No. 23-926

IN THE

Supreme Court of the United States

NO ON E, SAN FRANCISCANS OPPOSING THE AFFORDABLE 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 OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states and support and defend citizens in the exercise of their constitutional rights.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute supports citizens' right to participate anonymously in the political process. The multi-layered disclosure rules imposed by the Respondents serve no sufficiently important government interest and seem instead geared towards discouraging political participation, sowing voter confusion, chilling and unfairly diminishing donors' and organizations' right to participate in issue advocacy campaigns.

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[1] Pursuant to Rules 37.2(a), The Buckeye Institute states that it has provided timely notice of its intent to file this amicus brief to all the parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

This Court applies exacting scrutiny to restrictions on electoral speech and regulations that burden associational privacy interests relating to public policy advocacy. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010); *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2385 (2021). But while it is easy to recite "exacting scrutiny" as a standard, the concepts of a "substantial relation" to "a sufficiently important" government interest that comprise it can be slippery. This has led to confusion in applying the standard to cases involving direct political or electoral activity.

For example, in *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014), this Court described exacting scrutiny as allowing government action is only if it "promotes a compelling interest and is the least restrictive means to further the articulated interest." Yet in *Citizens United*, 558 U.S. at 366–67, the Court had articulated the test as requiring a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest." And in this case, the Ninth Circuit claimed that it was applying the exacting scrutiny test but ended with a result permitting onerous restrictions on both electoral speech and associational rights that seemed at odds with the standard it professed to apply. Simply put, exacting scrutiny can be inexact.

The standard's inherent slipperiness, however, can be made more manageable by anchoring it to this nation's history and tradition of free speech. In this case, the well-established and uncontested history of

anonymous political speech should loom large in evaluating the sufficiency of the government's interest in requiring the disclosure of second tier donors.

In his concurrence in *McIntyre v. Ohio Elections Comm'n*, Justice Thomas proposed an originalist approach to a nearly identical question. 514 U.S. 334, 359 (1995) (Thomas, J., concurring). This approach would rely on the well-documented and, in Justice Steven's words, "honorable" tradition of anonymous political speech. See *id.* (Thomas, J., concurring). The history should speak loudly. Because while the technology to propagate political messages may have changed, the human impulse to censor and the logical argument for anonymous publication has not.

But even if this Court does not expressly apply Justice Thomas's proposed historical test, the nation's long history of allowing—indeed celebrating—anonymous political speech should inform its exacting scrutiny analysis. When this Court has described anonymous political speech as part of an "honorable tradition" and noted that anonymous "pamphlets and leaflets . . . 'have been historic weapons in the defense of liberty,'" *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938), it seems doubtful that San Francisco has articulated a "sufficiently important" government interest in its prohibition.

Subjecting the government's "informational interest" in the disclosure of second-tier donors to even modest interrogation, the rationale for the regulation falls apart. The idea that underlies the Ninth Circuit's decision—and the regulation itself—is that donor disclosure is necessary to protect the voting public from being misled by association names. The

argument commonly advanced in favor of disclaimer regimes is that because large donors might have an outsize advantage in shaping public policy, naming those donors levels the playing field by alerting the voting public to their involvement. But perversely, rather than levelling the playing field, the secondary disclosure requirements disadvantage causes that do not have a few well-heeled funders and instead have to build coalitions of groups and individuals.

Finally, regardless of the standard applied, the Ninth Circuit's decision stands as an example of a Circuit Court "underruling" or narrowing from below this Court's holdings from *NAACP* and *Buckley* through *AFPF*. While claiming to apply the exacting scrutiny standard, the Ninth Circuit arrived at a conclusion that is inconsistent with this Court's exacting scrutiny precedent and antithetical to the free political expression upheld in those cases. This Court should grant the writ to bring the Circuit Courts into alignment on this fundamental issue.

