UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Voters Alliance; Mary Amlaw; Ken Wendling; Tim Kirk, Plaintiffs, v. Keith Ellison, in his official capacity as Attorney General; Brad Johnson, in his official capacity as Anoka County Attorney, Defendants.	Court File No. 0:23-cv-02774-NEB-TNL **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

Plaintiffs, Minnesota Voters Alliance ("MVA") and three Minnesota citizens active in state politics, challenge newly enacted provisions of Minn. Stat. § 211B.075 (the "Speech Code"), which subjects anyone who expresses controversial views about Minnesota election laws to criminal prosecution, civil litigation from any member of the public, and even prior restraint on their speech. For instance, if Plaintiffs continue to say that felons who have not completed their sentences cannot legally vote in Minnesota under the Minnesota Constitution, they can be accused of spreading "misinformation," subject to criminal and civil sanctions, including injunctions against their speech, and even sued by random members of the public who have a different view. That is not just according to them, but according to the law's author. Such speech suppression is anathema to our free society.

The Eighth Circuit agrees: "debate on public issues should be uninhibited, robust, and wide-open." *281 CARE Committee v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014) (quoting

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995)). So does the U.S. Supreme Court: "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 537–38 (1980) (cleaned up). "Political speech" is at the height of the First Amendment's protections. *See Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). Political speech includes speech on any "matter of public concern" and has ***never*** been limited to items specifically on a ballot. *Cox v. Louisiana*, 379 U.S. 536, 545–52 (1965) (citizens protesting segregation could not be held liable for "breaching the peace"); *see also Snyder*, 562 U.S. at 451–52.

Despite these bedrock principles, in 2023 the Minnesota Legislature passed a law, now codified at section 211B.075, which makes it a crime—and subjects the speaker to potentially fraudulent lawsuits and punishing civil penalties—for making any statement within 60 days of an election which the putative plaintiff believes is designed to prevent someone from voting. This law is unconstitutional, and the Court should enjoin its enforcement.

Beyond the inherent absurdity in the Speech Code's implication that merely ***talking*** about voter eligibility could cause someone not to vote, the Eighth Circuit has definitively rejected political speech codes like the one at issue. In *281 CARE Committee*, the court struck down the portion of Minn. Stat. § 211B.06 which made it a gross misdemeanor to make "false" statements "with respect to the effect of a ballot question." 766 F.3d at 778 (quoting Minn. Stat. § 211B.06, subd. 1). The court applied strict scrutiny to the statute because it regulated "political discussion in our system of government," "[d]irectly regulating what is said or distributed during an election." *Id.* at 784, 787. This "goes beyond an

attempt to control the process to enhance the fairness overall so as to carefully protect the right to vote." *Id.* at 787.

Plaintiffs' view of the Minnesota Constitution has nothing to do with verifiably false statements with no political-speech value. Yet the Defendant Anoka County Attorney draws tortured parallels between them and cross-burning by the Ku Klux Klan. The Anoka County Att'y's Mem. of Law in Supp. of Mot. for J. on the Pleadings ("County Mem."), ECF No. 21, Nov. 7, 2023, at 33 (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)). The Speech Code is so vague and overbroad that the Defendants cannot even agree on whether Plaintiffs' claims would fall within its ambit—the Attorney General claims that Plaintiffs' good-faith statements are obviously not within the Speech Code's punishment, *see* Def. Ellison's Mem. Supp. Mot. to Dismiss ("AG Mem"), ECF No. 25, Nov. 7, 2023, at 14, yet the County Attorney insists they are, Am. Countercl., ECF No. 16, Oct. 30, 2023. This is one of the same problems the Eighth Circuit found with Minn. Stat. § 211B.06: "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." *281 CARE Committee*, 766 F.3d at 792.

Defendants contrive high-minded sounding assertions of the Speech Code's value, but it is simply an attempt by the government to control who can disagree with them about voter eligibility rules, without limitation to true threats or real intimidation. The Speech Code threatens dissenting voices on important matters of public debate with criminal and civil sanctions, fines—even prior restraints. The Speech Code therefore "on its face burdens disfavored speech by disfavored speakers." *Sorrell v. IMS Health Inc.*, 564 U.S. 552,

564 (2011). There can be no question that "official suppression of ideas is afoot." *R.A.V. v. City of St. Paul, Minn*., 505 U.S. 377, 390 (1992).

Because the Speech Code is a content- and viewpoint-based regulation of speech, it is subject to the strictest scrutiny under the First Amendment. Indeed, "the conduct triggering coverage under the statute consists of communicating a message," *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010). The law sweeps so broadly that it chills a substantial amount of protected speech and empowers any citizen with an axe to grind to demand a prior restraint. It is also void for vagueness: it leaves critical terms undefined, including and especially constitutionally restricted concepts such as "threats" and "incitement," further limiting speech protected by the First Amendment and inhibiting discission on important matters of public concern.

"Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects." *Sorrell*, 564 U.S. at 577. But suppressing speech that the government considers harmful is never a legitimate government interest. This Court should deny Defendants' motions to dismiss and for judgment on the pleadings.

FACTS

I. This Lawsuit and Its Procedural Posture.

Plaintiffs filed this lawsuit on September 11, 2023, seeking declaratory and injunctive relief against the Speech Code. Compl., ECF No. 1. Defendant Johnson, the Anoka County Attorney, answered and counterclaimed, and Plaintiffs filed an amended verified

complaint.[1] Am. Compl., ECF No. 13. The County Attorney filed an amended counterclaim, ECF No. 16, and then brought a motion for judgment on the pleadings, ECF No. 17. Defendant Keith Ellison, the Attorney General, brought a motion to dismiss. ECF. No. 23. Plaintiffs now oppose Defendants' motions and request a preliminary injunction against the enforcement of the Speech Code. Plaintiffs and Defendant Johnson have stipulated that the Amended Counterclaim will be addressed later in the proceedings, depending on the Court's decision on these motions. Stipulation, ECF No. 29; Text-Entry Order, ECF No. 31, Nov. 20, 2023 (approving stipulation).

