

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA  
IN AND FOR MIAMI-DADE COUNTY  
GENERAL JURISDICTION DIVISION

FLORIDA RED & BLUE, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 ) CASE NO: 08-65948 CA 21  
 FLORIDA4MARRIAGE.ORG, *et al.*, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**MEMORANDUM OF LAW IN OPPOSITION TO  
PLAINTIFF'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF**

Mathew D. Staver  
FL Bar No. 0701092  
Anita L. Staver  
FL Bar No. 0611131  
Horatio G. Mihet  
FL Bar No. 026581  
LIBERTY COUNSEL  
Post Office Box 540774  
Orlando, FL 32854-0774  
(800) 671-1776 - Telephone  
(407) 875-0770 - Telefacsimile

*Attorneys for Defendants Florida4Marriage.org, Florida Family Action, Inc., Florida Family  
Policy Council, Inc., and John Stemberger*

**TABLE OF CONTENTS**

INTRODUCTION .....	1
BACKGROUND FACTS .....	2
LAW AND ARGUMENT .....	4
I. THE UNPRECEDENTED, EXTRAORDINARY RELIEF SOUGHT BY PLAINTIFF CARRIES AN EXACTING BURDEN OF PROOF WHICH PLAINTIFF CANNOT POSSIBLY OVERCOME. ....	4
II. BECAUSE PLAINTIFF’S LAWSUIT IS FRIVOLOUS, PLAINTIFF CANNOT SHOW ANY, MUCH LESS A SUBSTANTIAL, LIKELIHOOD OF SUCCESS ON THE MERITS. ....	6
A. Florida Red & Blue Has No Right to Bring this Private Cause of Action for Alleged Violations of Florida’s Campaign Finance Law, Because that Law Vests Enforcement Powers <i>Exclusively</i> in the Florida Elections Commission. ....	7
B. Florida Red & Blue Has No Standing to Bring this Action Because it Can Show No Particularized Injury Separate and Distinct from the General Public. ....	10
C. Even if Florida Red & Blue Could Bring this Action, it Could Not Possibly Prevail Because the Provisions of the Campaign Finance Law it Seeks to Enforce Have Been Declared Unconstitutional. ....	11
D. Even if Florida Red & Blue Could Bring this Action, and the Campaign Finance Law Could be Enforced, Florida Red & Blue Has No Evidence that Defendants Have Violated that Law. ....	14
E. Even if Florida Red & Blue Could Bring this Action, Enforce the Campaign Finance Law and Prove that Defendants Violated it, the Injunction it Seeks – Complete Suppression of All Political Speech by Defendants on the Eve of an Election – is Unconstitutional and Cannot be Issued as a Matter of Law. ....	15
III. PLAINTIFF CANNOT SHOW IRREPARABLE HARM. ....	18
A. There is No Emergency – Florida Red & Blue Has Known About the Facts it Alleges in this Lawsuit for Months, but Has Willfully Delayed the Filing of this Frivolous Lawsuit Until the Eve of the Election. ....	18

B.	Florida Red & Blue Has an Adequate Administrative Remedy which it Has Failed to Exhaust. ....	19
1.	<i>Florida Red &amp; Blue has an adequate administrative remedy provided by Chapter 106, thus it cannot show irreparable harm.</i> .....	19
2.	<i>Florida Red &amp; Blue's failure to exhaust the available administrative remedy operates as a separate and independent bar to this action.</i> .....	20
C.	There is No Irreparable Harm that an Injunction Could Avoid. ....	22
D.	The Injunction Sought by Florida Red & Blue Impermissibly Seeks to Change – Not to Preserve – the <i>Status Quo</i> . ....	22
IV.	THE BALANCE OF HARMS WEIGHS HEAVILY IN FAVOR OF DEFENDANTS. ....	23
V.	THE INJUNCTION SOUGHT BY PLAINTIFF VIOLATES THE PUBLIC INTEREST. ....	25
VI.	EVEN IF THE COURT COULD CONSIDER AN INJUNCTION, IT WOULD HAVE TO REQUIRE AN ENORMOUS BOND TO ADEQUATELY PROTECT DEFENDANTS' INTERESTS. ....	26
VII.	FLORIDA RED & BLUE SHOULD BE SANCTIONED HARSHLY FOR ITS ATTEMPT TO USE A FRIVOLOUS LAWSUIT TO SUBVERT THE DEMOCRATIC PROCESS AND INFLUENCE THE OUTCOME OF AN ELECTION. ....	27
	CONCLUSION .....	28

## INTRODUCTION

Florida Red & Blue's election eve lawsuit suffers from so many deficiencies that it is objectively without merit. By filing this campaign finance action as a private litigant, Florida Red & Blue willfully violated the clear language of Chapter 106 and the overwhelming weight of Florida law, including binding precedent that its own counsel helped to establish. Moreover, Florida Red & Blue lacks standing, and has failed to exhaust its administrative remedies. The provisions of the Campaign Finance Law which Florida Red & Blue seeks to enforce are unconstitutional, as is the sweeping and unprecedented prior restraint remedy it seeks—the ejection of Defendants' speech from this election through the freezing of all bank accounts and removal of all campaign advertising.

Compounding the procedural infirmities of its suit, Florida Red & Blue has no admissible evidence even to suggest that Defendants have actually violated the Campaign Finance Law. Its Complaint is unsworn and unverified, and does not contain any exhibits other than photographs of two billboards on public display. Its Emergency Motion for Injunctive Relief is likewise unsworn, unsupported by any Affidavits and devoid of any exhibits or proofs. Indeed, Florida Red & Blue seeks to base its entire claim on a handful of facts and figures publicly disclosed by Defendants since 2005. Needless to say, Florida Red & Blue cannot meet any of the elements required for a temporary injunction, much less overcome its high burden of proof.

To make matters worse, Florida Red & Blue has manufactured an “emergency” by sitting on publicly available facts and figures for months, and filing this lawsuit less than one week before the election. Immediately upon filing the suit, Florida Red & Blue trumpeted it and its unsworn allegations to media outlets across the state. This carefully calculated timing allowed for maximum media coverage of Plaintiff's unsworn allegations in the week before the election, when voters' attention to the campaigns was at its peak, while precluding a determination of the "merits" of

Plaintiff's suit until after the election.

Any one of these deficiencies or acts alone should rightfully subject Florida Red & Blue to litigation sanctions. Taken together, they leave no doubt that Florida Red & Blue's lawsuit is objectively meritless and frivolous. The Court should not countenance this thinly veiled attempt to exploit the judicial process for a political stunt aimed at swaying public opinion in a hotly contested election. Instead, the Court should deny Florida Red & Blue's Emergency Motion for Injunctive Relief, dismiss its frivolous lawsuit, and sanction Florida Red & Blue harshly for its conduct.

### **BACKGROUND FACTS**

On November 4, 2008, voters in Florida will have the opportunity to vote on Proposed Constitutional Amendment 2, also known as the Marriage Protection Amendment, which would provide constitutional protection to the existing statutory definition of marriage as between one man and one woman. This will be the culmination of a long and hard-fought campaign between the opponents and proponents of Amendment 2, which included litigation over the language of the Amendment that has since been settled by the Florida Supreme Court.

