No. 23-926

IN THE

Supreme Court of the United States

NO ON E, SAN FRANCISCANS OPPOSING THE AFFORDABLE HOUSING PRODUCTION ACT, *et al.*,

Petitioners,

v.

DAVID CHIU, IN HIS OFFICIAL CAPACITY AS SAN FRANCISCO CITY ATTORNEY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In its precedents upholding federal campaign-finance disclosure and disclaimer provisions, this Court has instructed that the exacting scrutiny standard applies to the review of campaign-finance disclosure laws. Petitioners ask the Court to reconsider those holdings. Therefore, the questions presented are:

1. Does exacting scrutiny provide the standard courts should use when evaluating election disclaimer requirements?

2. Did the decision below properly apply exacting scrutiny when affirming the district court's denial of Petitioners' Motion for a Temporary Restraining Order and Preliminary Injunction?

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INTRODUCTION

The Petition asks this Court to grant certiorari in a case where there is no circuit split, no final judgment, and no error by the court below. The lower courts properly denied Petitioners' request for preliminary injunctive relief where Petitioners failed to submit evidence supporting their claims. Review is not warranted.

Petitioners begin by asking the Court to reconsider the standard for review in election disclosure and disclaimer cases. While this Court has applied exacting scrutiny since *Buckley v. Valeo*, 424 U.S. 1 (1976), Petitioners ask this Court to hold that strict scrutiny applies. This case presents a poor vehicle to decide that question because, as Petitioners admit, this case does not "turn on the standard of review." Pet. at 18. Therefore, there is no need for this Court to decide that question. *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 623 (2021) (Alito and Gorsuch, JJ., concurring in part) ("Because the choice between exacting and strict scrutiny has no effect on the decision in these cases, I see no need to decide which standard should be applied here . . . .").

Petitioners also claim that the court below erred when applying the well-established exacting scrutiny standard to the facts presented in this case. But "error correction" is not a reason to grant review. (Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

Further, the court below did not misapply the exacting scrutiny standard. The court below recognized that the

challenged disclaimers advance the voters' substantial interest in being "fully informed about the person or group who is speaking" so they are "able to evaluate the arguments to which they are being subjected." *Citizens United v. Fed. Election Commn.*, 558 U.S. 310, 368 (2010) (citations and internal quotation marks omitted). Unable to dispute that Proposition F advances that well-recognized and substantial governmental interest, Petitioners present a straw man argument attacking an asserted governmental interest that the City has never advanced and that the Ninth Circuit did not consider.

Petitioners fault the Ninth Circuit for rejecting their claims that the challenged law unduly burdens their First Amendment rights, but all of Petitioners' claims fail for lack of evidence. Petitioners talk a big game, but, as the district court concluded, they "provid[ed] virtually no evidence that their First Amendment rights are burdened." Pet. App. 128a. In the absence of evidence, the court below properly held that Petitioners failed to satisfy their burden to show that they were entitled to preliminary injunctive relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The lack of evidence presented in the record raises yet another reason why the Petition should be denied. This case is at its beginning stages. No answer has been filed. No discovery has been taken. The district court considered Petitioners' motion for a temporary restraining order and preliminary injunction and denied them. The Ninth Circuit affirmed. But the case is not over. If they wish, Petitioners can gather evidence, litigate this case to final judgment, and then seek review by this Court. At this stage, however, there is no reason for this Court to deviate

from its general policy of "await[ing] final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (mem.) (Scalia, J., opinion respecting the denial of the petition for writ of certiorari); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916).

Just as this Court recently denied review in a case presenting a challenge to another on-advertisement donor disclaimer requirement, the Court should do the same here. *See Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021), cert. denied, *Gaspee Project v. Mederos*, 142 S.Ct. 2647, U.S., Apr. 25, 2022. San Francisco respectfully requests that the Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

I. PROPOSITION F

On November 5, 2019, San Francisco voters approved Proposition F with 76.89% of the vote.[1] Proposition F, known as the "Sunlight on Dark Money Initiative," sought to increase the "disclosures of the true sources of funds behind campaign ads by Dark Money SuperPACs . . . to help voters understand who is paying for the campaign ads they see in the mail, on television, and online."[2] To that end, Proposition F requires "primarily formed independent

1. *See* November 5, 2019 Final Election Results, https://sfelections.org/results/20191105w/index.html.

2. https://ballotpedia.org/San_Francisco,_California,_Proposition_F,_Campaign_Contribution_Restrictions_and_Advertisement_Disclaimer_Requirements_(November_2019).

expenditure committees" and "primarily formed ballot measure committees" to include disclaimers on their print advertisements that include "both the name of and the dollar amount contributed by each of the top three major contributors of $5,000 or more." S.F. Campaign and Gov't Conduct Code § 1.161(a)(1).[3] In addition, 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." *Id.*

After the Ninth Circuit issued the panel opinion in March 2023, the City amended the challenged law to provide two exceptions from Proposition F's disclaimer requirement for small print or video ads. S.F. Campaign Code and Gov't Conduct Code § 1.161(a)(1)(A)-(B). First, Proposition F's disclaimer requirement does not apply to print advertisements that are 25 square inches or smaller. S.F. Campaign Code and Gov't Conduct Code § 1.161(a)(1)(A). Second, Proposition F's disclaimer requirement does not apply to the spoken disclaimer in an audio or video advertisement that is 30 seconds or less. *Id.* § 1.161(a)(1)(B).[4]

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3. "Disclaimers" refers to information provided on a political advertisement.

