

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**RIO GRANDE FOUNDATION and
ILLINOIS OPPORTUNITY
PROJECT,**

Plaintiffs,

v.

MAGGIE TOLOUSE OLIVER, in
her official capacity as Secretary of
State of New Mexico,

Defendant.

Case No. _____

COMPLAINT

INTRODUCTION

1. Stretching back to the founding era and *The Federalist Papers*, the freedom of speech has included the right to engage in anonymous issue advocacy concerning important public issues. *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995).

2. Similarly, the freedom of association includes the right of private individuals to band together for common purposes without government prying in to those associations' membership or donor lists. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

3. Defendant Maggie Toulouse Oliver, secretary of state of New Mexico, is responsible for implementing New Mexico's campaign finance regime,

including 2019 Senate Bill 3 (SB 3). SB 3 requires groups that engage in issue advocacy at times proximate to an election to register with Oliver's agency, disclose their members and contributors, and place a sponsorship disclaimer on their materials.

4. Plaintiffs Rio Grande Foundation (RGF) and Illinois Opportunity Project (IOP) intend to engage in issue advocacy in New Mexico during the window of time designated in SB 3. Thus, if Plaintiffs were to engage in their planned issue advocacy, they would be required to register, disclose their donors, and place sponsorship disclaimers on their materials.

5. In order to protect the privacy of and on behalf of themselves and their donors, Plaintiffs bring this suit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief to protect the core First Amendment rights to free speech and association.

PARTIES

6. Plaintiff Rio Grande Foundation (RGF) is a 501(c)(3) charitable organization based in Santa Fe, Santa Fe County, New Mexico. It is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens. It does this by informing New Mexicans of the importance of individual freedom, limited government, and economic opportunity. It engages in issue

advocacy around topics central to its mission and publishes the “Freedom Index,” a real-time vote scorecard tracking legislators’ positions on free-market issues.

7. Plaintiff Illinois Opportunity Project (IOP) is a 501(c)(4) social-welfare organization based in Chicago, Cook County, Illinois. It seeks to promote the social good and common welfare by educating the public about policy that is driven by the principles of liberty and free enterprise. Increasingly, it is engaging in issue advocacy in states beyond Illinois. Member disclosure laws are one policy of great concern to IOP.

8. Maggie Toulouse Oliver is secretary of state of New Mexico. She works in Santa Fe, Santa Fe County, New Mexico. She is sued in her official capacity.

JURISDICTION AND VENUE

9. This case raises claims under the First and Fourteenth Amendments of the United State Constitution and 42 U.S.C. § 1983. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

10. Venue is appropriate under 28 U.S.C. § 1391(b)(1) and (2) because Defendants are located in and a substantial portion of the events giving rise to the claims occurred in the District of New Mexico, Santa Fe Division.

FACTUAL ALLEGATIONS

11. In March 2019, the New Mexico State Legislature adopted and the governor signed into law 2019 Senate Bill 3 (SB 3), an act related to campaign finance. In relevant part, SB 3 significantly expanded the definition of “independent expenditure” under New Mexico state law to include any advertisement or other communication that “refers to a clearly identified candidate or ballot question and is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary election or sixty days before the general election at which the candidate or ballot question is on the ballot.” N.M. Stat. Ann. § 1-19-26 (N)(3)(c). This has the practical effect of automatically categorizing all issue advocacy referring to candidates, including incumbents seeking reelection, or ballot measures as an electioneering activity as long as it is done proximate in time to an election.

12. SB 3 became effective July 1, 2019. 2019 Senate Bill 3, Section 18.

13. Because of SB 3, Plaintiffs and all other groups that engage in issue advocacy valued above certain thresholds are now required to register with Oliver as political committees. N.M. Stat. Ann. § 1-19-26.1(C).

14. Because of SB 3, Plaintiffs and similar groups will be required to disclose their members and contributors to Oliver. In the case of smaller expenditures, i.e., those worth under \$3,000 in a nonstatewide election or under

\$9,000 in a statewide election, committees must disclose the name, address, and amount given of any person who has made contributions over \$200 in the election cycle that were earmarked for or in response to a solicitation to fund independent expenditures. N.M. Stat. Ann. § 1-19-27.3(C).

