

2013

Minnesota Citizens Concerned for Life, Inc. v. Swanson and Disclosure Burdens: Does Getting Corporations to Talk Suppress Their Speech?

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Note*

*Minnesota Citizens Concerned for Life, Inc. v. Swanson*¹ and Disclosure Burdens: Does Getting Corporations to Talk Suppress Their Speech?

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1. No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012) (en banc).

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I. INTRODUCTION

Tommy and Joey are aging musicians still trying to make it big in Minnesota's Twin Cities.² Though not in business together, they share studio space in the same building through separate leases. In addition to their music, they also share a passion for limited government and deficit reduction, which bleeds into their songs of governmental intrusion and excessive taxation. Unhappy with Minnesota Governor Mark Dayton's handling of the state's government shutdown in the summer of 2011, the pair decides the governor has to go. However, the two are unable to agree on any aspects of a protest song save for its theme. Instead, Tommy determines that because their studio space adjoins a hallway all studio visitors must walk through, such an arrangement is ideal for posting signs advocating for Governor Dayton's defeat in the next election. Having little to no graphic design experience, Joey takes this idea to the local Minneapolis College of Art and Design, where he makes a deal with a student to design some signs. Including the costs for materials and labor, the total price for the job tallies at \$105. Finding the price reasonable and the signs admirable, Tommy and Joey purchase and hang them up.

A few days later, another musician, Alex, sees the signs for the first time. Both a supporter of wide social safety nets and a local activist who has some familiarity with election law, he files a complaint with the Minnesota Campaign Finance and Public Disclosure Board detailing Tommy and Joey's election activity. They soon receive a strongly-worded letter from the Board warning them of a possible violation of Minnesota's campaign finance laws for which they are being audited.³ Because the pair worked together on the signs, they are an association required by Minnesota law to form a fund and register with the state for any independent expenditures exceeding \$100. Furthermore, either Joey, Tommy, or a third party has to become the fund's treasurer, who must fill out a form disclosing the fund's contributors and expenditures. This, however, is not the only report. The

2. This introductory case study is a work of fiction. Names, characters, and places are either products of the author's imagination or used fictitiously. Any resemblance to any person, living or dead, is purely coincidental.

3. For the procedure for filing a complaint and the Board's response to it, see MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., COMPLAINT FOR VIOLATION OF THE CAMPAIGN FINANCE & PUBLIC DISCLOSURE ACT (2012), available at <http://www.cfbreport.state.mn.us/pdfStorage/2010/CampFin/YE/14857.pdf>.

two dodged a bullet, because 2011, which is not a general election year, only requires one report from them. But if they do not file a termination of the fund in 2012, they will have to file five more reports. Moreover, following a quick study of the law, the two musicians could not determine whether terminating the fund meant they were legally obligated to take down their signs, too. When the pair made a decision to exercise their political speech, they could not have imagined the extensive regulations thereby implicated.

Minnesota's laws are particularly interesting and potentially divisive because, following the seminal *Citizens United v. FEC* decision,⁴ they are perhaps the most extensive of any state disclosure laws in effect to be deemed unconstitutional.⁵ This Note considers the narrow question of whether, when viewed through the lens of political reality, Minnesota's disclosure laws regulating independent expenditures, particularly one requiring ongoing periodic reporting, cross the line from a mere administrative cost to a burden chilling the free speech of associations. Part II of this Note first examines the principles of disclosure and the legislative regulation of elections through disclosure throughout United States history alongside Supreme Court precedent interpreting those laws. This leads into Minnesota pushing back against *Citizens United* by subsequently enacting several disclosure laws. Part III argues that the majority in *Minnesota Citizens* incorrectly held that the plaintiffs were likely to succeed in a challenge that the laws were unconstitutional. In its quest to protect all associations from speech regulation, the majority overstated the actual burden of these disclosure laws out of fear they could hypothetically cause hesitation in spending money as political speech. Such a decision does not account for political theory and reality, and the truth is that the effect of such a ruling is an elimination of one of the few remaining mechanisms to regulate elections. Part IV concludes by emphasizing that the majority was mistaken in its narrow approach to this issue and that these disclosure laws should have been upheld.

4. 130 S. Ct. 876 (2010).

5. *Compare* Minn. Citizens Concerned for Life, Inc. v. Swanson, No. 10-3126, 2012 WL 3822216, at *2-4 (8th Cir. Sept. 5, 2012) (en banc) (Minnesota laws, passed by the legislature, require periodic reporting), *with* Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 43 (1st Cir. 2011) (Maine independent expenditure disclosure laws resemble event-driven reporting, not periodic reporting), Nat'l Org. for Marriage v. Daluz, 654 F.3d 115, 118 (1st Cir. 2011) (Rhode Island law also resembles event-driven reporting), *and* Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 996-97 (9th Cir. 2010) (Washington disclosure law at issue was passed as part of a voter-enacted ballot initiative rather than solely by the legislature), *cert. denied*, 131 S. Ct. 1477 (2011).

II. BACKGROUND

A. The Theory and Principles Underlying Disclosure

Disclosure, as it applies in the electoral context, can be defined as government-required divulgement of information to “help [citizens] make informed choices in the political marketplace.”⁶ It is a concept central to our democracy and one recognized early and supported in our nation’s history.⁷ Early in the twentieth century, future Supreme Court Justice Louis Brandeis recognized in an oft-quoted statement that “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁸ Furthermore, disclosure is the most widely adopted regulatory device for elections in democratic nations.⁹

The basic tenet underlying disclosure is anticorruption. The ability to purchase political access or influence is “antithetical to our ideal of equal citizenship.”¹⁰ With the enhanced capability to bankroll a campaign or indirectly support one, the wealthy and corporate or other concentrations of wealth have advantages both in money and political power over the unaligned masses. Mitigating this potential political corruption requires a democracy to “draw[] a line, marking a political sphere within which the power relationships of the market are kept under democratic control.”¹¹ Disclosure thus plays an important role, because the citizenry, armed with knowledge about campaign contributions, can hold candidates accountable for such influence.¹² Alarming, the United States Supreme Court has whit-

6. *Citizens United*, 130 S. Ct. at 915.

7. “I deem [an] essential principle[] of our Government, and consequently [one] which ought to shape its administration . . . the diffusion of information . . .” Thomas Jefferson, First Inaugural Address, in 33 THE PAPERS OF THOMAS JEFFERSON, 17 FEBRUARY TO 30 APRIL 1801, at 148–52 (Barbara B. Oberg et al. eds., 2006).

8. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT 92 (1914).

9. Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 273 (2010) (citing Joel W. Johnson, *Democracy and Disclosure: Electoral Systems and the Regulation of Political Finance*, 7 ELECTION L.J. 325 (2008)).

10. Ian Ayres, *Disclosure Versus Anonymity in Campaign Finance*, in DESIGNING DEMOCRATIC INSTITUTIONS 19, 22–23 (Ian Shapiro & Stephen Macedo eds., 2000) (citing Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 302 (1989)).

11. *Id.* (quoting Bruce Ackerman, *Crediting the Voters: A New Beginning for Campaign Finance*, 13 AM. PROSPECT 71, 71 (1993)) (internal quotation marks omitted).

12. *See id.* at 24. Ayres posits an intriguing theory that *anonymity*, rather than disclosure, would better deter corruption because candidates’ obliviousness to the identity of their campaign finance supporters “might make it harder for candidates to sell access or influence.” *Id.* at 20. This theory assumes, however, a

tled away at the anticorruption principle in the context of independent expenditures.¹³

Disclosure also serves an idealistic belief that government transparency is essential. This idea is that knowledge of which interests give how much money to elected officials is as “necessary for the success of representative democracy as open meeting laws, public access to government records, lobbying regulation, and government ethics laws.”¹⁴

Moreover, disclosure may be the preferred alternative in campaign finance for both politicians and industry, because it exposes, rather than limits, corporate influence.¹⁵ It allows the public, not the government, to determine whether campaign expenditures are corrupt.¹⁶ Of course, this conclusion rests on the assumption that the citizenry cares.¹⁷ Disclosure requirements serve little purpose if Americans do not act on the information provided to them through protest or the voting booth.

B. The History of Legislative Regulation of Campaign Finance Through Disclosure

State disclosure laws have existed since the late nineteenth century, and quickly following them was one of the first federal disclosure laws—the Publicity and Political Contributions Act of 1910. That law required limited disclosure of contributions for members of the House of Representatives.¹⁸ Other requirements were soon added to the mandate of the 1910 disclosure laws, including an increase in the number of disclosure reports as required by the Federal Corrupt Practices Act of 1925.¹⁹ While these early laws were poorly drafted and

scenario where absolutely no communication exists between contributors and candidates.

13. See *Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010).

14. Briffault, *supra* note 9, at 274.

15. *Id.* at 273 (citing PRESIDENT’S COMM’N ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS 18 (1962)).

16. *Id.* at 273–74.

17. Ayres argues that disclosure produces “very little deterrent benefit” because today’s citizenry does not impose any electoral punishment on candidates who sell political access. Ayres, *supra* note 10, at 24. This fact, he argues, supports the theory of anonymous expenditures as it could negate the informational aspect of disclosure and stifle candidates’ ability to even sell access. *Id.* at 23–25.

18. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW (1988); Briffault, *supra* note 9, at 273 (citing LOUISE OVERACKER, MONEY IN ELECTIONS 291–94 (1932)). The 1910 act followed the Tillman Act of 1907, which had banned corporate contributions to any candidate altogether. See Act of Jan. 26, 1907, ch. 420, 34 Stat. 864, 864–65 (codified as amended at 18 U.S.C. § 610 (2006)).

