Nos. 23-926

IN THE

Supreme Court of the United States

NO ON E, et al.,

PETITIONERS,

V.

DAVID CHIU, et al.,

RESPONDENTS.

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

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether requiring political advertisers to name their donors' donors within their advertisements advances any important or compelling state interest; and

2. Whether San Francisco's secondary donor speech mandate violates the First Amendment freedoms of speech and association.

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

As part of its mission to defend fundamental rights, the Center works to protect the privacy of citizens participating in civil society, including defending the right of donors to privacy in their political associations. *See, e.g., Smith v. Helzer* (9th Cir. No. 22-35612); *Students for Life Action v. Jackley* (D.S.D. No. 3:23-cv-03010-RAL); *Chancey v. Ill. State Bd. of Elections*, No. 22 CV 04043, 2022 U.S. Dist. LEXIS 188097 (N.D. Ill. Oct. 14, 2022.

This case interests *amicus* because the constitutional rights of citizens to speak on matters of public concern is fundamental, and the government may only abridge that right via narrowly tailored means that further a compelling government interest.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission. All counsel received timely notice of *amicus'* filing.

SUMMARY OF ARGUMENT

Speech about elections, candidates, and issues is at the core of the First Amendment's protection for the marketplace of ideas. For that reason, any attempt by the government to stifle or control such speech deserves vigilant judicial scrutiny. The San Fransico requirement challenged by Petitioners, for one, places new and unprecedented burdens on the rights of citizens to speak about matters of public concern, demands that speakers fill their ads with extensive disclaimers for huge portions of their run times, converting ads from communications about candidates into advertisements of the speaker's contributors, and requiring they fill those disclaimers with the names of donors—and indeed, even donors' donors—even where that information is more misleading than edifying.

The Liberty Justice Center submit this *amicus* brief to emphasize that the issues raised by Petitioners are of increasing national importance. In just the past few years, many states, including Alaska, South Dakota, and Arizona, have adopted donor disclosure requirements much like the San Francisco rules challenged here. This Court will inevitably be obliged to confront the question sooner or later—and given the First Amendment rights at stake, should resolve it now rather than allow these abridgments of fundamental rights to continue unabated.

This Court should therefore grant review, and rule that San Francisco's requirement that political speakers disclose not just their donors, but also the entire genealogy of donations they've received, fails both the

strict scrutiny to which it is rightfully subject and the lesser scrutiny the Ninth Circuit chose to apply.

ARGUMENT

I. This case merits review because multiple states have recently passed similar laws, and San Francisco's regulations therefore present an important question of law with national implications for political speech.

The challenged San Francisco policy is new, but no longer unusual. In the past few years, many states have enacted similar laws requiring both on-air naming of donors and expanded disclosure of tangential donors to the donors of donors. In Alaska, 2022's Ballot Measure 2 requires that any ad disclaimer include not simply the name of the person who paid for the ad, but also the three largest donors, and also requires reporting not simply donors' finances, but the donors of those donors, and their donors in turn—out perpetually to the "true source" of the money. Also in 2022, Arizona followed up with its own Proposition 211, which similarly requires any speaker who buys a sufficient number of ads to disclose their "original" donor, however far afield that might take one. South Dakota, meanwhile, requires communications over just $100 to include the top *five* donors, on pain of criminal penalties. *Amicus* Liberty Justice Center currently represents plaintiffs challenging the laws in both Alaska[2] and South Dakota,[3] and are aware of at least two lawsuits

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[2] *Smith v. Helzer* (9th Cir. No. 22-35612).

[3] *Students for Life Action v. Jackley* (D.S.D. No. 3:23-cv-03010-RAL)

against the 2022 enactment in Arizona.[4][5] This First Amendment issue is therefore of increasing importance around the country, as additional jurisdictions continue to impose similar requirements on core political speech on matters of public concern.

Alaska's Ballot Measure 2 compels not only the disclosure of an entity's donors, but also any donors to the entity's donors, and in turn any donors to the entity's donors' donors—requiring secondary and tertiary disclosure of third parties who have not themselves chosen to speak or advocate in Alaska elections. The law requires that every donor disclose the "true source" of a donation, which the law defines as tracing every dollar back all the way to the human being or corporation who earned the money. Alaska Stat. § 15.13.400(19).

