No. 24-53

IN THE

Supreme Court of the United States

NATHAN MILLER, *et al.*

Petitioners,

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the State of Minnesota may constitutionally regulate knowingly false statements that mislead the public about whether a candidate has been endorsed by a political party.

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Respondent, the Republican Party of Minnesota, states that it has no parent companies or publicly held companies with a 10% or greater ownership interest in it.

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STATEMENT OF THE CASE

I. Factual Background

Respondent, the Republican Party of Minnesota, is one of the two major political parties in Minnesota. A-7.

In 2022, Petitioner, Nathan Miller ("Mr. Miller"), was a candidate for election to the Minnesota State Senate for District 9 ("SD9"). A-3. Following an unsuccessful effort to obtain the nomination of the Republican Party of Minnesota in the primary election, Mr. Miller decided to pursue a write-in campaign. A-4. Miller for SD 9 was Mr. Miller's campaign committee, for which he also served as the committee's chairman. A-19. Mr. Miller was opposed in the election by candidates duly nominated and endorsed by the Republican Party of Minnesota and the Minnesota Democratic-Farmer-Labor Party.

In early 2022, a campaign event flyer was disseminated in SD9 advertising a political rally to be held in Perham, MN on October 15, 2022. According to the flyer, the rally was in support of conservative candidates in the area and was hosted by a group known as the "Caravan of Patriots." A-20.

Mr. Miller was invited by the Caravan of Patriots to attend the rally, and Mr. Miller agreed to do so. Mr. Miller was listed on the flyer advertising the rally as one of two candidates who would be attending the event. Under Mr. Miller's name was the descriptor: "SD 9 – Republican Party."[1] A-21.

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1. The other listed candidate was not ascribed to a political party. *See* A-21.

In furtherance and support of his appearance at the event, Mr. Miller re-posted the flyer on his campaign website for approximately one week prior to the event, and the flyer remained posted on Mr. Miller's website for approximately one week. A-21-22.

II. Procedural Background

Respondent, the Republican Party of Minnesota filed a complaint against Mr. Miller and Miller for SD 9 alleging that they violated Minn Stat. § 211B.02 through the reposting of the flyer on the Miller campaign website.

In its relevant part, that statute 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.

Minn. Stat. § 211B.02.

Such challenges are heard pursuant to Minnesota administrative law by the Minnesota Office of Administrative Hearings (OAH).

OAH Proceedings

On October 19, 2022, the Presiding Administrative Law Judge of the OAH found the complaint alleged a *prima facie* violation of § 211B.02 and scheduled a probable cause hearing for October 24, 2022. A-22.

By order dated October 27, 2022, the Presiding Administrative Law Judge found there was probable cause to believe that Mr. Miller and Miller for SD 9 violated the statute, and the matter was assigned to a panel of administrative law judges for a final determination. *Id.*

On November 8, 2022, Jordan Rasmusson, the endorsed candidate of the Republican Party of Minnesota, was elected State Senator for District 9 in the general election. A-22 – A-23.

Both parties agreed to waive an evidentiary hearing on this matter, and oral argument was held on December 6, 2022. A-23.

On December 9, 2022, the administrative law panel issued its Findings of Fact, Conclusions of Law, and Order. A-18. In its opinion, the administrative law panel made two key conclusions. First, it determined that the Republican Party of Minnesota "established by a preponderance of the evidence that Respondents disseminated the campaign flyer at issue by posting it on their campaign website." A-24. Next, the panel concluded that the "preponderance of the evidence" established that Mr. Miller and Miller for SD 9 "knowingly and falsely impl[ied] that Mr. Miller had the support or endorsement of the [Republican Party of Minnesota] for the office of SD9 in the general election held on November 8, 2022." A-24-A25.

Based on those findings, the panel "impose[d] a civil penalty against [Mr. Miller and Miller for SD 9] in the amount of $250 for the violation of Minn. Stat. § 211B.02." A-25.

