No. 23-_____

In The
Supreme Court of the United States

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,

Petitioners,

v.

DAVID CHIU, in his official capacity as San Francisco City Attorney; SAN FRANCISCO ETHICS COMMISSION; BROOKE JENKINS, in her official capacity as San Francisco District Attorney; and CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES R. SUTTON
THE SUTTON LAW FIRM
150 Post Street, Suite 405
San Francisco, CA 94108
415.732.7700
jsutton@campaignlawyers.com

ALAN GURA
Counsel of Record
BRETT R. NOLAN
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W., Suite 801
Washington, DC 20036
202.301.3300
agura@ifs.org
Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

San Francisco election ads must name up to nine separate donors: their speakers' top three donors, and for each of those donors that is a committee, that donor's top two donors, along with the dollar amount given by each primary and secondary donor. Donors' donors must be named regardless of whether they are even aware of the campaign, let alone support it. The city requires that the "disclaimer" including this information appear in writing, on the screen or as part of any print advertising, at certain minimum sizes, and that it be spoken, except for the dollar amounts, at the start of radio and video ads. *See* S.F. Campaign & Governmental Conduct Code § 1.161(a); S.F. Ethics Comm'n Reg. § 1.161-3.

Petitioners cannot run ads disclosing secondary donors, fearing that doing so would confuse and mislead the voters about the identities of the campaign's supporters. The secondary donor speech mandate also barred petitioners' 15- and 30-second ads, because the required spoken "disclaimers" ran 32 to 33 seconds. Likewise, the required written "disclaimers" entirely wiped out petitioners' smaller 2x4 inch newspaper ads. Although San Francisco has since exempted ads of up to 30 seconds from the requirement to speak about secondary donors, and no longer requires that print ads of 25 or fewer square inches name secondary donors, the disclaimer would still consume and displace 51% of the screen for up to 33% of petitioners' video ads' duration, 35% of petitioners' 5x10 inch print ads, 23% of petitioners' 8.5x11 inch mailers, and, when spoken, the first 53-55% of petitioners' 60-second video ads. The questions presented are:

1. Whether requiring political advertisers to name their donors' donors within their

QUESTIONS PRESENTED – Continued

advertisements advances any important or compelling state interest; and

2. Whether San Francisco's secondary donor speech mandate violates the First Amendment freedoms of speech and association.

PARTIES TO THE PROCEEDING

Petitioners were plaintiffs-appellants in the court below. They are No on E, San Franciscans Opposing the Affordable Housing Production Act, formerly known as San Franciscans Supporting Prop B ("No on E"); Edwin M. Lee Asian Pacific Democratic Club PAC Sponsored by Neighbors for a Better San Francisco Advocacy ("Ed Lee Dems"); and Todd David.

Respondents were defendants-appellees in the court below. They are David Chiu, in his official capacity as San Francisco City Attorney; San Francisco Ethics Commission; Brooke Jenkins, in her official capacity as San Francisco District Attorney; and City and County of San Francisco. Former San Francisco District Attorney Chesa Boudin, in his official capacity, was a defendant-appellee in the court below before respondent Jenkins succeeded him in office.

CORPORATE DISCLOSURE STATEMENT

1. No on E, San Franciscans Opposing the Affordable Housing Production Act, is a recipient committee organized under the laws of the State of California and the City and County of San Francisco. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. Edwin M. Lee Asian Pacific Democratic Club PAC Sponsored by Neighbors for a Better San Francisco Advocacy is a recipient committee organized under the laws of the State of California and the City and County of San Francisco. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

San Franciscans Supporting Prop B v. Chiu, No. 3:22-cv-02785-CRB (motion for temporary restraining order and preliminary injunction denied, June 1, 2022)

United States Court of Appeals (9th Cir.):

No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu, No. 22-15824 (initial opinion, March 8, 2023; amended opinion and order denying petition for rehearing en banc, Oct. 26, 2023)

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No on E, San Franciscans Opposing the Affordable Housing Production Act ("No on E"); Edwin M. Lee Asian Pacific Democratic Club PAC Sponsored by Neighbors for a Better San Francisco Advocacy ("Ed Lee Dems"); and Todd David respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

Todd David can speak clearly at a reasonably quick pace. The founder and treasurer of the "No on E" political committee, David can read the "disclaimer" required to open the committee's video campaign ads in just 32 to 33 seconds. App.26a; E.R. 19. But few voters would put up with an ad that starts with over half a minute of fine print. And some of No on E's ads were supposed to fit in 15- or 30-second slots. By hijacking so much of the committee's speech for its own purposes, San Francisco left nothing for the campaign's message. Thus the city protected voters from seeing and hearing any of the campaign's short video ads.

Similar problems impacted the ads' screen space, as well as No on E's print ads and mailers—all largely or entirely consumed by an even longer "disclaimer" when printed. *Id.* San Francisco has since tried to address *some* of the problem, excluding some smaller and shorter ads from the secondary donor speech mandate,

though fewer than it promised the court it would protect. But in doing so, the city created a new problem on top of the ones left unaddressed. Buying more ad time and space now means, at least in part, buying more ad time and space for the city's message.

