No. 24-539

In The
Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, in her official capacity as Executive Director of the Department of Regulatory Agencies, et al.,

Respondents.

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

AMICUS CURIAE BRIEF OF RANDY ELF IN SUPPORT OF PETITIONER KALEY CHILES

RANDY ELF
Counsel of Record
Post Office Box 525
Lakewood, N. Y. 14750
Telephone (202) 423-2122
ForEFilingOnly@gmail.com

June 11, 2025 *Counsel for Amicus*

TABLE OF CONTENTS[1]

[1] This brief is at https://ssrn.com/abstract=5289838 (all Internet sites, except the one for this brief, visited June 6, 2025).

TABLE OF AUTHORITIES[2]

CASES

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[2] "Authorities upon which [this filing] chiefly rel[ies] are marked with asterisks." D.C.CIR.R. 28(a)(2), *available at* https://www.cadc.uscourts.gov/circuit-rules-procedures; *accord* 11TH CIR.R. 28-1(e), *available at* https://www.ca11.uscourts.gov/rules-procedures.

This filing cites slip- or manuscript-opinion/order pages, rather than Westlaw star pages, where bound-volume pagination will later be available, because Westlaw removes star pagination when West issues bound-volume pagination.

RULES

LAW REVIEWS

FILINGS

PRESS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[3]

Amicus has presented many briefs and oral arguments on speech law's constitutionality and written a law-review article addressing this. Randy Elf, *The Constitutionality of State Law Triggering Burdens on Political Speech and the Current Circuit Splits,* 29 REGENT U.L. REV. 35 (2016) ("*Triggering*"), *available at* https://ssrn.com/abstract=5283417.

Amicus has also made many presentations across the country on this topic. *E.g., id.* at 35 n.*; Randy Elf, *How Political Speech Law Benefits Politicians and the Rich* (Aug. 20, 2020) (one-hour video), *available at* https://www.youtube.com/watch?v=h3ebymA7xOo.

Where this brief quotes *Triggering* text, some cites from corresponding footnotes are inserted into the text, and some cites remain in footnotes. Cites are converted from law-review style to brief style; many are condensed. Emphases are as in *Triggering*.

[3] No party's counsel wholly or partly authored this brief. No such counsel, party, or other person—other than Amicus or Amicus's counsel—contributed monetarily to preparing or submitting this brief. Amicus has no members. *Cf.* S.CT.R. 37.2(a), 37.6.

SUMMARY OF ARGUMENT

► Standing, ripeness, and mootness comprise justiciability, which is part of jurisdiction, which courts must always consider. Parties cannot establish jurisdiction by conceding it.

Standing addresses who may bring a claim or seek a form of relief, while ripeness—meaning, throughout this brief, "prudential ripeness"—and mootness address when the claim may be brought or the form of relief may be sought.

► The three criteria for standing require challengers such as Plaintiff-Petitioner Kaley Chiles to demonstrate that (3) a favorable decision will likely redress (1) the injury-in-fact that (2) the challenged law causes.

Pre-enforcement challengers to law banning, otherwise limiting, or regulating—i.e., requiring disclosure of—speech can establish standing in three ways. First, such challengers who have engaged in their speech and violated the law can have standing. Second, such challengers who engage in their speech and comply with the law can have standing. Third, such challengers whose speech the law chills can have standing.

Whichever way pre-enforcement speech-law challengers seek to establish standing, they must demonstrate credible fear of enforcement/prosecution.

What demonstrates such fear? The answer is simple: Challengers' doing or seeking to do what is "proscribed by" law objectively leads to credible fear of enforcement/prosecution.

Particularly—but not *only*—under law chilling speech, the existence of law implies a threat of enforcement/prosecution, and such a threat is latent in the law's existence. Alternatively, there is a presumption of a credible threat of enforcement/prosecution.

Neither nonbinding assurances from government that it will refrain from enforcing, or prosecuting violations of, challenged law—e.g., nonbinding disavowals of enforcement/prosecution—nor incorrect denials that law applies, render claims nonjusticiable, or deprive challengers of irreparable harm.

And before raising a First Amendment claim in a federal court, challengers need not raise it in a state forum, exhaust administrative remedies, or seek advice, including advisory opinions, from government officials.

► The Tenth Circuit's *conclusion* that Chiles has chill standing is correct.

► The Tenth Circuit's standing *analysis,* however, is incorrect. It is way too stringent. Way too stringent. The Tenth Circuit thereby splits with multiple circuits on chill standing.

Under the Tenth Circuit *Chiles* opinion, all three elements of the Tenth Circuit test for injury-in-fact are mandatory.

Apart from that, the first element of the Tenth Circuit's test is incorrect, and the third element derails.

► Whatever "type of speech" means, the first element is incorrect, because speakers *other than* those who "have engaged in the type of speech affected by the challenged government action" can have chill standing too. The Tenth Circuit *Chiles* opinion overlooks this.

► The test's third element derails. One reason is that, contrary to the third element and regardless of whether there has been "enforcement"/prosecution, law's "mere presence on the ... books" causes a "credible threat of enforcement"/prosecution; no separate "objectively justified fear of real consequences" is necessary to demonstrate credible fear of enforcement/prosecution.

► But there is more. The Tenth Circuit, already in a hole on the test's third element, keeps digging by identifying "at least three factors" to determine credible fear of enforcement/prosecution.

All "three factors" on credible fear are incorrect. Contrary to the first factor, enforcement/prosecution's absence does not undermine standing. Contrary to the second factor, "authority to initiate charges [being] limited to a prosecutor or an agency" does not undermine standing. Contrary to the third factor,

nonbinding enforcement/prosecution disavowals do not undermine standing, and their absence is unnecessary to establish standing.

► Given the Tenth Circuit's "three factors," Defendants-Respondents Colorado government officials ("Colorado") made in the Tenth Circuit, and Chiles makes in this Court, three assertions each on credible fear. All six are rooted in the Tenth Circuit's three credible-fear factors.

All three of Colorado's assertions, and all three of Chiles's assertions, are beyond what challengers must demonstrate to establish standing:

- Challengers need neither private-right-of-action law nor private-right-of-action-like exposure.

- Challengers need no enforcement/prosecution.

- Challengers need no pending enforcement/prosecution.

- Challengers need no confirmation that anyone will enforce, or prosecute violations of, the challenged law.

- Nonbinding enforcement/prosecution disavowals do not undermine standing, and

- Such disavowals' absence is unnecessary to establish standing.

