ORAL ARGUMENT SCHEDULED FOR JANUARY 11, 2011

No. 10-3126

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC., *et al.*
Plaintiffs-Appellants,

v.

SWANSON, *et al.*
Defendants-Appellees.

Appeal from the United States District Court
for the District of Minnesota, No. 0:10-cv-02938

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANTS-APPELLEES AND URGING AFFIRMANCE

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STATEMENT OF *AMICI CURIAE*

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* affirm that no party's counsel authored the brief in whole or in part, and no person – other than the *amici curiae* – contributed money that was intended to fund preparing or submitting the brief.

Pursuant to Fed. R. App. P. 29(a), counsel for appellants and appellees were contacted about their consent to the filing of the attached brief. Counsel for appellants and counsel for both state and county appellees consented to the *amici* participation.

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STATEMENT OF INTEREST

This case challenges Minnesota's disclosure requirements for corporate independent expenditures, Minn. Stat. §§ 10A.12(1a), 10A.121, 10A.13, 10A.14, 10A.20, and its restriction on corporate contributions to state candidates and political parties, *id.* § 211B.15. Both laws are vital to preventing corruption and ensuring transparency in candidate elections, and have become yet more crucial in light of the Supreme Court's recent decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which invalidated longstanding restrictions on corporate expenditures to influence elections.

Amici curiae Campaign Legal Center (CLC) and Democracy 21 are nonpartisan, nonprofit organizations that work to strengthen the laws governing campaign finance and political disclosure. *Amici* have participated in numerous past cases addressing political disclosure and corporate restrictions, including *Citizens United*, *FEC v. Wisconsin Right to Life (WRTL),* 551 U.S. 449 (2007) and *McConnell v. FEC*, 540 U.S. 93 (2003). *Amici* thus have a longstanding, demonstrated interest in the laws at issue here.

All parties have consented to *amici*'s participation in this case.

SUMMARY OF ARGUMENT

In this case, appellants Minnesota Citizens Concerned for Life (MCCL) *et al*. stretch the Supreme Court's recent decision in *Citizens United* beyond the

breaking point in their challenge to Minnesota's independent expenditure disclosure requirements and its restriction on corporate contributions. The holding in *Citizen United* simply does not support the radical result appellants seek here. *Amici* respectfully urge this Court to reject appellants' baseless challenge to Minnesota's campaign finance laws, and to affirm the district court's decision denying appellants' motion for a preliminary injunction. Opinion, *MCCL v. Swanson*, No. 10-2938 (D. Minn. Sept. 20, 2010).

First, appellants' attack on Minnesota's disclosure requirements is contrary to both the holding in *Citizens United* and the governing case law. In this year alone, the Supreme Court has twice upheld, by overwhelming 8-1 votes, laws requiring political disclosure. *Citizens United*, 130 S. Ct. at 916; *see also Doe v. Reed*, 130 S. Ct. 2811 (2010) (upholding Washington state law authorizing disclosure of ballot referenda petitions). Far from questioning campaign finance disclosure, *Citizens United* stressed that political "transparency" "enables the electorate to make informed decisions and give proper weight to different speakers and messages." 130 S. Ct. at 916. Appellants' attempt to distinguish the federal "electioneering communications" disclosure requirements at issue in *Citizens United* from the allegedly "PAC-style disclosure" required by Minnesota law is also unavailing. Both the D.C. Circuit and the Ninth Circuit have recently upheld disclosure requirements analogous to Minnesota's disclosure law, applying

"exacting scrutiny" to the requirements and relying upon *Citizens United* to reach their holdings. *SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied Keating v. FEC*, 131 S. Ct. 553 (2010); *Human Life of Washington (HLW) v. Brumsickle,* 624 F.3d 990 (9th Cir. 2010).

Less tenable still is appellants' argument that Minnesota's restriction on corporate contributions is constitutionally suspect. Corporate contribution restrictions have been approved by the Supreme Court on multiple occasions, most recently in *FEC v. Beaumont*, 539 U.S. 146, 162 (2003), and there is no support for appellants' suggestion that these precedents were called into question by *Citizens United*. The Supreme Court in *Citizens United* reviewed only the federal restriction on corporate expenditures, not the restriction on corporate contributions. 130 S. Ct. at 909. Furthermore, the expenditure restriction reviewed by *Citizens United* and the contribution restriction under review here are subject to different standards of scrutiny and are supported by different governmental interests. The Supreme Court's assessment of the former has no bearing on the constitutionality of the latter.

For these reasons, appellants are unlikely to succeed on the merits of their case, and the district court's decision should be affirmed.

