No. 25-2016

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GERALD ORTIZ Y PINO,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

Appeal from the U.S. District Court for the District of New Mexico
The Honorable Judge Margaret Strickland
Civil Action No. 1:24-cv-00240

BRIEF OF AMICUS CURIAE NEW MEXICO STATE ETHICS COMMISSION IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

Jeremy Farris
NEW MEXICO STATE ETHICS COMMISSION
800 Bradbury Dr., SE, Suite 215
Albuquerque, NM 87106
Telephone: (505) 827-7800
jeremy.farris@sec.nm.gov

Tara Malloy
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, D.C. 20005
Telephone: (202) 736-2200
tmalloy@campaignlegalcenter.org

Counsel for Amicus Curiae

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Legislative and Regulatory Materials:

Other Materials:

STATEMENT OF INTEREST

Amicus curiae New Mexico State Ethics Commission ("NMSEC") is a bipartisan, independent state agency established by Article V, Section 17 of the New Mexico Constitution and enabled by the State Ethics Commission Act, N.M. Stat. Ann. §§ 10-16G-1 to -16 (2019, as amended through 2023). NMSEC is New Mexico's principal anti-corruption agency, promoting the integrity of New Mexico state and local government through the interpretation, enforcement, and improvement of New Mexico's campaign finance, lobbying, financial disclosure, procurement, and governmental conduct laws. *See generally id*. §§ 10-16G-1 to -16.

NMSEC oversees the provisions of New Mexico's Campaign Reporting Act ("CRA"), N.M. Stat. Ann. §§ 1-19-25 to -36 (1978, as amended through 2024), including Subsection 1-19-29.1(A) (2009). The agency does so in three ways. First, NMSEC has discretionary, executive authority to bring civil actions in district court "if a violation has occurred or to prevent a violation of any provision of the Campaign Reporting Act." N.M. Stat. Ann. § 1-19-34.6(C); *see also id.* §§ 1-19-34.6(B), 10-16G-9(A)(1), (F). Second, NMSEC has quasi-judicial authority to investigate and adjudicate third-party administrative complaints alleging violations of the CRA. *See id.* § 10-16G-9(A)(1). Third, NMSEC has authority to issue advisory opinions interpreting provisions of the CRA, upon a written request and

after consultation with the New Mexico Secretary of State. *See id*. § 10-16G-8; *see also id*. § 1-19-34.4(A).

This appeal implicates the enforceability of Subsection 1-19-29.1(A), New Mexico's personal use restriction, which, inter alia, prohibits the donation of campaign funds to individuals, businesses, and organizations that are not fifty-percent limit organizations under federal tax law. N.M. Stat. Ann. § 1-19-29.1(A). This appeal, therefore, bears upon NMSEC's jurisdiction. NMSEC appears as amicus curiae to explain the key role that Subsection 1-19-29.1(A) plays in New Mexico's efforts to deter public corruption and to advocate for a resolution of this appeal that furthers New Mexico's anti-corruption efforts.[1]

SUMMARY OF ARGUMENT

Plaintiff-appellant Gerald Ortiz y Pino made a donation of $200 from his campaign coffers to a high school student so she could pay for a summer workshop. While perhaps charitable in intent, the gift violated New Mexico's personal use restriction, which prohibits candidates from donating campaign funds to individuals, businesses, and other organizations that are not fifty-percent limit organizations, as referenced in "Subparagraph (A) of Paragraph (1) of Subsection (b) of Section 170 of the Internal Revenue Code." N.M. Stat. Ann. § 1-19-29.1(A)(4) ("personal

[1] All parties have consented to the filing of this brief. No party or party's counsel authored any part of this brief, and no person, other than amicus, contributed money to fund its preparation or submission.

donation rule"). Instead of simply reimbursing his campaign committee from his personal funds—and thus effectively making the gift with his own money—plaintiff challenged the constitutionality of this law.

The district court preliminarily enjoined the personal donation rule as contrary to the First Amendment, App. Vol. 1, DNM 37–65, but ultimately granted summary judgment to defendant Secretary of State, upholding the rule after the Secretary observed that a charitable contribution that falls outside of Subsection 1-19-29.1(A)(4) would nevertheless "be a permissible 'expenditure[] of the campaign," if "it is truly campaign 'speech,'" App. Vol. 4, DNM 34.

NMSEC urges the Court to affirm the district court's summary judgment decision. While it is doubtful that plaintiff has Article III standing to mount his challenge, if the Court considers the merits, then NMSEC submits this amicus brief to offer additional and alternative grounds, other than those relied on by the district court, why plaintiff's challenge to New Mexico's personal donation rule fails. *See, e.g., Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).

First, New Mexico's personal donation rule is well within the range of state and federal campaign finance laws addressing personal use. New Mexico's rule is hardly sui generis. A materially similar federal personal use prohibition—which also regulates the charitable donation of campaign funds—has been on the books for over three decades. 52 U.S.C. § 30114(a)(3); 11 C.F.R. § 113.1(g)(2). Further, New

Mexico's personal donation rule is consistent with the personal use laws of the majority of states, including several states in this Circuit. *See, e.g.*, Kan. Stat. Ann. § 25-4157a(a)(1)(E); Utah Code Ann. § 20A-11-104(2)(i); Okla. Stat. tit. 74E 2.39, 2.48(C).

