C.A. No. 20-15456

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YES ON PROP B, COMMITTEE IN SUPPORT OF THE EARTHQUAKE SAFETY AND EMERGENCY RESPONSE BOND and TODD DAVID,

Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant-Appellee.

PLAINTIFFS-APPELLANTS' OPENING BRIEF

Appeal from the Order of the United States District Court
for the Northern District of California
D.C. No. 20-cv-00630-CRB
(Honorable Charles R. Breyer)

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April 21, 2020

CORPORATE DISCLOSURE STATEMENT

Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond, a recipient committee organized under the laws of the State of California, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3). Venue was proper pursuant to 28 U.S.C. § 1391(b).

On February 20, 2020, the United States District Court for the Northern District of California enjoined San Francisco from "enforcing the disclaimer laws adopted through Proposition F against Yes on Prop B's proposed 5" by 5" newspaper advertisements, smaller 'ear' advertisements, and spoken disclaimers on digital or audio advertisements of thirty seconds or less," but "otherwise denied" YPB's "requested injunctive relief." ER 17. Accordingly, as YPB timely appealed, jurisdiction is proper before this Court. 28 U.S.C. § 1292(a)(1) ("jurisdiction of appeals from…orders of the district courts of the United States…granting, continuing, modifying, refusing or dissolving injunctions").

ISSUE PRESENTED FOR REVIEW

The issue presented for review is: Do the challenged compelled speech requirements, in whole or in part, violate the freedoms of speech and association protected by the First and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment, forbids laws "abridging the freedom of speech…or the right of the people peaceably to assemble." U.S. Const. amend. I.

The relevant statutory provisions of the San Francisco Campaign & Governmental Conduct Code ("S.F. Code") are available in the Addendum.

STANDARD OF REVIEW

"Plaintiffs seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest." *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). "The Ninth Circuit weighs these factors on a sliding scale," *id.*, where "[l]ikelihood of success on the merits is a threshold inquiry and the most important factor." *Innovation Law Labs, Inc. v. Wolf*, 951 F.3d 1073, 1080 (9th Cir. 2020).

Additionally, even "'if a plaintiff can only show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 375 (9th Cir. 2016) (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (emphasis removed)).

"In general," this Court "review[s] the denial of a preliminary injunction for abuse of discretion." *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004).

But "[w]hen the district court is alleged to have relied on an erroneous legal premise," this Court "review[s] the underlying issues of law *de novo*." *Id.*

STATEMENT OF THE CASE

Appellants challenge, both facially and as-applied, San Francisco's requirement that political ads carry, on the face of the communication, a lengthy government-drafted script.

A. "Disclosures" and "Disclaimers": A Brief Review of Campaign Finance Jargon

This case turns on the distinction between two types of campaign finance requirements: "disclosures" and "disclaimers." Both disclosures and disclaimers are intended to give information to the voters concerning entities conducting election-related activity. But while these tools share superficial similarities, and have been confusingly named, they are factually, substantively, and constitutionally different.

In campaign finance parlance, "disclosure" is shorthand for the reports that organizations must file when advocating for or against a candidate or ballot measure. These reports include financial disclosures, including, in most cases, the names of donors supporting that organization's political or electoral advocacy. The government then makes that information available to the public in order to "help[] voters to define more of" the major financial and ideological "constituencies" behind candidates or ballot measures. *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (*per curiam*). In nearly all cases, including in San Francisco, this information is placed on a fully-

searchable internet database available to any voter, journalist, or researcher who wants to learn more about these organizations.[1]

As a general matter, "[d]isclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010); *Heller*, 378 F.3d at 994 ("reporting and disclosure requirements have been consistently upheld as comporting with the First Amendment based on the importance of providing information to the electorate"); *but see Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016) (striking down disclosure reporting for group intending to raise and spend no more than $3,500 on election-related activity). For these disclosures to be effective, voters need to know the sponsor of a given ad or other communication so they can then search for that speaker in the online database.

That is where "disclaimers" come in.

"Disclaimers" are the "paid for by" attributions placed on political ads. While "[i]n everyday language, a disclaimer is a repudiation or denial of responsibility," in

[1] Originally, of course, those wishing to get this information had to go to the FEC's offices, or the office of the relevant local regulator, and copy the disclosure information. The first federal disclaimers, in fact, informed the audience how to obtain those disclosure forms. Federal Election Campaign Act of 1974, Pub. L. 93-443 § 205, 88 Stat. 1263, 1278 (Oct. 15, 1974) (""A copy of our report is filed with the Federal Election Commission and is available for purchase from the Federal Election Commission, Washington, D.C.""). Internet disclosure has made it far easier to obtain this information, and has made it available to the general public in addition political professionals and dedicated journalists.

"election code[s], however, that word denotes a statement *accepting* responsibility or authorship—a *pro*claimer…rather than a *dis*claimer." *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., *dubitante*) (emphasis in original). While the term is awkward, it continues to be a central part of campaign finance law precisely because a separate term is needed to distinguish between compelled, on-communication messages and the mere filing of financial disclosure reports with the government.

Disclaimers, since they compel speech, are far more "constitutionally suspect" than disclosure reports, ER 12, especially when the disclaimer goes beyond merely identifying a speaker and fundamentally "'alters the content' of [Appellants'] speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. __; 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*") (quoting *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795 (1988)). Usually, once a disclaimer takes that wayward, "constitutionally determinative" step, it cannot coexist with the First Amendment. *Heller*, 378 F.3d at 991.

At their best, then, disclaimers prevent anonymous political spending by letting the viewer of an ad know which person or entity sponsored it. That information works together with comprehensive disclosure reports, which provide detailed financial information concerning that person or entity. *Infra* at 48 (describing federal disclaimer regime); *Citizens United*, 558 U.S. at 368; *cf.*

McIntyre v. Ohio Elections Comm'n, 514 U.S 334 (1995) (striking Ohio disclaimer requirement applying to a lone pamphleteer). At their worst, however, disclaimers hijack a speaker's message and force ad purchasers to substitute the government's preferred message for their own. *Talley v. Calif.*, 362 U.S. 60 (1960) (striking down more expansive disclaimer requirement); *Riley*, 487 U.S. at 804 (same); *Heller*, 378 F.3d at 1002 (striking down disclaimer regime reporting financial supporters on face of ad); *Calif. Republican Party v. Fair Political Practices Comm'n*, 2004 U.S. Dist. LEXIS 22160 (E.D. Cal. 2004) ("*Calif. Republican*") (same).

B. Appellants and Their Activities

Appellants are Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond ("YPB"), a recipient committee organized under California law and subject to San Francisco's campaign finance system, and Todd David, the committee's principal officer and treasurer. Mr. David, a local political activist, formed YPB "primarily…to support the passage of Proposition B on the March 3, 2020 ballot in the City and County of San Francisco," which "would authorize…issu[ing] $628,500,000 in bonds to improve San Francisco's fire, earthquake and emergency response facilities and services." ER 66; ¶ 6, 8 (David Decl.). In support of this aim, YPB intended "to spend its modest budget on cost-effective forms of advertising, including six-, fifteen-, and thirty-second digital video advertisements, yard or window signs, and Chinese language newspaper ads."

ER 3; ER 42-54 (exhibits of ads attached to the complaint).[2] YPB's proposed activities, however, trigger "a plethora," ER 1, of campaign finance laws.

C. San Francisco's Campaign Finance Rules

San Francisco comprehensively regulates political speech through both disclosure and disclaimer requirements.

i. San Francisco's disclosure rules for political committees.

Both California and San Francisco require persons purchasing political ads in San Francisco to file donor disclosures with the San Francisco Ethics Commission ("Ethics Commission"), S.F. Code § 1.112, and if the speaker is a primarily formed ballot measure or independent expenditure committee, donor disclosures must be filed within twenty-four hours of receiving contributions of $1,000 or more during the 90 days before an election. Cal. Gov't Code § 84203; S.F. Code § 1.106.[3] The Ethics Commission is obligated to make all these donor disclosure statements accessible to the public "through its website," which is user-friendly and fully searchable.[4] S.F. Code § 1.110(a). Although comprehensive donor disclosure "in

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[2] The ads were provided to the district court in their actual size. For ease of readability, they have been re-sized to fit standard 8.5" x 11" paper for the Excerpts of Record.

[3] YPB is regulated at both the state and local levels.

[4] *Available at*: https://sfethics.org/disclosures/campaign-finance-disclosure.

itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," *Buckley*, 424 U.S. at 64, YPB does not challenge any aspect of the City and County's disclosure system.

ii. San Francisco's political ad disclaimer regime

"[A]ll committees making expenditures which support or oppose any candidate for City elective office or any City measure," must include disclaimers on their advertisements. S.F. Code § 1.161(a). San Francisco's disclaimer laws, which were significantly amended last year, require far more than an attribution statement.[5]

In 2019, San Francisco introduced a sweeping new disclaimer regime, largely through Proposition F,[6] "a proposed ordinance" put before the voters by five members of the 11-person San Francisco Board of Supervisors. ER 57 ("How 'F' Got on the Ballot"). The official ballot statement by Proposition F's proponents contended that, despite San Francisco's disclosure system, the City and County's "elections are awash in unlimited Dark Money from Corporate SuperPACs. Voters

[5] Before the 2018 and 2019 changes to the law, San Francisco required disclaimers to (a) provide a statement of authorship, (b) a list of the top three contributors giving $10,000 to the speaker and (c) direct viewers to further "[f]inancial disclosures…available at sfethics.org." These requirements largely, but not entirely, cloned California's statewide disclaimer rules, which are not before the Court. *See, e.g.* Cal. Gov't Code §§ 84501(c); 84502(a); 84503(a); 84504.1; 84504.2.

[6] On May 22, 2018, the City and County added the requirement that audio and video ads contain a lengthy verbal disclaimer. YPB challenges this requirement in addition to the new rules imposed by Proposition F.

are prevented from making fully informed choices by the lack of strong disclosure laws, which allows shell committees to hide the true source of these Corporate PAC advertisements." ER 58 ("Proponent's Argument"). Proposition F's proponents argued that voting in favor of the ordinance would be a way to oppose "the Republican Party of Donald Trump" and, once enacted, the disclaimers would not chill speech. ER 59 ("Rebuttal to Opponent's Argument"). Proposition F was enacted with 76.89 percent of the vote.

