July 11, 2017

VIA ELECTRONIC MAIL

Hon. Maggie Toulouse Oliver,
New Mexico Secretary of State
Capitol Annex North
325 Don Gaspar
Suite 300
Santa Fe, N.M. 87501

RE: Constitutional and Practical Issues with Proposed Rule 1.10.13 NMAC

Dear Secretary Toulouse Oliver:

On behalf of the Center for Competitive Politics ("the Center"),[1] I respectfully submit the following comments on constitutional issues with portions of Proposed Rule 1.10.13 NMAC,[2] which substantively mirrors S.B. 96,[3] a bill vetoed by Governor Martinez this year.[4] Among other things, this regulation supplants the state's existing Campaign Reporting Act to create new, extra-statutory reporting requirements for individuals and organizations that make independent expenditures or publish information that simply mentions the name of a candidate in a specified window before a primary or general election. The provisions of this new rule would ultimately chill protected speech by mandating the disclosure of donors to organizations engaged solely in issue advocacy.[5]

In attempting to impose requirements essentially identical to proposed legislation vetoed by the Governor, the Proposed Rule advances new and burdensome reporting requirements for

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[1] The Center is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Just this past year, we secured judgments in federal court striking down laws in the states of Colorado and Utah on First Amendment grounds. We are also currently involved in litigation against California, Missouri, and the federal government.

[2] Proposed Rule § 1.10.13.1 *et seq*. *available at* http://www.sos.state nm.us/uploads/files/1%2010%2013%20NMAC%202017%20-%20DRAFT.pdf ("Proposed Rule"); *see also* New Mexico Secretary of State, Notice of Proposed Rulemaking, http://www.sos.state nm.us/Elections_Data/notice-of-proposed-rulemaking.aspx.

[3] Campaign Finance Fixes, S.B. 96, 53 Leg., 1st Sess. (N.M. 2017) ("S.B. 96").

[4] Gov. Susana Martinez, Senate Executive Message No. 56, Apr. 7, 2017 *available at* http://www.governor.state nm.us/uploads/files/SEM056_VETO%20SB96.pdf ("Veto Message").

[5] Issue advocacy is speech about public policy issues, as distinct from speech that advocates for or against candidates for office.

organizations. It purports to cover only "independent expenditures," but the definition of independent expenditure is so broad that it would cover many activities that have no relation to express advocacy for or against a candidate. Furthermore, the regulation extends onerous disclosure requirements that "call out" an organization's funders—whether or not the donors agree with the specific communication. Complicating matters, the regulation goes even further and creates a vague "coordination" standard.

Governor Martinez rejected these specific changes to the Campaign Reporting Act. As the Governor noted in her message vetoing S.B. 96, "the broad language in the bill could lead to unintended consequences that would force groups like charities to disclose the names and addresses of their contributors" and "would likely discourage charities and other groups that are primarily non-political from advocating for their cause and could also discourage individuals from giving to charities."[6] The Proposed Rule attempts to do what the governor forbade, and the Proposed Rule suffers from the same constitutional and practical infirmities as S.B. 96.

I. The Proposed Rule goes beyond the scope of the Secretary's authority.

The Proposed Rule attempts to *legislate* rather than *implement* existing law, as evidenced by the Proposed Rule's cut-and-paste of the legislature's failed bill.[7] While the Secretary has some authority to write interpretive rules, the wholesale adoption of new disclosure requirements—particularly when they may be suspect under the First Amendment to the United States Constitution—is simply beyond the scope of the Secretary's authority. Put simply, the Secretary "has no power to adopt a rule or regulation that is not in harmony with [her] statutory authority."[8]

a. Only the Legislature, with the consent of the Governor, may write laws.

Writing laws is a role solely for the state Legislature.[9] Even then, before a bill may become a law, it must

> be presented to the governor for approval. If [s]he approves, [s]he shall sign it, and deposit it with the secretary of state; otherwise, [s]he shall return it to the house in which it originated, with [her] objections, which shall be entered at large upon the journal; *and such bill shall not become a law* unless thereafter approved by two-thirds of the members present and voting in each house by yea and nay vote entered upon its journal.[10]

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[6] Veto Message*, supra* n. 4, *id*.

[7] *Compare* S.B. 96 *with* the Proposed Rule. Where the Proposed Rule does not replicate S.B. 96, an independent analysis is needed to ascertain if the Secretary has authority to promulgate the other provisions.

[8] *N.M. Pharm. Ass'n v. State*, 738 P.2d 1318, 1320 (N.M. 1987) (collecting cases).

[9] N.M. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New Mexico, and shall hold its sessions at the seat of government."). Indeed, even then, the people of New Mexico "reserve the power to disapprove, suspend and annul any law enacted by the legislature" via a petition process. *Id*. Attempts to use rulemaking authority to circumvent the citizens' veto—an important check on governmental power—is thus also likely violative of Article IV, Section 1.

[10] N.M. Const. art. IV, § 22 (emphasis added).

Governor Martinez vetoed S.B. 96, and transmitted her objections to the bill, and therefore the Campaign Reporting Act has not been amended.[11] Not even the New Mexico Supreme Court may override the Governor's veto or "usurp the role of the Legislature in enacting new legislation."[12] Administrative agencies also cannot usurp the Legislature's role in New Mexican government. The state Supreme Court has been perfectly clear: administrative agencies are not empowered to write substantive law, because "[t]he legislative power of the State of New Mexico is vested in the Legislature."[13]

The New Mexico Constitution set up separate branches of government,[14] and the Secretary is not empowered to step in the shoes of the Legislature or the Governor to demand more disclosure than the Campaign Reporting Act requires. This basic tenant of civics—the separation of powers doctrine—is an essential check on arbitrary use of power by the executive branch. The Secretary cannot legislate from her office.

b. The Secretary's authority to promulgate rules is limited to implement the Campaign Reporting Act, not enact new substantive law.

In more concreate legal terms, the Secretary lacks statutory authority to enact the Proposed Rule's adoption of S.B. 96. Neither the Campaign Reporting Act, the New Mexico Administrative Procedures Act, nor the State Rules Act allow the Secretary to usurp the process for substantively amending New Mexico's campaign finance laws. The New Mexico Supreme Court had clearly held that "[a]n administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority."[15] Because the Secretary lacks the statutory authority to promulgate the Proposed Rule, the regulation runs afoul of New Mexican law.

Of course, the state agencies are afforded some discretion to promulgate rules "where it is difficult or impracticable to lay down a definite, comprehensive" statute,[16] but the agency "has no authority to promulgate a regulation that conflicts with a statute."[17] Therefore, "[t]he Legislature can delegate legislative powers to administrative agencies, but in so doing, boundaries of authority must be defined and followed."[18] The New Mexico Supreme Court has held that any "action taken by a governmental agency must conform to some statutory standard… or intelligible principle."[19]

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[11] Veto Message, *supra* n. 4, *id*.

