No. 23-1316

IN THE

# Supreme Court of the United States

DOUG SMITH, *et al.*,

*Petitioners,*

*v.*

RICHARD STILLIE, JR., IN HIS OFFICIAL CAPACITY AS CHAIR, ALASKA PUBLIC OFFICES COMMISSION, *et al.*,

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## RESPONDENTS' BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

A group of plaintiffs brought a purely facial challenge to Alaska campaign finance disclosure and disclaimer laws, some of which were enacted by voter initiative a year earlier, others of which had been in place for a decade.

The district court denied the plaintiffs the extraordinary remedy of a preliminary injunction, and the Ninth Circuit affirmed. The case is ongoing.

The questions presented are:

1. Did the district court abuse its discretion in concluding that the plaintiffs did not adequately demonstrate that they are likely to succeed in showing that the laws are so insufficiently tailored to the State's interest in an informed electorate that a substantial number of the laws' applications are unconstitutional in relation to their plainly legitimate sweep?

2. Did the district court abuse its discretion in following *Citizens United v. FEC*, 558 U.S. 310 (2010), and other campaign finance precedent by applying exacting, rather than strict, scrutiny to the challenged disclaimer law?

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## INTRODUCTION

The courts below faithfully applied this Court's campaign finance precedents to standard disclosure and disclaimer laws in a facial, preliminary context in which the plaintiffs submitted no evidence that the laws are harming anyone.

Even if the Court were interested in exploring the limits of disclosure and disclaimer laws, this petition would make a terrible vehicle for the purpose. It is a "disfavored" facial challenge just like the Court struggled with in *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024), brought by plaintiffs with questionable standing. It is an interlocutory appeal that is so stale that the Ninth Circuit worried it might be moot. It presents an empty record populated with hypotheticals rather than real people. It concerns an outdated version of the complaint and does not tee up arguments about privacy or Alaska's "true source" law. Plus, these plaintiffs have shown no urgency that could justify not waiting for a final judgment.

Vehicle problems aside, the federal courts of appeals are not split, and the lower courts did nothing to warrant this Court's supervision. They simply applied settled precedent by subjecting the challenged laws to exacting scrutiny. And they denied the extraordinary remedy of a preliminary injunction because these plaintiffs—who submitted practically no evidence—did not demonstrate that they are likely to succeed in showing that a substantial number of the laws' applications are unconstitutional judged in relation to their "plainly legitimate sweep."

The Court should deny the petition.

## STATEMENT OF THE CASE

1. After *Citizens United v. FEC*, 558 U.S. 310 (2010), the Alaska Legislature updated Alaska's campaign finance laws. Previously, Alaska had limited who could make "independent expenditures" in candidate elections to individuals, groups, and non-group entities. AS 15.13.135(a) (2009). This excluded corporations and labor unions. *See* AS 15.13.400(8), (11), (13) (2009). In *Citizens United*, the Court held that "the Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." 558 U.S. at 319. So Alaska adjusted. Rather than prohibiting corporate political speech, it followed the path blessed by the Court and began relying more heavily on disclaimer and disclosure requirements.

First, the legislature modified the disclaimers required on communications. Since 1974, Alaska has required a "paid for by" disclaimer for all communications intended to influence the election of a candidate. *See* 1974 Alaska Sess. Laws ch. 76, § 1. In 2010, the legislature amended AS 15.13.090 to add more requirements and to extend these provisions to corporations and labor unions by using the word "person," which includes such entities. 2010 Alaska Sess. Laws ch. 36, §§ 13-14; AS 15.13.400(14) (2010). As of the 2010 legislation, disclaimers had to include the person's address or principal place of business; and for a person other than an individual or candidate, (1) the name and title of the principal officer; (2) the name, city, and state of residence or principal place of business of the top three contributors; and (3) a statement that the principal officer approved the communication. AS 15.13.090(a), (f ) (2010).

Second, the legislature amended the disclosure laws for independent expenditures to require corporations and labor unions to provide source information. 2010 Alaska Sess. Laws ch. 36, § 4. The expenditure-reporting statutes and regulations pre-dating *Citizens United* already covered every "person" making an expenditure so they easily extended to corporations and labor unions—once they began making expenditures—because Alaska law defined "person" to include them. *See* AS 15.13.040(d)-(e) (2009); 2 AAC 50.270(c) (2009); AS 15.13.400(14) (2009); AS 01.10.060. But existing law did not require a "person," other than a candidate, group, or nongroup entity, to report the source of funds used. *See* AS 15.13.040(a)-(b), (d)-(e), (j) (2009); AS 15.13.400(14) (2009). In the same 2010 legislation that expanded the disclaimer provisions, the legislature closed this loophole by amending AS 15.13.040(d) to provide that "[e]very person making an independent expenditure shall make a full report of expenditures made and contributions received, upon a form prescribed by the commission." 2010 Alaska Sess. Laws ch. 36, § 3. The report must include, among other things, the date and the name and address of the contributor. AS 15.13.040(e). Generally, a report must be filed no later than 10 days after an independent expenditure is made. AS 15.13.110(h). But the time shortens as an election approaches—an expenditure over $250 within nine days of an election must be reported within 24 hours. *Id.*

2. In 2020, after ten years of on-the-ground experience with these provisions, Alaska voters enacted Ballot Measure 2 to close gaps in the laws and require more information about independent expenditures. 2020 Alaska Laws Initiative Meas. 2, § 3. This ballot initiative made three changes relevant here. First, it added a donor

disclosure requirement: a donor who contributes $2,000 or more in a calendar year to an entity that made independent expenditures in candidate elections in the current or previous election cycle or is likely to do so in the current election cycle must report the contribution within 24 hours. AS 15.13.040(r). Second, Ballot Measure 2 updated the pre-existing disclaimer laws such that disclaimers must "remain onscreen throughout the entirety of the communication," and an entity receiving most of its funding from outside Alaska must include a disclaimer about this in any ad with a print or video component. AS 15.13.090(c), (g). Third, Ballot Measure 2 required that disclosures reveal the "true source" of funds, meaning the person who earned the funds rather than passing them on as an intermediary. *See* AS 15.13.400(19) (defining "true source" as the "person or legal entity whose contribution is funded from wages, investment income, inheritance, or revenue generated from selling goods or services," including through "contributions, donations, dues, or gifts" if those were "less than $2,000 per person per year"). These changes took effect in February 2021.

