No. 23-1316

IN THE

Supreme Court of the United States

DOUG SMITH, *et al.*,

Petitioners,

v.

RICHARD STILLIE, JR., IN HIS OFFICIAL CAPACITY AS CHAIR, ALASKA PUBLIC OFFICES COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ALASKANS FOR BETTER ELECTIONS, INC.

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the district court did not abuse its discretion by denying petitioners' motion for a preliminary injunction, where the district court determined that petitioners failed to develop a record establishing a likelihood of success on the merits of their First Amendment claims.

PARTIES TO THE PROCEEDING

Petitioners include Doug Smith, Robert Griffin, Allen Vezey, Albert Haynes, and Trevor Shaw, who are individual donors to independent expenditure organizations, as well as two independent expenditure organizations, Families of the Last Frontier and Alaska Free Market Coalition.

Respondents Richard Stillie, Jr., Suzanne Hancock, Eric Feige, Lanette Blodgett, and Dan LaSota, are named in their official capacities as members of the Alaska Public Offices Commission ("APOC" or "the Commission").

Respondent Alaskans for Better Elections, Inc. was formed in 2019 by a nonpartisan group of Alaskans to file "Alaska's Better Elections Initiative" ("Ballot Measure 2").

CORPORATE DISCLOSURE STATEMENT

Respondent Alaskans for Better Elections, Inc. is a non-profit entity. As such, Alaskans for Better Elections, Inc. hereby certifies that there is neither a parent corporation nor any publicly held corporation that owns 10 percent or more of the above-mentioned entity.

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INTRODUCTION

Petitioners fundamentally mischaracterize the legal issues considered and resolved by the court of appeals. In this interlocutory appeal, the only question presented is whether the district court abused its discretion in denying petitioners the preliminary injunction they sought in advance of the 2022 general election. Reviewing whether the district court erred in applying the well-established preliminary injunction factors from *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), to the incomplete record before it does not satisfy this Court's traditional certiorari standards. *See* Sup. Ct. R. 10.

The district court determined that petitioners failed to show a likelihood of success on the merits, and so did not reach "the remaining three *Winter* factors." Pet. App. 100a-101a. The Ninth Circuit concluded that petitioners did not meet the "heavy burden" of showing "that the district court abused its discretion when it concluded that the contribution-reporting and donor-disclaimer requirements were each substantially related and narrowly tailored to the government's asserted interest." Pet. App. 12a. Like the district court, the court of appeals also did "not reach the remaining *Winter* factors," as this was unnecessary to its holding. Pet. App. 12a. Thus, contrary to petitioners' assertions, the decision below did not turn on novel interpretations of law, but rather on the failure of their motion papers to establish the prerequisites for obtaining the extraordinary relief of a preliminary injunction.

The petition is also rife with factual assertions that are not established in the record. Such hypotheticals

provide an insufficient basis to find petitioners are likely to succeed on the merits of their First Amendment claims. The district court found on multiple occasions that petitioners "fail[ed] to provide evidence," including a single advertisement, to support the claims in their motion for preliminary injunction regarding the alleged burdens imposed by the challenged disclosure and disclaimer requirements. Pet. App. 73a, 95a-96a. Indeed, the court of appeals was clear that its ruling was limited to evaluating the propriety of denying a preliminary injunction based on a "factual record yet to be fully developed." Pet. App. 8a-9a. At petitioners' request, the district court proceedings on the merits of petitioners' underlying claims have been stayed pending this appeal. Pet. App. 40a-41a; D. Ct. Doc. 51 (July 22, 2022); D. Ct. Doc. 58 (Apr. 2, 2024). Petitioners also amended their complaint after briefing but before oral argument on the preliminary injunction. Pet. App. 57a-58a; D. Ct. Doc. 40 (June 6, 2022).

Certiorari is not warranted to review the interlocutory and case-specific assessment of petitioners' motion for "a preliminary injunction ahead of the 2022 election"—which is now moot. Pet. 5; Pet. App. 6a-8a. Particularly where petitioners no longer even request the equitable relief of a preliminary injunction, but instead ask this Court to decide the ultimate merits of their facial challenges before the courts below have had the opportunity to do so.

