IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

DOUGLAS P. SEATON, VAN L. CARLSON, LINDA C. RUNBECK, and SCOTT M. DUTCHER, Plaintiffs, v. 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, Defendants.	)	No. 14-CV-1016 DWF

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

INTRODUCTION

This is a First Amendment challenge to a Minnesota law that unconstitutionally restricts the ability of political candidates and donors to speak and associate. The law at issue is Minnesota's "special sources" limit as applied to ordinary citizens. Minn. Stat. § 10A.27, subd. 11. The State of Minnesota sets a limit on the amount of money that an individual may contribute to a candidate for state office. Minnesota then arbitrarily cuts an

ordinary citizen's contribution limit in half once the candidate he supports has accepted more than a certain amount of money from certain types of donors. This means some similarly situated donors cannot contribute as much as others. The law therefore violates the First Amendment rights of both donors and candidates.

Plaintiffs are two individual donors and two candidates whose First Amendment rights have been violated by Minnesota's special sources limit. Their rights will continue to be violated unless and until this Court protects those rights. Plaintiffs therefore respectfully request, pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 7.1(d), that this Court temporarily restrain and preliminarily enjoin the enforcement of Minn. Stat. §10A.27, subd. 11, as applied to individuals who make contributions of more than one half the individual contribution limit.[1]

FACTUAL BACKGROUND

The Plaintiffs

Plaintiffs are two donors who contribute to candidates for state office and two candidates who accept contributions in order to run for state office. In each of their cases, the special sources limit has arbitrarily violated their rights to free speech and association. And the special sources limit will

[1] Plaintiffs are not challenging the special sources limit as applied to PACs and lobbyists.

continue to violate their First Amendment liberties until this Court enjoins Defendants' enforcement of it. Specifically, the special sources limitation has harmed Plaintiffs in the following ways. It has:

- Prevented donors Doug Seaton and Van Carlson from contributing (or caused them to withhold from contributing) to candidates in amounts of more than half the individual limit for the candidate's specific office. Seaton Declaration ¶¶ 7-12 (Ex. 5, attached); Carlson Decl. ¶ 6 (Ex. 1, attached).

- Forced candidates Linda Runbeck and Scott Dutcher to send back contributions to donors that did not exceed the individual limit but could not be retained because the candidate had reached his or her special sources limit. Runbeck Decl. ¶¶ 11-14 (Ex. 3, attached); Dutcher Decl. ¶¶ 12-13 (Ex. 2, attached).

- Forced candidates Linda Runbeck and Scott Dutcher to spend more time raising contributions in amounts that were half of the individual limit ($500) when they would have been able to raise contributions in the amount of the full individual limit ($1,000) if not for the special sources limit, resulting in less time communicating with voters. Runbeck Decl. ¶¶ 8, 18; Dutcher Decl. ¶¶ 10, 16.

Douglas P. Seaton

Plaintiff Douglas ("Doug") P. Seaton is an attorney who lives and practices law in Edina, Minnesota. Seaton Decl. ¶¶ 2-3. Seaton cares deeply about public policy issues and financially supports candidates who share his views. *Id.* ¶¶ 5-6. This especially includes candidates who want to reduce government's involvement in the economy and protect economic liberty. *Id.* ¶ 5. To this end, Seaton has made contributions to many candidates in various state and federal races in prior elections, including for the Minnesota

Legislature and in Minnesota state-wide races, including governor, attorney general, and auditor. *Id.* ¶ 6.

On several occasions, Seaton wanted to contribute an amount to a candidate for Minnesota state office for more than half the individual contribution limit but has not been able to do so because it would be considered a special sources contribution. *Id.* ¶ 7. Seaton has withheld from attempting to contribute more than half the individual limit in the past because he knew that the candidate would have reached his or her special sources limit or was in danger of doing so. *Id.* ¶ 8. For example, Seaton contributed $250 to State Representative Pat Mazorol in 2010, which was the maximum amount Seaton could contribute, at that time, without making a special sources contribution. *Id.* ¶ 9. Additionally, Seaton contributed $250 to State Representative Ron Erhardt in 2006, the maximum amount Seaton could contribute, at that time, without making a special sources contribution. *Id.* ¶ 10. In each case, Seaton would have given more but he knew if he did that it either would have been rejected or would have complicated the candidate's fundraising strategy. *Id.* ¶ 11.

Seaton has occasionally, without realizing that the special sources limit had been exceeded at the time, made contributions of more than half the individual limit. *Id.* ¶ 12. But on more than one occasion, the candidate's campaign has contacted him after receiving his contribution and told him the

campaign could not accept anything more than half the limit because of the special sources cap. *Id.*

Seaton plans to make contributions to candidates for Minnesota state office in amounts greater than half the individual contribution limit for the relevant office in the 2014 election cycle, the 2016 election cycle, and in other future election cycles. *Id.* ¶ 13. He already has contributed $500 to each of the Republican endorsed state house candidates in his Edina senate district and would like to contribute an additional $500 to each of them in April or early May 2014. *Id.* ¶ 14. He also would like to contribute an amount of more than $500 to Runbeck in April or early May 2014. *Id.* ¶ 15. However, because giving over $500 would impact those candidates' special sources limits, and lower the total amount of money the candidate is able to raise, he is reluctant to do so, and may not be able to do so if the candidate has to refuse the contribution because of the special sources limit. *Id.* ¶¶ 14-15