3. In April 2022—more than a year after these changes went into effect—the plaintiffs sued the members of Alaska's campaign finance enforcement agency. Pet. App. 58. The complaint included three counts, challenging new requirements as well as pre-existing ones dating back a decade. Count I challenged the new donor disclosure law. Count II challenged the disclaimer requirements for political ads as enacted in 2010 and supplemented by Ballot Measure 2. Count III—which is not at issue in this appeal—challenged the requirement that disclosures include the "true source" of the money. The plaintiffs made clear that their lawsuit was a purely facial challenge.

DC.Dkt. 39 at 17 (stating that "[t]his is a facial challenge," "not an as-applied challenge"). The sponsors of Ballot Measure 2—Alaskans for Better Elections—intervened to defend the law. The plaintiffs moved for a preliminary injunction.

4. In July 2022, the district court denied the motion for a preliminary injunction, concluding that the "Plaintiffs have not demonstrated a likelihood of success on any of the three counts." Pet. App. 100.

On Count I—donor disclosure—the district court agreed with all parties that the appropriate standard of review is "exacting scrutiny" as laid out in *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021). Pet. App. 67. Applying that standard, the court concluded that the law is narrowly tailored to the State's important interest in informing voters about sources of funds. Pet. App. 71-79. The court reasoned that the law "overlaps with, but is not completely duplicative of, the reporting requirements for independent expenditure entities," because the donor is in a better position to identify the true source of the contribution and "requiring prompt disclosure by both parties maximizes the likelihood of prompt and accurate reporting of the information when it is most useful to the electorate." *Id.* at 75-76. The court rejected the argument that the law is "unduly burdensome," observing that the plaintiffs produced "no evidence to suggest" that compliance is difficult and that the State produced screenshots of its reporting form "which appears to be a straightforward document that enables a donor to promptly comply with the reporting requirement." *Id.* at 73. The court also disagreed that the law is too broad, emphasizing that a facial challenge cannot

be sustained based on "hypothetical" or "imaginary" cases, and that the plaintiffs did not submit evidence of negative impacts or demonstrate that a "substantial number" of the law's applications are unconstitutional. *Id.* at 73, 78.

On Count II—disclaimers—the district court ruled that the proper standard is likewise "exacting scrutiny," rejecting the plaintiffs' argument for strict scrutiny. Pet. App. 80-84. Applying exacting scrutiny, the court concluded that the disclaimers are sufficiently tailored to the State's informational interest. *Id.* at 84-96. The court observed that the top-three donor disclaimer "does not require [an ad producer] to convey a message that is directly contrary to whatever political statement they seek to make," and that "on-ad placement" "provides a far more efficient and effective form of disclosure." *Id.* at 89. As for the out-of-state funding disclaimer, the court noted that it is not "an outright ban or cap on contributions" and does not "even directly burden out-of-state donors," but rather "entities that receive over a certain percentage of their funds from out-of-state donors." *Id.* at 92-93. The court also rejected the position that the disclaimers consume too much space, observing that they "are not required by law to take up a certain percentage of ad space" and that the plaintiffs did not "offer evidence that shorter or less prominent disclaimers would serve the State's informational interest equally well." *Id.* at 95. They did not supply examples "or otherwise provide evidentiary support for this claim sufficient to demonstrate that a 'substantial number of [the disclaimer law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 96.

On Count III—the "true source" law not at issue on appeal—the district court again applied exacting scrutiny and concluded that the plaintiffs failed to establish likely success on the merits. Pet. App. 96-99.

5. The plaintiffs appealed the denial of a preliminary injunction on Counts I and II, but not Count III. Pet. App. 6. Reviewing for abuse of discretion, the Ninth Circuit affirmed in March 2024. *Id.* at 2-3.

The Ninth Circuit first considered whether the appeal was moot given that the plaintiffs' assertions of irreparable harm had focused on the 2022 election which had since come and gone. Pet. App. 6-8. Assuming the appeal would otherwise be moot, the court elected to consider it under the "capable-of-repetition-yet-evading-review" exception. *Id.* at 8. The court cautioned, however, that its review at this interlocutory stage was "limited" and, given the undeveloped record, "provides little guidance on the appropriate resolution of the merits." *Id.* at 9 (citation omitted). The court also observed that facial challenges are "disfavored" and cannot rest on speculation about "imaginary" cases. *Id.* at 10-11 (citations omitted).

On Count I—donor disclosure—the only question on appeal was whether the requirement was narrowly tailored to the State's informational interest. Pet. App. 14. The Ninth Circuit concluded that the district court did not abuse its discretion in finding that it was, rejecting arguments that the law is unnecessary, redundant, and too onerous. *Id.* at 14-21. The court agreed with the district court that donors will always be in a better position to identify and report true sources (as required by the true source law not challenged on appeal), observing

that "[p]rompt disclosure by both sides of a transaction ensures that the electorate receives the most helpful information in the lead up to an election." *Id.* at 15-16. And the court explained that the reporting process appears "straightforward" and that "[p]artly because of the posture of this appeal, and partly because plaintiffs failed to introduce any such evidence, there is nothing in the record to indicate that compliance with the reporting structure has been overly burdensome." *Id.* at 18-19.

