No. 11-________

In The
Supreme Court of the United States

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

Petitioners,

vs.

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

Section 211B.06, subd. 1 of Minnesota Statutes prohibits individuals from making false statements of fact designed to persuade voters about candidates or the effect of a ballot question when made knowing the statements are false or with reckless disregard for their truth or falsity.

The question presented is: whether the Free Speech Clause of the First Amendment protects knowingly false non-defamatory statements of fact and requires this statute to be struck down unless it can satisfy strict scrutiny review.

PARTIES TO THE PROCEEDINGS

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; Michael Junge, in his official capacity as County Attorney for McLeod County, Minnesota, or his successor; Tom N. Kelly, in his official capacity as County Attorney for Wright County, Minnesota, or his successor; and Lori Swanson, in her official capacity as the Minnesota Attorney General, or her successor.

PLAINTIFFS/APPELLANTS:

281 Care Committee; Ron Stoffel, W.I.S.E. Citizen Committee; Victor E. Niska; Citizens for Quality Education; and Joel Brude.

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OPINIONS BELOW

The opinion of the court of appeals (App. at 1-30) is reported at 638 F.3d 621. The order of the court of appeals denying rehearing and rehearing en banc is unreported (App. at 48). The opinion of the district court (App. at 31-47) granting defendants' motions to dismiss is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2011. A petition for rehearing was denied on July 27, 2011. 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. Section 211B.06, subd. 1 of Minnesota Statutes 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 (2010).

STATEMENT

Respondents are three 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 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, subd. 1, 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 even though the statute only proscribes false statements of fact made with knowledge of the statements' falsity or with reckless disregard to whether the statements are false, this statute violates the

First Amendment because it chills their protected speech.[1]

I. Minnesota Regulates False 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, subd. 1, 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

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[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 (2010).

Minnesota's first law criminalizing false campaign speech was enacted more than one hundred years ago. This statute was aimed at anonymous smear campaigns. This statute 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. 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).[2]

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). As currently codified, Section 211B.06 only proscribes false statements of fact if they are made with knowledge of their falsity or with reckless disregard of whether they are true or false. *See* Minn. Stat. § 211B.06, subd. 1 (2010).

The constitutionality of Minnesota's prohibition on false statements of fact in election materials has

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[2] The court of appeals mistakenly concluded that Minnesota began banning false statements of fact regarding ballot initiatives in 1988. App. at 3 ("[T]he FPCA'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.") However, the court of appeals' conclusion is in error. Minnesota has proscribed false statements of fact regarding ballot propositions for almost one hundred years. *See* Minn. Gen. Stat. 1913, § 573.

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]); *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 *New York Times v. Sullivan*, 376 U.S. 254 (1964)). Section 211B.06 was amended in 1998 after the *Jude* decision in order to satisfy *Sullivan*. 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 (2010).

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 *New York Times v. Sullivan,* 376 U.S. 254, 279-80 (1964). Thus, to violate this statute, an individual must make false statements of fact with respect to a candidate or a ballot question 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. District Court Proceedings.

Respondents filed suit in federal district court, asserting that Section 211B.06 violates the First Amendment because it chills them from vigorously participating in debates surrounding school-funding ballot initiatives in Minnesota. App. at 32. Petitioners and the Minnesota Attorney General filed motions to dismiss for lack of subject-matter jurisdiction and failure to state a claim. The district court granted the motions, holding that Respondents lacked standing and that their claim was not ripe. App. at 34-43. In addition, the district court held that, even if it had subject-matter jurisdiction, it would dismiss Respondents' suit for failure to state a claim because Section 211B.06, subd. 1, did not violate the First Amendment. App. at 43-46.

In dismissing Respondents' substantive claim, the district court, citing *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964), stated that "false statements made with actual malice are without First Amendment protection, and may be prohibited or regulated." App. at 45. The district court rejected Respondents' argument that the actual malice standard is limited to cases involving defamation and may not be applied to "ballot questions where no one's reputation is at stake." App. at 44. The Court stated, "[i]mportantly, the United States Supreme Court has never limited its actual malice requirement to cases of defamation." App. at 45 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967)).

III. Court of Appeals for the Eighth Circuit Proceedings.

Respondents appealed the dismissal of their claims to the Eighth Circuit Court of Appeals. The court of appeals reversed and remanded the case. The court first held that Respondents did have standing pursuant to Article III of the Constitution. The court of appeals concluded that because Respondents asserted they wished to engage in conduct that could be reasonably interpreted as making false statements with reckless disregard for the truth, they had a reasonable fear of consequences of Section 211B.06. App. at 7-17. Accordingly, the court of appeals held that Respondents presented a credible threat of prosecution sufficient to support a claim of objectively reasonable chill in the First Amendment context. App. at 7-17.

After concluding that Respondents had standing, the court of appeals held that the district court erred when it concluded that the false speech regulated by Section 211B.06 falls outside the protections of the First Amendment. App. at 21-29. In reaching this legal conclusion, the court first recognized that there are certain well-defined categories of speech that "the Supreme Court has found fall outside of the First Amendment, [which] include: fighting words, obscenity, child pornography, and *defamation*." App. at 22 (emphasis added). Speech falling into one of these categories is not subject to strict scrutiny as long as the restriction is view-point neutral. App. at 23.

In reversing the district court, the court of appeals held that Section 211B.06 proscribed speech that was fully protected by the First Amendment because it proscribed knowingly false *non-defamatory* speech in addition to defamatory speech. The court of appeals concluded that, despite numerous Supreme Court cases describing one of the categories of speech not fully protected by the First Amendment as simply "knowingly false speech," this category is actually limited only to knowingly false statements of fact that are "fraudulent or defamatory speech." App. at 23. The court of appeals then held that knowingly false non-defamatory statements of fact aimed at misleading voters are fully protected by the First Amendment. App. at 23. A statute seeking to regulate this type of knowingly false statements of fact violates the First Amendment unless it can withstand strict scrutiny review. App. at 28.

In reaching its conclusion that knowingly false non-defamatory statements of fact made to mislead voters about a ballot measure are protected by the First Amendment, the panel relied primarily on a recent Ninth Circuit Court of Appeals' decision and stated:

> We follow the lead of the Ninth Circuit in concluding that this language [from Supreme Court cases] dismissing the value of knowingly false speech, when read in context of the opinions, does not settle the question here today. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010) (striking down the

> Stolen Valor Act, which made it a crime to make a false statement about one's own military service.)

App. at 23.

Although recognizing that several Supreme Court cases could "be read broadly enough to include non-defamatory false speech" as speech not protected by the First Amendment, in accord with the Ninth Circuit's *Alvarez* decision, the court of appeals concluded that this Court's precedent related to false speech falling outside the protection of the First Amendment is limited to fraudulent and defamatory false speech only. App. at 25. After concluding that the Supreme Court had never recognized knowingly false speech as a category of speech not fully protected by the First Amendment, the court stated that it would not establish such a broad category of unprotected speech. App. at 25. The court concluded by stating:

> We agree with the Ninth Circuit that, "given our historical skepticism of permitting the government to police the line between truth and falsity, and between valuable speech and drivel, *we presumptively protect all speech, including false statements*, in order that clearly protected speech may flower in the shelter of the First Amendment." *Alvarez*, 617 F.3d at 1217. We do not, of course, hold today that a state may never regulate false speech in this context. Rather we hold that it may do so when it satisfies the First Amendment test required for content-based

> speech restrictions: that any regulation be narrowly tailored to meet a compelling government interest.

App. at 28 (emphasis added).

REASONS FOR HOLDING OR GRANTING THE PETITION

The court of appeals erred in holding that Minnesota's statute prohibiting knowingly false statements of fact designed to mislead voters regarding ballot questions violates the First Amendment unless it satisfies strict scrutiny. In light of this Court's recent decision to review the *United States v. Alvarez* case, it should hold this petition pending disposition of *Alvarez* and then dispose of the petition as appropriate in light of the Court's resolution of *Alvarez*. *See United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010), *petition granted*, 80 USLW 3141 (October 17, 2011) (No. 11-210). A decision in *Alvarez* is extremely likely to be dispositive in this case because the First Amendment question presented here is the same as in *Alvarez* and the court of appeals' holding in this case relies heavily on the Ninth Circuit's *Alvarez* decision.

If this Court decides not to hold this petition, it should accept review for two separate reasons. First, the court of appeals erroneously held that Section 211B.06, subd. 1 must withstand strict scrutiny analysis, notwithstanding this Court's longstanding

treatment of false factual statements as entitled, at most, only to limited First Amendment protection. Second, the court of appeals' unprecedented decision holding that knowingly false non-defamatory statements of fact are entitled to full First Amendment protection creates a circuit split and calls into question sixteen other state statutes aimed at false campaign speech.

I. This Court Should Hold This Petition Pending Resolution Of *United States v. Alvarez*.

This Court should hold this petition pending this Court's resolution of *United States v. Alvarez* and then dispose of it as appropriate in light of the decision in *Alvarez*. *See United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) (2-1), *petition granted*, 80 USLW 3141 (October 17, 2011) (No. 11-210). The issue presented to this Court in this petition is the same First Amendment issue presented in *Alvarez*. The question presented in *Alvarez* is whether 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 (a non-defamatory statement), is a constitutional limitation on false speech. In *Alvarez,* the Ninth Circuit examined this Court's First Amendment precedents and concluded that unlike defamatory false speech or fraudulent speech, non-defamatory false speech (like falsely claiming to have won a medal of honor) was not speech that historically had been viewed as falling outside the protections of the

First Amendment. *Id.* at 1206. Based on this analysis of this Court's First Amendment jurisprudence, the Ninth Circuit went on to hold that because Section 704(b) sought to proscribe non-defamatory false speech, it was unconstitutional unless the statute could satisfy strict scrutiny. *Id.* at 1215-16. Finally, the Ninth Circuit then applied strict scrutiny and concluded that while there was a compelling governmental interest, Section 704(b) was not narrowly tailored. 617 F.3d at 1216-17.

The United States petitioned for a Writ of Certiorari and argued that this Court should grant the petition because:

> The [Ninth Circuit] erroneously subjected Section 704(b) to strict scrutiny, notwithstanding this Court's longstanding treatment of false factual statements as entitled to, at most, only limited First Amendment protection. In so doing, the [Ninth Circuit] disregarded the Court's decisions upholding content-based false-speech restrictions that, like Section 704(b), are supported by an important government interest and provide adequate breathing space for fully protected speech.

