No. 10-3126

United States Court of Appeals For the Eighth Circuit

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

v.

Lori Swanson, et al., *Appellees*

Appeal from the United States District Court for the
District of Minnesota, Saint Paul Division

Appellees' Petition for Rehearing En Banc

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Federal Rules of Appellate Procedure Rule 35(B) Statement

The Appellants seek en banc rehearing and reversal of Part II.B of the decision in this case,[1] in which a divided Panel applied exacting scrutiny to find that the Appellants were unlikely to prevail on their challenge to Minnesota law that (1) bans corporate general-fund independent expenditures and (2) requires corporations making independent expenditures to employ a separate segregated fund ("SSF") and submit to PAC-style burdens.[2] The Panel's decision conflicts with the Supreme Court's rule that laws imposing PAC-style burdens are subject to strict scrutiny. *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986) ("*MCFL*"). It also conflicts with the Supreme Court's rule that laws forcing corporations to employ a SSF or submit to PAC-style burdens to make independent expenditures are unconstitutional. *Citizens United*, 130 S. Ct. 876.

This Petition therefore presents to this Court a question of exceptional importance: Whether associations in the Eighth Circuit that choose to incorporate may rely on *Citizens United*'s holding to make general-fund independent

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[1] *Minnesota Citizens Concerned for Life,et al. v. Swanson, et al.*, No. 10-3126, __ F.3d __, 2011 WL 1833236 (8th Cir. May 16, 2011) ("*MCCL*"). The panel consisted of Judge Melloy, who authored the opinion; Judge Bye, who joined it; and Chief Judge Riley, who dissented from the holding as to Part II.B.

[2] The Appellants do not seek en banc review of the Panel's decision that they were unlikely to succeed on their challenge to Minnesota's ban on corporate general-fund contributions. However, Appellants here preserve their arguments that the corporate contribution ban is unconstitutional.

expenditures without submitting to PAC-style burdens. Rehearing by the full Court is necessary to answer this question and cure the uncertainty in the law created by the panel decision's conflict with Supreme Court precedent.

Argument

I. This Case Conflicts With the Supreme Court's Holding That SSF Requirements and PAC-style Burdens Are Subject to Strict Scrutiny Review.

The Supreme Court ruled that laws forcing corporations to employ a SSF and submit to PAC-style burdens in order to make independent expenditures[3] burden political speech and so are subject to strict scrutiny, which they must fail. *Citizens*, 130 S. Ct. at 898 and 913. The *MCCL* Panel wrongly applied exacting scrutiny to such a law and then upheld it. En banc review is necessary to resolve the conflict between the Eighth Circuit and the Supreme Court.

A. Strict Scrutiny Review Applies To Laws Imposing PAC-style Burdens.

The hallmark of PAC-style burdens is the presence of requirements that speakers (1) register with the government in order to speak, (2) appoint a treasurer, (3) keep detailed records, (4) file ongoing disclosure reports even when no speech occurs, or (5) notify the government when they wish to dissolve, thereby terminating their ability to speak through their SSF. *Id*. at 897-98. These types of requirements are "burdensome," *id*. at 897, and "onerous," *id*. at 898, and discourage speakers from

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

speaking, *id*. at 897. Laws forcing those making independent expenditures to employ SSFs or submit to PAC-style requirements thus burden and chill speech and so must be subjected to strict scrutiny review. *Id*. at 898. *See also MCFL*, 479 U.S. at 256 (holding that imposing PAC-status burdens speech and so must be justified by a "compelling" interest); *id* at 262 (evaluating PAC-style burdens under strict scrutiny's 'least restrictive means' test).

In contrast, laws that only require speakers to file simple, event-driven disclosure reports only after someone actually speaks are subject to the less rigorous exacting scrutiny review. *Citizens United*, 130 S. Ct. at 914. Such event-driven disclosure requirements are not like PAC-style requirements. They do not require speakers to register, appoint a treasurer, keep extensive records, file disclosure reports even when they do not speak, or notify the government when they want to dissolve. Instead, event-driven disclosure requirements merely require the filing of a simple report when one actually makes an independent expenditure. If one does not speak, no report ever need be filed. This comports with the informational interest, because the government does not have any informational interest in the absence of speech. Such event-driven disclosure requirements are "a less restrictive alternative to more comprehensive regulations of speech" that are present in PAC-style reporting requirements. *Id*. at 915.

