United States District Court
District of Minnesota

Minnesota Citizens Concerned For Life, Inc. et al., *Plaintiff*, *v.* **Lori Swanson** et al., *Defendants*.	**Civ. No. 10-CV-2938 DWF/JSM** **ORAL ARGUMENT REQUESTED** Estimated Time Needed: 1 Hour

Preliminary Injunction Memorandum

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Table of Contents

Table of Authorities

Cases

Constitution, Statutes & Rules

Introduction

Minnesota Citizens Concerned for Life ("MCCL"), The Taxpayers League of Minnesota ("Taxpayers League"), and Coastal Travel Enterprises, LLC ("Coastal") (collectively "the Corporations") seek a preliminary injunction against enforcement of provisions unconstitutionally restricting their First Amendment free speech and association rights in subversion of *Citizens United v. FEC*, 130 S. Ct. 876 (2010) ("*Citizens*"), *Minn. Chamber of Commerce v. Gaertner*, No. 10-426, 2010 WL 1838362 (D. Minn. May 7, 2010) ("*Chamber*"), and *Buckley v. Valeo*, 424 U.S. 1 (1976). Preliminary relief is required so the Corporations may exercise their liberties before coming elections.

Facts

As set out more fully in the Verified Complaint, the facts are as follows.

MCCL is Minnesota's oldest and largest pro-life organization. Its mission is to secure protections for innocent human life from conception until natural death through effective education, legislation, and political action. It supports or opposes legislation relating to pro-life issues and advocacy and supports or opposes candidates based on their agreement with MCCL's positions.

Taxpayers League is a nonpartisan, nonprofit grassroots taxpayer advocacy organization which fights for lower taxes, limited government and full empowerment of taxpaying citizens in accordance with Constitutional principles.

Both MCCL and Taxpayers League are organized under 26 U.S.C. 501(c)(4). Organizations under (c)(4) must be "primarily engaged in promoting in some way the

common good and general welfare of the people of the community." (26 C.F.R. 1.501(c)(4)-1.) Further, "The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." (*Id*.) So, while (c)(4) organizations may engage in some unambiguously-campaign-related speech—and, MCCL and Taxpayers League want to do so—their major purpose can never be the nomination or election of candidates. That is, they cannot be organized for the purpose of nominating or electing candidates, nor can they spend the majority of their disbursements on such activity. Both MCCL and Taxpayers League are in compliance with this requirement and will remain so in the future. In fact, both MCCL and Taxpayers League spend far less than half their disbursements on regulable election-related speech and will under no circumstances spend more than twenty percent of their disbursements on such speech.

Coastal is a limited liability company organized under Minnesota law for the purpose of providing retail travel industry services. Coastal has approximately one million dollars in business sales annually, including sales in Minnesota. Coastal does not exist for the purpose of nominating or electing candidates, nor does it spend the majority of its disbursements on such activities.

None of the Corporations qualify for the nonprofit exemption to Minnesota's prohibitions on corporate political speech and association.[1]

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[1]The nonprofit corporation exemption provides:

The prohibitions in this section do not apply to a nonprofit corporation that:
(1) is not organized or operating for the principal purpose of conducting a

Minnesota's primary election is on August 10, 2010. The general election is November 2, 2010. As soon as possible, the Corporations each want to make general-fund independent expenditures ("IEs")[2] supporting or opposing candidates, totaling over $100 in a year. A specific planned example for MCCL is an IE of over $100 for a communication expressly advocating the election of Tom Emmer for Governor. A specific planned example for Taxpayers League is an IE of over $100 for a communication expressly advocating the election of Paul Gazelka, state senate candidate for District 12. Each of the Corporations want to make like general-fund independent expenditures before the general election for these and/or other candidates they support. But Minnesota prohibits corporate general-fund IEs. *Compare* Minn. Stat. 211B.15(3) (corporations may make only IEs),

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business;

(2) has no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and

(3) was not established by a business corporation or a labor union and has a policy not to accept significant contributions from those entities.

Minn. Stat. 211B.15(15).

Coastal is organized as a business, and while MCCL and Taxpayers League are nonprofits, neither has a policy not to accept significant contributions from corporations or unions as required for corporations that wish to avail themselves of the nonprofit exemption.

In 1994, the Eighth Circuit held that the language of the nonprofit exemption was unconstitutional as applied to MCCL. *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994), even though MCCL did not have the requisite "policy" required by No. 3. That decision turned on the fact that MCCL pled (and the State did not contest) that MCCL did not accept "significant" corporate contributions, *id*. at 1364, and recognized that if MCCL were ever to accept significant contributions, it would no longer be able to avail itself of the nonprofit exemption. *Id*. at 1365. MCCL is now actively soliciting, and expects to receive, significant contributions from corporations and labor unions. MCCL thus cannot rely on *Day*'s ruling.

[2]"Independent expenditures" are "express advocacy" communication made without coordination with a candidate. *See* Minn. Stat. 10A.01(18); 211B.15(3).

with 10A.12(1a) (associations making only IEs may do so only through an "independent expenditure political fund" ("IE-fund")).

As soon as possible, MCCL want to make general-fund contributions, as defined in Minnesota Statutes section 10A.01(11), totaling over $100 in a year, to an independent-expenditure political committee ("IE-committee").[3] A specific planned example is a contribution of over $100 before the general election to the Minnesota Chamber of Commerce Independent Expenditure Political Fund. But Minnesota prohibits corporate general-fund contributions to political parties. Minn. Stat. 211B.15(2).

As soon as possible, the Corporations want to make a general-fund contribution to, and/or coordinate an expenditure with, candidates up to the limit permitted by Minnesota Statutes section 10A.27. A specific example of a contribution that MCCL and Coastal want to make is a contribution to the campaign of Tom Emmer, candidate for Governor. A specific example of a contribution that Taxpayers League wants to make is a contribution to the campaign of Paul Gazelka, candidate for state senator from District 12. Each of the Corporations want to make like general-fund contributions before the general election to these and/or other candidates they support.

As soon as possible, MCCL and Coastal want to make a general-fund contribution, totaling over $100 in a year, to a political party. A specific planned example for both MCCL and Coastal is a contribution of over $100 before the general election to the

[3] An IE-committee is a political committee ("PAC") making IEs (and other permitted disbursements), but not contributions. *See* Minn. Stat. 10A.01(37).

Republican Party of Minnesota. Minnesota prohibits corporate general-fund corporate contributions to political parties. Minn. Stat. 211B.15(2).

Each of the Corporations spends far less than half its annual disbursements on regulable election-related speech, and none is under the control of a candidate. Thus, under *Buckley*'s major-purpose test for imposing PAC-burdens, *Buckley*, 424 U.S. at 79, the Corporations are constitutionally immune from imposed PAC-status.

