No. 10-3126

In the
United States Court of Appeals
for the Eighth Circuit

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC.,
THE TAXPAYERS LEAGUE OF MINNESOTA and
COASTAL TRAVEL ENTERPRISES, LLC,

Plaintiffs-Appellants,

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-Appellees.

Appeal from the United States District Court
for the District of Minnesota-Minneapolis, No. 0:10-cv-02938-DWF.
The Honorable **Donovan W. Frank**, U.S. District Judge Presiding.

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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ORAL ARGUMENT REQUESTED

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Summary of the Case

Minnesota Citizens Concerned for Life ("MCCL"), The Taxpayers League of Minnesota ("Taxpayers"), and Coastal Travel Enterprises, LLC ("Coastal") (collectively "Corporations") asked the district court to preliminary enjoin Minnesota Statutes sections 10A.12(1), 10A.12(1a), 211B.15(3) (corporate independent expenditure ban); sections 211B.01(4), 211B.15(2), 211B.15(4), 211B.15(16) (corporate contribution ban); and 10A.01(18) (independent expenditure definition). The district court denied Corporations' motion for preliminary injunction on September 20, 2010. (JA-222, Addm–1.)[1] The Corporations now appeal that denial.

Oral argument would benefit the Court, as this case involves several claims, each claim is itself significant and complex, and the Corporations advance several theories as to why each of these provisions fail the appropriate constitutional scrutiny. The Corporations request 30 minutes to present their oral argument.

[1] References to the Joint Appendix are designated "JA" throughout this brief. Where applicable, cross-references to the Addendum are designated "Addm."

Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Minnesota Citizens Concerned For Life, Inc., The Taxpayers League of Minnesota, and Coastal Travel Enterprises, LLC state that there is no publicly held corporation owning 10% or more of its stock.

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Jurisdictional Statement

This action arises under 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the Constitution of the United States. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). It denied the Corporations' motion for preliminary injunction on September 20, 2010. (JA-222, Addm–1.)

The Corporations timely appealed under Fed. R. App. P. 4(a)(1)(A) on September 22, 2010. (JA–257, Doc. 60.) This Court has jurisdiction over appeals of preliminary injunction orders under 28 U.S.C. §§ 1292(a)(1) and 1294(1).

Statement of the Issues

I. Whether the district court reached an erroneous legal conclusion and so erred when it declined to preliminarily enjoin the corporate independent expenditure ban. (JA–83, ¶ a; JA–256, ¶ 1, Addm–35.)

–*Buckley v. Valeo*, 424 U.S. 1 (1976)
–*FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986)
–*FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007)
–*Citizens United v. FEC*, 130 S.Ct. 876 (2010)

II. Whether the district court reached an erroneous legal conclusion and so erred when it declined to preliminarily enjoin the corporate contribution ban. (JA–84, ¶ e; JA–256, ¶ 1, Addm–35.)

–*Buckley v. Valeo*, 424 U.S. 1 (1976)
–*Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999)
–*FEC v. Beaumont*, 539 U.S. 146 (2003)
–*Citizens United v. FEC*, 130 S.Ct. 876 (2010)

III. Whether the district court reached an erroneous legal conclusion and so erred when it declined to preliminarily enjoin application of the independent expenditure definition. (JA–83, ¶ d; JA–256, ¶ 1, Addm–35.)

–*Buckley v. Valeo*, 424 U.S. 1 (1976)
–*Minnesota Citizens Concerned for Life v. Kelley*, 698 N.W.2d 424 (Minn. 2005)
–*FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007)
–*Citizens United v. FEC*, 130 S.Ct. 876 (2010)

Statement of the Case

This case involves challenges to the constitutionality of certain Minnesota campaign-finance provisions. First, the Corporations challenge the ban on corporate general-fund independent expenditures. Minn. Stat. §§ 10A.12(1), 10A.12(1a), and 211B.15(3) (JA–33-36, ¶¶ 59-65) (the "independent expenditure ban"). Together, these statutes ban corporate general-fund independent expenditures greater than $100 annually. (JA–26, ¶ 40.) Corporations wishing to make independent expenditures are forced to employ a separate segregated fund to do so, which is like the federal political committee ("PAC") requirement of a separate segregated fund. (JA–26, 29-32, ¶¶ 40, 55.) Minnesota's separate segregated 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. (JA–29-32, ¶ 55.)

Second, the Corporations challenged Minn. Stat. §§ 211B.01(4), 211B.15(2), 211B.15(4), and 211B.15(16), (JA–44-47, ¶¶ 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"), (JA–28-29 ¶ 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*.).

Third, the Corporations challenged Minn. Stat. § 10A.01(18), which defines "independent expenditure," as authoritatively interpreted by the Minnesota Campaign Finance and Public Disclosure Board (JA–41-44, ¶¶ 77-80.)

The Corporations moved for preliminary injunction on July 8, 2010. (JA–83.) The district court denied the motion for preliminary injunction on September 20, 2010 (JA-222, Addm–1.). The Corporations noticed this appeal on September 22, 2010 (JA–257.) and moved for injunction pending appeal (Doc. 61), which was denied by the district court on September 28 (Doc. 67.). On October 18, 2010, this Court ordered that Corporations' motion for injunction pending appeal will be addressed along with the merits of the case at the January 11, 2011 oral argument.

Statement of Facts

As set out more fully in the Verified Complaint, (JA–13), the facts are as follows.

MCCL is Minnesota's oldest and largest pro-life organization. (JA–20, ¶ 21.) Its mission is to secure protections for innocent human life from conception until natural death through effective education, legislation, and political action. (JA–20, ¶ 22.) It supports or opposes legislation relating to pro-life issues and advocacy and supports or opposes candidates based on their agreement with MCCL's positions. (*Id*.) Taxpayers League, meanwhile, is a nonpartisan, nonprofit grass-roots taxpayer advocacy organization that fights for lower taxes, limited government and full empowerment of taxpaying citizens in accordance with Constitutional principles. (JA–23, ¶ 29.)

Both MCCL and Taxpayers League are organized under 26 U.S.C. 501(c)(4). (JA–20, ¶ 23; JA–23, ¶ 30.) Organizations under (c)(4) must be "primarily engaged in promoting in some way the common good and general welfare of the people of the community." 26 C.F.R. 1.501(c)(4)-1. Further, "The promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." *Id*. So, while (c)(4) organizations may engage in some unambiguously-

campaign-related speech—and, MCCL and Taxpayers League want to do so—their major purpose can never be the nomination or election of candidates. That is, they cannot be organized for the purpose of nominating or electing candidates, nor can they spend the majority of their disbursements on such activity. Both MCCL and Taxpayers League are in compliance with this requirement and will remain so in the future. (JA–20, ¶ 23; JA 23, ¶ 30.) In fact, both MCCL and Taxpayers League spend far less than half their disbursements on regulable election-related speech and will under no circumstances spend more than twenty percent of their disbursements on such speech. (JA–21, ¶ 25; JA–24, ¶ 34.)

Coastal is a limited liability company organized under Minnesota law for the purpose of providing retail travel industry services. (JA–24, ¶ 35.) Coastal has approximately one million dollars in business sales annually, including sales in Minnesota. (*Id*.) Coastal does not exist for the purpose of nominating or electing candidates, nor does it spend the majority of its disbursements on such activities. (*Id*.)

None of the Corporations qualify for the nonprofit exemption to Minnesota's prohibitions on corporate political speech and association.[2] (JA–21, ¶ 26; JA–23,

[2] The nonprofit corporation exemption provides:

> The prohibitions in this section do not apply to a nonprofit corporation that:

¶ 32; JA–25, ¶ 37.) Coastal is organized as a business. (JA–24, ¶ 35). MCCL and Taxpayers League are nonprofits, (JA–20, ¶ 23; JA–23, ¶32), but neither has a policy against accepting significant contributions from corporations or unions, (JA–21, ¶ 26; JA–23, ¶ 33.)[3]

Minnesota compels associations (including corporations) wanting to make independent expenditures[4] to employ PAC-style segregated funds to make expenditures for them. *Compare* Minn. Stat. 211B.15(3) (corporations may make only independent expenditures), *with* 10A.12(1a) (associations making only

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(1) is not organized or operating for the principal purpose of conducting a business;

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

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

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

[3] This Court previously held that the language of the nonprofit exemption was unconstitutional as applied to MCCL. *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994). That decision turned on the fact that MCCL pled (and the State did not contest) that MCCL did not accept "significant" corporate contributions. *Id*. at 1364. The Court recognized that if MCCL were ever to accept significant contributions, it would no longer be able to avail itself of the nonprofit exemption. *Id*. at 1365. MCCL is now actively soliciting, and expects to receive, significant contributions from corporations and labor unions. (JA–21, ¶ 26.) MCCL thus cannot rely on *Day*'s ruling.