4. Petitioners assert that the City "promised not to demand that secondary donor names be spoken in audio and video ads of up to 60 seconds, it codified that exception only for ads of up to 30 seconds." Pet. at 13. That assertion is false. The City has consistently stated that it would not enforce the disclaimer requirement where the disclaimers take up most or all of an advertisements space or duration. Pet. App. 26a. If that ever happens, the City will not enforce. But that exercise of *enforcement discretion* in unusual cases is not inconsistent with codifying generally applicable rules and requirements in the City's Campaign and Gov't Conduct Code.

II. THE PROCEEDINGS BELOW

A. The District Court Proceedings

On May 12, 2022, Petitioners filed a Motion for a Temporary Restraining Order and Preliminary Injunction. Pet. App. 114a. Although Proposition F had been enacted over two years earlier and other committees complied with its requirements through five elections without any apparent difficulty, Pet. App. 114a., 130a n. 5, Petitioners claimed the need for emergency relief. Accordingly, the district court issued a scheduling order requiring the City to respond to the motion within three days.

In its motion, Petitioners challenged Proposition F's secondary contributor disclaimer requirement as applied. Pet. App. 116a. Petitioners did not seek facial relief or challenge any other provision of San Francisco law, including the requirements concerning the size of the disclaimers. *Id.*; Pet. App. 130a n. 6. Indeed, although Petitioners now assert that the required disclaimer is too large in comparison to the size of their proposed advertising, Petitioners did not seek any relief on that issue before the district court in their motion for a preliminary injunction. Pet. App. 130a-131a n. 6.

On June 1, 2022, the district court denied Petitioners' motion after Petitioners failed to submit evidence demonstrating a likelihood of success on the merits. Pet. App. 118a. The court explained that Petitioners "provid[ed] virtually no evidence that their First Amendment rights are burdened." Pet. App. 128a. Petitioners rested their arguments on "entirely speculative" claims of voter confusion and unfounded assertions that voters will

be misled by the secondary contributor disclaimer requirement. *Id*. Likewise, Petitioners claimed that their donations would be chilled, but those assertions were "conclusory and speculative," unsupported by any "concrete evidence." Pet. App. 130a.

The district court concluded that Proposition F's disclaimer requirement is narrowly tailored. Pet. App. 126a. Petitioners claimed that the City's governmental interests could be achieved by requiring disclosures that voters could view online or at the Ethics Commission's office. Pet. App. 127a. But the district court concluded that Petitioners' proposals were "unlikely to achieve the governmental interest *at all*" because Petitioners "provide[d] no plausible reason to think that either of their proposals would succeed at informing voters." *Id.* (emphasis added). Accordingly, the district court rejected Petitioners' unsupported assertion that there were less restrictive means that would serve the City's important governmental interest. *Id.*

After concluding that Petitioners failed to submit evidence demonstrating a likelihood of success on the merits, the district court held that Petitioners failed to satisfy their burden on the remaining preliminary injunction factors. Pet. App. 131a. Accordingly, the district court denied Petitioners' motion for preliminary injunctive relief. Petitioners appealed.

B. The Ninth Circuit Proceedings

The Ninth Circuit held that "the district court was within its discretion to conclude that Plaintiffs did not establish a likelihood of success on the merits" or any of the remaining preliminary injunction factors. Pet. App.

35a-36a. The court explained that exacting scrutiny provides the proper standard of review. Pet. App. 17a. Applying that test, the court concluded that there was a substantial relation between Proposition F and a sufficiently important governmental interest. Pet. App. 20a-25a.

With respect to the burden on First Amendment rights, the Ninth Circuit concluded that Petitioners failed to show that "the display of a written disclaimer for up to one-third of a video ad's duration is excessive" and failed to show that a print disclaimer of up to 35% of a print advertisement impermissibly burdens Petitioners' speech. Pet. App. 27a. Indeed, in *Citizens United*, this Court upheld a law that required 40% of a video advertisement's duration to be devoted to the display of a written disclaimer. 558 U.S. at 320, 366, 367-68. Petitioners claimed that the disclaimer would chill donations, but Petitioners failed to submit evidence showing that the deterrent effect they fear is real or more than a modest burden. Pet. App. 31a. Petitioners claimed that the disclaimer requirement would confuse or mislead voters, but again Petitioners provided no evidence or "factual basis" for their assumption that San Francisco voters would not understand the disclaimers they voted to require. Pet. App. 24a.

