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 *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right of freedom from compelled speech. The Center has previously appeared before this Court as *amicus curiae* or counsel of record in several cases addressing these issues, including *303 Creative v. Elenis*, 600 U.S. 570 (2023); *Americans for Prosperity Foundation v. Bonta,* 141 S.Ct. 2373 (2021); *Janus v. American Federation of State, County, and Municipal Employees*, 585 U.S. 878 (2018); *National Institute of Family and Live Advocates dba NIFLA* (*NIFLA*) *v. Becerra*, 585 U.S. 755 (2018); *Harris v. Quinn,* 573 U.S. 616 (2014); and *Knox v. Service Employees International Union, Local 1000,* 567 U.S. 298 (2012).

SUMMARY OF ARGUMENT

This is a compelled speech case concerning a content-based regulation of advertisements. But confusion over how to analyze the case led the court below to treat it as a compelled disclosure regulation. This is important because the standard of review appears to be vastly different for the two types of First Amendment infringements.

---

[1] All parties were notified of the filing of this brief more than 10 days prior to filing. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

The regulation at issue is content based because it only applies to one type of advertisement based on the content of the advertisement. Advertisements for stores, concerts, events, and other topics are not covered by the regulation. This regulation only applies to advertisements regarding political election campaigns. Only those advertisements are compelled to publish the government-required message. Under this Court's ruling in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), this is a content-based regulation that triggers strict scrutiny. This case provides the Court an opportunity to solidify "*Reed*'s clear rule for content-based restrictions." *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 1 61, 86 (2022) (Thomas, J., dissenting).

Further, this is a compelled publication regulation. The ordinance requires political campaigns to publish in both their written and broadcast advertisements the identity of the top donors to the campaign and the top donors to any committees or other organizations that are also top donors to the campaign. Compelled speech regulations also trigger strict scrutiny under *303 Creative*, *supra*; *NIFLA*, 585 U.S. at 766.

Much of the decision below is devoted to the amount of space that required publication of information will occupy on the advertisement. That discussion certainly demonstrates the burden placed on petitioner's political speech. Indeed, the requirement of publication of the information on the advertisement, by limiting space for actual campaign speech, operates to limit political speech in a way similar to the contribution limits this Court found unconstitutional in *Buckley v. Valeo*, 424 U.S. 1, 55 (1976); *see Colorado Republican Fed. Campaign Comm. v. Fed.*

Election Comm'n, 578 U.S. 604, 627-28 (1996) (Kennedy, J., concurring in the judgment and dissenting in part); 640-41 (Thomas, J., concurring in the judgment and dissenting in part). The lower court decided, however, to treat this as a simple compelled disclosure case, subject to the lower standard of review that the plurality employed in *Americans for Prosperity,* 141 S.Ct. at 2383.

That standard of review question is one reason for this Court to grant review. The lower court here was confused on the standard and applied the lower level "exacting scrutiny" standard of review rather than "strict scrutiny." But this is a content-based regulation that imposes compelled speech requirements. Review should be granted to hold that in such circumstances, strict scrutiny is the appropriate standard. Even if there were a basis for a lower level of scrutiny for compelled disclosures, the compelled speech doctrine of the Court requires analysis of the regulation under the strict scrutiny compelling state interest standard of review.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review to Hold that Even Disclosure Regulations Are Subject to Strict Scrutiny Where They Are Content Based.

The District Court rejected application of strict scrutiny to this content-based regulation because it involved a "campaign finance disclosure requirement." Pet. App. At 123a-24a. Both the Ninth Circuit and the District Court ruled that because the ordinance involved elements of "disclosure" of some do-

nors regarding an election campaign, the lower standard of review of "exacting scrutiny" applied by the plurality in *Americans for Prosperity*, 141 S.Ct. at 2383, governed. In so ruling, the lower courts ignored the fact that the ordinance was both content based and required compelled publication of a government-dictated message.

