NO. 24-3094

In the United States Court of Appeals for the Eighth Circuit

Minnesota Voters Alliance; Mary Amlaw; Ken Wendling; Tim Kirk

Plaintiffs-Appellants,

v.

Keith Ellison, in his official capacity as Attorney General; Brad Johnson, in his official capacity as Anoka County Attorney,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
District Court No. 0:23-cv-02774-NEB

PLAINTIFFS-APPELLANTS' PRINCIPAL BRIEF

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SUMMARY OF THE CASE

Plaintiffs-Appellants believe that the Minnesota Constitution, Article VII, section 1 prohibits convicted felons from voting in Minnesota elections unless they have been restored to civil rights, plural. Minnesota passed a law ("Felon Voting Law") that purported to restore "the civil right to vote" to convicted felons who are not imprisoned for their crimes. Minn. Stat. § 201.014, subd. 2a (2023). Because Appellants believe that restoring "the civil right to vote" is insufficient to make a felon "restored to civil rights," Appellants wish to be able to say, without retribution from the State, that felons still serving their sentences cannot lawfully vote. After all, the Constitution is the supreme law of Minnesota.

But Minnesota also passed a law, challenged here ("Speech Code"), which attaches criminal and civil penalties to saying so. Minn. Stat. §211B.075 (2023). The law's author expressly said that it targeted Minnesotans like Appellants who dare to say that the Felon Voting Law doesn't override the Constitution and enable felon voting prior to full restoration of civil rights. Appellants thus filed this suit and moved for a preliminary injunction to set the law aside. Appellees moved to dismiss and for judgment on the pleadings. The district court denied Appellants' motion and granted Appellees' motions. This appeal follows. This case implicates important First Amendment issues, so Appellants believe the Court should hear oral argument, 15 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eighth Circuit Local Rule 26.1A, the individual Appellants are not corporations. Appellant Minnesota Voters Alliance does not have any parent corporation, and no publicly held corporation owns 10% or more of its stock.

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The district court had subject-matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1343 because Appellants alleged violations of their First Amendment rights and 42 U.S.C. §§1983 and 1988.[1] The Court issued a final judgment dismissing Appellants' Amended Verified Complaint on September 17, 2024.[2] The same day, the district court denied Appellant's motion for a preliminary injunction.[3] This Court thus has jurisdiction over this appeal pursuant to 28 U.S.C. §1291 because it is an appeal from a final decision of a United States district court, and pursuant to 28 U.S.C. §1292(a)(1) because it is an appeal from an order of a United States district court "refusing . . . [an] injunction[]." Appellants timely filed the notice of appeal from the order and judgment on October 14, 2024.[4]

[1] App. 24-31; R.Doc. 13; Am. Compl. ("AC") ¶¶98-143.

[2] App. 344; R.Doc. 54; Judgment.

[3] *Id.*; App. 343; R.Doc. 53 at 14; Add. 14.

[4] App. 345; R.Doc. 55; Notice of Appeal.

STATEMENT OF ISSUES

1. Whether Appellants saying that felons who have not completed their sentences are ineligible to vote in Minnesota is "political speech" or "speech on matters of public concern" and occupies the highest rungs of First Amendment protection.

Apposite Cases and Statutes:

a. *Snyder v. Phelps*, 562 U.S. 443 (2011);
b. *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality);
c. *Stromberg v. California*, 283 U.S. 359 (1931);
d. *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1 (2018).

2. Whether Minn. Stat. §211B.075 is an unconstitutional content- and viewpoint-based restriction of speech which fails to advance any compelling government interest and is not narrowly tailored to any government interest.

Apposite Cases and Statutes:

a. *281 CARE Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014);
b. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015);
c. Minn. Stat. §211B.075.

3. Whether Minn. Stat. §211B.075 is a prior restraint on speech about voter eligibility because it allows the Attorney General, County Attorney, or any member of the public claiming to have been harmed by speech to sue to enjoin future speech.

Apposite Cases and Statutes:

a. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976);
b. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963);
c. *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015);
d. Minn. Stat. §211B.075.

4. Whether Minn. Stat. § 211B.075 is unconstitutionally vague because it leaves critical terms undefined such as (a) what speech constitutes a "direct[] or indirect[] .

. . threat[]" and (b) how a person may "hinder" or "impede" another from voting.

Apposite Cases and Statutes:

a. *United States v. Williams*, 553 U.S. 285 (2008);
b. *Counterman v. Colorado*, 600 U.S. 66 (2023);
c. *Baggett v. Bullitt*, 377 U.S. 360 (1964);
d. Minn. Stat. §211B.075.

5. Whether the district court erred in granting Appellees' motions for judgment on the pleadings and to dismiss.

Apposite Cases and Statutes:

a. Same as 1-4.

6. Whether the district court erred in denying Appellants' motion for a preliminary injunction.

Apposite Cases and Statutes:

a. Same as 1-4.

STATEMENT OF THE CASE

I. Minnesota passed a Felon Voting Law, which Appellants challenged in state court.

Article VII, section 1 of the Minnesota Constitution states:

> Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.

Appellants believe this article requires a felon to first be "restored to civil rights" before voting in Minnesota elections.[5] Merely restoring "the right to vote," which is but one of the "civil rights" lost upon sentencing, is insufficient.[6]

Undeterred, Minnesota chose that path: in 2023, the legislature amended Minn. Stat. §201.014, to include subdivision 2a, to state:

> An individual who is ineligible to vote because of a felony conviction has ***the civil right to vote*** restored during any period when the individual is not incarcerated for the offense. If the individual is later incarcerated for the offense, the individual's civil right to vote is lost only during that period of incarceration.

(emphasis added). Appellants believe this law was ineffective because it did not

[5] App. 17; R.Doc. 13; AC ¶53.

[6] App. 2; R. Doc. 13; AC ¶4.

restore the civil rights a felon lost upon sentencing and therefore conflicts with the Minnesota Constitution.[7] One Minnesota district court judge agreed and issued orders holding that the Felon Voting Law was unconstitutional and prohibiting recently convicted felons from voting until restored to civil rights, plural. *See, e.g.*, Order Holding Minn. Stat. §201.014, subd. 2a (2023) Unconstitutional, *Minnesota v. Trevino*, 48-CR-21-1450, Doc. 68 (Minn. Dist. Ct. Oct. 12, 2023).[8]

Appellants themselves also sued the state and Anoka County over the implementation of this unconstitutional law and lost in district court. *Minn. Voters All. v. Hunt*, No. 02-CV-23-3416, 2023 Minn. Dist. LEXIS 5308 (Minn. Dist. Ct. Dec. 13, 2023).[9] Unfortunately, the Minnesota Supreme Court failed to answer the constitutional question, instead (incorrectly) dismissing the case on standing grounds. *Minn. Voters All. v. Hunt*, 10 N.W.3d 163 (Minn. 2024). Thus, it remains an open question on an important matter of voter eligibility whether felons still under sentence can lawfully vote in Minnesota elections.

[7] App. 17; R.Doc. 13; Am. Compl. ¶¶53-54.

[8] Available at, https://tinyurl.com/3bfvjy3e. The Minnesota Court of Appeals later issued a writ of prohibition overriding the state district court order without reaching the constitutional-interpretive issue. *See In re Weyaus*, Nos. A23-1565, A23-1570, 2023 Minn. App. LEXIS 409 (Minn. Ct. App. Nov 2, 2023).

[9] App. 17; R.Doc. 13; Am. Compl. ¶56.

II. Appellants have spoken, and intend to speak, about their views on voter eligibility under Minnesota law, which is a broad issue of great public importance.

Appellants are Minnesota voters and an organization of Minnesota voters who want to speak freely on important matters of public concern regarding elections in Minnesota.[10] As part of their advocacy, they talk to their friends, colleagues, acquaintances, and others about their views on voter eligibility, especially given the increased focus on eligibility after the 2023 legislature passed the unconstitutional Felon Voting Law discussed above.

Each Appellant has publicly argued that the Felon Voting Law unconstitutionally expands the voter franchise.[11] Each Appellant intends to continue arguing and saying that felons still serving their sentences are not eligible to vote in Minnesota.[12] They have made these statements out of court,[13] and, through their attorneys, they made these statements in court filings and open court,[14] and the local media has broadcast the arguments in video, audio, and written form throughout Minnesota.[15]

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[10] App. 7-11; R.Doc. 13; AC ¶¶ 23-31.

[11] *Id.*

[12] App. 17-18; R.Doc. 13; AC ¶¶57-58.

[13] App. 7-11; R.Doc. 13; AC ¶¶23-31.

[14] App. 1-2; R.Doc. 13; AC ¶¶3-5.

[15] *See, e.g.*, Nicole Ki & Matt Sepic, MPR, *Judge weighs challenge to Minnesota felon voting law* (Oct. 30, 2023), https://tinyurl.com/dcja3nms.

