No. 20-2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RIO GRANDE FOUNDATION,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

Appeal from the U.S. District Court for the District of New Mexico
Honorable Judith C. Herrera
Civil Action No. 1:17-cv-00768-JCH-CG

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Oral Argument Requested

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

GLOSSARY OF ABBREVIATIONS

CARC	*Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981)
DSF	*Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015)
ECRB	Santa Fe Ethics & Campaign Review Board
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MCFL	*FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986)
NMYO	*New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010)
PAC	Political [Action] Committee
RGF	Rio Grande Foundation
SFCC	Santa Fe City Code of 1987

COUNTERSTATEMENT OF THE ISSUES

1. Is a disclosure law that requires event-driven reporting of spending on ballot measure advocacy in small City elections, and of contributions earmarked to support such spending, unconstitutional on its face, or as applied to a group that spent $7,700 and disclosed two donors of $250 and $7,500, because reporting occurs at a $250 spending threshold?

2. Is a longstanding group that has already disclosed under a challenged law without incident, and does not claim that any of its donors or members have ever suffered "threats, harassment, or reprisals" by reason of their association with the group, entitled to a disclosure exemption under *NAACP v. Alabama*, 357 U.S. 449 (1958), based on claimed harassment directed at members of unaffiliated out-of-state groups with allegedly similar views?

3. Does "distinct" language in the New Mexico Constitution's free-speech clause "compel a divergence from federal law" regarding the analysis of political disclosure laws?

COUNTERSTATEMENT OF THE CASE

Like many other states and municipalities, the City of Santa Fe requires basic disclosure from groups spending money in local ballot measure elections to "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

The specific disclosure provision at the heart of this challenge, subsection 9-2.6 of the Santa Fe City Campaign Code, "do[es] not prevent anyone from speaking," *Citizens United*, 558 U.S. at 366. Nor does it "prevent" plaintiff-appellant Rio Grande Foundation ("RGF"), a longstanding New Mexico advocacy group with a six-figure annual budget, APP.071, from "speaking" for or against Santa Fe ballot measures. The law merely requires RGF, if and when its spending on ballot measure advocacy exceeds $250—a threshold commensurate with Santa Fe's small size and population—to file an event-driven report disclosing such spending, and those donors who earmarked contributions to fund it. As the district court found, this carefully tailored disclosure requirement was crafted to "bring transparency to independent spending in local elections" without "offend[ing] First Amendment rights." APP.068.[1]

That is how the law applied to RGF's 2017 "No Way Santa Fe" campaign, which expressly urged City voters to reject a municipal "soda tax" ballot proposition. The approximately $7,700 RGF spent on this effort well exceeded the reporting threshold, and Santa Feans had an interest in knowing who was behind it. RGF nevertheless refused to make the modest disclosure the law requires. The Santa Fe Ethics and Campaign Review Board ("ECRB" or "Board") ordered RGF to comply

[1] Material in the Appellant's Appendix is cited as "APP.__." Citations to the City Appellees' Supplemental Appendix are styled "Supp.APP.__."

with the law—which it did, by filing a one-time disclosure report identifying a total of two donors, an individual and a Washington, D.C.-based entity whose respective $250 and $7,500 contributions were earmarked for RGF's soda tax campaign. After making this disclosure, RGF filed this lawsuit.

I. Factual and Legal Background

A. 2015 Amendments to the Santa Fe Campaign Code

Santa Fe, a New Mexico charter municipality with an estimated population of 82,927 and citizen voting age population of 58,453, administers local elections pursuant to the City Charter and the Santa Fe City Code of 1987 ("SFCC"). APP.068; Supp.APP.69-70.

The City's seven member ECRB is charged with promoting and enforcing compliance with the Campaign Code (Section 9-2 SFCC 1987), SFCC § 6-16.2(A), which contains numerous measures designed to inform the public about the sources of campaign spending. The disclosure requirement challenged here, SFCC § 9-2.6, is one such provision. Like the Campaign Code as a whole, SFCC § 9-2.6 aims to achieve the Code's articulated purposes, which include promoting public confidence in city government, securing "full[ ] disclos[ure]" of "political campaign contributions and expenditures," and avoiding "secrecy in the sources and application of such contributions." SFCC § 9-2.2(A)-(C); APP.068-69. It reflects the

City's policy judgment that "the public's right to know how political campaigns are financed far outweighs any right that [campaigns] remain secret and private." *Id.*

In 2015, at the ECRB's recommendation, the City amended the Campaign Code in response to widespread calls for greater transparency regarding non-candidate groups' funding sources. Supp.APP.14-17. The 2015 amendments to subsection 9-2.6 are the subject of this challenge. APP.015 ¶¶ 2-3; Supp.APP.55-58.

Following its review of the 2014 elections, the ECRB concluded that adjustments to the Campaign Code's disclosure requirements were necessary to ensure that City voters remained informed about those spending money to influence their votes. Supp.APP.12-13 ¶¶ 9-11, 15, 22-25. The Board developed revisions over the course of eight public meetings between December 2014 and May 2015, where it debated legislative language, took testimony from experts and candidates with first-hand campaign experience, and heard from members of the public. Supp.APP.15 ¶¶ 24-26. At the close of that process, the Board referred its proposed changes to the City Council, where they were enacted after further public deliberation and amendment. *Id.* At every stage, the ordinance was designed to advance the public's informational interests while minimizing any reporting or administrative costs borne by filers. APP.068; Supp.APP.16 ¶ 29.

Public support for improved transparency was strong throughout the legislative process. Citizens expressed "dismay[] at the amount of dark money

brought to bear on the races," Supp.APP.24, and noted "frustration, because often you could not be sure where the outside money came from," Supp.APP.29. The ECRB was urged to consider solutions that would "ensure the public's right to know" and "increas[e] the extent to which there is disclosure of sources of outside funding." Supp.APP.28-29. At the subsequent City Council hearing, numerous local citizens again spoke in favor of transparency. For example, the President of the Santa Fe Chamber of Commerce voiced strong support for the ECRB's recommendations, emphasizing his members' support for "efficiency and transparency," which he called the issues "of most concern to business people and citizens of Santa Fe." Supp.APP.65.

B. The Challenged Disclosure Law (SFCC § 9-2.6)

Subsection 9-2.6 does not ban or restrict any speech; instead, the modest reporting it requires equips voters with information about where campaign money comes from and how it is spent, so that voters can make informed choices in elections. APP.068-69; Supp.APP.13 ¶ 13; Supp.APP.117 ¶¶ 8-9. The ordinance requires event-driven reporting from persons that make "expenditures" of $250 or more for "any form of public communication" that is "disseminated to one hundred (100) or more eligible voters" and "that either expressly advocates the election or defeat of a candidate, or the approval or defeat of a ballot proposition; or refers to a

clearly identifiable candidate or ballot proposition within sixty (60) days before an election at which the candidate or proposition is on the ballot." SFCC § 9-2.6(A).

As amended, subsection 9-2.6 thus requires reporting only of "expenditures"—*i.e.*, the "payment or transfer of anything of value" for the purpose of supporting or opposing a ballot proposition—made for communications that either contain "express advocacy" or refer to a "clearly identifiable" ballot proposition within 60 days of the election. *Id.* §§ 9-2.6; 9-2.3(M).

The law requires that groups report only those "contributions received for the purpose of paying for" the relevant expenditures, *id*. § 9-2.6, *i.e.*, contributions that are "earmarked" by the contributor for that purpose. APP.070; Supp.APP.13-14 ¶ 16. The City rejects the assertion that this language is "not clear," Plaintiff-Appellant's Opening Br. ("AOB") at 4, and indeed, the Board deliberated on this question at its public meetings before deciding to retain the earmarking language. Supp.APP.16 ¶¶ 30-31. *See also* Supp.APP.37 (flagging earmarking language for discussion).

SFCC § 9-2.6 does not obligate groups to register or operate as "political committees," *see id.* § 9-2.3(N), file continuous, comprehensive reports of all receipts and disbursements, or comply with other organizational and recordkeeping requirements incident to political committee status. Instead, the reporting is event-driven: SFCC § 9-2.6(A) requires groups to file campaign finance reports only if

they make covered expenditures totaling $250 or more, specified by date, amount, recipient, and purpose. *Id.* § 9-2.6(A); APP.069-70; Supp.APP.13 ¶ 15. Similarly, filers must specify all earmarked contributions by date and amount, and provide the contributor's name, address, and occupation. SFCC § 9-2.6(A).

C. Rio Grande Foundation

Plaintiff-Appellant RGF is a longstanding Albuquerque-based nonprofit corporation organized under section 501(c)(3) of the federal tax code, APP.070, with an annual revenue from 2012 to 2016 ranging between $213,306 and $404,773. APP.071; Supp.APP.79.

