No. 21-951

In The
Supreme Court of the United States

RIO GRANDE FOUNDATION,

Petitioner,

v.

CITY OF SANTA FE, NEW MEXICO;
CITY OF SANTA FE ETHICS AND
CAMPAIGN REVIEW BOARD,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Tenth Circuit was correct to find that Petitioner Rio Grande Foundation lacked standing to challenge the constitutionality of an ordinance enacted by the City of Santa Fe, New Mexico because Petitioner was unwilling or unable to demonstrate a particularized injury.

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INTRODUCTION

The question presented in the petition filed by Rio Grande Foundation (RGF) makes plain the error of law underlying RGF's theory of standing: Petitioner asks whether a plaintiff in a First Amendment challenge can establish injury in fact by alleging that a law "would chill speech by a person of ordinary firmness," but without showing that the plaintiff will be personally injured by the law. Pet. i. The answer, as the Tenth Circuit correctly held, is no. The petition should be denied because it presents no question meriting this Court's review.

RGF challenges subsection 9-2.6 of the Santa Fe City Campaign Code, which requires persons spending more than a threshold amount to support or oppose municipal ballot measures to file a one-time report disclosing such spending, and any donors who earmarked contributions to fund it.

The jurisdictional deficiencies in this case arose on appeal to the Tenth Circuit, where it became apparent that RGF was both disavowing an overbreadth argument and resting its standing entirely on the possibility of future injury to third parties rather than concrete injury to itself. Because RGF was unwilling or unable to demonstrate that it "*personally* ha[d] suffered some actual or threatened injury as a result" of the City law, the court of appeals found that RGF lacked the requisite injury for Article III standing. Pet. App. 6-7 (emphasis added) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church*

& State, Inc., 454 U.S. 464, 472 (1982)). The Tenth Circuit panel correctly rejected RGF's contention that it could demonstrate injury in fact in the form of prospective "chill" by arguing that the law would "objectively" deter a "reasonable person" from speaking. Pet. App. 7, 8-9; *see also* RGF C.A. Suppl. Br. 1, 4, 5, 19.

Petitioner now urges this Court to adopt the "objective" test for standing that the Tenth Circuit rejected. But it is axiomatic that to satisfy Article III's case-or-controversy requirement, a plaintiff must show "an injury that affects him in a 'personal and individual way.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). Petitioner's argument that injury in fact can be assessed by an "objective inquiry" into a law's hypothetical effects on imagined third parties, Pet. 12-13, has no basis in this Court's standing jurisprudence.

All of Petitioner's arguments rest upon this fatal error of law and therefore must fail. For example, Petitioner's chief attempt to manufacture conflict between the decision below and this Court's precedents is to claim that the Tenth Circuit created a universal requirement that a First Amendment plaintiff allege an "actual intention not to speak" in order to establish standing. Pet. 10. But the only reason the panel examined whether RGF had alleged that it would refrain from future communications was "[b]ecause Plaintiff ha[d] disavowed any form of injury save for chilled speech," Pet. App. 9-10, a point RGF does not dispute.

The lower court in no way suggested that all or even most First Amendment plaintiffs must make a showing that they will be deterred from speaking. On the contrary, it acknowledged that RGF could have sought to plead injury in fact based on past application of the law, Pet. App. 4-5, or the "credible threat of prosecution under § 9-2.6" in the future, *id*. at 9 n.1. But RGF did not seek to demonstrate either species of injury. Instead, RGF rested its standing on the argument that the law "would deter a reasonable person from speaking," RGF C.A. Suppl. Br. 2-3, compelling the Tenth Circuit to conclude that RGF lacked a judicially cognizable injury to maintain its appeal.

Nor has Petitioner shown any circuit split on this issue. Every court of appeals to consider the question has concluded that a chill-based injury requires a showing that the plaintiff's speech has been or will be actually chilled. Unsurprisingly, RGF has yet to identify a single case that adopts its view that Article III's injury-in-fact requirement can be satisfied by determining in the abstract how a law would affect a "person of ordinary firmness." Instead, RGF resorts to citing cases that do not concern allegations of prospective First Amendment chill, or that fail to even address standing at all—confirming that the claimed conflict is illusory.

The justiciability issues here are not limited to a failure to demonstrate injury in fact, making this an exceedingly poor vehicle for consideration of the legal issues raised by the petition. Ripeness concerns, the court of appeals noted, would likely pose further

barriers to proper review. Pet. App. 10. n.2. RGF articulated no plan for future communications, nor even "specified any particular future Santa Fe election in which it intends to participate." *Id*. at 10 n.1. Given the infrequency of City ballot measure elections, it is quite possible that there will be *no* future measures upon which RGF will wish to opine. Finally, as Respondents noted before the Tenth Circuit, subsection 9-2.6 was amended in 2021 in several material respects, potentially mooting aspects of this case and raising further doubts as to whether or how the law might apply to RGF's unspecified future activity.

The decision below involves a local electoral ordinance that prohibits no speech, and Petitioner has declined to show that the disclosure it prescribes in any way chills its own communications. The Tenth Circuit's ruling neither strikes new ground nor creates a circuit split. Certiorari should be denied.

STATEMENT

I. The City of Santa Fe, the Campaign Code, and City Elections

The law at issue here is subsection 9-2.6 of the Santa Fe City Campaign Code (SFCC or Campaign Code).

As a municipal charter city in the State of New Mexico, the City regulates campaign finance practices in local elections pursuant to its City Charter and the

Campaign Code. Pet. App. 17. Respondent Santa Fe Ethics and Campaign Review Board is charged with promoting and enforcing compliance with the Campaign Code, as well as with making recommendations to the City Council for its revision. *Id*. at 18.