STATEMENT

1. On November 3, 2020, Alaska voters approved the "Alaska's Better Elections Initiative" ("Ballot Measure 2"). Pet. App. 3a, 102a. Ballot Measure 2 amended Alaska's campaign finance laws to "prohibit[] the use of dark money

by independent expenditure groups working to influence candidate elections in Alaska and requir[e] additional disclosures by these groups."[1] Pet. App. 102a.

Section 7 of Ballot Measure 2 amended Alaska Statute § 15.13.040 to require reporting for "[e]very individual, person, nongroup entity, or group that contributes more than $2,000 in the aggregate in a calendar year" to an independent expenditure organization. Pet. App. 108a. Contributors to qualifying organizations must now "report making the contribution or contributions on a form prescribed by the commission not later than 24 hours after the contribution" is made. Pet. App. 108a. Ballot Measure 2 also amended Alaska Statute § 15.13.390(a) to add civil penalties for contributors who fail to comply with Section 7. Pet. App. 113a-114a.

"[A]s a subpart of the contribution-reporting requirement," Pet. App. 5a, Ballot Measure 2 also created new requirements regarding "'dark money' and the 'true source' of contributions" to independent expenditure organizations. Pet. App. 62a, 116a; Alaska Stat. § 15.13.400(5), (19). These requirements prohibit those organizations from contributing or accepting "$2,000 or more of dark money," and prohibit contributions by intermediaries "without disclosing the true source of the contribution" as defined by Alaska Statute. Pet. App. 63a; Alaska Stat. § 15.13.074(b). Contributions funded by

1. Changes to Alaska's system of elections also included: (1) "repeal[ing] the * * * system of party primaries in favor of an open primary"; and (2) "adopt[ing] ranked-choice voting for the general election." Pet. App. 3a (quoting *Kohlhaas v. State*, 518 P.3d 1095, 1101 (Alaska 2022)). However, those provisions of Ballot Measure 2 are not at issue in this lawsuit.

"wages, investment income, inheritance, or revenue" are defined as a "true source," whereas funds derived from "contributions, donations, dues, or gifts" are from "an intermediary." Pet. App. 116a; Alaska Stat. § 15.13.400(19).

Finally, Ballot Measure 2 amended Alaska's on-ad disclaimer requirements for election communications. Prior to Ballot Measure 2, under Alaska law, any communication intended to influence an election was already required to include: "(1) the name and title of the speaking entity's principal officer; (2) a statement from that principal officer approving the communication; and (3) 'identification of the name and city and state of residence or principal place of business'" of the entity's three largest contributors. Pet. App. 5a (quoting Alaska Stat. § 15.13.090). Section 11 of Ballot Measure 2 amended these existing disclaimer requirements by requiring those disclaimers "remain onscreen throughout the entirety of the" "broadcast, cable, satellite, internet or other digital communication." Pet. App. 110a-111a. Section 12 of Ballot Measure 2 also added an onscreen disclaimer requirement to Alaska Statute § 15.13.090 for "a communication paid for by an outside-funded entity." Pet. App. 5a-6a, 111a.

Ballot Measure 2 became law in February 2021, and APOC adopted implementing regulations. Pet. App. 58a.

2. In April 2022, petitioners filed suit against the five APOC commissioners in their official capacities challenging "three sets of campaign finance provisions." Pet. App. 59a. Petitioners' facial challenge included previously-enacted provisions of Alaska law, as well as amendments in Ballot Measure 2 that "prohibit[ed] the use of dark money by independent expenditure groups

working to influence candidate elections in Alaska and requiring additional disclosures by these groups." Pet. App. 62a, 102a.

Shortly after filing their complaint, petitioners "filed a motion for a preliminary injunction seeking to enjoin the enforcement of several provisions of Alaska's campaign finance laws, including certain provisions added by Ballot Measure 2." Pet. App. 58a-59a. Petitioners alleged "that having to comply with these regulations in advance of the 2022 general election would irreparably harm their First Amendment rights." Pet. App. 6a. By the time the district court held oral argument on the motion for preliminary injunction, dispositive motions were pending, and petitioners had amended their complaint. Pet. App. 57a-58a & n.1.

