No. 23-926

In The
Supreme Court of the United States

NO ON E, SAN FRANCISCANS OPPOSING THE AFFORDABLE HOUSING PRODUCTION ACT, ET AL.,

Petitioners,

v.

DAVID CHIU, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* DR. DAVID PRIMO AND DR. JEFFREY MILYO IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Dr. David Primo is the Ani and Mark Gabrellian Professor, Professor of Political Science and Business Administration, and Associate Department Chair and Director of Graduate Studies in the Department of Political Science at the University of Rochester.

Dr. Jeffrey Milyo is a Professor of Economics and the Chair of the Department of Economics at the University of Missouri. Dr. Milyo is also the director of the University of Missouri's Economic and Policy Analysis Research Center.

Drs. Primo and Milyo are both experts on campaign finance law and have extensively studied the comparative effects of different campaign finance regulatory regimes on factors such as public trust in government and political efficacy. They are the authors of *Campaign Finance and American Democracy: What the Public Really Thinks and Why It Matters* (2020). Drs. Primo and Milyo have also extensively studied campaign finance disclosure, seeking to measure accurately both its potential benefits and its regulatory costs. See, *e.g.*, David M. Primo, *What Social Science Tells Us About Forced Donor Disclosure* (Philanthropy Roundtable Mar. 2024); David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 Election L.J. 114 (2013); Dick M. Carpenter II &

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[1] No party or its counsel authored any of this brief, and no person other than the Institute for Justice (IJ), its members, or its counsel contributed monetarily to this brief. The undersigned contacted every parties' counsel of record with timely notice that IJ was filing this brief in support of Petitioners.

Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us About the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 Fordham Urb. L.J. 603 (2012); Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate* (Institute for Justice 2007).

Drs. Primo and Milyo believe the ruling below adopts a scientifically unsound approach to evaluating disclosure laws, essentially assuming those laws to have significant public benefits and insignificant costs. Given the important First Amendment interests at stake, both believe that courts should instead look to the best available social science evidence, which shows that the disclosure laws rarely have positive benefits and are potentially injurious to democracy.

SUMMARY OF ARGUMENT

Mandated disclosures are omnipresent in the United States. Yet despite their popularity, mandated disclosures may also be the "least successful regulatory technique in American law." Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure 3 (2014). Why, then, do these laws proliferate? The short answer is that "[d]isclosure is politically attractive partly because lawmakers rarely assess its benefits or burdens." *Ibid.* at 146.

Under this Court's First Amendment precedent, however, courts reviewing the constitutionality of mandated disclosures are held to a higher standard.

They must ensure those laws satisfy "exacting scrutiny." *Ams. for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373 (2021). This, in turn, requires courts to examine the costs and benefits of disclosure regimes to see if there is any significant "mismatch * * * between the interest that the [government] seeks to promote and the disclosure regime that [it] has implemented in service of that end." *Ibid.* at 2386.

How ought courts go about that?

One approach—taken by the Ninth Circuit below—is to examine the alleged benefits and costs of a challenged disclosure regime at the highest level of generality. Under this approach, if courts have held disclosure on a subject to be beneficial in the abstract, then any particular disclosure law on the same subject must also be beneficial and important, regardless of the details. Similarly, if Courts have held, in the abstract, that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking," App. 18a (cleaned up), then the burdens of any particular disclosure regime aren't worth getting worked up about.

Not surprisingly, the Ninth Circuit found that San Francisco's unique secondary-contributor disclaimer requirement satisfied this lenient interpretation of "exacting" scrutiny. Indeed, it's hard to imagine a disclosure regime that could fail a cost-benefit analysis that both assumes benefits and ignores costs.

An alternative approach—and the approach *Amici* believe is more consistent with an evidence-based

approach to the law—is to examine the *actual* costs and benefits of a challenged disclosure regime in light of the best available social science evidence. And that evidence paints a much different picture. This is particularly true when one looks at the *marginal benefits* of disclosure laws. Because, like anything else, disclosure information has diminishing marginal utility: There comes a point where having more of it just isn't all that helpful. And it turns out that the best available social science evidence suggests that the point of diminishing returns is well short of the disclosure-on-disclosure required by San Francisco's secondary-contributor disclaimer requirement.

If "exacting scrutiny" is to live up to its name, disclosure regimes—particularly novel ones that go beyond those previously upheld—should be justified by more than platitudes about sunlight, open government, and "the right to know." This Court should grant certiorari to confirm that exacting scrutiny is a rigorous standard that requires real evidence.

