STATE OF MINNESOTA

IN SUPREME COURT

A23-0029

Republican Party of Minnesota,

Respondent,

vs.

Nathan Miller, et al.,

Petitioners,

Attorney General Keith Ellison,

Intervenor.

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Nathan Miller, et al., for further review is denied.

Dated: April 16, 2024 BY THE COURT:

s/
Natalie E. Hudson
Chief Justice

This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS

A23-0029

Republican Party of Minnesota,
Respondent,

vs.

Nathan Miller, et al.,
Relators,

Attorney General Keith Ellison,
Intervenor.

Filed January 16, 2024
Affirmed
Smith, Tracy M., Judge

Office of Administrative Hearings
File No. 60-0320-38740

R. Reid LeBeau, Jacobson, Magnuson, Anderson & Halloran, P.C., The Jacobson Law Group, St. Paul, Minnesota (for respondent)

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for relators)

Keith Ellison, Attorney General, Janine Kimble, Assistant Attorney General, St. Paul, Minnesota (for intervenor)

Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Relator Nathan Miller, a political candidate in the November 2022 election, [1] challenges the determination by the Minnesota Office of Administrative Hearings (OAH) that he made a false statement implying support of a major political party, in violation of Minnesota Statutes section 211B.02 (2022), as well as the fine that OAH levied against him for that violation. Miller also asserts that section 211B.02, as applied to him, is unconstitutional because it violates his rights of free speech and association. Because OAH did not make an error of law and had sufficient evidence for its decision, and because the statute is constitutional as applied to Miller, we affirm.

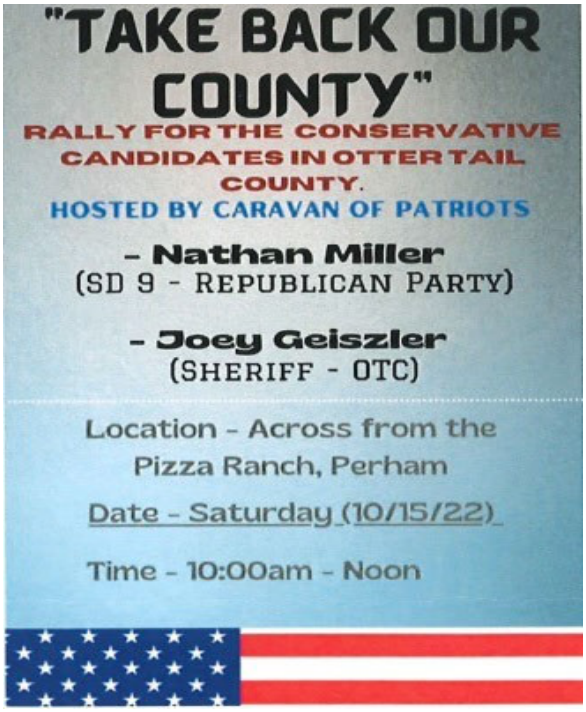
FACTS

In the November 2022 election, Miller ran as a write-in candidate for Minnesota State Senate District 9. Miller had first sought the endorsement of respondent Republican Party of Minnesota, but the party endorsed another candidate. Miller then ran in the party's primary election but lost to the party's endorsed candidate. After losing the primary, Miller filed with the Minnesota Secretary of State as a write-

[1] Miller's campaign committee is also a relator, but, consistent with the single brief submitted by relators, we refer only to Miller in this opinion.

in candidate for the general election.

During his campaign, Miller accepted an invitation to participate in an October 15, 2022 rally to be hosted by the group Caravan of Patriots. Caravan of Patriots produced a flyer for the event, which is reproduced below. Miller posted the flyer to his campaign website. The flyer indicated that Miller would attend the rally, and underneath his name it stated, "(SD 9 – Republican Party)."



The day before the event, the Republican Party of Minnesota filed a complaint with OAH, alleging that Miller's posting of the flyer to his website violated Minnesota Statutes section 211B.02 because the flyer stated and implied that the Republican Party of Minnesota endorsed Miller for the State Senate District 9 seat. The party also alleged that other

statements by Miller violated the statute. Shortly thereafter, an administrative law judge determined that the Republican Party of Minnesota had alleged a prima facie violation and then determined that there was probable cause that Miller had violated the statute.

The matter was then submitted to a panel of three administrative law judges based on the record and written and oral closing arguments. During the pendency of the complaint, the Republican Party of Minnesota's endorsed candidate won the November 2022 election for Minnesota State Senate District 9, defeating both Miller and the Democratic-Farmer-Labor (DFL) Party candidate.

In December 2022, the panel issued its findings of fact, conclusions of law, and order. It determined that Miller's posting of the flyer falsely implied that he had the support or endorsement of a major political party in violation of Minnesota Statutes section 211B.02. Using OAH's penalty matrix, the panel determined that Miller's violation was "negligent" and "may have had some impact on voters" and imposed a fine of $250.

