No. 25-1248

IN THE
Supreme Court of the United States

RIO GRANDE FOUNDATION,

Petitioner

v.

MAGGIE TOULOUSE OLIVER,
in Her Official Capacity as
Secretary of State of New Mexico,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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Questions Presented

Citizens United and its progeny provide that government disclosure requirements can constitutionally extend to more than just express advocacy or its functional equivalent. Longstanding precedent also provides that disclosure regimes are reviewed under exacting scrutiny. The questions presented are:

1. Whether the court of appeals correctly determined that New Mexico has an informational interest in requiring qualified donor disclosure for communications that necessarily have a political purpose.

2. Whether the court of appeals correctly determined that the donor disclosure requirements within New Mexico's Campaign Reporting Act ("CRA"), N.M. Stat. Ann. §§ 1-19-25 to -36, survive exacting scrutiny.

3. Whether the court of appeals correctly applied exacting scrutiny to review the CRA.

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Introduction

This case concerns Petitioner Rio Grande Foundation's ("RGF") facial challenge to New Mexico's electioneering communication disclosure law. Like other states and the federal government, New Mexico requires the public disclosure of information about large donors who fund election-related advertisements that are disseminated to voters in the days leading up to an election. These laws help voters make informed decisions about messaging that could influence their vote and, in doing so, help promote a healthy democracy.

RGF now asks this Court to revisit settled law—specifically, whether the State's informational interest applies when disclosure is required for organizations engaged solely in issue advocacy; whether disclosure requirements can satisfy narrow tailoring without donor earmarking; and whether disclosures triggered solely by references to candidates are subject to strict rather than exacting scrutiny. Pet. 1.

Out of the gate, and at every step along the way, the petition fails to demonstrate that this case is suitable for the Court to consider these questions.

First, the petition rests on faulty premises. RGF's arguments are predicated on an incorrect portrayal of New Mexico's statutory framework, which the lower courts rejected. As the Tenth Circuit explained, in an exercise of statutory interpretation that the petition does not challenge, various statutory provisions operate in harmony to reach only advertisements that can reasonably be interpreted as supporting or opposing a candidate or ballot measure. Because RGF's questions are grounded in a fundamental misperception of the law's scope, the petition's constitutional analysis is distorted from the outset.

Second, RGF's arguments are foreclosed by precedent. This Court has long held that disclosure regimes may permissibly extend to issue advocacy, and that these regimes are evaluated under exacting, not strict, scrutiny. RGF simply repackages theories already considered and rejected by this Court. Although the narrow-tailoring component of exacting scrutiny was only recently clarified by this Court, the Tenth Circuit ruling here was consistent with other circuits and with this Court's later clarification. Indeed, the petition does not identify a circuit split as to any of the questions it presents—because none exists.

Finally, this case is not a suitable vehicle for reconsidering election disclosure laws. The questions RGF raises are likely not brought into controversy by the facts of this case, and such questions rely on an incomplete and incorrect reading of New Mexico's disclosure law. Moreover, this case involves only a facial challenge, and the record presents too many unresolved threshold questions to even analyze the issues raised. This is not the right case to address the petition's broad constitutional claims.

Statement of the Case

A. New Mexico's Disclosure Regime

New Mexico's Campaign Reporting Act ("CRA"), N.M. Stat. Ann. §§ 1-19-25 to -36, requires the disclosure of major funders of all statutorily defined independent expenditures. N.M. Stat. Ann. § 1-19-27.3. Persons or groups that exceed statutory spending thresholds must disclose the name, address, and amount of contributions for each person who contributed more than $200 in an election cycle "that were earmarked or made in response to a solicitation to fund independent expenditures[.]" N.M. Stat. Ann. § 1-19-27.3(C). Persons or groups spending over an additional monetary threshold must also disclose donors who contributed: (i) more than $200 if the expenditure was made from a separate bank account specifically for independent expenditures, or (ii) more than $5,000 if the expenditure was made in whole or part from a general fund, and the donor did not opt out of disclosure. N.M. Stat. Ann. § 1-19-27.3(D).

An independent expenditure is an expenditure that is made by someone other than a candidate or campaign committee, does not constitute a coordinated expenditure, and is:

> (3) made to pay for an advertisement that:
>
> (a) expressly advocates the election or defeat of a clearly identified candidate or the

> passage or defeat of a clearly identified ballot question;
>
> (b) is susceptible to no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or ballot question; or
>
> (c) 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(Q).[1]

B. Procedural History

RGF and former plaintiff Illinois Opportunity Project filed suit against the New Mexico Secretary of State ("Secretary") in 2019, alleging that the CRA's disclosure and disclaimer requirements violated their First and Fourteenth Amendment rights as applied to mailings they planned to distribute to New Mexico voters before the 2020 general election. Pet. App. 16a, 64a-65a.

[1] Consistent with the lower courts and RGF, the Secretary refers to the subsection at issue in this case as "section (3)(c)."

