No. 23-926

In the Supreme Court of the United States

NO ON E, SAN FRANCISCANS OPPOSING THE AFFORDABLE CARE HOUSING PRODUCTION ACT, ET AL., *Petitioners*,
v.
DAVID CHIU, IN HIS OFFICIAL CAPACITY AS SAN FRANCISCO CITY ATTORNEY, ET AL., *Respondents*.

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

Brief of *Amici Curiae* Advancing American Freedom; Americans for Limited Government; American Values; Association for Mature American Citizens Action; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Eagle Forum; Freedom Foundation of Minnesota; Charlie Gerow; International Conference of Evangelical Chaplain Endorcers; Tim Jones, Fmr. Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; National Apostolic Christian Leadership Conference; National Center for Public Policy Research; National Religious Broadcasters; New Jersey Family Foundation; Rio Grande Foundation; Setting Things Right; 60 Plus Association; The Family Foundation Action; The James G. Martin Center for Academic Renewal; Richard Viguerie; Yankee Institute; and Young America's Foundation in Support of Petitioners

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QUESTIONS PRESENTED

1. Whether requiring political advertisers to name their donors' donors within their advertisements advances any important or compelling state interest.

2. Whether San Francisco's secondary donor speech mandate violates the First Amendment freedoms of speech and association.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including the uniquely American idea that all men are created equal and endowed by their Creator with unalienable rights to life, liberty, and the pursuit of happiness.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation."[2] AAF believes that both individuals and organizations have the fundamental right to speak and associate freely, and that that freedom requires the ability to do so anonymously.

Amici Americans for Limited Government; American Values; Association for Mature American Citizens Action; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Eagle Forum; Freedom Foundation of Minnesota; Charlie Gerow; International Conference of Evangelical Chaplain Endorcers; Tim Jones, Fmr. Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; National Apostolic Christian Leadership Conference; National Center for Public Policy Research; National Religious Broadcasters; New

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[1] No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of the filing of this brief.

[2] Edwin J. Feulner, Jr, *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

Jersey Family Foundation; Rio Grande Foundation; Roughrider Policy Center; Setting Things Right; 60 Plus Association; The Family Foundation Action; The James G. Martin Center for Academic Renewal; Richard Viguerie; Yankee Institute; and Young America's Foundation also believe in protecting the speech and associational rights of organizations and their donors from compelled disclosure of donor information.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns a San Francisco law that requires certain political committees to disclose in their political advertising not only their top donors, but their top donors' top donors. This Court has recognized that "First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)). San Francisco's law at issue here suffocates both free speech and free association.

In the campaign leading up to San Francisco's June 2022 ballot, No on E (then called San Franciscans Supporting Prop B) refrained from advertising in support of this measure because of the secondary donor speech mandate. *No on E v. Chiu*, 85 F.4th 493, 501 (9th Cir. 2023). One of the donors No on E would have had to disclose was Ed Lee Dems, one of whose donors was David Chiu for Assembly, a donor Ed Lee Dems would not allow No on E to disclose. *Id*. at 500-01.

The freedom to speak about ideas and to associate with others for the furtherance of those ideas has been

an integral part of the American fabric since its inception. The American Revolution itself was a marriage of freedom of speech and freedom of association—colonists banded together because of their shared ideas about the rights of people and the proper limitations on government to secure those rights. Thus, it is no surprise that these ideas and freedoms have echoed down through the American experience as both an end in themselves and a means to the protection of liberty.[3]

The illiberalization of liberal political culture has demonstrated the danger of engaging in political speech and association. The natural result of this danger is that people engage in self-censorship. Thus, if people must disclose that they are engaged in particular controversial communication, they are less likely to do so. In other words, their speech will be chilled. As evidence shows, this is exactly what is happening.