II. The Speech Code.

Plaintiffs are Minnesota voters and an organization of Minnesota voters who want to speak freely on important matters of public concern regarding elections in Minnesota. Am. Compl. ¶¶ 23–31. But 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. Am. Compl. ¶ 12. The Speech Code seeks to punish anyone expressing controversial views about election laws, providing, 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 . . . .

[1] The verified Amended Complaint provides context and additional details not included in the Complaint, and courts consider those additional sworn details when not contradictory or mutually exclusive to the original document. *See Sabre Indus. v. Module X Sols., LLC*, 845 Fed. App'x 293, 298 (5th Cir. Feb. 2, 2021).

> **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.

Subdivision 5 makes a violation of this prohibition 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 money damages and injunctive relief. Am. Compl. ¶ 46 (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.* ¶ 47 (emphasis added). And under subdivision 4, an organization like MVA is potentially criminally liable for the speech of its members, and its members for the speech of the organization. *Id.*

Despite its restrictions on core political speech, the statute's terms are largely undefined: there is no definition of "impede"; no description of what constitutes a "threat" "to

physical safety"; nor an explanation of what it means to "advise," "counsel," or "incite" another person to do the same. *Id.* ¶¶ 42–45, 49.

III. The Parties and Their Real Fears of Prosecution.

MVA is a nonpartisan organization that provides research and voter education to Minnesotans, including election rules. *Id.* ¶ 23. MVA cares deeply about freedom of speech, and particularly speech about voting in elections. *See, e.g., Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) (striking down ban on wearing political attire while voting). The individual plaintiffs are each voters and political activists who are long-time supporters and volunteers with MVA. Am. Compl. ¶ 25. Both MVA and each individual plaintiff regularly engages in speech on matters of public concern, including Minnesota election law. *Id.* ¶¶ 23, 26, 28, 30. They intend to continue to regularly engage in such speech, but now they must do so with trepidation, because the Speech Code threatens them with criminal and civil charges if they express their views. *Id.* ¶¶ 24, 27, 29, 31. In fact, based on the County Attorney's counterclaim, they are currently risking prosecution for their speech and proposed speech.

Those fears are particularly acute for Plaintiffs, since they are actively challenging a voting regulation they believe is unconstitutional. *Id.* ¶ 3; *See Minn. Voters All. v. Hunt*, Minn. Dist. Ct. No. 02-CV-23-3416. *Hunt* challenges the recently enacted Minn. Stat. § 201.014 (2a) (the "Felon Voting Law"), which allows felons to vote once they are released from custody, even before the restoration of lost "civil rights" (such as when they are on supervised release, probation, or even "work release," at which time an inmate is otherwise considered to be incarcerated under Minnesota law). Am. Compl. ¶ 51. In *Hunt*, the same

Plaintiffs argue that Article VII, section 1, of the Minnesota Constitution requires a felon to first be "restored to civil rights." Am. Compl. ¶ 53.

The Minnesota Supreme Court recently rejected the argument that under Article VII, section 1, "the right to vote is automatically restored upon release from incarceration," and held that "the person's right to vote is restored in accordance with an affirmative act or mechanism of the government restoring the person's right to vote." *Schroeder v. Simon*, 985 N.W.2d 529, 534 (Minn. 2023). And a judge in Mille Lacs County, Minnesota recently opined in supplemental sentencing orders that the new Felon Voting Law violates the Minnesota Constitution.[2]

Each of the Plaintiffs has likewise publicly argued that this expansion of the franchise is unconstitutional and intends to continue arguing that felons still serving their sentences are not eligible to vote in Minnesota. Compl. at ¶¶ 16, 19, 21, 23. They have, through their attorneys, made these statements in court filings and open court, and the local media has broadcast the arguments in video, audio, and written form throughout Minnesota.

Plaintiffs' 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. Thus, they have alleged as follows:

[2] These orders were reversed because a district court judge does not have authority to issue them, but the court did not reach the judge's reasoning on the constitutional issue. *See State v. Trevino*, No. A23-1565, Order Granting Writ of Prohibition (Minn. Ct. App. Nov. 2, 2023).

- The Plaintiffs . . . 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. Am. Compl. ¶ 3.
- Plaintiffs 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 Speech Code] . . . conflicts with the Constitution. *Id.* ¶ 5.
- 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. *Id.* ¶ 23.
- Plaintiff[3] . . . 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.
- Plaintiffs have not said, and do not intend to say, that the Felon Voting Law does not exist. Rather, Plaintiffs' political speech relates to their opinions about the interrelation of the Minnesota Constitution and the Felon Voting Law—that the former preempts the latter.[4]

But their public statements are now subject to the chilling effect of the Speech Code, which threatens to punish them for disfavored speech. Am. Compl. ¶¶ 24, 27, 29, 31. And it's not just the issue of felons: for instance, Plaintiffs 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. *Id.* ¶ 77.

[3] Each individual plaintiff made this allegation. *Id.* ¶¶ 26, 28, 30.

[4] *Id.* ¶¶ 58. None of these verified allegations in the Amended Complaint is contrary to the original Complaint. Rather, they provide context. A cursory comparison of the Complaint and Amended Complaint shows that there is no contradiction. The original Complaint repeatedly stated that Plaintiffs' statements are based on the Minnesota Constitution and directly referenced *Hunt*, which is premised on that argument. *E.g.,* Compl. ¶¶ 1, 2, 3, 16 (MVA), 19 (Amlaw), 21 (Wendling), 23 (Kirk), 42–45 (explaining the constitutional preemption issue in the state-court lawsuit), 47.

Plaintiffs' trepidation is not hypothetical. This is the Speech Code's express purpose:

> 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**.'

Deena Winter, *Election bill would make it illegal to knowingly spread false information that impedes voting*, Minnesota Reformer (Mar. 7, 2023), https://minnesotareformer.com/2023/03/07/election-bill-would-make-it-illegal-to-knowingly-spread-false-election-info-that-impedes-voting/ (last accessed Nov. 28 2023) (emphasis added); Am. Compl. ¶ 14 & Ex. 1. What's more, after Plaintiffs filed *Hunt*, the author of the Felon Voting Law, Representative Cedric Frazier, stated this:

> 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.