Van L. Carlson

Plaintiff Van L. Carlson is an entrepreneur who lives in Circle Pines, Minnesota. Carlson Decl. ¶¶ 2, 4. He runs his own business helping match workers with employers in the food manufacturing industry. *Id.* ¶ 4. Carlson cares deeply about public policy issues, especially issues that affect values and the family. *Id.* ¶ 5. After ignoring politics for a long time because he thought he could not change anything, in recent years Carlson has decided he

should get involved and try to make a difference. *Id.* To that end, among other actions, he has given money to various candidates and causes, including to Plaintiff Linda Runbeck, his state representative, in prior elections. *Id.*

From time to time, Carlson has wished to contribute an amount to a candidate for more than half the contribution limit but has not been able to do so because it would be considered a special sources contribution. *Id.* ¶ 6. For example, in 2012 Carlson contributed $250 to Runbeck's campaign and $250 to his state senator Roger Chamberlain's campaign, the highest amount allowed at that time without becoming a special sources contribution. *Id.* But for the special sources limit, Carlson would have contributed more. *Id.*

Carlson would like to make contributions to candidates for Minnesota state office in amounts greater than half the individual contribution limit for the relevant office in the 2014 election cycle, the 2016 election cycle, and in other future election cycles. *Id.* ¶ 7. He has already contributed $100 to Runbeck in the current campaign cycle. *Id.* But for the special sources limit. he would contribute another $750 to Runbeck in April or early May, 2014. *Id.* ¶ 8. However, because giving over $500 to her would impact her special sources limit, and lower the total amount of money she is able to raise, Carlson is reluctant to do so, and may not be able to if Runbeck has to refuse the contribution because of the special sources limit. *Id.* ¶¶ 8-9.

Linda C. Runbeck

Plaintiff Linda C. Runbeck is the Minnesota state representative for District 38A. *See* Runbeck Decl. ¶ 6. In addition to past public service at the state and local level, Runbeck ran for and was elected to her current position in 2010 and in 2012. *Id.* ¶¶ 2-6. She is running for reelection in 2014 and plans to run in future elections as well. *Id.* ¶ 7.

The special sources limit has forced, is forcing, and will force her campaign to change its behavior and incur additional expenses. *Id.* ¶¶ 11-16. This includes sending checks back to individuals who have attempted to make campaign contributions of more than one half the individual limit, asking married donors who pay from a joint checking account if part of the contribution is made in their spouses' name, and choosing not to solicit contributions of more than one half the individual limit even though those contributions on their own are perfectly legal. *Id.*

In the 2010 election, Runbeck's special sources donors were virtually all individual donors, with several checks split between the spouses. *Id.* ¶ 11. She then maxed out her special sources cap. This meant she had to return some contributions and strategize about how to fundraise going forward, because she could no longer raise any amount more than $250 per donor, one half of what was then the individual contribution limit of $500. *Id.* Complying

with the special sources limit in 2010 was a very time consuming process for Runbeck, taking hours of work. *Id.*

In raising money during the 2012 campaign, Runbeck again found she had raised "too much" in special sources money. *Id.* ¶ 12. This meant she again had to strategize about how to fundraise going forward, because people continued to send in checks that were more than half the individual limit, while, at the same time, lobbyist and PACs made contributions. *Id.* This juggling exercise was exceedingly time-consuming for Runbeck with paperwork, phone calls, accepting and then returning checks, and developing a fundraising strategy to maximize contributions while not exceeding the limit. *Id.*

This included contacting married donors who pay from a joint checking account to explain the complicated law and to see if both spouses were making, and splitting, a contribution or if the signing spouse on the check was making the entire contribution in his or her own name only. *Id.* ¶ 13. Most told Runbeck the donation was to be split between each spouse. *Id.* One donor expressed irritation and said it was not. *Id.* Whether both spouses or only one was contributing made a difference if the total contribution was more than half the individual limit because if only one spouse was contributing it was a special sources contribution, but if both were, then it was not. *Id.*

In the end, in the 2012 election, Runbeck decided to return several contributions, including a $250 contribution from an individual who had earlier given $200, a $50 contribution from an individual who contributed $300, and a $500 contribution from a PAC. *Id.* ¶ 14. Runbeck raised all but approximately $950 of the special sources limit for that year. *Id.* ¶ 14. She did not max out her special sources limit because she had already returned several checks not daring to exceed the limit. *Id.*

If it were not for the special sources limit's applicability to contributions by ordinary citizens, Runbeck would be able to raise more funds and reduce the amount of time she has to spend on fundraising. *Id.* ¶ 18. This would enable her to speak with her constituents more. *Id.* Runbeck plans to raise enough special sources contributions in the 2013-14 period, and in future election periods, that she will max out her special sources limit. *Id.* ¶ 19.

Runbeck is currently raising contributions for her 2014 campaign, and every day that goes by, the special sources limit is limiting her ability to raise contributions in excess of $500 per contributor. *Id.* ¶ 21. But for the special sources limit she would immediately change her website to ask for $1,000 contributions. *Id.* ¶ 22. Because of it, however, her website only includes $500 as the maximum option. *Id.* Further, but for the special sources limit

she would begin asking for $1,000 contributions instead of $500 contributions when she sends out fundraising letters immediately after the current legislative session ends, which will be no later than May 19, 2014. *Id.* ¶ 23.

