No. 19-3196

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JONATHAN COLE, KATIE SULLIVAN, and NATHANIEL FAFLICK
Plaintiffs-Appellants,

v.

DUANE GOOSSEN, in his official capacity as Secretary of Administration; TOM DAY, in his official capacity as Legislative Administrative Services Director; and HERMAN JONES, Superintendent of Kansas Highway Patrol
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
No. 19-cv-4028, The Hon. Holly L. Teeter presiding

APPELLANTS' OPENING BRIEF
ORAL ARGUMENT REQUESTED

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STATEMENT OF PRIOR AND RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), there are no prior or related appeals.

STATEMENT OF JURSIDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 to hear this case asserting claims for violations of Appellants' federal civil rights. This Court now has jurisdiction under 28 U.S.C. § 1292(a)(1) to consider this interlocutory appeal challenging the district court's August 30, 2019 Order denying Appellants' motion for a preliminary injunction. In the same order, the district court also granted the government's motion to dismiss Appellants' challenge to the categorical ban on handheld signs in the Kansas Statehouse. App.321-58. The court premised its decision both to deny Appellants' motion for preliminary injunction and to grant Appellees' motion to dismiss based on its finding that Appellants lacked standing to bring their claims. This Court therefore also has pendent jurisdiction to review the district court's dismissal of Appellants' claim challenging Appellees' sign policy. *See Cathey v. Jones*, 505 Fed. Appx. 730, 732 (10th Cir. 2012) (where an otherwise nonappealable interlocutory order is "inextricably intertwined" with the issues on appeal of a preliminary injunction decision, the court exercises pendent jurisdiction over the nonappealable order). On September 11, 2019, Appellants timely filed their Notice of Appeal App.359-61.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Appellants have standing under the First Amendment to challenge Appellees' non-moribund policy that categorically bans handheld signs inside the Kansas Statehouse, such that the district court erred in granting the Appellees' motion to dismiss.

2. Whether the district court erred in denying Appellants' motion for a preliminary injunction against Appellees' prior approval regulation that required protesters to obtain permission to hold demonstrations at the Kansas Statehouse and abide by sign restrictions inside the Statehouse building.

STATEMENT OF THE CASE

For decades, the Kansas Statehouse has been a locus of protest and advocacy activity on public issues of state and national importance. Activists have assembled inside the Capitol building and on the surrounding grounds to advocate in favor of ideas as diverse and divisive as gun reform, white supremacy, wealth redistribution, and abortion restrictions. "Assembling and expressing grievances at the site of the state government is the most pristine and classic form of exercising First Amendment freedoms," *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963), and Kansas protesters have consistently exercised these established rights at the Statehouse— taking advantage of the direct line to their government that the location provides. The Statehouse is equally open to sectarian speech from faith groups and commercial speech from vendors.

Despite the Statehouse practice of permitting broad, indiscriminate access to the Statehouse public spaces and grounds, Kansas has implemented a number of speech restrictions justified only by officials' fears that peaceful protesters pose a risk of danger and disruption. Two rules in particular have substantially chilled activists from exercising their First Amendment rights: Kansas Administrative Regulation (K.A.R.) 1-49-10 ("Prior approval of activities"), and Rule 3(h)(xxii) of the "Policy for Usage of the Statehouse and Capitol Complex" ("Usage Policy"). App.045.

K.A.R. 1-49-10 prohibits peaceful protesters from holding a silent demonstration in public spaces of the Statehouse without a permit even though other apolitical visitors can congregate in the exact same place without restriction. Rule 3(h)(xxii) of the Usage Policy prohibits handheld protest signs from the Statehouse, regardless of their size. These restrictions have chilled Kansas activists from exercising their right to engage in non-disruptive protests—including student activists Jonathan Cole, Katherine Sullivan, and Nathaniel Faflick—who are effectively forbidden from engaging in a silent, small-group protest with handheld signs in the seat of their state government.

The government's defense of these speech restrictions is based almost entirely on two false assertions. First, that the five floors of the capitol building and twenty acres of adjacent grounds constitute a limited public forum. The government asserts the entirety of the Statehouse and its grounds constitute a limited public forum despite the fact that the grounds have been devoted to assembly and debate since the Capitol was first constructed in 1901, and the fact that public spaces throughout the building have been opened for speech without any meaningful subject matter restrictions. Second, Appellees assert that their speech and assembly restrictions are reasonable safeguards against what they deem to be protester-specific hazards even from individuals who peacefully exercise their First Amendment rights. Neither Appellees' misapprehension of the applicable forum analysis nor their unreasonable

motivations for restricting speech permit the maintenance of these overbroad regulations. Accordingly, this Court should reverse the judgment below.

A. The Kansas Statehouse Grounds.

The Statehouse grounds constitute essentially a public park, open to assembly and speech on any topic. App.411. They are used for "just about anything" and "the public can use [them] without any restrictions." App.410-11. Activists have used the Statehouse grounds for political rallies since the building opened in the early 1900s. Suffragists convened on the north steps in 1916; thousands of anti-war activists demonstrated outside of the building in May 1970; and the Ku Klux Klan used the Statehouse to protest on MLK Jr. Day in 1994. App.142. More recently, the Statehouse grounds have been the site of dueling rallies on gun rights, pro-life protests, and a "White Unity" rally. App.143.

The grounds have also been used for a number of other activities unrelated to advocacy, including commercial book fairs, a weekly farmers market, and movie screenings. App.410; 413-14. Visitors are permitted to picnic and congregate on the grounds without receiving prior approval. App.419-20. Conversely, protesters—even in small groups—will be subject to arrest if they congregate in an area for which they do not have a permit. App.046-48; 377-78.

The grounds are subject to the restrictions of the Usage Policy and administrative regulations. App.411; K.A.R. 1-49-1, *et seq*. In particular, prior

approval is required to hold a demonstration on the Statehouse grounds. K.A.R. 1-49-9; App.378; 416-17. Protesters in small groups have been threatened with arrest simply for assembling in a space other than where they received a permit. App.046-48; 378.

B. The Kansas Statehouse Rotunda.

The interior of the Statehouse is a multipurpose forum that encompasses offices, art work, public event spaces, an auditorium, private meeting rooms, a gift shop, and legislative chambers. The rotunda in particular is regularly used for assembly and speech activity. The first and second floors of the rotunda have been used for rallies on specific legislative issues, to advocate for the resignation of the Governor, for ice cream socials by professional associations, and for charity chili cook-offs. App.144. The third, fourth, and fifth floors of the rotunda have been opened to assembly for political protests, including a rally to expand KanCare in January 2019 and a thousand-person crowd united for religious freedom in 2016. Indeed, the rotunda is equally open to assembly and speech as the Statehouse grounds. App.415.

The third-floor rotunda in particular is a common site for assembly and political speech for lobbyists, visitors, and "many people coming to advocate for a certain position." App.379. Use of the third floor is not limited by subject matter restrictions nor is it open to only specific speakers. App.382-83. Rather, it is open to

all visitors without restriction. The fourth and fifth floors are also open to any speaker on any subject matter. App.383-86.

The regulations and Usage Policy apply to every floor of the rotunda. K.A.R. 1-49-10. The plain language of the rules require a person to obtain prior approval before holding a demonstration inside the Capitol Building. *Id.*; App.416. Additionally, Officer Scott Whitsell and Lt. Eric Hatcher of the Kansas Highway Patrol both explained that a permit is required to protest at the Kansas Statehouse. App.408-09; 367-69; 422-24. Handheld signs are also explicitly prohibited from the building. Rule 3(h)(xxii); App.404; 303 ("there are policies and rules about people having protest signs of any kind"). While visitors and lobbyists can congregate in the rotunda without first obtaining a permit, protesters with handheld signs are banned from doing the same thing.

C. Assembly Restrictions and Regulations at the Kansas Statehouse.

Two sets of regulations control access to and use of the Statehouse: Article 49 of the Kansas Department of Administration Regulations and the "Usage Policy." The regulations proscribe a wide array of conduct, including unnecessary noise and damage to public property. K.A.R. 1-49-4; K.A.R. 1-49-5. Additionally, the regulations require prior approval of virtually all expressive activities:

> No person shall post any notices or petitions upon any grounds or in any public areas of the buildings listed in K.A.R. 1-49-1. No person shall conduct ***any*** meeting, ***demonstration*** or solicitation on any of the

> grounds or in any of the buildings listed in K.A.R. 1-49-1 without prior permission of the secretary of administration or secretary's designee.

K.A.R. 1-49-10 (emphasis added).

While Appellees may not apply 1-49-10 to every meeting, they do require permission to engage in demonstrations both on the Statehouse grounds and in the rotunda. As Davis Hammet testified, the Poor Peoples' Campaign protesters were threatened with arrest because they congregated in a location on the Statehouse grounds that they did not have prior approval to use. App.046-48; 377-78. Officer Whitsell and Lt. Hatcher confirmed that permission was needed to hold a demonstration in the Statehouse rotunda. App.408-09; 367-69; 422-24. Additionally, contrary to the conclusion of the district court, App.354, Appellee Day explained that demonstrations with handheld signs could not take place on the third, fourth, and fifth floors without prior approval. App.404. Appellees justified the prior approval rules based on their need to know what is going on in the Statehouse. App.394-95.

The Usage Policy also contains a number of official rules related to protests and demonstrations. Specifically, the policy prohibits handheld signs from the entire building, providing "no person will be allowed to bring personal signage to any building in the Capitol Complex. Security is authorized to confiscate signs." Rule 3(h)(xxii). All Appellees have enforced the sign restriction in the past and Appellee Day has held firm that he will enforce the ban on the upper levels of the rotunda.

App.392; 398-400. Appellee Day testified that the policy was needed to advance government interests in safety, sanitation, and aesthetics because signs could be used as weapons, become litter, or obstruct views of the building's artwork, respectively. App.394; 400-02; 405-07.

D. Appellants' Protest Activity.

Appellants are student activists who have engaged in silent, smallgroup protests at the Kansas Statehouse in the past. Mr. Cole is a community organizer and volunteers for the anti-poverty organization RESULTS when he is not attending classes. App.050. As part of his extracurricular work, he protests at the Kansas Statehouse and has expressed a desire to engage in silent protest with a handheld sign on issues related to housing, health equity, and LGBTQIA rights in the future. Ms. Sullivan is the President of the Kansas Young Democrats and is passionate about a number of social justice issues. Her commitment to advocacy prompted her to participate in a silent, small-group protest in support of Medicaid Expansion and she expressed a desire to engage in similar protests with handheld signs in the future. App.057-58. Mr. Faflick is passionate about economic justice issues and has advocated for anti-poverty initiatives to members of both state and federal government. App.060-61; 63. He wishes to hold non-disruptive protests on economic justice issues that come before the Kansas state government during future legislative sessions. App.063.

On March 27, 2019, Appellants and two other activists staged a silent protest in the Statehouse rotunda to call for a vote on HB 2066, a bill that would expand Medicaid coverage for uninsured Kansans. The activists unfurled four large banners that read "Blood on Their Hands #ExpandMedicaid," each banner naming a different House or Senate leader. The banners were removed approximately four minutes after they were posted. Approximately twenty minutes after the banners were removed, Appellants were stopped by Kansas Highway Patrol Officer Scott Whitsell who detained them as the individuals responsible for hanging the banners. App.056-57. Whitsell told the Appellants that he was imposing a ban prohibiting them from entering the Statehouse. App.061-62. When Appellants asked how long they would be banned from the building, Whitsell paused for a moment before telling them the ban would be in place for a year. *Id.* During their detention, Whitsell informed Appellants that their protest had violated a number of rules including the requirement to obtain a permit and the policy "prohibiting protest signs of any kind." App.303.

On March 28, 2019, Lieutenant Eric Hatcher called Appellants and told them that they were no longer banned from the Statehouse. Hatcher told Mr. Cole that while he "did something wrong" by unfurling the banners, a year ban was "a little harsh." *Id.* Lt. Hatcher concluded the call by telling Mr. Cole that he was required to obtain a permit to demonstrate with Ms. Sullivan and Mr. Faflick in the future. *Id.*

Following the call with Lt. Hatcher, Mr. Cole reviewed the regulations and rules regarding demonstrations at the Statehouse so that he could avoid being detained and banned in the future. Mr. Cole discovered that he was prohibited from holding any "meeting, demonstration or solicitation" at the Capitol or on its grounds absent prior permission of the Secretary of Administration. He also learned that he could not "bring personal signage to any building in the Capitol Complex."

These speech and assembly regulations have made Appellants reticent to exercise their First Amendment rights to petition the government during the legislative session and at future events at the Statehouse. Appellants desire to hold small-group demonstrations with handheld signs to express positions on Medicaid Expansion and other issues of public importance. However, Rule 3(h)(xxii) prohibits them from bringing "personal signage to any building in the Capitol Complex." Appellants specifically desire to use handheld signs so they can communicate their political messages silently, without causing a disruption. Mr. Cole testified that signs were the only method of communication that would enable him to silently communicate with Statehouse guests, legislators, and government officials. App.370. Similarly, Ms. Sullivan explained in her affidavit that she wished to protest with handheld signs in order to be able to communicate with other individuals inside the Statehouse without causing a disruption. App.057.

E. Procedural Background.

Appellants filed suit against the Secretary of Administration Duane Gooseen, Director of Legislative Administrative Service Tom Day, and Kansas Highway Patrol Superintendent Herman Jones, alleging the speech and assembly regulations that Appellees jointly maintain and enforce violate the First Amendment. Appellants alleged further that the prior approval and sign ban policies constituted overbroad restrictions on their speech and assembly rights. They also alleged that the policies had chilled them from engaging in future small-group protests with handheld signs.

In their Amended Complaint, Appellants identified specific issues they sought to protest and explicitly pleaded that they wished to display handheld signs in order to remain non-disruptive. Appellants also explained in their Amended Complaint that they were refraining from doing so on account of the rule banning signs and the rule forbidding protest without prior approval. Because Appellants desired to engage in these protests during the interim session, they moved for preliminary injunction and subsequently for a temporary restraining order.

F. Temporary Cessation and May 19, 2019 Protest.

After the lawsuit was filed, Appellees agreed to temporarily suspend enforcement of their prior approval and sign ban restrictions for the duration of the *sine die* session in exchange for Appellants withdrawing their motion for a temporary restraining order. App.300-01. No harm to the building or any person

resulted from the temporary cessation of the sign ban. The only negative consequence Appellee Day could cite was that several activists left signs on a bench outside of the senate chamber when they were finished protesting. App.300-01; 400. Appellants themselves participated in small-group, silent protest at the Statehouse complex with small handheld signs on May 19, 2019 as a result of this agreement—without being required to first obtain prior approval. (Def's Exhibit 118). However, Appellee Day has announced that the parties' provisional agreement concluded at the end of the Kansas legislative session in May. App.390. Appellees' speech restrictions are therefore currently in place and Appellants will not conduct their desired speech activities unless a court clarifies their right to do so.

G. This Case is an Appeal from the Trial Court's Dismissal.

Appellees moved to dismiss all of Appellants' claims while Appellants' motion for preliminary injunction was pending. With respect to Appellants' claim challenging the sign ban in particular, Appellees argued that Appellants lacked standing because there were no criminal penalties associated with the ban and the ban only applied to individuals attending events, App.167,—assertions which Appellee Day disavowed during his hearing testimony. App. 303; 404; 421. Following a Preliminary Injunction hearing, the court denied Appellant's motion for preliminary injunction on the prior restraint claim and granted Appellees' motion to dismiss Appellants' challenge to the sign ban. However, the court premised both

decisions on its erroneous conclusion that Appellants cannot demonstrate standing to prove their claims because they have not been directly threatened with future enforcement. Appellants appeal.

SUMMARY OF ARGUMENT

In an unprecedented departure from the required standard of review, the district court construed the Amended Complaint in this case in the light most favorable to Defendants/Appellees and threw out Plaintiffs'/Appellants' First Amendment claims brought under 42 U.S.C. § 1983 for lack of standing. The district court stated that it would limit its analysis to the four corners of the Amended Complaint; however, it then considered extrinsic evidence, but only extrinsic evidence favorable to Appellees, and construed all facts in favor of Appellees.

Count I of the Amended Complaint challenged the regulation requiring "prior approval of activities", K.A.R. 1-49-10, which requires speakers to obtain a permit prior to any demonstration in or around the Statehouse and which affords reviewing authorities unbridled discretion to censor speech. Count II of the Amended Complaint challenged Rule 3(h)(xxii) of the Usage Policy, which imposes a categorical ban on personal signage in the Statehouse and on its grounds. Appellants appeal the district court's order on Counts I and II.

