

File No. 221161

Committee Item No. 1

Board Item No. \_\_\_\_\_

# COMMITTEE/BOARD OF SUPERVISORS

## AGENDA PACKET CONTENTS LIST

Committee: Rules Committee

Date July 17, 2023

Board of Supervisors Meeting

Date \_\_\_\_\_

### Cmte Board

- Motion
- Resolution
- Ordinance
- Legislative Digest
- Budget and Legislative Analyst Report
- Youth Commission Report
- Introduction Form
- Department/Agency Cover Letter and/or Report
- Memorandum of Understanding (MOU)
- Grant Information Form
- Grant Budget
- Subcontract Budget
- Contract/Agreement
- Form 126 - Ethics Commission
- Award Letter
- Application
- Form 700
- Information/Vacancies (Boards/Commissions)
- Public Correspondence

### OTHER (Use back side if additional space is needed)

- Court Order
- Ethics Commission Response
- \_\_\_\_\_
- \_\_\_\_\_
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Completed by: Victor Young

Date July 13, 2023

Completed by: \_\_\_\_\_

Date \_\_\_\_\_

1 [Campaign and Governmental Conduct Code - Campaign Advertisement Disclaimer  
2 Requirements]

3 **Ordinance amending the Campaign and Governmental Conduct Code to modify**  
4 **disclaimer requirements for campaign advertisements, to conform to a court order.**

5 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
6 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
7 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
8 **Board amendment additions** are in double-underlined Arial font.  
9 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
10 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
11 subsections or parts of tables.

12 Be it ordained by the People of the City and County of San Francisco:

13 Section 1. Findings.

14 (a) Proposition F, adopted by the voters at the November 5, 2019 election, included  
15 several amendments to the Campaign and Governmental Conduct Code: prohibiting  
16 campaign contributions from limited liability companies and limited liability partnerships;  
17 prohibiting campaign contributions to certain City elected officials, candidates, and  
18 committees from persons with pending or recent land use matters before the City; and  
19 expanding disclaimer requirements for independent expenditure committee advertisements.  
20 The legislative file for Proposition F is available in Board File No. 190723.

21 (b) Proposition F's new disclaimer requirements on campaign advertisements included  
22 a requirement that a committee disclose "secondary contributors" – that is, for primarily  
23 formed independent expenditure committees and ballot measures, if any of the top three  
24 major contributors of \$5,000 or more is a committee, the disclaimer must also disclose the top  
25 two major contributors to that committee as well.

1 (c) In January 2020, a group of plaintiffs challenged the constitutionality of these  
2 disclaimer requirements, specifically with respect to the required disclosure of secondary  
3 contributors. In February 2020, the Honorable Charles R. Breyer, District Court Judge for the  
4 Northern District of California, granted in part and denied in part, the plaintiffs' request for a  
5 preliminary injunction. The court granted the preliminary injunction with respect to disclaimers  
6 of secondary contributors as applied to print advertisements that are 5 inches by 5 inches or  
7 smaller, other smaller print advertisements sometimes referred to as "ear" advertisements,  
8 and spoken disclaimers in audio or video advertisements that are 30 seconds or less. But  
9 citing the vital governmental interest in providing the public with information about the funding  
10 of campaign advertisements, the court otherwise upheld the Proposition F disclaimer  
11 requirements. A copy of Judge Breyer's order on the motion for preliminary injunction is  
12 available in Board File No.221161.

13 (d) The sole purpose of this ordinance is to bring the Proposition F disclaimer  
14 requirements, codified in Campaign and Governmental Conduct Code Section 1.161, in line  
15 with Judge Breyer's order.

16

17 Section 2. Article I, Chapter 1 of the Campaign and Governmental Conduct Code is  
18 hereby amended by revising Section 1.161, to read as follows:

19 **SEC. 1.161. CAMPAIGN ADVERTISEMENTS.**

20 (a) DISCLAIMERS. In addition to complying with the disclaimer requirements set forth  
21 in Chapter 4 of the California Political Reform Act, California Government Code sections  
22 84100 et seq., and its enabling regulations, all committees making expenditures which  
23 support or oppose any candidate for City elective office or any City measure shall also comply  
24 with the following additional requirements:

25

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

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

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

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

24 (3) MASS MAILINGS AND SMALLER WRITTEN ADVERTISEMENTS. Any  
25 disclaimer required by the Political Reform Act and by this section on a mass mailing, door

1 hanger, flyer, poster, oversized campaign button or bumper sticker, or print advertisement  
2 shall be printed in at least 14-point, bold font.

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

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

16 (b) FILING REQUIREMENTS.

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

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

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

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

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

5 (2) INDEPENDENT EXPENDITURE MASS MAILINGS.

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

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

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

18 (3) CANDIDATE MASS MAILINGS.

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

22 (B) Each candidate committee that pays for a mass mailing shall file a  
23 copy of the mailing and the itemized disclosure statement required by subsection (b)(3) within  
24 48 hours of the date of the mailing if the date of the mailing occurs within the final 16 days  
25 before the election.

1                   ~~(3)~~ (4) The Ethics Commission shall specify the method for filing copies of  
2 advertisements and mass mailings.

3                   Section 3. Requirements for Amendment by the Board of Supervisors.

4                   (a) As set forth in Proposition F, approved by the voters at the November 5, 2019  
5 election, an amendment to Section 1.161 of the Campaign and Governmental Conduct Code  
6 may be made if:

7                               (1) the amendment furthers the purposes of Chapter 1, Article I of the  
8 Campaign and Governmental Conduct Code;

9                               (2) the Ethics Commission approves the amendment in advance of Board of  
10 Supervisors approval by at least a four-fifths vote of all its members;

11                              (3) the amendment is available for public review at least 30 days before the  
12 amendment is considered by the Board of Supervisors or any committee of the Board of  
13 Supervisors; and

14                              (4) the Board of Supervisors approves the amendment by at least a two-thirds  
15 vote of all its members.

16                   (b) At its meeting of December 9, 2022, the Ethics Commission approved this  
17 ordinance by a vote of 4-0.

18                   (c) This ordinance has been available for public review for at least 30 days before  
19 consideration by a committee of the Board of Supervisors.

20  
21                   Section 4. Effective Date. This ordinance shall become effective 30 days after  
22 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
23 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
24 of Supervisors overrides the Mayor's veto of the ordinance.

1 Section 5. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors  
2 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,  
3 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal  
4 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment  
5 additions, and Board amendment deletions in accordance with the "Note" that appears under  
6 the official title of the ordinance.  
7

8 Section 6. Severability. If any section, subsection, sentence, clause, phrase, or word  
9 of this ordinance, or any application thereof to any person or circumstance, is held to be  
10 invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision  
11 shall not affect the validity of the remaining portions or applications of the ordinance. The  
12 Board of Supervisors hereby declares that it would have passed this ordinance and each and  
13 every section, subsection, sentence, clause, phrase, and word not declared invalid or  
14 unconstitutional without regard to whether any other portion of this ordinance or application  
15 thereof would be subsequently declared invalid or unconstitutional.  
16

17 APPROVED AS TO FORM:  
18 DAVID CHIU, City Attorney

19 By: /s/ Bradley A. Russi  
20 BRADLEY A. RUSSI  
21 Deputy City Attorney

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23  
24  
25



## **LEGISLATIVE DIGEST**

[Campaign and Governmental Conduct Code - Campaign Advertisement Disclaimer Requirements]

### **Ordinance amending the Campaign and Governmental Conduct Code to modify disclaimer requirements for campaign advertisements, to conform to a court order.**

#### **Existing Law**

Proposition F, adopted by the voters at the November 5, 2019 election, included several amendments to the Campaign and Governmental Conduct Code: prohibiting campaign contributions from limited liability companies and limited liability partnerships; prohibiting campaign contributions to certain City elected officials, candidates, and committees from persons with pending or recent land use matters before the City; and expanding disclaimer requirements for independent expenditure committee advertisements. Proposition F's new disclaimer requirements on campaign advertisements included a requirement that a committee disclose "secondary contributors" – that is, for primarily formed independent expenditure committees and ballot measures, if any of the top three major contributors of \$5,000 or more is a committee, the disclaimer must also disclose the top two major contributors to that committee as well.

#### **Amendments to Current Law**

To conform with a court order, the proposed ordinance creates exceptions to the requirement to disclose secondary contributors for the following types of smaller or shorter advertisements: (1) print advertisements measuring 25 square inches or less, and (2) spoken disclaimers in audio or video advertisements that are 30 seconds or less.

#### **Background Information**

In January 2020, a group of plaintiffs challenged the constitutionality of the disclaimer requirements imposed by Proposition F, specifically with respect to the required disclosure of secondary contributors. In February 2020, the Honorable Charles R. Breyer, District Court Judge for the Northern District of California, granted in part and denied in part, the plaintiffs' request for a preliminary injunction. The court granted the preliminary injunction with respect to disclaimers of secondary contributors as applied to print advertisements that are 5 inches by 5 inches or smaller, other smaller print advertisements sometimes referred to as "ear" advertisements, and spoken disclaimers in audio or video advertisements that are 30 seconds or less. The court otherwise upheld the Proposition F disclaimer requirements.

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United States District Court  
Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YES ON PROP B, COMMITTEE IN  
SUPPORT OF THE EARTHQUAKE  
SAFETY AND EMERGENCY RESPONSE  
BOND, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF SAN  
FRANCISCO,

Defendant.

Case No. [20-cv-00630-CRB](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
PRELIMINARY INJUNCTION**

Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Board, contends that the City and County of San Francisco’s new disclaimer requirements create an unconstitutional burden on its First Amendment right to advocate for earthquake safety. The Court agrees that the disclaimer rules are unconstitutional as applied to some smaller or shorter types of advertising, because they leave effectively no room for pro-earthquake safety messaging. But the rules are not an unconstitutional burden on larger or longer advertising, and requiring the committee to disclose not only its own donors but also the individuals and organizations who give money to committees that in turn support Yes on Prop B is not an unconstitutional forced association or burden on campaign contributions.

**I. BACKGROUND**

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

1 requirements under California and San Francisco law. See, e.g. Cal. Gov't Code §§ 84200,  
2 84200.5, 84202.3, 84203, 84502; see also, e.g. SF Code § 1.161.

3 This case concerns two new disclaimer requirements for committee advertising that went  
4 into effect in San Francisco last year. First, the San Francisco Board of Supervisors amended San  
5 Francisco's Campaign and Governmental Conduct Code to require a spoken disclaimer at the  
6 beginning (rather than the end) of any audio or video advertisement. See SF Code § 1.161(a)(5);  
7 see also Yes on Prop B RJN<sup>1</sup> (dkt. 5-1) Ex. B.

8 Last November, San Francisco voters amended the City's disclaimer laws by approving  
9 Proposition F. See generally Yes on Prop B RJN Ex. C at 112–13. Proposition F passed with  
10 76.89% of the vote. San Francisco RJN Ex. B at 6. Now, all ads paid for by “primarily formed”  
11 independent expenditure and ballot measure committees<sup>2</sup> must include a disclosure identifying the  
12 committee's top three donors of \$5,000 or more. If one of those contributors is itself a committee,  
13 the ad must also disclose that committee's top two donors of \$5,000 or more in the last five  
14 months. In all ads other than audio ads, the names of both primary and secondary contributors  
15 must be followed by the amount of money they contributed. Id.; SF Code § 1.161(a)(1), (5). On  
16 written ads, the disclosure must be in 14-point font (rather than 12-point font, which was the case  
17 before Proposition F). RJN Ex. C at 112; SF Code § 1.161(a)(3).

18 Yes on Prop B is a “primarily formed committee” which supports Proposition B.<sup>3</sup> David  
19 Decl. (dkt. 5-5) ¶ 6. Yes on Prop B has received \$5,000 in funding from each of three other  
20 committees: Yes on A, Affordable Housing for San Franciscans Now!, the Edwin M. Lee  
21 Democratic Club Political Action Committee, and the United Democratic Club of San Francisco.