For example: Under prior law, if the Alaska State Chamber of Commerce ran an independent expenditure ad, it would have had to disclose its donors, such as a local chamber like the Anchorage Chamber of Commerce. Under Ballot Measure 2, the state chamber must still report all of its donors. And the Anchorage Chamber separately must report itself as the donor and report its members. And if the donors to the Anchorage Chamber included, say, a non-profit entity like the Humane Society or Boys & Girls Club or a church or synagogue, then the Anchorage Chamber would also have to report donors to *that* non-profit entity. And if the Humane Society received a donation

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[4] *Americans for Prosperity v. Meyer* (D. Ariz. No. 2:23-cv-00470-ROS)

[5] *Center For Arizona Policy v. Hobbs*, *available at* https://www.goldwaterinstitute.org/wp-content/uploads/2022/12/Verified-Complaint.pdf.

from the Anchorage Dog Lovers Club—well, you get the idea. In Alaska, all of this information must be lined up before the Anchorage Chamber's donation is made, because all of the information must be reported within *24 hours*, subject to fines of $1,000 *per day* for getting it wrong.

The State does not keep these sweeping and unprecedented disclosures in confidence, as it might if it were only using the information to further its interest in enforcing its laws. Rather, Alaska posts donor reports online, so anyone can see a donor's name, home address, and occupation.[6] Under Ballot Measure 2, anyone who gives money to an organization that then donates money to some other entity that then makes independent expenditures can find their name posted on a government website as a supporter of a cause or candidate—exposing them to harassment or retaliation based on their ostensible support of a candidate they might never have even heard of. As a result, it is safe to predict that some organizations will decline to participate in political speech at all rather than see their members (and their members' donors, and so on) disclosed.

South Dakota, meanwhile, does not require such genealogies but does require extraordinary on-ad disclosures by nonprofit groups that communicate about candidate, ballot measures, or even officeholders: any nonprofit spending more than $100 "for an independent communication expenditure that concerns a candidate, public office holder, ballot question, or political

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[6] *See* Alaska Public Offices Commission, "Search Reports", https://doa.alaska.gov/apoc/SearchReports/

party," to "append to or include in each communication a disclaimer that clearly and forthrightly" states ""Top Five Contributors,' including a listing of the names of the five persons making the largest contributions in aggregate to the entity during the twelve months preceding that communication." S.D. Codified Laws § 12-27-16. The statute applies to any communication at any time, not just during a limited time before an election. S.D. Codified Laws § 12-27-16.

The failure to list those 'Top 5 Contributors' is a *crime*—a nonprofit that fails to make the disclosure commits a Class 2 misdemeanor. S.D. Codified Laws § 12-27-16. A subsequent offense within one calendar year is a Class 1 misdemeanor. *Id*. The law also empowers the Attorney General to demand access to a nonprofit's records if necessary for such enforcement. S.D. Codified Laws § 12-27-36. And the law separately authorizes the Attorney General to bring actions for civil penalties of up to $2,000 per violation for violations of the independent expenditure statute. S.D. Codified Laws § 12-27-43.

Like Alaska's ballot measure, Arizona's Proposition 211, Ariz. Rev. Stat. § 16-972, requires organizations that speak during elections to disclose the source of "original monies."

Both Alaska and Arizona define the "original" money from the "true source" as essentially the personal or business income of some originating person, and like San Francisco require that their identities be not simply revealed to the government for audit purposes, but be publicized, regardless of whether the individual gave the organization money for this purpose

at all. In this regard Arizona may improve on the Alaska example in providing that those unwitting donors receive notice and an opportunity to opt out of having their funds used for political purposes—but in return it imposes more onerous recordkeeping requirements, forcing even innocent small donors to keep records of their transactions for five years. *See* Ariz. Rev. Stat. § 16-972.

The disclosure schemes enacted in San Francisco, Alaska, Arizona, and South Dakota all impose similar requirements, but each has its idiosyncrasies, and it's possible that this Court might even come to different conclusions on each. But this Court can and should provide definitive guidance on the matter, so that both these and jurisdictions that consider inevitable similar schemes in the future can understand the First Amendment's limits on these kinds of restrictions.

II. This Court should reverse the decision below because it is inconsistent with the precedents of this Court.

Requiring speakers to track their donors' money all the way back to some supposed origin point violates the freedom of private association by compelling independent expenditure groups to keep track and disclose not simply their own donors, but also donors to those donors, and donors to those donors' donors, reaching out infinitely—and then compelling speech by requiring those names be disclosed on the face of the ad, no matter how much of the ad that information monopolizes. These requirements violate free association, and even require disclosure of donations that were not

made with any intention of engaging in electoral spending.

A desire for anonymity when engaging on issues, whether as a speaker or a donor, may be motivated "by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). A business or association as well as an individual might wish to maintain that privacy. *ACLU of Nev. v. Heller*, 378 F.3d 979, 990 (9th Cir. 2004). "[D]epriving individuals of this anonymity is a broad intrusion" into their private affairs. *Id*. at 988.

