

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

THE AMERICAN CIVIL LIBERTIES  
UNION OF FLORIDA, INC., *et al.*,

*Plaintiffs,*

V.

JONI ALEXIS POITIER, in her official capacity as member of the FLORIDA ELECTIONS COMMISSION, *et al.*,

*Defendants.*

[illegible]

Case No. 4:21-CV-190-AW-MJF

## PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs the American Civil Liberties Union of Florida, Inc. (ACLU of Florida), Fair Vote Florida, Our Votes Matter, and Florida Votes Matter move for summary judgment on their First Amendment claim against Defendants the members of the Florida Elections Commission (FEC), and state:

1. Plaintiffs are three political committees sponsoring statewide ballot initiatives (collectively, “Committee Plaintiffs”) and an organization supporting them (the ACLU of Florida).

2. Florida’s SB 1890 amends section 106.08, Florida Statutes, to impose a \$3,000 limit on the contributions a person or political committee may give to a committee sponsoring a state ballot initiative. Laws of Fla. ch. 2021-16, § 1.

(amending Fla. Stat. § 106.08 (2020)).

3. SB 1890's contribution limit unduly burdens Plaintiffs' speech and associational rights under the First Amendment to the U.S. Constitution.

4. The FEC is responsible for enforcing SB 1890.

5. Because there are no relevant factual disputes, Plaintiffs are entitled to summary judgment as a matter of law.

**WHEREFORE**, Plaintiffs respectfully request that this Court: (1) declare that the limit in section 106.08(1), Florida Statutes, as amended by SB 1890, on contributions to an initiative sponsor is unconstitutional in derogation of the First Amendment; and (2) permanently enjoin the FEC from enforcing section 106.08(1)'s limit on contributions to an initiative sponsor.<sup>1</sup>

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<sup>1</sup> SB 1890 limits contributions "to a political committee that is the sponsor of *or is in opposition to* a constitutional amendment proposed by initiative," which limit lifts once the initiative attains ballot status. Laws of Fla. ch. 2021-16 § 1 (emphasis added) (amending Fla. Stat. § 106.08(1)(a) (2020)). Plaintiffs are not raising or spending money to oppose any potential ballot initiatives, and therefore they have not challenged SB 1890's limit on contributions to initiative opponents (and likely do not have standing to do so). Nor have Plaintiffs challenged the law's other provisions, which amend a nearby subsection of section 106.08 to preempt local campaign finance regulations, *id.*, and amend section 106.141 regarding the disposition of surplus campaign funds, *id.* § 2.

Other than to note that Florida has a well-developed severability doctrine, *see, e.g., Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So. 3d 1181, 1195 (Fla. 2017), and to inform the Court that the phrase "or is in opposition to," the local preemption provision, and the surplus funds provision were each added to the bill at different points in the legislative process, *compare* SB 1890 (2021) (Filed), <https://flsenate.gov/Session/Bill/2021/1890/BillText/Filed/> with CS for SB 1890

## STATEMENT OF UNDISPUTED FACTS

### A. Floridians' Initiative Right

The right to amend the Florida Constitution by citizen initiative has been embedded in the state's foundational charter since 1968. Fla. Const. art. XI, § 3. To propose an initiative, Floridians must first form a political committee, submit the proposal to the Secretary of State, collect the requisite signatures, obtain a favorable advisory opinion from the Florida Supreme Court, and finally secure the approval of sixty percent of their fellow voters. *Id.* §§ 3, 5; Fla. Stat. §§ 16.061, 100.371.

### B. SB 1890's Contribution Limit

The Florida Legislature enacted SB 1890 at its 2021 regular session; Governor DeSantis signed it into law on May 7, 2021. Laws of Fla. ch. 2021-16. SB 1890 limits to \$3,000 the amount a person or political committee may contribute to a committee sponsoring a statewide ballot initiative. *Id.* § 1. This includes both monetary and in-kind donations as well as coordinated expenditures, which are considered in-kind donations. Fla. Stat. § 106.011(5), (12)(a). The cap applies until the initiative attains ballot status—in other words, during the signature-gathering process. Laws of Fla. ch. 2021-16, § 1. Violating SB 1890 by accepting, soliciting, or making over-the-limit contributions carries civil and criminal penalties. Fla. Stat.

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(2021), <https://flsenate.gov/Session/Bill/2021/1890/BillText/c1/> and Laws of Fla. ch. 2021-16, Plaintiffs take no position on severability.

§ 106.08(7)–(8), .19(2). Before the Legislature enacted SB 1890, Floridians could donate any amount to support a ballot initiative effort, in the form of both monetary and in-kind contributions. *See* Fla. Stat. § 106.08 (2020).

### **C. Plaintiffs and the Fair Elections Campaign**

Plaintiffs include three political committees each sponsoring a citizen initiative, as well as the ACLU of Florida, which supports the Committee Plaintiffs' initiatives. ECF No. 10-2 (Shaw Decl.) ¶ 6; ECF No. 10-1 (Latshaw Decl.) ¶ 12. These initiatives are the Voting Eligibility Restoration Amendment (VERA); A Voter Registration Method for Eligible Floridians (AVRM); and the Register and Vote Amendment (RAVA) (collectively, "Fair Elections Amendments"). Shaw Decl. ¶ 5; Latshaw Decl. ¶ 12. On May 28, 2021, the Secretary of State approved all three petitions for circulation. Latshaw Decl. ¶ 13.

Plaintiffs estimate the cost of getting a single measure on the ballot is between \$9 and \$13 million. *Id.* ¶ 10; Shaw Decl. ¶ 8. Plaintiffs estimate the total costs to place their amendments on the ballot at about \$28 million. Latshaw Decl. ¶ 11. To meet this cost, the Committee Plaintiffs planned to solicit and accept both in-kind and monetary contributions in excess of SB 1890's limit. Shaw Decl. ¶ 9. Indeed, the Committee Plaintiffs' campaign plans rely on being able to accept contributions in excess of SB 1890's limit. *Id.* ¶ 12. Complementing the Committee Plaintiffs' plans, the ACLU of Florida planned to make contributions to the Committee

Plaintiffs in excess of SB 1890's limit. Latshaw Decl. ¶ 14.

Further, the ACLU of Florida is coordinating and consulting with the Committee Plaintiffs on all expenditures it makes in support of the Fair Elections Campaign. *Id.* ¶ 17; ECF No. 41-1 (Supp. Latshaw Decl.) ¶ 5. Accordingly, Florida's campaign finance laws prohibit the ACLU of Florida from making independent expenditures for the purpose of expressly advocating for the Fair Elections Amendments' approval, and any such expenditures the ACLU of Florida makes will be in-kind contributions to the Committee Plaintiffs subject to SB 1890's limit. Fla. Stat. § 106.011(5), (12)(a); Laws of Fla. ch. 2021-16, § 1.<sup>2</sup> The ACLU of Florida made such in-kind contributions of \$5,335.32 to each of the Committee Plaintiffs during the most recent reporting period (June 2021). Supp. Latshaw Decl. ¶ 6.

Plaintiffs use the contributions they raise "to pay for the cost of engaging with voters, persuading voters to support the Fair Elections Amendments, collecting petitions, and getting the Fair Elections Campaign's message and ideas out to Floridians statewide through the news media, social media, Internet platforms, and

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<sup>2</sup> The ACLU of Florida's posture with respect to the Fair Elections Campaign has changed somewhat since the June 24 hearing on Plaintiffs' preliminary injunction motions. Supp. Latshaw Decl. ¶ 2. Since then, the ACLU of Florida has shifted its goal to a 2024 ballot placement for the Fair Elections Amendments. *Id.* ¶ 3. The Committee Plaintiffs continue to pursue 2022 ballot placement for these initiatives. *Id.* ¶ 4.

direct person-to-person discussion.” Shaw Decl. ¶ 10. During the paid petitioning phase of the initiative campaign, Plaintiffs plan to “hire petitioners who work in the individual communities to reach out to donors and have one-on-one conversations about what these petitions are trying to do and ask them to sign the petition.” ECF No. 41-2 (Prelim. Inj. Hr’g Tr.) at 17:24–18:2 (Latshaw). This involves “a lot of conversations on the street corners, reaching out to the people . . . , having conversations about why these petitions matter.” *Id.* at 18:3–6.

Because of the cost of the initiative campaign’s petitioning phase, Plaintiffs do not expect an initiative effort could be viable under SB 1890’s contribution limit. *Id.* at 18:12–21. The Committee Plaintiffs “will be unable to effectively spread their ideas and message under the limit.” Shaw Decl. ¶ 15. Because of the limit’s direct impact on the viability of the Fair Elections Campaign, “there could be . . . hundreds of thousands of conversations that won’t take place about th[ese] initiative[s]” if SB 1890 is in place. Prelim. Inj. Hr’g Tr. at 18:18–20 (Latshaw).

Plaintiffs and their officers and employees will not solicit, accept, or make illegal contributions over SB 1890’s limit if SB 1890 goes into effect, due to fear of the civil and criminal penalties. Latshaw Decl. ¶ 16; Shaw Decl. ¶ 16.

#### **D. The FEC is Responsible for Enforcing SB 1890**

The FEC has jurisdiction to investigate, determine, and assess civil penalties for violations of the campaign finance laws. Fla. Stat. §§ 106.25(1), .26(11), .265,

.27(2). Defendants Joni Alexis Poitier, Kymberlee Curry Smith, Jason Todd Allen, and J. Martin Hayes are the members of the FEC and are sued in their official capacities. ECF No. 16 (SAC) ¶ 14; ECF No. 26 (FEC’s Mem. Opp’n to Mot. Prelim. Inj.) at 1.

## MEMORANDUM OF LAW

### A. Legal Standard

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Maddox v. Stephens*, 727 F.3d 1109, 1118 (11th Cir. 2013). “A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.” *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)). “By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

A plaintiff moving for summary judgment must support their motion by citing “particular parts of materials in the record” to establish the absence of a genuine

factual dispute. Fed. R. Civ. P. 56(c)(1)(A), (B). “An issue of fact is ‘genuine’ if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.” *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305, 1311 (11th Cir. 2018) (quoting *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1259–60 (11th Cir. 2004)). The movant may also use facts in the record to show that the “adverse party cannot produce admissible evidence.” Fed. R. Civ. P. 56(c)(1)(B).

### **B. SB 1890 Unduly Burdens Plaintiffs’ First Amendment Rights**

“The right to make political contributions is protected under the first amendment as an important freedom of association.” *Let’s Help Fla. v. McCrary*, 621 F.2d 195, 199 (5th Cir. 1980), *aff’d sub nom. Firestone v. Let’s Help Fla.*, 454 U.S. 1130 (1982). The Supreme Court has reiterated this basic tenet of speech and association, finding that “[c]ontributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression.” *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981); *see Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“[C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.”).

The State can only curtail this First Amendment right when it has a significant, legitimate state interest. *Citizens Against Rent Control*, 454 U.S. at 296. “[R]egulation of First Amendment rights is always subject to exacting judicial



review.” *Id.* at 294. For the state to survive exacting scrutiny, it must provide a “relevant correlation” or “substantial relation” between a legitimate government interest and the abridgment of the right. *Buckley*, 424 U.S. at 64. The Supreme Court recognizes “a single narrow exception to the rule that limits on political activity were contrary to the First Amendment.” *Citizens Against Rent Control*, 454 U.S. at 296–97. That exception applies to limits on contributions to candidates, justified by the legitimate state interest in preventing “corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates’ positions and on their actions if elected to office.” *Buckley*, 424 U.S. at 25.

Initiative sponsor committees are not candidate committees. “Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.” *Citizens Against Rent Control*, 454 U.S. at 298 (alterations adopted) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978)). The State cannot prevent corruption or the appearance of corruption by capping contributions to initiative sponsor committees. *Id.* at 297–98 (citing *McCrary*, 621 F.2d at 199). Since the anti-corruption rationale is the only legitimate government interest that can justify limiting political contributions, contributions to initiative sponsors are *per se* unconstitutional.

SB 1890 limits contributions to committees sponsoring citizen initiatives. Laws of Fla. ch. 2021-16, § 1. This contribution cap encompasses both monetary and in-kind donations. Fla. Stat. § 106.011(5), (12)(a). If SB 1890’s contribution limit goes into effect, Plaintiffs’ core political expression will be severely restrained as a result. (Facts, *supra* at 5–6.) Such a cap is in clear violation of the precedent set by *Citizens Against Rent Control* and *McCrary*; Defendants fail to put forth, and indeed cannot put forth, a legitimate government interest substantial enough to support this limit on free speech and association. *See* ECF No. 38 (Order on Mots. for Prelim. Inj.) at 15 (“Because the Commission identifies no sufficiently important government interest to support SB 1890, I conclude Plaintiffs are likely to succeed on the merits.”).

The undisputed facts show that the FEC’s enforcement of SB 1890 would unduly burden Plaintiffs’ First Amendment rights. Plaintiffs are sponsoring and supporting three citizen initiatives. (Facts, *supra* at 4.) Plaintiffs plan to solicit, make, and accept contributions above SB 1890’s limit, and SB 1890 would prevent them from doing so. (*Id.* at 4, 6). Without being able to solicit, make, and accept contributions above SB 1890’s limit, a significant amount of Plaintiffs’ core political expression—indeed, most of the expression they plan to engage in during the Fair

Elections Campaign—will be excluded from the marketplace of ideas.<sup>3</sup> (*Id.* at 6.)