At the time of summary judgment briefing in 2018, the City had an estimated citizen voting age population of 58,453, and an estimated total population of 82,927. Pet. App. 17-18. Given this modest population, City elections are relatively small-scale affairs, and the electorate is only intermittently asked to vote on ballot questions. *See* City C.A. Opp'n to Reh'g Pet. 7. Since the 2017 special election that gave rise to this lawsuit, for example, a question has appeared on the ballot only once, out of three City elections.

Subsection 9-2.6 was amended in 2015 to provide for greater transparency regarding non-candidate spending in City elections. Pet. App. 18-19. As amended, the provision required event-driven reporting from persons who make "expenditures" of $250 or more for "any form of public communication" that is "disseminated to one hundred (100) or more eligible voters" and "that either expressly advocates the election or defeat of a candidate, or the approval or defeat of a ballot proposition; or refers to a clearly identifiable candidate or ballot proposition within sixty (60) days before an election at which the candidate or proposition is on the ballot." SFCC § 9-2.6(A).

The law required that groups report information about their expenditures for covered communications

and those "contributions received for the purpose of paying for" the relevant expenditures. *Id*. § 9-2.6. Thus, only contributions that are earmarked by the contributor for covered spending are subject to disclosure.

In 2021, in accordance with its obligation to periodically review and revise the Campaign Code, the City enacted legislation amending, among other Code provisions, subsection 9-2.6, including its disclosure thresholds and other requirements material to RGF's challenge. *See* Ordinance No. 2021-16 (enacted Aug. 25, 2021), https://www.santafenm.gov/archive_center/document/20905. The amendments retained the essential components of subsection 9-2.6, including its earmarking limitation on contributor disclosure, but raised the reporting threshold from $250 to $500.

Because it applies only to earmarked contributions, subsection 9-2.6 has never required the plenary disclosure of all one cent donors, Pet. App. 20, contrary to Petitioner's repeated mischaracterizations of the law, *see* Pet. 2-4, 7, 9, 20. But after the 2021 amendments, the provision applies even more narrowly: organizations subject to subsection 9-2.6 need report only those donors who give earmarked funds "for the purpose of paying for" covered expenditures *and* who contribute $25 or more. Respondents noted these changes in the Tenth Circuit, City C.A. Opp'n to Reh'g Pet. 3, 16, but RGF continues to misrepresent the law's scope and requirements before this Court.

II. Factual Background

Petitioner's action below focused on a ballot question that appeared in the City's May 2, 2017 special municipal election that asked voters whether a tax should be levied on certain sugary sweetened beverages (the "soda tax" measure). Pet. App. 21-22.

RGF is an Albuquerque-based nonprofit corporation founded in 2000 to promote "free market" principles. Pet. App. 21. RGF has often participated in legislative and policy advocacy in New Mexico, but apparently had not made expenditures in connection to a City ballot measure until early 2017, when it launched a multi-media "No Way Santa Fe" campaign against the soda tax measure. *Id*. at 21-22. The campaign comprised a series of newspaper editorials, a website, and a video featured on the website. *Id*. at 22-23. Both the website and video included disclaimers prominently noting that "No Way Santa Fe" was "a project of the Rio Grande Foundation." *Id*. at 23. RGF also paid for Facebook advertisements promoting its website and advocacy against the soda tax, and to print 5,000 postcard mailers. *Id*. at 22, 24.

In April 2017, a citizen filed a complaint with the Board alleging RGF had failed to disclose its spending on its "No Way Santa Fe" initiative in violation of SFCC subsection 9-2.6. Pet. App. 24-25. After a hearing, the Board determined that RGF spent at least $3,000 on the video alone, but "probably closer to at least twice that amount," and found that the organization had violated SFCC subsection 9-2.6 by failing

to file a disclosure report in connection with this and other expenditures related to the soda tax measure. *Id*. at 25.

The Board issued a reprimand and ordered RGF to file the required disclosure. In response, RGF submitted a single, six-page campaign report disclosing a $7,500 in-kind contribution from an out-of-state entity, Interstate Policy Alliance, and one individual $250 contribution. Pet. App. 25-26. The Board assessed no penalties or fines. *Id*. at 25.

RGF has not alleged that the two contributors it disclosed in this report suffered any harassment or other repercussions, nor that the disclosure affected the organization's fundraising or activities. Pet. App. 55-56; City C.A. App. 3-4.

III. Proceedings Below

A. District court proceedings

RGF commenced this action in July 2017, seeking a declaration that subsection 9-2.6 is unconstitutional, both on its face and as applied to RGF and "similarly situated" nonprofit groups, "as it relates to speech about the approval or defeat of a ballot proposition." Pet. App. 91-92.

The lawsuit sought "only prospective" declaratory and injunctive relief. Pet. App. 86. RGF did not claim actual or nominal damages or "seek any relief related to" the 2017 enforcement proceeding, but rather specifically affirmed that it "d[id] not challenge the City's

prosecution of the Foundation over its speech about the soda tax." *Id*. at 86, 91-92. RGF did not claim to be injured by any "reporting and regulatory burdens" the law imposes on covered groups. *Id*. at 48.

RGF also requested an organization-specific as-applied exemption under *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam), on the ground that disclosure would subject its donors to potential harassment. Its exclusive support for this claim came in the form of three affidavits from the leaders of out-of-state advocacy organizations with no established relation to RGF. Pet. App. 54-56. The district court considered the affidavits but gave them little weight, finding the groups insufficiently similar to RGF to bear on its claim of possible harassment. *Id*. at 55-56.