The disruptive impact of San Francisco's "disclaimer" on campaign speech is driven by the city's requirement that ads reveal not only the speaker and the speaker's top three donors, but also up to six additional donors-to-the-donors—up to nine donors in all. Ads must mention secondary donors regardless of whether they even knew about the campaign, let alone agreed with the ads, when they donated to the speaker's donors. And if that were not enough, the "disclaimers" must then direct the audience to the city's website, noting the availability of the speakers' disclosure reports.

Beyond the city's aggressive commandeering of ad time and space, its secondary donor speech mandate proved to be a deal-breaker for one of the campaign's top donors—the Ed Lee Dems PAC—and thus, the campaign. Ed Lee Dems could not abide having one of its donors—who had nothing to do with the campaign—named in a No on E ad, because it would harm the PAC's interests and undermine its organizational mission.

Over two dissents both joined by nine judges, the Ninth Circuit approved all of this. This Court should take a second look. While San Francisco may impose the nation's most severe intrusion into campaign speech, the problem is not unique to the City by the

Bay. The quaint "disclaimer" by which speakers identify themselves as an ad's sponsor is increasingly a thing of the past. Speech regulators seem to think that if it's acceptable to compel just a little bit of speech for one good reason, surely it's acceptable to compel a little more speech for other good reasons. And there are always more reasons. Exacting scrutiny, at least as the Ninth Circuit understands it, poses no obstacle, as the court is prepared to subordinate the First Amendment interests in campaign speech to the interests that it cares more about.

Here, the Ninth Circuit approved the government making itself the primary speaker in someone else's campaign ad. Not so that voters might know who sponsored the ad or learn about a campaign's donors, but so that they might speculate as to who might be conspiring to secretly support the campaign. There is no limit to this alleged informational interest, which extends far beyond anything ever approved by this Court as a reason to compel and intrude upon campaign speech. If the donors' donors might be the real power behind an ad, why not the donors' donors' donors? The Ninth Circuit's reasoning approves of compelling such disclosures rooted in mere conjecture.

The D.C. and Tenth Circuits have taken a different view. The D.C. Circuit rejected an effort to require the naming of a group's donors without any evidence tying them to a campaign. And the Tenth Circuit upheld a regime requiring the disclosure of a group's donors, because disclosure was conditioned upon their actual support of an electioneering communication.

The Ninth Circuit's opinion conflicts with decisions of this Court and of other courts of appeals in greenlighting unlimited intrusion into core First Amendment political campaign speech. It merits this Court's review.

OPINIONS BELOW

The order denying rehearing en banc and the amended opinion of the court of appeals, App.1a-78a, are reported at 85 F.4th 493. The initial opinion of the court of appeals, App.79a-112a, is reported at 62 F.4th 529. The order of the district court, App.113a-132a, is reported at 604 F. Supp. 3d 903.

JURISDICTION

The court of appeals issued its initial opinion on March 8, 2023. The court of appeals issued an amended opinion, and an order denying rehearing en banc, on October 26, 2023. On December 6, 2023, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 23, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix, at App.133a-183a, and their appropriate citations are as follows:

U.S. Const. amend. I.; U.S. Const. amend. XIV, § 1; Cal. Gov't Code §§ 84501, 84502, 84503 (2021), 84503 (2022), 84504.1 (2021), 84504.1 (2022), 84504.2 (2021), 84504.2 (2022), 84504.8, 84505 (2021), 84505 (2022), 84510; S.F. Charter § 6.102(10); S.F. Charter Appendix C § C3.699-13; S.F. Campaign & Governmental Conduct Code §§ 1.112, 1.161 (2021), 1.161 (2023), 1.162, 1.168, 1.170; and S.F. Ethics Commission Reg. § 1.161-3.

STATEMENT OF THE CASE

1. California requires that political advertising by ballot committees include the words "Ad paid for by [the name of the committee]." Cal. Gov't Code § 84502(a)(1). Additionally, the state requires that most ads addressing ballot measures name the speaker's top three donors of at least $50,000. *Id.* §§ 84501(c)(1), 84503(a).[1] "Depending on the medium, the advertisement must follow certain formatting

[1] California law provides that smaller print ads need disclose only one top contributor, Cal. Gov't Code § 84504.2(a)(7), while radio and telephone ads must mention only one or two top contributors, depending on their length and that of the "disclaimer," *id.* § 84504(b).

requirements." App.6a (citations omitted). Under state law, video ads must open or close by displaying the "disclaimer," but they are not required to speak it. *Id.* § 84504.1(a).