Second, the Court should not apply strict scrutiny to assess the constitutionality of the personal donation rule. Plaintiff mistakenly analogizes the personal donation rule to a monetary limit on campaign expenditures. *See* Appellant's Opening Br. at 14, 30–32 ("AOB"). The district court below appeared to accept plaintiff's argument, at least in its initial ruling applying strict scrutiny. *See* App. Vol. 1, DNM 51-52. But this analysis begs the question whether a charitable donation—or any personal use of campaign money—should be treated as a "campaign expenditure" in the first place. N.M. Stat. Ann. § 1-19-26(G)(defining "campaign expenditure"). New Mexico has the authority to define which disbursements are "in support of the candidate's campaign in an election," *id.* § 1-19-26(G), and few jurisdictions include donations of campaign funds to individuals in this category. Plaintiff's analogy also overlooks that the personal donation rule does not function as an expenditure limit: it neither restricts the content of a candidate's speech nor its quantity.

For these reasons, the Secretary of State's narrowing interpretation of the personal use restriction to permit "charitable" donations to individuals and non-

170(b)(1)(1) organizations that "convey[] a strong political message for the campaign" is not required to save New Mexico's personal donation rule from constitutional challenge. App. Vol. 4, DNM 35. Even without this construction, the personal donation rule does not infringe on the "political message" of the candidate. On appeal, plaintiff also raises the facial claim that the personal donation rule is unconstitutional because it bars donations to Section 501(c)(4) groups; but even assuming that such donations are more likely to "convey a political message" than donations to individuals, plaintiff certainly has not shown "a substantial number of [the rule's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n.6 (2008) (internal quotations omitted). Plaintiff has not identified even a single unconstitutional application of the rule to a 501(c)(4) donation.

NMSEC thus respectfully requests that this Court reconsider the need for a narrowed construction of the personal donation rule, but in any event, urges affirmance of the ruling below. An overly narrow interpretation of the rule risks undermining the integrity of New Mexico's campaign finance laws in at least two ways. First, the construction would allow candidates to donate large (and potentially self-directed) sums of campaign money to friends and associates on the shaky premise that such donations were "in furtherance of the political speech of [the] campaign." App. Vol. 4, DNM 35. Second, the narrow construction would allow

candidates to "donate" large sums to 501(c)(4) organizations, potentially outsourcing their campaigns and avoiding the CRA's requirement that campaign expenditures be disclosed in detail.

Finally, the district court conceived of the governmental interests supporting the personal donation rule too narrowly, in part because strict scrutiny review typically considers only the prevention of "quid pro quo" corruption and its appearance. App. Vol. 1, DNM 52-53. Certainly, the personal donation rule averts the risk of quid pro quo exchanges—both between a donor and the candidate, and the candidate and the recipient of their largesse—and thus would survive strict scrutiny. But the district court overlooked the more basic anti-corruption interest in preventing a candidate or officeholder from misappropriating campaign funds for their own benefit. Self-enrichment occurs not only when candidates spend campaign funds on their personal expenses, but also when they direct money to third parties in ways that indirectly benefit them. And because of its narrow focus on quid pro quo exchanges, the district court also did not consider two other important bases for the rule, namely ensuring transparency in the financing of campaigns and protecting campaign contributors from having their contributions converted to personal use.

BACKGROUND

I. New Mexico Law

The CRA provides that it is unlawful for a candidate "to make an expenditure of contributions received" except for "expenditures of the campaign." N.M. Stat. Ann. § 1-19-29.1(A)(1). Subsection 1-19-29.1(A) therefore operates as a restriction on a candidate's personal use of campaign funds. The subsection also sets forth various exceptions to this restriction, including for "donations to an organization to which a federal income tax deduction would be permitted" under I.R.C. § 170(b)(1)(A). N.M. Stat. Ann. § 1-19-29.1(A)(4). *See also* N.M. Admin. Code § 1.10.13.25(B)(2).

Pursuant to its authority to interpret the CRA, *see* N.M. Stat. Ann. § 10-16G-8, NMSEC has issued advisory opinions interpreting the personal use restrictions. For instance, NMSEC has advised that campaign funds may be spent: (1) by candidates for childcare expenses if such expenses are incurred as a direct result of their campaign, NMSEC Adv. Op. 2025-01 (Feb. 7, 2025); and (2) by legislators for expenses that are "reasonably related" to performing the duties of their office, such as professional development training, NMSEC Adv. Op. 2024-02 (Apr. 5, 2024). NMSEC has not received a request for guidance on the personal donation rule specifically, and plaintiff Ortiz y Pino did not seek an advisory opinion from NMSEC before making the $200 gift at issue here.

II. Prohibitions on the Personal Use of Campaign Funds Are a Cornerstone of Campaign Finance Law at the Federal and State Levels.