22 \_\_\_\_\_  
23 <sup>1</sup> Yes on Prop B's request for judicial notice is unopposed and asks for notice of three documents  
24 made publicly available by San Francisco or the State of California. Because these documents  
25 come from sources whose accuracy cannot reasonably be questioned, Yes on Prop B's request is  
26 granted. See Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998–99 (9th Cir. 2010). San  
27 Francisco has also requested that the Court notice publicly available documents, plus a municipal  
28 ordinance. San Francisco RJN (dkt. 20). San Francisco's request is also granted. See id.; see also  
Tollis, Inc. v. Cty. of San Diego, 505 F.3d 935, 938 n.1 (9th Cir. 2007). Finally, the unopposed  
motion to file an amicus curiae brief (dkt. 24) is granted. See also Statement of Non-Opposition  
(dkt. 26).

<sup>2</sup> A “primarily formed” committee is one created to support or oppose a single candidate or  
measure appearing on the ballot. Cal. Gov't Code § 82047.5.

<sup>3</sup> Proposition B is an earthquake safety and emergency response bond. David Decl. ¶ 8.

1 Id. ¶ 12. Yes on Prop B wishes to spend its modest budget on cost-effective forms of advertising,  
2 including six-, fifteen-, and thirty-second digital video advertisements, yard or window signs, and  
3 Chinese language newspaper ads. Id. ¶ 29, Mot. (dkt. 5) at 1.

4 Those ads will be subject to Proposition F’s new disclaimer requirements. Yes on  
5 Prop B’s video ads must include the following disclaimer, spoken at the beginning of the video:

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

16 Muir Decl. (dkt. 5-3) ¶ 34. That disclaimer takes roughly twenty-eight seconds to read “in a  
17 clearly spoken manner and in a pitch and tone substantially similar to the rest of a typical  
18 television advertisement.” Id. ¶ 35.

19 Print ads must include the following disclosure:

20 Ad paid for by Yes on Prop B, Committee in Support of the  
21 Earthquake Safety and Emergency Response Bond. Committee  
22 major funding from: 1. United Democratic Club of San Francisco  
23 (\$5,000) – contributors include San Francisco Association of  
24 Realtors (\$6,500), Committee on Jobs Government Reform Fund  
25 (\$5,000), 2. Edwin M. Lee Democratic Club Political Action  
26 Committee (\$5,000) – contributors include Committee on Jobs  
27 Government Reform Fund (\$5,000), 3. Yes on A, Affordable Homes  
28 for San Franciscans Now! (\$5,000) – contributors include  
Salesforce.com, Inc. (\$300,000), Chris Larsen (\$250,000) Financial  
disclosures are available at sfethics.org.

29 Id. Ex. 1. That disclosure, when printed in size 14-point font, takes up 100% of the most common  
30 and economical ads printed in Chinese language newspapers (so-called “ear” ads), 75 to 80% of a  
31 5” by 5” ad, and 31 to 33% of a 5” by 10” ad. Id. ¶¶ 66–67. It occupies approximately 35% of a  
32 typical 14” by 22” horizontal window sign, id. ¶¶ 58, 61, and approximately 35 to 38% of one side  
33 of a typical 5.5” by 8.5” palm card, id. ¶¶ 52–53.

34 Yes on Prop B seeks a preliminary injunction “prohibiting defendant the City and County  
35 of San Francisco and its officers, agents, divisions, commissions, and all persons acting under or  
36

1 in concert with it, from enforcing the spoken disclaimer rule in San Francisco Campaign &  
 2 Governmental Conduct Code Section 1.161(a)(5) and amendments to Section 1.161 imposed by  
 3 Proposition F.” Mot. at 1.

## 4 **II. LEGAL STANDARD**

5 A preliminary injunction is an “extraordinary remedy” that should only be awarded upon a  
 6 clear showing that the plaintiff is entitled to such relief. See Winter v. Natural Res. Def. Council,  
 7 Inc., 555 U.S. 7, 22 (2008). The party seeking a preliminary injunction must establish: (1) a  
 8 likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief;  
 9 (3) that the balance of equities tips in the plaintiff’s favor; and (4) that an injunction is in the  
 10 public interest. See id. at 20. Alternatively, the moving party must demonstrate that “serious  
 11 questions going to the merits were raised and the balance of hardships tips sharply in the  
 12 plaintiff’s favor,” and that the other two Winter elements are met. Alliance for Wild Rockies v.  
 13 Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011). The “[l]ikelihood of success on the merits is the  
 14 most important Winter factor.” Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir.  
 15 2017) (internal quotation marks omitted). It is Yes on Prop B’s burden to establish each of the  
 16 four Winter elements, but San Francisco’s burden to demonstrate Proposition F’s constitutionality.  
 17 Klein v. City of San Clemente, 584 F.3d 1196, 1201 (9th Cir. 2009).

## 18 **III. DISCUSSION**

19 Yes on Prop B presents two theories of Proposition F’s constitutional infirmity: that the  
 20 disclaimer requirements are so lengthy they impose an undue burden on political speech and that  
 21 requiring Yes on Prop B to disclose its secondary contributors unconstitutionally forces it to  
 22 associate with those entities and impermissibly chills political contributions. See Mot. at 1–2.  
 23 This order evaluates the likelihood of success on each theory, before analyzing whether the  
 24 standard for a facial challenge has been satisfied and discussing the other three Winter factors.

### 25 **A. Constitutional Standard**

26 As a preliminary matter, the parties dispute the appropriate standard for evaluating  
 27 Proposition F’s constitutionality. Because “[d]isclaimer and disclosure requirements may burden  
 28

1 the ability to speak, but . . . do not prevent anyone from speaking,” they are subject to “exacting  
 2 scrutiny.”<sup>4</sup> Citizens United v. FEC, 558 U.S. 310, 366 (2010). This standard “requires a  
 3 ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’  
 4 governmental interest.” Id. at 366–67. “[T]he strength of the governmental interest must reflect  
 5 the seriousness of the actual burden on First Amendment rights.” Davis v. FEC, 554 U.S. 724,  
 6 744 (2008).

7 Yes on Prop B nonetheless contends the Court should apply strict scrutiny, because “the  
 8 Supreme Court has avoided applying these standards in a mechanical manner, particularly when a  
 9 regulation appears on its face to fit within on[e] category, but has broader First Amendment  
 10 implications.” Mot. at 10. Neither of the cases Yes on Prop B cites for this proposition is on  
 11 point. Both involved laws that effectively penalized candidates who expended more than a  
 12 threshold amount of personal funds, by raising contribution limits or providing public funds for  
 13 their opponents. See Davis, 554 U.S. at 738–40; Ariz. Free Enter. Club’s Freedom Club PAC v.  
 14 Bennett, 564 U.S. 721, 736–37 (2011). The Court applied strict scrutiny to these schemes,  
 15 because they constituted an “unprecedented penalty” on campaign expenditures. Davis, 554 U.S.  
 16 at 739.

17 Yes on Prop B does not cite a case which employed this logic to subject disclosure or  
 18 disclaimer requirements to strict scrutiny. Even if the logic of Davis and Bennett could be  
 19 extended to the disclaimer and disclosure context, for the reasons explained below, most  
 20 applications of Proposition F do not impose such “a special and significant burden” on First  
 21 Amendment rights that strict scrutiny would apply. Cf. Davis, 554 U.S. at 739. The only possible  
 22 exception is its application to smaller or shorter advertisements that are completely occupied by  
 23 the required disclaimers. As explained below, that application of Proposition F is unconstitutional  
 24

25  
 26 <sup>4</sup> Before the Supreme Court clarified that disclaimer and disclosure requirements are subject to  
 27 exacting scrutiny, some courts subjected these laws to strict scrutiny. See, e.g. Cal. Republican  
 28 Party v. Fair Political Practices Comm’n, No. CIV-S-04-2144 FCD PAN, 2004 U.S. Dist. LEXIS  
 22160, at \*13 (E.D. Cal. Oct. 27, 2004). This approach is no longer good law. See Human Life of  
Wash., Inc. v. Brumsickle, 624 F.3d 990, 1013 (9th Cir. 2010) (“[T]he Supreme Court has made  
 clear that exacting scrutiny, not strict scrutiny, is applicable to campaign finance disclosure  
 requirements.”).

1 regardless of the standard of review. For the reasons explained above, the Court will subject all  
2 other applications of the law to exacting scrutiny.

3 **B. Burden on Speech**

4 Yes on Prop B’s first theory of Proposition F’s constitutional infirmity is that the  
5 disclaimer requirements “are so long and cumbersome” that they leave no room for political  
6 advertising’s political message. Mot. at 13–17. The merits of this argument depend to some  
7 extent on the type of ad. The smaller or shorter the ad, the greater the burden. This section  
8 therefore proceeds by considering two categories of Yes on Prop B’s proposed advertisements:  
9 those in which the required disclaimers take up more than 40% of the ad and those in which the  
10 required disclaimers take up 40% or less of the ad.

11 **1. Yes on Prop B’s proposed 5” by 5” newspaper advertisements, smaller**  
12 **“ear” advertisements, and digital/audio advertisements of 30 seconds or**  
13 **less.**

14 San Francisco agrees that when Proposition F’s disclaimers take up more than 40% of the  
15 space or run time of a given ad they impose an unconstitutional burden on political speech. Opp’n  
16 (dkt. 18) at 4. Both parties have called for the Court to enjoin Proposition F’s application where  
17 its disclaimer requirements will occupy more than 40% of a given Yes on Prop B advertisement.  
18 Id. at 24; Mot. at 1. The Court agrees that such an injunction is necessary.

19 Yes on Prop B’s required disclaimers consume 75 to 100% of 5” by 5” newspaper  
20 advertisements, smaller “ear” advertisements, and digital/audio advertisements 30 seconds or less  
21 in length. Muir Decl. ¶¶ 36, 67. Proposition F virtually forecloses the use of these ads, because  
22 the mandated disclaimers leave little or no room for the political message. This is especially  
23 troubling because the burden is greatest for some of the most cost-effective types of advertising.  
24 David Decl. ¶¶ 28–30. Perversely, a law intended to reveal the influence of money in politics may  
25 have the unintended result of severely hampering the political speech of underfunded committees.  
26 The First Amendment cannot tolerate a law that, as a practical matter, forecloses certain forms of  
27 political speech and requires Yes on Prop B to expend precious funds on more expensive  
28

1 advertising or forgo its political expression altogether. Cf. Buckley v. Valeo, 424 U.S. 1, 17–19  
 2 (1976) (“substantial . . . restraints on the quantity and diversity of political speech” are  
 3 unconstitutional). The burden Proposition F imposes on these forms of advertising is  
 4 unconstitutional whether it is reviewed under strict or exacting scrutiny.

5 Because Yes on Prop B has shown a likelihood of success on the merits of this issue, it has  
 6 also demonstrated that the other Winter factors weigh in favor of a preliminary injunction. First  
 7 Amendment violations constitute irreparable harm and demonstrate that the balance of hardships  
 8 tips in the plaintiff’s favor. Am. Beverage Ass’n v. City & Cty. of San Francisco, 916 F.3d 749,  
 9 758 (9th Cir. 2019). There is also a strong public interest in avoiding constitutional violations. Id.

10 **2. Yes on Prop B’s other proposed advertisements.**

11 Larger and longer advertisements present a different case, which the rest of this section  
 12 evaluates under the exacting scrutiny framework.

13 **a. Governmental interest.**

14 The Ninth Circuit has recognized that in the referendum context, where “voters act as  
 15 legislators, the government has a vital interest in providing the public with information about who  
 16 is trying to sway its opinion.” Brumsickle, 624 F.3d at 1017 (internal alterations and citations  
 17 omitted). “Given the complex detail involved in ballot initiatives, and the sheer volume of  
 18 relevant information confronting voters, voters cannot be expected to make such a determination  
 19 on their own.” Id. Disclaimer and disclosure requirements that help “voters . . . determine who is  
 20 behind the advertisements seeking to shape their views” therefore serve a “sufficiently important”  
 21 governmental interest. Id. at 1017–18.

22 Yes on Prop B argues that San Francisco has failed to offer any justification for the new  
 23 formatting rules “[o]ther than boiler-plate statements about the need for more disclosure.” Mot. at  
 24 17. It contends that without more specific arguments or a “factual record” demonstrating “why it  
 25 is now necessary for disclaimers to be spoken at the beginning of audio and digital ads, and why  
 26 print disclaimers must be so much bigger,” San Francisco cannot demonstrate an important  
 27 governmental interest. Id.; see also Reply (dkt. 22) at 6 (“The City has provided no evidence or  
 28



1 rationale as to why disclaimers on print ads had to change from 12-point font to 14-point font, or  
 2 why an entire disclaimer must be spoken for all audio and video ads instead of just identifying the  
 3 sponsor.”). But “[t]he quantum of empirical evidence needed to satisfy heightened judicial  
 4 scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the  
 5 justification raised.” Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 391 (2000). It is hardly  
 6 novel or implausible to suggest that the informational interest described above is better served by  
 7 more noticeable, easier-to-read font or more obvious, difficult to ignore, and complete disclaimers.