Due to these changes, disclaimers in San Francisco must include substantial information:

(1) The City and County requires a speaker to provide an attribution statement—that is, a standard disclaimer. ER 3 ("Ad paid for by Yes on Prop B, Committee in support of the Earthquake Safety and Emergency Response Bond").

(2) The committee is also required to list the top three contributors that gave at least $5,000 to the speaker in the past 12 months, as well as the specific amounts contributed, information already made public by the Ethics Commission through disclosure reports. S.F. Code § 1.161(a)(1).

(3) If a top-three contributor ("primary contributor") happens to be a committee, this data must be further supplemented with additional information from the Ethics Commission's database. In that case, the script

requires the committee to list the top two contributors ("secondary contributors") giving "$5,000 or more" to the primary contributor. *Id.*[7]

(4) Finally, the ad must close with the statement, "Financial disclosures are available at sfethics.org." S.F. Code § 1.161(a)(2).

This disclaimer must be written out in 14-point font[8] on mail and print ads that are individually distributed and, for television and oversized print ads (such as billboards), each line of the disclaimer must take up at least 4 and 5 percent, respectively, of the height of the ad. Cal. Gov't Code §§ 84504.1(b)(1), 84504.2(b); S.F. Code § 1.161(a). Also, when a committee chooses to make an audio or video communication via radio, television, or the internet, the disclaimer must be spoken aloud. S.F. Code § 1.161(a)(5).[9] When a spoken disclaimer is required, this entire

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[7] It was undisputed below that all of these reportable secondary contributors made their original contributions before Mr. David had even formed YPB. These secondary contributors gave their money to YPB's *actual* donors before YPB even existed, and so before the secondary contributors could have any knowledge that their money might ever reach YPB. For example, YPB must list Salesforce as a secondary contributor that gave $300,000, because Salesforce gave that sum to Yes on A, Affordable Homes for San Franciscans Now—one of the donors, in turn, to YPB. Yet YPB raised less than $300,000, *total*, from all sources.

[8] The law previously required 12-point font.

[9] Ethics Commission regulations slightly tweak these requirements. S.F. Reg. § 1.161-3(a). Primary contributors must be numbered (1, 2, 3), secondary contributors must be introduced with the phrase "contributors include," and dollar amounts must be written out next to a donor's name in parentheses. However, under the law, dollar amounts are not required to be included in any spoken disclaimer. S.F. Code § 1.161(a)(5).

disclaimer must be read *first*, not only privileging the government's required communication over the speaker's preferred content, but doing so in a way that could lead recipients to tune out and ignore that message entirely. *Id*.

For the ads that YPB wished to run in support of Proposition B, the required verbal statement was:

> Ad paid for by Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond. Committee major funding from: 1. United Democratic Club of San Francisco – contributors include San Francisco Association of Realtors, Committee on Jobs Government Reform Fund; 2. Edwin M. Lee Democratic Club Political Action Committee – contributors include Committee on Jobs Government Reform Fund; 3. Yes on A, Affordable Homes for San Franciscans Now!– contributors include Salesforce.com, Inc., Chris Larsen. Financial disclosures are available at sfethics.org.[10]

[10] For YPB's proposed print ads, the disclaimer would look like this:

> Ad paid for by Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond. Committee major funding from: 1. United Democratic Club of San Francisco ($5,000) – contributors include San Francisco Association of Realtors ($6,500), Committee on Jobs Government Reform Fund ($5,000), 2. Edwin M. Lee Democratic Club Political Action Committee ($5,000) – contributors include Committee on Jobs Government Reform Fund ($5,000), 3. Yes on A, Affordable Homes for San Franciscans Now! ($5,000) – contributors include Salesforce.com, Inc. ($300,000), Chris Larsen ($250,000) Financial disclosures are available at sfethics.org.

Examples of YPB's proposed print and video ads were attached to the complaint and are available in the Excerpts of Record at ER 42-54.

Reading this disclaimer aloud takes approximately 28 seconds, or 93.3 percent of the archetypal[11] 30-second campaign ad, 46.7 percent of a 60-second ad, and 31.1 percent of a 90-second communication.[12] For the types of printed ads that YPB sought to distribute, it is undisputed that this printed disclaimer would, regardless of format, take up over 30 percent of the ad. ER 3. For smaller "ear" advertisements and five-by-five newspaper ads, YPB discovered that these disclaimers would consume nearly the entire communication. *Id*. ("100% of the most common and economical ads printed in Chinese language newspapers (so-called 'ear' ads), 75 to 80% of a 5" by 5" ad, and 31 to 33% of a 5" by 10" ad. It occupies approximately 35% of a typical 14" by 22" horizontal window sign, and approximately 35 to 38% of one side of a typical 5.5" by 8.5" palm card").

If YPB, or any other committee, fails to comply with San Francisco's disclaimer requirements, it and its officers face substantial criminal and civil

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[11] "While we would hope that California voters will independently consider the policy ramifications of their vote, and not render a decision based upon a thirty-second sound bite they hear the day before the election, we are not that idealistic nor that naive." *Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003).

[12] For comparison, in 2018, "S.F. Kids vs. Big Tobacco," an organization dedicated to opposing Proposition C, one of five measures of the ballot that year, ran several 30-second advertisements. *See* "JUUL's Record," https://www.youtube.com/watch?v=RKF0sQkQXKM; "Time," https://www.youtube.com/watch?v=VobAmmT_F7U. But were that group to run those same ads today, it would likely need to purchase far more time to convey the exact same message.

penalties, which can include jail time and a $5,000 fine per violation. S.F. Code § 1.170(a-c). Committee treasurers, such as Mr. David, "are responsible for complying with this Chapter and may be held personally liable for violations by their committees." S.F. Code § 1.170(g).

YPB filed suit in the United States District Court for the Northern District of California on January 28th, 2020, and moved for a preliminary injunction that same day. ER 90. YPB sought relief, pursuant to the First and Fourteenth Amendments, from San Francisco's disclaimer obligations, including the 14-point font requirements for print disclaimers, the spoken disclaimer rules for video and audio ads, and the donor disclosure requirements for secondary contributors for all ads. *See* ER 3-4. It also sought facial invalidation of both the disclaimer rules adopted by Proposition F and the rules passed by the Board of Supervisors on May 22, 2018. *Id*.

D. District Court Proceedings

The Parties fully briefed YPB's motion for preliminary relief, and oral argument was heard on February 14. ER 90-92. Six days later, the district court issued its order and opinion. ER 1-17.

Once in federal court, the City and County promptly conceded that the challenged on-communication disclaimers were unconstitutional in a substantial number of applications. Specifically, the Government determined that when "disclaimers take up more than 40% of the space or run time of a given ad they

impose an unconstitutional burden on political speech." ER 6. The district court agreed, and accordingly enjoined the law as it applied to YPB's five-by-five newspaper ads, "ear" Chinese language newspaper ads, and "digital/audio advertisements 30 seconds or less in length." *Id*. But the district court rejected YPB's facial attack on the disclaimer regime and its remaining as-applied challenges to the font size, secondary donor requirements, and proposed five-by-ten Chinese language newspaper ads, window signs, and palm cards. ER 17.

Applying exacting scrutiny, the district court determined that the disclaimer regime substantially furthered the Government's interest in supplying relevant information to the electorate. ER 5-7 (citing *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010)). It first rejected the challenge to the new font size requirements due to the "plausib[ility]" of a larger disclaimer's utility. ER 8. The court then held that Supreme Court precedent "established that a disclaimer may commandeer a prominent position in a political ad without offending the First Amendment," citing the *Citizens United* decision. ER 8. It further held that this Court's recent *en banc* decision in *American Beverage* did not apply. ER 9-10.

Turning to YPB's specific complaint against San Francisco's secondary donor disclaimer, the district court upheld the provision. Specifically, it held that *Citizens United* had resolved any constitutional issues with the reporting of redundant or duplicative donor information on the face of the ad, ER 12, and that merely requiring

primary donor reporting neither "provide[s] useful information" nor is "particularly revealing" without knowing more about the primary donor's own financial supporters. ER 11 (citation and quotation marks omitted, brackets supplied). The court also rejected concerns about forced association or the reporting of misleading information, concluding that a Supreme Court decision about ballot design, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) ("*Grange*"), "flatly rejected" any "voter confusion theory of association," ER 13, and that other campaign finance and forced association cases were distinguishable. ER 13-14.

The district court did concede that Appellants had presented evidence that the secondary donor requirement imposes a chilling effect, but found that the overall danger of chill was "modest." ER 15-16 (citation and quotation marks omitted).

Finally, in a four-paragraph analysis, the district court rejected YPB's facial attack on the statute. ER 16-17.

YPB timely filed its appeal on March 17, 2020. ER 93.

F. Recent Developments

Proposition B was placed before the voters on March 3, 2020, and it passed by the required two-thirds vote. On April 16, Mr. David made a public statement about the instant case and YPB's future activities to the *Bay City Beacon*, stating

that "[t]here are still many issues the Prop B Committee cares deeply about and it plans to be active in November's election and beyond."[13]

SUMMARY OF ARGUMENT

In San Francisco, it is unlawful to run a political advertisement unless it begins with a lengthy, government-directed script. In this case, that message occupied—at the speaker's expense—28 seconds of a typical 30-second ad, and between 31 percent and 100 percent of the space available in a printed advertisement.

In addition to being extraordinarily costly and burdensome, San Francisco's compelled speech regime is a poor fit with its stated goal. In its quest to "assist voters in making informed decisions," ER 58 ("Proponent's Argument"), the City and County has gone beyond state law that already requires the on-communication disclosure of the top donors who directly support Yes on Prop B's ("YPB") efforts. Instead, the donors to *those* donors must also be disclosed, even though those contributions were given to other organizations, for other purposes. In Appellants' case, all of these "secondary contributors" made their contributions to other committees before YPB even existed.

