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.

On Appeal from the United States District Court
for the Northern District of California
No. 3:22-cv-02785-CRB
The Honorable Charles R. Breyer

APPELLEES' RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION

Over three years ago, San Francisco voters enacted the challenged disclaimer requirement to address the well-recognized problem of political committees obscuring their funding sources from voters. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 197 (2003) (overruled on other grounds by *Citizens United*, 558 U.S. 310); *see also ACLU v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004). As the Supreme Court recognized, committees often misrepresent their funding sources by "hiding behind dubious and misleading names like: 'The Coalition–Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly)." *McConnell*, 540 U.S. at 197 (2003). Because "'uninhibited, robust, and wide-open' speech" cannot "occur when organizations hide themselves from the scrutiny of the voting public," *McConnell*, 540 U.S. at 197, the voters enacted Proposition F, which requires committees to reveal their primary and secondary funding sources on political advertisements. Appellants claim that the disclaimer requirement burdens committees who do not want to reveal their donors to voters, but Appellants ignore that the disclaimers further "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.*

Recognizing the First Amendment interests in this case, the panel carefully analyzed Appellants' arguments in a 33-page opinion, and determined that the district court did not abuse its discretion when denying preliminary injunctive relief. Appellants' attacks on the panel's opinion do not stand up to scrutiny. Appellants claim that the required disclaimers confuse voters, but that argument fails because Appellants did not submit any evidence of voter confusion. The panel did not err by following the Supreme Court's instruction to not assume voter

confusion in the absence of evidence. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 (2008). Likewise, Appellants claim that the disclaimer requirement would chill donations, but again Appellants failed to submit any evidence showing that the disclaimers "actually and meaningfully" reduce contributions. *Fam. PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012). Indeed, Appellants' argument is untenable given that the disclaimer requirement has been in effect for over three years through election cycles during which contributions to candidates and ballot measures have continued to "pour in."[1]

Appellants claim that the panel "conducted no tailoring" when applying the narrow tailoring prong of the exacting scrutiny test, but that is plainly incorrect. Pet. 15. The panel explained in detail the "close fit between San Francisco's ordinance and the government's informational interest," and explained why Appellants' proposed less intrusive alternatives failed to advance the City's interests. Opn. 19-32. Appellants claim that campaign disclosure reports filed with government agencies should satisfy San Francisco's informational interest, but the panel correctly joined other circuits in recognizing that disclosure reports are no substitute for on-ad disclaimers. "[F]ewer people are likely to see" disclosure reports, which makes disclosure requirements "a less effective method of conveying information" to the voters than disclaimers. *Majors v. Abell*, 361 F.3d 349, 353 (7th Cir. 2004). As the Seventh Circuit explained, "[i]t's as if cigarette companies, instead of having to disclose the hazards of smoking in their ads, had only to file a disclosure statement with the Food and Drug Administration." *Id.*

[1] Benjamin Schneider, *In a big election year, money is pouring into key San Francisco campaigns*, published Jan 5, 2022 (updated Jun 16, 2022), available at https://www.sfexaminer.com/archives/in-a-big-election-year-money-is-pouring-into-key-san-francisco-campaigns/article_340c79e1-7cb0-5aa0-98dc-113632eff14e.html.

Finally, Appellants claim that the panel's opinion conflicts with *American Beverage Association v. City and County of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019), but that is incorrect. In *American Beverage*, this Court held that San Francisco could not require sugar sweetened beverage advertisers to devote 20% of their advertising space to a health warning, where the evidence suggested that a smaller warning would serve the City's interests. That case is inapposite here for at least three reasons. First, the Court in *American Beverage* applied the *Zauderer* test, not the exacting scrutiny test courts apply when evaluating election disclaimers and disclosures. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010). Appellants' argument fails to recognize that the "election context is distinctive in many ways," and cases outside the election context have limited applicability in election cases. *Id*. at 422 (Stevens, J., concurring); *see also Gaspee Project v. Mederos*, 13 F.4th 79, 95 (1st Cir. 2021). Second, San Francisco does not require election communications to devote any specific percentage of space to disclaimers. Nor is there any evidence in the record that Proposition F's disclaimers typically take 20% or more of advertising space. Indeed, committees have complied with Proposition F's requirements for *three years* through *seven election cycles* without any apparent difficulty. Supplemental Excerpts of Record ("SER") 38; Excerpts of Record ("ER") 14 n. 5. Appellants seem to suggest that disclaimers can never be allowed to take more than 20% of advertising space, but that argument cannot be squared with *Citizens United*, in which the Supreme Court upheld a disclaimer that took 40% of an advertisement's space. *Citizens United*, 558 U.S. at 367-68. *Citizens United* demonstrates that disclaimers can take a significant portion of advertising space without violating the First Amendment. Finally, the amount of space Proposition F's disclaimers take is controlled by font and size requirements that *Appellants did not challenge before the district court or*

on appeal. SER 32; ER 14 n. 6. There simply is no conflict between the issues presented in this case and *American Beverage.*

The Petition should be denied.

