UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Minnesota Citizens Concerned for Life, Inc., The Taxpayers League of Minnesota, and Coastal Travel Enterprises, LLC,

Plaintiffs,

v.

Lori Swanson, Minnesota Attorney General, in her official capacity; Bob Milbert, John Scanlon, Terri Ashmore, Hilda Bettermann, Felicia Boyd, and Greg McCullough, Minnesota Campaign Finance and Public Disclosure Board Members, in their official capacities; Raymond Krause, Chief Administrative Law Judge of the Minnesota Office of Administrative Hearings, in his official capacity; Eric Lipman, Assistant Chief Administrative Law Judge of the Minnesota Office of Administrative Hearings, in his official capacity; Manuel Cervantes, Beverly Heydinger, Richard Luis, Steve Mihalchick, Barbara Neilson, and Kathleen Sheehy, Administrative Law Judges of the Minnesota Office of Administrative Hearings, in their official capacities; and Michael Freeman, Hennepin County Attorney, in his official capacity,

Defendants.

Civ. No. 10-cv-02938 DWF/JSM

STATE DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO CONSOLIDATE

INTRODUCTION

In the wake of the *Citizens United* decision, Minnesota law was amended to clearly permit corporate independent expenditures. Minn. Stat. § 10A.12, subd. 1a (as

added by Minn. Laws 2010, ch. 397, § 4); Minn. Stat. § 10A.121 (as added by Minn. Laws 2010, ch. 397, § 6); Minn. Stat. § 211B.15, subds. 2-3 (2008) (as amended by Minn. Laws 2010, ch. 397, §§ 16, 17). Through this lawsuit Plaintiffs attempt to emasculate the disclosure and related reporting requirements for corporate independent expenditures, despite *Citizens United's* holding that disclosure regarding independent expenditures is an essential constitutional element of an informed electorate and fair elections. *Citizens United v. FEC*, 130 S. Ct. 876, 915-17 (2010).

Plaintiffs' claims regarding Minnesota's interpretation of the definition of "independent expenditure" are also specious and were rejected by this Court in a prior decision. Similarly without merit is Plaintiffs' assertion that *Citizens United* implicitly overruled previous U.S. Supreme Court precedent upholding a ban on corporate contributions to candidates and political parties. Their argument has already been rejected by several other courts.

Plaintiffs simply cannot show that they are likely to succeed on the merits, a threshold condition for obtaining a preliminary injunction. *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Lourdes,* 530 F.3d 724, 731 (8th Cir. 2008). The equities also weigh in favor of denying the motion. A ruling in Plaintiffs' favor would cause substantial harm to the State and the public, since it would result in a less informed electorate and an unfair election. Changing the rules and standards applicable to Minnesota's elections in the middle of the election season also adversely impacts the State and the public. Plaintiffs' inexplicable delay in bringing their case and then seeking immediate relief during the course of the elections further supports denial of their motion.

FACTS

A. Parties

1. Plaintiff Minnesota Citizens Concerned for Life ("MCCL")

MCCL is a nonprofit Minnesota corporation and states that it is exempt from federal income taxes as a social welfare organization under 26 U.S.C. § 501(c)(4). Compl. ¶¶ 13, 23. MCCL wants to make an independent expenditure of over $100 from its general funds for a communication expressly advocating the election of a particular gubernatorial candidate. *Id.* ¶ 39. MCCL also alleges that it wants to make a contribution of over $100 from its general funds to the "Minnesota Chamber of Commerce Independent Expenditure Political Fund," which MCCL represents to be an existing committee that makes only independent expenditures. *Id.* ¶ 42. In addition, MCCL wants to make a contribution of over $100 from its general funds to both the gubernatorial candidate's campaign and a particular Minnesota political party. *Id.* ¶¶ 45, 48.

2. Plaintiff The Taxpayers League of Minnesota ("Taxpayers League")

The Taxpayers League is also a nonprofit Minnesota corporation and states that it is exempt from federal income taxes as a social welfare organization under 26 U.S.C. § 501(c)(4). Compl. ¶¶ 14, 30. The Taxpayers League wants to make an independent expenditure of over $100 from its general funds for a communication expressly advocating the election of a particular candidate for the State Senate. *Id.* ¶ 39. It also wants to make a contribution of over $100 from its general funds to the candidate's campaign. *Id.* ¶ 48.

3. Plaintiff Coastal Travel Enterprises, LLC ("Coastal")

Coastal is a Minnesota limited liability company. Compl. ¶ 15. It is a wholly-owned subsidiary of Esmay Enterprises, Inc., an S-corporation wholly owned by John Esmay. *Id.* ¶ 35. Coastal wants to make an independent expenditure of over $100 from its general funds for a communication expressly advocating the election of a particular gubernatorial candidate. *Id.* ¶ 39. Coastal also wants to make a contribution of over $100 from its general funds to both the candidate's campaign and a particular Minnesota political party. *Id.* ¶¶ 45, 48.

4. Defendants

Plaintiffs' complaint names a number of state officials as Defendants: the Minnesota Attorney General; the six members of the Minnesota Campaign Finance and Public Disclosure Board; and the eight administrative law judges of the Office of Administrative Hearings. The remaining Defendant is the Hennepin County Attorney. All of the Defendants are sued in their official capacities. Compl. ¶ 20.

B. Minnesota Campaign Finance Laws

1. Chapter 10A

Minnesota Statutes Chapter 10A, the Campaign Finance and Public Disclosure Act, is the primary legislation regulating campaign finance and disclosure in Minnesota. The Act is administered by the Board. Minn. Stat. § 10A.02, subd. 11 (2008). The six-member Minnesota Campaign Finance and Public Disclosure Board ("Board") is appointed by the Governor on a bipartisan basis, and confirmed by a three-fifths vote of the members of each house of the Legislature, for staggered four-year terms. *Id.*, subd. 1;

Minn. Stat. § 15.0575, subd. 2 (2008); Affidavit of Gary Goldsmith ("Goldsmith Aff."), ¶ 2.

The Board's mission is to "promote public confidence in state government decision-making through development, administration, and enforcement of disclosure and public financing programs which will ensure public access to and understanding of information filed with the Board." *Id.* The Board is responsible for investigating alleged violations of Chapter 10A. It may publicly determine whether probable cause exists that a violation occurred, impose civil penalties, or enter conciliation agreements. Minn. Stat. § 10A.02, subd. 11 (2008). The Board may bring an action in district court to recover fees and penalties imposed under Chapter 10A, or may seek an injunction in district court to enforce the Act. Minn. Stat. § 10A.34, subds. 1a, 2 (2008). The Board also issues advisory opinions regarding the requirements of Chapter 10A and adopts rules to carry out the purposes of the Act. Minn. Stat. § 10A.02, subds. 12-13.

2. Chapter 211B

Minnesota Statutes Chapter 211B, the Fair Campaign Practices Act, is part of the Minnesota Election Law. Minn. Stat. § 200.01 (2008). Chapter 211B regulates a variety of campaign practices and applies to all federal, state and local candidates, except President and Vice-President. Minn. Stat. § 211B.01, subd. 3 (2008). Violations of Chapter 211B are prosecuted by county attorneys. Minn. Stat. § 211B.16, subd. 3 (2008). A citizen may file a complaint with the Office of Administrative Hearings ("OAH") under Minn. Stat. § 211B.32 (2008) for civil adjudication of an alleged violation of Chapter 211B. If a civil complaint is pending before the OAH, a county attorney may not

initiate a prosecution for that alleged violation until the civil proceeding is completed. Minn. Stat. § 211B.32, subd. 1.

