No. 22-2004

United States Court of Appeals for the Tenth Circuit

RIO GRANDE FOUNDATION AND ILLINOIS OPPORTUNITY PROJECT,
PLAINTIFFS-APPELLANTS,

v.

MAGGIE TOULOUSE OLIVER, IN HER OFFICIAL CAPACITY
AS SECRETARY OF STATE OF NEW MEXICO,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, NO. 19-CV-01174, HON. JUDITH C. HERRERA, PRESIDING

REPLY BRIEF

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INTRODUCTION

Just as New Mexico led the district court astray in assessing standing at the wrong time, so it seeks to lead this Court astray too. First it quibbles with whether standing is assessed at the time of the complaint, even though this Court could not be any clearer: "Standing is determined as of the time the action is brought." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). Next, the State says the district court *did* assess standing at the time of the complaint. Then, it relies on the same post-complaint, 2020 election speech as the district court. That 2020 conduct does not help the State's argument: Rio Grande Foundation (RGF) and Illinois Opportunity Project (IOP) did not engage in speech that violated the law in the 2020 election cycle because the district court refused to grant them a preliminary injunction and the Secretary threatened enforcement. This Court should reject the State's effort to use that simple fact as both proof that RGF and IOP never wanted to speak *and* that they would never again seek to speak.

RGF's and IOP's 2020 speech is irrelevant in any event to the two legal questions here. The first question is whether the district court correctly applied the *Walker* factors in finding no standing. Those factors are past engagement "in the type of speech," "affidavits or testimony stating a present desire, though no specific plans, to engage in such speech," and "a plausible claim" that the plaintiffs will

refrain from speaking because of "a credible threat that the statute will be enforced." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006).

1. On past engagement in the type of speech, the State does not dispute that that RGF had engaged in issue campaigns in New Mexico and IOP had engaged in similar speech elsewhere. The State also concedes that SB 3's registration and disclaimer regulations would have applied to RGF's previous speech. But the State argues that the groups had not engaged in the *exact* amount of speech covered by the law's disclosure provision. But *Walker*'s "type of speech" limitation is not concerned with the dollar amount of past speech. What matters is that these groups had engaged in issue advocacy. The State cites no precedent to the contrary, and *Walker* itself—which held that mere conduct in preparation for speech suffices—refutes the State's position.

2. On a present desire to engage in speech—again, as assessed at the complaint's filing—the State resists the district court's own conclusion that RGF and IOP had shown this desire. Yet the State concedes that RGF and IOP planned imminent, specific issue campaigns in New Mexico before the 2020 election that would have been subject to SB 3's regulations. Moreover, as shown below, RGF and IOP have each expressed future desires to engage in speech now regulated by SB 3.

3. On a plausible claim that SB 3 chills RGF's and IOP's speech, the State concedes that it will enforce the statute against the groups. Yet, resting on the same

post-complaint conduct as the district court, the State says the groups did not show that SB 3 kept them from speaking. Brushing aside the sworn affidavits from each president explaining the chill on their speech, the State claims some contradiction between the affidavits and deposition testimony. Nonsense. RGF's president testified in his deposition that "the donor disclosure thing is a very serious issue for us, and barring some legal change or a victory in court, we probably will withhold spending above the $3,000 threshold for the foreseeable future." App. 152. He said that absent SB 3, it is "quite possible" that RGF would "spend more than $3,000 in any legislative district to make these kind of mail communications." *Id.* IOP's president likewise explained that it did not engage in speech and instead "filed a lawsuit because we don't want our donors to be disclosed"—but that it still wants "to engage in substantially similar speech in future New Mexico elections." App. 163.

Seeming to recognize that it invoked the wrong jurisdictional doctrine below, the State for the first time argues mootness. But this case, like many election-related challenges, easily falls into the exception for cases capable of repetition yet evade review. The State concedes both "that any challenged action ended too quickly to be fully litigated" and that it will "enforce violations of SB 3" against RGF and IOP. Br. 41 n.11, 37 n.10. And RGF and IOP have shown a reasonable expectation of engaging in speech that would bring the State's enforcement authority down on them. The State cherry-picks deposition testimony to imply uncertainty as to the

groups' future speech plans, but the only uncertainty is what issues might be relevant in the future—not whether the groups will engage in issue advocacy subject to SB 3.