Anonymous political communication is an American tradition. The Federalist Papers, among the most well known and most often cited discussions of the Constitution, were written pseudonymously. *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 343 n. 6 (1995). So were many of the antifederalists' writings opposing the adoption of the Constitution. *Id.* As the Supreme Court has recognized, "[a]nonymity is a shield from the tyranny of the majority." *Id.* at 357

[3] The Founders, themselves, "saw the freedom of speech 'both as an end and as a means.'" *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 22310 (2023) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

(citation omitted). Anonymity thus "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.*

The Freedom of Association is also an American tradition. As Alexis de Tocqueville noted, early Americans made a habit of forming associations. Unlike aristocratic societies where aristocrats hold the power and those beneath them carry out their will, in America, "all citizens are independent and weak; they can hardly do anything by themselves, and no one among them can compel his fellows to lend him their help. So they all fall into impotence if they do not learn to help each other freely."[4] Moreover, "[w]hen you allow [citizens] to associate freely in everything, they end up seeing in association the universal and, so to speak, unique means that men can use to attain the various ends that they propose."[5] In America, "[t]he art of association then becomes . . . the mother science; everyone studies it and applies it."[6]

Today, these fundamental rights, so widely employed at the founding and after, are under attack at both the state and federal level. Through its donor disclosure laws, San Francisco undermines the right of organizations like No on E and its members to freely

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[4] 3 Alexis de Tocqueville, *Democracy in America*, 898 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010) (1840).

[5] *Id.* at 914.

[6] *Id.*

associate and thus to partake in America's long heritage of free and anonymous political association.

Anything impairing these fundamental rights deserves strict scrutiny. Regulations that chill speech and association are only consistent with the First Amendment if they are the least restrictive possible means to achieve an compelling government interest. However, because the donor disclosure law at issue in this case does not even meet the lower standard of exacting scrutiny and because the interests at stake in this case are so significant, the Court should grant certiorari in this case and rule for Petitioners.

ARGUMENT

San Francisco compels organizations that engage in certain forms of political speech to violate both their fundamental rights and the confidence of their most generous donors. Under California law, certain political advertisers must identify themselves and their top three donors that have given over $50,000, in campaign advertising, in addition to other disclaimers. Cal. Gov't Code § 84503(a).

Additionally, San Francisco law compels certain committees engaging in political advertising to name up to six secondary donors. Committees engaging in campaign speech must name in their advertisements the top two donors to each of the speakers' top three donors that are political committees and that have given over $5,000. S.F. Code S.F. Campaign & Governmental Conduct Code ("S.F. Code") § 1.161(a)(1). Political advertisers are required, therefore, to name up to nine separate donors in their advertisements. This requirement to name donors of

donors applies regardless of whether those secondary donors intended to fund the advertisement. These disclosures take up a significant portion of advertising space such that they may often render the advertisement economically inefficient because it will consist mostly of compelled disclosures rather than the message the speaker wishes to communicate. This double donor disclosure regime is unconstitutional.

I. Throughout Recent History, Americans Have Faced Retaliation for Their Speech and Association, Underscoring the Importance of the First Amendment-Protected Right to do So Anonymously.

Throughout recent American history, engaging in one's right to free speech or association has entailed certain risks. Americans today have reason to believe that engaging in speech or association that another might interpret as political, or which might be controversial to some third party, opens one up to social, professional, and potentially physical retribution. There are numerous examples of this sort of backlash.

In 2017, James Damore, a Google engineer, was fired after he shared a memo internally, suggesting that there were fewer women employed in science, technology, engineering, and math (STEM) positions not because of sexism but because women, statistically, are less likely than men to be interested in STEM positions and the work that they entail.[7]

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[7] Daisuke Wakabayahi, *Google Fires Engineer Who Wrote Memo Questioning Women in Tech,* The New York Times (Aug. 7, 2017)

In 2008, California's Proposition 8 was a ballot measure that amended the state constitution with the language, "Only marriage between a man and a woman is valid or recognized in California."[8] Many people who supported the proposition faced backlash for their political activity. One, Richard Raddon, resigned from his position as director of the Los Angeles Film Festival in the face of threatening calls and emails in response to his $1,500 donation in support of Proposition 8's passage.[9]

Similarly, Scott Eckern resigned from his position as artistic director of the California Music Theater and Sacramento Music Circus after a backlash, including a call for a boycott of the theater, in response to his donation of $1,000 in support of Proposition 8.[10] One supporter of that boycott was actress Susan Egan who said in response to hearing about Eckern's donation,

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https://www.nytimes.com/2017/08/07/business/google-women-engineer-fired-memo.html. Paul Lewis, *'I see things differently': James Damore on his autism and the Google memo,* The Guardian (Nov. 17, 2017) https://www.theguardian.com/technology/2017/nov/16/james-damore-google-memo-interview-autism-regrets.