RGF intended to mail its "Freedom Index," but voluntarily refrained because of the CRA's requirements. Pet. 8. The Freedom Index "track[s] New Mexico state legislators' floor votes on bills important to RGF," Pet. App. 16a, and assigns positive and negative numerical scores to individual New Mexico legislators based on RGF's evaluation. Pet. 29a. Scores are reflected within a circle next to the name and photo of the legislator receiving that score. Positive, higher scores are encapsulated within a green circle, while lower, negative scores are contained within a red circle.[2]

Following the 2020 election, Plaintiffs reframed their claims to challenge the CRA on its face, resulting in litigation and a prior appeal concerning standing and mootness. Pet. App. 65a-66a; *see Rio Grande Found. v. Oliver*, 57 F.4th 1147 (10th Cir. 2023).

District Court Proceedings

On remand, all that remained was RGF's facial challenge to the CRA's disclosure requirement. The parties filed cross-motions for summary judgment. *See* Pet. App. 55a-56a.

In accordance with "long-standing precedent," the district court applied exacting scrutiny and concluded that New Mexico's disclosure law is constitutional. Pet. App. 71a-72a. Also relying on well-established precedent, the district court held that "there is an important informational interest in the disclosure of

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[2] The Freedom Index is also published online: https://perma.cc/9KZZ-5KS9

donors who fund ads that mention a candidate shortly before an election." Pet. App. 82a.

Agreeing with the Secretary's view regarding the most logical way to interpret section (3)(c), the district court rejected RGF's statutory argument that section (3)(c) captures advertisements that do not contain any explicit or implicit advocacy for or against a candidate or ballot question. Pet. App. 86a-87a. Rather, "[t]he timing of the expenditures on ads shortly before an election indicate the political purpose of such ads." Pet. App. 87a.

To address RGF's concerns that general fund donors might not support a particular advertisement, Pet. App. 89, the district court highlighted several statutory provisions that serve to "tighten the fit" between New Mexico's informational interest and the general fund disclosure requirements, including monetary thresholds, opt-out provisions, temporal limitations, and dissemination requirements. Pet. App. 90a-94a.

Concerning RGF's claim that the chilling effect of the disclosure regime outweighs the State's interest, the district court noted that RGF could not substantiate a single instance of retaliation against its donors or provide an example of donors who withdrew or refused donations on grounds related to the CRA's disclosure requirements. Pet. App. 94a-95a. Further, RGF's president admitted that he was not aware of any harassment or retaliation against RGF's employees in its over-twenty-year history. Pet. App.

94a-95a. The court concluded that the record, even construed in RGF's favor, was insufficient to support "a reasonable probability that RGF or other advocacy groups in New Mexico would face threats, harassment, or reprisals from CRA's disclosure requirements that would outweigh the State's important interest in disclosure." Pet. App. 96a-97a.

Finally, the district court assessed whether the disclosure requirements are narrowly tailored to the State's informational interest and determined that numerous features of the CRA serve to ensure the law is narrowly tailored to the State's interest. Pet. App. 98a-103a.

The court ultimately concluded RGF failed to demonstrate that section (3)(c) is unconstitutional on its face. Pet. App. 103a-104a.

Tenth Circuit Court of Appeals

RGF appealed. The Tenth Circuit upheld the ruling of the district court, agreeing that New Mexico's disclosure regime is "substantially related and narrowly tailored to the governmental and public interest in knowing who is funding large election-related advertisements about a candidate or ballot measure shortly before an election." Pet. App. 11a.

Before reaching RGF's constitutional arguments, the Tenth Circuit first analyzed RGF's statutory construction argument. Pet. App. 20a-21a. RGF argued that the district court erred by concluding "that an advertisement published and disseminated shortly before an election, that refers to a candidate or ballot question, has a political purpose under the amended CRA." Pet. App. 21a. Both parties agreed that interpreting the meaning of section (3)(c) was a "threshold question" that "frames the constitutional analysis." Pet. App. 21a.

The Tenth Circuit rejected RGF's statutory argument, concluding that it "misconstrues section (3)(c) and is contradicted by both the text of the CRA and binding precedents." Pet. App. 22a. The court determined instead that various statutory provisions "work in harmony to capture only speech that expressly or implicitly is made for a political purpose." Pet. App. 24a-25a; *see* N.M. Stat. Ann. § 1-19-26(W) (defining a "political purpose" as "supporting or opposing a ballot question or the nomination or election of a candidate"). The court concluded that, to fall within the purview of section (3)(c), "advertisements must be reasonably interpreted as advocacy[.]" Pet. App. 26a-27a. More precisely, "[s]ection (3)(c) advertisements are those that could reasonably be interpreted to advocate for or against a candidate or ballot initiative, even if they are susceptible to another reasonable interpretation of their purpose." Pet. App. 23a-24a.

RGF's incomplete view of the statute rippled through its constitutional arguments. RGF conceded "that there is an important governmental interest in the public knowing who is advocating for or against candidates and ballot questions." Pet. App. 28a. But it maintained, relying on its interpretation of the statute, that section (3)(c) advertisements "do not advocate for or against candidates or ballot questions" and therefore "disclosures would 'tell voters absolutely nothing.'" Pet. App. 28a.

