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

RIO GRANDE FOUNDATION,

Plaintiff,

vs.

CITY OF SANTA FE, NEW MEXICO; and CITY OF SANTA FE ETHICS AND CAMPAIGN REVIEW BOARD,

Defendants,

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

PLAINTIFF RIO GRANDE FOUNDATION'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

Constitutional Provisions

COMES NOW Plaintiff Rio Grande Foundation (the "Foundation"), by and through its attorneys of record, the Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute (Matthew R. Miller and Jonathan Riches) and Barnett Law Firm (Colin L. Hunter and Jordy L. Stern), and in reply in support of Plaintiff's Motion for Summary Judgment, filed pursuant to F.R.C.P. 56 and Rule 1-056, NMRA, states:

Plaintiff's Motion for Summary Judgment should be granted. Plaintiff has shown that Santa Fe City Campaign Code § 9-2.6 (the "Disclosure Ordinance") is unconstitutional using the exacting First Amendment scrutiny required by binding Tenth Circuit case law. The Court should reject Defendants' attempts to conflate this case—which involves pure speech about ballot measures—with cases involving candidate elections or signature gathering, both of which implicate important governmental interests that are not at issue here. Plaintiff has introduced considerable evidence supporting its contention that being forced to disclose its donors' confidential information is a cognizable First Amendment injury. On the other hand, Defendants have proffered no evidence that would demonstrate that their "informational interest" in donor disclosure is anything but minimal.

Rather than demonstrate that the government's interest here outweighs the interests of non-profits and their donors, Defendants attempt to argue that the facial–as-

applied distinction is a pleading standard, rather than a question of remedy. But the Supreme Court has expressly rejected this line of reasoning.

Finally, Defendants continue to argue that Plaintiff's free-speech claims under the New Mexico Constitution are without merit because, according to Defendants, the state guarantee is the same as the federal guarantee. But New Mexico case law shows that this is not so, and, accordingly, Defendants' argument is without merit.

I. CASES INVOLVING PURE SPEECH ABOUT BALLOT MEASURES ARE DIFFERENT, IN KIND, THAN OTHER KINDS OF CAMPAIGN-FINANCE CASES.

Defendants' briefing has intermingled three kinds of campaign-finance cases, two of which are wholly irrelevant here. Defendants discuss cases involving speech about *candidates*, cases involving standards for *petition gathering and lobbying*, and cases that, like this one, involve pure speech about ballot measures as if the constitutional analyses are interchangeable. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003) (candidate election); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (petition circulators); and *United States v. Harriss*, 347 U.S. 612 (1954) (lobbying). They are not. The governmental interest changes greatly depending on which type of campaign-finance law a court is reviewing. As discussed in Doc. 45 at ep.6–8, when a law regulates speech *about candidates*, the governmental interest is—according to the Supreme Court—preventing corruption and the appearance of corruption. *Citizens*

United v. FEC, 558 U.S. 310, 345 (2010). When a law regulates the *gathering of petition signatures*, the governmental interest is protecting the integrity of the electoral process. *Doe v. Reed*, 561 U.S. 186, 197 (2010). Courts treat these interests as *de facto* significant.

But cases involving pure speech about ballot measures are different. While the Tenth Circuit has stated, in dicta, that "there is a legitimate public interest in financial disclosure from issue committees," it went on to hold that "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." *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1278 (10th Cir. 2016) (internal quotations and citations omitted). The government's "informational interest" in cases like this one is not a license to conduct a fishing expedition into the finances of every non-profit that chooses to speak about a particular ballot measure. Unlike an anti-corruption interest or ballot-integrity interest, an informational interest is *not* presumed to be significant. Instead, the government bears the burden of demonstrating the legitimacy and significance of its informational interest. Defendants have failed to do so here.

II. DEFENDANTS ATTACK PLAINTIFF'S SUBSTANTIAL EVIDENCE OF HARM WHILE OFFERING NO EVIDENCE SUPPORTING THEIR ASSERTED INTEREST IN DISCLOSURE.

Throughout this briefing, Defendants have attacked the evidence offered by Plaintiff as being insufficient to support a First Amendment claim, all while offering no

evidence to substantiate Defendants' asserted informational interest in compelled disclosure of Plaintiff's donors' confidential information. Yet the record shows that Plaintiff has offered more than enough evidence to satisfy the test enunciated in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), which held that a showing of harassment of groups with "similar views" is sufficient. Rather, it is Defendants who have made no effort to satisfy their evidentiary burden.

