No. 23-926

IN THE

Supreme Court of the United States

NO ON E, SAN FRANCISCANS OPPOSING THE AFFORDABLE CARE HOUSING PRODUCTION ACT, *ET AL.*,
Petitioners,

v.

DAVID CHIU, IN HIS OFFICIAL CAPACITY AS SAN FRANCISCO CITY ATTORNEY, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

BRIEF OF CITIZEN ACTION DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether San Francisco's Campaign & Governmental Conduct Code §1.161(a)—its donor-disclosure rule—bears a "substantial relation" to its proffered ends of electoral transparency, which this Court recently held to require the government demonstrate that such rule is "narrowly tailored" to its "asserted interest."

2. Whether San Francisco's donor-disclosure rule and like regulations in other jurisdictions—especially secondary-donor disclosure requirements—have, or *will have*, a chilling effect on nonprofit giving during electoral campaigns *and* in general.

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INTEREST OF *AMICUS CURIAE*[1]

This *amicus* brief is submitted by the **Citizen Action Defense Fund** ("CADF"). CADF is an independent, nonprofit organization based in Olympia, Washington that supports and pursues strategic, high-impact litigation in cases to advance free markets, restrain government overreach, or defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs when the state enacts laws that violate the state or federal constitutions, when government officials take actions that infringe upon the First Amendment or other constitutional rights, and when agencies promulgate rules in violation of state law.

Amicus has a strong interest in the outcome of this case as it is committed to the protection of free-speech and free-association rights throughout the United States, and Washington in particular. Specifically, *amici* worry that if the lower court's opinion in this case stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.

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[1] Pursuant to Rule 37, counsel for *amicus* affirms that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of *amicus*'s intent to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

In San Francisco, certain political advertisements—aired on television, radio, or published in print—must contain a "disclaimer" listing the names of the top three donors over $5,000 to the nonprofit or political action committee ("PAC") sponsoring the advertisement. There are several carveouts and caveats. Even with these, however, the names of *indirect* donors must (in most cases) be included if they are among the top three. This includes donors who did not gift funds in anticipation or with the intent that the recipient organization would spend any of it on political advertising. San Francisco's draconian donor-disclosure rule bears at best an insufficient "substantial relation" to an "asserted" *legitimate* "government interest"—the "exacting" standard by which courts review donor-disclosure rules.

The public's so-called "informational interest" in learning the names of donors to causes now involved in political advertising does not bear a "substantial relation" to the purported governmental purpose of informing the public of who is funding such drives. *See* Arg. I. This failure is self-evident in the inclusion within the rule's ambit of *secondary* donors— "top donors" (of more than $5,000) who gifted money to a nonprofit with *zero* certainty that that nonprofit would subsequently use donor funds to engage in political speech. In too many cases, the donors listed in an advertisement's "disclaimer" will have had nothing to do with the group's campaign activities but

will now for all time be directly associated with such efforts.

Finally, San Francisco's donor-disclosure rule—like many of its kind—has and will continue to have a "chilling effect" on nonprofit giving in general, and to causes that garner political controversy in particular. *See* Arg. II. Chilling otherwise protected exercises of free-speech and free-association rights is always a slippery slope. It is especially dangerous, however, when the instinct to regulate exposes certain participants in the marketplace of ideas to social scorn, professional rapprochement, or even physical harm. All for advocating and funding civil or political causes that, though perhaps well within our societal norms to champion (not that those outside our societal norms should be subject to harsher disclosure rules), nonetheless generates substantial ire in response.

ARGUMENT

I. The "Informational Interest" Justifying Donor Disclosure Does Not Permit the Extent to Which San Francisco's Disclosure Rules Under §1.161(a) Infringe Upon Donors' Freedom of Association

Even where individuals' constitutional rights are at stake, the public still has a cognizable interest in learning the names of donors to political causes. This "informational interest," however, is far from limitless, especially in view of countervailing private interests:

> We are not unmindful that the damage done by disclosure to the associational interest of the minor

> parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances, fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.

Buckley v. Valeo, 424 U.S. 1, 71 (1976).

