No. 25-1248

IN THE

Supreme Court of the United States

RIO GRANDE FOUNDATION,

Petitioner

v.

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

Respondent.

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

---

Reply to Brief in Opposition

Jeffrey M. Schwab
Counsel of Record
Ryan Morrison
Liberty Justice Center
7500 Rialto Blvd.
Austin, Texas 78735
512-481-4400
jschwab@ljc.org
rmorrison@ljc.org

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

Argument

This Court has long held that the First Amendment freedom of association limits the government's ability to compel nonprofits to disclose their donors—a protection that is most acute when the nonprofit organization engages in pure issue advocacy. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606–07 (2021). The government may nonetheless require a nonprofit that makes independent expenditures expressly or impliedly advocating the election or defeat of a candidate to disclose its donors, subject to exacting scrutiny.

The petition addresses the gray area in between: whether a government may compel donor disclosure by a nonprofit whose speech merely mentions a candidate shortly before an election, but neither expressly advocates nor can be reasonably interpreted as advocating the candidate's election or defeat.

The Tenth Circuit held that it may. *Rio Grande Found. v. Oliver*, 154 F.4th 1213, 1224–27 (10th Cir. 2025). And states increasingly compel issue-advocacy organizations that neither expressly nor impliedly advocate for or against candidates to disclose their donors simply because their speech happens to mention one.

This Court should grant the petition to protect these organizations' and their donors' associational rights, and to clarify: (1) the scope of a government's informational interest as applied to speech that merely mentions, but does not advocate for or against, a candidate; (2) the narrow-tailoring element of exacting scrutiny; and (3) that disclosure requirements targeting pure political speech demand strict, not exacting, scrutiny.

In response to Rio Grande Foundation's (RGF) petition, the Secretary attempts to obscure these questions and cast this case as a poor vehicle by raising state-law issues neither relevant to nor addressed by the courts below, and by manufacturing factual disputes she conceded below. Those efforts fail, and this Court should grant the petition.

I. The Secretary's state-law arguments present no vehicle problem.

The Secretary insists that this case turns on questions of state law that could defeat RGF's standing and that RGF misrepresents the case. Opp. 13–18, 29–30. Not so.

A. The parties stipulated that section (3)(c) governs, and the Secretary cannot disavow that concession.

New Mexico requires donor disclosures for independent expenditures—advertisements that (a) expressly advocate for or against a candidate or ballot question; (b) are susceptible to no reasonable interpretation other than as express advocacy; or (c) "refer[] to a clearly identified candidate or ballot question and [are] published and disseminated" to the relevant New Mexico electorate within 30 days of a primary or 60 days of a general election. N.M. Stat. Ann. § 1-19-26(Q)(3).

The parties stipulated that RGF's Freedom Index falls under section (3)(c), not (3)(a) or (3)(b). Opp. 29.

The question presented is therefore whether New Mexico may, consistent with the First Amendment, compel RGF to disclose its donors simply because it published the Index—pure issue speech that is neither express advocacy nor its functional equivalent—shortly before an election. The Tenth Circuit held that it may. App. 40a. No other state-law question is at issue.

The Secretary nonetheless contends that because the Tenth Circuit observed that the Index might fall under section (3)(b)—a section which RGF has not challenged—no actual controversy exists despite the stipulation that section (3)(c) governs. Opp. 15 n.3, 29–30 (citing App. 29a–30a n.8).

That misreads the decision below. The Tenth Circuit thought the Index likely fell under section (3)(b), but accepted the Secretary's concession that it fell under (3)(c) and analyzed it as a (3)(c) advertisement. The Secretary now asks this Court to disregard that very concession to manufacture a standing defect. She may not. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter . . . assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him").

B. RGF has standing.

Stipulations routinely frame the controversy and establish standing. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 582–83, 587, 593–94, 598–99 (2023) (relying on the parties' stipulations to establish the case or controversy). The Tenth Circuit never questioned RGF's standing despite believing the Index might fall under section (3)(b). RGF has standing.