► None of these assertions—neither individually nor taken together—is a threshold below which challengers lack standing. *To her credit, Chiles*—unlike Colorado—*neither asserts nor implies otherwise. Yes, challengers must prove standing. Yet they need not prove as much as Colorado or Chiles asserts.*

Their assertions instead show Chiles's case—like *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 164-67 (2014)—is an easy case on standing. To be sure, that is a good position for challengers to be in. *To her credit, Chiles describes the good position in which she finds herself.*

Colorado's three assertions and Chiles's three assertions, however, are not—absolutely, positively not—a threshold below which Chiles lacks standing.

Even if any of them were inaccurate on the facts, Chiles would still have standing.

To put the point generally: *Challengers' standing depends on none of Colorado's three assertions or Chiles's three assertions—neither individually nor taken together.* The Court should not imply, much less hold, otherwise.

Even such an *implication* would risk making it harder for challengers to establish standing. Why? Because it would risk *implicitly* raising the threshold for standing. Such an implication would also risk spawning misunderstandings like the Tenth Circuit's misunderstanding of *Anthony List.*

Which brings us to *Anthony List.*

► Where did the Tenth Circuit *Chiles* panel get those "three factors"? That is easy to see. Please follow the trail. The Tenth Circuit *Chiles* panel quoted a 2022 Tenth Circuit panel, which quoted a 2021 Tenth Circuit panel, which quoted the 2014 Supreme Court *Anthony List* opinion.

The fundamental problem here is that those alleged "three factors" are not really *factors* in, but are *facts* of, *Anthony List.* None is a *factor limiting* other chilled challengers'—or, for that matter, *any* other challengers'—standing.

Those facts of *Anthony List* merely made *Anthony List* an easy case. Other facts further made *Anthony List* an easy case. It was not even a close call. The decision was unanimous.

> To look at this in a slightly different way, the ... Court held, and rightly so, that under the facts that the *Anthony List* challengers presented, they had standing.
>
> It doesn't follow, however, that challengers presenting less-easy facts lack standing. Challengers can present less-easy facts and still have standing.

Infra at 38 (citations omitted).

Courts must not turn facts of Anthony List*—an easy case on standing—into factors that, to whatever extent, limit challengers' standing.*

► The *Anthony List* opinion could have deterred the Tenth Circuit's misunderstanding.

> Saying something such as this may have sufficed ... : "*Anthony List* presents an easy case on standing. We do not hold that challengers not presenting *Anthony List*'s facts lack standing. That is not before us. We leave such a question for another day."
>
> Without such a clarification, the *Anthony List* opinion has created confusion, and the "at least three factors" language in the Tenth Circuit ensued.

Infra at 39 (citation omitted).

Without such a clarification, *Anthony List* opened the door to lower courts', to varying extents, turning *Anthony List* facts into factors limiting—or at least in effect limiting—challengers' standing.

The Court should close that door.

► The Court has an infrequent opportunity to clarify *Anthony List* and correct the misunderstanding. The Court would serve the law well by taking the opportunity and not leaving this one for another day.

Particularly since the misunderstanding is partly due to *Anthony List,* which could have deterred the misunderstanding.

———♦———

ARGUMENT

I. Standing answers the 'who' question; ripeness and mootness answer the 'when' question: Standing addresses who may bring a claim or seek a form of relief, while ripeness and mootness address when the claim may be brought or the form of relief may be sought.

Standing, ripeness, and mootness are part of justiciability, which is part of jurisdiction, *Warth v. Seldin,* 422 U.S. 490, 498-99 & n.10 (1975), which courts must always consider, *Capron v. van Noorden,* 6 U.S. (2 Cranch) 126, 127 (1804). Parties cannot establish jurisdiction by conceding it. *Id.*

Standing answers the "who" question; ripeness—meaning, throughout this brief, "prudential ripeness," *Anthony List,* 573 U.S. at 167—and mootness answer the "when" question: Standing addresses who may bring a claim or seek a form of relief, while ripeness and mootness address when the claim may be brought or the form of relief may be sought. *Compare Davis v. FEC,* 554 U.S. 724, 733-76 (2008) (addressing standing/mootness) *with Pa. Family Inst., Inc. v. Black,* 489 F.3d 156, 165 (3d Cir. 2007) ("Whereas ripeness is concerned with *when* an action may be brought, standing focuses on *who* may bring a[n] action" (emphasis in original) (quoting *Pic-A-State Pa., Inc. v. Reno,* 76 F.3d 1294, 1298 n.1 (3d Cir. 1996))).

Ripeness and mootness are like what happens to fruit: First it is not ripe, then it becomes ripe, and then it becomes rotten, or moot.

This brief discusses

- justiciability, especially standing, in general, *infra* Part II,
- Chiles's standing, *infra* Part III, and
- Tenth Circuit standing analysis, *infra* Part IV.

II. In First Amendment challenges, the test for standing 'is quite forgiving,' and courts apply it 'most loosely … to provide broad protection for speech.'

Challengers must have standing from the outset, *see Davis,* 554 U.S. at 732 ("at the commencement of the litigation" (quoting *Friends of the Earth, Inc. v. Laidlaw Env't'l Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000))), and maintain standing throughout the action, *see id.* at 733 ("at all stages of review, not merely at the time the complaint is filed" (quoting *Arizonans for Official English v. Arizona,* 520 U.S. 43, 67 (1997))).[4]

[4] By contrast, courts determine ripeness and mootness as of now. *See Blanchette v. Conn. Gen. Ins. Corps.,* 419 U.S. 102, 140 (1974) ("since ripeness is peculiarly a question of timing, it is the situation now ... that must govern"); *Powell v. McCormack,* 395 U.S. 486, 496 (1969) (holding that claims are "moot

Standing, moreover, "'is not dispensed in gross.'" *Id.* at 734 (quoting *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996)). Rather, challengers must establish standing for each claim they bring and each form of relief they seek. *Id.* (quoting *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 352 (2006)).

The three *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992), standing criteria require challengers such as Chiles to demonstrate that (3) a favorable decision will likely redress (1) the injury-in-fact that (2) the challenged law causes.[5]

Lujan's having "tightened up the rules on standing," *Children's Healthcare is a Legal Duty, Inc. v. Deters,* 92 F.3d 1412, 1420 (6th Cir. 1996) (Batchelder, J., concurring), does not undermine pre-enforcement challenges, *see id.* at 1416 n.10 (distinguishing *Zielasko v. Ohio,* 873 F.2d 957, 958-59 (6th Cir. 1989), which, *unlike Children's Healthcare,* 92 F.3d at 1416, *is* a pre-enforcement challenge).

And in First Amendment challenges, the test for standing[6] "is quite forgiving." *N.H. Right to Life*

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when the issues presented are no longer 'live'" (citations omitted)).