Rep. Cedric Frazier statement on Restore the Vote Lawsuit, Minn. House of Representatives (June 29, 2023), https://house.mn.gov/members/profile/news/15548/37364 (emphasis added); Am. Compl. ¶ 15 & Ex. 2.

Plaintiffs' fears that the Speech Code would be used to silence their political speech have come true: the County Attorney has counterclaimed against them, which chills their speech. Am. Compl. ¶¶ 19, 20, 69, 75, 87. The Speech Code has already harmed them by forcing them to defend themselves against the counterclaim. Now, if Plaintiffs speak as to

their view of the Minnesota Constitution, they risk further action and prosecution by the Defendants.

ARGUMENT

I. Standard of review.

On the motion to dismiss and the motion for judgment on the pleadings,[5] the Court applies the standard applicable to motions under Federal Rule of Civil Procedure 12(b)(6). *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1109 (8th Cir. 2017), related to the plausibility of a complaint pleaded under Rule 8. Under that rule, a pleading must only contain a short and plain statement of the claim showing that the pleader is entitled to relief.

Consistently,

> [t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Importantly, assuming the truth of the Amended Complaint's allegations here, the Court must take all reasonable inferences in Plaintiffs' favor. *Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 730 (8th Cir. 2015).

Further, the record here is limited to the allegations in the four corners of the *Amended* Complaint and any documents necessarily embraced by it. While the Court might later consider the initial verified Complaint for *evidentiary* purposes at summary judgment, the

[5] To streamline briefing, Plaintiffs present their arguments against Defendants' motions in this combined memorandum of law. Plaintiffs write separately to support their motion for a preliminary injunction, but incorporate the merits arguments in this memorandum of law.

Court does not consider an original pleading that has been amended, even if verified, on Rule 12 motions.[6] *See Beal v. Beller*, 847 F.3d 897, 901 (7th Cir. 2017) ("***For pleading purposes***, once an amended complaint is filed, the original complaint drops out of the picture . . . . a verified complaint . . . is also the equivalent of an affidavit for purposes of ***summary judgment*** . . . .") (emphasis added).

II. Plaintiffs have alleged both facial and as-applied First Amendment challenges to the Speech Code, and the Court must consider both.

Plaintiffs allege that the Speech Code is unconstitutional *both* facially and as applied to them because of its overbreadth, underinclusiveness, lack of tailoring, failure of proof of a concrete harm to address, and vagueness. Am. Compl. ¶¶ 22, 97–142. The distinction between facial and as-applied challenges relates to the breadth of the remedy sought, not the complaint's facial plausibility. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (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.

While the Court should generally "construe statutes as necessary to avoid constitutional questions," the Court cannot "adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned." *Id.* at 329. Thus, in *Citizens United*, the Court struck down a speech restriction because it would have a "substantial,

[6] Plaintiffs' statements in the initial Complaint plainly refer to their view of the Minnesota Constitution and are just as protected as the statements in the Amended Complaint. But again, the Amended Complaint provides context to ensure that Plaintiffs' original meaning was clear.

nationwide chilling effect." *Id.* at 333. The Court held that a facial challenge had to be considered in part because the application of the law to the particular facts is affected by time—Citizens United's legal challenge to the speech restriction at issue was decided in 2010, two years after the 2008 election, when Citizens United sought to show its *Hillary* movie. *Id.* at 334.

Where a statute unquestionably chills political speech, including "false" political speech, it "must be invalidated." *See Citizens United*, 558 U.S. at 336; *281 CARE Committee*, 766 F.3d at 793. Thus, in *281 CARE Committee*, on a facial challenge, the Eighth Circuit struck down the portion of Minn. Stat. § 211B.06 which made it a crime and subject to a civil penalty to make false statements about the effect of ballot questions, even though the only speech alleged in the complaint was the plaintiffs' speech. *Id*.

The same is true here. The Attorney General acknowledges that facts might change such that Plaintiffs' speech and proposed speech might be considered differently later in time. *See* AG Mem. at 14 n.6. If the Minnesota Supreme Court decides how the Minnesota Constitution is interpreted, Plaintiffs could conceivably change their positions on the issue of the constitutionality of felon voting. *See id.* Or Defendants could. That circumstances can change and affect as-applied challenges is not a future defense for Defendants. It is why Court must consider the facial invalidity of the Speech Code, even if the law could also be struck down as-applied.

III. Plaintiffs' speech is quintessential political speech.

Plaintiffs are engaged in core political speech. Their speech on the Felon Voting Law is on a major "matter of public concern" in Minnesota, as the Legislature just passed the

new law. Further, Plaintiffs are challenging it because they believe it is unconstitutional and therefore ineffective from the start. Likewise, Plaintiffs' speech related to Minnesota's constitutional prohibition on the voting eligibility of wards of the state is core political speech. Am. Compl. ¶ 77.

Issues related to voter eligibility in elections are common and contentious political issues, as our nation's and our state's history amply shows. The Minnesota Constitution's Article VII, section 1 contains several prohibitions on voting enumerated by our founders which have led our legislature to change eligibility requirements over a century and a half. Minn. Const. art. VII, § 1; *see also Schroeder*, 985 N.W.2d at 539–43 (discussing history of statutory voter eligibility changes). The fact that these issues are subject to legislative change (as long as that change comports with the Constitution) and legislators run on platforms related to expanding the vote,[7] election integrity, and so on, indicates the obvious political nature of Plaintiffs' speech.

Other protected political speech could be interpreted as within the Speech Code's ambit. For example, major political parties are entitled to appoint "challengers" to appear at polling places for the *sole purpose* of challenging voter eligibility. Minn. Stat. § 204C.07, subd. 1 & 2. When a citizen believes that a person is ineligible to vote, he or she may

[7] *E.g.,* Peter Callaghan, *With or without court ruling, Minnesota lawmakers seek to restore ex-offender voting rights*, MinnPost (Jan. 10, 2023), https://www.minnpost.com/state-government/2023/01/with-or-without-court-ruling-minnesota-lawmakers-seek-to-restore-ex-offender-voting-rights/.

challenge that person's ineligibility at the polling place. Minn. Stat. § 204C.12.[8] Yet the Speech Code makes it a gross misdemeanor to falsely state that another person is ineligible to vote. This means that honest mistakes about a person's eligibility could subject poll challengers to defending lawsuits under the Speech Code.

