No. 11-535

In The Supreme Court of the United States

ROSS ARNESON, in his official capacity as County Attorney for Blue Earth County, Minnesota, or his successor; MIKE FREEMAN, in his official capacity as County Attorney for Hennepin County, Minnesota, or his successor; MICHAEL JUNGE, in his official capacity as County Attorney for McLeod County, Minnesota, or his successor; TOM N. KELLY, in his official capacity as County Attorney for Wright County, Minnesota, or his successor,

Petitioners,

v.

281 CARE COMMITTEE; RON STOFFEL; W.I.S.E. CITIZEN COMMITTEE; VICTOR E. NISKA; CITIZENS FOR QUALITY EDUCATION; JOEL BRUDE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Governmental entities cannot sue for defamation. *New York Times Co. v. Sullivan,* 376 U.S. 257, 291 (1964). Likewise, a ballot initiative or referendum cannot be a victim of character assassination. *See McIntyre v. Ohio Elections Commn,* 514 U.S. 334, 352 n. 16 (1995). Hence, false statements about the government (as opposed to a particular government official) may not be punished. *New York Times Co.,* 376 U.S. at 291. Yet, under Minnesota political campaign statutes, Minn. Stat. § 211B.06, citizens can be civilly and criminally prosecuted for disseminating political campaign materials and writing letters to the editor of questionable veracity designed to defeat or promote governmental policies embodied in referendums.

> Does the First Amendment's Free Speech Clause protect citizens from prosecution for knowingly making false statements to promote or defeat ballot questions during political campaigns?

CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Supreme Court Rule 29.6, counsel for the Respondents makes the following disclosure regarding the Respondent parties:

1. W.I.S.E. Citizen Committee, 281 CARE Committee, and Citizens for Quality Education are associations with individual members, and are not domestic corporations organized under the laws of Minnesota or any other state.

2. As associations, W.I.S.E. Citizen Committee, 281 CARE Committee, and Citizens for Quality Education do not have parent corporations.

3. As associations, W.I.S.E. Citizen Committee, 281 CARE Committee, and Citizens for Quality Education do not have public stock. Therefore, no publicly held corporation owns stock of any kind in these member associations.

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STATEMENT OF THE CASE

The Respondents 281 CARE Committee, Ron Stoffel, W.I.S.E. Citizen Committee, Victor E. Niska, Citizens for Quality Education and Joel Brude ("Niska",[1] incorporate by reference the statement of facts of the opinion held below. However, to support denying the Petition for the Writ of Certiorari there are two important factors to emphasize. First, the state statute at issue, Minn. Stat. § 211B.06, includes not only campaign materials, but also letters to the editor:

> A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or *campaign material . . . with respect to the effect of a ballot question,* that is designed or tends . . . to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.
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> * * *
>
> A person is guilty of a misdemeanor who intentionally participates in the *drafting of a letter to the editor with respect . . . to the effect of a ballot question*, that is designed or tends to . . . promote or defeat a ballot

[1] By letter of the Clerk of Court, dated December 19, 2011, the Court invited the Respondents to file the instant response brief.

> question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.[2]

But, the statute specifically exempts newspaper editorials from its restrictions.[3]

Second, the enforcement mechanism of the state statute allows not only private individuals, but also governmental entities, such as county attorneys or the state's Attorney General, to commence a civil prosecution against alleged violators of the law, and expose the citizen to criminal prosecution as well. In the Court of Appeals decision denying the applicability of sovereign immunity to the Attorney General, the court found "section 211B.06 allows *any* person, entity, or agency to file a civil complaint."[4] The penalties associated with Minn. Stat. § 211B.06 can be more severe monetarily in the civil context than in the criminal context. But, criminal prosecution cannot be commenced until after the civil prosecution has ended.[5]

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[2] Minn. Stat. § 211B.06. (Emphasis added). There is also an exception to prosecution: "Subdivision 1 does not apply to any person or organization whose sole act is, in the normal course of their business, the printing, manufacturing, or dissemination of the false information." Minn. Stat. § 211B.06, subd. 2.

[3] Minn. Stat. § 211B.06.

[4] App. 20 (emphasis added).

[5] Minn. Stat. § 211A.08, subd. 3.

ARGUMENT

The Petition for a Writ of Certiorari and the request for a hold on the Petition should be denied because the underlying instant case involves issues regarding First Amendment protections on core political speech.