ARGUMENT

I. Minnesota's Disclosure Requirements Applicable to Independent Expenditure Political Funds Are Constitutional.

Minnesota law permits corporations and other associations to use their treasury funds to make independent expenditures to influence state elections provided that they comply with reasonable disclosure requirements. To make an independent expenditure of over $100, any association other than a political committee must either register an internal independent expenditure political fund (IEPF) or contribute to an existing independent expenditure political fund or political committee. Minn. Stat. § 10A.12(1a). In either case, the IEPF or political committee must operate transparently, and comply with reporting and record-keeping requirements. *Id.* at §§ 10A.12(1a), 10A.13, 10A.14, 10A.20 ("IEPF disclosure requirements"). Registration of an IEPF in order to facilitate disclosure, however, does not subject the association to any restrictions on either its independent expenditures or its fundraising to finance such expenditures.

Amici will focus on three aspects of appellants' challenge to this disclosure law: (1) appellants' claim that Minnesota's IEPF disclosure requirements are analogous to the "independent expenditure ban" at issue in *Citizens United*; (2) appellants' assertion that strict scrutiny applies to the disclosure requirements; and (3) appellants' argument that the disclosure requirements can be applied only to "major purpose" groups. *See* Opening Brief of Plaintiffs-Appellants (Nov. 17,

2010) ("Pl. Br.") at 22-24, 28-30, 32-35. None of these arguments has legal merit, and each relies on outright distortions of *Citizens United* and federal campaign finance law.

A. Minnesota's Disclosure Law Is Not an "Independent Expenditure Ban."

Appellants labor mightily to equate Minnesota's IEPF disclosure requirements with the federal expenditure ban at issue in *Citizens United*, arguing that the IEPF required under state law is functionally identical to the "separate segregated fund"[1] ("SSF" or "PAC") previously mandated for corporate independent expenditures under federal law. Pl. Br. at 22-24. But Minnesota's IEPF disclosure requirements are not remotely comparable to the federal expenditure ban, and this court should reject this analogy.

Prior to the *Citizens United* decision, federal law prohibited corporations from using treasury funds to make either "contributions" or "expenditures" to influence a federal election. 2 U.S.C. § 441b; *id*. §§ 431(8)(A)(i), (9)(A)(i). A corporation was permitted to establish a SSF to engage in political activities, a choice often referred to as the "PAC option," but the SSF was barred from using corporate treasury funds to finance either political contributions or independent

[1] For a plain language guide to the Federal Election Commission's extensive SSF regulations, see the FEC's *Campaign Guide for Corporations and Labor Organizations* (January 2007), *available at* http://fec.gov/pdf/colagui.pdf.

expenditures.[2] 2 U.S.C. § 441b(b)(2). Instead, a corporate SSF was required to finance its contributions and expenditures exclusively with contributions from individuals raised under the federal contribution limits. *See* 2 U.S.C. § 441a(a)(1); 11 C.F.R. 114.5(f).[3] And the SSF was not permitted to solicit contributions from the general public, but only from the corporation's "restricted class" of officers, employees and shareholders in a strictly-regulated process. 2 U.S.C. § 441b(b)(4); 11 C.F.R. 114.5-114.8. By striking down the federal restriction on corporate expenditures, the Supreme Court in *Citizens United* eliminated the requirement that corporations establish a SSF in order to make corporate independent expenditures, but a corporation still must establish a SSF in order to make any contributions to candidates in federal elections. 2 U.S.C. § 441b.

The crucial distinction between the federal corporate expenditure ban and the IEPF disclosure law is that the latter in no way restricts how a corporation finances its independent expenditures in state elections. Prior to *Citizens United*, a corporation and its SSF were prohibited by federal law from using corporate treasury funds to fund independent expenditures. In clear contrast to the federal "PAC option," the state IEPF disclosure requirements do not restrict or limit the

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[2] Corporate treasury funds could be used only to defray the administrative expenses of the SSF. 2 U.S.C. § 441b(b)(2)(C).

[3] Under the applicable limits, an SSF may receive up to $5,000 per year from any one contributor. 11 C.F.R. 110.1(d).

use of corporate treasury funds for independent expenditures. To the contrary, Minnesota amended its law after *Citizens United* to facilitate precisely this type of corporate expenditure. 2010 Minn. Laws ch. 397; *see also MCCL*, slip. op. at 18.

Second, federal SSFs were subject not only to the prohibition on the use of corporate treasury funds for independent expenditures, but also to extensive additional regulation of their political fundraising. As discussed above, an SSF was subject to contribution limits and source restrictions, as well as stringent restrictions on its solicitation of contributions. For instance, the SSF was prohibited from using threats of job discrimination or financial reprisal when soliciting contributions, and from accepting as contributions any dues or fees obtained as a condition of membership or employment. 2 U.S.C. § 441(b)(3); 11 C.F.R. 114.5(a). In its solicitations, the SSF was required to inform its restricted class of the political purpose of the SSF, and of the individual's right to refuse to contribute without reprisal. *Id.* As noted by the district court, however, none of these contribution restrictions are imposed on corporations or their IEPFs under Minnesota law. The IEPF disclosure requirements allow corporations to finance their independent expenditures with any of their available funds without limitation or restriction.