Appellants' statements have been and will continue to be based on their view that under the Minnesota Constitution, those still serving felony sentences who have not had their lost "civil rights" restored are constitutionally ineligible to vote. They are not attorneys and may not always speak with excruciating nuance about the detailed basis for their beliefs. They have alleged as follows:

- The [Appellants] . . . believe that, under current law, those convicted of felonies must complete their sentences before they can register to vote and vote, consistent with the Minnesota Constitution.[16]
- [Appellants] intend to continue to speak . . . as to their view of the Minnesota Constitution: felons who have not served their full sentences, or otherwise had their sentences discharged, cannot legally vote. This is because [the Felon Voting Law] . . . conflicts with the Constitution.[17]
- MVA has repeatedly argued, in the public square, that felons still serving their sentences are not eligible to vote under the Minnesota Constitution, and the Felon Voting Law passed to the contrary is preempted by Article VII, section 1 of the Minnesota Constitution.[18]
- [Appellant] . . . believes, says, and will continue to believe and say . . . that felons still serving their sentences are not eligible to register to vote or vote under the Minnesota Constitution because the Felon Voting Law is unconstitutional.[19]
- [Appellants] have not said, and do not intend to say, that the Felon Voting Law does not exist. Rather, [Appellants'] political speech relates to their

[16] App. 1-2; R.Doc. 13; AC ¶ 3.

[17] App. 2; R.Doc. 13; AC ¶5.

[18] App. 7-8; R.Doc. 13; AC ¶23.

[19] Each individual Appellant made this verified allegation. App. 9-11; R.Doc. 13; AC ¶¶26, 28, 30.

> opinions about the interrelation of the Minnesota Constitution and the Felon Voting Law—that the former preempts the latter.[20]

But their public statements are now subject to the chilling effect of the Speech Code, which threatens to punish them for disfavored speech.[21]

That the Speech Code's purpose. To its author and proponents, that's a good thing:

> Rep. Emma Greenman, DFL-Minneapolis, a national voting rights attorney and chief author of the election bill, said the provision is designed to protect voters from intimidation, harassment or anything that would hinder them from voting.
> . . . .
> Now that the state is restoring voting rights for over 50,000 people on parole or probation, Greenman anticipates disinformation that might say, "**You're a felon and you can't vote**."[22]

What's more, after the Appellants filed *Hunt*, the author of the Felon Voting Law, Representative Cedric Frazier, falsely stated:

> This is nothing more than an attempt to suppress the vote of certain members in our communities across the state. By bringing this lawsuit, MVA is seeking to create confusion and fear among our neighbors who have recently had their voting rights restored.[23]

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[20] App. 17-18; R.Doc. 13; AC ¶58.

[21] App. 8-11; R.Doc. 13; AC ¶¶24, 27, 29, 31.

[22] Deena Winter, *Election bill would make it illegal to knowingly spread false information that impedes voting*, Minnesota Reformer (Mar. 7, 2023), https://tinyurl.com/3d5s4vfr (emphasis added); App. 4; R.Doc. 13; AC ¶14.

[23] *Rep. Cedric Frazier statement on Restore the Vote Lawsuit*, Minn. House of Representatives (June 29, 2023), https://tinyurl.com/2cjh49sk; App. 5; R.Doc. 13; AC ¶15.

The Minnesota media robustly, if unevenly, covered *Hunt*.[24] The ACLU of Minnesota, which represented intervenors in *Hunt*, went so far as to falsely declare that the lawsuit itself was designed to dampen voter turnout for convicted felons.[25] And, after a Minnesota judge held the Felon Voting Law unconstitutional, Appellee Ellison publicly complained,[26] while community activists called the ruling "dangerous," and Governor Tim Walz likened it to intimidation.[27]

Politicians have campaigned on and openly discussed the merits or demerits of

[24] *See, e.g.*, Liz Sawyer, Star Tribune, *Anoka judge rejects challenge to Minnesota's new law restoring voting rights to felons* (Dec. 15, 2023), https://tinyurl.com/39w2jhw3; Michelle Griffith, Minn. Reformer, *Facing skeptical court, right-wing group seeking to limit voting rights of felons relies on grammar* (Apr. 1, 2024), https://tinyurl.com/yc23nc6j.

[25] *See, e.g.*, Peter Callaghan, MinnPost, *With ACLU, formerly incarcerated Minnesotans ask to intervene in suit challenging restoration of voting rights* (Sept. 6, 2023), https://tinyurl.com/ms7pcvhp ("McKinney said he is suspicious that the suit is actually an attempt to discourage people covered by the law from registering and voting, that the motivations behind it are political and not constitutional.").

[26] FOX9, *Mille Lacs Co. judge interfering with felons' right to vote: AG Ellison* (Oct. 20, 2023), https://tinyurl.com/34ztzm35 ("It took two decades to pass a law to restore the right to vote to people who are longer incarcerated, and the new law that restores that right is fully constitutional. Minnesotans should know Judge Quinn's illegal orders have no effect on their voting rights.").

[27] Mohamed Ibrahim, MinnPost, *Felons' voting rights unaffected by unprompted ruling by judge on new law, say AG Ellison, Sec. Simon* (Nov. 24, 2023), https://tinyurl.com/5ccd7y2k ("No intimidation, no wrong rulings, nothing will preclude you from that very basic right as an American to be able to cast your vote."). This is the same Governor Walz who stridently claimed on the VP campaign trail that as part of another new Minnesota speech law, employers who talk to their employees about unionization "go to jail now." *See How Tim Walz Defines Free Speech*, Wall Street Journal (Sept. 9, 2024), https://tinyurl.com/4he6mvvx.

felon voting. The Internet is full of examples.[28] Minnesota is just one of several states that have recently liberalized felon voting laws following substantial media and public lobbying campaigns to extend the voting franchise.[29]

All in all, the question of whether felons can vote in Minnesota elections before they finish their sentences is a hot-button political issue and otherwise an issue of great public interest and concern. Many individuals talk about it, but only those who have the "wrong" view of the law—like Appellants apparently do—are facing censorship. Free speech for Appellee Ellison, the ACLU, and the Minnesota media, but

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[28] Sen. Mark Johnson called it out as not a priority. Minnesota Senate Republicans (@mnsrc), *X* (Mar. 16, 2023, 12:59 PM), https://tinyurl.com/2jc6m4xk. Deputy Department of Corrections Commissioner Sarah Walker said Minnesota needed to restore felon voting rights. Stephen Montemayor (@smontemayor), *X* (Feb. 7, 2019, 10:12 AM), https://tinyurl.com/2w3ebhxt. MSNBC's Kyle Griffin touted the Felon Voting Law as a feather in Governor Walz's cap after his VP-candidate selection. Kyle Griffin (@kylegriffin1), *X* (Aug. 6, 2024, 9:35 AM), https://tinyurl.com/2nkhf7m7. President-elect Trump issued a statement excoriating Governor Walz for legalizing felon voting. Lauren Irwin, *Trump campaign slams Harris VP pick Walz: 'West Coast wannabe'*, The Hill (Aug. 6, 2024), https://tinyurl.com/2pr259sy; Stephen Montemayor of the Star Tribune chronicled the major Minnesota political leaders who have waged a public lobbying campaign for felon voting for years. Stephen Montemayor, *Push to restore felon voting rights in Minnesota gains momentum, key supporters*, The Minnesota Star Tribune (Feb. 5, 2019), https://tinyurl.com/5xhdcumf.

[29] *E.g.*, Nebraska: John Grinvalds, *Nebraska Supreme Court upholds felon voting rights after sentence served*, 10/11NOW (Oct. 16, 2024), https://tinyurl.com/yj3b3jvn; Virginia: Henry Graff, *Virginia lawmakers advance constitutional amendments ahead of session start*, 29News (Nov. 13, 2024), https://tinyurl.com/mts9hatw; New Mexico: *Former inmates with felony convictions can register to vote under new provisions in New Mexico*, AP (Oct. 10, 2024), https://tinyurl.com/mrxwf9kc.

not for Appellants and others with similar views.

And it's not just the issue of felons. For instance, Appellants also believe that those under guardianship may not vote under the Minnesota Constitution and are concerned that they could be targeted for expressing those views as well.[30] At present, many under guardianship are voting in Minnesota elections, despite the express prohibition of Minn. Const. art. VII, §1. *See In re the Guardianship of Brian W. Erickson*, No. 27-GC-PR-09-57 (Minn. Dist. Ct. Oct. 4, 2012).[31]

The legislature also recently passed a law that allows 16- and 17-year-olds to "preregister" to vote so that they are registered once they turn 18. Minn. Stat. §201.061, subd. 1b (2023). Given recent trends, it is not unthinkable that Minnesota could soon pass a law that allows 16-year-olds to vote. Former Speaker of the House Nancy Pelosi supports the idea,[32] as have other congresspeople.[33] But the Minnesota Constitution limits voting to those 18 and older. Minn. Const. art. VII, §1. This Speech Code could easily be applied to speech criticizing such a law, or court

[30] App. 21; R.Doc. 13; AC ¶77.

[31] Available at https://tinyurl.com/4abecj4b.

[32] John Bowden, The Hill, *Pelosi says she backs lowering voting age to 16* (Mar. 14, 2019), https://tinyurl.com/bdhz963u.

[33] Peter Hasson, Daily Caller, *125 Democrats And 1 Republican Vote To Lower Voting Age To 16* (Mar. 8, 2019), https://tinyurl.com/wts4ch2y.

decisions, that violate the Constitution, like the Felon Voting Law does.

