IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 20-cv-0357-WJM-KLM

INFOCISION MANAGEMENT CORPORATION,

Plaintiff,

v.

JENA GRISWOLD, in her official capacity as Colorado Secretary of State,

Defendant.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This dispute regarding the constitutionality of the Colorado Charitable Solicitations Act, Colo. Rev. Stat § 6-16-101, *et seq.*, (the "Act") is before the Court on Plaintiff InfoCision Management Corporation's ("InfoCision") Motion for Summary Judgment (ECF No. 37) and Defendant Jena Griswold's, in her official capacity as Colorado Secretary of State ("Secretary"), Motion for Summary Judgment (ECF No. 43). For the following reasons, InfoCision's Motion for Summary Judgment is denied, and the Secretary's Motion for Summary Judgment is granted.

I. STANDARD OF REVIEW

Summary judgment is warranted under Federal Rule of Civil Procedure 56 "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986). A fact is "material" if, under the relevant substantive law, it is essential to proper disposition of the claim.

Wright v. Abbott Labs., Inc., 259 F.3d 1226, 1231–32 (10th Cir. 2001). An issue is "genuine" if the evidence is such that it might lead a reasonable trier of fact to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

In analyzing a motion for summary judgment, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In addition, the Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *See Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

II. BACKGROUND[1]

InfoCision has been registered as a "paid solicitor" as defined under the Act, Colorado Revised Statutes § 6-16-103(7), for seventeen years—since the beginning of the Colorado charity registration program in 2002. InfoCision has been calling on behalf of nonprofit organizations such as the American Cancer Society, the American Heart Association, and March of Dimes in Colorado since 1982. All of InfoCision's charitable organization clients either write or approve all scripted presentations made by InfoCision on their behalf.

[1] The following factual summary is largely based on the parties' briefs on the motions and documents submitted in support thereof. All citations to docketed materials are to the page number in the CM/ECF header, which sometimes differs from a document's internal pagination.

In addition to the statements of material facts in both sets of briefing, which are largely undisputed, the parties submitted a Joint Statement of Stipulated Facts. (ECF No. 35.) The Court only includes a citation to the docket for disputed facts.

The Secretary acknowledges that the Secretary of State's Office has no record of public complaints about InfoCision or its charitable solicitation activity from Colorado residents. The Secretary has never alleged that InfoCision's specific charitable solicitation activities in Colorado have violated Colorado law.

A. Injunction

In January 2018, InfoCision entered into a Stipulated Final Order for Permanent Injunction and Civil Penalty Judgment ("Stipulated Final Order") to resolve a federal complaint brought by the Federal Trade Commission ("FTC"). (ECF No. 35-3 at 1); *see United States v. InfoCision, Inc.*, Case No. 5:18-cv-64 (N.D. Ohio Jan. 11, 2018). The FTC's complaint charged InfoCision with engaging in deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule as amended, 16 C.F.R. Part 310, in telemarketing to solicit charitable contributions on behalf of charitable organizations. (ECF No. 35-3 at 2.) The Stipulated Final Order enjoined InfoCision from "[m]aking a false or misleading statement to induce any person to pay for goods or services or to induce a Charitable Contribution" and "from failing to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call . . . [t]hat the purpose of the call is to solicit a Charitable Contribution." (ECF No. 35-3 at 4–5.) The Stipulated Final Order also required InfoCision to pay a $250,000 civil penalty to the federal government. (ECF No. 35-3 at 5.)

The stipulated settlement agreement resolved disputed claims, and it contains no finding or admission of wrongdoing. (ECF No. 35-3 at 2 ¶ 3.) There was no hearing or adjudication on the merits. The Stipulated Final Order was filed one day after the complaint was filed, and it resolved that litigation.

B. 2018 Application

On July 30, 2018, InfoCision filed an application for the annual renewal of its registration to solicit charitable contributions in Colorado. In its application, InfoCision disclosed the Stipulated Final Order. On August 10, 2018, the Secretary denied InfoCision's 2018 application for renewal because her office determined that the Stipulated Final Order "enjoined" InfoCision "within the immediately preceding five years . . . from engaging in deceptive conduct relating to charitable solicitations" and, therefore, the existence of that injunction bars registration under Colorado Revised Statutes, § 6-16-104.6(10). InfoCision appealed the Secretary's denial of its 2018 renewal application by letter of August 17, 2018. InfoCision argued that the Secretary's denial of its registration constituted an "unconstitutional restraint on protected speech" and violated its "First and Fourteenth Amendment rights." InfoCision also argued that the Secretary failed to issue the denial within the statutorily required ten-day period.

On August 21, 2018, the Secretary approved the 2018 renewal application of a different applicant, Associated Community Services, that disclosed a court-ordered injunction in the State of Iowa within the preceding five years. That injunction prohibited that applicant from making charitable solicitations in another state. Chris Cash, Charities Program Manager of the Office of Secretary of State, testified at the administrative hearing that, "in hindsight we may have made a different decision" with respect to that application, but it "was the first time we had seen that."

On August 24, 2018, the Secretary retracted the denial of InfoCision's 2018 renewal application because she had failed to timely issue the denial. The Secretary stated that, "upon further review," the Secretary "has determined that" InfoCision's

registration "was deemed approved on August 9, 2018." Cash testified that because the Secretary's office missed the ten-day statutory deadline, they determined that they "needed to deem the renewal accepted as filed."

C. 2019 Application

On August 1, 2019, InfoCision submitted its annual application to renew its paid solicitor registration with the Colorado Secretary of State's Office. InfoCision's application again disclosed the Stipulated Final Order. On August 9, 2019, within eight days of InfoCision filing its 2019 renewal application, the Secretary denied InfoCision's application for renewal of its registration to solicit charitable contributions in the State of Colorado. In her 2019 Notice of Denial, the Secretary stated that InfoCision is statutorily barred from soliciting for a period of five years under § 6-16-104.6(10) and based the denial on the injunction contained in the Stipulated Final Order.

InfoCision appealed the Secretary's 2019 denial under Colorado Revised Statutes § 6-16-111(6)(b), and an administrative hearing was held on October 3, 2019. Cash testified at the hearing, stating that if an applicant had been enjoined from engaging in deceptive conduct, he was required to deny the application. Following the administrative hearing, the hearing officer issued an initial decision on October 15, 2019, which affirmed the Secretary's denial. The hearing officer explained that "[b]ecause [§ 6-16-104.6] requires an annual renewal application and review, the 2018 acceptance d[id] not relieve the [Secretary] of [her] duty to enforce the statute in a later application year." (ECF No. 43 at 9 ¶ 22.)

