BY EMAIL sos.rules@state.nm.us

Attn: Kari Fresquez–Proposed Rule

Re: Comments Regarding the Commission's Proposed Rule Changes (N.M. Admin. Code § 1.10.13.1 *et seq.*)

Dear Secretary of State Toulouse Oliver:

The New Mexico chapter of Concerned Veterans for America – a project of Americans for Prosperity – on behalf of itself, Americans for Prosperity, and its more than 25,000 grassroots activists in New Mexico (collectively, "CVA-NM"), submits these comments in response to the 2017 draft campaign finance rule proposed on June 13, 2017. The proposed rules would not only restrict the ability of CVA-NM to educate citizens across the state, but would also silence dozens of other groups and the thousands of citizens they represent.

CVA-NM strongly urges the Secretary of State's Office not to proceed with these rules because they will impermissibly infringe on New Mexicans' constitutional rights to freely speak and associate, will directly deter citizens from exercising their First Amendment right to advocate on important public policy issues, diminish their ability to communicate their ideas to their fellow citizens, and invade citizens' privacy. Further, the rules are exceedingly vague and overbroad. In several key respects, the rules also fail to comply with a 2010 federal appellate court ruling that is directly binding on the Secretary and contravene the Campaign Reporting Act.

INTRODUCTION

CVA-NM is a project of Americans for Prosperity New Mexico, which is comprised of more than 25,000 grassroots activists who live and work in New Mexico. Americans for Prosperity is a non-partisan, non-profit organization with more than 3.2 million grassroots activists nationwide with brands that focus on outreach to the Hispanic, millennial, and veteran communities. Our activists work to educate their friends and neighbors on the value of a free and open society.

COMMENTS

I. The Proposed Rule Chills Constitutionally Protected Speech.

It's no secret that the language for this proposed rule heavily borrows from S.B. 96. That bill would have violated the privacy of thousands of New Mexico citizens and silenced many thousands more. If implemented, the rule would similarly silence speech, impose unconstitutionally onerous and impractical reporting requirements on charitable organizations, abridge the freedom of association, and invade the privacy of thousands of New Mexico citizens.

A. *The Rule Unnecessarily Captures Constitutionally Protected Non-Partisan Issue Speech and Voter Education Materials*

Section 1.10.13.11(B) of the Secretary's proposed rule requires extensive disclosure by any person, including any organization, who makes so-called "independent expenditures." The term "independent expenditures" is defined broadly to include speech that dares so much as to publicly mention a candidate or a ballot measure within 30 days before a primary election or 60 days before a general election.[1] This includes advocacy speech about legislative issues and non-partisan voter guides.[2] Studies show that most voters are woefully ill-informed about the issues,[3] and yet the proposed rule also would regulate neutral educational materials about ballot measures that are essential to informing the electorate about what they are being asked to vote on.

Further, the term "independent expenditures" also improperly includes a communication that "*unmistakably* urges election or defeat of one or more clearly identified candidate(s) or ballot measure(s)."[4] This definition introduces a new standard for regulating speech not previously seen under the campaign finance laws. It is unclear what "unmistakably" means as a legal concept, but it appears to be broader than how the U.S. Supreme Court has defined "express advocacy" and the "functional equivalent of express advocacy." Thus, this is yet another way in which the proposed rules likely will regulate issue speech, even outside of the 30- and 60-day pre-election windows.

B. *The Rule Subjects Non-Partisan Issue Speech and Voter Education Materials to Unconstitutionally Broad and Burdensome Donor Reporting Requirements*

Under the proposal, any person or organization that spends more than $3,000 during an "election cycle" on so-called "independent expenditures," including issue advocacy and voter education communications, is required to publicly report the names and addresses of donors who have given to the organization within the past 12 months.[5] The rule purports to give organizations an option to avoid generalized donor reporting by limiting reporting only to donors who have given to a "segregated bank account" that must be used to pay for the communication, or to ask donors to provide a written notice restricting their donations from being used to fund the communication (a restriction which the organization then must comply with).[6]

This is hardly a meaningful choice at all, and most organizations will not be able to avail themselves of these options to limit reporting of their donors. Legislative issues often arise suddenly, and it is impossible to plan more than 12 months in advance for an issue advocacy

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[1] Proposed N.M. Admin. Code § 1.10.13.7.M(3)(c).

