No. 10-A _____

In the Supreme Court of the United States

_____

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC. ET AL., ***Appellants***

v.

LORI SWANSON ET AL., ***Appellees*****,**

_____

Appeal from Case NO. 10-3126 in the
U.S. Court of Appeals for the Eighth Circuit

and

Civ. No. 10-CV-2938 DWF/JSM in the
U.S. District Court for the District of Minnesota

_____

Emergency Application of Minnesota Citizens Concerned For Life, Inc. et al. for Injunction Pending Appeal

To the Honorable Samuel A. Alito

Justice of the United States Supreme Court and
Circuit Justice for the Eighth Circuit

_____

James Bopp, Jr., *Counsel of Record*
Joe La Rue
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434
(812) 235-3685 (facsimile)

October 20, 2010

Table of Contents

Table of Authorities

Cases

Constitution, Statutes, and Rules

Other

Application for a Writ of Injunction Pending Appeal

To the Honorable Samuel A. Alito, Justice of the United States and Circuit Justice for the U.S. Court of Appeals for the Eighth Circuit:

Appellants Minnesota Citizens Concerned for Life ("MCCL"), The Taxpayers League of Minnesota ("Taxpayers"), and Coastal Travel Enterprises, LLC ("Coastal") (collectively "Corporations") respectfully move for an order granting a writ of injunction, pending final action by the Eighth Circuit and possible review by the U.S. Supreme Court.

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. As the Supreme Court has recently noted, "the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign." *Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010) ("*CU*").

The Corporations have a concrete plan to make independent expenditures during *this* election. However, in direct subversion of *Citizens United*, the State of Minnesota requires corporations that wish to make independent expenditures to submit to PAC-style burdens. Unless immediate relief is granted prior to the November 2, 2010 election the Appellants will forever be denied their constitutional right to engage in protected political speech *during the 2010 election*.

Facts and Procedural History

MCCL is a Minnesota pro-life advocacy corporation. (Doc. 1 ("VC.") ¶¶ 21-22.) Taxpayers is a Minnesota nonpartisan corporation advocating lower taxes, limited government,

and taxpayer empowerment. (*Id*. ¶ 29.) Both are nonprofit under 26 U.S.C. 501(c)(4). (*Id*. ¶¶ 23, 30.) Coastal is a Minnesota limited liability corporation providing retail travel industry services. (*Id*. ¶ 35.) None of the Corporations exists for the purpose of nominating or electing candidates, nor does any spend the majority of its disbursements on such activities. (*Id*. ¶¶ 25, 34, 35.)

On July 7, 2010, the Corporations challenged the constitutionality of certain Minnesota campaign-finance provision. First, they challenged Minn. Stat. §§ 10A.12(1), 10A.12(1a), and 211B.15(3), (*id*. ¶¶ 59-65,) which ban corporate general-fund independent expenditures ("IEs") greater than $100 annually ("IE ban"). (*Id*. ¶ 40.) Corporations wishing to make IEs are forced to employ a separate IE-fund for doing so, which is like the federal political committee ("PAC") requirement of a separate segregated fund. (*Id*. ¶¶ 40, 55.) Such funds have PAC-style requirements, including registration, treasurer, record-keeping, and dissolution requirements, as well as the requirement that regular, ongoing reports be filed even absent activity. (*Id*. ¶ 55.) As soon as possible, the Corporations want to make general-fund IEs totaling over $100 in a year. (*Id*. ¶ 39.) But Minnesota prohibits them. (*Id*. ¶ 40.)