Like New Mexico, virtually all jurisdictions specify how campaign funds must be used, typically restricting their use to expenditures to advance the candidate's election and prohibiting the conversion of such funds to personal use.[2]

Jurisdictions differ in how they define the scope of personal use; for instance, several prohibit *any* individual from personally benefitting from campaign funds, not only the candidate and their family members. The Federal Election Campaign Act ("FECA"), for instance, prohibits "*any* person" from benefiting from campaign money. 52 U.S.C. § 30114(b)(1) (emphasis added).[3] *See also* Alaska Stat. §

---

[2] Ala. Code § 17-5-7(b)(1); Alaska Stat. § 15.13.112(a); Ark. Code Ann. § 7-6-203(f); Cal. Gov't Code § 89512; Del. Code Ann. Tit. 15, § 8020; Fla. Stat. Ann. § 106.1405; Ga. Code Ann. § 21-5-33; Haw. Rev. Stat. Ann. § 11-382(3); Iowa Code § 68A.302; Kan. Stat. § 25-4157a; Ky. Rev. Stat. § 121.175(1); La. Stat. Ann. § 18:1505.2(I)(1); Md. Code Reg. § 33.13.10.03; Mass. Gen. Laws Ann. ch. 55, § 6; Mich. Comp. Laws Ann. § 169.244(b); Minn. Stat. Ann. § 211B.12; Miss. Code Ann. § 23-15-821(1); Mo. Ann. Stat. § 130.034(1); Mont. Admin. Rules 44.11.608; Neb. Rev. Stat. Ann. § 49-1446.01(1); Nev. Rev. Stat. Ann. § 294A.160(1); N.J. Stat. Ann. § 19:44A-11.2; N.Y. Elec. Law § 14-130; N.C. Gen. Stat. Ann. § 163-278.16B; N.D. Cent. Code Ann. § 16.1-08.1-04.1; Okla. Stat. tit. 74E § 2.39; Or. Rev. Stat. Ann. § 260.407; 17 R.I. Gen. Laws Ann. § 17-25-7.2(a); S.C. Code Ann § 8-13-1348; S.D. Codified Laws § 12-27-50; Tenn. Code Ann. § 2-10-114(b)(1); Tex. Elec. Code Ann. § 253.035; Utah Code Ann. § 20A-11-104; Va. Assembly, H.B. 2165 (approved by Governor Mar. 24, 2025) (adding § 24.2-948.6 to prohibit personal use of campaign funds); Wash. Rev. Code § 42.17A.445; W. Va. Code Ann. § 3-8-10; Wis. Stat. Ann. § 11.1208(2)(a).

[3] *See also* Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7864 (Feb. 9, 1995) (noting that final FEC rules "generally apply with equal force to uses of campaign

15.13.112(b)(1) (providing that campaign contributions may not be "used to give a personal benefit to the candidate or to another person"); La. Stat. Ann. § 18:1505.2(I)(1) (prohibiting use of campaign funds "by any person for any personal use"); Wis. Stat. Ann. § 11.1208(2)(a) (providing that "committee may not make a disbursement . . . for the committee's or an individual's strictly personal use").

Jurisdictions also often enumerate certain permissible uses of campaign funds for purposes unrelated to the candidate's campaign, such as for charitable donations, although many limit charitable giving to unexpended campaign funds after the election. There is considerable variation: several states limit charitable donations to groups organized under to I.R.C. § 501(c)(3);[4] others permit donations to any organizations described in I.R.C. § 170(c).[5] Others are more idiosyncratic. *See*, *e.g.*, Haw. Rev. Stat. Ann. § 11-381(a)(3) (permitting campaign donations to "community service, educational, youth, recreational, charitable, scientific, or literary organization[s]" but limiting amount to double the applicable candidate contribution limit); Md. Code Ann. Elec. Law § 13-247 (permitting campaign donations to

---

funds that benefit third parties as they do to uses of campaign funds that benefit the candidate or a member of the candidate's immediate family").

[4] *See*, *e.g.*, S.C. Code Ann. § 8-13-1370; Okla. Stat. tit. 74E § 2.48(C); Minn. Stat. Ann. § 211B.12(6); Ky. Rev. Stat. § 121.180(10)(d); Fla. Stat. Ann. § 106.141(4)(a)(2); Ark. Code Ann. § 7-6-203(g)(1)(c).

[5] *See*, *e.g.*, Ga. Code Ann. § 21-5-33(b)(1)(A); La. Stat. Ann. § 18:1505.2(I)(1)(A); N.J. Stat. Ann. § 19:44A-11.2(a)(2); N.C. Gen. Stat. Ann. § 163-278.16B; Or. Rev. Stat. Ann. § 260.407; Tenn. Code Ann. § 2-10-114(a)(5)-(6).

"nonprofit organization[s] that provide[] services or funds for the benefit of pupils or teachers").

As NMSEC has recognized in past guidance, New Mexico regulations on personal use "follow" those "imposed in federal law," NMSEC Adv. Op. 2025-01 (Feb. 7, 2025), and thus a review of FECA is instructive here.