Finally, Minnesota's IEPF disclosure requirements are not comparable to the federal "PAC option" because Minnesota does not even require corporations to

create a separate entity for their independent expenditures. By contrast under federal law, an SSF is "a separate association from the corporation." *Citizens United*, 130 S. Ct. at 897. Typically, it is an independent not-for-profit corporation organized under Section 527 of the Internal Revenue Code and subject to additional organizational obligations under the federal tax laws. 26 U.S.C. § 527. As a result, the Supreme Court found that "the PAC exemption from § 441b's expenditure ban … does not allow corporations to speak." *Citizens United*, 130 S. Ct. at 897. An IEPF, on the other hand, is not a separate entity, and a corporation need not even open a separate bank account to comply with the IEPF disclosure requirements. *See MCCL*, slip. op. at 9 (noting that if corporation uses only general treasury money, IEPF functions as an "internal bookkeeping device, such as a spreadsheet"). The IEPF is simply an accounting mechanism to facilitate the disclosure of money spent by corporations for political expenditures. Thus, appellants err in alleging that Minnesota law forces corporations to employ a political fund to "speak on their behalf." Pl. Br. at 24. Because the corporation and its IEPF are one and the same entity, the corporation speaks on its own behalf.

The district court was thus correct in rejecting appellants' attempt to recast Minnesota's IEPF disclosure law as an expenditure ban. MCCL, slip. op. at 17-21. *Amici* are aware of no court that has characterized a law that requires only an

internal accounting system for the disclosure of independent expenditures as an "expenditure ban." This court should not be the first.

B. Strict Scrutiny Is Not Applicable to This Court's Review of Minnesota's Disclosure Law.

Because the challenged law entails only disclosure obligations, appellants' argument that strict scrutiny should apply to this Court's review of the law has no basis. The Supreme Court has repeatedly made clear that disclosure laws are subject not to strict scrutiny, but rather only to "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizen United*, 130 S. Ct. at 914, *quoting Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976) (internal citations omitted).

The Supreme Court determines the level of scrutiny based on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation. Expenditure restrictions, as the most burdensome campaign finance regulations, are subject to strict scrutiny and are reviewed for whether they are "narrowly tailored" to "further[] a compelling interest." *WRTL*, 127 S. Ct. at 2664; *see also Buckley*, 424 U.S. at 44-45. Contribution limits, by contrast, are deemed less burdensome of speech, and are constitutionally "valid" if they "satisfy the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136, *quoting Beaumont*, 539 U.S. at 162 (internal quotations omitted). Disclosure requirements, the "least restrictive" campaign

finance regulations, *Buckley*, 424 U.S at 68, are subject to "exacting scrutiny," which requires only that there exist a "relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." *Id*. at 64 (internal quotations omitted). *See also Citizens United*, 130 S. Ct. at 914 ("The Court has subjected [disclosure] requirements to 'exacting scrutiny'"); *Reed*, 130 S. Ct. at 2818 (finding that disclosure law relating to ballot referenda petitions was subject only to "exacting scrutiny").[4]

Without disputing this framework for determining the level of judicial review, appellants attempt to heighten the standard of scrutiny applicable to Minnesota's disclosure law by arguing that the law should be treated as an expenditure ban and therefore subjected to strict scrutiny. *See* Pl. Br. at 28-29, *citing Citizens United*, 130 S. Ct. at 898.

But, as discussed above, the challenged disclosure provisions are not comparable to the federal corporate expenditure ban. Federal law imposed contribution limits and source restrictions on corporate SSFs in connection to their independent expenditures. Minnesota IEPF disclosure law, on the other hand, imposes no restrictions on how corporations finance their independent

[4] Lest there was any doubt as to the meaning of "exacting scrutiny" in the review of disclosure laws, the Supreme Court in *Reed* stated explicitly that in applying "exacting scrutiny" to the challenged ballot referenda disclosure law, the Court was *not* applying strict scrutiny. 130 S. Ct. at 2820 n.2.

expenditures. The challenged IEPF disclosure requirements entail nothing more than registration, reporting and recordkeeping, and hence warrant only "exacting scrutiny."

Given the implausibility of their argument, it is unsurprising that appellants also advance an alternative theory, namely, that the challenged disclosure law imposes "PAC-style requirements" and for this reason warrants strict scrutiny. But even accepting this description of the challenged law for the sake of argument, the phrase "PAC-style requirements" does not advance the analysis because it could refer to multiple substantive regulations, each of which may be subject to a different standard of scrutiny. For instance, a federal political committee is subject to disclosure requirements, 2 U.S.C. §§ 432, 433, 434(a)(4), 441d, as well as contribution limits, 2 U.S.C. §§ 441a(a)(1), (2), and source prohibitions, 2 U.S.C. § 441b(a). The applicable standard of scrutiny will turn on the nature of specific "PAC-style requirement" at issue.

