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* REPUBLICAN GOVERNORS ASSOCIATION AND REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Republican Governors Association (RGA) is a Washington, D.C.-based § 527 organization founded in 1961. Members of the RGA include U.S. state and territorial Republican governors. For the past six decades, the RGA has helped elect Republican governors and provided them the resources to govern effectively.

The RGA has both an acute interest in and firsthand knowledge of the impact that speech restrictions can have on the ability of political organizations to speak on the issues of the day. RGA members and their campaigns regularly engage in public communication—op-eds, policy statements, coalition efforts—on subjects that may later become the focus of a ballot initiative. The RGA is therefore uniquely situated to explain how a contextual, audience-perception-based test for regulable speech—of the kind the decision below adopts—threatens to sweep ordinary political and policy communication into onerous registration and disclosure regimes, based not on anything a speaker said, but on the contextual events outside the speaker's control.

The Republican Governors Public Policy Committee (RGPPC) is a Washington, D.C.-based §

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, amici curiae certify that counsel of record for all parties received timely notice of the intent to file this brief.

501(c)(4) organization that serves to connect Republican Governors to discuss and promote public policies and best practices. RGPPC's mission is to monitor and communicate about state and federal public policy affecting Republican governors and the states they lead, including through issue-based communications on subjects such as energy, healthcare, education, and public safety. RGPPC therefore has a direct and substantial interest in ensuring that the test turns on the words a speaker actually uses, not on a regulator's after-the-fact assessment of context and audience perception.

SUMMARY OF THE ARGUMENT

In Alaska, the line between issue advocacy and campaign speech has become vanishingly small. In the decision below, the Alaska Supreme Court held that mere reference to an issue close in time to an election suffices to show that an "average listener" would view an organization's advocacy as an exhortation to vote. No mention of a ballot measure necessary. No requirement that the speech urge its passage or defeat. No requirement even that the speech reference Alaska at all. Such a malleable standard "offers no security for free discussion." *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (*per curiam*) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). It violates this Court's repeated admonition that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (opinion of Roberts, C.J.) (*WRTL II*).

Alaska Policy Forum (APF) did the sorts of things advocacy organizations do. It joined Protect My Ballot, a national coalition opposed to ranked-choice voting. It shared the coalition's press release and its video regarding ranked-choice voting. And it posted an op-ed, a white paper, and a short article—all critical of ranked-choice voting—on its website. After these educational efforts began, a ballot measure which included a ranked-choice voting provision qualified for the election.

Even though APF's speech never mentioned the ballot measure, and even though some of its speech did not even mention Alaska, the Alaska Public Offices Commission (APOC) concluded that APF had violated Alaska election law. Paradoxically, APOC concluded that Protect My Ballot had *not* engaged in election communications and was not subject to the state's registration and reporting requirements. This is precisely the "bizarre result" this Court has found impermissible: "identical ads aired at the same time could be protected speech for one speaker, while leading to . . . penalties for another." *WRTL II*, 551 U.S. at 468 (opinion of Roberts, C.J.). This was so even though some of APF's speech did not merely resemble Protect My Ballot's speech—it reproduced it verbatim.

To arrive at this "bizarre result," the Alaska Supreme Court adopted an audience-effect test long discredited by this Court. In Alaska, speakers may keep their right to associational privacy only by forfeiting their right to speak about the most important issues of the day. The decision below eviscerates foundational protections for core First

Amendment issue advocacy, conflicts with this Court's precedents, and deepens circuit confusion regarding when a government may constitutionally subject a speaker to regulation. It merits this Court's review.

ARGUMENT

I. *WRTL II* Requires a Text-Bound, Speaker-Blind Test—Not The Alaska Supreme Court's Constitutionally Infirm Intent-and-Context Inquiry.

The First Amendment demands that government regulation of political speech apply an objective standard that is substance-based and speaker-blind. This fundamental principle dates from the Court's holding that limiting independent expenditures for or against federal candidates "is unconstitutional under the First Amendment." *Buckley*, 424 U.S. at 51. "After noting the difficulty of distinguishing between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other, the *Buckley* Court explained that analyzing the question in terms of intent and of effect would afford no security for free discussion." *WRTL II*, 551 U.S. at 467 (opinion of Roberts, C.J.) (citation modified).

