CASE NO. 21-2015

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COWBOYS FOR TRUMP, LLC. *et al*,

Plaintiffs – Appellants

v.

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

Defendant – Appellee.

On Appeal from the United States District Court for the District of New Mexico
The Honorable Judge Gregory Faurat D.C. Case No.: 2:20-cv-0587 GJF/SMV

APPELLANT'S OPENING BRIEF
ORAL ARGUMENT REQUESTED

Respectfully submitted,

BARNETT LAW FIRM, P.A.

By: /s/ Colin Hunter
COLIN L. HUNTER
1905 Wyoming Blvd NE
Albuquerque, NM 87112
(505) 275-3200
colin@theblf.com

CORPORATE DISCLOSURE STATEMENT

Undersigned counsel of record for Cowboys for Trump LLC, certifies that it does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

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RELATED CASES STATEMENT

No prior appeals have been taken in this action, or to this Court from any related action.

INTRODUCTION

This case is about the Office of the Secretary of State's (hereafter "SOS") misuse of its enforcement power to trample the First Amendment right to free speech and association of a high-profile ideological opponent, Cowboys for Trump, LLC (hereinafter "C4T")., The SOS (mis)use of an unconstitutional law to silence ideological opponents and hinder their ability to associate with one another to amplify their message is contrary to the First Amendments right to free speech and association. The First Amendment elevates political speech above all other forms of individual expression by prohibiting laws that regulate it unless the laws are narrowly tailored to serve a compelling state interest.

Justice Kennedy succinctly states in his majority opinion in Citizens United, discriminatory political speech prohibitions run afoul of the First Amendment because:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment 'has its fullest and most urgent application" to speech uttered during a campaign for political office.' (Internal citations omitted). For these reasons, political speech must prevail against laws that would suppress it whether by design or

inadvertence.

Citizens United at 339. Stretching back to the founding era and The Federalist Papers, the freedom of speech has included the right to engage in anonymous issue advocacy concerning important public issues. *McIntyre v. Ohio Election Commission*, 514 U.S. 334 (1995).

The Supreme Court and Tenth Circuit precedent are unambiguous on this point: N.M. Stat. Ann. §§ 1-19-27.3(C) and (D)(2) suffer from incurable constitutional defects. No constitutional carving scalpel exists that could carve out the defective provision thus saving the whole. Plaintiffs lost after the district court granted Defendant's motion for judgment on the pleadings finding that Plaintiffs' lacked standing.

The district court erred when it found that Plaintiffs lack standing, in their own right, and in addition and alternatively, lacked associational standing to bring a facial challenge to provisions of New Mexico's Campaign Reporting Act and an as-applied challenge to the Secretary's enforcement action. This decision should be reversed.

STATEMENT OF JURISDICTION

Plaintiffs-Appellants brought this civil action against the New Mexico Secretary of State Maggie Toulouse Oliver under 42 U.S.C. § 1983 seeking relief for violations of their rights under the First Amendment of the United States Constitution. The district court therefore had subject-matter jurisdiction over this

action under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the Plaintiffs-Appellants seek review of a final decision of the district court that disposed of all the parties' claims. This appeal is timely. The final judgment or order to be reviewed was entered on the district court docket on January 20, 2021. Plaintiff timely filed their notice of appeal on February 19, 2021, within the 30-day limit provided by Federal Rule of Appellate Procedure 4(a)(1).

STATEMENT OF ISSUES

1. Whether the district court erred in finding that Plaintiffs lacked standing, in their own right, to contest the validity of the New Mexico Campaign Reporting Act, N.M. Stat. §§ 1-19-26, *et seq*.

2. Whether, in addition and alternatively, the district court erred when it held that Cowboys for Trump, LLC (hereinafter "C4T") may not assert the rights of its donors (*i.e*. has associational standing).

STATEMENT OF CASE AND PROCEDURAL HISTORY

Plaintiffs brought a civil rights action seeking declaratory and injunctive relief to vindicate right of freedom of speech and association to organize and vocally support the President of the United States, Donald J. Trump and his agenda as well as the right to enjoy the equal protection of the law. *See* Compl. at pg. 1, ¶ 1.

Plaintiffs, Cowboys for Trump, LLC ("C4T"), Couy Griffin, and Karyn Griffin "engage in educational advocacy in New Mexico and around the country in

support" of President Donald Trump. *See* Mem. Op. and Order, Dec. 30, 2020, ECF 28.