This principle is well illustrated by the D.C. Circuit's decision in *SpeechNow.org*. There, the Court of Appeals reviewed both the contribution limits and the registration, reporting and organizational requirements connected to federal political committee status. It struck down the federal contribution limits as applied to "independent expenditure committees" after reviewing such limits under the "closely drawn" scrutiny appropriate for contribution limits. 599 F.3d at 692

(noting that contribution limits must be "closely drawn to serve a sufficiently important interest") (citing *Davis v. FEC*, 128 S. Ct. 2759, 2772 n.7 (2008)). By contrast, the Court upheld the federal political committee disclosure requirements under a more relaxed standard, stating that "the government may point to any 'sufficiently important' governmental interest that bears a 'substantial relation'" to the requirements." *Id*. at 696. The appropriate standard of scrutiny thus turned on the nature of the substantive regulation associated with political committee status.

This has also been the approach of a number of courts that have heard post-*Citizens United* challenges to disclosure-related requirements accompanying state political committee status. *See National Organization for Marriage v. Roberts*, 2010 WL 4678610, *5 (N.D. Fla. Nov. 8, 2010) (finding that Florida disclosure requirements connected to "electioneering communications organizations" "would not prohibit [plaintiff] from engaging in its proposed speech" and were subject only to exacting scrutiny); *Yamada v. Kuramoto*, 2010 WL 4603936, *11 (D. Haw. Oct. 29, 2010) (finding that recent case law "leaves no doubt [that] exacting scrutiny applies" to Hawaii's regulation of noncandidate committees); *Iowa Right to Life (IRTL) v. Smithson*, 2010 WL 4277715, *13-14 (S.D. Iowa Oct. 20, 2010) (finding that Iowa disclosure requirements connected to "independent expenditure committees" were not subject to strict scrutiny, but rather exacting scrutiny); *National Organization of Marriage v. McKee*, 2010 WL 3270092, *9 (D. Me. Aug.

19, 2010) (finding that "the Supreme Court has made clear that when election-related speech is not prohibited, but simply carries consequences such as these PAC-type requirements, courts must apply 'exacting scrutiny' to the law"). There is no one-size-fit-all standard of review for "PAC-style requirements."

In particular, the Ninth Circuit in *Human Life* recently rejected an argument virtually identical to appellants' claim here. There, HLW challenged Washington State's public disclosure law that required groups that supported or opposed candidates or ballot propositions to register as political committees and to satisfy detailed reporting and organizational requirements. 624 F.3d at 997-98. The Court of Appeals rejected HLW's assertion that strict scrutiny applied. It noted that "recent Supreme Court decisions have eliminated the apparent confusion as to the standard of review applicable in disclosure cases." *Id*. at 1005. It concluded that *Citizens United* and *Reed* removed all doubt regarding the correct degree of scrutiny for PAC disclosure obligations by confirming that "a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest." *Id.* (emphasis added).

As the Ninth Circuit did in *Human Life*, this Court should follow the clear guidance of *Buckley*, *Citizens United* and *Reed* and apply exacting scrutiny, not strict scrutiny, to the challenged disclosure law.

C. The "Major Purpose" Test Does Not Apply to Minnesota's Disclosure Law.

Appellants' final line of attack is their assertion that Minnesota's IEPF disclosure law "imposes PAC-style burdens," and therefore may not be applied to groups whose "major purpose" does not relate to the nomination or election of a candidate. Pl. Br. at 32-35. But the "major purpose" test was formulated as a narrowing construction to the definition of "political committee" in the Federal Election Campaign Act (FECA), 2 U.S.C. § 431, *et seq*. Here neither federal law nor the substantive restrictions that attend federal PAC status are at issue. The "major purpose" test is hence inapplicable.

1. The Major Purpose Test Was a Statutory Cure.

The "major purpose" test was formulated by the Supreme Court in *Buckley* to address the constitutional concern that FECA's definition of the term "political committee" was vague and overbroad to the extent it relied upon the statutory definition of "expenditure." FECA defined a "political committee" as a group which "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). The statute in turn defined "expenditure" as any spending "for the purpose of influencing any election for Federal office." 2 U.S.C. §§ 431(9)(A)(i). The Court recognized that the expansive definition of "expenditure" caused "line-drawing problems" by potentially "encompassing both issue discussion and advocacy of a political

result." 424 U.S. at 78-79. Furthermore, it feared that the "political committee" definition "could raise similar vagueness problems," because "'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion." *Id*. at 79.

To resolve these constitutional concerns, the *Buckley* Court imposed two different limiting constructions. First, it narrowed the definition of "political committee" to encompass only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* (emphasis added). For such "major purpose" groups, there was no vagueness concern about the statutory "for the purpose of influencing" definition of "expenditure" because, the Supreme Court held, disbursements by such "major purpose" groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id.* Second, "when the maker of the expenditure is *not* within these categories – when it is an individual other than a candidate or a group other than a 'political committee,'" the Court narrowly construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 79-80 (emphasis added).