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

independent expenditures may do so only through an "independent expenditure political fund."

And it requires corporations wanting to contribute to candidates, committees and political parties to employ PAC-style "conduit funds," while other associations—including unincorporated labor unions—may contribute through PAC-style "political funds." *Compare* Minn. Stat. 211B.15(2) (corporations may not contribute to committees), 211B.15(4) (corporations may not contribute to candidates), 211 B.15(16) (authorizing corporations to employ "conduit funds") *with* Minn. Stat. 10A.12 (non-incorporated associations, such as labor organizations, may form political funds to make contributions to candidates).

Entities creating political funds determine what contributions the political funds make. Minn. Stat. 10A.12(1). Corporations creating conduit funds, however, are not allowed to determine what contributions the conduit fund makes, because corporations are banned from making contributions. Minn. Stat. 211B.15(2), (4). Instead, those individuals who donate to the conduit fund must approve any contributions by earmarking their contributions "to candidates of the employee's choice." Minn. Stat. 211B.15(16). Thus, while every other association in Minnesota—including unincorporated labor unions—may use its PAC-style political

fund to make contributions the *association* wants to make, corporations are completely banned from making contributions they want to make.

Minnesota's "political funds," "independent expenditure political funds," and "conduit funds" have the same type of burdensome and onerous registration, reporting, and record-keeping requirements as federal PACs. (*Compare* JA–13 at 16, (¶ 53) (Minnesota's PAC-style burdens), *with Citizens United v. FEC*, 130 S.Ct. 876, 897-98 (2010) ("*Citizens*") (detailing "onerous" federal PAC burdens making the PAC-option an inadequate vindication of corporations' First Amendment rights)). For example, just like federal PACs, Minnesota's political funds, independent expenditure funds and conduit funds must appoint a treasurer before engaging in First Amendment activity. Minn. Stat. 10A.12(2). And they must register with the Campaign Finance and Public Disclosure Board, providing: (1) name and address of entity; (2) name and address of supporting associations of political funds; (3) name and address of treasurer and deputy treasurers; and (4) depositories and safety deposit boxes. Minn. Stat. 10A.14.

These funds must also keep records for all contributions over $20, including amount, date, and source (name and address). Minn. Stat. 10A.13(1). They must do the same for all expenditures, including date, amount, and receipt "stating the

particulars." *Id.* All necessary records must be maintained for at least four years. Minn. Stat. 10A.025(3).

The funds must also file reports by each January 31, with additional reports 15 days before primaries and 10 days before general elections. Reports must disclose, among other things, names, addresses, and employers or occupations (if self-employed) of individuals or associations making contributions aggregating over $100; sum of contributions; receipts over $100 not otherwise listed; sum of receipts; name and address of recipients of expenditures aggregating over $100, with amount, date, and purpose of each expenditure, and in the case of independent expenditures made in opposition to a candidate, the candidate's name, address, and office sought; sum of expenditures by entity during period; sum of contributions by entity during period; name and address of entities to whom noncampaign disbursements were made aggregating over $100 in the year and amount, date, and purpose of noncampaign disbursements; sum of noncampaign disbursements; name and address of any nonprofit corporation providing administrative assistance, and aggregate fair market value of assistance provided. Minn. Stat. 10A.20(3). If they lack reportable activity, they must still file a report, indicating that they have no activity to report. Minn. Stat. 10A.20(7). Dissolution, mean-

while, requires disbursing assets over $100 and filing a termination report. Minn. Stat. 10A.24.

Minnesota's general election was November 2, 2010. (JA–25, ¶ 38.) When they filed their lawsuit, the Corporations each wanted to make general-fund independent expenditures, totaling over $100 in a year, as soon as possible. (JA–25, ¶ 39.) A specific planned example for MCCL and Coastal was an expenditure of over $100 for a communication expressly advocating the election of Tom Emmer for Governor. A specific planned example for Taxpayers League was an expenditure of over $100 for a communication expressly advocating the election of Paul Gazelka, state senate candidate for District 12. (*Id*.) But Minnesota prohibits corporate general-fund independent expenditures. *Compare* Minn. Stat. 211B.15(3) (corporations may make only independent expenditures), *with* 10A.12(1a) (associations making only independent expenditures may do so only through an "independent expenditure political fund." (JA–26, ¶ 40.)) So the Corporations did not make their planned expenditures, but suffered the chill of their speech. (JA–26, ¶ 41.)

The Corporations also wanted to make, as soon as possible, general-fund contributions to candidates up to the limit permitted by Minnesota Statutes section 10A.27. (JA–27, ¶ 48.) A specific example for both MCCL and Coastal

was a contribution to the campaign of Tom Emmer, candidate for Governor. (*Id.*) A specific example for Taxpayers League was a contribution to the campaign of Paul Gazelka, candidate for state senator from District 12. (*Id.*) But Minnesota prohibits corporate general-fund contributions to candidates. Minn. Stat. 211B.15(2), (4). So the Corporations did not make their planned contributions, but suffered the chill of their speech and associational rights. (JA–28, ¶ 50.)

As soon as possible, MCCL and Coastal also wanted to make general-fund contributions, totaling over $100 in a year, to a political party. (JA–27, ¶ 45.) A specific planned example for both MCCL and Coastal was a contribution of over $100 before the general election to the Republican Party of Minnesota. (*Id.*) Minnesota prohibits corporate general-fund corporate contributions to political parties. Minn. Stat. 211B.15(2). So MCCL and Coastal did not make their planned contributions, but suffered the chill of their speech and associational rights. (JA–27, ¶ 47.)

The Corporations object to the unconstitutional bans on contributions and independent expenditures described above, the unconstitutional imposition of the PAC-burden; the onerous independent-expenditure-political-fund and conduit-fund requirements; and the penalties for noncompliance. (JA–26, ¶ 41; JA–27, ¶ 47.) The Corporations would make their planned general-fund independent

expenditures and contributions—both those recited above and other, similar ones—but for the fact that they are chilled by Minnesota's prohibition on, and penalties for, general-fund corporate independent expenditures and contributions. (JA–20, ¶ 56.)

In addition to the planned activity recited herein, the Corporations intend to do materially similar future activity. (JA–20, ¶ 57.) The Corporations have no adequate remedy at law. (JA–21, ¶ 58.)

Summary of the Argument

The Corporations' appeal the district court's denial of their motion for preliminary injunction as improper both as to the preliminary injunction standards used and as to the legal conclusions reached by the court. Regarding the preliminary injunction standards, the district court erred by failing to follow the speech-protective principles necessary when First Amendment rights are implicated.

Regarding the district court's legal conclusions, the court erred in finding that the independent expenditure ban does not ban corporate speech. The independent expenditure ban is a ban on speech as it prevents a corporation from speaking for itself. The district court also erred in finding the contribution ban likely to be constitutional, despite the controlling precedent of *Citizens*, 130 S.Ct. 876, which held that bans on speech are impermissible. Finally, the district court erred by

finding the Corporations' challenge to the independent expenditure definition unlikely to succeed. In so doing, the district court erroneously "held" what Minnesota law means despite conflicting precedent found in advisory opinions.

Argument

Standard Of Review

All the issues on appeal arise out of the district court's preliminary injunction order. (JA–222, Addm–1.) This Court evaluates preliminary injunction orders for abuse of discretion. *Coyne's & Co., Inc. v. Enesco*, *LLC*, 553 F.3d 1128, 1131 (8th Cir. 2009). The court below abuses its discretion when it rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions. *Id*. This Court reviews the district court's factual findings for clear error. *Heartland Academy Community Church v. Waddle*, 335 F.3d 684, 689-90 (8th Cir. 2003). But it reviews the district court's legal conclusions de novo. *Id*. When purely legal questions are presented (as in this case), this Court owes no special deference to the district court. *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006).

The Corporations ask this Court to review the district court's legal conclusions. *See supra* at 2. Thus, the standard of review is de novo for all the questions presented.

I. The District Court Erred by Not Applying Speech-Protective Preliminary-Injunction Standards.

A. *Winter* Standards Require Speech-Protective Application.

Preliminary injunctions require (1) likely merits success; (2) irreparable harm; (3) a favorable equitable balance; and (4) public-interest service. *Dataphase Sys. v. CL Sys.*, 640 F.2d 109, 113 (8th Cir.1981); *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374-75 (2008). In "characteriz[ing] . . . injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *id.* at 375-76, *Winter* cited *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). *Mazurek* applied the "clear showing" requirement to "the burden of persuasion," *id.*, which is *ordinarily* on plaintiffs.