III. The Speech Code.

The Speech Code provides, in relevant part:

> Subdivision 1. **Intimidation.**
> (a) A person may not directly or indirectly use or threaten...damage, harm, or loss...against:
> (1) any person with the intent to compel that person to register or abstain from registering to vote, vote or abstain from voting....
>
> Subd. 2. **Deceptive practices.**
> (a) No person may, within 60 days of an election, cause information to be transmitted by any means that the person:
> (1) intends to impede or prevent another person from exercising the right to vote; and
> (2) knows to be materially false.
> (b) The prohibition in this subdivision includes but is not limited to information regarding the time, place, or manner of holding an election; the qualifications for or restrictions on voter eligibility at an election; and threats to physical safety associated with casting a ballot.
>
> Subd. 3. **Interference with registration or voting.**
> No person may intentionally hinder, interfere with, or prevent another person from voting, registering to vote, or aiding another person in casting a ballot or registering to vote.

Minn. Stat. §211B.075. Subdivision 5 makes a violation a "gross misdemeanor" subject to "a civil penalty of up to $1,000 for each violation" and authorizes the "attorney general, a county attorney, or *any person* injured by an act prohibited by this section" to "bring a civil action to prevent or restrain a violation of this section," including for money damages and injunctive relief. *Id.* §211B.075, subd. 5 (emphasis added). What's more, it allows those same parties (meaning: anyone) to "restrain

a violation of this section if there is a *reasonable basis to believe* that an individual...*intends to commit* a prohibited act." *Id.* subd. 5(b) (emphasis added). And under subdivision 4, organizations like MVA may be criminally liable for their members' speech, and their members for the organization's speech. *Id.* subd. 4.

Despite restricting core political speech, the statute largely fails to define its terms: it does not define "impede," nor describe what constitutes a "threat" "to physical safety"; nor explain what it means to "advise," "counsel," or "incite" another person to do the same. *Id.*[34]

IV. Appellants' real fears, and the credible threat, of prosecution.

By its text, the Speech Code presents a real problem for Appellants. MVA is a nonpartisan organization that provides research and voter education to Minnesotans, including election rules.[35] MVA cares deeply about freedom of speech, and particularly speech about elections. *See, e.g., Mansky*, 585 U.S. 1 (striking down ban on wearing political attire while voting). The individual Appellants are voters and political activists.[36] Appellants regularly engage in speech on matters of public concern, including Minnesota election law.[37] Their speech about elections can be,

[34] App. 14-16; R.Doc. 13; AC ¶¶42-45, 49.

[35] App. 7-8; R.Doc. 13; AC ¶23.

[36] App. 8-9; R.Doc. 13; AC ¶25.

[37] App. 7-10; R.Doc. 13; AC ¶¶23, 26, 28, 30.

especially to ideological opponents, controversial. Now they must speak with trepidation, because the Speech Code threatens them with both criminal and civil penalties if their speech upsets the powers-that-be—or anyone else, as the statute includes a private right of action. Minn. Stat. §211B.075, subd. 5.[38]

Those fears have already been realized. After filing this lawsuit, County Attorney Johnson slammed Appellants with a counterclaim seeking a restraining order against their speech, plus civil penalties and costs of investigation.[39] After Appellants amended the Complaint, Johnson doubled down and brought an Amended Counterclaim.[40] In Johnson's view, statements like "felons who have not served their full sentence, or otherwise had their sentences discharge, cannot legally vote" and "felons still serving their sentences do not have a right to vote in Minnesota because the Minnesota Constitution preempts the Felon Voting Law," are "intended to, and actually will, interfere with the ability of convicted felons to exercise their lawful right to vote."[41] Johnson went after not only the statements Appellants made in their Amended Complaint, but also those made in the *Hunt* litigation.[42] In other words,

[38] App. 4; R.Doc. 13; AC ¶12.

[39] App. 6; R.Doc. 13; AC ¶19.

[40] App. 55-67; R.Doc. 16; Amend. Counterclaim.

[41] App. 63; R.Doc. 16; Amend. Counterclaim ¶27.

[42] App. 62; R.Doc. 16; Amend. Counterclaim ¶24.

under the Speech Code, Appellants have been targeted for raising good-faith constitutional questions.

According to Johnson, Appellants' statements violate *every* provision of the Speech Code, with Appellants' political speech somehow causing "a reasonable person previously convicted of a felony but no longer incarcerated" to "feel intimidated," in violation of subdivision 1 of the Speech Code.[43] This speech is also purportedly a deceptive practice which violates subdivision 2 and somehow managed to "hinder, interfere with, or prevent another person from registering to vote," in violation of subdivision 3.[44] Johnson's Amended Counterclaim again asked for an order blocking Appellants' speech, damages to compensate Johnson for the costs of investigating Appellants' speech, attorney fees, and a civil penalty of $1,000 for each violation.[45]

At the district court, Johnson did note that he has no "present intention" of "actively pursuing this counterclaim until the court rules on our pending motion for judgment on the pleadings."[46] Still the threat remained: "if we learn from members of the public that [Appellants] are making false statements that interfere with the

[43] App. 65; R.Doc. 16; Amend. Counterclaim ¶36.

[44] App. 65; R.Doc. 16; Amend. Counterclaim ¶¶38-40.

[45] App. 66-67; R.Doc. 16; Amend. Counterclaim ¶46.

[46] App. 246; R.Doc. 43-1; Second Stover Decl., Exhibit A.

exercise of eligible voters' right to vote, then in that circumstance, we may need to ask the Court to act prior to the scheduled February hearing date."[47] Johnson was only willing to back off the threat—temporarily—if Appellants would agree to "not mak[e] the types of statements described in the Amended Complaint."[48]

Johnson's counterclaims demonstrate that Appellants' fears that the Speech Code would be used to chill their political speech were reasonable; indeed, prophetic.[49] The Speech Code has already harmed Appellants by chilling their speech. Now, if Appellants make the grave mistake of engaging in further political speech, they risk further action and prosecution by Appellees, and anyone else in Minnesota.

V. This lawsuit and its procedural posture.

Appellants filed this lawsuit on September 11, 2023, seeking declaratory and injunctive relief against the Speech Code. County Attorney Johnson answered and counterclaimed, and Appellants filed an Amended Verified Complaint.[50] Appellee Johnson filed an amended counterclaim,[51] and then brought a motion for judgment

[47] *Id.*

[48] *Id.*

[49] App. 6-7; R.Doc. 13; AC ¶¶18-20.

[50] App. 1-37; R.Doc. 13; AC.

[51] App. 55-67; R.Doc. 16; Amend. Counterclaim.

on the pleadings.[52] Attorney General Keith Ellison brought a motion to dismiss.[53] Appellants opposed Appellees' motions and sought a preliminary injunction against the enforcement of the Speech Code.[54]

All three motions were heard on February 21, 2024. Ellison defended the Speech Code as simply "prohibit[ing] messages intended to mislead voters about voting requirements."[55] Judge Brasel pushed back on this statement and acknowledged that subdivision 2 of the Speech Code is not really limited to "requirements and procedures" about voting because "[t]he prohibition in this subdivision includes *but is not limited to* information regarding the time, place or manner of holding an election."[56] Judge Brasel observed that "'[i]ncludes but not limited to' is problematic" and stated she had "never seen that phrase written with an intent to restrict."[57] Ellison assured the court that the plain statutory text somehow wouldn't apply to statements causing someone to "choose not to vote,"[58] while also acknowledging that a key feature of

[52] App. 68; R.Doc. 17; Anoka Cnty. Mot. for J. on the Pleadings.

[53] App. 123; R.Doc. 23; Def. Ellison's Mot. to Dismiss.

[54] App. 155-197; R.Doc. 32; Pls.' Mem. in Opp. to Defs.' Mots. to Dismiss and for J. on the Pleadings; App. 198; R.Doc. 33; Pls.' Mot. for a Prelim. Inj.

[55] Tr. 16:24-25.

[56] Tr. 29:6-12 (emphasis added).

[57] Tr. 29:13-16.

[58] Tr. 30:3.

the statutory scheme is to "discourag[e]" Appellants from speaking.[59]

Moreover, a key takeaway from the hearing was Appellees' inability to demonstrate that the Speech Code was actually necessary. Judge Brasel asked Ellison what the remedy would be under the Speech Code if an individual is "200 yards from the polling place and they tell somebody, You are a felon, You can't vote."[60] Ellison acknowledged that "the person's remedy would be to ignore them and go in and vote."[61] In other words, most Minnesotans are perfectly capable of voting without having to call on the speech police.

Despite these statements, the Court granted Appellees' motions and denied Appellants' motion for a preliminary injunction.[62] This appeal timely followed.[63]

[59] Tr. 18:25-19:5.

[60] Tr. 18:7-10.

[61] Tr. 18:12-13; *see also* Tr. 18:15-16 (The Court: "Which would probably happen." Counsel: "Yes.").

[62] App. 344; R.Doc. 54; Judgment.

[63] App. 345; R.Doc. 55; Notice of Appeal.

SUMMARY OF THE ARGUMENT

The Speech Code converts Appellees and *anyone* who claims to be somehow harmed by speech into speech police who can haul Minnesotans into court to defend their speech on controversial voter-eligibility issues during Minnesota's recurring election seasons. It therefore violates the First Amendment.

