

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 a Writ of Certiorari to the
Supreme Court of the State of Alaska*

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether the Alaska Supreme Court erred by upholding campaign finance requirements for independent issue advocacy without an objectively ascertainable boundary between discussion of a public issue and advocacy of a ballot measure.

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was founded in 1989 and seeks to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato's scholars regularly research, write, publish, and republish commentary on questions of public policy, including issues that may become the subject of elections or ballot initiatives. Cato has a longstanding interest in protecting the freedoms of speech and association guaranteed by the First Amendment. Furthermore, Cato has a practical interest in exercising those freedoms in its work without being burdened by speech-chilling registration, reporting, and disclosure obligations.

¹ Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

The ability to participate in the marketplace of ideas and express views on matters of public policy should not require mastery of arcane and indeterminate campaign finance law. But when disclosure obligations attach to the exercise of First Amendment rights, an institutional speaker must often determine—even before it speaks—whether publishing will require registration, financial reporting, and the disclosure of the identities of its supporters. The Cato Institute’s employees investigate questions of public policy, develop recommendations, and circulate their conclusions. That work is why Cato exists, so its interest in this case is not just theoretical. Here is the central question this case presents: Does the First Amendment allow a State to impose the obligations described above on an organization that simply publishes discussions of public policy?

This case came about because Alaska Policy Forum (“APF”), a nonprofit research organization, exercised its First Amendment rights by publishing materials that criticized ranked-choice voting. APF issued those criticisms just before voters were asked to consider a ballot initiative to adopt ranked-choice voting. Even though APF’s publications never mentioned the name of that ballot initiative, the Alaska Public Offices Commission (“APOC”) nonetheless treated APF’s publications as regulated electoral communications, relying on their language and the context in which they were released. Ultimately, APOC found that compensated employee time constituted the expenditures that triggered Alaska’s registration, reporting, and disclosure requirements. The Alaska Supreme Court affirmed APOC’s finding. App.1a–91a. The State’s treatment of

policy research demonstrates how a regulatory regime intended to promote electoral transparency can discourage the very speech that informs voters.

The First Amendment places strict limits on how the government may exercise authority over the resources people devote to political persuasion. Starting with *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), this Court has rightly narrowed the means by which government may permissibly regulate the financing of political speech. *Buckley* struck down the ceiling that Congress tried to place on independent expenditures—that is, those expenditures “made totally independently of the candidate and his campaign.” *Id.* at 47. Restrictions on corporate independent spending then fell in turn. *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). Disclosure survived each round because, “[u]nlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities.” *Buckley*, 424 U.S. at 64.

Thus far, this Court has sustained disclosure because of the government’s interest in “provid[ing] the electorate with information” about the sources and uses of political money. *Id.* at 66; *Citizens United*, 558 U.S. at 369. But compelled disclosure itself burdens association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Indeed, “[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.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348 (1995).

This Court should grant review so that it can pass judgment on Alaska’s disclosure requirements: They

cannot be reconciled with this Court’s First Amendment jurisprudence. In *Buckley*, a disclosure provision reached anyone who made expenditures “for the purpose of . . . influencing” a federal election. 424 U.S. at 77. This Court held that “the ambiguity of this phrase . . . poses constitutional problems.” *Id.* The phrase had “the same potential for encompassing both issue discussion and advocacy of a political result.” *Id.* at 79. This Court therefore construed that language to reach “only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” *Id.* at 80. *McConnell v. FEC* later held that “a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command.” 540 U.S. 93, 191–92 (2003). But objective lines were still critical. The Court sustained the broader category Congress substituted only because BCRA’s definition supplied criteria that were “both easily understood and objectively determinable.” *Id.* at 194.