[2] This is confirmed by the fact that the rule finds it necessary to create a special carve-out to exclude voter guides issued by 501(c)(3) organizations from regulation. However, the identical voter guides would be regulated if they are distributed by a 501(c)(4) advocacy organization (which are often connected to related 501(c)(3) organizations), 501(c)(5) union, 501(c)(6) trade association, or 501(c)(19) veterans' organization – just to name a few examples of the types of non-profit organizations that could be regulated. This makes no sense, and constitutes an impermissible form of discrimination based on a speaker's identity. *See, e.g.*, *Pacific Gas & Electric Co. v. Pub. Util. Comm'n of Calif.*, 475 U.S. 1, 8 (1986) (discussing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) and *Consolidated Edison Co. v. Pub. Svc. Comm'n of N.Y.*, 447 U.S. 530, 544 (1980)).

[3] *See, e.g.*, Ilya Somin, "*What No One Talks About During Election Season: Voter Ignorance*," FORBES, Nov. 3, 2014, *at* https://www.forbes.com/sites/realspin/2014/11/03/what-no-one-talks-about-during-election-season-voter-ignorance/#51539783a494.

[4] Proposed N.M. Admin. Code §§ 1.10.13.7.M(3)(a), 1.10.13.7.I (emphasis added).

[5] Proposed N.M. Admin. Code § 1.10.13.11.D.

[6] *Id.*

effort and to solicit donors to contribute to a "segregated bank account" to fund such efforts. It is also unheard of for nonprofit and civic organizations to undertake a special fundraising effort in order to put out a voter guide or other voter education materials – which is what the rule would require in order to avoid generalized reporting of donors. The proposal's requirement to file "independent expenditure" reports within 24 hours of making an expenditure for communications disseminated within 14 days before an election make these accounting burdens even more obnoxious.[7] Is an organization that wishes to protect the privacy of its general donor base really expected to obtain within 24 hours written notices from all its donors who don't wish to be reported? And, while the proposal fails to specify the reporting deadline for independent expenditures of more than $3,000 disseminated outside of the 14-day pre-election window, any turnaround time that the rule seeks to implement likely also would be insufficient

Further, by wrongfully expanding the definitions of an: (1) "expenditure" or "independent expenditure," and (2) an organization's "primary purpose" beyond what a federal court has permitted under New Mexico's PAC law, the proposed rule impermissibly attempts to subject organizations engaging in issue advocacy and non-partisan voter education activities to rules governing political committees ("PACs"), subjecting them to a litany of registration, accounting, recordkeeping, and ongoing generalized donor and spending reporting requirements and random audits.

C. *Consequences and Historical Context of Compulsory Donor Reporting*

While these comments thus far have addressed at a granular level the severe legal infirmities in the Secretary's proposal, it is equally important to explain the larger context for why courts such as the Tenth Circuit have been so vigilant in limiting the reach of compulsory donor disclosure laws like the proposed rule.

1. Compulsory Donor Disclosure Laws Historically Have Been Used to Squelch Dissent

Compelled reporting of an organization's supporters is hardly a novel political tactic—it was precisely the tool used by Alabama as they sought to stop the civil rights movement in their state by requiring the NAACP to report their supporters to the state. The Supreme Court struck down this attempt in unequivocal terms, stating that "compelled disclosure of affiliation with groups engaged in advocacy may constitute a restraint on freedom of association . . . ."[8] In the landmark case *NAACP v. Alabama ex rel. Patterson*, the Court unanimously held that Alabama's attempts to compel the NAACP to disclose the private information of their members was a substantial restraint on the members' ability to exercise their right to freedom of association.[9] The Court labeled "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs" as tantamount to "'[a] requirement that adherents of particular religious faiths

