Case No. 24-2070

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RIO GRANDE FOUNDATION,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

DEFENDANT-APPELLEE MAGGIE TOULOUSE OLIVER'S ANSWER BRIEF

Appeal from the U.S. District Court for the District of New Mexico
Case No. 1:19-cv-1174, the Honorable Judith C. Herrera

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Oral argument is not requested

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STATEMENT OF RELATED CASES

This case was previously before this Court as *Rio Grande Foundation and Illinois Opportunity Project v. Maggie Toulouse Oliver*, No. 22-2004, 57 F.4th 1147 (Jan. 18, 2023).

STATEMENT OF THE ISSUE

Whether a New Mexico statute that imposes donor disclosure requirements on certain expenditures for political advertisements that refer to a clearly identified candidate or ballot question and are published and disseminated to the relevant electorate in the days before an election violates the First Amendment on its face.

STATEMENT OF THE CASE

This case concerns New Mexico's disclosure requirements for certain electioneering communications. At issue is the statutory definition for "independent expenditure," which the Campaign Reporting Act ("CRA"), N.M. Stat. Ann. §§ 1-19-25 to -36 (2024), defines as 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] The CRA requires the disclosure of major funders of all statutorily defined independent expenditures. N.M. Stat. Ann. § 1-19-27.3; *see also* Aplt. Br. at 2–5.[2] This appeal concerns Section (3)(c) in particular.

In a thorough and well-reasoned order, the district court concluded that New Mexico's disclosure laws withstand the required level of constitutional scrutiny. Specifically, the disclosure requirements are substantially related and narrowly tailored to the governmental and public interest in knowing who is making large election-related advertisements about a candidate or ballot measure shortly before an election. *See* App. 185.[3]

The court first explained "that the government has an interest in disclosures of contributions designed to influence elections." App. 165. This interest is not limited to election-related communications that amount to express advocacy, Section (3)(a) or its equivalent, Section (3)(b). *See* App. 167–69. Concerning the electioneering communications described in Section (3)(c), the district court relied on the timing component of the definition, concluding that "there is an important informational interest in the disclosure of donors who fund ads that mention a

[1] Section 1-19-26 was amended in 2024, and this specific statutory provision was renumbered from Section 1-19-26(**N**)(3) to Section 1-19-26(**Q**)(3). The statutory language remains the same. For ease of reference, the Secretary refers to the subsection at issue, as does RGF, as "Section (3)(c)."
[2] "Brief of Appellant" is referenced as "Aplt. Br."
[3] Appellants' Appendix is cited as "App."

candidate shortly before an election[,]" App. 169, and "in informing voters about who is making large expenditures on ballot-initiative advertisements close in time to an election[,]" App. 172. According to the court, "the temporal limitations and the targeting of ads that are disseminated to the relevant electorate tailor the law to ads that are intended to influence an election." App. 182.

To resolve RGF's claim that the chilling effect of the disclosure regime outweighs the State's interest, the 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. *See* App. 179–82. 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. *See* App. 179–80. The court concluded that the record, 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." App. 181.

SUMMARY OF THE ARGUMENT

The district court correctly determined that the CRA does not violate the First Amendment and that RGF's facial challenge fails as a matter of law. This Court should affirm for the following reasons.

At the outset, RGF's arguments rest, almost entirely, on the contention that the challenged independent expenditure definition only regulates speech that does not amount to election-related advocacy. Yet, RGF's characterization of Section (3)(c) relies on a selective reading of the statutory text and discounts the precise components of the statute that the district court relied on in its analysis. *See* Part I.A, *infra*. Compounding its selective reading, RGF urges the Court to adopt a narrow and unreasonable view of the political advertisements at issue in this case. RGF's position that ads covered by Section (3)(c) "cannot reasonably be interpreted as advocating for or against a candidate or ballot initiative" wrongfully presumes that if a communication does not fall within the express advocacy definitions in the statute, it can never be interpreted as advocating for or against a candidate or ballot initiative. *See* Part I.B, *infra*.

Ultimately, RGF's interpretive arguments amount to no more than a claim that the State may impose disclosure requirements only for advertisements that amount to express advocacy or its equivalent. Such position has been utterly rejected by the Supreme Court and countless other courts across the country, including this one. *See* Part I.C, *infra*. Fundamentally, RGF's claims of unconstitutionality are all grounded in its flawed perception of Section (3)(c); indeed, this entire appeal hinges on what RGF refers to as the district court's "interpretative error." Aplt. Br. at 14. Because

the district court did not err in its interpretation of the statute, RGF's arguments necessarily fail. *See* Part I.D, *infra*.

Further, the CRA withstands constitutional scrutiny. Although RGF urges the Court to apply strict scrutiny, it acknowledges binding precedent mandating that disclosure laws such as the CRA are reviewed under an exacting scrutiny analysis. *See* Part II, *infra*. The district court rightfully applied exacting scrutiny and determined that the CRA meets that standard.

The CRA bears all the hallmarks of a constitutional disclosure regime. First, the State has a sufficiently important interest in requiring disclosure for ads subject to Section (3)(c). *See* Part III.A, *infra*. The Supreme Court and this Circuit have repeatedly recognized that the government's informational interest exists even where a political advertisement does not contain express advocacy or its functional equivalent. Second, the State has demonstrated that there is a substantial relation between the State's informational interest and the disclosure requirements of the CRA. *See* Part III.B, *infra*. Various statutory limitations ensure that the burdens are appropriately matched with the informational interest, as reaffirmed by analysis set forth in Supreme Court and Tenth Circuit precedent. Third, the CRA's disclosure requirements are narrowly tailored to achieve the intended informational purpose because the various statutory limitations ensure that the government interest is met while minimally imposing on any First Amendment rights. *See* Part III.C, *infra*.

STANDARD OF REVIEW

This Court "review[s] a grant of summary judgment de novo, applying the same standard for summary judgment that applied in the district court." *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1159 (10th Cir. 2023) (internal quotation marks and citation omitted). 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[,]" summary judgment is warranted. Fed. R. Civ. P. 56(a). "When the parties file cross motions for summary judgment," a court is "entitled to assume that no evidence needs to be considered other than that filed by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts." *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000) (internal quotation marks and citation omitted). "On de novo review of a grant of summary judgment in a First Amendment case, [the Court] consider[s] the entirety of the record submitted." *Rio Grande Found.*, 57 F.4th at 1153.