On Count II—disclaimers—the Ninth Circuit likewise applied exacting scrutiny and concluded that the district court did not abuse its discretion in finding that the law was narrowly tailored. Pet. App. 21-25. The court discussed its recent decision in another disclaimer case, *No on E v. Chiu*, 85 F.4th 493 (9th Cir. 2023), rejecting arguments similar to those rejected there. Pet. App. 22-24. As for Alaska's out-of-state disclaimer, the court noted that it does not restrict the speech of out-of-state speakers. *Id.* at 25. And as with the other disclaimers, the court was not convinced that disclaimers are impermissible when the same information is concededly validly required in disclosures. *Id.* The court thus concluded that "at this stage" the challenged laws pass muster. *Id.*

The petition now asks this Court to review the Ninth Circuit's decision affirming the district court's denial of a preliminary injunction.

## REASONS FOR DENYING THE PETITION

### I. This petition is an abysmal vehicle.

This is a stale interlocutory appeal in a facial challenge brought by dilatory plaintiffs whose barebones, outdated allegations could not justify extraordinary preliminary relief even if the Court agreed with them on the merits. If the Court is interested in exploring campaign finance disclosure and disclaimer laws, it will have plenty of better petitions to choose from.

#### A. This is a stale interlocutory appeal.

1. The interlocutory posture of this petition is reason enough to deny it. *See Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (statement of Thomas, J.) ("This Court is rightly wary of taking cases in an interlocutory posture."); *Abbott v. Veasey*, 580 U.S. 1104, 1105 (2017) (statement of Roberts, C.J.) (noting that "[t]he issues will be better suited for certiorari review" after final judgment); *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J.) (agreeing with the denial of certiorari given interlocutory posture). The Court usually waits for final judgment. *See* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, p. 224 (7th ed. 1993) ("[I]n the absence of some such unusual factor, the interlocutory nature of a lower court judgment will result in a denial of certiorari.").

2. This petition's interlocutory posture means, as the Ninth Circuit observed, that the factual record is "yet to be fully developed." Pet. App. 9. In fact, it has barely been developed at all: the district court heard no live testimony

and received only a handful of nearly identical conclusory declarations in support of the plaintiffs' motion for preliminary injunction. DC.Dkt. 18-3 to 18-8. The record contains not even a single example of an advertisement—real or illustrative—with the challenged disclaimers. It is hard to see how the Court could decide that Alaska's disclaimers are unconstitutionally burdensome without even a single example showing how they allegedly occupy too much space in an ad. "This Court has often refused to decide constitutional questions on an inadequate record." *Ellis v. Dixon*, 349 U.S. 458, 464 (1955).

3. This petition's interlocutory posture also inserts unnecessary layers of complexity because a preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, pp. 129–130 (2d ed. 1995) (emphasis this Court's)). This drastic remedy "does not follow as a matter of course from a plaintiff 's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 585 U.S. 155, 158 (2018). Instead, the denial of relief is reviewed for abuse of discretion, "keeping in mind that a preliminary injunction is 'an extraordinary remedy never awarded as of right.'" *Id.* (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). A court considers not just the merits, but also whether the movant has shown "that he is likely to suffer irreparable harm" without relief, "that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.*

The Ninth Circuit recognized that this posture meant that its review was "confined" and "much more limited," cautioning that its disposition "provides little guidance on the appropriate resolution of the merits." Pet. App. 9. (quoting *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1983)); *see also Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982) (observing that parties may appeal preliminary injunction orders "to ascertain the views of the appellate court on the merits of the litigation" but that such appeals "often result in 'unnecessary delay to the parties and inefficient use of judicial resources'"). Absent extraordinary reasons, the district court should have the space to *actually* decide the merits without this Court stepping in to evaluate whether it abused its discretion in evaluating the *likely* merits outcome.

4. The plaintiffs offer no extraordinary reasons to depart from the usual practice of waiting for a final judgment before granting certiorari. Although granting a petition in a non-ideal interlocutory posture is sometimes justified by urgency, these plaintiffs have shown the opposite of urgency in this litigation. They waited over a year after Ballot Measure 2 went into effect in February 2021 before finally filing suit in April 2022 (and indeed, some of the challenged provisions date back to 2010).[1]

1. Below, the plaintiffs attempted to justify this initial delay by pointing to another suit about unrelated components of the same ballot initiative. But that case would not have invalidated the campaign finance provisions challenged here even if successful. *See Kohlhaas v. State*, 518 P.3d 1095, 1101 (Alaska 2022) ("This case concerns only the open primary and ranked-choice voting, not the campaign finance reforms."). Nor did anything stop these plaintiffs from intervening there or suing then too.

Pet. App. 58, 100. Then, after suing and unsuccessfully seeking a preliminary injunction from the district court, they did nothing to accelerate their appeal or to pursue other interim relief. And instead of diligently prosecuting their case in the district court in the meantime, they asked to pause it pending their appeal and then again pending this petition. DC.Dkt. 50, 57.

Although the plaintiffs say they are now petitioning this Court to "ensure their rights in advance of this November's crucial elections," Pet. 3, they have not sought the kind of emergency treatment that would allow them to get relief that quickly. Even if this Court were to grant their petition, this case would not be argued, let alone decided, before November's election. The upcoming election thus creates no urgency to justify departing from the usual practice of waiting for a final decision from the lower courts.

5. The plaintiffs' relaxed litigation strategy has also undermined and rendered stale the justification for preliminary relief that they presented to the district court two years ago. "[A] party requesting a preliminary injunction must generally show reasonable diligence," and "[t]hat is as true in election law cases as elsewhere." *Benisek*, 585 U.S. at 160. Unnecessary delay weighs against one seeking relief. *See id.* The State did not oppose the requested stays because it has no need of its own to speed up this litigation. But if these plaintiffs truly faced urgent irreparable harm, they would have done more to press forward. Indeed, if they had just litigated below rather than seeking stays, we might already have a final decision rather than being two years in with little progress.