The Ninth Circuit also held that Petitioners failed to demonstrate that the disclaimer requirement is not narrowly tailored. Petitioners proposed that the existing disclosures available on a website could serve the City's interest, but "[c]ase law and scholarly research support the proposition that, because of its instant accessibility, an on-advertisement disclaimer is a more effective method of informing voters than a disclosure that voters must seek out." Pet. App. 32a. The court also rejected Petitioners'

argument that disclaimers must be limited to donations that are earmarked for electioneering because Petitioners did not cite any authority for that proposition. Further, the challenged disclaimer only included donors who made "an affirmative choice to engage in election-related activity" by donating to a primarily formed committee.[5] Pet. App. 34a-35a.

Finally, the Ninth Circuit concluded that Petitioners failed to show that an injunction was required under any of the remaining preliminary injunction factors. Pet. App. 36a. Accordingly, the Ninth Circuit affirmed the decision of the district court.

Petitioners sought *en banc* review. Thereafter, the Ninth Circuit issued an amended opinion and denied the petition for rehearing *en banc*. Pet. App. 3a.

REASONS THIS COURT SHOULD DENY THE PETITION

I. THE COURT SHOULD NOT RECONSIDER THE EXACTING SCRUTINY STANDARD.

Petitioners begin their brief by asserting that the Court should grant review to "clarify" whether election disclaimer requirements are subject to exacting scrutiny or strict scrutiny. This is not the appropriate case for

5. A primarily formed committee is a committee that is "formed or exists primarily to support or oppose any of the following: (a) A single candidate. (b) A single measure. (c) A group of specific candidates being voted upon in the same city, county, or multicounty election. (d) Two or more measures being voted upon in the same city, county, multicounty, or state election." Cal. Gov't Code Ann. § 82047.5.

resolving that question because Petitioners assert that this case does not "turn on the standard of review." Pet. at 18. Therefore, there is no need for this Court decide that question in this case. *Americans for Prosperity Found.*, 594 U.S. at 623 (Alito and Gorsuch, JJ., concurring in part).

Further, no clarification is needed because it has been settled law for decades that exacting scrutiny provides the proper standard of review for election-law disclaimer and disclosure requirements. *Citizens United*, 558 U.S. at 366-67 (holding disclaimer and disclosure requirements are subjected to "exacting scrutiny"); *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (holding that "challenges to disclosure requirements in the electoral context" are reviewed under "exacting scrutiny"); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008) (holding governmental interest in disclosure "must survive exacting scrutiny"); *Buckley*, 424 U.S. at 64 (holding disclosure requirements are subject to exacting scrutiny). Indeed, as recently as 2021, this Court reaffirmed that compelled disclosure requirements are reviewed under exacting scrutiny. *Americans for Prosperity Found.*, 594 U.S. at 608 (holding "compelled disclosure requirements are reviewed under exacting scrutiny").

Petitioners offer nothing to call that authority into question. Petitioners assert that the disclaimers at issue in this case are not "true disclaimers" but instead are a hybrid between disclaimers and disclosures. Petitioners are mistaken. As this Court recognized in *Citizens United*, disclaimers are statements that appear on the advertisement or are spoken as part of the advertisement. Disclosures are statements and information filed with governmental entities. *Citizens United*, 558 U.S. at 366. The challenged regulations here are clearly disclaimers.

Petitioners assert that disclaimers must be "short" "two-or-three-second" statements exclusively about "who made the ad," but Petitioners offer no support for that claim. Pet. at 20. Indeed, *Citizens United* upheld a longer disclaimer requirement that required additional information to be provided to voters, including the name and address (or Website address) of the person or group that funded the advertisement and a statement that the advertisement "is not authorized by any candidate or candidate's committee." *Citizens United*, 558 U.S. at 366. In any event, the distinction between disclaimers and disclosures is without a difference, because both disclaimers and disclosures are evaluated under exacting scrutiny. *Id.*

Amici assert that strict scrutiny is required by *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), but Amici's reliance on that case is misplaced. *McIntyre* considered the minimal "informational interest in knowing the identity of ordinary pamphleteers," based on "extremely broad statutes requiring any person publishing material relating to an election or ballot measure to include his name on the face of the publication." *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 540 n. 15 (9th Cir. 2015). This case, by contrast, concerns disclaimers on campaign speech, where this Court has repeatedly recognized a significant governmental interest in providing the electorate with information about the speaker and "where political campaign money comes from" so the electorate can make informed choices about communications that seek to influence votes. *Buckley*, 424 U.S. at 66-67. Even *McIntyre* itself distinguished the burdensome obligation to identify ordinary pamphleteers at issue in that case from campaign

finance disclosure requirements. *See McIntyre*, 514 U.S. at 355.

Accordingly, there is no confusion about the applicable standard of review. Exacting scrutiny applies.

II. THE DECISION BELOW FOLLOWS THIS COURT'S PRECEDENTS

The Petition asserts that the decision below misapplied the well-established exacting scrutiny standard and misconstrued the evidence presented, but a petition for a writ of certiorari should not be granted on that basis. (Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.") In any event, Petitioners are incorrect when they assert that the decision below misapplied the exacting scrutiny standard.