Petition for Writ of Certiorari, *United States v. Alvarez*, 2011 WL 3645396 (August 18, 2011) (No. 11-210). On October 17, 2011, this Court granted the petition. *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010), *petition granted*, 80 USLW 3141 (October 17, 2011) (No. 11-210).

This case will be directly controlled by this Court's decision in *Alvarez*. Not only is the First Amendment issue the same, the court of appeals in this case relied heavily on the Ninth Circuit's *Alvarez* decision to support its conclusion that Minnesota's prohibition on knowingly false statements regarding ballot initiatives must satisfy strict scrutiny. App. at 23, 28 ("We agree with the Ninth Circuit that, 'given our historical skepticism of permitting the government to police the line between truth and falsity, and between valuable speech and drivel, we presumptively protect all speech, including false statements, in order that clearly protected speech may flower in the shelter of the First Amendment.' *Alvarez*, 617 F.3d at 1217."). Moreover, in this case, the court of appeals employed the exact same First Amendment analysis as the Ninth Circuit did in *Alvarez*. The question presented in this petition – whether the First Amendment protects knowingly false non-defamatory speech – is the precise First Amendment issue presented in *Alvarez.* In both cases the laws at issue criminalize non-defamatory statements of fact made by a person knowing they are false or with reckless disregard to their falsity. This Court's decision in *Alvarez* is therefore almost certain to be dispositive in this case. Accordingly, this Court should hold this petition pending resolution of the *Alvarez* case and then dispose of the petition in accord with this Court's resolution of *Alvarez*.

II. If This Court Does Not Hold This Petition Pending Resolution Of *United States v. Alvarez*, It Should Grant The Petition.

A. The Court Of Appeals Incorrectly Concluded That The First Amendment Protects Knowingly False Non-Defamatory Statements Of Fact Aimed At Misleading Voters.

The court of appeals improperly concluded that intentional lies designed to mislead voters regarding ballot initiatives are entitled to full First Amendment protection. This is an unprecedented and far-reaching holding. The court of appeals concluded that Minnesota's statute criminalizing intentional lies told to influence voters who are voting on ballot questions can only survive if it satisfies strict scrutiny. App. at 28. The court of appeals arrived at this conclusion because it held that knowingly false non-defamatory factual statements regarding ballot initiatives are entitled to full First Amendment protection. This holding is erroneous.

1. Section 211B.06 Does Not Need To Satisfy Strict Scrutiny Because Knowingly False Factual Statements Designed To Mislead Voters About Ballot Questions Are Not Protected By The First Amendment.

"[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic*

Cent. Comm., 489 U.S. 214, 223 (1989) (internal citation omitted). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . and all such matters relating to political processes." *Brown v. Hartlage,* 456 U.S. 45, 52-53 (1982) (quotation omitted). However, the liberty of speech is not an absolute right. *Near v. Minnesota,* 283 U.S. 697, 708 (1931). States may punish or regulate certain speech consistent with the First Amendment. *Id.* In *Gitlow v. New York*, this Court stated:

> It is a fundamental principle, long established, that the freedom of speech . . . which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity in every possible use of language and prevents punishment of those who abuse this freedom.

268 U.S. 652, 666 (1925).

As a general rule, content-based restrictions on speech can only stand if they meet the demands of strict scrutiny. *See Phila. Newspaper, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("[T]he government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified."). However, strict scrutiny review is required only when *constitutionally protected*

speech is regulated. This Court has recognized there are "certain well-defined and narrowly limited classes of 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). This Court has made clear that false statements of fact uttered with actual malice are a category of speech that is not fully protected by the First Amendment. This Court has held on numerous occasions that false statements of fact are only entitled to limited First Amendment protection that is derivative of the need to ensure that fully protected truthful statements of fact are not chilled.

The First Amendment analysis begins with identifying the speech being proscribed. This Court has consistently stated that false statements of fact have no constitutional value in their own sake and are not protected speech. It has never explicitly limited this category to false statements of fact that defame an individual. More than forty-five years ago, in *Garrison v. Louisiana*, this Court struck down Louisiana's criminal defamation statute for not satisfying the malice standard first articulated in *Sullivan*. 379 U.S. at 74-75. In striking down the statute because it did not satisfy *Sullivan*, this Court eloquently explained why knowingly false political speech is not protected under the First Amendment:

> The use of a calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful

> exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were 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. *That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a 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.* Calculated falsehood falls into that class 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. Hence *the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*

Garrison, 379 U.S. at 75 (emphasis added) (internal quotations omitted).

Since *Garrison*, this Court has frequently reiterated that false statements of fact have no constitutional value in themselves. *See 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."); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech."); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." (*quoting New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))); *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 52 (1971) (plurality opinion) ("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*, *Gertz,* 418 U.S. 323 (1974); *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, 389-90 (1967) ("But the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." (emphasis added)); *Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53, 63

(1966) ("The most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.").

From the general principle that false statements of fact are not protected speech for their own sake, this Court has carved out protection for some false speech when necessary to avoid chilling protected truthful speech. This analysis recognizes that "erroneous statement is 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 (*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)). This Court has therefore upheld content-based restrictions on false statements of fact that are supported by a government interest and that accommodate First Amendment concerns by providing adequate "breathing space" for fully protected speech. *Sullivan*, 376 U.S. at 271-72. Thus, false statements of fact receive "a measure of strategic protection," in appropriate contexts in order to ensure that regulation of such statements does not unduly inhibit fully protected speech. *See Gertz*, 418 U.S. at 342; *see also Sullivan*, 376 U.S. at 271-72 (false statements made innocently or merely negligently "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'").

This Court has upheld content-based restrictions on false statements of fact in a variety of contexts by employing this "breathing space" analysis. As discussed above, in the defamation context, the Court

has held that there is sufficient protection for protected speech when the tort action requires knowledge of the falsity or actual malice and clear and convincing evidence of falsity and fault. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12-17 (1990); *Gertz*, 418 U.S. at 342, 347; *Sullivan*, 376 U.S. at 279-81. Similarly, in the fraud context, the Court has concluded that the necessary breathing space is supplied by elements such as scienter, materiality, and reliance. *See Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (concluding that these restrictions ensure that fraud prohibitions do not chill fully protected speech and "properly tailor[ ]" the limitations to protect the government interests). The Court has also applied this analysis to a First Amendment based challenge to frivolous lawsuits. *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (stating that baseless lawsuits have been analogized to false statements and that Court has allowed punishment for such suits in a manner that is "consistent" with "'breathing space' principles"). It has also applied it to torts predicated on non-defamatory speech. *See Hill*, 385 U.S. at 388-89 (applying *Sullivan* standard to false-light tort action involving false non-defamatory speech and stating "[e]rroneous statement is no less inevitable in [speech aimed at entertainment] than in the case of comment upon public affairs, and in both, if innocent or merely negligent, it must be protected if the freedoms of expression are to have the breathing space that they need to survive." (internal quotations and citations omitted)).

a. The Court Of Appeals Erred When It Concluded That A Different First Amendment Analysis Applied To Statutes Aimed At Knowingly False Speech Depending On Whether They Are Aimed At Defamatory Or Non-Defamatory False Statements Of Fact.

The court of appeals rejected employing the "breathing space" analysis this Court has used repeatedly when analyzing content-based regulations aimed at false statements of fact. The court of appeals erroneously concluded that "all the language [from the Supreme Court cases] the district court and defendants cited come[ ] from cases dealing with otherwise unprotected speech, namely fraudulent or defamatory speech." App. at 23. The court of appeals went on to incorrectly assert that because the "private interests implicated by defamatory speech" are lacking when the speech is not defamatory, this category of false speech – knowingly false non-defamatory statements of fact regarding ballot issues – is fully protected by the First Amendment. App. at 25.

In order to reach this conclusion, the court of appeals ignored this Court's precedents and the analysis this Court has used in false speech cases. Under the court of appeals' erroneous First Amendment approach, knowingly false speech aimed at misleading voters can be proscribed by a state without satisfying strict scrutiny if, and only if, the speech proscribed is also

defamatory. In contrast, statutes that seek to proscribe knowingly false non-defamatory statements of fact must satisfy strict scrutiny. This Court has never articulated such a constitutional distinction when dealing with knowingly false speech. This approach is completely inconsistent with this Court's First Amendment jurisprudence.

This Court has never stated that the category of false speech that is without full First Amendment protection is somehow limited to false "defamatory" speech. In fact, in three cases this Court has concluded that *non-defamatory* false statements of fact do *not* receive full First Amendment protection, but rather are treated the same as defamatory false statements. In *Hill,* this Court applied the actual malice standard in a suit involving invasion of privacy. *Id.* 385 U.S. at 391. The plaintiffs filed a lawsuit against *Time* magazine based on the magazine's false, but non-defamatory, assertion that a new play depicted the plaintiffs' experience as crime victims. The plaintiffs claimed that the article, though laudatory, exposed them to unwanted publicity and caused them mental anguish. *Id.* at 376-80. This Court concluded that the false non-defamatory statements at issue were not protected by the First Amendment in their own right. *Id.* at 390-91. Rather, this Court ruled that the plaintiffs could only recover damages if the magazine's false statements of fact were made knowingly or with reckless disregard for whether they were false. *Id.* at 389-90, 394. In reaching this conclusion, the Court observed that:

> [T]he constitutional guarantees [of freedom of speech and expression] can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in *New York Times* that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct. *Similarly, calculated falsehood should enjoy no immunity in the situation here presented us.*

Id. at 389-90 (emphasis added).

