No. _____

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

PETITION FOR WRIT OF CERTIORARI

Craig W. Richards
Law Offices of
Craig Richards
810 N Street, Ste. 100
Anchorage, Alaska
99501
crichards@alaska
professionalservices.com

June 13, 2024

Jacob Huebert
Counsel of Record
Reilly Stephens
LIBERTY JUSTICE CENTER
13341 W. U.S. Highway 290
Building 2
Austin, Texas 78737
512-481-4400
jhuebert@ljc.org

Counsel for Petitioners

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?

PARTIES TO THE PROCEEDING

Petitioners, Doug Smith, Robert Griffin, Allen Vezey, Albert Haynes, and Trevor Shaw are natural persons and residents of the state of Alaska.

Petitioners Families Of The Last Frontier and Alaska Free Market Coalition are independent expenditure committees registered in Alaska who raise and spend money in Alaska elections.

Respondents Richard Stillie Jr., Suzanne Hancock, Eric Feige, Lanette Blodgett, and Dan Lasota are natural persons and members of Alaska Public Offices Commission.[1]

Intervenor-Defendant Respondent Alaskans For Better Elections, Inc. is a nonprofit advocacy group that sponsored the challenged ballot measure.

RULE 29.6 STATEMENT

Petitioners Doug Smith, Robert Griffin, Allen Vezey, Albert Haynes, and Trevor Shaw are natural persons for whom no corporate disclosure is required under Rule 29.6.

Petitioners Families Of The Last Frontier and Alaska Free Market Coalition are independent expenditure committees who do not issue stock or have any parent or subsidiary entitles.

---

[1] Respondents Eric Feige and Lanette Blodgett are substituted for previous official capacity Respondents Anne Helzer and Van Lawrence, who served on the Commission when the case was pending below. *See* Fed. R. App. P. 43(c)(2).

STATEMENT OF RELATED CASES

The proceedings in other courts that are directly related to this case are:

- *Smith v. Helzer*, 22-35612, United States Court of Appeals for the Ninth Circuit. Judgment entered March 15, 2023.
- *Smith v. Helzer*, No. No. 3:22-cv-00077-SLG, United States District Court for the District of Alaska. Order denying preliminary injunction entered July 14, 2022.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Speech about elections, candidates, and issues lies at the core of the First Amendment's protection for the marketplace of ideas. For that reason, any attempt by the government to stifle or control such speech deserves the strongest judicial scrutiny. This is a burden Alaska's Ballot Measure 2 cannot survive.

Ballot Measure 2, passed in November 2020, places unprecedented burdens on citizens' right to speak about matters of public concern. The law requires that donors to political campaigns redundantly report contributions—within 24 hours of making them—to avoid incurring thousands of dollars in fines. It demands that speakers fill their advertisements with extensive disclaimers for huge portions of their run time, converting such ads from communications about candidates to communications about the speaker's contributors.

This law is an outlier among all state and federal campaign finance rules. It is not narrowly tailored; it discourages everyday citizens from participating in the public square, commandeers more of an advertisement's space with compelled speech, and imposes substantial costs on speakers in exchange for marginal information gains. And the Ninth Circuit's decision upholding the law is also an outlier, inconsistent with rulings from at least the Eighth, Tenth, and D.C. Circuits.

This Court should grant this Petition, resolve the inconsistent rulings among different circuits, and hold that Alaska's regime cannot withstand First Amendment scrutiny.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Smith v. Helzer*, 95 F.4th 1207 (9th Cir. 2024), and reproduced at App. 1.

The opinion of the United States District Court for the District of Alaska is reported at *Smith v. Helzer,* 614 F. Supp. 3d 668(D. Alaska 2022) reproduced at App. 57.

JURISDICTION

The Ninth Circuit issued its opinion and judgment on March 15, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Ballot Measure 2, including the challenged provisions of Alaska law, is included in the Petitioner Appendix beginning at App. 102 *et seq*.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

In November 2020, Alaska voters approved Ballot Measure 2, the most sweeping overhaul of election procedures in the State's history, and the most speech-restrictive state campaign finance law in the country. Petitioners challenge two aspects of the scheme to ensure their rights in advance of this November's crucial elections.

First, Ballot Measure 2 requires donor disclosure, not only by the political committees and other groups that receive them, but also simultaneously by the donors themselves. Section 7 provides that anyone who contributes as little as $2,000 in the aggregate in a calendar year to any group that makes independent expenditures or is "likely to make independent expenditures" in the current election cycle, must themselves file a report with the commission within 24 hours of the donation. App. 108. Under Section 15, anyone who neglects to file this immediate disclosure is subject to civil fines of up to $1,000 per day, whether the oversight is intentional or out of ignorance—notwithstanding state law's requirement that recipient independent expenditure groups also report the contributions themselves. App. 113.

