No. 23-1316

IN THE

Supreme Court of the United States

DOUG SMITH, ROBERT GRIFFIN, ALLEN VEZEY, ALBERT HAYNES, TREVOR SHAW, FAMILIES OF THE LAST FRONTIER, AND ALASKA FREE MARKET COALITION,

PETITIONERS,

V.

RICHARD STILLIE, JR., SUZANNE HANCOCK, ERIC FEIGE, LANETTE BLODGETT, AND DAN LASOTA, *in their official capacities as members of the Alaska Public Offices Commission*,

RESPONDENTS.

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

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

1. Does Alaska's requirement that individual donors file duplicative reports of their political contributions within 24 hours of making them—on pain of thousands of dollars in fines—violate the First Amendment?

2. Do Alaska's extensive on-ad disclosure requirements, which monopolize a majority of a given advertisement with government-mandated messages including the public naming of individual donors, violate the First Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTRODUCTION & SUMMARY OF ARGUMENT 1
REPLY 1
I. This case presents an excellent vehicle to consider issues of national importance. 1
II. There are significant differences among the circuits that this court should resolve 6
III. The decision below is wrong on the merits and should be reversed. 8
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Americans for Prosperity Found. v. Bonta,
41 S. Ct. 2373 (2021) 9

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011)............................ 10

Citizens United v. Federal Election Commission,
558 U.S. 310 (2010) 4

Gaspee Project v. Mederos,
13 F.4th 79 (1st Cir. 2021) 7

Iowa Right to Life Committee, Inc. v. Tooker,
717 F.3d 576 (8th Cir. 2013) 7

Kohlhaas v. State, 518 P.3d 1095 (Alaska 2022)....... 5

Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024)..... 4

No on E v. Chiu, 85 F.4th 493 (9th Cir. 2023)....... 5, 6

Van Hollen v. FEC, 811 F.3d 486 (D.C. Cir. 2016).... 6

Wyoming Gun Owners v. Gray,
83 F.4th 1224 (10th Cir. 2023) 6

Statutes

AS § 15.13.040(a)(1)(c) 9

AS § 15.13.040(a)(1)(d) 9

AS § 15.13.090.. 10

AS § 15.13.090(a) 3

AS § 15.13.110(k) 9

AS § 15.13.135... 10

AS § 15.13.135(b)(2).. 3

Other Authorities

Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019-2020) 6

INTRODUCTION & SUMMARY OF ARGUMENT

Petitioners submit this Reply to the Briefs in Opposition of the Alaska Respondents ("State Br.") and Intervenors Alaskans for Better Elections ("ABE Br.").

Respondents attempt to convince the Court that this case has some kind of procedural hurdle, but of course the case is not moot or otherwise nonjusticiable: Petitioners challenge laws that are still on the books, and there was never any temporal limit to their claims. Respondents' attempts to distinguish the division of authority below in fact reinforce the division. And their arguments on the merits fall similarly flat.

This Court should grant the petition and find that the challenged restrictions fail constitutional scrutiny because they are content-based restrictions not narrowly tailored to the asserted government interest.

REPLY

I. This case presents an excellent vehicle to consider issues of national importance.

This appeal is not "stale," moot, or procedurally deficient. Petitioners did not challenge and are not challenging any law, policy, or official action that was specific to the 2022 election cycle. Rather, they challenge provisions of Ballot Measure 2, a campaign finance regulation that continues to regulate Petitioners' ongoing political activities. Neither Petitioners' claims, nor the law or facts supporting them, are temporally limited. The Ninth Circuit agreed, finding that "[t]his case, like the many others involving facial challenges to election laws and campaign-finance regulations, is

exceptional" because the issues so consistently reoccur. App. 8. The record reflects that Petitioners have a consistent history of participating in Alaska elections, and that their speech will be restricted by Ballot Measure 2 going forward, including in relation to up-coming elections in the state in 2024 and beyond.

None of Petitioners' claims is specific to the 2022 election. Nor was Petitioners' Motion for Preliminary Injunction specific to the 2022 election—it mentions the impending election only to establish the urgency of the matter because Petitioners' right to speak would be (and, as it turned out, was) abridged in that election. They were not asking to enjoin Ballot Measure 2 as applied to some specific race in 2022 in which they particularly wanted to participate. They invoked the upcoming election only to establish that the harms they alleged were not just imminent, but in fact occurring, since campaigns were on-going as the days for voting approached.

This is therefore unlike other preliminary injunction appeals relating to, say, a specific candidate or ballot measure, who could not be placed on or removed from the ballot for an election that has already occurred. Here, Petitioners' have established in the record that they have made and intend in the future to make donations and expenditures that would trigger the challenged provisions of Ballot Measure 2. The Complaint alleges that each Petitioner has an established history of donating and/or making independent expenditures in Alaska elections and intends to do so going forward. There is, therefore, no reasonable ques-

tion that Petitioners continue to experience the injuries pled in their complaint and fairly raised in their preliminary injunction motion.

