No. 22-35612

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Doug Smith, Robert Griffin, Allen Vezey, Albert Haynes, Trevor Shaw, Families of the Last Frontier, and Alaska Free Market Coalition,
Plaintiffs-Appellants,

v.

Anne Helzer, in her official capacity as chair of the Alaska Public Offices Commission, and Lanette Blodgett, Richard Stillie Jr., Suzanne Hancock, and Dan LaSota, in their official capacities as members of the Alaska Public Offices Commission,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska
No. 3:22-cv-00077-SLG
Hon. Sharon L. Gleason

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The State begins its brief by recounting in deep detail all of Alaska's pre-existing campaign finance regulations, which addressed the Supreme Court's *Citizens United* decision by mandating numerous disclosure and disclaimer provisions.[1] The State makes it seem like this lawsuit is tackling many of these long-standing rules, but the reality is that Ballot Measure 2 went well beyond all of those pre-existing campaign finance regulations and imposed a new set of rules that substantially expanded Alaska's regime, making it the most aggressive state campaign finance regulation in the country. Appellants challenge these new provisions layered atop and integrated into the preexisting scheme, which violate the First Amendment's fundamental guarantee of free speech.

[1] The Plaintiffs disagree with the State's characterization of the *Kohlhaas* state litigation. State Resp. 10-11. Though *Kohlhaas* did not directly challenge the campaign finance provisions, he "argue[d] that the entirety of Ballot Measure 2 should be deemed unconstitutional because its parts are not 'severable' from each other." *Kohlhaas v. State*, No. 3AN-20-09532-CI, Order Re: All Pending Motions (3d Judicial Distr., Superior Ct. of Alaska July 29, 2021). Thus, had Kohlhaas succeed in his suit, it would have struck the campaign finance provisions as well as the others.

I. The disclosure requirements are unconstitutional.

1. Instant reporting by donors is not narrowly tailored.

No other state in the nation requires donors—everyday people with lives and careers who are not focused first and foremost on politics or campaign finance compliance—to file reports of their donations.[2] 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 requires *both* the donor and the entity to report, and requires such reporting within 24 hours of the donation, no matter how close in time the donation is to the election. The State's response is that it must have the donor report because only the donor knows the true source of the funds. Resp. 30.

Smith asserted a simple way the State could have narrowly tailored the law: exclude from the provision all individuals, given that any individual who is not the true source of the funds would be breaking the law against straw donations. The State's response is breathtaking: it is only a straw donation if the first person directs the second person to

[2] *See* Nat'l Conf. of State Legislatures, https://www.ncsl.org/research/elections-and-campaigns/state-campaign-finance.aspx#/.

give the money towards politics. It is not an illegal straw donation to "receiv[e] donated funds and re-donat[e] them to an independent expenditure group in the absence of such direction." Resp. 30. In other words, if a parent gives an adult child a $10,000 gift for her birthday, no strings or direction attached, and the adult child gives $2,000 to a political group, then the adult child must report the parent as the true source of the donation. Because the adult child donated funds that were not "wages, investment income, inheritance, or revenue generated from selling goods or services" (Alaska Stat. § 15.13.400(19)) but rather from a birthday gift, the adult child is not the true source. That scenario may be far-fetched, but it illustrates the incredible breath of the State's assertion: this is not narrowly tailored—it is invasive in the extreme. And the solution is not to bring an as-applied challenge on behalf of financial freedom for birthday gift recipients; it is to recognize this law is not narrowly tailored—must every individual donor report every donation so the State can root out the one birthday boy so patriotic he uses his birthday money for an independent expenditure ad?

Smith suggested a second way the State could have more narrowly tailored the law: exempting organizations that already publicly disclose

the information under existing reporting obligations. The State's response is that such reports may not be timely; for instance, reports of independent expenditures are not due to APOC until ten days after the expenditure is made. Resp. 31 & n.88. This just highlights the burden: an individual donor, who is not a sophisticated political actor, must report within 24 hours, but the political organization gets 10 days to file its report?