ARGUMENT

I. The Case for an Originalist First Amendment Jurisprudence

In his *McIntyre* concurrence, Justice Thomas suggested that the Court set aside the debate over the sufficiency of the government's interest and how substantially it related to the regulation imposed and simply "determine whether the phrase 'freedom of speech, or of the press,' as originally understood, protected anonymous political leafletting." *McIntyre*, 514 U.S. at 359 (Thomas, J., concurring). Cases like this—where the government demands that parties

engaging in issue advocacy dedicate a portion of their ad space to multi-tiered disclosure, identifying not only the source of the communication, but the top funders of the communication, as well as the funders of those funders—demonstrate the limitations and complexities of applying the exacting scrutiny test to issue campaign disclaimers. San Francisco's requirements go so far beyond simple source disclosure that they compromise a political speaker's ability to get his or her message out. Justice Thomas's originalist approach suits this case well.

In *McIntyre*, the plaintiff distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio. The pamphlets argued against a proposed school levy. A school official subsequently filed a complaint in the Ohio Elections Commission against Ms. McIntyre for violating Ohio Rev. Code §3599.99, which prohibited the distribution of anonymous political communications. The Commission fined Ms. McIntyre $100 for her violation.

Rather than weighing and balancing the competing interests inherent in the exacting scrutiny test, Justice Thomas recommended that the Court look at the plain text and apply "what history reveals was the contemporaneous understanding" of the clause at issue. *Id.* (Thomas, J., concurring) (quoting, *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984)). The rationale for this approach is simple: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. United States,* 199 U.S. 437, 448 (1905).

This originalist approach to First Amendment rights is nothing new. In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022), this Court based its history and tradition test, applied in the Second Amendment context, in part on how the Court had treated First Amendment rights. The Court pointed out that to carry its burden to show that certain speech is unprotected, it "must generally point to historical evidence about the reach of the First Amendment's protections." *Id.* at 24–25 (citing *United States v. Stevens*, 559 U.S. 460, 468-71 (2010)). The Court in fact noted that its "focus on history [ ] 'comports with how we assess many other constitutional claims,'" such as the Confrontation Clause and the Establishment Clause. *Id.* at 25 (citing *Giles v. California*, 554 U.S. 353, 358 (2008) and *American Legion v. American Humanist Assn.*, 139 S.Ct. 2067, 2087 (2019)).

The argument for taking an originalist approach to state schemes that regulate anonymous political speech is particularly strong here, where the very men who drafted the Constitution argued anonymously for its adoption. See *McIntyre*, 514 U.S. at 360 (Thomas, J., concurring) ("There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of 'Publius,' are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution.").

Justice Thomas—along with the *McIntyre* majority—documented this "honorable tradition" of anonymous political speech in America from the

colonial period and the trial of John Peter Zenger, to Madison, Hamilton and Jay's anonymous publication of the Federalist Papers, the Anti-Federalists' anonymous responses, and the American literary tradition of pseudonymous publishing. *Id.* at 341 n.4; 343 n.6. In fact, the *McIntyre* Court began its analysis quoting *Talley v. California's* reminder that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Id.* at 341 (quoting *Talley v. California*, 362 U.S. 60, 64 (1960)).

The historical analysis here is neither difficult nor controversial. There is no historical disagreement, for example that this Court's first Chief Justice published anonymous essays to help ratify the Constitution. There is no historical debate that the primary drafter of the Declaration of Independence, and the man hailed as the Father of the Constitution published the Kentucky and Virgina Resolutions anonymously. And although some of the conclusions that flow from those documents are now universally rejected, the anonymity of their prominent authors shows how the Framers understood the newly ratified Constitution.

The case here, like the revolutionaries' pamphlets and the anonymous arguments for and against the Constitution, presents pure political speech. The regulation at issue requires not merely disclosure ancillary to that speech, but that as a condition of speaking, the speaker devote a portion of his speech to the government's message. This is not a matter of simple disclosure, where the inclusion of a disclaimer or the impact on the message is de minimis. Requiring disclaimers that can occupy up to a third of the ad

space necessarily changes how the speaker communicates. Speakers must adapt the form, length, and visual composition of their speech to accommodate the government's requirements. The regulation at issue thus requires changes to content and effectiveness of the speaker's message.