8 **b. First Amendment burden.**

9 The next question is whether this interest “reflect[s] the seriousness of the actual burden on  
 10 First Amendment rights.” Davis, 554 U.S. at 744. San Francisco argues it must, because the  
 11 Supreme Court has upheld a four-second disclaimer requirement as applied to a ten-second  
 12 advertisement. Opp’n at 8 (citing Citizens United, 558 U.S. at 368). San Francisco concludes that  
 13 “the Supreme Court [has] recognized that disclaimers that take 40% of advertising space satisfy  
 14 exacting scrutiny.” Id.

15 The Court declines the invitation to establish a bright-line rule that disclaimer requirements  
 16 are not unduly burdensome so long as they consume no more than 40% of a political  
 17 advertisement. The burden imposed by a given disclaimer will vary depending on the type of  
 18 disclaimer, relevant advertisement, and various other case-specific factors. For instance, the four-  
 19 second disclaimer in Citizens United had to be displayed, not spoken. 558 U.S. at 366. It was  
 20 accompanied by a spoken disclaimer that was considerably shorter than the one required by  
 21 Proposition F. Id. Yes on Prop B suggests this disclaimer format is less burdensome than a  
 22 spoken disclaimer lasting for a comparable percentage of the ad. Reply at 2. That may be true for  
 23 some ads, but not for others. In any event, the Court is convinced that the extent of the burden on  
 24 First Amendment activity will depend on facts other than the percentage of ad forfeited to a  
 25 disclaimer. A bright-line, 40% rule would lead to absurd results. Id. at 6.

26 That being said, Citizens United does establish that a disclaimer may commandeer a  
 27 prominent position in a political ad without offending the First Amendment. That is the case here.  
 28

1 With Proposition F’s application to the smaller ads enjoined, its disclaimers will not take up more  
2 than approximately 35% of any of Yes on Prop B’s proposed ads. David Decl. ¶¶ 32–33. That  
3 leaves almost two-thirds of the ad for Yes on Prop B’s pro-Prop-B messaging. The Court finds  
4 that this space is sufficient to communicate Prop B’s political message. See, e.g. Muir Decl.  
5 Ex. 1. While the burden imposed by the disclaimer requirements is not insignificant, it is not  
6 inappropriate given the important governmental interest at stake. Brumsickle, 624 F.3d at 1017–  
7 18. This is especially true because most of the disclaimer’s length is attributable to its content,  
8 which is substantially related to San Francisco’s informational interest. See supra Section C.1.

9 Yes on Prop B offers a mathematical formula of its own. It argues the disclaimer  
10 requirements must be unduly burdensome, because the Ninth Circuit has struck down a  
11 requirement that warnings about the dangers of sugar occupy 20% of printed ads for sugar-  
12 sweetened beverages. Mot. at 13–14 (citing Am. Beverage Assoc., 916 F.3d at 756). But  
13 American Beverage Association is distinguishable, because it applied a different standard to a  
14 different type of speech.

15 The Ninth Circuit evaluated the sugar warning under the Zauderer test, which applies to  
16 “required warnings on commercial products,” and asks, inter alia, whether the mandatory  
17 disclaimer is “unjustified or unduly burdensome.” Am. Beverage Assoc., 916 F.3d at 756.  
18 American Beverage Association concluded San Francisco had failed to meet its burden of showing  
19 that the sugar warning was not unjustified or unduly burdensome, because “the record here shows  
20 that a smaller warning—half the size—would accomplish Defendant’s stated goals.” Id. at 757.  
21 Specifically, a study in the record suggested that a smaller warning would still reduce  
22 consumption of sugary beverages and improve consumers’ awareness of such beverages’ dangers.  
23 Id. The Ninth Circuit acknowledged that in other circumstances, a more prominent disclaimer  
24 might be warranted. Id. (“To be clear, we do not hold that a warning occupying 10% of product  
25 labels or advertisements necessarily is valid, nor do we hold that a warning occupying more than  
26 10% of product labels or advertisements necessarily is invalid.”). There is no similar empirical  
27 evidence in the record here, and the fact that the content of the challenged disclaimer is a major  
28 factor contributing to its length suggests a smaller disclaimer would not be equally effective.

1 The applicable constitutional standard is another distinguishing factor. Exacting scrutiny,  
 2 not the Zauderer test, applies in this case. Yes on Prop B oversimplifies when it argues that  
 3 American Beverage Association necessarily controls the result here because political speech  
 4 enjoys greater protection than commercial speech. Mot. at 14. It ignores the factual distinctions  
 5 between these cases, and the fact that the political context raises concerns not present in a  
 6 commercial speech case. The referendum context implicates the important governmental interest  
 7 in informing voters about who is paying for political advertising. Brumsickle, 624 F.3d at 1017–  
 8 18.

9 Finally, San Francisco has taken the position that Proposition F does not mandate  
 10 disclaimers for live telephone calls. Opp’n at 2 n.2. Given that representation the Court need not  
 11 decide whether the disclaimer requirements are constitutional when applied to this form of  
 12 advertising.<sup>5</sup>

### 13 C. Secondary Contributor Disclosure Requirements

14 Yes on Prop B also argues that the secondary contributor disclosure requirements are  
 15 unconstitutional, regardless of the format they appear in.

#### 16 1. Governmental interest.

17 As explained above, the governmental interest in helping “voters . . . determine who is  
 18 behind the advertisements seeking to shape their views” is “sufficiently important.” Brumsickle,  
 19 624 F.3d at 1017–18.

20 Yes on Prop B argues that “the relationship between the secondary contributor and the  
 21 ultimate speaker is far too attenuated” to demonstrate a substantial relation between the disclosure  
 22 requirement and the informational interest. Mot. at 22. But “individuals and entities interested in  
 23 funding election-related speech often join together in ad hoc organizations with creative but  
 24

---

25 <sup>5</sup> In any case, the Court agrees with San Francisco’s interpretation of the applicable requirements.  
 26 Yes on Prop B argues Proposition F applies to live phone calls because “[t]he City ordinance  
 27 cross-references the Political Reform Act which, in turn, defines ‘advertisement’ broadly as ‘any  
 28 general or public communication that is authorized and paid for by a committee for the purpose of  
 supporting or opposing . . . a ballot measure.’ Reply at 2 n.1 (citing Cal. Gov’t Code  
 § 84501(a)(1)). A phone call from a live volunteer to a specific voter is not a “general or public  
 communication.”

1 misleading names.” ACLU v. Heller, 378 F.3d 979, 994 (9th Cir. 2004). As the Ninth Circuit has  
2 recognized, “reporting and disclosure requirements can expose the actual contributors to such  
3 groups and thereby provide useful information concerning the interests supporting or opposing a  
4 ballot proposition,” when “simply supplying the name . . . of the organization . . . does not provide  
5 useful information.” Id.

6 These observations explain the utility of the secondary contributor disclosures. If Yes on  
7 Prop B only revealed that it had received funding from the United Democratic Club of San  
8 Francisco, that would not be particularly revealing. The fact that the United Democratic Club of  
9 San Francisco received substantial funding from the San Francisco Association of Realtors and the  
10 Committee on Jobs Government Reform Fund is helpful to voters in understanding “the interests  
11 supporting” the Club, see id., and therefore “who is behind the advertisements seeking to shape  
12 their views.” Brumsickle, 624 F.3d at 1017–18. The secondary contributor disclosure  
13 requirements effectuate the interests served by the primary disclosure requirements, by helping  
14 voters understand who the primary contributors actually are.

15 The persuasive precedent Yes on Prop B cites in support of its position is distinguishable.  
16 Citizens Union of New York v. Attorney General of New York, 408 F. Supp. 3d 478 (S.D.N.Y.  
17 2019), struck down as unconstitutional a law that required 501(c)(3) non-profit organizations to  
18 disclose the identities of donors that gave more than \$2,500 if the non-profit itself gave more than  
19 \$2,500 to a 501(c)(4) organization engaged in lobbying. Id. at 504. The court concluded that  
20 “[t]he link between a 501(c)(3) donor and the content of lobbying communications by the  
21 501(c)(4) is too attenuated to effectively advance any informational interest.” Id. at 505. But this  
22 conclusion depended on the unique nature of a 501(c)(3), which “by definition cannot engage in  
23 substantial lobbying activity.” Id. It made little sense to tie donors to lobbying activities because  
24 they made a donation to an organization that could not, by law, engage in substantial lobbying  
25 activity. Id. That is not the case here—none of the relevant parties are 501(c)(3)s.

26 Yes on Prop B also argues that the secondary contributor disclaimers are unnecessary,  
27 because other disclosure laws require that most of this information be made publicly available  
28 online. Mot. at 20–21. This argument proves too much. If it were correct, no disclaimer would

1 withstand constitutional muster if all it did was provide information that was already on the  
 2 internet. But the Supreme Court has approved disclaimer requirements that were at least partially  
 3 redundant of reporting requirements. Citizens United, 558 U.S. at 366.

4 True, the Ninth Circuit has suggested that because disclaimer requirements “affect the  
 5 content of the communication itself” they are more constitutionally suspect than laws that  
 6 “requir[e] the reporting of funds used to finance speech.” Heller, 378 F.3d at 987. But it has also  
 7 upheld disclaimer requirements for political advertising as an appropriate means of furthering the  
 8 government’s interest in informing voters “who or what entity is trying to persuade them to vote in  
 9 a certain way.” Yamada v. Snipes, 786 F.3d 1182, 1203 n.14 (9th Cir. 2015). And it has  
 10 recognized that the voting public “cannot be expected to explore the myriad pressures to which  
 11 they are regularly subjected” and may “render a decision based upon a thirty-second sound bite  
 12 they hear the day before the election.” Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088,  
 13 1106 (9th Cir. 2003). The government may therefore constitutionally “provide[ ] its voters with a  
 14 useful shorthand for evaluating the speaker behind the sound bite.” Id. The secondary contributor  
 15 disclaimers provide voters with the necessary information at the time they hear (or see) the “sound  
 16 bite” and without having to independently “explore the myriad pressures to which they are  
 17 regularly subjected.” See id. That is why they further a sufficiently important governmental  
 18 interest.

19 **2. First Amendment burden.**

20 Yes on Prop B offers two theories of the secondary contributor disclaimer requirement’s  
 21 burden on First Amendment rights. First, that the requirement infringes on the committee’s  
 22 associational rights, and second that it impermissibly chills political contributions.

23 **a. Associational rights.**

24 According to Yes on Prop B, the secondary contributor disclaimers are a form of  
 25 unconstitutional forced association because they “requir[e] that plaintiffs display on the face of  
 26 every political communication the names and contribution amounts of secondary contributors with  
 27 whom they have not associated” and “force[ ] the Committee to credit these secondary  
 28

1 contributors as endorsers of that message, regardless of whether that is actually true.” Mot. at 18.  
 2 In support of this argument, Yes on Prop B cites cases like Janus v. American Federation of State,  
 3 County, and Municipal Employees, 138 S. Ct. 2448 (2018), for the proposition that the First  
 4 Amendment guarantees the right not to associate. Mot. at 19. But Janus and its ilk are  
 5 distinguishable, because Yes on Prop B is not being forced to associate with anyone. It is not, for  
 6 example, being forced to fund speech it disagrees with. Cf. Janus, 138 S. Ct. at 2459–60. What it  
 7 is required to do is accurately report that it has chosen to associate, at least indirectly, with certain  
 8 organizations and individuals by taking money from groups they support financially.

9 Yes on Prop B’s argument reduces to a theory of forced association by way of confusion.  
 10 Yes on Prop B thinks it is being forced to associate with its secondary contributors because the  
 11 disclaimers will confuse voters into believing that Yes on Prop B is more closely associated with  
 12 its secondary contributors than it actually is. See Mot. at 17 (“Prop. F requires that the Committee  
 13 identify on the face of its political messages, individuals and entities that they have not associated  
 14 with, information that will ultimately confuse and misinform the electorate.”); see also id. at 21  
 15 (“[B]y requiring the names of secondary contributors to appear on the political communications of  
 16 a third-party to whom they have not contributed, Prop. F implies to the voting public that those  
 17 secondary contributors knew, approved, and directed their money to fund the third party’s  
 18 communication.”).

