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

PETITIONER'S REPLY

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INTRODUCTION

The City enforced the Ordinance against Rio Grande Foundation (RGF) in the past and will again, because RGF intends to engage again in the kind of speech that triggers enforcement. RGF therefore sought prospective injunctive relief to prevent such enforcement. That's a routine application of the law of standing. *See*, *e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 711 (1977).

RGF sought no retrospective relief. But past enforcement proves future enforcement is likely. *See id.*; *Wolfe v. Strankman*, 392 F.3d 358, 363 (9th Cir. 2004). It's therefore not true that RGF "disavowed any reliance on past enforcement . . . as a basis for standing." Opp'n at 14. Rather, like the plaintiffs in *Wooley* and *Wolfe*, RGF relied on past enforcement to *prove* standing.

But rather than apply this rudimentary standing principle, the Tenth Circuit created a new rule—one that turns on a subjective inquiry instead of the objective inquiry required by the decisions of other Circuits and this Court. Under that new rule, a plaintiff must "mak[e] an affirmative choice not to speak" before she can challenge a burden on her speech rights. Pet. App. at 8. That conflicts with the rule in other Circuits, is illogical, and will lead to deleterious consequences.

The Opposition doesn't defend that new rule. Instead, its argument is effectively summarized in its footnote 1, which admits that *Laird v. Tatum*, 408 U.S. 1, 12 (1972), said the standing inquiry is objective, not

subjective, but says a plaintiff " 'must show that *he* has sustained, or is immediately in danger of sustaining, a *direct* injury"—which is true—and that RGF has only experienced "purely subjective fear"—which is not true. Opp'n at 13.[1] RGF has sustained, and is in danger of again sustaining, direct injury, because RGF has already been subjected to enforcement. And it intends "to engage in a course of conduct arguably affected with a constitutional interest"—i.e., it wants to speak again—which means there is "a credible threat of prosecution" when it does. *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979). Thus, were it not for the new rule adopted below, RGF would have standing.

In other Circuits and in this Court, the law is that the test is *objective*: would the speech burden deter a person of ordinary sensitivity from speaking? *See*, *e.g.*, *Garcia v. Trenton*, 348 F.3d 726, 729 (8th Cir. 2003), *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005), *Bennie v. Munn*, 822 F.3d 392, 400 (8th Cir. 2016). If the plaintiff can show a likelihood of future enforcement, she has standing, even if she keeps speaking despite the speech burden. *Edgar v. Haines*, 2 F.4th 298, 310 (4th Cir. 2021). This conflict should be rectified.

The City claims that recent amendments to the Ordinance render this case moot. That is not true. The amendment merely increases the amounts that trigger

[1] The City says the Ordinance "prohibits no speech." Opp'n at 4. This is also untrue. The Ordinance prohibits RGF from communicating a political opinion to the public, absent the surrender of donors' privacy. That, by definition, is a prohibition of certain kinds of speech.

the disclosure requirement. Santa Fe Ordinance 9-2.6, Reply App. 1–2. Now, if RGF spends more than $500 on a communication that "refers to a clearly identifiable . . . ballot proposition" and reaches more than 100 voters, it must place on a publicly accessible government list the names, addresses, phone numbers, and employment information of anybody who donated more than $25 for that purpose. *Id.* at 1–3. These are trivial changes from the original version and would have made no difference had they been in place from the beginning. These amounts are legally indistinguishable from the amounts found unconstitutionally low in *Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010), and *Coalition for Secular Government v. Williams*, 815 F.3d 1267, 1271 (10th Cir. 2016). And because RGF exceeded these thresholds in the past, RGF would have been subject to the same enforcement proceedings even if they had been the law all along.

The City claims RGF has not specified what communications it plans to engage in in the future, or when, and therefore lacks standing for prospective relief. Opp'n at 33–34. But no such showing is required. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088–89 (10th Cir. 2006). In fact, to force a person to tell the government what she plans to say before she may be allowed to say it is contrary to the law. *See Citizens United v. FEC*, 558 U.S. 310, 335 (2010) (that would be a prior restraint).