Second, the Corporations challenged Minn. Stat. §§ 10A.27(13), 211B.15(2), and 211B.15(4), (*id*. ¶¶ 81-86,) which ban corporate contributions to candidates and political parties by requiring that they be made through a PAC-option "conduit fund" ("contribution ban"), (*id*. ¶ 53.) Corporations may not decide to whom their conduit funds contribute. (*Id*.). Conduit funds must contribute to candidates for whom the employee-donors earmarked contributions. (*Id*.). Labor unions need not employ conduit funds. (*Id*.) They use "political funds" for contributions and determine to which candidates the funds will contribute. (*Id*.). So contributions to political funds need not be earmarked as contributions to conduit funds must be. (*Id* ¶¶ 52-53.) As soon as

possible, each corporation wants to contribute to candidates it supports. (*Id*. ¶ 48.) MCCL and Coastal also want to make a general-fund contribution over $100 in a year to a political party. (*Id*. ¶ 45.) They would do so but for Minnesota's prohibition. (*Id*. ¶¶ 46-47, 49-50.)

Third, the Corporations challenged Minn. Stat. § 10A.01(18), which defines "independent expenditure" ("IE definition"), as authoritatively interpreted by the Minnesota Campaign Finance and Public Disclosure Board (*Id*. ¶¶ 77-80.)[1]

The Corporations moved for preliminary injunction (Doc. 8), denied on September 20, 2010 (Doc. 59), noticed appeal (Doc. 60), and moved for injunction pending appeal (Doc. 61), which was denied on September 28 (Doc. 67). On October 18, 2010, the United States Court of Appeals for the Eighth Circuit ordered that appellants' motion for injunction pending appeal will be addressed along with the merits of the case at the January 11, 2011 oral argument.

Standards for Granting a Writ of Injunction

The authority of this Court to grant a writ of injunction is found in the All Writs Act, 28 U.S.C. § 1651(a), which reads:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

---

[1]While the independent-expenditure definition requires so-called "magic words" of "express advocacy," such as "vote for," which follows the Supreme Court's instruction when it created the express-advocacy standard to avoid vagueness and overbreadth in an expenditure definition, *see Buckley v. Valeo*, 424 U.S. 1, 44 & n.52 (1976), the Board subsequently issued an advisory opinion saying that express advocacy did not require magic words, which opinion the State now claims was reversed in comments pertaining to an enforcement matter. The debate over whether such commentary can overrule an advisory opinion is not necessary for this Court to consider here because the State's present position is that express advocacy requires magic words. The Corporations seek a declaratory judgment due to the State's vacillation, which does not require consideration in this motion for injunction pending appeal.

Although Applicants here are not seeking a stay, it is useful to review the standards used by the Court in assessing stay applications. The Court evaluates four factors to determine whether to grant a stay: (1) whether the stay applicant will be irreparably injured absent a stay; (2) whether the applicant has made a strong showing that he is likely to succeed on the merits; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). The factors are substantially the same as those considered in a preliminary injunction analysis, and the first two factors are the most critical. *Id.*

Applicants here seek more than a stay (which would operate upon the judicial proceeding itself); they seek injunctive relief. *See id.* at 1757–58. The grant of a writ of injunction, unlike a stay, "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., Circuit Justice). It therefore "demands a significantly higher justification than that described in . . . stay cases." *Id.* The most significant difference is that rather than having to make a "strong showing" of likelihood of success on the merits (the standard in stay cases), the Court will not issue a writ of injunction unless the legal rights at issue are "indisputably clear." *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., Circuit Justice) (citation and internal quotation marks omitted). However, while a preliminary injunction may be generally an "extraordinary remedy," it is not "extraordinary" where free speech is at issue, *see, e.g.*, *Ashcroft v. ACLU*, 524 U.S. 656 (2004) (finding no abuse of discretion in granting preliminary injunction against enforcement of Child Online Protection Act). In any event, all the requirements for an injunction are met in this

case.

Argument

I. Absent Swift Relief, Applicants Will Suffer Immediate and Irreparable Injury.

"The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury . . . ." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Deprivation of equal protection rights is irreparable injury. *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (in equal-protection context: "alleged constitutional infringement will often alone constitute irreparable harm"); *Henry v. Greenville Airport Commission*, 284 F.2d 631, 633 (4th Cir. 1960) (preliminary injunction may not be denied when plaintiff shows equal-protection violation). Unless immediate injunctive relief is granted here, the Appellants will forever lose their right to engage in protected political speech during the 2010 election campaign.