3. The district court denied petitioners' request for a preliminary injunction. Pet. App. 57a-101a. The district court started its analysis by outlining the four *Winter* factors for granting a preliminary injunction. Pet. App. 64a-65a (citing 555 U.S. at 20). Because petitioners advanced only a facial challenge to provisions of Alaska election law, the district court concluded that they had the burden of demonstrating that a "substantial number of applications [of the challenged provisions] are unconstitutional, judged in relation to [their] plainly legitimate sweep." Pet. App. 66a (alterations in original) (quoting *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021)). The district court then assessed petitioners' likelihood of success on the merits for each of their three counts. Pet. App. 67a-100a.

In evaluating the donor reporting requirement,[2] all parties agreed that exacting scrutiny was the appropriate standard of review, meaning "there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" Pet. App. 67a (quoting *Ams. for Prosperity Found.*, 594 U.S. at 607). The district court noted that "[w]hile 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." Pet. App. 68a (quoting *Ams. for Prosperity Found.*, 594 U.S. at 608). And the district court found "that the State has a sufficiently important governmental interest in providing voters with information related to the source of funds received by independent expenditure entities," as recognized by this Court in *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).[3] Pet. App. 69a-71a.

In evaluating whether the donor reporting requirement was narrowly tailored to the informational interest, the district court considered the arguments that it was "unduly

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2. The challenged provisions of Alaska Statute § 15.13.040 discuss "contributions" and the "contributor" reporting requirements, Pet. App. 108a-109a, but because petitioners refer to this as a "donor" reporting requirement, that terminology will be used where addressing petitioners' arguments.

3. The trial court further found "that the State has an important governmental interest in deterring the appearance of and actual corruption in elections," but did "not separately address the anti-corruption interest" because it found petitioners were unlikely to prevail on their claim that the disclosure provisions are unconstitutional based on their substantial relation to the State's informational interest. Pet. App. 71a n.42 (citing *Buckley v. Valeo*, 424 U.S. 1, 67 (1976)).

burdensome and duplicative." Pet. App. 71a. The district court found that petitioners "fail[ed] to provide evidence from the previous 16 months since the donor disclosure requirement took effect to support their assertion that compliance has been burdensome," while APOC provided a "straightforward" online reporting form. Pet. App. 73a. And in determining whether this requirement was "unduly duplicative," the district court found that the donor disclosure requirement was "not completely duplicative," because a donor is in the best position to know the "true source" of a contribution, and "prompt disclosure by both parties maximizes the likelihood of prompt and accurate reporting of the information when it is most useful to the electorate." Pet. App. 74a-76a. Based on these findings, the district court concluded that "the donor disclosure requirement is closely tailored to providing valuable funding information to the State and its citizens." Pet. App. 76a.

With respect to petitioners' challenge to the on-ad disclaimer requirement, the district court concluded that *Citizens United*, which applied exacting scrutiny to both disclosures and disclaimers, set the appropriate standard. Pet. App. 79a-84a; Alaska Stat. § 15.13.090. Moreover, *Citizens United* already rejected petitioners' argument that strict scrutiny should apply, and concluded "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" Pet. App. 83a (alteration in original) (quoting 558 U.S. at 366).

The district court then found "providing voters with information related to the funding of political

advertisements by independent expenditure organizations" was a sufficiently important governmental interest and was narrowly tailored to the required disclaimers. Pet. App. 84a-96a. The district court found "persuasive" the First Circuit's reasoning in *Gaspee Project v. Mederos*, 13 F.4th 79, 91 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022), upholding on-ad disclaimers identifying the top five donors. Pet. App. 89a. Because of the value in "prompt disclosure," *Citizens United*, 558 U.S. at 371, and "[g]iven the modest nature of the burden imposed by the on-ad top-three donor disclaimer requirement and the fact that exacting scrutiny does not require that the government use the least restrictive means possible," the district court found that requirement withstood exacting scrutiny. Pet. App. 90a. The district court also found that the out-of-state funding disclaimers requirement survived exacting scrutiny because it was narrowly tailored to the informational interest.[4] Pet. App. 90a-93a.

