**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MINNESOTA**

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| DOUGLAS P. SEATON, VAN L. CARLSON, LINDA C. RUNBECK, and SCOTT M. DUTCHER,<br><br>Plaintiffs,<br><br>v.<br><br>DEANNA WIENER, GEORGE BECK, JON STAFSHOLT, ED OLIVER, NEIL PETERSON, and CHRISTIAN SANDE, in their official capacities as Chair and members of the Minnesota Campaign Finance and Public Disclosure Board, and TONY PALUMBO and CHAD LARSON, in their official capacities as county attorneys for Anoka and Douglas Counties,<br><br>Defendants. | ) | No. 14-CV-1016 DWF/JSM |

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

## INTRODUCTION

In their response, Defendants fail to rebut Plaintiffs' showing that their motion for a temporary restraining order and a preliminary injunction should be granted. Defendants' brief contains a number of errors and omissions, which Plaintiffs address in turn, below.

First, Defendants identify the wrong standard in determining whether Plaintiffs have suffered a First Amendment injury and simply ignore Plaintiffs' testimony and allegations demonstrating their injuries. Second, Defendants identify the wrong standard in determining whether the contribution limit Plaintiffs are challenging violates the First Amendment.

Third, Defendants present snippets from newspaper articles and legislative history from the early 1990s that might be relevant to a challenge to individual contribution limits but have nothing to do with Plaintiffs' challenge. Fourth, Defendants fail to address the fact that the case *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1115 (8th Cir. 2005), explicitly limited its holding to limits on PAC contributions, which Plaintiffs are not challenging.

Fifth, Defendants' analysis of the balance of harms and public policy factors of the *Dataphase* test is in error. The period before an election is the time when the public's need for an injunction to a law restricting speech is *highest*.

## I. PLAINTIFFS HAVE STANDING BECAUSE THEY HAVE SUFFERED, ARE SUFFERING, AND WILL SUFFER A CHILLING EFFECT ON THEIR CHOICE TO SPEAK.

Both in their Complaint and in their sworn declarations, Plaintiffs demonstrate they have standing and are suffering irreparable harm. In response, Defendants fail to identify the relevant standard for a First

Amendment injury. They also ignore the abundant allegations in Plaintiffs' Complaint and testimony in Plaintiffs' declarations enumerating numerous injuries that the special sources limit, as applied to individual contributions of more than half the individual limit, has inflicted, is currently inflicting, and will inflict upon them. And, Defendants mistakenly confuse standing with the merits in arguing the candidate plaintiffs, Runbeck and Dutcher, have not been injured.

In a First Amendment challenge a plaintiff properly alleges an injury if he alleges he has an "objectively reasonable" fear that he will be burdened if he chooses to speak. *See, e.g.*, *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 486-87 (8th Cir. 2006) (involving burden of fear of prosecution); *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994) (involving burden on a speaker because the candidate the speaker opposes is given public money in response). Both the donor and candidate plaintiffs have alleged and testified to numerous burdens on their speech. Those burdens are both in the form of chills to their willingness to contribute and accept money that will be used for speech and in the form of having to spend extra time fundraising and complying with paperwork instead of speaking to voters. These burdens are sufficient for standing. They also constitute irreparable harm.

Donor plaintiffs Doug Seaton and Van Carlson have specifically alleged and testified that the special sources limit, as applied to individuals who contribute more than half of the individual contribution limit, has injured them, is presently injuring them, and will injure them, in the following ways:

- Is presently chilling their choice to make contributions to candidates. But for the special sources limit, in the next month Seaton would make $500 contributions to two candidates he has already contributed $500 each to, as well as a contribution of more than $500 to Runbeck, and Carlson would make a $750 contribution to Runbeck. Seaton Decl. ¶¶ 13-15; Carlson Decl. ¶¶ 7-9; Compl. ¶¶ 52-53, 60-61.

- Chilled them from contributing funds to candidates in prior elections after the candidates' campaigns reached their special sources limits. Seaton Decl. ¶ 12; Carlson Decl. ¶ 6; Compl. ¶¶ 49, 57.

- Chilled their choice to contribute more than half the individual limit to a candidate even when they did not know for certain whether the candidate had reached his or her limit. This includes a contribution Seaton wanted to make to State Representative Pat Mazorol in 2010 and a contribution Carlson wanted to make to Plaintiff Runbeck in 2012. Seaton Decl. ¶¶ 8-9; Carlson Decl. ¶ 6; Compl. ¶¶, 46, 58.

