United States Court of Appeals
For the Eighth Circuit

Minnesota Citizens Concerned For Life, Inc. et al., *Appellants*, *v*. **Lori Swanson** et al., *Appellees*.	**NO. 10-3126** (CIVIL)

Emergency Motion for Injunction Pending Appeal

James Bopp, Jr.,
jboppjr@aol.com
Richard E. Coleson*
rcoleson@bopplaw.com
Joe La Rue*
jlarue@bopplaw.com
Kaylan L. Phillips*
kphillips@bopplaw.com
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
Lead Counsel for Plaintiffs
*Admission application filed.

James R. Magnuson*
magnuson@mklaw.com
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street #4100
Minneapolis, MN 55402
Telephone: (612) 341-1074
Facsimile: (612) 341-1076
Local Counsel for Plaintiffs
*Admission application filed.

Minnesota Citizens Concerned for Life ("MCCL"), The Taxpayers League of Minnesota ("Taxpayers"), and Coastal Travel Enterprises, LLC ("Coastal") (collectively "Corporations") move for an injunction pending appeal against enforcement of certain Minnesota campaign-finance provisions. FRAP 8(a)(1). Because the Appellants want to speak now, but certainly prior to the November 2, 2010 election, relief is needed as soon as possible and prior to November 2, 2010.

Factual Background

MCCL is a Minnesota pro-life advocacy corporation. (Doc. 1 ("VC.") ¶¶ 21-22.) Taxpayers is a Minnesota nonpartisan corporation advocating lower taxes, limited government, and taxpayer empowerment. (*Id*. ¶ 29.) Both are nonprofit under 26 U.S.C. 501(c)(4). (*Id*. ¶¶ 23, 30.) Coastal is a Minnesota limited liability corporation providing retail travel industry services. (*Id*. ¶ 35.) None of the Corporations exists for the purpose of nominating or electing candidates, nor does any spend the majority of its disbursements on such activities. (*Id*. ¶¶ 25, 34, 35.)

On July 7, 2010, the Corporations challenged the constitutionality of certain Minnesota campaign-finance provision. First, they challenged Minn. Stat. §§ 10A.12(1), 10A.12(1a), and 211B.15(3), (*id*. ¶¶ 59-65,) which ban corporate general-fund independent expenditures ("IEs") greater than $100 annually ("IE ban"). (*Id*. ¶ 40.) Corporations wishing to make IEs are forced to employ a separate IE-fund for doing so, which is like the federal political committee ("PAC")

requirement of a separate segregated fund. (*Id*. ¶¶ 40, 55.) Such funds have PAC-style requirements, including registration, treasurer, record-keeping, and dissolution requirements, as well as the requirement that regular, ongoing reports be filed even absent activity. (*Id*. ¶ 55.) As soon as possible, the Corporations want to make general-fund IEs totaling over $100 in a year. (*Id*. ¶ 39.) But Minnesota prohibits them. (*Id*. ¶ 40.)

Second, the Corporations challenged Minn. Stat. §§ 10A.27(13), 211B.15(2), and 211B.15(4), (*id*. ¶¶ 81-86,) which ban corporate contributions to candidates and political parties by requiring that they be made through a PAC-option "conduit fund" ("contribution ban"), (*id*. ¶ 53.) Corporations may not decide to whom their conduit funds contribute. (*Id*.). Conduit funds must contribute to candidates for whom the employee-donors earmarked contributions. (*Id*.). Labor unions need not employ conduit funds. (*Id*.) They use "political funds" for contributions and determine to which candidates the funds will contribute. (*Id*.). So contributions to political funds need not be earmarked as contributions to conduit funds must be. (*Id* ¶¶ 52-53.) As soon as possible, each corporation wants to contribute to candidates it supports. (*Id*. ¶ 48.) MCCL and Coastal also want to make a general-fund contribution over $100 in a year to a political party. (*Id*. ¶ 45.) They would do so but for Minnesota's prohibition. (*Id*. ¶¶ 46-47, 49-50.)

Third, the Corporations challenged Minn. Stat. § 10A.01(18), which defines

"independent expenditure" ("IE definition"), as authoritatively interpreted by the Minnesota Campaign Finance and Public Disclosure Board (*Id.* ¶¶ 77-80.)[1]

The Corporations moved for preliminary injunction (Doc. 8), denied on September 20, 2010 (Doc. 59), noticed appeal (Doc. 60), and moved for injunction pending appeal (Doc. 61), which was denied on September 28 (Doc. 67).

