No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that a plaintiff may challenge the constitutionality of a burden on speech by alleging that it objectively deters people from exercising their speech rights—i.e., a "chilling effect." Rio Grande Foundation (RGF) challenged the constitutionality of a Santa Fe ordinance that forces nonprofits to reveal their donors' private information whenever the nonprofit spends more than $250 supporting or opposing a ballot initiative. RGF alleged that this mandate would chill speech by a person of ordinary firmness. The Tenth Circuit, however, held that "an element of a chilled speech injury is an actual intention not to speak," and because RGF expects to support or oppose ballot initiatives in the future, it lacks standing to bring its chill claim, regardless of whether the ordinance would chill speech by a person of ordinary firmness. Did the Tenth Circuit err?

PARTIES TO THE PROCEEDINGS

Petitioner Rio Grande Foundation, which was the Plaintiff and Appellant below, is a New Mexico non-profit corporation.

Respondents, who were Defendants and Appellees below, are the City of Santa Fe, New Mexico, and the City of Santa Fe Ethics and Campaign Review Board, a department of the City of Santa Fe.

CORPORATE DISCLOSURE STATEMENT

Petitioner Rio Grande Foundation has no parent corporations, and no publicly held company owns 10 percent more of its stock.

RELATED CASES

Rio Grande Foundation v. City of Santa Fe, et al., No. 1:17-cv-00768-JCH-CG, U.S. District Court, District of New Mexico. Judgment entered January 29, 2020.

Rio Grande Foundation v. City of Santa Fe, et al., No. 20-2022, U.S. Court of Appeals for the Tenth Circuit. Judgment entered August 3, 2021. Petition for Rehearing denied September 27, 2021.

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JURISDICTION

The Tenth Circuit issued its opinion on August 3, 2021. Petitioners filed a timely petition for rehearing, or in the alternative, for rehearing en banc. That petition was denied on September 27, 2021. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution and the relevant Santa Fe City Campaign Code (Santa Fe Ordinance) are reproduced at App. 70–73.

INTRODUCTION AND STATEMENT OF THE CASE

This case is about a Santa Fe, New Mexico, ordinance that forces nonprofit organizations that spend more than $250 supporting or opposing a ballot initiative to place on a publicly-accessible government list

the names, addresses, and employment information of any donor who contributes even a penny to the organization for that purpose.

Rio Grande Foundation (RGF) sued to challenge the constitutionality of this mandate, arguing that conditioning speech on a waiver of these privacy rights violates the First Amendment and objectively chills free speech.

The Court of Appeals, however, ruled that because RGF said that it expects to support or oppose ballot initiatives in the future, it lacked standing. Holding that "an element of a chilled speech injury is an actual intention not to speak," App. 9–10, the Tenth Circuit concluded that RGF may not seek prospective declaratory and injunctive relief regarding the law's constitutionality. That is illogical, contrary to existing precedent, and likely to bar legitimate lawsuits challenging speech-chilling laws in the future.

A. The Santa Fe soda tax campaign

RGF is a nonprofit free-market think tank based in New Mexico, that advocates for limited government, lower taxes, and private property rights. It is supported primarily by donations from people who agree with its mission. Its president is Paul Gessing.

In 2017, a citywide ballot initiative was proposed in Santa Fe, which would have levied a tax of two cents per ounce on sugared beverages sold in the city. App. 78. RGF opposed the initiative, so it undertook a public information campaign it called "No Way Santa Fe,"

which consisted of four parts: a series of newspaper editorials written by Mr. Gessing, a website called NoWaySantaFe.com, a short YouTube video that was featured on the website, and a postcard campaign. *Id.* at 22. RGF spent approximately $1,500 to print the postcards, which it intended to send to voters. *Id.* at 24. But it did not make the video, and it spent no money on the video or the website. *Id.* at 23, 25.

On April 6, 2017, RGF issued a news release and a Facebook post, published its NoWaySantaFe.com website and associated YouTube video, and made other communications about the proposed soda tax. *Id.* at 22.