II. It Is Indisputably Clear that Applicants Will Ultimately Prevail on the Merits.

A. The IE Ban Is Unconstitutional as a Matter of Law.

1. The IE Ban Forces Corporations to Employ Segregated Accounts to Make IEs in Violation of *Citizens United*.

CU held that corporations may not be prohibited from making *general-fund* IEs. 130 S. Ct. at 913. Nor may they be required to employ a separate segregated fund ("SSF")[2] to make their

[2]"SSFs" and "PACs" are synonymous. *See CU*, 130 S. Ct. at 887 (under 2 U.S.C. 441b(b)(2), corporations "may establish a 'separate segregated fund' (known as a political action committee, or PAC)" for political speech purposes); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 485 (2007) (Scalia, J., concurring) ("*WRTL-II*") (a "separate segregated fund" is "commonly known as a 'PAC'"); *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238, 254 (1986) ("a 'separate segregated fund' . . . . is considered a 'political committee'").

Under federal law, a political committee (PAC) includes "any separate segregated fund established under the provisions of section 441b(b) of this title." 2 U.S.C. 431(4)(B). Section

IEs, *id*., because such a requirement is actually a ban on corporate speech, *id*. at 897 ("Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak."). SSFs cannot allow *corporations* to speak because they are separate legal entities. *Id*. Corporations must be allowed to make their own, *general fund*, IEs. *Id*. at 914. Minnesota does precisely what *CU* forbids: it bans corporate general-fund IEs, and requires corporations to employ SSFs to make their IEs. This is unconstitutional.

The State sought to avoid this conclusion below with two claims. First, it asserted it has not banned corporate IEs because corporations may make IEs either by contributing funds to other IE committees or by forming an SSF. (Doc. 43 at 16-17.) Neither option allows the *corporation itself* to speak. If corporations give money to organization making IEs, the corporations are not making their *own* IEs. If corporations form SSFs to make IEs, the SSFs make the IEs, not the corporations. *CU* was clear: corporations must be allowed to make their own, general-fund IEs. *Id*. at 913. Allowing them to contribute to others' IEs or form SSFs to make IEs is not a constitutionally permissible alternative.

Second, the State asserted a disclosure interest in requiring corporations to employ SSFs to make IEs. (Doc. 43 at 17-20.) Yet *CU* explicitly rejected PAC-style disclosure elements adopted by Minnesota—e.g., regular, ongoing reporting (even when there is nothing to report), registration, and record-keeping—for corporations making IEs. 130 S. Ct. at 897-98. The type of disclosure that *CU* upheld was on-ad disclaimers and event-driven disclosure (organization

---

441b(b) provides for "the establishment, administration, and solicitation of contributions to a separate segregated fund . . . for political purposes by a corporation . . . "—in other words, a PAC. 2 U.S.C. 441(b)(2)(C).

reports speech when done), not PAC-style burdens. *Id*. at 914.

The State thus confuses its PAC-style disclosure requirements—which *CU* (1) declared are "burdensome" and "onerous," 130 S. Ct. at 897, 898; (2) evaluated under *strict* scrutiny, *id*. at 898; and (3) held unconstitutional for corporate IEs, *id*. at 913—with the on-ad attribution and one-time reports that *CU* upheld under exacting scrutiny, *id*. at 914. Every positive statement *CU* made about disclosure related to on-ad attribution requirements and simple, *"event-driven"* reporting of *general-fund* IEs (i.e., reporting IEs when made and any contributions earmarked for express advocacy). None related to the type of detailed, PAC-style reporting Minnesota requires each reporting period regardless of whether IEs were made, nor to the PAC-style registration, record-keeping, and dissolution requirements Minnesota imposes on corporations.