The Tenth Circuit rejected this argument. Given that "section (3)(c) covers only those advertisements that can reasonably be interpreted to have a political purpose," Pet. App. 28a-29a, the court concluded that "disclosure of these expenditures would provide the public with information about who is advocating for or against a candidate or ballot question." Pet. 29a. Because section (3)(c) advertisements have a political purpose, the court had "no trouble concluding that New Mexico has an important governmental interest to give the electorate useful information about who is paying for these advertisements." Pet. App. 32a.

The court then examined RGF's Freedom Index, concluding that its color-coding and numerical score "reflect[] an obvious intent by RGF to influence voters to vote for and against specific legislators." Pet. App. 28a-30a. The court explicitly rejected RGF's assertion that the Freedom Index's color-coding was "meaningless," opining that the advertisement's advocacy is so obvious that it would likely be captured under section (3)(b) rather than (3)(c). Pet. App. 29a n.8. In addition, the court observed that RGF had not argued the Freedom Index qualified as a "nonpartisan voter guide," which is exempted from the CRA's definition of "advertisement[.]" Pet. App. 30a n.9.

The court next considered the relationship between the State's interest and the CRA's disclosure provisions. Again, the arguments advanced by RGF were "dependent upon its interpretation of the breadth of section (3)(c)[.]" Pet. App. 33a. The court explained that, "given the best textual interpretation of section (3)(c), the relationship between the [S]tate's informational interest in election advocacy communications and the disclosures is somewhat self-evident." Pet. App. 33a. And several statutory provisions serve to limit the disclosure requirements, such that "the CRA focuses on large donors who do not opt out of supporting advertisements and who support expenditures designed to influence the relevant electorate, within a short period of time prior to an election." Pet. App. 34a (text only).

Turning to narrow tailoring, the court concluded that the CRA is narrowly tailored to the State's interest, highlighting several provisions of New Mexico's disclosure regime including its "(1) temporal limitations, (2) monetary thresholds, (3) earmarking, (4) the opt-out provision, and (5) geographic range." Pet. App. 35a. The court explained that "[t]he CRA limits disclosure requirements to relatively large independent expenditures made shortly before an election, targeting New Mexico voters, and it provides an opt-out for the donors." Pet. App. 35a. In sum, "the CRA requires the disclosure of major funders of significant election advertisements, while closing loopholes that would leave the CRA toothless." Pet. App. 35a (cleaned up).

Lastly, the court discussed RGF's evidence of chilled speech, concluding it failed to "establish a present harm to defeat the [S]tate's informational interest" and that RGF's "concerns were untethered from concrete facts that would permit a court to find 'a reasonable probability that [the disclosure requirements] will subject them [donors] to threats, harassment, or reprisals.'" Pet. App. 39a (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

Judge Hartz concurred, joining the opinion in full because "it properly follows controlling precedent." Pet. App. 42a. Although Judge Hartz opined that "disclosure of expenditures on ballot initiatives" may not be a wise policy choice, he still agreed that precedent required holding section (3)(c) constitutional. Pet. App. 42a-43a.

Judge Eid dissented, viewing section (3)(c) as "fail[ing] at the narrow-tailoring step of the analysis because it casts too wide a net[.]" Pet. App. 44a. Unlike RGF's focus on the meaning of section (3)(c), the dissent primarily engaged with the actual disclosure requirements. *See* Pet. App. 50a-54a. "[A]ssuming the disclosure requirement for [s]ection (3)(c) advertisements bears a substantial relation to a sufficiently important informational interest," Judge Eid concluded that "New Mexico has not shown the disclosure requirement is narrowly tailored to that interest." Pet. App. 48a-49a.

RGF petitioned for en banc review, which the Tenth Circuit denied. Judge Eid wrote a dissent from that decision, in which she reiterated her prior concerns and additionally suggested that the CRA's temporal scope is too expansive. Pet. App. 6a-7a.

Reasons for Denying the Petition

I. The Questions RGF Asserts are Not Properly Before the Court Because the Petition Rests on Mistaken Premises.

A. The petition relies on faulty propositions.

The petition gives short shrift to the Tenth Circuit's opinion, ignoring key rulings that are essential to a complete understanding of this case and the issues RGF asks this Court to review.

In particular, the petition ignores altogether two crucial components of the Tenth Circuit's opinion, in which it expressly rejected RGF's arguments concerning: (1) the scope of the statutory disclosure regime and (2) the nature of RGF's Freedom Index. As a result, the petition does not accurately portray this case and the issues it presents.

1. The petition mischaracterizes section (3)(c) advertisements.

New Mexico requires certain disclosures when significant amounts of money are used to fund political advertisements, including those that "refer[] to a clearly identified candidate or ballot question and [are] 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(Q)(3)(c).

Below, the parties presented vastly different views about the scope of advertisements captured by section (3)(c). RGF argued that section (3)(c) reaches advertisements that contained no express or implied advocacy, while the Secretary maintained that covered advertisements necessarily have a political purpose as defined in the statute. Nonetheless, RGF and the Secretary did agree on one thing: interpreting section (3)(c) is "a threshold question" that "frames the constitutional analysis." Pet. App. 21a. Indeed, RGF's statutory construction argument bled heavily into its constitutional arguments. *See* Pet. App. 32a-33a.