Seaton and Carlson also explained that even when they do not know if a candidate has reached the special sources limit, they sometimes withhold from making contributions of more than half the individual limit because that contribution, in turn, lowers the total amount of money that a candidate can raise. Seaton Decl. ¶ 14; Carlson Decl. ¶ 9; Compl. ¶¶ 53, 60. This is because for every two dollars a candidate raises from an individual in excess of half the individual limit, the candidate can then raise a dollar less, overall,

because PAC and lobbyist contributions are crowded out. Runbeck Decl. ¶ 20; Compl. ¶ 34.

Further, the candidate plaintiffs, Runbeck and Dutcher, have specifically alleged and testified that the same limit has injured them, is presently injuring them, and will injure them, in the following ways:

- Is presently chilling Runbeck from allowing contributors to donate more than $500 via her website and will chill her from asking for contributions of more than $500 when she sends out fundraising letters immediately following the end of the current legislative session. Runbeck Decl. ¶¶ 22-23.

- Is presently chilling Runbeck from raising more than the special sources limit from donors who contribute more than $500, as it did in 2010 and 2012. Runbeck Decl. ¶ 19; Compl. ¶ 71.

- Chilled them from raising more funds to use to speak to voters by forcing them to send back contributions that did not exceed the individual limit but could not be retained because the candidate had reached his or her special sources limit, including checks in the amounts of $250 and $50. Runbeck Decl. ¶¶ 14-15; Dutcher Decl. ¶¶ 12-13; Compl. ¶¶ 69, 74.

- Chilled their speech by forcing them to spend more time raising contributions in amounts that were half of the individual limit when they would have been able to raise contributions in the amount of the full individual limit but for the special sources limit, resulting in less time communicating with voters. Runbeck Decl. ¶¶ 8, 18; Dutcher Decl. ¶¶ 9, 10, 16; Compl. ¶¶ 40, 70, 75.[1]

[1] As Dutcher testified, "Because it is time consuming raising money, and that time takes away from actually communicating with voters, I can run a much more effective campaign through receiving more money in larger contributions." Dutcher Decl. ¶ 10.

Further, although Plaintiffs have detailed these numerous burdens, this is not even necessary because those burdens are evident and inherent on the face of the challenged statute itself, Minn. Stat. § 10A.27, subd. 11. That was the case in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) ("*AFEC*"). There, the Supreme Court struck down a law giving public funds to candidates when their opponents, or independent groups supporting their opponents, chose to only raise money privately. *Id.* at 2813. Even though the law placed no direct limits on candidates—it merely gave money to candidates' opponents when the candidates, or independent groups supporting them, spent beyond a certain threshold—the Court recognized it constituted a burden on the exercise of First Amendment rights by the candidates and independent groups. *Id.* at 2820. In addition, the Court stated that even if there had been no evidence *at all* that the candidates and independent groups were burdened, it was "evident and inherent" on the face of the statute. *Id.* at 2823. The same is the case with the special sources limit, as applied to individuals who contribute more than half the individual limit. *See also Day*, 34 F.3d at 1360 (stating Minnesota's former matching funds law, similar to the one in *AFEC*, infringed upon "protected speech because of the chilling effect the statute has on the political speech of the person or group making the independent expenditure").

In this case, Plaintiffs have unquestionably demonstrated that they are refraining from engaging in activity protected by the First Amendment because of the law they are challenging and their fear of the law's burdens is objectively reasonable. Furthermore, their detailed statements are not even necessary under *AFEC*. Thus, they have standing and they are currently suffering irreparable harm.

Defendants argue the candidate plaintiffs have not been injured because they have not been prevented "'from amassing the resources necessary for effective advocacy.'" Def.'s Resp. at 11 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). As is explained below in Section II, this is not the correct standard. Instead it is either the "closely drawn" standard or strict scrutiny. *See also* Pls.' Mem. at 25-26. However, even if it were the correct standard, it is irrelevant as to whether Plaintiffs have standing because it confuses standing with the merits. Plaintiffs have alleged that they have been chilled, and are being chilled, from engaging in First Amendment protected activity. Whether or not that restriction in turn *violates* the First Amendment is a question for the merits, not standing. *See Meese v. Keene*, 481 U.S. 465, 473 (1987) ("[W]hether the statute in fact constitutes an abridgement of the plaintiff's freedom of speech is, of course, irrelevant to the standing analysis . . ."); *see also Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (determining whether or not plaintiff's speech was

protected was a merits question and all that mattered for standing was that plaintiff had suffered an objective chill). Plaintiffs have standing.