A. The Decision Below Correctly Recognized That Proposition F's Disclaimer Requirement Advances Important Governmental Interests.

The Ninth Circuit correctly recognized that San Francisco has "a strong governmental interest in informing voters about who funds political advertisements." Pet. App. 22a. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices" in elections is "essential." *Buckley*, 424 U.S. at 14-15. Proposition F's disclaimer "provides the electorate with information as to where political campaign money comes from . . . in order to aid the voters in evaluating" those who seek their votes. *Id.* at 66-67. It also allows voters to

place the speaker "in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." *Id.*

"Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment." *Human Life of Washington Inc. v. Brumsickle,* 624 F.3d 990, 1005 (9th Cir. 2010). By "revealing information about the contributors to and participants in public discourse and debate," disclaimer and disclosure "laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention." *Id.* Indeed, because "[a]n appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another," disclaimer and disclosure requirements "advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas." *Id.* at 1008.

As this Court explained in *Citizens United*, the increased "transparency" provided by disclosure and disclaimer requirements "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United,* 558 U.S. at 371. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978). Proposition F's disclaimer

requirements gives San Francisco voters the tools they need to make those determinations.

Petitioners describe the City's governmental interest as "flimsy," but nothing could be further from the truth. The City's interest in providing information to the voters about the speaker in political advertisements is of a great "magnitude," as the interest involves the "free functioning of our national institutions." *Buckley*, 424 U.S. at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)).

It follows that the challenged disclaimer requirement advances the City's governmental interest. As the court below recognized, the information voters need to make informed choices "can require looking beyond the named organization that runs the advertisement." Pet. App. 22a. "[I]ndividuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names" designed to obscure the interests that support a ballot measure and thus keep valuable information from the voters. *Am. Civ. Liberties Union of Nevada v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004); *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 197 n. 23 (2003) (overruled on other grounds by *Citizens United*, 558 U.S. 310). Without Proposition F, political committees would continue to be able to hoodwink the public by "hiding behind dubious and misleading names like: 'The Coalition–Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly)." *McConnell*, 540 U.S. at 197 (quoting *McConnell v. Fed. Election*

Comm'n, 251 F. Supp. 2d 176, 237 (D.D.C. 2003).) But such tactics are contrary to the spirit and purposes of the First Amendment. As this Court recognized, "'uninhibited, robust, and wide-open' speech" cannot "occur when organizations hide themselves from the scrutiny of the voting public." *Id.* Petitioners' arguments ignore "the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.*

Proposition F's disclaimer requirement allows voters to learn information about "where political campaign money comes from," *Buckley*, 424 U.S. at 66, which is particularly important in the case of ballot measures. Given that initiative campaigns have become a "money game, where average citizens are subjected to advertising blitzes of distortion and half-truths," "[k]nowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105-06 (9th Cir. 2003).

Petitioners assert that the need to provide information to the voters cannot justify a disclaimer requirement because that requirement could force a speaker to "make statements or disclosures she would otherwise omit." Pet. at 22. Petitioners are mistaken. All disclaimer requirements—including those that have been repeatedly upheld by this Court—force election communications to include information the speaker would otherwise omit.

Citizens United, 558 U.S. at 366. Nonetheless, disclaimers are constitutional because of the compelling state interests in providing information to the voters about the persons or entities trying to influence their votes. *Id.*

Unable to dispute that the City has an important governmental interest in informing voters about the speaker in a political advertisement and their sources of funding, Petitioners attack a straw man. The City has not asserted—and the decision below did not consider—a governmental interest in encouraging voters to "speculate as to who might be conspiring to secretly support the campaign." Pet. at 3. The City's governmental interest is not based on the "off chance that the donor's donors intended to support the advertising." Pet. at 18. It does not rely on speculation about the donor's motives. Instead, Proposition F advances the well-recognized government interest in providing information to inform voters about the speaker in election communications and where the speaker's "money comes from." *Buckley*, 424 U.S. at 14-15. While the name No on E tells the voters little about the committee, understanding its funding sources goes a long way to helping voters evaluate that speaker and give "proper weight" to the advertisement. *Citizens United,* 558 U.S. at 371. As the First Circuit has concluded, "[t]he public is flooded with a profusion of information and political messages, and the on-ad donor disclaimer provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names." *Gaspee Project,* 13 F.4th at 91.

Petitioners assert that some secondary donors *might* not support the advertisement. Petitioners note that some secondary contributors *might* make donations for purposes

other than to fund the committee's advertising. Pet. at 22. But Petitioners miss the point. Knowing a committee's donors and their sources of funding speaks volumes about the committee, the sources of the committee's money, and "where a particular ballot measure or candidate falls on the political spectrum." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 832 (9th Cir. 2014); *see also Buckley*, 424 U.S. at 66-67. In any event, the hypothetical possibility that someday a secondary contributor "might" disagree with a ballot measure is not relevant to Petitioners' as-applied challenge because Petitioners offered no evidence to show that has ever happened to Petitioners. *United States v. Raines*, 362 U.S. 17, 21 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.").

