No. 14-443

In The

Supreme Court of the United States

BONN CLAYTON,

Petitioner,

v.

HARRY NISKA,

and

OFFICE OF ADMINISTRATIVE HEARINGS,

Respondents.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the petitioner Bonn Clayton's certiorari petition explains, the question presented in this case implicates an untenable suppression of political speech on a well-defined legal issue of exceptional national importance. Clayton was prosecuted and fined by a government agency for claims of implied false speech regarding judicial candidate endorsement despite the "affected" political party countering any "confusion" through its own publications before the election.[1] This case remains the best vehicle for consideration of the constitutionality of state statutes which allows for governmental agencies to act as ministries of truth to "prevent voter confusion." Niska identifies no sound basis for denying review here.

I. This Case is the best vehicle for consideration of the constitutionality of state statutes which suppress false statements in political speech through government agencies as ministries of truth to prevent voter confusion.

The government through the Office of Administrative Hearings, an executive branch agency, prosecuted and fined Clayton for political speech regarding endorsed support of judicial candidates. *New York*

[1] Notably, the respondent state agency, the Minnesota Office of Administrative Hearings (OAH) declined to respond to this Court's request for a response to Niska's petition.

Times Co. v. Sullivan, 376 U.S. 254 (1964). Yet, Niska asserts that the state's interest is to avoid voter confusion or undue influence but does so in a vaccum without regard to the engaged counterspeech of the affected endorsement party. If any "confusion" existed as claimed, that "confusion" was countered with political counterspeech through publications prior to the election contest exactly as this Court envisioned: "The preferred First Amendment remedy of more speech, not enforced silence . . . has special force." *Brown v. Harlage,* 456 U.S. 45, 61 (1982).

Clayton's prosecution demonstrated that it is the government who determined what is true or false speech allowing for the targeting of activists to curtail, if not quash, political speech. The statutory scheme allows any party – and not necessarily the named candidate or entity – to start an action based upon the litigant's interpretation of the message enforced by the government through civil or criminal prosecution or both. The state may not position itself to prevent others from "resort[ing] to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement." *Cantwell v. Conn.,* 310 U.S. 296, 310 (1940).

The Minnesota appellate court decision and Niska contend that "preventing voter confusion"[2] is a compelling state interest upon which political speech can be curtailed. In turn, Niska contends that the

[2] *See, e.g.,* Response Brief at 6-8.

OAH acts as basically a ministry of truth[3] as the enforcer (and which collects the monetary fine, *not* the prevailing accusing party to "prevent voter confusion." Yet, no U.S. Supreme Court case has ever held that such a state interest is compelling to regulate political speech when counterspeech is available as an effective pre-election remedy.

The $600 fine against Clayton illuminates that such statutes can lead to penalties on apparently true speech even when pre-election counterspeech is an effective, available alternative. The claims adjudicated by the OAH against petitioner were whether petitioner's pre-election statements regarding his committee's recommendation of support for an unendorsed judicial candidate constituted a false claim of Republican Party of Minnesota's endorsement of the judicial candidate. Although Clayton's statements were apparently true, the OAH found his statements to be an "indirect" and "implicit" false claim of endorsement; and, in turn, the OAH found petitioner had made, statutorily, a false claim of political support.

Unlike the parties involved in *281 Care Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014), and *Susan B. Anthony List v. Ohio Elections Comm'n*, No. 1:10-CV-720, 2014 WL 4472634 (S.D. Ohio Sept. 11, 2014), the Republican Party of Minnesota in this case engaged in effective pre-election counterspeech.

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[3] In George Orwell's novel "1984" the Ministry of Truth is Oceania's propaganda ministry.

The Republican Party of Minnesota effectively communicated to its members and the public, prior to the election, that an endorsement of a judicial candidate had not occurred – clarifying or counteracting Clayton's statements.

Further, unlike the Plaintiffs in *281 Care Committee* and *Susan B. Anthony List,* Clayton has actually been fined $600 for violating Minnesota's statutory ban on false claims of major political party support.

Because petitioner has been fined, there are no standing issues as raised in the facial challenges in *281 Care Committee* and *Susan B. Anthony List.* A U.S. Supreme Court reversal of the decision below nullifies Clayton's $600 fine. Thus, Petitioner's case is a real, not hypothetical, First Amendment case. U.S. Const. amend. I.

The need for this Court's review is reinforced by the pending petition for writ of certiorari in *281 Care Committee v. Arneson,* 766 F.3d 774 (8th Cir. 2014). Under a different provision of the same Minnesota statutory scheme, Minnesota Statute § 211B.06, the *281 Care Committee* petitioner county attorneys threatened the respondent political activists with prosecution chilling the respondents' political speech for alleged false statements against the government and ballot questions, entities and things that cannot be defamed. The U.S. Court of Appeals for the Eighth Circuit deemed the statute unconstitutional, but found it difficult to identify any compelling state

interest; and, thus, the Eighth Circuit did not identify a compelling state interest nor did it need to because the statute was found unconstitutional on other grounds.

II. The purported compelling state interest to "prevent voter confusion" is vague and too broad to administer effectively the protection of political speech from bans on false speech.

As the petition for writ of certiorari explains, the questions involved in this case are issues of first impression for this Court. How does the Court protect political speech from state bans on false speech? Is "preventing voter confusion" a compelling state interest for a state ban on false political speech? If not, what is a compelling state interest for such bans?

These questions are of exceptional nationwide importance because the nation politically needs a workable First Amendment legal standard to protect political speech from bans on false speech. Yet, in response, the respondents offer no assistance to a Court which seeks that workable First Amendment legal standard protecting political speech from bans on false speech.

