No. 22-15824

In the United States Court of Appeals for the Ninth Circuit

NO ON E, SAN FRANCISCANS OPPOSING THE AFFORDABLE HOUSING PRODUCTION ACT; EDWIN M. LEE ASIAN PACIFIC DEMOCRATIC CLUB PAC SPONSORED BY NEIGHBORS FOR A BETTER SAN FRANCISCO ADVOCACY; AND TODD DAVID,

Plaintiffs-Appellants,

v.

DAVID CHIU, SAN FRANCISCO ETHICS COMMISSION, BROOKE JENKINS, AND CITY AND COUNTY OF SAN FRANCISCO,

Defendants-Appellees.

Appeal from an order of the United States District Court for the Northern District of California, The Hon. Charles R. Breyer (Dist. Ct. No. 3:22-cv-02785-CRB)

PETITION FOR REHEARING EN BANC

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March 22, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND RULE 35(B) STATEMENT

Laws compelling political campaigns to reveal their donors are common. Laws compelling speakers to speak and publish their donors' identities within their advertising are rare. And laws compelling speakers to speak and publish their *donors' donors*' identities within their advertising apparently exist only in San Francisco.

The logic of requiring donor disclosure is obvious: they support a campaign. But the panel broke new ground recognizing an informational interest in compelling the naming of donors' donors, who may not know about the campaign, or might even oppose it. This unprecedented decision also lacks any limiting principle. If naming the donors' donors might be compelled—here, up to *nine* total donors—why not name the donors' donors' donors? The recognition of a new governmental interest in compelling political speech is always a serious matter. It warrants the full court's attention.

Moreover, the panel's decision conflicts with Supreme Court and circuit precedent. When the government compels advertisers to speak its message, the First Amendment requires it to carefully balance its purported informational interest against the speaker's interest in

conveying its own message. In the commercial disclaimer context, where the standard is "less exacting scrutiny," *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010), this Court has held that taking 20% of a speaker's ad presumptively violates the First Amendment. *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019) (en banc).

This Court should be at least as skeptical of compelled speech in the political speech context, where scrutiny is at least "exacting," not "less exacting." Yet faced with a compelled speech regime that consumes from 23% to 100% of Plaintiffs' *political* ads, backed by no evidence, the panel buried *American Beverage* in a footnote dismissing its relevance on grounds that it employed a different standard of review.

Indeed, *American Beverage* employed a different standard of review.

A lower one.

This decision cannot be reconciled with *American Beverage*. Nor could the panel have properly applied exacting scrutiny per *Ams. for Prosperity Found. v. Bonta,* 141 S. Ct. 2373 (2021) ("*AFPF*"). En banc review is necessary to secure and maintain uniformity of this Court's decisions. Fed. R. App. P. 35(b)(1)(A).

There is no important informational interest in misleading voters. The panel's novel decision recognizing a government interest in compelling campaign speakers to name their donors' donors within their ads will severely impede people's ability to speak, inform, and persuade their neighbors about political campaigns. It involves a question of exceptional importance. Fed. R. App. P. 35(b)(1)(B). After all, the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted).

This case merits rehearing en banc.

STATEMENT OF THE CASE

A. Regulatory background

California's Political Reform Act defines a "committee" as "any person or combination of persons who directly or indirectly," in one calendar year, receives at least $2,000 in contributions, makes at least $1,000 in independent expenditures, or contributes at least $10,000 "to or at the behest of candidates or committees." Cal. Gov't Code § 82013. A "primarily formed committee" is a committee "which is formed or

exists primarily to support or oppose" a single candidate or measure, or multiple candidates or measures "being voted upon in the same city, county, multicounty, or state election." Cal. Gov't Code § 82047.5.

Committees must file a "statement of organization" with the Secretary of State and "the local filing officer" (here the San Francisco Ethics Commission) "within 10 days" of qualifying as a committee, Cal. Gov't Code § 84101(a); S.F. Campaign & Governmental Conduct Code ("S.F. Code") § 1.112(a)(1). Committees must also regularly report details of their donations, Cal. Gov't Code § 84200, et seq., and include various specifically-formatted disclaimers in their political advertising, *id.* §§ 84501–84511, including the names of their top three donors giving $50,000 or more, *id.* § 84501(c)(1).

San Francisco requires primarily formed independent expenditure and ballot committees to include various disclaimers within their ads, beyond those required by state law. S.F. Code § 1.161(a). It drops the top-contributor threshold to $5,000, and provides that for each of a speaker's three top donors that is also a committee, the speaker must identify on the face of each communication that donor's top two donors. *Id.* Except for audio and video communications, the ad must note the

amount given by each of these up-to-nine donors. *Id*. § 1.161(a)(1), (5); S.F. Ethics Comm'n Reg. ("S.F. Reg.") § 1.161-3(a)(4). San Francisco further demands that political ads declare that the speaker's financial disclosures may be found at the San Francisco Ethics Commission's website. S.F. Code § 1.161(a)(2).

Print disclaimers must appear in text that is "at least 14-point, bold font," S.F. Code § 1.161(a)(3), and list the dollar amounts given by any named contributor, *id.* § 1.161(a)(1); S.F. Reg. § 1.161-3(a)(4). Each of the primary donors "must be numbered by placing the numerals 1, 2, and 3, respectively, before each" donor's name. S.F. Reg. § 1.161-3(a)(1). The words "contributors include" must follow each of the primary donors, followed by the secondary donors who gave to that primary donor. *Id*. § 1.161-3(a)(2).

Audio and video ads must begin by speaking any contributor disclaimers. S.F. Code § 1.161(a)(5). They must first state "Paid for by [committee's name]." *Id.* § 1.162(a)(1). The on-communication disclosure follows: Committee major funding from [name(s) and dollar amount contributed of top three (3) donors of $5,000 or more], with each of those primary contributors followed by their "top two major contributors of

$5,000 or more." *Id.* § 1.161(a)(1). Audio and video communications must then state, "Financial disclosures are available at sfethics.org." *Id.* § 1.162(a)(2). The city also requires that video ads carry a written banner with a disclosure similar to that required for print ads. *Id.* § 1.161(a)(1).

B. The secondary donor speech mandate's impact on Plaintiffs' campaign speech

Todd David is the founder and treasurer of No on E, San Franciscans Opposing the Affordable Housing Production Act, a primarily formed independent expenditure committee originally founded to support Proposition B in San Francisco's June 7, 2022 election. ER-17 ¶¶2–4. It has since been renamed to reflect a different mission. Opinion 11 n.3.

The Committee raised $15,000, including $5,000 each from three donors, including Plaintiff Edwin M. Lee Asian Pacific Democratic Club PAC sponsored by Neighbors for a Better San Francisco Advocacy ("Ed Lee Dems"). *Id.* ¶6. Ed Lee Dems and another major donor are committees that have received $5,000 or more from specific donors. ER-18 ¶7. Among Ed Lee Dems' top donors was David Chiu for Assembly 2022 ($10,600). *Id.*

No on E's donors' donors have not supported or indicated support for the committee. ER-20 ¶19. No on E has not communicated with them about its messages, and they have had neither control over nor input into the committee or its messages. *Id*.

But Ed Lee Dems could not support No on E had it run ads mentioning Ed Lee Dems's donors. ER-24–25 ¶11. Not all of Ed Lee Dems' donors support all of its goals and projects. For example, Defendant City Attorney David Chiu, whose Assembly committee would be mentioned in No on E's ad, left the Assembly and ceased running for it. ER-24 ¶7. And as City Attorney, it would be illegal for Chiu to take a position on city ballot measures. S.F. Charter § 6.102(10). Naming Chiu's Assembly committee as No on E's secondary donor might have misled voters into believing that Chiu was running for another office and improperly took positions on issues. ER-24 ¶7.

Accordingly, Ed Lee Dems would have had to withdraw its support from No on E and ask that its donations be returned, as it cannot risk damaging the reputations of Asian-Pacific-Islander elected leaders. *Id.* ¶8. Moreover, some of Ed Lee Dems' donors would be upset were they connected to positions in which they have no interest or even oppose,

and would thus cease supporting the group. *Id*. No on E's potential contributors also expressed concern about the secondary donor disclosure requirements and were reluctant to contribute if their donors would be disclosed on the committee's ads. ER-20 ¶20.