The Tenth Circuit employed basic principles of statutory construction to explicitly reject RGF's reading of the CRA. The court reasoned that the disclosure requirement applied only to advertisements "that expressly or implicitly [are] made for a political purpose." Pet. App. 24a-25a. That is, "section (3)(c) advertisements are those that could reasonably be interpreted to advocate for or against a candidate or ballot initiative[.]" Pet. App. 23a-24a.

RGF does not ask this Court to review the Tenth's Circuit's construction of New Mexico's CRA. Rather, RGF sidesteps this threshold question entirely, instead maintaining its own flawed view that section

(3)(c) requires disclosures when a political advertisement "simply mentions a candidate[.]" Pet. 15. According to RGF, "New Mexico has gone beyond the bounds of informing the public on who supports candidates by requiring donor disclosure when issue advocacy groups merely mention a candidate's name within a defined pre-election window." Pet. 14.

But the Tenth Circuit rejected this notion, in no uncertain terms, when it held that advertisements "must be reasonably interpreted as advocacy . . . to properly fall within the purview of section (3)(c)[.]" Pet. App. 26a-27a.

2. The petition misrepresents the Freedom Index.

The petition's faulty narrative does not end with the statute.

RGF asserts that its Freedom Index is merely "a scorecard" that "does not exhort the public to vote for or against a specific candidate." Pet. 8; Pet. App. 76a. This description is not only incomplete, but the court of appeals soundly rejected it.

The Tenth Circuit concluded that the Freedom Index's combination of color coding and scores "reflects an obvious intent by RGF to influence voters to vote for and against specific legislators." App. 29a-30a. Rejecting RGF's assertion that the colors were "meaningless," the court explained, "[t]here is no doubt that RGF intends for the 'green' to signify a good or favorable candidate, while red signifies a bad or unfavorable candidate." Pet. App. 29a. "After all, in this country we are hard-wired to know that green means go, and red means stop." Pet. App. 29a.

In light of the Freedom Index's obvious intent to influence voters, the Tenth Circuit noted that it was likely to fall within section (3)(b), rather than (3)(c), "because it 'is susceptible to no other reasonable interpretation than an appeal to vote for or against a clearly identified candidate[.]'" Pet. App. 29a-30a n.8 (quoting N.M. Stat. Ann. § 1-19-26(Q)(3)(b).[3] So, it is not accurate to say that this case "undisputedly" involves "speech that is neither express advocacy nor its functional equivalent[.]" Pet. 15.

Yet, RGF continues to describe the Freedom Index as a "scorecard that mention[s] candidates but [does] not advocate for or against their election." Pet. 8. The Tenth Circuit's contrary conclusion—which, again, RGF has not asked this Court to review—cannot be reconciled with its portrayal in the petition.

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[3] Because the petition only concerns section (3)(c), *see* Pet. 7, this conclusion raises yet another threshold question as to whether RGF has standing to maintain arguments premised on section (3)(c). *See* § III.A., *infra*.

B. RGF's choice to ignore the Tenth Circuit's rulings on these threshold matters is fatal to its petition.

The petition does not explain, much less engage with, the Tenth Circuit's rulings interpreting the CRA and the Freedom Index. As a result, the petition presents a distorted view of the case and the issues it presents. Because each question the petition presents is based on incorrect premises regarding the meaning of section (3)(c) and the Freedom Index, this case does not actually place those questions in controversy.

RGF asks this Court to grant the petition to assess when and how a disclosure regime may be applied to "issue advocacy organizations" that do not advocate for or against candidates. That theme runs through each of its three questions presented and Reasons for Granting the Writ. Its first Reason for Granting is that "[t]here is no government informational interest to justify donor disclosure for *pure issue advocacy*." Pet. 13 (emphasis added). Its second Reason insists that "disclosure regulations can never be properly tailored when applied to undisputed issue advocacy groups that do not engage in express advocacy or its functional equivalent." Pet. 18-19. And its third Reason is that "[d]isclosure requirements targeting *pure political speech* should satisfy strict scrutiny, not exacting scrutiny." Pet. 24 (emphasis added). RGF goes so far as to maintain that section (3)(c) "applies only because of the topic discussed: if an ad mentions a candidate or ballot question close to an election, then the disclosure requirements apply." Pet. 24.

In short, the entire premise of RGF's arguments is that it engaged in pure issue advocacy, entirely disconnected from the support of any candidate.

But as explained, the Tenth Circuit expressly concluded otherwise in an unchallenged exercise of state-law statutory construction and in its assessment of the Freedom Index. The court interpreted section 3(c) to reach only advertisements "that could reasonably be interpreted to advocate for or against a candidate or ballot initiative." Pet. App. 23a-24a. And it construed the Freedom Index as doing just that. RGF has not asked this Court to review either ruling; it just pretends they do not exist.