Alaskans for Better Elections (ABE) makes a similarly hard to credit response.[3] ABE argues the burden must fall on the donor because "the contributor will always be in a better position than the [independent expenditure organization] to both identify the true source of its own contribution and quickly report it." ABE Br. 18-19. It would also be equally true that the donor would be in a better position to know their own address, occupation, and employer, yet Alaska law imposes the duty to report those items on the recipient organization, not the donor, for any garden variety campaign donation. Alaska Stat. § 15.13.040(a)(1)(c) & (d). There is no reason to think that recipient

[3] Alaskans for Better Elections (ABE) is the political organization that advocated for the passage of Ballot Measure 2.

organizations could not also report true-source information with any less accuracy than they currently report donors' addresses or occupations.

2. The donor disclosure law is temporally overbroad.

If the question is no longer when an entity is actively engaged in making independent expenditures, but rather is (in the State's judgment) *likely* to make independent expenditures, there is truly no limit to the State's ability to demand financial information from nonprofit organizations. Why not also demand complete disclosure from every 501(c)(4) social welfare organization and every 501(c)(6) business league or union, since these are the tax categories of organizations most likely to make independent expenditures? The State could, if "likely" is the new test for invading an organization's financial privacy.

For now, the State requires disclosure by donors to groups that made donations last election cycle. This invades the privacy of groups that limit their electoral engagement to particular races or issues. A group may engage in independent expenditures one election cycle because an issue they care about will be before the Legislature. The bill passes, and so the group does not care to influence legislative elections the next

cycle. What business of the State is it who gives that group money in that next two-year period? The answer is not for that group to shoulder the burden of filing a lawsuit with an as-applied challenge to protect its' financial privacy. Rather, it is for this Court to recognize this law is not "tied with precision to specific election periods." *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1117-18 (9th Cir. 2019).

The State's concern is that a group will amass funds from intermediary groups, run its ads, and Alaskans will never know the "true sources" of the donations. Resp. 33. Assuming true source reporting is even constitutional (which Smith does not concede), the answer is simple: the recipient entity can report the true source at the time its disclosure report is due for that expenditure. Alaska Stat. § 15.13.110(k) already puts on the entity the burden of reporting true source information that it must collect from a donor. And other laws put the burden on the entity to collect other information from the donor, including the name, address, occupation, and employer. Alaska Stat. § 15.13.040(a)(1)(c) & (d). 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.

Finally, the State tries to distinguish the U.S. Supreme Court's decisions against overbroad disclosure laws by saying "all or nearly all of Alaska's required donor disclosures directly serve the interest in informing voters about the sources of election spending." Resp. 35-36. 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." Resp. 35. The State never provides any evidence that the donor-disclosure data it puts on its website is more than "rarely used." Resp. 35. *See* ABE 40. The State provides no evidence that tens of thousands of Alaska voters flock to its website every fall, anxious to read about who contributed how much to various independent expenditure groups. Indeed, the State's argument for on-ad top-three donor disclaimer seems to boil down to, "Not enough voters visit our website, so we have to save them the work and give them the information we think they want when it's most convenient, on the ad itself." Resp. 47. Maybe the better explanation is that most

voters just don't care about donor information that much, and that "a handful of cases" where voters do care is not enough to justify the burden imposed. *See* Carpenter & Milyo, *The Public's Right to Know versus Compelled Speech: What Does Social Science Research Tell Us about the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 Fordham Urb. L.J. 603 (2012).

3. The donor disclosure law is overly burdensome.

The State's argument about the burdensome nature of its law basically comes down to the interaction of Ballot Measure 2 with the separate statutory definition of "contribution," such that "[i]f the donor is truly not giving money for political purposes and has no reason to know that the recipient has made or intends to make independent expenditures, the donor disclosure obligation is not triggered." Resp. 37.[4] *See* ABE 26. The problem with that is the entirely subjective nature of it. Again, return to the example Smith frequently uses to illustrate: a

[4] The State also says (Resp. 36) that the Seventh Circuit has upheld a "one-page form" as minimally burdensome, but fails to note that the burden fell not on everyday citizen-donors, but on the political committees who were already subject to numerous other filing requirements. *Wisconsin Right to Life v. Barland*, 751 F.3d 804, 843 (7th Cir. 2014).

