CENTER *for* COMPETITIVE POLITICS

Congress shall make no law...

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August 29, 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 Revised Proposed Rule 1.10.13 NMAC

Dear Secretary Toulouse Oliver:

On behalf of the Center for Competitive Politics ("the Center"),[1] I respectfully submit these comments concerning constitutional and practical issues with portions of Revised Proposed Rule 1.10.13 NMAC,[2] which was substantively revised by you and your office in response to public comment earlier this year.[3] The Center submitted substantive comments on the first iteration of the Proposed Rule,[4] and I appreciate the opportunity to further aid your office in promulgating constitutionally-sound rules that protect First Amendment activity.

While the promulgation of a rule creating substantive new disclosure burdens may still be beyond the Secretary's authority,[5] these comments will focus on the additions to the Revised Proposed Rule. Many of the additions are helpful and narrow the scope of the Proposed Rule, particularly Section 1.10.13.7 (the definition section), but the definition of "advertisement" is still too broad. Another substantive change came in the regulation of "coordinated expenditures," which resulted in a complex and amorphous rule that is not properly tailored. Finally, your office

[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] Revised Proposed Rule § 1.10.13.1 *et seq*. *available at* http://www.sos.state.nm.us/uploads/files/1-10-3%20NMAC%20Revised%20Draft.pdf ("Revised Proposed Rule").

[3] New Mexico Secretary of State, 2017 Revised Campaign Finance Rule Draft & Additional Public Input Process, http://www.sos.state nm.us/Elections_Data/2017-campaign-finance-rulemaking.aspx.

[4] Tyler Martinez, Center for Competitive Politics, Constitutional and Practical Issues with Proposed Rule 1.10.13 NMAC, July 13 2017 *available at*: http://www.campaignfreedom.org/wp-content/uploads/2017/07/2017-07-11_CCP-Comments_NM_SoS-Proposed-Rule-1.10.13-NMAC.pdf.

[5] *See*, *id*. at 2-6 ("I. The Proposed Rule goes beyond the scope of the Secretary's authority."). I incorporate by reference the analysis in my prior comments.

refined the reporting thresholds, though the Center notes that they are still below those found too burdensome under *Coalition for Secular Government v. Williams*[6] and *Sampson v. Buescher*.[7]

I. The definitions in § 1.10.13.7 are much improved, though the definition of "advertisement" is still too broad.

The Center appreciates the careful revision of the definitions in Revised Proposed Rule § 1.10.13.7. Many of these changes are helpful and clarify the scope of the Secretary's Revised Proposed Rule. But the definition of "advertisement"[8] is still too broad, encompassing Internet speech and speech reaching only a few people. While the Revised Proposed Rule does have broad categorical exemptions, such as for news media or membership communications, the Revised Proposed Rule would be better served by categorically exempting grassroots lobbying by nonprofit organizations.

There are many substantive changes to the definition section which help narrow the impact of the proposed rule and further refine the regulation to comply established court precedent. For example, the Center's prior comments highlighted the issue of defining "election cycle" too narrowly for calculating the major purpose test.[9] Now "election cycle" is defined as "the period beginning on the day after the last general election and ending on the day of the general election."[10] The Revised Proposed Rule also includes a definition for "clearly identified."[11] In a similar vein, the definition of "expressly advocate"[12] applies the proper dual tests mandated by *Buckley v. Valeo*,[13] *New Mexico Youth Organized v. Herrera*,[14] and *Federal Election Commission v. Wisconsin Right to Life, Inc*.[15]

The changes are helpful. But there are three main areas where the definition of "advertisement" can be tweaked to assure proper room for First Amendment activity. First, the Secretary should exempt Internet communications that are not made or paid for by campaigns. Second, the Secretary should clarify that the news media exemption applies to more than just traditional media corporations. Finally, the Secretary should exempt "grassroots lobbying"—communications by a nonprofit focusing on public policy issues—from the definition of

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[6] 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).

[7] 625 F.3d 1247, 1261 (10th Cir. 2010).

[8] Revised Proposed Rule § 1.10.13.7(A).

[9] *Supra* n.4 at 10-11.

[10] Revised Proposed Rule § 1.10.13.7(L). But the rule provides *two* different definitions for "election cycle"—one used for calculating the major purpose of an organization and another for calculating contribution limits. It may be more clear for users of the rules to subdivide subsection (L) into two subclauses. Such organization will add clarity and ease for users of the final promulgated rule.

[11] Revised Proposed Rule § 1.10.13.7(E).

[12] Revised Proposed Rule § 1.10.13.7(M).

[13] *Buckley*, 424 U.S. 43-44 (establishing express advocacy test)

[14] 611 F.3d 669, 676 (10th Cir. 2010) (applying *Buckley*'s express advocacy test to New Mexican law).

