UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Citizens Concerned for Life, Inc., The Taxpayers League of Minnesota, and Coastal Travel Enterprises, LLC, Plaintiffs, vs. Lori Swanson, Minnesota Attorney General, in her official capacity; Bob Milbert, John Scanlon, Terri Ashmore, Hilda Bettermann, Felicia Boyd, and Greg McCullough, Minnesota Campaign Finance and Public Disclosure Board Members, in their official capacities; Raymond Krause, Chief Administrative Law Judge of the Minnesota Office of Administrative Hearings, in his official capacity; Eric Lipman, Assistant Chief Administrative Law Judge of the Minnesota Office of Administrative Hearings, in his official capacity; Manuel Cervantes, Beverly Heydinger, Richard Luis, Steve Mihalchick, Barbara Neilson, and Kathleen Sheehy, Administrative Law Judges of the Minnesota Office of Administrative Hearings, in their official capacities; and Michael Freeman, Hennepin County Attorney, in his official capacity. Defendants.	File No. 10-CV-02938 (DWF/JSM) **HENNEPIN COUNTY ATTORNEY MICHAEL O. FREEMAN'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs, three Minnesota corporations, are attempting to strike down Minnesota's recently enacted campaign finance disclosure laws, so that they can spend significant amounts of money in Minnesota's upcoming election without any relevant

disclosure of their actions. The Court should reject Plaintiffs' motion. The Court should deny the preliminary injunction because Plaintiffs cannot satisfy the high burden required for granting a preliminary injunction striking down a duly enacted law – especially one that was passed by the Minnesota Legislature without a single dissenting vote. Plaintiffs' Complaint alleges that several provisions of Minnesota law related to campaign finance violate the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Defendant Freeman joins the State Defendants' legal arguments and adopts by reference the State Defendants' substantive arguments contained in their opposition to the motion for a preliminary injunction. Defendant Freeman has some additional arguments regarding Counts III and IV, and therefore responds separately to those counts.

FACTUAL BACKGROUND

Plaintiffs Minnesota Citizens Concerned for Life ("MCCL") and The Taxpayers League of Minnesota ("Taxpayers League") are organized under 26 U.S.C. § 501(c)(4). Compl. ¶¶ 13-14, 23, and 30. As 501(c)(4) organizations, MCCL and Taxpayers League allege they cannot be organized primarily to engage in the nomination or election of candidates running for political office. *Id.* ¶¶ 23, 30. Plaintiff Coastal Travel Enterprises, LLC ("Coastal") is a non-stock, for-profit limited liability company organized under the laws of Minnesota. *Id.* ¶¶ 15, 35.

Plaintiffs allege that they want to make independent expenditures (i.e., express advocacy communications without coordination with a candidate) supporting or opposing candidates who are running in the general election on November 2, 2010. *Id. ¶* 39. Specifically, Plaintiffs assert they want to make independent expenditures paid for with

money drawn from the general funds of Plaintiffs. *Id.* In addition, MCCL alleges that it wants to make general-fund contributions to committees making only independent expenditures. *Id.* ¶ 42. Plaintiffs allege that Minnesota law violates the First Amendment in several ways. Plaintiffs assert that they would make their planned general-fund independent expenditures but for Minnesota's laws. *Id.* ¶¶ 40-41. Plaintiffs allege that some of their planned activity is banned by provisions in Minnesota Statutes Chapter 10A and some by Minnesota Statutes Section 211B.15. Chapter 10A violations are punishable by civil fines and Section 211B.15 violations are punishable by civil fines and potentially criminal prosecution. Defendant Freeman is named as a defendant because he has criminal prosecution authority pursuant to Minn. Stat. § 211B.16, subd. 3, to prosecute violations of Minn. Stat. § 211B.15. Defendant Freeman does not enforce Chapter 10A or have a formal role with prosecuting cases before the Minnesota Campaign Finance and Public Disclosure Board (the "Board").

Plaintiffs divide their complaint into five counts. However, the legal theories supporting these counts can be divided into three categories. First, Plaintiffs allege that Minnesota's legislative response to *Citizens United v. FEC*, 130 S. Ct. 876 (2010) is unconstitutional. Specifically, Plaintiffs assert Minnesota's new laws related to corporate independent expenditures are unconstitutional because they: (1) prohibit corporate general-fund independent expenditures (Count I); and (2) prohibit corporate general-fund contributions to independent expenditure committees (Count II). Second, Plaintiffs allege that Minnesota's long standing laws prohibiting corporate general-fund contributions directly to candidates and political parties is unconstitutional (Count V).

Third, Plaintiffs allege that the definition of "promote or defeat" in Minn. Stat. § 211B.15 and the definition of "independent expenditure" in Minn. Stat. § 10A.01, subd. 18, are unconstitutional (Counts III and IV).

Plaintiffs seek a declaratory judgment that the following statutes are unconstitutional: Minn. Stat. §§ 10A.12, subds. 1 and 1a, 10A.01, subd. 18, 10A.27, subd. 13, and 211B.15, subds. 2, 3, and 4. In addition, Plaintiffs seek a preliminary and permanent injunction enjoining the Board and all county attorneys from enforcing the challenged provisions against Plaintiffs, and all similarly situated entities.

