

No. 25-1248

IN THE
Supreme Court of the United States

RIO GRANDE FOUNDATION,
Petitioner,

v.

MAGGIE TOULOUSE OLIVER, IN HER OFFICIAL CAPACITY
AS NEW MEXICO SECRETARY OF STATE,

Respondent.

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

**BRIEF FOR *AMICI CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION AND MANHATTAN
INSTITUTE IN SUPPORT OF PETITIONERS**

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June 3, 2026

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INTEREST OF *AMICI CURIAE*¹

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

In particular, AFPF has an interest in this case because laws like the New Mexico disclosure mandate threaten the rights of speakers to speak anonymously and the rights of individuals to associate freely for whatever reason they wish. The New Mexico law places the ability to support 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 are willing to shoulder all the views of the others—excluding temporary or limited-purpose cooperation for fear of being painted with a broad brush. Driving civil society further into tribalism will operate to the detriment of us all.

The Manhattan Institute (“MI”) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster

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

economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of law and opposing government overreach, including in the marketplace of ideas. Its scholars regularly speak on college and graduate-school campuses, and likewise have faced protest, shutdown, and cancelation. MI also runs the Adam Smith Society, which brings together business-school students and alumni for discussion and debate on how the free market has contributed to human flourishing and opportunity for all.

This case interests *amici* because the First Amendment prevents the mandated tribalism at its heart.

BACKGROUND

The New Mexico Campaign Reporting Act (“the Act”) requires any person making independent expenditures that exceed \$1,000 in a non-statewide election or \$3,000 in a statewide election to report the name and address of donors who funded those expenditures. N.M. Stat. Ann. §§ 1-19-27.3(A)(1), (B); *see* Pet. 6 –7. There is no exclusion for donors who are not aware of the message. Pet. 5. As relevant here, an independent expenditure is made to pay for an advertisement that “refers to a clearly identified candidate or ballot question and is published and disseminated . . . within thirty days before the primary election or sixty days before the general election.” N.M. Stat. Ann. § 1-19-26(Q)(3)(c).

All reports are posted publicly on the Secretary of State’s website. N.M. Stat. Ann. § 1-19-32(c); Pet. 7. Violations are punishable by up to one year in prison, a \$1,000 fine, or both, and civil penalties of up to

\$20,000. *See* Pet. 7–8 (citing N.M. Stat. Ann. § 1-19-36; § 1-19-34.6(B)).

SUMMARY OF ARGUMENT

Anonymous speech and association have been essential to the framework and vigor of this country since its founding. As Judge Eid noted below regarding written advocacy:

Perhaps most famously, this includes advocacy for the ratification of the Constitution itself by “Publius,” the collective pseudonym used by Alexander Hamilton, James Madison, and John Jay when writing the *Federalist Papers*.²

Had Publius been confronted with compelled disclosure under New Mexico’s law, their writings may have never seen the light of day. Had *AFPF v. Bonta*, 594 U.S. 595 (2021), existed at the time, however, Publius may reasonably have invoked it to protect the identities of its component writers. And, under longstanding First Amendment law, Publius could likewise have assumed that political writings would receive the very highest level of protection.

But, as this case shows, that expectation may well have been misplaced. After all, if limiting core political speech can be deemed a compelling governmental interest through the simple expedient of broad statutory definitions, and a disclosure scheme rendered narrowly-tailored by applying it to a limited

² App. 3a (Eid, J., dissenting from denial of petition for rehearing en banc) (citing *Federalist Papers*, *Black’s Law Dictionary* (12th ed. 2024); *see also McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343 n.6 (1995) (detailing other anonymous political writings from the Founding Era)).

number of people, then Hamilton, Madison, and Jay would have been left bare.

Publius was writing for a political purpose; and exposure of the underlying writers would affect only three people. Thus, under the reasoning here—and a growing number of other federal courts—that is enough to satisfy exacting scrutiny.

But that is not what *AFPF* requires. Under *AFPF*, exacting scrutiny requires the government to explain why it needs *this* information from *these* people.

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 Schedule B of their IRS Form 990. *See* 594 U.S. at 601–04. *AFPF*, which 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. *Id.* at 601–03. This Court held that exacting scrutiny applied and therefore the government was required to demonstrate narrow tailoring, or a “means-end fit” that “demonstrate[s] its need for universal production in light of any less intrusive alternatives.” *Id.* at 613.

Had *AFPF* been applied to Hamilton, Madison, and Jay, writing as Publius, their identities would have been protected unless the government could show a “sufficiently important governmental interest” in exposing them and narrow tailoring of the demand to government’s asserted interest. *Id.* at 607.