Sure, the defendant in this scenario can still win the case, but as this Court said in *281 CARE Committee v. Arneson*: "[e]ven if the speaker is ultimately victorious, that speaker gets little or nothing for his or her efforts but additional legal bills." 766 F.3d 774, 791 (8th Cir. 2014) (quotation omitted). This is totally unacceptable under the First Amendment. The Speech Code is overbroad, underinclusive, lacks tailoring, lacks proof of a concrete harm to address, and is vague. Like the unconstitutional law in *281 CARE Committee*, the law "perpetuates fraud" by allowing political opponents to shut down speech. *Id.* at 788-90. Minnesotans are more than capable of figuring out what is false and what is true through their own deduction and through counterspeech—as Minnesota's elected government officials who support felon voting, for example, have proven quite capable of doing.

The Court should hold that the Speech Code targets core "political" speech, or speech on "matters of public concern," and thus triggers strict scrutiny. Once it does, because the government can educate voters about their voting rights as it sees fit, the

Speech Code must fall because the government has an option less restrictive of speech available to push the government narrative.

ARGUMENT

I. Standard of review.

This appeal comes from an order and judgment from the district court on cross-motions: the denial of Appellants' motion for a preliminary injunction under Federal Rule of Civil Procedure 65, and the grant of Appellees' motions for judgment on the pleadings and to dismiss under Federal Rule of Civil Procedure 12.[64]

On review of a Rule 12 motion, the Court "accept[s] as true all facts pleaded by the non-moving party and grant[s] all reasonable inferences from the pleadings in favor of the non-moving party." *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1109 (8th Cir. 2017) (internal quote omitted). "The same standards that govern motions to dismiss under Rule 12(b)(6) also govern motions for judgment on the pleadings under Rule 12(c)." *Id.* The Court reviews the district court's conclusions of law *de novo*. *Id.* "In reviewing the sufficiency of the complaint, [the Court] take[s] the factual allegations as true and consider[s] whether they plausibly allege a violation of the Constitution." *Ness v. City of Bloomington*, 11 F.4th 914, 919 (8th Cir. 2021) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

[64] App. 343; R.Doc. 53 at 14 & n.9; Add. 14 & n.9.

The Court reviews "a district court's ultimate ruling on a preliminary injunction for abuse of discretion, though [the appellate court] review[s] its underlying legal conclusions de novo." *Principal Sec., Inc. v. Agarwal*, 23 F.4th 1080, 1083 (8th Cir. 2022) (internal quote omitted). Where a district court rules on the merits of a case but declines to entertain the other three *Dataphase* factors, and this Court reverses on the merits determination (styled as likelihood of success on the merits), it constitutes an abuse of discretion. *See Firearms Regul. Accountability Coal., Inc. v. Garland*, 112 F.4th 507, 526 (8th Cir. 2024); *see also McGlone v. Bell*, 681 F.3d 718, 735-36 (6th Cir. 2012) (vacating denial of preliminary injunction motion when reversing a grant of a motion to dismiss). When this scenario arises, the Court "remand[s] with instructions to reconsider the motion consistent with [the Court's] opinion.". *Firearms*, 112 F.4th at 526.

II. Appellants' speech is core political speech and speech on "matters of public concern."

The district court's most profound error actually comes in a footnote, where it invents—without citation—a new distinction directly conflicting with Supreme Court precedent and unknown to this circuit, by which Appellants' speech about the rules governing the political process in Minnesota is not "'core' political speech" subject to the highest level of constitutional scrutiny, because it is not specifically

"about any issue or candidate on the ballot" but rather is "about who is eligible to vote rather than who *should be* eligible to vote."[65]

The Supreme Court, however, has said otherwise for decades: "[s]peech on 'matters of public concern'...is 'at the heart of the First Amendment's protection.'" *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (opinion of Powell, J.). Because "speech concerning public affairs is more than self-expression; it is the essence of self-government….speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452 (first quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), and then quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). The First Amendment's highest protection goes to public *issues*—not just public candidates or ballot questions, but matters of public *affairs* that no citizen is immediately asked to vote on.

Political speech—or speech "on matters of public concern," as the Supreme Court more accurately terms the idea[66]—is not limited to issues before voters. Rather,

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[65] App. 337; R.Doc. 53 at 8 n.6; Add. 8 n.6 (emphasis in original).

[66] The *Alvarez* Court did not limit the First Amendment's highest rung of protection only to "political" statements, but rather any statement on a "matter of public concern." 567 U.S. 709 (plurality). All nine justices agreed that speech on "matters of public concern," such as Appellants', is entitled to "instrumental constitutional protection." *E.g.*, *id.* at 751 (Alito, J., dissenting) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat.").

"[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'...or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Snyder*, 562 U.S. at 453 (first quoting *Connick*, 461 U.S. at 146, and then quoting *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)).

Take the facts of *Snyder*: the Westboro Baptist Church "believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military." *Id.* at 448. They therefore chose to picket Matthew Snyder's funeral, carrying "signs [that] reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment." *Id.* at 447. What was the issue before the voters there? There was no ballot question related to homosexuality in Maryland in 2006, nor any formal referendum on foreign military interventions. Westboro Baptist's signs mentioned no candidate for office, nor any government official. *Id.* at 448. Yet the Supreme Court found that "Westboro's signs plainly relate[d] to broad issues of interest to society at large, rather than matters of 'purely private concern.'" *Id.* at 454 (quoting *Dun & Bradstreet*, 472 U.S. at 759).

Similarly, in *Stromberg v. California*, 283 U.S. 359 (1931), the defendant was accused of "wilfully [sic], unlawfully and feloniously display[ing] a red flag and

banner in a public place...as a sign...of opposition to organized government." *Id.* at 361. The Court overturned the conviction as unconstitutional because the prohibition against "the display of the flag 'as a sign...of opposition to organized government'.... might also be construed to include peaceful and orderly opposition to government by legal means." *Id.* at 369. None of this speech related expressly to items on a ballot. *See id.*

Similar examples abound. In *Cox v. Louisiana*, citizens were convicted of "disturbing the peace" for protesting "segregation and discrimination against" black Americans. 379 U.S 536, 544-45 (1965) (internal quotation mark omitted). The Court overturned the convictions because protesters could not be held liable for "disturbing the peace" when they were merely engaged in "free political discussion." *Id.* at 552. Likewise, "'Black Lives Matter,' 'Thin Blue Line,' and anti-mask-mandate masks all comment on matters of 'political [or] social concern to the community.'" *Amalgamated Transit Union Loc. 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 103-04 (3d Cir. 2022) (quoting *Snyder*, 562 U.S. at 453). As do social-media posts about critical race theory. *See Gustilo v. Hennepin Healthcare Sys.*, No. 23-3512, 2024 U.S. App. LEXIS 31016, at *3, 16 (8th Cir. Dec. 9, 2024).

The Supreme Court recently reaffirmed this black-letter principle in *Minnesota Voters Alliance v. Mansky*, holding Andy Cilek wearing a "Please ID Me" button and a Tea Party t-shirt was protected political speech, even though no voter

identification law was on the 2010 Minnesota ballot. 585 U.S. 1, 18-19 (2018). Minnesota's proposed voter-ID amendment would not come to the voters until two years after the incidents in *Mansky*. The Court held that Minnesota's proposed "'electoral choices' standard…poses riddles that even the State's top lawyers struggle to solve." *Id.* at 21. One can listen to that oral argument to see exactly what the Court meant.[67] The Court also provided examples in its opinion: "A shirt simply displaying the text of the Second Amendment? Prohibited…But a shirt with the text of the First Amendment? 'It would be allowed.'" *Id.*

Point being, election-related speech is not a special topic insulated from First Amendment scrutiny. Political speech is political speech, even if it's about election regulations. *Buckley v. Am. Constitutional Society*, 525 U.S. 182, 206 (1999) (Thomas, J., concurring in the judgment) (explaining that election regulations "often will directly restrict or otherwise burden core political speech and associational rights"). That's why states can't prohibit voters from photographing their marked ballots, *see Rideout v. Gardner*, 838 F.3d 65, 75-76 (1st Cir. 2016) (striking down prohibition on "ballot selfies" because the law "reaches and prohibits innocent political speech by voters unconnected to the State's interest in avoiding voter buying or voter intimidation"), prevent voters from wearing buttons saying "Please I.D. Me"

[67] Mark Joseph Stern, *The Sam Alito Treatment*, Slate (June 14, 2018), https://tinyurl.com/3nnh47f9.

on election day even where voter ID is not a voting requirement, *see Mansky*, 585 U.S. at 23, nor prohibit political speech within 500 feet of a polling place, *Anderson v. Spear*, 356 F.3d 651, 666 (6th Cir. 2004).

