable. Section 9-2.6 requires individuals or entities making expenditures of \$250 or more per election cycle to fund certain public communications to file campaign finance statements with the city. Santa Fe, N.M., Campaign Code § 9-2.6(A). Those statements need only disclose information about expenditures made and contributions received *for the purpose* of making those expenditures. *Id.* The \$250 reporting threshold and related earmarking provisions were carefully calibrated to address the realities of Santa Fe’s size and election spending trends, while ensuring that only the identities of donors intending to fund election activities are disclosed. Such fact-specific legislative judgments deserve this Court’s deference. *See* Defs.’ Mot. Summ. J. 32 (collecting cases upholding comparably small disclosure thresholds); *Buckley*, 424 U.S. at 83 (upholding monetary thresholds of \$10 and \$100 for federal record-keeping and reporting provisions regarding contributions, concluding that “the line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion”); *McKee*, 649 F.3d at 60 (“Following *Buckley*, we have granted ‘judicial deference to plausible legislative judgments’ as to the appropriate location of a reporting threshold, and have upheld such legislative determinations unless they are ‘wholly without rationality.’”) (internal citations omitted) (quoting *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 32-33 (1st Cir. 1993)).

## CONCLUSION

This case is not, as Plaintiff contends, “about a government obsessed with knowing the origins of garden-variety speech about municipal ballot measures[.]” Pl.’s Mot. Summ. J. 13, ECF No. 40. It is about making sure that voters know who is trying to influence them so that, even with imperfect information, they can nevertheless make informed decisions that align with their policy preferences. The City enacted § 9-2.6 to provide voters with this information. The law is plainly constitutional and should be upheld.

For the foregoing reasons, *amici* urge the Court to grant the City’s motion for summary judgment, to deny Plaintiff’s motion for summary judgment, and to hold that Santa Fe City Campaign Code § 9-2.6 comports with the First Amendment and the New Mexico Free Speech Clause.

Respectfully submitted,

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