UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

RIO GRANDE FOUNDATION, Plaintiff, v. CITY OF SANTA FE, et al., Defendants.	Case No. 1:17-cv-00768-JCH-CG

DEFENDANTS' REPLY IN FURTHER SUPPORT OF
THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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I. Introduction

Despite Plaintiff RGF's attempts to complicate this case, the doctrinal standards that govern here are simple and well-settled. Political disclosure laws like subsection 9-2.6 are constitutional if they are "'substantial[ly] relat[ed]'" to "a 'sufficiently important' governmental interest." *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010). Ensuring that voters are "'fully informed' about the person or group who is speaking," *id.* at 368—whether with respect to candidates or ballot measures—is indisputably an "important" interest, so the only question here is whether Santa Fe's law is sufficiently tailored to advance this interest.

As the undisputed facts show, it is. Subsection 9-2.6 requires modest, event-driven reporting to provide Santa Fe voters with the information they need "to evaluate the arguments to which they are being subjected," *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978). It was amended in 2015 to better advance this purpose after careful review by the ECRB and the City Council, which solicited comment from experts, stakeholders and local residents over the course of eight public meetings. SF Facts ¶¶ 15-29 (Dkt. 39). And RGF *did* make the minimal disclosure the law requires—by filing one form reporting two contributions—and has been unable to identify any repercussions to its donors or activities as a result.

Perhaps that is why RGF's legal challenge has become a moving target. It has variously asked that this Court enjoin the law on its face, Compl. ¶ 75; as applied to all "nonprofits" or "charities" that spend "more than $250" to support or oppose City ballot propositions, *id.* ¶¶ 63-64; as applied to all "free-market non-profit groups like [RGF]," RGF Resp. to Defs.' MSJ ("RGF Opp'n") 5 (Dkt. 45); and as applied specifically to RGF, Compl. ¶¶ 55-56; RGF MSJ 18-19 (Dkt. 40). In support of this various relief, RGF has cycled through a number of tenuous legal

theories, never making clear if they support RGF's facial or as-applied claims, or some amalgam of the two.

In its latest submission, RGF takes its first shot at analyzing the law's tailoring. *See* RGF Opp'n 18-23. RGF's facial argument rests on the dubious theory that the Tenth Circuit has declared the informational interest categorically "minimal" with respect to all ballot measure disclosure laws, whether they entail only "event-driven" reporting or comprehensive "PAC" registration, reporting, and recordkeeping. *Id.* at 2-3 (citing *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) and *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016) ("*CSG*")). As the City pointed out in its opposition brief, *see* SF Opp'n 18 (Dkt. 44), even if this were correct as a matter of precedent, RGF still failed to address whether the interest is outweighed by the "actual" First Amendment burdens imposed by subsection 9-2.6—if any, given its limited scope. *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010). Only now does RGF offer a belated tailoring analysis, but it mischaracterizes the law and does not correct this deficiency.

RGF's as-applied "harassment" arguments have also fluctuated. In its opening brief, RGF argued that it was entitled to facial and as-applied relief based on its unsubstantiated fear that disclosure exposes "donors to potential intimidation and harassment" and causes donor attrition. RGF MSJ 20-22. Defendants countered that general allegations of donor "chill" have never been sufficient to support either the facial invalidation of a disclosure law, or an as-applied disclosure exemption under *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) and *Buckley v. Valeo*, 424 U.S. 1 (1976). Now RGF, for the first time, attempts to offer evidence that its donors, or at least donors to "similarly situated" "free market" groups, face a "reasonable probability" of

"threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370. But even if true, these new "facts" have no connection to RGF, its donors, or this case, and are legally insufficient to support even as-applied relief.[1]

II. Santa Fe's Disclosure Law Advances an Important Governmental Interest, and It Is Carefully Tailored to Achieve This End.

A. The Supreme Court has recognized the importance of informing voters of the "source and amount of money spent" on ballot measure advocacy.