The district court rejected petitioners' reliance on cases setting "an outright ban or cap on contributions," where the disclaimer did "not limit how much out-of-state donors can give, nor does it even directly burden out-of-state donors." Pet. App. 92a-93a. Rather, "independent expenditure entities that receive over a certain percentage of their funds from out-of-state donors" simply provide a disclaimer about their funding sources. Pet. App. 93a.

4. The petition constructs a strawman argument that this "disclaimer serves no anti-corruption interest." Pet. 29. The district court explicitly noted it would "only consider whether the disclaimers are justified based on the State's informational interest," because defendants did not assert any interest related to corruption. Pet. App. 85.

Finally, the district court considered petitioners' challenges to the "true source" requirement for contributions over $2,000, which the parties agreed were subject to exacting scrutiny. Pet. App. 96a-97a. The district court found "that Ballot Measure 2's 'true source' definition, together with its requirement that independent expenditure entities report these true sources to the State, are both substantially related and narrowly tailored to fulfill the State's informational interest in informing voters about the actual identity of those trying to influence the outcome of elections." Pet. App. 99a. Furthermore, in challenging the "true source" requirements, the district court found that petitioners "lack standing to maintain an action based on hypothetical scenarios by non-parties to this action," as courts should not speculate "when evaluating a facial challenge to a disclosure requirement." Pet. App. 99a.

4. The Ninth Circuit affirmed. Pet. App. 1a-26a.
a. After requesting supplemental briefing addressing jurisdictional issues, the court of appeals concluded that the appeal was moot because it "c[ould] not grant any relief that would address plaintiffs' concerns about irreparable harm around the 2022 election, which formed the basis of the preliminary injunction motion." Pet. App. 8a n.2. The Ninth Circuit nonetheless determined it retained jurisdiction under "the capable-of-repetition-yet-evading-review exception" to mootness. Pet. App. 6a-8a.

The Ninth Circuit held that the district court did not abuse its discretion in denying the preliminary injunction by concluding that petitioners had failed to demonstrate a likelihood of success on the merits of the two claims raised in their interlocutory appeal. Pet. App. 12a. The

Ninth Circuit emphasized that it was not empowered to substitute its judgment for that of the district court given the procedural posture, Pet. App. 16a n.6, nor was its decision a final determination on the merits of the underlying claims. Pet. App. 9a.

The Ninth Circuit noted that petitioners did not appeal the denial of their requested preliminary injunction as to "[t]he true-source requirement—which is a subpart of the contribution-reporting requirement." Pet. App. 5a-6a; Alaska Stat. §§ 15.13.040(r) & 15.13.400(19). The court of appeals also recognized that petitioners did "not contest that the individual-donor contribution-reporting requirement is substantially related to the state's asserted informational interest." Pet. App. 14a. With respect to petitioners' argument that Alaska's donor reporting requirement was duplicative, after "[p]utting aside that this argument goes more to the true-source requirement—from which plaintiffs 'do not seek relief * * * in this preliminary appeal,'" the court of appeals concluded that it was not duplicative of existing criminal laws prohibiting "straw-donor contributions" because the "true source" requirement "covers donations outside the limited reach of the criminal law." Pet. App. 14a-15a (second alteration in original). The court of appeals further concluded that the donor reporting requirement "works in concert with the recipient independent-expenditure organizations' disclosures to the Commission, helping to ensure that the information received by voters is reliable and accurate." Pet. App. 15a.

The Ninth Circuit also found that "there is nothing in the record to indicate that compliance with the reporting structure has been overly burdensome." Pet. App.

18a. Because courts "cannot consider 'hypothetical' or 'imaginary' cases to sustain a facial challenge," the court of appeals concluded "plaintiffs have failed to show that a substantial number of the applications of this contribution-reporting requirement are unconstitutional in relation to the law's 'plainly legitimate sweep.'" Pet. App. 18a-19a (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, at 449-50 (2008)).