Reading past the State's truncated quotations proves the point. When asked by the State, "Do you intend to send similar mailings to the taxpayer pledge mailers in the future?" RGF's president said that "the broad answer is yes" and offered specific testimony ignored by the State:

- "We do plan on doing some postcards . . . thanking legislators for adhering to the pledge."
- "[W]e have an entire legislative cycle to come or an election cycle, but we do . . . plan to do more mailings relating to the pledge."
- "We also have specific plans in the works to do postcards relating to the Freedom Index itself."

App. 149. RGF's president said that the group planned to spend at least $10,000 on future efforts, *id.*, which would subject the speech to SB 3's regulations. Likewise, IOP's president was asked at his deposition: "depending on what policies might arise in New Mexico, you may engage in issue advocacy; is that correct?" App. 165. He answered: "Yes." *Id.*

Thus, RGF and IOP have shown a reasonable expectation that they will be subject to SB 3's limitations again—especially when all reasonable inferences are drawn in their favor. They each have standing, the case is not moot, and Article III jurisdiction exists. This Court should reverse and remand.

ARGUMENT

I. The State mischaracterizes the summary judgment standard.

At the outset, two repeated errors in the State's brief require correction. First, the State repeatedly refers to RGF and IOP's "burden." For instance, the State says that "[n]either RGF nor IOP met their burden on summary judgment to establish the elements needed for standing." Br. 38; *see* Br. 47 ("Appellants had not met their burden"). But the party opposing summary judgment "has no 'burden of proof,' as such." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 982 (10th Cir. 2002). It makes no difference whether the issue is one on which the nonmoving party has "the ultimate burden of persuasion at trial." *Id.* At summary judgment, "the nonmoving party only has a 'burden,' if that be the appropriate word, to identify specific facts posing genuine issues of material fact." *Id.* (cleaned up). And the court must "view the evidence in the light most favorable to [the nonmoving party] and draw all reasonable inferences in [its] favor." *Id.* That means, for example, that its "affidavit[s]" must generally be "taken as true." *Id.*

This error matters, particularly given the many places the State argues that RGF's and IOP's "declarations are contradicted by Appellants' deposition testimony." Br. 34; *e.g.*, Br. 17, 26, 44. As shown below, that characterization is wrong. But even if it were arguable, it would only underscore that summary judgment was inappropriate. At summary judgment, "[t]he court may not make credibility

determinations or weigh the evidence, and must disregard all evidence favorable to the moving party that the jury is not required to believe." *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1175 (10th Cir. 2001) (internal quotation marks omitted); *accord* 10A Wright & Miller, *Federal Practice & Procedure* § 2726.1 (4th ed.) ("[I]f conflicting testimony appears in the affidavits and depositions that are filed, summary judgment may be inappropriate as the issues involved will depend on the credibility of the witnesses.").

A second, related correction has to do with the State's repeated suggestion that this Court "reviews the factual findings underlying the district court's standing determination for clear error." Br. 18 (cleaned up); *see* Br. 2, 17, 39, 47. But "[b]ecause summary judgment may only be based on undisputed facts," "such 'factual findings,' to the extent they were made, [a]re inappropriate for summary judgment." *Fowler v. United States*, 647 F.3d 1232, 1239 (10th Cir. 2011). "This court reviews de novo a district court's grant of summary judgment." *Brooks v. Colorado Dep't of Corr.*, 12 F.4th 1160, 1169 (10th Cir. 2021). If "a rational trier of fact could

resolve the issue either way"—drawing "inferences in favor of the nonmoving party"—summary judgment may not be granted. *Id.* at 1169–70.[1]

II. RGF and IOP have standing.

The district court's standing determination hinged on its retrospective review of what happened during the 2020 election. The State can't decide whether to double-down on this error or make new arguments, so it does both. Neither works. As the State's own defense of the district court shows, the court relied on post-complaint conduct to find no standing. But black-letter law forbids that approach. Properly viewed at the time of the complaint, RGF and IOP each had standing under the three *Walker* factors. The State's arguments otherwise conflate the two organizations, cherry-pick deposition testimony, and most of all, rely on post-complaint evidence of what happened during the 2020 election. Even that evidence, however, only underscores that the State's law chills RGF's and IOP's speech. They have standing.