In short, "[t]here is plainly an informational interest served by an on-ad disclaimer that identifies some of the speaker's donors." *Gaspee Project*, 13 F.4th at 91. Proposition F's disclaimers provide the electorate with information so that voters can be informed in real time about the committee that is speaking through the advertisement. By providing voters the information they need to evaluate an advertisement at the same time they see or hear it, Proposition F's disclaimer requirements advance the well-recognized and important governmental interests in having an informed electorate. *Citizens United,* 558 U.S. at 368; *Buckley*, 424 U.S. at 66-67.

B. Petitioners Failed To Submit Evidence Showing A Burden To Their First Amendment Rights.

After concluding that there is a substantial relation between the challenged law and a sufficiently important governmental interest, the Ninth Circuit next evaluated whether "the strength of the governmental interest reflect[ed] the seriousness of the actual burden on First Amendment rights." Pet. App. 19a. The Ninth Circuit concluded that Petitioners failed to submit evidence showing a burden on their First Amendment rights, and therefore failed to show that they were entitled to injunctive relief.

Petitioners assert that the Ninth Circuit improperly placed the burden on Petitioners to submit evidence supporting their entitlement to a preliminary injunction, but that is incorrect. Pet. at 28, 30. A preliminary injunction is an extraordinary remedy never awarded as a matter of right. *Winter*, 555 U.S. at 22. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. The burden is on the party seeking the injunction to satisfy the *Winter* elements. *Id.*; *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). Even in the First Amendment context, the "moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point the burden shifts to the government to justify the restriction." *Id.* at 1116. Here, Petitioners failed

to meet that initial burden with evidence; and therefore, they were not entitled to a preliminary injunction.

1. Petitioners Failed To Submit Evidence Demonstrating That The Size Of The Disclaimer Impermissibly Burdens Speech.

Petitioners asserted for the first time on appeal that the disclaimer requirement imposed an excessive burden on their rights and was not narrowly tailored because the disclaimer takes too much space on their advertisements. Before the district court, Petitioners waived that argument because they did not tie that argument to any issue presented to the district court. Pet. App. 131a. Petitioners did not even challenge the provisions of San Francisco law that controls the size of the disclaimer, including the 14-point font requirement. S.F. Campaign and Gov't Conduct Code § 1.161(a)(3). Thus, the district court did not have the opportunity to consider Petitioners' arguments about the size of the disclaimer, and this case presents a poor vehicle for considering those issues. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

In any event, Petitioners' arguments about the size of the disclaimer relative to its advertising space misrepresents the record. Petitioners assert that the City requires disclaimers that take 53-100% of their advertising space, Pet. at 8-9, but the City has never done so. Not even once. In the past five years, the City is aware of two instances in which Proposition F's disclaimers allegedly took up a majority of space on advertisements, and, in both cases, the advertisements were created

by Appellant David (or a committee he represents) for litigation purposes. Pet. App. 118a-119a. In those cases, the City readily and consistently agreed not to enforce Proposition F's disclaimer requirement where disclaimers take up most or all of an advertisements' space. Pet. App. 26a-27a; 130a. Therefore, the Ninth Circuit considered only the advertisements that remained in dispute between the parties where Petitioners claimed the disclaimers took 23-35% of advertising space.[6] Pet. App. 26a-27a.

With respect to those advertisements, Petitioners have not demonstrated an impermissible burden under the First Amendment. After recognizing the important role disclaimer requirements serve in providing information to the electorate, this Court in *Citizens United* upheld a law where the disclaimer took 40% of the advertising space.[7] *Citizens United*, 558 U.S. at 367-68. Thus, disclaimers that take a significant portion of advertising space can satisfy exacting scrutiny.

This Court has also expressly rejected the same argument that Petitioners advance here that disclaimers amounting to 23-35% of the advertisement unconstitutionally "decrease[d] both the quantity and effectiveness of the group's speech." *Citizens United*, 558 U.S. at 368. Although all disclaimer requirements necessarily decrease the available space for a speaker's own message, that burden is not an *undue* burden given the important role disclaimers play in our electoral system.

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6. Petitioners assert that the Ninth Circuit approved of or ignored an instance in which the disclaimer took 51% of a video's ad space, Pet. at 27, but that is false. Pet. App. 27a.

7. The disclaimer took four seconds of the ten-second advertisement. *Citizens United*, 558 U.S. at 367-68.

Disclaimers "provide the electorate with information," and "insure that the voters are fully informed about the person or group who is speaking." *Citizens United*, 558 U.S. at 368 (internal quotations and citations omitted). Given the "cacophony of political communications through which California voters must pick out meaningful and accurate messages . . . being able to evaluate who is doing the talking is of great importance." *Cal. Pro-Life Council, Inc.*, 328 F.3d at 1105. Thus, the burden on Petitioners from having to devote 23-35% of their advertising space to disclaimers is not an undue burden on their First Amendment rights.