[13] Bay City Beacon Staff, "Yes on Prop B Campaign Appeals District Court's Ruling," The Bay City Beacon, Apr. 16, 2020; *available at*: https://www.thebaycitybeacon.com/politics/yes-on-prop-b-campaign-appeals-district-courts-ruling/article_befcd4c8-800d-11ea-9d39-6793342792ee.html

These requirements cannot be reconciled with the First Amendment, as this Court has twice recognized by invalidating less burdensome regimes. And while compelled reporting of a political committee's donors ("disclosure"), and the government's publication of that information, is often on solid constitutional ground, the commandeering of expensive advertising space is another matter. The Supreme Court has allowed simple "paid for by" attribution statements to survive constitutional scrutiny, but it has never blessed on-communication donor disclosure at all, much less the lengthy and misleading approach San Francisco has mandated.

Under controlling law in this Circuit, this "distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements" is "constitutionally determinative" and forbids the type of on-communication disclosure San Francisco has demanded. *Am. Civil Liberties U. of Nev. v. Heller*, 378 F.3d 979, 991 (9th Cir. 2004). In fact, the kinds of burdens imposed here are unconstitutional even under the lower standard of scrutiny applied to purely commercial speech. *Am. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749, 757 (9th Cir. 2018) (*en banc*) ("…a government-compelled disclosure that imposes an undue burden fails for that reason alone").

Nevertheless, rather than facially enjoining San Francisco's troubled ordinance, as the Constitution requires, the district court permitted only a narrow injunction protecting one ballot committee, in a single election. And even then, the

court only preliminarily enjoined the law as to a limited subset of political advertisements, albeit a subset that includes the overwhelming majority of ordinary political advocacy.

Because Appellants are likely to prevail on the merits, both facially and as-applied, and because San Francisco's law is substantially overbroad "judged in relation to" its "plainly legitimate sweep," this Court should reverse and remand with instructions to enjoin that law in its entirety. *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973).

ARGUMENT

I. THIS CASE IS PROPERLY BEFORE THIS COURT

A federal court may lose "jurisdiction to reach the merits of a claim when the court can no longer effectively remedy a present controversy between the parties." *ProtectMarriage.com – Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014). Election-related challenges, however, are a well-established "exception to [the] mootness" doctrine, as an example of cases that are "capable of repetition, yet evading review.'" *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) ("*WRTL II*") (compiling cases); *see also Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 528 n.7 (9th Cir. 2015) (applying in a ballot measure case); *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007) (applying in a recall campaign case).

This "exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (internal quotation marks omitted). As this Court has "recognized, the exception frequently arises in election cases because the inherently brief duration of an election is *almost invariably* too short to enable full litigation on the merits." *Brumsickle*, 624 F.3d at 1002 (citation and quotation marks omitted, emphasis supplied). Both this Court and the Supreme Court have held that periods ranging from 90 days to two years are "insufficient to allow full review." *Am. Civil Liberties U. v. Lomax*, 471 F.3d 1010, 1017 (9th Cir. 2006) (collecting cases). San Francisco's Charter allows for an election on an initiative in as little as 105 days after a valid petition is submitted, and even less if there is an upcoming general or statewide election. S.F. Charter § 14.101. Given the short time available to challenge an initiative in San Francisco, the first prong applies here. Indeed, the district court had time before the election only to address the request for a preliminary injunction—hardly "full litigation on the merits." *Brumsickle*, 624 F.3d at 1002 (internal quotation marks omitted).

YPB and Mr. David also meet the second prong's reasonable expectation requirement. In *Davis*, the plaintiff made his jurisdiction-sustaining statement not just after the litigation began, or even after the district court decision, but only before

his U.S. Supreme Court *reply* brief. 554 U.S. at 736 (noting his intent to "self-finance another bid for a House seat"). On that basis alone, the Supreme Court was "satisfied that [his] facial challenge [was] not moot." *Id*.

In fact, in circumstances very similar to those here, this Court required only a footnote to find standing. In *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, the plaintiffs appealed the denial of an application to place a measure on the ballot. But, during the pendency of that litigation, they succeeded with a second application. This Court held that even the qualification and passage of the proposition "did not moot th[e] case because it [was] capable of repetition, yet evading review." *Chula Vista*, 782 F.3d at 528, n.7.

Mr. David's political experience, and his intent to continue participating in San Francisco politics *through YPB* further sustain jurisdiction here. The Verified Complaint demonstrated that Mr. David has "substantial experience in San Francisco politics," including managing YPB and other committees. ER 34, ¶ 4. It further expressed his intent, "[o]nce the March election is over," to "be[] active in the City's November 2020 election, either through the Committee or a different committee." *Id*.; *see Brumsickle*, 624 F.3d at 1002. Mr. David also filed a declaration in the district court stating, "[g]iven my interest and involvement in San Francisco politics, I expect to participate in future ballot measure and other campaigns in San Francisco, and expect to be particularly active in connection with the November 3,

2020 presidential election cycle, either with this Committee or with another." ER 71, ¶ 35). And Mr. David reiterated those statements as recently as five days ago, saying that YPB "plans to be active in November's election and beyond."

Furthermore, even if YPB and Mr. David did not meet both the duration and reasonable expectation requirements, Appellants still have standing. In the context of a facial overbreadth challenge like this one, the Supreme Court has instructed the judiciary to relax traditional standing rules so as "to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984); *Broadrick*, 413 U.S. at 612 (First Amendment facial overbreadth doctrine permits "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity") (citation and quotation marks omitted); *see also Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

In a facial challenge, standing is satisfied irrespective of "whether or not [an appellant's] own First Amendment rights are at stake." *Munson*, 467 U.S. at 958. All that it must do is show that it "satisfies the requirement of 'injury-in-fact,' and whether it can be expected satisfactorily to frame the issues in the case." *Id*. As in *Munson* and *Clark v. City of Lakewood*, 259 F.3d 996 (9th Cir. 2001). YPB has done both. YPB is undoubtedly injured by the law, and as in *Clark*, YPB "has a vested

interest in having [the disclaimer requirements] overturned," as it "has been an aggressive advocate in this matter so far," and, if it prevails, will also be able to freely share its political messaging and "to recover…attorney's fees." *Id*. at 1011.

Accordingly, as in *Davis*, Appellants retain standing and this case is properly before the Court.

II. SAN FRANCISCO'S COMPELLED SPEECH REGIME IS UNCONSTITUTIONAL

Although YPB brings both a facial and an as-applied challenge, the best remedy would be to enjoin the entirety of the challenged disclaimer regime because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation and quotation marks omitted); *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) (describing facial overbreadth); *see also Citizens United v. Schneiderman*, 882 F.3d 374, 383 (2d Cir. 2017) ("[F]acial review thus focuses on whether too many of the applications interfere with expression for the First Amendment to tolerate"). Here, San Francisco has explicitly commandeered a "prominent position," ER 8, on a broad sweep of political advertisements. *Supra* at 14 (describing ads affected by the regime). The piecemeal protections that YPB was granted below are insufficient. San Francisco's law requires a lengthy and large-printed script, regardless of the length or size of the ad: a 35-second radio spot, a 60-second television ad, a five-minute long internet video, yard signs, five-by-ten print

ads, palm cards, or window signs. And while the district court did enjoin the law's application to small ads in Chinese-language newspapers, such protections are only for YPB; they continue to burden every other speaker in San Francisco. Similarly, while YPB is protected from the law's burdens on 30-second ads, neither it nor anyone else is protected from the disclosure overwhelming the messages of 35- or even 45-second communications. Even a 60-second communication in San Francisco will be forced, depending on the names of the speaker's donors and "secondary" contributors, to carry a 28-second spoken advisory at the beginning of the ad—a longer period of time than the Centers for Disease Control and Prevention advises Americans to wash their hands.

San Francisco has transmogrified every independent expenditure and ballot measure ad into an audio or visual "mini-campaign finance report," less a proclamation of authorship than an oversized warning label:[14] "a government-drafted script [that]…plainly 'alters the content' of [Appellants'] speech." *NIFLA*, 138 S. Ct. at 2371 (quoting *Riley*, 487 U.S. at 795). This is a substantial and sweeping intrusion by the Government into the political debate that cannot be turned back by the narrow injunction granted below. *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941

[14] Even the Food and Drug Administration lets the audience absorb a commercial drugmaker's message before providing a warning. And those compelled messages concern potentially-deadly contraindications and side effects, not indirect financial sources.

F.2d 970, 974 (9th Cir. 1991) ("Injunctive relief, however, must be tailored to remedy the specific harm alleged").

Accordingly, YPB is before this Court on behalf of all committees that will speak through political advertising in future San Francisco elections, and it accordingly seeks to fully enjoin the City and County's challenged disclaimer regime before the November 2020 elections. *Cf. Citizens United*, 558 U.S. at 334 (facially striking statute and lamenting that "[t]oday, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed").

A. Existing Ninth Circuit precedent requires facial relief.

In both *Americans for Civil Liberties of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004)[15] and *American Beverage Association v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2018) (*en banc*) ("*American Beverage*"), the Ninth Circuit struck down the overbroad government hijacking of private speech. Standing alone, either case compels a ruling for Appellants.

Heller facially invalidated a Nevada disclaimer requirement that "require[d] certain groups or entities publishing 'any material or information relating to an election, candidate[,] or any question on a ballot' to reveal on the publication the

[15] *Heller* preceded the Supreme Court's blessing of the federal disclaimer in *Citizens United*. But, for reasons given in detail at pages 48-52 of this brief, *Citizens United* neither overturns *Heller* nor supports San Francisco's position.

names and addresses of the publications' financial sponsors." *Heller*, 378 F.3d at 981 (emphasis removed). In practice, this meant that individual members of the Nevada ACLU would have to have their names appended to other groups' speech if they "act[ed] in concert and cooperation with other persons and groups." *Id*. at 984 (brackets supplied, cleaned up). Thus, the Nevada law demanded more than just a brief statement of responsibility by the regulated entity doing the speaking; it substantially altered the communication itself and dug far deeper into the financial give-and-take of civil society. *Buckley*, 424 U.S. at 66 (noting sensitivity in making public either "the giving and spending of money" or the "joining of organizations," both of which "'can reveal much about a person's activities, associations, and beliefs'") (quoting *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring))

As a "communication-altering requirement[]," *Heller*, 378 F.3d at 994, the Nevada statute had to survive "the most exacting scrutiny under the First Amendment." *Id*. at 992 (citation and quotation marks omitted); *Montanans for Cmty. Dev. v. Mangan*, 735 F. App'x 280, 284 (9th Cir. 2018) (contrasting treatment of "'paid-for' attributions subject to exacting scrutiny" with the more onerous *Heller* disclaimer that required strict scrutiny). Given the required content of Nevada's script, the *Heller* Court found that the State had taken the "constitutionally determinative" step of taking too much of a private speaker's message for itself.

