

**No. 10-3126**

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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Minnesota Citizens Concerned For Life, Inc., et al.,  
Appellants,

vs.

Lori Swanson, et al.,  
Appellees.

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On Appeal From The United States District Court  
For The District of Minnesota

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**BRIEF OF STATE APPELLEES**

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## SUMMARY OF CASE

In the wake of the Supreme Court's decision in *Citizens United*, Minnesota law was amended to permit corporate independent expenditures. Plaintiffs, by their lawsuit and this appeal of the district court's denial of a motion for preliminary injunction, attempt to emasculate Minnesota's disclosure and related reporting requirements for corporate independent expenditures. Similar claims have already been uniformly rejected by numerous other cases decided since *Citizens United*. Plaintiffs' assertion that *Citizens United* implicitly overruled Supreme Court precedent upholding a ban on corporate contributions to candidates and political parties has also been unanimously rejected by the various courts that have considered the issue.

As the district court correctly reasoned, Plaintiffs have not shown that they are likely to succeed on the merits, a threshold condition for obtaining a preliminary injunction, and the equities also weigh in favor of denying the motion.

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## JURISDICTIONAL STATEMENT

The Court is without subject matter jurisdiction to review the third issue raised on appeal by Plaintiffs, *i.e.*, whether the June 17, 2008 advisory opinion of the Minnesota Campaign Finance and Public Disclosure Board (“Board”) incorrectly applied the definition of independent expenditure. This issue is moot as a result of a subsequent decision of the Board on December 3, 2008, as well as the Board’s withdrawal of the opinion. The issue is also not ripe because Plaintiffs fail to allege any non-independent expenditure activity from which they are refraining based on the Board’s advisory opinion. See *infra* pp. 43-46 & n.19. The district court acknowledged that it had “concerns” about the justiciability of this claim by Plaintiffs, but determined that Plaintiffs are unlikely to succeed on the merits of the claim. Joint Appendix (“J.A.”) 250 n.15; Appellants’ Addendum (“A.A.”) 29 n.15. The court indicated that it would consider the justiciability issue on a motion to dismiss. *Id.*

## STATEMENT OF THE ISSUES

1. Did the district court clearly err or abuse its discretion in determining that Plaintiffs are unlikely to succeed on the merits of their claim that the Minnesota independent expenditure political fund law is unconstitutional?

Apposite authorities:

*Citizens United v. FEC*, 130 S. Ct. 876 (2010)

*Doe v. Reed*, 130 S. Ct. 2811 (2010)

*Buckley v. Valeo*, 424 U.S. 1 (1976)

*McConnell v. FEC*, 540 U.S. 93 (2003)

2. Did the district court clearly err or abuse its discretion in determining that Plaintiffs are unlikely to succeed on the merits of their claim that the Minnesota law prohibiting corporate contributions to candidates and political parties is unconstitutional?

Apposite authorities:

*Citizens United v. FEC*, 130 S. Ct. 876 (2010)

*FEC v. Beaumont*, 539 U.S. 146 (2003)

*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)

3. Did the district court clearly err or abuse its discretion in determining that Plaintiffs are unlikely to succeed on the merits of their claim that the Board incorrectly defines the term “independent expenditure”?

Apposite authorities:

*Buckley v. Valeo*, 424 U.S. 1 (1976)

*Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424 (Minn. 2005)

## STATEMENT OF THE CASE

Plaintiffs served their complaint on July 9, 2010. They named as defendants the six members of the Board, the eight State administrative law judges, the Minnesota Attorney General (collectively “State Appellees”), and the Hennepin County Attorney. The administrative law judges and the Attorney General have moved to dismiss because they are not proper parties to the litigation. Docket #68-70; see also J.A. 234-36; A.A. 13-15. That motion is scheduled to be heard by the district court on January 21, 2011. Docket #69.

The complaint challenges the constitutionality of certain Minnesota statutes enacted earlier this year which allow corporations to use their own money to make independent expenditures (count 1) and contribute their corporate money to independent expenditure political committees and funds (count 2), J.A. 33-39; asserts that a Minnesota statute’s use of the phrase “promote or defeat” is vague and overbroad (count 3), J.A. 39-41; claims that a Board advisory opinion, dated June 17, 2008, improperly defines the term “independent expenditure” (count 4), J.A. 41-44, 73-78; and contends that the Minnesota law prohibiting corporate contributions to candidates and political parties is unconstitutional (count 5), J.A. 44-47. Plaintiffs subsequently withdrew counts 2 and 3. J.A. 234 n.10; A.A. 13 n.10; Pls.’ Prelim. Inj. Reply Mem. (Docket #51) at 1 n.2.

With their complaint, Plaintiffs filed a motion for preliminary injunction seeking, among other things, to enjoin enforcement of Minnesota laws relating to disclosure and reporting of corporate independent expenditures, and to enjoin enforcement of the statutory ban on corporate contributions to candidates and political parties. J.A. 83-84. The motion was heard by the district court, the Honorable Donovan W. Frank, on August 20, 2010. Docket #53.

On September 20, 2010, the district court denied Plaintiffs' motion in its entirety reasoning, in part, that Plaintiffs are unlikely to prevail on the merits of their claims. J.A. 247, 250, 255-56; A.A. 26, 29, 34-35. Plaintiffs appealed to this Court and sought an injunction pending appeal from the district court, which was denied. Docket #67. Plaintiffs thereafter sought an injunction pending appeal from this Court, which took the motion under advisement to be considered with Plaintiffs' appeal. Order of Oct. 18, 2010. Plaintiffs then sought an emergency injunction pending appeal from the Supreme Court, which the Supreme Court denied. Docket #71.

### **STATEMENT OF FACTS**

The facts set forth in the district court's decision are not disputed by Plaintiffs on appeal, including the facts drawn from the affidavit of the Board's executive director, Gary Goldsmith, J.A. 85-103 (Goldsmith Aff.). See

Appellants' Br. at 14; see also Appellants' Reply in Supp. Mot. for Inj. Pending Appeal at 2 ("This case involves questions of law, not fact.").

In response to *Citizens United v. FEC*, 130 S. Ct. 876 (2010), the Minnesota Legislature amended Minnesota's campaign finance laws to expressly permit corporate independent expenditures. 2010 Minn. Laws ch. 397 (J.A. 104-10). The legislation was supported by various groups including Common Cause, the League of Women Voters, the Minnesota Business Partnership, and the Minnesota Chamber of Commerce. J.A. 88 ¶ 5. It was passed unanimously by both houses of the Legislature on May 16, 2010 and signed by the Governor on May 27, 2010. 2010 Minn. Laws ch. 397; Journal of the Senate, May 16, 2010, pp. 12357-12364; Journal of the House, May 16, 2010, pp. 13698-13704. The legislation became effective on June 1, 2010. 2010 Minn. Laws ch. 397, § 21.

Pursuant to the legislation, a corporation can use its own money to make independent expenditures,<sup>1</sup> in two different ways: (1) a corporation can make a

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<sup>1</sup> Minn. Stat. § 10A.01, subd. 18 (2010), defines "independent expenditure" as follows:

[A]n expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate.

(footnote continued on next page)

contribution to an independent expenditure committee or fund; or (2) a corporation can make its own independent expenditures. Minn. Stat. § 10A.12, subd. 1a (2010).

If a corporation makes its own independent expenditures, it must register with the Board under the independent expenditure political fund statute. Minn. Stat. § 10A.12, subd. 1a; *see also* Minn. Stat. § 10A.01, subd. 28 (2010).<sup>2</sup> In so doing, the corporation must use an “account” of some kind, which can be an existing bank account of the corporation or simply an internal bookkeeping device, such as a spreadsheet, to facilitate tracking for disclosure purposes of funds used for independent expenditures. J.A. 90-91 (Goldsmith Aff., ¶ 9).<sup>3</sup> Moreover, the

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The phrase “expressly advocating” is defined by the Board to require the use of specific words such as “vote for”, “elect”, “defeat” or similar words in accordance with *Buckley v. Valeo*, 424 U.S. 1, 80 (1976). J.A. 92-93 ¶ 14, 147.

<sup>2</sup> If, however, the major purpose of the corporation is to influence the nomination or election of candidates for office, then registration is required as an independent expenditure political committee. Minn. Stat. § 10A.01, subds. 18a, 27 (2010).