[15] 551 U.S. 449, 470 (2007) (Roberts, C.J., plurality opinion) (establishing functional equivalent of express advocacy test); *cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324-325 (2010) (majority opinion incorporating use of the functional equivalent of express advocacy test). *New Mexico Youth Organized* also applied the functional equivalent of express advocacy test. 611 F.3d at 676.

"advertisement," much in the same way non-partisan voter guides by § 501(c)(3) organizations are already exempted.

a. The Secretary should follow the federal model and exempt Internet communications that are not made by campaigns or paid for by campaigns.

The definition of "advertisement" is still too broad because it heavily regulates Internet speech. The definition covers "print, broadcast, satellite, cable or electronic media, including recorded phone messages, internet videos, paid online advertising, recordings, or by printed materials, including mailers, handbills, signs and billboards."[16] Again, as outlined in the Center's prior comments,[17] New Mexico would be regulating almost every form of communication.

Speech on the Internet is nearly free, when compared to broadcast ads, newspaper ads, and printing t-shirts. Therefore, the government's interest in fighting corruption or informing the public on who is spending money to speak about candidates is much less when the spending is *de minimis*. With this in mind, the Federal Election Commission ("FEC" or "Commission") categorically exempted uncompensated Internet communications from the term "public communication."[18] The FEC also generally exempted uncompensated Internet activity, including political messages, from federal reach.[19] The Commission also recognized "significant policy reasons" for generally excluding disclaimer requirements for internet speech, including the fact that "the Internet is by definition a bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost."[20]

Again, as outlined in the Center's prior comments,[21] the draft rule provides no *de minimis* exception as regards the audience for a campaign "advertisement." Even reaching one person with a handbill counts. This is in stark contrast to the federal rules. In the disclosure context, the Supreme Court has specifically protected hearty souls who pass out handbills of their own accord (as opposed to being funded by a formal campaign)[22] and the federal rules wisely require some indicia of a major political campaign—that is, spending lots of money and reaching a broad

[16] Revised Proposed Rule § 1.10.13.7(A).

[17] *Supra* n.4 at 12.

[18] 11 C.F.R § 100.26. But *paid* advertisements on the Internet are still regulated and reported. *Id*. ("The term general public political advertising shall not include communications over the Internet, *except for communications placed for a fee on another person's Web site.*") (emphasis added). Thus the Revised Proposed Rule, by adding "paid online advertising," § 1.10.13.7(A), is more in line with the federal rule, if it were to otherwise exempt Internet communications.

[19] 11 C.F.R § 100.94.

[20] FEC, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49072 (July 29, 2002).

[21] *Supra* n.4 at 12.

[22] *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.").

audience—before regulating the speech.[23] Following the federal model will help limit the scope of regulated "advertisements" and thereby help to properly tailor the Revised Proposed Rule.

b. The news media exemption applies to more than just traditional media corporations.

The Revised Proposed Rule's definition of "advertisement" provides an exemption for news media,[24] but does not give explicit notice that, under longstanding First Amendment precedents the "news media" provision must cover more than traditional institutional press such as the *Clovis News Journal* or KOB Eyewitness News 4. It is a bedrock principle that "[t]he liberty of the press is not confined to newspapers and periodicals.… The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[25] The Secretary must take care that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns."[26]

The Tenth Circuit was recently asked to consider the scope of Colorado's campaign finance media exemption. In *Citizens United v. Gessler*, the Tenth Circuit applied Supreme Court precedent and noted that courts have "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[27] Such a distinction between institutional press and other speakers "has no basis in the First Amendment and cannot immunize differential treatment from a First Amendment challenge."[28] Nor is non-partisan or "transparent, balanced, and accountable" reporting required, since "[o]ur nation's founding and history are replete with examples of highly partisan newspapers, and many observers would say that some modern media continue the tradition."[29] In other words, the media exemption is wide, and must remain so under the First Amendment.

In the words of the *Buckley* Court, "whatever differences there may be between the constitutional guarantees of a free press and of free speech, it is difficult to conceive of any principled basis upon which to distinguish… limitations upon the public at large and similar limitations imposed upon the press specifically."[30] Applying these principles to the Revised Proposed Rule, if a YouTube channel, for example, offers news and information, along with

[23] For example, as outlined at *id*. at 12 n.82, 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).

[24] Revised Proposed Rule § 1.10.13.7(A)(2).

[25] *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)

[26] *Turner Broad. Sys. v. Fed. Communications Comm'n*, 512 U.S. 622, 659 (1994).

[27] 773 F.3d 200, 212 (10th Cir. 2014) (quoting *Citizens United*, 558 U.S. at 352) (emphasis removed, internal quotation marks omitted).

[28] *Id*.

[29] *Id*.