Apparently believing that California's scheme compels too little speech, San Francisco voters enacted Proposition F, the so-called "Sunlight on Dark Money Initiative." App.7a. The measure dramatically increased the government's intrusion into political advertising, often making the government the primary or even only speaker in what is supposed to be someone else's ad. Among the new regulations:

- The city decimated the threshold at which a campaign contributor becomes a "top contributor." Donating as little as $5,000, rather than $50,000, can get one named in the recipient's advertising, S.F. Governmental Conduct & Campaign Code ("S.F. Code") § 1.161(a)(1);
- In addition to identifying the speaker, and naming the speaker's top three donors of $5,000 or more, political ads must also name the top two donors to each of the speaker's three top donors that is also a committee, *id.*;
- Ads must also note the amount given by each of these up-to nine donors, *id.*; S.F. Ethics Comm'n Reg. ("S.F. Reg.") § 1.161-3(a)(4);
- Since naming up to nine donors and the amounts they gave is apparently not

enough, ads must also state, "[f]inancial disclosures are available at sfethics.org," S.F. Code §§ 1.161(a)(2), 1.162(a)(1);

- Audio and video political advertising must open by speaking the disclaimer, including all required donors and donors' donors, though the dollar amounts may be omitted, S.F. Code § 1.161(a)(5); and
- Although California only requires that printed "disclaimers" use "standard Arial Regular type with a type size of at least 10-point," Cal. Gov't Code § 84504.2(a)(2) (2022), San Francisco upped the font size, requiring printed disclaimers "in at least 14-point, bold font," S.F. Code § 1.161(a)(3).

2. In 2020, David and another ballot campaign committee he founded challenged the secondary donor speech mandate for interfering with their ads targeting the March, 2020 election. App.9a. Although the district court enjoined the mandate's application to print ads up to 5" by 5", and the spoken disclaimers in digital/audio ads up to 30 seconds in length, it did so only on an as-applied basis, rejecting the plaintiffs' facial challenge. *Yes on Prop B v. City and County of San Francisco*, 440 F. Supp. 3d 1049, 1062 (N.D. Cal. 2020). On appeal, the Ninth Circuit held that the case was moot, as it found that the record did not establish a likelihood that the dispute would recur. *Yes on Prop B v. City and County of San Francisco*, 826 F. App'x 648 (9th Cir. 2020).

3. Of course, the dispute did recur. San Francisco keeps holding elections, and David remains a fixture on the city's political scene. Ahead of the June, 2022 election, David returned to file this case, along with Ed Lee Dems and San Franciscans Supporting Prop B, as No on E was then known—a new David-founded committee dedicated to supporting a different Prop B. "The Committee sought to communicate its message by publishing mailers, print ads in newspapers, and digital ads on the internet." App.10a-11a. But under San Francisco's law, its "disclaimer" would read:

> 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.

App.11a; *see* App.45a (full page ad), 47a (video ad). The "disclaimer" would displace 51% of the screen for up to

33% of a video ad's duration, 100% of a two-by-four inch ad, 70% of a five-by-five inch ad, 35% of a five-by-ten inch ad, and 23% of an 8.5-by-11 inch mailer. App.26a; E.R. 19-20.[2] And when spoken in video ads, the "disclaimer" would displace the entirety of 15- and 30- second ads, and 53%-55% of 60-second ads. *Id.*

Beyond these significant intrusions into the Committee's speech, the secondary donor speech mandate presented petitioners a more basic challenge: Ed Lee Dems could not, consistent with its mission, agree to have one of its top-two donors mentioned in advertising endorsing Prop B. Ed Lee Dems, dedicated to advancing Asian and Pacific Islander leaders, would never want voters to suspect that respondent David Chiu is a lawbreaker. The city's charter forbids Chiu, the City Attorney, from taking positions on ballot measures. Yet David Chiu for Assembly, his political committee from his time as a legislator, would have had to be disclosed in No on E's ads as one of Ed Lee Dems' top two contributors—though neither that committee nor Chiu are connected to petitioners' ads. App.66a-67a.

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[2] At the time, California required that the letters of video ads' written disclaimers occupy a minimum 4% of screen height. Cal. Gov't Code § 84504.1(b)(1). That provision has since been amended to require minimum letter size of 4% of screen height or width, whichever is smaller. *Compare* App.143a *with* App.145a. Todd David declared that the disclaimer could be contained to 35% of the screen if letters were sized at about 2.7% of screen height, but that the disclaimer occupies 51% of the screen when letters are sized, as required, at 4% of screen height. E.R. at 19, ¶ 15.

Six days before the election, the district court denied petitioners' motion for a temporary restraining order and for a preliminary injunction. App.113a-132a. The court rejected petitioners' argument that given the scope of the compelled speech, strict rather than exacting scrutiny governs. App.124a. Purporting to apply exacting scrutiny, the district court held that petitioners were unlikely to succeed. It rejected the idea that *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) ("*AFPF*") "substantially changed the 'exacting scrutiny' standard," App.125a, and limited the decision to its facts. App.125a-126a. The court then held that San Francisco's interest in unmasking potentially hidden donors "is far more substantial than the state's interest in *AFPF* of administrative ease in investigating fraud," and deemed the challenged law narrowly tailored. App.126a.

