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 United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION, MANHATTAN INSTITUTE, AND THE FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and diverse society.

In particular, AFPF has an interest in this case because laws like the San Francisco disclosure and disclaimer law threaten the rights of speakers to speak anonymously and the rights of individuals to associate freely for whatever reason they wish—whether temporarily to achieve a single goal, indefinitely for discrete but ongoing interests, or long-term with consistently aligned organizations. Civil society requires Americans to be open to associating at will and changing associations regularly to solve issues or simply to express themselves. Donors to large, heterodox organizations may share only a portion of those organizations' views. The San Francisco law places the ability to support diverse

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF notified counsel for all parties of its intent to file this brief on March 21, 2024. Petitioners consented to the filing and Respondents graciously stated that they would not object to the filing as long as AFPF made clear to the Court that notice was provided seven days before filing.

projects and opinions at risk by implying that potentially unrelated groups are linked, chilling participation to only those circumstances in which all participants are aware of each other are willing to shoulder all the views of the others—excluding temporary or limited-purpose cooperation for fear of being painted with a broad brush. Driving civil society further into tribalism will operate to the detriment of us all.

The Manhattan Institute ("MI") is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of law and opposing government overreach, including in the marketplace of ideas. Its scholars regularly speak on college and graduate-school campuses, and likewise have faced protest, shutdown, and cancelation. MI also runs the Adam Smith Society, which brings together business-school students and alumni for discussion and debate on how the free market has contributed to human flourishing and opportunity for all.

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. FIRE defends First Amendment rights both on campus and in society at large. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioners in No. 22-555 and Respondents in No. 22-277, *NetChoice v. Paxton*, Nos. 22-555 & 22-277 (2023); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and

Reversal, *Counterman v. Colorado*, 600 U.S. 66 (2023).

FIRE is concerned that the challenged San Francisco law and others like it both chill and compel speech in a way that reinforces an "us versus them" mentality. These laws not only violate the First Amendment, they reinforce the prevailing dogma that all Americans must pick a side and forever be associated with it, no matter the issue. But neither people nor organizations are monoliths, and treating them as such will only worsen the heated rhetoric that predominates our political discourse. Properly applied, the First Amendment prevents that kind of mandated tribalism, and this Court should intervene.

SUMMARY OF ARGUMENT

The ways of attempting to circumvent the First Amendment are limited only by the ingenuity of politicians and lawyers, a resource not in short supply. All they must do is add an adjective here, a self-referential definition there, or perhaps an extra procedural step, and clear precedent can be distinguished or ignored, allowing rigorous donor disclosure protection to be bypassed by asserting a generic government interest in information or by defining the relevant population through complex parameters without reference to necessary causation.

This case presents one such instance in which donors to nonprofits (and donors to donors) may be swept up in a discloser and disclaimer scheme and included on the face of advertising that supports or opposes a ballot initiative, regardless of whether the donors support the advertising or are even aware of it.

If allowed to stand, this process would gut the donor associational rights recognized by this Court in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) ("*AFPF*"), while imposing additional First Amendment injury by compelling speech and association—or the appearance thereof—that may not even be accurate. For donors who support a charity's general mission, or a portion of that mission, and who may not police the full range of the charity's interests or know who other donors to the organization are, surprise disclosure imposes a shocking price, while anticipated disclosure re-imposes the chill on association that *AFPF* recognized and minimized.

In *AFPF*, the Court held that the exacting scrutiny standard requires narrow tailoring, or a "means-end fit" between a donor disclosure mandate and the sufficiently important governmental interest the mandate is meant to promote. *AFPF*, 141 S. Ct. at 2385–86. In *AFPF*, exacting scrutiny was applied to the California Attorney General's mandate for blanket disclosure of donors to charitable organizations. *Id*. at 2385. But *AFPF* was not limited to narrow categories of charities or particular formats of disclosure; nor did it include loopholes that could allow the government exceptions that, if publicly known, would chill First Amendment exercise, and if not known, would subject donors to surprise disclosure and implied association with unrelated messages and parties.

