App. No. 23A-___

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 APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

Alan Gura*
Institute for Free Speech
1150 Connecticut Avenue, N.W.
Suite 801
Washington, DC 20036
202.301.3300
agura@ifs.org

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*Counsel of Record

Rule 29.6 Statement

Petitioner 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 companies, and no publicly held company owns 10% or more of its shares.

Petitioner 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 companies, and no publicly held company owns 10% or more of its shares.

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To the Honorable Elana Kagan, Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioners 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 request that the time to file a Petition for Writ of Certiorari in this matter be extended for thirty days to and including February 23,

2024. The Court of Appeals issued its amended panel opinion and order denying Petitioners' timely petition for rehearing en banc on October 26, 2023. *See* App. A, *infra*. Absent an extension of time, the petition would therefore be due on January 24, 2024. Petitioners are filing this application at least ten days before that date. See S. Ct. R. 13.5. This Court would have jurisdiction over the judgment per 28 U.S.C. § 1254(1).

Background

1. California and San Francisco require political advertisers to identify themselves and their top three donors in their election advertising, in addition to other disclaimers. Cal. Gov't Code § 84503(a); S.F. Campaign & Governmental Conduct Code ("S.F. Code") § 1.161(a)(1). But San Francisco has recently added another campaign speech mandate, which is the subject of this litigation. The City compels speakers to name, in their ads, the top two donors to each of the speakers' top three donors who are political committees. S.F. Code § 1.161(a)(1).

Accordingly, San Francisco compels political advertisers to name, in addition other sundry disclaimers, up to nine separate donors in their ads (three primary and up to six secondary). The requirement to name donors' donors in an ad applies regardless of whether those secondary donors intended to fund the ad or were even aware of their recipients' political contributions. And naming all these donors consumes time and space—sometimes, consuming the entire ad altogether.

2. Petitioner No on E (then called San Franciscans Supporting Prop B) refrained from advertising in support of a measure on the city's June 2022 ballot

owing to the secondary donor speech mandate. Two of its three major donors, including Petitioner Ed Lee Dems, were committees whose top two donors No on E was compelled to name within its ads. But Ed Lee Dems would not allow No on E to mention one of its donors in campaign advertising and would have demanded its money back had an ad run naming it. That donor was David Chiu for Assembly, the political committee of Respondent San Francisco City Attorney David Chiu, from his days as a California legislator. As City Attorney, Chiu is barred from taking positions on ballot measures. S.F. Charter § 6.102(10). Ed Lee Dems thus fears that associating Chiu with a ballot measure campaign would confuse voters and unfairly impugned his reputation. Ed Lee Dems finds this risk unacceptable, especially as its mission includes working to empower young Asian Pacific Islander ("API") people in the political process and to support strong API leaders.

The secondary donor speech mandate would also consume substantial portions of No on E's ads. It would balloon No on E's required spoken word "disclaimer" to 100% of its 15-second and 30-second internet video ads and 53%-55% of its 60-second ads. App. A at 25. "[T]he written disclaimer in video ads would take up between 35% and 51% of the screen for up to 33% of the ad's duration." *Id.* And the "disclaimer" would consume 100% of No on E's two-by-four-inch ads, 70% of its five-by-five-inch ads, 35% of its five-by-ten-inch ads, and 23% of its 8-x-11.5-inch mailers. App. A, at 25-26.

San Francisco has since excluded print ads of 25 or fewer square inches, and ads of 30 seconds or less, from the secondary donor speech mandate. S.F. Code §

1.161(a)(1)(A)-(B) (effective Aug. 27, 2023). Buying additional time and space now buys additional compelled speech, disincentivizing larger and longer ads.

No on E, its founder and treasurer Todd David, and Ed Lee Dems brought suit in the United States District Court for the Northern District of California on May 11, 2022, challenging the secondary donor speech mandate as a violation of their First Amendment speech and associational rights. On June 1, 2022, the District Court denied Petitioners' motion for a temporary restraining order and preliminary injunction. *San Franciscans Supporting Prop. B v. Chiu*, 604 F. Supp. 3d 903 (N.D. Cal. 2022). The Ninth Circuit initially affirmed that decision on March 8, 2023, *No on E v. Chiu*, 62 F.4th 529 (9th Cir. 2023). Petitioners timely sought rehearing en banc.