Scott M. Dutcher

Plaintiff Scott M. Dutcher is an attorney who lives in Brandon, Minnesota and works in nearby Alexandria, Minnesota. Dutcher Decl. ¶ 2. Dutcher has been very involved in politics for years, including volunteering on campaigns, serving on party committees, and running for office. *Id.* ¶ 4. He was elected to and serves on the Brandon City Council and ran for state house in District 12A in 2012. *Id.* ¶¶ 3, 5-6. He may run for District 12A again in 2014, and plans to run for state office in a future election, either state house, state senate, or a state-wide race. *Id.* ¶ 7. He has not dissolved his 2012 campaign committee and still files its required reports with the Minnesota Public Disclosure Board ("Board"). *Id.* ¶ 8.

Dutcher maxed out the special sources limit while running for election in 2012. *Id.* ¶ 12. In order not to exceed the special sources limit, Dutcher had to return checks to donors, including an individual who had tried to contribute more than one half the individual limit, and to several PACs. *Id.* ¶ 13. The individual gave him $100 and then another $200 a few months later, after Dutcher had reached his special sources cap. *Id.* Because this

would have made the individual's entire set of contributions special sources, Dutcher was forced to refund him $50. *Id.*

But for the special sources limit's applicability to contributions from ordinary citizens, Dutcher would be able to raise and spend more funds and reduce the amount of time he has to spend on fundraising. *Id.* ¶¶ 10, 16. This would enable him to speak more with voters. *Id.*

If he runs for office in 2014, Dutcher plans to raise enough special sources contributions in the 2013-14 period that he will max out his special sources limit. *Id.* ¶¶ 7, 19. Beyond 2014, Dutcher plans to run for a legislative or state-wide office in a future election, and plans on maxing out his special sources limit at that time too. *Id.*

How the Special Sources Limit Was Adopted

Since the 1970s, Minnesota has limited the amount that an individual may contribute to a candidate's campaign for state office. *See* H.F. 404 1978 Leg. Reg. Sess. (Minn.1978) (amending Minn. Stat. § 10A.27, subd. 1 to add contribution limits for candidate committees). These individual contribution limits restrict how much a donor may contribute to a candidate.

Individual limits differ depending on the office sought by the particular candidate and also on whether the contribution is made in the "election segment of an election cycle," i.e., the two years including an election year and the previous year, or a "nonelection segment of an election cycle," i.e., the

two years following an election year. Minn. Stat. § 10A.27, subd. 1(a). As state house terms are only two years, the contribution limit for house candidates is always the same. Further, the individual limit for state senate is the same for nonelection and election segments.

The election segment individual contribution limits for each office are:

- $4,000 for the offices of Governor and Lieutenant Governor (running on the same ticket);
- $2,500 for Attorney General;
- $2,000 for Secretary of State and for Auditor;
- $1,000 for a state senate seat (also $1,000 in a nonelection segment); and
- $1,000 for a state house seat.

Minn. Stat. § 10A.27, subd. 1(a).

These individual limits apply to contributions from political committees, political funds, lobbyists, and ordinary citizens. *Id*; subd.1(c). Separate individual limits apply to contributions from political party units and campaign committees to candidates. Minn. Stat. § 10A.27, subd. 2. Plaintiffs are not challenging those individual limits.

In 1993, the Minnesota Legislature added a new layer of regulatory complexity, restricting both donors' and candidates' ability to speak and associate on top of the state's standard individual contribution limits. Along with a host of other changes to Minnesota's campaign finance laws, it placed

a limit on the total amount of money a candidate may raise from certain types of donors. S.F. 1, 1993 Leg., 1st Spec. Sess. (Minn.1993).

Codified as Minn. Stat. § 10A.27, subd. 11, this new limit capped the total amount of money a candidate may raise from political committees, political funds, associations not registered with the Board, lobbyists, and what the statute today calls "large contributors."[2] (For the sake of brevity, hereinafter political committees, political funds, and associations not registered with the Board are collectively referred to as "political action committees" or "PACs."). These various types of donors are commonly referred to as "special sources."[3]

A stated purpose of the special sources limit, as applied to individuals who give more than half the individual limit, was to "create a level playing field." Testifying before a Minnesota Senate committee, one of the bill's original authors, Senator William P. Luther, stated that the special sources limit, as applied to what the original bill called "large givers," was designed to address the competitive disparity between candidates who raise

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[2] A "large contributor" is defined as "an individual, other than the candidate, who contributes an amount that is more than one-half the amount an individual may contribute during the election cycle segment." Minn. Stat. § 10A.27, subd. 11. "Large contributors" are therefore simply ordinary citizens who happen to give more than half the individual contribution limit to a candidate.

