No. _____

IN THE

Supreme Court of the United States

GASPEE PROJECT AND
ILLINOIS OPPORTUNITY PROJECT,
Petitioners,

v.

DIANE C. MEDEROS, STEPHEN P. ERICKSON, JENNIFER L. JOHNSON, RICHARD H. PIERCE, ISADORE S. RAMOS, DAVID H. SHOLES, AND WILLIAM E. WEST, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE RHODE ISLAND STATE BOARD OF ELECTIONS,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rhode Island law requires most issue advocacy groups that mention a candidate or referendum in a communication before an election to register with the State and disclose most donors of at least $1,000. The law also requires that such communications include a disclaimer of the sponsoring group as well as an on-advertisement disclaimer of the group's top five donors of at least $1,000 during the preceding year.

Does Rhode Island's on-advertisement donor disclaimer law impermissibly compel speech in violation of *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018)?

CORPORATE DISCLOSURE STATEMENT

The Gaspee Project, Inc. is a nonprofit, nonstock corporation incorporated in the State of Rhode Island. The Illinois Opportunity Project is a nonprofit, nonstock corporation incorporated in the State of Illinois. They have no parent companies or publicly held companies owning stock.

LIST OF ALL PROCEEDINGS

United States Court of Appeals for the First Circuit, No. 20-1944, *Gaspee Project & Illinois Opportunity Project v. Mederos et al.*, judgment entered September 14, 2021.

United States District Court for the District of Rhode Island, No. 19-cv-609, *Gaspee Project & Illinois Opportunity Project v. Mederos et al.*, judgment entered August 28, 2020.

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DECISIONS BELOW

The District of Rhode Island's order granting the motion to dismiss is reported at 482 F. Supp. 3d 11 (D.R.I. 2020), and reprinted in the Appendix ("App.") at App. 34-57.

The First Circuit's opinion affirming is reported at 13 F.4th 79 (1st Cir. 2021), and reprinted at App. 1-33.

STATEMENT OF JURISDICTION

Petitioners timely file this petition from the First Circuit's September 14, 2021, decision. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The relevant statutory provisions are set out at App. 73-95.

INTRODUCTION

This case is about a state's attempt to compel speech. Rhode Island law requires most issue advocacy groups that engage in communications before an election to register with the State and disclose most donors giving at least $1,000. Rhode Island also requires that those communications disclose the sponsoring group on the advertisement itself. But the State has taken yet another step, requiring that these communications display—for at least four seconds on video ads—the group's top-five donors over the preceding year. In radio ads, the top donors' names must be read aloud.

This requirement to substitute the government's speech for the group's own violates the First Amendment. In *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), this Court held that compelled speech requirements alter content and are subject to strict scrutiny. Compelled speech is anathema to the First Amendment because it forces speakers to adopt views with which they may disagree. At a minimum, it forces speakers to substitute the government's message for their own. Thus, compelled speech is a content-based speech restriction under this Court's precedents. And because Rhode Island's on-ad donor disclaimer forces issue advocacy groups to change the content of their speech, it contravenes this Court's precedents, especially *NIFLA*.

The First Circuit in the decision below refused to classify the on-ad donor disclaimer as compelled speech, reasoning that the requirement only "burdens speech modestly." App. 32. Even if forcing an advocacy group to substitute the government's message for its

own could be classified as a "modest" burden, strict scrutiny applies to all content-based speech restrictions. Because this compelled speech requirement alters the content of private speech, the Court's precedents require the application of strict scrutiny.

Even on its own terms, the decision below deviates from this Court's precedents. The First Circuit held that the on-ad donor disclaimer satisfied exacting scrutiny because the State has an interest in informing voters about groups' donors and because the disclaimer requirement is "not entirely redundant" of the other disclosures. App. 22. But this Court's precedents require that compelled disclosure regimes be (at least) narrowly tailored to an important government interest. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021). This Court has repeatedly cast doubt on the value of an abstract "informational" interest. And Rhode Island cannot show an important informational interest here, given that information about *all* covered donors is already available online because of the separate donor disclosure requirement. Nor could the State show that the on-ad donor disclaimer is narrowly tailored, given both the existing disclosure requirement and the limited value of listing five potentially unrepresentative donors who may not even support the advertisement at issue. To preserve the integrity of this Court's precedents, review is needed.

The question presented is important. More and more states are adopting similar compelled on-ad donor disclaimer requirements. Review is necessary to protect the freedom of speech from states' efforts to

push the bounds of this Court's limited precedents upholding narrow express advocacy disclosures.

