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APPENDIX A

FOR PUBLICATION

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; TODD DAVID, *Plaintiffs-Appellants*, v. DAVID CHIU, in his official capacity as San Francisco City Attorney; SAN FRANCISCO ETHICS COMMISSION; BROOKE JENKINS, in his official capacity as San Francisco District Attorney; CITY AND COUNTY OF SAN FRANCISCO, *Defendants-Appellees*.	No. 22-15824 D.C. No. 3:22-cv-02785-CRB ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted December 9, 2022
San Francisco, California

Filed March 8, 2023
Amended October 26, 2023

Before: Susan P. Graber and Ronald M. Gould, Circuit Judges.*

Order;
Opinion by Judge Graber;
Dissent from Order by Judge Collins;
Dissent from Order by Judge VanDyke

COUNSEL

Alan Gura (argued), Institute for Free Speech, Washington, D.C.; James R. Sutton, The Sutton Law Firm, San Francisco, California; for Plaintiff-Appellant.

Tara M. Steeley and Wayne K. Snodgrass, Deputy City Attorneys; David Chiu, City Attorney; San Francisco City Attorney's Office, City and County of San Francisco, San Francisco, California; for Defendant-Appellee.

Tara Malloy and Megan P. McAllen, Campaign Legal Center, Washington, D.C., for Amicus Curiae American Legal Center.

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* Judge Watford, who was on the panel that issued the original opinion, left the court on May 31, 2023. In accordance with General Order 3.2(h), this Order and the Amended Opinion are issued by the remaining panel members as a quorum pursuant to 28 U.S.C. § 46(d).

Daniel R. Suhr and Reilly Stephens, Liberty Justice Center, Chicago, Illinois, for Amicus Curiae Liberty Justice Center.

ORDER

The Opinion filed on March 8, 2023, is hereby amended. The amended opinion will be filed concurrently with this order.

Appellants filed a petition for rehearing en banc, Docket No. 41. Judge Graber recommends denial of the petition for rehearing en banc and Judge Gould so votes.

The full court was advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. See Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

GRABER, Circuit Judge:

In response to the growing prevalence of money in politics, many governments have required groups that run political advertisements to identify their funding sources publicly. Under California law, certain political advertisements run by a committee must name the

committee's top contributors. The City and County of San Francisco adds a secondary-contributor disclaimer requirement that compels certain committees, in their political advertisements, also to list the major donors to those top contributors.[1]

Plaintiffs—a political committee that runs ads, the committee's treasurer, and a contributor to the committee—seek to enjoin enforcement of San Francisco's ordinance. They allege that the secondary-contributor requirement violates the First Amendment. The district court held that Plaintiffs are unlikely to succeed on the merits and denied Plaintiffs' request for a preliminary injunction. Reviewing the denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo, Fyock v. Sunnyvale, 779 F.3d 991, 995 (9th Cir. 2015), we agree with the district court. Plaintiffs have not shown a likelihood of success on the merits. San Francisco's requirement is substantially related to the governmental interest in informing voters of the source of funding for election-related communications. The ordinance does not create an excessive burden on Plaintiffs' First Amendment rights

[1] The parties in this case distinguish between "disclaimers" (statements at the time of the advertisement, identifying who is funding the ad) and "disclosures" (public reports filed with government entities). Although that distinction is recognized in the case law, see, e.g., Citizens United v. FEC, 558 U.S. 310, 366–67 (2010), some courts use the terms interchangeably. Where relevant, we clarify whether laws considered by prior courts required disclosures or disclaimers, consistent with the foregoing definitions.

relative to that interest, and it is sufficiently tailored to the governmental interest. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. California Political Reform Act

The California Political Reform Act defines a "committee" as "any person or combination of persons" who, in a calendar year, receives contributions totaling $2,000 or more; makes independent expenditures totaling $1,000 or more; or makes contributions totaling $10,000 or more to, or at the behest of, candidates or committees. Cal. Gov't Code § 82013. A "primarily formed committee" is defined as a committee that receives $2,000 or more in contributions in a calendar year and is formed or exists primarily to support or oppose a single candidate, a single measure, a group of candidates being voted on in the same election, or two or more measures being voted on in the same election. Id. § 82047.5. Every committee, whether or not it is primarily formed, must file a statement of organization with the California Secretary of State and the relevant local filing officer, id. § 84101(a), which in this case is the San Francisco Ethics Commission. See S.F. Campaign & Governmental Conduct Code ("S.F. Code") § 1.112(a)(1).

Committees must file semiannual statements, Cal. Gov't Code § 84200(a), and must file two preelection statements, one at least 40 days before an election and the second at least 12 days before an election, id. §§ 84200.5, 84200.8. Among other requirements, each

of those campaign statements must include "[t]he total amount of contributions received during the period covered by the campaign statement and the total cumulative amount of contributions received." Id. § 84211(a). If any donor contributes money to the committee during a reporting period and has given aggregate contributions of $100 or more, then the report must include that donor's name, address, occupation, and employer, plus the dates and amounts of the donor's contributions during the period and the donor's total aggregate contributions. Id. § 84211(f).

California law also requires specific disclaimers in political advertisements. Id. §§ 84501–84511. An "advertisement" is defined as "any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures." Id. § 84501(a)(1). Advertisements must include the words "[a]d paid for by [the name of the committee]." Id. § 84502(a)(1). They also must state "committee major funding from," followed by the names of the top contributors to the committee. Id. § 84503(a). "Top contributors" are defined as "the persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of fifty thousand dollars ($50,000) or more." Id. § 84501(c)(1). Depending on the medium, the advertisement must follow certain formatting requirements. See id. §§ 84504.1 (video); 84504.2 (print); 84504.4 (radio and telephone); 84504.3 (electronic media); 84504.6 (online platforms).

B. San Francisco's Proposition F

On November 5, 2019, San Francisco voters passed Proposition F. Referred to by proponents as the "Sunlight on Dark Money Initiative," Proposition F changed the disclaimer requirements for advertisements paid for by independent political committees, among other provisions. After the passage of Proposition F, "all committees making expenditures which support or oppose any candidate for City elective office or any City measure" must comply with the City's new disclaimer requirements, in addition to the state's requirements. S.F. Code § 1.161(a).

Under the new ordinance, ads run by primarily formed independent expenditure and ballot measure committees must include a disclaimer listing their top three contributors of $5,000 or more. Id. § 1.161(a)(1). Additionally, "[i]f 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." Id. The ad also must inform voters that "[f]inancial disclosures are available at sfethics.org" or, if an audio ad, provide a substantially similar statement that specifies the website. S.F. Code § 1.161(a)(2).

Printed disclaimers that identify a "major contributor or secondary major contributor" must list the dollar amount of relevant contributions made by each named contributor. S.F. Code § 1.161(a)(1); S.F. Ethics Comm'n Reg. ("S.F. Reg.") 1.161-3(a)(4). Print ads must

include the disclaimers in text that is "at least 14-point, bold font." S.F. Code § 1.161(a)(3). Audio and video advertisements must begin by speaking the required disclaimers of major contributors and secondary major contributors, but need not disclose the dollar amounts of those donors' contributions. Id. §§ 1.161(a)(5); 1.162(a)(3). In addition, video ads must display a text banner that contains similar information to that required in print ads. Cal. Gov't Code § 84504.1; S.F. Code § 1.161(a)(1).[2]

Violations of the City's campaign finance laws are punishable by civil, criminal, and administrative penalties. S.F. Code § 1.170. A committee's treasurer may be held personally liable for violations by the committee. Id. § 1.170(g). Any individual who suspects a possible violation may file a complaint with the Ethics Commission, City Attorney, or District Attorney. Id. § 1.168(a); see id. § 1.168(b) (providing for enforcement through civil action); San Francisco Charter, appendix C, § C3.699-13 (Ethics Commission procedures for investigations and enforcement proceedings).

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[2] The City recently amended the statute to provide for two exemptions from the ordinance's secondary-contributor requirements. First, the requirement to disclose secondary major contributors does not apply to print advertisements that are 25 square inches or smaller. S.F. Code § 1.161(a)(1)(A). Second, the requirement to disclose secondary major contributors does not apply to the spoken disclaimer in an audio or video advertisement that is 30 seconds or less. Id. § 1.161(a)(1)(B).

C. Earlier Litigation Challenging Proposition F

In 2020, Todd David founded Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond.[3] David and Yes on Prop B challenged San Francisco's secondary-contributor requirement in the lead-up to the March 3, 2020 election. On February 20, 2020, the district court enjoined the application of that requirement to the plaintiffs' smaller and shorter advertisements "because they [left] effectively no room for pro-earthquake safety messaging." Yes on Prop B v. City & County of San Francisco, 440 F. Supp. 3d 1049, 1051, 1062 (N.D. Cal. 2020). The district court, however, concluded that the challenged ordinance was "not an unconstitutional burden on larger or longer advertising" and declined to enjoin the secondary-contributor disclaimer requirement on its face or as applied to the plaintiffs' larger ads. Id. at 1051, 1061–62.

On October 21, 2020, in an unpublished disposition, we dismissed the plaintiffs' appeal on the ground of mootness. Yes on Prop B v. City & County of San Francisco, 826 F. App'x 648 (9th Cir. 2020). The plaintiffs argued that the "capable of repetition, yet evading review exception" applied, but we held that the case was moot because the plaintiffs had not "shown that 'there is a reasonable expectation that the same complaining party will be subject to the same action

[3] The Prop B at issue in the 2020 litigation concerned an earthquake safety and emergency response bond and is unrelated to the Prop B that was originally at issue in this litigation.

again.'" Id. at 649 (quoting Protectmarriage.com–Yes on 8 v. Bowen, 752 F.3d 827, 836 (9th Cir. 2014)). We stressed that the record was "devoid of any detail" that plaintiffs would run advertisements in the future, particularly in the upcoming November 2020 election. Id. Thus, we concluded that, "[a]t best, [the plaintiffs] have shown only that there is a theoretical possibility that the same controversy will recur with respect to them." Id.

D. Current Litigation

This action was brought by three plaintiffs: (1) No on E, San Franciscans Opposing the Affordable Housing Production Act ("the Committee"), a primarily formed independent expenditure committee that runs ads subject to the secondary-contributor requirement;[4] (2) Todd David, the founder and treasurer of No on E (and the founder of Yes on Prop B); and (3) Edwin M. Lee Asian Pacific Democratic Club PAC Sponsored by Neighbors for a Better San Francisco Advocacy ("Ed Lee Dems"), a committee and a direct contributor to No on E, whose major donors would be subject to disclosure in ads under the San Francisco ordinance. David established the Committee to support the passage of Prop B in the June 7, 2022 election. The Committee

[4] The lead plaintiff in this suit was known as "San Franciscans Supporting Prop B" throughout the district court litigation. On appeal, and after the conclusion of the June 7, 2022 election, the case caption was updated to reflect the fact that the Committee rededicated itself to opposing Proposition E and changed its name, as required by California Government Code section 84107.

sought to communicate its message by publishing mailers, print ads in newspapers, and digital ads on the internet.

As of May 10, 2022, the Committee had raised a total of $15,000 from three donors, each of which contributed $5,000. Two of those donors were committees that, in turn, had donors that had made contributions of more than $5,000. Thus, according to the examples provided by Plaintiffs, San Francisco's ordinance would require the following disclaimer on the Committee's print and video advertisements:

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.

On May 11, 2022, Plaintiffs filed this action. Plaintiffs allege that the secondary-contributor disclaimer requirement violates the First Amendment, both on its

face and as applied against Plaintiffs. In their prayer for relief, Plaintiffs request a declaration that the requirement violates the First Amendment, on its face and as applied to Plaintiffs; an injunction barring enforcement of the secondary-contributor requirement, in general and against Plaintiffs specifically; and nominal damages.

On May 12, 2022, Plaintiffs filed a motion for a preliminary injunction. Plaintiffs submitted a proposed order requesting that the court "preliminarily [enjoin] Defendants and their agents, officers, and representatives from enforcing against Plaintiffs the on-communication disclosure requirements for secondary donors at S.F. Code § 1.161(a)." In support of the motion for a preliminary injunction, David submitted a declaration stating that, "[b]ecause Concerned Parents and Ed Lee Dems are committees, they have contributed $5,000 to the Committee, and they both have donors who have given them $5,000 or more, San Francisco's law will require that our Committee report those secondary donors on our communications."

On June 1, 2022, the district court denied Plaintiffs' motion. Plaintiffs timely appeal. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292.

DISCUSSION

To obtain a preliminary injunction, a plaintiff must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the

absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008). On appeal, Plaintiffs argue primarily that they have demonstrated a likelihood of success on the merits. See Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015) (en banc) ("The first factor under Winter is the most important—likely success on the merits."). Below, we address (A) mootness, (B) Plaintiffs' likelihood of success on the merits, and (C) the remaining Winter factors.

A. Mootness

Before turning to the merits, we first must establish that we have jurisdiction. "[A] federal court loses its jurisdiction to reach the merits of a claim when the court can no longer effectively remedy a present controversy between the parties." Protectmarriage.com—Yes on 8, 752 F.3d at 836. Defendants maintain that, because the June 2022 election has occurred, Plaintiffs can no longer receive meaningful relief and this appeal is moot. Although the June 2022 election has passed, this appeal is not moot because this controversy is "capable of repetition, yet evading review." FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007).

The "capable of repetition, yet evading review" exception to mootness applies when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party

will be subject to the same action again." Id. (citation and internal quotation marks omitted). Defendants do not dispute that Plaintiffs have satisfied the first prong of that test. See Protectmarriage.com—Yes on 8, 752 F.3d at 836 (describing an election as a controversy of inherently limited duration).

"The second prong of the capable of repetition exception requires a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." Wis. Right to Life, 551 U.S. at 463 (citation and internal quotation marks omitted). But that standard does not require Plaintiffs to establish a certainty that they will be subject to the same enforcement: "Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges." Id. Plaintiffs bear the burden of showing that the "capable of repetition" prong is satisfied. Lee v. Schmidt-Wenzel, 766 F.2d 1387, 1390 (9th Cir. 1985).

On this record, Plaintiffs have met that burden with respect to at least one plaintiff.[5] David has a demonstrated history of establishing committees that run advertisements that are subject to the secondary-contributor requirement, and he has twice engaged in

[5] Although Plaintiffs' motion for a preliminary injunction did not include a facial challenge, the relief sought by Plaintiffs was not limited to the June 2022 election. Instead, Plaintiffs asked the court to preliminarily enjoin Defendants from enforcing the secondary-contributor requirement against Plaintiffs indefinitely.

litigation on this same issue. He also has clearly expressed his intent to continue those activities, unlike the plaintiffs in the earlier suit. Plaintiffs' complaint alleges that David "will engage in materially and substantially similar activity in the future, establishing committees and using them to speak about San Francisco candidates and measures." (Emphasis added). In support of Plaintiffs' motion for a preliminary injunction, David averred that he "will continue to create primarily formed committees in future elections, to share ads and communications substantially and materially similar to those we wanted to share in 2020 and that we want to share now." (Emphasis added).

Defendants offer no persuasive reason to doubt David's affidavit, which is supported by his past practice. See Wis. Right to Life, 551 U.S. at 463–64 (holding that there was a reasonable expectation that the same controversy would recur where plaintiff "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads" and "sought another preliminary injunction based on an ad it planned to run" during another blackout period). Accordingly, this appeal is not moot, because it falls within the exception for controversies that are "capable of repetition, yet evading review." See Hum. Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1001–02 (9th Cir. 2010) (concluding that there was a reasonable expectation that the controversy would recur because the plaintiff was a politically active organization that had been heavily involved in public debates in the past and intended to undertake future communications); Porter v. Jones,

319 F.3d 483, 490 (9th Cir. 2003) (rejecting mootness argument because plaintiff had expressed intent to create a similar website in future elections); Baldwin v. Redwood City, 540 F.2d 1360, 1365 (9th Cir. 1976) (holding that an issue is "capable of repetition, yet evading review" where the record established that plaintiff had continuing interest in and past practices of participating in local political campaigns by creating signs).

B. Likelihood of Success on the Merits

Plaintiffs seek a preliminary injunction on the ground that the secondary-contributor disclaimer requirement violates the First Amendment. We hold that the district court acted within its discretion to conclude that Plaintiffs did not establish a likelihood of success on the merits.

The district court applied "exacting scrutiny," which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam)). On de novo review, Fyock, 779 F.3d at 995, we hold that exacting scrutiny is the correct legal standard.

Regardless of the beliefs sought to be advanced by association, "compelled disclosure requirements are reviewed under exacting scrutiny." Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (opinion of Roberts, C.J.); see also id. at 2396 (applying exacting

scrutiny to First Amendment challenge to compelled disclosure) (Sotomayor, J., dissenting). In the electoral context, both the Supreme Court and our court have consistently applied exacting scrutiny to compelled disclosure requirements and on-advertisement disclaimer requirements. See Citizens United, 558 U.S. at 366–67 (holding that disclaimer and disclosure requirements are subject to exacting scrutiny); John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010) (applying exacting scrutiny to disclosure requirement); Buckley, 424 U.S. at 64 (requiring that compelled disclosure requirements survive exacting scrutiny); Davis v. FEC, 554 U.S. 724, 744 (2008) (evaluating whether disclosure requirements satisfy exacting scrutiny); Brumsickle, 624 F.3d at 1005 (applying exacting scrutiny to Washington law that required disclaimers on political advertising and disclosure of certain contributions and expenditures); see also Family PAC v. McKenna, 685 F.3d 800, 805–06 (9th Cir. 2012) ("Disclosure requirements are subject to exacting scrutiny.").[6]

Plaintiffs' argument to the contrary is unavailing. Plaintiffs take the position that disclaimer and disclosure are "terms of art," and argue that the City's ordinance should be reviewed under strict scrutiny

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[6] In ACLU of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004), we held that strict scrutiny applied to statutes that affect the content of election communications. 378 F.3d at 987. But we have since acknowledged that intervening Supreme Court decisions clarified that we apply exacting scrutiny to disclosure and disclaimer requirements. See Brumsickle, 624 F.3d at 1005 (citing John Doe No. 1, 561 U.S. at 196, and Citizens United, 558 U.S. at 366–67).

because it is a "hybrid disclaimer/disclosure requirement." But Plaintiffs cite no authority that makes a similar distinction.[7] Indeed, they acknowledge that the Supreme Court has applied exacting scrutiny to both disclosure rules, John Doe No. 1, 561 U.S. at 196, and disclaimer requirements, Citizens United, 558 U.S. at 366–67.

The concerns that Plaintiffs suggest are uniquely implicated in this case animate the entirety of the exacting scrutiny standard: "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." Buckley, 424 U.S. at 65. Courts have upheld other laws, even where there was some deterrent effect, because "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,'

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[7] Citing Americans for Prosperity Foundation v. Bonta, Plaintiffs further argue that San Francisco's "hybrid" requirement should be reviewed under strict scrutiny because "[t]he Supreme Court recently signaled that it may be increasing the scrutiny given to any disclosure regime." This reading of Americans for Prosperity Foundation clashes with a plain reading of the case and the manner in which other courts have applied it to disclaimer laws. See, e.g., Gaspee Project v. Mederos, 13 F.4th 79, 95 (1st Cir. 2021), cert. denied, 142 S. Ct. 2647 (2022); Smith v. Helzer, No. 3:22-CV-00077-SLG, 2022 WL 2757421, at * 10 (D. Alaska July 14, 2022), appeal docketed, No. 22-35612 (9th Cir. argued Feb. 9, 2023). We hold that Americans for Prosperity Foundation does not alter the existing exacting scrutiny standard.

Buckley, 424 U.S., at 64, and 'do not prevent anyone from speaking,' McConnell v. FEC, 540 U.S. 93, 201 (2003)." Citizens United, 558 U.S. at 366 (citations altered). Any argument that the secondary-contributor requirement violates the First Amendment because of the length and content of the disclaimer is appropriately addressed as part of the exacting scrutiny analysis.

To survive exacting scrutiny, a law must satisfy all three steps of the inquiry. The threshold question is whether there is a "substantial relation" between the challenged law and a "sufficiently important" governmental interest. Citizens United, 558 U.S. at 366–67 (citation and internal quotation marks omitted); see Ams. for Prosperity Found., 141 S. Ct. at 2384 (describing a substantial relation as "necessary but not sufficient"). Next, "[t]o withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." Ams. for Prosperity Found., 141 S. Ct. at 2383 (quoting John Doe No. 1, 561 U.S. at 196) (internal quotation marks omitted). Finally, "[w]hile exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." Id.

Below, we assess (1) the relation between the secondary-contributor disclaimer requirement and the governmental interest; (2) whether the strength of that interest reflects the seriousness of the burden on Plaintiffs' First Amendment rights; and (3) whether San

Francisco's ordinance is narrowly tailored to that interest.

1. Relation Between the Secondary-Contributor Disclaimer Requirement and Defendants' Interest

Defendants take the position that the secondary-contributor requirement serves their interest in providing information to voters about the source of election-related spending. A committee can circumvent California's on-advertisement disclaimer requirement and avoid including its top donors in a disclaimer by providing funding to another committee instead of running an advertisement directly. Defendants contend that the secondary-contributor requirement satisfies voters' need for additional information by making it more difficult to hide the sources of funding for political advertisements.

Courts have long recognized the governmental interest in the disclosure of the sources of campaign funding:

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the

> interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley, 424 U.S. at 66–67 (internal quotation marks and citation omitted); see Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) ("[I]n the context of disclosure requirements, the government's interest in providing the electorate with information related to election and ballot issues is well-established."), abrogated on other grounds as stated in Brumsickle, 624 F.3d at 1013.

"[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978). As the role of money in politics has expanded, the public is faced with a "cacophony of political communications through which . . . voters must pick out meaningful and accurate messages." Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 (9th Cir. 2003). Understanding what entity is funding a communication allows citizens to make informed choices in the political marketplace. Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 793 (9th Cir. 2006); see Bellotti, 435 U.S. at 791–92 ("[The public] may consider, in making their judgment, the source and credibility of the advocate."); Getman, 328 F.3d at 1105 ("Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, we think being able to evaluate who is doing the talking is of great importance.").

We have "repeatedly recognized an important (and even compelling) informational interest in requiring ballot measure committees to disclose information about contributions." Family PAC, 685 F.3d at 806. Disclosure of who is speaking "enables the electorate to make informed decisions and give proper weight to different speakers and messages." Citizens United, 558 U.S. at 371. "An 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." Brumsickle, 624 F.3d at 1008. Thus, we conclude that, as in other cases, Defendants have a strong governmental interest in informing voters about who funds political advertisements.

It follows that the secondary-contributor requirement is substantially related to that interest. We have previously recognized that providing information to the electorate may require looking beyond the named organization that runs the advertisement. In ACLU of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004), for example, the plaintiffs challenged a Nevada statute that required printed election-related communications to include the names of the businesses, social organizations, or legal entities responsible for those communications. 378 F.3d at 981–83. We recognized that "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names." Id. at 994. Thus, we concluded that, "[w]hile reporting and disclosure requirements can expose the actual contributors

to such groups and thereby provide useful information concerning the interests supporting or opposing a ballot proposition or a candidate, simply supplying the name and address of the organization on the communication itself does not provide useful information—and that is all the Nevada Statute requires." Id.

While Heller is an anonymous speech case, we agree with Heller's reasoning, and find it relevant to the election disclaimer context. The interests in "where political campaign money comes from," Buckley, 424 U.S. at 66 (citation omitted), and "in learning who supports and opposes ballot measures," Family PAC, 685 F.3d at 806, extend beyond just those organizations that support a measure or candidate directly. Plaintiffs do not challenge California's law that requires an on-advertisement disclaimer listing the top three donors to a committee. But those donors are often committees in their own right. The secondary-contributor requirement is designed to go beyond the "ad hoc organizations with creative but misleading names" and instead "expose the actual contributors to such groups." Heller, 378 F.3d at 994; see McConnell v. FEC, 540 U.S. 93, 128 (2003) (noting that "sponsors of [political] ads often used misleading names to conceal their identity" and providing examples), overruled on other grounds by Citizens United, 558 U.S. at 365–66. In the context of San Francisco municipal elections, Defendants show that donors to local committees are often committees themselves and that committees often obscure their actual donors through misleading and even deceptive committee names. Because the interest in learning the

source of funding for a political advertisement extends past the entity that is directly responsible, the challenged ordinance is substantially related to the governmental interest in informing the electorate.