Fifteen years later, in *Hartlage,* the Court applied this same analysis to a Kentucky statute that prohibited candidates from making certain non-defamatory campaign promises. 456 U.S. at 48. In *Hartlage*, the Kentucky Court of Appeals rescinded a candidate's election victory based on an alleged violation of the state's Corrupt Campaign Practices Act. *Id.* The Act prohibited political candidates from "making expenditure, loan, promise, agreement, or contract as to action when elected in consideration for a vote." *Id.* at 48. During the campaign, Brown – the victor – promised to lower his salary if elected as a county commissioner. *Id.* Shortly afterwards, Brown learned that his non-defamatory (possibly truthful) statement may have violated the Act and rescinded it. *Id.* Hartlage – the loser – convinced the appellate court to declare the election void based on Brown's violation of the statute. *Id.* at 48-49. This Court reversed the decision. This Court did not strike down the statute as a violation of the First Amendment because it regulated non-defamatory speech. Instead,

consistent with the "breathing space" analysis employed in false speech cases, this Court held that the state court's ruling violated Brown's First Amendment rights because there was "no showing in this case that [Brown] made the disputed statement in other than good faith and without knowledge of its falsity, or that he made the statement with reckless disregard." *Id*. at 61. Thus, the Court struck down the Kentucky law because it did not provide sufficient "breathing space" by requiring knowledge of its improper nature and not because it purported to restrict non-defamatory speech.

Finally, in *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995), this Court recognized, in dictum, that the State of Ohio had the right to directly proscribe false campaign speech regardless of whether it was defamatory or not. The suit involved an Ohio statute that proscribed the distribution of anonymous campaign literature. *Id.* at 338. The legislature enacted the statute to prevent fraud on voters. *Id.* Like Minnesota, Ohio also had a law that prohibited making or distributing false statements during political campaigns and the law applied to "both candidate elections and to issue-driven ballot measures." *Id.* at 349. The speech at issue in *McIntyre* – like the speech at issue here – related to leaflets opposing a school referendum. *Id.* at 337. In analyzing the speech issue presented – whether Ohio could ban anonymous campaign speech – this Court agreed that "the state interest in preventing fraud" (i.e., misleading voters about a ballot initiative) carried "special weight"

because false statements in election materials "may have serious adverse consequences for the public at large." *Id.* at 350.

This Court concluded, however, that this interest was only "indirectly" served by the ban on anonymous campaign literature and the ban was overbroad because it was not limited to false, fraudulent or libelous speech. *Id.* at 351-52, 357. Important to this Court's decision was its observation that Ohio's "principal weapon" against fraud was Ohio's statute, Ohio Rev. Code Ann. § 3599.09.2(B) (1988), that specifically prohibited the making or dissemination of false statements during political campaigns. *Id.* at 349-50 ("Thus, Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud. Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators."). In contrast to the ban on anonymous literature, the Court found Ohio's statute prohibiting "making or disseminating false statements during political campaigns" in both "candidate elections and . . . issue-driven ballot measures," *id.* at 349, was a permissible effort to "directly" regulate fraud in campaign speech. *Id.* at 357 ("The State may, and does, punish fraud directly.").[3]

[3] The law banning false statements of fact in ballot measures cited in *McIntyre*, Ohio Rev. Code Ann. § 3599.09.2(B) (1988) is strikingly similar to Section 211B.06, subd. 1. It states in relevant part:

(Continued on following page)

In reaching its conclusion that non-defamatory false statements of fact are entitled to full First Amendment protection, the court of appeals does not attempt to distinguish or even cite to *Hill*, and asserts that it need not follow the "negative implications of dicta" from *Hartlage* and *McIntyre*. App. at 28. In fact, the court of appeals' decision in this case is in direct conflict with *Hill, Hartlage,* and *McIntyre*. In *Hill* and *Hartlage*, this Court applied the "breathing space" analysis to determine whether the regulation at issue violated the First Amendment. In each, the speech at issue was non-defamatory. Finally, in *McIntyre*, the Court justified its holding that Ohio's ban on anonymous speech was unconstitutional based in significant part on the fact that Ohio could constitutionally (and did) ban false non-defamatory speech about a ballot initiative directly. 514 U.S. at 357. The court of appeals' holding that Minnesota's prohibition on false statements of fact regarding ballot initiatives

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> No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material . . . shall knowingly and with intent to affect the outcome of such campaign do any of the following:
>
> . . . .
>
> (2) Post, publish, circulate, distribute, or otherwise disseminate, 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. § 3599.09.2(B) (1988).

must satisfy strict scrutiny conflicts with these decisions.

In sum, the Court has repeatedly upheld content-based regulation of false statements of fact that are supported by an important government interest and provide adequate "breathing space" for fully protected speech. *See Sullivan*, 376 U.S. at 272. This Court has not required strict scrutiny of regulations of knowingly false statements of fact.

b. The Court Of Appeals' Creation Of A Distinction For First Amendment Purposes Between Defamatory And Non-Defamatory Speech Is Irrational.

In addition to being contrary to Supreme Court precedent, the court of appeals' holding that false non-defamatory statements of fact designed to mislead voters is fully protected by the First Amendment is irrational. In limiting the category of knowingly false statements of fact which are not entitled to full First Amendment protection to defamatory statements, the court of appeals held that certain defamatory-law principles justified limiting the category of speech outside the First Amendment to defamatory speech. The court of appeals stated "defamation-law principles are justified not only by the falsity of the speech, but also the important private interests implicated by defamatory speech . . . The importance of private interest to the foundations of defamation-law principles

prevents us from assuming its applicability to knowingly false political speech." App. at 24.

This analysis is flawed. As discussed above, this Court has never justified limiting First Amendment protections to knowingly false speech based on the "important private interest implicated." *Id.* Instead, it is the fact that false speech does not advance the society's interest in "uninhibited, robust, and wide-open debate on public issue." *Sullivan,* 376 U.S. at 271; *Gertz*, 418 U.S. at 340 (the "intentional lie" is "no essential part of any exposition of ideas.") (internal citation omitted). The category of "false speech" receives only limited First Amendment protection because it is "of such slight social value as a step to truth that any benefit that may be derived from [it], is clearly outweighed by the social interest in order and morality." *Chaplinsky* 315 U.S. at 572. In addition, the interests in preventing voters from being misled about the meaning or impact of a ballot initiative are at least as compelling as the private interests of an individual who is defamed.

The flawed logic of the court of appeals' distinction between defamatory and non-defamatory knowingly false statements of fact is made clear by applying this distinction to several examples. Under the court of appeals' new First Amendment construction, the following are entitled to full First Amendment protection: a candidate's intentional false statements about themselves, intentional false statements about the meaning or impact of a ballot initiative, intentional lies about where and when an election is being

held, and intentional lies about voter qualifications. In other words, intentional lies to voters to induce them to vote in a certain way or about where and when they can vote or if they are qualified to vote (non-defamatory falsehoods) are statements fully protected by the First Amendment. Statutes prohibiting this speech can only survive if they satisfy strict scrutiny.

In contrast, intentional false statements about another candidate (which implicate private interests) and are considered defamatory are categorically excluded from First Amendment protection because they fall into the defamation category of false speech outside the full protection of the First Amendment. Statutes prohibiting such defamatory speech made with actual malice are constitutional as long as they provide adequate "breathing space" for inadvertent or negligent false speech.

This dramatic distinction between knowingly false defamatory and non-defamatory statements of fact is illogical and is not supported by this Court's precedents.

2. Section 211B.06 Is A Constitutional Limitation On False Statements Of Fact.

Analyzed under this Court's precedents, Section 211B.06 is constitutional. Minnesota, like all states, has a "compelling interest in preserving the integrity of its election process." *Eu*, 489 U.S. at 223. This

Court has repeatedly found this interest to be compelling. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 204-06 (1992) (upholding total ban on speech within 100 feet of polling place); *McIntyre*, 514 U.S. at 350 ("The state interest in preventing fraud" in campaign communications carries "special weight" because false statements in election materials "may have serious adverse consequences for the public at large."); *see also* Becky Kruse, *The Truth Masquerade: Regulating False Ballot Proposition Ads Through State Anti-False Speech Statutes*, 89 Cal. L. Rev. 129, 150 (2001) ("Thus confusing, misleading, or false advertising can affect proposition campaigns in three ways: First, confused voters are less likely to vote on propositions. . . . Second, ads can sway voters by misrepresenting the possible outcome of a measure. Finally, ads and other political speech can mislead and confuse voters into voting against their views. Such ads often win campaigns, but they also rob direct democracy of its representativeness and legitimacy.")

Section 211B.06 is a regulation of false political speech that is specifically aimed at protecting the integrity of the election process by proscribing intentional false speech aimed at deceiving voters. In accord with the Court's precedents, Section 211B.06 provides "breathing space" for constitutionally protected speech by limiting its application to false statements of fact that are designed to influence voters, are factual, and are made by an individual who knows they are false or communicates to others with reckless disregard of whether they are false. Minnesota

has carefully constructed its law to comply with the First Amendment by ensuring "adequate breathing space" for protected speech by proscribing only false statements made with actual malice. *Sullivan*, 376 U.S. at 272.

The court of appeals' holding that this statute must withstand strict scrutiny because knowingly false non-defamatory false statements of fact are fully protected by the First Amendment is erroneous. Non-defamatory false statements of fact aimed at misleading voters enjoy no constitutional protection for their own sake. Section 211B.06 legitimately criminalizes false statements of fact when communicated with knowledge of the statements' falsity or reckless disregard to whether they are false. The court of appeals therefore erred in holding that Section 211B.06's proscription of knowingly false non-defamatory statements of fact can only survive if it satisfies strict scrutiny. Considered under this Court's First Amendment precedents, Section 211B.06 does not violate the First Amendment and the statute does not need to satisfy strict scrutiny. Accordingly, if this Court does not hold the petition pending resolution of *Alvarez*, this Court should grant the petition.

B. The Court Of Appeals' Decision Conflicts With Other Circuit Court Precedents.

In addition to being a dramatic departure from this Court's First Amendment precedents, this Court should grant the petition because this decision

creates a split in the circuits. Twenty years ago, the Sixth Circuit Court of Appeals reviewed an Ohio statute proscribing false statements in campaigns. *See Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 577 (6th Cir.), *cert. denied,* 502 U.S. 1022 (1991). In *Pestrak,* the Sixth Circuit held that Ohio's clean elections law was constitutional and rejected the argument that the First Amendment protected false campaign speech. The Court stated:

> Subsection (B)(10), under which Pestrak was charged, punishes making a false statement either knowingly, or with reckless disregard as to its falsity. These portions of the statute clearly come within the Supreme Court holdings in *Garrison v. Louisiana,* 379 U.S. 64, 75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964) and *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). These cases indicate that false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth.

