INSTITUTE FOR FREE SPEECH

August 14, 2023

The Hon. Molly Dwyer, Clerk of Court
United States Court of Appeals, Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1518

Re: *No on E v. Chiu*,
U.S. Court of Appeals, Ninth Cir. No. 22-15824

Response to Defendants' August 8, 2023, Notice of Supplemental Authority Fed. R. App. P. 28(j), via ECF

Dear Ms. Dwyer:

The ordinance San Francisco cites is not new. Although only now finally enacted, Defendant Ethics Commission approved it the day of the panel argument, and Plaintiffs raised the matter with the panel. Arg. Audio at 2:38-4:21. San Francisco does not explain how its new ordinance impacts this case. But as Plaintiffs explained at oral argument, this ordinance only makes the First Amendment violation more apparent.

The new ordinance seeks to mirror the as-applied relief awarded in the previous litigation, Appellants' Br. at 13, by exempting speakers from the requirement to discuss their donors' donors in print ads 25 square inches or smaller and in audio and video ads of 30 seconds or less. San Francisco does not claim that this moots the case, as the secondary donor speech mandate still applies to Plaintiffs' longer ads. The government's message still consumes 53-55% of Plaintiffs' 60-second ads, *id.* at 17; 35% of Plaintiffs' 5x10 inch ads, *id.* at 19; and 23% of Plaintiffs' 8.5x11 inch mailers, *id.*, well in excess of the 20% displacement that San Francisco failed to justify under less-exacting scrutiny in *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019) (en banc), where, unlike here, it at least offered evidence on the topic.

Moreover, exempting shorter ads from this speech mandate does not eliminate the mandate's speech-reducing impact. Sixty-second ads that must open with lengthy secondary donor discussions are now relatively impractical, and potentially contain less of a speaker's message than exempted 30-second ads. But San Francisco has no interest in reducing the quantity of political expression. *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014); *Buckley v. Valeo*, 424 U.S. 1, 19-20 (1976) (per curiam). San Francisco must justify, under strict scrutiny, its decision to penalize larger ads. *Davis v. FEC*, 554 U.S. 724, 738-40 (2008). Neither reason nor record evidence supports the notion that voters must be informed of secondary donors—but only at the outset of larger ads. San Francisco's amendment serves as an admission that it is not essential that speakers invite speculation about secondary donors' campaign ties.

Sincerely,

Alan Gura
Alan Gura
Counsel for Appellants

The body of this letter contains 350 words as measured by Microsoft Word.
cc: Tara Steeley, counsel for Appellees (via ECF)