InfoCision appealed and filed its exceptions as outlined in the Colorado Administrative Procedure Act ("APA"), Colo. Rev. Stat. § 24-4-101, *et seq*. on

November 14, 2019. The Secretary responded to InfoCision's exceptions on December 5, 2019.

On January 7, 2020, Deputy Secretary of State Jenny Flanagan issued the agency's final order affirming the denial of InfoCision's license to solicit charitable contributions in Colorado under § 6-16-104.6(10) of the Act. The final order explained that the Secretary did not abuse her discretion in denying InfoCision's 2019 renewal application because "[s]ection 6-16-104.6(10), [Colorado Revised Statutes], is not discretionary, but rather mandates that a person cannot act as a paid solicitor if they have been enjoined from engaging in deceptive conduct relating charitable solicitations within the immediately preceding five years." (ECF No. 43 at 9 ¶ 25.)

The final order also concluded that "the [Secretary] ha[d] not treated similarly situated registrants different from InfoCision" for three reasons. (ECF No. 43 at 10 ¶ 26.) First, "the application review process changed in 2018 and . . . in hindsight, the [Secretary] would not have approved the renewal application of" Associated Community Services. (ECF No. 43 at 10 ¶ 27.) Second, "[l]ike [Associated Community Services], InfoCision's 2018 Renewal Application was approved despite noncompliance issues." (ECF No. 43 at 10 ¶ 28.) Third, "[b]oth applicants received what is tantamount to a one-year grace period even though they were subject to injunctions that disqualified them under the statute." (ECF No. 43 at 10 ¶ 29.)

III. PROCEDURAL HISTORY

On February 11, 2020, InfoCision filed its Complaint in this action, bringing four claims: (1) Colorado Revised Statutes § 6-16-104.6(10) violates the First Amendment based on prior restraint, U.S. Const. Amend. I, 42 U.S.C. § 1983; (2)

Colorado Revised Statutes § 6-16-111(6) violates the First Amendment based on unbridled discretion, U.S. Const. Amend. I, 42 U.S.C. § 1983; (3) Colorado Revised Statutes § 6-16-104.6(10) violates the Colorado Constitution based on freedom of speech, Colo. Const. art. II, § 10; and (4) Colorado Revised Statutes § 6-16-104.6(10) is unconstitutional on its face and as applied in violation of the Colorado Constitution, and the Secretary's denial of InfoCision's registration to solicit charitable contributions under §§ 6-16-104.6(10) and 6-16-111(6) constitutes an abuse of unbridled discretion in violation of the Colorado APA because it is contrary to constitutional right and abuse of discretion, Colorado Revised Statutes §§ 24-4-106(7)(b)(III), (IV). (ECF No. 1.) On April 4, 2020, the Secretary filed her Answer. (ECF No. 11.)

On September 10, 2020, the parties filed a Joint Stipulation of Agreement regarding a stay of enforcement of § 6-16-104.6(10) and a cap on attorney's fees. (ECF No. 36.) In the Joint Stipulation, the parties stipulated to a cap on reasonable attorney's fees in the district court proceeding in the amount of $85,000, not including any services rendered on appeal, in the event that this Court finds InfoCision to be a prevailing party for purposes of an award of attorney's fees under 42 U.S.C. § 1988. In the event the district court determines that InfoCision is a prevailing party under § 1988, InfoCision understands it will still need to substantiate its attorney's fees, as is customary any time Colorado pays attorney's fees. In exchange, the Secretary agreed to stay enforcement of § 6-16-104.6(10) and left InfoCision's registration active during the pendency of judicial review in federal district court, not including any period of appellate review.

On September 30, 2020, InfoCision filed its Motion for Summary Judgment. (ECF No. 37.) The Secretary filed a response in opposition (ECF No. 42), and InfoCision filed a reply (ECF No. 44). On November 16, 2020, the Secretary filed her Motion for Summary Judgment. (ECF No. 43.) InfoCision filed a response in opposition (ECF No. 45), and the Secretary filed a reply (ECF No. 46).

IV. RELEVANT STATUTORY PROVISIONS

The opening provision of the Act explains that Colorado's General Assembly passed the Act to protect the public from fraudulent charitable solicitations:

> The general assembly hereby finds that fraudulent charitable solicitations are a widespread practice in this state that results in millions of dollars of losses to contributors and legitimate charities each year. Legitimate charities are harmed by such fraud because the money available for contributions continually is being siphoned off by fraudulent charities, and the goodwill and confidence of contributors continually is being undermined by the practices of unscrupulous solicitors. The general assembly further finds that legitimate charities provide many public benefits and that charitable donations are a direct result of public trust in charities. The general assembly therefore finds that the provisions of this article, including those involving pertinent information to be filed in a timely manner by charitable organizations and disclosures to be made by paid solicitors, are necessary to protect the public's interest in making informed choices as to which charitable causes should be supported. Furthermore, these provisions are intended to help the secretary of state investigate allegations of wrongdoing in charities, without having a chilling effect on donors who wish to give anonymously or requiring public disclosure of confidential information about charities.

Colo. Rev. Stat. § 6-16-102.

In this lawsuit, InfoCision challenges two provisions of the Act as unconstitutional. First, under the Act,

> (10) No person may act as a paid solicitor and no paid

> solicitor required to be registered under this section shall knowingly employ any person as an officer, trustee, director, or employee if such person, within the immediately preceding five years, has been convicted of, found guilty of, pled guilty or *nolo contendere* to, been adjudicated a juvenile violator of, or been incarcerated for any felony involving fraud, theft, larceny, embezzlement, fraudulent conversion, or misappropriation of property or any crime arising from the conduct of a solicitation for a charitable organization or sponsor, under the laws of this or any other state or of the United States, or has been enjoined within the immediately preceding five years under the laws of this or any other state or of the United States from engaging in deceptive conduct relating to charitable solicitations.

Id. § 6-16-104.6(10).

Also relevant to InfoCision's case is the provision requiring the Secretary to make decisions on registration applications within ten days of receipt of the application:

> (6) The secretary of state shall examine each registration to determine whether the applicable requirements of this section are satisfied. The secretary of state shall notify the applicant within ten days after receipt of its application of any deficiencies therein, otherwise the application shall be deemed approved as filed. . . .

Id. § 6-16-104.6.[2]

Second, the Act provides guidance for the Secretary to apply a potential statutory ban on charitable solicitation:

> (6)(a) In addition to any other applicable penalty, the secretary of state may deny, suspend, or revoke the registration of any charitable organization, professional fund-raising consultant, or paid solicitor that makes a false statement or omits material information in any registration

[2] InfoCision does not appear to directly challenge this provision as unconstitutional in its Complaint (*see* ECF No. 1), but because it is relevant to the Court's analysis of InfoCision's claims that the Act constitutes an unconstitutional prior restraint, the Court takes note of the provision here.