ARGUMENT[2]

Mandated disclosures compel speech. Sometimes they require speakers to disclose information they

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[2] Portions of this argument are adapted from David M. Primo, *What Social Science Tells Us About Forced Donor Disclosure* (Philanthropy Roundtable March 2024), https://www.philanthropyroundtable.org/resource/what-social-science-tells-us-about-forced-donor-disclosure/. The views expressed in this brief are those of the *Amici* and their counsel and do not necessarily reflect the views of Philanthropy Roundtable, the University of Rochester, or the University of Missouri.

otherwise would not. Other times, as here, they require speakers to disclose information at a time or in a place that they feel detracts from their ability to convey their message. In either case, mandated disclosures interfere with the right of speakers to decide the content of their speech—both what they choose to say and what they choose to omit.

For this reason, this Court in *Americans for Prosperity Foundation* v. *Bonta* confirmed that mandated disclosures are subject to "exacting scrutiny." 141 S. Ct. at 2383. Under that standard, when a disclosure requirement is challenged, the government must show that there is "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Ibid.* This standard also requires that "the strength of the governmental interest * * * reflect the seriousness of the actual burden on First Amendment rights." *Ibid.*

Amici suggest that this analysis should be informed by what social science has actually found about the benefits and costs of mandated disclosure. In Section I, *Amici* will discuss the alleged benefits of donor disclosure in the context of campaign finance and will show that, in general, the benefits of this disclosure have been significantly oversold, particularly when the information made available through disclosure is considered alongside the wide array of other information that is easily available to voters to assist them in their decision making. In Section II, *Amici* will discuss some costs of donor disclosure, which are generally underappreciated. Finally, in Section III, *Amici* will suggest that these findings, along with insights from public choice theory, suggest that

mandatory disclosures should be greeted with more skepticism than was shown by the Ninth Circuit, below.

I. The alleged benefits of disclosure are significantly oversold, particularly in the information-rich context of competitive elections.

In evaluating disclosure policies, one must understand, first, what disclosure policies are intended to achieve. Without a clear picture of what the alleged benefits of disclosure are, it is impossible to determine whether disclosure laws are tailored to achieving those benefits. Once we have a clear picture of those alleged benefits, we can then look to whether disclosure policies achieve those benefits in the real world.

As explained below, the primary alleged benefit of campaign finance disclosure is that it provides voters with helpful informational "shortcuts," known as cues, to assist in voting. But recent social science evidence suggests that disclosure information has little benefit when considered alongside other information already available to voters.

A. The primary alleged benefit of disclosure is that it gives voters a cue for figuring out whether they support a proposed policy.

In cases like this one—concerning disclosure of donors to groups speaking about ballot issues—the alleged informational benefits of campaign finance

disclosure are at their heart about *cues*. Cues are shortcuts to help a voter decide where they stand on a question of public policy.

The idea behind cues is that voters trying to figure out questions of public policy face a problem: gathering information about policies is costly. At the same time, a voter's likelihood of affecting a policy or election outcome is close to zero. As a result, citizens have an incentive to remain "rationally ignorant" about politics.[3] So, the theory goes, voters benefit if they can be provided a mental shortcut—a cue—that will help them cast votes that reflect the views they would hold if they were fully informed.

Donor disclosure is theorized to provide valuable cues to voters in non-candidate elections such as those regarding a ballot measure. For example, if a pro-regulation environmentalist learns the ice cream maker Ben & Jerry's, known for its environmental advocacy, has contributed money to support a ballot measure in California related to the environment, the voter may use this information to vote "yes," even if he doesn't fully understand the ballot measure.

B. In the real world, voters are surrounded by cues, and donor disclosure provides little marginal benefit.

If disclosure is about providing voters with cues, does it achieve that goal in the real world? A growing

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[3] Anthony Downs, An Economic Theory of Democracy (1957).

body of social science evidence gives reason to be skeptical.

The reason is simple: In the real world, disclosure data is relevant only if it provides *additional* information about an issue beyond what is already available to voters, and if that information is *pivotal* in a voter's calculus (i.e., leads them to draw meaningfully different conclusions about that issue). But in the real world, voters have access to lots of cues beyond those provided by disclosure data. This raises the question of the *marginal benefit* of disclosure data in an already information-rich environment.