3. The 2010 Amendments to Chapter 10A

In response to *Citizens United v. FEC,* 130 S. Ct. 876 (2010), the Minnesota Legislature amended Minnesota's campaign finance laws to permit corporate independent expenditures. Minn. Laws 2010, ch. 397 (hereinafter "2010 Laws ch. 397") (attached to Goldsmith Aff. as Ex. A). The legislation was supported by various groups including Common Cause, the League of Women Voters, the Minnesota Business Partnership, and the Minnesota Chamber of Commerce. Goldsmith Aff., ¶ 5. The legislation was passed unanimously by both houses of the Legislature on May 16, 2010 and signed by the Governor on May 27, 2010. 2010 Laws ch. 397; Journal of the Senate, May 16, 2010, pp. 12357-12364; Journal of the House, May 16, 2010, pp. 13698-13704. It became effective on June 1, 2010. 2010 Laws ch. 397, § 21.

a. Changes to Chapter 10A

Pursuant to the 2010 Amendments, corporate independent expenditures[1] may be

[1] Minn. Stat. § 10A.01, subd. 18 (2008) (as amended by 2010 Laws ch. 397, § 1), defines "independent expenditure" as follows:

> "[A]n 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. An independent expenditure is not a contribution to that candidate."

The phrase "expressly advocating" is defined by the Board to require the use of specific words such as "vote for", "elect", "defeat" or similar words in accordance with the U.S.
(footnote continued on next page)

made in two different ways: (1) a corporation can make a contribution of its own money to an independent expenditure committee or fund, or (2) a corporation can make its own independent expenditures. Minn. Stat. § 10A.12, subd. 1a (added by 2010 Laws ch. 397, § 4). If a corporation contributes to an independent expenditure committee or fund, it need not set up its own fund for doing so.[2] *See id.*; *see also* "Corporate participation in Minnesota's political process," Goldsmith Aff., ¶ 7, Ex. B at 2, issued by the Board and available at the Board's website (stating that a corporation may "register its own political fund or may donate directly to an existing independent expenditure political committee or fund").[3]

Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1, 80, 96 S. Ct. 612, 664 (1976). Goldsmith Aff., ¶ 14, Ex. F at 7.

[2] This assumes that the major purpose of the corporation is not to influence the nomination or election of candidates. Plaintiffs allege in their complaint that their major purpose is not to influence the nomination or election of candidates, Compl. ¶¶ 23, 30, 35, and the 501(c)(4) status of Plaintiffs MCCL and The Taxpayers League would be nullified if it were.

[3] The Board's interpretation of Chapter 10A is entitled to substantial deference. *See Geo. A. Hormel & Co. v. Asper,* 428 N.W.2d 47, 50 (Minn. 1988) (stating that "an agency's interpretation of the statutes it administers . . . should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature"); *Gershman v. American Cas. Co.,* 251 F.3d 1159, 1162 (8th Cir. 2001) (recognizing that in interpreting a state's statute, federal courts are "bound by" the state's rules of statutory construction). In addition, to the extent Plaintiffs proffer a construction of Minnesota law that raises a constitutional issue, it is presumed that the Minnesota Legislature did not intend an unconstitutional construction. *See* Minn. Stat. § 645.17(3) (2008).

The recipient independent expenditure committee or fund makes the necessary disclosures as required by law. Minn. Stat. § 10A.27, subds. 14-16 (added by 2010 Laws ch. 397, §§ 10-12); see also, e.g., Goldsmith Aff., Exs. C and D (MN Forward, LLC's independent expenditure committee disclosure forms itemizing various corporations that made contributions to committee). Under some circumstances, for disclosure purposes, a non-business corporation may need to provide the recipient committee or fund with information regarding the source(s) of the corporation's contribution. Minn. Stat. § 10A.27, subd. 15 (added by 2010 Laws ch. 397, § 11); see also, e.g., Goldsmith Aff., ¶ 8.

If a corporation makes its own independent expenditures, it must establish an "account" for doing so and register with the Board under the independent expenditure political fund statute. Minn. Stat. § 10A.12, subd. 1a; *see also* Minn. Stat. § 10A.01, subd. 28 (2008) ("'[p]olitical fund' means an accumulation of dues or voluntary contributions by an association other than a political committee . . ."); Goldsmith Aff., Ex. B at 1 ("A political fund is an account established by an existing entity whose major purpose is something other than to influence the nomination or election of candidates.").[4] The account does not have to be a bank or depository account separate from the corporation's existing account(s) and could simply be an internal bookkeeping device to facilitate tracking for disclosure purposes of funds used for independent expenditures.

[4] If, however, the major purpose of the corporation is to influence the nomination or election of candidates for office, then registration is required as a political committee. Minn. Stat. § 10A.01, subd. 27 (2008); see also *supra* note 2.

Goldsmith Aff., ¶ 9. Moreover, the fund is not a separate entity from the corporation and the corporation "controls the operations of the political fund." Goldsmith Aff., Ex. B at 1.

Registration must occur within fourteen days *after* the first expenditure, or the transfer or bookkeeping entry of corporate funds being placed in the account. Minn. Stat. § 10A.14 (2008). The two-page independent expenditure political fund registration form, Goldsmith Aff., Ex. E, can be filed by facsimile, email, personal delivery or U.S. Mail, and entails no filing fee. *Id.,* ¶ 10.

The statutory provisions regarding political funds are designed to facilitate disclosure through an individual who is designated as the treasurer. Minn. Stat. § 10A.12, subd. 3; Goldsmith Aff., ¶ 12. A treasurer is identified by the corporation as a contact for the Board and for accountability purposes. *Id.* During a general election year, the treasurer must file five reports with the Board, four of them during time periods close to the actual primary or general elections. Minn. Stat. § 10A.20 (as amended by 2010 Laws ch. 397, §§ 7-9). The reports disclose independent expenditures by the corporation and contributions from other entities or individuals for the purpose of making independent expenditures. See Goldsmith Aff., ¶ 16, Exs. C, G and H. The reports also can be filed by facsimile, email, personal delivery or U.S. Mail, with no filing fee. *Id.,* ¶ 13.

To accomplish this reporting, the corporation is required to keep records in the ordinary course of its business of the transactions relating to its independent expenditures. Minn. Stat. § 10A.13 (2008). This recordkeeping is no different than what

the corporation otherwise engages in to comply with conventional bookkeeping and general accounting standards as well as IRS and nonprofit organization requirements. *See, e.g.*, 26 C.F.R. § 1.6001-1(a) (any person required to file tax return "shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information"); Goldsmith Aff., ¶ 29, Exs. K, L and M.

The records must be kept available for four years for audit, inspection or examination by the Board to enable later verification or clarification of filed reports. Minn. Stat. § 10A.025, subd. 3 (2008).[5] If a corporation wishes to terminate its political fund registration, it can do so by either checking the "termination" box on the last fund report, or by otherwise notifying the Board that its last report will be the final report. Minn. Stat. § 10A.24 (2008); Goldsmith Aff., ¶ 31, Ex. C at 1.

b. Change to Chapter 211B

A similar corresponding change was also made to Chapter 211B. Section 211B.15 was amended by the Minnesota Legislature this year to specifically provide that corporations can make independent expenditures, as defined in Minn. Stat. § 10A.01,

[5] Records should be kept for IRS purposes a minimum of six years. *See* 26 C.F.R. § 301.6501(e)-1 (six-year limitations period for omissions from returns).

subd. 18. Minn. Stat. § 211B.15, subds. 2-3 (2008) (as amended by 2010 Laws ch. 397, §§ 16, 17).[6]

C. Plaintiffs' Complaint

Plaintiffs served their complaint on July 9, 2010. They claim that the 2010 Amendments allowing corporate independent expenditures are unconstitutional (counts 1 and 2); Minnesota law and the Board improperly define "independent expenditure" (counts 3 and 4); and the Minnesota law prohibiting corporate contributions to candidates and political parties is unconstitutional (count 5). Their motion for preliminary injunction seeks, among other things, to enjoin enforcement of Minnesota laws relating to corporate independent expenditures, including legislation which provides for reporting and disclosure regarding corporate independent expenditures. Plaintiffs also request a preliminary injunction precluding enforcement of the statutory ban on corporate contributions to candidates and political parties. Pls.' Prelim. Inj. Mem. at 38-39.