The secondary donor speech mandate also rendered No on E's planned June 2022 election ads impossible or ineffective. Naming the group's four secondary donors would have lengthened the disclaimer to 32–33 seconds, consuming 100% of No on E's 15-second and 30-second internet video ads and 53–55% of its 60-second ads. ER-19 ¶¶13–14. To be effective, an ad must get a viewer's attention within the first three to five seconds. ER-28—29 ¶¶12-15; ER-31 ¶6; ER-32—34 ¶¶11-18.

No on E's disclaimer banner would have consumed about 51% of the video screen at the required letter size. ER-19 ¶3. And the required disclaimer would have claimed 100% of the committee's 2x4 inch print ads, ER-19 ¶16, about 70% of its 5x5 inch ads, *id.*, about 35% of its 5x10 inch ads, ER-20 ¶17, and about 23% of its 8.5x11 inch mailers.

Plaintiffs remain politically active in San Francisco, and the secondary donor speech mandate will continue to impact their speech. *See, e.g.* ER-20—21 ¶¶22-25; ER-23–24 ¶6.

C. Procedural history

Plaintiffs brought this suit challenging San Francisco's secondary donor speech mandate, on its face and as-applied, for violating their rights to free speech and association. The district court denied Plaintiffs' motion for a preliminary injunction. It held that exacting, not strict scrutiny, governs Plaintiffs' challenge, ER-10, and that the mandate is narrowly tailored to the government's important interest in assisting voters determine who is speaking, and "who is most closely associated with that speaker," ER-12. The court also held that Plaintiffs had not shown that complying with the mandate would chill donations. ER-13—14. Labeling the law's burden "modest," the court also found that Plaintiffs did not satisfy the remaining preliminary injunction factors. ER-14—15.

The panel affirmed. After turning aside Defendants' mootness claims, Opinion at 13-16, it held that exacting scrutiny governed the challenge, and rejected Plaintiffs' argument that strict scrutiny applies to a novel "disclaimer/disclosure" requirement, Opinion at 16-18. The panel found that "Defendants have a strong governmental interest in informing voters about who funds political advertisements," Opinion at

21, and reasoned that "[i]t follows that the secondary-contributor requirement is substantially related to that interest," Opinion at 22. "Because the interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible, the challenged ordinance is substantially related to the governmental interest in informing the electorate." Opinion 23.

The panel also held that the required disclaimer did not displace an excessive amount of Plaintiffs' speech. With respect to larger ads, where the disclaimer displaces under 40% of Plaintiffs' speech, the remaining space allegedly suffices. Opinion 25. For this proposition, the panel relied on the Supreme Court's upholding a four-second disclaimer announcing the speaker's identity at the outset of a 10-second ad. *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 368 (2010)).

And again, the panel relegated to a footnote this Court's en banc decision in *American Beverage*, which held that the government's taking 20% of an ad violated the First Amendment rights of sugary-drink purveyors. Opinion at 26 n.7. *American Beverage*, noted the panel, applied not *AFPF*'s exacting scrutiny, but a more permissive test from *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

With respect to the law's impact on shorter ads, the panel held that denial of an injunction was proper because Defendants "took the position that they would not enforce the challenged ordinance with respect to shorter ads in which 'the required disclaimer would consume the majority of Plaintiffs' advertisement.'" Opinion at 27 (no citation).[1]

"The second burden identified by Plaintiffs—that the secondary-contributor requirement violates their right to freedom of association and drives away potential donors—is likewise insufficient to outweigh the strength of the governmental interests." *Id.* And as for tailoring, "the district court was within its discretion to conclude that the secondary-contributor requirement has a scope in proportion to the City's objective." Opinion at 30.

[1] In earlier litigation, the district court enjoined the law as-applied to a different committee's short ads, but declined to grant facial relief. *Yes on Prop B v. City & Cnty. of S.F.*, 440 F. Supp. 3d 1049, 1051, 1061-62 (N.D. Cal.), *appeal dismissed*, 826 F. App'x 648 (9th Cir. 2020). San Francisco is considering legislation exempting print ads 25 square inches or smaller and audio and video ads of 30 seconds or less from the secondary-donor speech mandate. *See* S.F. Legislative File No. 221161, https://sfgov.legistar.com/LegislationDetail.aspx?ID=5941744&GUID=33EACEA7-9885-4992-AD17-BFBB1135B51B.

Having determined that Plaintiffs did not establish a likelihood of success on the merits, the panel found that they could not have satisfied the remaining preliminary injunction elements. Opinion at 32-33.

REASONS FOR REHEARING THIS CASE EN BANC

I. THE PANEL OPINION CONFLICTS WITH THIS COURT'S EN BANC DECISION IN *AMERICAN BEVERAGE*, WHICH APPLIED A LOWER STANDARD OF REVIEW TO STRIKE DOWN A MUCH LESS BURDENSOME COMPELLED DISCLOSURE REGIME.

There is no reconciling this Court's disapproval of San Francisco's hijacking of 20% of a beverage ad under "less exacting scrutiny," and the panel's approval of the city displacing up to 50% of a political ad, including the *first* half of a spoken ad, under "exacting" scrutiny.[2]

Exacting scrutiny requires a substantial relation to an important governmental interest and narrow tailoring. *AFPF*, 141 S. Ct. at 2383. The *Zauderer* test applied in *American Beverage* requires only that the compelled speech be "(1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome." *Am. Beverage*, 916 F.3d at 756

[2] The proper test for reviewing this novel regulation is strict scrutiny, given that this is essentially a case of compelled political speech. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 797-98 (1988). But as Plaintiffs have always maintained, the precise level of heightened scrutiny, strict or exacting, is ultimately irrelevant; the law fails both.

(citation omitted). This test affords "less exacting scrutiny" than that generally afforded commercial speech. *Milavetz*, 559 U.S. at 249.

But the burden *American Beverage* struck down, taking up 20% of the speakers' messages, was smaller than the *least* burdensome requirement that the city imposed on Plaintiffs' political speech. Much more than in *American Beverage*, the city's requirements here "'drown[] out' Plaintiffs' messages and 'effectively rule[] out the possibility of having [an advertisement] in the first place.'" *Am. Beverage*, 916 F.3d at 757 (alterations in original).

The conflict between the panel's decision and *American Beverage* is starker yet considering that in *American Beverage*, San Francisco marshaled expert testimony to support its position, which this Court examined and found unpersuasive. It did not cite *Citizens United*'s 4-second disclaimer in a 10-second ad, declare 40% speech displacement acceptable, and call it a day.

Indeed, contrary to the panel's approach here, *American Beverage* expressly declined to adopt a one-size-fits-all rule determining that a set amount of displacement is or is not constitutional. "Rather, we hold only that, on this record, Defendant has not carried its burden to

demonstrate that the Ordinance's requirement is not unjustified or unduly burdensome." *Am. Beverage*, 916 F.3d at 757 (internal quotation marks omitted).

The record here is bereft of any evidence submitted by San Francisco purporting to justify its need to seize vastly more time and space from political speakers than it seized in *American Beverage*. It cannot be that under *Zauderer*, this Court would skeptically eye the city's experts to see if they could carry the city's burden of justifying a 20% beverage ad blot, but that under *Americans for Prosperity*, where political campaign speech is concerned, mere supposition and assertion can justify the taking of up to half (or more) of an ad, no evidence required.

In dismissing this inconsistency, the panel invoked Justice Stevens' proposition that "[t]he election context is distinctive in many ways," Opinion at 26 n.7 (quoting *Citizens United*, 558 U.S. at 422 (Stevens, J., concurring)). Perhaps. But the Supreme Court rejected the argument that exacting scrutiny is distinctive owing to its application in the election context. "[E]xacting scrutiny is not unique to electoral disclosure regimes. To the contrary," the Supreme Court "derived the test from . . . nonelection cases." *AFPF*, 141 S. Ct. at 2383 (citations

omitted). "Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." *Id.*

And this Court's application of exacting scrutiny here was less exacting than its application of less exacting scrutiny. That conflict warrants a second look.