While preliminary injunctions may be "extraordinary remed[ies]," they are not "extraordinary" where free speech is at issue. *See, e.g.*, *Ashcroft v. ACLU*, 524 U.S. 656 (2004) (no abuse of discretion in granting preliminary injunction against enforcement of Child Online Protection Act). And the generally "extraordinary" nature of preliminary injunctions does not heighten *Winter*'s "likely" standards, i.e., movants must show *likely* merits success, not *extraordinarily likely* merits success. While a "clear showing" is required to meet the burden of persuasion, that

requirement is incorporated in the "likely" standard, i.e., movants need only show that they are *likely* to succeed on the merits, not that they are *clearly likely* to succeed on the merits. "Likely" denotes "probable" and "likelihood" denotes "probability . . . [but] something less than reasonably certain." Black's Law Dictionary 834 (5th ed. 1979). And "probable" means "[h]aving more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt." *Id.* at 1081. The Supreme Court deliberately chose the word "likely" as its standard—without modifiers—and not something higher, though it had the clear opportunity in *Winter*. In fact, the Court reiterated the "likely" standard with *emphasis*: "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 129 S.Ct. at 375 (emphasis in original). So "likely" is the standard.

Winter's standards must be applied in speech-protective ways in free-speech cases. For instance, in free-speech cases the *government* bears the burden of persuasion (after the plaintiff places a burden on free speech at issue). In such cases, the *government* must make *Mazurek*'s "clear showing." This was made clear in *Ashcroft*, 524 U.S. 656, which noted the usual burden on "plaintiffs [to] demonstrate[] that they are likely to prevail on the merits" and have "irreparable injury,"

but then noted the shifted burden in a free-speech case: "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than [the challenged provision]." *Id.* at 666 (citations omitted). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (holding that "the burdens at the preliminary injunction stage track the burdens at trial.").

So in the present case, the *government* has the burden of persuasion to constitutionally justify the challenged laws, and if it fails then a preliminary injunction should issue. *See also Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 968 (8th Cir. 1999) ("*IRLC*") (placing preliminary-injunction burden on state to justify statute). And regardless of the burden, all ties and benefits of the doubt go to free speech. *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 474 n.7, 482 (2007) ("*WRTL-II*").

Another speech-protective change is application of the Supremacy Clause. U.S. Const. art. VI. If it is likely that a challenged provision violates First Amendment rights of expressive association, then the preliminary-injunction analysis is over except for formally recognizing that loss of First Amendment rights is irreparable harm, that balancing harms favors constitutional rights, and that the

public interest is always in protecting the "supreme Law of the Land." *Id. See also Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (likely merits success in First Amendment case established irreparable harm and favorable equities balance and public interest); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) (When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary.").

Thus, the government may not be heard to argue that it has an enforcement interest, that duly-enacted laws must be presumed constitutional, that there will be a 'wild west' scenario shortly before an election,[5] that the status quo must be preserved,[6] or the like if the First Amendment prescribes liberty. Such interests

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[5] *See Center for Individual Freedom v. Ireland*, 613 F. Supp. 2d 777, 807 (S.D. W. Va. 2009) ("[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario Defendants . . . foretell. Rather, it will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect.").

[6] *WRTL-II* requires that we recall that we deal with the First Amendment, which mandated that "'Congress shall make no law . . . abridging the freedom of speech,'" *WRTL-II*, 551 U.S. at 482, and that "[t]he Framers' actual words put these cases in proper perspective." *Id.* So "no law," i.e., "freedom of speech," is the constitutional default and must be the overriding presumption where free expression is at issue. The status quo to be preserved is "freedom of speech," i.e., the state of the law *before* a challenged provision or policy regulating speech or association was set in place. Thus, when a regulation is challenged as unconstitutional, that *regulation* has altered the status quo. The status quo is "the last,

asserted for balancing harms or determining public interest are not cognizable if they were inadequate to defeat a determination of likely success on the merits. The First Amendment trumps all such interests.

Expressly rejected too are considerations of the speech's *intent and effect*, *WRTL-II*, 551 U.S. 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.

B. The District Court Did Not Follow These Speech-Protective Principles.

In denying the preliminary injunction, the court held against the Corporations the fact that (1) they wanted to speak near an election and (2) the state had no

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uncontested status which preceded the pending controversy." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). "The purpose of a preliminary injunction is to preserve the status quo as it exists or *previously existed* before the acts complained of, thereby preventing irreparable injury or gross injustice." *Slott v. Plastic Fabricators, Inc*., 167 A.2d 306 (Pa. 1961) (emphasis added). *See also Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978) (noting that "[t]oo much concern with the status quo may lead a court into error."); *Foster v. Dilger*, slip op. at 3-4, No. 3:10-cb-00041-DCR, 2010 WL 3620238 at *2 (E.D. Ky. Sept. 9, 2010) (memorandum and order granting preliminary injunction) (ruling that "[i]f the current status quo is the cause of the irreparable injury, the Court should alter the status quo to prevent the injury.") (*citing Stenberg*, 573 F.2d at 925).

constitutionally permissible disclosure law through which the funding for their speech could be publicly disclosed. 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." (JA–255-56, Addm–34-35.) From that proposition, the court concluded that the Corporations "would not be able to establish that the balance of the harms or the public interest favor the granting of an injunction[,]" even if the court determined they enjoyed likely merits success. (JA–255, Addm–34.) As demonstrated above, this result is impermissible in First Amendment contexts. When merits success is enjoyed, all other factors necessary for injunctive relief follow.

II. The District Court Erred by Not Enjoining the Independent Expenditure Ban.

Minnesota Statutes section 211B.15(3) bans corporate general-fund independent expenditures, and section 10A.12(1a) requires all associations (including corporations) making independent expenditures (over $100 annually) to do so through a segregated-fund, PAC-option called an "independent expenditure

political fund." Together, these statutes ban corporate independent expenditures, requiring them instead to either employ a separate segregated fund ("SSF") (i.e., a PAC),[7] or else register as a SSF and submit to PAC-burdens, if they want to engage in such political speech (the "independent expenditure ban").

This ban subverts *Citizens*, 130 S.Ct. 876 (2010), which held that government may not prohibit corporations from making general-fund independent expenditures, nor require them to employ SSFs to make independent expenditures. 130 S.Ct. at 897-98 and 913. Minnesota does precisely what *Citizens* forbids: it bans corporate general-fund independent expenditures, and requires corporations to employ SSFs to make their independent expenditures. For this reason alone, the court below should have found that the Corporations enjoyed likely merits success.

The district court erroneously concluded, however, that the independent expenditure ban does not really ban corporate independent expenditures, but still lets corporations speak. (JA–237, Addm–16.) From that mistaken proposition, the

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[7] "SSFs" and "PACs" are synonymous. *See Citizens*, 130 S.Ct. 876, 887 (2010) (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 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) ("*MCFL*") ("a 'separate segregated fund' . . . . is considered a 'political committee'").

court erroneously concluded that the independent expenditure ban is not a ban, but merely a disclosure mechanism, (JA–242, Addm–21.), and applied the wrong level of scrutiny, (JA–243, Addm–22.). The court also erroneously concluded that the Corporations could be subjected to PAC-burdens, even though they do not have *Buckley*'s major purpose.[8] (JA–247 n.14, Addm–26.) Any one of these errors is sufficient for this Court to find that the district court abused its discretion in denying the Corporation's motion for preliminary injunction. This Court should therefore reverse the district court's decision.

A. The District Court Erroneously Concluded that the Independent Expenditure Ban Does Not Really Ban Corporate Speech.

The district court implausibly thought that, even though Minnesota bans corporate general-fund independent expenditures, it does not really ban corporate speech. (JA–237, Addm–16.) Corporations may still speak, the court erroneously concluded, "either by contributing to an independent expenditure committee or fund or by establishing a fund for the purpose of making independent expendi-

[8] *Buckley v. Valeo*, 424 U.S. 1 (1976), held that the only entities subject to PAC-style burdens are groups "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Whether a committee has *Buckley*'s major purpose is determined on the basis of either its "central organizational purpose" or its "independent spending." *MCFL*, 479 U.S. 238, 262 & n.6 (1986). Thus, only entities that are organized to nominate or elect candidates, or spend the majority of their money to nominate or elect candidates, may be regulated as PACs.

tures." (*Id*.) However, neither of those options allows the *corporation itself* to make independent expenditures. They only allow corporations to contribute to the independent expenditures of others, or else employ a SSF to speak on their behalf. Corporations giving money to organizations making independent expenditures are not making their own independent expenditures—they are funding someone else's independent expenditures. Similarly, corporations employing SSFs to make independent expenditures are not making their own independent expenditures—their SSF must make the independent expenditure on their behalf.

