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' REPLY 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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INTRODUCTION

This case is not about political transparency. Not a single new fact will become public if San Francisco prevails. Nor is it about disclaimer requirements generally. YPB will identify itself, and its top donors, on all advertisements.

The issue is whether there is a limit to San Francisco's ability to commandeer a political ad and force a speaker to carry the government's preferred message. San Francisco suggests that this appeal should not be heard at all, or if it is, that the requirements at issue here are unremarkable efforts taken in aid of its "informational interest." But that merely begs the question. While the City and County marshals judicial quotations praising disclosure generally, no court has ever held that the informational interest goes as far as San Francisco suggests, and several have held to the contrary.

San Francisco's effort to compel speakers to dedicate a substantial portion of their communications to naming so-called secondary donors is an unprecedented expansion of campaign finance regulation. And under heightened constitutional scrutiny, the burdens it imposes cannot be justified by the ethereal advantages obtained.

ARGUMENT

I. THIS CASE IS PROPERLY BEFORE THIS COURT

San Francisco does not dispute that the first requirement for the "capable of repetition, yet evading review" exception applies here.

It instead argues that there is no reasonable expectation that Appellants will be subject to the challenged disclaimer regime in the future. But, even though San Francisco asserts that the cases cited by Mr. David and YPB "are easily distinguishable," Opp'n Br. at 12 n.2, it fails to address the principal cases on this question: *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008), and *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520 (9th Cir. 2015).[1]

In *Chula Vista*, the plaintiffs pled less than Mr. David has here. Mr. David, who has managed both YPB and other committees, ER 34, ¶ 4, has said that he "expect[s] to participate in future ballot measure and other campaigns in San Francisco," and that he "expect[s] to be particularly active" in the election this November, with YPB or other committees. ER 71, ¶ 35. The plaintiffs in *Chula Vista* were nowhere near so specific, asserting simply the intention "to do future initiative petitions in the City." Compl. ¶ 23, *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, No. 3:09-cv-00987 (S.D. Cal. Apr. 28, 2009), ECF No. 1.

[1] San Francisco is aware of these cases, however, as it cites them on other issues later in its brief. *See* Ans. Br. at 14, 20.

And in circumstances nearly indistinguishable from those here—both cases involve parties successful on one ballot measure and wishing to sponsor future initiatives—this Court quickly concluded that the evading review exception applied. *Chula Vista*, 782 F.3d at 528 n.7.

Moreover, *Davis* is fatal to the City and County's implication that Mr. David's recent statements to the press cannot sustain jurisdiction. Ans. Br. 11 (noting public statement "just before Appellants' deadline"). *Davis* demonstrates that, even if there were no other evidence of Mr. David's intentions, his recent statement that he and YPB will be active this November also sustains jurisdiction. If a statement made just before a reply brief to the Supreme Court is sufficient, a statement before an opening brief on appeal certainly is. *See Davis*, 554 U.S. at 736.

To avoid these decisions, the City and County turns to case law about ripeness, but ripeness addresses different questions. *See* Ans. Br. 11. Mootness asks whether, after a change in a case that was previously ripe, it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). Ripeness examines whether the issues in a case were fit for judicial decision when it was filed, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001), because government regulations were still undeveloped or the actions allegedly affected by regulation were nebulous and undefined, *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735-37 (1998), or

"further factual development of the issues presented" would otherwise be helpful, *Whitman*, 531 U.S. at 479 (citation and quotation marks omitted). But San Francisco has nowhere claimed that there are any additional facts of this kind required to resolve this appeal. There are no ripeness issues.

Furthermore, San Francisco does not point to a single decision requiring that the future activity alleged for the escaping review exception be presently ripe. All the escaping review exception requires is "a reasonable expectation that the same controversy involving the same party will recur." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) ("*WRTL II*"). That does not require the detail demanded by the Federal Election Commission in *WRTL II* or by San Francisco here, such as evidence that future ads will "shar[e] all the characteristics that [might be] deemed legally relevant."[2] *Id.* (quotation marks omitted). Both Mr. David and the Committee have shared their intent to be active in the November 2020 elections and beyond, ER 34, ¶ 4, ER 71, ¶ 35, *Yes on Prop B Campaign Appeals District Court's Ruling*, Bay City Beacon, Apr. 16, 2020,[3] and the communications

[2] Moreover, to the extent the City would require Appellants to identify "what campaigns they plan to get involved with," Ans. Br. 12, it asks the impossible. San Francisco's citizens will not learn which measures have qualified for the ballot until July. S.F. Mun. Elections Code §§ 120(b), 300.