Injunction Standard

A. The Injunction Pending Appeal Standard Involves Four Factors.

For injunctions pending appeal, FRAP 8(a)(1)(C), 8(a)(2), movants must show (1) strong likelihood of merits success; (2) irreparable injury absent injunction; (3) the injunction will not substantially injure other parties; and (4) an injunction is in the public interest. *Fargo Women's Health Organization v. Schafer*, 18 F.3d 526, 538 (8th Cir. 1994) (discussing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

B. Free-Speech Cases Require Speech-Protective Application.

In the election context, "[t]here are short timeframes in which speech can have

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[1] While the independent-expenditure definition requires so-called "magic words" of "express advocacy," such as "vote for," which follows the Supreme Court's instruction when it created the express-advocacy standard to avoid vagueness and overbreadth in an expenditure definition, *see Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976), the Board subsequently issued an advisory opinion saying that express advocacy did not require magic words, which opinion the State now claims was reversed in comments pertaining to an enforcement matter. The debate over whether such commentary can overrule an advisory opinion is not necessary for this Court to consider here because the State's present position is that express advocacy requires magic words. The Corporations seek a declaratory judgment due to the State's vacillation, which does not require consideration in this motion for injunction pending appeal.

influence[.]" *Citizens United v. FEC*, 130 S.Ct. 876, 895 (2010) ("*CU*"). Much core political naturally occurs near elections, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 472 (2007) ("*WRTL-II*"). During the heat of campaigns, speakers decide to speak in reaction to others' speech. *CU*, 130 S.Ct. at 876. So "[a] speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on . . . ." *Id*. In such situations, preliminary injunction denials effectively decide the case. For example, in *WRTL-II*, WRTL was denied a preliminary injunction, which deprived it of opportunity in 2004 to oppose judicial-nominee filibusters. 551 U.S. at 460. The 2007 vindication of WRTL's right did not repair the 2004 deprivation.

Recognizing this problem, the Supreme Court set speech-protective standards for First Amendment challenges to assure expeditious decisions that protect free speech rights. Notably, deference to the legislature is not appropriate in the First Amendment context. Rather, the *government* is required to demonstrate it has a constitutionally cognizable interest in its law, and that the law is properly tailored to that interest. *Id*. at 464-65 (State bears burden under strict scrutiny); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000) (State bears burden under intermediate scrutiny). This is true even for preliminary injunctions. *Gonzales v. O*

Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429 (2006). If the State cannot meet its threshold burden, the law must be enjoined. *Id*. (*citing Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004)). The benefit of any doubt goes to protecting speech. *WRTL-II*, 551 U.S. at 469, 474 n.7, 482. Expressly rejected are considerations of the speech's *intent and effect*, *id.* at 465-69, 472, its *context* (other than basic background information), *id.* at 472-74, and its *proximity to the election*, *id.* at 472-73—factors which have no bearing on whether speech is protected and whether (or how) it may be regulated. Rather, evaluations of political speech regulations "must be objective, focusing on the substance of the communication." *Id*. at 469. Every effort should be made to quickly resolve suits without burdensome litigation in a way that promotes robust public debate on issues of the day. *Id*. And the Supremacy Clause, U.S. Const. art. VI, requires that state laws yield where First Amendment rights are likely violated.

C. The District Court Did Not Follow Supreme Court Mandates.

In denying preliminary injunction, the court below held against the Corporations the fact that (1) they wanted to speak near an election and (2) the state had no constitutionally permissible disclosure law through which the funding for their speech could be disclosed to the public. Despite the Supreme Court's clear rule that these are not factors to consider, *see supra*, the district court said that "[i]nvalidating the election laws at issue here would likely result in corporations

making independent expenditures without any reporting or disclosure on the eve of the upcoming general election on November 2, 2010. This result so close to the election would clearly harm the State, Minnesota voters, and the general public interest." (Doc. 59 at 34-35.)[2] This is the result—application of factors inappropriate to First Amendment contexts—that *WRTL-II* sought to avoid.

D. This Court Should Apply Speech-Protective Standards.

Preliminary injunction denials deprive speakers of timely speech. For time-sensitive speech, preliminary-injunction denials decide the litigation. By the time this appeal concludes, it will likely be too late for the Corporations to engage in their planned speech at a time when it will still be possible to influence *this* election.The Corporations want to expressly advocate for candidates they support now, before the election, while public attention is so focused so as to make the communication uniquely effective. Unless this Court grants an injunction, the particular teachable moment will be lost and the Corporations will be deprived forever of their First Amendment right to speak about *this* election.[3]

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[2] The district court also erroneously found that the Corporations were unlikely to enjoy merits success in large part because it viewed the challenged bans on speech as mere disclosure laws. (Doc. 59. at 21.) That the court erred, and that the Corporations enjoy strong likelihood of merits success, is explained *infra*.