Citizens was clear: corporations must be allowed to make their own, general-fund independent expenditures. 130 S.Ct. at 913. Minnesota's sleight of hand allowing corporations to contribute to others' independent expenditures or form SSFs to make independent expenditures is not a constitutionally permissible alternative. In fact, *Citizens* explicitly ruled that SSFs are not permissible alternatives for corporate general-fund speech, holding that requiring corporations to employ SSFs to speak is actually a ban 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."). The *Citizens* Court explained that SSFs can never allow corporations to speak, because corporations and SSFs are separate legal entities. *Id*. Even if the PAC-option allowed groups to speak (and the Court

stressed that this is not possible, *id*), the onerous PAC-option is an inadequate vindication of groups' First Amendment rights, *id*. PACs are "burdensome alternatives" that are "expensive to administer and subject to extensive regulations." *Id*. They have "onerous restrictions," and corporations may be unable to establish a PAC quickly enough to engage in vital political speech. *Id*. at 898.

The court below therefore erred in concluding that the independent expenditure ban allows corporations to speak. It does not. Rather, it allows corporations to contribute to others' speech, or else employ a SSF to speak on their behalf. That is not the same as allowing corporations to make their own independent expenditures, and is an impermissible option under *Citizens*. *Id*. at 897-98 and 913.[9]

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[9] The court below sought to distinguish Minnesota SSFs from federal PACs in order to conclude that *Citizen*'s statements about SSFs did not apply to Minnesota's SSFs. (JA–238-41, Addm–17-20.) The Corporations believe some of the supposed "differences" are no differences at all. For instance, the court suggests that Minnesota's SSFs are not like the SSFs at issue in *Citizens* because they are not really separate from the connected organizations that create them. (JA–238, Addm–17.) The Corporations disagree: if a political fund were the same as the corporation, there would be no need for it. Corporations could instead make general fund expenditures.

Regardless, the differences the court cites are differences of degree, not kind. The fact remains that both the federal SSFs at issue in *Citizens* and Minnesota's SSFs require registration, the appointment of a treasurer, regular and ongoing reporting irrespective of whether there is anything to report, detailed record-keeping, and notification of the government when they disband. (*Compare* JA–13 at 16, ¶ 53 (Minnesota's PAC-style burdens), *with Citizens*, 130 S.Ct. at 897-98 (detailing "onerous" federal PAC burdens making the PAC-option an inadequate vindication of corporations' First Amendment rights)).

B. The District Court Erroneously Characterized the Independent Expenditure Ban as a Permissible Disclosure Law.

Having mistakenly decided that the independent expenditure ban allows corporations to make independent expenditures, the court then erroneously determined that the ban was merely "a disclosure law—a method of requiring corporations desiring to make independent expenditures to disclose their activities." (JA–242, Addm–21.) It cited *Citizens* for this proposition. (*Id*.) But *Citizens* said that constitutional disclosure requirements "do not prevent anyone from speaking." 130 S.Ct. at 914. The independent expenditure ban, however, bans corporate general-fund speech. It is not the simple style disclosure that *Citizens* upheld, but the PAC-style disclosure *Citizens* invalidated for corporations making independent expenditures. It requires more disclosure for independent expenditures than the Constitution permits. The court's conclusion that the independent expenditure ban is but a disclosure law is therefore erroneous.

1. The Independent Expenditure Ban Requires the PAC-Style Disclosure Rejected by *Citizens*, Not the Event-Driven Disclosure Approved by *Citizens*.

The independent expenditure ban certainly requires disclosure. *See supra* at 10-11. However, the type of disclosure it requires is the PAC-style disclosure explicitly rejected by *Citizens*. 130 S.Ct. at 897-98. For instance, the independent

expenditure ban requires regular, ongoing reporting (even when there is nothing to report); registration; and record-keeping. Minn. Stat. 10A.025(3), 10A.14, 10A.20(3). *Citizens* held it was constitutionally impermissible to impose such requirements on corporations merely making independent expenditures. 130 S.Ct. at 897-98 and 913.

In spite of *Citizen*'s rejection of PAC-style disclosure for corporations making independent expenditures, the court below held that Minnesota's PAC-style disclosure is permissible under *Citizens*. (JA–242, Addm–21.) The court thus confused Minnesota's PAC-style disclosure requirements—which *Citizens* (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 independent expenditures, *id*. at 913—with the on-ad attribution and one-time reports that *Citizens* upheld under exacting scrutiny, *id*. at 914.

Every positive statement *Citizens* made about disclosure related to on-ad attribution requirements and simple, "event-driven" reporting of *general-fund* independent expenditures (i.e., reporting independent expenditures when made and any contributions earmarked for express advocacy). None related to the type of detailed, PAC-style reporting Minnesota requires each reporting period regard-less of whether independent expenditures were made, nor to the PAC-style

registration, record-keeping, and dissolution requirements Minnesota imposes on corporations seeking to make independent expenditures.

2. The Disclosure Required by the Independent Expenditure Ban Goes Beyond What the Constitution Allows.

The Supreme Court established the parameters for independent expenditure reporting in *Buckley*, 424 U.S. 1, *MCFL*, 479 U.S. 238, and *Citizens*, 130 S.Ct. 876. *Buckley* upheld event-driven reporting of independent expenditures. 424 U.S. at 80. *MCFL* said such event-driven reporting, where the organization identified only independent expenditures and those contributions earmarked for express advocacy, was the constitutional option for groups that do not have *Buckley*'s "major purpose."479 U.S. at 252-53. And *Citizens* held on-ad attribution requirements and simple event-driven reporting constitutional for independent expenditures and electioneering communications, 130 U.S. at 914, but struck the requirement that groups making such communications submit to PAC-style reporting, *id*. at 913, which is on-going, burdensome, and must be filed at regular intervals whether speech occurs or not. *Id*. at 897.

Minnesota's required reporting for segregated funds is the PAC-style type that was struck down in *Citizens*. It is not event-driven, but must be regularly made regardless of whether there is anything to report. Minn. Stat. 10A.20. Minnesota

requires the disclosure of all contributions above a certain threshold, regardless of whether they are earmarked for express advocacy. *Id*. Plus, segregated funds must register, Minn. Stat. 10A.14, employ a treasurer, Minn. Stat. 10A.12, keep detailed records of all contributions and expenditures for a prescribed period, Minn. Stat. 10A.13; 10A.025(3), and notify the State when dissolving, Minn. Stat. 10A.24. These are *PAC*-style requirements, which *Citizens* emphatically said could not be imposed on non-major-purpose corporations making independent expenditures.

Minnesota has thus not imposed a constitutionally permissible, event-driven disclosure law on corporations making independent expenditures. Instead, it imposes what is not allowed. The district court's failure to recognize this, along with its characterization of the independent expenditure ban as not a ban, but a disclosure law, was an erroneous conclusion of law.

C. The District Court Erroneously Applied the Wrong Level of Scrutiny.

The failure to recognize the independent expenditure ban for what it is—a ban on corporate speech, and the imposition of PAC-style requirements—led the court below to its third error: it applied the wrong level of scrutiny. (JA–243, Addm–22.) Bans of speech, including corporate speech, are subject to strict scrutiny, which requires the government to prove that the law is "narrowly tailored" to a "compelling interest," *Citizens*, 130 S.Ct. at 898 (*citing WRTL-II*, 551

U.S. at 464), and uses the "least restrictive means" to accomplish the interest. *Gonzales*, 546 U.S. at 429; *MCFL*, 479 U.S. at 262. The imposition of PAC-style burdens are likewise subject to strict scrutiny. *Id*. at 898 (holding that the imposition of PAC requirements burdened speech, and so is subject to strict scrutiny); *MCFL*, 479 U.S. at 256 (holding that imposing PAC-status burdens speech and so must be justified by a "compelling" interest); *id* at 262 (evaluating PAC-style burdens under strict scrutiny's 'least restrictive means' test). Event-driven disclosure, however, is subject to exacting scrutiny, which requires only a "substantial relation" between the disclosure requirement and a "sufficiently important" interest. *Id*. at 914.

Because the court below mischaracterized the independent expenditure ban as not a ban on speech but a simple disclosure law, it erroneously applied exacting scrutiny. (JA–243, Addm–22.) This was the wrong scrutiny: as just explained, bans on speech and imposition of PAC-style burdens are subject to strict scrutiny. Applying the wrong level of scrutiny, the court reached the wrong result.

Had the court below employed strict scrutiny as it should have, the State would have had to demonstrate that a compelling state interest justifies the independent expenditure ban, and that the ban is narrowly tailored to that interest,

using the least restrictive means to accomplish it. *WRTL-II*, 551 U.S. at 464; *Gonzales*, 546 U.S. at 429. The law fails on both counts.