[12] *State ex rel. AFSCME v. Johnson*, 994 P.2d 727, 728 (N.M. 1999).

[13] *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 980 (N.M. 1975) (citing N.M. Const. art. IV, § 1).

[14] N.M. Const. art. III, § 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.").

[15] *Rivas v. Bd. of Cosmetologists*, 686 P.2d 934, 935 (N.M. 1984) (collecting cases).

[16] *State ex rel. State Park & Rec. Comm'n v. N.M. State Auth.*, 411 P.2d 984, 992 (N.M. 1966) (quoting *State ex rel. Sofeico v. Heffernan*, 67 P.2d 240, 245 (N.M. 1936)).

[17] *Aguilera v. Bd. of Educ.*, 114 P.3d 322, 327 (N.M. Ct. App. 2005).

[18] *Rivas*, 686 P.2d at 935.

[19] *Id*. (citing *State ex rel. Lee v. Hartman*, 367 P.2d 918 (N.M. 1961) *and State Park & Rec. Comm'n v. New Mexico State Author.*, 411 P.2d 984 (N.M. 1966)).

Thus the Secretary is bound by the scope of her statutory authority—and, in this instance, cannot promulgate a rule that is substantively similar to a vetoed bill.

In the area of campaign finance, the Legislature granted only limited authority to the Secretary, who "may adopt and promulgate rules and regulations *to implement* the provisions of the Campaign Reporting Act."[20] Nothing in the statute empowers this office to substantively amend the Campaign Reporting Act to create new categories of disclosure covering new types of speakers. New disclosure regimes are not implementing existing law.

Likewise, the Campaign Reporting Act mandates that this office promulgate rules subject to New Mexico's Administrative Procedures Act ("APA").[21] The APA is likewise clear on this office's authority: "No agency or member thereof shall:… impose any sanction or substantive rule or order except within jurisdiction delegated to the agency and as authorized by law."[22] The secretary is also subject to the State Rules Act.[23] The very same Legislature and Governor that considered S.B. 96 also substantively changed the State Rules Act in House Bill 58, which clarifies that the ministers of government are not to legislate in the place of the representatives of the people.[24] The changes made by H.B. 58 are now in effect.[25]

Specifically, the State Rules Act now clearly mandates that "[n]o rule is valid or enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the statute."[26] More importantly, the amendments made by H.B. 58 specifically require that a "proposed rule" have "specific legal authority authorizing" it's creation.[27] Because the Governor rejected S.B. 96, there is no specific legal authority for the Proposed Rule, which is substantively the same as the vetoed bill. Therefore, the Proposed Rule violates the State Rules Act.

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[20] N.M. Stat. Ann. § 1-19-26.2 (emphasis added). Similarly, the Secretary is bound to only promulgate rules "*pursuant to the provisions of*, and necessary to carry out the purposes of, the Election Code…." N.M. Stat. Ann. § 1-2-1(B)(2) (emphasis added).

[21] *See*, *e.g.* N.M. Stat. Ann. § 1-19-26.2 ("In adopting and promulgating these rules and regulations, the secretary of state shall comply with the provisions of the Administrative Procedures Act…") The APA is found at N.M. Stat. Ann. § 12-8-1 *et seq.*

[22] N.M. Stat. Ann. § 12-8-12(B).

[23] The Secretary is covered under the State Rules Act (N.M. Stat. Ann. § 14-4-1 *et seq.*), because under the State Rules Act, a covered agency is "any agency, board, commission, department, institution or officer of the state government except the judicial and legislative branches of the state government," N.M. Stat. Ann. § 14-4-2(A), and the Secretary of State is a part of the executive branch. N.M. Const. art. V, § 1 ("The executive department shall consist of a governor, lieutenant governor, *secretary of state*, state auditor, state treasurer, attorney general and commissioner of public lands…") (emphasis added). *See also* N.M. Stat. Ann. § 1-2-1(B)(2) (subjecting the Secretary to the State Rules Act).

[24] Rulemaking Requirements, H.B. 58, 53 Leg., 1st Sess. (N.M. 2017) ("H.B. 58").

[25] H.B. 58 § 11 ("The effective date of the provisions of this act is July 1, 2017.").

[26] H.B. 58 § 9, *to be codified at* N.M. Stat. Ann. § 14-4-__(A).

[27] H.B. 58 § 1, *to be codified at* N.M. Stat. Ann. § 14-4-2(D).

It will not serve to argue that the Proposed Rule is simply implementation of existing law, as if it were some ministerial action.[28] It is for the courts to decide the scope of the agency's authority under its enabling statute, which only allows for *implementing* regulations, not wholesale legislation. In reviewing the actions of an agency, a New Mexican court "is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law."[29]

If the existing Campaign Reporting Act allowed for such new forms of disclosure and regulation of speech, there would have been no need to invest substantial legislative resources in the debate surrounding S.B. 96 (or its predecessor versions in prior legislative sessions).[30] One cannot infer new disclosure that was unknown to the drafters of the Campaign Reporting Act as it stands now. For "[i]t is a strong thing to read into an Act… words which are not there, and, in the absence of clear necessity, it is a wrong thing to do."[31] Therefore, neither the courts nor the Secretary is "entitled to read words into an Act… unless [there is] clear reason for it is to be found *within the four corners of the Act itself*."[32] Clearly the Legislature and Governor agree that the Campaign Reporting Act does not cover the new disclosure mandates, and the Governor ultimately vetoed S.B. 96, citing constitutional concerns.[33] The Secretary is not empowered to do what the Legislature and Governor chose not to do in law, nor can the Secretary infer a power from S.B. 96's failure to become law.[34]

Since the Proposed Rule is not *implementing* existing law but instead creates new disclosure, it goes beyond the authority granted the Secretary in the Campaign Reporting Act, the APA, and the State Rules Act. Adoption of the Proposed Rule is therefore suspect and likely to be struck down by the courts, which set aside regulations when "they are clearly incorrect."[35] The New Mexico Supreme Court has held that a "court should reverse if the agency's interpretation of

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[28] *See*, *e.g. Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 603 P.2d 285, 295 (N.M. 1979) ("In making these rules [the Secretary] is not performing a ministerial act; [s]he is not acting in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of [her] own judgment…. We disagree with the Court of Appeals that promulgating these rules is a ministerial act.") (internal citation and quotation marks omitted).

[29] *Morningstar Water Users Ass'n v. N.M. PUC*, 904 P.2d 28, 32 (N.M. 1995); *cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (In the federal law context, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.") (collecting cases from 1896 to 1981).

[30] Here, the plain meaning of the Campaign Reporting Act guides the Secretary, for "[t]he first and most obvious guide to statutory interpretation is the wording of the statutes themselves." *DeWitt v. Rent-A-Center, Inc.*, 212 P.3d 341, 348 (N.M. 2009); *see also Cordova v. Cline*, 2017-NMSC-020 ¶ 13, ___ P.3d ___ (N.M. 2017) (citing *DeWitt*).

