FILED
United States Court of Appeals
Tenth Circuit

August 3, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RIO GRANDE FOUNDATION,

Plaintiff - Appellant,

v.

CITY OF SANTA FE, NEW MEXICO; CITY OF SANTA FE ETHICS AND CAMPAIGN REVIEW BOARD,

Defendants - Appellees,

and

THE BRENNAN CENTER FOR JUSTICE; COMMON CAUSE; THE LEAGUE OF WOMEN VOTERS OF SANTA FE COUNTY; NEW MEXICO ETHICS WATCH; REPRESENT US,

Amicus Curiae.

No. 20-2022

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:17-CV-00768-JCH-CG)

Timothy Sandefur, Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix, Arizona (Matthew R. Miller and Jonathan Riches, Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix, Arizona, and Colin L. Hunter and Jordy L. Stern, Barnett Law Firm, Albuquerque, New Mexico with him on the briefs), for Plaintiff - Appellant.

Tara Malloy, Campaign Legal Center, Washington, DC (Megan P. McAllen, Campaign Legal Center, Washington, DC, and Marcos D. Martinez, Senior Assistant City Attorney,

City of Santa Fe, New Mexico, Santa Fe, New Mexico, with her on the briefs), for Defendants - Appellees.

Daniel I. Weiner, The Brennan Center for Justice at NYU School of Law, Washington, DC (Joanna Zdanys, The Brennan Center for Justice at NYU School of Law, New York, New York, and Ruth Anne French-Hodson, Sharp Law LLP, Prairie Village, Kansas, with him on the brief), for *amici curiae* The Brennan Center for Justice, Common Cause, The League of Women Voters of Santa Fe County, New Mexico Ethics Watch, and Represent Us.

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **McHUGH**, Circuit Judge.

LUCERO, Senior Circuit Judge.

Laws that require disclosure of campaign finance information, including the identities of political donors, pit the public's interest in transparent political messaging against potential burdens on the exercise of core First Amendment rights. The case before us might have called on us to conduct such a balancing. But the posture of this appeal forecloses that path. Instead, we conclude that plaintiff Rio Grande Foundation lacks standing to challenge § 9-2.6 of the City of Santa Fe, New Mexico's ("the City") Campaign Code and its enforcement by the Santa Fe Ethics and Campaign Review Board ("ECRB"). We therefore dismiss the appeal for lack of jurisdiction.

I

In 2015, the City amended its Campaign Code to enact disclosure requirements for campaign spending. Under § 9-2.6 of the Santa Fe Campaign Code, any person or entity that makes expenditures of $250 or more during a single Santa Fe election

on public communications relating to a candidate or ballot measure must disclose certain information to the city clerk, including the names, addresses, and occupations of the donors who earmarked their contribution for that particular campaign. Failure to disclose this information by § 9-2.6's specified deadline may result in fines of up to $500 per day. Santa Fe City Code § 6-16.7(B)(2).

Plaintiff Rio Grande Foundation is a non-profit organization based in Albuquerque that has engaged in political advocacy since 2000. In 2017, it participated in a Santa Fe election, advocating against a ballot measure concerning a proposed soda tax. Combined spending by advocacy groups on each side of the measure amounted to several million dollars. Plaintiff's expenditures were more modest, totaling an estimated $7,700, most of which was attributable to the production of a YouTube video and a website. But those expenditures gave rise to a letter from a City Assistant Attorney informing Plaintiff that it appeared Plaintiff would need to file a campaign finance statement. The day after Plaintiff received that letter, the ECRB received a citizen complaint lodged against Plaintiff, triggering an ECRB investigation.

Because production of the YouTube video and website was donated in-kind—an out-of-state political advocacy group produced the video and then donated it to Plaintiff—Plaintiff assumed that it did not need to disclose any information under § 9-2.6. The ECRB determined otherwise, citing Plaintiff for failure to comply with the Campaign Code. No penalties or fines were imposed, however. Plaintiff was simply ordered to file the required paperwork. Plaintiff submitted a six-page

campaign report, disclosing two donations of $7,500 and $250 respectively, and that was that. The campaign report ended the ECRB enforcement of the Campaign Code against Plaintiff.

