November 16, 2017

Via electronic transmission

Members of the Governing Body
City of Santa Fe
200 Lincoln Avenue
P.O. Box 909
Santa Fe, NM 87504-0909

Dear Mayor Gonzales and Councilors,

It has come to the attention of the Campaign Legal Center (CLC) that the City Council is considering amendments to the City Campaign Code, subsection 9-2.6, to eliminate the reporting of expenditures relating to municipal ballot propositions, Bill No. 2017-27. We strongly urge the Council to reject this legislation.

CLC is a nonprofit, nonpartisan organization based in Washington D.C. committed to protecting our democratic system. We were founded in 2002 to represent the public interest in administrative, legislative and legal proceedings to defend and improve campaign finance, political disclosure and election laws. CLC has participated in every major campaign finance case that has come before the U.S. Supreme Court since our founding, including *Citizens United v. FEC*.[1] We have also been active in the area of political disclosure, serving as counsel to Delaware in its recent successful defense of its independent spending disclosure law,[2] and as a friend-of-the court in disclosure litigation in over a dozen states across the nation.

Our understanding is that Bill No. 2017-27 was introduced in response to a legal action, *Rio Grande Foundation v. City of Santa Fe* (Case No. 17-cv-00768, D.N.M.), which challenges the constitutionality of subsection 9-2.6 insofar as it requires the reporting of expenditures for municipal ballot propositions. But this lawsuit has no merit.

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1 558 U.S. 310 (2010).

2 *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304 (2015), *cert. denied sub nom. Del. Strong Families v. Denn*, 136 S. Ct. 2376 (2016).

Both the U.S. Supreme Court and the Tenth Circuit Court of Appeals have expressed approval of measures requiring disclosure of the financing of ballot measure advocacy, with the Tenth Circuit recently emphasizing the public's "informational interest"[3] in such disclosure. There is no constitutional justification for Bill No. 2017-27.

In fact, First Amendment considerations weigh *in favor* of bringing transparency to the financing of advocacy on ballot measures. Ensuring that voters have information about those seeking to influence their vote is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment. For this reason, the U.S. Supreme Court has long endorsed disclosure in the context of ballot issue advocacy, stating in a 1978 decision that "[i]dentification of the source of advertising" for ballot measures "may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."[4]

Some have argued, however, that these Supreme Court precedents notwithstanding, the Tenth Circuit has cast doubt on the constitutionality of subsection 9-2.6 in recent decisions that invalidate state laws requiring disclosure relating to ballot measure advocacy.[5] But this misunderstands the Circuit's rulings. The Court of Appeals has never suggested that ballot measure-related disclosure itself is constitutionally suspect. Instead the Court's concern has been limited to a *particular type of disclosure law*: namely, laws that require groups engaged in ballot measure-related advocacy to register as political committees (or "PACs"), and to comply with comprehensive reporting and record-keeping requirements, even when their "major purpose" does not relate to such advocacy. The Tenth Circuit has held that a full PAC disclosure regime is unduly burdensome under the First Amendment—at least as applied to small groups engaged in minimal amounts of ballot measure-related advocacy. By contrast, CLC is aware of no decision from the Tenth Circuit striking down a more streamlined disclosure law, such as subsection 9-2.6, that requires only a "one-time" report when a group's electoral spending exceeds a statutory threshold. On the contrary, the Tenth Circuit last year upheld a Colorado law that required exactly this type of "event-driven" reporting when a group's "electioneering communications" exceeded the statutory threshold.[6]

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[3] *Coalition for Secular Government (CSG) v. Williams*, 815 F.3d 1267, 1278 (10th Cir. 2016).

[4] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978). *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (noting that "there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting.").

[5] *See, e.g., Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010); *CSG v. Williams*, 815 F.3d 1267 (10th Cir. 2016).

[6] *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016).