ARGUMENT

I. Preliminary Injunction Standard.

A court considering a motion for preliminary injunction must consider (1) the probability of the movant succeeding on the merits; (2) the threat of irreparable harm to the movant; (3) the state of the balance between this harm and the injury in granting the injunction will inflict on the other party; and (4) the public interest. *See Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008); *Dataphase Sys. v. CL Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

Because they are seeking to strike down a state statute, in analyzing the first factor, Plaintiffs must establish that they are "likely to prevail" on the merits. *See Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 730-33 (8th Cir. 2008) (en banc) ("Instead, we now clarify that, where a preliminary injunction of a duly enacted state statute is sought, we require a more rigorous threshold showing that the movant is likely to prevail on the merits."). The Eight Circuit reasoned that by re-emphasizing "this

more rigorous standard for determining a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Id.* at 733. In such cases, it is only after finding a party is likely to prevail on the merits that a district court should weigh the other *Dataphase* factors. *Id.* at 732-733.

In addition, the burden on Plaintiffs "at the preliminary injunction stage track[s] the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). The party requesting the injunctive relief bears the "complete burden" of proving that an injunction should be granted. *Gelco Corp. v. Coniston Partners,* 811 F.2d 414, 418 (8th Cir. 1987). Thus, Plaintiffs bear the burden of showing that their First Amendment and Equal Protection rights are violated by Minnesota's laws. As discussed below, Plaintiffs cannot establish that they are entitled to a preliminary injunction.

II. Legal Background on U.S. Supreme Court's Decision Related to Campaign Finance Laws and Minnesota's Response.

Prior to directly analyzing the merits of Plaintiffs' motion for a preliminary injunction, it is necessary to briefly review the U.S. Supreme Court's momentous *Citizens United* decision and Minnesota's legislative response.

A. *Citizens United* and Disclosure Requirements.

In March 2010, the United States Supreme Court issued the *Citizens United v. Federal Elections Comm'n* decision. 130 S. Ct. 876 (2010). In a 5-4 decision the Court held that corporations have a First Amendment right to make "independent expenditures"

to expressly advocate for or against election of candidates for office. The Court concluded that the federal law banning corporations from making independent expenditures that directly advocated the election or defeat of a candidate or from making "electioneering communications," 2 U.S.C. § 441b, was unconstitutional. In *Citizens United*, the Court overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and a portion of *McConnell v. FEC*, 540 U.S. 93 (2003). *See Citizens United*, 130 S. Ct. at 913. In *Austin*, the Supreme Court upheld a Michigan law that prohibited corporate independent expenditures. 494 U.S. at 654-55. In *McConnell*, the Court relied on *Austin* to uphold the Bipartisan Campaign Reform Act of 2002's ("BCRA") ban on corporate expenditures for electioneering communications. 540 U.S. at 203-209. The *Citizens United* Court reevaluated this recent precedent and 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. The Court declared that this expenditure ban in 2 U.S.C. § 441b was unconstitutional and held that corporations may not be prohibited from spending money for express political advocacy, when those expenditures are independent from candidates and uncoordinated with their campaigns. *Id.* at 913.

While the *Citizens United* Court did strike down the ban on independent expenditures by corporations, it also held that the disclaimer and disclosure requirements for electioneering communications were constitutional. 130 S. Ct. at 914-916.[1] The

[1] The disclosure requirement at issue in *Citizens United* was 2 U.S.C. § 434(f)(1). This statute requires that any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the Federal Election Commission. 2 U.S.C § 434(f)(1). That statement must identify the person

Court noted that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." 130 S. Ct. at 915 (citing *FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 262 (1986)). The Court then went on to explain how disclosure requirements provide citizens with vital information:

> 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 election 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 (internal citation omitted).

Citizens United asserted that the government's asserted interest in the disclosure requirement – providing information to voters and others – was insufficient to justify the disclosure requirements. *Id.* at 915. The Court rejected this argument and stated:

> Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest alone is sufficient to justify application of § 201 [2 U.S.C. § 434(f)(1)] to these ads, it is not necessary to consider the Government's other asserted interests.

Id. at 915-916.

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making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. 2 U.S.C. § 434(f)(2). The disclaimer requirement at issue requires television electioneering communications funded by anyone other than a candidate to include a disclaimer that "_____ is responsible for the content of this advertising." 2 U.S.C. § 441d(d)(2). It must also display the name and address of the person or group funding the advertisement. *Id.*

The *Citizens United* holding regarding the constitutionality of the disclosure requirements found in 2 U.S.C. § 434(f)(1) was not surprising. In fact, the United States Supreme Court has repeatedly and consistently upheld organizational and reporting requirements against facial challenges. In *Buckley v. Valeo,* the Court upheld federal campaign finance disclosure requirements and stated that "provid[ing] the electorate with information" about the sources of campaign funds was an important governmental interest. 424 U.S. 1, 66 (1976). In *McConnell*, the Court upheld similar requirements for organizations engaged in electioneering communications. 540 U.S. at 196-97.[2] Finally, in *Doe v. Reed*, a decision several weeks after *Citizens United,* the Court again affirmed the validity of disclosure requirements stating:

> To the extent a regulation concerns the legal effect of a particular activity in that process, the government is afforded substantial latitude to enforce that regulation. Also pertinent is the fact that the [Washington state Public Records Act] is not a prohibition on speech, but a *disclosure* requirement that may burden "the ability to speak, but [does] 'not prevent anyone from speaking.'"

130 S. Ct. 2811, 2813-2814 (2010) (emphasis in original) (quoting *Citizens United*, 130 S. Ct. at 914). *See also MCFL,* 479 U.S. at 259-62 (striking down a prohibition, and noting that the disclosure provisions will apply to the newly permitted speech); *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley,* 454 U.S. 290, 297-98 (1981) (same); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 791-92 & n. 32

[2] This holding from *McConnell* was not overturned by *Citizens United. See Citizens United*, 130 S. Ct. at 913 ("Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures . . . This part of *McConnell* is now overruled.").