Miller appeals by writ of certiorari, challenging OAH's decision and arguing that section 211B.02 is unconstitutional as applied to him. The Republican Party of Minnesota did not file a responsive brief.[2] Minnesota Attorney General Keith Ellison intervened for the limited purpose of defending the constitutionality of section 211B.02.

[2] Under the Minnesota Rules of Civil Appellate Procedure, when a respondent does not submit a brief, we decide the case on the merits. Minn. R. Civ. App. P. 142.03.

DECISION

I. OAH's decision was not affected by an error of law and is supported by substantial evidence.

Miller first challenges (A) OAH's determination that he violated Minnesota Statutes section 211B.02 and (B) the fine that OAH imposed.

Generally, complaints of unfair campaign practices, including violations of Minnesota Statutes section 211B.02, must be filed with and decided by OAH. Minn. Stat. § 211B.32, subd. 1(a) (2022). On appeal, OAH's decision is presumed to be correct. *Lewison v. Hutchinson*, 929 N.W.2d 444, 447 (Minn. App. 2019). An appellate court can reverse or remand only if the substantial rights of the relator have been prejudiced because the decision was (1) in violation of constitutional provisions, (2) in excess of the authority of the agency, (3) made through an unlawful procedure, (4) affected by other error of law, (5) unsupported by substantial evidence, or (6) arbitrary or capricious. Minn. Stat. § 14.69 (2022); *see* Minn. Stat. § 211B.36, subd. 5 (2022) (providing for judicial review of OAH determinations of election-law violations via Minn. Stat. § 14.69).

Appellate courts review questions of statutory interpretation de novo. *J.D. Donovan, Inc. v. Minn. Dep't of Transp.*, 878 N.W.2d 1, 4 (Minn. 2016). In a challenge asserting that an OAH decision was not supported by substantial evidence, the relator has "the burden of establishing that the findings of the agency are unsupported by the evidence in the record, considered in its entirety." *Fine v. Bernstein*, 726 N.W.2d 137, 142 (Minn. App. 2007), *rev. denied* (Minn. Apr. 17, 2007). Substantial evidence is "such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

A. Violation of the Statute

Section 211B.02 reads in relevant part: "A... candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate…has the support or endorsement of a major political party…" Miller contends that OAH made an error of law and a decision unsupported by substantial evidence when it determined that the flyer's statement "SD 9 – Republican Party" under his name on the rally flyer falsely implied that the Republican Party of Minnesota supported or endorsed him.

First, Miller argues that OAH committed legal error by determining that the flyer's statement implied that a "major political party" had supported or endorsed him because the flyer stated only "Republican Party"—not "Republican Party of Minnesota"—and the national Republican Party is not a "major political party" under the statute.

There is no dispute that the Republican Party of Minnesota is the relevant "major political party" in this matter. *See* Minn. Stat. § 200.02, subd. 7 (2022) (defining "major political party"); Minn. Sec'y of State, *Elections & Voting, How Elections Work, Political parties*, https://www.sos.state.mn.us/ elections-voting/how-elections-work/political-parties [https://perma.cc/Q5LJ-7SBQ] (listing the current major political parties). Contrary to Miller's argument, OAH did not interpret "major political party" to include the national Republican Party. Rather, OAH explicitly stated that the Republican Party of Minnesota was the major political party at issue and determined that Miller had implied the

support or endorsement of the Republican Party of Minnesota. Miller's argument that OAH legally erred is unavailing.

Second, Miller contends that OAH's determination that the statement "impl[ied]…the support or endorsement" of the Republican Party of Minnesota is not supported by substantial evidence. Miller suggests that the statement reflected merely that he was a "republican" and "a member of the Republican Party."

But, in other election-law cases, Minnesota courts have decided that using the name or initials of a political party is sufficient to imply the support or endorsement of the political party. In *In re Ryan*, the Minnesota Supreme Court sustained the factfinder's determination that placing the terms "DFL" and "LABOR ENDORSED" on campaign materials implied that the candidate was supported or endorsed by Minnesota's DFL party. 303 N.W.2d 462, 465-66 (Minn. 1981).