Besides, *CU* held that the *only* permissible interest in restricting speech is the anticorruption interest. *Id*. at 901, 909. *CU* explicitly rejected *all* other interests, including (1) preventing "distortion" in elections owing to corporate wealth, *id*. at 903-05, (2) preventing influence or access with candidates, *id*. at 910, (3) protecting dissenting shareholders, *id*. at 911, and (4) suppressing speech on the basis of the speaker's corporate identity, *id*. at 913. While there is an interest in disclosure, *id*. at 914, that interest cannot justify banning a corporation's own general-fund speech. In fact, the type of disclosure *CU* held permissible is on-ad and event-driven reporting that "do[es] not prevent anyone from speaking[.]" *Id*. at 914. Limitations on speech must be justified by an anti-quid-pro-quo corruption interest. *Id*. at 901, 909. But IEs are, by definition, noncorrupting. *Id*. at 909. So they may not be restricted nor banned. *Id*. at 913.

The State has no law that will require constitutional disclosure of the sources of IEs—that is, the type of on-ad, event-driven disclosure that *CU* upheld for IEs. (Doc. 43 at 40 ("Plaintiffs'

requested relief would invalidate any reporting and related disclosure of corporate independent expenditures . . . .")) That, however, should not be held against the Corporations, or used as an excuse to impose on them unconstitutional speech bans. The State's permissible remedy is to draft a constitutional disclosure law, not ban corporate speech. *CU*, 130 S. Ct. at 911.

2. The IE Ban Imposes PAC-Style Burdens in Violation of *Buckley*.

Only groups "under the control of . . . candidate[s] or [having] the major purpose of . . . nominati[ng] or electi[ng] . . . candidate[s]" may be subjected to PAC status or burdens. *Buckley*, 424 U.S. at 79. An entity's major purpose is determined on the basis of (1) its "central organizational purpose" or (2) its "independent spending." *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 and n.6 (1986) (plurality opinion) ("*MCFL*"). So only organizations that are organized to nominate or elect candidates or that spend the majority of their money to nominate or elect candidates may be subjected to PAC-style burdens. Federal circuits have invalidated state and federal laws imposing PAC status or burdens absent the major-purpose test. *See N.M. Youth Organized v. Herrera*, __F.3d__, 2010 WL 2598314 at *7 (10th Cir. 2010) (no PAC status absent *Buckley*'s "major purpose"); *N.C. Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008) (same); *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1153–54 (10th Cir. 2007) (same).[3]

[3]District courts have recognized the necessity of the major-purpose test. *See, e.g., S.C. Citizens for Life v. Krawcheck*, No. 4:06-cv-2773, slip op., 2010 WL 3582377 (D. S.C. September 13, 2010); *Nat'l Fed'n of Republican Assemblies v. U. S.*, 218 F. Supp. 2d 1300, 1330 (S.D. Ala. 2002); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1327 (S.D. Ala. 2000); *S.C. Citizens for Life v. Davis*, No. 3:00-0124-19 (D.S.C. 2000) (unpublished opinion and order granting preliminary injunction); *FEC v. GOPAC*, 917 F. Supp. 851, 1468-71 (D.D.C. 1996); *N.Y. Civil Liberties Union v. Acito*, 459 F. Supp. 75 (S.D.N.Y. 1978). *But see NOM v. McKee*, No. 09-538, slip op., 2010 WL 3270092 (D. Me. Aug. 19, 2010) (test inapplicable to state regulations).

Even if requiring corporations to employ IE funds does not ban general-fund IEs, it still imposes PAC-style burdens on entities that may not be regulated as PACs. None of the Corporations have *Buckley*'s major purpose. (VC ¶¶ 25, 34, 35.) They may neither be subjected to PAC-style burdens nor required to employ a PAC to engage in First Amendment activity. But the IE ban forces corporations wishing to make IEs to do so through a separate fund, which the State then regulates as a PAC, regardless of the corporations' major purpose. It may not constitutionally do so.