Notwithstanding that relationship, Plaintiffs contend that the challenged ordinance actually undermines that interest. They take the position that the secondary-contributor requirement could cause confusion because a committee must list donors who may not have any position on the issue that the ad is addressing or who may not have known that their donation would be used to promote those views. But Plaintiffs provide no factual basis for their assumption that San Francisco voters are unable to distinguish between supporting a group that broadcasts a statement and supporting the statement itself. See Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 454–55 (2008) (requiring more than "sheer speculation" of voter confusion). Additionally, adopting Plaintiffs' position could call into question the logic underlying decisions that uphold disclosure and disclaimer requirements as applied to primary donors. Those cases emphasize that the laws at issue further the governmental interest in revealing the source of campaign funding, not ensuring that every donor agrees with every aspect of the message. Brumsickle, 624 F.3d at 1005– 08; Getman, 328 F.3d at 1104–07.

Plaintiffs' final argument—that any informational interest furthered by San Francisco's ordinance is outweighed by the corresponding limitation on time available for other speech—is similarly unavailing. It is

well-established that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." Citizens United, 558 U.S. at 366 (internal quotation marks and citations omitted). Even if Plaintiffs are correct that the governmental interest is somewhat diminished in this instance because the challenged ordinance requires disclosure of secondary contributors instead of direct donors, that principle still applies.

Thus, we hold that the district court did not abuse its discretion by concluding that the secondary-contributor disclaimer requirement is substantially related to Defendants' informational interest.

2. Burden On First Amendment Rights

"To withstand [exacting] scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" John Doe No. 1, 561 U.S. at 196 (quoting Davis, 554 U.S. at 744). It is well-established that there is an important governmental interest in providing voters with information about the source of funding for political advertisements. Buckley, 424 U.S. at 66–67; Heller, 378 F.3d at 994; Family PAC, 685 F.3d at 806. Given the strength of that interest, we are not persuaded by either of Plaintiffs' arguments that San Francisco's ordinance impermissibly burdens their First Amendment rights.

First, Plaintiffs assert that the required disclaimer displaces an excessive amount of speech. As noted above, Plaintiffs wished to use video ads and print ads. According to David, the spoken disclaimer in video ads would take up 100% of a 15-second ad, 100% of a 30-second ad, and 53-55% of a 60-second ad. David averred that the written disclaimer in video ads would take up between 35% and 51% of the screen for up to 33% of the ad's duration (either 10 seconds of an ad that is 30 seconds or longer, or the first 5 seconds of a 15-second ad). Finally, David declared that the required disclaimer would take up 100% of a two-inch by four-inch ad, 70% of a five-inch by five-inch ad, 35% of a five-inch by ten-inch ad, and 23% of the face of an 8.5-inch by 11-inch mailer.

In this litigation, Defendants consistently have stated that they would not enforce the disclaimer requirement where disclaimers take up most or all of an advertisement's space or duration. When Plaintiffs moved for an injunction in this action, Defendants offered to agree not to enforce San Francisco's ordinance with respect to print ads that were five-inches by five-inches or smaller, or to spoken disclaimers on digital and audio advertisements of 60 seconds or less. After Plaintiffs refused that offer, Defendants again took the position that they would not enforce the challenged ordinance where the "required disclaimer would consume the majority of Plaintiffs' advertisement." We thus consider only those ads in which the disclaimer would take up less than a majority of the ad. The required disclaimers that remain subject to enforcement

are (1) the written disclaimer on video ads that would take up a portion of the screen for up to 33% of the ad's duration; and (2) the written disclaimer that would take up 35% of a five-inch by ten-inch ad or 23% of an 8.5-inch by 11-inch mailer.

We first consider the written disclaimer that the ordinance would require Plaintiffs to display for up to 33% of a video ad's duration. In Citizens United, the Supreme Court upheld a law that required 40% of a video advertisement's duration to be devoted to the display of a written disclaimer. 558 U.S. at 320, 366, 367–68. In the earlier litigation challenging San Francisco's ordinance, the district court relied on Citizens United and concluded that the secondary-contributor requirement was not unduly burdensome for ads in which the disclaimer took up less than 40% of the ad. Yes on Prop B, 440 F. Supp. 3d at 1056–57. The court found that, for those ads, the remaining space was sufficient to communicate the plaintiffs' political message. Id. We find that reasoning to be persuasive. Plaintiffs have not shown that they are likely to succeed on the merits of their argument that the secondary-contributor requirement is an impermissible burden on speech because the display of a written disclaimer for up to one-third of a video ad's duration is excessive.

Nor are Plaintiffs likely to succeed on their claim that the required disclaimers' occupation of up to 35% of a printed ad impermissibly burdens their speech. Plaintiffs rely heavily on American Beverage Ass'n v. City & County of San Francisco, 916 F.3d 749 (9th Cir. 2019) (en banc), to support their assertion that the size

of the disclaimer is excessive here. In that case, we invalidated a San Francisco ordinance requiring that certain printed beverage advertisements include a health warning that occupied at least 20% of the advertisement. Id. at 753–54. Plaintiffs correctly point out that the size of the disclaimer here is, at least for some ads, greater than 20%; and they correctly point out that the First Amendment provides greater protection to election-related speech than to commercial speech. United States v. United Foods, Inc., 533 U.S. 405, 409–10 (2001).

But American Beverage differs from this case in two critical ways. First, the governmental interest in informing voters about the source of funding for election-related communications is much stronger and more important than the governmental interest in warning consumers about the dangers of sugar-sweetened beverages. See, e.g., Brumsickle, 624 F.3d at 1005–06 (noting that, in the context of political disclaimer laws, the "vital provision of information repeatedly has been recognized as a sufficiently important, if not compelling, governmental interest"); Yes on Prop B, 440 F. Supp. 3d at 1057 (stating that "the political context raises concerns not present in a commercial speech case").

Second, the constitutional problem in American Beverage was that the City required a disclaimer that was twice as large as necessary to accomplish the City's stated goals. 916 F.3d at 757. The challenged law mandated that, no matter the size of the ad, the health warning had to occupy at least 20% of the advertising

space. Id. at 754. Here, by contrast, no evidence suggests that a smaller or shorter disclaimer would achieve the same effect as the required disclaimers. Unlike in American Beverage, where the ordinance mandated the entirety of the disclaimer's content and required that it occupy at least 20% of the ad, id. at 753– 54, here a disclaimer's content and size vary, depending on the number of secondary contributors and on the size of the ad. Therefore, unlike in American Beverage, the size of the disclaimer here is closely tailored to the governmental interest of informing the public about the source of funding and is not greater than necessary to accomplish that goal. As the district court noted in the earlier litigation, the fact that the content of a required disclaimer "is a major factor contributing to its length suggests a smaller disclaimer would not be equally effective." Yes on Prop B, 440 F. Supp. 3d at 1057.

In short, we are unpersuaded by Plaintiffs' argument that the size of the required disclaimers on the ads that they wished to run presents an impermissible burden on their First Amendment rights. With respect to the ads now exempt under the amended statute, and in the circumstances in which Defendants have agreed not to enforce the ordinance, San Francisco's ordinance does not burden Plaintiffs' speech such that "the intervention of a court of equity is essential in order effectually to protect . . . rights against injuries otherwise irremediable." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citation and internal quotation marks omitted).

The second burden identified by Plaintiffs—that the secondary-contributor requirement violates their right to freedom of association and drives away potential donors—is likewise insufficient to outweigh the strength of the governmental interests. "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute." Buckley, 424 U.S. at 68. But to support an exemption from a compelled disclosure requirement, Plaintiffs must show more than a "modest burden." Family PAC, 685 F.3d at 808; see Ams. for Prosperity Found., 141 S. Ct. at 2388–89 (concluding that petitioners had shown a "widespread burden on donors' associational rights" where there was evidence that petitioners and their supporters had been subjected to "bomb threats, protests, stalking, and physical violence," and hundreds of organizations expressed that they shared the petitioners' concerns).

Plaintiffs provided only two declarations in support of their contention that San Francisco's ordinance burdens their right to freedom of association. David asserts that "[p]otential donors have expressed concern to me about the secondary disclosure rules and are more reluctant to contribute to committees where their donors need to be disclosed." Ed Lee Dems asserts that it would have to withdraw its donations from the Committee and would have its own fundraising challenges if donors thought that their names might become public through the secondary-contributor requirement.

The district court was within its discretion to conclude that Plaintiffs failed to demonstrate that the secondary-contributor requirement "actually and meaningfully deter[s] contributors." Family PAC, 685 F.3d at 807. 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. See Family PAC, 685 F.3d at 806–08 (concluding that disclosure requirements presented only a modest burden without a showing of a significant risk of harassment or retaliation). That level of hesitation on the part of donors is insufficient to establish that the "deterrent effect feared by [Plaintiffs] is real and pervasive." Ams. for Prosperity Found., 141 S. Ct. at 2388.

Adopting Plaintiffs' view that a modest burden on their right to associate anonymously outweighs the informational interest would "ignore[] the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." McConnell, 540 U.S. at 197 (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)), overruled in part on other grounds by Citizens United, 558 U.S. at 365–66. The modest burden imposed on the Plaintiffs is permissible when contrasted with the alternative: "Plaintiffs never satisfactorily answer the question of how uninhibited, robust, and wide-open speech can occur when organizations hide themselves from the scrutiny of the voting public." Id. (internal quotation marks omitted).

3. Narrow Tailoring

Under exacting scrutiny, "the challenged requirement must be narrowly tailored to the interest it promotes." Ams. for Prosperity Found., 141 S. Ct. at 2384. But this standard does not require "the least restrictive means of achieving that end." Id. Despite the close fit between San Francisco's ordinance and the government's informational interest, Plaintiffs present two different arguments as to why the secondary-contributor requirement is insufficiently tailored. Neither argument is persuasive.

First, Plaintiffs argue that the requirement fails narrow tailoring because there are other available alternatives, such as making the same information available in an online database. That suggestion misunderstands the relevant standard. The secondary-contributor requirement must have a scope "in proportion to the interest served," but it need not represent the "single best disposition." McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (plurality opinion) (internal quotation marks omitted). Case law and scholarly research support 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. See Gaspee Project, 13 F.4th at 91 (holding that an on-ad donor disclaimer is "not entirely redundant to the donor information revealed by public disclosures" because it "provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names"), cert. denied, 142 S. Ct. 2647 (2022); Majors v. Abell, 361 F.3d 349, 353

(7th Cir. 2004) (reasoning that because fewer people are likely to see reports to government agencies than notice in the ad itself, "reporting [is] a less effective method of conveying information"); Michael Kang, Campaign Disclosure in Direct Democracy, 97 Minn. L. Rev. 1700, 1718 (2013) ("Research from psychology and political science finds that people are skilled at crediting and discrediting the truth of a communication when they have knowledge about the source, but particularly when they have knowledge about the source at the time of the communication as opposed to subsequent acquisition."). Given the realities of voters' decision-making processes amidst a "cacophony" of electoral communications, Getman, 328 F.3d at 1105–06, the district court was within its discretion to conclude that the secondary-contributor requirement has a scope in proportion to the City's objective.

Plaintiffs' second argument—that the requirement is not limited to donations that are earmarked for electioneering—does not change that conclusion. Plaintiffs cite two out-of-circuit cases in which courts concluded that disclosure laws were narrowly tailored, in part because the laws applied only to donations that were earmarked for electioneering. See Indep. Inst. v. Williams, 812 F.3d 787, 797 (10th Cir. 2016) (upholding Colorado constitutional provision that only required disclosure of donors who have specifically earmarked their contributions for electioneering purposes); Indep. Inst. v. FEC, 216 F. Supp. 3d 176, 190–92 (D.D.C. 2016) (three judge panel holding that a large-donor disclosure requirement limited to donors who contribute

$1,000 or more for the specific purpose of supporting the advertisement is tailored to advance the government's interest in informing the electorate of the source of the advertisement).[8] Those courts upheld laws that required only disclosure of earmarked contributions. But neither court suggested that, or had occasion to consider whether, a law fails narrow tailoring unless it is limited to the disclosure of earmarked contributions.

And even though San Francisco's ordinance goes beyond donations that are earmarked for electioneering, it does not have an unconstrained reach. The challenged ordinance requires an on-advertisement disclaimer listing only the top donors to a committee that is, in turn, a top donor to a primarily formed committee. S.F. Code § 1.161(a)(1). Under California law, a primarily formed committee is formed or exists primarily to support candidates or ballot measures. Cal. Gov't Code § 82047.5. By donating to a primarily formed committee, a secondary committee necessarily

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[8] Plaintiffs also cite Van Hollen, Jr. v. FEC, 811 F.3d 486 (D.C. Cir. 2016), in which the D.C. Circuit considered a challenge to an FEC rule requiring corporations and labor organizations to disclose only donations "made for the purpose of furthering electioneering communications" instead of all donations. 811 F.3d at 488 (citation and internal quotation marks omitted). But because the court in Van Hollen did not consider whether a campaign finance law violated the First Amendment, we do not find its analysis to be persuasive. See id. at 495, 501 (holding that the FEC's rule is consistent with the text, history, and purposes of the authorizing statute and is not an arbitrary and capricious exercise of the FEC's regulatory authority).

is making an affirmative choice to engage in election-related activity.

If a secondary committee were to purchase and run an advertisement opposing a ballot measure directly, its top donors could be subject to California's disclaimer requirements, which Plaintiffs do not challenge. The application of that law does not depend on whether the top donors earmarked their contributions for electioneering, or on whether they support the content of the advertisement. The City's ordinance does not violate narrow tailoring just because the secondary committee funneled its donations through a separate committee instead of running its own advertisements.

Additionally, even if Plaintiffs' challenge to the City's requirement were to succeed, the secondary donors still would be subject to disclosure and publicly visible on government websites. Plaintiffs do not challenge those public disclosures of secondary donors, which occur whether or not the donors earmarked their contributions. Assuming that those disclosures are permissible, as Plaintiffs do by failing to challenge their validity, we are not persuaded that a law requiring those same donors to be named in an on-advertisement disclaimer is insufficiently tailored.

Thus, we hold that the district court was within its discretion to conclude that Plaintiffs did not establish a likelihood of success on the merits.

C. Remaining Preliminary Injunction Factors

The district court concluded that none of the remaining Winter factors weighed in favor of an injunction, in part because Plaintiffs' argument as to those factors largely relied on their position that they had demonstrated a likelihood of success on the merits. The same is true on appeal. We hold that the district court did not abuse its discretion by reaching that conclusion.

Without an injunction, Plaintiffs likely would be injured by the loss of some First Amendment freedoms, Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion), but that injury would be modest, Family PAC, 685 F.3d at 806. Defendants, however, have established that there is a strong public interest in providing voters with the information of who supports ballot measures. Brumsickle, 624 F.3d at 1008. Thus, the public interest and the balance of hardships weigh in favor of Defendants. See FTC v. Affordable Media, LLC, 179 F.3d 1228, 1236 (9th Cir. 1999) ("Under this Circuit's precedents, 'when a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.'" (quoting FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989))).

AFFIRMED.

COLLINS, Circuit Judge, with whom CALLAHAN, IKUTA, BENNETT, R. NELSON, LEE, BRESS, BUMATAY, and VANDYKE, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I join Judge VanDyke's dissent, which persuasively explains why the panel's erroneous decision "threatens vital constitutional protections" and should have been reheard en banc. *See* J. VanDyke Dissent at 72. But there is an additional troubling aspect of the panel's decision that alone would have warranted rehearing en banc—namely, that it explicitly allows San Francisco to commandeer political advertising to an intrusive degree that greatly exceeds what our settled caselaw would tolerate in the context of *commercial* advertising. Although the remaining two judges on the original panel have now issued an amended opinion that tries to justify this upside-down view of the First Amendment's protections, the panel's reasoning and result remain indefensible.

I

As Judge VanDyke notes, San Francisco recently amended the challenged ordinance to exempt many small or short advertisements, thereby "addressing some of the most egregious ways" in which the ordinance's disclaimer requirements intruded into the political speech of the Plaintiffs. *Id*. at 52 n.6. The original panel decision correctly summarized Plaintiffs' earlier contentions on this score as follows:

> . . . Plaintiffs assert that the required disclaimer displaces an excessive amount of speech. According to David [the founder of No on E], the spoken disclaimer would take up 100% of a 15-second ad, 100% of a 30-second ad, and 53-55% of a 60-second ad. David averred that the written disclaimer on video ads would take up between 35% and 51% of the screen for either 10 seconds of an ad that is 30 seconds or longer, or the first 5 seconds of a shorter ad. Finally, David declared that the required disclaimer would take up 100% of a two-inch by four-inch ad, 70% of a five-inch by five-inch ad, 35% of a five-inch by ten-inch ad, and 23% of the face of an 8.5-inch by 11-inch mailer.

No on E, San Franciscans Opposing the Affordable Hous. Prod. Act v. Chiu, 62 F.4th 529, 542 (9th Cir. 2023). The recent amendment creates an exemption from the requirement to disclose the top two major donors of committee contributors in the case of either "a print advertisement that is 25 square inches or smaller" or "an audio or video advertisement that is 30 seconds or less." *See* S.F. CAMPAIGN & GOV'T CONDUCT CODE § 1.161(a)(1)(A)–(B) (effective Aug. 27, 2023).

But that amendment does nothing to address Plaintiffs' objections that (1) the written disclaimer would take up "35% of a five-inch by ten-inch ad, and 23% of the face of an 8.5-inch by 11-inch mailer"; (2) "the written disclaimer on video ads would take up between 35% and 51% of the screen" while displayed; and (3) the "spoken disclaimer would take up . . . 53-55% of

a 60-second ad." *No on E*, 62 F.4th at 542. The panel's treatment of those objections, both in its original opinion and its amended opinion, raises additional concerns that warranted rehearing en banc.

A

With respect to Plaintiffs' first two objections (concerning the amount of physical space occupied by the disclaimers), the panel's analysis—both in its original and amended opinion—is clearly contrary to controlling precedent.

1

The panel held in its original decision that the substantial percentages of physical space taken up by the disclaimers did not involve "an impermissible burden on speech." *No on E*, 62 F.4th at 542. The panel asserted that, in *Citizens United v. FEC*, 558 U.S. 310 (2010), "the Supreme Court upheld a law that required 40% of an advertisement to be devoted to a disclaimer," and the panel therefore concluded that the percentages devoted to disclaimers here left sufficient remaining space "to communicate the plaintiffs' political message." *No on E*, 62 F.4th at 542 (citing *Citizens United*, 558 U.S. at 320, 366–68). In a footnote, the panel attempted to distinguish our en banc decision in *American Beverage Association v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (en banc), in which we held that a San Francisco requirement that soda ads contain a health disclaimer occupying 20% of

the ad's physical space was "unduly burdensome." *Id*. at 757. *American Beverage* was "inapposite," the panel claimed, because it was applying the standards for compelled commercial speech set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and the "*Zauderer* test" involves "a separate inquiry that requires the defendant to prove that compelled commercial speech was neither unjustified nor unduly burdensome." *No on E*, 62 F.4th at 542 n.7. According to the panel, "[t]hat test differs from exacting scrutiny review, which applies to disclaimer and disclosure requirements in the electoral context." *Id*. That analysis, which the panel's amended opinion has now abandoned, was deeply flawed.

As an initial matter, the original panel decision was flatly wrong in suggesting that *Citizens United* supports upholding a disclaimer requirement that occupies 40% of the physical space of a printed advertisement. The referenced portion of *Citizens United* upheld a provision of federal law providing that "televised electioneering communications funded by anyone other than a candidate must include a disclaimer" stating who "is responsible for the content of this advertising" and that the "required statement must be made in a 'clearly spoken manner,' and displayed on the screen in a 'clearly readable manner' *for at least four seconds*." 558 U.S. at 366 (emphasis added) (citations omitted). The panel's reference to a "40%" requirement was apparently based on the fact that this four-second-minimum rule was upheld as applied to the plaintiff's 10-second ads in that case. *See id*. at 320,

367. But the requirement to display a concise disclaimer "on the screen in a 'clearly readable manner' for at least four seconds" of the ads' 10 seconds does *not* equate to taking over *40% of the physical space of a printed ad*, which is a substantially greater intrusion on the speaker's message.

Even more egregiously, the original panel opinion adopted a wholly implausible theory for distinguishing *American Beverage*, which invalidated a 20% physical-occupation requirement for health warnings in printed ads for certain sugar-sweetened beverages. 916 F.3d at 757. It is true, as the panel noted, that *American Beverage* involved commercial speech and this case involves the "election context," which is "distinctive in many ways." *No on E*, 62 F.4th at 542 n.7 (citation omitted). It is also true that *American Beverage* was applying the "*Zauderer* test," and this case instead involves "exacting scrutiny review." *Id*. But these distinctions emphatically cut the other way. Election-related speech is distinctive in the sense that it receives a *higher* degree of constitutional protection than commercial speech. *See United States v. United Foods, Inc.*, 533 U.S. 405, 409–10 (2001). And *Zauderer* scrutiny differs from exacting scrutiny in the sense that it is a decidedly *lower* standard—lower even than the already more lenient standards applied to commercial speech generally. *See*, *e.g.*, *Milavetz, Gallup & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (noting that the *Zauderer* test is even less demanding than the normal standards applied to regulation of commercial speech under *Central Hudson Gas & Electric Corporation v.*

Public Service Commission of New York, 447 U.S. 557 (1980)). By affording greater First Amendment protection to soda ads than to core political speech, the original panel decision thus got the First Amendment analysis exactly backwards.

2

The two judge quorum remaining from the original panel has now issued an amended opinion that takes another shot at trying to distinguish *American Beverage* and to defend the head-snapping proposition that government may commandeer a greater percentage of political ad space than it may for commercial advertising. This effort again fails.

The amended opinion now concedes that the core political speech at issue here is entitled to greater First Amendment protection than the soda ads at issue in *American Beverage*, where we invalidated, as unduly burdensome, a disclaimer that took up 20% of an ad's physical space. *See* Amended Opin. at 27. In nonetheless upholding a substantially more burdensome occupation of 35% or more of a political ad's physical space, the panel relies on two flawed points that only underscore the damage being done to the First Amendment in this case.

First, the panel declares that, although political speech is entitled to much greater First Amendment protection than soda ads, 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. *See* Amended Opin. at 27–28. Second, the panel asserts that the City is entitled to take as much space as it needs to set forth the required disclosures, so that the very verbosity of the mandated disclaimers necessarily requires that they occupy a large amount of physical space in the regulated political ad. *See id*. at 28. The panel's amended opinion thus combines (1) *ipse dixit* reflecting the panel's value judgments about the supposed weight of the asserted government interests and the relative importance of the different types of speech with (2) a whatever-it-takes approach to burdening political speech. This analysis bears little resemblance to the required "exacting scrutiny," under which "the strength of the governmental interest must reflect the seriousness of the *actual burden* on First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 744 (2008) (emphasis added). Here, a consideration of those actual burdens confirms that, as in *American Beverage*, the City's desire to commandeer more physical space in other people's speech must yield to the First Amendment.

In requiring the challenged additional disclosures, the City's ordinance piggybacks onto the disclosure requirements set forth in Chapter 4 of California's Political Reform Act, California Government Code § 84100 *et seq*. *See* S.F. CAMPAIGN & GOV'T CONDUCT CODE § 1.161(a). For printed ads, those disclosure requirements specify that the "disclosure area shall have a

solid white background and shall be in a printed or drawn box on the bottom of at least one page that is set apart from any other printed matter." *See* CAL. GOV'T CODE § 84504.2(a)(1). Although the Political Reform Act only requires the text of disclaimers to be in "10-point" font, *see id*. § 84504.2(a)(2), the City's ordinance instead generally requires the use of "14-point, bold font," *see* S.F. CAMPAIGN & GOV'T CONDUCT CODE § 1.161(a)(3). Given these baseline requirements, the blizzard of additional words required by the City's ordinance results in a substantial takeover of the physical space of the regulated political ads, as illustrated in the following example of a supposedly "full-page" ad contained in the record below:

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).

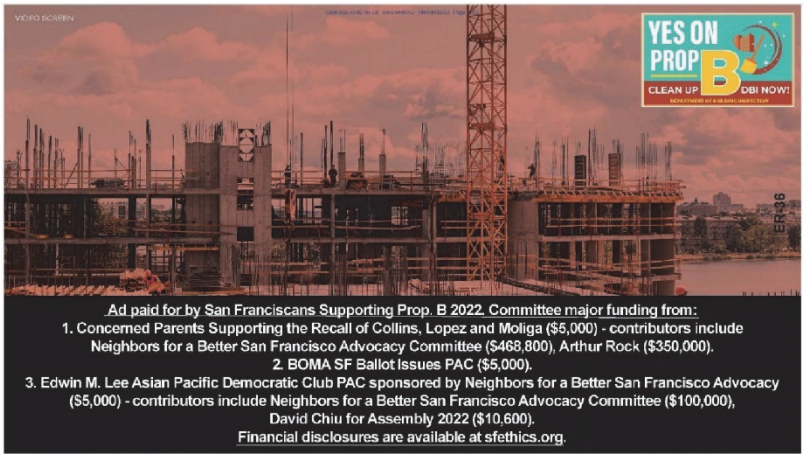
Financial disclosures are available at sfethics.org.