Imposing these complexities on people who simply want to support a cause with no purpose or intent to finance a particular communication, imposes an unconstitutional burden on speech and association. "The First Amendment does not permit laws that

force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 324 (2010) (cleaned up). This prohibition against vague and prolix laws should forbid laws that expose donors to disclosure for speech the donor did not intentionally fund. Without a tight relationship between the donor and the speech, the means-end test cannot be satisfied.

This case is not alone. Since *AFPF* was decided, the First Circuit has also blessed a disclosure scheme that lacks means-ends connection. In *Gaspee Project v. Mederos,* rather than ensure causation between the First Amendment burden and the government's goal, Rhode Island's disclosure and disclaimer scheme replaced a means-end test with an elaborate set of parameters regarding who would be affected by the scheme rather than *why* they would be affected—essentially substituting narrow application for narrow tailoring. 13 F.4th 79, 82, 88–9 (1st Cir. 2021).

Adding another layer of injury, the San Francisco law empowers the public to inform on anonymous speakers who could then be subjected to civil, administrative, and criminal penalties. This is not the degree of First Amendment protection envisioned by *AFPF* and, if allowed to stand, would gut donor privacy by allowing a complete decoupling between donor intent and any downstream use of funds.

BACKGROUND

The San Francisco Sunlight on Dark Money Initiative, changed the "disclaimer requirements for advertisements paid for by independent political committees" to include "a disclaimer listing their top three contributors of $5,000 or more" and if "any of the top three major contributors is a committee, the disclaimer must also disclose both the name of and the dollar amount contributed by each of the top two major contributors of $5,000 or more to that committee." *No on E v. Chiu*, 85 F.4th 493, 498–99 (9th Cir. 2023). Advertisements regarding a ballot initiative now must include disclaimers with up to nine "contributors" listed.

"Print ads must include the disclaimers in text that is 'at least 14-point, bold font'" and "Audio and video advertisements must begin by speaking the required disclaimers of major contributors and secondary major contributors." *Id.* For video or audio ads, this means that over 30-seconds of disclaimer must be announced before the substance of the message is reached, absorbing the bulk of any ad under 60 seconds long. Print ads are "largely or entirely consumed by an even longer 'disclaimer' when printed." Pet. at 1. Thus, either the majority of the speaker's message is lost to the City's compelled message or speakers must spend more funds on longer ads to deliver the City's message—assuming any listener could tolerate the disclaimer long enough to reach the substance of the message. For listeners who can't hack the legalese, the message is lost altogether.

There is no exclusion for donors who are not aware of the message and no assurance that donors had any intent to support it. Pet. at 2. Moreover, the City

maintains a database of financial disclosures, which must also be announced within the ad. *No on E*, 85 F.4th at 498–99.

These mandates are in addition to existing California law requiring disclosure of donations to "committees" and on-ad disclaimers of the committee paying for an ad and the top-three contributors of $50,000 or more. *No on E*, 85 F.4th at 497–98.

Violations of the San Francisco law "are punishable by civil, criminal, and administrative penalties." *Id.* at 499. "Any individual who suspects a possible violation may file a complaint with the Ethics Commission, City Attorney, or District Attorney." *Id*.

ARGUMENT

I. *AMERICANS FOR PROSPERITY FOUNDATION V. BONTA* CONTROLS AND EXACTING SCRUTINY MUST BE APPLIED TO DONOR DISCLOSURE.

AFPF v. Bonta controls the San Francisco Sunlight on Dark Money Initiative's demand for donor disclosure ("disclosure provision"), yet the Ninth Circuit did not faithfully apply its holding. Like the "blanket demand for Schedule Bs" in *AFPF*, the disclosure requirement here is subject to exacting scrutiny. *AFPF*, 141 S. Ct. at 2385. The second provision, which requires donor identification to be prominently placed in political advertising ("disclaimer provision') in lieu of whatever message the speaker would prefer to deliver is subject to strict scrutiny in accordance with traditional compelled speech.

The disclosure provision here, unlike the purportedly confidential[2] disclosure in *AFPF*, does not appear guarantee confidentiality. Accordingly, the associational chill identified in *AFPF* applies with even greater force where disclosure to the general public is not only presumed, but is facilitated.[3] *Id.* at 2388 ("Our cases have said that disclosure requirements can chill association even if there is no disclosure to the general public.") (cleaned up).