A. Standing is assessed at the time of the complaint.

The State first suggests some confusion over when standing is assessed, noting that another circuit once criticized a 1995 decision of this Court for conflating

[1] Only where "[t]he parties stipulated that they did not dispute the underlying facts" has this Court applied the different standard of "review[ing] the district court's legal conclusions de novo and its fact findings for clear error." *Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 951 F.3d 1185, 1192 (10th Cir. 2020). That is not the case here. *See* ECF No. 56, at 9-12 (State denying facts asserted by RGF and IOP); ECF No. 57, at 3-4 (vice versa).

standing and mootness. Br. 24 (citing *Powder River Basin Res. Cnty. v. Babbitt*, 54 F.3d 1477 (10th Cir. 1995)). The State also relies on a truncated quotation from an unpublished 2003 opinion. Br. 25. But there is no confusion, in this circuit or elsewhere: "Standing is determined as of the time the action is brought." *Dr. John's, Inc. v. City of Roy*, 465 F.3d 1150, 1156 n.2 (10th Cir. 2006) (quoting *Nova Health*, 416 F.3d at 1154); *e.g.*, *Davis v. FEC*, 554 U.S. 724, 735 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.").

This Court long ago cleared up any confusion from earlier cases, explaining that *Powder River*'s suggestion of "'lost standing' in the middle of a lawsuit" "was really a mootness question." *Nova Health*, 416 F.3d at 1155 n.5. Thus, courts must "look to when the complaint was first filed, not to subsequent events[,] to determine if a plaintiff has standing." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013).

Contrary to the State's suggestion, this error infected every part of the district court's standing analysis. *See, e.g.*, S.A. 11 (emphasizing that RGF and IOP had not engaged in "electioneering communications subject to disclosure in 2020"); S.A. 12 ("the referenda at issue in this lawsuit" "ha[ve] already been voted upon"); S.A. 15 ("lack of evidence of specific planned issue advocacy" *after* the 2020 planned issue campaigns). Of course, the district court's error was thanks to the State, which makes

the same post-complaint assertions about standing that it made below, even as it says that RGF and IOP are "incorrect" "that the district court mistakenly assessed standing at the time the summary judgment motions were filed." Br. 17. In the very next sentences, the State relies on the backwards-looking assertion "that RGF and IOP had failed to show that their plans were abandoned because of the threatened enforcement of SB 3." *Id.* This is their main argument, and it is wrong thrice over: it misunderstands the summary judgment burden, it looks from the wrong point in time, and it contradicts the record.

Analyzing the three *Walker* factors based on the facts at the *relevant* time—the complaint's filing—shows that both RGF and IOP had (and have) standing. As required by precedent, RGF and IOP each presented "(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." *Walker*, 450 F.3d at 1089. "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006).

B. RGF has standing.

1. RGF engaged in the "type of speech" regulated by SB 3.

The State does not question that RGF engages in issue advocacy in New Mexico. Yet it argues that RGF has never engaged in "the type of speech" at issue, *Walker*, 450 F.3d at 1089, because its past expenditures were possibly "too small to trigger the challenged disclosure" provision. Br. 28, 25. But the State agrees that the type of issue advocacy that RGF has engaged in is now regulated, as it concedes that SB 3's registration and disclaimer requirements *would* have been triggered. Br. 29; *see also* ECF No. 56, at 11 ¶ 14. Regardless, this Court's precedents do not define the relevant "type of speech" so narrowly, and RGF has engaged in issue advocacy.

To begin, RGF's president testified that "perhaps" the group hit the disclosure threshold on a "right to work" campaign several years ago. App. 154. He also said that another past campaign "could have" hit the threshold "as well." *Id.* Drawing all inferences in RGF's favor, the State's assumption that RGF has never hit SB 3's disclosure threshold is unsound. *See also* App. 146 ("certain expenditures of ours would indeed be covered under this law.").