II. THE PANEL OPINION CONFLICTS WITH THE SUPREME COURT'S DECISION IN *AMERICANS FOR PROSPERITY*, AS IT DID NOT TRULY APPLY EXACTING SCRUTINY TO EVALUATE SAN FRANCISCO'S COMPULSION OF POLITICAL SPEECH.

There was nothing exacting about the panel's scrutiny of the secondary donor speech mandate. Even assuming that San Francisco has a sufficiently important interest in having campaigns inform voters about the identities of people or organizations who might have nothing to do with or even oppose them, *see infra*, the panel conducted no tailoring. It arbitrarily declared that displacing 40% of *any* campaign ad, in *any* medium, with *any* governmental message, imposes a tolerable burden because 40% displacement survived under the particular and quite different facts of *Citizens United*. And it dismissed substantial evidence of the law's deterrence of contributions.

"Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need

breathing space to survive.'" *AFPF*, 141 S. Ct. at 2384 (internal quotation marks omitted). Under exacting scrutiny, even important government interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).[3]

Although San Francisco carried the exacting scrutiny burden, the only evidence regarding the disclaimer's impact came from Plaintiffs and their experts. To be effective, an ad must get a viewer's attention within the first three to five seconds. ER-28 ¶12; ER-31 ¶6. After that time, a viewer will change the channel, scroll down the page, or otherwise avoid the ad. ER-28–29 ¶¶12–15; ER-32–34 ¶¶11–18.

A 4-second disclaimer announcing the speaker's identity in a 10-second message is quite different than a 24-second recital of donors and donors' donors at the start of a minute ad. Both impositions take 40% of a speakers' time, but these are not the same thing. The speaker's alignment with a message might well be the purpose of a 10-second ad. Nor does a spoken disclaimer's impact map out neatly to that of a

[3] *Citizens United*'s exacting scrutiny application omitted mention of narrow tailoring.

printed disclaimer, in terms of their relative impositions on a speaker. *Citizens United*'s 4-second spoken disclaimer might be more tolerable, in the context of that ad, than the 35% disclaimer San Francisco imposed on Plaintiffs' 5x10 inch print ad.

The panel should have also credited Plaintiffs' "only two" declarations, Opinion at 28, explaining that the secondary donor speech mandate dissuades contributions. And not only because Plaintiffs are well-positioned to gauge the law's impact. The panel missed the point that *Ed Lee Dems* is a major contributor ($5,000) to No on E, and collaborates frequently with David. And it has declared that the use of its money, and its future donations, hinge on this law's enforcement. ER-24 ¶8; ER-25 ¶11. The panel thus erred in declaring that "Plaintiffs have not provided evidence of any specific deterrence beyond some donors' alleged desire not to have their names listed in an on-advertisement disclaimer." Opinion at 28. Even if one believes that Ed Lee Dems is overreacting to the law's impact, it is entitled to defend itself and its donors' interests as it sees fit. Here, that has already meant disapproval of No on E's ads. ER-24 ¶8; ER-20 ¶21.

Considering these burdens, the city must "demonstrate its need for [compelling speech] in light of any less intrusive alternatives." *AFPF*, 141 S. Ct. at 2386. That more narrowly-tailored alternative is obvious. "Campaign statements are to be open for public inspection and reproduction." S.F. Code § 1.110(a). San Francisco could "itself publish [any] financial disclosure forms it requires," thus "communicat[ing] the desired information to the public without burdening a speaker with unwanted speech." *Riley*, 487 U.S. at 800.

San Francisco's concession with respect to shorter ads led the panel to avoid hard questions about this alternative's adequacy. If the government can deem ads lacking secondary donor disclaimers truly intolerable, as the panel held, political ads too small to carry the entire disclaimer may be *banned*. Absent the city's concession, the panel's logic would have "protected" voters from reading Plaintiffs' 5x5 inch print ads and viewing its 15 and 30 second internet ads. Under this opinion, jurisdictions wishing to ban shorter ads can do so.

This is not what the Supreme Court had in mind in *AFPF*.

III. RECOGNITION OF A NEW GOVERNMENT INTEREST IN COMPELLING POLITICAL SPEECH PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

"[T]he public has an interest in learning who supports and opposes ballot measures." *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012). "[R]eporting and disclosure requirements can expose the actual contributors to . . . groups and thereby provide useful information concerning the interests supporting or opposing a ballot proposition or a candidate." *ACLU of Nev. v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004).

But the government has no open-ended interest in informing the public about whatever might strike its fancy. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995).

Learning "who supports and opposes ballot measures" is one thing. Learning *who supports those* who support and oppose ballot measures is quite another. Creating new grounds to displace and compel political speech based on an interest in attenuated donor relationships is serious business. It warrants en banc review.

As noted *supra*, the panel reasoned that "[b]ecause the interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible, the challenged ordinance is substantially related to the governmental interest in informing the electorate." Opinion at 23. This non-sequitur lacks any limiting principle.

That "Defendants have a strong governmental interest in informing voters about who funds political advertisements," Opinion at 21, does not mean "[i]t follows that the secondary-contributor requirement is substantially related to that interest," Opinion at 22. It is pure supposition that every donor to a group necessarily supports everything that group does and intends for its money to flow to the subject campaign. People may donate to Ed Lee Dems for its work advancing LGBT rights, but not want their names attached to some position the group takes on a crime-related ballot initiative. If the Southern Baptist Convention were to donate to the ACLU for its efforts in fighting the patentability of human genetic material, it would be irrational to conclude that the denomination supported an ACLU ad favoring abortion rights. *See* ACLU, BRCA — Statement of Support from the

Ethics & Religious Liberty Commission, Southern Baptist Convention, https://bit.ly/3xEs8QP (noting alliance on issues).

The D.C. Circuit upheld an FEC regulation requiring corporations and labor unions to disclose only those donations earmarked for electioneering purposes, noting "the intuitive logic" that an expansive donor disclosure regime would spread misinformation. *Van Hollen v. FEC*, 811 F.3d 486, 497–98 (D.C. Cir. 2016). It contemplated a "not unlikely scenario" where a partisan Republican donor wishing to support the American Cancer Society's general cancer-curing mission would find 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).

Forcing campaigns to suggest that they are supported by such attenuated groups and people is guaranteed to confuse as much as to inform, to foment conspiracy theories, and to dissuade donors of all

persuasions from supporting committees lest they be tagged in an ad relating to some cause with which they would not want to be publicly associated. Defendant Chiu's potential entanglement in a ballot measure he could not legally support by virtue of his committee's support for Ed Lee Dems is just one of endless potential pitfalls generated by mandating campaigns' discussion of attenuated people.

Yet while California law already forbids the use of multiple committees to hide the true source of a campaign's funds, requiring original source disclosure, Cal. Gov't Code § 85704, there is no limit to the panel's logic in requiring campaigns to discuss ever-more attenuated donor relationships. Today San Francisco wants campaigns to discuss their donors' donors. Tomorrow it could claim that the use of multiple intermediaries requires disclosure to the third degree.

CONCLUSION

This case should be reheard en banc.

Dated: March 22, 2023

Respectfully submitted,

By: /s/ Alan Gura

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) _____22-15824_____

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[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** __4,177_____**.**

(Petitions and responses must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature ___s/Alan Gura_____ **Date** ___March 22, 2023____
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO ON E, SAN FRANCISCANS OPPOSING THE AFFORDABLE HOUSING PRODUCTION ACT; EDWIN M LEE ASIAN PACIFIC DEMOCRATIC CLUB PAC SPONSORED BY NEIGHBORS FOR A BETTER SAN FRANCISCO ADVOCACY; TODD DAVID, *Plaintiffs-Appellants,* v. DAVID CHIU, in his official capacity as San Francisco City Attorney; SAN FRANCISCO ETHICS COMMISSION; BROOKE JENKINS, in his official capacity as San Francisco District Attorney; CITY AND COUNTY OF SAN FRANCISCO, *Defendants-Appellees.*	No. 22-15824 D.C. No. 3:22-cv-02785-CRB OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted December 9, 2022
San Francisco, California

Filed March 8, 2023

Before: Susan P. Graber, Ronald M. Gould, and Paul J. Watford, Circuit Judges.