BACKGROUND

On November 5, 2019, San Francisco voters approved Proposition F with 76.89% of the vote. SER 073. Proposition F, known as the "Sunlight on Dark Money Initiative," sought to increase the "disclosures of the true sources of funds behind campaign ads by Dark Money SuperPACs . . . to help voters understand who is paying for the campaign ads they see in the mail, on television, and online." SER 77, 80. To that end, Proposition F requires "primarily formed independent expenditure committees" and "primarily formed ballot measure committees" to include disclaimers in their print advertisements that state "both the name of and the dollar amount contributed by each of the top three major contributors of $5,000 or more."[2] S.F. Campaign and Gov't Conduct Code § 1.161(a)(1). In addition, if "any of the top three major contributors is a committee, the disclaimer must also disclose both the name of and the dollar amount contributed by each of the top two major contributors of $5,000 or more to that committee."[3] *Id.*

On May 11, 2022, Appellants filed a complaint challenging the secondary-contributor disclaimer ("disclaimer") requirement in Proposition F. The next day, Appellants filed a Motion for a Temporary Restraining Order and Preliminary Injunction. SER 86. Although the voters enacted Proposition F over two years earlier, Appellants claimed the need for emergency relief to enjoin the disclaimer requirement, and the district court ordered San Francisco to file a response within

[2] Primarily formed committees are committees created to support or oppose a measure or two or more measures being voted on in the same election.

[3] "Disclaimers" refers to information on a political advertisement, and "disclosures" refer to public reports filed with government entities.

days. On June 1, 2022, the district court denied Appellants' motion after concluding that Appellants had failed to demonstrate a likelihood of success on the merits or any of the other requirements for obtaining preliminary injunctive relief.

A panel of this Court affirmed. Applying the exacting scrutiny standard, the panel held that the district court did not abuse its discretion when concluding that the disclaimer requirement is substantially related to the City's important governmental interest in providing information to the voters about who is speaking in election communications. Citing numerous cases from this circuit and the United States Supreme Court, the panel concluded that the City has "a strong governmental interest in informing voters about who funds political advertisements," and the disclaimer requirement is substantially related to that interest. Opn. 20-23.

While Appellants claimed that the disclaimer would cause confusion, Appellants' argument failed because Appellants did not submit any evidence showing voter confusion. Opn. 23; *Wash. State Grange*, 552 U.S. at 457 (requiring more than sheer speculation of voter confusion to invalidate a voter enactment). Likewise, the Appellants failed to demonstrate that the disclaimer "actually and meaningfully deter[s] contributors," because Appellants did not provide evidence of deterrence beyond some donors' alleged desire not to have their donations disclosed to voters. Opn. 28 (quoting *Family PAC*, 685 F.3d at 807).

The panel also concluded that Appellants failed to demonstrate that the disclaimer was insufficiently tailored. Opn. 29. While Appellants claimed that the City's governmental interests could be achieved through disclosure reports that voters could search for on-line or at the Ethics Commission's office, the district court did not abuse its discretion when it recognized that an on-advertisement disclaimer is a more effective method of informing voters than a disclosure that voters must seek out. Opn. 29.

Because Appellants failed to satisfy their burden of showing that they were entitled to preliminary injunctive relief, the panel concluded that the district court did not abuse its discretion in denying Appellants' motion.

ARGUMENT

I. The Panel Properly Applied Exacting Scrutiny.

Exacting scrutiny requires that there be a "substantial relation" between Proposition F's disclaimer requirement and a "sufficiently important" governmental interest. *Citizens United*, 558 U.S. at 366-67. In addition, "the challenged requirement must be narrowly tailored to the interest it promotes." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021). While the law must be tailored to the government's important interest, the government need not choose "the least restrictive means of achieving that end." *Id.* The panel correctly concluded that the disclaimer requirement satisfies those requirements.

A. The City Has An Important Governmental Interest In Providing The Electorate With Information About The Sources Of Election-Related Spending.

The disclaimer serves the City's important interest in providing the electorate with information about the sources of election-related spending and the entity who is speaking in political advertisements. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices" in elections is "essential." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). By "revealing information about the contributors to and participants in public discourse and debate," disclaimer and disclosure "laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention." *Hum. Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). Because "[a]n 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," disclaimer requirements "advance the important and well-

recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas." *Id.* at 1008; *see also Citizens United,* 558 U.S. at 371; *Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1105-06 (9th Cir. 2003).