[5] By contrast, ripeness turns on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99, 105 (1977).

[6] And ripeness. *E.g., Nat'l Org. for Marriage, Inc. v. Walsh,* 714 F.3d 682, 689 (2d Cir. 2013).

PAC v. Gardner, 99 F.3d 8, 14 (1st Cir. 1996). Courts apply it "most loosely … to provide broad protection for speech." *Fla. Family Policy Council v. Freeman,* 561 F.3d 1246, 1253 (11th Cir. 2009) (quoting *Pittman v. Cole,* 267 F.3d 1269, 1283 (11th Cir. 2001)).

Thus, notwithstanding (OPP'N-BR. at 33 (asserting Chiles "has faced no disciplinary action")), preenforcement challengers to speech law need not violate the law, thereby exposing themselves to enforcement/prosecution, to have standing to challenge it. *Steffel v. Thompson,* 415 U.S. 452, 459 (1974) (citing *Epperson v. Arkansas,* 393 U.S. 97 (1968)).

True, such challengers lack standing if they have only an "imaginary or speculative" fear of enforcement/prosecution—e.g., if they neither (1) have received a threat of enforcement/prosecution, (2) claim that enforcement/prosecution is likely, nor (3) allege enforcement/prosecution is even remotely possible. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298-99 (1979) (quoting *Younger v. Harris,* 401 U.S. 37, 42 (1971)).

Threats, however, need not be express threats. Far from it. Such challengers have injury-in-fact, *supra* at 11, if what they do or seek to do is "arguably affected with a constitutional interest, but proscribed by [law], and there exists a credible threat of [enforcement/]prosecution," *Anthony List,* 573 U.S. at 159 (quoting *Babbitt,* 442 U.S. at 298), i.e., "an actual and well-founded fear" of enforcement/prosecution, *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393 (1988).

Even if law provides "only civil [enforcement], and not criminal" prosecution. *Nat'l Org. for Marriage, Inc. v. Walsh,* 714 F.3d 682, 690 (2d Cir. 2013) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell,* 221 F.3d 376, 382 (2d Cir. 2000)); *cf. Anthony List,* 573 U.S. at 166 (not reaching this); *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972) (holding that challengers without "direct injury," i.e., "specific present objective harm or a threat of specific future harm," lacked chill standing (collecting authorities)).

A. Pre-enforcement challengers to law banning, otherwise limiting, or regulating speech can establish standing in three ways.

Pre-enforcement challengers to law banning, otherwise limiting,[7] or regulating[8] speech can establish standing in three ways.

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[7] A ban is a limit of zero. *Ala. Democratic Conference v. Strange,* No. 11-cv-02449-JEO, at 17 (N.D. Ala. Dec. 14, 2011), *vacated on other grounds*, 541 F.App'x 931, 935-37 (11th Cir. 2013) (unpublished).

Triggering at 38 n.25.

[8] In other words, requir[ing] disclosure of, which differs from "ban[ning]" or otherwise "limit[ing]." *See Yamada v. Kuramoto,* 744 F.Supp.2d 1075, 1082 & n.9 (D. Haw. 2010) (distinguishing restrictions, i.e., bans or other limits, from regulation, i.e., disclosure).

1. Pre-enforcement challengers to speech law who have engaged in their speech and violated the law can have standing.

First, as to (1) injury-in-fact, (2) causation, and (3) likely redress, respectively, *supra* at 11: Pre-enforcement speech-law challengers have standing if[9] they

- (1) meet the injury-in-fact criteria, *supra* at 12, including by *having engaged in their speech, having violated the challenged law,* and credibly fearing enforcement/prosecution
- (2) under the challenged law; and
- (3) ask a court to invalidate it, and enjoin enforcement/prosecution, thereby relieving the fear of enforcement/prosecution.

See N.H. Right, 99 F.3d at 13-14 (discussing this form of standing).[10]

Triggering at 35 n.2 (distinguishing forms of disclosure).

[9] Not "when." Please recall that standing addresses "who," not "when." *Supra* at 9.

[10] Such claims can also be ripe. *E.g., Jacobus v. Alaska,* 338 F.3d 1095, 1105 (9th Cir. 2003).

Abstention can arise *post*-enforcement. *Compare New Ga. Project v. Att'y Gen. of Ga.,* 106 F.4th 1237, 1239-46 (11th Cir. 2024), *with id.,* No. 22-14302, AMICUS'S BR. at 2, 35 (11th Cir. May 11, 2023) (addressing law discussed in *Triggering*), *avail-*

2. Pre-enforcement challengers to speech law who engage in their speech and comply with the law can have standing.

Second, as to (1) injury-in-fact, (2) causation, and (3) likely redress, respectively, *supra* at 11: Pre-enforcement speech-law challengers have standing if they

> ● (1) meet the injury-in-fact criteria, *supra* at 12, including by *engaging in their speech, and complying with the challenged law* because they credibly fear enforcement/prosecution
>
> ● (2) under the challenged law; and
>
> ● (3) ask a court to invalidate it, and enjoin enforcement/prosecution, thereby allowing them to engage in their speech without complying with the challenged law and without fearing enforcement/prosecution.

See Davis, 554 U.S. at 733-35 (discussing this form of standing).[11]

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able at https://ssrn.com/abstract=4445665. Chiles, however, brings a *pre*-enforcement challenge. (OPP'N-BR. at 7.)

[11] Such claims can also be ripe. *E.g., Peachlum v. City of York, Pa.,* 333 F.3d 429, 435 (3d Cir. 2003) ("Our stance toward pre-enforcement challenges stems from a concern that a person will merely comply with an illegitimate statute rather than be subjected to [enforcement/]prosecution." (citing *Presbytery of*

3. Pre-enforcement challengers to speech law whose speech the law chills can have standing. Chill itself is a harm.

Third, as to (1) injury-in-fact, (2) causation, and (3) likely redress, respectively, *supra* at 11: Pre-enforcement speech-law challengers have standing if they

> ● (1) meet the injury-in-fact criteria, *supra* at 12, including by *shunning their speech, given that the challenged law chills their speech* because they credibly fear enforcement/prosecution
>
> ● (2) under the challenged law; and
>
> ● (3) ask a court to invalidate it, and enjoin enforcement/prosecution, thereby allowing them to engage in their speech without complying with the challenged law and without fearing enforcement/prosecution.

See, e.g., Wis. Right to Life State PAC v. Barland, 664 F.3d 139, 147 (7th Cir. 2011) (discussing this form of standing); *cf. Anthony List,* 573 U.S. at 155 (acknowledging chill); *Citizens United v. FEC*, 558 U.S. 310, 324, 327, 329, 333-34, 336, 351, 357, 371 (2010) (same); *id.* at 375 (Roberts, C.J., concurring) (same); *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449,

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N.J. of Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1467 (3d Cir. 1994))).