That same day, Santa Fe Assistant City Attorney Zachary Shandler sent Mr. Gessing a letter asserting that RGF had spent more than $250 on broadcast advertising referring to a ballot proposition which reached more than 100 voters, and therefore that RGF was required to file a campaign finance statement, pursuant to Santa Fe Ordinance § 9.2-6. *Id.* at 23. The letter offered RGF the opportunity to explain, in the event that RGF believed this requirement was inapplicable, why it was exempt from Section 9-2.6. *Id.*

B. The City's disclosure requirement

Santa Fe Ordinance § 9.2-6 requires any organization that spends more than $250 to make "any form of public communication" in support of, or opposition to, a ballot initiative to file with the City Clerk a report which lists all the contributions received for that purpose, regardless of the amount of the contribution. *Id.*

at 70–71. That report must—among other things—list, for each contribution, the name, address, and occupation of the person who made that donation. App. 19–20. News media organizations are exempt from these requirements. *Id*. at 20. The City makes these reports available to the general public. *Id.*

This means that if a nonprofit such as RGF spends $250 or more on an advertisement opposing a ballot initiative, it must place on a publicly accessible government list the names, addresses, and employment information of any donor who contributed even a penny to RGF for that purpose. If, on the other hand, the *Albuquerque Journal* publishes an editorial opposing that initiative, it is not required to do likewise.

The Ordinance is enforced by the Santa Fe Ethics and Campaign Review Board (ECRB), which is empowered to fine individuals or entities that fail to comply. These fines may be $500 per offense per day. *Id.* at 75. The City Clerk is also empowered to fine individuals or entities $100 for late-filed reports. *Id.* at 21.

C. The 2017 enforcement proceedings

On April 7, 2017, a day after the City sent RGF the letter asserting that RGF was in violation of the disclosure mandate, a Santa Fe resident named Edward Stein filed a complaint with the ECRB, alleging that RGF violated the Election and Political Campaign Codes. *Id.* at 23. Also on April 7, Mr. Gessing responded to Mr. Shandler's April 6 letter, informing the City that the Foundation had not spent more than $250

to communicate about the soda tax and that, accordingly, it would not disclose its donors to the City. *Id*. at 80.

On April 10, 2017, the City Clerk notified RGF about Mr. Stein's complaint in a letter which said RGF could file a sworn, written response within 10 days, but could also submit a response on or before the already scheduled ECRB meeting on April 19, 2017. *Id.* at 80–81. On April 13, 2017, Mr. Stein amended his complaint to specifically list the "No Way Santa Fe" website and video as violating the ordinance. *Id.*

The following day, Mr. Gessing submitted another letter to the City, stating that "[w]e were planning to engage in public communications [i.e., mailing the postcards] that would have triggered your reporting requirements and would have done so but for the ordinance. Requiring 501c3 nonprofits to disclose their donors is a major burden and, accordingly, we are choosing not to speak rather than expose the privacy of our donors, including exposing them to potential harassment." *Id.* at 24, 81.

Mr. Gessing then destroyed the postcards—which cost $1,500—rather than mailing them to voters as planned. *Id.* at 24. He did so solely as a consequence of the anti-privacy mandate in the Ordinance. *Id.*

On April 20, 2017, Mr. Gessing received yet another letter from the City, stating that—notwithstanding the fact that RGF had refrained from engaging in further communications about the soda tax—the ECRB would hold a formal hearing on April 24 about

the alleged violations of the Ordinance. *Id*. The April 20 letter further informed RGF that one day earlier, on April 19 and without RGF being present, Mr. Stein had presented his complaint to the ECRB, and had presented an affidavit from a man named Glenn Silber regarding the cost of the video. *Id*. The letter informed RGF that the ECRB viewed the video and concluded that Mr. Stein's complaint established probable cause to believe that there was a violation of the Ordinance. *Id.*

D. The hearing before the City's ethics board

Mr. Gessing attended the ECRB's formal hearing on April 24 on behalf of RGF, accompanied by an attorney. *Id.* at 24–25. At the hearing, Mr. Stein called Mr. Silber as a witness. *Id.* at 25. Mr. Silber testified that he is a local videographer, and that he estimated that the video cost at least $3,000 to produce. *Id*. Since this exceeded the $250 reporting threshold, the citizen complainant argued that RGF was required to disclose its donors to the City. Although RGF spent no money on either the video or website, Mr. Stein argued that the video and website were in-kind donations that nevertheless triggered the disclosure requirements. *Id.*

