No. 14-_____

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,

Petitioners,

vs.

281 CARE COMMITTEE; RON STOFFEL; CITIZENS FOR QUALITY EDUCATION; JOEL BRUDE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Minnesota Statutes § 211B.06, subd. 1(a), prohibits individuals from making false, fraudulent statements of fact in campaign material about the effect of a ballot question, when such statements are designed to promote or defeat the ballot question, and when such statements are made knowingly or with reckless disregard for their truth or falsity.

The question presented is: to what extent are false statements of fact, which are designed to deceive voters, protected by the Free Speech Clause of the First Amendment?

PARTIES TO THE PROCEEDINGS IN THE EIGHTH CIRCUIT COURT OF APPEALS

PLAINTIFFS/APPELLANTS:

281 Care Committee; Ron Stoffel; Citizens for Quality Education; Joel Brude.

DEFENDANTS/APPELLEES:

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; and
Lori Swanson, in her official capacity as the Minnesota Attorney General, or her successor.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1-49) is reported at 766 F.3d 774. The order of the court of appeals denying rehearing en banc (App. 91) is unreported. The opinion of the district court (App. 50-90) granting defendants' motions for summary judgment is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. A petition for rehearing was denied on October 2, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Minnesota Statutes § 211B.06, subd. 1(a), states in relevant part:

> 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 personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or

> tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or 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.

Minn. Stat. § 211B.06, subd. 1(a) (2014).

STATEMENT

Respondents are two grass-roots political associations and their leaders. Each organization was founded to oppose school-funding ballot initiatives, which Minnesota law authorizes school boards to propose. Respondents claim that Section 211B.06, subd. 1(a) ("Section 211B.06"), of Minnesota Statutes (a section of the Minnesota Fair Campaign Practices Act ("FCPA")) inhibits their ability to speak freely against ballot initiatives and thereby violates their First Amendment rights. Section 211B.06 makes it a crime to knowingly or with reckless disregard for the truth disseminate false statements of fact regarding candidates or ballot initiatives. Respondents assert that the statute violates the First Amendment and chills their protected speech, even though the statute only proscribes fraudulent statements of fact, designed to induce a particular vote and made with knowledge of the statements' falsity or with reckless disregard to whether the statements are false, consistent with the

malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964).[1]

I. Minnesota Regulates Fraudulent Campaign Speech.

Minnesota has a long history of ensuring fair elections through promulgation of numerous laws relating to voting and the campaign process. Minnesota's prohibition on misleading voters by making and disseminating false statements of fact regarding candidates and ballot issues, currently codified at Section 211B.06, is one of these laws. It provides, in relevant part:

> 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 personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to

[1] The Minnesota Attorney General, named as a defendant/appellee in this matter, has not joined in this petition, but Petitioners understand she will advise the Court by letter that she supports the petition.

> others with reckless disregard of whether it is false.

Minn. Stat. § 211B.06, subd. 1(a) (2014).

Minnesota's first law criminalizing false campaign speech was enacted more than one hundred years ago. This statute was aimed at anonymous smear campaigns and stated, in relevant part:

> Whoever writes, prints, posts or distributes . . . a circular or poster or other written or printed paper, which is designed or tends to injure or defeat any candidate [without attribution to a committee or voter] shall be punished by a fine not exceeding one hundred dollars or by imprisonment in jail not exceeding six months, or both; *and if the statements are untrue the person so offending shall also be deemed guilty of libel and may be prosecuted in the civil or criminal courts or both.*

Minn. Laws 1893, c. 4 § 194 (emphasis added). In 1913, this law was separated into two statutes, one aimed at anonymous smear campaigns, Minn. Gen. Stat. 1913, § 621, and another aimed at false campaign speech, Minn. Gen. Stat. 1913, § 573. At this time, the law related to false campaign speech was expanded to include knowingly false statements of fact regarding ballot propositions. The law stated, in relevant part:

> [A]ny person, firm, corporation or committee who shall knowingly make or publish or cause to be published, any false statement

> in relation to any candidate *or proposition to be voted upon*, which statement is intended to or tends to affect any voting at any primary or election, shall be guilty of a misdemeanor.

Minn. Gen. Stat. 1913, § 573 (emphasis added).

The specific language and statutory codification of this law has changed through the years, but since 1913 it has banned knowingly false statements of fact aimed at misleading voters about candidates and ballot propositions or ballot questions. *Id.* Section 211B.06 is "directed against the evil of making false statements of fact and not against criticism of a candidate or unfavorable deductions derived from a candidate's conduct." *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

The constitutionality of Minnesota's prohibition on false statements of fact in campaign material has been litigated a number of times in Minnesota courts. *See, e.g., Scheibel v. Pavlak*, 282 N.W.2d 843, 852-53 (Minn. 1979) (upholding statute and finding Minnesota House of Representatives candidate violated Minn. Stat. § 210A.04 [now codified at Section 211B.06]); *Hawley v. Wallace*, 163 N.W. 127, 129 (Minn. 1917) (upholding annulment of election because winning candidate made "deliberate, serious and material" false statements regarding his opponent in violation of Minn. Gen. Stat. 1913, § 573 [now codified at 211B.06]); *State v. Jude*, 554 N.W.2d 750, 753-54 (Minn. Ct. App. 1996) (holding 1994 version of Minn. Stat. § 211B.06 violated the First Amendment because it did not

satisfy the malice standard from *Sullivan*, 376 U.S. at 280). Section 211B.06 was amended in 1998 after the *Jude* decision in order to satisfy the *Sullivan* standard. The phrase that the Minnesota Court of Appeals concluded was overbroad ("knows or has reason to believe is false") was replaced with "and that the person knows is false or communicates to others with reckless disregard of whether it is false." Minn. Stat. § 211B.06, subd. 1(a) (2014).

By proscribing only false statements of fact that are made with knowledge of their falsity, or with reckless disregard of whether they are true or false, Section 211B.06 incorporates the "actual malice" standard from *Sullivan,* 376 U.S. at 279-80. This standard recognizes that "erroneous statement[s are] inevitable in free debate" and that even some false speech must be protected "if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Sullivan*, 376 U.S. at 271-72 (alteration omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). False statements of fact receive "a measure of strategic protection," under Section 211B.06, in order to ensure that this law does not unduly inhibit fully protected speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). To violate this statute, an individual must make false statements of fact with respect to a candidate or a ballot question in prepared campaign material that the individual knows are false or subjectively believes are probably false. *See Riley v. Jankowski*, 713 N.W.2d 379, 398-99 (Minn. Ct. App. 2006).

II. Prior Appeal.

In 2008, Respondents filed suit pursuant to 42 U.S.C. § 1983 in federal district court, asserting that Section 211B.06 is facially unconstitutional in violation of the First Amendment because it chills them from vigorously participating in debates surrounding school-funding ballot initiatives in Minnesota. *See* First Amended Complaint. In 2010, the district court granted Petitioners' motion to dismiss, holding that Respondents lacked standing and that their claim was not ripe. *See 281 Care Committee v. Arneson*, Case No. 08-CV-5215 (JMR/FLN), 2010 WL 610935 (D. Minn., Feb. 19, 2010) (Order, pp. 4-13). The district further held that the Complaint failed to state a claim, based on its conclusion that Section 211B.06 was a constitutional regulation of false speech. *Id.* (Order, pp. 13-16).

The court of appeals reversed the grant of dismissal, holding that Respondents had sufficiently alleged standing and ripeness based on the potential criminal consequences of a Section 211B.06 violation. *281 Care Committee v. Arneson*, 638 F.3d 621, 627-31 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2012) ("*281 Care Committee I*"). The court of appeals further held that Section 211B.06 is subject to strict scrutiny as a content-based regulation on speech. *Id.* at 636. This Court denied Petitioners' petition for a writ of certiorari on the last day of the term, after deciding *United States v. Alvarez*, ___ U.S. ___, 132 S. Ct. 2537 (2012), *see* 133 S. Ct. 61 (2012), and the case was remanded to the district court for further proceedings.

III. Proceedings in the District Court.

Upon remand, Petitioners and the Minnesota Attorney General filed motions for summary judgment. The district court granted the motions, holding that Section 211B.06 is a constitutional regulation of false speech. App. 90.

In granting Petitioners' motion for summary judgment, the district court first determined that intermediate scrutiny applied to Section 211B.06, based on Justice Breyer's controlling opinion in *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring). App. 60-67. The *Alvarez* decision addressed the appropriate level of scrutiny for knowingly false speech, after the court of appeals' decision in *281 Care Committee I*. Because there was no majority opinion in *Alvarez*, the district court applied the rule of *Marks v. United States*, 430 U.S. 188, 193-94 (1977), to identify the holding of the court, i.e., "that position taken by those Members who concurred in the judgments on the narrowest grounds." App. 64-65. The district court concluded that Justice Breyer's concurrence, which applied intermediate scrutiny to regulations of knowingly false speech, is the controlling opinion of *Alvarez*. App. 64.

Although the district court concluded that intermediate scrutiny was the appropriate standard of review, it nonetheless concluded that Section 211B.06 survives strict scrutiny analysis. App. 67-88.

Accordingly, the district court granted Petitioners' motion for summary judgment.[2]

IV. Proceedings in the Court of Appeals for the Eighth Circuit.

Respondents appealed the grant of summary judgment to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. The court of appeals reversed and remanded the case. The court of appeals first held that the district court erred by concluding that intermediate scrutiny applied to Section 211B.06. App. 6, 14. In reaching this legal conclusion, the court rejected the district court's reliance on *Alvarez* because that case did not address false *political* speech. App. 14-18. Despite Justice Breyer's discussion of political speech in his concurring opinion, the court of appeals determined that *Alvarez* had no bearing on the appropriate level of scrutiny for Section 211B.06 and stated:

> [I]t is *key* that the regulatory scheme at play in *Alvarez* dealt entirely, and only, with false speech. *Alvarez*, 132 S. Ct. at 2545 (plurality) ("[T]he Stolen Valor Act . . . targets falsity and nothing more."). In fact, it was largely (if not solely) because the regulation at issue in *Alvarez* concerned false statements about easily verifiable facts that did not concern

[2] Because the district court concluded that the statute satisfied strict scrutiny, it did not address Petitioners' argument that the statute is a constitutional regulation of fraudulent speech.

> subjects often warranting greater protection under the First Amendment, that the concurring Justices applied intermediate scrutiny. *Id.* at 2552-53 (Breyer, J., concurring). Here, because the speech at issue occupies the core of the protection afforded by the First Amendment, we apply strict scrutiny to legislation attempting to regulate it. *Iowa Right to Life Comm.* [*v. Tooker*], 717 F.3d [576,] 589 [(8th Cir. 2013), *cert. denied*, 134 S. Ct. 1787 (2014)]. Accordingly, because *Alvarez* does not alter the landscape on this issue, the scrutiny directed in *281 Care Committee I* endures.

App. 17-18 (emphasis in original).

The court of appeals then concluded that Section 211B.06 failed to satisfy strict scrutiny review. The court declined to decide whether "preserving fair and honest elections and preventing a fraud on the electorate comprise a compelling state interest[.]" App. 24. Instead, the court determined that the statute is not narrowly tailored and stated:

> First, because § 211B.06 perpetuates fraud, as discussed below, it is not actually necessary. It is also simultaneously overbroad and underinclusive. And, finally, it is not the least restrictive means of achieving the stated goals it allegedly advances.

App. 28.

Throughout its analysis, the court of appeals expressed its concern with the statute's administrative

procedure, which allows any person to lodge a complaint with the Minnesota Office of Administrative Hearings ("OAH"), for review by an administrative law judge ("ALJ"). App. 3-4, 12-13. Upon conclusion of the OAH proceeding, the complaint may be referred to the appropriate county attorney for prosecution. App. 4. As the court observed, this OAH procedure was modeled on a similar statutory scheme in Ohio, which has been litigated recently in this Court. App. 11 n. 5-6 (citing *Susan B. Anthony List v. Driehaus*, ___ U.S. ___, 134 S. Ct. 2334 (2014) ("*SBA List*")).

In fact, the court of appeals cited extensively to the amicus brief of the Ohio Attorney General in *SBA List*, in order to show that "[j]ust having a statute like § 211B.06 on the books creates an environment fraught with problems." App. 30. Again, the court's focus was on the "burdens of the OAH proceedings themselves" and the possibility that the statute might be used "tactically" by political opponents to "inflict[ ] political damage." App. 31-36. Based on this concern, the court of appeals concluded that Minnesota's statute was not narrowly tailored because counterspeech was a less restrictive alternative and therefore the only constitutional solution to knowingly false political speech. App. 38-41. Accordingly, the court of appeals held Section 211B.06 was facially unconstitutional.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Has Decided an Important Question of First Amendment Law in a Way that Conflicts With Applicable Decisions of This Court, Dramatically Limits the Ability of States to Protect the Integrity of Elections, and Calls into Question Laws in Seventeen Other States.

This case squarely presents the question of the First Amendment's limitations on a state's ability to regulate knowingly false political speech aimed at tricking voters. The court of appeals improperly concluded that intentional lies designed to mislead voters regarding ballot initiatives are entitled to full First Amendment protection. The court of appeals effectively held that counterspeech is the only constitutionally permissible solution to the problem of fraudulent political speech.

Almost twenty years ago, this Court struck down Ohio's ban on distributing anonymous campaign literature as violating the First Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). In doing so, the Court rejected Ohio's assertion that the disclosure provision was needed to prevent fraud. *Id.* Instead, the Court stated that Ohio's interest in preventing election fraud was satisfied by its direct regulation of knowingly false political speech through a law extremely similar to the one challenged in this litigation. *Id.* However, the Court explicitly noted that it was not deciding the constitutionality of Ohio's ban on knowingly false political speech. *Id.* at 349 n. 12. It

is time for the Court to answer this critical question: Do the protections of the First Amendment preclude states from protecting the integrity of their elections and democratic institutions with laws that prohibit knowing lies designed to trick voters in order to win an election?[3]

There is no dispute that a major purpose of the First Amendment is "to protect the free discussion of governmental affairs[, . . .] includ[ing] discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama,* 384 U.S. 214, 218-19 (1966). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Accordingly, "[w]hen a law burdens *core* political speech, . . . [it must be] narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 346-47 (emphasis added).

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[3] Last term, this Court held that plaintiffs challenging an Ohio law similar to the statute at issue here had standing to bring their First Amendment claim, but the Court did not reach the merits of plaintiffs' claim. *See SBA List*, 134 S. Ct. 2334. Here, unlike *SBA List*, the court of appeals decided the First Amendment issue on the merits. This case therefore provides an opportunity for this Court to provide clarity on this significant First Amendment issue.

But this case is not simply about the "free exchange of ideas" in a political campaign, *Brown v. Hartlage*, 456 U.S. 45, 53 (1982), or "core" political speech, *McIntyre*, 514 U.S. at 346. Instead, this case is about the intersection of political speech and knowing lies – an area with significant impact on the integrity of an election and the right to vote. It is indisputable that a State has a compelling interest in preserving the integrity of its election process. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *see also Wesberry v. Sanders,* 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."); *McIntyre*, 514 U.S. at 349 (observing that a state's interest in preventing fraud "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large"); *cf. Crawford v. Marion County Election Bd.*, 553 U.S. 181, 194-97 (2008) (recognizing Indiana's interests in preventing voter fraud and safeguarding public confidence in the integrity of the electoral process). Furthermore, "a State has a compelling interest in protecting voters from confusion and undue influence," and in "ensuring that an individual's right to vote is not undermined by fraud in the election process." *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

In striking down Section 211B.06, the court of appeals disregarded the state's significant interest in ensuring the integrity of its elections and improperly concluded that intentional lies designed to mislead

voters regarding ballot initiatives are entitled to full First Amendment protection. This Court has never held that regulations directed at false, fraudulent speech in any forum are subjected to strict scrutiny. In fact, this Court has long held that statutes aimed at intentional fraudulent speech are not subject to First Amendment scrutiny at all. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976); *Donaldson v. Read Magazine*, 333 U.S. 178, 190 (1948). In addition, the Court has held that statutes aimed at knowingly false but not fraudulent speech are subject to intermediate scrutiny. *See Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring).

The court of appeals rejected both of these First Amendment tests and instead created a new First Amendment category: knowingly false political speech. It held that statutes punishing knowingly false statements directed at deceiving voters must meet strict scrutiny because the statute regulates false *political* speech. This decision provides constitutional immunity for individuals who knowingly and intentionally make false, fraudulent statements designed to trick voters about for whom or what they should vote. This far-reaching holding conflicts with this Court's precedents regarding statutes aimed at fraudulent speech and with *Alvarez*. In addition, it calls into question at least eighteen state statutes aimed at knowingly false political speech, and many

other statutes that proscribe tricking or deceiving voters about an election.[4] Review of this decision is necessary to provide clarity on the proper level of judicial scrutiny to apply to statutes directed at intentionally false, fraudulent political speech.

A. Review Is Needed to Clarify Whether This Court's First Amendment Jurisprudence Regarding Statutes Aimed at Fraudulent Speech Applies to Statutes Aimed at Fraudulent *Political* Speech.

The knowingly false political speech that is regulated by Section 211B.06 is speech designed to promote or defeat a ballot question (or a candidate) – in

[4] This decision is already having widespread impact. A district court in Ohio, relying on the court of appeals' decision in this case, struck down Ohio Rev. Code Ann. § 3517.21(B)(9)-(10) (West 2014), which bans knowingly false statements about candidates, for failure to satisfy strict scrutiny. *See Susan B. Anthony List v. Ohio Elections Comm'n*, ___ F.Supp.3d ___, 2014 WL 4472634 (S.D. Ohio Sept. 11, 2014), *appeal docketed*, No. 14-4008 (6th Cir. Oct. 16, 2014).