Given our country's long and laudable tradition of anonymous political speech, requiring speakers not only to disclose their identities, but to change and compromise their message in order to identify donors to donors finds no support in history and tradition.

II. Historically Informed Exacting Scrutiny

Yet even if the Court does not apply an original meaning test, history should inform its application of the exacting scrutiny test. Since *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court consistently has held forced disclosures that threaten freedom of association to exacting scrutiny. To meet the burden of exacting scrutiny under *NAACP*, this Court has held that the government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson v. Fla. Legislative Investigation Comm'n*, 372 U.S. 539, 546 (1963), and any such compelled disclosure must be "narrowly drawn," *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) (citation omitted).

As Judge Ikuta noted in the dissent from the denial of *en banc* review in the instant case, this Court modified the tailoring prong of *NAACP's* exacting scrutiny test when applying it to the electoral context in *Buckley v. Valeo*, 424 U.S. 1 (1976). Pet. App. 84a.

In *Buckley*, the Court applied a *per se* rule deeming "the disclosure requirement to be 'the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.'" *Id.* (quoting *Buckley*, 424 U.S. at 68).

While this test is easy to recite, its application has not generated consistent or predictable results. For example, applying *Buckley's* modified exacting scrutiny standard in the electoral context, this Court has sometimes described the test as closer to strict scrutiny, while at other times describing the test more like intermediate scrutiny. Compare *e.g.*, *McCutcheon* 572 U.S. at 197 ("Under exacting scrutiny," the government action is permissible only if it "promotes a compelling interest and is the least restrictive means to further the articulated interest."), with *Citizens United*, 558 U.S. 310, 366–67 (2010) ("'[E]xacting scrutiny requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.").

Even where the governmental interest is compelling, this Court has been crystal clear that disclosure requirements that go "far beyond" the asserted governmental interest are improper. See *Shelton v. Tucker*, 364 U.S. 479, 489 (1960); *Talley v. California*, 362 U.S. 60, 64 (1960); *McIntyre*, 514 U.S. at 357. In *Shelton*, for example, this Court invalidated a statute requiring public school teachers to disclose "without limitation every organization to which [they] ha[d] belonged or regularly contributed within the preceding five years." 364 U.S. at 480. Some of those associations may have been relevant to a state's "vital" interest in the fitness and competence of its teachers,

but that did not justify a "completely unlimited" inquiry into "every conceivable kind of associational tie." *Id.* at 485, 487–88; *see also Talley*, 362 U.S. at 64 (ordinance that prohibited distribution of anonymous handbills could not be justified by concern with "fraud, false advertising and libel" because the ordinance was not "so limited"); *McIntyre*, 514 U.S. at 357 (state's interest in "preventing the misuse of anonymous election-related speech" does not justify "a prohibition of all uses of that speech").

The government interest San Francisco advances to justify its multi-layered disclaimer requirement is voter information. Yet in light of this Court's decisions in *Talley* and *McIntyre*, expressly permitting anonymous political speech—indeed praising it—the information interest in requiring a disclaimer forcing a speaker to identify donors to donors can hardly be considered sufficient to justify the restriction on core First Amendment activity. While identifying the source of a communication to voters may be "helpful in evaluating ideas," the helpfulness of that information, like gravity or magnetism, diminishes quickly the further it moves away from its source. See *McIntyre*, 514 U.S. at 348. Thus, while a disclaimer requiring the speaker to identify the source of the communication conveys information that may be of value to the voter—for example, the name of the campaign committee or organization from which the voter can obtain additional information—knowing the identity of donors to donors provides rapidly diminishing returns.