Minnesota Court of Appeals Proceedings

Mr. Miller and Miller for SD 9 appealed the panel's decision to the Minnesota Court of Appeals, making three separate challenges. First, the Petitioners challenged the factual "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. . ." A-3. In addition, Petitioners challenged "the fine that OAH levied against him for that violation." *Id*. Finally, Petitioners "assert[ed] that section 211B.02, as applied to him, is unconstitutional because it violates his rights of free speech and association." *Id*. Petitioners did not assert a facial challenge to the statute.

Following briefing and oral argument, which was held on October 18, 2023, the Court of Appeals, by an unreported decision dated January 16, 2024, affirmed the OAH's decision.

In reviewing the factual findings of the OAH, the Court of Appeals first affirmed the OAH's determination that "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." A-9.

Having considered the factual record in the case and the parties' submissions, the Court of Appeals further concluded that "[b]ecause 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." *Id.*

In its consideration of the $250 fine imposed against Petitioners, the Court of Appeals first agreed that "substantial evidence supports OAH's finding that Miller falsely implied the support or endorsement of the Republican Party of Minnesota." A-10. As such, based on the "willfulness of Miller's violation, that part of OAH's fine determination was supported by the record." *Id.* Second, the Court of Appeals upheld OAH determination "that Miller's violation 'may have had some impact on voters'" and that "OAH's determination was supported by the record." *Id.* at A-10 – 11.

In evaluating that record, the Court of Appeals noted that Petitioners had submitted "several affidavits. . . 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." A-11 (emphasis added). However, based on the balance of the record, the "context of a campaign event provides support for OAH's determination that the statement 'may have had some impact on voters.'" *Id.* As such, OAH's "decision to impose a $250 fine for Miller's violation is supported by substantial evidence in the record." *Id.*

Finally, the court considered Petitioners challenge "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." A-11 – A-12. In its analysis, the

court first considered the appropriate level of scrutiny to apply to the challenge, as Petitioners had argued for strict scrutiny, while the Minnesota Attorney General's Office argued for rational basis analysis. A-12.

While the Court of Appeals appeared to favor strict scrutiny analysis, it ultimately passed on deciding the issue, as "we need not decide whether strict scrutiny or a less rigorous standard applies if the application of section 211B.02 satisfies strict scrutiny." *Id.*

First, the court found that "'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.'" A-13 (*quoting Linert*, 901 N.W.2d 664, 668 (Minn. Ct. App. 2017)).

Rejecting Petitioners' arguments that they are "being penalized for 'truthful, non-falsifiable speech,'" the court instead determined that "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." A-14 – A-15.

The court also concluded that the statute was "narrowly tailored," and that the statute was not overbroad. A-15 – A-16.

Finally, the court concluded that the statute also did not violate the Petitioners' right of freedom of association.

A-16. As such, the court affirmed OAH's decision in its entirety.

Further Proceedings

Mr. Miller and Miller for SD 9 then appealed the Court of Appeals decision to the Supreme Court of Minnesota, which declined to grant their petition for review. A-1.

Finally, on July 15, 2024, Mr. Miller and Miller for SD 9 filed the instant petition for writ of certiorari with this honorable court.

REASONS FOR DENYING THE PETITION

The Petition is dominated by the enormous chasm between Petitioners' characterizations of this case and the reality of the factual record and the relevant case law.

Despite being a nonprecedential decision of a state intermediate court stemming from exceedingly specific factual circumstances, Petitioners portray this matter as being compelling enough to merit this Court's review.

Despite the "preponderance of the evidence" (A-29) in the proceedings below that Petitioners "may have . . . impact[ed] . . . voters" (A-30) by having "knowingly falsely implied that [Petitioner] Miller had the support or endorsement of a major political party in violation of Minn. Stat § 211B.02" (A-19), Petitioners portray themselves as victims of a broad ban on Mr. Miller's "truthful speech to the electorate." Petition at 7.

Despite there being *no* conflict between the decision below and the jurisprudence of this or other courts, Petitioners persist in claiming there is one.

Finally, despite presenting the question to the Court as a facial challenge, Petitioners never made such a challenge in the proceedings below.