[30] *Buckley*, 424 U.S. at 51 n.56 (discussing non-unique role of institutional press in context of an exemption to a federal independent expenditure limit).

commentary, it must be exempted under Revised Proposed Rule § 1.10.13.7(A)(2)'s carve out for news media.

c. Grassroots lobbying should be categorically exempted from the definition of "advertisement."

The Revised Proposed Rule also exempts communications to members of a membership organization,[31] and defines "membership organization"[32] in similar fashion to the federal regulations.[33] This is good, but the Revised Proposed Rule can be a bit better by categorically exempting grassroots communications by nonprofit organizations.[34] Like many codifications of campaign finance law, the Revised Proposed Rule forgets that candidates are also often incumbents, and that grassroots lobbying is a call for an official to take official action. Therefore, to avoid regulating issue speech about public policy, the Revised Proposed Rule should categorically exempt grassroots lobbying by nonprofit organizations from any definition of "advertisement" and, therefore, from qualifying as independent expenditures.

The Center's prior comments already explained why exempting issue advocacy from campaign finance regulation is not only legally sound[35] but also good policy.[36] Demanding donor disclosure for speech that is not "unambiguously campaign related"[37] will chill speech about issues. Without a nexus to *campaign* speech, the Revised Proposed Rule will 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.

Therefore, the Center appreciates the hard work and receptivity of the Secretary and her staff in revising the Proposed Rule to better reflect established law. The Secretary should go a bit further and exempt Internet communications, as the federal government has done, to protect the diversity of speech the World Wide Web created. Certainly, the news media exemption can and should be applied liberally to all sorts of media, whether physical or electronic. Additionally, the Secretary should look to adopt a similar categorical exemption for speech that focuses on public policy issues, not a candidate's fitness for office. Doing so will protect the First Amendment rights of such nonprofit groups as well as keep the Secretary's recourses focused on those engaging in electoral politics.

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[31] Revised Proposed Rule § 1.10.13.7(A)(1).

[32] Revised Proposed Rule § 1.10.13.7(U).

[33] *See*, *e.g.*, 11 C.F.R. §§ 100.134(e) and (f); 11 C.F.R. § 114.1(e).

[34] And all of this is permissible for a § 501(c)(3) charity to do. *See supra* n.4 at 7 n.45 (discussing tax law regulations of grassroots lobbying by 501(c)(3) organizations).

[35] *Id*. at 6 (discussing need for campaign finance regulations to be tied to actual campaign speech); *id*. at 13 (discussing legal standard surrounding donor disclosure).

[36] *Id*. at 14-17 (discussing why such disclosure is bad policy)

[37] *New Mexico Youth Organized*, 611 F.3d at 676 (applying *Buckley*, 424 U.S. at 81).

II. The office should be careful when regulating "coordinated expenditures" to avoid impermissibly chilling speech.

The Revised Proposed Rule's coordinated expenditure regulation is complex and includes only a "non-exhaustive" list of factors. If subjected to judicial review, the Revised Proposed Rule's regulation of disclosure for independent expenditures, including the coordinated expenditure test, will be subject to heightened scrutiny. In the campaign finance context, regulations defining "coordination" are meant to police the line between independent expenditures and expenditures that are controlled by the candidate, and are subject to "closely drawn" scrutiny.[38] But when such regulation restricts speech, the rule only survives "if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest."[39]

To survive this heightened scrutiny, "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest… it is not enough that the means chosen in furtherance of the interest be rationally related to that end."[40] To apply closely drawn scrutiny, the Supreme Court demands careful review of both the asserted governmental interest *and* whether the law is tailored to that interest, because "[i]n the First Amendment context, fit matters."[41]

The Revised Proposed Rule's regulations on "coordinated expenditures" are designed to detect violations of the contribution limits by those purporting to speak independently. As such, the "coordinated expenditures" regulations of the Revised Proposed Rule work in close proximity to protected First Amendment speech. Careful tailoring of the impact of the Revised Proposed Rule is needed to survive judicial review, and the current language of § 1.10.13.28 is insufficient.

a. Independent Expenditures—political speech—are protected by decades of Supreme Court precedent applying the First Amendment.

At bottom, the regulation of expenditures "coordinated" with political campaigns is aimed at separating in-kind contributions that may be lawfully limited from independent speech that may not. This is a difficult task. In attempting it, the Revised Proposed Rule's appears to rely upon the federal statutory analog.[42] But the Federal Election Campaign Act and its amendments are heavily modified by a long list of judicial opinions and orders.

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[38] *McCutcheon v. FEC*, 572 U.S. ___, ___, 134 S. Ct. 1434, 1444 (2014) (Roberts, C.J., controlling op.) (requiring "the State [to] demonstrate[] a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.") (quoting *Buckley*, 424 U.S. at 25). In a similar, yet distinct fashion, disclosure regimes are subject to "exacting scrutiny," where "the subordinating interests of the State must… [possess] a 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64 (quoting *NAACP v. Ala.*, 357 U.S. 449, 463 (1958)).