Heller, 378 F.3d at 991; *id*. at 994 ("far from enhancing the reader's evaluation of a message," Nevada was "requiring the introduction of potentially extraneous information at the very time the reader encounters the substance of the message").

Nevada defended its statute by arguing that its disclaimers served the sort of informational interest that often justifies an off-communication disclosure regime. *Id*. But the Court refused to blend disclaimers and disclosures together, holding instead that "[c]ampaign regulation requiring off-communication reporting of expenditures made to finance communications does not involve the direct alteration of the content of a communication. Such [off-communication] reporting … serve[s] considerably more effectively the goal of informing the electorate of the individuals and organizations supporting a particular candidate or ballot proposition." *Id*. This "distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements" is "constitutionally determinative," *Id*. at 991, and rendered Nevada's compelled disclaimer regime "facially unconstitutional because it violate[d] the Free Speech Clause of the First Amendment." *Id*. at 981.

Despite this, the district court cited *Heller* only in passing, without reviewing its direct applicability here. ER 12. Instead, the district court appeared to suggest that *Heller* has been bypassed by other opinions of this Court. ER 12 (citing *Yamada v. Snipes*, 786 F.3d 1182, 1203 n.14 (9th Cir. 2015)). But that very footnote in *Yamada*, relying on the Supreme Court's decision in *Citizens United*, "reject[ed]"

any "comparison" between the law at issue in Hawai'i, which merely required an attribution statement, and "the disclosure provision invalidated by this [C]ourt in *ACLU of Nev. v. Heller*," 786 F.3d 1182, 1203 n.14. Nor has this Court changed its tune since. *Montanans for Cmty. Dev.*, 735 F. App'x at 284. *Heller* remains good law to this day, and it controls here.

This misunderstanding of *Heller*'s ongoing viability enabled the district court to take a dramatically different approach than that taken by the Eastern District of California when it struck down a voter-enacted California law that "required that any committee paying for an advertisement supporting or opposing a ballot measure identify on the face of the advertisement the committee's two largest contributors of $50,000 or more." *Calif. Republican* at 3. That court relied definitively on "the applicability of *Heller*'s reasoning," notwithstanding that "the statute in *Heller* was *broader* than" the California top-two disclaimer requirement. *Calif. Republican* at 15 (emphasis supplied).

More recently, this Court, sitting *en banc* in *American Beverage*, struck down one of the City and County's other on-communication messaging regimes, under the lesser scrutiny applied to purely commercial speech. San Francisco sought to impose a warning label on soda ads that would "occupy at least 20% of the advertisement." *American Beverage*, 916 F.3d at 754. As opposed to political messaging, such commercial speech disclaimers are reviewed under the more permissive standard

applied in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). But even under the *Zauderer* test, San Francisco bore the "burden of proving that the warning [was] neither unjustified nor unduly burdensome," because "[t]he Supreme Court made clear in *NIFLA* that a government-compelled disclosure that imposes an undue burden fails for that reason alone." *American Beverage*, 916 F.3d at 756-757; *id*. at 756 ("*NIFLA* requires us to reexamine how we approach a First Amendment claim concerning compelled speech"). Thus, this Court rejected San Francisco's argument that the disclaimer constituted "best practices" as non-responsive "to the First Amendment balancing test that we must apply." *Id*. at 757. Rather, under that commercial speech balancing test, San Francisco's compelled speech requirement was unconstitutional because "a smaller warning…would accomplish Defendant's stated goals." *Id*. at 757.

Even under lesser scrutiny, then, a lengthy disclaimer is unconstitutional if an alternative method provides a "superior" "fit between the regulation and the interest it serves." *Heller*, 378 F.3d at 994. Yet, the district court dismissed *American Beverage* as irrelevant, "because it applied a different standard to a different type of speech." ER 9. This was error. The *Zauderer* test is a *lighter* burden for the Government to carry. *United States v. Williams*, 553 U.S. 285, 298 (2008) (commercial speech is "less privileged" in the First Amendment hierarchy). Government-directed scripts are far more constitutionally suspect in the context of

a political campaign, where "the First Amendment 'has its fullest and most urgent application' to speech." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). If scripts allotting 80 percent of a message to a private speaker and 20 percent to the government are constitutionally invalid when it comes to warning labels on soft drink ads, *American Beverage*, 916 F.3d at 758, it follows that a disclaimer system "[t]hat leaves almost two-thirds of the ad for [political] messaging" cannot clear a still-higher hurdle. ER 9; *Heller*, 378 F.3d at 987 ("proscribing the *content* of an election communication is a form of regulation of campaign activity subject to strict scrutiny") (emphasis in original).

Thus, *Heller* and *American Beverage* are hardly irrelevant, ER 9-12; those cases control the outcome here. Lengthy government-directed scripts that report financial sponsorship are presumptively unconstitutional, and it falls to San Francisco to conclusively demonstrate that it is furthering an appropriate governmental interest and has tailored the "plainly legitimate sweep" of its law to that interest.[16] *Hoye*, 653 F.3d at 857 (citation and quotation marks omitted); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006) ("[B]urdens at the preliminary injunction stage track the burdens at trial");

[16] San Francisco complied with *American Beverage* by changing its law to require that the relevant disclaimer take up no more than 10 percent of a given ad. S.F. Health Code § 4203(b).

Am. Beverage Ass'n v. City & Cty. of S.F., 871 F.3d 884, 890 (9th Cir. 2017) (quoting same); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) ("In the First Amendment context, fit matters"); *American Beverage*, 916 F.3d at 757 ("…a government-compelled disclosure that imposes an undue burden fails for that reason alone").

B. San Francisco's disclaimers cannot survive under either strict or exacting scrutiny.

Even if San Francisco's law were not already unconstitutional in this Circuit under *Heller* and *American Beverage,* the proper application of heightened scrutiny would reach the same result. In this Circuit, substantive disclaimers on political ads must survive strict scrutiny. *Heller*, 378 F.3d at 992; *Calif. Republican* at 13-14. But even assuming, *arguendo*, that the district court was correct to apply exacting scrutiny, ER 6, "[t]his is not a loose form of judicial review." *Wisc. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). Exacting scrutiny is a far stricter standard than the *Zauderer* test used in *American Beverage*. "Under exacting scrutiny," a compelled speech requirement "must serve a compelling state interest that cannot be achieved through means significantly less restrictive of [First Amendment] freedoms," *Janus v. Am. Fed'n of State, Cty. and Municipal Emps.*, 585 U.S. __; 138 S. Ct. 2448, 2465 (2018) (citation and quotation marks omitted), and is thus only "possibly less rigorous than strict scrutiny." *Worley v. Cruz-Bustillo,* 717 F.3d 1238, 1249 (11th Cir. 2013) (citation and quotation marks omitted);

Citizens United, 558 U.S. at 366-367 ("[E]xacting scrutiny…requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (citation and quotation marks omitted). Under this form of review, where there is "a substantial mismatch between the Government's stated objective and the means selected to achieve it," *McCutcheon*, 572 U.S. at 199, a disclaimer regime is unconstitutional.

i. What is San Francisco's legitimate objective in requiring a disclaimer?

The district court correctly identified the "informational interest" as the only governmental interest that could be relevant here. ER 9 (citing *Brumsickle*, 624 F.3d at 1017-1018). This interest, grounded in *Buckley v. Valeo*, the Supreme Court's "seminal campaign finance case," *Ariz. Free Enter. Club's Freedom Club PAC*, 564 U.S. 721, 757 (2011) (Kagan, J., dissenting), is "in 'provid[ing] the electorate with information,'" so "citizens [can] 'make informed choices in the political marketplace.'" *Citizens United*, 558 U.S. at 367 (quoting *Buckley*, 424 U.S. at 66 (brackets in original), *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 197 (2003))); *Brumsickle*, 624 F.3d at 1017 ("unreservedly affirm[ing]" the prior "line of cases" extending through *Buckley*).

But the informational interest is not license. As *Heller* held, *id*. at 994, it is not an unlimited grant to the Government to reveal *any* information it wants through a "government-scripted, speaker-based disclosure requirement," *NIFLA*, 138 S. Ct.

at 2377, so long as it can assert a non-"implausible" need for it. ER 8. In *Riley*, a case relied on by the *Heller* Court, *e.g.* 378 F.3d at 992, the Supreme Court held that potential "relevan[ce] to the listener" is an insufficient reason to compel a disclaimer. 487 U.S. at 798.[17] Even in cases only involving off-communication donor disclosure, the informational interest is cabined to "provid[ing] the electorate with information" about a candidate's financial constituencies so as to "alert the voter to the interests to which a candidate is most likely to be responsive," *Buckley*, 424 U.S. at 66-67, or "where a particular ballot measure or candidate falls on the political spectrum." *ProtectMarriage.com – Yes on 8*, 752 F.3d at 832. And any disclaimer requirement reliant on that interest must provide this information thriftily and not "'drown out'" a speaker's message. *American Beverage*, 916 F.3d at 757 (quoting *NIFLA*, 138 S. Ct. at 2378) (brackets removed). Thus, the Government bears the responsibility not only of providing information to the electorate, but also presenting that information in a brief fashion that properly "alert[s] the voter" to its relevance. *Buckley*, 424 U.S. at 67.

[17] "Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech." *Riley*, 487 U.S. at 798.

