FIRST AMENDMENT — CAMPAIGN FINANCE DISCLOSURE — EIGHTH CIRCUIT GRANTS INJUNCTION AGAINST MINNESOTA REPORTING REQUIREMENT FOR INDEPENDENT CORPORATE POLITICAL EXPENDITURES. — *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (en banc).

The Supreme Court reviews the constitutionality of campaign finance disclosure requirements under the intermediate standard known as exacting scrutiny, which requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[1] Recently, in *Minnesota Citizens Concerned for Life, Inc. v. Swanson*,[2] the Eighth Circuit, sitting en banc, reversed a district court's denial of a preliminary injunction against a Minnesota disclosure law, holding that the burdens the law placed on free speech were likely unconstitutional.[3] The Eighth Circuit questioned whether the Supreme Court intended laws like the one under review to be subject to exacting — rather than strict — scrutiny, but held that the law would fail under either standard.[4] However, by closely examining the legislature's choice of specific disclosure requirements, the Eighth Circuit effectively transformed exacting scrutiny into strict scrutiny — an alchemy facilitated by the Supreme Court's own ambiguous approach to exacting scrutiny. The Supreme Court should resolve this vagueness so that legislators drafting disclosure laws clearly understand the scrutiny that courts will apply in the future.

The provisions at issue in *Minnesota Citizens* were portions of Minnesota's Campaign Finance and Public Disclosure law[5] and Fair Campaign Practices law.[6] These laws were amended after a ruling by the U.S. District Court for the District of Minnesota that certain provisions were unconstitutional under the Supreme Court's decision in *Citizens United v. FEC*.[7] The amended statutes prohibited associations from making direct or indirect political contributions, but allowed such organizations to make independent political expenditures by either contributing to an existing political fund or political action committee (PAC), or by registering their own "independent expenditure political

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[1] Citizens United v. FEC, 130 S. Ct. 876, 914 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976)).

[2] 692 F.3d 864 (8th Cir. 2012) (en banc).

[3] *Id.* at 877.

[4] *Id.* at 874–76. Strict scrutiny requires that a law be "narrowly tailored to promote compelling governmental interests." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274 (2007).

[5] MINN. STAT. § 10A (2012).

[6] MINN. STAT. § 211B (2012).

[7] 130 S. Ct. 876 (2010); *see* Minn. Chamber of Commerce v. Gaertner, 710 F. Supp. 2d 868, 872–74 (D. Minn. 2010).

fund."[8] The formation of a political fund required naming a treasurer, ensuring that the fund's contents were not commingled with other funds, and filing a report once a year in years without a general election and five times a year in general election years.[9]

Three organizations — Minnesota Citizens Concerned for Life, The Taxpayers League of Minnesota, and Coastal Travel Enterprises — challenged these provisions as unconstitutional. They sought a preliminary injunction, asserting that the laws violated their First and Fourteenth Amendment rights to engage in political speech through both independent expenditures and corporate political contributions.[10] The district court denied their motion for a preliminary injunction on both counts, and a divided panel of the Eighth Circuit affirmed.[11] The Eighth Circuit granted rehearing en banc to review the decision.

Writing for the court, Chief Judge Riley[12] ruled that Minnesota's disclosure laws for independent corporate political expenditures were presumptively unconstitutional, but upheld the ban on corporate political contributions.[13] Chief Judge Riley began by noting that, in order to issue a preliminary injunction against a state statute, Eighth Circuit precedent required that the court find that the plaintiff "is likely to prevail on the merits."[14] Looking initially to the issue of independent expenditures, the court found that Minnesota imposed similar burdens upon corporations and PACs, and viewed this as problematic given *Citizens United*'s characterization of PACs as "burdensome alternatives" to direct corporate speech.[15] The court found the requirement that political funds continue to file reports at state-mandated intervals, even when they did not engage in speech for the given period, particularly troublesome.[16]

Although the court recognized that disclosure laws are subject to exacting scrutiny,[17] it questioned whether the Supreme Court intended to allow legislatures to escape the harsher standard of strict scrutiny for laws like the one at issue — which place "substantial and ongoing burdens" upon organizations seeking to exercise their First Amend-

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[8] *Minn. Citizens*, 692 F.3d at 868–70. These provisions only applied to associations making expenditures greater than $100 in a calendar year. *See* MINN. STAT. § 10A.12.

[9] *Minn. Citizens*, 692 F.3d at 868–70.

[10] *Id.* at 867.

[11] Minn. Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304, 319 (8th Cir. 2011).

