No. 14-779

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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

This Court should grant the petition for certiorari and provide much needed guidance to state and federal courts on the standard of judicial review for regulations targeting false speech, including false political speech. Respondents have misconstrued the constitutional question presented by the petition. The question is not whether the First Amendment prohibits states from regulating *political speech* as argued by Respondents. Rather, the question is: Does the First Amendment prohibit states from regulating *false* political speech designed to mislead voters?

Stated bluntly, the court of appeals held that there is a constitutional right to lie to voters, by concluding that counterspeech is the only constitutional solution to false and fraudulent political speech. The court of appeals struck down Section 211B.06 of Minnesota Statutes, which prohibits intentional lies designed to trick voters about how they should vote. In doing so, the court of appeals failed to follow this Court's First Amendment jurisprudence and erroneously applied strict scrutiny to a state regulation of fraudulent speech. Moreover, the court of appeals effectively held that states are powerless to protect the democratic process from individuals willing to mislead voters with deliberately false campaign materials. The court of appeals' decision undermines the integrity of Minnesota's electoral process and the public's confidence in its elected branches of government, while calling into question seventeen similar laws in other states. *See John Doe*

No. 1 v. Reed, 561 U.S. 186, 197 (2010) (Fraud in the electoral process "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)). This case presents an important constitutional question for this Court's review. Certiorari should be granted.

I. The Court of Appeals Failed to Analyze the Challenged Statute as a Regulation of Fraudulent Speech.

Section 211B.06 is admittedly a content-based regulation of political speech, but it falls squarely within a long-recognized First Amendment exception: fraud. Section 211B.06 prohibits individuals, acting with actual malice, from making false statements of fact in campaign materials designed to mislead voters about how they should vote. Because fraudulent speech is categorically excluded from constitutional protection, the court of appeals erred by subjecting the challenged statute to strict scrutiny. *See* Pet. 16-21. Respondents utterly fail to address this critical reason for granting certiorari review.

As this Court recently reiterated, fraud is among the "few historic and traditional categories of expression" where the First Amendment allows content-based regulation. *United States v. Alvarez*, ___ U.S. ___, 132 S. Ct. 2537, 2544 (2012) (plurality opinion) (internal quotations and alteration omitted). "Where false claims are made to effect a fraud *or* secure

moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment." *Id.* at 2547 (plurality opinion) (emphasis added). Unlike the Stolen Valor Act at issue in *Alvarez*, Section 211B.06 of Minnesota Statutes does not target "falsity and nothing more." *Id.* at 2545 (plurality opinion). It only targets knowingly false factual statements that are designed to induce a vote – i.e., lies designed to convince a voter to vote for or against a ballot initiative or for or against a candidate. *Compare id.* at 2542 (plurality opinion) (observing that Alvarez had not lied about winning the Congressional Medal of Honor "to secure employment or financial benefits or admission to privileges reserved" to such medal recipients). Section 211B.06 thus regulates fraudulent speech, "the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (footnote omitted).

The court of appeals failed to address this argument in its decision, and then compounded its error by subjecting this viewpoint-neutral fraud regulation to strict scrutiny. This highest level of judicial scrutiny requires the government to show that the regulation is narrowly drawn to further a "compelling interest" and that the restriction amounts to the "least restrictive means" available to further that interest. *See McCutcheon v. Fed. Election Comm'n*, ___ U.S. ___, 134 S. Ct. 1434, 1444 (2014).

It "is a demanding standard," *Brown v. Entm't Merchants Ass'n*, ___ U.S. ___, 131 S. Ct. 2729, 2738 (2011), under which any state regulation of knowingly false political speech faces "near-automatic condemnation." *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring). Such scrutiny is wholly inappropriate for a regulation of fraudulent speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 (1995) (The 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.").

Review of the court of appeals' decision is necessary to affirm the government's ability to punish fraudulent speech, even in the context of a political campaign.

II. The Court of Appeals Failed to Follow the Controlling Rationale of *Alvarez*.

Even if Section 211B.06 is subject to First Amendment scrutiny, the court of appeals failed to follow this Court's binding precedent. This Court should grant review to clarify the controlling rationale of *Alvarez* and the level of First Amendment protection for false factual statements.

