No. 14-443

IN THE

Supreme Court of the United States

BONN CLAYTON,

Petitioner,

v.

HARRY NISKA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT HARRY NISKA

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QUESTION PRESENTED

Whether the State of Minnesota may constitutionally regulate knowingly false statements that mislead the public about whether a candidate has been endorsed by a political party.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OPINIONS BELOW

The Minnesota Court of Appeals opinion, *Niska v. Clayton*, No. A13-0622, 2014 WL 902680 (Minn. Ct. App. Mar. 10 2014), is designated as "unpublished," meaning it is not precedent. Minn. Stat. § 480A.08. The Minnesota Supreme Court denied review of the opinion on June 25, 2014.

BRIEF IN OPPOSITION

Minnesota Statute § 211B.02 restricts a narrow category of deceptive speech: false claims that a candidate has been endorsed by a political party or other organization. In order to impose a penalty under section 211B.02, Minnesota courts require a complainant to prove a knowing false claim of support that is intended to mislead voters.

Here, following a two-day evidentiary hearing, a panel of three administrative law judges unanimously held that Petitioner knowingly created and disseminated a website and email messages in an effort to mislead voters into believing that three candidates for the Minnesota Supreme Court had been endorsed by the Republican Party of Minnesota ("RPM") in the 2012 election. The panel found that Petitioner's false claims were knowing, intended to mislead, and actually misleading. The falsity of Petitioner's claims and his scienter are incontrovertible: at the 2012 RPM convention, he personally attempted to persuade RPM to endorse judicial candidates, and was present when the

convention delegates voted not to make any endorsements for Minnesota Supreme Court in 2012. The panel heard unchallenged testimony from the RPM executive director regarding the actual confusion created by Petitioner's false claims.

For these knowingly false claims of party endorsement, the panel imposed a civil penalty of $600. The Petition challenges this $600 fine, on the tenuous premise that even knowingly false speech intended to mislead voters is entirely immune from government regulation. This Court's precedents, and all applicable lower court decisions, are to the contrary. In addition, even if the question of the First Amendment's protection of false political speech merits further clarification by this Court, this case is a flawed vehicle for such clarification. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. Niska's Administrative Complaint Against Clayton.

Petitioner Bonn Clayton has been active in the Republican Party of Minnesota for decades, and has held several formal positions with RPM in the past. Clayton has spoken at party events and conventions, frequently presenting himself as an expert on judicial elections and judicial candidates.

At the RPM state convention in 2012, Clayton recommended that party delegates endorse candidates to run for Minnesota Supreme Court. The

convention initially voted to endorse candidates, but voted to reconsider that decision—and not endorse any candidate—following Clayton's proposal that the convention endorse Tim Tingelstad to run against Justice David Stras.

Despite knowing that the RPM had not endorsed any candidate for Minnesota Supreme Court, Clayton created a website called "www.judgeourjudgesmn.org" under the title "Republican Party of Minnesota – Judicial District Chairs Committee" and a banner headline reading "2012 Minnesota Judicial Voters' Guide." The guide "strongly recommended" three candidates for Minnesota Supreme Court and urged readers to "vote for them and encourage many others to do the same." Clayton emailed the guide to an RPM e-mail list of over 7,000 recipients. In the e-mail, Clayton claimed that "party leaders" had created the "guide" in response to questions about judges. Clayton's e-mail again used the name "Republican Party of Minnesota," under Clayton's title modified by the phrase "Judicial District Republican Chairs."

Clayton's website and e-mail created actual confusion among potential voters. RPM fielded a number of calls from confused persons who—based on Clayton's e-mail and website—believed RPM had endorsed judicial candidates. Concerned about Clayton's false claim of support, RPM sent its own e-mail clarifying that RPM had not endorsed any candidate for Minnesota Supreme Court.

Clayton did not take RPM's e-mail seriously, and continued sending additional e-mails advocating for the "voter guide" at www.judgeourjudgesmn.org. RPM's attorney sent an e-mail to Clayton demanding that Clayton cease using the RPM's name in connection with this statements supporting candidates for Minnesota Supreme Court. The e-mail from RPM's counsel expressly referenced Minn. Stat. § 211B.02, and informed Clayton that he was falsely claiming party support in violation of state law. Still defiant, Clayton took the position that RPM did not have the authority to stop him from using the name. Greg Wersal, an attorney advising Clayton, sent RPM's counsel a response disagreeing with RPM's interpretation of section 211B.02 and challenging RPM to settle the matter in litigation.