[8] Bob Egelko, *Prop. 8 backers drop challenge on wording*, SFGate (Aug. 12, 2008) https://www.sfgate.com/bayarea/article/Prop-8-backers-drop-challenge-on-wording-3199955.php.

[9] Rachel Abramowitz, *Film fest director resigns,* Los Angeles Times, (Nov. 26, 2008) https://www.latimes.com/archives/la-xpm-2008-nov-26-et-raddonresigns26-story.html.

[10] Jesse McKinley, *Theater Director Resigns Amid Gay-Rights Ire,* The New York Times (Nov. 12, 2008) https://www.nytimes.com/2008/11/13/theater/13thea.html

"I think at this point I shall do my best to 'out' him and any others like him."[11]

One supporter of Proposition 8 who had a sign in her yard had her home vandalized with spray paint.[12] Other buildings were similarly vandalized.[13] A report in the aftermath of the backlash against Proposition 8 outlined dozens of incidents of vandalism, harassment, threats, and efforts to induce professional harm of the measure's supporters.[14]

Further, in 2014, Brendan Eich resigned his position at Mozilla, of which he was a co-founder, after backlash to his having donated in support of Proposition 8 in 2008.[15]

More recently, contention around the issue of abortion has led to violence and vandalism with

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[11] Lisa Derrick, *Boycott Called: Musical Theatre's Artistic Director Supported Prop 8,* Huffpost (Dec. 11, 2008) https://www.huffpost.com/entry/boycott-called-musical-th_b_142882.

[12] *Anti-prop 8 vandals hit Alta Loma home,* KABC Television, LLC. (Oct. 26, 2008) https://abc7.com/archive/6470557/.

[13] Barbara Giasone, *Vandals spray paint signs in downtown Fullerton,* The Orange County Register (Oct. 20, 2008) https://www.ocregister.com/2008/10/20/vandals-spray-paint-signs-in-downtown-fullerton/.

[14] Thomas Messner, *The Price of Prop 8*, The Heritage Foundation (Oct. 22, 2009) https://www.heritage.org/marriage-and-family/report/the-price-prop-8.

[15] *Mozilla CEO resignation raises free-speech issues,* USA Today (April 4, 2014) https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/.

perpetrators targeting both pro-life facilities and abortion clinics. In 2022, a man in Pennsylvania was charged with a Freedom of Access to Clinic Entrances (FACE) Act violation for assaulting an abortion clinic escort and a California man was charged under the same statute for causing damage to an abortion clinic.[16] Similarly, pro-life pregnancy centers have been attacked, including in Longmont, Colorado, in which the Life Choices Pregnancy Center was set on fire at around three in the morning causing extensive damage.[17] Another pregnancy center in Winter Haven, Florida was vandalized with spray painted messages saying, "If abortions aren't safe then neither are you," "YOUR TIME IS UP!!," "WE'RE COMING for U," and "We are everywhere."[18] Similarly, in May of 2022 in Madison, Wisconsin, the office of Wisconsin Family Action was attacked with Molotov cocktails causing significant damage.[19] The vandal wrote with spray

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[16] *Recent Cases on Violence Against Reproductive Health Care Providers*, Department of Justice, https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers (Updated May 30, 2023).

[17] Kieran Nicholson, *Longmont Christian pregnancy crisis center vandalized, catches fire overnight*, Denver Post (June 6, 2022) *https://www.denverpost.com/2022/06/25/life-choices-longmont-vandalized/*.