Amicus David Primo studied this question in a 2013 paper focused on *information at the margin* in campaign finance disclosure.[4] The logic is straightforward. In an informational vacuum, a single piece of data about a candidate or ballot measure might have a huge effect on a citizen's assessment of how to vote. But as more information is gathered or available, the *marginal* effect of an additional piece of information declines.

In the modern world, individuals who wish to seek out information about the positions of politicians, or about the consequences of a ballot measure, will not have to look far to acquire such information. Candidates issue public statements and are endorsed by parties, other politicians, interest groups, and even celebrities. Ballot measures are often discussed in

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[4] David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 Election L.J. 114 (2013).

voter guides containing pro and con positions, and like candidates, they are endorsed or opposed publicly, including by parties, politicians, and interest groups. More generally, in today's information-rich world, there is virtually no issue or election on which a voter cannot become well-informed. In such an informational environment, then, mandated donor disclosure adds little value *at the margin*.

In Dr. Primo's paper, he conducted a survey experiment to test this claim. Depending on the treatment, a control group had access to no information about a ballot measure besides a brief description, a second group had access to voter guides and news articles in addition to the brief description, and a third group had access to all the information just described plus disclosure information embedded in news articles. These respondents were then asked to identify the positions of interest groups on the ballot measure. Respondents in the treatment group with access to the disclosure information, unsurprisingly given Dr. Primo's theory, did no better than respondents without access to such information in identifying those positions.

Recent research bolsters Dr. Primo's *information at the margin* theory. In a 2023 article, Dr. Thomas S. Robinson of the London School of Economics used an experimental technique known as conjoint analysis to show that when a realistic political environment is created (i.e., one with multiple sources of information about a candidate or ballot measure election), there is "little evidence that campaign finance information has a distinct impact on vote choice conditional on

other highly-salient cues [such as party ID]."[5] The one exception was having a majority of donors from within the state, which improved perceptions of the candidate or ballot measure position. Crucially, however, this information was not about the *identity* of donors. Put another way: Dr. Robinson finds no evidence that personally identifying information about a donor affects voter decision making.

Unlike Dr. Primo's and Dr. Robinson's findings, studies finding significant benefits from cues have done so only in highly artificial environments. A recent study by Dr. Cheryl Boudreau and Dr. Scott A. MacKenzie, for example, found that when given no other information about who is in favor or opposed to a ballot measure except for campaign finance disclosure information, high-knowledge voters act on donor disclosure cues.[6] But in the real world, this disclosure information is *not* a voter's only source of cues. Instead, voters are likely to have access to other sorts of information about where various groups stand on any given ballot measure, such as party endorsements or information disclosed in voter guides.

Further, even in these highly artificial environments, cues do not work for everyone. Boudreau and MacKenzie find that cues can backfire on low-

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[5] Thomas S. Robinson, *When Do Voters Respond to Campaign Finance Disclosure? Evidence from Multiple Election Types*, 45 Pol. Behav. 1309, 1311 (2023).

[6] Cheryl Boudreau & Scott A. MacKenzie, *TRENDS: Following the Money? How Donor Information Affects Public Opinion about Initiatives*, 74 Pol. Rsch. Q. 511 (2021).

information voters who cannot make use of donor disclosure cues because they lack the political knowledge base to do so. The result: they sometimes end up voting against their interests. This is consistent with earlier research in this area finding that political novices misuse cues and that cues are unlikely to be effective for the ill-informed.[7]

But it gets worse. Recent research suggests that interest group cues may lead voters of all knowledge levels, not just low-information voters, to make mistakes relative to their preferences. In recent survey experiments, researchers identified a phenomenon they term "heuristic projection," in which voters in candidate elections assume that interest groups they are unfamiliar with agree with them.[8] Using a survey experiment, the authors find that, in fact, voters do engage in heuristic projection, and politically knowledgeable voters are also prone to such errors. As the study's authors put it, "Our results, therefore, raise doubt about widely-shared hopes that interest group cues would improve accountability."[9]

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[7] Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 Am J. Pol. Sci. 951 (2001); James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, *in* Elements of Reason: Cognition, Choice, and the Bounds of Rationality 153 (Arthur Lupia et al. eds., 2000).

[8] David E. Broockman et al., *Heuristic Projection: Why Interest Group Cues May Fail to Help Citizens Hold Politicians Accountable*, 54 Brit. J. Pol. Sci. 69 (2023).

[9] *Ibid.* at 72.