In addition, a petition for a writ of certiorari is currently pending before this Court, seeking review of a Minnesota Court of Appeals' decision that upheld the constitutionality of another Minnesota statute regulating false political speech – Section 211B.02 of Minnesota Statutes, which prohibits knowingly false claims of political support or endorsement. *See Niska v. Clayton*, Case No. A13-0622, 2014 WL 902680 (Minn. App. Mar. 10, 2014), *rev. denied* (Minn. June 25, 2014), *petition for cert. filed* (U.S. Oct. 15, 2014) (No. 14-443). This Court recently requested a response to the *Niska* petition. If this Court grants the *Niska* petition, it should also grant this petition.

other words, fraudulent speech calculated to induce a voter's reliance. *See Chiarella v. United States*, 445 U.S. 222, 227-28 (1980) ("At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent."). This Court has long recognized and recently affirmed that certain "historical and traditional" categories of speech are categorically excluded from the protections of the First Amendment. *Alvarez*, 132 S. Ct. at 2544 (plurality). Fraud has long been counted among these categories of unprotected speech. *Id.* (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771); *see also Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.,* 538 U.S. 600, 621 (2003) ("[T]he First Amendment does not shield fraud. . . . Like other forms of public deception, fraudulent charitable solicitation is unprotected speech."); *Donaldson,* 333 U.S. at 190 (explaining that the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established").

Section 211B.06 regulates intentional fraudulent speech aimed at tricking voters, but the court of appeals did not apply or even discuss this Court's precedents regarding fraudulent speech. The prohibition of Section 211B.06 is limited to knowingly false statements of fact in campaign materials that are designed to induce a particular vote, in reliance on the false statement. Accordingly, unlike the Stolen Valor Act at issue in *Alvarez*, Section 211B.06 is not a regulation that targets "falsity and nothing more." *Alvarez*, 132 S. Ct. at 2539 (plurality). Fraudulent

political speech is hostile to the right to vote, as it undermines the integrity of an election outcome and the legitimacy of the elected government. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010) ("The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government.'") (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)).

Even though the court of appeals repeatedly described Section 211B.06 as "preserving fair and honest elections and *preventing fraud* on the electorate," it failed to discuss the fraud category of speech in its First Amendment analysis. App. 24 (emphasis added). This category of unprotected fraudulent speech does not disappear simply because the regulation involves a political form of speech. *See, e.g.*, *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (considering defamation during political debate); *McIntyre*, 514 U.S. at 349, 357 (stating that "[t]he state interest in preventing fraud and libel . . . carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large" and observing that "[t]he State may . . . punish fraud directly"); *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (holding that the First Amendment does not provide absolute immunity to protect libelous statements made to the President regarding appointment of a U.S. Attorney).

Moreover, the harm protected by a fraud statute does not need to be economic harm for speech to be unprotected. The plurality in *Alvarez* catalogued a number of federal prohibitions that are unquestionably constitutional yet do not require proof of monetary loss. *See Alvarez*, 132 S. Ct. at 2546 (citing 18 U.S.C. § 912 (impersonating an officer of the United States); 18 U.S.C. § 709 (unauthorized use of the names of federal agencies); 18 U.S.C. § 712 (using words such as "Federal" or "United States" in the collection of debts)); *see also* 18 U.S.C. § 1001 (making a false statement to a government official).

Despite the numerous cases holding that statutes which are directed at knowingly fraudulent speech are not subject to First Amendment scrutiny, the court of appeals failed to address whether Section 211B.06 was permissible as a regulation of not merely false, but fraudulent political speech. As part of the unprotected category of fraudulent speech, regulations of fraudulent political speech should enjoy the same "unquestioned constitutionality" as perjury statutes. *Alvarez*, 132 S. Ct. at 2546 (plurality). As this Court observed in *Alvarez*, "[p]erjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.'" *Id.* (quoting *In re Michael*, 326 U.S. 224, 227 (1945)). "Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system." *Id.* (citing *United States v. Dunnigan*, 507 U.S. 87, 97 (1993)). Here, the "evil to be restricted" – undermining democracy with

intentional and deceitful speech that tricks voters – similarly "outweighs the expressive interests [in knowingly false speech], if any, at stake," *United States v. Stevens*, 559 U.S. 460, 470 (2010) (quoting *New York v. Ferber*, 458 U.S. 747, 763-64 (1982)), because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17; *Garrison*, 379 U.S. at 75 ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.").

The court of appeals' decision not only strikes down Minnesota's law directed at fraudulent speech regarding ballot questions, it treats fraudulent political speech as a special category. This new categorical approach to false political speech calls into question other statutes directed at protecting the electoral system from fraud, including statutes prohibiting false claims of support or endorsement, *see, e.g.* Minn. Stat. § 211B.02;[5] and statutes prohibiting knowingly false statements regarding the time, place, or manner of an election or who is eligible to vote*, see, e.g.* Minn. Stat. § 204C.035. By logical extension, the court of appeals' application of strict scrutiny to a regulation of knowingly false and fraudulent political speech calls all statutes aimed at election fraud into question.

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[5] A First Amendment challenge to this statute is pending before the Court in the *Niska* petition. *See infra* n. 4.

Review of the court of appeals' decision is necessary to clarify states' ability to punish fraudulent political speech that threatens the integrity of elections.

B. Review Is Needed to Clarify Whether Statutes Directed at False *Political* Speech Are Subject to Intermediate Scrutiny Pursuant to *United States v. Alvarez*.

Even if knowingly false political speech is not treated as fraudulent speech, the court of appeals failed to follow this Court's binding precedent regarding false speech. In *Alvarez*, this Court considered the constitutionality of the Stolen Valor Act, Section 704(b) of Title 18 of the United States Code, which makes it a crime for an individual to falsely represent that he or she has been awarded a military honor. If Section 211B.06 is not considered a "fraud" statute, the question presented in this petition – the level of First Amendment protection for knowingly false political speech – is directly controlled by *Alvarez*. The court of appeals erred in its determination that *Alvarez* was wholly inapposite to its analysis of Section 211B.06. App. 16. Moreover, because the controlling opinion of *Alvarez* applied intermediate scrutiny to a regulation of knowingly false speech, the court of appeals compounded its error by subjecting Section 211B.06 to strict scrutiny. App. 18.

Alvarez is a splintered decision, with no majority in agreement on a controlling rationale. "When a

fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]'" *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). In *Alvarez*, Justice Kennedy authored the plurality decision, joined by Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor, holding that the Stolen Valor Act was subject to strict scrutiny as a content-based restriction on speech. 132 S. Ct. at 2542. Justice Breyer authored the concurring opinion, joined by Justice Kagan, holding that the statute was subject to intermediate scrutiny. 132 S. Ct. at 2551. Justice Alito authored a dissenting opinion, joined by Justice Scalia and Justice Thomas, holding that false factual statements do not enjoy constitutional protection. 132 S. Ct. at 2556. Because the *Alvarez* decision was a 4-2-3 split, the *Marks* rule applies to determine which opinion is precedential.

In *Alvarez*, Justice Breyer's opinion concurred in the judgment – to strike down the Stolen Valor Act – but on the narrowest grounds. Accordingly, Justice Breyer's concurrence is the controlling opinion of *Alvarez*. Under Justice Breyer's analysis, a state's regulation of knowingly false (but not fraudulent) speech should be subjected to intermediate scrutiny. In this case, the court of appeals failed to follow the holding of *Alvarez* and instead subjected Section 211B.06 to strict scrutiny. Review of the court of

appeals' decision is necessary to clarify the controlling rationale of *Alvarez*.

The court of appeals' error stemmed from its determination that *Alvarez* is inapplicable to regulations of false *political* speech. App. 16. Contrary to the court's decision, *Alvarez* was a watershed First Amendment decision where this Court for the first time held that the First Amendment protects intentional false speech. *See Alvarez*, 132 S. Ct. at 2557 (Alito, J., dissenting) ("By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."). Both *Alvarez* and this case address laws that criminalize non-defamatory statements of fact made with knowledge of their falsity or with reckless disregard for their falsity. Despite the clear precedential value of *Alvarez*, the court of appeals concluded that *Alvarez* was inapposite to its analysis because the regulation at issue in *Alvarez* proscribed knowingly false speech, but not knowingly false *political* speech. App. 16 ("This distinction makes all the difference and is entirely the reason why *Alvarez* is not the ground upon which we tread."). Review of the court of appeals' decision is necessary to clarify the applicability of *Alvarez* to any regulation of false speech.

This Court has long recognized that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political

office." *Eu*, 489 U.S. at 223 (internal quotations omitted). Even in the political context, however, First Amendment rights are not absolute. *See Garrison*, 379 U.S. at 75 ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution."); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("[T]he freedom of speech . . . does not confer an absolute right to speak or publish, without responsibility, whatever one may choose[.]"); *Gertz*, 418 U.S. at 340 ("Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.") (quoting *Sullivan*, 376 U.S. at 270).

To paraphrase *McIntyre*, 514 U.S. at 344, the question presented is to what extent the First Amendment's protection of false speech encompasses knowing lies intended to influence the electoral process and undermine the integrity of an election. The controlling opinion of *Alvarez* – Justice Breyer's concurrence – expressly held that such regulations of knowingly false speech are subject to intermediate scrutiny, not strict scrutiny, in recognition of the significant countervailing interests at issue.

Moreover, Justice Breyer's opinion expressly contemplated political speech in his application of intermediate scrutiny to the Stolen Valor Act. He recognized that in the political context, the necessary "narrowing will not always be easy to achieve," and he detailed the competing interests at stake:

> In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications.

132 S. Ct. at 2556.

Despite Justice Breyer's express inclusion of political speech in his determination that intermediate scrutiny applies to regulations of false speech, the court of appeals nonetheless held that regulations of political speech are always subject to strict scrutiny and concluded that Section 211B.06 was facially unconstitutional. App. 18. In fact, the court of appeals suggested that the concurring justices of *Alvarez* applied the less-rigorous standard of intermediate scrutiny "largely (if not solely) because the regulation at issue . . . concerned false statements about easily verifiable facts *that did not concern subjects often warranting greater protection* under the First Amendment[.]" App. 18 (emphasis added) (citing *Alvarez*, 132 S. Ct at 2552-53 (Breyer, J., concurring)). This constrained reading of *Alvarez* fails to account for the depth of Justice Breyer's analysis, which was plainly directed beyond the Stolen Valor Act's limited context of military honors to any regulation of knowingly false speech.

Moreover, the court of appeals' categorical rule requiring strict scrutiny for any regulation of political speech conflicts with this Court's precedents regarding the level of scrutiny required when the speech at issue is not "core" political speech. In general, statutes regulating core political speech are subject to strict scrutiny. However, statutes specifically targeting knowingly false speech that is designed to trick voters cannot be considered regulations of "core" political speech, nor can such regulations be considered "severe." *See, e.g., Garrison*, 379 U.S. at 75 ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality) ("Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech.' ") (quoting *Garrison,* 379 U.S. at 75), *overruled on other grounds by Gertz*, 418 U.S. 323; *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("Neither lies nor false communications serve the ends of the First Amendment[.]"); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("But the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function.") (emphasis added).

Contrary to the court of appeals' categorical strict scrutiny rule for political speech, regulations that do not restrict *core* political speech are often subject to less rigorous review. For example, in *Burdick v. Takushi*, this Court upheld as reasonable Hawaii's prohibition on write-in voting, holding that it imposed only a limited burden upon the constitutional rights of voters and stating that:

> [W]hen [First and Fourteenth Amendment] rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

Id., 504 U.S. 428, 434 (1992) (internal quotation marks and citations omitted). Consistent with *Burdick*, this Court has often applied less-rigorous First Amendment scrutiny to speech regulations that either do not target core political speech or that do not impose severe restrictions on speech. *See, e.g., John Doe No. 1*, 561 U.S. at 196 (rejecting claim that First Amendment provides a right to anonymity for individuals who sign petitions and applying less rigorous First Amendment test to require only a "substantial relation" to a "sufficiently important" government interest); *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 366-67 (2010) (rejecting strict scrutiny review for disclaimer and disclosure requirements for

electioneering materials, and instead upholding regulations because there was a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999) (applying same less rigorous standard to Colorado requirements that circulators be registered voters and wear name badges); *McCullen v. Coakley*, ___ U.S. ___, 134 S. Ct. 2518, 2529 (2014) (holding that "[e]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech" and applying that standard to a "buffer zone" law applicable to abortion clinics) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). In each of these cases, the regulation impacted political speech, yet was not subject to strict scrutiny.

The court of appeals' decision lacked any such nuance in its application of strict scrutiny. Under the court of appeals' holding, any state regulation of knowingly false political speech faces "near-automatic condemnation[.]" *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring). That result is at odds with Justice Breyer's conclusion that a "proportionality" approach is necessary where "the government often has good reasons to prohibit such false speech," but "its regulation can nonetheless threaten speech-related harms." *Id.* at 2552. As this Court has recognized, "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political

change is to be effected." *Garrison*, 379 U.S. at 75. Such countervailing interests are squarely within Justice Breyer's analysis in *Alvarez*.

By rejecting *Alvarez*'s application of intermediate scrutiny and instead applying strict scrutiny, the court of appeals effectively held that counterspeech is the only constitutionally permissible solution to knowingly false political speech:

> Possibly there is no greater arena wherein counterspeech is at its most effective. It is the most immediate remedy to an allegation of falsity. . . . It is the citizenry that can discern for themselves what the truth is, not an [administrative law judge] behind doors. . . .
>
> Outside of counterspeech it is difficult at this point to envision other, less restrictive means to abate the alleged interest. No matter, however, because counterspeech, alone, establishes a viable less restrictive means of addressing the preservation of fair and honest elections in Minnesota and preventing fraud on the electorate.

App. 39-40.

Counterspeech may be the "*preferred* First Amendment remedy of more speech[.]" App. 39 (emphasis added) (quoting *Brown*, 456 U.S. at 61 (internal quotation omitted)). But that does not mean it is the *only* constitutional remedy for knowingly false political speech. On this point, the court of appeals' assumption runs contrary to this Court's recognition that

"the truth rarely catches up with a lie." *Gertz*, 418 U.S. at 344 n. 9.

States must be permitted to regulate knowingly false political speech in order to prevent electoral fraud. *See Gertz*, 418 U.S. at 344 (recognizing that the efficacy of counterspeech depends on the status of the speaker). By foreclosing the possibility of any state regulation of knowingly false political speech, the court of appeals' decision calls into question laws in at least eighteen states (including Minnesota) that regulate false campaign speech.[6] These statutes derive from the states' judgments that counterspeech is inadequate to counter the corrupt campaign practice of the knowing lie. *See, e.g.,* La. Rev. Stat. Ann. § 18:1463(A) ("[I]t is essential to the protection of the electoral process to prohibit misrepresentation that a person, committee, or organization speaks, writes, or acts on behalf of a candidate, political committee, or

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[6] *See* Alaska Stat. § 15.13.095 (2014); Colo. Rev. Stat. § 1-13-109 (2014); Fla. Stat. § 104.271 (2014); La. Rev. Stat. Ann. § 18:1463 (2014); Mass. Gen. Laws ch. 56, § 42 (2014); Minn. Stat. § 211B.06 (2014); Miss. Code Ann. § 23-15-875 (2014); Mont. Code Ann. § 13-37-131 (2014); N.C. Gen. Stat. § 163-274(a)(8) (2014); N.D. Cent. Code § 16.1-10-04 (2013); Ohio Rev. Code Ann. § 3517.21-.22 (West 2014) (struck down as unconstitutional in *Susan B. Anthony List v. Ohio Elections Comm'n*, ___ F.Supp.3d ___, 2014 WL 4472634 (S.D. Ohio Sept. 11, 2014), *appeal docketed*, No. 14-4008 (6th Cir. Oct. 16, 2014)); Or. Rev. Stat. § 260.532 (2014); S.D. Codified Laws § 12-13-16 (2014); Tenn. Code Ann. § 2-19-142 (2014); Utah Code Ann. § 20A-11-1103 (2014); Wash. Rev. Code Ann. § 42.17A.335 (West 2014); W. Va. Code § 3-8-11 (2014); Wis. Stat. § 12.05 (2014).

political party, or an agent or employee thereof."); W. Va. Code § 3-8-1(a)(11) ("Non-broadcast media communications in the final days of a campaign can be particularly damaging to the public's confidence in the election process because they reduce or make impossible an effective response.").

Review of the court of appeals' decision is necessary to confirm the applicability of *Alvarez* and to resolve whether a state may regulate knowingly false political speech to prevent a fraud on the electorate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 30, 2014

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 13-1229

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281 Care Committee; Ron Stoffel;
Citizens for Quality Education; Joel Brude,

Plaintiffs-Appellants

v.

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; Lori Swanson, in her official capacity as the Minnesota Attorney General or her successor

Defendants-Appellees

Appeal from the United States District Court
for the District of Minnesota – Minneapolis

Submitted: February 13, 2014
Filed: September 2, 2014

Before SMITH, BEAM, and BENTON, Circuit Judges.

BEAM, Circuit Judge.

On appeal for the second time,[1] Appellants challenge the district court's denial of their motion for summary judgment, its corresponding grant of summary judgment in favor of Appellees, and the court's dismissal of all claims in the complaint with prejudice. For the reasons stated herein, we reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Appellants in this action are two Minnesota-based, grassroots advocacy organizations along with their corresponding leaders.[2] Each organization was founded to oppose school-funding ballot initiatives, which Minnesota law authorizes individual school boards to propose. Appellants claim that a provision of the Minnesota Fair Campaign Practices Act (FCPA) inhibits Appellants' ability to speak freely against these ballot initiatives and, thereby, violates their First Amendment rights. Minn. Stat. §§ 211B.01

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[1] In *281 Care Committee v. Arneson,* 638 F.3d 621 (8th Cir. 2011), *cert. denied,* 133 S. Ct. 61 (2012) (*281 Care Committee I*), this court reversed the district court's dismissal of Plaintiffs' complaint, vacated the denial of Plaintiffs' motion for summary judgment, and remanded to the district court for further proceedings, which proceedings we now review.