In any event, the State cites no case to support the proposition that "the type of speech" is parsed down to previous expenditures in dollars and cents—or whether past communications included voluntary disclaimers. Nor does the State meaningfully respond to the authorities already cited rebutting that proposition. Instead, it

distorts both RGF's arguments and the caselaw. RGF does not argue that its past speech "constitutes 'conduct in preparation' for chilled speech." Br. 31. It argues that its past speech *was* the same type of speech now chilled because of the State's onerous law. Under circuit law, even "past conduct *in preparation*" for speech is enough to satisfy this factor. *Walker*, 450 F.3d at 1091. Thus, actual past speech—even if it would have triggered only parts of SB 3—easily suffices. The State has no response to this point.

The State tries to distinguish *Walker* by noting that the plaintiffs there "had planned to support an initiative before the legislature changed the vote threshold needed to support an initiative." Br. 33. That does not help the State, for RGF did more than plan to engage in issue advocacy: it *engaged* in issue advocacy, as the State concedes. The State says, without quotation and citing multiple pages, that the *Walker* "plaintiffs also offered evidence that they had used the initiative process in the past, both in Utah where the challenged law existed, and in other states." Br. 33. But "no group or individual ha[d] pursued a wildlife initiative in Utah" in at least a decade, *Walker*, 450 F.3d at 1086, and "not a single Plaintiff ha[d] ever brought a wildlife management initiative in Utah," *id.* at 1105 (Tacha, C.J., dissenting). This Court held that it was enough that the plaintiffs had merely "prepar[ed]" to participate in such initiatives or had "support[ed]" "initiatives in other states." *Id.* at 1091

(majority op.). If those activities qualify as "the type of speech," materially identical issue advocacy (even if on a slightly smaller scale) certainly does.

The State tries to escape this Court's decision in *Aptive Environmental, LLC v. Town of Castle Rock* by arguing that "[t]he past activity demonstrated in *Aptive* was not merely 'similar evidence in surrounding localities.'" Br. 33 (quoting Opening Br. 18). But this Court could not have been clearer: "We conclude that this evidence of Aptive's solicitation after 7:00 p.m. in surrounding localities establishes that Aptive has a history of engaging in the type of speech affected by the challenged government action." 959 F.3d 961, 975 (10th Cir. 2020). Again, "the type of speech" did not depend on the plaintiff engaging in the precise speech now regulated.

Next, the State dismisses *Babbitt v. United Farm Workers National Union* without articulating any distinction. Br. 31. The State concedes that the past speech there was only "arguably prohibited by the statute" (*id.*), yet the Supreme Court held that the plaintiffs had standing: "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not first expose himself to actual arrest or prosecution to be entitled to challenge the statute." 442 U.S. 289, 302 (1979) (cleaned up). Under the State's theory, the plaintiffs in *Babbitt* would have had to prove that their past speech was the same as what the statute proscribed to have standing. That is not the law.

The State appears to agree that the Supreme Court in *Susan B. Anthony List v. Driehaus* held that a plaintiff who had merely "intended to disseminate" now-regulated speech had standing. 573 U.S. 149, 161 (2014). The State just focuses on a different plaintiff who had engaged in the precise speech, but the Court held that "[b]oth petitioners" had standing. *Id.*; *see* Br. 32.

Last, the State has no response to the broader point that interpreting "the type of speech" narrowly would unduly restrict standing law and discriminate against new or growing entities. The State's rejoinder—that there is "no authority that a party may, regardless of its history, avoid the first element of the *Walker* test" (Br. 30)—is hard to understand. RGF's argument goes to how the first element of *Walker* is applied, particularly whether "the type of speech" is artificially limited to the exact monetary parameters of the law. And *Walker* itself says that its first element can indeed be "avoid[ed]" (Br. 30): "evidence of past activities obviously cannot be an indispensable element—people have a right to speak for the first time." 450 F.3d at 1089. In short, RGF has engaged in the type of speech now regulated by the State because it regularly engages in issue advocacy in New Mexico.

2. RGF had a present desire to engage in regulated speech.

The district court held that RGF satisfied the second *Walker* factor: "affidavits or testimony stating a present desire, though no specific plans, to engage in" "the type of speech affected by the challenged government action." 450 F.3d at 1089; *see*

S.A. 12. RGF's president stated that RGF "intends to engage in substantially similar issue speech in future New Mexico elections." App. 35.