Mr. Gessing then testified that RGF had neither produced nor paid for the video or website, but simply directed people to these resources, which had been created by a third party at that third party's expense, without RGF's involvement. *Id*. After the hearing concluded, the ECRB issued a unanimous reprimand to

RGF for failing to comply with the Ordinance, and deemed the video and website to be in-kind contributions to RGF, the value of which it estimated at $3,000. *Id.*

After the hearing was completed, RGF filed the paperwork that the City demanded it file. *Id*. at 25–26. This included disclosure of the separate 501(c)(3) nonprofit organization that produced the video and website, as well as the identities of individual donors who funded the Facebook advertising purchased by RGF to educate voters about the soda tax. *Id.*

Voters rejected the soda tax at the May 2017 election. *Id.* at 25.

E. This lawsuit

RGF then filed suit against the City to challenge the disclosure Ordinance's constitutionality. App. 27, 74–92. RGF alleged that the Ordinance is a burden on free speech which cannot withstand exacting scrutiny, and sought only declaratory and injunctive relief to bar future application of the Ordinance. *Id.*

The City alleged that the Ordinance serves an "informational interest"—i.e., it helps inform voters regarding who supports or opposes ballot initiatives. RGF argued that the City's interest in information about donors who contribute as little as a penny to a nonprofit for the purposes of opposing a ballot initiative was *de minimis* and was far outweighed by the

burden the Ordinance imposes on RGF's speech rights. *Id.* at 59.

As to the latter, RGF alleged that compelled disclosure of donor identities was likely to deter donations and to chill speech by RGF on other issues of public importance. Pursuant to *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), which said that compelled disclosure can "impose a heavy burden" on free speech, and that "evidence of reprisals and threats directed against individuals or organizations holding similar views" can be used to demonstrate that burden, RGF offered evidence of harassment, threats, and intimidation that other free-market organizations have suffered as a consequence of compulsory disclosure. App. 26–27, 53–55.

The District Court, however, found that this evidence failed "to show a reasonable probability" that RGF itself or its donors would suffer from harassment or intimidation. *Id.* at 55. It found that RGF has existed since 2000 and had not experienced threats or reprisals in the past, and therefore there was no reason to believe it would face these in the future. *Id.* It also found that RGF had failed to prove that its donors would choose not to donate if they were forced to place their names, addresses, employment information, etc., on a publicly accessible government list. *Id.* at 55 n.8.

F. The appeal

On appeal, RGF argued that the Ordinance violates the First Amendment under the tests established

by this Court in *Buckley* and the Tenth Circuit in *Coalition for Secular Government v. Williams*, 815 F.3d 1267 (10th Cir. 2016), and *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). That is because the informational interest is only minimally served, given the extremely low (one cent) donation threshold, and such interest is vastly outweighed by the genuineness of the risk that the Ordinance's anti-privacy mandate will chill speech by both donors and organizations.

That chilling effect is not merely subjective, as in *Laird v. Tatum*, 408 U.S. 1 (1972), but is an objective, concrete and particularized injury, as in *Bigelow v. Virginia*, 421 U.S. 809, 816–17 (1975), because RGF has had this Ordinance enforced against it in the past, and showed at trial that organizations like RGF that have been forced to disclose information about their donors have experienced harassment, retaliation, and intimidation. RGF also argued that it was not required to prove that it, its employees, or its donors had *themselves* experienced intimidation or harassment, as the District Court had required, App. 55, and therefore that the District Court had applied an improper evidentiary burden. RGF asserted further that it intended to continue endorsing or opposing ballot initiatives, and therefore it was likely that the Ordinance would be enforced against it in the future, thereby depriving it and its supporters of their First Amendment rights. *Id.* at 86–87. In other words, RGF showed that there is an "objective . . . threat of specific future harm." *Laird*, 408 U.S. at 13.

Yet the Tenth Circuit ruled that RGF *lacks standing* to sue. It did so on the theory that because RGF intends to continue speaking out, its speech was not chilled. App. 8. Asserting that "an element of a chilled speech injury is an actual intention not to speak," *id*. at 9–10, it concluded that because RGF has "not . . . [made] an affirmative choice not to speak," *id.* at 8, it lacked standing to present a chilling effect claim.