[3] The Corporations have also filed concurrently with this motion a motion for expedited appeal. If the Court grants their motion to expedite, it could reach a decision in time for the Corporations to speak before the election. If the Court does not grant the motion to expedite, the appeal cannot be decided prior to the election.

This Court should therefore apply the *Hilton*-injunction standard in a speech-protective way. It should require the State to demonstrate that its laws survive the applicable scrutiny—that is, that its laws are properly tailored to an adequate interest. It should ignore factors the Supreme Court has declared out-of-bounds and only consider the type of speech at issue and whether Minnesota may constitutionally so regulate it. *See WRTL-II*, 551 U.S. at 469 (standards in First Amendment challenges "must be objective, focusing on the substance of the communication."). Because the State cannot meet its threshold burden of demonstrating that the challenged laws survive scrutiny, it fails its burden of justifying its laws and injunctive relief should issue.

I. The Corporations Are Likely to Succeed on the Merits.

A. The IE Ban Is Unconstitutional as a Matter of Law.

1. The IE Ban Forces Corporations to Employ Segregated Accounts to Make IEs in Violation of *Citizens United*.

CU held that corporations may not be prohibited from making *general-fund* IEs. 130 S.Ct. at 913. Nor may they be required to employ a separate segregated fund ("SSF")[4] to make their IEs, *id*., because such a requirement is actually a ban

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Regardless, an injunction pending appeal is needed so that the Corporations may exercise their First Amendment rights *now*, when they want to speak.

[4] "SSFs" and "PACs" are synonymous. *See CU*, 130 S.Ct. at 887 (under 2 U.S.C. 441b(b)(2), corporations "may establish a 'separate segregated fund' (known as a political action committee, or PAC)" for political speech purposes); *WRTL-II*, 551

on corporate speech, *id*. at 897 ("Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak."). SSFs cannot allow *corporations* to speak because they are separate legal entities. *Id*. Corporations must be allowed to make their own, *general fund*, IEs. *Id*. at 914. Minnesota does precisely what *CU* forbids: it bans corporate general-fund IEs, and requires corporations to employ SSFs to make their IEs. This is unconstitutional.

The State sought to avoid this conclusion below with two claims. First, it asserted it has not banned corporate IEs because corporations may make IEs either by contributing funds to other IE committees or by forming an SSF. (Doc. 43 at 16-17.) Neither option allows the *corporation itself* to speak. If corporations give money to organization making IEs, the corporations are not making their *own* IEs. If corporations form SSFs to make IEs, the SSFs make the IEs, not the corporations. *CU* was clear: corporations must be allowed to make their own, general-fund IEs. *Id*. at 913. Allowing them to contribute to others' IEs or form SSFs to make IEs is not a constitutionally permissible alternative.

U.S. at 485 (Scalia, J., concurring) (a "separate segregated fund" is "commonly known as a 'PAC'"); *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238, 254 (1986) ("a 'separate segregated fund' . . . . is considered a 'political committee'").

Under federal law, a political committee (PAC) is includes "any separate segregated fund established under the provisions of section 441b(b) of this title." 2 U.S.C. 431(4)(B). Section 441b(b) provides for "the establishment, administration, and solicitation of contributions to a separate segregated fund . . . for political purposes by a corporation . . . "—in other words, a PAC. 2 U.S.C. 441(b)(2)(C).

Second, the State asserted a disclosure interest in requiring corporations to employ SSFs to make IEs. (Doc. 43 at 17-20.) Yet *CU* explicitly rejected PAC-style disclosure elements adopted by Minnesota—e.g., regular, ongoing reporting (even when there is nothing to report), registration, and record-keeping—for corporations making IEs. 130 S.Ct. at 897-98. The type of disclosure that *CU* upheld was on-ad disclaimers and event-driven disclosure (organization reports speech when done), not PAC-style burdens. *Id*. at 914.