Alaska’s standard meets neither of these requirements. The State uses the label of express advocacy, but defines that term by what an audience would take a communication to mean—which is a perspective that a speaker cannot know in advance. Alaska’s standard asks whether speech, “read as a whole and with limited reference to outside events,” is “susceptible of no other reasonable interpretation” than an exhortation to vote, and it then allows timing and the audience’s presumed knowledge of the ballot to affect the outcome of that test. App.21a, 30a. This Court has twice rejected that method of inquiry. *Buckley* declined to analyze the question in terms “of intent and of effect,” largely because that perspective would afford “no

security for free discussion,” 424 U.S. at 43. Similarly, in *FEC v. Wisconsin Right to Life, Inc.*, the Court rejected tests resting on “the actual effect speech will have on an election or on a particular segment of the target audience,” holding that where doubt remains “the tie goes to the speaker, not the censor.” 551 U.S. 449, 469, 474 (2007) (opinion of Roberts, C.J.).

In short, Alaska has combined three speech-chilling features into a speech-destructive regulatory scheme. That scheme merges a contextual rule for classifying speech, an expenditure definition that includes ordinary employee time, and a scope that excludes even the smallest low-dollar threshold so as to produce a potent speech deterrent: a policy organization now must conduct its own campaign-finance analysis before it may legally publish its own research. As *Buckley* noted, vagueness is “particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights.” 424 U.S. at 76–77. Speakers facing an uncertain boundary “steer far wider of the unlawful zone.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). And speech rights are chilled even if no penalty is ever issued, because “[t]he risk of a chilling effect on association is enough.” *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 618 (2021).

This Court should therefore grant the petition; ultimately, this Court should reaffirm that the presence of a public question on a ballot does not diminish the freedom to discuss any issue that may be related to it.

ARGUMENT

I. COMPELLED DISCLOSURE IS NOT INNOCUOUS, EVEN THOUGH THE ALASKA SUPREME COURT TREATED IT AS IF IT WERE.

Compelled disclosure operates by making the speaker's identity public. Such compelled disclosure requires those who wish to speak on public questions to identify themselves to the government. But in many instances, potential speakers reasonably decide that such exposure is not worth the risk. In those cases, the effect of compelled disclosure is silence. And when speakers are coerced to self-censor *before* they even utter what they wish, the result is the worst kind of censorship: prior restraints. Because prior restraints deprive the speech marketplace, this Court has reviewed such restraints with the utmost skepticism: “[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); see *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

A. Disclosure isn’t harmless.

When compelled exposure reveals those who have joined together to speak, it treads upon freedom of association. The best illustration of the dangers resulting from compelled disclosure of political association comes from *NAACP v. Alabama ex rel. Patterson*. 357 U.S. 449 (1958). In that case, Alabama sued the NAACP for failing to register as a foreign corporation

and in the course of that suit demanded the NAACP's membership rolls. *Id.* at 451–53. The state's demand was issued in 1956, two years after *Brown v. Board of Education*, 347 U.S. 483 (1954). Alabama demanded the names of every NAACP member in the state—a state whose leaders were engaged in a “general plan of massive resistance to the integration of schools.” *NAACP v. Button*, 371 U.S. 415, 446 (1963) (Douglas, J., concurring); see Helen J. Knowles-Gardner, *The First Amendment to the Constitution, Associational Freedom, and the Future of the Country: Alabama's Direct Attack on the Existence of the NAACP*, 48 SEATTLE U. L. REV. 1 (2024).

Quite reasonably, “NAACP members in the Jim Crow South did not want to disclose their membership for fear of reprisals and violence.” *Bonta*, 594 U.S. at 623 (Sotomayor, J., dissenting). This Court correctly held that such disclosure was likely to chill the NAACP's speech rights, noting that “abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.” *NAACP v. Alabama*, 357 U.S. at 461. The NAACP had shown, without contradiction, that “revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *Id.* at 462. That alone established that “compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.” *Id.*

Sixty-three years later, history repeated itself. In *Bonta*, the petitioners “introduced evidence that they and their supporters ha[d] been subjected to bomb

threats, protests, stalking, and physical violence.” 594 U.S. at 617. As this Court observed, “[s]uch risks are heightened in the 21st century and seem to grow with each passing year.” *Id.* “It is irrelevant, moreover, that some donors might not mind—or might even prefer—the disclosure of their identities to the State,” because the requirement “creates an unnecessary risk of chilling” all the same. *Id.* at 616 (quoting *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1984)).