[31] *State v. Couch*, 193 P.2d 405, 415 (N.M. 1946) (quoting Maxwell on the Interpretation of Statutes, (8th Ed.) at 14) (internal quotation marks omitted).

[32] *Id*. (quoting Maxwell on the Interpretation of Statutes, (8th Ed.) at 14) (internal quotation marks omitted) (emphasis added).

[33] Veto Message, *supra* n. 4, *id*.

[34] *See N.M. Pharm. Ass'n v. State*, 738 P.2d 1318, 1321 (N.M. 1987) (bolstering rejection of administrative rule when state legislature "clearly expressed its intention to forbid physician's assistants from dispensing dangerous drugs. The Board cannot rely upon the form of the Legislature's express prohibition to circumvent that intention").

[35] *Pharm. Mfrs. Ass'n v. N.M. Bd. of Pharm.*, 525 P.2d 931, 936 (N.M. 1974) (internal citation omitted).

a law is unreasonable or unlawful."[36] Without statutory authority, and a clear, recent mandate from the Legislature to keep fidelity with existing statute generally, the adoption of the Proposed Rule is incorrect, unreasonable, and unlawful.

II. The Proposed Rule 's mandated disclosure is not properly tailored to a substantial governmental interest and includes a reporting threshold that is too low.

Even assuming, *arguendo*, that the Secretary may be empowered to write the Proposed Rule into the administrative code, the substance of the law suffers from the same defects as S.B. 96. Neither S.B. 96 nor the Proposed Rule survive heightened scrutiny from courts protecting fundamental First Amendment rights.

a. The Supreme Court and the Tenth Circuit Court of Appeals have severely limited New Mexico's ability to compel disclosure for speech that is not campaign-related.

The Proposed Rule attempts to substantively change how New Mexico's campaign finance disclosure system operates. In so doing, it impermissibly catches speech about public policy issues in the net designed to regulate campaign speech. Worse, once entangled in New Mexico's campaign finance regime, the bill imposes onerous registration and multiple reporting requirements on speakers in New Mexico. These flaws in the Proposed Rule are fatal.

Under the First Amendment and United States Supreme Court guidance, campaign finance disclosure must be tied to informing the public concerning groups seeking some electoral outcome. Courts review state and federal laws demanding donor lists under "exacting scrutiny," which demands there be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed."[37] This heightened scrutiny is required because, under the First Amendment, "compelled disclosure… cannot be justified by a mere showing of some legitimate governmental interest."[38] Therefore, the Supreme Court has long demanded a nexus between campaign finance disclosure and actual campaign-related activity in order to protect organizations merely discussing questions of public policy.[39]

Candidate committees (and, in the state law context, ballot measure committees) obviously support or oppose electoral outcomes and are campaign-related.[40] Organizations with the "major purpose" of supporting or opposing candidates or ballot measure questions are also subject to

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[36] *Morningstar Water Users Ass'n*, 904 P.2d at 32 (citing *Maestas v. New Mexico Pub. Serv. Comm'n*, 514 P.2d 847, 850 (1973)).

[37] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam).

[38] *Id*.

[39] *Id*. at 14 (noting "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs… of course includ[ing] discussions of candidates….") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (brackets and ellipses in *Buckley*).

[40] *Id*. at 79.

campaign finance disclosure.[41] Indeed, the United States Court of Appeals for the Tenth Circuit specifically applied the "major purpose" requirement to New Mexico's campaign finance law.[42]

But if an organization is neither controlled by a candidate nor has as its "major purpose" speech targeting electoral outcomes, then disclosure is appropriate *only* for activity that is "unambiguously campaign related."[43] The more disclosure is divorced from the interest of who is speaking about candidates or ballot measures, the greater the threat to protected issues speech under the First Amendment.

While the Center commends the drafters of S.B. 96, and now the Proposed Rule, for trying to avoid reaching activity by § 501(c)(3) nonprofit organizations,[44] the definition of "independent expenditure" is broad enough to cover grassroots lobbying by § 501(c)(3) organizations if they run their communications close in time to an election. Under Proposed Rule § 1.10.13.7(M), an "independent expenditure" can be a communication that "refers to a clearly identified candidate or ballot measure and is published and disseminated to the relevant electorate… within thirty days before the primary election or sixty days before the general election…." Thus, if a § 501(c)(3) organization runs a communication calling for support of a bill while mentioning a sitting member of the Legislature (who happens to be running for reelection),[45] the communication would qualify as an "independent expenditure" if disseminated close in time to an election. Once qualified as an "independent expenditure," the activity would compel the § 501(c)(3) organization to register and disclose its donors.

In its current form, the provisions of the Proposed Rule would chill protected speech by mandating the disclosure of donors to organizations that never endorse, support, or oppose a candidate and speak solely about issues. Despite the claims of the Rule's proponents, the First Amendment does not permit the imposition of unbounded government registration and reporting requirements as a precondition to speech.

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[41] *Id.*

[42] *N.M. Youth Organized v. Herrera,* 611 F.3d 669, 677 (10th Cir. 2010) ("a political committee may 'only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'") (quoting *Buckley*, 424 U.S. at 79).

[43] *Buckley*, 424 U.S. at 81.

[44] *See*, *e.g.*, the definition of "advertisement" in Proposed Rule § 1.10.13.7(A)(4), which exempts "nonpartisan voter guides allowed by the federal Internal Revenue Code… for Section 501(c)(3) organizations."

[45] Section 501(c)(3) organizations are prohibited from engaging in any activity supporting or opposing candidates. 26 U.S.C. § 501(c)(3); *see also* 26 C.F.R. § 1.501(c)(3)-1(a)(3)(ii). But such political activity is distinctly different than advocating for a particular policy. The Internal Revenue Service ("IRS") has recognized that "[a]n organization may be educational even though it advocates a particular position or viewpoint." 26 C.F.R. § 1.501(c)(3)-1(d)(3)(i)(b). IRS regulations, therefore, require some indicia of support or opposition to a candidate to disqualify a § 501(c)(3)'s activity as non-exempt. *See* IRS Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 ("Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case."). The IRS uses seven factors to examine a § 501(c)(3) organization's communications for impermissible political campaign intervention. *Id.* at 1424. Even when an ad is close in time to an election, the IRS may still find it to not be political campaign intervention. *See*, *e.g.*, *id.* (Situation 14, featuring an ad that "ends 'Call or write Senator C to tell him to vote for S. 24.'").

b. The Proposed Rule requires disclosure that is burdensome, especially for small entities, and therefore is not properly tailored to the state's interest.

For the sake of argument, even if the state has an interest in compelling disclosure, the reporting must be tailored to its interest and be in balance with the burdens it places on speakers. If the state's demand for disclosure is too onerous—demanding too much information or demanding regular registration and reporting to the state—then it may be too burdensome under the First Amendment. Thus, the *scope and method* of the state's disclosure system matters too. One-time, event-driven reports are less burdensome, and therefore more likely to survive a federal court's exacting scrutiny, than the continual reporting mandated of Political Action Committees ("PACs"). The Proposed Rule imposes PAC-like status on speakers,[46] and in that manner goes too far.