Second, Ballot Measure 2 imposes multiple extensive disclaimer requirements on political advertising. Under Section 11, television and internet advertisements must include, for the entirety of the ad, a disclaimer detailing (1) the individual or entity who paid for the ad along with the funder's city and state of principal place of business and (2) the name and city and state of residence of the three largest contributors to the speaker. App. 110. Section 12 also requires that any ad funded with out-of-state donations state on screen, in all capital letters, for its entirety:

> A MAJORITY OF CONTRIBUTIONS TO (OUTSIDE-FUNDED ENTITY'S NAME) CAME FROM OUTSIDE THE STATE OF ALASKA.

App. 111.

A third pillar of Ballot Measure 2, which Petitioners challenge below but do not seek relief from in this preliminary appeal, is the "true source" requirement. This provision requires that each donor to an independent expenditure group report the "true source" of the donated funds, which the law defines as the individual person or corporation that earned the funds. App. 108.

For instance, if the Alaska Chamber of Commerce donated $5,000 to an independent expenditure entity supporting Governor Dunleavy's reelection, the Chamber would have to report that contribution within 24 hours—and its report would have to include not only the date and amount of its donation, but also a list of the Chamber's own donors. If one of those donors was also an association rather than a

corporation—say, the Alaska Realtors Association—then the state chamber would have to somehow obtain a list of the Realtors Association's donors. And if the Realtors Association's donors, in turn, included a local realtors association, then the Chamber would have to include a list of *that* organization's members—and so on, all the way back to the so-called "true source," meaning the original person or corporation who earned the funds eventually donated. Alaska is the only state in the nation that demands this level of disclosure, wherein the genealogy of every dollar is reported.

Petitioners are individuals and organizations subject to Ballot Measure 2. Two plaintiffs are independent expenditure groups—Families of the Last Frontier and the Alaska Free Market Coalition. As such, they will be responsible for complying with the disclaimer requirements of Ballot Measure 2. The other plaintiffs are individual donors with proven track records of supporting independent expenditure groups and other political and charitable organizations at levels greater than $2,000 in a calendar year. As such, they will be subject to the disclosure requirements and their names may be included among the top three donors required in the disclaimer requirement.

Procedural History

Plaintiffs filed their Complaint challenging the various aspects of Ballot Measure 2 in April 2022, and sought a preliminary injunction ahead of the 2022 election. The District Court denied Plaintiffs' preliminary injunction motion, finding that Plaintiffs had failed to establish a likelihood of success on the merits of their claim, at which point Plaintiffs instituted this interlocutory appeal. App. 101. The

Ninth Circuit heard argument, and then later stayed the case pending the outcome of a case challenging a similar on-ad disclosure regime from San Francisco. The Ninth Circuit ultimately upheld the San Francisco scheme, and a Petition for Certiorari seeking review of that decision is currently pending before this Court. *No on E v. Chiu*, No. 23-926.

The Ninth Circuit ultimately affirmed the district court, finding that Ballot Measure 2's impositions on speech were subject to only exactly scrutiny, and under that standard upheld both the duplicative contributing reporting and on-air donor disclosures as insufficiently burdensome and sufficiently tailored. App. 26. Petitioners now ask this court to review that decision.

SUMMARY OF ARGUMENT

This Court has repeatedly criticized the "prophylaxis-upon-prophylaxis approach" that typifies much of campaign finance law. *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1652 (2022). This is the approach Alaska takes here, requiring individual and organizational donors to report their donations to independent expenditure entities within 24 hours, even as the entities themselves must also report those same donations. This duplicative, audit-and-accounting mindset failed exacting scrutiny in *Americans for Prosperity Foundation v. Bonta*, 41 S. Ct. 2373, 2387 (2021). The State argues it is necessary to discover secondary donors (itself a constitutional problem), but this is not narrowly tailored as to most donors.

Not only must individual donors report their contributions to independent expenditure committees within 24 hours, but also they must report with similar

promptitude their donations to any group that has made independent expenditures in the past two years, or that the donor thinks is *likely* to do so in the future. This is utterly unfair to donors: "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . ." *Citizens United v. FEC*, 558 U.S. 310, 324 (2010). Moreover, disclosure requirements must be "tied with precision to specific election periods" and "carefully tailored to pertinent circumstances." *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1117-18 (9th Cir. 2019). These requirements are not tied with precision or carefully tailored; instead, they invade the privacy of non-profit groups without justification.