The State purports to contest the district court's holding in a two-sentence argument that just restates its view of the third *Walker* factor (causation). Br. 34–35. Besides collapsing the two factors, the State's argument impermissibly views the requisite "present desire" from the post-complaint, post-2020 election standpoint of the depositions—committing the same error that it says the district court did not make. And it ignores *Walker*'s admonition that the second factor does not require "specific plans." 450 F.3d at 1089. Beyond the affidavits and testimony, filing this case and moving for a preliminary injunction show that RGF and IOP had a present desire to engage in the type of regulated speech. *See Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956, 960 (10th Cir. 2021) ("Nothing more concrete than this general aspiration is needed to meet the second prong.").

The State's parenthetical suggestion that the second factor cannot be met absent a specific "desire to take actions in violation of challenged laws" (Br. 34) ignores that a plaintiff chilled from speaking "by definition does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future." *Walker*, 450 F.3d at 1089. Regardless, as detailed in the mootness discussion below, RGF's president at his deposition offered specific future speech that would be subject to SB 3's disclaimer and disclosure requirements. *See* App. 149.

Finally, as explained, this second factor looks at the same "type of speech affected by the challenged government action" as the first factor. *Walker*, 450 F.3d at 1089; *see* Opening Br. 22. Yet the State does *not* argue that RGF engages in the wrong type of speech to meet the second factor, instead suggesting (without support) that the "similar[ity]" of "intended speech" may differ between the first and second *Walker* factors. Br. 34. The incomprehensibility of this argument proves the State's error on the first factor. RGF expressed a present desire to engage in speech regulated by SB 3.

3. RGF plausibly claimed it would avoid protected speech because of SB 3.

The third *Walker* factor is any "plausible claim that [the plaintiffs] presently have no intention to [engage in speech] *because of* a credible threat that the statute will be enforced." 450 F.3d at 1089. The question is merely "whether the plaintiff in question claims to be deterred and whether such deterrence is plausible." *City of Santa Fe*, 7 F.4th at 960. The State's argument on this factor depends on ignoring extensive testimony from RGF's president.

The State does not contest that RGF "promises its donors privacy when they make their contributions," or that RGF "believe[s] that if its members, supporters, and donors are disclosed, individuals, organizations, and corporations will be less likely to contribute to its mission, and it will experience greater difficulty in fundraising." App. 36–37. Nor does the State contest RGF's view that audiences may be

distracted from the speech's message if disclosure is required. App. 37. And the State affirmatively expresses its intent to "enforce violations of SB 3." Br. 37 n.10. Thus, RGF claims to be deterred, and that deterrence is plausible given its uncontested testimony that it would lose support if it followed SB 3.

The State argues that deterrence to donor contributions "is only evidence of donors' desire for anonymity, not that RGF or IOP would send electioneering communications but for SB 3's disclosure requirement and its effect on potential donors and donations." Br. 37. That argument blinks both reality and the record. Like any nonprofit, RGF would prefer not to lose donors. And that's what RGF's president explained, in a long passage of his testimony featured prominently in the opening brief yet conspicuously absent from the State's response. *See* Opening Br. 25–26. At his deposition, he testified that "the donor disclosure thing is a very serious issue for us, and barring some legal change or a victory in court, we probably will withhold spending above the $3,000 threshold for the foreseeable future." App. 152. He said that absent SB 3, it is "quite possible" that RGF would "spend more than $3,000 in any legislative district to make these kind of mail communications." *Id.*; *accord* App. 57 (preliminary injunction opinion stating that RGF expected "the loss of" donors). The State ignores this testimony because it has no answer.

This Court does not require anything beyond the plaintiffs' own affidavits and the threat of enforcement to "establish" that plaintiffs "have been discouraged by" a

challenged law. *Walker*, 450 F.3d at 1092; *see also Aptive*, 959 F.3d at 976. And in a pre-enforcement challenge, RGF cannot *prove* that it has lost donors due to disclosure when it generally has not disclosed its donors. The State's demand for "evidence needed . . . to meet *Walker*'s third requirement" (Br. 36) is not supported by *Walker*, which (unlike the first factor) does not require "evidence" but only "a plausible claim." 450 F.3d at 1089. A plaintiff need not "have specific plans to take actions subject to the statute." *Walker*, 450 F.3d at 1088–89.