It is sometimes said that the Supreme Court's decision in *Citizens United v. Federal Election Commission*[47] upheld the constitutionality of "disclosure," but, in fact, the Court approved only a particular, narrow type of disclosure subject to a large array of statutory and regulatory limitations. It did not reverse a long line of precedent placing limits on disclosure. Rather, the Court merely upheld the disclosure of a federal independent expenditure report for an electioneering communication, which discloses the *entity making the expenditure* and the purpose of the expenditure.[48] Additionally, the federal report only discloses contributors giving over $1,000 *for the purpose of furthering the communication*.[49] This has been interpreted by the Federal Election Commission to mean contributions earmarked for these independent expenditures,[50] an interpretation recently upheld by the United States Court of Appeals for the District of Columbia Circuit in a case involving analogous "electioneering communication" reporting requirements.[51] Similarly, Colorado's electioneering communications provision was upheld precisely because it was similarly limited to the federal standard—including only reporting earmarked contributions.[52]

By contrast, this regulation proposes, in many cases, an open-ended disclosure of the names and addresses of everyone who contributes at a certain threshold to an entity that makes public communications over $3,000 that simply mention the name of a candidate.[53] This is not like the

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[46] *See* Proposed Rule § 1.10.13.10(B) (political committee reporting) and Proposed Rule § 1.10.13.11(B) (reporting requirements for independent expenditure committees).

[47] 558 U.S. 310, 369 (2010).

[48] 52 U.S.C. §§ 30104(f)(2)(A)-(D).

[49] 52 U.S.C. §§ 30104(f)(2)(E)-(F); *Citizens United*, 558 U.S. at 366-367.

[50] 11 C.F.R. § 104.20(c)(9).

[51] *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501 (D.C. Cir. 2016) (upholding 11 C.F.R. § 104.20(c)(9)).

[52] *Independence Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) ("[I]t is important to remember that the Institute need only disclose those donors who have specifically earmarked their contributions for electioneering purposes.").

[53] The Proposed Rule does attempt to place an earmarking requirement into the regulation. *See* Proposed Rule § 1.10.13.11(C) (an entity running an independent expenditure "shall report the name and address of each person who has made contributions of more than a total of two hundred dollars ($200) in the previous twelve months that were earmarked or made in response to a solicitation to fund independent expenditures"). But the phrase "in response to a solicitation" is quite broad and nowhere defined. What qualifies as a "solicitation to run an independent expenditure" must be carefully defined to be for funds dedicated to activity that is "unambiguously campaign related," *Buckley*, 424 U.S. at 81, rather than merely mentioning a candidate or the policy idea behind a ballot measure.

disclosure at issue in *Citizens United*, and instead resembles the disclosure regimes designed for PACs. In contrasting the disclosure burdens dealt with by the Court in the 1986 case *Massachusetts Citizens for Life, Inc. v. Federal Election Commission* ("*MCFL*"),[54] the *Citizens United* Court specifically held that the limited disclosure of an independent expenditure report is a "less restrictive alternative to more comprehensive regulations of speech," such as those proposed in in the Proposed Rule.[55]

In *MCFL*, both the plurality and the concurrence were troubled by the burdens placed upon nonprofit corporations by certain disclosure requirements. The plurality was concerned with the detailed record keeping, reporting schedules, and limitations on solicitation of funds to only "members" rather than the general public.[56] Likewise, Justice O'Connor was concerned with the "organizational restraints" imposed upon nonprofit corporations, including "a more formalized organizational form" and a significant loss of funding availability.[57]

If this Proposed Rule is promulgated, it will create conditions that raise the very concerns addressed by the Supreme Court in *MCFL*. This office's regulations would mandate detailed record keeping and force groups to create multiple bank accounts and solicitations.[58] The Proposed Rule would require the collection and reporting of information that is commonly kept by political parties and candidates in an election,[59] but not by nonprofit organizations or charities that might incidentally speak on a topic before the voters. Indeed, charities often receive anonymous donations because of donors' religious or ethical views—a fact that is generally praised. Thus, the bill would likely place a heavy burden of accounting and record keeping on any entity that speaks using the name of a candidate, including charities. Beyond administration, however, the bill would also affect fundraising, as now every nonprofit, church, and charity will have to reject anonymous donations over $100 individually or over $1,000 or $3,000 in the aggregate, depending on the proximity to an election, and reassure non-public funders that they have procedures in place to avoid falling into the snare of the Secretary's regulatory regime.

The threshold triggering the registration and reporting is too low. Just last year, in *Coalition for Secular Government v. Williams*, the Tenth Circuit held that an organization's planned activity of $3,500 was impermissibly low for triggering neighboring Colorado's regulation of an organization as an "issue committee" with attendant reporting requirements similar to those

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[54] 479 U.S. 238 (1986).

[55] *Citizens United*, 558 U.S. at 369 (contrasting federal independent expenditure reports with the burdens discussed in *MCFL*).

[56] *MCFL*, 479 U.S. at 253 (Brennan, J., plurality opinion).

[57] *Id*. at 266 (O'Connor, J. concurring).

[58] Proposed Rule § 1.10.13.11(D).

[59] *See*, *e.g. id*.

proposed here.[60] Colorado lost at every level of the federal judiciary, and ultimately needed to amend its campaign finance laws to comply with established Tenth Circuit precedent.[61]

Nor is *Coalition for Secular Government* a recent development. In 2010, the Tenth Circuit also examined burdensome disclosure requirements for small ballot measure organizations under Colorado's campaign finance disclosure scheme in *Sampson v. Buescher*.[62] In holding that Colorado's requirements "substantial[ly]" burdened the organization's First Amendment rights, the court balanced the "substantial" burden of reporting and disclosure against the informational interest at stake, which it considered "minimal."[63]

In contrast to the holdings of *MCFL*, *Coalition for Secular Government* and *Sampson*, the Proposed Rule creates reporting burdens on many nonprofits that would be similar to filings by political parties or PACs, drowning such groups in regulatory red tape. Proposed Rule § 1.10.13.10(A) purports to exempt small organizations by setting the triggering threshold at $5,000 for political committees. But the next section, Proposed Rule § 1.10.13.11(A), takes those under the $5,000 political committee threshold and subjects them to the disclosure requirements of Proposed Rule § 1.10.13.11(B)—which is burdensome and requires the sophistication and resources few small organizations possess.[64] Proposed Rule § 1.10.13.11 still requires special accounting,[65] recording of data not usually taken by nonprofit corporations,[66] and registration with the Secretary, including using the Secretary's proprietary online platform.[67]

The Proposed Rule also purports to classify organizations as PACs if their "primary purpose" is deemed to be making "expenditures" during an "election cycle."[68] While the imposition of a "primary purpose" test is consistently with the Tenth Circuit's holding in *New Mexico Youth Organized* and the Campaign Reporting Act,[69] the actual test adopted by the Proposed Rule in fact complies with neither authority, and is especially harmful to non-partisan issue advocacy.