The government asserts a general informational interest in donors supporting or opposing a ballot initiative but has not identified the means-end fit required by narrow tailoring. *No on* E, 85 F.4th at 505.

The concerns that informed this Court's holding in *AFPF* are likewise present here, chilling First Amendment rights of donors and speakers in the face of government demands to know who is speaking.

A. *AFPF* Held that Exacting Scrutiny is the Proper Standard for Compelled Disclosure of Donor Information.

AFPF v. Bonta was a facial challenge to a regulation requiring charities operating in California to register with the Attorney General's office and disclose major donors by filing their IRS Form 990. *AFPF*, 141 S. Ct. at 2379–80. The disclosure requirement was not related to any specific activity, speech, or issue area, but solely to annual registration renewal. *Id.* at 2380. The case came before the Court with the contours of the applicable standard of review unsettled. *Id.* at 2382–83. While the lower courts had

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[2] *AFPF*, 141 S. Ct. at 2387.

[3] *See* www.sfethics.org for search function.

nominally applied exacting scrutiny, there was disagreement whether narrow tailoring was required.

Americans for Prosperity Foundation, a public charity that was subject to the regulation, challenged the blanket donor disclosure requirement on the basis that it burdened the First Amendment associational rights of its donors and that exacting scrutiny required more than the lenient standard applied by the Ninth Circuit. *Id*. at 2380–81.

This Court held that, at the least, exacting scrutiny applies to compelled disclosure requirements and that narrow tailoring is a necessary element of that standard. *Id*. at 2383. Exacting scrutiny thus lies between strict scrutiny, with its least restrictive means test, and the "substantial relation" standard noted in *Doe v. Reed*, 561 U.S. 186, 196 (2010), to require narrow tailoring, but not least restrictive means. *Id*. at 2383–84.

B. *AFPF* Was Not Limited to Charities, But Relied Heavily on Political Advocacy Disclosure Precedent.

The precedential bases for applying exacting scrutiny to donor disclosure were derived largely from cases protecting political speech and association, such as *NAACP v. Alabama ex rel. Patterson*, because "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as other forms of governmental action" *AFPF*, 141 S. Ct. at 2382 (citing 357 U.S. 449, 462 (1958)). The Court also relied on cases reviewing electoral disclosure regimes but made clear that "exacting scrutiny is not unique to electoral

disclosure regimes." *Id.* at 2383[4] ("As we explained in *NAACP v. Alabama*, it is immaterial to the level of scrutiny whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.") (cleaned up). And the government cannot bypass constitutional protection by defining labels for new categories of speech to exclude them from the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("a State cannot foreclose the exercise of constitutional rights by mere labels"). Thus, exacting scrutiny applies squarely to disclosure regimes across the board, including to the political advocacy regime here.

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[4] *See Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963) ("an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights."); *Button*, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect."); *Bates v. Little Rock*, 361 U.S. 516, 527 (1960) (the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause"); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 245 (1957) ("when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas" compulsory process must be carefully circumscribed.).

C. Exacting Scrutiny Requires Narrow Tailoring.

Under *AFPF*, "exacting scrutiny requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure requirement be narrowly tailored to the interest it promotes". *AFPF*, 141 S. Ct. at 2385 (cleaned up). Thus, "even a legitimate and substantial" government interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id*. at 2384 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

The narrow tailoring element is critical in cases involving burdens on the First Amendment. *AFPF* 141 S. Ct. at 2384 (quoting *Button*, 371 U.S., at 433) ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'"). And, as *AFPF*'s reliance on electoral cases for its description of narrow tailoring shows, the election context provides no exemption from narrow tailoring. In *McCutcheon v. Federal Election Commission*, for example, a plurality of the Court explained that "[i]n 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 means narrowly tailored to achieve the desired objective." 572 U.S. 185, 218 (2014) (cleaned up).

