IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-00247-SKC

GREG LOPEZ,
RODNEY PELTON, and
STEVEN HOUSE,

Plaintiffs,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacity, and
JUDD CHOATE, Director of Elections, Colorado Department of State, in his official capacity,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Colorado's contribution limits prevent candidates from amassing the resources necessary to mount competitive campaigns, and they discriminate against candidates who fully exercise their rights to advocate for their own election, both in violation of the First Amendment. Accordingly, Plaintiffs, Greg Lopez, Rodney Pelton, and Steven House, seek a preliminary injunction prohibiting Defendants from enforcing the contribution limits in Article XXVIII, sections 3(1), 3(13), and 4(5) of the Colorado Constitution and Colo. Code. Regs. § 1505-6, Rule 10.17.1(b) (2020). In support thereof, Plaintiffs state as follows:

I. Factual and Legal Background

Article XXVIII imposes extensive rules on campaign and political finance. Since it was enacted, the provision has been an almost nonstop source of litigation. And almost every court to consider a challenge to it has either found the challenged portion

unconstitutional (under the federal constitution) or deliberately given the article a narrowing construction to avoid obvious constitutional problems. *See Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1275–81 (10th Cir. 2016); *Riddle v. Hickenlooper*, 742 F.3d 922, 928–29 (10th Cir. 2014); *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010); *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1153–55 (10th Cir. 2007); *Holland v. Williams*, 457 F. Supp. 3d 979, 997–98 (D. Colo. 2018); *Indep. Inst. v. Buescher*, 718 F. Supp. 2d 1257, 1273 (D. Colo. 2010); *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1257 (Colo. 2012); *In re Interrogatories Propounded by Ritter*, 227 P.3d 892, 894 (Colo. 2010) (per curiam); *Dallman v. Ritter*, 225 P.3d 610, 634–35 (Colo. 2010); *Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 70 (Colo. 2008); *Campaign Integrity Watchdog, LLC v. Colo. Citizens Protecting Our Constitution*, 415 P.3d 874, 877–78 (Colo. App. 2018); *All. for Colo.'s Families v. Gilbert*, 172 P.3d 964, 972–73 (Colo. App. 2007).

At issue here are the limits that Article XXVIII places on the amount a person may contribute to a single political candidate. For the purposes of these limits, candidates are divided into two tiers. Tier 1 candidates—those running for governor, secretary of state, state treasurer, and attorney general—may not accept more than $1250 per person, per election cycle. *See* Colo. Const. art. XXVIII, § 3; § 1505-6, Rule 10.17.1(b). Tier 2 candidates—those running for state senate, state house of representatives, state board of education, regent of the University of Colorado, and district attorney—may not accept more than $400 per election cycle. *Id*.

There is one exception to these rules: If a candidate agrees to limit his expenditures—and thus to limit his protected speech to voters—Colorado allows him to "accept contributions twice as large as he would ordinarily be able to." Colo. Const. art. XXVIII, § 4(5). But the state has constructed a classic prisoner's dilemma—if every

candidate accepts the limits on their expenditures and speech, then no one gets the doubled contributions. That is, candidates who accept expenditure limits may find themselves limited in both their expression and the contributions they may accept to fund that expression.

Plaintiffs Lopez and Pelton are current candidates for political office. Mr. Lopez is running for governor (a Tier 1 office) and Mr. Pelton is running for the state Senate (a Tier 2 office). Lopez Decl. ¶¶ 2, 4 (attached as Ex. 1); Pelton Decl. ¶¶ 3–4 (attached as Ex. 2). Neither is the incumbent in the office he seeks: Mr. Lopez hopes to be his party's nominee against the incumbent governor and Mr. Pelton is running for an open seat. Lopez Decl. ¶ 2; Pelton Decl. ¶ 3.

Mr. House is not a candidate for office but, for years, he has been contributing to political candidates he believes in. House Decl. ¶ 3 (attached as Ex. 3). He has often given maximum-allowable contributions and would have given more if it were legal. *Id.* ¶¶ 4, 8.

As candidates, both Mr. Lopez and Mr. Pelton are subject to Article XXVIII's contribution limits. Mr. Lopez is subject to another handicap, however: because one of his primary opponents at first agreed to limit her campaign spending to no more than $3,395,275 under Article XXVIII, section 4, she was—for a time—allowed to accept twice as much from each donor as he was. *See* Colo. Code Regs. § 1505-6 Rule 10.17.1(i) (2020) (setting expenditure limit for gubernatorial candidates); Ganahl Candidate Aff., Sept. 10, 2021 (accepting expenditure limits) (attached as Ex. 4).[1] This

[1] This opponent recently withdrew her commitment to the expenditure limits. *See* Ganahl Candidate Aff., Jan. 31, 2022 (removing expenditure limit affirmation) (attached as Ex. 5). But during the slightly more than four months in which her election was in effect, she accepted more than 100 contributions that were larger than anything Mr. Lopez was allowed to accept. Ganahl Individual Contributions >$1250 (attached as

puts Mr. Lopez in a difficult position. He's already running as an outsider and has far fewer resources than his primary opponent; he would love to accept twice as much from his most ardent supporters. *See* Lopez Decl. ¶ 10. But if he gains his party's nomination, Mr. Lopez will be running against an incumbent who, in the last election, used his personal wealth to launch the most expensive campaign in Colorado history—spending nearly $24 million to get elected. Ben Markus, *Record-Breaking Political Spending Swamps Colorado Election Races*, CPR News, Oct. 16, 2018, https://www.cpr.org/2018/10/16/record-breaking-political-spending-swamps-colorado-election-races/; Polis Financial Summary (attached as Ex. 7). As a challenger, Lopez fears that agreeing to limit his spending to less than $3.4 million might help him in the primary, but would create insurmountable difficulties in the general election.