ARGUMENT

I. RGF's Fundamentally Flawed Perception of Section (3)(c) is Fatal to its Arguments on Appeal

As a threshold matter and to ensure proper framing of the issue for the Court, the Secretary notes that she agrees with RGF that "[a] proper understanding of how Section (3)(c) applies is crucial for determining whether that section withstands constitutional scrutiny[.]" Aplt. Br. at 21. However, although the definition of

"independent expenditure" contained within Section (3)(c) is at the heart of this appeal, RGF's interpretation of it is profoundly flawed.

The district court properly rejected RGF's proposed reading of Section (3)(c), instead agreeing with the Secretary that pre-election communications distributed to voters in the days before an election and concerning candidates and ballot measures have a political purpose. *See Citizens United v. FEC*, 558 U.S. 310, 368–69 (2010) (upholding a definition of "electioneering communication" that is very similar to the definition contained in Section (3)(c)); *id.* at 369 (reiterating that "disclosure is a less restrictive alternative to more comprehensive regulations of speech" and ultimately "reject[ing] [the plaintiff]'s contention that [such] disclosure requirements must be limited to speech that is the functional equivalent of express advocacy"); *see also Indep. Inst. v. Williams*, 812 F.3d 787, 798 (10th Cir. 2016) (holding that a similar definition in Colorado law was neither vague nor overbroad, given its similarity to the law at issue in *Citizens United*).

Nonetheless, on appeal, RGF maintains that advertisements "covered by Section (3)(c) cannot be reasonably interpreted as advocating for or against a candidate or ballot initiative[.]" Aplt. Br. at 19. According to RGF, it is inconceivable that "an ad that simply refers to a candidate or ballot question can be found to be published for the purpose of supporting or opposing a candidate or ballot question when such an ad cannot reasonably be interpreted as an appeal to vote for

or against a candidate or ballot question." Aplt. Br. at 20. Such circular reasoning is flawed in several respects.

A. RGF's Selective Reading of the Statute Contravenes Basic Legal Principles

This case centers on a single statutory definition. Still, RGF ignores much of that definition, choosing to focus only on a portion of it. Section (3)(c) defines an independent expenditure as an advertisement that "refers to a clearly identified candidate or ballot question *and* is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary election or sixty days before the general election at which the candidate or ballot question is on the ballot[.]" Section(3)(c) (emphasis added). By repeatedly emphasizing that the ads covered by Section (3)(c) need only "mention" a candidate or ballot initiative, while simultaneously downplaying the rest of the definition, RGF mischaracterizes the statute.

Significantly, RGF's oversimplified characterization of Section (3)(c) dismisses the temporal and distribution components of the statute. In disregarding these components, RGF contravenes "one of the most basic interpretive canons[:] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 213 (2018) (alteration, internal quotation marks, and citation omitted). Moreover, "the words of a statute must be read in their context and

with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted). Proper application of these basic rules of statutory construction easily disposes of RGF's recurring and conclusory claims.

In addition, by disregarding portions of the statute, RGF fails to engage with the district court's reasoning. RGF faults the district court for failing to "explain how an ad that simply refers to a candidate or ballot question can be found to be published for the purpose of supporting or opposing a ballot question[.]" Aplt. Br. at 20. But the court did explain; it focused on the *timing* of the ads as dispositive to its analysis. *See* App. 168–73, 178. According to the court: "[t]he timing of the expenditures on ads shortly before an election indicate the political purpose of such ads." App. 173. RGF's claim of "interpretative error" by the district court does not engage with this reasoning; it simply ignores it. "The first task of an appellant is to explain to [the Court] why the district court's decision was wrong." *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015). Here, RGF claims the district court committed interpretative error but does so while skirting the actual reasoning the district court used to interpret the statute. Advancing other "arguments will not help the appellant if the reasons that were given by the district court go unchallenged." *Id*.

Describing Section (3)(c) advertisements without regard to the statute's temporal or distribution restrictions is simply an inaccurate portrayal of these advertisements and the district court's discussion of the same. As such, RGF "utterly fails . . . to explain what was wrong with the reasoning that the district court relied on in reaching its decision." *Nixon*, 784 F.3d at 1366. Because RGF's characterization of Section (3)(c) flouts basic principles of law, it is flawed from the outset.

B. RGF Misconstrues the Nature of Section (3)(c) Advertisements

In addition to its incomplete reading of Section (3)(c), RGF further misconstrues the statute to reach its conclusion that Section (3)(c) ads do "not expressly or implicitly advocate for or against a candidate or ballot measure." Aplt. Br. at 18–19. The district court correctly rejected this argument, reasoning that "[a]n ad may refer to a candidate or ballot question, without being so overt as to constitute express advocacy or its functional equivalent, but still have been published for the purpose of supporting or opposing a ballot question or the nomination or election of a candidate." App. 173.

Throughout the framing of its argument, RGF seems to acknowledge that Section (3)(c) ads need not contain express advocacy. Nevertheless, it fails to explain its position that such ads will *never* contain any advocacy, including implicit or other non-express advocacy. Instead, relying on all three of the Section (3) definitions for

independent expenditures, RGF reasons that Section (3)(c) ads cannot be considered advocacy because they do not constitute express advocacy or its equivalent. RGF asserts that if an advertisement does not "expressly advocate the election or defeat of a candidate or ballot question" or is not so express as to be "susceptible to no other reasonable interpretation than as an appeal to vote for or against a candidate or ballot question" (*i.e.*, ads covered by Sections (3)(a) and (b)), the only remaining possibility is that such ad "cannot reasonably be interpreted as an appeal to vote for or against a candidate or ballot question." Aplt. Br. at 19–20.

The three independent expenditure definitions, Sections (3)(a), (b) and (c), cover a range of political advertisements, all of which seek to influence elections. The two definitions with which RGF takes no issue, Section (3)(a) and (b), "are designed to cover express advocacy and its functional equivalent." *Rio Grande Found. v. Oliver*, No. 19-cv-01174, 2020 WL 6063442, at *2 n.3 (D.N.M. Oct. 14, 2020). New Mexico law makes clear that these definitions both describe political advertisements that "expressly advocate." *See* 1.10.13.7(I) NMAC ("'Expressly advocate' means that the communication contains a phrase including, but not limited to, 'vote for,' 're-elect,' 'support,' 'cast your ballot for,' 'candidate for elected office,' 'vote against,' 'defeat,' 'reject,' or 'sign the petition for,' or a campaign slogan or words that in context and with limited reference to external events, such as the proximity to the election, can have no reasonable meaning other than to

advocate the election, passage, or defeat of one or more clearly identified ballot questions or candidates.").