If the onerous reporting were not enough, the State of Alaska precisely prescribes in statute exactly what an independent expenditure entity must say in its television ads. This is literally a "a government-scripted, speaker-based disclosure requirement." *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018). Because it is compelled, content-altering speech, strict scrutiny applies. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163, 165 (2015). The Ninth Circuit erred when it found that exacting, rather than strict, scrutiny applies to the compelled speech requirements.

And even if only exacting scrutiny applies to the on-ad donor-disclaimer requirements, they constitute a tremendous burden on speakers, consuming a substantial portion of the ad. The minor gain in the convenience of information for voters is not narrowly tailored to the significant burden on speakers. *See Am. Bev. Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 754 (9th Cir. 2019). And what's more, the out-of-state

disclaimer not only has all the failings of the top-donor disclaimer, but also unconstitutionally discriminates against out-of-state speakers. *Thompson v. Hebdon*, 7 F.4th 811, 824 (9th Cir. 2021).

These decisions are wrong and conflict with decisions of other circuits. This Court should therefore grant the petition and resolve these questions once and for all.

REASONS FOR GRANTING THE PETITION

I. The decision below creates a division of authority among the circuits as to both the donor disclosure and duplicative reporting requirements.

The Ninth Circuit's rulings below are in conflict with other Circuits as to both the compelled disclosure requirements and the requirement that donors make redundant, unnecessary reports of their donations.

First, as to the donor disclosure, in *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016), the D.C. Circuit rejected a claim that FEC regulations should require the sort of on-air ad disclaimer that Alaska requires, agreeing with the FEC—and Petitioners—that because "some individuals who contribute to a union or corporation's general treasury may not support that entity's electioneering communications," the sort of "robust disclosure rule" Alaska employs "would thus mislead voters as to who really supports the communications." The court explained:

> Imagine the following not unlikely scenario. A Republican donates $5,000 to the American

> Cancer Society (ACS), eager to fund the ongoing search for a cure. Meanwhile, Republicans in Congress, aware of a growth in private donations to ACS, push for fewer federal grants to scientists studying cancer in order to reduce the deficit. In response to their push, the ACS runs targeted advertisements against those Republicans, leading to the defeat of several candidates in the upcoming election. Wouldn't a rule requiring disclosure of ACS's Republican donor, who did not support issue ads against her own party, convey some misinformation to the public about who supported the advertisements?

Id. This is precisely the argument—intuitive as Petitioners and the D.C. Circuit both find it—that the Ninth Circuit rejected below.

The Tenth Circuit likewise recently struck down Wyoming's donor disclosure rules as applied to an independent expenditure group under exacting scrutiny. *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1250 (10th Cir. 2023); *Cf. Indep. Inst. v. Williams*, 812 F.3d 787, 797 & n.12 (10th Cir. 2016) (upholding disclosure where the speaker "need[ed] only disclose those donors who have specifically earmarked their contributions for electioneering purposes.").

These disclosure regimes are proliferating—the question of their constitutionality arises again and again, and will not go away. *See, e.g.*, *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021) (upholding Rhode Island's disclosure requirement); *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304

(3d Cir. 2015) (upholding Delaware's); *Indep. Inst. v. Fed. Election Comm'n*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016), *aff'd*, 580 U.S. 1157 (2017) (three-judge panel upheld mandatory disclosure of donors where the donation was "for the specific purpose of supporting the advertisement"). This Court should resolve the issue sooner rather than later.

The Ninth Circuit's endorsement of Alaska's duplicative reporting requirements is likewise in conflict with decisions of other courts. Indeed, one of the cases on which the Ninth Circuit expressly relied, App. 19, in fact holds to the contrary: in *Iowa Right to Life Committee, Inc. v. Tooker*, the Eighth Circuit struck down Iowa's requirement that groups file redundant and duplicative reports as unconstitutionally burdensome. 717 F.3d 576, 597 (8th Cir. 2013); *see also Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 874 (8th Cir. 2012) (striking down Minnesota's regime as overly burdensome).

This Court should grant the petition, and resolve these important questions that have created disparate outcomes below.

II. Ballot Measure 2's Duplicative Disclosure is not narrowly tailored.

Ballot Measure 2 requires donors to independent expenditure groups to report donations to the Alaska Public Offices Commission within 24 hours—even though the law already requires the recipients of such donations to report exactly the same information. § 15.13.040(r) (donors) & (d) (recipients). The Ninth Circuit and the parties agree that this disclosure

requirement is subject to exacting scrutiny. App. 11. Ballot Measure 2's requirement of near-instantaneous duplicative reporting fails exacting scrutiny because it is not narrowly tailored, especially given the burden it places on donors.