The Proposed Rule looks at how an organization spends "a majority of its expenditures" or the "majority of the working time of its personnel" during an "election cycle" to determine a

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[60] *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1275, 1281 (10th Cir. 2016), *cert. denied sub. nom Williams v. Coal. for Secular Gov't*, 580 U.S. ___, 137 S. Ct. 173 (2016).

[61] Colo. Rev. Stat. § 1-45-108(1.5) ("[I]n light of the opinion of the United States [C]ourt of [A]ppeals for the [T]enth [C]ircuit in the case of *Coalition for Secular Government v. Williams*, No. 14-1469 (10th [C]ircuit March 2, 2016), that affirmed the order of the federal district court in the case of *Coalition for Secular Gov't v. Gessler*, Case No. 12 CV 1708, the disclosure requirements… of this section shall not apply to a small-scale issue committee.").

[62] 625 F.3d 1247 (10th Cir. 2010).

[63] *Id* at 1260.

[64] Perhaps the Secretary should look to Colorado Revised Statute § 1-45-108(1.5) for an example of more restrained disclosure for small committees, though the new Colorado law is as-yet untested in the Tenth Circuit.

[65] Proposed Rule § 1.10.13.11(D)(1).

[66] *Id*.

[67] Proposed Rule § 1.10.13.11(E).

[68] Proposed Rule § 1.10.13.7(T); *cf.* N.M. Stat. Ann. § 1-19-26(L).

[69] *See* Proposed Rule §§ 1.10.13.3 and 1.10.13.6.

group's "primary purpose," and whether it should be deemed a PAC.[70] "Election cycle" is undefined as a stand-alone term,[71] but for the general election, an "election cycle" consists of only the period between the primary and the general elections[72]—about five months in an election year.[73] The Tenth Circuit's reasoning precluded the Secretary from adopting such a narrow calculation window. Specifically, the Tenth Circuit looked at the "*yearly* budget[s]" of the groups at issue in *New Mexico Youth Organized*,[74] and held that an organization's "electioneering spending" must be compared with its "*overall* spending,"[75] and that PAC status could not be triggered by a "expenditure that is insubstantial in relation to [a group's] overall budget[]."[76] And the Campaign Reporting Act, which the Secretary purports to interpret, is closer to the Tenth Circuit's commands, since it regulates an organization as a PAC based on the organization's spending and primary purpose over the course of "one calendar year."[77] The Secretary is bound by law to follow the Tenth Circuit and the Campaign Reporting Act.[78]

Even then, the Tenth Circuit mandates that the yearly calculus can only be based on contributions to candidates or spending on material that qualifies as "express advocacy."[79] A group's "primary purpose," cannot be calculated based on the costs of issue advocacy.[80] But the

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[70] Proposed Rule §§ 1.10.13.7(T)(2) and (3).

[71] Unlike S.B. 96, the Proposed Rule does not appear to generally define the term "election cycle." Instead, the Proposed Rule defines "general election cycle" and "primary election cycle" as distinct timelines. Proposed Rule §§ 1.10.13.7(L) and (S).

[72] Proposed Rule §§ 1.10.13.7(L) and 1.10.13.27. While § 1.10.13.7(L) includes a reference to "Section 1.10.13.26," that appears to be a typographical error. Section 1.10.13.26 details "donations to charity from campaign funds." The Center believes the correct reference appears to be Section 1.10.13.27, which discusses election cycles for the purposes of contribution limits.

[73] *See*, *e.g.*, New Mexico Secretary of State, Official Results: 2016 Primary, *available at* http://electionresults.sos.state nm.us/?eid=78 (indicating the primary was held on June 7, 2016) *and* New Mexico Secretary of State, Official Results: 2016 General Election, *available at* http://electionresults.sos.state nm.us/ (indicating the general election was held on November 8, 2016).

[74] *New Mexico Youth Organized*, 611 F.3d at 679 (emphasis added).

[75] *Id.* at 678 (emphasis added).

[76] *Id.* (quoting *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1153 (10th Cir. 2007)).

[77] N.M. Stat. § 1-19-26(L)(3).

[78] The Secretary's predecessor, Mary Herrera, was the defendant-appellant in *New Mexico Youth Organized,* 611 F.3d. at 670, and so this office is bound by both that court's order and its reasoning. Similarly, as discussed in Section I, *supra*, the State Rules Act holds that "[n]o rule is valid or enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the statute." H.B. 58 § 9, *to be codified at* N.M. Stat. Ann. § 14-4-__(A).

[79] Express advocacy and its functional equivalent are unambiguously campaign related. *New Mexico Youth Organized*, 611 F.3d at 676. The *Buckley* Court defined the term as speech that "include[s] explicit words of advocacy of election or defeat of a candidate," 424 U.S. at 43, using words of campaigning like "vote for" and "reject." *Id*. at 44 n.52. If an ad comes close, but does not say one of the *Buckley* "magic words," then it is the "functional equivalent" of express advocacy: when an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (Roberts, C.J., plurality opinion); *cf. Citizens United*, 558 U.S. at 324-325 (majority opinion incorporating use of the functional equivalent of express advocacy test).

[80] *New Mexico Youth Organized*, 611 F.3d at 678. The Supreme Court fortunately also described a genuine issue advertisement. Issue advocacy would "focus on a legislative issue, take a position on the issue, exhort the public to

Proposed Rule would cover precisely that spending. The definition of "advertisement" is expansive, covering "print, broadcast, satellite, cable or electronic media, including recorded phone messages, internet videos, recordings, or message, or by printed materials, including mailers, handbills, signs and billboards."[81] New Mexico would be regulating almost every form of communication, even YouTube channels. Worse, unlike its federal analogue,[82] there is no *de minimis* limitation upon the audience that makes something a campaign "advertisement." Even reaching one person counts. Yet the United States Supreme Court has specifically protected from disclosure hearty souls who pass out handbills of their own accord (as opposed to being funded by a formal campaign).[83]

Finally, the Proposed Rule mandates heavy reporting and accounting requirements. If, for example, a small nonprofit wants to spend more than $3,000 on an issue ad or mailing encouraging legislators to support prison reform in New Mexico, and that ad mentions any current lawmakers by name in specified time frames before an election, in order to avoid disclosure of many of its significant donors, the organization must either: (1) form and maintain a separate bank account, make sure that funds between the two bank accounts are not transferred in the wrong way or commingled, maintain a separate roster of donors who contribute to the segregated account, and report only those donors to the government (even those who gave as little as $201 to the group over the course of the year); (2) contact all donors who contributed in the current election year and obtain written permission indicating their funds were not meant for said separate account, and comply with all tax regulations relating to operating two separate accounts; or (3) cancel the planned communication.

