No. 26-88

IN THE

Supreme Court of the United States

ALASKA POLICY FORUM,

Petitioner,

v.

ALASKA PUBLIC OFFICES COMMISSION, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alaska

BRIEF FOR *AMICI CURIAE* UPPER MIDWEST LAW CENTER, AND AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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August 20, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and pluralistic society.

In particular, AFPF has an interest in this case because laws like the Alaska disclosure mandate threaten the rights of speakers to speak anonymously and the rights of individuals to associate freely. In *AFPF v. Bonta*, 594 U.S. 595 (2021), this Court was clear that exacting scrutiny applies to blanket donor disclosure laws, requiring the government to explain why it needs *this* information from *these* people. But, since *AFPF* was decided, caselaw has developed in some troubling ways, putting exacting scrutiny and the associational freedom it protects at risk.

The Upper Midwest Law Center ("UMLC") is a nonpartisan public-interest law firm headquartered in Minnetonka, Minnesota which litigates for individual liberty, separation of powers, and religious freedom. UMLC also fights against governmental and special interest overreach. UMLC regularly

[1] All parties have received timely notice of *amici*'s intent to file this brief. No counsel for a party authored this brief in whole or in part and no person other than *amici* or its counsel made any monetary contributions to fund its preparation or submission.

represents litigants in cases challenging the constitutionality of government action such as in this case.

SUMMARY OF ARGUMENT

AFPF challenged a California regulation that required charities to register with the Attorney General's office and disclose major donors by filing Schedule B of their IRS Form 990. *See* 594 U.S. at 601–04. AFPF, which was subject to the regulation, challenged the donor disclosure requirement because it burdened its First Amendment associational rights with its donors. *Id*. at 601–03. This Court held that exacting scrutiny applied and therefore the government was required to demonstrate narrow tailoring, or a "means-end fit" that "demonstrate[s] its need for universal production in light of any less intrusive alternatives." *Id.* at 613.

Since *AFPF* was decided, lower courts have developed two types of errors when applying exacting scrutiny. The first is a category error in which the names of donors to an entity are deemed interchangeable with the funders of specific advertisements and thus assumed to be relevant to readers. This assumption is applied even when donors are unaware of the advertisement or if the donor was not a direct donor to the speaker but a donor to a donor to a donor of the speaker. Listing names and personal information, such as home addresses, of people with no relationship to an ad campaign enlightens no one, while creating stochastic risk of exposure of donors especially to large, multi-topic charities or organizations that support unpopular causes. Catching donors by surprise through attaching their names to unfamiliar speech or implying affiliation with unknown others is both unjust and chilling. Without a compelling causative link between a funder and the speech, the disclaimer may as well list the graphic designer, the printer, or the mail carrier—people who contributed in some way to delivering the message but are not relevant to the reader.

The second type of error is the persistent confusion between narrow application and narrow tailoring. In some cases, the closer a law comes to resembling a bill of attainder, the more "narrow" it is deemed to be tailored. But like the category error, without requiring clear causation between *who* is burdened and *why*, narrow application simply misleads the public to infer a relationship while improperly burdening a subset of people who cannot logically be distinguished from those left unburdened.[2] Fortunately, a small number of cases have correctly required causation to be demonstrated thus providing a roadmap for application of exacting scrutiny.

This brief provides an overview of the risks to the freedom of association from the misapplication of *AFPF*'s exacting-scrutiny requirement and where courts have course corrected when voters or legislatures have enacted disclosure requirements that fail exacting scrutiny. The Alaska law at issue here includes both types of error. The Court should take this case to correct these two errors that have run

[2] *See* Cynthia Fleming Crawford, *Narrow Applicability Is Not the Same As Narrow Tailoring: Applying the First Amendment in First Choice Women's Resource Centers v. Platkin*, FedSoc Blog (Feb 21, 2025) (discussing the difference between narrow applicability and narrow tailoring), https://tinyurl.com/3c8retu8.

rampant in exacting scrutiny cases in lower courts since *AFPF*.