The central argument in RGF's facial challenge—and virtually its only argument—is that the City's informational interest in subsection 9-2.6 is " minimal" or "nonexistent," and that it follows, axiomatically, that the law is unconstitutional. But the premise of this argument is wrong, *see* SF Opp'n 6-12, and because it falls, so too does RGF's facial claim.

This premise cannot be correct because Supreme Court precedent explicitly holds the opposite—a body of case law RGF all but ignores. The Court has repeatedly affirmed the state's informational interest in the disclosure of ballot measure-related advocacy, recognizing that "[i]dentification of the source of advertising" for ballot propositions enables the public "to evaluate the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32; *see also Buckley v. Am. Const. Law Found. Inc.*, 525 U.S. 182, 203 (1999); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981). RGF attempts to dismiss this precedent (Opp'n at 2) as "cases about the gathering of ballot-measure signatures" and "speech in candidate elections," but this is simply incorrect. *See generally* SF MSJ 20-21.

RGF's entire case rests on *Sampson* and *CSG*, but it ignores *CSG*'s affirmation that

[1] Although RGF's new factual allegations do not suffice to demonstrate a likelihood of harassment as a matter of law, defendants note that they were not included in RGF's statement of material fact and defendants have not had opportunity to test or dispute their accuracy.

"[v]oters certainly have an interest in knowing who finances support or opposition to a given ballot initiative," 815 F.3d at 1280, and *Sampson*'s recognition that the Supreme Court "on three occasions has spoken favorably of such requirements." 625 F.3d at 1257. Both decisions may have questioned the strength of Colorado's interest in demanding "PAC-style" reporting of all receipts and disbursements from small groups with negligible amounts of ballot measure advocacy, but they did so *as applied* to specific facts. The Tenth Circuit did not purport to find that the informational interest was minimal with respect to any and all ballot measure-related expenditures. Indeed, it expressly declined to reach the Colorado law's facial validity, recognizing that the informational interest would differ in the case of larger-scale expenditures or "complex policy proposals." *CSG*, 815 F.3d at 1278. Even RGF concedes (Opp'n at 3) that the Tenth Circuit only found the informational interests to be "attenuated" "when the contributions and expenditures are slight."

And tellingly, RGF has refused to engage in any analysis of the state's informational interest as applied *to RGF's* activity—no doubt because its contributions and expenditures are not remotely "slight." RGF is not a single-issue group with a $3,500 annual budget, *see CSG*, 815 F.3d at 1278, nor an ad hoc neighborhood association making only $782 in expenditures, *see Sampson*, 625 F.3d at 1251-52. It is a long-standing group with a six-figure budget that regularly engages in ballot measure-related campaigns, including the nearly $10,000 it devoted to expressly advocating the defeat of Santa Fe's 2017 soda tax measure. SF Facts ¶¶ 31-33, 51, 65.

B. RGF's tailoring analysis mischaracterizes the law's scope and effect.

After ignoring the tailoring of subsection 9-2.6 in its earlier submissions, RGF now rattles off a list of objections to the law's sweep. But RGF's complaints, which invoke

"[h]ypothetical borderline situations," *United States v. Harriss*, 347 U.S. 612, 626 (1954), involving bloggers and $1 contributions, ignore the facts here and betray its ignorance about the scope and operation of both subsection 9-2.6 and the Colorado "issue committee" law reviewed in *Sampson* and *CSG*.

Most fundamentally, RGF fails to distinguish between "event-driven" reporting laws like Santa Fe's and comprehensive *committee* disclosure regimes like Colorado's, or otherwise put, "between laws that require disclosure only of campaign-related contributions and expenditures and those . . . that require disclosure of every organizational contribution and expenditure." *N.M. Youth Organized v. Herrera*, No. CIV 08-1156, 2009 WL 10681497, at *12 (D.N.M. Aug. 3, 2009), *aff'd*, 611 F.3d 669 (10th Cir. 2010). This "essential distinction," *see id*., has driven much of the jurisprudence on political disclosure. *See* SF MSJ 27-31.

