No. 21-890

IN THE

Supreme Court of the United States

GASPEE PROJECT *and*
ILLINOIS OPPORTUNITY PROJECT,
Petitioners,

v.

DIANE C. MEDEROS, STEPHEN P. ERICKSON, JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, AND WILLIAM E. WEST, *in their official capacities as members of the Rhode Island State Board of Elections*,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The State—for all its meandering discussions of federal campaign finance regulations, unrelated disclosure laws, and different types of advocacy—does not dispute that it seeks to compel speech in a new way never sanctioned by this Court: forcing speakers to change their own speech to disclose five financial supporters that are already disclosed to the public.

In response to the argument that the decision below conflicts with *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the State argues only that on-ad donor disclaimer is not compelled speech because it is "factual," not "substantive." Br. in Opp. ("Opp.") 22. But the disclaimer necessarily alters the content of petitioners' speech by substituting the government's speech for theirs. Regardless, the "general rule that the speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 573 (1995).

The State fails to explain why *NIFLA* doesn't apply, relying instead on a *Citizens United* brief, which made an argument that this Court never addressed. That is not how precedent works. In any event, other disclosure laws have not arisen in a context where disclosure of all the information is already required. Nor does petitioners' argument depend at all on the distinction between express and issue advocacy. Under this Court's precedents, compelled speech must satisfy strict scrutiny, and as the State seems to concede by its silence, its on-ad

donor disclaimer requirement cannot satisfy this scrutiny.

Even if exacting scrutiny applies, the First Circuit departed from this Court's precedents. The only interest that the State asserts is a generalized informational interest. But that already weak interest is further weakened by the fact that the same information (and more) has already been disclosed. The State contends that on-ad donor disclaimer frees voters from "having to independently explore the myriad pressures to which they are regularly subjected." Opp. 29 (cleaned up). Whatever that might mean, it does not amount to an important governmental interest.

Nor is the State's requirement narrowly tailored to any important interest. The same information is already provided in a more complete way that does not force petitioners to change the content of their speech. This mismatch between the requirement and its burdens is not alleviated by the narrow opt-out that blocks donors from supporting protected advocacy. And because the lack of tailoring is categorical, this Court's precedents require facial invalidation. Review is needed.

Last, this case is an ideal vehicle. The State does not dispute that many states are adopting similar laws. The State's odd contention that petitioners' argument was not addressed below is contradicted by both the briefing and the First Circuit's opinion. App. 22–25. Though the State makes pro forma noises about standing and unspecified "other jurisdictional questions" (Opp. 38), petitioners' standing to mount a facial challenge to a law that replaces their speech with the government's is secure.

Because the on-ad donor disclaimer requirement forces speakers to change the content of their speech, it contravenes this Court's precedents. The Court should grant certiorari or hold this case for *City of Austin, Texas v. Reagan National Advertising of Texas Inc.*, No. 20-1029.

ARGUMENT

I. The decision below conflicts with this Court's precedents.

A. Laws that compel speech are subject to strict scrutiny.

Compelled speech laws "alter the content of [private] speech" and must face the same strict scrutiny that applies broadly to content-based speech regulations. *NIFLA*, 138 S. Ct. at 2371 (cleaned up). The State never meaningfully contests that its on-ad donor disclaimer requirement compels speech.

Instead, the State suggests that the speech compelled in *NIFLA* was a "different breed" because it involved "a substantive message," whereas the compelled speech here purportedly involves "factual information." Opp. 22. But again, the prohibition on compelled speech applies equally "to expressions of value, opinion, or endorsement" and "to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. "[E]ither form of compulsion burdens protected speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 797–98 (1988); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995); *NIFLA*, 138 S. Ct. at 2372–73.

Next, the State objects that whether petitioners' "philosophical commitments" are "offended by" on-ad

donor disclaimer "ha[s] no bearing on whether the Act is facially unconstitutional." Opp. 23. Petitioners agree. "It is not necessary to inquire" about such commitments if the State does not possess "power to make the [compelled speech] a legal duty." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 635 (1943). And this reinforces the primary point: it makes no difference whether on-ad donor disclaimer might be "factual." *Cf. Hurley*, 515 U.S. at 569 ("a narrow, succinctly articulable message is not a condition of constitutional protection").

The State's assumption that the requirement is "generally applicable" and compels "factual information" (Opp. 22–23) is wrong in the first place. That assumption ignores that petitioners must change their speech to accommodate the government's. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley*, 487 U.S. at 795. It changes and distorts the message, and even more so given petitioners' commitment to freedom from government intrusion. Pet. 11, 15–17. Plus, it applies based on content. Pet. 14–15.

The State points to a concurring opinion to suggest that the *NIFLA* law was potentially viewpoint-based given its "design and structure." Opp. 22. But a lack of viewpoint discrimination does not free content-based speech laws from strict scrutiny. *E.g.*, *McIntyre*, 514 U.S. at 345. And one could easily see viewpoint discrimination in this law, which targets speech based on spending and other gerrymandered criteria.

The State's fallback argument is that one brief in *Citizens United* made a compelled-speech argument about a different type of regulation. Opp. 21–22, 24.