<sup>3</sup> At the hearing in the district court, Plaintiffs contended that corporate money, once designated on the spreadsheet for use in making independent expenditures, cannot thereafter be used for different corporate purposes. Transcript at 21-22. The court rejected this argument, J.A. 240-41; A.A. 19-20, citing, as an example, Minn. Stat. § 10A.01, subd. 26(2) (2010) (allowing political fund to make noncampaign disbursements, including return of contribution to source). J.A. 241; A.A. 20; *see also* Advisory Opinion 271 (recognizing that contributions can be returned to the source) (available at <http://www.cfboard.state.mn.us/ao/AO271.pdf>). Plaintiffs do not raise this claim on appeal. *See, e.g., Halabi v.* (footnote continued on next page)

political fund is not a separate entity from the corporation and the corporation “controls the operations of the political fund.” J.A. 111 (Goldsmith Aff., Ex. B at 1).

Registration must occur within fourteen days after the first expenditure, or the transfer or bookkeeping entry of corporate funds to the account. Minn. Stat. § 10A.14 (2010). The two-page independent expenditure political fund registration form, J.A. 139-40, can be filed with the Board by facsimile, email, personal delivery or U.S. Mail, and entails no filing fee. J.A. 91 ¶ 10. If a corporation wishes to terminate its political fund registration, it can do so by either checking the “termination” box on the last fund report, or by otherwise notifying the Board that its last report will be the final report. Minn. Stat. § 10A.24 (2010); J.A. 101-02 ¶ 31, 115.

The statutory provisions regarding political funds are designed to facilitate disclosure to the public. Minn. Stat. § 10A.20 (2010); J.A. 88, 91-96. During a general election year, five reports are filed with the Board, two of them during time periods close to the primary election and two reports similarly before the general election. Minn. Stat. § 10A.20. The reports disclose independent expenditures by the corporation and contributions from other entities or individuals to the

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*Ashcroft*, 316 F.3d 807, 808 (8th Cir. 2003) (reiterating that an argument not raised in a party’s initial brief is waived).

corporation for the purpose of making independent expenditures. J.A. 94 ¶ 16, 115, 148, 158 (Goldsmith Aff., ¶ 16, Exs. C, G and H). The reports can also be filed with the Board by facsimile, email, personal delivery or U.S. Mail, with no filing fee. J.A. 92 ¶ 13.

To accomplish this reporting, the corporation is required to keep records of the transactions relating to its independent expenditures. Minn. Stat. § 10A.13 (2010). This recordkeeping is no different than what the corporation otherwise engages in to comply with conventional bookkeeping and general accounting standards as well as IRS, corporate and nonprofit organization requirements. *See, e.g.*, 26 C.F.R. § 1.6001-1(a) (requiring taxpayer to “keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information”); J.A. 100-01 ¶ 29, 189-217.

### **SUMMARY OF ARGUMENT**

Plaintiffs’ claims mischaracterize the *Citizens United* decision and erroneously assert that *Citizens United* implicitly overruled certain prior Supreme Court precedent. Numerous court decisions have unanimously rejected these arguments.

Plaintiffs’ first claim attempts to gut the disclosure requirement of Minnesota’s independent expenditure political fund law. However, *Citizens*

*United* could not have been more clear that disclosure is an essential and constitutional part of campaign finance regulation. By an 8-1 vote, the Court held that disclosure and related reporting requirements are constitutional if they satisfy “exacting scrutiny,” *i.e.*, are substantially related to a sufficiently important governmental interest. *Citizens United*, 130 S. Ct. at 914. The Court also reiterated that providing information to the public “about the sources of election-related spending” is a sufficiently important governmental interest to justify disclosure. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). The district court properly concluded that the Minnesota law is substantially related to this informational interest, and is not unduly burdensome in light of that critically important governmental interest.

Plaintiffs do not dispute that the Minnesota independent expenditure political fund law satisfies exacting scrutiny. Instead, they make the convoluted argument that strict scrutiny, and therefore the least restrictive means requirement, applies because the Minnesota law allegedly does not permit corporations to use their own money to make independent expenditures. As the district court thoroughly reasoned, this argument has no basis in law or fact because Minnesota’s independent expenditure political fund legislation clearly permits such expenditures of corporate money. This Court should similarly reject Plaintiffs’ claim.

Plaintiffs also mischaracterize the *Buckley* decision to argue that the Minnesota law can only be applied to corporations with the major purpose of express advocacy, *i.e.*, influencing the nomination or election of a candidate. As the district court and many other courts have concluded, this contention is misplaced for several reasons. One of these reasons is that *Citizens United* makes clear that the constitutionality of a disclosure law is dependent on whether it satisfies the exacting scrutiny standard, without reference to the corporation's major purpose. In any event, Plaintiffs totally misinterpret *Buckley*, which specifically upholds disclosure regarding independent expenditures even if the entity's major purpose is something other than express advocacy.

The district court also correctly rejected Plaintiffs' claim that *Citizens United* implicitly overruled *FEC v. Beaumont*, 539 U.S. 146 (2003), which held that legislation prohibiting corporate contributions to candidates and political parties is constitutional. *Citizens United* clearly distinguished independent expenditures from direct contributions because “[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Citizens United*, 130 S. Ct. at 902 (quoting *Buckley*, 424 U.S. at 47). The eight courts (including the district court in this case) that have considered the issue raised by Plaintiffs have all concluded that *Beaumont* remains binding precedent.

In addition, the district court properly concluded that *Citizens United* did not implicitly overrule the equal protection analysis in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which is dispositive of Plaintiffs' equal protection claim in this case. *Austin* held that there are "crucial differences" between corporations and unions in the use of their general funds for political purposes because a union cannot use a member's fees or dues for such purposes unless the member consents.

Finally, Plaintiffs' claim regarding the Board's application of the definition of "independent expenditure" is specious. The allegedly erroneous Board opinion of June 17, 2008, was superseded by a Board decision on December 3, 2008 (which Plaintiffs concede correctly applies the definition of independent expenditure), and the June 2008 opinion was subsequently withdrawn. Moreover, the Minnesota Supreme Court's binding interpretation regarding independent expenditures under Minnesota law is entirely consistent with the *Buckley* decision. *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 428-30 (Minn. 2005).

As the district court concluded, Plaintiffs are unlikely to succeed on the merits, a threshold condition for obtaining a preliminary injunction. *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 731 (8th Cir. 2008) (en banc). Moreover, the district court correctly reasoned that the

remaining *Dataphase* factors also support the denial of Plaintiffs' motion. The district court's decision should be affirmed.

### ARGUMENT

#### **THE DISTRICT COURT CORRECTLY DENIED PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, AND THE COURT CERTAINLY DID NOT CLEARLY ERR OR ABUSE ITS DISCRETION IN DOING SO.**

The district court has broad discretion in ruling on motions for preliminary injunction. *See, e.g., Manion v. Nagin*, 255 F.3d 535, 538 (8th Cir. 2001). As this Court noted in *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Hum Servs.*, 444 F.3d 991 (8th Cir. 2006), *cert. denied*, 549 U.S. 1205 (2007) the standard for appellate review of such rulings is highly deferential, "only permitting us to reverse the district court if, 'after a thorough review of the record, the proof unmistakably establishes clear error or an abuse of discretion.'" *Id.* at 994 (citation omitted). Moreover, the district court's factual determinations are binding unless clearly erroneous. *See, e.g., Manion*, 255 F.3d at 538; *Sierra Club v. United States Army Corps of Engineers*, 771 F.2d 409, 412 (8th Cir. 1985).

