CASE NO. 21-2015

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

COWBOYS FOR TRUMP, INC., *et al.*,	)
Plaintiff – Appellant,	)
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 Magistrate Judge Gregory J. Fouratt,
Presiding by consent
No. 2:20-cv-00587-GJF-SMV

APPELLEE'S ANSWER BRIEF

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There are no prior or related appeals.

INTRODUCTION

This appeal reveals the fundamental mismatch between the case Cowboys for Trump, LLC, Couy Griffin, and Karyn Griffin (collectively, "C4T" or "Plaintiffs") *wish* they had brought against New Mexico Secretary of State Maggie Toulouse Oliver, and the case they *actually* brought against the Secretary. After a binding arbitration upheld the Secretary's determination that C4T is a political committee under New Mexico's Campaign Reporting Act (CRA), N.M. Stat. §§ 1-19-25 through -37 (1979, as amended through 2019), Plaintiffs sued to enjoin the Secretary from complying with her statutory duty to enforce the disclosure and disclaimer requirements that apply to political committees under the CRA. *See, e.g.*, N.M. Stat. § 1-19-27.3 (2019) (setting forth disclosure requirements for political committees making independent expenditures in certain amounts). But in pursuing their claims, Plaintiffs neither challenged the Secretary's determination nor conceded that C4T is, in fact, a political committee. Instead, they challenged the constitutionality of the CRA's disclosure and disclaimer requirements while simultaneously alleging that they "have not and will not make independent expenditures" under the CRA.

Accepting Plaintiffs' allegations as true, the District Court[1] correctly determined that "Plaintiffs have affirmatively disclaimed any intent" to engage in

[1] All references to the District Court are to the Honorable Magistrate Judge Gregory J. Fouratt, who presided over the proceedings by consent of the parties.

conduct that could trigger the CRA's disclaimer and disclosure requirements. [App. 0069 (*Mem. Op.* at 10).][2] Accordingly, the District Court concluded that Plaintiffs had failed to allege an injury in fact sufficient to challenge enforcement of the CRA and dismissed the complaint for lack of standing. The dismissal is consistent with the law and should be affirmed.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the District Court properly dismissed the Complaint for lack of standing when Plaintiffs alleged that they "have not and will not make independent expenditures" that could subject them to the disclaimer and disclosure requirements of the New Mexico Campaign Reporting Act.

[2] All record citations are to the appendix or the opening brief and use the format "[App. XXXX.]" or "[BIC XX.]."

STATEMENT OF THE CASE

I. C4T's Complaint.

Cowboys for Trump, LLC,[3] Couy Griffin, and Karyn Griffin[4] sued New Mexico Secretary of State Maggie Toulouse Oliver, purportedly "seeking declaratory and injunctive relief to vindicate [the] right of freedom of speech and association to organize and vocally support the President of the United States, Donald J. Trump and, his agenda." [App. 0006.] In the "Introduction" section of the Complaint, C4T alleged that Secretary Oliver had "made a final determination that Cowboys for Trump, LLC qualifies as a political committee under New Mexico's Campaign Reporting Act." [App. 0008.] C4T also alleged that the Secretary lacked constitutional authority to regulate C4T because it is not an organization that has the primary purpose of influencing elections. [App. 0009 (citing *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010).] C4T further alleged that "Plaintiffs have not and will not make independent expenditures":

> Plaintiffs engage in educational advocacy in New Mexico and around the country in support of President Donald J. Trump and his policies. *Plaintiffs have not and will not make independent expenditures* in support of candidates or ballot questions and they also have not and will

[3] As the District Court noted, "[t]he record reflects that the caption erroneously identifies C4T as a corporation instead of correctly reflecting that it is a limited liability company." [App. 0060 (*Mem. Op.* at 1 n.2).]

[4] The District Court noted that the complaint is inconsistent about the spelling of Plaintiff Karyn Griffin's first name. This Answer Brief uses the spelling adopted by the District Court. [App. 0060 (*Mem. Op.* at 1 n.3).]

> not make financial contributions to candidates. Further, Cowboys for Trump's focus is on educating the public about the President of the United States and his policies. *They have not and will not make financial contributions or independent expenditures* in support of candidates for state, local, and city elections in the state in New Mexico.

[App. 0008 (emphasis added).] And according to the Complaint, C4T has not "expended a single penny on independent expenditures in support or in opposition to any candidate for office, much less a state office." [App. 0009.]