Respondents claim that Petitioners never gave examples of ads they intend to run that would be monopolized by the on-ad disclosure requirements and therefore cannot demonstrate that the requirement would monopolize the ad. ABE Br. at 15. But Petitioners pled specific examples and demonstrated that burden. For instance, here is paragraph 64 from Plaintiffs' First Amended Complaint:

> Under the terms of Ballot Measure 2, FLF would have had to include the following message in every radio ad during the 2020 election year, based on the reports they submitted to APOC that year: "Paid for by Families of the Last Frontier. This notice to voters is required by Alaska law. We certify that this advertisement is not authorized, paid for, or approved by any candidate. The top contributors of Families of the Last Frontier are GOPAC, ABC Alaska PAC, and Arctic E&P Advisors." AS 15.13.090(a) & (d) and AS 15.13.135(b)(2) . . .

FAC ¶¶ 64, 67, D. Alaska No. 3:22-cv-00077-SLG Dkt 40 (June 6, 2022). As Petitioners pled, that radio script, at a rate of two words per second—to comply with the requirement that "the . . . statements must be read in a manner that is easily heard," AS 15.13.090(d)—would take up 41% of a 60-second radio ad, and 83% of a 30-second radio ad. FAC ¶ 66. That is a significant commandeering of Petitioners' speech,

and one that is simply basic math: that is how long it is going to take to read the required disclaimer. The FAC includes similar examples for the other Petitioners that engage in ad spending.

The State likewise claims that Petitioners lack standing because "neither the complaint nor the declarations allege that any of the plaintiffs has any desire to produce (or has ever produced) such an ad." State Br. at 16. But Petitioners' pleadings explicitly do say that they have made the sort of expenditures covered by Ballot Measure 2 and that they want to do such spending in the future. FAC ¶¶40-41, 53-54.

The State complains that this is a facial challenge, State Br. at 14, but facial challenges are common in this sort of campaign finance case, because there is a specific requirement, and the Court can decide whether that requirement passes the appropriate level of scrutiny. *See, e.g.*, *Citizens United v. Federal Election Commission*, 558 U.S. 310, 329 (2010) ("[T]he Court cannot resolve this case on a narrower ground without chilling political speech."). They invoke this Court's recent decision in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024), but the problem in *Moody* was that the plaintiffs were facially challenging the entire broadly worded social media laws at issue, even though they had uncertain application to a variety of other internet-based services, like email and instant messaging, that may have required a different analysis than Facebook or Twitter. There is no such issue here: Petitioners have challenged a specific set of requirements

Respondents object to "the plaintiffs' relaxed litigation strategy," claiming that Petitioners have somehow lollygagged, first by waiting to file the case and then by failing to expedite it. State Br. at 11-12. But Petitioners did no such thing. They waited a short time to file this case because there was ongoing state court litigation over Ballot Measure 2, *see Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022), and they concluded that it made sense to see how that resolved. Following that prudential delay, they litigated this case promptly, filing the instant motion for preliminary injunction just a few weeks after the Complaint in April 2022, and filing their notice of appeal just a week after the District Court opinion in July 2022, invoking the Ninth Circuit Rule 3-3, which provides expedited consideration of preliminary injunction appeals. Petitioners filed their opening brief in the Ninth Circuit in August 2022, less than three weeks after the case was docketed and 11 days before even the expedited briefing deadline. This appeal has taken a relatively long time to reach this Court only because the Ninth Circuit first stayed this case *sua sponte* while it resolved another appeal with some similar legal questions. *See No on E v. Chiu*, 85 F.4th 493, 497 (9th Cir. 2023). That was outside Petitioners' power—and is no reason to deny them review here.

There was no way for Petitioners to move more quickly without invoking this Court's so-called "Shadow Docket." Petitioners did not file an emergency application with the Ninth Circuit, or with this Court, for the simple reasons that 1) their claims were not specific to one election, but rather implicated all future Alaska elections, and 2) it is not desirable that every election speech case be decided under exigent

circumstances, without the full briefing and argument important First Amendment questions deserve. If this Court were to establish that any such appeal will be dismissed if not resolved prior to the instant election, the incentive for litigants will be to force its hand with eleventh-hour emergency filings—a practice that has already become endemic in recent years. *See, e.g.,* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019-2020).

II. There are significant differences among the circuits that this court should resolve.

Respondents attempt to distinguish the various cases that Petitioners have cited, but each attempt falls flat.

It is true enough that *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016), was a regulatory case about the FEC's regulations, but what matters is that the principle articulated by the D.C. Circuit is directly at odds with the reasoning of the Ninth Circuit, both in the decision below and in its earlier decision in *No on E v. Chiu*, 85 F.4th at 508 (9th Cir. 2023). The D.C. Circuit agrees with Plaintiff that the sort of "robust disclosure rule" that Alaska has enacted will "mislead voters as to who really supports the communications." *Van Hollen*, 811 F.3d at 497. The Ninth Circuit rejected this argument. This Court should decide which circuit is right.