RGF observed that the fact that a party continues to speak out despite a chill does not disprove the existence of a chill; on the contrary, precedent firmly establishes that a plaintiff who "perseveres [in speaking] despite governmental interference" may still bring a chill claim. *Eaton v. Meneley*, 379 F.3d 949, 955 (10th Cir. 2004). But the panel concluded that an "actual intention not to speak" is "an element" of a chilled speech argument, and the panel and the en banc court denied rehearing. App. 9, 68–69.

REASONS FOR GRANTING THE PETITION

The decision below creates a new element for chilled speech cases—an element that stands in direct conflict with the holdings of other circuits as well as this Court's precedent. That new element prevents plaintiffs from bringing chill claims unless they first "affirmative[ly] [choose] not to speak." *Id.* at 8. The consequence of this new rule is to undermine the objectivity of the speech-chill inquiry and to bar plaintiffs who

refuse to be silenced from challenging the constitutionality of laws that burden speech.

I. The Tenth Circuit's newly crafted element of chill claims, in conflict with at least eight other Circuits, holds that plaintiff must actually desist from speaking before bringing suit.

A. The court below established a new test for "chill" case that, in conflict with other Circuits and this Court's precedent, requires a subjective inquiry into whether the plaintiff is actually refraining from speaking.

The theory of speech "chill" is that a law that threatens to impose punishments or burdens on a speaker is likely to cause that speaker and other speakers to self-censor, rather than risk enforcement. This means that *actual* enforcement cannot be the barometer of the First Amendment injury, because the mere threat is sufficient to cause speakers to refrain. *See Cmty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1118 (D.C. Cir. 1978) ("the absence of any direct actions against individuals . . . can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern.").

Yet this Court has also recognized that the chill inquiry cannot be merely subjective—that is, a person cannot sue based solely on personal fear of enforcement. As this Court explained in *Laird*, 408 U.S. at 13,

there must instead be an *objectively realistic* risk, one that would lead reasonable people to hesitate to exercise their free speech rights.

And several circuits have expanded on that objectivity requirement. Beginning with the Seventh Circuit in *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982), they have held that the proper inquiry is whether the speech burden would "deter a person of ordinary firmness" from exercising her speech rights. *Accord*, *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996); *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). *Cf. Nieves v. Bartlett*, 139 S. Ct. 1715, 1721 (2019) (noting use of the "person of ordinary firmness" test in Courts of Appeals).

But the opposite is also true: there will frequently be someone willing to continue speaking despite the risk of enforcement. And that fact cannot defeat a chill claim, because, as the Ninth Circuit has explained, "it would be unjust to allow [the government] to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Mendocino Envtl. Ctr.*, 192 F.3d at 1300. Or, as the Eleventh Circuit has put it, "[t]here is no reason to 'reward' government officials for picking on unusually hardy speakers." *Bennett v. Hendrix*, 423 F.3d 1247, 1252 (11th Cir. 2005).

Therefore, the 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." *Mendocino Envtl. Ctr.*, 192 F.3d at 1300 (citation omitted). That means even someone who "perseveres" in speaking "despite governmental interference"—who is of more than ordinary firmness—may still bring a chill claim. *Eaton*, 379 F.3d at 955.

For example, in *Rodriguez v. Serna*, No. 1:17-cv-01147-WJ-LF, 2019 WL 2340958 (D.N.M. June 3, 2019), the plaintiff was a professor who sued college officials who retaliated against her for complaining about financial improprieties at the school. *Id*. at *1. She alleged that their threats created a chilling effect against her free speech rights. Among other things, the college's provost personally harassed her and even encouraged people to physically attack her. *Id*. at *8. Yet she continued to speak anyway. The District Court said that this "show[ed] extraordinary persistence" on her part—and the fact that she continued speaking did not mean she was barred from suing. "Rather, the inquiry is objective," the court said. The test was whether "a person of ordinary firmness, faced with these alleged threats . . . would cease their First Amendment activities." *Id*. That was all that was required, so the plaintiff had standing to sue.