Thus, RGF submits that the only way to advocate for or against a candidate or ballot measure is to do so expressly. Such claim is not supported by the plain statutory text or controlling law. Instead, "disclosure requirements for political speech that mentions a candidate or ballot initiative in the days leading up to an election reflect the unremarkable reality that such speech—express advocacy or not—is often intended to influence the electorate regarding the upcoming election." *Nat'l Ass'n for Gun Rts., Inc. v. Mangan*, 933 F.3d 1102, 1114 (9th Cir. 2019); *see also Delaware Strong Fams. v. Att'y Gen. of Delaware*, 793 F.3d 304, 309 (3d Cir. 2015) ("By selecting issues on which to focus, a voter guide that mentions candidates by name and is distributed close to an election is, at a minimum, issue advocacy."). RGF's contrary arguments ignore the logical conclusion that the purpose of spending significant sums of money to distribute information regarding a candidate or ballot initiative immediately before an election would most certainly be to influence voters.

For an apt example, one need look no further than RGF's own Freedom Index, a communication that the parties agree would be subject to the CRA's disclosure requirements if distributed to voters in the days before an election. Aplt. Br. at 19. The Freedom Index gives each legislator a score based on their past voting record

on various bills.[4] *See* App. 133, 138, 152. A positive score is reflected in a green circle, while negative scores are shown in red circles. It is entirely reasonable to interpret this type of communication, disseminated throughout the relevant electorate in the days preceding an election, as having a political purpose.[5] This may not be the *only* interpretation, but it is a reasonable one. *Cf. Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1236 n.4 (10th Cir. 2023) ("WyGO's ad could similarly be understood to serve multiple purposes while still amounting to the functional equivalent of express advocacy.").

C. Disclosure Requirements May Permissibly Extend Beyond Political Advertisements Amounting to Express Advocacy or its Equivalent

Ultimately, RGF urges the Court to adopt a narrow view regarding the nature of political advertisements that may permissibly be subject to disclosure requirements. RGF's assertion that Section (3)(c) extends beyond the "traditional understanding of independent expenditures" is based on RGF's own restrictive understanding of what types of election-related advertising may lawfully be

[4] The Freedom Index "evaluate[s] legislators by how they vote on legislation. The legislation is analyzed and scored on a scale of -8 to +8. -8 is reserved for the most liberty-depriving legislation. +8 is given for legislation considered to be among the best of advancing freedom. Legislators are then scored based strictly on their voting record." *New Mexico Freedom Index*, https://riograndefoundation.org/freedom-index/#/ (last visited Aug. 7, 2024).

[5] It is axiomatic that green means go and red means stop. Perhaps it is a coincidence that RGF chose those colors, but most would interpret such visual depiction as a recommendation on how to proceed in an election with regard to such candidates.

subjected to disclosure requirements. Aplt. Br. at 18–19. Disentangling RGF's arguments, it is apparent that RGF seeks to limit the reach of disclosure laws to express advocacy or its functional equivalent.

At the outset, RGF's assertion regarding the "traditional understanding of an independent expenditure" relies on a selective reading of *Citizens United*, 558 U.S. 310. According to RGF, the "traditional understanding" is "speech expressly advocating the election or defeat of a candidate[.]" Aplt. Br. at 18 (quoting *id.* at 319). But in *Citizens United*, the Supreme Court addressed "speech expressly advocating the election or defeat of a candidate" *and* speech that amounted to "electioneering communications." *Id.* at 318–19. Notably, the definition of "electioneering communication" at issue in *Citizens United* was very similar to that contained in Section (3)(c). *See id.* at 321. And as the district court here properly recognized, the Supreme Court in *Citizens United* explicitly rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." App. 167 (quoting *id.* at 369); *see also McConnell v. FEC*, 540 U.S. 93 (2003) (endorsing the application of disclosure requirements to the "entire range" of similarly-defined "electioneering communications"), *overruled on other grounds by Citizens United*, 558 U.S. 310.

In addition, numerous courts—including this one—have rejected the precise argument embedded throughout RGF's briefing. *See, e.g.*, *Free Speech v. FEC*, 720

F.3d 788, 795 (10th Cir. 2013) ("[I]n addressing the permissible scope of disclosure requirements, the Supreme Court not only rejected the 'magic words' standard urged by [the p]laintiff but also found that disclosure requirements could extend beyond speech that is the 'functional equivalent of express advocacy' to address even ads that 'only pertain to a commercial transaction.'" (quoting *Citizens United*, 558 U.S. at 369)); *see also, e.g.*, *Gaspee Project v. Mederos*, 13 F.4th 79, 86 (1st Cir. 2021) ("In the election context, the Supreme Court has rejected the attempt to distinguish between express advocacy and issue advocacy when evaluating disclosure laws[.]"); *Delaware Strong Fams.*, 793 F.3d at 308 ("Any possibility that the Constitution limits the reach of disclosure to express advocacy or its functional equivalent is surely repudiated by *Citizens United*[.]"); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) ("*Citizens United* made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context."); *Hum. Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010) ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); *Republican Party of N.M. v. Torrez*, 687 F. Supp. 3d 1095, 1152–55 (D.N.M. 2023) (rejecting arguments that certain definitions in the CRA were overbroad by encompassing electioneering speech that was not express advocacy or

its functional equivalent); *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 187 (D.D.C. 2016) ("[T]he Supreme Court and every court of appeals to consider the question have already largely, if not completely, closed the door to the Institute's argument that the constitutionality of a disclosure provision turns on the content of the advocacy accompanying an explicit reference to an electoral candidate."), *aff'd sub nom. Indep. Inst. v. F.E.C.*, 580 U.S. 1157 (2017).

Here, the district court correctly relied on this wealth of authority to conclude that disclosure requirements may permissibly extend beyond political advertising amounting to express advocacy or its equivalent. App. 172–74. In the context of disclosure laws, there simply "is no constitutionally mandated distinction between express advocacy and some issue speech in the context of disclosure." *Indep. Inst.*, 812 F.3d at 794. The district court therefore rightfully refused to impose a "rigid barrier between express advocacy and so-called issue advocacy." *McConnell*, 540 U.S. at 193.

D. RGF's Arguments Rely Entirely on Unfounded Interpretative Error

RGF's facial challenge fails because it relies on RGF's own flawed interpretation of the statute. Specifically, RGF argues that "Section (3)(c) is facially unconstitutional under both traditional facial analysis (there [is] no set of circumstances under which it would be valid) and under the overbreadth doctrine (a substantial number of its applications are unconstitutional)." Aplt. Br. at 22–23. RGF

readily admits, however, that it reaches its conclusions based solely on its belief that "the Act's disclosure requirement under Section (3)(c) only applies to ads that simply mention, but cannot be reasonably interpreted as advocating for or against a candidate or ballot initiative[.]" Aplt. Br. at 22–23. Because RGF advances a flawed understanding of Section (3)(c), the arguments premised on such flawed understanding cannot survive.