1. No Compelling Interest Exists for the Independent Expenditure Ban.

Citizens held that the *only* permissible interest in restricting speech is the anticorruption interest, which it defined as anti quid-pro-quo corruption. 130 S.Ct. at 901, 909. *Citizens* 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. Significantly, *Citizens* also rejected the interest in disclosure. While recognizing that such an interest exists, *id*. at 914, it cannot justify banning a corporation's own general-fund speech, *id*. at 897-98 and 913.[10] Limitations on speech must be justified by an anti-quid-pro-quo corruption interest. *Id*. at 901, 909.

As a matter of law, however, independent expenditures are noncorrupting. *Id*. at 909 (holding that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"). Thus, there

[10] The disclosure *Citizens* held permissible is on-ad and event-driven reporting that "do[es] not prevent anyone from speaking[.]" 130 S.Ct. at 914.

is no interest in restricting them. *Id*. at 913 (holding that "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."). The independent expenditure ban must, therefore, fail scrutiny: there is no compelling interest to justify it.

2. The Independent Expenditure Ban Is Not Narrowly Tailored.

Even if limits on corporate independent expenditures could be justified—and they cannot, *id*.—the narrow tailoring requirement means that the independent expenditure ban must employ the least restrictive means to further the interest. *MCFL*, 479 U.S. at 262. The independent expenditure ban fails this test.

Citizens ruled that "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy." 130 S.Ct. at 911. Thus, if there were some interest in restricting corporate independent expenditures, a complete ban is not appropriately tailored. Beyond that, though, the federal scheme for reporting independent expenditures is significantly less restrictive than Minnesota's imposition of PAC status and burdens. Under the federal scheme, groups making independent expenditures simply file an event-driven report the next time quarterly independent expenditure reports are due. 2 U.S.C. 434(c). 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 independent expenditures, Minnesota may not constitutionally impose it.

Had the court below applied the proper level of scrutiny, it would have found the independent expenditure ban likely to be held unconstitutional. Instead, it erroneously applied exacting scrutiny and found that the Corporations were unlikely to succeed on their challenge. This was an erroneous conclusion of law.

D. The District Court Erroneously Concluded It Permissible to Subject Those Not Having *Buckley*'s Major Purpose to PAC-style Burdens.

In addition to the errors arising from its erroneous conclusion that the independent expenditure ban did not actually ban speech, the district court concluded that the SSFs are not really separate from the corporation, (JA–239, Addm–18), but allow corporations to speak, (JA–237, Addm–16.) The Corporations disagree and believe this conclusion is erroneous as a matter of law, because *Citizens* said that SSFs and their connected organizations are separate legal entities, 130 S.Ct. at 897, and so SSFs cannot allow corporations to speak, *id*. But if Minnesota's SSFs are not separate legal entities from the corporations that create them, then a different unconstitutional result occurs: Minnesota impermissibly regulates organizations as PACs that may not constitutionally be regulated as such. The court below, however, erroneously concluded that subjecting organizations that

cannot be regulated as PACs to PAC-style burdens does not offend the First Amendment. (JA–247 n.14, Addm–26.)

In doing so, the court overlooked *Buckley*'s major purpose test, which says that 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." *MCFL*, 479 U.S. 238, 262 and n.6 (1986) (plurality opinion); *see also New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (same). 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 regulated as PACs and subjected to PAC-style burdens.

Federal circuit courts have invalidated state and federal laws imposing PAC status or burdens absent the major-purpose test. *See New Mexico Youth Organized*, 611 F.3d at 678 (no PAC status absent *Buckley*'s "major purpose"); *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (same); *Colorado Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1153–54 (10th Cir. 2007) (same).[11] This is consistent with *Buckley*, which expressly rejected the possibility

[11] *But see Human Life of Washington Inc. v. Brumsickle*, __ F.3d__, 2010 WL

that organizations not having the major purpose could be regulated as PACs. It held that when the speaker does not fit within the major purpose categories, that is, "when it is an individual other than a candidate or a group other than a 'political committee,'" PAC-burdens may not be imposed. *Buckley*, 424 U.S. at 80.

Thus, even if requiring corporations to employ independent expenditure funds does not impermissibly ban general-fund independent expenditures, Minnesota's scheme impermissibly imposes PAC-style burdens on entities that may not be regulated as PACs. None of the Corporations have *Buckley*'s major purpose. They may neither be subjected to PAC-style burdens nor required to employ a PAC to

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3987316 at *16 (holding that "a" major purpose is sufficient for the imposition of PAC-status, and "the" major purpose is not required). *Human Life*'s dilution of *Buckley*'s "the major purpose" is constitutionally suspect. First, "*a* major purpose" is vague. Organizations cannot know what qualifies as "a" major purpose, or how much unambiguously campaign related activity they may engage in before they will be judged to have "a" major purpose of supporting or opposing candidates. This leaves speakers chilled or subject to the whims of enforcement officials, which violates Fourteenth Amendment due process and First Amendment clarity standards. *Buckley*, 424 U.S. at 40 n.47. Second, reading *Buckley*'s "the major purpose" as "a major purpose" creates the likelihood that government will regulate much constitutionally protected political speech. Under *Human Life*'s reasoning, organizations can have many "major purposes," some or many of which may be unrelated to elections. Yet, if government may impose PAC-burdens on such organizations, the effect will be that constitutionally protected speech, unrelated to elections, will be regulated. This is not constitutionally permissible. *See NCRTL*, 525 F.3d at 289.

engage in First Amendment activity. The court below erred when it concluded that it was permissible to do so.

III. The District Court Erred by Not Enjoining the Contribution Ban.

Minnesota bans corporate contributions to committees, Minn. Stat. 211B.15(2), which include political parties, Minn. Stat. 211B.01(4), and also bans corporate contributions to candidates, Minn. Stat. 211B.15(4) (together, the "contribution ban"). Rather than let corporations make their own contributions, Minnesota unconstitutionally requires that such contributions be done through a PAC-option called a "conduit fund." Minn. Stat. 211B.15(16). This subverts the Supreme Court's holding that PACs cannot speak for corporations, because they are separate entities. *Citizens*, 130 S.Ct. at 897. It is also a content-based regulation of speech, which this Court holds unconstitutional. *IRLC*, 187 F.3d at 967. And it prevents corporations controlling how their conduit funds make contributions, though other associations may control how their funds make contributions.

The contribution ban thus 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. Despite these constitutional infirmities, the district court erroneously held that the contribution ban was likely constitutional. (JA–255, Addm–34.) To reach this decision, the court below failed to

follow Supreme Court precedent (JA–251-53, Addm–30-32), applied the wrong level of scrutiny and also failed to perform a tailoring analysis, (JA–254, Addm–33), and incorrectly evaluated the contribution ban under the Fourteenth Amendment, (JA–253-54, Addm–32-33.) Any one of these errors is sufficient for this Court to find that the district court abused its discretion in denying the Corporation's motion for preliminary injunction. This Court should therefore reverse the district court's decision.

A. The District Court Erroneously Failed to Follow Binding Precedent Mandating that the Contribution Ban Is Unconstitutional.

The court below erroneously failed to follow binding precedential authority in holding that the Corporations' challenge to the contribution ban was unlikely to enjoy merits success. First, the court failed to follow *Citizens*, 130 S.Ct. 876, which held that bans on speech are impermissible. *Id*. at 911. Second, the court failed to follow *Buckley*, 424 U.S. 1, and *FEC v. Beaumont*, 539 U.S. 146 (2003), both of which held that limits on contributions are constitutionally permissible only if some avenue for making contributions remains. *Buckley*, 424 U.S. at 21-22; *Beaumont*, 539 U.S. at 162-63.

1. The Court Failed to Follow *Citizens*, Which Held Bans on Speech Constitutionally Impermissible.

a. Contributions Are Speech.

Beginning with the seminal campaign finance case, *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has consistently held that making a contribution is both an act associating contributors with the ones contributed to, and also an expressive act in which contributors speaks by means of making the contribution. The *Buckley* Court noted that limits on contributions "operate in an area of the most fundamental First Amendment activities[,]" because "[d]iscussion of public issues and debate on the qualifications of candidates [i.e., *speech*] are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. The Court then ruled that "contribution and expenditure limitations impose direct quantity restrictions on political communication [i.e., *speech*] and association by persons, groups, candidates, and political parties . . . ." *Id*. at 18. The Court then opined that "a limitation on the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication [i.e., *speech*]." *Id*. at 20. This is because "[a] contribution serves as a general expression of support [i.e., *speech*] for the candidate and his views, but does not

communicate the underlying basis for that support." *Id*. at 21. Further, "The quantity of communication [i.e., *speech*] by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id*. So "[a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication [i.e., *speech*], for it permits the symbolic expression [i.e., *speech*] of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates an" *Id*.