The objective of the *Buckley* Court was thus to save from claims of vagueness the FECA definition of "political committee," as well as the definition of "expenditure" upon which the "political committee" definition relied. The "major purpose" test was the Court's cure for the specific constitutional defects of the federal statute.

But the "major purpose" text is not, as appellants claim, an absolute constitutional requirement for so-called "PAC-style burdens" that automatically applies regardless of the language of the underlying campaign finance statute or the requirements the statute imposes. *See Human Life*, 624 F.3d at 1009-1010. Minnesota's IEPF disclosure statute is far more tailored than federal law, and as will be discussed in the following section, imposes far fewer requirements on IEPFs than FECA imposes on federal PACs. *Buckley's* narrowing construction is therefore not appropriate here.

Under Minnesota law, an "independent expenditure political fund" is defined as a "political fund"[5] that makes only "independent expenditures" and

[5] Minnesota defines "[p]olitical fund" [as] an accumulation of dues or voluntary contributions by an association other than a political committee, principal campaign committee, or party unit, if the accumulation is collected or expended to influence the nomination or election of a candidate or to promote or defeat a ballot question." Minn. Stat. § 10A.01(28).

certain related disbursements. Minn. Stat. §§ 10A.01(18b), 10A.121(1).[6] Minnesota law in turn defines an "independent expenditure" 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." *Id.* § 10A.01(18) (emphasis added).

Thus, unlike FECA's original definition of "political committee," Minnesota's statutory definition of an "independent expenditure political fund" relies on the precise, express advocacy standard for "independent expenditures." Furthermore, the term "political fund" has been construed by the Minnesota Supreme Court to encompass only "groups that expressly advocate the nomination or election of a particular candidate or the promotion or defeat of a ballot question." *Minnesota Citizens Concerned for Life (MCCL) v. Kelley*, 698 N.W.2d 424, 428-30 (Minn. 2005) (emphasis added); *MCCL v. Kelley,* 427 F.3d 1106, 1110 (8th Cir. 2005). As a result, Minnesota IEPF disclosure law does not raise the vagueness and overbreadth concerns that necessitated the "major purpose" test in connection to federal law. Because the IEPF disclosure requirements, by

[6] An "independent expenditure political committee" is defined in identical terms, but is limited only to "political committees," *i.e.* groups whose "major purpose is to influence the nomination or election of a candidate or to promote or defeat a ballot question." Minn. Stat. §§ 10A.01(18a), (27).

definition, will only apply to associations that make expenditures for express advocacy, the law cannot "reach groups engaged purely in issue discussion" unrelated to an election, as the *Buckley* Court feared.

Minnesota's law also stands in stark contrast to the state "political committee" statutes reviewed in the cases cited by appellants in support of the "major purpose" test. *See* Pl. Br. at 33, *citing New Mexico Youth Organized (NMYO) v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010); *North Carolina Right to Life (NCRTL) v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008); and *Colorado Right to Life Comm. (CRLC) v. Coffman*, 498 F.3d 1137, 1153–54 (10th Cir. 2007). Many of the statutes at issue mirrored the defects of federal law, and thus threatened to regulate groups that made no express advocacy communications to influence elections. In *NMYO*, for instance, the New Mexico statute at issue defined a "political committee" as, *inter alia*, "an organization of two or more persons that within one calendar year expends funds in excess of five hundred dollars ($500) to conduct an advertising campaign for a political purpose." 611 F.3d at 673, *citing* N.M. Stat. § 1-19-26(L) (emphasis added). But the statutory definition of "political purpose," *i.e.* "influencing or attempting to influence an election or pre-primary convention including a constitutional amendment or other question submitted to the voters," *see* N.M. Stat. § 1-19-26(M), was found to be vague and overbroad. *Id.* at 674. Thus, the New Mexico statute was analogous to the federal

statute in *Buckley* in that it relied on vague and overbroad terminology, and consequently, applied to groups, like the plaintiff NMYO, that ran only issue advertising unrelated to an election. *Id.* at 671-72. *See also NCRTL*, 525 F.3d at 286-87 (considering North Carolina definition of "political committee," which relied upon a definition of "expenditure" that went beyond express advocacy); *id*. at 280-83 (finding North Carolina definition of "expenditure" unconstitutional).

By contrast, Minnesota's IEPF requirements are triggered only by express advocacy, and therefore will be "directed precisely to that spending that is unambiguously related to the campaign of a particular … candidate." *Buckley*, 424 U.S. at 80. As found by the district court below, the major purpose test is not needed. *MCCL*, slip op. at 26 n.14.

2. Minnesota's Disclosure Law Is Not Comparable to the Federal Political Committee Requirements.

Even if Minnesota law raised the same vagueness and overbreadth concerns as the original FECA definition of "political committee," however, the challenged disclosure statute does not impose "PAC-style burdens" within the meaning of federal law. Because the IEPF disclosure provisions do not entail contribution restrictions or other burdens that accompanied federal political committee status, the major purpose test is inapplicable.