Before Ballot Measure 2, Alaska law already required independent expenditure entities to promptly report their donors. AS § 15.13.110(a)-(b). Ballot Measure 2 extends that reporting requirement to donors. The Respondents offered only one reason for this below: that only the donor knows, or can discover, the "true source" of the donation. In other words, if the Alaska Chamber receives money from the Anchorage Chamber, only the Anchorage Chamber knows its members that it must now report as the true sources of its funds.

But this is not narrowly tailored. Petitioner donors are all individuals who are themselves always the true source of their donations. It would be an illegal straw donation for an individual to accept funds from someone else and give it in their name, 2 AAC 50.258(a), and no one would report to Respondents that they are breaking the law. Moreover, all independent expenditure donations by corporations that earned the funds donated are the "true source" of their own donations; again, it would be an illegal straw donation for a corporation to accept funds from someone else and then donate those funds in their own name. 2 AAC 50.258(a). Finally, many organizations that do not themselves earn income nevertheless report publicly their donors to other public authorities, such as the Alaska Public Offices Commission, the Internal Revenue Service, or the Federal Election

Commission (for instance, a 527 entity or a federal campaign or political action committee).

In each of these three ways, the State could have crafted a more narrowly tailored statute that still would have served the State's asserted purpose of discovering "true sources" without burdening everyday Americans. Indeed, even the District Court acknowledged that "the donor disclosure requirement in Section 7 overlaps with, but is not completely duplicative of, the reporting requirements for independent expenditure entities." App. 75. This marginal amount of additional information does not justify Alaska casting "a dragnet for sensitive donor information . . . even though that information will become relevant in only a small number of cases." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

That overlap, where individuals, corporations, and registered political committees are reporting information that adds nothing new beyond what the recipient is already reporting, is proof of that lack of narrow tailoring. Alaska "is not free to enforce any disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives." *AFPF*, 141 S. Ct. at 2386. It cannot make such a demonstration here: the less intrusive alternative is obvious, but was not the law the State enacted.

Both courts below dismissed Petitioners' reliance on the *McCutcheon v. FEC*, 572 U.S. 185 (2014) "'prophylaxis-upon- prophylaxis' analysis," on the theory that *McCutcheon* addressed limits on

contributions and expenditures, whereas this case addresses disclosure. App. 16, 77. This is a legal error. *McCutcheon* did concern a different type of campaign-finance rule, but its discussion of prophylaxis-upon-prophylaxis bears on the nature of the exacting scrutiny test. The point of this portion of *McCutheon*, readopted in *Cruz*, is that a law is not narrowly tailored when it layers safeguard atop safeguard, whatever the underlying problem being guarded against. Here, requiring duplicative reporting from everybody when the informational gain is quite narrow is a layering approach that fails exacting scrutiny.

Meanwhile, the burden on everyday Americans is great. Filing requirements that are onerous and unduly burdensome are unconstitutional. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 254 (1986) (plurality) (when a law imposes "[d]etailed record-keeping and disclosure obligations" and other "administrative costs that many small entities may be unable to bear," it is unconstitutional). Under Ballot Measure 2, anyone donating as little as $2,000 must meet the sort of compliance burdens typically reserved for sophisticated parties who have the expertise—and the lawyers—to ensure they are following the rules. "The average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth" by Ballot Measure 2. *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. 2010). "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . " *Citizens United v. FEC*, 558 U.S. 310, 324 (2010).

Everyday citizens who make modest donations face three burdens. First, they must know whether the group they are supporting is engaged in independent expenditures. Of course the recipient entity knows if it is engaged in independent expenditures; it is subject to a bevy of rules if so. *See* AS Ch. 15. But there is no reason a businessman who decides to donate $2,000 to the Alaska Chamber of Commerce would necessarily know whether the Chamber is or is not actively sponsoring independent expenditure advertisements at the moment. And if the Chamber sends him a thank-you letter with a note to make sure to file his APOC report, it will arrive after the 24-hour period, too late to prevent him from violating the law.

Second, even if the donor knows the recipient is engaged in an independent expenditure, he must also know of his obligation to report his donation. Anyone familiar with Alaska's previous campaign-finance rules, the laws of other states, and the rules for federal campaigns would assume that the recipient entity is the only one obligated to report its donors.

Third, the donor who does know must suspend whatever else he is doing and complete the required forms within 24 hours every time he makes a donation. Filing requirements that are counted in hours rather than weeks or months are often reserved for the periods shortly before an election, where regular quarterly reporting would not serve the informational interest in a timely way. *See, e.g., Nordstrom v. Lyon*, 35 A.3d 710, 716 (N.J. Super. Ct. App. Div. 2012) ("a 48-hour reporting requirement for donations greater than $1200 within the last thirteen days prior to an election"). Imposing such a near-immediate

turnaround on everyday citizens regardless of the proximity of the election is not narrowly tailored.