At this point, their conclusory declarations in support of the motion for preliminary injunction are so weak and stale that the lack of irreparable harm (a preliminary injunction factor not reached by the lower courts) provides a strong alternative basis for affirming the denial of extraordinary relief. Indeed, the Ninth Circuit worried that this appeal might have been moot given that it could not grant relief before the 2022 election, "which formed the basis of the preliminary injunction motion." Pet. App. 8 n.2. And the declarations lacked urgency and detail even when viewed from a 2022 perspective: none expressed a time-sensitive desire to contribute large sums to any entity covered by the challenged disclosure law, nor explained why filing the simple required form would cause irreparable harm if they did (given that the recipient would be obligated to disclose their names regardless under the unchallenged recipient disclosure law). *See* DC.Dkt. 18-3 to 18-8. The declarations were even more deficient to demonstrate irreparable harm from the disclaimer laws because they did not even allege that any declarant (or any recipient of any declarant's donations) intended to run any advertisements that would need the disclaimers. *See id.*

6. What's more, even the version of the complaint that's before the Court is now stale. Back when the State and the sponsors opposed the motion for preliminary injunction, they also filed motions to dismiss the original complaint for failure to state a claim. DC.Dkt. 31, 33. The plaintiffs responded by amending their complaint. DC.Dkt. 40. But by that point, the preliminary injunction briefing was already complete and addressed only the original complaint rather than the amended version. DC.Dkt. 18, 30, 34, 39. Thus, the complaint before this

Court is stale and—as the plaintiffs implicitly recognized in amending it—deficient.

### B. This is a facial challenge by plaintiffs with questionable standing.

Even setting aside this case's stale interlocutory posture, it presents a poor vehicle because it is a disfavored facial challenge by plaintiffs with questionable Article III standing that have not squarely teed up their asserted privacy concerns.

1. These plaintiffs chose to bring only a "disfavored" facial challenge. *See* DC.Dkt. 39 at 17 (stating that "[t]his is a facial challenge," "not an as-applied challenge"); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (labeling facial challenges "disfavored"). This choice "comes at a cost." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). Because facial challenges "'often rest on speculation' about the law's coverage and its future enforcement," this Court has made them "hard to win." *Id.* (quoting *Wash. State Grange*, 552 U.S. at 450). This adds another unnecessary layer of complexity because the Court must assess whether these plaintiffs showed that they are likely to succeed in proving that a substantial number of these laws' applications are unconstitutional judged in relation to their "plainly legitimate sweep." *See id.*

The Court need not take a disfavored facial challenge when it could just as easily await a challenge to disclosure and disclaimer laws as applied to real-life circumstances. The parties' disagreements below about how the challenged laws would apply to hypotheticals call to mind

the problems caused by the facial challenge in *Moody*. *See* 144 S. Ct. at 2397-99. For example, the plaintiffs posited "a businessman who decides to donate $2,000 to the Alaska Chamber of Commerce" who might not know his money would be spent on campaign ads. CA9.Dkt. 6-1 at 16-17. In response, the State pointed out that donors and recipients can avoid having to disclose non-political donations by making their intentions clear to each other and segregating funds not destined for political spending. CA9.Dkt. 12 at 29. The plaintiffs replied by writing a shrugging emoticon ("¯_(ツ)_/¯") to indicate that they remained unsure whether the State would punish their hypothetical businessman for violating the donor disclosure law. CA9.Dkt. 24-2 at 9.

An as-applied challenge would give the Court a helpful practical context for analyzing legal issues and save the Court from wading into such fruitless "'speculation' about the law's coverage and its future enforcement." *Moody*, 144 S. Ct. at 2397; *see also id*. at 2409 (Barrett, J., concurring) (noting "the dangers of bringing a facial challenge"); *id*. at 2411 (Jackson, J., concurring) (noting that "plaintiffs bringing a facial challenge must clear a high bar"); *id*. at 2413 (Thomas, J., concurring) (opining that "[f ]acial challenges are fundamentally at odds with Article III"); *id*. at 2428 (Alito, J., concurring) (explaining that facial challenges are "strongly disfavored" and "strain the limits of the federal courts' constitutional authority to decide only actual 'Cases' and 'Controversies'").

2. Not only does this case not provide any helpful as-applied context, but these plaintiffs' Article III standing is dubious for some aspects of this case. Standing "is not dispensed in gross." *DaimlerChrysler Corp. v. Cuno*, 547

U.S. 332, 353 (2006) (citation omitted). Here, although the petition complains about the disclaimers that would need to be included in a radio or television advertisement, Pet. 22-23, neither the complaint nor the declarations allege that any of the plaintiffs has any desire to produce (or has ever produced) such an ad. They did not even clearly allege a desire to produce *any* communications that would need disclaimers. DC.Dkt. 1 at 5-11. And although the donor plaintiffs at least alleged that they "would like to continue giving" to unspecified causes, e.g. DC.Dkt. 1 at 5, their allegations are so generic that they may not satisfy Article III either. *See Carney v. Adams*, 592 U.S. 53, 64 (2020) (explaining that "'some day intentions' do 'not support a finding of the "actual or imminent" injury that our cases require'") (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992)).

3. On top of all this, this lawsuit fails to tee up the plaintiffs' "invasion of privacy" concerns. Pet. 7, 16-17. Several donor plaintiffs claimed to fear that "being public[l]y associated with my donations may lead to reprisals against me and my business interests in the current climate of cancel culture." *E.g.*, DC.Dkt. 18-3 at 2. But any such fear is irrelevant here because this lawsuit cannot redress it. This lawsuit challenges only the requirement that *donors* report contributions, not the separate requirement that *recipients* report those same contributions. Striking down the donor disclosure law—the only disclosure law at issue here—would not protect donors from public association with their donations because recipients would still have to report them. This makes this case an inadequate vehicle for exploring any privacy concerns.

It is not as if the Court must settle for a case with these vehicle problems if it is interested in the questions presented. It should await a stronger petition.