Mr. Pelton is also handicapped, but in a different way. Fearing that refusing to accept the expenditure limits would give any opponent an easy way to get a leg up, Mr. Pelton agreed to limit his campaign spending. Pelton Decl. ¶ 9; *see also* § 1505-6, Rule 10.17.1(i) (setting expenditure limit for Senate candidates). This was effective as a defensive strategy—his primary opponent faces the same contribution limits that Mr. Pelton does. But to get that result, he's had to curtail his ability to spend funds to get his campaign message out. Pelton Decl. ¶ 9.

Article XXVIII's extremely low contribution limits and its scheme to limit campaign spending are both unconstitutional. But getting a declaratory judgment to that effect a year or so down the road would be little comfort to Plaintiffs. Colorado has primary elections this coming June, with statewide elections to follow in November. Party assemblies—which is the way Plaintiffs Lopez and Pelton intend to qualify for the ballot,

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Ex. 6). And she does not have to return those donations.

Lopez Decl. ¶ 2; Pelton Decl. ¶ 3—are in early spring. Taheri Decl. ¶ 11 (attached as Ex. 8). And precinct caucuses (where assembly delegates are chosen) will be held in early March. *Id.* ¶ 10. In other words, the campaign is in full swing. Plaintiffs need relief now, by way of a preliminary injunction, before it's too late. Otherwise, both their own candidacies and others they support will be harmed in a way no final judgment could adequately repair.

II. Plaintiffs Are Entitled to a Preliminary Injunction Because There Is a Substantial Likelihood They Will Prevail in This Suit.

"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." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). With a government defendant, though, the final two elements—the balance of harms and the public interest—collapse into one. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Furthermore, a state can have no legitimate interest in violating the Constitution, *see Arizona v. Gant*, 556 U.S. 332, 1273 (2009)—"it is always in the public interest to prevent the violation of a party's constitutional rights," *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (internal quotes omitted). And the curtailment of constitutionally protected speech and association always constitutes irreparable harm. *See ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (citations omitted).

As a result, the propriety of a preliminary injunction to secure First Amendment rights rises and falls on the first factor alone: whether the plaintiffs are likely to prevail in showing that their First Amendment rights have been violated. *Quinly v. City of Prairie Vill.*, 446 F. Supp. 2d 1233, 1237 (D. Kan. 2006) (citing *Joelner v. City of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004)); *accord Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th

Cir. 2016) (citations omitted).

"[W]hen a law infringes on the exercise of First Amendment rights, its proponent[s]"—in this case, Defendants—"bear[] the burden of establishing its constitutionality." *Ass'n of Cmty. Organizations for Reform Now v. Mun. of Golden*, 744 F.2d 739, 746 (10th Cir. 1984); *accord United States v. Playboy Entertainment Grp., Inc.*, 529 U.S. 803, 815 (2000); *Harmon v. City of Norman*, 918 F.3d 1141, 1147 (10th Cir. 2020).

Regulation of political campaigns is especially fraught. While the government may tool around the edges in the interest of preventing corruption, it carries a heavy burden to justify any regulation, and the courts must "give the benefit of the doubt to speech, not censorship." *FEC v. Wis. Right to Life*, 551 U.S. 449, 482 (2007) (Roberts, C.J., controlling opinion). That is because "political belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion); *accord Connick v. Myers*, 461 U.S. 138, 145 (1983). And the Constitution protects association with and advocacy for or against particular candidates just as much as it protects "the discussion of political policy generally." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (per curiam). Indeed, the First Amendment "has its fullest and most urgent application *precisely* to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (emphasis added).

Consequently, any campaign regulation that impinges on the right to free speech or association[2] must focus on eliminating actual or apparent quid pro quo corruption. That is the only legitimate purpose for such rules. *E.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 192, 206–07 (2014) (plurality opinion); *Ariz. Free Enter. Club's Freedom Club PAC*

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[2] Just in case there is any doubt, campaign contribution limits do impinge on these rights. *Buckley*, 424 U.S. at 20–22.

v. Bennett, 564 U.S. 721, 750 (2011); *Republican Party of N.M. v. King*, 741 F.3d 1089, 1094 (10th Cir. 2013) (citation omitted). Furthermore, even when targeted at eliminating corruption, the rules still must be "closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25.

This suit challenges two aspects of Colorado's campaign-contribution limits: (1) the limits themselves and (2) Colorado's decision to punish candidates for not accepting expenditure limits when their opponents do. Both these parts are facially unconstitutional: Colorado's contribution limits aren't really targeted at corruption and, even if they were, aren't closely drawn. Plaintiffs are therefore likely to prevail.

A. Article XXVIII's contribution limits are so low that they stifle candidacies and muzzle candidates beyond what can be justified by any legitimate government goal.

Broadly speaking, the government may limit contributions to political campaigns in the interest of combatting corruption. And it is rarely the role of a court to fine tune lawmakers' decisions on the appropriate limits. *Id*. at 30 (noting that courts "have no scalpel to probe" small distinctions between contribution limits (internal quotes omitted)). But just because contribution limits may be okay as a general matter, that doesn't mean the state can just set the limits at whatever it wants. Contribution limits "implicate fundamental First Amendment interests." *Id.* at 23. "Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates . . . from amassing the resources necessary for effective advocacy." *Id.* at 21. Consequently, there is still "some lower bound" at which the limits cannot be justified, and courts have a duty "to review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of restrictions." *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (opinion of Breyer, J.).

The key case on unconstitutionally low contribution limits is *Randall v. Sorrell*, in which the Supreme Court sustained a challenge to Vermont's contribution limits.[3] The state imposed a $400 limit on candidates for statewide offices like governor, a $300 limit on candidates for state senator, and $200 for candidates for state representative. *Id.* at 238. The Supreme Court found that these limits were unconstitutionally low.