Finally, this case is an ideal vehicle, for it resolved a pure question of law about a provision typical of such regimes. And it would give this Court an opportunity to begin to address the tensions in lower court decisions after recent cases like *NIFLA* and *AFPF*, which broadly protect speech and association rights.

To vindicate core First Amendment protections of speech about public issues, the Court should grant the petition. In the alternative, this case could be held for *City of Austin, Texas v. Reagan National Advertising of Texas Inc.*, No. 20-1029, which raises related questions about how to determine whether a government regulation constitutes a content-based restriction subject to strict scrutiny.

STATEMENT OF THE CASE

A. Legal framework

Rhode Island law defines an electioneering communication as "any print, broadcast, cable, satellite, or electronic media communication . . . that unambiguously identifies a candidate or referendum and is made either within sixty (60) days before a general or special election or town meeting for the office sought by the candidate or referendum; or thirty (30) days before a primary election, for the office sought by the candidate; and is targeted to the relevant electorate." R.I. Gen. Laws § 17-25-3(16). If any person or organization spends at least $1,000 on electioneering communications in a calendar year, it becomes an independent-expenditure entity subject to several regulatory requirements. R.I. Gen. Laws § 17-25.3-1(b).

Three requirements are relevant. *First*, the entity must register with the State and report its name and address. R.I. Gen. Laws § 17-25.3-1(f). *Second*, the entity must file reports disclosing the identity of all donors who gave at least $1,000 to the organization's general fund if that fund was used to pay for the ad. R.I. Gen. Laws § 17-25.3-1(h). *Third*, the entity must include on all electioneering communications a disclaimer identifying its sponsorship *and* a list of its top-five donors (of at least $1,000) during the one-year period preceding the communication. R.I. Gen. Laws § 17-25.3-3(a) & (c).

This donor requirement is the focus here. Under this requirement, the top-five donor information must be displayed or spoken in all television, mail, radio, or internet advertising. For printed advertising, the speech must "bear upon its face the words 'Top Five Donors'" and the list. R.I. Gen. Laws § 17-25.3-3(a). The statute exempts "[a]ny editorial, news story, or commentary"; "[p]olitical paraphernalia including pins, buttons, badges, emblems, hats, bumper stickers or other similar materials"; and, "[s]igns or banners with a surface area of not more than thirty-two (32) square feet." *Ibid.*

For video advertising, the speech must include "at the end," "for a period of not less than four (4) seconds," "a written message in the following form: 'The top five (5) donors to the organization responsible for this advertisement are' followed by a list." R.I. Gen. Laws § 17-25.3-3(b).

For audio advertising longer than 30 seconds, the speech must include "[a]n audio message in the following form: 'The top five (5) donors to the organization responsible for this advertisement are'

followed by a list." R.I. Gen. Laws § 17-25.3-3(d)(3)(A). A similar requirement exists for telephone calls. R.I. Gen. Laws § 17-25.3-3(e). And for shorter audio ads, the speech must "provid[e] a website address that lists such five (5) persons or entities," and the website must be "maintain[ed]" "for the entire period during which such person, business entity or political action committee makes such advertisement." R.I. Gen. Laws § 17-25.3-3(d)(3)(B).

If an entity fails to comply with these laws, it is subject to civil penalties and potentially criminal prosecution. R.I. Gen. Laws § 17-25.3-4(a)-(b).

B. Facts

Petitioners are nonprofit social-welfare organizations that seek to exercise their First Amendment rights to speak about public issues. The Gaspee Project is a Rhode Island-based organization that "engages in issue advocacy communications around its mission to return government to the people." App. 64. [Amended Compl. ¶ 26] The Illinois Opportunity Project (IOP) is a Chicago-based organization that "engages in issue advocacy in states across the country on issues that relate to its mission, which is to promote the social welfare and common good by supporting policies founded on the principles of liberty and free enterprise." App. 64-65. [*Id.* ¶ 27]

Both groups planned to spend more than $1,000 on issue advocacy materials mailed to Rhode Island voters in the weeks before the 2020 election. Gaspee intended to mail information to voters about the effect of referenda proposals on local taxes. App. 65. [*Id.* ¶ 28.] IOP planned to inform voters "about how their legislators voted on a bill expanding the power of

government unions." App. 65. [*Id*. ¶ 29.] Both groups sought to engage only in issue advocacy, not express ballot advocacy. And both groups "have received donations over $1,000 in the past and intend to solicit and accept donations over $1,000 in the future." App. 65. [*Id*. at ¶ 31.]