And, in *Schmitt v. McLaughlin*, a case relied on in *Ryan*, the supreme court affirmed the determination that a candidate's use of the initials "DFL" in his advertisements and lawn signs violated the statute by falsely implying that the candidate had the support or endorsement of the DFL party. 275 N.W.2d 587, 591 (Minn. 1979). The supreme court wrote that the candidate's "use of the initials 'DFL' would imply to the average voter that [he] had the endorsement or, at the very least, the support of the DFL party," explaining that "[t]o hold otherwise would render the word 'imply' meaningless." *Id.* The *Schmitt* court further stated that the candidate "could have informed the voters of his political affiliation"—while avoiding the implication of party endorsement or support—"had he done so clearly by the use of such

words as 'member of' or 'affiliated with' in conjunction with the initials 'DFL.'" *Id.*

Like in *Schmitt*, Miller's use of the phrase "Republican Party" in the context of his posting would imply to the average voter that Miller had the support or endorsement of the party, especially since Miller did not state that he was simply a "member of" or "affiliated with" the Republican Party. And, although the full phrase "Republican Party of Minnesota" was not on the rally flyer, Miller has not shown that the record lacks evidence that a reasonable mind would accept as adequate to support the conclusion that the use of "Republican Party" implied support or endorsement by the Republican Party of Minnesota. In the context of a Minnesota state election, use of the term "Republican Party" on a rally flyer is enough to indicate by implication that Miller was supported or endorsed by the Republican Party of Minnesota.

Because Miller has not shown an error of law or a lack of adequate evidence to support OAH's decision that Miller implied the support or endorsement of the Republican Party of Minnesota when he posted a rally flyer using the phrase "SD 9 – Republican Party" under his name, OAH did not err by determining that Miller violated Minnesota Statutes section 211B.02.

B. Monetary Fine

Miller also challenges OAH's imposition of a monetary fine based on the violation. He contends that OAH's determination that his statement was "negligent" is not supported by the record because his statement was truthful. He also argues that OAH's determination that his statement "may have had some impact on voters" was speculation and is not supported by the record.

For a violation of Minnesota Statutes section 211B.02, OAH may impose a civil penalty of up to $5,000. Minn. Stat. § 211B.35, subd. 2(d) (2022). Under Minnesota Statutes section 14.045, subdivision 3 (2022), OAH must consider several factors in determining the amount of a fine, including the "willfulness of the violation" and the "gravity of the violation." OAH has developed a penalty matrix that, consistent with section 14.045, subdivision 3, measures the willfulness of the violation on one axis and the gravity of the violation on the other axis. *See* Minn. Off. of Admin. Hearings, *Home, Self Help, Administrative Law Overview, Fair Campaign Practices*,https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp [https://perma.cc/XV6N-UQ84]; *see also Fine*, 726 N.W.2d at 149. On the "willfulness" axis, the middle category is "negligent, ill-advised, ill-considered." On the "gravity of violation" axis, the lowest category is "minimal/no impact on voters, easily countered." The fine range for a "negligent" violation that has "minimal/no impact on voters" is $250 to $600. OAH determined that Miller's violation fell on that point in the matrix and imposed a fine of $250.

Miller has not shown that OAH's decision is not supported by substantial evidence. First, as to the willfulness of the statement, as we concluded above, substantial evidence supports OAH's finding that Miller falsely implied the support or endorsement of the Republican Party of Minnesota. Because OAH relied on that finding when evaluating the willfulness of Miller's violation, that part of OAH's fine determination was supported by the record.

Second, as to the gravity of the violation, OAH stated that Miller's violation "may have had some impact on voters." OAH went on to state:

> [G]iven that [Miller] was a write-in candidate, it is not likely that many voters were misled or confused. Moreover, [Miller] widely publicized the fact that he was a write-in candidate running against the [Republican Party of Minnesota] endorsed candidate. These factors mitigate the violation and support imposition of a penalty at the lower end of the range.

OAH's determination was supported by the record. The record contains several affidavits, submitted by Miller, in which the affiants aver that they were not confused by the rally flyer—supporting OAH's determination that it is not likely that many voters were misled. Yet the publication of the false statement in the context of a campaign event provides support for OAH's determination that the statement "may have had some impact on voters." OAH found that the gravity of the violation fell in the lowest category based on the record and assessed the fine accordingly.

OAH has the authority to impose a fine of up to $5,000 for a violation of section 211B.02. Minn. Stat. § 211B.35, subd. 2(d). Its decision to impose a $250 fine for Miller's violation is supported by substantial evidence in the record.

II. As applied to Miller, Minnesota Statutes section 211B.02 does not violate Miller's free-speech or associational rights under the U.S. and Minnesota Constitutions.

Miller next argues that, as applied to him, Minnesota Statutes section 211B.02 is unconstitutional because it violates his free-speech

and associational rights under the U.S. and Minnesota Constitutions. *See* U.S. Const. amend. I; Minn. Const. art I, § 3.

We begin with the level of scrutiny to apply. Miller argues for strict scrutiny. Quoting *State v. Holloway*, he asserts that application of the statute is constitutional only "if it advances a compelling state interest and is narrowly tailored to further that interest." 916 N.W.2d 338, 344 (Minn. 2018) (quotation omitted). Miller observes that the Minnesota Supreme Court has held that courts must employ the same constitutional standard to an as-applied challenge to a statute as to a facial challenge, *see, e.g.*, *Rew v. Bergstrom*, 845 N.W.2d 764, 778 (Minn. 2014), and points out that we applied strict scrutiny when we upheld section 211B.02 against a facial challenge in *Linert v. MacDonald*, 901 N.W.2d 664, 668 (Minn. App. 2017).