It is true that *Wyoming Gun Owners v. Gray,* 83 F.4th 1224, 1229 (10th Cir. 2023), was an as-applied challenge, but Respondents don't explain why that distinguishes the case, apart from a generalized assertion that a different case might have been different. State

Br. at 18. It is also true that the Tenth Circuit thought that its analysis could be squared with *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021), but for reasons that actually *strengthen* Petitioners' argument. As the Tenth Circuit understood it, out, the First Circuit's decision in *Gaspee Project* agreed about the "importance of allowing donors to 'opt out' of a disclosure scheme while maintaining the ability to speak." It found the decisions reconcilable because the statute upheld in *Gaspee Project* "provided guidance for following a specific carve-out procedure" that potential donors could take advantage of. By contrast, the Alaska scheme that Petitioners challenge here lacks any "'opt out' provision for donors who do not want their money used on politics," State Br. at 21, so such a provision could not have been the basis of the Ninth Circuit's decision. Indeed, on this point, *Gaspee Project* itself is in conflict with the decision below even though the First Circuit upheld the law challenged there.

Respondents attempt to distinguish *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013) but never actually point to a relevant distinction between the disclosure laws the Eighth Circuit struck down there and those the Ninth Circuit upheld here. Respondents fall back on the idea that both the Eighth Circuit there and the Ninth Circuit here applied exacting scrutiny. ABE Br. at 20. But the split Petitioners identify here is not about the level of scrutiny to be applied, but about how that scrutiny should be applied to statutes like the one at issue here. The result of this circuit split, as with any other circuit split, is that people living in different parts of the country are effectively subject to different legal rules (and, in this case, differing constitutional protections).

III. The decision below is wrong on the merits and should be reversed.

No other state requires donors—everyday people with lives and careers who are not focused first and foremost on politics or campaign fi-nance compliance—to file reports of their donations. In every other state, the burden is on the recipient entity, which is already forced to comply with campaign finance regulations, to report the donations it receives. Alaska not only requires both the donor and the entity to report donations—as no other state does—but also requires such reporting within 24 hours of the donation, no matter how close in time the donation is to the election.

Worse, this requirement is not triggered based on the objective question of whether an entity is actively engaged in making independent expenditures, but based on the subjective prediction of whether it is (in the State's judgment) *likely* to make independent expenditures in the future. In other words, potential parties must *guess* as to the future activities of the group they wish to support, on penalty of thousands of dollars a day in fines.

The State asserts its concern is that groups will run ads using funds amassed from intermediary groups, and Alaskans will never know the "true sources" of the ads' funding. State Br. at 23. Assuming "true source" reporting is even constitutional (which Petitioners do not concede), the solution to this purported problem is simple: the recipient entity can report the true source at the time its disclosure report is due for that expenditure. Alaska law already requires the recipient entity to report true source information that it must collect

from a donor. AS § 15.13.110(k). And other laws put the burden on the entity to collect additional information from a donor, including the name, address, occupation, and employer. AS § 15.13.040(a)(1)(c) & (d). If true source reporting really is a legitimate government interest, then this law is not narrowly tailored to that interest: there is no reason that the entity, at the time it makes the expenditure, could not also report the true source by discerning that information from the donor. In that way, the law could achieve its purpose without invading the privacy of groups that are not engaged in independent expenditures. Again, this law as it is written is not narrowly tailored to the State's asserted interest.

The State tries to distinguish this Court's decisions against overbroad disclosure laws by asserting that "all or nearly all of Alaska's required donor disclosures directly serve the interest in informing voters about the sources of election spending." State Br. at 25. The problem in *Americans for Prosperity*, the State says, was that California's attorney general collected all donor information but only used it "in a handful of cases each year." *Americans for Prosperity Found. v. Bonta*, 41 S. Ct. 2373 (2021). But does the information collected by Alaska get used in more than a handful of cases per year? The state provides no reason to believe the situation is meaningfully different.

The State attempts to downplay the burdensome nature of its law by pointing to the separate statutory definition of "contribution," arguing that "[i]f the donor is truly not giving for political purposes and has no reason to know that the recipient might do so, disclosure is not triggered." State Br. at 26. But that is an entirely

subjective criterion. Again, return to the example Petitioners have used to illustrate: a small businessman renews his annual membership in the Alaska Chamber of Commerce for $2,500. The funds go to the Chamber's general fund. The Chamber uses its general fund that year to buy an independent expenditure ad for $1 million. Should that businessman have reported his chamber membership donation within 24 hours to APOC? Who knows?

For all of its argument, the State never addresses the fact that the disclaimer requirements are content-based and content-altering. They are based on the content of the message (if you talk about candidates, then you must include the disclaimer) and content-altering (rather than say what you want to say for several seconds of your ad, you must say what the State wants you to say).

Demonstrating the burden these laws place on speech does not require record evidence or sample advertisements or an as-applied challenge. "[W]e do not need empirical evidence to determine that the law at issue is burdensome." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 746 (2011). All the Court needs do is read Alaska's statutes, which spell out exactly all the information that any speaker would have to include in any message. AS § 15.13.090 & AS § 15.13.135. All of the required disclosures would consume a substantial proportion of *any* normal political advertisement.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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