[2] A third organization and plaintiff, W.I.S.E. Citizen Committee, has been dismissed from the lawsuit following the death of its former chairman, Plaintiff Victor Niska.

et seq. Appellees are two Minnesota county attorneys and the Minnesota Attorney General, all sued in their official capacities ("Appellees" or "the county attorneys").[3]

In relevant part, the challenged provision of the FCPA provides:

> 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.

Minn. Stat. § 211B.06, subd. 1. Other than a source protected by the FCPA exemption for "news items or editorial comments by the news media," anyone can lodge a claim under § 211B.06 with the Minnesota Office of Administrative Hearings (OAH) within one year after the alleged occurrence of the act that is the subject of the complaint. Minn. Stat. §§ 211B.01, subd. 2; 211B.32, subd. 2. The OAH immediately assigns an administrative law judge (ALJ) to the matter, who then determines if there is a prima facie violation and, if so, probable cause supporting the

[3] Two county attorneys have likewise been dismissed from the lawsuit following this court's initial remand.

complaint. Minn. Stat. § 211B.33, subd. 1, 2. If the complaint alleging a § 211B.06 violation is filed "within 60 days before the primary or special election or within 90 days before the general election to which the complaint relates, the ALJ must conduct an expedited probable cause hearing." Minn. Stat. § 211B.33, subd. 2. If a complaint survives a probable cause assessment, the chief ALJ assigns the complaint to a three-judge panel for an evidentiary hearing, which could realistically necessitate the employment of legal counsel by the accused. Minn. Stat. § 211B.35, subd. 1. A final decision and/or civil penalty (up to $5,000) imposed by an ALJ panel is subject to judicial review. Minn. Stat. §§ 211B.35, sub.d [sic] 2(d); 211B.36, subd. 5. Only when a complaint is finally disposed of by the OAH, is it subject to further prosecution by the county attorney. Minn. Stat. § 211B.32, subd. 1. One possible resolution by the ALJ panel is to refer the complaint to the appropriate county attorney without rendering its own opinion on the matter, or in addition to its own resolution. Minn. Stat. § 211B.35, subd. 2(e).

As noted in *281 Care Committee I*:

> Minnesota has a long history of regulating knowingly false speech about political candidates; it has criminalized defamatory campaign speech since 1893. However, the FCPA's regulation of issue-related political speech is a comparatively recent innovation. Minnesota did not begin regulating knowingly false speech about ballot initiatives until 1988.

> Between 1988 and 2004, the FCPA's regulation of speech regarding ballot initiatives allowed for only one enforcement mechanism: mandatory criminal prosecution of alleged violators by county attorneys. In 2004, the Minnesota legislature amended the FCPA to provide that alleged violations of section 211B.06 initially be dealt with through civil complaints filed with the [OAH].

638 F.3d 621, 625 (8th Cir. 2011).

Upon remand from *281 Care Committee I,* the district court faced various issues: (1) a renewed challenge by Appellees to Appellants' standing on the basis of a failure of proof, (2) a decision regarding the level of scrutiny to apply to this First Amendment action, and (3) whether the Minnesota statute survived under such an analysis. As to the first issue, the county attorneys argued that even if Appellants sufficiently alleged standing at the motion to dismiss stage, they failed to prove standing sufficient to survive summary judgment because they failed to identify a specific ballot initiative they intended to oppose, nor had they, argued Appellees, provided examples of statements they intended to use (i.e., failure of proof). The district court held that this circuit's prior conclusion – that Appellants had standing because a credible threat of prosecution existed by virtue of the recent enactment of § 211B.06 – persisted at the summary judgment stage, and thus the court rejected Appellees' argument as to the first issue.

Regarding the appropriate level of scrutiny to apply in this action, even though this court in *281 Care Committee I* directed the district court to apply strict scrutiny upon remand, 638 F.3d at 636, the district court determined that the intervening Supreme Court opinion, *United States v. Alvarez,* 132 S. Ct. 2537 (2012), altered the landscape. Discussing *Alvarez,* the district court noted that the four-Justice plurality, led by Justice Kennedy, applied strict scrutiny and found the Stolen Valor Act unconstitutional. The district court accurately noted that Justice Breyer wrote a concurring opinion in *Alvarez,* joined by Justice Kagan, in which he agreed that the Stolen Valor Act was unconstitutional but arrived at that holding applying intermediate, not strict, scrutiny. *See Alvarez,* 132 S. Ct. at 2551-56 (Breyer, J., concurring). Appellees argued to the district court that Justice Breyer's concurrence controlled in *Alvarez* because when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States,* 430 U.S. 188, 193 (1977) (internal quotation omitted). Accordingly, applying the *Marks* rule, Appellees argued that the appropriate level of scrutiny to apply in this case is intermediate scrutiny. The district court agreed that intermediate scrutiny applied according to *Alvarez,* but conducted its determinative analysis applying strict scrutiny because the court held that no matter the level of scrutiny,

Minnesota Statute § 211B.06 survives even the most stringent.

Applying a strict scrutiny analysis to the instant facts, the district court held § 211B.06 serves a "compelling interest" (i.e., preserving fair and honest elections and preventing a fraud upon the electorate through the deliberate spreading of material, false information) and that, on balance, that interest was important enough to justify the speech § 211B.06 has restricted in pursuit of that interest. This appeal followed.

II. DISCUSSION

A. Standard of Review

"This court reviews de novo a grant of summary judgment." *Iowa Right To Life Comm., Inc. v. Tooker,* 717 F.3d 576, 583 (8th Cir. 2013), *cert. denied,* 134 S. Ct. 1787 (2014). "This court affirms where there are no genuine issues of material fact, and judgment is appropriate as a matter of law." *Minn. Citizens Concerned for Life, Inc. v. Kelley,* 427 F.3d 1106, 1109 (8th Cir. 2005).

B. Standing

We first dispose of the county attorneys' claim that the district court erred in its conclusion that Appellants had standing to pursue their claims at summary judgment. In *281 Care Committee I,* this court held that Appellants had standing, in part, because a

credible threat of prosecution existed by virtue of the recent enactment of § 211B.06. 638 F.3d at 627-31. Upon remand, the county attorneys revisited that claim. Before the district court, the county attorneys argued that Appellants lacked standing due to a failure of proof on that issue – that Appellants failed to offer specific facts to support standing at summary judgment. For example, the county attorneys claimed Appellants failed to identify a specific ballot initiative they intended to oppose nor did they provide examples of specific statements they intended to use.

Despite the fact that Appellants filed declarations describing their opposition to particular ballot initiatives, the county attorneys maintain that the posited statements "are beyond the reach of the statute" and appear to be exaggerations, conjecture, or illogical inferences that, according to the county attorneys, are not within the scope of the statute. Thus, the county attorneys argue, no threat of prosecution actually exists, nor does § 211B.06 create any objectively reasonable chill on Appellants' speech. And, to the extent that the proposed statements contain verifiable facts, the county attorneys further claim that Appellants would not face liability under § 211B.06 unless (1) the statements are false, (2) the speaker made such statements in paid political advertising or campaign material, and (3) the speaker had knowledge of their falsity, or made the statements with reckless disregard for their truth or falsity. Until all three occur, argue the county attorneys, there exists

no objectively reasonable chill on protected political speech.

The county attorneys additionally revisit a previous claim that Appellants are not pursuing claims against their political opponents who might file a complaint under § 211B.06 with the OAH, but rather against the county attorneys charged with criminal prosecution in the unlikely event the OAH refers a matter for criminal investigation. They claim that by limiting the suit against those who may at some unlikely point seek prosecution, the claims are too farfetched to reasonably chill Appellants' speech. Overall, the county attorneys claim Appellants have not offered sufficient evidence of an injury-in-fact caused by § 211B.06. Faced with the renewed standing challenge at summary judgment, the district court held that the reasoning of *281 Care Committee I* prevailed and was unchanged by the case's progression. We agree.

Briefly, standing is always a "threshold question" in determining whether a federal court may hear a case. *Eckles v. City of Corydon,* 341 F.3d 762, 767 (8th Cir. 2003) (quotation omitted). To assert a right in federal court a party invoking federal jurisdiction must establish "(1) that he suffered concrete, particularized injury in fact, (2) that this injury is fairly traceable to the challenged action of defendants, and (3) that it is likely that this injury will be redressed by a favorable decision." *281 Care Committee I,* 638 F.3d at 627. To establish injury in fact for a First Amendment challenge to a state statute, "the plaintiff

needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute. Self-censorship can itself constitute injury in fact." *Id.* "The relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was 'objectively reasonable.'" *Id.* (quoting *Zanders v. Swanson,* 573 F.3d 591, 594 (8th Cir. 2009)). "Reasonable chill exists when a plaintiff shows 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution.'" *Id.* (alteration in original) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)).

We rely almost exclusively on our disposition in *281 Care Committee I* to resolve this revisited claim and offer little additional reasoning at this stage in support of our rejection of the county attorneys' challenge to standing. *Id.* at 27-31 (determining that § 211B.06 presents a credible threat of prosecution sufficient to support a claim of objectively reasonable chill and that the plaintiffs have reasonable cause to fear the consequences of § 211B.06, as they alleged that they wish to engage in conduct that could reasonably be interpreted as making false statements with reckless disregard for the truth of those statements). To that end, we reiterate even now at the summary judgment stage, that the relevant facts have not changed and Appellants' decision to chill their speech was objectively reasonable given a credible threat of

prosecution and that the conduct alleged by Appellants in which they wish to engage could fall within the prohibition of § 211B.06. *See 281 Care Committee I,* 638 F.3d at 627-29.[4]

The Court's recent pronouncement in *SBA List* solidifies our instant *and* prior rulings on the county attorneys' standing challenge and actually represents a timely discussion directly relevant to our approach herein to Minnesota's § 211B.06. 134 S. Ct. 2334 (2014). In *SBA List*, the Court addressed a sort of "sister statute," part of the Ohio statutory scheme, that is quite similar to § 211B.06,[5] and is also traveling a similar path in litigation.[6] The posture in *SBA*

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[4] We also deny the county attorneys' request to conduct additional discovery pursuant to Federal Rule of Civil Procedure 56(d), as we have now reiterated that there is no need for additional inquiries on this issue. Lest there be any need for further clarification on the matter, the Supreme Court's discussion in *Susan B. Anthony List v. Driehaus,* should settle it pointedly. *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334 (2014) (*SBA List*).

[5] In fact the OAH procedure in Minnesota under its Fair Campaign Practices "is modeled on one created by Ohio in 1995." Appellee App. 14.

[6] Ohio Revised Code Annotated § 3517.21(B), part of the Ohio Election Code, provides in relevant part:

> No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do

(Continued on following page)

List is similar to that which we faced in *281 Care Committee I.* In *SBA List*, the Court faced a challenge to a party's Article III standing. The petitioners in *SBA List* were advocacy organizations that made a preenforcement challenge on constitutional grounds against the Ohio law that prohibits certain false statements during the course of any campaign for nomination or election to public office or to an office of a political party. *SBA List,* 134 S. Ct. at 2338. The Sixth Circuit affirmed the dismissal of the action, but a unanimous Supreme Court reversed. *Id.* at 2347.

The Court in *SBA List* held that despite the prior courts' determinations that the case was not ripe because the petitioners had not alleged a credible threat of enforcement, such a threat indeed existed. *Id.* at 2343-45. Like § 211B.06, the Ohio false statements law sweeps broadly and covered the intended speech of the *SBA List* petitioners, even though they fully intended to speak truthfully, just as the Appellants assert here. *Id.* Despite the organizations' intentions, the Court held, the reviewing administrative body where complaints could be lodged as part of the statutory scheme could *still* find probable cause to

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> any of the following: . . . (9) Make a false statement concerning the voting record of a candidate or public official; (10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

believe the law was violated. *Id.* at 2344-45. The real injury was the filing of a complaint itself, the Court realized, and that threat was only exacerbated by the procedure in place in Ohio where "any person" could file such a complaint. *Id.* at 2345. The Court recognized that in such a scheme, the filing of the complaint itself can be used to tactically diffuse an organization's support during, say, the heat of a campaign and *that* threat, coupled with burdensome Commission proceedings and an additional threat of criminal prosecution more than suffice to create an injury for standing purposes. *Id.* at 2345-47.

The instant matter, too, is justiciable, and as to this specific statute, there is sufficient factual support to find an Article III injury in fact. Appellants claim they plan to continue to engage in electoral speech concerning opposition to school-funding ballot initiatives. As in *SBA List*, Appellants' challenge to the Minnesota false statements statute presents a purely legal issue fully supported by the facts at hand, and denying this judicial review would impose a substantial hardship on Appellants, "forcing them to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly [OAH] proceedings and criminal prosecution on the other." *Id.* at 2347. Accordingly, we reject the county attorneys' renewed challenge to standing.

C. Scrutiny

"As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Alvarez,* 132 S. Ct. at 2543 (plurality) (quotation omitted). To evaluate whether a statute violates the First Amendment, the first step is to articulate the level of scrutiny to apply in this court's analysis – i.e., the standard on which this court examines the fit between the statutory ends and means. *Id.* at 2551 (Breyer, J., concurring); *see also Wersal v. Sexton,* 674 F.3d 1010, 1019-20 (8th Cir. 2012). The parties hotly dispute the level of scrutiny to apply here, including a vibrant discussion as to whether, and how, *Alvarez* applies. The district court and now Appellees advocate that *Alvarez* is the guidepost for our analysis regarding the constitutionality of § 211B.06, and instructs that we apply intermediate scrutiny in this case. However, while *Alvarez* dealt with a content-based restriction on protected speech, the restriction at issue in *Alvarez* did *not* regulate political speech, the key factor in the instant analysis. *Alvarez,* 132 S. Ct. at 2543, 2548 (plurality). Accordingly, *Alvarez* is not dispositive.

In *Alvarez,* the Supreme Court analyzed a First Amendment challenge to the Stolen Valor Act, which criminalized false claims about the receipt of military decorations or medals. *Id.* at 2542-43 (plurality). Specifically, the defendant, Alvarez, lied in announcing he held the Congressional Medal of Honor and he was indicted under the Stolen Valor Act for doing so. *Id.* at

2542 (plurality). In arriving at the conclusion that the Stolen Valor Act as written violated the First Amendment, four Justices applied strict scrutiny and the two concurring Justices applied intermediate scrutiny.[7] Despite the disagreement over the level of scrutiny to apply, however, all six Justices in *Alvarez* agreed that false statements do *not* represent a category of speech altogether exempt from First Amendment protection. *Id.* at 2544-45, 2553 (plurality and Breyer, J., concurring). Simply stated, false statements, as a general proposition, are not beyond constitutional protection.[8] *Id.* Like the Stolen Valor Act,

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[7] The *Alvarez* plurality utilized the term "the most exacting scrutiny" in its analysis. 132 S. Ct. at 2548 (plurality) (quotation omitted). To be sure, the Supreme Court has used the term "exacting scrutiny" in many contexts, some of which indicate the application of a less-than-strict scrutiny approach. *See, e.g., Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 876 (8th Cir. 2012) (discussing various cases utilizing the "exacting scrutiny" standard and how it was applied). In *Alvarez,* though, no matter the cloudiness of its usage in prior case law, the plurality's application of "the most exacting scrutiny" is interchangeable with strict scrutiny. 132 S. Ct. at 2551 (Breyer, J., concurring) (applying the less vigorous, intermediate scrutiny, approach in the analysis, in distinct contrast to the plurality's strict scrutiny approach).

[8] In this same vein, *Alvarez* likewise forecloses Appellants' argument (made in reliance upon language found in *New York Times Co. v. Sullivan,* 376 U.S. 254, 291 (1964)) that because § 211B.06 "imposes criminal and civil liability on citizens based solely on statements criticizing the government's laws or proposed laws, it is categorically unconstitutional." Just as we previously illuminated why defamation-law principles advance the importance of private interests but do not settle the question regarding a categorical exemption for knowingly false speech, *281*

(Continued on following page)

§ 211B.06 targets falsity, as opposed to the legally cognizable harms associated with a false statement. In this arena, the Court makes clear that there is no free pass around the First Amendment. *Id.* at 2545 (plurality).[9]

The key today, however, is that although *Alvarez* dealt with a regulation proscribing false speech, it did not deal with legislation regulating false *political* speech. *Id.* at 2543 (plurality). This distinction makes all the difference and is entirely the reason why *Alvarez* is not the ground upon which we tread. Justice Breyer in his concurring opinion in *Alvarez* recognized the significant difference between the

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Care Committee I, 638 F.3d at 634, *Sullivan*'s discussion of liability for the defamation of a public official likewise does not settle the matter here. *See Sullivan,* 376 U.S. at 271-72, 279-80. *Sullivan* certainly furthers the discussion concerning the importance of enforcing the First Amendment to advance free debate and robust public discussion of issues, but the Court's discussion in *Sullivan* does not support the proposition that § 211B.06 is categorically unconstitutional. *Id.* at 270-72.