RGF's failure to grasp this distinction results in its mistaken assertion that Santa Fe's disclosure law is no more narrowly tailored than Colorado's "issue committee" disclosure law because the latter "also applied to earmarked contributions." RGF Opp'n 22. But RGF quotes from Colorado's *definition* of "political committee,"[2] not the *reporting* that committee status entails. Unlike subsection 9-2.6, which requires filers to disclose only earmarked donors, Colorado law required groups qualifying as "issue committees" to report "*all* contributions," including "the name and address of *any* person who contributes $20 or more." *Sampson*, 625 F.3d at 1250 (emphasis added) (citing Colo. Rev. Stat. § 1-45-108(1)(a)(I)-(II)).

RGF also mischaracterizes the relative scope of Santa Fe's donor disclosure requirement

[2] *See* Colo. Const. art. XXVIII, § 2(10)(a)(II) (defining "[i]ssue committee," in relevant part, as "any person . . . [t]hat has accepted . . . contributions . . . in excess of two hundred dollars to support or oppose any ballot issue or ballot question").

when it claims that "any donor who contributes *a penny* must be reported." RGF Opp'n 4. The earmarking limitation ensures that this is not the case. It is true that subsection 9-2.6 does not layer on top of its $250 reporting threshold a secondary donor disclosure threshold, but the earmarking limitation obviates the need for this additional threshold. Filers must report only those donors who give "for the purpose" of funding ballot measure expenditures, which significantly shrinks the pool of donors subject to disclosure: in this case, RGF reported only two contributions. Ans. Ex. 1 (Dkt. 12-1) (reporting one $7,500 in-kind contribution and one $250 individual contribution). RGF certainly has not shown that this approach to donor disclosure casts doubt on the law's "plainly legitimate sweep," and has made no attempt to "demonstrate from the text of [the law] and from actual fact that a substantial number of instances exist in which the [law] cannot be applied constitutionally." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988).

Also unavailing are RGF's attacks on the law's tailoring with respect to the content of disclosure reports. RGF Opp'n 20-21. A filer must report with respect to an earmarked contribution only its "date, amount . . . [and the] name, address and occupation of the person or entity from whom the contribution was made." SFCC § 9-2.6(A); SF Facts ¶ 11. Because RGF cannot dispute that the reporting entailed by the law is minimal, it now claims that the real burden is not the "paperwork" burden of reporting, RGF Opp'n 17-18, but rather the "disclosure of the identities and occupations of non-profit donors" in itself, and the postulated "ideological harassment that such disclosure invites," *id.* at 20. But this merely restates RGF's claims based

on alleged harassment. It does not speak to the law's tailoring.[3]

III. RGF Distorts the Standards Applicable to Facial Versus As-Applied Claims, Conflates Distinct Theories of Relief, and Fails to Meet the Standards for Either.

RGF misconstrues Defendants' objection to how it has pleaded its facial and as-applied claims. The City does not contest that RGF can and has requested facial relief, but rather points out that RGF's facial claim rests largely on legal authority and factual allegations that could only support an as-applied claim. SF Opp'n 12-15.

Most significantly, RGF rests its facial challenge on *Sampson* and *CSG*, without ever acknowledging that these decisions considered the constitutionality of Colorado "issue committee" disclosure regime only as applied to certain groups based on concrete facts about their "prospective" intentions. *See* SF Opp'n 18-22. These authorities would therefore, at most, support a request for as-applied relief from an analogous "PAC-style" disclosure regime for a comparably small-scale and unsophisticated advocacy group.

RGF waves off the City's objections by claiming that *Citizens United* relaxed the standards for facial relief, so "the facial/as-applied distinction matters only as to remedy." RGF Opp'n 4. That is not what *Citizens United* said. There, the Supreme Court addressed why it was compelled to review the facial validity of the federal corporate spending ban at issue when the plaintiff had only pleaded and argued an as-applied challenge. The Court explained that if as-

[3] RGF's discussion of IRS 990 reporting (Opp'n at 20-21) is also off point. Defendants did not describe the IRS requirements to suggest that they were more burdensome than the reporting required by subsection 9-2.6—although they clearly are—but to counter RGF's claim that the law must be invalidated as applied to any "nonprofit" organization because the reporting it requires is particularly onerous for such groups. Compl. ¶¶ 63-64. As the City pointed out, and RGF does not dispute, nonprofits like RGF are generally *better* positioned than other entities to comply with subsection 9-2.6 without added administrative cost because they already undertake much more comprehensive reporting to fulfill IRS requirements.

applied relief cannot be granted "without assuming a premise—the permissibility of restricting corporate political speech—that is itself in doubt," facial relief may be appropriate. 558 U.S. at 331.