RGF was founded in 2000 by former New Mexico Attorney General Hal Stratton and economist Harry Messenheimer. APP.070; Supp.APP.76. It is governed by an eight-member Board of Directors, and lists on its website a staff of six, including its full-time, compensated President, Paul Gessing. APP.071; *About the Rio Grande Foundation*, Rio Grande Found., https://riograndefoundation.org/about/staff (last visited June 22, 2020).

RGF often participates in legislative and policy advocacy in New Mexico, including advocacy for and against ballot measures; for example, RGF made public communications opposing the City of Albuquerque's 2017 paid sick leave proposition and was part of a coalition organized to oppose the measure. APP.071; Supp.APP.80-83.

Despite RGF's long history, there is no suggestion or record evidence that RGF or any of its board members, staff, or donors have ever been "harassed" or suffered any concrete harm due to association with RGF. APP.093; Supp.APP.84 (RGF Resp. to Interrog. 1). The record lacks any evidence that disclosure under SFCC § 9-2.6 has adversely effected RGF's fundraising or will do so in the future. APP.096. RGF has disclosed contributors in the past without apparent incident, including the two donors it disclosed in its campaign finance report covering the No Way Santa Fe initiative. APP.073; Supp.APP.3-4.

D. The "Soda Tax" Ballot Proposition and No Way Santa Fe

The Santa Fe City Council voted to hold a special municipal election on May 2, 2017 to pose to the residents of Santa Fe the question of whether to vote for or against a sugary sweetened beverage tax (the "soda tax" measure). APP.071.

The soda tax measure drew an unprecedented level of campaign spending in Santa Fe. APP.071. Four groups reported expenditures and/or in-kind contributions exceeding $250, and two, "Pre-K for Santa Fe" and "Better Way for Santa Fe & Pre-K," raised about $1.9 million and $2.2 million respectively for their advocacy. APP.071; Supp.App.85-89. The Campaign Code's disclosure provisions enabled Santa Feans to learn that the two principal groups spending for and against the measure were funded by former New York City Mayor Bloomberg and an out-of-state beverage industry group, respectively. APP.071.

RGF was a vocal public opponent of the soda tax, and devoted considerable effort to developing, and soliciting funds to support, a campaign against the proposition. APP.072; Supp.APP.90-91. In the months before the election, RGF solicited contributions for "[w]ork to defeat proposed City of Santa Fe tax on sugary beverages." Supp.APP.90 (proposing to "leverage social media, hard mailing lists, and a broad activist network to generate and organize the Santa Fe public and electorate" against the soda tax and "defeat it at the ballot").

On April 6, 2017, RGF announced the launch of its "No Way Santa Fe" initiative, consisting of a series of newspaper editorials, a website, and an embedded video featured on the website. APP.071-72. RGF also paid to promote its website and advocacy against the soda tax via its Facebook page, spent $1,500 on 5,000 postcard mailers that it planned to distribute to Santa Fe voters urging them to "Vote 'Against' the Soda Tax," and contemplated radio advertising. APP.073-74; APP.018 ¶ 23; Supp.APP.106-110.

The website, embedded video, and proposed mailers expressly advocated against the soda tax measure. For example, the website, http://www.nowaysantafe.com, listed reasons it was "A Truly Terrible Tax Scheme," while urging viewers to "Vote on Tuesday, May 2, 2017!" Supp.APP.97-101. Both the video and website

prominently identify "No Way Santa Fe" as "A Project of the Rio Grande Foundation." APP.071-72; Supp.APP.101, 103-05.[2]

The Washington, D.C.-based Interstate Policy Alliance produced the No Way Santa Fe video and website and contributed them to RGF pursuant to an "ongoing arrangement" between the two entities. APP.072.

E. ECRB Enforcement Action Against RGF

After RGF announced the launch of No Way Santa Fe, several members of the local press contacted the ECRB seeking comment as to whether RGF would be required to disclose its activities under SFCC § 9-2.6. Supp.APP.94-96. The ECRB also received a citizen complaint from Edward Stein alleging RGF was in violation of SFCC § 9-2.6. Stein subsequently amended the complaint to provide a web address for the No Way Santa Fe video and attach an affidavit from Glenn Silber, an award-winning documentary filmmaker, who estimated that the video would cost an "absolute minimum of three thousand dollars ($3,000.00), and possibly two or three times that amount." APP.018-19 ¶¶ 24, 28; APP.049-50.

On April 24, 2017, the Board held a hearing on the matter. APP.073. The Board found that RGF created a sub-entity called "No Way Santa Fe," which began

[2] Contrary to RGF's claim that it "simply directed people to these resources," AOB at 9, it was undisputed that RGF created the "No Way Santa Fe" project, which "expressly advocated the defeat of the proposition" via a website and embedded campaign video bearing RGF's name. APP.071-72.

running a video on its web page opposing the soda tax proposition on April 11, 2017. Supp.APP.18 ¶ 41; Supp.APP.8. After hearing uncontroverted testimony from Silber that the cost of the video was at least $3,000, but "probably closer to at least twice that amount," APP.073, the Board found that the video cost more than $250.00. APP.074.

Paul Gessing, appearing on behalf of RGF, did not contest the Board's findings. He alleged the video was created by a third party and given to RGF but refused to identify the third party. APP.073; Supp.APP.8. Gessing stated that RGF spent approximately $200 in advertising fees connected to the video, had planned to send postcards opposing the soda tax, and "contemplated radio advertising." APP.073-74.

The Board, by unanimous vote, found that RGF had violated SFCC § 9-2.6 by failing to file a disclosure report in connection with the No Way Santa Fe campaign, and issued a reprimand and order requiring RGF to file a report. APP.073-74. In response, RGF submitted a single, six-page campaign report disclosing a $7,500 in-kind contribution from Interstate Policy Alliance and one individual $250 contribution, and seven expenditures to Facebook for advertising. APP.073.

The Board took no further action against RGF and assessed no penalties or fines. APP.073.

II. Procedural History

RGF commenced this action on July 26, 2017. APP.027. RGF did not challenge or seek relief in connection with the 2017 enforcement action, but instead sought a declaration that SFCC § 9-2.6 is unconstitutional, on its face and as applied to RGF and "similarly situated" nonprofit groups, "as it relates to speech about the approval or defeat of a ballot proposition." APP.026; APP.068.

At summary judgment, as in this appeal, RGF rested its facial challenge on *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) and *Coalition for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016). However, these two cases considered the constitutionality of a Colorado "issue committee" disclosure scheme only as applied to particular plaintiffs. RGF disclaimed any intent to seek the type of as-applied relief provided in *Sampson* and *Williams*, which was particular to small groups burdened by the comprehensive regulatory requirements of Colorado's disclosure regime. APP.23. Despite suggesting otherwise on appeal, RGF has never limited its requested relief to groups spending at or below a particular amount, $7,700 or otherwise.

RGF has also pursued an as-applied claim, but that, too, has evolved. In its responses to the City's specific discovery requests on the subject, RGF cited no experience with donor loss, nor mentioned any threats to its members or concerns that affiliated groups were suffering threats or harassment. APP.091; Supp.APP.84.

In opposing the City's summary judgment motion, however, RGF for the first time introduced testimony from officers of three unrelated out-of-state advocacy groups who claimed harassment due to their "pro-free market" views, which RGF claimed entitled it to an as-applied exemption under *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). But RGF produced no evidence specific to its own donors, and nothing indicating a "reasonable probability" that they would face "threats, harassment, or reprisals" if disclosed. APP.095. The district court considered the three affidavits but gave them little weight, finding the groups insufficiently similar to RGF to support this claim. APP.096.[3]

The district court concluded that Santa Fe's disclosure law is substantially related to a sufficiently important informational interest, both on its face and as applied to RGF, and granted summary judgment to the City. APP.066.

SUMMARY OF ARGUMENT

The Supreme Court and this Circuit have confirmed that laws requiring transparency of the funding of ballot measure-related expenditures serve important informational interests crucial to a functioning democracy. So too does Santa Fe's disclosure ordinance.

[3] The City objected to the introduction and relevance of this evidence, which RGF did not produce until mid-way through summary judgment briefing—having failed to produce it when the City sought in discovery "all facts" on which RGF based its claims about potential harassment. Supp.APP.84.

The district court reviewed the law and record evidence under the "substantial relation" standard prescribed by Supreme Court and Tenth Circuit precedent. This Court should not disturb its well-considered conclusion: subsection 9-2.6 is supported by an important informational interest, and its modest disclosure requirements are substantially related to that interest both on their face and as applied to RGF.

RGF's facial challenge is incoherent. First, it argues that the district court committed reversible error by declining to apply the as-applied holdings of *Sampson* and *Williams* to find subsection 9-2.6 *facially* unconstitutional, ignoring the incongruity within the very premise of its argument. RGF's singular focus is on the reporting thresholds of subsection 9-2.6; it contends that under *Sampson* and *Williams*, there is a fixed dollar value below which the public interest in disclosure ceases to exist, irrespective of what the law requires or the jurisdiction in which it applies—*i.e.*, without regard to the law's actual tailoring. AOB at 16. Then, citing no authority, RGF declares that the City's $250 threshold is well under this line. *Id.* at 19-20.