Under Supreme Court precedent, such statements are quintessential political speech. And "political speech"—which the Supreme Court has defined as any public discussion on matters of public concern—is at the height of the First Amendment's protections. *See Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). Political speech and has ***never*** been limited to items specifically on a ballot, *Cox v. Louisiana*, 379 U.S. 536, 545–52 (1965), contrary to the County Attorney's implication that it is, County Mem. 26.

In *Snyder*, for example, the Supreme Court held that the outrageously offensive picketing at the funeral of killed-in-action veteran Matthew Snyder could not sustain a claim for intentional infliction of emotional distress by Snyder's father because the First Amendment protected the demonstrators. 562 U.S. at 460–61. The Court held that the "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

In *Cox*, citizens were convicted of "breaching the peace" for protesting "segregation and discrimination against" Black Americans. *Id.* at 545 (internal quotation mark omitted).

[8] The law requires "personal knowledge" as to whether a person is eligible to vote in order for a challenge to be lobbied. Minn. Stat. § 204C.12, subd 1. That phrase is undefined. And a recently passed amendment to Minn. Stat. § 204C.07 forbids anyone from gathering information supporting legitimate challenges to voter eligibility.

"They assembled peaceably at the State Capitol building and marched to the courthouse where they sang, prayed, and listened to a speech." *Id.* at 545–46. Cox then told the gathered to "go uptown and sit in at lunch counters." *Id.* at 546. The Court overturned the appellants' convictions because they could not be held liable for "breaching the peace" when they were merely engaged in "free political discussion." *Id.* at 552.

In *Stromberg v. California*, 283 U.S. 359 (1931), the defendant was accused of "willfully, 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.*

The Supreme Court recently reaffirmed this black-letter principle in *Minnesota Voters Alliance v. Mansky*, holding Andy Cilek wearing "Please ID Me" buttons was protected political speech, even though no voter identification law was on the 2010 Minnesota ballot. 138 S. Ct. 1876, 1889 (2018). Defendants' claim that Plaintiffs' alleged speech is not "political" or on matters of "public concern" is nonsense.

IV. There is no "*Anderson-Burdick*" standard to apply to regulations of political speech.

"The Supreme Court has applied the *Anderson-Burdick* framework to cases governing the 'mechanics of the electoral process' rather than election-related speech." *VoteAmerica v. Schwab*, No. 21-2253-KHV, 2023 U.S. Dist. LEXIS 78316, at *32-33 (D. Kan. May 4,

2023) (quoting *McIntyre*, 514 U.S. at 345). Under this framework, the various Courts of Appeals have reviewed

> under *Anderson-Burdick* laws regulating, *e.g.*, the order in which candidates' names appear on the ballot, whether the ballot is electronic, the form and content of ballot initiatives, absentee voting, early voting, nomination of candidates, voter registration, the counting of ballots, polling hours, voter identification and proof-of-citizenship requirements, regulation of voter data, the appointment and qualifications of election workers, the use of primaries or caucuses, the use of straight-ticket voting, the use of ranked choice voting, the cancellation of an uncontested primary, the use of district-level or at-large election systems, and the composition of Independent Redistricting Commissions.

Mazo v. N.J. Sec'y of State, 54 F.4th 124, 140-41 (3d Cir. 2022) (footnotes collecting cases omitted).

These are non-speech regulations for elections and Election Day. They apply when the incidental burden on speech occurs because the speech is "on the ballot or within the voting process" and *not* "interactive communication between individuals." *Mazo*, 54 F.4th at 142–43. The Supreme Court has not applied that framework to political speech. *See id.* Rather, "the balancing test is a general approach . . . in deciding the constitutionality of content-neutral regulation of the voting process. . . . [S]trict scrutiny is applied where the government restricts the overall quantum of speech available to the election or voting process." *Campbell v. Buckley*, 203 F.3d 738, 745 (10th Cir. 2000).

Plaintiffs' allegations reveal no speech subject to "regulation of the voting process" or related to marking a ballot or other mechanical actions which are not interactive political speech by nature. Plaintiffs' speech poses no burden on any person's right to vote—anyone is free to disagree and ignore Plaintiffs. And the Speech Code, without question, "restricts

the overall quantum of speech available." It is a direct regulation of pure speech, and so *Anderson-Burdick* does not apply.

V. The Speech Code violates the First Amendment.

Defendants here are of two minds and can't seem to figure out which is true: either the Plaintiffs' speech is in good faith and therefore cannot violate the Speech Code, AG Mem. 14–15, or Plaintiffs' speech is somehow intended to stop felons from voting, County Mem. 20–21, 29. That the Attorney General and a county attorney for one of Minnesota's largest counties cannot figure out how to classify Plaintiffs' speech is case-in-point here: if they can't figure out whether to sue Plaintiffs, how much more troubling is it that *any person* who doesn't like Plaintiffs' speech can sue them to try to shut them down? The Speech Code enables *anyone* claiming harm from Plaintiffs' speech (somehow) to bring an action against them.

This makes the Speech Code overbroad and vague on its face and causes the Speech Code to not *stop* fraud, but to affirmatively *perpetuate* it, as the Eighth Circuit has definitively held related to speech codes which "deputize" the general public:

> [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 Comm., 766 F.3d at 790, 92–93 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014).

Plaintiffs are, by nature of their advocacy, "easy targets" for political opponents to sue. The Speech Code inherently perpetuates fraud, for which there is no government interest. So because Plaintiffs' 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. *United States v. Alvarez*, 567 U.S. 709 (2012), and its intermediate scrutiny does not apply, as the Eighth Circuit held in *281 CARE Committee*. 766 F.3d at 783–84; *see also Am. Freedom Def. Initiative v. King Cnty.*, 577 U.S. 1202, 1206 (2016) (construing *Alvarez* as prohibiting content-based bans on false political speech). "The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Sorrell*, 564 U.S. at 566.