[3] *See* Minnesota Campaign Finance and Public Disclosure Board, *Campaign Finance – Glossary of Terms* 8, *available at* http://www.cfboard.state.mn.us/issues/glossary.pdf.

contributions in large individual amounts and those who raise contributions from a larger number of smaller contributions. Testimony of Sen. William P. Luther before Senate Ethics and Campaign Finance Reform Committee, Feb. 2, 1993 (Sanders Decl. (Ex. 4, attached), Ex. A).[4]

In 2013, despite other changes to Minnesota's campaign finance laws, the legislature left unchanged the structure of the special sources limit, including the definition of "large contributor," and how the limit is calculated.[5] S.F. 661, 2013 Leg., Reg. Sess. (Minn. 2013). The legislature separately increased individual contribution limits, as well as the voluntary spending limits that candidates can agree to in exchange for public financing. *Id.*

[4] The relevant portion of Senator Luther's testimony is attached. Sanders Decl., Ex. A. In asking Senator Luther a question, Senator Douglas J. Johnson said "I'm not sure we have a level playing field because of the Republican Party's ability to raise money from very rich Minnesotans who are trying to get access to the system. Does this bill address that situation?" *Id.* In response Senator Luther explained the mechanics of how the special sources limit would work—including that a "large giver" is "somebody that gives more than one half of the contribution limit"—and then concluded, "So I think the bill does begin to address that very important issue that you are raising, the one of large givers." *Id.*

[5] The one exception is that the limit now applies over a two-year period of contributions, not a one-year period. Minn. Stat. § 10A.27, subd. 1(a); §10A.01, subd.16 (defining election cycle.) In other words, whether or not a contributor exceeded one half of the individual limit used to depend on the total amount contributed in one year, whereas now it is a two-year period.

How the Special Sources Limit Works

The special sources limit is tied to the so-called "voluntary spending limits."[6] Unlike the spending limits themselves, the special sources limit applies whether or not the candidate has voluntarily agreed to the spending limits in exchange for public financing.[7]

Under Minn. Stat. § 10A.27, subd. 11, any combination of contributions from special sources cannot exceed an amount equal to 20 percent of the voluntary spending limit for that office during that period. The special

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[6] Under Minn. Stat. § 10A.25, candidates can agree to spending limits in exchange for receiving some public funds to use in their campaigns.

[7] The Board updates the voluntary spending limits for various offices every two years by an inflation-adjusted amount with reference to the Consumer Price Index. *See* Minn. Stat. § 10A.255, subd. 1. For the 2013-14 period the voluntary spending limits are:

- $3,651,200 for the offices of Governor and Lieutenant Governor (running on the same ticket);
- $626,000 for Attorney General;
- $417,300 for Secretary of State and for Auditor;
- $30,000 for a state senate seat; and
- $62,600 for a state house seat.

Minnesota Campaign Finance and Public Disclosure Board, 2013—2014 *Election Cycle Segment Contribution and Campaign Expenditure Limits*, *available at* http://www.cfboard.state.mn.us/campfin/Limits/CONTRIB_LIMITS_2013_2014.pdf.

sources limit of 20 percent of the so-called voluntary spending limit for each office for the 2013-14 period are as follows:

- $730,200 for the offices of Governor and Lieutenant Governor (running on the same ticket);
- $125,200 for Attorney General;
- $83,500 for Secretary of State and for Auditor;
- $6,000 for a state senate seat (with no election until 2016), and;
- $12,500 for a state house seat.[8]

A candidate may accept any one contribution, standing alone, at the maximum individual contribution limit. The special sources limit caps the total amount of contributions from special sources, and a candidate must return a special sources contribution if the candidate has already exceeded the special sources limit. *Id.* Alternatively, a candidate may choose to return a previously accepted special sources contribution and replace it with a new one of the same or lesser amount from a different donor. *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1115 (8th Cir. 2005).

Further, when a contribution is large enough that it qualifies as a special sources contribution, the entire contribution counts toward a candidate's special sources limit, not just the amount that exceeds half the individual limit. *See* Minn. Stat. § 10A.27, subd. 11. For example, a state

[8] *Election Cycle Segment Contribution and Campaign Expenditure Limits*, *supra* note 7.

house candidate who raises 25 contributions of $500 has raised $12,500, none of which counts toward the special sources limit. However, a candidate who raises 25 contributions of $500.01 has raised $12,500.25, all of which counts toward the special sources limit (and, indeed, exceeds the limit by 25 cents).

Because "large contributors" are special sources, a candidate has an incentive to accept contributions from PACs and lobbyists before contributions from ordinary citizens that are more than half the individual limit. Runbeck Decl. ¶ 20. In other words, it is more advantageous for candidates to get all of their "special sources" money from PACs and lobbyists because they can always get $500 or less from an ordinary citizen but cannot get any non-special sources money from a PAC or lobbyists once they reach their special sources limit. If they use up their special sources limit with ordinary citizens giving more than $500, however, then they cannot get *any* money from PACs or lobbyists. For example, if a state house candidate accepts 12 different $1,000 contributions from 12 different PACs she may then accept 12 contributions of $500 from ordinary citizens, for a total of $18,000. However, if she instead first accepts 12 contributions of $1,000 from the same 12 ordinary citizens, she would then be allowed to accept only $500 from all PACs or lobbyists, for a total of only $12,500. It pays to accept PAC and lobbyist money first, and money from ordinary citizens later.

Enforcement of the Special Sources Limit

Defendants are the members of the Minnesota Campaign Finance and Public Disclosure Board ("Board") and the county attorneys of Anoka and Douglas counties, the counties in which Plaintiffs Runbeck and Dutcher reside, respectively, all sued in their official capacities. Runbeck Decl. ¶ 2; Dutcher Decl. ¶ 2. Both sets of Defendants have the power to enforce the special sources limit.