ARGUMENT

I. *SURPRISE! YOU'RE RESPONSIBLE FOR THIS AD.*

In *The Concept of Mind*,[3] Gilbert Ryle provides an example of a visitor to Oxford, who, after seeing the individual colleges, playing fields, museums, and libraries, asks, "But where is the University?"[4] The visitor's error, Ryle explains, "was mistakenly allocating the University to the same category as that to which the other institutions belong."[5]

Many donor disclosure laws make a similar error by presuming that producing the name of any donor—regardless how remote—is equivalent to informing the public about the power behind a message the named donor may have never seen. The Alaska law embeds this error by requiring donors to be disclosed if they have contributed to an educational charity in the event the educational topic later becomes the subject of a ballot initiative, thus implying that donors to the educational entity are political advocates. This error is especially stark for national donors to charities that may educate on issues relevant across the country without reference to a state election or any particular state law or that educate on a variety of topics that appeal to diverse donors.

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[3] Ryle, Gilbert. *The Concept of Mind*. London: Hutchinson, 1949.

[4] *Id*. at 16.

[5] *Id*.

A. *No on E v. Chui* and the San Francisco Sunlight on Dark Money Initiative (petition denied).

No on E v. Chui demonstrated how attenuated the source of funding for an ad can be from the information the law requires to be disclosed and how multi-level disclosure schemes can result in accumulation of nonsense disclosures that displace political speech. 85 F.4th 493 (9th Cir. 2023).

The San Francisco Sunlight on Dark Money Initiative, changed the "disclaimer requirements for advertisements paid for by independent political committees" to include "a disclaimer listing their top three contributors of $5,000 or more" and if "any of the top three major contributors is a committee," requiring "the disclaimer [to] also disclose both the name of and the dollar amount contributed by each of the top two major contributors of $5,000 or more to that committee." *No on E*, 85 F.4th at 498–99. Advertisements regarding a ballot initiative were thus required to include disclaimers with up to nine "contributors" listed.

There was no exclusion for donors who were not aware of the message and no assurance that donors had any intent to support it. *Id*. at 506. Moreover, the City database of financial disclosures was also required to be announced within the ad. *No on E*, 85 F.4th at 498–99. These mandates came in addition to existing California law requiring disclosure of donations to "committees" and on-ad disclaimers of the committee paying for an ad and the top-three contributors of $50,000 or more. *No on E*, 85 F.4th at 497–98.

Thus, donors who contributed to a committee could find their names publicly disclosed on an ad, creating an inference they support the message even if they knew nothing about it and implying a relationship among the names listed even if no such relationship exists. Such misinformation clarifies nothing and thus fails to satisfy exacting scrutiny.

B. *Rio Grande Foundation v. Oliver* (petition pending).

Rio Grande Foundation v. Oliver presents another example of multi-level donor disclosure but with the added twist that it offers a roadmap for avoiding judicial review by making the sweep of the law broad, *i.e.*, the opposite of narrowly tailored. *Rio Grande Found. v. Oliver*, 154 F.4th 1213 (10th Cir. 2025) (*Rio Grande II*). The New Mexico law compels an issue advocacy organization to disclose its donors if it mentions a candidate's name within 60 days of an election. *Rio Grande II*, 154 F.4th at 1219; N.M. Stat. Ann. § 1-19-26(Q)(3)(c); N.M. Stat. Ann. §§ 1-19-27.3(A)(1), (B). This is so even if the speech does not advocate for or against a candidate but confines itself to discussing issues. *Id*. As core political speech, at least exacting scrutiny should apply.

