No. 24-781

IN THE

Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,
Petitioner,
v.
MATTHEW PLATKIN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW JERSEY,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

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

In particular, AFPF has an interest in this case because bypassing the robust protections of *AFPF v. Bonta* threatens the rights of anonymous speakers and the rights of individuals to associate freely for whatever reason they wish—whether temporarily to achieve a single goal, indefinitely for a discrete but ongoing interest, or long-term with broadly aligned organizations. Civil society requires that Americans be open to associating at will and changing associations nimbly to solve issues or simply to express themselves—and our Constitution protects that freedom. Donors to large, heterodox organizations may support only a portion of those organizations' activities. And donors to small associations may share a single goal with other donors and have no other commonality. Threats to expose donors to non-profits places the ability to support

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF notified counsel for all parties of its intent to file this brief more than ten days before filing.

diverse projects and opinions at risk by implying that potentially unrelated donors are linked, chilling participation to only those circumstances in which all participants are aware of each other and willing to shoulder the multifarious views of other participants—burdening temporary or limited-purpose cooperation with the risk of being painted with a broad brush. Driving civil society further into tribalism will harm us all.

SUMMARY OF ARGUMENT

The ways of attempting to circumvent the First Amendment are limited only by the ingenuity of politicians and lawyers. All they must do is add an adjective here, a self-referential definition there, or perhaps an extra procedural step, and clear precedent can be distinguished or ignored. The eternal vigilance on which our liberty rests[2] requires us to be on guard against any such attempt to bypass First Amendment protection.

Sometimes, as here, the peril comes from nuanced interplay between state and federal law, but the chill to First Amendment rights remains the same. This case presents the threat to nonprofit pregnancy center donors from an investigatory subpoena that may evade review in federal court, leaving the pregnancy center and its donors without First Amendment protection and leapfrogging *AFPF v. Bonta* 594 U.S.

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[2] John Philpot Curran, Dublin, 1790 ("The condition upon which God hath given liberty to man is eternal vigilance,"). *See,* Anna Burkes, *Eternal Vigilance*, Thomas Jefferson's Monticello (Sept. 7, 2010) available at: https://www.monticello.org/exhibits-events/blog/eternal-vigilance/.

595 (2021) ("*AFPF*") and the exacting scrutiny that is applicable to donor disclosure schemes.

The subpoena here was allegedly issued for the donors' own protection—even though not a single one of nearly 5,000 donations swept up by the subpoena triggered a complaint. If allowed to stand, exempting broad investigatory demands for donor identification from constitutional review until after associational rights have been irreparably damaged would gut *AFPF*. And, although the process employed here is different from the blanket rule at issue in *AFPF*, the chilling effect on donors who may be exposed against their will, is the same.

In addition to exposing donors to politically-motivated blowback, for donors who may support the charity's mission, or a portion of that mission, but not police the viewpoints of other donors or even know what those viewpoints are, surprise disclosure imposes a shocking price for exercising their associational rights.

In *AFPF*, the Court held that the exacting scrutiny standard requires narrow tailoring, or a "means-end fit" between a disclosure mandate and the sufficiently important governmental interest the mandate claims to promote. *AFPF*, 594 U.S. at 611, 614. In *AFPF*, exacting scrutiny was applied to the California Attorney General's mandate for blanket disclosure of donors to charitable organizations. *Id*. at 611. But *AFPF* was not limited to narrow categories of charities or particular formats of disclosure; nor did it include loopholes that could allow the government exceptions from the First Amendment that, if publicly known, would chill association, and if not known, would

subject donors to startling disclosure and implied association with unrelated messages and parties.

The *AFPF* means-end fit seems to be tripping up lower courts with some regularity, exposing charitable donors to unconstitutional risk. And the way in which *AFPF* was bypassed here exposes a serious loophole in First Amendment protection in which a motivated attorney general can impose an investigatory demand on a charity to threaten disclosure of unwilling donors without satisfying the exacting scrutiny that should limit such attempts.