A. The issue in *Alvarez* regarding representations of the person is diametrically dissimilar to false statements about ballot questions and criticism of government during political campaigns, not issues of self-misrepresentations.

The Petition for a Writ of Certiorari should be denied. Likewise, the Petitioners request for a "hold" on their Petition until after this Court's decision in *United States v. Alvarez* should also be denied.[6] This Court's disposition in *Alvarez* will not be dispositive in the instant case because it does not pertain to the question presented here. Whether prosecutions for knowingly made false statements criticizing the government in political campaigns on issue-based referendums are constitutional. As the United States noted in its Petition in *Alvarez* "the statute [18 U.S.C. § 704(b)] prohibits only a discrete category of misrepresentations of fact about the *speaker himself*."[7] The divergence between the instant case and *Alvarez* could not be wider. Here, where a ballot

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[6] *United States v. Alvarez,* 617 F.3d 1198 (9th Cir. 2010), *petition granted,* 80 USLW 3141 (October 17, 2011).

[7] *United States v. Alvarez,* U.S. Pet. for Writ of Certiorari at 27 (Aug. 2011).

question or criticism of the government is at issue, political rhetoric is at stake:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of the amendment was to protect the free discussion of governmental affairs.[8]

> For speech concerning public affairs is more than self-expression, it is the essence of self-government.[9]

The instant case involves innate ballot questions or referendums reflecting a government policy to do something with the permission of the electorate – for example, to levy taxes or to amend the state constitution. The decision to place on the ballot a bond referendum is frequently an issue decided by school boards; whereas constitutional amendments are initiated by legislative procedures. Even if a ballot referendum is generated by the general populace, the premise of free speech protections for false statements regarding ballot questions remains the same. The ballot question does not have a reputation. And since the government is involved as a result of the referendum's enactment, the government cannot retaliate through campaign laws regardless of what the citizen has stated during the election contest.

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[8] *Mills v. Alabama,* 384 U.S. 214, 218 (1966).

[9] *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964).

In other words, because a ballot question is inanimate it does not have a reputation. "A public question clearly cannot be the victim of character assassination."[10] Likewise, governmental entities cannot be the victim of character assassination and sue for defamation:

> Governments and governmental entities cannot maintain an action for libel. Criticism of government is at the very center of the constitutionally protected area of free discussion. No case has been found allowing a government to recover for libel. For good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.[11]

Therefore, neither may a person, organization, or the government itself maintain an action to sue another regarding a ballot question for false statements inclusive of those made with knowledge or with careless disregard of whether the statements are false. If this were true, the United States would be no

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[10] *McIntyre v. Ohio Elections Commn,* 514 U.S. 334, 353 n. 16 (1995).

[11] Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech,* vol. 3, § 23.3.50, 23; 35-36 (West 2010); *New York Times Co. v. Sullivan,* 376 U.S. 254, 291 (1964).

better than, for example, China,[12] Rwanda,[13] Iran,[14] Nigeria,[15] or Afghanistan.[16]

Minnesota Statute § 211B.06 is a regulation of pure speech, with direct regulation of the content of speech. When we speak of statements made in political campaigns critical of government as reflected in issue-based elections, we speak of core political speech. The principles enunciated by this Court in *Buckley v. Valeo* regarding the conduct of campaigns

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[12] Jurist Legal News & Research, U. of Pitt. Sch. of Law, April 26, 2010 ("Chinese authorities have arrested a prominent Tibetan writer after he signed a letter critical of the Chinese government's relief efforts following the recent earthquake in western Qinghai.").

[13] Committee to Protect Journalists, July 9, 2010 ("Police in Rwanda arrested the editor of a private newspaper on Thursday in connection with a series of articles critical of the government."), cpj.org.

[14] The Seattle Times, Dec. 26, 2010 ("An Iranian news agency says authorities have confirmed that remarks by an economist critical of the government's subsidy cuts were the reason for his detention."), seattletimes.nwsource.com.

[15] Associated Press, Reading Eagle.com, July 3, 2011 ("[Nigeria intelligence service spokeswoman] Ogar says El-Rufai, now an opposition politician, was arrested Saturday morning for writing newspaper articles that were 'inciting, inflammatory and grossly misleading.' "), readingeagle.com/article.aspx.