Despite the well-pleaded allegations in the Complaint, affidavits filed in support, and Appellees' own admissions, the district court dismissed Count II for

lack of standing and denied preliminary injunction as to Count I, in part, because it found Appellants were unlikely to establish standing and, in part, because it found no traditional or designated public forum. In so doing, the district court rejected controlling United States Supreme Court and Tenth Circuit precedent recognizing First Amendment standing to challenge overbroad rules that have a pre-enforcement, chilling effect on protected speech[1] and identifying Statehouses as traditional public forums for assembly, petition, and political demonstration.[2]

Appellants established standing and a likelihood of success on the merits of their First Amendment challenge to unconstitutional speech restrictions at the Kansas Statehouse. Appellants also established the other preliminary injunction factors. If allowed to stand, this decision creates a split with other Circuits[3] and enables Appellees to muzzle Appellants' political speech while evading judicial review.

[1] *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 302 (1979); *United States v. Supreme Court*, 839 F.3d 888, 902 (10th Cir. 2016); *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003).
[2] *See, infra* at 32.
[3] *N.H.R.L.P.A.C. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996); *Hedges v. Obama*, 724 F.3d 170, 197 (2nd Cir. 2013); *ACLU v. Alvarez*, 679 F.3d 583, 591 (7th Cir. 2012); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010)..

STANDARD OF REVIEW

A district court's grant of a motion to dismiss for failure to state a claim is reviewed "*de novo*." *Nixon v. City & Cty. Of Denver*, 784 F.3d 1364, 1368 (10th Cir. 2015) ("We review a Rule 12(b)(6) dismissal de novo."). Denial of a preliminary injunction is reviewed for abuse of discretion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013). "A district court abuses its discretion by denying a preliminary injunction based on an error of law." *Id.* Preliminary injunction rulings that rely on factual findings are reviewed under the clear error standard. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1243 (10th Cir. 2001) (quoting *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999)).

ARGUMENT

I. The District Court Incorrectly Found that Appellants Lacked Standing, or Were Not Likely to Establish Standing, to Challenge the Kansas Statehouse's Speech Restrictions.

As a matter of standing, the justiciability issues in this case are straightforward and easily resolved. Appellants have standing to litigate this pre-enforcement challenge because they have a credible fear of prosecution demonstrated by Appellees' past enforcement against Appellants for prior protests with personal signs in the Statehouse rotunda, as well as against others similarly situated, and Appellees' continued threat of enforcement of the challenged rules and policy.

A. The District Court Erred in Analyzing the Complaint in Favor of Appellees.

As an initial matter, the district court was required to treat all pleaded facts as true and draw all inferences in favor of the Plaintiffs/Appellants. *Moore v. Gutherie*, 438 F.3d 1036, 1039 (10th Cir. 2006); *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1305 (10th Cir. 2001) ("We must accept the well-pleaded allegations in the complaint as true, construe them most favorably to the plaintiffs"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a complaint should not be dismissed if it "contains sufficient factual matter, [if] accepted as true, to state a claim to relief that is plausible on its face"); *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013) (same); *Jacobs, Visconsi & Jacobs Co. v. Lawrence*, 927 F.2d 1111, 1115 (10th Circuit 1991) (a complaint should only be dismissed under 12(b)(6) if it appears that plaintiffs can prove no set of facts that would entitle them to relief).

To survive a motion to dismiss for lack of standing, a complaint need only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." When reviewing "a plaintiff's standing at the stage of a motion to dismiss on the pleadings, 'both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d at 1152 (*citing Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *Kerr v. Hickenlooper*,

744 F.3d 1156, 1163 (10th Cir. 2014). The court's refusal to construe the allegations as true and in favor of Plaintiffs/Appellants constitutes an unprecedented departure from that well-established standard of review at the pleading stage.

The district court did not accept Appellants' allegations as true, including and specifically that they intended to demonstrate with handheld signs, that Appellees maintained a rule prohibiting demonstrations with handheld signs, and that after they read the rules at the instruction of Lt. Hatcher and confirmed the rule prohibiting personal signage, that they had a reasonable belief that the rule would be enforced against them. App.336. Nor did the court accept as true Appellees' admissions that they previously enforced the sign ban against Appellants with regard to Appellants' unfurling of personal banners in the rotunda. *Id*. Had the court accepted Appellants' allegations and Appellees' statements as true, and applied the appropriate standard of analysis for First Amendment pre-enforcement claims as the law requires, it would have had to deny Appellants' motion to dismiss in its entirety.

Moreover, when the district court decided to cite outside the Amended Complaint in its analysis—as it did in footnotes 13 to 15—it had an obligation to characterize the evidence accurately. App.336-37. It did not. For example, the fact that an officer told Appellants that there are "policies and rules about people having *protests signs of any kind*" clearly communicated that the rules were in place and Appellants could be subject to punishment if they brought handheld personal signs

into the Statehouse in the future. *See* App.303. Further, the fact that a temporary agreement was required to ensure Appellants would not be targeted with enforcement for bringing signs into the building demonstrates that Appellants feared the rules would be enforced against them based on Whitsell's comments and the past enforcement actions they experienced. *Id.* And the temporary agreement is now over, thereby subjecting Appellants to threat of enforcement now and in the future. App.390.

Furthermore, Appellants' claim that the sign policy has not been even-handedly enforced but that it has been enforced against them does not undercut their argument or the objective, credible fear of prosecution for violation of the sign ban. Appellees concessions that they have enforced the sign ban against others, App.375-76, and will continue to enforce it in the future lends credibility to the objective fear of prosecution. App.392; 398-400.

The court also erred in accepting Appellees' interpretation that the challenged sign ban is more narrow than its plain language allows. App.333-34. Appellees argued that small protests are not considered "events" and, therefore, that the challenged regulations did not apply to Appellants. Appellees' own admissions plainly contradict this narrow interpretation. App. 303; 404. And when Appellees' testimony conflicted, the court interpreted the contradictory testimony in favor of Appellees. App.334-36; *see also* 081; *cf.* 303; 404.

Indeed, the narrow interpretation advanced by Appellees and accepted by the court as true cannot be squared with the plain language of the regulation and policy, both of which apply to *any* demonstration in the Statehouse or on its grounds—large or small, silent or audible, mobile or stationary. App.074-75; 078-80; *see also* 052-53; 057-58. Nor can it be squared with Appellees' past enforcement, which Appellants set forth in detail in their Amended Complaint. App.068-84. Accordingly, Appellees have not articulated a saving construction applicable to Appellants' desired demonstrations.

Just as the court cannot construe facts in favor of Appellees at the pleading stage, neither the 12(b)(1) nor 12(b)(6) standards of review authorize the court to erase factual allegations pleaded in the Amended Complaint. *See* App.294.

B. Appellants Demonstrated They Are Substantially Likely to Establish Standing to Challenge the Speech Restrictions.

To establish standing, Appellants must demonstrate that (1) they have "suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision." *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003).

1. First Amendment Pre-Enforcement Standing Standard.

A plaintiff in a suit for prospective relief based on a "chilling effect on speech" can satisfy the "injury in fact" requirement by showing the following factors: (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 of enforcement. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006). The Tenth Circuit has adopted a flexible approach to the first prong noting "evidence of past activities obviously cannot be an indispensable element—*people have a right to speak for the first time*." *Id.* at 1089 (emphasis added).

In pre-enforcement First Amendment challenges, this Circuit focuses not on past enforcement but on whether the Appellant can expect enforcement if they engage in future protected activity. *Clark v. City of Williamsburg*, Case No. 2:17-CV-02002-HLT, 2019 U.S. Dist. LEXIS 78385, at *12 (D. Kan May 9, 2019) ("The Tenth Circuit has stated that, though an injury must be impending, a plaintiff need not 'await the consummation of threatened injury'"); *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). This is in accordance with a recent United States Supreme Court case finding a petitioner's "intended future speech" was sufficient to establish standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014).

All three elements of "injury" under the First Amendment pre-enforcement standing standard are met. Appellants stated detailed factual allegations supporting their desire to peacefully assemble demonstrations of three persons holding personal

handheld signs protesting legislative measures in the Statehouse during the current and future legislative sessions. App.069-71. They stated they wish to do this without first obtaining a permit. The regulation and policy challenged by Appellants plainly forbid demonstrations without a permit. And the policy prohibits personal signs of any kind in any Statehouse building (whether handheld or tacked). Violators of those rules will be subject to arrest for unlawful assembly and "may be expelled and ejected from any of the buildings or grounds of buildings listed in K.A.R. 1-49-1," which includes the Statehouse. *See* K.A.R. 1-49-9.

Moreover, Appellees previously enforced that same sign ban against Appellants. App.077-79; 081; 408-09. And they testified that they would enforce it and the permit requirement with respect to protests in the Statehouse, including the rotunda, in the future. App.392; 398-400. Appellees have also enforced their regulation and policy against others similarly situated. App.375-76; 046-48; 377-78. The regulation and policy challenged by Appellants thus prohibit the political demonstrations in which they desire to engage and, fatal to the court's analysis, Appellees have not disavowed enforcement. App.392.

Absent the relief sought, Appellants cannot engage in their desired protected speech activity without credible fear of reprisal. The facially unconstitutional rules and policy challenged by Appellants have silenced Appellants' speech, and that injury is redressable by the injunctive and declaratory relief sought.

2. Standing Based on a Credible Threat of Prosecution in the First Amendment Context is Uniquely Permissive.

In *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), the United States Supreme Court found that the United Farm Workers ("UFW") had standing to challenge a law prohibiting consumer campaigns that used dishonest, untruthful, and deceptive publicity even though the law had never been enforced against the union in the past. *Babbitt*, 442 U.S. at 301-02. Nobody had actively threatened to enforce the unconstitutional provisions against the union. *Id.* at 302. And the union did not intend to promote untruths, prohibited by the challenged law. Rather, the union claimed that untruths were inevitable in a consumer campaign. *Id.* at 301.

Because "the consumer publicity provision *on its face proscribes* dishonest, untruthful, and deceptive publicity, and the criminal penalty provision applies in terms to '[any] person . . . who violates any provision' of the Act", and "*the State has not disavowed any intention of invoking the criminal penalty provision against unions* …", the plaintiffs were "not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity." *Id.* at 302 (emphasis added). The court found standing to challenge the speech restrictions even though the law had never been enforced against the union in the past and not one government official had actively threatened to enforce the provisions against the union.

Appellants have engaged in demonstrations with the use of personal signs (banners) at the Statehouse in the past and have alleged in their complaint an intention to continue to engage in demonstrations at the Statehouse with personal signs (handheld) in the future. Although Appellants do not plan to use banners again, they do plan to use personal handheld signs, which, like their banners, are prohibited. On its face, the policy prohibits all personal signage—large or small.

Further, Appellees have actually enforced the policy prohibiting personal signs against Appellants by removing their banners, detaining them, and banning them from entering the Statehouse for one year because they broke policy. App.322 (they eventually lifted the ban).

But even if there were no prior enforcement against Appellants or others similarly situated, *Babbitt* requires a finding that standing is met because the state actors have not disavowed enforcement in the future. Instead, they have affirmed an intent to continue to enforce the sign ban.

3. Appellants Do Not Need to Be Actively Threatened with Prosecution to Demonstrate They Face A Credible Threat of Prosecution.

The district court reasoned that Appellants did not face a credible threat of prosecution because they had never been sanctioned for bringing a personal *handheld* sign into the Statehouse building in the past and were not actively

threatened with enforcement for same.[4] However, as *Babbitt* makes clear, past enforcement and direct threats are not required to demonstrate credible fear of enforcement under the pre-enforcement standard.

"A plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in" an activity "arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *SBA List*, 573 U.S. at 159 (internal quotations omitted). Under this standard, Appellants only need to allege that their proposed actions are constitutionally protected and that the challenged law would prohibit or chill them from engaging in those actions. *Id.* Appellants have satisfied this pleading requirement. App.076, 080-83.

Appellants have sufficiently alleged an intention to demonstrate with handheld signs inside the Kansas Statehouse. *See* App.069-71. Appellants also alleged a credible threat of future enforcement based on rules they were told would be enforced against them and their experience with past enforcement for protests with other personal signage. App.068-69; 074; 075; 077-79; and 081. And the

[4] The district court found that Appellants were not substantially likely to prevail on the merits of their Count I claim, in part, because they were unlikely to demonstrate pre-enforcement standing at future stages in the litigation due to the purported differences between Appellants' past conduct and future protests. App.343. However, this finding is premised on the same incorrect pre-enforcement standard the court used to dismiss Appellants' sign challenge.

district court recognized that Tom Day threatened Appellants with enforcement of the rules and policy for future demonstrations. App.334.

Even if Plaintiffs have "never been prosecuted or actively threatened with prosecution," *Ward*, 321 F.3d at 1267, they would still satisfy Article III standing under this more forgiving pre-enforcement standard. *Id.*; *United States v. Supreme Court*, 839 F.3d 888, 902 (10th Cir. 2016) ("even in the absence of any actual enforcement action, Rule 16-308(E) creates a sufficiently credible threat of prosecution to confer standing upon the United States."); *see also Babbitt*, 442 U.S. at 302 (identifying justiciable controversy, even though "criminal penalty provision has not yet been applied and may never be applied to commissions of unfair labor practices"); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) ("when a challenged [policy] risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements" and adopted a more forgiving pre-enforcement standard); *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) ("First Amendment cases raise unique standing considerations that tilt dramatically toward a finding of standing.").

A "threat of prosecution is generally credible where a challenged 'provision on its face proscribes' the conduct in which the plaintiff wishes to engage, and," as here, "the state 'has *not disavowed* any intention of invoking the… provision' against the plaintiff. *Babbitt*, 442 U.S. at 302*; United States v. Supreme Court, 839*

F.3d at 901. "Part of what makes the [Supreme] Court's approach in these cases 'forgiving' is that it appears willing to presume that the government will enforce the law as long as the relevant statute is 'recent and not moribund.'" *Hedges v. Obama*, 724 F.3d 170, 197 (2nd Cir. 2013).

Here, the challenged sign policy dates to 2018. Its recency is unquestioned. Because "[t]he existence of the policy implies a threat to prosecute," and the Supreme Court presumes that the government will enforce recently adopted policies, "pre-enforcement challenges are proper [under Article III]," such that "the probability of future injury counts as 'injury' for the purpose of standing." *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010); *ACLU v. Alvarez*, 679 F.3d 583, 591 (7th Cir. 2012).

4. While Past Enforcement of Similar Laws Against Appellants' Similar Conduct May Bolster their Claim of Credible Fear of Prosecution, Enforcement Against Identical Demonstration Is Not Required.

The district court dismissed actual evidence of enforcement of Rule 3(h)(xxii) because personal banners and signs were too distinct in its estimation. App.333-34. However, comparable conduct is persuasive as well. *Ward*, 321 F.3d at 1269 (explaining desire to engage in activities comparable to the ones for which plaintiff had been enforced against in the past constituted evidence of a credible threat). And, because both the banners and handheld signs constitute personal signs and, therefore,

are equally prohibited by the policy, they are not nearly as distinct as the court proposed.

Even if the court declines to consider enforcement against comparable activities, such evidence is not required. *Initiative & Referendum Inst. v Walker*, 450 F.3d at 1089. In *Initiative & Referendum Inst.*, this Circuit noted that while past activities lend concreteness to the plaintiffs' claims, "evidence of past activities obviously cannot be an indispensable element—people have a right to speak for the first time." *Id.*

5. Appellant Does Not Need to Be Singled Out for Enforcement to Bring a Pre-enforcement Challenge.

Even where a First Amendment challenge could be brought by one actually engaged in the protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984). Accordingly, the Supreme Court permits third party standing in First Amendment cases. *Id.*

II. The District Court Erred in Ruling that Appellants Were Not Likely to Succeed on Their Argument that the Statehouse Is a Public Forum and That Appellees' Prior Approval Requirements Must Therefore Satisfy "Time, Place, and Manner" Scrutiny.

Federal courts across the country have ruled that public spaces in Statehouse capitols are quintessential public forums. The Kansas Statehouse is no different and receives hundreds of requests to use its public spaces for events related to political, religious, and other speech activities. As Appellants are specific with regard to the spaces involved in this suit—"the sprawling capitol grounds surrounding the Statehouse; the public areas of the first and second floors of the Statehouse . . . ; and the public spaces on the third to fifth floors overlooking the rotunda in the Statehouse," App.366, the court below erred by ruling all these spaces were not traditional or designated public forums.

The court noted "the key step in the First Amendment merits analysis is determining the nature of the forum involved…." App.345; 348. With respect to Count I, the court ruled that Appellants are unlikely to succeed in their claim because the Statehouse is not a traditional or designated public forum. App.345. The court did not, however, rule that it is a limited public forum, and it should not so rule. The court instead concluded that Appellants did not meet their burden of demonstrating a likelihood of success on the merits as to Count I. App.343-52.