This case represents the far extreme, bypassing *AFPF* altogether, but review by this Court is needed because lower courts are failing to properly apply exacting scrutiny. In *Gaspee Project v. Mederos,* for example, the First Circuit blessed a disclosure scheme that replaced a means-end test with an elaborate set of parameters regarding who would be affected by the scheme rather than focusing on *why* they would be affected— essentially substituting narrow application for narrow tailoring. 13 F.4th 79, 82, 88–9 (1st Cir. 2021). And, in *No on E v. Chiu*, 85 F.4th 493 (9th Cir. 2023) *cert. denied sub nom. No on E, San Franciscans v. Chiu*, No. 23-926, 2024 WL 4426534 (U.S. Oct. 7, 2024), the Ninth Circuit blessed a multi-level disclosure requirement that would mislead viewers by implying that donors to donors to entities responsible for advertising had some involvement (or even knowledge) of the message, *i.e.*, reverse application of narrow tailoring in a way that would actually undercut the alleged goal.

The approach here adds insult to the constitutional injury, by subjecting donors to disclosure "for their own protection" because the

attorney general disfavors the charity to which they have donated. This is not the First Amendment protection envisioned by *AFPF* and is contrary to this Court's approach to the Speech Clause of the First Amendment. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

If allowed to stand, this approach would gut donor privacy by allowing the state to insert its own policy preferences between a donor and the donor's choice of charity and replace constitutional protection with procedural maneuvering.

ARGUMENT

I. *AMERICANS FOR PROSPERITY FOUNDATION V. BONTA* CONTROLS AND EXACTING SCRUTINY MUST BE APPLIED TO DONOR DISCLOSURE.

AFPF v. Bonta controls the New Jersey Attorney General's investigatory demand for donor disclosure, yet the procedural turnings of this case threaten to evade faithful application of its holding. Like the "blanket demand for Schedule Bs" in *AFPF*, the demand for disclosure is subject to exacting scrutiny. *AFPF*, 594 U.S. at 611. Even if the disclosure is purportedly confidential, the associational chill identified in *AFPF* applies. *Id.* at 616 ("Our cases have said that disclosure requirements can chill association even if there is no disclosure to the general public.") (cleaned up). "Exacting scrutiny is triggered by 'state action which may have the effect of curtailing the freedom to associate,' and by the 'possible deterrent effect' of disclosure." *Id*. (quoting *NAACP v. Alabama*, 357 U.S., 449, 460–461 (1958). *See also Talley v.*

California, 362 U.S. 60, 65 (1960) ("identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance").

Like in *AFPF*, the Attorney General here asserts an interest in preventing fraud, specifically whether donors have misunderstood that they donated to a pregnancy center rather than an abortion clinic. And, like in *AFPF*, it "goes without saying that there is a substantial governmental interest in protecting the public from fraud." *AFPF* at 612 (cleaned up). But the informational demand here fails the means-end test in the same way the means-end test was not satisfied in *AFPF* by seeking information on nearly 5,000 donations with no identified causality between a list of donations and speculation that somewhere among the donors might be a donor who was confused.[3]

The concerns that informed this Court's holding in *AFPF* are present here, chilling the First Amendment rights of donors in the face of government demands to know who is supporting a charity and why.

A. *AFPF* Held that Exacting Scrutiny is the Proper Standard for Compelled Disclosure of Donor Information.

AFPF was a facial challenge to a regulation requiring charities operating in California to register with the Attorney General's office and disclose major donors by filing their IRS Form 990. *AFPF*, 594 U.S. at 601–02. The disclosure requirement was not

[3] App.100a–10a; Br. of Def-Appellee at 6–8, *First Choice Women's Res. Ctrs., Inc. v. Att'y Gen. N.J.*, 2024 WL 5088105 (3d Cir. Dec. 12, 2024) (No. 24-3124), Doc.43 (Attorney General's concern was that a donor might mistakenly believe First Choice was a pro-abortion organization.).

related to any specific activity, speech, or issue area, but solely to annual registration renewal. *Id*. at 602. The case came before the Court with the contours of the applicable standard of review unsettled. *Id*. at 607. While the lower courts had nominally applied exacting scrutiny, there was disagreement whether narrow tailoring was required. *Id*. at 605.

Americans for Prosperity Foundation, a public charity that was subject to the regulation, challenged the blanket donor disclosure requirement on the basis that it burdened the First Amendment associational rights of its donors and that exacting scrutiny required more than the lenient standard applied by the Ninth Circuit. *Id*. at 602–03.