The rest of the State's argument on the third factor commits the same legal error as the district court, fixating on a retrospective inquiry into whether "RGF and IOP forwent their plans to send electioneering communications before the 2020 election because of SB 3." Br. 35; *see* Br. 37. As exhaustively explained, that is not relevant to standing, which considers the facts at the time of the complaint. Yet the State spends almost its entire argument pressing this point (and mostly ignores RGF). *See* Br. 37–38.

Even that irrelevant effort fails. As to RGF, the State notes its president's testimony that the group switched to taxpayer pledge cards "for a variety of practical and logistical reasons." Br. 36. But RGF's president testified that the cards were "obviously" "below the threshold" for disclosure: "if we had done them at above the threshold," SB 3 "would have been applicable," plausibly causing RGF to lose donors. App. 154–55; *see also* App. 148. That was why RGF sought a preliminary

injunction: to enable it to send the legislator scorecards at higher expense. ECF No. 38, at 3–4, 33. Again, RGF's subsequent "acquiescence" does not mean that RGF "does not have standing." *Aptive*, 959 F.3d at 976.

The State's discussion of SB 3's disclaimer requirement suffers from all the same flaws, focusing on the supposed lack of "evidence that had SB 3 not been in place, [RGF and IOP] would have sent their proposed, pre-2020 election mailers, without attribution." Br. 25. Even putting aside the State's post-hoc error, the State ignores the testimony of RGF's president that "the focus of our conversation in the public square should be on ideas and principles rather than sources of funding and sponsors." App. 37. The State does not dispute that SB 3 forces RGF to put a sponsor disclaimer on its advertisements. Thus, RGF has again shown a plausible claim that it will avoid speaking because of SB 3. It satisfies all three *Walker* factors and has standing.

C. IOP has standing.

1. IOP engaged in the "type of speech" regulated by SB 3.

The State does not dispute that "IOP engages in issue advocacy in Illinois." App. 30. Instead, it repeats its argument that IOP had to have engaged in the precise speech now covered by the regulation in New Mexico. Br. 30. As shown, that is wrong. *See Walker*, 450 F.3d at 1090 (considering initiatives prepared or supported by plaintiffs in "surrounding states"); *Aptive*, 959 F.3d at 975 (considering

"surrounding localities"); *see also Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012) (finding standing because "[t]he Center's past out-of-state 'issue ads' could qualify as electioneering communications under the Illinois disclosure laws"). IOP engages in issue advocacy, which suffices for the first *Walker* factor.

2. IOP had a present desire to engage in regulated speech.

The State's new argument about IOP and the second *Walker* factor fails too, for the reasons above. The State alludes to but does not cite whatever "deposition testimony" that it believes "contradict[s]" IOP's present desire to engage in regulated speech. Br. 34. IOP's president stated that the group "plan[ned] to spend over $9,000 communicating by mail to thousands of New Mexico voters within 60 days of the 2020 general election." App. 30. He said the same in his deposition, explaining that IOP wanted "to engage voters so they knew and were informed about the policy" and "filed a lawsuit because we don't want our donors to be disclosed." App. 163. And when asked whether IOP plans "to engage in substantially similar speech in future New Mexico elections," he answered "Yes." *Id.* IOP satisfies the second *Walker* factor.[2]

[2] Defending the district court for relying on post-complaint events, the State says that the court's statement that the constitutional amendment at issue "has already been voted upon" was "not part of the district court's analysis of the second *Walker* element." Br. 34 n.9. It self-evidently was. *See* S.A. 12.

3. IOP plausibly claimed it would avoid protected speech because of SB 3.

IOP also satisfies the third *Walker* factor. Most of the State's counter-arguments about post-complaint 2020 election conduct are addressed above. IOP's president explained that IOP had *never* "disclosed its donors publicly" and that it sued before its 2020 planned advocacy "because we don't want our donors to be disclosed." App. 163, 166; *see also* App. 31. The State asserts that "IOP filed its lawsuit—*not* . . . refrained from sending advertisements—because of a concern that donors' identity could be disclosed." Br. 38. That assertion makes little sense: IOP only needed this lawsuit to avoid disclosing its donors *if it wanted to engage in speech for which SB 3 requires disclosure*. If IOP was not going to engage in regulated speech, it had no need for a lawsuit or preliminary injunction. And after the district court refused to grant a preliminary injunction, IOP had to refrain from engaging in its planned speech. *Cf. Walke*r, 450 F.3d at 1087–88 ("a plaintiff need not expose himself to actual arrest or prosecution to be entitled to challenge a statute" (cleaned up)).

