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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 RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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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 response to Defendants' Cross-Motion for Summary Judgment, filed pursuant to F.R.C.P. 56 and Rule 1-056, NMRA, states:

Defendants' Cross-Motion for Summary Judgment should be denied. Laws requiring donor disclosure in the ballot-measure context are strongly disfavored under the First Amendment. As the Tenth Circuit has noted, the "[Supreme] Court has never upheld a disclosure provision for ballot-issue campaigns that has been presented to it for review." *Sampson v. Buescher*, 625 F.3d 1247, 1258 (10th Cir. 2010). Defendants' motion ignores the Tenth Circuit's clear holdings in *Sampson* and *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016), where it struck down laws regulating ballot-measure speech because the government's interest in the information it sought was—as here—"minimal, if not nonexistent." *Sampson*, 625 F.3d at 1261.

Because they cannot overcome those cases, Defendants attempt to claim that the Foundation needed to show actual harassment of itself and its donors in order to bring this challenge, but this is directly contrary to what the Supreme Court said in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), and Justice Alito's summary of that holding—upon which Defendants heavily rely—in his concurrence in *Doe v. Reed*, 561 U.S. 186, 204 (2010)

(Alito, J., concurring). Finally, Defendants attempt to show that their law is narrowly drawn, but this argument is undercut by the very text of the law, which applies to donations as small as one cent, and to expenditures as small as $250. SFCC § 9-2.6(A).

Ultimately, nothing in Defendants' motion demonstrates that the donor-disclosure law is anything but an unconstitutional intrusion into the constitutional rights of non-profits and their donors under the U.S. and New Mexico constitutions, as shown in Plaintiff's Cross-Motion for Summary Judgment.

I. NONE OF DEFENDANTS' ARGUMENTS CHANGE THE FACT THAT THEIR INTEREST IN THIS INFORMATION IS MINIMAL OR NON-EXISTENT ACCORDING TO BINDING PRECEDENT.

Much of Defendants' motion is premised on the claim that the government's informational interest here is more than minimal. To support this claim, Defendants cite only inapposite cases. At pages 19-22 of their Cross-Motion for Summary Judgment, Defendants cite cases that *struck down* disclosure requirements, which do not help Defendants' position; cases from other circuit courts of appeal, which only show that an acknowledged circuit split exists; and a handful of cases about the gathering of ballot-measure signatures and cases about speech in candidate elections from the Supreme Court and Tenth Circuit, none of which discuss the government's interest in knowing who is funding simple speech about a ballot measure. *See, e.g., Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (petition circulators); *McConnell v.*

FEC, 540 U.S. 93 (2003) (candidate election); and *United States v. Harriss*, 347 U.S. 612 (1954) (lobbying).

Defendants' cases ignore the actual holdings of *Sampson* and *Williams*, which are recent, on-point, and binding. Defendants take cases involving candidate elections, or challenges to laws regulating petition signature gatherers, and attempt to apply the same legal standards in those cases to this case, which involves pure speech (a YouTube video and website) about a ballot measure.

But cases involving speech about ballot measures are not treated like other campaign-finance cases, largely because *significant* governmental interests that may be present in other contexts—like preventing corruption or maintaining the integrity of the electoral process—are not present in this context. The Tenth Circuit has been clear on this point: The "disclosure" interest asserted by Defendants is "significantly attenuated" in the context of ballot measures, especially "when the contributions and expenditures are slight." *Sampson*, 625 F.3d at 1259; *see also id.* at 1260 n.5 (the ballot issue committee had reported in-kind contributions of $782.02, and $31.53, and cash contributions totaling $1,426, and expenditures of $1,178.82 toward attorney fees, and $247.18 balance in the bank account). *Sampson* struck down the disclosure obligation "as a matter of common sense." *Id.* at 1260 (citation and internal punctuation omitted). It found that the value of the information at issue "declines drastically as the value of the

expenditure or contribution sinks to a negligible level." *Id.* (quoting *Canyon Ferry Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009)).