Although these threshold matters are necessary before reaching the questions presented in the petition, they cannot be said to be "fairly included" within the questions RGF presents. Rule 14.1(a). Simply put, the questions cannot fairly be read to include consideration of whether RGF is a "pure issue advocacy" organization because the petition asserts that this is undisputed. And the Freedom Index itself belies any argument that RGF only engages in issue advocacy that simply "mentions," rather than advocates for or against, political candidates.

By failing to engage with the Tenth Circuit's holistic reading of the CRA, the petition raises issues that are not actually presented by this case. The petition should be denied. *Cf. Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (explaining that the Court "does not sit to satisfy a scholarly interest in" issues that, "abstractly considered, . . . may present an intellectually interesting and solid problem"); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring in the judgment) ("The nature of judicial review constrains us to consider the case that is actually before us.").

II. The Petition Fails to Identify a Basis for Certiorari.

A. The decision below does not conflict with this Court's precedent.

RGF suggests that the decision below is contrary to *Citizens United* on the grounds that *Citizens United* "does not resolve" whether disclosure requirements can extend to advertisements that are not express advocacy or its functional equivalent. Pet. 14-18. RGF also suggests conflict with *Buckley* and *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 607 (2021) ("*AFPF*"), by arguing that "applying a disclosure regime to an organization that fails *Buckley*'s major purpose test cannot satisfy narrow tailoring absent donor earmarking." Pet. 18-23. Neither suggestion is well taken.

1. This Court has already determined that disclosure laws are not constitutionally limited to only express advocacy or its functional equivalent.

In *Citizens United*, this Court "reject[ed] Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy" because disclosure laws are "a less restrictive alternative to comprehensive regulations of speech." 558 U.S. 310, 369 (2010). In other words, this Court has already resolved the issue RGF raises. Pet. 13-17. The Tenth Circuit simply obeyed the command of *Citizens United* in rejecting RGF's same arguments below. Pet. App. 28a-32a. Judge Hartz, who expressed personal disagreement with the New Mexico Legislature's policy choices in his concurrence, nevertheless acknowledged that applying this Court's precedent requires upholding section (3)(c). Pet. App. 42a. And even in dissent, Judge Eid focused on the tailoring aspect of the inquiry under *AFPF*, arguing that certain earmarking is necessary to make section (3)(c) constitutional. Pet. App. 44a, 52a-54a. She did not endorse RGF's strained reading of *Citizens United*, Pet. 14-15, or its argument that a state can never require disclosure for issue advocacy. The Tenth Circuit's agreement on *Citizens United*'s application makes this an open and shut case.

Still, RGF tries to muddy the waters. It first suggests that this Court got it wrong in *Citizens United*, arguing that *Citizens United*'s treatment of disclosure laws "lacks thorough analysis and rests on shaky authority in an opinion focused on other First Amendment issues." Pet. 14-17. In RGF's view, the Tenth Circuit should not have applied *Citizens United*'s directive because "[t]hat holding does not resolve—and should not be read to resolve—whether disclosure requirements may constitutionally extend to speech that is neither express advocacy nor its functional equivalent." Pet. 14-15. On that basis, RGF argues that "the Tenth Circuit's application of *Citizens United* to this case therefore exceeds this Court's holding." Pet. 15.

RGF's claim is simply wrong. The words in the opinion mean what they say: in *Citizens United*, this Court "rejected" the contention that "disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. at 369. It is of no consequence that this conclusion was preceded by "only a four-sentence paragraph" or that the ad at issue in *Citizens United* was "a film designed to influence voters[.]" Pet. 14-15. Further, this Court considered its prior precedent, including the same authorities and arguments RGF relies on now—*Buckley* and *Wisconsin Right to Life v. Federal Election Commission*, 551 U.S. 449 (2007) (Pet. 14-17)—in reaching its conclusion. *Citizens United*, 558 U.S. at 366-71; *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 193 (2003) ("Nor are we persuaded . . . that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy."), *overruled on other grounds by Citizens United*, 558 U.S. 310.

Any claim that the Tenth Circuit "exceeded" *Citizens United*'s holding ignores the reasoning and words this Court chose and improperly suggests that the Tenth Circuit should have done the same. *See Hutto v. Davis*, 454 U.S. 370, 374 (1982) ("[A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

Moreover, *Citizens United*'s reasoning draws no distinction between express advocacy and advocacy that could be interpreted as less than express. Instead, it focused on the political intent and the timing of publication in proximity to an election, noting that disclosure for ads that referred to a candidate by name shortly before an election "provid[es] the electorate with information" and "insure[s] that voters are fully informed" about who is speaking. 558 U.S. at 366-68 (quoting *Buckley*, 424 U.S. at 66, 76) (internal quotation marks omitted). And while the Court acknowledged that "[*Wisconsin Right to Life*] limited [the Bipartisan Campaign Reform Act's] restrictions on independent expenditures to express advocacy and its functional equivalent," *id.* at 368-69 (internal citation omitted), it rejected that such reasoning would apply in the context of disclosure because, unlike independent expenditure limits, disclosure "is a less restrictive alternative to more comprehensive regulations of speech." *Id.* (also relying on *Buckley*). The arguments

RGF submits have therefore already been considered—and rejected—by this Court.