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 to buy ads later 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? ¯_(ツ)_/¯

On the one hand, he likely knows the Chamber does public advocacy work, and perhaps he's even seen Chamber TV ads in past elections. But he's not focused on that when he renews his membership. What if the Chamber lists him and 399 other members paying the $2,500 dues as the collective sources of the $1 million, and he did not file a report within 24 hours? If APOC audits the list and discovers he did not report, will he be subject to fines and penalties?[5]

The State and ABE seem to think that every independent expenditure is funded by the Koch Brothers or a few other sophisticated megadonors who use intermediary layers of organizations to hide their

[5] ABE says that Smith has not pointed to anything that's actually burdensome, ABE 25 & n.47, but Smith has argued consistently that the law is burdensome in numerous ways: the 24-hour near-instant reporting requirement and the comprehensive knowledge of active, previously active, and potentially active IE groups most notably.

dark money. In the State's quest to get them, it has looped in hundreds or thousands of everyday Alaskans who support civil society organizations. Yet as the State itself points out in the context of researching disclosure data, "people have jobs, families, and other distractions," Resp. 47 (quoting *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003)), and they can hardly be expected to comply instantaneously with disclosure requirements based on a comprehensive knowledge of all groups that are, have recently, or might soon run independent expenditures.

Smith's complaint is not that directly political donations are disclosed, though the plaintiffs do believe the fear of cancel culture is real, but rather that everyday Alaskans will be discouraged from supporting civil society organizations because of an unreasonable, vague, and overly burdensome reporting requirement imposed on them as supposedly intermediary organizations by Ballot Measure 2.

II. The disclaimer requirements are unconstitutional.

For all of its argument, the State never addresses two basic facts: (1) the disclaimer requirements are literally compelled speech. The State is forcing the plaintiffs to say something they would otherwise not say.

That is the definition of compelled speech. (2) 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). The First Circuit in *Gaspee Project* was simply wrong about this, and this Court should instead follow its own precedent in *ACLU of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004). Though *ACLU* predates *Citizens United*, it's logic remains sound: these requirements are content-based and content-altering.

The State argues that it only mandates that a speaker disclose his, her, or its identity in the ad. Resp. 42-43. But that is not what the law requires. Such a law might require that a radio ad include the statement "Paid for by Alaska Free Market Coalition," to use a plaintiff as an example. Instead, the law requires the ad to include the sponsor name, mailing address, approval ("I approved this message"), independence ("this advertisement is not authorized, paid for, or approved by any candidate or candidate committee"), top three donors (with their cities), and out-of-state disclaimer ("A majority of the money

the Coalition raised this year came from outside the State of Alaska."). This is far more than just the speaker's identity. Strict scrutiny should apply.

Next, the State argues that the disclaimer law survives exacting scrutiny based on this Circuit's precedent in *Yamada v. Snipes*. Resp. 45. Yet *Yamada* concerned a much narrower requirement: the sponsor had to disclose its name, mailing address, and independence ("this advertisement is not authorized, paid for, or approved by any candidate"). Hawaii Rev. Stat. § 11-391. And the message was not required to be verbalized; it simply had to appear on the screen or print advertisement in a prominent location. *Id*. To conclude such a scheme "imposes only a modest burden" (786 F.3d at 1202) simply highlights the immodesty of the burden imposed by Alaska, which requires this information and much more, and requires that much of it be verbalized in a broadcast ad and not only displayed.

Demonstrating this burden does not require record evidence or sample advertisements or an as-applied challenge, contra Resp. 50-51. "[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. Alaska Stat. § 15.13.090 & Alaska Stat. § 15.13.135. All of the required disclosures would consume a substantial proportion of any normal political advertisement.