This Court held that, at the least, exacting scrutiny applies to compelled disclosure requirements and that narrow tailoring is a necessary element of that standard. *Id*. at 607. Exacting scrutiny thus lies between strict scrutiny, with its least restrictive means test, and the "substantial relation" standard noted in *Doe v. Reed*, 561 U.S. 186, 196 (2010), to require narrow tailoring, but not least restrictive means. *Id*. at 608.

B. *AFPF* Relied Heavily on Precedent Protecting Political Advocacy.

The precedential bases for applying exacting scrutiny to donor disclosure were derived largely from cases protecting political speech and association, such as *NAACP v. Alabama ex rel. Patterson*, because "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" *AFPF*, 594 U.S. at 606 (citing 357 U.S. at 462). The Court also relied on cases

reviewing electoral disclosure regimes but made clear that "exacting scrutiny is not unique to electoral disclosure regimes." *Id.* at 608[4] ("As we explained in *NAACP v. Alabama*, it is immaterial to the level of scrutiny whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.") (cleaned up). And the government cannot bypass constitutional protection by defining labels for new categories of speech to exclude them from the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("a State cannot foreclose the exercise of constitutional rights by mere labels"). Thus, exacting scrutiny applies squarely to donor disclosure regimes, including where, as here,

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[4] *See Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963) ("an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights."); *Button*, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect."); *Bates v. Little Rock*, 361 U.S. 516, 527 (1960) (the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause"); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 245 (1957) ("when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas" compulsory process must be carefully circumscribed.).

the charity promotes a viewpoint contrary to the state's favored viewpoint.

C. Narrow Application is not a Substitute for the Means-Ends Requirement of Narrow Tailoring.

Under *AFPF*, "exacting scrutiny requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure requirement be narrowly tailored to the interest it promotes." *AFPF*, 594 U.S. at 611 (cleaned up). Thus, "even 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 609 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

The narrow tailoring element is critical in cases involving burdens on the First Amendment. *AFPF* 594 U.S. at 609 (quoting *Button*, 371 U.S. at 433) ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'"). And, as *AFPF*'s reliance on electoral cases for its description of narrow tailoring shows, political context provides no exemption from narrow tailoring. In *McCutcheon v. Federal Election Commission*, for example, a plurality of the Court explained that "[i]n the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly

tailored to achieve the desired objective." 572 U.S. 185, 218 (2014) (cleaned up).

In *AFPF*, blanket donor disclosure failed narrow tailoring because it was overbroad and lacked any "tailoring to the State's investigative goals." *AFPF*, 594 U.S. at 615. Here, the subpoena has the same lack of connection between the demand and the alleged investigatory interest; but that obvious flaw is obscured by the patina of law enforcement and the choice of specific targets for the subpoenas. But that does not satisfy the key characteristic of tailoring: a means-end fit between the demand for disclosure and the governmental interest the demand purports to address. If anything, a targeted demand without a close means-end fit is more dangerous, because it allows the Attorney General to direct the inquiry toward disfavored charities and create the misimpression that the request is narrow. *But narrow application is not the same as narrow tailoring.* And, where narrow application is discretionary rather than based in regulation, a means-end fit is even more crucial to protecting associational freedom.

Because "exacting scrutiny is triggered by state action which may have the effect of curtailing the freedom to associate, and by the possible deterrent effect of disclosure," *AFPF*, 594 U.S. at 616 (cleaned up), narrow tailoring must be rigorously applied lest exacting scrutiny be exacting in name only.

D. The Burden of Disclosure Must be Commensurate to the Need for the Information.

The burden imposed by a disclosure demand must be commensurate with the burden placed on the target because "even a 'legitimate and substantial'

governmental interest 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *AFPF*, 594 U.S. at 609 (citing *Shelton*, 364 U.S. at 488; *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961). And, "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." *AFPF*, 594 U.S. at 611.

This analysis is required even when the claimed injury is chill of constitutional rights. *AFPF*, 594 U.S. at 609 (citing *Button*, 371 U.S. at 433) ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—"[b]ecause First Amendment freedoms need breathing space to survive."). This Court has been clear that "[w]hen it comes to 'a person's beliefs and associations,' '[b]road and sweeping state inquiries into these protected areas ... discourage citizens from exercising rights protected by the Constitution.'" *AFPF* 594 U.S. at 610 quoting (*Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)). "Such scrutiny, we have held, is appropriate given the 'deterrent effect on the exercise of First Amendment rights' that arises as an 'inevitable result of the government's conduct in requiring disclosure.'" *AFPF* 594 U.S. at 607 (citing *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (*per curium*)). "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