Moreover, RGF's structural misunderstanding of the statute and relevant law ripples throughout its constitutional scrutiny analysis. Based on its selective reading of the statute, RGF submits that any governmental interest the State has is simply not implicated by Section (3)(c) ads, *see, e.g.*, Aplt. Br. at 14–15 (blaming the district court's "interpretative error" for its conclusion that the disclosure requirement is substantially related to an important information interest), and that the law is not narrowly tailored because, in RGF's view, the informational interest is not implicated, *see, e.g.*, Aplt. Br. at 15. Significantly, the district court's exacting scrutiny analysis relied extensively on the very portions of Section (3)(c) that RGF minimizes on appeal. *See, e.g.*, App. 169 ("[T]here is an important informational interest in the disclosure of donors who fund ads that mention a candidate shortly before an election."), 172 ("[T]he Secretary has shown an important State interest in informing voters about who is making large expenditures on ballot-initiative advertisements close in time to an election."), 185 ("Tying the disclosure of donors

of ads mentioning a candidate or ballot question close to the election is targeted to [the informational interest] to enable voters to have information about who may be attempting to influence the election.").

Thus, although RGF is correct that "[a] proper understanding of how Section (3)(c) applies is crucial for determining whether that section withstands constitutional scrutiny," Aplt. Br. at 21, its resultant conclusions are wrong, and its appellate arguments—which rely heavily on these faulty conclusions—are therefore without merit. Nonetheless, the Secretary also addresses why the district court was correct in concluding the CRA withstands constitutional scrutiny.

II. The District Court Properly Employed Exacting Scrutiny

The Secretary notes at the outset that the district court employed the correct test: exacting scrutiny. RGF continues to argue, as it did below, that Section (3)(c) disclosures should be subject to strict scrutiny, on the ground that such disclosures are "content-based" bans on speech. Aplt. Br. at 23–28. As RGF readily admits, however, its argument is foreclosed in this Court by the same binding precedent followed by the district court below. Aplt. Br. at 25. Having acknowledged that it cannot prevail on this point, RGF asserts that it is merely "preserv[ing] the argument." Aplt. Br. at 25. The Secretary responds correspondingly.

The district court correctly recognized it was bound to apply exacting scrutiny. Section (3)(c) regulates disclosures, which do not constitute a ban on

speech. *See Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) (stating that "[d]isclosure requirements are not inherently content-based nor do they inherently discriminate among speakers. In most circumstances they will be a less burdensome alternative to more restrictive speech regulations. For this reason, they are not only reviewed using a lower degree of scrutiny, they are routinely upheld" (citing *Citizens United*, 558 U.S. at 366–67)). Indeed, although "[d]isclaimer and disclosure requirements may burden the ability to speak, . . . they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (internal citations and quotation marks omitted). Such requirements are subject to "exacting scrutiny." *Free Speech*, 720 F.3d at 792–93; *see also Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021) (explaining that the Court has "settled on a standard referred to as 'exacting scrutiny'" for "First Amendment challenges to compelled disclosure," including in challenges to campaign finance laws (internal quotation marks and citation omitted)); *No on E, San Franciscans Opposing the Affordable Hous. Prod. Act v. Chiu*, 62 F.4th 529, 538 (9th Cir. 2023) (collecting authorities concluding that exacting scrutiny applies to election disclosure laws); *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014) (applying exacting scrutiny in challenge to Colorado's disclosure law).

Recently, in *Bonta*, the Supreme Court reexamined its historical application of exacting scrutiny in compelled disclosure cases. 594 U.S. 595. The *Bonta* majority

declined to change course, unequivocally stating that "compelled disclosure requirements are reviewed under exacting scrutiny." *Id.* at 608. Although the Supreme Court added a requirement that such laws must also be narrowly tailored, *id.* at 610, 619–21, exacting scrutiny remains the standard. Accordingly, this Circuit has continued to apply exacting scrutiny in disclosure cases. *See*, *e.g.*, *Wyo. Gun Owners*, 83 F.4th at 1243 (applying *Bonta*'s exacting scrutiny standard to a compelled disclosure law). And in the instant case, the district court properly applied exacting scrutiny in line with past disclosure cases, observing that it is "not at liberty to buck precedent[.]" App. 160.

RGF's argument to the contrary relies on *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), a case addressing a content-based ban on speech rather than a compelled disclosure law. Unlike the ban addressed in *Reed*, the CRA's disclosure requirements do not restrict expression on any basis—content or otherwise—rendering *Reed* inapposite. This Court must follow the binding precepts of *Bonta* and apply exacting scrutiny to this disclosure case.

III. The District Court Correctly Concluded that the CRA Withstands Exacting Scrutiny

Having established the proper standard for evaluating the present statutory challenge, the Secretary addresses whether the CRA does, in fact, survive exacting scrutiny. "[E]xacting scrutiny requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and

that the disclosure requirement be narrowly tailored to the interest it promotes." *Bonta*, 594 U.S. at 611 (internal citations and quotation marks omitted). As the district court correctly concluded, and as explained in more detail below, the CRA's disclosure requirement for ads covered by Section (3)(c) withstands exacting scrutiny. The Secretary addresses each component of this analysis in turn.

A. The State's Informational Interest is Implicated by Section(3)(c)

First, the State has a sufficiently important governmental interest. Specifically, the State possesses an "informational interest": an "interest in the disclosure of donors spending large amounts funding ads covered by Section 1-19-26(N)(3)(c)." *See* App. 174. This interest is a well-established important governmental and public interest in disclosing the funders of large advertisements issued to voters prior to an election concerning candidates and ballot measures. *See Wyo. Gun Owners*, 83 F.4th at 1244 ("The Supreme Court has long accepted the informational interest as an important one.").

Although RGF acknowledges this interest in the general sense, *see* Aplt. Br. at 30, it maintains there is no important state interest for disclosure requirements associated with the ads governed by Section (3)(c). Instead, RGF asserts that the State's informational interest is not implicated because the ads at issue do not advocate for or against a ballot initiative or candidate. *See* Aplt. Br. at 30–31. RGF contends that "knowing the donors of ads that simply mention a candidate, with no

express or implied advocacy, tells voters absolutely nothing about the candidate or the ballot question." Aplt. Br. at 30–31. This argument is grounded entirely in RGF's mistaken beliefs that Section (3)(c) ads lack any sort of political purpose or advocacy and that only express advocacy is permissibly covered by the statute. If the Court were to adhere to RGF's reasoning, the State's interest would only extend to ads that contain express advocacy or its equivalent. This is not the law.