Thus, under Rhode Island law, both groups would have to register with the state, report their donors, and both disclose their sponsorship and name their top-five donors on their messages. Petitioners believed that "compelled disclosure of their members and supporters could lead to substantial personal and economic repercussions" such as "harassment, career damage, and even death threats for engaging and expressing their views in the public square." App. 66. [Id. ¶ 35.]

C. Proceedings below

Faced with the chilling effect of Rhode Island law on their speech, petitioners sought pre-enforcement relief under the First Amendment and 42 U.S.C. § 1983. *See* 28 U.S.C. § 1343. Petitioners argued that: (1) requiring them to register with and report their supporters to the State violates their right to organizational privacy; (2) requiring them to disclaim their sponsorship of electioneering communications violates their right to anonymous speech; and (3) requiring them to list their top-five donors on their messages violates their right against compelled speech.

The district court rejected these arguments, granting respondents' motion to dismiss. App. 57-58. And the First Circuit affirmed on the same grounds. Though the court acknowledged that "[r]egulations

that burden political speech must typically withstand strict scrutiny," it said that "disclosure and disclaimer regimes are cut from different cloth." *Id.* at 8. Such regimes, the court claimed, do not impose a "ceiling" on speech or "prevent anyone from speaking." *Id.* at __ (cleaned up). The court found it insignificant that petitioners wish to engage in issue advocacy and not express political advocacy, even though it acknowledged that this Court has relied on that distinction in the context of spending limits. *Id.* According to the court, "[u]nlike limits on expenditures (which place a brake on political speech), disclosure regimes do not limit political speech at all." *Id.* at 10-11.

The First Circuit used a similar analysis to reject petitioners' anonymous speech, organizational privacy, and compelled speech claims. According to the court, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), was limited to "outright ban[s] on anonymous literature." App. 27. The court dismissed the relevance of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), because the fit "between the Act and the state's informational interest is reasonable." App. 30.

Turning to the focus here—the donor disclaimer requirement—the First Circuit said that the requirement only "modestly" compels speech and "does not require any organization to convey a message antithetic to its own principles." *Id.* at 32. The court emphasized that petitioners could, "for the most part," "control the content of any particular communication." *Id.*

Thus, the First Circuit refused to use strict scrutiny and instead applied "exacting scrutiny." *Id.* at 9. It found that the State has an important interest "in promoting an informed electorate." *Id.* at 12. And it found that all the challenged requirements were narrowly tailored to that interest. As to the requirements that groups register and disclose supporters to the state, the court emphasized the spending threshold ($1,000) within a given time before an election. *Id.* at 18. The court also emphasized that supporters could give less money to the group or "opt out of having their monies used for independent expenditures or electioneering communications" to avoid disclosure to the State. *Id.*

On the on-air donor disclaimer requirement, the court again emphasized the law's "spending and temporal thresholds." *Id.* at 19. The court did not contest that the donors required to be listed on the communication would already have been disclosed to the State and that information would already be available to citizens. Yet the court thought that the on-ad donor disclaimer would not be "entirely redundant" because it might be "a more efficient tool for a member of the public who wishes to know the identity of the donors backing the speaker." *Id.* at 22. The court also thought that the disclaimer "may be more effective in generating discourse" about "the extent of donor influence on the message." *Id.* at 23.

Finally, the First Circuit held that the dispute was not moot, because "the Act is still on the books" and the groups state "without contradiction" "that they plan to engage in similar advocacy during future election cycles." App. 7.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with this Court's precedents.

By upholding Rhode Island's on-ad donor disclaimer requirement for issue advocacy, the First Circuit departed from this Court's precedents. Under those precedents, laws that compel speech "alter the content of [private] speech" and are subject to the same strict scrutiny that applies broadly to content-based speech regulations. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (cleaned up). Rhode Island's on-ad donor disclaimer requirement only applies to speech with a certain content: that which refers to candidates or referenda. Even beyond that grounding in content, the State's requirement compels petitioners and other issue advocacy groups to substitute the government's speech for their own, thereby altering the content of those groups' speech. By refusing to apply strict scrutiny to this content-based speech restriction, the First Circuit contradicted this Court's precedents.

Even the First Circuit's application of exacting scrutiny departed from this Court's precedents, which require the government to prove that its speech restriction is a narrowly tailored way to further an important government interest. Here, the restriction on speech is great, given that on-ad donor disclaimer preempts a part of petitioners' own speech and runs counter to their views about privacy. The government's asserted informational interest in on-ad donor disclaimer is weak, not least because the same (and more) information is already available at the click of a mouse. And the requirement cannot be narrowly tailored, given that the top five donors may

not be representative and that those donors may have no connection with—or even disapprove of—a message to which their name is attached. The First Circuit speculated that the requirement was "not entirely redundant" of the other disclosures. App. 22. But that is a far cry from being narrowly tailored to an important interest. To maintain the integrity of this Court's precedents, review is necessary.