The Corporations object to the unconstitutional bans on contributions and IEs described above and the penalties for noncompliance. They also object to Minnesota's unconstitutional imposition of the PAC-burden; the onerous independent-expenditure-political-fund and conduit-fund requirements; and the penalties for noncompliance. *See infra*.

The Corporations would make their planned general-fund IEs and contributions—both those recited above and other, similar ones—but for the fact that they are chilled by Minnesota's prohibition on, and penalties for, general-fund corporate IEs and contributions. In addition to the planned activity recited herein, the Corporations intend to do materially similar future activity. The Corporations have no adequate remedy at law.

Statutory Scheme

Minnesota compels associations (including corporations) wanting to make IEs and contribute to IE-committees to use PAC-style IE-funds. And it requires corporations wanting to contribute to candidates and political parties to employ "conduit funds" (uncontrolled by the corporation) while other associations—including unincorporated

labor unions—may contribute through PAC-style "political funds."

Minnesota's "political funds," "independent expenditure political funds," and "conduit funds" have the same type of burdensome and onerous registration, reporting, and record-keeping requirements as federal PACs. *Compare* Compl. ¶ 53 (Minnesota's PAC-style burdens), *with Citizens*, 130 S.Ct. at 897-98 (detailing "onerous" federal PAC burdens making the PAC-option an inadequate vindication of corporations' First Amendment rights). For example, they must appoint a treasurer before engaging in First Amendment activity. Minn. Stat. 10A.12(2). And they must register with the Campaign Finance and Public Disclosure Board, providing: (1) name and address of entity; (2) name and address of supporting associations of political funds; (3) name and address of treasurer and deputy treasurers; and (4) depositories and safety deposit boxes. Minn. Stat. 10A.14.

These funds must also keep records for all contributions over $20, including amount, date, and source (name and address). Minn. Stat. 10A.13(1). They must do the same for all expenditures, including date, amount, and receipt "stating the particulars." *Id.* All necessary records must be maintained for at least four years. Minn. Stat. 10A.025(3).

These funds must file reports by each January 31, with additional reports 15 days before primaries and 10 days before general elections. Reports must disclose, among other things, names, addresses, and employers or occupations (if self-employed) of individuals or associations making contributions aggregating over $100; sum of contributions; receipts over $100 not otherwise listed; sum of receipts; name and address of recipients of expenditures aggregating over $100, with amount, date, and purpose of each

expenditure, and in the case of independent expenditures made in opposition to a candidate, the candidate's name, address, and office sought; sum of expenditures by entity during period; sum of contributions by entity during period; name and address of entities to whom noncampaign disbursements were made aggregating over $100 in the year and amount, date, and purpose of noncampaign disbursements; sum of noncampaign disbursements; name and address of any nonprofit corporation providing administrative assistance, and aggregate fair market value of assistance provided. Minn. Stat. 10A.20(3). Political funds lacking reportable activity must report that. Minn. Stat. 10A.20(7).

These funds cannot even disband without notifying the government: dissolution requires disbursing assets over $100 and filing a termination report. Minn. Stat. 10A.24.

Corporations may *not* control their conduit funds that are permitted to make contributions to candidates and political parties. Every other association—including unincorporated labor unions—*may* control funds from which contributions may be made, i.e., they may form PAC-style "political funds" and decide what contributions to make to candidates, political committees, or party units. Minn. Stat. 10A.12. Corporations, however, are banned from forming political funds because they may not make contributions. Minn. Stat. 211B.15(3), (4). They are *only* allowed to form pseudo-PAC "conduit funds." Minn. Stat. 211B.15(16). These are no substitute for political funds because corporations cannot control contributions made from their conduit funds. Unlike with political funds, control of contributions made from conduit funds remains in the hands of employee-donors, who must approve any contributions or expenditures by 'earmarking' their contributions "to

candidates of the employee's choice." *Id*. Thus, while *every other* association in Minnesota—including unincorporated labor unions—may use its PAC-style political fund to make contributions the *association* wants to make, corporations are completely banned from making such contributions.

Further, Minnesota Statutes section 10A.27(13)(a) imposes PAC-style burdens on unregistered groups making contributions. In short, the provision forbids political committees, funds, parties, and candidates from receiving contributions from unregistered associations unless the association files with the Campaign Finance and Public Disclosure Board ("Board") a report providing the same PAC-style information in 10A.20 required of registered groups and then provides the contribution recipient a certified copy of the report. Section 10A.27(13)(b) provides that such a report may only be provided to three recipients and then the group must register. Since MCCL wants to make contributions to a committee, a party, a candidate, and others not specified, it would be forced to register as a PAC under this unconstitutional three-strikes provision if by reason of litigation MCCL is permitted to make contributions without registration.

Some of the Corporations' planned activity is banned by Minnesota Statutes Chapter 10A and some by section 211B.15. Chapter 10A violations are "subject to a civil penalty of up to four times the amount of the contribution or approved expenditures." Minn. Stat. 10A.121(2). Section 211B.15 violations are subject to jail and fines for officers, managers, members, agents, employees, attorneys, and other representatives, including fines up to $20,000 and imprisonment for up to five years, or both. Minn. Stat. 211B.15(6).

Corporations convicted of violating section 211B.15 are subject to fines up to $40,000. Domestic corporations may be dissolved for violations, while foreign corporations may lose their right to do business in Minnesota. Minn. Stat. 211B.15(7).

Argument

Preliminary injunctions require (1) likely merits success; (2) irreparable harm; (3) a favorable equitable balance; and (4) public-interest service. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374-75 (2008); *Dataphase Sys. v. CL Sys.*, 640 F.2d 109, 113 (8th Cir.1981). "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). So under strict scrutiny, the *government*, even at the preliminary-injunction stage, must prove that its political speech regulation is narrowly tailored to a compelling interest and that less-restrictive means are inadequate to serve the interest. *See Gonzales*, 546 U.S. at 428, *citing Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). The government must provide proof, not speculation. *See Gonzales*, 546 U.S. at 430 ("strict scrutiny" rejects "categorical approach"). The government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 664 (1994) (internal citation omitted). In First Amendment cases, once likely merits success is established, the other elements follow. *See infra*.

I. The Corporations Will Likely Succeed on the Merits.

"Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. To justify free speech and association infringements, *government* must prove infringements are properly tailored to sufficient, constitutionally cognizable interests. *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 464 (2006).[4] Viewpoint discrimination is forbidden. *Citizens*, 130 S.Ct. at 898. Because the challenged provisions violate these requirements, the Corporations have likely success on the merits.