II. The Freedom Index is pure issue advocacy, making this an ideal vehicle.

The Secretary also accuses RGF of misrepresenting its Freedom Index. Opp. 14–15. Not so.

A. The Index's color-coded scores are incidental to grading past legislative votes.

The Index tracks legislators' floor votes on bills important to RGF. App. 61a. It is "a scorecard about specific legislators' votes, mentions incumbent legislators by name, but does not exhort the public to vote for or against a specific candidate." App. 76a. It reports how legislators voted; it does not tell anyone how to vote.

The parties agreed, and the Tenth Circuit acknowledged, that the Index is not express advocacy or its functional equivalent. App. 30a n.8, Opp. 30.

The Secretary and the Tenth Circuit nonetheless found an "obvious intent . . . to influence voters to vote for and against specific legislators," because the Index assigns each legislator a numerical score highlighted in green or red. Opp. 14–15; App. 29a–30a. That is wrong.

The color-code scores are incidental to the Index's purpose—grading current *legislators* on bills important to RGF. "Legislators who supported legislation RGF deems favorable receive higher scores in green, while those who did not support this legislation receive lower scores in red." App. 29a.

The Index cannot tell anyone how to vote because it scores only the incumbent legislator's past votes—not the positions of whoever is running against that legislator. Because voters choose among the candidates actually before them, the score reveals nothing about who to choose in any given race: a voter fully aligned with RGF might rationally favor an incumbent scored in red if the challengers' positions are worse or reject one scored in green if a challenger's are better. Grading a single candidate's past legislative votes is not advocacy for or against that candidate in an election.

B. The Secretary's "intent to influence" theory would collapse section (3)(c) into (3)(b).

Because the Index grades legislators' past votes rather than appraising the candidates in any race, it does not seek to influence voters and is properly categorized under section (3)(c). The Secretary's contrary theory proves too much. Any expenditure reflecting an "obvious intent by [the speaker] to influence voters to vote for and against specific legislators," App. 30a, would necessarily be "susceptible to no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or ballot question," N.M. Stat. Ann. § 1-19-26(Q)(3)(b)—that is a section (3)(b) expenditure. The Secretary's reading would thus write subsection (3)(c)—which reaches ads that merely mention a candidate without expressly advocating—out of the statute.

C. Issue advocacy that merely mentions a candidate may not be regulated like express advocacy.

This Court has recognized that "the distinction between campaign advocacy and issue advocacy may often dissolve in practical application" but held that is not enough to permit regulating the speech. *Wis. Right to Life, Inc. v. Fed. Election Comm'n,* 551 U.S. 449, 474 (2007) (cleaned up). "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.*; *see also Citizens United*, 558 U.S. at 327 ("First Amendment standards, however, 'must give the benefit of any doubt to protecting rather than stifling speech.'" (quoting *Wis. Right to Life*, 551 U.S. at 469)). The Court further posited that "the interests held to justify the regulation of campaign speech and its functional equivalent might not apply to the regulation of issue advocacy," *id.* at 457 (internal quotation marks omitted)—precisely the kind of speech the Freedom Index embodies.

It logically follows that issue advocacy that simply mentions a candidate or ballot question shortly before an election should not be regulated like express advocacy or its functional equivalent. Because the Index is subject to subsection (3)(c)—reaching pure issue speech that merely mentions a candidate, not express advocacy or its functional equivalent—it presents that question cleanly. This case is therefore an ideal vehicle to decide whether the government may compel an issue-advocacy organization to disclose its donors simply because its speech mentions a candidate shortly before an election, without expressly or impliedly supporting or opposing that candidate. This Court should grant the petition and adopt *Wisconsin Right to Life*'s reasoning on issue advocacy.

III. *Citizens United* neither decided nor forecloses the question in this case.

A. *Citizens United* did not decide whether disclosure may reach speech that is neither express advocacy nor its functional equivalent.

The Secretary argues that *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010), already decided that the government may impose disclosure regimes for issue groups. Opp. 18–22. It did not.