Under *Sampson v. Buescher,* 625 F.3d 1247, 1255 (10th Cir. 2010), and *Williams,* 815 F.3d at 1275-76, the Disclosure Ordinance must be reviewed under exacting scrutiny. That means the burden is on the government to demonstrate a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id*. The "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Williams,* 815 F.3d at 1276. Plaintiffs, on the other hand, must show that they suffer a "substantial" burden in complying with the disclosure requirements. *Id*. at 1279. As shown below, the Foundation has addressed its burden.

When spending and contribution triggers are low, the government's interest is presumed to be "minimal, if not nonexistent." *Sampson*, 625 F.3d at 1261. Here, the Disclosure Ordinance forces the Foundation to disclose its donors' confidential information once it spends $250 to communicate with voters about a ballot measure.

Anyone wishing to communicate with the public is virtually guaranteed to exceed this threshold because advertising, YouTube videos, and websites cost money to develop, and—as in this case—those costs are considered as monetary contributions, even if the person or entity in question did not create those videos or websites. Worse, once the disclosure mandate applies, donors are subject to disclosure at *every level of giving*, all the way down to one-penny donations. Every donor must be disclosed, no matter how minimal her contribution.

At these $250/$0.01 thresholds, Defendants' interest is, at best, minimal, which cannot satisfy exacting First Amendment scrutiny. The precise point at which the government's interest in disclosure *becomes* significant under the First Amendment is not specified in either *Sampson* or *Williams*, but *Sampson* held that the government's interest was "minimal, if not non-existent" when the spending trigger was $200. 625 F.3d at 1261. *Williams* declined to address whether the $200 trigger in that case was facially invalid, but held that while the government might have a substantial interest in disclosure from "an issue committee [that] has raised and spent $10 million," the government's interest was "minimal where an issue committee raises or spends $3,500." *Id*. at 1277-78. This Court does not need to decide exactly where the minimal/substantial line is in order to find that the amounts in this case—a $250 trigger and $0.01 contribution threshold—fall far below the line.

A. The Foundation has introduced substantial evidence to support its fear of harassment and intimidation.

Defendants continue to insist that the Foundation has not established a credible fear of harassment and intimidation, but that simply is not true. In *Buckley*, the Supreme Court held that a group can establish a likelihood of harassment by showing "evidence of reprisals and threats directed against individuals or organizations holding similar views." 424 U.S. at 74. The Foundation has made just such a showing:

- Foundation President Paul Gessing has testified that the "Foundation is very concerned that compelled disclosure of its donors will make those donors less likely to contribute in the future because some donors will fear public harassment and intimidation from their ideological opponents if their support is made public." Doc. 40-1 at ep.10, ¶ 22.
- The Foundation has provided affidavits from employees of three non-profit groups that hold similar pro-free market views as the Foundation. These affidavits detail actual intimidation, harassment, and violence that have been endured by these individuals in their capacities as employees of free-market groups. This includes threats of sexual violence, assault (being spat upon), vandalism, shout-downs, and vile and threatening communications. Doc. 45-1.
- The Foundation has directed the Court to the district court's findings in *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016), in which employees and donors to a similar pro-free market group were subjected to death threats, including threats to family members, and a constant campaign of harassment and intimidation.
- The Foundation has directed the Court to media accounts of ideological harassment, including member of Congress encouraging people to confront and threaten ideological opponents and one member noting that such harassment serves a valuable function in silencing certain speakers. Doc. 45 at ep.17–18.

Defendants do not dispute that free-market groups are routinely subjected to ideological harassment. Instead, they propose a rule under which the Foundation must wait until the death threats, vandalism, and harassment happen *to the Foundation itself* before it can assert its First Amendment rights. Doc. 39 at ep.40–42.

This attempt to place the entire evidentiary burden on the *plaintiff* in a First Amendment case is contrary to the law *See, e.g., United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999) ("the Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993) (government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree").