4. The Ninth Circuit affirmed. App.79a-112a. But first, it disposed of San Francisco's mootness claim. The city argued, as it did in the previous *Prop B* case, that the intervening election mooted the controversy. This time, however, the court found the controversy "capable of repetition, yet evading review." App.90a. The city did not dispute that election controversies are inherently too short to be fully litigated before expiring. App.90a. And after noting that petitioners sought an indefinite injunction applying to all future elections, as they regularly participate in San Francisco politics, App.91a n.4, the court found

that "at least one plaintiff," David, established that he will again be subject to the challenged law. App.91a.[3]

On the merits, however, the court agreed with the city. First, it determined that exacting scrutiny governed the dispute. App.93a-96a. It then reasoned that because the city has a "strong governmental interest in informing voters about who funds political advertisements," "[i]t follows that the secondary-contributor requirement is substantially related to that interest." App.99a. The court dismissed the risk that naming secondary donors would confuse the electorate into believing that those secondary donors necessarily agreed with the ad, App.101a.

The court also held that the imposition on petitioners' speech was not excessive. Relying on this Court's approval of a 4-second disclaimer in the context of a 10-second ad, the court held that it is no violation for the city to take up to 40% of "larger ads." App.103a-104a (citing *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)). With respect to "shorter ads," the Ninth Circuit held that the district court acted within its discretion to deny relief even if the law "likely causes constitutional issues," App.104a,

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[3] The panel erred in claiming that petitioners' preliminary injunction motion did not include a facial challenge. It did. *See* Notice of Motion and Motion for TRO and Prelim. Injunction, *San Franciscans Supporting Prop B v. Chiu*, No. 3:22-cv-02785-CRB, Dkt. 9 (May 12, 2022) at 1 (seeking injunction), 17 ("the requirements are unconstitutional, both facially and as applied to the Committee's speech"), 19 ("San Francisco's on-communication secondary donor disclosure fails tailoring and is facially unconstitutional").

because the city promised not to enforce the secondary donor speech mandate against ads smaller than 5" by 5", or with respect to spoken disclaimers in ads running 60 or fewer seconds. App.105a.

In a footnote, the court distinguished recent circuit precedent enjoining San Francisco's imposition of health warnings on sugary-beverage labels. The en banc court had determined that seizing 20% of a beverage label for the city's warning was excessive under *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626 (1985). *See Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (en banc). But the panel upheld the much larger "disclaimers" mandated here, because *Zauderer*'s test "differs from exacting scrutiny review." App.104a n.7.

The court also dismissed the sufficiency of petitioners' declarations that the secondary donor speech mandated deterred donors—including Ed Lee Dems' declaration that it would withdraw its donations from the Committee if it ran ads naming Ed Lee Dems' donors. App.106a-107a. And it rejected petitioners' argument that San Francisco could have tailored its law more narrowly, by relying on ordinary disclosures that do not consume ad space or by requiring a secondary donor's earmarking to support a campaign as a condition of mandating its naming in the campaign's ad. App.108a-111a.

Finally, the court noted that "[w]ithout an injunction, Plaintiffs likely would be injured by the loss of some First Amendment freedoms, but that injury

would be modest." App.112a (citations omitted). And it found that the balance of the equities, and the public interest, favored denying relief. *Id.*

5. Petitioners sought rehearing en banc. While their petition was pending, San Francisco modified the secondary donor speech mandate in two respects. First, it exempted print ads of 25 square inches or less from the secondary donor speech mandate. S.F. Code § 1.161(a)(1)(A). Second, although the city had promised not to demand that secondary donor names be spoken in audio and video ads of up to 60 seconds, it codified that exemption only for ads of up to 30 seconds. *Id.* § 1.161(a)(1)(B).

6. On October 23, 2023, the court issued an amended panel opinion and denied rehearing en banc. The amended opinion differed from the initial one in two ways. First, the court clarified its acceptance of San Francisco's representation that it "would not enforce the challenged ordinance where the 'required disclaimer would consume the majority of Plaintiffs' advertisement.'" App.26a. "We thus consider only those ads in which the disclaimer would take up less than a majority of the ad." *Id.*

The court also acknowledged "that the First Amendment provides greater protection to election-related speech than to commercial speech," App.28a (citation omitted), and thus offered two new, different reasons for distinguishing its en banc decision in *American Beverage*. First, the governmental interest in warning voters about potential donors is more

important than its interest in warning consumers about hazardous drinks. App.28a. Second, while the beverage warning requirement failed *Zauderer* review because it was fixed at an excessive 20% of a drink's label, there is no limit on the amount of campaign speech the government might seize from a speaker if "no evidence suggests that a smaller or shorter disclaimer [on campaign ads] would achieve the same effect as the required disclaimers." App.28a-29a.

7. Judges Callahan, Ikuta, Bennett, R. Nelson, Collins, Lee, Bress, Bumatay, and VanDyke all joined two separate dissents, authored by Judges Collins and VanDyke, respectively.

a. Judge Collins addressed the decision's "troubling aspect . . . that it explicitly allows San Francisco to commandeer political advertising to an intrusive degree that greatly exceeds" what the court "tolerate[s] in the context of *commercial* advertising." App.37a.