There are no factual disputes to be resolved here, no ancillary matters or procedural irregularities involved, and the question presented is a clear legal issue

with important consequences. The Tenth Circuit's new rule conflicts with the law of other Circuits, and if left unchanged, will bar litigants from vindicating their free speech rights. The Court should grant the petition.

ARGUMENT

I. The decision below conflicts with those of the First, Third, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits.

This Court said in *Laird*, 408 U.S. at 13–14, that the test for a speech-chill case is *objective*.[2] It asks whether the challenged speech burden is such that a reasonable person would be deterred from speaking.

The reason is that one consequence of a speech burden is self-censorship, and it's hard to measure or prove the existence of self-censorship. Moreover, some people will *not* self-censor; they will keep speaking despite the speech burden. If that were the benchmark, unconstitutional restrictions would escape judicial notice whenever someone happened to be bold enough to continue speaking despite the restriction. Such a rule would "'reward' government officials for picking on unusually hardy speakers" by preventing courts from interceding. *Hendrix*, 423 F.3d at 1252.

[2] It is revealing that the decision below never even cites *Laird*.

Thus, the test is simply whether the burden would deter a reasonable person from speaking—and someone can sue even if she has continued to speak anyway. *See*, *e.g.*, *Eaton v. Meneley*, 379 F.3d 949, 955 (10th Cir. 2004).

Of course, she cannot sue based on mere subjective offense at the existence of a law. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 473 (1982). A person has standing to seek prospective injunctive relief only if she shows a likelihood of future enforcement against her. RGF did show that, because RGF has suffered enforcement before, Pet. 5–7, and plans to speak again, whereupon it will be subjected to enforcement again. Pet. App. 86–87 ¶¶ 54–60. The best way for a plaintiff to prove standing for prospective relief is to show past enforcement. *Wolfe*, 392 F.3d at 363.

The Tenth Circuit did not deny any of this. Instead, it created a new rule: only someone who has *in fact* ceased to speak may bring a speech-chill case. Pet. App. at 8. Because RGF intends to speak about ballot initiatives in the future—exposing itself to future enforcement—the Tenth Circuit said it *lacks standing* to sue. That's not only illogical, it also conflicts with the precedent of other Circuits, which have said that even a plaintiff who continues to speak may sue to challenge a speech burden.

For instance, in *Garcia*, 348 F.3d at 729, the **Eighth Circuit** said "[t]he test is an objective one, not subjective. The question is not whether the plaintiff

herself was deterred." In *Hendrix*, 423 F.3d at 1250–51, the **Eleventh Circuit** rejected the "subjective test, under which the plaintiffs would have to show that they were actually chilled," in favor of the objective inquiry into whether a speech burden "'would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." (citation omitted). The **Third Circuit** said the same in *Mirabella v. Villard*, 853 F.3d 641, 650 (3d Cir. 2017), when it rejected the idea that plaintiffs are barred from suing if they "were undeterred in the exercise of their constitutional rights." And the **Fourth Circuit** said last summer that "plaintiffs need not show that the government action led them to stop speaking" in order to have standing to challenge a speech burden—they need only "show that the [burden] would be 'likely to deter a person of ordinary firmness from the exercise of First Amendment rights.'" *Edgar*, 2 F.4th at 310 (citation omitted). *See further* Pet. at 14–16 (citing other conflicting cases).

By contrast, the **Fifth Circuit** requires plaintiffs to prove that their "exercise of free speech has been curtailed." *Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002). In fact, that Circuit has acknowledged the Circuit split at issue here. In November, it acknowledged that "the law in other circuits" is "that 'a chilling injury does not require the injured party to stop exercising her First Amendment rights,'" but that this is *not* the rule in the Fifth Circuit. *Villarreal v. City of Laredo*, 17 F.4th 532, 542 (5th Cir. 2021).