The Attorney General, on the other hand, asserts that we should apply the lower standard that the U.S. Supreme Court employed in evaluating the constitutionality of a state election law in *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Burdick*, a voter challenged Hawaii's prohibition on write-in voting, asserting that the law did not satisfy strict scrutiny. 504 U.S. at 432. While recognizing that the law imposed some burden on the right to vote, the Supreme Court rejected the argument that the law therefore was subject to strict scrutiny. *Id.* at 433-34. Rather, the Court explained, the rigorousness of the inquiry depends on the extent to which the law burdens voters' First or Fourteenth Amendment rights. *Id.* at 434. If a challenged regulation imposes "severe" restrictions on those rights, strict scrutiny applies. *Id.* (quotation omitted). But, if the regulation imposes only "reasonable, nondiscriminatory

restrictions" upon voters' rights, the standard is whether "the State's important regulatory interests" justify the restrictions. *Id.* (quotation omitted). The *Burdick* Court concluded that the latter, less demanding standard applied to Hawaii's regulation. *Id.* at 438-39. Here, the Attorney General asserts that, like the regulation in *Burdick*, section 211B.02's prohibition on false statements of endorsement is a "reasonable, nondiscriminatory restriction" and that the lower constitutional standard therefore applies.

We question whether the lower standard used in *Burdick* applies here. In *McIntyre v. Ohio Elections Comm'n*, a case involving an Ohio statute that prohibited distributing anonymous pamphlets in an election, the U.S. Supreme Court declined to use the standard used in *Burdick* and instead applied strict scrutiny. 514 U.S. 334, 347 (1995). The Court explained that Ohio's prohibition on anonymous election pamphlets, unlike Hawaii's prohibition on write-in voting, did not "control the mechanics of the electoral process" but rather burdened "core political speech." *Id.* at 345, 347. Similarly, here, although section 211B.02 involves the regulation of elections, it is primarily a statute that regulates speech (albeit false speech), not the mechanics of an election. Moreover, we have already applied strict scrutiny in evaluating the facial constitutionality of section 211B.02. *See Linert*, 901 N.W.2d 664. Nevertheless, we need not decide whether strict scrutiny or a less rigorous standard applies if the application of section 211B.02 satisfies strict scrutiny. We turn to that question.

Freedom of Speech

Miller asserts that application of the statute violates his constitutional right to free speech.

Although statutes are generally presumed constitutional, a statute that restricts speech is not presumed to be constitutional, and the government must show that the statute is constitutional. *Id.* at 667. "Content-based restrictions on speech survive First Amendment strict-scrutiny analysis only if they are necessary to serve a compelling state interest and are narrowly drawn to achieve that end." *Id.* at 668 (quotation omitted).

First, we evaluate whether application of section 211B.02 serves a compelling government interest. As we concluded when we upheld section 211B.02 against a facial challenge, "promoting informed voting and protecting the political process" is a compelling government interest and that interest is served by the statute's "prohibition against false claims of support or endorsement." *Id.*; *see also McIntyre*, 514 U.S. at 349 (stating that the state's interest in preventing fraud carries "special weight" during election campaigns); *Schmitt*, 275 N.W.2d at 591 (determining that the prohibition against false statements of support or endorsement serves the government interest in "protecting the political process").

Miller contends that that governmental interest is not served here because he is being penalized for "truthful, non-falsifiable speech." He characterizes the challenged statement as expressing that he is a "republican" who has "Republican Party virtues but as a constitutional conservative." He contends that the statement, thus characterized, is true, and therefore properly informed the electorate, or is at least nonfalsifiable because it cannot be proved false. But, as OAH found, Miller's statement in the context of the rally flyer implied that he had the support or endorsement of the Republican Party of

Minnesota—a statement that was false and could be proved false. His statement therefore did not accurately inform the voters, and the state has a compelling interest in prohibiting it.

Second, we evaluate whether section 211B.02, as applied to Miller, is narrowly tailored to achieve the government's interest. "A statute is narrowly tailored if it advances a compelling state interest in the 'least restrictive means among available, effective alternatives.'" *Linert*, 901 N.W.2d at 668 (quoting *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 666 (2004)). A statute is overbroad if it prohibits constitutionally protected activity in addition to the activity that is not constitutionally protected. *Id.*

Miller suggests that, as an alternative to applying the statute to him, voters could have accessed several websites, including the Minnesota Secretary of State's website and political parties' websites, in order to find out whether Miller had been endorsed by the Republican Party of Minnesota. Miller, however, does not show that this would be an effective alternative because he does not explain how the availability of other information would combat the harm of his false claim of support or endorsement. In *Linert*, we rejected the argument that counterspeech is an effective and less-restrictive means to achieve the compelling state interest served by section 211B.02's prohibition on false statements of support or endorsement. *Id.* at 669. We concluded that the candidate challenging the statute had not demonstrated or persuaded us "that counterspeech—even media statements and retractions—is an effective alternative means to combat false claims of support or endorsement" and that "[t]his is particularly true with respect to false claims made in the final days leading up to an election." *Id.* at 670.