As demonstrated through conspicuous consistency in the lower courts, this Court's directive in *Citizens United* is beyond dispute. *See* Pet. App. 26a n.6 (collecting cases); *see also Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 548-53 (4th Cir. 2012).

And just a month ago, this Court reaffirmed the stark connection between disclosure laws and the government's interests in campaign finance regulation. *See Nat'l Republican Sen. Comm. v. FEC*, No. 24-621, slip op. at 16-20 (U.S. Jun. 30, 2026) ("*NRSC*"). *NRSC* strongly suggests that disclosure requirements are among the most constitutional methods of campaign finance regulation. *Id.* The Court also acknowledged that disclosure laws have become much more effective at accomplishing their purpose "given continued technological advances." *Id.* at 17.

The law is already settled, and the Tenth Circuit's rejection of RGF's issue advocacy arguments aligns with this Court's precedent.

2. RGF's narrow tailoring arguments are likewise unmoored in precedent.

Relying on the dissent below, RGF argues that "it is impossible to properly tailor a disclosure regime applied to an issue advocacy organization that does not engage in express advocacy or its functional equivalent." Pet. 20-23. Thus, RGF suggests conflict with *Buckley* or *AFPF*.

First, RGF's argument that a state cannot constitutionally require disclosure for issue advocacy is foreclosed by *Citizens United* for the same reasons discussed above. *See* § II.A.1., *supra*. And because RGF's narrow tailoring arguments are predicated on its issue advocacy arguments, Pet. 14-17, its narrow tailoring arguments likewise fail.

Second, the Tenth Circuit faithfully applied exacting scrutiny. It recognized that the CRA's temporal limitations, monetary thresholds, earmarking, and geographic range "limit[] disclosure requirements to relatively large independent expenditures made shortly before an election, targeting New Mexico voters, and [that the CRA] provides an opt-out for the donors." Pet. App. 35a. Based on these limitations, the CRA "requires the disclosure of major funders of significant election advertisements, while closing loopholes that would leave the CRA toothless." Pet. App. 35a (cleaned up).

The Tenth Circuit balanced the need to further the State's informational interest with any potential burdens on association, recognizing that narrow tailoring does not require opening loopholes that would defeat the disclosure requirement altogether, as narrow tailoring does not require least restrictive means.[4] Pet. App. 35a-36a; *see* Pet. App. 90a-94a (comparing the CRA's disclosure regime with the disclosure regimes that did not survive exacting scrutiny).

The Tenth Circuit was correct that *AFPF* does not require New Mexico to have taken all possible limiting measures as the dissent and RGF assert. Pet. App. 35a; *see* Pet. 18-23; Pet. App. 52a. Requiring such measures to survive exacting scrutiny would import a "least restrictive means" standard into exacting scrutiny, which is inconsistent with *AFPF* and its predecessors. Those cases are clear that strict scrutiny does not apply. *AFPF*, 594 U.S. at 607-08. And "when the Court is not applying strict scrutiny," it requires "a fit that is not necessarily perfect, but reasonable." *McCutcheon v. Fed. Election Comm'n,* 572 U.S. 185, 218 (2014) (plurality opinion) (cleaned up).

Further, the dissent's view is hard to square with *NRSC*. If earmarking that *strengthens* a disclosure scheme's prophylactic reach is constitutional, No. 24-621, slip op. at 16-20, then narrow tailoring cannot require provisions that overly *weaken* the disclosure

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[4] On one hand, if the CRA's disclosure requirements only captured earmarked donations, or those made from a segregated fund, organizations that do not utilize earmarking or separate accounts could escape disclosure altogether. On the other hand, if New Mexico's disclosure regime *required* earmarking and the use of segregated funds, those groups might be forced to change their accounting practices. The CRA avoids either extreme by striking a careful balance between the state's interest and the burdens of disclosure.

scheme by creating complete loopholes to disclosure, such as those suggested in the dissent, Pet. App. 51a-52a.

Finally, RGF, its amici, and the dissent disregard that RGF produced no evidence that the CRA's disclosure requirements have caused its members' associational rights to be chilled. Pet. App. 38a-40a n.11. That is significant because *AFPF* suggests that a plaintiff must show "that donors to a substantial number of organizations will be subjected to harassment and reprisals." *See* Pet. App. 38a-40a (citing *AFPF*, 594 U.S. at 617). That lack of evidence discredits the notion that section (3)(c)'s disclosure requirements are not "proportionate to the interest served." *AFPF*, 594 U.S. at 609 (cleaned up).

B. There is no circuit split.

RGF does not even attempt to identify a circuit split. Indeed, there are no conflicting decisions from any United States Court of Appeals. Rather, like other courts before it, the Tenth Circuit faithfully applied precedents like *Citizens United* and *AFPF* to a state or local disclosure regime.

Notwithstanding a distinct lack of circuit split on the issues presented to this Court, amici supporting RGF contend one exists anyway. *See* Br. of Amicus Curiae National Taxpayers Union Foundation and People United for Privacy Foundation ("Taxpayers" or "Taxpayers Br."). Taxpayers assert there is a split as to "whether an organization must have a 'major purpose' of political activity before campaign finance obligations attach[.]" Taxpayers Br. 8.[5]

But the cases Taxpayers cite are distinguishable or otherwise contain reasoning foreclosed by subsequent precedent.