This inflexible test is at odds with Supreme Court precedent, which directs courts to consider whether the informational interest supporting a disclosure law is in *proportion* to the "actual" First Amendment burdens imposed. *Doe v. Reed*, 561 U.S. 186, 196 (2010). It is also unsupported by the as-applied holdings in *Sampson*

and *Williams*, which were necessarily tied to their facts. Those decisions questioned whether Colorado's "overly burdensome regulatory framework" for "issue committees"—and the comprehensive registration, reporting, and recordkeeping it entailed—could be applied to specific small-scale groups spending under $782.02 and under $3,500 on ballot measure-related advocacy. *Sampson*, 625 F.3d at 1254; *Williams*, 815 F.3d at 1279. But Santa Fe's event-driven reporting is nothing like Colorado's onerous PAC regime, and RGF is nothing like those small, unsophisticated plaintiffs. More importantly, neither case provided the sweeping facial relief that RGF seeks here; indeed, both cases declined to consider a facial challenge to Colorado's $200 reporting threshold.

RGF also complains that the district court erred by undertaking an overbreadth analysis of RGF's facial claim. AOB at 28. In fact, the district court first reviewed subsection 9-2.6 under the applicable "exacting scrutiny" standard, APP.085-96, and only then turned to the overbreadth doctrine—in response to hypotheticals RGF itself raised below. Moreover, RGF's facial challenge necessarily contains an overbreadth argument because it hinges on the validity of a monetary threshold that RGF exceeded by more than 30 times. Either its case contains an overbreadth challenge—one that failed, as the district court found—or RGF cannot reach beyond the facts here to challenge theoretical applications of the statute to just-over $250 expenditures and one-cent contributors.

RGF's as-applied challenge fares no better. RGF has no evidence that disclosure would subject its donors to a "reasonable probability" of "threats, harassment, or reprisals," *Buckley*, 424 U.S at 74, nor any showing that disclosure will lead to lost contributions or otherwise "chill" its donors, APP.095 n.8. The district court nonetheless indulged RGF's "general and unsupported" fears and considered the three affidavits RGF provided from unaffiliated out-of-state groups. APP.092-096. But it found that this "limited" evidence from unrelated groups did not speak to any potential risk faced by RGF, concluding instead—as the Supreme Court did with respect to an identical claim in *Citizens United*, 558 U.S. at 370—that "the best evidence of whether there is a reasonable probability RGF's donors would face threats and reprisals is what RGF or its donors have experienced in the last approximately 19-years of RGF's advocacy." APP.095.

Finally, RGF cannot obtain relief under the New Mexico Constitution's free speech clause. As the district court found, "distinct" language in that clause does not "compel a divergence from federal law" regarding the analysis of political disclosure laws, and no New Mexico court has ruled otherwise. APP.102.

ARGUMENT

I. Standard of Review

A grant of summary judgment is reviewed *de novo*. *Faustin v. City & Cty. of Denver, Colo.*, 423 F.3d 1192, 1195-96 (10th Cir. 2005).

II. Santa Fe's Disclosure Ordinance Advances Its Vital Interest in an Informed Electorate and Withstands Review Under the "Exacting Scrutiny" Test.

A. It is well settled that political disclosure laws receive less demanding constitutional scrutiny than laws restricting or limiting speech.

Transparency regarding the sources of funding for election-related advocacy has been a cornerstone of American campaign finance law for over a century, and the Supreme Court has upheld such laws against constitutional challenge. *See Buckley*, 424 U.S. at 64-68 (upholding federal disclosure requirements); *McConnell v. FEC*, 540 U.S. 93, 194-99 (2003) (same); *Citizens United*, 558 U.S. at 366-71 (same); *see also Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299-300 (1981) ("*CARC*") (expressing approval of disclosure in ballot initiative context); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.32 (1978) (same).

Courts have applied the same standard of review to such laws for decades. Unlike laws that restrict campaign expenditures or contributions, which are subject to "strict" and "closely drawn" scrutiny, respectively, disclosure requirements "'impose no ceiling on campaign-related activities,'" so are reviewed under the "exacting" scrutiny standard. *Citizens United*, 558 U.S. at 366. A disclosure law satisfies exacting scrutiny if there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 366-67.

Because the importance of the government's interest in ensuring that voters are "'fully informed' about the person or group who is speaking," *id.* at 368, is well established—including in ballot measure elections—judicial review focuses on whether a challenged disclosure law is "sufficiently tailored to justify the compelled disclosure of donors to the [election-related] ad," *Independence Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016), *i.e.*, whether it is "substantially related" to the public's informational interest. "Line-drawing" questions concerning the extent and frequency of the reporting required, the type of information that must be reported, and the monetary thresholds for coverage are assessed as part of this tailoring analysis and granted substantial deference if they "rationally" advance the government's informational interest. *Buckley*, 424 U.S. at 83 (noting that the "line" at which reporting thresholds are set "is necessarily a judgmental decision").

RGF now attempts to sidestep this analysis by arguing that the $250 reporting threshold in subsection 9-2.6 bears on whether there is *any* governmental interest in the law; it posits that the interest is "minimal," so "the inquiry ends there and the disclosure requirements are unconstitutional." AOB at 18. RGF's abbreviated approach does not assess the actual burdens the law imposes and makes no attempt to balance them against the disclosure the law actually provides; RGF fails to conduct the tailoring assessment controlling precedent requires. *See Buckley*, 424 U.S. at 83; *Independence Inst.*, 812 F.3d at 797-98 (assessing whether Colorado's

threshold for reporting is "sufficiently tailored to the public's informational interests").

B. The important informational interests advanced by political disclosure laws like subsection 9-2.6 are well established.

Although RGF dismisses the government's informational interests, AOB at 20-23, the importance of transparency to our political system is well established. *See Buckley*, 424 U.S. at 64-68. Disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. Without it, elections become flooded by advocates seeking to influence voters "while concealing their identities" and funding sources to disguise the interests they promote and "hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197.

In *Buckley*, the Supreme Court articulated three important interests served by disclosure requirements in the Federal Election Campaign Act ("FECA"): "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. But it also has found that the public's informational interest is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369. Indeed, with respect to the disclosure of *independent* spending to influence candidate elections, the Court has questioned

whether the other two interests are relevant at all, *Buckley*, 424 U.S. at 80-81[4]—much in the same way this Court has questioned the relevance of these interests for independent spending for ballot measure-related communications. *Sampson*, 625 F.3d at 1249. *Cf. Citizens United v. Gessler*, 773 F.3d 200, 211 (10th Cir. 2014) (recognizing that the informational interest—but not the anticorruption interest—applies to disclosure laws in the context of *independent* expenditures).

But under the informational interest, the Supreme Court has upheld disclosure laws relating to a wide range of political advocacy including lobbying, *see United States v. Harriss*, 347 U.S. 612, 625 (1954); ads expressly advocating the election or defeat of candidates, *Buckley*, 424 U.S. at 64-68; "issue ads" that mention candidates, see *Citizens United*, 558 U.S. at 369 (finding informational interest "alone sufficient" to sustain disclosure requirements "[e]ven if the ads only pertain to a commercial transaction"); and broadcast ads addressing "political matters of national importance," *McConnell*, 540 U.S. at 240-43 (noting disclosure furthered "First Amendment interest in free and open discussion of campaign issues"). These precedents, all of which assessed the constitutionality of a disclosure law based on

[4] *Buckley* noted that if the constitutionality of the federal independent expenditure disclosure statute had relied on the anti-corruption interest, that "might have been fatal," 424 U.S. at 80; it nevertheless sustained the provision because, although the "corruption potential" of *independent* expenditures "may be significantly different" than that of contributions or coordinated expenditures, "the informational interest can be as strong." *Id*. at 81.

the strength of the government's informational interest, inform the Court's review of the disclosure ordinance challenged here.

Most importantly, the Supreme Court has voiced approval of disclosure relating to ballot issue advocacy because "[i]dentification of the source of advertising" enables voters "to evaluate the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32; *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999) ("Through the disclosure requirements . . . voters are informed of the source and amount of money spent . . . [and] will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation.'" (second alteration in original)); *CARC*, 454 U.S. at 299 ("The integrity of the political system will be adequately protected if [ballot measure] contributors are identified."). As the district court noted, "bringing more transparency and informing the electorate of special interests seeking to influence ballot measures helps citizens evaluate who stands to gain and lose from proposed legislation." APP.067.