Given this litany of problems, this case is an exceedingly poor vehicle for review. As such, the Petition should be denied.

I. The Petition Seeks Review of a Legal Issue Waived by Petitioners

While Petitioners claim that "Minnesota Statutes § 211B.02 is **facially unconstitutional**", such a facial challenge is not properly before this Court as Petitioners waived it by not asserting it in the court below. *Compare* Petition p. 22 (emphasis added) with A-3 (noting Petitioners' challenge at Court of Appeals was that "section 211B.02, **as applied to him**, is unconstitutional because it violates his rights of free speech and association.") (emphasis added); s*ee also* Minnesota Court of Appeals Oral Argument Recording at 4:12 (Oct. 18, 2023) *available at* https://mncourts.gov/CourtOfAppeals/OralArgumentRecordings/ArgumentDetail.aspx?rec=2743 (where Petitioners, through counsel, expressly note that the case is an as-applied challenge, only).[2]

2. The relevant exchange during oral argument before the Court of Appeals is as follows:

> The Court: "Are you making a facial challenge to the statute?"

Due to Petitioners' decision not to raise a facial challenge to section 211B.02 in the proceedings below, this issue has never been briefed or argued by any of the parties, nor has any factfinder previously considered a facial challenge in this case.[3] Therefore it would be unwise for the Court to consider it here without benefit of those proceedings below to better develop this matter.

As a general matter, this Court "[o]rdinarily . . . will not consider a claim that was not presented to the courts below." *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1, (1980); *see also Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a . . . right may be forfeited in . . . civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."). While it is unresolved "whether this rule is jurisdictional or prudential in cases arising from state courts . . ., [e]ven if the rule were prudential, we would adhere to it in this case. Because petitioners did not raise their . . . claim below, and because the state courts did not address it, we will not consider it here." *Yee v. City of Escondido*, 503 U.S.

Mr. Kaardal (Counsel for Petitioners): "No. We didn't in our principal brief."

The Court: "So your challenge is only as-applied. OK."

3. The Minnesota Court of Appeals previously held that Section 211B.02 was facially constitutional on two occasions. *See Niska v. Clayton*, 2014 Minn. App. Unpub. LEXIS 197, No. A13–0622 (Minn. Ct. App. 2014), *rev. denied* (Minn. 2014), *cert. denied*, 135 S.Ct. 1399 (2015); *Linert v. MacDonald*, 901 N.W.2d 664 (Minn. Ct. App. 2017). *See also Schmidt v. McLaughlin*, 275 N.W.2d 587 (Minn. 1979) (upholding constitutionality of prior version of statute).

519, 533 (1992); *see also Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996) (declining to hear facial challenge without lower court proceedings due to "failure of the parties and the lower courts to focus specifically on the complex issues. . .").

This case is distinguishable from a case like *Citizens United*, where this Court considered a facial challenge to a statute that had been made in the initial complaint but was temporarily resolved during the pendency of the litigation. *See Citizens United v. FEC*, 558 U.S. 310 (2010). In *Citizens United*, the plaintiff originally brought both a facial and as-applied challenge in district court, but later agreed to dismiss its facial challenge as a part of a stipulation between the parties. *Id.* at 329. During its ensuing review, this Court considered the facial challenge in that case, because the Court's "practice permit[s] review of an issue not pressed [below] so long as it has been passed upon . . . ." *Id.* at 330 (*quoting Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotations omitted)). Therefore, on the basis that "the District Court addressed Citizens United's facial challenge" in the proceedings below, this Court considered the facial challenge to be properly before it. *Citizens United*, 558 U.S. at 330.

Here, however, a facial challenge to the statute was not only "not pressed [below]", but it has *never been made* by Petitioners, and therefore was never "passed upon" by the court below. *Id.* Given that absence of briefing or argument on a facial challenge in the proceedings below, it would be inappropriate for this Court to consider it here.

Therefore, given the absence of a facial challenge below, this Court should use its discretion to deny the Petition.