First, this ordinance is a content-based regulation. It burdens speech based on the subject matter (though not based on the viewpoint) of the publication. As this Court noted in *Reed*, "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. By its terms, the ordinance at issue in this case only applies to advertisements and mailings that are "electioneering communications." The ordinance does not apply to advertisements or communications on any other topic. For instance, a communication (print or broadcast) regarding art, the environment, public health, or any of a myriad of other topics are not covered by this regulation.

The *Reed* Court explained that the determination of whether a regulation is "content-based" is a commonsense determination. Does the regulation draw distinctions based on the "message the speaker conveys." *Id.* On its face, this ordinance draws such a distinction.

Reed involved a sign ordinance restricting the size, duration, and placement of directional signs to church "or some qualifying event." This Court ruled that the ordinance treated a church's signs directing the public to its services differently than other types of signs. "On its face, the Sign Code is a content-based

regulation of speech." *Id.* at 164. The motivation for enacting the ordinance is irrelevant to the question of whether "strict scrutiny" applies. If a regulation imposes burdens on speech based on the subject that is discussed, it is content based and strict scrutiny applies.

The dissent in *City of Austin v. Regan National Advertising, LLC*, 596 U.S. 61 (2022), noted that the Court in that case upheld a regulation only because it "proscribes a sufficiently broad category of communicative content" such that it should not be seen as content based. *Id.* at 86 (Thomas, J., dissenting). But that concern is not present here. The regulation here is quite discreet, focusing exclusively on political speech regarding an election. Messages about other topics are not governed by this regulation.

The Court's decision in *Reed* provided much needed clarity to the analysis of content-based regulations. That analysis has yet to be applied to election-related speech. The Court should take the opportunity to do so here.

Regulation of election-related speech is regulation of speech at the core of the First Amendment. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."). Regulation of speech regarding a political campaign is not mere "self-expression," "it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Burson v. Freeman*, 504 U.S. 191, 196-97 (1992).

The regulation at issue in this case is not just generic political speech. It deals with a political campaign to make the laws governing the city. The First Amendment "'has its fullest and most urgent application'" to this type of speech. *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (*quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Attempts to regulate political speech should be reviewed with great skepticism. Our system of government is based on the precept that the people are not the subjects of those in power. *An Antifederalist*, Massachusetts Centinel, *reprinted in* The Documentary History of the Ratification of the Constitution, Ratification by the States, Vol. VII. The people are the sovereign and those holding political office are the servants. *Id.* Strict scrutiny is required of any regulation that burdens the ability of the people to engage in speech in political campaigns – whether for candidates or ballot measures.

The theme of Jefferson's first inaugural address was unity after a bitterly partisan election, and the goal he expressed was "representative government" — a government responsive to the force of public opinion. Thomas Jefferson, First Inaugural Address (1801) in 5 THE FOUNDERS CONSTITUTION at 152; Thomas Jefferson Letter to Edward Carrington (1787) in 5 THE FOUNDERS CONSTITUTION at 122 (noting, in support of freedom of the press, "[t]he basis of our government [is] the opinion of the people"). How is government to be responsive to public opinion if the government has the ability to burden and limit core political speech?

Madison too noted the importance of public opinion for the liberty the Founders sought to enshrine in

the Constitution. "[P]ublic opinion must be obeyed by the government," according to Madison, and the process for the formation of that opinion is important. James Madison, Public Opinion (1791) in 2 THE FOUNDERS CONSTITUTION at 73-74. Madison argued that free exchange of individual opinion is important to liberty. *Id.* The regulation here operates to limit speech seeking to influence public opinion. The city has decided that it is more important for voters to receive the government-mandated information than the speech of those sponsoring the advertisement.

Regulations burdening speech related to government affairs need to be reviewed under the most exacting standards. Only strict scrutiny is sufficient to protect this core purpose of the First Amendment. That is especially true of a regulation that singles out core political speech regarding an election for disfavored treatment. As Justice Thomas has noted, these types of regulations are often calculated to curtail and prevent exercise of First Amendment liberties. *Delaware Strong Families v. Denn*, 136 S.Ct. 2376, 2377 (2016) (Thomas, J., dissenting from denial of certiorari). The stakes are simply too high to allow a lesser form of scrutiny. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 480 (2010) (Thomas, J., concurring in part and dissenting in part).