[6] Even before the 2010 Amendments, corporations could make contributions or expenditures to promote or defeat a ballot question, to place a question on the ballot or to express its views on issues of public concern, Minn. Stat. § 211B.15, subd. 4; contribute to or conduct public media projects to encourage individuals to attend precinct caucuses, register or vote, providing the projects are not controlled by or operated for the advantage of any candidate, political party or committee, *id.*, subd. 9; provide meeting facilities for committees, political parties or candidates on a nondiscriminatory and nonpreferential basis, *id.*, subd. 10; and sell products or services to the public and post notices on their public premises promoting participation in the precinct caucuses, voter registration or voting, provided these messages are not controlled or operated for the advantage of any candidate, political party or committee. *Id.*, subd. 11.

ARGUMENT

I. DEFENDANTS CERVANTES, HEYDINGER, KRAUSE, LIPMAN, LUIS, MIHALCHICK, NEILSON, SHEEHY, AND SWANSON ARE NOT PROPER DEFENDANTS AND SHOULD BE DISMISSED.

The Attorney General and the OAH administrative law judges are not proper defendants in this case because they cannot commence proceedings to enforce Chapter 10A or Chapter 211B. As this Court recently recognized, only those state officials with the responsibility for enforcing the allegedly unconstitutional state legislation may be sued in federal court to prevent enforcement of the law. *Advanced Auto Transport, Inc. v. Pawlenty*, 2010 WL 2265159, *2-3 (D. Minn. June 2, 2010) (dismissing the Governor and the Attorney General in an action challenging the constitutionally of a provision of Minnesota's unemployment insurance law). Suing state officials who do not enforce the challenged state statute "is merely making [them] a party as a representative of the state, and thereby attempting to make the state a party," which the Eleventh Amendment forbids. *Ex parte Young*, 209 U.S. 123, 157, 28 S. Ct. 441, 453 (1908).

Plaintiffs do not allege that the Attorney General enforces the challenged statutory provisions. They include the Attorney General as a defendant only on the ground that Minn. Stat. § 8.01 (2008) requires her to "appear for the state in all causes in the . . . federal courts wherein the state is directly interested." Compl. ¶ 16. This is not a basis to include the Attorney General as a defendant. *See Advanced Auto,* 2010 WL 2265159, at *3 ("[n]or is the mere fact that an attorney general has a duty to prosecute all actions in which [the] state is interested enough to make [her] a proper defendant in every . . .

action" that "attack[s] the constitutionality of a state statute") (quoting *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979)).

Plaintiffs also do not allege that the OAH judges enforce the challenged provisions of Chapter 10A or Chapter 211B. Plaintiffs sue the OAH judges only because they "have power to adjudicate citizen-initiated complaints that allege violations of [Chapter] 211B." *Id*. ¶ 18. This is not a basis to include the OAH judges as defendants because it neither overcomes the Eleventh Amendment jurisdictional bar nor states a claim under 42 U.S.C. § 1983.

Because a judge's adjudication of proceedings under a state statute is not enforcement of the statute, the Eleventh Amendment does not permit inclusion of state judicial officers as defendants in a federal court action challenging the statute's constitutionality. *See Shalaby v. Freedman*, 2003 WL 22416492, *3-5 (N.D. Cal. Oct. 21, 2003) (dismissing state judicial officers who adjudicated violations of law and could not commence proceedings under the statute), *aff'd*, *Shalaby v. Judicial Officers of the State of California*, 138 Fed. Appx. 897, 898 (9th Cir. 2005) ("We agree with [the] decisions holding that judges adjudicating cases pursuant to state statutes may not be sued under § 1983 in a suit challenging the state law.") (citations omitted).

Moreover, section 1983 was amended in 1996 to provide that injunctive relief against a "judicial officer" in his or her judicial capacity "shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." *See, e.g., Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999) (dismissing section 1983 claim for injunctive relief against state judicial officer where plaintiff alleged neither violation of declaratory

decree nor unavailability of declaratory relief). OAH judges are "judicial officers" protected by this amendment to section 1983. *See, e.g., Pelletier v. Rhode Island*, 2008 WL 5062162, *5-6 (D. R.I. Nov. 26, 2008) (holding that the provision protects even quasi-judicial actors such as parole board members). Even before the amendment to section 1983, the Eighth Circuit concluded that plaintiffs did not state a claim against judicial officers in section 1983 actions challenging the constitutionality of a state statute. *See R.W.T. v. Dalton*, 712 F.2d 1225, 1232 (8th Cir. 1983) (recognizing that "[i]n the typical prospective assault on the constitutionality of a statue statute, the state judge is not a proper party defendant under § 1983 because he has no stake in upholding the statute [and] he is not the plaintiff's adversary"), *cert denied*, 464 U.S. 1009 (1983).

For all of the above reasons, OAH judges are not proper parties to this case. Indeed, the past federal lawsuits challenging the constitutionality of provisions of Chapter 211B have never included OAH judges as defendants. *See, e.g., St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006); *Republican Party of Minnesota v. Klobuchar*, 381 F.3d 785 (8th Cir. 2004)*; Minnesota Chamber of Commerce v. Gaertner,* 2010 WL 1838362 (D. Minn. May 7, 2010).

II. PLAINTIFFS LACK STANDING TO ASSERT THE CLAIM IN COUNT 2 OF THEIR COMPLAINT, AND IN ANY EVENT, THE CLAIM IS NOT RIPE.

One of the claims asserted in the complaint (count 2) is that Minnesota law unconstitutionally prohibits corporations from contributing to an independent expenditure committee or fund. This claim is asserted only by MCCL, as it is the only Plaintiff that alleges an intention to make such a contribution. Compl. ¶ 42.

The independent expenditure political committee to which MCCL alleges it wants to make a contribution — "Minnesota Chamber of Commerce Independent Expenditure Political Fund" — does not exist, as shown by the Board's public records. Goldsmith Aff., ¶ 34. Thus, because MCCL cannot make this contribution, it lacks standing to challenge the provisions that would govern it. *See Minnesota Citizens Concerned for Life v. Kelley*, 427 F.3d 1106, 1109-10 (8th Cir. 2005) (holding that MCCL lacked standing to challenge the constitutionality of a statutory provision because MCCL did not allege it would engage in conduct to which the provision applies).

Similarly, MCCL's challenge is not ripe,[7] and therefore is not justiciable, because it rests on the contingency that the Minnesota Chamber of Commerce will actually form an independent expenditure committee or fund. *See KCCP Trust v. City of North Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005) (recognizing that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259 (1998)).

III. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED.

When deciding a motion for preliminary injunction, a court must consider: (1) the moving party's probability of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting the

[7] As discussed *infra* at 31-34, Plaintiffs' claims in counts 3 and 4 of their complaint are also not ripe.

injunction will inflict on other interested parties; and (4) the public interest in the issuance of the injunction. *Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109, 114 (8th Cir. 1981). None of these factors favors granting the requested relief.

A. Plaintiffs Cannot Show That They Are Likely To Prevail On The Merits.

In a case such as this Plaintiffs bear the heavy burden of establishing as a threshold matter that they are likely to succeed on the merits. The court in *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Lourdes,* 530 F.3d 724 (8th Cir. 2008) stated:

> [A] more rigorous standard 'reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.' If the party with the burden of proof makes a threshold showing that *it is likely to prevail on the merits, the district court should then proceed to weigh the other Dataphase factors*.

Id. at 731 (emphasis added; citation omitted). Plaintiffs have not and cannot meet their burden.