Judge Collins pointed out that the recent amendment carving out some exemptions for smaller and shorter ads "does nothing to address Plaintiffs' objections" to the city's seizure of 35% of 5" by 10" ad, 23% of an 8.5" by 11" mailer, 35%-51% of a video ad's screen when displayed,[4] and 53%-60% of a 60-second ad's audio. App.38a-39a. The amended opinion, Judge Collins observed, "combines (1) *ipse dixit* reflecting the panel's value judgments about the supposed weight of the asserted government interests and the relative

[4] The disclaimer takes 51% of the screen at the required letter size. *See* supra n.2.

importance of the different types of speech with (2) a whatever-it-takes approach to burdening political speech." App.43a. "This analysis bears little resemblance to the required 'exacting scrutiny.'" *Id.*

"[T]aking such a large percentage of the physical space of an ad inevitably dilutes the speaker's message in a way that crowds out that message and impedes its effectiveness." App.46a. "Viewed in light of the seriousness of the actual burden on First Amendment rights, the panel's take-as-much-as-you-need approach to burdening political speech is flatly contrary to *American Beverage* and *NIFLA* [*Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018)] and is anathema to the First Amendment." *Id.* (internal citations and quotation marks omitted).

Judge Collins also criticized the panel for refusing to address the law's application to some of petitioners' ads, owing to the city's promise not to enforce the law against ads of 60 seconds or less. The city, Judge Collins noted, only codified half that exemption, calling its representations into question. "San Francisco's manifest effort to hang on to a portion of an ordinance that it simultaneously insists to us that it will never enforce is deeply troubling. We should not tolerate this kind of coyness from government litigants, especially when it comes to constitutional rights." App.49a.

b. Judge VanDyke's dissent first focused on the free association problem inherent in compelling the

disclosure of secondary donors. He explained that "San Francisco's law . . . compels unwanted associations by requiring political speakers to give the appearance of affiliation with secondary contributors, despite the lack of any affirmative act giving rise to such an association." App.61a. "In compelling these on-ad disclosures, Proposition F will cause the public to naturally infer second-degree associations between political speakers and secondary contributors, notwithstanding the absence of any logical basis to infer such an association actually exists." App.64a.

Judge VanDyke also noted that San Francisco compels vast amounts of speech, "notwithstanding how much the sheer volume of the disclosure may dilute or distract from the speaker's desired message, and even if the message itself is as short as 'Vote for Pedro' or 'Save Ferris.'" App.69a-70a (citation omitted). "These disclosures necessarily alter the content of the advertisement, burdening Plaintiffs' rights to free speech." App.70a (internal quotation marks and brackets omitted).

Yet the law does not advance any important government interest, "because a voter cannot reasonably infer any relevant information about a political speaker or an advertisement by knowing the speaker's secondary contributors." App.72a (citation omitted). Thus, "worse than simply compelling the disclosure of information that furthers no sufficiently important governmental interest, Proposition F will actually encourage voters to draw inaccurate conclusions" as

they speculate about nonexistent relationships. App.73a. But while any true donor hiding behind a front-committee could simply create an additional intermediary to shield its identity, App.74a, "[t]he panel's reasoning sets no logical limit to how many layers of disclosures are necessary to find the true or original source of a political ad's funding." App.77a. "[I]t will presumably permit, under the guise of 'exacting scrutiny,' any number of layers between a contributor and a political speaker, no matter how disconnected." App.78a.

REASONS FOR GRANTING THE PETITION

The nine dissenting judges put it bluntly: "This is not the exacting scrutiny the Supreme Court reminded our circuit to undertake when it reversed us only two years ago." App.50a-51a (citing *AFPF*).

In the Ninth Circuit, the government is now presumptively entitled to displace and compel as much political speech as it believes necessary to advance whatever interest it can imagine. And it can do so regardless of the impact on what are supposed to be the fundamental rights of political free speech and association, unless impacted speakers establish that less intrusive means would achieve the same effect.

Here, the purported governmental interest San Francisco relies on to make itself the primary speaker in political advertising is untethered to any justification that this Court has ever approved for regulating

political speech. The city wants voters to know the identities of a speaker's donors' donors, on the off chance that the donor's donors intended to support the advertising. If encouraging voters to engage in this type of speculation justifies wiping out huge swaths of political speech, then exacting scrutiny is toothless.

That "exacting scrutiny" might not mean much more in the Ninth Circuit than rational basis review is unsurprising. The court afforded petitioners' campaign speech less protection than it provides under the lowest level of review for protecting commercial speech. But other circuits are more faithful to this Court's precedent, requiring a real campaign connection before compelling a donor's disclosure.

This Court should grant certiorari to stop this split from widening, to bring the Ninth Circuit into compliance with this Court's precedents, and to prevent the violations of political speech and association that this decision invites.

I. Considering the expansion of on-ad "disclaimers," this Court should clarify when strict rather than exacting scrutiny governs the compulsion of speech in political advertising.