[18] *Two Defendants Indicted for Civil Rights Conspiracy and FACE Act Offenses Targeting Pregnancy Resource Centers*, Department of Justice (Jan. 24, 2023) https://www.justice.gov/opa/pr/two-defendants-indicted-civil-rights-conspiracy-and-face-act-offenses-targeting-pregnancy-0.

[19] Todd Richmond, *Man charged with 2022 firebombing of Wisconsin anti-abortion office*, Wisconsin Public Radio (Mar. 28,

paint on an exterior wall, "If abortions aren't safe then you aren't either."[20] Further, the Department of Justice has tracked dozens of other attacks on pregnancy centers and abortion clinics.[21]

This type of threat has also reached members of the federal government. On June 14, 2017, a man opened fire on members of the Republican congressional baseball team while they were practicing for the annual congressional baseball game. GOP House Majority Whip, Steve Scalise was critically injured, and several others were hurt.[22] Similarly, members of

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2023) https://www.wpr.org/history/conflicts-disasters/wisconsin-family-action-firebomb-arrest-hridindu-sankar-roychowdhury.

[20] *Id*.

[21] *Recent Cases on Violence Against Reproductive Health Care Providers*, Department of Justice, https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers (Updated May 30, 2023). AAF is now engaged in litigation in the Federal District Court for the District of DC challenging the DOJ's failure to respond to a Freedom of Information Act request regarding violence against pro-life pregnancy centers. *Advancing American Freedom v. U.S. Dept. of Justice*, No. 23-cv-743. AAF's follow up FOIA request regarding attacks against pregnancy centers, joined by Americans United for Life, CatholicVote, Center for Urban Renewal and Education, Concerned Women for America, The Ethics and Public Policy Center, Faith Wins, Heritage Action for America, Heritage Oversight Project, Human Coalition, Keystone Policy, Students for Life Action, and Susan B. Anthony Pro-Life America, available at https://advancingamericanfreedom.com/wp-content/uploads/2022/09/FOIA-Request-to-DOJ-on-Violence-Against-Pro-Life-Orgs.pdf.

[22] Michael D. Shear, Adam Goldman, and Emily Cochrane,

this Court have been threatened and harassed for their work.[23]

Similarly, efforts have been made to use the court system as a means of harassment. In one case, activists and the DOJ subpoenaed records from amicus Eagle Forum, a nonparty to the litigation. Both of those subpoenas were quashed.[24]

Nor have Americans failed to notice the threat that comes along with expressing their political views. For example, a study from professors within the University of North Carolina systems found that 70% of conservative students and 22% of liberal students are afraid to express their opinions.[25] Similarly, a Cato

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Congressman Steve Scalise Gravely Wounded in Alexandria Baseball Field Ambush, The New York Times (June 14, 2017) https://www.nytimes.com/2017/06/14/us/steve-scalise-congress-shot-alexandria-virginia.html.

[23] Maria Cramer and Jesus Jiménez, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, The New York Times (June 8, 2022) https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html.

[24] *Eagle Forum of Alabama fights Trans Activists Subpoena* (Mar. 19, 2024) https://eagleforum.org/publications/press-releases/eagle-forum-of-alabama-fights-trans-activists-subpoena.html. Further, the DOJ failed to respond to AAF's Freedom of Information Act request relating to DOJ coordination with outside of organization to intimidate Eagle Forum, a pro-family grass roots group. AAF's FOIA is available at https://alabamaeagle.org/wp-content/uploads/2022/09/FOIA-Request-to-DOJ-on-EFA-Advancing-American-Freedom.pdf.

[25] *Nearly 70% of Conservative Students Fear Social Repercussions for Opinions, Study Finds*, Young Americans Foundation (July

Institute study found that 62% of Americans say they have political views they are afraid to share. Of "strong liberals," 50% think that being a Trump donor should be a fireable offense.[26] Among "strong conservatives," 36% believe Biden donors should be fired.[27]

The pervasiveness of the threat to liberty that donor disclosure laws can facilitate has been noted by this Court. In *Americans for Prosperity Foundation*, the Court recognized "[t]he gravity of the privacy concerns in this context" as "underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners" in that case. 141 S. Ct. at 2388. Those amici's concerns related to the "real and pervasive" "deterrent effect" of the disclosure laws challenged in that case. *Id*.