This Court's rejection of elusive standards for regulable speech has only crystallized in the decades since *Buckley*. In 2003, the Court upheld the Federal Election Campaign Act's "definition of 'electioneering communication'" precisely *because* that definition "raises none of the vagueness concerns that drove our analysis in *Buckley*." *McConnell v. FEC*, 540 U.S. 93, 194 (2003). Specifically, the electioneering communication definition "applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners." *Id.* Since "[t]hese components are both easily understood and objectively determinable," this Court found that the definition was not vague or overbroad in violation of the First Amendment. *Id.*

FEC v. Massachusetts Citizens for Life, Inc., continued this Court's effort to protect and distinguish issue discussion from electoral advocacy. 479 U.S. 238, 243 (1986) ("*MCFL*"). In *MCFL*, the Court explained that *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Id.* at 249. This Court went on to note that express advocacy generally "depend[s] upon the use of language such as 'vote for,' 'elect,' [or] 'support.'" *Id.* (quoting *Buckley*, 424 U.S. at 44 n. 52). There, an exhortation to vote "pro-life" along with the names and photographs of specific pro-life candidates satisfied that standard. *Id.* The mailer at issue "provide[d] in effect an explicit directive: vote for these (named) candidates." *Id.*

In his controlling opinion in *WRTL II*, the Chief Justice further explained the standard for regulable speech in the candidate context: "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469–70 (opinion of Roberts, C.J.). The line between what is regulated and what is not "must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *Id.* at 469. Any contrary test would "unquestionably chill a substantial amount of political speech." *Id.*

To be sure, under the Chief Justice's opinion, reviewing courts "need not ignore basic background information"—like the fact an election is occurring—but he warned that acknowledging basic background information "should not become an excuse for discovery or a broader inquiry of the sort [that would] raise[] First Amendment concerns." *Id.* at 473–74. Rather, to avoid "impermissible vagueness," *id.* at 474 n.7, Chief Justice Roberts' controlling opinion in *WRTL II* expressly foreclosed consideration of intent and effect—providing that a speaker's "intent is irrelevant" and that "a test based on the actual effect speech will have on an election or on a particular segment of the target audience . . . puts the speaker wholly at the mercy of the varied understanding of his hearers." 551 U.S. at 472 (opinion of Roberts, C.J.) (citation modified).

Three members of the *WRTL II* majority would have gone further. In his concurrence, Justice Scalia, joined by Justices Kennedy and Thomas, agreed that a text-based speaker-blind rule was necessary, but argued that the Chief Justice's test was *still* too vague. 551 U.S. at 492 (Scalia, J. concurring in part and concurring in judgment). The concurrence would have held only a bright-line "magic words" test sufficient to protect the important First Amendment rights at stake from the inevitable chill of an ambiguous regulation. *Id*.

In 2010, the Court confirmed that *WRTL II* requires—at minimum—an "objective" test. In *Citizens United v. FEC*, this Court described *WRTL II* as "adopt[ing] an objective 'appeal to vote' test for determining whether a communication [i]s the functional equivalent of express advocacy," and thus subject to regulation. 558 U.S. 310, 335 (2010) (citing *WRTL II*, 551 U.S. at 470). *Citizens United* emphasized that this objective inquiry is necessary because First Amendment standards "must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal." *Citizens United*, 558 U.S. at 336 (citation modified). This follows from the bedrock principle that "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Citizens United*, 558 U.S. at 327 (quoting *WRTL II*, 551 U.S. at 469; citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 269–270 (1964)). In short, to distinguish between issue and election advocacy, this Court's precedents prohibit any sort of intent or audience-effect test, limit "inquiry into" contextual factors, and hold that close cases must always be "resolved in favor of protecting speech." *WRTL II*, 551 U.S. at 474 n.7 (opinion of Roberts, C.J.).

II. The Alaska Supreme Court Badly Erred In Departing From *WRTL II*, Looking To Audience Understanding, And Finding Identical Speech To Be "Advocacy" Or "Not Advocacy" Depending On The Speaker.

The Alaska Supreme Court embraced—rather than eschewed—an open-ended rough-and-tumble set of contextual factors, inviting discovery and inevitable appeal in every case, and failing to give First Amendment freedoms the "breathing space [they need] to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). In the lower court's view, "express and issue advocacy are arguably one and the same when it comes to ballot initiatives." *Alaska Pol'y F. v. Alaska Pub. Offs. Comm'n*, 583 P.3d 701, 722 (Alaska 2026) (citing *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1018 (9th Cir. 2010)). This perspective—that there is no such thing as protected issue advocacy in the ballot initiative space—infected the rest of the lower court's analysis, leading it to make fundamental errors and give the benefit of the doubt to state regulators rather than speakers. In doing this, the lower court ran afoul of this Court's precedent in four dangerous ways.