If the Board finds there is reason to believe a candidate has accepted special sources contributions in excess of the candidate's special sources limit, the Board is mandated to investigate the candidate. It first must make an effort to "correct the matter by informal methods" and enter into a conciliation agreement with the candidate. Minn. Stat. § 10A.28, subd. 3. If no conciliation agreement is reached, then the Board is mandated to make a public finding of probable cause and is then further mandated to bring an action, or transmit the finding to a county attorney who is mandated to bring an action "in the District Court of Ramsey County or, in the case of a legislative candidate, the district court of a county within the legislative district" to collect a penalty of up to four times the amount of the excessive contribution. Minn. Stat. § 10A.28, subd. 2(4), subd. 4. Further, these penalties are not theoretical. The Board regularly fines candidates for exceeding the special sources limit whether the violation is intentional or not.

Sanders Decl., Ex. B (conciliation agreements involving special sources violations).

Separately from the Board, the county-attorney Defendants have the power to separately enforce any provision in Chapter 10A, including the special sources limit, by seeking an injunction in district court. Minn. Stat. § 10A.34, subd. 2.

ARGUMENT

The special sources limit, as applied to individuals who contribute more than half the individual limit, violates the First Amendment. The legislature justified the adoption of the special sources limit with a government interest—leveling the playing field—that does not support restricting the rights of free speech and association. Further, the limit fails both potentially relevant forms of scrutiny, strict scrutiny and "closely drawn" scrutiny. For these reasons, Plaintiffs are likely to prevail on the merits.

Besides being likely to prevail on the merits, Plaintiffs satisfy the other criteria relevant to this Court issuing a temporary restraining order and a preliminary injunction: irreparable harm, balance of harm, and the public interest. Plaintiffs also request this Court should waive the Rule 65(c) bond requirement.

I. STANDARD OF REVIEW.

Plaintiffs request that this Court enter a temporary restraining order and a preliminary injunction. In reviewing a motion for either of those forms of relief this Court applies the same four factors. *S.B. McLaughlin & Co., Ltd. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708-09 (8th Cir. 1989). Those four factors are: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant in the absence of preliminary relief; (3) the balance between that harm and the harm that relief would cause to other litigants; and (4) the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008); *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc) (the Eight Circuit's "*Dataphase* test"); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (*Dataphase* test applied to constitutional challenge). Plaintiffs meet all four of these.

Further, where First Amendment rights are at stake, it is the government's burden to demonstrate that the challenged law's restrictions are constitutional. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Thus, in this case, it is Defendants' burden to show why a temporary restraining order and a preliminary injunction should not be issued. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("[T]he burdens at the preliminary injunction stage track the burdens at trial.").

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE SPECIAL SOURCES LIMIT, AS APPLIED TO INDIVIDUALS WHO GIVE MORE THAN HALF THE INDIVIDUAL LIMIT, VIOLATES THE FIRST AMENDMENT.

Plaintiffs are likely to prevail on the merits because the special sources limit violates the First Amendment. The limit is an arbitrary bar on speech and association that does not further the only permissible governmental objective in this setting: to prevent *quid pro quo* corruption or the appearance of *quid pro quo* corruption.

Plaintiffs will demonstrate in Section II.A below that the special sources limit, as applied to individuals who contribute more than half the individual contribution limit, was not adopted to further a permissible interest and is therefore unconstitutional. In Section II.B, Plaintiffs explain that even if it was adopted to further a permissible interest the special sources limit fails under either standard the Supreme Court has stated may apply to a contribution limit, strict scrutiny or closely drawn scrutiny.

A. The Special Sources Limit, as Applied to Individuals Who Give More than Half the Individual Limit, Was Not Adopted to Further a Permissible Interest and Is Therefore Unconstitutional.

Contribution limits implicate free speech and association rights protected by the First Amendment. *McCutcheon v. FEC*, No. 12-536, slip op., at 14 (U.S. Apr. 2, 2014). Accordingly, the Supreme Court has only identified one interest that can justify a restriction on First Amendment free speech

and association rights in the context of contribution limits: preventing *quid pro quo* corruption or the appearance of *quid pro quo* corruption. *Id.* at 2 ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance."). It is the only permissible interest under either strict scrutiny—requiring a compelling interest—or closely drawn scrutiny—requiring a sufficiently important interest. *Id.* at 10, 18; *Citizens United v. FEC*, 558 U.S. 310, 356-57 (2010); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 n.1 (2d Cir. 2013) (preventing *quid pro quo* corruption only compelling interest and sufficiently important interest "strong enough to justify restrictions on political speech").

The Supreme Court has explicitly rejected other government interests, including the one that animated Minnesota's special sources limit: leveling the playing field. "We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.'" *McCutcheon*, slip op. at 18; *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011). Another interest that the Supreme Court has rejected is "influence" that donors may have on politicians that stops short of *quid pro quo* deals. As explained in *McCutcheon*: "the Government may not seek to limit the

appearance of mere influence or access." Slip.op. at 19. This is consistent with the Court's earlier holding in *Citizens United* that, "[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Citizens United*, 558 U.S. at 359.

The special sources limit, as applied to individuals who give more than half the individual limit, was not adopted in order to prevent *quid pro quo* corruption or the appearance thereof. As one of the sponsors of the legislation adopting the special sources limit explicitly and frankly stated, it was adopted to level the playing field between candidates who receive large contributions and those who receive smaller contributions. *See supra* at 12-13. Therefore, it cannot be justified under the First Amendment.