The instances of backlash are by no means exhaustive. They merely demonstrate the pervasiveness of efforts to retaliate against those who speak or associate in favor of political or social causes. Thus, there is a cultural pressure Americans feel that chills their exercise of speech and associational rights. It is no surprise, then, that Americans would desire opportunities to express their political beliefs and advance their policy goals by anonymous means. While social pressure is, of course, not

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19, 2023) https://yaf.org/news/nearly-70-of-conservative-students-fear-social-repercussions-for-opinions-study-finds/.

[26] Emily E. Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share* (July 22, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659953.

[27] *Id*.

unconstitutional, when the government weaponizes that pressure by compelling disclosure of speakers' identities, it crosses the constitutional line. Donor disclosure laws risk doing exactly that. The San Francisco law at issue in this case undermines San Franciscans' ability to speak and associate anonymously and thus should face strict scrutiny.

II. Only Strict Scrutiny Provides Sufficient Protection for Anonymous Association and Speech.

A. The freedom of association protected in the First Amendment is just as central to the scheme of American liberty as is the freedom of speech and of the press.

There is no question that "The First Amendment protects political association as well as political expression." *Citizens Against Rent Control v. Berkley*, 454 U.S. 290, 295 (1981) (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S 1, 15 (1976)). The Court's explication of that right "stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Buckley*, 454 U.S. at 15 (alteration in original) (quoting *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958)). As the Court said in *NAACP v. Alabama*, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." 357 U.S. at 460 (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Palko v. Connecticut*, 302 U.S. 319, 324

(1937); *Cantwell*, 310 U.S. at 303; *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958)).

Because effective expression so often depends on effective association, in the constitutional scheme, association, like speech, is of "transcendent value." *Speiser v. Randall*, 357 U.S. 513, 526 (1958) ("Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."). As Luke Sheahan writes, "Associations in a democracy are not a means to self-government; they are self-government. They are not one option for the ordering of human life; they are the order of human life."[28] The right to freely speak, and freely associate, strike at the heart of human freedom.

The freedom to associate, protected by the Assembly Clause of the First Amendment, includes not only the right to associate, but the right to do so anonymously. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring in part and concurring in the judgement) ("The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously.").

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[28] Luke C. Sheahan, *Why Associations Matter: The Case for First Amendment Pluralism* 17 (2020).

B. The rights of free expression and free association both include the right to exercise those rights anonymously, and that right deserves the protection provided by strict scrutiny review.

As discussed in Section I, those who exercise their rights of association and expression face the risk of retaliation in various forms. For this reason, the Court has recognized that the rights of speech and association include the right to speak or associate anonymously.

As Justice Thomas has explained, "This Court has long recognized the 'vital relationship between' political association 'and privacy in one's associations,' and held that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs.'" *Doe v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) (quoting *NAACP v. Alabama,* 357 U.S. at 462; *Brown v. Socialist Workers '74 Campaign Comm. (Ohio),* 459 U.S. 87, 91 (1982)).

This protection of anonymity is in keeping with the Court's approach to anonymous speech. In *Buckley v. American Constitutional Law Foundation*, the Court explained that it had previously applied "'exacting scrutiny' to Ohio's fraud prevention justifications," and thus "held that the ban on anonymous speech violated the First Amendment." 525 U.S. 182, 199 (1999) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347-357 (1995)).

Because "disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public,'" *Ams. for Prosperity Found.*, 141 S. Ct. at 2388 (alterations in original) (quoting *Shelton v.*

Tucker, 364 U.S. 479, 486 (1960)), disclosure laws not only threaten the ability of people to speak anonymously; they also threaten the right to associate freely with others. Yet the Court's precedent does not reflect the fundamentality of the interests protected in the First Amendment.

In cases of content-based regulations of speech, the Court rightly gives the rights enshrined in the First Amendment its most protective form of review; strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). On the other hand, as noted above, in reviewing government regulation that undermines anonymity in expression, the Court has applied exacting scrutiny. *American Constitutional Law Found.*, 525 U.S. at 199 (citing *McIntyre*, 514 U.S. at 347-357)).