The three Defendant entities in this action are proponents of Amendment 2.<sup>1</sup> Defendant Florida4Marriage.org is the political committee organized to sponsor Amendment 2. (Compl., ¶ 8.) Florida Family Action, Inc. is a not-for-profit organization formed under Section 501(c)(4) of the Internal Revenue Service Code for the purpose of promoting marriage and family through legislation, litigation and education. (*Id.* at ¶ 9.) Defendant Florida Family Policy Council, Inc. is also a not-for-profit organization formed under Section 501(c)(3) of the Internal Revenue Service Code to educate,

---

<sup>1</sup> Plaintiff has sued a fourth purported entity, "SupportMarriage.org" and alleges that it "is an entity formed to promote the passage of proposed Amendment 2." However, according to the records published by the Florida Department of State, Division of Corporations, on the sunbiz.org website, "SupportMarriage.org" is not an entity but merely a fictitious name owned by a non-profit religious organization that is not a party to this lawsuit. It is unclear whether Plaintiff has achieved service of process on any "SupportMarriage.org" entity.

inform and serve as an advocate for issues impacting Florida's families. (*Id.* at ¶ 10.) The various individual defendants are representatives and board members of Florida Family Action, Inc. and Florida Family Policy Council, Inc.<sup>2</sup>

Neither the entity nor the individual Defendants are alleged to have been involved in express advocacy or the equivalent thereof on behalf of individual candidates. Plaintiff alleges and concedes that each Defendant has engaged solely in issue advocacy, specifically, promoting the passage of the Marriage Protection Amendment. (Compl. ¶¶ 8-18.)

Plaintiff describes itself as a registered political committee and a “bi-partisan” organization dedicated to defeating the passage of the Marriage Protection Amendment. (Compl. ¶ 7.) Plaintiff claims to have been in existence since April 2007, and further claims that it has “actively followed the operation of defendants” since that time. (*Id.* at ¶ 21.)

The crux of Plaintiff's complaint is that Defendants have made contributions to the effort to pass Amendment 2 without following the registration and disclosure requirements of the Campaign Finance Law, Fl. Stat. § 106 (2008). Plaintiff principally objects to in-kind contributions made to Florida4Marriage.org by the other Defendants, allegedly without registration of the other Defendants or disclosure of their donors. (Compl. ¶¶ 35-49.) According to Plaintiff, the in-kind contributions to which it now objects were all disclosed by Florida4Marriage.org to the Division of Elections, some as early as 2005 and none later than October 1, 2008. (*Id.* at ¶¶35, 37, 41.)

Despite following Defendants' “operation” since April 2007, and despite having constructive or actual knowledge of Florida4Marriage.org's public campaign disclosures dating back to 2005, Plaintiff did not file this lawsuit until October 29, 2008, less than one week before the November 4,

---

<sup>2</sup> Plaintiff has sued a “Tom Messer,” and alleges that he is a representative of the “SupportMarriage.org” organization. On information and belief, Plaintiff has not effectuated service of process on Mr. Messer or any of the other individual defendants besides John Stemberger.

2008 election. Neither Plaintiff's Complaint, nor its Emergency Motion for Injunctive Relief, is verified, sworn or accompanied by any affidavit. Neither pleading contains any exhibit to back up any of the unverified and unsworn statements of Plaintiff's counsel. The only explanation offered by Plaintiff for failing to act months ago is comprised within seven words in the entire 22-page Complaint and 4-page Emergency Motion: "plaintiff has only just learned of it." (Compl. at ¶ 36.) Plaintiff does not tell the Court exactly when it supposedly learned of this "it." (*Id.*)

The unsworn and unverified "facts" presented by Plaintiff fall far short of the high standard for obtaining the sweeping injunctive relief sought.

### LAW AND ARGUMENT

#### **I. THE UNPRECEDENTED, EXTRAORDINARY RELIEF SOUGHT BY PLAINTIFF CARRIES AN EXACTING BURDEN OF PROOF WHICH PLAINTIFF CANNOT POSSIBLY OVERCOME.**

Temporary injunctions are highly disfavored even where they do not threaten the paramount constitutional right to freedom of speech. *Florida High School Activities Ass'n v. Kartenovich*, 749 So.2d 1290, 1291 (Fla. 3d DCA 2000) ("A temporary injunction is an extraordinary and drastic remedy which should be sparingly granted."); *Jennings v. Perrine Fish Market, Inc.*, 360 So.2d 434, 435 (Fla. 3d DCA 1978) ("the issuance of a temporary injunction is an extraordinary and drastic remedy which should be granted sparingly and with caution only after the moving party has proven sufficient facts entitling it to relief.").

To justify such "extraordinary" and "drastic" relief, the moving party must show: "(1) a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) a substantial likelihood of success on the merits; (3) that the threatened injury to the petitioner outweighs any possible harm to the respondent, and (4) that the granting of a temporary injunction will not disserve the public interest." *Kartenovich*, 749 So.2d at 1291; *NRD Investments, Inc. v. Velazquez*, 976 So.2d

1, 3 (Fla. 3d DCA 2007) (same). The burden of proof rests squarely on the movant. *Airport Executive Towers v. CIG Realty, Inc.*, 716 So.2d 311, 313 (Fla. 3d DCA 1998). That burden is appropriately high in light of the drastic nature of the relief – the movant must prove each of the requisite elements with “clear, definite, and unequivocally sufficient factual findings before the court can enter a temporary injunction.” *Colucci v. Kar Kare Automotive Group, Inc.*, 918 So.2d 431, 438 (Fla. 4th DCA 2006).

Were Plaintiff seeking only a run-of-the-mill injunction, it could not meet this high evidentiary threshold on the unsworn facts alleged in its Complaint. Yet the injunction sought by Plaintiff is anything but ordinary – it is a profound intrusion on Defendants’ constitutionally guaranteed right of free speech, carefully timed on the eve of a close election, that is unprecedented in both its scope and far reaching effects. Plaintiff brazenly asks this Court to interfere in this election by freezing all of Defendants’ funds and removing all of Defendants’ campaign advertisements, including billboards, print, radio and television media. Plaintiff thus seeks nothing short of shutting down Defendants’ entire speech and operations, so that Plaintiff’s own deceptive campaign advertising goes unaddressed, un rebutted and unchallenged in the critical time that remains before the ballots are cast.

Such extraordinary and unparalleled relief, to the extent it is ever available under any circumstances, demands the highest and strictest of proofs. It is “one of the most extraordinary remedies known to our jurisprudence,” which cannot be granted unless the evidence is “manifestly overwhelming.” *Republican Party of Florida v. Florida Elections Commission*, 658 So.2d 653, 657 (Fla. 1st DCA 1995). As shown below, even if Plaintiff’s unsupported allegations could be aired in this Court – which they cannot – they fall far, far short of the “overwhelming” proof that could justify ejecting Defendants out of this election and handing Plaintiff an undeserved, judicially-

sanctioned election result.

But, fortunately for our democratic process, Plaintiff's attempt to interfere with this election fails right out of the starting gate – for several reasons – such that this Court need not even entertain the “merits” of Plaintiff's October surprise.