Rather, regardless of the level of advocacy contained within a pre-election political communication, the public interest is implicated. As the Supreme Court explained in *Citizens United*, "the public has an interest in knowing who is speaking about a candidate shortly before an election." 588 U.S. at 368; *see also id.* at 371 ("[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *Rio Grande Found. v. City of Santa Fe*, 437 F. Supp. 3d 1051, 1069 (D.N.M. 2020) ("[T]he Supreme Court has indicated there is a governmental interest in knowing where ballot initiative advocacy money comes from and how it is spent, so citizens have more information about whether special interests are attempting to influence the election.").

This interest alone is sufficient to justify application of disclosure provisions. *See Citizens United*, 558 U.S. at 369; *cf. Indep. Inst.*, 812 F.3d at 796 (explaining that "advertisements that mention a candidate shortly before an election are deemed sufficiently campaign-related to implicate the government's interests in disclosure"). Indeed, knowing who is criticizing, praising, or speaking about candidates or ballot measures assists in maintaining an informed electorate and helps voters assess what weight to place on the message, including whether the advertisement is being funded by an entity with a direct stake in the outcome of the election, such as regulated entities. The usefulness of disclosure and its relationship to a state's informational interest does not hinge on whether the disclosure contains express advocacy or "make[s] clear that the ads are not funded by candidate or political party," as RGF claims. Aplt. Br. at 35. *See Citizens United*, 558 U.S. at 369 (rejecting the contention that "disclosure requirements must be limited to speech that is the functional equivalent of express advocacy").

RGF suggests that *Citizens United* only supports a state's informational interest when the disclosure involves a political advertisement that contains express advocacy or its functional equivalent. Aplt. Br. at 34–35. But the reasoning of *Citizens United* is not so narrow or inflexible in application, as this Circuit has recognized. *See Indep. Inst.*, 812 F.3d at 79 (applying *Citizens United*'s reasoning in the context of issue advocacy); *see also Madigan*, 697 F.3d at 48 (same); *Gaspee*

Project, 13 F.4th at 86 (same); *Republican Party of N.M.*, 687 F. Supp. 3d at 1150–51 (same). *Citizens United*'s reasoning extends to cases weighing disclosure requirements for issue advocacy that mention candidates or ballot issues and are published shortly before an election. *See Indep. Inst.*, 812 F.3d at 79; *Brumsickle*, 624 F.3d at 1016 ("Given the Court's analysis in *Citizens United*, and its holding that the government may impose disclosure requirements on speech, the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable."); *see also* App. 165–67.

Although RGF continues to argue that *Citizens United* is inapposite because the CRA's disclosure for ads subject to Section (3)(c) does not "help make clear the ads are not funded by a candidate or political party" as did the disclaimer in *Citizens United*, Aplt. Br. at 35, RGF improperly conflates the Supreme Court's *reasoning* with the result of its application in that case, *see* Aplt. Br. at 35. Indeed, after explaining the broader principles supporting a state's informational interest in requiring disclosures for electioneering communications, the Supreme Court applied that reasoning to the ad at issue. 558 U.S. at 368–69. Although the Supreme Court did state that the law in that case avoided confusion "by making clear that the ads are not funded by a candidate or political party," RGF has omitted the Court's qualifying language that, "*[a]t the very least*, [the disclaimers as applied to the ad at issue] avoid confusion by making clear that the ads are not funded by a candidate or

political party." *Id*. (emphasis added). This qualifying language shows that the Supreme Court was simply identifying one of many potential ways in which the disclaimer at issue related to the state's informational interest in that case. Contrary to RGF's selective reading of *Citizens United*, the Supreme Court was not imposing a condition or requirement for its reasoning to be applicable in other contexts. The CRA's disclosure requirements for issue advocacy falling under Section (3)(c) is supported by the reasoning of *Citizens United*, as exemplified by this and other courts' precedent. *See also* App. 165–67.

RGF also argues that *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), requires reversal. Aplt. Br. at 42–43. Specifically, RGF argues that *Sampson* is relevant to this case for two reasons: (1) "Section (3)(c)'s application to ads that simply mention but cannot reasonably [be] interpreted as advocating for or against a candidate or ballot initiative is even more attenuated than the statute in *Sampson*, which only applied to ads that had a 'major purpose of supporting or opposing' a ballot question'" and (2) "[*Sampson*] stands for the proposition that the Court cannot simply accept the state's information interest as sufficient simply because it applies to ads that mention a candidate or ballot initiative." Aplt. Br. at 43.

Sampson does not support reversal in this case. First, contrary to RGF's implication, this Court did not determine that no informational interest exists in the ballot context; instead, *Sampson* recognized an informational interest in the

identities of donors involving larger scale expenditures and committees who support or oppose ballot initiatives close to an election. *See id.* at 1259 (assuming "that there [wa]s a legitimate public interest in financial disclosure from campaign organizations"), 1261 (noting the difference between that case and one "involving the expenditures of tens of millions of dollars on ballot issues"). Thus, rather than concluding that no informational interest exists, *Sampson* advances the notion that, when dealing with ballot-initiative disclosure cases, the strength of the state's informational interest in issue advocacy speech increases as the amount of monetary spending increases.

Second, the Secretary is not asking the Court to "accept the state's informational interest as sufficient simply because it applies to ads that mention a candidate or ballot initiative." Aplt. Br. at 43. Again, RGF returns to its flawed characterization of Section (3)(c). RGF claims "[t]he value of the state's informational interest here is much lower [than in *Sampson*] because it applies only to ads that simply mention a ballot question, but do not support or oppose it, either explicitly or implicitly." Aplt. Br. at 43. For the reasons already discussed, *Sampson* does not change the outcome.

Third, *Sampson* is inapposite. New Mexico's CRA has a significantly higher expenditure threshold to trigger the disclosure requirement when compared to the disclosure regime at issue in *Sampson*, which had an expenditure threshold of only

$20. 625 F.3d at 1249. Although it is true that the disclosure regime in *Sampson* only applied to ads that had a "major purpose of supporting or opposing" a ballot question, whether the ad contained express advocacy or not was not determinant to the Court's ruling that the disclosure regime did not have a substantial relation to Colorado's informational interest. As such, the Court's explanation that the informational purposes of the disclosure regime "ha[d] little to do with a group of individuals who have together spent less than $1,000 on a campaign," *id.* at 1261, does not apply here. Further, the Court was explicit that "the governmental interest in imposing those regulations [wa]s minimal, if nonexistent, *in light of the small size of the contributions*." *Id*. (emphasis added). The district court was right to distinguish *Sampson* on these grounds. *See* App. 170–72.