This case presents the opposite scenario. RGF has not requested as-applied relief from a law in such a way as to necessitate a review of its facial validity. Instead, it has directly requested facial relief without presenting any legal arguments or authority that would support it. RGF has not even attempted to counter the City's showing that the law is sufficiently tailored under the relevant standard of scrutiny or to make a countervailing demonstration that it reaches a substantial amount of protected activity. *See, e.g.*, *Citizens United v. Schneiderman*, 882 F.3d 374, 383 (2d Cir. 2018) ("To succeed on a facial First Amendment challenge . . . Appellants would have to plead either that no application would be permissible or that a 'substantial number' of its applications are likely to result in the prevention of material support for protected expression.").

RGF's conflation of its facial and as-applied challenges is also evident in its novel theory (Opp'n 15-16) that the plaintiff should not bear the burden of "com[ing] forward with proof of harassment" to obtain as-applied relief from a facially constitutional disclosure law. This turns the doctrine on its head. The government has the burden of demonstrating that a law implicating the First Amendment survives the applicable standard of scrutiny: here, that there is a "substantial relation" between subsection 9-2.6 and a "sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67. But once a disclosure law has survived that standard of review, *Buckley* made clear that the burden shifts to the plaintiff to show it is entitled to an as-applied exemption by showing a "reasonable probability" of threats, harassment, and

reprisals. 424 U.S. at 74.

That was plainly how the Supreme Court approached the minor party appellants' request for a blanket disclosure exemption in *Buckley*. The Court rejected their request, explaining that in *NAACP*, the group "made an uncontroverted showing" that the state could not overcome, whereas "no appellant in [*Buckley*] ha[d] tendered record evidence of the sort proffered in *NAACP*." *Id.* at 69, 71. This discussion simply cannot be squared with RGF's theory that Santa Fe bears the evidentiary burden here. *Cf. In re Motor Fuel Temp. Sales Practices Litig.*, 641 F.3d 470, 492 (10th Cir. 2011) (requiring "the party asserting the [First Amendment] privilege to initially demonstrate a reasonable probability that disclosure will chill its associational rights").[4]

IV. RGF's Last-Ditch Attempt to Demonstrate a "Reasonable Probability" of Donor Harassment Fails as a Matter of Law.

At the eleventh hour of this litigation, RGF for the first time attempts to present evidence to show that its donors would face harassment and reprisals if their names were disclosed. Still unable to show any mistreatment of its *own* donors, RGF now submits affidavits from the leaders of *other* groups alleging harassment on the theory that RGF is a similarly situated "free-market" group and therefore faces similar threats. On this basis, it demands an "as-applied" exemption from Santa Fe's disclosure law not only for RGF, but for all "pro-free market" groups. While the experiences alleged in these affidavits are unfortunate, they in no way warrant the extraordinary

[4] A Colorado district court recently rejected a group's similar attempt to invoke its donors' generalized associational interests without claiming an as-applied "harassment" exemption, reasoning that "the Supreme Court already addressed this argument in *Buckley*" by "bump[ing] up the level of scrutiny under which to review disclosure requirements"—so, "[i]n effect, the associational interests of the [group]'s donors have already been accounted for." *Indep. Inst. v. Gessler*, 71 F. Supp. 3d 1194, 1199 n.2 (D. Colo. 2014) (citing *Buckley*, 424 U.S. at 64-68), *aff'd sub nom. Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016). Although the group could still receive an as-applied exemption upon making the requisite factual showing, its "donors' more general interest in privacy is subsumed in the level of scrutiny." *Id.*

as-applied relief RGF now seeks: a blanket disclosure exemption for an ill-defined but potentially vast category of self-described "free enterprise" organizations.