This Court should grant review to hold that the correct standard of review for this ordinance is strict scrutiny because it is content based.

II. This Court Should Grant Review to Hold that Required Publication is Compelled Speech Subject to Strict Scrutiny.

In *Citizens United v. Federal Election Comm'n*, this Court considered the constitutionality of the Bipartisan Campaign Reform Act of 2002, including provisions requiring a "disclaimer," disclosing who is responsible for an ad not funded by a candidate or candidate's committee. 558 U.S. at 366. The Court applied the lower standard of "exacting scrutiny" because regulations "'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" *Id.*

Clever legislative drafting has latched on to this term "disclaimer" as a means of avoiding strict scrutiny review. But this Court does not allow government created labels to control its First Amendment analysis. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 627 (1996) (Kennedy, J., concurring in the judgment and dissenting in part). The ordinance under review does not require a "disclaimer" as that term is normally used. Instead, it requires publication of government-mandated information (the identity of donors and the identity of donors to committees that are donors). Further, it requires the publication of so much information that the regulation does impose a ceiling on campaign speech in the advertisements.

In any event, the *Citizens United* Court did not consider the Court's prior precedents on compelled speech such as *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

In *Riley*, the Court considered a statute that required fundraisers to "disclose to potential donors" the amount of donations retained by the fundraiser, among other factual matters. *Id*. at 784. This Court noted that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id*. at 795. On this basis, the Court ruled that the regulation should be viewed as a "content-based regulation of speech." *Id*.

This Court ruled that freedom from compelled speech and freedom from censorship, at the very least, receive equivalent protection under the First Amendment. *Id*. at 797. This compelled speech portion of the regulation was reviewed under strict scrutiny. *Id*. at 798. On its way to these holdings, this Court noted that it presumed that "speakers, not the government, know best both what they want to say and how to say it." *Id*. at 790-91. According to the Court, this means that government, regardless of motive, may not interfere in free and robust debate by dictating what speakers must say. *Id*. at 791. Although the law was meant to provide the public with information they might need before making a donation, "'[b]road prophylactic rules in the area of free expression are suspect.'" *Id*. at 801 (*quoting NAACP v. Button*, 371 U.S. 415, 438 (1963). Of particular relevance to this case, the *Riley* Court rejected a distinction between compelled statements of opinion and compelled statements of fact, "either form of compulsion burdens protected speech." *Riley*, 487 U.S. at 797.

It does not matter that the regulation here requires publication of "purely factual" information. This Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573

(1995), noted that compelled publication of purely factual, noncontroversial matter is permitted only in the context of *commercial* advertising. That is not the case here. The burdened speech is speech that is at the core of the First Amendment – political speech related to an election campaign. Further, the regulation mandates that the government message appear on the advertisement. The mandated speech takes up a significant portion of the advertisement and thus imposes a limit on what the speakers can say in their own advertisement. Limits on campaign speech like this cannot be tolerated. *Buckley*, 424 U.S. at 55; *see Colorado Republican*, 578 U.S. at 627-28 (1996) (Kennedy, J., concurring in the judgment and dissenting in part); 640-41 (Thomas, J., concurring in the judgment and dissenting in part).

As this Court recently noted in *303 Creative*, the government simply may not interfere with the speaker's desired message. 600 U.S. at 596. In this case, the regulation requires political campaigns to publish government-mandated information, and to do so in a way that interferes with the speaker's message. This is something that this Court has prohibited as a violation of the First Amendment. *Id*. at 586. The Court should grant review in this case to hold that the so-called "disclaimer" provision of the ordinance at issue is subject to strict scrutiny as compelled speech, a level of scrutiny that it fails.

CONCLUSION

The Court should grant review in this case to hold that regulations that single out political speech for special burdens are subject to strict scrutiny. Review is also required on the important issue of the level of scrutiny required for compelled speech regulations that burden political speech.

March 2024

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Constitutional Counsel Group
1628 N. Main St. #289
Salinas, CA 93906
(916) 601-1916
atcaso@ccg1776.com

Counsel for Amicus Curiae