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

BRIEF FOR APPELLANTS

DANIEL R. SUHR
Liberty Justice Center
141 W. Jackson Blvd.
Suite 1065
Chicago IL 60604
(312) 637-2280
dsuhr@libertyjusticecenter.org

Counsel for Appellants

*ORAL ARGUMENT REQUESTED

RULE 26.1 DISCLOSURE STATEMENT

Both corporate plaintiffs are non-profit entities that have no parent corporation and no stock-holders.

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There are no prior or related appeals.

INTRODUCTION

New Mexico's 2019 Senate Bill 3 requires permits and detailed disclosures from nonprofit organizations that want to speak on political issues thirty days before a primary or sixty days before a general election. Organizations that engage in issue advocacy must now register with the New Mexico Secretary of State before they can express their views, and must disclose the identities of their donors who give more than $200 or who have cumulatively donated at least $5,000 since January 1, 2019. The State displays this information on a public website.

Plaintiffs challenge that scheme for violating their First Amendment rights. This appeal, however, is not primarily about the First Amendment. It is about whether a plaintiff that asserts that an election law is chilling its speech may maintain its challenge after an election passes. Plaintiffs-Appellants Rio Grande Foundation ("RGF") and Illinois Opportunity Project ("IOP") are two longstanding issue advocacy organizations that sought to engage in speech before the 2020 election—speech that would have been impeded by SB 3. So they sued and sought an as-applied preliminary injunction months before the election. The district court denied that motion based on its view of the merits, and RGF and IOP did not engage in their planned speech during the 2020 election.

After discovery, the parties cross-moved for summary judgment, and the district court dismissed for lack of standing. The district court assessed standing as of

the time of the summary judgment briefing, even though it is black-letter law that standing is assessed based on the circumstances existing at the time of the complaint. That fundamental error led to a parade of further errors, as the district court reasoned that RGF and IOP had not engaged in the relevant "type of speech" because they did not violate SB 3 during the 2020 election—even though both groups indisputably and routinely engage in issue advocacy. The district court also concluded that RGF and IOP could not show a plausible future chill on speech because, post-2020, they could not identify specific future issue campaigns for an election well over a year away.

But this Court's and the Supreme Court's precedents require consideration of standing as of the complaint's filing. At that time, RGF and IOP planned imminent, specific issue campaigns and alleged a plausible chill from SB 3's requirements on that advocacy. That was why they sought a preliminary injunction, which was litigated without anyone suggesting that they lacked standing. The State's successful squashing of their speech at the time does not eliminate their injury or standing.

Indeed, the district court's reasoning is contrary to this Court's and the Supreme Court's precedents, which hold that courts have continuing jurisdiction over challenges to election-related laws even after an election passes. Otherwise, few election challenges would ever survive. The proper doctrine to consider whether a suit can continue is *mootness*, not standing. And under the well-established body of

mootness precedents governing election challenges, the bar is low for a plaintiff to show a reasonable expectation that a challenged law may apply in the future. RGF and IOP easily clear that low hurdle. The State has never suggested any hesitation about enforcing SB 3, and it has vigorously defended that law. Both groups offered specific testimony that they would like to speak on issues in New Mexico again before an election but would be deterred by SB 3's onerous disclosure requirements. Because 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—the case is not moot, and Article III jurisdiction exists.

Thus, the district court's dismissal for lack of standing was error. The Court should reverse and remand for consideration of the merits.

JURISDICTIONAL STATEMENT

The district court exercised subject-matter jurisdiction under 28 U.S.C. § 1331. Because the court entered summary judgment, this Court has jurisdiction under 28 U.S.C. § 1291. The judgment below was entered on December 9, 2021. Short Appendix (S.A.) 020. Appellants filed a notice of appeal on January 7, 2022. Appendix (App.) 235.

STATEMENT OF ISSUE

Plaintiffs challenge the constitutionality of election-related speech regulations. Did the District Court err dismissing their case for lack of standing after the election was held?

STATEMENT OF THE CASE

A. RGF and IOP

Plaintiffs are non-electoral nonprofit organizations. The Rio Grande Foundation is a 501(c)(3) charitable research and education institution that works to further the liberty and prosperity of the citizens of New Mexico through its advocacy for the principles of freedom, limited government, and economic opportunity. S.A. 004 (Op. 4). To this end, RGF engages in issue advocacy about those topics central to its mission, including publishing a scorecard known as the "Freedom Index" that tracks the positions of New Mexico legislators on relevant issues. *Id.*; *see* App. 035 (Gessing Decl. ¶¶ 3–6). As the district court stated, "RGF has been an established nonprofit speaking out in state and local matters since 2000." App. 060 (Prelim. Inj. Op. 21).

Illinois Opportunity Project is a 501(c)(4) social welfare organization that seeks to educate the public about policy choices driven by the principles of liberty and free enterprise. Though IOP at first focused its work in Illinois, it increasingly engages in issue advocacy around the country. Besler Decl. ¶ 3 (App. 030); Besler Dep. 37:8–21 (App. 163); *see also id.* at 45:17–20 (App. 165).

Together, RGF and IOP brought this facial challenge on behalf of non-electoral nonprofit organizations that operate in New Mexico and find themselves subject to onerous new speech and disclosure requirements because of SB 3.

B. SB 3

Enacted in March 2019, SB 3 defines "independent expenditure" to include any advertisement or communication that "refers to a clearly identified candidate or ballot question and is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary or sixty days before the general election at which the candidate or ballot question is on the ballot." N.M. Stat. Ann. § 1-19-26(N)(3)(c). New Mexico statutes did not previously require any disclosure for independent expenditures. *See* Op. N.M. Atty. Gen. 10-03, 2010 N.M. AG LEXIS 18, at *9–10.