A. Banning General-Fund IEs Is Unconstitutional (Count 1).

Minnesota Statutes section 211B.15(3) bans corporations from making general-fund IEs, and section 10A.12(1a) requires all associations (including corporations) making IEs (over $100 annually) to do so through a PAC-option called an "independent expenditure political fund" (IE-fund). Together, these provisions ban general-fund IEs ("IE ban"). The IE ban unconstitutionally subverts recent overturnings of identical bans by *Citizens*, 130 S.Ct. 876, and *Chamber*, 2010 WL 1838362. The IE ban fails constitutional scrutiny for lack of justification. And it impermissibly imposes PAC-burdens on groups not constitutionally subject to such status by requiring them to be PACs or use the PAC-option to exercise First Amendment liberties.

1. The IE Ban Subverts Rulings of the Supreme Court and this Court.

There have been only two situations in which the government may require groups to

[4]This opinion ("*WRTL-II*") by Chief Justice Roberts, joined by Justice Alito, states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977).

have or be a PAC. One is now gone.

First, until recently *incorporated* groups could be required to employ a PAC for IEs. This was because *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), held that the corporate form posed a risk permitting government to prohibit corporate general-fund IEs and require corporations to employ a PAC for IEs. But *Citizens* overturned *Austin* and ruled that there is no interest in regulating corporations per se. 130 S.Ct. at 913. Thus, corporations may not be prohibited on this basis from making general-fund IEs and may not be required to employ a PAC for IEs. *Id.*

Second, PAC-status may be imposed on groups "under the control of . . . candidate[s] or [having] the major purpose of . . . nominati[ng] or electi[ng] . . . candidate[s]." *Buckley*, 424 U.S. at 79. Analytically, this is about whether a group *is* a PAC not whether it must *have* a PAC, but absent any corporate-form governmental interest, this is the only remaining justification for imposing some PAC requirement. To the extent Minnesota relies on this basis for requiring groups that cannot be *deemed* PACs (because they lack the requisite major purpose) to *have* PACS, its analysis is flawed and it violates the constitutionally required major-purpose test. Since the Corporations lack the requisite major purpose to be deemed a PAC, they may not be required to do their First Amend-ment activity through a PAC based on any major-purpose analysis.

So how can Minnesota, in light of *Citizens*, *Chamber*, and *Buckley*, constitutionally forbid corporations from making general-fund IEs and make corporations wanting to do IEs employ a PAC? Perhaps Minnesota believes that it does not really ban groups' IEs

because it allows the PAC-option. *Citizens* rejected that, holding that imposing the PAC-option *bans* corporate IEs. *Id*. at 897. *Citizens* held that the PAC-option does not allow corporations and other groups *themselves* to speak because PACs are distinct and separate legal entities from organizations creating them. *Id*. Even if the PAC-option allowed groups to speak, the onerous PAC-option is an inadequate vindication of groups' First Amendment rights. *Id*. PACs are "burdensome alternatives" that are "expensive to administer and subject to extensive regulations." *Id*. They have "onerous restrictions," and corporations may be unable to establish a PAC quickly enough to engage in vital political speech. *Id*. at 898. So Minnesota must fail if it asserts that the PAC-option is not a ban and is an adequate substitute for the group itself speaking.

The "purpose and effect" of laws that force corporations to form PACs in order to speak is to "silence entities whose voices the Government deems to be suspect," *id*. at 897, and to "prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public." *Id*. at 907. The First Amendment stands against such government efforts, *id*. at 898, because it "protects speech and speaker, and the ideas that flow from each." *Id*. at 899.

Because PACs do not allow corporations and associations to speak, *id*. at 897, and the PAC-option is an inadequate and problematic alternative anyway, *id*. at 897-98, bans on general-fund IEs are speech bans. *Id*. at 898. So the IE ban must survive strict scrutiny. The *government* "must prove" that it is "narrowly tailored" to a "compelling interest." *Id*. (citation omitted). General-fund bans on corporate and association IEs fail strict scrutiny.

Citizens, *Id.* at 913 ("[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

The only constitutionally cognizable interest that can justify limiting political speech and association is the interest in preventing quid-pro-quo corruption. *Id*. at 901, 909. *Citizens* specifically rejected *all* other interests, including (1) preventing "distortion" in elections owing to corporate wealth, *id*. at 903-05, (2) preventing influence or access with candidates, *id*. at 910, and (3) protecting dissenting shareholders, *id*. at 911. Nor may government claim an interest in suppressing speech on the basis of the corporate identity of the speaker. *Id*. at 913. *Only* an anticorruption interest can justify restrictions on speech. *Id*. at 901, 909. But IEs do not present a danger of corruption because they are made independently of the candidate. "'The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.'" *Id*. at 908 (*quoting Buckley*, 424 U.S. at 47). The Court concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens*, 130 S.Ct. at 909. Therefore, the Court held that laws that restrict corporate IEs, as Minnesota's IE ban does, are unconstitutional. *Id*. at 913.

After *Citizens* was decided, the Minnesota Chamber of Commerce challenged in this Court two of the same provisions the Corporations challenge, Minnesota Statutes sections 211B.15(2) and 211B.15(3), which "prohibit[ed] a corporation from either directly or

indirectly spending *corporate funds* 'to promote or defeat the candidacy' of an individual for public office." *Chamber*, 2010 WL 1838362, at *1 (emphasis added). Relying on *Citizens*, *Chamber* held both these provisions unconstitutional. *Id*. at *4.

After *Chamber*, Minnesota revised its campaign-finance law, purportedly to comply with *Citizens* and *Chamber*. But Minnesota still does precisely what it was expressly told in *Citizens* and *Chamber* it may *not* do, namely, it forbids the use of *general* corporate treasury funds for political advocacy. Minnesota instead requires associations (including corporations) to use special funds, e.g., "political funds" and "independent expenditure political funds" ("IE funds") that are *not* general corporate funds. Rather, these funds are precisely the PAC-style funds that *Citizens* and *Chamber* held were *not* a sufficient substitute for the corporation speaking with its *own* funds. They have the same burden-some and onerous requirements, including the registration, record-keeping, and reporting requirements that *Citizens United* pointed to as constitutionally unacceptable. *Compare Citizens*, 130 S.Ct. at 897-98, *with* Compl. ¶ 53 (Minnesota's PAC-style burdens) (*citing* Minn. Stat. 10A.025; 10A.12; 10A.13; 10A.14; 10A.20).

As this Court said, "The Supreme Court's decision in *Citizens United* is *unequivocal*: the government may not prohibit independent and indirect corporate expenditures on political speech." *Chamber*, 2010 WL 1838362, at *4 (emphasis added). Yet, that is precisely what Minnesota does. It bans "independent and indirect corporate expenditures on political speech," and instead forces all associations (including corporations) to employ the PAC-option. The Corporations must refrain from making the IEs they wants

to make. This self-censorship chills their speech. *Day*, 34 F.3d at 1360. Under *Citizens* and *Chamber*, the IE ban is not constitutionally permissible.