San Francisco's message is neither brief nor does it display its information in a relevant context. Instead, it pre-empts a speaker's message in order to rattle off a series of donor names and, in print ads, out-of-context dollar figures.[18] The Supreme Court's decision in *Riley* specifically warned against this approach. The *Riley* Court struck down a requirement forcing professional fundraisers to make lengthy financial disclosures pursuant to a government-directed script. Instead, it determined that "as a general rule," it would be constitutionally permissible for the "the State…itself [to] publish the detailed financial disclosure forms it requires professional fundraisers to file." 487 U.S. at 800. This is precisely the route the *Heller* Court took in contrasting a financial supporter *disclaimer* with campaign finance donor *disclosure*. 378 F.3d at 991 ("The *constitutionally determinative* distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements has been noted and relied upon both by the Supreme Court and by this Circuit") (emphasis supplied).

As discussed *supra*, disclaimers function best as an introduction and an invitation: telling the voter the name of the regulated entity speaking so she can find out more if she chooses. Once a statement has been attributed to a particular group,

[18] This concern has particular salience today, where "a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others." *Ams. for Prosperity v. Grewal*, 2019 U.S. Dist. LEXIS 170793 at *61 (D.N.J. 2019) (unpublished).

an interested voter may place that communication in a larger context by accessing the organization's publicly available campaign finance reports online. And that reporting is often supplemented by analysis from easily-accessible nonprofit organizations on the internet. *McCutcheon*, 572 U.S. at 224. Thus, such reporting provides more and better information about a candidate or cause's financial supporters than the approach taken here: flashing names on a screen or forcing a listener to strain to remember all of the reported names uttered in a voice-over. *Heller*, 378 F.3d at 994 ("[F]ar from enhancing the reader's evaluation of a message, identifying the publisher can interfere with that evaluation by requiring the introduction of potentially extraneous information at the very time the reader encounters the substance of the message"); *American Beverage*, 916 F.3d at 757 ("[T]he record here shows that a smaller warning—half the size—would accomplish [San Francisco's] stated goals").

San Francisco then, must demonstrate that its scripts supply "useful information," *Heller*, 378 F.3d at 994, in a "superior" fashion to such a disclaimer-and-disclosure system. *Id*. YPB does not object to continuing to file campaign finance reports revealing its donors with the San Francisco Ethics Commission for public disclosure online. Nor does YPB object to political advertisers being required to place an attribution statement on their advertisements, so members of the audience

know what name to Google or punch into sfethics.org's search bar.[19] Thus, off-communication donor reporting and attribution statements offer the substantial benefits described *supra*, where "massive quantities of information can be accessed at the click of a mouse" or the tap of a phone screen. *McCutcheon*, 572 U.S. at 224.[20]

ii. San Francisco's disclaimer regime does not substantially further its legitimate objectives.

The City and County cannot simply assert that "its statute serve[s] the purpose of more thoroughly informing the electorate than would otherwise be the case," *Heller*, 378 F.3d at 993, or provide plausible conjectures that its scripts "better serve[]" the public interest. ER 8; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden"). The City and County must conclusively demonstrate that its

[19] YPB does not even specifically object to providing the identities of *its* individual donors. But it does object to how the disclaimer regime takes up so much of the advertising space that it seeks to buy, and that the City and County forces YPB to list the names of persons that it has no relationship with as though they were major donors giving hundreds of thousands of dollars.

[20] Judge Breyer appeared to misunderstand the nature of modern disclosure regimes, and dismissed the informational utility of donor reporting at oral argument. ER 28 (Trs. at 12, *l* 5-9). (Disclosure would require a person to "drop whatever you're doing, and you get in your car. And if you're very lucky, you'll get to City Hall before the polls close, and you'll be able to go up to the front desk and say: I want to see the form. Okay, I got that. Anything else?")

scripts are a more properly tailored method of informing the electorate about candidates and causes than other reasonable options.

San Francisco already collects and reports the donor information it wants to paste into YPB's ads.[21] If San Francisco did not already provide this information to the public (and had no way of doing so), it might explain why it believes it must take 30 percent of an ad to convey primary and secondary contributor information. *Mass. Fiscal Alliance v. Sullivan*, 2018 U.S. Dist. LEXIS 189403 (D. Mass. 2018) (denying preliminary injunction against disclaimer that reported donor information that was neither collected nor reported by the Commonwealth's campaign finance agency). But in the absence of such a justification, its belt-and-suspenders approach is nothing more than an unconstitutional "prophylaxis-upon-prophylaxis approach to regulating expression." *WRTL II*, 551 U.S. at 479. San Francisco cannot provide an independent justification that its unnecessary "drown[ing] out," *NIFLA*, 138 S. Ct. at 2378, of political messaging shortly before an election with duplicative, unnecessary campaign finance reporting is better than the alternative that Appellants have presented, and which has been nearly uniformly adopted by other jurisdictions.

Indeed, the City and County's approach is likely counterproductive. It will distract the audience from "evaluat[ing] the arguments to which they are being subjected," *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978), "by

[21] https://www.sfethics.org

requiring the introduction of potentially extraneous information at the very time the reader encounters the substance of the message." *Heller*, 378 F.3d at 994. As "[d]emocracy depends on a well-informed electorate," *Buckley*, 424 U.S. at 49 n.55, the marketplace of ideas should not be hijacked by the singular voice of the Government. *McIntyre*, 514 U.S. at 346 ("'Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution'") (quoting *Buckley*, 424 U.S. at 14).

The district court did not properly evaluate San Francisco's disclaimer regime. It dismissed concerns that San Francisco's law unnecessarily transformed its disclaimers into duplicative "mini-campaign finance reports," and instead determined that "no disclaimer would withstand constitutional muster if all it did was provide information that was already on the internet," and that "the Supreme Court has approved disclaimer requirements that were at least partially redundant of reporting requirements." ER 11-12. At the threshold, Appellants note that both points inappropriately shift the burden away from the Government to a plaintiff and therefore clash with *Heller* and *American Beverage*. *WRTL II*, 551 U.S. at 482 ("[W]e give the benefit of the doubt to speech, not censorship. The First Amendment's command that 'Congress shall make no law…abridging the freedom of speech' demands at least that"). The government must demonstrate that the disclaimers demanded here match disclaimers approved before, and it must show

that the new information and its novel delivery are not burdens without corresponding governmental benefits, not merely use the word "disclaimer" as a talisman to ward off constitutional challenges. But even on their own merits, neither of the court's two points are persuasive.

First, San Francisco is not just compelling the reporting of facts that swim around somewhere in the general public domain. Rather, this donor information is placed before the public by force of law and hosted online by the City and County itself. Second, the district court's citation for the constitutionality of redundant disclaimers, the *Citizens United* case, ER 12, is only superficially correct. *Citizens United* upheld the federal disclaimer system, discussed further *infra* at 48, and had nothing to do with using disclaimers to report donor information. The redundant information that the district court identified appears to be the organization's name and address, which would have been reported on both the disclaimer and on an expenditure reporting form.

But "[i]n for a calf is not always in for a cow." *McIntyre*, 514 U.S. at 358 (Ginsburg, J., concurring). Neither point advanced by the district court demonstrates that San Francisco's disclaimer regime provides a "superior" fit to alternative means of advancing the informational interest, *Heller*, 378 F.3d at 994, or that the enormous costs and burdens it has imposed upon political speakers are justified under the First Amendment.

C. San Francisco's "secondary contributor" disclaimers especially undermine the Government's legitimate informational interest.

Although neither the Supreme Court nor this Court has dealt with the reporting of "secondary contributors," San Francisco's secondary contributor requirements only further misalign the Government's chosen means with its legitimate ends. Secondary contributor requirements subvert, rather than advance, the informational interest because they provide inaccurate and potentially misleading information to the electorate. If Jerry Brown gives $100,000 to a nonprofit corporation dedicated to small business growth, which, among its millions of dollars of political contributions, happens to give the maximum donation of $31,000 to the Republican candidate for governor of California, it does not follow that Jerry Brown maxed out to the Republican nominee.[22] Suggesting otherwise would be extremely misleading—yet that is precisely what secondary donor disclosure does.

This level of confusion is inevitable when secondary donors are included directly on the face of an ad, with similar billing to the primary speaker and its actual financial supporters. It is only natural to assume that individuals listed on the face of

[22] Likewise, if the Southern Baptism Convention were to donate to the ACLU for its efforts in fighting the patentability of human genetic material, it would be an exaggeration to conclude that it supported an ad run by the ACLU in favor of legal abortion. *See* BRCA – Statement of Support from the Ethics & Religious Liberty Commission, Southern Baptist Convention, https://www.aclu.org/other/brca-statement-support-ethics-religious-liberty-commission-southern-baptist-convention (noting ideological alliance on issues)

a communication support it—why else would they be there? And while voters may change their votes based upon the actual donors supporting the ad's sponsor, voters are not helped to better "understand who the primary contributors actually are" by this six-degrees-of-separation approach to financial reporting. ER 11. Warning labels tell us about the specific dangers of the specific product carrying the disclaimer; a Surgeon General's warning on a pack of cigarettes does not also take that opportunity to inform a smoker about the dangers of binge drinking.

In fact, if the point of compelling secondary contributor information is not to suggest those donors support the ad, then how is San Francisco advancing the informational interest? That interest is keyed to informing the viewer about the *speaker* "seeking the[] vote" and "the source[s] of" the *speaker*'s "campaign money," and "where a particular ballot measure or candidate falls on the political spectrum." *ProtectMarriage.com – Yes on 8*, 752 F.3d 832. But, as the examples above show, this second-order reporting serves none of these purposes.

Due to this disconnect, even though secondary contributor reporting is a recent innovation, two recent federal cases, *Citizens Union of New York v. Attorney General of New York*, 408 F. Supp. 3d 478 (S.D.N.Y. 2019) ("*Citizens Union*")[23],

[23] While confusingly named, Citizens Union is not affiliated in any way with Citizens United, and in facts predates the formation of Citizens United by over 100 years. Citizens Union, "About Us", ("Citizens Union was founded in 1897…"), https://citizensunion.org/about/; *cf.* http://www.citizensunited.org ("Citizens United, Since 1988").

and *Van Hollen v. Federal Election Commission*, 811 F.3d 486 (D.C. Cir. 2016), have already demonstrated its unconstitutionality. We will take each in turn.