[9] The Court's ruling on this issue affirms the pronouncement in *281 Care Committee I* that knowingly false speech does not fall outside the protections of the First Amendment. 638 F.3d at 635. The district court seems to have read this pronouncement as the sum total of our ruling on the issue of scrutiny on remand because the court deduced it was "thus directed" to apply strict scrutiny only because the statute was a content-based restriction on knowingly false speech. However, *281 Care Committee I* makes clear that its discussion focuses on false statements in the political context, specifically "in the context of political campaigns on a ballot issue." *Id.* at 636. It was for *that* reason, we held strict scrutiny applied. *Id.* at 635-36.

false speech regulated by the Stolen Valor Act and other areas of false speech, including false political speech, acknowledging that strict scrutiny is often the test to apply, and noting that almost no amount of fine tailoring could achieve a similar government interest in a political context:

> I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.

Id. at 2556 (Breyer, J., concurring). *Alvarez,* of course, guides our analysis to the extent it discusses the regulation of false speech in light of general First Amendment protections, but the Court's pronouncements in the myriad other cases discussing the regulation of political speech dictate the level of scrutiny to apply to our analysis. *McCutcheon v. FEC,* 134 S. Ct. 1434 (2014); *Citizens United v. FEC,* 558 U.S. 310, 340 (2010); *Republican Party of Minn. v. White,* 536 U.S. 765, 774 (2002) (*White I*); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347 (1995); *Mills v. Ala.,* 384 U.S. 214, 218-19 (1966).

So, again, it is *key* that the regulatory scheme at play in *Alvarez* dealt entirely, and only, with false

speech. *Alvarez,* 132 S. Ct. at 2545 (plurality) ("[T]he Stolen Valor Act . . . targets falsity and nothing more."). In fact, it was largely (if not solely) because the regulation at issue in *Alvarez* concerned false statements about easily verifiable facts that did not concern subjects often warranting greater protection under the First Amendment, that the concurring Justices applied intermediate scrutiny. *Id.* at 2552-53 (Breyer, J., concurring). Here, because the speech at issue occupies the core of the protection afforded by the First Amendment, we apply strict scrutiny to legislation attempting to regulate it. *Iowa Right To Life Comm.,* 717 F.3d at 589. Accordingly, because *Alvarez* does not alter the landscape on this issue, the scrutiny directed in *281 Care Committee I* endures.

D. Regulation of Political Speech

The First Amendment of the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment. *McIntyre,* 514 U.S. at 346. "Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people." *McCutcheon,* 134 S. Ct. at 1462 (Thomas, J. concurring) (internal quotations omitted). It is, particularly, at the heart of the protections of the First Amendment, *281 Care Committee I,* 638 F.3d at 635, and is, "of course, . . . at the core of what the First Amendment is designed to protect." *Morse v.*

Frederick, 551 U.S. 393, 403 (2007) (internal quotation omitted). "Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it." *Republican Party of Minn. v. White,* 416 F.3d 738, 749 (8th Cir. 2005) (en banc) (*White II*); *see also McIntyre,* 514 U.S. at 347.

Much legal discourse has taken place regarding the special place held for political discussion in our system of government, and the application of these principles, usually discussed in the context of speech surrounding candidates for office, "extend[s] equally to issue-based elections such as [political campaigns on a ballot issue]." *McIntyre,* 514 U.S. at 347. So,

> [d]iscussion 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. Although First Amendment protections are not confined to the exposition of ideas, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, of course including discussions of [political campaigns on a ballot issue]. This no more than reflects our profound national commitment to the

> principle that debate on public issues should be uninhibited, robust, and wide-open.

Id. at 346 (quotation and internal quotations omitted); *see also Mills,* 384 U.S. at 218-19. Applying strict scrutiny, the burden on Appellees in this matter is to demonstrate that the interest advanced in support of the § 211B.06 is narrowly tailored to meet a compelling government interest. *281 Care Committee I,* 638 F.3d at 636.

E. Statutory Ends and Means

The county attorneys are unable to meet their burden in this case. Even if we were to assume that the asserted compelling interests discussed herein pass muster for purposes of this constitutional analysis, no amount of narrow tailoring succeeds because § 211B.06 is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal. We explain.

1. Compelling Interest

"Precisely what constitutes a 'compelling interest' is not easily defined. Attempts at definition generally use alternative, equally superlative language: 'interest[ ] of the highest order,' 'overriding state interest,' 'unusually important interest.'" *White II,* 416 F.3d at 749 (quoting *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972); *McIntyre,* 514 U.S. at 347; *Goldman v. Weinberger,* 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting)). Too, the discussion regarding whether a

state interest is compelling or not bottoms on other considerations in the strict scrutiny analysis, such as the impact of the regulation itself.

> The inquiry of whether the interest (the end) is 'important enough' – that is, sufficiently compelling to abridge core constitutional rights – is informed by an examination of the regulation (the means) purportedly addressing that end. A clear indicator of the degree to which an interest is 'compelling' is the tightness of the fit between the regulation and the purported interest: where the regulation [is underinclusive and] fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being 'compelling.' If an interest is *compelling* enough to justify abridging core constitutional rights, a state will enact regulations that substantially protect that interest from similarly significant threats. . . . A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.

White II, 416 F.3d at 750 (internal quotation omitted) (second and fourth alterations in original). That said, and looking at all of these related factors, we analyze the compelling state interest advanced in this case.

The district court[10] concluded that the major purpose of § 211B.06 is to preserve fair and honest elections and prevent a fraud on the electorate. The district court additionally articulated that the purpose of § 211B.06 is to "implement[] minimal, narrowly tailored safeguards against campaigns of misinformation," and to "[l]imit[ ] the dissemination of knowingly or recklessly false statements about the effects of ballot initiatives," because "[d]eliberate or reckless efforts to mislead the public and change the outcome of a ballot measure not only have an adverse impact on the issue being decided, [they] undermine the premises of democratic government, including the necessity of free but fair debates."

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[10] Appellees do not espouse just one articulation of the state interest advanced by § 211B.06. Instead they articulate many versions of a similar theme. In their briefing on appeal, the county attorneys intimate that the interests advanced in *other* cases suffice to articulate the state's interest behind § 211B.06 here, quoting previously discussed interests in "preventing fraud and libel," "protecting the political process from distortions caused by untrue and inaccurate speech," "the evil of making false statements of fact regarding an election," and, finally, that § 211B.06 "is designed to prevent corrupt campaign practices that would mislead the public and permit close elections to be won by fraud." *See generally McIntyre,* 514 U.S. at 349; *Brown v. Hartlage,* 456 U.S. 45, 61 (1982); *Kennedy v. Voss,* 304 N.W.2d 299, 300 (Minn. 1981); and *In re Contest of Gen. Election,* 264 N.W.2d 401, 406 (Minn. 1978) (Otis, J., dissenting). In the interest of uniformity, because the theme remains the same, and the particular articulation of the state interest advanced is not determinative in the analysis, we refer in our analysis to the district court's articulation of the interest advanced by § 211B.06.

Despite the strong protection for political speech under the First Amendment, the Supreme Court has acknowledged that a state interest in preventing fraud "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre,* 514 U.S. at 349. It is true that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 231-32 (1989) (discussing several laws the Court has held furthered a state's interest in preserving the integrity of its election *process,* all of which exerted an infringement on the associational rights of the citizenry as an indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections). And, interests in protecting elections conducted with integrity and reliability "obviously are compelling." *Burson v. Freeman,* 504 U.S. 191, 199 (1992) (reiterating the Court's view that a state has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process, and reconciling the accommodation of the right to engage in political discourse with the right to vote). Yet, when these preservation goals are achieved at the expense of public discourse, they become problematic. "[A] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Eu,* 489 [U.S.] at 228 (quotation omitted). We are thus ever-cognizant in

this analysis of the significant First Amendment costs for individual citizens.

Directly regulating what is said or distributed during an election, as § 211B.06 does, goes beyond an attempt to control the process to enhance the fairness overall so as to carefully protect the right to vote. We concede that regulating falsity in the political realm definitely exemplifies a stronger state interest than, say, regulating the dissemination and content of information generally, given the importance of the electoral process in the United States. *McIntyre,* 514 U.S. at 348-49. Even in that context, however, the state does not have carte blanche to regulate the dissemination of false statements during political campaigns and the Supreme Court has yet to specifically weigh in on the balancing of interests when it does. *Id.* at 349-50 n.12.

Today we need not determine whether, on these facts, preserving fair and honest elections and preventing fraud on the electorate comprise a compelling state interest because the narrow tailoring that must juxtapose that interest is absent here. Again, "[a] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *White II*, 416 F.3d at 750 (second alteration in original) (quotation omitted). Accordingly, we turn to the "narrow tailoring" examination of § 211B.06.

2. Narrowly Tailored

Even if we conclude that Minnesota has a compelling state interest in preserving "fair and honest" elections and preventing a "fraud upon the electorate," § 211B.06 fails under strict scrutiny. Under such inquiry, the requisite tailoring is determinative as to the statute's constitutionality because those making the laws may pursue stated interests "only so long as [they do] not unnecessarily infringe an individual's right to freedom of speech." *McCutcheon,* 134 S. Ct. at 1450 (plurality).

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

White II, 416 F.3d at 751.

Keeping Minnesota's alleged interests in mind, the First Amendment requires that the chosen restriction on the speech at issue be "actually necessary" to achieve them. *Brown v. Entm't Merchants Ass'n,* 131 S. Ct. 2729, 2738 (2011). "There must be a direct causal link between the restriction imposed and the injury to be prevented." *Alvarez,* 132 S. Ct. at 2549 (plurality). So, to survive strict scrutiny, Appellees must do more than assert a compelling state

interest – they must demonstrate that § 211B.06 is narrowly tailored.

The county attorneys claim that § 211B.06 is indeed "actually necessary" to preserve fair and honest elections in Minnesota. They do so, however, without confirming that there is an actual, serious threat of individuals disseminating knowingly false statements concerning ballot initiatives. The county attorneys instead claim that empirical evidence is not required to support this legislative judgment. Rather, they assert that common sense dictates "that political advertising aimed at voters and intentionally designed to induce a particular vote through the use of false facts impacts voters' understanding and perceptions; can influence their vote; and ultimately change an election." Because American elections employ secret ballots, Appellees continue (adopting the district court's reasoning), the effects of knowingly false statements do not lend themselves easily to empirical evidence. Accordingly, they argue, the statute is justified, reasonably, by its purpose in preventing fraud on the electorate through minimal regulations on knowingly false statements of fact.

Continuing in their defense of § 211B.06, the county attorneys argue that § 211B.06 is also not overbroad because it is narrowly tailored through its mens rea requirement of actual malice, achieved through the "knowingly false or reckless disregard of falsity" limitation. This mens rea requirement, they claim with reference to the district court's analysis of *Garrison v. La.,* 379 U.S. 64, 75 (1964), provides the

"breathing space" necessary to protect free speech, while narrowly tailoring the prohibition to further the state's interest. In that same vein, the county attorneys additionally claim that § 211B.06 is not underinclusive because it exempts "news items or editorial comments by the news media," Minn. Stat. § 211B.01 subd. 2, and is limited to "paid political advertising or campaign material," Minn. Stat. § 211B.06, subd. 1. Again, as did the district court, the county attorneys deduce that such an exemption is not only viewpoint neutral but recognizes the countervailing interests in a free press and keeps the government out of the editorial rooms while simultaneously targeting the problem – ballot-question advocates and opponents who pose a greater threat than the news media of disseminating intentionally false statements regarding the effect of a ballot question. This, too, according to the district court, allows for oral statements made in debates or "on the street corner soap box," made spontaneously or in the heat of the moment, such that these speakers "need never curb their unscripted oral statements to avoid violating § 211B.06." And, finally, the county attorneys (as did the district court) conclude that § 211B.06 *is* the least restrictive alternative because even though counterspeech *could* be used, it is not as effective in achieving the legitimate purpose § 211B.06 was enacted to serve, especially after an election is over or towards the end of a campaign, when, apparently, the county attorneys believe § 211B.06 best serves the state's interest.

Each of these arguments fail under the required scrutiny. Previously stated, § 211B.06 is not narrowly tailored. First, because § 211B.06 perpetuates fraud, as discussed below, it is not actually necessary. It is also simultaneously overbroad and underinclusive. And, finally, it is not the least restrictive means of achieving the stated goals it allegedly advances. We address all of the areas.

Relying in part upon *McIntyre,* the district court held that § 211B.06 is actually necessary and "directly linked" to the harm sought to be prevented in Minnesota. In *McIntyre,* the Court evaluated the constitutionality of an Ohio statute prohibiting anonymous leafletting, another Ohio statute, also part of the Ohio Election Code recently discussed in *SBA List. McIntyre,* 514 U.S. at 338-39. The Court found the anonymous leafletting statute unconstitutional and in doing so, pointed to two Ohio false statements statutes, similar in kind to § 211B.06, as examples of statutes that more directly dealt with Ohio's professed interest in preventing fraud and libel in election campaigns.[11] *Id.* at 349-50. Because the

[11] The Court specifically pointed to Ohio Revised Code Annotated §§ 3599.09.1(B) and 3599.09.2(B) in Ohio's Election Code as statutes that include detailed and specific prohibitions against making or disseminating false statements during political campaigns, applying both to candidate elections and to issue-driven ballot measures. *McIntyre,* 514 U.S. at 349-50 n.12. Today, these provisions can be found at Ohio Revised Code Annotated. §§ 3517.21 and 3517.22. Section 3517.21(B) is the statute challenged in *SBA List. SBA List,* 134 S. Ct. at 2338.

challenged leafletting statute at issue in *McIntyre* was not the principal weapon against fraud, its "extremely broad prohibition" failed to satisfy strict scrutiny. *Id.* at 351.

The district court and the county attorneys rely upon *McIntyre* to establish that § 211B.06 is actually necessary and a "direct means" to counter the fraud of voter manipulation, but this takes *McIntyre* too far. The *McIntyre* Court expressly refrained from analyzing the constitutionality of the Ohio false statements statutes. *Id.* at 349-50 n.12 ("We need not, of course, evaluate the constitutionality of these provisions. We quote them merely to emphasize that Ohio has addressed directly the problem of election fraud."). The Court *only* noted the false statements statutes to illuminate the fact that Ohio had in existence *other* legislation that more directly addressed the professed interest in preventing fraud, simply as a means to establish that the leafletting statute at issue was not "necessary" in the endeavor. *Id.* at 349-53. To hold that *McIntyre* affirmatively *establishes* a statute like § 211B.06 is actually necessary to prevent voter deception greatly overstates *McIntyre*'s holding.

However, the Court's discussion of particular statutes in the Ohio Election Code in *McIntyre* and *SBA List* provides us insight into this dispute. Neither case controls the consideration before us, as *McIntyre* expressly refrained from any decision regarding the constitutionality of Ohio's false statements statutes similar in kind to § 211B.06, and *SBA List* simply presented the Court with a standing

challenge, mimicking the posture of this case in *281 Care Committee I. 281 Care Committee I,* 638 F.3d at 627-31. But, each case in its own way delves into the realm of protected political speech and the ways states attempt to regulate in that arena. They are, therefore, useful to us.

Stated most simply, § 211B.06 does not survive strict scrutiny because it tends to perpetuate the very fraud it is allegedly designed to prohibit. For this reason, among others, the restriction is neither narrowly tailored nor necessary. In fact, it illustrates that the asserted compelling interest falls short. If § 211B.06 is truly intended, in part, to ensure "campaigns of decency" and "election of candidates to office[s] of honor and trust," as the county attorneys claim (in reliance upon Minnesota case law), the statute wholly misses the mark. *Bank v. Egan,* 60 N.W.2d 257, 262 (Minn. 1953). In fact, looking to the similar statutory scheme in Ohio, the Supreme Court in *SBA List* illuminated the many abuses that emanate from such an endeavor. *SBA List,* 134 S. Ct. at 2344-46. Just having a statute like § 211B.06 on the books creates an environment fraught with problems.

In *SBA List,* the Ohio Attorney General himself (Ohio AG), though charged simultaneously with the zealous representation of the Ohio Elections Commission in the same action, took the unique and rare step of filing an amicus brief as a "friend of the Court and the legal process" and as Ohio's "chief law officer" to enlighten the Court as to the "actual workings and effect of the Ohio false statements statute in

practice." Brief of Amicus Curiae Ohio Attorney General Michael DeWine in Support of Neither Party at 1, 22, *SBA List,* 134 S. Ct. 2334 (No. 13-193), 2014 WL 880938 (Ohio AG Brief). Many of the concerns expressed by the Ohio AG made headway with the Court and resonate here as well. *SBA List,* 134 S. Ct. at 2345-46 (relying upon the submission by the Ohio AG as to the practical effect of the Ohio false statements scheme).

First, as a practical matter, it is immensely problematic that *anyone* may lodge a complaint with the OAH alleging a violation of § 211B.06. There is no promise or requirement that the power to file a complaint will be used prudently. "Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." *Id.* at 2345. Complaints can be filed at a tactically calculated time so as to divert the attention of an entire campaign from the meritorious task at hand of supporting or defeating a ballot question, possibly diffusing public sentiment and requiring the speaker to defend a claim before the OAH, thus inflicting political damage.[12] Just as the Court explained in the context of

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[12] The Ohio AG describes the inherent problems as well:

> It is not unduly cynical to suggest . . . that in at least some Elections Commission matters, complainants may time their submissions to achieve maximum disruption of their political opponents while calculating

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the Ohio false statements statute, section § 211B.06 makes anyone speaking out about a ballot question "easy targets." *Id.* at 2345.