Plaintiffs challenged certain reporting, disclosure, and disclaimer provisions of the New Mexico Campaign Reporting Act ("CRA"). *See generally* N.M. Stat. §§ 1-19-26, 1-19-26.1, 1-19-26.4,. 1-19-27.3, 1-19-34.4, 1-19-34.6, 1-19-36. Under the CRA, C4T (as a "political committee") is required to register a "statement of organization" with Defendant. N.M. Stat. § 1-19-26.1(B)-(C). That requirement obligates C4T to identify to Defendant its name, a statement of purpose for which it was organized, the names and addresses of its officers, and the bank account used to "receive or make contributions or make expenditures." N.M. Stat. § 1-19-26.1(C)(1)-(4). At the heart of the dispute are the disclosure requirements triggered by certain threshold amounts of "independent expenditures." *Id.* at pg. 2, ¶ 1. The New Mexico Legislature defined an "independent expenditure" as one that is:

> (1) made by a person other than a candidate or campaign
> (2) not a coordinated expenditure as defined in the Campaign Reporting Act; and
> (3) made to pay for an advertisement that:
>
> > (a) expressly advocates for 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. § 1-19-26(N). Persons who make independent expenditures of less than $3,000 in "nonstatewide" elections or $9,000 in statewide elections must disclose the identity of (and amount contributed by) each donor who contributed more than $200 toward the independent expenditure. N.M. Stat. § 1-19-27.3(C). Persons who make independent expenditures of more than $3,000 in "nonstatewide" elections or $9,000 in statewide elections are subject to additional disclosure requirements. *See* N.M. Stat. § 1-19-27.3(D). Persons who make independent expenditures for advertisements in an amount greater than $1,000 must "ensure that the advertisement contains the name of the candidate, committee or other person who authorized and paid for the advertisement." N.M. Stat. § 1-19-26.4. Defendant publishes all of these disclosures online. *Id.* at pg. 3, ¶ 1.

C4T receives support from a "variety of sources" to fund its general operations and pay for its "educational efforts." Plaintiffs fear that the CRA's disclosure requirements could drive away donors, thereby reducing C4T's fundraising. Plaintiffs maintain that they "have not and will not make independent expenditures." *Id.* at pg. 2, ¶ 2.

Defendant filed a Motion to Dismiss contending that Plaintiffs do not have

standing to challenge the CRA because they have not alleged that they have suffered an injury in fact. Alternatively, even if Plaintiffs have suffered an injury, Defendant insists that any such injury is not redressable in this case. Defendant further argues that C4T cannot assert the rights of its donors because C4T only interacts with its donors via arm's-length transactions. *Id.* at pg. 4, ¶ 3.

Plaintiffs argued that they have established injury in fact because the CRA's reporting, and disclosure requirements chill their ability to exercise their First Amendment rights. Plaintiffs contended that their injuries are redressable because a ruling on the merits would "forestall [Defendant's] overreach in forcing state registration and disclosure on Plaintiffs." Last, C4T argued that it can assert the rights of its donors because "the First Amendment recognizes a right of associations to litigate on behalf of their members as a mechanism for petitioning the government for redress. *Id.* at pg. 5, ¶ 1.

The Court granted Defendant's Motion finding:

> One of the hallmarks of the American experiment in governing itself is the right of her citizens to band together to speak on matters of political importance. Another hallmark is the ability of her citizens to turn to a federal court whenever the right to engage in political speech is believed to be unconstitutionally threatened, chilled, or impinged. But the refuge offered by the federal court is not a forum for the general airing of miscellaneous political grievances a citizen or group of citizens may wish to air about the regulatory efforts of a government actor. The key to the door at the federal courthouse requires a *concrete injury* that is redressable by the Court *in that case*. The allegations in the Complaint filed here stop well short of opening the Court's door.

See Mem. Op. and Order, Dec. 30, 2020, ECF 28 at pg. 12, ¶ 2.

ARGUMENT

First Amendment standing analysis is uniquely permissive. The United States Supreme Court, the Tenth Circuit, and numerous other courts have recognized that standing is more permissive when First Amendment harms are alleged because First Amendment challenges are necessary for the very functioning of our democracy. Courts routinely allow third parties to assert First Amendment harms on behalf of others and recognize that measures chilling protected expression give rise to First Amendment injury-in-fact.