The Court reaffirmed that contributions are speech in *Nixon v. Nixon Missouri Shrink PAC*, 528 U.S. 377 (2000), when it noted that speech "suffered little direct effect from contribution limits." *Id*. at 386. Citing many of *Buckley*'s numerous statements that contributions are speech, *id*. at 386-87, the Court explained that "limiting contributions left communication significantly unimpaired." *Id*. at 387. The Court then noted that contribution limits "bore more heavily on the associational right than on freedom to speak[,]" so "a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well[.]" *Id*. at 388.

The Court's statement that speech "suffered little direct effect," *id*. at 386, does not mean it suffered no direct effect, but implies that speech suffers some direct effect through limits on contributions. Similarly, saying that speech was left "significantly unimpaired" by contribution limits, *id*. at 387, does not mean speech was not impaired at all, but implies that some impairing of speech occurs when contributions are limited. And noting that contribution limits burden associational rights more than speech rights, *id*. at 388, does not mean that speech rights are unburdened by contribution limits. *Nixon* thus reaffirmed that limits on contributions burden speech, because making a contribution is an expressive activity.

The Court again called contributions "speech" in *Beaumont*, 539 U.S. 146, when it noted that "restrictions on political contributions have long been treated as marginal speech restrictions subject to relatively complaisant First Amendment review because contributions lie closer to the edges than to the core of political expression [i.e., *speech*]." *Id*. at 147-48. That contributions "lie closer to the edges than to the core of political expression" does not mean they lie outside speech, but that they are included within the category of expressive activity.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court quoted much of the language quoted above from its previous cases, *id*. at 134-37, then notes that the

"communicative value" of contributions "inheres mainly in their ability to facilitate the speech of their recipients," *id*. at 135. But to say that contributions' "communicative value" lies "mainly" in the fact that recipients turn contributions into speech does not mean that the communicative value lies solely in that function, but rather indicates that some communicative value lies in the act itself of making the contribution.

The Court again affirmed that contributions are speech in *Randall v. Sorrell*, 548 U.S. 230 (2006) when it explained that "contribution limits like expenditure limits, 'implicate fundamental First Amendment interests,' namely, the freedoms of 'political expression' [i.e., *speech*] and 'political association.'" *Id*. at 246 (*quoting Buckley*, 424 U.S. at 15).

Thus, while "contribution limits burden associational rights more than speech rights, *Nixon*, 528 U.S. at 388, the Supreme Court has consistently held that the act of making a contribution is equivalent to speaking. It may be "symbolic" speech, *Buckley*, 424 U.S. at 21, and "lie closer to the edges than to the core of political expression[,]" *Beaumont*, 539 U.S. at 148, but it is speech nonetheless.

b. The Contribution Ban Is an Impermissible Ban on Speech.

Citizens held that bans on speech during the pre-election period are impermissible. 130 U.S. at 911. This is because "it is our law and our tradition that more

speech, not less, is the governing rule." *Id*. Thus, even if the government may constitutionally regulate speech, it may not completely ban it. *Id*.

The contribution ban, however, is a complete ban on corporate contributions, i.e., a ban on corporate speech. *See supra* at 37-38. Instead of allowing corporations to make their own general-fund contributions, the contribution ban requires that they form PAC-style conduit funds, which then purportedly make contributions on their behalf. But *Citizens* is clear: PACs cannot and do not speak for the associations that create them, because associations are separate legal entities from PACs. 130 U.S. at 897. Consequently, the contribution ban "is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak." *Id*. It is therefore impermissible. *Citizens*, 130 U.S. at 911.

It does no good to say, as the district court did, that *Citizens*' holding cannot apply to contribution limits, because such limits were not before the *Citizens* Court. (JA–252-53, Addm–31-32.) That contribution limits were not before the Court would be significant only if *Citizens* had held that bans on expenditures are unconstitutional. Then it would be proper to distinguish contributions, which were not before the Court, from expenditures, which were before it. However, *Citizens* did not hold that bans on expenditures are unconstitutional, but that bans on *speech* are; and, the act of making a contribution is a form of speech. Because the

contribution ban completely bans corporate contributions, which are speech, it is unconstitutional under *Citizens* and the district court erred by concluding otherwise.

2. The Court Failed to Follow *Buckley* and *Beaumont*, Which Held that Contribution Limits Must Leave Some Avenue for Making Contributions.

Buckley explained that contribution limits are permissible only because such limits still allow contributors to make some amount of contributions. In other words, contributors may still make small contributions, giving their "symbolic expressions of support," even when the total amount they may contribute is limited. *Buckley*, 424 U.S. at 21. This is constitutionally significant, because "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate." *Id*. at 22. Because contribution limits leave contributors free to associate with candidates and parties and engage in some speech, *id*., they are permissible if they satisfy applicable scrutiny, *id*. at 25.

Then in *Beaumont*, 539 U.S. 146, the Court considered the constitutionality of a ban on general-fund corporate and labor union contributions, and a requirement that those entities instead employ a PAC to make contributions. The Court upheld that regulation because the Court believed that the PAC option still allowed corporations and labor unions to make contributions through their PACs. 539 U.S.

at 162-63. Thus, *Beaumont*'s decision comported with *Buckley*'s requirement that contribution limits must leave some avenue for making contributions.

The Corporations assert that because (1) contributions are speech, *see, e.g.*, *Buckley*, 424 U.S. at 20-21, and we now know that (2) PACs cannot speak for corporations, *Citizens*, 130 S.Ct. at 897, (3) a ban on corporate general-fund speech is therefore a ban on speech, notwithstanding the PAC option, *id*., and (4) bans on speech during the preelection period are impermissible, *id*. at 911, *Beaumont* has been implicitly overruled by *Citizens* as to its holding that a *complete ban* on corporate general-fund political speech is acceptable so long as there is a PAC option.[12] But even if *Beaumont* is controlling, the contribution ban is unconstitutional because it does not comport with *Beaumont*'s requirement that bans on corporate general-fund contributions provide some means for the corpora-

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

tions themselves to still make contributions. *Id*. at 149 (noting that "[t]he prohibition [on general-fund corporate contributions] does not, however, forbid the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes."). This was constitutionally determinative because the PAC-option "permits some participation of unions and corporations in the federal electoral process" and allows for regulation of campaign activity without jeopardizing associational rights. *Id*. at 162-63. If the PAC-option did not exist, the Court implied, associational rights would be jeopardized and the federal corporate contribution ban would be constitutionally problematic. But since the challenged law still "allows corporate political participation," because it allowed corporations to make contributions through PACs they controlled, it did not amount to a complete ban on corporate contributions. *Id*. at 162-63.

Minnesota's contribution ban does not allow corporations to form political funds, over which the connected organization exercises control by determining what contributions are made, and to whom. Minn. Stat. 10A.12(1). Instead, the contribution ban prohibits corporations from making contributions, Minn. Stat. 211B.15(2), (4), so they are not permitted to create political funds. Instead, if they want to create a fund, they are required to create conduit funds and are banned

from exercising any control over their conduit funds' contributions. Minn. Stat. 211B.15(16).[13] Instead, employees making contributions to corporations' conduit funds must earmark for whom their contributions are made. Minn. Stat. 211B.15(16). The conduit fund must disburse contributions as the employee-donors—not the corporations—designate. *Id*. Thus, corporations are left with no way to make contributions to candidates and parties they want to support. The contribution ban is therefore unconstitutional under *Beaumont*.

The district court upheld the contribution ban without addressing these constitutional infirmities. (JA–252-53, Addm–31-32.) Instead, the court rested its decision that it is permissible to require corporations to employ conduit funds to make their contributions on the fact that *Citizens* did not expressly overrule *Beaumont*. (*Id*.) That fact, however, does not dispel the constitutional problem with the contribution ban, but rather magnifies it. If "*Beaumont* remains good

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[13] That corporations are prohibited from creating political funds and required to create conduit funds is plain not only from the face of the law cited, but also from various state advisory opinions and court decisions. *See* AO-6 (September 9, 1974) (advising that corporations may create "a nonpartisan or conduit plan" and explaining that corporate operation of a nonconduit plan would be impermissible) (JA–55-60); AO-406 (May 5, 2009) (a conduit fund is not the same as a political fund) (JA–61-65); and *Minnesota Association of Commerce and Industry v. Foley*, 316 N.W.2d (Minn. 1982) (construing earlier version of Minnesota law and holding that corporations may utilize nonpartisan conduit funds, but may not utilize partisan PACs).

law," as the district court believes, (JA–253, Addm–32), then *Beaumont*'s holding requires that the contribution ban permit corporations to control the contributions their conduit funds make. 539 U.S. at 162-63. Minnesota's law, however, does not allow corporations to control their conduit funds. Minn. Stat. 211B.15(16). Rather, it requires that the employee-donors designate to whom their donations should be contributed. *Id*. This leaves corporations *no* avenue by which they may make contributions. Consequently, the contribution ban is unconstitutional under *Buckley* and *Beaumont* and the district court erred by concluding otherwise.