Citizens United's treatment of this issue is only four sentences, and its holding concerned speech that was the functional equivalent of express advocacy—not the pure issue relevant here. *Citizens United*, 558 U.S. at 369. It therefore does not resolve the question presented: whether disclosure requirements may constitutionally extend to speech that is neither express advocacy nor its functional equivalent. *See* Pet. 14–17.

B. *Citizens United's* disclosure holding rests on precedents that do not support disclosing pure-issue-advocacy donors.

Because *Citizens United* gave the question only superficial attention, this case is an excellent vehicle to clarify that portion of the decision. Its four-sentence holding rested on three precedents—*McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and *United States v. Harriss*, 347 U.S. 612 (1954)—none of which supports compelling disclosure for pure issue advocacy.

McConnell upheld disclosure requirements for electioneering communications in federal elections but did not address speech that merely mentions a candidate without being express advocacy or its functional equivalent. 540 U.S. at 321.

Citizens United cited *Buckley* for the proposition that it "upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures," 558 U.S. at 369 (citing *Buckley*, 424 U.S. at 75–76). But that passage is only the beginning of *Buckley*'s explanation for why disclosure of issue groups must be confined to express advocacy. 424 U.S. at 75–81. Finding the Federal Election Campaign Act's § 434(e) disclosure regime beset by "serious" constitutional vagueness problems, *id*. at 76–78, *Buckley* construed it to reach only "combinations that expressly advocate the election or defeat of a clearly identified candidate," *id*. at 79–80. Disclosure of pure issue advocacy thus falls outside *Buckley's* holding.

Buckley also established the "major purpose" test—grounded in First Amendment principles—confining political committee regulation to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79; *see also Pub. Citizen v. FEC*, 547 F. Supp. 3d 51, 53 (D.D.C. 2021) ("[I]n order to protect issue advocacy under the First Amendment, the Supreme Court narrowed the definition of 'political committee' by establishing the 'major purpose' test in *Buckley v. Valeo*."). *McConnell's* observation that this was "the product of statutory interpretation rather than a constitutional command," 540 U.S. at 192, ignores that test's constitutional foundation.

Harriss offers no more support: the lobbyist-disclosure rules it upheld do not reach "advertisements, which directly or indirectly urge the passage or defeat of legislation"—i.e., mere issue advocacy. 347 U.S. at 615 & n.2; *see also id.* at 624 & n.14. Because *Citizens United's* disclosure holding rests on decisions that do not support it, its reasoning warrants reconsideration. *See Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018) (weighing the quality of a precedent's reasoning).

In reconsidering that reasoning, the Court should be guided by *Wisconsin Right to Life*: because issue groups differ fundamentally from those engaged in express advocacy or its functional equivalent, *Citizens United's* disclosure rationale cannot extend to pure issue speech. *See* 551 U.S. at 456–57.

C. *NRSC* confirms that issue groups implicate no anti-corruption or anti-circumvention interest.

The Secretary's reliance on *National Republican Senatorial Committee v. Federal Election Commission*, 225 L. Ed. 2d 998 (2026) ("*NRSC*"), is misplaced. That decision reinforces that "in light of the First Amendment free-speech rights at stake, courts must be particularly vigilant" in the campaign-finance context. *Id.* at 1022. Its discussion of FECA's interest in preventing circumvention of contribution limits and corruption has no application here: issue groups do not exist to nominate or elect anyone and present no circumvention or corruption concerns. *Id.*

at 1019. And *NRSC* rejected the notion that earmarking creates campaign-finance loopholes; the Secretary's suggestion otherwise is simply wrong. *Id.* at 1020.

IV. Section (3)(c) is not narrowly tailored to meet New Mexico's informational interest.

A. The narrow-tailoring question is properly before the Court.

The Secretary argues that RGF's narrow-tailoring challenge is unsuited to certiorari because it is facial and rests on a "major purpose" argument not raised below. Opp. 31–35. Both objections fail.

