

Constitutionality of Campaign-Material Disclaimers

Yes on Prop B v. City and County of San Francisco (3:20-cv-630) and San Franciscans Supporting Prop B v. Chiu (3:22-cv-2785) (Charles R. Breyer, N.D. Cal.)

A district judge held that campaign disclosures required as part of campaign materials for a ballot measure were unconstitutionally burdensome for short advertisements but not for longer advertisements.

Subject: Ballot measures. *Topics:* Campaign materials; ballot measure; case assignment.

Proponents of an earthquake-safety and emergency-response bond on San Francisco's ballot of March 3, 2020, filed a federal complaint in the Northern District of California on January 28 against San Francisco, alleging that new campaign disclaimer regulations unconstitutionally burdened free speech because the amount of text required would swamp the advocacy message.¹ With their complaint, the plaintiffs filed a motion for a preliminary injunction.²

Although San Francisco would not agree to an order shortening the time to consider the plaintiffs' motion, neither would it oppose a motion for a February 14 hearing.³ Judge Charles R. Breyer agreed to hear the injunction motion then.⁴

But two days before the hearing, about three weeks before the election, Judge Breyer issued a partial preliminary injunction prohibiting San Francisco from enforcing the disclaimer requirements "against Yes on Prop B's proposed [5 in. by 5 in.] newspaper advertisements, smaller 'ear' advertisements, and spoken disclaimers on digital or audio advertisements of thirty seconds or less. The Court will rule on the remainder of Yes on Prop B's requested relief after full briefing and a hearing."⁵

On February 20, Judge Breyer determined that the disclaimer requirements were improper as applied to short ads, but proper as applied to longer ads:

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

1. Complaint, *Yes on Prop B v. City and County of San Francisco*, No. 3:20-cv-630 (N.D. Cal. Jan. 28, 2020), D.E. 1.

2. Preliminary-Injunction Motion, *id.* (Jan. 28, 2020), D.E. 5.

3. Motion at 2, *id.* (Jan. 29, 2020), D.E. 9.

4. Order, *id.* (Jan. 31, 2020), D.E. 14; *see* Transcript, *id.* (Feb. 14, 2020, filed Mar. 4, 2020), D.E. 34.

5. Order, *id.* (Feb. 12, 2020), D.E. 23.

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.⁶

On October 21, the court of appeals dismissed the plaintiffs' appeal because the case was moot.⁷

On May 17, 2022, Judge Breyer decided that the case was related to an action filed on May 11.⁸ The new action alleged, "San Francisco coopts speakers' messages about political candidates and ballot measures, forcing speakers not just to replace their message with what the City wants said, but to put the City's message front and center, before listeners hear anything else."⁹ On May 12, the plaintiffs in the second case filed a motion for a temporary restraining order and a preliminary injunction.¹⁰ Judge Breyer set the second case for a virtual hearing on May 24.¹¹

On June 1, Judge Breyer denied plaintiffs in the second case immediate relief,¹² a decision that the court of appeals affirmed on March 8, 2023.¹³

6. *Yes on Prop B v. City and County of San Francisco*, 440 F. Supp. 3d 1049, 1051 (N.D. Cal. 2020); see *No on E v. Chiu*, 85 F.4th 493, 499 (9th Cir. 2023); see also Bob Egelko, *Judge Upholds Most of S.F.'s Campaign Ad Disclosure Rule*, S.F. Chron., Feb. 21, 2020, at C1.

7. Opinion, *Yes on Prop B v. City and County of San Francisco*, 826 F. App'x 648 (9th Cir. 2020); *No on E*, 85 F.4th at 499; *San Franciscans Supporting Prop B v. Chiu*, 604 F. Supp. 3d 903, 906 (N.D. Cal. 2022).

8. Order, *Yes on Prop B*, No. 3:20-cv-630 (N.D. Cal. May 17, 2022), D.E. 48; Complaint at 2, *San Franciscans Supporting Prop B v. Chiu*, No. 3:22-cv-2785 (N.D. Cal. May 11, 2022), D.E. 1 [hereinafter *San Franciscans Supporting Prop B* Complaint]; see *No on E*, 85 F.4th at 500.

9. *San Franciscans Supporting Prop B* Complaint, *supra* note 8, at 2.

10. Motion, *San Franciscans Supporting Prop B*, No. 3:22-cv-2785 (N.D. Cal. May 12, 2022), D.E. 9; *No on E*, 85 F.4th at 500.

11. Order, *Yes on Prop B*, No. 3:20-cv-630 (N.D. Cal. May 17, 2022), D.E. 26.

12. *San Franciscans Supporting Prop B*, 604 F. Supp. 3d 903; *No on E*, 85 F.4th at 497.

13. *No on E*, 85 F.4th 493, amending 62 F.4th 529 (9th Cir. 2023).