Compelled disclosure forces speakers to hand over identifying information to the government, even though the central constitutional value of speech rests in its use to *check* government power. Because such disclosure requirements can easily chill speech, especially unpopular speech, they must be reviewed with great skepticism.

B. Exacting scrutiny requires narrow tailoring, which the Alaska Supreme Court did not apply.

Because compelled disclosure “can seriously infringe on privacy of association and belief guaranteed by the First Amendment,” exacting scrutiny applies even where the deterrent effect arises “indirectly as an unintended but inevitable result of the government’s conduct in requiring disclosure.” *Buckley*, 424 U.S. at 64, 65. *Bonta* clarifies what that scrutiny demands: “A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters.” 594 U.S. at 609. “Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it

promotes, even if it is not the least restrictive means of achieving that end.” *Id.* at 609–10. “Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—‘[b]ecause First Amendment freedoms need breathing space to survive.’” *Id.* at 609 (quoting *NAACP v. Button*, 371 U. S. at 433).

The Alaska Supreme Court restated that standard, App.16a n.36, but it never conducted the tailoring inquiry that the standard requires. The court sustained the disclosure requirement based on the State’s “interest in an informed electorate” alone, but that bare assertion provides no evidence of tailoring (let alone a sufficiently important informational interest). Even if a disclosure serves the State’s interest, that establishes only that the means advance the end. But tailoring asks a further question: whether the State could obtain its aim while burdening less speech. This Court has made that requirement clear: “[A] substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored.” *Bonta*, 594 U.S. at 609.

Of course, any disclosure of anything by anyone informs the electorate to *some* extent, but the question is whether the speech burden in this case is tailored to achieve a sufficiently important interest. And that evidence is entirely lacking. Indeed, the Alaska Supreme Court itself conceded that Alaska’s first-dollar threshold gave it pause. App.69a n.188. In nonetheless upholding the law, the Alaska Supreme Court failed to follow the guidance of *Bonta*. As that case explained, a State may not cast “a dragnet for sensitive donor information” on the mere ground that the information would *sometimes* prove relevant. 594 U.S. at 614. But Alaska has done exactly that, beginning at the first

dollar. The disclosure regime fails exacting scrutiny, and that fact alone compels review and reversal.

II. WHATEVER FORCE THE CORRUPTION RATIONALE HAS IN CANDIDATE ELECTIONS, IT HAS NONE HERE.

In *Buckley*, the Court sustained FECA’s disclosure requirements against First Amendment challenge. In doing so, the Court emphasized the importance of providing “the electorate with information as to where political campaign money comes from and how it is spent by the candidate,” observing that “[t]he sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.” 424 U.S. at 66–67.

Notably, this line of argument focuses on the universe of candidates and officeholders, not ballot referenda. The responsiveness the Court highlighted is inherent in the human behavior of the candidate. And the future performance is that of the officeholder. The information the electorate receives is valuable only because it might shed light on the decisions *people* will make.

None of these interests apply when a ballot proposition is at issue. A ballot proposition is never sworn into office. It cannot become responsive to the interests that funded its passage; it can neither incur a political debt nor repay one. It is not an agent at all. It is a text that either becomes law or does not.

This Court has said so. “Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a

public issue.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) (citations omitted). The concern behind corrupt-practices legislation “was the problem of corruption of elected representatives through the creation of political debts,” and the referendum before the Court “present[ed] no comparable problem.” *Id.* at 788 n.26. Dissenting in *Citizens United*, Justice Stevens conceded the point: “A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation’s retaliation,” and “over the past 30 years, our cases have repeatedly recognized the candidate/issue distinction.” 558 U.S. at 443 (Stevens, J., concurring in part and dissenting in part).