**II. BECAUSE PLAINTIFF'S LAWSUIT IS FRIVOLOUS, PLAINTIFF CANNOT SHOW ANY, MUCH LESS A SUBSTANTIAL, LIKELIHOOD OF SUCCESS ON THE MERITS.**

The infirmities in Plaintiff's lawsuit are many, and each of them is fatal to both the lawsuit itself and the injunctive relief. First, Florida Red & Blue has no right to bring a private cause of action under the Campaign Finance Law, because that law vests enforcement authority exclusively in the Florida Elections Commission and other government bodies. This precept is universally established and not subject to reasonable dispute. Plaintiff's own counsel has helped to create the precedent which binds this Court to so hold.

Second, Florida Red & Blue has no standing to bring this cause of action because it cannot show any particularized injury separate and distinct from the general public.

Third, the provisions of the Campaign Finance Law which Plaintiff seeks to enforce have been declared unconstitutional, and the Florida Elections Commission is prohibited by a federal court injunction from enforcing those provisions against the Defendants before this Court.

Fourth, Florida Red & Blue has adduced no admissible evidence which could even suggest that Defendants have violated the Campaign Finance Law. The unsworn, unverified words of counsel contained in the Complaint and Emergency Motion cannot come close to the “manifestly overwhelming” standard required for the imposition of the drastic relief sought.

Fifth, Florida Red & Blue has failed to exhaust the administrative remedies afforded by the Campaign Finance Law. Even if a private cause of action existed under that statute, which it does not, it would not materialize until Plaintiff exhausts the administrative remedies thereunder. Binding precedent holds that when it comes to the constitutionally-guaranteed freedom of political speech, the imminence of an election is no excuse for supplanting the extensive enforcement mechanism provided within the Campaign Finance Law.<sup>3</sup>

Sixth and finally, the sweeping relief sought by Plaintiff has likewise been declared unconstitutional under binding Florida precedent.<sup>4</sup>

**A. Florida Red & Blue Has No Right to Bring this Private Cause of Action for Alleged Violations of Florida's Campaign Finance Law, Because that Law Vests Enforcement Powers *Exclusively* in the Florida Elections Commission.**

The clear language of Florida's Campaign Finance Law, Fl. Stat. § 106 (2008), as well as the universal application of that law by Florida Courts, make on thing unmistakably clear: private litigants have no cause of action for alleged violations of Chapter 106. Instead, violations of the statute are classified as crimes ranging from misdemeanors to felonies. *See e.g.*, § 106.071(4) (first degree misdemeanor); § 106.08(7)(a) (same); §106.08(7)(b) (third degree felony); § 106.09(2)(a) (first degree misdemeanor); § 106.09(2)(b) (third degree felony); § 106.1439(2) (first degree misdemeanor); § 106.19(1) (same).

“Jurisdiction to investigate and determine violations of [Chapter 106] is vested in the Florida Elections Commission, [and in] any other officers or agencies of government empowered by law to investigate, act upon, or dispose of alleged violations of this code.” § 106.25(1) (emphasis added). Violators of Chapter 106 are subject to civil penalties or fines imposed by the Florida Elections

---

<sup>3</sup> Plaintiff's failure to exhaust administrative remedies is discussed separately in a subsequent section.

<sup>4</sup> There are many additional infirmities that specifically preclude the injunctive relief sought by Plaintiff. These are discussed separately in subsequent sections.

Commission, § 106.265(1); injunctive relief imposed in “civil actions brought by the commission,” § 106.27(2) (emphasis added); or criminal prosecution. § 106.27(1). The statute clearly grants the right to bring civil actions only to the Elections Commission, § 106.27, and no provision in the statute even remotely hints that private citizens or entities have that same right.

In light of this clear statutory framework and intent, it is not surprising that Florida courts, including the Third District, universally have held that the Elections Commission has exclusive enforcement powers under Chapter 106, and have rejected attempts by others to bring private lawsuits alleging campaign finance violations. In *Cullen v. Cheal*, 586 So.2d 1228 (Fla. 3d DCA 1991), the Third District flatly rejected a private litigant's argument that he too could bring a “civil action” under Chapter 106:

We agree with the trial court that Cullen has no standing. Section 106.27, Florida Statutes, must be read *in pari materia* with the remainder of chapter 106. Section 106.25 vests the enforcement power for chapter 106 in the Division of Elections and the Florida Elections Commission ... . [t]he phrase “civil actions” ... is not intended to authorize the filing of civil actions by private citizens.

586 So.2d at 1229 (emphasis added) (affirming dismissal of action with prejudice for lack of standing). *See also*, *Schurr v. R. Sanchez-Gronlier*, 937 So.2d 1166, 1170 (Fla. 3d DCA 2006) (“the Court recognizes binding precedent holding that § 106.021 does not provide for a private right of action”) (denying injunctive relief to private litigant alleging campaign finance irregularities); *Smith v. Tynes*, 412 So.2d 925, 927 (Fla. 1st DCA 1982) (affirming dismissal with prejudice of action for violations of Chapter 106 brought by unsuccessful candidate, because the remedies afforded under that statute “are not designed to be imposed by way of a civil cause of action by an unsuccessful candidate”); *Goff v. Ehrlich*, 776 So.2d 1011, 1012 (Fla. 5th DCA 2001) (“Because we find that Chapter 106 does not confer a private right of action, we affirm the trial court’s dismissal of the

complaint.”).<sup>5</sup>

Florida Red & Blue cannot plead ignorance of this indisputable bar to its lawsuit. In the last election, just two years ago, the same counsel who currently represent Florida Red & Blue successfully argued to the Third District that Chapter 106 affords no private cause of action. *Schurr v. R. Sanchez-Gronlier*, 937 So.2d 1166 (Fla. 3d DCA 2006). In that action, Mr. Kuehne, Mr. Geller and Ms. Fisher's client was sued by an opposing candidate for a circuit court judgeship on grounds that he violated Chapter 105 and Chapter 106 of the Election Code. *Id.* at 1166-67. The private plaintiff sought similarly draconian injunctive relief as Florida Red & Blue in this case: ejection of the opponent from the election. *Id.* at 1167. The court found that the defendant had in fact violated Chapter 106, but refused to award injunctive relief because Mr. Kuehne, Mr. Geller and Ms. Fisher convinced it that plaintiff had no private cause of action:

... the Court recognizes binding precedent holding that §106.021 does not provide for a private right of action. As properly argued by Defendant Sanchez-Gronlier, §§ 106.18 and 106.19 detail the removal of a candidate for violations of Chapter 106, with enforcement within the purview of the Florida Elections Commission. As a result, the requested injunctive relief is not warranted.

*Id.* at 1170 (emphasis added).

Simply put, the lack of a private cause of action under Chapter 106 is not subject to reasonable debate or dispute. Plaintiff's own counsel has helped to create the precedent which now binds this Court. Plaintiff's Emergency Motion for Injunctive Relief can be denied, and its groundless lawsuit should be dismissed, on this basis alone.<sup>6</sup>

---

<sup>5</sup> The lack of a private cause of action under Chapter 106 is so universally established that it is a matter of hornbook law. “The phrase ‘civil actions’ as used in this statute is not intended to authorize the filing of civil actions by private litigants because the enforcement power for this statute is vested in the Division of Elections, the Florida Elections Commission, and other governmental officers and agencies.” 21 Fla. Jur. 2d Elections § 184 (2008).