[12] Chief Judge Riley was joined by Judges Wollman, Loken, Gruender, Benton, and Shepherd.

[13] *Minn. Citizens*, 692 F.3d at 870, 878.

[14] *Id.* at 870 (quoting Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 733 (8th Cir. 2008) (en banc)) (internal quotation mark omitted).

[15] *Id.* at 872 (quoting Citizens United v. FEC, 130 S. Ct. 876, 897 (2010)) (internal quotation marks omitted).

[16] *Id.* at 873.

[17] *Id.* at 874–75.

ment rights — merely by labeling them disclosure laws.[18] Nonetheless, after describing exacting scrutiny as "possibly less rigorous" than strict scrutiny, the court stated that Minnesota's law still failed exacting scrutiny.[19] It found that Minnesota's ongoing reporting requirement was not supported by any sufficiently important interest, and that Minnesota could accomplish its interests related to ongoing reporting "[t]hrough less problematic measures" — namely, less strict disclosure requirements.[20] Accordingly, the court reversed the district court's denial of the appellants' motion for a preliminary injunction with respect to the ongoing reporting requirement.[21]

Judge Melloy[22] wrote an opinion concurring in the court's judgment upholding the ban on political contributions but dissenting from its decision to enjoin Minnesota's disclosure requirements for independent expenditures.[23] He noted that, while he believed the majority had cited the correct Eighth Circuit precedent for considering preliminary injunctions against state statutes, the majority's analysis lacked the appropriate deference to legislative decisions that this precedent requires.[24] Judge Melloy also disagreed with the majority's suggestion that strict scrutiny might be the better standard here, noting the clear distinction between laws that trigger strict scrutiny by directly imposing limitations on speech and those, like the requirements at issue, that do not directly limit speech and thus trigger exacting scrutiny.[25] He argued that, because the court examined the burden to determine which standard of scrutiny to apply before reevaluating the burden under that standard, its application of exacting scrutiny suffered from an overestimation of the law's burdens and an underestimation of the state's interests in disclosure.[26]

After articulating the state's interests in disclosure,[27] Judge Melloy turned to the burdens the laws imposed, arguing that the state's inter-

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[18] *Id.* at 875.

[19] *Id.*

[20] *Id.* at 876–77 (alteration in original) (quoting Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 204 (1999)) (internal quotation marks omitted).

[21] *Id.* at 877. The court also considered the appellants' challenge to Minnesota's prohibition on corporate political contributions. *Id.* at 877–80. The Eighth Circuit found that the contribution ban did not violate the appellants' First or Fourteenth Amendment rights, relying on the Supreme Court's holdings that "restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* at 878 (quoting FEC v. Beaumount, 539 U.S. 146, 158–59 (2003)) (internal quotation marks omitted).

[22] Judge Melloy was joined by Judges Murphy, Bye, and Smith.

[23] *Minn. Citizens*, 692 F.3d at 880 (Melloy, J., concurring and dissenting).

[24] *Id.*

[25] *Id.* at 881.

[26] *Id.*

[27] Judge Melloy highlighted the state's interest in providing the electorate with information about which candidates associations support, giving shareholders information about the causes

ests justified these burdens.[28] He found the majority's observation that Minnesota applied similar burdens to corporations and PACs unpersuasive, as the burdens placed on both were less onerous than those placed on federal PACs.[29] Based on this analysis, Judge Melloy would have found that the laws survived exacting scrutiny.[30]

The Eighth Circuit's application of exacting scrutiny in *Minnesota Citizens* was flawed. The majority purported to apply exacting scrutiny to Minnesota's law, but its considerations — specifically, its rigorous analysis of specific disclosure requirements — are more appropriately part of a strict scrutiny inquiry. Although the decision's misstep resulted in part from a misreading of Supreme Court precedent, this error was facilitated by the Supreme Court's ongoing lack of clarity regarding exacting scrutiny. While the Supreme Court's political expenditure disclosure cases applying exacting scrutiny have consistently rejected the type of rigorous analysis employed in *Minnesota Citizens*, the Court's occasional treatment of exacting scrutiny as a spectrum, continued use of the terms "exacting scrutiny" and "strict scrutiny" interchangeably, and confusing language regarding PACs enabled the *Minnesota Citizens* majority to justify its analysis despite these holdings. The Supreme Court should resolve these ambiguities to provide clear guidance for legislators writing disclosure laws in the future.[31]

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their corporations support, preventing improper relationships between elected officials and their supporters, and helping to detect violations of campaign finance law. *Id.* at 882–83.