A. The Public Spaces of the Capitol and Statehouse are a Traditional or Designated Public Forum.

This Court should rule that the trial court erred in not finding the public spaces of the capitol to be traditional or designated public forums.

Courts recognize four types of fora: traditional public forum, designated public forum, limited public forum, or nonpublic forum. Traditional public fora are government properties that have historically been used as places of discussion and debate, a public park, for example. *Hague* v. *CIO*, 307 U.S. 496, 515 (1939). Designated public fora are government properties that have not traditionally been sites for public debate but have been intentionally opened up for "use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985); *Scroggins v. City of Topeka*, 2 F. Supp. 2d 1362, 1369 (1998). Whether the government has created a designated public forum depends on its intent, as evidenced by its "policy and practice" and the "nature of the [government] property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 801. To create a designated public forum, the government must be "motivated by an affirmative desire to provide an open forum." *Id*. at 805.

Regardless of whether the Statehouse rotunda and grounds are traditional or designated public fora, Appellees' challenged restrictions are subject to the same

level of constitutional scrutiny. Time, place, and manner restrictions must be "narrowly tailored to serve a significant governmental interest" in both a traditional public forum and designated public forum. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (applying test to a traditional public forum); *Verlo v. Martinez*, 820 F.3d 1113, 1131 (10th Cir. 2016) ("even content-neutral restrictions on speech in a public forum—whether a traditional public forum or a designated public forum—must be narrowly tailored to advance a significant government interest."). As the Supreme Court has noted, this scrutiny of even content-neutral speech regulations is essential to "prevent the government from too readily sacrificing speech for efficiency." *McCullen*, 134 S. Ct. at 2529.

1. The Statehouse Grounds Are a Traditional Public Forum Based on Past Speech Permitted on the Grounds.

This Court should rule the Statehouse and its public areas, including inside the capitol are a traditional public forum.

"Traditional public fora are places that by long tradition have been open to public assembly and debate." *Verlo*, 820 F.3d at 1129. "At one end of the spectrum are streets and parks which 'have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id*. at 1129 (quoting *Hague*, 307 U.S. at 515). Courts have begun this analysis "at a very high level of generality" adopting a presumption that some types of property are

normally public forums. *Oberwetter v. Hilliard*, 639 F.3d 545, 552 (D.C. Cir. 2011); *see also First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1123 (10th Cir. 2002).

Specifically, Statehouse grounds as a class of property have as tradition been held open for public expression. *See Lederman v. United States*, 291 F.3d 36, 41 (D.C. Cir. 2002)*; Columbia v. Haley*, 738 F.3d 107, 121-22 (4th Cir. 2013)*; Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)*; State v. Linares*, 232 Conn. 345, 371 (1995).

Contrary to the court's finding, App.346, Appellants established they were interested in protesting on the grounds outside the Statehouse and its status was at issue for the purpose of the preliminary injunction. Jonathan Cole testified that he has, in fact, congregated on the Statehouse grounds to conduct his protest activity. App.371. Additionally, Appellants established that Appellees have traditionally allowed free exchange of public expression on those grounds. App.410-11.

Frank Burnham, Director of Office of Facilities and Property Management for the Kansas Department of Administration, testified that the Statehouse grounds are used for a "variety of things", including movies, book fairs, Frisbee, long walks with pets—"just about anything." App.410-11. He confirmed the grounds were used similarly to a park on a "regular everyday" basis. *Id*. The Statehouse interior enjoys many of these same uses, speech activities and events. *See infra*, App.411.

As Defendants' testimony and practice makes clear, the Statehouse grounds are used like a public park, open for public expression, and available as a space for the public to gather. They are, therefore, a traditional public forum.

2. The Statehouse Rotunda Is Either a Traditional Public Forum or a Designated Public Forum.

The Statehouse and the public areas of the capitol complex constitute a designated public forum based on the behaviors and long-time practice of the government allowing public expression in those spaces.

Public areas of the Statehouse, including the Statehouse rotunda and grounds, have historically been used for public expression and the property is compatible with expressive activity. Both are designated fora under the applicable Supreme Court test. *See e.g. Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1391 & n.14 (11th Cir. 1993) ("The [Georgia State Capitol] Rotunda's status as a true public forum fundamentally defines the constitutional analysis"); *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 999 (W.D. Wis. 2013) ("The Wisconsin State Capitol may be thought of as either a traditional or designated public forum").

Designated public fora are government properties that have not traditionally been sites for public debate but have been intentionally "opened for use by the public as a place for expressive activity." *Perry Education Association.*, 460 U.S. at 45; *Cornelius*, 473 U.S. at 802; *Scroggins v. City of Topeka*, 2 F. Supp. 2d at 1369. Whether the government has created a designated public forum depends on its intent,

as evidenced by its "policy and practice" and the "nature of the [government] property and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 801. Both limited public fora and nonpublic fora are government properties that are not completely open to the public; they are not at issue here.

The district court erred when it concluded that cases holding state rotunda were traditional public fora involved the spaces outside the building, not inside spaces. App.346. To the contrary, the rotunda of capitol buildings are regularly deemed to be public forums. *See Shiel v. United States*, 515 A.2d 405 (D.C. Ct. App. 1986) (holding the capitol rotunda might be closed early prior to President's address there, but must be available to protestors during normal hours when open); *Gaylor v. Thompson*, 939 F. Supp. 1363 (W.D. Wis. 1996) (Wisconsin state capitol rotunda a public forum, based on its traditional open use); *ACT-UP v. Walp*, 755 F. Supp. 1281 (M.D. Penn. 1991) (similarly, Pennsylvania capitol rotunda); *Reilly v. Noel*, 384 F. Supp. 741, 746 (D.R.I. 1974).

"[G]overnmental entities create designated public forums when 'government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose[.]' . . .") *Doe v. City of ABQ*, 667 F.3d 1111, 1128 (10th Cir. 2012)(*citing Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010). Courts look beyond the government's post hoc statements about whether it intended to open a public forum for expressive activity. *Verlo*, 820 F.3d at 1143 ("to avoid post hoc

justification for a desire to suppress a particular message, courts have considered the government's statement of policy in light of the government's actual practice");; *Hays Cty. Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992).

Forum status is an inherently factual inquiry about the government's intent, practice, and the surrounding circumstances that requires the district court to make detailed factual findings. *Verlo*, 820 F.3d at 1144. By the same token, the mere existence of speech restrictions does not make a forum limited or nonpublic. *United States v. Grace*, 481 U.S. 171, 180 (1983) (the government's "own *ispe dixit*" is not dispositive of a forum's status and the mere fact that a forum is covered by a restrictive statute is insufficient to establish a forum).

Here, the government has designated the Statehouse, both its grounds and interior rotunda, as a public forum. Jim Ward, Kansas House of Representatives, testified that "its openness to the public is critical." App.372-73. Further, its long-time use for assembly and speech on public matters is unquestioned. *Id.*

For example, Appellee Day testified that "by the rail" refers to ""a gathering place" in the Statehouse rotunda "of individuals, whether it's lobbyists, visitors[,] . . . reporters or legislators." App.379-80. Day confirmed that the rail is on the third floor of the rotunda, and that it "is routinely used" by lobbyists and visitors to advocate and petition state government." *Id.* Davis Hammet testified that such

assembly and protest has occurred on all floors of the rotunda and even in the gallery once – "pretty much everywhere in the Statehouse." App.374.

The Government thus has opened these areas for public expression and cannot now, post hoc, change that public forum designation.

3. The Statehouse Rotunda Is Not a Limited Public Forum.

The district court did not rule the Statehouse rotunda and its public areas were a limited public forum, nor should this Court make that ruling.

The state can have a designated forum for limited expressive activities. *Doe*, 667 F.3d at 1129 ("While public libraries are not designated for other First Amendment activities, such as speeches or debate, this limitation on the types of First Amendment activity permitted does not preclude a library from constituting a designated public forum. *See Cornelius*, 473 U.S. at 802 ("[A] public forum may be created by government designation of a place . . . for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) ("[D]esignated public forums may be limited in terms of participants and in terms of subject matter.")).

"[G]overnmental entities establish limited public forums by opening property 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.'" *Doe*, 667 F.3d at 1128. As acknowledged by the court, the governing case

in this Circuit, *Summum v. Callihan*, 130 F.3d 906 (10th Cir. 1997), ruled that typical indicia of a "limited" public forum includes approval granted only to certain groups, subject matter or topics. *Id.* at 918.

The district court cited activities occurring "outside the Statehouse" to support the notion that activities held on the Statehouse grounds "may qualify" as a traditional public forum. App.346. But, the court's order ignores the numerous public activities happening inside the Statehouse. And while the court did not conclude the Statehouse rotunda was a limited public forum, it ruled Appellants "have not demonstrated the Statehouse rotunda is a traditional or designated public forum …." App.350-51.

Given the facts established at the hearing, however, the Statehouse cannot be a limited public forum. Appellee Day affirmed that the Statehouse is not a limited forum because it is open to petition and assembly on all floors, App.374, and on all issues "important to the people of Kansas." App.383-84 (topics covered could include Medicaid expansion, children in poverty, or any of the "numerous issues that are just important to people of Kansas and why they would want to talk to their legislators.") And "no class of speaker [is] prohibited from using any . . . floor" as all floors are used for such protest. App.397.

By Appellees' own admissions and longstanding practice, the Statehouse and Capitol areas are, therefore, not a limited public forum.

B. The Government's Rules Are Therefore Subject to "Time, Place and Manner" Scrutiny.

As the Statehouse is a public forum, content-neutral restrictions on the time, place, and manner of speech must be "narrowly tailored to serve a significant government interest" in both a traditional public forum and designated public forum. *McCullen*, 134 S. Ct. at 2529 (applying test to a traditional public forum); *Verlo*, 820 F.3d at 1131 ("even content-neutral restrictions on speech in a public forum—whether a traditional public forum or a designated public forum—must be narrowly tailored to advance a significant government interest."). As the Supreme Court has noted, this scrutiny of even content-neutral speech regulations is essential to "prevent the government from too readily sacrificing speech for efficiency." *McCullen*, 134 S. Ct. at 2529.

Appellants' prior approval requirement is not narrowly tailored to any legitimate government interest. The only legitimate interest that Appellants articulated for requiring prior approval to demonstrate in public spaces in the Kansas Statehouse was to prevent security risks and generally know what was happening inside the Statehouse. App.394-95. However, Appellants never explained how demonstrators posed a greater security risk than guests other than asserting that they were more likely to arrive in large groups. Even though Appellees conceded that their security concerns were limited to large groups of protesters, they acknowledged that the rules applied to small groups as well. App.390; 393-94; 396; 403; 387-88.

Appellees' prior approval policy cannot apply to small groups in the Kansas Statehouse. These policies are almost always facially invalid and Appellees' have failed to show that the policy is narrowly tailored to their security interest. *See, e.g.*, *Marcavage v. City of Chi.*, 659 F.3d 626, 635 (7th Cir. 2011) (noting the "powerful consensus" of almost every circuit court finding "permit requirements for groups of ten and under to be either unconstitutional or constitutionally suspect"); *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009). This is because where ordinary members of the public are free to come and go—as they are at the Kansas Statehouse— there is no principled reason to single out individuals who wish to express their political views as somehow more of a threat to public safety or security. *See Boardley v. United States DOI*, 615 F.3d 508, 522 (D.C. Cir. 2010) ("The government asserts interests in preventing overcrowding, protecting park facilities, protecting visitors, and avoiding interference with park activities. [...] But why are individuals and members of small groups who speak their minds more likely to cause overcrowding, damage park property, harm visitors, or interfere with park programs than people who prefer to keep quiet?").

III. The District Court Erred in Finding Appellants Were Not Substantially Likely to Show Appellees' Categorical Ban on Signs Violates the First Amendment.

The district court erred by rejecting Appellants' motion to enjoin Appellees' categorical ban on signs in the Kansas Statehouse, a decision premised on its finding

that Appellants' lacked standing to pursue the claim. App.342. Consequently, the district court incorrectly bypassed the merits analysis of Appellants' sign claim. While the court failed to consider the question of whether Appellees' premises-wide, categorical ban on signs in the Kansas Statehouse violated the First Amendment, this Court may do so in the first instance on the record submitted. *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009) ("If the district court fails to analyze the factors necessary to justify a preliminary injunction, this court may do so if the record is sufficiently developed"); *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1196 n. 51 (10th Cir. 2015). Regardless of whether the court finds that the public spaces of the Kansas Statehouse are designated public fora or limited fora, Appellees' policy unlawfully interfered with Appellants' clearly established First Amendment right to engage in political speech through signs.

A. The First Amendment Protects Speech in Form of Political and Public Issue Signs.

The long recognized constitutional protection for political advocacy through signs stems from well-established First Amendment principles. The First Amendment has its "fullest and most urgent application" to political speech. *See e.g. Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995) (noting "no form of speech is entitled to greater constitutional protection" than debate on political issues); *Republican Party v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013) ("political speech is the lifeblood of democracy—it is

the means by which citizens learn about candidates, hold their leaders accountable, and debate the issues of the day… [f]or these reasons, laws that burden political speech are subject to careful judicial review."). Accordingly, political speech communicated on signs is entitled to highest reverence and protection. *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (public issue picketing is "an exercise…of basic constitutional rights in their most pristine and class form, [and] has always rested on the highest rung of the hierarchy of First Amendment values").

Similarly, the Supreme Court has recognized speech passively conveyed through non-disruptive means and silent protest provide an important medium of communication critical to preserving the First Amendment. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (striking down blanket prohibition on lawn signs while noting "the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech"); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) .

Handheld signs in particular facilitate speech that would otherwise be foreclosed in several ways. First, the use of signs permits the speaker to communicate to a specific, target audience in proximity to where the speaker chooses to hold the sign. *Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (*10th Cir.* 2002) (*quoting Meyer v. Grant* , 486 U.S. 414, 424 (1988). The First Amendment protects Appellants' right, "'not only to advocate their cause but also to select what

they believe to be the most effective means for so doing.'"*Id.*; *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) ("the simple fact that Weinberg is permitted to communicate his message elsewhere does not end our analysis if the intended message is rendered useless or is seriously burdened"). Second, as the court noted in *Ladue*, signs are cheaper and more convenient than other means of communicating with a target audience. 512 U.S. at 57. Holding a sign outside of a legislative chamber is a cheaper and more convenient method to communicate with legislators than mailing individual messages to each lawmaker's office or taking out an advertisement in the *Topeka Capitol Journal*.

Additionally, signs ensure speakers can convey their message in a manner consistent with the tone and tenor of their protest location and in a way that is not disruptive. Appellants presented evidence on why they desired to use handheld signs for their protest inside the Statehouse and how the categorical sign ban precluded their ability to communicate their political messages through a non-disruptive medium. Mr. Cole testified that signs were the only method of communication that would enable him to silently communicate with Statehouse guests, legislators, and government officials. App.370. Similarly, Ms. Sullivan noted in her affidavit that she wished to protest with handheld signs in order to be able to communicate with other individuals inside the Statehouse without causing a disruption. App.057.

Appellants thus explained why handheld signs were a highly singular method of non-disruptive communication that allowed them to communicate core political speech and petition their government. Given First Amendment protections for Appellants' desired speech, Appellees cannot justify their blanket ban on signs, regardless of whether the public spaces of the Statehouse are designated public or limited fora.

B. Appellees' Categorical Ban on Signs is Not Narrowly Tailored.

If the court determines that any part of the interior of the Kansas Statehouse is a designated public forum, the sign restriction must be narrowly tailored to serve a significant government interest specific to that area. *McCullen*, 573 U.S. at 479; *Verlo*, 820 F.3d at 1120. A regulation is not narrowly tailored if the government can achieve its significant interest through methods that impose less of a burden on First Amendment rights. In particular, the Supreme Court has expressly rejected speech regulations designed to advance a significant interest where the government already had laws prohibiting the misconduct the speech was designed to abate. *See e.g.*, *McCullen* 573 U.S. at 491. The ban on the silent hand-carrying of signs no larger than a piece of paper or poster board is not narrowly tailored to serve any significant governmental interest, including the three interests advanced by Appellees.

Appellees devised three reasons to justify their ban on handheld signs. First, Appellees argued that the ban was necessary to preserve the aesthetics of the building

because signs could potentially interfere with the visitors viewing the artwork that appears in discrete locations throughout the Kansas Statehouse. App.401-02. Next, Appellees argue that handheld signs must be banned because they may result in litter. App.400. Finally, Appellees suggested that handheld signs presented a security threat because they could be used as a weapon. App.394-95.