Opinion by Judge Graber

SUMMARY*

Civil Rights

The panel affirmed the district court's denial of Plaintiffs' motion for a preliminary injunction seeking to enjoin enforcement of a San Francisco ordinance requiring that "all committees making expenditures which support or oppose any candidate for City elective office or any City measure" must comply with the City's new disclaimer requirements, in addition to California's requirements." S.F. Campaign & Governmental Conduct Code § 1.161(a).

Under California law, certain political advertisements run by a committee must name the committee's top contributors. After the passage of Proposition F, referred to by proponents as the "Sunlight on Dark Money Initiative," the City and County of San Francisco added a secondary-

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

contributor disclaimer requirement that compels certain committees, in their political advertisements, also to list the major donors to those top contributors. Plaintiffs, who supported the passage of a ballot measure in the June 7, 2022 election, alleged that the secondary-contributor disclaimer requirement violated the First Amendment, both on its face and as applied against Plaintiffs.

The panel first determined that even though the June 2022 election had occurred, this appeal was not moot because the controversy was capable of repetition yet evading review.

The panel held that Plaintiffs had not shown a likelihood of success on the merits. Applying exacting scrutiny, the panel held that San Francisco's requirement was substantially related to the governmental interest in informing voters of the source of funding for election-related communications. As this court previously recognized, providing information to the electorate may require looking beyond the named organization that runs an advertisement. In the context of San Francisco municipal elections, Defendants showed that donors to local committees are often committees themselves and that committees often obscure their actual donors through misleading and even deceptive committee names. Because the interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible, the challenged ordinance was substantially related to the governmental interest in informing the electorate.

The panel next held that the ordinance did not create an excessive burden on Plaintiffs' First Amendment rights relative to the government interest and was sufficiently

tailored. Thus, the panel was not persuaded that the secondary-contributor requirement was an impermissible burden on speech because the size of the disclaimer was excessive with respect to larger ads. And given Defendants' position that it would not enforce the challenged ordinance with respect to shorter ads, the district court was within its discretion to conclude that any burden on speech did not require a preliminary injunction in this instance. Plaintiffs' argument that the secondary-contributor requirement violated their right to freedom of association was likewise insufficient to outweigh the strength of the governmental interests. The district court was within its discretion to conclude that the secondary-contributor requirement had a scope in proportion to the City's objective.

Addressing the remaining preliminary injunction factors, the panel concluded that without an injunction, Plaintiffs likely would be injured by the loss of some First Amendment freedoms, but that injury would be modest. Defendants, however, established that there is a strong public interest in providing voters with the information of who supports ballot measures. Thus, the public interest and the balance of hardships weighed in favor of Defendants.

COUNSEL

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Tara M. Steeley (argued) and Wayne K. Snodgrass, Deputy City Attorneys; David Chiu, City Attorney; Office of the San Francisco City Attorney; San Francisco, California; for Defendants-Appellees.

Tara Malloy and Megan P. McAllen, Campaign Legal Center, Washington, D.C., for Amicus Curiae Campaign Legal Center.

OPINION

GRABER, Circuit Judge:

In response to the growing prevalence of money in politics, many governments have required groups that run political advertisements to identify their funding sources publicly. Under California law, certain political advertisements run by a committee must name the committee's top contributors. The City and County of San Francisco adds a secondary-contributor disclaimer requirement that compels certain committees, in their political advertisements, also to list the major donors to those top contributors. [1]

[1] The parties in this case distinguish between "disclaimers" (statements at the time of the advertisement, identifying who is funding the ad) and "disclosures" (public reports filed with government entities). Although that distinction is recognized in the case law, see, e.g., Citizens United

Plaintiffs—a political committee that runs ads, the committee's treasurer, and a contributor to the committee—seek to enjoin enforcement of San Francisco's ordinance. They allege that the secondary-contributor requirement violates the First Amendment. The district court held that Plaintiffs are unlikely to succeed on the merits and denied Plaintiffs' request for a preliminary injunction. Reviewing the denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo, Fyock v. Sunnyvale, 779 F.3d 991, 995 (9th Cir. 2015), we agree with the district court. Plaintiffs have not shown a likelihood of success on the merits. San Francisco's requirement is substantially related to the governmental interest in informing voters of the source of funding for election-related communications. The ordinance does not create an excessive burden on Plaintiffs' First Amendment rights relative to that interest, and it is sufficiently tailored to the governmental interest. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. California Political Reform Act

The California Political Reform Act defines a "committee" as "any person or combination of persons" who, in a calendar year, receives contributions totaling $2,000 or more; makes independent expenditures totaling $1,000 or more; or makes contributions totaling $10,000 or more to, or at the behest of, candidates or committees. Cal. Gov't Code § 82013. A "primarily formed committee" is

v. FEC, 558 U.S. 310, 366–67 (2010), some courts use the terms interchangeably. Where relevant, we clarify whether laws considered by prior courts required disclosures or disclaimers, consistent with the foregoing definitions.

defined as a committee that receives $2,000 or more in contributions in a calendar year and is formed or exists primarily to support or oppose a single candidate, a single measure, a group of candidates being voted on in the same election, or two or more measures being voted on in the same election. Id. § 82047.5. Every committee, whether or not it is primarily formed, must file a statement of organization with the California Secretary of State and the relevant local filing officer, id. § 84101(a), which in this case is the San Francisco Ethics Commission. See S.F. Campaign & Governmental Conduct Code ("S.F. Code") § 1.112(a)(1).

Committees must file semiannual statements, Cal. Gov't Code § 84200(a), and must file two preelection statements, one at least 40 days before an election and the second at least 12 days before an election, id. §§ 84200.5, 84200.8. Among other requirements, each of those campaign statements must include "[t]he total amount of contributions received during the period covered by the campaign statement and the total cumulative amount of contributions received." Id. § 84211(a). If any donor contributes money to the committee during a reporting period and has given aggregate contributions of $100 or more, then the report must include that donor's name, address, occupation, and employer, plus the dates and amounts of the donor's contributions during the period and the donor's total aggregate contributions. Id. § 84211(f).

California law also requires specific disclaimers in political advertisements. Id. §§ 84501–84511. An "advertisement" is defined as "any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures." Id. § 84501(a)(1).

Advertisements must include the words "[a]d paid for by [the name of the committee]." Id. § 84502(a)(1). They also must state "committee major funding from," followed by the names of the top contributors to the committee. Id. § 84503(a). "Top contributors" are defined as "the persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of fifty thousand dollars ($50,000) or more." Id. § 84501(c)(1). Depending on the medium, the advertisement must follow certain formatting requirements. See id. §§ 84504.1 (video); 84504.2 (print); 84504.4 (radio and telephone); 84504.3 (electronic media); 84504.6 (online platforms).

B. San Francisco's Proposition F

On November 5, 2019, San Francisco voters passed Proposition F. Referred to by proponents as the "Sunlight on Dark Money Initiative," Proposition F changed the disclaimer requirements for advertisements paid for by independent political committees, among other provisions. After the passage of Proposition F, "all committees making expenditures which support or oppose any candidate for City elective office or any City measure" must comply with the City's new disclaimer requirements, in addition to the state's requirements. S.F. Code § 1.161(a).

Under the new ordinance, ads run by primarily formed independent expenditure and ballot measure committees must include a disclaimer listing their top three contributors of $5,000 or more. Id. § 1.161(a)(1). Additionally, "[i]f 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." Id. The ad also must inform voters that "[f]inancial disclosures are

available at sfethics.org" or, if an audio ad, provide a substantially similar statement that specifies the website. S.F. Code § 1.161(a)(2).