After discovery and briefing on the parties' cross-motions for summary judgment, the district court held that Santa Fe's disclosure law is substantially related to a sufficiently important informational interest, both on its face and as applied to RGF, and granted summary judgment to the City. Pet. App. 66.

The district court, which did not directly address the question of jurisdiction, assessed Petitioner's claim that subsection 9-2.6 would "chill" it and "similarly situated" groups from "engaging in public debates about Santa Fe ballot propositions" as a facial overbreadth challenge. Pet. App. 88, 90.

To support its allegations of prospective injury, RGF submitted one brief affidavit from its president, who averred only that the organization intended to

"speak[] about municipal ballot measures in the future." Pet. App. 7-8; RGF C.A. App. 37 (Gessing Aff. ¶ 23). He did not identify any future communications RGF wished to make, nor any future City election in which RGF wished to advocate. At no point in the litigation has RGF provided information about the medium, message, or approximate cost of its intended future ballot measure advocacy.

Nor did Mr. Gessing allege that RGF would refrain from any particular communications in the future because of a threat that the law would be enforced. On the contrary, he claimed that RGF "fully intends to continue speaking about municipal ballot measures." Pet. App. 8; RGF C.A. App. 37 (Gessing Aff. ¶ 23).

Petitioner did not offer any support for the allegation that disclosure under subsection 9-2.6 may chill its donors, and affirmed during discovery that it had no such evidence. Pet. App. 55-56; City C.A. App. 84.

B. Tenth Circuit proceedings

RGF appealed to the Tenth Circuit, arguing that the district court should be reversed because the City's interest in disclosure did not "outweigh the chilling effect of the ordinance" and "its commensurate burden on [RGF]." RGF C.A. Br. 15. For the first time on appeal, RGF also explicitly disavowed any overbreadth claim, *id.* at 28-29, and asserted that it was "reversible legal error" for the district court to even consider its facial challenge under an overbreadth analysis, *id*. at 28.

After merits briefing but before oral argument, the court of appeals directed supplemental briefing on whether RGF had "established an injury in fact to establish standing." C.A. Order (Dec. 3, 2020).

In its supplemental standing brief, RGF claimed it "ha[d] standing to seek prospective relief" because it had shown injury due to "chilled speech" under *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc). RGF C.A. Suppl. Br. 1, 5. To meet *Walker*'s three-pronged test for injury in fact, plaintiffs must show: (1) past speech activities covered by the challenged law, (2) a "a present desire, though no specific plans, to engage in such speech," and (3) a "plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced." *Walker*, 450 F.3d at 1089; *see also* RGF C.A. Suppl. Br. 1. RGF asserted that it met the first two prongs, but said the third could be satisfied by alleging that "a reasonable speaker would be dissuaded from speaking under these circumstances." RGF C.A. Suppl. Br. at 1. It further argued that the evidence it had adduced "was sufficient as a matter of law to show that a reasonable speaker would be dissuaded from speaking," and that consequently, further factfinding was unnecessary. *Id*. at 5.

The Tenth Circuit disagreed, and dismissed the appeal. Pet. App. 7. It found that RGF had "failed to establish standing under the *Walker* test," *id*. at 10, chiefly because RGF had failed to offer any evidence about the law's impact on RGF or its donors, and instead had attempted to "transform *Walker*'s third

prong into a purely objective inquiry" about the law's effect on hypothetical speakers, *id*. at 7.

RGF sought panel and en banc rehearing, arguing that the panel's decision conflicted with Supreme Court and Tenth Circuit precedent. The court of appeals denied the petition with no noted dissents.

REASONS FOR DENYING THE PETITION

I. The Petition Is Based Upon a Fatal Error of Law.

Plaintiffs bear the burden of demonstrating standing, including an injury in fact that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," and of proving each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 560-61. At the summary judgment stage, "the plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts." *Id*. (citation and internal quotation marks omitted). "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth*, 570 U.S. at 705 (citation omitted).

Pre-enforcement First Amendment challenges are permitted if a plaintiff satisfies the injury-in-fact requirement by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that]

there exists a credible threat of prosecution thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In the electoral disclosure context, a plaintiff's submission of "specific statements they intend to make in future election cycles" will ordinarily suffice to show such a "course of conduct." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014).

The Tenth Circuit properly adhered to this precedent when it found no judicially cognizable injury in fact based on RGF's unsupported allegations that subsection 9-2.6 would chill a hypothetical reasonable person. Even when pleading prospective harm, a plaintiff must show a " 'personal and individual' injury beyond [a] generalized grievance." *Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (quoting *Hollingsworth*, 570 U.S. at 705). "[I]f [plaintiffs] themselves are not chilled . . . [they] clearly lack that 'personal stake in the outcome of the controversy' essential to standing." *Laird v. Tatum*, 408 U.S. 1, 13 n.7 (1972) (citation omitted); *see also Warth v. Seldin*, 422 U.S. 490, 498 (1975) (the injury-in-fact requirement ensures that plaintiff has a "personal stake in the outcome of the controversy" (citation omitted)).

A. Petitioner's theory of standing conflicts with the fundamental requirements of Article III.

The court of appeals conducted a two-stage analysis to find, first, that RGF had asserted no theory of injury beyond a bare, unsupported claim that

subsection 9-2.6 would prospectively chill its speech, Pet. App. 8-10; and second, that RGF had not substantiated—and indeed, had countermanded—its exclusive basis for standing, because it failed to show that the organization "*personally* ha[d] suffered some actual or threatened injury," *id*. at 6-7 (emphasis added) (quoting *Valley Forge*, 454 U.S. at 472). Fatally, the court held, RGF instead attempted to ground its injury on the law's impact on a reasonable person "standing in the plaintiff's shoes." *Id*. at 7.