First, Appellees' ban on signs is not narrowly tailored to their interest in preserving the aesthetics of the building and maintaining unobstructed view of the artwork. Courts have struck down bans on temporary, portable protest equipment where the restrictions are based on the government's aesthetic interests, noting the lack of fit between the city's aesthetic goals and the regulation in light of the brief presence of the purported visual blight. *See, e.g.*, *Tucker v. City of Fairfield*, 398 F.3d 457, 464 (6th Cir. 2005) (striking down a temporary ban on balloons for lack of narrow tailoring where government's asserted interest was maintaining aesthetics); *State v. DeAngelo*, 963 A.2d 1200 (D.N.J. 2009) (invalidating restriction on ten-foot-tall inflatable rat-shaped balloon on a sidewalk during labor protest where ban was justified for aesthetic reasons). Temporary expression does not meaningfully interfere with the aesthetic interests and thus a total ban on such expression is too broad.

Similarly, the government has less restrictive and more efficient alternatives to achieve its aesthetic interests where it bans some portable signs but not others.

Ballen v. City of Redmond, 466 F.3d 736, 744 (9th Cir. 2006) (finding city had narrower alternatives available to achieve goal of preserving community aesthetics where ordinance prohibited Bagel store employee from displaying handheld advertisement sign yet permitted real estate companies to display stationary portable signs).

The handheld signs that Appellants and other protesters seek to use would be both temporary and exclusively confined to the person holding the sign. These inherent features of handheld signs ensure that there is no risk that they will damage or mar the interior aesthetics of the Statehouse. Moreover, Appellees' policies expressly permit the display of temporary signs affixed to easels, panels, or tables as part of pre-approved events. A person holding a sign presents no more of an eyesore than the affixed event signs Appellees currently permit inside of the Statehouse.

Appellees could apply the same limitations regarding location and size that it uses for event signs to preserve its aesthetic interests. Appellees could impose location specific limitations like prohibiting the display of handheld signs in front of the Statehouse murals. Alternatively, Appellees could restrict the size of handheld signs or prohibit protesters from raising the signs above their head. To the extent Appellees' aesthetic concerns are solely related to the possibility that they will interfere with viewing artwork, a total ban on handheld signs is not tailored to achieve these interests.

Second, Appellees' have numerous alternative measures that burden substantially less speech to achieve their interest in reducing litter. The Supreme Court has held for decades that concerns about littering cannot justify a ban on speech or expressive activity explaining "there are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the street." *Schneider v. State*, 308 U.S. 147, 163 (1939) (striking down hand billing ordinance premised on government interest in reducing litter); *Nixon v. Srink Mo. Gov't Pac.*, 528 U.S. 377, 429 (2000) (*citing Schneider* for support that "the First Amendment does not permit the State to sacrifice speech for efficiency"). Appellees have a readily available, less restrictive alternatives to reduce litter in the Kansas Statehouse, namely, their regulation prohibiting littering. K.A.R. 1-49-2. Because enforcement of the littering regulation would achieve Appellees' interests, the ban on signs is overbroad and not narrowly tailored to achieve the interest in preventing littering.

Finally, Appellees' ban on signs does not serve their interest in maintaining building security in either a broad or narrow way. To the extent Appellees genuinely fear that signs could be used as a weapon, they have a number of laws to enforce that would address this conduct. *See e.g.* K.S.A. 21-5412; K.S.A. 21-5413.

C. Appellees' Categorical Ban on Personal Signs is Not Reasonable.

Regardless of the forum analysis applied, Appellees have failed to articulate a rational basis for their categorical ban on all handheld signs. First Amendment protection extends beyond the public forum. *Cornelius*, 473 U.S. at 806. While the government does have greater latitude to restrict protected speech in a nonpublic forum, regulations must be reasonable and viewpoint neutral. *Rosenberg v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Barnard v. Chamberlain*, 897 F.2d 1059, 1063 (10th Cir. 1990). Reasonableness in the context of a First Amendment claim in a nonpublic forum requires a more stringent test than the traditional rational basis review. *Hawkins v. City & Cnty of Denver*, 170 F.3d 1281, 1289-90 (10th Cir. 1999); *Multimedia Pub. v. Greenville-Spartanburg*, 991 F.3d 154, 159 (4th Cir. 1993) (distinguishing the First Amendment analysis from typical rational basis review "it is not enough to establish that the regulation is rationally related to a legitimate government objective – as might be the case for a typical exercise of the government's police power"). This Circuit assesses the nature of the regulated speech and the extent to which the proposed speech would interfere with the asserted purposes of the forum. *Hawkins*, 170 F.3d at 1290.

The Supreme Court has recognized that non-disruptive speech and passive expressive conduct are generally consistent with the use of large, open multipurpose nonpublic forums. *See e.g. International Soc'y of Krishna Consciousness, Inc. v.*

Lee, 505 U.S. 672, 690 (1992) (finding peaceful pamphleteering consistent with airport terminal because it was a huge open complex that contained commercial establishments, art exhibits, and newsstands); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (noting that "Much non-disruptive speech—such as the wearing of a T-shirt or button that contains a political message…is still protected speech even in a nonpublic forum."). Displaying a small handheld sign, like pamphleting or wearing political apparel, can occur without making noise, causing congestion, or demeaning the aesthetics of the location where the sign is displayed. *See e.g., Wickersham v. City of Columbia*, 2006 U.S. Dist. LEXIS 15438 at 28 (W.D. Mo. 2006) (finding handheld signs created no disruption at airshow), *aff'd* 481 F.3d 591, 601 (8th Cir. 2007).

Further, courts have consistently rejected categorical bans on speech and expressive activity in large multipurpose forums. *See e.g., News & Observer Pub. Co. v. Raleigh-Durham*, 597 F.3d 570, 580 (4th Cir. 2010); *Prisoners Union v. Dep't of Corrections*, 135 Cal. App. 3d 930, 935 (1982) (while reasonable restriction on parking lot leafleting were permitted, an entire ban was not). Some restrictions may be reasonable but a complete foreclosure of a medium of speech is unlikely to survive in even the most restrictive forums.

The display of handheld signs is consistent with the majority of public locations in the Kansas Statehouse—including the rotunda—and many of its uses—

including the operation of the state government. The Kansas Statehouse is a large, multipurpose forum that is open to the public. It contains offices, legislative chambers, art exhibits, a library, a snack shop, a meeting auditorium, and event spaces. The Statehouse rotunda in particular can be used for events, meetings, and to display presentation materials. App.379-82; 386.

Indeed, the silent display of handheld signs is consistent with the use of virtually every area in the Statehouse other than the offices and chambers. While one of the asserted purposes of the forum is to observe artwork, there is not artwork in every space throughout the Statehouse. Further, as Appellee. Day conceded, a large group of sign-less guests congregating in front of murals and art displays would present the same problem. App.401-02. Thus, while restrictions on handheld signs in certain locations inside the Statehouse may be reasonable to preserve art viewing functions of the space, a categorical ban on all handheld signs in all locations is not.

The act of holding signs is also consistent with use of the building's rotunda and hallways for ingress and egress. While a large group of individuals holding signs in tight quarters of the building could potentially cause congestion, a single person holding a sign in the rotunda would not interfere with foot traffic. Any potential interference with ingress and egress caused by the display of handheld signs would be attributable to the number of protesters not the fact that they were holding a sign.

And a reasonable regulation could limit protest demonstrations from blocking ingress and egress (as opposed to unconstitutionally banning all signs).

Similarly, there is no nexus between the display of handheld signs and any conceivable interference with legislative or business operations. While the display of signs in conjunction with other expressive conduct may create a disruption, the mere act of holding a small sign in a public space in the Statehouse could not plausibly interfere with governmental business being conducted in the legislative chambers, government official offices, or meeting rooms. Indeed, Appellants seek to be able to express themselves through this medium precisely because it is consistent with the building's operational purposes.

The display of handheld signs also does not interfere with Appellees' stated goals of preventing littering and maintaining security. Signs present no greater risk of becoming litter than packaged food, documents used by legislators, or dozens of other types of unrestricted paper stuffs. Appellees offered no evidence that the display of handheld signs would substantially harm their interest in maintaining a clean building. The display of handheld signs is also consistent with Appellees' security goals. Appellees' argument that signs could be used as weapons has no basis in common sense, logic, or reality. Appellees permit guests to bring in everyday objects with greater capacity to inflict bodily harm than a sign, including heavy books, steel water bottles, and keys. This rationale is particularly absurd given the

fact that firearms are permitted in the Statehouse. App.375-76. In short, Appellees' restriction on handheld signs is unreasonable and overbroad given the nature of Appellants' expressive activity and other facts of the forum.

Accordingly, Appellees articulated reasons for restricting the size of signs and possibly the number of protesters permitted in a given area, but not signs as a whole.

IV. The District Court Erroneously Found That Appellants Failed to Carry Their Burden on the Remaining Injunctive Factors.

Appellants who demonstrate a likelihood of First Amendment injury are presumed to have established the three remaining injunctive factors. *Hobby Lobby*, 723 F.3d at 1145 (*citing ACLU*, 679 F.3d at 589, *cert. denied*, 133 S. Ct. 651 (2012)). This presumption exists because: (1) the loss of First Amendment freedoms "unquestionably constitutes irreparable injury"; (2) the government's interests in defending an unconstitutional restriction can never outweigh plaintiffs' speech interests; and (3) "it is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby*, 723 F.3d at 1145 (*citing Awad v. Ziriax*, 670 F.3d 1111, 1131-32 (10th Cir. 2012); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003)). Where a plaintiff has established a likelihood of success on the merits of a First Amendment claim, these remaining injunctive factors are then easily satisfied as a matter of law. *See Verlo*, 820 F.3d at 1126 (*citing Hobby Lobby*, 723 F.3d at 1145).

The district court did not apply the appropriate presumption to Appellants' claims because it reached the erroneous conclusion that Appellants could not demonstrate a likelihood of success on the merits. App.353-54. Because this conclusion was legal error, however, this Court should now determine that the remaining injunctive factors do presumptively support the issuance of a preliminary injunction. *See Citizens United v. Gessler*, 773 F.3d 200, 218-19 (10th Cir. 2014) (reversing denial of a preliminary injunction on a First Amendment claim after finding a likelihood of success on the merits and noting that "the remaining preliminary-injunction factors present little difficulty"). Even absent this presumption, however, Appellants have established that the remaining injunctive factors weigh decisively in their favor based on the record at the preliminary injunction hearing. The district court erred in reaching a contrary result.

A. The District Court Improperly Evaluated the Remaining Injunctive Factors on Appellants' Prior Restraint Claim, All of Which Weigh Heavily in Support of a Preliminary Injunction.

The district court determined that Appellants did not establish a likelihood of irreparable injury because they could not prove that their desired small-group protest required Appellees' prior approval.[5] App.354-56. But the court overlooked specific

[5] The district court's discussion of irreparable harm mirrors its analysis on the merits of Appellants' prior restraint claim—reinforcing that the irreparable harm inquiry is essentially subsumed by the merits inquiry in the First Amendment context. *Heideman*, 348 F.3d at 1190 ("the loss of First Amendment freedoms, for even

testimony introduced by Appellants demonstrating that Appellees would actively prevent them from engaging in small-group protest.

At the preliminary injunction hearing, Appellee Day specifically identified that standing in a small group with signs would constitute a demonstration for which prior approval is required. App.390. Indeed, Appellee Day indicated that "anything that is occurring" on his floors of the Statehouse—including a "demonstration, rally, or other picketing purpose"— would require prior approval. App.387-88. Day also unequivocally stated that demonstration activities are covered in the definition of an "event" which expressly requires prior approval under Appellees' rules. App.393; 388-389. When given the opportunity to expressly exclude small groups from the prior approval requirement, Day instead indicated that even a group of two might be removed for failure to seek permission prior to staging a demonstration. App.392. Hammet also confirmed Appellee Day's position, testifying to his personal experience being twice threatened with arrest for failing to acquire a permit for a small-group protest. App.376. This testimony raises an independent likelihood of irreparable harm never acknowledged by the district court.[6]

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minimal periods of time, unquestionably constitutes irreparable injury") (internal quotations and citations omitted).

[6] Instead, the district court relied on Appellee Day's half-hearted statement that small groups could "probably" congregate at the Statehouse without being removed for failure to seek prior approval. App.391. This non-commitment from Day is inconsistent with the many statements he made to the contrary at the preliminary injunction hearing. The district court also appears to have determined that Appellants

In rejecting Appellants' speech interests, the district court likewise incorrectly determined that the balance of harms favored Appellees' interests in upholding their permitting rules. App.355-56. As described above, while these interests may be legitimate as applied to larger groups, a consensus of circuit courts have determined that the government cannot use this justification to apply a permit process to small-group speech. *See, e.g.*, *Marcavage v. City of Chi.*, 659 F.3d 626, 635 (7th Cir. 2011). This is because where ordinary members of the public are free to come and go—as they are at the Kansas Statehouse—there is no principled reason to single out individuals who wish to express their political views as somehow more of a threat to public safety or security. *See Boardley*, 615 F.3d at 522. Under these circumstances, Appellees' interests in a permitting process are greatly diminished and the balance of harms clearly favors Appellants' vindication of their First Amendment expressive rights.[7]

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would not suffer any harm because Appellees' themselves aver that they do not reject permits on the basis of viewpoint. App.355. Respectfully, Appellees' averments about their own conduct are insufficient to cure the unfettered discretion inherent in Appellees' permitting process. *See Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006) ("[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints"); App.167-68.

[7] The district court chose not to address the public interest factor in its Order. However, to the extent Appellants have demonstrated a First Amendment injury in being denied the opportunity to engage in small-group protest without a permit, it is unquestionably in the public interest to secure Appellants' rights. *Awad*, 670 F.3d at 1131-32.

B. The District Court Did Not Consider the Remaining Injunctive Factors on Appellants' Sign Ban Claim, All of Which Weigh Heavily in Support of a Preliminary Injunction.

Although the district court never considered the remaining injunctive factors with respect to Appellants' sign ban claim, this Court is empowered to do so based on the existing record. *Hobby Lobby*, 723 F.3d at 1145 (*Westar Energy*, 552 F.3d at 1224). That record reveals that Appellee Day is continuing to enforce a ban on all handheld signs on the third, fourth, and fifth floors of the Kansas Statehouse rotunda. App.392. Appellants have therefore demonstrated a substantial likelihood of irreparable injury in being denied an entire medium of First Amendment expression at the seat of their state government. Vindication of Appellants' First Amendment rights is also necessarily in the public interest and will inform whether and how silent protest will be permitted at the Kansas Statehouse in the future. *Awad*, 670 F.3d at 1131-32 ("it is always in the public interest to prevent the violation of a party's constitutional rights").

Finally, Appellees have failed to demonstrate how their interests in protecting Statehouse visitors and the Capitol Complex itself would be at all hindered by allowing Appellants to carry small handheld signs—particularly when signs are already permitted by Appellees in the Statehouse if they are attached to easels, panels, or tables for approved events. App.147-48. Appellees' interests in enforcing

their restrictions are therefore significantly exceeded by Appellants' interests in safeguarding their core First Amendment speech activity.

CONCLUSION

For all of these reasons, Appellants ask this Court to reverse the district court's dismissal of its challenge to Appellees' sign ban on the basis of standing and to remand this case with instructions to enter an injunction from (1) enforcing the prior approval requirement against small-group protests at the Kansas Statehouse and (2) enforcing their categorical ban on personal signs in the Statehouse.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellants requests oral argument. Counsel believes that this Court's disposition of this case would be aided by oral presentation to this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 12,936 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

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CERTIFICATE OF DIGITAL SUBMISSION

In the electronic version of the foregoing APPELLANTS' OPENING BRIEF, I hereby certify that: 1) all required privacy redactions have been made; 2) the ECF submission is an exact copy of the hard copy that will be filed; and 3) the digital submission has been scanned for viruses with the most recent version of Symantec Endpoint Protection Small Business Edition using components Symantec.cloud-Cloud Agent 3.00.31.2817 and Symantec.cloud-Endpoint Protection NIS-22.15.2.26, last updated on November 5, 2019, and according to the program, is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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ADDENDUM

ADDENDUM TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JONATHAN T. COLE, et al., **Plaintiffs,** **v.** **DUANE GOOSSEN, et al.,** **Defendants.**	**Case No. 5:19-CV-4028-HLT-ADM**

MEMORANDUM AND ORDER

Plaintiffs Jonathan Cole, Katie Sullivan, and Nathaniel Faflick filed this case seeking declaratory and injunctive relief regarding certain policies and regulations at the Kansas Statehouse that they claim are unconstitutional. Defendants Duane Goossen, Kansas Secretary of Administration, Tom Day, Legislative Administrative Services ("LAS") Director, and Sherman Jones, Superintendent of the Kansas Highway Patrol—all named in their official capacities—have moved to dismiss the operative amended complaint on grounds that Plaintiffs lack standing. Doc. 22. Plaintiffs have moved for a preliminary injunction. Doc. 3.