Defendants' donor-disclosure requirements are even more onerous than the ones struck down in those cases. Not only is the *expenditure* trigger "*de minimis*" ($250), but the *contribution* trigger (one cent) is even more so. *Id.*; SFCC § 9-2.6(A). The name, address and occupation of any donor who contributes *a penny* must be reported under Santa Fe's provision. SFCC § 9-2.6(A). Nothing in Defendants' motion addresses this fundamental truth: Defendants' informational interest in this case approaches the vanishing point, and, as such, is insufficient to meet *Sampson*'s exacting First Amendment scrutiny, regardless of any showing made by the Foundation.

II. THE FACIAL/AS-APPLIED DISTINCTION MATTERS ONLY AS TO REMEDY.

Defendants make much of whether this challenge should be classified as facial or as-applied. Defs.' Cross-Mot. Summ. J. at 33-36. Yet, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction … goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). In truth, this lawsuit could rightly be characterized as either. The challenge is facial to the extent that it seeks to have the involuntary disclosure of any

non-profit group's donors declared unconstitutional in the ballot-measure context. The challenge is as-applied to the extent that the facts of this case focus—obviously—on the harassment faced by free-market non-profit groups like the Foundation.

Ultimately, the facial/as-applied distinction matters only as to remedy. *Id*. The Foundation believes, and argues in the main, that *all* non-profit groups and their donors, in the ballot-measure context, are protected by the First Amendment. But, as shown below, the Foundation can only demonstrate facts that apply to it and groups of similar ideological persuasion. This Court should, at a minimum, find that the Foundation has shown that it and similarly situated groups should be protected from involuntary donor disclosure, based on the facts of this case. But a better holding would be that all non-profits are protected from involuntary donor disclosure by the U.S. and New Mexico constitutions when those groups speak about ballot measures, regardless of the ideological persuasions of those groups or their donors.

III. DEFENDANTS' PROPOSED RULE IS CONTRARY TO SUPREME COURT PRECEDENT AND WOULD CREATE SIGNIFICANT ADJUDICATION PROBLEMS.

Defendants propose a rule under which a group must wait until after harassment, intimidation, vandalism, and death threats commence before that group can challenge a donor-disclosure requirement. Defs.' Cross-Mot. Summ. J. at 33. But Defendants fail to show that their rule has ever been adopted by the Supreme Court or

Tenth Circuit, particularly in the ballot-measure context. Indeed, as shown below, the Supreme Court has expressly held otherwise—that actual harassment is *one* way of establishing a First Amendment injury, but far from the only way—and the Tenth Circuit has never adopted such a rule. The rule proposed by Defendants would deny groups and individuals their First Amendment rights and would be extremely difficult to adjudicate.

A. The Supreme Court has said that a challenger may show that groups with "similar views" have suffered harassment and intimidation.

Defendants attempt to rely on Justice Alito's concurrence in *Reed* to support their position that a showing of previous harassment is necessary in order to challenge a donor-disclosure ordinance. Defs.' Cross-Mot. Summ. J. at 33-34. However, Defendants omit a key part of what Justice Alito actually wrote when he summarized the holding of *Buckley v. Valeo*. Contrary to Defendants' position that "a group must show specific evidence of past or present harassment," Defs.' Cross-Mot. Summ. J. at 33 (citation and internal quotations omitted), Justice Alito did not characterize the Court's holding in *Buckley* that way.

To the contrary, Justice Alito's concurrence viewed *Buckley* as holding that "unduly strict requirements of proof *could impose a heavy burden on speech*," and that because "speakers must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim," a plaintiff "need show only a *reasonable probability* that

disclosure will lead to threats, harassment, or reprisals." *Doe v. Reed*, 561 U.S. at 204 (Alito, J., concurring) (internal citations and quotations omitted). "Significantly," Justice Alito continued, "[*Buckley*] also made clear that … groups that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id*. (citation and internal quotations omitted).