Petitioners rely heavily on the Ninth Circuit's decision in *Am. Beverage Ass'n v. City and County of San Francisco*, 916 F.3d 749 (9th Cir. 2019), but that case shows why Petitioners are not entitled to a preliminary injunction. In *Am. Beverage*, the Court held that the City could not require sugar sweetened beverage advertisers to devote 20% of their advertising space to a warning about sugar sweetened beverages *because the evidence showed that a 10% warning would accomplish the City's stated goals. Id.* at 757. Here, Petitioners did not introduce any evidence suggesting that the size of the disclaimers they challenge is larger than necessary to satisfy the City's governmental interest.[8] Pet. App. 29a.

8. The Ninth Circuit in *Am. Beverage* did not determine that larger warnings would be prohibited. Indeed, the Court acknowledged that in other circumstances, a more prominent disclaimer might be warranted. *Am. Beverage Ass'n*, 916 F.3d at 757 ("To be clear, we do not hold that a warning occupying 10% of product labels or advertisements necessarily is valid, nor do we hold that a warning occupying more than 10% of product labels or advertisements necessarily is invalid.").

Petitioners assert that its political speech should receive the fullest protection under the First Amendment; and, of course, that is true. But Proposition F's disclaimer requirements do not impose undue burdens on Petitioners' speech. *Citizens United*, 558 U.S. at 368. Instead, Proposition F seeks to ensure that voters have the information they need to evaluate political ads so that the voters can make an informed choice. The purposes of the First Amendment are furthered—not hindered—by Proposition F's disclaimers. *Id.*; *see also Citizens United v. Gessler*, 773 F.3d 200, 215 (10th Cir. 2014) ("When a speaker "drops in" on an election and starts talking about candidates and issues, the electorate wants to know who the speaker is to better enable it to evaluate the message. Knowing who is financing the speaker can be helpful in this regard.").

2. Petitioners Failed To Submit Evidence Showing That The Disclaimers Impermissibly Chill Donations.

Petitioners' assertions about a chilling effect on their speech also fail for lack of evidence. As the district court concluded, Petitioners' assertions that their donations would be chilled were "conclusory and speculative," unsupported by any "concrete evidence." Pet. App. 130a.

Petitioners assert that Proposition F's disclaimer requirements—like all disclosure and disclaimer requirements—might deter contributions from some entities that do not wish to disclose their major donors. *See Buckley*, 424 U.S. at 68 ("It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who

otherwise might contribute."). But that possible deterrent effect does not outweigh the government's interests in providing information about funding sources to the voters. *Citizens United*, 558 U.S. at 366 (upholding disclaimer requirements even though they "may burden the ability to speak," because "they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking").

Petitioners failed to cite any evidence showing that Proposition F's disclaimer requirements "actually and meaningfully" reduce contributions. *Fam. PAC v. McKenna*, 685 F.3d 800, 807 (9th Cir. 2012). That absence is particularly striking given that Proposition F has been in effect since 2019 through numerous election cycles during which contributions to candidates and ballot measures continued to "pour in."[9] Petitioners assert that one donor (Ed Lee Dems) would withdraw its support for the committee instead of allowing its contributors to be disclosed, but that argument makes little sense. Ed Lee Dems would not be a secondary contributor subject to Proposition F's disclaimer requirement if it reduced its donation by *a single dollar* from $5,000 to $4,999 because Proposition F's disclaimers only apply to donors of $5,000 or more. S.F. Campaign and Gov't Conduct Code § 1.161 (a)(1). It is hard to see why one committee reducing its contribution by one dollar would have a meaningful effect on No on E. *See Gaspee Project*, 13 F.4th at 89 (noting

9. Benjamin Schneider, *In a big election year, money is pouring into key San Francisco campaigns*, published Jan 5, 2022 (updated Jun. 16, 2022), available at https://www.sfexaminer.com/the_fs/findings/in-a-big-election-year-money-is-pouring-into-key-san-francisco-campaigns/article_340c79e1-7cb0-5aa0-98dc-113632eff14e.html.

that "readily available means of avoiding disclosure punches a sizable hole in the appellants' insistence that the Act's disclosure requirements are tantamount to the compelled disclosure of membership lists"). In any event, one committee's desire to hide its funding sources from the voters during the five years Proposition F has been in effect does not show a meaningful deterrence in donations. *Buckley*, 424 U.S. at 68; *Family PAC*, 685 F.3d at 806-09. Indeed, because information about "secondary contributors" is already in the public record, it is hard to see—and Petitioners have offered no evidence to show—why Proposition F's disclaimer requirements will have any meaningful effect on contributions.

Petitioners rely on *Americans for Prosperity Found. v. Bonta*, but that reliance is misplaced. In *Americans for Prosperity*, this Court considered whether the challenged law would deter contributions after the district court conducted a full trial on the merits and entered final judgment. 594 U.S. at 603. Unlike here, the litigants in *Americans for Prosperity* introduced evidence showing that the "deterrent effect feared by these organizations is real and pervasive." *Id.* at 617. No similar showing has been made in this case. Indeed, because this case is at its earliest stages, the parties have not yet had the opportunity to conduct discovery or resolve disputes of fact before the district court.