If this office promulgates the Proposed Rule and it is challenged, it is likely that the Tenth Circuit will view the burdens imposed on organizations by this bill with the same skepticism it brought to *New Mexico Youth Organized*, *Coalition for Secular Government,* and *Sampson*. The state cannot impose heavy burdens on the ability to speak, particularly for groups spending little funds. Of significance, the reporting requirements in the Proposed Rule are triggered at only $3,000, which is below the thresholds permitted in Tenth Circuit precedent in the political committee context.

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adopt that position, and urge the public to contact public officials with respect to the matter." *Wis. Right to Life, Inc.,* 551 U.S. at 469-70 (Roberts, C.J., plurality opinion).

[81] Proposed Rule § 1.10.13.7(A).

[82] For example, federal electioneering communications are defined only as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made either within 60 days of a general election or 30 days before a primary election. 52 U.S.C. § 30104(f)(3)(A)(i)(I)-(II). The ad must also be "targeted to the relevant electorate," 52 U.S.C. § 30104(f)(3)(A)(i)(III), meaning in practice that it "can be received by 50,000 or more persons" in the relevant jurisdiction. 52 U.S.C. § 30104(f)(3)(C).

[83] *Talley v. Calif.*, 362 U.S. 60 (1960) (striking down a disclosure statute regulating genuine issue speech); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (striking down a disclosure statute regulating small-scale issue advocacy); *see also Buckley*, 424 U.S. at 14 ("Discussion of public issues…[is] integral to the operation of the system of government established by our Constitution.").

III. The Proposed Rule's disclosure requirements may materially harm organizations in New Mexico and their donors.

a. The type of disclosure mandated by organizations making independent expenditures under the Proposed Rule would impinge upon donors' freedom of association and potentially deter individuals from contributing to regulated organizations.

The Supreme Court has emphasized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,"[84] and that there is a "vital relationship between freedom to associate and privacy in one's associations."[85] Thus, the Court recognized that two rights touch on associations and civic groups. First, the First Amendment protects the right to engage in debate concerning public policies and issues, and, second, to protect that right, the Constitution protects the right to associational privacy. But the freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference,"[86] such as registration and disclosure requirements and the attendant sanctions for failing to disclose.

In *NAACP v. Alabama*, the Supreme Court protected the right to privacy of association—in particular, from disclosure of an organization's contributors and members—by subjecting "state action which may have the effect of curtailing the freedom to associate… to the closest scrutiny."[87] In *Buckley*, the Supreme Court directly addressed both the associational rights discussed in *NAACP v. Alabama* and the "[d]iscussion of public issues"[88]—now referred to as "issue advocacy" or "issue speech."[89] The *Buckley* Court confronted a statute that "require[d] direct disclosure of what an individual or group contributes or spends."[90] The Court stated, "[i]n considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization's members to advocate their personal points of view in the most effective way."[91] Thus, the Court required that "the subordinating interests of the State… survive exacting scrutiny."[92] And, under exacting scrutiny,

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[84] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-461 (1958) ("*NAACP v. Alabama*").

[85] *Id*. at 462 (noting that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective… restraint on freedom of association").

[86] *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that the freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions").

[87] 357 U.S. at 460-61; *see also id*. at 462.

[88] 424 U.S. at 14.

[89] *See*, *e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 190 (2003).

[90] 424 U.S. at 75.

[91] *Buckley*, 424 U.S. at 75; *see also id*. at 66 (noting "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.").

[92] *Id*. at 64 (collecting cases).

the Supreme Court "insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed."[93]

In the almost 60 years since *NAACP v. Alabama* and the over 40 years since *Buckley*, the right to engage in issue speech and the right to associate—and to associate privately—in order to more effectively debate policies and issues has neither changed nor diminished. Rather, as the Supreme Court recently held in *Citizens United*, laws that burden these fundamental rights must continue to meet "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[94]

This Proposed Rule threatens the right of private association by mandating intrusive donor disclosure for organizations that may not even engage in electoral advocacy. The disclosure, therefore, threatens citizens with harassment, misinforms the public about who supports a specific advertisement or communication, and produces "junk disclosure" that intrudes on the privacy of average New Mexicans.

b. Disclosure information can result in the harassment of individuals by their ideological opponents and should be carefully balanced with the public's "right to know."

The reporting requirements in the Proposed Rule could lead to the harassment of donors based on their beliefs. In today's polarized political environment, more and more individuals have suffered threats, harassment, and property damage as a result of this compulsory disclosure information.

For example, the United States District Court for the Central District of California recently held a trial on the threats faced by organizations during these tumultuous times. Donors to the Americans For Prosperity Foundation ("AFPF") "faced threats, attacks, and harassment, including death threats."[95] And those threats extended broadly to AFPF's "employees, supporters and donors."[96] For example, a "technology contractor working inside AFP[F] headquarters posted online that he was 'inside the belly of the beast' and that he could easily walk into [the Chief Executive Officer's] office and slit his throat."[97] The individual making the threats was seen "in AFP[F]'s parking garage, taking pictures of employees' license plates."[98] Likewise, a major donor to AFPF recounted the story of attending an event in Washington, D.C., at which protestors shoved both him and a woman in a wheelchair as they attempted to exit an AFPF event.[99] Compelling the public disclosure of the names and addresses of individuals only heightens the fears of those in the middle of such tumult and civic strife. The court summarized: "The Court can keep listing all the

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[93] *Id*.

[94] *Citizens United*, 558 U.S. at 366-367 (quoting *Buckley*, 424 U.S. at 64, 66).

[95] *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Ca. 2016) (internal citation to hearing transcripts omitted).

[96] *Id*. at 1055.

[97] *Id*. at 1056 (citation omitted).

[98] *Id*. (citation omitted).

[99] *Id*. (citation omitted).

examples of threats and harassment presented at trial; however, in light of these threats, protests, boycotts, reprisals, and harassment directed at those individuals publically associated with AFP[F], the Court finds that AFP[F] supporters have been subjected to abuses," warranting protection from public disclosure.[100]

But AFPF's woes are not unique. Recently, individuals who contributed to the Hillary Clinton campaign faced death threats.[101] Supporters of ballot measures in California also endured death threats.[102] Employees at the New York Civil Liberties Union and Goldwater Institute faced threats and harassment at their workplaces—and at their homes—due to their organizations' positions.[103] Nor is the media immune, for even newspaper staff faced death threats for their employer's political endorsements.[104] Even delegates to both major political parties' national nominating conventions faced death threats.[105] The list can go on, but all of the examples point to the same conclusion: in our current volatile political atmosphere, disclosure carries real danger to donors and employees of organizations speaking on hot button issues.