Similarly, in *Bennett*, *supra*, the plaintiffs sued the sheriff's office for engaging in a campaign of harassment and intimidation against them for supporting a referendum that the sheriff's office opposed. Among other things, the sheriff's office targeted them for surveillance, set up roadblocks near their homes, pulled them over and ticketed them without justification,

obtained confidential information about them, mailed flyers to voters that called them criminals, and even obtained warrants for their arrest on baseless charges. 423 F.3d at 1249.

Notably, the plaintiffs continued to speak and to contribute to political causes, although to a lesser degree than they otherwise would have. *Id.* The sheriff's office argued that no liability could apply unless the plaintiffs proved they had "actually [been] chilled in the exercise of their First Amendment rights," *id*. at 1251, but the Eleventh Circuit rejected that argument, explaining that according to the objective chill inquiry, even a plaintiff who persists in speaking may bring suit if the complained-of conduct would have deterred an ordinary person from speaking. *Id.* at 1251–52.

In fact, the First, Third, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits—and, until this case, the Tenth Circuit—endorsed the same objective standard. *Agosto–de–Feliciano v. Aponte–Roque*, 889 F.2d 1209, 1217 (1st Cir. 1989); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003)*; Thaddeus–X v. Blatte*r, 175 F.3d 378, 396 (6th Cir. 1999) (en banc); *Bart*, 677 F.2d at 625; *Mendocino Envtl. Ctr.*, 192 F.3d at 1300; *Poole v. Cnty. of Otero*, 271 F.3d 955, 960 (10th Cir. 2001); *Bennett*, 423 F.3d at 1250–51; *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002).

The Second Circuit has mixed precedent on the question of whether a plaintiff has to allege that she has *actually* desisted from speaking in order to bring a chill claim. In *Curley v. Vill. of Suffern*, 268 F.3d 65, 73

(2d Cir. 2001), it said a plaintiff must actually refrain from speaking in order to have standing to bring a chill claim, but in *Mangino v. Inc. Vill. of Patchogue*, 808 F.3d 951 (2d Cir. 2015), it said it had not meant to "'give[] the impression that silencing of the plaintiff's speech is the only injury sufficient to give a First Amendment plaintiff standing.'" *Id*. at 956 (quoting *Dorsett v. Cnty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013)). The idea that a plaintiff only has standing to bring a chill case if she has *actually* self-censored, the court said, resulted from "'an imprecise statement of law,'" *id*., and even people who persist in speaking despite the burden on their rights can still bring suit.

The Tenth Circuit also endorsed the objective test in *Poole*, a case in which the plaintiff argued that he experienced a chilling effect when police officers brought charges against him to deter him from filing a civil rights case against them. The court said the case could proceed even if "the injury [did] not actually . . . deter[] Mr. Poole from filing this lawsuit," because the question was whether the government's conduct "would chill a person of ordinary firmness." 271 F.3d at 960 (citation omitted).

But in this case, the Tenth Circuit reversed course and created an entirely new test whereby "an element of a chilled speech injury is an actual intention not to speak." App. 9–10. Thus, it concluded that RGF lacks standing to bring this chill claim because it intends to persist in exercising its First Amendment rights. The court said that RGF cannot sue because it failed to "alleg[e] [that] it will not engage in future speech

activity," *id*. at 8—yet no such allegation is required under an *objective* test. That is a *subjective* inquiry—precisely the kind of subjectivity this Court rejected in *Laird*.

The decision below—creating a new test whereby a plaintiff must allege that it has actually ceased speaking before it may bring a chill case—therefore conflicts with this Court's precedent and with the precedent of other Circuits and changes the rules for chilled-speech claims.

B. *Walker* did not say plaintiffs must refuse to speak in order to sue—it only said plaintiffs who do choose not to speak can *still* sue.

The Court of Appeals was led astray by a misunderstanding of *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), a case about whether a plaintiff who *does* refrain from speaking can still challenge the legality of a speech restriction. That case said that a plaintiff who *does* refrain from speaking can still bring suit. The panel below interpreted it as saying that a plaintiff *must* refrain from speaking before bringing suit. That fallacy led it to create a new rule of law that conflicts with the decisions of other Circuits and will bar legitimate speech claims from being heard.

