



Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond and Todd David v. City and County of San Francisco

Litigation Background

Disclaimers must be simple and straightforward so that viewers can remember them and speakers are not forced to read lengthy government scripts. Yet San Francisco has created disclaimer requirements for campaign ads that can take up 28 seconds of ad time or over 30% of printed ads. Such a lengthy disclaimer chills protected political speech and is the subject of the lawsuit *Yes on Prop B v. San Francisco*.

Under San Francisco law, campaign advertisers may be required to report up to *fifteen* different contributors as part of their ads, including individuals who never actually gave to the committee. This time-consuming process makes many common advertising formats impractical. The government's authority to require disclaimers does not justify a policy that takes up nearly half of a 60-second ad. Moreover, the new disclaimer does not give the public any information it did not already have access to about campaign advertisers or their financial supporters.

San Francisco political activist Todd David formed the committee Yes on Prop B to support the passage of a March 2020 ballot initiative to improve his city's fire, earthquake, and emergency response facilities and services. To support the proposal, Yes on Prop B ("YPB") intended to purchase digital video ads, yard and window signs, and Chinese language newspaper ads. The group's efforts to inform and persuade the electorate were effectively silenced by San Francisco's unconstitutional disclaimer requirements.

YPB had planned to run ads as short as 15 or even 6 seconds long, yet the required disclaimer for the group takes approximately 28 seconds to read. Even for lengthier ads, a 28-second disclaimer is an enormous burden – and one shouldered solely by the group paying for the ad.

"These requirements prevent campaigns from getting their message out. How are groups supposed to communicate with voters if their ads are eaten up by a disclaimer?" said David.

On January 28, Yes on Prop B filed a lawsuit in the U.S. District Court for the Northern District of California to secure its right to speak about elections in common, cost-effective formats. After hearing oral arguments, the court granted only limited relief covering newspaper advertisements and audio and video ads of 30 seconds or less. The ruling upheld the disclaimer regime outside of these narrow categories and determined that the risk of the disclaimers chilling speech was "modest." In doing so, the district court went against precedent of both the U.S. Supreme Court and the Ninth Circuit.

On March 20, YPB appealed to the U.S. Court of Appeals for the Ninth Circuit. Represented by attorneys from the Institute for Free Speech, the appellants are asking the court to declare San Francisco's disclaimer regime unconstitutional in its entirety.

San Francisco's Compelled Speech Regime for Campaign Ads

Like most states and the federal government, San Francisco requires ads that support or oppose candidates or ballot measures to carry disclaimers. Courts have generally upheld disclaimer requirements that inform the electorate of an ad's sponsor so that viewers can access the advertiser's financial filings with government agencies. San Francisco's required disclaimers, however, go far beyond a simple statement of attribution. Due to changes in the law since 2018, primarily through the ballot measure Proposition F, the City and County now require a lengthy verbal script that includes extraneous and even misleading information.

Under San Francisco law, ads that support or oppose candidates or ballot measures must list the names of the top three contributors who gave at least \$5,000 to the committee and direct viewers to a government website with additional financial disclosures. In addition, if any of the top three contributors is another registered committee, the ad must list that committee's top two contributors – even if they never gave to the group running the ad. For audio or visual ads, this disclaimer must be spoken aloud at the start of the ad.

For the Yes on Prop B campaign, the required disclaimer was as follows:

“Ad paid for by Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond. Committee major funding from: 1. United Democratic Club of San Francisco – contributors include San Francisco Association of Realtors, Committee on Jobs Government Reform Fund; 2. Edwin M. Lee Democratic Club Political Action Committee – contributors include Committee on Jobs Government Reform Fund; 3. Yes on A, Affordable Homes for San Franciscans Now–contributors include Salesforce.com, Inc., Chris Larsen. Financial disclosures are available at sfethics.org.”

The Disclaimers are Misleading and Duplicative

The law requires YPB to report, as if they were its own contributors, people who gave to its major donors. The law labels these people as “secondary contributors.” That label is both unfair to these donors and YPB and misleads voters by leaving the impression the donors support YPB's ads. In fact, every so-called “secondary contributor” identified in the disclaimer above made their contribution before YPB even existed.