The court below rested its judgment on “the State’s ‘interest in an informed electorate.’” App 62a, 74a. But the court failed to scrutinize further whether there is a sufficient informational interest in knowing who is funding speech related to *ballot measures* specifically. That oversight is crucial, because the public’s informational interest that this Court found in *Buckley* is not equally relevant to everything citizens vote on. *Perhaps* it is relevant in candidate elections, where knowing who funds a campaign might tell the voter to whom the winner will be responsive once in office. But outside of the context of a human candidate, the public’s informational interest in funding speech is thin to non-existent. That is why this Court has sustained the informational interest standing alone only with respect to speech “about a candidate shortly before an election.” *Citizens United*, 558 U.S. at 369.

Two passages from previous Court opinions might be thought to authorize what Alaska has done, but neither succeeds. *Bellotti* observed in a footnote that “[i]dentification of the source of advertising may be

required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.” 435 U.S. at 792 n.32. But later on, *McIntyre* built a wall around that footnote’s implications, describing it as “dicta on the prophylactic effect of requiring identification of the source of corporate advertising” that “did not necessarily apply to independent communications by an individual.” 514 U.S. at 353–54. Similarly, *McIntyre* explained that *Buckley*’s previous approval of independent-expenditure reporting entailed “nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate.” *Id.* at 355. In contrast, Alaska compels identification that is attached to the communication itself.

An approaching election does not transform a ballot measure into a human candidate. The structure of Alaska’s regulatory scheme was meant to regulate the allies and supporters of human beings, and human beings have qualities that are not replicated by ballot measures. The regulatory scheme was sustained below by reference to an interest that this Court has approved only where a candidate stood for election. That is not a narrow application of *Buckley*. It is a solution to a non-problem. This Court should take the case and hold that there is no important informational interest in knowing which donors support or oppose ballot measures.

III. AT MINIMUM, AN INDEPENDENT SPEAKER MUST BE ABLE TO ASCERTAIN WHAT TRIGGERS DISCLOSURE REQUIREMENTS BEFORE PUBLISHING.

The regulatory scheme at issue here has a forbidding feature: Before a State may compel disclosure,

speakers are required to determine, in advance, whether their speech falls inside the regulated category. In *Buckley*, this Court stressed the chilling effect of speech regulations that have uncertain scope. FECA required the reporting of money spent for the purpose of influencing an election. Because of “the ambiguity of this phrase,” the Court construed the scope of required reporting, as applied to independent speakers, to reach only communications that “expressly advocate the election or defeat of a clearly identified candidate.” 424 U.S. at 77, 80. *McConnell* later allowed Congress to regulate a wider category. 540 U.S. at 190. But the Court greenlighted this broader regulatory domain because Congress had defined that category in terms of four facts that a speaker could check before publishing: Its scope extended “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.* at 194. These were criteria the Court found “both easily understood and objectively determinable.” *Id.* *McConnell* let Congress regulate more speech, but it did not let Congress leave the speaker guessing.

For much the same reason, this Court has twice refused to let coverage turn on what the speaker meant or on what his words accomplished. To analyze the question “in terms ‘of intent and of effect’” would afford “no security for free discussion.” *Wisconsin Right to Life*, 551 U.S. at 467 (quoting *Buckley*, 424 U.S. at 43). An inquiry into intent leaves First Amendment freedoms without the “breathing space” they require. *Button*, 371 U.S. at 433. *Buckley* “also explains 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.” *Wisconsin Right to Life*, 551 U.S. at 469.

Where the application of such a standard is uncertain, “the tie goes to the speaker, not the censor.” *Id.* at 474.

The standard applied by the Alaska Supreme Court is an impermissibly vague effect test in all but name. The standard that it set out does not examine a communication’s content; rather, it attempts to predict what a listener would take that communication to mean in light of circumstances the speaker does not control. According to the court below, “[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.” App.30a. This knowledge that the court attributed to the audience converted a criticism of ranked-choice voting into (in the court’s eyes) an electoral exhortation. Under the Alaska Supreme Court’s effects test, a release referring to “Alaskans tak[ing] to the polls in November” thus qualified as election advocacy. *Id.* at 722.

The court then acknowledged where its reasoning led: It invoked the authority of the Ninth Circuit to observe that “express and issue advocacy are arguably one and the same” where ballot initiatives are concerned. *Id.* But that is not a narrowing construction. It is a concession that no construction is being applied, and that every communication touching on a ballot-qualified subject will now be read to constitute express advocacy.