The court of appeals also held that the district court did not abuse its discretion in concluding that petitioners were unlikely to succeed on the merits of their claim regarding on-ad disclaimers. Pet. App. 21a-25a. The court of appeals relied on *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003), and *Citizens United*, 558 U.S. at 369, "in which the Court found the informational interest sufficient to uphold disclosure and disclaimer requirements" against analogous challenges. Pet. App. 22a n.10. The Ninth Circuit further noted that the challenged disclaimers only include "information plaintiffs concede is already validly disclosed to the Commission." Pet. App. 25a. Under similar circumstances, the Ninth Circuit recently concluded in *No on E v. Chiu*, 85 F.4th 493, 511 (9th Cir. 2023), that where "disclosures are permissible" it was "not persuaded that a law requiring those same donors to be named in an on-ad disclaimer is insufficiently tailored." Pet. App. 25a.

b. Judge Forrest dissented in part. Pet. App. 26a-56a. In her view, the case was not moot, and so there was "no need to reach the capable-of-repetition-yet-evading-review exception to mootness." Pet. App. 32a. Nonetheless, Judge Forrest agreed "that it would be more efficient and effective to resolve the complex issues raised by this case on an appeal from a merits decision, rather than in

this interlocutory posture," particularly "with dispositive motions pending" before the district court. Pet. App. 40a-41a. Judge Forrest also "agree[d] that the district court did not abuse its discretion in concluding at this preliminary stage that Plaintiffs failed to show they were likely to succeed in establishing that Ballot Measure 2's on-ad disclaimers fail under exacting scrutiny." Pet. App. 26a. Nor did she dispute the district court's finding that imposing reporting obligations on individual donors "may as a general matter increase the accuracy of information." Pet. App. 49a n.8.

Judge Forrest's substantive disagreement with the majority was that, in her view, "the district court failed to properly weigh the burdens of the individual-donor reporting requirement against the degree to which Alaska's informational interest is actually served by requiring individual donors to report the same information that is collected from the entities that receive the donations." Pet. App. 55a. Judge Forrest would have "reverse[d] as to Plaintiffs' challenge to the individual-donor reporting requirement and remand[ed] for the district court to consider the remaining *Winter* factors." Pet. App. 55a-56a.

REASONS FOR DENYING THE PETITION

I. There is a fundamental mismatch between this vehicle and the questions presented in this interlocutory appeal.

This is an interlocutory appeal of the district court's denial of a preliminary injunction, which the Ninth Circuit reviewed for an abuse of discretion. Pet. App.

9a-10a. Yet petitioners' arguments do not even address the preliminary injunction standard. Petitioners instead mischaracterize the Ninth Circuit's decision as a final decision on the merits of their underlying facial challenge. Pet. 1, 6-30. Based on this false premise, petitioners ask this Court to "hold that Alaska's regime cannot withstand First Amendment scrutiny." Pet. 1.

Petitioners, however, made the choice to delay a decision on the merits of their amended complaint by requesting a stay of the underlying proceedings while they appealed the denial of this preliminary injunction. *See* D. Ct. Doc. 50 (July 21, 2022); D. Ct. Doc. 57 (Mar. 29, 2024). There likely would have been a final decision on the merits, as well as a complete record, had petitioners continued developing their underlying claims on the merits. Instead, petitioners ask this Court to "jump ahead of the lower courts" in interpreting the requirements of Alaska law based on their fears about what the law might require, while "the parties' positions are still evolving." *Moyle v. United States*, 144 S. Ct. 2015, 2019-23 (2024) (Barrett, J., concurring) ("dismissing the writ as improvidently granted" where the Court stayed the district court's preliminary injunction and granted certiorari before judgment, and concluded after merits briefing and oral argument that the cases were not "ready for the Court's immediate determination").

The absence of any merits ruling from the courts below makes this interlocutory appeal a poor vehicle for deciding these issues in the first instance. Pet. App. 8a-9a. This Court is "a court of review, not of first view," and ordinarily "decline[s] to consider * * * in the first instance" issues not adjudicated by the court below. *Expressions*

Hair Design v. Schneiderman, 581 U.S. 37, 48 (2017) (cleaned up) (declining to address whether regulation of speech "survived First Amendment scrutiny" where lower court had not addressed the issue). The Court should follow that course here.