(1978) (discussing how disclosure provisions can help offset the coercive aspects of corporate speech).

B. Minnesota's Response to *Citizens United.*

Like many other states, Minnesota law prohibited corporations from making independent expenditures prior to the *Citizens United* decision. In response to the decision, Minnesota amended its campaign finance laws to permit corporate independent expenditures. 2010 Minn. Laws Ch. 397 (Senate File 2471) (attached as Exhibit 1 to the Affidavit of Daniel P. Rogan ("Rogan Aff.")). The Minnesota Legislature passed Senate File 2471 on May 16, 2010. It passed in the Minnesota House of Representatives unanimously by a vote of 131-0 and it passed the Minnesota Senate unanimously by a vote of 61-0.[3] Most of the provisions of the law became effective on June 1, 2010.

Pursuant to this new law, corporations can make independent expenditures as long as they do so in compliance with certain disclosure requirements. *See* 2010 Minn. Laws Ch. 397. Specifically, Minn. Stat. § 211B.15 previously stated that all corporate expenditures "to promote or defeat" a candidate for office, including independent expenditures, were unlawful. It was amended as of June 1, 2010 and now states:

> A corporation may not make an expenditure or offer or agree to make an expenditure to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office, **unless the expenditure is an independent expenditure**. For purposes of this

[3] The roll call vote from the Journal of the Senate and House are attached as Exhibit 2 to the Rogan Affidavit. In addition, the legislative action related to Senate File 2471 can be found at https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=SF2471&y=2010&ssn=0

> subdivision, "independent expenditure" has the meaning given in section 10A.01, subd. 18.

Minn. Stat. § 211B.15 (as amended by 2010 Minn. Laws Ch. 397, § 17 (emphasis added)). The law now expressly allows independent expenditures by corporations, as long as they comply with the relevant disclosure requirements. *See* Minn. Stat. § 10A.12, subd. 1a (2010 Minn. Laws, Ch. 397, § 4). The law provides two options for corporations to make such expenditures. First, a corporation may make its own independent expenditures. Second, it may make contributions to an independent expenditure committee or fund. *Id.* The new statute relating to independent expenditures states:

> **When required for independent expenditures.** An association other than a political committee that makes only independent expenditures and disbursements permitted under section 10A.121, subdivision 1, must do so by forming and registering an independent expenditure political fund if the expenditure is in excess of $100 or by contributing to an existing independent expenditure political committee or political fund.

Minn. Stat. § 10A.12, subd. 1a (2010 Minn. Laws, Ch. 397, § 4). An "independent expenditure political fund" means "a political fund that only makes independent expenditures and disbursements permitted under Section 10A.121, subd. 1." Minn. Stat. § 10A.01, subd. 18b (2010 Minn. Laws, Ch. 397, § 3).

Thus, if a corporation desires to make its own independent expenditures in excess of $100, it must establish an "account" for doing so and register with the Board under the independent expenditure political fund statute. *See* Minn. Stat. § 10A.12, subd. 1a (2010 Minn. Laws, Ch. 397, § 4). The corporation can then make unlimited independent expenditures funded directly by the corporation. In sum, contrary to Plaintiffs'

allegations, Minnesota's new law authorizes corporations to make independent expenditures and creates a process to track contributions and expenditures for disclosure purposes. There are no limits relating to the source of funds used for independent expenditures by corporations or other associations. Contrary to Plaintiffs' claims, corporations can use funds from the corporation's "general fund" to fund independent expenditures. Corporations and other associations simply must track these expenditures in an independent expenditure political fund or committee so this information can be disclosed to the Board. Finally, a corporation's independent expenditure political fund is not a separate legal entity from the corporation itself. The fund is simply a mechanism to track corporate independent expenditure activity (as opposed to the corporation's non-independent expenditure activity). A corporation making independent expenditures simply registers with the Board (as an independent expenditure political fund) and accounts for its independent expenditures in an account.

These statutory changes expressly authorize "independent expenditures" by corporations and create a disclosure mechanism through the individual designated by the corporation as the treasurer. The treasurer is required to file reports with the Board, primarily during time periods close to primaries and general elections. *See* Minn. Stat. § 10A.20. These reports only require that the corporation or other association track relatively basic information, including the fund balance, the contributions it has received, and independent expenditures it has made. *See* Minn. Stat. § 10A.20, subd. 3. As detailed by the State Defendants, a number of independent expenditure political funds and committees have already registered with the Board and have submitted reports.

The new statute includes penalties for "associations" (which includes corporations) that make independent expenditures without complying with new independent expenditure disclosure provisions. *See* Minn. Stat. § 10A.12, subd. 1b (2010 Minn. Laws Ch. 397, § 5). The penalty is a civil fine of up to four times the amount of the independent expenditure, but not to exceed $25,000, except when the violation is intentional. *Id.* This is the penalty that would apply to a corporation if it chose to make "independent expenditures" without registering an independent expenditure political fund and complying with Minn. Stat. § 10A.12, subd. 1a. In addition, under these circumstances, a corporation may be subject to criminal penalties for violation of Minn. Stat. § 211B.15, but only after the Office of Administrative Hearings has finally disposed of the complaint. *See* Minn. Stat. §§ 211B.16, subd. 3, 211B.32, subd. 1. Moreover, this criminal penalty can only be imposed if a corporation (or other association) does not account for their expenditures in their independent expenditure political fund disclosures and in accordance with Minn. Stat. § 10A.12, subd. 1a (2010 Minn. Laws Ch. 397, § 4).