Here, the Tenth Circuit said the standing inquiry *requires* RGF to "mak[e] an affirmative choice not to speak" before it can sue. Pet. App. at 8. As the Petition explains (at 18–20), this will probably prevent those parties who are best suited to bring legal challenges from doing so. That rewards government officials for picking on unusually hardy speakers. *Hendrix*, 423 F.3d at 1252.

Attempting to downplay this Circuit split, the City claims RGF is conflating standing with merits, and that the plaintiffs in cases such as *Hendrix*, *Mirabella*, etc., had standing because they "complain[ed] about distinct official conduct that actually occurred." Opp'n at 25. But RGF *does* complain about distinct official conduct that actually occurred—and will again. RGF *had* the ordinance enforced against it before, and *will* again. That's all standing requires.

The City is right that many of the cases RGF cites were retrospective, *id.* at 26, whereas RGF is seeking prospective relief. But that makes no difference. The standing test for *prospective* relief is whether RGF is likely to suffer a future injury absent an injunction. A plaintiff can prove this by showing that it has been injured before and will be again. *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983). RGF did that.

It's notable that the City makes no real effort to defend this new rule. Instead, it tries to distinguish the cases RGF cites. But these distinctions are red herrings. For example, the City says *Eaton*, 379 F.3d 949, involved "retaliatory conduct" instead of the

"prospective chill." Opp'n at 26–27. But the retaliatory conduct in *Eaton* was challenged because it chilled speech. And the court said "our standard for evaluating that chilling effect on speech is objective, rather than subjective. . . . [This] objective standard permits a plaintiff who perseveres despite governmental interference to bring suit." 379 F.3d at 954–55 (citations omitted). That's the opposite of the rule created below.

II. This case is an ideal vehicle for resolving the question presented.

This case has a fully developed record leaving only legal questions to be resolved. The Circuit split is stark, and if unaltered, will have dramatic consequences. Whether a plaintiff must affirmatively choose not to speak in order to have standing to bring a chill claim is a question of great significance that is cleanly presented, without need for further ripening.

The City concludes with two baseless arguments that this case is a bad vehicle. First it claims that it's either uncertain whether RGF will speak again, or that RGF must specify when it will speak and what it will say before it may sue. Opp'n at 32. But it's not unclear whether RGF will speak again, and it's unnecessary for RGF to be more specific than that. Second, the City says the ordinance has been amended in ways that render this case moot. *Id.* at 4. That is false. The amendments are trivial and would have made no difference even if they had been in place from the beginning.

A. There's no uncertainty that RGF will speak again in ways that incur enforcement—and except for the Tenth Circuit's new standing rule, that's all RGF needs to show.

The City says it's unlikely there will be future initiatives on which RGF can speak, because citywide ballot questions are "intermittent[]." *Id*. at 32. Putting aside the fact that a 2019 election featured a bond issue, the law does not say *intermittent* chilling effects are acceptable.

The Ordinance's requirements aren't in dispute, nor are the consequences of its enforcement: when RGF "refers to a clearly identifiable candidate or ballot proposition within sixty (60) days before an election," Pet. App. at 71, it will be forced to disclose its donors' private information—rendering them liable to retaliation and harassment. *Id*. at 26–27. And "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974).

In *Walker*, the Tenth Circuit itself rejected the argument the City offers here. That case involved rules governing petition circulators; the defendants argued that the plaintiffs lacked standing because it wasn't clear when another petition campaign would be mounted. The court said that was irrelevant: "[t]here

is no occasion in this case for speculation about . . . whether the law will be enforced against the Plaintiffs. If anyone, Plaintiffs included, mounts an initiative campaign involving wildlife management, the initiative will be subject to the [challenged] requirement, and any attendant effects on the freedom of speech will be felt." 450 F.3d at 1090. And given the plaintiffs' "past and current conduct," and their "desire to use the initiative process" in the future, there was nothing "abstract or speculative" that might bar their standing. *Id.* at 1090–92.