While the enforcement action was a relatively painless affair, Plaintiff did not think it or advocacy groups like it should have to endure the disclosure requirements in the future. It brought a § 1983 action against Defendants, seeking only prospective relief: namely, a declaration that § 9-2.6 is unconstitutional, both on its face and as applied to Plaintiff, insofar as it is enforced against speech concerning ballot measures. Both species of Plaintiff's claims focus solely on the chilled speech effects caused by the publication of the identities of donors; the other potentially burdensome aspects of § 9-2.6, such as the cost of compliance or the difficulty of understanding the applicable rules, were explicitly disclaimed in Plaintiff's suit.

The parties each moved for summary judgment. The district court sided with Defendants, dismissing Plaintiff's lawsuit. Plaintiff appealed.

II

At the outset, we must attend to our "independent duty to assure ourselves of the district court's subject-matter jurisdiction." Planned Parenthood of Kansas v. Andersen, 882 F.3d 1205, 1211 (10th Cir. 2018). We fulfill this duty by reviewing a plaintiff's standing de novo. Id. at 1215. "The constitutional requirements for standing are (1) an injury in fact, (2) a causal connection between the injury and the challenged act, and (3) a likelihood that the injury will be redressed by a favorable

decision." Id. (quotation omitted). Plaintiffs bear the burden of proof to establish standing. Brown v. Buhman, 822 F.3d 1151, 1164 (10th Cir. 2016).

When a plaintiff's First Amendment claim is based on chilled speech, the issue of standing becomes "particularly delicate." Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc). This is because "the injury is inchoate," as speech that is chilled "has not yet occurred and might never occur . . . ." Id. While "[w]e cannot ignore such harms," "in speech cases as in others, courts must not intervene in the processes of government in the absence of a sufficiently 'concrete and particularized' injury." Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

In light of this conundrum, our court crafted in Walker a relatively relaxed test for standing in chilled speech claims seeking prospective relief:

> [P]laintiffs 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" by (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.

Id. at 1089 (emphasis omitted).

All three prongs of the Walker test center on the circumstances of the particular plaintiff before the court. Such a focus is part and parcel of standing more broadly. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge

Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (quotation omitted).

Accordingly, the third prong of the Walker test turns on the circumstances of the plaintiff before us. There is certainly an objective gloss to this prong. The claim must be "plausible" because a plaintiff must allege more than a subjective chill—an objective basis must render the alleged chilling effect on the plaintiff plausible. Yet this plausibility requirement does not transform Walker's third prong into a purely objective inquiry. The focus in Walker was on whether there is a plausible claim that the plaintiff does not intend to speak because of the challenged government action. See Walker, 450 F.3d at 1089. Orienting Walker's third prong to the plaintiff before the court comports with the "irreducible minimum" of standing that the plaintiff "personally has suffered some actual or threatened injury," Valley Forge, 454 U.S. at 472 (quotation omitted). Thus, the question posed by the third prong is not whether someone standing in the plaintiff's shoes would be deterred from speaking, but rather whether the plaintiff in question claims to be deterred and whether such deterrence is plausible. This distinction proves crucial for Plaintiff's standing in this case.

There is no doubt that Plaintiff satisfies the first two prongs of the Walker test. Defendant's enforcement action against Plaintiff makes it clear that Plaintiff's campaign expenditures for its soda tax advocacy were "affected" by § 9-2.6, as required by the first prong. As for the second prong, Plaintiff has expressed, via an affidavit from its president, a desire to continue speaking about municipal ballot

measures in the future. Nothing more concrete than this general aspiration is needed to meet the second prong.