The State thus confuses its PAC-style disclosure requirements—which *CU* (1) declared are "burdensome" and "onerous," 130 S. Ct. at 897, 898; (2) evaluated under *strict* scrutiny, *id*. at 898; and (3) held unconstitutional for corporate IEs, *id*. at 913—with the on-ad attribution and one-time reports that *CU* upheld under exacting scrutiny, *id*. at 914. Every positive statement *CU* made about disclosure related to on-ad attribution requirements and simple, *"event-driven"* reporting of *general-fund* IEs (i.e., reporting IEs when made and any contributions earmarked for express advocacy). None related to the type of detailed, PAC-style reporting Minnesota requires each reporting period regardless of whether IEs were made, nor to the PAC-style registration, record-keeping, and dissolution requirements Minnesota imposes on corporations.

Besides, *CU* held that the *only* permissible interest in restricting speech is the anticorruption interest. *Id*. at 901, 909. *CU* explicitly 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, (3) protecting dissenting shareholders, *id*. at 911, and (4) suppressing speech on the basis of the speaker's corporate identity, *id*. at 913. While there is an interest in disclosure, *id*. at 914, that interest cannot justify banning a corporation's own general-fund speech. In fact, the type of disclosure *CU* held permissible is on-ad and event-driven reporting that "do[es] not prevent anyone from speaking[.]" *Id*. at 914. Limitations on speech must be justified by an anti-quid-pro-quo corruption interest. *Id*. at 901, 909. But IEs are, by definition, noncorrupting. *Id*. at 909. So they may not be restricted nor banned. *Id*. at 913.

The State has no law that will require constitutional disclosure of the sources of IEs—that is, the type of on-ad, event-driven disclosure that *CU* upheld for IEs. (Doc. 43 at 40 ("Plaintiffs' requested relief would invalidate any reporting and related disclosure of corporate independent expenditures . . . .")) That, however, should not be held against the Corporations, or used as an excuse to impose on them unconstitutional speech bans. The State's permissible remedy is to draft a constitutional disclosure law, not ban corporate speech. *CU*, 130 S.Ct. at 911.

2. The IE Ban Imposes PAC-Style Burdens in Violation of *Buckley*.

Only groups "under the control of . . . candidate[s] or [having] the major purpose of . . . nominati[ng] or electi[ng] . . . candidate[s]" may be subjected to PAC

status or burdens. *Buckley*, 424 U.S. at 79. An entity's major purpose is determined on the basis of (1) its "central organizational purpose" or (2) its "independent spending." *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 and n.6 (1986) (plurality opinion) ("*MCFL*"). So only organizations that are organized to nominate or elect candidates or that spend the majority of their money to nominate or elect candidates may be subjected to PAC-style burdens. Federal circuits have invalidated state and federal laws imposing PAC status or burdens absent the major-purpose test. *See N.M. Youth Organized v. Herrera*, __F.3d__, 2010 WL 2598314 at *7 (10th Cir. 2010) (no PAC status absent *Buckley*'s "major purpose"); *N.C. Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (same); *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1153–54 (10th Cir. 2007) (same).[5]

Even if requiring corporations to employ IE funds does not ban general-fund IEs, it still imposes PAC-style burdens on entities that may not be regulated as PACs. None of the Corporations have *Buckley*'s major purpose. (VC ¶¶ 25, 34, 35.) They may neither be subjected to PAC-style burdens nor required to employ a

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[5] District courts have recognized the necessity of the major-purpose test. *See, e.g., S.C. Citizens for Life v. Krawcheck*, No. 4:06-cv-2773, slip op., 2010 WL 3582377 (D. S.C. September 13, 2010); *Nat'l Fed'n of Republican Assemblies v. U. S.*, 218 F. Supp. 2d 1300, 1330 (S.D. Ala. 2002); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1327 (S.D. Ala. 2000); *S.C. Citizens for Life v. Davis*, No. 3:00-0124-19 (D.S.C. 2000) (unpublished opinion and order granting preliminary injunction); *FEC v. GOPAC*, 917 F. Supp. 851, 1468-71 (D.D.C. 1996); *N.Y. Civil Liberties Union v. Acito*, 459 F. Supp. 75 (S.D.N.Y. 1978). *But see NOM v. McKee*, No. 09-538, slip op., 2010 WL 3270092 (D. Me. Aug. 19, 2010) (test inapplicable to state regulations).

PAC to engage in First Amendment activity. But the IE ban forces corporations wishing to make IEs to do so through a separate fund, which the State then regulates as a PAC, regardless of the corporations' major purpose. It may not constitutionally do so.