Scholars have also questioned the salience of the informational interest in voter choices:

> If disclosure is intended to enhance voters' ability to make decisions, then their capacity to understand how the disclosed information is relevant to the electoral arena becomes critical in assessing the validity of different legal regimes. However, the rosy conception that disclosure is "capable of creating . . . an informed and competent electorate able to critically evaluate campaign-related speech" is threatened by a growing view that undeserved reliance on disclosure is actually helping facilitate many of the problems it was attempting to prevent.

Lear Jiang, *Disclosure's Last Stand? The Need to Clarify the "Informational Interest" Advanced by Campaign Finance Disclosure*, 119 Colum. L. Rev. 487, 501 (2019) (internal citations omitted). In fact, the more disclosure required, the more apt the voter is to tune it out as noise. See *id.* at 504 ("Commentators discussing mandatory disclosures more generally have suggested that disclosed information must be kept simple if it is to have any effect toward intended objectives.") (citing Omri Ben-Shahar & Carl E. Schnieder, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 687–88 (2011)).

The related complication is that disclosure—particularly the type of disclosure here, which can consume a significant portion of the ad—can "distract voters from the substantive issues at stake in the election by 'directing attention away from the content of an ad,' suggesting to voters that they 'need not evaluate the content.'" *Id.* (internal citations omitted). The heuristic argument that voters can and perhaps should make their determinations about an issue

based on who supports one side or another may find traction in how voters actually make up their minds. See, *e.g.,* Abby K. Wood, *Learning from Campaign Finance Information*, 70 Emory L.J. 1091, 1113–14 (2021). But logicians would caution that a voter deciding the merits of an issue based on the speaker's identity or the identity of the speaker's supporters has fallen prey to the "ad hominem" fallacy.

Madison, Hamilton and Jay may have written anonymously so that they could appear to be disinterested, letting the arguments speak for themselves. See Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 801 Boston Univ. L. Rev. 811 (2007) ("Why the authors thought that signing their own names would have less political advantage than using a pseudonym remains unclear. Perhaps Hamilton and Madison felt that praising a Constitution that they had helped to write would appear immodest".); see also Ctr. for the Study of the Const., *Pseudonyms and the Debate over the Constitution*, University of Wisconsin (July 22, 2022), https://csac.history.wisc.edu/2022/07/22/pseudonyms-and-the-debate-over-the-constitution/ ("Pseudonyms were used for a variety of reasons. First and foremost, it was felt that the avoidance of authors' names concentrated attention on the issues, not on the personalities of the authors.").

It is unclear why the government should have any interest, much less a sufficient interest to curtail First Amendment freedoms, in encouraging voters to avoid the substance of an issue and vote based on their opinion of its supporters or detractors.

The competitive nature of campaigns and the relative ease of obtaining campaign finance information online—compared to 1976 when this Court first recognized that interest in *Buckley*, or even 1995, when it decided *McIntyre*—further erodes the government's interest in requiring disclaimers to voters. Although voters and commentators regularly decry negative campaigning, the adversarial electoral system, just as the adversarial trial system, helps jurors weed fact from fiction, ensures that voters have the opportunity to weigh who is funding the campaign—and their desire to find anonymously into their voting decisions. Empirical studies in fact suggest that speaker anonymity negatively affects the message. See Wood, *supra*, at 1113–14 ("Anonymity, when exposed as such, reduced the persuasiveness of the message. It also reduced respondents' confidence in the credibility or trustworthiness of the sender of the message.") (internal citations omitted). In other words, if a speaker wishes to speak anonymously, the opposing side is free to point that out and let voters draw their own conclusions from the anonymity. Given these incentives, the government's interest in requiring speakers to provide this information—particularly the identity of second-tier donors—is slim.

The multi-layered disclosure in this case also runs contrary to the notion underlying the informational interest that greater disclosure will help level the electoral playing field between the ultra-rich and the average citizen. San Franciso's regulation result in the perverse effect that a lone plutocrat can sponsor political advertising without having his message obscured or confused by a lengthy disclaimer. Causes

without a single or few well-heeled donors must cobble together coalitions of interest groups, requiring more disclosure, longer disclaimers, and distraction from the speaker's message.