As previously noted, the county attorneys claim that empirical evidence is not needed to establish that § 211B.06 is actually necessary. However, their reliance upon "common sense" to establish that the use of false statements impacts voters' understanding, influences votes and ultimately changes elections, is not enough on these facts to establish a direct causal link between § 211B.06 and an interest in preserving fair and honest elections. Even though the effect of election fraud or detecting the fraud itself, arguably, is a bit more amorphous and difficult to detect, *only* relying upon common sensibilities to prove it is taking place still falls short. In *Alvarez,* the Court took the government to task for relying upon "common sense" to establish that its stated interest

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> that an ultimate decision on the merits will be deferred until after the relevant election. . . . Even where the Commission does not find probable cause, the damage is often done. The speaker is forced to use time and resources responding to the complaint, typically at the exact moment that the campaign is peaking and his time and resources are best used elsewhere. In other words, the State has constructed a process that allows its enforcement mechanisms to be used to extract a cost from those seeking to speak out on elections, right at the most crucial time for that particular type of speech. And if the allegations turn out to be unfounded, there is no possibility of timely remedy.

Ohio AG Brief at 14-15.

was at risk. 132 S. Ct. at 2549 (plurality). Certainly, it must be acknowledged that allowing an individual to disseminate political advertising that contains knowing falsehoods does not advance a fair and honest election. Yet merely relying upon common sense does not satisfy the heavy burden when protected speech is regulated. *Id.* We "have never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 392 (2000). Appellees defend the statute's ability to dissuade fraud with common sense, but is there such a problem that this infringement on protected speech must occur in the first instance? They argue that the law itself has been construed by Minnesota courts countless times but how often, in practice, is it put to use? Such conjecture about the effects and dangers of false statements equates to implausibility as far as this analysis goes, because, when the statute infringes core political speech, we tend to not take chances.

The Ohio AG addressed the reality of the problem head on and explained that by its nature, the "statutory scheme pulls within its ambit much protected speech." Ohio AG Brief at 18.

> Few respondents contest an adverse Commission finding in court because the election will be over, won or lost, by the time any judicial hearing takes place, and so the remedy is largely meaningless. Even if the speaker is ultimately victorious, that speaker gets little or nothing for his or her efforts but

> additional legal bills. Nevertheless, the few challenges that do take place demonstrate that the State administrative apparatus affects a good deal of speech that is well within the ambit of constitutionally protected speech, and that the remedy is rarely, if ever, a timely one.

Id. at 18. Between 2001 and 2010 in Ohio, for example, their Commission (the body in Ohio charged with similar duties as Minnesota's OAH to review these complaints) found violations of their respective false statements statute in 90 cases. Additionally,

> the Commission dismissed another forty-eight cases after a hearing, and 112 were dismissed because the complainant withdrew the complaint or failed to prosecute (typically after the election – a further indication that the goal may often be less an ultimate finding of a violation than a probable-cause finding before the election). Two hundred sixty were dismissed with findings of 'no probable cause.'

Ohio AG Brief at 20. The Ohio AG included such figures to illuminate that in reality "numerous speakers who have not made a false statement even under the modest burden of proof for 'probable cause,' are forced to devote time, resources, and energy defending themselves before the Elections Commission, typically in the late stages of a campaign." *Id.*

We do not cite to the Ohio AG statistical offerings to imply that just such empirical evidence is required

to establish the causal link between § 211B.06 and the interests it is in place to protect. Nor do we cite the Ohio AG's explanation of how that state's false statements statutes are working in practice to imply that, in fact, the exact same reality must exist in Minnesota. The Ohio AG's explanation, however, clearly exemplifies the potential for abuse and an absence of narrow tailoring of the Minnesota law – and thus, a lack of necessity.

An affidavit submitted by the county attorneys in this matter avers that the Hennepin County Attorney's Office has not commenced any criminal prosecutions under § 211B.06 for false political and campaign material. The county attorneys have likewise filed copies of OAH decisions that have followed evidentiary hearings concerning § 211B.06 complaints, with varying findings concerning the challenged statements – some successful, some not. These exhibits, however, do not provide us with the bigger picture and thus we are at a loss to deduce any significance from their inclusion in the record except to establish that the OAH receives some complaints under § 211B.06, some of which are meritorious and others not. If anything, the sampling of orders exemplify that protected speech is being swept in by § 211B.06 unnecessarily, further establishing the chilling nature of this statute, as well as its overbreadth, which we turn to next.

For all practical purposes, the real potential damage is done at the time a complaint is filed, no matter the possibility of criminal prosecution down

the line. The burdens of the OAH proceedings themselves greatly impact electoral speech and are cause for concern. Even before a probable cause hearing, the allegation of the falsity itself likely makes the news circuit and creates a stir in the ongoing political discourse. Practically, should probable cause be found by the ALJ when the complaint is filed close to an election, no judicial review can take place to effect any relief prior to the impending election. So, the damage is inflicted at the point of filing, even if the complainant is ultimately unable to prove up the allegations of falsity under the clear and convincing standard required during a resulting evidentiary hearing that would occur after a finding of probable cause. Minn. Stat. § 211B.32, subd. 4. Essentially, then, this damage (or injury) occurs quite easily, at the whim of "anyone" willing to file a complaint under oath. Minn. Stat. § 211B.32, subd. 3. Not only does this injury occur upon filing, it only deepens upon the finding of probable cause. At bottom, then, this core political speech is penalized using a burden of proof even lower than a preponderance of the evidence, with few, if any, safeguards to protect this "zenith" of First Amendment-protected political speech. *See Meyer v. Grant,* 486 U.S. 414, 425 (1988).

The county attorneys seem to presume without question that "exaggerations, conjecture, or illogical inferences," which they claim is all Appellants wish to convey, are not within the scope of § 211B.06 and are thus not at risk. But, they cannot support such a claim. *Anyone* can file a complaint under § 211B.06

and it is only at that time that the OAH begins to decide whether a violation has occurred. At that point, however, damage is done, the extent which remains unseen. Section 211B.06 is thus overbroad because although it may seem axiomatic that particular speech does not fall within its scope, there is nothing to prohibit the filing of a complaint against speech that may later be found wholly protected. We have examples of just such protected speech in the record submitted by both sides, found within the OAH orders, both from prima facie determinations and following evidentiary hearings by a three-judge panel.[13]

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[13] For example, the county attorneys filed OAH orders issued by three-judge administrative panels to demonstrate, in part, that no criminal prosecutions have taken place under § 211B.06 since the OAH process was put in place in 2004. These filings demonstrate civil challenges under § 211B.06 against false statements disseminated "with respect to the personal or political character or acts of a candidate," which are also actionable under § 211B.06 but are not at issue in this case. All of the orders, however, serve as examples of statements that get challenged nonetheless, even though they are either true or do not fall within the ambit of § 211B.06. One order filed by the county attorneys addresses a complaint filed by a citizens' group that supported passing a school bond referendum that challenged seventeen statements made in campaign material disseminated to urge voters to vote against the referendum. The complaint was filed under § 211B.06 and the statements were made in the context of a ballot initiative asking voters to vote on a $25.6 million bond referendum to finance a new school building. Fourteen of the alleged violations were dismissed at the outset by an ALJ making the initial inquiry and three survived the initial prima facie inquiry. Following the evidentiary hearing on those three statements, the OAH dismissed the entire complaint. Examples

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Notwithstanding its overbreadth, the lack of a causal link between the advanced interests and § 211B.06 is not the only way in which § 211B.06 is not actually necessary to achieve the stated interests. A second consideration in our analysis as to whether § 211B.06 is narrowly tailored to achieve Minnesota's asserted compelling interest in preserving fair and honest elections and preventing a fraud on the electorate, is that the county attorneys have not offered persuasive evidence to dispel the generally accepted proposition that counterspeech may be a logical solution to the interest advanced in this case. "[W]hen the Government seeks to regulate protected speech, the restriction must be the least restrictive means among available, effective alternatives." *Alvarez,* 132 S. Ct. at 2551 (plurality) (internal quotation omitted). There is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal.

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of challenged statements in connection with the referendum were: (1) "Like most Minnesotans, HLWW taxpayers saw their tax support of schools shift from property taxes to state income taxes a few years ago," (2) a statement that the particular delivery method chosen by the school district will "take the District out of the majority of the construction details, decisions and quality control" and (3) a statement by the respondent that "I have personally been offered a bribe by SGN Architect's – free tickets to the Twins game during the World Series." Following the month-long hearing process, the OAH panel ultimately held that each of these statements were either true, or merely statements of opinion that were not false, or were not made "with respect to the effect of a ballot question" as § 211B.06 requires.

> The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uniformed [sic], the enlightened; to the straight-out [sic] lie, the simple truth. . . . The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Id. at 2550 (plurality).

Possibly there is no greater arena wherein counterspeech is at its most effective. It is the most immediate remedy to an allegation of falsity. "The theory of our Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* (internal quotation omitted). It is the citizenry that can discern for themselves what the truth is, not an ALJ behind doors. "The preferred First Amendment remedy of more speech, not enforced silence . . . has special force." *Brown v. Hartlage,* 456 U.S. 45, 61 (1982) (internal quotation omitted). Especially as to political speech, counterspeech is the tried and true buffer and elixir.

Putting in place potential criminal sanctions and/or the possibility of being tied up in litigation before the OAH, or both, at the mere whim and mention from anyone who might oppose your view on a ballot question is wholly overbroad and overburdensome and chills otherwise protected speech. That counterspeech confronts these asserted compelling interests and is a less restrictive means of countering the concern leads us again to deduce that the interests are less compelling than touted and the statute is not narrowly tailored to achieve the goal.

Outside of counterspeech it is difficult at this point to envision other, less restrictive means to abate the alleged interest. No matter, however, because counterspeech, alone, establishes a viable less restrictive means of addressing the preservation of fair and honest elections in Minnesota and preventing fraud on the electorate. The county attorneys claim that counterspeech is not good enough to adequately address the concern because it cannot change the outcome of an election, nor can it effectively counter targeted communications with voters at the end of a campaign. The district court added that counterspeech may not be effective in the "David and Goliath" scenario when one group may so greatly outmatch a political opponent that the message, or correction, offered in response goes largely unheard. But these claims do not sufficiently respond to the use of counterspeech on these facts. The county attorneys simply do not acknowledge that if counterspeech does not suffice, § 211B.06 does not either. We have already

pointed out the practical problems inherent with § 211B.06 and the reality regarding how it could actually perpetuate fraud in an election. Such realities cannot be ignored. If the genuine concern is to preserve fair and honest elections and prevent a fraud on the electorate, then it would seem that they, too, could not continue to keep § 211B.06 as part of a legislative scheme when the realities of its possible abuse are exposed. Section 211B.06 thus plainly fails the test of being the least restrictive means to serve the state's interest.

Another basis advanced by the county attorneys to demonstrate the narrow tailoring of § 211B.06 falls short. The mens rea requirement in § 211B.06 does not effectively narrow the statute to limit its reach as intended. The risk of chilling otherwise protected speech is not eliminated or lessened by the mens rea requirement because, as we have already noted, a speaker might still be concerned that someone will file a complaint with the OAH, or that they might even ultimately be prosecuted, for a careless false statement or possibly a truthful statement someone deems false, no matter the speaker's veracity. Or, most cynically, many might legitimately fear that no matter what they say, an opponent will utilize § 211B.06 to simply tie them up in litigation and smear their name or position on a particular matter, even if the speaker never had the intent required to render him liable. *See Alvarez,* 132 S. Ct. at 2555 (Breyer, J., concurring) (discussing the similar chill inherent in the Stolen Valor Act, rendered unconstitutional by the

Court). The mens rea requirement in this context does not safeguard the statute's constitutionality nor deter someone from filing a complaint challenging statements involving exaggeration, rhetoric, figurative language, and unfavorable, misleading or illogical statements or opinions. There is nothing in place to realistically stop the potential for abuse of § 211B.06' s mechanisms.

Finally, the exemption for "news items or editorial comments by the news media," from the FCPA, § 211B.01 subd. 2, as well as § 211B.06's limitation to "paid political advertising or campaign material," actually exemplify that § 211B.06 is underinclusive. The former, the county attorneys argue, protects the countervailing interests in a free press, and the latter, the district court points out, allows for oral statements in debates and on television, along with spontaneous soapbox pronouncements and other such speech that includes "unscripted oral statements," without fear of reprisal. First, to claim that a statement made during a debate is spontaneous and unscripted, and thus should receive greater leeway, is disingenuous at best, in a day when many political speakers take the greatest pains to be politically correct at all times, carefully crafting, in advance, every statement they make in the political arena. Applying their logic regarding the effect of such speech, to allow the "dissemination" (albeit orally) of these statements outside the confines of § 211B.06 leaves equally injurious speech untouched, although it is capable of inflicting the same harm, say, as that

included in a published campaign pamphlet. Appellants' example of the hypocrisy that can occur under this scheme perhaps best illustrates the problem, although we alter their example slightly. Overlaying the press exemption with the statutory restrictions, we envision a newspaper opinion section which, on the same day, prints the very same "false" information regarding the effects of a ballot question twice – once as an editorial and again in a paid advertisement from a local group opposing the initiative. One is exempt from prosecution and the other is not. Such a result does not advance a stated interest in preventing a fraud on the electorate.

It is in the political arena where robust discourse must take place. And although there *are* certain outright falsities one could envision in the discussion of a proposed ballot question, especially when considering there are hotly debated sides to every issue, it seems that too often in that situation, the "falsity" deemed by one person actionable under § 211B.06 will be a statement of conjecture about the future state of affairs should the ballot question pass or fail. Despite the certainty of conjecture, however, the state may not 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). Such "back and forth" is the way of the world in election discourse. "[S]ome false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation. . . ."

Alvarez, 132 S. Ct. at 2544 (plurality). We therefore leave room for the rough and tumble of political discourse for the farfetched. "[P]olitical speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre,* 514 U.S. at 357.

The county attorneys claim that § 211B.06 actually serves its purpose most fervently at the end of a campaign or even after an election is over. This claim is wholly without merit. Given the information exposed by the Ohio AG and our own analysis of § 211B.06, it is possible that it is at *that* point that § 211B.06 can be utilized to induce the most damage to the state interest it is designed to serve. As asserted by the Ohio AG, who is charged with the task of enforcing the similar statutory scheme, these laws "allow [ ] the State's legal machinery to be used extensively by private actors to gain political advantage in circumstances where malicious falsity cannot ultimately be established." Ohio AG Brief at 7.

Given these realities, the county attorneys have failed to demonstrate that § 211B.06 is either narrowly tailored or necessary to preserve fair and honest elections and prevent a fraud on the electorate. The mens rea requirement established in the statute, and any other alleged narrowing safeguards that Appellees claim render this statute constitutional, have little effect in abating the advanced concern of the state. Citing Minnesota law, the county attorneys claim that the legislative intent of § 211B.06 is to

prevent corrupt campaign practices that would "mislead the public and permit close elections . . . to be won by fraud." *In re Contest of Gen. Election,* 264 N.W.2d 401, 406 (Minn. 1978) (Otis, J., dissenting). But as we have discussed, the practical application of § 211B.06 only opens the door to more fraud. The statute itself actually opens a Pandora's box to disingenuous politicking itself.

While we would like to agree with the district court that because § 211B.06 employs "the force and impartiality of law," it "serves to check the unfair use of disparate advantage during a campaign," we do not have the luxury of indulging that scenario given the abridgement of core political speech at risk. With such abridgement left unregulated, not only is § 211B.06 not narrowly tailored but likely does not rise to the level of explicating a "compelling" interest. The citizenry, not the government, should be the monitor of falseness in the political arena. Citizens can digest and question writings or broadcasts in favor or against ballot initiatives just as they are equally poised to weigh counterpoints. *McIntyre,* 514 U.S. at 348 n.11 ("People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.") (quotation omitted).

F. Eleventh Amendment Immunity

The attorney general revisits the issue of Eleventh Amendment immunity. In *281 Care Committee I,* we held that the attorney general was a proper defendant under the *Ex parte Young,* 209 U.S. 123 (1908), exception to Eleventh Amendment immunity. 638 F.3d at 632. We determined that the attorney general's connection to the enforcement of § 211B.06 was three-fold: (1) the attorney general "may, upon request of the county attorney assigned to a case, become involved in a criminal prosecution of section 211B.06," (2) "the attorney general is responsible for defending the decisions of the OAH – including decisions pursuant to section 211B.06 – if they are challenged in civil court," and (3) "the attorney general appears to have the ability to file a civil complaint under section 211B.06." *Id.* This connection, we held, was sufficient to make the attorney general amenable to suit under the *Ex parte Young* exception to Eleventh Amendment immunity. *Id.* at 633. The district court did not directly address this immunity issue when it granted summary judgment in favor of the county attorneys upon remand because it dismissed the claims. The district court did intimate, however, that this court's original denial of immunity "appears to have the same force of reason at the summary judgment stage as at the motion to dismiss stage."

On appeal, the attorney general reiterates that she may initiate a prosecution for violation of § 211B.06 only "[u]pon request of the county attorney" and only

if the attorney general then "deems [it] proper." Minn. Stat. § 8.01. Violations of the statute are prosecuted by county attorneys, not the attorney general. Minn. Stat. § 211B.16, subd. 3. In support of the motion for summary judgment the Deputy Minnesota Attorney General filed an affidavit testifying that (1) the attorney general's office has never initiated a prosecution alleging a violation of § 211B.06 and he was not aware of any county attorney ever requesting the office to do so, (2) the attorney general's office would decline any request to prosecute any of the activities described in the amended complaint as a violation of § 211B.06, and (3) the attorney general's office never has filed, and has no intention of ever filing, a complaint with the OAH alleging a violation of § 211B.06, especially based upon any of the activities in which the parties wish to engage, as stated in the first amended complaint. Accordingly, the attorney general argues that the record now establishes that there is no threat of her enforcing the challenged criminal statute against Appellants.