Moreover, bifurcating speech about voting procedures from speech about candidates and ballot proposals in terms of what constitutes "matters of public concern" is just factually wrong. The Internet is full of examples of politicians running on the merits or demerits of felon voting, and other states have dealt with the question of whether felon voting laws are constitutional and thus effective. *Supra* Facts Section II (Nebraska 2024 and Virginia 2016). Because many states have enduring constitutional prohibitions on felon voting, criticism and discussion of laws defying these prohibitions are clearly speech on matters of public concern, especially where a state's highest court has not finally adjudicated the constitutionality of a controversial felon voting law, like in Minnesota. Disputes about voting procedures are and always will be important matters of public debate. Should Minnesota require voters to provide identification, or does that impose a burden that will disenfranchise too many voters? Should mail-in ballots be widely available, or are such ballots overly susceptible to fraud? Should 16-year-olds be allowed to vote; should non-citizens; should felons?

Take the 16-year-old example further. Former Speaker of the United States House of Representatives Nancy Pelosi has come out in support of lowering the

voting age to 16,[68] as have other congresspeople.[69] Assume Minnesota passes a law following their lead and statutorily authorizes 16-year-olds to vote. The Minnesota Constitution says one must be 18 to vote. Minn. Const. Art. VII, §1. If, after the hypothetical law's passage, Andy Cilek bluntly says in public, "16-year-olds can't vote," without mentioning the legal backdrop for his assertion (constitutions prevail over statutes), is that not speech on a matter of public concern? Under the Speech Code, there is nothing to stop Appellees from suing him for that statement under those facts. It's exactly the same as the county attorney's counterclaim here. Even if this hypothetical Cilek could later "prove his innocence," all he gets for that are higher legal bills. *281 CARE Committee*, 766 F.3d at 791. And if Steve Simon says in response, "16-year-olds *can* vote," would *he* be lying? Again, constitutions prevail over statutes. But under the Speech Code, he *can't* be sued, because his speech could only be encouraging voting, instead of discouraging voting. This is clear viewpoint discrimination on issues of broad and enduring public concern.

Minnesota has outlawed simply "caus[ing] information to be transmitted" that state officials (or private parties) disagree with—and even authorized the prior

[68] John Bowden, The Hill, *Pelosi says she backs lowering voting age to 16* (Mar. 14, 2019), https://tinyurl.com/bdhz963u.

[69] Peter Hasson, Daily Caller, *125 Democrats And 1 Republican Vote To Lower Voting Age To 16* (Mar. 8, 2019), https://tinyurl.com/wts4ch2y.

restraint of that transmittal. Minn. Stat. §211B.075, subd. 2. That criminalization of pure political speech on matters of public concern is subject to strict scrutiny. The district court's belief that Appellants' speech is not "political" or on matters of "public concern" is simply wrong, and that is sufficient grounds for this Court to reverse.

III. Appellants make both facial and as-applied challenges, and should prevail on both.

The Speech Code is unconstitutional both facially and as applied to Appellants because of its overbreadth, underinclusiveness, lack of tailoring, failure of proof of a concrete harm to address, and vagueness.[70]

As described more below, each "substantive" subdivision of the Speech Code (subdivision 1, 2, 3) is ***facially*** unconstitutional because of overbreadth: they each sweep in tons of protected speech and ignore the State's easy and non-restrictive remedy of counterspeech. Further, each substantive subdivision, ***applied*** to Appellants (quite clearly by the counterclaim), directly attempts to criminalize Appellants' particular speech, making them unconstitutional as-applied.

The vicarious liability provision of the Speech Code is likewise unconstitutional both facially and as-applied. Subdivision 4 goes so far as to make *third parties* criminally and civilly liable for the speech of *other people*—and folks like MVA can get hauled into court based on any putative plaintiff's speculation as to MVA's "aid[ing]"

[70] App. 7, 24-31; R.Doc. 13; AC ¶¶22, 98-143.

or "advis[ing]" them to speak on voter eligibility issues. This dramatically expands the universe of speech subject to prosecution and could be applied to MVA given that each individual Appellant is an MVA supporter.

Also unconstitutional facially and as-applied is Subdivision 5's "remedies" provision, which makes violations of the other subdivisions a ***gross misdemeanor*** and enables the attorney general, any county attorney, and *any other person* to sue Appellants over speech that allegedly harmed them. This provision is even broader than the prosecutorial scheme of *281 CARE Committee*, where at least the county attorneys couldn't get involved until after an unscrupulous anti-speech-plaintiff dragged speech-defendants through the OAH process. *Compare 281 CARE Committee*, 766 F.3d at 778 (describing initial OAH process and subsequent referral to county attorneys for further state-court action) *with* Minn. Stat. §211B.075, subd. 5 (OAH process does not apply; anyone can sue Appellants directly in state court).

The Court reviews Appellants' facial and as-applied challenges differently in the "breadth of the remedy" sought, ***not*** the complaint's facial plausibility. *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010)). Indeed, the "distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United*, 558 U.S. at 331.

The district court fundamentally misunderstood this and improperly narrowed the Amended Complaint to an as-applied challenge to subdivision 2 of the Speech Code, a facial challenge to subdivision 5, and a vagueness challenge.[71] In contrast, Appellants' 37-page Amended Complaint made sure to cover all subdivisions[72] of the Speech Code on which County Attorney Johnson counterclaimed (if an elected county attorney is making claims under every provision of the Speech Code, it is clear that each section can be improperly applied to squelch Appellants' speech), and Appellants pleaded, briefed, and argued facts giving rise to facial and as-applied challenges on every subdivision. Paragraph 22 of the Amended Complaint makes this abundantly clear, even though Appellants had no obligation to put flashing lights on the *legal basis* for their causes of action in a complaint.[73] *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) ("[I]t is unnecessary to set out a legal theory for the plaintiff's claim for relief [in a complaint.]" (quoting 5 Wright & Miller, Federal Practice and Procedure, §1219, at 277-78 (2004))).

As for facial challenges, Count I identifies Appellants' overbreadth claim.[74] Appellants note their speech about felon voting but also their concern over criminalized

[71] App. 336-43; R.Doc. 53 at 7-14; Add. 7-14.

[72] App. 12-14; R.Doc. 13; AC ¶41.

[73] *E.g.*, App. 7; R.Doc. 13; AC ¶22.

[74] App. 24-25; R.Doc. 13; AC ¶¶98-106

speech about wards of the state voting.[75] At oral argument, Appellants also identified speech about other types of hypothetical voter eligibility issues where the Speech Code criminalizes protected speech, like if Minnesota enacted a law allowing 16-year-olds to vote.[76] As stated on the record below, there are too many different possible voter eligibility issues to catalog, and too many laws about voter eligibility which could be passed that would raise disputes about who can vote.[77] This is far more than the plaintiffs in *281 CARE Committee* provided, and the Speech Code is exactly the kind of law for which a facial challenge is appropriate.

To that point, while Courts should generally "construe statutes as necessary to avoid constitutional questions," they cannot "adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned." *Citizens United*, 558 U.S. at 328-29. Thus, in *Citizens United*, the Court struck down a speech restriction because it would have a "substantial, nationwide chilling effect." *Id*. at 333. Where a statute unquestionably chills political speech, including "false" political speech, it "must be invalidated." *Id.* at 336; *281 CARE Committee*, 766 F.3d at 793.

[75] App. 21; R.Doc. 13; AC ¶77; App. 305-06; R.Doc. 46; Pls.' Reply Mem. of Law in Supp. of Their Mot. for a Prelim. Inj. 25-26.

[76] Tr. 38-39.

[77] Tr. 37-38.

This is why in *281 CARE Committee*, on a facial challenge, this Court struck down the portion of Minn. Stat. §211B.06 which penalized making false statements about the effect of ballot questions, even though the only speech alleged in the complaint and in the plaintiffs' declarations was *the plaintiffs'* speech. *Id*.; *E.g.*, Decl. of Joel Brude, Oct. 18, 2012, R.Doc. 120, *281 CARE Committee v. Arneson*, D. Minn. No. 08-CV-5215-ADM-FLN (describing his speech about opposing local tax levy increases in the past, present, and future). Appellants' speech in their verified Amended Complaint is *exactly* like that in the declarations of Joel Brude and Ron Stoffel filed in *281 CARE Committee*, on which this Court based its controlling decision. 766 F.3d at 780 ("Appellants filed declarations describing their opposition to particular ballot initiatives.").

Thus, while the Court can apply the *remedy* of a facial injunction based on the Appellants' pleadings and arguments showing overbreadth and a broad chilling effect, the Court can also apply the *remedy* of an as-applied injunction to protect Appellants' particular speech that gave rise to this case. After all, "upholding the law against a broad-based challenge does not foreclose a litigant's success in a narrower one." *Doe v. Reed*, 561 U.S. 186, 201 (2010).

IV. The Speech Code discriminates based on content and viewpoint and is therefore presumptively unconstitutional.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the

government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* A simple way to determine whether a restriction is content-based is to consider whether the law "requires authorities to examine the contents of the message to see if a violation has occurred." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1073 (9th Cir. 2020) (internal quotation omitted); *see also City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 73-74 (2022) ("regulations that discriminate based on the . . . message expressed" "are content based" (quoting *Reed*, 576 U.S. at 171)).

"Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination." *Reed*, 576 U.S. at 168 (internal quotation omitted). Because "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943), such restrictions are "presumptively unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830-31 (1995).