15. In the case of larger expenditures, worth more than \$3,000 (nonstatewide) or \$9,000 (statewide), where those expenditures are funded by the committee's general fund, the committee must also disclose the name, address, and amount given of donors of over \$5,000 during the election cycle to the organization's general fund. N.M. Stat. Ann. § 1-19-27.3(D)(2).

16. Oliver posts the independent expenditure reports filed by committees on her agency's website, <https://portal.sos.state.nm.us/IESearch/>, so that anyone will be able to see donors' information.

17. The new definition of independent expenditure also means that when Plaintiffs engage in issue advocacy close in time to an election, they must include a sponsorship disclaimer identifying their sponsorship of the advertisement. N.M. Stat. Ann. § 1-19-26.4.

18. New Mexico is holding a general election on November 3, 2020. The ballot will include the races for the State Senate and State House, including incumbents who voted on SB 3. It will also include a referendum vote on a ballot measure to make the Public Regulation Commission an appointed rather than

elected body. The PRC regulates utility companies, transportation companies, infrastructure companies, insurance companies and other public companies.

19. Plaintiffs engage in issue advocacy on issues that relate to their mission. They feel strongly that issue advocacy is a protected right under the First Amendment.

20. RGF wishes to share its legislator scorecard with thousands of New Mexico voters in advance of the November 2020 election. In particular, it plans to make paid communications by mail to thousands of voters within 60 days of the 2020 general election. These mailings will include names and pictures of incumbent legislators who are candidates for reelection, along with information on their voting record in the legislature. These mailings will cost over \$3,000 in any particular legislative district. They will be funded from RGF's general fund.

21. IOP wishes to communicate its views on the nature of accountable, democratic government to thousands of New Mexico voters in advance of the November 3, 2020 general election. In particular, it plans to make paid communications by mail to thousands of voters within 60 days of the 2020 general election. These mailings will provide information about the ballot proposition but will not tell voters how IOP believes they should vote. These mailings will cost over \$9,000 statewide. They will be funded from IOP's general fund.

22. Plaintiffs intend to engage in substantially similar speech in future New Mexico elections.

23. RGF and IOP receive support from a variety of sources, including from donors of more than \$5,000 per year. RGF raises money from New Mexico donors to support its mission, and IOP desires to solicit financial support from donors within New Mexico to support its mission.

24. RGF and IOP sometime solicit funds to support a specific issue advocacy initiative, and other times each raises general funds to support their general operations, and then the general fund pays for their issue advocacy efforts.

25. Both Plaintiffs are concerned that compelled disclosure of their donors could lead to substantial personal and economic repercussions for their supporters. Across the country, individual and corporate donors to political candidates and issue causes are being subject to boycotts, harassment, protests, career damage, and even death threats for publicly engaging in the public square. Plaintiffs fear that their donors may also encounter similar reprisals from activists if their donations are made public. Oliver's posting of all donor information on the Internet makes this fear of harassment and retaliation all the more real, as it exposes national or multinational donors to harassment from anywhere in the world.

26. Both Plaintiffs are also concerned that if their donors are disclosed, their membership and revenue will decline as donors prioritize their anonymity over supporting Plaintiffs' work.

27. If Plaintiffs engage in this issue advocacy but fail to register, file the required reports, or include the required disclaimers, their officers will be subject to punishment as a misdemeanor with a \$1,000 fine or one year in jail or both. N.M. Stat. Ann. § 1-19-36. Plaintiffs as corporate entities may also be subject to civil penalties of \$1,000 for each violation not to exceed a total of \$20,000. N.M. Stat. Ann. § 1-19-34.6(B).

28. Plaintiffs therefore bring this pre-enforcement challenge on behalf of themselves and their donors to vindicate their First Amendment rights. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) (setting the standard for pre-enforcement challenges). Plaintiffs intend to engage in a course of conduct affected with constitutional interest (namely its issue advocacy). If they moved forward with their course of conduct, their sponsorship and their donors would be subject to disclosure.

29. Because of these potential harms, Plaintiffs will be forced to silence their own speech and not engage in their desired communications so long as these provisions of SB 3 are in force.