<sup>6</sup> Since the Florida Elections Commission has exclusive authority to enforce Chapter 106, this action cannot be venued in Miami-Dade County, but must be brought in Tallahassee. § 106.25. Thus, Plaintiff's lawsuit and

**B. Florida Red & Blue Has No Standing to Bring this Action Because it Can Show No Particularized Injury Separate and Distinct from the General Public.**

Even if Chapter 106 could be construed to permit a private cause of action, Plaintiff still lacks standing because it cannot satisfy the special injury standing rule.

In order to secure an efficient administration of the law for the benefit of the public and to avoid the evil of many suits to accomplish one purpose, public wrongs are redressed at the suit of proper officials, and individuals are not permitted to maintain separate judicial proceedings to redress a wrong that is public in its nature unless the individual suffers or is threatened with some special, particular, or peculiar injury growing out of the public wrong. If a public nuisance causes special or peculiar injury to an individual different in kind and not merely in degree from the injury to the public at large, and the injury is substantial in its nature, the individual may have his civil remedy.

*Brown v. Florida Chautauqua Assn.*, 52 So. 802, 804 (Fla. 1910). While a private party might prove that its interests, *e.g.* as a city taxpayer or voter, have been adversely affected by a particular action, that is not sufficient to establish standing unless the party can also demonstrate that its claimed injury is greater in degree than that of the general public. *Henry L. Doherty & Co. v. Joachim*, 200 So. 238, 240 (Fla. 1941) (*en banc*). The party must show that it will suffer a result that is “different in kind from that to others in the same community, the neighbor next door or the man across the street.” *Id.* Plaintiff here cannot.

Florida Red & Blue alleges that Defendants’ purported actions have clouded the “required transparency necessary for the free and fair participation in the election process,” and “misled plaintiff and the public in knowing the sources of their advocacy.” (Compl. at ¶¶ 53-54.) Plaintiff also alleges that the emergency relief it seeks will further the “interests of the public in the conduct of free and fair elections.” (*Id.* at ¶ 57) (emphasis added). None of these allegations show any injury to Plaintiff that is in any way different from an injury that would be suffered by any Florida voter. The only allegation that even comes close to describing a different kind of injury is Plaintiff’s

---

request for injunctive relief also fails for improper venue.

allegation that it will suffer injury in its efforts to oppose passage of proposed Amendment 2. (*Id.* at ¶¶ 53, 59.) However, Plaintiff is not the only entity or individual that is opposed to passage of proposed Amendment 2 and therefore cannot assert an injury that is different from any other voter who is opposed to the amendment. To allow Plaintiff standing would mean that anyone can file suit. Such a notion is absurd. The mere volume of suits would mean that no person or entity could ever sponsor a constitutional amendment because anyone who objected could bring a cause of action and literally shut down the democratic process.

Without the required allegations of particularized injury, Plaintiff cannot establish standing. Enforcement of Chapter 106 for any purported public wrongs is properly left to the Florida Elections Commission, as mandated by the statute itself.

**C. Even if Florida Red & Blue Could Bring this Action, it Could Not Possibly Prevail Because the Provisions of the Campaign Finance Law it Seeks to Enforce Have Been Declared Unconstitutional.**

Florida Red & Blue seeks to enforce the Election Code's campaign finance law (Chapter 106) – specifically its requirements that all entities engaged in “electioneering communications” register with the Department of Election and disclose their donors and expenditures – against entities which indisputably are engaged solely in issue advocacy. Even if Plaintiff could bring this claim in this Court, it has no likelihood of prevailing on the merits, because those provisions of the Campaign Finance Law have been declared unconstitutional.

On the same day that Florida Red & Blue filed this action, the United States District Court for the Northern District of Florida issued an injunction precluding enforcement of the onerous registration and disclosure requirements of Chapter 106 against individuals and entities engaged solely in issue advocacy. Order Granting Mot. for Prelim. Inj., dkt. 32, *Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc. v. Browning*, Case

No. 4:08cv445-SPM/WCS (N. D. Fla., Oct. 29, 2008) (copy attached). In so doing, the Court drew a distinction between (1) “express advocacy” (endorsing a specific candidate); (2) “the functional equivalent of express advocacy” (“sham issue ads that [are] really advocacy for candidates but put forth by big corporations and unions”); and (3) issue advocacy (endorsing or promoting ballot initiatives). Order at pp. 17-22. The court explained that “speech relating to ballot issues cannot, by definition, be express advocacy because it has nothing to do with candidates.” *Id.* at p. 19. The court then observed:

The Supreme Court has never equated advocacy of particular ballot issues to express advocacy for or against a candidate .... when the [Supreme] Court has been confronted with regulations of speech about ballot issues, it has struck them down. ... indeed, [the Supreme Court] has repeatedly recognized that advocacy of ballot issues enjoys even stronger protection than express advocacy for candidates because it raises absolutely no danger of corruption or the appearance of corruption.

*Id.*, at 17, 19 (emphasis added).

The court enumerated a plethora of cases from the Supreme Court and other jurisdictions that have invalidated campaign finance requirements for groups engaged in issue advocacy alone.<sup>7</sup> Comparing Florida's campaign finance requirements for issue advocacy groups to those invalidated elsewhere, the court concluded: “It is difficult to imagine a more overbroad law.” *Id.* at 24. The court thus struck down Chapter 106’s requirements that issue advocacy groups who do not engage in

---

<sup>7</sup> Order at pp. 17-19, citing *Federal Election Commission v. Wisconsin Right to Life, Inc.* 127 S.Ct. 2652, 2672 (2007) (holding that the Bipartisan Campaign Reform Act's prohibition on the use of corporate funds to finance “electioneering communications” during pre-federal election periods violated corporation's free speech rights when applied to issue-advocacy advertisements); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995) (Ohio's campaign finance law unconstitutionally infringed on ballot-issue related speech); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (“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 v. City of Berkeley*, 454 U.S. 290, 297-98 (1981) (“striking down restrictions on ballot issue speech because there is no possibility of quid pro quo corruption in a ballot issue election”); *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1187-89 (9th Cir. 2007) (“holding that California’s political action committee requirements could not be constitutionally imposed on groups discussing only ballot measures, rather than candidates”); *Richey v. Tyson*, 120 F. Supp.2d 1298, 1318 (S.D. Ala. 2000) (“concluding that Alabama’s ‘registration, organizational and recordkeeping requirements are unconstitutional as applied to

the “functional equivalent of express advocacy” bear the same registration and disclosure burdens imposed upon political committees. *Id.* at 18-26.

[The Florida Elections Commission] cannot demonstrate a compelling interest in regulating Plaintiffs' speech. And because Plaintiffs' speech cannot be regulated, it necessarily follows that the State has no interest in requiring Plaintiffs to submit to a prior restraint on their speech; to restructure their organizations and comply with registration, reporting, and disclosure requirements requiring, among other things, information regarding all of their donors; to surrender their ability to speak and associate anonymously; and to accept restrictions on Plaintiffs' right to make expenditures five days before an election.

*Id.* at 21 (emphasis added).