This case does not turn on the standard of review. As discussed *infra*, San Francisco's law plainly violates the exacting scrutiny that the Ninth Circuit purported to apply. And it may be that no standard of review or analytical framework, however demanding, will

impress judges who simply do not value or actively oppose the right at issue.

But at the outset, before addressing the many flaws in the Ninth Circuit's exacting scrutiny take, this Court should ask whether exacting scrutiny is even the correct standard of review. Because beyond raising important exacting scrutiny and governmental interest questions, this case presents an opportunity to clarify a critical ambiguity in this Court's compelled speech doctrine. This Court recently signaled that it may be increasing the scrutiny given to any disclosure regime. *Compare AFPF*, 141 S. Ct. at 2383 (Roberts, C.J., op.) (exacting scrutiny applies to disclosure requirement), *with id.* at 2390 (Thomas, J., concurring) (strict scrutiny applies to all disclosure requirements), *with id.* at 2391 (Alito, J., concurring) (withholding judgment whether strict or exacting scrutiny applies). Increased scrutiny may be needed as regulators blur the line between traditional "disclaimer" and "disclosure" laws, requiring ever-more intrusive government messaging in campaign advertising—with the lower courts' approval.

In the jargon of campaign regulation, disclaimer statutes require that a communication state who made it—who "is responsible for the content of th[e] advertising," *Citizens United*, 558 U.S. at 366, while disclosure statutes require that speakers report to the government their expenditures and contributions, *Buckley v. Valeo*, 424 U.S. 1, 63 (1976) (per curiam). So defined, disclosure and disclaimer requirements "impose no ceiling on campaign-related activities."

Citizens United, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64). In traditional understanding, a true disclaimer is short, little more than a two-or three- second statement about who made the ad. Disclosure entails giving information to the government, that it may then make available to the public using its own resources. Neither acts to "impose [a] ceiling on campaign-related activities," *id*., or to "reduce[ ] the quantity of expression," *McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 197 (2014) (citation omitted). As the Ninth Circuit correctly noted, App.17a, this Court has applied exacting scrutiny to both "disclaimer" and "disclosure" laws. *See*, *e.g.*, *Citizens United*, 558 U.S. at 366-67; *Doe v. Reed*, 561 U.S. 186, 196 (2010).

But just as 1+1 does not equal 1, the new hybrid created by San Francisco's law—placing what is essentially a longform disclosure fit for a government office in the advertising context of a traditional disclaimer—creates new burdens not anticipated by the existing understanding of "disclaimers." Even if secondary donor information could properly be the subject of a disclosure mandate, not everything that the government can order disclosed belongs in an ad.

Typically, outside the commercial speech context, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is "consider[ed] . . . as a content-based regulation of speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988) (citation omitted); *see also NIFLA*, 138 S. Ct. at 2371. The notion that San Francisco's law "impose[s] no ceiling on campaign-related activities, and

do[es] not prevent anyone from speaking," App.25a (quoting *Citizens United*, 558 U.S. at 366), is risible. In San Francisco, many ads are impracticable or impossible. Longer ads come with more government speech mandates. Donors balk at dragging their own donors into election campaigns.

This Court should address the problem of hybrid "disclaimsures" sooner rather than later. The Ninth Circuit rejected the more-narrowly tailored alternative of providing secondary donor information as a regular disclosure, citing two other circuits for 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." App.32a (citing *Gaspee Project v. Mederos*, 13 F.4th 79, 91 (1st Cir. 2021) and *Majors v. Abell*, 361 F.3d 349, 353 (7th Cir. 2004)) (other citation omitted). The old notion that disclaimers are inherently too short, and thus not sufficiently transformative of campaign speech to trigger strict scrutiny, does not reflect the emerging landscape of campaign speech regulation. First Amendment doctrine should keep pace with campaign speech regulators.

II. The Ninth Circuit's recognition of a governmental interest in forcing speakers to reveal their donors' donors is irrational, and conflicts with this Court's precedent and the precedent of other circuits.

The government cannot conjure any flimsy interest to justify the compulsion of speech. Even under exacting scrutiny, its interest must be "sufficiently important." *Citizens United*, 558 U.S. at 366-67 (citing *Buckley*, 424 U.S. at 64). San Francisco may believe that speakers should tell voters all kinds of things, but informing voters about the speaker, without more, is unimportant. "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).

The only informational interest important enough to warrant compelled disclosure is narrow: informing voters "where political campaign money comes from," *Buckley*, 424 U.S. at 66 (footnote omitted), that is, "the source of advertising," *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 n.32 (1978).

But the "source of the advertising" is not *the source of the source* of the advertising. Information about the speaker is one thing. Information about the speaker's donors, quite another. Guilt by association is not a First Amendment standard. Disclosure laws justified under the government's informational interest must inform voters "concerning those who support" a ballot

measure or candidate, *Buckley*, 424 U.S. at 81, not those who support those who support the measure or candidate, because they *might* support the ad, and they *might* have intended for their donation to fund it.