American Beverage properly recognized that, at some point, the sheer size and intrusiveness of a disclaimer requirement threaten to "drown out" the speaker's message and even to "effectively rule out the possibility of having an advertisement in the first place." 916 F.3d at 757 (simplified); *see also National Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (*NIFLA*) (making a similar observation in striking down required disclaimers in the advertisements of certain unlicensed providers of "pregnancy-related services"). As the above illustration shows here, taking 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. Viewed in light of "the seriousness of the actual burden on First Amendment rights," *Davis*, 554 U.S. at 744, the panel's take-as-much-as-you-need approach to burdening political speech is flatly contrary to *American Beverage* and *NIFLA* and is anathema to the First Amendment.

The panel's defense of the City's physical-occupation requirement for videos fares no better. For starters, the panel's amended opinion inexplicably ignores the percentage of the physical space consumed by the required visual video disclaimer and instead addresses only the percentage of *time* in which that disclaimer must be displayed.[1] Assuming that the panel is implicitly

[1] The omission is apparently an artifact of the panel's effort to fix the original opinion's mistaken use of *Citizens United*'s discussion of *temporal* percentage requirements to justify *physical* percentage requirements. *See supra* at 38. But in un-crossing

relying on the same whatever-the-government-needs approach to a disclaimer's physical occupation of an ad, that reasoning is equally defective in the video context. Once again, the challenged ordinance's disclaimer requirements piggyback onto the requirements of the Political Reform Act. The baseline established by that Act is that the required disclaimers must "appear on a solid black background on the entire bottom one-third of the television or video display screen," *see* CAL. GOV'T CODE § 84504. 1 (b)(1), but here the City's much lengthier disclosure requirements will often require more than one-third of the screen. The resulting intrusion into the physical space of the video ad is illustrated by the following example in the record:



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those wires, the panel's amended opinion now fails to directly address Plaintiffs' objection that, when displayed, the visual video disclaimer occupies between 35% and 51% of the physical space of the screen.

This commandeering of such a substantial portion of the visual space of the ad raises concerns comparable to those discussed earlier about crowding out the speaker's message and impeding effective communication. This sort of significant intrusion into political speech greatly exceeds what the Supreme Court upheld in *Citizens United*, in which the challenged disclaimer had to be "displayed on the screen in a 'clearly readable manner' for at least four seconds" and consisted of (1) the statement that "_____ is responsible for the content of this advertising"; (2) a statement that the communication "is not authorized by any candidate or candidate's committee"; and (3) "the name and address (or Web site address) of the person or group that funded the advertisement." 558 U.S. at 366 (quoting 2 U.S.C. § 441d (2006)).

Under *American Beverage* and *NIFLA*, the challenged ordinance's commandeering of 23%, 35%, or even 51% of the physical space of a political ad is unduly burdensome and violates the First Amendment.

B

With respect to Plaintiffs' third objection (concerning the required spoken disclaimers), the panel has not even attempted—either in its original opinion or its amended opinion—to defend the constitutionality of having spoken disclaimers take up *more than half* of a 60-second audio or video ad. Indeed, the patent unconstitutionality of the resulting burdens is underscored by the fact that this commandeering of more than half

of the speaking time in a video ad is imposed *on top of* the already unduly burdensome seizure of 35% to 51% of the ad's visual space for as much of a third of the ad's running time. Rather than defend this obviously unconstitutional restriction, the panel assumed that such an application of the challenged ordinance would raise serious constitutional issues, but it nonetheless upheld the denial of a preliminary injunction on that score as unnecessary. *No on E*, 62 F.4th at 542–43; *see also* Amended Opin. at 25–26. It is unnecessary, the panel concluded, because San Francisco has committed, on the record, not to enforce the "spoken disclaimers on digital and audio advertisements of 60 seconds or less." *No on E*, 62 F.4th at 543; *see also* Amended Opin. at 26. This reasoning is also clearly wrong.

In its recently enacted amendment, San Francisco has specifically exempted *only* audio or video ads of "30 seconds or less," rather than 60 seconds or less. By conspicuously adopting a *lesser* cut-off than the one it had committed to follow in the district court and in this court, San Francisco has called into question the reliability of the representations on which the panel relied. 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. On this score, the panel was wrong to uncritically accept San Francisco's representations, which provide insufficient grounds for declining to preliminarily enjoin

enforcement of this aspect of the ordinance against ads of 60 seconds or less.

II

The astonishing result of the panel's erroneous decision is that the jurisprudence of this circuit now affords more robust constitutional protection to ads hawking sugary beverages than to core political speech about ballot initiatives. That defies both controlling precedent and common sense. We should have reheard this case en banc, and I respectfully dissent from our failure to do so.

VANDYKE, Circuit Judge, joined by CALLAHAN, IKUTA, BENNETT, R. NELSON, COLLINS, LEE, BRESS, and BUMATAY, Circuit Judges, dissenting from the denial of rehearing en banc:

The panel in *No on E v. Chiu* upheld an election disclosure regulation that burdens Plaintiffs' First Amendment speech and association rights, and that will inevitably result in voter confusion. It did so on the ground that the law advances the government's interest in educating the electorate. That ruling subverts the First Amendment rights of many San Franciscans and encourages increasingly onerous compelled disclosure laws that will similarly fail to advance an important government interest. This is not the exacting scrutiny the Supreme Court reminded our circuit to undertake when it reversed us only two years ago. *See*

Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

Proposition F, a recently adopted San Francisco election regulation, burdens associational and speech rights in at least two ways.[1] First, Proposition F burdens the associational rights of political speakers and their contributors (and even their contributors' contributors) by requiring political speakers to disclose on political advertisements the names of both their own contributors and their contributors' contributors. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). Second, Proposition F burdens political speakers' speech rights by requiring they change their message to (ostensibly) advance the government's informational interests. *See ACLU of Nev. v. Heller*, 378 F.3d 979, 988 (9th Cir. 2004); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

Election disclosure requirements that burden First Amendment rights are evaluated under "exacting" scrutiny.[2] *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (plurality opinion); *see Citizens United v. FEC*, 558 U.S. 310, 366 (2010). Exacting scrutiny requires "a substantial relation between the disclosure requirement and a

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[1] Proposition F is unrelated to the ballot measure that Plaintiff No on E was formed to oppose.

[2] The caselaw typically labels an entity's on-ad identification of itself as a "disclaimer" and an entity's report to the state listing its top donors as a "disclosure." *See*, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010). But because both are more intuitively understood as disclosures, I will refer to the law here as requiring on-ad disclosures.

sufficiently important governmental interest." *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (plurality opinion) (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). A substantial relation mandates that "the rule requiring disclosure" "further[s]" or advances a sufficiently important government interest. *Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219, 225–26 (9th Cir. 1989). And a "disclosure regime[]" must also "be narrowly tailored to the government's asserted interest." *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (plurality opinion).

The panel erroneously concluded that Proposition F survives such scrutiny. To get there, it recited holdings indicating that the government has an important interest in informing voters about the source of funding for political advertisements. *See*, *e.g.*, *Fam. PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012). The panel then leapt from those holdings to conclude that "[i]t follows" that a law requiring the on-ad disclosure of a political speaker's *contributors' contributors* is substantially related to that same government interest. This leap was unwarranted: by contributing to the organization, contributors do not necessarily endorse other entities that the organization may choose to fund. A man may be known by the company he keeps, but not by the company that his company keeps, particularly when his company's company isn't also his company. Put differently, a man may be known by the company that *he* opts to keep, but he is not known by company once-removed with whom he has not opted to associate or disassociate—indeed, who he may not even know exists. Nor is the panel's leap precedented.

Until this case, we have never blessed the compelled disclosure of secondary contributors. Our court should have taken the opportunity to correct en banc this unjustified First Amendment intrusion. I respectfully dissent.

I. BACKGROUND

A. Regulatory Background

California requires thorough disclosures from those engaged in political action. Many of these regulations target entities defined as "committees" under California law.[3] California requires such committees to file periodic reports, disclosing many of their contributors. Cal. Gov't Code § 84211. California also requires these committees to list their top contributors on their advertisements.[4] *Id.* §§ 84501(c), 84503. When a committee runs political advertisements, it must include on the ad the identity of who paid for the ad, *i.e.*, the name of the committee, and list the committee's top

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[3] A committee is "any person or combination of persons who directly or indirectly . . . [r]eceives contributions totaling two thousand dollars ($2,000) or more in a calendar year," "[m]akes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year," or "[m]akes contributions totaling ten thousand dollars ($10,000) or more in a calendar year to or at the behest of candidates or committees." Cal. Gov't Code § 82013.

[4] California law defines advertisements for purposes of the on-ad disclosure requirement as those "general or public communication[s] that [are] authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures." Cal. Gov't Code § 84501(a)(1).

three contributors of "fifty thousand ($50,000) or more." *Id.* §§ 84501(c), 84502, 84503.

Perhaps thinking that it never hurts to have more of a good thing—in this case, compelled disclosure—San Francisco in 2019 adopted Proposition F. Proposition F increased the disclosure "requirements for primarily formed independent expenditure [and ballot measure] committees." S.F. Campaign & Governmental Conduct Code ("S.F. Code") § 1.161(a). Primarily formed committees are those "formed or exist[ing] primarily to support or oppose . . . [a] single candidate," "[a] single measure," "[a] group of specific candidates being voted upon in the same city, county, or multicounty election," or "[t]wo or more measures being voted upon in the same city, county, multicounty, or state election." Cal. Gov't Code § 82047.5; S.F. Code § 1.161(a). Proposition F requires primarily formed committees to provide on-ad disclosures of their top contributors of $5,000 or more (down from the $50,000 minimum established by state law). S.F. Code § 1.161(a). Of particular importance here, Proposition F also requires that the on-ad disclosure list, for those of the committee's top contributors that are themselves committees, the name and contribution amount of those contributors' top two contributors of $5,000 or more. *Id.* § 1.161(a)(1).[5]

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[5] Partially adopting the parties' convention, I refer to the committee issuing an ad as the "political speaker," the political speaker's top contributors as "primary contributors," and the primary contributors' top contributors as "secondary contributors."

Proposition F and its implementing regulations govern how committees must list these contributors on their ads. That ordinance requires that each disclaimer required by California law or Proposition F be followed, in the same format as the disclaimer itself, by this phrase: "Financial disclosures are available at sfethics.org." *Id.* § 1.161(a)(2). For print advertisements, Proposition F requires all the on-ad disclosures be "printed in at least 14-point, bold font." *Id.* § 1.161(a)(3). For audio and video advertisements, Proposition F's disclaimers must be "spoken at the beginning of such advertisements," but Proposition F does not require they "disclose the dollar amounts of contributions." *Id.* § 1.161(a)(5). Implementing regulations impose even more specific requirements, down to the placement of em dashes and the number of spaces separating items in certain parts of the disclosure. *See* S.F. Ethics Comm'n Reg. ("S.F. Reg.") § 1.161-3(a). To use Plaintiff No on E as an example, its print on-ad disclosure would appear as follows in the required 14-point bold font:

Ad paid for by San Franciscans Supporting Prop. B 2022.
Ad Committee's Top Funders:

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 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.

This requirement, facially onerous and visually cumbersome, drowns the political speaker's message in disclosure.[6]

B. This Litigation

Todd David, "long . . . active in San Francisco politics," formed San Franciscans Supporting Prop B ("SPB"). After the June 2022 election where San Franciscans adopted Proposition B, SPB changed its name twice in short succession, ending with its current name, No on E.[7] SPB received contributions from three

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[6] After Plaintiffs in this case petitioned for rehearing en banc, San Francisco amended the regulation to exempt certain small advertisements, thus addressing some of the most egregious ways the regulation infringed on First Amendment rights. S.F. Bd. of Supervisors, Ordinance 186-23, File No. 221161 (July 28, 2023). San Francisco essentially codified the commitment that Defendants had earlier made to not enforce the regulation against certain smaller advertisements. I would submit that Proposition F fails such scrutiny in circumstances beyond just those exempted by the recent amendment.

[7] *See* S.F. Ethics Comm'n, San Franciscans Supporting Prop B 2022, FFPC 410, Filing ID 203483641 (Apr. 13, 2022), https://public.netfile.com/Pub2/RequestPDF.aspx?id=203483641; S.F. Ethics Comm'n, San Franciscans Supporting Prop B, FPPC 410

entities, Concerned Parents Supporting the Recall of Collins, Lopez, and Moliga; BOMA SF Ballot Issues PAC; and Edwin M. Lee Asian Pacific Democratic Club PAC ("Ed Lee Dems"). Each of these entities gave SPB $5,000, triggering Proposition F's requirement that SPB disclose them on their advertisements. Moreover, Ed Lee Dems and Concerned Parents are both committees who have received more than $5,000 from certain donors, triggering Proposition F's requirement that SPB disclose these secondary contributors. One of SPB's primary contributors, Ed Lee Dems, received funding from Neighbors for a Better San Francisco Advocacy Committee and David Chiu for Assembly 2022. One of SPB's other primary contributors, Concerned Parents, received funding from Neighbors for a Better San Francisco Advocacy Committee and Arthur Rock. These donors to Ed Lee Dems and Concerned Parents have not contributed to SPB monetarily or otherwise.

Proposition F inhibits SPB's contributors from freely associating with, and speaking through, SPB. Ed Lee Dems has financially contributed to SPB and supports the passage of Proposition B. But the treasurer for Ed Lee Dems declared that if SPB were to issue ads triggering Proposition F's on-ad disclosure requirement, then Ed Lee Dems would withdraw its support and request its money be returned. Withdrawal would

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Amendment, Filing ID 204422769 (Aug. 12, 2022), https://public.netfile.com/Pub2/RequestPDF.aspx?id=204422769; S.F. Ethics Comm'n, No on E, San Franciscans Opposing the Affordable Housing Production Act, FPPC 410 Amendment, Filing ID 204444625 (Aug. 16, 2022), https://public.netfile.com/Pub2/RequestPDF.aspx?id204444625.

be necessary because Ed Lee Dems's "[d]onors contribute to Ed Lee Dems to support any of its various goals and projects, and some donors do not support all of its goals and projects." Some of these donors "would be upset to end up on disclaimers on issues that they have no interest in, or even [have] contrary positions on," such as SPB. These donors "would withdraw their support if they knew that Ed Lee Dems supported groups making communications that triggered such on-communication disclosure."

As an example of the confusion and compelled association Proposition F triggers, the treasurer for Ed Lee Dems reported receiving more than $5,000 from "David Chiu for Assembly 2022." But Chiu's 2022 candidacy for the assembly seat ended and he is now the City Attorney. Listing David Chiu for Assembly 2022 as a secondary contributor to SPB "would mislead voters into believing that the City Attorney is running for another office and improperly taking positions on issues, damaging Mr. Chiu's reputation."

Several Plaintiffs, consisting of Todd David, SPB, and Ed Lee Dems, sued San Francisco's City Attorney David Chiu and several other San Francisco authorities seeking and moving for injunctive relief from Proposition F and its implementing regulations. The district court denied the motion. Plaintiffs appealed, and the panel in this case affirmed. The panel concluded that "Plaintiffs did not establish a likelihood of success on the merits."

Purporting to apply exacting scrutiny, the panel determined that there was "a 'substantial relation' between [Proposition F] and a 'sufficiently important' governmental interest." In assessing the government's interest, the panel recited several cases that establish that interest is "in informing voters about who funds political advertisements." According to the panel, "[i]t follows" from that informational interest that Proposition F "is substantially related to that interest." The panel reasoned that the contributors to committees running election advertisements might be committees themselves and ones with names that might "obscure their actual donors." The panel did not explain how voters would distinguish between secondary contributors that funnel money through primary contributors, and thus can reasonably be inferred to support the political speaker, and those with no relationship to the political speaker.

The panel further concluded that the governmental interest was sufficient given "the seriousness of the actual burden on First Amendment rights." At the end of its purportedly "exacting" scrutiny, the panel concluded that Proposition F was narrowly tailored to advance the government's interest. Plaintiffs petitioned for en banc rehearing.

II. ANALYSIS

Despite the severe burdens on their First Amendment rights that Proposition F caused and will continue to cause Plaintiffs to suffer, the panel upheld the

ordinance by identifying a government interest that is not advanced—and in fact is undercut—by the regulation. Our law requires more before we uphold government intrusions on speech and association rights. We should have corrected course.

A. Proposition F Seriously Burdens Plaintiffs' Association and Speech Rights.

The First Amendment prohibits the government from "abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. Proposition F burdens Plaintiffs' rights to both free association and free speech.

i. Proposition F Burdens Plaintiffs' Association Rights.

Defendants argued to the panel that Proposition F imposes no burden on association rights. Although the panel did not conclude that Proposition F imposes *no* burden on association rights, it did conclude that the burden was light in comparison to "the strength of the governmental interests." Before proceeding to exacting scrutiny, it is thus worth reviewing the severity of Proposition F's intrusion on association rights.

Proposition F burdens Plaintiffs' right of association in a peculiarly egregious fashion. The law exceeds California's requirement that political speakers disclose their top contributors on ads—a requirement that already seriously encroaches on the First Amendment's association guarantees. *See NAACP v. Alabama*

ex rel. Patterson, 357 U.S. 449, 462 (1958); *Ams. for Prosperity Found.*, 141 S. Ct. at 2382. San Francisco's law instead 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. And to be clear, as both a matter of logic and the law, forcing the appearance of association is a form of forcible association. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (explaining how forced affiliation can infringe the right of association).

Compelled disclosure of anonymous associations and compelled formation of association are both uncomfortable reminders of the ugly history of majoritarian groups forcing the disclosure of culturally unpopular minority associations. *See Latta v. Otter*, 771 F.3d 456, 474 (9th Cir. 2014) ("[A] primary purpose of the Constitution is to protect minorities from oppression by majorities."); John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149, 198 (2010) (noting the First Amendment right of assembly's history of "shielding dissident groups from a state-enforced majoritarianism throughout our nation's history"). As James Madison noted, "[i]f a majority be united by a common interest, the rights of the minority will be insecure." *The Federalist No. 51*, at 270 (George W. Carey & James McClellan eds., Liberty Fund 2001).

The clash of majoritarian power with private and unpopular associations found its paradigmatic display in *NAACP v. Alabama ex rel. Patterson*, where the

Supreme Court upheld the NAACP's right to not disclose its membership rolls to the state of Alabama. 357 U.S. at 449. The need to protect vulnerable members of an unpopular association was nowhere more apparent than protecting members of the NAACP in the American South during the Civil Rights Era. The "identity of [NAACP's] rank-and-file members" in Alabama exposed the members to serious risk of reprisal for their membership, "adversely [affecting] the ability of [NAACP] and its members to pursue their collective effort[s]." *Id.* at 462–63. In *NAACP*, the Court upheld the NAACP's right to protect its *members* from identification with a culturally unpopular organization. *See id.* But the same right to anonymously associate also protects *organizations* from reprisal based on the membership of, or contributions from, culturally unpopular people and other organizations. Just as the NAACP members were at risk for reprisal in 1950s Alabama, so a candidate or ballot measure with unpopular supporters (or in this case, supporters of supporters) can be at risk of reprisal when those supporters are forcibly disclosed. Likewise, an unpopular *speaker* who is forced to disclose the supporters of its supporters also puts those secondary supporters at a risk of reprisal, even though they may have no relationship (and may desire no relationship) with the speaker.

As is helpfully illustrated by the *NAACP* case, the mere fact that a compelled disclosure law is facially neutral doesn't prevent it from having an acute disparate impact on culturally unpopular groups. *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335

n.15 (1977) (explaining disparate impact occurs when "practices that are facially neutral in their treatment of different groups . . . in fact fall more harshly on one group than another"). Forcibly disclosing members of organizations advocating *for* segregation in 1950s Alabama would not have harmed those organizations in the same way as disclosing members of the NAACP would have. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2388 (noting that "some donors might not mind—or might even prefer—the disclosure of their identities to the State"). When only a minority of the community supports an institution—such as the NAACP in Alabama of the 1950s—the public disclosure of a person's support for that institution may often invite reprisal. *See NAACP*, 357 U.S. at 462. In contrast, organizations and contributors that are culturally popular at a given time often do not risk similar harm by the surrounding community knowing of the association. The harms of compelled disclosure inevitably fall unevenly on the unpopular—that is, precisely those groups most in need of First Amendment protection.

But San Francisco's ordinance does not merely require disclosure of anonymous association, as is the case for California's on-ad disclosure law—it forces the formation of associations. We have no logical reason to think that either a political speaker in accepting a contribution from a primary contributor, or a secondary contributor in contributing to that primary contributor, necessarily have any desire to associate with one another. The friends of your friend may want nothing to do with you—and vice versa. Nonetheless, when it is

time for a political speaker to create its advertisements, Proposition F requires the speaker to prominently display the secondary contributor's name. *See* S.F. Code § 1.161(a).

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. Advertisements containing the name of a political speaker (and the speaker's message) as well as the names of secondary contributors will lead many to infer an association between the speaker and the secondary contributor. Such advertisements will often take the form of a radio ad that a citizen casually hears while driving to work or a poster someone sees from a distance while waiting in line to order his morning coffee, or any number of other ads delivered or consumed in a similarly fleeting manner.[8] These citizens, who cannot rewind a radio ad or who must step forward in line and order coffee, will rarely enjoy sufficient time or motivation to discern whether the secondary contributor actually endorses the political speaker. They

[8] Even the most non-fleeting of advertisements poses this same risk because of how advertisements are commonly treated by the deluged citizenry. How often do people glance only for a moment at a detailed pamphlet they receive in the mail before throwing it in the garbage? Such a fleeting perusal of an otherwise thorough advertisement prompts quick inferences citizens would not make when situated to carefully consider the existence (or lack thereof) of a connection between political speakers and secondary contributors.

will just remember the association (true or not) created by the mandatory disclosure. Indeed, that is precisely the result that Proposition F intends—otherwise, why compel such disclosure?

Of course, if an ordinary citizen fully understood that the sole connection between a political speaker and a secondary contributor is that the secondary contributor gave money to an organization (the primary contributor) that then independently chose to give money to the political speaker, that ordinary citizen would not rationally infer any necessary association between the political speaker and the secondary contributor. People do not ordinarily assume an association necessarily exists between, say, a non-profit who receives money from a synagogue and that synagogue's top contributors.[9] Proposition F thus causes the busy public to infer an association that people ordinarily would not infer if they had time or reason to fully understand the tenuous connection between political speakers and secondary contributors.

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[9] A "committee" need not be *exclusively* political under California law and can be a multipurpose organization. *See* Cal. Gov't Code §§ 82013(a) (defining a committee as a "combination of persons" that receives at least $2,000 a year in contributions), 82015(a)–(b) (defining a contribution as payment without consideration that is unambiguously for a "political purpose[]" even if given to a "multipurpose organization"), 84222(a) (defining a multipurpose organization as, inter alia, "a civic organization[or] a religious organization"). So a synagogue that solicits and receives at least $2,000 in donations that are for the synagogue to engage in a political function would be classified under California law as a committee, and those synagogue members who have given would be classified as contributors.

It is difficult to "think of [a] heavier burden on . . . associational freedom" than "forced association." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581–82 (2000) (holding unlawful a law "forc[ing] petitioners to" open "their candidate-selection process . . . to persons wholly unaffiliated with the party"). After all, "the freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom" of an organization to identify its members "*and to limit the association to those people only*." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) (cleaned up; emphasis added); *see Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) ("The right to eschew association for expressive purposes is likewise protected [under the First Amendment].").

That harm is starkly visible in this litigation. Plaintiff committee No on E—earlier known as SPB—received funding from Ed Lee Dems, which received funding from David Chiu for Assembly 2022. Listing David Chiu for Assembly 2022 as a donor on No on E's ads forces the appearance of association between Chiu, the current City Attorney for San Francisco *defending this lawsuit*, and No on E. The forced association created by listing Chiu on the ad is particularly problematic because the City Attorney is prohibited from taking positions on ballot measures.

Despite their attempts to argue otherwise, Defendants confirmed in their briefing that the appearance of secondary contributors on these ads will, in fact, create a perception of association. First, Defendants devoted

six sentences in their briefing to explaining that City Attorney David Chiu cannot and has not supported any ballot measures, even though his organization, David Chiu for Assembly 2022, is a secondary contributor to SPB, a committee supporting ballot measure Proposition B. Defendants, in other words, strived with these sentences to disassociate David Chiu from SPB. But while those six sentences may clarify confusion in the courtroom, those same sentences will not be available to most secondary contributors objecting to their forced association with a political advertisement or its speaker.