The gravamen of RGF's case is its contention that the Tenth Circuit has turned its back on this precedent, and instead announced that the informational interest is *per se* too "minimal" or "weak" to support disclosure laws in ballot measure elections. AOB at 20. This Court has done no such thing. RGF ignores the Court's affirmation in *Williams* that "[v]oters certainly have an interest in knowing who

finances support or opposition to a given ballot initiative," 815 F.3d at 1280, and its acknowledgement in *Sampson* that the Supreme Court "on three occasions . . . has spoken favorably of such requirements." 625 F.3d at 1257. *Cf. Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings.").[5]

While this Court rejected Colorado's "onerous" political committee disclosure regime when applied to very small ballot-measure committees with total spending of $800 and $3500, it has never suggested that groups like RGF, with budgets of hundreds of thousands of dollars, are exempt from tailored disclosure requirements. Indeed, it has said the opposite. *See Williams*, 815 F.3d at 1280; *Sampson*, 625 F.3d at 1257. The Court's concerns in *Sampson* and *Williams* arose from the particular disclosure law at issue, which required small-scale groups to register as committees and comply with comprehensive registration, reporting, and

[5] Other courts of appeals have assigned even greater weight to the government's informational interest in ballot measure-related disclosure relative to candidate-related disclosure. *See, e.g.*, *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1251 (11th Cir. 2013); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 480 (7th Cir. 2012); *Family PAC v. McKenna*, 685 F.3d 800, 806-07 (9th Cir. 2012); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 41 (1st Cir. 2012). Multiple circuits have found that "[e]ducating voters [through disclosure] is at least as important, *if not more so*, in the context of initiatives and referenda as in candidate elections." *Madigan*, 697 F.3d at 480 (emphasis added); *see also Hosemann*, 771 F.3d at 298.

recordkeeping requirements. Neither addressed a carefully-tailored event-driven reporting requirement like Santa Fe's. *See infra* Part III.B.2.

C. The district court correctly found that subsection 9-2.6 is "substantially related" to the City's interest in providing transparency about the sources of ballot measure-related spending.

The district court correctly applied "exacting scrutiny" to Santa Fe's disclosure ordinance and found the law "substantially related" to the City's unquestionably important interest in an informed electorate, both on its face and as applied to RGF. APP.087. Although disclosure laws need not satisfy a "least restrictive means" test, as the district court recognized, the City crafted a law that imposes minimal reporting obligations and reaches no further than necessary to serve its important purposes. APP.068.

1. Subsection 9-2.6 advances the important informational interests recognized in Supreme Court precedent.

The 2015 amendments to the Campaign Code were enacted to protect "the public's right to know how political campaigns are financed." SFCC § 9-2.2(C). Indeed, the Code's stated purposes are virtually identical to those approved by the Supreme Court. SFCC § 9-2.2(A)-(C); *see supra* at 3-4.

In weighing the strength of the City's asserted informational interest, the district court considered the record and confirmed that the informational interest advanced by subsection 9-2.6 is well founded and that the ordinance provides meaningful disclosure to Santa Fe voters. APP.103. And, as the district court

acknowledged, the City "provided evidence of the importance of this issue to the electorate in Santa Fe." APP.087. *See supra* at 4-5.

Nor is there any question that Santa Feans had an interest in knowing who funded RGF's "No Way Santa Fe" campaign against the soda tax proposition, just as they had an interest in knowing that billionaire former New York City Mayor Bloomberg and a Washington, D.C. beverage industry association were the principal funders behind two other groups spending money advocating for and against the measure. *See supra* at 8-10. It is undisputed that RGF's website, video, and proposed mailers expressly advocated the proposition's defeat, and that RGF solicited and received large contributions for the same purpose. The voting public had an interest in knowing who was financially supporting its effort. APP.087.

2. Subsection 9-2.6 sweeps no more broadly than necessary to achieve its purpose.

a. It requires event-driven reporting of minimal information.

Subsection 9-2.6 requires reporting when, and only when, a "person" spends $250 on public communications disseminated to 100 or more eligible voters that promote or oppose a ballot proposition. These reports require basic information: the dates, amounts, recipients, and purposes of such "expenditures," and the dates, amounts, and sources of "contributions" given for the purpose of funding these expenditures. SFCC § 9-2.6. Unlike a political committee, an entity like RGF need only submit this information once, when it reaches the $250 threshold, and is not

required to undertake additional reporting unless it makes additional expenditures. *Id*. Importantly, subsection 9-2.6 requires only the reporting of financial information, not the inclusion of disclaimers identifying the sponsor on the face of the covered communication. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 354-55 (1995) (invalidating ban on anonymous campaign literature applied to individual pamphleteer but distinguishing disclosure of financing of election-related advocacy and expenditures by corporations).[6]

b. The event-driven reporting structure is doctrinally distinct from more onerous PAC disclosure regimes.

In crafting subsection 9-2.6, the City also tailored this provision to avoid the more extensive registration, reporting, and record-keeping obligations that typically attend "political committee" (or "PAC") status.

Both the Supreme Court and this Circuit have distinguished PAC disclosure regimes from the form of event-driven, streamlined reporting that subsection 9-2.6 requires. *See, e.g.*, *Independence Inst.*, 812 F.3d at 795 n.9 ("The obligations that come with political committee status, including reporting and auditing requirements . . . tend to be considerably more burdensome than disclosure requirements."); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 675 (10th

[6] The law is further narrowed by its exemptions for spending on communications made to or by the news media, impartial candidate forums, shareholder/member communications, or "impartial voter guides." SFCC § 9-2.6(A).

Cir. 2010) ("*NMYO*") (noting that a PAC disclosure law requiring reporting of all receipts and expenditures "differs in a material respect from valid laws governing regulation of only election-related transactions").

PAC regulation typically entails a host of "[d]etailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of records." *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 254 (1986) ("*MCFL*"). The Supreme Court has recognized that because regulation as a PAC comes with "the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, [and] to file periodic detailed reports," *id*. at 255, formal PAC status creates burdens that "small entities may be unable to bear." *Id*. at 254.[7]

But subsection 9-2.6 imposes no such requirements. It simply requires an entity to file an event-driven report for the benefit of voters when it spends $250 to influence their votes. This stands in contrast to the more extensive disclosure regime for "political committees" prescribed elsewhere in the Campaign Code, which compels registration, *see* SFCC § 9-2.7; appointment of a treasurer, *see id*. § 9-2.8; continuous filing of disclosure reports on a fixed schedule, even in periods with no

[7] Other circuits, have recognized the distinction between event-driven reporting and "PAC-style" disclosure regimes—finding the former indicative of narrower tailoring. *See, e.g.*, *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 312 n.10 (3d Cir. 2015) ("*DSF*") ("Disclosure that is singular and event-driven is far less burdensome than the comprehensive registration and reporting system oftentimes imposed on political committees.") (citation omitted).

activity, *id*. §§ 9-2.10, 9-2.13; and liquidation at the conclusion of a campaign, *id*. § 9-2.9(H)(3). In short, unlike a "political committee," an organization subject only to subsection 9-2.6 need not "assume a more sophisticated organizational form . . . adopt specific accounting procedures, [or] . . . . file detailed periodic reports." *MCFL*, 479 U.S. at 255. Indeed, a similar distinction exists in federal law: under 52 U.S.C. § 30104(c), "[e]very person (other than a political committee)" who makes independent expenditures aggregating more than $250 in one year must file a one-time disclosure report with the Federal Election Commission.

The decision not to incorporate "PAC-style" requirements also distinguishes subsection 9-2.6 from the Colorado "issue committee" law reviewed in *Sampson* and *Williams*. In *Sampson*, the Court emphasized that Colorado required any group that spent $200 on a ballot issue "(1) to register as an issue committee, (2) to establish a committee bank account with a separate tax identification number, and (3) to comply with the reporting requirements." 625 F.3d at 1251. In *Williams*, it further noted that Colorado's online filing system included thirty-five training videos to ease compliance with the law's extensive reporting regime, which entailed twelve annual reports disclosing all contributions and expenditures in minute detail. 815 F.3d at 1279. Subsection 9-2.6 includes none of these requirements, which may explain why RGF does not argue that its reporting is unduly burdensome. APP.092-93.

c. Only "earmarked" contributions must be reported.

Subsection 9-2.6 is also narrowed by an earmarking limitation. When an organization meets the spending threshold, its one-time report need only disclose those "contributions received *for the purpose of paying for* [the relevant] expenditures." SFCC § 9-2.6 (emphasis added). Unlike a PAC regime, this provision does not require RGF to disclose all of its donors, but only those who "earmarked" their contributions for the relevant expenditures.

This Court views such provisions as less burdensome. In *Independence Institute*, for example, the Court found it "important to remember that the [plaintiff] need only disclose those donors who have specifically earmarked their contributions for electioneering purposes" when upholding Colorado's electioneering communications disclosure law. 812 F.3d at 797.

The practical effect of the earmarking limitation in subsection 9-2.6 is that many groups need only disclose a handful of donors. It also means that RGF's focus on the *contributor*-reporting threshold and the hypothesized disclosure of a person "who contribute[s] even one penny" is misplaced. AOB at 23. It is true that subsection 9-2.6 does not layer on top of its $250 reporting threshold a secondary donor-disclosure threshold, but the earmarking limitation obviates the need for one. Any donor who does not want to appear in disclosure reports under this provision can choose not to contribute for ballot measure advocacy. Thus, the pool of donors

subject to disclosure is circumscribed, and donors have control over whether their names will be disclosed. Here, RGF disclosed a total of two contributors. Supp.APP.3-4 (reporting one $7,500 in-kind contribution and one $250 individual contribution).

d. The monetary thresholds are tailored to Santa Fe's small size and relatively inexpensive campaigns.