The new provisions of Minnesota law also include penalties for corporations and other associations that register as independent expenditure political committees and funds, for making contributions to candidates, party units, political committees or for making "approved expenditures" (as opposed to "independent expenditures"). Minn. Stat. § 10A.121, subd. 2(a) (2010 Minn. Laws Ch. 397, § 6). The law creates the same civil penalty of up to four times the amount of the contribution or approved expenditure. The statute, however, clarifies that no other penalty provided in law (including criminal prosecution) may be imposed against a corporation or other association that has

registered an independent expenditure political fund or committee and that is subject to a civil penalty under Minn. Stat. § 10A.121, subd. 2(a). *See* Minn. Stat. § 10A.121, subd. 2(b) (2010 Minn. Laws Ch. 397, § 6) ("No other penalty provided for in law may be imposed for conduct that is subject to a civil penalty under this section.") and Minn. Stat. § 211B.15, subd. 7a (2010 Minn. Laws Ch. 397, § 17) ("Application of penalties. No penalty may be imposed [on a corporation] for a violation of this section that is subject to a civil penalty under 10A.121.").

In sum, when an association makes independent expenditures without registering an independent expenditure political fund and complying with Minn. Stat. § 10A.12, subd. 1a (2010 Minn. Laws Ch. 397, § 4), it may be subject to civil and potentially criminal penalties. In contrast, when an association registers its independent expenditure political fund or committee and then makes illegal contributions or expenditures there are no criminal penalties applicable for such violations. *See* Minn. Stat. § 10A.121, subd. 2(b) (2010 Minn. Laws Ch. 397, § 6). Thus, as a matter of law, Plaintiffs could only face criminal charges from Defendant Freeman (or another county attorney) for making independent expenditures in violation of Minn. Stat. § 211B.15, if they fail to register an independent expenditure political fund or committee and account for their independent expenditure activity.

III. Plaintiffs Cannot Satisfy Their Burden for a Preliminary Injunction.

A. Plaintiffs Cannot Show They Are "Likely to Prevail" on the Merits.

Plaintiffs cannot establish that they are "likely to prevail" on the merits on any of their counts. *Planned Parenthood*, 530 F.3d at 730-33. In fact, as discussed below, Plaintiffs' arguments are without legal merit. However, even if the Court believes some of Plaintiffs' claims would survive under the motion to dismiss standard, Plaintiffs cannot show that they are "likely to prevail" on the merits.

1. Plaintiffs Cannot Show That They Are Likely To Prevail on Their Constitutional Challenge to Minnesota's Disclosure Requirements for Independent Expenditure Political Funds.

In Counts I and II, Plaintiffs allege that Minnesota "bans" corporate independent expenditures. Compl. ¶¶ 1a-1c, 5-7, 40-41, 43, 56, 60-63, 65, 67, 70. In addition, Plaintiffs assert that the provisions requiring corporate independent expenditures be reported through a political fund are unconstitutionally burdensome. *Id.* ¶¶ 55-56. The Court should deny Plaintiffs' preliminary injunction with respect to these counts because Plaintiffs cannot show that they are likely to prevail on the merits. Defendant Freeman hereby adopts and incorporates the substantive arguments made by the State Defendants regarding these Counts. Accordingly, those arguments are not repeated here. In addition to incorporating the State Defendants' arguments, Defendant Freeman highlights two legal issues regarding Plaintiffs' arguments in their memorandum in support of the motion for a preliminary injunction.

a. Dicta in *Citizens United* Regarding Reporting Requirements for Political Action Committees Is Not Controlling Precedent and Is Distinguishable from Minnesota's Statutory Disclosure Provisions.

The Court should reject Plaintiffs' attempt to equate Minnesota's disclosure requirements with federal law governing Political Action Committees ("PACs"). The gravamen of Plaintiffs' argument in Counts I and II is that because Minnesota's new disclosure requirements for corporate independent expenditures require reporting contribution and expenditure transactions through an independent expenditure political fund controlled by the corporation, the corporation is somehow "banned" from making independent expenditures through its general fund. The Court should reject this strawman argument, which has been made by other plaintiffs challenging disclosure requirements. *See National Organization for Marriage v. McKee*, 666 F. Supp.2d 193, 206-09 (D. Me. 2009) (rejecting a similar argument and stating "[i]t is important to emphasize that the Maine statute does not *prohibit* contributions or expenditures. Instead it is a registration and reporting statute.") (emphasis in original).

Plaintiffs allege that because corporate independent expenditures must be accounted for in an independent expenditure political fund (created and controlled by the corporation) and then subsequently disclosed, corporations are somehow "banned" from making independent expenditures. For support for this argument, Plaintiffs cite to dicta in the *Citizens United* decision, *see* 130 S. Ct. at 897, in which the Court states that requiring corporations to make independent expenditures through a separate legal entity, as defined by 2 U.S.C. § 441b(b)(2) (i.e., a federal PAC), does not allow the corporation

to make independent expenditures. The *Citizens United* Court did in fact state that "[a] PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak." The Court then went on to state that even if it did allow a corporation to speak (which it does not), the federal requirements for PACs are extremely burdensome. In other words, the *Citizens United* Court rejected the argument that a federal PAC, which is a separate entity from a corporation, which cannot accept unlimited contributions from the corporation, and which has other significant substantive limitations on its abilities to accept contributions and make expenditures, could make the corporation's independent expenditures. For these reasons, the Court concluded that even if a corporation had a federal PAC, that was a constitutionally insufficient method for allowing a corporation to make independent expenditures.