Similarly, here, we reject the argument that other sources of information render application of the statute not "narrowly tailored."

As for overbreadth, Miller argues that application of the statute to him is overbroad because it penalizes a truthful or at least a nonfalsifiable statement. But, for the reasons explained above, Miller's implied statement of support or endorsement of the Republican Party of Minnesota was neither truthful nor nonfalsifiable. His argument that application of the statute is overbroad is unavailing.

Freedom of Association

Finally, Miller argues that section 211B.02 is unconstitutional as applied to him because it violates his right to free association. Miller contends that OAH's penalty violates his right to associate with the Caravan of Patriots and his right to associate with potential voters for the purpose of engaging in expressive activity regarding conservatism and political views.

As Miller asserts, the constitutional right to freedom of association includes the right to associate for the purpose of engaging in other activity protected by the First Amendment, including speech and assembly. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). But the statute's prohibition on false statements of support or endorsement did not restrict Miller's ability to associate with the Caravan of Patriots or to attend the event, nor did it limit his ability to associate with voters. And, even if any such restrictions were imposed, again, the statute is constitutional as applied to Miller because it furthers the compelling government interest of promoting informed voting and is also narrowly tailored since it

merely forbids falsely implying party support or endorsement.

Affirmed.

OAH 60-0320-38740

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Republican Party of Minnesota,

Complainant,

vs.

Nathan Miller and Miller for SD9 (#18849),

Respondents.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

This Fair Campaign Practices complaint (Complaint) is pending before the following panel of three Administrative Law Judges: James E. LaFave (Presiding Judge), Jessica A. Palmer-Denig, and Kimberly Middendorf (Panel).

The matter was submitted to the Panel based on the record created at the probable cause hearing, the underlying record, including the Complaint, the Prima Facie Determination, the Probable Cause Order, and the parties' final submissions and oral argument. The parties came before the Panel for final closing arguments on December 6, 2022, and the record closed on that date.

Benjamin N. Pachito, The Jacobson Law Group, represented the Republican Party of Minnesota (Complainant). Nathan Miller (Respondent Miller) appeared on his own behalf and on behalf of his campaign committee, Miller for SD9 (#18849), without legal counsel.

STATEMENT OF THE ISSUES

1. Did Complainant demonstrate by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.02 (2022), by knowingly falsely claiming or implying that Respondent Nathan Miller had the support or endorsement of the Minnesota Republican Party?

2. If so, what penalty is appropriate?

SUMMARY OF CONCLUSIONS

Complainant established that Respondents knowingly falsely implied that Respondent Miller had the support or endorsement of a major political party in violation of Minn. Stat § 211B.02. The Panel concludes that a penalty in the amount of $250 is appropriate for the violation.

Based on the record and proceedings herein, the undersigned Panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. Respondent Miller was a write-in candidate for State Senate District 9 (SD9) in the general election held on November 8, 2022.[1] Respondent Miller serves as the chair of Miller for SD9 (#18849), which is his campaign committee.[2]

2. Respondent Miller is a member of the Republican Party of Minnesota (RPM or Republican Party).[3] He attended the Otter Tail County Republican Party endorsing convention held on April 23, 2022, as

[1] Complaint (Oct. 14, 2022).

[2] *Id.*; Respondent's Responsive Brief at ¶ 1.

[3] Testimony (Test.) of Nathan Miller; Complaint at Exhibit (Ex.) D.

an elected party delegate for Eagle Lake Township.[4]

3. Respondent Miller sought, but did not obtain, the endorsement of the RPM for his candidacy for SD9 at the endorsing convention.[5] Instead, Jordan Rasmusson earned the Republican Party endorsement for SD9 after receiving the support of over 64% of the local party delegates on the first ballot.[6]

4. On August 9, 2022, Rasmusson defeated Respondent Miller in the Republican Party primary election for SD9.[7]

5. After losing the primary election, Respondent Miller launched a write-in campaign for SD9.[8]

6. On September 14, 2022, Respondent Miller announced his write-in candidacy for SD9 in an open letter addressed to Jordan Rasmusson that was published in several local newspapers with circulations throughout the SD9 area.[9]

7. In early October 2022, a campaign event flyer was disseminated in SD9, including in the city of Perham.[10] The flyer advertised a political rally to be held in Perham, Minnesota on October 15, 2022.[11] According to the flyer, the rally was in support of conservative candidates in Otter Tail County and was hosted by the "Caravan of Patriots."[12]

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[4] Test. of N. Miller.

[5] Complaint at ¶ 3.

[6] *Id*. at ¶ 4.