[3] *Available at*: https://www.thebaycitybeacon.com/politics/yes-on-prop-b-campaign-appealsdistrict-courts-ruling/article_befcd4c8-800d-11ea-9d39-6793342792ee.html.

they will inevitably make as part of that activity give "every reason to expect the same parties to generate a similar, future controversy." *Norman v. Reed*, 502 U.S. 279, 288 (1992); *see also NAACP, W. Region v. Richmond*, 743 F.2d 1346, 1353 (9th Cir. 1984) (noting that "active and continuing interest in" issues indicates that the "effect of the statute on arguably protected speech will therefore persist").

Furthermore, San Francisco's only response to Appellants' overbreadth arguments is *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000), where the plaintiffs lacked any "personal interest in the outcome" because they had graduated and would "never again be required to omit sectarian references from their Oroville graduation presentations." *Id.* at 1098-99. Any facial relief here, however, will directly benefit Appellants, relieving them of Proposition F's disclaimer requirements in future communications they have said they will make.

II. San Francisco's Arguments For Deference Should Be Rejected

San Francisco provides a series of arguments against probing judicial review of its compelled speech regime: (1) that the district court's decision must be deferred to, (2) that a voter-approved initiative deserves special deference, (3) and that First Amendment case law from this Court and the Supreme Court is "easily distinguishable," leaving (4) *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), as precedent requiring this Court to affirm the decision below. YPB takes each of these arguments in turn.

A. The district court's conclusions of law should be reviewed *de novo*.

San Francisco cautions this Court that its review of the district court's opinion below is "limited and deferential," Ans. Br. 8 (citation and quotation marks omitted), and that the burden rests with YPB, who "must demonstrate that the district court abused its discretion." *Id.* at 34. But "[w]hen we consider First Amendment claims, 'historical questions of fact (such as credibility determinations or ordinary weighing of conflicting evidence) are reviewed for clear error, while constitutional questions of fact (such as whether certain restrictions create a severe burden on an individual's First Amendment rights) are reviewed *de novo*.'" *Am. Beverage Ass'n v. City and Cty. of S.F.*, 871 F.3d 884, 889 (9th Cir. 2017); *vacated* en banc *on other grounds by Am. Beverage Ass'n v. City & Cty. of S.F.*, 916 F.3d 749 (9th Cir. 2018) (*en banc*) ("*American Beverage*") (reversing denial of preliminary relief) (cleaned up, quoting *Prete v. Bradbury*, 438 F.3d 949, 960 (9th Cir. 2006)). Far from this Court's range of action being "limited and deferential," Ans. Br. 8, the Constitution compels a skeptical, *de novo* review where "the burden is on the government." *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (Brennan, J., plurality op.).

B. A voter-approved initiative does not merit special deference.

San Francisco suggests that S.F. Camp. and Gov. Code § 1.161(a) is entitled to deference because it was largely passed at the ballot box and "[i]t is not this Court's function to 'appraise the wisdom' of the voter's decisions." Ans. Br. 42

(quoting *Pena v. Lindley*, 898 F.3d 969, 980 (9th Cir. 2018) (reviewing a gun control law enacted through the traditional legislative process)); Ans. Br. at 40 (arguing that "San Francisco voters resoundingly demonstrated that they wanted disclaimers").

Of course, the First and Fourteenth Amendments restrain all lawmaking, whether done by the people directly or through their elected representatives. There is no judicial doctrine giving an enactment of the people greater deference than one passed through the traditional legislative process. If anything, the opposite should hold,[4] as legislators are generally better informed, better able to consult with legal counsel, and more likely to have considered a measure's constitutional implications and attendant litigation expense.

But even if that were not so, the record hardly supports Appellee's assertions. The official voter guide for the City and County's elections made no effort to explain the burdens Proposition F would impose on speakers. ER 57. And the Proponent's Argument in Favor of Proposition F contains no discussion of how the disclaimers would work whatsoever. ER 58. Instead, the voters were told that current law "prevented [them] from making fully informed choices" because of "shell committees" hiding "the true source of funds behind campaign ads by Dark Money

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[4] "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion." Edmund Burke, Speech to the Electors of Bristol, (Nov. 3, 1774).

SuperPACs such as 'Progress San Francisco,'" ER 58, a PAC whose funding by Silicon Valley entrepreneurs was a political issue in the 2018 campaign. *E.g.* Joe Kukura, *Head of the PAC*, SFWeekly, Apr. 30, 2018.[5] Of course, this rhetorical assertion is completely beside the point, and is arguably misleading, since every donor that could conceivably appear on San Francisco's disclaimers is already publicly disclosed. S.F. Camp. & Gov. Code § 1.114.5.