The public's "informational interest" in transparency applies in several contexts but is particularly fragile in the political realm, where today a person's real *or imagined* endorsement of certain policies can have grievous consequences for their personal and professional lives. Specifically, San Francisco's Campaign & Governmental Conduct Code §1.161(a) requires that each political advertisement name its "top three contributors" of $5,000 or more, though it does not differentiate between general and ad-specific donors. *Id.* That is, if one donates $5,001 to a "YogaLove PAC" to promote yoga *in general*, unless the donor specifically restricts the gift (and the recipient organization accepts it with such restrictions), that PAC is free (and perhaps expected, eventually) to spend at least some of its budget on political advertising. Individual donors, however, have no reason to know their donation would cause the publicization of their personal charitable preferences (some of which can be controversial without being offensive to American social norms or

legal principles[2]) and could expose them to undue risks.

The growing prevalence of donor-disclosure rules—with similar laws in place in Washington[3] and New York[4], to name just a couple—makes this an issue of emergent national interest for all manner of groupings glued together by a mutual interest in achieving specific social or political objectives—the *geist* of any eleemosynary endeavor. Exacerbating this emergent issue, donor-disclosure rules are also the cause of several circuit and low-court splits, which together instantiate political-advertising jurisprudence with even greater confusion than it already provokes.

From this standpoint, *Amicus* urges the Court to grant this case review and decide, once and for all, the *narrow* circumstances under which the public has an informational interest in learning the names of the top donors to an organization that so happens to be engaged in the business of political persuasion. To this end, *Amicus* points the court to a healthy mixture of case law, data-driven research, and scholarship that together strongly support imposing significant

[2] For example, even gifting to Susan G. Komen for the Cure—on the surface a highly reputable anti-cancer charity—can hoist unwanted attention on those disclosed as donors in light of accusations in the last decade that the health nonprofit overpays its administrators at the expense of actual medical research. Paul Karon, *Does Komen Need a Cure of Its Own?*, INSIDE PHILANTHROPY, Dec. 11, 2019 (https://tinyurl.com/ymfh44xw).

[3] RCW 42.17A.300 *et seq.*

[4] N.Y. Legis. Law §§ 1-h(c)(4); 1-j(c)(4)

guardrails on any jurisdiction's donor-disclosure rules.

Donor-disclosure rules can be particularly troubling when they are designed or applied unevenly. Though §1.161(a) applies to all organizations producing political advertisements, this is not always the case for rules governing political contributions. In Washington, for example, state law prohibits "insurer[s] or fraternal benefit societ[ies]" from contributing to candidate or PAC campaigns for the Office of Insurance Commissioner. RCW 48.30.110. The law says nothing, however, about labor unions making the same contributions. The far-from-uncommon tendency of campaign rules to take on partisan-political dimensions in practice counsels strongly against construing such laws liberally or—where they cannot be read any other way—arming them with a constitutional imprimatur.

Of course, whether the public's "informational interest" in donor disclosure outweighs individuals' free-speech and free-association rights requires fact-intensive inquiries that will inevitably vary from case to case. It is a balancing act, to be sure—though one without a single definitive test to guide it. Section 1.161(a) in particular suffers at least (though likely more than) one fatal flaw that cuts to the quick its chilling impact (discussed in greater detail in Argument II, below). To wit, it invites speculation regarding a political advertisement's link to both proximate and distant parties who might not even be aware that their donations are being used for political purposes.

In *Americans for Prosperity Foundation v. Bonta (AFPF)*, 141 S.Ct. 2373 (2021), this Court invalidated a California law similar to §1.161(a) and held that conditioning nonprofit advertising on disclosing the names of some of a subject group's contributors requires courts employ an "exacting scrutiny." Pursuant to this standard—just a step below so-called "strict scrutiny"[5]—the government must at least demonstrate "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). And under this rubric, "[a] substantial relation" between means and ends "is necessary but not sufficient to ensure that the government adequately considers the potential First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters." *AFPF*, 141 S.Ct. at 2384. As this Court earlier held, and then reaffirmed in *AFPF*:

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a

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[5] Strict scrutiny requires the government to prove that the rules employed are the "least restrictive means of achieving a compelling state," *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

> means narrowly tailored to achieve the desired objective.