Like New Mexico, federal law provides that a contribution "shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office[.]" 52 U.S.C. § 30114(b)(2).

Because federal law forbids campaign funds from personally benefiting "*any* person," *Id.* § 30114(b)(1) (emphasis added), it effectively bars any donation of campaign funds, subject to two exceptions. First, FECA and related regulations permit candidates to donate campaign funds to "organizations described in section 170(c) of the Internal Revenue Code." *Id.* § 30114(a)(3); 11 C.F.R. § 113.1(g)(2). The Federal Election Commission ("FEC") strictly enforces the parameters of this exception—requiring a candidate to show *both* that the recipient group "has obtained or is planning to apply for status as an entity described in section 170(c) of the IRC," *and* that neither the candidate nor their family members will receive compensation

or any other benefit from the group. FEC Adv. Op. 2005-6 at 2 (June 23, 2005); *see also* FEC Adv. Op. 1983-27 at 2 (Oct. 21, 1983).

Second, FEC regulations permit "[g]ifts of nominal value and donations of a nominal amount made on a special occasion such as a holiday, graduation, marriage, retirement, or death." 11 C.F.R. § 113.1(g)(4). Again, this exception is strictly policed. In 2000, the FEC advised a House Member that he could use campaign funds to purchase replica "Liberty Medals" from a private company and award them to veterans of World War II in his district. FEC Adv. Op. 2000-37 (Dec. 12, 2000). But the FEC made clear that the cost of the particular medals (about $13-$17 each) had "little monetary value," and cautioned that the undertaking would be problematic under FEC rules if it conferred a "significant personal benefit" upon the recipient veterans. *Id*. at 3.

Thus, although there is considerable variation, virtually every jurisdiction defines permissible and non-permissible uses of campaign funds, and most prescribe how and to whom charitable contributions from campaign accounts can be made in a manner consistent with federal and New Mexico law.

ARGUMENT

I. Because the First Amendment Burden Posed by the Personal Donation Rule Is Minimal, Strict Scrutiny Is Not Warranted.

As the survey of federal and state law demonstrates, states have generally enjoyed significant latitude to define which uses of campaign funds are permissible

"campaign expenditures" and which are prohibited personal use. These laws have not been subjected to strict scrutiny because a prohibition on personal use is not generally considered a significant burden on First Amendment activity, or a restriction on campaign expenditures at all.

For instance, in one of the few cases to squarely consider the constitutionality of a personal use restriction, a federal district court in Delaware upheld FECA's personal use prohibition as to a candidate's use of campaign funds for rent and living expenses. *FEC v. O'Donnell*, 209 F. Supp. 3d 727, 729 (D. Del 2016). The court held that heightened scrutiny did not apply, even though the statute necessarily limited the range of uses for which a candidate could spend their funds. *Id.* at 739–40. But because FECA did "not restrict the content of one's message" nor "limit the amount of speech or political activity in which one can engage," it was only "subject to rational basis review." *Id.*

So too does New Mexico's personal donation rule impose no restraint on speech. New Mexico, like states across the country, has the authority to define which disbursements are "campaign expenditures" made "in support of the candidate's campaign in an election," and which are not. N.M. Stat. Ann. § 1-19-26(G). This necessary line-drawing exercise is not tantamount to an expenditure limit. Nor does the personal donation rule *function* as a limit because it restricts neither the content

of a campaign speech, nor quantity of a candidate's expression. Strict scrutiny is not warranted.

A. Proscribing the use of campaign funds for personal benefit is not a restriction on "campaign expenditures."

Plaintiff makes a critical error in constructing his constitutional challenge by assuming that *any* disbursement his campaign committee makes—or at least any disbursement it makes with putative expressive intent—constitutes a "campaign expenditure" that receives absolute protection from regulation. This premise is incorrect.

Candidates have a recognized right to make campaign expenditures without monetary limit, *see infra* Part I.C., but they do not have unilateral authority to delineate what spending is "campaign-related" in the first place. Indeed, if this question were left entirely up to the candidates' "judgment," as plaintiff urges, *see* AOB at 24, they could effectively obviate the prohibition on personal use that is central to most campaign finance laws.

Plaintiff appears to forget that the personal donation rule is not restricting him as an individual, and instead is part of a comprehensive regulatory system for political committees. A campaign committee is an entity established and operated to receive and spend funds contributed by others for "the purpose of electing [a] candidate to office." N.M. Stat. Ann. § 1-19-26(F). It is not unconstitutional for states to require committees to use their funds for that purpose.

This is not to say that states have unchecked authority to define what spending is or is not related to a campaign—although this threshold determination may only be subject to rational basis review, at least absent a clear "First Amendment harm." *O'Donnell*, 209 F. Supp. 3d at 740. So, for instance, if a state prohibited candidates from using campaign funds for online advertising, this would not be a reasonable, or even rational, line between campaign-related activity and personal use; to the contrary, it would restrict First Amendment activity that is central to modern campaigning. That law would fail any level of judicial review.