Because Plaintiffs face no credible threat of enforcement of the handheld sign provision in the usage policy challenged in Count II of the amended complaint, and because they only face a speculative threat of future alleged retaliation, as claimed in Count IV, the Court dismisses those counts for lack of standing. The Court denies Defendants' motion as to Counts I and III. As to the surviving counts, the Court denies Plaintiffs' motion for a preliminary injunction. The Court finds that Plaintiffs have failed to carry their heightened burden of showing a likelihood of success on the merits for either Count I or Count III and have not demonstrated that they are likely to suffer irreparable harm on either count.

I. BACKGROUND

A. Plaintiffs' March 27, 2019 Protest

On March 27, 2019, Plaintiffs, along with some others, entered the Kansas Statehouse to protest the failure to expand Medicaid in Kansas. Doc. 9 at 10. During their protest, Plaintiffs unfurled four 24-by-10 feet banners that read "Blood on Their Hands #Expand Medicaid," with each banner naming a different legislative leader. *Id.*[1] Plaintiffs hung the cloth banners from balconies on the 5th floor overlooking the Statehouse rotunda. Tr. at 25:11-12.[2] They held the banners in place using cords strung through the railing balusters. Tr. at 162:15-163:5. The banners hung from the 5th floor down into a walkway on the 3rd floor. *Id.*; Doc. 9 at 10-11.

Within a few minutes, Day removed the banners by pulling them up. Day told Cole, "I am not telling you to leave but don't put the banner down." *Id*. at 10. A short time later, Capitol Police Officer Scott Whitsell stopped Plaintiffs and informed them he was issuing a ban on them entering the Statehouse for one year because they broke policy. *Id.* at 10-11. Whitsell detained Plaintiffs for about ten minutes before releasing them without saying what policy Plaintiffs violated. *Id*. at 11.

The next day, March 28, 2019, Whitsell's supervisor, Lieutenant Eric Hatcher, called Plaintiffs and told them he was lifting their ban from the Statehouse. *Id*. Hatcher told Cole that he

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[1] The amended complaint states that Plaintiffs "unfurled four 24 x 10 banners." Doc. 9 at 10. Although the amended complaint does not further describe the banners, it contains several links to news stories about the event, which state that the banners spanned nearly two stories, and which contain video or pictures of the banners showing how large they were. *See* Doc. 9 at 10-11 n.16, n.20 (citing *Students banned from Kansas Statehouse over Medicaid Protest*, KSNT (Mar. 27, 2019), https://www.ksnt.com/news/students-banned-from-kansas-statehouse-over-medicaid-protest/ and Rafael Garcia, *Update: Students no longer banned from Statehouse after unfurling sign with bloody hands for Medicaid expansion*, THE COLLEGIAN (Mar. 27, 2019), https://www.kstatecollegian.com/2019/03/27/students-banned-from-statehouse-after-unfurling-bloody-hand-sign-for-medicaid-expansion/).

[2] Cites to "Tr. at ___" reference testimony at the hearing held on the motion for a preliminary injunction, available at Doc. 33. Although the Court references facts elicited from the hearing for background purposes, the Court is mindful that it must evaluate the motion to dismiss on the well-pleaded facts of the amended complaint. By contrast, the Court can consider all relevant pleadings and the testimony and evidence presented at the hearing in ruling on the preliminary-injunction motion.

"did something wrong" by unfurling the banners, but that a one-year ban was "a little harsh." *Id.* Hatcher did not identify any specific policy that Plaintiffs violated, but he did tell Cole that he needed to obtain a permit to demonstrate with Sullivan or Faflick in the future. *Id.* Hatcher later testified that he had informed the Capitol Police under his command that bans should only be issued for violations of the law, not policy. Tr. at 262:15-18; 265:5-17; 266:4-13; 283:18-284:5.

B. Regulations and Statehouse Policies

After his call with Hatcher on March 28, 2019, Cole reviewed the rules and regulations governing demonstrations at the Statehouse. Doc. 9 at 11-12. According to the amended complaint, Cole discovered that state regulations required prior permission for any "meeting, demonstration or solicitation" on Statehouse grounds, and that a policy prohibited "personal signage" in the Statehouse unless part of a preapproved event. *Id*. Cole also learned that the Capitol Police could ban someone from the Statehouse for any perceived rule violation. *Id.*

Article 49 of the Kansas Department of Administration's regulations govern certain conduct in state-owned buildings. Two are relevant to this case. K.A.R. § 1-49-9 states in part that "[a]ny person violating any of these regulations may be expelled and ejected from any of the buildings or grounds of buildings listed in K.A.R. 1-49-1."[3] K.A.R. § 1-49-10 states in part that "[n]o person shall conduct any meeting, demonstration or solicitation on any of the grounds or in any of the buildings listed in K.A.R. 1-49-1 without the prior permission of the secretary of administration or the secretary's designee."

The Kansas Department of Administration has issued a "Policy for Usage of the Statehouse and Capitol Complex," effective January 2018. Doc. 14-2.[4] The Kansas Statehouse is a historic

[3] K.A.R. § 1-49-1(a)(1) lists the Statehouse as one of the covered properties.

[4] There is also a separate list of event reminders given to individuals or groups holding events in the Statehouse. *See* Doc. 28-10. Those reminders include some but not all of the rules listed in the usage policy.

landmark and the seat of state government in Kansas. *Id.* at 3. The usage policy states that different entities control different parts of the Statehouse. The Office of Facilities and Property Management ("OFPM"), part of the Department of Administration, controls the ground level and 1st and 2nd floors of the Statehouse, as well as the Statehouse grounds. *Id*. LAS controls the legislative chambers and committee rooms, the 3rd through 5th floors of the Statehouse, and other areas managed by the state legislature. *Id*. The Kansas State Historical Society controls some remaining areas on the ground level of the Statehouse. *Id.*

The usage policy sets out procedures to request permission to hold an "event" in areas controlled by OFPM. *Id*. Non-governmental entities must pay a $20 application fee. *Id.* at 4. Applicants must submit their requests no later than ten work days before the "requested activity." *Id.* at 3. The event must relate to a governmental purpose, and the Secretary of Administration or his or her designee has "final authority in determining whether an event may be approved, whether the event relates to a governmental purpose and whether or not any provision of [the usage] policy may be waived." *Id.* at 3, 5. Those seeking to use space in the areas controlled by LAS must make that request directly to that office. *Id*. at 3. But the usage policy applies to those areas as well. Tr. at 129:3-8. The usage policy also states that "[n]o banners, signs, exhibits or any other materials will be taped, tacked, nailed, hung or otherwise placed in any manner within the Capitol Complex." *Id.* at 7 (section 3.h.xix.). Additionally, the usage policy prohibits "personal signage" in the building. *Id.* (section 3.h.xxii.)

C. Kansas Poor People's Campaign June 18, 2018 Incident

The amended complaint also references another incident at the Statehouse a year earlier involving the Kansas Poor People's Campaign. On June 18, 2018, the Capitol Police briefly locked the Statehouse doors to prevent entry by a group of protestors and threatened them with arrest for

unlawful assembly. Doc. 9 at 9. The amended complaint does not allege that Plaintiffs were involved in that incident. In response to the June 18 incident, the Legislative Coordinating Council requested a review of the Capitol Police's conduct. Doc. 9 at 9 n.13 (citing to the report of June 18, 2018 incident); *see also* Doc. 3-2 (report of June 18, 2018 incident). According to the amended complaint, Day, as director of LAS, drafted a report indicating that the Capitol Police have authority to ban or exclude individuals from the Statehouse, and that there were no policies guiding officer discretion on whether or when to exclude or expel individuals from the building. Doc. 9 at 9-10.

D. Plaintiffs' Lawsuit

Plaintiffs filed this case under 42 U.S.C. § 1983 not long after their March 27, 2019 protest where they unfurled the two-story banners. Doc. 1. Shortly thereafter, they amended their complaint. Doc. 9. The operative amended complaint has four counts. Count I asserts a First Amendment violation against Goossen and Day stemming from the permitting scheme outlined in the usage policy and regulations. *Id*. at 12-13. Count II asserts a First Amendment violation against Goossen and Day based on the usage policy's ban on handheld signs. *Id.* at 14. Count III is against all defendants and asserts First and Fourteenth Amendment violations based on Defendants' policy and practice authorizing the Capitol Police to ban individuals from the Statehouse "if they suspect the individual's First Amendment activity will result in a violation of building rules." *Id.* at 14-15. Count IV asserts a First Amendment retaliation claim against Defendants. *Id.* at 15.

Plaintiffs only seek prospective relief. Specifically, they seek declaratory judgments, a preliminary and permanent injunction enjoining the permitting rules and the ban on all handheld signs, as well as on the policy empowering Capitol Police to ban individuals from the Statehouse.

Id. at 16. Plaintiffs also seek an injunction "enjoining Defendants from retaliating against Plaintiffs in the future for past, present, or future exercise of their First Amendment rights." *Id.* at 17.

Upon filing their original complaint, Plaintiffs immediately moved for a preliminary injunction. Doc. 2.[5] They seek a preliminary injunction enjoining Defendants from:

> (1) Enforcing their permitting scheme under K.A.R. 1-49-10 and the Statehouse usage policy;
>
> (2) Enforcing the Statehouse usage policy's ban on the display of hand-held posters and signs in the public areas of the Statehouse and its grounds;
>
> (3) Issuing any complete premises ban pursuant to K.A.R. 1-49-9 that are exclusively for violations of the Statehouse usage policy.

Doc. 3 at 28-29. The Court held an evidentiary hearing on the preliminary-injunction motion on June 19, 2019.[6]

At the same time they responded to the preliminary-injunction motion, Defendants moved to dismiss Plaintiffs' amended complaint for lack of standing. Doc. 22. Defendants' motion challenges Plaintiffs' standing on grounds that they have not demonstrated a particularized, actual, or imminent injury supporting the prospective relief they seek. Doc. 23 at 3. Defendants also briefly argue that, to the extent any claims survive, the Court should dismiss all claims against Defendant Tom Day. *Id.* at 17. Because the motion to dismiss raises the threshold issue of Plaintiffs' standing to assert the claims on which they seek an injunction, the Court first addresses that issue before turning to the motion for a preliminary injunction.

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[5] Plaintiffs also sought a temporary restraining order Doc. 11. But before the TRO hearing, the parties informed the Court that they had reached a temporary resolution that allowed Plaintiffs to engage in nondisruptive protests in the Statehouse during the legislative veto session. Plaintiffs then withdrew the motion for a temporary restraining order. Doc. 16.

[6] On the eve of the hearing, both parties sought leave to file supplemental briefs. Doc. 29, 30. Although neither party has put forth much justification for the additional briefing, the Court grants the motions and has considered the supplemental briefing. *See* Docs. 29-1 and 30-1.

II. ANALYSIS

A. Motion to Dismiss

1. At the pleading stage, the Court analyzes standing based on the well-pleaded allegations of the operative complaint.

Before reaching the question of the preliminary injunction, the Court must first evaluate Plaintiffs' standing to bring this case. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) ("[W]e cannot reach the merits based on 'hypothetical standing,' any more than we can exercise hypothetical subject matter jurisdiction."). Courts are not "free-wheeling enforcers of the Constitution and laws"—they are limited under Article III of the Constitution to "cases" and "controversies." *Id*. The "mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." *Mink v. Suthers*, 482 F.3d 1244, 1253 (10th Cir. 2007) (quoting *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006)).

Article III of the Constitution limits the jurisdiction of federal courts to cases and controversies. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The case or controversy limitation requires that a plaintiff have standing." *United States v. Colo. Supreme Court*, 87 F.3d 1161, 1164 (10th Cir. 1996); *see also Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d 1086, 1091 (D. Kan. 2015) ("One of several doctrines reflecting Article III's case-or-controversy limitation on the judicial power is the doctrine of standing."). Standing requires that a plaintiff have an actual stake in the controversy. *Brady Campaign*, 110 F. Supp. 3d at 1091. A plaintiff can show this stake by demonstrating "that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is

likely that the injury will be redressed by a favorable decision." *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003) (quoting *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997)).

The burden of alleging standing is on a plaintiff. *See Initiative & Referendum*, 450 F.3d at 1087. The extent of a plaintiff's burden depends on the stage of the litigation. *Lujan*, 504 U.S. at 561. At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," and courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)); *see also Initiative & Referendum*, 450 F.3d at 1089 ("When evaluating a plaintiff's standing at this stage, 'both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975))).[7] But a court need not accept "conclusory allegations, unwarranted inferences, or legal conclusions." *Brady Campaign*, 110 F. Supp. 3d at 1092.

2. Standing to seek prospective relief based on a claim of First Amendment chilling requires a credible threat of enforcement.

At the outset, the Court notes that Plaintiffs in this case do not seek any retrospective or monetary relief based on the events of March 27-28, 2019. Doc. 9 at 16-17. They do not assert any

[7] Motions to dismiss for lack of jurisdiction under Rule 12(b)(1) can generally take two forms: a facial attack or a factual attack. "[A] facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). A factual attack looks beyond the operative complaint to the facts on which subject-matter depends. *Id.* at 1003. Defendants' motion to dismiss has three exhibits attached: the usage policy, the "Capitol Complex Events Applications," and the relevant Kansas Administrative Regulations. Doc. 23 at 2. Plaintiffs referenced or quoted all these materials in the amended complaint. *See* Doc. 9 at 6 n.1 (citing usage policy); at 6 n.9 (citing Capitol Complex Events Applications); at 7 (outlining and quoting relevant K.A.R. provisions). In response to the motion to dismiss, Plaintiffs include some exhibits for the Court's consideration should the Court construe Defendants' motion as a factual attack and wish to look beyond the pleadings. Doc. 31 at 3 n.1. But in the reply, Defendants clarify their motion is a facial attack of the amended complaint. Doc. 34 at 2. The Court therefore treats this motion as a facial attack and notes that consideration of documents attached to or referenced in a complaint generally do not convert a facial attack to a factual one. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017).

claims for damages stemming from Defendants' actions in removing the two-story banners Plaintiffs hung from the Statehouse balconies or for the ban that lasted one day. *Id*. Plaintiffs seem to cite that event only to bolster their claim of First Amendment chilling. *See* Doc. 31 at 2 (asserting standing on "their past experience with Defendants and their justifiable fear of future consequences for failing to comply with Statehouse rules"); *see also Winsness*, 433 F.3d at 735 ("We have noted that 'a declaratory judgment is generally prospective relief,' and that we treat declaratory relief as retrospective only 'to the extent that it is intertwined with a claim for monetary damages that requires us to declare whether a past constitutional violation occurred.'" (quoting *PeTA v. Rasmussen*, 298 F.3d 1198, 1202-03 n.2 (10th Cir. 2002))).

As noted above, to demonstrate that he has an actual stake in the controversy, a plaintiff must first demonstrate that he has suffered an injury in fact. *See Ward*, 321 F.3d at 1266. An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Initiative & Referendum*, 450 F.3d at 1087 (quoting *Lujan*, 504 U.S. at 560).

A past wrong in and of itself does not confer standing for prospective relief, absent some "credible threat of future injury." *Mink*, 482 F.3d at 1253 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)). "Absent a sufficient likelihood that he will again be wronged in a similar way," a past wrong against a plaintiff does not entitle him to assert a claim for prospective relief any more so than any other citizen. *Lyons*, 461 U.S. at 111. A suit for prospective relief in a First Amendment case requires a plaintiff to show "a credible threat of prosecution or other consequences flowing from the statute's enforcement." *Initiative & Referendum*, 450 F.3d at 1088 (quoting *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004)); *Brady Campaign*, 110 F. Supp. 3d at 1092 ("To establish standing for prospective injunctive relief, 'a plaintiff must be suffering a continuing

injury or be under a real and immediate threat of being injured in the future.'" (quoting *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004))).

The chilling effect of a law can create a judicially cognizable injury. *Initiative & Referendum*, 450 F.3d at 1088. But to qualify, the chilling must arise from an objectively justified fear of consequences; a subjective chill is not enough. *Id*. The Tenth Circuit has explained how a plaintiff seeking prospective relief based on a chilling effect can assert an injury that is sufficiently concrete and particularized for Article III purposes. Specifically, a plaintiff must show:

> (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. Though evidence of past activities obviously cannot be an indispensable element—people have a right to speak for the first time—such evidence lends concreteness and specificity to the plaintiffs' claims, and avoids the danger that Article III requirements be reduced to the formality of mouthing the right words.

Id. at 1089 (emphasis in original).