In *AFPF*, a single layer of blanket donor disclosure failed narrow tailoring because it was overbroad and lacked any "tailoring to the State's investigative goals" *AFPF*, 141 S. Ct. at 2387. Here, of course, one must ask how an even more attenuated multi-level disclosure requirement could be tailored to achieve a vaguely defined interest in "informing voters about who funds political advertisements". *No on E.*, 85 F.4th at 505. To comply with narrow tailoring, the chill at each donor level must be considered in light of whether disclosure would achieve any informational interest, much less provide information that would be correct and material. As the Petition explained, multi-level disclosure is likely to misinform whenever the secondary-contributor did not intend or even know its donation was made to an organization that later used its own funds for a political ad. Pet. at 22–24.

Given the fungible nature of money, it would be incorrect, of course, to frame a multi-level donor relationship as *causing* the secondary donor's funds to be used by its donee for political advertising. Unless the donee was so small, or the expenditure so large, that the advertisement could not have been funded without using the first-level donor's funds, it would be impossible to establish even but-for causation much less the necessary agency to deem a donor responsible for the message. The San Francisco law does not call for this but-for relationship between the secondary-contributor's funds and the ultimate expenditure. Thus the means-ends test fails at the first step, before the multifarious other objections raised by Petitioners in terms of voter confusion, compelled association, and so forth are even reached. Pet. 22–24; *See also No on E*, 84 F.4th at 523–24 (Van Dyke, J. dissenting).

Because "exacting scrutiny is triggered by state action which may have the effect of curtailing the freedom to associate, and by the possible deterrent effect of disclosure," *AFPF*, 141 S. Ct. at 2388 (cleaned up), narrow tailoring must be rigorously applied lest exacting scrutiny be exacting in name only.

D. The First Circuit's *Gaspee* Opinion Misapplied *AFPF* and Does Not Control Here.

Gaspee Project v. Mederos demonstrates how First Amendment speech and associational rights can be undermined by misapplying exacting scrutiny and bypassing the necessary connection between a donor's purpose and a targeted communication. *Gaspee* was decided shortly after the Court issued its opinion in *AFPF*, and dealt with disclosure of funding sources for certain independent expenditures[5] and electioneering communications.[6] 13 F.4th 79, 82 (1st Cir. 2021). *Gaspee* nominally embraced *AFPF,* but misapplied the narrow tailoring element. *Id*. at 85.

Gaspee was similar to *AFPF* in addressing mandatory disclosure of donors to non-profits. Like the annual blanket demand for disclosure in *AFPF*, the Act in *Gaspee* required filing with the State Board of Elections a report disclosing all organization donors

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[5] An "'independent expenditure' . . . 'expressly advocates the election or defeat of a clearly identified candidate, or the passage or defeat of a referendum.'" *Gaspee Project v. Mederos,* 13 F.4th 79, 82–3 (1st Cir. 2021).

[6] An "'electioneering communication' . . . identifies a candidate or referendum'" and "is made within sixty days of a general election or referendum or within thirty days of a primary election." *Id*. at 83.

over $1,000, but it also imposed an on-communication disclaimer identifying the five largest donors from the preceding year.[7] *Id.* at 83. But as the not-for-profit plaintiffs in *Gaspee* made clear, their interest was in issue advocacy, not candidate support. *Id.* at 82, 85.

Gaspee allowed First Amendment protection of core political speech to be circumvented for messages delivered during the time period the speech was likely to be most salient, distinguishing it from speech that takes place outside an election context, 13 F.4th at 89. But neither the First Amendment nor *AFPF* includes such a distinction.

Gaspee also found no relevant distinction between issue advocacy versus candidate-specific advocacy, despite relying on *Buckley* and *Citizens United*, which acknowledge a government anti-corruption interest in who pays for messaging supporting or opposing a specific candidate but make no such argument regarding issue advocacy. 13 F.4th at 85–86.[8] Instead of relying on a purpose-based rationale, *Gaspee* resorted to a plethora of characteristics unrelated to the only relevant criterion: whether there is a means-

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[7] Donors could opt out of the disclosure requirement by electing that donations not be used for funding of independent expenditures or electioneering communications. *Id.* at 82.