A. Laws that compel speech are subject to strict scrutiny.

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. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Compelled speech on the government's behalf is impermissible if 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 the 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 *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018). At issue was a California statute compelling 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 the required notices for licensed clinics were compelled speech. Those clinics "must 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[s] the content of [the] speech." *Ibid.* (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.

NIFLA dooms Rhode Island's donor disclaimer requirement. Like California's licensed clinic notice, Rhode Island's requirement that petitioners list their top donors on their speech is a "government-drafted script" whose exact wording is set by statute. Petitioners' printed speech must "bear upon its face the words 'Top Five Donors'" and the list; their video and audio speech are similarly scripted by the government. *Supra*, at 5-6; *see* R.I. Gen. Laws § 17-25.3-3. Petitioners are compelled to alter their speech to incorporate the government's message just like the

pregnancy centers were forced to alter their speech to incorporate the government's notice. By requiring crisis pregnancy centers to post a notice about California's state-sponsored abortion services, California's licensed clinic notice effectively altered the message of crisis pregnancy centers seeking to counsel pregnant women against having an abortion. Similarly, the donor disclaimer requirement forces petitioners to alter their advertisements that seek to inform or convince people on a particularly political issue, to also provide information petitioners believe undermines their philosophical commitments. In both cases, the government has altered the intended message by forcibly injecting its own message. Thus, Rhode Island's donor disclaimer requirement compels speech and is a content-based restriction.

Resisting this conclusion, the First Circuit purported to distinguish *NIFLA* in several ways. First, it said that compelled donor disclaimers on speech are "simply not comparable" to the notices in *NIFLA* because "[d]isclaimers—in the unique election-related context—serve the salutary purpose of helping the public to understand where 'money comes from.'" App. 31. But that mistakes application of some level of scrutiny for the antecedent question of whether the law is a content-based speech restriction. Here, Rhode Island has forced petitioners to change their ads from their intended message to include a message they would not otherwise include. By forcing petitioners to change the content of their ads, Rhode Island has forced petitioners to change the content of their speech. "If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles

cause—it surely protects" petitioners' speech about important matters of public policy before elections. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014). Indeed, because discussions of such issues "are integral to the operation of our system of government," the First Amendment should have "its fullest and most urgent application" here. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (cleaned up).

Next, the First Circuit claimed that the law "burdens speech modestly" because "[t]he speaker can for the most part control the content of any particular communication." App. 32. That claim misunderstands this Court's holdings on compelled speech. Never has this Court approved only a "modest" or proportionate compelling of speech. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Rhode Island's law is content-based not just because it compels the speaker to communicate particular content, but also because the regulation is triggered based on the content of the speech. The law applies only if a message mentions a candidate for public office close in time to an election. R.I. Gen. Laws § 17-25.3-1(e). Such "facial distinctions" that "defin[e] regulated speech by particular subject matter" constitute "obvious" content-based restrictions. *Reed*, 576 U.S. at 163.[1]

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[1] The Court's resolution of the question presented in *City of Austin, Texas v. Reagan National Advertising of Texas Inc.*, No. 20-1029, about how to identify content-based speech restrictions could bear on this issue.

To read this Court's precedents as excusing from strict scrutiny "*any regulation* involving *any sort of disclosure* and burdening *any category of speech*" is implausible. *Calzone v. Summers*, 942 F.3d 415, 427 (8th Cir. 2019) (Grasz, J., concurring). Just because some precedents apply exacting scrutiny to campaign-finance disclosure is not a warrant to give every law labeled a campaign finance regulation an automatic pass on strict scrutiny. A law imposing campaign finance disclosure based on race would still receive strict scrutiny; so too should a law compelling and altering the content of a speaker's speech.

Regardless, the on-ad donor disclaimer here is content-based and thus subject to strict scrutiny for an independent reason: 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 opinion), the compelled speech requirement here harms petitioners in multiple ways. It both deprives petitioners of the chance to speak a message they want to *and* forces them to speak a message they do not want to.

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*, the Court noting that one aspect "of the penalty resulting from the compelled printing" is "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). So too here, where the space or ad time consumed by the government's speech displaces petitioners' own.