19 Yes on Prop B’s problem is that the Supreme Court has flatly rejected a virtually identical  
 20 voter confusion theory of association. Washington State Grange v. Washington State Republican  
 21 Party, 552 U.S. 442 (2008), upheld a Washington state law that dictated that elections for “partisan  
 22 offices” should occur “in two stages: a primary and a general election.” Id. at 447. Candidates  
 23 declared their “party preference, or independent status” in the primary. Id. Political parties could  
 24 not “prevent a candidate who [was] unaffiliated with, or even repugnant to, the party from  
 25 designating it as his party of preference.” Id. The top two vote-getters in the primary advanced to  
 26 the general election, maintaining the party preference they declared at the primary stage. Id. at  
 27 447–48.

28 Washington’s Republican Party challenged the law on the theory that it “burden[ed] their

1 associational rights because voters [would] assume that candidates on the general election ballot  
2 [were] the nominees of their preferred parties.” Id. at 454. The Court held that relying “on the  
3 possibility that voters will be confused as to the meaning of the party preference designation” was  
4 “sheer speculation” and “the fatal flaw in [the Republican Party’s] argument.” Id. The Supreme  
5 Court concluded that its case law “reflect[ed] a greater faith in the ability of individual voters to  
6 inform themselves about campaign issues.” Id. There was “simply no basis to presume that”  
7 voters would misunderstand the import of the party preference designation. Id. This was  
8 “especially true” because “it was the voters of Washington themselves, rather than their elected  
9 representatives, who enacted” the relevant law. Id. at 455.

10 So too here. There is simply no reason to presume San Francisco voters will  
11 misunderstand the import of the very disclaimers they voted to require. The only evidence Yes on  
12 Prop B posits to the contrary is a single sentence in Margaret Muir’s declaration that “recipients of  
13 campaign communications perceive that a person listed as a funding source on that  
14 communication is associated with the message sought to be conveyed.” Muir Decl. ¶ 18. Even  
15 assuming this statement is accurate and admissible, it does not establish Yes on Prop B’s  
16 contention that voters will mistakenly believe the secondary contributors are more closely  
17 associated with the pro-Proposition B message than is true. Voters may accurately determine that  
18 secondary contributors are associated with Yes on Prop B because they financially support  
19 organizations that support Yes on Prop B. But, as the Supreme Court has recognized, there is  
20 simply no reason to believe voters will be deceived into believing that a closer association exists  
21 by the very disclaimers they voted to require.

22 Yes on Prop B relies on California Republican Party v. Fair Political Practices  
23 Commission as support for its voter-confusion theory of forced association, but that unpublished  
24 case is unpersuasive here for three reasons. First, the court in Fair Political Practices applied strict  
25 scrutiny, 2004 U.S. Dist. LEXIS 22160, at \*13–14, which the Ninth Circuit has since determined  
26 “set[s] the bar too high” in cases concerning disclaimer and disclosure requirements, Brumsickle,  
27 624 F.3d at 1013.

28 Second, Fair Political Practices is distinguishable. It considered a law that “required that

1 any committee paying for an advertisement supporting or opposing a ballot measure identify on  
2 the face of the advertisement the committee's two largest contributors of \$50,000 or more." Fair  
3 Pol. Practices Comm'n, 2004 U.S. Dist. LEXIS 22160, at \*3. The court enjoined application of  
4 that requirement to political party committees. Id. at \*23. But that result rested on the unique  
5 nature of political parties. The court reasoned that it was unnecessary to disclose a political  
6 party's financial backers, because "[i]n the context of political parties, the true 'speaker' is the  
7 political party." Id. at \*18. In contrast, the court recognized that "primarily formed committees"  
8 might be "ad hoc organizations with creative but misleading names." Id. (citing Heller, 378 F.3d  
9 at 994). Disclosing the top financial contributors of primarily formed committees could, therefore,  
10 "prove useful at identifying the true 'speaker,'" and thus further "a compelling interest in  
11 unveiling for the voters the true 'speakers' behind such an advertisement." Id.

12 It is true that the result in Fair Political Practices also rested on a theory of association by  
13 voter confusion akin to Yes on Prop B's. The court found it was "not difficult to imagine a  
14 situation in which the contributor will be identified as a major donor on an advertisement  
15 containing a political message with which the contributor does not agree." Id. at \*19. But this  
16 logic also depended in part on the unique nature of political parties. The court noted that  
17 "[c]ontributions are made to political parties for many reasons, including agreement with a party's  
18 general philosophy, support of certain platform positions, or simply opposition to the competing  
19 party." Id. at \*18–19. And in any event, Fair Political Practices is an unreported decision of  
20 another court which predates the Supreme Court's decision in Washington State Grange. To the  
21 extent Fair Political Practices and Washington State Grange conflict, the Supreme Court's  
22 decision must control.

23 **b. Chilling effect on donations.**

24 Yes on Prop B also complains that the secondary contributor disclosure requirements chill  
25 political contributions. Mot. at 20. Its principal officer, Todd David, states that certain would-be  
26 contributors have declined to donate due to concerns about having their own contributor's names  
27 listed on the committee's advertising. See David Decl. ¶ 23–25. Even assuming this claim is true  
28



1 and admissible, the Ninth Circuit has held that the possibility that “individuals who would prefer  
 2 to remain anonymous [will be deterred] from contributing to a ballot measure committee”  
 3 establishes only a “modest burden” on First Amendment rights. Family PAC v. McKenna, 685  
 4 F.3d 800, 806 (9th Cir. 2012) (survey showing that contributors may “think twice” about donating  
 5 if it would mean publicly disclosing their names and addresses did not show that the disclosure  
 6 law “actually and meaningfully deter[ed] contributors” and thus established only a “modest  
 7 burden”). At most, Yes on Prop B’s evidence establishes that the chilling effect on campaign  
 8 contributions is a modest burden reasonably related to the important informational interest  
 9 discussed above.

10 **D. Facial Challenge**

11 Yes on Prop B seeks a preliminary injunction blocking all enforcement of Proposition F.  
 12 Mot. at 1. Because this relief would “reach beyond the particular circumstances of these  
 13 plaintiffs,” Yes on Prop B must “satisfy [the] standards for a facial challenge.” John Doe No. 1 v.  
 14 Reed, 561 U.S. 186, 194 (2010). To do this, it must at least show that a “substantial number of  
 15 [Proposition F’s] applications are unconstitutional, judged in relation to the statute’s plainly  
 16 legitimate sweep.” Wash. State Grange, 552 U.S. at 450 n.6 (internal quotation marks omitted).  
 17 Yes on Prop B’s burden is heavy, because “[f]acial challenges are disfavored.” Id. at 450.

18 Yes on Prop B has failed to meet its heavy burden. As discussed above, it has not even  
 19 shown that Proposition F is unconstitutional as applied to all of Yes on Prop B’s proposed  
 20 advertising. It offers no evidence or argument that Proposition F is generally unconstitutional in  
 21 its application to the numerous other advertising for and against ballot measures in San Francisco.  
 22 Its arguments are tailored to its own disclosures (the content of which varies by committee) and  
 23 advertising. See generally Mot. The injunction issued by this Order applies only to  
 24 Proposition F’s enforcement against Yes on Prop B.

25 Rather than addressing the standard for a facial challenge, Yes on Prop B argues that  
 26 enjoining the law only as applied to its own advertisements will confuse other committees, chill  
 27 speech, and lead to needless repeat litigation. Reply at 14–15. The risk of confusion and repeat  
 28

1 litigation is irrelevant to the standard for a facial challenge. See Wash. State Grange, 552 U.S. at  
 2 450 n.6. The possibility of a chilling effect is necessarily tied up in the merits and does not  
 3 warrant a broader injunction for the reasons explained above.

4 Yes on Prop B also cites Citizens United to suggest that facial review is preferable to an  
 5 as-applied challenge in these circumstances. Reply at 15. The Court’s determination that facial  
 6 review was appropriate in that case rested on its conclusion that “a statute which chills speech can  
 7 and must be invalidated where its facial invalidity has been demonstrated.” Citizens United, 558  
 8 U.S. at 336 (emphasis added). Therein lies the crucial distinction: Yes on Prop B has not  
 9 demonstrated Proposition F’s facial invalidity.

10 **E. Other Winter Factors**

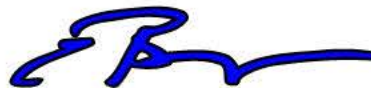
11 The “most important” Winter factor, likelihood of success on the merits, favors San  
 12 Francisco. VidAngel, 869 F.3d at 856. Yes on Prop B’s arguments that the other Winter factors  
 13 weigh in its favor rely on its position that it has demonstrated a likelihood of success on the merits.  
 14 See Mot. at 23–24. Yes on Prop B has therefore failed to demonstrate that any of the Winter  
 15 factors weigh in favor of a preliminary injunction.

16 **IV. CONCLUSION**

17 The City and County of San Francisco are enjoined from enforcing the disclaimer laws  
 18 adopted through Proposition F against Yes on Prop B’s proposed 5” by 5” newspaper  
 19 advertisements, smaller “ear” advertisements, and spoken disclaimers on digital or audio  
 20 advertisements of thirty seconds or less. Yes on Prop B’s requested injunctive relief is otherwise  
 21 denied.

22 **IT IS SO ORDERED.**

23 Dated: February 20, 2020



24 CHARLES R. BREYER  
 25 United States District Judge



# San Francisco Ethics Commission

25 Van Ness Avenue, STE 220  
San Francisco, CA 94102-6053  
ethics.commission@sfgov.org  
415-252-3100 | sfethics.org

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December 12, 2022

Honorable Members of the San Francisco Board of Supervisors  
Attention: Angela Calvillo, Clerk of the Board of Supervisors  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102

Re: **Ethics Commission Adoption of Amendments to SF Campaign & Governmental Conduct Code Sec. 1.161 to Conform with 2020 Prop. F Court Order Issued by Federal District Court Judge Charles R. Breyer**

Dear Members of the Board:

On November 22, 2022, the Board of Supervisors' Rules Committee referred an ordinance ([File # 221161](#)) amending Campaign & Governmental Conduct Code Sec. 1.161 to modify disclaimer requirements for campaign advertisements to the Ethics Commission. The proposed ordinance would amend the Code to conform with a court order issued by the Honorable Charles R. Breyer, District Court Judge for the Northern District of California.

The proposed ordinance was transmitted to the Ethics Commission pursuant to Campaign and Governmental Conduct Code, Section 1.103, for public hearing and recommendation. A four-fifths votes of the Ethics Commission is required in advance prior to consideration by the Board of Supervisors.

At the Ethics Commission's meeting on Friday, December 9, 2022, the Commission approved the ordinance by a vote of 4-0, which satisfies the required vote threshold for Ethics Commission approval of the ordinance under Section 1.103.

A hard copy of the [Staff memorandum dated December 2, 2022](#), in which Ethics Staff recommended the Commission vote to approve the legislation as provided, has been attached for reference.

If you have any questions about the attached regulations, please feel free to contact me or Senior Policy Analyst, Michael Canning at (415) 252-3100.

Sincerely,

*LeeAnn Pelham*

LeeAnn Pelham, Executive Director

Attachment Included

cc: Brad Russi, Office of the City Attorney

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# Attachment



# San Francisco Ethics Commission

25 Van Ness Avenue, STE 220  
San Francisco, CA 94102-6053  
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Date: December 2, 2022

To: Members of the Ethics Commission

From: Michael Canning, Senior Policy Analyst

Re: **AGENDA ITEM 09 – Discussion and possible action on legislation to amend campaign finance disclaimer requirements to comply with court order.**

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## Summary and Action Requested

This memo provides background on the City’s campaign finance disclaimer requirements and analysis of the recently introduced legislation that is currently before the Board of Supervisors and the Ethics Commission to amend these rules to comply with a court order. Staff recommends the Commission consider the proposed legislation presented in **Attachment 1** and vote to approve the ordinance as drafted.