But the New Mexico Law survived review for an unexpected reason: the court required two levels of injury to establish chill. First the speaking entity was required to show injury to itself, and then, it was also required to show injury to its underlying donors. *Rio Grande Found. v. Oliver*, 727 F. Supp.3d 988, 994 (D.N.M. 2024) (*Rio Grande I*) ("admitting for purposes of this motion that RGF alleges a fear of lost donations if its donors' identities are disclosed"); *Rio Grande II*, 154 F.4th at 1230 ('insufficient to establish a reasonable probability that the compelled disclosures will subject RGF's donors to threats, harassment, or reprisals").

Because the New Mexico law applies to ads that refer to "a clearly identified candidate or ballot question" and are "published and disseminated . . . within thirty days before the primary election or sixty days before the general election," N.M. Stat. Ann. § 1-19-26(Q)(3)(c), a donor who had supported issue advocacy earlier in the year could be surprised by being inaccurately disclosed as for or against a particular candidate, without even agreeing that the candidate should win or lose.

The result of *Rio Grande* is thus rather ironic. By writing the law so broadly that it sweeps up not just the speaking organization but also its donors and then requiring injury at both levels before the rights of either can be protected, the incentive is clear: exacting scrutiny can be bypassed by employing the inverse of narrow tailoring. Instead, sweep as broadly as possible and require multiple levels of injury. The broader the sweep, and the more the levels of donors that must be threatened, the harder it becomes to establish injury across all participants.

That is the opposite of narrow tailoring.

C. Students for Life Action v. Jackley.

Students for Life Action v. Jackley, presents a similar law to the disclaimer law at issue in *No on E*, requiring "[a]ny person or entity that makes a payment or promise of payment totaling more than one hundred dollars," . . . "for an independent communication expenditure that concerns a candidate, public office holder, ballot question, or political party" to include with the communication that donor's name, address, website address (if applicable), and if the speaker is not an individual, its 'Top Five Contributors' during the twelve months preceding that communication." 746 F. Supp. 3d 668, 681 (D.S.D. 2024) (citing South Dakota Codified Law § 12-27-16). Thus, donors to Students for Life Action, which does not advocate for or against candidates, and who may have contributed up to a year in advance of an election, must be disclosed as if they are campaign donors. Like the San Francisco and New Mexico laws, the South Dakota law not only lacks tailoring to any purported government interest in disclosing campaign supporters, but actually risks misinforming the public and surprising donors who contributed to issue advocacy wholly unrelated to an election.

The Alaska law presented here imposes the same type of category error, to the detriment of Petitioner's associational rights, by treating issue education as political advocacy if an initiative pertaining to a similar topic is placed on the ballot.

II. *SNEAKING UP ON BILLS OF ATTAINDER AS A PROXY FOR NARROW TAILORING.*

The second type of error conflates narrow application with narrow tailoring by presuming that constraining the number of donors to whom a law applies is sufficient to satisfy narrow tailoring. But limiting a law based on characteristics that do not satisfy the means-ends requirement raises concerns that the law may be unconstitutionally underinclusive and simply target a disfavored group. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 802 (2011) ("Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) ("The ordinances are underinclusive for those ends. . . . The underinclusion is substantial, not inconsequential."). Taken to its logical limit, such an approach would reward the crafting of laws that are tailored to apply only to the disfavored few.

With some notable exceptions, this type of error is spreading and is present here, where the disclaimer requirement falls on advocates for issues that are more likely to eventually appear on a ballot than on advocates for issues more likely to be addressed in a nonelectoral fashion or simply ignored. This is an unconstitutional content-based distinction even though it turns on who is speaking. That type of distinction does not resolve the constitutional dilemma because "the fact that a distinction is speaker based does not, . . . automatically render the distinction content neutral," *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). And "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Id.* (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010)).

This would be like applying a law only to redheads and thus claiming narrow tailoring because only a small portion of the population is affected. But such an approach would be unlikely to satisfy the means-end test necessary for exacting scrutiny. Likewise, a law that applied to bookstores that sell political fiction but not to other bookstores, while nominally tailored to the identity of store, is more likely "simply a means to control content" and thus not tailored to a constitutionally valid interest. Moreover, the government could not justify the law by indicating that there are many bookstores that are unaffected because they choose not to sell political fiction.