[28] *Id.* at 883–85.

[29] *Id.* at 887.

[30] *Id.* Judge Colloton also wrote an opinion, concurring in the judgment with respect to Minnesota's ban on contributions and concurring in Judge Melloy's opinion with respect to Minnesota's disclosure requirements. *Id.* at 887–88 (Colloton, J., concurring in part and dissenting in part). Judge Colloton wrote to state that, while he found Judge Melloy's reliance on the state's interest in preventing corruption to justify disclosure inconsistent with *Citizens United*, he believed the state's other interests were sufficiently compelling to justify the disclosure requirements. *Id.*

[31] Clarifying the scope of exacting scrutiny seems particularly important given the view — which a significant majority of the Court appears to hold — that disclosure "help[s] citizens 'make informed choices in the political marketplace'" and is of central importance to campaign finance law. Citizens United v. FEC, 130 S. Ct. 876, 914 (2010) (quoting McConnell v. FEC, 540 U.S. 93, 197 (2003)). Eight of the nine Justices joined this part of *Citizens United*, with only Justice Thomas dissenting. As the Court seems to hold disclosure in high regard, the rise in challenges to disclosure requirements following *Citizens United* suggests that clarifying the scope of exacting scrutiny is of immediate importance. *See* Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 417–19 (2012) ("Advocates who led the charge against expenditure restrictions . . . have turned their focus to disclosure requirements." *Id.* at 417). While courts have generally upheld disclosure requirements following *Citizens United*, *id.* at 419 (citing 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, 1084–85 (2011)), *Minnesota Citizens* validates Professor Anthony Johnstone's fear that a lack of doctrinal clarity could allow judges so inclined to easily overturn disclosure requirements.

The Supreme Court first announced "exacting scrutiny" as the standard for considering disclosure requirements in *Buckley v. Valeo*[32] (*Buckley*). *Buckley* noted that disclosure serves three critical interests: (1) providing information on campaign spending to the electorate; (2) deterring corruption; and (3) detecting violations of campaign finance law.[33] These interests continue to guide courts' inquiries into whether a disclosure law passes exacting scrutiny, which requires "a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed."[34]

Although a "relevant correlation" and a "substantial relation" appear to be slightly different standards, neither seems close to the "narrow tailoring" required by strict scrutiny.[35] Exacting scrutiny's terms also appear to allow for a less than "compelling" governmental interest and more deference to legislative choices. Judged by this standard, Minnesota had a strong argument that the ongoing reporting requirement was substantially related to its informational and enforcement interests. By requiring reports from all active funds, rather than just those that donated in a given period, the state had effective administrative means to determine whether an organization that did not file a report had not donated in that period, or had instead skirted the law. Additionally, the ongoing reporting provision only required an organization that did not spend over one hundred dollars in a given year to fill out a short form once in a non–general election year and five times in a general election year[36] — a small burden seemingly justified by the relationship between the state's interests and ongoing reporting.

Rather than meaningfully consider this relationship, *Minnesota Citizens'* analysis emphasized the presence of less restrictive alternatives — namely, requiring organizations to disclose only when they spent money.[37] This focus seems misplaced as, looking to the language of exacting scrutiny itself, less restrictive alternatives bear little relevance to the relationship between an important governmental interest and the ongoing reporting requirement. Less restrictive alternatives seem more relevant to a strict scrutiny analysis, as they demonstrate a lack of "narrow tailoring" to a governmental interest. Moreover, al-

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[32] 424 U.S. 1 (1976).

[33] *Id.* at 66–68.

[34] *Minn. Citizens*, 692 F.3d at 876 (quoting Davis v. FEC, 554 U.S. 724, 744 (2008)). For a discussion of the tone that *Buckley*'s three considerations have set for subsequent disclosure cases, see Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 280–83 (2010).

[35] *See* Daniel R. Ortiz, *The Informational Interest*, 27 J.L. & POL. 663, 667–68 (2012) (noting that a "relevant correlation" seems closer to rational basis review, while a "substantial relation" seems closer to intermediate scrutiny applied in contexts other than campaign finance disclosure).

[36] *Minn. Citizens*, 692 F.3d at 885 (Melloy, J., concurring and dissenting).