Because of SB 3, RGF, IOP, and all other groups that engage in issue advocacy that falls under SB 3's expansive definition of "independent expenditure" must now register with the State to express their views, assuming the group has received more than $5,000 in contributions or made independent expenditures of more than $5,000 in the election cycle. N.M. Stat. Ann. § 1-19-26(Q)(4), § 1-19-26.1(C).

Moreover, any group making independent expenditures of more than $9,000 in a "statewide" race, or as little as $3,000 in a "nonstatewide" race, must disclose the name, address, and donation amount of all donors who meet one of two criteria.

First, they must disclose any donor who gave more than $200, if the donation was "earmarked or made in response to a solicitation to fund independent expenditures." N.M. Stat. Ann. § 1-19-27.3(C). Second, if the expenditure was paid for at least in part from the group's general fund, the group must disclose any donor to their general fund who cumulatively donated more than $5,000 since January 1, 2019. N.M. Stat. Ann. § 1-19-27.3(D)(2). These disclosures are not confidential or collected simply for governmental purposes such as discovering fraud or preventing subversion of campaign finance laws. Instead, the donor history of every group is posted on the State's website for public consumption. N.M. Stat. Ann § 1-19-32(c).

Besides disclosing their donors for public identification, groups making independent expenditures subject to SB 3 must also attach an identifying sponsorship disclaimer to any issue advertisements exceeding $1,000. N.M. Stat. Ann. § 1-19-26.4. That disclaimer must include "the name of the candidate, committee, or other person who authorized and paid for the advertisement." *Id.*

A person who violates these requirements may be punished by a fine of up to $1,000 and by imprisonment for a year. N.M. Stat. Ann. § 1-19-36(A). The state ethics commission may also institute an action for relief for violations, including a civil penalty of up to $1,000 for each violation. *Id.* § 1-19-34.6(B).

C. Proceedings below

As the district court explained, "RGF planned to send mailings within 60 days of the November 2020 general election that would mention the name of the incumbent legislator and their votes and score on the Freedom Index, spending over $3,000 in individual legislative districts." Op. 5 (S.A. 005). "IOP planned to send mailings within 60 days of the November 2020 general election in New Mexico to thousands of New Mexico voters that would have mentioned the referendum on amending the New Mexico Constitution to end elections for the New Mexico Public Regulation Commission." *Id*.

But "[b]oth IOP and RGF receive general-fund support from a variety of sources, including from multiple donors over $5,000." *Id*. "Some donors give over $5,000 in a single election contribution, and others may give over $5,000 total in a two-year cycle." *Id*. And both groups believe, based on experience and statements from donors, that disclosure would make some donors less likely to support the groups. Gessing Decl. ¶¶ 10-12 (App. 036-37); Besler Decl. ¶¶ 11-13 (App. 031).

Because speaking through their planned issue advocacy would require them to alter their speech—both disclosing their donors and disclaiming their sponsorship—they brought suit in an initial complaint dated December 13, 2019, and an amended complaint dated February 14, 2020, App. 012 (amended complaint),

alleging various First Amendment theories. Several months before the 2020 election, RGF and IOP sought an as-applied preliminary injunction against SB 3.

The district court denied the preliminary injunction. Neither the State nor the district court suggested any jurisdictional problems. Instead, the district court held that RGF and IOP were unlikely to succeed on the merits of their First Amendment claim. The court did not question that these groups expected to lose donors if they were forced to disclose. App. 057 (Prelim. Inj. Op. 18). But the court found that "New Mexico has an important informational interest in the disclosure of donors" and that "[t]here is not enough evidence to establish a reasonable probability that identified RGF and/or IOP donors have been or would be subject to threats, harassment, and reprisals" to succeed on an as-applied challenge. App. 061, 065 (Prelim. Inj. Op. 22, 26). The court held that though "the disclosures may undoubtedly chill potential donors to some extent, these requirements are sufficiently drawn to serve the public's informational interests and are less restrictive than other alternatives." App. 066 (Prelim. Inj. Op. 27 (cleaned up)). As for the disclaimer requirement, the court held that "voters have an informational interest in knowing who the source of the mailings is" that overcomes the requirement's burden on speech. App. 071 (Prelim. Inj. Op. 32).

After the court denied a preliminary injunction, RGF "did not send its proposed postcards with Freedom Index results." S.A. 005 (Op. 5). Instead, it sent

smaller mailings involving "a taxpayer pledge card, stating whether certain candidates signed a 'Taxpayer Protection Pledge' that demanded no tax hikes through the end of the 2021 New Mexico legislative session." S.A. 005-06 (Op. 5-6). The State has suggested that even the scaled-back mailing subjected RGF to some of SB 3's requirements, albeit not donor disclosure. App. 116. IOP too "did not send [its] mailers . . . because it did not want its donors disclosed." S.A. 005 (Op. 5).

Both groups' presidents testified that they "intend[] to engage in substantially similar issue speech in future New Mexico elections." App. 030 (Besler Decl. ¶ 7); App. 035 (Gessing Decl. ¶ 6). But both groups also testified that if their donors were disclosed, they would "experience greater difficult in fundraising," as some donors would no longer support the organizations due to a fear of retaliation and harassment. App. 031 (Besler Decl. ¶¶ 10–12); App. 036 (Gessing Decl. ¶¶ 9-11). The groups also feared that audiences for their messages would focus on the disclosure or disclaimers "rather than the ideas presented in the messages themselves." App. 031-32 (Besler Decl. ¶¶ 13–14); App. 037 (Gessing Decl. ¶¶ 12–13).