1. Minnesota law allows Plaintiffs to make independent expenditures to promote or defeat the nomination or election of a candidate.

As discussed above, contrary to Plaintiffs' contention (counts 1 and 2 of the complaint), Minnesota law expressly permits corporate independent expenditures in accordance with *Citizens United*. Minnesota law clearly allows Plaintiffs to make independent expenditures either by (1) contributing to an independent expenditure political committee or fund or (2) by establishing an "account" for that purpose and

registering with the Board under the political fund law. *See* Minn. Stat. § 10A.12, subd. 1a; *supra* at 6-7. Plaintiffs' convoluted and confusing analysis to the contrary is simply erroneous, and their misleading reference to "conduit" funds (Pls.' Prelim. Inj. Mem. at 5) has nothing to do with the use of corporate funds for independent expenditure purposes.[8]

2. The Minnesota independent expenditure political fund disclosure provisions and related requirements are constitutional.

In *Citizens United,* the U.S. Supreme Court held in a 5-4 decision that corporations have a First Amendment right to make independent expenditures to expressly advocate for or against the nomination or election of a candidate for office. However, the Court also held that disclaimer and disclosure requirements, including reporting requirements which facilitate disclosure, are constitutional with respect to those independent expenditures. *Id.* at 914-16; *see also id.* at 943 (Stevens, J., dissenting in part and joined by three other justices) (recognizing that majority opinion upheld "disclaimer, disclosure and reporting requirements"); *id.* at 980 (Thomas, J., dissenting in part) (stating that majority opinion "does not go far enough" because "disclosure, disclaimer and reporting requirements" are unconstitutional). Therefore, by a vote of 8-1, the U.S. Supreme Court upheld the disclosure, disclaimer and reporting requirements challenged in *Citizens United*.

[8] A conduit fund involves a solicitation by a corporation of its employees to make political contributions to the conduit fund. Minn. Stat. § 211B.15, subd. 16 (2008). The employee, not the corporation, "direct[s] the contribution to candidates of the employee's choice." *Id.*; Goldsmith Aff., ¶ 32.

The Court reasoned that "[d]isclaimer and disclosure requirements *may burden* the ability to speak, but they 'impose no ceiling on campaign related activities' and 'do not prevent anyone from speaking.'" *Id.* at 914 (citations omitted; emphasis added). The Court further stated that "the public has an interest in knowing who is speaking about a candidate shortly before an election," and this "informational interest alone is sufficient to justify" disclosure. *Id.* at 915-16.[9]

The Court discussed the vitally important requirement of disclosure as follows:

> With the advent of the Internet, *prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters*. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "'in the pocket' of so-called moneyed interests." The First Amendment protects political speech; and *disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions* and give proper weight to different speakers and messages.

Id. at 916 (citation omitted; emphasis added). *See also Buckley v. Valeo,* 424 U.S. 1, 14-15, 96 S. Ct. 612, 632 (1976) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the

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[9] In *Buckley v. Valeo,* 424 U.S. 1, 96 S. Ct. 612 (1976) and *McConnell v. FEC,* 540 U.S. 93, 124 S. Ct. 619 (2003), the Court identified two other sufficiently important governmental interests to justify disclosure requirements, *i.e.,* deterring and avoiding the appearance of actual corruption and gathering data to enforce other electioneering restrictions. *McConnell,* 540 U.S. at 196, 124 S. Ct. at 690 (citing *Buckley,* 424 U.S. at 67-68, 96 S. Ct. at 657-58).

identities of those who are elected will inevitably shape the course that we follow as a nation.").

The Court further stated that disclosure requirements are not limited to "express advocacy," *id.* at 915, and observed that "the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself." *Id.* (citation omitted.) The Court also concluded that disclosure is a valid requirement "[e]ven if the ads [involved in *Citizens United*] only pertain to a commercial transaction" because "the public has an interest in knowing who is speaking about a candidate shortly before the election." *Id.* at 915-16.

The Court held that disclosure provisions are constitutional as long as there is a "'substantial relationship' between the disclosure requirement and a "sufficiently important governmental interest.'" *Id.* at 914 (citations omitted).[10] The Court then noted that disclosure "could be justified based on a governmental interest in 'provid[ing] the electorate with information' about sources of election-related spending," *id.* (citation omitted), which "would help citizens 'make informed choices in the political marketplace.'" *Id.* (citations omitted).

In *Speechnow.org v. FEC,* 599 F.3d 686, 696-98 (D.C. Cir. 2010), the court upheld disclosure, and related organizational and reporting requirements of PACs under federal law. In so doing, the court noted that "[t]he supreme court has consistently

[10] Contrary to Plaintiffs' contention (Pls.' Prelim. Inj. Mem. at 9) "strict scrutiny" is not the applicable standard. See also *infra* note 12.

upheld organizational and reporting requirements against facial challenge" to provide "the electorate with information about the sources of political campaign funds." *Id.* at 696 (citation omitted). The court cited to *Citizens United* and stated that "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation'" to the requirements. *Id.* The court concluded that "the public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenditures or independent expenditures." *Id.* at 698.

If Plaintiffs choose to make independent expenditures pursuant to the political fund provisions of Minnesota law, those provisions effectuate the disclosure of information to the public which *Citizens United* and other Supreme Court opinions have recognized is a sufficiently important governmental interest. Contrary to Plaintiffs' assertion, the political fund provisions are materially different than PAC requirements under federal law, and simply facilitate disclosure to provide necessary information to the public regarding independent expenditures, including "sources of election-related spending." *Citizens United,* 130 S. Ct. at 914.

For example, a PAC is a separate association from the corporation, *see id.* at 897, but a political fund is not separate from the corporation and is entirely controlled by the corporation. See Goldsmith Aff., ¶ 9, Ex. B at 1. Rather, the political fund is merely an account or accounting device for the purpose of the corporation making independent expenditures with its own corporate money. See *id.* In addition, a PAC cannot operate until it is established under federal law, *see Citizens United,* 130 S. Ct. at 899, but a

political fund can be registered within 14 days *after* the corporation engages in independent expenditure activity. Minn. Stat. § 10A.14. The frequency of reports and the detail of accounting information for PACs under federal law is also more extensive than required under Minnesota's independent expenditure political fund law.[11]

a. The provisions of the Minnesota political fund law are substantially related to the important government interest of informing the electorate about independent expenditures, including the sources of that election-related spending.

The registration of a political fund, within 14 days after the initial independent expenditure activity, is substantially related to the important government interest of providing information to the public regarding independent expenditures. Registration itself discloses to the public, including corporate shareholders, that the corporation is

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[11] Under Minnesota's political fund law, an annual report and, in a general election year, four additional reports close to the time of the primary and general elections, must be filed. Minn. Stat. § 10A.20, subds. 2(a), (c) (as amended by Laws 397, § 7); *see also* Minnesota Laws 2010, ch. 327, § 29. In limited circumstances, 24-hour reports may be required during the last two to three weeks just before an election. Goldsmith Aff., ¶¶ 19-21. In contrast, PACs must file semiannual reports in a non-election year and, in an election year must file quarterly reports, a post-general and a year-end report, and a pre-primary and a pre-general election report if there are contributions or expenditures prior to those elections. 2 U.S.C. § 434(a)(4); 11 C.F.R. §§ 104.5(c)(1), (c)(2). A PAC additionally must file reports of independent expenditures within 48 hours of each $10,000 or more of expenditures made from January 1 to 20 days before the election, and within 24 hours after $1,000 or more of expenditures during the last 20 days before an election. 2 U.S.C. §§ 434(b), (d), (g); 11 C.F.R. §§ 104.4(b)(2), (c). Goldsmith Aff., ¶¶ 22-23. A PAC must also itemize its receipts and disbursements by numerous different categories whereas the political fund law includes more general reporting through a handful of categories. See Goldsmith Aff., ¶ 24; *compare* Goldsmith Aff., Ex. I at 3-5 (FEC Form 3X Detailed Summary Page) *with* Ex. C at 2 (Minnesota Committee or Fund Transaction Summary).

engaged in independent expenditure activity and facilitates the reporting and disclosure of information required by law. *See, e.g., Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 791 (9th Cir. 2006) (stating that independent expenditure organization registration in conjunction with reporting requirements "are justified by compelling state interests") *cert. denied,* 549 U.S. 886 (2006); *National Org. for Marriage v. McKee,* 666 F. Supp.2d 193, 207 n.78 (D. Me. 2009) (stating registration requirement furthers a "compelling governmental interest") (plaintiffs represented by same counsel representing Plaintiffs in this case).