[8] *Buckley* explained the rationale for disclosure of donor information for specific candidates to avoid corruption or the appearance thereof. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). This rationale does not apply to contributions to support an idea or to discuss an issue because an idea cannot be corrupted. *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections, simply is not present in a popular vote on a public issue.") (cleaned up).

end relationship between the government's goal and the First Amendment burden imposed. Thus while *Gaspee* nominally adopted the exacting scrutiny standard from *AFPF*, its analysis misapprehended what it means for a law to be "narrowly tailored to achieve the desired objective." 141 S. Ct. at 2383.

The asserted government interest in *Gaspee* was in an "informed electorate" which it held to be "sufficiently important to support reasonable disclosure and disclaimer regulations." 13 F.4th at 86. But under *AFPF* it is not enough to invoke tautologies such as demanding information for the purpose of being informed.[9] Something more is needed; and while the notion of an "informed electorate" sounds appealing, not all information is created equal. Misleading or irrelevant information, for example, diminishes an electorate's ability to absorb meaningful information. What is the government interest in confusing the public by dousing it in irrelevancies?

Instead, whether narrow tailoring is satisfied requires evaluating the purpose to which the demanded information would be put. *Gaspee* does none of that. Instead, *Gaspee* focuses on time and size limitations—which affect the pool of speakers and messages subject to the law but fail to explain why the

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[9] *AFPF* did not address disclaimers nor any other form of compelled speech and *Buckley*, likewise, involved disclosure but not disclaimers. *Citizens United*, which addressed mandatory disclaimers was decided under the pre-*AFPF* annunciation of exacting scrutiny and thus required only "a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest." *Citizens United*, 558 U.S. at 366.

law should be applied to them at all. 13 F.4th at 88–9. Much like a law that applies only to redheads or people with dogs without any explanation of how that narrow application creates the desired end, this type of analysis substitutes an exercise in narrow application for narrow tailoring. But infringing the rights of a small group is still infringement.

Moreover, *Gaspee* bypasses any analysis of whether the donations in question were intended to support the particular communication. Thus unlike laws that include "for the purpose of" or "designated to support" language,[10] simply listing the five largest donors to an organization for the preceding year lacks the necessary link between the donor information and the communication on which a disclaimer is made.

Having "tailored" the law to nonrelevant characteristics, *Gaspee* goes one step further—blessing, rather than condemning as it should, the statutory demand that donors silence themselves by opting out of constitutionally protected messaging to avoid being outed by the organizations to which they donate. 13 F.4th at 89. Donors can avoid exposure under the law by either limiting the size of their donations or by opting out of allowing their donations to be used for the restricted forms of speech. *Id*. Reliance on self-censorship to excuse an unconstitutional law is a dangerous step that creates a moral hazard, allowing constitutional protections to

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[10] *See e.g.*, *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 492 (D.C. Cir. 2016) (discussing "purpose requirement" in context of independent expenditures under the Federal Election Campaign Act).

be bypassed by shifting the burden to the speaker. Nothing in *AFPF* endorses that approach.

This Court has not yet had to grapple with whether the First Amendment allows compelled disclosure of donors with no discernable connection to a particular communication, such as an earmarked contribution or contributing to the PAC. *Gaspee* provides no guidance on how this case or any such a case should be decided.

II. DISCLAIMER REQUIREMENTS RELATING TO BALLOT INITIATIVES THAT DISPLACE POLITICAL SPEECH RAISE ADDITIONAL CONSTITUTIONAL CONCERNS.

Disclaimer mandates that displace core political speech violate the Constitution on many levels and lack precedential support. *First*, they compel speech by forcing the primary speaker to disclose information that it otherwise would not disclose. *Second*, they burden speech by diverting time or space (or the money used to purchase them) away from the desired message. *Third*, they chill the primary speakers and any upstream donors who may avoid speaking or contributing to speech to avoid the unwanted disclaimer. *Fourth*, they create a potentially false impression of association between entities that each may have contributed funds to other entities but have no direct relationship with each other. *Fifth*, they create the potentially false impression that donors support a message they know nothing about or would disagree with if given the chance.