Subdivision 2 is content- and viewpoint-based. It expressly targets, *without limitation*, "information regarding the time, place, or manner of holding an election; [and] the qualifications for or restrictions on voter eligibility at an election." Minn. Stat. §211B.075, subd. 2(b). Where a statute announces a target on "***information regarding***" something, what follows that phrase is the content. Beyond that, it targets a specific subset of that content: it only and particularly applies to speech that tells people *not* to vote. This is viewpoint discrimination. Speech telling people they're *eligible* to vote, even if completely false and misleading, is perfectly fine. One can falsely tell noncitizens, middle schoolers—even Wisconsinites—that they are eligible to vote, and subdivision 2 is no barrier. Only those expressing the *viewpoint* that the franchise in Minnesota is more limited than some might prefer are criminalized. Likewise, subdivision 3 only targets "interference" as to the act of voting, registering, or aiding a voter, and not the contrary—wrongfully encouraging ineligible voters to vote. These are therefore content- and viewpoint-based restrictions and are presumptively unconstitutional.

This is what happened after a Mille Lacs County judge held the Felon Voting Law unconstitutional on October 12, 2023. But despite a court decision that the law is not enforceable because of Article VII, section 1 of the Minnesota Constitution, Secretary of State Simon and Attorney General Ellison openly stated that

Minnesotans still serving felony sentences could vote.[78] That court's decision was nullified a few weeks later by a writ of prohibition unrelated to the constitutional issues, but the Secretary and Attorney General openly disagreed with a then-effective court order declaring the Felon Voting Law unconstitutional. Appellants do not believe the Speech Code *should* be enforced against Appellees for their public statements. But the fact that it *could not* be so enforced demonstrates that the Speech Code's substantive subdivisions are viewpoint-based discrimination. A law which fails to address both allegedly improper *limitations* on the franchise and improper *expansions* on the franchise plainly discriminates against a viewpoint.

Further, one "feature" of the Speech Code (a "bug" to Appellants) is that it punishes both completed and *potential* violations and thus creates prior restraints on disfavored speakers, as well as attorney-fee provisions to enable putative plaintiffs to attract high-priced lawyers to fund "lawfare."[79] In this one-sided scheme, there is no provision enabling citizen-plaintiffs to bring actions to stop the aiding and

[78] *Secretary Simon stands in support of Attorney General Ellison intervention to stop Mille Lacs County judge from interfering with legal right to vote*, Office of the Minnesota Secretary of State, Oct. 23, 2023, https://tinyurl.com/3nvmkjzy; *see also supra* Facts Section II.

[79] *See* Tr. 18:25-19:5 (admitting that "plaintiffs will in theory be discouraged from making these [*allegedly*] false statements if they know that they could have to pay damages").

abetting of voter fraud via ineligible votes. This is viewpoint discrimination on an important and hotly debated political issue.

V. Subdivision 5 of the Speech Code imposes a prior restraint on protected speech and subjects regular citizens to vexatious lawsuits against them after-the-fact for that speech.

Prior restraints on speech "are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n*, 427 U.S. at 559. In fact, "the main purpose of [the First Amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.'" *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (emphasis in original) (internal quotation omitted). Blackstone explained that "[e]very freeman has an undoubted right to lay what sentiments []he pleases before the public: to forbid this, is to destroy the freedom of the press." 4 William Blackstone, Commentaries on the Laws of England ch.11 (1769).[80] If free speech means anything, it means no prior restraints. Therefore, for good reason, "[t]he Supreme Court has roundly rejected prior restraint." *Kinney v. Barnes*, 443 S.W.3d 87, 91 n.7 (Tex. 2014) (quoting Sobchak, W., *The Big Lebowski*, 1998).

The Speech Code operates as a prior restraint. Any ostensibly aggrieved citizen can sue to "prevent…a violation of this section if there is a reasonable basis to believe that an individual or entity…intends to commit a prohibited act." Minn. Stat.

[80] Available at https://tinyurl.com/5n6tsvnd (page 86).

§211B.075, subd. 5(b). One need not have even uttered the claimed false speech to be prosecuted—or sued by a random person. Under this broad language, Appellants' expression of their views on voter eligibility in the past could conceivably create a "reasonable basis" to believe they intend to say the same in the future. This also renders the limitation to 60 days before an election no limitation at all: since the Speech Code allows prior restraints on future speech, Appellants must also be concerned about what they say outside of the 60-day window because any disfavored statement creates a "reasonable" basis for enjoining their speech closer to elections. Because the Speech Code embraces the prior restraint as a remedy, this remedy bears a "heavy presumption against its constitutional validity" and is subject to the strictest scrutiny. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Speech Code cannot bear this heavy burden.

The district court waved this away, arguing that "Subdivision 5 is not an administrative or judicial order, it does not require advanced permission to speak."[81] But government action "[t]hreatening penalties for future speech goes by the name prior restraint." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th Cir. 2015) (quoting *Fairly v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009)). So a sheriff cannot "issue and publicize dire threats…of prosecution." *Id.* Else, that would give "official coercion

[81] App. 341; R.Doc. 53 at 12; Add. 12.

a free pass." *Id.* at 238. Like the sheriff in *Dart*, Appellee Ellison has announced that Appellants "could have to pay damages, [and] be enjoined in the future"[82] for their speech. "Stop talking, or else" is a prior restraint. *See id.* at 235.

The district court's defense of court orders under the Speech Code has no support in the law. According to the district court, they are fine since "such orders are not *per se* unconstitutional, especially when they have appropriate procedural and substantive safeguards."[83] The district court has no example of such an order—and Appellants can't think of one either. The district court's *only* citation for this proposition is *Auburn Police Union v. Carpenter*, 8 F.3d 886, 889 (1st Cir. 1993), a case from a different circuit about limiting *law enforcement*—government employees—from soliciting donations. The power of a state to limit the speech of its own employees—perhaps to limit the ability of unscrupulous police officers to use their uniformed status to extort donations—is far broader than the power of the state to restrict independent citizens from voicing their own views on matters of public concern. *See, e.g. Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

Prior restraint has been "roundly rejected" as the quintessential violation of the First Amendment, for good reason. The Court should strike down the Speech Code as just such an unconstitutional law.

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[82] Tr. 19:2-3.

[83] App. 341; R.Doc. 53 at 12; Add. 12.

VI. Subdivisions 1, 2, and 3 are overbroad because they sweep in pure political speech on various subjects, and they are underinclusive because they target only one political viewpoint.

Even if some interest unrelated to speech suppression were at stake, the Speech Code is vastly overbroad: "a statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008); *United States v. Stevens*, 559 U.S. 460, 473 (2010) (a law is overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (internal quotation omitted)). And even if there were sparse examples of bad behavior Appellees would like to use the Speech Code against, laws punishing speech are not saved by the odd "deplorable" they capture. They are judged by the full range of expression they curtail. Simply put, "[p]recision must be the touchstone when it comes to regulations of speech." *NIFLA v. Becerra*, 585 U.S. 755, 775 (2018) (cleaned up).

The statute sweeps in protected speech, including true speech, by Appellants and others who might make similar political statements in the future. Subdivisions 1, 2, and 3 are overbroad because their elements do not stop them from encompassing pure political speech, and their *mens rea* sweeps in much speech that is not even intended to violate its prohibition.

First, Subdivision 1(a) punishes both direct and indirect use or threat of "damage, harm, or loss" against a person to compel them to register to vote, not register, vote,

or not vote, or encourage others to vote, register, travel to a polling place, or participate in the election process. Minn. Stat. §211B.075, subd. 1. But subdivision 1(b) only requires that the putative plaintiff prove that "the action or attempted action would cause a reasonable person to *feel* intimidated." *Id*. (emphasis added).

Appellants have not threatened or used "damage, harm, or loss" as to any person.[84] They have not said that voting under the Felon Voting Law might be punished, nor have they threatened to report anyone for voting, or done so. They have merely stated how they interpret the Minnesota Constitution vis-à-vis the Felon Voting Law. Appellants brought a lawsuit to vindicate their position on the constitution and the law. Yet by virtue of Appellants' political speech alone, with nothing more, and saying nothing at all about any repercussion for illegal voting, the County Attorney initiated proceedings against them on the theory that they have in fact threatened[85] or used damage, harm, or loss.

[84] App. 18; R.Doc. 13; AC ¶¶ 61, 64.

[85] These government Appellees, who have obligations to uphold the constitutions of Minnesota and the United States, couldn't even agree below on whether Appellants' speech as pleaded and verified can be punished by the Speech Code. *Compare* App. 138; R.Doc. 25; AG Mem. at 14 ("Plaintiffs also claim they have 'a good faith belief' that [their speech] is true," and good-faith beliefs don't violate the statute), *with* App. 90; R.Doc. 21, Anoka County Mem. at 2 ("Plaintiffs want to spread false speech intended to mislead voters…."). If they can't definitively say whether Appellants' pleaded, verified speech is within the statute's ambit, there is a serious danger of bad actors using big money to sue putative speech-defendants as part of "lawfare" to shut down political speech they dislike.

But case law limits "intimidation" liability to "true threats," because otherwise such laws would violate the First Amendment. *See United States v. Nguyen*, 673 F.3d 1259, 1265 (9th Cir. 2012). Calling Appellants' pleaded speech a "true threat" akin to KKK cross-burning makes a mockery of the seriousness of true threats. Yet the counterclaim here shows that the Speech Code welcomes such meritless lawsuits against innocent citizens with disfavored political views.