II. The Facts and Law of the Case Belie the Issues Raised by Petitioners

Should this Court need to consider the merits of the Petition, such as through a consideration of the as-applied challenge brought by Petitioners below, the Petition has other structural issues that also support the Petition being denied—namely that the Petition misrepresents the nature of the statute being challenged and the factual record in the proceedings below.

Given that to grant relief, this Court would need to reopen the factual record and reach different factual conclusions, the Petition does not lend itself to review by this Court. This is especially true in the backdrop of the *de minimis* fine imposed by, and nonprecedential nature of, the proceedings below.

A. The Subject Statute Does Not Broadly Ban Campaign Speech

Despite the characterization by the Petitioners, the subject statute does not "broadly ban[]" political speech. Petition at i.

By its plain language, the statute only implicates circumstances where a person has "*knowingly*" made "a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party. . ." Minn Stat. § 211B.02 (emphasis added).

Rather than being a broad ban, the subject statute is a very narrowly tailored statutory requirement that rarely comes into play. Indeed, by its very terms, it only implicates a very specific type of false political speech—namely situations where someone, with knowing intent, falsely claims a candidate has the support or endorsement of a particular political party. *See id.*

Therefore, the actual lens of any judicial review would be on a very narrow issue of a statute banning knowingly false speech concerning political party endorsements. Given the exceedingly narrow scope of this statute, it is not surprising that it is rarely implicated. Indeed, by Petitioners' own admission, they are only aware of four instances of enforcement of Section 211B.02 in the past decade. *See* Petition at 10.

This limited enforcement is further evidenced by a recent decision of the United States District Court for the District of Minnesota dismissing a challenge to the constitutionality of Section 211B.02 on Eleventh Amendment grounds due to the lack of "evidence reasonably supporting a finding that [plaintiffs] are subject to or threatened with any enforcement proceeding by Defendants." *Minn. RFL Republican Farmer Lab. Caucus v. Moriarty*, 661 F. Supp. 3d 891, 903 (D. Minn. 2023), *aff'd* 108 F.4th 1035 (8th Cir. 2024).

These rare instances of enforcement demonstrate the very limited importance of review of the subject statute by this Court.

B. The Petition Ignores the Lower Tribunals' Factual Findings Which Were Established by a Preponderance of the Evidence

As noted above, the subject statute is only implicated by a very narrow sort of knowingly false speech, which by Petitioners' own admission, rarely occurs.

Just as the statute is significantly narrower than Petitioners portray, Petitioners improperly disregard and diminish the factual determinations of both the administrative law panel and the reviewing Court of Appeals concerning Petitioners' conduct that led to the imposition of the fine.

While Petitioners claim that Mr. Miller's conviction was due to Mr. Miller "hold[ing] principled convictions" (Petition at 15) or having "republican values" (*Id*. at 16)—arguments that Mr. Miller unsuccessfully pursued in the proceedings below—the factual record of the case demonstrates that the determinations below are the result of Petitioners' knowing false speech; actions that may have negatively affected a state election.

In the proceedings below, the Republican Party of Minnesota "**established by a preponderance of the evidence** that [Petitioners] . . . knowingly and falsely impl[ied] that Mr. Miller had the support or endorsement of the [Republican Party of Minnesota" for the office of SD9 in the general election held on November 8, 2022." A-24 – A-25 (emphasis added).[4] The panel further concluded

4. The factual findings in the proceedings below directly contradict the Petition's contention that "[n]o evidence revealed

that Petitioners' "violation was negligent and may have had some impact on voters." A-30. The Court of Appeals reached the same conclusion as to the "willfulness of the statement", holding that substantial evidence supports OAH's finding that Miller falsely implied the support or endorsement of the Republican Party of Minnesota." A-10. Moreover, the court concluded that "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.'" A-11 (quoting A-30).