Defendants confirmed again that Proposition F forcibly associates presumptive strangers, arguing that an on-ad disclosure is critical to effecting San Francisco's goal because voters do not have the time to research the funding of political speakers. Voters are indeed busy. As a result, many will infer an association between the political speaker and secondary contributors merely from the appearance of the secondary contributor's name on a political advertisement. The ignorance of voters that Defendants relied upon to justify Proposition F's required disclosures undercuts any argument that such voters will *not* be misled when they glimpse a bunch of names in apparent association with each other.

In upholding Proposition F, the panel made two additional points that should not be understood to indicate that Proposition F causes anything short of a

severe intrusion upon associational rights.[10] First, the panel noted that "[b]y donating to a primarily formed committee, a secondary committee necessarily is making an affirmative choice to engage in election-related activity." True enough. But the problem is not that secondary contributors are being forcibly drawn into electoral politics—the problem is that secondary contributors are being forcibly associated with entities with whom they never sought to associate. One should not be subjected to undesired and illogical forced associations merely because he voluntarily entered the political arena.

Second, the panel noted that "even if Plaintiffs' challenge" was successful, "secondary donors still would be subject to disclosure and publicly visible on government websites." But this fact is irrelevant for purposes of assessing the burden on Plaintiffs' associational rights. The disclosure of such second-order connections through official records, which are usually investigated by those prepared to carefully consider whether an association *necessarily* exists, will not risk the false inferences generated by on-ad disclosures.[11]

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[10] The panel raised these arguments in its analysis of narrow tailoring. Because Proposition F fails on the first element of exacting scrutiny and I therefore need not address narrow tailoring, I address them here.

[11] The reason that Proposition F causes a materially different risk of reprisal from the status quo disclosures—*i.e.*, those in the official records—should be clear enough when we consider who ordinarily investigates the official records and why: a journalist learning about a political speaker or funder, for the purpose of highlighting what that journalist believes to be an unflattering

ii. Proposition F Burdens Plaintiffs' Right to Speak.

In addition to its burden on Plaintiffs' associational rights, Proposition F burdens Plaintiffs' speech rights. Indeed, it directly targets one of the fundamental reasons for the First Amendment: protecting political speech. *See Meyer v. Grant*, 486 U.S. 414, 425 (1988) (recognizing that "the importance of First Amendment protections is 'at its zenith'" when a law regulates political speech); *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016).

Plaintiffs obviously engage in political speech when issuing advertisements to promote a candidate or a political issue. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966). Proposition F requires that they modify their speech by adding a list of (potentially nine) names and the amount that each of those persons or entities contributed. For print ads, these names must be in 14-point bold font, notwithstanding how much the sheer volume of the disclosure may dilute or

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association. But journalists meticulously poring over official records are better equipped to draw reasonable inferences from the data than a citizen bombarded by advertisements during election season. And the standard practice of a journalist engaging in such work is to solicit comments from parties the journalist investigates. That request gives the discussed party the chance to disclaim an endorsement of the political speaker or the speaker's message (or, if the discussed party is a secondary contributor, to disclaim any association with the speaker at all). Political speakers and secondary contributors suffer a far different and smaller intrusion into their associational rights from investigations into public records than the intrusion suffered by those parties from Proposition F's forced on-ad disclosures.

distract from the speaker's desired message, and even if the message itself is as short as "Vote for Pedro" or "Save Ferris." S.F. Code § 1.161(a)(3). These disclosures "necessarily alter[] the content of the [advertisement]," burdening Plaintiffs' rights to free speech. *Riley*, 487 U.S. at 795; *see Citizens United*, 558 U.S. at 366 (subjecting "[d]isclaimer and disclosure requirements" to exacting scrutiny because they "may burden the ability to speak"). Proposition F thus burdens Plaintiffs' association and speech rights.

B. Proposition F Fails Exacting Scrutiny Because It Lacks a Substantial Relation to an Important Government Interest.

Proposition F places onerous burdens on Plaintiffs' First Amendment rights, which demands the law withstand exacting scrutiny. The panel concluded Proposition F satisfies such scrutiny, reasoning that the law has a substantial relation to the government's asserted "interest in informing voters about who funds political advertisements." That conclusion glosses over the distinction between primary and secondary contributors. San Francisco does not have a sufficiently important interest in requiring disclosure of secondary contributors—which in any event will likely only confuse many voters about who supports political ads.

i. San Francisco Has a Circumscribed and Limited Interest in Informing Voters About Political Speakers.

No one denies that the government has an interest in informing voters about who is funding political ads. But the precise contours of that interest are important—"[t]he 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 government's informational interest that can justify burdens on First Amendment rights is the disclosure of information that helps voters understand who is speaking in a political advertisement.

"We have repeatedly recognized an important (and even compelling) informational interest in requiring ballot measure committees to disclose information about contributions." *Fam. PAC*, 685 F.3d at 806. The Supreme Court has said such disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." *Buckley*, 424 U.S. at 67. "An 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." *Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010). Our law does not assume that an organization and its financiers are precisely aligned on every issue, nor does it assume that disclosure serves the purpose of

telling the world of such a precise alignment. But the premise on which the government's informational interest sits is that learning a political advertiser's financiers can serve as a reasonable proxy for informing the voter of where the speaker falls on the political spectrum. Or as I emphasized above, channeling the Greek moralist: "A man is known by the company he keeps." Aesop, *Aesop's Fables* 109 (R. Worthington, trans., Duke Classics 1884).

ii. Proposition F Does Not Advance a Sufficiently Important Government Interest.

But man is not known by the company of the company he keeps. Proposition F does not advance any governmental information interest that our court has previously recognized. That is because a voter cannot reasonably infer any relevant information about a political speaker or an advertisement by knowing the speaker's secondary contributors. *Cf. Van Hollen, Jr. v. FEC*, 811 F.3d 486, 491, 497 (D.C. Cir. 2016) (recognizing that disclosing the names of donors who do not designate their contributions for "electioneering communications" would "convey some misinformation to the public about who *supported* the advertisements"). Secondary contributors may contribute to the primary contributor for a variety of reasons unrelated to the primary contributor's support for a political speaker. That is not merely a theoretical proposition; it is exactly what Plaintiff Ed Lee Dems's treasurer declared regarding Ed Lee Dems's contributors. And the government's interest in providing information about

political speakers is not an interest in communicating *everything* about a political speaker. *See McIntyre*, 514 U.S. at 348. Under the panel's logic, the government could require the disclosure of as many donation connections as it takes to show a given political speaker's degrees of separation from Kevin Bacon. Is that information about the political speaker? Sure. Is it relevant in any way to an arguable governmental interest? We should all hope not.

But 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. When voters view these ads with their on-ad secondary contributor disclosures, one of two things will happen. Either the busy voter will be confused and believe that a secondary contributor—who has taken no action to support the advertisement or its speaker—endorses the speaker and the advertisement, or the voter will recognize that no relationship between the two can be inferred. The first, as explained earlier, is more likely to occur and not only fails to advance the government's interest in informing voters, it undermines that interest by *mis*informing the voter. And in the rare instances where voters properly draw no inference about a relationship between the speaker and secondary contributors, no governmental interest is furthered. Either way, Proposition F does not further any sufficiently important government interest.

The panel concluded that compelling the disclosure of secondary contributors advances the government's

informational interests, but the three reasons it provided do not hold up. *First*, the panel reasoned that Proposition F advances the government's interests because primary donors "are often committees in their own right" and may use "creative but misleading names." This reasoning perhaps explains *why* San Francisco adopted the ordinance, but it does not show that Proposition F advances San Francisco's informational interest. The interest might be advanced if voters could know, when they see a secondary contributor's name, whether that secondary contributor intentionally supported the political speaker and is only a secondary contributor because it is trying to hide the source of funding. But Proposition F's requirements will never provide such information through on-ad disclosures. Moreover, if it is true that many donors want to hide their identities, it stands to reason that most sophisticated election financiers will simply funnel their money through an additional opaquely named committee to avoid identification.[12]

Second, the panel concluded that we cannot infer that voters will be confused into believing secondary contributors endorse the speaker or message unless Plaintiffs advance affirmative proof of such confusion. But our court does not require empirical proof before it

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[12] Under California's disclosure laws—but seemingly not Proposition F's on-ad disclosure regime—a donor who earmarks donations and funnels the donation through multiple entities will still be disclosed as funding the political speaker. *See* Cal. Gov't Code § 85704; *see also id.* § 84501(c)(3). Of course, if that law did apply to Proposition F, then Proposition F advances no informational interest because the "true" contributor will already be disclosed.

can reach a logical conclusion. *See Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008) (noting that, under rational basis review, "[t]he State is not compelled to verify *logical* assumptions with statistical evidence" (quotation omitted)). Common sense dictates that when election season brings on a deluge of political advertisements, voters will reflexively conclude a connection exists between an ad and the names that appear on it. Indeed, that perception of a connection is the whole purpose behind Proposition F's mandated disclosure of secondary contributors. To pretend otherwise is to hide our judicial heads in the sand.

The Supreme Court's opinion in *Washington State Grange v. Washington State Republican Party*, which rejected a challenge on association grounds to Washington's ballot designating candidates with their "party preference," is not to the contrary. 552 U.S. 442, 444 (2008). The Court in that case emphasized that the voting system had not yet "been implemented" and so the Court lacked "ballots indicating how party preference will be displayed. It stands to reason that whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot." *Id.* at 455. Although the Court would not speculate whether the form of a possible ballot could confuse voters, this case calls for no such speculation. Here, we have the evidence that was missing in *Washington State Grange*: namely, the precise format and content of the on-ad disclosures required by Proposition F.

Moreover, as discussed above, when voters are not confused or misled, then Proposition F still does not advance the government's interest, because in that instance Proposition F effectively does nothing. For those voters who are not confused, they will know that the identity of a secondary contributor merely allows them a chance to guess at whether the secondary contributor is (or isn't) supportive of the ad. Encouraging voter speculation, which is the most that San Francisco can hope Proposition F accomplishes without misleading voters, does not advance any government interest. *See Acorn Invs., Inc.*, 887 F.2d at 226.

Third, the panel insisted that there must be a substantial relation here because "adopting Plaintiffs' position could call into question the logic underlying decisions that uphold disclosure and disclaimer requirements as applied to primary donors." This reasoning highlights that the panel failed to recognize the fundamental distinction between a primary contributor and a secondary contributor. As discussed above, the two are different not as a mere matter of degree, but in kind. We know a primary contributor supports the political speaker; we don't know whether the secondary contributor does. Indeed, we don't know whether the secondary contributor even *knows* the political speaker, or vice versa. Recognizing that Proposition F doesn't advance the government's informational interest is not at odds with our cases holding that the government's interest is advanced by disclosing primary contributors.

In sum, Plaintiffs suffered and will suffer severe burdens on their association and speech rights. The panel justified such burdens by pointing to a governmental interest that is not advanced by the burdensome law. The panel's scrutiny was "exacting" in name only.

C. The Panel's Rationale Encourages Governments to Impose Even More Invasive On-Ad Disclosures.

The panel erroneously held that San Francisco may require primary committees to provide, when acting as political speakers, on-ad disclosure of their top contributors' top contributors. Its error, however, is not limited to depriving political committees and their contributors of their First Amendment rights of association and speech. The 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.

Proposition F arbitrarily assumes that voters will be meaningfully informed if they know the identities of a political speaker's contributors' contributors. The government's supposedly animating concern is that political donors will hide behind clever committee names to hide the source of money if only disclosure of primary contributors is required. But the 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? Why not contributors even further removed from the political speaker? The problem with the panel's reasoning is that it will presumably permit, under the guise of "exacting scrutiny," any number of layers between a contributor and a political speaker, no matter how disconnected. Under the panel's logic, the on-ad disclosure of the contributors' contributors' contributors (and so on) will be substantially related (enough) to the government's informational interest.

For the same reasons that the on-ad disclosure of secondary contributors here is different in kind from a primary contributor, it is best to cut off the errant logic at its source. The reason a government cannot justify an interest in the compelled disclosure of five layers of contributors (that is, the disclosure of a political speaker's contributors' contributors' contributors' contributors' contributors) is precisely the same reason Proposition F fails any sort of heightened scrutiny: because a secondary contributor logically does not endorse a political speaker or the speaker's message by funding a primary contributor.

That the panel's rationale would permit such increasingly onerous disclosures should have given our court pause. The panel decision in this case may only immediately curtail the First Amendment rights of San Franciscans, but its reasoning threatens vital constitutional protections for citizens in the entire Ninth Circuit. We should have granted rehearing en banc.

APPENDIX B

FOR PUBLICATION

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; TODD DAVID, *Plaintiffs-Appellants*, v. DAVID CHIU, in his official capacity as San Francisco City Attorney; SAN FRANCISCO ETHICS COMMISSION; BROOKE JENKINS, in his official capacity as San Francisco District Attorney; CITY AND COUNTY OF SAN FRANCISCO, *Defendants-Appellees*.	No. 22-15824 D.C. No. 3:22-cv-02785-CRB OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted December 9, 2022
San Francisco, California

Filed March 8, 2023

Before: Susan P. Graber, Ronald M. Gould, and Paul J. Watford, Circuit Judges.

Opinion by Judge Graber

COUNSEL

Alan Gura (argued), Institute for Free Speech, Washington, D.C.; James R. Sutton, The Sutton Law Firm, San Francisco, California; for Plaintiffs-Appellants.

Tara M. Steeley (argued) and Wayne K. Snodgrass, Deputy City Attorneys; David Chiu, City Attorney; Office of the San Francisco City Attorney; San Francisco, California; for Defendants-Appellees.

Tara Malloy and Megan P. McAllen, Campaign Legal Center, Washington, D.C., for Amicus Curiae Campaign Legal Center.

OPINION

GRABER, Circuit Judge.

In response to the growing prevalence of money in politics, many governments have required groups that run political advertisements to identify their funding sources publicly. Under California law, certain political advertisements run by a committee must name the committee's top contributors. The City and County of

San Francisco adds a secondary-contributor disclaimer requirement that compels certain committees, in their political advertisements, also to list the major donors to those top contributors.[1]

Plaintiffs—a political committee that runs ads, the committee's treasurer, and a contributor to the committee—seek to enjoin enforcement of San Francisco's ordinance. They allege that the secondary-contributor requirement violates the First Amendment. The district court held that Plaintiffs are unlikely to succeed on the merits and denied Plaintiffs' request for a preliminary injunction. Reviewing the denial of a preliminary injunction for abuse of discretion and the underlying legal principles de novo, Fyock v. Sunnyvale, 779 F.3d 991, 995 (9th Cir. 2015), we agree with the district court. Plaintiffs have not shown a likelihood of success on the merits. San Francisco's requirement is substantially related to the governmental interest in informing voters of the source of funding for election-related communications. The ordinance does not create an excessive burden on Plaintiffs' First Amendment rights relative to that interest, and it is

[1] The parties in this case distinguish between "disclaimers" (statements at the time of the advertisement, identifying who is funding the ad) and "disclosures" (public reports filed with government entities). Although that distinction is recognized in the case law, see, e.g., Citizens United v. FEC, 558 U.S. 310, 366–67 (2010), some courts use the terms interchangeably. Where relevant, we clarify whether laws considered by prior courts required disclosures or disclaimers, consistent with the foregoing definitions.

sufficiently tailored to the governmental interest. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. California Political Reform Act

The California Political Reform Act defines a "committee" as "any person or combination of persons" who, in a calendar year, receives contributions totaling $2,000 or more; makes independent expenditures totaling $1,000 or more; or makes contributions totaling $10,000 or more to, or at the behest of, candidates or committees. Cal. Gov't Code § 82013. A "primarily formed committee" is defined as a committee that receives $2,000 or more in contributions in a calendar year and is formed or exists primarily to support or oppose a single candidate, a single measure, a group of candidates being voted on in the same election, or two or more measures being voted on in the same election. Id. § 82047.5. Every committee, whether or not it is primarily formed, must file a statement of organization with the California Secretary of State and the relevant local filing officer, id. § 84101(a), which in this case is the San Francisco Ethics Commission. See S.F. Campaign & Governmental Conduct Code ("S.F. Code") § 1.112(a)(1).

Committees must file semiannual statements, Cal. Gov't Code § 84200(a), and must file two preelection statements, one at least 40 days before an election and the second at least 12 days before an election, id. §§ 84200.5, 84200.8. Among other requirements, each

of those campaign statements must include "[t]he total amount of contributions received during the period covered by the campaign statement and the total cumulative amount of contributions received." Id. § 84211(a). If any donor contributes money to the committee during a reporting period and has given aggregate contributions of $100 or more, then the report must include that donor's name, address, occupation, and employer, plus the dates and amounts of the donor's contributions during the period and the donor's total aggregate contributions. Id. § 84211(f).

California law also requires specific disclaimers in political advertisements. Id. §§ 84501–84511. An "advertisement" is defined as "any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures." Id. § 84501(a)(1). Advertisements must include the words "[a]d paid for by [the name of the committee]." Id. § 84502(a)(1). They also must state "committee major funding from," followed by the names of the top contributors to the committee. Id. § 84503(a). "Top contributors" are defined as "the persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of fifty thousand dollars ($50,000) or more." Id. § 84501(c)(1). Depending on the medium, the advertisement must follow certain formatting requirements. See id. §§ 84504.1 (video); 84504.2 (print); 84504.4 (radio and telephone); 84504.3 (electronic media); 84504.6 (online platforms).

B. San Francisco's Proposition F

On November 5, 2019, San Francisco voters passed Proposition F. Referred to by proponents as the "Sunlight on Dark Money Initiative," Proposition F changed the disclaimer requirements for advertisements paid for by independent political committees, among other provisions. After the passage of Proposition F, "all committees making expenditures which support or oppose any candidate for City elective office or any City measure" must comply with the City's new disclaimer requirements, in addition to the state's requirements. S.F. Code § 1.161(a).

Under the new ordinance, ads run by primarily formed independent expenditure and ballot measure committees must include a disclaimer listing their top three contributors of $5,000 or more. Id. § 1.161(a)(1). Additionally, "[i]f 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." Id. The ad also must inform voters that "[f]inancial disclosures are available at sfethics.org" or, if an audio ad, provide a substantially similar statement that specifies the website. S.F. Code § 1.161(a)(2).

Printed disclaimers that identify a "major contributor or secondary major contributor" must list the dollar amount of relevant contributions made by each named contributor. S.F. Code § 1.161(a)(1); S.F. Ethics Comm'n Reg. ("S.F. Reg.") 1.161-3(a)(4). Print ads must

include the disclaimers in text that is "at least 14-point, bold font." S.F. Code § 1.161(a)(3). Audio and video advertisements must begin by speaking the required disclaimers of major contributors and secondary major contributors, but need not disclose the dollar amounts of those donors' contributions. Id. §§ 1.161(a)(5); 1.162(a)(3). In addition, video ads must display a text banner that contains similar information to that required in print ads. Cal. Gov't Code § 84504.1; S.F. Code § 1.161(a)(1).

Violations of the City's campaign finance laws are punishable by civil, criminal, and administrative penalties. S.F. Code § 1.170. A committee's treasurer may be held personally liable for violations by the committee. Id. § 1.170(g). Any individual who suspects a possible violation may file a complaint with the Ethics Commission, City Attorney, or District Attorney. Id. § 1.168(a); see id. § 1.168(b) (providing for enforcement through civil action); San Francisco Charter, appendix C, § C3.699-13 (Ethics Commission procedures for investigations and enforcement proceedings).

C. Earlier Litigation Challenging Proposition F

In 2020, Todd David founded Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond.[2] David and Yes on Prop B challenged San Francisco's secondary-contributor

[2] The Prop B at issue in the 2020 litigation concerned an earthquake safety and emergency response bond and is unrelated to the Prop B that was originally at issue in this litigation.

requirement in the lead-up to the March 3, 2020 election. On February 20, 2020, the district court enjoined the application of that requirement to the plaintiffs' smaller and shorter advertisements "because they [left] effectively no room for pro-earthquake safety messaging." Yes on Prop B v. City & County of San Francisco, 440 F. Supp. 3d 1049, 1051, 1062 (N.D. Cal. 2020). The district court, however, concluded that the challenged ordinance was "not an unconstitutional burden on larger or longer advertising" and declined to enjoin the secondary-contributor disclaimer requirement on its face or as applied to the plaintiffs' larger ads. Id. at 1051, 1061–62.

On October 21, 2020, in an unpublished disposition, we dismissed the plaintiffs' appeal on the ground of mootness. Yes on Prop B v. City & County of San Francisco, 826 F. App'x 648 (9th Cir. 2020). The plaintiffs argued that the "capable of repetition, yet evading review exception" applied, but we held that the case was moot because the plaintiffs had not "shown that 'there is a reasonable expectation that the same complaining party will be subject to the same action again.'" Id. at 649 (quoting Protectmarriage.com-Yes on 8 v. Bowen, 752 F.3d 827, 836 (9th Cir. 2014)). We stressed that the record was "devoid of any detail" that plaintiffs would run advertisements in the future, particularly in the upcoming November 2020 election. Id. Thus, we concluded that, "[a]t best, [the plaintiffs] have shown only that there is a theoretical possibility that the same controversy will recur with respect to them." Id.

D. Current Litigation

This action was brought by three plaintiffs: (1) No on E, San Franciscans Opposing the Affordable Housing Production Act ("the Committee"), a primarily formed independent expenditure committee that runs ads subject to the secondary-contributor requirement;[3] (2) Todd David, the founder and treasurer of No on E (and the founder of Yes on Prop B); and (3) Edwin M. Lee Asian Pacific Democratic Club PAC Sponsored by Neighbors for a Better San Francisco Advocacy ("Ed Lee Dems"), a committee and a direct contributor to No on E, whose major donors would be subject to disclosure in ads under the San Francisco ordinance. David established the Committee to support the passage of Prop B in the June 7, 2022 election. The Committee sought to communicate its message by publishing mailers, print ads in newspapers, and digital ads on the internet.

As of May 10, 2022, the Committee had raised a total of $15,000 from three donors, each of which contributed $5,000. Two of those donors were committees that, in turn, had donors that had made contributions of more than $5,000. Thus, according to the examples provided by Plaintiffs, San Francisco's

[3] The lead plaintiff in this suit was known as "San Franciscans Supporting Prop B" throughout the district court litigation. On appeal, and after the conclusion of the June 7, 2022 election, the case caption was updated to reflect the fact that the Committee rededicated itself to opposing Proposition E and changed its name, as required by California Government Code section 84107.

ordinance would require the following disclaimer on the Committee's print and video advertisements:

> 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.

On May 11, 2022, Plaintiffs filed this action. Plaintiffs allege that the secondary-contributor disclaimer requirement violates the First Amendment, both on its face and as applied against Plaintiffs. In their prayer for relief, Plaintiffs request a declaration that the requirement violates the First Amendment, on its face and as applied to Plaintiffs; an injunction barring enforcement of the secondary-contributor requirement, in general and against Plaintiffs specifically; and nominal damages.

On May 12, 2022, Plaintiffs filed a motion for a preliminary injunction. Plaintiffs submitted a proposed order requesting that the court "preliminarily [enjoin] Defendants and their agents, officers, and representatives from enforcing against Plaintiffs the on-communication disclosure requirements for secondary donors at S.F. Code § 1.161(a)." In support of the motion for a preliminary injunction, David submitted a declaration stating that, "[b]ecause Concerned Parents and Ed Lee Dems are committees, they have contributed $5,000 to the Committee, and they both have donors who have given them $5,000 or more, San Francisco's law will require that our Committee report those secondary donors on our communications."

On June 1, 2022, the district court denied Plaintiffs' motion. Plaintiffs timely appeal. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292.

DISCUSSION

To obtain a preliminary injunction, a plaintiff must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, 555 U.S. 7, 20 (2008). On appeal, Plaintiffs argue primarily that they have demonstrated a likelihood of success on the merits. See Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015) (en banc) ("The first factor under Winter

is the most important—likely success on the merits."). Below, we address (A) mootness, (B) Plaintiffs' likelihood of success on the merits, and (C) the remaining Winter factors.

A. Mootness

Before turning to the merits, we first must establish that we have jurisdiction. "[A] federal court loses its jurisdiction to reach the merits of a claim when the court can no longer effectively remedy a present controversy between the parties." Protectmarriage.com—Yes on 8, 752 F.3d at 836. Defendants maintain that, because the June 2022 election has occurred, Plaintiffs can no longer receive meaningful relief and this appeal is moot. Although the June 2022 election has passed, this appeal is not moot because this controversy is "capable of repetition, yet evading review." FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007).