Presumably, if the private information of donors to similar groups in New Mexico were forcibly reported to the government, these citizens would also be at risk. To be clear, the Proposed Rule would extend the same type of disclosure to supporters of any nonprofit that even incidentally engages in political speech.

c. The Proposed Rule will produce "junk disclosure" that associates a donor with a communication they have no knowledge of or may not even support—and who may even disagree with it.

The Supreme Court explicitly defined the government's informational interest in disclosure as "increas[ing] the fund of information concerning those who *support* the candidates," such that voters can better define "the candidates' constituencies."[106] Consequently, the Court restricted the

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[100] *Id.*

[101] *See*, *e.g.*, Casey Sullivan, *After Clinton Donation, Legal Recruiter Complains of Death Threat*, BLOOMBERG LAW, Oct. 11, 2016 *available at*: https://bol.bna.com/after-clinton-donation-legal-recruiter-complains-of-death-threat/.

[102] *See*, *e.g.*, Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, THE NEW YORK TIMES, Feb. 7, 2009 *available at*: https://www nytimes.com/2009/02/08/business/08stream html.

[103] *See*, *e.g.*, Donna Lieberman and Irum Taqi, "Testimony of Donna Lieberman and Irum Taqi on Behalf of the New York Civil Liberties Union Before the New York City Council Committee on Governmental Operations Regarding Int. 502-b, in Relation to the Contents of a Lobbyist's Statement of Registration," New York Civil Liberties Union. *available at*: http://www nyclu.org/content/contents-of-lobbyists-statement-of-registration; Tracie Sharp and Darcy Olsen, *Beware of Anti-Speech Ballot Measures*, THE WALL STREET JOURNAL, Sept. 22, 2016 available at: https://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180.

[104] *See*, *e.g.*, Kelsey Sutton, *Arizona Republic receives death threats after Clinton endorsement*, POLITICO, Sept. 29, 2016 *available at*: http://www.politico.com/blogs/on-media/2016/09/arizona-republic-receives-death-threats-for-clinton-endorsement-228889.

[105] *See*, *e.g.*, Alan Rappeport, *From Bernie Sanders Supporters, Death Threats Over Delegates*, THE NEW YORK TIMES, May 16, 2016 *available at*: http://www.nytimes.com/2016/05/17/us/politics/bernie-sanders-supporters-nevada.html?_r=0; Eli Stokols and Kyle Cheney, *Delegates face death threats from Trump supporters*, POLITICO, Apr. 22, 2016 *available at*: http://www.politico.com/story/2016/04/delegates-face-death-threats-from-trump-supporters-222302.

[106] *Buckley*, 424 U.S. at 81 (emphasis added).

government's informational interest to situations involving "spending that is unambiguously related to the campaign of a particular… candidate,"[107] because it was only in that context that disclosure would provide any information about a candidate's *supporters*. The Proposed Rule departs from this informational interest and will produce two primary types of "junk disclosure." First, the bill requires reporting of very minor donors, making detecting major donors more difficult. Second, the bill incorrectly assumes that giving to an organization, without earmarking or some other indicia of support for a particular communication, is support for *all* the speech by the organization.

First, if disclosure information is to tip voters as to major sources of financial support, muddying up the report's contents with many relatively small donors runs counter to this aim. In effect, this amounts to "junk disclosure"—disclosure that is primarily used by other parties to look for potential donors and by prying neighbors to search their fellow citizens' political activity and affiliations. The Proposed Rule's low thresholds for disclosure frustrates the very purpose of disclosure: to inform the electorate of a candidate's high-dollar backers. In fact, the Proposed Rule makes it *more* difficult for voters to identify those supporters because it reports low-level donors, obfuscating the major donors on the list.

A simple test is this: in all of the stories about money in politics in the past two elections, did any express alarm about persons donating $200 or even $5,000? I suggest that the answer is no. It is difficult to argue that public reporting on contributions to organizations speaking on issues (especially at such low thresholds), which also do not advocate for or against candidates, advances the legitimate purposes of informing the public or preventing corruption.

Second, the Proposed Rule creates "junk disclosure" by associating donors with speech over which they have no control. By mandating general donor disclosure, and not just the listing of those who earmarked their money for campaign activity, the state mistakes general support for an organization with support for a specific advertisement.

For example, consider a hypothetical New Mexico cattle rancher: a proud, life-long Democrat, who donates to the New Mexico Cattle Growers' Association ("NMCGA"). This cattle rancher then finds himself listed as a supporter of Republican candidates in news accounts because the NMCGA ran an issue ad that mentioned Republican legislators. Or consider a Republican worker who supports her labor union for its work in helping her bargain for better pay. But one day she is associated with *opposing* Republican candidates because her union urged opposition to a right-to-work bill supported by a few Republicans. In both situations, neither of these individuals knew about or agreed with the organization's specific position. They instead opted to donate to these groups not because they agree with everything their trade association or their labor union does, or particular policy positions they take, but because on balance they think these organizations provide a voice for their views. But, under the Proposed Rule, they may be listed as supporting communications they disagree with, simply because they support the organization making the advertisement.

When we speak of political committees and political parties, we can be reasonably assured that all donors to such organizations intend for their contributions to be used for political purposes.

[107] *Id*. at 80.

The same is not true of donors to 501(c) membership organizations and other forms of incorporated advocacy groups. However, if a group decides to engage in the extremely broad types of communications covered in the Proposed Rule starting at the low level of $1,000,[108] all or many of its donors over a $200 threshold could potentially be made public.[109] Further, all donors over $5,000 will be disclosed, regardless of whether their donations were earmarked for the purpose of furthering an independent expenditure.[110] This is not only contrary to the federal disclosure system, it is suspect under Tenth Circuit precedent.[111]

To publicly identify these individuals with expenditures of which they had no advance knowledge, and which they may even oppose, is unfair to these citizens and misleads the public. The disclosure serves little purpose other than to provide a basis for official or private harassment.

IV. The "coordinated expenditure" definition is vague and would be better served by following the definition and safe harbors provided by the federal regulation of "coordination."

The Proposed Rule uses vague and broad terms in defining "coordinated expenditure"—a term so broad as to chill protected speech and violate the First Amendment. A much better means of ensuring the independence of independent expenditures is to follow the multi-factor test used by the federal government in the oversight of federal campaigns. This important tweak to the Proposed Rule will ensure the citizens of New Mexico may continue to speak freely while providing a system to regulate coordinated expenditures.

Under the Proposed Rule, a "coordinated expenditure" is the outlay of money that is made "at the request or suggestion of, or in cooperation, consultation or concert with" a campaign or political party.[112] Certainly, a candidate requesting an independent expenditure negates the "independent" nature of the advertisement.[113] But the words "cooperation," "consultation," and

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[108] Proposed Rule § 1.10.13.11(B).

[109] Proposed Rule §§ 1.10.13.11(B)(3) and (C). While subsections (C) and (D)(1) have earmarking provisions, it also says donors are disclosed who donated "in response to a solicitation to fund independent expenditures." It is unclear what would qualify as a "response to a solicitation to fund independent expenditures" in practical effect for nonprofit organizations that solicit for a variety of projects in a single communication to donors. The Proposed Rule does not define these terms.