[7] *Id*. at ¶ 5.

[8] *Id*. at ¶ 7; Ex. 107.

[9] Respondent's Responsive Brief at ¶ 7.

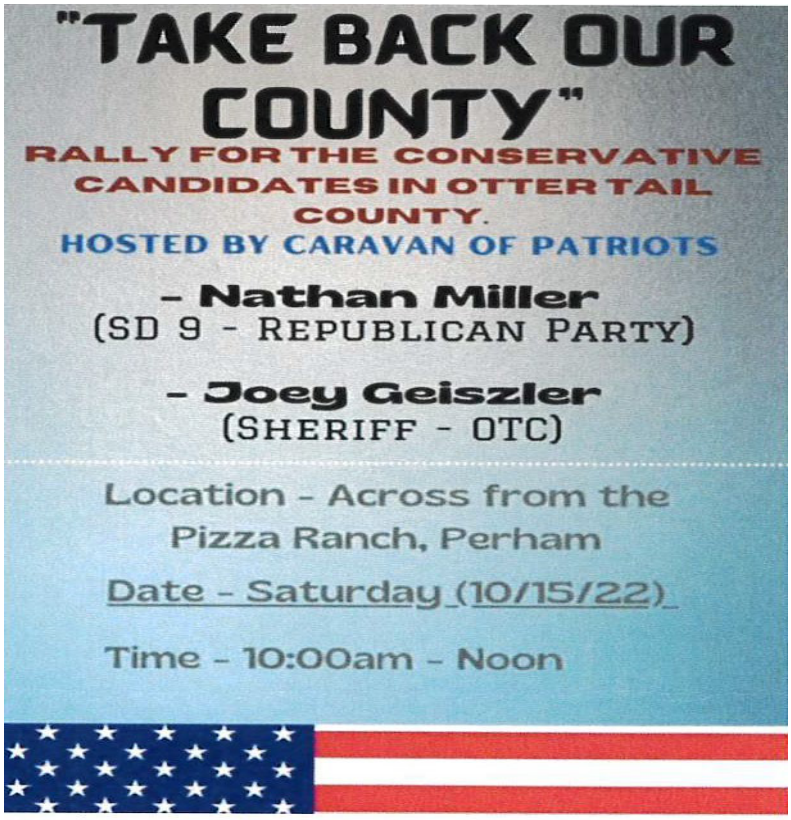
[10] Complaint at ¶ 16; Test. of Pauline Nelson.

[11] Exhibit (Ex.) A.

[12] *Id*.

8. Respondent Miller had been contacted by a member of the group "Caravan of Patriots" inviting him to attend the rally.[13] Respondent Miller agreed to attend the rally.[14]

9. Respondent Miller was listed on the flyer advertising the rally as one of two candidates who would be attending the event. Under Respondent Miller's name was the descriptor: "(SD9 – Republican Party)." An image of the campaign flyer appears below:



10. Respondent Miller posted the campaign

[13] Respondent's Responsive Brief at ¶ 9.
[14] *Id.*

flyer on his campaign website (www.millerforsd9.com) approximately one week prior to the event,[15] and the flyer remained posted on the website for approximately one week.[16]

11. Respondent knew he was not the Republican Party's endorsed candidate for SD9 when he posted the flyer on his campaign website.[17]

12. Complainant filed the Complaint against Respondents with the Office of Administrative Hearings on October 14, 2022.[18]

13. By Order dated October 19, 2022, the Presiding Administrative Law Judge found the Complaint alleged a prima facie violation of Minn. Stat. § 211B.02 and set the matter on for a probable cause hearing to be conducted by telephone on October 24, 2022.[19]

14. By order dated October 27, 2022, the Presiding Administrative Law Judge found there was probable cause to believe Respondents violated Minn. Stat. § 211B.02 and that the matter should be assigned to a panel of administrative law judges for a final determination.[20]

15. By Order dated November 8, 2022, the Chief Administrative Law Judge assigned this matter to the Panel and set this matter on for an evidentiary hearing to be held on November 18, 2022.[21]

16. Jordan Rasmusson, the RPM endorsed

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[15] Complaint at ¶¶ 14, 18; Ex. A.

[16] Test. of N. Miller; Respondent's Responsive Brief at ¶ 10.

[17] Test. of N. Miller.

[18] Complaint.

[19] *See* Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing (Oct. 19, 2022).

[20] Order on Probable Cause (Oct. 27, 2022).