Maybe they did. But maybe they didn't. People have many reasons to donate to Ed Lee Dems. They might intend to support the group's efforts to promote Asian and Pacific Islander representation; to further civil rights, women's rights, and LGBT rights; to support public schools, public transportation, and local parks; or to secure access to affordable housing and health care. *See* About, *Edwin M. Lee Asian Pacific Democratic* Club, https://www.edleedems.org/about (last visited Feb. 20, 2024). Motivated by any of these causes, the group's donors might well be indifferent or even opposed to its positions on Propositions B and E.

Other circuits understand that absent a donor's earmarking (that is, directing the recipient to use the donation in some specific campaign), the informational interest cannot support that donor's disclosure.

The D.C. Circuit upheld an FEC regulation that conditioned disclosure of a donor's identity on the donor's earmarking of the donation toward the campaign. The court noted "the intuitive logic" that an expansive donor disclosure regime would spread misinformation. *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 497-98 (D.C. Cir. 2016). The court contemplated a "not unlikely scenario" where a partisan Republican gave to the American Cancer Society's general mission "to fund the ongoing search for a cure," yet found herself

reported as supporting Cancer Society ads that attacked "Republicans in Congress" whose deficit-reducing efforts would mean "fewer federal grants for scientists studying cancer." *Id*. at 497. "Wouldn't a rule requiring disclosure of [the] Republican donor, who did *not* support issue ads against her own party, convey some misinformation to the public about who *supported* the advertisements?" *Id*.; *see also Indep. Inst. v. Fed. Election Comm'n*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016), *aff'd*, 580 U.S. 1157 (2017) (three-judge panel upholding mandatory disclosure of donors who contribute substantial amounts "for the specific purpose of supporting the advertisement") (citations omitted).

Similarly, the Tenth Circuit upheld a Colorado law requiring the disclosure of donors to a speaker making certain electioneering communications, largely because the speaker "need only disclose those donors who have specifically earmarked their contributions for electioneering purposes." *Indep. Inst. v. Williams*, 812 F.3d 787, 797 & n.12 (10th Cir. 2016).

The informational interest recognized by this Court in requiring donor disclosure does not extend to an interest in disclosing donors' donors. The Ninth Circuit's recognition of an interest in disclosing such attenuated parties—non-donors to the speaker's campaign—creates a circuit split that should be addressed before the havoc it wreaks spreads any further.

III. The Ninth Circuit failed to apply exacting scrutiny in evaluating San Francisco's "disclaimer" imposition on political advertising.

There is nothing exacting about the Ninth Circuit's blessing of a secondary donor speech mandate. The importance assigned to the city's purported interest reflected only the court's low regard for political speech. The court also conducted no tailoring analysis. And it dismissed the plainly excessive burden imposed on speakers, the damage done to associational freedom, and the confusion sowed among the voters by the secondary donor speech mandate, as well as obvious less restrictive alternatives.

1. Although petitioners have explained that the governmental interest accepted here—promoting voter speculation about who might support a campaign—is neither coherent nor consistent with precedent, the Ninth Circuit's unserious approach to determining that this interest is "sufficiently important" is perhaps even more problematic. Recall that in its initial opinion, the Ninth Circuit waved away the discrepancy between its version of "exacting scrutiny" for political speech and the more vigorous protection it affords commercial speech applies under *Zauderer*. In a footnote, it observed that the latter test "differs from exacting scrutiny review," which applies here owing to "[t]he election context [that] is distinctive in many ways." App.104a n.7 (quoting *Citizens United*, 558 U.S. at 422 (Stevens, J., concurring)). But *Zauderer* provides "less exacting scrutiny" than that generally afforded

commercial speech, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010), and *AFPF* rejected the argument that exacting scrutiny is distinctive owing to its application in the election context. "To the contrary, *Buckley* derived the test from . . . non-election cases." *AFPF*, 141 S. Ct. at 2383 (citations omitted).

While the Ninth Circuit eventually acknowledged that exacting scrutiny is stricter than *Zauderer*'s test, its solution to applying a high level of scrutiny was to simply elevate the importance of the government's interest. As Judge Collins remarked, "the City's corresponding interest in demanding highly detailed in-the-ad disclosures of indirect funding sources is so very much greater than the interest in disclosing the health risks of sugared beverages that—voilà—it more than swamps the greater protection afforded to political speech." App.42a-43a. Indeed, the Framers would have been surprised to learn that the risks of consuming campaign speech warrant greater regulation than the threats posed by mass consumption of unhealthy drinks. Today it seems readily apparent that more Americans suffer, and suffer more seriously, from too much sugar than from insufficient speculation about shadowy dark-money conspiracies.

Exacting scrutiny requires more discernment as to the importance of the government's asserted interest.

2. Even if San Francisco could demonstrate a substantial relation between the secondary donor "disclaimer" and a sufficiently important interest, "a

substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored." *AFPF*, 141 S. Ct. at 2384. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—[b]ecause First Amendment freedoms need breathing space to survive." *Id*. (internal quotation marks omitted).