The Supreme Court has also recently held that "the threatened enforcement of a law creates an Article III injury" where a plaintiff alleges "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." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).[8]

[8] The Tenth Circuit has previously stated that "two types of injuries may confer Article III standing to seek prospective relief" in the First Amendment context. *See Ward*, 321 F.3d at 1267. "First, a plaintiff generally has standing if he or she alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder.'" *Id*. (quoting *Phelps*, 122 F.3d at 1326)). The second type of injury is where "a First Amendment plaintiff who faces a credible threat of future prosecution suffers from an 'ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment rights.'" *Id*. (quoting *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (emphasis in original)). This encompasses the types of injury claimed in both *Driehaus* (threat of enforcement) and *Initiative & Referendum* (chilling). But the distinction between these injuries is not entirely clear, as both

These cases establish that a plaintiff's First Amendment standing to seek prospective relief turns on a credible threat of enforcement or objectively justified fear of future consequences or prosecution.[9] "When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt*, 442 U.S. at 299-300 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

In *Driehaus*, the Supreme Court outlined some circumstances that amount to a credible threat of enforcement. *Driehaus*, 573 U.S. at 159-61. Many involved plaintiffs who had engaged in the precise conduct targeted by the law in the past, stated an intent or desire to continue doing so, and the circumstances suggested that the threat of future prosecution was credible. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding that plaintiff's concern for arrest was not "chimerical" where he had been twice warned to stop handbilling, warned he would be arrested, and his companion had been arrested for the same conduct); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (finding justiciable case or controversy because plaintiffs faced a credible threat of prosecution where they engaged in the targeted action before, would undertake similar action, and the government had prosecuted about 150 individuals for similar conduct and would not disavow prosecution of plaintiffs). The Supreme Court specifically noted that "past

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ultimately turn on a credible fear of future enforcement or action. The Court notes that in this case, the issue comes down to the same question, and that is whether Plaintiffs face a credible threat of enforcement sufficient to make their claimed injury objectively reasonable, concrete, and imminent, such that it satisfies Article III standing requirements. *See Initiative & Referendum*, 450 F.3d at 1087.

[9] Administrative consequences can suffice under this standard. In *Driehaus*, the Supreme Court evaluated a law that primarily, or at least initially, led only to administrative action. *Driehaus*, 573 U.S. at 165-66. The Supreme Court noted that "administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review." *Id.* at 165. In that case, administrative actions could also eventually lead to criminal prosecution, and the Supreme Court concluded "that the combination of those two threats suffices to create an Article III injury under the circumstances of this case." *Id*. at 166. Although the parties do not address the issue, the Court notes that the "ban" at issue here is essentially a trespass warning, which could lead to criminal consequences. *See* Tr. at 259:3-10; 261:20-23.

enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'" *Driehaus*, 573 U.S. at 164 (quoting *Steffel*, 415 U.S. at 459).

The Tenth Circuit has likewise stated that "evidence of past activities . . . lends concreteness and specificity to the plaintiffs' claims." *Initiative & Referendum*, 450 F.3d at 1089; *see also Wilson*, 819 F.2d at 945-47 (finding appreciable threat of injury flowing directly from statute prohibiting anonymous campaign literature where the plaintiff had been arrested (but not yet charged) for violating the challenged statute and wished to continue his conduct); *Ward*, 321 F.3d at 1266-70 (finding that a plaintiff challenging hate-crimes statute faced a credible threat of prosecution sufficient to confer standing where he had previously been charged under the same statute he was challenging).

By contrast, courts generally find no standing where a plaintiff has never been threatened with enforcement of a statute in the past, or future prosecution has been disavowed in some way. *See D.L.S.*, 374 F.3d at 974 (finding no objectively justifiable "chilling" based on anti-sodomy statute where statute had never been applied to the plaintiff or anyone else similarly situated, where prosecutor said that he would not file charges for the conduct the plaintiff sought to engage in, and similar statutes had been declared unconstitutional by the Supreme Court); *PeTA*, 298 F.3d at 1202-03 (finding no chilling where the challenged statute was initially misinterpreted as applying to the plaintiff's conduct, and thus there was no credible threat of future prosecution); *Faustin v. City & Cty. of Denver*, 268 F.3d 942, 947-49 (10th Cir. 2001) (finding the plaintiff lacked standing to seek prospective injunctive relief because there was no real and immediate threat that she would be prosecuted under the challenged statute in light of prosecutor's determination that her conduct did not violate the statute); *Phelps*, 122 F.3d at 1327 (finding the plaintiffs lacked standing to

challenge a statute that had not been applied against them, despite threats by prosecutor to prosecute the plaintiffs generally and past prosecutions of the plaintiffs under other statutes).

These cases counsel that standing based on a claim of chilling turns on whether there is a credible or objectively justified fear of future enforcement, and that question is largely dependent on whether there has been a past enforcement of the same statue or provision for the same conduct. With this guidance, the Court turns to each of Plaintiffs' claims to evaluate whether they have adequately pleaded sufficient factual allegations to establish standing at this stage of the case. *See Lujan*, 504 U.S. at 561.

a. Count I

In Count I, Plaintiffs assert a facial constitutional challenge to various permitting rules for Statehouse events, including that permits are required for any meeting or demonstration regardless of size, that permits must be sought 10 days in advance and cost $20, and that they must have a legislative sponsor and be related to a governmental purpose. Doc. 9 at 13. For relief, Plaintiffs seek an injunction barring implementation of these rules. *Id*. at 16.

Plaintiffs assert they have standing to bring this claim because the "Usage Policy has been applied to restrict Plaintiffs' past protest activity," its terms apply to activity other than just "events," and Hatcher specifically told Plaintiffs they "would need to comply with permit requirements in order to engage in a small group protest in the future." Doc. 31 at 5.

As to the first point—that the usage policy has previously been applied to restrict Plaintiffs' past protest activity—the Court notes that resolution of this issue has been complicated by the somewhat uncompelling comparison Plaintiffs draw between the conduct they engaged in on March 27 (claiming it was just a small five-person[10] protest) with the conduct that they wish to

[10] In addition to the three Plaintiffs, two others were involved in the March 27 protest. Doc. 9 at 10.

engage in in the future (a silent, small-group protest with handheld signs). Doc. 31 at 5-6. Plaintiffs neglect to note that their "small group" protest on March 27 involved them unfurling and hanging several two-story banners from the railings overlooking the Statehouse rotunda—conduct specifically prohibited by a rule that has not been challenged by Plaintiffs. *See* Doc. 14-2 at 7 (3.h.xix., prohibiting the hanging of banners in the Statehouse). This is significantly different than what they claim to want to do in the future, which is stand silently, individually or together in a group of three, with handheld signs. *See* Doc. 31 at 6.

The Court notes that the amended complaint also includes allegations that undercut any claim that any officials specifically enforced the permitting rules of the usage policy against Plaintiffs on March 27. The amended complaint states that no one told Plaintiffs what policy they broke during their March 27 protest. Doc. 9 at 10-11. At the same time, it also alleges that Day told them to not put the banners back down after he removed them, and Hatcher told them the next day that they "did something wrong" by unfurling the banners—suggesting that it was not the permitting rules that were the issue, but the prohibited hanging of two-story banners inside the Statehouse. *See id.*

But the amended complaint does contain one allegation that Hatcher told Plaintiffs that they would have to obtain a permit to engage in future protests. *Id*. at 11.[11] Plaintiffs also point to the plain language of K.A.R. 1-49-10, which states that "[n]o person shall conduct any meeting, demonstration or solicitation [in the Statehouse] without the prior permission of the secretary of

[11] Defendants argue that Hatcher's statement on this point must be understood in context, namely that he was speaking to what Plaintiffs must do if they wanted to stage an "event," which was not envisioned to encompass the three-person silent protest Plaintiffs claim to want to do now. *See* Doc. 23 at 9. The Court agrees that a plausible interpretation of Hatcher's statement and the usage policy is that a permit is required to stage a demonstration or "event" on the scale of Plaintiffs' March 27 actions, or some other such "event," but not required for the conduct Plaintiffs claim to want to engage in in the amended complaint (a three-person silent protest). But at this stage of the case, the Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Initiative & Referendum*, 450 F.3d at 1089 (quoting *Warth*, 422 U.S. at 501).

administration or the secretary's designee." This, at least literally read, would apply to Plaintiffs' proposed future activities: to "engage in individual and three-person demonstrations at the Statehouse without prior approval." Doc. 9 at 2. They likewise state, at least cursorily, that the regulations have had a chilling effect and "made Plaintiffs reticent to exercise their First Amendment rights to petition the government during the remainder of the legislative session and at future events taking place at the Statehouse during the Summer and Autumn of 2019." *Id*. at 12.

The Court finds that this narrowly passes the test enunciated in *Initiative & Referendum* for stating an injury based on a chilling effect at the pleading stage. *See Initiative & Referendum*, 450 F.3d at 1089. While the Court agrees that the context of the usage policy and its applications to "events" may ultimately be found to not apply to the activity Plaintiffs want to engage in, the plain language of this regulation does apply to "any" demonstration, and the permitting rules of the usage policy would thus seem to be applicable, at least as judged by the deferential standard at this stage of the litigation. Further, Hatcher's statement could plausibly be read as a threatened enforcement of the permitting rules against a future protest by Plaintiffs, such that they could credibly claim a threat of future enforcement.

In light of this, and because the "general factual allegations of injury resulting from the defendant's conduct may suffice" to show standing, *Lujan*, 504 U.S. at 561, the Court concludes that Hatcher's statement and the plain language of the regulation that requires prior approval for "any" demonstration can generously be read to instill in Plaintiffs a credible threat of future enforcement of the usage policy's permitting rules.[12]

[12] The Court notes that this preliminary determination is not finally determinative of this issue, and as the case progresses, so will Plaintiffs' burden. *See Lujan*, 504 U.S. at 561 (noting that "mere allegations" of standing will not be sufficient at summary judgment, and any controverted facts will have to be adequately supported by evidence at trial).

b. Count II.

Count II presents a clearer question. In Count II, Plaintiffs challenge the ban on personal, handheld signs inside the Statehouse. Doc. 9 at 14. But as explained above, no one has ever sanctioned Plaintiffs for having handheld signs in the Statehouse.[13] No one has ever even threatened Plaintiffs with enforcement of the provision of the usage policy that bars personal signs.[14] There is not even any allegation in the amended complaint that Plaintiffs have ever even attempted to bring a handheld sign into the Statehouse. And the amended complaint certainly contains no factual allegations that suggest Plaintiffs have ever faced a credible threat of enforcement of the handheld sign provision—other than a conclusory allegation that enforcement of the sign ban has been "threatened" against Plaintiffs. Doc. 9 at 14.[15] Nor can Plaintiffs claim a credible threat of future enforcement of the handheld-sign prohibition based solely on officials' reaction to them unfurling four two-story banners inside the Statehouse—the conduct is not analogous.

In other words, Plaintiffs are no more chilled from having personal, handheld signs in the Statehouse than any other person. "We have consistently held that a plaintiff raising only a

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[13] In response to the motion to dismiss, Plaintiffs attach Whitsell's incident report and claim that it says he told them "they violated Rule 3(h)(xxii) when he banned them from the building"—the provision of the usage policy prohibiting handheld signs. Doc. 31 at 9-10. As noted above, Defendants' motion to dismiss is a facial challenge to the amended complaint, which is proper because the elements of standing are "an indispensable part of the plaintiff's case" and the Court can "presume[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (1992) (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 889). Thus, the Court does not look outside the amended complaint to understand the basis of Plaintiffs' claimed injury. But more to the point is that Whitsell's incident report does not cite to any specific provision of the usage policy. It only states that he "told the group that in the Statehouse there are policies/rules about people having protest signs of any kind, especially four-story long banners, hung from the fifth floor, running the full length of the building." Doc. 31-4 at 1. Thus, given the context of Plaintiffs' March 27 conduct, Plaintiffs claim that Whitsell cited them specifically under Rule 3.h.xxii. is somewhat disingenuous to the extent it tries to imply that they were banned from the Statehouse for having handheld signs versus for hanging two-story banners in the rotunda (which is conducted covered by an entirely separate portion of the usage policy—3.h.xix.).

[14] In support of their preliminary-injunction motion, Plaintiffs curiously argue that "personal signage has consistently been permitted in the Kansas Statehouse Rotunda" and that until the March 27 protest, the policy against handheld signs "was one of non-enforcement." Doc. 20 at 8. Plaintiffs make this argument to try to avoid a heightened standard in establishing the need for a preliminary injunction. *Id*. at 8-9. But it also undercuts their standing

generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. Accordingly, Plaintiffs lack standing on Count II.

c. Count III

In Count III, Plaintiffs challenge an alleged official policy and practice empowering the Capitol Police to ban individuals from the Statehouse. Doc. 9 at 14-15. They assert that the "unconstitutional overbreadth and vagueness of Defendants' policy, coupled with its chilling effect on First Amendment rights and lack of due process protections, renders the policy facially unconstitutional and invalid in all applications." *Id.* at 15. The provision specifically challenged is K.A.R. § 1-49-9, which empowers Capitol Police to expel or eject from the Statehouse any person violating "any of these regulations." And as noted above, K.A.R. § 1-49-10 states that "[n]o person shall conduct any meeting, demonstration or solicitation" in the Statehouse without prior permission—the provision that Plaintiffs challenge in part in Count I as part of the permitting challenge. *See* Doc. 31 at 11.

For similar reasons to those discussed in Count I, the Court finds that Plaintiffs have standing to seek prospective relief regarding the Capitol Police's authority to issue bans. Officials

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argument on this claim. If it is true that officials do not enforce the handheld sign ban, that certainly cuts against any credible threat of future enforcement for Article III standing purposes. The Court notes that the motion to dismiss is focused on the well-pleaded allegations of the amended complaint and thus it does not—and need not, for the reasons stated above—rely on this in determining standing. But even if the Court found standing, this would certainly counsel against issuance of a preliminary injunction on Count II. If officials do not routinely enforce the handheld sign ban, then it is unlikely that Plaintiffs face any irreparable harm. Thus, Plaintiffs would not be entitled to a preliminary injunction on this claim.

[15] In response to the motion to dismiss, Plaintiffs suggest that the provisional agreement between the parties that resolved the need for a temporary restraining order "further supports their allegation of credible fear of enforcement if they silently displayed handheld signs." Doc. 31 at 10. The Court disagrees. The fact that the parties came to an agreement to at least temporarily resolve some of the pressing issues of this lawsuit does not demonstrate that Plaintiffs have a credible threat of future enforcement. Plaintiffs' claim about the handheld sign ban discussed *supra* in note 14 further undercuts this argument.

did ban Plaintiffs in the past (albeit for a very short time), and Plaintiffs have declared an intent to engage in activities in the future that could theoretically subject them to a ban (i.e. protesting in the Statehouse without prior permission). Given the statement by Hatcher that they need a permit to protest in the future, and considering the early stage of the litigation, the Court finds that Plaintiffs have shown at this stage standing to challenge a policy enabling Capitol Police to ban individuals from the Statehouse.

d. Count IV

Count IV alleges Defendants retaliated against Plaintiffs for exercising their First Amendment rights, including detaining Plaintiffs for an unreasonable amount of time, imposing a ban on Plaintiffs, and "harassing Plaintiffs through coercive and intimidating investigation tactics because they engaged in speech activity." Doc. 9 at 15. Defendants argue that Plaintiffs only seek prospective relief for this past conduct and that the requested relief will not rectify past retaliation. Doc. 23 at 15-16.

Defendants are correct that Plaintiffs do not seek any retrospective relief for this alleged past retaliation. Plaintiffs only seek "a preliminary and permanent injunction enjoining Defendants from retaliating against Plaintiffs in the future for past, present, or future exercise of their First Amendment rights." Doc. 9 at 17 (emphasis added). The Court agrees with Defendants that this prospective relief cannot rectify the alleged past injury. *Ward*, 321 F.3d at 1266 (stating that an element of standing is that "the injury will be redressed by a favorable decision"). Without redressability on this count, Plaintiffs lack standing.