The "capable of repetition, yet evading review" exception to mootness applies when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Id. (citation and internal quotation marks omitted). Defendants do not dispute that Plaintiffs have satisfied the first prong of that test. See Protectmarriage.com—Yes on 8, 752 F.3d at 836 (describing an election as a controversy of inherently limited duration).

"The second prong of the capable of repetition exception requires a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." Wis. Right to Life, 551 U.S. at 463 (citation and internal quotation marks omitted). But that standard does not require Plaintiffs to establish a certainty that they will be subject to the same enforcement: "Requiring repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges." Id. Plaintiffs bear the burden of showing that the "capable of repetition" prong is satisfied. Lee v. Schmidt-Wenzel, 766 F.2d 1387, 1390 (9th Cir. 1985).

On this record, Plaintiffs have met that burden with respect to at least one plaintiff.[4] David has a demonstrated history of establishing committees that run advertisements that are subject to the secondary-contributor requirement, and he has twice engaged in litigation on this same issue. He also has clearly expressed his intent to continue those activities, unlike the plaintiffs in the earlier suit. Plaintiffs' complaint alleges that David "will engage in materially and substantially similar activity in the future, establishing committees and using them to speak about San

[4] Although Plaintiffs' motion for a preliminary injunction did not include a facial challenge, the relief sought by Plaintiffs was not limited to the June 2022 election. Instead, Plaintiffs asked the court to preliminarily enjoin Defendants from enforcing the secondary-contributor requirement against Plaintiffs indefinitely.

Francisco candidates and measures." (Emphasis added). In support of Plaintiffs' motion for a preliminary injunction, David averred that he "will continue to create primarily formed committees in future elections, to share ads and communications substantially and materially similar to those we wanted to share in 2020 and that we want to share now." (Emphasis added).

Defendants offer no persuasive reason to doubt David's affidavit, which is supported by his past practice. See Wis. Right to Life, 551 U.S. at 463–64 (holding that there was a reasonable expectation that the same controversy would recur where plaintiff "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads" and "sought another preliminary injunction based on an ad it planned to run" during another blackout period). Accordingly, this appeal is not moot, because it falls within the exception for controversies that are "capable of repetition, yet evading review." See Hum. Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 1001–02 (9th Cir. 2010) (concluding that there was a reasonable expectation that the controversy would recur because the plaintiff was a politically active organization that had been heavily involved in public debates in the past and intended to undertake future communications); Porter v. Jones, 319 F.3d 483, 490 (9th Cir. 2003) (rejecting mootness argument because plaintiff had expressed intent to create a similar website in future elections); Baldwin v. Redwood City, 540 F.2d 1360, 1365 (9th Cir. 1976) (holding that an issue is "capable of repetition, yet evading review" where the record established that

plaintiff had continuing interest in and past practices of participating in local political campaigns by creating signs).

B. Likelihood of Success on the Merits

Plaintiffs seek a preliminary injunction on the ground that the secondary-contributor disclaimer requirement violates the First Amendment. We hold that the district court acted within its discretion to conclude that Plaintiffs did not establish a likelihood of success on the merits.

The district court applied "exacting scrutiny," which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam)). On de novo review, Fyock, 779 F.3d at 995, we hold that exacting scrutiny is the correct legal standard.

Regardless of the beliefs sought to be advanced by association, "compelled disclosure requirements are reviewed under exacting scrutiny." Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (opinion of Roberts, C.J.); see also id. at 2396 (applying exacting scrutiny to First Amendment challenge to compelled disclosure) (Sotomayor, J., dissenting). In the electoral context, both the Supreme Court and our court have consistently applied exacting scrutiny to compelled disclosure requirements and on-advertisement disclaimer requirements. See Citizens United, 558 U.S. at

366–67 (holding that disclaimer and disclosure requirements are subject to exacting scrutiny); John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010) (applying exacting scrutiny to disclosure requirement); Buckley, 424 U.S. at 64 (requiring that compelled disclosure requirements survive exacting scrutiny); Davis v. FEC, 554 U.S. 724, 744 (2008) (evaluating whether disclosure requirements satisfy exacting scrutiny); Brumsickle, 624 F.3d at 1005 (applying exacting scrutiny to Washington law that required disclaimers on political advertising and disclosure of certain contributions and expenditures); see also Family PAC v. McKenna, 685 F.3d 800, 805–06 (9th Cir. 2012) ("Disclosure requirements are subject to exacting scrutiny.").[5]

Plaintiffs' argument to the contrary is unavailing. Plaintiffs take the position that disclaimer and disclosure are "terms of art," and argue that the City's ordinance should be reviewed under strict scrutiny because it is a "hybrid disclaimer/disclosure requirement." But Plaintiffs cite no authority that makes a similar distinction.[6] Indeed, they acknowledge that the

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[5] In ACLU of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004), we held that strict scrutiny applied to statutes that affect the content of election communications. 378 F.3d at 987. But we have since acknowledged that intervening Supreme Court decisions clarified that we apply exacting scrutiny to disclosure and disclaimer requirements. See Brumsickle, 624 F.3d at 1005 (citing John Doe No. 1, 561 U.S. at 196, and Citizens United, 558 U.S. at 366-67).

[6] Citing Americans for Prosperity Foundation v. Bonta, Plaintiffs further argue that San Francisco's "hybrid" requirement should be reviewed under strict scrutiny because "[t]he Supreme Court recently signaled that it may be increasing the

Supreme Court has applied exacting scrutiny to both disclosure rules, John Doe No. 1, 561 U.S. at 196, and disclaimer requirements, Citizens United, 558 U.S. at 366–67.

The concerns that Plaintiffs suggest are uniquely implicated in this case animate the entirety of the exacting scrutiny standard: "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." Buckley, 424 U.S. at 65. Courts have upheld other laws, even where there was some deterrent effect, because "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' Buckley, 424 U.S., at 64, and 'do not prevent anyone from speaking,' McConnell v. FEC, 540 U.S. 93, 201 (2003)." Citizens United, 558 U.S. at 366 (citations altered). Any argument that the secondary-contributor requirement violates the First Amendment because of the length and content of the disclaimer is

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scrutiny given to any disclosure regime." This reading of Americans for Prosperity Foundation clashes with a plain reading of the case and the manner in which other courts have applied it to disclaimer laws. See, e.g., Gaspee Project v. Mederos, 13 F.4th 79, 95 (1st Cir. 2021), cert. denied, 142 S. Ct. 2647 (2022); Smith v. Helzer, No. 3:22-CV-00077-SLG, 2022 WL 2757421, at *10 (D. Alaska July 14, 2022), appeal docketed, No. 22-35612 (9th Cir. argued Feb. 9, 2023). We hold that Americans for Prosperity Foundation does not alter the existing exacting scrutiny standard.

appropriately addressed as part of the exacting scrutiny analysis.

To survive exacting scrutiny, a law must satisfy all three steps of the inquiry. The threshold question is whether there is a "substantial relation" between the challenged law and a "sufficiently important" governmental interest. Citizens United, 558 U.S. at 366–67 (citation and internal quotation marks omitted); see Ams. for Prosperity Found., 141 S. Ct. at 2384 (describing a substantial relation as "necessary but not sufficient"). Next, "[t]o withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." Ams. for Prosperity Found., 141 S. Ct. at 2383 (quoting John Doe No. 1, 561 U.S. at 196) (internal quotation marks omitted). Finally, "[w]hile exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." Id.

Below, we assess (1) the relation between the secondary-contributor disclaimer requirement and the governmental interest; (2) whether the strength of that interest reflects the seriousness of the burden on Plaintiffs' First Amendment rights; and (3) whether San Francisco's ordinance is narrowly tailored to that interest.

1. Relation Between the Secondary-Contributor Disclaimer Requirement and Defendants' Interest

Defendants take the position that the secondary-contributor requirement serves their interest in providing information to voters about the source of election-related spending. A committee can circumvent California's on-advertisement disclaimer requirement and avoid including its top donors in a disclaimer by providing funding to another committee instead of running an advertisement directly. Defendants contend that the secondary-contributor requirement satisfies voters' need for additional information by making it more difficult to hide the sources of funding for political advertisements.

Courts have long recognized the governmental interest in the disclosure of the sources of campaign funding:

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley, 424 U.S. at 66–67 (internal quotation marks and citation omitted); see Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) ("[I]n the context of disclosure requirements, the government's interest in providing the electorate with information related to election and ballot issues is well-established."), abrogated on other grounds as stated in Brumsickle, 624 F.3d at 1013.

"[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978). As the role of money in politics has expanded, the public is faced with a "cacophony of political communications through which . . . voters must pick out meaningful and accurate messages." Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 (9th Cir. 2003). Understanding what entity is funding a communication allows citizens to make informed choices in the political marketplace. Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 793 (9th Cir. 2006); see Bellotti, 435 U.S. at 791–92 ("[The public] may consider, in making their judgment, the source and credibility of the advocate."); Getman, 328 F.3d at 1105 ("Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, we think being able to evaluate who is doing the talking is of great importance.").

We have "repeatedly recognized an important (and even compelling) informational interest in requiring ballot measure committees to disclose information

about contributions." Family PAC, 685 F.3d at 806. Disclosure of who is speaking "enables the electorate to make informed decisions and give proper weight to different speakers and messages." Citizens United, 558 U.S. at 371. "An 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." Brumsickle, 624 F.3d at 1008. Thus, we conclude that, as in other cases, Defendants have a strong governmental interest in informing voters about who funds political advertisements.

It follows that the secondary-contributor requirement is substantially related to that interest. We have previously recognized that providing information to the electorate may require looking beyond the named organization that runs the advertisement. In ACLU of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004), for example, the plaintiffs challenged a Nevada statute that required printed election-related communications to include the names of the businesses, social organizations, or legal entities responsible for those communications. 378 F.3d at 981–83. We recognized that "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names." Id. at 994. Thus, we concluded that, "[w]hile reporting and disclosure requirements can expose the actual contributors to such groups and thereby provide useful information concerning the interests supporting or opposing a ballot proposition or a candidate, simply

supplying the name and address of the organization on the communication itself does not provide useful information—and that is all the Nevada Statute requires." Id.

While Heller is an anonymous speech case, we agree with Heller's reasoning, and find it relevant to the election disclaimer context. The interests in "where political campaign money comes from," Buckley, 424 U.S. at 66 (citation omitted), and "in learning who supports and opposes ballot measures," Family PAC, 685 F.3d at 806, extend beyond just those organizations that support a measure or candidate directly. Plaintiffs do not challenge California's law that requires an on-advertisement disclaimer listing the top three donors to a committee. But those donors are often committees in their own right. The secondary-contributor requirement is designed to go beyond the "ad hoc organizations with creative but misleading names" and instead "expose the actual contributors to such groups." Heller, 378 F.3d at 994; see McConnell v. FEC, 540 U.S. 93, 128 (2003) (noting that "sponsors of [political] ads often used misleading names to conceal their identity" and providing examples), overruled on other grounds by Citizens United, 558 U.S. at 365–66. In the context of San Francisco municipal elections, Defendants show that donors to local committees are often committees themselves and that committees often obscure their actual donors through misleading and even deceptive committee names. Because the interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible, the

challenged ordinance is substantially related to the governmental interest in informing the electorate.

Notwithstanding that relationship, Plaintiffs contend that the challenged ordinance actually undermines that interest. They take the position that the secondary-contributor requirement could cause confusion because a committee must list donors who may not have any position on the issue that the ad is addressing or who may not have known that their donation would be used to promote those views. But Plaintiffs provide no factual basis for their assumption that San Francisco voters are unable to distinguish between supporting a group that broadcasts a statement and supporting the statement itself. See Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 454–55 (2008) (requiring more than "sheer speculation" of voter confusion). Additionally, adopting Plaintiffs' position could call into question the logic underlying decisions that uphold disclosure and disclaimer requirements as applied to primary donors. Those cases emphasize that the laws at issue further the governmental interest in revealing the source of campaign funding, not ensuring that every donor agrees with every aspect of the message. Brumsickle, 624 F.3d at 1005–08; Getman, 328 F.3d at 1104–07.

Plaintiffs' final argument—that any informational interest furthered by San Francisco's ordinance is outweighed by the corresponding limitation on time available for other speech—is similarly unavailing. It is well-established that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they

impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." Citizens United, 558 U.S. at 366 (internal quotation marks and citations omitted). Even if Plaintiffs are correct that the governmental interest is somewhat diminished in this instance because the challenged ordinance requires disclosure of secondary contributors instead of direct donors, that principle still applies.

Thus, we hold that the district court did not abuse its discretion by concluding that the secondary-contributor disclaimer requirement is substantially related to Defendants' informational interest.

2. Burden On First Amendment Rights

"To withstand [exacting] scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" John Doe No. 1, 561 U.S. at 196 (quoting Davis, 554 U.S. at 744). It is well-established that there is an important governmental interest in providing voters with information about the source of funding for political advertisements. Buckley, 424 U.S. at 66–67; Heller, 378 F.3d at 994; Family PAC, 685 F.3d at 806. Given the strength of that interest, we are not persuaded by either of Plaintiffs' arguments that San Francisco's ordinance impermissibly burdens their First Amendment rights.

First, Plaintiffs assert that the required disclaimer displaces an excessive amount of speech. According to David, the spoken disclaimer would take up

100% of a 15-second ad, 100% of a 30-second ad, and 53-55% of a 60-second ad. David averred that the written disclaimer on video ads would take up between 35% and 51% of the screen for either 10 seconds of an ad that is 30 seconds or longer, or the first 5 seconds of a shorter ad. Finally, David declared that the required disclaimer would take up 100% of a two-inch by four-inch ad, 70% of a five-inch by five-inch ad, 35% of a five-inch by ten-inch ad, and 23% of the face of an 8.5-inch by 11-inch mailer. Defendants dispute that disclaimers required by the ordinance would take up the majority of the space on most committee's advertisements. In any event, Defendants have consistently stated that they would not enforce the disclaimer requirement where disclaimers take up most or all of an advertisement's space.

In Citizens United, the Supreme Court upheld a law that required 40% of an advertisement to be devoted to a disclaimer. 558 U.S. at 320, 366, 367–68. In the earlier litigation challenging San Francisco's ordinance, the district court relied on that precedent and denied the plaintiffs' request for an injunction with respect to the larger ads. Yes on Prop B, 440 F. Supp. 3d at 1056–57. Although the court declined to establish a mathematical formula, it concluded that the secondary-contributor requirement was not unduly burdensome for larger ads, in which the disclaimer took up less than 40% of the ad. Id. The court found that, for larger ads, the remaining space was sufficient to communicate the plaintiffs' political message. Id. We find that reasoning to be persuasive. Plaintiffs have not

shown that they are likely to succeed on the merits of their argument that the secondary-contributor requirement is an impermissible burden on speech because the size of the disclaimer is excessive with respect to larger ads.[7]

Shorter ads warrant a different analysis. In the earlier litigation, the district court enjoined San Francisco's ordinance with respect to smaller advertisements because the burden on speech was too great. Yes on Prop B, 440 F. Supp. 3d at 1055–56. But, in this litigation, the district court denied the entirety of Plaintiffs' motion for an injunction. Even if we assume that we agree with the district court's conclusion that the secondary-contributor requirement likely causes constitutional issues with respect to shorter ads, the district court was within its discretion to conclude that

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[7] Plaintiffs rely heavily on American Beverage Association v. City & County of San Francisco, 916 F.3d 749 (9th Cir. 2019) (en banc), to support their assertion that the size of the disclaimer is excessive here. But American Beverage is inapposite. The court in American Beverage was applying the Zauderer test, a separate inquiry that requires the defendant to prove that compelled commercial speech was neither unjustified nor unduly burdensome. Am. Bev., 916 F.3d at 756 (citing Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985), and Nat'l Inst. of Family & Life Advocs. v. Becerra (NIFLA), 138 S. Ct. 2361, 2372, 2377 (2018)). That test differs from exacting scrutiny review, which applies to disclaimer and disclosure requirements in the electoral context. Citizens United, 558 U.S. at 366–67; see id., 558 U.S. at 422 ("The election context is distinctive in many ways[.]" (Stevens, J., concurring)); Gaspee Project, 13 F.4th at 95 ("The election-related context implicated here is alone sufficient to distinguish NIFLA").

any burden on speech did not require a preliminary injunction in this instance.

In the earlier litigation, the City took the position that it would not enforce the requirement with respect to shorter ads, and the district court granted an injunction to that effect. Yes on Prop B, 440 F. Supp. 3d at 1055. When Plaintiffs moved for an injunction in this action, Defendants offered to agree not to enforce San Francisco's ordinance with respect to print ads that were five-inches by five-inches or smaller, or to spoken disclaimers on digital and audio advertisements of 60 seconds or less. After Plaintiffs refused that offer, Defendants again took the position that they would not enforce the challenged ordinance with respect to shorter ads in which the "required disclaimer would consume the majority of Plaintiffs' advertisement." In light of that commitment, San Francisco's ordinance does not burden Plaintiffs such that "the intervention of a court of equity is essential in order effectually to protect . . . rights against injuries otherwise irremediable." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citation and internal quotation marks omitted).

The second burden identified by Plaintiffs—that the secondary-contributor requirement violates their right to freedom of association and drives away potential donors—is likewise insufficient to outweigh the strength of the governmental interests. "It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute." Buckley, 424

U.S. at 68. But to support an exemption from a compelled disclosure requirement, Plaintiffs must show more than a "modest burden." Family PAC, 685 F.3d at 808; see Ams. for Prosperity Found., 141 S. Ct. at 2388–89 (concluding that petitioners had shown a "widespread burden on donors' associational rights" where there was evidence that petitioners and their supporters had been subjected to "bomb threats, protests, stalking, and physical violence," and hundreds of organizations expressed that they shared the petitioners' concerns).

Plaintiffs provided only two declarations in support of their contention that San Francisco's ordinance burdens their right to freedom of association. David asserts that "[p]otential donors have expressed concern to me about the secondary disclosure rules and are more reluctant to contribute to committees where their donors need to be disclosed." Ed Lee Dems asserts that it would have to withdraw its donations from the Committee and would have its own fundraising challenges if donors thought that their names might become public through the secondary-contributor requirement.

The district court was within its discretion to conclude that Plaintiffs failed to demonstrate that the secondary-contributor requirement "actually and meaningfully deter[s] contributors." Family PAC, 685 F.3d at 807. 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. See Family PAC, 685 F.3d at 806–08 (concluding that disclosure requirements presented only a

modest burden without a showing of a significant risk of harassment or retaliation). That level of hesitation on the part of donors is insufficient to establish that the "deterrent effect feared by [Plaintiffs] is real and pervasive." Ams. for Prosperity Found., 141 S. Ct. at 2388.

Adopting Plaintiffs' view that a modest burden on their right to associate anonymously outweighs the informational interest would "ignore[] the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." McConnell, 540 U.S. at 197 (quoting McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)), overruled in part on other grounds by Citizens United, 558 U.S. at 365–66. The modest burden imposed on the Plaintiffs is permissible when contrasted with the alternative: "Plaintiffs never satisfactorily answer the question of how uninhibited, robust, and wide-open speech can occur when organizations hide themselves from the scrutiny of the voting public." Id. (internal quotation marks omitted).

3. Narrow Tailoring

Under exacting scrutiny, "the challenged requirement must be narrowly tailored to the interest it promotes." Ams. for Prosperity Found., 141 S. Ct. at 2384. But this standard does not require "the least restrictive means of achieving that end." Id. Despite the close fit between San Francisco's ordinance and the government's informational interest, Plaintiffs present two

different arguments as to why the secondary-contributor requirement is insufficiently tailored. Neither argument is persuasive.

First, Plaintiffs argue that the requirement fails narrow tailoring because there are other available alternatives, such as making the same information available in an online database. That suggestion misunderstands the relevant standard. The secondary-contributor requirement must have a scope "in proportion to the interest served," but it need not represent the "single best disposition." McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (plurality opinion) (internal quotation marks omitted). Case law and scholarly research support 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. See Gaspee Project, 13 F.4th at 91 (holding that an on-ad donor disclaimer is "not entirely redundant to the donor information revealed by public disclosures" because it "provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names"), cert. denied, 142 S. Ct. 2647 (2022); Majors v. Abell, 361 F.3d 349, 353 (7th Cir. 2004) (reasoning that because fewer people are likely to see reports to government agencies than notice in the ad itself, "reporting [is] a less effective method of conveying information"); Michael Kang, Campaign Disclosure in Direct Democracy, 97 Minn. L. Rev. 1700, 1718 (2013) ("Research from psychology and political science finds that people are skilled at crediting and discrediting the truth of a communication

when they have knowledge about the source, but particularly when they have knowledge about the source at the time of the communication as opposed to subsequent acquisition."). Given the realities of voters' decision-making processes amidst a "cacophony" of electoral communications, Getman, 328 F.3d at 1105–06, the district court was within its discretion to conclude that the secondary-contributor requirement has a scope in proportion to the City's objective.

Plaintiffs' second argument—that the requirement is not limited to donations that are earmarked for electioneering—does not change that conclusion. Plaintiffs cite two out-of-circuit cases in which courts concluded that disclosure laws were narrowly tailored, in part because the laws applied only to donations that were earmarked for electioneering. See Indep. Inst. v. Williams, 812 F.3d 787, 797 (10th Cir. 2016) (upholding Colorado constitutional provision that only required disclosure of donors who have specifically earmarked their contributions for electioneering purposes); Indep. Inst. v. FEC, 216 F. Supp. 3d 176, 190–92 (D.D.C. 2016) (three-judge panel holding that a large-donor disclosure requirement limited to donors who contribute $1,000 or more for the specific purpose of supporting the advertisement is tailored to advance the government's interest in informing the electorate of the source of the advertisement).[8] Those courts upheld

[8] Plaintiffs also cite Van Hollen, Jr. v. FEC, 811 F.3d 486 (D.C. Cir. 2016), in which the D.C. Circuit considered a challenge to an FEC rule requiring corporations and labor organizations to disclose only donations "made for the purpose of furthering

laws that required only disclosure of earmarked contributions. But neither court suggested that, or had occasion to consider whether, a law fails narrow tailoring unless it is limited to the disclosure of earmarked contributions.

And even though San Francisco's ordinance goes beyond donations that are earmarked for electioneering, it does not have an unconstrained reach. The challenged ordinance requires an on-advertisement disclaimer listing only the top donors to a committee that is, in turn, a top donor to a primarily formed committee. S.F. Code § 1.161(a)(1). Under California law, a primarily formed committee is formed or exists primarily to support candidates or ballot measures. Cal. Gov't Code § 82047.5. By donating to a primarily formed committee, a secondary committee necessarily is making an affirmative choice to engage in election-related activity.

If a secondary committee were to purchase and run an advertisement opposing a ballot measure directly, its top donors could be subject to California's disclaimer requirements, which Plaintiffs do not challenge. The application of that law does not depend on

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electioneering communications" instead of all donations. 811 F.3d at 488 (citation and internal quotation marks omitted). But because the court in Van Hollen did not consider whether a campaign finance law violated the First Amendment, we do not find its analysis to be persuasive. See id. at 495, 501 (holding that the FEC's rule is consistent with the text, history, and purposes of the authorizing statute and is not an arbitrary and capricious exercise of the FEC's regulatory authority).

whether the top donors earmarked their contributions for electioneering, or on whether they support the content of the advertisement. The City's ordinance does not violate narrow tailoring just because the secondary committee funneled its donations through a separate committee instead of running its own advertisements.

Additionally, even if Plaintiffs' challenge to the City's requirement were to succeed, the secondary donors still would be subject to disclosure and publicly visible on government websites. Plaintiffs do not challenge those public disclosures of secondary donors, which occur whether or not the donors earmarked their contributions. Assuming that those disclosures are permissible, as Plaintiffs do by failing to challenge their validity, we are not persuaded that a law requiring those same donors to be named in an on-advertisement disclaimer is insufficiently tailored.

Thus, we hold that the district court was within its discretion to conclude that Plaintiffs did not establish a likelihood of success on the merits.

C. Remaining Preliminary Injunction Factors

The district court concluded that none of the remaining Winter factors weighed in favor of an injunction, in part because Plaintiffs' argument as to those factors largely relied on their position that they had demonstrated a likelihood of success on the merits. The same is true on appeal. We hold that the district court did not abuse its discretion by reaching that conclusion.

Without an injunction, Plaintiffs likely would be injured by the loss of some First Amendment freedoms, Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion), but that injury would be modest, Family PAC, 685 F.3d at 806. Defendants, however, have established that there is a strong public interest in providing voters with the information of who supports ballot measures. Brumsickle, 624 F.3d at 1008. Thus, the public interest and the balance of hardships weigh in favor of Defendants. See FTC v. Affordable Media, LLC, 179 F.3d 1228, 1236 (9th Cir. 1999) ("Under this Circuit's precedents, 'when a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.'" (quoting FTC v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989))).