> statement, annual report, or other information required to be filed by this article or that acts or fails to act in such a manner as otherwise to violate any provision of this article. The secretary of state may also deny, suspend, or revoke the registration of any person who does not meet the requirements for registration set forth in this article.

Id. § 6-16-111(6)(a).

V. ANALYSIS[3]

The First Amendment provides that government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In a facial and as applied challenge, InfoCision argues that the Act operates both as an impermissible abridgement of protected speech and as an unconstitutional prior restraint.[4] (ECF No. 37 at 18.) Because nothing in the record indicates that the Act will have any different impact upon interests not before this Court, the undersigned analyzes both prongs of the First Amendment challenge as they are presented under the facts of

[3] The Court acknowledges that both parties made numerous arguments in their Motions for Summary Judgment and responsive briefing. While the Court has considered all of the arguments in making its decision, it will not here restate every one of the parties' arguments or analyze each one independently.

[4] In its Complaint, InfoCision alleges that the Act violates the First Amendment on two grounds: in Count I, InfoCision alleges that § 6-16-104.6(10) is an unconstitutional prior restraint, and in Count II, InfoCision alleges that §§ 6-16-104.6(10) and 6-16-111(6)(a) unconstitutionally grant unbridled discretion to the Secretary. (ECF No. 1.)

However, the unbridled discretion analysis is *part of* the Court's analysis of prior restraint. *See Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1250–54 (10th Cir. 2000) (no system of prior restraint may place unbridled discretion in the hands of a government official or agency) (internal quotations and citation omitted). Despite the manner in which InfoCision drafted its Complaint, it appears as though InfoCision intended to bring a claim alleging that the Act is an impermissible abridgment of protected speech, and a separate claim alleging that the Act also operates as an impermissible prior restraint upon protected speech because it grants the Secretary unbridled discretion and lacks procedural safeguards.

For purposes of clarity only the Court will organize its Order with this understanding in mind, noting that the structure of the Order still mirrors the parties' briefs and does not alter the substance of InfoCision's claims or the Court's analysis of those claims.

this case. *See Giani*, 199 F.3d at 1246–47 (citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801–02 (1984)). If any provision should fail as applied to InfoCision, the Court will then decide if the provision is unconstitutional on its face. To find a provision facially unconstitutional, the Court must conclude that "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas." *Id.* (citation omitted).

A. Protected Speech

"Charitable solicitations qualify as protected speech for First Amendment purposes." *Id.* (citing *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980)). In examining InfoCision's claims, the Court must review the applicable principles of law identified in the Supreme Court's trilogy of charitable solicitation cases: *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); and *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). In those cases, the Supreme Court affirmed that solicitations to pay or contribute money, because they are so intertwined with speech, are entitled to protection under the First Amendment. *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1480–81 (6th Cir. 1995) (citing *Riley*, 487 U.S. at 787–89; *Munson*, 467 U.S. at 959–960; *Schaumburg*, 444 U.S. at 632–33).

Furthermore, that speech is not entitled to less protection simply because the speaker is compensated for the message. *Id.* (citing *Riley*, 487 U.S. at 801). Consequently, statutes attempting to restrict such speech must be narrowly tailored to achieve an important governmental interest without an unnecessary infringement of First Amendment freedoms. *Id.* (citing *Riley*, 487 U.S. at 788). However, some

speech by professional fundraisers may be regulated without violating the First Amendment. *Id.* For instance, a statute or regulation may constitutionally require fundraisers to disclose certain financial information or fulfill mandated registration requirements. *Id.* (citing *Riley*, 487 U.S. at 795; *Munson*, 467 U.S. at 967 n.16; *Schaumburg*, 444 U.S. at 637–38).

1. Content Neutral

a. *Legal Standard*

First, the Court must determine whether the regulation of protected speech is content based or content neutral, which according to the Supreme Court "is not always a simple task." *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 642 (1994). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citation omitted). According to the Supreme Court, "[t]his commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* Laws that are facially content neutral are considered content based if they cannot be justified without reference to the content of the regulated speech or if they were adopted by the government because of disagreement with the message the speech conveys. *Id.* at 164 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Content based speech is subject to strict scrutiny. *Id.*

Restrictions based on the identity of the speaker may also be content based. *Id.* at 170 ("[T]he fact that a distinction is speaker based does not . . . automatically render the distinction content neutral."). But unlike a restriction based on subject

matter, a restriction based on the identity of the speaker is not always content based. *Id.* "[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Id.* (quoting *Turner*, 512 U.S. 658). Therefore, if a restriction is based on the identity of the speaker, the Court must look to the legislature's intent before determining whether the regulation is content based. *Id.* ("Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.").

"The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Giani*, 199 F.3d at 1247 (internal quotation marks and ellipsis omitted).

> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.

Turner, 512 U.S. at 643 (citation omitted). Simply because an otherwise content-neutral law has "an incidental effect on some speakers or messages" does not change its classification so long as it "serves purposes unrelated to the content of expression." *Doe v. Shurtleff*, 628 F.3d 1217, 1223 (10th Cir. 2010) (citing *Golan v. Holder*, 609 F.3d 1076, 1083 (10th Cir. 2010)). Content neutral regulation of protected speech is subject to "an intermediate level of scrutiny." *Giani*, 199 F.3d at 1247 (citing *Turner*, 512 U.S. at 642).

b. *Analysis*

A plain reading of § 6-16-104.6(10) demonstrates that it applies to certain

speakers, not certain subjects. Specifically, the statute temporarily prohibits persons who have been enjoined from engaging in deceptive conduct related to charitable solicitations within the previous five years from acting as a paid solicitor. Colo. Rev. Stat. § 6-16-104.6(10). Thus, the Court must analyze whether the "legislature's speaker preference reflects a content preference." *Reed*, 576 U.S. at 170.

The Court concludes that it does not. In § 6-16-102, the Colorado General Assembly explains the purpose behind the Act: to target the secondary effects of professional solicitation, namely fraud and misrepresentation.

> [F]raudulent charitable solicitations are a widespread practice in this state that results in millions of dollars of losses to contributors and legitimate charities each year. Legitimate charities are harmed by such fraud because the money available for contributions continually is being siphoned off by fraudulent charities, and the goodwill and confidence of contributors continually is being undermined by the practices of unscrupulous solicitors.