North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 286-91 (4th Cir. 2008), applied *Buckley*'s major purpose test to strike down a North Carolina law's definition of "political committee." First, the CRA's definition of "political committee" is not at issue in this case, as RGF challenges only section (3)(c) and does not dispute that it qualifies as a political committee as that term is defined in New Mexico's CRA. Pet. 7; Pet. App. 13a. Second, the CRA does not have identical features to the North Carolina law in *Leake*. But even if *Leake* were somehow relevant, it is a pre-*Citizens United* case. *See* § II.A.1., *supra*.

Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021 (9th Cir. 2009), is another pre-*Citizens United* case. It therefore offers no aid to Taxpayers' claim of a circuit split as to *Buckley*'s "major purpose." *Cf. Citizens for Resp. & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 90-91

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[5] It is questionable whether the issue at the center of this purported split is even properly before the Court because RGF did not raise a "major purpose" argument below. *See* § III.A., *infra*.

(D.C. Cir. 2016) (collecting cases and observing that "federal appellate courts have resoundingly concluded that [*Wisconsin Right to Life*'s] constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context"). And among other differences with the CRA, the law at issue in *Unsworth* had a zero-dollar spending threshold, and the Ninth Circuit's analysis was focused on how that burdened *de minimis* donors. 556 F.3d at 1033-35. Here, the CRA's higher spending thresholds do not burden *de minimis* donors, nor does RGF assert as much, centering its narrow tailoring arguments on the disclosure requirements involved for donations exceeding $5,000. Pet. 20-23.

Taxpayers' reliance on *Minnesota Citizen Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (en banc), is likewise unavailing. *Swanson* involved a challenge to Minnesota's committee registration requirements that the Eighth Circuit saw as abridging "the right to engage in political speech through independent expenditures." 692 F.3d at 870. In contrast, RGF's challenge concerns only required disclosures for section (3)(c) advertisements, not the CRA's registration requirements or any limitation on independent expenditures (indeed, the CRA does not limit independent expenditures, nor does it require all donors to register as a "political committee"). Further, *Swanson*'s discussion of *Buckley*'s major purpose test is rife with pre-*Citizens United* cases. *See Swanson*, 692 F.3d at 872-73. Finally, the Eighth Circuit did not have the benefit of many Supreme Court or circuit cases after *Citizens United*, such as *AFPF*, which "sutured shut" any suggestion that issue advocacy is treated differently than express advocacy when evaluating disclosure regimes. *See CNH Indus. N.V. v. Reece*, 583 U.S. 133, 138 (2018) (noting Judge Sutton's argument that a purported split was already resolved by intervening Supreme Court precedent (citation omitted)); *AFPF*, 594 U.S. at 608 ("[I]t is immaterial to the level of scrutiny whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." (internal quotation marks and citation omitted)); Pet. App. 26a n.6 (collecting cases).

In sum, the purported circuit split advanced by Taxpayers is nothing more than courts applying the law to different circumstances, or cases that did not account for intervening changes in the law.

III. This Case is an Exceptionally Poor Vehicle to Address the Issues Raised in the Petition.

This case is not well-suited to considering the questions presented in the petition, which ask the Court to consider expansive departures from precedent. First, the questions presented are disconnected from the actual case to such an extent that RGF may lack standing to pursue them. Second, as this case arises from RGF's facial challenge, the record is sparse and insufficient to adequately assess the issues raised.

A. The petition fails to demonstrate that the questions it presents are properly before the Court.

As discussed, the petition advances a faulty narrative, relying on fundamental premises that were rejected by the Tenth Circuit. *See* § I, *supra*. RGF's repeated insistence that this case involves regulation of "pure issue advocacy" cannot be reconciled with the Tenth Circuit's statutory interpretation ruling and its assessment of the Freedom Index.

That disconnect undermines each of the questions presented and raises serious questions about whether the petition involves an actual case or controversy.

And RGF does not challenge the statutory disclosure requirement for ads containing express advocacy or its functional equivalent under sections (3)(a) and (3)(b)—even though the Tenth Circuit suggested that the Freedom Index might more properly be characterized as falling within section (3)(b). Pet. App. 29a-30a n.8. The petition takes no issue with the Court's precedent recognizing the government's informational interest in requiring disclosure for express advocacy or its functional equivalent.

If the only ad at issue, the Freedom Index, falls within section (3)(b) and RGF does not dispute the constitutionality of section (3)(b), then there is no case or controversy. This is more than a vehicle problem—it is a jurisdictional one.

Although the Secretary conceded below that the Freedom Index "may fall under section (3)(c)," Pet. App. 30a n.8, concessions below applying law to fact do not bind this Court. *See, e.g.*, *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289-90 (1917) (considering the parties' stipulation to the legal effect of admitted facts as "a nullity" because "the court cannot be controlled by agreement of counsel on a subsidiary question of law"); *see also Sanford's Est. v. Comm'r of Internal Rev.*, 308 U.S. 39, 51 (1939) (acknowledging that the Court "is not bound to accept, as controlling, stipulations as to questions of law").