Randall requires courts to look for danger signs that particular limits may be unconstitutionally low. Such danger signs trigger greater scrutiny of the law. *Thompson v. Hebdon* (*Thompson I*), 140 S. Ct. 348, 350–51 (2019) (per curiam).

The two main danger signs that led to heightened scrutiny in *Randall* are also present here: (1) the limits are substantially lower than those the Supreme Court has previously upheld and (2) they are substantially lower than "comparable limits in other States." *Randall*, 548 U.S. at 253 (opinion of Breyer, J.).[4] When such signs appear, independent and careful scrutiny of the limits is necessary. *Id.* Once Justice Breyer engaged in that careful scrutiny in *Randall*, several considerations led to the conclusion "that, from a constitutional perspective, [Vermont]'s contribution limits [were] too restrictive," *id.*: first, the limits were not indexed to inflation, *id.* at 261; second, they limited a candidate's ability to amass the resources necessary for an effective campaign, *id.* at 253–56; third, the law treated volunteer services and political parties in a way that exacerbated the other problems, *id.* at 256–61; and, fourth, the state had not

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[3] *Randall* itself was a fractured opinion. However, the full Court later adopted Justice Breyer's reasoning from *Randall* in *Thompson v. Hebdon* (*Thompson I*), 140 S. Ct. 348 (2019) (per curiam).

[4] In *Thompson I*, the Court discussed two other danger signs: whether the limits are "adjusted for inflation" and whether the state lacks "any special justification" for such low limits. 140 S. Ct. at 351. Those are present here as well, but they bleed into the independent, careful scrutiny required by *Randall* and are thus discussed below.

provided "any special justification" particular to Vermont "that might warrant a contribution limit so low," *id.* at 261.

Not much daylight passes between Colorado's contribution-limit regime and Vermont's already-invalidated one. The similarities between the two systems make a strong case for invalidating Colorado's limits too and, consequently, justify a preliminary injunction.

i. *Colorado's Limits Are Among the Lowest in the Country and Are Far Lower than Anything the Supreme Court Has Approved Before.*

Colorado's limits exhibit the danger signs that led the Court to be wary in *Randall*: they are far lower than both limits the Supreme Court has approved before and limits in most other states. In *Buckley v. Valeo*, the Supreme Court upheld a $1000 contribution limit to federal candidates. 424 U.S. at 13. Adjusted for inflation, that limit would be about $5014 today.[5] Later, in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court upheld a $1075 contribution limit for statewide candidates in Missouri. Adjusted for inflation, the limit in *Nixon* would be about $1776 today. Colorado's limits are much lower than either of these inflation-adjusted numbers. *See generally Randall*, 424 U.S. at 250, 252 (opinion of Breyer, J.) (discussing *Buckley* and *Nixon*'s limits in inflation-adjusted terms).

As for other states, only one—Delaware—has lower limits than Colorado for Tier 1 candidates.[6] *See* Del. Code Ann. tit. 15, § 8010(a) (2020). (Of course, Colorado is

[5] Inflation adjustments in this brief are based on the Bureau of Labor Statistics' inflation calculator at https://data.bls.gov/cgi-bin/cpicalc.pl.

[6] Alaska has a statute setting a lower limit than Colorado has, *see* Alaska Stat. § 15.13.070(a) (2020), but it was recently found to be unconstitutional. *Thompson v. Hebdon* (*Thompson II*), 7 F.4th 811, 822–23 (9th Cir. 2021). Massachusetts also has a nominally lower contribution limit at $1000, but it operates per year rather than per

nearly six times larger than Delaware by population, *see* U.S. Census Bureau, *Change in Resident Population of the 50 States, the District of Columbia, and Puerto Rico: 1910 to 2020* at 1, *available at* https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/population-change-data-table.pdf, and nearly forty-two times larger by area, *see* U.S. Census Bureau, *United States Summary: 2010* at 41, *available at* https://www.census.gov/prod/cen2010/cph-2-1.pdf.). And as for Tier 2 candidates, no state in the country has lower contribution limits. Thus, Colorado's limits are already suspiciously low. And these suspiciously low limits are made worse by several aspects of how Article XXVIII operates.

ii. *Article XXVIII's Supposed Inflation Adjuster Is Ineffective as a Practical Matter.*

The unconstitutional effects of Colorado's low limits only worsen with time. Although Article XXVIII contains a process for administratively adjusting contribution limits upwards, it doesn't actually work in practice. Rather, it lags far behind inflation, such that "limits already suspiciously low will almost inevitably become too low over time." *Randall*, 548 U.S. at 261 (opinion of Breyer, J.).

Colorado's adjustment operates every four years and is "based upon the percentage change over a four year period in the United States bureau of labor statistics consumer price index [(CPI)] for" the Denver metro area. Art. XXVIII, § 3(13). However, that number is "rounded to the nearest lowest twenty-five dollars." *Id.*

Because of this rounding-down requirement, neither Tier 1 nor Tier 2 limits have adequately kept up with inflation. The relevant consumer price index has increased

election cycle and therefore is effectively greater than Colorado's limit. Mass. Gen. Laws ch. 55, § 7A(a)(1) (2021). At any rate, the limits do not have to be the lowest in the country to raise a danger sign, just be among the lowest. *See Thompson I*, 140 S. Ct. at 351.

approximately 55% since the second half of 2002 (when Article XXVIII was added to the state constitution). *See* Bureau of Labor Statistics, Denver-Aurora-Lakewood CPI, *available at* https://data.bls.gov/pdq/SurveyOutputServlet?data_tool=dropmap&series_id=CUURS48BSA0,CUUSS48BSA0 (last visited Jan. 25, 2022). But the Tier 1 contribution limit has only increased 25% in the same time, and the Tier 2 limit has not changed at all.