Finally, the district court made clear that its injunction against the Elections Commission protected not just the parties before it, but also the Defendants before this Court. *Id.* at 21 (“the injunction should extend not just to them, but also to all speakers who make electioneering communications). Chapter 106 can only be enforced with respect to “express advocacy” and “the functional equivalent of express advocacy.” *Id.*

There is no allegation before this Court that any of the Defendants have engaged in “express advocacy” or “the functional equivalent of express advocacy.” Plaintiff does not allege that any Defendant endorsed a candidate, or that Defendants' issue ads are sham advocacy for a particular candidate. On the contrary, Plaintiff alleges and admits that Defendants are engaged in issue advocacy alone, specifically, promoting the passage of the Marriage Protection Amendment. (Compl., ¶¶ 8-18.) As such, the purported registration and disclosure requirements that Plaintiff complains of cannot be enforced against Defendants.<sup>8</sup> Plaintiff has NO likelihood of success on the merits, so its requested injunction should be denied and its lawsuit dismissed.

---

organizations whose major purpose is not to engage in election activity”).

<sup>8</sup> To the extent Plaintiff would have this Court apply Chapter 106 to require disclosure of Defendants' donors and members, such remedy would also be an unconstitutional violation of Defendants' and their members' freedom of association. *See NAACP v. Patterson*, 357 U.S. 449, 1171-72 (1958) (holding that privacy is “vital” to the freedom of association, reason for which disclosure of members of groups engaged in issue

**D. Even if Florida Red & Blue Could Bring this Action, and the Campaign Finance Law Could be Enforced, Florida Red & Blue Has No Evidence that Defendants Have Violated that Law.**

Given the insurmountable procedural and substantive obstacles to Plaintiff's claims, the Court need not reach an analysis of the "merits" of Plaintiff's argument. But if it does, the Court will have no basis from which to find that any violation has taken place. Plaintiff's unsworn and unverified Complaint amounts to nothing more than statements of counsel that carry no evidentiary value before the Court. Plaintiff's Emergency Motion for Injunctive Relief also is not supported by any affidavit or other sworn testimony. And neither the Complaint nor the Emergency Motion have any exhibits (other than two photographs of publicly displayed billboards) that might provide evidentiary support for Plaintiffs' claims.

In light of such dearth of proof, Defendants cannot properly defend against Plaintiff's unsupported and unexplained accusations. For example, Plaintiff claims that "Florida4Marriage received two cash contributions amounting to \$25,100, even though cash contributions exceeding \$50 are not permitted by Florida's election law." (Compl. ¶ 39.) Plaintiff cites to no document, much less an exhibit, that supports this allegation. Plaintiff does not even identify the source of its information. Defendants have no idea what Plaintiff is referring to, because they have reasonable systems in place to ensure that cash donations over \$50 are not received or are promptly returned. Without knowing any specifics of Plaintiff's allegation, Defendants cannot possibly defend against it. Fortunately, they need not mount a defense, because a bare allegation of this type cannot even raise a credible inference of improper conduct, much less carry the heavy burden of proof.

Essentially, Plaintiff is asking this Court to eject Defendants out of this election on the basis of nothing more than campaign finance disclosures publicly made by Defendants themselves.

---

advocacy could not be compelled).

(Compl. ¶¶ 35-42.) Those disclosures reveal that Defendant Florida4Marriage received certain in-kind contributions from Defendant Florida Family Action, which is absolutely proper under Chapter 106. Plaintiff's only complaint is that Florida Family Action has not disclosed its individual donors. (*Id.* at ¶¶ 38, 44-46.) But Florida Family Action is not a political committee under Chapter 106, and need not comply with the registration and disclosure requirements thereunder. For Plaintiff to establish otherwise it would have to prove that Florida Family Action actively solicited and received contributions for the express purpose of advocating the passage of Amendment 2, and then provided those same funds to Florida4Marriage. § 106.011(1)(b)(2) There is no admissible evidence in any of Plaintiff's filings upon which such a showing could be based.

Even if Florida Family Action could be classified as a political committee subject to the registration and disclosure requirements of Chapter 106, it cannot be compelled to disclose its donors without violating its and its donors' constitutional right to freedom of association. *Patterson*, 357 U.S. at 1171-72. Moreover, as shown above, because Florida Family Action indisputably is engaged solely in issue advocacy, it cannot be made to comply with the same registration and disclosure requirements imposed on express advocacy political committees under Chapter 106.

In sum, neither Plaintiff's Complaint nor its Emergency Motion for Injunctive Relief present any admissible evidence, much less "manifestly overwhelming" evidence, that Defendants have violated the Campaign Finance Law.

**E. Even if Florida Red & Blue Could Bring this Action, Enforce the Campaign Finance Law and Prove that Defendants Violated it, the Injunction it Seeks – Complete Suppression of All Political Speech by Defendants on the Eve of an Election – is Unconstitutional and Cannot be Issued as a Matter of Law.**

Finally, even if Florida Red & Blue could somehow overcome the fatal procedural and substantive deficiencies discussed above, it still would not be entitled to the outrageous remedy it

seeks. That is because an injunction removing campaign advertising is an unconstitutional prior restraint on speech, even where, unlike here, probable cause exists to investigate campaign finance violations. *Republican Party of Florida v. Florida Elections Commission*, 658 So.2d 653, 657 (Fla. 1st DCA 1995). In *Republican Party of Florida*, the Democratic Party sought to enjoin the Republican Party's television advertising based on allegations of campaign finance violations under Chapter 106. The Elections Commission conducted a preliminary investigation of the Democratic Party's complaint, and concluded that probable cause existed to conduct a full investigation. *Id.* at 654. The Democratic Party then sought an injunction directly from the circuit court, which was granted after the Elections Commission intervened. *Id.* at 655 ("the circuit court determined the Commission, rather than the Democratic Party, was the proper party to seek the injunction") (emphasis added).

The First Circuit promptly reversed the injunction. *Id.* at 657. It concluded that the Republican Party's political speech deserved the highest constitutional protection, and that the prior restraint on that speech imposed by the circuit court was "the most serious and least tolerable infringement on First Amendment rights." The First Circuit held that political speech on the eve of an election "is much too important to permit such prior restraint under the circumstances." *Id.* The court then concluded that even the Election Commission's probable cause finding was insufficient to overcome the "manifestly overwhelming" level of proof that would justify such a restraint. *Id.* Notwithstanding the imminency of the election, the proper recourse available to the Democratic Party was a full investigation by the Elections Commission, and the imposition of post-election sanctions if warranted by the findings. *Id.*

Florida Red & Blue seeks the same exact remedy here, and on the same exact grounds. Plaintiff asks the Court to enjoin all further campaign advertising of Defendants based on allegations

of campaign finance violations. Plaintiff also asks the Court to freeze all of Defendants' bank accounts, which has exactly the same pernicious effect on speech as an outright prohibition of advertising. *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (“virtually every means of communicating ideas in today's mass society requires the expenditure of money”) (concluding that because money is the equivalent of speech in political campaigns, restrictions on campaign expenditure are unconstitutional restrictions on campaign speech). It would be an equally unconstitutional prior restraint on speech to freeze Defendants' accounts as it would be to ban their campaign advertising.