Plaintiff runs into trouble, however, on the third prong. Rather than claim it "presently ha[s] no intention to" speak in future Santa Fe ballot measure elections, Walker, 450 F.3d at 1089, Plaintiff has averred precisely the opposite. In its complaint, Plaintiff titled a section heading "**The Foundation Intends to Continue Speaking About Santa Fe Ballot Propositions**" (emphasis in original). Its President proclaimed the same plans in an affidavit, explaining that Plaintiff "fully intends to continue speaking about municipal ballot measures in the future," and reiterated the same in its appellate briefing. Plaintiff never asserts that its future speech will be any more limited than it would be in the absence of § 9-2.6. Perhaps the closest Plaintiff comes in the summary judgment record to alleging it will not engage in future speech activity is its statement in its complaint that it "does not want to choose between remaining silent or disclosing the names and personal information of its donors to the government." But a desire not to make that decision is not the same as making an affirmative choice not to speak. And it is precisely such a choice that the third prong of the Walker inquiry demands. Nor is the fact that Plaintiff "is very concerned that compelled disclosure of its donors will make those donors less likely to contribute" sufficient to satisfy the third prong. Plaintiff's supplemental brief focuses on Plaintiff's own speech or that of a reasonable person in its position. See Suppl. Aplt. Br. at 2-3, 7-9, 10-12. The brief does not develop an argument that RGF has standing because its donors are chilled from donating to RGF in the future. Had the argument

been developed, and even assuming donors' non-speech could confer Plaintiff standing, the mere concern that speech will not occur does not amount to an affirmative claim that the speech really will not occur.

Without such a claim, Plaintiff fails to carry its burden of showing an injury-in-fact. That failure deprives it of standing to lodge both its as-applied and its facial claim. "While the rules for standing are less stringent for a facial challenge to a statute, a plaintiff must still satisfy the injury-in-fact requirement." PETA v. Rasmussen, 298 F.3d 1198, 1203 (10th Cir. 2002). Because Plaintiff has disavowed any form of injury save for chilled speech,[1] and because an element of a chilled

[1] It is this disavowal that keeps us from considering whether a credible threat of prosecution under § 9-2.6 could confer Plaintiff jurisdiction—that threat is not the injury Plaintiff claims it has suffered. It is also not the theory of jurisdiction Plaintiff asserts. See Appellant's Supp. Br. at 9 ("[F]or standing purposes, all the Foundation needs to show is that it is subject to the challenged law—and also . . . that the chilling effect it complains of is more than merely 'subjective.'"). Even if this theory were before us, the threat of prosecution is too speculative to permit reaching the merits on that basis.

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. But persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.

Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979) (quotations omitted). Even if it had asserted an injury based on the threat of future prosecution, Plaintiff has not specified any particular future Santa Fe election in which it intends to participate. The threat of prosecution at this stage is therefore too speculative to convey standing.

speech injury is an actual intention not to speak, Plaintiff cannot show an injury-in-fact.

We therefore conclude that Plaintiff failed to establish standing under the Walker test due to the lack of an injury-in-fact.[2] Consequently, we lack jurisdiction to consider this appeal.

III

The appeal is **DISMISSED**.

[2] The parties also provided briefing on a concern sounding in prudential ripeness. See United States v. Cabral, 926 F.3d 687, 693 (10th Cir. 2019). At issue is whether we have sufficient facts before us to permit resolution of Plaintiff's as-applied claim. Plaintiff seeks an exemption from § 9-2.6 in a future, unspecified election. Both parties agree that addressing the merits of this request would entail an exacting scrutiny inquiry that pits Plaintiff's burdens of disclosure against the strength of Defendants' interest in disclosure. See Coal. for Secular Gov't v. Williams, 815 F.3d 1267, 1279 (10th Cir. 2016) (describing the exacting scrutiny analysis as "balancing the informational interest in the [plaintiff's] disclosures and the burdens [the government's] law imposes"). Defendants point out that we have little information with which to conduct this balancing—we do not know how much Plaintiff would spend in the next election, for example, a factor often crucial to an exacting scrutiny analysis. See, e.g., Sampson v. Buescher, 625 F.3d 1247, 1260-61 (10th Cir. 2010). Faced with similar circumstances, two of our sibling circuits have declined to reach the merits of the claim. Justice v. Hosemann, 771 F.3d 285, 292-95 (5th Cir. 2014); Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1249-50 (11th Cir. 2013). Because of our conclusion that Plaintiff lacks standing, we need not resolve this issue.