To survive strict scrutiny—"the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)—Minnesota must demonstrate that the Speech Code "furthers a compelling interest and is narrowly tailored." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015) (cleaned up). The State bears the burden of establishing this both on the merits and to defeat a request for preliminary injunction. *Ashcroft*

v. ACLU, 542 U.S. 656, 660–61, 666 (2004). Defendants 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) (cleaned up), because "[c]ontent-based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382. 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*, 140 S. Ct. 2246, 2261 (2020) (cleaned up).

Further, when speech that the government considers harmful is at issue, 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. "[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 v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam) (holding advocacy of violent resistance not sufficient to justify punishment of speech).

The Speech Code directly restricts pure speech. Subdivision 2 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. Further, the entire law is overbroad, sweeping in a wide swath of protected speech, including true speech. The law lacks narrow tailoring because it empowers not only defendants, but any citizen with a different view, to impose not simply penalties and costs but even prior restraints against speech. The law is also void for vagueness because it leaves crucial terms undefined, exacerbating its First Amendment problems.

A. The Speech Code's subdivisions 2 and 3 discriminate based on content and viewpoint and are 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*, 576 U.S. at 163. "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.* One simple way of determining whether a restriction is content-based is by considering 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) (cleaned up); *see also City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022) ("regulations that discriminate based on the . . . message expressed" "are content based" (cleaned up)).

"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 (cleaned up). "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters." *Barnette*, 319 U.S. at 641. Such restrictions are "presumptively unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

The Speech Code's subdivision 2 is both content- and viewpoint-based. It targets the content of speech, and 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). It only and particularly applies to speech that tells people *not* to vote. Speech telling people they're *eligible* to vote, even if completely false and misleading, is perfectly fine. One can falsely tell noncitizens, the mentally ill, 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 others 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, 2020. Despite the judge's ruling that the law is not enforceable because of Article VII, section 1 of the Minnesota Constitution, Secretary of

State Steve Simon[9] and Attorney General Ellison[10] openly stated that Minnesotans still serving felony sentences could vote. 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. Plaintiffs do not believe subdivision 2 of the Speech Code *should* be enforced against them for their public statements. But the fact that it *could not* be so enforced demonstrates that the Speech Code's subdivision 2 is viewpoint-based discrimination. A law which fails to address both allegedly improper *limitations* on the franchise and improper *expansions* on the franchise discriminates based on viewpoint.

Further, one "feature" of the Speech Code (a "bug" to Plaintiffs) 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." A provision that worked both ways would certainly help stop voter fraud before it happens.[11] Yet there is no provision enabling citizen-plaintiffs to bring actions to

[9] https://twitter.com/MNSteveSimon/status/1716511233614983221

[10] https://x.com/AGEllison/status/1715541384579399916?s=20.

[11] Voter fraud is extraordinarily hard to prove, which the Secretary of State acknowledged in a recent oral argument before the Minnesota Supreme Court. Justice Thissen asked how one catches a person forging an absentee ballot for a relative—a felony. The Secretary's attorney admitted that "it would be difficult" to catch. Oral Argument, *Minn. Voters All. v. Minn. Sec'y of State*, No. A22-0111, Feb. 2, 2023, at 44:20–46:40 https://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1601.

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

B. The Speech Code imposes a prior restraint on protected speech.

The Speech Code contains specific penalty provisions that expressly authorize prior restraints on core political speech:

> The attorney general, a county attorney, or any person injured by an act prohibited by this section may bring a civil action to prevent or restrain a violation of this section if there is a reasonable basis to believe that an individual or entity is committing or intends to commit a prohibited act.

Subd. 5(b). Thus, even if it were content- and viewpoint-neutral, the Speech Code, here illustrated in the form of Defendant Johnson's counterclaim, still fails constitutional scrutiny as a prior restraint.

Prior restraints on speech "are the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). 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). 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." William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 4:150-53. To Joseph Story, "the language of this [first] amendment import[ed] no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint." COMMENTARIES ON THE CONSTITUTION 3: § 1874. If our protection for free speech means anything, it means that

prior restraints are anathema to our law. Therefore, for good reason, "[t]he Supreme Court has roundly rejected prior restraint." *Kinney v. Barnes*, 443 S.W.3d 87 at n.7 (Tex. 2014) (quoting Sobchack, W., The Big Lebowski, 1998).

The Speech Code authorizes its use 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" (emphasis added). One need not have even uttered the claimed false speech to be prosecuted—or sued by a random person. But because Plaintiffs have expressed these views in the past could 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, Plaintiffs must also be concerned about what they say outside of the 60-day windows 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.

C. The Speech Code is unconstitutional because it is overbroad and underinclusive in several respects.

Even if some interest unrelated to speech suppression were at stake, the Speech Code is vastly overbroad. The Free Speech Clause prohibits speech restrictions that sweep too broadly in relation to the statute's legitimate sweep; "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" (cleaned up)). There may be sparse examples of bad behavior Defendants would like to use the Speech Code against, but laws punishing speech are not saved by the odd miscreant 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*, 138 S. Ct. 2361, 2376 (2018) (cleaned up).

The statute sweeps in much protected speech, including true speech proposed by Plaintiffs and others who might make similar political statements in the future, because political opponents and the Defendants may subjectively determine what they've espoused to be false and haul Plaintiffs into Court over it. In fact, they already have, via Defendant Johnson's counterclaim. This case shows the Court *exactly* what the problem is with the Speech Code: these government Defendants, who have obligations to uphold the constitutions of Minnesota and the United States, and who are officers of the Court, don't even agree on whether Plaintiffs' speech can be punished by the Speech Code. If they can't figure it out, others certainly will not, and there is a serious danger of bad actors using greater resources to sue putative speech-defendants as part of a campaign to shut down political speech they dislike.

1. Subdivisions 1, 2, and 3 are overbroad because they sweep in pure political speech.

Subdivisions 1, 2, and 3 are overbroad because their elements do not limit 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.* subd. 2.