926 F.2d at 577. The *Pestrak* court followed this Court's false speech precedents and focused on whether Ohio's statute provided adequate breathing space for fully protected speech. The *Pestrak* court did not first determine whether the false speech was defamatory and therefore not protected by the First Amendment or non-defamatory and protected by the First Amendment. The *Pestrak* court simply concluded that "false speech, even political speech, does not merit constitutional protection if the speaker

knows of the falsehood or recklessly disregards the truth." *Id.* The court of appeals' First Amendment analysis in this case is inconsistent with the *Pestrak* court's analysis.

In addition to creating a split with the Court of Appeals for the Sixth Circuit, the court of appeals' decision calls into question laws in at least seventeen states (including Minnesota) that regulate false campaign speech.[4] None of these laws make a distinction between defamatory and non-defamatory statements of fact.

Review of the court of appeals' decision is required to resolve this split in circuit courts of appeals.

CONCLUSION

Petitioners respectfully request the Court hold this petition pending resolution of *United States v. Alvarez*. In the alternative, Petitioners request the Court grant this petition. Minnesota has a significant

[4] *See* Alaska Stat. § 15.13.095 (2010); Colo. Rev. Stat. § 1-13-109 (2011); Fla. Stat. § 104.271 (2011); La. Rev. Stat. Ann. § 18:1463 (2010); Mass. Gen. Laws ch. 56, § 42 (2011); Minn. Stat. § 211B.06 (2010); Miss. Code Ann. § 23-15-875 (West 2010); N.C. Gen. Stat. § 163-274(7)-(8) (2011); N.D. Cent. Code § 16.1-10-04 (2009); Ohio Rev. Code Ann. § 3517.21-22 (West 2011); Or. Rev. Stat. § 260.532 (2011); S.D. Codified Laws § 12-13-16 (2010); Tenn. Code Ann. § 2-19-142 (2011); Utah Code Ann. § 20A-11-1103 (2010); W. Va. Code § 3-8-11 (2011); Wis. Stat. § 12.05 (2011).

interest in ensuring that its elections, including elections related to ballot initiatives, are conducted in a fair manner. By requiring Section 211B.06 to withstand strict scrutiny to proscribe knowingly false statements of fact regarding ballot initiatives will significantly restrict Minnesota's ability to satisfy this significant interest.

Respectfully submitted,

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Dated: October 25, 2011

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638 F.3d 621
United States Court of Appeals,
Eighth Circuit.

281 CARE COMMITTEE; Ron Stoffel; W.I.S.E. Citizen Committee; Victor E. Niska; Citizens for Quality Education; Joel Brude, Plaintiffs/Appellants,

v.

Ron ARNESON, in his official capacity as County Attorney for Blue Earth County, Minnesota, or his successor; Mike Freeman, in his official capacity as County Attorney for Hennepin County, Minnesota, or his successor; Michael Junge, in his official capacity as County Attorney for McCleod County, Minnesota, or his successor; Tom N. Kelly, in his official capacity as County Attorney for Wright County, Minnesota, or his successor; Lori Swanson, in her official capacity as the Minnesota Attorney General or her successor, Defendants/Appellees.

No. 10-1558. Submitted: Nov. 17, 2010.
Filed: April 28, 2011. Rehearing and
Rehearing En Banc Denied July 27, 2011.

Attorneys and Law Firms

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Jean Burdorf, argued, Minneapolis, MN, for appellee. John Steven Garry, AAG, argued, St. Paul, MN, for Minnesota Attorney General.

Before SMITH, BEAM and BENTON, Circuit Judges.

Opinion

BEAM, Circuit Judge.

In this First Amendment challenge to a Minnesota law that makes it a crime to knowingly or with reckless disregard for the truth make a false statement about a proposed ballot initiative, plaintiffs appeal: (1) the district court's dismissal of plaintiffs' complaint for lack of subject-matter jurisdiction; (2) the district court's alternate holding that it would dismiss plaintiffs' complaint for failing to state a claim upon which relief could be granted; and (3) the district court's denial of plaintiffs' motion for summary judgment. We reverse the dismissal of plaintiffs' complaint and remand for proceedings consistent with this opinion.

I. BACKGROUND

Plaintiffs are three Minnesota-based grass-roots-advocacy organizations along with their corresponding leaders. Each organization was founded to oppose school-funding ballot initiatives, which Minnesota law authorizes individual school boards to propose. These ballot initiatives ask county taxpayers to approve bond hikes or tax levies designed to increase funding to the local school districts. Plaintiffs claim that a provision of the Minnesota Fair Campaign Practices Act (FCPA) inhibits plaintiffs' ability to speak freely against these ballot initiatives and, thereby, violates plaintiffs' First Amendment rights. Defendants are four Minnesota county attorneys and

the Minnesota attorney general, all sued in their official capacities.

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 (2008). 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 Office of Administrative Hearings (OAH). The revised version of section 211B.06 authorizes any person, organization

or agency to file a complaint with the OAH, and gives county attorneys discretion to determine whether to bring criminal charges after civil proceedings are complete.

In 2006, the B.U.I.L.D. Citizen Committee – a citizen group that campaigned in support of a school-funding ballot initiative in Howard Lake, Waverly-Winsted Independent School District – filed an OAH complaint against plaintiffs W.I.S.E. Citizen Committee and its Chairperson Victor Niska. The complaint alleged that W.I.S.E. and Niska prepared and distributed, in violation of section 211B.06, campaign materials containing statements of fact that W.I.S.E. and Niska knew to be false. After reviewing the complaint, an OAH judge found that the complainants had established a prima facie case against W.I.S.E. and Niska and scheduled an evidentiary hearing. Following the hearing several months later, an OAH panel dismissed the complaint. W.I.S.E. and Niska spent over $1,900 in legal fees defending against the complaint.

In the fall of 2007, plaintiff 281 Care Committee and its leader plaintiff Ron Stoffel campaigned against a school-funding ballot initiative proposed by the Robbinsdale Public School District. After a vigorous campaign, the ballot initiative was rejected. On November 8, 2007, the Superintendent of the Robbinsdale Public School District told statewide media that the district was investigating 281 Care Committee and exploring ways to deal with the "false" information it spread about the initiative.

Plaintiff Stoffel alleges that he interpreted these statements, which were published in the Minnesota Star Tribune and played on Minnesota Public Radio, as a warning that litigation would follow if 281 Care Committee continued using the same tactics to oppose ballot initiatives.

All plaintiffs allege that, given the above-described occurrences, plaintiffs have been chilled from, and continue to be chilled from, vigorously participating in the debate surrounding school-funding ballot initiatives in Minnesota. In particular, plaintiffs allege they declined to participate in a 2008 campaign regarding a school-funding ballot initiative for the Orono School District because they feared repercussions arising from section 211B.06.

In the wake of these events, plaintiffs filed a suit in federal district court, alleging that section 211B.06 violates the First Amendment. Plaintiffs moved for summary judgment and defendants filed a motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim. The district court granted defendants' motion, holding that plaintiffs lacked standing and that their claim was not ripe. The district court also held that, even if it had subject-matter jurisdiction, it would dismiss plaintiffs' complaint for failing to state a claim upon which relief could be granted. The court denied plaintiffs' motion for summary judgment, finding it was moot in light of the court's ruling. Plaintiffs appeal.

II. DISCUSSION

This case involves a fundamental question about the ability of a state, under the First Amendment, to enact a statute restricting a category of political speech – namely, knowingly or recklessly false speech about a ballot initiative – without demonstrating that the enacted statute is narrowly tailored to a compelling state interest. The court below held that plaintiffs' challenge to section 211B.06 was not justiciable because plaintiffs lacked standing and their claim was not ripe. The district court also held, in the alternative, that if plaintiffs did have standing, their complaint failed to state a claim because section 211B.06 fell outside the protection of the First Amendment. We reject each of these holdings.

A. Justiciability

Those who invoke federal subject-matter jurisdiction must "demonstrate an actual, ongoing case or controversy within the meaning of Article III of the Constitution." *Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 789-90 (8th Cir.2004) (internal quotations omitted). We review de novo the district court's dismissal of plaintiffs' complaint for lack of federal subject-matter jurisdiction. *Hansen v. United States*, 248 F.3d 761, 763 (8th Cir.2001).

Here, the district court held that it lacked subject-matter jurisdiction because (1) plaintiffs lack Article III standing, and (2) plaintiffs' claim is not ripe. On appeal, defendant Lori Swanson, the Minnesota

Attorney General, additionally argues, as she did below, that this court lacks subject-matter jurisdiction over the claim against her because she is entitled to Eleventh Amendment immunity. We reject these arguments and conclude that plaintiffs' claims are justiciable and that subject-matter jurisdiction is proper in federal court.

a. Article III Standing

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). A party invoking federal jurisdiction has the burden of establishing that he has the right to assert his claim in federal court. *Schanou v. Lancaster Cnty. Sch. Dist. No. 160*, 62 F.3d 1040, 1045 (8th Cir.1995). This requires establishing three elements: (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. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The court below concluded that plaintiffs failed to establish that they had suffered an injury in fact. On appeal, defendants also argue that plaintiffs lack standing because plaintiffs have not established that any injury they did suffer is likely to be redressed by a favorable decision. We reject these arguments.

To establish injury in fact for a First Amendment challenge to a state statute, a plaintiff need not have been actually prosecuted or threatened with prosecution. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 487 (8th Cir.2006). Rather, 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. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988). Of course, self-censorship based on mere allegations of a "subjective" chill resulting from a statute is not enough to support standing, *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), and "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). The relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was "objectively reasonable." *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." *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301.

The district court concluded that plaintiffs' decision to chill their speech was not objectively reasonable for two reasons. First, the court held that,

because the relevant provision of section 211B.06 has not been regularly enforced, plaintiffs face no credible threat of prosecution. Second, the court held that none of plaintiffs' speech could have been reasonably chilled by section 211B.06 because plaintiffs have not alleged that they wish to engage in any conduct that would actually violate the statute. We conclude that neither reason is convincing and that plaintiffs have made legally sufficient allegations to support a finding that their speech was reasonably chilled by section 211B.06.