19. Briffault, *supra* note 9, at 273 (citing MUTCH, *supra* note 18, at 12–15, 24–25).

clumsily enforced, they established an obligation of disclosure to the public revealing where money came from and how it was spent.²⁰

Early Supreme Court decisions upheld these disclosure laws and provided cleaner analysis than future cases because only direct contributions to candidates implicated disclosure.²¹ However, a different form of campaign finance, now known as “independent expenditures,” could be employed by individuals or associations not in conjunction with a candidate yet still in his or her support or in opposition to another candidate.²² Because these early campaign finance laws regulated only direct contributions, those making independent expenditures did not trigger disclosure laws.

The regulation of independent expenditures budded with the Taft-Hartley Act of 1947, which prohibited direct contributions *and* independent expenditures by corporations.²³ However, a narrow construction of the statute allowed corporations to easily sidestep the Act by supporting candidates through other channels.²⁴ The regulation of independent expenditures came to fruition with the passage of the Federal Election Campaigns Act of 1971 (FECA).²⁵ Enacted in the wake of the Watergate scandal, FECA was a comprehensive campaign finance reform allowing corporations to avoid the independent expenditure ban by forming a Political Action Committee (PAC), a highly-regulated entity created for the purpose of campaign finance.²⁶

Soon after, *Buckley v. Valeo*,²⁷ a touchstone case for campaign finance disclosure, arose out of numerous constitutional challenges. Senator James Buckley of New York, Democratic presidential candidate Eugene McCarthy, and the New York Civil Liberties Union all

20. *Id.*

21. *See generally* *Burroughs v. United States*, 290 U.S. 534 (1934) (upholding the Federal Corrupt Practices Act of 1925 requirement that presidential campaign committees report the names and addresses of contributors to the House of Representatives). The Court in *Burroughs* held that Congress had the power to prevent corruption with the “choice of means to that end” as a question solely for it. *Id.* at 547. The Court viewed Congress’s action in this context as reasonable to promote public disclosure to prevent “corrupt use of money to affect elections.” *Id.* at 545–48. These views seem at odds with the current Roberts Court’s readiness to invalidate legislatively-enacted campaign finance laws. *See infra* section III.B.

22. Independent expenditures are defined by Minnesota law as: “expenditure[s] expressly advocating the election or defeat of a clearly identified candidate” if made without any sort of cooperation with any candidate, the candidate’s committee, or an agent thereof. MINN. STAT. ANN. § 10A.01(18) (West Supp. 2012).

23. Labor Management Relations Act, ch. 120, § 340, 61 Stat. 139, 159–160 (1947).

24. *Citizens United v. FEC*, 130 S. Ct. 876, 953 (2010) (Stevens, J., dissenting) (citing *FEC v. Wis. Right to Life*, 551 U.S. 449, 511 (2007) (Souter, J., dissenting)).

25. Federal Elections Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431–456 (2006)).

26. *See id.* § 302, 86 Stat. at 12–13.

27. 424 U.S. 1 (1976) (*per curiam*).

challenged 1974 FECA amendments that limited, among other things, independent expenditures.²⁸ *Buckley* distinguished direct contributions from independent contributions by rendering a financial ceiling on independent expenditures unconstitutional for violating the First Amendment while at the same time retaining the limitation on direct contributions.²⁹ While invalidating the limitation on independent expenditures, the Supreme Court recognized the importance of disclosure, though not without concern over the chilling effect on speech created by the disclosure of contributors' names and contribution information.³⁰ The Court's solution for this conundrum was to lay a firm foundation for the "exacting scrutiny" of disclosure laws, which could survive a constitutional challenge only by constituting a substantial relation between the governmental interest and the information required by disclosure.³¹

Consequently, *Buckley* upheld FECA's independent expenditure disclosure requirements only so far as the expenditure was "express advocacy" using a number of magic words the Court supplied.³² As a result of this ruling, from 1976 to 2002 hundreds of millions in corporate funds were poured into federal campaign advertisements through a legally sound "sham issue ad" loophole.³³ These advertisements could feature a candidate near an election but simply avoid the use of *Buckley*'s magic words of express advocacy, thereby bypassing regulations, including the disclosure requirements, upheld in *Buckley*.³⁴

Congress's response to this and other loopholes, largely spearheaded by Arizona Senator John McCain and Wisconsin Senator Russell Feingold, was the Bipartisan Campaign Reform Act of 2002 (BCRA).³⁵ The Act amended section 441b of FECA in part by adding a

28. *Id.* at 7–8.

29. *Id.* at 58–59. The Court held that direct contribution limits, "along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence," but that the Act's ceiling on independent expenditures infringed on "the ability of candidates, citizens and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.*

30. Briffault *supra* note 9, at 280 (citing *Buckley*, 424 U.S. at 66).

31. *Buckley*, 424 U.S. at 64–68.

32. *Id.* at 43–44 ("We agree that in order to preserve the provisions against invalidation on vagueness grounds, § 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.").

33. CIARA TORRES-SPPELLISY, BRENNAN CTR. FOR JUSTICE, TRANSPARENT ELECTIONS AFTER CITIZENS UNITED 4 (2011) (citing CRAIG B. HOLMAN & LUKE P. McLOUGH-LIN, BRENNAN CTR. FOR JUSTICE, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 10–11 (2001)).

34. *Id.*

35. Pub. L. No. 107-155, 116 Stat. 81.

new definition, “electioneering communications,”³⁶ which subjected communications such as sham issue ads to regulation and disclosure.³⁷ The only vehicle for a corporation or other association to finance express advocacy through independent expenditures was through the “separate segregated fund” known as a PAC.³⁸ The fallout from the BCRA culminated in the highly controversial and hotly contested *Citizens United* decision. What began as an argument that Supreme Court precedent excused a film and its advertisements from disclosure requirements “morphed . . . into a paradigm-shifting Supreme Court case about the ability of all corporations to spend their treasury money on any election ad.”³⁹

In *Citizens United*, the plaintiff wanted to make its documentary *Hillary*, a critique on presidential candidate Hillary Rodham Clinton, available through video-on-demand within thirty days of a 2008 primary election.⁴⁰ Fearing that the film and its advertisements would subject the corporation to civil and criminal penalties under FECA, *Citizens United* sought declaratory and injunctive relief against the Federal Election Commission (FEC).⁴¹ It argued that section 441b of FECA, which required a corporation to form a PAC to make independent expenditures, was unconstitutional along with BCRA’s disclaimer and disclosure requirements as applied to the movie and its advertisements.⁴²

Holding that the documentary was functionally equivalent to express advocacy, which meant section 441b of FECA indeed applied to it,⁴³ the Court, in a sharply divided 5-4 decision, agreed with the plaintiff that section 441b was unconstitutional.⁴⁴ The reasoning given for this decision was that “the Government may not suppress political speech [with burdensome regulations] on the basis of the speaker’s corporate identity.”⁴⁵ As a result, the Supreme Court case *Austin v. Michigan Chamber of Commerce*⁴⁶ was overruled along with

36. 2 U.S.C. § 434(f)(3)(A)–(C) (2006) (“[A]ny broadcast, cable, or satellite communication that . . . refers to a clearly identified candidate . . . within 60 days before a general election . . . or within 30 days before a primary . . . [which] can be received by 50,000 or more persons [in that candidate’s constituency].”).

37. *Citizens United v. FEC*, 130 S. Ct. 876, 887 (2010) (citing 2 U.S.C. § 441b(b)(2) (2006)).

38. *Id.* at 887–88 (citing 2 U.S.C. § 441b(b)(2)).

39. Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics after Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1057 (2011).

40. *Citizens United*, 130 S. Ct. at 888.

41. *Id.*

42. *Id.*

43. *Id.* at 889–90.

44. *Id.* at 917.

45. *Id.* at 913.

46. 494 U.S. 652 (1990).

BCRA section 203 and section 441b's prohibition on the use of corporate treasury funds for express advocacy.⁴⁷ Further, the Supreme Court was compelled to overrule *McConnell v. FEC*⁴⁸ in part because the decision relied on reasoning from *Austin* to uphold BCRA section 203's extension of section 441b restrictions on corporate independent expenditures.⁴⁹

Yet, even as the Court rejected limitations on corporate independent expenditures, it ruled 8-1 in favor of preserving disclosure requirements without limitation to speech "that is the functional equivalent of express advocacy," or to particular media or technology from a particular speaker.⁵⁰ Disclosure was held to enable the electorate to "react to the speech of corporate entities in a proper way" while not actually preventing anyone from speaking.⁵¹ The Court again endorsed election disclosures in *Doe v. Reed*, where it upheld a Washington law allowing public disclosure of petition signatories because it "preserv[ed] the integrity of the electoral process" and prevented fraud while promoting transparency and accountability.⁵²

The general principle that can be derived from these recent cases is that elections are special—a right to anonymity in "speech must generally give way to governmental interests in the overall integrity of the democratic process."⁵³ But following *Citizens United* and *Doe*, relaxed election laws have triggered a veritable arms race in election spending with a handful of wealthy donors heightening the proliferation.⁵⁴ Even comedian Stephen Colbert had a SuperPAC, painting a satirical portrait of the absurd and disturbing aspects of the state of U.S. campaign finance law.⁵⁵ On the legal side of this issue, "a slew of election-year challenges to disclosure laws" are testing the applicability of *Citizens United* to state election regulation through disclosure.⁵⁶ *Minnesota Citizens* is one of these cases, and *Citizens United* provided the legal framework for a majority of the Eighth Circuit to banish many of Minnesota's disclosure laws to the pages of history.

47. *Citizens United*, 130 S. Ct. at 913.

48. 540 U.S. 93 (2003).