3. The IE Ban Fails Scrutiny.

Laws that burden political speech, including IE bans, are subject to strict scrutiny. *Citizens*, 130 U.S. at 898; *Day v. Holahan*, 34 F.3d 1356, 1360-61 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995). So the State must "prove" that the law is "narrowly tailored" to a "compelling" interest, *WRTL-II*, 551 U.S. at 464, and employs the "least restrictive means," *Gonzales*, 546 U.S. at 429; *MCFL*, 479 U.S. at 262. The State cannot meet its burden because "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," *CU*, 130 S.Ct. at 909, and only the anti-quid-pro-quo corruption interest justifies political speech restriction, *id*. at 901, 909. Regardless, "[a]n outright ban on corporate political speech during the critical preelection period *is not a permissible remedy*." *Id*. at 911 (emphasis added).

Even if the IE ban were not a ban on speech but rather a disclosure law, as the State claims, it would still fail scrutiny. While on-ad and event-driven disclosure requirements are subject to exacting scrutiny, *CU*, 130 S.Ct. at 914, laws that impose PAC status or require groups to speak through PACs are subject to strict scrutiny, *id*. at 898; *Day*, 34 F.3d at 1363. Because

laws subject to strict scrutiny must employ the least restrictive means to further their interest, *MCFL*, 479 U.S. at 262, states may not impose these burdensome, PAC-style requirements unless doing so is the least-restrictive means to meet a compelling governmental interest.

The federal scheme for reporting IEs is significantly less restrictive than Minnesota's imposition of PAC status and burdens. Under the federal scheme, groups making IEs simply file what may be called an "event-driven report" the next time quarterly independent expenditure reports are due. There is no requirement (as in Minnesota) to register, file ongoing periodic reports (absent further independent expenditures), or file a notice of dissolution. Because PAC status is not the least restrictive means for reporting IEs, Minnesota may not constitutionally impose it.

B. The Contribution Ban Is Unconstitutional as a Matter of Law.

The contribution ban fails First Amendment scrutiny as both a ban on speech and a content-based regulation of speech, and it fails the Fourteenth Amendment's equal protection guarantee.

1. The Contribution Ban Is Subject to Strict Scrutiny, Which it Fails.

Though contribution *limits* are generally evaluated under intermediate scrutiny, the contribution ban is subject to strict scrutiny for two reasons. First, *CU* clarified that *bans* on political speech are subject to strict scrutiny, 130 S. Ct. at 897, 898, and a contribution is both political association and speech, *Buckley*, 424 U.S. at 20. Second, the contribution ban is a content-based regulation, which targets one type of speech—namely, *political* contributions—but does not prohibit other kinds of contributions, such as contributions to charitable, educational, or religious organizations. Such content-based regulations are subject to strict scrutiny, because

"above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *See Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972). *See also Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (statute that both prohibits speech on the basis of its content and burdens a category of speech that is essential to First Amendment freedoms triggers strict scrutiny).

That the statute targets political speech broadly is irrelevant. It is still a content-based restriction because it bans only one type of contribution. "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). Thus, a statute that singles out political speech as a general category is content-based even though it does not single out particular political views, and even though it applies to all political speech and "does not favor either side of a political controversy," *Consol. Edison Co.*, 447 U.S. at 537. *See also Burson v. Freeman*, 504 U.S. 191, 197 (1992) (plurality opinion) (speech restriction on all campaign-related speech was content-based); *Mosley*, 408 U.S. at 94 (speech restriction that permitted labor picketing but not other peaceful picketing was content-based).