[110] Proposed Rule § 1.10.13.11(D)(2). In fact, to avoid disclosure, the bill requires "the contributor request[] in writing that the contribution not be used to fund independent or coordinated expenditures or make contributions to a candidate, campaign committee or political committee." *Id*. In this way, the donor must "reverse earmark"—say what the funds cannot be used for—in order to not be disclosed.

[111] As mentioned previously, the federal campaign finance laws have an earmarking requirement for such independent expenditures as electioneering communications. 11 C.F.R. § 104.20(c)(9); *Van Hollen*, 811 F.3d at 501. Likewise, the Tenth Circuit upheld neighboring Colorado's disclosure requirements because it had a similar earmarking requirement. *Independence Inst.*, 812 F.3d at 797.

[112] Proposed Rule § 1.10.13.7(F).

[113] *See*, *e.g.*, *Buckley*, 424 U.S. at 80 (where the Court "impose[d] independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes *or authorized or requested by a candidate or his agent*, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.") (emphasis added).

"concert" are much broader than a backroom deal to coordinate an advertising campaign for a candidate, and the rule fails to define these terms.

It is troublesome to write a rule that attempts to vaguely prohibit First Amendment activity, such as speaking on public policy issues or supporting a candidate. The problem is not just that a vague rule may be applied inconsistently or arbitrarily, but that such a rule might also "operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone."[114] The First Amendment needs "'breathing space to survive, [and so] government may regulate in the area only with narrow specificity.'"[115] The Proposed Rule has an expansive definition of "coordination" and leaves no room for the First Amendment to take a breath.

The Proposed Rule may end up regulating speech that has nothing to do with an election. For instance, imagine a situation in which the governor agrees to be recorded for a public service announcement by a charity advertising an effort to collect clothing for the poor. In the announcement, the governor says she donates her unwanted clothes and urges people to do the same. The group spends $6,000 running the public service announcement during the wrong time in an election year. Unknowingly, the group just made a coordinated expenditure and illegal contribution to the governor's campaign. Under the Proposed Rule, the PSA subjects the group to significant sanctions and fines.

In contrast to the problems of the Proposed Rule, the federal regulation of "coordination" uses multiple factors to clearly define expenditures that are not truly independent. Under the Federal Election Commission's regulations, a communication is coordinated when it is "paid for, in whole or in part, by a person other than" the candidate or political party *and* the communication satisfies one of several content standards *and* one of several conduct standards in the regulation.[116]

The *content* standards include, among other things, republishing or redistributing campaign materials,[117] referencing candidates or political parties by name shortly before the election,[118] or expressly advocating for candidates.[119] The *conduct* standards include, among other things, a candidate or party: requesting or suggesting the advertisement;[120] having material involvement in its creation;[121] or having a "substantial discussion" of the candidate or political party's campaign

[114] *Buckley*. 424 U.S. at 41 n. 48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)))) (internal quotation marks omitted).

[115] *Id*. (quoting *NAACP v. Button*, 371 U.S. at 433).

[116] 11 C.F.R. § 109.21(a).

[117] 11 C.F.R. § 109.21(c)(2).

[118] 11 C.F.R. § 109.21(c)(4).

[119] 11 C.F.R. § 109.21(c)(3); *see also* 11 C.F.R. § 109.21(c)(5) (providing for communications that do not have express words of advocacy, but contain the "functional equivalent" of express advocacy).

[120] 11 C.F.R. § 109.21(d)(1).

[121] 11 C.F.R. § 109.21(d)(2).

plans, projects, activities, or needs.[122] Thus, under the federal system, there must be some financial support and evidence in the form of content and conduct to suggest coordination.

The Proposed Rule already borrows from the federal "coordination" regulation. The federal regulation provides safe harbors that cannot give rise to a finding of "coordination," and the Proposed Rule incorporates many of these exemptions. For example, an independent committee is permitted to ask a candidate about legislative or policy issues.[123] Similarly, one candidate endorsing another candidate is not "coordination."[124] But the Proposed Rule does not follow the federal system in exempting communications discussing a candidate who is "identified only in his or her capacity as the owner or operator of a business that existed prior to [their] candidacy."[125] This office should consider amending Proposed Rule § 1.10.13.28 to cover this scenario.

The federal law therefore requires there to be satisfaction of a number of factors before there may be a finding of "coordination" and provides multiple safe harbors. This clarity in the law protects speakers from inadvertently violating the law while still ensuring independent expenditures remain independent. If New Mexico is concerned about coordination between political parties and candidates with those making independent expenditures, then the state should adopt the federal standard for "coordination" found at 11 C.F.R. § 109.21.

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The Legislature has clearly mandated in the APA and State Rules Act that the Secretary is allowed only to write rules *interpreting* existing statute law, not write substantive legislation, such as S.B. 96. The Legislature has therefore not delegated to this office the authority to promulgate by rule what failed to pass the political process. In a similar vein, the Campaign Reporting Act's "intelligible principle" is that the Secretary is to promulgate rules that only *implement* existing law, not add new burdensome disclosure requirements. The Proposed Rule is therefore beyond the Secretary's authority to promulgate.

Even if the Proposed Rule were proper under administrative law, it still fails First Amendment scrutiny while failing to achieve its aims. The Proposed Rule seeks to improve transparency, but ultimately provides little useful information. What this rule will do is discourage donors and workers from contributing to useful nonprofit organizations and subject donors and workers to potential harassment. Overall, this Proposed Rule makes disclosure information less meaningful by broadly capturing the activity of smaller, inconsequential contributors or activity about issues of public importance that is not related to the election or defeat of candidates. Finally, if New Mexico is concerned with coordination between campaigns and third parties, it should adopt the federal standard of "coordination" instead of borrowing from S.B. 96's vague definition,

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[122] 11 C.F.R. § 109.21(d)(3).

[123] 11 C.F.R. § 109.21(f); *cf.* Proposed Rule § 1.10.13.28(D).

[124] 11 C.F.R. § 109.21(g)(1); *cf.* Proposed Rule § 1.10.13.28(B).

[125] 11 C.F.R. § 109.21(i). That is, provided that the timing, content, and distribution of the communication was arranged prior to the candidacy and the ad does not "promote, support, attack, or oppose" the candidate or opponents in the race. 11 C.F.R. §§ 109.21(i)(1)-(2).

which was vetoed by the Governor. Therefore, I suggest your office should carefully consider the constitutional and practical difficulties posed by the Proposed Rule.

Thank you for allowing me to submit comments on the Proposed Rule. I hope you will find this information helpful. Should you have any further questions regarding this Proposed Rule or other campaign finance proposals, please contact me at (703) 894-6800 or by email at tmartinez@campaignfreedom.org.

Respectfully submitted,

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