The *Ex parte Young* exception only applies against officials "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." *Ex parte Young,* 209 U.S. at 156. It is the attorney general's now-established (via affidavit), not speculative, unwillingness to exercise her ability to prosecute a § 211B.06 claim against Appellants that carries the day at this stage in the proceedings. *Kitchen v. Herbert,* 755 F.3d

1193, 1201 (10th Cir. 2014) ("An officer need not have a special connection to the allegedly unconstitutional statute; rather, he need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.") (quotation omitted). "The *Ex parte Young* doctrine does not apply when the defendant official has neither enforced nor threatened to enforce the statute challenged as unconstitutional." *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery,* 226 F.3d 429, 438 (6th Cir. 2000); *Okpalobi v. Foster,* 244 F.3d 405, 417 (5th Cir. 2001) ("[A]ny probe into the existence of a *Young* exception should gauge (1) the ability of the official to enforce the statute at issue under his statutory or constitutional powers, and (2) the demonstrated willingness of the official to enforce the statute."). "Absent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *Long v. Van de Kamp,* 961 F.2d 151, 152 (9th Cir. 1992) (per curiam).

At this stage in the proceedings we are no longer concerned with who is "a *potentially* proper party for injunctive relief" but rather who in fact is the right party. *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon,* 428 F.3d 1139, 1146 (8th Cir. 2005) (alteration in original). Now that the attorney general has testified with assurances that the office will not take up its discretionary ability to assist in the prosecution of § 211B.06, Appellants are not subject to or threatened with any

enforcement proceeding by the attorney general. Thus, we find the attorney general immune from suit under the Eleventh Amendment, and, accordingly, dismiss the action as against the attorney general.

III. CONCLUSION

For the reasons stated herein, we dismiss Lori Swanson, in her official capacity as the Minnesota Attorney General, and reverse and remand for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

281 CARE Committee, Ron Stoffel, Citizens for Quality Education, and Joel Brude,

Plaintiffs,

v.

Ross Arneson, in his official capacity as County Attorney for Blue Earth County, Minnesota, or his successor, Michael Freeman, in his official capacity as County Attorney for Hennepin County, Minnesota, or his successor, and Lori Swanson, in her official capacity as the Minnesota Attorney general, or her successor,

Defendants.

MEMORANDUM OPINION AND ORDER
Civil No. 08-5215 ADM/FLN

William F. Mohrman, Esq., and Erick G. Kaardal, Esq., Mohrman & Kaardal, P.A., Minneapolis, MN, on behalf of Plaintiffs.

Daniel P. Rogan, Esq., and Beth A. Stack, Esq., Hennepin County Attorney's Office, Minneapolis, MN, on behalf of Defendants Ross Arneson and Michael O. Freeman.

John S. Garry, Esq., Minnesota Attorney General's Office, St. Paul, MN, on behalf of Defendant Lori Swanson.

I. INTRODUCTION

On November 8, 2012, the undersigned United States District Judge heard oral argument on Plaintiffs' Motion for Summary Judgment [Docket No. 111]; Defendants Ross Arneson's and Michael Freeman's (the "County Attorneys") Motion for Summary Judgment [Docket No. 98]; and Defendant Attorney General Lori Swanson's Motion for Summary Judgment [Docket No. 106]. Plaintiffs challenge the constitutionality of Minn. Stat. § 211B.06, a statute prohibiting the dissemination of certain false political statements. Defendants argue the statute is constitutional, and the Attorney General separately argues she is entitled to Eleventh Amendment immunity from Plaintiffs' suit. For the reasons stated herein, the County Attorneys' motion is granted; Plaintiffs' motion is denied; and the Attorney General's motion is denied as moot.

II. BACKGROUND

Plaintiffs are Minnesota residents and organizations who campaign against ballot initiatives that seek to increase funding for local school districts through the use of bond increases and tax levies. Plaintiff Ron Stoffel is the treasurer of Plaintiff 281 CARE Committee ("281 Care"), while Plaintiff Joel Brude is the Chair of Citizens for Quality Education. First Decl. of Erick G. Kaardal [Docket No. 44] at Exs. 1, 3. Plaintiff Victor Niska, former Chairman of Plaintiff W.I.S.E. Citizen Committee ("W.I.S.E."), died

after the filing of the motions at issue, and has been dismissed from the lawsuit. Stip. of Dismissal [Docket No. 124].

Plaintiffs challenge the constitutionality of Minn. Stat. § 211B.06, a provision of the Minnesota Fair Campaign Practices Act (FCPA). The statute states in relevant part:

> 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 personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or 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.

Minn. Stat. § 211B.06, subd. 1 (2012). Minnesota has regulated knowingly false speech about political candidates since 1893. *See* Minn. Stat. ch. 1, § 199 (1894) (amended 1901). However, Minnesota did not begin regulating knowingly false speech about ballot initiatives until 1988. Minn. Stat. § 211B.06 (1988) (amended 1998). From 1988 until 2004, the FCPA's only enforcement mechanism was the prosecution of alleged violators by the relevant county attorney. *Id.* In 2004, the state legislature amended the FCPA to

allow private persons to file a civil complaint before the Office of Administrative Hearings (OAH). *Id.*; *see* Minn. Stat. § 211B.32. The amended FCPA allows a county attorney to bring criminal charges only after the civil complaint reaches a final disposition. Minn. Stat. § 211B.32, subd. 1.

Plaintiffs have a history of involvement with § 211B.06. In 2006, the B.U.I.L.D. Citizen Committee ("B.U.I.L.D.") filed a civil complaint with the OAH against the late Mr. Niska and his organization, W.I.S.E. Third Decl. of Erick Kaardal [Docket No. 46] Ex. U. B.U.I.L.D. supported a school bond referendum to raise money for a new school building in the Howard Lake, Waverly-Winsted School District. *Id.* In its complaint, B.U.I.L.D. alleged Mr. Niska disseminated campaign materials containing false statements about the impact of the school bond referendum. *Id.* The OAH found that B.U.I.L.D. had stated a prima facie case against Mr. Niska and W.I.S.E. but ultimately dismissed the complaint. *See id.* The OAH concluded that of the three statements at issue, two were not verifiably false and one did not fall under § 211B.06 because it was not a statement about the "effect" of a ballot initiative. *See id.*

In late 2007, Stoffel and 281 Care campaigned against a Robbinsdale School District ballot initiative. Ron Stoffel Decl., Apr. 14, 2009 [Docket No. 47]. After the initiative was defeated, 281 Care filed a "pre-emptive" suit against the district, alleging the infringement of free speech rights. *Id.* at Ex. 1. On November 8, 2007, the Superintendent for the district

responded that the district was "weighing its options" for dealing with 281 Care's alleged use of false statements, including considering whether to pursue a case against Stoffel's organization. *Id.* at Ex. 3. Neither the school district nor any other person filed an action against Stoffel, and Stoffel voluntarily dismissed his claims without prejudice. *281 Care Committee v. Krause,* No. 07-4560 JMR/FLN (D. Minn. July 8, 2008).

On September 19, 2008, Plaintiffs filed this action against several County Attorneys.[1] Plaintiffs allege that they have and will continue to engage in advocacy and campaigning involving statements that "will be interpreted" as false or misleading. *See, e.g.,* Am. Compl. [Docket No. 23] ¶ 38. Section 211B.06, Plaintiffs allege, chills their ability to engage in vigorous political debate. Plaintiffs thus seek a declaratory judgment ruling Minn. Stat. § 211B.06 unconstitutional, as well as permanent injunctive relief preventing Defendants from enforcing the statute.

In mid-2009, Defendants filed a motion to dismiss and Plaintiffs filed a motion for summary judgment. Order, Feb. 19, 2010 [Docket No. 70]. On February 19, 2010, Judge Rosenbaum, now retired,

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[1] Because the parties agreed to dismiss Plaintiffs Niska and W.I.S.E., the relevant County Attorneys in this action, Michael Junge and Thomas N. Kelly, were also dismissed. Stip. of Dismissal [Docket No. 124].

granted the former and denied the latter. Judge Rosenbaum held that Plaintiffs lacked standing to bring suit, that the issue was not ripe for decision, and that Plaintiffs had failed to state a claim upon which relief could be granted. *See id.*

Plaintiffs appealed, and on November 17, 2010, the Eighth Circuit reversed the order granting dismissal. The Eighth Circuit held that Plaintiffs had sufficiently established standing and ripeness, and that Minn. Stat. § 211B.06 should be subject to strict scrutiny analysis. *See 281 Care,* 638 F.3d at 626-31, 633-36. The court also held that the Attorney General was not protected by Eleventh Amendment immunity. *Id.* at 631-33. The Eighth Circuit remanded the case for further proceedings. In the meantime, Judge Rosenbaum retired and this action was reassigned to the undersigned Judge [Docket No. 84]. Upon remand, the parties brought the present motions for summary judgment.

III. DISCUSSION

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. On a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party. *Ludwig v. Anderson,* 54 F.3d 465, 470 (8th Cir. 1995). However, the nonmoving

party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. Cnty. of Le Sueur,* 47 F.3d 953, 957 (8th Cir. 1995).

If evidence sufficient to permit a reasonable jury to return a verdict in favor of the nonmoving party has been presented, summary judgment is inappropriate. *Id.* However, "the mere existence of some alleged factual dispute between the parties is not sufficient by itself to deny summary judgment. . . . Instead, 'the dispute must be outcome determinative under prevailing law.'" *Get Away Club, Inc. v. Coleman,* 969 F.2d 664, 666 (8th Cir. 1992) (citation omitted). However, "summary judgment need not be denied merely to satisfy a litigant's speculative hope of finding some evidence that might tend to support a complaint." *Krenik,* 47 F.3d at 959.

B. Scope of Decision

With this decision, the Court addresses only those provisions of Minn. Stat. § 211B.06 regarding ballot initiatives. The parties do not offer any argument regarding the constitutionality of the provisions governing statements about candidates, nor do they address the constitutionality of the statutory provision regarding letters to the editor. The County Attorneys also argue that severing the ballot-related language from the statute would be an appropriate

remedy if the Court were to find the language unconstitutional, and Plaintiffs do not object to this suggestion. Plaintiffs' willingness to accept severance as a remedy indicates they do not challenge the remainder of the statute.

In addition, the Eighth Circuit noted the significant and long-standing distinction between knowingly false speech about candidates and knowingly false speech about political issues. *See 281 Care,* 638 F.3d at 625. The distinction between these two veins of speech restriction is significant; as the parties agree, knowingly false speech about candidates implicates defamation concerns while false speech about ballot initiatives does not. Given the parties' arguments and the Eighth Circuit's holding, the Court will not rule on the constitutionality of Minn. Stat. § 211B.06 in its entirety. Thus, this decision addresses only those portions of the statute the parties challenge: paid political advertising and campaign materials about ballot initiatives.

C. Standing

In their summary judgment memoranda, the County Attorneys revisit the issue of Plaintiffs' standing to bring suit. The County Attorneys originally argued Plaintiffs had failed to establish sufficient injury in fact because Plaintiffs did not allege an intent to make maliciously false statements (i.e. knowingly false statements or statements made with reckless disregard for the truth) about ballot initiatives.

Defs.' Mem. Supp. Mot. Dismiss [Docket No. 49] 6. Instead, the County Attorneys argued, Plaintiffs only alleged an intent to use exaggerated rhetoric that might be interpreted as false.

The Eighth Circuit rejected the County Attorneys' argument. The appellate court held that for a First Amendment challenge of a state statute, a plaintiff need only "establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute." *281 Care,* 638 F.3d at 627 (citation omitted). In evaluating First Amendment standing, the relevant inquiry is whether the plaintiff's decision to chill his or her speech was "objectively reasonable," meaning there is a "credible threat of prosecution." *Id.* (citing *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)). In this case, the Eighth Circuit held that Plaintiffs had standing to sue because the legislature had recently enacted § 211B.06, which presented a credible threat of prosecution. *281 Care,* 638 F.3d at 628. Perhaps just as importantly, the court also held that Plaintiffs' intent to engage in speech that "could reasonably be interpreted as making false statements with reckless disregard for the truth" justified an objectively reasonable fear of prosecution. *Id.* at 628. This fear amounted to sufficient injury in fact to support constitutional standing.

In their present motion, the County Attorneys again challenge standing, this time for a failure of proof. The County Attorneys argue that even if Plaintiffs sufficiently alleged standing at the motion to

dismiss stage, they have failed to prove standing sufficient to survive summary judgment. Although Plaintiffs have submitted multiple affidavits and declarations over the course of this litigation, the County Attorneys argue Plaintiffs have failed to offer "specific facts" supporting Plaintiffs' standing. Defs.' Mem. Supp. Summ. J. [Docket No. 100] 15. For example, the County Attorneys argue Plaintiffs have not identified a specific ballot initiative they intend to oppose, nor have Plaintiffs provided examples of specific statements they intend to use. *Id.* at 15-16. For their part, Plaintiffs respond that the Eighth Circuit expressly found Plaintiffs had standing to sue, and the County Attorneys are improperly re-opening an issue decided by the court.

Plaintiffs have established standing to bring this action. First and foremost, the Eighth Circuit specifically directed this Court to evaluate the parties' arguments on their merits, and the rationale for the ruling remains sound. The appellate court concluded that Plaintiffs had standing because a credible threat of prosecution existed by virtue of the recent enactment of § 211B.06. That basis for standing is just as applicable at the summary judgment stage as it was during the motion to dismiss stage. In addition, the Eighth Circuit held that Plaintiffs' fear of prosecution under the statute was reasonable given their alleged intent and past experiences. Plaintiffs cite several declarations testifying to their intent to use heated, arguably-misleading rhetoric, and the chilling effect § 211B.06 has caused. *See, e.g.,* Decl. of Erick

Kaardal, Dec. 23, 2008 [Docket No. 11] Exs. 1, 3, 4, 6; Decl. of Ron Stoffel, Apr. 14, 2009 [Docket No. 47]; Decl. of Joel Brude, Oct. 18, 2012 [Docket No. 120]; *and* Decl. of Ron Stoffel, Oct. 18, 2012 [Docket No. 121]. Plaintiffs have also cited evidence of Mr. Niska's past prosecution, and their awareness of the similarity of their own conduct to Mr. Niska's complained-of conduct. *See, e.g.,* Kaardal Decl., Dec. 23, 2008 at Ex. 1, ¶¶ 16, 23. This evidence is sufficient to establish standing in the manner stated by the Eighth Circuit.

For the same reasons, the additional discovery requested by the County Attorneys under Rule 56(d) of the Federal Rules of Civil Procedure is unwarranted. As the appellate court held, specific examples of proposed speech, or the identification of contested ballots, are unnecessary to establish a reasonable fear of prosecution.

D. Constitutionality of Ballot Language in Minn. Stat. § 211B.06

1. Level of Scrutiny

In the decision remanding this case, the Eighth Circuit directed this Court to apply strict scrutiny analysis to § 211B.06. The appellate court held that knowingly false speech is not categorically exempt from First Amendment protection in the same manner as "fighting words, obscenity, child pornography, and defamation." *281 Care,* 638 F.3d at 633. In particular, the Eighth Circuit reasoned that knowingly false speech is not automatically akin to fraud or

defamation; while knowingly false speech may be an element of fraud or defamation, false speech by itself does not implicate "important private interests" such as an individual's reputation. *Id.* at 634. As a result, knowingly false speech does not fall outside of First Amendment protection and any attempt to limit such speech is a content-based restriction. The Eighth Circuit thus directed this Court to apply strict scrutiny – the default First Amendment test for content-based restrictions – to analyze the constitutionality of Minn. Stat. § 211B.06.

After the Eighth Circuit's decision in this action, however, the Supreme Court addressed the level of scrutiny appropriate for knowingly false speech. In *United States v. Alvarez,* the Supreme Court addressed the constitutional challenge of a man charged under the Stolen Valor Act, 18 U.S.C. § 704, with falsely representing himself as a recipient of a decoration or medal from Congress or the armed forces. *United States v. Alvarez,* 132 S. Ct. 2537 (2012). In a split decision, a majority of the justices upheld the Ninth Circuit Court of Appeal's ruling that the Stolen Valor Act was unconstitutional. *Id.* at 2551. The majority also agreed that no categorical exemption from First Amendment protection existed for false speech. *See generally, id.* at 2543-48. In conducting its First Amendment analysis, however, the Court disagreed regarding the appropriate level of scrutiny. A four-justice plurality, led by Justice Kennedy, held

that strict scrutiny must apply to the Stolen Valor Act.[2] *See id.* at 2548-51. Although the plurality recognized the compelling interests behind the Stolen Valor Act, it held that the law was not necessary to achieve these interests and that less restrictive alternatives existed. *Id.* at 2250-51. As a result, the plurality found the act unconstitutional. *See id.* at 2549-51.

Justice Breyer, joined by Justice Kagan, wrote a concurring opinion in which he agreed that the Stolen Valor Act was unconstitutional. Unlike the plurality, the concurring justices held that intermediate scrutiny, not strict scrutiny, should apply to restrictions against knowingly false speech. *Id.* at 2551-52. The concurrence held that false speech had less social value than other types of speech, though it could still

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[2] The *Alvarez* plurality used the term "exacting scrutiny" instead of "strict scrutiny" in its analysis of the Stolen Valor Act. In the past, the Supreme Court has used these terms interchangeably. *See, e.g., Burson v. Freeman,* 504 U.S. 191, 198, 211 (1992). But it has also used the term "exacting scrutiny" to refer to a potentially less-demanding standard in the context of disclosure laws. *See Minn. Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 874-76 (8th Cir. 2012) (analyzing Supreme Court's use of "exacting scrutiny" in reviewing disclosure laws). In *Alvarez,* it appears the plurality used the term "exacting scrutiny" to mean the highest level of constitutional scrutiny, because it applied the necessary elements of a strict scrutiny analysis. *See Alvarez,* 132 S. Ct. at 2548-51 (discussing the "most exacting scrutiny" and considering the compelling interests behind the Stolen Valor Act, as well as whether the law was narrowly tailored); *see also Minn. Citizens,* 692 F.3d at 876 (observing same).