A regulation targeting speech expressly advocating the election or defeat of candidates was content-based, though burdening all speech equally, and applied strict scrutiny. *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 967 (8th Cir. 1999). *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1009 (9th Cir. 2003). Here, as in those cases, the restricted speech (political contributions) is defined precisely by its *content*. The regulation bans all general-fund political contributions, but not other contributions. The ban also

singles out certain speakers—corporations—and prohibits them from making general fund political contributions, as others are allowed to do. The First Amendment prohibits speaker-based restrictions on speech, in part because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *CU*, 130 S. Ct. at 898-99; *see also id.* at 904-08 (government may not ban political speech "simply because the speaker is an association that has taken on the corporate form").

The contribution ban is therefore content-based, and so must satisfy strict scrutiny and employ the least restrictive means. The *only* interest that can justify restrictions on political speech is the anti-quid-pro-quo-corruption interest. *CU*, 130 S. Ct. at 901, 909. That interest is *only* implicated by *large* contributions. *Id*. at 901; *Buckley*, 424 U.S. at 28, 45. A *ban* on contributions cannot be "narrowly tailored" to the interest of eliminating *large* contributions, but is overinclusive, reaching small contributions that could never encourage quid-pro-quo corruption. The contribution ban therefore fails strict scrutiny.[4]

2. The Contribution Ban Violates Equal Protection.

The ban violates Fourteenth Amendment equal protection for treating corporations differently than similarly situated associations, including labor unions. Such organizations may raise contributions from members into "political funds," then determine the candidates that will receive contributions from the members' donations. Minn. Stat. § 10A.12. Corporations may not use political funds, *id*., but must use "conduit funds" to raise donations from employees. Minn.

[4]The ban also fails intermediate scrutiny because, while courts may have "no scalpel to probe" whether one limit would be better than another, *Randall v. Sorrell*, 548 U.S. 230, 248 (2006), none is needed to determine that a complete ban cannot be "closely drawn" to the interest of eliminating *large* contributions.

Stat. § 211B.15(16). Unlike labor unions, corporations cannot decide to whom their fund should contribute. Rather, they must follow the direction of their employee-donors, who must earmark their contributions for specific candidates. *Id*.

The Corporations are only aware of two cases considering whether corporations and labor unions are similarly situated for campaign-finance purposes. In *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 665-66 (1990), the Supreme Court said they were not similarly situated because of "crucial differences." But the "crucial differences" *Austin* identified resulted from the "state conferred advantages" of the corporate form, which *Austin* said distorted elections, *Austin*, 494 U.S. at 665-66, a concern that *CU* said is no longer valid in overturning *Austin*, *CU*, 130 S. Ct. at 903-908. Thus, *Austin*'s analysis is overturned and inapplicable.

In *Dallman v. Ritter*, 225 P.3d 610 (Col. 2010), the situation was the exact opposite from Minnesota's law. Corporations could control PACs that could make contributions while labor unions could not. *Id*. at 634. The court said this "strips unions of any political voice, while still allowing corporations to participate through their own PACs." *Id*. This disparate treatment "implicat[es] the freedoms guaranteed by the Equal Protection Clause of the Fourteenth Amendment" because corporations and labor unions, though "structurally dissimilar," are nevertheless "similarly situated" for purposes of campaign-finance regulations. *Id*.

Dallman applied strict scrutiny because "[e]qual [p]rotection . . . requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Id*. (*quoting Mosley*, 408 U.S. 92, 101 (1972). Because the government had no compelling interest in restricting contributions from labor unions but not corporations, the court held the restriction an equal-protection violation. *Id.* at 635. As in *Dallman*, the State has no interest supporting

disparate treatment of corporations and other associations, including labor unions. The contribution ban therefore violates the Fourteenth Amendment.