A. A well-established group like RGF must show that disclosure would subject its *own* donors to a reasonable probability of threats, harassment, or reprisals.

As discussed extensively in earlier submissions, *see* SF MSJ 33-35; SF Opp'n 13-15, the Supreme Court has always required a plaintiff seeking an as-applied disclosure exemption to demonstrate "a reasonable probability that [its] members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370; *accord McConnell v. FEC*, 540 U.S. 93, 198 (2003); *Buckley*, 424 U.S. at 74. Justice Alito's concurrence in *Doe*, which RGF now highlights, just reiterated the test that the Court has always imposed. 561 U.S. at 204 (Alito, J., concurring) (describing *Buckley*'s holding). He noted that groups should enjoy some flexibility in making the requisite factual showing, but nothing in his concurrence relaxes the need to actually make that showing. And although RGF was repeatedly invited to substantiate its claims about the prospect of harassment faced by its own donors, it has been unable to provide any evidence to that effect. *E.g.*, RGF Resps. to Interrog. 1, RFP 6 (Dkt. 39-5 at 79-80).

Instead, RGF now offers evidence that *other* groups have been harassed, albeit not as the result of any disclosure requirement, much less one comparable to Santa Fe's. Justice Alito's *Doe* concurrence, like *Buckley* before it, permitted reliance on "evidence of reprisals and threats directed against individuals or organizations holding similar views," but only for "[n]ew [groups] that have no history upon which to draw." 561 U.S. at 204 (Alito, J., concurring) (alteration in

original) (quoting *Buckley*, 424 U.S. at 74).[5] RGF conveniently elides the fact that it *does* have "history upon which to draw." *Id.* It was founded in 2000 and Paul Gessing has been its president since 2006, RGF MSJ 4—as well as a prominent public spokesperson on the group's behalf. *See, e.g.*, SF Exs. E, G-H (Dkt. 39-5 at 54-55, 60-65) (RGF webpage touting "Accomplishments," news articles authored by Gessing). It publicizes the names of its staff, SF Facts ¶ 31, and has released the names of its major donors to the New Mexico Attorney General despite not needing to do so, SF Opp'n 21 n.8. And crucially, it has already made all the disclosure required by the challenged law, but is "not aware of any of its own donors who have been subject to such harassment" in that or any other context. RGF Resp. to Interrog. 1.

By contrast, Justice Alito's *Doe* concurrence raised the possibility of using another group's experiences where the plaintiff claiming the exemption was *new* and advocating for a *specific* measure that was identical to the measure for which the other group had advocated. 561 U.S. at 205 (discussing possible exemption for a new group supporting a same-sex marriage ban in one state based on the experiences of a different group supporting a same-sex marriage ban elsewhere). RGF is not analogous to such a group. It is much more like Citizens United, which was denied an as-applied exemption on the basis of its allegations about *other* groups because Citizens United was well established and could "offer[ ] no evidence that *its* members may face similar threats or reprisals." *Citizens United*, 558 U.S. at 370 (emphasis added); *see* SF Opp'n 16-17.

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[5] RGF implies (Opp'n at 1) that Justice Alito's language controls because Defendants "heavily rely" on his concurrence. As discussed above, Justice Alito's reasoning does not support RGF's as-applied arguments because RGF *does* have "history upon which to draw." *Buckley*, 424 U.S. at 74. But in any event, the City did *not* rely on the language or logic of Justice Alito's concurrence, and his opinion was not controlling in *Doe*.

Citizens United's rejection of this argument underscores why RGF's proposed exemption for groups that share its "pro-free market" "ideological persuasion" (Opp'n at 7) cannot be squared with the law. Allowing an organization to point to the experiences of *other* groups to claim an exemption would defeat disclosure laws in every context and contradict decades of Supreme Court precedent. *See* SF Opp'n 17-18. So too would accepting RGF's attempt to manufacture an ideological connection between itself and the other groups whose experiences it now invokes. The universe of self-described "pro-free market" groups dedicated to promoting "prosperity" and "helping every American live their dream" (RGF Opp'n 8) likely encompasses a substantial share, if not the majority, of mainstream interest groups nationwide.[6] Moreover, RGF's proposed constitutional test would require the courts to probe the "ideological persuasion" of every group seeking this new "pro-free market" exemption—introducing precisely the kind of boundless, open-ended inquiry that the Supreme Court has rejected in the First Amendment arena.