Based upon documented harassment of organizations holding similar views, the Foundation easily satisfies this test. The Foundation is not a political group and does not support candidates for office. It therefore does not identify with any political party. However, it is a self-described "pro-free market" think tank and its work supports this characterization. Other pro-free market groups have routinely been harassed by their ideological opponents. Several such examples are cited in the Foundation's Cross-Motion for Summary Judgment. Pls.' Mot. Summ. J. at 21-22.

In addition to those already provided, perhaps the best example is the documented harassment of a pro free-market organization in *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016). There, the non-profit showed that its associates had been subjected to "threats, attacks, and harassment, including death threats." *Id*. at 1056. Their families, including their grandchildren, had been subjected to similar threats. *Id*. A supporter of the organization had "encountered boycotts of his

nationwide stores" and picketing of his stores. *Id*. "[T]his Court is not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members." *Id*.

Americans for Prosperity is larger than the Foundation, but the missions of the two organizations are similar. The Foundation's mission statement reads, "The Rio Grande Foundation is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens. We do this by informing New Mexicans of the importance of individual freedom, limited government, and economic opportunity."[1] The mission statement of Americans for Prosperity reads, "Americans for Prosperity exists to recruit, educate, and mobilize citizens in support of the policies and goals of a free society at the local, state, and federal level, helping every American live their dream—especially the least fortunate."[2] Based upon their mission statements and activities, the Foundation and Americans for Prosperity clearly hold "similar views," under the *Buckley* test. And harassment and intimidation of Americans for Prosperity is clearly documented in *Harris* and elsewhere.

[1] Mission Statement, http://riograndefoundation.org/about-the-rio-grande-foundation/#rms (last viewed June 30, 2018).

[2] Our Mission, https://americansforprosperity.org/about/ (last viewed June 30, 2018).

The Foundation can also document harassment and intimidation of other free-market non-profit groups. Affidavits attached to this response show that individuals associated with free-market non-profits are routinely subjected to harassment, threats, and intimidation by their ideological opponents.

- Dave Trabert is the President of the Kansas Policy Institute, a 501(c)(3) non-profit with a similar free-market mission and size as the Foundation. Affidavit of Dave Trabert, attached as Exhibit 1 ¶ 3. As his affidavit shows, Mr. Trabert has received vulgar and threatening emails and Tweets based on the work his organization performs. *Id.* ¶ 5. One email read, "Hey asshole, we know who signs your checks for the propaganda you spew. *We know where you live and we're watching you.* Go crawl back into the hole from which you came!" *Id.* ¶ 6 (emphasis added). A Tweet directed at Mr. Trabert read, "KOCH (just say the word) … makes 1 wish some crazy could get them a *bullet between the eyes*!" *Id.* ¶ 7 (emphasis added.) Mr. Trabert has also attached, to his affidavit, emails he received which detail explicit threats of sexual violence. *Id.* ¶ 8.
- Lynn Harsh is the former CEO of the Freedom Foundation, a Washington, D.C. based free-market non-profit. Affidavit of Lynn Harsh, attached as Exhibit 2 ¶ 4. As her affidavit shows, Ms. Harsh was, during her time as

CEO, subjected to repeated acts of intimidation and vandalism based on her work. Acts of vandalism directed at Ms. Harsh include the slashing of her car's tires at her office (*Id.* ¶ 11), the spray painting of the windows of her home (*Id.* ¶ 8), plastic cutlery (bizarrely) being arranged in her yard (*Id.* ¶ 7), and her trash being rifled through routinely (*Id.* ¶ 10).

- F. Vincent Vernuccio is the former Director of Labor Policy at the Mackinac Center for Public Policy, a Michigan-based free-market non-profit group that has a similar mission as the Foundation. Affidavit of F. Vincent Vernuccio, attached as Exhibit 3 ¶ 4. As his affidavit shows, Mr. Vernuccio was, during his time at the Mackinac Center, routinely subjected to harassment and intimidation based on the work he did. His affidavit shows that he has been spat upon by people who oppose his work. *Id.* ¶ 5. It shows that he has been shouted down by ideological opponents to the extent that the people shouting him down needed to be removed by police. *Id.* ¶ 6. It shows that once, during an appearance on a radio program, he received a threatening phone call indicating something dangerous would be waiting for him when he returned home. *Id.* ¶ 7. His employer was alarmed enough to perform a security check of the home before he returned. *Id*.