The Petition ignores and obfuscates those factual findings, and instead continually mischaracterizes Mr. Miller as being "penalize[d] . . . [for] truthful, non-falsifiable statements" (Petition at 29) or for having "a republican or Republican Party philosophy." Petition at 5

However, Petitioners made those argument before both the administrative law panel and the Court of Appeals, both of which rejected those contentions in favor of a conclusion that the Republican Party of Minnesota "**established by a preponderance of the evidence** that [Petitioners] . . . knowingly and falsely impl[ied] that Mr. Miller had the support or endorsement of the RPM for the office of SD9 in the general election held on November 8, 2022." A-24 – A-25 (emphasis added).

Given that evidentiary record, what Petitioners are really arguing here is that there were improper factual findings in the proceedings below. But "[t]his Court . . . customarily accept[s] the factual findings of state

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that anyone believed nor confused Miller as a [Republican Party of Minnesota] candidate." Petition at 18.

courts in the absence of 'exceptional circumstances.'" *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 111-12 (1980) (*quoting Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952)); *see also* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Perhaps recognizing that hurdle, Petitioners fail to even acknowledge that they are asking the Court to overturn the factual findings of the state court proceedings below—but instead frame the case based on their own rejected factual arguments.

Given Petitioners' misstatement of the factual findings in the proceedings below and the absence of the "exceptional circumstances" to merit this Court conducting its own factual review, this matter simply does not merit this Court's time given the factual record of Petitioners' "negligent" conduct that "may have had some impact on voters." A-30.

III. There is No Compelling Reason for the Court to Grant the Petition

A. Review of a Nonprecedential Decision of a State Intermediate Court is Unwarranted

The decision of the court below is that of the state intermediate court, the Minnesota Court of Appeals.

That court's opinion in the present case was designated as "nonprecedential" by the appeals court (*see* A-2), which means it is "not binding authority except as law of the case,

res judicata or collateral estoppel, but nonprecedential opinions . . .” Minn. R. Civ. App. P. 136.01, subd. 1(c). As such, the opinion’s effect going forward is limited to serving “as persuasive authority.” *Id.*

Given that exceedingly limited impact, especially when viewed in the context of the prudential concerns concerning the nature of the Petition, the instant case is simply not compelling or important enough to merit this Court’s time and attention.

B. There is No Split in Authority to be Resolved

Petitioners’ legal arguments are premised on a supposed split in authority that does not exist.[5]

Petitioners primarily rely on *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014) and *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016) to suggest confusion regarding whether the government can ever regulate false political speech. Both of those decisions and the jurisprudence of this Court, however, can be squarely reconciled with this narrowly tailored statute.

In *Niska v. Clayton*, this Court previously declined to grant certiorari on a constitutional challenge to Section

5. Importantly, the decision below is an unreported, nonprecedential decision of a state intermediate court, and not the decision of “a state court of last resort” that would ordinarily be reviewed by this Court. *See* S. Ct. R. 10(b). As discussed below, the Minnesota Court of Appeals has also not “decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.” *Id.* at (c).

211B.02 on nearly identical grounds, and where the petition which cited these same supposed conflicts. 2014 Minn. App. Unpub. LEXIS 197, No. A13–0622 (Minn. Ct. App. 2014), *rev. denied* (Minn. 2014), *cert. denied*, 135 S.Ct. 1399 (2015). This Court should likewise deny the Petition here.

1. The Jurisprudence of this Court Permits Narrowly Tailored Election Rules Designed to Prevent Fraud

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

However, this "Court's precedents allow the government to 'constitutionally impose reasonable time, place, and manner regulations' on speech, but the precedents restrict the government from discriminating 'in the regulation of expression on the basis of the content of that expression.'" *Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610, 618 (2020) (*quoting Hudgens* v. *NLRB*, 424 U. S. 507, 520 (1976)).

"Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 155 (2015). "That this speech and

association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection is elementary." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 42 (2010) (emphasis in original).

"However, this principle, like other First Amendment principles, is not absolute." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). "The First Amendment permits restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Va. v. Black*, 538 U.S. 343, 359 (2003) (*quoting R. A. V. v. City of St. Paul*, 505 U.S. 377, 382-383 (1992) (internal citation and punctuation omitted); *see also Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.").

Indeed, a state like Minnesota has a "compelling interest in protecting voters from confusion and undue influence." *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *see also Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."). And "[t]he state interest in preventing fraud and libel . . . carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349 (1995).