[7] *Id.* at § 1.10.13.11.F.
[8] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).
[9] *Id.* While the NAACP decision focused on a group's membership list, the case did arise in part from the organization's solicitation of contributions within Alabama, *see id.* at 452, and the Supreme Court later applied the NAACP holding specifically in the context of campaign finance donor disclosure laws, *see also Buckley v. Valeo*, 424 U.S. 65, 65-66 (1976).

or political parties wear identifying arm-bands . . . .'"[10] For this reason, the Court held that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association. . . ."[11]

In *NAACP v. Alabama*, the Court engaged in an "exacting scrutiny" analysis of the State's disclosure requirement, and noted that only a "compelling" state interest could override the constitutionally protected right of association.[12] The Court rejected the State's proffered interest of using the compelled disclosures to verify compliance with State law.[13] Instead, the Court pronounced, in no uncertain terms, that the ability of an organization to withhold the confidential information of its members was directly "related to the right of the members to pursue their lawful private interests privately and to associate freely with others," and therefore squarely within the protection of the First and Fourteenth Amendments.[14]

While the State of New Mexico might have a compelling state interest to require donor disclosures with regard to political committees, candidate committees, or political parties,[15] compelled disclosure of donor's confidential information is irrational as applied to any non-political organization. CVA-NM is a prime example. CVA-NM is registered as a 501(c)(4) non-profit entity, and as such, operates "exclusively for the promotion of social welfare . . . ."[16] Our activists are engaged in educating their community—their neighbors and friends—on the value of a free and open society. In some cases, the values espoused by our activists may correspond to public policy issues that are political campaign issues, while in other cases, there is no connection. In some cases, CVA-NM may raise public awareness of issues in the hopes that they will become campaign issues that elected officials will then take up once the election is over. But CVA-NM and our activists raise these issues in order to affect policies – not election outcomes. As the Supreme Court has held, simply because speech about issues and speech about candidates may converge, that doesn't mean the two types of speech may be regulated on the same basis.[17]

Regardless, for the reasons outlined below,[18] compelled disclosure of CVA-NM's donors[19] places ordinary citizens at risk and denies our members the ability to exercise their constitutionally protected freedom of association. CVA-NM is therefore concerned that the proposed rules would unconstitutionally abridge its supporters' and members' "right . . . to pursue their lawful private interests privately [or] to associate freely with others."[20]

2. Requiring Non-Profit Donor Disclosure Puts Ordinary Citizens at Risk

[10] *Id.* (quoting *Am. Commc'ns Assn. v. Douds*, 339 U.S. 382, 402 (1950)).
[11] *Id.*
[12] *Id.* at 463 (quoting *Sweezy v. N.H.*, 354 U.S. 234, 265 (concurring opinion); *see also Buckley*, 424 U.S. at 64.
[13] *Id.* at 464.
[14] *Id.* at 466.
[15] CVA-NM takes no position on whether the State has a sufficiently compelling interest to regulate or compel disclosure on the part of political or candidate committees or political parties.
[16] 26 U.S.C. § 501(c)(4) (2012).
[17] *See Buckley*, 424 U.S. at 42-43.
[18] *See* Section I.C.2, *infra*.
[19] Or the donors of any similarly situated organization.
[20] *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958).

The onerous and unnecessary reporting requirements that are the key component of this proposed rule requires organizations like CVA-NM to disclose to the government and to ideological opponents the names and addresses of individuals who wish to exercise their free speech rights. This private information would be made available for review by anyone on the Secretary of State's website.[21] Although the names and addresses of individual donors may seem like benign information, public disclosure of this information has proven to be incredibly dangerous. There are numerous examples where the public disclosure of an organization's supporters has been used to intimidate and harass individuals by those who have differing viewpoints,

Americans for Prosperity has experienced firsthand this harassment.