468-69 (2007) (same); *Buckley v. Valeo*, 424 U.S. 1, 41 n.47, 82 n.109 (1976) (per curiam) (same).[12]

The main difference between the second and third ways, *supra* at 15-16, is whether challengers engage in their speech. *Compare supra* at 15-16 *with Triggering* at 57-58 n.130 (contrasting (2) *Davis* standing and (3) chill standing).

As for the third: What is the main difference between "pre-enforcement" and "chill"? The latter is a proper subset of the former. *See, e.g., N.H. Right,* 99 F.3d at 13-14 (addressing these).

The danger in chill "is, in large measure, one of self-censorship[,] a harm that can be realized even without an actual [enforcement/]prosecution." *Am. Booksellers,* 484 U.S. at 393.

Chill itself is a harm. *E.g., id.; Speech First, Inc. v. Fenves,* 979 F.3d 319, 330-31 (5th Cir. 2020) (quoting *Houston Chronicle v. City of League City,* 488 F.3d 613, 618 (5th Cir. 2007)); *NRA v. Magaw,* 132 F.3d 272, 285 (6th Cir. 1997) (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486 (1965)).

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[12] Such claims can also be ripe. *E.g., Walsh,* 714 F.3d at 687-92; *Barland,* 664 F.3d at 148-49. Even if standing and *constitutional* ripeness, *Anthony List,* 573 U.S. at 167, "boil down to the same question," *id.* at 157 n.5 (quoting *Med-Immune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128 n.8 (2007))—*in which case one wonders why we need* constitutional *ripeness*—standing and *prudential* ripeness, whatever its "continuing vitality," *id.* at 167, are different questions, *supra* at 9.

B. The very 'existence of [law] implies a threat to [enforce/]prosecute.'

Whichever way pre-enforcement speech-law challengers seek to establish standing, they must demonstrate credible fear of enforcement/prosecution. *Supra* at 12.

What demonstrates such fear? The answer is simple: Challengers' doing or seeking to do what is "proscribed by" law, *supra* at 12 (quoting *Anthony List,* 573 U.S. at 159 (quoting, in turn, *Babbitt,* 442 U.S. at 298)),[13] objectively leads to credible fear of enforcement/prosecution, *see, e.g., Fenves,* 979 F.3d at 337 (rhetorically asking why law would exist without enforcement/prosecution).

The very "existence of [law] implies a threat to [enforce/]prosecute, so pre-enforcement challenges are proper under Article III, because a probability of future injury counts as 'injury' for purposes of standing." *Barland,* 664 F.3d at 147 (original brackets omitted) (quoting *Bauer v. Shepard,* 620 F.3d 704, 708 (7th Cir. 2010)); *see also File v. Martin,* 33 F.4th 385, 389 (7th Cir. 2022) (similar post-*Anthony List*); *accord Parents Defending Educ. v. Linn Mar Cmty. School Dist.,* 83 F.4th 658, 667 (8th Cir. 2023) ("When a course of action is within the plain text of a policy, a 'credible threat' of enforcement[/prosecution] exists." (quoting *Alexis Bailly Vineyard, Inc. v. Harrington,* 931 F.3d 774, 778 (8th Cir. 2019))).

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[13] *Younger,* 401 U.S. at 42, challengers lacking such facts lacked standing.

C. The enforcement/prosecution 'threat is latent in the existence of the' law. The law's 'mere existence risks chilling First Amendment rights.'

In other words, the enforcement/prosecution "threat is latent in the existence of the" law. *E.g., Fenves,* 979 F.3d at 336 (quoting *Majors v. Abell,* 317 F.3d 719, 721 (7th Cir. 2003)); *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (same); *accord Children's Healthcare,* 92 F.3d at 1416 n.10 (recalling, from a pre-enforcement challenge, a "threat of criminal penalty" for not signing a required declaration (citing *Zielasko,* 873 F.2d at 958-59)).

This is particularly—but not *only*—so under the third way of establishing standing, *supra* at 16: The law's "mere existence risks chilling First Amendment rights." *N.C. Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 711 (4th Cir. 1999); *accord Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006) ("a chilling of speech because of the mere existence of an alleged[] vague or overbroad statute can be sufficient injury to support standing").

D. Alternatively, if law bans, otherwise limits, or regulates speech, 'there is a presumption of a credible threat of' enforcement/prosecution.

Alternatively, if law

- bans,

- otherwise limits, or

- regulates, i.e., requires disclosure of,

speech, *supra* at 13 & nn.8-9, "there is a presumption of a credible threat of" enforcement/prosecution. *Va. Soc'y for Human Life, Inc. v. FEC,* 263 F.3d 379, 388 (4th Cir. 2001) (citing *N.C. Right,* 168 F.3d at 710); *accord N.H. Right,* 99 F.3d at 15 (holding that, absent compelling contrary evidence, courts presume a credible threat of (enforcement/)prosecution in pre-enforcement challenges to law regulating speech (collecting authorities)), *quoted in Fenves,* 979 F.3d at 335.

"This presumption is particularly appropriate [if—but not *only* if—law] chill[s] First Amendment rights." *Va. Soc'y,* 263 F.3d at 388 (citing *N.C. Right,* 168 F.3d at 710).

E. Neither nonbinding assurances from government that it will refrain from enforcing, or prosecuting violations of, challenged law—nor incorrect denials that law applies—deprive challengers of standing, render claims unripe, or deprive challengers of irreparable harm.

Yet what if government—to whatever extent or by whatever means—issues some nonbinding assurance that it will refrain from enforcement/prosecution?

That will not do.

"Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which ... speech must never be subject." *Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 873 n.8 (8th Cir. 2012) (en-banc) (quoting *N.C. Right to Life, Inc. v. Leake,* 525 F.3d 274, 290 (4th Cir. 2008)).

Speakers "can't rely on [government's] unofficial[, i.e., nonbinding,] expression of intent to refrain from enforcing," or prosecuting violations of, its law. *Wis. Right to Life, Inc. v. Barland,* 751 F.3d 804, 828-29 (7th Cir. 2014); *cf. 281 Care Comm. v. Arneson,* 638 F.3d 621, 628 (8th Cir. 2011) ("official," i.e., binding). So no such assurance from government that it will refrain—to whatever extent or by whatever means, *e.g., Fenves,* 979 F.3d at 337 (enforcement/prosecution disavowals)—from enforcement/prosecution

- deprives challengers of standing, *see id.* (doubting such disavowals and addressing standing); *Citizens for Responsible Gov't State PAC v. Davidson,* 236 F.3d 1174, 1192-93 (10th Cir. 2000) (addressing standing); *Vt. Right,* 221 F.3d at 383-84 (same); *N.C. Right,* 168 F.3d at 711 (same), or

- renders claims unripe, *see Walsh,* 714 F.3d at 691 (addressing ripeness).