To sum up, no systematic body of peer-reviewed research establishes that donor disclosure information improves voter knowledge *at the margin*, and there is reason to believe that disclosure-related cues (among others) might lead voters to make incorrect (relative to their preferences) evaluations of a candidate or ballot measure. The takeaway? Courts applying "exacting scrutiny" should not assume that disclosure laws will provide meaningful benefits.

Existing research has clear implications for this case. Here, there is even more reason to be skeptical that San Francisco's secondary-contributor disclosures provide meaningful informational benefits to voters because the information being disclosed is often that of a donor to a group which in turn donates to another group which in turn runs an ad, thereby attenuating the already weak informational value of disclosure cues.

Viewing those alleged benefits skeptically is also consistent with the approach this Court has taken to applying intermediate scrutiny in other campaign finance contexts. In the context of contribution limits, for example, this Court has held that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). This Court has also noted that courts applying intermediate scrutiny must be "particularly diligent in scrutinizing [a] law's fit" whenever the government adopts a "prophylaxis-upon-prophylaxis approach" to regulating campaign activity. *McCutcheon* v. *FEC*, 572 U.S. 185, 221 (2014).

The Ninth Circuit's application of "exacting scrutiny" fell well short of those principles. San Francisco's system of disclosure-upon-disclosure is novel, and—based on the best available social science—the claim that it provides meaningful informational benefits to voters is implausible.

II. The costs of disclosure are real.

Having established what the social science literature says about disclosure's benefits, *Amici* now turn to its costs. As this Court noted in *Americans for Prosperity Foundation*, for disclosure rules to be constitutionally permissible, "the strength of the governmental interest must reflect the seriousness of the *actual* burden on First Amendment rights."[10]

The two main burdens associated with disclosure requirements are administrative costs and the "chilling" of speech. Administrative burdens come in the form of record keeping and compliance with often Byzantine rules. The chilling of speech arises when donors hesitate to give because they fear reprisals from friends, family members, coworkers, or internet mobs.

Statistical research in both areas is particularly difficult to carry out, in part because of the challenges of measurement and data gathering. For instance, we do not observe non-contributions, and we do not observe which groups fail to form because of administrative burdens. There is almost no peer-reviewed

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[10] *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (emphasis added) (quoting *Doe* v. *Reed*, 561 U.S. 186, 196 (2010)).

research on administrative burdens, but there is a small but important literature on the "chilling" effects of disclosure.

In a survey experiment conducted by Dr. Ray La Raja, individuals informed that their personal information would be disclosed upon contributing to a candidate were more likely to say that they would give less or not at all, especially if they were at odds politically with neighbors, friends, and co-workers.[11] These findings track with those of an earlier study conducted by Dr. Dick M. Carpenter.[12] Similarly, in a field experiment conducted by Dr. Ricardo Perez-Truglia and Dr. Guillermo Cruces, individuals provided with information about the contribution behavior of neighbors were less likely to contribute to a candidate if their political persuasion differed from that of their neighbors: "our evidence suggests that public disclosure could have the unintended effect of facilitating social pressure."[13]

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[11] Raymond J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, 36 Pol. Behav. 753 (2014).

[12] Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 Indep. Rev. 567 (2009); *see also* Dick M. Carpenter II & Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us About the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 Fordham Urb. L. J. 603, 623–631 (2012) (discussing the costs of compelled disclosure in non-candidate campaign efforts).

[13] Ricardo Perez-Truglia & Guillermo Cruces. *Partisan Interactions: Evidence from a Field Experiment in the United States*, 125 J. Pol. Econ. 1208 (2017).

Research by Dr. Stan Oklobdzija provides further suggestive evidence using data about a "dark money" group forced to reveal its donors after a change in state law and a subsequent lawsuit. The author finds that donors to a "dark money" group supporting a conservative proposition are much more liberal than their counterparts who contributed to a group disclosing its donors.[14] His assessment is that these donors "may have simultaneously feared backlash against their businesses or their reputations."[15]

Whatever the magnitude of these costs, existing evidence suggests that they are real. Simply put, in public policy, there are no free lunches, and disclosure is no exception. And because these costs are real, it is all the more important that the government be held to a meaningful burden when showing that these costs are justified.