With this magnitude of infringement, the governmental justification for compelled disclaimers must be rigorous in terms of both legal precedent and a clear and reliable means-end test. Here, it is not.

This Court's treatment of disclaimer requirements has been limited, and thus the body of caselaw on which the government may rely to elucidate the narrow circumstances in which it may evade the First Amendment is thin and should not be applied broadly.

The issue came before the Court obliquely in *Citizens United*, embedded in a challenge to a ban on a nonprofit corporation's speech. 558 U.S. at 318. The opinion drew a distinction between disclaimers and disclosures on the one hand and campaign contribution and spending limitations on the other hand, but did not address the constitutional distinction between disclosure requirements and disclaimer requirements. That distinction was not necessary to the decision, did not figure in the analysis, and does not appear to have been advanced by the parties. Thus, *Citizens United* is of limited utility in analyzing how a disclaimer regime may impose additional constitutional burdens on top of those already imposed by mandatory disclosure to the government.

In *Citizens United*, the unified treatment of disclosures and disclaimers applied only to communications that "referred to then-Senator Clinton by name," *Id* at 368, which thus fell squarely within *Buckley*, without informing the question of mandatory disclaimers regarding other forms of messaging. Moreover, the required disclaimer was small in scope, "displayed on the screen in a clearly readable manner for at least four seconds". *Id*. at 366. Taken in the context of a 90-minute movie[11] such a disclaimer represents a very small slice of real

[11] *Id*. at 319.

estate—which does not excuse the infringement but minimizes the burden that informs the means-end test.[12] The limited scope of the disclaimer and the lack of challenge on the basis of compelled speech cast into doubt the extent to which *Citizens United* controls where disclaimers are intrusive and displace protected speech.

Under *AFPF*, exacting scrutiny with the rigor of narrow tailoring is the standard for donor disclosures; and under the *Citizens United*, limited to its facts, exacting scrutiny applies to 4-second disclaimers appended to *Buckley*-style candidate-specific messaging. But that calculus must change when those narrow circumstances do not apply because "[t]his Court's precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 767 (2018) (cleaned up) ("*NIFLA*"). Here, that long tradition, to the extent it exists, is limited to *Buckley* and disclaimers that may implicate candidate-specific corruption concerns. *Buckley*, 424 U.S. at 26–27 (recognizing a governmental interest in preventing *quid pro quo* corruption). By contrast the pedigree of First Amendment protection against compelled speech is long and diverse. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) ("Generally . . . the government may not compel a person to speak its own preferred messages.") (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503,

[12] The disclaimer also applied to 10-second and 30-second advertisements, *Id.* at 369, which represents a greater, but still limited, intrusion in scope as well as content.

505–506 (1969); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *NIFLA*, 585 U.S. at 766). So when the state hijacks the bulk of an issue-based ad for its own message, compelling content-based speech, strict scrutiny must be applied. *See Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 453 (2007) (distinguishing express advocacy of the election or defeat of a clearly identified candidate from issue advocacy referring to a clearly identified candidate's position on an issue, but not expressly advocating his election or defeat); *accord Bellotti,* 435 U.S. at 790 (distinguishing candidate elections from votes on public issues).

Applying strict scrutiny, the compelled disclaimer here is unconstitutional. Indeed, it does not even satisfy exacting scrutiny. But the "least restrictive means" test drives the last nail into the coffin.

First, as the Petition explains, the City has failed to establish a "sufficiently important government interest" because the interest it asserts is irrational. Information for the sake of information without more is not important. Pet. at 22 citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit."). And information that is misleading or confusingly vague by implying non-existent relationships or imputing non-existent knowledge is almost certainly not important to any legitimate governmental interest.

Second, the San Franciso law lacks a sufficient nexus between the information required to be

disclosed and the interest asserted. It thus fails even exacting scrutiny by providing no causal link between disclosing multiple levels of donors and any informational need of a voter. Instead it demands layers of disclosure that, if upheld, would have no limiting principle. Why two layers of disclosure? Why not three? Or four? And why demand the largest donors to an underlying charity that may have many interests unrelated to the ad while excusing smaller donors that may have donated with the express purpose of funding the communication? Even the first layer of disclosure, which contravenes constitutional protection for anonymous speech is suspect. Each additional layer heaps error upon error. And, without *Buckley*'s interest in preventing corruption of elective officials or the appearance thereof, it is unclear how even a single layer of disclosure may be justified.