2. The IE Ban Fails Scrutiny.

IE bans are subject to strict scrutiny. *Citizens*, 130 U.S. at 898; *Day*, 34 F.3d at 1360-61 (8th Cir. 1994). So Minnesota must "prove" that the law is "narrowly tailored" to a "compelling" interest, *WRTL-II*, 551 U.S. at 464, and use the "least restrictive means" to accomplish the interest. *Gonzales*, 546 U.S. at 429; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (plurality opinion) ("*MCFL*"). But Minnesota cannot meet its burden of proof because "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," *Citizens*, 130 S.Ct. at 909, and only the quid-pro-quo anticorruption interest justifies political speech-restriction. *Id*. at 901, 909. Regardless, "[a]n outright ban on corporate political speech during the critical preelection period *is not a permissible remedy*." *Id*. at 911 (emphasis added).

Minnesota's constitutionally permissible solution for reporting independent expenditures for groups like the Corporations that lack *Buckley*'s "major purpose" is the one-time independent-expenditure reports employed in federal election law and recognized as the permissible alternative to PAC-style disclosure in *MCFL*, 479 U.S. at 252-53 (plurality) (emphasis added):

> If it were not incorporated, MCFL's obligations under the Act would be those specified by 434(c), the section that prescribes the duties of "[e]very person (other than a political committee)." Section 434(c) provides that any such person

> that during a year makes independent expenditures exceeding $250 must: (1) identify all contributors who contribute in a given year over $200 in the aggregate in funds *to influence elections*, 434(c)(1); (2) disclose the name and address of *recipients of independent expenditures* exceeding $200 in the aggregate, along with an indication of whether the money was used to support or oppose a particular candidate, 434(c)(2)(A); and (3) identify any persons who make contributions over $200 that are *earmarked* for the purpose of furthering independent expenditures, 434(c)(2)(C). All unincorporated organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these regulations.

These one-time, IE reports containing this limited information are the less-restrictive means Minnesota is required under strict scrutiny to use to satisfy any interest it might have in disclosure as to IEs, not PAC-style disclosure.

Thus, the IE ban fails strict scrutiny because (1) there is no constitutionally cognizable interest in limiting IEs and (2) forcing organizations that make IEs to submit to PAC-style reporting is not the least restrictive means for satisfying the State's informational interest. The IE ban is therefore unconstitutional.

3. The IE Ban Impermissibly Imposes PAC-Status on Groups Not Subject to PAC-Status.

Buckley held that the only entities subject to imposed PAC-status or PAC-style burdens are groups "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. A committee's major purpose is determined on the basis of (1) its "central organizational purpose" or (2) its "independent spending." *MCFL*, 470 U.S. at 262 and n.6. Thus, only organizations that are organized to nominate or elect candidates, or spend the majority of their money to nominate or elect candidates, may be regulated as political committees and forced to

submit to PAC-style burdens. *See New Mexico Youth Organized v. Herrera*, __F.3d__, 2010 WL 2598314 at *7 (10th Cir. 2010) (recognizing this requirement for political committee status); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (same).

The Corporations are not controlled by candidates and also lack the requisite major purpose to be subject to imposed PAC-status. They spend far less than half their annual disbursements on regulable election-related speech and are not organized for the purpose of nominating or electing candidates. Yet Minnesota forces the Corporations to register as independent expenditure political funds and submit to PAC-style registration, reporting, and record-keeping requirements if they make independent expenditures. Minnesota may not constitutionally require this.

B. The Ban on Corporate Contributions to IE Committees Is Unconstitutional (Count 2).

The ban on corporate contributions to IE committees ("IE contribution ban") imposed by Minnesota Statutes sections 10A.12(1) and 211B.15(2) violates the rationale of *Citizens* and *Chamber*. Groups that may not be forced to make IEs through PACs may not be forced to contribute to IE committees through PACs, either.

1. The IE Contribution Ban Fails Scrutiny.

Contribution limits are generally evaluated under intermediate scrutiny, requiring them to be "closely drawn" to a "sufficiently important" interest. *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (*quoting Buckley*, 424 U.S. at 25). However, limits subject to

intermediate scrutiny are those that apply to everybody. When limits only apply to *some*, and not to all, they are content-based for "distinguish[ing] among different speakers, allowing speech by some but not others." *Citizens*, 130 S.Ct. at 899. Content-based regulations seek to eliminate the speech of disfavored speakers, *id*. at 898, and are subject to *strict* scrutiny. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

The IE contribution ban does not apply to everybody, only to associations. Individuals may make all the contributions they want, but associations are banned from doing so. They must employ a PAC-like IE-fund to make contributions. Minn. Stat. 10A.12(1) and 211B.15(2). The State must satisfy strict scrutiny: it must prove that the IE contribution ban is "narrowly tailored" to a "compelling" interest. *White*, 536 U.S. at 774-75.

Under either level of scrutiny the ban is unconstitutional because there is *no* interest, "compelling" *or* "sufficiently important," justifying the ban. Only the interest in preventing quid-pro-quo corruption can undergird restrictions on political speech and association. *Citizens*, 130 S.Ct. at 901, 909.[5] The anticorruption interest only supports limits on contributions to candidates, *Buckley*, 424 U.S. at 26-27, or committees that make contributions to candidates, *California Med. Ass'n v. FEC*, 453 U.S. 182 (1981).[6] It

[5]Though an IE ban subject to strict scrutiny was at issue in *Citizens*, *id.* at 898, the Court explained that the anticorruption interest was the only interest satisfying intermediate scrutiny, too. *Id*. at 909 ("sufficiently important interest" necessary for contribution limits is "quid pro quo corruption.").

[6]*McConnell* upheld limits on contributions to political parties because they might purchase "access" or "influence" with office holders. *McConnell v. FEC*, 540 U.S. 93, 154

cannot support limits on contributions made to IE committees. There is no quid-pro-quo corruption associated with IEs because they are made *independently* of candidates. *Id*. at 908-09. So under either level of scrutiny, limits on contributions to IE committees are unconstitutional because there is no constitutionally cognizable interest to support them. *SpeechNow.Org v. FEC*, 599 F.3d 686, at 695 (D.C. Cir. 2010) (en banc) (under either level of scrutiny, contributions to IE committees are noncorrupting and cannot be restricted); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 693 (9th Cir. 2010) (same).

Because there is no danger of quid-pro-quo corruption associated with IEs, there can be no danger of quid-pro-quo corruption associated with contributions to IE committees. There is therefore no constitutionally cognizable interest to sustain the IE contribution ban.[7] It is unconstitutional.