The *Walker* case sought to resolve a paradox in standing law with respect to chill claims: how does a plaintiff sue if she is afraid to speak? Since plaintiffs

must assert a particularized injury, a plaintiff would normally have to point to a specific plan to act in a way prohibited by the law, but in a chill case, where the plaintiff fears to speak because of that prohibition, such a requirement would "make[] no sense." *Id*. at 1089. Therefore, the Court said, a plaintiff *can* still sue by alleging that she refrained from speaking.

That does not mean a plaintiff who still *does* speak lacks standing. Since the test is an objective "person of ordinary firmness" test, then plaintiffs who show *extra*ordinary firmness are not barred from suing. Yet the panel read *Walker* as saying just that. Simply put, where *Walker* said a plaintiff "*can* satisfy" the standing requirement by alleging she fears to speak, *id.* (emphasis added), but the court below said the plaintiff *must* satisfy the standing requirement by alleging she fears to speak. Reading *Walker* that way commits the fallacy of the disjunctive syllogism. *See* Timothy R. Zinnecker, *Syllogisms, Enthymemes and Fallacies*, 56 Wayne L. Rev. 1581, 1649 (2010). The Court of Appeals effectively said:

> A. Plaintiffs can bring chill claims by alleging that they've self-censored.
>
> B. RGF has not alleged that it has self-censored.
>
> ∴ RGF may not bring a chill claim.

Thus, the panel found that because RGF intends to speak about ballot initiatives in the future—which means RGF will be subject to the disclosure mandate

and/or punishment for failure to comply—RGF lacks standing to challenge that law.

Indeed, it said that the decision not to speak is an *element* of a chill claim—a truly new proposition of law. And given that the Tenth Circuit's decision was published, this new rule—which conflicts with the law of other Circuits—will bar plaintiffs from bringing legitimate chill cases in the future. That warrants certiorari.

II. The Court of Appeals' new element for chill claims will bar plaintiffs from bringing legitimate challenges to donor disclosure mandates.

The result of the Tenth Circuit's newly-minted element for chill claims will be to block people and organizations from challenging speech burdens unless they "mak[e] an affirmative choice not to speak." App. 8. That principle will effectively close the courthouse doors to individuals and organizations seeking to bring legitimate First Amendment cases.

In fact, it is most likely to deter precisely those plaintiffs who are in the best position to bring suit to challenge speech burdens. It is precisely those people of "extraordinary persistence," *Serna*, 2019 WL 2340958 at *8, who are most likely to be able to spend the money and risk the hostility necessary to challenge the constitutionality of a speech burden. By contrast, people who "mak[e] an affirmative choice not to speak," App. 8, are also more likely to also make the

affirmative choice not to sue. Thus the Tenth Circuit's new rule will increase the risk that chills on speech will remain on the books, unchallenged—precisely because they are effective.

The reason *Walker* went out of its way to say plaintiffs can sue even if they choose not to speak is because the decision to file a lawsuit is itself subject to the chilling effect. If a person fears being punished for expressing her views, she is also likely to fear suing over that. The decision below puts a new spin on this paradox. By saying that an *element* of a chill claim is a choice to refrain from speaking, the court below essentially said that a person must be both *afraid to speak* and also *unafraid to file suit* before bringing a chill claim. This is illogical, and is likely to result in barring the courts to people at risk of punishment for speech.

This is a particular concern in the context of donor disclosure laws, a subject this Court has addressed in important recent decisions, such as *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). Such cases have recognized that forcing nonprofits to publish the names of their donors imposes a serious burden on speech rights. *See id.* at 1281 ("the petitioners . . . suffered from threats and harassment in the past, and . . . donors were likely to face similar retaliation in the future if their affiliations became publicly known.").

Bonta cited *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and similar cases for the proposition that forcing an organization to publish the

identities of its supporters is likely to chill speech both by the organization and by the supporters, who may "face[] a risk of reprisals if their affiliation with the organization became known." *Bonta*, 141 S. Ct. at 2382.