Printed disclaimers that identify a "major contributor or secondary major contributor" must list the dollar amount of relevant contributions made by each named contributor. S.F. Code § 1.161(a)(1); S.F. Ethics Comm'n Reg. ("S.F. Reg.") 1.161-3(a)(4). Print ads must include the disclaimers in text that is "at least 14-point, bold font." S.F. Code § 1.161(a)(3). Audio and video advertisements must begin by speaking the required disclaimers of major contributors and secondary major contributors, but need not disclose the dollar amounts of those donors' contributions. Id. §§ 1.161(a)(5); 1.162(a)(3). In addition, video ads must display a text banner that contains similar information to that required in print ads. Cal. Gov't Code § 84504.1; S.F. Code § 1.161(a)(1).

Violations of the City's campaign finance laws are punishable by civil, criminal, and administrative penalties. S.F. Code § 1.170. A committee's treasurer may be held personally liable for violations by the committee. Id. § 1.170(g). Any individual who suspects a possible violation may file a complaint with the Ethics Commission, City Attorney, or District Attorney. Id. § 1.168(a); see id. § 1.168(b) (providing for enforcement through civil action); San Francisco Charter, appendix C, § C3.699-13 (Ethics Commission procedures for investigations and enforcement proceedings).

C. Earlier Litigation Challenging Proposition F

In 2020, Todd David founded Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency

Response Bond.[2] David and Yes on Prop B challenged San Francisco's secondary-contributor requirement in the lead-up to the March 3, 2020 election. On February 20, 2020, the district court enjoined the application of that requirement to the plaintiffs' smaller and shorter advertisements "because they [left] effectively no room for pro-earthquake safety messaging." Yes on Prop B v. City & County of San Francisco, 440 F. Supp. 3d 1049, 1051, 1062 (N.D. Cal. 2020). The district court, however, concluded that the challenged ordinance was "not an unconstitutional burden on larger or longer advertising" and declined to enjoin the secondary-contributor disclaimer requirement on its face or as applied to the plaintiffs' larger ads. Id. at 1051, 1061–62.

On October 21, 2020, in an unpublished disposition, we dismissed the plaintiffs' appeal on the ground of mootness. Yes on Prop B v. City & County of San Francisco, 826 F. App'x 648 (9th Cir. 2020). The plaintiffs argued that the "capable of repetition, yet evading review exception" applied, but we held that the case was moot because the plaintiffs had not "shown that 'there is a reasonable expectation that the same complaining party will be subject to the same action again.'" Id. at 649 (quoting Protectmarriage.com–Yes on 8 v. Bowen, 752 F.3d 827, 836 (9th Cir. 2014)). We stressed that the record was "devoid of any detail" that plaintiffs would run advertisements in the future, particularly in the upcoming November 2020 election. Id. Thus, we concluded that, "[a]t best, [the plaintiffs] have shown only that there is a theoretical

[2] The Prop B at issue in the 2020 litigation concerned an earthquake safety and emergency response bond and is unrelated to the Prop B that was originally at issue in this litigation.

possibility that the same controversy will recur with respect to them." Id.

D. Current Litigation

This action was brought by three plaintiffs: (1) No on E, San Franciscans Opposing the Affordable Housing Production Act ("the Committee"), a primarily formed independent expenditure committee that runs ads subject to the secondary-contributor requirement; [3] (2) Todd David, the founder and treasurer of No on E (and the founder of Yes on Prop B); and (3) Edwin M. Lee Asian Pacific Democratic Club PAC Sponsored by Neighbors for a Better San Francisco Advocacy ("Ed Lee Dems"), a committee and a direct contributor to No on E, whose major donors would be subject to disclosure in ads under the San Francisco ordinance. David established the Committee to support the passage of Prop B in the June 7, 2022 election. The Committee sought to communicate its message by publishing mailers, print ads in newspapers, and digital ads on the internet.

As of May 10, 2022, the Committee had raised a total of $15,000 from three donors, each of which contributed $5,000. Two of those donors were committees that, in turn, had donors that had made contributions of more than $5,000. Thus, according to the examples provided by Plaintiffs, San Francisco's ordinance would require the following

[3] The lead plaintiff in this suit was known as "San Franciscans Supporting Prop B" throughout the district court litigation. On appeal, and after the conclusion of the June 7, 2022 election, the case caption was updated to reflect the fact that the Committee rededicated itself to opposing Proposition E and changed its name, as required by California Government Code section 84107.

disclaimer on the Committee's print and video advertisements:

> Ad paid for by San Franciscans Supporting Prop. B 2022. Committee major funding from:
>
> 1. Concerned Parents Supporting the Recall of Collins, Lopez and Moliga ($5,000) – contributors include Neighbors for a Better San Francisco Advocacy Committee ($468,800), Arthur Rock ($350,000).
>
> 2. BOMA SF Ballot Issues PAC ($5,000).
>
> 3. Edwin M. Lee Asian Pacific Democratic Club PAC sponsored by Neighbors for a Better San Francisco Advocacy ($5,000) – contributors include Neighbors for a Better San Francisco Advocacy Committee ($100,000), David Chiu for Assembly 2022 ($10,600).
>
> Financial disclosures are available at sfethics.org.

On May 11, 2022, Plaintiffs filed this action. Plaintiffs allege that the secondary-contributor disclaimer requirement violates the First Amendment, both on its face and as applied against Plaintiffs. In their prayer for relief, Plaintiffs request a declaration that the requirement violates the First Amendment, on its face and as applied to Plaintiffs; an injunction barring enforcement of the secondary-contributor requirement, in general and against Plaintiffs specifically; and nominal damages.

On May 12, 2022, Plaintiffs filed a motion for a preliminary injunction. Plaintiffs submitted a proposed order requesting that the court "preliminarily [enjoin]

Defendants and their agents, officers, and representatives from enforcing against Plaintiffs the on-communication disclosure requirements for secondary donors at S.F. Code § 1.161(a)." In support of the motion for a preliminary injunction, David submitted a declaration stating that, "[b]ecause Concerned Parents and Ed Lee Dems are committees, they have contributed $5,000 to the Committee, and they both have donors who have given them $5,000 or more, San Francisco's law will require that our Committee report those secondary donors on our communications."

On June 1, 2022, the district court denied Plaintiffs' motion. Plaintiffs timely appeal. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292.

DISCUSSION

To obtain a preliminary injunction, a plaintiff must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008). On appeal, Plaintiffs argue primarily that they have demonstrated a likelihood of success on the merits. See Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015) (en banc) ("The first factor under Winter is the most important—likely success on the merits."). Below, we address (A) mootness, (B) Plaintiffs' likelihood of success on the merits, and (C) the remaining Winter factors.

A. Mootness

Before turning to the merits, we first must establish that we have jurisdiction. "[A] federal court loses its 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, 752 F.3d at 836. Defendants maintain that, because the June 2022 election has occurred, Plaintiffs can no longer receive meaningful relief and this appeal is moot. Although the June 2022 election has passed, this appeal is not moot because this controversy is "capable of repetition, yet evading review." FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007).

The "capable of repetition, yet evading review" exception to mootness applies when "(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." Id. (citation and internal quotation marks omitted). Defendants do not dispute that Plaintiffs have satisfied the first prong of that test. See Protectmarriage.com—Yes on 8, 752 F.3d at 836 (describing an election as a controversy of inherently limited duration).

"The second prong of the capable of repetition exception requires a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." Wis. Right to Life, 551 U.S. at 463 (citation and internal quotation marks omitted). But that standard does not require Plaintiffs to establish a certainty that they will be subject to the same enforcement: "Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges." Id. Plaintiffs bear the burden of showing that the "capable of repetition" prong is satisfied. Lee v. Schmidt-Wenzel, 766 F.2d 1387, 1390 (9th Cir. 1985).

On this record, Plaintiffs have met that burden with respect to at least one plaintiff.[4] David has a demonstrated history of establishing committees that run advertisements that are subject to the secondary-contributor requirement, and he has twice engaged in litigation on this same issue. He also has clearly expressed his intent to continue those activities, unlike the plaintiffs in the earlier suit. Plaintiffs' complaint alleges that David "will engage in materially and substantially similar activity in the future, establishing committees and using them to speak about San Francisco candidates and measures." (Emphasis added). In support of Plaintiffs' motion for a preliminary injunction, David averred that he "will continue to create primarily formed committees in future elections, to share ads and communications substantially and materially similar to those we wanted to share in 2020 and that we want to share now." (Emphasis added).