[39] *McCutcheon*, 134 S. Ct. at1444 (citing *Sable Communications of Cal., Inc. v. Fed. Communications Comm'n*, 492 U.S. 115, 126 (1989).

[40] *Elrod v. Burns*, 427 U.S. 347, 362 (1963) (citing *Buckley*, 424 U.S. at 94) (emphasis added).

[41] *McCutcheon*, 134 S. Ct. at 1456.

[42] *Compare, e.g.*, Revised Proposed Rule § 1.10.13.7(H) *with* 52 U.S.C. § 30116(a)(7).

The litigation background of the federal statute has led the FEC, on a bipartisan vote,[43] to create a multi-step test for coordination that requires both *content* and *conduct* elements to be fulfilled. The Center suggested New Mexico follow suit.[44] The Commission's experience highlights that the line between regulating "coordination" and independent expenditures is often difficult to draw, and that the government must err on the side of allowing freedom of speech for independent groups.

The regulation of "coordination" implicates two interests. First, independent speech may not be limited, whereas in-kind contributions may. Second, contributions to candidates are clearly given for political purposes while contributions to groups making independent expenditures may not be, because such groups may engage in a wide range of non-political activity. Consequently, disclosure rules may differ in the two situations.

Contribution limits and disclosure laws are both designed to fight *quid pro quo* corruption.[45] In fact, that is the only substantial state interest in limiting contributions.[46] Similarly, campaign finance disclosure is heavily tied to the fight against *quid pro quo* corruption. Mandating detailed disclosure serves three purposes: (1) it is "'an essential means of gathering the data necessary to detect violations of . . . contribution limitations,'"[47] (2) it deters actual corruption and "facilitate[s] detection of post-election favoritism,"[48] and (3) it informs voters of the financial backers of a candidate.[49] Thus, for "over the past 40 years, [the Supreme Court] ha[s] spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech."[50]

Independent expenditures—political speech not controlled by a candidate or political party—is the height of political participation. That is because the "First Amendment right to speak one's mind… on all public institutions includes the right to engage in vigorous advocacy no less than abstract discussion."[51] Against this fundamental right, the *Buckley* Court found "that the governmental interest in preventing corruption and the appearance of corruption" is inadequate to support an independent expenditure limit.[52] That is because "independent advocacy restricted by

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[43] The FEC is a unique agency, consisting of six commissioners, no more than three of which may be from the same political party. 52 U.S.C. § 30106(a)(1). Furthermore, substantive actions by the agency, such as promulgating regulations, require the affirmative votes of at least four commissioners. 52 U.S.C. § 30106(c) (requiring four votes); 52 U.S.C. § 30107(a)(8) (power to promulgate rules).

[44] *Supra* n.4 at 18.

[45] *Buckley*, 424 U.S. at 26-27 ("To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined.").

[46] *McCutcheon*, 134 S. Ct. at 1441 ("Any regulation must instead target what we have called "*quid pro quo*" corruption or its appearance.").

[47] *Sampson*, 625 F.3d at 1256 (quoting *Buckley*, 424 U.S. at 68) (ellipsis in *Sampson*).

[48] *Id*. (citing *Buckley*, 424 U.S. at 67).

[49] *Id*. (citing *Buckley*, 424 U.S. at 67). Of the three, the informational interest is the *only* interest in disclosure for independent expenditures about ballot measures. *Id*.

[50] *McCutcheon*, 134 S. Ct. at 1441.

[51] *Buckley*, 424 U.S. at 48 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Bridges v. Calif.*, 314 U.S. 252, 270 (1941) and *NAACP v. Button*, 371 U.S. 415, 429 (1963)) (internal quotation marks omitted, ellipsis in *Buckley*).

[52] *Id*. at 45.

the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[53]

In fact, independent expenditures are not always helpful to the campaign they support.[54] Even the "100,000" page record in *McConnell v. Federal Election Commission* contained "only scant evidence that independent expenditures even ingratiate."[55] Even then, "[i]ngratiation and access, in any event, are not corruption."[56] With this in mind, the D.C. Circuit, sitting *en banc*, has held "the government has no anti-corruption interest in limiting contributions to an independent expenditure group."[57]

Consequently, the Supreme Court's "present doctrine sharply distinguishes contributions to candidates or expenditures coordinated with candidates from independent expenditures free of any such coordination" because "expenditures and contributions that are not independent present a risk of quid pro quo corruption."[58] What makes an expenditure "independent" is "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent."[59] Coordination, therefore, becomes the key distinction between independent speech and coordinated speech that may be regulated as a contribution.