Any similar attempt to claim a donor disclosure law is narrowly tailored because the population to whom it applies has been artificially constrained should trigger skepticism and a close look at causation to see whether the law is narrowly tailored to the ends it purports to pursue or whether it just targets a smaller group of people.

A. The First Circuit's *Gaspee* opinion misapplied *AFPF.*

Gaspee Project v. Mederos has been responsible for much of this wayward interpretation. 13 F.4th 79 (1st Cir. 2021). *Gaspee*, which was decided shortly after the Court decided *AFPF*, dealt with disclosure of funding sources for independent expenditures and electioneering communications. 13 F.4th at 82–83 (1st Cir. 2021). *Gaspee* nominally embraced *AFPF* but misapplied the narrow tailoring element. *See id*. at 85.

Like the annual blanket demand for disclosure in *AFPF*, the act in *Gaspee* required filing a report with the State Board of Elections disclosing all organization donors over $1,000. It also imposed an on-communication disclaimer identifying the five largest donors from the preceding year.[6] *Id*. at 83. But as the not-for-profit plaintiffs in *Gaspee* made clear,

[6] Donors could opt out of the disclosure requirement by electing that donations not be used for funding of independent expenditures or electioneering communications. *Id*. at 82.

their interest was in issue advocacy, not candidate support. *See id*. at 82, 85.

Gaspee allowed First Amendment protection of core political speech to be circumvented for messages delivered during the time period the speech was likely to be most salient, distinguishing it from speech that takes place outside an election context, 13 F.4th at 89. But neither the First Amendment nor *AFPF* includes such a distinction.

Gaspee also found no relevant distinction between issue advocacy versus candidate-specific advocacy, despite relying on *Buckley v. Valeo* and *Citizens United*, which acknowledge a government anti-corruption interest in who pays for messaging supporting or opposing a specific candidate but make no such argument regarding issue advocacy. 13 F.4th at 85–86.[7] *Buckley* explained the rationale for disclosure of donor information for specific candidates to avoid corruption or the appearance thereof. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). This rationale does not apply to contributions to support an idea or to discuss an issue because an idea cannot be corrupted. *See First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections, simply is not present in a popular vote on a public issue." (cleaned up)).

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[7] *AFPF* did not address disclaimers—nor any other form of compelled speech. *Buckley*, likewise, involved disclosure but not disclaimers. *Citizens United*, which addressed mandatory disclaimers, was decided under the pre-*AFPF* annunciation of exacting scrutiny and thus required only "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." 558 U.S. 310 at 366–67 (2010) (cleaned up).

Instead of relying on a purpose-based rationale, *Gaspee* resorted to a plethora of characteristics unrelated to the only relevant criterion: whether there is a means-end relationship between the government's goal and the First Amendment burden imposed. Like a disclosure law that applies only to retirees or people who are left-handed without any explanation of how that narrow application creates the desired end, this type of analysis substitutes narrow application for narrow tailoring.

B. *Dinner Table Action v. Schneider* came to the correct conclusion but applied the wrong rubric.

Dinner Table Action v. Schneider presented a similar disclosure scheme that reached even smaller donors. No. 24-430, 2025 WL 1939946, at *5 (D. Me. July 15, 2025). In *Dinner Table Action v. Schneider*, the issue was a Maine law that required any person, party committee, or PAC making any "independent expenditure" in excess of $250 during any one candidate's election, to disclose the total contributions from each contributor regardless of the amount of the contribution. No. 24-430, 2025 WL 1939946, at *5 (D. Me. July 15, 2025) (cleaned up). Dinner Table Action claimed that its smaller dollar contributors would not continue to contribute if their identities were subject to disclosure. *Id*. The court relied on *Gaspee* to guide its application of narrow tailoring on two points. First, it compared the $1,000 expenditure limit from *Gaspee* to the $250 expenditure limit in the Maine law. *Id*. at 5. Second, it compared the *Gaspee* opt-out provision to the absence of such an opt-out provision under the Maine law. *Id*. at 6. The court found that the Maine disclosure requirement swept so broadly that it provided "no meaningful opportunity for anonymous contributions," thus could not be "described as narrowly tailored to Maine's informational interest." *Id*. at 6.