Colorado's ineffectual adjustments are even more problematic given that the rise in the average cost of political races in Colorado is vastly outstripping even CPI increases. This is true even in non-competitive races, but it is especially true in the most competitive ones. The average cost of a competitive legislative race has risen from about $82,000 to over $232,000 in just twelve years. Masket Decl. ¶ 17 (attached as Ex. 9). That is, the cost of a competitive campaign has risen about 185%, far exceeding changes in the consumer price index that Colorado's adjustment is (ineffectively) pegged to. If an *actual* inflation adjustment can't keep up with the rapidly rising costs of campaigning in the state, Colorado's anemic version hasn't a prayer.

iii. *Challengers Cannot Mount Effective Campaigns.*

Colorado's limits are also so low that they "significantly restrict the amount of funding available for challengers to run competitive campaigns," 248 U.S. at 253 (opinion of Breyer, J.). As in *Randall*, the evidence suggests that the limits are strangling campaigns.

Article XXVIII's immediate effect was to cut candidate contribution intake substantially. As detailed below, *infra* Pt. D, the 2000 and 2002 elections featured much higher contribution limits than the elections after the enactment of Article XXVIII. And the fundraising results for candidates who ran for the same offices both before and after Article XXVIII tell a clear story of the difficulties they immediately faced:

- John Andrews raised $57,908 in 2000, but only $49,275 in 2004, despite becoming Senate President in the meantime;
- Joan Fitz-Gerald raised $364,677.71 in 2002, but only $135,782.95 in 2006, despite becoming the first female Senate minority leader in the meantime;
- Ken Gordon raised $89,718 in 2000, but only $25,475 in 2004;
- Jim Isgar raised $340,572.40 in 2002, but only $84,085 in 2006;
- Bill Crane raised $77,633 in 2002, but $22,701 in 2004 and $29,787 in 2006.
- Richard Decker raised $11,956.55 in 2000 and $25,366 in 2002, but only $9230 in 2004;
- Jerry Frangas raised $38,697 in 2002, but only $25,530 in 2004, $23,060 in 2006, and $15,433 in 2008;
- Joel Judd raised $67,735.35 in 2002, but only $22,043.12 in 2004, $13,540 in 2006, and $34,871.68 in 2008.[7]

Candidate Financial Summaries (attached as Ex. 10). *See generally Thompson II*, 7 F.4th at 820 (holding reduction in same-candidate fundraising under different limits suggested new limits significantly restricted available campaign funding).

Candidates running against entrenched politicians already face an uphill climb. They must bear “higher costs . . . to overcome the name-recognition advantage enjoyed by an incumbent.” *Randall*, 248 U.S. at 256 (opinion of Breyer, J.). Also, “challengers often have to run first in primary elections for which they need to spend money, while incumbents are less likely to face primary challenges, and hence they may save that money to use against their challengers in general elections.” *Thompson II*, 7 F.4th at 819. It’s no surprise, then, that Colorado incumbents win their elections 90% of the time.

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[7] This is not all of the candidates who ran for the same office both before and Article XXVIII. It is intended as a representative sample.

Masket Decl. ¶ 20.

Yet the average cost of a competitive legislative race—which includes those winning incumbents—was about $232,000 last election. *Id.* ¶ 16. And a challenger will need to raise even more. For the sake of illustration, let's say that's $250,000. Even with nothing but maximum donations, a challenger would need 625 donors to reach that number. That's a heavy lift. Even candidates in the most hotly contested races in the state cannot garner that many contributors. *See* Taheri Decl. ¶ 13.

Furthermore, while the average cost of a campaign keeps increasing rapidly, the median[8] candidate's fundraising remains well below the average, even in competitive campaigns. Masket Decl. ¶ 17. And the distance between mean and median fundraising continues to widen. *See id.* This means that most candidates' fundraising continues to lag behind what is really necessary for a robust campaign, and it gets worse every election.

Making things even tougher for challengers is that although they tend to raise less money than incumbents, the marginal value of each new dollar spent is significantly greater for challengers than it is for incumbents. Chris W. Bonneau & Damon M. Cann, *Campaign Spending, Diminishing Marginal Returns, and Campaign Finance Restrictions in Judicial Elections*, 73 J. of Pol. 1267, 1268, 1277–78 (2011); *see also* Masket Decl. ¶ 20 (noting increased success rate when challenger raises more funds

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[8] In statistics, the median "designate[s] the middle number in a series containing an odd number of items" or "the number midway between the two middle numbers in a series containing an even number of items." *Median*, Webster's New World Dictionary (3d college ed. 1988). In other words, half of the candidates—arranged by fundraising totals—fall above the median and half are below. "Median" is different from from the "mean" or "average," which is the number halfway between the largest and smallest values in a set of numbers. *Mean*, Webster's New World Dictionary (3d college ed. 1988)

than incumbent). In other words, challengers need the money more and yet are less likely to accumulate it because of contribution limits. *See generally* Bonneau & Cann, *supra*, at 1279 (concluding that contribution limits do not "level[] the playing field between incumbents and challengers" but rather "disproportionately handicap challengers" (internal quotes omitted)).

There is also advertising, which is necessary in Colorado even for Tier 2 races. Unlike in smaller or denser states, Colorado candidates have to bridge long distances and reach large constituencies by relying heavily on advertising. Even in Tier 2 races, door-to-door work is only the fourth-most-common mode of getting a candidate's message out. Masket Decl. ¶ 12. This all requires money, but the most common, effective modes of campaigning in Colorado are particularly cost intensive. Television is the most expensive method of mass communication, Taheri Decl. ¶ 16, but it is the preferred method in Tier 1 races by a wide margin, and the second most preferred method (and rising) for Tier 2 candidates. *See id.*

These facts suggest that, as in *Randall*, Colorado's low contribution limits make it difficult for candidates of all stripes—but especially challengers—to amass the resources necessary for an effective campaign.

iv. *Article XXVIII's Treatment of Volunteer Services Exacerbates Its Other Problems.*