The monetary threshold in subsection 9-2.6, which RGF views as a constitutional infirmity, in fact denotes careful tailoring. As the district court found, the $250 reporting threshold in subsection 9-2.6 was designed to reflect Santa Fe's small size. Santa Fe political campaigns are relatively inexpensive; $250 can buy a significant amount of exposure for a political message. *See* APP.088; *see also* Supp.APP.117 ¶¶ 10-11 (explaining that most local campaigns rely on "direct mail, radio, newspaper, and phone messaging," which are "inexpensive compared to television advertising and state or federal use of such advertising methods"). The $250 reporting trigger is thus commensurate with the small city elections to which it applies, and well in line with comparable thresholds in even much larger jurisdictions, including the largest of all: the entire United States under FECA. 52 U.S.C. § 30104(c).

In *Sampson* and *Williams*, moreover, this Court declined to set a bright-line minimum for monetary thresholds, whether at $250 or a higher number, even for a much more extensive PAC disclosure scheme. And elsewhere, this Court has noted

that review of the monetary threshold depends on tailoring and "a disclosure threshold for state elections" is "lower than an otherwise comparable federal threshold. Smaller elections can be influenced by less expensive communications." *Independence Inst.*, 812 F.3d at 797. "By this reasoning," as the district court noted, "even lower disclosure thresholds may be permissible for municipal elections." APP.088.

The same principle has guided review of disclosure laws in other courts of appeals, which have rejected facial challenges asserting that reporting thresholds are too low. *See, e.g.*, *DSF*, 793 F.3d at 310 (upholding $500 threshold in part because "Delaware is a small state"); *Hosemann*, 771 F.3d at 288 (rejecting facial challenge to Mississippi's $200 threshold but noting that "[s]ome states with large populations set the [PAC] registration bar higher," and identifying Texas's $500 threshold as one such example); *Nat'l Org. for Marriage Inc. v. McKee*, 649 F.3d 34, 60 (1st Cir. 2011) (upholding Maine's $100 threshold). *Cf. Worley*, 717 F.3d at 1251 ("[K]nowing the source of even small donations is informative in the aggregate and prevents evasion of disclosure.").

III. The District Court Properly Rejected RGF's Facial Challenge.

A. RGF's facial claims were correctly analyzed below under "exacting scrutiny" and the overbreadth doctrine.

RGF faults the district court for committing "reversible legal error" by "confus[ing] the concept of a facial challenge with the concept of an overbreadth

challenge." AOB at 28. In fact, before conducting an overbreadth analysis, the district court first assessed RGF's facial challenge by applying the "relevant constitutional test" governing the review of a political disclosure law, *i.e.*, by assessing whether subsection 9-2.6 was "substantially related" to a sufficiently important governmental interest. *See* APP.076-85 (discussing First Amendment authorities on ballot measure disclosure).

That the district court identified this test and balanced the relevant state interest and burdens first *as applied* to RGF is of no consequence. Because the same "substantial relation" standard applies to both facial and as-applied disclosure challenges, there was no need for the district court to conduct identical analyses of RGF's respective facial and as-applied claims. *See* APP.085; *Citizens United*, 558 U.S. at 331 (the facial/as-applied distinction goes to the "breadth of the remedy," not the standard of scrutiny).

RGF's argument that any consideration of overbreadth was improper is incorrect. First, much of the district court's overbreadth discussion responds to hypothetical applications of the law advanced by RGF to support its broad claim to facial relief. *See* APP.099. *RGF* speculated that the law could apply to "a paid blogging website" or "an individual who raises a dollar. . . on GoFundMe.com," RGF Summ. J. Resp. at 19 (D.N.M. July 16, 2018) (ECF No. 45), and it is absurd for RGF to fault the district court for analyzing RGF's own arguments.

More fundamentally, RGF's challenge to aspects of a statute inapplicable to its own activities, a monetary spending threshold that RGF exceeded by more than 30 times, relies on the overbreadth doctrine. RGF never suggests that a threshold of $7,700 would be unconstitutional, so its facial challenge necessarily rests on how the $250 threshold would apply to others. As this Court has noted, "[t]he overbreadth doctrine is an exception to the 'traditional rule' concerning facial attacks 'that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.'" *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1104 (10th Cir. 2006) (citations omitted). *See also* APP.097.

Thus, the district court correctly stated that "[t]he challenger of the law must show the law penalizes a substantial amount of protected speech judged in relation to the law's legitimate sweep." APP.098 (citing *United States v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014)). Applying this standard, the court further found that the record here did not show that the Act penalized "a substantial amount of protected speech." APP.100. RGF does not dispute that *Brune* correctly states the standard for overbreadth challenges, but rather claims that *Brune* is irrelevant because RGF is not claiming overbreadth. AOB at 28-29. But because RGF repeatedly invoked applications of the statute to just-over $250 expenditures and

one-cent contributors, circumstances unrelated to RGF's own case, RGF's facial challenge necessarily contained an overbreadth challenge.

Indeed, it is unclear on what basis RGF brings its facial challenge, if not on overbreadth. RGF claims that "the City's 'informational interest' is insufficient to justify the speech burden imposed" in light of "the $250 and $0.01 thresholds." AOB at 28, 30. But RGF spent nearly $8,000, not $250, to influence the soda tax proposition, and its smallest-dollar contributor subject to disclosure gave $250, not $0.01. APP.089, APP.098. RGF never explains why it can maintain this aspect of its challenge absent evidence that it has *ever* made covered expenditures just exceeding $250 or received earmarked contributions of "one penny"—or intends to do so in the future. By disavowing an overbreadth theory, RGF by implication concedes that the thresholds are facially constitutional if they are constitutional as applied to RGF. As the district court correctly found, they are. APP.096.

In another election case challenging the New Mexico Campaign Reporting Act, this Court described an analytical framework for facial overbreadth challenges similar to that employed by the district court here:

> "[Overbreadth is a] type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional." The ultimate question in a facial challenge is whether the law is unconstitutional in most of its applications, or, in overbreadth terms, whether the law chills a substantial amount of protected speech.

NMYO, 611 F.3d at 677 n.5 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). However, RGF concludes the district court's analysis under this framework was reversible error. AOB at 28.

RGF appears to imagine a "facial challenge" where it obtains the benefit of the overbreadth doctrine, the ability to stand in the shoes of another to challenge a law that is constitutional as applied, but is relieved of that doctrine's concomitant need to show, with "actual facts," that overbreadth "exists" and is "substantial." *Brune*, 767 F.3d at 1020-21. There is no such doctrine. Because the law is constitutional under the "exacting scrutiny" framework with respect to RGF itself as to both its 2017 expenditures and its vague and unspecified future plans to "speak about" ballot measures in City elections, RGF's facial claim that the law "can *never* be constitutional," AOB at 30, fails. As RGF has disclaimed an overbreadth challenge, *id.* at 28, there is nothing further for this Court to evaluate.

B. RGF's facial challenge to the disclosure thresholds seeks to displace the "exacting scrutiny" inquiry with a bright-line rule this Court has specifically rejected.

RGF's facial challenge to Santa Fe's disclosure ordinance rests on its flawed contention that *Sampson* and *Williams* require evaluating a disclosure law's monetary threshold independently from either the interests the law serves or the burdens it imposes. Indeed, RGF insists that these as-applied holdings dictate facial invalidation because Santa Fe's $250 spending threshold is "materially identical" to

the $200 threshold in Colorado's PAC disclosure regime. AOB at 19. RGF's interpretation contradicts the "exacting scrutiny" test and Circuit precedent. To claim that *Sampson* and *Williams* require finding that the City's informational interest is *per se* "weak" or "border[s] on non-existent," *id*. at 20, 29, requires divorcing those decisions from their facts and ignoring the record here.

1. Circuit precedent does not require Santa Fe to amass a factual record to prove the validity of its interest in securing more transparent elections.

The Supreme Court and this Circuit have affirmed that the interest in informing the public about the sources of campaign-related spending justifies electoral disclosure laws. *See supra* Part I.B. RGF attempts to undercut this precedent by converting the as-applied judgments in *Sampson* and *Williams* into a general rule about the government's overarching interest in ballot measure disclosure.

But *Sampson* and *Williams* did not find that the informational interest was "minimal" with respect to all ballot measure-related expenditures. Nor did either call into question the general validity of the informational interest or suggest it must be proven in each case; the City was entitled to rely upon Supreme Court and 10th Circuit precedent accepting the legitimacy of this interest when it adopted the ordinance here. *See* APP.090 (noting that subsection 9-2.6 was deliberately crafted to remain within the bounds of this longstanding authority); *Nixon v. Shrink Mo.*

Gov't PAC, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). Because the interest in knowing who is spending to influence ballot measure elections is so well-established, a jurisdiction is not required to prove its validity from a blank slate. *Cf. Citizens United v. Gessler*, 773 F.3d at 211 (noting that an asserted justification for disclosure *other* than the informational interest would need to be "support[ed] with evidence").