The Tenth Circuit followed this Court's governing authorities and refused to find injury in fact where a plaintiff disclaims any responsibility to show personal injury. "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citation omitted) (collecting cases).

Still, the lower court was also careful to assess whether RGF had shown any other cognizable injury beyond its argument that the law has an "objectively" chilling effect on the speech of a reasonable person. There too, however, it found none:

- RGF had explicitly disavowed any reliance on past enforcement against it as a basis for standing, and sought "only prospective relief." Pet. App. 4-5; *see also id*. at 86 (Compl. ¶ 54).

- RGF had "explicitly disclaimed" any injury related to "the other potentially burdensome aspects of subsection 9-2.6, such as the cost of compliance or the difficulty of understanding the applicable rules." Pet. App. 5.
- RGF was not pressing a more traditional form of pre-enforcement injury based on a "credible threat of prosecution under § 9-2.6." Pet. App. 9-10 n.1. Because RGF had not described any concrete plan for future communications that would trigger the law or "specified any particular future Santa Fe election in which it intends to participate," the court found that even if RGF had pursued this theory of injury, it was too "speculative" to confer standing. *Id.*

In light of this analysis, the court of appeals evaluated RGF's allegations of injury only as relating to the possibility of prospective chilled speech. After reviewing the record and RGF's claims, however, the panel found that RGF had failed to substantiate this theory of injury. Pet. App. 10.

As the court noted, RGF asserted no more than a "general aspiration," to "continue speaking about municipal ballot measures," Pet. App. 8, but then failed to explain how the law would affect even this vague intention, *id*. at 7-10. Instead, RGF had emphasized that it "**Intends to Continue Speaking About Santa Fe Ballot Propositions**." *Id.* at 8 (emphasis original); *see also id*. at 86. RGF thus failed to describe how "its future speech will be any more limited than it would be in the absence of § 9-2.6." *Id.* at 8.

Nor did RGF develop an argument that it "has standing because its donors are chilled from donating to RGF in the future." Pet. App. 9. First, the law requires the reporting of only those donors who "earmark" their funds for ballot measure-related spending, so most donors are not subject to disclosure at all. Moreover, RGF was unable to produce evidence suggesting any actual or prospective donor loss, nor any donor requests for anonymity arising from potential disclosure under the law. *Id.* at 55-56; City C.A. App. 84.

Instead, RGF attempted to show donor injury by pointing to the experiences of third parties, arguing that the affidavits it submitted from "other, similarly situated organizations" that claimed to "have suffered harassment and reprisals" "demonstrated injury for standing purposes." RGF C.A. Suppl. Br. 11; *see also* Pet. 21; Pet. App. 55-56. But these affidavits were offered in a futile attempt to show that disclosure would put RGF's donors at risk. Even assuming the experiences of unrelated groups entitled RGF to an exemption from required disclosure—and the district court found the opposite, Pet. App. 55-56—they still have no bearing on whether RGF or its donors will ever again be required to disclose under subsection 9-2.6. If this were enough to confer standing, there would be little left of Article III's injury-in-fact requirement.

Finally, RGF has filed disclosure under subsection 9-2.6 without repercussions to its donors—namely, the report it belatedly filed in connection with the 2017 soda tax measure. RGF has not claimed that these

disclosed donors experienced harm or "chill" as a result, nor alleged that this disclosure negatively impacted its fundraising or any other operations. *See supra* at 7.

RGF did not seriously dispute these characterizations of the record—nor does it do so here—but instead countered that, as a matter of law, a plaintiff need only "plead a 'plausible claim' that a reasonable speaker would be dissuaded from speaking" to establish injury based on prospective chill. RGF C.A. Suppl. Br. 1; *accord* RGF C.A. Reh'g Pet. 7.

RGF has not retreated from its "objective theory" of injury in its petition. It argues that the proper "objective inquiry" asks not whether the plaintiff actually desisted from speaking, but whether the challenged law or action "would chill or silence a person of ordinary firmness from future First Amendment activities." Pet. 12-13 (quoting *Mendocino Env't Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999)).[1]

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[1] RGF relies heavily on *Laird* to justify this approach, arguing that the case stands for the proposition that "the chill inquiry cannot be merely subjective . . . there must instead be an objectively realistic risk" of enforcement. Pet. 11-12 (citing *Laird*, 408 U.S. at 13). While accurate, RGF's description of *Laird* is incomplete. What Petitioner leaves out is that this "objectively realistic risk" must be *personal* to the plaintiff: "[H]e must show that *he* has sustained, or is immediately in danger of sustaining, a *direct* injury as the result of [government] action." 408 U.S. at 13 (emphasis added) (citation omitted). Petitioner errs in leaping from *Laird*'s rejection of standing based on a purely subjective fear of enforcement to the conclusion that a purely "objective" inquiry into a law's effect on a reasonable person will suffice.

But, as the court of appeals concluded, this legal argument cannot be squared with governing Article III doctrine. "[T]he 'irreducible minimum' of standing [is] that the plaintiff 'personally has suffered some actual or threatened injury.'" Pet. App. 7 (quoting *Valley Forge*, 454 U.S. at 472). Thus, the standing inquiry turns not on "whether someone standing in the plaintiff's shoes would be deterred from speaking, but rather whether the plaintiff in question claims to be deterred and whether such deterrence is plausible." *Id*.