But this is not the nature of the rule under review here, which limits what types of charitable donations and gifts can be made by campaigns. It is reasonable for New Mexico to deem campaign money gifted by Mr. Ortiz y Pino to a private individual following an election to be unrelated to campaign activity, and indeed, not a "campaign expenditure" at all.[6]

[6] Because plaintiff conflates a campaign committee with a private individual for the purposes of his First Amendment claim, the judicial authorities he cites—all of which considered *private* charitable contributions—are off point. For instance, *Florida Right to Life, Inc. v. Lamar* considered a sweeping Florida law that "forbid[] political candidates from making any donations out of *personal* . . . funds," as well as campaign funds. 273 F.3d 1318, 1325 (11th Cir. 2001) (emphasis added). Similarly, *Coral Ridge Ministries Media, Inc. v. Amazon.com* considered the right of a private retailer to make decisions about charitable giving. 6 F.4th 1247, 1254–55 (11th Cir. 2021). *See also Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1116 (8th Cir. 2005) (considering a Minnesota law that prohibited charitable organizations from soliciting donations from candidates). None of these cases suggest it is unconstitutional to regulate the "charitable" donations of campaign committees, as New Mexico does.

B. The donation of campaign funds to an individual functions as a "gift" and has little expressive value.

Plaintiff—and the district court in its initial decision granting preliminary relief—nevertheless posit that a donation of campaign funds to an individual enjoys robust First Amendment protection because it may be "imbued with elements of communication." App. Vol. 1, DNM 51-52 (quoting *Texas v. Johnson*, 491 U.S. 397 (1989)). The district court then imagined a hypothetical donation from a state senator to pay for a rape victim's abortion to communicate support for "a woman's right to choose." App. Vol. 1, DNM 52.

But the $200 campaign "donation" made by Mr. Ortiz y Pino—and the payment for an abortion imagined by the court—cannot be equated to political speech at the center of the First Amendment's protection; instead, these "charitable" donations to individuals are functionally identical to, and more accurately characterized as, personal gifts. The key difference between a gift and a campaign contribution or expenditure is that the former inures to the personal benefit of the recipient, whereas the latter funds the development, production, or distribution of campaign communications or other campaign activities. For this reason, making gifts is not considered core First Amendment activity. *Schickel v. Dilger*, 925 F.3d 858, 869 (6th Cir. 2019) (citation omitted), *cert. denied sub nom. Schickel v. Troutman*, 140 S. Ct. 649 (2019) (explaining that "if contribution restrictions 'lie

closer to the edges than to the core of political expression,' gifts of value hug the fringe").

An officeholder has no "right" under the First Amendment to receive a gift, and consequently, legislatures can—and often do—restrict gifts to public officials of more than insubstantial value. *See* N.M. Stat. Ann. § 10-16B-3(A); *see also* 5 U.S.C. § 7353; 5 C.F.R. §§ 2635.201–.205. Nor does a candidate or an officeholder have a "right" to give gifts from official or campaign funds. *See* 52 U.S.C. § 30114(b)(1); 11 C.F.R. § 113.1(g)(4). And because gifts have little expressive value, courts review gift laws under relatively relaxed scrutiny. *See Schickel*, 925 F.3d at 869 (applying "closely drawn scrutiny" to Kentucky gift ban); *O'Donnell*, 209 F. Supp. 3d at 739-740 (reviewing personal use restriction under "rational basis" standard).

It is therefore not constitutionally necessary to narrowly interpret the personal use restrictions to permit "charitable" donations to individuals that "convey[] a strong political message for the campaign" under Subsection 1-19-29.1(A)(1). App. Vol. 4, DNM 35. The personal donation rule is constitutionally sound with or without the Secretary's construction.

The narrowing interpretation could create an exception that swallows the rule. If a $200 gift for a summer program is Mr. Ortiz y Pino's expression of support for education—and thus a protected campaign expenditure—so to would his campaign's

payment of an entire year of college tuition constitute protected speech. By this logic, a candidate could devote their entire campaign account to paying for school tuition—or, as the district court hypothesized, for abortions for their constituents—notwithstanding the clear threat of quid pro quo corruption and vote buying such largesse poses.

C. The personal donation rule does not regulate content, nor limit campaign expenditures.

Plaintiff attempts to escape the faulty premises of his constitutional challenge by asserting that the personal donation rule nevertheless impacts campaign speech because it restricts the content of candidates' communications. AOB at 19–20.