Colo. Rev. Stat. § 6-16-102. As such, the legislature designed the Act to prevent fraud by paid solicitors; the legislature expressed no preference for the substance of what any speaker has to say. *See Turner*, 512 U.S. at 658. InfoCision has offered no evidence that the Act was adopted by Colorado because of disagreement with the message the speech conveys. To the contrary, the Act applies to any paid solicitor who has had an injunction entered against it for engaging in deceptive conduct related to charitable solicitations within the previous five years, regardless of the message the solicitor conveys. And just as critically for our purposes here, the Act does *not* apply to paid solicitors expressing the exact same speech who have not been subject to such an injunction. Strong evidence, in the Court's view, that the Act's provisions are not targeted to the content of the speech in question.

In *Giani*, a case in which the plaintiff challenged the constitutionality of the Utah Charitable Solicitations Act ("Utah Act"), Utah Code Ann. § 13–22–2(11) (Supp. 1999), the Tenth Circuit found that charitable wrongdoing is a secondary effect of professional solicitation. 199 F.3d at 1247. The Tenth Circuit observed that the Utah Act "targets the effects of professional solicitations, *i.e.*, increased fraud and misrepresentations." *Id.* The Utah Act did not, however, authorize a content based review of charitable mailings. *Id.* Rather, it merely facilitated "oversight of the mailers' backgrounds and methods," and thus was "content neutral" and subject to intermediate scrutiny. *Id.* Like the Utah Act reviewed in *Giani*, § 6-16-104.6(10) serves an antifraud purpose unrelated to the content of expression and is justified without any reference to the content of the solicitor's message. *See Schickel v. Dilger*, 925 F.3d 858, 876 (6th Cir. 2019), *cert. denied sub nom. Schickel v. Troutman*, 140 S. Ct. 649 (2019) (reaffirming wariness of speaker-based restrictions that are "nothing more than content-based restrictions in disguise," but nonetheless concluding that Kentucky's gift ban provision served an anticorruption purpose unrelated to content of expression and was justified without reference to the content of the gifts regulated).

To the extent InfoCision argues that § 6-16-104.6(10) is content based because the subject matter the statute targets is "charitable solicitation," (ECF No. 45 at 16–17), the Court agrees with the Secretary that such a level of abstraction is "much too high" (ECF No. 46 at 10). While it is undeniable that the Act—and § 6-16-104.6(10) specifically—concern the topic of charitable solicitation, as explained above, § 6-16-104.6(10) bans paid solicitors' speech without reference to the content

of their messages. The Supreme Court's precedents do not prevent the legislature from regulating paid charitable solicitors simply because they speak about charitable giving. Accordingly, the Court concludes that § 6-16-104.6(10) is content neutral, and as a consequence is subject to an intermediate level of scrutiny.[5] *See Turner*, 512 U.S. at 642.

2. Intermediate Scrutiny

The Supreme Court has stated that a law survives intermediate scrutiny if: (1) it furthers an important or substantial governmental interest, (2) the governmental interest is unrelated to the suppression of free expression, and (3) the substantial government interest would be achieved less effectively absent the law. *Turner*, 512 U.S. at 662. "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Id.* "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* (citations omitted). "Narrow tailoring in this context requires, in other words, that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (citation omitted).

a. *Substantial Government Interest*

First, the Court easily finds that the Act furthers an important or substantial government interest. The Supreme Court has found that "'[t]he interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation.'" *Giani*, 199 F.3d at 1247 (quoting *Riley*, 487

[5] Because the Court concludes that § 6-16-104.6(10) is content neutral, it need not consider the parties' arguments regarding whether strict scrutiny applies.

U.S. at 792). The Colorado General Assembly declared that "fraudulent charitable solicitations are a widespread practice in this state that results in millions of dollars of losses to contributors and legitimate charities each year." Colo. Rev. Stat. § 6-16-102. Under § 6-16-104.6(10), the Secretary is required to deny the application of any person who has been enjoined from engaging in deceptive conduct within the past five years. Because the Act's "general declarations and specific prohibitions clearly target fraud," it "serves a substantial government interest." *Giani*, 199 F.3d at 1247.

The parties agree that courts have found fraud prevention to be a substantial government interest. (ECF No. 45 at 35.) Nonetheless, InfoCision argues that the law "has no nexus to the stated interest in fraud prevention because the statutory ban language does not require a past finding of fraud or deceptive conduct[.]" The Court finds this argument to be without merit. (ECF No. 45 at 36.) InfoCision correctly states that there is no finding of fraud or wrongdoing against it in the Stipulated Final Order. (*Id.*) But the Court disagrees that the lack of a requirement of a finding of wrongdoing in the Act renders it unconstitutional.

As the Secretary argues, "if Colorado did not prohibit persons who have been enjoined from engaging in deceptive conduct from acting as paid solicitors, fraudulent solicitors could evade the law by simply settling claims brought against them." (ECF No. 46 at 13.) By settling its claims with the FTC in the Stipulated Final Order, InfoCision may well have *avoided* the very finding it now argues Colorado must require in the statute for it to pass intermediate scrutiny. The settlement enjoined InfoCision from "[m]aking a false or misleading statement to induce any person to pay for goods or services or to induce a Charitable Contribution" and "from failing to

disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call . . . [t]hat the purpose of the call is to solicit a Charitable Contribution." (ECF No. 35 ¶ 6; ECF No. 35-3 at 4–5.) By agreeing to the Stipulated Final Order, InfoCision acknowledged that it would stop engaging in conduct that the FTC found to be fraudulent. The Secretary correctly points out that "[b]y prohibiting any person who has been enjoined from engaging in deceptive conduct from serving as a paid solicitor, the General Assembly ensured that a fraudulent solicitor could not evade oversight and continue to operate in Colorado even though it settled serious charges brought against it." (ECF No. 46 at 14–15.)

Additionally, InfoCision's comparison between the bond provision of the Utah Act and § 6-16-104.6(10) does not change the Court's conclusion. (ECF No. 45 at 36.) The bond provision of the Utah Act required hired professionals who assist nonprofit organizations in delivering their message to post a $25,000 bond in order to register under the Utah Act. *See Giani*, 199 F.3d at 1249 (citing Utah Code Ann. § 13–22–9(4)(a)). In *Giani*, the Tenth Circuit struck down the bond provision of the Utah Act because it lacked a nexus with, and was not narrowly tailored to, the stated interest of fraud prevention. *Id.* InfoCision argues that the Court should find that § 6-16-104.6(10) similarly fails to pass intermediate scrutiny. (ECF No. 45 at 21.)