## II. WHETHER PLAINTIFFS CAN ALREADY RAISE "ENOUGH" MONEY FOR EFFECTIVE ADVOCACY IS NOT THE STANDARD FOR DETERMINING WHETHER THE SPECIAL SOURCES LIMIT IS CONSTITUTIONAL.

Defendants argue the special sources limit, as applied to individual contributions of more than half the individual limit, is constitutional because candidates can raise enough money to mount effective campaigns in spite of it. Def.'s Resp. at 16. Whether that is true is beside the point. Contribution limits can be unconstitutional for reasons other than being too low. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, slip op. (2014) (striking down contribution limit without examining whether it allowed candidates to mount effective campaigns); *See also Russell v. Burris*, 146 F.3d 563, 572 (8th Cir. 1998) (striking down difference in contribution limits between PACs without examining whether the limits allowed candidates to mount effective campaigns). Most obviously, a particular limit can be unconstitutional because it fails the relevant standard: it does not further the interest of preventing *quid pro quo* corruption or its appearance, or is not closely drawn to furthering that interest. Defendants fail to admit this and also fail to

address the fact that *McCutcheon* has made this standard even more demanding.[2]

Defendants' argument that Plaintiffs are not likely to succeed on the merits because candidates can raise "enough" money to speak "effectively" in spite of the special sources limit would be beside the point even without *McCutcheon*. However, *McCutcheon* clarified the Court's earlier rulings on a few issues, and also overruled some earlier reasoning. These should be mentioned in light of Defendants' reliance on earlier cases.

First, *McCutcheon* rejected *Buckley*'s statement that a contribution limit is a lesser burden than other speech restrictions because a donor can express himself in other ways, such as through volunteer work. *McCutcheon*, slip op. at 16 (citing *Buckley*, 424 U.S. at 22, 28). This is because "personal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a

[2] Plaintiffs argue herein under the closely drawn standard, but note that *McCutcheon* indicated doubt on whether it or strict scrutiny is the correct standard. *McCutcheon*, slip op. at 10. The former standard was applied in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000), and *FEC v. Beaumont*, 539 U.S. 146, 162 (2003), but there is now a question because of cases such as *McCutcheon* and *Citizens United v. FEC*, 558 U.S. 310, 356-57 (2010). *See also Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 n.12 (8th Cir. 2012) (en banc) (stating that after *Citizens United*, the authority of *Beaumont v. FEC* was on "shaky ground").

select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening." *Id.* Plaintiffs Seaton and Carlson are not among those select few. They are busy entrepreneurs who want to help many different candidates by contributing money.

The *McCutcheon* Court also clarified *Buckley* by explaining that a contribution limit can violate an individual's First Amendment rights even if the limit is not a complete ban: "It is no answer to say that the individual can simply contribute less money to more people. . . . the Government may not penalize an individual for 'robustly exercise[ing]' his First Amendment rights. *Id.* (quoting *Davis v. FEC*, 554 U.S. 724, 739 (2008)).

Further, *McCutcheon* clarified that in determining whether a limit is "closely drawn" a court must find a "fit" that is "'a means narrowly tailored to achieve the desired objective.'" *McCutcheon*, slip op. at 30 (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). This is hardly the "complaisant" standard of review, on which Defendants insist. Def.'s Resp. at 16, 21.