The District Court dismissed this all because the State introduced "seven screen shots of the relevant Statement of Contributions Form 15-5, which appears to be a straightforward document." App. 73. The Ninth Circuit similarly dismissed the "reporting mechanism [as] relatively simple and 'straightforward.'" App. 19. But the problem is not the complexity of document itself; rather, the problem is the burden on the individual donor to know about the recipient entity's activities, know of the requirement, and to comply with it instantaneously—keeping in mind that most donors are ordinary individual Americans, not professional political operatives. "It is easy to suppose these reporting and filing requirements are slight. They may be so for a large enterprise. They are care-demanding and time-consuming" for a single individual. *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1036 (9th Cir. 2009) (Noonan, J., concurring).

Ballot Measure 2 requires both encyclopedic and prophetic knowledge of Alaska independent expenditure groups. Under Section 7 of Ballot Measure 2, a donor must report not only a contribution to an active independent expenditure group, but also a contribution to any group that has made independent expenditures in the past two years or that she has reason to believe is likely to do so in the future. AS § 15.13.040(r).

This is, again, not narrowly tailored for at least two reasons. First, it is unfair to the donors. Again, a donor

should not have to hire a campaign finance attorney to research whether the group she is supporting engaged in an independent expenditure eighteen or more months ago. Second, it is an unconstitutional invasion of privacy as to the recipient groups. As this court has repeatedly held, nonprofit organizations are entitled to keep their donors private from the prying eyes of the state. *AFPF*, 141 S. Ct. at 2382. "The government may regulate in the First Amendment area only with narrow specificity, and compelled disclosure regimes are no exception. When it comes to a person's beliefs and associations, broad and sweeping state inquiries into these protected areas discourage citizens from exercising rights protected by the Constitution." *Id.* at 2384 (cleaned up); *See also NAACP v. Alabama*, 357 U.S. 449 (1958).

Because the baseline is privacy for nonprofit groups, narrow tailoring (or narrow specificity) to the state interest is necessary. Here, the state interest is knowing who funds election advocacy. Hence, disclosure requirements must be "tied with precision" and "carefully tailored" to actual election advocacy. *Nat'l Ass'n for Gun Rights*, 933 F.3d at 1117-18. The government's only interest is in the disclosure of dollars "that [are] unambiguously campaign related." *Buckley v. Valeo*, 424 U.S. 1, 81 (1976).

The Respondents and the courts below "acknowledge that the disclosure law 'might sweep in some excess information at the margins' as it applies to contributions made during a current election cycle to an entity that has not made any expenditures in the current cycle, but did make them in the past cycle." App. 77. The District Court found such excess does not

violate narrow tailoring because "requiring the disclosure of donations made to independent expenditure entities in the previous election cycle and [to entities that] are likely to make independent expenditures in the current election cycle helps ensure that voters will promptly have access to complete information regarding the source of independent expenditures in advance of an election, and prevents donors from sidestepping disclosure requirements by strategically donating in the final stretch of an election cycle." App. 79. The Ninth Circuit agreed, finding that "the individual-donor contribution-reporting requirement works in concert with the recipient independent-expenditure organizations' disclosures to the Commission, helping to ensure that the information received by voters is reliable and accurate." App. 15.

This is a phantom fear; such sidestepping is impossible under current Alaska law. A full report is due to APOC seven days before an election for all activity up to three days before the due date, i.e., ten days before the election. AS § 15.13.110(a)(2). And for the "final stretch" after that last full report, any contribution over $250 must be reported by the recipient entity within 24 hours. AS § 15.13.110(b).

The requirement that donors disclose contributions to groups that are not actively engaged in independent expenditures places an unreasonable burden on donors and an unconstitutional invasion of the recipient group's privacy. If the group chooses to become an independent expenditure group again in this current cycle, it will have to disclose all of its donors who gave over $100 for the calendar year per

existing disclosure law. AS § 15.13.040(b)(2). But if it does not become an independent expenditure entity this cycle, either because it never intended to or because it changes its mind, then its privacy will have been invaded without cause. This requirement is not narrowly tailored to election activity.

III. Ballot Measure 2's on-air disclaimer requirements are compelled speech and should be subject to strict scrutiny.

Alaska's requirement that Petitioners list their top-donor information on their advertisements is a "government-drafted script" whose exact wording is set by statute. *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2377 (2018).

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The general rule is that the government may not compel a person "to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Compelled speech on the government's behalf is impermissible because it "affects the message conveyed." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 572 (1995). Put another way, the government violates a speaker's First Amendment rights by "interfer[ing] with the [speaker's] ability to communicate its own message." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006).

"Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the

same rigorous scrutiny" as other content-based laws. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). In other words, such laws are "subject to strict scrutiny." *Id.* at 165.

This Court recently applied these settled principles in *NIFLA*, which considered a California statute that compelled clinics licensed to serve pregnant women to post a notice about abortion rights. Unlicensed clinics were required to post a notice that they were not licensed to provide medical services.

The Court concluded that the required notices for licensed clinics were compelled speech. Those clinics had to "provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them." *Id.* at 2371 (cleaned up). "By compelling individuals to speak a particular message," this requirement "alter[ed] the content of their speech." *Id.* (cleaned up). And though the Court focused on the unlicensed clinic requirement's lack of tailoring, the Court characterized this requirement as "a government-scripted, speaker-based disclosure requirement." *Id.* at 2377.

Similarly, the Alaska donor disclaimer requirement forces Petitioners to alter their advertisements that seek to inform or convince people on a particularly political issue, to also encourage

viewers or listeners to consider Petitioners' own donors. If anything, the speech alteration here is even more severe, for instead of merely having to post a government-provided notice, Petitioners must change *their own* speech—one third of an advertisement—to accommodate the government's message. Alaska's intrusion on speech is even more offensive to the First Amendment because it pertains to speech about elections—an area "integral to the operation of our system of government," where the First Amendment should have "its fullest and most urgent application." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (cleaned up).

The on-ad donor disclaimer here is content-based and thus subject to strict scrutiny because compelled speech is content-altering. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988). "Since all speech inherently involves choices of what to say and what to leave unsaid," *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 11 (1986) (plurality), the compelled speech requirement here harms Petitioners in multiple ways, both restricting their ability to speak their preferred message and forcing them to speak a message they do not want to voice.

First, Petitioners cannot use those portions of their advertisements that the government commandeers. Such a feature has been recognized in other content-based compelled speech cases as a "penalty" on speech. For instance, in *Miami Herald Publishing Co. v. Tornillo*, considering a statute that granted political candidates equal space in a newspaper to reply to

criticism, the Court noted that this "compelled printing" imposed a "penalty" on publishers, including "the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print." 418 U.S. 241, 256 (1974). Here, similarly, the government's speech consumes ad time that displaces Petitioners' preferred speech.

The requirement here also forces organizations to speak the government's own message. Petitioners believe strongly in the right to privacy and would not include their donors' information in their advertisements if Alaska's law did not force them to do so. D. Alaska Dkt. 18-6 (Shaw Decl. ¶¶ 5, 6, & 9); Dkt. 21 (Strait Decl. ¶¶ 4, 5 & 7). Forcing an organization committed to limited government and personal freedom to announce the names of its donors in advertisements is similar to forcing pro-life groups to share information about abortion access. "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley,* 515 U.S. at 576. Donors may be less likely to support groups that appear to violate their own principles. And listeners' rights are harmed, too, as the government's interference distorts Petitioners' message. *Cf. Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."). Rather than hearing the information the speaker wants to convey, listeners must hear the

information the government says the speaker must convey.

The requirement also forces Petitioners to change the subject of their advertisements, from informing or trying to convince listeners about a political issue to talking about Petitioners' donors. The government's forced speech about the speaker's funding distracts the listener from the speaker's intended message. *Wash. Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019) ("many political advocates today also opt for anonymity in hopes their arguments will be debated on their merits rather than their makers," or in this instance their makers' funders).

The compelled disclosure is no less offensive because it compels statements of fact rather than statement of opinion: 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*, 515 U.S. at 573. The problem is the government-mandated change in the content of one's speech, not whether the new content is neutral, factual, or otherwise non-ideological. *Frudden v. Pilling*, 742 F.3d 1199, 1206 (9th Cir. 2014) ("the right against compelled speech is not, and cannot be, restricted to ideological messages." Rather, "compelled statements of fact, like compelled statements of opinion, are subject to First Amendment scrutiny." (cleaned up)). Thus, Alaska's mandate is a regulation of "pure speech"—not merely a regulation of "the mechanics of the electoral process." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

Here is the disclaimer Alaska law now requires of Families of the Last Frontier. On a radio ad: "Paid for

by Families of the Last Frontier, 123 Main Street, Anchorage, Alaska 56789. 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 Tim Smith, Sally Jones, and Jane Doe." AS § 15.13.090(a) & (d) and AS § 15.13.135(b)(2). And one cannot rush reading this announcement: "[T]he . . . statements must be read in a manner that is easily heard." AS § 15.13.090(d).