Defendants offer no persuasive reason to doubt David's affidavit, which is supported by his past practice. See Wis. Right to Life, 551 U.S. at 463–64 (holding that there was a reasonable expectation that the same controversy would recur where plaintiff "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads" and "sought another preliminary injunction based on an ad it planned to run" during another blackout period). Accordingly, this appeal is not moot, because it falls within the exception for controversies that are "capable of

[4] Although Plaintiffs' motion for a preliminary injunction did not include a facial challenge, the relief sought by Plaintiffs was not limited to the June 2022 election. Instead, Plaintiffs asked the court to preliminarily enjoin Defendants from enforcing the secondary-contributor requirement against Plaintiffs indefinitely.

repetition, yet evading review." See Hum. Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1001–02 (9th Cir. 2010) (concluding that there was a reasonable expectation that the controversy would recur because the plaintiff was a politically active organization that had been heavily involved in public debates in the past and intended to undertake future communications); Porter v. Jones, 319 F.3d 483, 490 (9th Cir. 2003) (rejecting mootness argument because plaintiff had expressed intent to create a similar website in future elections); Baldwin v. Redwood City, 540 F.2d 1360, 1365 (9th Cir. 1976) (holding that an issue is "capable of repetition, yet evading review" where the record established that plaintiff had continuing interest in and past practices of participating in local political campaigns by creating signs).

B. Likelihood of Success on the Merits

Plaintiffs seek a preliminary injunction on the ground that the secondary-contributor disclaimer requirement violates the First Amendment. We hold that the district court acted within its discretion to conclude that Plaintiffs did not establish a likelihood of success on the merits.

The district court applied "exacting scrutiny," which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam)). On de novo review, Fyock, 779 F.3d at 995, we hold that exacting scrutiny is the correct legal standard.

Regardless of the beliefs sought to be advanced by association, "compelled disclosure requirements are reviewed under exacting scrutiny." Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (opinion of

Roberts, C.J.); see also id. at 2396 (applying exacting scrutiny to First Amendment challenge to compelled disclosure) (Sotomayor, J., dissenting). In the electoral context, both the Supreme Court and our court have consistently applied exacting scrutiny to compelled disclosure requirements and on-advertisement disclaimer requirements. See Citizens United, 558 U.S. at 366–67 (holding that disclaimer and disclosure requirements are subject to exacting scrutiny); John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010) (applying exacting scrutiny to disclosure requirement); Buckley, 424 U.S. at 64 (requiring that compelled disclosure requirements survive exacting scrutiny); Davis v. FEC, 554 U.S. 724, 744 (2008) (evaluating whether disclosure requirements satisfy exacting scrutiny); Brumsickle, 624 F.3d at 1005 (applying exacting scrutiny to Washington law that required disclaimers on political advertising and disclosure of certain contributions and expenditures); see also Family PAC v. McKenna, 685 F.3d 800, 805–06 (9th Cir. 2012) ("Disclosure requirements are subject to exacting scrutiny.").[5]

Plaintiffs' argument to the contrary is unavailing. Plaintiffs take the position that disclaimer and disclosure are "terms of art," and argue that the City's ordinance should be reviewed under strict scrutiny because it is a "hybrid disclaimer/disclosure requirement." But Plaintiffs cite no

[5] In ACLU of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004), we held that strict scrutiny applied to statutes that affect the content of election communications. 378 F.3d at 987. But we have since acknowledged that intervening Supreme Court decisions clarified that we apply exacting scrutiny to disclosure and disclaimer requirements. See Brumsickle, 624 F.3d at 1005 (citing John Doe No. 1, 561 U.S. at 196, and Citizens United, 558 U.S. at 366–67).

authority that makes a similar distinction.[6] Indeed, they acknowledge that the Supreme Court has applied exacting scrutiny to both disclosure rules, John Doe No. 1, 561 U.S. at 196, and disclaimer requirements, Citizens United, 558 U.S. at 366–67.

The concerns that Plaintiffs suggest are uniquely implicated in this case animate the entirety of the exacting scrutiny standard: "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." Buckley, 424 U.S. at 65. Courts have upheld other laws, even where there was some deterrent effect, because "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' Buckley, 424 U.S., at 64, and 'do not prevent anyone from speaking,' McConnell v. FEC, 540 U.S. 93, 201 (2003)." Citizens United, 558 U.S. at 366 (citations altered). Any argument that the secondary-contributor requirement violates the First Amendment because of the length and

[6] Citing Americans for Prosperity Foundation v. Bonta, Plaintiffs further argue that San Francisco's "hybrid" requirement should be reviewed under strict scrutiny because "[t]he Supreme Court recently signaled that it may be increasing the scrutiny given to any disclosure regime." This reading of Americans for Prosperity Foundation clashes with a plain reading of the case and the manner in which other courts have applied it to disclaimer laws. See, e.g., Gaspee Project v. Mederos, 13 F.4th 79, 95 (1st Cir. 2021), cert. denied, 142 S. Ct. 2647 (2022); Smith v. Helzer, No. 3:22-CV-00077-SLG, 2022 WL 2757421, at *10 (D. Alaska July 14, 2022), appeal docketed, No. 22-35612 (9th Cir. argued Feb. 9, 2023). We hold that Americans for Prosperity Foundation does not alter the existing exacting scrutiny standard.

content of the disclaimer is appropriately addressed as part of the exacting scrutiny analysis.

To survive exacting scrutiny, a law must satisfy all three steps of the inquiry. The threshold question is whether there is a "substantial relation" between the challenged law and a "sufficiently important" governmental interest. Citizens United, 558 U.S. at 366–67 (citation and internal quotation marks omitted); see Ams. for Prosperity Found., 141 S. Ct. at 2384 (describing a substantial relation as "necessary but not sufficient"). Next, "[t]o withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." Ams. for Prosperity Found., 141 S. Ct. at 2383 (quoting John Doe No. 1, 561 U.S. at 196) (internal quotation marks omitted). Finally, "[w]hile exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." Id.

Below, we assess (1) the relation between the secondary-contributor disclaimer requirement and the governmental interest; (2) whether the strength of that interest reflects the seriousness of the burden on Plaintiffs' First Amendment rights; and (3) whether San Francisco's ordinance is narrowly tailored to that interest.

1. Relation Between the Secondary-Contributor Disclaimer Requirement and Defendants' Interest

Defendants take the position that the secondary-contributor requirement serves their interest in providing information to voters about the source of election-related spending. A committee can circumvent California's on-

advertisement disclaimer requirement and avoid including its top donors in a disclaimer by providing funding to another committee instead of running an advertisement directly. Defendants contend that the secondary-contributor requirement satisfies voters' need for additional information by making it more difficult to hide the sources of funding for political advertisements.

Courts have long recognized the governmental interest in the disclosure of the sources of campaign funding:

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley, 424 U.S. at 66–67 (internal quotation marks and citation omitted); see Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) ("[I]n the context of disclosure requirements, the government's interest in providing the electorate with information related to election and ballot issues is well-established."), abrogated on other grounds as stated in Brumsickle, 624 F.3d at 1013.

"[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978). As the role of money in politics has expanded, the public is faced with a "cacophony of political communications through which . . . voters must pick out meaningful and accurate messages." Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 (9th Cir. 2003). Understanding what entity is funding a communication allows citizens to make informed choices in the political marketplace. Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 793 (9th Cir. 2006); see Bellotti, 435 U.S. at 791–92 ("[The public] may consider, in making their judgment, the source and credibility of the advocate."); Getman, 328 F.3d at 1105 ("Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, we think being able to evaluate who is doing the talking is of great importance.").

We have "repeatedly recognized an important (and even compelling) informational interest in requiring ballot measure committees to disclose information about contributions." Family PAC, 685 F.3d at 806. Disclosure of who is speaking "enables the electorate to make informed decisions and give proper weight to different speakers and messages." Citizens United, 558 U.S. at 371. "An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another." Brumsickle, 624 F.3d at 1008. Thus, we conclude that, as in other cases, Defendants have a strong governmental interest in informing voters about who funds political advertisements.