2. The IE Contribution Ban Imposes PAC-Status on Groups Not Subject to PAC-Status.

If MCCL may lawfully make contributions, Minnesota may not impose PAC-status on it for doing so. *See supra*. If MCCL is permitted by this Court to make contributions to IE committees without registration, it would be unconstitutionally burdened by Minnesota Statutes section 10A.27(13)(a), which imposes PAC-style burdens on unregistered groups

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(2003). But *Citizens* held these interests not constitutionally cognizable. 130 S.Ct. at 910.

[7]The State cannot assert an anticircumvention interest because that is only constitutionally cognizable when a valid corruption interest that someone might try to circumvent exists. *FEC v. Colorado Republican Fed. Campaign Committee*, 533 U.S. 431, 456 (2001).

making contributions. The provision forbids political committees, funds, parties, and candidates from receiving contributions from unregistered associations unless the association files with the Board a report providing the same PAC-style information in 10A.20 required of registered groups and then provides the contribution recipient a certified copy of the report. Section 10A.27(13)(b) provides that such a report may only be provided to three recipients and then the group must register. Since MCCL wants to make contributions to a committee, a party, a candidate, and others not specified, it would be forced to register as a PAC under this unconstitutional three-strikes provision.

Minnesota may not constitutionally impose this PAC-style requirement on the Corporations or other associations that are not under the control of a candidate and do not have the major purpose of nominating or electing candidates. Minnesota Statutes sections 10A.27(13)(a) and 10A.27(13)(b) are therefore unconstitutional.

C. The Ban on "Promote or Defeat" Contributions and Expenditures Is Unconstitutional (Count 3).

The Corporations challenge Minnesota Statutes sections 211B.15(2), (3), and (4) which ban corporations from making contributions or expenditures that might be deemed by the State as designed "to promote or defeat" candidates. These are unconstitutional for three reasons.

1. The "Promote or Defeat" Language Bans Speech That May Not Constitutionally Be Banned.

First, 211.15(2), (3), and (4) unconstitutionally ban speech that may not be banned. As applied to contributions and disbursements to make contributions, they are unconstitu-

tional for the reasons stated regarding Counts 2 and 4, which challenge Minnesota's corporate contribution ban. They ban every form of speech that might be deemed by the State as "promot[ing] or defeat[ing]" candidates.

This unconstitutionally subverts *Citizens*, which held both independent-expenditure *and electioneering-communication* corporate bans unconstitutional. 130 S.Ct. at 897, 913. Minnesota attempts—though it fails—to incorporate the first holding into its laws by requiring corporations to employ political funds to make IEs. But it totally subverts the second holding, with no attempt to pretend otherwise. By striking the electioneering-communication ban, the *Citizens* Court allowed corporations to broadcast ads that are the "functional equivalent of express advocacy . . . [because they are] susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL-II*, 551 U.S. at 469-70. "[A]ppeal[s] to vote for or against . . . candidate[s]" are "expenditures to promote or defeat" candidates that are permitted under *Citizens* but banned by Minnesota in subversion of *Citizens*. Minnesota unconstitutionally bans what *Citizens* permits.

2. The "Promote or Defeat" Language Is Vague and Overbroad.

Second, 211.15(2), (3), and (4) identify the banned speech by unconstitutionally vague and overbroad language. The promote/defeat test reaches at least as far as *WRTL-II*'s appeal-to-vote test, but it is unclear how much further State officials might deem "promote or defeat" to extend. This leaves speakers chilled or subject to the whims of enforcement officials, which violates Fourteenth Amendment due process and First

Amendment clarity standards, *Buckley*, 424 U.S. at 40 n.47 ("vague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (citations and quotation marks omitted)). The benchmark against which the "promote or defeat" is measured is *Buckley*'s holding that the phrase "'advocating the election or defeat' of a candidate" is unconstitutionally vague and overbroad, *id*. at 42 (citation omitted), unless given the express-advocacy construction requiring so-called "magic words" (e.g., "vote for") expressly advocating the election or defeat of a clearly identified candidate. *Id*. at 44 & n.52. Minnesota's language is unconstitutionally vague and overbroad measured against this benchmark.

3. The "Promote or Defeat" Language Is Susceptible to Unconstitutional Intent-and-Effects Tests.

Third, 211.15(2), (3), and (4) do not prohibit State officials from interpreting "promote or defeat" based on intent and effect, so it is unconstitutional under *WRTL-II*, which expressly rejected intent-and-effect tests for determining regulable speech in favor of objective, bright-line tests, 551 U.S. at 467-68 (controlling opinion).

This proscription on all corporate general-fund political advocacy other than express-advocacy independent expenditures is not alleviated by Minnesota Statutes section

10A.121(1)(2), which allows independent expenditure political *funds* to make non-approved expenditures, because the corporation *itself* is not permitted to make non-independent-expenditure communications.

Minnesota Statutes sections 211.15(2), (3), and (4) are unconstitutional on its face and as applied to the Corporations because it violates the First and Fourteenth Amendment and plainly subverts the Supreme Court's holding in *Citizens*.

D. The "Independent Expenditure" Definition Is Unconstitutional (Count 4).

Minnesota Statutes section 10A.01(18) defines independent expenditures as "an expenditure *expressly advocating* the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent." (Emphasis added). Had the State stopped there, its definition would be constitutional, because the Supreme Court has repeatedly defined IEs as communications that use specific words of express advocacy.

But the Board issued an authoritative interpretation of "express advocacy:" "A communication that omits the specific words of express advocacy may, nevertheless, be found to be for the purpose of influencing . . . the nomination or election of a candidate based on an examination of the communication." (Advisory Opinion 398 (2008) ("AO-398".))[8] So "when a communication clearly identifies a candidate, *it is not necessary* that the communication use specific words of express advocacy, such as 'vote for,' 'elect,'

[8]Compl., **Exh. 5**.

'support' or others for it to be for the purpose of influencing the nomination or election of a candidate" (and thus to constitute an independent expenditure). (AO-398 at 3 (emphasis added.))

This contradicts the Supreme Court's requirement of so-called "magic words" for speech regulated as an IE. *Buckley* said IEs are "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52. And the Court has repeatedly limited express advocacy to "magic words." *MCFL* said "'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." 479 U.S. at 249 (citation omitted). In *McConnell*, the Supreme Court repeatedly equated express advocacy with "magic words." 540 U.S. 93, 126, 191–93, 217–19 (2003). In *WRTL-II*, all members of the Court equated express advocacy with "magic words." 551 U.S. at 474 n.7 (opinion of Roberts, C.J., joined by Alito, J.); *id.* at 495 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in judgment); *id.* at 513 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). And even the *Citizens* dissent noted that "[i]f there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the 'magic words' test of *Buckley*." *Citizens*, 130 S.Ct. at 935 n.8 (Stevens, J., concurring in part and dissenting in part).