49. *Citizens United*, 130 S. Ct. at 913.

50. *Id.* at 891, 915.

51. *Id.* at 914, 916.

52. 130 S. Ct. 2811, 2819 (2010).

53. Torres-Spelliscy, *supra* note 39, at 1084.

54. See *The SuperPAC Superdonors*, NPR (July 23, 2012), <http://www.npr.org/2012/02/13/146836082/the-superpac-super-donors>.

55. See *Colbert Super PAC*, AMERICANS FOR A BETTER TOMORROW, TOMORROW, <http://www.colbertsuperpac.com/home.php> (last visited Dec. 12, 2012).

56. Torres-Spelliscy, *supra* note 39, at 1084.

C. *Minnesota Citizens Concerned for Life, Inc. v. Swanson*

1. *Factual and Procedural History: Backlash from Citizens United*

“[R]egarded as a leader in campaign finance reform,” Minnesota has had “some of the nation’s toughest laws on political spending by corporations.”⁵⁷ In 1988, Minnesota effectively banned corporate spending, and violations at that time could lead to hefty fines, up to five years of jail time, and for out-of-state corporations the risk of losing the right to do business in the state.⁵⁸ Continuing in this vein and in reaction to the *Citizens United* ruling, the Minnesota legislature amended several of its election statutes to comply with that landmark ruling by permitting corporate independent expenditures—but only if a number of conditions were met.⁵⁹

While Minnesota “retained a longstanding prohibition on direct corporate contributions to candidates and affiliated entities,”⁶⁰ it allowed only two avenues for corporations to make independent expenditures exceeding \$100: either form and register an independent expenditure fund or contribute to an existing independent expenditure political committee or political fund.⁶¹

In addition, the revised statutes imposed a number of burdensome requirements on these funds. When making or receiving a contribution or independent expenditure exceeding \$100, an association thereafter must appoint a treasurer for the fund who must register it within fourteen days by filing a form detailing the fund’s depositories and the names and addresses of the fund, treasurer, and any deputy treasurers.⁶² Once established, the political fund is statutorily required to file frequent, detailed reports with disclosures of contributors, lenders, expenditures, recipients, amounts, and dates.⁶³ Recordkeeping requirements for audit purposes were imposed,⁶⁴ as were procedures for dissolving a political fund⁶⁵ or disposing of assets by returning contributions to their sources.⁶⁶

57. John Gibeaut, *A Cautionary Tale of Corporate Political Spending Emerges in Minnesota*, AM. BAR ASS’N J. (Oct. 22, 2010, 3:48 PM), http://www.abajournal.com/news/article/a_cautionary_tale_target_corporate_political_spending_emerges_in_minnesota.

58. *Id.*

59. See 2010 Minn. Sess. Law Serv. 2001–08 (West).

60. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 308 (8th Cir. 2011) (citing MINN. STAT. ANN. § 211B.15(2) (West Supp. 2012)), *rev’d en banc*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012).

61. MINN. STAT. ANN. § 10A.12(1)(a) (West Supp. 2012).

62. MINN. STAT. ANN. §§ 10A.12(3), 10A.14(1)–(2) (West Supp. 2012).

63. MINN. STAT. ANN. § 10A.20 (West Supp. 2012).

64. MINN. STAT. ANN. § 10A.13 (West 2005).

65. MINN. STAT. ANN. § 10A.24 (West 2005).

66. MINN. STAT. ANN. §§ 10A.01(26)(2), 211B.12 (West Supp. 2012).

A corporation choosing merely to contribute to an *existing* fund subjected itself to fewer statutory requirements.⁶⁷ For-profits had only to provide their name and address for contributions made from their general treasury while non-profits had to disclose information on the source of the contribution to a political fund or committee if it exceeded \$5,000.⁶⁸

Soon after these amendments, attorney James Bopp Jr., the “original architect behind [*Citizens United*]” and plaintiffs’ arguing attorney in *Minnesota Citizens*, challenged Minnesota’s new laws and those in other states primarily on behalf of ideological clients opposed to same-sex marriage and abortion rights.⁶⁹ Bopp stated that Minnesota had “employed a common method” and “[w]hat is particularly reprehensible about [the] approach is *Citizens United* says you just can’t do that.”⁷⁰

Various groups filed a Verified Complaint for Declaratory and Injunctive Relief against Minnesota Attorney General Lori Swanson, among others, in her official capacity in the United States District Court for the District of Minnesota.⁷¹ Plaintiffs (collectively “Minnesota Citizens”) included: Minnesota Citizens Concerned for Life, a nonprofit advocacy group opposed to abortion;⁷² the Taxpayers League of Minnesota, a nonprofit advocacy group supporting lower taxes and limited government;⁷³ and Coastal Travel Enterprises, LLC, a for-profit business providing retail travel industry services.⁷⁴

The plaintiffs challenged Minnesota campaign finance and disclosure statutes on the basis that *Citizens United* rendered such overly burdensome requirements on independent expenditures, specifically as applied to PACs, as bans on political speech.⁷⁵ Therefore, Minnesota Citizens argued, the specified statutes “violate First Amendment free speech and association guarantees as well as Fourteenth Amend-

67. See *Minn. Citizens Concerned for Life, Inc. v. Swanson*, No. 10-3126, 2012 WL 3822216, at *2 (8th Cir. Sept. 5, 2012) (en banc).

68. *Id.*

69. Gibeaut, *supra* note 57.

70. *Id.*

71. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 741 F. Supp. 2d 1115, 1119 (D. Minn. 2010), *rev'd en banc*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012).

72. For a list of that organization’s legislative successes, see *MCCL’s Legislative History*, MINN. CITIZENS CONCERNED FOR LIFE, <http://www.mccl.org/page.aspx?pid=377> (last visited Nov. 3, 2011).

73. See *Welcome to the Taxpayers League of Minnesota*, TAXPAYERS LEAGUE OF MINN., <http://www.taxpayersleague.org/home/about-us.html> (last visited Nov. 3, 2011).

74. *Minn. Citizens*, 741 F. Supp. 2d at 1119.

75. *Id.* at 1126.

ment equal protection guarantees.”⁷⁶ They moved for a preliminary injunction to enjoin enforcement of the statutes.⁷⁷

To be successful in their pursuit of an injunction under Eighth Circuit precedent, Minnesota Citizens had to win on four factors: (1) probability of success on the merits; (2) threat of irreparable harm to the movant absent a restraining order; (3) the balance of harms; and (4) the public interest.⁷⁸

Instead, on September 20, 2010, the district court denied the motion for a preliminary injunction.⁷⁹ The plaintiffs failed to meet the threshold first factor of a preliminary injunction, which, when one is seeking to invalidate a duly enacted statute, requires a heightened showing of a *likelihood* to prevail on the merits.⁸⁰ Because the statutes in controversy had important public policy goals of reporting and disclosure of corporations’ independent expenditures and did not require a corporation to be separate from and cede control of its fund, Judge Donovan Frank determined that to enjoin them “on the eve of the upcoming general election,” would “clearly harm . . . the general public interest.”⁸¹

An appeal soon followed and was submitted January 11, 2011. Appellants argued they would be likely to prevail on the merits of the issue of corporate independent expenditures “because Minnesota regulates such expenditures in a manner *Citizens United* prohibits.”⁸²

2. *Holding: Majority and Dissent on the Extent of a Burden*

On May 16, 2011, long after the 2010 election season, the Eighth Circuit Court of Appeals affirmed the district court’s decision.⁸³ This ruling was made despite a vigorous dissent from Chief Judge Riley, who concurred, albeit hesitantly, only with the contention that the case *FEC v. Beaumont*⁸⁴ was still sound precedent for banning direct corporate contributions.⁸⁵ His dissent was boldest in questioning Minnesota’s ongoing reporting requirement with a declaration that “[a] state should not be able to sidestep strict scrutiny analysis simply

76. *Id.* at 1119.

77. *Id.*

78. *Id.* at 1125 (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981)).

79. *Id.* at 1134–35.

80. *Id.* at 1134 (citing *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732–33 (8th Cir. 2008)).

81. *Id.*

82. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 310 (8th Cir. 2011), *rev’d en banc*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012).

83. *Id.* at 319.

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

85. *See Minn. Citizens*, 640 F.3d at 323 (Riley, C.J., concurring in part and dissenting in part).

by labeling burdensome regulations as a disclosure law, when the effect, if not the design, is to discourage corporate speech.”⁸⁶

Chief Judge Riley’s dissent certainly appears to have been convincing as the appellants’ petition for a rehearing en banc was considered and granted by the Eighth Circuit on July 12, 2011.⁸⁷ The original opinion and judgment was vacated with a new oral argument scheduled for September 21, 2011, in St. Louis.⁸⁸ The en banc panel of the Eighth Circuit proceeded to reverse the district court’s denial of a preliminary injunction.⁸⁹

Now writing for a majority consisting of six of ten Eighth Circuit justices, Chief Judge Riley retained Minnesota’s contributions ban but argued the state’s ongoing reporting requirement would fail under exacting scrutiny and hinted without ruling that the ongoing reporting requirement should be considered under strict scrutiny.⁹⁰ The dissent, on the other hand, focused on applications of Minnesota’s laws to real-life scenarios rather than drawn-up hypotheticals in arguing that the laws would withstand exacting scrutiny.⁹¹ This dispute sets up the core issue subsequently arising from this case: At what point does a law characterized as a disclosure provision cross the line from supporting a governmental interest to being so burdensome to corporate independent expenditures that it restricts speech?

The essence of appellants’ pertinent argument⁹² on appeal was that the requirement of establishing or contributing to political funds, along with the funds’ burdensome regulations, “constitute[d] a de

86. *Id.* at 322 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *Nat’l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 694–95 & n.11 (8th Cir. 2003)).

87. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, No. 10-3126 (8th Cir. July 12, 2011) (order granting appellant an en banc hearing, vacating opinion and judgment, and scheduling an en banc argument).

88. *Id.*

89. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012) (en banc).

90. *Id.* at *8–9.

91. *Id.* at *18–19 (Melloy, J., concurring and dissenting).

92. A concurrent argument Minnesota Citizens brought in the lower court and on appeal was that Minnesota “functionally banned all forms of direct corporate contributions.” *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 310 (8th Cir. 2011), *rev’d en banc*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012). With no alternative available for the plaintiffs to speak, they argued, this ban meant the “disputed election laws [were] not properly tailored in light of the constitutionally heightened level of scrutiny.” *Id.* The Eighth Circuit sitting en banc completely rejected that argument along with an alternative one that *Citizens United* overruled previous precedent in order to allow direct corporate contributions if no other means of speech were available. *Minn. Citizens*, 2012 WL 3822216, at *11–12. Not only did the Eighth Circuit find that argument without merit, it stated that it could only follow a divergent line of decisions if the Supreme Court expressly overruled a prior decision. *Id.*

facto ban” on independent expenditures, which should trigger a strict scrutiny level of review.⁹³ They argued further that, if appellants satisfied the threshold factor of likelihood of success on the merits, they met the remaining elements for an injunction as well.⁹⁴

The en banc majority agreed and gave the appellants a boon in stating that, if plaintiffs showed a likelihood of success in a First Amendment case, “the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.”⁹⁵ Thus, the other considerations, including whether an injunction would affect the public interest (by, say, invalidating disclosure laws immediately before an election) will play no role in the decision to grant an injunction on remand.

Because a government ban on corporate independent expenditures triggers strict scrutiny, “[n]o sufficient government interest exists to justify a ban under this constitutionally heightened level of scrutiny.”⁹⁶ The en banc’s majority disagreed with the vacated opinion, which had been able to distinguish Minnesota’s statutes from the PAC regulations invalidated by *Citizens United* as burdensome only in relation to their goal of upholding the important public interests of informing the electorate and transparency of elections.⁹⁷ The original opinion argued that disclosure laws do not prevent speech, and “[u]nlike outright bans on corporate independent expenditures, which are viewed with great suspicion and subjected to strict scrutiny,” courts view corporate disclosure laws as beneficial and subject them to “less-rigorous” exacting scrutiny.⁹⁸

But sitting en banc, the majority viewed the ongoing reporting requirement along with the other “collective burdens” of Minnesota’s independent expenditure laws as a chill on political speech.⁹⁹ Arguing the ongoing reporting requirement is “untethered from continued speech,” the Eighth Circuit stated “less problematic measures,” such as event-driven reporting, could be used.¹⁰⁰ However, as made clear by the analysis below, this ruling in favor of the appellants eliminated a valid means of effectuating disclosure and will further erode legislative protection against corporate spending in elections.

93. *Minn. Citizens*, 640 F.3d at 310.

94. *Id.*

95. *Minn. Citizens*, 2012 WL 3822216, at *4 (quoting *Phelps-Roper v. Troutman*, 662 F.3d 485, 488 (8th Cir. 2011) (per curiam)).

96. *Minn. Citizens*, 640 F.3d at 312 (alteration in original) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 897–913 (2010)) (internal quotation marks omitted).

97. *See id.* at 316.

98. *Id.* at 315 (citing *Citizens United*, 130 S. Ct. at 914).

99. *Minn. Citizens*, 2012 WL 3822216, at *7.

100. *Id.* at *9.

III. ANALYSIS

Corporate influence in American government is nothing new and not necessarily more pervasive now than it was directly before *Citizens United* loosened restrictions on independent expenditures or even further into history.¹⁰¹ Indeed, in the nineteenth century the Chief Justice of the Supreme Court had to press Justice Stephen Field, who was heavily invested in railroads and other industries, not to weigh in on certain cases.¹⁰² But now, because “the ability to influence elections by spending great sums of money is considered a legitimate and important element of our democracy,” disclosure provisions may be at the pinnacle of their importance.¹⁰³

The complainants’ action to invalidate Minnesota’s duly enacted disclosure laws reveals a fundamental legal and policy question concerning what should be an acceptable burden on corporate independent expenditures. Following Chief Judge Riley’s reasoning leads to the incongruous result that laws requiring corporations to disclose, or speak, about their independent expenditures suppress their political speech. The focus of this issue has become analysis of when a burden moves from mere “administrative costs” sacrificed for the purposes of disclosure to unconstitutional suppression of political speech.¹⁰⁴ However, Chief Judge Riley did not fully consider how ongoing reporting requirements could promote disclosure.

Legal and policy bases justify upholding such a requirement. First, Minnesota’s laws in general were consistent with those upheld in *Citizens United*. Second, Chief Judge Riley’s opinion, hinting that ongoing reporting deserves strict scrutiny and fails exacting scrutiny by being overly burdensome, viewed the disclosure benefits of such a law too narrowly and runs counter to the policy underlying disclosure laws. Finally, Minnesota Citizens’ action to invalidate the ongoing reporting requirement not only chips away at one of the last remaining tools to regulate campaign finance, it demonstrates a disturbing trend of legislatures’ diminishing power to regulate corporate influence in elections. For these reasons, Minnesota’s laws should be upheld.

101. See Eric Sandberg-Zakian, *Rethinking “Bias”: Judicial Elections and the Due Process Clause After Caperton v. A.T. Massey Coal Co.*, 64 ARK. L. REV. 179, 179 (2011).

102. See generally Ryan Grim & Mike Sacks, *Corporate Citizenship: How Public Dissent in Paris Sparked Creation of the Corporate Person*, HUFFINGTON POST (Oct. 12, 2011, 3:18 PM), http://www.huffingtonpost.com/2011/10/12/corporate-citizenship-corporate-personhood-paris-commune_n_1005244.html (describing the history of corporations as “persons” in light of the Occupy Wall Street protests).

103. Sandberg-Zakian, *supra* note 101, at 179.

104. See *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 316 (8th Cir. 2011), *rev’d en banc*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012).

A. Minnesota's Independent Expenditure Disclosure Laws—Consistent with *Citizens United* or a Burden on Corporations?

While the plaintiffs argued Minnesota's laws were "materially indistinguishable from the PAC regulations the Supreme Court found to be unconstitutionally burdensome," the Eighth Circuit found in its vacated *Minnesota Citizens* opinion that those same provisions were similar in "purpose and effect" to disclosure laws upheld in *Citizens United* and thus were not repugnant to that case.¹⁰⁵ This argument, that Minnesota's laws impose no greater burden than the disclosure provisions upheld in *Citizens United*, is essential.¹⁰⁶ Chief Judge Riley's vociferous opinion primarily dismisses the utility of Minnesota's ongoing reporting requirement, but, as he lamented the "collective burdens" of the state's laws,¹⁰⁷ the following analysis counters that the other provisions of Minnesota's statutory scheme are not repugnant to *Citizens United*.

Citizens United stated that corporations have a First Amendment right to make independent expenditures and PACs were "burdensome alternatives" by requiring a treasurer, detailed records, organizational statements, and monthly reports to make such expenditures.¹⁰⁸ At first glance, these requirements do appear remarkably similar to Minnesota's own statutory scheme permitting a corporation's independent expenditures;¹⁰⁹ however, they do not require the corporation to be

105. *Id.* at 311.

106. Minnesota lawmakers were fortunate from the outset that more Supreme Court Justices did not side with Justice Clarence Thomas's *Citizens United* dissent. Fearing potential reprisal against campaign contributors whose names are disclosed to the public, Justice Thomas argued disclosure, disclaimer, and reporting requirements in sections 201 and 311 of BCRA were unconstitutional. *Citizens United v. FEC*, 130 S. Ct. 876, 982 (2010) (Thomas, J., concurring in part and dissenting in part). His basis for this argument was the harassment of Californians who paid to support Proposition 8, which amended California's constitution to allow marriage solely between a man and woman. *Id.* at 980–81. "Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Id.* at 982. Were it possible to incorporate this argument into *Minnesota Citizens*, Justice Thomas's emphasis on the negative ramifications of disclosure laws could have forced the Eighth Circuit to eliminate the entirety of Minnesota's disclosure laws.

107. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, No. 10-3126, 2012 WL 3822216, at *7 (8th Cir. Sept. 5, 2012) (en banc).

108. *Citizens United*, 130 S. Ct. at 897.

109. *Compare* 2 U.S.C. § 441b (2006) (detailing the limitations on a corporation or labor organization's ability to make political expenditures or contributions), *with* MINN. STAT. ANN. § 10A.025 (West 2005) (detailing filing requirements for expenditures), MINN. STAT. ANN. § 10A.12 (West Supp. 2012) (detailing requirements for an independent expenditure fund, including election of a treasurer),

separate from its fund and allow retention of control over it.¹¹⁰ Furthermore, while striking down a number of other election laws, *Citizens United* strongly upheld a FECA disclosure provision requiring those spending more than \$10,000 on electioneering communications to file an extensive report.¹¹¹ The language of this particular federal statute bears a remarkable resemblance to Minnesota's own independent expenditure statutes.¹¹² Viewing Minnesota's provisions collectively, the Eighth Circuit initially found they were "significantly less burdensome" than the federal regulations on PACs before the en banc panel decided otherwise.¹¹³

An in-depth, side-by-side analysis shows these statutes are materially the same. For example, any association with a political fund in Minnesota is required to elect or appoint a treasurer for the fund.¹¹⁴ This type of requirement is essentially identical to a FECA provision requiring disclosure of the custodian of the books and accounts of the one making the disbursement.¹¹⁵ The majority is too quick to dismiss a treasurer requirement as "only tangentially related to disclosure."¹¹⁶ A treasurer under Minnesota law is fulfilling the same role as a custodian under federal law. A contact person, custodian, treasurer, or whatever label is given, is substantially related to the purpose and goal of disclosure by providing the electorate with a readily available vehicle for ascertaining the true sources of election-related spending.¹¹⁷ Also, the treasurer "acts as little more than a custodian of the records."¹¹⁸

Minnesota further requires the treasurer to register the fund with a statement of organization no later than fourteen days after the fund made or received contributions or made expenditures exceeding \$100.¹¹⁹ A committee or fund making an electioneering communication under the federal law upheld in *Citizens United* is required to

and MINN. STAT. ANN. § 10A.14 (West Supp. 2012) (detailing the registration requirements for an independent expenditure fund).