III. Public choice concerns bolster the case for meaningful scrutiny of disclosure laws.

As *Amici* have shown, there are good reasons to be skeptical about the alleged informational benefits of disclosure, particularly when the government

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[14] Stan Oklobdzija, *Public Positions, Private Giving: Dark Money and Political Donors in the Digital Age*, Rsch. & Pol., Jan.–Mar. 2019, at 1, https://journals.sagepub.com/doi/pdf/10.1177/2053168019832475.

[15] *Ibid.* at 6.

requires disclosure of ever-more attenuated donors, as it does in this case. Meanwhile, the evidence shows that disclosures impose costs on organizations and individuals, potentially chilling speech. Taken together, these findings suggest that courts applying exacting scrutiny should not simply assume that disclosures achieve their alleged benefits in a narrowly tailored way.

Insights from public choice scholarship reinforce this conclusion. Public choice theory uses the tools of economics, with its foundation in understanding incentives, to study political decision making. This lens is useful for understanding the motivation behind disclosure rules. Disclosure rules emerge from the political processes they seek to regulate, and public choice suggests that these rules may seek to serve the interests of those proposing the rules. In other words, despite public-spirited rhetoric about providing voters with useful cues, politicians' actual motive for enacting disclosure laws may be to achieve political advantage by imposing additional costs on their opponents' speech or making that speech less effective.

This danger can be seen in arguments that proponents of disclosure make for which groups should and should not be subject to additional disclosure. For instance, a director of Clean Elections Minnesota wrote that disclosure laws should apply to politically engaged 501(c)4 organizations because they are different than "nonprofits like the Sierra Club, or a scientific society or a firefighter organization. That is,

groups devoted to public service, not politics."[16] Yet as this amicus brief goes to print, the headline on the Sierra's Club's main webpage reads, "Together, we can help deepen the movement for a livable planet, safe communities, and a democracy that works for everyone," alongside a picture featuring protestors holding signs such as "Voting is Climate Action."[17] The Sierra Club is a 501(c)4 clearly engaged with politics, so the desire to exempt it from disclosure requirements seems tied to an assessment of its policy goals. In other words, supporters of disclosure laws seem to be targeting certain kinds of political speakers—those whose speech is not "public service" *as they define it*.

These are not outlier views among reformers. For instance, Senator Sheldon Whitehouse, in advocating for stronger disclosure laws, argues, "[A] torrent of dark money spending has for too long prevented Congress from pursuing solutions that are overwhelmingly supported by the public."[18] In other words, disclosure laws are needed to get the "correct" policies enacted. Although disclosure laws are framed as

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[16] George Beck, *Minnesota Must Let Sun Shine on Campaign Cash*, Star Trib. (Feb. 12, 2023), https://www.startribune.com/minnesota-must-let-sun-shine-on-campaign-cash/600251109/.

[17] Sierra Club, https://www.sierraclub.org/home (last visited Mar. 20, 2024).

[18] Press Release, Sen. Sheldon Whitehouse, Whitehouse Introduces DISCLOSE Act to Restore Americans' Trust in Democracy (Apr. 11, 2019), https://www.whitehouse.senate.gov/news/release/whitehouse-introduces-disclose-act-to-restore-americans-trust-in-democracy.

designed to provide informational benefits, it appears that another goal is to move substantive policies in the direction its advocates prefer.

This Court has adopted various forms of heightened scrutiny precisely because government officials may cloak illegitimate interests in public-spirited slogans. These forms of scrutiny help smoke out those illegitimate purposes by "requiring courts to consider evidence" going to "the substantiality of the asserted legitimate interest * * * and the closeness of the fit between that interest and the terms of the law." Elena Kagan*, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 453 (1996). Thus, even in the context of commercial speech, this Court has held that evidentiary "burden is not satisfied by mere speculation or conjecture." *Edenfield* v. *Fane*, 507 U.S. 761, 770 (1993). Rather, the government has an affirmative evidentiary burden to "demonstrate that the harms it recites are real" and that the law it has enacted "will in fact alleviate them to a material degree." *Ibid.* at 771.

Amici submit that there is no reason to hold the government to a lesser evidentiary standard in the context of campaign finance disclosure laws. Not only do such laws concern speech at the core of the First Amendment's protection, there is even greater reason to worry that politicians will tailor those laws for political advantage. Thus, if "exacting scrutiny" is to live up to its name, this Court should grant certiorari to make clear that it, too, cannot be satisfied by mere speculation and conjecture, particularly when, as

here, the government has enacted a novel disclosure regime that goes beyond those previously upheld by this Court.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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