## II. The circuits are not split.

Contrary to the petition, the courts of appeals are not split on the questions presented. Pet. 8-10. The Court can wait until a split arises to intervene.

1. The D.C. Circuit in *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016) did not decide anything remotely like the questions presented, much less decide them differently from the Ninth Circuit. That was not a First Amendment case, but rather a case about statutory interpretation and agency rulemaking under the now-defunct *Chevron* framework. There, the court considered whether it was "arbitrary and capricious" for the FEC, in implementing the Bipartisan Campaign Reform Act (BCRA), to require corporations and labor organizations to disclose only donations "made for the purpose of furthering electioneering communications" rather than all donations. *Id.* at 495-502. The court concluded that the FEC's choice was not arbitrary even though its explanation was not one of "ideal clarity." *Id.* at 497. Among the FEC's reasons for choosing narrower disclosure was the theory that some donors "may generally support the entity but not its electioneering communications," a reason the court called "fairly intuitive, at least enough to pass [a] 'very deferential scope of review.'" *Id.* at 497-98.

This is nothing like holding that a donor disclosure rule like Alaska's violates the First Amendment. Not only is ruling that the FEC's approach is *permissible* a

far cry from ruling that it is constitutionally *required*, but Alaska's approach is not that dissimilar from the FEC's. Alaska law, like BCRA, defines "contribution" to depend on the political purpose of a donation. *See* AS 15.13.400(4)(A). Thus, as the State pointed out below, donors and recipients can avoid the need to disclose donations not intended for political purposes by making their intentions clear and segregating political contributions. *See* CA9.Dkt. 12 at 28-29. This is not so different from the FEC regime the D.C. Circuit approved, but even if it were, *Van Hollen* represents no circuit conflict because the D.C. Circuit decided none of the questions considered here.

2. Nor is the Ninth Circuit in direct conflict with the Tenth Circuit. In *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1250 (10th Cir. 2023), the Tenth Circuit held that some aspects of Wyoming's disclosure laws were unconstitutional as applied to a small gun advocacy group. But the Tenth Circuit did not apply a different test or rule differently on an identical legal issue—it was confronted with a different challenge, in a different posture, to a different law. It is not clear how the Tenth Circuit would have ruled on a purely facial challenge like this one with no factual context rather than a specific example of a challenged disclosure law's real-world effect on a small organization.

The Tenth Circuit also explicitly recognized that its analysis would come out differently for different disclosure laws, explaining that its decision was not "in tension with" the First Circuit's decision in *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021)—which upheld Rhode Island disclosure laws—due to salient differences in the laws. *Wyo. Gun Owners*, 83 F.4th at 1249. The

court distinguished Wyoming's very low $100 disclosure threshold from much higher thresholds like Rhode Island's $1,000 (and here, Alaska's is double that). *Id.* Wyoming's laws also did not make clear how to avoid disclosure of non-political donations. *Id.* Alaska law, by contrast, requires an entity that makes independent expenditures to maintain a "political activities account" for them, meaning it can simply put a non-political donor's funds in a different account. *See* AS 15.13.052; *infra* at 21-22. The Tenth Circuit likely would not have ruled any differently from the Ninth Circuit on a preliminary injunction appeal in a facial challenge to Alaska's law.

3. The petition's third stab at a circuit split invokes the Eighth Circuit, Pet. 10, but there is no conflict there either. Like the Tenth Circuit, the Eighth Circuit in *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013), faced an as-applied challenge to meaningfully different disclosure laws, some of which it approved and some of which it held unconstitutional as applied. The Ninth Circuit here correctly cited the Eighth Circuit's observation, regarding one of the laws it upheld, that "[w]ith modern technology, the burden of completing the short, electronic form within two days of making a $750 expenditure is not onerous." Pet. App. 19 (citing *id.* at 595). Although the Eighth Circuit disapproved of other aspects of the recipient disclosure laws under review, those laws were unlike the donor disclosure law challenged here. The court's analysis does not easily map on to this case and reveals no conflict.

The petition acknowledges that other states have similar disclosure and disclaimer laws and that "the question of their constitutionality arises again and again,

and will not go away." Pet. 9. The Court should thus wait for a real circuit split (and a better vehicle).

## III. The decision below was correct.

The Court should also deny the petition because it need not intervene to micromanage the lower courts' application of the correct legal standard to the sparse factual record in this facial, preliminary context, nor should it use this petition as a vehicle to unnecessarily revisit the applicable legal standard.

The petition labels Alaska's laws "speech-restrictive," Pet. 3, but they do not restrict speech—instead, they require disclosures and disclaimers, an approach this Court has approved as an alternative to restricting speech. *See Citizens United*, 558 U.S. at 369 ("[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech."); *McCutcheon*, 572 U.S. at 223 ("[D]isclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech."). The courts below thus correctly subjected the challenged laws to "exacting scrutiny." Pet. App. 11-12, 67-68, 83-84. This is not a "least restrictive means" test—instead, it falls between strict and intermediate scrutiny. *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021).

### A. The challenged disclosure law facially satisfies exacting scrutiny.

Exacting scrutiny requires (1) a "sufficiently important governmental interest" and (2) "that the disclosure requirement be narrowly tailored to the interest it promotes." *Americans for Prosperity*, 594

U.S. 611. The plaintiffs have challenged only the donor disclosure law's tailoring, conceding that it is substantially related to the government's important interest in an informed electorate. Pet. App. 12-14.

Several features of the law show its narrow tailoring. For one thing, small contributions need not be disclosed—only significant ones totaling $2,000 or more. AS 15.13.040(r). This is twice as high as the threshold for the disclosures upheld in *Citizens United*. *See* 558 U.S. at 366-67. For another thing, disclosure is triggered only by a "contribution" to an entity that makes "independent expenditures" in candidate elections. *See* AS 15.13.040(r). An "expenditure" means spending money "for the purpose of . . . influencing the nomination or election of a candidate." AS 15.13.400(7). A definitional carve-out tailors this to exclude an "issues communication," which identifies a candidate but "addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office." AS 15.13.400(7)(C) & (13).