In sum, the district court correctly concluded that the government has an interest in disclosing major funders of political advertisements, regardless of whether such ads contain express advocacy or its equivalent. *See* App. 165–67. This interest is implicated by Section (3)(c) ads because "[t]he timing of the expenditures on ads shortly before an election indicate the political purpose of such ads." App. 173. Further, the State's informational interest extends to ads that mention a candidate as well as ads that refer to a ballot initiative close in time before an election.

B. The Statutory Disclosure Requirements are Substantially Related to the State's Interest

Having established a sufficiently important government interest, the Secretary turns to the second factor for consideration: whether such interest is substantially related to the disclosure requirements. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010); *Coal. For Secular Gov't v. Williams*, 815 F.3d 1267, 1275–76 (10th Cir. 2016). In other words, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Reed*, 561 U.S. at 196 (internal quotation marks and citation omitted). Again, this requirement is satisfied.

Generally, "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369. "Requiring disclosure of information related to subtle and indirect communications likely to influence voters' votes is critical to the State's interest in promoting transparency and discouraging circumvention of its electioneering laws." *Mangan*, 933 F.3d at 1114. Here, the district court correctly recognized the strength of the State's informational interest. *See* App. 174–78. And while the CRA requires disclosure, it incorporates several limiting provisions to ensure the statute reflects the seriousness of the burdens.

The CRA imposes reporting obligations on organizations with independent expenditures exceeding $3,000 in a statewide election or $1,000 in a non-statewide election. Section 1-19-27.3(A). Specifically, groups that meet this threshold but spend less than $9,000 in a statewide election or $3,000 in a non-statewide election,

must disclose the name, address, and amount of contribution 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." Section 1-19-27.3(C). Section 1-19-27.3(D)(2). Groups spending over the $9,000/$3,000 threshold must disclose donors who contributed more than $200 if the expenditure was made from a separate bank account specifically for independent expenditures, or over $5,000 if the expenditure was made in whole or part from a general fund, and the donor did not opt out. Section 1-19-27.3(D)(1), (2).

Although such disclosure may target those who do not have a specific financial interest in the ads themselves, the CRA includes an opt-out provision to more closely relate the disclosures of general-fund donors with the government and public's informational interest. *See* N.M. Stat. Ann. § 1-19-27.3(D)(2). Additionally, Section (3)(c) incorporates both temporal limitations—communications that refer to a "clearly identified candidate or ballot question" within thirty days of a primary election and sixty days of a general election—and geographic limitations—those ads that are "published and disseminated" to the relevant electorate in New Mexico.

The CRA's limitations focus the required disclosures on the informational interest identified: 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. Such limitations ensure that the CRA

disclosure requirement burdens match the State's informational interest. No actual harms resulting from required disclosures in that limited context have been identified, as discussed more fully below. As such, any burden imposed is, at best, a "modest" one. *See Madigan*, 697 F.3d at 482–83 (providing that speculative harm established only a modest burden on First Amendment rights).

This Court has previously arrived at the same conclusion addressing a similarly structured disclosure regime in Colorado. *See Indep. Inst.*, 812 F.3d at 798 (concluding that "Colorado's spending requirements are sufficiently tailored to the public's informational interests"). Specifically, in *Independence Institute*, this Court held that a Colorado disclosure law that targeted ads made shortly before an election—even if they did not explicitly reference any campaign or state any facts or opinions about a gubernatorial candidate—can be subject to sufficiently tailored disclosure laws. *Id.* at 792–93. Drawing on the same reasoning from *Citizens United* discussed herein, this Court declined to draw a distinction between what the appellant called "campaign-related" issue speech and speech that is "unambiguously not campaign-related." *Id*. at 795–96. This Court explained that limiting the applicability of disclosure laws to speech that "promotes, supports, attacks, or opposes" a candidate would essentially impose an express advocacy requirement, which *Citizens United* had disavowed. *Id*. at 796–97 (internal citations and quotation marks omitted). This Court also held that Colorado's disclosure regime, despite its

broad substantive sweep considering ads other than express advocacy or its functional equivalent, survived exacting scrutiny. *Id*. at 798–99. Section (3)(c) similarly requires disclosure for ads that mention a candidate or ballot initiative shortly before an election. Thus, *Independence Institute* supports affirmance.

RGF nonetheless attempts to distinguish *Independence Institute* and argue that it does not support the district court's conclusion that there is a substantial relation between the disclosure requirement for Section (3)(c) ads and the State's informational interest in maintaining an informed electorate. *See* Aplt. Br. at 37–41. But RGF's argument regarding *Independence Institute* fails to demonstrate error in the district court's legal analysis regarding that case (App. 176–77) or offer any contrary analysis of the fit between the CRA's contours and any burden imposed. *See* Aplt. Br. at 37–38. Rather, RGF merely states that *Independence Institute* stands for the proposition that "a disclosure law *could* be unconstitutional under exacting scrutiny." Aplt. Br. at 39 (emphasis added). RGF's attempt to distinguish the case likewise relies, again, on its incorrect interpretation of Section (3)(c). *See* Aplt. Br. at 41 ("Because ads under Section (3)(c), by definition, do not explicitly or implicitly advocate for or against a candidate or ballot initiative, the government's informational interest is not advanced by the disclosure requirement for such ads."). Again, these arguments fail.

Moreover, the distinction RGF attempts to draw fails because the extent to which the Colorado disclosure regime addressed the presence of advocacy in an ad was not determinant in the Court's analysis. Rather, in evaluating the question of substantial relation, the Court based its conclusions on the spending threshold for disclosure and the requirement for disclosure when the ad is published shortly before an election, even for ads that simply mention a candidate but do not necessarily take a position. *See id*. at 798–99. Likewise, New Mexico's CRA has a similar (and even higher) spending threshold[6] and likewise temporally limits when the disclosure requirements apply to thirty days within a primary election or sixty days within a general election.