Plaintiffs counter this by arguing that that Count IV clearly asserts a claim based on "a fear of future retaliation." Doc. 31 at 12. While Plaintiffs may state elsewhere in their amended complaint that they fear future retaliation, Count IV clearly attacks Defendants' past actions in

banning Plaintiffs from the Statehouse on March 27. Doc. 9 at 15 (detailing the alleged retaliatory actions of March 27). Thus, as pleaded, Count IV asserts claims of past retaliation, not a fear of future retaliation.[16]

Nor can past retaliation sustain a claim of future retaliation. "[A] plaintiff cannot maintain standing by asserting an injury based merely on 'subjective apprehensions' that the defendant might act unlawfully." *Finstuen v. Crutcher*, 496 F.3d 1139, 1144 (10th Cir. 2007) (quoting *Lyons*, 461 U.S. at 107 n.8). The Supreme Court has stated that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lyons*, 461 U.S. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

In *Lyons*, the plaintiff challenged use of chokeholds by police officers because an officer had illegally choked him in a past incident. *Id.* at 105. The Supreme Court held that, although Lyons had standing to claim damages from that past incident, that experience "does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.* The Supreme Court went on to note that Lyons would have to allege he would have another encounter with police, that all police choke any

[16] The Court also notes that Plaintiffs' allegation of retaliation is largely conclusory in that it simply calls the Capitol Police's conduct retaliatory and states that Defendants' actions "constitute unlawful retaliation for [Plaintiffs'] exercise of First Amendment rights to free expression, peaceable assembly, and petitioning for the redress of grievances." Doc. 9 at 12, 15. A First Amendment retaliation claim requires that a plaintiff show "that (a) he or she was engaged in constitutionally protected activity; (b) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (c) the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Van Deelen v. Johnson*, 497 F.3d 1151, 1155-56 (10th Cir. 2007). Although Plaintiffs have possibly pleaded adequate facts to meet the first two elements, there are no facts suggesting that Defendants banned Plaintiffs because of their exercise of constitutionally protected conduct, rather than for violating certain Statehouse policies, or for other reasons altogether. Having failed to plead sufficient facts to support a claim of past retaliation, Plaintiffs have certainly not pleaded a credible threat of future retaliation.

citizens with whom they have any encounter, and that the city authorized such conduct, in order to establish an actual case or controversy. *Id.* at 105-06.

Lyons is instructive here. In this case, Plaintiffs would have had, at a minimum, to allege that they would engage in protected activity and that Defendants would retaliate against them. This seems highly improbable given that the entire premise of Plaintiffs' case is that they desire—but have no immediate plans—to protest in the Statehouse because they fear the consequences. As explained above, Plaintiffs have established standing at this stage to challenge some of those policies in hopes of rectifying that chilling. But they have not established a "real and immediate, not conjectural or hypothetical," *id.* at 102 (internal quotations omitted), threat of future retaliation based solely on their past experience.

Plaintiffs also argue that they have standing because they have shown an ongoing violation by alleging that "enforcement of an unconstitutional law is threatened." Doc. 31 at 12. But this misses the point. Count IV challenges retaliation—not the ongoing enforcement of an allegedly unconstitutional law or regulation. Although Plaintiffs may allege that officials are enforcing the specific provisions of the usage policy or regulations they challenge (the subject of the standing analysis on the prior counts above), that does not establish any ongoing retaliation, which is separate conduct. *See NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 395 (5th Cir. 2015) ("It is true that a complaint must allege that the defendant is violating federal law, not simply that the defendant has done so." (emphasis in original)). To the contrary, Plaintiffs' amended complaint makes clear that Hatcher lifted the ban—which they claim was retaliatory—just one day after Whitsell imposed it. *See* Doc. 9 at 11. Accordingly, Plaintiffs have even failed to allege any ongoing retaliation that would permit them to seek prospective relief.

Accordingly, the Court finds that Plaintiffs lack standing to assert a claim for prospective relief on their retaliation claim.[17]

e. Tom Day

Defendants also very briefly argue that the Court should dismiss Day because none of Plaintiffs' allegations concern conduct by Day or the areas of the Statehouse controlled by LAS, which Day directs. Doc. 23 at 17. But the amended complaint clearly asserts that Day controls the use of the 3rd through 5th floors of the Statehouse—including the area where Plaintiffs staged their March 27 protest, which Day was involved in ending. *See* Doc. 9 at 5, 10; *see also Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014) ("Plaintiffs suing public officials can satisfy the causation and redressability requirements of standing by demonstrating 'a meaningful nexus' between the defendant and the asserted injury." (quoting *Bronson v. Swensen*, 500 F.3d 1099, 1111 (10th Cir. 2007))). Further, the usage policy states that individuals seeking to hold events on the 3rd through 5th floor of the Statehouse must make that request to LAS. Doc. 14-2 at 3. This suggests that Day, as director of LAS, holds the final say in who can hold an event on those floors—conduct Plaintiffs wish to engage in. *See Finstuen*, 496 F.3d at 1151 (noting that suit against a state officer with "some connection with the enforcement of the act" is sufficient (quoting *Dairy Mart Convenience Stores, Inc. v. Nickel*, 411 F.3d 36, 372-73 (2d Cir. 2005) and *Ex Parte Young*, 209 U.S. 123, 157 (1908))).

Finally, Defendants contend that Plaintiffs do not indicate that their proposed future activities will happen on those floors controlled by LAS. The Court disagrees. The amended

[17] It does not appear that Plaintiffs' preliminary-injunction motion seeks any relief on Count IV. *See* Doc. 3 at 2 ("This motion, however, is based exclusively on Plaintiffs['] facial constitutional challenges to the Statehouse regulations and usage policy."); *see also id.* at 28-29 (seeking an injunction enjoining Defendants from enforcing the permitting rules, the ban on handheld signs, and from issuing any complete premises bans pursuant to K.A.R. § 1-49-9 that are exclusively for violations of the usage policy). Accordingly, even if Plaintiffs did have standing as to Count IV, there would be no grounds to issue a preliminary injunction as to that count.

complaint simply states that "Plaintiffs seek to engage in individual and three-person demonstrations at the Statehouse without prior approval." Doc. 9 at 2. While Plaintiffs do not indicate specifically a desire to protest on the floors controlled by LAS, neither do they state an affirmative plan to only protest on the other floors. Accordingly, the Court finds that Defendants have not established adequate grounds to dismiss Day at this stage.

In sum, the Court dismisses Count II and Count IV of the amended complaint for lack of standing. The Court will proceed to evaluate Plaintiffs' preliminary-injunction motion on the remaining two claims—Count I involving the permitting rules of the usage policy and Count III involving the Capitol Police's authority to ban individuals from the Statehouse.

B. Motion for Preliminary Injunction

1. Plaintiffs' request for a preliminary injunction alters the status quo and thus the Court applies a heightened standard.

Having determined that at least some of Plaintiffs' claims survive the initial motion to dismiss, the Court now turns to Plaintiffs' motion for a preliminary injunction, but only as to the surviving claims. The Court denies the motion as to the dismissed claims.

A party seeking a preliminary injunction must show "(1) he is likely to succeed on the merits of his claim; (2) he will suffer irreparable harm if the injunction is denied; (3) his threatened injury outweighs the harm the grant of the injunction will cause the opposing party; and (4) if issued, the injunction will not adversely affect the public interest." *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247, 1252 (10th Cir. 2018). A preliminary injunction is "an extraordinary remedy" that requires a "clear showing" of an entitlement to relief. *Id*. (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

Courts disfavor three types of preliminary injunctions: (1) those that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford all the relief that

could be awarded after a full trial on the merits. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 977 (10th Cir. 2004) (en banc). A movant seeking these types of injunctions must satisfy a heightened burden. *Id*. Specifically, the movant has a heightened burden as to both the likelihood-of-success prong and on the balance of the harms. *McDonnell*, 878 F.3d at 1252.

Plaintiffs suggest they not have to meet this heightened burden because "Plaintiffs simply seek to be able to assemble in small groups without prior approval and display handheld signs inside the Statehouse." Doc. 20 at 7. But that does not address whether they are seeking to change the status quo.[18] Plaintiffs are seeking to stop enforcement of certain regulations and policies currently in place—to effectively order the state to change its current Statehouse policies. This would clearly alter the status quo. Accordingly, Plaintiffs have a heightened burden.

2. Plaintiffs have not met their heightened burden of likelihood of success on the merits.

a. Count I

Whether Plaintiffs have a likelihood of success on the merits of Count I first relates back to the standing analysis above. The Court has already concluded that Plaintiffs' standing to challenge the permitting policies is thin, even given this early stage of the case where it considers only the factual allegations in the amended complaint. As explained above, Plaintiffs' past conduct is very different than their proposed conduct. The premise of their case is that, as a result of them unfurling several two-story banners, they fear enforcement of permitting policies. Although the Court has found that, by a narrow margin at this very early stage, Plaintiffs have pleaded adequate

[18] To the extent Plaintiffs claim that their requested injunction would not alter the status quo because the personal sign ban is not currently enforced, *see supra* note 14, that argument is no longer relevant given the Court's finding that the Plaintiffs lack standing to challenge the personal sign ban. They make no such similar arguments to the policies underlying the surviving counts.

facts to overcome an initial standing inquiry, the Court is less convinced that they will be able to muster sufficient evidence to maintain their standing under the analysis above as their burden increases with the progress of this litigation. *See Lujan*, 504 U.S. at 561. Accordingly, the Court doubts Plaintiffs' likelihood of success because they very likely will be unable to sustain a more rigorous standing challenge.

Even if Plaintiffs have standing to pursue Count I, the Court finds that Plaintiffs have failed to carry their burden on the substantive analysis. A first step in evaluating a request for a preliminary injunction is evaluating whether the Plaintiffs have demonstrated a likelihood of success on the merits of their claim. *McDonnell*, 878 F.3d at 1252. As noted above, Plaintiffs' have a heightened burden on this element. *Id*. In evaluating the likelihood of Plaintiffs' success, "[t]he proper framework to apply in a facial challenge is . . . to apply the appropriate constitutional test to determine whether the challenged restriction is invalid on its face (and thus incapable of any valid application)." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1122 (2012). This does not require a showing that there are no set of circumstances that the law could constitutionally apply. *Id.* at 1124. Rather, it just measures the terms of the statute against the applicable constitutional standard. *Id.* at 1127.

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. But an individual's right to free speech is not absolute and "[e]ven protected speech is not equally permissible in all places and at all times." *Snyder v. Phelps*, 562 U.S. 443, 456 (2011). Courts employ a three-step process to analyze free speech claims: (1) determine whether the plaintiff's conduct is protected speech; (2) "identify the nature of the forum, because the extent to which the [defendant] may limit access depends on whether the forum is public or nonpublic"; and (3) determine "whether the

justifications for exclusion from the relevant forum satisfy the requisite standard." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

The parties do not dispute that this case involves constitutionally protected speech. Thus, the key step in the First Amendment merits analysis is determining the nature of the forum involved, because "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Four types of fora may exist on government property: (1) traditional public fora; (2) designated public fora; (3) limited public fora; and (4) nonpublic fora. *See Doe*, 667 F.3d at 1128. As discussed below, restrictions in the first two forums face a more exacting scrutiny, while those in the latter two require a less rigorous justification.

Plaintiffs primarily argue that the Statehouse is a traditional public forum. Doc. 3 at 10-14. The Court disagrees. Traditional public forums are those such as "streets and parks which have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Doe*, 667 F.3d at 1128 (quoting *Perry*, 450 U.S. at 45-46); *Celebrity Attractions, Inc. v. Oklahoma City Public Prop. Auth.*, 660 F. App'x 600, 604 (10th Cir. 2016) (stating that traditional public forums "are places like streets and parks, which 'by long tradition have been open to public assembly and debate'" (quoting *Verlo v. Martinez*, 820 F.3d 1113, 1129 (10th Cir. 2016))). While the Court acknowledges that the Statehouse is generally a place where debate and the exchange of ideas occurs by elected officials, the Court sees no similarity between the Statehouse rotunda—where elected officials have offices and which houses important historical artifacts—and a sidewalk or public park. To hold that the Statehouse rotunda—in close proximity to the offices of the governor

and legislators and other state officials—is a traditional public forum would open up the very center of the Statehouse to the same activities that can take place on a city street or public park. The Statehouse rotunda simply is not appropriate for such conduct, and Plaintiffs have not come forward any evidence to the contrary.

Some cases cited by Plaintiffs generally assert that statehouses are traditional public forums. But in reality, those cases focus on the grounds outside a statehouse. S*ee Harcz v. Boucher*, 763 F. App'x 536, 542 (6th Cir. 2019) ("Here, the parties agree that the appellants engaged in protected speech and that the Michigan State Capitol grounds constitute a public forum."); *Watters v. Otter*, 986 F. Supp. 2d 1162, 1170, 1173 (D. Id. 2013) (focusing on the outside grounds surrounding the statehouse); *Pouillon v. City of Owosso*, 206 F.3d 711, 715 (6th Cir. 2000) (focusing on the steps of city hall). Those cases support the notion that the grounds surrounding the Statehouse—greenspace, sidewalks, and a park-like setting—may qualify as a traditional public forum. But the Court need not decide that issue here. This is because Plaintiff Cole testified that he only wishes to protest in the Statehouse rotunda. Tr. at 33:1-3 ("Q. And can you be specific about where you plan to do your protest at the Statehouse? A. Particularly in the rotunda."). Plaintiffs Sullivan and Faflick did not testify at the hearing. All three Plaintiffs filed generally identical affidavits in support of the preliminary-injunction motion. *See* Docs. 3-3, 3-4, and 3-5. All state a generic desire to protest either "in" the Statehouse or "at" the Statehouse. But none specifically discuss protests on the sidewalks or around the Statehouse grounds. Accordingly, the Court concludes that the Statehouse grounds, or any other areas beyond the Statehouse rotunda, are not at issue for purposes of the preliminary-injunction motion.[19]

[19] Stated differently, because Plaintiffs express no desire to protest on the Statehouse grounds or anywhere other than the Statehouse rotunda, they suffer no irreparable harm from the lack of a preliminary injunction as to those forums.

The Court also disagrees with Plaintiffs that other courts have "unambiguously" held that statehouses are traditional public forums. Doc. 3 at 11. The cases cited do not support Plaintiffs' claim. For example, in *Chadbad-Lubavitch v. Miller*, the court did, as Plaintiffs quote, state that the statehouse rotunda in Georgia was "a true public forum [that] fundamentally defines the constitutional analysis." 5 F.3d 1383, 1392 (11th Cir. 1993). But that was in the context of determining whether the state would violate the Establishment Clause by allowing a particular religious display. *Id.* At the same time, the court noted that the parties did not dispute the lower court's finding that the statehouse rotunda at issue was a limited public forum, *id.* at 1391, while later stating that the rotunda would more precisely be described as a "designated public forum," *id.* at 1391 n.13. This is not "unambiguous."

Plaintiffs alternatively argue that the Statehouse rotunda is a designated public forum. "[G]overnmental entities create designated public forums when 'government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose[.]'" *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)). However, the "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802.

In support of their claim that the "Statehouse bears the indicia of a designated public forum," Plaintiffs cite to past rallies and protests held there. *See* Doc. 3 at 12 nn. 20-21. But the examples cited occurred outside the Statehouse, which tells the Court little about the nature of the Statehouse rotunda as a forum. Nor is the Court persuaded by Plaintiffs' argument that the Statehouse rotunda is a public forum simply because it is "large, open, and encompass[es] spaces

dedicated to pedestrian passage," that the space is "physically compatible with expressive activity," and that the rotunda is open to the public. Doc. 3 at 12-13. The same is true for many buildings, public or not. That does not make them the equivalent of a public sidewalk or street for First Amendment purposes. Finally, and perhaps most significant, is the fact that there is no indication that the state has intentionally opened the Statehouse rotunda for unlimited public discourse. That is evidenced by the very reason Plaintiffs bring this case—the permitting rules. Those rules set specific limitations on what type of events and on what terms can occur in the Statehouse. "[P]ermitting limited discourse," *Cornelius*, 473 U.S. at 802, is not an indication that officials wish the rotunda to be the equivalent of a sidewalk or public park. The Court therefore finds that Plaintiffs have not met their burden to show that the Statehouse rotunda is either a traditional or designated public forum. Because these forums carry a higher degree of scrutiny, *see Christian Legal Soc'y*, 561 U.S. at 679 n.11; *Doe*, 667 F.3d at 1130-31, Plaintiffs are unlikely to succeed on their claims if the forum is not either a traditional or designated public forum.

In their reply brief, Plaintiffs contend that they still are likely to succeed even if the Statehouse rotunda is a limited public forum.[20] In a limited public forum, courts employ a more relaxed standard to evaluate the regulations at issue. It "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46; *see also Christian Legal Soc'y*, 561 U.S. at 679 n.11 (stating that in a limited public forum, "a governmental entity may impose restrictions on speech that are reasonable and viewpoint-neutral"); *Farnsworth v. City of Mulvane*, 660 F. Supp. 2d 1217 1224-25 (D. Kan. 2009) ("Both the Supreme Court and the Tenth Circuit have applied nonpublic fora standards to 'limited

[20] Neither party has argued that the Statehouse rotunda is a nonpublic forum.

public fora' such that restrictions on speech must be reasonable and viewpoint-neutral."). In other words, in a limited public forum, the government can put reasonable limits on content based on the nature of the forum, so long as the distinctions are viewpoint neutral. *Summum v. Callaghan*, 130 F.3d 906, 916 (10th Cir. 1997).

