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 SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION**

INTRODUCTION

Plaintiffs, Minnesota Voters Alliance ("MVA") and three Minnesota citizens active in state politics, challenge the 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.

Plaintiffs have briefed the Court on why the Speech Code is unconstitutional in their combined memorandum of law in opposition to the Attorney General's motion to dismiss and the Anoka County Attorney's motion for judgment on the pleadings. ECF No. 32. To avoid needless repetition, Plaintiffs incorporate their fact recitation and arguments from that memorandum here in support of their motion for a preliminary injunction. *See id.* In addition to those arguments, Plaintiffs here specifically brief additional matters related to

their motion for a preliminary injunction. Plaintiffs ask the Court to issue a preliminary injunction against the enforcement of the Speech Code, either on its face or as-applied to them.

ARGUMENT

For Plaintiffs' motion under Federal Rule of Civil Procedure 65 for a preliminary injunction, the Court considers (1) Plaintiffs' likelihood of success on the merits; (2) the threat of irreparable harm to Plaintiffs; (3) the balance of this harm and any injury that granting the injunction will inflict on Defendants; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

I. Because strict scrutiny applies to the Speech Code, the government defendants bear the burden of satisfying that test to avoid issuance of an injunction.

While a movant is often saddled with the burden of showing likelihood of success on the merits to warrant a preliminary injunction, where the "Government bears the burden of proof on the ultimate question of [the challenged law's] constitutionality, [the plaintiffs] must be deemed likely to prevail unless the Government has shown that [the plaintiffs'] proposed less restrictive alternatives are less effective than [the law]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *accord Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Here, the Defendants bear that burden because First-Amendment scrutiny applies to the Speech Code. Whether strict or intermediate, the Defendants still bear the burden of showing the law's constitutionality. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)

II. For a First Amendment challenge, the *Dataphase* factors collapse into an analysis of the likelihood of success on the merits.

When deciding "whether to grant an injunction in a case involving allegations of First Amendment harm, the *Dataphase* factors collapse into a single inquiry: 'the likelihood of success on the merits is often the determining factor in whether a preliminary injunction should issue.'" *Brooks v. Roy*, 881 F. Supp. 2d 1034, 1039 (D. Minn. 2012) (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008)). The balance of equities here favors Plaintiffs, and Defendants should be enjoined from enforcing the Speech Code until this lawsuit is decided on the merits.

Suppression of speech is always an irreparable harm, and vindication of constitutional rights is always an overriding public interest. Since Plaintiffs have "a colorable First Amendment claim," they have "demonstrated that they likely will suffer irreparable harm if the [law] takes effect." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). "When, as here, a plaintiff raises a legitimate constitutional question, the balance of hardships tips sharply in the plaintiff's favor." *Goyette v. City of Minneapolis*, 338 F.R.D. 109, 120 (D. Minn. 2021) (citing *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007)). "Similarly, the public interest, as reflected in the principles of the First Amendment, is served by free expression on issues of public concern." *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995).

Thus, in a First Amendment challenge such as this one, the preliminary injunction factors essentially collapse into the merits. If the Court agrees with Plaintiffs that the Defendants' motions should be denied because the verified Amended Complaint sets forth a well-pleaded First Amendment claim, the Court should, consistently, find that Plaintiffs are likely to succeed on the merits of this case. *See Ashcroft*, 542 U.S. at 666. In turn, the Court should find that Plaintiffs' have met their burden on each of them.

III. The Court should waive any bond requirement for Plaintiffs.

Under Rule 65, when issuing a preliminary injunction, the Court may set a bond to protect the enjoined party from harm caused if the enjoined party eventually succeeds on the merits of the case. *See* Fed. R. Civ. P. 65(c). However, the Court has discretion to waive a bond requirement. *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 425 F.3d 964, 971 (11th Cir. 2005). And "[w]aiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right." *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1289 (N.D. Fla. 2022). Where plaintiffs bring First Amendment challenges and there are no financial costs associated with enjoining prosecutions of speech, as is the case here, the Court should waive the bond requirement under Rule 65 and issue the injunction.

CONCLUSION

Plaintiffs respectfully request that the Court preliminarily enjoin the operation of Minn. Stat. § 211B.075 while this case proceeds. At minimum, the Court should enjoin the operation of the statute as to these Plaintiffs.

UPPER MIDWEST LAW CENTER

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