First, the lower court violated *WRTL II*'s repeated pronouncement that context "should seldom play a significant role in the inquiry." 551 U.S. at 474. Instead, the lower court made context the whole of the inquiry—and then punished one speaker but not another for identical speech based on just such context. *Alaska Pol'y F.*, 583 P.3d at 728.

Second, as part of its context-centric approach, the lower court considered timing. *Id.* But as Chief Justice Roberts explained in *WRTL II*, "[t]hat the ads were run close to an election is unremarkable in a challenge like this." 551 U.S. at 472. Indeed, "[i]f this were enough to prove that an ad is the functional equivalent of express advocacy," then the Supreme Court would have found BCRA to be "constitutional in all of its applications." *Id.* Yet "[t]his Court unanimously rejected this contention in *WRTL I*." *Id.*

So too here. "Every ad covered" by Alaska's disclosure and reporting laws for ballot initiatives "will by definition air just before [the] election." *Id.* That is because the law only applies once an initiative is the subject of an application filed with the State. Alaska Stat. § 15.13.050(a). Were the test close-in-time, regulators could disallow issue advocacy related to ballot initiatives entirely. That cannot be right. Indeed, this Court's cases establish that a speaker has the right "to run an issue ad to coincide with public interest." *WRTL II*, 551 U.S. at 473 (opinion of Roberts, C.J.).

Third, and perhaps most troubling, the lower court based its contextual analysis around a "reasonable listener." *Alaska Pol'y F.*, 583 P.3d at 719. Whether speech is protected or not, in the lower court's view, depends upon what a hypothetical listener is "aware of" or "not aware of." *Id.* That is a recipe for the fact-intensive discovery this Court barred in *WRTL II*. Worse, instead of according to free speech the tie, the lower court *assumed* a politically engaged and educated listenership. *Id.* By the Alaska

Supreme Court's lights, burdens on the associational rights of advocacy organizations were permissible because "[a]n upcoming election is the kind of information that most reasonable listeners will be aware of, and that knowledge will shape their understanding of the message." *Id.* That sort of reasoning would swallow *WRTL II* whole. It would prohibit *any* issue advocacy—in the ballot initiative or candidate context—close in time to an election because regulators could always assume that a listener should be aware of elections and ballot measures.

That is not the law. *WRTL II* required that there be no reasonable interpretation of a communication other than as an appeal to vote—not that a reasonable listener would understand the message as such. Indeed, in *WRTL II*, Chief Justice Roberts reiterated "the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience." 551 U.S. at 469 (opinion of Roberts, C.J.). "Such a test 'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers.'" *Id.* (quoting *Buckley*, 424 U.S. at 43). And "[i]t would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result." *Id.* Under this Court's precedent, "[l]itigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech." *Id.*

Just so here. As the Alaska Supreme Court's opinion acknowledges, listener effect depends upon many contextual factors, including the person's knowledge and memory of current events, ballot initiatives, and past speaker statements. Such an approach is particularly susceptible to vague interpretations and to regulators' post-hoc reasonableness determinations. It "shifts the determination of what is express advocacy away from the words in and of themselves to the unpredictability of audience interpretation." *Chamber of Commerce v. Moore*, 288 F.3d 187, 194 (5th Cir. 2002) (internal quotation marks omitted). Further, as *Buckley* acknowledged, *anything* that a speaker might say upon "the general subject" might "be understood by some as an invitation" to vote in a certain way. 424 U.S. at 43. Allowing a regulator to speculate about speech's effect on a listener chills core political speech and deprives speakers of a "safe harbor for . . . First Amendment rights." *WRTL II*, 551 U.S. at 467 (opinion of Roberts, C.J.). And the Alaska Supreme Court did not even stop there: it injected further ambiguity for would-be issue speakers, stating, "We do not rule out the possibility that prior speech may be a permissible contextual factor in some cases." *Alaska Pol'y F.*, 583 P.3d at 719.