The requirement here also forces organizations like petitioners to speak the government's own message. In the First Circuit's view, the law "does not require any organization to convey a message antithetic to its own principles." App. 32. That is incorrect. Petitioners believe strongly in the right to privacy for citizens and would not include this information if not forced to by the law. App. 61-61, 67 (Amended Compl. ¶¶ 6, 40). For an organization committed to limited government and personal freedom, saying the names of one's donors is similar to forcing pro-life groups to share information about abortion access. Forcing petitioners to appear hypocritical is hardly a "modest[]" burden. App. 32. "[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, for petitioners' message is distorted by government interference. *Cf. Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas.").

The requirement also forces petitioners to modify their message from informing or trying to convince listeners about a political issue to talking about

petitioners' donors. The addition of petitioners' donors into the content of the ad is extraneous information that distorts the petitioners' message, consuming valuable time and confusing the listener with information unconnected to the message the speaker wants to convey. *See Wash. Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019) (Wilkinson, J.) ("Much as our forebears elected to hash out the architecture of this nation under the pseudonyms of 'Publius' and 'Agrippa,' many political advocates today also opt for anonymity in hopes their arguments will be debated on their merits rather than their makers.").

Nor would it matter if the First Circuit's view about the nature of the speech mandated here were correct. 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 petitioners' speech, not whether the new content is neutral, factual, or otherwise non-ideological. As this Court well-explained in *Riley*:

> [W]e would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would

> clearly and substantially burden the protected speech.

487 U.S. at 798. Stating an organization's donors is no less burdensome than stating a candidate's travel budget. Thus, the on-ad donor disclaimer requirement alters the content of petitioners' speech.

This alteration of speech represents an essential difference between a regulation of "the mechanics of the electoral process" and a regulation of "pure speech." *McIntyre*, 514 U.S. at 345. Regulations pertaining to filings with a state agency might concern the mechanics of the electoral process. But a regulation requiring a speaker to read a state-mandated script affects pure speech and is content-based.

"[C]ontent-based regulations of speech are subject to strict scrutiny," *NIFLA*, 138 S. Ct. at 2371, which means "presumptively unconstitutional." *Reed*, 576 U.S. at 163. As shown, the on-ad donor disclaimer requirement is content-based, yet the First Circuit refused to apply strict scrutiny. That refusal contradicts this Court's precedents and requires review.[2]

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[2] This Court's pre-*NIFLA* decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is not to the contrary. There, the Court considered an on-ad statement that "___ is responsible for the content of this advertising" and that the ad "is not authorized by any candidate or candidate's committee." *Id.* at 366. The Court characterized this as a disclosure requirement subject to exacting scrutiny. *Id.* at 366–67. The Court did not consider or decide a compelled speech challenge to the on-ad disclosure, so its holding cannot be read as deciding the issue presented here. *E.g.*, *United States v. L.A. Tucker Truck*

B. On-ad disclaimer of donors cannot satisfy even exacting scrutiny.

Apart from the First Circuit's refusal to apply strict scrutiny to this content-based speech restriction, its application of exacting scrutiny also contradicted this Court's precedents. To satisfy exacting scrutiny, the government must show "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (cleaned up). "[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ibid.* (cleaned up). And exacting scrutiny requires that the law "be narrowly tailored to the government's asserted interest." *Ibid.* Here, no important government interest is at stake, and the on-ad donor disclaimer provision would not be a narrowly tailored way to further any such interest.

1. The State identified no important interest.

First, any state interest in on-ad disclaimer of donors is not important, especially relative to the burden on speech discussed above. The identity of five persons who gave money to a fund generally used to fund an advertisement is not significant information. No doubt some would also like to know the top 10 or 15 or 100 donors, or the donors' home addresses, or

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Lines, Inc., 344 U.S. 33, 38 (1952) (emphasizing that where an argument was not "discussed in the opinion of the Court," "the case is not a binding precedent on th[at] point"). Moreover, disclaiming the names of donors is a much greater burden on an organization that disclaiming the organization's own sponsorship.

their employers. Others would like to know which employees or vendors may have been involved with making an advertisement or otherwise assisting the entity. All that too theoretically provides a bit more information. But it is not important information so necessary that the government may compel speech and alter content. That is especially true given that disclaimers like this go hand in hand with a "vast" "potential . . . for harassment." *John Doe No. 1 v. Reed*, 561 U.S. 186, 209 (2010) (Alito, J., concurring).

This Court's precedents recognize the limited scope of informational interests in this context. In *McIntyre*, for instance, the Court said that "[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." 514 U.S. at 348–49. Thus, this Court has recognized that informational interests do not carry the same weight as, for example, "preventing fraud." *Id.* at 49; *accord Doe*, 561 U.S. at 197 (refusing to rely on an "informational" interest); *id.* at 206–08 (Alito, J., concurring) (explaining why such an interest is weak); *id.* at 238–29 (Thomas, J., dissenting) (same).