After discovery, including depositions of RGF's and IOP's presidents, all parties moved for summary judgment on RGF and IOP's facial challenge to SB 3. The State moved for summary judgment for lack of standing, focusing not on the facts when the complaint was filed but on the likelihood of "future activity in New Mexico" *after* "the 2020 election." App. 124-25.

The district court dismissed the case "for lack of Article III standing." S.A. 018-19. The court applied the Tenth Circuit's test for determining when "plaintiffs in a suit for prospective relief based on a 'chilling effect' on speech can satisfy the requirement that their claim of injury be 'concrete and particularized.'" *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006). Courts in such cases consider "(1) evidence that in the past [the plaintiffs] 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." *Id.*; *see* S.A. 010.

Like the State, the court focused on RGF's and IOP's post-2020 plans, not on the situation when the complaint was filed. On the first factor (past engagement in "type of speech"), the court said that RGF's long history of issue advocacy in New Mexico did not suffice because it is unclear whether all of SB 3's requirements would have applied to its past speech—and because RGF did not in fact engage in the speech that it wanted to in 2020. S.A. 011. The court also believed that IOP's advocacy did not suffice because IOP had not "done any mailings in New Mexico in the past." *Id.*

On the second *Walker* factor (a present desire to engage in speech), the court held that RGF satisfied it because its president testified that "RGF intends to engage

in substantially similar issue speech in future New Mexico elections." S.A. 012. The court's discussion of IOP was unclear, but it doubted IOP's president's similar testimony because the 2020 referendum on which IOP wanted to send mailers "has already been voted upon." *Id*.

On the third *Walker* factor (plausible claim of chilled speech), the court agreed that "there is some evidence in the record that IOP did not send mailers in 2020 because it did not want its donors disclosed" but still said that there was a "lack of evidence of specific planned issue advocacy by IOP in New Mexico" in the future. S.A. 015. As for RGF, the court said that it did not meet its "burden" of showing "that it forwent its plans to spread its views in advance of the November 3, 2020 general election because of SB 3's new requirements." S.A. 015–16. According to the court, "RGF has not met its evidentiary burden on summary judgment of establishing that it engaged and will not engage in future advocacy *because of* SB 3." S.A. 016.

The court thus dismissed for "lack of standing." S.A. 018. In a footnote, the court said that its holding was consistent with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which applied the mootness exception for "controversies capable of repetition, yet evading review" "where the challenged action was too short to be fully litigated prior to its end and there is a reasonable expectation that the same complaining party will be subject to the same action again." S.A. 018 n.3.

The court said that "Plaintiffs have not shown a *reasonable* expectation that they will be subject to SB 3 in the future." *Id.*

RGF and IOP timely appealed. App. 235.

STANDARD OF REVIEW

"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). Summary judgment is warranted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)). If "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," summary judgment may not be granted. *Id.* And "[i]n analyzing whether a genuine fact issue exists, this court views the facts, resolves all factual disputes, and draws all reasonable inferences in favor of the nonmoving party." *Id.* at 1169–70.

SUMMARY OF ARGUMENT

The district court's dismissal for lack of standing was erroneous. That court's holding was premised on an analysis of standing at the time of summary judgment, rather than at the correct time: when the complaint was filed. At that time, RGF and IOP each showed that they routinely engaged in issue advocacy, the relevant "type of speech" affected by SB 3. Both organizations expressed a present, imminent desire to engage in speech before the 2020 election, pointing to specific planned issue

campaigns. And both organizations plausibly claimed that SB 3's requirements chilled that planned speech. As their presidents testified, donors would likely decline to offer support if the donors would be disclosed. More, both organizations wanted the public to focus on the message before their advocacy, not the identity of the sponsor or its supporters. Thus, RGF and IOP each satisfied this Court's test for standing in a First Amendment "chill" case, especially at the summary judgment stage when all inferences must be drawn in their favor.

Further, this case is not moot, for it easily falls into the "capable of repetition" exception to mootness. As the Supreme Court has repeatedly recognized, election-related challenges often cannot be fully litigated before an election, and courts must apply this mootness exception liberally to ensure judicial review of important constitutional issues. Again, the State evidently plans to continue to fully enforce SB 3's onerous requirements, and both RGF and IOP have expressed that they would like to speak on New Mexico issues before future elections free from SB 3's unconstitutional restrictions. No more is needed to show that the case is not moot.

ARGUMENT

I. Both plaintiffs have standing, assessed when the complaint was filed.

The district court's analysis hinges on assessing standing in the present, when the summary judgment motions were decided. But "[s]tanding is determined as of the time the action is brought." *Dr. John's, Inc. v. City of Roy*, 465 F.3d 1150, 1156

(10th Cir. 2006) (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005)); *see also, e.g.*, *Mink v. Suthers*, 482 F.3d 1244, 1253 (10th Cir. 2007) (same); *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.").

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); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n.4 (1992) (emphasizing the "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed"). The district court did not do so, thereby "conflat[ing] questions of standing with questions of mootness." *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 387 n.3 (1st Cir. 2000) (collecting cases criticizing this conflation).