Not only was the measure sold with the abstract language of disclosure, but the voters were told that a "yes" vote would register public opposition to "REPUBLICAN PARTY LIES" from the "Republican Party of Donald Trump." ER 59. Certainly, no deference should be afforded if voters enact a law pursuant to a viewpoint based, retaliatory motive. *See Bates v. City of Little Rock*, 361 U.S. 516 (1960).

C. Controlling case law of this Court and the Supreme Court cannot be avoided.

The City and County argues that the case law marshalled by YPB in its opening brief is "easily distinguishable," Ans. Br. 1, 12 n.2, 14 n.3, 20, 24, 25, 31, 33, and once this thicket of judicial reasoning has been hacked away, its regime is presumptively constitutional. We will take San Francisco's objections case by case, starting with *American Beverage* and *American Civil Liberties Union of Nevada v.*

[5] *Available at*: https://www.sfweekly.com/news/head-of-the-pac/

Heller, 378 F.3d 979 (9th Cir. 2004), which bind this Court, move to *Citizens Union of New York v. Attorney General of New York*, 408 F. Supp. 3d 478 (S.D.N.Y. 2019) ("*Citizens Union*") and *Van Hollen v. Federal Election Commission*, 811 F.3d 486 (D.C. Cir. 2016), which are merely persuasive, and conclude with the Supreme Court's decisions in *Talley v. California,* 362 U.S. 60 (1960), *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988), and *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. __; 138 S. Ct. 2361 (2018) ("*NIFLA*").

i. American Beverage *and* Heller *control.*

In 2019, this Court reversed a district court that had declined to enter a preliminary injunction against another San Francisco law that commandeered a good chunk of particular advertisements, in that case a mere 20 percent. *American Beverage*, 916 F.3d at 758. San Francisco argues *American Beverage* is inapplicable because it is a "commercial speech case." Ans. Br. 24.[6]

True, but that point cuts in favor of YPB, not San Francisco. Commercial speech is less protected than political speech. *United States v. Williams*, 553 U.S. 285, 298 (2008) (commercial speech is "less privileged" in the First Amendment

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[6] San Francisco makes similar arguments regarding the application of *Janus v. Am. Fed'n of State, Cty. and Municipal Emps.*,585 U.S. __; 138 S. Ct. 2448 (2018), which fail for the same reason. Ans. Br. 15 ("*Janus* [is a case] concerning the compulsory subsidization of commercial speech. That test has no application to cases concerning election disclaimers") (citation and quotation marks omitted).

hierarchy); *R. A. V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in part) ("Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression"); *American Beverage*, 916 F.3d at 755 ("*NIFLA* also acknowledged that the Court has applied a lower level of scrutiny to laws that compel disclosures in…commercial speech") (cleaned up, ellipses in original, citation and quotation marks omitted). Accordingly, *American Beverage* struck down San Francisco's sugary beverage disclaimers under a standard of review that was far more forgiving than even exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (*per curiam*) (exacting scrutiny is a "strict test").

YPB merely contends that what cannot be done by the government in the more permissive context of commercial speech, where it is generally allowed to heavily regulate advertising for pharmaceutical drugs, tobacco, alcohol, and other products, surely cannot be done to political speech.[7] It is not that "Appellants argue that *American Beverage* demonstrates that there should be a 20% cap on disclaimers," Ans. Br. 26, but rather, "[i]f scripts allotting 80 percent of a message to a private

[7] San Francisco argues that "Appellants have not cited any authority for the proposition that the holdings from commercial speech cases can be applied in the election law context." Ans. Br. 25. This is unsurprising, since commercial speech doctrine would only be relevant where a jurisdiction felt entitled to impose greater restrictions on political expression than on commercial advertisements, and San Francisco appears to be on the only jurisdiction to have fallen into that situation.

speaker and 20 percent to the government are constitutionally invalid" for soft drink warnings, a system that commandeers a greater percentage of more carefully protected speech cannot clear a higher hurdle. YPB Br. 29.

Remarkably, San Francisco argues that "Appellants have not cited even a single case that has held that disclaimers are unconstitutional because they take up too much space on advertisements." Ans. Br. 26. But that is exactly the holding of *American Beverage*. 916 F.3d at 757 ("That study used warnings covering only 10% of the image…therefore, the 20% requirement is not justified when balanced against its likely burden on protected speech"); *see also NIFLA*, 138 S. Ct. at 2378 ("[T]he unlicensed notice drowns out the facility's own message").

All that remains of the City and County's objection to *American Beverage* is its claim that, unlike Appellee's soda disclaimers, its new disclaimers do not "compete with [a speaker's] own message." Ans. Br. 25. This assertion can hardly be credited. The required disclaimers carry San Francisco's speech, not the speaker's, must run before any verbal speech of YPB's, and take up at minimum a third of the ad. *Bates*, 361 U.S. at 525 (a government's "mere assertion" of legitimacy is insufficient to survive judicial review). This takeover of private speech, at private expense, to run public service announcements about donors *instead of* the speaker's preferred arguments about issues or candidates, is precisely the form of

"government-compelled disclosure that imposes an undue burden [and] fails for that reason alone." *American Beverage*, 916 F.3d at 757.