As the district court found, "the provisions of Minnesota's independent expenditure political fund law are significantly different than federal PAC

requirements." *MCCL,* slip op. at 26 n.14. As discussed in greater detail in Section I.A. *supra*, federal SSFs are subject to strict fundraising and solicitation requirements, including a restriction on contributions from corporations and unions and limits on contributions from individuals.[7] Federal political committees are thus subject to numerous requirements that have no analog in Minnesota's IEPC disclosure requirements. *See MCCL,* slip op. at 26, n.14.

Because federal political committees are subject to regulatory burdens that extend well beyond disclosure, most courts reviewing state disclosure-only statues have distinguished the state statutes from federal PAC status and consequently declined to impose a major purpose test. *See, e.g., Roberts*, 2010 WL 4678610 at *5 (noting that "[t]here is no major purpose requirement because the [disclosure] statutes do not impose full-fledged political-committee like burdens upon NOM…"); *IRTL*, 2010 WL 4277715 at *14 (finding that "[*Buckley*] also does not categorically prohibit Iowa from subjecting entities to disclosure requirements simply because those requirements may be characterized as "PAC-style regulations"); *McKee*, 2010 WL 3270092 at *10. The contrary decisions cited by

[7] In response to the *SpeechNow.org* decision, the FEC recently issued a pair of advisory opinions ruling that political committees making only independent expenditures are no longer bound by the federal contribution limits, nor by the corporate and union contribution source restrictions. FEC AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten). However, when *Buckley* formulated the "major purpose" test, federal political committees were subject to these contribution restrictions under FECA.

appellants in support of the major purpose test do not contradict this guidance, because the state statutes reviewed in those cases extended beyond basic disclosure requirements and imposed additional substantive requirements on "political committees." For instance, in evaluating North Carolina's definition of "political committee," the Fourth Circuit specifically noted that "political committees" were subject not only to disclosure requirements under North Carolina law, but also "face limits on the amount of donations they can receive in any one election cycle from any individual or entity." *NCRTL*, 525 F.3d at 286. Similarly, as noted by the district court in *CRTL*, "political committee" status under Colorado law entailed strict contribution requirements. *CRTL v. Davidson*, 395 F.Supp.2d 1001, 1020-21 (D. Colo. 2005) (noting that "political committees are prohibited from accepting contributions or dues from any person in excess of five hundred dollars per house of representatives election cycle" under Colo. Const. art. XXVIII, § 3(5)). Because the challenged state statutes thus imposed full-fledged PAC regulation, it was reasonable for the reviewing court to hold that, under *Buckley*, these statutes could be permissibly applied only to groups with a "major purpose" to influence elections. In this case, by contrast, where only disclosure requirements are at issue, and such requirements are imposed only on groups that engage in "express advocacy" expenditures, application of the "major purpose" test is not constitutionally required.

II. Minnesota's Restriction on Corporate Contributions to Candidates and Political Parties Is Constitutional.

Appellants' challenge to Minnesota's restriction on corporate contributions is foreclosed by the Supreme Court's decision in *Beaumont* that squarely upheld the comparable federal restrictions on corporate contributions. 539 U.S. at 163; *see also* 2 U.S.C. § 441b. Appellants attempt to circumvent this binding precedent in two ways. First, they argue that *Citizens United* "implicitly overruled" *Beaumont* although *Citizens United* addressed an expenditure restriction whereas *Beaumont* addressed a contribution restriction. Pl. Br. at 43. Second, they argue that *Beaumont* is distinguishable from this case because the federal corporate contribution restriction is far less restrictive than the Minnesota statute challenged here. Both arguments are entirely without merit and should be rejected by this Court.

A. *Citizens United* Does Not Cast Doubt on Supreme Court Precedent Upholding Corporate Contribution Restrictions.

Appellants do not dispute that *Citizens United* reviewed only a restriction on corporate expenditures, not a restriction on corporate contributions. Indeed, the Supreme Court explicitly noted that "Citizens United has not made direct contributions to candidates, and it is not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." 130 S. Ct. at 909 (emphasis added). Nevertheless, appellants contend

that the reasoning of *Citizens United* indirectly undermines *Beaumont*, and therefore renders Minnesota's corporate contribution restriction, Minn. Stat. § 211B.15, unconstitutional. Pl. Br. at 43 n.12.

Appellants have no basis for this radical extension of *Citizens United*. It is black-letter law that expenditure restrictions and contribution restrictions are subject to different standards of scrutiny and are supported by different governmental interests. The Court's analysis of the former in *Citizens United* therefore has no bearing on the constitutionality of the latter. Moreover, the majority opinion in *Citizens United* repeatedly distinguished between contributions and expenditures for the purposes of First Amendment review. The Supreme Court made clear that its invalidation of the corporate expenditure restriction did not impact the constitutionality of a corporate contribution restriction.