Amici have expressed unsubstantiated fears that donors might face threats, harassment or reprisals if the public learns of their donations, but this Court has repeatedly refused to strike down disclaimer and disclosure requirements based on speculation in the absence of evidence. *Citizens United*, 558 U.S. at 370; *see*

also McConnell, 540 U.S. at 198. If there is ever evidence of threats or reprisals, the affected party can bring an as-applied challenge. But here, the Ninth Circuit correctly rejected Petitioners' unsupported claims.

3. Petitioners Failed To Submit Evidence Showing That The Disclaimers Cause Voter Confusion.

Petitioners assert that they cannot run ads because they fear that complying with the disclaimer requirement would "confuse and mislead the voters about the identities of the campaign's supporters." Pet. at i. But Petitioners submitted no evidence of voter confusion before the district court, and that lack of evidence was fatal to their claim under *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 (2008). In *Wash. State Grange*, this Court considered a challenge to a voter-approved initiative that provided that candidates for office shall be identified on the ballot by their self-designated "party preference"; that voters may vote for any candidate; and, that the top two candidates who obtained the highest vote totals for each office, regardless of party preference, advance to the general election. The state republican party claimed that the initiative would burden the party's associational rights because voters will assume that candidates on the general election ballot are the nominees of their preferred parties. This Court rejected that argument because, as here, the argument "rests on factual assumptions about voter confusion," and, in the absence of evidence, courts should not "assume" that "voters will be misled." *Id.* Without evidence, "[t]here is simply no basis to presume that a well-informed electorate" will misunderstand information provided, and that is "especially true here, given that it was the voters

. . . themselves, rather than their elected representatives, who enacted" the challenged requirements. *Id.* at 454-55.

The same is true here. The voters of San Francisco resoundingly approved Proposition F, and Petitioners do not cite any evidence showing that voters will be confused by the very disclaimers they voted to require. Petitioners have not provided any voter surveys, studies of voter behavior, or any evidence at all to show that voters will actually misunderstand the disclaimers required by Proposition F. Accordingly, the Ninth Circuit and district court properly refused to credit Petitioners' unsubstantiated claims of voter confusion. Pet. App. 24a; 128a-129a.

C. Petitioners Failed To Demonstrate That The Disclaimers Are Not Narrowly Tailored.

Under exacting scrutiny, "the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Americans for Prosperity Found.*, 594 U.S. at 609-10. Narrow tailoring requires that the law promote "a substantial government interest that would be achieved less effectively absent the regulation," and not "burden substantially more speech than is necessary to further the government's legitimate interests." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 861 (9th Cir. 2004).

Petitioners assert that the Ninth Circuit "deemed insufficient the obvious less restrictive alternative" of "directing the audience to a speaker's disclosure reports." Pet. at 28. Petitioners, however, offered no evidence showing that directing voters to disclosure reports would serve the City's governmental interests. That lack of

evidence is not surprising because disclaimers provide benefits that disclosures do not. Disclaimers give voters the information they need to evaluate the speaker's message at the same time they hear or see the message; whereas, disclosures will only be viewed after the fact by individuals who have the time and motivation to search for them. "[F]ewer people are likely to see" disclosure reports, which makes disclosure requirements "a less effective method of conveying information" to the voters than disclaimers. *Majors v. Abell*, 361 F.3d 349, 353 (7th Cir. 2004). As the Seventh Circuit explained, "[i]t's as if cigarette companies, instead of having to disclose the hazards of smoking in their ads, had only to file a disclosure statement with the Food and Drug Administration." *Id.*; *see also Gaspee Project,* 13 F.4th at 91. Accordingly, the Ninth Circuit did not err in concluding that Petitioners' proposed alternative would not advance the City's governmental interests.

III. THE PETITION DOES NOT IDENTIFY ANY CIRCUIT SPLIT

Unable to overcome their own failure to submit evidence in support of their claims, Petitioners seek to manufacture a circuit split where none exists. The Petition asserts vaguely that "the D.C. and Tenth Circuits have taken a different view" than the Ninth Circuit, Pet. at 3, but Petitioners' attempt to suggest a circuit split fails.

Petitioners rely on *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486 (D.C. Cir. 2016), but that case is easily distinguishable. *Van Hollen* does not consider whether a campaign finance law violates the First Amendment, and thus has no relevance to this case. In *Van Hollen*, the D.C. Circuit considered whether the FEC abused its discretion when enacting a rule that resolved

an ambiguity in the Bipartisan Campaign Reform Act by requiring corporations and labor organizations to disclose only donations that were "made for the purpose of furthering electioneering communications." *Van Hollen*, 811 F.3d at 488. The D.C. Circuit noted that it was required to defer to the judgment of the FEC, and to uphold the FEC's interpretation of the statute "regardless whether there may be other reasonable, or even more reasonable, views." *Id.* at 492 (quoting *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 296 (D.C. Cir. 2013)). Under that "very deferential" standard, the D.C. Circuit concluded that the challengers had not met their "heavy burden" to show that the FEC's rule was arbitrary and capricious.