"Where false claims are made to effect a fraud . . . or other valuable considerations, . . . it is well established that

the Government may restrict speech without affronting the First Amendment." *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

So in a situation such as here, where Minnesota has enacted a narrowly tailored law to protect the electorate from fraud, this Court has consistently held and "it is well established that the Government may restrict speech without affronting the First Amendment." *Id.*

2. There is no conflict with the Jurisprudence of the Eighth Circuit

While the Petitioners claim a conflict with the Eighth Circuit's decision in *281 Care Committee*, that decision is squarely reconcilable with the decision of the court below. *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014).

In *281 Care Committee*, the Eighth Circuit considered a broadly written Minnesota statute that prohibited "the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question, that is designed or tends to . . . promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false." Minn. Stat. § 211B.06, subd. 1.

The Eighth Circuit analyzed the statute in question under strict scrutiny analysis. *281 Care Comm.*, 766 F.3d at 785.

Importantly, the Eighth Circuit, recognized the multitude of cases from this Court "that a state interest

in preventing fraud 'carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.'" *Id.* at 786 (*quoting McIntyre*, 514 U.S. at 349). The Eighth Circuit further acknowledged "that regulating falsity in the political realm definitely exemplifies a stronger state interest than, say, regulating the dissemination and content of information generally, given the importance of the electoral process in the United States." *Id.* at 787.

However, the Eighth Circuit ultimately concluded that the subject statute regulating *all false speech* related to ballot initiatives was overbroad and not sufficiently narrowly tailored. *Id.* at 796.

Unlike the present statute which is only implicated by a narrow set of misleading false speech about party endorsements, the statutory provision considered in *281 Care Committee* prohibited *any* false speech "with respect to the effect of a ballot question. . ." *Id.* Regulating the truth of *any* speech concerning *any* ballot initiative is by its terms incredibly broad, and markedly different from the statute in the present case.

Moreover, it is important that the court in *281 Care Committee* expressly rejected the idea that *all* governmental restrictions on political speech are unconstitutional. *See 281 Care Comm.*, 766 F.3d at 783 n.8. As such, it is natural to reconcile the holding in *281 Care Committee* (ban on *any* false speech in connection with referendum), with the narrowness of the statute in the present case.

3. There is No Conflict with the Jurisprudence of the Sixth Circuit

Petitioners also incorrectly claim a conflict with the decision of the court below and the Sixth Circuit's decision in *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016) ("*SBA List*").

The posture of *SBA List* mirrors that of *281 Care Committee*: overly broad statutes prohibiting persons from *any* "disseminati[on] [of] false information about a political candidate in campaign materials during the campaign season 'knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.'" *SBA List*, 814 F.3d at 469-70 (*quoting* Ohio Rev. Code § 3517.21(B)(10)).

As explained by the Sixth Circuit, these "statutes specifically prohibit false statements about a candidate's voting record, but are not limited to that" as the regulated "'campaign materials' are broadly defined as, but not limited to, 'sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, [or] press release.'" *Id.* at 470 (*citing* Ohio Rev. Code § 3517.21(B)(9)—(10); and *quoting* Ohio Rev. Code § 3517.21(B)).

Importantly, the Sixth Circuit readily acknowledged that "Ohio's interests in preserving the integrity of its elections, protecting 'voters from confusion and undue influence,' and 'ensuring that an individual's right to vote is not undermined by fraud in the election process' are compelling." *Id.* at 473 (*quoting Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion)).

Mirroring the rationale of the Eighth Circuit in *281 Care Committee*, the *SBA List* court found that Ohio's broad prohibition was not "narrowly tailored to protect the integrity of Ohio's elections." *Id.* at 474.

Again, the holding of the court below readily squares with that of the *SBA List* court—that while a state does have a compelling interest in "preserving the integrity of its elections, protecting 'voters from confusion and undue influence,' and 'ensuring that an individual's right to vote is not undermined by fraud in the election process'", that the corresponding statute must be narrowly tailored to achieve that interest. *Id.* at 473 (*quoting* Burson, 504 U.S. at 199).