110. See *Minn. Citizens*, 2012 WL 3822216, at *2.

111. *Citizens United*, 130 S. Ct. at 914 (citing 2 U.S.C. § 434(f)(2) (2006)).

112. The federal report "required detailed disclosures and extensive recordkeeping," including, among other requirements, disclosure of one's identity, a records custodian, any recipients' identities, and the names and addresses of anyone who contributed \$1,000 or more to the person or entity paying for the electioneering communication. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 313–14 (8th Cir. 2011) (citing *Citizens United*, 130 S. Ct. at 914), *rev'd en banc*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012).

113. *Id.* at 314.

114. MINN. STAT. ANN. § 10A.12(3) (West 2005).

115. 2 U.S.C. § 434(f)(2)(A) (2006).

116. *Minn. Citizens*, 2012 WL 3822216, at *8 n.9.

117. See *Citizens United*, 130 S. Ct. at 914.

118. *Minn. Citizens*, 2012 WL 3822216, at *16 (Melloy, J., concurring in part and dissenting in part).

119. MINN. STAT. ANN. § 10A.14(1) (West Supp. 2012).

disclose significantly greater expenditures (aggregate amount in excess of \$10,000 in one calendar year); however, they have a far more burdensome twenty-four hours after the disbursement date rather than two weeks to file an extensive statement with the FEC.¹²⁰

Despite ample precedent that a \$100 trigger for disclosure was reasonable,¹²¹ the Eighth Circuit indicated that such a trigger for ongoing reporting was questionable.¹²² The majority distinguished Minnesota's law from a federal ongoing reporting requirement upheld in *SpeechNow.org v. FEC*¹²³ in part because the federal law only applied to political committees with the major purpose of nominating or electing a candidate.¹²⁴ This distinction, along with the majority's focus on protecting certain associations because of their "major purpose,"¹²⁵ is divorced from reality. Many "social welfare" organizations, such as Crossroads GPS, enjoy tax exempt status and apparently can avoid ongoing reporting simply by claiming they run issue advertisements not in support or opposition to any candidate.¹²⁶ Yet Karl Rove, a leader of Crossroads GPS, spoke at a retreat hosted by Tagg Romney, son of Republican presidential candidate Mitt Romney, and allegedly promoted Rove's SuperPAC to Romney campaign donors invited to the retreat.¹²⁷ The *Minnesota Citizens* majority has fallen into the same trap as that in *Citizens United* with judges making technical legal decisions "not [in] accord with the theory or reality of politics."¹²⁸

Additionally, the majority noted that Minnesota's \$100 trigger for its ongoing reporting requirement was "much lower" than that in *SpeechNow.org*,¹²⁹ which was \$1,000.¹³⁰ This disparity, including the \$10,000 trigger upheld in *Citizens United*, is misleading. It can be explained by the immense differences between spending in state and federal elections. Al Franken, the Democratic Senator of Minnesota,

120. 2 U.S.C. § 434(f)(1) (2006).

121. *See Minn. Citizens*, 2012 WL 3822216, at *16 (Melloy, J., concurring in part and dissenting in part).

122. *Id.* at *8 n.10.

123. 599 F.3d 686 (D.C. Cir. 2010) (en banc), *cert. denied*, Keating v. FEC, 131 S. Ct. 553 (2010).

124. *Minn. Citizens*, 2012 WL 3822216, at *8 n.10.

125. *Id.* at *10.

126. 'Social Welfare' Organizations Play Big Role in Presidential Politics, NPR (July 7, 2012, 6:46 AM), <http://www.npr.org/blogs/itsallpolitics/2012/07/07/156381618/social-welfare-organizations-play-big-role-in-presidential-politics>.

127. Peter H. Stone, *Karl Rove Gave Secret Speech Outside Romney Donor Retreat*, HUFFINGTON POST (July 9, 2012, 2:18 PM), http://www.huffingtonpost.com/2012/07/09/karl-rove-speech_n_1656013.html.

128. *Citizens United v. FEC*, 130 S. Ct. 876, 961 (2010) (Stevens, J., dissenting in part and concurring in part).

129. *Minn. Citizens*, 2012 WL 3822216, at *8 n.10.

130. *SpeechNow.org v. FEC*, 599 F.3d 686, 697 (D.C. Cir. 2010) (en banc).

raised \$29,075,107 and spent \$28,947,178 from 2005–2010 (he was elected in 2008).¹³¹ In contrast, Sandra Masin, the Minnesota House Representative for District 38A from 2007–2010, had a political fund with receipts totaling \$29,471 and disbursements totaling \$30,318 in 2010.¹³² Masin's opponent in that election, Diane Anderson, had similar but smaller numbers and was victorious.¹³³ Masin's receipts were 0.1% of Franken's, which amounts to an even larger disparity in spending than the gap between a \$100 trigger in Minnesota law and a \$10,000 trigger in federal law (1%). Though this is but one example, it illustrates the vast chasm between spending on state elections and federal congressional elections for politicians of the same state.

Furthermore, while some Minnesota funds paid exorbitant amounts for independent expenditures,¹³⁴ others did not come close to a \$10,000 mark.¹³⁵ If Minnesota is to effectively regulate its own state elections and provide information to the electorate, a \$100 trigger for disclosure and periodic reporting is patently more reasonable than a \$10,000 or even a \$1,000 trigger.¹³⁶ This point is bolstered by the fact that states generally must contend with regulation of local judicial elections whereas the federal government does not.¹³⁷

However, one concern within the Eighth Circuit was that corporations with limited resources would be discouraged by Minnesota's provisions and would thus lose access to the citizenry and participation in

131. *Al Franken: Summary Data*, THE CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/politicians/summary.php?cid=N00029016&cycle=2010> (last visited Nov. 4, 2011).

132. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE Bd., REPORT OF RECEIPTS AND EXPENDITURES FOR PRINCIPAL CAMPAIGN COMMITTEE: MASIN CAMPAIGN COMMITTEE (2011), available at <http://www.cfbreport.state.mn.us/pdfStorage/2010/CampFin/YE/14857.pdf>.

133. See MINN. CAMPAIGN FIN. & PUB. DISCLOSURE Bd., REPORT OF RECEIPTS AND EXPENDITURES FOR PRINCIPAL CAMPAIGN COMMITTEE: ANDERSON VOLUNTEER COMMITTEE (2011), available at <http://www.cfbreport.state.mn.us/pdfStorage/2010/CampFin/YE/15491.pdf>.

134. See MINN. CAMPAIGN FIN. & PUB. DISCLOSURE Bd., REPORT OF RECEIPTS AND EXPENDITURES FOR POLITICAL COMMITTEE OR POLITICAL FUND: FREEDOM CLUB STATE PAC (2011), available at <http://www.cfbreport.state.mn.us/pdfStorage/2010/CampFin/YE/40742.pdf> (about \$223,000).

135. See MINN. CAMPAIGN FIN. & PUB. DISCLOSURE Bd., REPORT OF RECEIPTS AND EXPENDITURES FOR POLITICAL COMMITTEE OR POLITICAL FUND: TWINWEST CHAMBER OF COMMERCE PAC (2011), available at <http://www.cfbreport.state.mn.us/pdfStorage/2010/CampFin/YE/70013.pdf> (about \$4,300); MINN. CAMPAIGN FIN. & PUB. DISCLOSURE Bd., REPORT OF RECEIPTS AND EXPENDITURES FOR POLITICAL COMMITTEE OR POLITICAL FUND: TAKEACTION POLITICAL FUND (2011), available at <http://www.cfbreport.state.mn.us/pdfStorage/2010/CampFin/YE/30636.pdf> (about \$6,200).

136. See also *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115 (1st Cir. 2011) (holding that a \$100 trigger for disclosing independent expenditures was rational).

137. See *TORRES-PELLISCY*, *supra* note 33, at 5.

political speech.¹³⁸ The definition of “association” under Minnesota’s statutory scheme would allow even a partnership to be subjected to disclosure requirements for independent expenditures exceeding \$100.¹³⁹ This broad definition does not blatantly target corporations as the invalidated *Citizens United* laws did;¹⁴⁰ however, it arguably increases the burden on the smallest of associations that fit under the definition’s umbrella. One commentator wrote that “[d]isclosure laws should not trap the unwary or entangle tiny groups of people spending relatively small amounts of money.”¹⁴¹ This potential to expose more associations to extensive regulations makes it significantly more difficult to demonstrate a substantial relation between disclosure interests and any burden imposed thereby.