When deciding a motion for interim injunctive relief, a court considers: (1) the moving party's probability of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) the public interest in the issuance of the injunction. *Dataphase Sys., Inc. v. CL Sys.*,

*Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). However, in a case such as this, Plaintiffs bear the heavy burden of establishing as a threshold matter that they are likely to succeed on the merits. As this Court stated in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc):

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

*Id.* at 732 (emphasis added; citation omitted). The district court correctly denied Plaintiffs’ motion for preliminary injunction.<sup>4</sup>

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<sup>4</sup> Plaintiffs mistakenly suggest that because this is a First Amendment case, the burden is on the State to show a likelihood of success on the merits. See Appellants’ Br. at 16-17. *Planned Parenthood* itself concerned a First Amendment challenge to a statute. 530 F.3d at 727, 730-37 (requiring plaintiffs moving for preliminary injunction of state statute to meet threshold burden of showing likelihood of success on their claim that challenged statute violates First Amendment); *see also Phelps-Roper v. Nixon*, 545 F.3d 685, 688-94 (8th Cir. 2008) (applying *Planned Parenthood* standard to First Amendment challenge to state statute), *cert. denied*, 129 S. Ct. 2865 (2009). Unlike the instant matter, the cases on which Plaintiffs rely, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660, 663-69 (2004), and *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999), concerned laws to which strict scrutiny applied. Under *Planned Parenthood*, Plaintiffs bear the threshold burden of showing they are likely to succeed on their claims that strict scrutiny applies to the challenged Minnesota laws.

**A. The District Court Properly Determined That Plaintiffs Are Not Likely To Prevail On The Merits.**

For all of the reasons discussed in the district court's thorough and well-reasoned opinion, Plaintiffs' inability to show a likelihood of success on the merits mandates affirmance of the district court's order denying their motion for preliminary injunction.

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

As the district court concluded, J.A. 237-42; A.A. 16-21, Minnesota law expressly permits corporate independent expenditures in accordance with *Citizens United*. Minnesota law clearly allows Plaintiffs to make independent expenditures either by (1) contributing to an independent expenditure political committee or fund, or (2) by establishing an "account" for that purpose, which can merely be a spreadsheet to track the information for disclosure purposes, and registering with the Board under the political fund law. *See* Minn. Stat. § 10A.12, subd. 1a; J.A. 239; A.A. 18. Plaintiffs' convoluted analysis to the contrary is simply erroneous, and as the district court recognized, J.A. 242; A.A. 21, their reference to "conduit" funds has nothing to do with the use of corporate funds for independent expenditure purposes.<sup>5</sup>

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<sup>5</sup> The district court explained, J.A. 242; A.A. 21, that a conduit fund involves a solicitation by a corporation of its employees to make political contributions to the (footnote continued on next page)

The district court also specifically rejected Plaintiffs' argument that Minnesota law "effectively ban[s]" corporate independent expenditures because the law allegedly imposes a "segregated fund" requirement. J.A. 237-38; A.A. 16-17. In so doing, the court reasoned in part:

The Court concludes that Plaintiffs are unlikely to succeed in showing that the independent expenditure funds provided for under Minnesota law constitute separate, segregated "PAC-style" accounts. Indeed, the federal PACs discussed in *Citizens United* are significantly different from the political independent expenditure funds at issue here. In *Citizens United*, the Supreme Court focused on the fact that PACs are separate from the corporations. *See Citizens United*, 130 S. Ct. at 897. Moreover, under the PAC law examined in *Citizens United*, a corporation is prohibited from making general treasury fund contributions to PACs for PAC expenditures. *Id.* at 881-82 (citing 2 U.S.C. § 441b(b)(2)). A federal PAC created by a corporation cannot use general corporate funds to fund PAC expenditures; rather, federal PACs can only receive a limited amount of contributions from individuals (such as employees of a corporation) and can only make limited contributions to certain candidates. *Id.* The same is not true of the funds allowed under Minnesota law.

Here, Defendants have submitted sufficient support to establish that independent expenditure funds under Minnesota law need not be separate from the corporation. For example, Defendants have submitted evidence that, unlike a PAC, a political fund created by a corporation remains under the control of the corporation. (Goldsmith Aff. ¶ 9, Ex. B at 1.) Significantly, the fund can consist of a corporate account created for the purpose of the corporation making independent expenditures or a simple bookkeeping device, such as a spreadsheet. *Id.* In addition, Minnesota law allows corporations to

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conduit fund, Minn. Stat. § 211B.15, subd. 16 (2010), and the employee, not the corporation, "direct[s] the contribution to candidates of the employee's choice." *Id.*; J.A. 102 ¶ 32.

make general treasury fund contributions to independent expenditure funds and does not limit from whom funds are solicited, the amount a corporation can contribute to independent expenditure funds, or the amount that may be spent on independent expenditure funds.

J.A. 238-39; A.A. 17-18.<sup>6</sup>

Accordingly, based on the law and the facts, the district court correctly determined that the political fund statute does not ban corporate independent

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<sup>6</sup> The district court also noted other material differences between a federal PAC and Minnesota's independent expenditure political fund law:

In addition, while a PAC cannot operate until it is established under federal law, *Citizens United*, 130 S. Ct. at 899, an independent expenditure fund under Minnesota law can register with the Board *after* the corporation makes an expenditure. Minn. Stat. § 10A.14. Finally, the reporting requirements for PACs are significantly more extensive than those for political independent expenditure funds under Minnesota law.

J.A. 239-40; A.A. 18-19 (emphasis in original). As for the significantly different reporting requirements, the court explained as follows:

For example, under federal law governing PACs, a PAC must file semi-annual reports in non-election years and, in an election year, a PAC must file quarterly reports, a year-end report, a pre-primary report, a pre-general election report, and post-general election report if there are contributions or expenditures prior to those elections. 2 U.S.C. § 434(a)(4); 11 C.F.R. §§ 104.5(c)(1), (c)(2). A PAC must also file reports of any independent expenditures within 48 hours after \$10,000 of expenditures made from January 1 to twenty days before the election and within 24 hours after \$1,000 of expenditures during the last twenty days before an election. 2 U.S.C. §§ 434(g); 11 C.F.R. §§ 104.4(b)(2), (c). In addition, PACs must itemize receipts and disbursements in its reports. (Goldsmith Aff., ¶ 24, Ex. I.) In contrast, Minnesota law requires a general summary for far fewer categories. (*Id.* ¶ 24, Ex. C.)

J.A. 240 n.11; A.A. 19 n.11.

expenditures. J.A. 237-40; A.A. 16-19. The district court’s factual determination is soundly based in the record, *see, e.g.*, J.A. 90-91, 111 (Goldsmith Aff., ¶ 9, Ex. B at 1), and is therefore binding on this Court. *See Sierra Club*, 771 F.2d at 412.<sup>7</sup> The court also properly concluded, consistent with *Citizens United*, that the political fund law is constitutional.

**a. The Minnesota independent expenditure political fund provisions are constitutional.**

In *Citizens United*, the Supreme Court held in a 5-4 decision that corporations have a First Amendment right to make independent expenditures to expressly advocate for or against the nomination or election of a candidate for office. However, the Court also held that disclaimer and disclosure requirements, including reporting requirements which facilitate disclosure, are constitutional with respect to those independent expenditures. 130 S. Ct. at 914-16; *see also id.* at 943 (Stevens, J., dissenting in part and joined by three other justices) (recognizing that

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<sup>7</sup> The Board’s interpretation of Minnesota’s independent expenditure political fund law is also entitled to substantial deference. *See Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988) (stating that “an agency’s interpretation of the statutes it administers . . . should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature”); *Gershman v. American Cas. Co.*, 251 F.3d 1159, 1162 (8th Cir. 2001) (recognizing that in interpreting a state’s statute, federal courts are “bound by” the state’s rules of statutory construction). In addition, to the extent Plaintiffs proffer a construction of Minnesota law that raises a constitutional issue, it is presumed that the Minnesota Legislature did not intend an unconstitutional construction. *See* Minn. Stat. § 645.17(3) (2010).

majority opinion upheld “disclaimer, disclosure and reporting requirements”); *id.* at 980 (Thomas, J., dissenting in part) (stating that majority opinion “does not go far enough” because majority opinion does not hold that “disclosure, disclaimer and reporting requirements” are unconstitutional). Therefore, by a vote of 8-1, the Supreme Court upheld the disclosure, disclaimer and reporting requirements challenged in *Citizens United*.

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

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

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

*Id.* at 916 (citation omitted; emphasis added); *see also Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”). The Court also concluded that disclosure is a valid requirement “[e]ven if the ads [involved in *Citizens United*] only pertain to a commercial transaction” because of the public’s interest in being informed of who is speaking about a candidate prior to the election. 130 S. Ct. at 915-16.