Moreover, the State's answer on out-of-state discrimination is unsatisfying. Though the cases cited in Appellants' opening brief are all on out-of-state contribution limits (and Appellants can add to this list the recent decision in *Chancey v. Ill. State Bd. of Elections*, No. 22 CV 04043, 2022 U.S. Dist. LEXIS 188097, *22 (N.D. Ill. Oct. 14, 2022)), the principle underlying them remains applicable to the out-of-state disclaimer: it represents discrimination against one class of speakers. As Judge Tharp said in *Chancey*, "Illinois' exclusive targeting of out-of-state contributions raises a serious red flag that it is actually animated by what prospective out-of-state contributors have to say—or the ideologies of the judges whom they may tend to support—rather than public confidence in its judiciary." *Id*. at *26. In the same way, the State's requirement of a disclaimer about out-of-state donors is really a

hint as to how voters are supposed to judge the views expressed by such out-of-state contributors.

Finally, there is truly no limit to the State's theory of its informational interest. If the State, whether through ballot measure or legislation or APOC regulation, determines that some tidbit of information would be interesting or informative or helpful to voters, it may require not only its disclosure, but its inclusion on an ad, as long as the sum total of such requirements does not take up more than perhaps 40 percent of the ad. In other words, Alaska could pass "a law requiring a speaker favoring an incumbent candidate to state during every [advertisement] that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from [voting for that candidate], a law compelling its disclosure would clearly and substantially burden the protected speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 798 (1988).

III. The equities favor issuing injunctive relief.

1. *Purcell* is no bar to relief.

ABE's invocation of *Purcell* is a red herring. *Purcell* does not apply to campaign finance, but the mechanics of election administration. *Chancey*, 2022 U.S. Dist. LEXIS 188097, *40; *Make Liberty Win v. Ziegler*, 499 F. Supp. 3d 635, 645 (W.D. Mo. 2020); *Holland v. Williams*, 457 F. Supp. 3d 979, 996 (D. Colo. 2018). *Purcell* is concerned with "[c]hanges that require complex or disruptive implementation." *Merrill v. Milligan*, 142 S. Ct. 879, 881 n.1 (2022) (Kavanaugh, J., concurring). The idea is that one cannot tell thousands of poll workers spread out across dozens of wards that the rules for counting ballots are changing mere days before an election. That is very different from this case, where all the State would need to do is update its website to reflect the correct law and not enforce provisions subject to an injunction. This is not the sort of "complex or disruptive implementation" where scores of volunteer precinct election officials are being given different rules at the last minute.

2. Smith has raised at least a serious question as to the merits, and the balance of hardships tips sharply in his favor.

First, the State and ABE continually harp on Smith's lack of record evidence below. Setting aside that in a preliminary injunction posture, before discovery and depositions, such record evidence will necessarily be limited, this puts the burden in the wrong place. *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012). In *Sanders*, this Court considered another instance where "the district court, in denying preliminary relief, pointed to the dearth of evidence before it and held that it ought not decide issues of such 'fundamental and far-reaching import' without a complete record." This Court rejected that rationale, saying "the statute here is facially unconstitutional, and the burden then shifts to the state to try to justify the statute, either by evidence or argument." *Id.*

Second, as ABE correctly points out, "In the Ninth Circuit, if a plaintiff shows 'that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips *sharply* in the plaintiff's favor.' *Friends of the Wild Swan v. Weber*, 767

F.3d 936, 942 (9th Cir. 2014)." ABE 14. Even if Smith is not likely to succeed, he has at least demonstrated serious questions as to the merits. And the balance of hardship favors him—as this Court has said, again in *Sanders*, "with the Committee's First Amendment rights being chilled daily, the need for immediate injunctive relief without further delay is, in fact, a direct corollary of the matter's great importance." *Sanders Cnty. Republican Cent. Comm.*, 698 F.3d at 748. "When, as here, a party seeks to engage in political speech in an impending election, a 'delay of even a day or two may be intolerable.'" *Id.* The Smith appellants respectfully request the Court's prompt action to safeguard their First Amendment rights from the unconstitutional provisions of Ballot Measure 2.

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Respectfully submitted,

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CERTIFICATE AS TO WORD COUNT

Counsel certifies that the foregoing brief has 3,374 words in the body.

/s/ Daniel R. Suhr