None of the features that the Alaska Supreme Court identified restores the boundary that the Constitution requires. The court wrote that a speaker uncertain of his obligations may request an advisory opinion from APOC. App.56a n.150 (citing ALASKA STAT. § 15.13.374 (2025)). But this option merely expands the scope of the disclosure scheme’s

constitutional defects. A speaker may ask APOC whether his planned speech is covered, but he may not ask in the abstract: The request must disclose the speaker's identity and describe his proposed speech with particularity, and no opinion issues until the executive director prepares a draft and four commissioners vote to approve it at a later meeting. ALASKA STAT. § 15.13.374(b)–(d). In other words, the speaker must first disclose his or her own identity in order to discover whether publishing will compel its disclosure—and then wait for a vote to be conducted that has an uncertain outcome.

The fact that this rule cannot be applied before publication is far from its only defect. The court below also invoked the principle that a plaintiff “whose speech is clearly proscribed” cannot complain of a want of notice. App.56a n.149 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010)). That defense fails: Whether this speech is clearly proscribed is the very question presented, and the court resolved it by means of the imputed-awareness analysis under challenge.

The court also relied on a First Circuit decision that partially rejected the canon requiring disclosure statutes to be narrowly construed to exempt issue advocacy. The First Circuit held that this canon has less force as to ballot measures, because for “state ballot question committees, . . . only issue advocacy is involved, and there is no vagueness.” App.54a n.145 (quoting *Nat’l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 45 (1st Cir. 2012)). That reasoning is upside-down. It treats the absence of a boundary as an argument that no boundary is needed. In reality, it is the boundary’s absence that leaves the speaker unable to

determine whether he or she is free from burdensome speech regulations.

The monetary threshold also supplies no protection of its own, because a speaker can only discover whether his spending counts after his communication has been publicly evaluated. APF spent \$643.20 in staff time over roughly one year—a sum the court found adequate to trigger disclosure because “[s]uch efforts required significant time, and someone paid for that time.” App.70a. The court protected only the trivial case of minimal use of resources, in which “expending a few moments of a[n employee’s] time” might warrant a different result. *Id.* But above this *de minimis* floor, what remains is the ordinary overhead that any organization would engage in: the hours consumed in researching a question, editing a paragraph, uploading a file, adding a hyperlink, or republishing a coalition partner’s video. In effect, an organization that employs anyone cannot publish anything without cost, so a first-dollar threshold excludes the unpaid hobbyist and no one else.

The foreseeable cost, once again, is self-censorship. Where a vague enactment “abut[s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms,” because “uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *accord Sullivan*, 376 U.S. at 279.

Defamation law provides an instructive contrast here: its protections illustrate how much further Alaska’s regulatory scheme reaches. A defamation defendant at least has a defense, since truth defeats

liability. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (requiring “that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages”). A speaker subject to Alaska’s rule has no comparable safe harbor. A speaker’s analysis may be accurate, carefully sourced, and materially identical to what that same speaker published a year earlier, and yet it can become reportable all the same because of an imminent election. Diligence protects the defamation defendant, but it accomplishes nothing here; in the context of an impending election, there is apparently no way to exercise one’s First Amendment rights free of regulation. That is why “[t]he risk of a chilling effect on association is enough,” *Bonta*, 594 U.S. at 618, and the sorting of such lines remains “a dicey business indeed, both ex post for courts and ex ante for speakers,” Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1791 (1999).

The court below established a rule that asks what a listener would take a message to mean, assuming the listener knows an election is coming. That is an inquiry into intent and effect, which this Court has already rejected. *Wisconsin Right to Life*, 551 U.S. at 467 (“*Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates”); see *Buckley*, 424 U.S. at 43–44. This Court should grant review to make clear that such a test is impermissibly indeterminate in the context of a rule triggering speaker disclosures.

CONCLUSION

For these reasons and those given by petitioner, this Court should grant the petition and reverse the decision below.

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