Thus, if the rules on coordinated expenditures are not tailored to target only *quid pro quo* corruption, they impermissibly restrict the First Amendment rights of those seeking to speak independently. Tailoring, then, is key to keeping the Revised Proposed Rule in line with the First Amendment.

b. While policing unlawful coordination is necessary, the Revised Proposed Rule must be carefully tailored to avoid chilling speech.

As is so often the situation in the campaign finance world, tailoring is the key to the constitutional regulation of political speech. Nevertheless, the Revised Proposed Rule creates a broad and sometime vague test that would leave the regulated community wondering if their activity is permitted by the Secretary. This is inherently dangerous, as the Supreme Court has repeatedly held that "First Amendment freedoms need breathing space to survive."[60]

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[53] *Id*. at 46.

[54] *Id*. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive.").

[55] *Citizens United*, 558 U.S. at 360 (discussing size record from *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (three judge court) (opinion of Kollar-Kotelly, J.) *aff'd in part and rev'd in part* 540 U.S. 93 (2003)).

[56] *Id*.

[57] *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc). The Center represented the *SpeechNow.org* plaintiffs.

[58] *Citizens United v. Gessler*, 773 F.3d at 211.

[59] *Buckley*, 424 U.S. at 47.

[60] *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Wis. Right to Life, Inc.*, 551 U.S. at 468-469 (2007) (Roberts, C.J., controlling op.) (quoting same); In re *Primus*, 436 U.S. 412, 432 (1978) (quoting same); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972) (quoting same); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 604 (1967) (quoting same); *cf. Rankin v. McPherson*, 483 U.S. 378, 387 (1987) ("'Just as erroneous statements must be protected

The Revised Proposed Rule creates a six-factor, "non-exhaustive list" for determining if an independent expenditure is, in fact, coordinated with a candidate.[61] As a general matter, the factors become less tailored as the list progresses. Overall, the six factors are repressive and delve beyond the Secretary's expertise; the rule even attempts to direct landlord-tenant agreements.[62] These comments will examine each factor in turn.

i. Factors 1 and 2: Regulating the Candidate's Agent

The factors start out simply and clearly. Sections 1.10.13.28(E)(1) and (E)(2) are obvious ways to police improper coordination. If "the person making the expenditure is also an agent of a candidate or committee"[63] or if the a person serves as a treasurer (or otherwise has financial control of political money) and "is also an agent of a candidate or committee"[64] then the state will suspect that the expenditure is a "coordinated expenditure."

The key to both subsections is the decision to regulate the *agent* of the candidate or committee. Such a rule clearly "encompass[es] organizations that are under the control of a candidate"[65] because the agent of the candidate is running the supposedly "independent" expenditures. Such expenditures are appropriately suspect since they "are under the control of a candidate" or her committee.[66]

ii. Factor 3: Common Founders

Based on the intelligible nature of the prior two subsections, section 1.10.13.28(E)(3) would seem at first blush to similarly regulate "encompass organizations that are under the control of a candidate."[67] This subsection examines "whether the person making the expenditure has been established, financed, maintained, or controlled by any of the same persons that have established, financed, maintained, or controlled a political committee authorized by the candidate."[68] In so far as this regulates persons who *concurrently* set up and run a candidate committee and an independent expenditure committee, the rule is likely tailored to police the state's contribution limits.

But the rule does not apply only where the same person sets up both groups, and it provides no time frame whatsoever. These oversights expand the scope of factor three to encompass multiple election cycles and a potentially wide range of individuals.

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to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected'") (quoting *Bond v. Floyd*, 385 U.S. 116, 136 (1966)).

[61] Revised Proposed Rule § 1.10.13.28(E).

[62] Revised Proposed Rule § 1.10.13.28(E)(4).

[63] Revised Proposed Rule § 1.10.13.28(E)(1).

[64] Revised Proposed Rule § 1.10.13.28(E)(2).

[65] *Buckley*, 424 U.S. at 79.

[66] *Id*.

[67] *Id*.

[68] Revised Proposed Rule § 1.10.13.28(E)(3).

If a person sets up a candidate committee, but leaves that job to work for another organization that happens to make independent expenditures, then the rule suspects "coordination"—whether or not significant time has passed. There is no basis for such a presumption when, for instance, months, or even election cycles, have intervened. The proposed factor is improper on that ground alone. Moreover, even in closer cases, the passage of time will doubtless erode the utility of any coordinated communications made before the individual begins work for the independent group. The factor does not seriously grapple with these eventualities, Instead, it appears to assume that whenever friends or allies have collaborated in the past, they will inevitably attempt to coordinate in the future, even where doing so is plainly unlawful. Again, there is no basis for this cynical assumption. The First Amendment requires a better tailored, and better proven, rule.