Triggering at 72 n.203. "Holding otherwise would place 'First Amendment rights "at the sufferance of"" government. *Id.* (quoting *Vt. Right,* 221 F.3d at

383 (addressing standing (quoting, in turn, *N.C. Right,* 168 F.3d at 711))). But there is more:

> Incorrectly denying ... speech law applies [(*e.g.,* CERT.-REPLY-BR. at 11 (refuting the incorrect denial in OPP'N-BR. at 34))] also does not negate justiciability. *See Barland,* 664 F.3d at 147 (addressing standing). Government need not say such law applies for claims to be justiciable. *See Walsh,* 714 F.3d at 691 & n.8 (addressing ripeness).
>
> Nor do such assurances or such denials deprive those challenging law of irreparable harm. Otherwise, the *Barland* panels, *Citizens for Responsible Government, Vermont Right, North Carolina Right,* and *Walsh* would have denied injunctions, because irreparable harm is a prerequisite for both preliminary injunctions, *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008), and permanent injunctions, *United Fuel Gas Co. v. R.R. Comm'n of Ky.,* 278 U.S. 300, 310 (1929). Such assurances or such denials do not diminish, much less eliminate, irreparable harm, because they do not bind government officials. Government officials are free to change their minds, and the law does not require trusting them, especially after *United States v. Stevens* holds "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government prom-

> ised to use it responsibly." 559 U.S. 460, 480 (2010) (citing *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 473 (2001)).

Triggering at 72 n.203; *see also Free Speech Coal., Inc. v. Att'y Gen. of U.S.,* 677 F.3d 519, 528, 539 n.15, 545 (3d Cir. 2012) (quoting and following *Stevens,* 130 S.Ct. 1577, 1591 (2010), while reversing the dismissal of a First Amendment claim on which the challengers sought a preliminary injunction).

Government's "insinuat[ing]" it "might not enforce" law against, or prosecute, challengers would be "disingenuous" if the law applies and others follow it. *Walsh,* 714 F.3d at 691 (addressing ripeness) (emphasis omitted).

Even if government, rather than merely "insinuat[ing]," *id.,* adopted a policy to refrain—to whatever extent or by whatever means—from enforcement/prosecution, that would undermine neither

- standing,
- ripeness, nor
- irreparable harm,

because such a policy, unlike a statute or regulation, does "not carry the binding force of law. Th[ose] who adopted the policy might be replaced with [others] who disagree with it, or some of th[ose who approved it] might change their minds." *Va. Soc'y,* 263 F.3d at 388 (addressing standing (citing *Chamber of Com. v. FEC,* 69 F.3d 600, 603 (D.C. Cir. 1995))).

F. Before raising a First Amendment claim in a federal court, challengers need not raise it in a state forum, exhaust administrative remedies, or seek advice, including advisory opinions, from government officials.

Before raising a First Amendment claim in a federal court, challengers need not raise it in a state forum, *see Vt. Right,* 221 F.3d at 382 n.1 ("there is no requirement that a plaintiff challenging the facial [or as-applied] validity of a state statute first raise its claim in state court" (citing *Am. Booksellers,* 484 U.S. at 392-93; *Babbitt,* 442 U.S. at 298-99)), or exhaust administrative remedies, *Patsy v. Board of Regents,* 457 U.S. 496, 516 (1982).

And challengers need not seek advice, *Walsh,* 714 F.3d at 691 & n.8, including advisory opinions, from government officials before seeking to vindicate First Amendment rights in federal court, *see Citizens United,* 558 U.S. at 335-36 (addressing advisory opinions), *superseding McConnell v. FEC,* 540 U.S. 93, 170 n.64 (2003) (same); *N.C. Right,* 525 F.3d at 296 (same). *Cf. Citizens United,* 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign[-]finance attorney, conduct demographic[-]marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.").

III. The Tenth Circuit's conclusion that Chiles has chill standing is correct.

The Tenth Circuit's *conclusion* that Chiles has chill standing (10TH-CIR.-DKT.-187-1 at 25, CERT.-PET. at APP.26, 116 F.4th 1178 (10th Cir. 2024) (Tenth Circuit opinion) ("OP.")) is correct (CERT.-REPLY-BR. at 11-12; *contra* OPP'N-BR. at 33-35).

Chiles meets the injury-in-fact criteria, *supra* at 12, and has established chill standing. *Compare,* (*e.g.,* D.CT.-DKT.-1 at 33¶115-34¶123 (verified complaint), D.CT.-DKT.-29 at 10-11 (preliminary-injunction motion (citing D.CT.-DKT.-1 at ¶¶94, 113)), D.CT.-DKT.-55 at 5, CERT.-PET. at APP.140 (citing D.CT.-DKT.-1 at 35¶134), 2022-WL-17770837 (preliminary-injunction-denial order ("ORDER")), 10TH-CIR.-DKT.-144 at 6, 8, 9, 10 (Chiles's explaining—in her Tenth Circuit response/reply brief—the chill), *and* CERT.-REPLY-BR. at 11-12 (Chiles's explaining the chill)) *with supra* at 16 (describing chill standing).

IV. The Tenth Circuit's standing analysis is incorrect. It is way too stringent. Way too stringent.

The Tenth Circuit's standing *analysis,* however, is incorrect. It is way too stringent. Way too stringent. The Tenth Circuit thereby splits with multiple circuits, *supra* at 16-23, on chill standing.

For challengers asserting chill standing, the Tenth Circuit *Chiles* panel holds on injury-in-fact: If

> pre-enforcement relief is [sought] based on an alleged "chilling effect," ... plaintiff[s] *must* come forward with
>
> > (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating 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.
>
> *Initiative & Referendum Inst. v. Walker,* 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc). These elements of the required injury-in-fact showing are known as the "*Walker* test."

(OP. at 16-17, CERT.-PET. at APP.18-19 (emphasis added).)

Please notice the emphasized *must* and *and.* (*Id.*) For chilled challengers to have standing under the Tenth Circuit *Chiles* opinion, all three elements are mandatory. (*Id.*) Not one or two. All three. (*Id.*); *see also Wyo. Gun Owners v. Gray,* 83 F.4th 1224, 1239 (10th Cir. 2023) ("must").