At oral argument for *Minnesota Citizen*’s September 21, 2011 en banc hearing, one judge first introduced a hypothetical later used by the majority in its opinion asking whether two farmers wishing to make a campaign sign for their yard costing \$101 would be subjected to Minnesota’s extensive statutes.¹⁴² The obvious response to this hypothetical, which illustrates the majority’s reliance on speculation and deservedly spurred a rebuke from the dissent,¹⁴³ is “yes,” but the real question is whether Minnesota’s statutes would truly chill these two farmers’ speech so as to violate the First Amendment. Nonetheless, the simple fact that disclosure requirements may deter the ability to speak is not enough. The Supreme Court has already stated that disclosure requirements “do not prevent anyone from speaking,”¹⁴⁴ and, as discussed above, a \$100 trigger for disclosure is reasonable in the state election context. The crux of the *Minnesota Citizens* majority’s concern is that Minnesota’s requirement of ongoing reporting is so burdensome that *it* is the rime threatening to chill corporate speech.¹⁴⁵

138. *Minn. Citizens for Life, Inc. v. Swanson*, No. 10-3126, 2012 WL 3822216, at *7 (8th Cir. Sept. 5, 2012) (en banc).

139. See MINN. STAT. ANN. § 10A.01(6) (West 2005) (“‘Association’ means a group of two or more persons, who are not all members of an immediate family, acting in concert.”); MINN. STAT. ANN. § 10A.12(1)(a) (West Supp. 2012).

140. See *Citizens United v. FEC*, 130 S. Ct. 876, 896–98 (2010).

141. TORRES-SPPELLISCY, *supra* note 33, at 13.

142. Oral Argument at 17:25, *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304 (No. 10-3126), available at <http://www.ca8.uscourts.gov/cgi-bin/new/oaByCase.pl?caseno=10-3126&getOA=search>.

143. *Minn. Citizens*, 2012 WL 3822216, at *18 (Melloy, J., concurring in part and dissenting in part).

144. *Citizens United*, 130 S. Ct. at 914 (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)).

145. *Minn. Citizens*, 2012 WL 3822216, at *6, *8–9.

1. *Avoiding Strict Scrutiny: A Search for the Purpose of Ongoing Reporting*

A fund in Minnesota, whose formation is required for any independent expenditure exceeding \$100,¹⁴⁶ must file five reports during a general-election year and one report in other years until a fund is dissolved or terminated.¹⁴⁷ By contrast, the FECA provisions upheld in *Citizens United*, according to the *Minnesota Citizens* majority, have “event-driven reporting requirement[s],” that end “as soon as the report [is] filed.”¹⁴⁸

To be upheld, Minnesota’s ongoing reporting provision must act for the integral purpose of disclosure to avoid strict scrutiny and also have a substantial relation to disclosure to withstand exacting scrutiny.¹⁴⁹ For the threshold question of whether strict scrutiny is applicable, Chief Judge Riley hinted without ruling that any ongoing periodic reporting may automatically require strict scrutiny analysis.¹⁵⁰ Though the opinion’s dicta left open the “question whether the Supreme Court intended exacting scrutiny to apply to laws such as this” rather than strict scrutiny,¹⁵¹ the following analysis argues that strict scrutiny should not be applied to ongoing reporting requirements.

The dichotomy in *Minnesota Citizens* is that the dissent viewed periodic reporting as an enhancement for transparency¹⁵² whereas the majority suspected the Minnesota legislature of burdening corporations’ ability to make independent expenditures as much as constitutionally possible.¹⁵³ This dichotomy originally played out in the vacated *Minnesota Citizens* opinion through a debate over whether the ongoing reporting requirement follows Supreme Court precedent. The majority had argued that *Buckley v. Valeo* approved periodic reporting requirements for non-PAC entities and that they are not per se invalid.¹⁵⁴ Chief Judge Riley’s dissent, on the other hand, distinguished the periodic reporting law in *Buckley* because it “at most” required filing statements through the end of the calendar year.¹⁵⁵

146. MINN. STAT. ANN. § 10A.12(1)(a) (West Supp. 2012).

147. *Minn. Citizens*, 2012 WL 3822216, at *6 (citing MINN. STAT. ANN. § 10A.20 (West Supp. 2012)).

148. *Id.* at *8 n.9 (citing 2 U.S.C. § 434(f) (2006)).

149. *Id.* at *8.

150. *Id.*

151. *Id.*

152. *Id.* at *14–15 (Melloy, J., concurring in part and dissenting in part).

153. *Id.* at *6.

154. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 314 n.4 (8th Cir. 2011) (citing *Buckley v. Valeo*, 424 U.S. 1, 80–81 (1976)), *rev’d en banc*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012).

155. *Id.* at 321 (Riley, C.J., concurring in part and dissenting in part) (citing 2 U.S.C. § 434(e) (2006)).

As the en banc dissent in *Minnesota Citizens* pointed out, at the very least, once the threshold expenditure amount is made, an association could easily establish the fund, file a report, and terminate the fund with a short statement to the Minnesota Campaign Finance and Public Disclosure Board.¹⁵⁶ This action would be essentially identical to the event-driven reporting the majority views with approval.¹⁵⁷ Further, such disclosure would impose only a light burden while “shed[ding] the light of publicity” on campaign-related spending that would not otherwise be reported because it is an independent expenditure.¹⁵⁸ Further, any association raring to get into the campaign finance game has the option of avoiding nearly all of these regulations by contributing to an existing fund rather than establishing its own.¹⁵⁹

Additionally, the *Minnesota Citizens* dissent proffers a number of justifiable reasons to support upholding periodic reports.¹⁶⁰ One basis is for reasons of enforcement and detection of improprieties from a particular source of campaign finance, which is a policy supported by precedent.¹⁶¹ While the majority considered these goals, it did not properly apply them in the context of campaign finance in America. Ongoing periodic reporting allows the electorate to stay abreast of independent supporters of a candidate.¹⁶² This basis supplies a reasonable explanation for why five periodic reports are required in a general election year in Minnesota—when the ability to “evaluat[e] those who seek . . . office” is most important.¹⁶³ It is no coincidence that these justifications for ongoing reporting closely resemble the anticorruption and transparency principles underlying disclosure.¹⁶⁴ Ongoing reporting in this context is certainly preferable to the farce of campaign finance regulation at the federal level, where primary voters in a num-

156. *Minn. Citizens*, 2012 WL 3822216, at *17 (Melloy, J., concurring in part and dissenting in part).

157. *See id.* at *8 n.9.

158. *Buckley*, 424 U.S. at 81.

159. *Minn. Citizens*, 2012 WL 3822216, at *5. In an associated footnote, Chief Judge Riley does point out that this option “does not allow the association itself to speak. Instead it only allows the association to assist another entity in speaking. As soon as the contribution is made, the association loses control of the message.” *Id.* at *5 n.6. It is incredible that *Citizens United* has created an atmosphere where the option of an association submitting itself to ongoing reporting is considered an unconstitutional restriction on the exercise of speech through spending money because another alternative of contribution allegedly alters the money-speech.

160. *See id.* at *14–16 (Melloy, J., concurring in part and dissenting in part).

161. *See Buckley*, 424 U.S. at 67–68.

162. *Id.* at 66–67.

163. *Id.*

164. *See supra* text accompanying notes 10–14.

ber of states could not discover the true source of independent expenditures until well after the primary election.¹⁶⁵

The *Minnesota Citizens* dissent, as well as Minnesota,¹⁶⁶ could have served itself better by supplying a real-world example for why periodic reporting may be necessary. One potential consequence from a lack of periodic reporting is illustrated by a recent scenario. A corporation, W Spann LLC, contributed \$1 million to the Restore Our Future PAC, which supported Mitt Romney's 2012 presidential bid, and dissolved just four months after formation.¹⁶⁷ While the Supreme Court affirmed the importance of disclosure in *Citizens United*, the Court's lack of foresight has initiated a scenario where corporations can "give millions to a Super PAC and shut it down before they have to file annual reports, allowing donors to remain anonymous . . ." ¹⁶⁸ Yet, under Minnesota law, W Spann LLC would have been required, at most, to file periodic reports detailing its election activity up until termination of the fund if it set up its own fund and, at the very least, to file a disclosure statement for contributing \$5,000 or more to an existing fund. Both extremes satisfy the public interest in disclosure, and arguably Minnesota's laws could go further to reveal the true nature of entities inserting themselves into political discourse.

It is an association's choice whether to continue making expenditures and thus continue to fulfill disclosure interests by satisfying Minnesota's reporting requirements. But it cannot expressly or impliedly seek to continue speaking and at the same time complain that reporting requirements related to that continued speech will chill future political speech. Ongoing reporting is extensive, but the ongoing nature of it should not be automatically subjected to strict scrutiny without complete analysis of the law's virtues and vices. Chief Judge Riley took a narrow view and, if confronted with a similar law in the future, it appeared he would rubber-stamp ongoing reporting as requiring strict scrutiny though an association in Minnesota had a myriad of options to both effectuate disclosure and avoid regulation.

For those who choose to form a fund, the periodic reporting requirements have a reasonable basis because of important governmen-

165. See Jack Gillum, 'Super' PACs Set to Disclose Big Donors Tuesday, ASSOCIATED PRESS, Jan. 31, 2012, available at <http://news.yahoo.com/super-pacs-set-disclose-big-donors-tuesday-065005955.html>.

166. Apparently the defendant failed to adequately support its ongoing reporting requirement as it did not state "any plausible reason why *continued* reporting from nearly all associations, regardless of the association's major purpose, is necessary to accomplish these interests." Minn. Citizens Concerned for Life, Inc. v. Swanson, No. 10-3126, 2012 WL 3822216, at *10 (8th Cir. Sept. 5, 2012) (en banc).