The Supreme Court has thus established a bright-line rule for determining the

level of scrutiny to apply to disclosure requirements impacting independent expenditures. Requirements imposing only event-driven reporting when someone actually speaks are subject to exacting scrutiny. *Citizens United*, 130 S. Ct. at 914. Requirements forcing organizations to employ a SSF or submit to PAC-style registration, treasurer, recordkeeping, reporting, or dissolution burdens are subject to strict scrutiny. *Id*. at 897-98; *MCFL*, 479 U.S. at 256 and 262.

B. Minnesota's Law Imposes PAC-style Burdens.

Minnesota's segregated political funds should have been subjected to strict scrutiny review because they both (1) force corporations to employ a segregated fund to speak and also (2) have the same type of burdensome and onerous registration, treasurer, reporting, record-keeping, and dissolution requirements as federal PACs. For example, just like federal PACs, Minnesota's political funds must appoint a treasurer before engaging in First Amendment activity. Minn. Stat. 10A.12(2). And they must register with the Campaign Finance and Public Disclosure Board, providing: (1) name and address of entity; (2) name and address of supporting associations of political funds; (3) name and address of treasurer and deputy treasurers; and (4) depositories and safety deposit boxes. Minn. Stat. 10A.14.

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

necessary records must be maintained for at least four years. Minn. Stat. 10A.025(3).

The funds must also file reports by each January 31, with additional reports 15 days before primaries and 10 days before general elections. Reports must disclose, among other things, names, addresses, and employers or occupations of individuals or associations making contributions aggregating over $100; sum of contributions; receipts over $100 not otherwise listed; sum of receipts; name and address of recipients of expenditures aggregating over $100, with amount, date, and purpose of each expenditure, and in the case of independent expenditures made in opposition to a candidate, the candidate's name, address, and office sought; sum of expenditures by entity during period; sum of contributions by entity during period; name and address of entities to whom noncampaign disbursements were made aggregating over $100 in the year and amount, date, and purpose of noncampaign disbursements; sum of noncampaign disbursements; name and address of any nonprofit corporation providing administrative assistance, and aggregate fair market value of assistance provided. Minn. Stat. 10A.20(3). They must still file a report even when they have no reportable activity. Minn. Stat. 10A.20(7). Dissolution, meanwhile, requires disbursing assets over $100 and filing a termination report. Minn. Stat. 10A.24.

Corporations and responsible individuals who fail to comply with these requirements face civil and criminal penalties, ranging from fines to imprisonment of up to five years. *See* Minn. Stat. 10A.12(1b) and (6); 10A.121(2); 10A.13(1);

10A.14(4); 10A.15(4); 10A.16; 10A.17(5); 10A.20(12); 211B.15(6) and (7).

C. Under Binding Supreme Court Precedent, the Panel Should Have Applied Strict Scrutiny to Minnesota's Law.

Minnesota's PAC-style burdens are the same type as the federal PAC burdens considered in *Citizens United*. *See* 130 S. Ct. at 897-98. The *Citizens United* Court (1) called those requirements "burdensome," *id*. at 897, and "onerous," *id*. at 898, (2) subjected them to strict scrutiny, *id*. at 897-98, and (3) held them unconstitutional, *id*. at 913. The *MCCL* Panel should have followed the Supreme Court and subjected Minnesota's law to strict scrutiny, requiring the government to prove its law is "narrowly tailored" to a "compelling interest," *Id*. at 898 (*citing FEC v. Wisc. Right to Life*, 551 U.S. 449, 464 (2007) ("*WRTL-II*")), and uses the "least restrictive means" to accomplish the interest, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *MCFL*, 479 U.S. at 262. Instead, the Panel mistakenly subjected Minnesota's PAC-style burdens to exacting scrutiny. *MCCL*, 2011 WL 1833236 at *8-9. This was the wrong standard of review for two reasons.