This makes good sense. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source" or its supporters. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *contra* App. 23. Instead, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 534 (1980) (quoting *Abrams v.*

United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). As Madison, Hamilton, and Jay understood when they published the *Federalist Papers*, anonymity "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge [the] message simply because they do not like its proponent." *McIntyre*, 514 U.S. at 342; *see Majors v. Abell*, 361 F.3d 349, 357 (7th Cir. 2004) (Easterbrook, J., *dubitante*). Rather than let the government regulate anonymous speech out of existence, this Court has trusted "the common man" "to evaluate" a writing's "anonymity along with its message" to ultimately decide "what is truth." *McIntyre*, 514 U.S. at 349 n.11 (cleaned up).

The government's interest is even less in forcing on-ad disclaimer of those who merely support an organization that engages in some speech. As Judge Noonan asked, "Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'" *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1036 (9th Cir. 2009) (concurring opinion). Judge Noonan's observation is backed up by research showing that donor information provides substantially less useful information to voters than party affiliation and major endorsements. *See* Dick Carpenter and Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech*, 40 Fordham Urb. L.J. 603, 618–23 (2012); *see also* Lilian BeVier, *Mandatory Disclosure, "Sham Issue Advocacy," and* Buckley v. Valeo*: A Response to Professor Hasen*, 48 UCLA L. Rev. 285, 303 (2000).

Any informational interest in on-ad donor disclaimer all but disappears in the face of the other statutory provisions here—specifically, the on-ad

sponsorship disclaimer and the donor disclosure. *See* R.I. Gen. Laws §§ 17-25.3-1, 17-25.3-3. Because of those requirements, an advertisement listener or viewer will both know the ad's sponsor and be able to immediately discover *all* of the sponsor's donors who gave $1,000 or more—not just the top five such donors. *See* State of Rhode Island, Campaign Finance Electronic Reporting & Tracking System, http://www.ricampaignfinance.com/RIPublic/Homepage.aspx (official State website collecting this information in a searchable format).[3]

The on-ad sponsor disclaimer alone easily satisfies any informational interest that might exist, and the separate donor disclosure requirement means that the viewer already has *more* information than the on-ad donor disclaimer would provide. Indeed, as discussed below, conveying the top-five donors on the ad may *decrease* viewers' information by giving them a distorted view of the organization's overall donors.

Finally, the First Circuit believed that the on-ad donor disclaimer "may" "generat[e] discourse" about "the extent of donor influence on the message" and whether "the top five donors are representative of the speaker's donor base." App. 23. But there is no important government interest in suppressing some speech to "generat[e]" other speech. "This sort of 'beggar thy neighbor' approach to free speech—

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[3] Further, the law expressly exempts from the on-ad donor disclaimer many communications, from "commentary" to "paraphernalia" to yard signs. R.I. Gen. Laws § 17-25.3-3(a). "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (cleaned up).

restricting the speech of some elements of our society in order to enhance the relative voice of others—is wholly foreign to the First Amendment." *Arizona Free Enter.*, 564 U.S. at 741. And it is unclear why the First Circuit found it preferable to shift the conversation from the merits of ideas to the funders behind messages. It is also unclear how disclosing only the top five donors would enable "discourse" about whether those donors "are representative." App. 23.

The First Circuit's logic has no stopping point. To give a bit more information about who donors are and whether they are "representative," could the government also require on-ad disclosure of "all kinds of demographic information, including [their] race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships"? *Doe*, 561 U.S. at 207 (Alito, J., concurring). Under the sweeping "informational interest" set forth in the decision below, it is hard to see why not. "Requiring such disclosures, however, runs headfirst into a half century of [this Court's] case law." *Id.*

No important informational interest exists in on-ad donor disclaimer, and certainly not one that could overcome its content-based restriction on speech and potential to be used for harassment.

2. The State's law is not narrowly tailored to its asserted interest.

Even if the government could show some important informational interest here, the on-ad donor disclaimer requirement is not narrowly tailored to that interest. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need

breathing space to survive." *AFPF*, 141 S. Ct. at 2384 (cleaned). A "reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary." *Id.* at 2385.

As discussed, 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" (or less). *McCutcheon*, 572 U.S. at 224. So the on-ad disclaimer cannot be narrowly tailored to further an interest that is already satisfied.