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCANS SUPPORTING PROP B, et al., Plaintiffs, v. DAVID CHIU, et al., Defendants.	Case No. 22-cv-02785-CRB **ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** (Filed Jun. 1, 2022)

On June 7, 2022, San Francisco will hold its second of three elections this year. In addition to choosing candidates for fourteen offices, residents will vote on eight local ballot measures on issues ranging from the solicitation of behested payments to the design of the Refuse Rate Board. See Future Elections, https://sfelections.200bsfgov.org/futureelections (accessed June 1, 2022); Fed. R. Evid. 201(b). Among these ballot measures is Proposition B ("Prop B"), which would modify the City Charter to change the composition and appointment structure of the City's Building Inspection Commission. David Decl. (dkt. 9-1) ¶¶ 3, 4. Plaintiffs San Franciscans Supporting Prop B ("SPB"), Edwin M. Lee Asian Pacific Democratic Club PAC ("Ed Lee Dems"), and Todd David support the passage of Prop B. Ed Lee Dems has donated $5,000 to SPB. Cheng Decl. (dkt. 9-7) ¶ 3. David is the founder and treasurer of SPB. David Decl. ¶ 2.

Under a law passed by nearly 77% of the voters, committees in San Francisco must include on their advertisements a disclaimer disclosing their secondary contributors. SF Code § 1.161(a)(1), (5). That is, SPB must disclose to voters not only that Ed Lee Dems is one of its major contributors, but also the top two recent contributors to Ed Lee Dems.

On May 11, Plaintiffs sued City Attorney David Chiu, District Attorney Chesa Boudin, San Francisco Ethics Commission, and the City of San Francisco, contending that the secondary-contributor disclaimer requirement burdens their right to associate and chills political donations in violation of the First Amendment. Compl. (dkt. 1). They moved for a temporary restraining order and preliminary injunction. TRO Mot. (dkt. 9). The Court rejected a nearly identical argument two years ago. See Yes on Prop B v. City & Cnty. of San Francisco, 440 F. Supp. 3d 1049, 1057–62 (N.D. Cal.), appeal dismissed as moot, 826 F. App'x 648 (9th Cir. 2020). Because intervening law has not changed and the facts are not meaningfully distinct, the Court DENIES Plaintiffs' motion.

I. BACKGROUND

A. Statutory Scheme

Under California law, any person or group of people that raises at least $2,000 or spends at least $1,000 for political purposes in a given year must register as a committee. Cal. Gov't Code § 82013. Political advertising by committees is subject to a plethora of

disclaimer and disclosure requirements under California and San Francisco law. See, e.g. Cal. Gov't Code §§ 84200, 84200.5, 84202.3, 84203, 84502; see also, e.g., SF Code § 1.161.

As relevant here, San Francisco voters enacted a new disclaimer requirement when they approved Proposition F in 2019. Prop F passed with 76.89% of the vote. See RJN Ex. B (dkt. 31-2) at 6; Fed. R. Evid. 201(b). Under Prop F, all ads paid for by "primarily formed" independent expenditure and ballot measure committees must include a disclaimer identifying the committee's top three donors of $5,000 or more. SF Code § 1.161(a)(1). If one of those contributors is itself a committee, the ad must also disclose that committee's top two donors of $5,000 or more in the last five months. Id. In all ads other than audio ads, the names of both primary and secondary contributors must be followed by the amount of money they contributed. Id. § 1.161(a)(5). On written ads, the disclosure must be in 14-point font (rather than 12-point font, as was the case before Proposition F). Id. § 1.161(a)(3).

B. This Case

In support of passing Prop B, SPB has raised $15,000—$5,000 each from three different committees. David Decl. ¶ 6. On any ads produced by SPB, San Francisco law requires it to include the following disclaimer:

> 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.

See David Decl. Ex 4 (dkt. 9-5) (five by ten ad); see also David Decl. ¶ 12.

Plaintiffs argue that "the on-communication secondary donor disclosure requirements . . . are unconstitutional and should be enjoined." TRO Mot. (dkt. 9) at 3. Their motion is an as-applied challenge. See Proposed Order (dkt. 11) (proposing that the Court "preliminarily [enjoin] Defendants and their agents, officers, and representatives from enforcing against Plaintiffs the on-communication disclosure requirements for secondary donors at S.F. Code § 1.161(a)"). In support of their motion, Plaintiffs include:

- exhibits of their proposed ads with the disclaimers (dkts. 9-2 to 9-6)
- a declaration by David (founder and treasurer of SPB) (dkt. 9-1)

- a declaration by Jay Cheng (treasurer of Ed Lee Dems) (dkt. 9-7)
- a declaration by Nicole Derse (founder and principal of 50+1 Strategies, a management and political consulting firm) (dkt. 9-8)
- a declaration by Andrew Sinn (chief financial and operations officer for 50+1 Strategies) (dkt. 9-9)

II. LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy" that should only be awarded upon a clear showing that the plaintiff is entitled to such relief. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). The party seeking a preliminary injunction must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief; (3) that the balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public interest. See id. at 20. Alternatively, the moving party must demonstrate that "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," and that the other two Winter elements are met. Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011). The "[l]ikelihood of success on the merits is the most important Winter factor." Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir. 2017) (internal quotation marks omitted). These same principles apply to a

motion for a TRO. See Martinez Franco v. Jennings, 456 F. Supp. 3d 1193, 1196–97 (N.D. Cal. 2020).

III. DISCUSSION

The Court already rejected Plaintiffs' arguments in a prior case. The Court reaches the same conclusion here because the law has not changed and Plaintiffs still have not provided sufficient evidence in support of their challenge.

A. Likelihood to Succeed

1. The Prior Case

Before the March 3, 2020 election, the Court heard a nearly identical First Amendment challenge to this law by Yes on Prop B, an independent expenditure committee formed to support the Prop B in that election,[1] and David himself. See Prop B, 440 F. Supp. 3d at 1049. In Prop B, the Court analyzed the disclaimer law under "exacting scrutiny," which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." Id. at 1054 (quoting Citizens United v. FEC, 558 U.S. 310, 366–67 (2010)); accord Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1013 (9th Cir. 2010)

[1] Although both the instant case and the 2020 case involved the same or similar plaintiffs in favor of something called Prop B, the Prop Bs are completely unrelated. The March 2020 proposal involved an earthquake safety and emergency response bond, and the June 2022 proposal involves proposed changes to the city's Building Inspection Commission.

("[T]he Supreme Court has made clear that exacting scrutiny, not strict scrutiny, is applicable to campaign finance disclosure requirements.").

The Court reached two holdings in Prop B. First, the Court enjoined the enforcement of Prop F as to Yes on Prop B's smaller advertisements, holding that it failed exacting scrutiny because the disclaimer would take up so much of the advertisement that it would swamp Yes on Prop B's ability to speak. Id. at 1056. But the Court did not enjoin enforcement of the law as to its larger ads, as the disclaimer was sufficiently small that Yes on Prop B could still convey its message. The Court noted that Citizens United upheld by an 8-1 vote a four-second disclaimer in a ten-second advertisement, thus "establish[ing] that a disclaimer may commandeer a prominent position in a political ad." Prop B, 440 F. Supp. 3d at 1055; see Citizens United, 558 U.S. at 367–71. The Court noted that the Ninth Circuit has found a "sufficiently important" governmental interest in "providing the public with information about who is trying to sway its opinion" because of the "complex detail involved in ballot initiatives, and the sheer volume of relevant information confronting voters." Prop B, 440 F. Supp. 3d at 1055 (quoting Brumsickle, 624 F.3d at 1017–18). Considering Prop F in light of "the type of disclaimer, relevant advertisement, and various other case-specific factors," the Court concluded that it passed exacting scrutiny with regard to the larger ads. Prop B, 440 F. Supp. 3d at 1056.

Second, the Court addressed the only issue on which Plaintiffs seek relief now: whether the secondary-contributor disclaimer requirement was constitutional. See id. at 1057–58; see TRO Mot. at 3 (stating that this is the sole "issue[] to be decided"). The Court found that the government's informational interest as to secondary contributors was "sufficiently important" because it provided the public with information about who was trying to sway its opinion given that "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names." Id. at 1058 (quoting ACLU v. Heller, 378 F.3d 979, 994 (9th Cir. 2004)). "[R]eporting and disclosure requirements can expose the actual contributors to such groups and thereby provide useful information concerning the interest supporting or opposing a ballot proposition." Id. (quoting Heller, 378 F.3d at 994). The Court rejected the plaintiffs' argument that the disclaimers were unnecessary because other laws made the information available online: "[i]f [this argument] were correct, no disclaimer would withstand constitutional muster if all it did was provide information that was already on the internet." Id. After all, Citizens United had approved of a disclaimer that was at least partially redundant of reporting requirements. And although the disclaimer affected the content of the communication itself (i.e., rather than just disclosing information in a form to the Ethics Commission), see Heller, 378 F.3d at 987, the Ninth Circuit had upheld these disclaimers as a "useful shorthand for evaluating the speaker behind the

sound bite," Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 (9th Cir. 2003).

Next, the Court evaluated the purported burdens of the rule on plaintiffs' First Amendment rights: (1) that it burdened their associational rights, and (2) that it impermissibly chilled political contributions. The Court noted first that Prop F did not require any entity to fund speech that it disagreed with. Rather, the associational rights argument "reduce[d] to a theory . . . [that the committee] is being forced to associate with its secondary contributors because the disclaimers will confuse voters into believing that Yes on Prop B is more closely associated with its secondary contributors than it actually is." Prop B, 440 F. Supp. 3d at 1059. Yet "the Supreme Court has flatly rejected a virtually identical voter confusion theory of association." Id. at 1059–60. In Washington State Grange v. Washington State Republican Party, the Court rejected a challenge to a Washington law passed by initiative under which, at the beginning of election season, each candidate could choose a "party preference" to be printed on the ballot, and the named party had no recourse even when the candidate was "unaffiliated with, or even repugnant to" it. 552 U.S. 442, 447 (2008). The Court held that the associational rights argument failed because there was "no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." Id. at 454. The idea "that voters will misinterpret the party-preference

designation" was "sheer speculation." Id. at 454. That was particularly true because "it was the voters . . . themselves, rather than their elected representatives, who enacted" the law through initiative. Id. at 455. Because there was little burden on the associational rights, the state's "asserted interest in providing voters with relevant information about the candidates on the ballot is easily sufficient to sustain" the law. Id. at 458. Similarly, the Prop B plaintiffs had provided no evidence that San Francisco voters were confused about the association between a committee and its secondary contributors. That was particularly so because a supermajority of the voters themselves enacted the law that required this disclaimer. Thus, there was no cognizable burden on Yes on Prop B's associational rights and the informational interest was sufficient.

The Court also rejected the second asserted First Amendment burden—that the secondary contributor disclosure requirement chilled political contributions. The Court noted that the Ninth Circuit has held that the possibility that "individuals who would prefer to remain anonymous [will be deterred] from contributing to a ballot measure committee" establishes only a "modest burden" on First Amendment rights. Prop B, 440 F. Supp. 3d at 1061 (quoting Family PAC v. McKenna, 685 F.3d 800, 806 (9th Cir. 2012)). Although disclosure requirements "may burden the ability to speak," "they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." Citizens United, 558 U.S. at 366 (citations and quotations omitted). Generalized evidence that people may

"think twice" about contributing to a political committee if their names are disclosed is not sufficient: to show a cognizable First Amendment burden, a party must present "evidence suggesting . . . that [the law] actually and meaningfully deter[s] contributors." Family PAC, 685 F.3d at 807. Because Yes on Prop B failed to meet this evidentiary burden, the asserted informational interest was sufficient.

The Ninth Circuit dismissed the appeal as moot. See Prop B, 826 F. App'x at 649 (noting that "the record is devoid of any detail indicating that Appellants would engage in the type of conduct subject to Proposition F—i.e., running advertisements," which was particularly odd given that the November 2020 election was just one month away).

2. Plaintiffs' Arguments

Plaintiffs primarily make two arguments in their brief and at the hearing as to why, in spite of Prop B, they are likely to succeed on the merits in their claim that the secondary-contributor requirement violates the First Amendment. First, Plaintiffs argue that this Court must apply strict scrutiny. Second, Plaintiffs argue that Prop F cannot even survive exacting scrutiny in light of the Supreme Court's recent decision in Americans for Prosperity Foundation v. Bonta, 141 S. Ct. 2373 (2021) (AFPF). The Court disagrees on both counts.

Plaintiffs are mistaken that the disclaimers are content-based restrictions that must be evaluated

under strict scrutiny. See TRO Mot. at 13. It's true that, in Heller, the Ninth Circuit analyzed a disclaimer law as a content-based restriction because it "requir[ed] a speaker to reveal her identity while speaking" as opposed to merely "requiring her to reveal it in an after-the-fact reporting submission to a governmental agency." 378 F.3d at 992. But later Supreme Court cases "made clear that exacting scrutiny, not strict scrutiny, is applicable to campaign finance disclosure requirements." Brumsickle, 624 F.3d at 1013; see John Doe No. 1 v. Reed, 561 U.S. 186, 196 (2010) (exacting scrutiny applies to a disclosure rule); Citizens United, 558 U.S. at 366–67 (exacting scrutiny applies to a rule mandating a disclaimer that takes up time or space in an advertisement). Exacting scrutiny therefore applies even when a disclaimer requires a speaker to reveal her identity while speaking, and even when it takes up a considerable amount of space on an advertisement. And although the six justices in the AFPF majority differed on how to frame the standard, they did not disturb the "exacting scrutiny" formulation.[2] See 141 S. Ct. at 2383.

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[2] At least six justices agreed that the "exacting scrutiny" formulation from Citizens United was correct. See 141 S. Ct. at 2383 (Roberts, C.J.) (plurality opinion) (reaffirming on behalf of three justices that "compelled disclosure requirements are reviewed under exacting scrutiny"); see also id. at 2396 (Sotomayor, J., dissenting) (agreeing, on behalf of three justices, that exacting scrutiny is appropriate). But see id. at 2390 (Thomas, J., concurring) (endorsing strict scrutiny); id. at 2391–92 (Alito, J., concurring) (declining to specify a level of scrutiny but stating that exacting scrutiny has "teeth").

Plaintiffs' other arguments depend on the view that AFPF substantially changed the "exacting scrutiny" standard or otherwise controls the outcome here. In AFPF, the Supreme Court struck down a California regulation that required tax-exempt charities to disclose their major donors to the state Attorney General to assist in investigating fraud. The Court held that the regulation burdened the plaintiffs' First Amendment associational rights because their donors would be chilled, noting that the state's "assurances of confidentiality" rang hollow because it had not kept the information confidential in the past. Id. at 2388. The Court acknowledged that the state's interest in investigating fraud was substantial and could satisfy exacting scrutiny. Id. at 2385–86. But, in reviewing the trial court record, it found that there was no "single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." Id. at 2386. Consequently, there was a "dramatic mismatch" between a "dragnet" regulation that required nearly 60,000 charities to disclose their donors and the state's interest in more easily investigating fraud—an interest the regulation did not even meaningfully assist. Id. at 2386, 2387. The Court explained that "a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored." Id. at 2384.

AFPF provides relatively little direct guidance here, as this case arises in the distinct context of information that contextualizes political speech before an

election. On June 7, San Francisco voters will vote for fourteen offices and eight propositions, some of which concern abstruse issues such as City law on solicitation of behested payments. Voters "have jobs, families, and other distractions." Getman, 328 F.3d at 1106. Bombarded by so many issues, voters may struggle to cast an informed and meaningful vote if they do not know who is speaking.[3] As noted above, "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names." Heller, 378 F.3d at 994. Prop F assists voters in determining who is speaking, and if that speaker has a "creative and misleading" name, who is most closely associated with that speaker. That governmental interest is far more substantial than the state's interest in AFPF of administrative ease in investigating fraud.

Further, the Court still finds that Prop F is narrowly tailored to its governmental interest. See Prop B,

[3] A considerable body of social science and legal research substantiates this. See, e.g., Michael S. Kang, Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus", 50 UCLA L. Rev. 1141, 1157 (2003) (noting that interest group support provides reliable heuristic cues to less informed voters in issue elections); Elizabeth Garrett & Daniel A. Smith, Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy, 4 Election L.J. 295, 296-99 (2005) (similar); Arthur Lupia, Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections, 88 Am. Pol. Sci. Rev. 63, 71–72 (1994) (finding, in a study of California voters, that knowledge of interest group alignment assisted voters with little knowledge of insurance reform in approximating the vote patterns of informed voters, as compared to a control group of uninformed voters without this heuristic).

440 F. Supp. 3d at 1056 ("It is hardly novel or implausible to suggest that the informational interest described above is better served by more noticeable, easier-to-read font or more obvious, difficult to ignore, and complete disclaimers."). Plaintiffs read the Supreme Court's statements in AFPF that exacting scrutiny requires tailoring to suggest that a law cannot stand if hypothetical alternatives could also inform voters. See 141 S. Ct. at 2384. They point to two. First, each voter could go down to the Ethics Commission and look up secondary contributors. TRO Mot. at 17–18. Second, the City could design a regulatory regime by which committees regularly notify the Ethics Commission of its secondary contributors so that the City can maintain a website to inform voters of those contributors. Id. at 18. But Citizens United nowhere implied that an election-related disclaimer passes exacting scrutiny only if no hypothetical alternative disclosure regime is conceivable. Moreover, Plaintiffs provide no plausible reason to think that either of their proposals would succeed at informing voters. Because "fewer people are likely to see" disclosure requirements, they are "a less effective method of conveying information" to voters than disclaimers. Majors v. Abell, 361 F.3d 349, 353 (7th Cir. 2004). And disclosure in person at the Ethics Commission or online would not provide the information contemporaneously with the speech. In short, Plaintiffs' proposals appear unlikely to achieve the governmental interest at all. Requiring a disclaimer on the advertisement achieves this interest and does so in a sufficiently tailored way.

As in Prop B, Plaintiffs provide virtually no evidence that their First Amendment rights are burdened. To challenge the constitutionality of a law, a plaintiff must show a burden. See, e.g., AFPF, 141 S. Ct. at 2381 (noting that the plaintiffs introduced evidence of "threats, harassing calls, intimidating and obscene emails, and even pornographic letters"). Plaintiffs here provide only vague supposition. They note that one of Ed Lee Dems' main donors is the committee David Chiu for Assembly 2022, even though Chiu has left the California Assembly and is now the City Attorney. Cheng Decl. ¶ 7. They argue that "the disclaimer San Francisco requires would lead voters to believe that Mr. Chiu is running for another office and improperly taking positions on City issues." TRO Mot. at 16. Yet this claim of voter confusion is entirely speculative. See Washington State Grange, 552 U.S. at 457 n.9 ("We are aware of no case in which the mere impression of association was held to place a severe burden on a group's First Amendment rights."); id. at 455 ("[W]e have no evidentiary record against which to assess their assertions that voters will be confused."). And because Plaintiffs do not make any showing that information about SPB's secondary-contributors would mislead voters, the Court has no basis to conclude that the government's informational interest is at all attenuated—particularly given that 77% of the voters enacted this rule in the first place.[4]

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[4] Plaintiffs note that the D.C. Circuit has upheld an FEC rule that was based on the agency's reasoning that an overly expansive donor disclosure regime might "mislead voters as to who

Plaintiffs also lack any concrete or specific evidence that their political donations will be chilled. The treasurer of Ed Lee Dems avers that "[t]he Club has donors who would be upset to end up on disclaimers on issues that they have no interest in, or even contrary positions on. They would withdraw their support if they knew that Ed Lee Dems supported groups making communications that triggered such on-communication disclosure." Cheng Decl. ¶ 9. David similarly declares that "[p]otential donors have expressed concern to me about the secondary disclosure rules and are more reluctant to contribute to committees where their donors need to be disclosed" and they "may not wish to have their names and contribution amounts appear on

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really supports the communications." Van Hollen v. Fed. Election Comm'n, 811 F.3d 486, 497 (D.C. Cir. 2016); see TRO Mot at 16. But out-of-circuit dicta in an administrative law case arising under the "very deferential" arbitrary-and-capricious standard is not a substitute for evidence of how a rule operates on the ground as to certain plaintiffs. Id. at 497–98. And it is notable that, although Prop F has been in effect for two years, Plaintiffs still have not produced evidence that actual San Francisco voters are confused or misled.

Plaintiffs insist that information about secondary contributors is not useful to voters because some of them may not support the speech. Of course, they have not made any showing that any secondary contributors do not support SPB's speech. But even if a secondary contributor did not have an explicit position on the issue, the identity of a secondary contributor might communicate helpful information. Where many advocacy groups have misleading names—and where voters need informational shortcuts to competently vote on eight propositions—it may be nearly as useful a heuristic for voters to know which entities or people are generally aligned with or affiliated with the speaker. Cf. Garrett & Smith, Veiled Political Actors, 4 Election L.J. at 297.

campaign advertisements." David Decl. ¶ 20. These assertions are conclusory and speculative. No concrete evidence in the record indicates that Ed Lee Dems' top donors are reluctant to donate to Ed Lee Dems because of SPB's required disclaimer, nor even that those donors have any opinion about SPB's proposed message or Prop B itself. (Without evidence, it is difficult for the Court to infer that the Building Inspection Commission is a controversial topic about which SPB's secondary contributors invariably have strong views.) Simply put, Plaintiffs have not produced "evidence suggesting . . . that [the law] actually and meaningfully deter[s] contributors."[5] Family PAC, 685 F.3d at 807.

For these reasons, Plaintiffs are not likely to succeed in their claim that the secondary-contributor requirement violates the First Amendment.[6]

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[5] Although this is beyond the scope of this as-applied challenge, there is no evidence that other committees or donors have been burdened by the requirement during the more than two years that it has been in effect—indeed, the opposite appears to be true. See Canning Decl. (dkt. 30) ¶ 2 (Acting Senior Policy Analyst for the San Francisco Ethics Commission: "To the best of my knowledge, since the voters enacted Proposition F in 2019, the Ethics Commission has not received complaints/feedback from committees that would suggest that committees other than the Yes on Prop B and San Franciscans Supporting Prop B committees had difficulty complying with Proposition F's requirements."); cf. AFPF, 141 S. Ct. at 2388 (finding that the chilling effect was "real and pervasive" because "hundreds of organizations" of different ideologies supported the challenge).

[6] Plaintiffs also appear to argue that the required disclaimer is too large in comparison to the size of their proposed advertisement. See TRO Mot. at 19-23. The Court already dealt with (and agreed with) some of these same arguments two years ago. See

B. Other Winter Factors

The "most important" Winter factor, likelihood of success on the merits, favors the City. VidAngel, 869 F.3d at 856. Plaintiffs' arguments as to the other Winter factors Largely rely on its position that it has demonstrated a likelihood of success on the merits. Because the burden on Plaintiffs is "modest" and the government has an important interest in informing voters before an election, the Court concludes that Plaintiffs will not suffer irreparable harm. See Family PAC, 685 F.3d at 807. For similar reasons, Plaintiffs have lot shown that the balancing of the equities and the public interest favors an injunction. See Winter, 555 U.S. at 20. Plaintiffs fail to demonstrate that any of the Winter factors Neigh in favor of emergency relief.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES the motion for a temporary restraining order or preliminary injunction.

Prop B, 440 F. Supp. 3d at 1056. But Plaintiffs here fail to tie these arguments to the issue to be decided in this motion—that is, "Whether the on-communication secondary donor disclosure requirements at S.F. Code § 1.161(a) are unconstitutional and should be enjoined," id. at 3. The Court continues to adhere to its view in Prop B that the disclaimer rule may not be constitutionally applied to small ads. In any case, the City has agreed not to enforce the law under those circumstances. See Steeley Decl. (dkt. 29) ¶ 5.

IT IS SO ORDERED.

Dated: June 1, 2022 /s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

Appendix D

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Gov't Code § 84501

For purposes of this article, the following definitions apply:

(a)(1) "Advertisement" means any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a

candidate or candidates for elective office or a ballot measure or ballot measures.

(2) "Advertisement" does not include any of the following:

(A) A communication from an organization, other than a political party, to its members.

(B) An electronic media communication addressed to recipients, such as email messages or text messages, from an organization to persons who have opted in or asked to receive messages from the organization. This subparagraph does not apply to a customer who has opted in to receive communications from a provider of goods or services, unless the customer has provided express approval to receive political messages from that provider of goods or services.

(C) Any communication that was solicited by the recipient, including, but not limited to, acknowledgments for contributions or information that the recipient communicated to the organization, or responses to an electronic message sent by the recipient to the same mobile number or email address.