Although the disclosure law does not contain an explicit "opt out" provision for donors who do not want their money used on politics, the freedom to opt out is inherent in the definition of "contribution." If a donor gives money without the "purpose of . . . influencing the nomination or election of a candidate," that is not a "contribution" that triggers reporting. AS 15.13.400(4)(A)(i). Donors and recipients can avoid having to report non-political donations by simply making their intentions clear: the donor can tell the recipient that her money should not be used for this purpose, and the recipient can place the money in an account that will not be used for it. Indeed,

an entity making independent expenditures already must maintain a "political activities account," so it can simply put the donor's funds elsewhere. *See* AS 15.13.052. The State has explained in advisory opinions how donors and recipients can avoid disclosure of non-political donations. *See* AO 21-11-CD, *The Alaska Center*, https://bit.ly/3Z28fAI (June 20, 2022); AO 22-01-CD, *The Elias Law Group on behalf of "The Organization,"* https://bit.ly/479yrf0 (June 20, 2022).

The disclosure law is further tailored by a temporal limitation: it applies only to contributions to an entity that made independent expenditures in the current or previous election cycle, or "that the contributor knows or has reason to know is likely to" do so in the current cycle. AS 15.13.040(r). The petition argues that this makes the law overbroad, because not every such group will necessarily make expenditures this cycle. Pet. 15-17. But covering contributions to entities *likely* to make expenditures is reasonable tailoring. Contrary to the petition, an entity amassing funds for independent expenditures is indeed "actively engaged" in campaign activity even if it has not yet made the planned expenditures. Pet. 17. And an entity amassing funds for non-political purposes can avoid the need for reporting (by themselves or donors) by simply segregating the funds. This is not a serious burden for an entity that has recently been politically active, which likely already has a "political activities account." *See* AS 15.13.052.

The petition complains that the donor disclosure law is "duplicative" because recipients must also report contributions. Pet. 10-11. But the two halves of the law work together to provide voters complete, accurate,

real-time information about the money being funneled into expenditures. The donor is the one who can trace the "true source" of the donor's funds, so the law reasonably obligates the donor to certify the truth of this information. *See* AS 15.13.400(19) (defining "true source"). Placing this obligation solely on the recipient would lead to incomplete or inaccurate reporting of true sources. Below, the plaintiffs acknowledged the "state interest in knowing who funds election advocacy." CA9.Dkt. 6-1 at 19-20. And they did not challenge the true source law on appeal, so its validity is not in question here. Pet. 4.

Without donor-side disclosure for contributions to entities planning to make independent expenditures, an entity could amass a secret war chest, blitz Alaskans with campaign ads before an election, and disclose only that it paid for them with $1 million contributions from opaque intermediaries like "Citizens for Alaska" and "Alaskans for Our Future" received long before. The petition calls this a "phantom fear" but does not explain how Alaskans would untangle the true source of this money until after the election, if at all. Pet. 17. The contribution disclosure laws the petition cites as purportedly fixing the problem do not apply to everyone making independent expenditures. Only the broad post-expenditure disclosure in AS 15.13.110(h) covers any "person," while the cited provisions in AS 15.13.110(a) or (b) are narrower. *See* AS 15.13.400 (defining "group" and "non-group entity"); 2 AAC 50.292 (limiting "non-group entity").

The petition asserts that the State could reveal true sources by other means, but despite claiming that "the less intrusive alternative is obvious," the plaintiffs have never adequately explained how it works. Pet. 12. They

first seem to suggest that nearly all donors will themselves be the "true source" of their donations because otherwise they would be making "illegal straw donation[s]." Pet. 11. But a donation is only an illegal straw donation if is made at the direction of the source of the funds. *See* 2 AAC 50.258(a) (describing the scenarios that qualify as illegally donating in the name of another). There is nothing illegal about receiving donated funds and re-donating them to an independent expenditure group absent such direction. The State thus cannot presume that a donor is not passing on donated funds unless the donor certifies that they are the true source. If the donor is indeed the true source, the disclosure form is even easier to complete. *See* CA9. Dkt. 30-2 at 7.

The petition further asserts that many entities "report publicly their donors to other public authorities," Pet. 11-12, but different reports differ in their timeframes, applicability, and where and how they are publicly accessible. The plaintiffs have never even cited the other reporting laws they believe somehow adequately serve the State's interests, nor did they provide the district court with any evidence about this that could support preliminary relief.

Even some overlap in the laws would not make donor disclosure a "prophylaxis-upon-prophylaxis" in the words of *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014), Pet. 12-13, because disclosure is not a "prophylaxis" in the first place. A contribution limit is a "prophylaxis" because it caps all contributions to safeguard against corruption even though "few if any contributions to candidates will involve quid pro quo arrangements." *McCutcheon*, 572 U.S. at 221. The aggregate limit in *McCutcheon*, designed to safeguard against circumvention of such prophylactic

limits, was therefore a "prophylaxis-upon-prophylaxis." *Id.* By contrast, a disclosure law's main purpose is not to safeguard against a rare harm, but rather to inform voters, a purpose it serves in *all* cases. And while a truly redundant law could be called a "prophylaxis"—designed merely to safeguard against failure of an existing law—Alaska's donor disclosure law is not redundant, as explained above.

Given all its tailoring, Alaska's donor disclosure law stands in contrast to the overbroad one this Court disapproved in *Americans for Prosperity*, 594 U.S. 595, which required vastly more disclosure than was useful. There, the Court saw a "dramatic mismatch" between the up-front, across-the-board disclosures that California required from charities and the state interest in policing charity fraud, because the disclosed information was never used to initiate investigations and only became marginally useful in a handful of cases each year after complaints were filed. *Id.* at 612. Unlike that law—which "cast[ ] a dragnet" for information that was rarely used, *id.* at 614—all or nearly all of Alaska's required donor disclosures directly serve the interest in informing voters.