The Eighth Circuit has embraced this understanding of express advocacy and IEs. In *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) ("*IRTL*"),

the Eighth Circuit described the magic-words test as a "bright-line test" and explained that "[t]he Supreme Court has made clear that a finding of 'express advocacy' depends upon the use of language such as 'vote for,' 'elect,' 'support,' etc." Because Iowa's definition of express advocacy at issue in that case went beyond magic words to include communications that, "taken as a whole," could "only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)," the Eighth Circuit held that the plaintiffs were likely to succeed on the merits of their challenge to Iowa's definition. *Id*. at 969–70.

The Board, however, rejects the magic-words test and adopts a we-know-it-when-we-see-it approach to express advocacy. The Board's subjective opinion determines IEs, leaving the Corporations with no way to know whether communications will be judged IEs. This renders the law unconstitutionally vague because it does not "provide people of ordinary intelligence a reasonable opportunity to understand" what the law means. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). *See also Buckley*, 424 U.S. at 77 (laws impacting First Amendment freedoms must have an even greater degree of specificity than what is normally demanded). The Board's interpretation forces people to guess and to hire an attorney to speak. The Constitution forbids this. *Citizens*, 130 S. Ct. at 889. Minnesota Statutes section 10A.01(18), as authoritatively interpreted by the Board, is vague and unconstitutional.

The Board's rejection of the magic-words test also imposes IE reporting requirements

on substantially more speech than that containing true express advocacy.[9] This overbreadth also renders the law facially unconstitutional. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 1191 n.6 (2008).

E. The Candidate and Party Contribution Ban Is Unconstitutional (Count 5).

Minnesota Statutes sections 211B.15(2) and 211B.15(4) ban corporate general-fund contributions to candidates and political parties ("candidate and party ban"), despite the lack of corporate-form corruption, and unconstitutionally require that such contributions be done through a PAC-option called a "conduit fund." This subverts the Supreme Court's holding that PACs cannot speak for corporations, because they are separate entities. Even if that were not so, Minnesota's scheme would still be unconstitutional, because it does not allow corporations to control how their conduit funds make contributions, though other associations may control how their funds make contributions.

1. The Candidate and Party Ban Subverts Supreme Court Precedent.

As explained *supra* at 12, *Citizens* held that PACs cannot and do not speak for the

[9]The Board may be relying on *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), which held that magic words were not necessary for express advocacy if, taken in context, the communication advocated the nomination or election of a candidate. However, *only* the Ninth Circuit has held this. Every other Circuit to consider the question, *including the Eighth*, has held that the magic-words test is required for express advocacy. *See Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 664–65 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651, 664 (6th Cir. 2004); *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 329 (4th Cir. 2001); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 506 (7th Cir. 1998); *Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991); *FEC v. Cent. Long Island Tax Reform*, 616 F.2d 45, 53 (2d Cir. 1980). Moreover, *Furgatch* has been limited by the Ninth Circuit itself, *see Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003), and cannot survive *McConnell*, *WRTL-II*, and *Citizens,* as explained in the text above.

associations that create them because associations are separate legal entities from PACs. 130 U.S. at 897. Consequently, the PAC-option is a *ban* on corporate speech, because a PAC can *never* speak for a corporation. *Id*. But "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy." *Id*. at 911. The candidate and party ban is an unconstitutional subversion of *Citizens* and unconstitutional facially and as applied to the Corporations.

Even if post-*Citizens* it were permissible to require corporations to employ a PAC to make contributions, Minnesota Statutes sections 211B.15(2) and 211B.15(4) do not actually allow corporations to do that. Rather, the corporate and party ban only allows corporations to form pseudo-PACs, which the corporation may *not* control. This makes the requirement constitutionally flawed.

Beaumont upheld a general-fund corporate contribution ban on the theory that a PAC-option was a reasonable alternative for direct corporate contributions. *FEC v. Beaumont*, 539 U.S. 146, 162-63 (2003). The Corporations believe *Beaumont* should be revisited and overruled in light of *Citizens*.[10] But even if *Beaumont* is controlling, the candidate and

[10] *Beaumont*'s holding that a ban on general-fund corporate contributions is permissible was based on its belief that the PAC-option allowed for corporate expressive activity. 539 U.S. at 162-63. But *Citizens* held that a PAC is a separate legal entity from the corporation that creates it, so the PAC-option *cannot* allow for corporate expressive activity. 130 S.Ct. at 897. Further, *Beaumont* found three interests supporting the ban, two of which were invalidated, and one discredited, by *Citizens*. *Compare Beaumont*, 539 U.S. at 154 (antidistortion and shareholder-protection interests), *with Citizens*, 130 S.Ct. at 903-08 (invalidating antidistortion interest), 911 (invalidating shareholder-protection interest). *Compare also Beaumont*, 539 U.S. at 155 (anticircumvention interest), *with Citizens*, 130 S.Ct. at 912 (regulations are always underinclusive to the anticircumvention interest). *Beaumont* thus rests on a now-rejected premise (that PACs can engage in expressive activity

party ban is unconstitutional. *Beaumont* turned on a PAC-option where corporations *controlled* their affiliated PACs. 539 U.S. at 162-63. The Court concluded that "[t]he prohibition [on general-fund corporate contributions] does not, however, forbid the establishment, administration, and solicitation of contributions to a separate segregated fund [i.e., a PAC] to be utilized for political purposes." *Id*. Rather, the law allowed PACs created by corporations to make contributions. *Id*. This was constitutionally determinative because the PAC-option "permits some participation of unions and corporations in the federal electoral process" and allows for regulation of campaign activity without jeopardizing associational rights. *Id*. at 162-63. If the PAC-option did not exist, the Court implied, associational rights would be jeopardized and the federal corporate contribution ban would be constitutionally problematic. But since the challenged law still "allows corporate political participation," because it allowed corporations to make contributions through PACs they controlled, it did not amount to a complete ban on corporate contributions. *Id*. at 162-63.

Minnesota's candidate and party ban does not allow corporations that option. Rather, employees making contributions to corporations' 211B.15(16) conduit funds must earmark for whom their contributions are made. The conduit fund must disburse contributions as employees—not corporations—designate. Thus, the corporation itself—unlike every other type of association, including unincorporated labor unions—is left with *no* way to make contributions to candidates and parties it wants to support. Unlike the

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for the organization that creates them) and discredited reasoning.

regulation at issue in *Beaumont*, it actually is a complete ban on corporate contributions. The candidate and party ban is therefore unconstitutional even under *Beaumont*'s rationale.