This Court reviews district court's decisions on motions for judgment on the pleadings *de novo*. *de novoThournir v. Meyer*, 909 F.2d 408, 409 (10th Cir. 1990). For

the reasons shown below, the decision of the trial court should be reversed.

I. Plaintiffs Can Challenge the CRA's Reporting and Disclosure Requirements as Violations of their First Amendment Rights

The New Mexico Campaign Reporting Act Section 1-19-27.3(C) and (D)(2) requiring C4T to disclose their donors violates their "right to privacy in their association for free speech about issues." [*See* Compl. Doc. 1, ¶ 40.] Further Section 1-19-26.1(C) requirement that C4T register with the Secretary of State and Section 1-19-26.4 requirement that they claim their sponsorship of advertisements violates their right to "anonymity in . . . free speech about issues." [Id. ¶ 44.]

A. Plaintiffs Can Sue on Behalf of Their Supporters

The First Amendment protects the rights to free speech, to freedom of religion, to peaceably assemble and associate, and to petition the government for redress. There is a synergistic relationship among the First Amendment rights: just as association facilitates speech, it also facilitates petitioning the government. The leading case with regard to the right of association is *NAACP v. Alabama ex rel. Patterson*. The case centered on Alabama's attempt during the civil rights movement to compel the NAACP to reveal the names and addresses of all its Alabama members, as was required under state laws. The NAACP refused, claiming that the release of its membership lists would subject its members to harassment and retaliation for participating in efforts to end racial discrimination and segregation in Alabama. *Patterson*, 357 U.S. at 451. The NAACP showed that past release of its membership lists had exposed members to economic targeting, loss of employment, physical coercion, and other forms of hostility. *Id*. The Supreme Court unanimously held that compelled disclosure of the NAACP's membership lists would violate its members' right to the freedom of association. *Id*.

The Supreme Court reasoned that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly" and found that the

"compelled disclosure of [the NAACP's] Alabama membership was likely to adversely affect the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly ha[d] the right to advocate." This was because compelled disclosure of the NAACP's membership might have induced members to withdraw from the NAACP, and to dissuade others from joining it out of fear of the consequences of their membership being exposed. "[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458–59 (1958). As we have seen, the First Amendment recognizes a right of associations to litigate on behalf of their members as a mechanism for petitioning the government for redress, and this right may be at its zenith when matters of self-governance are at issue. *Id.*

The SOS does not cite to a single First Amendment case in support of her argument to C4T does not have an associational right to assert on behalf of its supporters. This failure to recognizing that First Amendment standing analysis is uniquely permissive leads the SOS to the erroneous conclusion that Plaintiffs lack standing.

II. Plaintiffs have Alleged an Injury in Fact to Support Their Own First Amendment Claims

Again, the district court did not take into account the uniquely permissive First

Amendment standing analysis. Revealing an anonymous speaker's identity or prohibiting anonymous speech constitutes a recognized First Amendment injury.

The Supreme Court has for over fifty years recognized that the First Amendment protects the right to speak anonymously. *Talley v. California*, 362 U.S. 60 (1960); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Anonymity "protect[s] unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357. The Supreme Court has recognized that the long tradition of anonymous pamphleteering in the United States has been essential to the development of our democracy. *Talley*, 362 U.S. at 64; see also *McIntyre*, 514 U.S. at 360.

A. Plaintiffs Have Alleged Redressable Injuries

The district court further found then argues failed to establish that a ruling in this case will redress their alleged injuries. The requirement that a favorable judgment meaningfully redress the alleged injury, likewise is not supported by case law. *Lujan*, 504 U.S. at 568-69, 112 S.Ct. 2130. The argument is, in effect, that relief in this lawsuit is neither sufficient nor necessary for Plaintiffs to achieve their objectives. This argument misconceives the nature of the Plaintiffs' alleged injury. Plaintiffs' alleged injury is not having to comply with the reporting and disclosure requirement of the CRA but the chilling effect of reporting and disclosure requirements have on their exercise of free speech rights. Accordingly, redressability

is not in doubt. Declaratory and injunctive relief against the enforcement of these requirement, if granted, would remove any chilling effect caused by the requirements and thereby put a stop to the alleged continuing injury.