The Kansas Policy Foundation, Freedom Foundation, and Mackinac Center are all non-profit groups that hold views, and engage in activities, that are very similar to those of the Rio Grande Foundation. As the attached affidavits show, individuals associated with these groups have been spat upon, endured serious vandalism of their property, been subjected to shout downs, and have received vulgar threats of death, injury, and sexual violence. It is perfectly credible, then, for the Foundation and its donors to worry about its donors' identities being disclosed by Defendants due to the harassment and intimidation that could follow. The harm of disclosure in this case is far from speculative under *Buckley*, and the Foundation does not have to wait to receive threatening emails, or endure vandalism, or be spat upon, before it can seek to assert its rights under the First Amendment and New Mexico Constitution.

B. A strict "previous harassment" rule would violate the Supreme Court's test for bringing pre-enforcement First Amendment challenges.

Consistent with *Buckley*, the Supreme Court has always been clear that the credible threat of a constitutional injury is sufficient to bring a First Amendment challenge. In *Susan B. Anthony List v. Driehaus*, the Court reiterated the three-part test for pre-enforcement review of a law that violates the First Amendment. 134 S. Ct. 2334, 2343-45 (2014). First, the challenger must demonstrate an intention to engage in a course of conduct that is proscribed by the law. *Id*. at 2343. The facts of this case show that this prong is satisfied here. The Foundation has already been prosecuted by

Defendants for its speech about the soda tax in the past, and it intends to speak out about Santa Fe ballot initiatives as they arise in the future.

Second, the challenger must show that its intended future conduct is proscribed by the law. *Id*. at 2344. Neither side disputes that if the Foundation spends more than $250 to communicate with voters about a future ballot measure, it will be subject to Defendants' disclosure requirements.

Finally, the future threat of enforcement must be "substantial." *Id*. at 2345. The meaning of this third prong is the crux of a key dispute between Plaintiff and Defendants in this case. Donor-disclosure cases are seemingly complicated by the fact that the alleged injury—fear of harassment by ideological opponents—is caused by private parties, rather than the government itself. In other words, the Foundation and its donors are not afraid that the City itself will intimidate or harass them; they are afraid that their ideological opponents will harass them using reports compiled and distributed by Defendants.

Fortunately, this apparent public/private complication has already been resolved by the Supreme Court. In *Nat'l Ass'n of Colored People v. Alabama*, the Court rejected the government's argument that private parties, and not it, were the ones causing the First Amendment injury, holding that "[t]he crucial factor is the interplay of governmental

and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold." 357 U.S. 449, 463 (1958).

As the Foundation has shown above, free-market groups are often subjected to harassment, threats, and even acts of vandalism by their ideological opponents. Sadly, it is uncontroversial to state that in recent years, ideological harassment has become commonplace across the country. Supporters of California's Proposition 8 were singled out for reprisals and harassment at their homes and workplaces when their private information was disclosed publicly. Thomas M. Messner, *The Price of Prop. 8*, Heritage Foundation Backgrounder No. 2328 at 2 (Oct. 22, 2009) (Opponents of the initiative even created websites that "combine[d] donor information with an interactive map, allowing activists to ascertain the identity, employer, amount of donation, and approximate location of certain Prop 8 supporters.")[3] One Senator stated that he believed disclosure mandates are "good" because they "have a deterrent effect" against people "trying to influence the government."[4] One member of Congress recently encouraged people to harass members of the President's cabinet.[5] President Trump has said things like:

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[3] http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf (last viewed June 30, 2018).

[4] Remarks of Sen. Chuck Schumer regarding the DISCLOSE ACT (Senate Rules and Administration Committee Hearing (July 17, 2012)) https://www.youtube.com/watch?v=NHX_EGH0qbM (last viewed June 30, 2018).