When they filed their complaint, RGF and IOP had standing. To have standing, a plaintiff must show "an 'injury in fact'" that "is fairly traceable to the challenged action" and that "is redressable by a favorable decision." *Walker*, 450 F.3d at 1087. But "a plaintiff need not 'expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.'" *Id.* at 1087–88 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). And "[b]ecause of the significance of First Amendment rights, the Supreme Court

has enunciated other concerns that justify a lessening of prudential limitations on standing." *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (internal quotation marks omitted). "The mere threat of prosecution under the allegedly unlawful statute may have a 'chilling' effect on an individual's protected activity, and the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Id.* at 1266–67. Thus, "a chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury in fact, as long as it arises from an objectively justified fear of real consequences." *Walker*, 450 F.3d at 1088 (cleaned up); *accord* 13A Wright & Miller, *Federal Practice & Procedure* § 3531.4 (3d ed.) ("The nature of First Amendment rights readily supports recognition of injury; the importance of these rights supports recognition of rather attenuated injury.").

For these reasons, this Court has articulated three factors for determining whether "plaintiffs in a suit for prospective relief based on a 'chilling effect'" have an injury in fact: "(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 (emphasis omitted). "If the plaintiffs satisfy these three criteria, it is not necessary to show that they

have specific plans or intentions to engage in the type of speech affected by the challenged government action." *Id.*

The district court's confusion about when standing is assessed permeated its analysis. For instance, on the first *Walker* factor, the district court emphasized that RGF and IOP had not engaged in "electioneering communications subject to disclosure in 2020." S.A. 011. But they sued before the 2020 elections because they wanted to do just that, without complying with the disclosure requirement. Because the district court denied a preliminary injunction, they could not.

Likewise, on the second *Walker* factor, the district court suggested that IOP did not satisfy it because "the referenda at issue in this lawsuit" "ha[ve] already been voted upon." S.A. 012. Again, that has nothing to do with IOP's standing *at the time of the complaint*. And on the third *Walker* factor, the court pointed to the supposed "lack of evidence of specific planned issue advocacy" *after* the 2020 planned issue campaigns. S.A. 015.

Analyzing the three *Walker* factors based on the facts at the *relevant* time—the complaint's filing—shows that both RGF and IOP had standing. Tellingly, the entire preliminary injunction proceeding occurred with no suggestion that RGF or IOP lacked standing. As shown next, they sued because they wanted to imminently engage in 2020 issue advocacy and were chilled from doing so by SB 3's

requirements. Particularly drawing all reasonable inferences in their favor, both have standing.

A. RGF has standing.

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

The first *Walker* factor considers evidence that the plaintiff "in the past" has "engaged in the type of speech affected by the challenged government action." *Walker*, 450 F.3d at 1089. Of course, "evidence of past activities obviously cannot be an indispensable element"; after all, among other reasons, "people have a right to speak for the first time." *Id.* But evidence of past engagement in speech may "lend[] concreteness and specificity to the plaintiffs' claims." *Id.*

RGF has engaged in the "type of speech" covered by the law. The State admitted that RGF engages in issue advocacy in New Mexico. App. 115. As shown in more detail below, RGF has engaged in this advocacy on many local and state issues. The government did not dispute that RGF planned to publicize the results of its "Freedom Index" (tracking New Mexico state legislators' votes) by spending over $3,000 in individual legislative districts on mail campaigns within 60 days of the November 2020 election. App. 043 (citing Gessing Decl. ¶ 5 (App. 035)). The district court too agreed that "RGF considered sending a postcard with Freedom Index results." S.A. 011. And the district court said more broadly that "RGF has been an established nonprofit speaking out in state and local matters since 2000." App. 060.

The district court agreed that "RGF has done numerous mailings in New Mexico." S.A. 011.

So RGF has engaged in "the type of speech" covered by SB 3: issue advocacy in New Mexico before an election. Yet the district court reached the counterintuitive conclusion that RGF had *not* engaged in this type of speech by reasoning that "RGF's pre-2020 advertisements were small enough that they would not have triggered the requirement to report contributors under SB 3 had it been enacted previously." S.A. 011.

That reasoning misunderstands the law. Even "past conduct *in preparation*" for similar speech "provides concrete support for the inference that Plaintiffs would pursue similar [speech] in the future." *Walker*, 450 F.3d at 1091. In *Walker*, for example, it did not matter that "not a single Plaintiff has ever brought a wildlife management initiative in Utah." *Id.* at 1105 (Tacha, C.J., dissenting). Instead, the "past conduct" that mattered was 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.); *see also Aptive Env't, LLC v. Town of Castle Rock, Colorado*, 959 F.3d 961, 975 (10th Cir. 2020) (considering "similar evidence concerning conduct in 'surrounding' localities" to inform this factor); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 474 (7th Cir. 2012).

The Supreme Court has reached the same conclusion. In *Babbitt v. United Farm Workers National Union*, for instance, the union had standing to challenge a chill on its speech in part because it had "actively engaged in consumer publicity campaigns in the past in Arizona." 442 U.S. 289, 301 (1979). The Court did *not* require the union to also show that their advertisements would have violated the new law by "propagat[ing] untruths." *Id.* And in *Susan B. Anthony List v. Driehaus*, the Supreme Court both approved *Babbitt*'s reasoning and found standing for a plaintiff who "alleged that it previously *intended* to disseminate materials" potentially affected by the law. 573 U.S. 149, 160–61 (2014) (emphasis added); *see id.* at 167 (focusing on "*similar* speech" (emphasis added)).