Even when dissenting in part, Judge Forrest agreed "that it would be more efficient and effective to resolve the complex issues raised by this case on an appeal from a merits decision." Pet. App. 40a. This was especially true since petitioners appealed the district court's denial of a preliminary injunction "only as to the contribution-reporting and donor-disclaimer requirements," and not the "true-source requirement—which is a subpart of the contribution-reporting requirement." Pet. App. 4a-6a. Attempting to review just a portion of the requirements of these interrelated provisions to reach the merits would be a fraught and imperfect endeavor. As explained by the court of appeals, reaching the merits of petitioners' claim that donor contribution reporting is "duplicative of existing criminal laws" implicates "the true-source requirement," which petitioners elected not to appeal. Pet. App. 14a-15a. And severability of provisions is an issue of state law for the lower courts to address in the first instance, if necessary, after reaching the merits. Pet. App. 54a n.12.

Even assuming this Court were inclined to conduct a piecemeal review of a portion of the interrelated statutory provisions, there are material gaps in the factual record that would thwart review on the merits. The district court found that petitioners failed to introduce evidence to substantiate the assertions underlying their claims; yet petitioners now assume this Court would be able to find such facts in evaluating the merits.

For example, the second question presented in the petition asserts that "Alaska's extensive on-ad disclosure requirements * * * monopolize a majority of a given advertisement." Pet. i. But the district court found that Alaska law does not contain such a requirement, and petitioners did not provide a single advertisement that they had run, or intended to run, to demonstrate what percentage of the advertisement is in fact occupied with disclaimers. Pet. App. 95a-96a. Regardless, *Citizens United* rejected the argument that such disclaimers were impermissible because it forced the group to "devote four seconds of each advertisement to the spoken disclaimer," which in that instance was a full 40% of the 10-second ad. 558 U.S. at 368; Pet. App. 95a.

The same lack of factual basis in the record plagues petitioners' claim that the challenged donor reporting requirements "are onerous and unduly burdensome" and require "prophetic knowledge." Pet. 13-15. The district court found that petitioners failed to introduce any evidence from the 16 months the provisions had been in effect "to support their assertion" in this facial challenge. Pet. App. 71a-73a.

"Facial challenges are disfavored for several reasons," including because they "often rest on speculation" and "raise the risk of premature interpretation of statutes" based on "barebones records." *Wash. State Grange*, 552 U.S. at 450 (cleaned up). And "the Court has no power to enjoin the *lawful* application of a statute just because that statute might be unlawful as-applied in other circumstances." *Ams. for Prosperity Found.*, 594 U.S. at 620 (Thomas, J., concurring in the judgment). This Court has therefore cautioned, "[i]n determining whether a law

is facially invalid, [the Court] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50. Granting the petition would require this Court to do just that. And this concern is heightened here because this case involves not only a facial challenge, but the denial of a preliminary injunction on that facial challenge.

II. Because petitioners' request for a preliminary injunction is moot, they seek an advisory opinion on the merits of their underlying claims.

Petitioners no longer seek the preliminary injunction at issue in this interlocutory appeal. Therefore, even if this Court were to conclude that they were likely to succeed on the merits, this would not entitle them to a preliminary injunction. "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. Instead, the district court would still need to make findings on the remaining *Winter* factors, including the balance of the equities and consideration of the public interest, which the courts below have yet to reach. *Id.*; Pet. App. 12a, 100a-101a.

Regardless, petitioners' interlocutory appeal is moot: petitioners can no longer receive the relief that they sought in their motion for a preliminary injunction—an injunction to prevent irreparable harm that they alleged they would suffer in advance of "the November 2022 election." Pet. App. 6a-8a & n.2. As explained by Justice Scalia in discussing Article III's redressability requirement, "relief against prospective harm is traditionally afforded

by way of an injunction, the scope of which is limited by the scope of the threatened injury." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 204 (2000) (Scalia, J., dissenting). This interlocutory appeal to prevent injury in advance of the 2022 general election is therefore "moot even though the underlying appeal" may still "present[] a live controversy." *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016).