But the First Circuit's decision cannot be justified by a pre-*NIFLA* brief's argument that this Court never addressed. The Court's opinion in *Citizens United* "d[id] not mention" petitioners' argument (much less about a law like this) "and so [is] not contrary to" it. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011); *id.* at 145 ("The Court would risk error if it relied on assumptions that have gone unstated and unexamined."); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue," "we are free to address [it].").

The State asserts that it "modeled its disclosure requirements for electioneering communications on federal provisions." Opp. 17. But it points to no federal provision requiring an on-ad donor disclaimer. Instead, it relies on pre-*NIFLA* cases about unrelated, less intrusive requirements, Opp. 21, 24 n.3, even as it argues elsewhere that no "other appellate court" has addressed a law like this, Opp. 39.

Even putting aside *NIFLA*, the difference in *this* requirement matters. This Court has applied exacting scrutiny to some disclosure laws based on its view that "the government's important interests justify less searching review." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021); *see Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010). But this law is different, for it compels petitioners to recite information that is already disclosed. There is no important interest here. All this requirement does is alter petitioners' speech and place a "burden[] on individual rights" by "deter[ring] some individuals who otherwise might contribute." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). Thus, *this* requirement

cannot "be the least restrictive means of curbing the evils of campaign ignorance," *id.*, for rather than merely requiring disclosure, it changes petitioners' own speech. That makes it a regulation of "pure speech" rather than of "the mechanics of the electoral process." *McIntyre*, 514 U.S. at 345. There is no reason to treat this regulation differently from any other one that compels speech.

Finally, the State mischaracterizes petitioners' "core premise" as the distinction between "express advocacy" and "issue advocacy." Opp. 20, 25–27. Not so. Petitioners' only "core premise" is that the State's rule compels speech. The State does not meaningfully contest that premise.[1] It makes no difference whether the regulation applies to (or petitioners engage in) express advocacy, particularly with no anti-corruption interest present. Strict scrutiny applies. Review is needed.

B. On-ad donor disclaimer cannot satisfy exacting scrutiny.

Even if exacting scrutiny applies, the law is unconstitutional.

No important government interest. The State asserts one supposed interest: "the same" "informational interests" that sometimes "justify federal disclaimer and disclosure provisions." Opp. 28. But the State concedes that all donors required to be

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[1] For this reason, the State's distinction of *Reagan* as about "identifying content-based speech restrictions" (Opp. 27 n.5) is difficult to understand. The State's inability to articulate how its law is *not* a content-based speech restriction proves the overlap, as does the State's implication that regulations based on election-related content are not content-based. *See* Pet. 14–15.

identified on the communication must be disclosed and posted on the State's website. Opp. 12. Like the First Circuit, the State assumes that voters are too dull "to independently 'explore the myriad pressures to which they are regularly subjected.'" Opp. 29; *see* Pet. 24. The State provides no evidence to support that assumption, and regardless, the information is easily accessible, so any informational interest is already satisfied. As this Court has said, such an interest is weak to start: "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." *McIntyre*, 514 U.S. at 348.

Like the First Circuit, the State misses the burden of this compelled speech requirement. "[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *AFPF*, 141 S. Ct. at 2383. According to the State, its requirement does not "limit or restrict anyone's speech." Opp. 29; *accord* App. 11 (no "limit" on "political speech at all"). Of course it does. Petitioners cannot use the space consumed by the State's speech for their own. And, with compelled disclosure, donors are less likely to engage in political speech, a proposition that *Buckley* called "undoubtedly true." 424 U.S. at 68; *see Doe v. Reed*, 561 U.S. 186, 209 (2010) (Alito, J., concurring) (emphasizing the "vast" "potential . . . for harassment"). That is why this Court has recognized that, in terms of "intrusi[veness]," "compelled self-identification on all election-related writings" "is a far cry" from mere "reporting" of campaign expenditures.

McIntyre, 514 U.S. at 355; *see ACLU Union of Nevada v. Heller*, 378 F.3d 979, 991–93 (9th Cir. 2004).

Given these harms, a voter's "short though regular journey" to the Internet "is an acceptable burden" to discover this supposedly crucial information about at most five donors. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 72 (1983); *accord McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 224 (2014) (plurality opinion) ("Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not [previously] possible"); *Citizens United*, 558 U.S. at 370 (similar).

The State says that its passage of the law shows "the information's value." Opp. 36. But "the purpose behind" the First Amendment is "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357. Rhode Island has a history of passing speech restrictions that unconstitutionally suppress advocacy. *E.g.*, *Blakeslee v. St. Sauveur*, 51 F. Supp. 3d 210, 212 (D.R.I. 2014). To say that a majority would *like* to commandeer (and deter) private speech is not to say that the government has a valid, important interest in doing so.

No narrow tailoring. Presumably recognizing the weakness of its narrow tailoring argument, the State leads with an irrelevant disquisition on facial versus as-applied challenges. Opp. 30–32. This is a facial challenge. And the State must still show narrow tailoring. *E.g.*, *AFPF*, 141 S. Ct. at 2385. It cannot, because the State already uses a more narrowly tailored method of satisfying its purported interest: disclosure to the State and thereby the public. The State's "'prophylaxis-upon-prophylaxis approach'

requires that [the Court] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 572 U.S. at 221.