While this holding represented a win for Dinner Table Action and its donors, the narrow tailoring analysis replicated the *Gaspee* errors by relying on the number of people to whom the law applied rather than on whether there was a causal relationship between those people and the government's alleged interest, *i.e.* narrow application, not narrow tailoring.

C. *Wyoming Gun Owners v. Gray* presents another use of narrow application rather than requiring narrow tailoring.

In *Wyoming Gun Owners v. Gray*, Wyoming had a campaign finance scheme that required organizations that spend over $1,000 on an "electioneering communication" to disclose contributions and expenditures related to that communication. 83 F.4th 1224, 1229 (10th Cir. 2023). Wyoming Gun Owners, a non-profit gun rights advocacy group, challenged the constitutionality of the disclosure scheme. *Id*.

The court considered "whether Wyoming narrowly tailored the law" to the state's anticorruption and informational interests and held that it did not, in part because the vague language regarding to whom the statute applied required over-disclosing contributions to avoid missing anyone. *Id*. at 1244, 1247.

Wyoming Gun Owners is thus another case that could be considered a win for narrow tailoring. But like *Gaspee*, much of the analysis turned on whether donors could opt-in or opt-out of disclosure, placing the burden on the donor, rather than on the state to justify why donors with certain characteristics or behaviors could be compelled to disclose their identities. The opt-out/opt-in test, to the extent it has gained traction in the narrow tailoring analysis, must be justified by a link to the purpose of the disclosure and not simply provide a way to ratchet up or down the number of people to whom the disclosure applies or to shift the burden to the donor.

D. The Colorado Supreme Court got it right in *No on EE – A Bad Deal for Colorado, Issue Committee v. Beall.*

A Colorado case, by contrast, showed the correct approach to the means-end test when it reviewed a state law that required an "issue committee" to disclose the name of the "natural person who is the registered agent" of the entity paying for the communication supporting or opposing a ballot issue. *No on EE - A Bad Deal for Colorado, Issue Comm. v. Beall*, 558 P.3d 671, 673 (Colo. Aug. 4, 2025). No on EE, which was an issue committee, challenged the registered-agent provision of the law. *Id.* at 675–76.

Applying exacting scrutiny, the court explained that it was required to "consider whether the government has demonstrated its need for the disclosure requirement in light of any less intrusive alternatives." *Id.* at 676–77 (cleaned up). It thus examined whether the links that were claimed to exist between the disclosure and the state's informational interest made sense, holding,

> There can be no serious argument that requiring an issue committee to disclose the name of its registered agent serves the governmental interest in informing

> the public about an issue committee's sources of funding. There is no requirement in Colorado law that the registered agent be a donor to an issue committee, much less a significant donor. Thus, to the extent the state would assert such an interest in this context, there would be a "dramatic mismatch . . . between the interest [the state] seeks to promote and the disclosure regime that [it] has implemented in service of that end.

Id. at 678 (citing *AFPF*, 594 U.S. at 612).

Accordingly, because "the defendants don't even try to explain how knowing the name of the registered agent—as opposed to some other person with a closer connection to the issue committee—will actually assist voters" and "the mere possibility that disclosure of the registered agent's name might, in some cases, provide relevant information to someone can't be sufficient if 'exacting scrutiny' is to mean anything." *Id*. at 679. The court held the requisite link between the informational interest of the state and the name of the registered agent was lacking—even though, had the court simply employed the erroneous narrow application test, disclosure of a single name would certainly qualify as "narrow". It thus followed "that the registered agent disclosure requirement . . . violates issue committees' free speech rights under the First Amendment." *Id*. at 680.