Privacy is no less important for being ephemeral. It "has always been a fundamental tenet of the American value structure." *California v. Byers*, 402 U.S. 424, 450 (1971) (Harlan, J., concurring) (quoting Robert McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 210). Privacy is an end in itself that courts must respect and protect. *United States v. Connolly*, 321 F.3d 174, 188 (1st Cir. 2003). Privacy interests are especially pronounced when private financial information is involved. *See Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 695 n.8 (9th Cir. 1995). "[O]ur nation values individual autonomy and privacy," *United States v. Valdes-Vega*, 738 F.3d 1074, 1076 (9th Cir. 2013), and the loss of that privacy is in itself a substantial burden.

Requiring expansive genealogies of the sources of donations invades this protected privacy interest. And these rules are not limited to large or influential contributors. Alaska's version requires any group that receives as little as $2,000 to disclose what the law calls

the "true source" of the funds. Under this framework, the "true source" of the money is "a person or legal entity whose contribution is funded from wages, investment income, inheritance, or revenue generated from selling goods or services," as opposed to someone who "derived funds via contributions, donations, dues, or gifts," which Alaska terms an "intermediary."

The First Amendment restricts burdensome disclosure requirements because "each governmental demand for disclosure brings with it an additional risk of chill." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) ("*AFPF*"). "True source" requirements burden speech in several ways. First, they demand of recipients that they disclose information they might not even have access to. Entities are not generally in the business of tracking the finances of other entities—indeed, donor lists for nonprofit entities are valuable and closely held pieces of information that implicate both associational privacy and also the ability for groups to compete in the marketplace for donations—the equivalent of demanding that companies publicize their sales leads.

Second, compelled secondary disclosure chills speech by limiting who an independent expenditure group can solicit funds from. These "true source" requirements are a departure from accepted practice around the country, and many potential donors will refuse to participate in elections rather than severely alter their usual operations, which are conducted on the basis of donor privacy.

Third, these requirements sweep up innocent third parties who are nowhere near any nexus to the given

elections—an arbitrary citizen who gave funding to a group they were familiar with, only to discover later that their privacy has been invaded not because of who they gave it to, but because some portion of money they gave to an organization made its way to another group—which the donor might never have heard of, whose speech the donor might even disagree with—that engaged in political speech in Alaska or San Francisco.

Indeed, "true source" requirements are not only burdensome, they are *misleading*, in that they associate donors with causes they may have no interest in at all—even causes they oppose. People give money to a particular entity for a particular purpose, among many purposes that entity may have. Jane Doe may donate to a libertarian-minded nonprofit because she supports that group's libertarian position against foreign military interventions. She will be very surprised to find her name among the funders of ads opposing an increase in San Francisco's tax rates, a policy position she has never considered and happens to disagree with. But it turns out the group she donated to also provides funding to independent expenditure groups that advocate for lower taxes.

In this sense, a "true source" requirement doesn't simply punish association; it also compels association, affiliating donors with whichever cause or speaker somehow comes into possession of the funds, regardless of the original donor's intent or beliefs. This compulsory association likewise violates the First Amendment because "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary

affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943) (internal quotation marks omitted)).

Moreover, there's an inherent vagueness in the ways these laws attempt to distinguish between donations and income. Restrictions on speech require "a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed.'" *Grayned v. City of Rockford*, 408 U.S. 104, 124 n.5 (1972) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963)). Avoiding vague and manipulable language is necessary to "assure[] [courts] that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." *Id.* But these laws display no such precision and instead establish a false dichotomy between income and donations. In the nonprofit sector, donations are revenue, and the attempt to bifurcate the two concepts collapses into confusion. Do these laws' inclusion of inherited money include inheriting a corporation that has existing cash on hand that a donor decides to direct to a favored cause? Is the heir in that case a true source, or does one need to trace the corporate treasury's funds back to an even 'truer' source?

Further, San Franciso's requirement that organizations list their top three donors on their advertisements imposes "government-drafted script" on what should be their own independent speech. *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2371 (2018). Petitioner is

compelled to alter its advertisements to incorporate the government's message just as the pregnancy centers in *NIFLA* were forced to alter their speech to incorporate the government's notice. By requiring crisis pregnancy centers to post a notice about California's state sponsored abortion services, California's licensed clinic notice effectively altered the message of crisis pregnancy centers seeking to counsel pregnant women against having an abortion. Similarly, donor disclaimer requirements like San Franciso's force Petitioner to alter its advertisements that seek to inform or convince people on a particular political issue, by placing the focus of the communication instead on the identity of Petitioners' donors' donors' donors.

If anything, the speech alteration is even more severe here, for instead of merely posting a government-provided notice, petitioners must change their own speech to accommodate the government's. Nor was there any suggestion California's poster took up one-third of the clinic's wall space, as San Francisco's mandated disclaimer can take up one third of an advertisement's time. Such restrictions are especially offensive to the First Amendment because they pertain to speech about elections—an area "integral to the operation of our system of government," where the First Amendment should have "its fullest and most urgent application." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (cleaned up).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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