No. 23-926

In The
Supreme Court of the United States

NO ON E, SAN FRANCISCANS OPPOSING THE AFFORDABLE HOUSING PRODUCTION ACT; EDWIN M. LEE ASIAN PACIFIC DEMOCRATIC CLUB PAC SPONSORED BY NEIGHBORS FOR A BETTER SAN FRANCISCO ADVOCACY; and TODD DAVID,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF

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

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

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REPLY SUMMARY OF ARGUMENT

Seeking to avoid review of its controversial victory, yet lacking compelling grounds to contest this case's suitability for certiorari, San Francisco argues with this Court's established practice, with the record, with prior stipulations it joined, and with the plain existence of significant First Amendment issues that warrant this Court's immediate review.

Petitioners do not "talk a big game." BIO at 2. It was not Petitioners' advocacy, but rather the Ninth Circuit's "big" opinion—an opinion at war with this Court's precedent securing free political speech—that prompted nine federal appellate judges to dissent, and the filing of seven cert-stage amicus briefs. That opinion is already wreaking havoc with fundamental First Amendment rights, as courts follow it to rubber stamp ever-more draconian speech restrictions from Arizona to Alaska. This Court should address the Ninth Circuit's problematic approach at its root, now, in the only certiorari petition that will arise from this case.

That this case comes here on a preliminary injunction motion hardly counsels against certiorari. This Court routinely reviews the grant or denial of preliminary injunctions, including and perhaps especially in First Amendment cases. San Francisco's suggestion that further factual development is coming is disingenuous. The city has repeatedly stipulated to staying the proceedings below because it intends to file a motion to dismiss, of which the opinions below would likely be

dispositive. It knows full well that denial of this petition will be the end of the line.

In any event, under exacting scrutiny, San Francisco, not Petitioners, bore the evidentiary burden below to establish constitutionality. It is the city that failed to make any record that might conceivably satisfy exacting scrutiny. Petitioners did their job, supplying ample evidence of how the challenged provisions burden and prohibit their speech. The record is replete with declarations explaining what kind of messages are most effective, how and why the city's law makes those messages impossible, and the secondary donor speech mandate's impact on donors. The record also features the ads that Petitioners could not run owing to the challenged provisions.

Denying the record's existence does not make it disappear. Nine dissenting judges considered this evidence, and so can this Court. San Francisco's claim that no one has ever been burdened by this law, because the only examples of unlawful ads appear in preenforcement challenges, does not make the point the city thinks it makes.

This case plainly satisfies this Court's traditional standards for cert worthiness. The Ninth Circuit's opinion addressed important constitutional questions that this Court should answer. Does the informational interest extend beyond a speakers' donors? Does it justify, beyond the filing of disclosure reports, the unbridled compulsion of government "informational" speech in political advertising? The Ninth Circuit did not

merely answer these questions incorrectly. It did so in a manner that conflicts with this Court's exacting scrutiny precedent, and the precedent of other circuits with respect to earmarking. The petition should be granted.

ARGUMENT

I. This petition's preliminary injunction context is a reason to grant, not deny it.

1. This Court routinely hears and decides cases arising on preliminary injunction motions. *See*, *e.g.*, *Nebraska v. Biden*, 600 U.S. 477 (2023); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Nat'l Inst. of Family Life Advocates v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Indeed, as *Fulton*, *NIFLA*, and *Hobby Lobby* demonstrate, this Court has of late decided some of its most notable First Amendment landmarks in the preliminary injunction context.

When—as here—a petition satisfies Rule 10's guidelines, the need for urgent relief is hardly a reason to deny review. To the contrary: legal holdings announced at the preliminary injunction stage often preordain the ultimate result. In such cases—and this is such a case—the decision whether to grant review is a decision this Court gets to make only once. Whether this Court grants or denies certiorari to review preliminary injunction decisions, its orders are often constructively dispositive, leaving the losing parties with

controlling legal opinions that render further litigation pointless.

In all of the aforementioned cases, this Court's findings that the plaintiffs were entitled to preliminary injunctions forced stipulations to permanent injunctive relief. There was no point fighting this Court's decisions that the defendants' positions lacked merit. *See Nebraska v. Biden*, E.D. Mo. No. 4:22-cv-01040-HEA, Dkt. 76 (Aug. 16, 2023); *Fulton v. City of Philadelphia*, E.D. Pa. No. 2:18-cv-02075-PBT, Dkt. 79 (Sep. 24, 2021); *Nat'l Inst. of Family Life Advocates v. Becerra*, S.D. Cal. No. 3:15-cv-02277-JAH-RNB, Dkt. 76 (Oct. 26, 2018); *Hobby Lobby Stores, Inc. v. Sebelius*, W.D. Okla. No. 5:12-cv-01000-HE, Dkt. 98 (Nov. 19, 2014). Indeed, *Fulton* and *NIFLA* followed the same path Petitioners seek here: after the courts of appeals affirmed the denial of preliminary injunction motions, this Court granted certiorari and reversed, and the governments folded.