However, the Utah Act's bond requirement "support[ed] victim recovery," and "the guarantee of victim relief only peripherally support[ed] the recognized state interest in regulatory oversight." *Giani*, 199 F.3d at 1249–50. In contrast, the Colorado General Assembly designed § 6-16-104.6(10) to prevent fraud *before* it occurs, not to compensate victims *after* fraud has occurred. *See* Colo. Rev. Stat. § 6-

16-102. To accomplish this goal, Colorado must be able to prohibit deceptive solicitors from operating in the State, and § 6-16-104.6(10) facilitates that goal. Because § 6-16-104.6(10) serves Colorado's substantial interest in *preventing* fraud, it is readily distinguishable from the bond requirement struck down in *Giani*.

b. *Unrelated to the Suppression of Free Expression*

Second, the Court finds that Colorado's stated interest in preventing charitable fraud is unrelated to the suppression of free expression. Section 6-16-104.6(10) is not designed to prevent InfoCision or any other paid solicitor from expressing its views or the views of its clients. Rather, as generally expressed in the legislative declaration, the Act (and relatedly § 6-16-104.6(10)) is designed to prevent "money available for contributions [from] continually . . . being siphoned off by fraudulent charities, and the goodwill and confidence of contributors . . . [from] being undermined by the practices of unscrupulous solicitors." Colo. Rev. Stat. § 6-16-102. Colorado's interest in protecting legitimate charities and donors is therefore unrelated to the suppression of free expression.

c. *Does Not Burden Substantially More Speech Than Necessary*

Third, the Court concludes that § 6-16-104.6(10) does not burden substantially more speech than is necessary to further Colorado's legitimate interests in preventing charitable solicitation fraud. The statute only prohibits persons enjoined from engaging in deceptive conduct from acting as paid solicitors for a defined period. Colo. Rev. Stat. § 6-16-104.6(10). Notably, the provision does not prohibit persons who have been enjoined from engaging in deceptive conduct from speaking in Colorado. As the Secretary points out, InfoCision can still speak, for example, about the work of its clients and advocate for their policy priorities. (ECF No. 42 at 13.)

The provision simply prohibits InfoCision from acting as a paid solicitor in Colorado. *Cf. Dayton*, 70 F.3d at 1487 (Ohio charitable solicitation statute did not completely bar an individual from exercising protected First Amendment freedoms because conviction of a solicitation offense barred the individual only from serving as a paid solicitor).[6]

InfoCision argues there are numerous alternative, less restrictive options available to Colorado to prevent fraud and punish actual fraudulent solicitation in this jurisdiction. (ECF No. 37 at 26.) InfoCision suggests at least three alternatives, including: (1) publish the disclosures, including injunctions, made by all registrants in their registration applications (ECF No. 37 at 24; ECF No. 45 at 33); (2) take criminal action against a solicitor that committed charitable fraud (ECF No. 37 at 24–25); and (3) deny only those applications where there is a violation of Colorado law (ECF No. 37 at 24–26). The Court addresses these suggestions in turn.

First, the Court concludes that publishing disclosures, including injunctions, would not effectively prevent charitable fraud in Colorado. As the Secretary emphasizes, the purpose of § 6-16-104.6(10) is not simply to inform the public but to protect Coloradans from deceptive solicitors siphoning off contributions that would otherwise be available for legitimate charitable organizations. (ECF No. 43 at 18.) Publishing the disclosures would not facilitate this goal, particularly in instances in which Coloradans unexpectedly receive a charitable solicitation call while away from

[6] InfoCision argues that *Dayton* is inapposite, emphasizing that the Sixth Circuit was limited to an abuse of discretion review because the procedural posture was an appeal of a preliminary injunction. (ECF No. 45 at 37.) The Court is aware that *Dayton* is only persuasive authority and affords the decision the more limited weight it is due. Nonetheless, in the Court's view, the similarity of the legal issues in *Dayton* and this action—despite the different procedural postures—makes *Dayton* a helpful comparison here.

their computers or other means to investigate the legitimacy of the solicitor. And of course, publishing disclosures would in no way aid those Coloradans who lack easy access to the internet, or to Colorado publications which might publish such disclosures.

Similarly, taking criminal action against a solicitor that has committed charitable fraud would not achieve the Act's goal of preemptively preventing fraudulent charitable solicitation in Colorado. Punishing criminal conduct after it has occurred would not achieve the goal of preventing deceptive solicitors from "siphon[ing] off" contributions that would otherwise be available for other legitimate causes. Colo. Rev. Stat. § 6-16-102.

Finally, InfoCision's suggestion that the Secretary deny only those applications where there is a violation of Colorado law misses the mark, too. It is obvious that deceptive charitable solicitation may occur in states other than Colorado, and the General Assembly and the Secretary must be able to consider judicial and administrative proceedings from other states in implementing laws in Colorado to protect Coloradans from fraudulent charitable solicitation.

Therefore, the Court finds that § 6-16-104.6(10) "promotes a substantial government interest that would be achieved less effectively absent the" law. *Turner*, 512 U.S. at 662. Under these circumstances, the Court finds that § 6-16-104.6(10) is not an impermissible restraint on protected speech, and grants summary judgment in the Secretary's favor as to Claim 1.

B. Prior Restraint

InfoCision contends that §§ 6-16-104.6(10) and 6-16-111(6) are unconstitutional on their face and as applied because they grant unbridled discretion

to the Secretary to subjectively determine whether to apply the statutory ban (or abstain from applying it) to any given applicant. (ECF No. 37 at 34–42.) It argues that the Act fails to prescribe adequate standards for the Secretary to apply in determining whether disclosures made by the applicant qualify for the statutory ban. (*Id.* at 34.) According to InfoCision, the Act also lacks the procedural safeguards necessary to obviate a censorship system. (*Id.*)

Despite InfoCision's arguments, for the following reasons, the Court finds that §§ 6-16-104.6(10) and 6-16-111(6) do not constitute an unconstitutional prior restraint on InfoCision's First Amendment rights.

1. Unbridled Discretion

"The state may not condition protected speech 'upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official.'" *Giani*, 199 F.3d at 1252 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)). "'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" *Id.* (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992)).

