IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

John Doe,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:15-cv-
	)	
Charles Weedman, et al,	)	
	)	
Defendants.	)	

Suggestion in Support of Motion for Temporary Restraining Order and Motion for Preliminary Injunction

I. BACKGROUND

Plaintiff is a resident of Ferguson, Missouri. *Verified Complaint* at ¶ 10. Although not affiliated with any candidate or campaign, Plaintiff supports Lee Smith, a candidate for city council from Ferguson's third ward. *Id.* at ¶¶ 15, 17. The election will be held on April 7, 2015. *Id.* at ¶ 14.

At his own expense, Plaintiff has created a handbill articulating the reasons why he believes that residents should vote in favor of Smith and against Smith's opponent, Wesley Bell. *Id.* at ¶ 18. The handbill does not include Plaintiff's name or address. *Id.* at ¶ 19. He did not include his name or address on the handbill because he fears retaliation from Ferguson officials based on the content of the handbill. *Id.* at ¶ 20. He also believes that he has a constitutionally protected right to engage in anonymous political speech through the distribution of handbills that do not identify him. *Id*.

Doe has not yet published, circulated, or distributed the handbill. *Id.* at ¶ 21. The reason he has not done so is that state law prohibits any person from publishing, circulating, or distributing any printed material, including handbills, related to a candidate for public office

unless the face of the printed matter identifies the name and address of the individual paying for the printed matter. *Id.* at ¶ 22 (citing Mo. Rev. Stat. § 130.031.8). A violation of the disclosure requirements of section 130.031.8 is class A misdemeanor, punishable by a fine and jail time. *Id.* at ¶ 23 (citing Mo. Rev. Stat. § 130.081.1).

Because Plaintiff is chilled from publishing, circulating, and distributing the handbills, he seeks prospective relief to prevent Defendants and anyone acting in concert with them from enforcing Missouri Revised Statute section 130.031.8. *Id.* at ¶ 25. The upcoming election will occur before this matter can be considered on the merits, so Plaintiff seeks a temporary restraining order and preliminary injunction.

II. ARGUMENT

A. Standard for a Preliminary Injunction and Temporary Restraining Order

In considering a motion for preliminary injunction, this Court must determine whether: (a) Plaintiff is likely to prevail on the merits; (b) there exists a threat of irreparable harm to Plaintiff absent the injunction; (c) the harm to Plaintiff outweighs the injury that granting the injunction would inflict upon Defendants; and (d) the preliminary injunction is in the public interest. *See Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc); *accord Pence v. City of St. Louis, Mo.*, 958 F. Supp. 2d 1079, 1082 (E.D. Mo. 2013). The standard for a temporary restraining order is the same as the standard for a preliminary injunction. *See Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991).

"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." *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc) (internal quotation marks and citation omitted). "In a First Amendment case, ... the

likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012) (en banc).

B. Plaintiff is likely to prevail on the merits.

Plaintiff is likely to succeed on the merits of his as-applied challenge to the disclosure requirements of Missouri Revised Statutes section 130.031.8.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "The regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment." *281 Care Comm. v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995)). "Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (Thomas, J. concurring) (internal quotations omitted). "Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it." *Republican Party of Minn. v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (en banc); *see also McIntyre*, 514 U.S. at 347.

The special protection afforded political speech applies to speech about the qualification of candidates for office. In *McIntyre*, the Court explained:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Although First Amendment protections are not confined to the exposition of ideas, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of

> governmental affairs, of course including discussions of candidates. This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.

McIntyre, 514 U.S. at 346 (quotation and internal quotations omitted). Moreover, "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id*. at 342.[1] Any restriction on anonymous discussion of candidates, therefore, is subject to exacting scrutiny and will be upheld only if it is narrowly tailored to serve an overriding state interest. *Id*. at 347.

Section 130.031.8 prohibits Doe from distributing handbills that do not disclose his name and address. As relevant to this case, Missouri's statute is not distinguishable from the Ohio statute held unconstitutional in *McIntyre*, except that it provides for criminal penalties, including the possibility of jail, in addition to a fine.[2]

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[1] Although "where 'the identity of the speaker is an important component of many attempts to persuade,' the most effective advocates have sometimes opted for anonymity." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995) (quoting *City of Ladue v. Gilleo,* 512 U.S. 43, 56 (1994)). This "respected tradition of anonymity in the advocacy of political causes," *id*., "is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed 'Publius.'" *Id*. at 343 n.6.

[2] The Ohio law provided:

> "No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such

Section 130.031.8 cannot survive the exacting scrutiny required by the Constitution. The two interests that Missouri might identify were rejected by the Court in *McIntyre*. There, Ohio argued that its interest in providing the electorate with relevant information and its interest in preventing fraudulent and libelous statements were sufficiently compelling to justify the anonymous speech ban. But the Court found the first interest plainly insufficient and the restriction not narrowly tailored to the second.

The Court found Ohio's informational interest plainly insufficient because,

> [i]nsofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document,…the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude.…The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message.

McIntyre, 514 U.S. at 348-49.

In contrast, the Court did find Ohio's interest in preventing fraud and libel "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *Id*. at 349. But it also found that, while legitimate, the ancillary benefits did not justify the broad prohibition. *Id*. at 351. In other words, the restriction was not narrowly tailored. Even so, Plaintiff is likely to prevail given the Eighth

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> form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor."

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 338 n.3 (1995) (quoting Ohio Rev. Code Ann. § 3599.09(A) (1988)).

Circuit's recent holding that a statute prohibiting false campaign speech violates the First Amendment. *281 Care Comm. v. Arneson*, 766 F.3d 774, 777 (8th Cir. 2014).

C. Remaining *Dataphase* factors weigh in favor of a preliminary injunction and temporary restraining order.

Although for violations of First Amendment rights a showing that the plaintiff is likely to prevail is sufficient for the issuance of a preliminary injunction, *Swanson*, 692 F.3d at 870, in this case the other *Dataphase* factors also weigh heavily in favor of a preliminary injunction.

Permitting continued enforcement of the disclosure requirements will cause irreparable harm to Plaintiff. It is settled law that a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality).

And, any injury to Defendants from not being able to enforce a likely unconstitutional statute is minimal and cannot outweigh the substantial harm incurred by Plaintiff. "The balance of equities … generally favors the constitutionally-protected freedom of expression." *Nixon*, 545 F.3d at 690.

Finally, "[i]t is always in the public interest to protect constitutional rights." *Id*. at 689; *see Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1004 (8th Cir. 2012) (noting that a likely First Amendment violation favors the issuance of an injunction); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (finding that the "public interest favors protecting core First Amendment freedoms").

III. CONCLUSION

For the forgoing reasons, this Court should enter a preliminary injunction and temporary restraining order.

Respectfully submitted,

/s/ Anthony E. Rothert
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Certificate of Service

A copy of the foregoing has been sent by first-class mail on March 18, 2015, to each Defendant, addressed to 3411A Knipp Drive, Jefferson City, Missouri 65109. A courtesy copy is also being emailed to general counsel for the Missouri Ethics Commission and the Missouri Attorney General's office at the email addresses they have provided to counsel for Plaintiff.

/s/ Anthony E. Rothert