Turning to *American Civil Liberties Union of Nevada v. Heller*, Appellee posits that this case "is easily distinguishable," Ans. Br. 14 n.3, because it "considered an individual's right to anonymous speech," *id*. at 19, and is thus "a narrow decision." *Id*. at 22 (quotation marks omitted). But *Heller* explicitly declined to limit its holding to the protection of "an individual's right to anonymous speech." *Id*. at 19. The State of Nevada sought to evade facial invalidation of its compelled speech law by pointing to an exception in the statute for individuals acting alone, and this Court refused to take the offer, pointedly noting that the First Amendment protects not only individuals, but also those "allied with other individuals, or with a business or social organization." *Heller*, 378 F.3d at 989 (quotation marks omitted).

Heller can only be sliced one way: it is a compelled speech case. After opening with a quotation from *Talley v. California*, where the Supreme Court struck down an on-communication disclaimer, *infra* at 18, this Court described the facially unconstitutional Nevada statute as "requir[ing] *certain groups or entities* publishing 'any material relating to an election, candidate or any question on the ballot' to reveal *on the publication* the names and addresses of the publications' *financial sponsors*." *Heller*, 378 F.3d at 981 (second emphasis in original). This characterization cannot

be squared with Appellee's statement that *Heller* does not control because "[it] is…not an election disclaimer case." Ans. Br. 14, n. 3.

San Francisco would like to limit *Heller* to the fringes of the Nevada statute. And it is true that *Heller* involved the regulation of an astonishing quantum of speech, reaching all the way down to "'ordinary pamphleteers.'" Ans. Br. 20 (quoting *Chula Vista*, 782 F.3d at 540, n.15). But as this Court acknowledged, the statute was hardly limited to those facts. *Heller*, 378 F.3d at 981; Nev. Rev. Stat. § 294A.320(1-2) (2004) ("unlawful for any person" except "candidate[s]," parties discussing candidates, and "a natural person who acts independently"). The fact that a court, reasonably, discusses the worst applications of a law in facially enjoining it does not mean that the holding of the case is limited to those examples.

Similarly, San Francisco argues that the constitutional issue in *Heller* was that Nevada "*did not go far enough*," Ans. Br. 21 (emphasis in original), and that San Francisco's law cures this problem by compelling more speech. The concession that the instant law goes further than the Nevada statute cuts against Appellee; *Heller* was not a First Amendment underbreadth case. *Heller*, 378 F.3d 992 ("[R]equiring a publisher to reveal her identity on her election-related communication is considerably more intrusive than simply requiring her to report to a government agency for later publication how she spent her money"). Indeed, while the *Heller* Court did acknowledge that the reporting of financial sponsors might not always be

especially helpful because contextless information is necessarily incomplete, the Court explained that "[m]oreover, and more fundamentally," governments should avoid "requiring the introduction of potentially extraneous information at the very time the reader encounters the substance of the message." 378 F.3d at 994.

Nor can *Heller* be read has having been defanged by either *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003) or *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), as Appellee posits. *E.g.* Ans. Br. 17. *Getman* was cited by the *Heller* Court, and both cases upheld after-action disclosure reporting to a government agency, not the compulsion of lengthy on-communication disclaimers, a distinction with a difference. *See* Ans. Br. 4, n.1. That is precisely the less-restrictive remedy YPB suggests San Francisco use.

Fundamentally, San Francisco seeks a crabbed reading of *Heller*. It argues that only "dicta in *Heller* suggest[s] that disclaimers are problematic because they appear on the advertisement and thus eliminate the possibility of anonymous speech." Ans. Br. 21. But *Heller*'s finding of a "constitutionally determinative distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements," *Heller*, 378 F.3d at 991, does not become dicta on Appellee's say-so. Nor was this controlling language designed merely to save the slight "possibility of anonymous speech," Ans. Br. 21, but rather drew directly from the Court's determination that "it is not just *that* a speaker's identity is revealed, but

how and when that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech." *Heller*, 378 F.3d at 991 (second emphasis supplied).

Accordingly, we are left with San Francisco's concession that its regime goes further than Nevada's facially unconstitutional disclaimer regime.[8] Ans. Br. 21. That alone is fatal to its case.

ii. Courts have struck down secondary contributor reporting in analogous circumstances.

San Francisco dismisses the relevance of *Citizens Union* and *Van Hollen*, but does not dispute that those decisions warn against secondary donor reporting.

The City and County argues that *Citizens Union* should remain off-screen because of the unique treatment of § 501(c)(3) organizations in the tax code[9]

[8] San Francisco also asks that this Court ignore *California Republican Party v. Fair Political Practices Comm'n*, 2004 U.S. Dist. LEXIS 22160 (E.D. Cal. 2004) ("*California Republican*"), which relied on *Heller* to strike down a top-two donor on-communication disclaimer on the grounds that "existing off-publication requirements are less restrictive on speech and more effective in meeting the purpose of informing voters." *Id*. at 16-17. Appellee argues this holding is irrelevant based on dicta suggesting that principal committees, unlike political parties, exist as proxies for their financial supporters, who are the "true 'speakers.'" *Id*. at 18. The *California Republican* court's musings aside, YPB and principal committees are independent entities that speak for themselves, not their donors—just like parties.

[9] The government claims that *Independence Institute v. Federal Election Commission*, 216 F. Supp. 3d 176 (D.D.C. 2016) can be safely ignored because it merely "distinguish[ed] another court's holding based on the facts presented." Ans. Br. 32. Not quite. In that case, "a [§] 501(c)(3) organization, that, by definition, cannot engage in…campaigning for candidates for office," Ans. Br. 33, was forced

(namely, that § 501(c)(3) groups cannot intervene in candidate campaigns). Ans. Br. 32. San Francisco ignores that the *Citizens Union* court not only struck down § 501(c)(3) disclosure, but donor reporting from § 501(c)(4) social welfare organizations as well. 408 F. Supp. 3d at 506 ("Section 172-f sweeps far more broadly than any disclosure law that has survived judicial scrutiny"). Moreover, § 501(c)(3) groups are permitted to lobby and engage in ballot measure campaigns—hardly the wall of separation implied by the government's brief.

But more fundamentally, none of the secondary donors publicized by the disclaimers contribute to the groups forced to recite their names, as San Francisco itself admits. Ans. Br. 34 ("Of course, the 'secondary contributors,' by definition, have not directly contributed to Yes on Prop B"). That is the heart of the reasoning in *Citizens Union,* and if the disclosures there made "little sense," *id*. at 32, the compelled speech imposed here hardly makes more.

San Francisco distinguishes *Van Hollen* on different grounds, arguing that the D.C. Circuit "reasonably concluded" that disclosing union members or corporate shareholders "tells the voters little about the actual funding sources for the election communication," but that "Proposition F requires disclosure of entities that

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to comply with a donor disclosure regime triggered by speaking about candidates *in spite of* its tax status. It follows that the constitutionality, or lack thereof, of a donor disclosure regime cannot turn on where a group is slotted within the Internal Revenue Code.

voluntarily engage in election communications by donating money to political committees." Ans. Br. 34.

This statement exposes the breadth of San Francisco's conception of the informational interest. It argues that, once people give to a political committee, they are fair game to be plastered on ads they did not pay for from organizations they did not financially support. No case law supports giving the informational interest such a titanic ambit. That interest rests in providing voters with information about the financial constituencies *of the speaker*, not the financial constituencies of political committees *generally*. *Buckley*, 424 U.S. at 79-81.

Regardless, *Van Hollen* was not centered on mere "membership dues" or "persons who buy stock." Ans. Br. 34. The court's key example involved mislabeling a donation "to the American Cancer Society" as financial support for "targeted advertisements against…Republicans." *Van Hollen*, 811 F.3d at 497. That is precisely YPB's concern here.

iii. Supreme Court case law is relevant and supports YPB.

San Francisco argues that Supreme Court case law striking down disclaimers and involuntary association need not be considered because "none of those cases concern the well-recognized and important governmental interests in having an informed electorate." Ans. Br. 18 (discussing *Riley* and *NIFLA*); Ans. Br. 20, n.8

(dismissing *Talley* because "[t]his is an elections disclaimer case, not a case about the right to anonymous speech").

The non-viability of *Riley* and *Talley* in the campaign finance context would be news to both the Supreme Court and this Court. Just a few short Terms ago, the Supreme Court reviewed a judicial election regulation, explicitly noting in its analysis that the Court applies strict scrutiny "to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest." *Williams-Yulee v. The Fla. Bar*, 575 U.S. 433, 442 (2015) (citing *Riley*, 487 U.S. at 798). Similarly, *Talley* was cited in the first sentence of the *Heller* opinion, framing that decision. 378 F.3d at 981. And *NIFLA* held "that a government-compelled disclosure that imposes an undue burden fails for that reason alone" regardless of whether the compulsion involves speech about elective abortion or elective politics. *American Beverage*, 916 F.3d at 757. The Supreme Court has read these cases together, and this Court should do likewise.

iv. Citizens United *does not support Appellee's position.*

San Francisco claims it prevails under *Citizens United v. Federal Election Commission*. Ans. Br. 23; YPB Br. 47-51 (distinguishing *Citizens United*). Appellee's argument comes down to simple math. Because "the Supreme Court

recognized that disclaimers that take 40%[10] of advertising space satisfy exacting scrutiny," the City and County asserts a right to commandeer precisely that percentage. Ans. Br. 23.