First, different standards of review apply to expenditure restrictions and contribution restrictions. Beginning with *Buckley*, the Court has held "that expenditure limits bar individuals from "any significant use of the most effective modes of communication," and therefore represent "substantial … restraints on the quantity and diversity of political speech." 424 U.S. at 19. Consequently, a statutory restriction on expenditures must satisfy strict scrutiny review. *Citizens United*, 130 S. Ct. at 898; *WRTL,* 551 U.S. at 464; *Buckley*, 424 U.S. at 44-45. By contrast, a contribution limit "entails only a marginal restriction upon [one's]

ability to engage in free communication," because a contribution "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley,* 424 U.S. at 20-21. Further, a contribution restriction leaves open multiple alternative channels for speech and association, allowing persons and entities to "engage in independent political expression" and "associate actively through volunteering their services." *Id.* at 28. As a result, a contribution restriction "passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *Beaumont*, 539 U.S. at 162 (internal quotations omitted); *see also Buckley*, 424 U.S. at 25. That this case concerns a "ban" rather than a limit on contributions does not alter this analysis. In *Beaumont*, the Court emphasized that "the level of scrutiny is based on the importance of the political activity at issue to effective speech or political association," and applied only "closely drawn" scrutiny to the federal "ban" on corporate contributions. 539 U.S. at 161-62 (internal quotations omitted); *see also Green Party v. Garfield*, 616 F.3d 189, 198-99 (2d. Cir. 2010).

Consistent with this framework, the Court in *Citizens United* applied strict scrutiny to the challenged corporate expenditure restriction. 130 S. Ct. at 898. But the Court's application of strict scrutiny to an expenditure restriction in no way suggested that a restriction on corporate contributions must also be reviewed under strict scrutiny. To conclude otherwise would upend the longstanding framework

for determining the scrutiny applicable to campaign finance laws. As noted by the Second Circuit, "although the [Supreme] Court's campaign-finance jurisprudence may be in a state of flux" after *Citizens United*, "*Beaumont* and other cases applying the closely drawn standard to contribution limits remain good law." *Green Party*, 616 F.3d at 199.

Second, expenditure restrictions and contribution restrictions are justified by different governmental interests. In *Austin* and earlier precedents, restrictions on corporate expenditures were found to further two governmental interests: first, the interest in ensuring that the expenditure of corporate funds amassed in the "economic marketplace" did not distort the "political marketplace," *see Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990), *quoting FEC v. Massachusetts Citizens for Life (MCFL),* 479 U.S. 238, 257 (1986), and second, the desire to protect shareholders from the unapproved corporate use of their investment dollars to fund electoral advocacy, *see id.* at 670-71 (Brennan, J., concurring). By contrast, corporate contribution restrictions have been justified on the basis of wholly different governmental interests. In *Beaumont*, the Court noted that the federal restriction on corporate contributions prevented "corporate earnings from conversion into political 'war chests,'" and thereby was "intended to 'preven[t] corruption or the appearance of corruption.'" *Id.* at 154, *quoting National Conservative PAC (NCPAC) v. FEC*, 470 U.S. 480, 496-97 (1985).

Relatedly, the Court found that "another reason for regulating corporate electoral involvement" was to "hedge[] against their use as conduits for 'circumvention of [valid] contribution limits.'" *Id.* at 155, *quoting FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456 and n.18 (2001). To be sure, *Beaumont* acknowledged that the interests set forth in *Austin* also supported the federal corporate contribution restrictions, but the Court made clear that the contribution restrictions were justified principally by the state interests in preventing quid pro quo corruption and the circumvention of contribution limits. 539 U.S. at 154-56. *See also IRTL*, 2010 WL 4277715, at *25 n.20 (noting that *Beaumont* discussed *Austin* interests, but "never suggested that the government's interest in preventing corruption was not itself sufficient to support a ban on corporate contributions").

In *Citizen United*, the majority held that *Austin*'s "distortion" and "shareholder protection" interests, as well as the state's anticorruption interest, did not justify a restriction on independent expenditures. 130 S. Ct. at 904-11. But the Court's decision that these governmental interests failed to support a corporate expenditure restriction does not "invalidate" or "discredit" these interests with respect to a corporate contribution restriction, as appellants claim. Pl. Br. at 43 n.12. Indeed, the *Citizen United* majority was careful to distinguish between expenditure restrictions and contribution restrictions in its analysis of the

governmental interests at play. It noted that "contribution limits … unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption." 130 S. Ct. at 908. The Court further noted that the *Buckley* Court "sustained limits on direct contributions in order to ensure against the reality or appearance of corruption," but "did not extend this rationale to independent expenditures." *Id.* It acknowledged that *Buckley* found that large contributions could be given "to secure a political quid pro quo," *id., citing Buckley*, 424 U.S. at 26, but found that "[t]he absence of prearrangement and coordination of an *expenditure* with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id., citing Buckley*, 424 U.S. at 47. Thus, far from questioning whether a corporate contribution restriction is supported by sufficiently important governmental interests, the *Citizens United* majority emphasized that the state's anticorruption interest alone repeatedly had been found to justify restrictions on contributions.[8]