Not so here.

First, this case classifies speech as being for a “political purpose” to dictate whether it is protected—leaving speech for a political purpose with less

constitutional protection than other speech. App. 20a–21a. But that approach is inconsistent with *NAACP v. Button*, 371 U.S. 415, 429 (1963) (“a State cannot foreclose the exercise of constitutional rights by mere labels”). And is at odds with the bedrock principle that “the First Amendment requires . . . err[ing] on the side of protecting political speech rather than suppressing it.” *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007). Such an approach would have left Publius scratching his head as his exertions on behalf of ratifying the Constitution were no doubt for a political purpose and yet worthy of anonymity.

Next, the lower courts diverged from *AFPF* by demanding multiple injuries not required by *AFPF*.

In *AFPF*, a variety of factors contributed to the chill on association, including, threats to donors, threats to itself, and the demonstrated risk that the state would inadvertently disclose donor information that it pledged to keep confidential. *See id.* at 604. But *AFPF* did not require all three sources of injury to be checked off to prove “chill” to associational rights. *See id.* at 616–17.

Here, Rio Grande was required to establish two discrete injuries: one to its donors, and one to itself.³ First, it was required to show that its donors were threatened. Then it was required to show that it also had been threatened. But *AFPF* does not require both donor and recipient to sustain separate injuries. Especially where, as here, the injury to Rio Grande is

³ The third source of chill in *AFPF*, risk of public disclosure, is automatic in New Mexico as disclosure reports are posted publicly on the Secretary of State’s website. N.M. Stat. Ann. § 1-19-32(c); Pet. 7.

a classic pocketbook injury redressable in a court of law. This injury flows from the chill to the donations, no additional threat to Rio Grande is required.

Under the reasoning below, Hamilton, Madison, and Jay would have been required to show threats to themselves, but *so would Publius*. That was error. Requiring a two-entity threat analysis to be satisfied before the associational rights of the underlying parties can be recognized simply makes no sense. All that is required is an injury to *one* party. The Tenth Circuit’s two-party damage requirement is contrary to *AFPF* and unsupported by this Court’s precedent.

Compounding this error, the panel majority and district court expansively applied the erroneous “narrow tailoring” interpretation of *Gaspee Project v. Mederos*, which replaced the means-end test of *AFPF* with an elaborate set of parameters regarding *who* would be affected by a disclosure scheme rather than *why* they would be affected—essentially substituting narrow application for narrow tailoring. 13 F.4th 79, 82, 88–9 (1st Cir. 2021).⁴

Moreover, here, as well as in a growing body of disclosure cases across circuits, narrow application is determined through dollar limits. The arbitrary denominations from early cases become precedent in later cases and are used to decide whether the disclosure scheme is sufficiently “narrow.” But the happenstance of which dollar values appeared in the

⁴ See Cynthia Fleming Crawford, *Narrow Applicability Is Not the Same As Narrow Tailoring: Applying the First Amendment in First Choice Women’s Resource Centers v. Platkin*, FedSoc Blog (Feb 21, 2025) (discussing the difference between narrow applicability and narrow tailoring), <https://tinyurl.com/3c8retu8>.

earliest post-*AFPF* cases has no bearing on whether causation is satisfied. Yet mere chronology risks arbitrarily establishing those first-adjudicated dollar values as the law of the land. Nothing in *AFPF* sanctions this result.

If allowed to stand, this process and the lower courts' growing reliance on *Gaspee* would gut the donor associational rights recognized in *AFPF*, while imposing additional First Amendment injury by implying an association between a message and a donor that may not even be accurate. For donors who support an organization's general mission, or a portion of that mission, and who may not police the full range of the organization's interests or know who other donors to the organization are, these complexities impose an unconstitutional burden on speech and association.

The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application.

Citizens United v. Federal Election Comm'n, 558 U.S. 310, 324 (2010) (cleaned up).

This is not the degree of First Amendment protection envisioned by *AFPF* and, if allowed to stand, would gut donor privacy by a decoupling donor intent and any downstream use of funds.

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

AFPF controls this case and establishes the rigorous standard of review that must be applied to the New Mexico Campaign Reporting Act demand for donor disclosure (“disclosure provision”). The disclosure provision, like the “blanket demand for Schedule Bs” in *AFPF*, exposes donors based on characteristics that do not even require a donor to know that a particular advertisement is being run. *See* 594 U.S. at 611. But unlike in *AFPF*, there is no façade of anonymity here because the purpose and effect of the law is to publicly disclose donor names. Right off the bat the risk of chill from the law itself is greater. *See id.* at 615 (“Our cases have said that disclosure requirements can chill association even if there is no disclosure to the general public.” (cleaned up)). Thus, exacting scrutiny applies—and the result is the same.