[37] *Id.* at 876–77 (majority opinion) (discussing less problematic steps the state could have taken to achieve the ongoing reporting requirement's goals).

though the Supreme Court has previously considered less restrictive alternatives to disclosure when applying exacting scrutiny to political expenditure disclosure requirements, it has consistently rejected arguments for less stringent disclosure requirements, basing its rulings on deference to legislative decisions[38] and disclosure's status as "a less restrictive alternative to more comprehensive regulations of speech."[39] Parsing through the legislature's choice of specific disclosure requirements, as *Minnesota Citizens* did, flies in the face of these precedents and seems far closer to making sure disclosure requirements are "narrowly tailored" to the state's interest.

However, the fault for *Minnesota Citizens*' flawed reasoning lies as much with the Supreme Court's inconsistent treatment of exacting scrutiny as with the Eighth Circuit's own misapplication of precedent. While *Minnesota Citizens*' decision to invalidate the ongoing reporting requirement based on the availability of less problematic disclosure measures seems to conflict with the Supreme Court's standard of deference regarding political expenditure disclosure requirements, the Court invalidated ballot initiative disclosure requirements based on the presence of less problematic disclosure measures in *Buckley v. American Constitutional Law Foundation, Inc.*[40] (*ACLF*). The *ACLF* Court justified its ruling based on the assertion that ballot initiative disclosure requirements, unlike political expenditure disclosure requirements, trigger a "heightened" form of exacting scrutiny.[41] While this distinction made *ACLF*'s ruling inapplicable to *Minnesota Citizens*, *Minnesota Citizens*' initial discussion of whether exacting scrutiny was the appropriate standard to apply here, as well as its ruling predicated on the presence of less problematic disclosure measures, highlights the confusion engendered by the existence of this "heightened" exacting scrutiny standard.

Further clouding the picture is the Supreme Court's use of the terms "exacting scrutiny" and "strict scrutiny" interchangeably. While it appears that the Court has given the terms separate meanings when considering disclosure,[42] the Court has also used the term "exacting

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[38] *See Buckley*, 424 U.S. at 83 (noting that the specific threshold amounts requiring disclosure are "best left in the context of this complex legislation to congressional discretion").

[39] Citizens United v. FEC, 130 S. Ct. 876, 915 (2010).

[40] 525 U.S. 182 (1999).

[41] *Id.* at 203–05.

[42] *See, e.g.*, Doe v. Reed, 130 S. Ct. 2811, 2814 (2010); *Citizens United*, 130 S. Ct. at 914; *ACLF*, 525 U.S. at 204. Justice Thomas has articulated his belief that the *Buckley* court may have meant to apply strict scrutiny when it used the term "exacting scrutiny" in regards to disclosure laws, *see ACLF*, 525 U.S. at 212 (Thomas, J., concurring in the judgment), and that, due to the Court's application of a lesser degree of scrutiny to disclosure requirements, *Buckley* should be overturned, McConnell v. FEC, 540 U.S. 93, 275–77 (2003) (Thomas, J., concurring in part and dissenting in part). The fact that Justice Thomas consistently concurs or dissents to make these points suggests that the rest of the

scrutiny" when applying what appears to be strict scrutiny in other contexts. Indeed, *Minnesota Citizens* repeatedly justified its interpretation of exacting scrutiny by citing cases where the Supreme Court used the phrase "exacting scrutiny" but the cases themselves indicate that the Court applied strict scrutiny. For example, when speculating that exacting scrutiny may be as rigid as strict scrutiny, *Minnesota Citizens* cited *United States v. Alvarez*,[43] a case involving the Stolen Valor Act,[44] which made it a crime falsely to claim receipt of military decorations.[45] Although the *Alvarez* plurality chose to subject the Act to strict scrutiny, it called this standard "exacting scrutiny."[46] Later, when arguing that the Court had previously found laws unconstitutional under exacting scrutiny, *Minnesota Citizens* cited to *McIntyre v. Ohio Elections Commission*,[47] where the Supreme Court considered a statute that prohibited anonymously authored campaign literature.[48] The Court found that the provision was a direct prohibition on speech, mandating strict scrutiny, but referred to this standard as "exacting scrutiny."[49] *Minnesota Citizens* later cited *McIntyre* for the idea that exacting scrutiny requires that a law be "narrowly tailored to serve an overriding state interest"[50] and *Alvarez* for the idea that Minnesota had failed to show why continued reporting was "necessary" to accomplish its interests,[51] suggesting that these inapposite precedents informed its finding that Minnesota's disclosure law failed exacting scrutiny.