First, we disagree with the district court's conclusion that the infrequent enforcement of section 211B.06 undermines the objective reasonableness of plaintiffs' decision to chill their speech. Total lack of enforcement of a statute can itself undermine the reasonableness of chill allegedly resulting from that statute, but only in extreme cases approaching desuetude. *St. Paul Area Chamber of Commerce*, 439 F.3d at 486. Here, the district court emphasized that there have been no criminal prosecutions under section 211B.06 since the statute was amended in 2004 and that defendants have not themselves initiated any civil proceedings under the statute since 2004. Relying on these facts, the district court cited *Poe v. Ullman*, 367 U.S. 497, 508, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), and concluded the prospect of a prosecution under section 211B.06 is "speculative and hypothetical in the extreme" and, thus, that plaintiffs' fear was not objectively reasonable. This conclusion was erroneous.

The district court's reliance on Poe is misplaced. Poe involved a statute that had been enforced only once in the more than eighty years since it had been adopted. 367 U.S. at 501, 81 S.Ct. 1752. Section 211B.06, on the other hand, was adopted comparatively recently and was amended fewer than five years before this suit was filed. The Supreme Court has repeatedly found that plaintiffs have standing to bring pre-enforcement First Amendment challenges to criminal statutes, even when those statutes have never been enforced. *See, e.g., Babbitt*, 442 U.S. at 302, 99 S.Ct. 2301; *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). It is only evidence – via official policy or a long history of disuse – that authorities actually reject a statute that undermines its chilling effect. Defendants have neither established a long history of disuse nor produced a clear statement by proper authorities that they do not intend to enforce the statute. *See United Food & Commerical Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 429 (8th Cir.1988) (representation by state officials that they have "no present plan" to enforce a statute did not divest standing to challenge the statute because the state's position was not binding and could change). Therefore, we conclude that section 211B.06 presents a credible threat of prosecution sufficient to support a claim of objectively reasonable chill in the First Amendment context.

Second, we disagree with the district court's conclusion that plaintiffs have not established objectively reasonable chilled speech because they have

not alleged that they wish to engage in conduct that actually violates section 211B.06. We acknowledge that plaintiffs have not alleged that they wish to knowingly make false statements of fact. However, plaintiffs *have* 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 and that, therefore, they have reasonable cause to fear consequences of section 211B.06. We hold that, given the specifics of the challenged statute and the nature of the standing analysis in First Amendment political speech cases, this is enough to establish that plaintiffs' decision to chill their speech was objectively reasonable.

A First Amendment plaintiff does not always need to allege a subjective intent to violate a law in order to establish a reasonable fear of prosecution. The Supreme Court has made clear that, at least when intent is not an element of a challenged statute that prohibits some category of false speech, the likelihood of inadvertently or negligently making false statements is sufficient to establish a reasonable fear of prosecution under the statute. *Babbitt*, 442 U.S. at 301-02, 99 S.Ct. 2301. Defendants argue that *Babbitt* is irrelevant here because – unlike the statute challenged in *Babbitt* – section 211B.06 has an intent requirement. They urge that this case is, instead, controlled by our decision in *Zanders*, 573 F.3d 591. In *Zanders*, we denied standing to plaintiffs who attempted to challenge a statute that made it a crime to knowingly make a false report of police

misconduct. *Id*. at 592. We reasoned that, because the plaintiffs did not allege they intended to knowingly make false reports, they could not reasonably fear consequences from the challenged statute. But *Zanders* does not settle the question here.

In *Zanders*, the plaintiffs' claim of standing was based on their speculative fear that police officers would engage in bad-faith conduct and wrongfully accuse citizens of making false reports when the officers knew the reports to be true. *Id*. at 594. Our decision to deny standing turned on the fact that we believed the *Zanders* plaintiffs to:

> fail in the key respect of asserting that peace officers in fact initiate retaliatory prosecution in instances where the peace officers believe that the allegations are truthful, or at least not knowingly false. It is too speculative for standing purposes to allege that this statute could be manipulated or that the police might misuse the criminal justice system for retaliatory purposes.

Id. The *Zanders* plaintiffs presented no evidence that there was a likelihood that officers would mistakenly believe citizens were making knowingly false statements, which was unlikely given that officers would have personal knowledge about misconduct in which they were allegedly involved. Here, on the other hand, plaintiffs' fear of the statute does not rest upon such speculative notions of bad faith. Rather, we conclude that – given the scope, context, and enforcement structure of section 211B.06 – plaintiffs

have made sufficient allegations of objectively reasonable chill.

The chilling effects of section 211B.06 cannot be understood apart from the context of the speech it regulates: political speech about contested ballot initiatives. Plaintiffs persuasively argue that deciding whether a statement was made with "reckless disregard for the truth" in the political-speech arena often proves difficult;[1] this inquiry leaves substantially more room for mistake and genuine disagreement than does, as was relevant in *Zanders*, deciding whether a citizen knowingly made a false report about factual allegations of police misconduct. Plaintiffs allege a desire to use political rhetoric, to

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[1] The difficulty of making this distinction is reflected in cases dealing with defamation against public officials. Courts and scholars constantly struggle to draw a line between knowingly or recklessly false statements and uses of rhetoric, exaggeration, and ideologically-derived facts. *See, e.g., Greenbelt Coop Publ'g Ass'n v. Bressler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) (allegedly false statement that city council member blackmailed someone was "no more than rhetorical hyperbole"); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974) (holding that the use of the word "traitor" could not be reasonably interpreted as a representation of fact because it was used "in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization"); Terri R. Day, "*Nasty as They Wanna be Politics:" Clean Campaigning and the First Amendment*, 35 Ohio N.U. L. Rev. 647, 652 (2009) ("Often characterized as hyperbole and overstatement, campaign speech is meant to persuade and, as such, tends toward exaggeration, to vilification . . . and even to false statement.") (internal quotation omitted).

exaggerate, and to make arguments that are not grounded in facts. In turn, they have presented allegations of their reasonable worry that state officials and other complainants – including their political opponents who are free to file complaints under the statute – will interpret these actions as violating the statute. *See Mangual v. Rotger-Sabat*, 317 F.3d 45, 58 (1st Cir.2003) (allowing pre-enforcement challenge to criminal libel statute where plaintiff did not admit he wanted to commit criminal libel but wanted to publish articles that would "exacerbat[e his] exposure to a criminal libel prosecution"). We cannot say that plaintiffs' fears are "imaginary" or "wholly speculative." *Babbitt*, 442 U.S. at 302, 99 S.Ct. 2301. The tactics plaintiffs have clearly alleged that they want to use come close enough to speaking with reckless disregard for the truth that we can say it would be objectively reasonable for plaintiffs to modify those tactics in light of potential consequences from section 211B.06. *See Majors v. Abell*, 317 F.3d 719, 721 (7th Cir.2003) (plaintiffs need only allege they wish to engage in activity that the challenged statute "arguably covers" because "most people are frightened of violating criminal statutes").

The reasonableness of plaintiffs' fear is also underscored by the fact that, in the past, plaintiffs' speech has triggered threats and the filing of one complaint under section 211B.06. *See United Food & Commercial Workers Int'l Union*, 857 F.2d at 427 (noting that past experience with a statute is relevant to standing determination). Although no complaints

against the plaintiffs ever reached the criminal stage and no criminal prosecution was ever threatened, non-criminal consequences contemplated by a challenged statute can also contribute to the objective reasonableness of alleged chill. *Babbitt*, 442 U.S. at 302 n.13, 99 S.Ct. 2301 (noting that possible administrative and civil sanctions provide "substantial additional support for the conclusion that appellees' challenge to the publicity provision is justiciable"); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir.2000) (finding standing and noting that fear of civil penalties can be as inhibiting of speech as fear of criminal prosecution). Although the civil complaint against plaintiff 281 Care Committee was ultimately dismissed, this happened only after a prima facie violation was found and after plaintiffs spent several months and $1,900 in attorney fees litigating the matter. This complaint – and the other complaints threatened – give plaintiffs grounds to reasonably fear that, unless they modify their speech, they will be subject to the hassle and expense of administrative proceedings.

"Under these circumstances, we find that plaintiffs are not simply attempting to obtain an advisory opinion or to enlist the court in a general effort to purge the [Minnesota] statute books of unconstitutional legislation." *United Food & Commercial Workers Int'l Union*, 857 F.2d at 430. The record before us indicates that plaintiffs have modified their speech in light of section 211B.06. We conclude that, if the statute survives, it may well be objectively reasonable

for plaintiffs to continue to do so. Standing analysis under the First Amendment is intended to allow challenges based on this type of injury. *See Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (recognizing the "sensitive nature of constitutionally protected expression" in permitting a pre-enforcement action involving the First Amendment). Thus, the plaintiffs have alleged injury in fact sufficient to support standing to ask the federal courts to consider their claim.

On appeal, defendants urge that, even if plaintiffs have established that they suffered injury in fact, plaintiffs still lack standing because it is unlikely their injury will be redressed by a favorable decision. Defendants argue that, because any party can institute a civil complaint and because criminal prosecution cannot occur until the civil complaint is resolved, enjoining the attorney general and the county attorneys will not redress plaintiffs' concerns about the chilling effects of the civil portion of the statute. However, a party "satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir.1997) (emphasis in original) (internal quotation omitted). When a statute is challenged as unconstitutional, the proper defendants are the officials whose role it is to administer and enforce the statute. *Mangual*, 317 F.3d at 57. The county attorneys are the parties primarily responsible for

enforcing the criminal portion of the statute; enjoining them would redress a discrete portion of plaintiffs' alleged injury in fact. Further, the county attorneys and the attorney general are also authorized – along with any other individual or organization – to institute a civil complaint. Granting declaratory or injunctive relief against the defendants, would redress a discrete injury to plaintiffs. Thus, we find plaintiffs have standing.

b. Ripeness

Defendants also argue, as the district court held, that plaintiffs' claim is not justiciable because it is not ripe for adjudication. A claim is not ripe if the alleged injury "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *KCCP Trust v. City of North Kansas City*, 432 F.3d 897, 899 (8th Cir.2005) (quotation omitted). Here, defendants' ripeness challenge fails because plaintiffs' alleged injury has already occurred and will continue to occur at defined points. Plaintiffs' alleged injury is not based on speculation about a particular future prosecution or the defeat of a particular ballot question. Rather, the injury is speech that has already been chilled and speech that will be chilled each time a school funding initiative is on the ballot because of the very existence of section 211B.06. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir.2006) (plaintiffs' claim was ripe where plaintiff alleged the requirement "by its very existence, chills the exercise of the Plaintiffs' First

Amendment rights"); *see also Minn. Citizens Concerned for Life*, 113 F.3d at 132. Here, the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression. Thus, we conclude that plaintiffs' claim is ripe for review.

c. Sovereign Immunity

On appeal, defendant Lori Swanson – the Minnesota Attorney General – argues that there is an additional and independent reason plaintiffs' claims against her are not justiciable: she argues the Eleventh Amendment bars plaintiffs from bringing this suit against her in her official capacity. We find that the suit is proper under the *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), exception to Eleventh Amendment immunity and reject Swanson's argument.