2. The Candidate and Party Ban Is Impermissible Viewpoint Discrimination.

The First Amendment prohibits "disfavor[ing] certain subjects or viewpoints" or "allow[ing] speech by some, but not others." *Citizens*, 130 S.Ct. at 898. Such viewpoint discrimination is *never* permissible. *See, e.g.*, *RAV v. City of St. Paul*, 505 U.S. 377 (1992) (holding invalid as viewpoint discrimination, without applying scrutiny, an ordinance prohibiting "fighting words" related to gender, religion, or race, but not other categories, even though "fighting words" are beyond the protection of the First Amendment). The candidate and party ban is viewpoint discrimination because it prohibits the political speech and association of one group of speakers (corporations), whose viewpoint Minnesota thus disfavors, while allowing the political speech and association of all others.

Every other association besides corporations, including unincorporated labor organizations, are free to form 10A.12 political funds, which may solicit contributions and are controlled by the creating association. Incorporated associations are the only ones banned from this option. Instead, they are required to employ 211B.15(16) conduit funds. Unlike political funds, conduit funds are not controlled by the creating association. Rather, employees earmark contributions, which must be used as designated. Thus, whereas all other associations control their political funds and make contributions to serve

their own interests, corporations cannot.

This is an attempt by Minnesota "to command where a person may get his or her information or what distrusted source he or she may not hear." *Citizens*, 130 S.Ct. at 908. It is "unlawful" as "censorship to control thought," which the First Amendment forbids. *Id*. *See also RAV*, 505 U.S. at 391 ("First Amendment does not permit . . . special prohibitions on . . . speakers . . . express[ing] views on disfavored subjects."). The candidate and party ban is therefore unconstitutional viewpoint discrimination.

3. The Candidate and Party Ban Cannot Survive Scrutiny.

Contribution limits are generally evaluated under intermediate scrutiny. But content-based regulation, which occurs when—as here—the government discriminates among speakers based on their identity, must survive strict scrutiny. *See Citizens*, 130 S.Ct. at 898 (regulations distinguishing among speakers are used to control the content of speech); *White*, 536 U.S. at 774-75 (content regulation is impermissible under the First Amendment unless the regulation satisfies strict scrutiny). Under either level of scrutiny, the candidate and party ban is unconstitutional. There is *no* interest justifying it. Even if there were an interest, the ban is not properly tailored.

The only constitutionally cognizable interest in limiting contributions is the interest in preventing quid-pro-quo corruption. *Citizens*, 130 S.Ct. at 901, 909. *Buckley* and *Citizens* explains that only *large* contributions implicate that interest because only *large* contributions give rise to corruption or its appearance. *Citizens*, 130 S.Ct. at 901 ("large contributions 'could be given to secure a political quid pro quo'") (*quoting Buckley*, 424 U.S. at

26). *See also McConnell*, 540 U.S. at 138 ("large financial contributions" can lead to corruption and its appearance); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 (2000) ("large contributions" can corrupt and create an appearance of corruption); *Buckley*, 424 U.S. at 28 ($1000 contribution limit "focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified"); *id*. at 45 ("dangers of actual or apparent quid pro quo arrangements" presented by "large contributions").

Minnesota eliminated the large contributions that can give rise to real or apparent corruption through the contribution limits imposed by Minnesota Statutes section 10A.27 ("regular limits"). There is therefore no constitutionally cognizable interest in restricting corporate contributions beyond the regular limits because (1) those limits have *already* eliminated the large contributions that make quid-pro-quo corruption possible and (2) *Citizens* held that corporations pose no constitutionally cognizable corruption risk warranting special restriction of their activities. 130 S. Ct. at 899-911.

Even if there were an interest in additional regulation of corporate contributions, a ban is not properly tailored under either level of scrutiny: "An outright ban on corporate political speech during the critical preelection period is not a permissible remedy." *Citizens*, 130 S. Ct. at 911.

Further, while formerly the anticircumvention interest in preventing individuals from circumventing valid contribution limits was regarded as a constitutionally cognizable interest, *see, e.g.*, *Beaumont*, 539 U.S. at 155 (upholding regulations of contributions on

anticircumvention theory among others), that theory was discredited by *Citizens*, which noted that "speakers find ways to circumvent campaign finance laws." 130 S.Ct. at 912. Thus, the regulations will always be underinclusive to an anticircumvention interest, and so cannot be properly tailored.

If anticircumvention is still a constitutionally cognizable interest despite this inherent tailoring difficulty, the permissible remedy for circumvention is reasonable disclosure and law prohibiting the proliferation of corporations by individuals for the purpose of multiplying one's ability to make contributions. *See, e.g.*, 11 C.F.R. 100.5(g) (rules limiting PAC proliferation). The answer is not a ban, which is "not a permissible remedy." *Citizens*, 130 S.Ct. at 911.

Citizens explained that "disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities . . . and do not prevent anyone from speaking[.]" 130 S.Ct. at 914 (quotations and citations omitted). Disclosure is "less restrictive," and therefore better, than restrictions on expressive activity. *Id*. at 915. Requiring corporations making contributions to disclose persons controlling them will allow identification of individuals attempting to circumvent the regular contribution limits through proliferating corporations and multiplying their ability to make contributions. Banning corporate contributions, as Minnesota does, not only prevents circumvention but also prevents corporations themselves from engaging in protected speech and association. "The Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). The idea that

"protected speech may be banned as a means to ban unprotected speech. . . . turns the First Amendment upside down." *Id*.

4. The Candidate and Party Ban Imposes PAC-Status on Groups Not Subject to PAC-Status.

If the Corporations may lawfully make contributions, Minnesota may not impose PAC-status on them, or require a pseudo-PAC-option, for doing so. *See supra*. If by reason of this litigation the Corporations are permitted to make contributions to candidates and political parties without registration, they would be unconstitutionally burdened by 10A.27(13)(a), which imposes PAC-style burdens on unregistered groups making contributions. In short, the provision forbids political committees, funds, parties, and candidates from receiving contributions from unregistered associations unless the association files with the Campaign Finance and Public Disclosure Board a report providing the same PAC-style information in 10A.20 required of registered groups and then provides the contribution recipient a certified copy of the report. Section 10A.27(13)(b) provides that such a report may only be provided to three recipients and then the group must register. Since the Corporations want to make contributions to multiple candidates and a political party, they would be forced to register as PACs under this unconstitutional three-strikes provision.

Minnesota may not constitutionally impose PAC-style burdens on the Corporations or other associations that are not under the control of a candidate and do not have the major purpose of nominating or electing candidates. Minnesota Statutes sections 10A.27(13)(a)

and 10A.27(13)(b) are therefore unconstitutional.