"To decide a moot case would be to give an advisory opinion," *Uzuegbunam v. Preczewski*, 592 U.S. 279, 295 (2021) (Roberts, J., dissenting). Petitioners effectively ask this Court to issue an advisory opinion that they are likely to succeed on the merits of their underlying First Amendment claims. "It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability." *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023); *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (explaining "federal courts do not issue advisory opinions."). Although the "purpose of such interim equitable relief is not to conclusively determine the rights of the parties," but is instead "to balance the equities as the litigation moves forward," the petition asks this Court to reach the ultimate merits. *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). This Court need not provide an advisory opinion weighing in on the merits of petitioners' underlying First Amendment claims in this facial challenge to provisions of Alaska election law before the courts below have had an opportunity to do so.

III. The decision below is correct and does not even arguably conflict with the decisions of other circuit courts.

Although the petition broadly attacks Ballot Measure 2, the issues properly presented for review in this interlocutory appeal are limited. Petitioners only appealed the denial of the preliminary injunction as to donor disclosure and on-ad disclaimer requirements; the "third pillar of Ballot Measure 2," which "is the 'true source' requirement," was not appealed. Pet. 4. The issues presented for review are further narrowed by petitioners' agreement that exacting scrutiny is the correct legal standard to apply in reviewing the donor disclosure requirements. Pet. 10-11; Pet. App. 67a. Petitioners nonetheless insist that the Ninth Circuit created a circuit conflict by applying exacting scrutiny in reviewing the likelihood of success on the merits of petitioners' donor disclosure claims—apparently taking issue with the application of an agreed-upon legal standard to the incomplete factual record. Pet. 8-10.

Regarding on-ad disclaimers, petitioners argue either that the disclaimers should be subject to strict scrutiny—without squarely presenting this issue in their questions presented—or that these disclaimers fail to survive exacting scrutiny based on hypotheticals and speculation in this facial challenge in the electioneering context. Pet. i, 18-30. These arguments do not warrant granting certiorari when this Court has already held that both disclosure and disclaimer requirements are subject to exacting scrutiny. *Citizens United*, 558 U.S. at 366-67; *Buckley*, 424 U.S. at 64-65.

The Ninth Circuit did not err in affirming the district court's denial of petitioners' motion for preliminary injunction. Pet. App. 1a-26a. The district court correctly applied exacting scrutiny in evaluating the likely merits of petitioners' First Amendment facial challenges, and found that petitioners' reliance on hypothetical burdens did not demonstrate that the challenged disclaimer and disclosure requirements were not narrowly tailored to the sufficiently important informational interest of the State of Alaska and the public. Pet. App. 57a-101a.

1. Petitioners incorrectly assert that the Ninth Circuit's decision creates a "conflict" with other circuits regarding the legal standards applicable to reviewing the donor disclosure requirements. Pet. 8. Even putting aside the fact that the Ninth Circuit's decision was not a final judgment on the merits, petitioners do not identify a circuit split in legal standards that granting the petition for certiorari would allow this Court to resolve. Pet. 8-10. The Ninth Circuit correctly described exacting scrutiny as requiring "that the contribution-reporting and donor-disclaimer requirements were each substantially related and narrowly tailored to the government's asserted interest." Pet. App. 12a. Instead, petitioners take issue with the fact-specific conclusions courts have reached in applying exacting scrutiny to disclosures.

In *Wyoming Gun Owners v. Gray*, the Tenth Circuit voided a disclosure requirement under exacting scrutiny "as applied" to Wyoming Gun Owners, while affirming dismissal of a facial challenge and several pre-enforcement challenges. 83 F.4th 1224, 1229, 1251 (10th Cir. 2023). The Tenth Circuit noted that to survive exacting scrutiny, there must be "a substantial relation between the disclosure

requirement and a sufficiently important governmental interest," *Citizens United*, 558 U.S. at 366, and that the disclosure must be "narrowly tailored to the government's asserted interest," *Ams. for Prosperity Found.*, 594 U.S. at 608. *Wyoming Gun Owners*, 83 F.4th at 1243-44.

Similarly, in *Iowa Right to Life Committee, Inc. v. Tooker*, the Eighth Circuit reviewed a grant of summary judgment on multiple claims, including challenges to specific disclosure requirements in Iowa law. 717 F.3d 576, 583 (8th Cir. 2013). The Eighth Circuit applied exacting scrutiny to determine whether each disclosure requirement bore "a substantial relation to Iowa's sufficiently important interest in keeping the public informed." *Id.* at 595-96. The Ninth Circuit, just like the Eighth and Tenth Circuits in *Tooker* and *Wyoming Gun Owners* respectively, correctly applied exacting scrutiny as articulated by this Court. *Citizens United*, 558 U.S. at 366-67; *Ams. for Prosperity Found.*, 594 U.S. at 608, 611.

