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 A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONERS' SUPPLEMENTAL BRIEF


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## ARGUMENT

On the eve of the conference at which the Court is set to consider this petition, Respondents inform the Court that San Francisco took steps to modify its law almost two months ago so that the government's compelled speech will never occupy more than 33% of an ad. Resp.Supp.Br. 1. While Respondents do not claim that this will moot any part of Petitioners' case, the brief suggests that this change would diminish the law's First Amendment problems.

It will not. If anything, San Francisco's eleventh-hour gamesmanship only promises to make things worse. Three points:

*First*, one third of an ad is a lot. Consider some of the ads at issue in this case. The original law required Petitioners to include disclaimers that took up 23% of a mailer, 35% of a newspaper ad, and 51% of a video ads' screen. *See* Pet. 27. The revised law makes no change to the mailer and reduces the disclaimer size by a mere 2% for the newspaper ad. And while 33% of a video's screen time is better than 51%, the improvement is only marginal. It is inconceivable that the constitutional problems with a compelled disclaimer taking up half of an ad disappear when the imposition is reduced to "only" one third.

*Second*, this change reveals that San Francisco's interest in on-ad disclosures is not nearly as significant as it claims. Respondents told this Court that compelling political committees to identify secondary donors as part of their ads is "vital" to informing the electorate. BIO 12. They argued that the city's interest here "is of a great magnitude," *id.* at 13

(cleaned up), because the information is "valuable" to the voters, *id.* "Without [the old version of] Proposition F," Respondents claimed, "political committees would continue to be able to hoodwink the public . . . ." *Id.*

All that apparently changed seven weeks ago. Now, compelling political committees to identify secondary donors in their ads is "vital" only if doing so takes up a third of the ad or less. Perhaps the number will decrease even more if this Court grants certiorari next week.

*Third*, the change does not address two other reasons for granting certiorari: clarifying the standard of review, Pet.18-22, and, most critically, resolving the constitutionality of publicizing the identity of so-called secondary donors, *id.* 22-24, 29-30.

On the standard of review, limiting the disclaimer so that it co-opts only one third of the speaker's message will not make it any less problematic. The city will still require speakers to use a significant part of their ad to "make statements or disclosures [they] would otherwise omit." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995). Thus, the need for this Court to address whether strict scrutiny applies to such hybrid "disclaimsures" remains. Pet. 21.

Nor will the change in San Francisco's law answer any of the problems caused by identifying secondary donors in an ad. Pet. 22-24. Those problems range from spreading "misinformation," *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 497-98 (D.C. Cir. 2016), to having donors withhold support out of fear that the

secondary-donor rule might be triggered, Reply 9; Pet. App. 66a-67a, 129a.

Indeed, the recent change will only make the latter problem worse by increasing uncertainty about when a secondary donor will be disclosed. Donors already faced uncertainty because disclosure depended on how large an ad is and whether other donors contributed more or less than they did. That uncertainty will now increase because disclosure also depends on whether identifying secondary donors takes up too much space. No one reticent about having their name printed on a political ad that they do not support can donate under such uncertainty.

## CONCLUSION

The city's new version of its disclaimer law only exacerbates the constitutional problems. This Court should grant certiorari.

Respectfully submitted,

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