Indeed, the Supreme Court has never required the rigorous evidentiary showing that RGF demands to establish the basic legitimacy of an interest in electoral transparency. On the contrary, it has upheld state and federal laws in First Amendment cases, including challenges to electoral disclosure laws, based on "various unprovable assumptions" about the interests at stake. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973). In upholding lobbying disclosure requirements in *United States v. Harriss*, for example, "the Court made no inquiry into whether the legislative record supported the determination that disclosure of who was endeavoring to influence Congress was 'a vital national interest.'" *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 16 (D.C. Cir. 2009) (en banc) (quoting *Harriss*, 347 U.S. at 626). This is likely because the interest does not "rest[] on 'economic' analysis that [i]s susceptible to empirical evidence," but represents a legislative judgment

"that good government requires greater transparency." *Id.* The same principle applies here: the City's interest in informing the electorate "is a value judgment based on the common sense of the people's representatives, and repeatedly endorsed by the Supreme Court as sufficient to justify disclosure statutes." *Id.* (citing *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 66-67; *Harriss*, 347 U.S. at 625-26).

The record refutes RGF's assertions that Santa Fe has no "evidentiary support" for its informational interest, AOB at 22, and has failed to prove that its disclosure law makes voters "materially more informed" or identify "specific anecdotal harms that the law has addressed," *id.* at 10. The district court correctly found that Santa Feans have an informational interest in the disclosure required by subsection 9-2.6, APP.086, and more specifically, that they had in interest in knowing who funded RGF's "No Way Santa Fe" campaign. APP.090; *see also supra* Part II.C.

As the undisputed record of RGF's 2017 campaign well illustrates, subsection 9-2.6 ensures that City voters have access to information about groups spending money to influence their votes, enabling them to "make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. The Supreme Court has confirmed the legitimacy of this objective. *Bellotti*, 435 U.S. at 791-92 ("[T]he people in our democracy are entrusted with the responsibility for

judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.").

2. *Sampson* and *Williams* did not find that the government's informational interest was "weak" or "non-existent" because it applies at a $250 monetary threshold.

RGF insists that the district court erred because it failed to treat the onerous PAC disclosure regime reviewed in *Sampson* and *Williams* as identical to Santa Fe's event-driven reporting requirement "for purposes of analyzing the law's constitutionality." AOB at 19-20. According to RGF, these two very different disclosure schemes are "materially identical" because their monetary disclosure and contributor-reporting thresholds are comparable, and that alone compels holding subsection 9-2.6 unconstitutional. *Id.* at 19-22. But this Court decided those cases on as-applied challenges to a PAC disclosure regime, not a facial challenge to event-driven reporting.

RGF's arguments thus rest on a misreading of *Sampson* and *Williams.* Neither held that there is no "constitutionally significant" informational interest in any form of ballot measure disclosure triggered at a spending threshold similar to that in Colorado's law. Indeed, in *Sampson*, this Court declined to "draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures." 625 F.3d at 1261.

RGF, ignoring this clear language, now claims that *Sampson did* draw a bright

line, and that a "statutory $200 spending threshold is 'well below' that line." AOB at 22. That reading is wrong; what is more, it ignores that *Williams* later declined to rule on the facial validity of the same law because the Court recognized that the strength of Colorado's informational interest would differ in the case of larger-scale expenditures or "complex policy proposals." 815 F.3d. at 1278. And *Williams* also acknowledged the converse point: even "[a]n issue committee raising or spending a meager $200" still might permissibly be required to disclose more "*limited* information without violating the First Amendment." *Id*. (emphasis added).

Rather than assessing whether Santa Fe's law satisfies the "substantial relation" standard, RGF asks this Court to sidestep the tailoring analysis in favor of a one-size-fits-all constitutional rule that both *Sampson* and *Williams* declined to adopt. Those cases decided one question: whether Colorado could constitutionally apply its particular "onerous" PAC reporting regime to certain small groups. But in *Sampson*, this Court "assum[ed] that there is a legitimate public interest" in the disclosure required by Colorado's issue committee reporting regime; it just found the interest "attenuated" where "the organization is concerned with only a single ballot issue" and "the contributions and expenditures are slight." 625 F.3d at 1259. And in *Williams*, the Court likewise emphasized that "there is an informational interest in [the plaintiff's]'s financial disclosures," 815 F.3d at 1278, but found the interest "minimal" as to a group that planned to limit its spending against a statewide

ballot measure, and indeed its entire budget, to $3,500. *Id*. at 1272, 1274 n.5, 1277.

RGF is not comparable to the plaintiffs in *Sampson* and *Williams*, so even if subsection 9-2.6 resembled Colorado's disclosure scheme, which it does not, RGF could not claim to face analogous burdens here. *Sampson* concerned an ad hoc association of neighbors who raised and spent $782.02. 625 F.3d at 1251-52. *Williams* considered an organization established, operated, and primarily self-financed by a single individual; the organization's only activity involved the updating and dissemination of one position paper, and $3,500 represented its *entire* budget, not merely its ballot measure-related expenditures. *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1178 (D. Colo. 2014).

Here, however, RGF is not "small scale" and subsection 9-2.6's limited, event-driven reporting is not "onerous." RGF is a longstanding group with an annual budget several orders of magnitude greater than the *Williams* plaintiff, and it regularly engages in policy advocacy, including the nearly $10,000 in actual and anticipated expenditures it devoted to "kill[ing]" the soda tax measure. Supp.APP.90. *See supra* at 9. And as for the prospective relief it seeks, RGF claims only that it will spend "*more than* $250" in future City ballot measure elections. APP.023 (emphasis added). How much more is left to the imagination.

Indeed, even as RGF asserts that "[t]he *facts* of this case fall squarely in line with [*Williams*]," AOB at 13 (emphasis added), it resists any attempt to assess those

facts under the applicable standard of scrutiny. Instead of discussing its own circumstances, RGF speculates about the law's effects on hypothetical one-cent donors and speculates about the enforcement process it set in motion by refusing to follow the law. But the upshot of this enforcement "ordeal", where no fines were assessed and no speech was curtailed, was a letter of reprimand directing RGF to file a report as the law required. Because RGF does not, and cannot, dispute that the required reporting is minimal, it claimed below that the only burden it challenges is the "disclosure of the identities and occupations of non-profit donors" in itself, and the possible "ideological harassment that such disclosure invites." RGF Summ. J. Resp. at 20 (ECF No. 45). This rehashes RGF's claims based on alleged harassment; it does not speak to the law's facial validity, tailoring, or administrative burden.

Santa Fe's $250 spending threshold is set at a level proportionate to the small municipal elections in which it applies. *See supra* Part I.C.2. RGF provides no basis in law or fact for its claim that a $250 disclosure threshold applicable to municipal elections is too low to survive exacting scrutiny. Santa Fe's choice was well within the "'reasonable latitude' given the legislature 'as to where to draw the line.'" *Buckley*, 424 U.S. at 83.

Similarly, although RGF spills much ink complaining about the Act's "$0.01 thresholds" for donor reporting, it ignores that Santa Fe uses *earmarking* as a trigger for contributor reporting, not a monetary threshold. *See supra* Part I.B. Contrary to

RGF's repeated mischaracterizations of what the law requires, groups need not disclose the "personal identifying information" of "all donors" who contribute "even one penny" to them. *See* AOB at 21, 23, 29. They only report the donors who have specifically earmarked their contributions for ballot measure-related advocacy.

In most cases, a donor-reporting provision with an earmarking requirement will be more tightly related to an interest in informing voters who is behind election-related expenditures than a law requiring across-the-board reporting of *all* donors who gave above a fixed dollar threshold to a non-committee group like RGF. *See, e.g.*, *NMYO*, 611 F.3d at 675 (noting that a disclosure law requiring reporting of all receipts and expenditures "differs in a material respect from valid laws governing regulation of only election-related transactions"); *Family PAC*, 685 F.3d at 811 n.12 (upholding Washington's contributor-disclosure thresholds for ballot measure committees and noting that "[a]lmost all [states] require campaigns to itemize contributions below the federal threshold of $200 . . . and several others require reporting of all contributions, no matter what their size"). The City will not further speculate about theoretical burdens faced by donors who earmark one-cent contributions for ballot measure advocacy, because none exist in the record. Like the $250 reporting threshold, the donor-disclosure "line" is "a judgmental decision, best left . . . to [legislative] discretion." *Buckley*, 424 U.S. at 83.