167. Paul Blumenthal, *Secret Corporate Money Powers Pro-Romney Super PAC*, HUFFINGTON POST (Aug. 4, 2009, 9:14 AM), http://www.huffingtonpost.com/2011/08/04/w-spann-llc-restore-our-future_n_918051.html.

168. *Id.*

tal interests in informing the public and enforcing campaign finance laws. While Chief Judge Riley argued an association “must initiate the bureaucratic process again” to speak after the termination or dissolution of a fund,¹⁶⁹ he characterizes this act as a suffocation of every association’s voice while at the same time not giving due regard to state interests in tracking political organizations’ campaign finance activities. The majority’s position could give corporations, which have already gained a strong foothold in campaign finance, the power to subject laws serving the public interest to a strict scrutiny death sentence on the mere basis that they allow a state agency to keep periodic track of election activities. These laws should instead be subjected to exacting scrutiny.

2. *Exacting Scrutiny Analysis: Tailoring a Burden to Disclosure*

The Supreme Court has reviewed challenges to disclosure requirements in the electoral context under the exacting scrutiny standard, requiring “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.”¹⁷⁰ In this case, the proper inquiry is whether the laws “unnecessarily restrict constitutionally protected liberty.”¹⁷¹

The *Minnesota Citizens* majority essentially subscribed to Chief Judge Riley’s opinion that the purpose of Minnesota’s disclosure law was mere pretense when “the effect, if not the design [of the law], is to discourage corporate speech.”¹⁷² Chief Judge Riley stated in the vacated opinion’s dissent that, even under exacting scrutiny, each provision must be reviewed separately to determine substantial relation to disclosure interests.¹⁷³ Unlike the majority in the vacated Eighth Circuit opinion, the dissent in *Minnesota Citizens* made strong arguments for why exacting scrutiny would be satisfied in the case.¹⁷⁴ This analysis will augment those arguments by pointing out the flaws in the majority’s reasoning.

The majority “points primarily to the ongoing reporting requirement” in its view that the disclosure requirements in the case are too heavy to satisfy.¹⁷⁵ However, simple bookkeeping devices, such as a basic Microsoft Excel spreadsheet, would limit the cost of complying

169. *Minn. Citizens*, 2012 WL 3822216, at *6.

170. *Doe v. Reed*, 130 S. Ct. 2811, 2814 (2010) (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010)).

171. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976).

172. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, 322 (8th Cir. 2011) (Riley, C.J., concurring in part and dissenting in part), *rev’d en banc*, No. 10-3126, 2012 WL 3822216 (8th Cir. Sept. 5, 2012).

173. *Id.*

174. *See Minn. Citizens*, 2012 WL 3822216, at *17–19 (Melloy, J., concurring in part and dissenting in part).

175. *Id.* at *17.

with Minnesota's regulations by separating and tracking expenditures and contributions.¹⁷⁶ Further, the Minnesota Campaign Finance and Public Disclosure Board has issued a memorandum stating that a political fund need not set up a separate bank account from its general treasury to take contributions and make expenditures.¹⁷⁷ These simple measures reduce reporting to a pithy burden.

However, questions may still arise over whether an association of, say, two farmers has the expertise to use technology to ease reporting burdens for independent expenditures. This issue has a basic counter: individuals teaming up to make these types of expenditures should be expected to have the business sense to ease their own burden without expecting the government to account for every individual association's limitations in satisfying the governmental interest of disclosure to the public. This logic is also noted by the *Minnesota Citizens* dissent, which points out that "the majority's hypothetical seems to assume that the farmers are unsophisticated business people . . ." ¹⁷⁸

A simple form also eases the burden on Minnesota political funds. A Taxpayers League Victory Fund form reporting the organization's 2010 election year activity to the Minnesota Campaign Finance & Public Disclosure Board is an example of this.¹⁷⁹ One can easily check a box stating that the committee received no contributions or made no expenditures during that reporting period or to notify the Disclosure Board that the committee has settled its debts and disposed of its assets in excess of \$100 and dissolved. The rest of the form is fairly typical—it asks for disclosure of the fund's balance, its total receipts, total expenditures, and the certification or signature of the treasurer.¹⁸⁰ Nothing in the form appears so sinister that it would chill the speech of associations choosing to participate in the political speech process. As the dissent stated, "Minnesota's check-the-box requirement" does not "rise[] to the level of a constitutional violation."¹⁸¹

One potential issue is an ambiguity within this law's termination provision. The law provides that a fund may not dissolve until it "dis-

176. *See id.* at *2.

177. MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., DEPOSITORY REQUIREMENT FOR POLITICAL FUNDS (2011), available at http://www.cfboard.state.mn.us/bdinfo/memo_resolutions_depositories.pdf.

178. *Minn. Citizens*, 2012 WL 3822216, at *18 (Melloy, J., concurring in part and dissenting in part).

179. *See* MINN. CAMPAIGN FIN. & PUB. DISCLOSURE BD., REPORT OF RECEIPTS AND EXPENDITURES FOR POLITICAL COMMITTEE OR POLITICAL FUND: TAXPAYERS LEAGUE MN VICTORY FUND (2011), available at <http://www.cfreport.state.mn.us/pdfStorage/2010/CampFin/YE/40794.pdf>.

180. *Id.*

181. *Minn. Citizens*, 2012 WL 3822216, at *18 (Melloy, J., concurring in part and dissenting in part).

pose[s] of all its assets in excess of \$100,” which includes “physical assets.”¹⁸² Minnesota Citizens may have some argument that this requirement of disposing assets is unduly burdensome because it could be interpreted to require disposition of the assets that are themselves the independent expenditures. If a billboard is purchased for advertising and costs more than \$100, should a dissolving fund be required to take down the billboard, the very physical asset it intended to procure by establishing the fund in the first place? However, this is but one interpretation of an ambiguous statute. The court could have simply applied the canon of constitutional avoidance to avoid an unconstitutional result.¹⁸³ Further, any concern over the termination provision is misplaced as a Minnesota statute establishes a presumption that the legislature does not intend Minnesota laws to reach an absurd result.¹⁸⁴ While the majority stated that it would not rely on “Minnesota’s informal assurance” that it would not “enforce the plain meaning of the statute” involving the termination of physical assets,¹⁸⁵ it could have disposed of this issue by deferring to the agency’s interpretation of the statute. This deference would have avoided both a constitutional question and not extended the statute to an absurd result.

Chief Judge Riley also points to the law’s penalty provisions, which could lead to civil and criminal penalties ranging from fines to imprisonment of up to five years,¹⁸⁶ as burdensome for hindering participation in political debate.¹⁸⁷ But if Minnesota’s other statutes are viewed as valid in their substantial relation to disclosure, the penalty provisions are merely enforcement measures.

Most concerning is what appears to be a misapplication of Supreme Court precedent to outline the Eighth Circuit’s test for finding whether ongoing reporting failed exacting scrutiny. The majority states that exacting scrutiny is the “most exacting scrutiny” and requires the government to use the least restrictive means to effectuate government purpose.¹⁸⁸ However, *Ashcroft v. ACLU* states that it is when a plaintiff challenges a content-based speech restriction that “the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.”¹⁸⁹ Nowhere else in the cases cited by the *Minnesota Citizens* majority does the Su-

182. MINN. STAT. ANN. § 10A.24(1) (West 2005).

183. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979).

184. MINN. STAT. ANN. § 645.17 (West 1947).

185. *Minn. Citizens*, 2012 WL 3822216, at *7 n.8.

186. See MINN. STAT. ANN. §§ 10A.13(1), 10A.15(4) (West Supp. 2005); MINN. STAT. ANN. §§ 10A.12(1)(b)(6), 10A.14(4), 10A.17(5), 10A.20(12), 10A.121(2), 211B.15(6)–(7) (West Supp. 2012).

187. See *Minn. Citizens*, 2012 WL 3822216, at *5.

188. *Id.* at *9 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

189. *Ashcroft*, 542 U.S. at 665.

preme Court specify that the government must use the “least restrictive means” to satisfy exacting scrutiny.¹⁹⁰ Accordingly, Minnesota’s statutes do not approach the level where their substantial relation to the governmental interest in disclosure is eclipsed by the actual burden they impose. Under an exacting scrutiny analysis, these laws pass muster.

B. Disclosure Requirements: The Fading Regulatory Tool

Disclosure laws are on firm constitutional footing after eight of nine Supreme Court Justices voted in favor of upholding federal election disclosure laws while invalidating other campaign finance laws in *Citizens United*.¹⁹¹ Following that decision, such laws may be more essential than ever. In just one example among many, a severe conflict of interest in the West Virginia judiciary may never have seen the light of day were it not for disclosure requirements.¹⁹² Yet, even as corporate participation in political speech is becoming more pronounced, legislatures are losing their ability to regulate elections—and *Minnesota Citizens* is another example of this disturbing trend.

Campaign financiers have already discovered ways to navigate around the contours of *Citizens United* by forming and dissolving a corporation so quickly that annual reporting requirements are not triggered.¹⁹³ While he notes the importance of honoring the legislature’s intent,¹⁹⁴ Chief Judge Riley’s lack of deference to Minnesota’s legislative experimentation with measures that could combat this and other campaign finance problems is troublesome.

But Minnesota is not the only state where legislative regulation of elections is in peril. In June 2011, the Supreme Court struck down the Arizona Citizens Clean Election Act, which provided escalating matching funds to candidates accepting public financing based on amounts spent by their privately financed opponents and independent

190. See *Minn. Citizens*, 2012 WL 3822216, at *9 (collecting cases).

191. See *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

192. See *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009) (ruling that an appellate judge’s refusal to recuse himself, in light of the risk of actual bias, deprived petitioners of due process). In 2004, Massey Coal Company President Don Blankenship spent nearly \$3 million of his own money on contributions and independent expenditures for embattled Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia, who won his election and later cast the deciding vote to overturn a \$50 million tort verdict against Massey. *Id.* at 2257–58. Notably, Justice Kennedy, who wrote the majority opinion in *Citizens United*, wrote the majority opinion in *Caperton*. See *id.* at 2256.