The designation of a treasurer for a political fund account is also substantially related to public disclosure. The treasurer is both a contact for the Board and the individual accountable on behalf of the corporation for compliance with the reporting and disclosure requirements of the law. *See, e.g., National Right to Life Political Comm. v. Connor,* 323 F.3d 684, 695 (8th Cir. 2003) (upholding treasurer requirement and stating that it "further[s] Missouri's compelling interest in 'preserving the integrity of the electoral process' by ensuring 'that each committee provides an individual who is accountable for compliance with the provisions of the disclosure law . . .'") (citation omitted); *McKee,* 666 F. Supp.2d at 207 (concluding that plaintiffs could not show a likelihood that treasurer requirement was unconstitutional and stating that the requirement "provides a contact person"); *National Right to Life Political Action v. Lamb,* 202 F. Supp.2d 995, 1020 (W.D. Mo. 2002) (upholding treasurer requirement and stating "the treasurer is the critical official that the [Missouri enforcement agency] must reach to investigate and address violations of the campaign finance law").

The reporting requirements are likewise substantially related to the critically important government interest of public disclosure. The required reporting, including the four recurrent reports around the time of the primary and general elections, provides timely disclosure to the electorate "about the sources of election-related spending." *Citizens United,* 130 S. Ct. at 914 (citation omitted). Furthermore, as the Court stated in *Citizens United*: "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called 'monied interests.'" *Id.* at 916 (citation omitted).

This reporting requirement is at the heart of the government interest of "help[ing] its citizens 'make informed choices in the political marketplace.'" *Id.* at 914 (citation omitted) (upholding federal electioneering communications disclosure and related reporting requirements); *see also Miles,* 441 F.3d at 791 (upholding recurrent reporting requirements as being "justified by compelling state interests"); *North Carolina Right To Life Comm. Fund for Indep. Political Expenditures v. Leake,* 524 F.3d 427, 440 (4th Cir. 2008) (upholding requirement that "eight reports be filed within two-and-a-half month period preceding the election," and stating that reporting requirements have a "substantial relationship to an important state interest") *cert. denied,* 129 S. Ct. 490 (2008); *McKee,* 666 F. Supp.2d at 208 (concluding that "plaintiffs cannot show a likelihood of success on

their challenge to Maine's recurrent reporting requirement"); *Speechnow.org,* 599 F.3d at 600 (upholding federal PAC reporting requirements).[12]

The recordkeeping provisions of the political fund law similarly have a substantial relation, indeed an essential relationship, to public disclosure. The disclosure of information to the public relies on the creation and maintenance of financial records that generate the information that is so vital to the electorate. The records also facilitate

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[12] Plaintiffs assert that "one-time reporting" with "limited information" is all that can be required because it is the "least restrictive means" to provide for disclosure. Pls.' Prelim. Inj. Mem. at 15-16. This assertion is misplaced for several reasons. First, "strict scrutiny," and therefore the "least restrictive means" standard, does not apply here. *See, e.g., Citizens United,* 130 S. Ct. at 914 (applying "substantial relationship to a sufficiently important governmental interest" test to disclosure requirements and stating that "disclosure [itself] is a less restrictive alternative to more comprehensive regulations of speech"); *Buckley,* 424 U.S. at 64, 96 S. Ct. at 656 ("We also have insisted that there be a 'relevant correlation' or 'substantial relation' between the government interest and the information required to be disclosed") (citation and footnotes omitted). Second, as discussed above at 23-24, 25-26, the reporting provisions of the political fund statute are substantially related to sufficiently important government interests. Third, one-time reporting does not satisfy the compelling disclosure interests of the government. *See, e.g., McKee,* 666 F. Supp.2d at 208 ("It will not do to say that a one-time disclosure in the week before the election is sufficient. That would not give the opposing viewpoint the opportunity to point out the source of financing and seek to persuade the electorate that the source of support discounts the message.") (footnote omitted). Fourth, the federal law on which Plaintiffs allegedly base their suggested one-time reporting, 2 U.S.C. § 434(c), actually provides for extensive periodic and recurrent reporting (report must be filed in any regular quarterly period once the $250 threshold is met and in any subsequent quarterly reporting period in which independent expenditures are made in any amount, 2 U.S.C. § 434(c)(1), (2); 11 C.F.R. § 109.10(b), and 48- and 24-hour reports required in same manner as for electioneering communications, 11 C.F.R. § 109.10(c), (d).) Finally, the information required to be reported by 2 U.S.C. § 434(c) is similar to that required under Minnesota Chapter 10A. *Compare* 11 C.F.R. § 109.10(e)(1)(i)-(vi) (reports must identify amount, date, purpose, recipient of expenditure and whether in support of or in opposition to specified candidate, and identification of each person who made contribution of over $200 to further independent expenditure) *with* Goldsmith Aff., Ex. C.

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enforcement which is furthered by the requirement that the records be maintained for a period of four years. Minn. Stat. § 10A.25, subd. 3 (2008); *see also, e.g., McKee,* 666 F. Supp.2d at 208 (concluding that plaintiffs are not likely to show that recordkeeping requirement is unconstitutional and stating that "[r]ecordkeeping is essential to enforcement").

Although the "informational interest alone is sufficient to justify" the political fund provisions, *see Citizens United,* 130 S. Ct. at 915-16, they are also supported by the government interests of "avoiding any appearance [of corruption], and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC,* 540 U.S. 93, 196, 124 S. Ct. 619, 690 (2003); *see also supra* note 9. While *Citizens United* concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," 130 S. Ct. at 909, some members of the public may nonetheless have a different perception. *Cf.* 130 S. Ct. 960-70 (Stevens, J., dissenting in part and joined by three other justices). Transparency mitigates against such perceptions, no matter how unfounded they might be, and engenders confidence in our system of campaign finance and our elections.

In addition, the political fund "recordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations" of Minnesota's campaign finance law. *Buckley*, 424 U.S. at 68, 96 S. Ct. at 658 (1976); *see also Miles,* 441 F.3d at 792 (upholding reporting requirements based in part on government data gathering interest as set forth in *Buckley* and *McConnell*); *Leake,* 524 F.3d at 440 (same); *see also Speechnow.org,* 599 F.3d at 698 (upholding organizational

and reporting requirements of federal PAC law based in part on the ground that "requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals"); Goldsmith Aff., ¶ 17.

b. The political fund provisions are not burdensome, or at least are not unduly burdensome in light of the critically important government interests served by disclosure.

As noted above, *Citizens United* made clear, consistent with prior U.S. Supreme Court precedent, that "[d]isclaimer and 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 (emphasis added) (citations omitted). In *Buckley,* the Court similarly reasoned:

> [C]ompelled disclosure has the potential for *substantially infringing* the exercise of First Amendment rights. But we have acknowledged that there are government interests sufficiently important to *outweigh the possibility of infringement*, particularly when the "free functioning of our national institutions" is involved.
>
> The *governmental interests* sought to be vindicated by the disclosure requirements *are of this magnitude*.