Likewise, this Court's decisions not to review the denial of preliminary relief have forced First Amendment plaintiffs to abandon their claims. *See*, *e.g.*, *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 2639 (2023), *voluntary dismissal*, C.D. Cal. No, 2:21-cv-05115-VAP-JPRx, Dkt. 43 (June 21, 2023); *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314 (D.C. Cir. 2018), *cert. denied*, 140 S. Ct. 1198 (2020), *stipulation of dismissal*, D.D.C., No. 17-CV-2554-ABJ, Dkt. 36 (May 18, 2020). That a preliminary injunction decision can be conclusive is unsurprising. The federal rules

contemplate that courts might advance preliminary injunction proceedings to a trial on the merits. Fed. R. Civ. P. 65(a)(2).

2. San Francisco has no intention of developing the record any further. It has already signaled its understanding that the denial of preliminary injunctive relief here would be dispositive. In stipulating to a stay of district court proceedings pending Petitioners' interlocutory appeal, the city recounted that "Defendants would respond to the Complaint by filing a motion to dismiss for failure to state a claim." Stipulation and Order, *San Franciscans Supporting Prop B v. Chiu*, N.D. Cal. 3:22-cv-02785-CRB, Dkt. 42 (June 7, 2022). And to continue effectuating this stay, San Francisco did not oppose staying the Ninth Circuit's mandate. *No on E v. Chiu*, Ninth Cir. No. 22-15824, Dkt. 52 (Nov. 3, 2023).

3. The parties are not alone in reading the opinion below as adopting broadly applicable constitutional holdings that preclude First Amendment free speech claims. Relying on this opinion, the Ninth Circuit upheld Alaska's law mandating that election ads identify, by name and city and state of residence or primary business location, the speaker's top three donors, as well as a provision requiring donors to report their political contributions within 24 hours. *Smith v. Helzer*, 95 F.4th 1207 (9th Cir. 2024), *petition for certiorari sub nom Smith v. Stillie*, No. 23-1316 (filed June 13, 2024).

Shortly afterward, the District of Arizona invoked the decision below to uphold far-reaching disclosure

and record-keeping requirements on political speakers and donors, including the disclosure of secondary donors, against a First Amendment challenge. "The Ninth Circuit's opinion [in *No on E*] addresses the issues under the standard of review applicable to preliminary injunction appeals but, in doing so, the Ninth Circuit set forth numerous legal principles relevant here." *Ams. for Prosperity v. Meyer*, No. CV-23-00470-PHX-ROS, 2024 U.S. Dist. LEXIS 49047, at *17 (D. Ariz. Mar. 20, 2024). Applying those "numerous legal principles," the district court dismissed the challengers' complaint. But although the court granted them leave to amend, *id.* at *51-*52, the plaintiffs apparently concluded that amendment was futile given the legal holdings, and appealed on their initial complaint. *Ams. for Prosperity v. Meyer*, D. Ariz. No. CV-23-00470-PHX-ROS, Dkt. 49 (Apr. 9, 2024).

* * *

The sixty-six pages of considered opinions below, written and joined by 12 circuit judges arguing for opposing outcomes, and the comprehensive record on which they are based, are not an initial skirmish. Everyone understands that the panel opinion likely ends this case—unless this Court acts. It should do so.

II. San Francisco's law burdens campaign speech.

The record belies San Francisco's assertion that Petitioners submitted no evidence of how the city

burdens their speech. San Francisco's arguments to the contrary defy reality.

A. Petitioners submitted copious evidence demonstrating that the "disclaimer's" size impermissibly burdens speech.

1. San Francisco's assertion that Petitioners' challenge somehow excludes the 14-point font requirement as a component of the secondary donor speech mandate, BIO 18, is wrong. David, for example, declared that "the required disclaimer and disclosure statement would dominate and distract from the Committee's messages . . . as the font size in newspapers is significantly smaller than 14-point." Dkt. 9-1, ¶ 17. The district court apparently responded to this concern. Pet.App. 127a. In any event, it is readily obvious that the lengthy discussion of secondary donors is what drives the "disclaimer's" size.

Oddly, San Francisco claims that its law does not burden speech because it has "never" seen ads with "disclaimers" occupying 53%-100% of their time and space, apart from Petitioners' exhibits. BIO 18. This is a somewhat novel argument. "Our law requires impractical or impossible ads, people don't publish them, therefore, no one's speech is burdened," is one approach. The more obvious explanation is that people don't publish ads that are excessively burdened by the challenged law. Certainly the city never claimed that Petitioners misunderstood or misapplied the law in

generating their exhibits of constructively forbidden ads.[1]

San Francisco's assertion that Petitioners somehow never argued that "the disclaimer takes too much space on their advertisements," BIO 18, is more remarkable still. Evidence and argument about the "disclaimer's" space formed the bulk of Petitioners' submissions. San Francisco partially quotes an unreasoned statement in a district court footnote for this proposition, Pet.App. 131a, but fails to cite what precedes it: "Plaintiffs also appear to argue that the required disclaimer is too large in comparison to the size of their proposed advertisement." Pet.App. 130a (citing Petitioners' brief, Dkt. 9, at 19-23).