Whether New Mexico has a sufficient informational interest for its disclosure regime, and whether that regime is narrowly tailored, has been the core of this case from the outset—it is the basis of the decision below and of the petition. RGF's reliance on *Buckley*'s "major purpose" test is not a new claim but the settled doctrinal label for that same informational-interest inquiry. *See Buckley*, 424 U.S. at 79.

The facial posture is no obstacle. RGF does not raise a fact-bound overbreadth challenge requiring a record of how many disclosures happen to involve general-fund donors. It raises a legal question—whether disclosure can ever be tailored to an issue-advocacy organization that neither engages in express advocacy nor satisfies the "major purpose" test—that is common to every application of the regime to such an organization and is resolvable without factual development. The Secretary's reliance on *Moody* and *Washington State Grange* is thus misplaced: those decisions counsel caution where a facial claim turns on speculation about a statute's varied applications, not where it turns on a discrete legal question presented identically in every application. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Opp. 32.

B. Disclosing an issue-advocacy organization's general donors serves no information interest, so no tailoring can save the regime.

Disclosure regimes serve the government's "informational interest" by "increas[ing] the fund of information concerning those who support the candidates" and "help[ing] define more of the candidates' constituencies." *Buckley*, 424 U.S. at 81. That interest is candidate-focused: it "alert[s] the voter to the interests to which a candidate is most likely to be responsive." *Id.* at 66–67.

Issue groups do not exist to nominate or elect candidates, and so do not satisfy *Buckley's* "major purpose" test—the test confining committee regulation to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79; *see also Pub. Citizen v. FEC*, 547 F. Supp. 3d 51, 53 (D.D.C. 2021). *Buckley* accordingly confined disclosure to "those expenditures that expressly advocate a particular election result," reaching only spending that is "unambiguously campaign related." *Id.* at 80–81. Disclosure of an issue group's general donors—who have not earmarked their contributions for express advocacy—sheds no light on any candidate's support and therefore serves none of the interests *Buckley* recognized.

That is a failure of narrow tailoring, and the Secretary's "least restrictive means" objection misses it. Opp. 24. RGF does not contend that exacting scrutiny demands a perfect fit or the least restrictive alternative. *Cf. McCutcheon v. FEC*, 572 U.S. 185, 218 (2014). It contends there is no fit at all: absent donor earmarking for express advocacy, nothing connects disclosure of an issue group's general donors to the only interest that could justify it. This was Judge Eid's point in dissent. App. 6a–8a, 48a, 50a–53a. The Secretary's demand that RGF instead prove "a substantial number" of disclosures involve general-fund donors, Opp. 32–33, assumes the overbreadth framework RGF does not invoke; the constitutional defect inheres in every application to a non-earmarked general-fund donor, whatever their number.

C. RGF need not produce evidence that its donors were chilled.

The Secretary faults RGF for producing no evidence of actual chill. Opp. 25, 32–34. But evidence of chilled donor speech is necessary only where "the challenged regime is narrowly tailored to an important government interest. Such a demanding showing is not required, however, where—as here—the disclosure law fails to satisfy these criteria." *AFPF*, 594 U.S. at 617 (internal citation omitted). This Court reaffirmed last term that the deterrent effect of a compelled-disclosure demand need not be proven, because it inheres in the demand itself: such demands "discourage[] people from associating with groups engaged in protected First Amendment advocacy" and do so "not just when a demand is enforced, but when it is made and for as long as it remains outstanding." *First Choice Women's Resource Centers, Inc. v. Davenport*, 146 S. Ct. 1114, 1122 (2026) (quoting *NAACP*, 357 U.S. at 460–463).

That risk has only grown since *Citizens United* was decided in 2010: such risks "are heightened in the 21st century and seem to grow with each passing year, as anyone with access to a computer can compile a wealth of information about anyone else, including such sensitive details as a person's home address or the school attended by his children." *AFPF*, 594 U.S. at 617.

Conclusion

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

Jeffrey M. Schwab
Counsel of Record
Ryan Morrison
Liberty Justice Center
7500 Rialto Blvd.
Austin, Texas 78735
512-481-4400
jschwab@ljc.org
rmorrison@ljc.org

August 10, 2026