These weaknesses are compounded by the clear chill the factor will impose on individuals engaged in political advocacy. The rule is not limited to paid efforts, and would seem to reach volunteer treasurers, board members, and campaign managers, who are common in small states like New Mexico.[69]

At a minimum, the Secretary should therefore cabin this subsection to each election cycle, as is done elsewhere in the Rule,[70] and revise the list of covered persons to reach only cases where the same person has controlled both the candidate's strategic decision making and the content of the relevant independent expenditure.

iii. Factor 4: Sharing Space

Section 1.10.13.28(E)(4) would find coordination where "the reporting individual shares or rents space for a campaign-related purpose with or from the person making the expenditure."[71] While the Center appreciates the qualifier "for a campaign-related purpose," which exempts residential leases and the like, there is no exemption for arms-length transactions. This means that real estate investors—landlords or the companies they control—cannot speak about the candidates they have as tenants, even if the rental transaction was made in the ordinary course of business.

Candidate committees, like any other organization, often need a base from which to operate—an office. Candidate committee offices are often filled with exhausted volunteers, day-old pizza, and cases of Diet Coke. But the offices provide a place to stuff envelopes, gather yard signs, make calls to volunteers, and interact with the media. Many campaigns, particularly large campaigns, rent office space for such work.

Under the Revised Proposed Rule, however, the candidate's landlord—whether a natural person or an organization—cannot also run expenditures about the candidate. Section 1.10.13.28(E)(4) provides no explanation for why such an expenditure would be *a priori* suspect

[69] Even if it were so limited, there is no basis for discouraging individuals from making a career in politics.

[70] *See, e.g.* Revised Proposed Rule § 1.10.13.28(E)(5) (limiting its scope to each election cycle).

[71] Revised Proposed Rule § 1.10.13.28(E)(4).

without some other indicia of coordination. Again, this is where the federal rules are helpful, requiring objectively identifiable evidence of coordinated *conduct* and *content*, not speculation[72]

iv. Factor 5: Regulating Professional Services

Section 1.10.13.28(E)(5) would find an expenditure "coordinated" if the reporting individual (or any entity controlled by the reporting individual) "has retained the professional services of the person making the expenditure" (or of any entity controlled by the person making the expenditure).[73] Thankfully, this finding is restricted to only activity "during the same election cycle, either primary or general, in which the expenditure is made."[74] Leaving aside the ethical concerns,[75] how does this rule effect a lawyer who represented a candidate in their individual capacity (such as writing a will), or if she represented a candidates company on a construction law matter?

It may be that section 1.10.13.28(E)(5) is aimed at preventing possible games of "telephone" between candidate committees and independent expenditure committees via common vendors. But even that gloss presents its own challenges. Does using a common FedEx Kinkos to print flyers count? What about Comcast providing Internet services to both the candidate campaign and the independent expenditure committee?

While these examples seem silly, the reality is that the world of campaign material expertise is rather small and insular. There are only so many printing companies that can make campaign t-shirts. There are a limited number of vendors for door hangers or yard signs. In a small state like New Mexico, it's likely that these vendors are roughly split between the "pro-left/Democratic" vendors and the "pro-right/Republican" vendors. Section 1.10.13.28(E)(5) does not grapple with these practical considerations, nor does the Revised Proposed Rule do anything to target actual coordination, rather than its merely theoretical appearance.

v. Factor 6: Third Party Doctrine

Section 1.10.13.28(E)(6) creates the most problematic factor, and is in most need of revision. Its dual dependent clauses make the rule inherently unclear. As it is written now, the regulation of communications with "third parties" impermissibly extends the Revised Proposed Rule to reach daily interactions between New Mexican residents.

The sixth factor regulates persons in consultation with "or [who have] otherwise been in communication with" a common "third party or parties."[76] This is broad, to say the least, making every conversation suspect and requiring regulated persons to know the professional and social networks of people with whom they converse. Theoretically, this could reach talking to the attendant at a Santa Fe gas station. The plain meaning of the rule, as written, would regulate

[72] *Supra* n.4 at 18 (discussing 11 C.F.R. § 109.21).

[73] Revised Proposed Rule § 1.10.13.28(E)(5).

[74] *Id*.

[75] *See, e.g.*, New Mexico Rules of Professional Conduct 16-107 through 16-113.

[76] Revised Proposed Rule § 1.10.13.28(E)(6).

interactions at church, the grocery store, or anywhere in the public square or commercial life of the state.

Section 1.10.13.28(E)(6) attempts to reach only situations where the regulated individual "knew or should have known" that information could get to the other committee or its agents.[77] But even this approach ignores the role of the putative intermediary, who is the person actually choosing whether to violate the law by conveying improper information. This is particularly problematic because *it is entirely lawful* for the first individual to discuss a campaign with a third party.[78] In other words, the rule manufactures a presumption that otherwise-legal speech can serve as the trigger for an investigation aimed at limiting the speech of a third party. The opportunities for selective enforcement present in such a standard, especially as it turns upon intent rather than objective coordination, are legion.