Instead, Niska suggests that the government may restrict false claims of political party support as a basis for a compelling state interest. Br. in Opp. at 8. However, each of the cases cited – *Schmitte v. McLaughlin,* 275 N.W.2d 587 (Minn. 1979); *United We*

Stand America, Inc. v. United We Stand America New York, Inc., 128 F.3d 86 (2d Cir. 1997); and *Tomei v. Finley,* 512 F.Supp. 695 (N.D. Ill. 1981) – are pre-*Alvarez* (*United States v. Alvarez*, 132 S. Ct. 2537 (2012)) regarding standards applicable to false statements albeit not political statements. None of the cases Niska cited review the First Amendment claims involved under a strict scrutiny analysis.

Niska contends that this Court has recognized "on numerous occasions that the government has a 'compelling interest in protecting voters from confusion and undue influence'" citing *Burson v. Freeman,* 504 U.S. 91, 199 (1992); *Eu v. San Francisco Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 231-32 (1989); and *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 349 (1995). Each of these cases involves specific acts at specific times or places. *Burson* involved restrictions on campaign activities near polling places. *Eu* involved a state's interference with internal affairs of political parties. *McIntyre* involved requiring the identity of a person be made in written handbills distributed during an election (held unconstitutional). But, this Court has never said that false statements during campaigns are categorically unprotected.

Niska requests this Court to conclude that under § 211B.02, as it pertains to political speech, the government may determine the truth of a statement or the falsity of a statement, if it would confuse the voter regardless of the availability of counterspeech or if counterspeech actually occurred. *See* Br. in Opp. 10. Niska would have the OAH make a determination

of future events to ascertain that the false speech caused a person to vote differently and affected the outcome of the election and would have the OAH conclude that any counterspeech was ineffective or would never be effective under the circumstances involved. Niska argues that any false speech leads to a fraudulent election result. Finally, Niska contends that "it was Clayton's false claims that caused the confusion . . . demonstrating that Minnesota's compelling interest is real." *Id.*

Yet, the government has not shown how the post-election administrative OAH process prevents voter confusion when pre-election counterspeech is available to and used by the Republican Party of Minnesota. App. 37 at ¶33. Niska's arguments fail when political counterspeech is available and used, as it was here by the Republican Party of Minnesota. Under the First Amendment, political counterspeech is preferred over lawsuits asserting political falsity. Simply put, the government's proffered compelling state interest to "prevent voter confusion" and its other alternatives are vague and too broad for courts to adequately protect pre-election political speech from bans on false speech.

III. Niska offers no substantiated reason to deny Clayton's petition.

Niska offers no substantiated reason to deny Clayton's petition. First, there is no merit to Niska's suggestion that Clayton failed to argue that the

offending statute was overbroad or underinclusive in the Minnesota appellate courts. Br. in Opp. 11 and 12. Clayton certainly argued that the lower court should find Minnesota Statute § 211B.02 unconstitutional. The decision of the Minnesota appellate court dealt with the issues of First Amendment overbreadth and underinclusiveness. App. 17 and 19. Even under an as-applied challenge, the doctrines of overbreadth and underinclusiveness are available for a court to review. Clayton, as did the appellate court, argued about the applicability of the First Amendment principles and how they could be applied to § 211B.02.

Second, Niska further implicates the OAH, because it can be engaged by *any* person, as a ministry of truth to "prevent voter confusion." Niska's use of § 211B.02, through the only means of administrative enforcement, brings into question how the application of § 211B.02 against Clayton revealed the overbreadth of the offending statute. The chilling effect of the prosecution is as much the statute's overbreadth as is the statute's application. As Justice Breyer once opined, "[t]he ordinance is unconstitutional, not because the policeman applied [his] discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case." *City of Chicago v. Morales,* 527 U.S. 41, 71 (1999).

Niska contends that *281 Care Committee* and *Susan B. Anthony List* are cases consistent with the instant case because of the court of appeals' application of strict scrutiny and because both cases involved

"broader statutory prohibitions on all knowingly false statements in campaign material" as opposed to a "tighter fit between [§ 211B.02] and the state's interest." Br. in Opp. at 10. Niska also contends that it was Clayton's false claims that caused the confusion . . . demonstrating that Minnesota's compelling interest is real." *Id.*

Yet, the government in this case has not shown how the administrative OAH process actually prevents voter confusion when political counterspeech is available and engaged. App. 37 at ¶33. The matters in *281 Care Committee* and *Susan B. Anthony List* do not have this element. Certainly, a determination of a statute with a "tighter fit" will guide other courts regarding "broader statutory prohibitions" on political speech.

Additionally, as Clayton argued in his petition, § 211B.02 is fatally underinclusive because it does not ban false claims of support for a candidate's ideas, policies, or platforms indicative of a political party's support. If false political support is such a problem, why doesn't the government ban all false claims of political support? For example, the statute does not ban false claims of support for a candidate's wisdom, premises, or logic. Thus, what is the difference between "the Republican Party supports the candidate" and "the Republican Party supports the candidate's ideas?" Pet. at 21-22. Here, the statute prohibits some speech, but does not prohibit other speech. *See RAV v. City of St. Paul,* 505 U.S. 377, 387 (1992). Such

underinclusiveness is normally considered fatal to a governmental claim of a compelling state interest.

Upon review, Niska's arguments provide no reason to deny Clayton's petition. This case remains the best vehicle for consideration of the constitutionality of a state statute which sets up a ministry of truth to "prevent voter confusion."

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For the foregoing reason and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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