[16] RAWA News, July 28, 2008 ("Muhammad Naseer Fayyaz, an Afghan journalist, news anchor and the host and writer of the political show "Haqeeqat" (The Truth) in [sic] ATN TV channel was arrested on July 28 by Directorate for National Security (DNS, Afghan intelligence service) for assessing and criticizing the actions of the Afghan government under Hamid Karzai."), www.rawa.org.

for political office affirming that "it can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application" extends equally to issue-based elections such as tax referendums or constitutional amendments.[17]

Core political speech is a category of speech protected by the First Amendment:[18]

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[19]

In essence, the Petitioners seek to regulate core political speech to a lesser and therefore an unacceptable standard of review for a content-based prosecutorial statute than what this Court has demanded – strict scrutiny. As this Court established seven decades ago in *Chaplinsky v. New Hampshire*,[20]

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[17] *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam); *see McIntyre,* 514 U.S. at 347; *First Nat. Bank of Boston v. Bellotti,* 435 U.S. at 776-77 (speech on income tax referendum "is at the heart of the First Amendment's protection").

[18] *See New York Times Co. v. Sullivan,* 376 U.S. at 291.

[19] *McIntyre*, 514 U.S. at 346, *quoting, Roth v. United States,* 354 U.S. at 484.

[20] *Chaplinsky v. New Hampshire,* 315 U.S. at 571-72.

strict scrutiny is required for constitutionally protected speech to those "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." Core political speech is one of those classes. The Petitioners' analysis of *McIntyre v. Ohio Elections Commn* ignored the "exacting" standard of review required although the *McIntyre* facts (where McIntyre was handing out leaflets regarding a school tax levy), like here (statements and protests against school bond levies), involve core political speech:[21]

> When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest. . . . Our precedents thus make abundantly clear that the Ohio Supreme Court applied a significantly more lenient standard than is appropriate in a case of this kind.[22]

The Petitioners unfairly criticize the Court of Appeals for failing to cite *Time, Inc. v. Hill*[23] and for not following *Brown v. Hartlage*[24] in its decision.[25] There was no need for the Court of Appeals to rely on the Supreme Court's applied "breathing space"

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[21] Pet. for Writ of Cert. at 25-26.

[22] *McIntyre,* 514 U.S. at 347.

[23] *Time, Inc. v. Hill,* 385 U.S. 374 (1967).

[24] *Brown v. Hartlage,* 456 U.S. 45 (1985).

[25] Pet. for Writ of Cert. at 27.

analysis to determine whether regulations violated the First Amendment for non-defamatory statements at issue. In *Hill*, non-defamatory false statements, treated as defamatory statements, involved the invasion of privacy of a *person* against a magazine publisher.[26] Ballot questions and government criticism, here was not at issue.

Likewise, in *Hartlage*, a state statute prohibiting candidates from making certain non-defamatory campaign promises was found unconstitutional.[27] This Court held, in part, that an election law prohibiting all false statements of fact as "inconsistent with the atmosphere of robust political debate protected by the First Amendment."[28] Neither *Hill, Hartlage*, nor *McIntyre* concerned public-issue referendum and criticism of the government during political campaigns. In fact, the extensive list of cases Petitioners cite involve either private persons or candidates, not ballot questions or criticism of government entities during political campaigns.[29] Hence, efforts to apply

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[26] *Hill,* 385 U.S. at 391.

[27] *Hartlage,* 456 U.S. at 48.

[28] *Id.* at 62.

[29] Pet. for Writ of Cert. at 19. *See Hustler Magazine v. Falwell,* 485 U.S. 46 (1988) (parody of public figures); *Bill Johnson's Rest., Inc. v. NLRB,* 461 U.S. 731 (1983) (defamation action by company co-owners against employee protesters); *Herbert v. Lando,* 441 U.S. 153 (1979) (defamation action by public figure against member of the press); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (commercial speech issue); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323

(Continued on following page)

defamation common law to statements regarding an inanimate ballot question or governmental entity, as the Petitioners attempt to do,[30] also fail because it amounts to nothing more than interference with the "content" of the person's political speech. To allow the state to dictate restrictions is to quash political rhetoric from the political arena:

> [T]he First Amendment precludes punishment for generalized "public" frauds, deceptions and defamation. In political campaigns the grossest misstatements, deceptions, and defamations are immune from legal sanction unless they violate private rights – that is, unless individuals are defamed.[31]

In the instant case, the ballot questions arise from the government or its political subdivisions –

(1964) (newspaper sued by individual for libel); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (defamation action between a radio station and a magazine distributor); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (libel action between deputy sheriff and candidate for public office); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (defamation action between publisher and individual); and *Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53 (1966) (defamation action between company manager and labor organization).