It follows that the secondary-contributor requirement is substantially related to that interest. We have previously recognized that providing information to the electorate may require looking beyond the named organization that runs the advertisement. In ACLU of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004), for example, the plaintiffs challenged a Nevada statute that required printed election-related communications to include the names of the businesses, social organizations, or legal entities responsible for those communications. 378 F.3d at 981–83. We recognized that "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names." Id. at 994. Thus, we concluded that, "[w]hile reporting and disclosure requirements can expose the actual contributors to such groups and thereby provide useful information concerning the interests supporting or opposing a ballot proposition or a candidate, simply supplying the name and address of the organization on the communication itself does not provide useful information—and that is all the Nevada Statute requires." Id.

While Heller is an anonymous speech case, we agree with Heller's reasoning, and find it relevant to the election disclaimer context. The interests in "where political campaign money comes from," Buckley, 424 U.S. at 66 (citation omitted), and "in learning who supports and opposes ballot measures," Family PAC, 685 F.3d at 806, extend beyond just those organizations that support a measure or candidate directly. Plaintiffs do not challenge California's law that requires an on-advertisement disclaimer listing the top three donors to a committee. But those donors are often committees in their own right. The secondary-contributor requirement is designed to go beyond

the "ad hoc organizations with creative but misleading names" and instead "expose the actual contributors to such groups." Heller, 378 F.3d at 994; see McConnell v. FEC, 540 U.S. 93, 128 (2003) (noting that "sponsors of [political] ads often used misleading names to conceal their identity" and providing examples), overruled on other grounds by Citizens United, 558 U.S. at 365–66. In the context of San Francisco municipal elections, Defendants show that donors to local committees are often committees themselves and that committees often obscure their actual donors through misleading and even deceptive committee names. Because the interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible, the challenged ordinance is substantially related to the governmental interest in informing the electorate.

Notwithstanding that relationship, Plaintiffs contend that the challenged ordinance actually undermines that interest. They take the position that the secondary-contributor requirement could cause confusion because a committee must list donors who may not have any position on the issue that the ad is addressing or who may not have known that their donation would be used to promote those views. But Plaintiffs provide no factual basis for their assumption that San Francisco voters are unable to distinguish between supporting a group that broadcasts a statement and supporting the statement itself. See Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 454–55 (2008) (requiring more than "sheer speculation" of voter confusion). Additionally, adopting Plaintiffs' position could call into question the logic underlying decisions that uphold disclosure and disclaimer requirements as applied to primary donors. Those cases emphasize that the laws at issue further the governmental interest in revealing the source of

campaign funding, not ensuring that every donor agrees with every aspect of the message. Brumsickle, 624 F.3d at 1005–08; Getman, 328 F.3d at 1104–07.

Plaintiffs' final argument—that any informational interest furthered by San Francisco's ordinance is outweighed by the corresponding limitation on time available for other speech—is similarly unavailing. It is well-established that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." Citizens United, 558 U.S. at 366 (internal quotation marks and citations omitted). Even if Plaintiffs are correct that the governmental interest is somewhat diminished in this instance because the challenged ordinance requires disclosure of secondary contributors instead of direct donors, that principle still applies.

Thus, we hold that the district court did not abuse its discretion by concluding that the secondary-contributor disclaimer requirement is substantially related to Defendants' informational interest.

2. Burden On First Amendment Rights

"To withstand [exacting] scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" John Doe No. 1, 561 U.S. at 196 (quoting Davis, 554 U.S. at 744). It is well-established that there is an important governmental interest in providing voters with information about the source of funding for political advertisements. Buckley, 424 U.S. at 66–67; Heller, 378 F.3d at 994; Family PAC, 685 F.3d at 806. Given the strength of that interest, we are not persuaded by either of Plaintiffs' arguments that San

Francisco's ordinance impermissibly burdens their First Amendment rights.

First, Plaintiffs assert that the required disclaimer displaces an excessive amount of speech. According to David, the spoken disclaimer would take up 100% of a 15-second ad, 100% of a 30-second ad, and 53-55% of a 60-second ad. David averred that the written disclaimer on video ads would take up between 35% and 51% of the screen for either 10 seconds of an ad that is 30 seconds or longer, or the first 5 seconds of a shorter ad. Finally, David declared that the required disclaimer would take up 100% of a two-inch by four-inch ad, 70% of a five-inch by five-inch ad, 35% of a five-inch by ten-inch ad, and 23% of the face of an 8.5-inch by 11-inch mailer. Defendants dispute that disclaimers required by the ordinance would take up the majority of the space on most committee's advertisements. In any event, Defendants have consistently stated that they would not enforce the disclaimer requirement where disclaimers take up most or all of an advertisement's space.

In Citizens United, the Supreme Court upheld a law that required 40% of an advertisement to be devoted to a disclaimer. 558 U.S. at 320, 366, 367–68. In the earlier litigation challenging San Francisco's ordinance, the district court relied on that precedent and denied the plaintiffs' request for an injunction with respect to the larger ads. Yes on Prop B, 440 F. Supp. 3d at 1056–57. Although the court declined to establish a mathematical formula, it concluded that the secondary-contributor requirement was not unduly burdensome for larger ads, in which the disclaimer took up less than 40% of the ad. Id. The court found that, for larger ads, the remaining space was sufficient to communicate the plaintiffs' political message. Id. We find that reasoning to be persuasive. Plaintiffs have not shown that they are likely

to succeed on the merits of their argument that the secondary-contributor requirement is an impermissible burden on speech because the size of the disclaimer is excessive with respect to larger ads.[7]

Shorter ads warrant a different analysis. In the earlier litigation, the district court enjoined San Francisco's ordinance with respect to smaller advertisements because the burden on speech was too great. Yes on Prop B, 440 F. Supp. 3d at 1055–56. But, in this litigation, the district court denied the entirety of Plaintiffs' motion for an injunction. Even if we assume that we agree with the district court's conclusion that the secondary-contributor requirement likely causes constitutional issues with respect to shorter ads, the district court was within its discretion to conclude that any burden on speech did not require a preliminary injunction in this instance.

In the earlier litigation, the City took the position that it would not enforce the requirement with respect to shorter

[7] Plaintiffs rely heavily on American Beverage Association v. City & County of San Francisco, 916 F.3d 749 (9th Cir. 2019) (en banc), to support their assertion that the size of the disclaimer is excessive here. But American Beverage is inapposite. The court in American Beverage was applying the Zauderer test, a separate inquiry that requires the defendant to prove that compelled commercial speech was neither unjustified nor unduly burdensome. Am. Bev., 916 F.3d at 756 (citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985), and Nat'l Inst. of Family & Life Advocs. v. Becerra (NIFLA), 138 S. Ct. 2361, 2372, 2377 (2018)). That test differs from exacting scrutiny review, which applies to disclaimer and disclosure requirements in the electoral context. Citizens United, 558 U.S. at 366–67; see id., 558 U.S. at 422 ("The election context is distinctive in many ways[.]" (Stevens, J., concurring)); Gaspee Project, 13 F.4th at 95 ("The election-related context implicated here is alone sufficient to distinguish NIFLA").

ads, and the district court granted an injunction to that effect. Yes on Prop B, 440 F. Supp. 3d at 1055. When Plaintiffs moved for an injunction in this action, Defendants offered to agree not to enforce San Francisco's ordinance with respect to print ads that were five-inches by five-inches or smaller, or to spoken disclaimers on digital and audio advertisements of 60 seconds or less. After Plaintiffs refused that offer, Defendants again took the position that they would not enforce the challenged ordinance with respect to shorter ads in which the "required disclaimer would consume the majority of Plaintiffs' advertisement." In light of that commitment, San Francisco's ordinance does not burden Plaintiffs such that "the intervention of a court of equity is essential in order effectually to protect . . . rights against injuries otherwise irremediable." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citation and internal quotation marks omitted).