1. Minnesota's Law Burdens Political Speech, So Under Supreme Court Precedent Strict Scrutiny Review Was Required.

In applying exacting scrutiny, the Panel accepted the State's wrong argument that the requirements were "collectively" "significantly less burdensome than the federal regulations on PACs[,]" so they did not function as a ban on corporate speech. *Id*. at *7. This led the Panel to wrongly conclude that strict scrutiny need not apply. But

when laws impose PAC-style burdens on those making independent expenditures, the proper inquiry to determine whether strict scrutiny applies is not whether the regulation completely bans speech, or whether a state's PAC-style burdens are less burdensome than federal ones.[4] Rather, the proper inquiry is whether the PAC-style requirements burden political speech; for, "[l]aws that burden political speech are subject to strict scrutiny." *Citizens United*, 130 S. Ct. at 898.

Minnesota's law burdens political speech, as the Panel recognized. *MCCL*, 2011 WL 1833236 at *7. It creates a "long-term or even perpetual morass of regulatory red tape" for corporations making independent expenditures. *Id*. at *12 (Riley, C.J., dissenting in part). Especially troubling is the ongoing reporting requirement—"once initiated, the requirement is potentially perpetual regardless of whether the corporation ever again makes an independent expenditure." *Id*. (footnote omitted). Also troubling is the fact that if a corporation wishes to stop reporting its non-activity, it must dissolve its political fund—thereby giving up its right to make future independent expenditures. *Id*.

As the Chief Judge recognized, Minnesota's ongoing reporting requirements burden speech. *Id*. So does its requirement that corporations establish a separate segregated fund, register with the government, appoint and publicly identify a

[4] The Appellants disagree that Minnesota's PAC-style requirements are "significantly" less burdensome than the federal requirements. However, because that is not pertinent to the proper inquiry, the Appellants will not argue the point.

treasurer, maintain detailed records for lengthy periods, and file dissolution request in order to terminate their perpetual reporting obligation. *Citizens United* said these requirements cannot be imposed on corporations making independent expenditures. 130 S. Ct. at 897-98 and 913. Under *Citizens United*, the *only* disclosure requirement that can be imposed on those making independent expenditures is the simple, event-driven disclosure and on-ad disclaimer that the Court upheld. *Id*. at 914.

Minnesota's burdensome regulations force corporations to "decide whether exercising its constitutional right is worth the time and expense . . . ." *Id*. Faced with that decision, "[s]ome corporations will decide the exercise is simply not worth the trouble." *MCCL*, 2011 WL 1833236 at *12. Minnesota's regulation will "manifestly discourage corporations, particularly corporations with limited resources, from engaging in protected political speech, and hinder their participation in the political debate and their access to the citizenry and the government." *Id*. at *11. Thus, Minnesota's law burdens and chills speech, just as the provisions at issue in *Citizens United* did. As such, it should have been subjected to strict scrutiny. 130 S. Ct. at 898.

2. Minnesota's Law Is Not Simple, Event-Driven Disclosure, So Under Supreme Court Precedent Strict Scrutiny Review Was Required.

The *MCCL* Panel also accepted the State's argument that Minnesota's PAC-style burdens are "a statutory scheme designed to require corporations to disclose certain information *when making independent expenditures*." *MCCL*, 2011 WL 1833236 at

*9 (emphasis added). However, that characterization is wrong: Minnesota's scheme forces corporations to disclose information even when they do not make independent expenditures. Once they register a separate segregated political fund, their obligation to report each period is perpetual whether they actually make an independent expenditure or not.

Regardless, the *MCCL* Panel wrongly agreed with the State's characterization of its PAC-style burdens as mere "disclosure laws." *Id*. The Panel then applied exacting scrutiny, "just as the Supreme Court did in *Citizens United*." *Id*. This, however, misunderstands *Citizens United*, which applied exacting scrutiny *only* to simple, event-driven disclosure and on-ad disclaimer requirements. 130 S. Ct. at 914. Minnesota does not impose simple, event-driven disclosure requirements, but rather PAC-style burdens, which *Citizens United* subjected to *strict* scrutiny. *Id*. at 897-98. As the Chief Judge correctly observed in dissent, "A state should not be able to sidestep strict scrutiny analysis simply by labeling burdensome regulations as a 'disclosure law,' when the effect, if not the design, is to discourage corporate speech." *MCCL*, 2011 WL 1833236 at *14 (Riley, C.J., dissenting in part). Allowing states to do this "risks transforming First Amendment jurisprudence into a legislative labeling exercise." *Id*.