The Court held that disclosure provisions are constitutional as long as there is a “‘substantial relationship’ between the disclosure requirement and a ‘sufficiently important governmental interest.’” *Id.* at 914 (citations omitted); *see also Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) (reiterating the “exacting scrutiny” constitutional standard for disclosure provisions and quoting *Citizens United*). The Court then noted that disclosure “could be justified based on a governmental interest in ‘provid[ing] the electorate with information’ about the sources of election-related spending,” *Citizens United*, 130 S. Ct. at 914 (citation omitted), which “would help citizens ‘make informed choices in the political marketplace.’” *Id.* (citations omitted).

In *SpeechNow.org v. FEC*, 599 F.3d 686, 696-98 (D.C. Cir. 2010) (en banc), *cert. denied sub nom Keating v. FEC*, 131 S. Ct. 553 (2010), the court, based on

*Citizens United*, upheld the disclosure and related organizational and reporting requirements of PACs under federal law. In so doing, the court noted that “[t]he Supreme Court has consistently upheld organizational and reporting requirements against facial challenges” to provide “‘the electorate with information’ about the sources of political campaign funds.” *Id.* at 696 (citation omitted); *see also Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010) (upholding disclosure and related reporting requirements based on *Citizens United* and stating that “[p]roviding information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment”).

**i. The political fund provisions of Minnesota law are substantially related to sufficiently important governmental interests.**

In a detailed analysis of the Minnesota independent expenditure political fund law, the district court correctly concluded, in accordance with *Citizens United*, that Plaintiffs are unlikely to succeed in showing that the law “lack[s] a substantial relationship with the government’s important interests.” J.A. 245;

A.A. 24. The court reasoned, in part:

There can be little doubt that the reporting requirements assist the electorate to make informed decisions in the political marketplace, help shareholders determine whether corporate political speech advances the corporation’s interests, and allow citizens to determine whether elected officials are “in the pocket” of outside interests.

J.A. 245-46; A.A. 24-25 (citing *Citizens United*, 130 S. Ct. at 914, 916).

Indeed, the reporting requirements are at the heart of the governmental interest of “help[ing] citizens ‘make informed choices in the political marketplace.’” *Citizens United*, 130 S. Ct. at 914 (upholding federal electioneering communications disclosure and related reporting requirements) (citation omitted); *see also Brumsickle*, 624 F.3d at 1005 (upholding disclosure and related reporting requirements as serving “vital” governmental interests); *SpeechNow.org*, 599 F.3d at 698 (upholding federal PAC reporting requirements and stating “the public has an interest in knowing who is speaking about a candidate and who is funding that speech”); *North Carolina Right To Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 440 (4th Cir. 2008) (upholding requirement that “eight reports be filed within two-and-a-half month period preceding the election,” and stating that reporting requirement has a “substantial relationship to an important state interest”), *cert. denied*, 129 S. Ct. 490 (2008); *Alaska Right To Life Comm. v. Miles*, 441 F.3d 773, 791 (9th Cir. 2006) (upholding registration and recurrent reporting requirements as being “justified by compelling state interests”), *cert. denied*, 549 U.S. 886 (2006); *National Right to Life Political Comm. v. Connor*, 323 F.3d 684, 695 (8th Cir. 2003) (upholding treasurer requirement and stating that it “further[s] Missouri’s compelling interest in ‘preserving the integrity of the electoral process’ by ensuring ‘that each committee provides an individual

who is accountable for compliance with the provisions of the disclosure law”)) (citation omitted); *Iowa Right to Life Comm., Inc. v. Smithson*, No. 4:10-cv-00416, 2010 WL 4277715, at \*16 (S.D. Iowa Oct. 20, 2010) (upholding “periodic reporting requirement [as] substantially related to . . . important informational interest”); *National Org. for Marriage v. McKee*, No. 09-538, 2010 WL 3270092, at \*9 (D. Me. Aug. 19, 2010) (upholding periodic reporting and related registration and recordkeeping requirements as substantially related to the government interest of “provid[ing] information to the public about the source of monies being spent in an election”).

Although the “informational interest alone is sufficient to justify” the political fund provisions, *see Citizens United*, 130 S. Ct. at 915-16, they are also supported by the government interests of “avoiding any appearance [of corruption], and gathering the data necessary to enforce more substantive electioneering restrictions.” *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (citing *Buckley*, 424 U.S. at 67-68). Both *McConnell* and *Buckley* recognized that these governmental interests are also sufficiently important to justify campaign finance disclosure laws. *McConnell*, 540 U.S. at 196-97; *Buckley*, 424 U.S. at 66-67; *see also Yamada v. Kuramoto*, No. 10-00497, 2010 WL 4603936, at \*12 (D. Haw. Oct. 29, 2010) (recognizing “other sufficiently important interests” served by disclosure and quoting *Buckley*).

While *Citizens United* concluded that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” 130 S. Ct. at 909, some members of the public may nonetheless have a different perception. *Cf. id.* at 960-70 (Stevens, J., dissenting in part and joined by three other justices). Transparency through disclosure mitigates against such perceptions, no matter how unfounded they might be, and engenders confidence in our system of campaign finance and our elections. *Id.* at 916 (disclosure allows the public to determine “whether elected officials are ‘in the pocket’ of so-called money interests”) (citation omitted).

In addition, the political fund “recordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations” of Minnesota’s campaign finance law. *Buckley*, 424 U.S. at 68; *see also Miles*, 441 F.3d at 792 (upholding reporting requirements based in part on government data gathering interest as set forth in *Buckley* and *McConnell*); *Leake*, 524 F.3d at 440 (same); *SpeechNow.org*, 599 F.3d at 698 (upholding organizational and reporting requirements of federal PAC law, in part because “requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals”); J.A. 94 (Goldsmith Aff., ¶ 17).

**ii. Strict scrutiny does not apply.**

Plaintiffs do not dispute that the independent expenditure political fund law satisfies the exacting scrutiny standard. Rather, they erroneously argue that strict scrutiny should apply. The district court properly rejected this contention, again concluding that Minnesota law does not ban corporate independent expenditures. J.A. 243; A.A. 22; see also *supra* pp. 15-17. Other courts have likewise rejected such arguments that strict scrutiny applies to laws requiring disclosure of corporate independent expenditures. *See, e.g., Brumsickle*, 624 F.3d at 1012-14; *Smithson*, 2010 WL 4277715, at \*13; *McKee*, 2010 WL 3270092, at \*9 & n.126; *Yamada*, 2010 WL 4603936, at \*10-11.

Similarly without merit is Plaintiffs' related assertion that so-called "one-time" reporting, which on appeal they refer to as "event-driven" reporting, is all that can be required because it is the "least restrictive means" to provide for disclosure. Pls.' Prelim. Inj. Mem. (Docket #10) at 15-16; Appellants' Br. at 31-32. Since strict scrutiny does not apply here, neither does the "least restrictive means" requirement. *See, e.g., Citizens United*, 130 S. Ct. at 914 (applying "substantial relationship to a sufficiently important governmental interest" test – exacting scrutiny – to disclosure requirements and stating that "disclosure [itself] is a less restrictive alternative to more comprehensive regulations of speech"); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring)

(stating that “least restrictive means” standard is applicable to strict scrutiny review); *Leake*, 524 F.3d at 439 (rejecting argument that state’s disclosure requirements must satisfy least restrictive means standard); *Smithson*, 2010 WL 4277715, at \*13-14 (same).

Moreover, contrary to Plaintiffs’ suggestion, federal law regulating non-PAC independent expenditures is not limited to “one-time” reporting. The applicable legislation, 2 U.S.C. § 434(c), provides for periodic reporting. *See* 2 U.S.C. § 434(c)(1)-(2) and 11 C.F.R. § 109.10(b) (report must be filed in any regular quarterly period once the \$250 threshold is met and in any subsequent quarterly reporting period in which independent expenditures are made in any amount). The information required to be reported under federal law for non-PAC independent expenditures is similar to that required under the Minnesota independent expenditure political fund law. *Compare* 11 C.F.R. § 109.10(e)(1)(i)-(vi) (reports must identify amount, date, purpose, recipient of expenditure and whether in support of or in opposition to specified candidate, and identification of each person who made a contribution of over \$200 to further independent expenditure) *with* J.A. 148, 158 (Goldsmith Aff., Exs. G and H).