Petitioner's argument is all the more untenable because on appeal, RGF disavowed any overbreadth claim, and thus forfeited any right to challenge subsection 9-2.6 based on its potential application to the hypothetical expenditures of other groups. RGF C.A. Br. 28-29. Of course, arguing overbreadth does not exempt a plaintiff bringing a facial challenge from the basic Article III standing requirements of injury in fact, causation, and redressability. *See Warth*, 422 U.S. at 500-01 (noting that although in "some circumstances" a plaintiff's "claim to relief [may] rest on the legal rights of third parties," the plaintiff still must "allege a distinct and palpable injury to himself"). But in explicitly choosing not to argue overbreadth, RGF lost any basis, however narrow, to challenge aspects of the law based on its effects on third parties.

The invocation of *Americans for Prosperity Foundation v. Bonta* (*AFP*), 141 S. Ct. 2373 (2021), does not lend RGF's argument any further support. That decision did not concern the petitioner organizations' standing, and RGF attempts to conflate *AFP*'s merits

discussion with the standing question at issue here. Pet. 19-21. No party in *AFP* disputed that the petitioners were subject to a present, ongoing disclosure demand from the California Attorney General for their outstanding annual filings, as well as monetary fines for their refusal to comply. *See* 141 S. Ct. at 2380. RGF, however, even on the merits of its First Amendment claim, has demonstrated no risk of chill commensurate to the *AFP* petitioners, who had established at trial that their organizations had *personally* "suffered from threats and harassment in the past" and "were likely to face similar retaliation in the future." *Id*. at 2381. RGF made no such showing here; it instead has attempted to rely on the experiences of unrelated out-of-state groups or an analysis of a hypothetical reasonable person to establish injury both for Article III purposes and on the merits.[2]

RGF's theory of injury is thus fundamentally in error. Its invocation of an "objective inquiry" does not relieve it of the burden to establish a particularized injury that affects the organization "in a personal and

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[2] RGF makes much of the fact that unlike California, which was attempting to enforce a non-public tax reporting law, the "City does not promise to keep the information" reported under subsection 9-2.6 "private." Pet. 20. But Petitioner misses the entire point of a public disclosure law—which is to "enable[ ] the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). It is precisely because subsection 9-2.6 makes spending information available to the public that it advances the City's important interest in an informed electorate.

individual way." *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560 n.1).

B. The Tenth Circuit's fact-bound standing analysis was correct and dictated by the nature of Petitioner's asserted injury.

The Tenth Circuit does not, as Petitioner claims, require a First Amendment "plaintiff [to] actually desist from speaking" to establish injury in fact. Pet. 11.

RGF does not dispute that it failed to adduce evidence showing that RGF or its donors would personally and concretely be chilled from engaging in activities regulated by subsection 9-2.6 in the future. The petition primarily argues that the Tenth Circuit, by requiring such a showing, has "creat[ed] a new test" for standing "whereby a plaintiff must allege that it has actually ceased speaking before it may bring a chill case." Pet. 16.

This misstates the holding below. The lower court expressly noted that RGF could have pursued multiple alternative theories of standing, Pet. App. 4-5, 9-10, none of which would have required such a showing. RGF simply declined to do so. *Id*. at 9-10. The court reviewed whether RGF had alleged that it would be deterred from future speech only because "being deterred from future speech" was RGF's sole claim of injury: "Because Plaintiff has disavowed any form of injury save for chilled speech, and because an element of a chilled speech injury is an actual intention not to

speak, Plaintiff cannot show an injury-in-fact." *Id*. at 9-10 (footnote omitted).

The court of appeals thus did not suggest that a plaintiff need "surrender her free speech rights as the price of bringing suit." Pet. 26. It found only that RGF lacked standing because RGF asserted a prospective chill-based injury but offered no evidence of such chill—and indeed, expressly denied that the organization would actually be chilled in the future. The decision does not purport to hold that such an allegation is a universal requirement for all First Amendment litigants. Quite the opposite: the court provided this option as a "last chance" for RGF to establish standing because it had asserted no other injury.

What is particularly untenable about Petitioner's objections to the standard applied by the lower court is that Petitioner itself urged this mode of analysis. RGF C.A. Suppl. Br. 1, 4, 5-8. RGF chose to rest its standing entirely on a theory of prospective organizational "chill"; RGF identified *Walker* as the test governing the review of this asserted injury; and yet RGF declined to allege it would be "chilled" from speaking for fear of enforcement—the bare minimum required under the very test it selected. The court of appeals' standing analysis was thus an inevitable consequence of how RGF chose to frame its case in district court and how it elected to articulate its injury on appeal.[3]

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[3] RGF also argues the Tenth Circuit's "new rule" conflicts with the principle that "a person is not required to submit to an unconstitutional law before challenging its constitutionality."

The Tenth Circuit decision does not create a "newly-minted element for chill claims" or otherwise "close the courthouse doors" to organizations "seeking to bring legitimate First Amendment cases." Pet. 18. It requires a showing of "chill," i.e., an "affirmative choice not to speak," Pet. App. 8, from only those plaintiffs who disavow any form of injury save for prospective chilled speech, *id*. at 9-10. And, as this Court's precedents instruct, it closes the door to only those plaintiffs who cannot show injury in fact, an "irreducible minimum" of standing. *Lujan*, 504 U.S. at 590.

II. There Are No Circuit Splits for This Court to Resolve.

The decision below did not produce a circuit split. The Tenth Circuit's test for injury arising from First Amendment "chill" is, if anything, unusually solicitous to plaintiffs, and every other court of appeals that has considered the question agrees that plaintiffs asserting such an injury must allege that their speech has actually been chilled. The authorities cited by RGF do not contradict this conclusion; rather, they are largely

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Pet. 25. But the Tenth Circuit did not bar RGF from bringing a pre-enforcement challenge to avoid "an unconstitutional law," but rather found that RGF had not met the standards this Court has set for such a challenge. Pet. App. 9 n.1 (quoting *Babbitt*, 442 U.S. at 298). RGF's collection, Pet. 24-26, of inapposite authority concerning administrative exhaustion, *see Pub. Utils. Comm'n of Cal. v. United States*, 355 U.S. 534 (1958), and abstention, *see Zwickler v. Koota*, 389 U.S. 241 (1967) and *Wooley v. Maynard*, 430 U.S. 705 (1977), does not cast doubt on the lower court's ruling on this issue.

drawn from other contexts and irrelevant to the standing issue presented in this case.