D. The Panel Decision Conflicts With *Citizens United*'s Holdings.

The required strict scrutiny review would have required the Panel to find that

Minnesota's PAC-style burdens are unconstitutional for corporations making independent expenditures.[5] *Citizens United* held that the imposition of PAC-style burdens restricts and burdens political speech. 130 S. Ct. at 897-98. It also held that the only constitutionally cognizable interest in restricting political speech is the interest in preventing quid pro quo corruption. *Id*. at 901 and 909. And it held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Id*. at 909. The government is therefore constitutionally prohibited from restricting independent expenditures or requiring those making them to submit to PAC-style burdens, because "[n]o sufficient governmental interest" can justify such requirements. *Id*. at 913.

Even if that were not so, the imposition of PAC-style burdens cannot survive the strict scrutiny requirement that laws employ the least restrictive means to further the government's compelling interest. *Gonzales*, 546 U.S. at 429; *MCFL*, 479 U.S. at 262. *See also Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (requiring that statutes satisfying strict scrutiny "not unnecessarily circumscribe protected expression"). The federal requirement upheld in *Citizens United*, that those making independent expenditures above a certain threshold dollar amount file event-

[5] The Appellants agree with Chief Judge Riley's conclusion that, even under exacting scrutiny, Minnesota's PAC-style burdens are likely unconstitutional. *MCCL*, 2011 WL 1833236 at *14 (Riley, C.J., dissenting in part). As the Chief Judge noted, "Minnesota is unable to show a substantial relation between its ongoing reporting requirement and any important governmental interest." *Id*.

driven disclosure reports when they actually make their expenditures, is the "least restrictive means" for disclosure. It fully satisfies the interest in disclosure, *Citizens United*, 130 S. Ct. at 114, without burdening more speech than necessary.

If the *MCCL* Panel had applied strict scrutiny review, as *Citizens United* requires, it would have found that the Appellants were likely to succeed on the merits of their challenge, as *Citizens United* also requires. As Chief Judge Riley explained in dissent,

> The effect of [the event-driven disclosure requirement upheld in *Citizens United*]—requiring one-time disclosure only when a substantial amount of money was spent—logically matched the government's disclosure purpose. In contrast, the effect of Minnesota's ongoing reporting requirement, which is initiated upon a $100 aggregate expenditure, and is untethered from continued speech, does not match any disclosure interest. Other requirements, such as requiring a treasurer, segregated funds, and record-keeping, also are only tangentially related to disclosure.

MCCL, 2011 WL 1833236 at *13 (Riley, C.J., dissenting in part).

The Panel's failure to apply the proper scrutiny and reach the mandatory conclusion, as required by *Citizens United*, brings the Eighth Circuit into conflict with the Supreme Court and creates uncertainty and confusion in the law. This Court should grant the Appellants' Petition for En Banc Rehearing to address this conflict.

II. This Case Conflicts With the Supreme Court's Holding That Laws Forcing Corporations to Employ A Separate Segregated Fund Or Submit to PAC Burdens to Make Independent Expenditures Are Unconstitutional.

Citizens United was clear: laws imposing PAC-style burdens on corporations making independent expenditures, or forcing them to make their expenditures through

separate segregated funds, burden speech and so are subject to strict scrutiny. *Citizens United*, 130 S. Ct. at 897-98. But they cannot satisfy scrutiny because there is no constitutionally cognizable interest supporting PAC-style burdens for those making independent expenditures. *Id*. at 913. Rather, the constitutionally permissible disclosure requirement for those making independent expenditures is the simple, event-driven disclosure made when someone actually speaks. *Id*. at 914. Event-driven disclosure is supported by the informational interest. *Id*. at 914. PAC-style burdens masquerading as disclosure requirements are not. *Id*. at 897-98 and 913. Because *Citizens United* held that there is *no* constitutionally cognizable interest in imposing PAC-style burdens on those making independent expenditures, *id*., such burdens are per se unconstitutional under binding Supreme Court precedent.[6]

The Panel wrongly found that the imposition of PAC-style burdens are not per se unconstitutional. For support, the Panel cited *Buckley*, which it mistakenly said "approved a periodic reporting requirement for entities other than PACs or candidates, necessarily holding that such requirements are not per se invalid." *MCCL*, 2011 WL 1833236 at *7 n.4 (*citing Buckley*, 424 U.S. at 80-81). But this misunderstands *Buckley* and federal law.