Subdivision 2 is also overbroad in relation to its legitimate sweep. It may be true that intentional attempts to mislead voters about "voting requirements and procedures" could be barred—though the Supreme Court has not explained under what facts that result might obtain. *Mansky*, 585 U.S. at 18 n.4. The district court accepted Appellees' overreading of this footnote in *Mansky*,[86] but in context, the Supreme Court's laconic footnote supports Appellants: *Mansky* held that political statements like the "Please ID Me" button in 2010 were not "intended to mislead voters," but rather "political" in nature, and thus improperly banned by Minnesota, which action was struck down by the United States Supreme Court. 585 U.S. at 18-19. *Mansky's* footnote 4 thus supports Appellants: if Appellants' speech were punishable, then Andy Cilek's "Please ID Me" button, speech on an issue that was not on the ballot

[86] App. 339-40; R.Doc. 53 at 10-11; Add. 10-11.

in 2010, would have been, in the eyes of the *Mansky* Court, a legitimate reason to keep him out of the polling place—but it wasn't. *Id.*

The *Mansky* Court may have meant that state laws can proscribe individuals from sending false messages to voters intentionally designed to mislead them as to, say, the hours or dates for voting. While satire is not actionable under the First Amendment, misleading voters with false statements of readily verifiable and indisputable facts as to the nuts and bolts of Election Day (or early voting) are very different from the statements at issue here. *Cf. United States v. Mackey*, 652 F.Supp.3d 309, 319-20 (E.D.N.Y. 2023). Likewise, this case is a far cry from telling voters that voting by mail will cause law enforcement to find and prosecute them or force-vaccinate them. *Cf. Nat'l Coalition on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 510-11 (S.D.N.Y. 2021).

Appellants' speech also has nothing to do with interests in stopping "voter intimidation and election fraud." *Burson v. Freeman*, 504 U.S. 191, 205 (1992). Appellants' speech simply does not implicate those concepts. *See id*. These refer to *Election Day* regulations of how far one must be from a polling place to engage in political speech, not regulations of the quantum of speech which may be offered. Notably, the state interest recognized in *Burson* relates to *where* one can speak on Election Day, not *what* someone can say about elections, candidate eligibility, or voter eligibility.

Likewise, this Court has only allowed speech restrictions when they remedy "legally cognizable harm," consistent with fraud and defamation case law. *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021). In *ALDF I*, the legally cognizable harm prevented by the Access Provision of the challenged Iowa law was apparent: the plaintiffs' lies caused trespass, "an ancient cause of action" addressing "violation[s] of the right to exclude." *Id.*; *see also Animal Legal Defense Fund v. Reynolds*, 89 F.4th 1071, 1080 (8th Cir. 2024) (discussing trespass and privacy interests). In *ALDF II*, just this year, the Court reaffirmed that the Iowa statute was constitutional because Iowa sought to "protect property rights by penalizing that subset of trespassers who—by using a camera while trespassing—cause further injury to privacy and property rights." *Id.* at 1081. Iowa's content-neutral law limited the time, place, and manner of video recording—it did not single out viewpoints spoken to the public at large. The Speech Code blatantly targets political speech spoken into the ether to whoever will listen in the manner of the common Norman Rockwell "Freedom of Speech" painting now circulating the Internet as a meme.[87] The unlimited geographic scope of the Speech Code creates an impassable gulf between *ALDF* and this case.

[87] *See Norman Rockwell's Four Freedoms*, Norman Rockwell Museum, https://tinyurl.com/4d5ajua4 ("Freedom of Speech" painting).

Appellants are entitled to articulate what they believe the Minnesota Constitution says on a good-faith basis. The plaintiffs in *281 CARE Committee* were entitled to say what they thought the "effect of a ballot question" would be, even if they couldn't know for sure they were right. Issues related to voter eligibility in elections are common and contentious political issues, as our nation's and our state's history amply shows. Minn. Const. art. VII, §1; *see also Schroeder v. Simon*, 985 N.W.2d 529, 539-43 (Minn. 2023) (discussing history of statutory voter eligibility changes); Minn. Stat. §§204C.07, 204C.12 (challengers may challenge eligibility at polls). To forbid this political speech, as the Speech Code does, is a gag order on anyone who reads the Constitution how Appellants do. That such speech is actionable in the eyes of a prosecutor unconstitutionally chills political expression in Minnesota. *281 CARE Committee*, 766 F.3d at 793 ("Putting in place potential criminal sanctions and/or the possibility of being tied up in litigation before the OAH, or both, at the mere whim and mention from anyone who might oppose your view on a ballot question is wholly overbroad and overburdensome and chills otherwise protected speech.").

The Speech Code does not simply sanction naughty speech that shouldn't have been uttered; it prohibits "intended" speech before it is uttered, and criminalizes so-called advising, counseling, and inciting violations, without defining those terms. If MVA tells people that it believes its claims in the *Hunt* case were meritorious, it is

guilty of conspiracy to spread 'bad' ideas, whether or not it expressed them itself. This is clear overbreadth.

Just because political speech is related to election issues does not mean the state can ban it. Yet the Speech Code does exactly that. It authorizes lawsuits against speakers based on pure conjecture about their political speech, like the counterclaim in this case. And it is the fact of filing the lawsuit that creates harm, regardless of whether Appellants win their counterclaim defense—they are forced to "lawyer up" and the only thing they "win" is an increase in the resources spent in their legal defense. *281 CARE Committee*, 766 F.3d at 791.

Subdivisions 1 and 2 are also underinclusive. If Appellants pen an op-ed in a local newspaper stating the same view they advanced in court pleadings, they can be prosecuted. But if the media reports on the case in which they make that argument on the same page as the op-ed, or presents a "counterpoint" contrary to Appellants' view of the law, that speech is presumably protected from prosecution by litigation privilege, even though the "harm" (if it can be called that) is the same. This is akin to the "press exemption" in *281 CARE Committee* that rendered Minn. Stat. §211B.06 underinclusive. 766 F.3d at 795. And the broad public discussion not targeted by the Speech Code, discussed in Fact Section II, *supra*, shows that the Speech Code is woefully underinclusive and not serious about addressing any so-called harm from false speech.

VII. The Speech Code is unconstitutionally vague.

A law is unconstitutionally vague if it does not give "a person of ordinary intelligence fair notice of what is prohibited" or if it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. Put another way, a law is void for vagueness if it "lack[s] any ascertainable standard for inclusion and exclusion." *Kashem v. Barr*, 941 F.3d 358, 374 (9th Cir. 2019) (internal quotation omitted).

The district court below found that the law was not unconstitutionally vague because, well, the fact that Appellants are being sued over their speech by Appellees under all five subdivisions doesn't mean Appellees are *right* about that, so the statute is not vague.[88] But the question is not whether the County is *right,* the question is whether the statute is *sufficiently vague* to allow the county attorney to *sue Appellants* for protected political speech. *281 CARE Committee*, 766 F.3d at 791. Again, prosecution for speech itself is an injury, whether or not you can actually vindicate your rights after years of litigation and potentially thousands of dollars in legal fees.

That the Speech Code does not define its terms is fatal here because the terms it doesn't define are rife with legal importance: "threats," and "incitement" are important and carefully-drawn concepts in free-speech law. *See Virginia v. Black*, 538

[88] App. 337, 342; R.Doc. 53 at 8, 13; Add. 8, 13.

U.S. 343, 360 (2003); *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969). Courts apply a heightened vagueness test to criminal penalties of protected speech. *Reproductive Health Serv. v. Webster*, 851 F.2d 1071, 1077-78 (8th Cir. 1988), *rev'd on other grounds for mootness*, 492 U.S. 490, 512 (1989). And though civil laws are sometimes permitted a greater "degree of vagueness," if "the law interferes with the right of free speech or of association"—as here—"a more stringent vagueness test should apply." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498-99 (1982).

Vague laws "raise[] special First Amendment concerns" because they empower the government to silence viewpoints with which it disagrees. *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). So, "where First Amendment freedoms are at stake, a "great[] degree of specificity and clarity of laws is required." *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2020) (cleaned up). When "[d]efinitions of proscribed conduct...rest wholly or principally on the subjective viewpoint of a" government official, such laws "run the risk of unconstitutional murkiness." *Id*. at 666.

The Speech Code's terminology is "fraught with ambiguity" and thus "incapable of objective measurement." *Baggett*, 377 U.S. at 367. This is not acceptable, particularly when laws "abut upon sensitive areas of basic First Amendment freedoms." *Id*. at 372. The Speech Code, by its terms, require Appellants—and even their

attorneys—to "steer far wider of the unlawful zone…than if the boundaries of the forbidden areas were clearly marked." *Id*.

There are a number of ways in which this is true. First, subdivision 1 is unclear what a "threat" of "damages, harm, or loss" might be. The County Attorney's own argument that Appellants have somehow "threatened" some sort of penalty shows that the Speech Code's lack of definition causes anodyne political speech—as opposed to true threats—to be dragged into its ambit.[89] The County Attorney cannot claim, after counterclaiming against Appellants, that the Speech Code only threatens "true threats." If so, there would not be a counterclaim.