Despite Plaintiffs' claims to the contrary, this discussion in *Citizens United* regarding federal PACs is totally irrelevant to the issues before the Court in this matter. First, *Citizens United* does not hold that laws, like Minnesota's, which require corporations to disclose their independent expenditures and to account for dollars contributed by the corporation for this purpose and expended by the corporation for this purpose, are unconstitutional.

Second, and more importantly, the federal PACs describe by the *Citizens United* Court share very little in common with Minnesota's independent expenditure political funds. There are at least two extremely significant differences that Plaintiffs simply ignore. First, corporations are <u>prohibited</u> from making general-fund contributions to

federal PACs for PAC expenditures (corporations can fund certain administrative costs of the PAC). *See* 2 U.S.C. § 441b(b)(2). In other words, a federal PAC created by a corporation to engage in campaign activity cannot use general corporate funds to fund the PAC's expenditures. Second, federal PACs are limited in the amount of contributions they can receive from individuals (including employees of the corporation) and are limited in how and when they can solicit for contributions from certain individuals, *see* 2 U.S.C. §441b(b), and the amount of contributions they can make to particular candidates, *see* 2 U.S.C. § 441a. These are critical distinctions that dramatically curtail the ability of federal PACs to operate.

In contrast, Minnesota's law related to corporate independent expenditures: (1) allows corporations to use general treasury funds for independent expenditures made and tracked in an independent expenditure political fund account or provided to a separate independent expenditure political fund or committee; (2) does not limit from whom funds are solicited, when individuals are solicited, or the amount of funds a corporation or anyone can contribute or use for independent expenditures; and (3) does not limit the amount of dollars that may be expended on independent expenditures. Accordingly, Plaintiffs' allegation that Minnesota's disclosure law for independent expenditure political funds and committees is just like the law related to federal PACs that the *Citizens United* Court criticized is without merit.

What Plaintiffs really want to do is make independent expenditures without having to timely (or ever) disclose those expenditures and/or where those funds were generated.

Minnesota's disclosure law for independent expenditures is constitutional and is very different from the PAC requirements discussed in *Citizens United*.

b. Minn. Stat. § 10A.12, subd. 1a, is a Disclosure Law and Not a Law Prohibiting Constitutional Expenditures.

Plaintiffs assert that the constitutionality of Minnesota's new disclosure requirements for corporations that wish to make independent expenditures should be analyzed under strict scrutiny, but their argument should be rejected. As discussed above, Plaintiffs assert that Minnesota's new disclosure law, Minn. Stat. §§ 10A.12, subd. 1a (2010 Minn. Laws Ch. 397, § 4), is actually a "ban" on corporate speech and then assert that because it is a "ban," the Court must apply strict scrutiny to determine if the law is constitutional. In fact, Minn. Stat. §10A.12, subd. 1a, is not a "ban" on corporate speech, it is a method of making corporations that wish to make independent expenditures disclose their activities. For the reasons outlined above and by the State Defendants the statute is constitutional. Defendant Freeman writes to highlight the standard the Court should use when analyzing this issue.

In order to analyze whether Plaintiffs can show that they are likely to prevail on the merits, it is necessary for the Court to determine what level of scrutiny applies to Minnesota's law. After *Citizens United*, there can be no dispute that disclosure requirements are not subject to strict scrutiny. Because "disclosure requirements may burden the ability to speak, but they . . . 'do not prevent anyone from speaking,'" disclosure requirements are reviewed under "exacting scrutiny." *Citizens United*, 130 S. Ct. at 914 (citing *Buckley*, 96 S. Ct. at 64 and quoting *McConnell*, 540 U.S. at 201). *See*

also Reed, 130 S. Ct. at 2818 ("We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed 'exacting scrutiny.'").

That standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (citations omitted). Plaintiffs do not appear to challenge that disclosure requirements need only satisfy this standard; rather they assert that this standard does not apply because Minnesota's new law on independent expenditures is a "ban" on corporate expenditures. This argument is without merit. Corporations can make unlimited independent expenditures as long as they register with the Board and make the relevant disclosures. Minnesota's new laws relating to corporate independent expenditures are disclosure laws. They are not substantive bans on the ability of corporations or any other entities to make independent expenditures.

Moreover, when this "exacting scrutiny" test is used, Plaintiffs cannot satisfy their burden that they are "likely to prevail." There can be no doubt that Minnesota has sufficiently important government interests to support its disclosure requirements. The governmental interests underlying the disclosure requirement include providing relevant information to voters and gathering data necessary to enforce more substantive campaign finance provisions. These are "sufficiently important" interests to withstand "exacting

scrutiny." *See Citizens United,* 130 S.Ct. at 914; *McConnell,* 540 U.S. at 194-99; *Buckley*, 424 U.S. at 65-68.[4]

Plaintiffs also assert that the disclosure requirements imposed on an independent expenditure committee or fund are too burdensome. However, the burden here is minimal as highlighted by the State Defendants. Plaintiffs are not likely to prevail on this claim and therefore the Court should deny their request for a preliminary injunction. *See, e.g.*, *National Organization for Marriage v. McKee*, 666 F. Supp.2d at 206-09 (denying preliminary injunction challenging Maine's disclosure requirements for organizations making expenditures related to a ballot initiative and concluding that Maine's campaign disclosure requirements were not unduly burdensome); *Human Life of Washington, Inc. v. Brumsickle*, 2009 WL 62144 at *11 (W.D. Wash. Jan. 8, 2009) (concluding registration and disclosure requirements were not particularly onerous).