B. The Disclaimer Requirement Is Substantially Related To The City's Important Interest In Providing Information To The Voters.

The disclaimer requirement is substantially related to the City's interest in providing information to the voters. As courts have repeatedly recognized, "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names" designed to obscure the interests that support a ballot measure and to thus keep valuable information from the voters. *Heller*, 378 F.3d at 994. The disclaimer makes such evasion more difficult by allowing voters to learn about the "actual contributors to such groups and thereby provide[s] useful information concerning the interests supporting or opposing a ballot proposition or a candidate." *Id.*; *see also Alaska Right To Life Comm. v. Miles,* 441 F.3d 773, 793 (9th Cir. 2006) ("[W]e believe that there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way."). Indeed, given that initiative campaigns have become a "money game, where average citizens are subjected to advertising blitzes of distortion and half-truths," "[k]nowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation." *Getman,* 328 F.3d at 1105-06. The disclaimer provides "critical" information to the voters, while making it more difficult for political committees to use misleading or uninformative names to hide

the sources of their funding from the public. *Id.*; *see also McConnell*, 540 U.S. at 197.

C. The Disclaimer Requirement Is Narrowly Tailored.

The disclaimer requirement is narrowly tailored to the City's important governmental interests. Appellants accuse the panel of conducting "no tailoring," but that is plainly incorrect. The panel explained in detail the "close fit" between Proposition F and the City's important governmental interests. Opn. 19-29. The panel did not "declar[e] that displacing 40% of *any* campaign ad, in *any* medium, with *any* governmental message, imposes a tolerable burden." Pet. 15. Instead, the panel carefully analyzed the disclaimer requirement, the burden it imposes based on the evidence presented, and the ways in which the law furthers the City's important interest in having an informed electorate.

Appellants' argument for en banc review is based on misrepresentations of the panel's opinion and the record on appeal. Appellants assert that the panel held that San Francisco can ban political ads that are too small to contain disclaimers, but opinion says no such thing. Pet. 18. Of course, San Francisco cannot ban political advertisements, and has not tried to do so. Appellants complain that the panel did not consider whether disclaimers spoken at the beginning of an advertisement unduly burdens speech, but the panel had no occasion to consider that argument because Appellants did not challenge the law that requires disclosures to occur at the beginning of audio/visual advertisements before the district court or on appeal.[4] The panel did not err by not considering an argument that Appellants did not present to the panel or to the district court.

[4] Appellants challenged the disclaimer requirement of Campaign & Gov't Conduct Code § 1.161(a)(1), but did not challenge the separate spoken disclaimer requirement in Campaign & Gov't Conduct Code § 1.161(a)(5). AOB at 17; SER 96.

Appellants also claim that the panel ignored "less intrusive alternatives," but Appellants did not show that any less intrusive alternatives exist. Appellants assert that the City should have relied on voters to find for themselves the disclosure reports that committees file with government agencies, but Appellants ignore that disclaimers provide benefits that disclosures do not. Disclaimers give voters the information they need to evaluate the speaker's message *at the same time they hear or see the message*. In contrast, disclosures will only be viewed after the fact, and only by individuals who have the time and motivation to search for them. Case law and scholarly research support the district court's conclusion that on-advertisement disclaimers are a more effective method of informing voters than a disclosure that voters must seek out. *Majors*, 361 F.3d at 353 (explaining that on-ad disclaimers are a more effective way of conveying information to voters than disclosure reports); *Gaspee Project*, 13 F.4th at 91 ("The appellants cannot plausibly dispute that on-ad donor information is a more efficient tool for a member of the public who wishes to know the identity of the donors backing the speaker.")

Appellants note that San Francisco's disclaimer requirement—like all disclosure and disclaimer requirements—might deter contributions from some entities that do not wish to disclose their major donors. *See Buckley*, 424 U.S. at 68 ("It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.") But the Ninth Circuit has described that burden on First Amendment rights as "modest," and has held that small deterrent effect does not outweigh the government's interests in providing information about funding sources to the voters. *Family PAC*, 685 F.3d at 806-09; *see also Citizens United*, 558 U.S. at 366. Appellants' chill argument hinges on the notion that committees should be able to hide their funding sources from voters, and that donations will be chilled if

they cannot. But that argument is not consistent with "the precious First Amendment values that Appellants argue are trampled," and it "ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197.