193. See Paul Blumenthal, *Secret Corporate Money Powers Pro-Romney Super PAC*, HUFFINGTON POST (Aug. 4, 2009, 9:14 AM), http://www.huffingtonpost.com/2011/08/04/w-spann-llc-restore-our-future_n_918051.html.

194. See *Minn. Citizens*, 2012 WL 3822216, at *10.

groups supporting them.¹⁹⁵ The majority viewed the matching funds scheme as a burden on speech “inhibit[ing] robust and wide-open debate” as a candidate could be reluctant to spend money on political speech if it triggered taxpayer subsidization of an opponent’s speech.¹⁹⁶ Justice Elena Kagan’s dissent, joined by three other Justices, instead advocated for deference to Arizona lawmakers: “Arizonans deserve a government that represents and serves them all Arizonans deserve the chance to reform *their electoral system* so as to attain that most American of goals.”¹⁹⁷

Freedom Club PAC, the fifth successive ruling from the Roberts Court scaling back the government’s ability to regulate campaign finance,¹⁹⁸ has far-reaching ramifications as multiple states, including Nebraska, have clean-election laws that are now invalid.¹⁹⁹ Additionally, in the summer of 2012, the Supreme Court struck down Montana campaign finance restrictions that had been in place for decades.²⁰⁰ As corporate participation in campaign finance becomes increasingly less restricted, lawmakers are running out of options to regulate corporate election activity.

Nonetheless, regulatory options still overwhelmingly supported are disclaimer and disclosure provisions.²⁰¹ Disclosure is one of the few remaining tools legislatures have at their disposal to regulate campaign finance, yet it is in peril. An Eighth Circuit ruling invalidating Minnesota’s laws is another incremental step toward diluting the effectiveness of disclosure provisions. An inability to require periodic reporting could make it simpler for corporations to circumnavigate disclosure purposes, and, if subjected to such reporting, they could sue to invalidate the disclosure provision simply by making an argument that its burden kept them from engaging in political speech. Indeed, merely claiming that Minnesota’s laws had hindered the

195. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813–14 (2011). One stated purpose of these types of laws is to “sever political candidates’ dependence on large contributors.” *Id.* at 2845 (Kagan, J., dissenting).

196. *Id.* at 2823, 2829. However, one study found that candidates who accept clean-election funds are significantly more likely to spend time interacting with voters. So, rather than clean-election funding chilling speech by reducing a privately funded candidate’s incentive to spend money/speak in an election, it appears that “the absence of clean-election funding chills the ability of voters to speak to their candidates” Ezra Klein, *The Importance of Campaign-Finance Reform in One Graph*, WASH. POST, WONKBLOG (Mar. 23, 2011, 5:58 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/the-importance-of-campaign-finance-reform-in-one-graph/2011/03/18/ABka8iKB_blog.html.

197. *Bennett*, 131 S. Ct. at 2846 (Kagan, J., dissenting) (emphasis added).

198. Adam Liptak, *Justices Strike Down Arizona Campaign Finance Law*, N.Y. TIMES, June 27, 2011, <http://www.nytimes.com/2011/06/28/us/politics/28campaign.html>.

199. *See State ex rel. Bruning v. Gale*, 284 Neb. 257, 817 N.W.2d 768 (2012).

200. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 1307 (2012).

201. *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010).

plaintiffs' speech was enough to convince the Eighth Circuit that "the collective burdens" of the Minnesota law created a chill on political speech that was "more than a theoretical concern."²⁰² Unfortunately, these policy arguments likely cannot play a role in the final determination of whether an injunction is called for as the Eighth Circuit ruled that the law is likely unconstitutional, thus automatically satisfying the public interest element of obtaining an injunction.²⁰³

But not all is doom and gloom on this campaign finance front. In *Human Life of Washington, Inc. v. Brumsickle*²⁰⁴ the Ninth Circuit Court of Appeals upheld Washington's public disclosure laws. Though it is arguable that those laws are distinguishable because they were enacted via a ballot initiative,²⁰⁵ the fact remains that disclosure provisions containing periodic reporting requirements similar to *Minnesota Citizens'* were upheld by a different circuit court.²⁰⁶ More recently, the First Circuit issued two rulings upholding Maine and Rhode Island disclosure laws.²⁰⁷ The Rhode Island law was challenged as overbroad and vague but was held to impose little burden while promoting an important government interest in identifying any *individual* giving more than \$100 to support or defeat a candidate.²⁰⁸ The Maine law also obligated any person spending more than an aggregate of \$100 for communications expressly advocating the election or defeat of a candidate to report the expenditure.²⁰⁹ The court concluded that "the modest amount of information requested is not unduly burdensome and ties directly and closely to the relevant government interests."²¹⁰

202. *Minn. Citizens for Life, Inc. v. Swanson*, No. 10-3126, 2012 WL 3822216, at *7 (8th Cir. Sept. 5, 2012) (en banc).

203. *Id.* at *4 (citing *Phelps-Roper v. Troutman*, 662 F.3d 485 (8th Cir. 2011) (per curiam)).

204. 624 F.3d 990 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2010). The suit was in response to a state initiative on assisted suicide, and the plaintiff, a pro-life group, desired to advocate against the initiative through messaging but feared it would then be exposed to Washington's disclosure laws. *Id.* at 995-96.

205. *Id.* at 996.

206. Some of the disclosure requirements challenged by the group could be viewed as more burdensome than those in *Minnesota Citizens'*, such as one requiring *monthly* reports if a political committee's total contributions or expenditures in a previous month exceeded \$200. *Id.* at 994-98.

207. *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115 (1st Cir. 2011); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011).

208. *Daluz*, 654 F.3d at 118. James Bopp Jr. represented the National Organization for Marriage in these two actions as well. *Id.* at 116. In *Daluz*, he argued that Rhode Island lacked a sufficiently important interest to support a \$100 reporting threshold, but the court rejected this argument because, under a "wholly without rationality" standard, the \$100 threshold passed muster. *Id.* at 119.

209. *McKee*, 649 F.3d at 59 (citing ME. REV. STAT. ANN. tit. 21-A, § 1019-B (1)(A), (3) (2008) (repealed in part 2011)).

210. *Id.* (quoting *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445, 466 (1st Cir. 2000)) (internal quotation marks omitted).

These rulings indicate permissiveness toward these types of disclosure provisions; however, federal appeals courts are now split 3–3 on disclosure laws, “making the issue ripe for consideration by the U.S. Supreme Court.”²¹¹ It remains to be seen whether Minnesota will appeal the Eighth Circuit ruling, though it appears that attorney James Bopp Jr. will continue his crusade against election laws.²¹² If appealed to the Supreme Court, this may spell disaster for Minnesota’s laws as the Roberts Court seems to be where campaign finance laws go to die. Still, disclosure laws are on firm constitutional footing as the Supreme Court has dispensed with numerous other campaign finance laws while protecting disclosure provisions. The strong underlying policy of this one remaining control mechanism at legislatures’ disposal may in the long run win the day in favor of upholding Minnesota’s laws.

IV. CONCLUSION

With a seasoned analysis, Minnesota’s laws pass constitutional muster and should have been upheld in the en banc hearing. First, they are materially consistent with disclosure provisions upheld in *Citizens United*. Second, in so much as aspects of Minnesota’s laws, such as the ongoing reporting requirements, are distinguishable from *Citizens United*, these laws have a design and purpose intended to promote disclosure. Further, the burden imposed by these laws is not so great that it overshadows the governmental interest in disclosure. Not only should these laws be subjected to an exacting scrutiny standard, they would withstand such scrutiny. Finally, disclosure is one of the few remaining mechanisms for campaign finance, and it would be poor policy to further erode this regulatory tool. Viewing these legal and policy justifications for Minnesota’s laws in tandem, it is at least questionable whether Minnesota Citizens could prove that it would be likely to prevail on the merits of its case.²¹³

Tommy and Joey may feel overwhelmed and perhaps even slighted by the extensive requirements they once faced just for putting some signs up in their studio. Nevertheless, if they had dug deeper they would have grasped the fundamentals behind the government’s insistence on their disclosure. While they were caught in the net of Minnesota’s statutory disclosure scheme, so were many others whose influence on elections would never be known were it not for the state’s laws. If the pair made the choice to continue making *their own* inde-

211. *Appeals Court Rejects MN Corporate Disclosure Law*, ASSOCIATED PRESS, Sept. 6, 2012, available at http://www.cbsnews.com/8301-505245_162-57507220/appeals-court-rejects-mn-corporate-disclosure-law/.

212. *Id.*

213. See *Minn. Citizens Concerned for Life, Inc. v. Swanson*, No. 10-3126, 2012 WL 3822216, at *4 (8th Cir. Sept. 5, 2012) (en banc).

pendent expenditures, they could have applied just a bit of business savvy to avoid most of the burden from the regulations they now face. Further, they had the ability to research and find out who else made independent expenditures in support of Governor Daley and in turn others could determine who Tommy and Joey have chosen to give independent support to as well. This disclosure serves purposes of both preventing corruption of elected officials and preserving the ideal of transparency in government. Unlike a restriction on what a corporation can and cannot spend on an election,²¹⁴ disclosure puts power directly into the hands of people to decide what corruption means and how best to combat it. This power should not be snatched away with an inexplicable argument that it imposes some burden on corporations.

214. *See* *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).