[5] John Wagner, *Trump seeks to keep attention focused on Maxine Waters, calling her 'the face of the Democrats'*, THE WASHINGTON POST, (June 26,2018)

"[K]nock the crap out of them [protesters], would you? … I promise you I will pay for the legal fees," and, "Part of the problem … is nobody wants to hurt each other anymore."[6]

Nobody should have to wait for death threats or vandalism to start before they can challenge a law that forces them to disclose their donors' information to the government. The evidence in this case, evidence from other cases, and the current political climate make clear that groups like the Foundation—any nonprofit foundation, regardless of its ideology—are legitimately concerned about laws requiring them to disclose their donors to the government.

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https://www.washingtonpost.com/politics/trump-seeks-to-keep-attention-focused-on-maxine-waters-calling-her-the-face-of-the-democrats/2018/06/26/11619ecc-7928-11e8-80be-6d32e182a3bc_story.html?utm_term=.2371ad49f4ae ("If you see anybody from that Cabinet in a restaurant, in a department store, at a gasoline station, you get out and you create a crowd and you push back on them!" said Rep. Maxine Waters) (last viewed June 30, 2018).

[6] Colin Campbell, *Donald Trump tells his fans to 'knock the crap out of' any protesters about to throw tomatoes at him*, BUSINESS INSIDER (Feb. 1, 2016), http://www.businessinsider.com/donald-trump-crap-protesters-tomatoes-2016-2 (last viewed June 30, 2018); Nick Gass, *Trump: 'There used to be consequences' for protesting*, POLITICO (March 11, 2016), https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/trump-defends-protest-violence-220638 (last viewed June 30, 2018).

C. The Tenth Circuit has never required previous harassment and there was no such harassment in *Williams*.

The Foundation has been unable to find—and Defendants do not proffer—any case in which the Tenth Circuit has required evidence of actual, previous harassment in order to challenge a disclosure requirement. Quite the opposite. For instance, in *Williams*, which controls the outcome of this case, there was no evidence of prior harassment. 815 F.3d at 1279. Nevertheless, the court acknowledged that the reporting requirements were a significant burden on the non-profit's First Amendment rights. "We would expect some prospective contributors to balk at producing their addresses or employment information." *Id*. And this chilling of support—when balanced against the government's minimal interest in disclosure—was enough to declare the law unconstitutional. *Id*. at 1280.

D. A strict "previous harassment" rule would create significant adjudication problems.

Defendants argue for a strict requirement that a plaintiff show previous harassment in order to bring an as-applied challenge to a donor-disclosure requirement. As shown above, neither the Supreme Court nor the Tenth Circuit has ever adopted such a rule, and for good reason. In addition to offending decades of First Amendment caselaw in multiple contexts, such a rule would be virtually impossible to enforce.

First, in the context of the First Amendment, the presumption is in favor of the Plaintiffs, and the government bears the burden of justifying restrictions on freedom of speech and association. *Swepi, LP v. Mora Cnty., N.M.*, 81 F. Supp. 3d 1075, 1135–36 (D.N.M. 2015). To require Plaintiffs to come forward with proof of harassment would reverse that presumption and would amount to a presumption of constitutionality to which Defendants are not entitled. *Id.* Here, it is the government that bears the burden of proving that its restriction on Plaintiff's rights is justified by a compelling interest and that the means it has chosen are the least restrictive means of achieving its aims. *Harris,* 182 F. Supp. 3d at 1054. As a matter of law, therefore, the Defendants' "previous harassment" rule is indefensible.