In a television ad, the message must include a video statement: "I am Steve Strait, president of Families of the Last Frontier, and I approved this message." AS § 15.13.090(a)(2)(B). On the screen there must be text reading: "Paid for by Families of the Last Frontier, 123 Main Street, Anchorage, Alaska 56789. 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 Tim Smith of Anchorage, Alaska, Sally Jones of Fairbanks, Alaska, and Jane Doe of Wasilla, Alaska. A MAJORITY OF CONTRIBUTIONS TO FAMILIES OF THE LAST FRONTIER CAME FROM OUTSIDE THE STATE OF ALASKA." AS § 15.13.090(a), (c), & (g) and AS § 15.13.135(b)(2). The statement must be "easily discernible" and must "remain onscreen throughout the entirety of the communication." AS § 15.13.090(c) & (g).

As a matter of precedent, "[t]he 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,"

so the government's "informational interest is plainly insufficient." *McIntyre*, 514 U.S. at 348–49.

Second, all the information conveyed by the on-ad donor disclaimer is already available to the public under the law's other provisions, "at the click of a mouse." *McCutcheon*, 572 U.S. at 224. Narrow tailoring requires more than a marginal gain in convenience or efficiency. California made the same type of argument trying to survive exacting scrutiny in *AFPF*: "the up-front collection of Schedule B information improves the efficiency and efficacy of the Attorney General's important regulatory efforts." 141 S. Ct. at 2385. California said other measures, such as subpoenas or audit letters for specific investigations, "are inefficient and ineffective compared to up-front collection" of information. *Id.* at 2386. This Court rejected this rationale, saying "the prime objective of the First Amendment is not efficiency." *Id.* at 2387. Once again, Alaska's law is prophylaxis-atop-prophylaxis. Not content to make this information available to voters on the Internet, we must now beam it into their homes and force them receive it.

Third, the on-ad sponsor disclaimer (the name of the independent expenditure committee) alone easily satisfies any informational interest that might exist. Who sponsored the ad "will signify more about the candidate's loyalties than the disclosed identity of an individual contributor will ordinarily convey." *Vote Choice v. DiStefano*, 4 F.3d 26, 35 (1st Cir. 1993). "That a certain, unknown individual supplied the [funds] involved in producing a given communication 'adds little, if anything, to the reader's ability to evaluate the document.'" *ACLU of Nev. v. Heller*, 378 F.3d 979, 994

(9th Cir. 2004) (quoting *McIntyre*, 514 U.S. at 348-49). Indeed, conveying the top-three donors on the ad may decrease viewers' information by giving them a distorted view of the organization's overall donors.

Fourth, the State's claim lacks any limiting principle. If the State can require the city and state of residence for the top three donors to be included on an ad, why not whether they are registered as Republicans or Democrats? That could be more useful to voters than their names and cities—a voter in Anchorage viewing an ad may not know who Sally Jones of Fairbanks is but know that he likes Democrats and opposes Republicans. Certainly Sally Jones's party affiliation would help him know whether "Citizens for Alaska" is a front for Republican or Democrat interests. Because different voters find different information important as they consider an advertisement, the State could serve the informational interest Respondents have asserted by requiring donors to "disclose all kinds of demographic information, including the signer's race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships." *Doe v. Reed*, 561 U.S. 186, 207 (2010) (Alito, J., concurring). Or the State could require ads to include not only donors names and cities, but also their phone numbers or e-mail addresses to "more easily enable members of the voting public to contact them and engage them in discussion." *Id.* The "informational interest" is not a blank check for the State to require disclosure and now disclaimer of any and all information it wants.

On the other side of the balance sheet, the imposition on the speaker and donors is considerable.

First, the speaker must speak a message he does not wish to say. The District Court discounted this, saying

> [T]he burden here on independent expenditure entities is much lower than in *NIFLA*, where pro-life pregnancy crisis centers were required to 'inform women how they can obtain state-subsidized abortions,' which was 'the very practice that [they] are devoted to opposing.' Here, while Plaintiffs may hold broad ideological concerns about privacy, the on-ad top-three-donor disclaimer does not require them to convey a message that is directly contrary to whatever political statement they seek to make in their electioneering communications.

App. 89. Actually, however, the burden on Petitioners is greater than the burden on the clinics in *NIFLA*: instead of merely having to post a government-provided notice, Petitioners must change their own speech to say the government's message with their own mouths. And it is not a court's role to say that the pregnancy resource centers' opposition to abortion is any less fervent or important than Petitioners' opposition to government control of otherwise free speech.