McCutcheon v. Fed. Elec. Comm'n, 572 U.S. 185, 218 (2014).

Section 1.161(a) fails this test in multiple respects, especially when a court—properly—reviews "disclosure regimes" to ensure that their rules are "*narrowly tailored* to the government's asserted interest." *AFPF*, 141 S.Ct. at 2384 (emphasis added). This Court's contextual use of the term "narrowly tailored" for a less-than-"strict-scrutiny" standard tells a great deal about where disclosure rules fall within the broader constellation of campaign and electoral laws and regulations. Specifically, that courts will not pell-mell endorse such a regime simply because the government proffers a "substantial relation" between it and the ostensible governmental interest of informing the public who is "behind" this or that electoral venture. Again, §1.161(a) does *not* do this. For several reasons, as explained, but if for no other than the fact that it demands disclosure of donors who might well have *nothing whatsoever* to do with a group's political advertisements. For the case at hand, this means requiring San Francisco *at least* demonstrate that identifying the names and other personal information of donors to groups now engaged in political advertising does, in any substantial respect, influence voters' decision-making on which candidates and other ballot matters to support.

Even if there *were* other grounds upon which the City could, plausibly, link §1.161(a) with bona fide governmental interests, a blanket demand such as this can never be a narrowly tailored solution. All

§1.161(a) does is offer governments ready assistance in "impos[ing a] ceiling on campaign-related activities"—a decidedly *illegitimate* governmental interest. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 366 (2010). In metaphorical terms, the rule enables San Francisco to look "under the hood" and focus partisan scrutiny of certain donors over others—hardly "narrowly tailored to the government's asserted interest." *AFPF*, 141 S.Ct. at 2384. For §1.161(a) to "narrowly tailor" to San Francisco's asserted interest of alerting the public to who is funding what political causes—assuming, strongly *arguendo*, that this is a legitimate governmental purpose—at least demands the City differentiate between general donors whose contributions indirectly fund political advertising from those who gift monies to nonprofits with the express or otherwise obvious intent that such be used to further electoral ends.

One way to do this is to require disclosure of donors who fund nonprofits engaged in political advertising beginning, say, two weeks prior to election day. Another, as Petitioners suggested in the Ninth Circuit, is to reduce the rule's direct burden on speech—*e.g.*, transforming a 50-second commercial spot into a 20-second ad with 30 seconds of seemingly random names preceding it—by permitting subject organizations to instead publish donor names online. Of course, these are not panacea for the broader concerns with donors' safety or their rights to privacy, but at the very least, they present alternative means of furthering the goals of donor-disclosure, which, in turn, suggests that there are *narrower* ways for San Francisco to tailor such rules. And while "narrowly

tailored" in the exacting-scrutiny context does not *require* that the law or regulation in issue be the least burdensome means of reaching a government's prescribed ends, the existence of alternatives at least *undermines* the salience of the methods chosen. This is particularly so in view of this Court's finding, in *AFPF*, that exacting scrutiny in the donor-disclosure context requires a government "demonstrate its need for [disclosure] in light of any less intrusive alternatives." 141 S.Ct. at 2386. The existence of less burdensome alternatives therefore is not dispositive, but it is certainly more than merely hortatory.

In *Buckley v. Valeo*—a mainstay of this Court's campaign-finance jurisprudence—this Court held, *inter alia*, that the public's "informational interest" in learning donors' names is to "shed the light of publicity on spending that is unambiguously campaign related but would not otherwise be reported because it takes the form of independent expenditures" or the like. 424 U.S. at 81. While the public's interest in learning the names of political donors has some salience on this front—sufficient, perhaps, to permit *limited* interference with free speech and free association in the name of transparency—the degree to which §1.161(a) interferes with these constitutional rights is wholly unwarranted. On ballot initiatives or otherwise, members of the public are by and large competent to evaluate the sponsors of particular political advertisements without a concomitant need to know the names of several persons or organizations who may have even unwittingly helped fund such messages.