2. Plaintiffs Cannot Show That They Are Likely to Succeed on the Merits of the Claims in Counts III and IV.

In Counts III and IV, Plaintiffs allege that the definition of "promote or defeat" in Minn. Stat. § 211B.15, subds. 2, 3, and 4 and the definition of "independent expenditure" in Minn. Stat. § 10A.01, subd. 18, are unconstitutional. Plaintiffs are not likely to

[4] *See, e.g. McConnell*, 540 U.S. at 196 ("The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public. BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. . . . Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public.") (quoting the district court).

succeed on the merits of these claims for two reasons. First, the claims are not justiciable against Defendant Freeman. Second, Plaintiffs cannot show that they are likely to succeed on the merits of these claims. Each Count will be discussed in turn.

a. Plaintiffs Cannot Show that They Are Likely to Succeed in Their Claim Challenging the Constitutionality of the Phrase "Promote or Defeat" in Minn. Stat. § 211B.15.

Plaintiffs cannot show that they are likely to prevail on Count III of Plaintiffs' Complaint because this claim is not justiciable and Plaintiffs' legal argument is without merit. Count III alleges that Minn. Stat. § 211B.15, subds. 2 and 3, which ban corporations from making contributions or expenditures that "promote or defeat" a candidate unless the contribution or expenditure is an independent expenditure, is unconstitutional because the language is vague and overbroad, and because it is susceptible to an interpretation by government officials based on intent and effect.[5] As discussed above, this statute allows independent expenditures, but continues to ban corporate contributions or expenditures that "promote or defeat" a candidate that are not independent expenditures.[6]

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[5] Plaintiffs also challenge Minn. Stat. § 211B.15, subd. 4. This subdivision is focused on contributions and expenditures related to "ballot questions." Plaintiffs do not have standing to make a challenge to this subdivision because they have not alleged there is a "ballot question" on the ballot or that they plan to make any expenditures related to a ballot question. In addition, this challenge fails for the same reasons Plaintiffs' challenge to subdivisions 2 and 3 fails.

[6] Plaintiffs also argue that Minn. Stat. § 211B.15, subds. 2, 3, and 4 violate the First Amendment by banning corporations from engaging in electioneering communications. Pls. Mem. at 20-21. This is the same legal argument Plaintiffs use in Counts I and II (i.e., corporations are banned because they must account for their activity through an

(1) Count III is Not Justiciable.

Plaintiffs' argument in Count III against Defendant Freeman based on the language "promote or defeat" being unconstitutional is not justiciable. Article III, § 2, of the Constitution limits the federal judicial power to the adjudication of "Cases" and "Controversies."

> In order to invoke the jurisdiction of the federal courts, the parties must demonstrate an actual, ongoing case or controversy within the meaning of Article III of the Constitution. Federal courts are not empowered to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

Republican Party of Minn., Third Congressional District v. Klobuchar, 381 F.3d 785, 789-90 (8th Cir. 2004).

Both standing to sue and ripeness are necessary components of a justiciable case or controversy in federal court. *See Renne v. Geary*, 501 U.S. 312, 319-20 (1991). Federal courts presume there is a lack of jurisdiction unless the contrary appears affirmatively from the record. *Id.* at 316. "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Id*. (quotation omitted). A party's lack of standing to bring suit or the failure of a claim to be ripe for adjudication warrants dismissal of a complaint under Fed. R. Civ. P. 12(b)(1). *See St. Paul Area*

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independent expenditure political fund). For the reasons detailed in the State Defendants' memorandum, this argument supporting Count III fails as well.

Chamber of Commerce v. Gaertner, 439 F.3d 481, 483, 485 (8th Cir. 2006); *Wax'n Works v. City of St. Paul*, 213 F.3d 1016, 1020 (8th Cir. 2000).

The elements of Article III standing are well established:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, et al., 504 U.S. 555, 560-61(1992) (quotations and citations omitted).

In a First Amendment overbreadth challenge, the standing requirements are somewhat relaxed. A plaintiff is not "required to await and undergo a criminal prosecution as the sole means of seeking relief." *Gaertner*, 439 F.3d at 485. An injury in fact exists as "long as the plaintiff is objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences." *Klobuchar,* 381 F.3d at 792. A plaintiff meets this requirement "only if there exists a credible threat of prosecution under [the] statute if the plaintiff actually engages in the prohibited expression." *Id.*

> The ripeness doctrine is grounded in both the jurisdictional limits of Article III of the Constitution and policy considerations of effective court administration. Article III limits the federal courts to deciding "Cases" and "Controversies" and thus prohibits us from issuing advisory opinions. One kind of advisory opinion is an opinion advising what the law would be upon a hypothetical state of facts. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.

KCCP Trust v. City of North Kansas City, 432 F.3d 897, 899 (8th Cir. 2005) (citations and quotations omitted). The concepts of ripeness and standing often overlap "most notably in the shared requirement that injury be imminent rather than conjectural or hypothetical." *Mississippi Democratic Party v. Barbour,* 529 F.3d 538, 545 (5th Cir. 2008) (quotation omitted). Where a case raises "free speech issues" that may have "fundamental and far-reaching import," it is particularly important for courts not to decide a case on an "amorphous and ill-defined factual record[.]" *Renne*, 501 U.S. at 324.

Here, with respect to Plaintiffs' allegations in Count III, there is no credible threat of criminal prosecution from Defendant Freeman. For this argument, Plaintiffs admit that if "promote or defeat" is construed to apply only to statements expressly advocating the election or defeat of a candidate it is constitutional. Pls. Mem. at 22. Plaintiffs have not identified any reasonable fear that Defendant Freeman is likely to prosecute them or that Defendant Freeman is likely to construe this statute in an unconstitutional manner. In fact, Plaintiffs have not identified any specific expenditure that they believe could subject to them to an unconstitutional prosecution. Plaintiffs simply assert that the language "promote or defeat" is vague and overbroad. This is insufficient to show that there is a justiciable case against Defendant Freeman.