Opinions about the meaning of constitutional provisions are pure political speech and not true threats. On the contrary, "true threats" "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359. Thus, cross-burning by Klansmen with a specific intent to intimidate is a "true threat" and may be prohibited by law, while cross-burning alone may not be. *Id*. at 365–66. "True threats" require a demonstration that "what is at issue"

[89] *E.g.*, App. 121; R.Doc. 21; Anoka Cnty. Mem. in Supp of Mot. for J. on the Pleadings 33 (equating the statement that felons cannot vote in Minnesota elections with a threat of jail time).

is not "statements that when taken in context do not convey a real possibility that violence will follow." *Counterman*, 600 U.S. at 74.

Likewise, subdivision 2 says that one may not speak if the intent behind that speech is to "impede or prevent another person from exercising the right to vote." Again, only true threats come to mind as possibly subject to restriction. Absent a true threat, what is it about speech, exactly, that impedes someone from walking into the polling place and casting a ballot?[90] The statute does not say. Instead of defining its terms, it gives a few examples of types of speech which the legislature apparently believes exemplify this prohibition, including "information regarding the time, place, or manner of holding an election [and] the qualifications for or restrictions on voter eligibility at an election." The district court thought this was resolved by simply pointing out that Webster's defines "impede" as "to interfere with or slow the progress of."[91] But what sort of speech would sufficiently "slow the progress" of a voter, exactly? If someone hollering on the street corner "felons can't vote!" causes a felon on his way to vote to slow his step, but he gets there eventually, has he been "impeded"? Literally yes, by the district court's definition. And Subdivision 3 suffers

[90] *See* Tr. 18:12-13 (counsel for Ellison stating that the listener could "ignore" the speech "and go in and vote").

[91] App. 342-43; R.Doc. 53 at 13-14; Add. 13-14.

from similar problems as subdivision 1. It is not clear what "interference" would give rise to liability, or how speech on political issues would constitute interference.

For these reasons, the Speech Code is vague and causes putative speech-defendants to "swallow words that are in fact not true threats." *Counterman*, 600 U.S. at 78.

VIII. The Speech Code also fails narrow tailoring and ignores less restrictive alternatives.

Appellants are, by nature of their advocacy, "easy targets" for political opponents to sue—and indeed, have already been sued by Appellee Johnson because of their advocacy. This is not hypothetical. And since Appellants' speech is quintessential political speech and the Speech Code sweeps it in and sweeps in political speech like it, it is subject to strict scrutiny. *Alvarez*, 567 U.S. 709. Intermediate scrutiny does not apply, as this Circuit held in *281 CARE Committee*. 766 F.3d at 783-84. "The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011).

To survive strict scrutiny, Minnesota must demonstrate that the Speech Code "furthers a compelling interest and is narrowly tailored." *Reed*, 576 U.S. at 171 (cleaned up). The State bears the burden of establishing this. *Ashcroft v. ACLU*, 542 U.S. 656, 660-61, 666 (2004). Appellees must "specifically identify an 'actual problem'" and show that restricting "speech [is] actually necessary to the solution,"

Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 799 (2011) (quotation omitted), because "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Further, to pass strict scrutiny, the State must first show that its law "plainly serves compelling state interests of the highest order" and is "unrelated to the suppression of expression." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984). "A law does not advance 'an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 486 (2020) (quotation omitted). Likewise, a law is not properly tailored when overbroad, as discussed above.

The Speech Code does not *stop* fraud, rather it affirmatively *perpetuates* it, as this court explained in *281 CARE Committee*:

> [i]t is immensely problematic that *anyone* may lodge a complaint with the OAH alleging a violation of § 211B.06. There is no promise or requirement that the power to file a complaint will be used prudently. "Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents."
> ….
> The county attorneys seem to presume without question that "exaggerations, conjecture, or illogical inferences,"...are not within the scope of § 211B.06 and are thus not at risk. But, they cannot support such a claim. *Anyone* can file a complaint under § 211B.06 and it is only at that time that the OAH begins to decide whether a violation has occurred. At that point, however, damage is done, the extent which remains unseen. Section 211B.06 is thus overbroad because although it may seem axiomatic that particular speech does not fall within its scope, there is nothing to prohibit the filing of a complaint against speech that may later be found wholly protected.

> ….
> Putting in place potential criminal sanctions and/or the possibility of being tied up in litigation…at the mere whim and mention from anyone who might oppose your view on a ballot question is wholly overbroad and overburdensome and chills otherwise protected speech.

281 CARE Committee, 766 F.3d at 790, 92-93 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014). The self-defeating nature of the Speech Code is fatal to its constitutionality.

Further, when the government believes speech is harmful, the "least restrictive alternative" is unlikely to involve censorship, even related to false speech. "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Alvarez*, 576 U.S. at 727 (plurality opinion). "[M]ore speech, not enforced silence" is the best response to perceived falsehoods or misguided ideas. *Whitney v. California*, 274 U.S. 357, 377 (1927). It is therefore of no moment that Minnesota believes it is distinguishing between good and bad content—between, say, information that encourages or discourages potentially ineligible people from showing up to vote. It is not the State's role to decide what content is disfavored. Arguments about informational harm are irrelevant as a matter of law, because censorship cannot be justified on the plea that bad ideas cause harm. *See Brandenburg*, 395 U.S. at 447-49 (advocacy of violent resistance not sufficient to justify punishment of speech).

The Speech Code directly restricts pure speech. It has no point other than suppression of expression. Because such suppression can never give rise to a legitimate government interest, the State cannot show either a significant state interest or a narrowly tailored means. There is no freestanding "falsity" exception to the First Amendment, and neither would one apply here.

Of course, Appellants' speech is true, in their minds. The Minnesota Supreme Court declined to resolve the issue even after Appellants explicitly sought that resolution, and that makes the county attorney's suit against them all the more troubling: they will have no resolution of their claims, and therefore no relief from the Speech Code's chilling effect, without a reversal from this court. Luckily, this Court has rejected the claim that speech could be inherently "fraudulent" on its own in the political context. *281 CARE Committee*, 766 F.3d at 790.

IX. The Speech Code is not "actually necessary" to address an "actual problem" in need of solving.

A law regulating political speech because of its content must also be "actually necessary" to achieve the stated government interest, based on a "direct causal link" to the alleged problem. *Id.* at 787 (quotations omitted). "The State must specifically identify an 'actual problem' in need of solving,…and the curtailment of free speech must be actually necessary to the solution." *Brown*, 564 U.S. at 799 (internal quotes and citations omitted). And any identified interest must be "unrelated to the

suppression of ideas." *Roberts*, 468 U.S. at 624. But here, Minnesota's entire goal is to suppress disfavored ideas. That is not a legitimate interest.

Appellees cannot rely on vague claims of phantom boogeymen to justify a restriction on Appellants' speech. This Circuit outright rejected that sort of reliance on "common sense" in *281 CARE Committee*. The First Amendment requires more:

> The county attorneys claim that § 211B.06 is indeed "actually necessary" to preserve fair and honest elections in Minnesota. They do so, however, without confirming that there is an actual, serious threat of individuals disseminating knowingly false statements concerning ballot initiatives. The county attorneys instead claim that empirical evidence is not required to support this legislative judgment.
> ....
> Appellees defend the statute's ability to dissuade fraud with common sense, but is there such a problem that this infringement on protected speech must occur in the first instance?....Such conjecture about the effects and dangers of false statements equates to implausibility as far as this analysis goes, because, when the statute infringes core political speech, we tend to not take chances.

281 CARE Comm. 766 F.3d at 787-88, 790-91. There is no "actual, serious threat" to be addressed here, and neither Appellees nor the district court identified any "empirical evidence" that supports the law.

The closest there seems to be is the *ipse dixit* of the bill's author—a statement in a hearing that there is a "rising risk of threats, disinformation that we've seen over the last four years," based on the hiring of private security firms, ballot-box

monitoring, and door-to-door voter-fraud efforts.[92]. But each of these unsubstantiated "threats" would place a *physical presence* before a putative voter, not pure speech. But even as to these vague allusions, the author even acknowledged that voters in Minnesota have *not* faced those same types of physical presences related to their votes or registration.

And the author failed to recognize the quintessential tool to combat so-called disinformation, always available under the First Amendment: counterspeech. Whereas the First Amendment prohibits laws like the Speech Code, nothing prevents Minnesota from waging a public information campaign[93] pushing what the state believes to be true—even if Appellants think *the State's* speech is actually the lie. Minnesota's government officials have already amply shown the capability and willingness to use their bully pulpit to do so, with pliant Minnesota media repeatedly amplifying their speech, free of charge. Facts Section II.

[92] H'ring Before H. Judiciary, Fin. & Civ. Law Comm., 2023 Leg., 93d Sess. Mar. 2, 2023, at 42:00-43:27.

[93] *See, e.g.*, *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1079 (8th Cir. 2024) (discussing permissible government speech).

CONCLUSION

For the reasons set forth herein, Appellants respectfully request that the Court reverse the district court's grant of Appellees' Rule 12 motions and remand for further proceedings, including reconsideration of Appellants' preliminary injunction motion applying the legal standard set forth by the Court.

Respectfully submitted,

Dated: December 20, 2024

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on December 20, 2024. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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