But as the district court acknowledged, in most contexts, including this case, a candidate's "charitable" gift to an individual "is not 'speech' as the Supreme Court defined it." App. Vol. 1, DNM 51 (quoting *Texas v. Johnson*, 491 U.S. 397 (1989)). And even as applied to the district court's hypothetical senator who wishes to fund abortions, the private donation rule in no way restricts the "content" of their supposed message, only the recipient of their campaign money. This senator is free to speak about "a woman's right to choose" or spend campaign funds to run ads or distribute literature about reproductive rights. Under Subsection 1-19-29.1(A)(4), the candidate is even allowed to donate campaign funds to Planned Parenthood, a 501(c)(3) non-profit, at an amount equal to the cost of the reproductive medical care. The rule in no way restricts the candidate's message. Plaintiff thus "misses one

crucial element in the 'content-based restriction on speech' inquiry: speech." *Libertarian Nat'l Comm.. v. FEC*, 924 F.3d 533, 548 (D.C. Cir. 2019), *judgment entered*, 771 F. App'x 8 (D.C. Cir. 2019) (rejecting First Amendment challenge to FECA's "purpose restrictions" on how funds in segregated accounts established by the national parties could be used).

Nor is the personal donation rule analogous to an expenditure limitation. First, plaintiff errs in assuming his donation even is a "campaign expenditure" in the first place. *See supra* Part I.A. But more fundamentally, this analogy fails for the simple reason that the rule does not limit *how much* a candidate may spend.

Compare, by contrast, the $1,000 expenditure cap considered in *Buckley v. Valeo* that limited how much an individual or group could spend "relative to a clearly identified candidate." 424 U.S. 1, 13 (1976). *see also Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004) (considering a $174,720 limit on expenditures by mayoral candidates). These monetary expenditure limits "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19.

New Mexico's personal donation rule has no such impact. It neither caps the amounts that candidates can expend, nor reduces the "quantity of expression" they can disseminate. To the contrary, the rule *increases* the pool of funds available for

campaign speech by preventing campaign monies from being diverted to enrich the candidate or other individuals personally.

Finally, although plaintiff on appeal argues that the private donation rule also impermissibly restricts campaign donations to 501(c)(4) groups, he did not make this claim in any detail below, and, of course, his case does not concern any such donation. In any event, plaintiff has not identified a single unconstitutional application of the rule with respect to a 501(c)(4) donation. Nor has he attempted to explain why disallowing such donations would materially regulate the content of a candidate's speech or limit the amount a candidate can spend.

But even assuming arguendo that plaintiff—or the district court—could identify an "charitable" donation that comes closer to "convey[ing] a particularized message," App. Vol. 1, DNM 51-52, plaintiff has not shown "that there are a substantial number of campaign expenses that are prohibited under the personal-use prohibition, but that constitute or facilitate political speech." *O'Donnell*, 209 F. Supp. 3d at 740. Plaintiff falls far short of the demonstration necessary "to prevail on a facial challenge under the First Amendment." *Id*.

II. Compelling Governmental Interests Support Restrictions on the Personal Use of Campaign Funds.

Because the district court reviewed the personal donation rule under strict scrutiny, it focused only on quid pro quo corruption as a potential governmental interest. App. Vol. 1, DNM 52-53 (citing *Republican Party of New Mexico v. King*,

741 F.3d 1089, 1094 (10th Cir. 2013)). To be sure, the rule prevents quid pro quo corruption and its appearance and thus satisfies even strict scrutiny review. *See O'Donnell*, 209 F. Supp. 3d at 740 (finding that personal use restriction "reduces corruption and promotes public confidence in the campaign finance and political system"); *see also* NMSEC Adv. Op. 2025-01 (Feb. 7, 2025) (opining that the "underlying purpose of governmental restrictions on the use of campaign funds is the same as the restriction on contribution amounts," chiefly to "prevent[] corruption and the appearance thereof"). But the personal use restriction also advances additional governmental interests not discussed in the proceedings below.

The rule prevents two distinct risks of corruption: first, the risk that candidates will attempt to direct gifts in a manner that enriches themselves or their families; and second, the risk that the gifts will serve as patronage or another form of quid pro quo, inducing the recipient to provide political support or other benefits to the candidate. While the lower court acknowledged the latter possibility of quid pro quo corruption, it disregarded the former interest, namely prohibiting outright self-enrichment.

The parties below also did not discuss two additional governmental interests advanced by the rule: in ensuring campaign transparency by preventing the outsourcing of campaign spending, and in protecting campaign contributors' contributions from misuse and thereby promoting their democratic participation.

Given that strict scrutiny is inapplicable, all of these interests support the challenged rule.

A. Restricting a campaign's donations to bona fide charities prevents the risk that these donations will corrupt either the candidate or the recipient.

1. The personal donation rule targets self-enrichment.

The most blatant example of personal use is when a candidate misappropriates campaign funds to immediately benefit themselves financially. For example, in 2015, then-Secretary of State of New Mexico, Dianna Duran, pled guilty "to embezzlement and money laundering for using campaign contributions to pay gambling debts." Fernanda Santos, *New Mexico Secretary of State Dianna Duran, Pleads Guilty to Fraud*, N.Y. Times (Oct. 23, 2015), https://www.nytimes.com/2015/10/24/us/new-mexico-secretary-of-state-dianna-duran-pleads-guilty-to-fraud.html.