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. *See id.* at 601–04. The disclosure requirement was not 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 607–08. While the lower courts claimed to have applied exacting

scrutiny, there was disagreement about whether narrow tailoring was required.

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.⁵ *See id.* at 607–08. 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. *See AFPP*, 594 U.S. at 607–08.

B. *AFPP* Was Not Limited to Charities, But Relied Heavily on Political Advocacy Disclosure Precedent

In *AFPP*, 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.” *AFPP*, 594 U.S. at 606 (citing 357 U.S. 449, 462 (1958)). The Court also relied on cases reviewing electoral disclosure regimes but made clear that “exacting scrutiny is not unique to electoral disclosure regimes.”⁶ *See id.* at 608 (“As we

⁵ Some justices have suggested that strict scrutiny should apply. *See* App. 46a–47a n.3 (Eid, J., dissenting). And as Judge Eid noted below, in *AFPP* “a majority of the Court agreed that exacting scrutiny requires narrow tailoring.” App. 48a n.4 (Eid, J., dissenting).

⁶ *See Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963) (“an adequate foundation for inquiry must be laid

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. *Button*, 371 U.S. at 429 (“a State cannot foreclose the exercise of constitutional rights by mere labels”). Thus, exacting scrutiny applies squarely to disclosure regimes across the board, including to the political advocacy regime here.

The exacting scrutiny standard has long been applied in the campaign-finance context. Indeed, as *AFPF* notes, this Court “first enunciated [it] in a campaign finance case.” 594 U.S. at 608 (citing *Buckley v. Valeo*, 424 U.S. 1, 64–68 (1976) (per curiam)); see *Wis. Right to Life*, 551 U.S. at 485 (Scalia, J., concurring in part and concurring in judgment) (describing *Buckley* as “seminal case”). As

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).

this Court explained in *Buckley*, “[t]he strict test established by *NAACP vs. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.” 424 U.S. at 66.

**C. Narrow Tailoring Requires Causation—
Not Broad Definitions or Circular
Reasoning**

Under *AFPP* exacting scrutiny is rigorous and protective of First Amendment rights. Nowhere does *AFPP* invite the government to seek creative ways to minimize constitutional protection through capacious application of statutory terms or bootstrapping anodyne interests, such as the state’s interest in enforcing the laws, into a compelling interest to expose speakers where no other interest has been demonstrated.

Under *AFPP*, “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.” 594 U.S. at 611 (cleaned up). Thus, “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.’” *Id.* at 609 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

The narrow tailoring element is critical in cases involving burdens on the First Amendment. *See id.* (“Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—‘[b]ecause First Amendment freedoms need breathing space to survive.’” (quoting *Button*, 371 U.S., at 433)). And, as

AFPP's reliance on electoral cases for its description of narrow tailoring shows, the election context provides no exemption from narrow tailoring. In *McCutcheon v. Federal Election Commission*, for instance, 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).

Here, given the fungible nature of money, without any express earmarking, it would be incorrect to frame a general donor relationship as *causing* any specific political advertising. Without even that basic relationship between donor and message, any claim that a donor is attempting to persuade a viewer as to a particular candidate or ballot initiative is even more attenuated.

Yet that causal relationship, between donor and message—even when inaccurate—is exactly what New Mexico compels the Rio Grande Foundation to imply by triggering public disclosure when two potentially unrelated facts happen to exist at the same time.

Indeed, the Tenth Circuit acknowledged that it was *inferring* a relationship between donors and specific messages. App. 36a. (“[I]t is reasonable to infer that people who make larger donations to a political committee, such as RGF, are people who agree with its point of view and want to support its

mission to promote that point of view to New Mexico’s citizens.”). Neither the court nor New Mexico provided an explanation for why the state would be interested in raising the risk of *misinforming* voters nor how the voters would benefit from the state dictating which erroneous inference they should rely on when the voters could just as easily infer erroneous connections on their own. And whether New Mexico has chosen to label an organization as a “political committee” is constitutionally irrelevant.

The means-end test of *AFPP* is not satisfied by spurious associations nor can freedom of association be protected when not only true associations are chilled but false connections may be implied by law.