RGF further challenges the strength of New Mexico's informational interest by continuing to advance the argument that the CRA's disclosure requirements impose greater burdens because of a risk of chilled speech. This argument remains unavailing. First, it is predicated on RGF's mistaken belief that the State's

[6] The Court in *Independence Institute* explained that spending thresholds can reasonably be lower for state elections and still pass exacting scrutiny because smaller amounts of money can create more influence in a state election than a federal one. 812 F.3d at 797. If the measure of a spending threshold's reasonableness relates to the size of the electorate, then the CRA's spending thresholds make the CRA even more constitutionally sound than the Colorado disclosure regime upheld in *Independence Institute* because New Mexico's population is not only lower than Colorado's, but the CRA also requires higher spending thresholds. *See* App. 090, 176 (explaining that in New Mexico, a smaller population means that smaller amounts of spending can influence elections).

informational interest is not sufficiently important. Second, as the district court correctly concluded, there was insufficient evidence presented to support RGF's claim in this regard. *See* App. 179–81 ("[T]he Court here does not have a comparable record, even construing the evidence in RGF's favor, from which a trier of fact could find that there is a reasonable probability that RGF or other advocacy groups in New Mexico would face threats, harassment, or reprisals from the CRA's disclosure requirements that would outweigh the State's important interest in disclosure.").

To show a risk of chilled speech, a party must demonstrate "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). Here, RGF has not produced any evidence corroborating any purported burden that the CRA's disclosure requirements impose upon it or its donors. *See* App. 179–81. Notably, RGF failed to provide any real example of its donors experiencing chill or burden at all—only vague speculation by its president that it was likely to occur, in his opinion. *See Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1201 (10th Cir. 2015) ("Unsubstantiated allegations carry no probative weight in summary judgment proceedings; they must be based on more than mere speculation, conjecture, or surmise." (internal citation and brackets omitted)); *see also id.* (stating that at summary judgment, affidavits must contain certain indicia of reliability).

Indeed, RGF admitted below that "it is not aware of any harassment or retaliation of its employees or donors in its over 20-year history," rendering its own president's representations regarding chill entirely speculative. *See* App. 179–80; *see also Madigan*, 697 F.3d at 482–83 (noting a potential chilling effect of a disclosure law as "modest" where the plaintiff provided only speculation that the law would be likely to result in threats, harassment, or reprisals). RGF's president also testified that no donors have actually told him they would not donate if their information was made public. *See* App. 155; *see also* App. 179 ("General concerns . . . do not de facto invalidate every disclosure law; rather a court must carefully consider the evidence of chilled speech and weigh the burdens against the legislative interests." (citing *Buckley*, 424 U.S. at 68–74)). Moreover, assuming that RGF may properly raise claims that its donors' speech—as opposed to its own speech—will be restricted, "the mere concern that speech will not occur does not amount to an affirmative claim that the speech really will not occur." *Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956, 960 (10th Cir. 2021) (noting that RGF did not develop an argument that it "had standing because its donors [were] chilled from donating to RGF in the future"). All told, any purported burden is simply outweighed by the State's informational interest. *See* App. 179–81; *see also Citizens United*, 558 U.S. at 370.

Lastly, to the extent RGF asserts error arising from the manner in which the district court considered RGF's claims of chilled speech, such an argument lacks merit. Specifically, RGF contends that the district court erred by addressing whether RGF provided evidence of chilled speech to overcome the State's informational interest *before* addressing whether Section (3)(c)'s disclosure requirement is narrowly tailored. Aplt. Br. at 48. According to RGF, it is not required to show evidence of chill "because Section (3)(c) is not narrowly tailored to serve the government's informational interest[.]" Aplt. Br. at 48. In support, RGF claims that *Bonta* "held" a plaintiff must "show that the burden imposed outweighs the strength of the government's interest only where a disclosure requirement has been found to be narrowly tailored." Aplt. Br. at 49 (citing *Bonta*, 594 U.S. at 611).

First, *Bonta* does not hold or require what RGF claims it does. The passage RGF invokes is the *Bonta* majority explaining why it disagreed with the dissent's view of *Reed* as not requiring narrow tailoring when a law imposes only modest burdens. *Bonta*, 594 U.S. at 611. *Bonta* does not hold that a court errs when it follows the exacting scrutiny analysis, but rather addresses burdens imposed by a disclosure requirement in a particular portion of its written opinion. And while the Supreme Court did explain that exacting scrutiny also requires a court to assess whether the law at issue is narrowly tailored to the sufficiently important government interest, 594 U.S. at 608–09, its holding did not impose a particular order of operations;

rather, it offered clarity regarding the exacting scrutiny standard by consulting precedent. 594 U.S. at 609 ("Our more recent decisions confirm the need for tailoring."). *Bonta* does not compel this Court to find error based on the placement of the district court's analysis thereof.

In any event, the district court appropriately structured its opinion. The substantial relation prong of the exacting scrutiny test requires weighing the burden of a disclosure requirement against the burden on First Amendment rights. *See Reed*, 561 U.S. at 196. After deciding whether a substantial relation to the important government interest exists, a court then addresses whether the law is narrowly tailored. *See Wyo. Gun Owners*, 83 F.4th at 1244 ("[T]he government still must demonstrate a substantial relation between a disclosure scheme's burden and an important governmental interest, [and] it must also show that the regime is narrowly tailored to the government's asserted interest." (citing *Bonta*, 594 U.S. at 610–11) (internal quotation marks omitted)). *Wyo. Gun Owners* exemplifies that, even post-*Bonta*, this Circuit examines the issue of substantial relation before the issue of narrow tailoring. *See* 83 F.4th at 1244, 1247. Thus, the district court appropriately considered any evidence of burden, including the alleged chilling effect, when assessing the substantial relation component of the analysis. Moreover, even if the form of the district court's order were somehow incorrect, reversal would not be

warranted because the district court properly concluded the CRA is narrowly tailored to the State's interest, as discussed below.

C. The Statutory Disclosure Requirements are Narrowly Tailored to the State's Interest

The Secretary therefore and finally turns to the Supreme Court's recent addition to the factors required under the exacting scrutiny analysis: that the disclosure law be narrowly tailored to achieve the government's sufficiently important interest. *Wyo. Gun Owners*, 83 F.4th at 1243–44 (citing *Bonta*, 594 U.S. at 609–10). Although the Supreme Court made clear that the least restrictive means are not required, the relevant inquiry requires a court to "consider the extent to which the burdens are unnecessary[.]" *Bonta*, 594 U.S. at 610–11. Thus, "the government must 'demonstrate its need' for the disclosure regime 'in light of any less intrusive alternatives.'" *Wyo. Gun Owners*, 83 F.4th at 1247 (quoting *Bonta*, 594 U.S. at 613).