Elsewhere, the Tenth Circuit has used *can,* not *must. Rio Grande Found. v. Oliver,* 57 F.4th 1147, 1161 (10th Cir. 2023) (quoting *Walker,* 450 F.3d at 1089); *Peck v. McCann,* 43 F.4th 1116, 1129-30 (10th

Cir. 2022) (quoting *Walker,* 450 F.3d at 1088-89), *cited in* (10TH-CIR.-DKT.-78 at 22 (Colorado's Tenth Circuit principal/response brief's using *must*)) *and quoted in* (D.CT.-DKT.-29 at 10 (Chiles's using *can*)); *Rio Grande Found. v. City of Santa Fe,* 7 F.4th 956, 959 (10th Cir. 2021) (quoting *Walker,* 450 F.3d at 1089); *Walker,* 450 F.3d at 1089.

Discretion under *can* is gone under *must*. Yet whichever word applies under Tenth Circuit law, the first and third elements of the Tenth Circuit's *Walker* test are erroneous.

A. The first element of the Tenth Circuit's Walker test is incorrect.

Whatever "type of speech" means, *supra* at 26, the *Walker* test's first element is incorrect. Notwithstanding this element, *supra* at 26, speakers *other than* those who "have engaged in the type of speech affected by the challenged government action," e.g.,

- new speakers and

- previous speakers who have *not* previously "engaged in the type of speech affected by the challenged government action,"

can have chill standing too. *See, e.g., Walker,* 450 F.3d at 1089 ("people have a right to speak for the first time"); *Barland,* 664 F.3d at 144, 147 (previous speaker newly seeking to receive contributions—beyond a contribution limit—for independent spending for political speech).

The Tenth Circuit *Chiles* opinion (OP. at 16-21, CERT.-PET. at APP.18-22) overlooks this.

Beyond that, the Tenth Circuit's *analysis of* the first element (OP. at 18-21, CERT.-PET. at APP.20-22) is unnecessary to consider. Alternatively, it is prolix under *Citizens United,* 558 U.S. at 324.

B. The second element of the Tenth Circuit's Walker test rightly requires no specificity.

The *Walker* test's second element, *supra* at 26, requires neither "specific statements" challengers will make nor "specific plans" for their speech. (10TH-CIR.-DKT.-144 at 8-9 (quoting 10TH-CIR.-DKT.-78 at 17, 20).) This is correct. Standing, *supra* at 11-16, requires no such specificity.

C. The third element of the Tenth Circuit's Walker test derails.

In analyzing the *Walker* test's third element, *supra* at 26, the Tenth Circuit asks whether challengers have "alleged 'a credible threat that the [law] will be enforced.'" (OP. at 23, CERT.-PET. at APP.24 (quoting *Peck,* 43 F.4th at 1132).)

That is roughly on track with *Babbitt* and *American Booksellers, supra* at 12, but then the third element derails with this:

> "The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement[/prosecution] or credible threat of enforcement[/prosecution], does

> not entitle any[plaintiffs] to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." *Winsness v. Yocom,* 433 F.3d 727, 732 (10th Cir. 2006). Instead, "to satisfy Article III, the plaintiff[s'] expressive activities must be inhibited by 'an objectively justified fear of real consequences.'" *Id.* (quoting *D.L.S. v. Utah,* 374 F.3d 971, 975 (10th Cir. 2004)).

(OP. at 23, CERT.-PET. at APP.24.) That is incorrect for two reasons:

- Whether challenged law is "unconstitutional" (*id.*) goes to the merits, not standing. Standing and the merits are separate (*e.g.,* OP. at 18 n.15, CERT.-PET. at APP.20 n.15) and

- Regardless of whether there has been "enforcement"/prosecution, *supra* at 28-29, law's "mere presence on the ... books" causes a "credible threat of enforcement"/prosecution; no separate "objectively justified fear of real consequences" is necessary to demonstrate "credible fear of enforcement"/prosecution. *See supra* at 18-23 (explaining why).

D. The Tenth Circuit, already in a hole on the Walker test's third element, keeps digging.

But there is more. The Tenth Circuit, already in a hole on the *Walker* test's third element, *supra* at 28-29, keeps digging by saying the Tenth Circuit

> "has identified 'at least three factors to be used in determining a credible fear of [enforcement/]prosecution: (1) whether the plaintiff showed past enforcement[/prosecution] against the same conduct; (2) whether authority to initiate charges was not limited to a prosecutor or an agency and, instead, any person could file a complaint against the plaintiffs; and (3) whether the state disavowed future enforcement[/prosecution].'"

(OP. at 23-24, CERT.-PET. at APP.24-25 (quoting *Peck,* 43 F.4th at 1132 (quoting, in turn, *303 Creative LLC v. Elenis,* 6 F.4th 1160, 1174 (10th Cir. 2021)[14] (quoting, in turn, *Anthony List,* 573 U.S. at 164-65))).)

All "three factors" on credible fear (*id.*) are incorrect. The Court should not imply, much less hold, otherwise.

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[14] *Overruled on other grounds,* 600 U.S. 570, 587-92 (2023) (merits, not standing).

1. The Tenth Circuit's first credible-fear factor is incorrect.

As to the first credible-fear factor: Whatever "the same conduct" (*id.*) means, the Court has repeatedly held pre-enforcement challengers can have standing without *any* enforcement/prosecution, *281 Care,* 638 F.3d at 628 (citing *Babbitt,* 442 U.S. at 302; *Doe v. Bolton,* 410 U.S. 179, 188 (1973)), *followed in 281 Care Comm. v. Arneson,* 766 F.3d 774, 781 (8th Cir. 2014) (post-*Anthony List*). Thus,

- enforcement/prosecution is unnecessary to establish standing, *Fenves,* 979 F.3d at 336 (citing *Carmouche,* 449 F.3d at 660), and

- enforcement/prosecution's absence does not undermine standing, *id.,* except "in extreme cases approaching desuetude," *281 Care,* 638 F.3d at 628 (citing *St. Paul Area Chamber of Com. v. Gaertner,* 439 F.3d 481, 487 (8th Cir. 2006))).

Asserting otherwise "misses the point." *Fenves,* 979 F.3d at 337 (quoting *Speech First, Inc. v. Schlissel,* 939 F.3d 756, 766 (6th Cir. 2019)).

2. The Tenth Circuit's second credible-fear factor is incorrect.

As to the second credible-fear factor, *supra* at 30: Does "authority to initiate charges [being] limited to a prosecutor or an agency" really undermine standing? Does that make sense? No, because that

presumes trust in "a prosecutor or an agency" that the First Amendment does not condone, especially after *Stevens, supra* at 22-23. Such limits do not undermine standing, and their absence is unnecessary to establish standing. *See, e.g., Barland,* 664 F.3d at 143, 147 (holding that a challenger in a state with such limits had standing).