And because the plaintiffs brought a purely facial challenge, speculation that the State will apply the law too harshly—or that problematic cases might arise at the margins—cannot sustain the burden of showing that a "substantial number" of applications are unconstitutional compared to the "plainly legitimate sweep." *See Moody*, 144 S. Ct. at 2397.

The petition suggests that "everyday Americans" will face onerous compliance burdens, but they failed to

present evidence of this. Pet. 13. As the district court observed, the State produced evidence that compliance is simple—a donor need only fill out a straightforward online form—and the plaintiffs produced no contrary evidence. Pet. App. 73. This simple form is not the "sort of compliance burden[ ] typically reserved for sophisticated parties." Pet. 13.

The petition objects that "the problem" is not the complexity of the form, but rather the burden "to know about the recipient entity's activities, know of the [disclosure] requirement, and to comply with it instantaneously." Pet. 15. But the plaintiffs failed to produce evidence that even a single donor has struggled. The simple need to "know of the requirement" is not a "burden" because this is true of all laws. The plaintiffs do not claim that the law is unconstitutionally vague. As for the need to "know about the recipient entity's activities," a donor does not need "encyclopedic and prophetic knowledge" or "a campaign finance attorney." Pet. 15-16. They need only know a little bit about the recipient of their $2,000. It is reasonable to expect that someone making that size donation will already know whether the recipient makes independent expenditures in candidate elections, and if not, the donor can simply ask. And if 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.

The obligation to report within 24 hours is likewise not unreasonable as the petition claims. Pet. 14-15. Reporting can be done online concurrently with writing a large check—the plaintiffs presented no evidence to suggest that donors need more time. And indeed, keeping

the timeframe constant simplifies the process: donors need not keep track of shifting deadlines; they need only submit an easy online form whenever they write a large political check.

At bottom, the plaintiffs' objection is not that donor disclosure is redundant, nor that it is difficult, but rather that political spending must be disclosed at all: they claim that disclosure is "in conflict with their principles" and "may lead to reprisals against them and their business interests in the current climate of cancel culture." DC.Dkt. 1 at 7. But they do not have a constitutional right to avoid disclosure absent very specific facts: although the Court has left open the possibility of as-applied challenges to disclosure based on a threat of retaliation, it has repeatedly rejected such challenges, and these plaintiffs have not even attempted to bring one. *See Citizens United*, 558 U.S. at 370 (noting that although amici pointed to threats of retaliation, the plaintiff "offered no evidence that its members may face similar threats or reprisals"); *John Doe No. 1 v. Reed*, 561 U.S. 186, 201-02 (2010) (acknowledging that disclosure of names on "controversial" petitions might lead to threats, but rejecting a facial challenge because "only modest burdens attend[ed] the disclosure of a typical petition").

Plus, these plaintiffs' litigation choices make any purported chilling effect or "invasion of privacy" caused by disclosure irrelevant. *Contra* Pet. 16. Because they have not challenged the *recipient* disclosure law (nor appealed the district court's ruling on their challenge to the "true source" law), striking down the law at issue here would not shield donors' names from publicity. In other words, their observation that "the law already requires the recipients

of such donations to report exactly the same information" is a double-edged sword. Pet. 10. Although it provides their basis for arguing that the law is "duplicative," it also cuts any privacy concerns out of the analysis. The only burden this appeal could alleviate would be the need for donors to file reports themselves—not the disclosure itself.

### B. The Court should not overrule precedent and apply strict scrutiny to disclaimers.

The district court and Ninth Circuit correctly adhered to the Court's precedent in applying exacting rather than strict scrutiny to disclaimers.

In *Citizens United*, the Court applied exacting scrutiny to both disclosures and disclaimers. *See* 558 U.S. at 366. And it did so even though the plaintiff there—like those here—advocated strict scrutiny for disclaimers on the theory that they are "compelled speech" or "content-based restrictions." *See* Br. for Appellant, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 61467 at *43-44 (Jan. 8, 2009) (arguing that "oral and written disclaimers" are "content-based restrictions on political speech" and "compelled speech requirements" subject to strict scrutiny). The Court explained that like disclosures, disclaimers "may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." 558 U.S. at 366 (cleaned up).

The petition ignores this controlling precedent and relies on cases that are not about political disclaimers, like *National Institute of Family & Life Advocates v. Becerra (NIFLA)*, 585 U.S. 755 (2018). Pet. 19. But *NIFLA* did not discuss, much less overrule, the *Citizens United*

holding on political disclaimers. Political disclaimers may burden speech but they also *further* First Amendment values. *See Buckley v. Valeo*, 424 U.S. 1, 82 (1976) (observing that disclosure is a "method of furthering First Amendment values by opening the basic processes of our federal election system to public view"). The increased "transparency" they provide "enables the electorate to make informed decisions and give proper weight to different speakers and messages" and "react to the speech." *Citizens United*, 558 U.S. at 371. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978). As this Court has recognized, it is hard to see "how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public." *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (quoting district court), *overruled on other grounds by Citizens United*, 558 U.S. 310.

Political disclaimers do not force speakers to "accommodate the government's message" or "speak the government's own message," they merely require speakers to disclose their identities when speaking to voters. Pet. 20-21. This is not a government "message" and does not "change the subject" of the speaker's ads. Pet. 20, 22. It conveys no ideological, political, or even substantive content. And including donor information just prevents entities from "hiding behind dubious and misleading names" like "'Citizens for Better Medicare' (funded by the pharmaceutical industry)." *McConnell*, 540 U.S. at 196-97 (quoting district court).