Colorado's treatment of volunteer services is also substantially the same as Vermont's approach was. In *Randall*, Justice Breyer was concerned that the difficulties imposed by extremely low contribution limits were made worse by how the state treated volunteer services. A volunteer could donate his time, but his expenses—mileage or other travel expenses, for example—counted as campaign contributions. 548 U.S. at 259. This meant that "a volunteer who [made] four or five round trips driving across the

state" for the campaign, or "a volunteer who offer[ed] a campaign the use of her house along with coffee and donuts for a few dozen neighbors to meet the candidate," could find that they'd already exceeded the contribution limits without giving the candidate any cash. *Id.*

The same is true with Colorado. Here, the definition of "contribution" is exceptionally broad and includes not just money but "[t]he fair market value of any gift or loan of property" and "[*a*]*nything* of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election." Colo. Const. art. XXVIII, § 2(5)(a) (emphasis added). This is substantively identical to Vermont's treatment of volunteer services. *See Randall*, 548 U.S. at 259 (opinion of Breyer, J.).

In particular, given some of the vast legislative districts in Colorado, mileage alone could easily wipe out any contribution a volunteer wanted to give. Senate District 35, where Mr. Pelton is running, exemplifies the problem. Let's say a volunteer were to travel from Cheyenne Wells (where Mr. Pelton lives) to help with door knocking or a political event in eastern El Paso County, one of the district's heaviest-populated areas. That would be 260 miles round trip. At current mileage rates,[9] that is over $152 for a single volunteer activity in a months-long campaign. The drive from Burlington to Trinidad—two county seats in District 35—is even further: 458 miles round trip and $267.93 for mileage. And that doesn't include a hotel that might be needed if one plans to campaign and not just spend the day driving there and back. This is a heavy burden, particularly for Tier 2 candidates, who tend to raise less money and thus need to rely more heavily on volunteer (rather than paid) campaign staff.

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[9] The standard mileage rate for 2022 is 58.5¢ per mile. I.R.S. News Release IR-2021-251 (Dec. 17, 2021).

Or consider a statewide candidate making a five-day tour of the state, as Mr. Lopez recently did, Lopez Decl. ¶ 7. He could use up the money his donors have given him by paying for hotel rooms, or he can forfeit the donations they would have given him by staying in their houses. Using this coming weekend as an example, Airbnb lists market rates for a one-bedroom in Durango at up to $319/night before taxes. Airbnb Results, Durango, Colo., Feb. 12–13, 2022, at 2 (attached as Ex. 11). Each of those nights takes out a quarter of a donor's contribution limit, quickly eating away at the donations on which a competitive campaign relies.

Thus, a campaign that fastidiously complies with the law may find its volunteers reaching their contribution limits—and being barred from further volunteering—without having actually given any money to the candidate. And one had better treat this with caution—as Justice Breyer pointed out, "any carelessness in this respect can prove costly, perhaps generating a headline, 'Campaign laws violated,' that works serious harm to the candidate." *Randall*, 548 U.S. at 260 (opinion of Breyer, J.). Nor is there just bad press to worry about. Every contribution that goes unreported is subject to a penalty "at least double and up to five times the amount contributed." Colo. Const. art. XXVIII, § 10. And the candidate himself is personally liable for that fine. *Id.* Alternatively, a candidate may decide that the risks are not worth it and so not use volunteers as effectively as he otherwise could. *Randall*, 548 U.S. at 260 (opinion of Breyer, J.). Either way, Article XXVIII's restrictions have forced candidates into a situation in which they can neither raise enough money to be competitive nor use volunteers effectively to make up for fundraising shortfalls.

v. *There Are No Peculiarities About Colorado that Make Inordinately Low Contribution Limits Necessary.*

Nor is there anything unique about Colorado "that might [justify] a contribution limit

so low." *Id*. at 261. The state had no substantial history of quid pro quo corruption before the enactment of Article XXVIII, *see Citizens for Responsible Gov't State Political Action Comm. v. Buckley* (*Citizens I*), 60 F. Supp. 2d 1066, 1080 (D. Colo. 1999); *see also* Taheri Decl. ¶ 6 ("I do not recall any investigation or enforcement action during my nearly seven years in the [Secretary of State's] office that involved a suspicion or allegation of quid pro quo corruption."). Nor do other potential special justifications that some have hypothesized appear to have any application in Colorado. *See Thompson I*, 140 S. Ct. at 351–52 (statement of Ginsburg, J.) (suggesting Alaska's small legislature and economic dominance of a single industry might warrant lower contribution limits). *But see Thompson II*, 7 F.4th at 822–23 (on remand, rejecting these considerations as insufficient to support Alaska's low limits).

vi. *Political Party Contributions Cannot Rescue Article XXVIII from Its Infirmities.*

Colorado's system also violates "the right to associate in a political party." *Randall*, 548 U.S. at 256 (opinion of Breyer, J.). In *Randall*, the ability of parties to promote a particular candidate was restricted by the low limits on contributions that both individuals and parties could give to candidates. *Id*. While Colorado allows much larger contributions to candidates by parties, *see* Colo. Code Regs. § 1505-6, Rule 10.17(h) (2020), parties cannot spend to adequately support candidates because the parties themselves are subject to contribution limits. Colo. Const. art. XXVIII, § 3(3).

As a realistic matter, then, party contributions to candidates do not commonly approach the higher party-to-candidate limits. In 2020, for example, the largest contribution by any party organ was $24,425. *See* Political Party to Candidate Committee Contribution Data, Jan. 1, 2019 to Dec. 31, 2020, at 1 (attached as Ex. 12). Nor are such large contributions very common. Republican Party organs (state and

county-level parties together) made only six contributions in excess of $17,000 that year, and Democratic Party organs made seven. *See id.* The vast majority of party contributions were for $4000 or less, *see id.* at 1–8 (less than 2% of the cost of the average competitive legislative race, *see* Masket Decl. ¶ 16.). *See also* House Decl. ¶ 11 (discussing Republican Party contributions in 2016).