Plaintiffs have not threatened or used damage, harm, or loss as to any person. Am. Compl. ¶¶ 61, 64. 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. *See generally* Am. Compl. Plaintiffs brought a lawsuit to vindicate their position on the constitution and the law. Yet the County Attorney believes that by virtue of Plaintiffs' political speech alone, with *nothing more*, and saying nothing at all about *any* repercussion for illegally voting, they have in fact threatened or used damage, harm, or loss. County Mem. 33. The County Attorney also believes that a reasonable person could "feel intimidated" by another person merely stating an opinion about whether a law is effective. *See id.* But case law limits the types of behavior which could lead to "intimidation" liability to

"true threats," because to hold otherwise would violate the First Amendment. *See U.S. v. Nguyen*, 673 F.3d 1259, 1265 (9th Cir. 2012). The County Attorney's counterclaim shows that the subdivision 1 welcomes frivolous lawsuits against putative defendants over their political speech.

Subdivision 2 is also overbroad in relation to its legitimate sweep. Plaintiffs acknowledge that intentional attempts to mislead voters about "voting requirements and procedures" may be barred. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1889 n. 4 (2018). Defendants attempt to get a *lot* of mileage from this tiny bit of *dictum* from *Mansky*, but its limitations are clear from its context: it shows 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. 138 S. Ct. at 1889. *Mansky*'s footnote 4 thus supports Plaintiffs: if Plaintiffs' speech were punishable, then Andy Cilek's "Please ID Me" button—speech on an issue that was not on the ballot in 2010—would have been, in the eyes of the *Mansky* Court, a legitimate reason to keep him out of the polling place.[12] But it wasn't. *Mansky*, 138 S. Ct. at 1889. That the *Mansky* Court rejected the State's attempt to keep Cilek out of the polling place is the death-knell for Defendants' quote-grab.

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

[12] In *Mansky*, MVA's executive director, Andy Cilek, was turned away from the polling place twice because he was wearing a "Tea Party Patriots" T-shirt and a "Please ID Me" button. *Mansky*, 138 S. Ct. at 1884.

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*, No. 21-CR-80 (NGG), 2023 U.S. Dist. LEXIS 11335, at *6 (E.D.N.Y. Jan. 23, 2023). Likewise, this case is a far cry from telling voters that voting by mail certainly *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).

Plaintiffs' speech also has nothing to do with interests in stopping "voter intimidation and election fraud." *Burson v. Freeman,* 504 U.S. 191, 205 (1992). Plaintiffs' 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. *Compare id.* with Am. Compl. 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.

Plaintiffs are entitled to say what the Minnesota Constitution says, on a good-faith basis. Likewise, 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*, 985 N.W.2d at 539–43 (discussing history of statutory voter eligibility changes); Minn. Stat. §§ 204C.07, 204C.12. To forbid this political speech, as the Speech

Code does, is a gag order on anyone who reads the Constitution how Plaintiffs do. That such speech is actionable in the eyes of a prosecutor unconstitutionally chills political expression in Minnesota.

As to subdivision 3, the law is also overbroad for similar reasons as for subdivisions 1 and 2. Based on the snippets of legislative discussion referenced by the Attorney General, the purpose of subdivision 3 appears to be stopping *physical* impediments to voting or registering to vote, such as the threatened hiring of a private security firm to monitor polls in Minnesota, or watching ballot drop-boxes in Arizona. But if the Speech Code is interpreted to go further than prohibiting physical actions that impede the right to vote, or true threats, it becomes unconstitutional as a restriction on political speech without proper tailoring, for the same reasons as for subdivisions 1 and 2.

Finally, for all three substantive sections, the law 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 to be 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, making the law overbroad. The Attorney General's insistence that Plaintiffs' speech simply isn't actionable based on their allegations is beside the point based on the real threat of prosecution. AG Mem. 14. His argument is reminiscent of that of the county attorneys in *281 CARE Committee*, which the Eighth

Circuit rejected. 766 F.3d at 791. And according to the law's author, Rep. Emma Greenman, and the County Attorney, restriction of political speech is *the point*—talking about whether felons may constitutionally exercise voting rights is illegal. The Speech Code thus authorizes lawsuits against speakers based on pure conjecture about their political speech, which is exactly what the County Attorney has done. And it is the fact of *filing the lawsuit* that creates harm, regardless of whether Plaintiffs 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.

The Speech Code is overbroad, as Plaintiffs' political speech and other similar political speech are swept in, without any narrow tailoring to actual harms exempted from First Amendment protection, like true threats.

2. Subdivisions 1, 2, and 3 are underinclusive.

Subdivision 1 is also underinclusive. As all parties know, Plaintiffs brought a lawsuit against Anoka County election officials and the Secretary of State to stop those government actors from exceeding their constitutional limitations by implementing the Felon Voting Law. *Hunt*, Minn. Dist. Ct. No. 02-CV-23-3416. In *Hunt*, Plaintiffs have made repeated statements explaining their interpretation of the Minnesota Constitution and how the Felon Voting Law violates it. The obvious conclusion from their reasoning is that felons not restored to lost civil rights are not eligible to vote in Minnesota.

Local media have also covered the case, including Minnesota Public Radio and KSTP-TV, which had audio and video coverage of the merits hearing that took place on October 30, 2023. *E.g.,* Nicole Ki and Matt Sepic, *Judge weighs challenge to Minnesota felon*

voting law, MPRNews (Oct. 30, 2023), https://www.mprnews.org/story/2023/10/30/judge-weighs-challenge-to-minn-felon-voting-law. Based on that hearing, the local media recorded and replayed Plaintiffs' arguments to the general public, which is overwhelmingly likely to include felons who haven't finished their sentences.