The First Circuit ventured that the on-ad donor disclaimer is "not entirely redundant" because it might be a "more efficient tool for a member of the public who wishes to know the identity of the donors backing the speaker." App. 22. But "not entirely redundant" is a far cry from "narrowly tailored." And the First Circuit's view seems to rest on the assumption that the public is "too dull" to perform a quick Internet search when viewing advertisements. App. 23; *see* App. 22 (the public may "too easily overlook[]" this information). No evidence supports that assumption. As this Court has admonished, "Don't underestimate the common man." *McIntyre*, 514 U.S. at 349 n.11 (cleaned up). A viewer's decision not to do an easy search would only underscore that the informational value in the identity of five supporters who gave money potentially used to make an ad is nil.

Even on the First Circuit's assumption that on-ad donor disclaimers could lead to a slight efficiency gain in conveying a scrap of information, the requirement is not narrowly tailored to an important interest. At best, the only interest here could be a minor efficiency

one. And the "government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 803 n.8 (2011). Journalists, opponents, and citizens can already access the same information at the board's website. Rhode Island's asserted "'prophylaxis-upon-prophylaxis approach' requires that [the Court] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 572 U.S. at 221.

Yet the law is over- and under-inclusive in several ways, again underscoring its lack of fit with any informational interest. *E.g.*, *Reed*, 576 U.S. at 172 ("In light of this underinclusiveness, the Town has not met its burden to prove that its [regulation] is narrowly tailored"). In the First Circuit's view, "the on-ad donor disclaimer provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names." App. 22. Putting aside that the same information can be obtained—if anyone cared—instantaneously on every smartphone, this "heuristic" is unlikely to be informative. In some respects, the law is vastly underinclusive. Zeroing in on the top five contributors (of potentially thousands) to the general fund could provide irrelevant information, especially for a national organization like Illinois Opportunity Project. Such a group's top five donors may be from different states, but its sixth largest donor may be from Rhode Island yet will not be listed on the ad. And the top five donors may be unrepresentative of the group's other donors.

The First Circuit dismissed this "line-drawing exercise" as "a task best left to the legislature." App. 23. But that is not how exacting scrutiny works. The

government must prove that its regulation is narrowly tailored to an important interest, and the courts must rigorously assess the government's proof. *See AFPF*, 141 S. Ct. at 2384–85.

The requirement is also over-inclusive. Many donors may give money for reasons unrelated to the particular ad. If donors were motivated to support issue advocacy in another state, or because of petitioners' work on another issue, or to support general office operations rather than issue-oriented advertisements, they would be disclosed, yet their disclosure would not provide Rhode Islanders with particularly interesting or relevant information. Some disclosed donors might even see their names listed on a message with which they do not agree—potentially misleading voters. The First Circuit dismissed this concern as "not necessarily aris[ing] in all cases." App. 24. Once again, whatever scrutiny was being applied below was not exacting.

The First Circuit accused petitioners of considering citizens "too dull to ask" questions about donor influence. App. 23. Yet only the State and the First Circuit think citizens incapable of performing an easy Internet search to obtain this same information. According to the decision below, citizens, "flooded with a profusion of information," are now "reliant" on secondary "cues" about a message but may "too easily overlook[]" "such cues." App. 22. Neither the First Amendment nor this Court takes such a dim view of the People. The First Circuit erred by "underestimat[ing]" citizens' ability "to evaluate" a writing and decide—based on the message and all information provided (or not) about its source—"what

is 'responsible', what is valuable, and what is truth." *McIntyre*, 514 U.S. at 349 n.11.

Nothing prohibits citizens from rewarding organizations that voluntarily list five donors on advertisements by favoring their messages. If that information were important to citizens, the marketplace of ideas would lead to disclosure. And Rhode Island's law already uses more narrowly tailored means to provide that same information. Sanctioning this more speech-restrictive requirement makes a mockery of this Court's recent admonition that "[t]he government may regulate in the First Amendment area" through "compelled disclosure regimes" "only with narrow specificity." *AFPF*, 141 S. Ct. at 2384 (cleaned up). Review is necessary.

II. The question presented is exceptionally important.

Review is also necessary because the question presented is exceptionally important. "[T]he First Amendment's primary aim is the full protection of speech upon issues of public concern." *Connick v. Myers*, 461 U.S. 138, 154 (1983). Yet that is what Rhode Island's law here regulates: core protected speech about policy issues before elections. The law requires substitution of the government's message for the speaker's own, and in so doing exposes individual supporters to the real possibility of personal harassment and retribution. In this way, it imposes a triple burden on free speech by forcing speakers to mouth the government's message, preventing them from saying their own message, and discouraging others from supporting the speaker.