The "Factual Allegations" section of the Complaint abruptly shifted focus to the requirements for political committees that resulted from the 2019 amendments to the CRA. [App. 0012.] C4T alleged that "Plaintiffs engage in issue advocacy on issues that relate to their mission promoting the causes of secure borders, the unborn's protection from abortion, and the Second Amendment." [App. 0013.] C4T alleged that under the amended CRA, "Plaintiffs and all other groups that engage in issue advocacy valued above certain thresholds" are required to register with the Secretary as political committees; to disclose their members and contributors to the Secretary when they make independent expenditures that meet certain minimum thresholds; and to include a sponsorship disclaimer identifying their sponsorship of an advertisement when they "engage in issue advocacy close in time to an election." [App. 0012-13.] C4T alleged concern that compelled disclosure of their donors' identities could subject their donors to harassment and could cause C4T's membership and revenue to decline. [App. 0014.] And due to the potential criminal

and civil penalties for failing to comply, C4T alleged that they "will be forced to silence their own speech and not engage in their desired communications so long as these provisions . . . are in force." [App. 0014.]

C4T's legal claims were silent about the Secretary's determination that C4T is a political committee and challenged only the constitutionality of the CRA's disclosure and disclaimer requirements. Specifically, C4T claimed that the requirements to disclose the identity of their donors violates their "right to privacy in their association for free speech about issues." [App. 0014 (Count I).] C4T also claimed that the requirements to register with the Secretary and to disclaim their sponsorship of advertisements violates their right to "anonymity in . . . free speech about issues." [App. 0015 (Count II).] And C4T claimed that the application of the CRA against C4T was preempted by the Federal Election Campaign Act (FECA).[5] [App. 0018 (Count IV).]

[5] C4T also challenged a 2017 rulemaking by the Secretary as *ultra vires*. [App. 0016-18.] In the motion for judgment on the pleadings, the Secretary argued that the count should be dismissed as moot and for lack of supplemental jurisdiction. [App. 0026-32.] The Secretary also informed the Court that C4T's counsel had voluntarily dismissed a substantially identical claim on behalf of another client in a separate lawsuit challenging enforcement of the CRA's disclosure and disclaimer requirements for political committees. [App. 0025 n.1 (citing *Rio Grande Found'n v. Oliver*, No. 1:19-cv-01174-LF-JFR (D.N.M. Mar. 13, 2020).] C4T later stipulated to dismissal of its challenge to the 2017 rulemaking and has not raised the issue on appeal. [App. 0043, 0049, 0061 (*Mem. Op.* at 2, n.4).]

Based on these allegations and legal claims, C4T requested the following relief: (1) a declaration that the CRA's disclosure requirements violate the right of freedom of speech and association under the First and Fourteenth Amendments; (2) a declaration that the CRA's disclaimer requirements violate the right to anonymous speech under the First and Fourteenth Amendments; (3) a declaration that the CRA is preempted by federal law; (4) an injunction against the application of the CRA's disclosure and disclaimer requirements "as applied to organizations engaged [in] educational advocacy such as Plaintiffs'"; (5) nominal damages; and (6) costs and attorneys' fees under 42 U.S.C. § 1988. [App. 0018-19.]

II. The Secretary's Motion for Judgment on the Pleadings.

After answering the Complaint, the Secretary moved for judgment on the pleadings, arguing that C4T lacked standing to challenge the CRA's disclosure and disclaimer requirements. [App. 0034-38.] The Secretary argued that C4T's repeated allegation that "Plaintiffs have not and will not make independent expenditures" undermined their ability to demonstrate that they had suffered an injury in fact or that such an injury would be redressable by a favorable ruling on their claims. [App. 0034-38.] The Secretary also argued that C4T's preemption claim should be dismissed because, *inter alia*, C4T had failed to establish that it was subject to Section 1-19-26.1(E), and as a result, a favorable ruling would not redress C4T's alleged injury. [App. 0040 & n.3, 0057.]

C4T responded that it had properly alleged an injury in fact under the "uniquely permissive" standing analysis for First Amendment claims. [App. 0043.] C4T argued that it had satisfied the requirements for both individual and associational standing based on "the chilling effect of reporting and disclosure requirements have on their exercise of free speech rights." [App. 0047.] C4T also argued that it had standing for their preemption claim and "[i]f necessary" requested leave "to amend the Complaint and either clarify that its Count IV impliedly challenges the arbitration decision or add a fifth claim directly challenging the arbitration decision."[6] [App. 0049.]