5. The Candidate and Party Ban Violates Equal Protection.

The candidate and party ban also violates the Equal Protection Clause of the Fourteenth Amendment because it treats corporations differently than similarly situated associations.

Dallman v. Ritter, 225 P.3d 610 (Col. 2010), is the only case of which the Corporations are aware that has considered whether corporations and labor unions are similarly situated for campaign-finance purposes. In *Dallman*, the situation was the exact opposite of Minnesota's law: corporations were allowed to make contributions through PACs they controlled, while labor unions were prohibited. *Id*. at 634. The court noted that this "completely strips unions of any political voice, while still allowing corporations to participate through their own PACs." *Id*. This disparate treatment "implicat[es] the freedoms guaranteed by the Equal Protection Clause of the Fourteenth Amendment" because corporations and labor unions, though "structurally dissimilar," are nevertheless "similarly situated" for purposes of campaign-finance regulations. *Id*.

The *Dallman* court properly applied strict scrutiny because "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Id*. (*quoting Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). Because the government had not articulated a compelling interest in restricting contributions from labor unions but not corporations, the court held the restriction an unconstitutional violation of Equal Protection. *Dallman*, 225 P.3d at 635.

As in *Dallman*, the State has no interest supporting disparate treatment of corporations and other associations, including labor unions. The candidate and party ban therefore violates the Fourteenth Amendment.

II. The Corporations Will Suffer Irreparable Harm Absent An Injunction.

The Corporations have demonstrated likely merits success as to their First and Fourteenth Amendment challenges. That showing necessitates that the Court find that the Corporations are likely to suffer irreparable harm.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *IRTL*, 187 F.3d at 970 (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Corporations have made that showing. Irreparable harm follows.

A showing of loss of other "constitutional rights" likewise "supports a finding of irreparable injury." *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977). Plaintiffs alleging constitutional violations who establish likely merits success are "entitled to a presumption of irreparable harm." *Straights and Gays for Equality v. Osseo Area Schools-Dist.*, 471 F.3d 908, 913 (8th Cir. 2006). *See also Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Specifically, courts have ruled that deprivation of equal protection rights—as are at issue here—constitutes irreparable injury. *Goldie's Bookstore, Inc. v. Superior Court of*

State of Cal., 739 F.2d 466, 472 (9th Cir. 1984) (noting in Equal Protection context that "[a]n alleged constitutional infringement will often alone constitute irreparable harm"); *Henry v. Greenville Airport Commission*, 284 F.2d 631, 633 (4th Cir. 1960) (preliminary injunction may not be denied when plaintiff shows violation of equal protection).

Because the Corporations are likely to succeed on the merits, they are presumed likely to suffer irreparable harm because of the deprivation of their First and Fourteenth Amendment rights.

III. The Balance of Hardships Favors the Corporations.

When First Amendment freedoms are infringed, as here, the Eighth Circuit "view[s] the balance clearly in favor of issuing the injunction" because irreparable harm occurs otherwise. *IRTL*, 187 F.3d at 970. The balance of hardships "favors constitution-ally-protected freedom of expression" over the government's interest in maintaining law that is likely to be found unconstitutional. *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995). "In a First Amendment case, therefore, 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).

Neither the Eighth Circuit nor its district courts have considered whether a violation of equal protection compels a finding that the balance of hardships favors plaintiffs. *But see Planned Parenthood of Greater Iowa, Inc. v. Miller*, 1 F.Supp.2d 958, 964 (S.D. Iowa 1998) (noting that "[t]he protection of constitutional rights clearly outweighs any interest the State may have" in impermissibly regulating constitutionally-protected conduct). The

Ninth and Fourth Circuits, however, have directly considered the question, and have concluded that likely merits success on Equal Protection claims means the balance of hardships favors plaintiffs. *Goldie's Bookstore*, 739 F.2d at 472 (noting in equal protection context that a showing of likely merits success "will often alone" cause the balance tips toward plaintiffs); *Henry*, 284 F.2d at 633 (preliminary injunction may not be denied when plaintiff shows violation of Equal Protection). Other courts have held this as well. *See, e.g.*, *Reaching Hearts Intern., Inc. v. Prince George's County*, 584 F.Supp.2d 766, 795-96 (D. Md. 2008); *Grudzinski v. Bradbury*, 2007 WL 2733826 at *3 (D. Or. 2007); *Hughes v. Cristofane*, 486 F.Supp. 541, 546 (D. Md. 1980).

Because the Corporations are likely to succeed on the merits, the balance of hardships favors them.

IV. The Public Interest Favors an Injunction.

"[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *U.S. v. Raines*, 362 U.S. 17, 27 (1960). Thus, it is not surprising that "the public interest favors protecting core First Amendment freedoms[,]" *IRTL*, 187 F.3d at 970, because the public interest "is served by free expression on issues of public concern." *Kirkeby*, 52 F.3d at 775. Therefore, "the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights." *Phelps-Roper*, 545 F.3d at 690.

The same is true in the Eighth Circuit for other constitutional rights, because "the

protection of constitutional rights is always in the public interest." *Planned Parenthood Minn., North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008).

Because the Corporations are likely to succeed on the merits, the public interest favors an injunction.

Conclusion

For the foregoing reasons, this Court should grant the Corporations' motion for preliminary injunction and enjoin defendants from enforcing the following:

(1) Minnesota Statutes sections 10A.12(1), 10A.12(1a), and 211B.15(3), prohibiting associations (including corporations) from making general-fund independent expenditures (Count 1);

(2) Minnesota Statutes sections 10A.12(1), 10A.27(13), 211B.15(2), prohibiting associations (including corporations), from making general-fund contributions to independent expenditure committees (Count 2);

(3) Minnesota Statutes section 211B.15(3), prohibiting corporations from making expenditures for communications that might be deemed by the State as designed to promote or defeat candidates unless the expenditure is an independent expenditure (Count 3);

(4) Minnesota Statutes section 10A.01(18), as authoritatively interpreted by the Board, defining "independent expenditures" in vague and overbroad ways (Count 4); and

(4) Minnesota Statutes sections 10A.27(13), 211B.15(2), and 211B.15(4), prohibit-

ing corporate general-fund contributions to candidates and political parties (Count 5).

Plaintiffs also ask this Court to grant any other appropriate relief.

No security should be required because Defendants have no monetary stake.

July 8, 2010

Respectfully Submitted,

/s/ James R. Magnuson

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Local Rule 7.1(d) Word Count Certification

As required by Local Rule 7.1(d), I certify that the document filed with this certification (Plaintiff's Memorandum in Support of Motion to Consolidate) contains 9875 words, excluding the parts of the document that are exempted by Local Rule 7.1(d), according to the word count function of the word-processing program used to prepare it. (Wordperfect, v. X4).

Dated: July 8, 2010

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