1. RGF cites no case that adopts a test for injury in fact that inquires only into whether the challenged disclosure law "would chill or silence a person of ordinary firmness from future First Amendment activities." Pet. 12-13 (citation omitted). With good reason: every circuit that has considered the issue—that is, all but the Federal Circuit—has concluded that a chill-based injury requires that the challenged law actually have chilled the *plaintiff's* speech. *See*, *e.g.*, *Osediacz v. City of Cranston*, 414 F.3d 136, 141-43 (1st Cir. 2005) (finding no injury because the challenged law "did not chill any of the plaintiff's speech"); *Bordell v. General Elec. Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991); *Salvation Army v. Department of Cmty. Affairs*, 919 F.2d 183, 193 (3d Cir. 1990) (finding no injury because plaintiff offered no evidence of actual chill); *Donohoe v. Duling*, 465 F.2d 196, 199, 202 (4th Cir. 1972) (same); *Justice v. Hosemann*, 771 F.3d 285, 291-92 (5th Cir. 2014); *Green Party of Tenn. v. Hargett*, 700 F.3d 816, 828-29 (6th Cir. 2012) ("The injury asserted by the plaintiffs in this case—that *they* have been impacted because the speech of *hypothetical others* might be chilled—does not meet [the requirements of Article III]."); *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638-40 (7th Cir. 2020) (requiring "specific" evidence of actual chill and affirming dismissal because plaintiffs offered none); *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794-95 (8th Cir. 2016) (requiring allegation that plaintiff actually self-censored as result of

challenged law); *Libertarian Party of L.A. Cty. v. Bowen*, 709 F.3d 867, 870-71 (9th Cir. 2013); *Citizen Ctr. v. Gessler*, 770 F.3d 900, 913 (10th Cir. 2014) (applying *Walker*, as in this case, to find no standing where plaintiffs did not allege actual chill); *Pittman v. Cole*, 267 F.3d 1269, 1283-84 (11th Cir. 2001) (requiring actual chill and finding injury because plaintiffs had demonstrated changes in behavior in response to challenged law); *National Treasury Emps. Union v. Kurtz*, 600 F.2d 984, 988-89 (D.C. Cir. 1979) (requiring actual chill and finding no standing because plaintiffs did not allege that challenged law "ha[d] prevented [plaintiff union's members] from exercising protected rights").

This unanimous conclusion stands to reason—if the only alleged injury is the chill itself, but the plaintiff denies that any chill actually exists, then there is no harm for a court to remedy.

2. The purportedly contrary decisions cited in the petition address fundamentally different laws, and most do not discuss Article III standing at all. The bulk of the authorities on which RGF relies—and from which it concocts the "objective" test for injury it urges here—decided the *merits* of First Amendment retaliation claims. *See*, *e.g.*, *Thaddeus–X v. Blatter*, 175 F.3d 378, 393-400 (6th Cir. 1999); *Rodriguez v. Serna*, No. 1:17-cv-01147, 2019 WL 2340958, at *5-9 (D.N.M. June 3, 2019).

As the few cases RGF cites that even mention standing explain, plaintiffs in retaliation cases have, practically by definition, alleged a concrete and

particularized harm for Article III purposes: they complain about distinct official conduct that actually occurred and was directed at the plaintiffs personally. *See*, *e.g.*, *Blatter*, 175 F.3d at 393-94 ("In a retaliation claim such as this . . . the harm suffered is the adverse consequences which flow from the [plaintiff's] constitutionally protected action."); *accord Bennett v. Hendrix*, 423 F.3d 1247, 1253 (11th Cir. 2005) (explaining that "the harassment [the plaintiffs] received for exercising their rights" provided the personal injury necessary for standing). Most of the cited decisions therefore do not even discuss standing, and instead employ an objective test for "chill" only to determine whether the alleged retaliation violated the First Amendment—a merits question. *See*, *e.g.*, *Blatter*, 175 F.3d at 394; *Bart v. Telford*, 677 F.2d 622, 624-25 (7th Cir. 1982).[4] In other words, the cited decisions do not premise the plaintiff's injury on uncertain future contingencies or a law's hypothetical effects on other parties, as would be necessary under RGF's proposed theory of standing.

For example, the case discussed most extensively in the petition, *Serna*—in addition to being an

[4] For other decisions cited in the petition that follow this pattern, see *Mitchell v. Horn*, 318 F.3d 523, 529-31 (3d Cir. 2003); *Mendocino Env't Ctr.*, 192 F.3d at 1287-88, 1300; *Poole v. County of Otero*, 271 F.3d 955, 959-62 (10th Cir. 2001), *abrogated by Hartman v. Moore*, 547 U.S. 250 (2006); *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 584-85 (D.C. Cir. 2002); *Crawford-El v. Britton*, 93 F.3d 813, 825-29 (D.C. Cir. 1996) (en banc), *vacated*, 523 U.S. 574 (1998). *See also Community-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1114-19 (D.C. Cir. 1978) (en banc) (not analyzing standing and discussing chill only in considering merits of challenge to statute).