The disclaimer is also duplicative of other laws that are better tailored to limit the burden on speakers. Prior to the new regulations, both San Francisco and California law required purchasers of political ads to file reports with the San Francisco Ethics Commission listing donors who gave over \$100 to the committee. The Ethics Commission makes these reports public in an online, searchable database. Campaign ads must also carry a statement of attribution, making it a simple task for concerned voters to access donor reports online. YPB is not challenging any of these requirements.

The Government's Power to Require Disclaimers is Not Unlimited

Supreme Court and Ninth Circuit precedent strongly suggest that San Francisco's disclaimer regime is unconstitutional. Political ads do not belong to the government, but to the people.

The Supreme Court has never sanctioned a disclaimer regime as extensive or burdensome to political speech as San Francisco's. It has upheld only simple statements of attribution, as it did in *Citizens United v. Federal Election Commission*. The disclaimer in *Citizens United* did not include any donor information and took only four seconds of ad time. The government's authority to require simple "paid for by" disclaimers says nothing about whether it may take up large portions of ads with donor information that is already public.

The Ninth Circuit has struck down less burdensome disclaimers on less protected categories of speech. When San Francisco City and County attempted to require ads for sugary beverages to contain a disclaimer taking up 20% of ads, the Ninth Circuit invalidated the requirement in *American Beverage Association v. City & County of San Francisco*. It ruled that the government must carry the "burden of proving that the warning [was] neither unjustified nor unduly burdensome," because "[t]he Supreme Court made clear... that a government-compelled disclosure that imposes an undue burden fails for that reason alone." San Francisco's disclaimers for political ads are more burdensome and apply to a more protected class of speech. It stands to reason that they must pass a higher bar than disclaimers for soda ads.

In the political context, the Ninth Circuit found in 2004's *Americans for Civil Liberties Union of Nevada v. Heller* that the "distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements" was "constitutionally determinative." In other words, the government may compel groups to publicly report information that it cannot require them to place on the face of their ads. "Compared to communication-altering requirements," the Ninth Circuit found donor reporting to be both "considerably more effective[]" at "informing the electorate of the individuals and organizations supporting a particular candidate or ballot proposition," and "less" of an "imposition on freedom of speech" than expansive disclaimers.

San Francisco's preexisting reporting and disclaimer requirements provided the same information to voters with less of a burden on speech. The new regime forces speakers to pick up the tab for a substantial amount of government speech and treats voters as a passive audience that need to be spoon-fed the government's preferred context for political messages. Courts should not sanction a disclaimer regime that so forcefully injects the government into debate about elections.

What Happens If San Francisco's Disclaimer Regime is Struck Down?

If San Francisco's new disclaimer regime were struck down, advertisers would be free to use common and cost-effective forms of advertising to inform and persuade voters, without their messages being swallowed whole by a lengthy government disclaimer. San Francisco would be able to create new disclaimer requirements that pass constitutional muster.

Without the current disclaimer, voters would still have access to the same amount of information about advertisers and their financial backers as they do now. Ads that support or oppose candidates

or ballot measures would still be required to clearly state who paid for the ad and to list their top three donors. Committees would still be required to report their donors and expenditures to the government, which would still publish those reports in online databases. Any voter who wishes to learn more about a group's financial activities would do the exact same thing the current, unconstitutional policy advises: look them up on the government's website. Groups opposed to YPB's message could use that same information in their public statements and ads, if they thought doing so would persuade voters.

The Client

Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Bond, is a registered principal committee in California. YPB was founded by San Francisco political activist Todd David to support Proposition B, an initiative on the March 3, 2020 ballot in the City and County of San Francisco. The measure was ultimately adopted by voters and will authorize \$628,500,000 in bonds to improve San Francisco's fire, earthquake, and emergency response facilities and services. YPB intends to continue its involvement in San Francisco politics in the immediate future, including the November 2020 elections.

Todd David is the founder, principal officer, and treasurer of Yes on Prop B. David is a long-time political activist who formed the committee to support improved disaster preparedness in the San Francisco region.

The Legal Team

The Institute for Free Speech's legal team is led by IFS Legal Director Allen Dickerson. He is joined by IFS Attorneys Zac Morgan, Owen Yeates, and Ryan Morrison.

About the Institute for Free Speech

The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission.