UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

SOUTH DAKOTA NEWSPAPER ASSOCIATION, SOUTH DAKOTA RETAILERS ASSOCIATION, SOUTH DAKOTA BROADCASTERS ASSOCIATION, SOUTH DAKOTA CHAMBER BALLOT ACTION COMMITTEE, THOMAS BARNETT, JR., and AMERICANS FOR PROSPERITY, *Plaintiffs*, *v.* STEVE BARNETT, in his official capacity as South Dakota Secretary of State, and JASON RAVNSBORG, in his official capacity as South Dakota Attorney General, *Defendants*.	Civil Action No. 3:19-CV-3010-RAL **MEMORANDUM IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTIONS**

Plaintiffs, the South Dakota Newspaper Association (the "Newspaper Association"); the South Dakota Retailers Association (the "Retailers Association"); the South Dakota Broadcasters Association (the "Broadcasters Association"); South Dakota Chamber Ballot Action Committee (the "Chamber Committee"); Thomas Barnett, Jr.; and Americans for Prosperity ("AFP"), by

counsel, submit this motion for preliminary and permanent injunctions under Fed. R. Civ. P. 65(a) and L.R. 65.1. The basis for the motion is discussed in the following memorandum in support.

INTRODUCTION

This is a facial constitutional challenge against S.D.C.L. § 12-27-18.2 (the "Ban").[1] The Ban prohibits contributions to South Dakota ballot question committees by non-residents, out-of-state political committees, and entities that are not registered with the Secretary of State within four years of the time the contribution is given. *See* S.D.C.L. § 12-27-18.2. The Ban also imposes significant civil penalties for each violation on South Dakota ballot question committees. *See id.*

The Ban injures the Newspaper Association, the Retailers Association, the Broadcasters Association, and the Chamber Committee (collectively the "South Dakota Plaintiffs") in different ways. The Newspaper Association and the Broadcasters Association represent many media outlets that generate revenue from South Dakota ballot question committees' political advertisements. *See* Compl. ¶ ¶ 8, 10. Additionally, members of the Broadcasters Association rely on South Dakota ballot question committees to meet their local radio and television programming obligations. *Id*. at ¶ 10. South Dakota ballot question committees will receive fewer contributions because of the Ban and, therefore, have fewer financial resources to promote their political views through media outlets. Consequently, members of the Newspaper Association and the Broadcasters Association are harmed due to a decrease in revenue generated from South Dakota ballot question committees. And members of the Broadcasters Association will suffer additional harm with fewer opportunities to meet their local programing obligations.

[1]Available at: https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=12-27-18.2.

The Retailers Association has a long history of promoting its political interests regarding South Dakota ballot measures. During the 2018 election alone, the Retailers Association actively opposed three ballot measures, including Initiated Measure 24, and supported another. *Id*. at ¶ 9. These advocacy efforts involve financial contributions from partners both inside and outside of South Dakota, *id*., to its political action committee. The Ban will deter additional donations from the Retailers Association's out-of-state partners and, consequently, decrease its ability to express its political views on South Dakota ballot measures.

The Ban directly harms the Chamber Committee by forbidding it from accepting financial contributions from the prohibited sources listed in the statute. *See* S.D.C.L. § 12-27-18.2. The Chamber Committee is a South Dakota statewide ballot question committee affiliated with the South Dakota Chamber of Commerce and Industry (the "Chamber"). *See* Compl. at ¶ 11. The Chamber has a long history of involvement in South Dakota ballot measures. *Id*. at ¶ 13. It formed the plaintiff Chamber Committee as an ongoing statewide ballot question committee so that the Chamber's supporters, located both inside and outside of South Dakota, have a way to make financial contributions to ensure the Chamber is prepared to express its political views on any ballot measure. *Id*. at ¶ 14. The Ban forbids the Chamber Committee from accepting financial contributions from prohibited out-of-state supporters and, consequently, injures its ability to express its political views on South Dakota ballot measures. Additionally, the Chamber has members that have either moved their operations to South Dakota or are South Dakota affiliates of businesses that are headquartered in another state. *Id*. at 16. Under the restrictions of the Ban, these members cannot contribute to the Chamber Committee for four years, even if a ballot measure has a direct impact on their business. This is another example of how the Ban

unconstitutionally inhibits the Chamber Committee from expressing its views on South Dakota ballot questions.

Barnett is a Florida resident and AFP is a Virginia based nonprofit corporation organized under the laws of the District of Columbia (collectively the "Out-of-State Plaintiffs"). Barnett was actively involved in South Dakota ballot measures before he moved to Florida and AFP routinely promotes its political beliefs across the United States by making financial contributions to political and ballot measure committees organized under the laws of and located in various states. The Out-of-State Plaintiffs wish to promote their political interests in South Dakota ballot question initiatives by making financial contributions to South Dakota ballot question committees. But the Ban prohibits their political advocacy.

Plainly, the Ban prevents the Out-of-State Plaintiffs and the South Dakota Plaintiffs from exercising their core First Amendment political speech and associational rights and burdens their participation in interstate commerce in violation of the Commerce Clause. Therefore, the Ban is unconstitutional.

BACKGROUND

I. Plaintiffs' planned activity.

The Out-of-State Plaintiffs have political interests in South Dakota ballot questions. *See* Compl. ¶ ¶ 17-19, 28, 29, 34. The Out-of-State Plaintiffs want to further their political beliefs by making financial contributions to South Dakota ballot question committees. *Id*. at ¶ ¶ 17, 19, 28, 29. The Out-of-State Plaintiffs want to contribute to the South Dakota ballot question committees, including donations to plaintiff Chamber Committee, to promote the committees' activities regarding South Dakota ballot questions and to further their own political interests. *Id*. at ¶ ¶ 17, 19, 28, 29. But the Out-of-State Plaintiffs' desired political activities are prohibited by the Ban.

The South Dakota Plaintiffs are South Dakota entities that either solicit contributions from prohibited sources under the Ban to fund their political activities regarding South Dakota ballot questions or they represent media outlets that generate revenue from South Dakota ballot question committees that may receive contributions from prohibited sources under the Ban. *Id*. at ¶ ¶ 8-16, 24-27, 36. Accordingly, the Ban harms either the South Dakota Plaintiffs' political advocacy or pecuniary interests.

II. The Ban's impact on Plaintiffs' activities.

The Ban was enacted through Initiated Measure 24 § 1[2] by South Dakota voters in the 2018 general election. Section 1 was codified by the state legislature as part of its campaign finance laws. *See* S.D.C.L. § 12-27-18.2. The Ban prohibits out-of-state individuals, political committees, and corporations from speaking about major changes to South Dakota law. Many issues South Dakota faces have national or regional importance, such that out-of-state persons will be affected by South Dakota's laws and national organizations may provide expertise and perspectives that are beneficial to residents of the state. Like the Out-of-State Plaintiffs, these groups may wish to donate to a ballot measure committee either for or against a change in South Dakota law via a ballot measure.

But that is illegal now. Under S.D.C.L. § 12-27-18.2,

> Any contribution to a statewide ballot question committee by a person who is not a resident of the state at the time of the contribution, a political committee that is organized outside South Dakota, or an entity that is not filed as an entity with the secretary of state for the four years preceding such contribution is prohibited.

[2]Available at: http://sdsos.gov/elections-voting/assets/2018_IM_Petition_ProhibitBQContributions.pdf.

If a ballot question committee accepts a prohibited contribution, then the Secretary of State is required to impose "a civil penalty equal to two hundred percent of the prohibited contribution." *Id*.

In addition to the Secretary of State's enforcement powers, the Attorney General is required to "investigate and prosecute any violation of the provisions of" South Dakota's campaign finance chapter. S.D.C.L. § 12-27-35. The Attorney General has the discretion to seek either criminal or civil remedies for alleged violations. *Id*.

The Ban prevents the Out-of-State Plaintiffs from contributing to South Dakota ballot question committees, its prohibitions harm the South Dakota Plaintiffs, and it enforces these prohibitions with fines and investigations. The Plaintiffs want to exercise their collective First Amendment rights, but their conduct is prohibited by the Ban.

LEGAL STANDARD

A preliminary injunction is appropriate when a plaintiff establishes that (a) he is likely to succeed on the merits; (b) that he is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in his favor; and (d) an injunction is in the public interest. *Winter v. Nat. Res. Def. Coun., Inc.*, 555 U.S. 7, 20 (2008). *See also Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (*en banc*) (applying *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (*en banc*)). A decision to grant preliminary injunctive relief is reviewed for abuse of discretion. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (*en banc*). "The standard for a preliminary injunction is essentially the same as for a permanent injunction," except that the movant must actually succeed on the merits of his claims. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987). *See also Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999) (citing *Amoco*

Prod. Co.). As established in the Complaint, Plaintiffs' claims satisfy the standards for preliminary and permanent injunctions.

When, as here, a party seeks both a preliminary and permanent injunction, the matters are deemed consolidated for trial, unless otherwise ordered by the Court. L.R. 65.1.

ARGUMENT

I. Plaintiffs have meritorious constitutional claims.

A. The Ban violates the First Amendment.

"When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." *Phelps-Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011) (*per curiam*). That is because the "'likelihood of success on the merits will often be the determinative factor'" in cases involving laws that burden fundamental First Amendment rights. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (*en banc*) (citation omitted), *aff'd sub nom Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. _, 134 S. Ct. 2751 (2014). Success on the merits of Plaintiffs' claims will also demonstrate the need for a permanent injunction. *Randolph*, 170 F.3d at 857.

The Out-of-State Plaintiffs want to engage in debate on public issues in South Dakota by contributing to South Dakota ballot question committees, including the Chamber Committee. The Chamber Committee wants to engage in debate on public issues by receiving contributions from the Out-of-State Plaintiffs to fund their advocacy efforts. The remaining South Dakota Plaintiffs want the prohibited sources to continue to contribute to either advance their political interests or avoid financial harm. But the Ban prohibits these free speech rights and associational rights.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the

> First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (internal citations and quotation marks omitted). Indeed, when it comes to discussion of policy, "debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The First Amendment "remove[s] governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us," because nothing else is consistent "with the premise of individual dignity and choice upon which our political system rests." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) (internal quotation marks and citations omitted). Indeed, "the First Amendment safeguards an individual's right to participate in the public debate through political expression and political association." *Id*. When the Out-of-State Plaintiffs contribute money to a ballot question committee, they "exercise[] both of those rights: The contribution serves as a general expression of support for the [committee] and [its] views and serves to affiliate a person with [the committee]." *Id*. (internal quotation marks and citations omitted). South Dakota ballot question committees have "full First Amendment protection and are entitled to receive donations and make expenditures because they offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them." *Emily's List v. FEC*, 581 F.3d 1, 11 (D.C. Cir. 2009) (Kavanaugh, J.) (internal quotation marks and citation omitted).

These First Amendment rights to engage in political activity are "important" whether Plaintiffs modestly engage in the political process or have a more sophisticated role and spend large sums of money. *McCutcheon*, 572 U.S. at 203. "Either way, [the Plaintiffs are] participating in an electoral debate that [the Supreme Court has] recognized is integral to the operation of the

system of government established by our Constitution." *Id*. at 203-04 (internal quotation marks and citations omitted).

"The First Amendment burden is especially great for" the Out-of-State Plaintiffs because they do "not have ready access to alternative avenues for supporting their preferred [] policies" other than providing donations to the South Dakota ballot question committees, like the Chamber Committee. *Id*. at 205. The Out-of-State Plaintiffs are not members of the "select few" that can support a cause without contributing money. *Id*. And traveling to South Dakota or sending individuals there to volunteer for ballot question advocacy efforts "is not a realistic alternative." *Id*.

Indeed, the Ban prohibits core First Amendment activity—the giving and receiving of any amount of money for causes and campaigns Plaintiffs believe in. Accordingly, it fails every applicable level of First Amendment scrutiny.

i. The ban on core First Amendment activity fails strict scrutiny.

The Ban bars Plaintiffs from engaging in political activity by prohibiting their free speech and associational rights. *Id*. at 203 (making political contributions is an exercise of political speech and political association). The Ban prohibits the Out-of-State Plaintiffs from expressing their out-of-state viewpoint on ballot questions through a bar on contributions to the South Dakota ballot question committees and civil penalties on the Chamber Committee if it accepts contributions from prohibited sources. *See* S.D.C.L. § 12-27-18.2. Likewise, the other South Dakota Plaintiffs or their affiliated members are financially harmed due to a decrease in contributions from prohibited sources.

Accordingly, the Ban establishes a governmental preference for in-state speech as opposed to out-of-state speech.

> By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Citizens United v. FEC, 558 U.S. 310, 340-41 (2010).

Indeed, the Ban's viewpoint discrimination is an "egregious" and "more blatant" form of content discrimination and subject to strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230-31 (2015) (internal quotation marks and citations omitted). Therefore, the government must demonstrate the Ban is narrowly tailored to meet a compelling government interest. *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 784-85 (8th Cir. 2014) (a ban on political speech is subject to strict scrutiny).

Likewise, the burden the Ban places on associational rights is subject to strict scrutiny. The First Amendment protects the right of individuals to associate "for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). "Contributions 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. Berkeley*, 454 U.S. 290, 298 (1981). Accordingly, contribution limits can be "an impermissible restraint on freedom of association." *Id.*

To determine whether the Ban violates associational rights, the Court must "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons*, 520 U.S. at 358 (internal quotation marks and citations omitted). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance

a compelling state interest [*i.e.*, strict scrutiny]. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Green Party v. Martin*, 649 F.3d 675, 680 (8th Cir. 2011) (quoting *Timmons*, 520 U.S. at 358). Thus, the level of scrutiny applied depends on how severe the burden is on Plaintiffs' associational rights. *Id*.

Here, the Ban imposes a severe burden on the Out-of-State Plaintiffs associational rights and discriminates against them because they are not located in South Dakota. Consequently, they are prohibited them from associating with South Dakota ballot question committees, such as the Chamber Committee, through financial contributions. Because the Ban imposes a severe burden on Plaintiffs' associational freedoms in a discriminatory fashion, the state must show the Ban is narrowly tailored to advance a compelling state interest. *Id*. Therefore, strict scrutiny applies. *Id*.

The Ban's restrictions on free speech and associational rights fail strict scrutiny. South Dakota has no compelling governmental interest to limit Plaintiffs' political free speech and associational rights or discriminate against them in favor of the associational freedoms of South Dakota residents or political committees. And a ban on these political activities, by its very nature, is not narrowly tailored. Accordingly, the Ban fails strict scrutiny and is unconstitutional.

ii. The Ban's zero-dollar contribution limit fails "closely drawn" scrutiny.

The Ban limits the Out-of-State Plaintiffs' ability to make political contributions and South Dakota ballot question committees' ability to receive them. Under the Ban, the Out-of-State Plaintiffs' contributions to the South Dakota ballot question committees are prohibited, *i.e.*, limited to zero-dollars, and the law imposes civil penalties on ballot question committees, like the Chamber Committee, if the contribution limit is violated. *See* S.D.C.L. § 12-27-18.2.

Financial contributions to support a ballot measure committee are a substantial form of political speech. *See Citizens Against Rent Control*, 454 U.S. at 298. "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 and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

Indeed, contribution limits "automatically affect[] expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure." *Citizens Against Rent Control*, 454 U.S. at 299. Because contribution limits generally allow a "symbolic expression of support" without "infring[ing] the contributor's freedom to discuss candidates and issues," these laws must pass closely drawn scrutiny. *McCutcheon*, 572 U.S. at 197; *Buckley*, 424 U.S. at 21. *See also Free & Fair Election Fund v. Mo. Ethics Comm'n*, 903 F.3d 759, 763 (8th Cir. 2018) (referring to closely drawn scrutiny as "exacting scrutiny").

Under closely drawn scrutiny, the state must show that the law serves a "sufficiently important interest" and employs means "closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon*, 572 U.S. at 197; *Buckley*, 424 U.S. at 25. *See also Free & Fair Election Fund*, 903 F.3d at 763. "A restriction on First Amendment freedoms is unconstitutional on its face if no set of circumstances exists under which the restriction would be valid." *Id.* (internal quotation marks, brackets, and citations omitted).

"There is only one legitimate state interest in restricting campaign finances: 'preventing corruption or the appearance of corruption.'" *Id.* (quoting *McCutcheon*). "This interest is limited to preventing 'only a specific type of corruption—'*quid pro quo*' corruption' or its appearance."

Id. (quoting *McCutcheon*). *Quid pro quo* corruption requires "the exchange of a thing of value for an 'official act.'" *McDonnell v. United States*, 579 U.S. _, _, 136 S. Ct. 2355, 2372 (2016).

> A large donation that is not made "in connection with an effort to control the exercise of an *officeholder's* official duties, does not give rise to . . . *quid pro quo* corruption." Similarly, the general risk that a donor, through large donations, will "garner influence over or access to elected officials or political parties," either in fact or in appearance, is insufficient to create *quid pro quo* corruption.

Free & Fair Election Fund, 903 F.3d at 763 (quoting *McCutcheon*) (emphasis added). "Instead, 'the risk of *quid pro quo* corruption is generally applicable only to the narrow category of money gifts that are directed, in some manner, to a *candidate or officeholder*.'" *Id*. at 764 (quoting *McCutcheon*) (emphasis added).

In this case, it is impossible for the Ban to survive closely drawn scrutiny. The Ban applies to non-resident and non-South Dakota corporation contributions to South Dakota ballot question committees—not a political candidate or officeholder. *See* S.D.C.L. § 12-27-18.2. The Out-of-State Plaintiffs' contributions to South Dakota ballot question committees have no risk of giving them control over an officeholder's official duties and, therefore, do not give rise to *quid pro quo* corruption. *Free & Fair Election Fund*, 903 F.3d at 763. There is also no risk that the Out-of-State Plaintiffs' contributions to South Dakota ballot question committees will help them garner influence over or access to elected officials or political parties either in fact or in appearance. *Id*.

Fundamentally, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control*, 454 U.S. at 299. A donor cannot exchange a contribution for a *quid pro quo* favor from a ballot measure or even gain influence with a statute by contributing to its enactment. "The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) (citations omitted). "[T]he concern of a political *quid pro quo*

for large contributions, which becomes a possibility when the contribution is to an individual candidate, is not present when the contribution is given to a political committee or fund that by itself does not have legislative power." *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994).

The Ban does not regulate *quid pro quo* corruption. Regulating *quid pro quo* corruption is the only "legitimate state interest in restricting campaign finances." *Free & Fair Election Fund*, 903 F.3d at 763. Because the Ban restricts contributions to ballot question committees and not candidates or office holders to prevent *quid pro quo* corruption, there are no set of circumstances where the Ban can be valid. *Id.* Consequently, tailoring analysis is unnecessary and the Ban is facially unconstitutional. *Id.*

B. The Ban violates the Commerce Clause.

The Ban also fails under the Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3; *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018). The Out-of-State Plaintiffs wish to engage in interstate commerce by making financial contributions across state lines. The Chamber Committee wishes to engage in interstate commerce by receiving contributions from the Out-of-State Plaintiffs, and other similarly situated, across state lines. The remaining South Dakota Plaintiffs and their members want the free flow of this type of commerce to avoid financial harm. But the Ban discriminates against this form of interstate commerce because the contributions are not from a South Dakota resident or entity.

Congress has the sole power to regulate interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3; *Wayfair*, 138 S. Ct. at 2091; *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). Consequently, the Commerce Clause forbids the states from "discriminat[ing] against or burden[ing] the interstate flow of articles of commerce." *Or. Waste Sys.*, 511 U.S. at 98.

"This 'negative' aspect of the Commerce Clause is often referred to as the 'Dormant Commerce Clause' and is invoked to invalidate overreaching provisions of state regulation of

commerce." *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 911 (7th Cir. 2003). Plainly, the Dormant Commerce Clause forbids states from enacting "laws that discriminate against or unduly burden interstate commerce." *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003).

Here, the Ban unjustifiably discriminates against or burdens the interstate flow of articles of commerce, *i.e.* financial contributions, from out-of-state individuals and entities to South Dakota ballot question committees.

The Supreme Court has held that transferring money across state lines is interstate commerce. *See United States v. Shubert*, 348 U.S. 222, 226 (1955) (interstate commerce is the "continuous and indivisible stream of intercourse among the states involving the transmission of large sums of money. . . ." (internal quotation marks and citation omitted)). *See also United States v. Bailey*, 115 F.3d 1222, 1230 (5th Cir. 1997) (noting that nothing could be more commercial than "the transfer of money from one hand to another."). Additionally, the Eighth Circuit Court of Appeals held that contributions to non-federal political committees is commerce and can be regulated by Congress under the Commerce Clause. *See Egan v. United States*, 137 F.2d 369, 372-75 (8th Cir. 1943) ("The proposition that political contributions are not commerce and are not subject to regulation by Congress is not a valid objection to the Act."). Therefore, because the Ban regulates interstate commerce, it is subject to scrutiny under the Commerce Clause to determine whether the law has only an incidental effect on interstate commerce or discriminates against interstate commerce. *See Or. Waste Sys.*, 511 U.S. at 99.