Section 1.161(a)'s blanket application—with few exceptions—to all eleemosynary groups' top-three donors above $5,000 belies any claims that it is narrowly tailored to San Francisco's asserted interest. Rather, it suggests—incorrectly—that the public is entitled to track individuals' philanthropic activities and, presumably, to impose upon these donors' extra-governmental pressures—like shaming—meant to discourage the targeted individuals' political involvement. Neither Petitioners nor *Amicus* can postulate any other purpose §1.161(a) serves. And, as this Court has previously held, "[t]he simple interest in providing voters with additional relevant information"—to the extent that the identity of charitable donors is relevant to the merits of a policy proposal or one candidate over another—"does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre v. Ohio Elecs. Comm'n*, 514 U.S. 334, 348 (1995). Section 1.161(a) falls decidedly within this impermissible ambit. It also risks chilling nonprofit activities *writ large*.

II. San Francisco's §1.161(a) and Comparable Donor-Disclosure Rules in Other Jurisdictions Chill Political Speech

As this Court succinctly put it in *AFPF*, 'when it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals." Instead, just the "risk of a chilling effect on association is enough, '[b]ecause First Amendment freedoms need breathing space to survive. Rules like §1.161(a) *will* have a chilling effect

on overall nonprofit participation, especially acute in view of §1.161(a)'s requirement, for example, that PACs and other campaign conduits publicize the names of "donors" who had *zero* foreknowledge that their donations would be spent on political advertising. Such rules systematically discourage the only form of political involvement readily available to most members of the public—namely, financial contributions. And it does so in a way that suffuses the entire campaign enterprise with an undue air of paranoia—fostering the notion that politics is bathed in "dark money" instead of serving as one among manifold other outlets for private participation in the public sphere. Put simply, §1.161(a) and like rules have a chilling effect on *all* eleemosynary activities, insofar as they discourage donations for fear that these funds will, even only *potentially*, be used in a political advertisement that then opens such donors to a public attention they neither fostered nor desired. For example, amidst Israel's ongoing—and politically divisive—anti-terrorist operations in the Gaza Strip, Jack Salmon, Director of Policy Research at the Philanthropy Roundtable, recently noted that American Jews are especially concerned that the disclosure of their contributions to "provide critical aid to Israel" and "fight anti-[S]emitism at home" could expose them to "threats, violence, and even death." Jack Salmon, *Donor Privacy Is Essential. Stop Asking Lawmakers to Force Disclosure*, CHRON. PHIL., Jan. 16, 2024.[6]

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[6] Available at https://www.philanthropy.com/blogs/letters-to-the-editor/donor-privacy-is-essential-stop-asking-lawmakers-to-force-disclosure.

This sort of unease is not limited to Jewish-American donors, of course—and nor should it be. Fears of public exposure inform—and adversely influence—a host of nonprofit and charitable causes. In the lead up to this Court's hearing *AFPF*, an ideologically and politically diverse group of *amici* worked together to overturn California's donor-disclosure rule, and almost to a brief expressed deep concern with the impact such laws would have on their ability to maintain necessary levels of donorship. For example, the National Association for the Advancement of Colored People ("NAACP") opined that California's "position in this case, if adopted by [the Ninth Circuit], would call well-established First Amendment protections into question and could substantially chill associational activities." Br. Am. Cur. NAACP in Support of Appellants, *Americans for Prosperity Found. v. Becerra*, 2017 WL 412295 at *1–2 (9th Cir., filed Jan. 27, 2017).

By the time the case finally reached this Court, these fears had reached a fever pitch. Groups as diverse as the Council on American-Islamic Relations ("CAIR"), the Philanthropy Roundtable, Judicial Watch, the Chamber of the Commerce, and the American Civil Liberties Union ("ACLU") all expressed concern. CAIR noted that, similar to the federal terrorist watchlist—inclusion on which is "not the result of criminal investigation and bear no relationship to arrests or convictions of any crime"—a functional "donor watchlist" also threatens "associational harms from the government labeling Muslims as 'suspected terrorists' and the like." Br. Am. Cur. CAIR in Support of Petitioners, *Americans for Prosperity Found. v. Becerra*, No. 19-251, at *14