The *McCutcheon* Court further explained that when the limit challenged is not a "base limit" (what Plaintiffs have called an "individual limit") but an aggregate limit, such as the special sources limit, then courts must be "particularly diligent in scrutinizing the law's fit." *McCutcheon*, slip op. at 33. "[B]ase limits themselves are a prophylactic measure . . . 'because

few if any contributions to candidates will involve *quid pro quo* arrangements.'" *Id.* at 32-33 (quoting *Citizens United*, 558 U.S. at 357). An aggregate limit *on top of* an individual limit is therefore a "'prophylaxis-upon-prophylaxis,'" limiting the possibility that the law actually combats *quid pro quo* corruption or its appearance. *Id.* at 33 (quoting *FEC v. Wis. Right to Life*, 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J.)). This dovetails with *Shrink Missouri*'s statement that the quantum of evidence needed in a contribution limits challenge will vary depending on the novelty of the justification. *Shrink Missouri*, 528 U.S. at 391. Individual limits are not novel. The limit challenged in this case, however, is the very definition of novel. Plaintiffs know of no other contribution limit that changes an individual limit for ordinary citizens after "too many" of them have contributed "too much."

Defendants try to avoid the closely drawn standard, not to mention the standard's clarifications in light of *McCutcheon*, by emphasizing language describing the review of contribution limits as "relatively complaisant" and that a court will not invalidate a limit unless it is "'so radical in effect as to render political association ineffective . . . .'" Def.'s Resp. at 16 (quoting *Beaumont*, 539 U.S. at 161, *Shrink Missouri*, 528 U.S. at 397). However, what Defendants fail to inform this Court is that even before *McCutcheon* this language referred to challenges to the exact *dollar amount* of individual

limits, not challenges to contribution limits *per se*. Again, a dollar amount that is so low it makes political association ineffective is simply *one way* that an individual limit is not "closely drawn" and it is this inquiry that might receive "relatively complaisant" review. *See Shrink Missouri*, 528 U.S. at 387-88.

In this case, however, Plaintiffs are not challenging any individual contribution limit, let alone the dollar amount of any individual contribution limit. Plaintiffs are challenging another limit placed on top of the individual limits because that limit does not further the interest of preventing *quid pro quo* corruption or its appearance and is not closely drawn. The amount of the individual limit does not matter to this challenge. What matters is that once the Minnesota Legislature has determined that a contribution is not corrupting at a certain level—currently $1,000 for legislative candidates and up to $4,000 for governor—cutting that limit in half for ordinary citizens once "too many" other ordinary citizens have made non-corrupting contributions does not further the prevention of *quid pro quo* corruption or its appearance.

## III. DEFENDANTS' USE OF NEWS STORIES AND LEGISLATIVE HISTORY IS EITHER BESIDE THE POINT OR DEMONSTRATES THE LEGISLATURE WAS MOVED BY IMPERMISSIBLE INTERESTS.

Defendants quote several old newspaper articles and statements from legislative history to argue that in the early 1990s Minnesotans were worried

about large dollar contributions influencing politics and even at times constituting actual bribery. These statements prove nothing relevant to this case. Almost all of them said nothing about the special sources limit. Those are irrelevant because Plaintiffs *are not challenging the 1993 legislature's reduction of individual contribution limits*. The statements that do actually pertain to the special sources limit either are themselves irrelevant, or actually prove Plaintiffs' point.

The 1993 legislature reduced individual limits dramatically. This was especially true for governor, where the election year limit dropped from $20,000 to $2,000. *See* Laws of Minnesota 1993, Ch. 318-H.F. No. 201.[3] For state senate the drop was from $1,500 to $500 and for state house from $750 to $500. *Id.* This action was the legislature's determination of the amount a contribution can be below which there is not a danger of *quid pro quo* corruption. This is just like Congress's determination that a $5,200 contribution does not pose a danger of *quid pro quo* corruption. *McCutcheon*, slip op. at 21. Again, Plaintiffs are not challenging these changes to individual limits.

There are only two statements Defendants cite that actually relate to the special sources limit. One is from a person quoted in a *Pioneer Press*

[3] The bill, with notations indicating the old limits, is available at https://www.revisor.mn.gov/laws/?doctype=Chapter&year=1993&type=0&id=318.

news story who objected to the, then proposed, special sources limit because he thought the proposed individual limits themselves would still be too high. Campion Aff., Ex. 4. The other is Joan Higinbotham's affidavit, the former Executive Director of Common Cause of Minnesota, submitted in the *Kelley* case. *Id.*, Ex. 6. Higinbotham was part of the task force that, among numerous other proposals, came up with the mechanism that became the special sources limit. *Id.*, ¶¶ 2-3.