3. The IE Ban Fails Scrutiny.

Laws that burden political speech, including IE bans, are subject to strict scrutiny. *Citizens*, 130 U.S. at 898; *Day v. Holahan*, 34 F.3d 1356, 1360-61 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995). So the State must "prove" that the law is "narrowly tailored" to a "compelling" interest, *WRTL-II*, 551 U.S. at 464, and employs the "least restrictive means," *Gonzales*, 546 U.S. at 429; *MCFL*, 479 U.S. at 262. The State cannot meet its burden because "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," *CU*, 130 S.Ct. at 909, and only the anti-quid-pro-quo corruption 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).

Even if the IE ban were not a ban on speech but rather a disclosure law, as the State claims, it would still fail scrutiny. While on-ad and event-driven disclosure requirements are subject to exacting scrutiny, *CU*, 130 S.Ct. at 914, laws that impose PAC status or require groups to speak through PACs are subject to strict

scrutiny, *id*. at 898; *Day*, 34 F.3d at 1363. Because laws subject to strict scrutiny must employ the least restrictive means to further their interest, *MCFL*, 479 U.S. at 262, states may not impose these burdensome, PAC-style requirements unless doing so is the least-restrictive means to meet a compelling governmental interest.

The federal scheme for reporting IEs is significantly less restrictive than Minnesota's imposition of PAC status and burdens. Under the federal scheme, groups making IEs simply file what may be called an "event-driven report" the next time quarterly independent expenditure reports are due. There is no requirement (as in Minnesota) to register, file ongoing periodic reports (absent further independent expenditures), or file a notice of dissolution. Because PAC status is not the least restrictive means for reporting IEs, Minnesota may not constitutionally impose it.

B. The Contribution Ban Is Unconstitutional as a Matter of Law.

The contribution ban fails First Amendment scrutiny as both a ban on speech and a content-based regulation of speech, and it fails the Fourteenth Amendment's equal protection guarantee.

1. The Contribution Ban Is Subject to Strict Scrutiny, Which it Fails.

Though contribution *limits* are generally evaluated under intermediate scrutiny, the contribution ban is subject to strict scrutiny for two reasons. First, *CU* clarified that *bans* on political speech are subject to strict scrutiny, 130 S. Ct. at 897, 898, and a contribution is both political association and speech, *Buckley*, 424

U.S. at 20. Second, the contribution ban is a content-based regulation, which targets one type of speech—namely, *political* contributions—but does not prohibit other kinds of contributions, such as contributions to charitable, educational, or religious organizations. Such content-based regulations are subject to strict scrutiny, because "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *See Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).[6]

That the statute targets political speech broadly is irrelevant. It is still a content-based restriction because it bans only one type of contribution. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). Thus, a statute that singles out political speech as a general category is content-based even though it does not single out particular political views, and even though it applies to all political speech and "does not favor either side of a political controversy," *Consol. Edison Co.*, 447 U.S. at 537. *See also Burson v. Freeman*, 504

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[6] *See also*, *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 967 (8th Cir. 1999) ("*IRLC*") (content-based regulation subject to strict scrutiny); *Day v. Holahan*, 34 F.3d 1356, 1361 (8th Cir. 1994) (same); *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (statute that both prohibits speech on the basis of its content and burdens a category of speech that is essential to First Amendment freedoms triggers strict scrutiny).

U.S. 191, 197 (1992) (plurality opinion) (speech restriction on all campaign-related speech was content-based); *Mosley*, 408 U.S. at 94 (speech restriction that permitted labor picketing but not other peaceful picketing was content-based).

In *IRLC*, this Court recognized that a regulation targeting speech expressly advocating the election or defeat of candidates was content-based, though burdening all speech equally, and applied strict scrutiny. 187 F.3d at 967. Here, as in *IRLC*, the restricted speech (political contributions) is defined precisely by its *content*. The regulation bans all general-fund political contributions, but not other contributions. The ban also singles out certain speakers—corporations—and prohibits them from making general fund political contributions, as others are allowed to do. The First Amendment prohibits speaker-based restrictions on speech, in part because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *CU*, 130 S. Ct. at 898-99; *see also id.* at 904-08 (government may not ban political speech "simply because the speaker is an association that has taken on the corporate form").