InfoCision makes numerous arguments that §§ 6-16-104.6(10) and 6-16-111(6)(a) grant the Secretary overly broad discretion, including: the two provisions read together involve the subjective appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority as to whether the information disclosed by the paid solicitor in its application for registration constitutes an "injunction" and what past speech (or allegations of past speech) satisfy the vague, imprecise, and undefined term "deceptive conduct relating to charitable solicitations";

the Secretary may "enforce the ban against some applicants but not others similarly situated"; the Secretary may "enforce the ban against one applicant one year but not another year"; the terms "injunction," "deceptive conduct relating to charitable solicitations," and "enforcement action" are not defined in the statute; the statute and rules are silent as to any standards or guidance in determining whether a settlement agreement with another administrative agency, in another jurisdiction outside Colorado, can qualify as an "injunction" under the Act; the statute and rules lack any standards or guidance for determining what past speech constitutes "deceptive conduct relating to charitable solicitations" to trigger the application of the ban; and the application for renewal of a paid solicitor's registration does not ask any questions about an "injunction" or prior "deceptive conduct relating to charitable solicitations," and only asks if there is any "criminal history" or "enforcement action" to report.[7] (ECF No. 37 at 35–36.) Additionally, InfoCision argues that the Secretary's actions with respect to its 2018 application, denial of its 2019 application, and approval of Associated Community Services' 2018 application demonstrate the Secretary's unbridled discretion.

The Court is not persuaded. The language of the statute itself, as well as the actions the Secretary took to enforce the statutory provisions in connection with InfoCision and Associated Community Services in 2018 and 2019, demonstrate that the Secretary does not enjoy unbridled discretion under the Act.

[7] While the Court acknowledges InfoCision's numerous arguments, it finds that §§ 6-16-104.6(10) and 6-16-111(6) pass constitutional muster and therefore only addresses these arguments to the extent deemed necessary below.

a. *Statutory Language*

First, Section 6-16-104.6(10) provides that "[n]o person may act as a paid solicitor . . . if such person . . . has been enjoined within the immediately preceding five years under the laws of this or any other state or of the United States from engaging in deceptive conduct relating to charitable solicitations." Thus, the Secretary has no choice but to deny registration to any applicant who has been enjoined from engaging in deceptive conduct within the last five years.

Second, § 6-16-111(6)(a) provides that

> . . . the secretary of state may deny, suspend, or revoke the registration of any charitable organization, professional fund-raising consultant, or paid solicitor that makes a false statement or omits material information in any registration statement, annual report, or other information required to be filed by this article or that acts or fails to act in such a manner as otherwise to violate any provision of this article. The secretary of state may also deny, suspend, or revoke the registration of any person who does not meet the requirements for registration set forth in this article.

Rather than grant the Secretary unbridled discretion, the statutory language only allows the Secretary to take action if a paid solicitor: (1) makes a false statement in a required filing, (2) violates a provision of the Act, or (3) does not meet the requirements for registration. It does not, as InfoCision argues, give the Secretary discretionary authority to take action against a paid solicitor's registration at any time. Rather, as the Secretary states, this section "merely provides a mechanism for the Secretary to enforce other provisions of the Act." (ECF No. 46 at 18.)

To the extent InfoCision takes issue with the use of the word "may" in § 6-16-111(6)(a) to highlight the discretionary nature of the provision (ECF No. 45 at 40), its argument falls flat. Various circuit courts, including the Tenth Circuit, have "construed

'may' to mean 'must' when the statutory context and legislative history so required." *Nev. Power Co. v. Watt*, 711 F.2d 913, 920 (10th Cir. 1983) (citations omitted). In fact, the Supreme Court teaches that "[w]ithout question such a construction is proper in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power." *Id.* (quoting *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359 (1895)). Such is the case here. While the legislature chose to use the word "may" in the statute, it is clear from the statutory context and legislative history of the Act that the Secretary is required to comply with the requirements explained above.

b. *The Secretary's Enforcement of the Act*

In addition to the statutory language, the Secretary's actions and decisions in connection with InfoCision's and Associated Community Services' 2018 and 2019 applications further demonstrate her lack of unbridled discretion.

The Secretary denied InfoCision's 2018 application based on its disclosure of the Stipulated Final Order. The Notice of Denial explained that § 6-16-104.6(10) "mandates" that no person may act as a paid solicitor if they have been enjoined within the past five years from engaging in deceptive conduct relating to charitable solicitations. (ECF No. 35-4 at 1.) The use of the word "mandates" in the notice, coupled with the mandatory language of § 6-16-104.6(10), shows that the Secretary lacked discretion and had to deny the application because of the existence of the Stipulated Final Order.

Despite the requirement that she deny the application, the Secretary nonetheless retracted her denial of the 2018 application based on her failure to comply with § 6-16-104.6(6); that provision requires her to deny an application within

ten days, otherwise the application is deemed "approved as filed." Colo. Rev. Stat. § 6-16-104.6(6). Because the Secretary failed to deny the application within ten days, the application was *automatically* approved on August 9, 2018—one day *before* the Secretary issued the Notice of Denial. It did not come to the Secretary's attention that InfoCision's application had been automatically approved—due to the statutory time limitations—until after she had issued the Notice of Denial. (ECF No. 35-10 at 39–40.) When InfoCision informed the Secretary of the automatic approval, the Secretary determined that she was required to deem the renewal application accepted as filed. (*Id.* at 40.)

In the Court's view, *both* of these decisions demonstrate the Secretary's lack of discretion. She first denied the application because she was required to under § 6-16-104.6(10). She then retracted the denial when it came to her attention that she had missed the statutory deadline to deny the application under § 6-16-104.6(6). From the Court's experience a government official in the Secretary's position does not easily reverse a prior administrative decision unless compelled to do so under the governing statutory framework. This is strong evidence the Secretary believed herself to be without the discretion to simply allow her original decision to remain in place.

Moreover, under these circumstances, it cannot be gainsaid that InfoCision *benefited* from the Secretary's strict compliance with the statutory requirements and her lack of discretion regarding the same in that it received what the Secretary terms a "one-year grace period." (ECF No. 46 at 20.) InfoCision's argument that the Secretary then "chose to do nothing for a year" is without merit, as is its conclusory

argument that the Secretary had discretionary authority under § 6-16-111(6)(a) to suspend or revoke InfoCision's registration after she had failed to timely deny it. (ECF No. 44 at 20 and n.2.) To the contrary, the Secretary could do nothing until the following year—when InfoCision submitted its 2019 application—because under the Act, the application was deemed approved as filed. (ECF No. 46 at 19.) Regardless, while the Secretary's initial mistake regarding the ten-day deadline is undeniable, the issue here is her *discretion* under the statute. Both of the Secretary's decisions demonstrate compliance with the statute and her lack of discretion in carrying out its mandates.