The disclaimer requirement is, if anything, even worse. Even if disclosure could be justified in narrow circumstances, it would not follow that subjecting the population at large to lengthy and tedious lists of names promotes any interest at all. If anything, the approach is perverse by subjecting listeners or readers to tiresome recitations of names before they have a chance to find out whether the substance of the ad may be meaningful to them. The likely outcome would be listeners who have mentally checked out before the message even begins or who have devolved into speculation regarding how the names may be related before the substance of the message comes along and fails to answer that question.

Moreover, each additional layer of disclaimer must be weighed against the substance of the speech it displaces—causing the speaker to limit its own

message. As *Buckley* recognized, a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. Thus, while under *Citizens United*, disclosure/disclaimer was touted as less onerous than a ban, here, the magnitude of the San Francisco disclaimer funnels such a large portion of expenditures away from the desired message that it acts like an unconstitutional limit on speech. *Citizens United*, 558 U.S. at 318. As this Court held in *NIFLA*, an extensive notice requirement that "drowns out the facility's own message" did not even meet the lower *Zauderer* standard. 585 U.S. at 778; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (upholding mandatory inclusion in attorney advertising of "purely factual and uncontroversial information about the terms under which his services will be available.").

Finally, the disclaimer requirement cannot satisfy the strict scrutiny standard applicable to compelled speech because it is not the least restrictive means to accomplish the asserted goal of providing information to voters. It is overinclusive by sweeping up donors that have no established link to the messaging. It is underinclusive by failing to capture donors with the intent and purpose of funding the advertising but who fail to meet the donation thresholds. Thus, the government seeks to compel speech that cannot achieve the City's alleged interest much less by doing so via the least restrictive means.

III. THE COURT SHOULD GRANT CERTIORARI TO STOP THE SPREADING MISAPPLICATION OF *AFPF V. BONTA*.

The Court should grant *certiorari* because, although the *AFPF* decision is relatively recent, misapplication of exacting scrutiny has already begun to cause mischief. Here, nine judges of the Ninth Circuit dissented from the denial of rearing *en banc* raising a variety of concerns flowing from misapplied standards. 85 F.4th at 518 (Van Dyke, J. dissenting) ("This is not the exacting scrutiny the Supreme Court reminded our circuit to undertake when it reversed us only two years ago.") (citing *AFPF*, 141 S. Ct. 2373). *No on E* fails exacting scrutiny because it inverts the causation required by means-ends testing. *Id*. at 522 ("the panel upheld the ordinance by identifying a government interest that is not advanced—and in fact is undercut—by the regulation."). Moreover, as Judge Collins explained in dissent, "the panel's decision . . . explicitly allows San Francisco to commandeer political advertising to an intrusive degree that greatly exceeds what our settled caselaw would tolerate in the context of commercial advertising." 85 F.4th at 511 (Collins, J. dissenting). This application of "exacting" scrutiny employs a more lenient standard than the "decidedly *lower* standard" of *Zauderer*. *Id*. at 513 (emphasis in original).

Likewise, *Gaspee* has created precedent in the First Circuit replacing the means-end test of narrow tailoring with a narrow application test that evades causation by focusing on *who* rather than *why*.

These cases recently made an appearance in *Americans for Prosperity v. Meyer*, a case like this one, in which the district court held that multi-level donor

disclosure mandates satisfy exacting scrutiny. No. CV-23-00470, 2024 WL 1195467, at *8, 14 (D. Ariz. Mar. 20, 2024) (citing *No on E*, 85 F.4th at 515 and *Gaspee*, 13 F.4th at 87). The risk, of course, is that these permutations will spread, turning exacting scrutiny into the test applied to attenuated government interests with application schemes that are so prolix that they must be "exacting". This is not what the means-ends test from *AFPF* stands for and such application will end up undermining associational freedom rather than protecting it.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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