[21] *See* Notice of Panel Assignment and Order for Evidentiary Hearing (Nov. 8, 2022).

candidate, was elected State Senator for SD9 in the November 8, 2022, general election.[22] Respondent Miller received approximately nine percent of the votes cast as write-in candidate.[23]

17. On November 15, 2022, the Presiding Administrative Law Judge held a prehearing conference with the parties by telephone.[24] During the prehearing conference, the parties agreed to waive the evidentiary hearing and to submit the matter to the Panel based on the record with additional submissions and written closing arguments to be filed by December 5, 2022.[25] The parties were given until November 23, 2022, to notify the Presiding Judge whether they wished to present oral closing arguments.[26]

18. On November 23, 2022, Respondent Miller requested an opportunity to present oral closing argument.[27]

19. The Panel convened for oral argument by telephone on December 6, 2022, and the record closed on that date.

20. Any portion of the Memorandum below that constitutes a Finding of Fact is incorporated as such herein.

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

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[22] Respondent's Responsive Brief at ¶ 16.

[23] *Id*. See also, Index - Election Results (state.mn.us).

[24] *See* First Prehearing Order (Nov. 16, 2022).

[25] *Id*.

[26] *Id*.

[27] *See* Second Prehearing Order (Nov. 29, 2022).

CONCLUSIONS OF LAW

1. The Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35 (2022).

2. Complainant bears the burden to prove a violation of Minn. Stat. § 211B.02 by a preponderance of the evidence.[28]

3. Minn. Stat. § 211B.02, provides as follows:

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

4. The RPM is a major political party for purposes of Minn. Stat. § 211B.02.[29]

5. Complainant established by a preponderance of the evidence that Respondents disseminated the campaign flyer at issue by posting it on their campaign website.

6. Complainant established by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.02, by knowingly and falsely implying that Mr. Miller had the support or endorsement of the RPM for the office of SD9 in the

[28] Minn. Stat. § 211B.32, subd. 4 (2022).

[29] *See* Minn. Stat. § 200.02, subd. 7 (2022) (defining "major political party").

general election held on November 8, 2022.

7. It is appropriate to impose a civil penalty against Respondents in the amount of $250 for the violation of Minn. Stat. § 211B.02.

8. The attached Memorandum explains the reasons for these Conclusions of Law and is incorporated by reference.

Based upon the record herein, and for the reasons stated in the following Memorandum, the Panel makes the following:

ORDER

1. By **4:30 p.m.** on **Friday, January 13, 2023**, Respondents shall pay a civil penalty of $250 for violating Minn. Stat. § 211B.02.

2. The penalty shall be paid by check made to the order of: "Treasurer, State of Minnesota," and remitted to the Office of Administrative Hearings. The docket number, 60-0320-38740, should be included on the check.

Dated: December 9, 2022

s/
JAMES E. LAFAVE
Presiding Administrative Law Judge

s/
JESSICA A. PALMER-DENIG
Administrative Law Judge

s/
KIMBERLY MIDDENDORF
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5 (2022), this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63-.69 (2022).

MEMORANDUM

Minn. Stat. § 211B.02 prohibits a person or candidate from knowingly making a false claim stating or implying that the candidate has the support or endorsement of a major political party or of an organization. The statute "punishes speech only when the speaker knows that it will lead others to believe wrongly that a candidate has the support of a party or organization."[30] It does not punish inadvertent falsehoods.[31]

Respondent Miller concedes that he posted the campaign flyer on his campaign website. He notes that the flyer was created by a third party, but he admits that he distributed the flyer through his campaign website for approximately one week.

Respondent Miller is an active member of the Republican Party and describes himself to be a "Constitutionally inspired," conservative Republican.[32] Respondents argue that the flyer indicates only that Respondent Miller is a member of the Republican Party. They contend that it does not

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[30] *Niska v. Clayton*, No. A13-0622, 2014 WL 902680, at *8 (Minn. Ct. App. Mar. 10, 2014), *review denied* (Minn. June 25, 2014) (citing *In re Ryan*, 303 N.W.2d 462, 467 (Minn. 1981)).

[31] *Id*.

[32] Complaint at Ex. D.

falsely state or imply that Respondent Miller is endorsed or supported by the RPM.[33] Respondent Miller asserts that he lacked the specific intent required to establish a violation.

Respondents maintain that the facts in this case are similar to *Schwichtenberg v. Ortman*.[34] In that case, a candidate who was not endorsed by the Republican Party of Minnesota, disseminated campaign lawn signs prior to the primary election that included the phrase "Republican for State Senate" under her name.[35] The complaint alleged that use of the word "Republican" falsely implied endorsement.[36] The panel of administrative law judges dismissed the claim. The panel held that, unlike use of the initials "DFL," use of the word "Republican," standing alone, does not imply endorsement by the Republican Party.[37] Instead, it signifies membership in or affiliation with the political party.[38]

This case is distinguishable from *Ortman*. Unlike *Ortman*, Respondents disseminated a campaign flyer for an Otter Tail County candidates' event that identified Respondent Miller as "SD9 – Republican *Party*."[39] The flyer did not say only "Republican" and it did not include a qualifier, such as "Republican Party Member." Instead, it unequivocally

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[33] *Niska v. Clayton*, No. A13-0622, 2014 WL 902680, at *8 (Minn. Ct. App. Mar. 10, 2014), *review denied* (Minn. June 25, 2014) (citing *In re Ryan*, 303 N.W.2d 462, 467 (Minn. 1981)).