For all of the above reasons, the district court properly determined that Plaintiffs are unlikely to succeed in showing that Minnesota’s independent

expenditure political fund law is not substantially related to sufficiently important governmental interests.

**iii. The political fund provisions are not burdensome, or at least are not unduly burdensome in light of the critically important governmental interests underlying the law.**

As noted above, *Citizens United* made clear, consistent with prior Supreme Court precedent, that “[d]isclaimer and disclosure requirements *may burden* the ability to speak, but they ‘impose no ceiling on campaign related activities’ and do not prevent anyone from speaking.” 130 S. Ct. at 914 (emphasis added) (citations omitted). In *Buckley*, the Court similarly reasoned:

[C]ompelled disclosure has the potential for *substantially infringing* the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to *outweigh the possibility of infringement*, particularly when the “free functioning of our national institutions” is involved.

The *governmental interests* sought to be vindicated by the disclosure requirements *are of this magnitude*.

424 U.S. at 66 (citation omitted; emphasis added).

The political fund provisions are therefore constitutional even if they impose burdens because the provisions are substantially related to sufficiently important governmental interests. *See Citizens United*, 130 S. Ct. at 914-15 (upholding disclaimer and disclosure requirements as substantially related to important governmental interest without reference to potential burden of provisions). In any

event, the political fund provisions are not burdensome,<sup>8</sup> or at least are not unduly burdensome, in light of the important interests served by these provisions.

As the district court explained, Plaintiffs are unlikely to show that the law is “unconstitutionally burdensome,” J.A. 246; A.A. 25, and the court concluded that Plaintiffs “have not demonstrated that the [political fund] requirements are burdensome in light of the important governmental interests the statutes were enacted to preserve.” J.A. 246-47; A.A. 25-26. *See also, e.g., Brumsickle*, 624 F.3d at 1013 (stating that disclosure and related periodic reporting requirements

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<sup>8</sup> Plaintiffs make conclusory allegations that the political fund provisions are burdensome. *See, e.g.,* Pls.’ Prelim. Inj. Mem. (Docket #10) at 5, 8, 10, 14. They also refer to the discussion in *Citizens United* regarding federal PACs, which are significantly different from the political fund provisions under Minnesota law. J.A. 238-40 & n.11; A.A. 17-19 & n.11; *see also supra* pp. 15-16 & n.6. In any event, as the district court noted, the discussion in *Citizens United* focused on the outright prohibition on corporate independent expenditures under 2 U.S.C. § 441b. 130 S. Ct. at 897. The Federal Election Commission suggested in *Citizens United* that an exception to the ban that allowed a corporation to form a PAC to accept contributions from its employees for political purposes, *see* 2 U.S.C. § 441b(b)(2), permitted a corporation to make independent expenditures. 130 S. Ct. at 897. The Court rightly observed that this exception did not allow the corporation itself to speak because it could not use its own corporate funds to make independent expenditures. *See id.* The Court also stated that “the option to form PACs does not alleviate the First Amendment problems with § 441b [the corporate expenditure ban],” referring to the PAC requirements under federal law. *Id.* The Court then concluded that the ban on corporate expenditures (not the PAC requirements themselves) constituted “a ban on speech.” *Id.* at 898. The Court did not strike down the PAC requirements of federal law. In fact, *SpeechNow.org* recently upheld the federal PAC requirements, citing to *Citizens United*. 599 F.3d at 696-99.

“are not unduly onerous”); *Leake*, 524 F.3d at 440 (stating compliance with recurrent reporting schedule of eight reports in 2-1/2 month period prior to election “is not particularly burdensome”); *Miles*, 441 F.3d at 791 (stating registration is “not significantly burdensome” and reporting requirements “are not particularly onerous”); *McKee*, 2010 WL 3270092, at \*10 (stating that registration, periodic reporting, and recordkeeping requirements are “not unconstitutionally burdensome”); J.A. 94-96, 100-01 (Goldsmith Aff., ¶¶ 16-18, 21, 29-30).<sup>9</sup>

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<sup>9</sup> Minnesota’s political fund requirements are no more burdensome, and in some respects are less burdensome, than the disclosure and related provisions for electioneering communications upheld in *Citizens United*. 130 S. Ct. at 915-16; see also J.A. 99 (Goldsmith Aff., ¶ 26). Electioneering communications are not independent expenditures for express advocacy, *Citizens United*, 130 S. Ct. at 915; 2 U.S.C. §§ 431(17) and 434(f)(3)(B)(ii), and thus are not even regulated by Minnesota’s political fund law. Minn. Stat. §§ 10A.01, subd. 18 and 10A.12, subd. 1a; *infra* p. 32 n.11, pp. 44-45; J.A. 147. In any event, Section 201 of the Bipartisan Campaign Reform Act requires continuous and short deadline (24-hour) reporting of electioneering communications aggregating at least \$10,000. 2 U.S.C. § 434(f)(1); 11 C.F.R. § 104.20(b). The reporting obligation is effective as of January 1 of an election year and applies to any electioneering communications within 30 days of a political caucus or convention, or a primary election, or within 60 days of a general election. 2 U.S.C. § 434(f)(3)(A)(i)(II); 11 C.F.R. § 100.29(a)(2). Moreover, the federal electioneering communications reports must identify the person making the disbursement, any person sharing or exercising direction or control over that person (*i.e.*, the officers, directors, executive directors, partners or owners of the entity making the disbursement), and a custodian of records, and the report must be supported by specific recordkeeping requirements. 2 U.S.C. § 434(f)(2)(A); 11 C.F.R. §§ 104.14(b)(1), 104.20(a)(3), (c), (d). The reports also must include identification of donors and disbursements similar to Minnesota law. See 2 U.S.C. § 434(f)(2)(B)-(F); J.A. 115, 185. The Minnesota independent expenditure political fund law is also no more burdensome (footnote continued on next page)

The district court also noted that “the recordkeeping requirements [of the political fund law] are not unlike other corporate requirements regarding financial records and statements.” J.A. 246; A.A. 25. *See, e.g.*, 26 C.F.R. § 1.6001-1(a) (requiring taxpayers, including corporations, to maintain sufficient records to support tax return); Minn. Stat. §§ 302A.461, subd. 3 and 302A.463 (2010) (corporation required to keep financial records and prepare financial statements including balance sheet and statement of income); Minn. Stat. § 309.54, subd. 3 (2010) (nonprofit corporations required to maintain “the original books and records, or true copies thereof, pertaining to all money or other property collected from residents of this state and to the disbursement of such money or property”); 11 C.F.R. § 104.14(b)(1) (requiring maintenance of records for compliance under federal election law, including “vouchers, worksheets, receipts, bills and accounts, which shall provide in sufficient detail the necessary information and data from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness”). *See also* J.A. 100-01 ¶¶ 29, 189-217.

Based on the foregoing, the district court correctly decided that Plaintiffs are unlikely to show that the independent expenditure political fund law is unconstitutionally burdensome.

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than the federal law regulating non-PAC independent expenditures. *See* 2 U.S.C. § 434(c); 11 C.F.R. § 109.10(b). *See also supra* p. 25.

**b. The independent expenditure political fund provisions can apply to corporate independent expenditures even though the corporation's major purpose is not the nomination or election of a candidate.**

The district court correctly rejected Plaintiffs' so-called "major purpose" argument, J.A. 247 n.14; A.A. 26 n.14, which is misplaced for several reasons. First, Plaintiffs erroneously equate federal PAC requirements with the provisions of Minnesota's independent expenditure political fund law. Federal PAC requirements are materially different from the political fund law. J.A. 238-40 & n.11; A.A. 17-19 & n.11; *supra* pp. 15-16 & n.6.

Second, consistent with *Citizens United* and other Supreme Court precedent, the constitutionality of the political fund provisions is based on whether they are substantially related to a sufficiently important governmental interest, which they clearly are. J.A. 247 n.14; A.A. 26, n.14; see also J.A. 242-47; A.A. 21-26; *supra* pp. 20-24.