unpublished district court decision—contains no standing analysis whatsoever. *See* 2019 WL 2340958, at *2-9. Unsurprisingly so, as the plaintiff alleged that she had suffered retaliatory harassment, including a campus ban and physical battery by coworkers, in response to speech criticizing her public university employer. *See id.* at *1, *6-8, *11. Those concrete actions against her provided an obvious source of injury, regardless of whether the plaintiff's speech was actually chilled. *See id.*

The *Bart* decision, which the petition credits with originating the purported "objective" test, Pet. 12, tells a similar tale: the plaintiff in that case brought a damages action seeking compensation for a "campaign of petty harassments designed to punish her for having run for public office." 677 F.2d at 624. The decision did not examine the plaintiff's standing—no doubt because the relevant injury for the backward-looking remedy of damages stemmed from the "campaign" of adverse actions, not from any prospective chill of the plaintiff's speech. *See id.*; *see also*, *e.g.*, *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 581-82 (D.C. Cir. 2002) (addressing only damages claims, making prospective chill irrelevant). These decisions have no bearing on RGF's ability to assert standing using a chill-based injury in this case.

The few cases cited in the petition that actually discuss standing also do not help RGF's cause. As discussed above, where the cited retaliation cases analyze standing, they clarify that the plaintiffs could claim injury based on the allegedly retaliatory conduct at

issue, not any prospective chill. *See*, *e.g.*, *Eaton v. Meneley*, 379 F.3d 949, 954-56 (10th Cir. 2004) (noting that "neither party debates that the plaintiffs have established standing" based on the defendants' alleged retaliatory actions). And although the Second Circuit acknowledged in *Mangino v. Incorporated Village of Patchogue*, 808 F.3d 951 (2d Cir. 2015), that chilled speech is not "the *sine qua non* of [standing to bring] a First Amendment claim," it also explained that a plaintiff must "show *either* that his speech has been adversely affected by the [challenged law] *or* that he has suffered some other concrete harm." *Id.* at 956 (quoting *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013)). *Mangino* thus states only the unremarkable proposition that chilled speech is not the only potentially cognizable injury in the First Amendment realm. But where a plaintiff chooses to rely exclusively on a chill-based injury, as RGF has done here, a showing of actual chill is required. *See*, *e.g.*, *id.*; *Bordell*, 922 F.2d at 1060-61.

3. RGF also attempts to manufacture doctrinal discord by suggesting that the Tenth Circuit's ruling below conflicts with a series of cases finding standing based upon the plaintiffs' "'concrete plans' to act in ways that will incur the enforcement of the challenged law." Pet. 22. But RGF does not have any such "concrete plans," so this authority has no bearing here.

In its petition, RGF insinuates that its alleged wish to advocate in future Santa Fe ballot measure elections is analogous to the concrete plans that formed the basis for plaintiffs' standing in the case law

it cites. Pet. 23-24. But after careful review of the record, the Tenth Circuit found the opposite. It noted that RGF had not attempted to show a course of action that would create an imminent "threat of prosecution under § 9-2.6," nor "specified any particular future Santa Fe election in which it intends to participate." Pet. App. 9 n.1. Indeed, as Respondents highlighted below, the City does not have questions on the ballot in every election, or even most elections. City C.A. Opp'n to Reh'g Pet. 7. RGF has not alleged having advocated on any City ballot measure election in its 20-year history save the 2017 soda tax measure. There is certainly no guarantee that a question of interest to RGF will appear in a City election in the near future, or indeed, at all.

Unsurprisingly, the petition does not point to a single decision holding that a plaintiff had standing to bring a pre-enforcement challenge based on the vague "'some day' intentions" to speak that RGF alleged below. *Lujan*, 504 U.S. at 564. Indeed, many of RGF's cited decisions, *see* Pet. 22-24, held that the plaintiffs there *lacked* standing for failure to state their future plans with sufficient specificity. *See*, *e.g.*, *Phelps v. Hamilton*, 122 F.3d 1309, 1327 (10th Cir. 1997) (plaintiffs lacked standing to challenge Kansas Telephone Harassment Statute because they presented insufficient evidence to show they would advocate through covered telefacsimile transmissions); *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 550-51 (10th Cir. 2016) (plaintiff lacked standing to challenge restriction on possessing certain firearm magazines because she alleged only that she would "eventually"

acquire such magazines). RGF labors to distinguish itself from this case law, but RGF, like these plaintiffs, also "expressed no concrete plans" to engage in activities regulated by the statute in question, rendering its claimed injury "conjectural [and] hypothetical." *Carney*, 141 S. Ct. at 499 (citation omitted).

4. Finally, far from showing that the Tenth Circuit's standing requirements are unduly stringent, review of the relevant case law of its sister circuits suggests instead that the *Walker* standard for injury in "chill" cases is "relatively relaxed." Pet. App. 6. Indeed, it was devised specifically to accommodate the "inchoate" and "particularly delicate" First Amendment rights at stake in such an action. *Walker*, 450 F.3d at 1088 (concluding that wildlife protection groups had standing to bring pre-enforcement challenge to Colorado's supermajority requirement for wildlife ballot measures).

Walker does not require plaintiffs to describe "specific plans" to engage in speech that would likely trigger prosecution under the challenged law, but only to show "a present desire" to engage in such speech and to make a "plausible claim" that "they presently have no intention to do so because of a credible threat that the statute will be enforced." *Id.* at 1089.

Thus, RGF selected *Walker*, and the Tenth Circuit applied its standard, because RGF had alleged no specific plans for future communications and could meet no more rigorous standard for injury in fact. But RGF failed to meet even this modest test.