Except *Citizens United* made no such ruling, as even the court below acknowledged. ER 8. There is no reference to any percentage rule. And the opinion focused specifically on a verbal disclaimer that took up a mere four seconds of time.[11] 52 U.S.C. § 30120. Citizens United asserted a right to speak anonymously, and the disclaimer at issue in that case did nothing more than identify the speaker and state that the communication "[was] not authorized by any candidate or candidate's committee." 52 U.S.C. §§ 30120(a)(3); (d). As YPB has explained, YPB

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[10] San Francisco disagrees that the *Citizens United* ads actually took well under 40 percent of those ads. Ans. Br. 23, n. 9. But an organization seeking to run 10- and 30-second ads without a disclaimer would have provided the Court with scripts for 10- and 30-second ads without a disclaimer. *Id*. And that is precisely what Citizens United did. Ex. 1, Am. Compl., *Citizens United v. Fed. Election Comm'n*, No. 07-cv-02240-RCL-RWR (D.D.C. Dec. 21, 2007), ECF No. 22.

[11] Appellee suggests YPB waived any opposition to the May 2018 verbal disclaimer requirements, Ans. Br. 18, n.7, which YPB has consistently opposed since it filed its complaint. San Francisco fails to produce any evidence that Appellants intentionally relinquished its argument as to verbal disclaimers, but even if it means to argue that Appellants forfeited the issue, its arguments still fail. *See United States v. Laurienti*, 611 F.3d 530, 543 (9th Cir. 2010) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993) (distinguishing waiver and forfeiture). When Appellants argue that the disclaimer here is unlike the *Citizens United* verbal disclaimer, YPB is continuing to assert its claim that San Francisco's verbal compelled disclosure on the face of the communication is unconstitutional. YPB Br. 49 ("This is no four-second paid-for-by statement").

Br. 47-51, the disclaimers blessed in *Citizens United* are different in kind from those at issue here.

III. SAN FRANCISCO'S COMMANDEERING OF POLITICAL ACTIVITY FAILS ANY FORM OF FIRST AMENDMENT SCRUTINY.

The dispute over whether to apply strict or exacting scrutiny is only relevant as a matter of doctrine. San Francisco's hijacking of political speech fails regardless of whether the Court applies strict scrutiny, as required by *Heller*, *Riley*, *Talley*, and other compelled speech cases involving noncommercial disclaimers, or exacting scrutiny, which "is not a loose form of judicial review." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014); *see Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 684 (9th Cir. 2014), *rev'd and vacated* en banc *on other grounds* 782 F.3d 520 (9th Cir. 2015) (*en banc*) ("The Supreme Court has described exacting scrutiny as a strict test…Moreover, it is the *government's* burden to show that its interests are substantial, that those interests are furthered by the [disclaimer] requirement, and that those interests outweigh the First Amendment burden the [disclaimer] requirement imposes on political speech") (cleaned up, citations and quotation marks omitted, emphasis in original).

A. San Francisco's disclaimer is facially unconstitutional.

In San Francisco, if a group wishes to speak about a candidate or ballot measure, it forfeits the right to script its own message. S.F. Camp. & Gov. Code § 1.161(a). Instead, it must pre-empt its speech with a public service announcement

about its supporters, including reporting indirect associations as though they were financial backers, even when such a connection is impossible. YPB Br. 44 ("*All* of YPB's listed 'secondary contributors' made contributions to other committees when YPB *did not yet exist*") (emphasis in original). San Francisco treats electioneering as though it is a toxic commercial product, such as tobacco or alcohol (if not like sugary soda). Ans. Br. 41 (comparing San Francisco's regime to regulation of "cigarette companies" that must "disclose the hazards of smoking in their ads") (citation and quotation marks omitted).

The government is not willing to pay for seizing up to forty percent of an ad; it simply "commandeer[s]" the speech of others. Ans. Br. 7 (citing ER 8). As a categorical matter, this is no different than the rejected effort by the State of California to "drown[] out" the messaging of anti-abortion crisis pregnancy centers with the State's preferred language. *NIFLA*, 138 S. Ct. at 2378.