Thus, the lower court here got it wrong by rejecting chill as an injury sufficient to trigger review: "but this

Court finds that constitutional injury can only occur here if there is an actual or imminent threat of forced compliance by the state court, which, to date, there has not been." App. 42a, n 22. The burden here was imposed when the Attorney General made the sweeping demand for donor disclosure; it does not wait until the state court threatens contempt. Unlike a subpoena for private records, where the private party before the court may argue cost, privilege, or other burdens that would not attach unless the subpoena is enforced, here the chill on association attaches right away. And the threat of such investigations continues beyond the resolution of this particular subpoena. Once the bell blessing this practice has been rung, it cannot be unrung.

Moreover, as explained above it is no answer to say that the broad collection of donor information has been narrowed to only those entities the Attorney General doesn't like. If anything, such an approach aggravates the constitutional violation by imposing viewpoint discrimination,[5] striking at the very heart of the First Amendment. *AFPF* 594 U.S. at 606 ("Protected association furthers a wide variety of political, social, economic, educational, religious, and cultural ends, and is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.) (cleaned up). Moreover, any approach

[5] "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id*. at 829.

that substitutes narrow application for the required means-end test is both illogical—including targets with no meaningful connection to the governmental interest—and underinclusive—excluding potential targets based on irrelevant factors. Whether by rule, regulation, or investigatory demand, compelled donor disclosure must be tailored to a compelling governmental interest. This requirement cannot be bypassed by changing the form of the demand. *AFPF* 594 U.S. at 605–06 ("Government infringement of this freedom can take a number of forms.").

II. THIS CASE DEMONSTRATES THE RISK TO FREE ASSOCIATION BY PROCEDURAL MANEUVERING TO CIRCUMVENT *AFPF V. BONTA*.

This case demonstrates the risk to constitutionally-protected association from demoting constitutional review until after other procedures have run their course, allowing the constitutional injury to accumulate and review to be subordinated to other interests. *Cf. Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 180 (2023) (recognizing preeminence of federal court constitutional review over preferences for agency efficiency). For example, the district court opined, relative to the speech injury incurred from removing videos from public view, "Plaintiff can alter the video back to its original form. Therefore, the harm is, by definition, reparable." App. 52a. Unless altering the video also includes time-travel to recoup the time lost, the injury is locked in. Moreover, this approach misstates bedrock First Amendment law, which recognizes the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976).

Similarly, the Chancery Court's holding that "service of the subpoena itself was not unconstitutional based on the statutory investigatory powers granted to plaintiffs by the Legislature," App. 63a, also misses the point. Whether state law authorizes a district attorney to issue subpoenas has no bearing on whether the subpoena imposes unconstitutional burdens. But these types of misdirection will harm associational rights by miring a charity in procedures that should not be imposed when the request itself is unconstitutional—even if the procedures are supposedly "mild." *AFPF*, 594 U.S. at 611 ("Nor does our decision in *Reed* suggest that narrow tailoring is required only for laws that impose severe burdens.").

But the burden here is not mild. The New Jersey Attorney General's investigative power, which the New Jersey Supreme Court has characterized as the "power of inquisition", allows the Attorney General to "investigate merely on the suspicion that the law is being violated, or even just because [he] wants assurance that it is not." *In re Addonizio*, 248 A.2d 531, 539 (N.J. 1968). This is essentially the same justification employed in *AFPF*. This Court rejected that approach. *AFPF*, 594 U.S. at 597 ("In reality, California's interest is less in investigating fraud and more in ease of administration. But 'the prime objective of the First Amendment is not efficiency.'") (citing *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

Regardless of how the state court proceedings eventually turn out, proceedings in which constitutional concerns play second fiddle to state police powers, in which the Attorney General is a repeat player, and in which political issues motivate

investigating certain targets but not others, puts donors on notice that if they are disfavored by the state they can expect to be subject to persistent risk of disclosure. The chill to association and expression that *AFPF v. Bonta* was meant to avoid is inescapable.

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

The Court should grant *certiorari* because, although the *AFPF* decision is relatively recent, misapplication of exacting scrutiny has already begun to cause mischief from coast to coast.