Ruling on the papers, the District Court agreed with the Secretary that C4T had failed to allege an injury in fact. The Court reviewed Supreme Court and Tenth Circuit precedent on the law of standing in the context of a First Amendment pre-enforcement challenge and held that C4T had failed to show a "credible threat of future prosecution." [App. 0065-70.] The Court reasoned, "the allegation that C4T has not and will not make 'independent expenditures' is significant. Indeed, it is dispositive, for this allegation removes C4T entirely from the scope of actors whose

[6] C4T's reference to "the arbitration decision" is to the decision made in a binding arbitration requested by C4T to challenge the Secretary's determination that C4T is a political committee. *See* N.M. Stat. § 1-19-34.4 (1997). In its memorandum opinion and order, the District Court noted that "[t]he parties appear to agree that this determination was upheld in binding arbitration." [App. 0061 (*Mem. Op.* at 2 n.5).]

conduct the CRA purports to govern. The disclosure requirements at issue *only* apply to those making 'independent expenditures.'" [App. 0069 (*Mem. Op.* at 10).] The Court concluded, "because Plaintiffs allege that they have not made—and do not intend to make—any independent expenditures, they perforce will not be subject to the disclosure requirements the CRA attaches to such expenditures." [*Id.*]

Accordingly, the Court held that C4T had failed to allege an injury in fact, dismissed the Complaint without prejudice, and granted C4T's request for leave to file an amended complaint by January 15, 2021. [App. 0072 (*Mem. Op.* at 13).] C4T did not file an amended complaint, and the Court entered its final judgment on January 20, 2021. [App. 0073.] This appeal followed.

SUMMARY OF THE ARGUMENT

The District Court's opinion and order dismissing the Complaint is well-reasoned and should be affirmed. Under the CRA, a political committee has no duty to disclose information about its contributors unless it makes more than $1,000 in independent expenditures during the same election cycle. *See* N.M. Stat § 1-19-27.3 (setting forth reporting requirements for independent expenditures). Similarly, the duty to disclaim sponsorship of an advertisement arises only when a political committee makes more than $1,000 in independent expenditures to fund

advertisements during the same election cycle.[7] *See* N.M. Stat. § 1-19-26.4 (setting forth disclaimer requirements); N.M. Stat. § 1-19-26(N) (defining "independent expenditure"). The District Court therefore properly concluded that C4T's repeated allegation that it "has not and will not make independent expenditures" was dispositive. [App. 0069 (*Mem. Op.* at 10).] Put simply, C4T has not plausibly alleged that its rights have been chilled when it has "affirmatively disclaimed" any intent or desire to engage in the only conduct that would invoke the CRA's disclosure and disclaimer requirements. [App. 0069 (*Mem. Op.* at 10).] The dismissal should be affirmed.

ARGUMENT

I. Standard of Review.

"A decision by the district court granting a defense motion for judgment on the pleadings is reviewed de novo, using the same standard of review applicable to a Rule 1-12(b)(6) motion." *Soc. of Separationists v. Pleasant Grove City*, 416 F.3d 1239, 1240-41 (10th Cir. 2005) (quoting *Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1259 (10th Cir. 2004)). "Under that standard, we review the motion de novo, accepting factual allegations as true and considering them in the light most favorable

[7] The disclaimer requirement also applies to a campaign expenditure or a coordinated expenditure for an advertisement in an amount that exceeds $1,000. *See* N.M. Stat. § 1-19-26.4(A). C4T has not challenged Section 1-19-26.4(A) as it applies to campaign or coordinated expenditures or alleged an intent or desire to make campaign or coordinated expenditures.

to the plaintiff." *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1285-86 (10th Cir. 2011). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Burnett v. Mortgage Elec. Reg. Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The complaint must offer sufficient factual allegations 'to raise a right to relief above the speculative level.'" *Burnett*, 706 F.3d at 1235 (quoting *Bell Atl. Corp. v. Twombly*, 500 U.S. 544, 555 (2007)).

II. The CRA's Disclosure and Disclaimer Requirements Apply only to a Political Committee that Makes Independent Expenditures in an Amount that Exceeds $1,000 During the same Election Cycle.

The CRA defines a political committee in relevant part as "an association that consists of two or more persons whose primary purpose is to make independent expenditures and that has received more than five thousand dollars ($5,000) in contributions or made independent expenditures of more than five thousand dollars ($5,000) in the election cycle." N.M. Stat. § 1-19-26(Q)(4) (2019). The CRA defines an independent expenditure as an expenditure that is:

> (1) made by a person other than a candidate or campaign committee;
>
> (2) not a coordinated expenditure as defined in the Campaign Reporting Act; and
>
> (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. § 1-19-26(N) (2019).