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[6] The only exception applies to organizations having *Buckley*'s "major purpose" of nominating or electing candidates. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). PAC-style burdens may constitutionally be imposed on them. *Id*. However, the Panel correctly found that none of the Appellants has *Buckley*'s major purpose. *MCCL*, 2011 WL 1833236 at *3.

The federal law at issue in *Buckley*, former 2 U.S.C. 434(e), required those making independent expenditures above a certain threshold dollar amount in a calendar year to file simple, event-driven disclosure reports at the next due date for PAC reporting. *Buckley*, 424 U.S. at 80 (construing the challenged law); *see also id*. at 160 (providing the text of the challenged statute). If they subsequently made another independent expenditure, they were obligated to file another report at the next due date for PAC reporting. However, if they made no additional expenditures, they had no additional reporting obligations. *See Buckley*, 424 U.S at 160 (text of statute explaining that the required reports "need not be cumulative"); *see also id*. at 80 (explaining that reports must be filed only when independent expenditures are made).

The FEC explains that this is the proper understanding of federal disclosure law for independent expenditures in both the Code of Federal Regulations and also a brochure it publishes for the general public. Under federal law, non-PACs making independent expenditures "must file a report with the FEC . . . at the end of the first reporting period in which independent expenditures with respect to a given election aggregate more than $250 in a calendar year and in any succeeding period during the same year in which additional independent expenditures of any amount are made." Federal Election Commission, *Coordinated Communications and Independent Expenditures* June 2007 (Updated Feb 2011) at 8, *available at* http://www.fec.gov/-pages/brochures/ie_brochure.pdf (last visited May 25, 2011) (attached as Ex. 1). *See*

also 11 CFR 109.10(b), *available at* http://edocket.access.gpo.gov/cfr_2010/janqtr/11cfr109.10.htm (last visited May 25, 2011) (same).[7]

Thus, *Buckley* did not uphold ongoing periodic reporting for those making independent expenditures, as the Panel mistakenly thought. Rather, it upheld precisely what *Citizens United* upheld—event-driven disclosure when someone actually makes an independent expenditure. 130 S. Ct. at 914. If no expenditures are made, no reporting can constitutionally be required because there is no constitutionally cognizable interest to support it. *Id*. at 897-98 and 913.

In violation of this plain rule, Minnesota imposes PAC-style burdens on corporations making independent expenditures. Just like federal PACs, they must register with the government. They must appoint and identify a treasurer. They must keep detailed records for a period of many years. They must ask the government's permission to dissolve in order to relieve themselves from their PAC-style duties. And they must file regular, ongoing, perpetual disclosure reports, even when they have no speech whatsoever to disclose. *Citizens United* held that the government

[7] In 1980, the numbering of former 2 U.S.C. 434(e) was changed. It is currently 2 U.S.C. 434(c). *See* PL 96-187, 1980 HR 5010. The first Regulation to address the statute was 11 CFR 109.2. *See* 45 Fed. Reg. 15087 (March 7, 1980). This regulation was renumbered to 11 CFR 109.10(b) and modified only as to contents and method of reporting in 2003, 68 Fed. Reg. 415, 451 (January 3, 2003). There has been no change in the Code of Federal Regulations for non-PACs reporting independent expenditures from that time until today. Thus, from the time this provision was first addressed, the Regulations have been clear that those filing independent expenditure disclosure reports need do so only when they actually make an expenditure.

may not impose these types of requirements on corporations that simply want to engage in political speech. 130 S. Ct. at 897-98 and 913. Because there is *no* interest supporting such requirements, they are per se unconstitutional.

Had the Panel followed *Citizens United*, it would have found the Appellants were likely to succeed on the merits. Its failure to do so brings the Eighth Circuit into conflict with the Supreme Court and creates confusion in the law. This Court should grant the Appellants' Petition for En Banc Rehearing to address this conflict.

Conclusion

Supreme Court precedent requires that laws imposing PAC-style burdens (1) be evaluated under strict scrutiny and (2) held unconstitutional when enforced against corporations making independent expenditures. The Panel Decision did neither. This Court should grant en banc review to address the Eighth Circuit's conflict with the Supreme Court and correct the confusion in the law the Panel Decision created.

May 31, 2011

Respectfully Submitted,

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Certificate of Service

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