Nor can the parties' concessions of law cure a jurisdictional deficit caused by a lack of actual controversy. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-96 (1998) (citing *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 73 (1997)).

Regardless of what happened below, Article III's jurisdictional requirements "cannot be waived or forfeited." *Va. House of Delegates. v. Bethune-Hill*, 587 U.S. 658, 662 (2019). Rather, without proper jurisdiction, the Court "can only note the jurisdictional defect and dismiss the suit." *Citizens for a Better Env't*, 523 U.S. at 85.

At a minimum, standing is far from assured in this case.

In addition, at least one of the questions RGF presents was not raised below. RGF's second Question Presented asks the Court to consider "whether applying New Mexico's disclosure regime to an organization that does not meet *Buckley*'s 'major purpose' test and does not engage in express advocacy, like Petitioner, constitutes narrow tailoring under exacting scrutiny absent donor earmarking." Pet. i. Although RGF unquestionably argued about the scope of permissible regulation, it did not raise the "major purpose" argument below that it now seeks to advance.

Notwithstanding that RGF's "major purpose" argument is foreclosed by precedent, this case is not a good vehicle to further consider whatever relevance a group's major purpose may have on the applicability of disclosure requirements. RGF did not raise the argument below and has therefore forfeited it. *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below." (internal quotation marks omitted)); *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003) ("[I]n the absence of consideration of [a] matter by the Court of Appeals, we shall not consider it."); *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals[.]"). And in any event, that argument is foreclosed by precedent. *See* § II, *supra*.

B. RGF's facial challenge is not a suitable means through which to answer the questions it presents.

A facial challenge is not well-suited to reviewing the questions RGF presents. "For a host of good reasons, courts usually handle constitutional claims case by case, not en masse." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). Those reasons are illuminated here.

RGF argues that New Mexico's law is not narrowly tailored, homing in on misgivings raised in the dissent below. But those concerns are largely based on speculation rather than concrete evidence. Indeed, "[c]laims of facial invalidity often rest on speculation." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

Much of the dissent's concerns stem from the requirement to disclose general fund donors.[6] Pet. 21a; Pet. App. 50a-54a. But RGF has not shown that a substantial number of the disclosures made under the CRA involve general fund donors, as opposed to

[6] In dissenting from the denial of en banc review, Judge Eid raised additional concerns about various temporal components of the statute. Pet. App. 6a-7a. Although RGF points to this in its petition, Pet. 21, it has not raised arguments of this nature until now. *See generally Clark v. Sweeney*, 607 U.S. 7, 9-10 (2025) (discussing the importance of party presentation).

earmarked donations or those made from a segregated fund. *See AFPF*, 594 U.S. at 615 ("[A] law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (internal quotation marks and citation omitted)).

Under New Mexico's disclosure scheme, general fund donor disclosures are only required if an organization uses its general fund to fund political advertisements, the cost of the advertisement and the donation exceed sizeable monetary thresholds, and a donor elects not to opt out of disclosure. N.M. Stat. Ann. § 1-19-27.3(C), (D). Where those thresholds are not met, or where an organization uses earmarked donations or a segregated fund to pay for the advertisements, disclosure of general fund donors is not required. *Id*.

The record here is devoid of evidence demonstrating that the disclosure of general fund donors is "broad-sweeping" as the dissent suggests. Pet. 51a. Nor is there evidence to support the notion that "donors may not understand the need to opt out of advertisements they do not recognize as advocacy." Pet. App. 52a-53a. Notably, this case does not involve a vagueness challenge and RGF has not argued that the CRA's disclosure provisions are difficult to understand, impossible to comply with, or onerous.

Even if the general fund donor disclosure provision were cause for concern, the record is insufficient to conclude that "the ratio of unlawful-to-lawful applications is . . . lopsided enough to justify the strong medicine of facial invalidation for overbreadth." *United States v. Hansen*, 599 U.S. 762, 784 (2023) (internal quotation marks and citation omitted).

Finally, the record in this case does not demonstrate that New Mexico's disclosure regime is "silenc[ing] those who wish to speak." Pet. 27; *see also* Pet. 2. "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute." *Buckley*, 424 U.S. at 68. But "[t]he record of chill here is scant and speculative[,]" Pet. App. 40a n.11, and generalized concerns cannot "de facto invalidate every disclosure law[.]" Pet. App. 94a (citing *Buckley*, 424 U.S. at 68-74). *Contra AFPF*, 594 U.S. at 617 (noting the petitioners "introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence" and that hundreds of organizations appeared as amici to raise privacy concerns about the law at issue).

"In the First Amendment context, fit matters." *Id.* at 609 (text only). The petition asks this Court to address what it views as a "dramatic mismatch" between the government's interest and the CRA's disclosure regime, but it has not developed any record demonstrating such mismatch. This case is not a good vehicle to further examine New Mexico's CRA or to consider the sweeping departures from precedent contemplated in RGF's petition.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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