## Background

In 2019, voters approved [Proposition F](#), which amended the Campaign and Governmental Conduct Code (C&GCC) in several ways, including changes to the City’s disclosure requirements for primarily formed independent expenditure committees. Prior to the passage of Proposition F, these committees were required to disclose their top three contributors of \$10,000 or more on advertisements paid for by the committee. Proposition F lowered the dollar amount in this disclaimer requirement to \$5,000 and established a new requirement that these committees also disclose their “secondary contributors.”

Per [Section 1.161](#) of the C&GCC, the secondary contributors disclosure rule now requires that “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.”

In January 2020, a group of plaintiffs challenged the requirement to disclose secondary contributors established through Proposition F. The plaintiff’s request for a preliminary injunction was granted in part and denied in part, by the Honorable Charles R. Breyer, District Court Judge for the Northern District of California; a copy of the court order is included below as **Attachment 2**. The court granted the preliminary injunction with respect to the disclosure of secondary contributors on print advertisements that are “5” by 5” newspaper advertisements, smaller “ear” advertisements, and spoken disclaimers on digital or audio advertisements of thirty seconds or less.” The court upheld the other disclaimer requirements enacted through Proposition F.

The court order has prevented the City from enforcing the secondary disclaimer requirement on print advertisements that are 5" by 5" and on audio and video advertisements that are 30 seconds or less, since February 2020.

## Proposed Legislative Amendments

On November 15, 2022, Supervisor Mar introduced legislation ([File # 221161](#)) that would amend Section 1.161 of the C&GCC to align with Judge Breyer's order. The proposed legislation would insert the following two exceptions into Section 1.161(a)(1):

- ***(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.

The proposed legislation makes no other changes to the disclaimer rules and only codifies the limitations already established by Judge Breyer's order. A copy of the legislation is included as **Attachment 1** and a copy of the legislative digest for the legislation is included as **Attachment 3**.

Per [Section 1.103](#), Article I, Chapter 1 of the Campaign and Governmental Conduct Code can only be amended by the Board of Supervisors if "the Ethics Commission approves the proposed amendment in advance by at least a four-fifths vote of all its members." In order for the Board of Supervisors to approve the proposed legislation that would amend the City's disclaimer requirements, the Ethics Commission must first approve the legislation by a four-fifths vote.

## Recommended Next Steps

Considering the limited scope of this legislation and that it is only codifying what has already been established through court order, Staff recommends the Commission vote to approve the legislation as drafted, so that the Board of Supervisors can move forward.

### Attachments:

**Attachment 1:** Legislation Amending Campaign Finance Disclaimer Requirements

**Attachment 2:** Judge Breyer's Order Dated February 20, 2020

**Attachment 3:** Legislative Digest for Amendments to Campaign Finance Disclaimer Requirements

# Attachment 1

1 [Campaign and Governmental Conduct Code - Campaign Advertisement Disclaimer  
2 Requirements]

3 **Ordinance amending the Campaign and Governmental Conduct Code to modify**  
4 **disclaimer requirements for campaign advertisements, to conform to a court order.**

5 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
6 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
7 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
8 **Board amendment additions** are in double-underlined Arial font.  
9 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
10 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
11 subsections or parts of tables.

12 Be it ordained by the People of the City and County of San Francisco:

13 Section 1. Findings.

14 (a) Proposition F, adopted by the voters at the November 5, 2019 election, included  
15 several amendments to the Campaign and Governmental Conduct Code: prohibiting  
16 campaign contributions from limited liability companies and limited liability partnerships;  
17 prohibiting campaign contributions to certain City elected officials, candidates, and  
18 committees from persons with pending or recent land use matters before the City; and  
19 expanding disclaimer requirements for independent expenditure committee advertisements.  
20 The legislative file for Proposition F is available in Board File No. 190723.

21 (b) Proposition F's new disclaimer requirements on campaign advertisements included  
22 a requirement that a committee disclose "secondary contributors" – that is, for primarily  
23 formed independent expenditure committees and ballot measures, if any of the top three  
24 major contributors of \$5,000 or more is a committee, the disclaimer must also disclose the top  
25 two major contributors to that committee as well.



1 (c) In January 2020, a group of plaintiffs challenged the constitutionality of these  
2 disclaimer requirements, specifically with respect to the required disclosure of secondary  
3 contributors. In February 2020, the Honorable Charles R. Breyer, District Court Judge for the  
4 Northern District of California, granted in part and denied in part, the plaintiffs' request for a  
5 preliminary injunction. The court granted the preliminary injunction with respect to disclaimers  
6 of secondary contributors as applied to print advertisements that are 5 inches by 5 inches or  
7 smaller, other smaller print advertisements sometimes referred to as "ear" advertisements,  
8 and spoken disclaimers in audio or video advertisements that are 30 seconds or less. But  
9 citing the vital governmental interest in providing the public with information about the funding  
10 of campaign advertisements, the court otherwise upheld the Proposition F disclaimer  
11 requirements. A copy of Judge Breyer's order on the motion for preliminary injunction is  
12 available in Board File No.221161.

13 (d) The sole purpose of this ordinance is to bring the Proposition F disclaimer  
14 requirements, codified in Campaign and Governmental Conduct Code Section 1.161, in line  
15 with Judge Breyer's order.

16

17 Section 2. Article I, Chapter 1 of the Campaign and Governmental Conduct Code is  
18 hereby amended by revising Section 1.161, to read as follows:

19 **SEC. 1.161. CAMPAIGN ADVERTISEMENTS.**

20 (a) DISCLAIMERS. In addition to complying with the disclaimer requirements set forth  
21 in Chapter 4 of the California Political Reform Act, California Government Code sections  
22 84100 et seq., and its enabling regulations, all committees making expenditures which  
23 support or oppose any candidate for City elective office or any City measure shall also comply  
24 with the following additional requirements:

25

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

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

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

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

24 (3) MASS MAILINGS AND SMALLER WRITTEN ADVERTISEMENTS. Any  
25 disclaimer required by the Political Reform Act and by this section on a mass mailing, door

1 hanger, flyer, poster, oversized campaign button or bumper sticker, or print advertisement  
2 shall be printed in at least 14-point, bold font.

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

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

16 (b) FILING REQUIREMENTS.

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

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

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

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

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

5 (2) INDEPENDENT EXPENDITURE MASS MAILINGS.

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

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

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

18 (3) CANDIDATE MASS MAILINGS.

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

22 (B) Each candidate committee that pays for a mass mailing shall file a  
23 copy of the mailing and the itemized disclosure statement required by subsection (b)(3) within  
24 48 hours of the date of the mailing if the date of the mailing occurs within the final 16 days  
25 before the election.

1                   ~~(3)~~ (4) The Ethics Commission shall specify the method for filing copies of  
2 advertisements and mass mailings.

3                   Section 3. Requirements for Amendment by the Board of Supervisors.

4                   (a) As set forth in Proposition F, approved by the voters at the November 5, 2019  
5 election, an amendment to Section 1.161 of the Campaign and Governmental Conduct Code  
6 may be made if:

7                   (1) the amendment furthers the purposes of Chapter 1, Article I of the  
8 Campaign and Governmental Conduct Code;

9                   (2) the Ethics Commission approves the amendment in advance of Board of  
10 Supervisors approval by at least a four-fifths vote of all its members;

11                   (3) the amendment is available for public review at least 30 days before the  
12 amendment is considered by the Board of Supervisors or any committee of the Board of  
13 Supervisors; and

14                   (4) the Board of Supervisors approves the amendment by at least a two-thirds  
15 vote of all its members.

16                   (b) At its meeting of \_\_\_\_\_, the Ethics Commission approved this  
17 ordinance by a vote of \_\_\_\_\_.

18                   (c) This ordinance has been available for public review for at least 30 days before  
19 consideration by a committee of the Board of Supervisors.

20  
21                   Section 4. Effective Date. This ordinance shall become effective 30 days after  
22 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
23 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
24 of Supervisors overrides the Mayor's veto of the ordinance.

1 Section 5. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors  
2 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,  
3 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal  
4 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment  
5 additions, and Board amendment deletions in accordance with the "Note" that appears under  
6 the official title of the ordinance.

7  
8 Section 6. Severability. If any section, subsection, sentence, clause, phrase, or word  
9 of this ordinance, or any application thereof to any person or circumstance, is held to be  
10 invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision  
11 shall not affect the validity of the remaining portions or applications of the ordinance. The  
12 Board of Supervisors hereby declares that it would have passed this ordinance and each and  
13 every section, subsection, sentence, clause, phrase, and word not declared invalid or  
14 unconstitutional without regard to whether any other portion of this ordinance or application  
15 thereof would be subsequently declared invalid or unconstitutional.

16  
17 APPROVED AS TO FORM:  
18 DAVID CHIU, City Attorney

19 By: /s/ Bradley A. Russi  
20 BRADLEY A. RUSSI  
21 Deputy City Attorney

22  
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# Attachment 2

United States District Court  
Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YES ON PROP B, COMMITTEE IN  
SUPPORT OF THE EARTHQUAKE  
SAFETY AND EMERGENCY RESPONSE  
BOND, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF SAN  
FRANCISCO,

Defendant.

Case No. [20-cv-00630-CRB](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
PRELIMINARY INJUNCTION**

Yes on Prop B, Committee in Support of the Earthquake Safety and Emergency Response Board, contends that the City and County of San Francisco’s new disclaimer requirements create an unconstitutional burden on its First Amendment right to advocate for earthquake safety. The Court agrees that the disclaimer rules are unconstitutional as applied to some smaller or shorter types of advertising, because they leave effectively no room for pro-earthquake safety messaging. But the rules are not an unconstitutional burden on larger or longer advertising, and requiring the committee to disclose not only its own donors but also the individuals and organizations who give money to committees that in turn support Yes on Prop B is not an unconstitutional forced association or burden on campaign contributions.

**I. BACKGROUND**

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



1 requirements under California and San Francisco law. See, e.g. Cal. Gov't Code §§ 84200,  
2 84200.5, 84202.3, 84203, 84502; see also, e.g. SF Code § 1.161.

3 This case concerns two new disclaimer requirements for committee advertising that went  
4 into effect in San Francisco last year. First, the San Francisco Board of Supervisors amended San  
5 Francisco's Campaign and Governmental Conduct Code to require a spoken disclaimer at the  
6 beginning (rather than the end) of any audio or video advertisement. See SF Code § 1.161(a)(5);  
7 see also Yes on Prop B RJN<sup>1</sup> (dkt. 5-1) Ex. B.

8 Last November, San Francisco voters amended the City's disclaimer laws by approving  
9 Proposition F. See generally Yes on Prop B RJN Ex. C at 112–13. Proposition F passed with  
10 76.89% of the vote. San Francisco RJN Ex. B at 6. Now, all ads paid for by “primarily formed”  
11 independent expenditure and ballot measure committees<sup>2</sup> must include a disclosure identifying the  
12 committee's top three donors of \$5,000 or more. If one of those contributors is itself a committee,  
13 the ad must also disclose that committee's top two donors of \$5,000 or more in the last five  
14 months. In all ads other than audio ads, the names of both primary and secondary contributors  
15 must be followed by the amount of money they contributed. Id.; SF Code § 1.161(a)(1), (5). On  
16 written ads, the disclosure must be in 14-point font (rather than 12-point font, which was the case  
17 before Proposition F). RJN Ex. C at 112; SF Code § 1.161(a)(3).

18 Yes on Prop B is a “primarily formed committee” which supports Proposition B.<sup>3</sup> David  
19 Decl. (dkt. 5-5) ¶ 6. Yes on Prop B has received \$5,000 in funding from each of three other  
20 committees: Yes on A, Affordable Housing for San Franciscans Now!, the Edwin M. Lee  
21 Democratic Club Political Action Committee, and the United Democratic Club of San Francisco.

22  
23 <sup>1</sup> Yes on Prop B's request for judicial notice is unopposed and asks for notice of three documents  
24 made publicly available by San Francisco or the State of California. Because these documents  
25 come from sources whose accuracy cannot reasonably be questioned, Yes on Prop B's request is  
26 granted. See Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998–99 (9th Cir. 2010). San  
27 Francisco has also requested that the Court notice publicly available documents, plus a municipal  
28 ordinance. San Francisco RJN (dkt. 20). San Francisco's request is also granted. See id.; see also  
Tollis, Inc. v. Cty. of San Diego, 505 F.3d 935, 938 n.1 (9th Cir. 2007). Finally, the unopposed  
motion to file an amicus curiae brief (dkt. 24) is granted. See also Statement of Non-Opposition  
(dkt. 26).