Although San Francisco bore the exacting scrutiny burden, the only evidence regarding the disclaimer's impact came from petitioners and their experts. Yet just as the Ninth Circuit acknowledged no limits as to what might pass for a sufficiently important interest, no intrusion on political speech was too great for the court, either. It approved of or ignored remarkable encroachments upon campaign speech—23% of a mailer, 35% of a newspaper ad, 51% of a video ads' screen and a similar portion of its audio track at the ad's beginning—because that's what it took to imply a potential relationship between the speaker and its non-donors.

These intrusions cannot pass exacting scrutiny, as they plainly "drown[] out [petitioners'] own message," and "effectively rule[] out the possibility of having [these ads] in the first place." *NIFLA*, 138 S. Ct. at 2378; *cf. Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 832 (7th Cir. 2014) (enjoining "long and repetitive" disclosure containing 50 extra words, "which consume a significant amount of paid advertising time in a broadcast ad").

And there is no limit to the logic of exposing donors' donors to ferret out a hidden "real" donor. "[T]he obvious workaround for Proposition F is to simply

provide clever committee names for the secondary contributors too. So disclosing secondary contributors will not actually solve the problem—at least not for long. So what's next? Disclosure of tertiary (and quaternary, quinary, senary) contributors?" App.77a-78a. It's donors all the way down.

This is an especially concerning approach when married to the Ninth Circuit's apparent refusal to accept any subject or purpose limits on the government's intrusion into ads. Per the court, if a disclosure can be required, it can be required on advertising. "[B]ecause of its instant accessibility, an on-advertisement disclaimer is a more effective method of informing voters than a disclosure that voters must seek out." App.32a (citations omitted).

Thus the court deemed insufficient the obvious less restrictive alternative: directing the audience to a speaker's disclosure reports. 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. Indeed, the challenged provision already contains this alternative, consuming ad time and space by requiring speakers to discuss the city ethics commission's website. But the court did not require San Francisco to "demonstrate its need for [disclosure] in light of any less intrusive alternatives." *AFPF*, 141 S. Ct. at 2386. Instead, it appeared to place this burden on petitioners. App.29a ("no evidence suggests that a smaller or shorter disclaimer would achieve the same effect as the required disclaimers").

Indeed, California law already prohibits the creation of committees designed to shield the identities of top contributors. Cal. Gov't Code § 84505.

Worse still, the court disregarded *AFPF* by simply dismissing petitioners' declarations describing the chilling impact of the city's forcible associations. "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." App.31a. No "specific deterrence?" "Some" donors have only an "alleged desire" not to be listed? Ed Lee Dems is not "some" donor. It is a top three No on E donor that San Francisco believes is significant enough to mandate its naming and the naming of its donors in all committee advertising. 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 meant disapproving of No on E's ads. And petitioners, experienced political activists, described the difficulties that secondary donor disclosure posed in fundraising.

The Ninth Circuit's minimization of petitioners' concerns directly contradicts *AFPF*. Indeed, *AFPF* held that the *risk* of disclosure suffices to chill association, and that the possibility of deterrence is what triggers exacting scrutiny in the first place. 138 S. Ct. at 2388. Moreover, this Court found that "[t]he gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as *amici curiae*," demonstrating that "[t]he deterrent effect feared by these organizations is real and pervasive, even if

their concerns are not shared by every [impacted] charity." *Id.* In other words, chill is established under exacting scrutiny as a matter of logic. But the Ninth Circuit quoted this sentence for the exact opposite proposition. "That level of hesitation on the part of donors," exemplified by Ed Lee Dems' refusal to fund the Committee's ads and petitioners' description of the fundraising challenges posed by secondary donor disclosure, "is insufficient to establish that the 'deterrent effect feared by [Plaintiffs] is real and pervasive.' " App.31a (quoting *AFPF*, 138 S. Ct. at 2388). In other word, the Ninth Circuit once again flipped the burdens of exacting scrutiny.

IV. This case is an optimal vehicle for clarifying the law, resolving the split of authority, and securing fundamental rights.

The Ninth Circuit's decision here cannot be allowed to stand as the future of "exacting scrutiny." It invites virtually unlimited intrusion into and displacement of political campaign speech, for just about any speculative reason. It subordinates the interests in political speech below the interests in commercial speech, it declines any meaningful tailoring effort, and it calls for disregarding the plain and obvious chilling impact of involuntary association.

The decision's only merit is that it presents an ideal vehicle for certiorari, with a substantial and detailed record upon which this Court can speak clearly

in restoring the First Amendment's protection of core political campaign speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES R. SUTTON
THE SUTTON LAW FIRM
150 Post Street, Suite 405
San Francisco, CA 94108
415.732.7700
jsutton@campaignlawyers.com

ALAN GURA
Counsel of Record
BRETT R. NOLAN
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., N.W.,
Suite 801
Washington, DC 20036
202.301.3300
agura@ifs.org
Counsel for Petitioners

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