Prior to its decision in *Alvarez*, this Court had "frequently said or implied that false factual statements enjoy little First Amendment protection." *Id.* at 2553 (Breyer, J., concurring) (citing *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (stating that false statements are "unprotected for their own sake");

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless[.]"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact.")); *see also Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, [sic] do not enjoy constitutional protection."). Instead, false speech received constitutional protection only as a means to an end – namely, to provide adequate "breathing space" for protected speech. *Gertz*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect *speech that matters*.") (emphasis added). As a result, this Court's prior jurisprudence suggested that false statements of fact were categorically excluded from constitutional protection – much like defamation or fraud – as a "category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 340 (quoting *Chaplinsky*, 315 U.S. at 572).

Alvarez thus fundamentally changed the landscape of First Amendment doctrine, by holding for the first time that false factual statements uttered with knowledge of their falsity enjoy some level of constitutional protection for their own sake. *See* 132 S. Ct. at 2557 (Alito, J., dissenting) ("[T]he 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."). No opinion in *Alvarez* commanded a majority of the Court: the four justices in the plurality applied strict scrutiny, while the two concurring justices applied intermediate scrutiny. Under the *Marks* rule, Justice Breyer's concurrence is the controlling opinion. *See* Pet. at 21-23 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)). The court of appeals improperly sidestepped *Alvarez*, concluding that this watershed First Amendment false speech case did not apply because the false speech in *Alvarez* was not false *political* speech. However, *Alvarez* is not so limited. This case presents an important opportunity for this Court to clarify both the controlling rationale of *Alvarez*, and its applicability to false political speech.

A. This Court Has Never Held That Regulations of Political Speech Must Be Subject to Strict Scrutiny.

The court of appeals erred by concluding that Section 211B.06 is automatically subject to strict scrutiny, simply because it targets false factual statements in the *political* arena. Respondents similarly attempt to sweep aside *Alvarez*, claiming that it is inapposite to political speech. But this Court has never held that knowingly false factual statements lie at the heart of the First Amendment, as Respondents suggest.

To the contrary, "[t]hat speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution." *Garrison*, 379 U.S. at 75; *see also Brown v. Hartlage*, 456 U.S. 45, 55 (1982) ("It is thus plain that *some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without difficulty.") (emphasis in original); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 474 (Spring 1996) ("As a result, no separate standard reigns for speech on political affairs – or even, to dilute the category a bit, speech on matters of public interest.").

In fact, this Court has repeatedly indicated that protecting the electoral process from distortion justifies reasonable restrictions on some types of political speech. *See* Pet. at 27-28 (citing cases); *see also John Doe No. 1*, 561 U.S. at 197 (rejecting First Amendment claim to anonymity in petition process for statewide referendum and stating "[t]he 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[.]"); *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."); *McIntyre*, 514 U.S. at 378-79 (Scalia, J., dissenting) ("The . . . question is whether protection of

the election process justifies limitations upon speech that cannot constitutionally be imposed generally. . . . Our cases plainly answer that question in the affirmative – indeed, they suggest that no justification for regulation is more compelling than protection of the electoral process."). As an example, this Court has applied intermediate scrutiny to some campaign finance regulations, which unquestionably impact political speech. *See*, *e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (plurality opinion); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (considering First Amendment challenge to Hawaii's prohibition on write-in voting and stating that "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights").

Justice Breyer's concurrence in *Alvarez* explicitly contemplated application of intermediate scrutiny to false political speech. *See* 132 S. Ct. at 2556 (Breyer, J., concurring) ("I recognize that in some contexts, particularly political contexts, such a narrowing [as required by intermediate scrutiny] will not always be easy to achieve."). Justice Breyer concluded that for any regulation of false factual statements, the speech-related harm must be considered in context with the "substantial countervailing objectives" at stake, as part of a "proportionality review." *Id.* at 2551, 2555 (Breyer, J., concurring). This Court has recognized such countervailing objectives when examining the constitutionality of speech regulations. *See*, *e.g.*,

Gertz, 418 U.S. at 325 ("This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees [of free press and free speech] can tolerate sanctions against calculated falsehood without significant impairment of their essential function."); *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (May 2002) ("[A] court should approach most campaign finance questions with the understanding that important First Amendment-related interests lie on both sides of the constitutional equation, and . . . a First Amendment presumption hostile to government regulation, such as 'strict scrutiny,' is consequently out of place.").