(D) A campaign button smaller than 10 inches in diameter; a bumper sticker smaller than 60 square inches; or a small tangible promotional item, such as a pen, pin, or key chain, upon which the disclosure required cannot be conveniently printed or displayed.

(E) Wearing apparel.

(F) Sky writing.

(G) Any other type of communication, as determined by regulations of the Commission, for which inclusion of the disclosures required by Sections 84502 to 84509, inclusive, is impracticable or would severely interfere with the committee's ability to convey the intended message due to the nature of the technology used to make the communication.

(b) "Cumulative contributions" means the cumulative amount of contributions received by a committee beginning 12 months before the date of the expenditure and ending seven days before the time the advertisement is sent to the printer or broadcaster.

(c)(1) "Top contributors" means the persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of fifty thousand dollars ($50,000) or more.

(2) A tie between two or more contributors qualifying as top contributors shall be resolved by determining the contributor who made the most recent contribution to the committee, in which case the most recent contributor shall be listed before any other contributor of the same amount.

(3) If a committee primarily formed to support or oppose a state candidate or ballot measure contributes funds to another committee primarily formed to support or oppose the same state candidate or ballot measure and the funds used for the contribution were earmarked to support or oppose that candidate or ballot measure, the committee receiving the earmarked contribution shall disclose the contributors who

earmarked their funds as the top contributor or contributors on the advertisement if the definition of top contributor provided for in paragraph (1) is otherwise met. If the committee receiving the earmarked contribution contributes any portion of the contribution to another committee primarily formed to support or oppose the specifically identified ballot measure or candidate, that committee shall disclose the true source of the contribution to the new committee receiving the earmarked funds. The new committee shall disclose the contributor on the new committee's advertisements if the definition of top contributor provided for in paragraph (1) is otherwise met.

(A) The primarily formed committee making the earmarked contribution shall provide the primarily formed committee receiving the earmarked contribution with the name, address, occupation, and employer, if any, or principal place of business, if self-employed, of the contributor or contributors who earmarked their funds and the amount of the earmarked contribution from each contributor at the time the contribution is made. If the committee making the contribution received earmarked contributions that exceed the amount contributed or received contributions that were not earmarked, the committee making the contribution shall use a reasonable accounting method to determine which top contributors to identify pursuant to this subparagraph, but in no case shall the same contribution be disclosed more than one time to avoid disclosure of additional contributors who earmarked their funds.

(B) The committee receiving the earmarked contribution may rely on the information provided pursuant to subparagraph (A) for purposes of complying with the disclosure required by Section 84503 and shall be considered in compliance with Section 84503 if the information provided pursuant to subparagraph (A) is disclosed as otherwise required.

(C) For purposes of this paragraph, funds are considered "earmarked" if any of the circumstances described in subdivision (b) of Section 85704 apply.

(4) If an advertisement paid for by a committee supports or opposes a candidate, the determination of top contributors pursuant to paragraphs (1) and (2) shall not include any nonprofit organization exempt from federal income taxation pursuant to Section 501(c)(3) of the United States Internal Revenue Code or any person who has prohibited in writing the use of that person's contributions to support or oppose candidates if the committee does not use such contributions to support or oppose candidates.

Cal. Gov't Code § 84502

(a) (1) Any advertisement not described in subdivision (b) of Section 84504.3 that is paid for by a committee pursuant to subdivision (a) of Section 82013, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the words "Ad paid for by" followed by the name of the committee as

it appears on the most recent Statement of Organization filed pursuant to Section 84101.

(2) Any advertisement not described in subdivision (b) of Section 84504.3 that is paid for by a committee pursuant to subdivision (a) of Section 82013 that is a political party committee or a candidate controlled committee established for an elective office of the controlling candidate shall include the words "Ad paid for by" followed by the name of the committee as it appears on the most recent Statement of Organization filed pursuant to Section 84101 if the advertisement is any of the following:

(A) Paid for by an independent expenditure.

(B) An advertisement supporting or opposing a ballot measure.

(C) A radio or television advertisement.

(D) A text message advertisement that is required to include a disclosure pursuant to Section 84504.7.

(b) Any advertisement not described in subdivision (b) of Section 84504.3 that is paid for by a committee pursuant to subdivision (b) or (c) of Section 82013 shall include the words "Ad paid for by" followed by the name that the filer is required to use on campaign statements pursuant to subdivision (o) of Section 84211.

(c) Notwithstanding subdivisions (a) and (b), if an advertisement is a printed letter, internet website, or email message, the text described in subdivisions (a)

and (b) may include the words "Paid for by" instead of "Ad paid for by."

(d) Notwithstanding subdivisions (a) and (b), if an advertisement is a text message, the text described in subdivisions (a) and (b) may include the words "Paid for by" or "With," instead of "Ad paid for by."

[Subdivision (e) added 2022, effective Jan. 1, 2023]

(e) Notwithstanding subdivision (a), if an advertisement is a video advertisement that is disseminated over the internet, is a print advertisement that is larger than those designed to be individually distributed subject to subdivision (b) of Section 84504.2, is an electronic media advertisement subject to subdivision (b) of Section 84504.3, or is a text message advertisement subject to Section 84504.7, then the text for the name of the committee may be shortened by either of the following:

(1) Displaying only enough of the first part of the committee name to uniquely identify the committee. If the committee is a sponsored committee, then the name displayed must include the portion of the committee name that identifies the sponsor or sponsors, unless all of the sponsors are disclosed on the ad as top contributors as required by Section 84503. For example, if ACME Corporation is not listed as a top contributor, then a committee named "Yes on 99, Californians for a Better Tomorrow, a coalition of X, Y, and Z. Sponsored by ACME Corporation" may be disclosed as only "Yes on 99, Californians for a Better Tomorrow. Sponsored by ACME Corporation."

(2) If the advertisement is paid for by a committee that has top contributors and is subject to Section 84503, then the committee name may be replaced by displaying the words "Committee ID" followed by the committee's identification number.

Cal. Gov't Code § 84503 (2021)

(a) Any advertisement not described in subdivision (b) of Section 84504.3 that is paid for by a committee pursuant to subdivision (a) of Section 82013, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the words "committee major funding from" followed by the names of the top contributors to the committee paying for the advertisement. If fewer than three contributors qualify as top contributors, only those contributors that qualify shall be disclosed pursuant to this section. If there are no contributors that qualify as top contributors, this disclosure is not required.

(b) The disclosure of a top contributor pursuant to this section need not include terms such as "incorporated," "committee," "political action committee," or "corporation," or abbreviations of these terms, unless the term is part of the contributor's name in common usage or parlance.

(c) If this article requires the disclosure of the name of a top contributor that is a committee pursuant to subdivision (a) of Section 82013 and is a sponsored

committee pursuant to Section 82048.7 with a single sponsor, only the name of the single sponsoring organization shall be disclosed.

(d) This section does not apply to a committee as defined by subdivision (b) or (c) of Section 82013.

Cal. Gov't Code § 84503 (2022)

[Effective Jan. 1, 2023]

(a) Any advertisement not described in subdivision (b) of Section 84504.3 that is paid for by a committee pursuant to subdivision (a) of Section 82013, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the words "Ad Committee's Top Funders" unless only one contributor qualifies as a top contributor, in which case the advertisement shall include the words "Ad Committee's Top Funder." These words shall be followed by the names of the top contributors to the committee paying for the advertisement. If fewer than three contributors qualify as top contributors, only those contributors that qualify shall be disclosed pursuant to this section. If there are no contributors that qualify as top contributors, this disclosure is not required.

(b) The disclosure of a top contributor pursuant to this section shall not include terms such as "incorporated," "committee," "political action committee," or "corporation," or abbreviations of these terms, unless

the term is part of the contributor's name in common usage or parlance.

(c) If this article requires the disclosure of the name of a top contributor that is a committee pursuant to subdivision (a) of Section 82013 and is a sponsored committee pursuant to Section 82048.7 with a single sponsor, only the name of the single sponsoring organization shall be disclosed.

(d) This section does not apply to a committee as defined by subdivision (b) or (c) of Section 82013.

(e) Notwithstanding subdivision (a), if an advertisement is a printed letter, internet website, email message, or text message, the text described in subdivision (a) may include the words "Committee Top Funders" or "Committee Top Funder" instead of "Ad Committee's Top Funders" or "Ad Committee's Top Funder."

Cal. Gov't Code § 84504.1 (2021)

(a) An advertisement paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, that is disseminated as a video, including advertisements on television and videos disseminated over the Internet, shall include the disclosures required by Sections 84502 and 84503 at the beginning or end of the advertisement.

(b) The disclosure required by subdivision (a) shall be written and displayed for at least five seconds of a broadcast of 30 seconds or less or for at least 10 seconds of a broadcast that lasts longer than 30 seconds.

(1) The written disclosure required by subdivision (a) shall appear on a solid black background on the entire bottom one-third of the television or video display screen, or bottom one-fourth of the screen if the committee does not have or is otherwise not required to list top contributors, and shall be in a contrasting color in Arial equivalent type, and the type size for the smallest letters in the written disclosure shall be 4 percent of the height of the television or video display screen. The top contributors, if any, shall each be disclosed on a separate horizontal line separate from any other text, in descending order, beginning with the top contributor who made the largest cumulative contributions on the first line. All disclosure text shall be centered horizontally in the disclosure area. If there are any top contributors, the written disclosures shall be underlined in a manner clearly visible to the average viewer, except for the names of the top contributors, if any.

(2) The name of the top contributor shall not have its type condensed or have the spacing between characters reduced to be narrower than a normal non-condensed Arial equivalent type, unless doing so is necessary to keep the name of the top contributor from exceeding the width of the screen.

(c) An advertisement that is an independent expenditure supporting or opposing a candidate shall include the appropriate statement from Section 84506.5 in the solid black background described in paragraph (1) of subdivision (b) below all other text required to appear in that area in a contrasting color and in Arial equivalent type no less than 2.5 percent of the height of the television or video display screen. If including this statement causes the disclosures to exceed one-third of the television or video display screen, then it may instead be printed immediately above the background with sufficient contrast that is easily readable by the average viewer.

Cal. Gov't Code § 84504.1 (2022)

[Effective Jan. 1, 2023]

(a) An advertisement paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, that is disseminated as a video, including advertisements on television and videos disseminated over the Internet, shall include the disclosures required by Sections 84502 and 84503 at the beginning or end of the advertisement.

(b) The disclosure required by subdivision (a) shall be written and displayed for at least five seconds of a broadcast of 30 seconds or less or for at least 10 seconds of a broadcast that lasts longer than 30 seconds.

(1) The written disclosure required by subdivision (a) shall appear on a solid black background on the entire bottom one-third of the television or video display screen, or bottom one-fourth of the screen if the committee does not have or is otherwise not required to list top contributors, and shall be in a contrasting color in standard Arial Regular type, and the type size for capital letters in the written disclosure shall be 4 percent of the height or width of the television or video display advertisement, whichever is less.

(2) The disclosures required by Section 84502 shall be white. The disclosures required by Section 84503, if any, shall be yellow, such as HTML hex value #FFFF00, and shall be separated from the disclosures required by Section 84503 by a blank horizontal space at least 2 percent of the height of the television or video display screen. The top contributors, if any, shall each be disclosed on a separate horizontal line separate from any other text, in descending order, beginning with the top contributor who made the largest cumulative contributions on the first line. All disclosure text shall be centered horizontally in the disclosure area. If there are any top contributors, the written disclosures shall be underlined in a manner clearly visible to the average viewer, except for the names of the top contributors, if any.

(3) The names of the top contributors shall not have their type condensed or have the spacing between characters reduced to be narrower than a normal non-condensed standard Arial Regular type.

(4) If the name of one or more top contributor exceeds the width of the screen and is required to wrap onto a second line, then the names of contributors shall be clearly marked, using a highly visible symbol or minimum vertical separation defined by the Commission, to indicate where one top contributor name ends and the next begins.

(c) An advertisement that is an independent expenditure supporting or opposing a candidate shall include the appropriate statement from Section 84506.5 printed immediately above the background with sufficient contrast that is easily readable by the average viewer.

(d) Any text or image not required in this section shall not appear in the disclosure area, except as provided in Section 84504.8 and as otherwise authorized or required by applicable law.

Cal. Gov't Code § 84504.2 (2021)

(a) A print advertisement paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the disclosures required by Sections 84502, 84503, and 84506.5, displayed as follows:

(1) The disclosure area shall have a solid white background and shall be in a printed or drawn box on the

bottom of at least one page that is set apart from any other printed matter. All text in the disclosure area shall be in contrasting color and centered horizontally in the disclosure area.

(2) The text shall be in an Arial equivalent type with a type size of at least 10-point for printed advertisements designed to be individually distributed, including, but not limited to, mailers, flyers, and door hangers.

(3) The top of the disclosure area shall include the disclosure required by Sections 84502 and 84503. The text of the disclosure shall be underlined if there are any top contributors.

(4) The top contributors, if any, shall each be disclosed on a separate horizontal line separate from any other text, in descending order, beginning with the top contributor who made the largest cumulative contributions on the first line. The name of each of the top contributors shall be centered horizontally in the disclosure area and shall not be underlined. The names of the top contributors shall not be printed in a type that is condensed to be narrower than a normal non-condensed Arial equivalent type.

(5) A committee subject to Section 84506.5 shall include the disclosure required by Section 84506.5, which shall be underlined and on a separate line below any of the top contributors.

(6) A committee subject to Section 84223 shall next include the text "Funding Details At [insert Commission Internet Web site]," which shall be underlined and printed on a line separate from any other text.

(b) Notwithstanding paragraphs (2) and (4) of subdivision (a), the disclosures required by Sections 84502, 84503, and 84506.5 on a printed advertisement that is larger than those designed to be individually distributed, including, but not limited to, yard signs or billboards, shall be in Arial equivalent type with a total height of at least 5 percent of the height of the advertisement, and printed on a solid background with sufficient contrast that is easily readable by the average viewer. The text may be adjusted so it does not appear on separate horizontal lines, with the top contributors separated by a comma.

(c) Notwithstanding the definition of "top contributors" in paragraph (1) of subdivision (c) of Section 84501, newspaper, magazine, or other public print advertisements that are 20 square inches or less shall be required to disclose only the single top contributor of fifty thousand dollars ($50,000) or more.

Cal. Gov't Code § 84504.2 (2022)

[Effective Jan. 1, 2023]

(a) A print advertisement designed to be individually distributed, including, but not limited to, a mailer, flyer,

or door hanger, that is paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the disclosures required by Sections 84502, 84503, and 84506.5, displayed as follows:

(1) The disclosure area shall have a solid white background and shall be in a printed or drawn box on the bottom of at least one page that is set apart from any other printed matter. All text in the disclosure area shall be in contrasting color and centered horizontally in the disclosure area.

(2) The text shall be in standard Arial Regular type with a type size of at least 10-point.

(3) The top of the disclosure area shall include the disclosure required by Sections 84502 and 84503. The text of the disclosure shall be underlined if there are any top contributors.

(4) The top contributors, if any, shall each be disclosed on a separate horizontal line separate from any other text, in descending order, beginning with the top contributor who made the largest cumulative contributions on the first line. The name of each of the top contributors shall be centered horizontally in the disclosure area and shall not be underlined. The names of the top contributors shall not be printed in a type that is condensed to be narrower than a normal non-condensed standard Arial Regular type.

(5) An advertisement supporting or opposing a candidate that is paid for by an independent expenditure shall include the disclosure required by Section 84506.5, which shall be underlined and on a separate line below any of the top contributors.

(6) A committee subject to Section 84223 shall next include the text "Funding Details At [insert link to Secretary of State internet website page with top 10 contributor lists]," which shall be underlined and printed on a line separate from any other text at the bottom of the disclosure area.

(7) Notwithstanding the definition of "top contributors" in paragraph (1) of subdivision (c) of Section 84501, newspaper, magazine, or other public print advertisements that are 20 square inches or less shall be required to disclose only the largest top contributor of fifty thousand dollars ($50,000) or more.

(b) A print advertisement that is larger than those designed to be individually distributed, including, but not limited to, a yard sign or billboard, paid for by a committee, other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, shall include the disclosures pursuant to Section 84502, 84503, and 84506.5 in a printed or drawn box with a solid white background on the bottom of the advertisement that is set apart from any other printed matter. Each line of the written disclosures shall be in a contrasting color in standard Arial Regular type no less than 5 percent of the height of the advertisement, and

shall not be condensed to be narrower than a normal non-condensed standard Arial Regular type. The text may be adjusted so it does not appear on separate horizontal lines, with the top contributors separated by a comma.

(c) Any text or image not required in this section shall not appear in the disclosure area, except as provided in Section 84504.8 and as otherwise authorized or provided by applicable law.

Cal. Gov't Code § 84504.8

If a disclosure statement required by a local ordinance is substantially similar to a disclosure statement required pursuant to this article, the two disclosure statements may be merged into a single statement.

Cal. Gov't Code § 84505 (2021)

(a) In addition to the requirements of Sections 84502, 84503, and 84506.5, the committee placing the advertisement or persons acting in concert with that committee shall be prohibited from creating or using a noncandidate-controlled committee or a nonsponsored committee to avoid, or that results in the avoidance of, the disclosure of any individual, industry, business entity, controlled committee, or sponsored committee as a top contributor.

(b) Written disclosures required by Sections 84503 and 84506.5 shall not appear in all capital letters, except that capital letters shall be permitted for the beginning of a sentence, the beginning of a proper name or location, or as otherwise required by conventions of the English language.

Cal. Gov't Code § 84505 (2022)

[Effective Jan. 1, 2023]

(a) In addition to the requirements of Sections 84502, 84503, and 84506.5, the committee placing the advertisement or persons acting in concert with that committee shall be prohibited from creating or using a noncandidate-controlled committee or a nonsponsored committee to avoid, or that results in the avoidance of, the disclosure of any individual, industry, business entity, controlled committee, or sponsored committee as a top contributor.

(b) Written disclosures required by Sections 84503 and 84506.5 shall not appear in all capital letters, except that capital letters shall be permitted for the beginning of a sentence, the beginning of a proper name or location, part of the contributor's trademark name or part of its name in common usage or parlance, or as otherwise required by conventions of the English language.

Cal. Gov't Code § 84510

(a)(1) In addition to the remedies provided for in Chapter 11 (commencing with Section 91000), a person who violates Section 84503 or 84506.5 is liable in a civil or administrative action brought by the Commission or any person for a fine up to three times the cost of the advertisement, including placement costs.

(2) Notwithstanding paragraph (1), a person who intentionally violates a provision of Sections 84504 to 84504.3, inclusive, or Section 84504.5 or 84504.6, for the purpose of avoiding disclosure is liable in a civil or administrative action brought by the Commission or any person for a fine up to three times the cost of the advertisement, including placement costs.

(b) The remedies provided in subdivision (a) shall also apply to any person who purposely causes any other person to violate any of the sections described in paragraph (1) or (2) of subdivision (a) or who aids and abets any other person in a violation.

(c) If a judgment is entered against the defendant or defendants in an action brought under this section, the plaintiff shall receive 50 percent of the amount recovered. The remaining 50 percent shall be deposited in the General Fund of the state. In an action brought by a local civil prosecutor, 50 percent shall be deposited in the account of the agency bringing the action and 50 percent shall be paid to the General Fund of the state.

S.F. Charter § 6.102(10)

The City Attorney shall:

(10) During his or her tenure, not contribute to, solicit contributions to, publicly endorse or urge the endorsement of or otherwise participate in a campaign for a candidate for City elective office, other than himself or herself or of a City ballot measure or be an officer, director or employee of or hold a policy-making position in an organization that makes political endorsements regarding candidates for City elective office or City ballot measures.

S.F. Charter, Appendix C § C3.699-13

The commission shall conduct investigations in accordance with this subdivision of alleged violations of this charter and City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics.

(a) Investigations.

If the commission, upon the receipt of a sworn compliant of any person or its own initiative, has reason to believe that a violation of this charter or City ordinances relating to campaign finance, lobbying, conflicts of interest or governmental ethics has occurred, the commission immediately shall forward the complaint or information in its possession regarding the alleged violation to the district attorney and City attorney. Within ten working days, after receipt of the complaint

or information, the district attorney and City attorney shall inform the commission in writing regarding whether the district attorney or City attorney has initiated or intends to pursue an investigation of the matter

If the commission, upon the sworn complaint or on its own initiative, determines that there is sufficient cause to conduct an investigation, it shall investigate alleged violations of this charter or City ordinances relating to campaign finance, lobbying, conflicts of interest and governmental ethics. A complaint filed with the commission shall be investigated only if it identifies the specific alleged violations which form the basis for the complaint and the commission determines that the complaint contains sufficient facts to warrant an investigation.

Within 14 days after receiving notification that neither the district attorney nor City attorney intends to pursue an investigation, the commission shall notify in writing the person who made the complaint of the action, if any, the commission has taken or plans to take on the complaint, together with the reasons for such action or non-action. If no decision has been made within 14 days, the person who made the complaint shall be notified of the reasons for the delay and shall subsequently receive notification as provided above.

The investigation shall be conducted in a confidential manner. Records of any investigation shall be considered confidential information to the extent permitted by state law. Any member or employee of the

commission or other person who, prior to a determination concerning probable cause, discloses information about any preliminary investigation, except as necessary to conduct the investigation, shall be deemed guilty of official misconduct. The unauthorized release of confidential information shall be sufficient grounds for the termination of the employee or removal of the commissioner responsible for such release.

(b) Findings of Probable Cause.

No finding of probable cause to believe that a provision of this charter or City ordinances relating to campaign finance, lobbying, conflicts of interest or governmental ethics has been violated shall be made by the commission unless, at least 21 days prior to the commission's consideration of the alleged violation, the person alleged to have committed the violation is notified of the alleged violation by service of process or registered mail with return receipt requested, is provided with a summary of the evidence, and is informed of his or her right to be present in person and to be represented by counsel at any proceeding of the commission held for the purpose of considering whether probable cause exists for believing the person committed the violation. Notice to the alleged violator shall be deemed made on the date of service, the date the registered mail receipt is signed, or, if the registered mail receipt is not signed, the date returned by the post office. A proceeding held for the purpose of considering probable cause shall be private to the extent permitted by state law unless the alleged violator files with the commission a written request that the proceeding be public.

(c) Administrative Orders and Penalties.

(i) When the commission determines there is probable cause for believing a provision of this charter or City ordinance has been violated, it may hold a public hearing to determine if such a violation has occurred. When the commission determines on the basis of substantial evidence presented at the hearing that a violation has occurred, it shall issue an order which may require the violator to:

(1) Cease and desist the violation;

(2) File any reports, statements or other documents or information required by law; and/or

(3) Pay a monetary penalty to the general fund of the City of up to five thousand dollars ($5,000) for each violation or three times the amount which the person failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater. Penalties that are assessed but uncollected after 60 days shall be referred to the bureau of delinquent revenues for collection.

In addition, with respect to City officers other than those identified in Section 8.107 of this charter, when the commission determines on the basis of substantial evidence presented at the hearing that a violation has occurred, the commission may recommend to the appointing officer that the officer be removed from office.

When the commission determines that no violation has occurred, it shall publish a declaration so stating.

(d) In addition to any other penalty that may be imposed by law, any person who violates any provision of this charter or of a City ordinance relating to campaign finance, lobbying, conflicts of interest or governmental ethics, or who causes any other person to violate any such provision, or who aids and abets any other person in such violation, shall be liable under the provisions of this section.

S.F. Campaign & Governmental Conduct Code § 1.112

(a) FILING ELECTRONIC CAMPAIGN STATEMENTS.

(1) Filing Electronic Copies of Campaign Statements Required by State Law. Whenever any committee that meets the requirements of Subsection (b) of this Section is required by the California Political Reform Act, California Government Code Section 81000 *et seq.*, to file a campaign disclosure statement or report with the Ethics Commission, the committee shall file the statement or report in an electronic format with the Ethics Commission, provided the Ethics Commission has prescribed the format at least 60 days before the statement or report is due to be filed.

(2) Filing Electronic Copies of Campaign Statements Required by Local Law. Whenever any committee is required to file a campaign disclosure statement or report with the Ethics Commission under this Chapter, the committee shall file the statement or report in an

electronic format, provided the Ethics Commission has prescribed the format at least 60 days before the statement or report is due to be filed.

(3) Continuous Filing of Electronic Statements. Once a committee is subject to the electronic filing requirements imposed by this Section, the committee shall remain subject to the electronic filing requirements, regardless of the amount of contributions received or expenditures made during each reporting period, until the committee terminates pursuant to this Chapter and the California Political Reform Act, California Government Code Section 81000 et seq.

(4) Disclosure of Expenditure Dates. All electronic statements filed under this Section shall include the date any expenditure required to be reported on the statement was incurred, provided that the Ethics Commission's forms accommodate the reporting of such dates.