Even the district court understood that this was "evidence" "that IOP did not send mailers in 2020 because it did not want its donors disclosed." S.A. 15. Yet it still found that IOP did not satisfy the third *Walker* factor because of a "lack of evidence of specific planned issue advocacy by IOP in New Mexico." Br. 38 (quoting S.A. 15). The State restates but does not defend this analysis, *id.*, and for good

reason. IOP need not have "evidence" of "specific plans to take actions subject to the statute." *Walker*, 450 F.3d at 1088–89. As this Court has explained, such a requirement would "make[] no sense" in the context of a chilling claim. *Id.* at 1089. "By definition, the injury is inchoate: because speech is chilled, it has not yet occurred and might never occur, yet the government may have taken no formal enforcement action." *Id.* at 1088.

Finally, the State has no response to the testimony of IOP's president that the group would continue to "look at policy across the country" and "engage in issue advocacy" "in New Mexico" in the future. App. 165; *see* App. 163 ("[I]f we feel like we want to engage, then we will do that."). Particularly given its budget of over $3 million, App. 41, it has the capacity to speak in New Mexico at well above SB 3's limits.

In sum, at the time of the complaint (and now), both RGF and IOP had a plausible claim that they will avoid protected speech because of SB 3. Each has standing.[3]

[3] The State's coda about needing "an actual injury" besides "the requirements of standing and mootness" (Br. 46) is perplexing. The case cited by the State found "that Plaintiff failed to establish standing under the *Walker* test." *City of Santa Fe*, 7 F.4th at 961. Injury-in-fact is part of standing. *Id.* As shown, both RGF and IOP have an injury-in-fact here: chilled speech because of SB 3. In other words, *Walker* answers the "actual injury" question.

III. This case is not moot because it is capable of repetition yet evading review.

For the first time, the State presents a mootness argument. That argument fares no better than its standing one. The State agrees that the "challenged action ended too quickly to be fully litigated." Br. 41 n.11. Thus, the only question is whether RGF and IOP have shown a "reasonable expectation" that they "will be subject to the threat of prosecution under the challenged law." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.* (*WRTL*), 551 U.S. 449, 463 (2007). They have.

The State concedes that it will "enforce violations of SB 3." Br. 37 n.10. And under this Court's precedents in the context of elections, a continuation of the relevant legal regime is enough to "reasonably expect that the same dispute will erupt again between the parties." *Grant v. Meyer*, 828 F.2d 1446, 1449 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988); *accord Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 n.48 (1996) (stating the case was not moot when the defendant "has not disavowed the [challenged] practice"). The State does not respond to this point.[4]

Even if the State's intent to keep enforcing SB 3 were insufficient, the only question is whether RGF or IOP has a "reasonable expectation" of future issue

[4] Because RGF and IOP have shown a reasonable expectation of enforcement against their own speech, the Court need not consider whether "a future injury to a different plaintiff" suffices. Br. 42. But it is worth noting that the case cited by the State, *Marks v. Colorado Dep't of Corr.*, 976 F.3d 1087 (10th Cir. 2020), does not consider the authorities previously cited by RGF and IOP, *see* Opening Br. 34–35 & n.1.

advocacy subject to SB 3. This is not a demanding standard, especially in the context of election-related challenges. A plaintiff's "statement expressing [an] intent to" engage in the relevant speech suffices to show a reasonable expectation. *Davis*, 554 U.S. at 736; *see* Br. 44 (conceding that *Davis* involved only "a public announcement"); *see also First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 775 (1978) ("Appellants insist that they will continue to oppose the constitutional amendment"). All that matters is "whether the controversy [i]s *capable* of repetition," *not* "whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." *Honig v. Doe*, 484 U.S. 305, 320 n.6 (1988).

As discussed, RGF has already participated in speech in New Mexico that triggers SB 3's regulations. The State does not dispute that RGF "regularly engages in issue advocacy in New Mexico." Br. 44. It says that RGF's expenditures are "at such a level that they are unlikely to trigger the disclosure law," *id.*, but RGF stated its intention to engage in speech that *would* be subject to the disclosure law. Again, that is why it sued. *Cf. WRTL*, 551 U.S. at 463–64 ("Under the circumstances, particularly where WRTL sought another preliminary injunction based on an ad it planned to run during the 2006 blackout period, we hold that there exists a reasonable expectation that the same controversy involving the same party will recur." (citation omitted)).

RGF's president declared that RGF "intends to engage in substantially similar issue speech in future New Mexico elections." App. 35; *cf.* Br. 44 (conceding that "a public announcement" of future intent is enough). And, as noted, RGF's president testified in his deposition that "the donor disclosure thing is a very serious issue for us, and barring some legal change or a victory in court, we probably will withhold spending above the $3,000 threshold for the foreseeable future" App. 152. When then asked, "If you were victorious in this lawsuit or did not have the legal restrictions that you discussed, would you spend more than $3,000 in any legislative district to make these kind of mail communications?" he responded: "It's quite possible, yes." App. 152.

The State says that at the time of the depositions, RGF had "not even contemplated sending future mailers subject to SB 3." Br. 44. What the State cites does not say that. The cited testimony says that RGF did not know if it would send *taxpayer pledge cards* again, while emphasizing that the cards "really helped us make it very, very simple" to convey its message. App. 148. When asked by the State, "Do you intend to send similar mailings to the taxpayer pledge mailers in the future?" RGF's president said that "the broad answer is yes." App. 149. He said that the group "plan[s] on doing some postcards . . . thanking legislators for adhering to the pledge," "more mailings relating to the pledge," and "postcards relating to the

Freedom Index itself." *Id.* He said that the group planned to spend at least $10,000 on future efforts, *id.*, which would subject its speech to SB 3's requirements.

Likewise, IOP "intends to engage in substantially similar issue speech in future New Mexico elections." App. 30. When asked, "depending on what policies might arise in New Mexico, you may engage in issue advocacy; is that correct?" IOP's president answered "Yes." App. 165.

Naturally, long before the next election, RGF and IOP hadn't planned "[]certain" issue campaigns. Br. 45. That does not mean that an New Mexico issue advocacy group like RGF is unlikely to engage in issue advocacy in New Mexico. "[G]roups like [RGF and IOP] cannot predict what issues will be matters of public concern during [the] future," and they have "no way of knowing well in advance that [they] would want to run ads on" particular issues. *WRTL*, 551 U.S. at 462; *see* App. 154 (RGF's president testifying that "things can change quickly"); App. 163 (IOP's president: "I don't know what policies are going to happen in the future"). The point is that both groups intend to engage in future issue advocacy in New Mexico, and therefore there is a reasonable expectation that SB 3 will be enforced against it.

The State claims that "Plaintiffs' bare assertions that they intend to engage in electioneering communication subject to SB 3 are contradicted by their more detailed deposition testimony that any such actions are incredibly uncertain." Br. 45. Putting aside that the above statements do not reflect "incredibl[e] uncertain[ty],"

there is simply no contradiction: RGF and IOP want to engage in speech in New Mexico, but they do not yet know what issues will be at stake in future elections. Again, the State's argument conflicts with election precedents, which routinely apply this mootness exception to political speech or election challenges after the given election is over. *E.g.*, *WRTL*, 551 U.S. at 462; *Bellotti*, 435 U.S. at 774–75; *Grant*, 828 F.2d at 1449. Contra the State's argument, Br. 45, the fact that RGF and IOP focus on several issues while organizations like Wisconsin Right to Life focus on the same issue each election cycle does not mean that only single-issue organizations may bring election-related challenges.

RGF and IOP express an ongoing desire to engage in the same type of issue advocacy that they have long engaged in, and the State continues to say it will prohibit them from doing so. The case is not moot.

CONCLUSION

The Court should reverse and remand for adjudication on the merits.

Respectfully submitted,

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MAY 28, 2022

CERTIFICATE OF COMPLIANCE

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Dated: May 28, 2022

/s Daniel Suhr
Daniel Suhr