In support of the court of appeals' decision, Respondents point to two decisions from the Washington Supreme Court, which struck down a law substantially similar to Section 211B.06 based on a strict scrutiny analysis. *See State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998) (plurality opinion); *Rickert v. State, Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007) (plurality opinion). In light of this Court's subsequent guidance in *Alvarez*, these cases were wrongly decided. The same is true of the court of appeals' decision in this case; the court of appeals and the Washington Supreme Court failed to consider the substantial countervailing objectives at stake and

failed to analyze whether the statute struck "a reasonable balance between [its] electoral speech-restricting and speech-enhancing consequences[.]" Breyer, *Our Democratic Constitution*, *supra* at 253; *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring) (Under intermediate scrutiny, the Court must "determine whether the statute works speech-related harm that is out of proportion to its justifications."); *compare Gertz*, 418 U.S. at 341 (rejecting "absolute protection" for speech where such protection would require "a total sacrifice of the competing [societal] value served[.]").

B. The Proportionality of Intermediate Scrutiny Is Not the Same As the Narrow Tailoring of Strict Scrutiny.

In an effort to convince this Court that certiorari review would have no meaningful impact, Respondents also argue that even if the court of appeals committed error by applying strict scrutiny instead of intermediate scrutiny, the error was harmless because the "narrow tailoring" under these two standards is the same. Respondents' argument misses the mark.

"Narrow tailoring" under strict scrutiny requires that the regulation be the least restrictive or least intrusive means of serving the government's interest. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004). In contrast, to satisfy the tailoring required by intermediate scrutiny, a regulation must not "burden substantially more speech than is

necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *see also Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring) (Intermediate scrutiny or proportionality review requires "a 'fit' between means and ends that is 'in proportion to the interest served[.]' ") (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). In *Turner Broadcasting System, Inc. v. F.C.C.*, this Court clarified this distinction:

> To satisfy [intermediate scrutiny], a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward*, *supra*, 491 U.S., at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, *supra*, 491 U.S., at 799.

512 U.S. 622, 662 (1994); *see also McCullen v. Coakley*, ___ U.S. ___, 134 S. Ct. 2518, 2535 (2014) (explaining that the narrow tailoring required for intermediate scrutiny "must not burden substantially more speech than is necessary to further the government's legitimate interests," but "need not be the

least restrictive means or least intrusive means of serving the government's interest") (internal citation and quotations omitted).

The court of appeals' analysis of Section 211B.06 was premised entirely on an application of strict scrutiny – "near-automatic condemnation," *Alvarez*, 132 S. Ct. at 2552 (Breyer, J., concurring) – rather than the more balanced consideration of intermediate scrutiny required by *Alvarez*. Respondents offer no legitimate basis for this Court to deny review and their attempt to mischaracterize the requirements of intermediate scrutiny should be rejected.

CONCLUSION

The core purpose of the free speech clause of the First Amendment is democratic self-governance: nurturing a vibrant democratic system full of robust discussion and debate. This constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). But false factual statements uttered with actual malice do not make any valuable contribution to a meaningful political discussion, nor do they provide voters with the information they need to participate in our democratic system. Focused regulations, like Minnesota's – directed at individuals who are deceitful enough to create and distribute campaign materials with knowingly false factual

statements and designed to deceive voters regarding how to vote in an election – do not violate the First Amendment. Such regulations provide adequate breathing space for protected speech, safeguard our democratically elected branches of government, and directly support the First Amendment's core purpose by limiting the chances that elections will be won by deceit.

This Court's review is needed to reverse the court of appeals and to provide guidance to lower courts on the appropriate standard of review for regulations targeting knowingly false political speech. The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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