Applying exacting scrutiny, *Citizens Union* facially invalidated section 172-e of a New York law touted as one of "'the strongest reforms in the country to combat the outsized influence of dark money in politics.'" 408 F. Supp. 3d at 487; *compare* ER 58 (Proponent's Argument) ("San Francisco elections are awash in unlimited Dark Money from Corporate SuperPACs"). It specifically targeted the moving of money between two types of nonprofit groups, § 501(c)(3) organizations and § 501(c)(4) organizations. Under section 172-e, "[i]f a 501(c)(3) ma[de] an in-kind donation of greater than $2,500 to a 501(c)(4) engaged in lobbying, § 172-e require[d] that the 501(c)(3) file a public funding disclosure report that includes the identity of all donors who gave it more than $2,500." *Citizens Union*, 408 F. Supp. 3d at 504. "Such disclosures [were] required whether or not the 501(c)(3) donor intended to support a 501(c)(4) or exercised any control over the 501(c)(3)'s donation to the 501(c)(4)." *Id*. At the end of the day, this functioned as a secondary contributor reporting regime for § 501(c)(4) groups. The Southern District of New York found the law wanting because it targeted only "tangential and indirect support of political advocacy," *id*. at 504, not the actual financial supporters of that advocacy. (And, of course, the court made this finding regarding an off-communication donor

reporting regime, not a disclaimer script, where it would only be more constitutionally egregious.[24])

The district court here, however, dismissed the *Citizens Union* case because New York sought to regulate § 501(c)(3) organizations, which are barred "by law" from "engag[ing] in substantial lobbying activity." ER 11. It felt that *Citizens Union* was irrelevant since "none of the relevant parties" bringing the instant litigation "are 501(c)(3)s." *Id.*[25] But "[t]he First Amendment permits disclosure provisions that…regulate speech based on its reference to electoral candidates [or ballot measures], and not on the speaker's identity or taxpaying status." *Indep. Inst. v. Fed. Election Comm'n*, 216 F. Supp. 3d 176, 192 (D.D.C. 2016) (three-judge court), *aff'd Indep. Inst. v. Fed. Election Comm'n*, 580 U.S. __; 137 S. Ct. 1204 (2017). The relevant bottom line from *Citizens Union* was the court's final determination that a secondary contributor requirement cannot survive facial constitutional review

[24] Following the decision, the New York attorney general elected not to appeal and entered into a settlement for attorney's fees. *Citizens Union of N.Y. v. Att'y Gen'l of N.Y.*, No. 16-9592 (S.D.N.Y. Jan. 9, 2020) ECF No. 205 ("Stipulation of Settlement for Fees and Costs").

[25] Similarly, the district court dismissed the relevancy of a sister federal court in California striking down a top-two donor disclaimer in *Fair Political Practices Commission* on, *inter alia*, the grounds that the speaker was the California Republican Party, rather than a PAC. ER 15. But the Supreme Court has determined that, at least in some campaign finance cases, a political party is "not…in a unique position. It is in the same position as some individuals and PACs." *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 455 (2001).

"[w]ithout a more substantial relation between the governmental purpose and the disclosure." *Citizens Union*, 408 F. Supp. 3d at 506. Constitutionally speaking, disclosure requirements must report *actual*, not metaphysical, contributors to the group being required to file reports.

The D.C. Circuit's decision in the *Van Hollen* litigation also casts serious doubt that a secondary contributor reporting law, let alone one that compels that information directly on an ad, can survive constitutional scrutiny. The *Van Hollen* court addressed a challenge to a rulemaking by the Federal Election Commission ("FEC"), a rulemaking undertaken in response to the Supreme Court's 2007 *WRTL II* decision. *WRTL II* allowed corporations and unions to run limited types of issue ads, but it was unclear how donor reporting requirements would apply. A strict reading of the law seemed to trigger donor reporting of "every donation totaling $1,000 or more." *Van Hollen*, 811 F.3d at 491. But the FEC instead imposed an earmarking requirement: "corporations and unions would be required [only] to disclose all donations totaling $1,000 or more that are 'made for the purpose of furthering electioneering communications.'" *Id*. (quoting 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007)).

The D.C. Circuit upheld the regulation due, in part, to "the intuitive logic" that an expansive donor disclosure regime would spread misinformation. *Van Hollen*, 811 F.3d at 497-498. Specifically, the court of appeals contemplated a "not unlikely

scenario" where a partisan Republican gave to the American Cancer Society's general mission "to fund the ongoing search for a cure," yet found herself reported as supporting Cancer Society ads that attacked "Republicans in Congress" whose deficit-reducing efforts would mean "fewer federal grants for scientists studying cancer." *Id*. at 497. "Wouldn't a rule requiring disclosure of [the] Republican donor, who did *not* support issue ads against her own party, convey some misinformation to the public about who *supported* the advertisements?" *Id*. (emphasis in original).

The same "intuitive logic" applies here. *Id*. Every direct donor to a principal recipient committee like YPB can be counted as a supporter of the committee's political acts, since politicking is a principal committee's sole purpose, and the subject of that advocacy, and the viewpoint of the organization, are clear—indeed, inherent in its title. But the donors to *YPB's donors* may find themselves in the same boat as the D.C. Circuit's hypothetical cancer-fighting Republican partisan. The record below, in fact, demonstrated this. *All* of YPB's listed "secondary contributors" made contributions to other committees when YPB *did not yet exist*.

For example, Chris Larsen could not have known that, by donating to Yes on A on August 1, 2019, his contribution would be used to support YPB in December 2019, and that his name would have to appear as a supporter of YPB advertising in February 2020. None of these contributors is in any way a "true source," ER 58 ("Proponent's Argument"), yet San Francisco law forces Mr. Larsen and others into

association with YPB's advertising, with no ability for them to exercise their "right to eschew association for expressive purposes." *Janus*, 138 S. Ct. at 2463. In no meaningful way does this kind of reporting further the informational interest and untangle the web of "dark money" so feared by Proposition F's authors. Instead, the reporting of secondary donors will just sow confusion, "mislead[ing] voters as to who really supports the communications." *Van Hollen*, 811 F.3d at 497.

To uphold the secondary donor reporting, the district court relied on the *Grange* case as support for its bald assertion that "[t]here is simply no reason to presume San Francisco voters will misunderstand the import of the very disclaimers they voted to require." ER 14. But *Grange* is not a case about compelled speech, donor disclosure, or even about the general category of campaign financing. That case upheld a ballot design that allowed candidates to self-identity as a supporter of a political party. *Grange*, 552 U.S. at 447-448. Not only did *Grange* not grapple with the issue of compelled speech, it even acknowledged that Washington State could "eliminate any real threat of voter confusion," by placing a "prominent" statement, at the Government's expense, on its ballots "explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party." *Grange*, 552 U.S. at 456. It is difficult to conceive of a similar solution here, especially since adding additional language would only lengthen the disclaimers, and political committees—not San Francisco—pay for campaign ads. Thus, *Grange*

might have supported the district court in telling San Francisco to gather and publish at its own expense information it can legitimately gather, as the San Francisco Ethics Commission already does, but it provides no support for the City and County's compelled speech regime.

The district court next asserted, without citation, that the reporting of *primary* contributors does not actually provide useful information to the electorate, necessitating these extra disclosures. ER 11 ("If Yes on Prop B only revealed that it had received funding from the United Democratic Club of San Francisco, that would not be particularly revealing"). This has things precisely backwards, suggesting that the further away from an expenditure a donation is, the *more* control that attenuated donation must have upon the recipient organization's mission. The district court's theory ultimately suggests that the mandatory reporting of *primary* contributors through disclosure systems is often useless and therefore cannot be constitutionally justified. *Citizens Union*, 408 F. Supp. 3d at 494 ("There is no question that public disclosure of donor identities burdens the First Amendment rights to free speech and free association"); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("Something outweighs nothing every time") (cleaned up). Of course, the Supreme Court has repeatedly found just the opposite to be true, as far back as *Buckley*. 424 U.S. at 79-81.

Lastly, the district court determined that, despite an undisputed record of evidence that would-be donors declined to give to YPB because of the secondary contributor disclaimers, ER 69, ¶23-25, "the chilling effect on campaign contributions is a modest burden reasonably related to the important informational interest." ER 16. But this conclusion is belied by the flawed tailoring analysis the district court conducted, *supra* at 31-38, and the admitted evidence of chill is just one more reason to strike the secondary contributor disclaimers.[26] *Van Hollen*, 811 F.3d at 488, 501 ("Disclosure chills speech…a constitutional right" while "transparency [is] an extra-constitutional value").

D. The Supreme Court has shown us what a facially constitutional political disclaimer looks like.

The district court ultimately argued that it was merely applying *Citizens United*, which upheld the federal disclaimer system. ER at 5, 8, 12 (relying on *Citizens United*). The cases are not similar.

Citizens United was a political nonprofit that wanted to air, anonymously and without disclosing its financial supporters, a 90-minute movie that attacked Hillary Clinton as unfit to be President and promotional ads that referred to her "by name"

[26] Moreover, exacting scrutiny requires a "'substantial relation,'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64) with a governmental interest, not the "reasonable relation" found below. ER 16 ("[T]he chilling effect on campaign contributions is a modest burden reasonably related to the important informational interest").

and made "pejorative references to her candidacy." 558 U.S. at 368. At the time, federal law barred groups like Citizens United from running these sorts of attack ads at all, and most of the Court's opinion is dedicated to ruling that such a ban was unconstitutional. *Id*. at 318-366.

But the Court also rejected Citizens United's effort to hide its financial supporters: several pages of the Court's opinion are dedicated to rejecting its effort to avoid filing donor disclosure reports at all. *Id*. at 368-370. It spent even less time, a mere two analytical paragraphs, rejecting Citizens United's effort to spend millions on anonymous attack ads.