4. None of the Other Cases Identified by Petitioners Demonstrate Any Conflict of Authority

Beyond the two circuit court decisions cited by Petitioners, they also cite to two lower court decisions—both of which are consistent with the analysis of the court below.

First, Petitioners cite to *Linert v. MacDonald*, another decision of the Minnesota Court of Appeals upholding the subject statute, § 211B.02. *Linert v. MacDonald*, 901 N.W.2d 664 (Minn. Ct. App. 2017). *Linert*, which concerns a judicial candidate who falsely claimed a political party endorsement, is premised on the same rationale as the court below and is therefore equally sound.

Finally, Petitioners cite to a district court decision from the District of Nevada in *Make Liberty Win v.*

Cegavske, 499 F.Supp.3d 794 (D. Nev. 2020). Not only is there no conflict with the decision in *Make Liberty Win*, that court's analysis further explains why the statute here is constitutional.

Make Liberty Win concerned an enforcement action against a political action committee that used the word "reelect" in reference to a former incumbent's campaign to reclaim her seat in the Nevada legislature, as Nevada statutory law interpreted the word "reelect" to only apply to the current incumbent. *Make Liberty Win*, 499 F.Supp.3d at 798.

The political action committee then brought both as-applied and facial challenges to the Nevada statute. *Id.* at 799. While the district court granted a preliminary injunction as to the unopposed as-applied challenge, it declined to grant facial relief, as "the Court does not find that Plaintiff has proven at this early juncture that [enforcement] would be unconstitutional in every situation." *Id.* at 803. In doing so, the district court focused on the narrowness of the statute in question, and therefore distinguished that case from the Sixth Circuit's *SBA List* holding, in that the Nevada statute implicated "only statements that might falsely indicate that the candidate is the incumbent." *Id.*

That narrow permissible restriction of false political speech mirrors the situation here. Just as the *Make Liberty Win* court held that a statute prohibiting a false statement of incumbency is sufficiently tailored, so too would be a false statement about political party endorsement.

The district court later granted summary judgment on the same grounds—granting the political action committee's as-applied challenge but rejecting the facial challenge. *Make Liberty Win v. Cegavske*, 570 F. Supp. 3d 936 (D. Nev. 2021). Concluding that "much of this law restricts speech that does not have protection under the First Amendment, specifically invaliding false statements made for material gain or advantage in an election," the Court rejected the facial challenge. *Id*. at 944.

Given that the instant case also concerns a statute "invalidating false statements made for material gain or advantage in an election," the *Make Liberty Win* court's analysis is supportive of upholding the subject statute, rather than invalidating it.

All of these decisions are clear that a narrowly tailed restriction of false speech can and will be upheld if sufficiently justified.

Given that Petitioners have failed to identify a conflict between the decision below and any other legal opinion, the Court should deny the Petition.

C. The Court Below Correctly Upheld the Constitutionality of the Subject Statute

As discussed in the analysis of the court below, Section 211B.02 is "narrowly tailored to serve compelling state interest." *See Reed*, 576 at 155.[6]

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6. As discussed above, the decision of the Court of Appeals applied, but did not affirmatively endorse the application of strict scrutiny analysis to the subject statute. A-13. The Minnesota

1. The State Has a Compelling Interest in the Statute

Here, the court below found that "'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.'" A-13 (*quoting Linert*, 901 N.W.2d 664, 668 (Minn. Ct. App. 2017)); *see also Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion) (protecting "voters from confusion and undue influence," and "ensuring that an individual's right to vote is not undermined by fraud in the election process" are compelling interests).

Indeed, political party endorsement plays a pivotal role in our electoral system, as "[i]t is difficult to overestimate the contributions to our system by the major political parties. . ." *Elrod v. Burns*, 427 U.S. 347, 385 (1976). "When the names on a long ballot are meaningless to the average voter, party affiliation affords a guidepost by which voters may rationalize a myriad of political choices." *Id.*; *see also Rosen v. Brown*, 970 F.2d 169, 172 (6th Cir. 1992) ("Voting studies conducted since 1940 indicated that party identification is the single most important influence on political opinions and voting.").