The *McIntyre* Court cited Justice Holmes' marketplace of ideas to apply this principle, noting that "'the best test of truth is the power of the thought to get itself accepted in the competition of the market' *McIntyre*, 514 U.S. at 348 n.11 (citing *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The *McIntyre* Court gave more credit to the average voter than some of the academic literature but arrived at the same conclusion regarding anonymous political communication:

> Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible", what is valuable, and what is truth.

Id. (quoting *New York v. Duryea*, 76 Misc.2d 948, 966–967, 351 N.Y.S.2d 978, 996 (1974)). This Court should grant the writ to examine whether, in light voters' ability to evaluate political communications for themselves and assign whatever weight they see fit to any apparent lack of transparency is a sufficient government interest.

III. This Court Should Grant the Writ to Enforce its Clarify and Enforce Precedent

Commentators have observed that "[l]ower courts supposedly follow Supreme Court precedent—but they often don't. Instead of adhering to the most persuasive interpretations of the Court's opinions, lower courts often adopt narrower readings." Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Geo. L.J. 921 (2016). Professor Re calls this practice "narrowing from below," while Professor Ashutosh Bhagwat refers to it as "underruling." Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Fed. Courts, & The Nature of the "Judicial Power"*, 80 B.U.L. Rev. 967, 970 (2000). Regardless of the name applied though, the practice "challenges the authority of higher courts and can generate legal disuniformity." Re, *supra*, at 921.

Indeed, "[c]onsiderable anecdotal evidence suggests that when judges care deeply about a particular legal issue but disagree with existing precedent, they often attempt to subvert the doctrine and free themselves from its fetters by stretching to distinguish the holdings of the higher court." Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 819 (1994). "[B]oth evidence and observation suggest that more subtle, subterranean defiance, [than direct noncompliance] through means such as reading Supreme Court holdings narrowly, denying the logical implications of a holding, or treating significant parts of opinions as dicta, is far from unusual." Bhagwat, *supra*, at 986. Justice O'Connor also has voiced the concern that lower court judges intentionally avoid

applying rules they dislike, noting that some "know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." *TXO Prod. Corp. v. Alliance Resource Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting).

Lamentably some of our jurisprudential history demonstrates how, without this Court's enforcement of its decisions, obdurate lower court judges can frustrate those constitutional rights that are unfashionable. Examples of lower courts "underruling" this Court's clear holdings occurred immediately following this Court's in *Brown v. Board of Education*, 347 U.S. 483 (1954). Despite the Court's plain holding that "separate but equal" facilities were "inherently unequal," numerous courts clung to the discredited rule in *Plessy v. Ferguson*, 163 U.S. 537 (1896), taking great pains to avoid *Brown's* logical conclusion. They just could not accept the concept that all men really are "created equal." The Declaration of Independence ¶ 2 (U.S. 1776). See, *e.g., Flemming v. S.C. Elec. & Gas. Co.*, 128 F. Supp. 469, 470 (E.D.S.C. 1955), *rev'd*, 224 F.2d 752 (4th Cir. 1955) (holding that *Brown* applied only to "the field of public education," and *Plessy* allowed segregation in public transportation); *Lonesome v. Maxwell*, 123 F.Supp. 193, 196–97 (D.Md. 1954) (upholding "segregation of races with respect to recreational facilities . . . ."), *reversed sub nom. Dawson v. Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955).

Here, the precedents of *Talley* and *McIntyre*, as well as our nation's history and tradition, clearly

permit anonymous political speech. The Ninth Circuit's decision runs contrary to those precedents by imposing not merely that speakers disclose their supporters but compromise their message by including lengthy disclaimers that would seem to provide little relevant information to voters. By granting the writ, this Court can address this deviation from its well-established First Amendment jurisprudence.

CONCLUSION

For the reasons stated above, the Writ should be granted.

Respectfully submitted,

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