B. The SOS ordered C4T to disclose is contributions and expenditures, despite C4T not having made independent expenditures

The SOS ordered C4T to disclose is contributions and expenditures, despite C4T not having made independent expenditures. Again, this argument misconceives the nature of the Plaintiffs' alleged injury. Plaintiffs' alleged injury is not only having to comply with the reporting and disclosure requirement of the CRA but the chilling effect of reporting and disclosure requirements have on their exercise of free speech rights. Section 1-19-27.3 sets forth the reporting requirements for "[a] person who makes an independent expenditure not otherwise required to be reported under the [CRA]." Plaintiffs challenged Section 1-19-27.3(C) and (D)(2) in particular, which require, to a varying extent, disclosure of the names and addresses of each person who has made contributions, depending on the total amount of independent expenditures made in the election cycle. See § 1-19-27.3(C).

III. Plaintiffs Demonstrated that They Are Subject to Section 1-19-26.1(E) or Would Benefit from a Ruling that the Statute Is Preempted.

Plaintiffs contend that Section 1-19-26.1(E) is preempted by the Federal Election Campaign Act (FECA) and its associated regulations. Plaintiffs claim FECA preempts state law that requires in-state groups or political committees to

report their expenditures, even if those expenditures are for the advertisement of a candidate for federal office. 1978 NMSA 1-19-26.1(E). The challenged CRA section only exempts political committees who register with the federal election commission and are located in another state. *Id.* FECA, however, supersedes state law concerning organization and registration of political committees supporting Federal candidates. 11 CFR § 108.7(b)(1-3). FECA preempts state law whether the political committee is in New Mexico or any of the other forty-nine states. The CRA attempts to enlarge the state's power by forcing registration and disclosure once a political committee settles in New Mexico. FECA's preemption of state law applies wherever the purported political committee resides. FECA preempts state law on the registration requirements of groups who support Federal candidates, like Cowboys for Trump.

Plaintiffs would benefit from a finding that FECA preempts New Mexico's Campaign Reporting Act because it will forestall the Secretary's overreach in forcing state registration and disclosure on Plaintiffs. If the Court determines FECA preempts the CRA, the Plaintiffs escapes potential overreaching, or politically motivated Secretary of States.

The Secretary argued and the district court agreed that New Mexico's state interest in regulating Plaintiffs. Couy Griffin's position as an Otero County Commissioner in New Mexico does not change CRA's definition of an independent expenditure: an expenditure that expressly (i) advocates for the election or defeat of

a candidate or ballot measure, (ii) is susceptible to no other reasonable interpretation than an appeal to vote for or against a candidate or ballot measure; or (iii) refers to a candidate or ballot question within thirty days of a primary election or sixty days of a general election when the candidate's on the ballot. 1978 NMSA § 1-19-26(N). The Campaign Reporting Act does not extend the Secretary's reach anytime a New Mexico elected official appears on Facebook or rides a horse to the nation's capital. The Secretary needs to identify a group's expenditure that constitutes a CRA independent expenditure.

ORAL ARGUMENT STATEMENT

Oral argument is requested to ensure that any shortcomings in counsel's written presentation are revealed and corrected in colloquy with the Court.

CONCLUSION

For all of these reasons, Plaintiffs ask this Court to reverse the district court's dismissal of their claims on the basis of standing, and to remand this case with instructions that it proceed to discovery, dispositive motions, and trial.

Respectfully submitted on this 20th day of April, 2021.

BARNETT LAW FIRM, P.A.

By: /s/ Colin Hunter
COLIN L. HUNTER

1905 Wyoming Blvd NE
Albuquerque, NM 87112
(505) 275-3200
colin@theblf.com

Attorney for Plaintiffs-Appellants
COWBOYS FOR TRUMP, LLC

Certificate of Compliance

As required by Federal Rules of Appellate Procedure 28(a)(10) and 32(g)(1) and 10th Circuit Rule 32(a), undersigned counsel for Plaintiffs-Appellants certifies that this brief is proportionally spaced in 14-point font and contains 3,508 words, as calculated pursuant to Federal Rule of Appellate Procedure 32(f) with Microsoft Office Word 2016.

/s/ Colin Hunter

Certificate Digital Submission

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

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/s/ Colin Hunter

Certificate of Service

I hereby certify that on this 20th day of April, 2021, the foregoing brief was filed and served on all counsel of record via the ECF system.

/s/ Colin Hunter