Yet, Florida Red & Blue has infinitely less proof than proffered in *Republican Party of Florida*. Plaintiff here has no probable cause finding from the Elections Commission. The bare allegations in its Complaint are unsworn and unverified, and premised on public disclosures made by Defendants since 2005. There can be no question that Plaintiff's “proof” is woefully short of “manifestly overwhelming.” And, as discussed elsewhere in this Memorandum, Defendants' speech here enjoys significantly greater constitutional protection than in *Republican Party of Florida*, because their speech is limited to issue advocacy and does not include “express advocacy” or “the functional equivalent of express advocacy.”

Plaintiff's requested remedy also fails because Plaintiff has not properly served Defendant Tom Messer and perhaps some of the other individual defendants. “There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.” *Carroll v. President and Com'rs of Princess Anne* 393 U.S. 175, 180 (1968).

Simply put, Plaintiff cannot constitutionally obtain the relief it seeks.

### III. PLAINTIFF CANNOT SHOW IRREPARABLE HARM.

#### A. **There is No Emergency – Florida Red & Blue Has Known About the Facts it Alleges in this Lawsuit for Months, but Has Willfully Delayed the Filing of this Frivolous Lawsuit Until the Eve of the Election.**

There is no emergency here, other than the one manufactured by Florida Red & Blue. Plaintiff admits in the Complaint that it has been in existence “since April 2007,” and that it “has actively followed the operation of defendants” ever since. (Compl. ¶ 21.) Incredibly, Plaintiff then alleges that the in-kind contributions it finds objectionable have been publicly disclosed by one Defendant “since 2005.” (*Id.* at ¶ 35.) Plaintiff further admits that “the first in-kind contributions from Florida Family Action to the Florida4Marriage campaign commenced in February 2005.” (*Id.* at 37.) Even the last in-kind contribution of which Plaintiff complains preceded Plaintiff’s application for “emergency declaratory and injunctive relief” by an entire month. (*Id.* at 41.)

Plaintiff asserts that the supposed “campaign financing scheme has been ongoing for a period of time,” but offers just seven words in the entire 22-page Complaint and 4-page Emergency Motion to justify its failure for acting sooner: “plaintiff has only just learned of it.” (*Id.* at ¶ 36.) Plaintiff does not tell the Court exactly when it supposedly learned of the made-up “scheme.” (*Id.*) There is no affidavit from any witness. The seven unverified and unsworn words of Plaintiff’s counsel can neither supplant the required evidence nor rebut that which the Complaint otherwise makes obvious: that Defendants’ have not altered their conduct during the almost four years of this campaign, and that their conduct has been a matter of public record all along.

Far from constituting the type of emergency that could justify preliminary injunctive relief, Florida Red & Blue’s “emergency” is of its own deliberate creation. Florida Red & Blue had constructive, and most likely actual, knowledge of Defendants’ in-kind campaign contribution disclosures for months, even years, yet it has waited until the week before the election to file this

lawsuit and seek “emergency” relief. That is not an emergency, and this is not irreparable harm.

**B. Florida Red & Blue Has an Adequate Administrative Remedy which it Has Failed to Exhaust.**

1. *Florida Red & Blue has an adequate administrative remedy provided by Chapter 106, thus it cannot show irreparable harm.*

Irreparable harm also cannot be shown where, as here, the movant has an adequate legal remedy. *See e.g., Heslop v. Moore*, 716 So.2d 276, 278 (Fla. 3d DCA 1998) (“the moving party must demonstrate ... immediate and irreparable harm because of the unavailability of an adequate remedy at law”) (emphasis added). The Campaign Finance Law provides an extensive – and exclusive – administrative scheme for adjudicating Plaintiff’s charges. Pursuant to § 106.25, Plaintiff can file a sworn Complaint with the Elections Commission, which then has a duty to investigate and, if warranted by the facts, prosecute it. § 106.25(2). The Commission has full subpoena power, § 106.26, and may impose civil penalties, § 106.265, seek injunctive relief through civil actions, § 106.27(2), or refer a matter to the state attorney for criminal prosecution. §§ 106.25(4)(i) and 106.27(1).

Florida Red & Blue advises that it has “submitted a written complaint to both the Florida Elections Commission and several State Attorneys,” but laments that “to date, no resolution of the complaints has been announced.” (Compl., ¶ 50.) Importantly, Plaintiff does not tell the Court when it submitted its complaint. (*Id.*) Nor does Plaintiff reveal that the Florida Elections Commission recently has dismissed Plaintiff’s complaint, on grounds that it was “legally insufficient.” Fla. Elections Comm’n Ltr. to Plaintiff, October 29, 2008 (copy attached). Instead, Florida Red & Blue now claims that it has no adequate legal remedy because the November 4, 2008 election is imminent. (Compl. ¶ 56.) Having failed to act on information that has been publicly available for months, and then having filed a legally insufficient claim with the Elections Commission, Florida Red & Blue can

hardly be heard to complain now about the shortness of time. Even if this “emergency” was not of its own making, Plaintiff could not proffer it as a basis for the prior restraint on Defendants’ constitutionally-guaranteed right to freedom of speech. That argument has been tried before, on remarkably similar facts, and soundly rejected. As discussed above, in *Republican Party of Florida*, 658 So.2d 653, the court reversed an injunction on campaign advertisements that were allegedly funded with illegal contributions, because the injunction was an unconstitutional prior restraint on speech. *Id.* at 657. Even though the Elections Commission had found probable cause for investigating campaign finance violations, *Id.* at 654, the court concluded that the injunction was improper notwithstanding the movant’s “emergency” argument:

Appellees’ primary argument as to the need to enforce [Chapter 106] through an injunction has been that there will be no remedy for a campaign financing violation that occurs close in time to an election because the administrative process of obtaining a final determination from the Elections Commission takes too long. However, the cases on prior restraint dictate that it is usually preferable to punish any violation after the fact when First Amendment freedoms are concerned. We believe that for any violation that occurred here, the statute provides an adequate alternative to prior restraint in the form of fines and possible criminal prosecution.

*Id.*, at 657 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)). Of course, no probable cause to investigate any violation has ever been found here, so Florida Red & Blue’s request for the same, equally drastic remedy on the basis of a manufactured “emergency” is even more improper.

2. *Florida Red & Blue’s failure to exhaust the available administrative remedy operates as a separate and independent bar to this action.*

In addition to eradicating Plaintiff’s ability to show irreparable harm, the available administrative remedy also precludes Plaintiff from even bringing this action, because Plaintiff has failed to exhaust that remedy. To the extent a private cause of action could be found within Chapter 106 – which it cannot – it would be triggered only after the exhaustion of administrative remedies.

The exhaustion of administrative remedies doctrine “is well established in the jurisprudence of administrative law.” *See generally* 3 K. Davis, ADMINISTRATIVE LAW TREATISE § 20.01 *et seq.* (1958 ed., 1965 Supp.); L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-458 (1965); *McKart v. United States*, 395 U.S. 185, 193 (1969). “The doctrine provides ‘that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.’” *Id.* (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). Consistent with this doctrine, the Florida Supreme Court has established that where, as here, an administrative remedy is provided by statute, the party seeking relief must exhaust that remedy before the courts will act:

An examination of the many authorities of text on this question reveals a consistent attitude of the courts that judicial intervention with administrative action is justified only in those instances where the invalidity of the administrative act is not subject to reasonable differences of opinion.