Although the distinction between a PAC disclosure regime and an "event-driven" reporting requirement may seem technical, it often has constitutional import. The U.S. Supreme Court has recognized that PAC regulation typically entails a host of "detailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of records."[7] Given these burdens—including "the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, [and] to file periodic detailed reports"—the Supreme Court has recognized that PAC status is a regime "small entities may be unable to bear."[8]

But none of these administrative burdens are imposed by an event-driven reporting requirement. Here, for example, subsection 9-2.6 does not require any of the array of obligations typically imposed on PACs. A group subject to subsection 9-2.6 is *not* required to: (1) file a statement of organization upon formation, (3) appoint a treasurer or custodian of records, (3) open and maintain a segregated campaign depository account, (4) file regular disclosure reports according to a pre-established schedule, (5) file a statement even in reporting periods with no campaign spending, (6) disclose and itemize all receipts and disbursements, (7) liquidate and disburse all funds at the conclusion of the campaign, or (8) maintain its records for two years.[9] Instead, a group subject to subsection 9-2.6 need only file a one-time report whenever it makes over $250 in covered expenditures disclosing such expenditures and the contributions it received that were collected "for the purpose of paying for such expenditures." That is the sum total of a covered group's obligations. Subsection 9-2.6 is simply not comparable to the extensive PAC disclosure regimes invalidated by the Tenth Circuit—and then only with respect to small groups with minimal ballot measure-related activities.

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[7] *FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238, 254 (1986). Santa Fe's Campaign Code actually includes several provisions regulating PACs, although these provisions have limited scope and are not the subject of either the pending bill or the pending lawsuit. Subsections 9-2.7 through 9-2.13 SFCC 1987 require every "political committee" to register and to comply with comprehensive regulation and periodic reporting requirements. The coverage of these provisions is closely circumscribed, however, by the code's narrow definition of "political committee," which includes only entities that are "formed for the principal purpose" of engaging in certain specific kinds of electioneering activities in a Santa Fe city election. 9-2.3(N) SFCC 1987. Since the Rio Grande Foundation allegedly does not satisfy this definition, it was not required to register and report as a "political committee,' and its lawsuit does not challenge these provisions of the code.

[8] *MCFL*, 479 U.S. at 253-54 (listing, in detail, the obligations entailed by "PAC status" under federal law). The Tenth Circuit has also emphasized this distinction. *Independence Institute*, 815 F.3d at 795 n.9 ("[T]he obligations that come with political committee status, including reporting and auditing requirements, tend to be considerably more burdensome than disclosure requirements.") (internal citations omitted).

[9] Compare subsection 9-2.6 SFCC 1987 with subsections 9-2.7 through 9-2.13 SFCC 1987, which impose all of these requirements on entities that meet the narrow definition of a "political committee" in section 9-2.3(N) SFCC 1987. As noted above, the latter provisions are not affected by the pending bill and are not challenged in the RGF lawsuit.

The fundamental difference between a PAC disclosure regime and event-driven reporting is underscored by the fact that the Tenth Circuit has struck down PAC disclosure regimes for ballot measure advocacy,[10] while at the same time upholding event-driven reporting requirements such as Colorado's electioneering communications reporting law.[11] In short, the nature and extent of a disclosure law is crucial to a court's review of its constitutionality. Subsection 9-2.6 is squarely on the "constitutional" side of this jurisprudential divide.

We appreciate your attention to this letter. Please let us know if you would like additional information on any of the issues we have raised here.

Sincerely,

Tara Malloy

Senior Director, Appellate Litigation and Strategy
Campaign Legal Center

Cc:

Marcos Martínez, Esq.
Deputy City Attorney
City of Santa Fe
200 Lincoln Avenue
P.O. Box 909
Santa Fe, NM 87504-0909

Justin Miller, Esq.
Chair, Santa Fe ECRB
Bardacke Allison LLP
141 E. Palace Avenue
P.O. Box 1808
Santa Fe, NM 87504-1808

[10] *See* n.5 *supra*.

[11] *See* n.6 *supra*.