As these precedents show, RGF need not have engaged in the precise speech outlawed by the challenged law, down to the exact expenditure amount. This case is easier than *Walker*, for RGF has done better than engage in semi-related speech in other states. It has long engaged in issue advocacy *in New Mexico*. App. 035 (Gessing Decl. ¶ 3). It submitted unrebutted testimony that it planned expenditures that would have *violated* SB 3 without disclosure. *Id.* (Gessing Decl. ¶¶ 5, 7). And it undertook expenditures that, according to the State, fell under at least some of SB 3's requirements. App. 116; *see* S.A. 011.

More, when asked whether "RGF make[s] independent expenditures that would be subject to these reporting requirements if they met the monetary threshold

for the expenditure," RGF's president answered, "yes, certain expenditures of ours would indeed be covered under this law." App. 146, Dep. 43:19–25. Finally, RGF had engaged in other issue advocacy beyond the postcards, including speech that "perhaps" hit SB 3's later expenditure limits. App. 154, Dep. 83:14–84:1 (referencing campaign regarding right to work policies); *see also* App. 155, Dep. 92:6–24 (referencing a website about a proposed soda tax, postcards about sick leave, and radio advertising about a local bond). This is much more than *Walker*'s "preparation" or "support" for initiatives "in other states."

Thus, the district court's dismissal of RGF's past actions as potentially too small to fall within SB 3's requirements sets too high a bar. *Walker* disproves any suggestion that a plaintiff in this type of case must have engaged in the prohibited speech down to dollars and cents, for the plaintiffs there had never engaged in *any* initiative in Utah. The focus instead is broadly on the plaintiff's engagement "in the type of speech affected by the challenged government action." *Walker*, 450 F.3d at 1089. Here, there is no question that RGF has engaged in the type of speech regulated by SB 3: issue advocacy in New Mexico before an election. The district court's contrary conclusion was legal error.

Not only does the district court's conclusion contradict *Walker*, the court's rule would discriminate against new or growing organizations. A long-established organization that had spent more on political speech would have standing to

challenge the law, while a newer organization would not. This type of discrimination undermines the First Amendment, which protects speech "regardless whether the individual is, on the one hand, a lone pamphleteer or street corner orator in the Tom Paine mold, or is, on the other, someone who spends substantial amounts of money in order to communicate his political ideas through sophisticated means." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014) (plurality op.) (cleaned up). And the distinction makes no sense here anyway, for RGF has engaged in the type of advocacy regulated by SB 3.

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

The second *Walker* factor considers "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. The district court correctly found that the evidence here "satisfies the second factor." Op. 12. In unrebutted testimony, RGF's president stated that "RGF intends to engage in substantially similar issue speech in future New Mexico elections." App. 035 (Gessing Decl. ¶ 6). He also testified that RGF plans to send postcards related to the taxpayer pledge and "the Freedom Index itself." App. 149, Dep. 59:9–23; *see also id.* at 84:18–25 (App. 154). "Nothing more concrete than this general aspiration is needed to meet the second prong." *Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956, 960 (10th Cir. 2021).

The district court's finding that RGF met the second factor points again to its legal error on the first factor. Both factors look at the same "type of speech affected by the challenged government action." *Walker*, 450 F.3d at 1089. If "substantially similar issue speech" constitutes the relevant "type of speech" for the second factor, it does for the first factor too. What RGF's president expressed—without contradiction—was that RGF had tried to engage in—*and* desired to keep engaging in—advocacy before elections. App. 035 (Gessing Decl. ¶¶ 5–6); *see also* App. 146, Dep. 43:19–25. *That* is the type of speech regulated by SB 3, so RGF met the first two factors.

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

The third *Walker* factor considers 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. Unlike the first two factors, this factor does not require hard "evidence." *Id.* That is because a plaintiff in this context is not required to "have specific plans to take actions subject to the statute." *Id.* at 1088–89. "A plaintiff who alleges a chilling effect asserts that the very existence of some statute discourages, or even prevents, the exercise of his First Amendment rights." *Id.* at 1089. "Such a plaintiff by definition does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future." *Id.* As this Court has explained, "[i]t makes no sense to require plaintiffs simultaneously

to say 'this statute presently chills me from engaging in XYZ speech,' and 'I have specific plans to engage in XYZ speech next Tuesday.'" *Id.*; *accord Susan B. Anthony List*, 573 U.S. at 163 ("Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.").

The question, instead, is merely "whether the plaintiff in question claims to be deterred and whether such deterrence is plausible." *Rio Grande Found.*, 7 F.4th at 960. Here, just as in *Walker*, "the Plaintiffs' affidavits consistently point to the existence of the [law] as the *reason* they presently have no specific plans to [engage in protected speech.]" 450 F.3d at 1092. On SB 3's donor disclosure requirement, RGF submitted uncontested testimony that it "promises its donors privacy when they make their contributions." App. 036 (Gessing Decl. ¶ 8). More, 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." *Id.* ¶ 11. RGF's president knew "that several donors who support RGF would not continue to do so if they were subject to disclosure." *Id.* He testified that potential donors ask about disclosure "fairly regular[ly]." App. 154, Dep. 82:18–24; *see also* App. 151, Dep. 69:14–16 ("I've had people say, 'I can't donate to you because I'm afraid my donation will be made public.'"). Finally, RGF's president testified that its messages would be less effective with this

disclosure, given that audiences may be distracted by "who is paying for the messages rather than on the ideas presented in the messages themselves." App. 037 (Gessing Decl. ¶ 12).