IV. RGF Provides No Grounds for an As-Applied Exemption.

The Supreme Court has recognized one basis for granting an as-applied exemption from a facially valid disclosure requirement. A group must make a particularized factual showing that the group's donors would face a "reasonable probability" of "threats, harassment, or reprisals" if their names were disclosed. *Buckley*, 424 U.S. at 74.

RGF has not attempted to meet this standard. Instead, it has advanced varying alternative theories for why it should nevertheless receive an as-applied disclosure exemption. *See supra* at 12-15. First, RGF disclaimed as-applied relief of the sort provided in *Sampson* or *Williams* to small groups facing undue administrative or "paperwork burdens," resting instead on "donor disclosure burdens." APP.090. Accordingly, in its summary judgment brief, RGF claimed as-applied relief on the unsupported theory that disclosure could "chill" its contributors. It was not until filing its opposition to the City's motion for summary judgment that RGF attempted to retrofit this claim with new evidence, amounting to three affidavits from individuals who experienced varying forms of "harassment" while in leadership roles in out-of-state groups unconnected to RGF.

While RGF's theory of as-applied injury continues to evolve, it now asserts two possible arguments: (1) as-applied relief is warranted when a group shows that "a person of ordinary firmness would be deterred from contributing money to the

[group] if that person knows his or her name will be placed on a publicly-accessible government list," AOB at 25-26; and (2) RGF is entitled to an exemption under *Buckley* and *NAACP* based on the affidavits submitted from three unaffiliated but supposedly like-minded groups that promote "free market" viewpoints. *Id.* at 11-12, 25-27. The first standard is pure invention; the second is one that RGF lacks the evidence to meet.

A. Unsupported allegations of donor "chill" are not a free-standing basis to hold a disclosure law invalid as applied.

RGF's first flawed theory is that it can sustain its as-applied challenge without "prov[ing] a risk of harassment," by simply alleging "that the anti-privacy mandate 'might well result in fewer contributors willing to support [the Foundation's] advocacy.'" AOB at 24.

But the only as-applied exemption to an otherwise valid disclosure law recognized by the Supreme Court requires a particularized showing that there is a "reasonable probability" of donor harassment, not speculation about possible donor attrition. And even if this novel theory constituted a viable basis for an as-applied claim, RGF would have to at least demonstrate some actual or likely loss of donors. Here all evidence indicates the opposite.

RGF introduced no evidence and made no specific allegation that the disclosure required by subsection 9-2.6 has had any concrete adverse effect on its fundraising. APP.095. Nor has RGF produced evidence that any of its contributors

have professed a desire for anonymity or requested that their names be kept confidential. Further, RGF acknowledges that none of its contributors in nearly two decades of existence have been exposed to "harassment" for associating with RGF. Supp.APP.84. In short, RGF offers nothing to support a particularized claim for as-applied relief.

Although RGF cites *Williams* for this theory, AOB at 24, the plaintiff there did not rely on the theoretical possibility of donor chill; it actually demonstrated that Colorado's regulatory regime burdened the group's activities, including by deterring donors. 815 F.3d at 1279 (noting that plaintiff had shown it had "lost contributions it otherwise would have received" and that its founder "vividly recalled losing even $20 contributions"). This evidence was one of many factors, including the group's small size, the voluminous reporting required, and the administrative resources compliance demanded—the Court considered in weighing the overall burdens Colorado's law imposed on that plaintiff. *Id.* at 1278-79. *Williams* did not purport to find that a showing of donor loss, standing alone, would compel an as-applied disclosure exemption, much less suggest that mere speculation about *potential* donor loss, as RGF engages in here, would entitle a plaintiff to as-applied relief.

Finally, while RGF focuses its allegations of donor "chill" in connection to *Buckley*'s as-applied "harassment" exemption, AOB at 23-26, it appears to believe these allegations would support the law's facial invalidation as well. *See, e.g.*,

APP.025-26 ¶¶ 73-75. Insofar as RGF relies on the theoretical possibility of donor "chill" as a basis for finding a disclosure scheme facially unconstitutional, precedent the arguement.

Courts have not ignored the theoretical chilling effects of disclosure on associational rights: that is why they require disclosure law to withstand "exacting scrutiny" in the first place. *Buckley*, for example, observed that "[i]t is undoubtedly true that public disclosure of contributions" may "deter some individuals who otherwise might contribute." 424 U.S. at 68. Nonetheless, it upheld the challenged federal laws under exacting scrutiny, concluding that disclosure "certainly in most applications appear[s] to be the least restrictive means of curbing the evils of campaign ignorance." *Id*. Similarly, this Court upheld Colorado's "electioneering communications" disclosure statute because, while recognizing that the law "undoubtedly chill[ed] potential donors to some extent," it found that the law's "requirements [we]re sufficiently drawn to serve the public's informational interests." *Independence Inst*., 812 F.3d at 798. *See also, e.g.*, *Family PAC*, 685 F.3d at 806-07 (finding First Amendment "burden" posed by donors' preference for anonymity "modest"); *Madigan*, 697 F.3d at 482 (same).

Finding no support for its theory in relevant authority, RGF turns to unrelated First Amendment decisions from other circuits, attempting to replace the well-established standards for the review of an election-related disclosure law with new

tests more to its liking. *See, e.g.*, AOB at 24 (citing *Garcia v. City of Trenton*, 348 F.3d 726 (8th Cir. 2003) (considering whether evidence at trial was sufficient to support jury verdict awarding damages for First Amendment retaliation)). RGF also resorts to standing case law, confusing the inquiry into whether subjective "chill" creates Article III *standing* to bring a First Amendment claim with whether it would sustain that claim on the merits. *See, e.g.*, AOB at 26 (citing *Initiative & Referendum Inst.*, 450 F.3d 1082 (discussing standards for cognizable First Amendment injury-in-fact)).

But applicable case law is unequivocal that general allegations of "chill" are not sufficient grounds for the facial invalidation of a political disclosure law, *see Buckley*, 424 U.S. at 64-68, nor for a blanket disclosure exemption for all organizations that claim to share similar ideological viewpoints. *Cf. Independence Inst. v. Gessler*, 71 F. Supp. 3d 1194, 1199 n.2 (D. Colo. 2014) (rejecting challenge to disclosure law based on general allegations of chill because *Buckley* "already addressed this argument" by "bump[ing] up the level of scrutiny," so "[i]n effect, the associational interests of the [plaintiff]'s donors ha[d] already been accounted for" (citing *Buckley*, 424 U.S. at 64-68)), *aff'd sub nom. Independence Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016).

B. RGF has not demonstrated a "reasonable probability" that disclosure will subject its donors to threats, harassment, or reprisals.

The exclusive support for RGF's claim to an as-applied "harassment" exemption consists of affidavits from officers of three out-of-state groups with no demonstrated connection to RGF beyond an allegedly similar "pro-free market" ideology, each claiming they were subjected to verbal and email harassment in response to their policy advocacy. APP.094; AOB at 11-13. The probity of these affiants is not material here because their testimony fails as a matter of law to establish "a reasonable probability" that *RGF*'s "members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 558 U.S. at 370.

RGF has not alleged that any of its board members, staff, or donors have ever been subject to harassment or threats by reason of their association with RGF. APP.095; Supp.APP.84. While the *Buckley* standard is "flexible," it does not authorize a resort to evidence about *other* groups unless a plaintiff has no history of its own upon which to draw. 424 U.S. at 74 ("New parties 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."). RGF has plenty of history, just none that supports its claim. It has existed since 2000, publicizes the names of its staff, and "often participates in legislative and policy advocacy in New Mexico." APP.070-71. As the district court explained, "the best evidence of whether there is

a reasonable probability RGF's donors would face threats and reprisals is what RGF or its donors have experienced in the last approximately 19-years of RGF's advocacy." APP.095.

Although RGF had the opportunity to substantiate its claims about the prospect of harassment faced by its own donors, it provided no evidence to that effect. APP.095; Supp.APP.84. Indeed, RGF has already disclosed some of its contributors without incident, including the two who contributed to its No Way Santa Fe initiative.

As the district court explained, RGF's precise argument was rejected in *Citizens United*. APP.095-96. There, the Supreme Court had little trouble rejecting a request for an as-applied exemption from an organization with a significant history of policy advocacy that presented only evidence of reprisals towards other groups. 558 U.S. at 370. Like RGF, Citizens United submitted testimony from other groups claiming their donors had been "blacklisted, threatened, or otherwise targeted for retaliation," *id.*, but the Court found it was dispositive that Citizens United "had offered no evidence that *its* members may face similar threats or reprisal" and "ha[d] been disclosing its donors for years" without any "identified . . . instance of harassment or retaliation." *Id.* (emphasis added).

Even if evidence pertaining to the experiences of unrelated groups were appropriate here, the connection between the affiants and RGF is too attenuated.

None of the groups claim to be affiliated with RGF or to conduct any activities in New Mexico. *See* APP.074-75, APP.094. Indeed, the high-profile communications and lobbying activities undertaken by these groups' leaders lacked any nexus to election-related spending, or indeed, elections in general, much less ballot proposition elections in Santa Fe. *See id.* The district court correctly determined that such groups were not "similar enough to RGF" to merit the *Buckley* exemption. APP.095.