Citizens United sought to escape from saying the federally-required disclaimer. This required that the ad speak and display, for at least four seconds, the statement, "'[Citizens United] is responsible for the content of this advertising,'" along with a "state[ment] that the communication 'is not authorized by any candidate or candidate's committee,'" and a "display [of] the name and address (or Web site address) of the person or group that funded the advertisement." 558 U.S. at 366 (quoting 52 U.S.C. § 30120). The Court rejected Citizens United's request, upholding this simple "'[i]dentification of the source of advertising'" since the statement usefully "mak[es] clear" to the voters "that the ads are not funded by a candidate or political party." *Id*. at 368 (citation and quotation marks omitted). The disclaimer was so modest and so plainly connected to the informational interest that

the Court applied exacting, rather than strict, scrutiny. *Shrink Mo. Gov't PAC*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").

In contrast, San Francisco wants to "commandeer a prominent position" on every "political ad," ER 8, in order to regurgitate primary and secondary donor information that is freely available to any interested party willing to go view, in full and relevant context, the financial reports that San Francisco already puts online. *McCutcheon*, 572 U.S. at 224 (online reporting makes "disclosure [] effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided"). This is no four-second paid-for-by statement. The difference in degree between a federal law banning secret broadcast ads and San Francisco's mandate of lengthy, donor-reporting disclaimers which "leave," at best, just about "two-thirds of the ad" free of government speech, is a difference in kind. ER 9; *cf. Yamada*, 786 F.3d at 1203 n.14 (finding Hawai'i's attribution requirement incomparable with the disclaimers struck in *Heller*); *see Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) (*en banc*) ("Allowing states to sidestep" rigorous review "by simply placing a 'disclosure' label on laws imposing substantial and ongoing burdens…risks transforming First Amendment jurisprudence into a legislative labeling exercise").

The Supreme Court's two-paragraph dismissal of Citizens United's efforts is noteworthy for what it did *not* do. It did not, for example, overrule *Talley v. California*, where the Supreme Court facially struck the City of Los Angeles's requirement that every handbill list, in addition to the author, "the names and addresses of the persons who prepared, distributed[,] or sponsored them." 362 U.S. at 63-64. Nor did it dislodge *Riley*'s determination that while compelled speech disclaimers were facially unconstitutional, "as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file." 487 U.S. at 800. It did not even revisit *McIntyre v. Ohio Elections Commission*, where the Court struck down a far-less-invasive disclaimer requirement than the one at issue here. *See Heller*, 378 F.3d at 981 (relying on *McIntyre*).

Meanwhile, the Court has *strengthened* protections against compelled governmental speech. It has struck down unwieldy government-directed scripts in the *NIFLA* case, citing to *Citizens United* as it did so. 138 S. Ct. at 2378. In fact, this Court observed that *NIFLA*, to the extent it changed how courts must review compelled speech regimes, made it *harder* for government-compelled messages to survive judicial scrutiny. *American Beverage*, 916 F.3d at 756 ("*NIFLA* requires us to reexamine how we approach a First Amendment claim concerning compelled speech").

Meanwhile, this Court has repeatedly affirmed that *Heller* remains good law, an odd thing to do if *Citizens United* had truly supplanted it. *Montanans for Cmty. Dev.*, 735 F. App'x at 284 (citing *Heller* as good law), *Yamada*, 786 F.3d at 1203 n.14 (same); *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019) (same); *Chula Vista Citizens for Jobs & Fair Competition*, 782 F.3d at 541 (same). And *American Beverage*, of course, post-dates *Citizens United* and builds on *Heller*'s general skepticism of compelled speech.

If San Francisco had just cloned the same statement of responsibility rules required by federal law, then *Citizens United* would control here. But the City and County did not do that, and *Talley*, *Riley*, *Heller*, and *American Beverage* control instead.

E. No amount of "judicial surgery" can save the compelled speech regime.

Last year, San Francisco believed it could force its script into *every* ad, even when it would take over nearly 100 percent of the available ad space. Only once the Government was haled into court did the City and County change its mind. Now it thinks it can take up 40 percent of ads, but no more. ER 6. But even the district court rejected this "invitation to establish a bright-line rule that disclaimer requirements are not unduly burdensome so long as they consume no more than 40% of a political advertisement." ER 8; *American Beverage*, 916 F.3d at 757 ("To be clear, we do not hold that a warning occupying 10% of product labels or advertisements necessarily

is valid, nor do we hold that a warning occupying more than 10% of product labels or advertisements necessarily is invalid"). Ultimately, as the foregoing suggests, there is no bright line that can be drawn—the disclaimer regime, as a whole, has a plainly illegitimate sweep.

Indeed, there is arguably *no* legitimate sweep, given the sheer quantum of space San Francisco demands from ads run through the normal means of communication used during elections. If there is any legitimate sweep, however, it is small, judged in the context of typical local election advertising: The "bulk of a larger campaign's paid media spending generally focuses on direct mail and television ads," ER 75, ¶ 11, and even in "larger bond measure campaigns…the bulk of the campaign's budget – at least 70% – is spent on a variety of paid media, including TV, radio, direct mail, signs, a phone program, newspaper ads, and digital advertising." *Id*. ¶ 9. And "smaller" campaigns "use similar strategies," although "focus[ing] on only one or two forms of media for messaging and voter outreach." *Id*. ¶ 14.

Applying San Francisco's requirement to the feature-length film at issue in *Citizens United* is informative. A thirty-second disclaimer would take up 1/180th of the 90-minute film. But even then, one might ask what legitimate purpose the City and County would have in framing that film by placing that information at the beginning, or why secondary contributors were being listed if they did not actually

give to Citizens United. In any event, feature-length films in support of ballot measures or local candidates, if they exist at all, occupy at best a single pane in the overall quilt of electoral speech uttered during San Francisco's elections. The ads for *Hillary: The Movie*, rather than the movie itself, are closer to the norm, and for such ads the on-communication disclaimer is overwhelming. ER 74-76 ("I am a political consultant with over 20 years' experience running candidate and ballot measure campaigns…based on my experience I believe that in most cases these statements will overwhelm and dominate communications sent by a ballot measure campaign or independent expenditure committee").

Facial invalidation is, admittedly, "strong medicine." *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (citation and quotation marks omitted). Nevertheless, the prescription should be written here. Given the breadth and scope of San Francisco's law—the length of its scripts, the quantum of speech it commandeers, its general applicability to political advertising—strong medicine is preferable to attempting "judicial surgery" to save it. *Gwilliam v. United States*, 519 F.2d 407, 410 (9th Cir. 1975). The law must be enjoined in its entirety until such time as the Board of Supervisors can fashion a properly tailored disclaimer regime. YPB recommends that San Francisco devise one of substantial similarity to the one so breezily upheld by the *Citizens United* Court: an attribution statement for

the regulated entity speaking, and a note that further information can be found online.[27]

F. The compelled speech regime is also unconstitutional as-applied.

At a minimum, however, the statute ought to be preliminarily enjoined as-applied to YPB's window signs, palm cards, and five-by-ten newspaper ads, and to all ads from groups with similarly situated secondary contributors.

The district court rejected a bright-line rule that disclaimers taking up 40 percent of an ad's space were constitutional, but ads taking 40.1 percent were not. ER 8. Nevertheless, that 40 percent number drove the Court's ultimate analysis. ER 6 ("This section therefore proceeds by considering two categories of Yes on Prop B's proposed advertisements: those in which the required disclaimers take up more than 40% of the ad and those in which the required disclaimers take up 40% or less of the ad").

This 40 percent number is derived by noting that *Citizens United* upheld a four-second disclaimer on a 10-second ad. But the four-second disclaimer in *Citizens United* would have been *in addition to*, not a part of, Citizens United's proposed 10 and 30-second advertisements. 558 U.S. at 366. Both San Francisco and the district

[27] "'[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Co.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

court appear to be under the impression that the advertising scripts included the disclaimer, but they did not. *See Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 276 n.4 (D.D.C. 2008). Thus, it appears *Citizens United* upheld four-second disclaimers on 14-second ads: 28.6 percent of run-time, not 40 percent—and San Francisco's disclaimers cover at least 30 percent of those YPB advertisements that are unprotected by an injunction.

More to the point, the percentage of an ad taken up by the federal disclaimer did not feature in the *Citizens United* analysis, because Citizens United was insisting, not that the disclaimer was too long, but that it needn't be included at all. *Supra* at 48. Accordingly, the Supreme Court's reasoning turned on the value of the federal disclaimer itself, which was found to convey information sufficiently important to justify the Government's intrusion on Citizens United's speech. But here, YPB does not seek to speak anonymously and, as discussed *supra* at 44-45, precisely *none* of YPB's secondary contributors can be considered a "true source" of its messaging, since all of those persons gave to other committees before YPB was even a scribble on a statement of organization form. Compelling that information does not, under any form of judicial review, helpfully inform the electorate about YPB's ideology or financial constituencies.

III. THE NON-MERITS FACTORS FAVOR INJUNCTIVE RELIEF

San Francisco's compelled speech regime is likely unconstitutional, which "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (Brennan, J., plurality op.); *Ariz. v. United States*, 641 F.3d 339, 366 (9th Cir. 2011), *aff'd in part, rev'd in part on other grounds*, 567 U.S. 387 (2012) ("We have stated that an alleged constitutional infringement will often alone constitute irreparable harm") (citation and quotation marks omitted).

Furthermore, because San Francisco is trying to ensure itself a prominent position in virtually every independent political ad in the entire jurisdiction and threatens civil and criminal enforcement for those persons that do not comply, the harm to civil society sharply balances in favor of an injunction. Such relief would further the public interest because "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) ("The balance of equities and public interest favored relief, in part because the government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented") (citation and quotation marks omitted).

CONCLUSION

For the foregoing reasons, the district court should be reversed, and the case should be remanded with an instruction to enter a preliminary injunction against enforcement of San Francisco Code § 1.161(a) as amended since May 22, 2018.

Respectfully submitted,

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ADDENDUM

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SEC. 1.110. CAMPAIGN STATEMENTS – PUBLIC ACCESS.

(a) INSPECTION AND COPYMAKING. Campaign statements are to be open for public inspection and reproduction at the Office of the Ethics Commission during regular business hours and such additional hours as the Ethics Commission determines appropriate. The Commission shall provide public notice of the hours that the office is open for inspection and reproduction. The Ethics Commission shall also make campaign statements available through its website.