Higinbotham's statement does not address the mechanism of cutting individuals' contribution limits in half, but focuses on PAC contributions. Even so, far from assisting Defendants in defeating Plaintiffs' Motion, Higinbotham's statement is an honest admission that the law was not enacted in order to further a permissible government interest:

> The limit on the total amount that candidates can accept from PACs and other special interest groups works in tandem with the annual contribution limits to help *level the playing field* and *reduce the role of big money in politics*. The aggregate limit prevents a candidate from raising all or most of the money for his or her campaign from PACs, lobbyists, and other special interest groups. This helps lessen the perception or reality of PACs and other special interests having disproportionate *influence* over the elected officials to whom they have made contributions.

*Id.*, ¶ 7 (emphasis added). All of these purposes—leveling the playing field, reducing the role of money in politics, and preventing influence—have been explicitly rejected by the Supreme Court as permissible interests. *McCutcheon*, slip op. at 1, 18-19, 30.

There is no reason to think Ms. Higinbotham and Senator Luther, *see* Pls' Mem. at 13-14, were not being honest. But, their honesty demonstrates that the law is unconstitutional.

## IV. DEFENDANTS FAIL TO ACKNOWLEDGE *KELLEY* EXPLICITLY LIMITED ITS HOLDING TO PAC CONTRIBUTIONS.

Defendants argue the Eighth Circuit has determined the special sources limit does further the interest of preventing *quid pro quo* corruption and its appearance. This is not true. Defendants completely avoid Plaintiffs' discussion in their opening brief that in the *Kelley* case the Eighth Circuit explicitly stated its ruling only applied to PAC contributions and that this was because PAC contributions are more dangerous than other contributions. Pls.' Mem. at 23-24 (citing *Kelley*, 427 F.3d at 1114-15).

Further, although *Kelley* should be distinguished on this ground (and therefore this Court does not need to pronounce it overruled to grant Plaintiffs' Motion), it is clear that its reasoning has been overruled by *McCutcheon*. Defendants try to distinguish *McCutcheon* on its facts, stating that it concerned an aggregate limit on donors not candidates. But this is a distinction without a difference. *Kelley* and *McCutcheon* contradict each other. When a Supreme Court case is in conflict with a Court of Appeals case the Supreme Court case, of course, must be followed. *See Royal & Sun Alliance Ins. PLC v. Ocean World Lines, Inc.*, 572 F. Supp. 2d 379, 399

(S.D.N.Y. 2008) (concluding it should follow the Supreme Court as the "higher authority").

## V. THE BALANCE OF HARMS AND PUBLIC POLICY FACTORS ARE IN FAVOR OF PLAINTIFFS BECAUSE ELECTIONS ARE THE TIME WHEN FREE SPEECH IS MOST IMPORTANT.

Defendants argue that the balance of harms weighs in their favor, public policy considerations weigh against issuing an injunction, and Plaintiffs have been untimely in filing their Motion. Def.'s Resp. at 23-25. Aside from the balance of harm and public policy *always* being against the government when a law violates the First Amendment, Pls.' Mem. at 33-34, Plaintiffs' timing only accentuates the need for preliminary relief. The period before an election is precisely when courts *must* be willing to immediately halt unconstitutional restraints on campaign speech. *Citizens United*, 558 U.S. at 334.

Further, it should not matter whether Plaintiffs filed their Motion in April 1994 or April 2014. *See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000), *abrogated in part on other grounds by Winter v. NRDC, Inc.*, 129 S. Ct. 365, 375 (2008) (status quo refers to last uncontested status, not situation immediately before lawsuit filed). But, the fact it was filed nine days after the *McCutcheon* decision makes it all the more timely. It is even more timely than *Minnesota Chamber of Commerce v. Gaertner*, 710 F. Supp. 2d 868 (D. Minn. 2010) where, shortly after the *Citizens United*

decision, Judge Magnuson enjoined Minnesota's ban on corporate funds being used for independent expenditures. *Compare Gaertner*, 710 F. Supp. 2d at 868 (filed Feb. 16, 2010) *with Citizens United*, 558 U.S. 310 (issued Jan. 21, 2010).

## CONCLUSION

Defendants have the burden here. *See Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011) (stating, in ruling on a motion for a preliminary injunction in challenge to campaign finance law, that "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."). They have not met that burden. For the above reasons this Court should grant Plaintiffs' Motion.

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Respectfully submitted,

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