Attorney General had argued for the lower standard of rational basis analysis. *Id.* While the Republican Party of Minnesota agrees with the court below that Section 211B.02 survives either test, the Party calls this Court's attention to the fact that this issue remains unresolved in this case's proceedings. The Party further reserves the right to more fully brief its position on this issue should this Court either grant the Petition or remand this issue to the Court of Appeals for further proceedings. This outstanding issue is yet another example of the complications of this case that make the granting of this Petition challenging and inadvisable.

Here, Petitioners' negligent false speech obfuscating a voter's identification of the Republican Party of Minnesota's endorsed candidate presented a real danger to "informed voting and . . . the political process." *Linert*, 901 N.W.2d at 668.

There are other important state interests in play here as well—specifically the protection of the Republican Party and its members' own constitutional rights to "enjoy freedom of association protected by the First and Fourteenth Amendments." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989).

Here, the Republican Party of Minnesota conducted a primary election where it endorsed and nominated a candidate other than Mr. Miller. A-20. This is consistent with the Party's "right to identify the people who constitute the association, and to select a standard bearer who best represents the party's ideologies and preferences." *Id.* (citations omitted).

If this Court were to do as Petitioners suggest and overturn the law, this Court would be frustrating the nomination process and the ability of the Republican Party of Minnesota to communicate "whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought." *Id.* at 223. This would "directly hampe[r] the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues." *Id.*

Through the nomination process, the Republican Party of Minnesota determined its desired nominee. To

permit another candidate to misrepresent his association with the Party would frustrate the Party's ability to operate and participate in the political process.

Moreover, a candidate such as Mr. Miller knowingly misrepresenting his endorsement status allows the candidate to undeservedly appropriate the status and goodwill enjoyed by the Republican Party of Minnesota amongst its supporters for the candidate's "material gain" or "material advantage." *See Alvarez*, 567 U.S. 709 at 719, 722.

Furthermore, under state law, the Republican Party of Minnesota, having "adopted. . . [that] party name is entitled to the exclusive use of that name for the designation of its candidates on all ballots. . ." Minn. Stat. Ann. § 202A.11. To frustrate the Party's ability to exclusively use its name would also violate the Party's associational rights. *See Eu*, 489 U.S. at 224.

To remove the prohibition stopping Mr. Miller from trafficking on the name of the Republican Party of Minnesota for his own benefit—namely to appropriate the party's brand and associated goodwill for his own political benefit—would violate the Party's First Amendment rights and is an independent compelling state interest for the statute. *See Make Liberty Win v. Cegavske*, 570 F. Supp. 3d 936, 942 (D. Nev. 2021) ("[F]alse speech is not protected when made 'for the purpose of material gain' or 'material advantage,' or if such speech inflicts a 'legally cognizable harm.') (*quoting Alvarez*, 567 U.S. 709 at 719, 722).

Given the foregoing, the subject statute is supported by numerous compelling state interests.

2. The Statute is Narrowly Tailored to Serve the State Interest

As noted by the court below, "[a] statute is narrowly tailored if it advances a compelling state interest in the 'least restrictive means among available, effective alternatives.'" A-15 (*quoting Linert*, 901 N.W.2d at 668 (quoting *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 666 (2004)).

By contrast, "[a] statute is overbroad if it prohibits constitutionally protected activity in addition to the activity that is not constitutionally protected." A-15.

Here, the statute in question is narrowly tailored to meet the state interest. By its very terms, it is limited to situations where someone "knowingly" makes "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." Minn. Stat. § 211B.02.

That language is expressly limited to the state's interest in preventing fraud and voter confusion and goes no further. Indeed, the court below was unable to identify any "effective alternative means" for the government to achieve their state interest. A-15.

Given the foregoing, the court below was correct in its analysis that Section 211B.02 is constitutional as-applied to Petitioners, and as such, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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