424 U.S. at 66, 96 S. Ct. at 657 (citation omitted; emphasis added).

The political fund provisions are therefore constitutional even if they impose burdens because the provisions are substantially related to sufficiently important governmental interests. However, if the Court considers Plaintiffs' assertion of

burdensomeness,[13] the Court should determine that the political fund provisions are not burdensome, or at least are not unduly burdensome, in light of the critically important government interests served by these provisions.

Political fund registration, a one-time requirement using a simple two-page form, is not burdensome. *See Miles,* 441 F.3d at 789 (stating registration requirements for independent expenditure organization "are not significantly burdensome in themselves"); Goldsmith Aff., ¶¶ 10-11 & Ex. E. Furthermore, as noted above, registration is not even required until 14 days *after* the first independent expenditure activity. Minn. Stat. § 10A.14. Likewise, the identification of a treasurer imposes no burden on Plaintiffs.

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[13] Plaintiffs make conclusory allegations that the political fund provisions are burdensome. See, e.g., Pls.' Prelim. Inj. Mem. at 5, 8, 10, 14. They also refer to the discussion in *Citizens United* regarding federal PACs, which are significantly different from the political fund provisions under Minnesota law. See *supra* at 20-21 & note 11. In any event, the discussion in *Citizens United* focused on the outright prohibition on corporate independent expenditures under 2 U.S.C. § 441b. 130 S. Ct. at 897. The Federal Election Commission suggested in *Citizens United* that an exception to the ban that allowed a corporation to form a PAC to accept contributions from its employees for political purposes, *see* 2 U.S.C. § 441b(b)(2), permitted a corporation to make independent expenditures. 130 S. Ct. at 897. The Court rightly observed that this exception did not allow the corporation itself to speak because it could not use its own corporate funds to make independent expenditures. *See id.* The Court also stated that "the option to form PACs does not alleviate the First Amendment problems with § 441b [the corporate expenditure ban]," referring to the PAC requirements under federal law. *Id.* The Court then concluded that the ban on corporate expenditures (not the PAC requirements themselves) constituted "a ban on speech." *Id.* at 898. Significantly, the Court did not strike down the PAC requirements of federal law. In fact, *Speechnow.org* recently upheld the federal PAC requirements, citing to *Citizens United*. 599 F.3d at 696-99. The fact that disclosure and related reporting requirements "may burden the ability to speak" does not render the requirements unconstitutional. *Citizens United*, 130 S. Ct. at 914; see also *supra* at 26.

The corporation's existing treasurer,[14] or any other individual, can be designated the treasurer for contact and accountability purposes. *See McKee*, 666 F. Supp.2d at 207 (stating requirement to register and appoint a treasurer is not burdensome); see also Goldsmith Aff., ¶ 12.

Nor is reporting burdensome. The reporting occurs only five times during a general election year and the reported information is easily gleaned from corporate records. *See Miles,* 441 F.3d at 791 (stating reporting requirements "are not particularly onerous"); *Leake,* 524 F.3d at 440 (stating compliance with recurrent reporting schedule of eight reports in 2-1/2 month period prior to election "is not particularly burdensome"); *McKee*, 666 F. Supp.2d at 208 (finding recurrent reporting not burdensome); see also Goldsmith Aff., ¶¶ 13, 29.

In addition, the recordkeeping requirements are not burdensome. Corporations by their very nature are required to prepare and keep financial records regarding all of their corporate transactions. *See* Minn. Stat. §§ 302A.461, subd. 3 (2008); 302A.463 (2008) (corporation required to keep financial records and prepare financial statements including balance sheet and statement of income); Minn. Stat. § 309.54, subd. 3 (2008) (nonprofits registered in Minnesota must retain for not less than three years "the original books and records, or true copies thereof, pertaining to all money or other property collected from

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[14] For-profit and nonprofit corporations designate a treasurer or chief financial officer for corporate governance purposes. *See* Minn. Stat. §§ 302A.301, 302A.305 (2008) (Minnesota Business Corporation Act) (requiring such appointment); § 317A.301 (2008) (Minnesota Nonprofit Corporation Act) (same); § 322B.679 (2008) (Minnesota Limited Liability Company Act) (same).

residents of this state and to the disbursement of such money or property."); Minn. Stat. § 317A.461, subds. 1, 3 (2008) (nonprofit corporation must keep accounting records for six years); Minn. Stat. §§ 322B.373, subds. 1, 2 (2008); 322B.376 (2008) (LLCs must keep financial statements including balance sheet and statement of income); see also Goldsmith Aff., ¶ 29.

The retention of those records for four years is also not burdensome. *See* 26 C.F.R. § 301.6501(e)-1 (six-year limitations period for omissions from tax returns); Minn. Stat. § 541.05, subd. 1(1) (2008) (6-year limitations period for actions upon contract or other obligation); Minn. Stat. § 317A.461, subds. 1, 3 (2008) (six year record retention requirement for nonprofit corporations); *see also McKee*, 666 F. Supp.2d at 208 (finding "no reasonable incremental burden in keeping [records] for four years" instead of two years); Goldsmith Aff., ¶ 29.

Finally, Minnesota's political fund requirements are certainly no more burdensome, and in some respects are less burdensome, than the disclosure and related provisions upheld in *Citizens United*. 130 S. Ct. at 915-16; see also Goldsmith Aff., ¶ 26. Section 201 of the Bipartisan Campaign Reform Act imposes continuous and short deadline (24-hour) reporting of electioneering communications aggregating $10,000. 2 U.S.C. § 434(f). Moreover, the federal electioneering communications reports must identify the person making the disbursement, any person sharing or exercising direction or control over that person (*i.e.*, the officers, directors, executive directors, partners or owners of the entity making the disbursement), and a custodian of records. 2 U.S.C. § 434(f)(2)(A); 11 C.F.R. § 104.20(a)(3). The reports also must include identification of

donors and disbursements similar to Minnesota law. *See* 2 U.S.C. § 434(f)(2)(B)-(F); Goldsmith Aff., Exs. C and J.

Minnesota's political fund provisions are not burdensome, and in any event they are not unduly burdensome in light of the important governmental purposes substantially related to those requirements.

c. Disclosure requirements can apply to corporate independent expenditures even if the corporation's major purpose is not to promote or defeat the nomination or election of a candidate.

Plaintiffs mistakenly assert that *Buckley* only allows Minnesota's disclosure and related reporting requirements for corporate independent expenditures if the subject corporation's major purpose is the nomination or election of candidates.[15] Pls.' Prelim. Inj. Mem. at 5. To the contrary, *Buckley* established that even if an organization's major purpose is not the nomination or election of candidates, the organization's expenditures are still subject to such disclosure regulation when the expenditures are for express advocacy. 424 U.S. at 80, 96 S. Ct. at 664.

As discussed above, *Citizens United* makes clear that disclosure and reporting requirements are constitutional if they substantially relate to a sufficiently important government interest. 130 S. Ct. at 914. Nowhere in its opinion did the Court limit this

[15] In making this contention, Plaintiffs wrongly equate Minnesota's political fund provisions with federal PAC requirements and refer to these Minnesota provisions as "PAC-style" requirements. See, e.g., Pls.' Prelim. Inj. Mem. at 17. As discussed *supra* at 20-21 & note 11, Minnesota's political fund provisions for corporate independent expenditures are materially different than PAC requirements under federal law. Plaintiffs' erroneous "major purpose" argument amounts to an attempt by Plaintiffs to exempt them from any disclosure regulation for express advocacy expenditures.

standard to independent expenditures of organizations that only had a major purpose of defeating or promoting the nomination or election of candidates. Rather, *Citizens United* stated that "[t]his Court has stated that disclosure is a less restrictive alternative to more comprehensive regulations of speech," *id.* at 915 (citation omitted), and rejected the claim that disclosure requirements can only apply to "express advocacy and its functional equivalent." *Id.* at 916. See also *supra* at 19.