This conclusion—that the special sources limit, as applied to individuals who give more than half the individual limit, was not adopted to prevent *quid pro quo* corruption—is consistent with *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106 (8th Cir. 2005).[9] There, the Eighth Circuit reviewed the constitutionality of the special sources limit *as applied to PACs*. *Id.* at 1114-15. The court stated that "the district court

[9] Furthermore, as discussed below, *infra* at 29, *Kelley* is questionable in light of subsequent Supreme Court cases, of which *McCutcheon* is only one example. For instance, *Kelley* relied upon the reasoning of *Austin v. Michigan Chamber of Commerce*, which has now been overruled. *See Kelley*, 427 F.3d at 1115 (citing *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1096 (9th Cir. 2003) (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658-60 (1990), *overruled by Citizens United*, 558 U.S. at 365)).

found that Minnesota passed an aggregate limit on *PAC contributions* to prevent *PACs and other organizations* that can fund millions of dollars into campaigns" from unleashing a "flood of money" to effectively "control[] the Capitol."" *Id.* at 1114 (quoting *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 291 F. Supp. 2d 1052, 1063 (D. Minn. 2003) (emphasis added)). It also stated that "[b]ecause the record here 'demonstrates that the danger of corruption, or the appearance of such a danger, is greater when dealing with PAC money as opposed to other contributions,' Minnesota's interest is constitutionally sufficient." *Id.* at 1115 (quoting *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1096 (9th Cir. 2003) (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658-60 (1990), *overruled by Citizens United*, 558 U.S. at 365)). Ordinary citizens who give legal contributions that happen to be more than half the individual limit are not, of course, "PACs and other organizations."

Even if the special sources limit, as applied to individuals who give more than half the individual limit, was adopted to prevent *quid pro quo* corruption or the appearance thereof, it still is unconstitutional as it fails under both strict scrutiny and closely drawn scrutiny, as explained below.

B. Under Either Strict Scrutiny or Closely Drawn Scrutiny the Special Sources Limit as Applied to Individuals Who Contribute More than Half the Individual Limit Is Unconstitutional.

The special sources limit, as applied to ordinary citizens who contribute more than half the individual limit, fails either level of scrutiny that the Supreme Court has stated applies to contribution limits, strict scrutiny or closely drawn scrutiny. This is because it does not further the interest of preventing *quid pro quo* corruption or the appearance thereof.[10]

The special sources limit is very similar to the federal biennial aggregate limit the Supreme Court recently struck down in *McCutcheon v. FEC*. That law allowed an individual to give no more than an aggregate of $48,600 to candidates and a different aggregate amount to political committees. *McCutcheon*, slip op. at 4-5. The maximum contribution that could be made to a single candidate—akin to the unchallenged $1,000 limit for legislative candidates in this case—was $2,600 per election, totaling $5,200 per election cycle (primary and general election). *Id.* at 3-4. This meant that the plaintiff, Mr. Shaun McCutcheon, could give the maximum

[10] Strict scrutiny should apply because the limit challenged here applies unequally to different people. It is therefore like the limits that were subject to strict scrutiny in *Davis v. FEC*, 554 U.S. 724, 740 (2008), and *Russell v. Burris*, 146 F.3d 563, 572 (8th Cir. 1998). However, because the special sources limit, as applied to individuals who contribute more than half the individual limit, fails under either level of scrutiny, Plaintiffs do not spend further time arguing this point here.

individual contribution to nine candidates ($5,200 x 9 = $46,800), but not to a tenth candidate or any others. *Id.* at 15.

The Supreme Court held that this limit failed both strict and closely drawn scrutiny. *Id.* at 10 ("Because we find a substantial mismatch between the Government's stated objective and the means selected to achieve it, the aggregate limits fail even under the closely drawn test."). The ban on an individual giving "too much" money to different candidates in the aggregate—in amounts that on their own were perfectly legal—did not further the prevention of *quid pro quo* corruption or the appearance thereof. As the Court explained, "If there is no corruption concern in giving nine candidates up to $5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given $1,801, and all others corruptible if given a dime." *Id.* at 21-22.

The special sources limit, as applied to ordinary citizens who contribute more than half the individual limit, is even more extreme than the limit struck down in *McCutcheon*.

Just as in *McCutcheon*, the legislature here has determined that individuals may give a certain amount to a candidate, here up to $1,000 to a candidate for state house or senate (or more for state-wide offices). Therefore, just as in *McCutcheon*, the legislature has determined that contributions up to this amount are not corrupting. But once a candidate

reaches her special sources limit, either through contributions from ordinary citizens that are over half the individual limit or through PAC and lobbyist contributions, the donor's $1,000 contribution transforms into an act that must be banned. But while the federal limits struck down in *McCutcheon* applied only to wealthy donors who had already contributed tens of thousands of dollars, Minnesota's law—once triggered by a candidate's donors—applies to all other donors to that candidate, even if they have made no other political contributions.

Put simply, if it is unconstitutional to prevent an extremely wealthy individual from donating $5,200 to a tenth Congressional candidate when he has already contributed that amount to nine others, it has to be unconstitutional to prevent an ordinary citizen from making a single donation of $1,000 (or $501) to a state house candidate because "too many" other ordinary citizens have already done the same thing. *See also Russell v. Burris*, 146 F.3d 563, 572 (8th Cir. 1998) (having unequal contribution limits for different PACs contributing to candidates is unconstitutional).