The Eleventh Amendment establishes a general prohibition of suits in federal court by a citizen of a state against his state or an officer or agency of that state. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). However, there are exceptions to this rule. Relevant here, a suit against a state official may go forward in the limited circumstances identified by the Supreme Court in *Ex Parte Young*. Under the *Ex Parte Young* doctrine, a private party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law. In determining whether

this exception applies, a court conducts "a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (alteration in original) (internal quotation omitted). Here, there is no dispute that the relief plaintiffs seek is prospective. The only question is whether they have alleged that defendant Swanson is, herself, engaged in an ongoing violation of federal law.

Plaintiffs argue that the attorney general is engaged in an ongoing violation of federal law by virtue of the office's participation in the enforcement mechanism of section 211B.06. Swanson responds that her office has no special role in the enforcement of section 211B.06 and that a state attorney general is not automatically a proper defendant when a lawsuit challenges the constitutionality of a state statute. Swanson is correct that, under *Ex Parte Young*, a state attorney general cannot be sued merely as a representative of the state itself. 209 U.S. at 157, 28 S.Ct. 441. Rather, to be amenable for suit challenging a particular statute the attorney general must have "some connection with the enforcement of the act." *Reprod. Health Servs. v. Nixon*, 428 F.3d 1139, 1145-46 (8th Cir.2005). Here, plaintiffs have demonstrated a sufficient connection between the attorney general and the enforcement of section 211B.06 to satisfy this standard.

Plaintiffs allege a three-fold connection between the Minnesota attorney general and the enforcement of section 211B.06. First, the attorney general may, upon request of the county attorney assigned to a case, become involved in a criminal prosecution of section 211B.06. Minn. Stat. § 8.01. Second, 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. *See* Minn. Stat. § 8.06 (the attorney general "shall act as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties."). Third, the attorney general appears to have the ability to file a civil complaint under section 211B.06, as Minnesota law gives the attorney general broad discretion to commence civil actions, *see* Minn. Stat. § 8.01, and section 211B.06 allows any person, entity, or agency to file a civil complaint.

Under our precedent, this connection is strong enough to bring this suit under the *Ex Parte Young* exception to Eleventh Amendment immunity. While we do require "some connection" between the attorney general and the challenged statute, that connection does not need to be primary authority to enforce the challenged law. *See Missouri Pro. & Advocacy Servs. v. Carnahan*, 499 F.3d 803 (8th Cir.2007) (finding the *Ex Parte Young* exception applied to attorney general where he could potentially have represented the state in a criminal prosecution that might have arisen indirectly out of an individual's failure to comply with

the challenged voter-eligibility law). Nor does the attorney general need to have the full power to redress a plaintiff's injury in order to have "some connection" with the challenged law. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 864 (8th Cir.2006). In *Reproductive Health Services*, 428 F.3d at 1145-46, we found that a connection, more tenuous than the one here, was sufficient to make the attorney general amenable to suit under *Ex Parte Young*. In *Reproductive Health Services*, as here, the attorney general had no authority to initiate criminal prosecution. *Id*. Rather, the attorney general could only participate in a criminal proceeding if his assistance was requested by the assigned county attorney or the trial court asked him to sign indictments. *Id*. Further, in *Reproductive Health Services*, the attorney general did not have the connection to the civil enforcement of the statute that is present here. Nonetheless, there we held that – although the connection was not strong enough to support the issuance of a preliminary injunction against the attorney general – it *was* strong enough to bring the attorney general into the *Ex Parte Young* exception and make him a potentially proper defendant. *Id*. In the instant case, the threefold connection plaintiffs have alleged is sufficient to make Swanson amenable to suit under the *Ex Parte Young* exception to Eleventh Amendment immunity.

B. Failure to State a Claim

Because we find that the district court erred when it dismissed plaintiffs' complaint for lack of a

subject-matter jurisdiction, we consider the court's alternate ground for dismissal: that plaintiffs failed to state a claim upon which relief can be granted. We review de novo a district court's dismissal of a complaint under Federal Rule of Civil Procedure Rule 12(b)(6) for failing to state claim. *Smith v. St. Bernards Reg'l Med. Ctr.*, 19 F.3d 1254, 1255 (8th Cir.1994).

The district court concluded that the kind of speech regulated by section 211B.06 falls outside the protections of the First Amendment and, thus, the district court upheld section 211B.06 without conducting a strict-scrutiny analysis. We conclude this approach was erroneous and remand the case to allow the district court to determine whether section 211B.06 is narrowly tailored to serve a compelling interest of the State of Minnesota.

As a general rule, content-based speech restrictions can only stand if they meet the demands of strict scrutiny. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). However, there is an exception to this rule for "certain well-defined and narrowly limited classes of 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, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). The categories of speech that the Supreme Court has found fall outside the First Amendment include fighting words, obscenity, child pornography, and defamation; statutes restricting

speech from one of these categories are not subject to strict scrutiny as long as they are viewpoint-neutral. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-88, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). The district court concluded that knowingly false speech is another category in this group of exceptions. We disagree. We find that the Supreme Court has never placed knowingly false campaign speech categorically outside the protection of the First Amendment and we will not do so today.

The district court relied on, and defendants cite to, language from the Supreme Court to support their conclusion that knowingly false speech is valueless and categorically exempt from First Amendment protection. *See, e.g., Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). However, all the language the district court and defendants cited comes from cases dealing with otherwise unprotected speech, namely fraudulent or defamatory speech. We follow the lead of the Ninth Circuit in concluding that this language dismissing the value of knowingly false speech, when read in context of the opinions, does not settle the question here today. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir.2010) (striking down the Stolen Valor Act, which made it a crime to make a false statement about one's own military service); *see also State Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wash.2d 618, 957 P.2d 691 (1998) (striking down a statute that prohibited knowingly false speech about ballot issues).

The district court assumed, and defendants argue,[2] that the categorical exemption of defamatory speech is actually an exemption of all knowingly false speech. However, defamation-law principles are justified not only by the falsity of the speech, but also by the important private interests implicated by defamatory speech. *See* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 238 (1992) (noting defamation is an actionable wrong because it "vindicate[s] private rights invoked by, or at least on behalf of, private individuals," but that "the First Amendment precludes punishment for generalized 'public' frauds, deceptions, and defamation"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (noting defamatory falsehoods are punishable because they can "cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective"). The importance of private interests to the foundations of

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[2] To the extent that defendants also argue in favor of application of fraud principles to all knowingly false speech, we reject the argument, noting the Supreme Court has carefully limited the boundaries of what is considered fraudulent speech. It has not included all false speech, or even all knowingly false speech. *See, e.g.*, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620, 123 S.Ct. 1829, 155 L.Ed.2d 793 (2003) (noting that "[e]xacting proof requirements" of state law fraud claims, including requirements that "the defendant made the representation with the intent to mislead the listener, and succeeded in doing so," rendered the law constitutional since it "provided sufficient breathing room for protected speech").

defamation-law principles prevents us from assuming its applicability to knowingly false political speech. A government entity cannot bring a libel or defamation action. *New York Times v. Sullivan*, 376 U.S. 254, 291, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (noting no court "of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence" (internal quotations omitted)). A ballot initiative clearly cannot be the victim of a character assassination. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352 n.16, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). Although defendants are correct that some language from the defamation cases could, on its face, be read broadly enough to include non-defamatory false speech, "we are not eager to extend a statement (often quoted, but often qualified) made in the complicated area of defamation jurisprudence into a new context in order to justify an unprecedented and vast exception to First Amendment guarantees." *Alvarez*, 617 F.3d at 1208.

After finding that Supreme Court precedent does not currently recognize knowingly false speech as a category of unprotected speech, we also decline to, ourselves, establish it as such. Although defendants may be correct that knowingly false speech is, itself, often valueless, the First Amendment does not allow the courts of appeals to decide whether a category of speech, on the whole, tends to contain socially worthless information. *See United States v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 1585, 176 L.Ed.2d 435 (2010)

("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."). The Court recently labeled the government's advocacy of such an approach "startling and dangerous." *Id*. Prior decisions that have discussed the worthlessness of speech categorically excepted from the First Amendment are descriptive not prescriptive – they tell us something about the speech that is exempt but not about what other types of speech may be exempt from First Amendment scrutiny. Thus, even if we were convinced that knowingly false speech was generally valueless, we could not on that basis make a judgment that it falls outside the protections of the First Amendment because "[t]he First Amendment itself reflects a judgement by the American people that the benefits of its restrictions on the Government outweigh the costs." *Id*.

We are especially unwilling to do so here because the speech involved (i.e., speech about ballot initiatives) is quintessential political speech, which is at the heart of the protections of the First Amendment.[3]

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[3] The breadth of the protection afforded to political speech under the First Amendment is difficult to overstate in light of recent Supreme Court precedent. *See Snyder v. Phelps*, ___ U.S. ___, 131 S.Ct. 1207, 179 L.Ed.2d (2011); *Citizens United v. FEC*, ___ U.S. ___, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). In *Citizens United*, the Court struck down a ban on political-campaign contributions by corporations, repeatedly emphasizing the special status of political speech under the First Amendment. 130 S.Ct. at 898 ("[P]olitical speech must prevail against laws

(Continued on following page)

Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."). This law puts the Minnesota state government in the unseemly position of being the arbiter of truth about political speech. This raises special First Amendment concerns because the First Amendment is not only about protecting the rights of individual speakers, but also about "constraining the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false, as

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that would suppress it, whether by design or inadvertence."). Although the Court concluded that the application of strict scrutiny was sufficient to protect the speech in that case, the *Citizens United* Court went so far as to suggest that there may be a bright-line rule against restrictions on political speech. *Id.* ("[I]t might be maintained that political speech simply cannot be banned or restricted as a categorical matter."). The Court's recent decision in *Snyder* is similarly protective of political speech. Although it involved a challenge to a tort verdict rather than to a speech-restricting statute, *Snyder* is, nonetheless, notable because the Court's decision to overturn the verdict against defendants hinged largely on the fact that the speech defendants were held liable for was speech about matters of public concern, which the Court noted is the " 'essence of self-government.' " 131 S.Ct. at 1215 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)). This status was enough to entitle defendants' speech to special protection and insulate it from liability, despite the fact that the speech was "hurtful" and its contribution to society "may be negligible." *Id.* at 1220.

well as what is right and wrong." Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U.L. Rev. 1, 3 (2008).