Next, the Secretary's actions regarding InfoCision's 2019 application similarly demonstrate a lack of discretion. In 2019, the Secretary denied InfoCision's application as required under § 6-16-104.6(10). The Notice of Denial explained that InfoCision was "ineligible" to be a paid solicitor in Colorado because of Stipulated Final Order. (ECF No. 35-7 at 1.) Because InfoCision was subject to the Stipulated Final Order, the Secretary was never required to consider the merits of the application because InfoCision did not meet the objective criteria to be a paid solicitor. The Notice of Denial also explained that § 6-16-104.6(10) "mandates" that no person may act as a paid solicitor if they have been enjoined within the past five years from engaging in deceptive conduct relating to charitable solicitations. (*Id.*) Because InfoCision had been enjoined within the preceding five years from making false statements to induce consumers to make charitable contributions, the Secretary was obligated to deny the application.

InfoCision argues that the Secretary exercised broad discretion in determining

that InfoCision had been enjoined within the preceding five years from making false statements to induce consumers to make charitable contributions, and that the Act is constitutionally deficient in failing to provide standards or guidance in determining whether a settlement agreement with another administrative agency, in another jurisdiction outside of Colorado, can qualify as an "injunction" under the Act. (ECF No. 37 at 35–36.) In the Court's view, considering the clear language of § 6-16-104.6(10) in conjunction with the Stipulated Final Order, this argument borders on disingenuous.

Indeed, the full title of the Stipulated Final Order is "Stipulated Final Order for *Permanent Injunction* and Civil Penalty Judgment." (ECF No. 35-3 at 1 (emphasis added)).) The Stipulated Final Order enjoined InfoCision from "[m]aking a false or misleading statement to induce any person to pay for goods or services or to induce a Charitable Contribution" and "from failing to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call . . . [t]hat the purpose of the call is to solicit a Charitable Contribution." (*Id.* at 4–5.) Given this language, the Court agrees with the Secretary's conclusion that "it is impossible to read this document as anything other than an injunction from engaging in deceptive conduct relating to charitable solicitations." (ECF No. 42 at 23.) Therefore, the Secretary did not need to exercise any discretion in determining that § 6-16-104.6(10) applied to bar InfoCision's 2019 registration.[8] The statutory language and the Stipulated Final

[8] To the extent InfoCision argues that Cash's testimony shows that the Secretary engages in a deliberative process to determine whether § 6-16-104.6(10) applies to a paid solicitor (ECF No. 37 at 36), the Court has reviewed his testimony and finds InfoCision's assertions unavailing. The Secretary points to numerous quotations from Cash (which the Court will not repeat here) demonstrating that he considered no criteria other than § 6-16-104.6(10) in denying InfoCision's application. (ECF No. 42 at 24–25.)

Order did that work for her.

Finally, InfoCision's contention that the Secretary's treatment of its and Associated Community Services' applications demonstrates her unbridled discretion falls flat because the record shows that *both* entities received one-year grace periods following the Secretary's review of their applications. The Secretary's Final Order regarding InfoCision's 2019 application noted that the record "indicates that the application review process changed in 2018 and that, in hindsight, the Department would not have approved the renewal application of" Associated Community Services, which was "likewise subject to an injunction." (ECF No. 35-15 at 11.) Further, the Final Order explained that "[l]ike [Associated Community Services], InfoCision's 2018 Renewal Application was approved despite noncompliance issues," resulting in both applicants receiving "what is tantamount to a one-year grace period even though they were subject to injunctions that disqualified them under the statute." (ECF No. 35-15 at 11–12.) The Final Order warned that "[l]ike InfoCision, [Associated Community Services] should anticipate that subsequent renewal applications will be denied pursuant to § 6-16-104.6(10), C.R.S." (*Id.* at 12.) Because both InfoCision and Associated Community Services received one-year grace periods, the record shows that the has not exercised unbridled discretion and treated similarly situated registrants differently from InfoCision.

2. Procedural Safeguards

Two lines of cases govern procedural safeguards for prior restraints: *Freedman v. State of Maryland*, 380 U.S. 51 (1965), and *FW/PBS, Inc. v. Dallas*, 493

U.S. 215 (1990).[9] In *FW/PBS*, the Supreme Court addressed a city ordinance that required the city to "review[] the general qualifications of each license applicant," but not to "exercise discretion by passing judgment on the content of any protected speech." 493 U.S. at 229. The Supreme Court concluded "that the First Amendment d[id] not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." *Id.* Instead, a "[l]imitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the principle that the freedoms of expression must be ringed about with adequate bulwarks." *Id.* (internal quotations and citation omitted).

In its Motion for Summary Judgment, InfoCision argues that the Secretary "has demonstrated a pattern of failures in following her own existing, inadequate procedural safeguards, which fail to ensure against the suppression of constitutionally protected speech." (ECF No. 37 at 39.) Such allegedly deficient procedural safeguards include that the Secretary: missed her own deadline to approve or deny InfoCision's renewal registration in 2018 in violation of § 6-16-104.6(6) of the Act; failed to "take final agency action within ten days following the [administrative] hearing" in violation of § 6-16-111 and Rule 3.3; failed to initiate judicial review prior to censoring InfoCision's speech; and failed to satisfy her burden of proving the

[9] InfoCision argues that the Court should consider the requirements of both *Freedman* and *FW/PBS* in determining whether the Act—which it maintains is content based—contains constitutionally adequate procedural safeguards. (ECF. No. 45 at 43.) The only difference between the two standards is the third requirement of "prompt judicial review." *FW/PBS*, 493 U.S. at 230. *Freedman* requires this third element if the prior restraint is content based. *Id.*

However, because the Court has already concluded that the Act is content neutral, it need not consider whether the Act contains *Freedman*'s requirement of "prompt judicial review." *See id*.

speech restrained is "confined to judicially determined constitutional limits." (*Id.* at 39–42.)

The Court has already determined that the Act is content neutral and does not give the Secretary unbridled discretion. Thus, to meet *FW/PBS*'s standards for proper procedural safeguards, the Act must: (1) establish a time limit for the Secretary to approve or deny applications, and (2) allow for judicial review. For the following reasons, the Court finds that the Act satisfies these standards.

First, the Act provides deadlines for required actions by the Secretary. The Secretary must "notify the applicant within ten days after receipt of its application of any deficiencies therein." Colo. Rev. Stat. § 6-16-104.6(6). Under the statute, "[u]pon notice . . . that a registration has been denied . . . the aggrieved party may request a hearing." *Id.* § 6-16-111(6)(b). The Secretary must "promulgate rules to provide for expedited deadlines" for such hearings, which she has done. *Id.* The rules require the Secretary to "set the hearing between 20 and 45 days after the mailing of the notice" and to "take final agency action within ten days following the hearing." 8 Colo. Code Regs. § 1505-9:3.