All of this violates this Court's mandate that any test to distinguish issue advocacy from election advocacy must "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley,* 424 U.S. at 14 (quoting *Sullivan,* 376 U.S. at 270). A standard turning on what a listener should be aware of "does not remotely fit the bill." *WRTL II*, 551 U.S. at 467–68 (opinion of Roberts, C.J.). It "blankets with uncertainty whatever may be said." *Id.* at 468 (citation modified).

To be sure, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42. But that reality counsels an approach opposite the one taken by the Alaska Supreme Court. That is because "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL II*, 551 U.S. at 474 (opinion of Roberts, C.J.). The tie goes to the speaker.

Fourth, the lower court erred by distinguishing *WRTL II* on its facts and suggesting its test does not apply to disclosure mandates at all. *Alaska Pol'y F.*, 583 P.3d at 721. Not so fast. This Court's concerns with vague speech regulations do not disappear simply because Alaska's regime operates through registration, reporting, and compelled disclosure rather than an expenditure limit. To the contrary, "[t]he First Amendment constrains the government's power to compel the disclosure of independent contributions and expenditures, just as it constrains the government's power to regulate the amount of money that a person or group can contribute to . . . election campaigns." *Moore*, 288 F.3d at 191–92.

For decades, this Court has recognized that disclosure burdens "can seriously infringe on privacy of association and belief," exposing supporters to potential harassment and chilling associational freedoms. *Buckley*, 424 U.S. at 64; *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

And *Buckley* applied the *same* narrowing construction to expenditure limits (on the one hand) and to disclosure and reporting requirements (on the other). *See Buckley*, 424 U.S. at 79–80 (holding that "expenditure" must be limited to express words of advocacy to avoid unconstitutional vagueness). That's because indeterminate standards chill protected speech regardless of whether the consequence for miscalculating is a penalty for an excessive contribution or the burden of compelled disclosure and reporting. And since a vague standard means a speaker cannot know in advance whether his speech is regulable, some speakers will choose not to speak at all. *See Buckley*, 424 U.S. at 43.

Indeed, given the serious First Amendment burdens imposed by a disclosure mandate, *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 608 (2021) (*AFP*), held that exacting scrutiny demands a disclosure regime be narrowly tailored to an important governmental interest. A malleable, reasonable-listener-in-the-eyes-of-the-regulator test like the one adopted below is the antithesis of narrow tailoring: it cannot tell a speaker, in advance, whether posting a white paper or sharing a national coalition's video will trigger disclosure or reporting obligations. That answer will depend on facts entirely outside the speaker's control—an election's proximity, a regulator's assumptions about audience sophistication and education, and current events. A standard that leaves speakers "wholly at the mercy of the varied understanding of [their] hearers," causes speakers to "hedge and trim" their speech, regardless of whether a speaker faces liability for failing to register and disclose donors or for running afoul of an expenditure limit. *See WRTL II*, 551 U.S. at 469 (opinion of Roberts, C.J.) (citation modified). This will not do.

III. This Case Is a Clean Vehicle for Resolving Deep Circuit Conflict.

The Alaska Supreme Court's decision highlights pervasive confusion and division as lower courts struggle to apply *WRTL II*. Specifically, lower courts have split three ways on the same First Amendment question: does *WRTL II*'s vagueness test have anything to say about disclosure mandates, and if so, how clear must a speech regulation be? Whether disclosure mandates may be based on broad notions of context and audience understanding depends entirely on an accident of geography. That is precisely the kind of conflict this Court exists to resolve.

Before *WRTL II*, a majority of the federal courts of appeal had read *Buckley* to mandate "a bright-line test" allowing the government to regulate so-called "magic words," *i.e.*, "only those communications containing explicit words advocating the election or defeat of a particular candidate." *See, e.g., Moore*, 288 F.3d at 191–96; *Faucher v. FEC*, 928 F.2d 468, 470–71 (1st Cir. 1991) ("Express advocacy is language which 'in express terms advocate[s] the election or defeat of a clearly identified candidate' through the use of such phrases as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' and 'reject.'") (quoting *Buckley*, 424 U.S. at 44

& n. 52); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*) (rejecting interpretation of federal election statute allowing FEC to regulate statements made "for the purpose, express or implied, of encouraging election or defeat"); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997) (holding that regulation may "be applied consistently with the First Amendment only if it [is] limited to expenditures for communications that literally include words which in and of themselves advocate the election or defeat of a candidate . . . so that citizen participants . . . [do] not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result"); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) ("The Supreme Court's focus was on whether the communication contains 'express' or 'explicit' words of advocacy for the election or defeat of a candidate."); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) ("[C]ommunications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy, which the First Amendment shields from regulation."); *see also Governor Gray Davis Comm. v. Am. Taxpayers All.*, 125 Cal. Rptr. 2d 534, 551 (Ct. App. 2002) (declining to follow *Furgatch*'s standard because it "is too vague and reaches too broad an array of speech to be consistent with the First Amendment").