<sup>2</sup> A “primarily formed” committee is one created to support or oppose a single candidate or  
measure appearing on the ballot. Cal. Gov't Code § 82047.5.

<sup>3</sup> Proposition B is an earthquake safety and emergency response bond. David Decl. ¶ 8.

1 Id. ¶ 12. Yes on Prop B wishes to spend its modest budget on cost-effective forms of advertising,  
2 including six-, fifteen-, and thirty-second digital video advertisements, yard or window signs, and  
3 Chinese language newspaper ads. Id. ¶ 29, Mot. (dkt. 5) at 1.

4 Those ads will be subject to Proposition F’s new disclaimer requirements. Yes on  
5 Prop B’s video ads must include the following disclaimer, spoken at the beginning of the video:

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

16 Muir Decl. (dkt. 5-3) ¶ 34. That disclaimer takes roughly twenty-eight seconds to read “in a  
17 clearly spoken manner and in a pitch and tone substantially similar to the rest of a typical  
18 television advertisement.” Id. ¶ 35.

19 Print ads must include the following disclosure:

20 Ad paid for by Yes on Prop B, Committee in Support of the  
21 Earthquake Safety and Emergency Response Bond. Committee  
22 major funding from: 1. United Democratic Club of San Francisco  
23 (\$5,000) – contributors include San Francisco Association of  
24 Realtors (\$6,500), Committee on Jobs Government Reform Fund  
25 (\$5,000), 2. Edwin M. Lee Democratic Club Political Action  
26 Committee (\$5,000) – contributors include Committee on Jobs  
27 Government Reform Fund (\$5,000), 3. Yes on A, Affordable Homes  
28 for San Franciscans Now! (\$5,000) – contributors include  
Salesforce.com, Inc. (\$300,000), Chris Larsen (\$250,000) Financial  
disclosures are available at sfethics.org.

Id. Ex. 1. That disclosure, when printed in size 14-point font, takes up 100% of the most common  
and economical ads printed in Chinese language newspapers (so-called “ear” ads), 75 to 80% of a  
5” by 5” ad, and 31 to 33% of a 5” by 10” ad. Id. ¶¶ 66–67. It occupies approximately 35% of a  
typical 14” by 22” horizontal window sign, id. ¶¶ 58, 61, and approximately 35 to 38% of one side  
of a typical 5.5” by 8.5” palm card, id. ¶¶ 52–53.

Yes on Prop B seeks a preliminary injunction “prohibiting defendant the City and County  
of San Francisco and its officers, agents, divisions, commissions, and all persons acting under or

1 in concert with it, from enforcing the spoken disclaimer rule in San Francisco Campaign &  
 2 Governmental Conduct Code Section 1.161(a)(5) and amendments to Section 1.161 imposed by  
 3 Proposition F.” Mot. at 1.

## 4 **II. LEGAL STANDARD**

5 A preliminary injunction is an “extraordinary remedy” that should only be awarded upon a  
 6 clear showing that the plaintiff is entitled to such relief. See Winter v. Natural Res. Def. Council,  
 7 Inc., 555 U.S. 7, 22 (2008). The party seeking a preliminary injunction must establish: (1) a  
 8 likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief;  
 9 (3) that the balance of equities tips in the plaintiff’s favor; and (4) that an injunction is in the  
 10 public interest. See id. at 20. Alternatively, the moving party must demonstrate that “serious  
 11 questions going to the merits were raised and the balance of hardships tips sharply in the  
 12 plaintiff’s favor,” and that the other two Winter elements are met. Alliance for Wild Rockies v.  
 13 Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011). The “[l]ikelihood of success on the merits is the  
 14 most important Winter factor.” Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 856 (9th Cir.  
 15 2017) (internal quotation marks omitted). It is Yes on Prop B’s burden to establish each of the  
 16 four Winter elements, but San Francisco’s burden to demonstrate Proposition F’s constitutionality.  
 17 Klein v. City of San Clemente, 584 F.3d 1196, 1201 (9th Cir. 2009).

## 18 **III. DISCUSSION**

19 Yes on Prop B presents two theories of Proposition F’s constitutional infirmity: that the  
 20 disclaimer requirements are so lengthy they impose an undue burden on political speech and that  
 21 requiring Yes on Prop B to disclose its secondary contributors unconstitutionally forces it to  
 22 associate with those entities and impermissibly chills political contributions. See Mot. at 1–2.  
 23 This order evaluates the likelihood of success on each theory, before analyzing whether the  
 24 standard for a facial challenge has been satisfied and discussing the other three Winter factors.

### 25 **A. Constitutional Standard**

26 As a preliminary matter, the parties dispute the appropriate standard for evaluating  
 27 Proposition F’s constitutionality. Because “[d]isclaimer and disclosure requirements may burden  
 28

1 the ability to speak, but . . . do not prevent anyone from speaking,” they are subject to “exacting  
 2 scrutiny.”<sup>4</sup> Citizens United v. FEC, 558 U.S. 310, 366 (2010). This standard “requires a  
 3 ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’  
 4 governmental interest.” Id. at 366–67. “[T]he strength of the governmental interest must reflect  
 5 the seriousness of the actual burden on First Amendment rights.” Davis v. FEC, 554 U.S. 724,  
 6 744 (2008).

7 Yes on Prop B nonetheless contends the Court should apply strict scrutiny, because “the  
 8 Supreme Court has avoided applying these standards in a mechanical manner, particularly when a  
 9 regulation appears on its face to fit within on[e] category, but has broader First Amendment  
 10 implications.” Mot. at 10. Neither of the cases Yes on Prop B cites for this proposition is on  
 11 point. Both involved laws that effectively penalized candidates who expended more than a  
 12 threshold amount of personal funds, by raising contribution limits or providing public funds for  
 13 their opponents. See Davis, 554 U.S. at 738–40; Ariz. Free Enter. Club’s Freedom Club PAC v.  
 14 Bennett, 564 U.S. 721, 736–37 (2011). The Court applied strict scrutiny to these schemes,  
 15 because they constituted an “unprecedented penalty” on campaign expenditures. Davis, 554 U.S.  
 16 at 739.

17 Yes on Prop B does not cite a case which employed this logic to subject disclosure or  
 18 disclaimer requirements to strict scrutiny. Even if the logic of Davis and Bennett could be  
 19 extended to the disclaimer and disclosure context, for the reasons explained below, most  
 20 applications of Proposition F do not impose such “a special and significant burden” on First  
 21 Amendment rights that strict scrutiny would apply. Cf. Davis, 554 U.S. at 739. The only possible  
 22 exception is its application to smaller or shorter advertisements that are completely occupied by  
 23 the required disclaimers. As explained below, that application of Proposition F is unconstitutional  
 24

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25 <sup>4</sup> Before the Supreme Court clarified that disclaimer and disclosure requirements are subject to  
 26 exacting scrutiny, some courts subjected these laws to strict scrutiny. See, e.g. Cal. Republican  
 27 Party v. Fair Political Practices Comm’n, No. CIV-S-04-2144 FCD PAN, 2004 U.S. Dist. LEXIS  
 28 22160, at \*13 (E.D. Cal. Oct. 27, 2004). This approach is no longer good law. See Human Life of  
Wash., Inc. v. Brumsickle, 624 F.3d 990, 1013 (9th Cir. 2010) (“[T]he Supreme Court has made  
 clear that exacting scrutiny, not strict scrutiny, is applicable to campaign finance disclosure  
 requirements.”).

1 regardless of the standard of review. For the reasons explained above, the Court will subject all  
2 other applications of the law to exacting scrutiny.

3 **B. Burden on Speech**

4 Yes on Prop B’s first theory of Proposition F’s constitutional infirmity is that the  
5 disclaimer requirements “are so long and cumbersome” that they leave no room for political  
6 advertising’s political message. Mot. at 13–17. The merits of this argument depend to some  
7 extent on the type of ad. The smaller or shorter the ad, the greater the burden. This section  
8 therefore proceeds by considering two categories of Yes on Prop B’s proposed advertisements:  
9 those in which the required disclaimers take up more than 40% of the ad and those in which the  
10 required disclaimers take up 40% or less of the ad.

11 **1. Yes on Prop B’s proposed 5” by 5” newspaper advertisements, smaller**  
12 **“ear” advertisements, and digital/audio advertisements of 30 seconds or**  
13 **less.**

14 San Francisco agrees that when Proposition F’s disclaimers take up more than 40% of the  
15 space or run time of a given ad they impose an unconstitutional burden on political speech. Opp’n  
16 (dkt. 18) at 4. Both parties have called for the Court to enjoin Proposition F’s application where  
17 its disclaimer requirements will occupy more than 40% of a given Yes on Prop B advertisement.  
18 Id. at 24; Mot. at 1. The Court agrees that such an injunction is necessary.

19 Yes on Prop B’s required disclaimers consume 75 to 100% of 5” by 5” newspaper  
20 advertisements, smaller “ear” advertisements, and digital/audio advertisements 30 seconds or less  
21 in length. Muir Decl. ¶¶ 36, 67. Proposition F virtually forecloses the use of these ads, because  
22 the mandated disclaimers leave little or no room for the political message. This is especially  
23 troubling because the burden is greatest for some of the most cost-effective types of advertising.  
24 David Decl. ¶¶ 28–30. Perversely, a law intended to reveal the influence of money in politics may  
25 have the unintended result of severely hampering the political speech of underfunded committees.  
26 The First Amendment cannot tolerate a law that, as a practical matter, forecloses certain forms of  
27 political speech and requires Yes on Prop B to expend precious funds on more expensive  
28

1 advertising or forgo its political expression altogether. Cf. Buckley v. Valeo, 424 U.S. 1, 17–19  
 2 (1976) (“substantial . . . restraints on the quantity and diversity of political speech” are  
 3 unconstitutional). The burden Proposition F imposes on these forms of advertising is  
 4 unconstitutional whether it is reviewed under strict or exacting scrutiny.

5 Because Yes on Prop B has shown a likelihood of success on the merits of this issue, it has  
 6 also demonstrated that the other Winter factors weigh in favor of a preliminary injunction. First  
 7 Amendment violations constitute irreparable harm and demonstrate that the balance of hardships  
 8 tips in the plaintiff’s favor. Am. Beverage Ass’n v. City & Cty. of San Francisco, 916 F.3d 749,  
 9 758 (9th Cir. 2019). There is also a strong public interest in avoiding constitutional violations. Id.

10 **2. Yes on Prop B’s other proposed advertisements.**

11 Larger and longer advertisements present a different case, which the rest of this section  
 12 evaluates under the exacting scrutiny framework.

13 **a. Governmental interest.**

14 The Ninth Circuit has recognized that in the referendum context, where “voters act as  
 15 legislators, the government has a vital interest in providing the public with information about who  
 16 is trying to sway its opinion.” Brumsickle, 624 F.3d at 1017 (internal alterations and citations  
 17 omitted). “Given the complex detail involved in ballot initiatives, and the sheer volume of  
 18 relevant information confronting voters, voters cannot be expected to make such a determination  
 19 on their own.” Id. Disclaimer and disclosure requirements that help “voters . . . determine who is  
 20 behind the advertisements seeking to shape their views” therefore serve a “sufficiently important”  
 21 governmental interest. Id. at 1017–18.

22 Yes on Prop B argues that San Francisco has failed to offer any justification for the new  
 23 formatting rules “[o]ther than boiler-plate statements about the need for more disclosure.” Mot. at  
 24 17. It contends that without more specific arguments or a “factual record” demonstrating “why it  
 25 is now necessary for disclaimers to be spoken at the beginning of audio and digital ads, and why  
 26 print disclaimers must be so much bigger,” San Francisco cannot demonstrate an important  
 27 governmental interest. Id.; see also Reply (dkt. 22) at 6 (“The City has provided no evidence or  
 28

1 rationale as to why disclaimers on print ads had to change from 12-point font to 14-point font, or  
 2 why an entire disclaimer must be spoken for all audio and video ads instead of just identifying the  
 3 sponsor.”). But “[t]he quantum of empirical evidence needed to satisfy heightened judicial  
 4 scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the  
 5 justification raised.” Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 391 (2000). It is hardly  
 6 novel or implausible to suggest that the informational interest described above is better served by  
 7 more noticeable, easier-to-read font or more obvious, difficult to ignore, and complete disclaimers.