II. The Proceedings Below

On the day of the 2012 general election—November 6, 2012—Niska filed a complaint with the Minnesota Office of Administrative Hearings alleging that Clayton violated Minn. Stat. § 211B.02 by falsely claiming that the three candidates were supported by RPM. A three-member panel of Administrative Law Judges held a two-day evidentiary hearing taking testimony from eight witnesses, and considering hundreds of pages of exhibits. Ultimately, the Administrative Law Judges determined Clayton's false claims violated Minn. Stat. § 211B.02.

In an unpublished decision, a panel of the Minnesota Court of Appeals affirmed the agency determination that Clayton violated Minn. Stat. § 211B.02. Applying strict scrutiny, the panel rejected Clayton's constitutional challenge to the statute after concluding that the statute was narrowly tailored to meet Minnesota's compelling state interest in protecting the electorate from confusion regarding claims of support by political parties. The panel acknowledged that not all false statements are categorically unprotected by the First Amendment. However, the panel explained that Minn. Stat. § 211B.02 only prohibited knowingly false statements of false endorsement "that may mislead the public and harm the political process."

Clayton filed a petition for review by the Minnesota Supreme Court, and the Minnesota Supreme Court denied review on June 25, 2014. Clayton's Petition to this Court followed.

REASONS FOR DENYING THE PETITION

Minnesota's prohibition on false claims of political-party endorsement is consistent with this Court's precedent, and is drawn narrowly to meet the State's compelling interest in protecting voters from confusion and avoiding fraud on the electorate. The Minnesota Court of Appeals' decision upholding the law is correct, and does not conflict with any decision of this Court, nor does it create a conflict with any other court. Petitioner challenges the lower court's decision based on the assertion that political speech,

even knowingly false speech, is entirely exempt from regulation. Petitioner also challenges the Court of Appeals' application of strict scrutiny based on a series of arguments that were never raised below and, as a result, are not properly before the Court now. Even if these arguments had been properly raised, this case is an inadequate vehicle for the Court to consider a state's ability to regulate false political speech. That question would be better left to other cases. One such case, *281 Care Comm. v. Arneson,* currently has a petition for writ of certiorari pending before the Court while another case, *SBA List v. Ohio Elections Comm.*, currently is pending at the U.S. Court of Appeals for the Sixth Circuit.

I. The Decision Below Was Decided Correctly, And Consistently With This Court's Precedent And The Applicable Decisions Of Every Other Lower Court with Existing Law.

A. The Court of Appeals' holding that Minn. Stat. § 211B.02 survives strict scrutiny is consistent with this Court's precedent and the decisions of every applicable lower court.

Clayton argues that the government never has a compelling interest in "preventing false speech which misleads the public regarding elections." Pet. at 13. Clayton thus argues that false political speech is categorically immune from regulation. *See id.* at 13-14. This Court's precedents do not support this

argument.[1] *See Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.").

To the contrary, this Court has recognized on numerous occasions that the government has a "compelling interest in protecting voters from confusion and undue influence." *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *Eu v. San Francisco Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 231-32 (1989) (discussing cases where the Court has recognized a state's interest in preserving the integrity of its election process); *McIntyre v. Ohio Elections Com'n,* 514 U.S. 334, 349 (1995). *Cf. San Francisco Arts & Athletics, Inc.*

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[1] If anything, this Court's precedents hold the opposite—that Clayton's false statements are categorically unprotected because they amount to actual fraud on the electorate. This Court confirmed in *United States v. Alvarez* that certain categories of false and harmful speech—like fraud or defamation—may be restricted "without affronting the First Amendment." 132 S. Ct. 132 S. Ct. 2537, 2547 (2012). Prohibitions on actual fraud are permitted to punish statements where the speaker knows "that the representation was false," "intend[ed] to mislead the listener, and succeeded in doing so." *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 619-620 (2003). The Court of Appeals construed section 211B.02 narrowly to "punish[] speech only when the speaker knows that it will lead others to believe wrongly that a candidate has the support of a party or organization," *Niska*, App. 18, and the evidence established that Clayton actually succeeded in misleading the electorate, *id.* at 5. Thus, under this Court's precedent, Clayton's knowingly false statements—which actually caused voter confusion—likely are categorically unprotected.

v. United States Olympic Comm., 483 U.S. 522, 539-540 (1987) (rejecting First Amendment challenge to law prohibiting unauthorized use of the term "Olympic").