No more is needed on the third *Walker* factor. RGF claims to be deterred, and that deterrence is plausible given its uncontested testimony that it would lose support if it followed SB 3. It does not matter here whether donors' fears about disclosure are reasonable—though RGF's president articulated several examples showing that fears of harassment and retaliation are eminently reasonable. *See* App. 148, Dep. 56:10–20; App. 153, Dep. 80:6–22. All that matters is that donors have expressed a fear of disclosure to RGF, so RGF's claim that it will lose support if it engages in speech subject to SB 3's regulations is plausible.

The State has suggested no "doubt" that SB 3 "will be enforced." *Walker*, 450 F.3d at 1092. Instead, it "has vigorously sought to uphold its [regulation] in this litigation." *Aptive*, 959 F.3d at 976. This Court has needed nothing beyond the plaintiffs' own affidavits and the fact 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.

Rather than consider SB 3's effect on RGF's ongoing intention to engage in regulated speech—as required by *Walker*—the district court engaged in a retroactive inquiry into whether RGF "forwent its plans to spread its views in advance of the

November 3, 2020 general election because of SB 3's new requirements." S.A. 015–16. As noted above, that inquiry is legal error because what matters is the state of affairs at the time of the complaint.

In any event, the district court's discussion is incorrect. The court noted that "Mr. Gessing testified that RGF switched to sending the taxpayer pledge card, rather than the legislator scorecard, 'for a variety of practical and logistical reasons.'" S.A. 016. But even for those past mailings, he emphasized that the taxpayer pledge card was "obviously at lower expense." App. 148, Dep. 54:7-8; *see also id.* at 91:25–92:1 (App. 155) ("the pledge postcards that we did, obviously they were below the threshold"). That was "obvious" because the point of changing the campaign was to avoid SB 3's limitations on speech. RGF sought a preliminary injunction to enable it to send the legislator scorecards, and the district court denied that injunction. App. 042-43, 072. RGF's subsequent "acquiescence" does not mean that RGF "does not have standing." *Aptive*, 959 F.3d at 976.

What matters is whether RGF has plausibly claimed that it *will* avoid regulated speech because of SB 3. RGF's president said exactly that in his deposition testimony: "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, Dep. 74:6-10. When then asked, "If you were victorious in this lawsuit or did not have the legal restrictions

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, Dep. 74:15-20. He also testified that after the City of Santa Fe forced RGF to file disclosure reports, "we became a lot more careful about considering these campaign finance rules before we engaged in these kinds of campaign efforts." App. 147, Dep. 52:20–24; *see Rio Grande Found.*, 7 F.4th at 958; ECF No. 38, at 21 n.7. He gave that answer in response to the question of whether "RGF [has] made any disclosures . . . of its donors over $5,000"—as required by SB 3 for general fund donors. App. 147, Dep. 52:17–18. And he testified that RGF has at least 20 such donors. App. 149, Dep. 60:21.

That testimony contradicts the district court's conclusion that the testimony "does not establish that [RGF] will not speak in the future because of SB 3." S.A. 014. The court's own preliminary injunction opinion acknowledged that RGF expected "the loss of" donors. App. 057. *Walker* does not demand that plaintiffs somehow *prove* a future negative. In a pre-enforcement challenge, it is impossible to *prove* that RGF has lost donors due to disclosure when it generally has not disclosed its donors before. It is enough here, as it was in *Walker* and *Aptive*, that the plaintiffs plausibly expect this result.

Finally, the district court's logic makes little sense. As shown, RGF has engaged in this type of speech in the past, and it has an undisputed present desire to do

so. RGF is before the Court because SB 3 forbids it from doing so without altering its speech in accord with the government's dictates. The State has not suggested some other reason that RGF will *not* try to satisfy its present desire to engage in speech, and on summary judgment, all inferences must be drawn in RGF's favor.

Turning to the disclaimer requirement, though RGF has included sponsorship disclaimers on past materials, it sued to maintain its right to choose whether to do so. App. 144, Gessing Dep. 37:4–11. As RGF's president testified, RGF believes that "the focus of our conversation in the public square should be on ideas and principles rather than sources of funding and sponsors." App. 037 (Gessing Decl. ¶ 13). Again, this suffices to show a plausible claim that RGF will avoid speaking because of SB 3. RGF has standing.

B. IOP also has standing.

For many of the same reasons, IOP too has standing, for it satisfies all three *Walker* factors. The district court's contrary conclusion turned on its impermissibly retroactive focus and its misunderstanding of this Court's precedents.

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

First, "IOP engages in issue advocacy in Illinois and other states." App. 030 (Besler Decl. ¶ 3); App. 161 (Besler Dep. 27:2–8) (discussing education advocacy in "Illinois and other states."). The district court focused on the fact that IOP "has not done any mailings in New Mexico in the past." S.A. 011. As shown above, that

reasoning deviates from this Court's decisions. *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"). IOP engages in state-based issue advocacy, and, under *Walker*, that is enough.

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

IOP also satisfies the second factor. It "plan[ned] to spend over $9,000 communicating by mail to thousands of New Mexico voters within 60 days of the 2020 general election," and those mailings would have focused on the "referendum on amending the New Mexico Constitution to end elections for the New Mexico Public Service Commission." App. 030 (Besler Decl. ¶ 6); App. 163 (Besler Dep. 34:17–36:23). That effort, of course, was forestalled by SB 3, so according to its president, IOP "filed a lawsuit because we don't want our donors to be disclosed." App. 163 (Besler Dep. 35:4–9). Because the district court declined a preliminary injunction, IOP could not engage in that advocacy. *Id.*

The district court emphasized that the constitutional amendment at issue in 2020 "has already been voted upon," S.A. 012, but that is irrelevant to standing at the time of the complaint. In any event, IOP's president stated that it "intends to engage in substantially similar issue speech in future New Mexico elections." App. 030 (Besler Decl. ¶ 7). When asked whether IOP plans "to engage in substantially similar speech in future New Mexico elections," IOP's president answered "Yes."