Every political committee is required by the CRA "to appoint and maintain a treasurer, file a statement of organization with the [Secretary] and pay a filing fee of fifty dollars ($50.00)." N.M. Stat. § 1-19-26.1(B) (2019). The statement must include the full name of the committee, a statement of the committee's purpose, the names and addresses of the committee's officers, and "an identification of any bank account used by the committee to receive or make contributions or make expenditures." Section 1-19-26.1(C). A political committee must report any changes to the Secretary within ten days. Section 1-19-26.1(D). The Secretary is required by law to post the information on a publicly accessible website. *See* N.M. Stat. § 1-19-27(B)(3) (2016).

Beyond the statement of organization, a political committee has a duty to report additional information to the Secretary when the political committee makes

one or more independent expenditures in an amount that exceeds certain minimum thresholds. Significantly, no political committee has a duty to report such information unless it makes independent expenditures during the same election cycle in an amount that exceeds $1,000 in a nonstatewide election or $3,000 in a statewide election. *See* N.M. Stat. § 1-19-27.3(A). When required, the additional information includes "the source of the contributions used to make the independent expenditure." N.M. Stat. § 1-19-27.3(B)(3); *see also* § 1-19-27.3(C) (requiring reporting of "the name and address of each person who has made contributions of more than a total of two hundred dollars ($200) in the election cycle that were earmarked or made in response to a solicitation to fund independent expenditures and . . . the amount of each such contribution made by that person"); § 1-19-27.3(D)(2) (requiring, in some circumstances, reporting of "the name and address of, and amount of each contribution made by, each contributor who contributed more than a total of five thousand dollars ($5,000) during the election cycle to the person making the expenditures"). The Secretary has a duty to post this information on a publicly available website. *See* § 1-19-27(B)(3).

A political committee that uses independent expenditures to pay for advertisements also has a duty to disclaim its sponsorship of an advertisement when the committee makes expenditures for advertisements in an amount that exceeds $1,000 in the same election cycle. *See* N.M. Stat. § 1-19-26.4(A) (2019); *see also* 1-

19-26(A) (defining "advertisement" under the CRA). When required, the disclaimer must "contain[] the name of the candidate, committee or other person who authorized and paid for the advertisement." Section 1-19-26.4(D).

Thus, the CRA's requirements to disclose information about a political committee's contributors and to disclaim sponsorship of an advertisement apply only to a political committee that makes more than $1,000 in independent expenditures during the same election cycle. Put differently, a political committee that makes less than $1,000 in independent expenditures during the same election cycle has no duty to report information about its contributors or to disclaim sponsorship of an advertisement.

III. C4T Did Not Allege an Injury in Fact to Support Individual Standing.

As Plaintiffs, C4T must meet constitutional standing requirements to bring their claims. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) ("a plaintiff seeking relief in federal court must first demonstrate that he has standing to do so, including that he has a personal stake in the outcome" (internal quotation marks and citation omitted)). The burden to establish standing is on the plaintiff. *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016). "The irreducible constitutional minimum of standing" requires that the "plaintiff must have (1) suffered an injury in fact, (2) that is fairly tradeable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Renewable Fuels*

Ass'n v. EPA, 948 F.3d 1206, 1231 (10th Cir. 2020) (quotation marks and internal citations omitted).

"An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not 'conjectural' or 'hypothetical.'" *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks and citation omitted). Although the Supreme Court in the First Amendment context "has enunciated other concerns that justify a lessening of prudential limitations on standing," a First Amendment plaintiff nonetheless must demonstrate the existence of an injury in fact. *Ward v. Utah*, 321 F.3d 1263, 1267-68 (10th Cir. 2003) (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)).

"[A] chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury in fact, as long as it 'arise[s] from an objectively justified fear of real consequences." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (quoting *D.L.S. v. Utah*, 37 F.3d 971, 975 (10th Cir. 2004)) (alteration in original). Such a fear may arise when a plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder." *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) (quoting *Babbitt v. United Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Alternatively, "a First Amendment plaintiff who faces a credible threat of future

prosecution suffers from an 'ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment Rights.'" *Ward* 321 F.3d at 1267 (10th Cir. 2003) (quoting *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987)). Under either formulation, a plaintiff must allege at least an intention or desire to engage in protected conduct that would result in a credible threat of prosecution as a result of the challenged statute.