It would also be unworkable. First, it is impossible for a speaker to determine whether he or she will be retaliated against for First Amendment activity a day, a month, a year, or a decade later. One reason the government bears the burden of proof in cases like this is because it is not possible for a party in Plaintiff's position to prove that harassment will occur perhaps long after the fact. Second, it is not clear what sort of retaliation or harassment would satisfy the burden of proof that Defendants want this Court to adopt. Consider the simple line-drawing problem created by Defendants' rule against the examples provided above. Would emailed threats of sexual violence be adequate proof of harassment and retaliation? Trabert Aff., Ex. 1, at ¶ 8. Being spat

upon? Vernuccio Aff., Ex. 3, at ¶ 5. Vandalism of staff members' homes? Harsh Aff., Ex. 2, at ¶¶ 7, 8. Slashing car tires in a parking lot? Harsh Aff., Ex. 2, at ¶ 11. Death threats? Trabert Aff., Ex. 1, at ¶ 7. As shown above, all of these things have *already* happened to free-market groups and their supporters, which hold similar views as the Foundation. Under Defendants' proposed rule, it is not clear at what point an as-applied challenge could proceed. This line seems difficult, if not impossible, to draw.

The Supreme Court, however, resolved this concern in *Buckley* by allowing non-profit groups to show that groups with "similar views" have experienced harassment sufficient to deter potential supporters from offering their support. *Buckley*, 424 U.S. at 74.

IV. THE PAPERWORK BURDEN MIGHT CHANGE WITH THE SIZE OF AN ORGANIZATION, BUT THE DONOR-DISCLOSURE BURDEN DOES NOT.

Defendants take pains to differentiate the burden on the Foundation from the burdens that the laws in *Sampson* and *Williams* placed on those plaintiffs. Defs.' Cross-Mot. Summ. J. at 36-37. However, this attempt is misguided because the Foundation does not challenge the paperwork burden—it challenges only the *donor-disclosure* burden. Thus, comparing relative paperwork burdens proves nothing.

The burden imposed by a law's paperwork requirements might indeed change relative to the size of a given group. It is uncontroversial to observe that large, well-

funded groups have an easier time complying with reporting requirements than a small neighborhood group would. (However, the Foundation—which has one full-time employee—more closely resembles a neighborhood group than a large or well-funded one). And this might matter if the Foundation were complaining of the paperwork burden of complying with the Donor Disclosure mandate. But the Foundation is not complaining about the paperwork at all. *See* Complaint at 10–11.

Instead, the burden the Foundation complains of is the disclosure and publication of lists of its supporters. *Id.* at 11. And this burden does not change relative to the size of a particular group. Indeed, Americans for Prosperity and the NAACP were both large groups when they brought their challenges to the forced disclosure of their supporters. No court, including the Supreme Court, has indicated that the size of the group somehow lessens the burden of having the group's donors involuntarily disclosed.

V. THE DONOR-DISCLOSURE LAW IS NOT CAREFULLY DRAWN.

Contrary to Defendants' contentions, the donor-disclosure law is anything but carefully drawn. Defs.' Cross-Mot. Summ. J. at 26-33. It provides that "[a]ny person or entity" that spends $250 or more on "any form of public communication" "that is disseminated to one hundred … or more eligible voters," and that "refers to a clearly identifiable … ballot proposition within sixty … days before an election at which the …

proposition is on the ballot" is required to disclose, among other things, the "name, address and occupation of the person or entity" who made a contribution. SFCC § 9-2.6(A).

While Santa Fe has defined "charity" as a "501(c)(3)" organization, SFCC § 9-2.3(H), and knows how to use a statutorily-defined term in other statutes, the challenged provision imposes the donor-disclosure burden *not* on charities, but on *any person or entity*, including charities and entities like the Foundation. Further, "*any* form of public communication"—Facebook, blogs, emails—that is disseminated by "[a]ny person or entity" triggers the donor-disclosure burden. SFCC § 9-2.6(A) (emphasis added). All one needs to do is "*refer*[] to a clearly identifiable … ballot proposition" to be subject to the donor-disclosure burden. *Id.* (emphasis added). A blogger who writes about current topics on a paid blogging website, and cites his sources (unlike mainstream "news media," which is expressly exempt from the donor-disclosure obligation, SFCC § 9-2.6(A)), would be brought under the purview of this provision. So would the blog, if it pays the blogger more than $250 dollars. An individual who raises a dollar from a known or anonymous contributor on GoFundMe.com to speak up about ballot propositions—soda taxes, plastic bags, polar bears, civil-rights violations—is subject to the challenged provision if she spends more than $250 speaking about these ballot issues.