Meanwhile, other courts departed from *Buckley's* bright-line test and broadly evaluated context, including audience perception. In *FEC v. Furgatch*, the Ninth Circuit "conclude[d] that speech need not include any of the words listed in *Buckley* to be express advocacy under the Act," and allowed regulators to broadly rely on context. 807 F.2d 857, 864 (9th Cir. 1987). A smattering of state courts, along with the District Court for the District of Columbia, followed *Furgatch* to varying degrees. *See, e.g., Elections Bd. v. Wisconsin Mfrs. & Com.*, 597 N.W.2d 721, 733–34 (Wis. 1999) ("It may well be appropriate to consider context in determining whether a communication constitutes express advocacy"); *Osterberg v. Peca*, 12 S.W.3d 31, 53–54 (Tex. 2000) (citing *Furgatch* and declining to limit express advocacy to communications containing *Buckley*'s magic words); *FEC v. Nat'l Org. for Women*, 713 F. Supp. 428, 433 (D.D.C. 1989) (expressly adopting *Furgatch* and finding express advocacy based on timing and context).

Post-*WRTL II*, the lower courts have split three ways when evaluating disclosure mandates. One line of cases—the categorical-exemption camp—holds that the express-advocacy inquiry is irrelevant to disclosure altogether. A second line of cases—the loose-application camp—pays lip service to *WRTL II*'s functional-equivalent test but tolerates instead a loose, context-driven, audience-based approach. And a third line of cases—the narrow-construction camp—forbids broad reliance on context-based factors like audience perception.

The First and Fourth Circuits take the categorical exemption approach. These courts hold that *WRTL II*'s vagueness analysis does not apply to disclosure mandates because of their (supposed) lesser burden on First Amendment rights. The First Circuit articulated this theory most explicitly in *National Organization for Marriage v. McKee*, reasoning that "the distinction between issue discussion and express advocacy has no place in First Amendment review of" disclosure-oriented laws, because disclosure "impose[s] no ceiling on campaign-related activities" and therefore warrants no definitional gatekeeping at all. 649 F.3d 34, 54–55 (1st Cir. 2011) (quoting *Citizens United*, 558 U.S. at 366).

The Fourth Circuit adopted this reasoning wholesale in *The Real Truth About Abortion, Inc. v. FEC*, upholding a contextual, functional-equivalent test for political-committee disclosure purposes on the theory that a lesser burden warrants no narrowing construction whatsoever. 681 F.3d 544, 550–51 (4th Cir. 2012) (*RTAA*). *See also Indep. Inst. v. FEC*, 216 F. Supp. 3d 137, 188 (D.D.C. 2016) (three-judge court) (finding *WRTL II* inapplicable to a disclosure mandate).

In contrast, the Ninth and Tenth Circuits employ the loose-construction approach. These courts of appeal pay homage to *WRTL II*'s functional-equivalent test but ultimately employ instead a context-focused, audience-based approach. In *Human Life of Washington, Inc. v. Brumsickle*, for instance, the Ninth Circuit held that ballot-measure advertisements were the functional equivalent of express advocacy—without any need for the measure to be named—based on their "detailed language" and "unique timing." 624 F.3d at 1013–16. The Tenth Circuit likewise treated the *WRTL II* inquiry as nominally applicable, holding that 11 C.F.R. § 100.22(b), which codifies *Furgatch*'s contextual test, "closely correlates" to *WRTL II*'s functional-equivalent standard and satisfies it for disclosure purposes. *Free Speech v. FEC*, 720 F.3d 788, 795 (10th Cir. 2013).

The decision below fails to settle on one side of this split. It invokes *McKee*'s categorical exemption to wave away the relevance of *WRTL II* entirely, *Alaska Pol'y F.*, 583 P.3d at 721, yet it resolves the case using *Brumsickle*'s reasonable-listener, context-dependent methodology, *id.* at 720. This indeterminacy is a symptom of the underlying confusion that needs this Court's resolution.