A hypothetical may help illustrate the point. Ana and Beatrice live in the same neighborhood in Santa Fe. Ana is the campaign manager for state senate candidate Sofia, whose campaign focuses on transportation infrastructure reform. Similarly, Beatrice runs a nonprofit supportive of heavy rail transit solutions, such as the Rail Runner, in public transportation. Yet if both Ana and Beatrice use the same dry cleaner, who is known for being a bit of chatter box, then the language of section 1.10.13.28(E)(6) could be used to find coordination between Ana and Beatrice if the latter's group runs ads supporting candidate Sofia's vision for public transportation options in Northern New Mexico.

Obviously, enforcement based upon this hypothetical would be absurd, but nothing in the "coordinated expenditure" six-factor test says that such absurd results could not be pursued. The rule, in trying to ferret out every possible version of perceived "coordination," begins to regulate the daily interactions of everyone in the state. Such broad power cannot lie in the campaign finance regulations of this office. The "coordinated expenditure" provisions of the Revised Proposed Rule as presently drafted is insufficiently tailored. It instead must be cabined to policing the contribution limits, and confined to objective standards showing a likelihood, and not the mere paranoid possibility, of concrete coordination.

vi. The "non-exclusive" nature of the factors chills speech.

Finally, while most of the six factors of section 1.10.13.28(E) have their own deficiencies, the Revised Proposed Rule notes that they are merely a "non-exhaustive list."[79] In short, this office has announced that it will consider whatever information it wishes in choosing to pursue a

[77] *Id.*

[78] Moreover, the law does not presume that the independent actions of an intermediary automatically traces back to the first party. Indeed, even in tort law, a principal is responsible for the actions of an agent only "when the principal has clothed the agent with the appearance of authority." *Diversified Dev. & Inv., Inc. v. Heil*, 889 P.2d 1212, 1218 (N.M. 1995). Indeed, for any agency relationship to exist, there must be some ability for the principal to control the agent. *See, e.g.*, 3 Am. Jur. 2d Agency § 2 (noting the general nature of an agency relationship requires evidence of "(1) acknowledgment by the principal that the agent will act for him or her, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent."). Without some test of agency and control, the Rule will punish regulated persons for the independent actions of third parties.

[79] Revised Proposed Rule § 1.10.13.28(E).

coordination investigation. One wonders why the six factors, and their attendant overbreadth and chill, are necessary.

In any event, by enacting a lengthy list of vague factors, and then declaring them insufficient, the Revised Proposed Rule would create a nearly-limitless universe of relevant factors in the interest of determining concrete coordination, a fairly straightforward legal question. This is an error. "Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"[80] The Revised Propose Rule's test for coordination suffers from both ailments.

The entirety of section 1.10.13.28(E) amounts to "an amorphous regulatory interpretation"[81] aimed at regulating the actions and speech of people without any real indicia of coordination or backroom deals. Worse, the Revised Proposed Rule does this using a very complicated set of factors. As such, any speaker wishing to speak independently about a candidate will need to get extensive legal advice and do extensive research on all of their contacts—even the people they interact with daily in ordinary commerce. Otherwise, they will have no guarantee against politically charged investigations. Quite simply, the "First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day."[82]

All six factors, combined with their nonexclusivity, present "danger signs" that may well compel a court to "review the [regulatory] record independently and carefully with an eye toward assessing the [Rule's] 'tailoring,' that is, toward assessing the proportionality of the restrictions."[83] The discussion of Revised Proposed Rule § 1.10.13.28 started with the Supreme Court's extensive protection of independent expenditures and the heightened scrutiny applied to both contribution limits and disclosure regulations. Given the prolix and amorphous nature of the Secretary's test, it is unlikely the coordination portion of the Revised Proposed Rule will stand up to First Amendment scrutiny. The Center again suggests the Secretary instead adopt a more objective test based on the federal regulations found at 11 C.F.R. § 109.21.

III. While the Revised Proposed Rule raises several key reporting thresholds, they are still well below what the Tenth Circuit recognizes as the limit for regulating small organizations.

The threshold triggering the registration and reporting is too low. The Revised Proposed Rule triggers independent expenditure reporting for as little as $1,000 in a non-state-side race and $2,500 for a state-wide race.[84] Ballot measures fare a bit better, getting thresholds of $3,000 (non-

[80] *Citizens United*, 558 U.S. at 324 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) (second bracket in *Citizens United*).

[81] *Id.*

[82] *Id.*

[83] *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (Breyer, J., plurality op.).