But *Walker*'s standard is more permissive than what plaintiffs ordinarily show to establish injury in a campaign practices or political disclosure case. For instance, in *Susan B. Anthony List*, plaintiffs in a pre-enforcement challenge to a prohibition on untruthful campaign speech were found to have suffered injury in fact because they "pleaded specific statements they intend[ed] to make in future election cycles." 573 U.S. at 161; *see also FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2017) (challenging application of corporate funding restriction to three advertisements and submitting ad scripts and plans for their broadcast); *Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016) (three-judge court) (challenging federal disclosure requirement as to one specific ad that plaintiff wished to run in 2014 election cycle), *summarily aff'd*, 137 S. Ct. 1204 (2017).[5]

Precedent from other circuits often exceeds *Walker* in demanding more concrete proof that a challenged law has actually chilled a plaintiff's speech in order to support standing. The Second Circuit, for example, requires "objective evidence to substantiate [a] claim

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[5] Even in the Tenth Circuit, plaintiffs in political disclosure cases typically allege with specificity the communications they argue are burdened by the law at issue. *See*, *e.g.*, *Independence Inst. v. Williams*, 812 F.3d 787, 790 (10th Cir. 2016) (alleging concrete plan of action and submitting full ad scripts to judicial review). And—contrary to Petitioner's assertion that the Tenth Circuit's test will close the courthouse doors to challenges to disclosure laws—plaintiffs routinely make this showing. *See*, *e.g.*, *Sampson v. Buescher*, 625 F.3d 1247 (10th. Cir. 2010); *Coalition for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016).

that the challenged [law] has deterred [a plaintiff] from engaging in protected activity." *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 43 (2d Cir. 2015) (quoting *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170 (2d Cir. 1999)). The Seventh Circuit similarly requires a plaintiff to "substantiate a concrete and particularized chilling effect on his protected speech," and has concluded that plaintiffs did not meet this requirement where they "failed to identify in the record specific statements any [plaintiffs] wish[ed] to make that the [challenged] policies have chilled." *Killeen*, 968 F.3d at 638-40 (citation omitted).

A plaintiff in a pre-enforcement challenge typically must allege a concrete plan of action that would subject it to a "credible threat of prosecution" under the challenged law. Far from setting a high bar for standing, the Tenth Circuit's *Walker* decision applies a standard that is deliberately solicitous of First Amendment plaintiffs. But even under *Walker*'s relatively complaisant test, a plaintiff must at least demonstrate that its future speech has been chilled or will otherwise be impacted. Petitioner has failed to do so.

III. This Case Is a Poor Vehicle to Consider the Issues Presented.

The ruling below was narrow and fact-bound, turning on unique features of Santa Fe elections and Petitioner's prosecution of its case, and the challenged law has since been amended in relevant respects. This

case thus presents a poor vehicle for any broader consideration of this Court's standing doctrine.

The course of this litigation is unlikely to be replicated. Petitioner adopted the idiosyncratic strategy of refusing to seek any relief based on past application of the law, declining to challenge any reporting burdens entailed in disclosure, and failing at the summary judgment stage to describe any "chilling" effect or impact of the law with specificity. On appeal, Petitioner expressly disclaimed that it was challenging subsection 9-2.6 on overbreadth grounds, and in fact argued that it was error for the lower court to consider overbreadth. And, both before the Tenth Circuit and this Court, Petitioner has repeatedly emphasized that it wishes to rely on an "objective inquiry" into "chilled speech" as the basis for its injury in fact.

Unlike most plaintiffs in comparable pre-enforcement challenges, Petitioner was also unwilling—or unable—to allege any "specific statements [it] intend[s] to make in future election cycles," *Susan B. Anthony List*, 573 U.S. at 161, or otherwise describe a concrete plan for future communications. This failure is particularly problematic here because, unlike in larger jurisdictions, elections in Santa Fe only intermittently feature questions on the ballot. Since the 2017 soda tax measure, only a single ballot question has appeared in a City election. *See supra* at 5. RGF thus not only lacks a concrete plan to make expenditures in connection to a City ballot question, but does not even know when, or *if*, a question of interest will appear in future City election.

For these reasons, the Tenth Circuit also noted that the case may raise concerns sounding in ripeness. Pet. App. 10 n.2. The court noted it did not need to reach that question, but observed that RGF had provided little information with which to conduct an exacting scrutiny inquiry if it reached the merits; for example, the court did not even know "how much Plaintiff would spend in the next election, . . . a factor often crucial to an exacting scrutiny analysis." *Id*. Petitioner has simply failed to create "a factual record of an actual or imminent application of [the law] sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Renne v. Geary*, 501 U.S. 312, 321-22 (1991) (quoting *Rescue Army v. Municipal Ct. of L.A.*, 331 U.S. 549, 584 (1947)).

Further underscoring these justiciability concerns, the law has undergone material amendment since this litigation commenced in 2017, possibly mooting some aspects of RGF's challenge. Multiple provisions in the Campaign Code were recently amended, including by raising the monetary disclosure thresholds that RGF made the centerpiece of its merits case and repeatedly mischaracterizes in its petition. *See supra* at 5-6; City C.A. Opp'n to Reh'g Pet. 16; *see*, *e.g.*, *Hall v. Beals*, 396 U.S. 45, 48 (1969).

Even if the amendments are not so extensive to moot this action entirely, the material changes to the thresholds of subsection 9-2.6 further highlight the insubstantiality of RGF's intent to "speak about municipal ballot propositions" in the future. Pet. App. 86-87. Petitioner has not provided any information about

these intended communications—not even how much they would cost or in which "municipal" elections they would be disseminated, *id.* at 9-10 nn.1-2—precluding any attempt to ascertain how or whether subsection 9-2.6, as amended, would even theoretically apply to RGF's hypothetical future activities.

RGF has demonstrated no Article III injury, and even if its efforts to this end were more successful, prudential concerns would further weigh against review here.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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