We agree with the Ninth Circuit that, "given our historical skepticism of permitting the government to police the line between truth and falsity, and between valuable speech and drivel, we presumptively protect all speech, including false statements, in order that clearly protected speech may flower in the shelter of the First Amendment." *Alvarez*, 617 F.3d at 1217. We do not, of course, hold today that a state may never regulate false speech in this context. Rather, we hold that it may only do so when it satisfies the First Amendment test required for content-based speech restrictions: that any regulation be narrowly tailored to meet a compelling government interest.

Defendants also invoke the negative implications of dicta from two Supreme Court cases striking down election laws on First Amendment grounds. *See Brown v. Hartlage*, 456 U.S. 45, 61-62, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) (holding that an election law prohibiting all false statements of fact was "inconsistent with the atmosphere of robust political debate protected by the First Amendment," and noting that the politician whose victory was nullified promptly retracted the false statement and apparently made the statement "in good faith and without knowledge of its falsity" or without "reckless disregard as to whether it was false or not"); *McIntyre*, 514 U.S. at 349, 115 S.Ct. 1511 (holding that a ban on anonymous campaign pamphleteering violated the

First Amendment, and noting that the state interest in preventing electoral fraud was less compelling because Ohio law already included "prohibitions against making or disseminating false statements during political campaigns" that applied to issue-driven ballot measures). While these cases may inform the district court's strict-scrutiny analysis, neither holds that the actual malice standard applies to false speech in the context of political campaigns on a ballot issue, and neither goes so far as to categorically exempt prohibitions on knowingly false campaign speech from any scrutiny under the First Amendment – which would be necessary for a motion to dismiss to be granted in this case.

C. Plaintiffs' Motion for Summary Judgment

After granting the defendants' motion to dismiss, the district court denied plaintiffs' motion for summary judgment, finding that it was moot. Because we reverse the dismissal of plaintiffs' complaint, we also vacate this finding of mootness. On appeal, plaintiffs urge us to grant their motion for summary judgment. However, additional development of arguments regarding whether section 211B.06 satisfies strict scrutiny is required. Thus, we decline to consider the merits of plaintiffs' motion and, instead, remand the matter to the district court for reconsideration.

III. CONCLUSION

For the foregoing reasons, we reverse the district court's grant of defendants' motion to dismiss, vacate the denial of plaintiffs' motion for summary judgment, and remand to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
08-CV-5215(JMR/FLN)

281 CARE Committee, Ron Stoffel, W.I.S.E. Citizen Committee, Victor E. Niska, Citizens for Quality Education, and Joel Brude	ORDER
v.	(Filed Feb. 19, 2010)
Ross Arneson, in his official capacity as County Attorney for Blue Earth County, Minnesota, or his successor, Mike Freeman, in his official capacity as County Attorney for Hennepin County, Minnesota, or his successor, Michael Junge, in his official capacity as County Attorney for McLeod County, Minnesota, or his successor, and Tom N. Kelly, in his official capacity as County Attorney for Wright County, Minnesota, or his successor, and Lori Swanson, in her official capacity as the Minnesota Attorney General, or her successor	

Three political associations and their individual leaders[1] have sued four Minnesota County Attorneys and the Minnesota Attorney General. Plaintiffs claim Minn. Stat. § 211B.06 subd. 1 (2008) is contrary to the First Amendment. The matter comes before the Court on cross-motions: plaintiffs move for summary judgment; defendants seek to dismiss the Amended Complaint ("Complaint"). Defendants' motion is granted; plaintiffs' motion is denied.

I. Background[2]

Minnesota school districts may raise funds by tax levies and bond referenda if approved by the electorate. Plaintiffs claim they oppose such revenue-raising measures, and wish to persuade voters to reject them. They claim they are being prevented from doing so by a portion of the Minnesota Fair Campaign Practices Act, which purports to criminalize false statements in connection with elections and ballot questions.

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[1] Barbara White, an additional plaintiff, has been voluntarily dismissed.

[2] On a Rule 12(b)(1) motion, claiming a lack of subject matter jurisdiction, the Court may consider matters outside the pleadings without converting the motion to dismiss into one for summary judgment. *See Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990). In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court takes as true the well-pleaded factual allegations in plaintiffs' complaint. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

In relevant part, the statute 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 to 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 (2008). The statute also provides that, if the material containing the false statement is contained in a letter to the editor, rather than "paid political advertising or campaign material," the penalty is a misdemeanor. *Id*.

The Minnesota legislature revised this statute in 2004. Prior to that time, the statute applied only to statements about candidates and could only be enforced by county attorneys. The 2004 amendments extended the statute to ballot questions, and any person – not just a county attorney – could initiate civil enforcement proceedings against a person believed to have violated the law. These new civil enforcement charges were to be heard first by Minnesota's Office of Administrative Hearings ("OAH"). The defendant County Attorneys and the Attorney General claim, without contradiction, they have never initiated civil enforcement proceedings under the revised statute.

After the 2004 amendments, a complainant organization which opposed the anti-school-bond efforts of plaintiff W.I.S.E. Citizen Committee ("W.I.S.E."), filed a civil complaint against W.I.S.E. The complaint was ultimately dismissed after four months of litigation, and $1,900 in attorney's fees. In 2007, after plaintiff 281 CARE Committee ("281 CARE") successfully opposed a referendum, a local school official threatened to bring a complaint against it under the statute, but did not do so. Both 281 CARE and W.I.S.E. claim they wished to rebut what they considered to be a school district's misrepresentations concerning a proposed bond referendum in 2008. Plaintiffs' Complaint alleges each was deterred from doing so out of fear of being sued under the statute. The referendum passed.

Plaintiffs argue the statute is facially overbroad, and violates the First Amendment to the United States Constitution. Plaintiffs move for summary judgment and a declaration that the statute is unconstitutional. They, further, seek an injunction barring its enforcement. Defendants deny plaintiffs have standing to pursue their claims. Accordingly, defendants move to dismiss.

II. Analysis

A. Justiciability

Defendants argue the matter is not justiciable because plaintiffs lack standing to pursue their claims, and deny the matter is ripe for review.

Defendants also claim the Complaint fails to state a claim upon which relief can be granted.

"Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary*, 501 U.S. 312, 316 (1991). Plaintiffs bear the burden of alleging facts showing they are proper parties "to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Id.* (internal quotations omitted).

A plaintiff who would invoke federal subject matter jurisdiction must "demonstrate an actual, ongoing case or controversy within the meaning of Article III of the Constitution." *Republican Party of Minnesota v. Klobuchar*, 381 F.3d 785, 789-90 (8th Cir. 2004) (internal quotation omitted). "The basic inquiry is whether the conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Zanders v. Swanson*, 573 F.3d 591, 593 (8th Cir. 2009) (internal quotation omitted). Ultimately, plaintiff must establish at a minimum, (1) an "injury in fact," (2) "fairly traceable to the challenged action of the defendant," such that (3) the injury will likely be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted).

Here, plaintiffs claim Minnesota Statute § 211B.06 is facially overbroad. One bringing a First

Amendment challenge to a criminal statute "need not expose itself to arrest or prosecution" to demonstrate an injury in fact. *Saint Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006). "[A]ctual injury can exist for standing purposes . . . as long as the plaintiff is objectively reasonably chilled from exercising his First Amendment right to free expression in order to avoid enforcement consequences." *Klobuchar*, 381 F.3d at 792. But, to show an objectively reasonable chilling effect, a plaintiff must show "a credible threat of prosecution under [the] statute if the plaintiff actually engages in the prohibited expression." *Id*.

Here, the Court finds plaintiffs have failed to establish either that they actually intend to engage in conduct targeted by the statute, or there is a credible threat of prosecution if they do so. Accordingly, the Court finds no actual injury.

The Court cannot doubt plaintiffs intend to speak about future ballot questions involving bond levies and tax referenda. From this presumption, the Court can infer plaintiffs' speech will include criticism of the proposals. Plaintiffs' Complaint – perhaps understandably – does not allege specifically what they intend to say in the future. Instead, they generally claim an intent to make statements "including but not limited to exaggerated statements of fact, policy, or position, to emphasize [their] political beliefs and to agitate political discussions." (*See*, *e.g.*, Compl. ¶ 32.) Plaintiffs similarly aver they will make "statements that will be interpreted by others as false,

misleading, non-defamatory, unfavorable or unfair deductions or inferences, express opinions, rhetoric, and use of figurative language, and statements not easily representative or supportable by fact." (*See, e.g.*, Compl. ¶ 54.)

Assuming all of the foregoing to be true, such speech is undeniably protected by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964) (protected speech includes "vehement, caustic, and sometimes unpleasantly sharp attacks"); *Garrison v. Louisiana*, 379 U.S. 64, 78 (1964) (*New York Times* rule "forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false.") For precisely that reason, the statute's words do not target the kind of speech plaintiffs claim they will disseminate.

The statute 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) (construing pre-2004 statute). The statute does not even proscribe false statements of fact, unless such false statements are made with knowledge of their falsity, or with reckless disregard of whether they are true or false. *See* Minn. Stat. § 211B.06 subd. 1 (2008). This statutory exception encompasses the United States Supreme Court's "actual malice" standard. *See New York Times*, 376 U.S. at 279-80. Good faith or negligent errors of fact are protected by the First Amendment; knowing

falsehoods are not. *See id.* The same holds true of factual errors in campaign statements. *See Brown v. Hartlage*, 456 U.S. 45, 60-62 (1982) (First Amendment violated by Kentucky campaign statute prohibiting all false statements of fact, because prohibition not limited to statements made with actual malice).

The challenged Minnesota statute requires both a false statement of fact, and the declarant's actual malice. Minn. Stat. § 211B.06 subd. 1 (2008). Both requirements have been narrowly construed by Minnesota courts. *See Riley v. Jankowski*, 713 N.W.2d 379, 404 (Minn. Ct. App. 2006).