The CRA's disclosure requirements are narrowly tailored. As discussed by the district court, multiple features of the CRA, including its temporal limitations, monetary thresholds, earmarking scheme, and opt-out provisions, all serve to demonstrate that the law is narrowly tailored to the informational interest of knowing who is funding large advertisements for candidates or ballot initiatives before an election. *See* App. 181–83. The CRA requires the disclosure of major funders of significant election ads—while closing loopholes that would leave the law toothless—and ensures that the electorate understands which donors are spending

large amounts of money to influence elections. The CRA does so without infringing on the rights of small donors who spend too little or have too little influence to support a public informational interest or donors who opt-out of the general fund expenditures. App. 182.

Nevertheless, RGF contends the CRA is not narrowly tailored. To support its position, RGF once again returns to its flawed premise that Section (3)(c) ads cannot be understood as advocating for or against a candidate or ballot initiative. Aplt. Br. at 44–45. Specifically, based on its mischaracterization of Section (3)(c), RGF claims that a disclosure requirement for such ads "does not help the electorate make informed choices about a candidate or ballot initiative because" the ads lack advocacy and thus "information about those donors tells voters noting about a candidate or ballot question." Aplt. Br. at 44. But contrary to RGF's contention, the temporal limitations and the targeting of ads that are disseminated to the relevant electorate tailor the law to ads that are intended to influence an election.

RGF further questions the "quality" of information gained from disclosure. Aplt. Br. at 44. RGF argues that general fund donors may not support an organization's specific ads even if they support the totality of the organization's activities. Aplt. Br. at 45. However, as discussed above, if a donor does not support an organization's advertisements but supports other aspects of the organization, the CRA gives them the chance to opt out of funding independent expenditures. Thus,

the informational interest is furthered without deterring donors who support organizations like RGF but do not support their advertisements. Moreover, RGF does not provide any legal authority supporting the premise that only donors of earmarked funds may be subject to disclosure for a disclosure law to survive exacting scrutiny, and thus fails to show error on appeal. *Cf. Pignanelli v. Pueblo Sch. Dist. No. 60*, 540 F.3d 1213, 1217 (10th Cir. 2008) (rejecting a claim on appeal because the appellant failed to provide any legal authority in support). As the district court astutely observed, no such authority exists. *See* App. 182.

RGF additionally claims that *Bonta* supports its argument that Section (3)(c) is not narrowly tailored to the government interest. However, the disclosure regime in *Bonta* is hardly analogous to the CRA's disclosure regime. Rather, distinct from the CRA, the disclosure regime in *Bonta* required all nonprofit corporations in the entire state of California to automatically disclose their Schedule Bs to the state Attorney General. *Bonta*, 594 U.S. at 597. There were virtually no limits on the disclosure requirement, resulting in the Court's natural conclusions that it was not narrowly tailored at all, let alone narrowly tailored to California's interest in preventing nonprofit fraud, and that the resulting burdens were unnecessary in almost all instances of disclosure. *See id.* at 611–12, 614, 616. Here, as discussed, the CRA contains several limitations that narrowly tailor the imposition of disclosure to the government's interest. And, as the district court observed, "unlike in *Bonta*,

. . . the State is using the disclosures to enhance its asserted interest." App. 181. RGF's comparison to *Bonta* is neither useful nor accurate, and its reliance on *Bonta* to claim that the informational interest furthered by the CRA can only become relevant in a small number of cases involved, or no cases at all, is based on an incomplete understanding of *Bonta*. *See* Aplt. Br. at 44–45.

Finally, in response to RGF's hypothetical and its claim that the opt-out feature does not cure their concern, *see* Aplt. Br. at 47, it is worth reiterating this Court's prior conclusion that "[u]nsubstantiated allegations carry no probative weight in summary judgment proceedings; they must be based on more than mere speculation, conjecture, or surmise." *Ellis*, 779 F.3d at 1201 (alterations and internal citation omitted). Additionally, notwithstanding RGF's proposed scenario, the narrowly tailored threshold does not require the least restrictive means. *See Bonta*, 594 U.S. at 609. Indeed, in some rare instances, the disclosure requirement may be to some extent less necessary to achieve the state's informational interest.

Moreover, the disclosure in RGF's scenario still tells the public who is spending large amounts of money to influence voters shortly before an election regardless of whether some funds were earmarked for the ads where others were not, furthering the State's informational interest. The twenty hypothetical general fund donors triggered numerous limiting criteria to end up on that list—the timing of the ad, the size of the donation, and their choices to earmark or not opt-out of disclosure.

Indeed, RGF's hypothetical suggests that a disclosure law cannot be narrowly tailored unless the disclosure tells voters the full and detailed extent of every donors' contribution to or approval of a specific ad. RGF thus implies that the CRA can only be narrowly tailored if it contains the least restrictive means of furthering the CRA's informational interest. The law simply does not require the least restrictive means. *See id.* at 610–11.

The district court correctly concluded that the CRA's disclosure requirements for Section (3)(c) ads are narrowly tailored to the State's interest in providing voters with information regarding who is spending significant sums of money to influence their vote just before an election. New Mexico's disclosure laws are carefully tailored to target only significant expenditures to advertise to the public concerning an upcoming election. And to avoid donors being needlessly identified, the disclosure law excludes small donations, allows entities to fund expenditures from a segregated fund and only identify donors to that fund, and includes an option for donors to not fund an advertisement and remain anonymous. These provisions are hallmarks of the narrowly tailored laws that have been upheld by the Supreme Court and Tenth Circuit.

CONCLUSION

For the foregoing reasons and those set forth in briefing below and the district court's order, the Secretary respectfully requests that this Court affirm the order of

the district court granting the Secretary's motion for summary judgment and denying RGF's motion.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

The Secretary does not request oral argument. The dispositive issue or issues have been authoritatively decided and any additional embedded issues do not require elucidation at oral argument.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify that:

1) This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 21(d)(1). It contains 9,939 words, excluding the parts of the brief excluded by Federal Rule of Appellate Procedure 32(f) and Tenth Circuit Rule 32(B).

2) This brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6). It is printed in Times New Roman, 14-point.

By: /s/ Ellen Venegas

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

In accordance with the court's CM/ECF User's Manual, I hereby certify that all required privacy redactions have been made. In addition, I certify that the hard copies of this pleading that are required to be submitted to the court are exact copies of the ECF filing, and the ECF submission has been scanned for viruses with Webroot Endpoint Protection and, according to the program, is free of viruses.

CERTIFICATE OF SERVICE

On August 8, 2024, I filed the foregoing document through the Court's CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Ellen Venegas