Recognizing the importance of these interests, lower courts—including Minnesota's highest court—have held that the government may restrict false claims of political-party support. *See Schmitt v. McLaughlin,* 275 N.W.2d 587, 590 (Minn. 1979) (rejecting First Amendment arguments in holding that the defendant's use of initials "DFL" in advertisements and lawn signs violated section 211B.02's predecessor statute); *United We Stand America, Inc. v. United We Stand, America New York, Inc.,* 128 F.3d 86 (2d Cir. 1997) (rejecting First Amendment arguments against unauthorized use of the name "United We Stand, America"); *Tomei v. Finley,* 512 F. Supp. 695 (N.D. Ill. 1981) (rejecting First Amendment arguments and enjoining Democratic candidates from using the acronym "REP" to deceive voters into thinking that the candidates were Republicans).

The Minnesota Court of Appeals' decision here fits squarely in line with these cases. Applying strict scrutiny, the Court of Appeals concluded that Minnesota's interest in avoiding voter confusion was compelling, and that section 211B.02 was the least-restrictive means to achieve the State's interest. Clayton has identified no cases that conflict with this conclusion.

B. Clayton misapplies recent lower court decisions to manufacture a tenuous and immaterial split of authority regarding the standard of review.

Clayton relies primarily on *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014) and *Susan B. Anthony List v. Ohio Elections Com'n.*, Case No. 1:10-cv-720, 2014 WL 4472634 (S.D. Ohio Sept. 11, 2014) to suggest confusion regarding whether the government can ever regulate false political speech.

No case has held that the First Amendment creates "a blanket exemption" for knowingly false political speech. *Madigan*, 538 U.S. at 621. The courts in both *281 Care* and *SBA List* applied strict scrutiny when considering broad prohibitions on all false political speech. In applying strict scrutiny, the Eighth Circuit rejected the argument that all restrictions on political speech are unconstitutional. *281 Care*, 766 F.3d at 783 n.8. These two cases are consistent with the Minnesota Court of Appeals' application of strict scrutiny when it considered Clayton's challenge to section 211B.02 below. There is no conflict among these cases about the "standard of review to be applied."

Nor does either *281 Care* or *SBA List* create a conflict in how the strict-scrutiny standard is applied to statutes involving false political speech. The courts in those cases were reviewing much broader statutory prohibitions on all knowingly false statements in campaign material. *281 Care Comm.*,

766 F.3d 774; *SBA List*, 2014 WL 4472634, at *2. In contrast, the statute at issue here is drawn narrowly to address only a specific category of false statements, with a tighter fit between the statute and the state's interest. *See Niska,* App. 18.

281 Care and *SBA List* also can be distinguished as a factual matter, since the factual record here contains evidence that Clayton's false claims actually caused confusion—thus demonstrating that Minnesota's compelling interest is real. *Niska* App. 37. In addition, the factual record also shows that an administrative-agency complaint was the least restrictive means to address the confusion caused by Clayton's fraudulent website: RPM's counter speech was ineffective as Clayton persisted in falsely claiming party support even after RPM publicly responded to his deceptive voters' guide. *See* Pet. 8. These facts thus contrast with *281 Care* where the Eighth Circuit concluded that the states had insufficient proof of harm to justify the state's interest. *281 Care,* 766 F.3d at 790-91.

C. Clayton's argument that the statute is overbroad is not properly before the Court and is legally incorrect.

Clayton argues that section 211B.02 is unconstitutionally overbroad because the statute's enforcement mechanism—*i.e.* "an established administrative hearing process"—has the potential to chill speech. Pet. 16. As support, Clayton again relies on *281 Care* and *SBA List*, where the courts

expressed concerns that the filing of an administrative complaint could chill truthful speech.