B. Defendants have introduced no evidence to overcome the presumption that their interest is anything more than minimal.

In contrast to the evidence proffered by the Foundation, Defendants have offered no evidence that the "informational interest" served by disclosure is anything greater than minimal in the context of speech about a ballot measure. As shown above, Defendants' $250 spending threshold and $0.01 contribution threshold create a presumption that Defendants' informational interest is minimal, at best. *Williams*, 815

F.3d at 1278. Given this presumption, Defendants had an evidentiary burden to differentiate their asserted interest from those asserted by the government in *Sampson* and *Williams*. Defendants have made no effort to satisfy that burden and, accordingly, the Court should treat Defendants' informational interest as minimal.

III. DEFENDANTS' ATTEMPT TO ASSERT FACIAL VERSUS AS-APPLIED AS A CONTROLLING DISTINCTION SHOULD BE REJECTED.

Defendants' arguments attempting to distinguish as-applied from facial challenges permeate its briefing (Doc. 44 at ep.5, 8–10, 12, 14, 16–20, 22–26) in the hope of creating confusion where none exists. *Citizens United* explained that calling a challenge facial or as-applied does not have "some automatic effect" on the "disposition in every case involving a constitutional challenge." 558 U.S. at 331. The distinction is helpful only because "it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id.* Calling a legal challenge facial or as-applied does not prevent a court "from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved." *Id.*; *see also City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015) ("the Court has never held that these [facial] claims cannot be brought under any otherwise enforceable provision of the Constitution"). The *Citizens United* Court went on to consider the "facial validity of § 441b" even though Citizens United had presented "narrower arguments." 558 U.S. at 333.

Dealing with the validity of Santa Fe's donor disclosure ordinance on a piecemeal, as-applied basis necessarily "chill[s]" speech that is "within the[] reach" of the provision. *Id.* at 334. The *Citizens United* Court concluded, as this Court should, that the "ongoing chill upon speech that is beyond all doubt protected … must be invalidated where its facial invalidity has been demonstrated." *Id.* at 336.

The Tenth Circuit also rejected similar nitpicking between facial and as-applied challenges in *Doe v. City of Albuquerque*, 667 F.3d 1111, 1122–28 (10th Cir. 2012). Indeed, it called the "no set of circumstances" test "simply a fiction." *Id*. at 1124. In other words, the City's attempt[1] to shirk its burden of showing that the challenged ordinance meets appropriate scrutiny, and to offload that burden onto the Foundation is "readily dispelled by a plethora of Supreme Court authority." *Id.*

Defendants' briefing on facial versus as-applied challenges does nothing to help it overcome their burden in this case. Nor does it prevent this Court from remedying the complained-of violation of the state and federal constitutions under its broad legal and equitable powers. The Supreme Court has "repeatedly considered facial challenges

[1] *See, e.g.*, Doc. 44 at ep.9 (quoting *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 14 (1988) for the proposition that *plaintiff* or the court must conjure up "a substantial number of instances … in which the [challenged law] cannot be applied constitutionally" before the law can be facially struck down); *id.* at ep.12 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000) to erroneously suggest the City's burden of proof is "light" or nonexistent, erroneously implying that the burden is on Plaintiff).

simply 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." *Id.*

In short, based on the record, it is up to this Court to consider the *extent* of the *remedy* available in this case: whether to invalidate the challenged ordinance facially or as applied. The City's confused briefing on this point ends up distinguishing, not a legal test different from that articulated by *Citizens United*, but the sheer breadth and reach of § 9-2.6, which should be found facially invalid.

IV. DEFENDANTS ARE INCORRECT THAT THE STATE AND FEDERAL FREE-SPEECH GUARANTEES ARE COTERMINOUS.

The freedom of speech and association rights at issue in this case are protected under the federal First Amendment, and, to an even greater extent, by Article II, section 17 of the New Mexico Constitution. As such, strict scrutiny ought to apply, rather than "closely drawn" scrutiny as articulated in *Buckley*, 424 U.S. at 25.

When faced with claims under both federal and state constitutions, it is routine for state courts to construe substantially similar state constitutional provisions as affording greater protection to rights although the rights also appear in the federal constitution. *City of Farmington v. Fawcett*, 843 P.2d 839, 846–47 (N.M. App. 1992) ("While it is settled constitutional law that state courts may not restrict the protection afforded by the federal Constitution, as interpreted by the United States Supreme

Court, they may find greater protection under their state constitutions, even when the language is identical."); *see also Morris v. Brandenburg*, 356 P.3d 564, 573–74 (N.M. App. 2015) (recognizing greater due process protections under the state constitutional provision).