(b) RETENTION. Every campaign statement required to be filed in accordance with Section 1.106 shall be preserved by the Ethics Commission for the period required under Section 81009 of the California Government Code and any subsequent amendments thereto, or such additional periods as the Ethics Commission determines appropriate, provided that the period of retention is not less than eight years from the date the statement was required to be filed.

(c) ELECTRONIC COMMUNICATIONS. Campaign statements shall disclose, as required by the Political Reform Act, expenditures on electronic communications. Without limitation, campaigns shall disclose expenditures on the promotion of and efforts to increase popularity of any written communications, or any audio or video content distributed electronically.

SEC. 1.112. ELECTRONIC CAMPAIGN DISCLOSURE.

(a) FILING ELECTRONIC CAMPAIGN STATEMENTS.

(1) Filing Electronic Copies of Campaign Statements Required by State Law. Whenever any committee that meets the requirements of Subsection (b) of this Section is required by the California Political Reform Act, California Government Code Section 81000 et seq., to file a campaign disclosure statement or report with the Ethics Commission, the committee shall file the statement or report in an electronic format with the Ethics Commission, provided the Ethics Commission has prescribed the format at least 60 days before the statement or report is due to be filed.

(2) Filing Electronic Copies of Campaign Statements Required by Local Law. Whenever any committee is required to file a campaign disclosure statement or report with the Ethics Commission under this Chapter, the committee shall file the statement or report in an electronic format, provided the Ethics Commission has prescribed the format at least 60 days before the statement or report is due to be filed.

(3) Continuous Filing of Electronic Statements. Once a committee is subject to the electronic filing requirements imposed by this Section, the committee shall remain subject to the electronic filing requirements, regardless of the amount of contributions received or expenditures made during each reporting period, until the committee terminates pursuant to this Chapter and the California Political Reform Act, California Government Code Section 81000 et seq.

(4) Disclosure of Expenditure Dates. All electronic statements filed under this Section shall include the date any expenditure required to be reported on the statement was incurred, provided that the Ethics Commission's forms accommodate the reporting of such dates.

(b) COMMITTEES SUBJECT TO ELECTRONIC FILING REQUIREMENTS.

(1) A committee must file electronic copies of statements and reports if it receives contributions or makes expenditures that total $1,000 or more in a calendar year and is:

(A) a committee controlled by a candidate for City elective office;

(B) a committee primarily formed to support or oppose a local measure or a candidate for City elective office; or

(C) a general purpose recipient, independent expenditure or major donor committee that qualifies, under state law, as a county general purpose committee in the City and County of San Francisco; or

(D) a committee primarily formed to support or oppose a person seeking membership on a San Francisco county central committee, including a committee controlled by the person seeking membership on a San Francisco county central committee.

(2) The Ethics Commission may require additional committees not listed in this Section to file electronically through regulations adopted at least 60 days before the statement or report is due to be filed.

(c) VOLUNTARY ELECTRONIC FILING. Any committee not required to file electronic statements by this Section may voluntarily opt to file electronic statements by submitting written notice to the Ethics Commission. A committee that opts to file electronic statements shall be subject to the requirements of this Section.

SEC. 1.161. CAMPAIGN ADVERTISEMENTS.

(a) DISCLAIMERS. In addition to complying with the disclaimer requirements set forth in Chapter 4 of the California Political Reform Act, California Government Code sections 84100 et seq., and its enabling regulations, all committees making expenditures which support or oppose any candidate for City elective office or any City measure shall also comply with the following additional requirements:

(1) TOP THREE CONTRIBUTORS. The disclaimer requirements for primarily formed independent expenditure committees and primarily formed ballot measure committees set forth in the Political Reform Act with respect to a committee's top three major contributors shall apply to contributors of $5,000 or more. Such disclaimers shall include both the name of and the dollar amount contributed by each of the top three major contributors of $5,000 or more to such committees. If any of the top three major contributors is a committee, the disclaimer must also disclose both the name of and the dollar amount contributed by each of the top two major contributors of $5,000 or more to that committee. The Ethics Commission may adjust this monetary threshold to reflect any increases or decreases in the Consumer Price Index. Such adjustments shall be rounded off to the nearest five thousand dollars.

(2) WEBSITE REFERRAL. Each disclaimer required by the Political Reform Act or its enabling regulations and by this Section 1.161 shall be followed in the same required format, size, and speed by the following phrase: "Financial disclosures are available at sfethics.org." A substantially similar statement that specifies the web site may be used as an alternative in audio communications.

(3) MASS MAILINGS AND SMALLER WRITTEN ADVERTISEMENTS. Any disclaimer required by the Political Reform Act and by this section on a mass mailing, door hanger, flyer, poster, oversized campaign button or bumper sticker, or print advertisement shall be printed in at least 14-point, bold font.

(4) CANDIDATE ADVERTISEMENTS. Advertisements by candidate committees shall include the following disclaimer statements: “Paid for by _____ (insert the name of the candidate committee).” and “Financial disclosures are available at sfethics.org.” Except as provided in subsections (a)(3) and (a)(5), the statements’ format, size and speed shall comply with the disclaimer requirements for independent expenditures for or against a candidate set forth in the Political Reform Act and its enabling regulations.

(5) AUDIO AND VIDEO ADVERTISEMENTS. For audio advertisements, the disclaimers required by this Section 1.161 shall be spoken at the beginning of such advertisements, except that such disclaimers do not need to disclose the dollar amounts of contributions as required by subsection (a)(1). For video

advertisements, the disclaimers required by this Section 1.161 shall be spoken at the beginning of such advertisements, except that such disclaimers do not need to disclose the dollar amounts of contributions as required by subsection (a)(1).

SEC. 1.170. PENALTIES.

(a) CRIMINAL. Any person who knowingly or willfully violates any provision of this Chapter 1 shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $5,000 for each violation or by imprisonment in the County jail for a period of not more than six months or by both such fine and imprisonment; provided, however, that any willful or knowing failure to report contributions or expenditures done with intent to mislead or deceive or any willful or knowing violation of the provisions of Sections 1.114, 1.126, or 1.127 of this Chapter 1 shall be punishable by a fine of not less than $5,000 for each violation or three times the amount not reported or the amount received in excess of the amount allowable pursuant to Sections 1.114, 1.126, or 1.127 of this Chapter 1, or three times the amount expended in excess of the amount allowable pursuant to Section 1.130 or 1.140, whichever is greater.

(b) CIVIL. Any person who intentionally or negligently violates any of the provisions of this Chapter 1 shall be liable in a civil action brought by the City Attorney for an amount up to $5,000 for each violation or three times the amount not reported or the amount received in excess of the amount allowable pursuant to Sections 1.114, 1.126, or 1.127 or three times the amount expended in excess of the amount allowable pursuant to Section 1.130 or 1.140, whichever is greater. In determining the amount of liability, the court may take into account the seriousness

of the violation, the degree of culpability of the defendant, and the ability of the defendant to pay.

(c) ADMINISTRATIVE. Any person who violates any of the provisions of this Chapter 1 shall be liable in an administrative proceeding before the Ethics Commission held pursuant to the Charter for any penalties authorized therein.

(d) LATE FILING FEES

(1) Fees for Late Paper Filings. In addition to any other penalty, any person who files a paper copy of any statement or report after the deadline imposed by this Chapter shall be liable in the amount of ten dollars ($10) per day after the deadline until the statement is filed.

(2) In addition to any other penalty, any person who files an electronic copy of a statement or report after the deadline imposed by this Chapter shall be liable in the amount of twenty-five dollars ($25) per day after the deadline until the electronic copy or report is filed.

(3) Limitation on Liability. Liability imposed by Subsection (d)(1) shall not exceed the cumulative amount stated in the late statement or report, or one hundred dollars ($100), whichever is greater. Liability imposed by Subsection (d)(2) shall not exceed the cumulative amount stated in the late statement or report, or two hundred fifty dollars ($250), whichever is greater.

(4) Reduction or Waiver. The Ethics Commission may reduce or waive a fee imposed by this subsection if the Commission determines that the late filing was not willful and that enforcement will not further the purposes of this Chapter.

(e) MISUSE OF PUBLIC FUNDS. Any person who willfully or knowingly uses public funds, paid pursuant to this Chapter, for any purpose other than the purposes authorized by this Chapter shall be subject to the penalties provided in this Section.

(f) PROVISION OF FALSE OR MISLEADING INFORMATION TO THE ETHICS COMMISSION; WITHHOLDING OF INFORMATION. Any person who knowingly or willfully furnishes false or fraudulent evidence, documents, or information to the Ethics Commission under this Chapter, or misrepresents any material fact, or conceals any evidence, documents, or information, or fails to furnish to the Ethics Commission any records, documents, or other information required to be provided under this Chapter shall be subject to the penalties provided in this Section.

(g) PERSONAL LIABILITY. Candidates and treasurers are responsible for complying with this Chapter and may be held personally liable for violations by their committees. Nothing in this Chapter shall operate to limit the candidate's liability for, nor the candidate's ability to pay, any fines or other payments imposed pursuant to administrative or judicial proceedings.

(h) JOINT AND SEVERAL LIABILITY. If two or more persons are responsible for any violation of this Chapter, they shall be jointly and severally liable.

(i) EFFECT OF VIOLATION ON CANDIDACY.

(1) If a candidate is convicted, in a court of law, of a violation of this Chapter at any time prior to his or her election, his or her candidacy shall be terminated immediately and he or she shall be no longer eligible for election, unless the court at the time of sentencing specifically determines that this provision shall not be applicable. No person convicted of a misdemeanor under this Chapter after his or her election shall be a candidate for any other City elective office for a period of five years following the date of the conviction unless the court shall at the time of sentencing specifically determine that this provision shall not be applicable.

(2) If a candidate for the Board of Supervisors certified as eligible for public financing is found by a court to have exceeded the Individual Expenditure Ceiling in this Chapter by ten percent or more at any time prior to his or her election, such violation shall constitute official misconduct. The Mayor may suspend any member of the Board of Supervisors for such a violation, and seek removal of the candidate from office following the procedures set forth in Charter Section 15.105(a).

(3) A plea of nolo contendere, in a court of law, shall be deemed a conviction for purposes of this Section.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Allen Dickerson **Date** 04/21/2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

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