Indeed, the page of Petitioners' brief immediately preceding those cited by the district court decried the "disclaimer's" excessive size at some length, arguing that it "violates a speaker's right to decide 'what to say and what to leave unsaid.'" Dist. Ct. Br., Dkt. 9, at 18 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995)). Petitioners then observed that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 55 (1976) (per curiam)). While the Ninth Circuit may have disagreed

[1] San Francisco denies that the panel sanctioned a 51% encroachment on video ad space. BIO 19 n.6. Petitioners share the dissenters' view of this matter. Pet.App. 38a-39a, 46a-47a.

with Petitioners, it understood that they made the argument.

This Court has never approved of any "disclaimer" remotely approaching the burdens San Francisco imposes on political speech via its secondary donor speech mandate.

B. The secondary donor speech mandate plainly inhibits contributions.

Petitioner David, and Petitioner Ed Lee Dems' Treasurer, Jay Cheng, both declared that the secondary donor speech mandate dissuades donors who cannot allow their own donors to get caught up in unrelated political campaigns. This much should be readily obvious. But more specifically, Cheng confirmed that Ed Lee Dems, specifically, cannot donate money to political campaigns under these circumstances. Pet.App. 66a-67a, 129a.

San Francisco cannot dispute that people are reticent to engage in any conduct that would lead to their being named in political ads. So it responds by urging Ed Lee Dems to accept a contribution limit, to avoid becoming anyone's top three donor. BIO 22. But contribution limits, justified or not, burden political speech. And "[t]his Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *McCutcheon v. FEC*, 572 U.S. 185, 206 (2014). Ed Lee Dems cannot corrupt a ballot measure. San Francisco's proposed solution violates the

unconstitutional conditions doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013); *United States v. Jackson*, 390 U.S. 570 (1968).

C. The secondary donor speech mandate confuses voters.

It should be self-evident that voters would be confused by the naming of people with only attenuated six-degrees style connections to campaigns in campaign advertisements. San Francisco's extended discussion of the David Chiu Assembly Committee fiasco that so bothers Ed Lee Dems speaks for itself. Pet.App. 66a-67a.

But even if Ed Lee Dems overestimates the voters' confusion over Chiu's committee, the fact is, Ed Lee Dems is entitled to act on its legitimate concerns, including by withholding donations that would place its donors in someone else's campaign ads. The question is not whether the voters are irrational, or whether donors "correctly" assess the risks of compelled association and unwanted publicity. San Francisco forces people to be named in ads for political campaigns that they do not support, inviting speculation about their associations. It cannot blame voters for not understanding that this information is misleading, and it cannot escape liability by accusing dissuaded donors of overreacting.

III. The questions presented merit this Court's review.

1. Although the questions presented do not turn on the standard of review, San Francisco exerts great effort explaining that the standard of review is settled, because disclaimers are subject to exacting scrutiny and "[t]he challenged regulations here are clearly disclaimers." BIO 9.

But only the first part of this equation is true. This Court has never considered, much less approved, of anything quite like San Francisco's law. Alas, this is the trend—the informational interest is no longer confined to "the source of advertising," *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 n.32 (1978), but to guilt by association—the donors' donors, without regard to any earmarking. Some circuits scoff at such a wide net; the Ninth Circuit does not. And without any limit on the informational interest, so-called "disclaimers" balloon beyond recognition. The government no longer merely regulates a speaker's expression, it supplants it. The petition may not directly target the standard of review—there is plenty to consider here without it—but Petitioners, and this Court, would be remiss not to mention it.

2. In any event, if the Ninth Circuit's decision is what now passes for "exacting scrutiny," this Court should say so.

As *Helzer* and *Ams. for Prosperity v. Meyer* demonstrate, the decision below has greenlit a stampede of anything-goes campaign speech compulsion in the

circuit covering a fifth of the nation's population. Whether the informational interest can be stretched to include information about support for a speaker's donor's donors untethered to an election is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). So is the question of whether anything that the government can require be disclosed, a government can require be disclosed within campaign advertising, no matter *how* much time and space it occupies, and no matter how much it transforms the speakers' message.

And the Ninth Circuit decided these questions "in a way that conflicts with relevant decisions of this Court," *id.*, because as the dissenters observed, it did not follow exacting scrutiny. Exacting scrutiny requires a "sufficiently important" governmental interest. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366-67 (2010); *Buckley*, 424 U.S. at 64. Even if the city's interest in informing voters about the source of a speaker's funding is important, it does not "follow[,]" BIO 13, that forcing speakers to discuss their donors' donors advances that interest. Nor is the obliteration of the speakers' campaign speech with this information tailored to the First Amendment interests at stake. And it is plain enough that other circuits would not tolerate compelled speech about secondary donors absent some evidence of earmarking. The laws in *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486 (D.C. Cir. 2016) and *Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016) may have been different, but circuit splits involve legal holdings, not specific statutes.

This Court need not wait for another city, in another circuit, to adopt San Francisco's extreme law, before addressing the urgent problems caused by the Ninth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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

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

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