The City and County argues that it "could not reduce the length of its disclaimer without leaving out information needed to serve the City's informational interest." Ans. Br. 26. This begs the question—this case is about the constitutional ambit of the informational interest. San Francisco argues it can compel any information it considers relevant, a position that the Supreme Court has flatly rejected. *Riley*, 487 U.S. at 798 ("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"). And this Court has reiterated "'simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.'" *Heller*, 378 F.3d at 995 (citing *Riley*, 487 U.S. at 795). Virtually every other jurisdiction in the United States manages to regulate independent expenditures without "'burdening a speaker with unwanted speech'" taking up to 40 percent of purchased airtime or ad space. *NIFLA*, 138 S. Ct. at 2376 (quoting *Riley*, 487 U.S. at 800). Thus, the government's demand does not bear "a '*substantial* relation'" to a valid state interest. *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64) (emphasis supplied).

Similarly, San Francisco argues that its hefty disclaimer is necessary to "give all voters the information they need to evaluate the speaker's message at the same time they hear or see the message." Ans. Br. 2 (emphasis removed); *id*. at 18. Again, this argument is circular. It works only if the information provided is actually "needed to evaluate the speaker's message." And San Francisco has repeatedly failed to explain why providing the names of those who gave to completely different organizations, and who have no connection to the communication at issue, are "needed." There is no limiting principle to its position, which is why the Supreme Court has rejected it in other contexts. *Riley*, 487 U.S. 798.

Moreover, San Francisco seeks to shift the burden, positing that YPB's argument amounts to a "less speech is more" standard. Ans. Br. 39 (citation and quotation marks omitted). But Appellants do not object to the City and County speaking its message, it merely asks that it do so itself rather than commandeering intermediaries. *NIFLA*, 138 S. Ct. at 2376 ("California could inform low-income women about its services 'without burdening a speaker with unwanted speech'") (quoting *Riley*, 487 U.S. at 800). It can, and does, make campaign finance reports public. YPB Br. 7-8. It may even require an attribution statement on political ads to direct the electorate toward those forms. *Citizens United*, 558 U.S. at 366-368. Doubtless, there are other means of distributing its message that a clever legislator could envision and enact. But where a government's "goals could be accomplished with a smaller warning," *American Beverage*, 916 F.3d at 757, the Constitution requires that governments adopt the option that compels and co-opts less speech. *Riley*, 487 U.S. at 800; *Heller*, 378 F.3d at 991; YPB Br. 32-33.

Finally, Appellee suggests that San Francisco should be able to do whatever it wants with disclaimers, regardless of precedent. Ans. Br. 39 ("Disclaimers can come in all shapes and sizes, and can be tailored to the needs of each jurisdiction"). But the City and County offers no argument why its disclaimer regime is uniquely necessary for *its* campaigns, instead improperly relying on a presumption of constitutionality. Ans. Br. 39 ("The Constitution does not…prevent San Francisco

voters from determining the type of disclaimers that they will find useful"); *but see Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516 (2012) (rejecting argument Montana's unique circumstances justified an exemption from the holding of *Citizens United*).[12]

San Francisco further argues that facial relief is not warranted because there is "evidence of a Proposition F compliant advertisement with [an] 8 second disclaimer."[13] Ans. Br. 8. Viewing that 30-second video, however, only demonstrates how distracting and lengthy these disclaimers really are. Moreover, it contains no secondary donor information at all. If San Francisco's informational interest was adequately served by listing support from "Yerba Buena Consortium LLC" and the "Tenants and Owners Development Corp.," without prying into those organizations' hidden financing, how can it claim that listing the secondary donors to fully-disclosed political committees is somehow crucial to ordinary voters' decision making?

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[12] If an injunction is granted, of course, the City and County will have the opportunity to build a summary judgment record if it can, in fact, present evidence that San Francisco's unique issues can only be addressed by its uniquely expansive disclaimer regime.

[13] *Cf.* https://www.facebook.com/watch/rebuildcitycollege/ (San Francisco ads carrying 15-second disclaimers).

Finally, San Francisco does not back down from claiming a right to 40 percent of *any* speaker's message, and only facial relief can put an end to that demand. Even if it is true that "other committees complied with Proposition F's requirements during the March [2020] election without any apparent difficulty," Ans. Br. 3, the simple fact that a law *can* be complied with does not make it constitutional, nor does it counsel against facial relief.[14] The First Amendment does not require that all speech be chilled before the courts act.

B. The disclosure of non-contributors on the face of a political communication is especially problematic under the First Amendment.