"State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity." *Wayfair*, 138 S. Ct. at 2089 (quoting *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (internal quotation marks and citations omitted)). If a state law "is indeed discriminatory, it is *per*

se invalid unless the State can demonstrate, under *rigorous scrutiny*, that [it has] no other means to advance a legitimate local interest." *Jones v. Gale*, 470 F.3d 1261, 1270 (8th Cir. 2006) (emphasis added) (internal quotation marks, brackets, and citations omitted). Indeed, "when a state statute directly regulates or discriminates against interstate commerce, … , [the Supreme Court has] generally struck down the statute without further inquiry." *Granholm*, 544 U.S. at 487 (internal quotation marks and citations omitted). If a law is discriminatory, the state must show it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id*. at 489 (internal quotation marks and citations omitted). *See also Jones*, 470 F.3d at 1270. Accordingly, if a law is discriminatory and the state cannot meet its burden, then the law is unconstitutional and no further analysis is required. *See Hazeltine*, 340 F.3d at 597 n.9; *Jones v. Gale*, 405 F. Supp. 2d 1066, 1078 (D. Neb. 2005).

'"[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys*., 511 U.S. at 99. "A law overtly discriminates against interstate commerce if it is discriminatory on its face, if it has a discriminatory purpose, or if it has a discriminatory effect." *Jones*, 470 F.3d at 1267 (internal quotation marks and citations omitted).

There is direct evidence that the Ban is discriminatory on its face, in its purpose, and in its effect. *Jones*, 470 F.3d at 1267. Facially, the text of the law explicitly demonstrates discrimination against out-of-state persons and political committees by prohibiting them from contributing to a South Dakota ballot question committee.

Consequently, the text of the law also reveals its discriminatory purpose. *See id.* at 1269 (the text of a ballot measure can reveal its discriminatory purpose). The discriminatory purpose of the law is revealed by its supporters in the "pro-con" statement for 2018 ballot questions

complied by the Secretary of State for South Dakota voters. *See* 2018 Ballot Question Pamphlet, Initiated Measure 24.[3] The "pro" argument states, "Support initiated measure 24 to ban out-of-state financial contributions to ballot committees. Let's protect a SOUTH DAKOTAN's right to petition the people, but deny that privilege to New York, Massachusetts and California business interests." *Id*. As in *Hazeltine*, this is direct evidence of the Ban's discriminatory purpose and, along with the text of the law, "leads to a single conclusion: [the Ban] was motivated by a discriminatory purpose." 340 F.3d at 593-94, 596.

Finally, the Ban has a discriminatory effect because it prevents out-of-state individuals and political committees from making financial contributions to in-state ballot question committees.

The evidence shows the Ban is discriminatory on its face, has a discriminatory purpose, and has a discriminatory effect. *See Jones*, 470 F.3d at 1267. Because the Ban overtly discriminates against interstate commerce, *id*., the Court "must strike it down as unconstitutional" unless the Defendants can demonstrate under "the 'strictest scrutiny'" that there is "no other method by which to advance their legitimate local interests." *Hazeltine*, 340 F.3d at 596-97 (citing *Or. Waste Sys*., 511 U.S. at 101; Arizona *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)).

The Defendants' task is impossible. Typically, "[t]he focus of this test of the 'strictest scrutiny'" is "whether reasonable non-discriminatory alternatives exist to advance the [state's] interests." *Id*. at 597. But Defendants must first establish the requisite legitimate local interest for the Ban. *See Maine v. Taylor*, 477 U.S. 131, 140 (1986) ("the statute must serve a legitimate local purpose, *and* the purpose must be one that cannot be served as well by available nondiscriminatory means." (emphasis added)). Indeed, because the Ban overtly discriminates against interstate

[3] Available at: https://sdsos.gov/elections-voting/assets/2018BQPamphlet.pdf.

commerce, "the burden falls on the [Defendants] to demonstrate *both* that the statute serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means." *Id*. at 138 (emphasis added).