Moreover, the restriction is especially onerous because the required disclaimers will take up a significant portion of the advertisement. In the commercial context, various circuits have struck down mandatory warnings as compelled speech in situations where the requirement was only that the "warning occupy at least 20% of the advertisement." *Am. Bev. Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 754 (9th

Cir. 2019); *accord R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (striking down tobacco warning labels that took up 20% of the packaging). But the extensive disclaimers here cover far more—requiring not just the names but also identifying information for three different donors, and on top of that the State's all-caps warning about donations from out-of-state, for the entirety of the ad, commandeering even more speech than the health warnings in those cases. This burden is even more pronounced in a radio ad, where the names of contributors must be read aloud. The significant amount of space taken up by the State's mandated scripts exacerbates the compelled speech problem.

As with the "top three" disclaimer requirement, this Court should also find that Ballot Measure 2's disclaimer requirement for out-of-state contributions fails heightened scrutiny. Section 12 of the law requires that any independent expenditure entity that receives more than 50% of its aggregate contributions from "true sources" with their principal place of business outside Alaska must include as a part of their speech the government authored statement: "A MAJORITY OF CONTRIBUTIONS TO [THIS GROUP] CAME FROM OUTSIDE THE STATE OF ALASKA." Petitioner Families of the Last Frontier has received more than 50% of its contributions in the past from contributors outside Alaska and alleged in the Complaint that it intended to solicit contributions outside Alaska in 2022. First Amend. Compl. at ¶45.

This Court should likewise find that Petitioners are likely to succeed on the merits of their claim that the

out-of-state disclaimer requirement violates the First Amendment.

Courts routinely invalidate out-of-state campaign contribution restrictions like Alaska's. The Ninth Circuit previously struck down Alaska's nonresident aggregate limit, which barred candidates from accepting more than $3,000 per year from non-Alaskans. As the court there recognized, "[a]t most, the law aim[ed] to curb perceived 'undue influence' of out-of-state contributors—an interest that is no longer sufficient after" this Court's decisions in *McCutcheon* and *Citizens United*. *Thompson v. Hebdon*, 7 F.4th 811, 824 (9th Cir. 2021). The Ninth Circuit rejected Alaska's asserted interest in avoiding the appearance of undue out-of-state influence, pointing out that the only relevant inquiry was whether the state could show an interest in preventing actual corruption, and that Alaska's argument "sa[id] nothing about corruption." *Id.* Likewise, in *Landell v. Sorrell*, the Second Circuit held that Vermont's law prohibiting candidates, political parties, and political action committees from receiving more than twenty-five percent of their donations from out-of-state donors violated the First Amendment. 382 F.3d 91, 146 (2d Cir. 2004). That court recognized "that many non-residents have legitimate and strong interests in Vermont and have a right to participate, at least through speech, in those elections." *Id.* at 147. The court thus held that Vermont had "no sufficiently important governmental interest" to justify "disproportionately curtailing the voices of some, while

giving others free rein, because it questions the value of what they have to say." *Id*. at 146, 148.

Section 12 impermissibly burdens the protected speech of both donors and groups by compelling them to speak the government's message implying that out-of-state funding is somehow suspect or disreputable. The disclaimer serves no anti-corruption interest—the donors to independent expenditure groups are already disclosed to the state, and to the public on the state's website, so one can easily determine whether any particular group draws its support from outside Alaska—and rival groups can point out this supposed foreign influence in their own speech if they think it will matter to Alaska's voters. Compared to this traditional give-and-take of politics, Section 12's disclaimer requirement is more likely to mislead than enlighten: including the government's required message will only imply that there's something shady about a groups funding, devoid of any context by which voters could make a reasoned judgment.

Nor is Alaska's supposed interest narrowly tailored to its claimed interest. Section 19 defines "outside-funded entity" as a group that takes donations from a true source with a principal place of business outside Alaska. But one's principal place of business is a poor proxy for one's interest in Alaska's elections. Indeed, a donor could have significant operations in Alaska, even a majority of its operations, while happening to be headquartered elsewhere. *See, e.g., Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (noting corporation's

principal place of business was in New Jersey even though its biggest market was California).

The State, through the mandated disclaimer is telling voters which ads to listen to and which ads to ignore based on who supported the sponsor of the ad. This goes against the Supreme Court's admonition that the "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United*, 558 U.S. at 340. The Government should not "deprive[] the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id*. To permit the government to "restrict the speech of" out-of-state supporters "to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

Craig W. Richards
Law Offices of
Craig Richards
810 N Street, Ste. 100
Anchorage, Alaska 99501
crichards@alaska
professionalservices.com

June 13, 2024

Jacob Huebert
Counsel of Record
Reilly Stephens
LIBERTY JUSTICE CENTER
13341 W. U.S. Highway 290
Building 2
Austin, Texas 78737
512-481-4400
jhuebert@ljc.org
Counsel for Petitioners