In this case, the District Court correctly concluded that C4T failed to allege an injury in fact. C4T repeatedly declared in the Complaint that they have not "expended a single penny on independent expenditures in support or in opposition to any candidate for office, much less a state office" and that they "have not and will not make independent expenditures." [App. 0008-09.] Those allegations, which must be accepted as true, leave no room for C4T to claim that the CRA's disclosure and disclaimer requirements are chilling their intention or desire to engage in protected activity. As the District Court reasoned, C4T has "affirmatively disclaimed" any intent or desire to make independent expenditures in any amount, much less in an amount that would exceed $1,000 in the same election cycle. [App. 0069 (*Mem. Op.* at 10).] Similarly, the avowed absence of any intent or desire to make independent expenditures undermines even a plausible inference of a credible threat of prosecution for failing to comply with the CRA. For the same reasons, a favorable ruling in this case would not redress any purported chilling of C4T's rights.

See, e.g., *City of Hugo v. Nichols (Two Cases)*, 656 F.3d 1251, 1264 (10th Cir. 2011) ("To demonstrate redressability, a party must show that a favorable court judgment is likely to relieve the party's injury."). Without any intention or desire to engage in conduct that would trigger the CRA's disclosure and disclaimer requirements, C4T cannot meet the irreducible constitutional minimum of standing to support their First Amendment claims.

The District Court also correctly concluded that C4T's allegations do not rise to the level of the First Amendment injuries that were held to be sufficient in *Susan B. Anthony List* and *Ward*. [App. 0067-68 (*Mem. Op.* at 8-9).] In *Susan B. Anthony List*, the plaintiff demonstrated an injury in fact when it alleged that "it intended to continue making statements about candidates who voted for the [Affordable Care Act]"; that the language of the Ohio false statement statute "arguably covered [the plaintiff's] intended future speech; and that "the threat of future enforcement was 'substantial.'" [*Id.* (citing *Susan B. Anthony List*, 573 U.S. at 161-67).] In *Ward*, the plaintiff demonstrated an injury in fact through "sworn . . . testimony that he would persist in the conduct that precipitated his past felony charge but for his fear of being charged with the same felony." [*Id.* (citing *Ward*, 321 F.3d at 1269).] Here, the District Court correctly held that C4T failed to demonstrate an injury in fact because of its repeated allegations that "Plaintiffs have not and will not" engage in the only

conduct that could subject them to the CRA's disclosure and disclaimer requirements.

C4T argues that they have individual standing to challenge the CRA's disclaimer requirements under *Talley v. California*, 362 U.S. 60 (1960) and *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), which purportedly recognize "the long tradition of anonymous pamphleteering in the United States." [BIC 9-10.] These arguments miss the point. According to C4T's own allegations, they do not engage in private or anonymous speech, including anonymous pamphleteering. To the contrary, C4T "vocally" and publicly supports former-President Trump and his agenda and "promot[es] the causes of secure borders, the unborn's protection for abortion, and the Second Amendment." [App. 0006, 0013.] C4T cannot claim the chilling of an abstract right to private or anonymous speech when their very purpose is to attract public attention. Thus, even if C4T were to make independent expenditures in an amount that required them to disclaim sponsorship of an advertisement, any asserted injury to their right to private or anonymous speech "rings hollow" and fails to support standing for their First Amendment claims. *See Illinois Opportunity Project v. Bullock*, No. 6:19-cv-00056-CCL, 2020 WL 5118134, at *4 n.5 (D. Mont. Aug. 31, 2020) ("Counsel's comment . . . that the Executive Order invades its right to privacy because its name will appear on the State's website . . . rings hollow, given counsel's statement that Illinois Opportunity

is willing to forego its own privacy and advertise its plan to send out political flyers in Montana in order to raise funds."). This Court should affirm the dismissal of the Complaint.

IV. C4T Did Not Allege an Injury in Fact to Support Associational Standing.

The District Court also properly concluded that C4T lacks standing to sue on behalf of its donors. "The Supreme Court has held that 'even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Aid for Women v. Foulston*, 441 F.3d 1101, 1111 (10th Cir. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (alteration in original)). While courts have recognized exceptions for certain "close relationships" and associations that represent their members, neither exception applies in this case.

For associational standing, a fundamental requirement is that the association's members (or in this case, its donors) "would otherwise have standing to sue in their own right." *Chamber of Comm. of U.S. v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010) ("An association has such standing only if: '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'"

(quoting *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)). The same requirement applies to support third-party standing. *See Aid for Women*, 441 F.3d at 1112 (setting forth requirements to "assert the rights of others," including that "there is a 'hindrance' to the possessor's ability to protect his own interests" (quoting *Kowalksi v. Temmer*, 543 U.S. 125 (2004))).