In California, the State's Attorney General demanded that Americans for Prosperity Foundation (Americans for Prosperity's sister organization) and other non-profits turn over their confidential IRS Form 990 Schedule B to the AG's office, thereby providing the private information of the organizations' supporters to the State. This was an unprecedented request for information, and although the Attorney General's office promised that this sensitive information would remain out of public view and only in the State's hands, the data of numerous charitable organizations ended up on a publicly accessible website. After AFP brought a federal lawsuit to protect its donors' private information, the United States District Court for the Central District of California permanently enjoined the California Attorney General from demanding Schedule B forms, and concluded that that the disclosure requirement was unconstitutional.[22]

AFP's activists and supporters are not the only targets of intimidation and harassment after an organization has been forced to disclose the private identifying information of its donors. For example, those who contributed to either side of the Proposition 8 ballot measure had their names and addresses accessible to anyone at any time.[23] As a result of this information being named public, many supporters of this measure had their homes protested and even received death threats.[24]

If donors are faced with the prospect that the simple act of contributing to an advocacy organization could allow their private contact information to be posted to the internet and submit them to intimidation and harassment, there is no question it would chill the exercise of their First Amendment right to speech, and would deter them from contributing.[25]

II. The Proposed Rule Circumvents the Legislative Process

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[21] Currently mandated disclosure information is publicly accessible on the New Mexico Campaign Finance Information System (CFIS), https://www.cfis.state.nm.us/media/.

[22] *See Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1051, 1055-56 (N.D. Cal. 2016), appeal pending, *Americans for Prosperity Foundation v. Becerra*, No. 16-55786 (9th Cir.).

[23] *See Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 847 (9th Cir. 2014) (emphasis added).

[24] *Id.*

[25] *See, e.g.*, David M. Primo, *Full Disclosure: How Campaign Finance Disclosure Laws Fail to Inform Voters and Stifle Public Debate*, INST. FOR JUSTICE, 2011 at 7, *available at* http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf (describing a survey in which 60 percent of respondents stated that "disclosure of their name and address would lead them to think twice about contributing" to an organization).

The language for the proposed rules borrows heavily from S.B. 96, which Governor Martinez vetoed earlier this year. S.B. 96 was deeply flawed because it allowed for serious violations of privacy and may have been subject to legal challenge for violating the First Amendment.

In light of this, the Secretary's attempt to implement S.B. 96 through a rulemaking is an unconstitutional power grab. The New Mexico Constitution vests the power to pass legislation exclusively in the state legislature, and the power to approve legislation exclusively with the governor.[26] Nowhere in the state's Constitution or statutes does it provide the Secretary with the powers of a super-legislature-governor to unilaterally enact legislation.[27] The policy decisions contained first in S.B. 96 and now in the Secretary's proposed rule are substantial and will permanently alter policy advocacy and voter education in New Mexico. Equally alarming, the proposed rules are even *more* restrictive on speech than S.B. 96. If this legislation failed to gain the necessary support to become law, why is the Secretary of State unilaterally proposing more restrictive regulations. Since S.B. 96 failed to win approval through the legislative process, the Secretary of State should not adopt or implement many of the same provisions through the back-door of regulatory power.

III. Conclusion

If these unconstitutional rules are implemented, they would be very susceptible to litigation and judicial invalidation. To the extent the rules are not preliminarily enjoined, the damage to individuals and groups across the ideological spectrum would be vast and immediate in the interim. These rules would chill citizen's voices, and those who decide to continue to support the causes they believe in would be subject to intimidation and harassment. If the citizens of New Mexico want to adopt this shift in policy, it should be accomplished through the normal legislative process, not reverse-engineered unilaterally by one state official through regulations that lift language from a bill which could not survive the state's legislative process. For these reasons, CVA-NM strongly urges the Secretary to not to adopt these rules.[28]

[26] N.M. Const. Art. 3, § 1, Art. 4, §§ 1 and 22.
[27] *See id.* Art. 5, § 1; N.M. Stat. Ch. 8, Art. 4 and § 9-1-5.
[28] The problems these comments have identified in the Secretary's proposed rule are meant to be illustrative and not exhaustive. CVA-NM may identify additional problems in future proceedings involving this rulemaking.