This is nothing like the government message that pregnancy centers had to communicate in *NIFLA*, "inform[ing] women how they can obtain state-subsidized abortions," which was "the very practice that [they] are devoted to opposing." 585 U.S. at 766. Despite the petition's insistence, requiring election advocacy groups to list top donors is in no way "similar to forcing pro-life groups to share information about abortion access." Pet. 21. Nor is it like the substantive messages involved in the other compelled speech cases that the petition cites, like *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (requiring motorists to display the motto "Live Free or Die"), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 564 (1995) (requiring a parade to include gay pride marchers), or *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (requiring newspapers to publish opposing viewpoints). Pet. 18, 20. These cases are inapposite. The courts below did not err in following *Citizens United*.

### C. The challenged disclaimer laws facially satisfy exacting scrutiny.

Finally, particularly given the empty record, the district court did not abuse its discretion in concluding that the plaintiffs failed to demonstrate likely success in showing that Alaska's disclaimers fail exacting scrutiny in a substantial number of applications. Courts regularly uphold political disclaimers, and although Alaska's have been largely in place since 2010, the plaintiffs produced no ads—real or example—to show that they are especially onerous.

This Court upheld disclaimers in *Citizens United*, recognizing that they "provide the electorate with

information," "insure that the voters are fully informed about the person or group who is speaking," and "[a]t the very least . . . avoid confusion by making clear that the ads are not funded by a candidate or political party." 558 U.S. at 368 (cleaned up). The petition attempts to delegitimize this interest by invoking *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995)—in which the Court held that a lone pamphleteer had the right to remain anonymous—but *Citizens United* upheld disclaimers without mentioning this older case. Pet. 23-24. *Citizens United* also dismissed the concern—similar to the petition's—that disclaimers "decrease[d] both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer." *Citizens United*, 558 U.S. at 368. And the Court was unpersuaded by the argument that the disclaimers would "distort the message" of the ads. *See* Br. for Appellant, *Citizens United*, 558 U.S. 310 (No. 08-205), 2009 WL 61467 at *50 (Jan. 8, 2009).

The petition argues that on-ad donor disclaimers are unnecessary because voters can just look up information online. Pet. 24. But on-ad disclosure provides the information to voters more efficiently at a more relevant time. Though the petition objects that "[n]arrow tailoring requires more than a marginal gain in convenience or efficiency," *id.*, the State's concern is not about its own "convenience"—like in *Americans for Prosperity*, 594 U.S. 614-15—but about actually having an informed electorate. The State has no way, other than disclaimers, to timely get voters this information; disclosures will only be seen after the fact by voters motivated to search for them.

As for the possibility that top-donor information could mislead voters about who supports an ad, donors and

recipients can avoid the need to disclose non-supporting donations by segregating funds. "In the absence of evidence," the Court "cannot assume" that "voters will be misled" based on "sheer speculation" in a facial challenge. *Wash. State Grange*, 552 U.S. 442, 454-57. This is "especially true here, given that it was the voters . . . themselves, rather than their elected representatives, who enacted" the challenged laws. *Id.* at 455. And without top-donor information, entities could easily "hid[e] behind dubious and misleading names." *Cf. McConnell*, 540 U.S. at 196-97 (quoting district court).

The petition argues that the State's defense of its disclaimer law "lacks any limiting principle," Pet. 25, but as the Ninth Circuit correctly observed, speculation about non-existent laws does not justify a preliminary injunction against this one. Pet. App. 22 n.10. These disclaimers do not require extra information beyond what is already included in the unchallenged recipient disclosure laws.

Nor are Alaska's disclaimers "especially onerous" because they "will take up a significant portion of the advertisement." Pet. 26-27. The plaintiffs produced no evidence about how much space the disclaimers occupy, much less evidence that smaller disclaimers would work just as well. Alaska law does not require that words be printed larger than necessary to be read, nor spoken slower than necessary to be heard.

Any entity having trouble accommodating disclaimers in its ads or uncertain if its ads comply can ask the State for an advisory opinion and—if they do not like the answer—bring an as-applied challenge in which the Court will have concrete examples to examine. *See* AS 15.13.374

(providing that "[a]ny person" can request an advisory opinion). But this is a facial challenge, and the plaintiffs produced no evidence to show that even a single application of the disclaimer law is overly burdensome, much less a "substantial number" of them. This complete lack of evidence cannot justify a preliminary injunction.

The district court likewise did not abuse its discretion in denying a preliminary injunction on the out-of-state disclaimer. The petition's mistaken premise is that this disclaimer is analogous to a limit on nonresident participation in Alaska elections and that "[c]ourts routinely invalidate out-of-state campaign contribution restrictions." Pet. 28. But this case is not about "contribution restrictions," out-of-state or otherwise. Contribution limits—unlike disclaimers—must be justified as a means of preventing quid pro quo corruption. *See McCutcheon*, 572 U.S. at 206–07. That does not matter here because the State is not limiting nonresident contributions or justifying this disclaimer as a way to prevent corruption.

Instead, the interest justifying the out-of-state disclaimer is the same important state interest the plaintiffs have acknowledged: an informed electorate. The petition asserts that the disclaimer is not narrowly tailored to this interest because "one's principal place of business is a poor proxy for one's interest in Alaska's elections." Pet. 29. But the disclaimer is not a "proxy" for interest, but rather simply information about who is speaking. By passing Ballot Measure 2, Alaska voters decided that they want to know when an election communication is coming from an entity funded mostly from sources located outside Alaska. This can help voters from being misled when an entity uses a name—like "Families of the Last

Frontier"—that implies otherwise. *See* CA9.Dkt. 7 at 106. Voters may have trouble understanding who an election-influencing entity with such an opaque name really is, and this disclaimer will assist them. Unlike a campaign contribution limit, the disclaimer does not limit the speech of such entities, it just tells voters more about where that speech comes from.

The Court should not intervene to police the lower courts' correct application of the settled legal standard to Alaska's laws at this preliminary stage.

## CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

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