Also, the timing of those contributions often is not helpful for challengers. For example, on December 4, 2020—a month after the election—the state Democratic Party made a host of five-figure contributions. All of these contributions went to candidates who had already won their seats. *See* Ex. 12 at 1. In other words, a great number of the largest donations are solely intended to shore up incumbents, not to help any challengers.

Furthermore, parties generally have a policy of only contributing once a candidate has received the party's nomination. House Decl. ¶ 10; *accord* Colo. Democratic Party Neutrality Policy (attached as Ex. 13); Colo. Republican Party Bylaws art. III, § C (attached as Ex. 14). Party contributions are little help for challengers running in contested primaries (particularly if they chose to challenge an incumbent of the same party).

Thus, the limits on contributions to parties and the actual use of party funds in Colorado do not provide an avenue for party expenditures to alleviate the burdens on ordinary candidates.

B. Article XXVIII's contribution limits are also impermissibly underinclusive.

Even setting aside the *Randall* analysis, however, Colorado's contribution-limit regime is still unconstitutional. That is because it is underinclusive. Even where the government has a compelling interest that might otherwise justify infringing First

Amendment rights, a law that fails to address a significant portion of that interest will be unconstitutional. Such underinclusiveness shows that the law does not actually further the government's asserted interest. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 362 (2010); *Reed v. Town of Gilbert*, 576 U.S. 155, 172 (2015); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

Colorado's system casts doubt on whether the State in fact cares about actual or apparent corruption because its contribution limits are highest when there is the greatest risk of corruption. By statute, candidates running for a county-level office can accept twice as much as even gubernatorial candidates: $2500 for the primary and general elections combined. *See* Colo. Code Regs. § 1505-6, Rule 10.17(g)(1). But Mr. Pelton—running to represent twelve whole counties and a portion of a thirteenth—must get by on $400 donations.

Yet it is local governments—with smaller legislative bodies, more intimate and frequent interactions with the public, and more decentralized control—where quid pro quo corruption would seem to be the biggest threat. And, indeed, statistics from the U.S. Department of Justice show that local officials are charged and convicted of public corruption crimes more than twice as often as state officials. Pub. Integrity Section, U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2019*, at 24, *available at* https://www.justice.gov/criminal-pin/file/1346061/download. Putting the most restrictive limits on state officials, then, shows that Colorado is not adequately focused on the most pressing corruption problems.

Furthermore, the existence of the differential-contribution-limit scheme (discussed in more detail below) likewise shows Colorado's scheme is under-inclusive. Colorado allows candidates to double the donations they may receive from individual contributors

if the candidates agree to limit their expenditures. But accepting limits on one's expenditures does not lessen the danger that a contribution will be exchanged for the promise of some political favor. Rather, it shows that Colorado is not concerned about actual or apparent corruption, but instead has the goal of limiting money in politics. And the Supreme Court has not accepted any such interest. *McCutcheon*, 572 U.S. at 206–07 ("This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.").

Therefore, Colorado's base contribution limits "cannot be regarded as protecting an interest of the highest order" because the State has otherwise left "appreciable damage to that supposedly vital interest unprohibited." *Reed*, 576 U.S. at 172 (internal quotes omitted). This underinclusiveness is enough to show that its limits are not closely drawn to the asserted problem. For that reason, those limits are unconstitutional.

C. A system that punishes candidates for refusing to throttle back their campaign speech is unconstitutional.

Article XXVIII is also unconstitutional because it punishes candidates who refuse to limit their expenditures and thus their speech. That is, it subjects candidates who refuse to accept campaign spending limitations, like Mr. Lopez, to a deliberate handicap by allowing his opponents to accept contributions twice as large as what he can accept.[10]

The damage from this system is not just in the reduced donations themselves.

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[10] Mr. Lopez is not the only one harmed by these differential limits. Mr. Pelton agreed to spending limits, but only because he was forced into a dilemma of either limiting his own campaign advocacy or allowing his opponent to collect larger contributions. *See* Pelton Decl. ¶ 9. And Mr. House cannot support his preferred candidates to the same level as those who contribute to candidates who have accepted spending limits. *See* House Decl. ¶¶ 7–9. Mr. Lopez's situation is merely the simplest example of the inequity wrought by Article XXVIII.

The Supreme Court has held that the government may not limit candidates' expenditures, *Buckley*, 424 U.S. at 51–59, so Colorado has attempted instead to coerce candidates into giving up that right, by giving a decided advantage to a candidate's opponent if he does not yield to the state's coercion. *See generally United States v. Butler*, 297 U.S. 1, 74 (1936) (holding government "may not indirectly accomplish" what it "has no power to enforce [by] commands"). It allows a candidate's opponents to accept twice as much in donations when he refuses to limit his expenditures and they agree to do so. Art. XXVIII, § 4(5).[11]

And the effects of this unconstitutional regime compound. Candidates who refuse to give up their right to unlimited expenditures can only keep up by finding two maximum contributors for every one their opponents find. So they must spend more time fundraising. And while they are cloistered away, seeking donations to keep their campaign running, their opponents are out on the hustings, shaking hands and kissing babies; the differential contribution limits damage candidates' campaigns, not only by limiting their financial resources, but also by stealing their time.

This arrangement is unconstitutional. The Supreme Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates competing against each other." *Davis v. FEC*, 554 U.S. 724, 738 (2008).

The Tenth Circuit, in *Riddle v. Hickenlooper*, already struck down a similar provision in Article XXVIII, which limited write-in candidates in the general election to

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[11] One other requirement is that the candidate have "raised more than ten percent of the applicable voluntary spending limit." Art. XXVIII, § 4(5). That requirement is not material here because fundraising for the incumbent governor (who has not accepted spending limits) has already surpassed the 10% threshold. So the gubernatorial candidate who accepted spending limits (one of Mr. Lopez's primary opponents) has already received many contributions greater than $1250. *See* Ex. 6.