There is no reason to think, for example, that the 13th person, or anyone afterward, who gives a state house candidate $1,000 is any more corrupting than the first 12 who give $1,000. They are all simply individuals who want to contribute to a campaign. Their treatment under the law is different solely based on timing.

In addition, the special sources limit, as applied to individuals who contribute more than half the individual limit, does not further the interest of preventing the appearance of *quid pro quo* corruption. *See McCutcheon*, slip op. at 19 ("[T]he Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption . . ."). In fact, the opposite is true. To the public it must seem odd at best to see some ordinary citizens able to give $1,000 (or up to $4,000 for governor) and others only able to give half that. It is difficult to see how forcing politicians into only accepting larger donations from a few people to the exclusion of others would make them look less likely to be engaging in *quid pro quo* deals for votes.

Further, even if the law did further the interest of preventing *quid pro quo* corruption or the appearance thereof, it is not "closely drawn" to furthering that interest without "unnecessary abridgement" of First Amendment rights. *Id.* at 30 (requiring a "'means narrowly tailored to achieve the desired objective" (quotations omitted)). The limit applies to *all* money a donor gives a candidate once the donor gives more than half the individual limit, not just the amount that is more than half. As discussed above, *supra* 15, a state house candidate who raises 25 contributions of $500 has raised $12,500, none of which counts toward the special sources limit. However, a candidate who raises 25 contributions of $500.01 has raised

$12,500.25, all of which counts toward the special sources limit (and, indeed, exceeds the limit by 25 cents). This is in no way tailored toward preventing *quid pro quo* corruption or the appearance thereof. The special sources limit thus is not closely drawn and is unconstitutional.

C. *Minnesota Citizens Concerned for Life v. Kelley* Does Not Control this Case.

The Eighth Circuit case concerning the special sources limit as applied to PACs, *Kelley*, discussed above, does not control this case. *Kelley* itself emphasized the special need to regulate PACs, not ordinary citizens such as Plaintiffs Seaton and Carlson, and its reasoning has been superseded by more recent Supreme Court cases, *McCutcheon* being the most recent.

Kelley concluded that limiting the aggregate amount of PAC contributions is constitutional because of the special nature of PACs: "Because the record here 'demonstrates that the danger of corruption, or the appearance of such a danger, is greater when dealing with PAC money as opposed to other contributions,' Minnesota's interest is constitutionally sufficient." *Kelley*, 427 F.3d at 1115 (citing *Eddleman*, 343 F.3d at 1096 (citing *Austin*, 494 U.S. at 658-60)). The court relied upon newspaper articles from 1992 discussing PAC contributions to legislators in an attempt to influence legislation, and how PAC contributions are "special interest" contributions. *See id.* at 1114-15.

This reasoning and the evidence *Kelley* relied upon are inapplicable to whether the special sources limit, as applied to ordinary citizens who contribute more than half the individual limit, is constitutional. An ordinary citizen who gives more than half the individual limit is not a "special interest." Unlike PACs, an individual donor's money is not pooled with others. It simply is one ordinary citizen trying to help the candidate of his choice. Limiting the *total* number of ordinary citizens who can give to a candidate at a certain amount does not address the same concerns the legislature had when it applied the special sources limit to PACs. If anything, *Kelley* instead demonstrates that the special sources limit, as applied to individuals who contribute more than half the individual limit, is not closely drawn to the interest of preventing *quid pro quo* corruption.

Further, *Kelley* is of limited reliability because its reasoning has been overruled by the Supreme Court's rulings in *McCutcheon*, *Arizona Free Enterprise Club*, *Citizens United*, and *Davis v. FEC*, 554 U.S. 724 (2008). Again, those cases clarified that it is only *quid pro quo* corruption that contribution limits may constitutionally address. *See supra* 20-21. *Kelley* declared that the special sources limit as applied to PACs was "closely drawn" under the intermediate scrutiny standard because "[l]imiting PAC donations to 20 percent of a candidate's total expenditure limit combats the potential of PACs' *influence* on any one candidate." 427 F.3d at 1115

(emphasis added). Again, this "influence" rationale has now been expressly rejected. *See supra* at 20-21. Limiting the total amount of PAC donations may be intended to address "influence" but it does nothing to prevent individual PACs from entering into *quid pro quo* deals, let alone ordinary citizens who cannot contribute more than half the individual limit because other ordinary citizens already have.

III. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM AS (1) DEFENDANTS HAVE VIOLATED THE FIRST AMENDMENT, AND (2) PLAINTIFFS WILL BE UNABLE TO CONTRIBUTE AND ACCEPT CONTRIBUTIONS IN THE AMOUNT OF THE MAXIMUM CONTRIBUTION LIMIT FOR THE UPCOMING ELECTION SEASON.

The second factor in the test for a temporary restraining order and a preliminary injunction is whether the plaintiffs are likely to suffer irreparable harm. *Dataphase Sys., Inc.*, 640 F.2d at 114. To prevail under this factor, Plaintiffs need only demonstrate that they are *likely* to suffer irreparable harm if a temporary restraining order and a preliminary injunction are not issued. *Winter*, 555 U.S. at 20. Plaintiffs meet this standard.

Because Plaintiffs have satisfied their burden of demonstrating a likelihood of success on the merits, a finding of a likelihood of irreparable harm must follow. "It is well-settled law that a 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

irreparable injury.'" *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)) (overruled on other grounds by *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012) (en banc).