Defendants minimizes the scope of the law by calling it a "simple" matter of filling out a "form." Defs.' Cross-Mot. Summ. J. at 26. It is anything but. The challenged provision requires the reporting person or entity to disclose e*ach* contributor's "name, address and occupation," "date" and "amount of contribution." This is not a mere paperwork, or "reporting," burden. *Id.* The burden is the disclosure of the identities and occupations of non-profit donors, and the subsequent ideological harassment that such disclosure invites.

Defendants' analogy to the IRS Form 990 reporting burden similarly misses the mark. *Id.* Defendants' implication on pages 26–27 that all 501(c)(3) organizations must file Form 990 Schedule B is misleading. The gross-receipts trigger for Form 990 is $200,000—not *de minimis* amounts like the ones at issue here and in *Sampson* or *Canyon Ferry*. *See* Instructions for Form 990-EZ at 2.[7] In other words, only an organization whose gross receipts exceed $200,000 is required to file Form 990 or 990-EZ. If an organization has gross receipts of $50,000 or less, it is required to submit Form 990-N, a postcard that contains eight pieces of information, and *does not* require disclosure of donor-identifying information. *Id.*; Information Needed to File Form 990-N.[8]

[7] https://www.irs.gov/pub/irs-pdf/i990ez.pdf (last viewed June 30, 2018).

[8] https://www.irs.gov/charities-non-profits/information-needed-to-file-e-postcard (last viewed June 30, 2018).

Furthermore, Forms 990 or 990-EZ require disclosure of donor information only if that donor's contribution exceeds a high threshold: $5,000, or 2% of the organization's gross receipts, whichever is greater. IRS Form 990 Schedule B.[9]

Significantly, Form 990 Schedule B information is *not* publicly disclosed. Instructions for Form 990-EX, *supra*, at 29–30. On the other hand, Santa Fe has every intention of publicizing the lists of donors that it collects. Indeed, publication of donors' identities is the entire purpose of the law. SFCC § 9-2.2. Defendants contend that the law is justified by a purported public interest in publicizing the information. Without dissemination of donors' identities and occupations, there could be no such informational interest being served. Thus the example Defendants offer contradicts their legal position. The IRS's collection of Schedule B information, which facilitates the operation of the tax system, is kept confidential, and disclosure of that information to the public is strictly forbidden.

Defendants' analogy to political action committee (PAC) reporting is also unavailing. Defs.' Cross-Mot. Summ. J. at 27–28. Defendants discuss the more onerous PAC requirements with the hope of showing the donor-disclosure requirements in the ballot-issue context are not that onerous. *Id.* But *Sampson* expressly rejected this line of

[9] https://www.irs.gov/pub/irs-pdf/f990ezb.pdf (last viewed June 30, 2018).

reasoning: The interests involved in *candidate* campaigns are not applicable and are not relevant to the interests involved in *issue* campaigns. 625 F.3d at 1256–57 ("wonder[ing] about the utility of ad hominem arguments in evaluating ballot issues"; stating that *nondisclosure* "could require the debate to actually be about the merits of the proposition on the ballot" while *disclosure* in the ballot-issue context may bring about "deterioration of public discourse"). Defendants seem to grasp the futility of this argument when they admit that the two contexts are "not comparable." Defs.' Cross-Mot. Summ. J. at 28.

Defendants next argue that only earmarked contributions need be reported. *Id.* at 26, 31, 32. By so arguing, Defendants intend to make the point that the disclosure burden is minimal. *Id.* at 26–27. But the provision at issue in *Sampson* also applied to earmarked contributions. 625 F.3d at 1249 ("any person … that has accepted … contributions … in excess of two hundred dollars to support or oppose any ballot issue or ballot question") (citation and internal punctuation omitted). That provision was struck down. The earmarking provision at issue in *Williams*, 815 F.3d at 1269–70, met the same fate.