Van Hollen is also distinguishable from this case because it considered charitable donations, rather than election expenditures. The *Van Hollen* court considered the disclosure of funding sources for entities such as 501(c)(3) organizations, corporations, and labor unions that receive their money for non-political purposes from shareholders, members or donors who have no intention of participating in election communications. The court reasonably concluded that disclosure of individuals who pay membership dues to a union or persons who buy stock in a corporation tells the voters little about the actual funding sources for the election communication. Here, by contrast, Proposition F only requires disclosure of the top donors to committees that voluntarily engage in election communications by donating money to primarily formed independent expenditure committees and primarily formed ballot measure committees. "By donating to a primarily formed committee, a secondary committee necessarily is making an affirmative choice to engage in election-related activity." Pet. App. 34a-35a.

Petitioners fare no better with their reliance on *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016). In *Williams*, the Tenth Circuit considered a requirement that a 501(c)(3) organization disclose its donors who "specifically earmarked their contributions for electioneering purposes." *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016). *Williams* did state or imply that the requirement would be unconstitutional without that limitation. *Williams* did not consider any of the issues presented in this case, let alone create any split with the Ninth Circuit.

Accordingly, Petitioners have not identified any other circuit case that conflicts with the decision below.

IV. THIS CASE IS AN EXCEPTIONALLY POOR VEHICLE

This case presents an exceptionally poor vehicle for consideration of the issues raised in the Petition. The lower courts have not yet resolved the question of whether the challenged law violates Petitioners' First Amendment rights. The Ninth Circuit held only that the district court did not abuse its discretion when denying Petitioners' motion for a temporary restraining order and preliminary injunction. The case, therefore, reaches this Court in an interlocutory posture.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst.*, 113 S. Ct. at 2432 (Scalia, J., opinion respecting the denial of the petition for writ of certiorari). Indeed, it has cautioned that its jurisdiction to review interlocutory decisions should "be exercised sparingly" and is reserved for "extraordinary cases." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258 ("[E]xcept

in extraordinary cases, the writ is not issued until final decree.").

This case does not warrant deviation from the Court's ordinary practice of deferring review until final judgment. Indeed, this case does not present a sufficiently developed factual record for this Court to review. Of course, it is "essential" that parties "have the opportunity to offer all the evidence they believe relevant to the issues . . . (and) in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Singleton*, 428 U.S. at 120. But, in this case, there has been no discovery, no depositions, and very little factual development of any kind. Indeed, Petitioners' claims failed in large part because Petitioners did not submit evidence to support them. Pet. App. 24a-31a; 128a. On remand, Petitioners will have an opportunity to gather evidence and present that evidence to the lower courts. Until that occurs, review is not warranted. This Court should not consider weighty constitutional issues based on a record as flimsy as this one. *See, e.g., Americans for Prosperity Found.*, 594 U.S. at 603 (considering First Amendment claims after trial); *Citizens United*, 558 U.S. at 322 (considering First Amendment claims after district court entered summary judgment). At a minimum, the questions presented would be better addressed in a case in which there were findings of fact providing a concrete setting for resolution of the issues.[10]

10. The amici appear to agree that factual development is necessary. The Brief of Amici Curiae Dr. David Primo and Dr. Jeffrey Milyo asserts that courts should apply exacting scrutiny based on "the best available social science evidence," Primo Amicus Br. at 4, but no such scientific or expert testimony has been developed in this case or appears in the record. Amici Citizen Action Defense

Amicus Liberty Justice Center asserts that Alaska, Arizona and South Dakota recently passed laws that are "similar" to Proposition F, although the Center admits that the disclosure requirements in each jurisdiction are different enough that "this Court might even come to different conclusions" if it evaluated each one. Amicus Liberty Justice Center Br. at 7. But that is all the more reason to deny the Petition in this case. According to amici and Petitioners, Pet. at 2-3, district courts are just beginning to analyze the enactments in Alaska, Arizona and South Dakota, and the record is similarly undeveloped in this case. Neither Petitioners nor the amici explain why the issues should not continue to percolate before the lower courts. This Court ordinarily resists "the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Hollingsworth v. Perry*, 570 U.S. 693, 704-05 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). At a minimum, allowing these questions to develop in the lower courts will assist this Court in its review. *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (discussing the "benefit [this Court] receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari"); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (holding it is preferable to allow several courts to pass on a claim "in order to gain the benefit of adjudication by different courts in different factual contexts"). If any conflict eventually develops between the circuits, this Court could grant review at that time. For now, however, the questions presented are not ready for review.

Fund similarly argues that exacting scrutiny standard "requires fact-intensive inquiries," but the factual development has not yet occurred in this case. Citizen Action Defense Fund Br. at 6.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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