[84] Revised Proposed Rule § 1.10.13.11(B).

state-wide) or $7,500 (state-wide ballot measures).[85] In either event, the reporting threshold starts below that which was held as insufficient by the Tenth Circuit.

As discussed in the prior comments,[86] 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 proposed here.[87] While *Coalition for Secular Government* dealt with speech relating to a state-wide ballot initiative,[88] nothing in the Tenth Circuit's analysis cabined its ruling to that fact. Instead, the Tenth Circuit weighed the governmental interest in disclosure to the burden placed on small organizations. The central holding of the case is clear, "[t]he informational interest in the Coalition's disclosures is far outweighed by the substantial and serious burdens of the required disclosures."[89] It is the disclosure, weighed against only $3,500 in activity, that is too burdensome. While, certainly the Revised Proposed Rule's $1,000 threshold is higher than Colorado's $200 reporting threshold,[90] it is still well below the $3,500 at issue in *Coalition for Secular Government*.[91]

Even then, the Tenth Circuit did not specifically hold that $3,500 was the floor for allowing burdensome disclosure. Instead, the Tenth Circuit gave as-applied relief and specifically noted that the constitutional line may be higher than $3,500: "For instance, in *Sampson* we declared Colorado's regulatory scheme unconstitutional for an issue committee that raised $2,239.55. Here we do so again for $3,500. So what about $5,000? $10,000?"[92] The Tenth Circuit would not draw the line, instead instructing the Colorado legislature to amend the reporting thresholds.[93] But as noted in the Center's prior comments, the new Colorado law is as-yet untested in the Tenth Circuit.[94]

What matters under the First Amendment's scrutiny is that a state's reporting requirements "substantial[ly]" burden small organizations' First Amendment rights, and so the Tenth Circuit balances the "substantial" burden of reporting and disclosure against the informational interest at stake, which it considered "minimal."[95] The Tenth Circuit will examine the Revised Proposed Rule for the burdens imposed on organizations by this bill with the same skepticism it brought to

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[85] Revised Proposed Rule§ 1.10.13.11(C) *but see id.* at § 1.10.13.11(B)(4), which places reporting at whatever threshold is lower if a group speaks about both candidates and ballot measures.

[86] *Supra* n.4 at 9.

[87] *Coal. for Secular Gov't*, 815 F.3d at 1275; *id.* 1281. It should be noted that the panel in *Coalition for Secular Government* were all recent appointees from President Obama. *Id.* at 1268 ("Before PHILLIPS, McHUGH, and MORITZ, Circuit Judges.").

[88] *Id.* at 1269 ("In accordance with its mission, the Coalition publishes a policy paper each year in which a proposed 'personhood' amendment appears on Colorado ballots.").

[89] *Id.* at 1276.

[90] *Compare*, Proposed Revised Rule § 1.10.13.11(B) *with Coal. for Secular Gov't*, 815 F.3d at 1271 (discussing Colo. Rev. Stat. §1-45-108(3.3)).

[91] *Coal. for Secular Gov't*, 815 F.3d at 1274 n.5.

[92] *Id.* at 1280.

[93] *Id.*; *cf.* Colo. Rev. Stat. § 1-45-108(1.5).

[94] *Supra* n.4 at 10 n.64.

[95] *Sampson*, 625 F.3d at 1260.

Coalition for Secular Government and *Sampson*. The state cannot impose heavy burdens on the ability to speak, particularly for groups spending relatively little to discuss ballot measures.

The Center therefore suggests the Secretary set higher reporting threshold limits for all types of independent expenditure committees, perhaps at $10,000, based on the line from *Coalition for Secular Government*. Whatever line the Secretary promulgates based on case law and evidence during this rulemaking, the thresholds should be indexed to inflation. The rising cost of living weakens the relative value of the dollar over time. Congress wisely added indexing for many of the federal law's limits and thresholds in 2002.[96] The Secretary should likewise index such vital thresholds to the rate of inflation's increases in the relative cost of goods and services.

* * *

Overall, the Center commends the Secretary and the Secretary's staff for internalizing the public's comments. But the Revised Proposed Rule can be further refined and improved. The definition of "advertisement" is still too broad, and should exempt Internet communications and grassroots lobbying by nonprofit organizations. Likewise, fixing the "coordinated expenditure" test—a difficult line to draw for any regulator—will go far in protecting First Amendment activity while ensuring that independent expenditures are, in fact, independent. Additionally, setting the reporting thresholds higher will further inculcate the Proposed Rule from unnecessary litigation and protect small organizations that lack the sophistication and resources to higher expensive campaign finance attorneys.

Thank you for allowing me to submit comments on the Revised 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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[96] *See, e.g.* 52 U.S.C. § 30116(c) ("Increases on limits based on increases in price index.").