B. The District Court Erroneously Applied the Wrong Level of Scrutiny.

Although the district court recognizes that the Corporations asserted that the contribution ban should be evaluated under, and fails, strict scrutiny, (JA–250, Addm–29), the court does not address the Corporations' arguments. Instead, in a conclusory sentence the court opines that "the law serves an important governmental interest." (JA–254, Addm–33.) Thus, it appears that the court applied the intermediate scrutiny applicable to contribution *limits*, *see, e.g.*, *Randall*, 548 U.S. at 247, and not the strict scrutiny applicable to speech bans, *see, e.g.*, *Citizens*, 130 S.Ct. at 898.[14] However, the court did not conduct a tailoring analysis; that is, it

[14] The intermediate scrutiny associated with contribution limits requires that the Government prove that the limit is "closely drawn" to a sufficiently important interest." *Randall*, 548 U.S. at 247. Strict scrutiny, meanwhile, requires that the

did not ask whether the contribution ban is "closely drawn" to the "important governmental interest" that it never identified. This was erroneous.

1. Strict Scrutiny Applies Because the Contribution Ban Is a Political Speech Ban.

Though contribution *limits* are generally evaluated under intermediate scrutiny, the contribution ban is subject to strict scrutiny for two reasons. First, *Citizens* 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 20-22. The court below should therefore have applied strict scrutiny to the contribution ban, and required the government to prove that the regulation was "narrowly tailored" to a "compelling interest." *WRTL-II*, 551 U.S. at 464. Not doing so was erroneous.

2. Strict Scrutiny Applies Because the Contribution Ban Is a Content-Based Regulation of Speech.

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,

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government prove that the law is "narrowly tailored" to a "compelling interest," using the least restrictive means to accomplish it. *WRTL-II*, 551 U.S. at 464; *Gonzales*, 546 U.S. at 429.

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). *See also*, *IRLC*, 187 F.3d at 967 (content-based regulation subject to strict scrutiny); *Day*, 34 F.3d at 1361 (same).

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." *Consolidated 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," *Id*. *See also Burson v. Freeman*, 504 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 burden-

ing 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." *Citizens*, 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").

3. The Court Erroneously Applied Intermediate Scrutiny, and Did Not Perform a Tailoring Analysis.

The contribution ban is therefore (1) a ban on political speech and also (2) a content-based regulation of speech, 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. *Citizens*, 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 tailored" to the interest of eliminating quid-pro-quo corruption because it does not use the "least

restrictive means" to eliminate. Rather, it is overinclusive, reaching small contributions that could never encourage quid-pro-quo corruption. The contribution ban therefore fails strict scrutiny. Had the district court applied the proper level of scrutiny, it should have found the Corporations' challenge to the contribution ban enjoys likely merits success.

The district court, however, did not apply strict scrutiny. Rather, it appears it applied intermediate scrutiny, opining that "the law serves an important governmental interest," without actually identifying what that interest is. (JA–254, Addm–33.) The failure to apply strict scrutiny was erroneous.

It was also erroneous for the court to assume that the contribution ban serves a governmental interest in the absence of proof. In *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996) this Court stated that campaign finance laws will only be upheld if the government "can show" that the law furthers its interest and is properly tailored. And in *Russell v. Burris*, 146 F.3d 563, 567 (8th Cir. 1998), this Court said that the burden is on the government to "demonstrate" its interest in its law, and that the law is properly tailored. The Ninth Circuit has held it reversible error for a district court to find an anticorruption interest where the government has not presented evidence of such. *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007). The court below, however, did not hold the

government to its proof. In fact, the court assumed a governmental interest in the contribution ban in the absence of proof, and then stated that there was an interest without identifying what the interest is. This is an erroneous application of law.

It was also erroneous for the district court to fail to perform a tailoring analysis. Even if it were true that "the law serves an important governmental interest," (JA–254, Addm–33), that would not end the inquiry as to whether the contribution ban is constitutional. Rather, the ban must be "closely drawn" to the interest if intermediate scrutiny is the standard, and "narrowly tailored" to the interest under the proper, strict scrutiny standard. The court below, however, did not consider tailoring. This was an erroneous application of law.

Even if the contribution ban were subject to intermediate scrutiny, it would fail had the court considered tailoring. There is no constitutional justification in banning contributions merely because the contributor has the corporate form. *Citizens*, 130 U.S. 904-08. Thus, the only interest that can justify banning corporate contributions is the interest in eliminating quid-pro-quo corruption, which only occurs as a result of *large* contributions. *Citizens*, 130 S.Ct. at 901. While courts have "no scalpel to probe" whether one limit would be better than another, *Randall*, 548 U.S. at 248, none is needed to determine that a ban cannot be "closely drawn" to the interest of eliminating *large* contributions. Minnesota has

eliminated the large contributions that can give rise to real or apparent corruption through the contribution limits imposed by Minnesota Statutes section 10A.27 ("regular limits"). There is therefore no constitutionally cognizable interest in restricting corporate contributions beyond the regular limits because (1) those limits have *already* eliminated the large contributions that make quid-pro-quo corruption possible and (2) *Citizens* held that corporations pose no constitutionally cognizable corruption risk warranting special restriction of their activities. 130 S. Ct. at 899-911. A complete ban on corporate general-fund contributions thus goes too far, ensnares too much speech, and cannot survive a tailoring analysis even under intermediate scrutiny. The district court's failure to apply such an analysis was erroneous, and this Court should reverse its decision.

C. The District Court Erroneously Held the Contribution Ban Comports With Equal Protection.

The court below also erroneously relied on the analysis of *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens*, 130 S.Ct. 876, in determining that the contribution ban does not violate the Fourteenth Amendment's Equal Protection Clause. (JA–253-54, Addm–32-33.) The court considered it "bound" by *Austin*, even though it had been overruled, because, the court said, "*Citizens United* did not address, and therefore did not overrule, the

portion of the *Austin* decision that addressed the equal protection clause." (JA–254, Addm–33.) This, however, is incorrect: *Citizens* explicitly overruled the grounds upon which *Austin* rested its Equal Protection decision. *See infra*. The court below therefore erroneously applied *Austin*, and in doing so erroneously concluded that the contribution ban does not violate equal protection. This Court should therefore reverse the district court's decision.

1. The Contribution Ban Treats Similarly Situated Entities Differently.

The contribution 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 aware of only two cases considering whether corporations and labor unions are similarly situated for campaign-finance purposes. In

Austin, 494 U.S. 652, 665-66 (1990), the Supreme Court said they were not similarly situated because of "crucial differences." But 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 *Citizens* said is no longer valid in overturning *Austin*. *Citizens*, 130 S. Ct. at 903-908. Thus, *Austin*'s analysis is overturned and inapplicable, and the district court's reliance upon it, (JA–254, Addm–33), is misplaced and therefore erroneous.

The other case evaluating whether corporations and labor unions are similarly situated for campaign-finance purposes is *Dallman v. Ritter*, 225 P.3d 610 (Col. 2010). In *Dallman*, the situation was the exact opposite from Minnesota's law: corporations could control their PACs that 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.

2. The State Has No Constitutionally Permissible Interest in Treating Corporations and Other Associations Differently.

As in *Dallman*, there is no interest supporting disparate treatment of corporations and labor unions. The court below opined that "[t]he government's interest in limiting both the actuality and the appearance of *quid pro quo* corruption resulting from direct corporate contributions to candidates for political office is alive and well." (JA–254, Addm–33.) This, however, is clearly erroneous, because *Citizens* held that the mere presence of the corporate form does not give rise to corruption justifying the disparate treatment. *Citizens*, 130 S.Ct. 904-08. Thus, there must be some interest beyond a desire to limit *corporate* contributions, because that is not a constitutionally cognizable interest. *Id*.

The fact that Minnesota treats corporations and similarly situated labor unions differently for speech purposes violates equal protection. Because there is no

constitutionally cognizable interest in doing so, the contribution ban is unconstitutional. The district court therefore erred in concluding that the Corporations' challenge to the ban on equal protection grounds does not enjoy likely merits success. This Court should reverse the district court's decision.