Likewise, when a Mille Lacs County judge declared the Felon Voting Law unconstitutional and suspended convicted felons' right to vote upon their sentencing (which again was later reversed by the Minnesota Court of Appeals), Plaintiff Minnesota Voters Alliance submitted an *amicus* brief supporting the judge's reasoning on the constitutional analysis. The judge's decision, and MVA's amicus brief, was also covered by the local media. Kyle Brown, *Minnesota appeals court rules Mille Lacs County judge can't stop felons from voting*, KSTP-TV (Nov. 2, 2023), https://kstp.com/kstp-news/top-news/minnesota-appeals-court-rules-mille-lacs-county-judge-cant-stop-felons-from-voting/. Many, including the Secretary and Attorney General, commented that the judge's decision was wrong and scaring felons into not registering and not voting. *E.g.,* Mohamed Ibrahim, *Felons' voting rights unaffected by unprompted ruling by judge on new law, say AG Ellison, Sec. Simon*, MinnPost (Oct. 24, 2023), https://www.minnpost.com/public-safety/2023/10/felons-voting-rights-unaffected-by-unprompted-ruling-by-judge-on-new-law-say-ag-ellison-sec-simon/.

Plaintiffs' absolutely privileged in-court statements are *far more likely*, when repeated by media, to have a greater impact on the public's knowledge of the dispute and their feelings about eligibility under the Felon Voting Law than in other arenas. Thus, the restriction at issue here, which stops Plaintiffs from talking to their friends and neighbors about their

views *without* the media megaphone, obviously leaves the state's so-called interest open to attack from other, more "damaging" sources.

The Eighth Circuit found a media exemption to be a particular problem vis-à-vis the underinclusiveness of Minn. Stat. § 211B.06 in *281 CARE Committee*. As the Court said there:

> Overlaying the press exemption with the statutory restrictions, we envision a newspaper opinion section which, on the same day, prints the very same "false" information regarding the effects of a ballot question twice—once as an editorial and again in a paid advertisement from a local group opposing the initiative. One is exempt from prosecution and the other is not. Such a result does not advance a stated interest in preventing a fraud on the electorate.

766 F.3d at 795. This is the exact situation here: if Plaintiffs pen an op-ed in a local newspaper stating the same view they advance in court pleadings,[13] 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," that speech is presumably protected from prosecution, even though the "harm" (if it can be called that) is the same.

The Speech Code is underinclusive. It leaves its interests open to attack merely by media reporting on a matter of significant political importance to Minnesotans.

D. 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

[13] The Star Tribune Editorial Board did this in a similar, but generally opposing, fashion. Star Tribune Editorial Board, *District judge errs on voting rights*, StarTribune (Oct. 20, 2023), https://m.startribune.com/district-judge-errs-on-voting-rights/600313777/.

seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). 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 marks and citation omitted).

The Speech Code does not define its terms. This is concerning, since 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 Black*, 538 U.S. 360; *Brandenburg*, 395 U.S. at 447–49. 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 (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 v. Bullitt*, 377 U.S. 360, 367 (1964). 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 Plaintiffs—and even their attorneys—to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Id.*

Several portions of the Speech Code require more definition to pass constitutional muster. First, subdivision 1 is unclear what a "threat" of "damages, harm, or loss" might be. The County Attorney's own allegations that Plaintiffs 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. County Mem. 33. Defendants cannot claim, after counterclaiming against Plaintiffs, 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. The County Attorney's comparison of Plaintiffs' statements to this kind of behavior, County Mem. 33, is wrong, offensive, and absurd. Contrary to the County Attorney's view, "true threats" require a demonstration that "what is at issue" is not "statements that when taken in context do not convey a real possibility that violence will follow." *Counterman v. Colo.*, 143 S. Ct. 2016, 2114 (2023). True threats are "serious expressions conveying that a *speaker* means

to commit an act of unlawful violence." *Id.* (emphasis added) (quoting *Black*, 538 U.S. at 359) (cleaned up). They require a subjective intent as well because to require only an objective review would make even legislation aimed at true threats unconstitutional:

> The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats.

Counterman, 143 S. Ct. at 2116. Plaintiffs' statements come nowhere close, and neither is it possible to prove that Plaintiffs subjectively intend to harm anyone at all. Yet the County Attorney claims that they do.

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? The statute does not say. Instead of defining its terms, it gives a few examples of types of speech which the legislature apparently believe 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."[14] As to the latter of these examples, the statute appears to present a serious risk to poll challengers specifically authorized by statute to challenge ineligible voters. *Compare* Minn. Stat. § 211B.075, subd.

[14] To the extent subdivision 2 prohibits "true threats" to physical safety, Plaintiffs do not challenge that portion of the statute as vague.

2 *with* Minn. Stat. § 204C.12, subd. 1. Thus it is really not clear at all what conduct is allowable and what is not allowable.

Subdivision 3 suffers 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*, 143 S. Ct. at 2116.

E. The Speech Code is not "actually necessary" to address the harms Defendants, and the lawmakers who supported the law, claim to exist.

A law regulating political speech must be narrowly tailored to achieve a compelling government interest, and, specifically, "actually necessary" to achieve the stated government interest, based on a "direct causal link" to the alleged problem. *281 CARE Committee*, 766 F.3d at 787. Even under the intermediate scrutiny applicable in certain contexts, "the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 564 U.S. at 572. And again, "the governmental interest" must be "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). But here the state's entire goal is to suppress disfavored ideas. It is not a legitimate interest.

The Defendants cannot rely on vague claims of phantom boogeymen to justify a restriction on Plaintiffs' speech. The Eighth Circuit outright rejected this type of attempted reliance on "common sense" in *281 CARE Committee*. The Eighth Circuit required 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 the Defendants have not identified any "empirical evidence" which supports the law. The Attorney General merely cites a few portions of legislative discussion which fail that requirement. AG Mem 2. These snippets show nothing in Minnesota or elsewhere which might support the Speech Code. For example, Rep. Walter Hudson offered a cursory remark that he had "heard stories of folks who put out information . . . that intentionally misinforms about hours that polls are open and things of that nature. One hundred percent, that's something that we should not allow and should have corrective action for." *H'ring Before H. Pub. Safety, Fin. & Policy Comm.*, 2023 Leg., 93d Sess. Feb. 21, 2023, at 1:10:50–:11:15. There were no examples of any such speech in Minnesota. But he followed that with: "My concern is that if we're not deeply specific about what constitutes both intimidation and misinformation, this could very quickly become a tool used for political ends, to curtail speech that, whatever side happens to be in executive control, just doesn't like." *Id.* 1:11:15–:11:36. As to the second part of his statement, there is real evidence of that, as this case shows.