This argument is not properly before the Court because Clayton raised it for the first time in his petition for writ of certiorari. At the Court of Appeals, Clayton argued that Minn. Stat. § 211B.02 was overbroad for two reasons: "it prohibits constitutionally protected false speech associated with free debate and it prohibits factually accurate statements that imply a false endorsement." *Niska*, App. 18. The Petition now abandons these arguments, and challenges the statute based on the chilling effect that allegedly arises from the administrative-hearing process. Because this argument was not raised below, it is not properly before the Court and should not be considered. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Even if the issue had been raised below, Clayton is wrong to argue that section 211B.02 is overbroad solely because he can imagine a scenario where a frivolous complaint is filed to chill political speech. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The over breadth doctrine is used "sparingly and only as a last resort," *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 (1988), and there is no need to apply the doctrine here where statute's application, even as part of an administrative process, limits only a narrow category of false statements—*i.e.* claims of endorsement that the speaker knows to be false and intends to mislead. Given this narrow construction, the statute avoids

the overbreadth problems discussed in *281 Care* and *SBA List. See, e.g.*, *Schmitt*, 275 N.W.2d at 591 (construing predecessor statute to section 211B.02 narrowly to avoid constitutional problems).

D. Clayton's arguments that the statute is underinclusive fail for the same reasons—they are not properly before the Court and legally incorrect.

Clayton argues that section 211B.02 is underinclusive because the statute does not also prohibit false statements claiming that a "candidate's ideas" are supported by a political party or other dishonest use of party symbols. Pet. 20-21.

Here, again, Clayton raises an argument for the first time in his petition to this Court. At the Court of Appeals, Clayton argued the statute was underinclusive because it did not apply to "minor political parties." The Court of Appeals rejected that argument, concluding that Clayton's reading of the statute was absurd. *Niska*, App. 20. Clayton never argued that the statute was underinclusive for any other reason. Because the argument was not raised or decided below, this Court should not consider it now. *Delta Air Lines*, 450 U.S. at 362.

Even if Clayton's argument were properly before the Court, Clayton clearly is wrong to argue that section 211B.02 is doomed to fail because it is does not prohibit other types of false speech, such as fraudulent use of party symbols or false references to

party ideas. A statute is not unconstitutionally underinclusive simply because a litigant might imagine other speech regulations that also would advance the state's goal. *See Buckley v. Valeo*, 424 U.S. 1, 105 (1976) ("a statute is not invalid under the Constitution because it might have gone farther than it did.") (internal citation and quotation omitted). As demonstrated by cases interpreting Minnesota's statute, the limited reach of section 211B.02 is sufficient to address the state's compelling interest in preventing confusion. *E.g.*, *Schmitt*, 275 N.W.2d at 591; *In re Contest of Election DFL Primary Election Held Tuesday*, *September 13, 1983*, 344 N.W.2d 826, 831-31 (Minn. 1984).

II. This Case Is Not An Adequate Vehicle To Review The Question Presented.

To the extent this Court seeks to clarify or define the First Amendment's protections for false political speech, the issues would be better presented in two other pending cases. The government's attorneys recently filed a petition for a writ of certiorari in *281 Care Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014). A similar statute is at issue in *Susan B. Anthony List v. Ohio Elections Com'n et al.*, Case No. 14-4008 (6th Cir.), which is currently pending at the Sixth Circuit and likely will return to this Court following that court's decision.

Either of these cases would present a better vehicle because, in both cases, the lower courts have had the opportunity to fully consider the legal

arguments presented. By contrast, almost all of the legal arguments in the Petition are being raised for the first time at this Court, resulting in lower court decisions that did not address what Petitioner now believes are the most-pertinent arguments challenging the statute's constitutionality. This Court would need to decide Clayton's legal arguments in the first instance without the benefit of fully developed decisions in the courts below.

In addition, section 211B.02 is much narrower than the broader bans on false political statements at issue in *281 Care* and *SBA List* and, as noted above, the Minnesota Court of Appeals decision is supported by an extensive factual record. This creates a possibility that any decision by this Court may be viewed as limited to the narrow statutory prohibition in section 211B.02 or the relatively unique facts of this case. A decision in *281 Care* or *SBA List*, by contrast, could squarely address the degree of protection provided to false political speech.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: January 5, 2015

Respectfully submitted,

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