IV. The District Court Erred by Not Enjoining the Independent Expenditure Definition.

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

But the Campaign Finance Board ("CFB") issued an authoritative interpretation: "A communication that omits the specific words of express advocacy may, nevertheless, be found to be for the purpose of influencing . . . the nomination or election of a candidate based on an examination of the communication." (Advisory Opinion 398 (June 17, 2008) ("AO-398")) (JA–73.) So "when a communication

clearly identifies a candidate, it is not necessary that the communication use specific words of express advocacy, such as 'vote for,' 'elect,' 'support' or others for it to be for the purpose of influencing the nomination or election of a candidate." (JA–76.) This is unconstitutional.

The court below erroneously held that a subsequent CFB "finding" was an "opinion," giving it equal status with AO-398, (JA–249, Addm–28.), even though the subsequent "finding" was without precedential weight. The court also erroneously found that *Minnesota Citizens Concerned for Life v. Kelley*, 698 N.W.2d 424 (Minn. 2005), which defined express advocacy in terms of specific words of express advocacy, bars enforcement of AO-398. (JA–249, Addm–28.) The court below therefore erroneously concluded that the Corporations' challenge to the independent expenditure definition was unlikely to succeed. (JA–250, Addm–29.)

A. Independent Expenditures Must Contain Express Words of Advocacy.

Buckley, 424 U.S. 1, held that independent expenditures are "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id*. at 44 n.52. The Court has repeatedly reaffirmed this understanding. *See MCFL*, 479 U.S. at 249; *McConnell*, 540 U.S. at 191–93, 217–19;

WRTL-II, 551 U.S. at 474 n.7, 495. 513; *Citizens*, 130 S.Ct. at 935 n.8 (Stevens, J., concurring in part and dissenting in part).

In *IRLC*, 187 F.3d 963, the Eighth Circuit described the magic-words test as a "bright-line test" and explained that "[t]he Supreme Court has made clear that a finding of 'express advocacy' depends upon the use of language such as 'vote for,' 'elect,' 'support,' etc." *Id*. at 969. Because Iowa's definition of express advocacy went beyond the magic words, this Court held that the plaintiffs were likely to succeed on the merits of their challenge to Iowa's definition. *Id*. at 969–70.

B. Advisory Opinion 398 Defines Express Advocacy, and so Independent Expenditures, In Vague and Overbroad Ways.

The CFB's AO-398 rejected the magic-words test and adopted a we-know-it-when-we-see-it approach to express advocacy. This renders the definition unconstitutionally vague because it does not "provide people of ordinary intelligence a reasonable opportunity to understand" what the law means. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000). *See also Buckley*, 424 U.S. at 77 (laws impacting First Amendment freedoms must have an even greater degree of specificity than what is normally demanded). It also renders the law unconstitutionally overbroad, imposing independent expenditure reporting requirements on substantially more speech

than that containing true express advocacy. *See Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008).

C. The District Court Erroneously Found the Corporations Were Unlikely to Succeed on the Merits.

The district court, however, erroneously relied upon a subsequent, December 2, 2008,[15] adjudicatory finding by the CFB (the "Minnesota Majority finding"), which the court mistakenly called an "opinion," superceded AO-398. (JA–249, Addm–28. *See also* Minnesota Majority Finding, JA–141.))[16] It also found that a previous state court decision barred reliance upon AO-398. Both decisions were erroneous.

1. The Minnesota Majority Finding Does Not Supercede Advisory Opinion 398.

Neither the court in its opinion nor the State in its briefing identified any authority for the proposition that CFB "findings" of whether one violated cam-

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[15] Both the court and the State dated this finding "December 3;" however, the finding appears on the CFB's website under the date "December 2." (*Compare* JA–141, "Minnesota Majority" finding, *with* http://www.cfboard.state.mn.us/bdinfo/investigation/120208MN_Majority.pdf (linked under "December 2, 2008" at http://www.cfboard.state.mn.us/findings.html.))

[16] The December 2 decision is a adjudicatory "finding," not an advisory opinion. *Compare* "Findings Issued," *available at* www.cfboard.state.mn.us-/findings.html (including the December 2, 2008 "Minnesota Majority" finding), *with* "Advisory Opinions," *available at* www.cfboard.state.mn.us/Advisory.htm (which does not include the December 2, 2008 "Minnesota Majority" finding).

paign finance law trump advisory opinions. Minnesota law and CFB practice, however, indicates otherwise. For instance, Minnesota law states that a person or an association may request an advisory opinion and that a "written advisory opinion is binding on the Board in any subsequent Board proceeding concerning the person *making or covered by the request*" unless revoked by the Board, was based on wrong facts, or was requested in bad faith. Minn. Stat. 10A.02(12). The CFB's official website quotes this statute and applies it to advisory opinions. *See also* "Advisory Opinions," *available at* www.cfboard.state.mn.us/Advisory.htm (last visited Aug 4, 2010). While neither the law nor the CFB's website defines who is "covered by the request" in the statutory designation, "the person *making or covered by the request*," Minn. Stat. 10A.02(12), it must be someone other than the person or association *making* the request—otherwise, it would be superfluous. Thus, *someone* besides the requester may rely upon an advisory opinion—perhaps one whose facts mirror the facts stated in the advisory opinion. Further, advisory opinions on the CFB website are searchable by both keyword and topic, making them easy to locate, as one would expect of opinions with precedential weight.

On the other hand, Board "findings" are not searchable by keyword *or* topic. Thus, there is no way for the public to know which findings address a topic without opening and reading *each of the (at the time of the preliminary injunction*

hearing below) more than 330 findings. (*See* "Findings," *available at* www.cfboard.state.mn.us/findings.html (last visited Aug 4, 2010)). Nor does the website (or the law) discuss the precedential value of "findings." This is *not* what one would expect for precedential decisions.

Additionally, at the time of the preliminary injunction hearing, AO-398 was still available on the Board's website and had not been annotated to indicate it is no longer good advice, as one would expect to be the case if the Minnesota Majority finding had trumped it.

The Minnesota Majority finding does not, therefore, supercede AO-398. Unlike advisory opinions, it has no precedential value under Minnesota law. The district court erred in concluding otherwise.

2. The *Kelly* Decision Does Not Bar Reliance on Advisory Opinion 398.

Additionally, the court suggests that *MCCL v. Kelly*, 698 N.W.2d 424 (Minn. 2005), bars reliance on AO-398, because it held that the political fund provisions definition is limited to express advocacy and so forecloses the Corporations' challenge to AO-398. (JA–249, Addm–28.) But *Kelly* did not address the definition of "independent expenditure." It addressed the definitions of "influence" and "related phrases in Minn. Stat. 10A.01(27) and (28)[.]" 698 N.W.2d at 430.

"Independent expenditure" is not found in either of those subdivisions and was not considered by the *Kelly* court; thus, *Kelly* is inapposite.

Further, the CFB did not think *Kelly* applied when, three years after *Kelly*, it defined "independent expenditure" in AO-398 more broadly than *Kelly*'s "express advocacy as defined in *Buckley*." It is simply not clear that *Kelly* controls. The district court erred by declaring it does.

3. The District Court Erroneously "Held" What Minnesota Law Means.

The district court also erred by "hold[ing]" what Minnesota law means. (JA–249, Addm–28.) But district courts do not have power to construe state law, and the state is not bound by federal court constructions. For the district court to exercise its power over state law, it must enjoin it:

> An important difference between interpretation of a state statute by a federal court and by a state court is that only the latter interpretation is authoritative. If the district judge [reads the state's] statute so narrowly as to obviate all constitutional questions, it would still be possible for the state to prosecute people for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined.

Virginia Society for Human Life, Inc. v. Caldwell, 152 F.3d 268, 271 (4th Cir. 1998) (*quoting Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990)).

The district court thus erred by failing to enjoin the independent expenditure definition. This Court should reverse the district court's decision.

V. The District Court Erred as to the Other Preliminary Injunction Factors.

After finding that the Corporations were unlikely to enjoy merits success, (JA–250, Addm–29), the court then erroneously concluded that the Corporations did not prevail on the other preliminary injunction factors, (JA–255-56, Addm–34-35.) But this Court holds that when plaintiffs establish likely merits success in First Amendment challenges, the other factors follow. *Phelps-Roper*, 545 F.3d at 690. Because the Corporations enjoy likely merits success, the court erred in concluding that the remaining preliminary injunction factors weigh in the State's favor. (JA–255, Addm–34.)

Conclusion

For the foregoing reasons, this Court should reverse the district court's decision denying preliminary injunction as to each of the Corporations' challenges.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on November 17, 2010, the foregoing Brief of Plaintiffs-Appellants was electronically filed with the Clerk for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants (listed below) in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

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