Later, Defendants make a point that should be obvious: that the donor-disclosure provision applies only to ballot issues within the city limits. Defs.' Cross-Mot. Summ. J. at 32–33. So what? A legislative body enacting laws that apply within its jurisdiction, and that apply everywhere in its jurisdiction, is hardly evidence of the kind of narrow

tailoring required by the First Amendment. Indeed, the harm to the speaker of forcibly disclosing her identity, or association with a group, is *greater* at the local level where townsfolk are more likely to be familiar with the speaker, and to know where and how to retaliate against her most effectively. The danger of chilling speech and association by imposing a disclosure burden is greater in smaller jurisdictions because donor disclosure at the local level converts what should be a free marketplace of ideas into a necessarily "ad hominem affair[]." *Sampson*, 625 F.3d at 1256.

VI. THE NEW MEXICO CONSTITUTION CAN PROVIDE GREATER PROTECTION FOR FREE-SPEECH RIGHTS.

Finally, Defendants argue that the New Mexico Constitution does not provide greater protection for speech than the First Amendment. To support this argument, they primarily cite *State v. Ongley*, 882 P.2d 22 (N.M. App. 1994). Defs.' Cross-Mot. Summ. J. at 38. However, *Ongley* never held that "the State Constitution provides no greater speech protections than the Federal Constitution." Defs.' Cross-Mot. Summ. J. at 38. Instead, *Ongley* never reached the state constitutional claim because it was not properly preserved on appeal. 882 P.2d at 23.

It is true that New Mexico courts have said the state Constitution can *sometimes* be read to offer the same protection as the U.S. Constitution. *Ongley* made just such an observation, in *dicta*. *Id*. ("the protection of the federal and state constitutions are the same, at least with respect to content-neutral restrictions"). However, this does not

mean that the two constitutions are always read to offer the same protections. *City of Farmington v. Fawcett*, 843 P.2d 839 (N.M. App. 1992), cited in the Foundation's Cross-Motion for Summary Judgment at 25, provides just such an example. There, the state constitution was found to be more protective of free speech, in the obscenity context, than the federal. *Id*. at 847; *see also Morris v. Brandenburg*, 356 P.3d 564, 572 (N.M. App. 2015) (Courts "are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution[.]").

To Plaintiff's knowledge, New Mexico courts have never examined whether the state constitution provides more protection for the privacy, speech, and associational rights of non-profit groups and their donors. But the language of Article II, § 17 is certainly different than the First Amendment. The New Mexico Constitution provides that "[e]very person may freely speak, write and publish his sentiments on all subjects … and no law shall be passed to restrain or abridge the liberty of speech or of the press." This broader language strongly suggests a broader degree of freedom protected by that language. *Cf. Robins v. Pruneyard Shopping Ctr*., 592 P.2d 341, ___, 23 Cal. 3d 899, 908 (1979) ("Though the framers [of the state Constitution] could have adopted the words of the federal Bill of Rights they chose not to do so," and this demonstrated that state free speech guarantee was broader than its federal counterpart).

Santa Fe's donor-disclosure law "restrains" the ability of non-profit groups to "speak, write and publish [their] sentiments" about local ballot measures. This affirmative state constitutional protection for the Foundation's free-speech rights could absolutely be found to be greater than the protection offered by the First Amendment. Defendants are simply incorrect to argue otherwise, and their allegation that the Foundation has failed to state a claim under the New Mexico Constitution should be rejected.

CONCLUSION

Defendants have failed to show that the Santa Fe donor-disclosure law does not violate the First Amendment to the U.S. Constitution and Article II, § 17 of the New Mexico Constitution. Accordingly, Defendants' Cross-Motion for Summary Judgment should be denied, 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) deny Defendants' Cross-Motion for Summary Judgment;

(2) grant Plaintiff's 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 16th day of July, 2018 by:

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