There are simply no credible facts alleged regarding Plaintiffs being "chilled" as a result of an actual fear of prosecution from Defendant Freeman. As a matter of law, this claim against Defendant Freeman is not justiciable. Accordingly, Plaintiffs have not

shown that they are likely to prevail on the merits of this claim against Defendant Freeman.

(2) The Language of Minn. Stat. § 211B.15 is Not Unconstitutionally Vague and Overbroad.

In addition to not being ripe for adjudication, Count III of Plaintiffs' Complaint asserting that Minn. Stat. § 211B.15, subds. 2 and 3, are vague and overbroad because of the phrase "promote or defeat" a candidate extends beyond express advocacy fails as a matter of law. Plaintiffs argue that this language is unconstitutionally vague and overbroad because it does not clearly apply to only statements expressly advocating the election or defeat of a candidate. Pls. Mem. at 22. Plaintiffs' legal argument is without merit. More than fifteen years ago, the argument Plaintiffs bring here regarding the meaning of "promote or defeat" was made in a case and rejected by this Court. *See Day v. Hayes*, 863 F. Supp. 940, 955 (D. Minn. 1994), *aff'd in part, rev'd in part on other grounds sub nom. Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert denied*, 513 U.S. 1127 (1995). In rejecting the plaintiffs' vagueness and overbreadth challenge, the *Day* Court stated:

> In the present case, the statute prohibits corporations from making independent expenditures "to promote or defeat the candidacy of an individual for nomination, election or appointment to a political office." Minn. Stat. § 211B.15, subd. 3. Unlike the language in *Buckley*, the foregoing requires no limiting construction. A person of ordinary intelligence could readily understand that what is prohibited is any expenditure for communication clearly directed at a specific candidate with the intent of encouraging or discouraging the candidate's election or appointment. In the words of the *Buckley* Court, Subdivision 3 prohibits "communications that in express terms advocate the election or defeat" or a candidate for elective or appointed office. *See id.*

863 F. Supp. at 955. The *Day* Court held that the language "promote or defeat" a candidate was constitutional and complied with the standard set out by the United States Supreme Court in *Buckley.*

More recently, in *Minnesota Citizens Concerned for Life v. Kelley*, 427 F.3d 1106, 1110 (8th Cir. 2005), the Eighth Circuit rejected this same argument regarding a separate Minnesota campaign finance statute that used "promote or defeat." In *Kelley*, MCCL challenged the definition of "political fund," which included the following language: "to influence the nomination or election of a candidate or to promote or defeat a ballot question." (Emphasis added). In deciding the case, the Eighth Circuit certified a question to the Minnesota Supreme Court, which held:

> [T]o clarify the conformity of our statute with *Buckley*, we choose to reformulate the Eighth Circuit's question as follows:
>
> Whether the use of the phrase "to influence the nomination or election of a candidate or to promote or defeat a ballot question" and related phrases in Minn. Stat. § 10A.01, subds. 27 and 28 may be narrowly construed to limit the application of those statutes to groups that expressly advocate the nomination or election of a particular candidate or the promotion or defeat of a ballot question.
>
> We answer the certified question, as reformulated, in the affirmative.

MCCL, 427 F.3d at 1110 (quoting *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424, 430 (Minn. 2005)). Based on this answer the Eighth Circuit dismissed the case stating that "the Minnesota Supreme Court holds that the challenged definitions do not apply to groups that engage in pure issue advocacy." *Id.*

In sum, the Eighth Circuit Court of Appeals, the U.S. District Court for the District of Minnesota, and the Minnesota Supreme Court have each held that the phrase "promote

or defeat" only applies to "express advocacy" in support of or in opposition to the election of a candidate and do not apply to pure issue advocacy. In light of this precedent, even if the Court concludes that this claim is justiciable, Plaintiffs cannot show that they are likely to prevail on the merits.

b. Plaintiffs Cannot Show That They Are Likely to Succeed in Count IV of the Complaint Challenging the Definition of "Independent Expenditure."

Plaintiffs cannot show that they are likely to succeed in their claim against Defendant Freeman that the definition of "independent expenditure" is unconstitutional and chills their First Amendment rights. Defendant Freeman is not a proper Defendant for Count IV of Plaintiffs' complaint. Moreover, even if he were, the definition is constitutional. The statutory definition of "independent expenditure" is:

> [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. An independent expenditure does not include the act of announce a formal public endorsement of a candidate for public office, unless the act is simultaneously accompanied by an expenditure that would otherwise qualify as an independent expenditure under this subdivision.

Minn. Stat. § 10A.01, subd. 18 (2010 Minn. Laws, Ch. 397, § 1). Plaintiffs agree that this definition is constitutional. Pls. Mem. at 23.

Plaintiffs assert that Advisory Opinion 398, which was issued by the Board on June 17, 2008, construed the phrase "express advocacy" broadly and in violation of the First Amendment. Compl., Ex. 5. Plaintiffs assert that this Advisory Opinion from the

Board renders the law unconstitutionally vague because it now applies beyond "express advocacy" and the speaker is left to guess where the line will be drawn. This Count fails as a matter of law against Defendant Freeman for two reasons.