Further, even putting the merits to one side, the harm that Plaintiffs will suffer during the 2014 election without a temporary restraining order and a preliminary injunction is inarguably irreparable. Linda Runbeck's rights are being violated every day that the special sources limit currently inhibits her from raising contributions of more than $500, preventing her from soliciting contributions of $1,000 on her website and in fundraising letters she plans to send out in the next few weeks. Runbeck Decl. ¶¶ 21-23. Doug Seaton and Van Carlson's rights are being violated every day that the special sources limit currently inhibits their choice to contribute more than $500 to candidates for office, including the two additional contributions of $500 Seaton wants to make to his local state house candidates (for a total of $1,000 to each) in April or early May, 2014, the more than $500 contribution he wants to make to Runbeck in the same time period, and the $750 contribution Carlson wants to make to Runbeck in April or early May, 2014. Seaton Decl. ¶¶ 14-15; ¶ Decl. ¶ 7.

All of the Plaintiffs are being and will be prevented from engaging in basic First Amendment activity. Donors will lose forever the chance to speak

and associate to the extent they want in the 2014 campaign. Candidates will be unable to speak to, and associate with, voters as much as they would want before the November 2014 election, perhaps making the difference in being elected or not elected, something no judgment in this case after the election can rectify. These effects constitute irreparable harm.

IV. THE BALANCE OF HARM WEIGHS IN FAVOR OF THE PLAINTIFFS.

The third factor in considering whether to grant a temporary restraining order and a preliminary injunction is the balance between the plaintiffs' irreparable harm and "'the injury that granting the injunction will inflict on other parties litigant.'" *GMC v. Harry Brown's, LLC*, 563 F.3d 312, 320 (8th Cir. 2009) (quoting *Dataphase*, 640 F.2d at 113). As is the case with irreparable harm, because Plaintiffs have demonstrated a likelihood of success on the merits they automatically satisfy this element because Defendants can suffer no injury in being prevented from enforcing an unconstitutional law. *See Phelps-Roper*, 545 F.3d at 690.

Further, there is no risk of financial loss to Defendants. This "is not a case in which preliminary relief would require the state to cancel or reschedule an election, discard ballots already cast, or prepare new ballots or other election materials." *Scott v. Roberts*, 612 F.3d 1279, 1296 (11th Cir. 2010). The balance of harm clearly favors Plaintiffs.

V. IT IS IN THE PUBLIC INTEREST FOR THIS COURT TO PREVENT DEFENDANTS FROM ENFORCING THE UNCONSTITUTIONAL SPECIAL SOURCES LIMIT.

Because this Motion asks this Court to rule a law unconstitutional, a finding that Plaintiffs have a likelihood of success on the merits necessitates a finding that a temporary restraining order and a preliminary injunction are in the public interest. *Phelps*-Roper, 545 F.3d at 690 ("[T]he determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights."). The special sources limit is not preventing *quid pro quo* corruption or the appearance thereof but is instead violating First Amendment liberties. The interest of the public thus requires a temporary restraining order and a preliminary injunction.

VI. THE RULE 65(C) BOND REQUIREMENT SHOULD BE WAIVED BECAUSE THIS IS A PUBLIC-INTEREST LAWSUIT WITH NO RISK OF FINANCIAL LOSS FOR THE STATE.

Having established that Plaintiffs are entitled to a temporary restraining order and a preliminary injunction, the only remaining question is the amount, if any, of the security Plaintiffs must provide under Federal Rule of Civil Procedure 65(c). That Rule provides that federal courts may issue temporary restraining orders or preliminary injunctions only if the applicant provides a bond in an amount determined by the court.

Where temporary injunctive relief will vindicate constitutional rights or the public interest, and/or where the harm from such relief to the opposing party is speculative, federal courts often exercise their discretion under Fed. R. Civ. P. 65(c) and set the monetary amount of an injunction bond at zero. *See, e.g.*, *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. 1981) (recognizing discretion to waive Fed. R. Civ. P. 65(c) bond in "public interest litigation"); *Northshor Experience, Inc. v. City of Duluth*, 442 F. Supp. 2d 713, 723 (D. Minn. 2006) (waiving injunction bond to protect First Amendment rights); *Bhd. of Maint. of Way Emps., Lodge 16 v. Burlington N. R.R. Co.*, 642 F. Supp. 41, 49 (N.D. Iowa 1985) (waiving bond requirement in labor dispute to protect furloughed employees' freedom from mandatory drug testing) (aff'd in part, rev'd in part on other grounds, 802 F.2d 1016 (8th Cir. 1986);*Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971) (waiving injunction bond to secure welfare benefits).

Accordingly, Plaintiffs respectfully request that the Court waive the bond requirement in the event that it grants Plaintiffs' motion for a temporary restraining order and a preliminary injunction.

CONCLUSION

This Court should enter a temporary restraining order and a preliminary injunction forbidding Defendants from enforcing the unconstitutional special sources limit, as applied to individuals who give

more than half the individual contribution limit. This will allow Plaintiff donors, and other individual donors, to contribute up to the individual contribution limit and allow Plaintiff candidates, and other candidates, to accept contributions from individuals up to the individual contribution limit without regard to the special sources limit.

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Respectfully submitted,

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