And *Bonta* was notably similar to this case. For example, the state interest at issue there—the administrative "efficiency" interest, *id*. at 2385—was minimal compared to the burden, which took the form of the risk of retaliation and harassment. *Id.* at 2387 ("Mere administrative convenience does not remotely 'reflect the seriousness of the actual burden' that the demand for [disclosure] imposes on donors' association rights." (citation omitted)). Likewise here, the alleged informational interest is minimal compared to the burden on RGF's free speech rights and those of its donors, given the low contribution threshold that triggers the disclosure mandate—i.e., even a donor who pays a penny toward RGF's speech on ballot initiatives must have her information published. *Cf. Sampson*, 625 F.3d at 1261 (government's interest in compelling disclosure of donors who contributed de minimis amounts was "minimal.").

In *Bonta*, this Court was also particularly concerned with the fact that California failed to protect the privacy of the disclosed information, despite the state's promises to do so, *see* 141 S. Ct. at 2381, which increased the likelihood of retaliation or harassment. Here, the City does not promise to keep the information private—on the contrary, the entire point is to force publication of the names, addresses, and employment information of donors, and to maintain that information on a publicly-accessible list. The likelihood

that such an anti-privacy mandate will chill speech is obvious.

And if it were not, the evidence adduced at trial revealed that other, similar organizations have suffered harassment, retaliation, and violence due to such mandates. *See* App. 26–27. This is sufficient to show the risk of chill under the *objective* test. What's more, RGF destroyed $1,500 worth of postcards that it had intended to distribute to voters, in hopes of avoiding the Ordinance's anti-privacy rule, *id.* at 46 n.5, revealing that RGF was in fact deterred from exercising its First Amendment rights by the Ordinance.

Yet the Tenth Circuit's newly-minted "element" of a chill claim means that RGF still cannot bring suit to challenge that requirement, because RGF intends to exercise its speech rights in the future. Under its new rule, only an organization that is both *afraid to speak* and *unafraid to sue* will have standing. This Court should grant certiorari to provide guidance to lower courts which will protect the right of speakers to defend their freedom of speech against chilling effects.

III. The Court of Appeals' new test for chill conflicts with this Court's principles regarding standing.

Not only does the decision misconstrue the law and create a new element in chill claims—one that conflicts with this Court's precedent and that of other circuits—but it also conflicts in a deeper way with basic principles of the law of standing.

In order to have standing to seek prospective injunctive relief, a plaintiff must have "concrete plans" to act in ways that will incur the enforcement of the challenged law, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)—that is, there must be a "genuine threat of imminent prosecution," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 12 (2010) (citation omitted), as opposed to a merely speculative possibility.

For example, the plaintiffs in *Phelps v. Hamilton*, 122 F.3d 1309 (10th Cir. 1997), lacked standing to challenge the constitutionality of certain laws against stalking and harassment because they "failed to put forth any objective evidence that they intend to engage in activities prohibited by the [statute] . . . or that they face an imminent threat of prosecution." *Id*. at 1327. By contrast, in *ACORN v. City of Tulsa*, 835 F.2d 735 (10th Cir. 1987), an organization did have standing to challenge certain speech restrictions because it *did* "show[] an unmistakable intention to engage in activities that are prohibited by each of the challenged ordinances," and the government had "demonstrated its resolve to enforce the ordinances." *Id*. at 739. It was not necessary for the organization to actually be prosecuted before suing. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). Instead, it only had to "allege[] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [the existence of] a credible threat of prosecution thereunder." *ACORN*, 835 F.2d at 739 (citation omitted).

Under that rule, RGF would have lacked standing to sue if it had *no* intention of speaking in the future—as with the plaintiffs in *Phelps*. Only because RGF *does* intend to engage in speech that is subject to the challenged ordinance does it *have* standing, as the plaintiffs did in *ACORN*.

In *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 550–51 (10th Cir. 2016), the Tenth Circuit held that a plaintiff lacked standing to challenge a law restricting possession of certain magazines for firearms because she "expressed no concrete plans to engage in conduct that had any potential to violate [the statute]." That meant "she failed to demonstrate an imminent injury for purposes of mounting a pre-enforcement challenge." *Id.*

Likewise, in *Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp.3d 1086 (D. Kan. 2015), the district court found that an organization lacked standing to challenge the constitutionality of certain laws relating to firearms because in order to have standing, a plaintiff "must set forth 'concrete plans' to perform, in the near future, the conduct that would subject him to the threatened injury," but the plaintiff had not "indicate[d] . . . any concrete plans to engage in conduct proscribed by" the challenged laws. *Id*. at 1097–98.