8 **b. First Amendment burden.**

9 The next question is whether this interest “reflect[s] the seriousness of the actual burden on  
 10 First Amendment rights.” Davis, 554 U.S. at 744. San Francisco argues it must, because the  
 11 Supreme Court has upheld a four-second disclaimer requirement as applied to a ten-second  
 12 advertisement. Opp’n at 8 (citing Citizens United, 558 U.S. at 368). San Francisco concludes that  
 13 “the Supreme Court [has] recognized that disclaimers that take 40% of advertising space satisfy  
 14 exacting scrutiny.” Id.

15 The Court declines the invitation to establish a bright-line rule that disclaimer requirements  
 16 are not unduly burdensome so long as they consume no more than 40% of a political  
 17 advertisement. The burden imposed by a given disclaimer will vary depending on the type of  
 18 disclaimer, relevant advertisement, and various other case-specific factors. For instance, the four-  
 19 second disclaimer in Citizens United had to be displayed, not spoken. 558 U.S. at 366. It was  
 20 accompanied by a spoken disclaimer that was considerably shorter than the one required by  
 21 Proposition F. Id. Yes on Prop B suggests this disclaimer format is less burdensome than a  
 22 spoken disclaimer lasting for a comparable percentage of the ad. Reply at 2. That may be true for  
 23 some ads, but not for others. In any event, the Court is convinced that the extent of the burden on  
 24 First Amendment activity will depend on facts other than the percentage of ad forfeited to a  
 25 disclaimer. A bright-line, 40% rule would lead to absurd results. Id. at 6.

26 That being said, Citizens United does establish that a disclaimer may commandeer a  
 27 prominent position in a political ad without offending the First Amendment. That is the case here.  
 28

1 With Proposition F’s application to the smaller ads enjoined, its disclaimers will not take up more  
 2 than approximately 35% of any of Yes on Prop B’s proposed ads. David Decl. ¶¶ 32–33. That  
 3 leaves almost two-thirds of the ad for Yes on Prop B’s pro-Prop-B messaging. The Court finds  
 4 that this space is sufficient to communicate Prop B’s political message. See, e.g. Muir Decl.  
 5 Ex. 1. While the burden imposed by the disclaimer requirements is not insignificant, it is not  
 6 inappropriate given the important governmental interest at stake. Brumsickle, 624 F.3d at 1017–  
 7 18. This is especially true because most of the disclaimer’s length is attributable to its content,  
 8 which is substantially related to San Francisco’s informational interest. See supra Section C.1.

9 Yes on Prop B offers a mathematical formula of its own. It argues the disclaimer  
 10 requirements must be unduly burdensome, because the Ninth Circuit has struck down a  
 11 requirement that warnings about the dangers of sugar occupy 20% of printed ads for sugar-  
 12 sweetened beverages. Mot. at 13–14 (citing Am. Beverage Assoc., 916 F.3d at 756). But  
 13 American Beverage Association is distinguishable, because it applied a different standard to a  
 14 different type of speech.

15 The Ninth Circuit evaluated the sugar warning under the Zauderer test, which applies to  
 16 “required warnings on commercial products,” and asks, inter alia, whether the mandatory  
 17 disclaimer is “unjustified or unduly burdensome.” Am. Beverage Assoc., 916 F.3d at 756.  
 18 American Beverage Association concluded San Francisco had failed to meet its burden of showing  
 19 that the sugar warning was not unjustified or unduly burdensome, because “the record here shows  
 20 that a smaller warning—half the size—would accomplish Defendant’s stated goals.” Id. at 757.  
 21 Specifically, a study in the record suggested that a smaller warning would still reduce  
 22 consumption of sugary beverages and improve consumers’ awareness of such beverages’ dangers.  
 23 Id. The Ninth Circuit acknowledged that in other circumstances, a more prominent disclaimer  
 24 might be warranted. Id. (“To be clear, we do not hold that a warning occupying 10% of product  
 25 labels or advertisements necessarily is valid, nor do we hold that a warning occupying more than  
 26 10% of product labels or advertisements necessarily is invalid.”). There is no similar empirical  
 27 evidence in the record here, and the fact that the content of the challenged disclaimer is a major  
 28 factor contributing to its length suggests a smaller disclaimer would not be equally effective.



1 The applicable constitutional standard is another distinguishing factor. Exacting scrutiny,  
 2 not the Zauderer test, applies in this case. Yes on Prop B oversimplifies when it argues that  
 3 American Beverage Association necessarily controls the result here because political speech  
 4 enjoys greater protection than commercial speech. Mot. at 14. It ignores the factual distinctions  
 5 between these cases, and the fact that the political context raises concerns not present in a  
 6 commercial speech case. The referendum context implicates the important governmental interest  
 7 in informing voters about who is paying for political advertising. Brumsickle, 624 F.3d at 1017–  
 8 18.

9 Finally, San Francisco has taken the position that Proposition F does not mandate  
 10 disclaimers for live telephone calls. Opp’n at 2 n.2. Given that representation the Court need not  
 11 decide whether the disclaimer requirements are constitutional when applied to this form of  
 12 advertising.<sup>5</sup>

### 13 C. Secondary Contributor Disclosure Requirements

14 Yes on Prop B also argues that the secondary contributor disclosure requirements are  
 15 unconstitutional, regardless of the format they appear in.

#### 16 1. Governmental interest.

17 As explained above, the governmental interest in helping “voters . . . determine who is  
 18 behind the advertisements seeking to shape their views” is “sufficiently important.” Brumsickle,  
 19 624 F.3d at 1017–18.

20 Yes on Prop B argues that “the relationship between the secondary contributor and the  
 21 ultimate speaker is far too attenuated” to demonstrate a substantial relation between the disclosure  
 22 requirement and the informational interest. Mot. at 22. But “individuals and entities interested in  
 23 funding election-related speech often join together in ad hoc organizations with creative but  
 24

---

25 <sup>5</sup> In any case, the Court agrees with San Francisco’s interpretation of the applicable requirements.  
 26 Yes on Prop B argues Proposition F applies to live phone calls because “[t]he City ordinance  
 27 cross-references the Political Reform Act which, in turn, defines ‘advertisement’ broadly as ‘any  
 28 general or public communication that is authorized and paid for by a committee for the purpose of  
 supporting or opposing . . . a ballot measure.’ Reply at 2 n.1 (citing Cal. Gov’t Code  
 § 84501(a)(1)). A phone call from a live volunteer to a specific voter is not a “general or public  
 communication.”

1 misleading names.” ACLU v. Heller, 378 F.3d 979, 994 (9th Cir. 2004). As the Ninth Circuit has  
 2 recognized, “reporting and disclosure requirements can expose the actual contributors to such  
 3 groups and thereby provide useful information concerning the interests supporting or opposing a  
 4 ballot proposition,” when “simply supplying the name . . . of the organization . . . does not provide  
 5 useful information.” Id.

6 These observations explain the utility of the secondary contributor disclosures. If Yes on  
 7 Prop B only revealed that it had received funding from the United Democratic Club of San  
 8 Francisco, that would not be particularly revealing. The fact that the United Democratic Club of  
 9 San Francisco received substantial funding from the San Francisco Association of Realtors and the  
 10 Committee on Jobs Government Reform Fund is helpful to voters in understanding “the interests  
 11 supporting” the Club, see id., and therefore “who is behind the advertisements seeking to shape  
 12 their views.” Brumsickle, 624 F.3d at 1017–18. The secondary contributor disclosure  
 13 requirements effectuate the interests served by the primary disclosure requirements, by helping  
 14 voters understand who the primary contributors actually are.

15 The persuasive precedent Yes on Prop B cites in support of its position is distinguishable.  
 16 Citizens Union of New York v. Attorney General of New York, 408 F. Supp. 3d 478 (S.D.N.Y.  
 17 2019), struck down as unconstitutional a law that required 501(c)(3) non-profit organizations to  
 18 disclose the identities of donors that gave more than \$2,500 if the non-profit itself gave more than  
 19 \$2,500 to a 501(c)(4) organization engaged in lobbying. Id. at 504. The court concluded that  
 20 “[t]he link between a 501(c)(3) donor and the content of lobbying communications by the  
 21 501(c)(4) is too attenuated to effectively advance any informational interest.” Id. at 505. But this  
 22 conclusion depended on the unique nature of a 501(c)(3), which “by definition cannot engage in  
 23 substantial lobbying activity.” Id. It made little sense to tie donors to lobbying activities because  
 24 they made a donation to an organization that could not, by law, engage in substantial lobbying  
 25 activity. Id. That is not the case here—none of the relevant parties are 501(c)(3)s.

26 Yes on Prop B also argues that the secondary contributor disclaimers are unnecessary,  
 27 because other disclosure laws require that most of this information be made publicly available  
 28 online. Mot. at 20–21. This argument proves too much. If it were correct, no disclaimer would

1 withstand constitutional muster if all it did was provide information that was already on the  
 2 internet. But the Supreme Court has approved disclaimer requirements that were at least partially  
 3 redundant of reporting requirements. Citizens United, 558 U.S. at 366.

4 True, the Ninth Circuit has suggested that because disclaimer requirements “affect the  
 5 content of the communication itself” they are more constitutionally suspect than laws that  
 6 “requir[e] the reporting of funds used to finance speech.” Heller, 378 F.3d at 987. But it has also  
 7 upheld disclaimer requirements for political advertising as an appropriate means of furthering the  
 8 government’s interest in informing voters “who or what entity is trying to persuade them to vote in  
 9 a certain way.” Yamada v. Snipes, 786 F.3d 1182, 1203 n.14 (9th Cir. 2015). And it has  
 10 recognized that the voting public “cannot be expected to explore the myriad pressures to which  
 11 they are regularly subjected” and may “render a decision based upon a thirty-second sound bite  
 12 they hear the day before the election.” Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088,  
 13 1106 (9th Cir. 2003). The government may therefore constitutionally “provide[ ] its voters with a  
 14 useful shorthand for evaluating the speaker behind the sound bite.” Id. The secondary contributor  
 15 disclaimers provide voters with the necessary information at the time they hear (or see) the “sound  
 16 bite” and without having to independently “explore the myriad pressures to which they are  
 17 regularly subjected.” See id. That is why they further a sufficiently important governmental  
 18 interest.

## 19 2. First Amendment burden.

20 Yes on Prop B offers two theories of the secondary contributor disclaimer requirement’s  
 21 burden on First Amendment rights. First, that the requirement infringes on the committee’s  
 22 associational rights, and second that it impermissibly chills political contributions.

### 23 a. Associational rights.

24 According to Yes on Prop B, the secondary contributor disclaimers are a form of  
 25 unconstitutional forced association because they “requir[e] that plaintiffs display on the face of  
 26 every political communication the names and contribution amounts of secondary contributors with  
 27 whom they have not associated” and “force[ ] the Committee to credit these secondary  
 28

1 contributors as endorsers of that message, regardless of whether that is actually true.” Mot. at 18.  
 2 In support of this argument, Yes on Prop B cites cases like Janus v. American Federation of State,  
 3 County, and Municipal Employees, 138 S. Ct. 2448 (2018), for the proposition that the First  
 4 Amendment guarantees the right not to associate. Mot. at 19. But Janus and its ilk are  
 5 distinguishable, because Yes on Prop B is not being forced to associate with anyone. It is not, for  
 6 example, being forced to fund speech it disagrees with. Cf. Janus, 138 S. Ct. at 2459–60. What it  
 7 is required to do is accurately report that it has chosen to associate, at least indirectly, with certain  
 8 organizations and individuals by taking money from groups they support financially.

9 Yes on Prop B’s argument reduces to a theory of forced association by way of confusion.  
 10 Yes on Prop B thinks it is being forced to associate with its secondary contributors because the  
 11 disclaimers will confuse voters into believing that Yes on Prop B is more closely associated with  
 12 its secondary contributors than it actually is. See Mot. at 17 (“Prop. F requires that the Committee  
 13 identify on the face of its political messages, individuals and entities that they have not associated  
 14 with, information that will ultimately confuse and misinform the electorate.”); see also id. at 21  
 15 (“[B]y requiring the names of secondary contributors to appear on the political communications of  
 16 a third-party to whom they have not contributed, Prop. F implies to the voting public that those  
 17 secondary contributors knew, approved, and directed their money to fund the third party’s  
 18 communication.”).