But "personal use" is not limited to cases where an individual embezzles funds from a campaign, but also includes instances where they derive value from directing campaign funds to the recipient of their choice. *See Estate of Geiger v. Commissioner of Internal Revenue*, 352 F.2d 221 (8th Cir. 1965). The personal benefit is clear when a candidate donates to an organization that they control or that provides the candidate or their family with personal benefits; for this reason, at the federal level, the FEC requires candidates to show both that they are making

campaign donations to 501(c) organizations *and* that they will receive no compensation from the organization. *See supra* at 10-11.

Restricting the charitable donation of campaign funds to only groups listed in I.R.C. § 170(b)(1)(A) reduces the risk that such donations will enrich a candidate. Strict I.R.C. reporting requirements and restrictions on personal inurement and excess benefit transactions work to prevent groups organized under 501(c)(3) from serving as vehicles of self-dealing. *See, e.g.*, *Exemption requirements - 501(c)(3) organizations*, IRS, https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations. No such protections guard against the potential enrichment made possible by "charitable" donations to individuals or unincorporated associations.

The government has an important interest in preventing candidates from enriching themselves by converting campaign contributions to personal use— even if the monies are not part of an explicit quid pro quo between the contributor and the candidate. Indeed, the interest in preventing self-inurement was the impetus behind passage of the original federal personal use prohibition. FECA Amendments of 1979, Pub. L. No. 96-187, § 113, 93 Stat. 1339 (1980). The enactment of this prohibition followed the U.S. Senate's censure of one of its members for spending campaign funds on his personal expenses, which it found "derogates from the public trust expected of a Senator, and tends to bring the Senate into dishonor and

disrepute." Select Comm. on Standards and Conduct, U.S. Senate, 90th Cong., 1st Sess., Report No. 193 on the Investigation of Senator Thomas J. Dodd of Connecticut at 25 (Apr. 27, 1967). The subsequent FECA prohibition in essence codified the "position [against personal use] adopted by the Senate on previous occasions and reflected in . . . the Standing Rules of the Senate," and applied it to all federal candidates. *See* S. Rep. No. 96-319, at 5 (1979).

It is untenable to suggest that this interest cannot sustain a prophylactic law like the personal donation rule, in either its federal or New Mexico instantiation, when it supports significant criminal penalties, including imprisonment, even in the absence of any proven quid pro quo. For instance, former Congressman Duncan Hunter was sentenced to almost a year in prison for using over $100,000 in campaign funds for personal items, such as luxury hotels and overseas vacations. *Former Congressman Duncan D. Hunter Sentenced To 11 Months In Prison For Stealing Campaign Funds*, U.S. Attorney, S. Dist. Cal. (Mar. 17, 2020), https://www.justice.gov/usao-sdca/pr/former-congressman-duncan-d-hunter-sentenced-11-months-prison-stealing-campaign-funds. *See also Ex-state lawmaker gets 15 months in corruption scandal*, AP (Sept. 15, 2021), https://apnews.com/article/business-boston-campaigns-massachusetts-lowell-7b880ad450c33456be4af01368fecccd (Massachusetts state lawmaker sentenced to

15 months in prison for illegally using campaign funds to pay for personal expenses like trips to casinos and expensive dinners).

2. The rule prevents quid pro quo exchanges.

The potential quid pro quos arising from a candidate's donation of campaign funds is bi-directional. First, the candidate's personal use of a campaign contribution enhances its value to the candidate, thereby increasing the risk that the contributor might seek a quid pro quo from the candidate in exchange. Second, the candidate's "charitable" donation of campaign funds to an individual might also corrupt the *recipient* of the money and induce them to enter into a quid pro quo arrangement with the candidate.

As discussed in the foregoing section, the public interest in preventing self-enrichment is sufficient to justify the law here. But the personal use of campaign funds also poses a clear risk of quid pro quo corruption because it increases the value of a contribution to the candidate: a contribution to a campaign committee that is converted to personal use becomes the functional equivalent of a direct payment from the contributor to the candidate. Personal use restrictions counteract this dynamic by reducing candidates' own financial incentive to engage in improper exchanges.

A campaign "donation" to an individual also encourages quid pro quo arrangements between candidate and the beneficiary of the donation. Indeed, an

officeholder's power to direct money to the recipient of his choice not infrequently forms the predicate for criminal bribery convictions. In the case of former New York Assembly Speaker Sheldon Silver, for instance, Silver was convicted of honest services fraud for steering state grant money to a cancer researcher in exchange for kickbacks; these kickbacks took the form of the cancer researcher referring patients to a law firm where Silver got a cut of the fees. *See United States v. Silver*, 948 F.3d 538, 559–61 (2d Cir. 2020). *See also United States v. Householder*, No. 1:20-cr-77, 2023 WL 24090, at *5 (S.D. Ohio Jan. 3, 2023) (reviewing indictment of Ohio House Speaker Larry Householder for agreeing to take official acts in exchange for "millions of dollars in bribe payments" he directed to a 501(c)(4) group, Generation Now).

B. Allowing donations of campaign funds to individuals and 501(c)(4) groups undermines campaign finance disclosure.

The personal donation rule also promotes transparency in New Mexico elections by preventing candidates from "outsourcing" campaign spending to individuals and politically-active groups like 501(c)(4)s in order to avoid the disclosure requirements that otherwise would apply to such spending.