Third, *Buckley's* discussion of major purpose simply placed a narrowing construction on the application of the federal PAC provisions because the language of federal law had the "potential for encompassing both issue discussion and advocacy of a political result." *Buckley*, 424 U.S. at 79. The Court held that it is permissible to regulate any "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. In fact,

the Court concluded that the federal PAC law as construed in *Buckley* applied to all independent expenditures of any entity regardless of the entity's major purpose.

*Id.*<sup>10</sup>

Fourth, Plaintiffs' major purpose assertion was recently rejected by the Ninth Circuit in *Brumsickle*, 624 F.3d at 1008-12, and several other courts. *Brumsickle* stated that “[n]othing in *Buckley* suggests . . . that disclosure requirements are constitutional only when . . . applied” to an organization whose major purpose is political advocacy, and reiterated that the constitutionality of disclosure requirements depends on whether they “are substantially related to the government’s important informational interest.” *Id.* at 1009-10 (citing *Citizens*

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<sup>10</sup>*Buckley* specifically upheld reporting requirements for non-major purpose entities when they engage in expenditure activities for express advocacy. 424 U.S. at 80. The provision at issue, 2 U.S.C. § 434(e) (1971), required pre-election, post-election and quarterly reporting, similar to what currently is required under federal law for persons “other than political committees” making independent expenditures. *See* 2 U.S.C. § 434(c) (requiring regular, periodic reports regarding contributions and disbursements); *see also* 424 U.S. at 155-60. The Court found that these disclosure requirements served an important state interest precisely because this unambiguously campaign-related speech “would not otherwise be reported because it takes the form of independent expenditures or of contributions to an individual or group not itself required to report the names of its contributors.” 424 U.S. at 81. *Buckley* concluded that “[t]he burden imposed by § 434(e) is no prior restraint, but a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.” 424 U.S. at 82 (footnote omitted). Consistent with *Buckley*, Minnesota’s independent expenditure political fund disclosure requirements apply only to activity involving independent expenditures, and do not apply to issue advocacy. Minn. Stat. §§ 10A.01, subd. 18 and 10A.12, subd. 1a.

*United*); see also *Smithson*, 2010 WL 4277715, at \*14 (rejecting same major purpose argument made by Plaintiffs in this case); *McKee*, 2010 WL 3270092, at \*10 (same); *Yamada*, 2010 WL 4603936, at \*8-10, 15 (same); *National Org. for Marriage, Inc. v. Roberts*, No. 1:10cv192, 2010 WL 4678610, at \*5 (N.D. Fla. Nov. 8, 2010) (same).

Fifth, in the cases cited by Plaintiffs (Appellants' Br. at 33; Pls.' Ltr. re Suppl. Auth., Docket #56), the major purpose analysis was simply used to ensure that the subject state laws<sup>11</sup> did not apply to an excessive amount of issue advocacy. See *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 288-89 (4th Cir. 2008) (stating that North Carolina law would otherwise "threaten[] the regulation of too much ordinary political speech"); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (rejecting regulation of

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<sup>11</sup> Unlike the laws involved in those cases, Minnesota's regulation of political committees and political funds is consistent with *Buckley*. See *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 428-30 (Minn. 2005) (construing Minnesota's definitions of "political committee" and "political fund"); see also *Minnesota Citizens Concerned for Life, Inc., v. Kelley*, 427 F.3d 1106, 1110 (8th Cir. 2005) (following this binding construction of Missouri law). An association whose major purpose is the nomination or election of a candidate is a political committee, subjecting all of the entity's expenditures to regulation, whereas all other entities are subject to the political fund disclosure provisions which are limited to express advocacy expenditures. *Kelley*, 698 N.W.2d at 428-30; see also *infra* pp. 44-45.

organizations which engaged only in issue advocacy);<sup>12</sup> *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1141, 1152-54, 1156 (10th Cir. 2007) (same); *South Carolina Citizens for Life, Inc. v. Krawcheck*, No. 4:06-cv-2773, 2010 WL 3582377, at \*5 (D. S.C. Sept. 13, 2010) (stating that *Buckley* applied “major purpose” test “[t]o prevent the [federal PAC] regulations from reaching groups engaged primarily in issue advocacy”). Minnesota’s independent expenditure political fund law only applies to independent expenditures, which are express advocacy, and therefore there is no risk that the law will regulate any other speech, including issue advocacy. See *supra* p. 31 n.10.

Finally, Plaintiffs’ argument leads to absurd results. As stated by the court in *McKee*:

[Plaintiff’s] desire to limit campaign finance disclosures to “major purpose” groups would yield perverse results, totally at odds with the interest in “transparency” recognized in *Citizens United*. Under [Plaintiff’s] interpretation, a small group with the major purpose of re-electing a Maine state representative that spends \$1,500 for ads could be required to register as a PAC. But a megagroup that spends \$1,500,000 to defeat the same candidate would not have to register because the defeat of that candidate could not be considered the corporation’s major purpose.

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<sup>12</sup> The district court decision upheld in *New Mexico Youth* reasoned as follows: “[T]he ads [involved in the case] identify an issue, give the recipients information related to that issue, and urge them to contact their legislator with respect to that issue. This is precisely the type of political expression that is constitutionally protected as addressed by *Buckley* and its progeny.” *New Mexico Youth Organized v. Herrera*, No. CIV 08-1156, 2009 U.S. Dist. LEXIS 125104, at \*41 (D. N.M. Aug. 3, 2009).

*McKee*, 2010 WL 3270092, at \*10 (footnote omitted).

Plaintiffs’ “major purpose” argument simply has no merit and the district court correctly determined that Plaintiffs are unlikely to succeed on their challenge to the constitutionality of the independent expenditure political fund law.

**2. Minnesota law prohibiting corporations from making contributions to candidates and political parties is constitutional.**

The district court also properly rejected Plaintiffs’ challenge to the prohibition in Minnesota law precluding corporations from making contributions to candidates and political parties. As the court observed, J.A. 251-52; A.A. 30-31, *Citizens United* very carefully distinguished independent expenditures from direct contributions to candidates. *Citizens United* stated:

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

130 S. Ct. at 901-02 (citations omitted).

The district court also cited to other courts that have similarly analyzed *Citizens United*. See *Siefert v. Alexander*, 608 F.3d 974, 988 (7th Cir. 2010) (“We note that *Citizens United*, rather than overruling *Buckley*, noted and reinforced the

distinction between independent expenditures on behalf of candidates and direct contributions to candidates.”); *SpeechNow.org*, 599 F.3d at 695 (“Limits on direct contributions to candidates, ‘unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.”) (quoting *Citizens United*). J.A. 252; A.A. 31.

**a. The Supreme Court decision in *FEC v. Beaumont* is dispositive, and establishes that legislation prohibiting corporate contributions to candidates and political parties is constitutional.**

Furthermore, the district court correctly relied on the binding precedent of *FEC v. Beaumont*, 539 U.S. 146, 149-63 (2003) in which the Supreme Court rejected a constitutional challenge to the federal law prohibiting corporate contributions to candidates and political parties. *Beaumont* upheld the prohibition under the “closely drawn” standard applicable to contribution restrictions, rejecting the argument that strict scrutiny applies, *id.* at 161-62, and emphasized that the prohibition serves the important governmental interest of “prevent[ing] corruption or the appearance of corruption.” *Id.* at 154 (citation omitted).