*Odham v. Foremost Dairies, Inc.*, 128 So.2d 586, 592-93 (Fla. 1961) (emphasis added). The Third District Court likewise has held that it is inappropriate for the court to exercise jurisdiction where there has not yet been an exhaustion of administrative remedies. *Gamma Phi Chapter of Sigma Chi Fraternity v. University of Miami*, 718 So.2d 910, 911 (Fla. 3d DCA 1998) (*per curiam*).

Florida Red & Blue admittedly has not exhausted the administrative remedies provided in Chapter 106. At best, Plaintiff filed a complaint with the Elections Commission at an undisclosed date (Compl. ¶ 50), which was subsequently dismissed without prejudice because it was “legally insufficient.” Fla. Elections Comm’n Ltr. to Plaintiff, October 29, 2008 (copy attached). Instead of re-filing a legally sufficient complaint with the Elections Commission, Plaintiff filed the Complaint in this case. But Plaintiff has not alleged any abuses of power or *ultra vires* acts by the Elections Commission, nor that the Campaign Finance Act is invalid. Consequently, judicial intervention is

precluded, and this Court should deny the Motion for Injunctive Relief and dismiss the Complaint for failure to exhaust administrative remedies.

**C. There is No Irreparable Harm that an Injunction Could Avoid.**

Because of Plaintiff's delay, the Court will not hear Plaintiff's Emergency Motion for Injunctive Relief until 4:00 p.m. on Monday, November 3, 2008, just hours before the first ballots are cast on Election Day, Tuesday, November 4. Even if Plaintiff could bring this action, overcome the fatal infirmities discussed above and obtain the relief it seeks – which it absolutely cannot – by the time Plaintiff posts the enormous bond that such an injunction would require, the relief – freezing bank accounts and removing billboards – would be moot and impossible to implement. Plaintiff would have nothing but the Court's order, which it would undoubtedly trumpet to the media on Election Morning to complete its attempt to sway the vote on the Marriage Amendment.

The Court should not allow Plaintiff to employ the judicial process in its scheme to influence the election. If Plaintiff's allegations are sufficient to survive the Injunction Hearing, and Plaintiff does not withdraw them on the day after the election, they can be heard and adjudicated in due course following the election.

**D. The Injunction Sought by Florida Red & Blue Impermissibly Seeks to Change -- Not to Preserve – the *Status Quo*.**

Finally, Plaintiff cannot satisfy the irreparable harm requirement because the expansive remedy it seeks would radically change – not preserve – the *status quo*. “The primary purpose of entering a temporary injunction is to preserve the *status quo* pending the final outcome of a cause.” *NRD Investments, Inc. v. Velazquez*, 976 So.2d 1, 4 (Fla. 3d DCA 2007). *See also, Yardley v. Albu*, 826 So.2d 467, 470-71 (Fla. 5th DCA 2002) (same) (reversing injunction that did not maintain last non-contested condition between the parties); *Camji v. Helmsley*, 602 So.2d 617, 618 (Fla. 3d DCA 1992) (“the very purpose of a temporary injunction is to preserve the *status quo* in order to prevent

irreparable harm from occurring before a dispute is resolved”). The *status quo* to be preserved by an injunction is “the last, actual, peaceable, uncontested condition which preceded the pending controversy.” *Velazquez*, 976 So.2d at 4.

Plaintiff’s own allegations reveal that nothing new has transpired or taken place between the parties in the last month, six months, twelve months or eighteen months. There is no allegation that any of the Defendants have altered their behavior in the four years of the campaign to pass the Marriage Protection Amendment. The in-kind contributions decried by the Plaintiff date all the way back to 2005.

Clearly, the last, actual, peaceable and uncontested condition between the parties is that which has been in existence for several years. Florida Red & Blue does not seek to maintain that condition; on the contrary, it seeks to radically alter it through a drastic and unprecedented injunction that would essentially eject Defendants out of this campaign at the most critical time – Election Day. Such an outcome is impermissible under the law of injunctions in Florida.

**IV. THE BALANCE OF HARMS WEIGHS HEAVILY IN FAVOR OF DEFENDANTS.**

As the discussion above demonstrates, the harm that an injunction will inflict upon Defendants, and the democratic system in Florida, far outweighs any injury that could possibly befall Florida Red & Blue should the injunction be denied at this late stage. Therefore, Plaintiff cannot establish the third prerequisite for injunctive relief – that the threatened injury to Plaintiff outweighs any possible harm to the Defendants. *Cosmic Corp. v. Miami-Dade County*, 706 So.2d 347, 348 (Fla. 3d DCA 1998).

As the Florida Supreme Court noted:

The doctrine of “comparative injury” or “balance of conveniences” is set forth in 17 Fla. Jur. Injunctions, Sec. 24, as follows: “Situations may exist that require application of the principle of balancing the relative conveniences of the parties, the rule being that equity will not require by injunction the performance of an act where the harm to the person coerced is wholly disproportionate to the benefit of the other party, or, indeed, when greater injury and inconvenience will result to the defendant from an injunction than will be caused to the plaintiff by its refusal.”

*City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 82 (Fla. 1974).

Application of that concept to this case is appropriate and compels the conclusion that the balance of harms weighs in favor of Defendants. As discussed more fully above, Florida Red & Blue will suffer no irreparable injury if the injunction is denied in that it will be able to pursue all of the remedies sought in this action through the extensive and exclusive administrative adjudication procedure provided under the Campaign Finance Law. There is no “emergency” except that manufactured by the Plaintiff, who admits that the allegations of its Complaint are based upon circumstances which have been part of the public record for some time.

By contrast, if the injunction is granted, Defendants will suffer irreparable injury to their right to participate in this election, and to their cherished First Amendment rights, in the form of a prior restraint that the First District has already determined is impermissible. *Florida Republican Party*, 658 So.2d at 657. The First District’s conclusion is worth repeating here:

Appellees’ primary argument as to the need to enforce [Chapter 106] through an injunction has been that there will be no remedy for a campaign financing violation that occurs close in time to an election because the administrative process of obtaining a final determination from the Elections Commission takes too long. However, the cases on prior restraint dictate that it is usually preferable to punish any violation after the fact when First Amendment freedoms are concerned. We believe that for any violation that occurred here, the statute provides an adequate alternative to prior restraint in the form of fines and possible criminal prosecution.

Since Defendants’ First Amendment freedoms are at the core of this case, this Court should also find that the threat of infringing Defendants’ rights is far too grave to justify the kind of relief sought by Plaintiff.

**V. THE INJUNCTION SOUGHT BY PLAINTIFF VIOLATES THE PUBLIC INTEREST.**

Florida Red & Blue also cannot satisfy the final prerequisite for injunctive relief – proving that the granting of the injunction will not disserve the public interest. *Cosmic Corp.* 206 So.2d at 348. In fact, precisely the opposite is true in this case – granting an injunction against Defendants will constitute a substantial disservice to the public interest. Ironically, the very reasons offered by Plaintiff for injunctive relief, *e.g.*, protecting the “interests of the public in the conduct of free and fair elections,” and “free and fair participation in the election process,” (Compl. at ¶¶ 53, 54, 57), are the precise reasons why injunctive relief cannot be granted.