D. *AFPP* Does Not Require Multi-Level Injury to Establish Standing Nor Evidence that the Risk to Donors and Recipients is the Same

The alleged injury to the Rio Grande Foundation is loss of donations from donors. App. 62a (“admitting for purposes of this motion that RGF alleges a fear of lost donations if its donors’ identities are disclosed”). This is a classic pocketbook injury that is amenable to redress and sufficient to establish standing without any intangible harm.⁷ This “Court has said that ‘pocketbook’ or ‘wallet’ injury always qualifies, but that mere ‘ideological’ or ‘psychic’ harm never does.”⁸

⁷ See Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine’s Dirty Little Secret*, 107 Nw. U. L. Rev. 169, 178–79 (2012).

⁸ *Id.* at 179 n. 43 (collecting and comparing cases discussing wallet injury versus noneconomic injury).

Rio Grande identified fear of threats to its donors as the cause of its prospective lost donations. App. 62a (“some donors may stop contributing to RGF out of fear of retaliation and harassment”). That chill on donors is also sufficient to infringe Rio Grande’s First Amendment association rights. *AFPF*, 594 U.S. at 618–19 (“The risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive.” (cleaned up)). Rio Grande thus pled two here-and-now injuries.

But neither of these injuries requires harassment of Rio Grande itself. Nevertheless, the courts below found a lack of direct threat to Rio Grande to be material. *See* App. 64a (“The Secretary, however, denies that there is a record of any significant retaliation or harassment of RGF that would substantiate the fears.”); App. 64a (“RGF had not made and did not have any plans to make expenditures on the hot-button issues—labor, the Second Amendment, the environment, or energy—that it flagged as raising a risk of retaliation.”); App. 95a–96a (“Even viewing the evidence in RGF’s favor, this evidence is insufficient to establish a reasonable probability that the compelled disclosures required by SB 3 will subject RGF and similar organizations to threats, harassment, or reprisals from either Government officials or private parties”).

Transference of donor harassment onto Rio Grande is not required before it can demonstrate injury. And there is nothing in *AFPF* that requires donors and recipients both to be injured in exactly the same way. Nor must speakers show that their speech is “hot button” or controversial to establish injury. At least in this context, the government cannot have a

compelling interest in restricting non-controversial speech and association, while shielding and allowing what is deemed “controversial” into the marketplace of ideas. The First Amendment’s protections do not turn on this content- and viewpoint-based distinction. And “any demand for donor information . . . must overcome heightened First Amendment scrutiny ‘given the “deterrent effect on the exercise of First Amendment rights” that arises as an “inevitable result” of the government’s conduct.’” *First Choice Women’s Res. Centers, Inc. v. Davenport*, 146 S. Ct. 1114, 1124 (2026) (quoting *AFPF*, 594 U.S. at 607 (quoting *Buckley*, 424 U.S. at 65))).

E. The First Circuit’s *Gaspee* Opinion Misapplied *AFPF* and its Mischief is Spreading Here

The panel majority and district court both relied heavily on *Gaspee Project v. Mederos*, 13 F.4th 79, 82–3 (1st Cir. 2021). *See, e.g.*, App. 31a; App. 100a–101a. The mischief done by the erroneous application of narrow tailoring in *Gaspee* is spreading across circuits and merits this Court’s intervention.

Gaspee was decided shortly after the Court decided *AFPF*, and it dealt with disclosure of funding sources for independent expenditures and electioneering communications. 13 F.4th at 82–83. *Gaspee* nominally embraced *AFPF* but misapplied the narrow tailoring element. *See id.* at 85.

Like the annual blanket demand for disclosure in *AFPF*, the act in *Gaspee* required filing a report with the State Board of Elections disclosing all organization donors over \$1,000. It also imposed an on-communication disclaimer identifying the five

largest donors from the preceding year.⁹ *Id.* at 83. But as the not-for-profit plaintiffs in *Gaspee* made clear, their interest was in issue advocacy, not candidate support. *See id.* at 82, 85.

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

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

⁹ 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.

criterion: whether there is a means-end relationship between the government’s goal and the First Amendment burden imposed.

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 *AFPP* it is not enough to invoke tautologies such as demanding information for the purpose of being informed.¹⁰ Likewise here, claiming that the state has an interest in disclosure because it has an interest in promoting transparency and thus its interest in disclosures is “self-evident,” App. 33a, is just talking in circles. Something more is needed.

Moreover, while the notion of an “informed electorate” sounds appealing, not all information is created equal. Misleading or irrelevant information, for example, diminishes an electorate’s ability to absorb meaningful information. What is the government interest in confusing the public by dousing it in inaccuracies?