As the district court recognized, *Citizens United* did not overrule *Beaumont*. J.A. 252-53; A.A. 31-32.<sup>13</sup> The court noted that similar conclusions regarding the continuing validity of the *Beaumont* precedent were reached by the recent

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<sup>13</sup> At the hearing in the district court, Plaintiffs acknowledged that *Beaumont* is still “controlling” law. Transcript at 39.

decisions in *Green Party of Connecticut v. Garfield*, 616 F.3d 189, 198-200 (2d Cir. 2010) (recognizing that *Citizens United* did not overrule *Beaumont*'s use of closely drawn standard or its acceptance of governmental interest in preventing actuality or appearance of corruption), and *Thalheimer v. City of San Diego*, 706 F. Supp.2d 1065, 1083-1085 (S.D. Cal. 2010) (same). J.A. 253; A.A. 32. All other judicial decisions which have addressed the issue also recognized that *Beaumont* is still binding precedent. See *Smithson*, 2010 WL 4277715, at \*19-21 (following *Beaumont* to uphold Iowa's ban on direct corporate contributions as serving governmental interest "in preventing corruption or the appearance of corruption"); *Preston v. Leake*, No. 5:08-CV-397, 2010 WL 4153295, at \*5-6 (E.D. N.C. Oct. 19, 2010) (recognizing that "*Citizens United* does not call into question" use of closely drawn standard, rather than strict scrutiny, for ban on contributions); *Foster v. Dilger*, No. 3:10-41, 2010 WL 3620238, at \*3-4 nn. 1-2 (E.D. Ky. Sept. 9, 2010) (stating that *Citizens United* did not disturb closely drawn standard and clearly "did not intend to invalidate preventing the appearance of corruption as a sufficient justification for contribution limits"); *Lavin v. Brunner*, No. 1:10-CV-1986, 2010 WL 4340981, at \*2-3 (N.D. Ohio Oct. 27, 2010) (applying closely drawn standard in upholding ban on contributions from Medicaid providers to candidates for certain offices); *Republican Nat'l Comm. v. FEC*, 698 F. Supp.2d 150, 156 (D. D.C. 2010) (recognizing that *Citizens United* "left intact" use of

closely drawn standard, rather than strict scrutiny, for restrictions on contributions to candidates and parties), *aff'd*, 130 S. Ct. 3544 (2010).

As further noted by the district court, J.A. 253; A.A. 32, Plaintiffs are simply wrong to suggest that *Citizens United* somehow implicitly overruled *Beaumont*. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reiterating that lower courts should not “conclude our more recent cases have, by implication, overruled an earlier precedent”); see also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

Plaintiffs also incorrectly contend that *Beaumont* upheld the ban on corporate contributions only because federal law provides corporations the “PAC option” of directing contributions of money solicited from employees. See *Smithson*, 2010 WL 4277715, at \*21 n.20 (rejecting same contention). The Supreme Court made clear that it upheld the ban based on the fundamental distinction between contributions and independent expenditures and in particular “the historical role of contributions in the corruption of the electoral process.” *Beaumont*, 539 U.S. at 159 (citation omitted); *id.* (concluding that “we could not hold [the ban unconstitutional] without recasting our understanding of the risks of

harm posed by corporate political contributions, of the expressive significance of contributions, and of the consequent deference owed to legislative judgments on what to do about them”).

Even if the result in *Beaumont* depended on corporations being able to direct contributions of money solicited from employees, such an alternative exists in Minnesota as well. Under Minnesota law, a corporation can establish a political fund to solicit contributions from employees which the corporation can direct to candidates, as long as corporate funds are not used to pay for the fund’s administrative costs. *See* Minn. Stat. § 10A.01, subs. 6, 28 (2010) (providing that definition of “political fund” includes a corporation’s accumulation of voluntary political contributions from its employees to be directed by the corporation to candidates or political parties); Minn. Stat. § 211B. 15, subd. 2 (2010) (setting forth prohibition that prevents corporation from paying for the administrative expenses of such a political fund); *see also* Docket #55, State Defs.’ Response to Pls.’ Ltr. re Suppl. Auth. (explaining this option and noting its wide and longstanding use by corporations in Minnesota).<sup>14</sup>

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<sup>14</sup> Such a corporate political fund for which the corporation does not provide any financial support was not at issue in either *Minnesota Ass’n of Commerce & Indus. v. Foley*, 316 N.W.2d 524 (Minn. 1982), nor the lapsed Advisory Opinion No. 6 (1974), which Plaintiffs cite for their mistaken view that this option does not exist in Minnesota. *See also* Minn. Stat. § 10A.02, subd. 12 (1978) (providing that advisory opinions issued in 1974 lapsed in 1976).

Notwithstanding the *Beaumont* decision, Plaintiffs argue on appeal (Appellants' Br. at 47-49), but did not raise the issue in their complaint or otherwise before the district court, that the prohibition of corporate contributions to candidates and political parties is subject to strict scrutiny as a content-based law. The argument should not be considered by the Court. *See, e.g., Enowmbitang v. Seagate Tech., Inc.*, 148 F.3d 970, 974 (8th Cir. 1998) (declining to consider an argument not raised in the complaint and not addressed by the district court).

In any event, whether or not the prohibition is properly viewed as content-based,<sup>15</sup> *Beaumont* reiterated that the prohibition on corporate contributions to candidates and political parties is not subject to strict scrutiny. Rather, the Court held that the less demanding "closely drawn" standard of *Buckley* applies, and that the prohibition plainly satisfies this standard. 539 U.S. at 155-63. As already noted, *supra* pp. 35-37, courts have uniformly recognized that *Beaumont's* rejection of strict scrutiny is binding law. *See, e.g., Garfield*, 616 F.3d at 198-99 (recognizing that *Beaumont's* application of closely drawn standard to ban on

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<sup>15</sup> Restrictions on campaign contributions are not properly viewed as content-based. *See, e.g., Buckley*, 424 U.S. at 20-21 (stating that limitation on campaign contributions "entails only a marginal restriction upon the contributor's ability to engage in free communication" and "the transformation of contributions into political debate involves speech by someone other than the contributor"); *id.* at 259 (White, J., concurring in part and dissenting in part) (stating that contribution limitations are content-neutral); *see also Smithson*, 2010 WL 4277715, at \*20 (explaining that prohibition on direct contributions is not content-based).

campaign contributions remains controlling precedent after *Citizens United*); *Smithson*, 2010 WL 4277715, at \*19-22 (recognizing same in rejecting challenge to Iowa’s prohibition on corporate campaign contributions); *Preston*, 2010 WL 4153295, at \*6 (noting that “every court of appeals to have addressed the issue has held that the ‘closely drawn’ standard of *Buckley* remains good law after *Citizens United*”). This holding in *Beaumont* adhered to the longstanding distinction that *Buckley* drew between the level of scrutiny for restrictions on contributions as opposed to expenditures. *Beaumont*, 539 U.S. at 161-62.<sup>16</sup>

**b. The Supreme Court precedent of *Austin v. Michigan Chamber of Commerce* establishes that Plaintiffs’ equal protection claim has no merit.**

The district court also relied on binding Supreme Court precedent to reject Plaintiffs’ equal protection challenge regarding alleged different treatment of labor unions. J.A. 253-54; A.A. 32-33. The court explained that in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66 (1990), the Supreme Court concluded, in rejecting an equal protection claim, that there are “crucial

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<sup>16</sup> Plaintiffs’ reliance on *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999), is mistaken because that case applied strict scrutiny to a limit on political expenditures, not contributions. The Court recognized the distinction between spending and contribution restrictions. *Id.* at 967 (citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) (“We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.”). See also *supra* p. 39 n.15.

differences” between corporations and unions regarding the use of general funds for political purposes. J.A. 253; A.A. 32. The district court observed that this holding in *Austin* was not overruled by *Citizens United*. J.A. 254; A.A. 33. *See also Smithson*, 2010 WL 4277715, at \*22 (recognizing same and rejecting equal protection challenge based on *Austin*); *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994) (reiterating that a “threshold” requirement for “a viable equal protection claim” is that the plaintiff “is similarly situated to those who allegedly receive favorable treatment”), *cert. denied*, 513 U.S. 1185 (1995).

Plaintiffs incorrectly assert that *Austin*’s identification of “crucial differences” between corporations and unions was based on the antidistortion rationale. *See Austin*, 494 U.S. at 665-66 (explaining that the differences stem from the law that prohibits a union from using a union member’s dues and fees for political speech without the member’s approval). Plaintiffs are also mistaken in their reliance on *Dallman v. Ritter*, 225 P.3d 610, 634 (Colo. 2010). That case did not discuss *Austin*, determined in conclusory fashion that unions and corporations are similarly situated and, even then, did so only with respect to a ban on contributions by sole-source government contractors. *See also Smithson*, 2010 WL

4277715, at \*22 n. 21 (recognizing that “*Dallman* is neither binding authority nor persuasive in its reasoning”).<sup>17</sup>

Plaintiffs’ equal protection challenge also fails to meet the further threshold requirement of differential treatment. *See, e.g., Gilmore v. County of Douglas*, 406 F.3d 935, 937 (8th Cir. 2005) (stating that to make an equal protection claim, plaintiff “must establish that some government action caused [it] to be treated differently from others similarly situated”). Contrary to Plaintiffs’ contention, Minnesota law does not treat corporations differently than labor unions with respect to speaking themselves through campaign contributions.