The only connection RGF puts forward between itself and the affiant groups is that they are all "free-market" non-profits with "similar missions." AOB at 11-12, 25; *see* APP.074-75. But the suggestion that any group can obtain a disclosure exemption by showing that someone with superficially similar political views was harassed or criticized stretches the notion of similarity beyond recognition. Indeed, the purported ideological connection here is shared support of "free markets," a majority viewpoint in this country—and hardly the type of unpopular or "dissident belief[s]" that the *Buckley* exemption was designed to protect. *NAACP*, 357 U.S. at 462. To accept this argument would make secrecy the rule and disclosure the exception, running directly counter to recent Supreme Court precedent. *See Citizens United*, 558 U.S. at 366-71.

In any event, the incidents the affidavits describe fall short of the evidence that has historically warranted the *Buckley* exemption. Several affiants relate

troubling manifestations of apparent political acrimony, but they are the public leadership of the organizations, not their donors; the problematic acts are rarely connected to the political views the affiants promote; and much of this "ideological harassment" appears to have First Amendment dimensions of its own. *See, e.g.*, APP.065 ¶¶ 4-6 (describing protests outside an event promoting controversial legislation at which affiant was the keynote speaker); APP.063 ¶ 12 (noting that a religious group "call[ed] on [its] members to cast evil spells" on her). If a handful of allegations of objectionable behavior and internet trolling were enough to support an as-applied exemption for any group, let alone for all groups sharing "pro-free market" viewpoints, no disclosure law could survive.

More fundamentally, the incidents described in the affidavits are not analogous to those related in *NAACP* and *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982)—which involved sustained, coordinated, and systemic threats, including by the government itself. *See, e.g.*, *Socialist Workers*, 459 U.S. at 98-100. Here, however, there is nothing to seriously suggest that those affiliated with "free-market groups" are unable to avail themselves of police protection, or that the government itself is threatening or seeking reprisal against them. *See, e.g.*, APP.065 ¶ 6 (describing police action to remove protestors).

RGF's only excuse for its failure to introduce relevant evidence is to argue that the district court "impos[ed] an improper burden of proof," because it required RGF "to prove actual harassment." AOB at 25-26. But the district court stated, repeatedly, that RGF need show only "'a *reasonable probability* that the compelled disclosure . . . will subject them to threats, harassment, or reprisals' using a flexible means of proof." APP.095; APP.091-92 (emphasis added) (quoting *Buckley*, 424 U.S. at 74). In fact, RGF is not objecting to the evidentiary standard the lower court applied, just to its conclusion that RGF had failed to meet it. APP.094 (concluding affiant groups were not "similar enough to RGF to show a reasonable probability" that RGF's donors face harassment). RGF objects to the district court's decision to "focus[] on [RGF]'s own past experiences"—and the absence of any harassment of its members or donors over its 20-year history—rather than statements from unrelated affiants. *See* AOB at 27-28. Yet this is what *Buckley* and *Citizens United* prescribe for groups like RGF that have a "history upon which to draw." *Buckley*, 424 U.S. at 74. RGF's disagreement is less with the district court and more with precedent.

Finally, RGF's suggestion that the City has the burden of proving that RGF would not face harassment is contrary to both precedent and logic. As the district court explained, the "government bears the burden to show that the disclosure requirements are substantially related to a sufficiently important governmental

interest," but once this showing has been made, the "burden is on the challengers to show 'a reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals.'" APP.093 (citing *Buckley*, 424 U.S. at 72, 74). Were it otherwise, a state defendant would have the impossible task of proving a negative whenever a group seeks an as-applied disclosure exemption. Four decades of Supreme Court precedent endorsing transparency laws as a means to "enable the electorate to make informed decisions" would crumble if those laws were subject to such facile challenges. *Citizens United*, 558 U.S. at 371. *Cf. Doe*, 561 U.S. at 228 (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").

V. The Disclosure Ordinance Does Not Violate The New Mexico Constitution.

RGF fails to provide any authority to support its assertion that the New Mexico Constitution provides "greater protection for speech" than the First Amendment with respect to campaign-finance disclosure, AOB at 30.

A New Mexico constitutional provision reaches no more broadly than its federal counterpart unless a court believes that there is : (1) a "flawed" federal analysis, (2) "structural differences between state and federal governments," or (3) "distinctive [state] characteristics" justify doing so. *State v. Tapia*, 414 P.3d 332, 336 (N.M. 2018). RGF still has not specified which of these three requisite grounds could possibly apply here. It therefore has not even cleared the first bar to showing

that Art. II, § 17 reaches beyond the First Amendment in this context. *See Elane Photography, LLC v. Willock*, 284 P.3d 428, 441 (N.M. Ct. App. 2012) (declining to "deviat[e] from federal First Amendment precedent" where no required basis was identified), *aff'd*, 309 P.3d 53 (N.M. 2013); *Morris v. Brandenburg*, 356 P.3d 564, 573 (N.M. Ct. App. 2015) (noting plaintiffs carry the "initial burden" to establish when greater protection should be found under the state constitution), *aff'd*, 376 P.3d 836 (N.M. 2016).

Nor has RGF cited a single case holding that Art. II, § 17 offers greater protection against campaign-finance disclosure laws than the First Amendment. And it cannot. *Cf. Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1224 (D.N.M. 2010) ("*AAPD*") (agreeing that plaintiffs' "free speech and associational rights under the New Mexico Constitution, Article II, Section 17, are co-extensive with their rights under the United States Constitution" and analyzing both state and federal claims under the relevant federal constitutional test). When the New Mexico Supreme Court has analyzed free-speech issues under Art. II, § 17, it has used federal precedent. *See, e.g.*, *Temple Baptist Church, Inc. v. City of Albuquerque*, 646 P.2d 565 (N.M. 1982). Lower courts have followed suit. *See, e.g.*, *State v. Ongley*, 882 P.2d 22, 23 (N.M. App. 1994) ("[T]he [free-speech] protection of the federal and state constitutions are the same, at least with respect to content-neutral restrictions."). Federal courts have also viewed state and federal rights as

coterminous with respect to election-related issues, *AAPD*, 690 F. Supp. 2d at 1208, and the right to petition government, *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 895 (10th Cir. 2011). There is no reason to believe the New Mexico Supreme Court would deviate from "extensive and well-articulated" federal campaign finance law to resolve this claim. *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997).

The only authority RGF cites to the contrary is *City of Farmington v. Fawcett*, 843 P.2d 839 (N.M. Ct. App. 1992). However, RGF fails to note that *Fawcett* found that speech, even under the New Mexico Constitution, may be regulated: "While the language of Article II, Section 17, unambiguously protects speech on all subjects, . . . the state may constitutionally regulate the place and manner of such speech," and "the constitutional liberty to speak freely can be limited to the extent it conflicts with other constitutionally protected rights." *Id*. at 842-43.

Further, because *Fawcett* focused on the "abuse" clause of Art. II, § 17, RGF acknowledges that *Fawcett* applies to "the standard for 'obscenity'" under the New Mexico Constitution. AOB at 32. And the state supreme court has still not decided whether *Fawcett*'s interpretation of the abuse clause is even correct. *State v. Meyers*, 207 P.3d 1105, 1116 (N.M. 2009). In sum, RGF is asking the Tenth Circuit to create new law based on a novel interpretation of the New Mexico Constitution that the New Mexico Supreme Court has not endorsed.

RGF asks this Court to interpret the "plain language" of Art. II., § 17 as indicative of broader protection than the federal constitution. AOB at 33. But the "ultimate arbiter of the meaning of the New Mexico Constitution," *Morris*, 356 P.3d at 579, the New Mexico Supreme Court, has read the state and federal provisions as "substantially the same." *Fawcett*, 843 P.2d at 846 (collecting cases). RGF's fixation on the text also flouts the New Mexico Supreme Court's command that the state constitution cannot be interpreted more broadly than a parallel federal constitutional provision "base[d] . . . on a mere textual difference." *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 852 (N.M. 1988).

In short, RGF has failed to show that Art. II, § 17 dictates a different outcome in this case.

CONCLUSION

The City respectfully requests that the district court judgment be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellees concur with Plaintiff-Appellant that oral argument will materially assist the Court in resolving the issues presented in this case.

Dated: June 26, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rules of Appellate Procedure 28(a)(10) and 32(g)(1) and 10th Circuit Rule 32(a), undersigned counsel for Appellees certifies that this brief is proportionally spaced in 14-point font and contains 12,900 words, as calculated pursuant to Federal Rule of Appellate Procedure 32(f) with Microsoft Office Word 2016.

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that on June 26, 2020, a true and complete copy of this BRIEF FOR DEFENDANTS-APPELLEES was electronically transmitted to the Clerk of the Court using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing and/or hard copy via U.S. mail to the parties of record and that:

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s/Marcos D. Martinez
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