No on EE – A Bad Deal for Colorado, Issue Committee v. Beall presents an excellent example of distinguishing between narrow tailoring and narrow application.

E. The First Circuit Court of Appeals makes a comeback in *Central Maine Power Company v. Maine Commission on Governmental Ethics & Election Practices*.

Showing that voters as well as legislatures can misunderstand whether the information they demand is tailored to the ends they want to achieve, in 2023, Maine voters passed by ballot initiative "An Act to Prohibit Campaign Spending by Foreign Governments" ("the Act") with the expressed purpose of prohibiting foreign governments and foreign "government-influenced" entities from contributing to candidate elections and ballot initiatives. *Cent. Maine Power Co. v. Maine Comm'n on Governmental Ethics & Election Pracs*., 144 F.4th 9, 14 (1st Cir. 2025) (citing 1 Me. Rev. Stat. Ann. tit. 21-A, § 1064 (2024)).

The Act was overwhelmingly popular with voters, 86% of whom approved it as a ballot question. *Id*., at 14. Passage of the Act was motivated in part by previous ballot initiatives attempting to block completion of electrical lines through Maine that would have connected Canadian electricity to Massachusetts. *Id*. at 14. Companies that would have been negatively affected by the block, including plaintiffs, opposed those efforts in part by contributing money to PACs and ballot question committees. *Id*., at 15. These companies had varying degrees of foreign ownership (Canadian governmental entities, Spain, and Qatar in descending order), a fact that some Maine voters found improper. *Id*. at 15.

The language of the Act was broad, banning a "foreign government-influenced entity" from making a contribution to influence the nomination or election of a candidate or the initiation or approval of a referendum". *Id*. at 15 (citing 1 Me. Rev. Stat. Ann. tit. 21-A, § 1064(2)). But it also required that "whenever a foreign government-influenced entity finances a permissible public communication ... to influence the public or any ... local official or agency concerning government policy or government relations with a foreign country or political party, that communication must contain the words: 'Sponsored by [the name of the entity]' followed by the label of a 'foreign government-influenced entity' or a 'foreign government.'" *Id*. at 16–17 (cleaned up).

Plaintiff companies challenged that law, joined by electors who argued the Act unconstitutionally abridged their rights as voters to receive and consider political speech. *Id*. at 17. Although the Act largely related to whether an entity could donate rather than to disclosure of donations, the court applied exacting scrutiny and required narrow tailoring. *Id*. at 24 ("Under exacting scrutiny, the restrictions need not 'be the least restrictive means of achieving their ends,' but they must be 'narrowly tailored to the government's asserted interest.'") (citing *AFPF v. Bonta*, 594 U.S. at 608). Thus, it required "a direct causal link between the restriction imposed and the injury to be prevented," because "in the First Amendment context, fit matters." *Id*. at 23–24 (cleaned up).

Applying this framework, the court held that the Act failed to satisfy exacting scrutiny because it appeared to be either "aimed at silencing a large swath of corporations merely because they are corporations, or an effort to shape the ongoing debate in Maine about its two primary utility companies by silencing one side – the companies themselves." *Id*. at

27. Because neither approach is constitutional, the Act was tailored, but not to a constitutionally permissible interest.

Whether this more recent opinion displaces *Gaspee*, time will tell. But it is either a step in the right direction or further proof that this Court should clarify application of exacting scrutiny.

III. THE COURT SHOULD GRANT *CERTIORARI* TO STOP THE INCREASING MISAPPLICATION OF *AFPF V. BONTA*.

The Court should grant *certiorari* because, although *AFPF* is relatively recent, misapplication of exacting scrutiny has already begun.

The risk is that these permutations will spread, turning exacting scrutiny into the test applied to attenuated government interests with application schemes that are so prolix that they must be "exacting." This is not what the means-ends test from *AFPF* stands for and such application will end up undermining associational freedom rather than protecting it.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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August 20, 2026