The law allows a labor union to use “money derived from dues or membership fees” to make contributions from its political fund to candidates and political parties. Minn. Stat. § 10A.12, subd. 5 (2010). As was noted in *Austin*, union members can decline to have their dues and membership fees used for political speech. 494 U.S. at 665-66. Thus, such contributions made from a union’s political fund are effectively the speech of union members, not the union itself. If this were instead deemed to be the union itself speaking, a corporation itself would be able to speak in the same way under Minnesota law by using a political fund to make campaign contributions from voluntary donations of its

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<sup>17</sup> Although Plaintiffs are represented by the same counsel as the plaintiff in *Smithson*, they completely ignore that decision. See Appellants’ Br. at 53-54.

employees. See *supra* p. 38; Docket #55 (explaining this option is available to corporations under Minnesota law).

**3. The Board correctly applies the definition of independent expenditure.**

The district court also correctly concluded that Minnesota law, as applied by the Board, properly defines independent expenditures in accordance with the *Buckley* decision. Plaintiffs acknowledge that the definition of independent expenditure in Chapter 10A of Minnesota Statutes comports with *Buckley*'s description of express advocacy. Appellants' Br. at 56; Pls.' Prelim. Inj. Mem. (Docket #10) at 23. The definition provides that independent expenditures are expenditures made independently of any candidate and which "expressly advocate[] the election or defeat of a clearly identified candidate." Minn. Stat. § 10A.01, subd. 18; compare *Buckley*, 424 U.S. at 80 (defining express advocacy as "communications that expressly advocate the election or defeat of a clearly identified candidate").

Plaintiffs contend, however, that on June 17, 2008, the Board issued an opinion that erroneously applied the definition of independent expenditure because it did not incorporate certain "magic words" associated with express advocacy. J.A. 14, 18, 41-44 (Compl. ¶¶ 1d, 9, 77-80); Appellants' Br. at 56-58. Regardless of whether this contention has merit, a subsequent decision of the Board, dated December 3, 2008, stated that "the Board construes § 10A.01, Subd. 28 [definition

of political fund] to limit its application to associations that expressly advocate the nomination or election of candidates” and correspondingly concluded that “[e]xpress advocacy [in Chapter 10A’s definition of independent expenditure] requires use of specific words such as ‘vote for’, ‘elect’, ‘defeat’ or similar words.” J.A. 92-93, 146-47 (Goldsmith Aff., ¶ 14, Ex. F at 6-7). This interpretation of the Board supersedes the June 17, 2008 opinion, J.A. 93 ¶ 14, which has been expressly withdrawn by the Board. Transcript at 107-08; <http://www.cfboard.state.mn.us/ao/AO398.pdf>.<sup>18</sup>

Furthermore, as noted by the district court, J.A. 249; A.A. 28, and the Board in its December 3, 2008 decision, J.A. 146, the Minnesota Supreme Court has construed Chapter 10A’s political fund provisions to be limited to expenditures for express advocacy as described in *Buckley*. *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 428-30 (Minn. 2005) (answering certified question of this Court by holding that definition of “political fund” in Minn. Stat. ch. 10A is limited to express advocacy as set forth in *Buckley*, 424 U.S. at 80). This construction is binding on the Court. *See Johnson v. Fankell*, 520 U.S. 911, 916

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<sup>18</sup> Contrary to Plaintiffs’ mistaken view (Appellants’ Br. at 60), even before the June 17, 2008 advisory opinion was withdrawn, it could not have been applied to Plaintiffs. *See* Minn. Stat. § 10A.02, subd. 12(a) (2010) (limiting use of advisory opinions); *Kelly v. Campaign Fin. & Pub. Disclosure Bd.*, 679 N.W.2d 178, 181 (Minn. Ct. App. 2004) (stating that this statute “does not allow [the Board] to apply advisory opinions more broadly than to the individual to whom the opinion was issued unless the opinion is adopted as a rule”), *rev. denied* (Minn. July 20, 2004).

(1997) (“Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.”).

The Minnesota Supreme Court’s binding decision necessarily means that the independent expenditures which trigger Chapter 10A’s political fund disclosure requirements are limited to express advocacy as set forth in *Buckley* and the corresponding definition in section 10A.01, subd. 18. *See Kelley*, 698 N.W.2d at 430 (noting that decision’s reformulation of and answer to certified question clarifies that Minnesota law is to be “read consistent with *Buckley* to limit disclosure requirements to express advocacy expenditures”) (footnote omitted). Thus, Chapter 10A’s political fund provisions cannot be applied to expenditures for issue advocacy. *See National Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 688 n.3 (8th Cir. 2003) (explaining that issue advocacy “includes all political speech that is not express advocacy”).

As reasoned by the district court:

In light of the Board’s subsequent opinion and the Minnesota Supreme Court’s decision in *Kelley*, the Court holds that section 10A’s political fund provisions do not apply to expenditures for issue advocacy or advocacy that does not use the “magic words” constituting express advocacy. Thus, Plaintiffs have not demonstrated that they are likely to succeed in their assertion that the definition of “independent expenditure” is unconstitutionally vague.

J.A. 249-50; A.A. 28-29 (footnote omitted).<sup>19</sup>

**B. The Other *Dataphase* Factors Also Support The Denial Of Plaintiffs’ Motion.**

Based on the foregoing and as the district court concluded, J.A. 255; A.A. 34, it is apparent that Plaintiffs are unlikely to succeed on the merits and therefore their motion was properly denied. An analysis of the remaining *Dataphase* factors, as articulated by the district court, J.A. 255-56; A.A. 34-35, also supports the denial of Plaintiffs’ motion. In addition, as to Plaintiffs’ alleged harm, the record reflects that numerous corporations engaged in substantial

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<sup>19</sup> The district court also acknowledged that Plaintiffs’ claim raises a significant justiciability issue. J.A. 250 n.15; A.A. 29 n.15. Indeed, Plaintiffs do not allege that the Board’s June 17, 2008 advisory opinion is causing them to refrain from making any expenditures for issue advocacy. The expenditures that Plaintiffs allege they intend to make, but are refraining from making, are for express advocacy. J.A. 25-26 (Compl. ¶ 39). Accordingly, Plaintiffs’ claim is not ripe for adjudication by the Court. *See, e.g., KCCP Trust v. City of North Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005) (stating claim is not ripe, and therefore not justiciable, when it “rests on contingent future events which may or may not occur). In addition, Plaintiffs’ claim is moot because, as noted above, the Board’s decision of December 3, 2008 supersedes the June 17, 2008 advisory opinion, and the opinion has been withdrawn by the Board. *See, e.g., Missouri Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007) (stating that a claim “becomes moot when the challenged conduct ceases and ‘there is no reasonable expectation that the wrong will be repeated’”) (citation omitted); *see also Renne v. Geary*, 501 U.S. 312, 320 (1991) (stating that “the mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced”); *cf. Federation of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) (noting that the Supreme Court “has upheld the general rule that repeal [of] challenged legislation ends the ongoing controversy and renders moot a plaintiff’s request for injunctive relief”), *cert. denied*, 540 U.S. 879 (2003).

independent expenditures in Minnesota under the current statutory framework with no undue burden. See, e.g., J.A. 115, 127, 148, 158.

Furthermore, Plaintiffs will not suffer immediate harm because their complaint alleges injury regarding the election that already occurred on November 2, 2010. J.A. 25-28 (Compl. ¶¶ 38-39, 45, 48). The next election is almost two years away.

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

For the same reason, the public interest is served by denying Plaintiffs’ motion. The disclosure Plaintiffs attempt to avoid allows the public to be more informed in making “choices in the political marketplace.” *Citizens United*, 130 S. Ct. at 914 (citation omitted). This furthers the public interest.

## CONCLUSION

Based on the foregoing, State Appellees respectfully request that the Court affirm the district court's decision.

Dated: December 15, 2010

Respectfully submitted,

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WITH FRAP 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,648 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ Alan I. Gilbert

ALAN I. GILBERT

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The undersigned, on behalf of the parties filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

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