In this case, C4T's allegations that "Plaintiffs have not and will not make independent expenditures" effectively guarantee that the identities of C4T's donors will not have to be disclosed under the CRA. *See* § 1-19-27.3(A) (setting forth disclosure requirements when a political committee makes independent expenditures of more than $1,000 during the same election cycle in a nonstatewide election and more than $3,000 during the same election cycle in a statewide election); *see also* § 1-19-26.4(A) (providing that a political committee shall disclaim sponsorship of an advertisement funded by an independent expenditure in an amount of more than $1,000 or when all advertisements during the same election cycle are funded by independent expenditures that exceed $1,000 in the aggregate). As the District Court concluded, "C4T's donors have not suffered an injury in fact and are never expected to suffer such an injury." [App. 0071 (*Mem. Op.* at 12).] Accordingly, Plaintiffs lack associational standing to challenge the CRA's disclosure and disclaimer requirements on behalf of their members.

C4T relies on a single case, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), to argue that it has associational standing to sue on behalf of its donors. [App. 0045.] *NAACP* is "readily distinguishable." [App. 0070 (*Mem. Op.* at 11).] Unlike C4T, which has no intention to make independent expenditures that would require the disclosure of its donors' identities, the NAACP was subject to a court order to produce a list of names and addresses of all of its members within the state. *Id.* at 453. When the NAACP failed to comply, the lower court held it in civil contempt and imposed a $10,000 fine. *Id.* The Supreme Court held that the NAACP had standing to sue on behalf of its members to protect them "from compelled disclosure by the [s]tate of their affiliation with the [a]ssociation as revealed by the membership lists." *Id.* at 459.

In this case, C4T has not alleged that it must disclose the identities of its donors,[8] and it has "affirmatively disclaimed" any intent to engage in conduct that would subject its donors to the CRA's disclosure requirements. As a result, *NAACP* does not support C4T's attempt to challenge the CRA's disclosure requirements on behalf of its members.

[8] C4T represents in its Brief in Chief that "[t]he SOS ordered C4T to disclose its contributions and expenditures, despite not having made independent expenditures." [BIC 11.] That representation, regardless of its truth, is wholly absent from the Complaint and from the record below and should be disregarded in this appeal.

Moreover, *NAACP* reinforces the general rule that an association may assert the rights of its *members* when the association's nexus with those members "is sufficient to permit that it act as their representative" before the courts. *Id.* at 458-59. The Court in *NAACP* explained that the NAACP is "a nonprofit *membership* corporation," with membership available to "any person who is in accordance with its principles and policies" as set forth in the NAACP's formal Certificate of Incorporation.[9] *Id.* at 451 & note, 459 (emphasis added and alterations omitted). And the Court repeatedly referred to the NAACP and its *members*, and emphasized that the NAACP "and its *members* are in every practical sense identical." *Id.* at 458-59 (emphasis added).

Here, "C4T receives support from a variety of sources, including from donors of more than $5,000 per year. C4T raises money from New Mexico donors to supports its mission." [App. 0013.] C4T is organized as a Limited Liability Corporation and has not alleged a formal corporate purpose that would obligate it to spend donor-contributions in any particular manner. [*See generally* App. 0006-15.] Instead, C4T's donors make a contribution to an LLC and walk away, without any

[9] "The Certificate of Incorporation of the [NAACP] provides that its 'principal objects are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law." *NAACP*, 357 U.S. at 451, note.

membership or continuing ability to control or influence C4T's future activities. [App. 0009, 0013.] In other words, C4T has no members, and its relationship with its donors is limited, at best, to a series of arms-length transactions. Thus, unlike the nexus between the NAACP and its members, who "are in every practical sense identical," C4T lacks a nexus with its donors sufficient to permit it to represent their purported interests before the Court. *See also*, *e.g.*, *Hunt*, 432 U.S. at 343-45 (holding that the commission had associational standing where the apple growers and dealers "possess all of the indicia of membership in an organization," including the right to elect members of the commission and the exclusive rights to serve on the commission and to finance its activities); *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 435 (D.C. Cir. 2017) (holding that a magazine lacked associational standing to sue on behalf of its readers and subscribers because "readership is not the same as membership" and the magazine had failed to show that its readers and subscribers "played any role in selecting its leadership, guiding its activities, or financing those activities").