However, there is no legitimate local interest for the Ban. The law does not provide any economic, health, or safety benefits for the state. The sole purpose of the law is to prevent out-of-state individuals and entities from engaging in interstate financial transactions with South Dakota ballot question committees to further their political interests. This is patently illegitimate. "Without a legitimate state purpose, any burden on interstate commerce imposed by the [Ban] violates the Commerce Clause." *Solis v. Miles*, 524 F. Supp. 1069, 1072 (S.D. Tex. 1981).

The purpose of the Commerce Clause is to preserve the right to engage in interstate commerce without interference from state law. The Commerce Clause protects the right to participate in financial transactions across state lines regardless of participant's physical location. The Ban exists to prevent Plaintiffs' desired interstate commercial transactions. Defendants have no legitimate purpose for the Ban. Therefore, the Ban is unconstitutional under the Commerce Clause.

II. Plaintiffs will suffer irreparable harm without injunctive relief.

Preliminary injunctive relief is warranted when "irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22. Under the Ban, there is a prohibition on core First Amendment activity and impermissible interference with interstate commerce. The Supreme Court has directly held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal citation and quotation marks omitted). And "under *Elrod* and in the Eighth Circuit, a deprivation of constitutional rights generally constitutes irreparable injury." *Carhart v. Smith*, 178

F. Supp. 2d 1048, 1062 (D. Neb. 2001). Accordingly, a violation of the Commerce Clause also constitutes irreparable harm. *Id*. *See also Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 168 (S.D.N.Y. 1997) ("Deprivation of the rights guaranteed under the Commerce Clause constitutes irreparable injury.").

III. The balance of equities favors Plaintiffs.

The Ban prevents the Out-of-State Plaintiffs from contributing money to causes they believe in because they are, respectively, a Florida resident and a corporation organized outside of South Dakota. The Chamber Committee cannot receive contributions from the Out-of-State Plaintiffs, and others similarly situated, because of their location. The remaining South Dakota Plaintiffs or their members are financially harmed due to the Ban's frustration of the First Amendment. But while this case involves very real and important constitutional rights, it examines only a small portion of the state's campaign finance laws. All other applicable campaign finance disclosure and reporting elements remain in place. At issue here is a very new law that goes beyond disclosure regulation and imposes an outright ban on activity. Therefore, while public interest in upholding Plaintiffs' rights is great, the impact on South Dakota's campaign finance regime is small.

IV. The public interest is served by protecting constitutional rights.

Because no party has an interest in the enforcement of an unconstitutional law, the public interest is best protected by issuing preliminary and permanent injunctions to protect constitutional rights. *See, e.g.*, *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (in a First Amendment case, the Eighth Circuit held "it is always in the public interest to protect constitutional rights.") (overruled in part on other grounds). *See also G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights"); *Smith v. South Dakota*, 781 F. Supp. 2d 879, 888 (D.S.D. 2011) (applying *G & V Lounge*).

Consequently, this factor weighs in favor of preliminary and permanent injunctive relief for Plaintiffs.

CONCLUSION

For the forging reasons, Plaintiffs respectfully request the Court enter preliminary and permanent injunctions against the Ban.

REQUEST FOR ORAL ARGUMENT

Pursuant to L.R. 7.1(C), Plaintiffs respectfully request oral argument on this matter either in-person or telephonically. This motion involves important issues arising under the First Amendment and the Commerce Clause. The complexity of the pertinent case law suggests that oral argument will be helpful to the Court.

Dated: April 25, 2019

Respectfully submitted,

/s/ Marty J. Jackley

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CERTIFICATE OF COMPLIANCE

In accordance with Local Rule 7.1(b)(1), I certify that Plaintiffs' Memorandum in Support of Preliminary and Permanent Injunctions complies with the requirements set forth in the Local Rules. The brief was prepared using Microsoft Word 2016, Times New Roman (12 point) and contains 5,579 words, excluding the caption and signature block. I have relied on the work count of the word-processing program to prepare this certificate.

/s/ Marty J. Jackley
Marty J. Jackley

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2019, a true and correct copy of the Memorandum in Support of Preliminary and Permanent Injunctions was served by United States Postal Service, postage pre-paid, on the following individuals:

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