Plaintiffs argue that the fact that the usage policy vests discretion to approve or deny a permit request or waive any requirements renders the permitting scheme invalid, even if the Statehouse rotunda is a limited public forum. Doc. 3 at 18; Doc. 20 at 13-15.[21] The Court notes Plaintiffs' contention that the cases from outside the Tenth Circuit suggest that the discretion allowed to OFPM and LAS to deny permit requests for events in the rotunda creates a sufficient presumption of viewpoint discrimination, such to the extent that any such discretion even in a limited public forum is unconstitutional.

Although the "Supreme Court has not incorporated the rule against unbridled discretion into the requirement of viewpoint neutrality," the Court agrees with the parties that some circuits have. *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 508 F.3d 94, 103 (2d Cir. 2007); *see also Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 387 (4th Cir. 2006) ("For this reason, even in cases involving nonpublic or limited public forums, a policy (like the one at issue here) that permits officials to deny access for any reason, or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny."); *Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) ("[B]ecause the potential for the exercise of such power exists, we hold that this discretionary

[21] Plaintiffs also claim the lack of exception in the permitting rules for small groups or individuals is unconstitutional, but that analysis is based on the presumption that the Statehouse rotunda is a traditional or designated public forum. Doc. 3 at 14-17 (arguing that the permitting rules "lacks narrow tailoring" because it does not have a small-group exception). But the Court has concluded that Plaintiffs have not shown that the Statehouse rotunda is a designated public forum, and thus that standard does not apply. Plaintiffs have not analyzed this feature of the policy under the reasonableness standard that applies if the Statehouse rotunda is a limited public forum.

power is inconsistent with the First Amendment."). The primary Tenth Circuit authority cited by either party on this issue is *Summum v. Callaghan*.

In *Summon*, a church wished to display a monument with its own religious tenets next to a monument of the Ten Commandments on a county courthouse lawn. *Summon*, 130 F.3d at 910. When the county denied the request, the church sued. *Id.* Although the court noted that "unbridled discretion" often "raises the specter of . . . viewpoint discrimination, *id*. at 919 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988)), it did not hold that such discretion is a de facto unconstitutional provision. In *Summon*, the body with discretionary authority had denied the plaintiff's request to place a monument in an area where another monument with a different viewpoint already existed. *Id.* at 910. The court noted shifting explanations as to why. *Id.* at 919-20. On remand, the court ordered a careful examination as to why the county denied the request, given that the discretion of the deciding authority made viewpoint discrimination a dangerous possibility. *Id.* at 920.

Although *Summon* expressed concern about the possible negative effects of unfettered discretion of decisionmakers, the Court notes that the Tenth Circuit did not hold that discretion in and of itself equaled a constitutional violation.[22] Indeed, it remanded for an evaluation of why the county denied the request. *See id.* Based on this, the Court finds that Plaintiffs have not established that the discretion afforded Day and Burnham automatically renders the permitting scheme unconstitutional.

Accordingly, the Court finds that Plaintiffs have not established a likelihood of success on the merits because they have not demonstrated that the Statehouse rotunda is a traditional or

[22] Even the Fourth Circuit, which has held that "boundless discretion over access to the forum violates the First Amendment," *Child Evangelism Fellowship*, 457 F.3d at 386, has stated that review of a grant of discretion cannot be a static inquiry. *Id*. at 387.

designated public forum, and thus they have not established that a heightened scrutiny applies. Further, they have likewise not persuaded the Court that they are likely to succeed if the Statehouse rotunda is a limited public forum.

b. Count III

Much like with Count I, the Court has serious doubts of Plaintiffs' likelihood of success on the merits of Count III because of the problems Plaintiffs face with standing. Because Plaintiffs' fear of another ban stems from their fear that officials will enforce the permitting policies against their proposed activity—which is very different from their past activity—the Court questions their fear of future enforcement. *See Initiative & Referendum*, 450 F.3d at 1089 (noting that standing turns on a "credible threat" of enforcement). This counsels against a finding of a likelihood of success on the merits for Plaintiffs' challenge to the Capitol Police's authority to ban individuals from the Statehouse.

Substantively, the Court notes that Plaintiffs are not challenging the reasonableness of their ban, or any particular ban. They are challenging the facial constitutionality of K.A.R. § 1-49-9, which states that "[a]ny person violating any of these regulations may be expelled and ejected" from the Statehouse. *See* Doc. 20 at 17-18. Notably, on its face, K.A.R. § 1-49-9 does not even implicate First Amendment conduct. *See Cornelius*, 473 U.S. at 797 (stating that the first step in analyzing a free-speech claim is determining whether the conduct is protected speech). Plaintiffs do briefly argue that the Capitol Police have "maintained a practice of banning individuals from the Statehouse for future violations they predict will occur as a result of their First Amendment activity." Doc. 3 at 24. But this is a largely conclusory statement, and it does not establish a likelihood of success on the merits. *Lyons*, 461 U.S. at 103 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied

by any continuing, present adverse effects." (quoting *O'Shea*, 414 U.S at 495-96)). Nor is it clear that two isolated incidents establish a policy or practice.

Plaintiffs also argue that K.A.R. § 1-49-9 is unconstitutional for the same reason the permitting policy is unconstitutional—because it allows police officers discretion in deciding who to ban. Doc. 20 at 18-19. But the Court has already concluded that Plaintiffs have not established that discretion in and of itself renders a provision unconstitutional. *See supra* section II.B.2.a. Further, at least one case relied on by Plaintiffs actually cuts against their argument that K.A.R. § 1-49-9 is unconstitutional because it affords Capitol Police discretion. *See Yeakle v. City of Portland*, 322 F. Supp. 2d 1119, 1127 (D. Or. 2004) (concluding that a provision requiring a "one-size-fits-all thirty-day exclusion irrespective of the nature of the violation" fails narrow tailoring).

Several of the cases relied on by Plaintiffs discuss specific bans against specific individuals, and the issue in the case was whether that particular ban was constitutional. *See, e.g. Barna v. Bd. of Sch. Dist.*, 143 F. Supp. 3d 205, 222-23 (M.D. Pa. 2015), *aff'd in part, vacated in part* 877 F.3d 136 (3d Cir. 2017) (discussing the constitutionality of "the imposition on an individual, such as Barna herein, of a ban on attendance and speech at meetings of a school board, city council, or other limited public fora"); *Doe*, 667 F.3d at 1134 (discussing a specific ban on sex offenders from using public libraries); *Surita v. Hyde*, 665 F.3d 860, 871 (7th Cir. 2011) (discussing constitutionality of a directive targeting an individual); *Brown v. City of Jacksonville*, 2006 U.S. Dist. LEXIS 8162, at *4-*5 (M.D. Fla. Feb. 17, 2006) (discussing a ban from city council meetings and on the rule authorizing bans "as applied").[23] Plaintiffs' claim is distinguishable because, as noted above, Plaintiffs do not challenge their own ban, but the authority

[23] Some of the cases cited by Plaintiffs also involved traditional public forums, further distinguishing them from this case, where Plaintiffs have failed to establish that the traditional public forum analysis applies. *See, e.g., Yeakle*, 322 F. Supp. 2d at 1127; *Sanchez v. City of Austin*, 2012 U.S. Dist. LEXIS 190686, at *9-*12 (W.D. Tex. Sept. 27, 2012).

of the Capitol Police altogether to remove individuals from the Statehouse. In short, nothing cited by Plaintiffs suggests they will be successful in their claim that a regulation that generally authorizes police powers is facially unconstitutional.

Further, Plaintiffs' arguments about due process similarly fail. That certain processes may be due in specific cases does not establish that K.A.R. § 1-49-9 is facially unconstitutional in all cases simply because it does not also contain detailed due-process requirements. Certainly, in specific instances, certain process might be due. But Plaintiffs are not challenging certain instances. *Folkers v. City of Waterloo*, 582 F. Supp. 2d 1141, 1153 (N.D. Iowa 2008) ("There is no 'one size fits all' formula for what process is due in all circumstances."). Accordingly, Plaintiffs have failed to establish their likelihood of success on the merits as to Count III.

3. Plaintiffs have failed to carry their heightened burden on the remaining injunction factors.

a. Count I

Plaintiffs dedicate all their briefing to arguing their likelihood of success on the merits, save for half a page dedicated to the remaining injunction factors. For the remaining injunction factors, they simply conclusively state that the other factors weigh in their favor and an injunction will not harm Defendants. Doc. 3 at 28.[24] The Court disagrees and finds that Plaintiffs have fallen short of carrying their burden for a preliminary injunction.

Plaintiffs' harm analysis is limited to the statement that it is "well-established that the suppression of speech, even for short periods, constitutes irreparable injury." Doc. 3 at 28. The Court acknowledges that "there is a presumption of irreparable harm for the loss of First Amendment freedoms." *Celebrity*, 660 F. App'x at 603. But, given that Plaintiffs have not

[24] Neither Plaintiffs' reply nor their supplemental brief addresses the remaining factors. *See* Docs. 20 and 30-1.

established a likelihood of success on the merits of their First Amendment claim, the presumption of injury does not apply. In other words, there is no presumption of irreparable harm for the loss of First Amendment freedoms where Plaintiffs have not shown a First Amendment violation.

Without a more fulsome harm analysis, the Court must guess at what potential irreparable harm Plaintiffs believe they will incur. To the extent they believe they will suffer harm in not being able to engage in their desired small-group or individual protests, that claim is overstated. In particular, Frank Burnham, the director of OFPM—the official in charge of event approval on the lower levels of the Statehouse—testified that his office does not require a permit application for a spontaneous gathering of people on the ground, 1st, and 2nd floors unless they specifically need reserved space or have other logistical needs like a podium, chairs, or an easel. Tr. at 230:9-231:7; Tr. at 243:20-244:9. Day likewise indicated that small groups of protesters would likely be allowed on the upper floors controlled by LAS without prior approval. Tr. at 120:7-16.[25]

Nor have Plaintiffs presented any evidence that officials have stopped small groups or individuals from entering the Statehouse without prior approval—or any evidence that such conduct would be consider an "event" under the permitting policy.[26] The Court acknowledges that K.A.R. § 1-49-10 does state that "[n]o person shall conduct any meeting, demonstration or solicitation . . . without the prior permission" of the Secretary of Administration. On its face, this

[25] As explained above, the only areas of the Statehouse Plaintiffs wish to protest in is the rotunda. There was no evidence suggesting a desire to protest outside the Statehouse, or in areas other than the rotunda.

[26] Plaintiffs' amended complaint and preliminary-injunction motion both discuss the incident in June 2018 where the Capitol Police briefly barred a group of protesters—not including any of the named Plaintiffs—from entering the Statehouse based on "unlawful assembly." Doc. 3 at 6. Tom Day's report on this incident actually stated that the individuals involved had a permit to protest on the south steps of the Statehouse but tried to move the demonstration into the building, when security barred entry for lack of a permit. Doc. 12-2 at 2. Security locked the doors after about "a dozen people disobeyed law enforcement officers by entering the doors and entering the foyer entrance leading to the security stations." *Id.* Plaintiffs also allege that in the confusion of this incident, an individual who had a planned meeting with his legislator was turned away from entry. Doc. 3 at 6. But that isolated incident does not suggest that officials routinely block individuals or small groups from entering the building just because they do not have prior approval.

regulation arguably requires even just one person to seek prior permission before holding a "demonstration." But the usage policy, which outlines the requirements for holding an "event" in the Statehouse, seems to more clearly relate to large or space-specific conduct. In particular, the event-request form for OFPM requires a requesting party to designate a specific space. Doc. 14-3 at 1-2. It asks about equipment required, such as tables, chairs, or a PA system. *Id.* It contemplates itineraries and presenters. *Id.* In sum, it simply seems to relate to "events" that are very different than the type of small and spontaneous citizen protests in the rotunda that Plaintiffs indicate they wish to engage in.

Finally, even if it did apply, both Day and Burnham also testified at the hearing that neither of them was aware of any permit application being denied based on viewpoint. Tr. at 131:7-24 (noting that the request is approved unless there is something wrong with it, and although it depends on the "nature of the request" and is "first-come-first-serve," "most requests are approved" and that there is no class of speaker prohibited from using the space controlled by LAS); Tr. at 207:11-18 ("To my knowledge, in my two years, we have not denied an application.").[27] The Court understands that Plaintiffs wish to demonstrate without prior approval. But under the current record, the Court does not find that Plaintiffs have shown that the policies they are challenging even apply to them, let alone that they are unconstitutional. On those facts, Plaintiffs have not shown a threat of irreparable harm.

The Court next compares the lack of irreparable harm to Plaintiffs to the harm to the state if it were to grant the injunction. Burnham further testified that the reason for the permitting rules for events in the Statehouse is to offer some degree of control over what is happening in the

[27] Burnham did add the caveat that he once denied a request by the Kansas Department of Transportation to land a helicopter on the Statehouse lawn, and then bring it into the rotunda. But that is obviously unlike any event Plaintiffs are suggesting, and OFPM denied it for "practical" reasons, not because of any particular viewpoint. Tr. at 242:3-9.

Statehouse "from a security standpoint; that it's just not a free-for-all where everybody can just come in and block the exits and do po-up whatever." Tr. at 219:14-220:22. Likewise, Day testified that the prior-approval rules give officials an idea of the logistical demands of the event so that officials can arrange for appropriate security, housekeeping, or technological needs. Tr. 125:19-126:13. These concerns are not unimportant. Removing any event policies would certainly effectively open the Statehouse doors to any and all activities—helicopters even. And balanced against the minimal harm Plaintiffs have shown, this balancing weighs against issuing an injunction.

b. Count III

Plaintiffs' claim in Count III challenges the authority of Capitol Police to issue complete premises bans. As explained above, Plaintiffs' analysis on the remaining injunction factors suffers from the same infirmities discussed above in Count I. Plaintiffs have not carried their burden.

Additionally, Plaintiffs seek a preliminary injunction enjoining Defendants from "[i]ssuing any complete premises bans pursuant to K.A.R. 1-49-9 that are exclusively for violations of the Statehouse usage policy." Doc. 3 at 29 (emphasis added). However, the Court notes that Hatcher, who oversees the officers at the Statehouse, Tr. at 250:2-4, testified that he instructs the officers under his command to only issue premises bans for actual violations of the law, that an arrest precede any trespass warning, and that the main consideration is whether the person poses a safety risk. Tr. at 260:11-22; 266:4-13 (explaining that Hatcher told Whitsell "that [Plaintiffs' conduct on March 27] is not something that we should be banning people for"). Hatcher specifically testified that

> my officer did not follow the policy that I wanted for to be followed. I wanted someone to create some type of crime, whether it's theft, whether it's stalking, threat, something of that nature. And those are the reason that I want people to be

> banned from the Statehouse. Not for things that are not criminal in nature.

Tr. at 283:21-284:4. Although he stated this was his "personal philosophy," he made it clear that he oversees Capitol Police and that is the standard that currently applies to imposing premises bans, which is why he reversed the ban Whitsell issued to Plaintiffs. Tr. at 284:6-24 (noting that Hatcher has the authority to unilaterally lift bans).

Given this, and given Plaintiffs' desire for an injunction only against bans for violations of the usage policy, the Court cannot find that Plaintiffs face any immediate or irreparable harm. *See McDonnell*, 878 F.3d at 1252. It is already the stated policy of the Capitol Police to not issue bans for conduct short of criminal violations—the precise relief Plaintiffs seek. Accordingly, they are in no danger of being banned for simple policy violations, and thus face no threat of immediate or irreparable harm.

4. Plaintiffs have not met their burden for issuance of a preliminary injunction.

Accordingly, the Court denies the Plaintiffs' motion for a preliminary injunction as to their surviving claims. Plaintiffs have failed to convince the Court of their likelihood of success on the merits of either surviving claim and have not established a threat of irreparable harm. Thus, Plaintiffs have not demonstrated that they are entitled to the "extraordinary remedy" of a preliminary injunction. *See id.*

III. CONCLUSION

THE COURT THEREFORE ORDERS that Defendants' motion to dismiss (Doc. 22) is GRANTED IN PART AND DENIED IN PART. Specifically, the Court dismisses Counts II and IV of Plaintiffs' amended complaint. Counts I and III remain at issue.

THE COURT FURTHER ORDERS that Plaintiffs' motion for a preliminary injunction (Doc. 3) is DENIED.

THE COURT FURTHER ORDERS that the parties' motions for leave to file supplemental briefs (Docs. 29 and 30) are GRANTED.

IT IS SO ORDERED.

Dated: August 30, 2019

/s/ *Holly L. Teeter*
HOLLY L. TEETER
UNITED STATES DISTRICT JUDGE