30. Plaintiffs have no remedy at law.

COUNT I

By requiring Plaintiffs to disclose their members and supporters, Oliver violates the First and Fourteenth Amendments.

31. The allegations contained in all preceding paragraphs are incorporated herein by reference.

32. Plaintiffs and their donors enjoy a right to privacy in their association for free speech about issues. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963). This right to privacy in association for free speech is protected by the First Amendment as incorporated against the states. *Id.* SB 3 violates that right by requiring disclosure of donations, ending the privacy of the speech-oriented association.

33. SB 3 cannot meet the required level of scrutiny. The U.S. Supreme Court has only found a compelling interest in membership-disclosure regulations when the association was engaged in or advocating for illegal activity. *Familias Unidas v. Briscoe*, 619 F.2d 391, 401 (5th Cir. 1980) (“The disclosure requirements in [*Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961)] and [*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928)] attached only to organizations either having a demonstrated track record of illicit conduct or explicitly embracing, as doctrine, plainly unlawful means and ends.”). Plaintiffs have no track record of illicit conduct nor have they embraced plainly unlawful means and ends; each is a legitimate non-profit organization engaged in

issue advocacy. The government lacks a compelling interest in forcing them to disclose their members and supporters.

34. Plaintiffs and their members and supporters are entitled to an injunction under 42 U.S.C. § 1983 enjoining the continued enforcement of N.M. Stat. Ann. §§ 1-19-27.3(C) and (D)(2) as applied to Plaintiffs and other organizations engaged in issue advocacy.

COUNT II

By requiring Plaintiffs to register and disclose their sponsorship of issue advocacy, Oliver violates the First and Fourteenth Amendments.

35. The allegations contained in all preceding paragraphs are incorporated herein by reference.

36. Plaintiffs enjoy a right to anonymity in its free speech about issues, a right protected by the First Amendment as incorporated against the states. *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). SB 3 violates that right by requiring Plaintiffs to first register with Oliver before engaging in issue speech and to put a disclaimer announcing their sponsorship on all of their issue-advocacy.

37. SB 3 affects direct issue speech, not express advocacy concerning candidates or ballot measures. *See Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-37 (7th Cir. 2014) (government does not have “a green light to impose

political-committee status on every person or group that makes a communication about a political issue that also refers to a candidate.”).

38. Plaintiffs are entitled to an injunction under 42 U.S.C. § 1983 enjoining the continued enforcement of N.M. Stat. Ann. § 1-19-26.1(C) (registration) and § 1-19-26.4 (disclaimer) as applied to Plaintiffs and other persons or organizations engaged solely in issue advocacy.

PRAYER FOR RELIEF

Plaintiffs Rio Grande Foundation and Illinois Opportunity Project respectfully requests that this Court:

- a. Declare that the independent expenditure provisions of 2019 Senate Bill 3 as applied to issue advocacy such as Plaintiffs’ compel member and supporter disclosure in violation the right to freedom of speech and association under the First and Fourteenth Amendments;
- b. Declare that the independent expenditure provisions of 2019 Senate Bill 3 as applied to issue advocacy such as Plaintiffs’ compel sponsor registration and disclaimer in violation of the right to anonymous speech under the First and Fourteenth Amendments;
- c. Enjoin the application of the independent expenditure provisions of 2019 Senate Bill 3 as applied to organizations engaged in issue advocacy such as Plaintiffs’;

- d. Award Plaintiffs their costs and attorneys' fees under 42 U.S.C. § 1988; and
- e. Award any further relief to which Plaintiffs may be entitled.

Dated: December 13, 2019

Daniel R. Suhr (WI No. 1056658)*
Jeffrey M. Schwab (IL No. 6290710)*
Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
Ph.: 312/263-7668
Email: dsuhr@libertyjusticecenter.org
jschwab@libertyjusticecenter.org
Lead Counsel for Plaintiff

Colin Lambert Hunter
Barnett Law Firm, P.A.
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
Ph.: 505-275-3200
Email: colinhunterlaw@gmail.com
Local Counsel for Plaintiff

*Motion pro hac vice forthcoming