3. The Tenth Circuit's third credible-fear factor is incorrect.

As to the third credible-fear factor, *supra* at 30: Nonbinding enforcement/prosecution disavowals do not undermine standing, and their absence is unnecessary to establish standing. *Compare supra* at 21 (disavowals) *with supra* at 16-23 (standing).

E. Colorado's three credible-fear assertions are beyond what challengers must demonstrate to establish standing.

Given the Tenth Circuit's "three factors" on credible fear, *supra* at 30, Colorado made three credible-fear assertions in the Tenth Circuit. They are rooted in the first, second, and third of the Tenth Circuit's three credible-fear factors, respectively.

All three of Colorado's credible-fear assertions are beyond what challengers must demonstrate to establish standing.

1. Without desuetude, neither enforcement/prosecution's, nor pending enforcement/prosecution's, absence undermines standing.

First, Colorado said it has not enforced the challenged law against professionals such as Chiles and that there is no pending administrative action against anyone. (10TH-CIR.-DKT.-78 at 23.) But without desuetude, enforcement/prosecution's absence does not undermine standing. *Supra* at 31. Nor does pending enforcement/prosecution's absence.

2. Neither private-right-of-action law's, nor private-right-of-action-like exposure's, absence undermines standing.

Next, Colorado said the challenged law creates no private right of action, and that even if Chiles violated the challenged law, she would face no broad-reaching, private-right-of-action-like exposure. (10TH-CIR.-DKT.-78 at 23-24.) But neither such law's, nor such exposure's, absence undermines standing. *Supra* at 31-32 (addressing the Tenth Circuit's second factor); *see, e.g., Barland,* 664 F.3d at 144, 147 (holding that a challenger in a state without such law/exposure had standing).

3. Nonbinding enforcement/prosecution disavowals do not undermine standing.

Finally, Colorado said its not disavowing enforcement "should be of little weight." (10TH-CIR.-

DKT.-78 at 24.) But even that *over*states disavowal. Nonbinding enforcement/prosecution disavowals do not undermine standing, and their absence is unnecessary to establish standing. *Supra* at 32.

F. Chiles's three credible-fear assertions are beyond what challengers must demonstrate to establish standing.

Given the Tenth Circuit's "three factors" on credible fear, *supra* at 30, Chiles also makes three credible-fear assertions. They are rooted in the first, third (not second), and third of the Tenth Circuit's three credible-fear factors, respectively.

All three of Chiles's credible-fear assertions are beyond what challengers must demonstrate to establish standing.

1. Enforcement/prosecution is unnecessary to establish standing.

First, Chiles says "Colorado's record of zealously prosecuting citizens who disagree with its viewpoint ... is infamous." (CERT.-REPLY-BR. at 12 (citing *303 Creative LLC v. Elenis,* 600 U.S. 570 (2023); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n,* 584 U.S. 617 (2018)).) But enforcement/prosecution is unnecessary to establish standing. *Supra* at 31. Demonstrating that enforcement/prosecution "is extremely 'likely'" (CERT.-REPLY-BR. at 12 (quoting *Babbitt,* 442 U.S. at 298-99)) is also unnecessary.

2. Nonbinding enforcement/prosecution disavowals' absence is unnecessary to establish standing.

Next, Chiles says Colorado has not "disavow[ed] prosecution." (CERT.-REPLY-BR. at 12 (quoting *Anthony List,* 573 U.S. at 161).) But nonbinding enforcement/prosecution disavowals' absence is unnecessary to establish standing. *Supra* at 32.

3. Confirming intent to enforce/prosecute is unnecessary to establish standing.

Finally, Chiles says Colorado "confirms its intent to enforce the" challenged law. (CERT.-REPLY-BR. at 12.) That goes with Colorado's not disavowing enforcement/prosecution. (*See id.* ("Instead").) But enforcement/prosecution is unnecessary to establish/standing. *Supra* at 31. So is government's saying law applies. *Supra* at 22.

G. None of Colorado's or Chiles's credible-fear assertions—neither individually nor taken together—is a threshold below which challengers lack standing. In other words, challengers' standing depends on none of Colorado's or Chiles's credible-fear assertions—neither individually nor taken together.

None of Colorado's or Chiles's credible-fear assertions—neither individually nor taken together—is a threshold below which challengers lack standing. *Supra* at 32-35. *To her credit, Chiles* (CERT.-REPLY-

BR. at 12)—unlike Colorado (10TH-CIR.-DKT.-78 at 23-24)—*neither asserts nor implies otherwise. Yes, challengers must prove standing. Supra* at 11. *Yet they need not prove what Colorado or Chiles asserts.*

Their assertions instead show Chiles's case—like *Anthony List, infra* at 38—is an easy case on standing. To be sure, that is a good position for challengers to be in. *To her credit, Chiles* (CERT.-REPLY-BR. at 12) *describes the good position in which she finds herself.*

Colorado's and Chiles's credible-fear assertions, however, are not—absolutely, positively not—a threshold below which Chiles lacks standing. None of Colorado's or Chiles's credible-fear assertions is such a threshold. *Supra* at 32-35.

Even if any of them were inaccurate on the facts, Chiles would still have standing. *See supra* at 25 (addressing Chiles's standing).

To put the point generally: *Challengers' standing depends on none of Colorado's or Chiles's credible-fear assertions—neither individually nor taken together.* The Court should not imply, much less hold, otherwise.

Even such an *implication* would risk making it harder for challengers to establish standing. Why? Because it would risk *implicitly* raising the threshold for credible fear and, by extension, for standing. Such an implication would also risk spawning misunderstandings like the Tenth Circuit's misunderstanding of *Anthony List.*

To borrow a phrase from Chiles: Courts should not give a misimpression of "requir[ing] more than Article III demands." (10TH-CIR.-DKT.-144 at 8.)

Which brings us to *Anthony List*.

H. The Tenth Circuit misunderstands Anthony List. The Tenth Circuit's three credible-fear factors are not really factors in, but are facts of, Anthony List. Courts must not turn facts of Anthony List—an easy case on standing—into factors that, to whatever extent, limit challengers' standing.

Where did the Tenth Circuit *Chiles* panel get those "three factors" on credible fear, *supra* at 30? That is easy to see. Please follow the trail. The Tenth Circuit *Chiles* panel quoted the Tenth Circuit *Peck* panel, which quoted the Tenth Circuit *303 Creative* panel, which quoted the Supreme Court *Anthony List* opinion. *Supra* at 30.