New Mexico, like almost all jurisdictions, requires candidates to operate their campaign through an authorized campaign committee that is registered with the state and that discloses all significant receipts and disbursements, including the purposes and recipients of all campaign expenditures. *See, e.g.*, N.M. Stat. Ann. §§ 1-19-

26(F), -31, -34. This ensures that candidates can be held publicly accountable for all campaign spending—and by extension, all campaign messages and activities funded by their campaign.

As argued *supra* Part II.A, if candidates are permitted to "donate" their campaign funds to individuals or 501(c)(4) groups, this maneuver creates opportunities for self-enrichment and quid pro quo exchanges. But even if the recipient uses these donations for campaign purposes, this practice also provides an avenue for candidates to "outsource" their campaign spending to individuals or to politically-active entities that often might operate largely beyond the reach of campaign finance laws, frustrating the expenditure-disclosure requirements of New Mexico's CRA.

For instance, a candidate could direct a 501(c)(4) recipient of "donations" to use the funds for a controversial attack ad on their opponent or for negative messaging meant to depress turnout in order to avoid voter backlash for these messages. And no law would prevent the initial 501(c)(4) recipient from again transferring these funds to a different "dark money" group, further erasing the candidate's fingerprints from the campaign money and distancing the campaign ads from effective regulation.

Indeed, in arguing that campaign donations should be permitted to 501(c)(4) groups, plaintiff ignores one key difference between (c)(4) groups and those listed

in I.R.C. § 170(b)(1)(A): the former can legally engage in significant amounts of "political intervention"[7]—often without disclosure—whereas the latter are largely barred from such campaign activity. *See* I.R.C. §§ 170(b)(1)(A)-(D), 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). The entities that are permitted to accept campaign donations under New Mexico's personal donation rule are precisely those groups that cannot use the money for secret campaign activities.

C. The personal donation rule protects contributors from the misuse of their money.

In New Mexico, and in most federal and state elections, individuals contribute to political campaigns with the expectation that their contributions will be used for legitimate campaign purposes, not for the enrichment of the candidate or anyone else. Personal use restrictions ensure that donors do not have to fear that their campaign contributions will be diverted to benefit the candidate or his preferred "charitable" causes.

Unlike campaign finance limits on contributions, personal use restrictions in no way impinge upon the association between a contributor and the candidates supported by that contributor. *Buckley*, 424 U.S. at 22. To the contrary, they *enhance* the association between contributors and candidates by ensuring that contributions

[7] Section 501(c)(4) organizations may engage in political campaigns provided that such intervention does not constitute the organization's primary activity. Treas. Reg. 1.501(c)(4)-1(a)(2)(i), (ii); G.C.M. 34233 (Dec. 3, 1969).

will be spent for campaign efforts, not personal enrichment, and reinforcing contributors' confidence in the integrity of the campaign. Plaintiff's emphasis on the "charitable" purposes of his $200 gift entirely misses the point that contributors do not donate in order to support the candidate's pet causes or charity cases. It is reasonable for contributors to expect not only that their contributions will not be converted to the candidate's personal use, but also that the funds will not be gifted to high school students or other "charitable" recipients. This interest is sufficiently important that federal law and the statutes of several states prohibit *any* individual from personally benefiting from campaign funds, not only the candidate. *See supra* at 8-9.

This accountability increases "participation in the political process by allowing contributors to support a campaign without worrying that their funds will be converted to personal use." *O'Donnell*, 209 F. Supp. 3d at 740. If citizens lack confidence in the campaign finance system or fear misappropriation of their contributions, they will be less likely to contribute or otherwise engage in democratic campaign activity.

CONCLUSION

For these reasons, the district court's decision should be AFFIRMED.

Dated: May 6, 2025

Respectfully submitted,

Jeremy Farris
NEW MEXICO STATE ETHICS COMMISSION
800 Bradbury Dr., SE, Suite 215
Albuquerque, NM 87106
Telephone: (505) 827-7800
jeremy.farris@sec.nm.gov

/s/ Tara Malloy
Tara Malloy
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, D.C. 20005
Telephone: (202) 736-2200
tmalloy@campaignlegalcenter.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32 because this brief contains 6,486 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: May 6, 2025

/s/ Tara Malloy
Tara Malloy

CERTIFICATE OF DIGITAL SUBMISSION AND ANTIVIRUS SCAN

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5;

(2) any printed copies delivered to the Clerk will be exact copies of the PDF version of the document filed via CM/ECF;

(3) the digital submission has been scanned for viruses with the most recent version Microsoft Security Essentials, a commercial virus scanning program, and according to the program, the submission is free of viruses.

Dated: May 6, 2025

/s/ Tara Malloy
Tara Malloy

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2025, I electronically filed a copy of the foregoing Brief *Amicus Curiae* using the CM/ECF system, which will send notification of this filing to all counsel of record.

Dated: May 6, 2025

/s/ Tara Malloy
Tara Malloy