III. The Balance of Hardships and Public Interest Favors Granting an Injunction.

"[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]" *U.S. v. Raines*, 362 U.S. 17, 27 (1960). If it is likely that a challenged provision violates First Amendment rights of expressive association—which determination already includes examining asserted government interests under strict scrutiny—then the preliminary-injunction analysis is over except for formally recognizing that loss of First Amendment rights is irreparable harm, that balancing harms favors constitutional rights, and that the public interest is always in protecting the "supreme Law of the Land." U.S. Const. art. VI.[5] The government may not be heard to argue that it has an enforcement interest, that duly-enacted laws must be presumed constitutional, that there will be a 'wild west' scenario shortly before an election, that the status quo must be preserved, or the like if the First Amendment prescribes liberty. Such interests asserted for balancing harms or determining public interest are not cognizable if they were inadequate to defeat a determination of likely success on the merits. The First Amendment

---

[5]*See Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009) ("There appears to be no dispute over the appellants' entitlement to relief under the other criteria if their First Amendment rights were violated") (*citing Elrod*, 427 U.S. at 369-73); *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2010) (finding that the likely success prong is "most important . . . and often determinative in First Amendment cases"); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (likely merits success in First Amendment case established irreparable harm and favorable equities balance and public interest); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) (When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary."); *G & V Lounge v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1999) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.").

trumps all such interests.

The Supreme Court has recognized that challenges to campaign-finance laws would, by their nature, be brought near elections. As *Citizens* put it:

> It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on . . . .

130 S. Ct. at 895.

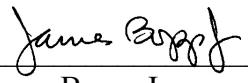
These principles answer common arguments made, and interests asserted, by government entities in the context of preliminary injunctions sought in First Amendment free speech and association cases brought near elections. For example, the fact that a challenge is brought near an election has no bearing on whether the challenged provision is likely unconstitutional and, therefore, no bearing on whether a preliminary injunction should issue. Bringing a challenge near an election may not be held against a plaintiff in a preliminary injunction analysis because that is naturally when such challenges arise. And every effort should be made, including at the preliminary injunction stage, to quickly resolve suits without burdensome litigation in a way that promotes robust public debate on issues of the day.

Conclusion

For the foregoing reasons, the Corporations respectfully request this Court to grant their Motion for Injunction Pending Appeal.

October 20, 2010

Respectfully Submitted,



James Bopp, Jr.
Joe La Rue
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
Phone: (812) 232-2434
Fax: (812) 235-3685

No. 10-A _____

In the Supreme Court of the United States

_____

MINNESOTA CITIZENS CONCERNED FOR LIFE, INC. ET AL., ***Appellants***

v.

LORI SWANSON ET AL., ***Appellees*,**

_____

Appeal from Case NO. 10-3126 in the
U.S. Court of Appeals for the Eighth Circuit

and

Civ. No. 10-CV-2938 DWF/JSM in the
U.S. District Court for the District of Minnesota

_____

Application of Minnesota Citizens Concerned For Life, Inc. et al. for an Injunction Pending Appeal

To the Honorable Samuel A. Alito

Justice of the United States Supreme Court and
Circuit Justice for the Eighth Circuit

_____

James Bopp, Jr., *Counsel of Record*
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434
(812) 235-3685 (facsimile)

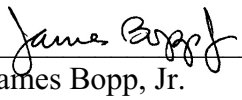
October 20, 2010

Certificate of Service

I, James Bopp, Jr., a member of the bar of this court, certify that on October 20, 2010, I served a copy of the *Emergency Application of Minnesota Citizens Concerned For Life, Inc. et al.*, together with the *Appendix*, with the following individuals at the addresses listed below by placing a copy for delivery by Federal Express, and served a courtesy copy of the same via email upon the following persons:

Alan I. Gilbert, Esq., Solicitor General
John Steven Garry, Asst. Attorney General
Kristyn Marie Anderson, Asst. Attorney General
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
Counsel for the State Defendants

Daniel Rogan, Assistant County Attorney
Beth A. Stack
300 South 6th Street
Government Center
Minneapolis, MN 55487
Counsel for Defendant County Attorney Freeman



James Bopp, Jr.
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
Phone: (812) 232-2434
Fax: (812) 235-3685