Respondents say RGF is relying on "hypothetical effects on imagined third parties," Opp'n at 2, but this, too, is untrue. RGF is relying on *actual* effects on *actual* parties—itself and the similar organizations that testified at trial. RGF already had this Ordinance enforced against it—and will again when it speaks again. And the record demonstrated that similar disclosure mandates have resulted in harassment against people who support organizations like RGF, Pet. App. 26–27—matters this Court recognized as grave concerns in *AFP v. Bonta*, 141 S. Ct. 2373, 2388 (2021).

Buckley v. Valeo, 424 U.S. 1, 74 (1976), and *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 94 (1982), said plaintiffs in RGF's position can prove the risks of compelled disclosure by "offer[ing] evidence of reprisals and threats directed against individuals or organizations holding similar views." RGF did that. There are no hypotheticals or imagined parties here.

The City says RGF did not "allege any 'specific statements [it] intend[s] to make in future election cycles.'" Opp'n at 32 (citation omitted). But the law doesn't require that. Again, *Walker*, 450 F.3d at 1088–89, expressly *rejected* the proposition that a plaintiff must allege "I have specific plans to engage in XYZ speech next Tuesday" before suing. It said that "cannot be right." *Id.* Instead, a plaintiff may challenge a burden on speech as long as the plaintiff has "a present desire, *though no specific plans*, to engage in such speech." *Id.* at 1089 (emphasis added). RGF easily satisfied that standard. *See* Pet. App. 86–87 ¶¶ 54–59.

There's nothing speculative here. For 20 years, RGF has engaged in advocacy and policy analysis on issues related to free markets, lower taxes, etc. *Id.* at 55. It wants to speak again the next time an initiative is proposed that affects these values—and the City will enforce the Ordinance then. That's all standing requires—except for the Tenth Circuit's new rule requiring self-censorship.

B. The amendments to the ordinance change nothing relevant.

When this case began, the Ordinance required any organization spending more than $250 to communicate to the public about a ballot initiative to place on a publicly accessible government list the names, addresses, and other private information of anyone who donated even a penny for that purpose.

RGF argued that this was facially unconstitutional under *Sampson* and *Williams* because the constitutionality of disclosure mandates falls on a "sliding scale": the larger the amounts involved, the greater the legitimate government interest in requiring disclosure—whereas, if the amounts are low, the "informational interest" becomes too small to justify that burden. *See Williams*, 815 F.3d at 1278; *Sampson*, 625 F.3d at 1260–61. Those cases concerned mandates that included a $200 triggering amount and a $20 disclosure threshold—i.e., any organization spending more than $200 had to reveal the identities of anyone who contributed $20. Both cases found these amounts too low. Such low amounts meant disclosures would not inform the public about who *sponsors* a political position, just who *supports* it—and that's unconstitutional.

Here, the Ordinance's original triggering amount was $250 and its disclosure threshold $0.01—consequently, RGF argued that the ordinance is unconstitutional. That is not changed by the new dollar amounts. Reply App. 1–3. The $500 trigger is still so low that practically any effort to use "public communication" to "communicat[e] with 100 or more voters" will exceed it. And the new $25 disclosure threshold is indistinguishable from the $20 amount found unconstitutional in *Sampson* and *Williams*. If these new amounts had been in the Ordinance already, this case would be unchanged.

Remember: RGF spent $1,500 on postcards urging voters to vote against the initiative. When the City told RGF that this would trigger the Ordinance, RGF chose

to destroy the postcards rather than send them, in a (futile) effort to avoid being forced to turn over donors' private information. Pet. App. at 24. That simply *is* a chilling effect—and nothing about the amendments would have changed that result.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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