If Plaintiff’s injunction were granted the day before the election, then Defendants would essentially be ejected from the election, and their free speech rights would be extinguished just as the *raison d’être* for their efforts was coming to pass. The temporary injunction sought by Plaintiff would silence the most fundamental First Amendment activity – “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). The abridgement of the constitutionally paramount right to free speech can never be in the interest of the public who cherishes it.

In a constitutional democracy, the people have the right to decide elections based on the electoral process and free, vigorous competition in the marketplace of ideas. Interference by the courts in that process at the behest of those involved in electioneering does not serve the public interest. For this very reason, the Florida legislature placed campaign finance election controversies exclusively within the hands of the Florida Elections Commission. Violating that statutory framework and intent on the eve of an election does not serve the public interest.

**VI. EVEN IF THE COURT COULD CONSIDER AN INJUNCTION, IT WOULD HAVE TO REQUIRE AN ENORMOUS BOND TO ADEQUATELY PROTECT DEFENDANTS' INTERESTS.**

If this Court were to consider a temporary injunction, it would have to require Florida Red & Blue to post a bond in excess of \$500,000 to sufficiently protect Defendants. Fla. R. Civ. Pro. 1.610(b) provides: "No temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined." The court must set bond at an amount that constitutes the court's determination of foreseeable damages that would be suffered by the affected party should the injunction prove to have been improperly granted. *Parker Tampa Two, Inc. v. Somerset Dev. Corp.* 544 So. 2d 1018, 1021 (Fla. 1989).

Any attempt to enjoin First Amendment freedoms, if permitted at all, must carry an enormous price tag. In cases involving much less cherished rights, Florida courts have required significant bonds before issuing temporary injunctions. For example, in *Braswell v. Braswell*, 881 So.2d 1193, 1202 (Fla. 3d DCA 2004), the Third District found that a \$100,000 bond was legally insufficient to support a temporary injunction that prohibited an ex-husband from transferring or alienating his interest in a condominium valued at more than \$5 million. Similarly, the Fourth District found that a \$500,000 bond was not excessive when the enjoined party faced possible dilution of its distinctive trade name. *Gaeta Cromwell Inc. v. Banyan Lakes Village*, 523 So. 2d 624, 627 (Fla. 4<sup>th</sup> DCA 1988) *disapproved on other grounds*, *Great Southern Bank v. First Southern Bank*, 625 So.2d 463, 469 (Fla. 1993). What is at stake here is far more valuable than real estate or a trade name. Discussion of public issues are so integral to our system of government that 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." *Buckley v. Valeo*,

424 U.S. at 15. Consequently, the bond required of Florida Red & Blue if this Court were to consider an injunction against Defendants would have to be significantly higher than the \$500,000 upheld in *Gaeta Cromwell*.

**VII. FLORIDA RED & BLUE SHOULD BE SANCTIONED HARSHLY FOR ITS ATTEMPT TO USE A FRIVOLOUS LAWSUIT TO SUBVERT THE DEMOCRATIC PROCESS AND INFLUENCE THE OUTCOME OF AN ELECTION.**

It is now manifest that Florida Red & Blue's lawsuit is objectively baseless. As discussed at the outset, any one of the fatal procedural and substantive deficiencies of Plaintiff's suit could potentially subject it to litigation sanctions. But taken together, these infirmities demonstrate that Florida Red & Blue could not have possibly anticipated that its allegations would actually be heard and decided in this Court. The real intent behind Florida Red & Blue's election eve stunt was to obtain widespread media coverage of its unsupported allegations, while deferring adjudication of the "merits" of those allegation until after the ballots are cast. Such a brazen attempt to use the judicial process and this Court to sway public opinion in a hotly contested election has no place in a constitutional democracy, and deserves the harshest sanctions.

A court "shall" award attorney's fees to the prevailing party under Fl. Stat. § 57.105 where there is an absence of justiciable issues of either law or fact. *Visoly v. Security Pacific Credit Corp.* 768 So.2d 448, 489 (Fla. 3d DCA 2000). When allegations are nothing more than a sham and frivolous, then sanctions are appropriate. *Id.* Attorney's fees will be awarded when "the court finds that there was a complete absence of a justiciable issue of either law or fact ...." *Hernandez v. Leiva* 391 So.2d 292, 294-295 (Fla. 3d DCA 1980). Where, as here, a party's attempt to create a controversy is frivolous, the court is justified in finding that there is a complete absence of a justiciable issue so as to support an award of sanctions. *Id.*

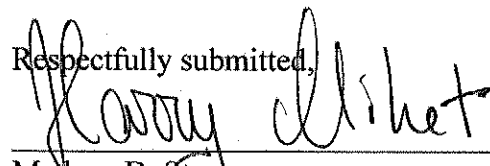
There is no question that Plaintiff's lawsuit presents no justiciable issues, and that Florida Red & Blue knew that to be the case prior to filing. After all, in just the last election, Plaintiff's own counsel helped to create binding precedent establishing that Plaintiff has no cause of action. Florida Red & Blue also must have known that it lacks standing, and that it has failed to exhaust its administrative remedies. And Florida Red & Blue, represented by experienced election law counsel, must have also known that its unsworn, unverified Complaint citing publicly disclosed facts could not even come close to the "manifestly overwhelming" level of proof required for its action.

This Court has the plenary power to sanction Florida Red & Blue on its own motion, § 57.105(1), and it should do so here to redress the wrongs visited upon Defendants.

### CONCLUSION

For all the foregoing reasons, Florida Red & Blue, Inc.'s Emergency Motion for Injunctive Relief should be denied, its frivolous lawsuit should be dismissed, and it should be sanctioned harshly for its conduct.

Respectfully submitted,



---

Mathew D. Staver  
FL Bar No. 0701092  
Anita L. Staver  
FL Bar No. 0611131  
Horatio G. Mihet  
FL Bar No. 026581  
LIBERTY COUNSEL  
Post Office Box 540774  
Orlando, FL 32854-0774  
(800) 671-1776 - Telephone  
(407) 875-0770 - Telefacsimile

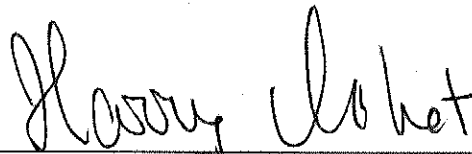
*Attorneys for Defendants  
Florida4Marriage.org, Florida Family  
Action, Inc., Florida Family Policy Council,  
Inc., and John Stemberger*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum of Law in Opposition to Plaintiff's Emergency Motion for Injunctive Relief was served via electronic mail and hand delivery this 3rd day of November, 2008 upon:

Benedict P. Kuehne, Esq.  
Law Office of Benedict P. Kuehne, P.A.  
Bank of America Tower, #3550  
100 S.E. 2 Street  
Miami, FL 33131-2154  
ben.kuehne@kuehnelaw.com

Attorney for Plaintiff



---

Mathew D. Staver  
FL Bar No. 0701092

Anita L. Staver  
FL Bar No. 0611131

Horatio G. Mihet  
FL Bar No. 026581

LIBERTY COUNSEL  
Post Office Box 540774  
Orlando, FL 32854-0774  
(800) 671-1776 - Telephone  
(407) 875-0770 - Telefacsimile

*Attorneys for Defendants  
Florida4Marriage.org, Florida Family  
Action, Inc., Florida Family Policy  
Council, Inc., and John Stemberger*