Finally, petitioners' reliance on *Van Hollen v. FEC* is inapposite. 811 F.3d 486 (D.C. Cir. 2016). In *Van Hollen*, at issue was whether to uphold an FEC rulemaking. *Id.* at 488. The D.C. Circuit concluded it "clears the *Chevron* Step Two hurdle," and further survived review under a "very deferential scope of review" consistent with *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). *Van Hollen*, 811 F.3d at 492-503. The D.C. Circuit's analysis under *Chevron* Step Two—an interpretative approach this Court recently overruled in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)—and *State Farm* in upholding an FEC rulemaking does not even arguably conflict with applying exacting scrutiny to review the challenged disclosure requirements.

Petitioners do not identify a circuit split. Pet. 8-10. Instead, petitioners disagree with the court of appeals' application of agreed-upon legal standards to the record before it, a record that—due to the procedural status of the case—was not even complete.

2. Petitioners argue that strict scrutiny should apply to the challenged disclaimers, but do not reconcile this argument with *Citizens United*, which upheld on-ad disclaimers in the electioneering context under exacting scrutiny. Pet. 18-30. *Citizens United* concluded that both "[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." 558 U.S. at 366 (cleaned up). Thus, contrary to petitioners' assertions, the challenged disclaimers do not contain a contribution limit or restriction that prevents speech. Pet. App. 16a-17a. Accordingly, the cases petitioners rely on regarding contribution limits are irrelevant to evaluating the challenged provisions.[5] Pet. 28-29; Pet. App. 91a-93a. Furthermore, this case involves disclaimers on advertisements within the electioneering context, unlike the cases in commercial and other contexts relied on by petitioners.[6] Pet. 26-27; Pet. App. 94a-96a.

5. *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014) (addressing aggregate contribution limits on top of individual contribution limits); *Thompson v. Hebdon*, 7 F.4th 811, 816, 827 (9th Cir. 2021) (addressing contribution limits); *Landell v. Sorrell*, 382 F.3d 91, 98 (2d Cir. 2002), *rev'd sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006) (same).

6. *See, e.g., Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (enjoining enforcement of requirement that crisis pregnancy centers "inform women how they can obtain state-subsidized abortions"); *Am. Beverage Ass'n v. City*

Petitioners' argument that courts below erred in applying exacting scrutiny to the challenged disclaimers fails.

Finally, petitioners' arguments regarding the burdens imposed by these disclaimers rely heavily on hypothetical facts and broad speculation about the lack of "any limiting principle," not the requirements of the challenged disclaimers. Pet. 25-27. As the district court found, Alaska's disclaimers "are not required by law to take up a certain percentage of ad space; nor [did petitioners] offer evidence that shorter or less prominent disclaimers would serve the State's informational interest equally well." Pet. App. 95a. Petitioners further failed to "supply one of their advertisements" or other "evidentiary support" to demonstrate that a substantial number of the applications of the disclaimer requirement are unconstitutional when judged in relation to the law's plainly legitimate sweep. Pet. App. 96a. The Ninth Circuit panel unanimously "agree[d] that the district court did not abuse its discretion in concluding at this preliminary stage that Plaintiffs failed to show they were likely to succeed in establishing that Ballot Measure 2's on-ad disclaimers fail under exacting scrutiny." Pet. App. 26a. The courts below did not err in concluding that the motion for preliminary injunction lacked evidentiary support to demonstrate a likelihood of success on the merits in this facial challenge to the disclaimer requirements.

& Cnty. of San Francisco, 916 F.3d 749, 756-58 (9th Cir. 2019) (invalidating city ordinance requiring on-ad health warnings for sugar-sweetened beverages in commercial speech context); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (affirming grant of summary judgment to companies challenging regulations requiring cigarette packages to contain warnings and graphics in commercial speech context).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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