Similarly, the Court has explained that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny*." *NAACP v. Alabama*, 357 U.S. at 460-61 (emphasis added). Yet, when reviewing laws that undermine associational anonymity, the Court has applied merely exacting scrutiny. *Ams for Prosperity Found.*, 141 S. Ct. at 2382-83.

The interests at stake here are too important to be reviewed under even exacting scrutiny. The ability to advocate for one's political views should never be subject to the goodwill or peaceable nature of those with whom one disagrees. The First Amendment is not there to protect popular speech. Yet when the

government demands that speakers and those engaging in association reveal themselves, it opens them up to all manner of retribution. As the Court explained in *NAACP v. Alabama*, because the NAACP had "made an uncontroverted showing that on past occasions 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," it was "apparent that compelled disclosure of petitioner's Alabama membership [was] likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." 357 U.S. at 462. When government demands the disclosure of speakers and associates to the public, it inevitably invites harassment of those groups and their members.

Because exacting scrutiny does not sufficiently protect the First Amendment rights to anonymous association and speech, and because the harms that result from disclosure of the identity of those engaged in expression and association will continue to pose a serious danger until those interests are sufficiently protected, the Court should grant certiorari and rule for Petitioners under strict scrutiny.

III. Even Under Exacting Scrutiny, San Franciso's Donor Disclosure Law Violates the First Amendment-Protected Right of Free of Association.

According to the Supreme Court, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable

aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. at 460. The fundamental right to free association includes the fundamental right to do so anonymously. *Ams. for Prosperity Found.*, 141 S. Ct. at 2390 (Thomas, J., concurring in part and concurring in the judgement) ("The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously."). Today, however, local, state, and federal laws curtail that freedom by requiring disclosure of private associations.

Because San Francisco's disclosure law violates No on E's right to freely associate, that law must survive at least exacting scrutiny. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2383. "Exacting scrutiny is just what its name says—exacting. It is just short of strict scrutiny." *Dakotans for Health v. Noem*, 52 F.4th 381, 389 (8th Cir. 2021). Exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted)). Further, the policy must "be narrowly tailored to the government's asserted interest." *Id.* If the policy fails on any of these three counts, it is unconstitutional and thus must be set aside as an unconstitutional invasion of the First Amendment-recognized right to free association.

A. Public disclosure of an organization's donor names does not provide useful information to the electorate.

In order to assess whether a law is sufficiently narrowly tailored to meet the requirements of exacting scrutiny, the scope and significance of the interest the pursuit of which motivated the government's adoption of the policy must be assessed.

To survive exacting scrutiny, the law in question must exist to accomplish some "sufficiently important governmental interest." *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Reed*, 561 U.S. at 196) (internal quotation marks omitted). Further, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (internal quotation marks omitted). "[E]ven a 'legitimate and substantial' government interest 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Id.* at 2384 (quoting *Shelton*, 364 U.S. at 488).

In the district court's order denying a temporary restraining order and preliminary injunction against San Francisco's donor disclosure law, the court found that the interest advanced by the law was providing information to voters that might provide context for their voting decisions, and that "[t]hat governmental interest is far more substantial than the state's interest in [*Americans for Prosperity Foundation*], of administrative ease in investigating fraud." App. 126a.

The Supreme Court has recognized an informational interest in disclosure to the voting public relating to electioneering communications. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 223-224 (2014) (plurality opinion). However, the informational interest here is not compelling because whatever information it provides to voters is not helpful enough to overcome the significant harm it does to First Amendment interests.

That compulsory public disclosure of donor information provides useful information to the electorate is dubious. First, the claimed government interest in providing information to the public about those funding communication is merely a weaponization of the ad hominem fallacy. That an argument is made by an organization supported by another entity that has some reputation is not a legitimate shortcut to the truth. That some people may take that shortcut is their own business. But the government cannot legitimately facilitate a birds-of-a-feather assertion at the expense of the rights of its citizens.