$200 contributions but allowed other candidates to accept $400 contributions. 742 F.3d at 925. Other candidates could accept $400 because they had passed through a primary, even if they had been unopposed. *Id*. The Tenth Circuit held that this arrangement was unconstitutional, because an "interest in fighting corruption . . . is not advanced by a law that allows" one candidate in a race to collect larger donations than the others. 742 F.3d at 928–29.[12] Given that the interest in combatting actual or apparent corruption is the only legitimate rationale for regulating campaign contributions, *e.g.*, *McCutcheon*, 572 U.S. at 206 (citations omitted); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985); *Brown v. State*, 680 So. 2d 1179, 1182 (La. 1996), the differential limits here are unconstitutional.

Nor can those differential limits be saved by the fact that Colorado allows a candidate to choose whether to be bound by spending limits. A "drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis*, 554 U.S. at 739. Candidates have a right to "vigorously and tirelessly" promote their candidacies. *Buckley*, 424 U.S. at 52. Article XXVIII, however, requires an unconstitutional choice: "abide by a limit on [campaign] expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits." *Davis*, 554 U.S. at 740.

Colorado's differential contribution limits, therefore, cannot be sustained. They should be enjoined.

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[12] Although *Riddle* was litigated as an Equal Protection case, the Tenth Circuit held that the Equal Protection and First Amendment analyses were the same and the case was controlled by First Amendment decisions like *Buckley* and *Davis v. FEC*. *See* 742 F.3d at 927–30.

D. Any anti-corruption rationale in support of Article XXVIII would be an inappropriate post-hoc justification anyhow.

Colorado's scheme must also fall because it wasn't passed for an anti-corruption purpose in the first place. The justification for a restriction on constitutionally protected liberties "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). And even where a law might be otherwise permissible, it may run afoul of the Constitution when lawmakers reveal "a clear and impermissible hostility toward" rights protected by the First Amendment. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). "Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.).[13]

Here, the history of Article XXVIII is telling. Colorado previously imposed contribution limits under the Fair Campaign Practices Act (FCPA). The FCPA placed much the same restrictions on campaign contributions as does Article XXVIII. *See* Colo. Rev. Stat. § 1-45-104(2) (1997). This Court, however, held that the Act's contribution limits were unconstitutional. *Citizens I*, 60 F. Supp. 2d at 1087. In response to that ruling, the General Assembly amended the statute to increase the limits substantially.

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[13] *Lukumi Babalu Aye* is an Establishment Clause decision, but courts also consider a law's historical background under the Free Speech Clause. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 581–82 (1998); *see also Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954–55 (2018) (otherwise lawful government action can be made unconstitutional by motive to retaliate for exercise of free speech right).

The new limits varied by office, but ranged from $5000 for a gubernatorial candidate down to $1000 for candidates for the state House, state Board of Education, and Board of Regents. Act of Mar. 15, 2000, ch. 36, sec. 1 § 1-45-105.3(1), 2000 Colo. Sess. Laws 118, 118. Because of this statutory change, the Tenth Circuit ended up vacating (as moot) the contribution-limit portion of the district court decision. *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1199 (10th Cir. 2000).

Two years later, however, Article XXVIII slashed what donors could contribute, imposing limits 60%–80% lower than they had been able to contribute before. For Tier 1 races, the contribution limit returned to the old $1000 limit that this Court had said was unconstitutional. The remaining candidates got a $400 limit—higher than the old FCPA limit, but still a significant cut from the prevailing limits. By largely reimposing limits that had already been declared in violation of the First Amendment, Article XXVIII emits more than a whiff of deliberate revolt against constitutional commands.

The public debate around Article XXVIII is revealing as well. Colorado publishes and distributes to every registered voter an information booklet—commonly known as the "Blue Book"—that describes, discusses, and gives pro and con arguments for every ballot proposal. *See* Colo. Const. art. V, § 1(7.5); Colo. Rev. Stat. §§ 1-40-124.5–25 (2021). These Blue Books are a reliable guide to the citizenry's purpose and intention in adding provisions to Colorado's laws. *E.g.*, *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009); *In re Title Adopted Apr. 5, 1995* (*Macravey v. Hamilton*), 898 P.2d 1076, 1079 n.5 (Colo. 1995); *Grossman v. Dean*, 80 P.3d 952, 962 (Colo. App. 2003).

Tellingly, the word "corruption" never appears in the Blue Book analysis of Article XXVIII (then known as Amendment 27). The 2002 booklet gives five arguments in favor of the measure. One of those is irrelevant to this case because it deals solely with the amendment's disclosure provisions (which Plaintiffs are not challenging). But the

remaining arguments all have to do with either limiting the amount of money in politics or leveling the playing field between candidates. The arguments are worth reading in full, but a few quotes will establish their general thrust:

- "This proposal may reduce the impact of special interests on the political process and increase the influence of individual citizens." Legislative Council of the Colo. Gen. Assembly, *2002 Ballot Information Booklet* 5 (2002) (relevant portions attached as Ex. 15).
- "Voluntary spending limits could reduce the overall amount spent on campaigns, while lower contribution limits could allow more challengers to compete with incumbents in raising campaign funds." *Id.* at 6.
- "Voluntary spending limits may encourage more people to run for public office." *Id.*

The pitch in the press was much the same. A representative of Colorado Common Cause (an organization supporting the amendment) said, "In Colorado . . . the problem stems from big special-interest money dominating who's able to run for office and who wins." Randy Wyrick, *Amendment 27 Seeks to Change Campaign Finance*, Vail Daily, Oct. 19, 2002, *available at* https://www.vaildaily.com/news/amendment-27-seeks-to-change-campaign-finance/. Thus, Article XXVIII was sold to voters as a way to reduce political spending, limit the influence of particular disfavored parties, and level the playing field between candidates. *Not* as an anti-corruption measure.