V. The District Court Properly Dismissed C4T's Preemption Claim.

Although the District Court did not address C4T's preemption claim separately, the Court also dismissed the claim for lack of standing. [App. 0063 (*Mem. Op.* at 4, n.7).] A brief review and consideration of C4T's preemption claim,

reproduced here in its entirety for ease of reference, shows that the dismissal should be affirmed:

> 55. Federal law preempts state law with respect to election to federal office. 52 U.S.C. § 30143(a).
>
> 56. Federal law supersedes "state law concerning the (1) organization and registration of political committees supporting Federal candidate; (2) disclosure of receipts and expenditures by Federal candidates and political committees; and (3) limitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. § 108.7(b)(1)-(3).
>
> 57. Plaintiffs seeks a declaratory judgment under 28 U.S. Code § 2201 that (i) 1978 NMSA §1-19-26.1(E) is preempted by federal law; and (ii) the Campaign Reporting Act is further preempted by the Federal Election Campaign Act to the extent the Campaign Reporting Act requires associations of people to register with or disclose receipts and expenditures to the New Mexico Secretary of State.

[App. 0018.]

To start, the specific provision of the CRA that C4T contends is preempted provides a carve-out from the CRA's registration requirements for a political committee that is registered with the Federal Election Commission and in compliance with the registration and reporting requirements of the FECA:

> The provisions of this section do not apply to a political committee that is located in another state and is registered with the federal election commission if the political committee reports on federal reporting forms filed with the federal election commission all expenditures for and contributions made to reporting individuals in New Mexico and

> files with the secretary of state, according to the schedule required for the filing of forms with the federal election commission, a copy of either the full report or the cover sheet and the portions of the federal reporting forms that contain the information on expenditures for and contributions made to reporting individuals in New Mexico.

Section 1-19-26.1(E). The carve-out is consistent with the FECA, which requires copies of reports filed with the FEC also to be filed with the state officers who are charged with maintaining state election campaign reports. *See* 52 U.S.C. § 30113(a)(1) ("A copy of each report and statement required to be filed by any person under this Act shall be filed by such person with the Secretary of State (or equivalent State officer) of the appropriate State, or, if different, the officer of such State who is charged by State law with maintaining State election campaign reports."). Thus, Section 1-19-26.1(E) allows the reports that must be filed with the FEC and provided to the Secretary to satisfy the CRA's reporting requirements for political committees that are located in another state and registered with the FEC.

Like C4T's First Amendment challenges, C4T did not allege an injury in fact due to Section 1-19-26.1(E) or an injury that would be redressed by a ruling that the provision is preempted. Indeed, it is difficult to see how C4T could be injured by Section 1-19-26.1(E) at all. In its Complaint, C4T did not allege that it is subject to the exception set forth in Section 1-19-26.1(E). And even if it had,[10] the only effect

[10] Although beyond the scope of this appeal, the Secretary has not waived the argument that C4T is not subject to Section 1-19-26.1(E). According to the Secretary's online records, C4T registered as a limited liability company in New

that Section 1-19-26.1(E) could have would be to *exempt* C4T from the CRA's registration requirements. Therefore, a finding that Section 1-19-26.1(E) is preempted would undermine the very result that C4T is pursuing with its preemption claim, i.e. avoidance of the CRA's registration requirement. As a matter of logic and reason, C4T cannot demonstrate an injury due to the carve-out in Section 1-19-26.1(E) from the CRA's registration requirement.

C4T similarly failed to allege an injury in fact with respect to its broader assertion that the CRA's registration and disclosure requirements are preempted. [App. 0018.] As demonstrated in Sections III and IV above, C4T's allegation that "Plaintiffs have not and will not make independent expenditures" effectively removes C4T and its donors from the disclosure and disclaimer requirements of the CRA. Similarly, C4T has not alleged that it is subject to Section 1-19-26.1(E) and therefore cannot claim an injury due to that provision.

The only remaining aspect of the CRA that C4T alleges is preempted is the basic requirement to register with the Secretary as a political committee. *See* § 1-19-26.1(B), (C). [App. 0012, 0016, 0019.] C4T alleged that the Secretary made a determination in 2019 that C4T is a political committee under the CRA. [App. 0008.]

Mexico in March 2019 and therefore is not a "political committee that is located in another state." C4T also is not registered with the FEC and therefore cannot meet its obligations under the CRA, if any, by furnishing reports that it files with the FEC. [App. 0048-49]

C4T further alleged that it "has accepted contributions from supporters to educate the public in support of President Trump's agenda and Cowboys for Trump had planned to continue doing so for the duration of President Trump's time in office." [App. 0015.] And C4T alleged that "[i]f Plaintiffs engage in this issue advocacy but fail to register, . . . their officers will be subject" to civil and criminal penalties under the CRA. As a result, C4T alleged that "Plaintiffs will be forced to silence their own speech and not engage in their desired communications so long as these provisions . . . are in force." [App. 0014.]