App. 163 (Besler Dep. 37:2–5). Of course he "d[id]n't know what policies are going to happen in the future," but the group is "constantly looking all over the country" for issues relevant to its mission. App. 163 (Besler Dep. 37:8–21); *see also* App. 165 (Besler Dep. at 45:17–20) (Question: "[D]epending on what policies might arise in New Mexico, you may engage in issue advocacy; is that correct?" Answer: "Yes."). But, again, 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 1088–89.

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

Finally, IOP explained "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. 031. Its president "know[s] that several donors who support IOP would not continue to do so if they were subject to disclosure." *Id.* The group also believes "that if its members, supporters, and donors are disclosed, the target audiences for its advocacy messages may focus on who is paying for the messages rather than on the ideas presented in the messages themselves." *Id*. IOP has *never* "disclosed its donors publicly." App. 166 (Besler Dep. 46:18–20). That is why IOP sued before its planned 2020 advocacy and why it did not undertake that advocacy: "because we don't want our donors to be disclosed." App. 163 (Besler Dep. 35:8–9). For its part, the State has appeared

eager to enforce SB 3 and "has vigorously sought to uphold [it] in this litigation." *Aptive*, 959 F.3d at 976. Again, that satisfies the third *Walker* factor: IOP plausibly claimed to be deterred from speech in New Mexico because it would lose support if it followed SB 3's requirements.

Once again, the district court's contrary conclusion hinged on facts after the complaint. The district court agreed that "there is some evidence in the record that IOP did not send mailers in 2020 because it did not want its donors disclosed." S.A. 015. Indeed, IOP alleged so in the complaint. Still, the court thought that IOP's claim was not plausible because of (1) "[t]he lack of evidence of specific planned issue advocacy by IOP in New Mexico" and (2) "the lack of evidence of issue advocacy by IOP in other states." *Id.*

Both points have largely been rebutted above. On the first point, IOP *did* have specific planned advocacy in New Mexico, which was prevented by SB 3, and that's all that matters for standing. And IOP need not "have specific plans to take actions subject to the statute." *Walker*, 450 F.3d at 1088–89. As this Court explained in *Walker*, 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. "We cannot ignore such harms just because there has been no need for the iron fist to slip its velvet glove." *Id.*

On the second point, IOP's president testified without contradiction that "we look at policy across the country." App. 165 (Besler Dep. 45:14–15); *see* App. 163 (Besler Dep. 37:5–7). Indeed, the fact that IOP was prepared to spend thousands of dollars on a New Mexico ad campaign seems to prove that it is at least *plausible* that IOP would engage in issue advocacy in states other than Illinois. Thus, IOP too satisfies the third *Walker* factor as to the disclosure provisions.

Turning to the disclaimer provisions, the district court emphasized that "IOP identifies itself on its own mailers that it has sent in Illinois as coming from IOP because it is best practice and required by the Illinois State Board of Elections." S.A. 13–14 (citing Besler Dep. 29:21-30:15 (App. 161-62)). But the fact that one state requires a disclaimer says little about a group's decision to speak in a different state—especially when the group is called "Illinois Opportunity Project" and the speech would be in New Mexico. IOP's president testified that "IOP believes that the focus of our conversation in the public square should be on ideas and principles rather than sources of funding and sponsors." App. 032; *cf. Majors v. Abell*, 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J., dubitante) ("[W]e must consider the possibility that anonymity promotes a focus on the strength of the argument rather than the identity of the speaker; this is a reason why Madison, Hamilton, and Jay chose to publish The Federalist anonymously. Instead of having to persuade New Yorkers

that his roots in Virginia should be overlooked, Madison could present the arguments and let the reader evaluate them on merit.").

For these reasons, both RGF and IOP had standing at the time of the complaint, and the district court's holding was legal error. Even if only one plaintiff had standing, the district court still erred. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.").

II. This case is not moot.

The jurisdictional doctrine that governs whether "[t]he requisite personal interest" "continue[s] throughout [the lawsuit's] existence" is mootness. *Collins v. Daniels*, 916 F.3d 1302, 1314 (10th Cir. 2019) (cleaned up). Under well-settled precedent, an challenge to an election law does not become moot when an election passes; otherwise these challenges would routinely evade review. *E.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774–75 (1978); *Grant v. Meyer*, 828 F.2d 1446, 1449 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988). Such challenges "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007) ("*WRTL*"). "The exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or

expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (cleaned up).

On the first prong, this "case could not be resolved before the 20[20] election concluded, demonstrating that [the] claims are capable of evading review." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008); *cf. Bellotti*, 435 U.S. at 774 ("Under no reasonably foreseeable circumstances could appellants obtain plenary review by this Court of the issue here presented in advance of a referendum on a similar constitutional amendment."); *Indep. Inst. V. Williams*, 812 F.3d 787, 791 n.3 (10th Cir. 2016) ("[I]t is clear in this case that there was not enough time to fully litigate the issue during the sixty-day window provided by law and that a significant chance exists for the alleged violation to recur."); *Homans v. City of Albuquerque*, 366 F.3d 900, 903 n.3 (10th Cir. 2004).