3. The claims in counts 3 and 4 of the complaint are not ripe, and in any event, an independent expenditure under Minnesota law requires "express advocacy" within the meaning of *Buckley*.

In counts 3 and 4 of their complaint, Plaintiffs erroneously claim that the definition of "independent expenditure" in Minn. Stat. ch. 10A as applied by the Board, and the phrase "promote or defeat" in Minn. Stat. § 211B.15, extend beyond "express advocacy" as described in *Buckley*. This claim is not ripe and, in any event, fails on the merits under governing case law.

Plaintiffs do not allege that the purported vagueness and overbreadth associated with this claim is causing them to refrain from making any expenditures or contributions for "issue advocacy." *See National Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 688 n.3 (8th Cir. 2003) (explaining that issue advocacy "includes all political speech that is not express advocacy"). The expenditures and contributions that Plaintiffs allege they intend to make, but are refraining from making, are for express advocacy — independent expenditures for communications advocating the election of certain candidates and campaign contributions to certain candidates and their party.

Thus, Plaintiffs' challenge to the Board's application of "independent expenditure" and to section 211B.15's use of the phrase "promote or defeat" rests on a contingent concern that these provisions might be applied to some unidentified, future issue advocacy in which Plaintiffs may or may not engage. This does not present a ripe claim. A claim is not ripe, and therefore is not justiciable, when it "rests on undefined future events which may or may not occur." *281 Care Comm. v. Arneson*, 2001 WL 610935, *5 (D. Minn. Feb. 19, 2010) (citing *Renne v. Geary*, 501 U.S. 312, 321-23, 111 S. Ct. 2331, 2339-40 (1991)).

As to the merits, Plaintiffs acknowledge that Chapter 10A's definition of independent expenditure comports with *Buckley*'s description of express advocacy. Pls.' Prelim. Inj. Mem. at 23. The definition provides that independent expenditures are expenditures made independently of any candidate and "expressly advocating the election or defeat of a clearly identified candidate." Minn. Stat. § 10A.01, subd. 18 (2008) (as amended by 2010 Laws ch. 397, § 1); *compare Buckley*, 424 U.S. at 80, 96 S. Ct. at 664 (defining express advocacy as "communications that expressly advocate the election or defeat of a clearly identified candidate").

Plaintiffs contend, however, that on June 17, 2008, the Board issued an opinion that erroneously applied the definition of independent expenditure because it did not incorporate certain "magic words" associated with express advocacy. Compl. ¶¶ 1d, 9, 77-80. Regardless of whether this contention has merit, a subsequent decision of the Board, dated December 3, 2008, stated that "the Board construes § 10A.01, Subd. 28, [definition of political fund] to limit its application to associations that expressly advocate

the nomination or election of candidates" and correspondingly concluded that "[e]xpress advocacy [in Chapter 10A's definition of independent expenditure] requires use of specific words such as 'vote for', 'elect', "defeat' or similar words." Goldsmith Aff., ¶ 14, Ex. F at 6-7. This interpretation of the Board supersedes the prior opinion.

In any event, as was noted by the Board in its December 3, 2008 decision, the Minnesota Supreme Court has construed Chapter 10A's political fund provisions to be limited to expenditures for express advocacy as described in *Buckley*. *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 428-30 (Minn. 2005) (answering certified question from the Eighth Circuit by holding that definition of "political fund" in Minn. Stat. ch. 10A is limited to express advocacy as set forth in *Buckley*, 424 U.S. at 80, 96 S. Ct. at 664). This construction is binding on the Court. *See Johnson v. Fankell*, 520 U.S. 911, 916, 117 S. Ct. 1800, 1804 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."). Thus, because of the Minnesota Supreme Court's authoritative construction, Chapter 10A's political fund provisions cannot be applied to expenditures for issue advocacy.

Likewise without merit is Plaintiffs' contention that the provisions of Minn. Stat. § 211B.15 are vague and overbroad because the phrase "promote or defeat" a candidate extends to issue advocacy. Compl. ¶¶ 72-75. This claim was rejected by this Court in a previous case in which it was asserted by MCCL (represented by the same counsel as here). *Day v. Hayes*, 863 F. Supp. 940, 955 (D. Minn. 1994) (rejecting vagueness and overbreadth challenge to "promote or defeat" phrase in section 211B.15), *aff'd in part,*

rev'd in part on other grounds sub nom. Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995). As Judge Magnuson held in *Day*, "[a] person of ordinary intelligence could readily understand" that the phrase "promote or defeat" a candidate is limited to express advocacy as set forth in *Buckley. Id.*[16] In addition, the recent amendments to section 211B.15 confirm that its prohibitions do not apply to corporate independent expenditures authorized under Chapter 10A. *See* 2010 Laws ch. 397, §§ 16-17.

4. Minnesota law prohibiting Plaintiffs from making contributions to candidates and political parties is constitutional.

Plaintiffs erroneously claim in count 5 of their complaint that the prohibition in Minnesota law precluding corporations from making contributions to candidates and political parties is unconstitutional.[17] *Citizens United* very carefully distinguished independent expenditures from contributions to candidates. As the Court stated:

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[16] This claim is further foreclosed by collateral estoppel at least as to MCCL. *See, e.g., Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5, 118 S. Ct. 657, 664 n.5 (1998) (stating that under collateral estoppel, "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action").

[17] This claim is brought only by MCCL and Coastal. The Taxpayers League lacks standing to challenge the ban on corporate contributions because its articles of incorporation do not allow it to make campaign contributions. Goldsmith Aff., Ex. N, at 3 (provision of articles stating that the League "shall not participate in, or intervene in . . . any political campaign on behalf of any candidate for public office"); *see also* Compl. ¶ 82 n.27 (stating that the League does not challenge the prohibition against corporate contributions to political parties). Notwithstanding its professed intention to contribute to the campaign of a candidate for the State Senate, Compl. ¶ 48, the League must abide by its articles. *Diedrick v. Helm*, 217 Minn. 483, 497, 14 N.W.2d 913, 921 (1944) (reiterating that a corporation's articles of incorporation and its by-laws "must be obeyed by the corporation, its directors, officers, and stockholders"); *see also Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 689 (9th Cir.
(footnote continued on next page)

> The *Buckley* Court explained that the potential for quid pro quo corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," because "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."

130 S. Ct. at 901-02 (citations omitted); *see also Siefert v. Alexander,* 2010 WL 2346659, *12 (7th Cir. June 14, 2010) ("We note *Citizens United*, rather than overruling *Buckley*, noted and reinforced the distinction between independent expenditures on behalf of candidates and direct contributions to candidates.") (plaintiff represented by same counsel as in this case); *Speechnow.org v. FEC,* 599 F.3d 686, 695 (D.C. Cir. 2010) ("Limits on direct contributions to candidates, 'unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.'") (quoting *Citizens United*); *Minnesota Chamber of Commerce v. Gaertner,* 2010 WL 1838362, *2 (D. Minn. May 7, 2010) ("Notably, the [plaintiff] does not take issue with the statute's prohibition on direct expenditures and professes no intent to attempt to contribute directly to any candidate's campaign fund or the like.").

Furthermore, in *FEC v. Beaumont,* 539 U.S. 146, 149-63, 123 S. Ct. 2200, 2203-11 (2003), the U.S. Supreme Court expressly upheld the federal law prohibiting corporate contributions to candidates and political parties. *Citizens United* did not overrule

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2010) (holding that a corporation lacked standing to challenge a prohibition on contributions and expenditures that its bylaws did not authorize it to make).

Beaumont. In a very recent decision in *Green Party of Connecticut v. Garfield,* 2010 WL 2737134, *6 (2d Cir. July 13, 2010) the court concluded as follows:

> *Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law. Indeed, in the recent *Citizens United* case, the Court overruled two of its precedents and struck down a federal law banning independent campaign *expenditures* by corporations, but it explicitly declined to reconsider its precedents involving campaign *contributions* by corporations to candidates for elected office.