Finally, it is undisputed that the FEC is responsible for enforcing SB 1890—and thus the FEC’s enforcement of SB 1890 would cause the deprivation of Plaintiffs’ rights. (*Id.*)

### **C. The Court Should Issue a Declaratory Judgment**

Plaintiffs are entitled to a declaration of their rights pursuant to 28 U.S.C. § 2201. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007). Plaintiffs request that this Court enter a declaration that SB 1890’s limit on contributions to an initiative sponsor violates the First Amendment.

### **D. The Court Should Issue a Permanent Injunction**

A plaintiff seeking a permanent injunction must satisfy a four-factor test demonstrating: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). “The third and fourth factors ‘merge’ when, as here, the

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<sup>3</sup> That Plaintiffs might pursue and secure ballot placement in 2024 rather than 2022 has no bearing on the fact that they “will suffer injury whether the political committees secure ballot placement or not,” because “the contributions themselves are ‘beyond question a very significant form of political expression.’” Order on Mots. for Prelim. Inj. at 15 (quoting *Citizens Against Rent Control*, 454 U.S. at 298).

government is the opposing party.” *Brown v. Sec’y, U.S. Dep’t of Health & Hum. Servs.*, No. 20-14210, 2021 WL 2944379, at \*20 (11th Cir. July 14, 2021) (citations, internal quotation marks, and alterations omitted) (reciting standard in preliminary injunction context).

First, Plaintiffs will suffer ongoing irreparable injury so long as the FEC can enforce SB 1890’s limit. As Plaintiffs’ harm is ongoing, monetary damages are an insufficient and inappropriate remedy. The threat of ongoing future harm is real and immediate because the FEC is responsible for enforcing the law at issue. (Facts, *supra* at 6.) Therefore, a permanent injunction is the only remedy that will ensure the FEC will not enforce SB 1890 and that Plaintiffs’ rights will not be violated. *See Thomas v. Bryant*, 614 F.3d 1288, 1318 (11th Cir. 2010) (finding irreparable injury requirement met when there is “a real or immediate threat that the plaintiff will be wronged again”). And “harms to speech rights ‘for even minimal periods of time, unquestionably constitute irreparable injury’ supporting preliminary relief.” *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (alteration adopted) (quoting *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n.2 (5th Cir. Unit B June 1981)).

Second, “[a]n injunction is proper in this case because no legal remedy could correct the irreparable injury to plaintiffs’ first amendment rights . . . .” *McCrory*, 621 F.2d at 199; *see also Scott*, 612 F.3d at 1295 (“An injury is irreparable if it

cannot be undone through monetary remedies.”).

Third and fourth, the balance of hardships weighs in the Plaintiffs’ favor. Permitting enforcement of SB 1890 will severely burden Plaintiffs’ First Amendment rights. (Facts, *supra* at 4–6.) An injunction, on the other hand, poses no additional burden for the FEC; at least, certainly none that outweighs the burden to Plaintiffs. In fact, enjoining enforcement of the contribution limitation decreases the FEC’s regulatory burden. Further, “[t]he vindication of constitutional rights and the enforcement of a federal statute serve the public interest almost by definition.” *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012). An injunction would allow for the dissemination of citizen initiative sponsors’ message, sparking debate and discussion on matters of public concern. (Facts, *supra* at 5–6.) An injunction serves not just Plaintiffs’ interests but the interests of all Floridians, who can be secure in supporting ballot initiatives above SB 1890’s limit, exercising their rights to engage in core political expression: collective action to circulate political ideas.

Because Plaintiffs meet this four-part test and seek to prevent ongoing injury to their constitutional rights, Plaintiffs are entitled to a permanent injunction prohibiting the FEC or its agents from enforcing SB 1890’s contribution limit.

### **E. Conclusion**

For the foregoing reasons, Plaintiffs respectfully request that this Court grant

their Motion for Summary Judgment.

### **CERTIFICATE OF WORD COUNT**

Pursuant to N.D. Loc. R. 56.1(B), the above Statement of Undisputed Facts and Memorandum of Law contain 2,641 words.

Dated: July 22, 2021

Respectfully submitted,

/s/ Nicholas Warren

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