This is particularly true when the texts of the federal and state constitutions are not identical, as with the free speech protections in the New Mexico and U.S. Constitutions. The principle of independent state constitutional interpretation is perhaps most clearly demonstrated in *Pap's A&M v. City of Erie*, 812 A.2d 591 (Penn. 2002). There, the U.S. Supreme Court upheld, against First Amendment challenge, a Pennsylvania ordinance that prohibited nude dancing. *See City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). In spite of this ruling from the highest court in the land, the Pennsylvania Supreme Court, on remand, struck down the same law as a violation of the freedom of expression protected in article 1, section 7 of the Pennsylvania Constitution. 812 A.2d at 601–13. California provides another example of broader, independent state constitutional interpretation in *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979). The California constitution provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art I, § 2(a)—wording that is similar to New Mexico's article II, section 17. Both

state provisions, however, are noticeably different than the First Amendment. To do justice to this difference and to "determine what 'liberty of speech' means in California," the court looked to California case law, and found that it provided greater rights to petition-gatherers in shopping centers than the First Amendment does. *Pruneyard*, 592 P.2d at 909; *see also, e.g., Fiesta Mall Venture v. Mecham Recall Comm.*, 767 P.2d 719, 723 (Ariz. App. 1988) (finding article II, section 6 of Arizona's constitution to be "more extensive than the First Amendment.").

"We can … assume that the authors of the New Mexico Constitution were aware of the language of the First Amendment to the United States Constitution and consciously chose to adopt a different formula." *Fawcett*, 843 P.2d at 847. This conscious decision to adopt broader language than the federal First Amendment suggests the Framers of New Mexico's constitution intended broader protections. As a logical matter, why would the Framers go through the trouble of crafting new language if they intended only the same protections as found in the First Amendment? Interpreting the state provision independently of its non-identical federal counterpart does justice to common sense and our federal system.

Defendants claim that "a decision to interpret the state constitution more broadly than a parallel federal constitutional provision cannot be 'base[d] … on a mere textual difference." Doc. 44 at ep.27 (quoting *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d

841, 852 (N.M. 1998)). Yet that is not what *NARAL* stands for—indeed, the court found that New Mexico's Equal Rights Amendment does afford "Medicaid-eligible women greater protection against gender discrimination than they receive under federal law." *Id.* at 851. *NARAL*, and the cases cited therein, support the proposition that "textual differences are not necessary prerequisites to affording broader protection under the New Mexico Constitution." *Id.* at 852. *Even when the provisions have the same wording*, the state constitution may provide broader protections than its federal counterpart.

Thus, nothing prevents this court from reading these differing provisions differently. New Mexico courts did so with regard to free speech in *Fawcett*, 843 P.2d 839. Other state supreme courts have done the same. While the U.S. Supreme Court has declared obscenity unprotected under the First Amendment to the U.S. Constitution, *Roth v. United States*, 354 U.S. 476 (1957), New Mexico courts found Article II, § 17 more protective in the obscenity context than the First Amendment. *Id.* at 847.

When state constitutional text suggests broader protections than its federal counterpart, federal courts ought to avoid the federal constitutional issue by redressing the plaintiff's grievance under the more stringent New Mexico Constitution.

CONCLUSION

Plaintiff's Motion for Summary Judgment should be granted, and Defendants should be permanently enjoined from demanding the identities of donors to non-profit groups speaking about ballot measures.

WHEREFORE, Plaintiff Rio Grande Foundation asks this Court to:

(1) grant Plaintiff's Motion for Summary Judgment;

(2) deny Defendants' Motion for Summary Judgment;

(3) declare that Santa Fe City Campaign Code § 9-2 violates the First Amendment to the United States Constitution to the extent that it requires non-profit groups to disclose their donors to Defendants when those groups spend more than $250 to communicate with voters about a ballot measure;

(4) declare that Santa Fe City Campaign Code § 9-2 violates Article II, § 17 of the New Mexico Constitution to the extent that it requires non-profit groups to disclose their donors to Defendants when those groups spend more than $250 to communicate with voters about a ballot measure;

(5) permanently enjoin Defendants' enforcement of Santa Fe City Campaign Code § 9-2 against non-profit groups that are communicating about ballot measures; and,

(6) grant such other relief as is just and proper.

RESPECTFULLY SUBMITTED this 6th day of August, 2018 by:

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CERTIFICATE OF SERVICE

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