[8] Because of the different constitutional analyses applicable to contribution restrictions and expenditure restrictions, the Supreme Court has frequently upheld contribution restrictions while striking down expenditure restrictions with respect to the same political actor. For instance, in *Buckley*, the Court upheld the challenged limits on contributions to federal candidates, 18 U.S.C. § 608(b) (1970 ed., Supp. IV), yet simultaneously invalidated the limits on expenditures by federal candidates, *id.* § 608(a), (c). 424 U.S. at 23-30, 54-59. Similarly, the Court upheld the limits on contributions to independent political committees in *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981), but four years later, struck down

Because expenditure restrictions and contribution restrictions are thus subject to fundamentally different constitutional analyses, the legal reasoning in *Citizens United* does not even indirectly impact the constitutionality of a corporate contribution restriction – or the continuing vitality of the *Beaumont* decision. This has also been the unanimous conclusion of those courts that have addressed the validity of *Beaumont* in the wake of *Citizens United*. *See, e.g., Green Party*, 616 F.3d at 199 ("*Beaumont* … remain[s] good law."); *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065, 1085 (S.D. Cal. 2010) (noting "the Supreme Court in *Beaumont* relied on the anticircumvention interest in upholding a corporate contribution" and "the validity of that rationale was not affected by *Citizens United*"); *IRTL*, 2010 WL 4277715, *25 n. 20 ("*Beaumont* is still good law that is binding on this Court.").

Thus, even if this court had the authority to disregard a controlling Supreme Court precedent – which it does not – appellants have no basis for their claim that the reasoning of *Citizens United* "implicitly overruled" *Beaumont*.

B. Appellants' Attempts to Distinguish *Beaumont* from the Instant Case Are Untenable.

As a last resort, appellants argue that *Beaumont* does not govern this case, alleging that Minnesota law differs from the federal law upheld in *Beaumont*

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limits on certain expenditures by such political committees in *NCPAC*, 470 U.S. at 501.

because it does not provide a sufficiently robust "PAC option." Pl. Br. at 44-46. For the reasons set forth in appellees' brief, appellants' characterization of Minnesota law is demonstrably inaccurate. Brief of State Appellees, at 38 (Dec. 15, 2010) (noting that corporation can establish and control a "political fund" for purpose of making campaign contributions under Minn. Stat. § 10A.01). But even if appellants' characterization of state law was credited, their argument still fails because it rests on a flawed understanding of *Beaumont*.

First, appellants are wrong in asserting that the availability of a "PAC option" under federal law was "constitutionally determinative" to the holding in *Beaumont*. Pl. Br. at 44. The *Beaumont* Court discussed the federal "PAC option" merely by way of refuting the plaintiff's description of the federal corporate contribution restriction as "complete ban" on contributions. *Id*. at 162-63. Instead of operating as a ban, the Court found, the federal restriction allowed "some participation of unions and corporations in the federal electoral process" through the establishment of a PAC. *Id*. However, the *Beaumont* Court in no way conditioned its decision to uphold the federal restriction on this observation; to the contrary, the Court stressed that it was the unique danger of corruption posed by corporate contributions that necessitated their regulation. *See* 539 U.S. at 152 ("[A]ny attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations'

potentially deleterious influences on federal elections….") (internal quotations omitted). *See also IRTL*, 2010 WL 4277715, *25 n.20 (noting that the *Beaumont* holding was not based on availability of "PAC option" under federal law, but rather on "the differences between independent expenditures and contributions").

Furthermore, appellants concede that Minnesota law does provide a PAC option; their complaint is merely that Minnesota's "conduit fund" provisions, Minn. Stat. § 211B.15(16), allegedly do not grant corporations sufficient "control" over their funds' activities. *See* Pl. Br. at 46 ("*Beaumont*'s holding requires that the contribution ban permit corporations to control the contributions their funds make."). But this "requirement" of absolute control is one that appellants invent. Even if *Beaumont* is interpreted to have turned on availability of a federal PAC option, the decision certainly did not establish any particular constitutionally-mandated criteria for corporate PACs. Nor did the Supreme Court in any way suggest that the federal PAC option was the only permissible model.

The alleged inadequacies of Minnesota's "PAC option" therefore do not render Minnesota's corporate contribution restriction unconstitutional under *Beaumont*. This court should not permit appellants to circumvent binding Supreme

Court precedent, and should affirm the district court decision denying appellants' preliminary relief on this claim.[9]

CONCLUSION

For the foregoing reasons, Minnesota's disclosure requirements for independent expenditures and its restriction on corporate contributions are consistent with the First Amendment. Accordingly, the district's court decision should be affirmed.

[9] The district court also correctly rejected appellants' equal protection argument, relying on *Austin*, as well as appellants' attempt to frame the contribution restriction as a "viewpoint-based" speech regulation. *MCCL*, slip op. at 32-33 and 33 n.16.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6903 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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