Most of the State's other tailoring arguments are equally irrelevant. For instance, that the requirement is limited to "covered electioneering communications" and donors who give money that can be used for such communications (Opp. 32) does not make it narrowly tailored to any marginal informational interest. The State's vaunted "opt-out" only deters protected speech and places the burden of compliance on private speakers, Pet. 26; it makes little sense anyway, given that money is fungible. The law's general disclosure parameters are beside the point and dubious to boot. For instance, the State does not explain exempting costly "messages for shareholders" if what matters is "significant election-related spending." Opp. 32–33; *cf.* Pet. 22 n.3.

More fundamentally, the State does not adequately explain how on-ad donor disclaimers are narrowly tailored when the same—but more complete—information is easily accessible. The State does not contest that disclaimer of five donors conveys *less* information than is already available. Nor does it contest the basic truth that less information is inherently more misleading. Conveying the top five donors may well *decrease* viewers' information by giving them a distorted view—even as it also replaces petitioners' speech. *See* Pet. 25–26.

In the end, the State can say only that "on-ad donor disclaimer provides an instantaneous heuristic." Opp. 36. But that does not make it narrowly tailored to any important interest. The "government does not have a compelling interest in each marginal

percentage point by which its goals are advanced." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 803 n.8 (2011). All information relevant has been conveyed in a more complete way, and at less cost to petitioners' speech. There is thus "a dramatic mismatch" between the State's claimed interest and its requirement. *AFPF*, 141 S. Ct. at 2386. "The lack of tailoring to the State's" purported interest "is categorical—present in every case—as is the weakness of the State's interest." *Id.* at 2387. The requirement is facially unconstitutional under this Court's precedents. Review is necessary.

II. This case is an ideal vehicle.

The State concedes that the issue here is a "a pure question of law." Opp. 38. And it does not contest that many other states are adopting laws that share the unconstitutional feature of Rhode Island's: compelled speech never sanctioned by this Court and contrary to its recent precedents. This Court has not hesitated to grant certiorari even absent a circuit split to review important First Amendment issues, particularly when a "large number of States" are passing similar laws. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 385 (2000); *see* Pet. 27–28, 30.

The State's half-hearted vehicle objections are frivolous. The State's suggestion that the "duplicative" nature of the on-ad donor disclaimer requirement was "not sufficiently developed" below (Opp. 37) is meritless. Petitioners specifically argued that "contributor information is already available online," so "adding it to the advocacy message itself significantly affects the content of the message while adding very little additional informational value." Appellants' 1st Cir. Principal Br. 30. A whole section

of the brief focused on that argument. *Id.* at 28–31; *see also id.* at 1 (Statement of the Issues); Reply Br. 9–13. And "the Court of Appeals expressly ruled on the question," *United States v. Williams*, 504 U.S. 36, 42 (1992), finding on-ad donor disclaimer "not entirely redundant," App. 22; *see* Opp. 2 ("The First Circuit carefully assessed each challenged aspect"). If all that were not enough, "parties are not limited to the precise arguments they made below." *Citizens United*, 558 U.S. at 331.

Next, the State notes the irrelevant facts that petitioners seek to engage in mailed communications and that the on-ad donor disclaimer requirement applies to those communications as well as "video and radio advertisements." Opp. 38. The State does not contest petitioners' standing as to the communications they seek to engage in. *See* Pet. 6–7. And, as the State belabors, this is a facial challenge. The point of a facial challenge is that it "reach[es] beyond the particular circumstances of the[] plaintiffs." *Reed*, 561 U.S. at 194. The State's requirement applies to petitioners' speech *and* other types of speech, and the State does not articulate any distinction that would make the statute constitutional for those other types. *Cf. Citizens United*, 558 U.S. at 326 (declining "to draw, and then redraw, constitutional lines based on the particular media or technology used"). Petitioners have standing to argue that the on-ad donor disclaimer requirement is facially unconstitutional.

The State gestures vaguely toward "other jurisdictional questions" supposedly "clouding this case." Opp. 38. None are real. The State's suggestion of future "factual supplementation of the record

related to issues including standing" can be disregarded, given its refusal to argue any standing deficiency or need for a fuller "factual record." Opp. 39. "[T]he standing inquiry" is "focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). If the State had anything new relevant to that inquiry, it would have said so.

The State points out that one petitioner sought to send a mailing about "legislation in a past session that is no longer under consideration." Opp. 39. But the State cannot bring itself to *argue* that the case is moot, presumably because (1) there are other plaintiffs, and (2) as the First Circuit below held, election speech "case[s] [are] not moot" simply because an election occurs. *Citizens United*, 558 U.S. at 334; App. 6–7; *e.g.*, *Davis*, 554 U.S. at 735–36. This case is an excellent vehicle.

CONCLUSION

The Court should grant the petition or hold for *Reagan*.

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MARCH 22, 2022