The Supreme Court's language regarding PACs in *Citizens United* has added further confusion to the application of exacting scrutiny. The Court's observations regarding the problematic nature of subjecting corporations to burdens similar to those placed on PACs has led to a large divide among courts regarding the question of whether PAC-style regulations of speech on corporations are per se unconstitutional.[52] Particularly unclear is whether it is unconstitutional for a state to

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Court believes exacting scrutiny to be less rigid than strict scrutiny, answering the question raised by the *Minnesota Citizens* majority. *See Minn. Citizens*, 692 F.3d at 876.

[43] 132 S. Ct. 2537 (2012).

[44] 18 U.S.C. § 704 (2006).

[45] *Minn. Citizens*, 692 F.3d at 876 (citing *Alvarez*, 132 S. Ct. at 2543, 2548, 2551 (plurality opinion)).

[46] *Alvarez*, 132 S. Ct. at 2548 (plurality opinion). Whatever its terminology, the Court's requirement of narrow tailoring, *id.* at 2551, and consideration of the government's "compelling interests," *id.* at 2249, demonstrate that it employed strict scrutiny.

[47] 514 U.S. 334 (1995).

[48] *Minn. Citizens*, 692 F.3d at 876 (citing *McIntyre*, 514 U.S. at 336, 347–57).

[49] *McIntyre*, 514 U.S. at 347 (internal quotation marks omitted).

[50] *Minn. Citizens*, 692 F.3d at 876 (quoting *McIntyre*, 514 U.S. at 347) (internal quotation mark omitted).

[51] *Id.* at 877 (citing *Alvarez*, 132 S. Ct. at 2551 (plurality opinion)).

[52] For a court that has found PAC-style regulations of speech per se unconstitutional, see *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677–79 (10th Cir. 2010). For courts that have

subject PACs and corporations to similar burdens, as was alleged in *Minnesota Citizens*, when the burdens the state places on both appear less onerous than those placed on federal PACs.[53] This was a central point of disagreement in *Minnesota Citizens* that partially drove the case's outcome.[54] The majority appeared to hold that subjecting PACs and corporations to similar disclosure burdens — even if both are subjected to burdens less onerous than those placed on federal PACs — is constitutionally problematic.

While these inconsistencies confuse courts, legislatures suffer most. As Judge Melloy noted in *Minnesota Citizens*, the main difference between exacting and strict scrutiny appears in courts' analyses of specific disclosure requirements.[55] While the Supreme Court's line of cases regarding political expenditure disclosure has suggested that legislative decisions about specific disclosure requirements should receive considerable deference,[56] the Court's continued use of the terms "exacting scrutiny" and "strict scrutiny" interchangeably and its creation of alternative forms of exacting scrutiny may allow courts so inclined to invalidate individual disclosure provisions more easily. The Court's continued ambiguity also casts doubt over the evidentiary burden legislators must meet to overcome exacting scrutiny, which may cause legislators to write less robust disclosure laws for fear of invalidation.[57] Given the Court's belief that robust disclosure "promotes transparency and accountability . . . to an extent other measures cannot,"[58] the Court should try to avoid this result. However, as long as this lack of clarity over exacting scrutiny continues, decisions like *Minnesota Citizens* may continue to engender legislative hesitancy.

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rejected the argument that these regulations are per se unconstitutional, see *National Organizations for Marriage v. McKee*, 649 F.3d 34, 56 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1635 (2012), and *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1009–11 (9th Cir. 2010).

53 *See Minn. Citizens*, 692 F.3d at 875.

54 *Compare id.* at 875 ("We question whether the Supreme Court intended exacting scrutiny to apply to laws such as this, which subject associations that engage in minimal speech to 'the full panoply of regulations that accompany status as a [PAC].'" (quoting FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 262 (1986))), *with id.* at 887 (Melloy, J., concurring and dissenting) ("Where Minnesota's disclosure laws subject its PACs and political funds to requirements that are less burdensome than those of federal PACs, the fact that political funds and PACs are subject to similar requirements is insignificant.").

55 *Id.* at 884 (Melloy, J., concurring and dissenting) ("[W]e should review these decisions with extreme deference, and require only that the legislature's choice be rational.").

56 Buckley v. Valeo, 424 U.S. 1, 83 (1976).

57 For example, Judge Melloy stated in dissent that the *Minnesota Citizens* majority essentially told legislators their threshold for disclosure was too low, the administrative burdens imposed by disclosure too high, and the number of required annual disclosures too many. 692 F.3d at 880 (Melloy, J., concurring and dissenting). He noted that, given the subjective nature of many of these decisions, a higher burden here amounted to the majority "impos[ing] its own judgment" instead of "deferring to the legislature." *Id.*

58 Doe v. Reed, 130 S. Ct. 2811, 2820 (2010).