[34] OAH 7-0320-22993-CV, Findings of Facts, Conclusions of Law, and Order (Minn. Office Admin. Hearings, Sept. 19, 2012).

[35] *Id*.

[36] *Id*.

[37] *Id*. at 6.

[38] *Id*.

[39] Ex. A (emphasis added).

stated "Nathan Miller (SD9 – Republican Party)."

In *Niska v. Clayton*,[40] the Minnesota Court of Appeals upheld a decision of this tribunal finding that a person violated Minn. Stat. § 211B.02 by using the term "Republican Party of Minnesota" on multiple documents and on his website to promote candidates who lacked the party's endorsement.[41] Similarly, in *Schmitt v. McLaughlin,*[42] the Minnesota Supreme Court held that an unendorsed candidate's use of the initials "DFL" violated the statute because it implied to the average voter that the candidate had the endorsement, or at the very least the support of, the DFL Party.

Respondent Miller is an active member of the Republican Party and he did not use the word "endorsed" in campaign material. Nevertheless, the statute prohibits knowingly false implications of support or endorsement of a major political party, not just false claims of support or endorsement.

Respondent did not secure the Republican Party endorsement and he lost the primary election to the RPM's endorsed candidate. Yet, Respondent Miller posted the rally flyer on his campaign website that included his name followed by the descriptor "SD9 – Republican Party." By coupling the reference to the Republican *Party*, which is a specific organization, with the SD9 race, he implied party support for his candidacy. Respondent Miller

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[40] *Niska v. Clayton*, 2014 WL 902680 (Minn. Ct. App. 2014), *review denied* (Minn. June 25, 2014).

[41] *Niska v. Clayton*, No. 68-0325-30147, 2013 WL 1411608 (Minn. Office Admin. Hearings Mar. 12, 2013).

[42] 275 N.W.2d 587, 591 (Minn. 1979). *See also In re Ryan*, 303 N.W.2d 462, 465-66 (Minn. 1981) (holding that placing the terms "DFL" and "LABOR ENDORSED" on campaign materials violated the statute).

admitted that at that time he posted the flyer on his campaign website, he knew the flyer listed "Republican Party" under his name and he knew the Republican Party did not endorse or support his candidacy for SD9. Respondent Miller did not qualify the implication created by the dissemination of this literature by adding that he was only a member of the Republican Party or clarify the flyer's statement with confirmation that he was not endorsed.

The Panel concludes that the use of the phrase "Republican Party" without qualification by an unendorsed candidate falsely implies support or endorsement of a major political party. Therefore, Panel finds Complainant established by a preponderance of the evidence that Respondents knowingly violated section 211B.02. The Panel further concludes that a penalty should be imposed for this violation.

To ensure consistency in the application of administrative penalties across types of violations of the Fair Campaign Practices Act, the Office of Administrative Hearings uses a "penalty matrix" to guide decision-making. The matrix categorizes violations based upon the willfulness of the misconduct and the impact of the violation upon voters and is set forth as follows:[43]

[43] *See* Penalty Matrix (https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp); *Fine v. Bernstein*, 726 N.W.2d 137, 149-50 (Minn. Ct. App.), *review denied* (Minn. 2007).

Willfulness	Gravity of Violation		
	Minimal/no impact on voters, easily countered	Some impact on several voters, difficult to correct/counter	Many voters misled, process corrupted, unfair advantage created
Deliberate, multiple violations in complaint, history of violations, clear statute, unapologetic	$600 - 1,200	$1,200 – 2,400 and/or Refer to County Attorney	$2,400 – 5,000 and/or Refer to County Attorney
Negligent, ill-advised, ill-considered	$250 - 600	$600 - 1,200	$1,200 – 2,400 and/or Refer to County Attorney
Inadvertent, isolated, promptly corrected, vague statute, accepts responsibility	$0 - 250	$400-600	$600 - 1,200

Because every case is unique, however, the Panel may depart from the presumptive penalty listed in the matrix.[44]

Complainant maintains that Respondent Miller's dissemination of the flyer was deceptive and gave Miller an unfair advantage, especially among voters who vote exclusively based on party endorsement. Respondents maintain that there was no impact on the race.

The Panel finds Respondents' violation was negligent and may have had some impact on voters. However, given that Respondent Miller was a write-in candidate, it is not likely that many voters were misled or confused. Moreover, Respondent Miller widely publicized the fact that he was a write-in candidate running against the RPM endorsed

[44] *Id.*

candidate. These factors mitigate the violation and support imposition of a penalty at the lower end of the range.

The Panel concludes that a penalty of $250 is an appropriate sanction for Respondents' violation.

J. E. L., J. P. D., K. M.