Even assuming *arguendo* that the Secretary's determination that C4T is a political committee is a cognizable injury in fact for C4T's preemption claim, the District Court correctly dismissed the Complaint in its entirety. [App. 0071.] C4T intended to continue to "educate the public in support of President Trump's agenda . . . for the duration of President Trump's time in office." Given the outcome of the 2020 presidential election, C4T's alleged injury is moot as the duration of President Trump's time in office has ended. *See, e.g.*, *Rhodes v. Judiscak*, 676 F.3d 931, 933 (2012) ("A case becomes moot when a plaintiff no longer suffers 'actual injury that can be redressed by a favorable judicial decision.'" (quoting *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983))); *see also Ind v. Colo. Dept. of Corrs.*, 801 F.3d 1209, 1213 (10th Cir. 2015) ("Because mootness is an issue of subject matter jurisdiction, it can be raised at any stage of the proceedings."). [*Cf.* App. 0072 (*Mem.*

Op. at 12 (granting leave to file an amended complaint unless "Plaintiffs should instead elect not to do so, whether because of events that have transpired since the filing of this suit or otherwise")).]

As a final matter, despite C4T's implications to the contrary [BIC 11, 12-13], C4T has not challenged in this lawsuit the Secretary's determination that it is a political committee, nor has it registered with the FEC. As a result, neither the propriety of the Secretary's determination[11] nor the applicability of the FECA to C4T was before the District Court, rendering C4T's preemption claim little more than an unsupported legal conclusion and speculative request for relief. *See Burnett*, 706 F.3d at 1235 ("The complaint must offer sufficient factual allegations 'to raise a right to relief above the speculative level.'").

Recognizing the deficiency, C4T represented that its preemption claim "will rely on facts beyond the pleadings to show that [C4T's] expenditures fall within the

[11] As explained in the Secretary's motion, the FECA says nothing about a state's ability to regulate political committees that support state candidates or state ballot questions in state elections. [App. 0041.] *Accord* N.M. Stat. Ann. § 1-19-37 (1979) ("The provisions of the [CRA] do not apply to any candidate subject to the provisions of the federal law pertaining to campaign practices and finance."). Moreover, C4T's "founding member" is a local official who, himself, is subject to the requirements of the CRA. [App. 0010 ("Plaintiff Couy Griffin is a resident of Otero County, is a member of the Otero County Commission, and the founding member of Cowboys for Trump.").] *See* § 1-19-26(G) ("'[C]andidate' means an individual who seeks or considers an office in an election covered by the [CRA.]"); § 1-19-26(K) ("'[E]lection' means any primary, general or statewide special election in New Mexico and includes county and judicial retention elections[.]").

scope of the FECA, if at all." [App. 0049.] C4T further requested leave to amend its Complaint to "either clarify that its Count IV [preemption] impliedly challenges the arbitration decision or add a fifth claim directly challenging the arbitration decision." [*Id.*] The District Court granted C4T's request and permitted C4T "to file an amended complaint that cures the errors that have nullified the original version." [App. 0072.] C4T failed to avail itself of that opportunity [App. 0073] and should not be permitted to rescue its Complaint on appeal.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Undersigned counsel does not request oral argument or believe that oral argument would aid the Court in resolving this appeal.

CONCLUSION

As the Brief in Chief makes clear, C4T's primary dispute with the Secretary is her determination that C4T is a political committee under the CRA. [BIC 1-2, 12-13.] That conclusion is reinforced by C4T's repeated allegations that it has not and will not make independent expenditures. But C4T did not challenge the Secretary's determination in this lawsuit; instead, it opted for legal claims that are a poor fit for C4T's posture in this litigation. As a consequence, C4T's repeated allegations that it has no intention or desire to engage in the conduct that would trigger the CRA's disclosure and disclaimer requirements, which must be accepted as true at this stage in the proceedings, fatally undermine its ability to show an injury in fact.

As for C4T's preemption claim, C4T failed to allege any injury due to Section 1-19-26.1(E). And according to C4T's own allegations, any purported injury resulting from the Secretary's determination that C4T is a political committee is moot as a result of 2020 presidential election. The District Court's dismissal of the Complaint should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2021, I served a copy of the foregoing Answer Brief electronically using the Tenth Circuit Court of Appeals ECF system, which caused an electronic copy to be served on all counsel of record in this appeal.

/s/ Neil R. Bell