The contribution ban is therefore content-based, and so must satisfy strict scrutiny and employ the least restrictive means. The *only* interest that can justify restrictions on political speech is the anti-quid-pro-quo-corruption interest. *CU*, 130 S. Ct. at 901, 909. That interest is *only* implicated by *large* contributions. *Id*. at 901; *Buckley*, 424 U.S. at 28, 45. A *ban* on contributions cannot be "narrowly tai-

lored" to the interest of eliminating *large* contributions, but is overinclusive, reaching small contributions that could never encourage quid-pro-quo corruption. The contribution ban therefore fails strict scrutiny.[7]

2. The Contribution Ban Violates Equal Protection.

The ban violates Fourteenth Amendment equal protection for treating corporations differently than similarly situated associations, including labor unions. Such organizations may raise contributions from members into "political funds," then determine the candidates that will receive contributions from the members' donations. Minn. Stat. § 10A.12. Corporations may not use political funds, *id*., but must use "conduit funds" to raise donations from employees. Minn. Stat. § 211B.15(16). Unlike labor unions, corporations cannot decide to whom their fund should contribute. Rather, they must follow the direction of their employee-donors, who must earmark their contributions for specific candidates. *Id*.

The Corporations are only aware of two cases considering whether corporations and labor unions are similarly situated for campaign-finance purposes. In *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 665-66 (1990), the Supreme Court said they were not similarly situated because of "crucial differences." But

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[7] The ban also fails intermediate scrutiny because, while courts may have "no scalpel to probe" whether one limit would be better than another, *Randall v. Sorrell*, 548 U.S. 230, 248 (2006), none is needed to determine that a complete ban cannot be "closely drawn" to the interest of eliminating *large* contributions.

the "crucial differences" *Austin* identified resulted from the "state conferred advantages" of the corporate form, which *Austin* said distorted elections, *Austin*, 494 U.S. at 665-66, a concern that *CU* said is no longer valid in overturning *Austin*, *CU*, 130 S. Ct. at 903-908. Thus, *Austin*'s analysis is overturned and inapplicable.

In *Dallman v. Ritter*, 225 P.3d 610 (Col. 2010), the situation was the exact opposite from Minnesota's law. Corporations could control PACs that could make contributions while labor unions could not. *Id*. at 634. The court said this "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*.

Dallman applied strict scrutiny because "[e]qual [p]rotection . . . requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Id*. (*quoting Mosley*, 408 U.S. 92, 101 (1972). Because the government had no compelling interest in restricting contributions from labor unions but not corporations, the court held the restriction an equal-protection violation. *Id.* at 635. As in *Dallman*, the State has no interest supporting disparate treatment of corporations and other associations, including labor unions. The contribution ban therefore violates the Fourteenth Amendment.

II. Appellants Will Be Irreparably Harmed Absent an Injunction.

"The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury . . . ." *IRTL*, 187 F.3d at 970 (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Deprivation of equal protection rights is irreparable injury. *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (in equal-protection context: "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 equal-protection violation). The State has failed its burden of showing that there is no irreparable harm.

III. The Injunction Will Not Substantially Injure Other Parties.

When First Amendment freedoms are infringed, this Court "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 constitutionally-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). No harms flows from enjoining laws likely unconstitutional—the Supremacy Clause mandates it. And while the public and State have an *interest* in disclosure in narrowly-defined circumstances, they have no constitutional *right* to disclosure and may not require disclosure unconstitutionally.

IV. The Public Interest Will Be Served by Granting a Preliminary 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. 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).

Conclusion

For the foregoing reasons, the Corporations respectfully request this Court to grant their Motion for Injunction Pending Appeal.

Dated September 29, 2010

/s/ James Bopp, Jr.
James Bopp, Jr.,
jboppjr@aol.com
Richard E. Coleson*
rcoleson@bopplaw.com
Joe La Rue*
jlarue@bopplaw.com
Kaylan L. Phillips*
kphillips@bopplaw.com
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
Lead Counsel for Plaintiffs
*Application for admission has been filed.

James R. Magnuson*
magnuson@mklaw.com
MOHRMAN & KAARDAL, P.A.
33 South Sixth Street #4100
Minneapolis, MN 55402
Telephone: (612) 341-1074
Facsimile: (612) 341-1076
Local Counsel for Plaintiffs
*Application for admission has been filed.

Certificate of Service

I hereby certify that on September 29, 2010, I electronically filed the foregoing document with the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I also mailed, by Federal Express overnight delivery, copies of the foregoing to:

Alan I. Gilbert, Esq., Solicitor General
John Steven Garry, Asst. Attorney General
Kristyn Marie Anderson, Asst. Attorney General
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
Counsel for the State Defendants

Daniel Rogan, Assistant County Attorney
Beth A. Stack
300 South 6th Street
Government Center
Minneapolis, MN 55487
Counsel for Defendant County Attorney Freeman

/s/ James Bopp, Jr.
James Bopp, Jr.