And there's more. The Fifth and Sixth Circuits—joined by the Fourth in an intra-circuit conflict—make up the narrow-construction camp and have refused to let broad context or supposed audience perception supply the grounds for regulators to mandate disclosure. In *Chamber of Commerce v. Moore*, the Fifth Circuit invalidated Mississippi's PAC registration and reporting requirements insofar as they turned on "the understanding of the reasonable person under the circumstances," holding that such a standard could not be reconciled with the First Amendment's demand for an objective, speaker-blind test. 288 F.3d at 191–96. The Fifth Circuit reached the same result four years later in *Center for Individual Freedom v. Carmouche*, limiting Louisiana's disclosure and reporting requirements to communications containing express words of advocacy rather than permitting a contextual, audience-perception-based trigger. 449 F.3d 655, 663–65 (5th Cir. 2006).

Similarly, the Sixth Circuit in *Anderson v. Spear* applied a narrowing construction to Kentucky's definition of prohibited electioneering. 356 F.3d 651, 663–65 (6th Cir. 2004). The court held that a standard that depends on how a communication might be understood in context must be narrowed to avoid unconstitutional vagueness. *Id.* at 665. Absent a "narrowing construction," a definition of electioneering, "which included political speech that did not expressly advocate the election or defeat of candidates for public office, prohibited more speech than was necessary." *Id.*

Remarkably, Fourth Circuit precedent occupies opposite poles of the conflict. *Contrast N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418, 429–35 (4th Cir. 2003) *with RTAA*, 681 F.3d at 550. In *Leake*, the Fourth Circuit confronted a state disclosure regime materially indistinguishable from Alaska's: a "political committee" designation—triggering registration, periodic reporting, and public disclosure of activities and donors—defined not by explicit words of advocacy but by whether a communication was, in context, "intended to influence" an election. 344 F.3d at 429–35. The Fourth Circuit held that "context prong" facially unconstitutional under *Buckley*, because a standard that asks regulators, courts, and speakers to divine intent and effect from surrounding circumstances "does not provide the sort of narrow, objective, and definite standards that must accompany a facially content-based regulation of speech." *Id.* On remand after *WRTL II* and *McConnell*, the Fourth Circuit doubled down, holding that a context-driven inquiry, if left unchecked, "threatens the regulation of too much ordinary political speech." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288–89 (4th Cir. 2008). This holding conflicts directly with *RTAA*. 681 F.3d at 557 (emphasizing "[t]he necessity of a contextual inquiry"). That the Fourth Circuit cannot maintain a consistent position on this question confirms confusion over the correct standard, confusion that warrants this Court's review.

Regardless, this Court's most recent decisions foreclose both the categorical exemption and a context-centric, audience-focused approach. *First Choice Women's Resource Centers v. Davenport*, reaffirmed "that government actions tending to 'curtai[l] the freedom to associate'"—like disclosure demands—warrant "'the closest scrutiny' under the First Amendment." 608 U.S. ____, 146 S. Ct. 1114, 1122 (2026) (quoting *NAACP*, 357 U.S. at 460–461). And per *AFP*, a disclosure demand must be narrowly tailored to an important government interest. 594 U.S. at 611–12.

The categorical theory of *McKee* and *RTAA* requires no tailoring at all. And the looser-application theory of *Brumsickle* and *Free Speech* fares no better. Indeed, a contextual, audience-perception-dependent trigger is the antithesis of narrow tailoring. It cannot tell a speaker, ex ante, whether his or her speech will trigger disclosure obligations. The answer will instead turn on "an open-ended rough-and-tumble set of contextual factors," *WRTL II*, 551 U.S. at 469 (opinion of Roberts, C.J.), like an election's proximity, current events, and a regulator's assumptions about what a "reasonable listener" should know.

In sum, this Court should resolve the three-way conflict over how *WRTL II* applies to disclosure obligations. It should confirm that AFP's narrow-tailoring requirement forecloses both the categorical exemption and the loose-application theory. Such theories are unconstitutional because they "offer[] no security for free discussion" and "compel[] the speaker to hedge and trim." *Buckley*, 424 U.S. at 43. This case cleanly and squarely presents just that question.

CONCLUSION

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

August 20, 2026

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