On October 26, 2023, the Ninth Circuit withdrew its initial opinion, substituted an amended panel opinion, and denied Petitioners' petition for rehearing en banc. *No on E v. Chiu*, 85 F.4th 493 (9th Cir. 2023) (App. A). Nine judges joined each of two dissents from denial of rehearing en banc, by Judges Collins and VanDyke.

Reasons for Granting an Extension of Time

1. The forthcoming certiorari petition raises substantial First Amendment concerns. Assuming that exacting rather than strict scrutiny applies, nine judges—enough to form a majority in any other circuit—found that "[t]his is not the exacting scrutiny the Supreme Court reminded our circuit to undertake when it reversed us only two years ago." App. A at 47 (VanDyke, J., dissenting) (citing *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021)).

First, although the government is understood to have an important interest in helping voters learn about "those who support the candidates," *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (per curiam), no court has ever adopted the position that the informational interest extends to the identity of a *speaker's donors' donors*, who might be unaware of the election or even oppose the speaker's message. "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) (emphasis added). Far from providing voters relevant information about the source of a speaker's support, San Francisco's secondary donor speech mandate invites rank speculation about relationships that may not exist. It also risks depressing philanthropy generally, because donors may grow concerned that their recipients might draw them into any and all manner of controversy by later making donations themselves.

Indeed, the D.C. Circuit rejects the Ninth Circuit's logic. Upholding the FEC's requirement that a secondary donor should be disclosed only if the donation is earmarked to support the speaker's message, the D.C. Circuit noted the "intuitive logic" that disclosing secondary donors who did not earmark their donation to fund the speech might misinform voters. *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 497-98 (D.C. Cir. 2016). And courts have relied upon such earmarking guardrails in upholding disclosure regimes under exacting scrutiny. *Indep. Inst. v.*

Williams, 812 F.3d 787, 797 (10th Cir. 2016); *Indep. Inst. v. FEC*, 216 F.3d 176, 191 (D.D.C. 2016) (three-judge court), *aff'd*, 580 U.S. 1157 (2017).

Moreover, the Ninth Circuit's logic admits of no limiting principle. If secondary donor disclosure is necessary to expose potential straw-donations, sneaky donors will just form another intermediary. "So what's next? Disclosure of tertiary (and quaternary, quinary, senary) contributors? Why not contributors even further removed from the political speaker?" App. A at 71 (VanDyke, J., dissenting). It's "donors all the way down."

Second, the secondary donor speech mandate admits of no narrow tailoring. Laws compelling donor disclosure *within an ad*, as opposed to within a public disclosure report, are of dubious constitutionality given their substantial displacement of a speaker's message. The government can advance a valid informational interest in disclosing donor relationships without hijacking political ads. And the problem is exacerbated with a demand to name up to nine total donors on top of other disclaimers. As the facts here demonstrate, the secondary donor disclosure mandate makes some small and short ads impossible. Exempting those ads from the speech mandate, which begs the question of whether the rule is truly needed, shifts the problem to the longer ads that are now impractical, as a speaker buying more time and space would also be buying much of that space for the government's speech.

2. An extension of time is needed to adequately complete this petition, in light of counsel's other pressing deadlines and obligations.

Petitioners' undersigned counsel is currently preparing to file an amicus brief in this Court in the consolidated matters of *Moody v. NetChoice, LLC*, No. 22-277 and *NetChoice, LLC v. Paxton*, No. 22-555. That brief is due January 23, 2024, the day before the current deadline to file the petition for certiorari in this matter. But undersigned counsel is already obliged to file that brief before the deadline, because on January 23, he is set to argue before the Eleventh Circuit in Atlanta on behalf of appellants in *Moms for Liberty – Brevard County, Fla. v. Brevard Public Schools,* 11th Cir. No. 23-10656, a substantial case concerning the First Amendment rights of speakers at school board meetings. It would be quite difficult to finalize the petition in this case for filing on January 24 while preparing for, traveling to, and conducting a January 23 argument in the Court of Appeals—on top of meeting the January 23 *NetChoice* deadline.

These are not counsel's only professional obligations, but they suffice to render the preparation of the petition for a writ of certiorari in this case unduly challenging absent the requested extension. The requested extension would not prejudice Respondents, who prevailed below and who are not currently enjoined from enforcing the challenged provision.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended by thirty days to and including February 23, 2024.

Dated: December 1, 2023

Respectfully submitted,

/s/ Alan Gura
Alan Gura*
Institute for Free Speech
1150 Connecticut Avenue, N.W.
Suite 801
Washington, DC 20036
202.301.3300
agura@ifs.org

*Counsel of Record