The operation of Article XXVIII itself confirms that combatting corruption is not the goal of its contribution limits. This is most easily seen in the different contribution limits for candidates who agree to spending limits and candidates who do not. As mentioned above, there is an exception to the ordinary limits where a candidate agrees to keep his campaign spending below a certain predetermined level. This exception shows that Colorado is not really concerned that any donation greater than $1250 for a Tier 1

candidate or $400 for a Tier 2 candidate might be corrupting. It is happy to countenance contribution limits twice that high. What the state really cares about is getting candidates to spend less money, period.

Plainly, then, Colorado's purpose in enacting Article XXVIII had nothing to do with concerns about corruption. Indeed, Colorado had no substantial history of quid pro quo corruption before the enactment of Article XXVIII. *See Citizens I*, 60 F. Supp. 2d at 1080 ("[The Secretary of State] could not recall a single investigation or prosecution of actual *quid pro quo* corruption occurring during her 25 years of working in the . . . office.")[14] Rather, the main purposes of Article XXVIII were to limit spending on politics, restrain the influence of certain people or groups, and open up opportunities for new candidates (i.e., to level the playing field between them and established political players).[15]

The problem is that none of these are valid purposes for campaign regulation. Neither a desire to curb the costs of campaigns, *Buckley*, 424 U.S. at 57, nor limiting influence or access, *McCutcheon*, 572 U.S. at 207, nor "leveling the playing field," *Ariz. Free Enter.*, 564 U.S. at 749 (internal quotes omitted); *accord Buckley*, 424 U.S. at 54, can support restrictions on campaign activity. *See also Ariz. Free Enter.*, 564 U.S. at 750 (holding leveling interest is not "a legitimate government objective, let alone a compelling one" (internal quotes omitted)); *Davis*, 554 U.S. at 741 (holding there is "no

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[14] The judge in *Citizens I* did find evidence of a public perception of corruption, but the vast majority of that evidence has nothing to do with true, quid pro quo corruption and is more about alleged undue influence. *See* 60 F. Supp. 2d at 1080–82. Such evidence is immaterial under current caselaw. *McCutcheon*, 572 U.S. at 207.

[15] Of course, Article XXVIII has achieved none of these goals. As discussed above, political spending has skyrocketed, outside special interest advocacy dwarfs what most candidates can muster, and the contribution limits have made it harder for challengers to take on entrenched political players. But set that aside for now.

support for the proposition that [leveling electoral opportunities] is a legitimate government objective"). Indeed, *any* objective other than one based in preventing corruption "impermissibly inject[s] the Government into the debate over who should govern." *McCutcheon*, 572 U.S. at 192 (internal quotes omitted).

It is true that Article XXVIII mentions corruption in passing. In a section containing a series of statements in the nature of legislative findings, the law briefly says "that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption." Colo. Const. art XXVIII, § 1. But after this perfunctory statement, it recites a host of supposed ills that—as far as the First Amendment is concerned—are none of the government's business:

> [L]arge campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process; . . . the rising costs of campaigning for political office prevent qualified citizens from running for political office; . . . in recent years the advent of significant spending on electioneering communications . . . has frustrated the purpose of existing campaign finance requirements; . . . the interests of the public are best served by limiting campaign contributions, establishing campaign spending limits, . . . and strong enforcement of campaign finance requirements.

Id. These are invalid considerations. The bottom line is this: the protection of speech and association "cannot turn on a legislative . . . determination that particular speech is [or is not] useful to the democratic process." *McCutcheon*, 572 U.S. at 206.

Given this history of Article XXVIII, any reliance on an anti-corruption justification would largely be an attorney's invention. That supposed justification went unmentioned in the debate over the measure and gets nothing but a pro forma mention in the provision itself. The purpose of the provision, as voiced both by its supporters and the provision itself, was to cut back on what certain people saw as excessive exercise of the rights to free speech and free association. ("Too much money" is nearly always a

euphemism for "Too much speech I don't like.") This is an invalid purpose, and the Court should not countenance any attempt to sanitize the law's history by turning to a heretofore barely mentioned anti-corruption purpose. The contribution limits are unconstitutional in their effect and unconstitutional in their motivation.

III. The Court Should Waive the Bond Requirement.

Under Fed. R. Civ. P. 65(c), a party who is the beneficiary of a preliminary injunction must "give[] security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Yet the court has the discretion to waive the bond requirement or require only a nominal bond. *Continental Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964) (per curiam). If a preliminary injunction merely requires a party to comply with the Constitution, bond waiver is appropriate. *Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009) (citations omitted); *accord BankDirect Capital Finance, LLC v. Capital Premium Financing, Inc.*, 912 F.3d 1054, 1058 (7th Cir. 2019); *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 (D. Utah 2017).

Moreover, it is not clear what economic losses Defendants could sustain from issuance of the requested preliminary injunction. *See generally Winnebago Tribe v. Stovall*, 261 F. Supp. 2d 1226, 1239–40 (D. Kan. 2002), *aff'd*, 341 F.3d 1202 (10th Cir. 2003) (finding "absence of proof showing a likelihood of harm" justified waiving bond (internal quotes omitted)). Thus, even if outright waiver is not appropriate, the proper amount to cover costs and damages would be nominal.

WHEREFORE, Plaintiffs request that the Court issue a preliminary injunction prohibiting Defendants from enforcing the limits on contributions to candidate committees in section 1505-6, Rule 10.17(b) and Article XXVIII, sections 3(1), 3(13) and

4(5).[16]

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[16] The undersigned has discussed this motion with opposing counsel and was informed that although Defendants object to the issuance of a preliminary injunction, they do not now have a position about waiving the bond if the Court were to grant the requested injunction.