Thus if RGF had no plans to support or oppose ballot initiatives in the future, and thereby incur the enforcement of the ordinance, it would lack standing. But RGF does have standing, because it has been punished

under the challenged ordinance before, and when RGF resumes speaking, it will be again. *Bigelow*, 421 U.S. at 816–17.

This case is therefore like *Wooley v. Maynard*, 430 U.S. 705 (1977), in which the plaintiffs were punished for covering up a motto on their license plate that they found offensive for religious reasons. *Id*. at 707–08. The statute prohibited "defacement" of license plates, *id*. at 713, but the plaintiffs believed that being punished for this violated their First Amendment rights. *Id*. at 714. Rather than appealing the citations they were issued, or seeking restitution, they sought prospective injunctive relief to prevent future enforcement of the anti-defacement statute, if and when they again covered that part of their license plate. *Id.* at 711. The Supreme Court let the case proceed. The plaintiffs had standing because they had been injured in the past and alleged a plan to continue behaving in a way that would trigger enforcement of the law again.

RGF has done the same. It intends to support or oppose ballot initiatives in the future. Doing so will trigger the disclosure requirement, which RGF alleges violates the First Amendment, and there's no dispute that the ordinance will be enforced against RGF and its donors again. That is why RGF *does* have standing. RGF further contends that the mandate is such that it would deter a person of ordinary firmness from speaking. *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001). These facts should mean RGF may bring this chill case for prospective injunctive relief.

But the Tenth Circuit's newly-minted "element" of a chill claim—requiring a plaintiff to actually give up his or her speech rights before bringing suit—throws these standing principles out of whack. A plaintiff who chooses to refrain from speaking out of fear of punishment will have to face the risk of being pleaded out of court for lack of standing due to the fact that he or she cannot prove an "unmistakable intention to engage in activities that are prohibited," *ACORN*, 835 F.2d at 739, whereas the "unusually determined plaintiff" who "persists in his protected activity" despite the speech burden will risk being barred from court because he or she has not affirmatively chosen to remain silent. *Mendocino Envtl. Ctr.*, 192 F.3d at 1300. That is illogical.

The Tenth Circuit's new rule also conflicts with this Court's standing doctrines in another way. In several contexts, this Court has said that a person is not required to submit to an unconstitutional law before challenging its constitutionality. *See, e.g.*, *Pub. Utils. Comm'n of Cal. v. United States*, 355 U.S. 534, 540 (1958) ("where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."); *cf. Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 506 (1982) (plaintiffs may "choose the [federal] forum in which to seek relief" without first going through a state proceeding).

Thus in *Zwickler v. Koota*, 389 U.S. 241 (1967), the Court allowed a lawsuit to proceed against a New York statute that requires any handbill supporting or

opposing a candidate to also include the name and address of the printer of the handbill. The Court said the plaintiff was not required to first file suit in state court, because "to force the plaintiff . . . to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Id.* at 252. And in *Dombrowski*, 380 U.S. at 486, this Court said a person could bring a pre-enforcement challenge to a burden on free speech, because "the sensitive nature of constitutionally protected expression" militated against a rule that would require plaintiffs to "risk prosecution [before] test[ing] their rights."

But the new rule adopted by the Tenth Circuit would accomplish something contrary to this precedent: it requires a plaintiff to actually surrender her free speech rights as the price of bringing suit to vindicate those very rights—which "mak[es] vindication of freedom of expression await the outcome of protracted litigation." *Id*. at 487.

In short, the Tenth Circuit's novel standing "element" will " 'reward' government officials for picking on unusually hardy speakers." *Bennett*, 423 F.3d at 1252. And those unusually hardy speakers are likely to be organizations like RGF—institutions that have the wherewithal to bring lawsuits—whereas those people most likely to succumb to a chill are those least likely to file a lawsuit to vindicate their rights.

CONCLUSION

The Tenth Circuit's novel new element of chill—fashioned in direct conflict with the holdings of other Circuits and this Court's precedent—will deter the most vulnerable plaintiffs from bringing suit to defend their First Amendment rights and will encourage further burdens on donor privacy and free speech. This petition should therefore be *granted*.

Respectfully submitted,

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