First, Plaintiffs admit the statutory definition is constitutional. Pls. Mem. at 23. County Attorney Freeman has no formal role in bringing cases before the Board alleging violations of Minn. Stat. Ch. 10A. County Attorney Freeman's role, if any, would be to consider criminal charges for violation of Minn. Stat. § 211B.15, after the matter was first considered by the Office of Administrative Hearings. *See* Minn. Stat. § 211B.32. Under these circumstances, it would presumably be based on a corporation engaging in some type of issue advocacy that Plaintiffs assert the Board and/or the OAH might conclude was express advocacy (based on the Board's Advisory Opinion 398) and should be reported as an independent expenditure. However, County Attorney Freeman's actions would be based on the statutory definition of independent expenditure and not an Advisory Opinion of the Board. The Board's advisory opinions are not controlling on county attorneys. *See* Minn. Stat. § 10A.02, subd. 12(b). Plaintiffs have not asserted that Defendant Freeman has improperly construed Minn. Stat. §§ 211B.15 or 10A.01, subd. 18. Accordingly, there can be no chilling of Plaintiffs' First Amendment rights by Defendant Freeman and there is no justiciable claim against Defendant Freeman as a matter of law.

Second, on December 3, 2008, subsequent to Advisory Opinion 398, the Board issued another opinion, which correctly interpreted applicable law. *See* Rogan Aff., Ex. 3

(Finding and Order on the matter of the Complaint of Richard V. Novack regarding Minnesota Majority). This decision states:

> By statutory definition, an "independent expenditure" is "an expenditure expressly advocating the election or defeat of a clearly indentified candidate . . ." Express advocacy requires use of specific words such as "vote for," "elect," "defeat," or similar words. None of the material produced by Minnesota Majority expressly advocates the election of defeat of a candidate so as to constitute an independent expenditure.

Id. at 7. This opinion correctly interpreted the law and this interpretation supersedes the prior opinion. Thus, as a matter of law, Plaintiffs' attempt to assert the definition of "independent expenditure" is unconstitutional fails as a matter of law. Accordingly, Plaintiffs cannot establish that they are likely to succeed on the merits on Count IV.

3. Plaintiffs Cannot Show That They Are Likely To Prevail on Their Claim that Minnesota's Ban on Direct Corporate Contributions to Candidates and Political Parties Is Unconstitutional.

Finally, Plaintiffs cannot show that they are likely to prevail on Count V of their Complaint, which seeks to strike down Minnesota's ban on direct corporate contributions to candidates and political parties. Defendant Freeman adopts all of the arguments made by the State Defendants regarding Count V and incorporates those arguments by reference. Accordingly, those arguments will not be repeated here.

In sum, Plaintiffs' legal arguments supporting their five-count Complaint are not sound. Plaintiffs' attempts to distort Minnesota's new disclosure requirements into substantive "bans" on corporate independent expenditures should be rejected. Because Plaintiffs cannot show that they are likely to prevail on the merits, the Court should deny their motion for a preliminary injunction. The Eighth Circuit has concluded that in "a

First Amendment case, therefore, the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue." *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008). If, as here, Plaintiffs have not show they are likely to prevail on the merits, a motion for a preliminary injunction should be denied.

B. Plaintiffs Have Not Met Their Burden of Showing They Are Likely To Suffer Irreparable Harm.

Plaintiffs do not satisfy the irreparable harm *Dataphase* factor because they are not likely to prevail on the merits. County Attorney Freeman does not dispute that if Plaintiffs could show that they were likely to succeed on the merits of the First Amendment claim, this would be an irreparable injury. *See Nixon*, 545 F.3d at 691 ("It is well-settled law that a 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion)). However, as discussed above, Plaintiffs are not likely to succeed on the merits. When the success on the merits factor is not met, the asserted threat of irreparable harm is weakened in comparison to the government's and public's interest in the statute. In fact, when the likelihood of success on the merits factor is not met, the "remaining *Dataphase* factors cannot tip the balance of harms in movant's favor[.]" *Planned Parenthood*, 530 F.3d at 738 n. 11. "If the movant cannot show that it is likely to prevail on the merits, there is no reason at the preliminary injunction stage for the courts to disturb a duly elected legislature's attempt to balance [the interests of movant and the public]." *Id.*

In addition, Plaintiffs will not suffer an irreparable injury because they can make independent expenditures (that are disclosed through an independent expenditure political fund).

C. Balance of Hardships and the Public Interest Factors Favors Defendants.

Similarly, the balance of hardship and the public interest factors favor Defendants. The Eighth Circuit has stated that *when* there is a showing that a plaintiff is likely to succeed on the merits of a First Amendment claim, the balance of equities and the public interest favor granting the preliminary injunction. However, when that standard is not met, the balance of equities and the public interest favor Defendants who have a significant interest in upholding a constitutional statute that is designed to ensure the public is informed about campaign spending. This is particularly true here. In response to the *Citizens United* decision, the Minnesota Legislature passed laws aimed at updating Minnesota's campaign finance system to authorize independent expenditures by corporations and to provide disclosures related to this activity. There is a general election on November 2, 2010. If the Court grants the relief requested by Plaintiffs, corporations will be able make independent expenditures that will directly and dramatically impact the election without there being any disclosure regarding who is making the expenditures. Voters, members of the media, corporate shareholders, candidates, and others will be without critical information prior to election. A significant amount of money will be thrust into the election with no disclosure. This is a significant harm that the Minnesota Legislature sought to prevent by passing the laws it did.

Plaintiffs argue that because constitutional rights are at stake, the balance of public interest and equities favors issuing the injunction. However, this is true only if Plaintiffs are likely to succeed on the merits. Because Plaintiffs have not made this showing, the balance of harms favors Defendants.

CONCLUSION

For the reasons outlined above, Defendant Freeman respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction.

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