The statute applies only to false statements of fact, not exaggerations, unreasonable inferences, or statements of opinion. *See Kennedy*, 304 N.W.2d at 300; *Fine v. Bernstein*, 726 N.W.2d 137, 144 (Minn. Ct. App. 2007). Whether a statement is fact or opinion is a question of law, governed by four factors: "(1) a statement's precision and specificity; (2) a statement's verifiability; (3) the social and literary context in which the statement was made; and (4) a statement's public context." *Fine*, 726 N.W.2d at 144. Such inquiries are necessarily fact-intensive, and absent specific allegations of the content of plaintiffs' proposed statements, the Court is plainly unable to decide, in advance, whether they be fact or opinion.

Statements of opinion are clearly protected by the First Amendment. *See Fine*, 726 N.W.2d at 144. It is also clear the statute – both on its face, and as

construed by Minnesota courts – does not target "exaggerated statements," "opinions, rhetoric," "use of figurative language, and statements not easily representative or supportable by fact." (Compl. ¶ 54.)

Even if the Court assumed plaintiffs' allegations encompassed their intent to make false statements of fact, those statements would not violate § 211B.06, absent actual malice. The statute's terms prohibit only statements made with knowledge of their falsity, or with reckless disregard of whether they are false. Minn. Stat. § 211B.06 subd. 1. "Notably, the standard for reckless disregard for truth is a subjective one." *Riley*, 713 N.W.2d at 398 (citing *Chafoulias v. Peterson*, 668 N.W.2d 642, 654-55 (Minn. 2003)). It requires that a party "make a statement while subjectively believing that the statement is probably false." *Riley*, 713 N.W.2d at 398.

Thus, to engage in conduct even facially prohibited by the statute, plaintiffs must: (1) make false statements of fact, which (2) they either knew at the time were false, or subjectively believed were probably false. Even given a charitable reading, the Court finds plaintiffs' allegations fail to rise to this level. An intent to make "exaggerated" statements that "will be interpreted by others as false" does not trigger the statute, for the test is not objective; only the speaker's knowledge and belief counts.

Having failed to allege an intent to engage in speech actually prohibited by the statute, plaintiffs have failed to establish a credible threat of prosecution.

Gaertner, 439 F.3d at 487; *Klobuchar*, 381 F.3d at 792-93; *Zanders*, 573 F.3d at 594.

The record reflects other reasons why plaintiffs cannot show a credible threat of prosecution. For example, plaintiffs have never been criminally prosecuted – by any of the named defendants, or anyone else – under the statute. They have entirely failed to identify any criminal prosecutions related to ballot questions since the statute's 2004 amendment.

Plaintiffs suggest defendants might initiate civil proceedings before the OAH. Assuming, arguendo, Minnesota's law would permit it, the Court finds plaintiffs have shown no reasonable probability that defendants might do so. The Court credits defendants' uncontroverted claim that, since the 2004 statutory amendments, they have never filed a single civil enforcement proceeding under the challenged statute.

While defendants do not disclaim their general obligation to enforce Minnesota law, the Court finds any threat of an actual criminal prosecution or civil enforcement proceeding against plaintiffs to be speculative and hypothetical in the extreme. *See Poe v. Ullman*, 367 U.S. 497, 508 (1961) (no credible threat of prosecution under statute that had never been enforced). In the absence of any such threat, plaintiffs have failed to assert any cognizable risk of actual injury from the named defendants.

B. Ripeness

"Ripeness requires a court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *KCCP Trust v. City of North Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005) (internal quotation omitted). If a claim rests upon "contingent future event[s]" which may not occur, the claim is not ripe. *Id*. For example, in *KCCP*, a cable company sought to enjoin Kansas City from owning or operating a cable television facility without the public vote required by statute. *Id.* at 898. As the city did not yet own or operate such a facility, and had no plans to do so, the dispute was not ripe. *Id.* at 899.

Similarly, *Renne v. Geary* involved a challenge to a California constitutional provision barring political parties from endorsing candidates for nonpartisan offices. San Francisco historically attempted to comply with the provision by deleting party endorsements from nonpartisan candidates' official statements mailed to city and county voters. A group of voters and political committee members sought to enjoin this practice.

The Supreme Court found their claims were not ripe for judicial decision because the political committee members had not alleged "an intention to endorse any particular candidate." *Renne*, 501 U.S. at 321. "We do not know the nature of the endorsement, how it would be publicized, or the precise language [city and county officials] might delete from the voter

pamphlet." *Id*. at 322. The court observed it "possess[ed] no factual record of an actual or imminent application" of the constitutional provision "sufficient to present the constitutional issues in clean-cut and concrete form." *Id*. at 321 (internal quotation omitted). The court also found the parties faced no substantial hardship from a deferred adjudication. "Postponing consideration of the questions presented, until a more concrete controversy arises, also has the advantage of permitting the state courts further opportunity to construe [the provision], and perhaps in the process to materially alter the question to be decided." *Id*. at 323.

So, too, here. Plaintiffs' claim rests on undefined future events which may or may not occur. They have identified no election cycle in which they would like to be heard; no specific referendum or ballot question they wish to oppose; and, as noted, they have not specified any particular statements they wish to make.

The Court is constrained to conjecture whether there may, at some unknown time, be a school district which may offer a bond referendum as a ballot question. The Court can then question whether plaintiffs may opt to make specific – but unknown – statements opposing it. And from these compounded conjectures, the Court might manufacture a possible factual record on which to offer an opinion – if anyone challenges the possible opposing statements. This is not a prescription for ripeness. And under these circumstances, the Court sees no realistic possibility of any

hardship to plaintiffs from a decision to stay its hand and withhold immediate judicial determination.

Plaintiffs have also failed to demonstrate why Minnesota courts could not, or would not, protect them, should a real case arise. This concern is supported by the fact that the only time plaintiffs claim one of them faced a challenge under this statute, the challenge failed. And plaintiffs have offered no evidence showing they attempted to seek recompense for their claimed legal fees, or that they were denied the opportunity to do so by the OAH or the Minnesota courts.

For all these reasons, the Court grants defendants' motion to dismiss for lack of subject matter jurisdiction.

C. Failure To State A Claim

Even if the Court found subject matter jurisdiction, it would be constrained to dismiss the Complaint for failure to state a claim upon which relief can be granted. As already noted, the Court takes as true properly-pleaded factual allegations in the Complaint. But it is not "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation omitted).

To survive a motion to dismiss, a complaint must contain sufficient facts – accepted as true – to state a claim to relief "plausible on its face." *Ashcroft v. Iqbal*,

129 S.Ct. 1937, 1949 (2009). A "plausible" claim states facts which allow a court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Where the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Id*. at 1950. Facts that are "merely consistent with" liability, therefore, are not sufficient to state a claim. *Id*. at 1949.

The Court finds plaintiffs' Complaint fails to plead facts showing § 211B.06 subd. 1 (2008) is unconstitutional. As discussed, the statute's words target only false statements of fact made with actual malice. The Supreme Court recognizes that regulating such speech comports with the First Amendment. Under these circumstances, the Complaint's allegations do not plausibly allege the statute's violation of the First Amendment.

Plaintiffs suggest the "actual malice" standard is limited to cases involving defamation, and may not be applied to ballot questions where no one's reputation is at stake. (Pl. Memorandum in Support of Summary Judgment at 39-41.) They argue that if speech is not defamatory, it is not for a state to determine its truth or falsity. From this precept, they claim a state's attempt to do so, itself, violates the First Amendment. Plaintiffs support this assertion by offering a Washington Supreme Court opinion holding the First Amendment prohibits a state from regulating false but non-defamatory speech. *Washington ex rel. Public*

Disclosure Comm'n v. 119 Vote No! Committee, 957 P.2d 691, 695 (Wash. 1998). This Court has no cavil with the Washington Supreme Court, but its holding appears to be unique to that State. Plaintiffs cite no Minnesota law, nor indeed any other state's embrace or adoption of the Washington holding.

Minnesota, like the United States, holds false statements made with actual malice are without First Amendment protection, and may be prohibited or regulated. *See Chafoulias*, 668 N.W.2d at 654-55; *Fine*, 726 N.W.2d at 146-47; *Garrison*, 379 U.S. at 75. Importantly, the United States Supreme Court has never limited its actual malice requirement to cases of defamation. Indeed, it has applied it to cases involving false but non-defamatory speech. *See Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (holding New York statute banning invasion of privacy violated First Amendment, absent proof that false statements were published with actual malice). Accordingly, the Court declines plaintiffs' invitation to ignore the actual malice standard.

Finally, plaintiffs argue § 211B.06 subd. 1 is both overbroad and underinclusive. Claiming the statute targets both those who merely disseminate false statements as well as those who create them, plaintiffs argue it is overbroad, chilling the speech and association rights of volunteers who would distribute their campaign literature. (Pl. Opp. Mem. at 31-33.) They, conversely, claim that as the statute targets only paid political advertising, campaign materials, and letters to the editor, while not addressing identical

statements communicated via other means, it is underinclusive. (*Id*. at 33-35.)

The Court cannot concur. On its face, and as interpreted by Minnesota's courts, the statute targets only false statements made with actual malice – speech lying beyond the First Amendment's ambit. Accordingly, plaintiffs cannot show the statute substantially prohibits protected speech.

Plaintiffs' argument on underinclusiveness is fundamentally flawed. The United States Supreme Court has held "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 387 (1992). Thus, a state may prohibit unprotected speech "only in certain media or markets," without disturbing the First Amendment. *Id.* Minnesota Statute § 211B.06 prohibits knowing false statements in paid political advertising, campaign material, or letters to the editor; such limits are consistent with the First Amendment. The challenged statute may not be a masterpiece of the legislative art, but that does not make it unconstitutional. And, ultimately, plaintiffs have not pleaded a cognizable case against it.

Because the Court finds this matter must be dismissed for lack of subject matter jurisdiction, it denies plaintiffs' motion for summary judgment as moot.

III. Conclusion

For the foregoing reasons, defendants' motion to dismiss is granted; plaintiffs' motion for summary judgment is denied.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: February 19, 2010

s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1558

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-JMR)

ORDER

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

July 27, 2011

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

/s/ Michael E. Gans