San Francisco contends that reporting non-contributors as contributors advances the informational interest. *But see Heller*, 378 F.3d at 994 ("far from enhancing the reader's evaluation of a message…the introduction of potentially extraneous information at the very time the reader encounters the substance of the message" does not serve the informational interest); *Van Hollen*, 811 F.3d at 497-498. But Appellee merely asserts that this is so. It provides not a shred of evidence showing that secondary-donor information helps, or has ever helped, voters make

[14] In any event, a cursory examination shows that some speakers did not actually comply with the dictates of the law, a point cutting the other way. *E.g.* https://www.twitter.com/AaronPeskin/status/1234720378506768386 (disclaimer at end of ad); S.F. Camp. & Gov. Code § 1.161(a)(5).

informed decisions. And "mere conjecture" is "never…adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000).

San Francisco also argues that labeling non-contributors as contributors does not infringe on the right to eschew association. Worse still, it hand-waives accusations of a chilling effect, claiming that decreased donations merely reflect the donors' "own condemnation of the informational value of the disclaimers." Ans. Br. 37.[15] San Francisco's position rests on its observation that the law "does not compel anyone to give money to support any candidates, ballot measures or any matters of public debate." Ans. Br. 29. This argument should be set aside for the "sophistic twist" it is. *Goland v. United States*, 903 F.2d 1247, 1257 (9th Cir. 1990). The problem is that by reporting a non-contributor as a contributor, San Francisco's law distorts reality, and donors should be able to contribute without running the risk that they will be involuntarily associated with *other* groups.

In addition, San Francisco argues that *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) ("*Grange*") forecloses any

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[15] The government makes much, *e.g.* Ans. Br. 27, 41, of Mr. David's observation that the rules chilled his fundraising efforts, in that he did not wish to solicit funds from the Realtors Association, because he did not wish for that association to become the predominant message of the ad. ER 69, ¶ 21. The suggestion that this means YPB wanted to take funds "without the voters learning," Ans. Br. 27, about any associational ties cannot be credited—YPB does not oppose off-communication reporting, it simply does not wish to have its associations put forward before its own speech, stripped of context.

need for it to carry any burden. Ans. Br. 30 ("[T]his case is on all fours with *Washington State Grange*"). But *Grange* does not shift the burden under exacting scrutiny. "*Grange* is not a case about compelled speech, donor disclosure, or even about the general category of campaign financing." YPB Br. 45. Rather, it involved a "State[]…implementing [its] own voting systems," an area where "the government will be afforded substantial latitude." *Doe v. Reed*, 561 U.S. 186, 195 (2010); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (noting distinction between the "control [of] the mechanics of the electoral process" and "a regulation of pure speech"). Nor does *Grange* stand for a general principle of trusting the electorate to properly understand the nuances of San Francisco's daisy-chain disclosures. Ans. Br. 31 (arguing *Grange* holds that courts cannot suggest "distrust for voters"). The *Grange* Court specifically provided a series of steps to eliminate the threat of a confusing ballot layout. *Grange*, 552 U.S. at 456.

Finally, San Francisco suggests it must report non-contributors as contributors because some groups do not name themselves as it likes, and such naming conventions "are contrary to the spirit and purposes of the First Amendment." Ans. Br. 36; Ans. Br. 17 ("[S]econdary contributor disclaimers…[are] particularly important given that 'individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names'") (quoting ER 10-11). Of course, the "spirit and purpose," and one might

also add, the text, of the First Amendment are vindicated when persons associate together as they see fit. *See Pursuing Am.'s Greatness v. Fed. Election Comm'n*, 831 F.3d 500 (D.C. Cir. 2016) (striking down federal rule restricting PACs from naming projects after candidates). Regardless, the Supreme Court's answer to any concern with anodyne naming conventions was to bless off-communication donor disclosure and require groups speaking about a candidate shortly before an election to file a public report that they did so. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201-202 (2003). That option remains available here.

At a time when donor disclosure is more comprehensive and easier to access than ever before, *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 224 (2014), San Francisco says that this is not enough. Instead, it must commandeer up to 40 percent of ads without paying for it, pre-empting the electoral pitches of civil society for the droning voice-over of a mini-campaign finance report. Yet Appellee does not demonstrate that its compelled speech regime is substantially related to its interest in informing the electorate, let alone survives the strict scrutiny generally applied to such regimes. Because it has not carried its burden, San Francisco's regime must be facially enjoined.

IV. THE NON-MERITS FACTORS COUNSEL PRELIMINARY RELIEF

San Francisco's non-merits arguments against reversal are grounded in the proposition that YPB has not demonstrated a likelihood that San Francisco's

disclaimer regime is unconstitutional. Ans. Br. 42-43. But since it is likely unconstitutional, and "the government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented," such relief ought to issue in advance of the November elections. *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) (citation and quotation marks omitted).

CONCLUSION

For the foregoing reasons, and those given in Appellant's opening brief, the district court should be reversed.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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