In any event, Appellants have not cited any evidence showing that the disclaimer requirement "actually and meaningfully" reduces contributions. *Family PAC*, 685 F.3d at 807. Appellants assert that one donor (Ed Lee Dems) would withdraw its support for No on E instead of allowing its contributors to be disclosed, but one committee's desire to hide its funding sources from the voters does not show that donations in San Francisco are meaningfully deterred. *Buckley*, 424 U.S. at 68; *Family PAC*, 685 F.3d at 806-09. Indeed, because information about "secondary contributors" is already in the public record, it is hard to see why the disclaimer will have any meaningful effect on contributions.

Finally, Appellants claim that the disclaimer will mislead voters, but Appellants did not offer any evidence showing voter confusion in the years that Proposition F has been in effect. Appellants' speculation about voter confusion is insufficient to support their challenge against Proposition F. Indeed, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 (2008) forecloses Appellants' argument. In *Wash. State Grange*, the Supreme Court rejected an argument that "rests on factual assumptions about voter confusion," and explained that, in the absence of evidence, courts should not "assume" that "voters will be misled." *Wash. State Grange*, 552 U.S. at 454. Nor should courts strike down voter enactments "based on the mere possibility of voter confusion." *Id*. at 455. Here, Appellants have not provided any voter surveys, studies of voter behavior, or any other evidence showing that voters will actually misunderstand the disclaimers they voted to require when they enacted Proposition F. Appellants rely on sheer speculation.

In lieu of evidence showing voter confusion, Appellants cite to an easily distinguishable case from outside this circuit, *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486 (D.C. Cir. 2016). In *Van Hollen*, the D.C. Circuit considered a FEC rule that resolved an ambiguity in the Bipartisan Campaign Reform Act by requiring corporations and labor organizations to disclose only donations that were "made for the purpose of furthering electioneering communications." *Van Hollen*, 811 F.3d at 488. The D.C. Circuit's conclusion that the proposed rule was not arbitrary and capricious has no bearing on the issues presented in this appeal. The *Van Hollen* court did not consider any First Amendment issues, apply the exacting scrutiny test, or consider any other issues relevant to this appeal.

Appellants note that donors who would be disclosed to voters through the disclaimer requirement "might" not have chosen to fund the committee's advertising, but Appellants miss the point. Pet. 1. Of course, secondary contributors, by definition, did not donate to the primarily formed committee. But nonetheless, knowing a committees' donors and their sources of funding speaks volumes about the committee, the sources of the committee's money, and "where a particular ballot measure or candidate falls on the political spectrum." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 832 (9th Cir. 2014). It is common sense that a committee is known by the company it keeps. In any event, the hypothetical possibility that a secondary contributor might disagree with a ballot measure cannot be considered in this challenge because Appellants offer no evidence to show that has ever happened to Appellants (or anyone else).

II. The Panel's Opinion Does Not Conflict With *American Beverage Association v. City and County of San Francisco*.

Finally, Appellants incorrectly claim that the panel's opinion is inconsistent with *American Beverage Association v. City and County of San Francisco*, 916

F.3d 749, 754 (9th Cir. 2019). Accordingly, to Appellants, the panel "buried" *American Beverage* in a footnote, and failed to recognize the importance of that opinion in this case. Pet. 2. Appellants are wrong.

The panel's opinion does not conflict with—or even address the same questions as were presented in—*American Beverage*. *American Beverage* did not consider election disclosures or disclaimers under exacting scrutiny, as the panel did in this case. Instead, *American Beverage* considered a health warning on commercial speech under the test established in *Zauderer v. Office of Disciplinary Counsel of S. Ct. of Ohio*, 471 U.S. 626, 631 (1985), which requires the Court to consider whether a warning is "(1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome." *Am. Beverage Ass'n*, 916 F.3d at 755-56. Under that test, this Court held that San Francisco did not satisfy its burden to show that a 20% warning was necessary, where the evidence suggested that a smaller warning would accomplish the City's goals. *Id*. at 757. The Court's rejection of a health warning when applying the *Zauderer* test says nothing about whether an election disclaimer would satisfy exacting scrutiny. Indeed, the Court acknowledged in *American Beverage* that in other circumstances, a more prominent warning might be warranted. *Id*. at 757 ("To be clear, we do not hold that a warning occupying 10% of product labels or advertisements necessarily is valid, nor do we hold that a warning occupying more than 10% of product labels or advertisements necessarily is invalid.").