Likewise, the Attorney General cites Rep. Emma Greenman's statement in a hearing that there is a "rising risk of threats, disinformation that we've seen over the last four years." Rep. Greenman then noted the hiring of private security firms, ballot-box monitoring, and door-to-door voter fraud efforts, which would place a *physical* presence before a putative voter, not pure speech. *H'ring Before H. Judiciary, Fin. & Civ. Law Comm.*, 2023 Leg., 93d Sess. Mar. 2, 2023, at 42:00–43:27. She then acknowledged, however, that voters in Minnesota have *not* faced those same types of physical presences related to their votes or registration. Again, nothing to support a restriction on pure speech, as opposed to physical intimidation.

The Attorney General also cites a statement by a member of Muslim Coalition of ISAIAH, but the timestamp cited does not appear to have any relevance to the Speech Code. *See* AG Br. at 2. And the Attorney General also cites a 15-second statement by Senator Liz Boldon in a hearing where she discussed voter registration applications. *See id.* None of this speech or testimony provides any actual evidence supporting any need for the Speech Code in Minnesota. Under controlling precedent in *281 CARE Committee*, these examples of so-called "evidence" fall well short of what is required to regulate political speech.

VI. There is no freestanding "fraud" or "false statements leading to harm" exception to the First Amendment, and neither would one apply here.

The County Attorney also argues that Minnesota may directly regulate speech where it is "fraud" or "false statements leading to harm." This is also reminiscent of the county attorneys' argument in *281 CARE Committee*: "Accordingly, they argue, the statute is

justified, reasonably, by its purpose in preventing fraud on the electorate through minimal regulations on knowingly false statements of fact." 766 F.3d at 788.

The Eighth Circuit rejected this argument, and this Court must as well. First, of course, Plaintiffs' speech is true, in their minds. The fact that the County Attorney counterclaimed against them on this record indicates that the Speech Code provides no "breathing space" and instead forces Plaintiffs to swallow their speech. Second, there is "no persuasive evidence to dispel the generally accepted proposition that counterspeech may be a logical solution to the [fraud] interest advanced" in support of the Speech Code. *281 CARE Comm.*, 766 F.3d at 793. In fact, because the Speech Code perpetuates fraud in the form of sham lawsuits, like section 211B.06 did, Defendants "could not continue to keep [the Speech Code] as part of a legislative scheme when the realities of its possible abuse are exposed." *Id.* at 794. Third, the fact that a person could be prosecuted for an op-ed in the newspaper stating what Plaintiffs say, but the newspaper or a contrary voice could not be prosecuted for speaking on the same issue with the same information, shows that there is no advancement of any anti-"fraud" interest by the Speech Code. *See id.* at 795.

Further, Plaintiffs' speech is quite unlike the examples of "fraud" the County Attorney cites. *Wohl* and *Mackey* are distinct and not binding on this Court. In *Wohl*, the plaintiffs sued the defendants for civil rights and Voting Rights Act violations for making false robocalls to voters to try to stop them from voting by mail. 512 F. Supp. 3d at 505–06. The threats in *Wohl* included statements that "if recipients of the message were to vote by mail, the recipients' personal information 'will be' used by creditors and law enforcement to collect debts and execute old, outstanding warrants." *Id.* at 510–11. They also said that "the

CDC is attempting to use vote-by-mail records to track people for mandatory vaccinations." *Id.* at 511. Likewise, the cases *Wohl* cited are very different from this case. In *LULAC v. Pub. Interest Legal Found.*, No. 18 Civ. 423, 2018 U.S. Dist. LEXIS 136524, at *3 (E.D. Va. Aug. 13, 2018), the defendants "linked Plaintiffs' names and personal information to a report condemning felonious voter registration in a clear effort to subject the named individuals to public opprobrium." *Id.* at *4. In *Nguyen*, a letter sent to specific voters "informed recipients that, if they voted in the upcoming election in November their personal information *would be* collected by a newly implemented government computer system, and that organizations that were 'against immigration' might request information from this system." 673 F.3d at 1261 (emphasis added).

In *Mackey*, the defendant "tweeted" a photo that identified a person as part of "African Americans for Hillary" and said, "Avoid the line. Vote from home. Text 'Hillary' to 59925." 2023 U.S. Dist. LEXIS 11335, at *6. As the court noted, this was "indubitably false, with 'no room to argue about interpretation or shades of meaning.'" *Id.* at *62 (quoting *Alvarez*, 567 U.S. at 713). Likewise, the *Mackey* Court held that "Mr. Mackey's tweets do not even arguably constitute 'pure speech.'" *Id.* at *62. The court compared the subterfuge engaged in by Mackey with false pretenses claims, where the speaker attempts to don the image of authority to make the false speech something others might rely on. *Id.* at *63.

This is all completely unlike Plaintiffs' speech. No reasonable person would believe that Plaintiffs are the arbiters of who can vote in Minnesota, or that Plaintiffs or anyone else will take action against voters for following the Felon Voting Law and not the Constitution.

These comparisons also show how the Speech Code might be more narrowly tailored to limit its scope in a way that would *avoid* pure political speech like Plaintiffs' speech. Regardless of whether *Mackey* and *Wohl* are upheld, they are examples of false speech specifically about the mechanics of the election apparatus (text message to vote) and misrepresenting the government's *sure* and *specific* responses to voting behavior (capturing information and representing that the government *will* use it for prosecution), falsely made with claimed authority or representing to be a trustworthy source (African Americans for Hillary). These are more like the claims analyzed under *Anderson-Burdick* which are focused on the nuts-and-bolts mechanics of elections. They are also much closer to the line of what constitutes a true threat than Plaintiffs' speech.

By comparison, the Eighth Circuit 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. That court has rejected legislative attempts to regulated "fraudulent" speech by creating private causes of action for anyone to bring—the perpetuation of fraud itself via sham lawsuits. *Id.* This Court should so hold here.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to dismiss and for judgment on the pleadings and let this case proceed to summary judgment.

Respectfully submitted,

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