The fundamental problem here is that those alleged "three factors," *supra* at 30, are not really *factors* in, but are *facts* of, *Anthony List,* 573 U.S. at 164 ("there is a history of past enforcement here"); *id.* ("authority to file a complaint with the Commission is not limited to a prosecutor or an agency"); *id.* at 165 ("respondents have not disavowed enforcement if petitioners make similar statements in the future"). None of those three facts is a *factor limiting* other chilled challengers'—or, for that matter, *any* other challengers'—standing. *Supra* at 30-32 (addressing the "three factors").

The credible-fear facts of *Anthony List,* 573 U.S. at 164-67, merely made *Anthony List* an easy case on credible fear. Other facts, *id.* at 161-63, further made *Anthony List* an easy case on standing overall. It was not even a close call. The decision was unanimous. *Id.* at 150, 168.

> To look at this in a slightly different way, the ... Court held, and rightly so, that under the facts that the *Anthony List* challengers presented, they had standing. [*Id.* at 161-67.]
>
> It doesn't follow, however, that challengers presenting less-easy facts lack standing. Challengers can present less-easy facts and still have standing. [*See supra* at 16-23 (describing chill standing).]
>
> Believing otherwise indulges the fallacy of the inverse: Starting with the statement, "If A, then B,"[15] and concluding from that, "If not A, then not B."[16] One can't start with the former and, without more, conclude the latter. [*See United States v. Lopez,* 514 U.S. 549, 595 (1995) (Thomas, J., concurring) (noting that this "inference … cannot be drawn").]

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[15] E.g.: "If challengers present *Anthony List* facts, then they have standing."

[16] E.g.: "If challengers do not present *Anthony List* facts, then they do not have standing."

Randy Elf, *High Court Should Clarify Anthony List*, POST-JOURNAL, April 18, 2025, at A4 (italics added), *available at* https://www.post-journal.com/opinion/local-commentaries/2025/04/high-court-should-clarify-anthony-list.

Courts must not turn facts of Anthony List*—an easy case on standing—into factors that, to whatever extent, limit challengers' standing.*

I. The Anthony List opinion could have deterred the Tenth Circuit's misunderstanding on credible fear.

The *Anthony List* opinion could have deterred the Tenth Circuit's misunderstanding on credible fear.

> Saying something such as this may have sufficed to deter the fallacy of the inverse in lower courts: "*Anthony List* presents an easy case on standing. We do not hold that challengers not presenting *Anthony List*'s facts lack standing. That is not before us. We leave such a question for another day."
>
> Without such a clarification, the *Anthony List* opinion has created confusion, and the "at least three factors" language in the Tenth Circuit ensued.

Id. (italics added); *cf. Triggering* at 51-52 & nn.97-103, 80 & nn.252-56, 84 & nn.272-75 (describing a misunderstanding of *Citizens United,* 558 U.S. at

366-71, and explaining that the misunderstanding is "at the epicenter of the circuit splits," which "have become ever more complex circuit chasms").

Without such a clarification, *Anthony List* opened the door to lower courts', to varying extents, turning *Anthony List* facts into factors limiting—or at least in effect limiting—challengers' standing. *Supra* at 30-32; *Christian Healthcare Ctrs., Inc. v. Nessel,* 117 F.4th 826, 848 (6th Cir. 2024) (considering *Anthony List* facts as credible-fear factors (quoting *Online Merchs. Guild v. Cameron,* 995 F.3d 540, 550 (6th Cir. 2021) (quoting, in turn, *McKay v. Federspiel,* 823 F.3d 862, 868-69 (6th Cir. 2016) (quoting, in turn and inter alia, *Anthony List,* [573 U.S. at 164-65,] 134 S.Ct. 2334, 2345 (2014))))); *cf. Schrader v. Dist. Att'y of York County,* 74 F.4th 120, 125 (3d Cir. 2023) (unnecessarily, *supra* at 31-32, addressing disavowals' absence and past enforcement without elevating them to factors); *Vitagliano v. Cty. of Westchester,* 71 F.4th 130, 138 (2d Cir. 2023) (same) (quoting *Tweed-New Haven Airport Auth. v. Tong,* 930 F.3d 65, 71 (2d Cir. 2019)); *Davison v. Randall,* 912 F.3d 666, 678-79 (4th Cir. 2019) (same) (quoting, inter alia, *Anthony List,* [573 U.S. at 164,] 134 S.Ct. at 2345); *Speech First, Inc. v. Cartwright,* 32 F.4th 1110, 1120 (11th Cir. 2022) (unnecessarily, *see supra* at 35 (addressing confirmation of intent), musing that "the threat of formal discipline or punishment is relevant to the inquiry, but it is not decisive"); *see also Boone Cty. Republican Exec. Comm. v. Wallace,* 132 F.4th 406, 416 (6th Cir. 2025) (same as *Christian Healthcare*), *reh'g pet. filed* (6th Cir. April 15, 2025).

The Court should close that door. Randy Elf, *Who May Bring First Amendment Pre-Enforcement Challenges and When* at 0:21.10-0:27.50 (May 14, 2025) (one-hour video), *available at* https://www.facebook.com/FentonHistoryCenter/videos/1408647736800216.

J. The Court should clarify Anthony List and correct the misunderstanding, particularly since the misunderstanding is partly due to Anthony List, which could have deterred the misunderstanding.

The Court has an infrequent opportunity to clarify *Anthony List* and correct the misunderstanding. The Court would serve the law well by taking the infrequent opportunity and not leaving this one for another day. *Cf. Trump v. Hawaii,* 585 U.S. 667, 710 (2018) (taking the infrequent opportunity to abrogate *Korematsu v. United States,* 324 U.S. 885 (1944)); *Republican Party of N.M. v. King,* 741 F.3d 1089, 1102 (10th Cir. 2013) (taking the infrequent opportunity, at Amicus's suggestion at oral argument, to clarify circumvention, *Triggering* at 66 & nn.163-66).

Particularly since the misunderstanding is partly due to *Anthony List,* which could have deterred the misunderstanding. *Supra* at 39.

CONCLUSION

The Court should

- set forth the standing analysis, *supra* Parts I-II,
- affirm the Tenth Circuit's *conclusion* that Chiles has standing, *supra* Part III,
- reverse the Tenth Circuit's standing *analysis, supra* Part IV, and
- proceed to the merits, which Amicus leaves in others' capable hands.

Respectfully submitted,

RANDY ELF
Counsel of Record
Post Office Box 525
Lakewood, N. Y. 14750
Telephone (202) 423-2122
ForEFilingOnly@gmail.com

June 11, 2025 *Counsel for Amicus*