On the second prong, in a short footnote, the district court suggested that "Plaintiffs have not shown a reasonable expectation that they will be subject to SB 3 in the future." S.A. 18 n.3 (emphasis omitted). The district court did not rule on this basis. *See* S.A. 18–19 (dismissing for "lack of standing"). Still, for many of the same reasons explained exhaustively above, the district court's suggestion is incorrect.

To avoid mootness, RGF and IOP need only show "reasonable expectation" that they "will be subject to the threat of prosecution under the challenged law."

WRTL, 551 U.S. at 463 (cleaned up). 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 also Bellotti*, 435 U.S. at 775 ("Appellants insist that they will continue to oppose the constitutional amendment"). In any event, all that matters is "whether the controversy [i]s *capable* of repetition and 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 (1988).

The State has expressed no hesitancy about enforcing SB 3. Some of this Court's precedents hold that the mere continuation of the relevant legal regime is enough to "reasonably expect that the same dispute will erupt again between the parties." *Grant*, 828 F.2d at 1449; *accord Honig*, 484 U.S. at 320; *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 n.48 (1996) (case not moot when the defendant "has not disavowed the [challenged] practice"). Moreover, the Supreme Court has "applied the capable of repetition yet evading review exception to hear challenges to election laws even when the nature of the law made it clear that the plaintiff would *not* suffer the same harm in the future." *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005) (emphasis added) (collecting cases); *e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974) (holding that although the 1972 election had

long since passed, the case was not moot because the statute under review would apply to other candidates in the future).[1]

In any event, RGF and IOP have also offered reasonable expectations of future advocacy chilled by SB 3. As shown above, RGF regularly engages in issue advocacy in New Mexico and plans to do so again but is deterred by SB 3. SB 3 (and the district court's denial of a preliminary injunction) forced RGF to abandon its stated plans and instead send "postcards and social media messages in the month before the 2020 general election that approved or disapproved of certain legislative candidates for agreeing to a 'taxpayer pledge.'" S.A. 011. The State asserted below that even these alternative mailings potentially "subject[ed]" RGF to "the registration and disclaimer requirements" of SB 3. App. 116. So there is at least a "reasonable expectation" that RGF's speech would be chilled by SB 3.

[1] Other circuits have applied this exception the same way. *See, e.g.*, *Cogswell v. City of Seattle*, 347 F.3d 809, 813 n.3 (9th Cir. 2003) ("Cogswell's claim is capable of repetition because in the future Seattle would deny him, *or any other candidate*, the right to discuss an opponent in a candidate statement included in the Seattle voters' pamphlet." (cleaned up, emphasis added)); *Libertarian Party of Mich. v. Johnson*, 714 F.3d 929, 932 (6th Cir. 2013) ("There is also a reasonable expectation that this controversy will recur, at least with respect to some other candidate and political party."); *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) ("[E]ven if it were doubtful that the plaintiff would again be affected by the allegedly offending election statute, precedent suggested that the case was not moot, because other individuals certainly would be affected by the continuing existence of the statute." (cleaned up)); *N. Carolina Right To Life Comm. Fund For Indep. Pol. Expenditures v. Leake*, 524 F.3d 427, 435 (4th Cir. 2008) ("the ex-candidate" need not "specifically allege[] an intent to run again in a future election").

Likewise, IOP considers issues relevant to its mission across the country, including in New Mexico, and engages in advocacy across the states. *See* App. 165 (Besler Dep. 45:17–20) (Question: "[D]epending on what policies might arise in New Mexico, you may engage in issue advocacy; is that correct?" Answer: "Yes."); App. 163 (Besler Dep. 37:8–21). And it was forced to abandon its advocacy plans in New Mexico before the 2020 election because of SB 3. So it too has shown a "reasonable expectation" that its speech would be chilled.

The district court (in its standing discussion) focused on whether RGF and IOP had pointed to specific future issues on which they might speak. S.A. 015 (focusing on "[t]he lack of evidence of specific planned issue advocacy by IOP"); S.A. 016 (RGF's president "did not know if RGF would do something like th[e taxpayer pledge card] again"). "But groups 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. Accepting such an argument would render the Supreme Court's election mootness precedents all but meaningless, because every challenge related to political speech or elections between elections would fail.

The Supreme Court's decision in *WRTL* highlights the district court's error. There, "WRTL credibly claimed that it planned on running materially similar future targeted broadcast ads," "and there [was] no reason to believe that the FEC [would]

refrain from prosecuting violations" of the statute. *Id.* at 462. The Court said that "[u]nder the circumstances, particularly where WRTL sought [a] preliminary injunction," "there exist[ed] a reasonable expectation that the same controversy involving the same party [would] recur." *Id.* at 462–63.

Here too, RGF and IOP sought a preliminary injunction, were denied and therefore could not engage in planned speech. They continue to express a desire to engage in speech that the State continues to say it will prohibit. The case is not moot, and Article III jurisdiction exists.

CONCLUSION

For these reasons, the Court should reverse and remand for adjudication on the merits. Because of the significant threshold First Amendment issues at stake, and the district court's departure from this Court's precedents, oral argument is necessary.

Respectfully submitted,

s/ Daniel R. Suhr

DANIEL R. SUHR
Liberty Justice Center
440 N. Wells St.
Suite 200
Chicago, IL 60654
(312) 637-2280
dsuhr@libertyjusticecenter.org

Counsel for Appellants

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Dated: March 7, 2022

/s Daniel Suhr
Daniel Suhr

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I, Daniel R. Suhr, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via CM/ECF.

Dated: March 8, 2022

s/ Daniel Suhr
Daniel Suhr