(Emphasis in original.)

The court in *Thalheimer v. City of San Diego,* 2010 WL 596397, *13-15 (S.D. Cal. Feb. 16, 2010), similarly rejected a claim by plaintiffs represented by the same counsel representing Plaintiffs in this case, challenging a ban on corporate contributions to candidates. In so doing, the court reasoned:

> Because the Supreme Court in *Beaumont* relied on the anticircumvention interest [to avoid the circumvention of contribution limits imposed on individuals] in upholding a corporate contribution limit, and the validity of that rationale was not affected by *Citizens United*, this Court accepts the City's assertion that the limit furthers this interest. In declining to extend the rationale of *Citizens United* to contribution limits, the Court finds significant "the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech." See No. 08-205 at 42 (Roberts, C.J., concurring). "Judicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of 'careful legislative adjustment.'" *Beaumont,* 539 U.S. at 162 n.9.

Id. at *15.

Moreover, Plaintiffs are wrong to suggest that *Citizens United* somehow implicitly overruled *Beaumont*. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997) (reiterating that lower courts should not "conclude our more recent cases have, by

implication, overruled an earlier precedent"); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Plaintiffs' equal protection challenge regarding alleged different treatment of labor unions (Compl. ¶ 85) also fails from the outset due to binding Supreme Court precedent. A "threshold" requirement for "a viable equal protection claim" is that the plaintiff "is similarly situated to those who allegedly receive favorable treatment." *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994), *cert. denied,* 513 U.S. 1185 (1995). In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66, 110 S. Ct. 1391, 1400-01 (1990), the Supreme Court concluded in rejecting an equal protection claim that there are "crucial differences" between corporations and unions with respect to use of general funds for political purposes because, unlike corporate shareholders, union members who disagree with a union's political activities can decline to fund those activities.

Citizens United did not address, and thus did not overrule, this equal-protection aspect of *Austin*. Plaintiffs' reliance on *Dallman v. Ritter*, 225 P.3d 610, 634 (Colo. 2010), is misplaced, as that case did not discuss *Austin*, determined in conclusory fashion that unions and corporations are similarly situated, and, even then, did so only with respect to a ban on contributions by sole-source government contractors.

Plaintiffs' equal protection challenge also fails to meet the further threshold requirement of differential treatment. *See, e.g., Gilmore v. County of Douglas*, 406 F.3d 935, 937 (8th Cir. 2005) (stating that to make an equal protection claim, plaintiff "must establish that some government action caused [it] to be treated differently from others similarly situated"). Contrary to Plaintiffs' contention, Minnesota law does not treat corporations differently than labor unions with respect to speaking themselves via campaign contributions. The law allows a labor union to use "money derived from dues or membership fees" to make contributions from its political fund to candidates and political parties. Minn. Stat. § 10A.12, subd. 5. As was noted in *Austin*, union members can decline to have their dues and membership fees used for political speech. 494 U.S. at 665-66, 110 S. Ct. at 1400-01. Thus, such contributions made from a union's political fund are effectively the speech of union members, not the union itself.

Plaintiffs also assert that the challenged law constitutes "impermissible viewpoint discrimination." Pls.' Prelim. Inj. Mem. at 29-30. This claim should not be considered because it is not asserted in the complaint. *See* Fed. R. Civ. P. 8(a)(2) (requiring that complaint contain "plain statement" giving notice of claim being asserted). In any event, the claim is without merit.

For purposes of First Amendment analysis, a "viewpoint" is speech motivated by an "ideology or the opinion or perspective of the speaker" and impermissible "viewpoint" regulation occurs when the speaker's particular ideology, opinion or perspective is "the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829, 115 S. Ct. 2510, 2516 (1995). Corporations do not share a single

political ideology and the rationale for prohibiting corporate contributions is not to suppress such a non-existent common ideology. *See, e.g., Citizens United,* 130 S. Ct. at 912 ("Corporations, like individuals, do not have monolithic views.").

The case on which Plaintiffs' rely, *R.A.V. v. St. Paul*, 505 U.S. 377, 112 S. Ct. 2538 (1992), is inapposite, as the city ordinance it struck down bears no resemblance to the prohibition on corporate contributions. *Id*. at 391-94, 2547-49 (holding that a city ordinance prohibiting "fighting words" violated the First Amendment because it prohibited only a certain subclass of such words — those containing messages of bias-motivated hatred — that the city deemed particularly offensive).

For all of the foregoing reasons, Plaintiffs have not shown and cannot show that they are likely to succeed on the merits. This *Dataphase* factor is dispositive of Plaintiffs' motion and therefore the motion must be denied. *See Planned Parenthood*, 530 F.3d at 731. In any event, application of the remaining *Dataphase* standards do not support Plaintiffs' motion.

B. Harm To Plaintiffs

If there is any harm to Plaintiffs, it is minimal. Plaintiffs may engage in independent expenditures by simply contributing to an independent expenditure fund or committee. Minn. Stat. § 10A.12, subd. 1a. Indeed, corporate money has been flowing freely into independent expenditure funds/committees during this election cycle. Numerous corporations have each made contributions of $100,000 or more under the current statutory framework with no undue burden. See, e.g., Goldsmith Aff., Exs. C and D. Alternatively, if Plaintiffs choose to register under the independent expenditure

political fund law, the requirements of the law are consistent with general corporate accounting and bookkeeping practices that they presumably already use. See *supra* at 9-10, 28-29; Goldsmith Aff., ¶ 29.

Moreover, Plaintiffs' alleged need for this expedited relief is based on their own delay in commencing this litigation. *Citizens United* was decided on January 21, 2010. Bills amending Minnesota's laws were passed on May 16, 2010 and signed by the Governor on May 27, 2010. See *supra* at 6. Yet, Plaintiffs waited until July 9, 2010 to serve their lawsuit. This delay is particularly inexplicable with regard to Plaintiffs' challenge to the prohibition on corporate contributions to candidates and political parties. This prohibition has been in effect for many years and the 2010 Amendments did not relate to that prohibition.

C. Harm To State And The Electorate

The harm to the State is substantial. The State oversees elections for its various elected officials. It is critical that financing of those elections be disclosed so that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916. Plaintiffs' requested relief would invalidate any reporting and related disclosure of corporate independent expenditures to the obvious detriment of the electorate.

In addition, the fairness of an election is furthered by the use of standards and rules that are applicable to the entire election season. To change those standards and rules during the course of the election season would work an injustice to the electorate

and candidates. This is especially true here because Plaintiffs did not expeditiously commence this case to vindicate their First Amendment claims.

D. Public Interest

For the same reasons, the public interest is served by denying Plaintiffs' motion. Plaintiffs' attempt to gut public disclosure might further their private interests, but certainly not the public interest. The disclosure Plaintiffs attempt to avoid allows the public to be more informed in making "choices in the political marketplace." *Citizens United*, 130 S. Ct. at 914. This furthers the public interest. The public interest is also served by maintaining consistent rules and standards throughout the entire election season.

IV. THE COURT SHOULD NOT CONSOLIDATE THE TRIAL WITH PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

Defendants believe that Plaintiffs' claims are without merit as a matter of law. However, as the Court noted in its Order of July 27, 2010, if the Court determines that there are material facts genuinely in dispute as to an issue (e.g., the alleged burdensomeness of the political fund provisions), then Defendants wish to conduct discovery. Plaintiffs have refused to allow Defendants to conduct such discovery. Defendants therefore oppose Plaintiffs' motion to consolidate.

V. MOTION TO SHORTEN TIME.

Plaintiffs ask the Court to rule on their motion for preliminary injunction before September 15, 2010. The Court should take whatever time it needs to make a fully informed decision.

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Respectfully submitted,

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