Appellants also have not cited any authority for the proposition that the holdings from commercial speech cases can be applied in the election law context. To the contrary, the Supreme Court has consistently recognized the unique nature of campaign and election-related disclosure and disclaimer requirements. *Citizens United*, 558 U.S. at 422 (recognizing that First Amendment protections applied in "[t]he election context is distinctive in many ways") (Stevens, J. concurring);

Gaspee Project v. Mederos, 13 F.4th 79, 95 (1st Cir. 2021) (explaining that "[t]he election-related context implicated here is alone sufficient to distinguish" a case concerning required statements outside of the election context).

Further, in *American Beverage*, the City sought to require commercial advertisers to include a warning that advertisers claimed would compete with their own message and potentially reduce demand for their product. Specifically, the ordinance required sugar sweetened beverage advertisers to devote 20% of their advertising space to a warning that stated "WARNING: Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay. This is a message from the City and County of San Francisco." *Am. Beverage Ass'n*, 916 F.3d at 753. The Court concluded that the City had not shown that the warning would not "drown[ ] out" the advertisers' messages and "effectively rule[ ] out the possibility of having [an advertisement] in the first place." *Am. Beverage Ass'n*, 916 F.3d at 757. Here, by contrast, the disclaimer does not threaten to undermine Appellants' message. Instead, the disclaimer simply provides information that voters need to allow them to understand who is funding the advertisement, so that they can know who is speaking and evaluate the credibility of the speech. *Family PAC*, 685 F.3d at 806; *Brumsickle*, 624 F.3d at 1005; *Getman*, 328 F.3d at 1105-06. The purposes of the First Amendment are furthered—not hindered—by disclaimers. *Brumsickle*, 624 F.3d at 1006; *see also Citizens United v. Gessler*, 773 F.3d 200, 215 (10th Cir. 2014). In short, the Court in *American Beverage* applied a different standard of review, for different reasons, and in a different context.

Proposition F's constitutionality is controlled by *Citizens United* and other disclaimer cases, not *American Beverage*. After recognizing the important role disclaimer requirements serve in providing information to the electorate, the Supreme Court in *Citizens United* upheld a law that required the Appellants to devote 40% – four seconds of their ten-second advertisements – to spoken

disclaimers. *Citizens United*, 558 U.S. at 367-68. Thus, the Supreme Court recognized that disclaimers that take a significant portion of advertising space can satisfy exacting scrutiny. Appellants' argument that election disclaimers should be capped at 20% of advertising space cannot be squared with *Citizens United*.

Appellants' arguments also fail because Appellants seek to manufacture a conflict with *American Beverage* where none exists. *American Beverage* considered an ordinance that required sugar sweetened beverage advertisers to devote 20% of their advertising space to a health warning. *Am. Beverage Ass'n*, 916 F.3d at 753. By contrast, Proposition F does not require election communications to devote any specific percentage of space to disclaimers. Nor is there any evidence in the record that Proposition F's disclaimers typically take 20% or more of advertising space. Indeed, numerous committees have complied with Proposition F's requirements for *three years* through *seven election cycles* without any apparent difficulty. SER 38; ER 14 n. 5. Appellants assert Proposition F's disclaimers would have taken more than 20% of their advertising space for advertisements they wished to run supporting a ballot measure pending in the June 7, 2022 election, but that election is long over and Appellants offer nothing to suggest that Proposition F's disclaimers will take a similar amount of space in future election advertisements. In any event, the amount of space Proposition F's disclaimers takes on election communications is controlled by font and size requirements that *Appellants did not challenge in this litigation*. SER 32; ER 14 n. 6. For all of those reasons, this case presents a poor vehicle to consider Appellants' claim that there is a conflict between Proposition F's requirements and *American Beverage.*

Appellants' remaining arguments simply misrepresent the record and the panel's opinion. Appellants assert that the panel "approved of the city displacing up to 50% of a political ad," Pet. 12, but the panel said no such thing, and the City

has never applied the disclaimer requirement where the disclaimer would take 50% of advertising space. ER 14 n.6; SER 35-36. Appellants also criticize the City for not "marshal[ing] expert testimony to support its position," Pet. 13, but Appellants ignore that they sought a Temporary Restraining Order before the district court and therefore San Francisco was ordered to file a response within *three days* of the district court's scheduling order. There has not been time to develop a full evidentiary record in this case, which also makes it an unsuitable candidate for en banc review. If Appellants wish to pursue their case before the district court, the parties could litigate the merits of this case, develop an evidentiary record, and then come back to this Court (if necessary) after judgment is entered. At this time, however, the Court should decline the Petition.

CONCLUSION

The Petition for Rehearing En Banc should be denied.

Dated: May 5, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Dated: May 5, 2023

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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APPELLEES' RESPONSE TO PETITION FOR REHEARING EN BANC

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s/ Pamela Cheeseborough
Pamela Cheeseborough