Beyond being unworkably vague, "pro-free market" viewpoints are plainly not comparable to the minority perspectives the *NAACP* exemption was designed to protect. *Buckley* created this exemption for "minor parties" to ensure that their viewpoints would not be removed from "the free circulation of ideas." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 93 (1982). And *NAACP* emphasized that exemptions from disclosure requirements are intended to protect groups that "espouse[ ] dissident beliefs." 357 U.S. at 462. This is not to say that a specific group with mainstream views could never fall victim to harassment, but there is no evidence of "governmental and private hostility" here, toward RGF's *own* "members and

[6] A simple keyword search for tax-exempt organizations that refer to "free markets" in their names or organizing documents returned almost 1,000 results on www.guidestar.org.

supporters," *Brown*, 459 U.S. at 99.[7] RGF's argument is all the more preposterous because groups harboring "pro-free market" views are not "espous[ing] dissident beliefs," but echoing the founding principles of conventional American political thought. Creating an exemption from lawful disclosure for an "ideological persuasion" commanding the support of 85% of Americans[8] would make a farce of *NAACP* and Supreme Court precedent on this subject.

B. The anecdotes in RGF's affidavits do not provide sufficient grounds to grant an as-applied exemption.

Even if it were appropriate for RGF to rely on the experiences of unrelated groups, and even if the allegations in the affidavits submitted by such groups were accepted as true, this evidence does not suffice to show a "reasonable probability" of harassment.

First, the affidavits are from individuals who lead and proactively publicize their associations with the relevant organizations; none involve a group's donors. RGF has never shied away from publicizing the identity of its President, Paul Gessing, who is a mainstay of New Mexico public policy debates, or his association with RGF. SF Facts ¶ 31. Second, each affidavit includes a litany of anecdotes, but few of them implicate a cognizable risk of "threats, harassment, or reprisals." Several affiants relate troubling manifestations of apparent partisan

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[7] In *Buckley*, when considering whether to extend as-applied relief to minor parties, the Court focused particularly on how a group's minority status could leave it existentially vulnerable to any loss of membership. Reasoning that small and independent movements are "less likely to have a sound financial base," the Court worried that "fears of reprisal may deter contributions to the point where the movement cannot survive." 424 U.S. at 71. Nevertheless, despite having been presented with evidence that donors had *in fact* refused to contribute to the minor parties for fear of being disclosed, the Court found the evidence insufficient to merit as-applied exemption. *Id.* at 71-72.

[8] *See*, *e.g.*, Frank Newport, *Americans' Views of Socialism, Capitalism Are Little Changed*, Gallup (May 6, 2016), https://news.gallup.com/poll/191354/americans-views-socialism-capitalism-little-changed.aspx.

acrimony, but they also recount having been "subjected to" speech with First Amendment dimensions of its own, *e.g.*, Vernuccio Aff. ¶¶ 4-6 (describing protests outside an event promoting controversial labor legislation at which affiant was the keynote speaker). Other affiants describe receiving sexually explicit emails that were vulgar, but not threatening, *e.g.*, Trabert Aff. Exs. A-C, or being the target of spell-casting by a fringe religious group, which can hardly be considered a serious threat—and may be protected expression in its own right, *see* Harsh Aff. ¶ 12. Some allege troubling incidents of vandalism but do not tie them to the affiant's political views, *see, e.g.*, *id.* ¶¶ 7-8, 10-11. One describes tweets, emails, and other online activity, *see* Trabert Aff. ¶¶ 6-8, Exs. A-C.