(b) COMMITTEES SUBJECT TO ELECTRONIC FILING REQUIREMENTS.

(1) A committee must file electronic copies of statements and reports if it receives contributions or makes expenditures that total $1,000 or more in a calendar year and is:

(A) a committee controlled by a candidate for City elective office;

(B) a committee primarily formed to support or oppose a local measure or a candidate for City elective office; or

(C) a general purpose recipient, independent expenditure or major donor committee that qualifies, under state law, as a county general purpose committee in the City and County of San Francisco; or

(D) a committee primarily formed to support or oppose a person seeking membership on a San Francisco county central committee, including a committee controlled by the person seeking membership on a San Francisco county central committee.

(2) The Ethics Commission may require additional committees not listed in this Section to file electronically through regulations adopted at least 60 days before the statement or report is due to be filed.

(c) VOLUNTARY ELECTRONIC FILING. Any committee not required to file electronic statements by this Section may voluntarily opt to file electronic statements by submitting written notice to the Ethics Commission. A committee that opts to file electronic statements shall be subject to the requirements of this Section.

S.F. Campaign & Governmental Conduct Code § 1.161 (2021)

(a) DISCLAIMERS. In addition to complying with the disclaimer requirements set forth in Chapter 4 of the California Political Reform Act, California Government Code sections 84100 *et seq.*, and its enabling regulations, all committees making expenditures which

support or oppose any candidate for City elective office or any City measure shall also comply with the following additional requirements:

(1) TOP THREE CONTRIBUTORS. The disclaimer requirements for primarily formed independent expenditure committees and primarily formed ballot measure committees set forth in the Political Reform Act with respect to a committee's top three major contributors shall apply to contributors of $5,000 or more. Such disclaimers shall include both the name of and the dollar amount contributed by each of the top three major contributors of $5,000 or more to such committees. 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. The Ethics Commission may adjust this monetary threshold to reflect any increases or decreases in the Consumer Price Index. Such adjustments shall be rounded off to the nearest five thousand dollars.

(2) WEBSITE REFERRAL. Each disclaimer required by the Political Reform Act or its enabling regulations and by this Section 1.161 shall be followed in the same required format, size, and speed by the following phrase: "Financial disclosures are available at sfethics.org." A substantially similar statement that specifies the web site may be used as an alternative in audio communications.

(3) MASS MAILINGS AND SMALLER WRITTEN ADVERTISEMENTS. Any disclaimer required by the Political Reform Act and by this section on a mass mailing, door hanger, flyer, poster, oversized campaign button or bumper sticker, or print advertisement shall be printed in at least 14-point, bold font.

(4) CANDIDATE ADVERTISEMENTS. Advertisements by candidate committees shall include the following disclaimer statements: "Paid for by _____ (insert the name of the candidate committee)." and "Financial disclosures are available at sfethics.org." Except as provided in subsections (a)(3) and (a)(5), the statements' format, size and speed shall comply with the disclaimer requirements for independent expenditures for or against a candidate set forth in the Political Reform Act and its enabling regulations.

(5) AUDIO AND VIDEO ADVERTISEMENTS. For audio advertisements, the disclaimers required by this Section 1.161 shall be spoken at the beginning of such advertisements, except that such disclaimers do not need to disclose the dollar amounts of contributions as required by subsection (a)(1). For video advertisements, the disclaimers required by this Section 1.161 shall be spoken at the beginning of such advertisements, except that such disclaimers do not need to disclose the dollar amounts of contributions as required by subsection (a)(1).

(b) FILING REQUIREMENTS.

(1) INDEPENDENT EXPENDITURE ADVERTISEMENTS. Committees required by state law to file late

independent expenditure reports disclosing expenditures that support or oppose a candidate for City elective office shall also file with the Ethics Commission on the same date a copy of the associated advertisement(s), an itemized disclosure statement with the Ethics Commission for that advertisement(s), and

(A) if the advertisement is a telephone call, a copy of the script and, if the communication is recorded, the recording shall also be provided;

(B) if the advertisement is audio or video, a copy of the script and an audio or video file shall be provided;

(C) if the advertisement is an electronic or digital advertisement, a copy of the advertisement as distributed shall be provided; or

(D) if the advertisement is a door hanger, flyer, pamphlet, poster, or print advertisement, a copy of the advertisement as distributed shall be provided.

(2) INDEPENDENT EXPENDITURE MASS MAILINGS.

(A) Each committee making independent expenditures that pays for a mass mailing shall, within five working days after the date of the mailing, file a copy of the mailing and an itemized disclosure statement with the Ethics Commission for that mailing.

(B) Each committee making independent expenditures that pays for a mass mailing shall file a copy of the mailing and the itemized disclosure statement required by subsection (b)(2) within 48 hours of the date

of the mailing if the date of the mailing occurs within the final 16 days before the election.

(C) Exception. Committees making independent expenditures to support or oppose a candidate for City elective office are not subject to the filing requirements imposed by this subsection (b)(2) during the time period that they are required by state law to file late independent expenditure reports and if they also file the itemized disclosure statement required by subsection (b)(1).

(3) CANDIDATE MASS MAILINGS.

(A) Each candidate committee that pays for a mass mailing shall, within five working days after the date of the mailing, file a copy of the mailing and an itemized disclosure statement with the Ethics Commission for that mailing.

(B) Each candidate committee that pays for a mass mailing shall file a copy of the mailing and the itemized disclosure statement required by subsection (b)(3) within 48 hours of the date of the mailing if the date of the mailing occurs within the final 16 days before the election.

(3) The Ethics Commission shall specify the method for filing copies of advertisements and mass mailings.

S.F. Campaign & Governmental Conduct Code § 1.161 (2023)

[Effective Aug. 28, 2023]

(a) DISCLAIMERS. In addition to complying with the disclaimer requirements set forth in Chapter 4 of the California Political Reform Act, California Government Code sections 84100 et seq., and its enabling regulations, all committees making expenditures which support or oppose any candidate for City elective office or any City measure shall also comply with the following additional requirements:

(1) TOP THREE CONTRIBUTORS. The disclaimer requirements for primarily formed independent expenditure committees and primarily formed ballot measure committees set forth in the Political Reform Act with respect to a committee's top three major contributors shall apply to contributors of $5,000 or more. Such disclaimers shall include both the name of and the dollar amount contributed by each of the top three major contributors of $5,000 or more to such committees. 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, except as set forth in subsections (a)(1)(A)-(B) below. The Ethics Commission may adjust this monetary threshold to reflect any increases or decreases in the Consumer Price Index. Such adjustments shall be rounded off to the nearest five thousand dollars.

(A) Exception—small print advertisements. The requirement in subsection (a)(1) to disclose the top two major contributors of $5,000 or more to committees that are major contributors shall not apply to a print advertisement that is 25 square inches or smaller.

(B) Exception—short audio and video advertisements. The requirement in subsection (a)(1) to disclose the top two major contributors of $5,000 or more to committees that are major contributors shall not apply to a spoken disclaimer in an audio or video advertisement that is 30 seconds or less.

(2) WEBSITE REFERRAL. Each disclaimer required by the Political Reform Act or its enabling regulations and by this Section 1.161 shall be followed in the same required format, size, and speed by the following phrase: "Financial disclosures are available at sfethics.org." A substantially similar statement that specifies the web site may be used as an alternative in audio communications.

(3) MASS MAILINGS AND SMALLER WRITTEN ADVERTISEMENTS. Any disclaimer required by the Political Reform Act and by this section on a mass mailing, door hanger, flyer, poster, oversized campaign button or bumper sticker, or print advertisement shall be printed in at least 14-point, bold font.

(4) CANDIDATE ADVERTISEMENTS. Advertisements by candidate committees shall include the following disclaimer statements: "Paid for by _____ (insert the name of the candidate committee)." and

"Financial disclosures are available at sfethics.org." Except as provided in subsections (a)(3) and (a)(5), the statements' format, size, and speed shall comply with the disclaimer requirements for independent expenditures for or against a candidate set forth in the Political Reform Act and its enabling regulations.

(5) AUDIO AND VIDEO ADVERTISEMENTS. For audio advertisements, the disclaimers required by this Section 1.161 shall be spoken at the beginning of such advertisements, except that such disclaimers do not need to disclose the dollar amounts of contributions as required by subsection (a)(1). For video advertisements, the disclaimers required by this Section 1.161 shall be spoken at the beginning of such advertisements, except that such disclaimers do not need to disclose the dollar amounts of contributions as required by subsection (a)(1).

(b) FILING REQUIREMENTS.

(1) INDEPENDENT EXPENDITURE ADVERTISEMENTS. Committees required by state law to file late independent expenditure reports disclosing expenditures that support or oppose a candidate for City elective office shall also file with the Ethics Commission on the same date a copy of the associated advertisement(s), an itemized disclosure statement with the Ethics Commission for that advertisement(s), and

(A) if the advertisement is a telephone call, a copy of the script and, if the communication is recorded, the recording shall also be provided;

(B) if the advertisement is audio or video, a copy of the script and an audio or video file shall be provided;

(C) if the advertisement is an electronic or digital advertisement, a copy of the advertisement as distributed shall be provided; or

(D) if the advertisement is a door hanger, flyer, pamphlet, poster, or print advertisement, a copy of the advertisement as distributed shall be provided.

(2) INDEPENDENT EXPENDITURE MASS MAILINGS.

(A) Each committee making independent expenditures that pays for a mass mailing shall, within five working days after the date of the mailing, file a copy of the mailing and an itemized disclosure statement with the Ethics Commission for that mailing.

(B) Each committee making independent expenditures that pays for a mass mailing shall file a copy of the mailing and the itemized disclosure statement required by subsection (b)(2) within 48 hours of the date of the mailing if the date of the mailing occurs within the final 16 days before the election.

(C) Exception. Committees making independent expenditures to support or oppose a candidate for City elective office are not subject to the filing requirements imposed by this subsection (b)(2) during the time period that they are required by state law to file late independent expenditure reports and if they

also file the itemized disclosure statement required by subsection (b)(1).

(3) CANDIDATE MASS MAILINGS.

(A) Each candidate committee that pays for a mass mailing shall, within five working days after the date of the mailing, file a copy of the mailing and an itemized disclosure statement with the Ethics Commission for that mailing.

(B) Each candidate committee that pays for a mass mailing shall file a copy of the mailing and the itemized disclosure statement required by subsection (b)(3) within 48 hours of the date of the mailing if the date of the mailing occurs within the final 16 days before the election.

(4) The Ethics Commission shall specify the method for filing copies of advertisements and mass mailings.

S.F. Campaign & Governmental Conduct Code § 1.162

(a) DISCLAIMERS.

(1) Every electioneering communication for which a statement is filed pursuant to subsection (b) shall include the following disclaimer: "Paid for by _____ (insert the name of the person who paid for the communication)." and "Financial disclosures are available at sfethics.org."

(2) Any disclaimer required by this Section 1.162 shall be included in or on an electioneering communication in a size, speed, or format that complies with the disclaimer requirements for independent expenditures supporting or opposing candidates set forth in the Political Reform Act and its enabling regulations.

(3) Notwithstanding subsection (a)(2), any disclaimer required by this Section 1.162

(A) to appear on a mass mailing, door hanger, flyer, poster, oversized campaign button or bumper sticker, or print advertisement, shall be printed in at least 14-point font;

(B) to be included in an audio advertisement, shall be spoken at the beginning of such advertisements; or

(C) to be included in a video advertisement, shall be spoken at the beginning of such advertisements.

(b) REPORTING OBLIGATIONS.

(1) Every person who makes payments for electioneering communications in an aggregate amount of $1,000 per candidate during any calendar year shall, within 24 hours of each distribution, file a disclosure statement with the Ethics Commission. For the purposes of this subsection, payments for a communication that refers only to one candidate shall be attributed entirely to that candidate. Payments for a communication that refers to more than one candidate, or also refers to one or more ballot measures, shall be apportioned among each candidate and measure

according to the relative share of the communication dedicated to that candidate or measure.

(2) Each disclosure statement required to be filed under this Section shall contain the following information for each communication:

(A) the full name, street address, city, state and zip code of the person making payments for electioneering communications;

(B) the name of any individual sharing or exercising direction and control over the person making payments for electioneering communications;

(C) the distribution date of the electioneering communication, the name(s) and office(s) of the candidate(s) for City elective office or City elective officer(s) referred to in the communication, the payments for the communication attributable to each such candidate or officer, a brief description of the consideration for which the payments were made, whether the communication supports, opposes, or is neutral with respect to each such candidate or officer, and the total amount of reportable payments made by the person for electioneering communications referencing each such candidate or officer during the calendar year;

(D) for any payments of $100 or more that the person has received from another person, which were used for making electioneering communications, the date of the payment's receipt, the name, street address, city, state, and zip code of the person who made such payment, the occupation and employer of the person who made

such payment, if any, or, if the person is self-employed, the name of the person's business, and the cumulative amount of payments received from that person during the calendar year which were used for making electioneering communications;

(E) a legible copy of the electioneering communication, including any electioneering communication distributed electronically, and

(i) if the communication is a telephone call, a copy of the script and if the communication is recorded, the recording shall be provided; or

(ii) if the communication is audio or video, a copy of the script and an audio or video file shall be provided.

(F) any other information required by the Ethics Commission consistent with the purposes of this Section.

(3) The filer shall verify, under penalty of perjury, the accuracy and completeness of the information provided in the disclosure statement, and shall retain for a period of five years all books, papers and documents necessary to substantiate the statements required by this Section.

(4) The Ethics Commission shall determine the method for filing the disclosure statement and the copy of the communication, which may include electronic filing.

(c) REGULATIONS. The Ethics Commission may issue regulations implementing this Section.

S.F. Campaign & Governmental Conduct Code § 1.168

(a) ENFORCEMENT—GENERAL PROVISIONS. Any person who believes that a violation of this Chapter 1 has occurred may file a complaint with the Ethics Commission, City Attorney, or District Attorney. The Ethics Commission shall investigate such complaints pursuant to Charter Section C3.699-13 and its implementing regulations. The City Attorney and District Attorney shall investigate, and shall have such investigative powers as are necessary for the performance of their duties under this Chapter.

(b) ENFORCEMENT—CIVIL ACTIONS. The City Attorney, or any resident, may bring a civil action to enjoin violations of or compel compliance with the provisions of this Chapter 1.

(1) No resident may commence an action under this subsection (b) without first providing written notice to the City Attorney of intent to commence an action. The notice shall include a statement of the grounds for believing a cause of action exists. The resident shall deliver the notice to the City Attorney and the Ethics Commission at least 60 days in advance of filing an action. No resident may commence an action under this subsection if the Ethics Commission has issued a finding of probable cause that the defendant violated the provisions of this Chapter, or if the City Attorney or District Attorney has commenced a civil or criminal action against the defendant, or if another

resident has filed a civil action against the defendant under this subsection.

(2) A Court may award reasonable attorney's fees and costs to any resident who obtains injunctive relief under this subsection (b). If the Court finds that an action brought by a resident under this subsection is frivolous, the Court may award the defendant reasonable attorney's fees and costs.

(c) STATUTE OF LIMITATIONS.

(1) Criminal. Prosecution for violation of this Chapter must be commenced within four years after the date on which the violation occurred.

(2) Civil. No civil action alleging a violation in connection with a campaign statement required under this Chapter shall be filed more than four years after an audit could begin, or more than one year after the Executive Director submits to the Commission any report of any audit conducted of the alleged violator, whichever period is less. Any other civil action alleging a violation of any provision of this Chapter shall be filed no more than four years after the date on which the violation occurred.

(3) Administrative. No administrative action alleging a violation of this Chapter and brought under Charter Section C3.699-13 shall be commenced more than four years after the date on which the violation occurred. The date on which the Commission forwards a complaint or information in its possession regarding an alleged violation to the District Attorney and City

Attorney as required by Charter Section C3.699-13 shall constitute the commencement of the administrative action.

(A) Fraudulent Concealment. If the person alleged to have violated this Chapter engages in the fraudulent concealment of his or her acts or identity, this four-year statute of limitations shall be tolled for the period of concealment. For purposes of this subsection, "fraudulent concealment" means the person knows of material facts related to his or her duties under this Chapter and knowingly conceals them in performing or omitting to perform those duties.

(4) Collection of Fines and Penalties. A civil action brought to collect fines or penalties imposed under this Chapter shall be commenced within four years after the date on which the monetary penalty or fine was imposed. For purposes of this Section, a fine or penalty is imposed when a court or administrative agency has issued a final decision in an enforcement action imposing a fine or penalty for a violation of this Chapter or the Executive Director has made a final decision regarding the amount of a late fine or penalty imposed under this Chapter. The Executive Director does not make a final decision regarding the amount of a late fine or penalty imposed under this Chapter until the Executive Director has made a determination to accept or not accept any request to waive a late fine or penalty where such waiver is expressly authorized by statute, ordinance, or regulation.

(d) ADVICE. Any person may request advice from the Ethics Commission or City Attorney with respect to any provision of this Chapter. The Ethics Commission shall provide advice pursuant to Charter Section C3.699-12. The City Attorney shall within 14 days of the receipt of said written request provide the advice in writing or advise the person who made the request that no opinion will be issued. The City Attorney shall send a copy of said request to the District Attorney upon its receipt. The City Attorney shall within nine days from the date of the receipt of said written request send a copy of his or her proposed opinion to the District Attorney. The District Attorney shall within four days inform the City Attorney whether he or she agrees with said advice, or state the basis for his or her disagreement with the proposed advice.

No person other than the City Attorney who acts in good faith on the advice of the City Attorney shall be subject to criminal or civil penalties for so acting; provided that, the material facts are stated in the request for advice and the acts complained of were committed in reliance on the advice.

(e) DEBARMENT. The Ethics Commission may, after a hearing on the merits or pursuant to a stipulation among all parties, recommend that a Charging Official authorized to issue Orders of Debarment under Administrative Code Chapter 28 initiate debarment proceedings against any person in conformance with the procedures set forth in that Chapter.

S.F. Campaign & Governmental Conduct Code § 1.170

(a) CRIMINAL. Any person who knowingly or willfully violates any provision of this Chapter 1 shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $5,000 for each violation or by imprisonment in the County jail for a period of not more than six months or by both such fine and imprisonment; provided, however, that any willful or knowing failure to report contributions or expenditures done with intent to mislead or deceive or any willful or knowing violation of the provisions of Sections 1.114, 1.126, or 1.127 of this Chapter 1 shall be punishable by a fine of not less than $5,000 for each violation or three times the amount not reported or the amount received in excess of the amount allowable pursuant to Sections 1.114, 1.126, or 1.127 of this Chapter 1, or three times the amount expended in excess of the amount allowable pursuant to Section 1.130 or 1.140, whichever is greater.

(b) CIVIL. Any person who intentionally or negligently violates any of the provisions of this Chapter 1 shall be liable in a civil action brought by the City Attorney for an amount up to $5,000 for each violation or three times the amount not reported or the amount received in excess of the amount allowable pursuant to Sections 1.114, 1.126, or 1.127 or three times the amount expended in excess of the amount allowable pursuant to Section 1.130 or 1.140, whichever is greater. In determining the amount of liability, the court may take into account the seriousness of the

violation, the degree of culpability of the defendant, and the ability of the defendant to pay.

(c) ADMINISTRATIVE. Any person who violates any of the provisions of this Chapter 1 shall be liable in an administrative proceeding before the Ethics Commission held pursuant to the Charter for any penalties authorized therein.

(d) LATE FILING FEES

(1) Fees for Late Paper Filings. In addition to any other penalty, any person who files a paper copy of any statement or report after the deadline imposed by this Chapter shall be liable in the amount of ten dollars ($10) per day after the deadline until the statement is filed.

(2) In addition to any other penalty, any person who files an electronic copy of a statement or report after the deadline imposed by this Chapter shall be liable in the amount of twenty-five dollars ($25) per day after the deadline until the electronic copy or report is filed.

(3) Limitation on Liability. Liability imposed by Subsection (d)(1) shall not exceed the cumulative amount stated in the late statement or report, or one hundred dollars ($100), whichever is greater. Liability imposed by Subsection (d)(2) shall not exceed the cumulative amount stated in the late statement or report, or two hundred fifty dollars ($250), whichever is greater.

(4) Reduction or Waiver. The Ethics Commission may reduce or waive a fee imposed by this subsection if the Commission determines that the late filing was not

willful and that enforcement will not further the purposes of this Chapter.

(e) MISUSE OF PUBLIC FUNDS. Any person who willfully or knowingly uses public funds, paid pursuant to this Chapter, for any purpose other than the purposes authorized by this Chapter shall be subject to the penalties provided in this Section.

(f) PROVISION OF FALSE OR MISLEADING INFORMATION TO THE ETHICS COMMISSION; WITHHOLDING OF INFORMATION. Any person who knowingly or willfully furnishes false or fraudulent evidence, documents, or information to the Ethics Commission under this Chapter, or misrepresents any material fact, or conceals any evidence, documents, or information, or fails to furnish to the Ethics Commission any records, documents, or other information required to be provided under this Chapter shall be subject to the penalties provided in this Section.

(g) PERSONAL LIABILITY. Candidates and treasurers are responsible for complying with this Chapter and may be held personally liable for violations by their committees. Nothing in this Chapter shall operate to limit the candidate's liability for, nor the candidate's ability to pay, any fines or other payments imposed pursuant to administrative or judicial proceedings.

(h) JOINT AND SEVERAL LIABILITY. If two or more persons are responsible for any violation of this Chapter, they shall be jointly and severally liable.

(i) EFFECT OF VIOLATION ON CANDIDACY.

(1) If a candidate is convicted, in a court of law, of a violation of this Chapter at any time prior to his or her election, his or her candidacy shall be terminated immediately and he or she shall be no longer eligible for election, unless the court at the time of sentencing specifically determines that this provision shall not be applicable. No person convicted of a misdemeanor under this Chapter after his or her election shall be a candidate for any other City elective office for a period of five years following the date of the conviction unless the court shall at the time of sentencing specifically determine that this provision shall not be applicable.

(2) If a candidate for the Board of Supervisors certified as eligible for public financing is found by a court to have exceeded the Individual Expenditure Ceiling in this Chapter by ten percent or more at any time prior to his or her election, such violation shall constitute official misconduct. The Mayor may suspend any member of the Board of Supervisors for such a violation, and seek removal of the candidate from office following the procedures set forth in Charter Section 15.105(a).

(3) A plea of *nolo contendere*, in a court of law, shall be deemed a conviction for purposes of this Section.

S.F. Ethics Commission Reg. § 1.161-3

(a) To comply with the requirements of section 1.161(a)(1), a committee must adhere to the following disclaimer formatting requirements, in addition to any and all formatting requirements imposed by the Political Reform Act or Campaign and Governmental Conduct Code:

(1) Each of the committee's top three major contributors must be numbered by placing the numerals 1, 2, and 3, respectively, before each major contributor's name. Each numeral must appear in the same font and size as the names of the major contributors and each numeral must be separated from the corresponding name of the major contributor by one period and one space.

(2) For any major contributor that is a recipient committee, the names of the top two major contributors of $5,000 or more to that committee ("secondary major contributors") must be included immediately following the name and contribution amount of the relevant major contributor. The names of secondary major contributors must appear in the same font and size as the names of the major contributors and must be separated from the name of and dollar amount contributed by the corresponding major contributor by one space, followed by one em dash, followed by one space, followed by the words "contributors include," followed by one space.

(3) If two secondary major contributors must be included for a single major contributor, the secondary

major contributor who has contributed more to the major contributor shall be listed before the other secondary major contributor; the name of and dollar amount contributed by the first secondary major contributor must be separated from the name of and dollar amount contributed by the second secondary major contributor by a single comma followed by a single space.

(4) Whenever a major contributor or secondary major contributor is included in a disclaimer, the amount of relevant contributions made by that major contributor or secondary major contributor must appear in the same font and size as the names of the major contributors. This dollar amount must immediately follow the name of the corresponding major contributor or secondary major contributor, must be placed inside parentheses, and must include the dollar symbol immediately before the numerals indicating the amount. Each set of three numerals in the dollar amount must be separated by a comma.

(b) If a major contributor included in a disclaimer is a recipient committee and secondary major contributors must therefore be included in the disclaimer, the committee paying for the advertisement shall seek in writing the names of and dollar amounts contributed by the secondary major contributors to that major contributor at the time of the major contributor's last contribution to the committee paying for the advertisement. If the committee paying for the advertisement requests such information from the major contributor in writing but does not receive such information as of the time the advertisement is printed or otherwise

produced, the committee may rely on public disclosures filed by the major contributor to discern the names of and dollar amounts contributed by the major contributor's secondary major contributors.