Rather than evaluating the purpose to which the demanded information would be put, *Gaspee* focuses 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 to them at all. 13 F.4th at 88–9. Much like a law that applies only to

¹⁰ *AFPP* did not address disclaimers—nor any other form of compelled speech. *Buckley*, likewise, involved disclosure but not disclaimers. *Citizens United*, which addressed mandatory disclaimers, was decided under the pre-*AFPP* annunciation of exacting scrutiny and thus required only “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” 558 U.S. at 366–67 (cleaned up).

redheads or people with dogs without any explanation of how that narrow application creates the desired end, this type of analysis substitutes narrow application for narrow tailoring. But infringing the rights of a small group is still infringement.

Moreover, *Gaspee* bypasses any analysis of whether the donations in question were intended to support the particular communication at issue. Thus, unlike laws that include “for the purpose of” or “designated to support” language,¹¹ simply listing the five largest donors to an organization for the preceding year lacks the necessary link between the donor information and the communication on which a disclaimer is made.

Having “tailored” the law to nonrelevant characteristics, *Gaspee* goes one 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 *AFPP* endorses that approach.

¹¹ See e.g., *Van Hollen v. Fed. Election Comm’n*, 811 F.3d 486, 492 (D.C. Cir. 2016) (discussing “purpose requirement” in context of independent expenditures under the Federal Election Campaign Act).

This Court has not yet had to grapple with whether the First Amendment allows compelled disclosure of donors with no discernable connection to a particular communication, such as an earmarked contribution or contributing to the PAC. *Gaspee* provides no guidance on how this case or any such case should be decided.

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

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

First, both the district court and panel majority replicated the errors of the *Gaspee* court. For example, the lower courts made the *Gaspee* scoping error by relying on characteristics that limit the pool of people to whom the law applies but without analyzing whether the distinction is meaningful: praising “limitations placed on the CRA’s disclosure requirements,” such as “certain monetary, temporal, and geographic ranges” that are not required to be disclosed. App. 34a. But why? What is the relevance of these characteristics? As in *Gaspee*, the characteristics may narrow application of the law without providing narrow tailoring.

Second, the courts below shifted the burden of avoiding violative speech onto the speaker, making the speaker responsible for censoring herself to avoid public disclosure. *See, e.g.*, App. 15a. (“Notably, certain contributors may opt-out of these requirements if they request ‘in writing’ that their ‘contribution not be used to fund independent or coordinated expenditures or to make contributions to a candidate, campaign committee or political

committee.” (quoting N.M. Stat. Ann. § 1-19-27.3(D)(2)). Constitutional infringement cannot be cured by demanding the victim simply stop exercising the infringed rights. The proper inquiry does not turn on the severity of the burden on First Amendment rights but rather whether the government “has burdened those rights at all.” *First Choice Women’s Res. Centers*, 146 S. Ct. at 1129. If it were “otherwise, the government could channel the ability of disfavored groups to associate through narrow and state-preferred forms” and “achieve exactly what the First Amendment forbids[.]” *Id.* at 1130.

Finally, it is unclear why the speech and association rights of shy donors are less valuable than the rights of gregarious donors—who may have an additional interest in promoting their contributions and thus disclose themselves voluntarily. Under *AFPF* an inclination for publicity is of no constitutional import. *See AFPF*, 594 U.S. at 616 (“It is irrelevant, moreover, that some donors might not mind—or might even prefer—the disclosure of their identities to the State.”). Indeed, the closer the speaker is to the heart of the debate, the more potential his speech has to be useful to his neighbors while he simultaneously risks more from his identity being disclosed to the people he must live with every day. The remote speaker who benefits from publicity has little to fear.

This case is not alone. The *Gaspee* framework recently made an appearance in *Americans for Prosperity v. Meyer*, which held that donor-disclosure mandates satisfy exacting scrutiny. No. CV-23-00470, 2024 WL 1195467, at *8, 14 (D. Ariz. Mar. 20, 2024) *appeal pending*. *See also Dinner Table Action v.*

Schneider, 2025 WL 1939946, at *5–6 (D. Me. July 15, 2025) (relying on *Gaspee* to guide its application of narrow tailoring on two points: 1) comparing the \$1,000 expenditure limit from *Gaspee* to the \$250 expenditure limit in the Maine law; 2) comparing the *Gaspee* opt-out provision to the absence of such an opt-out provision in the Maine law.).

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

CONCLUSION

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

Respectfully submitted,

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June 3, 2026