If a handful of allegations of problematic behavior and internet trolling were enough to support an as-applied exemption for any group, let alone for all groups sharing "pro-free market" viewpoints, no disclosure law could survive. More fundamentally, the incidents described in the affidavits do not meet the evidentiary thresholds established by the Supreme Court. Both *NAACP* and *Brown* involved sustained, coordinated, and systemic threats including, importantly, by the government itself. *See, e.g.*, *Brown*, 459 U.S. at 98-100 (describing widespread retribution by government and private actors, including nearly two-dozen cases of lost employment, sustained FBI surveillance and interference with the Socialist Workers' political activity); SF Opp'n 15-18.

Here, by contrast, there is nothing to seriously suggest that those affiliated with "free-market groups" are unable to avail themselves of police protection, or that the government itself is threatening or seeking reprisal against them. *See, e.g.*, Vernuccio Aff. ¶ 6 (describing police action to remove protestors); *see also Doe*, 561 U.S. at 215 (Sotomayor, J., concurring) (describing case-specific relief as appropriate when there is "a reasonable probability of serious

and widespread harassment that the State is unwilling or unable to control"). Nor can RGF credibly assert that disclosure would cause "free market" groups "falloffs in contributions" of such a magnitude that the "movement cannot survive." *Buckley*, 424 U.S. at 71. While much of what the affidavits relate is certainly distasteful, groups of all "ideological persuasions" are likely to encounter some opposition when they publicly air those convictions. But the fact that some would prefer to conduct their activities in secret to avoid "harsh criticism," *Doe*, 561 U.S. at 228 (Scalia, J., concurring), from their "ideological opponents" (RGF Opp'n 9) does not entitle them to do so, short of a demonstrable and serious risk of First Amendment chill specific to their own donors.

V. RGF's Invocation of the New Mexico State Constitution Provides No Further Relief.

In an exercise of wishful thinking, RGF again raises the possibility that the New Mexico Constitution provides "greater protection for speech than the First Amendment," RGF Opp'n 23, but again fails to offer any legal argument or support for this supposition.

Indeed, RGF has not even explained on which grounds interstitial interpretation could be invoked. As noted in Defendants' opening brief, provisions of the New Mexico Constitution may only be read more broadly than their federal counterparts when a court believes that "flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics" justify doing so. SF Opp'n 22. RGF still has not specified which of these three factors could possibly be in play. Consequently, it has not even stated a basis for asserting, much less shown, that Art. II, § 17 can reach more broadly than the First Amendment here. *See id.* at 23.

Nor has RGF addressed *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 852

(N.M. 1998), which holds that the state constitution cannot be interpreted more broadly than a parallel federal constitutional provision "base[d] . . . on a mere textual difference." RGF ignores this and repeats its claim that "the language of Article II, § 17 is certainly different than the First Amendment." RGF Opp'n 24. But this flies in the face of *N.M. Right to Choose*: even if RGF's observation is correct, a "mere textual difference" has no relevance to the relative scope of Art. II § 17 versus the First Amendment. 975 P.2d at 852.

The only authority RGF cites to support its theory that Art. II, § 17 extends beyond the First Amendment is *City of Farmington v. Fawcett*, 843 P.2d 839 (N.M. Ct. App. 1992). But because *Fawcett* turns on the "abuse" clause of Art. II, § 17, RGF admits that it is confined to "the obscenity context." RGF Opp'n 24. And RGF fails to explain why later cases limiting *Fawcett* to its facts should not control. *See, e.g.*, *City of Albuquerque v. Pangaea Cinema LLC*, 284 P.3d 1090, 1099 (N.M. Ct. App. 2012), *rev'd on other grounds*, 310 P.3d 604 (N.M. 2013).

CONCLUSION

Defendants respectfully urge this Court to deny Plaintiff's Motion for Summary Judgment and enter judgment for the City.

Dated: August 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply in Further Support of Defendants' Cross-Motion for Summary Judgment with the Clerk of the Court for the United States District Court of the District of New Mexico via the CM/ECF system on August 6, 2018 which will effect service on all counsel of record.

/s/ Marcos D. Martinez
Marcos D. Martínez