In *No on E.*, for example, the issue was whether a San Francisco law that adds a secondary-contributor disclaimer requirement to the single-contributor disclaimer required by state law was sufficiently tailored to the governmental interest. *No on E*, 85 F.4th at 497. The Ninth Circuit held that the requirement satisfied exacting scrutiny. *Id*.

Nine judges dissented from the denial of rehearing *en banc* raising a variety of concerns flowing from misapplied standards. 85 F.4th at 518 (Van Dyke, J. dissenting) ("This is not the exacting scrutiny the Supreme Court reminded our circuit to undertake when it reversed us only two years ago.") (citing *AFPF*). *No on E* failed exacting scrutiny because it inverted the causation required by means-ends testing. *Id*. at 522 ("the panel upheld the ordinance by identifying a government interest that is not advanced—and in fact is undercut—by the regulation."). Moreover, as Judge Collins explained in dissent, "the panel's decision . . . explicitly allows San Francisco to commandeer political advertising to an intrusive degree that greatly exceeds what our settled

caselaw would tolerate in the context of commercial advertising." 85 F.4th at 511 (Collins, J. dissenting). This application of "exacting" scrutiny employs a more lenient standard than the "decidedly *lower* standard" of *Zauderer*. *Id*. at 513 (emphasis in original).

Similarly, *Gaspee Project v. Mederos*, which was also decided after *AFPF*, dealt with disclosure of funding sources for certain independent expenditures[6] and electioneering communications.[7] 13 F.4th 79, 82 (1st Cir. 2021). *Gaspee* nominally embraced *AFPF* but misapplied the narrow tailoring element. *Id*. at 85.

The Act in *Gaspee* required filing with the State Board of Elections a report disclosing all organization donors over $1,000, but it also imposed an on-communication disclaimer identifying the five largest donors from the preceding year.[8] *Id*. at 83. The asserted government interest in *Gaspee* was in an "informed electorate" which it held to be "sufficiently important to support reasonable disclosure and disclaimer regulations." 13 F.4th at 86. But under *AFPF* it is not enough to invoke tautologies such as

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[6] An "'independent expenditure' . . . 'expressly advocates the election or defeat of a clearly identified candidate, or the passage or defeat of a referendum.'" *Gaspee,* 13 F.4th at 82–3.

[7] An "'electioneering communication' . . . identifies a candidate or referendum'" and "is made within sixty days of a general election or referendum or within thirty days of a primary election." *Id*. at 83.

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

demanding information for the purpose of being informed.[9] Something more is needed.

Instead of relying on a purpose-based rationale, *Gaspee* resorted to a plethora of characteristics unrelated to a means-end relationship between the government's goal and the First Amendment burden imposed. Instead, *Gaspee* focused on time and size limitations—which affect the pool of speakers and messages subject to the law but fail to explain why the law should be applied at all. 13 F.4th at 88–9. Much like a law that applies only to redheads or early risers without any explanation of how narrowing the pool of targets produces the desired end, this type of analysis substitutes an exercise in narrow application for narrow tailoring. But infringing the rights of a small group is still infringement. And limiting a law based on characteristics that do not satisfy the means-ends requirement raises concerns that the law may be unconstitutionally underinclusive. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) ("The ordinances are underinclusive for those ends. . . . The underinclusion is substantial, not inconsequential."); *Brown v. Ent. Merchants Ass'n,* 564 U.S. 786, 802 (2011) ("The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises

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

serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.").

Having "tailored" the law to irrelevant characteristics, *Gaspee* went a step further—blessing, rather than condemning as it should, the statutory demand that donors silence themselves by opting out of constitutionally protected messaging to avoid being outed by the organizations to which they donate. 13 F.4th at 89. Donors could avoid exposure under the law by either limiting the size of their donations or by opting out of allowing their donations to be used for the restricted forms of speech. *Id*. Reliance on self-censorship to excuse an unconstitutional law is a dangerous step that creates a moral hazard, allowing constitutional protections to be bypassed by shifting the burden to the speaker. Nothing in *AFPF* endorses that approach.

Thus while *Gaspee* nominally adopted the exacting scrutiny standard from *AFPF*, its analysis misapprehended what it means for a law to be "narrowly tailored to achieve the desired objective," 594 U.S. at 609, and created precedent in the First Circuit replacing the means-end test of narrow tailoring with a narrow application test that evades causation by focusing on *who* rather than *why*.

CONCLUSION

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

Respectfully submitted,

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