Worse, other jurisdictions are increasingly adopting similar laws. *See, e.g.*, Alaska Stat. § 15.13.090(a)(2)(C) (requiring disclosure "of the name and city and state of residence or principal place of business, as applicable, of each of the person's three largest contributors"); Cal. Gov't Code § 84503(a) (requiring "the names of the top contributors to the committee paying for the advertisement"); Conn. Gen. Stat. § 9-621(j)(1) (requiring "the names of the five persons who made the top five largest aggregate covered transfers"); D.C. Code § 1-1163.15(a)(2) (top five); Haw. Rev. Stat.§ 11-393 (top three); Me. Rev. Stat. tit. 21-A, § 1014(2-B) (top three); Mass. Gen. Laws ch. 55 § 18G (top five); S.D. Codified Laws § 12-27-16.1 (top five); Vt. Stat. tit. 17, § 2972(c) ("any contributor who contributed more than 25 percent of all contributions and more than $2,000.00"); Wash. Rev. Code § 42.17A.350 (top five).

All these laws restrict speech, for "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on" freedom of speech "as other forms of governmental action." *AFPF*, 141 S. Ct. at 2382 (cleaned up). This Court's review is necessary to protect the freedom of speech from states' efforts to push the bounds of this Court's limited precedents upholding narrow express advocacy disclosures. The relevant precedents that apply here are those that prohibit compelled speech and content-based speech restrictions, especially pertaining to core protected speech like petitioners' advocacy. To prevent a widespread chill of First Amendment speech, this Court's review is needed.

III. This case is an ideal vehicle.

This case presents an ideal vehicle to resolve the pure legal question about on-ad donor disclaimer requirements. The courts below expressly considered and resolved this question of law. App. 32-33, 56-57. The relevant facts are not in dispute, as the district court resolved the case on a motion to dismiss. App. 35, 54. As shown above, the legal provision here is typical. States are increasingly adopting on-ad donor disclaimer laws like this one. So this case would resolve the important legal question at issue, providing clarity for states and speakers going forward.

Further, resolution of the legal question here will be outcome-determinative. The State did not argue below that its on-ad donor disclaimer would satisfy strict scrutiny as the least restrictive means of furthering any compelling interest. But even if the State wanted to make that argument, it could be resolved on remand.

Finally, this case is a good vehicle for the Court to begin to address tensions in the lower courts' application of First Amendment principles. For instance, recent decisions considering regulations of social media platforms did not hesitate to apply strict scrutiny and strike the regulations down as content-based where, for instance, the regulations "impose[d] restrictions applicable only to material posted 'by or about a candidate.'" *NetChoice, LLC v. Moody*, No. 21-cv-220, 2021 WL 2690876, at *10 (N.D. Fla. June 30, 2021) (appeal filed); *see also Bongo Prods., LLC v. Lawrence*, No. 3:21-cv-490, 2021 WL 2897301, at *9 (M.D. Tenn. July 9, 2021) (applying strict scrutiny for compelled speech to a statute requiring businesses to

post a public notice if they permit members of either sex to use a public restroom). And courts have not hesitated to invalidate disclosure provisions for social media platforms, on the ground that it impermissibly "burden[s] First Amendment expression" to "forc[e] elements of civil society to speak when they otherwise would have refrained." *NetChoice, LLC v. Paxton*, No. 21-cv-840, 2021 WL 5755120, at *11 (W.D. Tex. Dec. 1, 2021) (cleaned up).

Yet the lower courts refuse to apply these same rules to laws directly regulating core political speech, instead applying scrutiny that is "exacting" in name only and nearly always results in upholding those laws. *E.g.*, *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 134 (2d Cir. 2014); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1244 (11th Cir. 2013) (collecting cases); *Hum. Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010); *see generally Delaware Strong Fams. v. Denn*, 136 S. Ct. 2376 (2016) (Thomas, J., dissenting from the denial of certiorari). This Court's intervention is necessary to ensure that neutral principles of law govern free speech jurisprudence.

Of course, this case does not require the Court to resolve all these tensions within free speech jurisprudence. The Court could take a small step in the right direction by correctly applying its recent precedents "to the new situation" presented by on-ad donor disclaimer laws in the issue advocacy context. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020) (cleaned up). This case provides an excellent vehicle for the Court's review of this important question.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari. In the alternative, the Court should hold this case for *City of Austin, Texas v. Reagan National Advertising of Texas Inc.*, No. 20-1029.

Respectfully submitted,

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