19 Yes on Prop B’s problem is that the Supreme Court has flatly rejected a virtually identical  
 20 voter confusion theory of association. Washington State Grange v. Washington State Republican  
 21 Party, 552 U.S. 442 (2008), upheld a Washington state law that dictated that elections for “partisan  
 22 offices” should occur “in two stages: a primary and a general election.” Id. at 447. Candidates  
 23 declared their “party preference, or independent status” in the primary. Id. Political parties could  
 24 not “prevent a candidate who [was] unaffiliated with, or even repugnant to, the party from  
 25 designating it as his party of preference.” Id. The top two vote-getters in the primary advanced to  
 26 the general election, maintaining the party preference they declared at the primary stage. Id. at  
 27 447–48.

28 Washington’s Republican Party challenged the law on the theory that it “burden[ed] their

1 associational rights because voters [would] assume that candidates on the general election ballot  
2 [were] the nominees of their preferred parties.” Id. at 454. The Court held that relying “on the  
3 possibility that voters will be confused as to the meaning of the party preference designation” was  
4 “sheer speculation” and “the fatal flaw in [the Republican Party’s] argument.” Id. The Supreme  
5 Court concluded that its case law “reflect[ed] a greater faith in the ability of individual voters to  
6 inform themselves about campaign issues.” Id. There was “simply no basis to presume that”  
7 voters would misunderstand the import of the party preference designation. Id. This was  
8 “especially true” because “it was the voters of Washington themselves, rather than their elected  
9 representatives, who enacted” the relevant law. Id. at 455.

10 So too here. There is simply no reason to presume San Francisco voters will  
11 misunderstand the import of the very disclaimers they voted to require. The only evidence Yes on  
12 Prop B posits to the contrary is a single sentence in Margaret Muir’s declaration that “recipients of  
13 campaign communications perceive that a person listed as a funding source on that  
14 communication is associated with the message sought to be conveyed.” Muir Decl. ¶ 18. Even  
15 assuming this statement is accurate and admissible, it does not establish Yes on Prop B’s  
16 contention that voters will mistakenly believe the secondary contributors are more closely  
17 associated with the pro-Proposition B message than is true. Voters may accurately determine that  
18 secondary contributors are associated with Yes on Prop B because they financially support  
19 organizations that support Yes on Prop B. But, as the Supreme Court has recognized, there is  
20 simply no reason to believe voters will be deceived into believing that a closer association exists  
21 by the very disclaimers they voted to require.

22 Yes on Prop B relies on California Republican Party v. Fair Political Practices  
23 Commission as support for its voter-confusion theory of forced association, but that unpublished  
24 case is unpersuasive here for three reasons. First, the court in Fair Political Practices applied strict  
25 scrutiny, 2004 U.S. Dist. LEXIS 22160, at \*13–14, which the Ninth Circuit has since determined  
26 “set[s] the bar too high” in cases concerning disclaimer and disclosure requirements, Brumsickle,  
27 624 F.3d at 1013.

28 Second, Fair Political Practices is distinguishable. It considered a law that “required that

1 any committee paying for an advertisement supporting or opposing a ballot measure identify on  
 2 the face of the advertisement the committee’s two largest contributors of \$50,000 or more.” Fair  
 3 Pol. Practices Comm’n, 2004 U.S. Dist. LEXIS 22160, at \*3. The court enjoined application of  
 4 that requirement to political party committees. Id. at \*23. But that result rested on the unique  
 5 nature of political parties. The court reasoned that it was unnecessary to disclose a political  
 6 party’s financial backers, because “[i]n the context of political parties, the true ‘speaker’ is the  
 7 political party.” Id. at \*18. In contrast, the court recognized that “primarily formed committees”  
 8 might be “ad hoc organizations with creative but misleading names.” Id. (citing Heller, 378 F.3d  
 9 at 994). Disclosing the top financial contributors of primarily formed committees could, therefore,  
 10 “prove useful at identifying the true ‘speaker,’” and thus further “a compelling interest in  
 11 unveiling for the voters the true ‘speakers’ behind such an advertisement.” Id.

12 It is true that the result in Fair Political Practices also rested on a theory of association by  
 13 voter confusion akin to Yes on Prop B’s. The court found it was “not difficult to imagine a  
 14 situation in which the contributor will be identified as a major donor on an advertisement  
 15 containing a political message with which the contributor does not agree.” Id. at \*19. But this  
 16 logic also depended in part on the unique nature of political parties. The court noted that  
 17 “[c]ontributions are made to political parties for many reasons, including agreement with a party’s  
 18 general philosophy, support of certain platform positions, or simply opposition to the competing  
 19 party.” Id. at \*18–19. And in any event, Fair Political Practices is an unreported decision of  
 20 another court which predates the Supreme Court’s decision in Washington State Grange. To the  
 21 extent Fair Political Practices and Washington State Grange conflict, the Supreme Court’s  
 22 decision must control.

23 **b. Chilling effect on donations.**

24 Yes on Prop B also complains that the secondary contributor disclosure requirements chill  
 25 political contributions. Mot. at 20. Its principal officer, Todd David, states that certain would-be  
 26 contributors have declined to donate due to concerns about having their own contributor’s names  
 27 listed on the committee’s advertising. See David Decl. ¶ 23–25. Even assuming this claim is true  
 28

1 and admissible, the Ninth Circuit has held that the possibility that “individuals who would prefer  
 2 to remain anonymous [will be deterred] from contributing to a ballot measure committee”  
 3 establishes only a “modest burden” on First Amendment rights. Family PAC v. McKenna, 685  
 4 F.3d 800, 806 (9th Cir. 2012) (survey showing that contributors may “think twice” about donating  
 5 if it would mean publicly disclosing their names and addresses did not show that the disclosure  
 6 law “actually and meaningfully deter[ed] contributors” and thus established only a “modest  
 7 burden”). At most, Yes on Prop B’s evidence establishes that the chilling effect on campaign  
 8 contributions is a modest burden reasonably related to the important informational interest  
 9 discussed above.

#### 10 **D. Facial Challenge**

11 Yes on Prop B seeks a preliminary injunction blocking all enforcement of Proposition F.  
 12 Mot. at 1. Because this relief would “reach beyond the particular circumstances of these  
 13 plaintiffs,” Yes on Prop B must “satisfy [the] standards for a facial challenge.” John Doe No. 1 v.  
 14 Reed, 561 U.S. 186, 194 (2010). To do this, it must at least show that a “substantial number of  
 15 [Proposition F’s] applications are unconstitutional, judged in relation to the statute’s plainly  
 16 legitimate sweep.” Wash. State Grange, 552 U.S. at 450 n.6 (internal quotation marks omitted).  
 17 Yes on Prop B’s burden is heavy, because “[f]acial challenges are disfavored.” Id. at 450.

18 Yes on Prop B has failed to meet its heavy burden. As discussed above, it has not even  
 19 shown that Proposition F is unconstitutional as applied to all of Yes on Prop B’s proposed  
 20 advertising. It offers no evidence or argument that Proposition F is generally unconstitutional in  
 21 its application to the numerous other advertising for and against ballot measures in San Francisco.  
 22 Its arguments are tailored to its own disclosures (the content of which varies by committee) and  
 23 advertising. See generally Mot. The injunction issued by this Order applies only to  
 24 Proposition F’s enforcement against Yes on Prop B.

25 Rather than addressing the standard for a facial challenge, Yes on Prop B argues that  
 26 enjoining the law only as applied to its own advertisements will confuse other committees, chill  
 27 speech, and lead to needless repeat litigation. Reply at 14–15. The risk of confusion and repeat  
 28

United States District Court  
Northern District of California

1 litigation is irrelevant to the standard for a facial challenge. See Wash. State Grange, 552 U.S. at  
2 450 n.6. The possibility of a chilling effect is necessarily tied up in the merits and does not  
3 warrant a broader injunction for the reasons explained above.

4 Yes on Prop B also cites Citizens United to suggest that facial review is preferable to an  
5 as-applied challenge in these circumstances. Reply at 15. The Court’s determination that facial  
6 review was appropriate in that case rested on its conclusion that “a statute which chills speech can  
7 and must be invalidated where its facial invalidity has been demonstrated.” Citizens United, 558  
8 U.S. at 336 (emphasis added). Therein lies the crucial distinction: Yes on Prop B has not  
9 demonstrated Proposition F’s facial invalidity.

10 **E. Other Winter Factors**

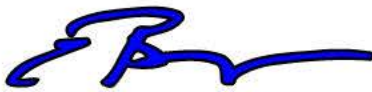
11 The “most important” Winter factor, likelihood of success on the merits, favors San  
12 Francisco. VidAngel, 869 F.3d at 856. Yes on Prop B’s arguments that the other Winter factors  
13 weigh in its favor rely on its position that it has demonstrated a likelihood of success on the merits.  
14 See Mot. at 23–24. Yes on Prop B has therefore failed to demonstrate that any of the Winter  
15 factors weigh in favor of a preliminary injunction.

16 **IV. CONCLUSION**

17 The City and County of San Francisco are enjoined from enforcing the disclaimer laws  
18 adopted through Proposition F against Yes on Prop B’s proposed 5” by 5” newspaper  
19 advertisements, smaller “ear” advertisements, and spoken disclaimers on digital or audio  
20 advertisements of thirty seconds or less. Yes on Prop B’s requested injunctive relief is otherwise  
21 denied.

22 **IT IS SO ORDERED.**

23 Dated: February 20, 2020

24   
25 \_\_\_\_\_  
26 CHARLES R. BREYER  
27 United States District Judge  
28



# Attachment 3

## **LEGISLATIVE DIGEST**

[Campaign and Governmental Conduct Code - Campaign Advertisement Disclaimer Requirements]

### **Ordinance amending the Campaign and Governmental Conduct Code to modify disclaimer requirements for campaign advertisements, to conform to a court order.**

#### **Existing Law**

Proposition F, adopted by the voters at the November 5, 2019 election, included several amendments to the Campaign and Governmental Conduct Code: prohibiting campaign contributions from limited liability companies and limited liability partnerships; prohibiting campaign contributions to certain City elected officials, candidates, and committees from persons with pending or recent land use matters before the City; and expanding disclaimer requirements for independent expenditure committee advertisements. Proposition F's new disclaimer requirements on campaign advertisements included a requirement that a committee disclose "secondary contributors" – that is, for primarily formed independent expenditure committees and ballot measures, if any of the top three major contributors of \$5,000 or more is a committee, the disclaimer must also disclose the top two major contributors to that committee as well.

#### **Amendments to Current Law**

To conform with a court order, the proposed ordinance creates exceptions to the requirement to disclose secondary contributors for the following types of smaller or shorter advertisements: (1) print advertisements measuring 25 square inches or less, and (2) spoken disclaimers in audio or video advertisements that are 30 seconds or less.

#### **Background Information**

In January 2020, a group of plaintiffs challenged the constitutionality of the disclaimer requirements imposed by Proposition F, specifically with respect to the required disclosure of secondary contributors. In February 2020, the Honorable Charles R. Breyer, District Court Judge for the Northern District of California, granted in part and denied in part, the plaintiffs' request for a preliminary injunction. The court granted the preliminary injunction with respect to disclaimers of secondary contributors as applied to print advertisements that are 5 inches by 5 inches or smaller, other smaller print advertisements sometimes referred to as "ear" advertisements, and spoken disclaimers in audio or video advertisements that are 30 seconds or less. The court otherwise upheld the Proposition F disclaimer requirements.

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BOARD of SUPERVISORS



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Fax No. 554-5163  
TDD/TTY No. 554-5227

## MEMORANDUM

TO: John Arntz, Director, Department of Elections

FROM: Victor Young, Assistant Clerk

A handwritten signature in black ink that reads "Victor Young".

DATE: November 22, 2022

SUBJECT: LEGISLATION INTRODUCED

The Board of Supervisors' Rules Committee received the following proposed legislation:

**File No. 221161**

**Ordinance amending the Campaign and Governmental Conduct Code to modify disclaimer requirements for campaign advertisements, to conform to a court order.**

If you have comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102 or by email at: [victor.young@sfgov.org](mailto:victor.young@sfgov.org).

cc: Patrick Ford, Ethics Commission  
Michael Canning, Ethics Commission