(U.S. filed Feb. 24, 2021). The Philanthropy Roundtable, meanwhile, declared that "confidentiality in charitable giving is grounded in the constitutional freedom of association and is *one of the most important elements of philanthropic freedom* . . ." Am. Cur. Phil. Roundtable in Support of Petitioners, *Americans for Prosperity Found. v. Becerra*, No. 19-251, at *29 (U.S. filed Mar. 1, 2021). The conservative-leaning Judicial Watch concurred, expressing that donor-disclosure in general more often becomes a cudgel for ideological opponents than it does a shield to protect the public from so-called "dark money": "*Amici* . . . know well the fear of 'harassment' and 'community hostility and economic reprisals' that afflicts potential donors to organizations like them." Am. Cur. Jud. Watch & All. Educ. Found. in Support of Petitioners, *Americans for Prosperity Found. v. Becerra*, No. 19-251, at *5 (U.S. filed Mar. 1, 2021). The Chamber of Commerce similarly argued that "[w]ould-be donors have many legitimate reasons to insist on anonymity—'fear of economic or official retaliation, 'concern about social ostracism,' the [lack of] *[sic]* assurance 'that readers will not prejudge [a] message simply because they do not like its proponent,' or 'merely [the] desire to preserve as much of one's privacy as possible.'" Am. Cur. Chamber of Comm. in Support of Petitioners, *Americans for Prosperity Found. v. Becerra*, No. 19-251, at *26 (U.S. filed Mar. 1, 2021) (quoting *McIntyre*, 514 U.S. at 341–42). Finally, the ACLU (alongside several other legal advocacy groups) echoed all of these fears, concluding that "compelled disclosure of associational information to the public dramatically increases the risk of private retaliation against the members and supporters of potentially controversial groups," and is

"*more likely* to chill the exercise of associational freedoms . . ." than are "compelled disclosure[s] of information to the government on a confidential basis." Am. Cur. ACLU *et al.*, *Americans for Prosperity Found. v. Becerra*, No. 19-251, at *5 (U.S. filed Mar. 1, 2021) (emphasis added).

It is telling that, in *AFPF,* what united usual ideological opponents more than anything was the fear of *private* instead of *governmental* retaliation. The latter is also a concern inherent to donor-disclosure rules, but apparently is of less immediate concern when the question in issue is whether the vast and temperamentally, shall we say, *varied* American public is entitled to learn the names (and, with minimal research, the home addresses, workplaces, and family members) of donors to causes with which they might disagree. It is difficult to think of any "asserted government interest" that is so great—and so utterly unachievable by other means—it justifies methods that expose thousands of individuals to the mercury of the crowd.

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In his seminal work *Crowds and Power*, Austrian-born sociologist Elias Canetti pinpointed the important role Western *small-r* liberal constitutionalism plays in the advancement (and protection) of diverse ideas. Canetti noted that in a parliamentary (that is, constitutional) versus violent "crowd"—the latter being one without preset rules or otherwise subject to sudden change by fiat— "the member of an outvoted party accepts the majority decision, not because he has ceased to believe in his own case, but simply because he admits defeat." Far

easier a task when "nothing happens to him" as a result. The dissenter "is not punished in any way for his previous opposition" but likely "would react quite differently if his life [were] endangered." Elias Canetti, *Crowds and Power* (1960).

Canetti's words cut to the heart of the matter before this Court: Whether it will continue to abide by the government's enabling private control over individuals' speech and associational rights in lieu of its own constitutional impotence to do the same. *Amicus* thus again urges the Court to grant review. If for no other reason than to signal to public officials nationwide that they cannot, with a nod and a wink, outsource to the crowd the task of threatening with violence those whose voices they *wish* they could silence themselves.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant review of the Petition, reverse the Ninth Circuit panel, and remand the case for further proceedings in accordance with the Court's longstanding recognition that public limitations on individuals' free-association rights are to be designed and applied *narrowly*, in order to avoid chilling popular involvement in federal, state, and local electoral politics.

Respectfully submitted,

MARCH 2024

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