Second, even if using a donor's identity were a legitimate means of understanding the validity of an organization's communication, the donors disclosed are likely to be unfamiliar, and thus unhelpful, to most voters. Further, it is probable that the people who do know the names of disclosed donors are also the people most informed and thus least in need of additional information about political communications. On the other hand, those who could most use additional context for the communications they are receiving are the least likely to know the names of top donors or

donors' donors meaning they will be least able to benefit from the additional disclosure. Thus, the supposed information that is being communicated to the electorate by San Francisco's disclosure law is of little value to few people and of no value to most people.

As noted above, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Reed*, 561 U.S. at 196) (internal quotation marks omitted) Because the disclosure law here opens up donors to significant retaliation for their association while providing at most minimal useful information to the electorate, it is not a compelling enough interest to meet the requirements of exacting scrutiny.

B. San Francisco's disclosure law infringes the First Amendment-recognized right to free association because it is not narrowly tailored to achieve a sufficiently important interest.

To survive exacting scrutiny, a law must be narrowly tailored to achieve a sufficiently important interest. *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 ("[A] substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored."). Even if San Francisco's interest in this case is sufficiently important to justify its invasion of the right to anonymous association, the law is not narrowly tailored to achieve its goal.[29]

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[29] The Supreme Court held that disclosure laws must be both substantially related to a sufficiently important interest and

According to the Court, "[n]arrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (second alteration in original). Here, San Francisco is stifling the First Amendment rights of organizations to freely and anonymously associate with their donors.

The test for narrow tailoring is not merely the severity of the harm caused by the law in question, but the breadth of its infringement on fundamental rights. *Ams. for Prosperity Found.*, 141 S. Ct. at 2384-85 (quoting *Shelton*, 364 U.S. at 488). "[A] reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring." *Id.* at 2385. A law is not narrowly tailored if it is either "hopelessly underinclusive," *See Reed v. Gilbert*, 576 U.S. 155, 171 (2015), or if it proscribes "more speech than necessary." *See Turner Broadcasting System, Inc. v. FCC.*, 520 U.S. 180, 189 (1997). The donor disclosure law at issue in this case

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narrowly tailored, but then went on to suggest that substantial relation is subsumed by narrow tailoring. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2383-84 ("The United States and the Attorney General respond that exacting scrutiny demands no additional tailoring beyond the 'substantial relation' requirement noted above. We think that the answer lies between [substantial relation and the least restrictive means]. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.").

is not narrowly tailored to achieve this interest because it is both over- and underinclusive.

San Francisco's donor disclosure law is underinclusive. If the interest intended to be advanced by the law is the provision of useful information to voters, there is much theoretically useful information that is not provided. First, there may be other donors or donors' donors who are either more recognizable to voters or in some other way more influential in the creation of the communication, and yet not listed because they are not one of the top donors. The law is also underinclusive to the extent that it does not compel disclosure of donors to organizations that engage in political speech but are not political committees and thus are not covered by the law.

Further, a law that restricts fundamental personal liberties, even if it does so in pursuit of a legitimate government interest, is not narrowly tailored "when the end can be more narrowly achieved." *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 (quoting *Shelton*, 364 U.S. at 488) (internal quotation marks omitted). Here, assuming that the informational interest is legitimate, the most useful information to voters is likely to be the organization directly sponsoring the communication. Such sponsors are likely to have a website or social media accounts that explain their purpose. Thus, a voter who sees an advertisement and wants to know more about the issue and the organization sponsoring the advertisement can research that organization directly. The additional benefit of being able to research donors and donors' donors is limited, if it exists at all, and may well lead

to more confusion for voters rather than greater clarity.

Because the San Francisco law at issue in this case fails exacting scrutiny, the Court should grant No on E's petition for certiorari to protect essential First Amendment interests. Because exacting scrutiny is insufficiently protective of the rights enshrined in the First Amendment, the Court should review San Francisco's donor disclosure law under strict scrutiny.

CONCLUSION

For the foregoing reasons, the Court should grant No on E's petition for a writ of certiorari.

Respectfully submitted,

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