[30] *See, e.g., Brown v. Hartlage*, 456 U.S. 45 (1982) and *Time Inc. v. Hill*, 385 U.S. 374 (1967).

[31] Charles Fried, *The First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 238 (1992).

namely school district bond and tax levy referenda[32] promoted by the government. Thus, § 211B.06 seeks to limit criticism of school districts by intruding upon the public debate via state imposed censorship.

B. Claims of protecting the integrity of elections through prosecutions in the context of ballot questions should be analyzed below on remand.

The Petitioners assert that Minn. Stat. § 211B.06 is designed to protect the integrity of the electoral process from the distorting influence of false speech. But in reality, the state attempts to suppress the communication of particular ideas of citizens (even if false) against the government and against ballot questions – not public officials. Thus, § 211B.06 sweeps within its arms civil and criminal prosecution of political speech unrelated to the state's expressed concern.[33]

Ultimately, the state shielding of falsehoods during a ballot question political campaign is paternalistic. "It assumes the people of this state are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political

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[32] *Village of Blaine v. Independent Sch. Dist. No. 12*, 272 Minn. 343, 138 N.W.2d 32 (1965) (School Districts are quasi-public corporations); *see* Minn. Stat. § 123A.55.

[33] *McIntyre*, 514 U.S. at 353 n. 16; *see Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

debate, and it is the proper role of the government to fill the void."[34] The positions of the Petitioners are untenable. The state cannot justify as a compelling interest the regulation of "unprotected speech"[35] related to ballot questions. But under the state's logic, criticisms of government would impermissibly engulf the whole content-rich environment of political rhetoric – and be liable to punishment if ill-constructed. With the Court of Appeals decision to remand the matter to the trial court, the Petitioners may then attempt to develop a rationale to survive a strict scrutiny review.

In addition, on remand, the Petitioners further need to justify the applicability of Minn. Stat. § 211B.06 in prosecuting citizens under a strict scrutiny analysis regarding letters to the editor. Under the present law, citizens who write letters to the editor (whom are identified) are subject to civil and criminal prosecution should they make false statements that promote or defeat a ballot question. But, editorials (mostly anonymous authors from media such as newspapers) are *not* subject to prosecution.[36] And, the disparity and inconsistencies within the statute become equally apparent because it fails to include other forms of communication.

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[34] *State ex rel. Public Disclosure Commn v. 119 Vote No! Committee*, 957 P.2d 691, 699 (Wash. 1998).

[35] *See R.A.V. v. City of Saint Paul*, 505 U.S. 377 (1992) and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[36] *See* Minn. Stat. § 211B.06, subd. 3.

C. The Petitioners' attempt to find a split in the circuits is ill-conceived since none exists regarding ballot questions.

Finally, the Petitioners attempt to identify a split in the circuits where none exists. Citing *Pestrak v. Ohio Elections Commn,* the Petitioners rely on the Sixth Circuit's determination that Ohio's statutes proscribing false statements in campaigns *against candidates* as constitutionally applicable to the instant case.[37] The *Pestrak* court however, did not rule on Ohio's present statute regulating political speech on ballot questions[38] as described above, on governmental policies adopted for placement on the ballot, or on governmental policies when adopted.[39]

CONCLUSION

The Petition for Writ of Certiorari should be denied. Likewise, the Petitioners' request to hold their Petition should also be denied. *Alvarez* concerns false statements about oneself. This Court will determine the scope of the First Amendment protections regarding false self-representations, but it is not the issue of the instant case.

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[37] *Pestrak v. Ohio Elections Commn*, 926 F.2d 573, 577 (6th Cir.), *cert. denied*, 502 U.S. 1022 (1991).

[38] *See* Ohio Rev. Code Ann. § 3517.22 (West 2011).

[39] *Pestrak*, 926 F.2d at 577.

Niska represents issues of core political speech in the context of ballot questions and ultimately criticism against governments. It is a category of speech that requires the state to provide a steadfast rationale beyond a general "to protect the integrity of the election process" to survive an analysis under strict scrutiny. The statement in and of itself is too generalized to have meaning, akin to "for the health, safety, and general welfare," especially in the context of political speech.

Furthermore, the Petitioners must explain the disparity in the civil and criminal prosecution under Minn. Stat. § 211B.06 of citizens who write letters to the editor and the immunity for authors of editorials. On remand, these explanations can be analyzed under the proper standard of review to allow a full record before coming to this Court now or in the future, if ever.

Respectfully submitted,

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