"serve useful human objectives." *Id.* at 2553. As a result, the justices supported a "proportionality" analysis in which suitably narrow restrictions of false speech would survive constitutional challenges. *See id.* at 2554-56 (reviewing various examples of restrictions against false speech, including perjury, fraud, and trademark infringement statutes). With regard to the Stolen Valor Act, the concurrence, like the plurality, expressed serious concern that the statute criminalized speech made in "family, social, or other private contexts." *Id.* at 2555. The concurrence held that Congress could have passed a more "finely tailored" statute, perhaps by requiring a showing of harm or materiality. *Id.* at 2556. As a result, the concurrence joined the plurality in striking down the Stolen Valor Act.

In their motion for summary judgment, the County Attorneys argue that Justice Breyer's concurrence is the controlling opinion in *Alvarez.* In support of this contention, the County Attorneys cite *Marks v. United States,* which held that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Marks v. United States,* 430 U.S. 188, 193-94 (1977) (internal quotation omitted). The County Attorneys reason that the application of intermediate scrutiny to false speech, as held by the *Alvarez* concurrence, is the narrower basis for striking down the Stolen Valor Act

as unconstitutional. Plaintiffs respond that *Alvarez* does not affect the Eighth Circuit's mandate, as strict scrutiny and intermediate scrutiny are mutually-exclusive bases for the *Alvarez* majority opinions. Plaintiffs also argue that this case is sufficiently distinguishable from *Alvarez,* meaning the Eighth Circuit's holding in this case is not "clearly wrong" and thus overruled. Pls.' Mem. Opp'n [Docket No. 122] 17 (citing *Morris v. Am. Nat'l Can Corp.,* 988 F.2d 50, 52 (8th Cir. 1993)).[3]

Under the *Marks* rule, Justice Breyer's concurrence is the controlling opinion of *Alvarez.* In applying *Marks,* appellate courts have attempted to discern which holding would elicit the support of the majority of justices. *See, e.g., United States v. Johnson,* 467 F.3d 56, 63-64 (1st Cir. 2006). For example, the concurring justices in *Alvarez* would, in the future, invalidate as unconstitutional fewer false speech statutes than the plurality, since the concurrence supports the application of a less stringent level of

[3] Plaintiffs also argue that neither level of scrutiny should apply in this case because restrictions on libel against the government, or its laws, are categorically unconstitutional. This argument contradicts the Eighth Circuit's decision in this case, as the appellate court explicitly held that strict scrutiny should apply to Minn. Stat. § 211B.06. Also, Plaintiffs too readily conflate libel against the government with false speech meant to mislead voters as to the effect of a ballot initiative. Section 211B.06 restricts only certain types of false speech made with respect to the "effect of a ballot question"; as discussed in Section III.D.2.c.i., below, it does not restrict false statements about the State.

scrutiny. However, the *Alvarez* plurality would always agree with the concurring justices when the concurrence found a statute unconstitutional, as a statute that does not satisfy intermediate scrutiny could never satisfy strict scrutiny. *See Alvarez,* 132 S. Ct. at 2552 (Breyer, J., concurring) (expressly placing intermediate scrutiny on a continuum between strict scrutiny and rational basis review). As a result, the *Alvarez* concurrence is a "logical subset" of the plurality opinion and thus the narrower holding, as it would find fewer statutes unconstitutional while always enjoying the support of the majority. *See Coe v. Melahn,* 958 F.2d 223, 225 (8th Cir. 1992) (holding Justice O'Connor's concurrence in *Hodgson v. Minnesota,* 497 U.S. 417 (1990), was the narrowest ground for the majority "because her approach would hold the fewest statutes unconstitutional"); *see also King v. Palmer,* 950 F.2d 771, 781 (D.C. Cir. 1991) (holding *Marks* rule only applies when one opinion is the "logical subset," or "common denominator," of the other).

Plaintiffs' argument that the facts of *Alvarez* are distinguishable from the facts in this case – and thus justify ignoring the effect of *Alvarez* – is not persuasive. The Eighth Circuit relied on the Ninth Circuit Court of Appeals' underlying decision in *Alvarez* as part of its analysis in this case, implicitly holding that the facts and ruling of that decision are relevant to the facts and legal issues in this case. *281 Care,* 638 F.3d at 634-36 (citing *United States v. Alvarez,* 617 F.3d 1198 (9th Cir. 2010)). On review, both the

plurality and the concurrence in the Supreme Court's *Alvarez* decision address the restriction of false speech in broad terms, and the concurrence specifically contemplates the restriction of false political speech. *Alvarez,* 132 S. Ct. at 2556. Finally, the facts in this case are not so different from the facts in *Alvarez* that they warrant the application of entirely separate constitutional principles. Both cases involve the restriction of non-defamatory false speech and thus trigger many of the same considerations discussed in the decisions cited above.

Having found intermediate scrutiny applies in this case, significant ambiguity remains in Justice Breyer's *Alvarez* concurrence, and no appellate court has yet offered any guidance regarding its application. *Cf. State v. Crawley,* 819 N.W.2d 94, 119 (Minn. 2012) (Stras, J., dissenting) (noting that Justice Breyer's concurrence is "arguably the binding rationale of *Alvarez*" under *Marks*). In addition, the previous articulations of the intermediate scrutiny test include different elements from those discussed in the *Alvarez* concurrence, and have traditionally not applied to content-based restrictions of "pure" speech.[4]

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[4] *See, e.g., SOB, Inc. v. Cnty. of Benton,* 317 F.3d 856, 860 (8th Cir. 2003) (citing *United States v. O'Brien,* 391 U.S. 367, 377 (1968)) (applying four-factor test sometimes applied to zoning ordinances and limits on commercial speech). There is also the similar test for time, place, and manner restrictions, which upholds a content-neutral statute if it is "narrowly tailored to

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It is not necessary for this Court to decide which version of intermediate scrutiny most properly applies here, because Minn. Stat. § 211B.06 survives the strict scrutiny analysis. Because the § 211B.06 satisfies the highest level of constitutional scrutiny, the statute would also be found constitutional under any applicable intermediate scrutiny test.

2. Strict Scrutiny

Under the strict scrutiny test, Defendants have the burden of showing that Minn. Stat. § 211B.06 is narrowly tailored to serve a compelling state interest. *Eu v. S.F. Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 222 (1989).

As the Eighth Circuit has observed, the definition of "compelling interest" has proven elusive. *See Republican Party of Minn. v. White,* 416 F.3d 738, 750 (8th Cir. 2005). In evaluating whether a compelling interest exists, the Supreme Court has in some cases looked to policy considerations, while in other instances the Court has pursued the "realization of constitutional guarantees." *Id.* (citing Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication,* 68 B.U. L. Rev. 917, 932-37 (1988)).

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serve a significant government interest," but leaves open "ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983) (citations omitted).

Once a compelling interest is identified, the application of strict scrutiny may still require a certain amount of balancing: the compelling interest at issue must be "important enough to justify the restriction it has placed on the speech in question in pursuit of that interest." *Id.*

Even if a compelling interest exists, the statute at issue must still be narrowly tailored to pursue that interest. Whether a statute is narrowly tailored depends on how closely connected the restriction is to protecting the State's interest. As the Eighth Circuit has held, a statute is narrowly tailored if it:

> actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

White, 416 F.3d at 751 (collecting cases). Each element of strict scrutiny analysis is addressed below.

a. Compelling Interest

The County Attorneys argue that Minn. Stat. § 211B.06 serves the compelling interest of preserving "fair and honest" elections and preventing a "fraud upon the electorate" through the deliberate spreading of material, false information. Plaintiffs respond that the State does not have a legitimate interest in

preventing voters from hearing false statements about ballot initiatives, and that its attempt to do so is paternalistic. In addition, Plaintiffs argue Defendants have presented no evidence that § 211B.06 is necessary to prevent false statements; in other words, Plaintiffs argue that Defendants have presented no evidence that maliciously false statements about ballot initiatives are a problem in need of a solution.

More than once, the Supreme Court has observed that knowingly false political speech has the power to cause significant harm. "[F]alse statements, if credited, may have serious adverse consequences for the public at large" if made during election campaigns. *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 349 (1995). There are also "those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration." *Garrison v. State of La.,* 379 U.S. 64, 75 (1964). And in the *Alvarez* concurrence, Justice Breyer wrote that in political contexts, violations of the Stolen Valor Act "are more likely to cause harm," thereby also acknowledging the potential for harm caused by lies in the political arena.[5] *See Alvarez,* 132 S. Ct. at 2555.

The Supreme Court has also observed the tension between a functioning democracy and maliciously

[5] Justice Breyer wrote that the risk of "censorious selectivity" by prosecutors is also higher in the political realm. *See Alvarez,* 132 S. Ct. at 2555.

false speech: "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison,* 379 U.S. at 75 (addressing defamation statute). It thus follows that "the State has a legitimate interest in fostering an informed electorate," though pursuing this interest through restrictions of information should admittedly be viewed "with some skepticism." *Eu,* 489 U.S. at 228 (citations omitted).

Limiting the dissemination of knowingly or recklessly false statements about the effects of ballot initiatives is a compelling state interest. A ballot initiative is a key political function by which citizens directly shape public policy, and the process of persuading voters to vote for a particular result is often dependent on the efforts of private citizens. A ballot initiative may alter the way the state addresses a wide-ranging social or moral issue, but it may also affect a single neighborhood's public schools. In any scenario, it is a fundamental exercise of democratic participation. For this reason, courts, including the Eighth Circuit, have held that speech about ballot initiatives "is quintessential political speech . . . at the heart of the protections of the First Amendment." *281 Care,* 638 F.3d at 635 (citing *Mills v. Alabama,* 384 U.S. 214, 218 (1966)). But it is also for this reason that the State has a compelling interest in implementing minimal, narrowly tailored safeguards against campaigns of misinformation. Deliberate or reckless efforts to mislead the public and change the

outcome of a ballot measure not only have an adverse impact on the issue being decided, these efforts undermine the "premises of democratic government," including the necessity of free but fair debates.

b. Actually Necessary

As an initial matter, § 211B.06 is directly linked to the harm the government seeks to prevent, and is thus "necessary" to address the government's compelling interest. *See Alvarez,* 132 S. Ct. at 2549 (holding that for a restriction to be "actually necessary," there must exist "a direct causal link between the restriction imposed and the injury to be prevented"). The Supreme Court has previously stated in dicta that a statute restricting knowingly false political speech about candidates and ballot measures is a direct means to counter the "fraud" of voter manipulation. *See McIntyre,* 514 U.S. at 348-51. In *McIntyre,* the Court struck down as unconstitutional Ohio's prohibition against the anonymous distribution of campaign material. *See generally, id.* In doing so, the Court instructed Ohio to instead rely on its "detailed and specific prohibitions" against making maliciously false statements regarding candidates and ballot measures. *Id.* at 351. Without addressing their constitutionality, the Court impliedly referred to these restrictions against false statements as Ohio's "principal weapon" against voter deception. *See id.* The Court held that through such restrictions, "the State may, and does, punish fraud directly." *See id.* at 357.

McIntyre's reasoning is persuasive because Ohio's restriction against false statements regarding ballot initiatives closely resembles the relevant portions of Minn. Stat. § 211B.06. Consistent with Minn. Stat. § 211B.06, Ohio's statute specifically restricts a person from posting, publishing, circulating, or otherwise disseminating "a false statement, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue." Ohio Rev. Code Ann. 3517.22(B)(2) (2012).[6] The Court in *McIntyre* concluded that this statute directly addresses the malicious misleading of the electorate, particularly in comparison to other, broader prohibitions of speech.[7] The Court's holding is thus directly relevant in establishing the causal link

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[6] At the time the Court issued its decision in *McIntyre,* Ohio's restriction against false speech regarding ballot initiatives was located at Ohio Rev. Code Ann. § 3599.092. The Ohio legislature amended and relocated the statute in 1995, but did not alter the relevant provisions. *See* 1995 Ohio Laws File 77 (S.B.9).

[7] Plaintiffs argue that *McIntyre* established that false speech about ballot initiatives could not serve as a compelling state interest. *See McIntyre,* 514 U.S. at 351-52 ("[The statute] applies not only to elections of public officers, but also to ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage."). But the quoted language pertains to the overbreadth of a prohibition against anonymous handbills, not against "arguably false or misleading" documents. *See id.* at 351. In addition, *McIntyre* held that the prevention of "false statements by unscrupulous prevaricators" was an "assuredly legitimate" interest. *Id.*

between Minn. Stat. § 211B.06 and the restriction against voter deception.

In addition, Plaintiffs' argument that the County Attorneys have failed to offer proof that false statements have altered the outcome of ballot initiatives is not persuasive. In some cases, including *Alvarez,* the Supreme Court has indeed required empirical evidence demonstrating the causal link between the statute at issue and the purported state interest. *See, e.g., Alvarez,* 132 S. Ct. at 2549 (citing *Brown v. Entm't Merchs. Ass'n,* 131 S. Ct. 2729, 2738 (2011) (regarding proof of harm caused by violent video games)). But the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 391 (2000).

In yet other First Amendment cases, the Supreme Court has found "various unprovable assumptions sufficient to support the constitutionality of state and federal laws." *Nat'l Ass'n of Mfrs. v. Taylor,* 582 F.3d 1, 15 (D.C. Cir. 2009) (citing *Nat'l Cable & Telecomms. Ass'n v. F.C.C.,* 555 F.3d 996, 1000 (D.C. Cir. 2009)). In *Taylor,* the appellate court reviewed the constitutionality of a lobbyist disclosure statute and held that the issues were not "susceptible to empirical evidence." *Id.* at 16. Instead, the court deferred to the "value judgment based on the common sense of the people's representatives, and repeatedly endorsed by the Supreme Court as sufficient to justify

disclosure statutes." *Id.* (citations omitted). Similarly, in *Wersal v. Sexton,* the Eighth Circuit "easily" concluded that the preservation of the appearance of judicial impartiality was a compelling interest without relying on empirical evidence. *See Wersal v. Sexton,* 674 F.3d 1010, 1020-24 (8th Cir. 2012). Instead of requiring empirical evidence, the court relied on relevant legal holdings and the Minnesota Supreme Court's Code of Judicial Conduct. *See id.*

Here, the County Attorneys have sufficiently demonstrated the necessity of and causal link to their stated compelling interest. The effects of knowingly false statements, or statements made with a reckless disregard for the truth, on the outcome of a ballot initiative do not lend themselves easily to empirical evidence. Among other reasons making the collection of evidence difficult, the State does not and should not engage in the business of polling its citizens regarding what they voted for and why, and then publicly filing the results. *See Campaign for Family Farms v. Glickman,* 200 F.3d 1180, 1187-88 (8th Cir. 2000) (discussing the importance of the secret ballot to American system of voting) (citations omitted). Even so, both Plaintiffs and the County Attorneys submitted declarations, affidavits, websites, news articles, and OAH decisions into the record demonstrating that the use of false statements remains an issue of public concern.[8]

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[8] *See, e.g.,* William F. Mohrman Decl., Sept. 27, 2012 [Docket No. 114] Exs. 1, 2; Michael O. Freeman Aff. [Docket No.

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As a national issue, the harm of voter deception by maliciously false speech is a current concern, and the restriction of such speech has longstanding precedents. In addition to the Supreme Court's holdings in *McIntyre* and *Garrison,* various state legislatures have adopted statutes restricting false speech about campaign issues and ballot initiatives. *See, e.g.,* Colo. Rev. Stat. Ann. § 1-13-109 (2012); Mass. Gen. Laws ch. 56, § 42 (2012); Ohio Rev. Code Ann. § 3517.22; Utah Code Ann. § 20A-11-1103 (2012); *and* Wis. Stat. Ann. § 12.05 (2012). Other states have restricted false political statements about candidates. *See Rickert v. State, Pub. Disclosure Comm'n,* 168 P.3d 826, 867-68 (Wash. 2007) (Madsen, J., dissenting) (collecting statutes). Courts in a few states, including Washington, have ruled similar but less narrowly defined statutes unconstitutional. *See, e.g., State v. 119 Vote No! Committee,* 957 P.2d 691 (Wash. 1998) (holding unconstitutional a statute that broadly prohibited all false political statements of material facts made in political advertisements); *see also Rickert,* 168 P.3d at 855-56. Nevertheless, the restriction of knowingly false political speech has a long pedigree.

Finally, as previously noted, the Minnesota state legislature first adopted language prohibiting false speech regarding ballot initiatives in 1988. The original statute, however, employed a standard of intent lower than actual malice; it prohibited knowingly false

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101]; Joseph Mansky Aff. [Docket No. 102]; Beth A. Stack Aff., Sept. 27, 2012 [Docket No. 104] Exs. 3-7.

speech but also speech made by a person who had "reason to believe" the speech was false. Minn. Stat. § 211B.06 (1988); *see also* 1988 Minn. Laws Ch. 578, art. 3, § 6. In 1996, the Minnesota Court of Appeals invalidated the statute as unconstitutional, holding the "reason to believe" standard was overbroad. *State v. Jude,* 554 N.W.2d 750, 753-54 (Minn. Ct. App. 1996). The court held that the actual malice standard, discussed in *New York Times Co. v. Sullivan,* stated the proper standard. *See id.* (citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964)). In the legislative session immediately following *Jude,* the state legislature amended Minn. Stat. § 211B.06 by replacing the "reason to believe" standard with "reckless disregard" in accordance with the court of appeals' holding. *See* 1998 Minn. Laws Ch. 376, § 3. Given both the longstanding legal principles at issue and the state legislature's judgment, Minn. Stat. § 211B.06 satisfies the "actually necessary" requirement of constitutional analysis.

c. Narrowly Tailored

Because Minn. Stat. § 211B.06 contains significantly limiting language, and because it applies the actual malice standard, the Court holds the statute is narrowly tailored.

i. Overinclusive/overbroad

A statute is unconstitutionally overinclusive, or overbroad, if it "sweep[s] too broadly" in restricting

speech. *Wersal,* 674 F.3d at 1024-26. In addition to unnecessarily restricting speech by its terms, a statute may be overbroad if it "chills" a speaker from engaging in otherwise protected speech. *See Turchick v. United States,* 561 F.2d 719, 721 (8th Cir. 1977). In this case, Plaintiffs argue Minn. Stat. § 211B.06 chills protected speech, including statements that could reasonably be interpreted as false by a reader. Plaintiffs also argue the statute is overbroad because it impermissibly prohibits the expression of opinion.