Second, prompt judicial review is available to applicants. After an administrative hearing, a solicitor may seek judicial review consistent with the Colorado APA. Colo. Rev. Stat. § 6-16-111(6)(b). The Colorado APA allows "any person adversely affected or aggrieved by any agency action [to] commence an action for judicial review in the district court within thirty-five days after such agency action becomes effective." Colo. Rev. Stat. § 24-4-106(4). Thus, the Act contains adequate procedural safeguards. *See Giani*, 199 F.3d at 1254 (holding that "Utah's

restraint . . . during the brief period of administrative review [wa]s constitutional").

The Court finds InfoCision's arguments that the Secretary failed to comply with these procedural requirements in connection with its 2018 and 2019 applications to be without merit. As the Court has explained above, it is true that the Secretary denied InfoCision's 2018 application one day late. However, the error in fact benefited InfoCision by resulting in the Secretary reversing her denial of its application, and regardless, the Act contains the adequate procedural safeguard of requiring the Secretary to notify an applicant of any deficiencies in an application within ten days of receipt of the application. Colo. Rev. Stat. § 6-16-104.6(6).

As to InfoCision's argument that there was a delay between the administrative hearing and the Secretary's final order in connection with its 2019 application, the Secretary has explained that the delay "was due solely to InfoCision's filing of exceptions to the hearing officer's October 15, 2019 decision." (ECF No. 46 at 20 (citing ECF No. 35-13).) "Had InfoCision refrained from filing exceptions, the hearing officer's timely decision would have served as the Secretary's final order."[10] (*Id.* (citing Colo. Rev. Stat. § 24-4-105(14)(b)(III)).)

Accordingly, the Court finds that the Act does not constitute an unconstitutional prior restraint and grants summary judgment in the Secretary's favor as to Claim 2.

C. Eleventh Amendment Immunity

The Eleventh Amendment provides: "The Judicial power of the United States

[10] The Secretary explains the timing of her decisions. (ECF No. 46 at 21 n.6.) The hearing officer's October 15, 2019 decision complied with the ten-day deadline in 8 Colo. Code Regs. § 1505-9:3.3. The ten-day deadline fell on a Sunday (October 13, 2019) and the next day (October 14, 2019) was a state holiday. *See* Colo. R. Civ. P. 6(a) (state rule regarding computation of deadlines); Colo. Rev. Stat. § 24-4-105(4)(a) (hearing officer may issue orders in accordance with "the procedure in the [state] district courts").

shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This immunity extends to suits by citizens against their own state or its agencies in federal court. *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995). "Only a state or 'arms' of a state may assert the Eleventh Amendment as a defense to suit in federal court." *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1232 (10th Cir. 1999).

It is undisputed that the Secretary is a state official sued in her official capacity for declaratory and injunctive relief. (ECF No. 1; ECF No. 45 at 46.) Accordingly, the Secretary contends that Eleventh Amendment immunity bars Claims 3 and 4, which respectively request relief solely under state law—namely, § 10 of article II of the Colorado Constitution and the Colorado APA. (ECF No. 1 ¶¶ 86, 88–91; ECF No. 42 at 26–27; ECF No. 43 at 29–30.)

The Court agrees. "[T]he United States Supreme Court has previously held that Congress did not abrogate states' Eleventh Amendment immunity when it enacted 42 U.S.C. § 1983." *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002). Further, "supplemental jurisdiction under § 1367 does not override the Eleventh Amendment's bar on suing a state in federal court." *Pettigrew v. Okla. ex rel. Okla. Dep't of Pub. Safety*, 722 F.3d 1209, 1213 (10th Cir. 2013). "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). "This jurisdictional bar applies regardless of the nature of the relief sought." *Id.* Because Claims 3 and 4

request relief solely under state law against a state official, the Eleventh Amendment bars these claims.

InfoCision's two arguments to the contrary are unavailing. First, InfoCision argues that the Secretary has waived Eleventh Amendment immunity by not raising it as an affirmative defense in her Answer. (ECF No. 11; ECF No. 44 at 22–24; ECF No. 45 at 44–46.) But the Secretary was not required to raise Eleventh Amendment Immunity in her Answer and "did not waive [her] immunity by merely participating in the litigation and failing to earlier raise the defense." *Stein v. N.M. Jud. Standards Comm'n*, 2006 WL 8443851, at *2 (D.N.M. Sept. 26, 2006). "The Court will give effect to a State's waiver of Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (internal quotation marks omitted; alteration in original).

Moreover, the Supreme Court has explained that a State may raise immunity from suit at any time during the proceedings, including on appeal. *See Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974). Under these circumstances, the Secretary's decision not to raise this issue earlier in the litigation through a motion to dismiss does not affect her ability to invoke the Eleventh Amendment now. *See Stein*, 2006 WL 8443851, at *2 (while defendant should have raised the immunity defense earlier in the litigation, it did not mean that defendant waived its immunity).

Second, InfoCision argues that because Claims 3 and 4 incorporate federal law, they are not barred by the Eleventh Amendment. (ECF No. 44 at 24–26; ECF

No. 45 at 46–48.) This is a curious argument given that these claims only request relief under state law and do not allege violations of federal law. While InfoCision references the First Amendment and the United States Constitution in these claims, it only requests relief under Colorado's Constitution and APA, and therefore these claims are barred by the Eleventh Amendment. *See Pennhurst*, 465 U.S. at 106 ("This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated state law.").

Therefore, the Court grants summary judgment in favor of the Secretary as to Claims 3 and 4.

VI. CONCLUSION

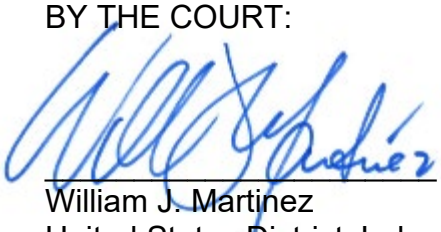
For the reasons stated above, the Court ORDERS:

1. InfoCision Management Corporation's Motion for Summary Judgment (ECF No. 37) is DENIED;
2. Defendant Jena Griswold's Motion for Summary Judgment (ECF No. 43) is GRANTED;
    a. Claims 1 and 2 are DISMISSED with prejudice;
    b. Claims 3 and 4 are DISMISSED without prejudice for lack of subject matter jurisdiction;
3. The Clerk shall enter judgment in favor of Defendant Jena Griswold, in her official capacity as Colorado Secretary of State, and against InfoCision Management Corporation;
4. Defendant shall have her costs upon compliance with D.C.COLO.LCivR 54.1; and

5. The Clerk shall terminate this action.

Dated this 9th day of November, 2021.

BY THE COURT:



William J. Martínez
United States District Judge