The second burden identified by Plaintiffs—that the secondary-contributor requirement violates their right to freedom of association and drives away potential donors—is likewise insufficient to outweigh the strength of the governmental interests. "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute." Buckley, 424 U.S. at 68. But to support an exemption from a compelled disclosure requirement, Plaintiffs must show more than a "modest burden." Family PAC, 685 F.3d at 808; see Ams. for Prosperity Found., 141 S. Ct. at 2388–89 (concluding that petitioners had shown a "widespread burden on donors' associational rights" where there was evidence that petitioners and their supporters had been subjected to "bomb threats, protests, stalking, and

physical violence," and hundreds of organizations expressed that they shared the petitioners' concerns).

Plaintiffs provided only two declarations in support of their contention that San Francisco's ordinance burdens their right to freedom of association. David asserts that "[p]otential donors have expressed concern to me about the secondary disclosure rules and are more reluctant to contribute to committees where their donors need to be disclosed." Ed Lee Dems asserts that it would have to withdraw its donations from the Committee and would have its own fundraising challenges if donors thought that their names might become public through the secondary-contributor requirement.

The district court was within its discretion to conclude that Plaintiffs failed to demonstrate that the secondary-contributor requirement "actually and meaningfully deter[s] contributors." Family PAC, 685 F.3d at 807. Plaintiffs have not provided evidence of any specific deterrence beyond some donors' alleged desire not to have their names listed in an on-advertisement disclaimer. See Family PAC, 685 F.3d at 806–08 (concluding that disclosure requirements presented only a modest burden without a showing of a significant risk of harassment or retaliation). That level of hesitation on the part of donors is insufficient to establish that the "deterrent effect feared by [Plaintiffs] is real and pervasive." Ams. for Prosperity Found., 141 S. Ct. at 2388.

Adopting Plaintiffs' view that a modest burden on their right to associate anonymously outweighs the informational interest would "ignore[] the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." McConnell, 540 U.S. at 197 (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 237

(D.D.C. 2003)), overruled in part on other grounds by Citizens United, 558 U.S. at 365–66. The modest burden imposed on the Plaintiffs is permissible when contrasted with the alternative: "Plaintiffs never satisfactorily answer the question of how uninhibited, robust, and wide-open speech can occur when organizations hide themselves from the scrutiny of the voting public." Id. (internal quotation marks omitted).

3. Narrow Tailoring

Under exacting scrutiny, "the challenged requirement must be narrowly tailored to the interest it promotes." Ams. for Prosperity Found., 141 S. Ct. at 2384. But this standard does not require "the least restrictive means of achieving that end." Id. Despite the close fit between San Francisco's ordinance and the government's informational interest, Plaintiffs present two different arguments as to why the secondary-contributor requirement is insufficiently tailored. Neither argument is persuasive.

First, Plaintiffs argue that the requirement fails narrow tailoring because there are other available alternatives, such as making the same information available in an online database. That suggestion misunderstands the relevant standard. The secondary-contributor requirement must have a scope "in proportion to the interest served," but it need not represent the "single best disposition." McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (plurality opinion) (internal quotation marks omitted). Case law and scholarly research support the proposition that, because of its instant accessibility, an on-advertisement disclaimer is a more effective method of informing voters than a disclosure that voters must seek out. See Gaspee Project, 13 F.4th at 91 (holding that an on-ad donor disclaimer is "not entirely

redundant to the donor information revealed by public disclosures" because it "provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names"), cert. denied, 142 S. Ct. 2647 (2022); Majors v. Abell, 361 F.3d 349, 353 (7th Cir. 2004) (reasoning that because fewer people are likely to see reports to government agencies than notice in the ad itself, "reporting [is] a less effective method of conveying information"); Michael Kang, Campaign Disclosure in Direct Democracy, 97 Minn. L. Rev. 1700, 1718 (2013) ("Research from psychology and political science finds that people are skilled at crediting and discrediting the truth of a communication when they have knowledge about the source, but particularly when they have knowledge about the source at the time of the communication as opposed to subsequent acquisition."). Given the realities of voters' decision-making processes amidst a "cacophony" of electoral communications, Getman, 328 F.3d at 1105–06, the district court was within its discretion to conclude that the secondary-contributor requirement has a scope in proportion to the City's objective.

Plaintiffs' second argument—that the requirement is not limited to donations that are earmarked for electioneering—does not change that conclusion. Plaintiffs cite two out-of-circuit cases in which courts concluded that disclosure laws were narrowly tailored, in part because the laws applied only to donations that were earmarked for electioneering. See Indep. Inst. v. Williams, 812 F.3d 787, 797 (10th Cir. 2016) (upholding Colorado constitutional provision that only required disclosure of donors who have specifically earmarked their contributions for electioneering purposes); Indep. Inst. v. FEC, 216 F. Supp. 3d 176, 190–92 (D.D.C. 2016) (three-judge panel holding that a large-donor disclosure requirement limited to donors who contribute

$1,000 or more for the specific purpose of supporting the advertisement is tailored to advance the government's interest in informing the electorate of the source of the advertisement).[8] Those courts upheld laws that required only disclosure of earmarked contributions. But neither court suggested that, or had occasion to consider whether, a law fails narrow tailoring unless it is limited to the disclosure of earmarked contributions.

And even though San Francisco's ordinance goes beyond donations that are earmarked for electioneering, it does not have an unconstrained reach. The challenged ordinance requires an on-advertisement disclaimer listing only the top donors to a committee that is, in turn, a top donor to a primarily formed committee. S.F. Code § 1.161(a)(1). Under California law, a primarily formed committee is formed or exists primarily to support candidates or ballot measures. Cal. Gov't Code § 82047.5. By donating to a primarily formed committee, a secondary committee necessarily is making an affirmative choice to engage in election-related activity.

If a secondary committee were to purchase and run an advertisement opposing a ballot measure directly, its top

[8] Plaintiffs also cite Van Hollen, Jr. v. FEC, 811 F.3d 486 (D.C. Cir. 2016), in which the D.C. Circuit considered a challenge to an FEC rule requiring corporations and labor organizations to disclose only donations "made for the purpose of furthering electioneering communications" instead of all donations. 811 F.3d at 488 (citation and internal quotation marks omitted). But because the court in Van Hollen did not consider whether a campaign finance law violated the First Amendment, we do not find its analysis to be persuasive. See id. at 495, 501 (holding that the FEC's rule is consistent with the text, history, and purposes of the authorizing statute and is not an arbitrary and capricious exercise of the FEC's regulatory authority).

donors could be subject to California's disclaimer requirements, which Plaintiffs do not challenge. The application of that law does not depend on whether the top donors earmarked their contributions for electioneering, or on whether they support the content of the advertisement. The City's ordinance does not violate narrow tailoring just because the secondary committee funneled its donations through a separate committee instead of running its own advertisements.

Additionally, even if Plaintiffs' challenge to the City's requirement were to succeed, the secondary donors still would be subject to disclosure and publicly visible on government websites. Plaintiffs do not challenge those public disclosures of secondary donors, which occur whether or not the donors earmarked their contributions. Assuming that those disclosures are permissible, as Plaintiffs do by failing to challenge their validity, we are not persuaded that a law requiring those same donors to be named in an on-advertisement disclaimer is insufficiently tailored.

Thus, we hold that the district court was within its discretion to conclude that Plaintiffs did not establish a likelihood of success on the merits.

C. Remaining Preliminary Injunction Factors

The district court concluded that none of the remaining Winter factors weighed in favor of an injunction, in part because Plaintiffs' argument as to those factors largely relied on their position that they had demonstrated a likelihood of success on the merits. The same is true on appeal. We hold that the district court did not abuse its discretion by reaching that conclusion.

Without an injunction, Plaintiffs likely would be injured by the loss of some First Amendment freedoms, Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion), but that injury would be modest, Family PAC, 685 F.3d at 806. Defendants, however, have established that there is a strong public interest in providing voters with the information of who supports ballot measures. Brumsickle, 624 F.3d at 1008. Thus, the public interest and the balance of hardships weigh in favor of Defendants. See FTC v. Affordable Media, LLC, 179 F.3d 1228, 1236 (9th Cir. 1999) ("Under this Circuit's precedents, 'when a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.'" (quoting FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989))).

AFFIRMED.