Minn. Stat. § 211B.06 is narrowly tailored. The statute includes several narrowing provisions, including language limiting it to the dissemination of "paid political advertising or campaign material." This limitation specifically allows "breathing space" for oral statements made in debates, on television, or on the street corner soapbox that might be made spontaneously or in the heat of the moment. A person passionately arguing for or against a ballot initiative thus need never curb their unscripted oral statements to avoid violating § 211B.06. Instead, the restrictions only apply against those forms of expression that require deliberation and which also tend to have a greater permanence than unscripted oral statements. While the provisions at issue do not directly implicate defamation concerns, the difference between libel and slander is instructive in discerning this narrow tailoring. *See* Restatement (Second) of Torts § 568 (1977) (distinguishing between libel and slander in part based on the "degree of permanence and the deliberation and premeditation of the defamer"). By

targeting only more premeditated and "persistent" forms of political speech, § 211B.06 both tailors and successfully balances the restriction of knowingly or recklessly false speech against the protections of the First Amendment. *See White,* 416 F.3d at 750.

The statute also preserves a speaker's ability to criticize the government, as it only applies to certain speech made "with respect to the effect of a ballot question." Minn. Stat. § 211B.06, subd. 1. Plaintiffs correctly argue that the Supreme Court has emphatically held against allowing the government, as an entity, to bring defamation claims. *See 281 Care,* 638 F.3d at 634 (citing *New York Times,* 376 U.S. at 291)). But the statute at issue does nothing to restrict a person from disparaging the government using false statements. For example, the statute would not apply to a flyer including the statement, "The School District has wasted $10 billion dollars of taxpayer money!" Instead, the statute targets only those statements specifically intended to mislead voters regarding the effect of a ballot initiative; whether a statement disparages the government is wholly immaterial.

In addition, although the actual malice standard in § 211B.06 does not categorically exempt knowingly false political statements, the standard does narrow the statute's application. Both the Eighth Circuit and the Supreme Court in *Alvarez* declined to hold that *Garrison* and other cases addressing defamation establish that all knowingly false statements fell outside of constitutional protection. *See 281 Care,* 638

F.3d at 634 (citing *Garrison,* 379 U.S. at 75); *see also Alvarez,* 132 S. Ct. at 2546. The Eighth Circuit also held that neither *Brown v. Hartlage,* 456 U.S. 45 (1982), nor *McIntyre* directly applied the actual malice standard to "false speech in the context of political campaigns on a ballot issue." *See 281 Care,* 638 F.3d at 636.

This Court holds that while knowingly false political statements do not categorically fall outside of the First Amendment, the actual malice standard nevertheless narrowly tailors Minn. Stat. § 211B.06 sufficiently to satisfy strict scrutiny. In *Garrison,* the Court reviewed a charge of criminal defamation against a district attorney for certain statements regarding the judges in his district. *Garrison,* 379 U.S. at 64-67. Because the case concerned public officials, the Court did not base its analysis on the private or reputational interests typically at issue in a defamation suit. *See 281 Care,* 638 F.3d at 634. Instead, *Garrison* focused on the protection of vibrant political discourse, noting that the "erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the 'breathing space' they need to survive." *Garrison,* 379 U.S. at 75 (quotation omitted). The Court held that application of the *New York Times* actual malice standard sufficiently allowed such "breathing space" because honestly held opinions, no matter how exaggerated or unpleasant, would remain protected by the Constitution, while calculated attempts to mislead voters would not. *See id.* at 74-75.

Although this is not a defamation case, *Garrison*'s reasoning regarding the protection of political discourse persuasively explains why Minn. Stat. § 211B.06 allows sufficient "breathing space" for free speech. Plaintiffs argue that § 211B.06 is overbroad because it chills them, and other speakers, from fully engaging in political discourse about ballot initiatives. In support of this contention, Plaintiffs offer declarations in which they testify about their intent to publish written statements "opposing bond levies which contain strong political rhetoric, are exaggerated and may not be grounded in verifiable facts." *See, e.g.,* Brude Decl., Oct. 18, 2012, at ¶ 20. To a large extent, such statements will not meet the actual malice standard. Minn. Stat. § 211B.06 restricts only those statements that Plaintiffs knew were false, or those statements for which Plaintiffs "in fact entertained serious doubts as to their truth" before publishing. *Cervantes v. Time, Inc.,* 464 F.2d 986, 990 (8th Cir. 1972) (citing *St. Amant v. Thompson,* 390 U.S. 727 (1968)) (discussing standard for reckless disregard for truth). The line between strong rhetoric and deliberately misleading statements, as articulated in *New York Times* and *Garrison,* is clear, and it adequately protects First Amendment interests in free and open debate.

Plaintiffs argue that the mens rea requirement of § 211B.06 nevertheless fails to narrow the statute. Because mental intent is necessarily based on circumstantial evidence, Plaintiffs argue the publisher of an innocently-false statement will always be at risk

of prosecution. But Minn. Stat. § 211B.06 has several procedural safeguards in place that drastically limit the potential for unfounded or abusive claims. At the outset, a person may only file a civil complaint under § 211B.32 if they do so under oath. *Id.* § 211B.32, subd. 3. Within three days of filing, the OAH then conducts a prima facie review of the complaint. *Id.* § 211B.33. If the complaint fails to state a violation of § 211B.06, the OAH will dismiss the complaint. *Id.* If the complaint survives, the OAH holds a probable cause hearing. *Id.* § 211B.34. If the administrative law judge concludes that the complaint is frivolous, or that there is no probable cause to believe a violation occurred, the OAH must dismiss the complaint. *Id.*

Only if a complaint survives to this stage will the OAH then conduct an evidentiary hearing before a panel of three administrative law judges, which must occur no later than 90 days after the original filing. *Id.* § 211B.35. The complainant has the burden of proving the defendant's mental state, and all other elements of the statute, by clear and convincing evidence. *Id.* § 211B.32, subd. 4. Even if the complainant succeeds, the defendant may appeal to the Minnesota Court of Appeals. *Id.* § 211B.36, subd. 5 (referring to Minn. Stat. § 14.63, et seq.). Further, the defendant may seek attorney fees and costs if the OAH deems the complaint frivolous. *Id.* § 211B.36, subd. 3. Only upon the completion of this process may a county attorney consider a criminal charge. *Id.* § 211B.32, subd. 1. This relatively demanding and thorough process of review, combined with the complainant's burden of proof, deters unfounded or abusive

complaints. Indeed, the relative scarcity of successful ballot-related complaints brought to the Court's attention by the parties is testament to this fact.

Next, Plaintiffs' argument that Minn. Stat. § 211B.06 impermissibly restricts opinions also fails because the argument relies on a stilted dichotomy. As the Supreme Court and the Eighth Circuit have recognized, the difference between a statement of fact and an opinion is artificial, as opinions may include implicit statements of fact. *See Toney v. WCCO Television, Midwest Cable & Satellite, Inc.,* 85 F.3d 383, 394 (8th Cir. 1996) (citing *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19-21 (1990)). The Eighth Circuit has thus held that "the First Amendment absolutely protects opinion that lacks a 'provably false statement of fact.'" *Aviation Charter, Inc. v. Aviation Research Group/US,* 416 F.3d 864, 868 (8th Cir. 2005) (quoting *McClure v. Am. Family Mut. Ins. Co.,* 223 F.3d 845, 853 (8th Cir. 2000)). Although it is in a different legal context, Minn. Stat. § 211B.06 specifically avoids application to stated opinions. The statute applies only to those statements that are provably false; the vast majority of opinions fall outside of this category.

Even when a person publishes a statement about the effect of a ballot measure that is verifiably false, a complainant under § 211B.06 must still prove that the speaker did so with knowledge that the statement was actually false or with reckless disregard for whether it was false. *See St. Amant,* 390 U.S. at 731 ("high degree of awareness of probable falsity" a

requirement for reckless disregard of the truth standard). These two requirements, of: (1) a provably false statement, (2) made with actual malice, combine to exclude opinions from restriction under § 211B.06. The statute only applies to maliciously false statements deliberately disseminated for the purpose of changing the outcome of a ballot measure. A person entertaining an opinion in public debate would not come under this scope.

ii. Underinclusive

In addition to being overinclusive, a statute may also fail strict scrutiny if it is underinclusive. The Supreme Court has held that a restriction is impermissibly underinclusive if it represents an attempt by the government to favor one side of a public debate over another. Even if a statute does not discriminate among speakers, significant underinclusiveness may raise "serious doubts that the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown,* 131 S. Ct. at 2740. However, a "failure to regulate all speech" does not necessarily render a statute "fatally underinclusive." *See Burson,* 504 U.S. at 207. This is because legislatures " . . . adopt laws to address the problems that confront them." *Id.; see also White,* 416 F.3d at 762-63. Here, Plaintiffs argue Minn. Stat. § 211B.06 is underinclusive because it does not restrict: (1) television, radio, or internet speech; and (2) news media editorials.

Contrary to Plaintiffs' first argument, the plain language of § 211B.06 restricts the use of knowingly false political statements in paid political advertisements on television and radio. The statute restricts the "preparation, dissemination, or *broadcast*" of paid political advertising and campaign material. *Id.* (emphasis added). The word "broadcast," by its common definition, pertains to television and radio media,[9] and Plaintiffs offer no contrary argument as to how "broadcast" refers only to the written word. As with written publications, paid political advertisements broadcast on television or radio media entail a level of pre-meditation and persistence of message greater than unscripted spoken statements. Their inclusion in § 211B.06 comports with the overbreadth analysis discussed in Section III.D.2.c.i., above.

Similarly, the statute does not necessarily exclude mass emails or political websites from its application. The FCPA defines "campaign material" as "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media." *Id.* § 211B.01, subd. 2. Nothing in this definition, or in

[9] The dictionary defines "broadcast" as "[t]o disseminate (a message, news, a musical or dramatic performance, or any audible or visible matter) from a radio or television transmitting station to the receiving sets of listeners and viewers; said also of a speaker or performer." *Oxford English Dictionary* (Online ed. 2012).

the undefined term "paid political advertisement," necessarily excludes a website, an internet advertisement, or a "mass email" from restriction under § 211B.06. As with paper pamphlets, newsletters, and letters, the OAH must determine on a case-by-case basis whether a particular communication is a paid political advertisement or campaign material disseminated with the intent of influencing voters.

The County Attorneys argue, and the Court agrees, that the news media exemption is a legislative judgment that should be accorded deference.[10] In an effort to narrowly tailor restrictions of speech, legislatures may legitimately exclude certain restrictions if they have a neutral justification for doing so, and do not attempt to favor one viewpoint over another. *See, e.g., Fraternal Order of Police, N.D. State Lodge v. Stenehjem,* 431 F.3d 591, 601 (8th Cir. 2005); *see also Nat'l Fed'n of the Blind v. F.T.C.,* 420 F.3d 331, 345-46 (4th Cir. 2005). The legislature apparently decided in its efforts to restrict knowingly false speech about ballot initiatives that the news media did not present the same risk of harm as other speakers. *See Burson,* 504 U.S. at 207. By exempting the news media, the state legislature attempted to draw a narrower restriction that balanced First Amendment protection against the best means to achieve its stated interest. In doing so, the State did

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[10] Minn. Stat. § 211B.01, which defines "campaign material," includes the referred to news media exemption.

not favor a particular viewpoint with regard to ballot measures. The statute is not fatally underinclusive.

iii. Least restrictive means

If a statute limiting otherwise protected speech is achievable by less restrictive means, the restriction may not survive strict scrutiny. *See, e.g., Assoc. of Cmty. Orgs. for Reform Now v. City of Frontenac,* 714 F.2d 813, 818-19 (8th Cir. 1983). The Supreme Court has held that the least restrictive means test does not require the law at issue to be less restrictive than any imaginable alternative. Instead, a statute is "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Ashcroft v. Am. Civil Liberties Union,* 542 U.S. 656, 665-66 (2004) (citing *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 874 (1997)). Plaintiffs argue, in the context of their compelling interest analysis, that counterspeech sufficiently remedies knowingly false statements about ballot measures. Plaintiffs' [sic] argue counterspeech is a less restrictive yet equally effective means to prevent voter deception about ballot initiatives than Minn. Stat. § 211B.06. The Court finds otherwise.

While counterspeech may partially address the State's compelling interest, it is not as effective as a limitation against maliciously false political speech about ballot measures. Ballot initiatives occur in a variety of contexts in Minnesota, ranging from

statewide issues to setting policy for a single, small school district. For the broader, more fiercely contested ballot measures, counterspeech may serve as an equally-efficient remedy to the restrictions of § 211B.06. Citizens and interest groups are more likely to have the interest and ability to correct calculated lies, perhaps even those made on the eve of voting.

However, for ballot measures regarding less controversial topics, or regarding local issues, counterspeech may not always suffice or even exist at all. As Plaintiffs argue, large power or wealth disparities sometimes exist between the proponents and opponents of a given ballot measure, particularly regarding local issues. Plaintiffs cite the potential for such disparity as one reason a person or entity might file abusive claims under Minn. Stat. § 211B.06. But § 211B.06, by employing the force and impartiality of law, actually serves to check the unfair use of disparate advantage during a campaign. In some instances, an interest group or citizens' group may go largely unopposed and thus have wide berth to mislead the voting public, perhaps in an effort to alter a ballot initiative in a way that materially benefits them. In other instances, a group may so greatly outmatch a political opponent that the message, or correction, offered in response goes largely unheard. In such cases, the use of deliberate, pernicious falsehoods may be countered, or at least challenged, by a single person filing a claim under § 211B.06.

3. Vagueness

Plaintiffs briefly argue that Minn. Stat. § 211B.06 is unconstitutionally vague. These arguments are not persuasive. First, Plaintiffs argue that the statute's prohibition of "false information" offers no guidance for future conduct. Setting aside the fact that the statute only uses the term "false information" with regard to an *exception* to the restriction, the statute provides sufficient guidance. Section § 211B.06 specifically prohibits the dissemination of false "paid political advertising" and "campaign material," and the FCPA specifically defines the latter. And contrary to Plaintiffs' assertion that it provides "no ascertainable standard for conduct," the statute expressly employs the actual malice standard discussed in *New York Times*.

Second, Plaintiffs argue the penalties attached to § 211B.06 are unclear. However, § 211B.32 states that before a county attorney may bring a criminal charge, a civil complaint must be filed and finally disposed of. Section 211B.35, subd. 2(d), allows the OAH to impose a maximum civil penalty of $5,000. When the civil proceedings reach a final disposition, the relevant county attorney has discretion to bring a gross misdemeanor charge under § 211B.06, to which general state criminal laws apply. Nothing about these penalties is unclear.

E. Attorney General's Eleventh Amendment Immunity Argument

The Attorney General also revisits an issue previously decided by the Eighth Circuit. On appeal of Judge Rosenbaum's initial decision, the Attorney General argued that sovereign immunity precluded Plaintiffs' claims against her. The Eighth Circuit disagreed, holding that the *Ex Parte Young* doctrine applied to exempt the Attorney General from immunity in this case. *See 281 Care,* 638 F.3d at 631-33 (citing *Ex Parte Young,* 209 U.S. 123 (1908)). Although the Eighth Circuit's ruling appears to have the same force of reason at the summary judgment stage as at the motion to dismiss stage, it is unnecessary to reach the issue as the claims are dismissed.

IV. CONCLUSION

Plaintiffs correctly note that our country's forefathers used rancourous, sometimes false statements to influence voters or even gain material benefits for themselves. But what's past is not always prologue. Over a century ago, the Minnesota legislature implemented minimal, narrow restrictions against knowingly false speech about political candidates in an effort to protect the debates between honestly held beliefs that are at the core of the First Amendment. For nearly a quarter of a century, these restrictions have also applied to statements regarding ballot initiatives. The ballot provisions in Minn. Stat. § 211B.06 reflect a legislative judgment on behalf of Minnesotan citizens to guard against the malicious

manipulation of the political process. The Court finds that the provisions at issue are narrowly tailored to serve this compelling interest.

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. Plaintiffs' Motion for Summary Judgment [Docket No. 111] is **DENIED**.

2. Defendants Ross Arneson's and Michael Freeman's Motion for Summary Judgment [Docket No. 98] is **GRANTED**.

3. Defendant Lori Swanson's Motion for Summary Judgment [Docket No. 106] is **DENIED**.

4. All claims in the First Amended Complaint [Docket No. 23] are **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: January 25, 2013.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-1229

281 Care Committee, et al.

Appellants

v.

Ross Arneson, in his official capacity as County Attorney for Blue Earth County, Minnesota, or his successor, et al.

Appellees

Appeal from U.S. District Court for the District of Minnesota – Minneapolis
(0:08-cv-05215-ADM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 02, 2014

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans