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 MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT ATTORNEY GENERAL KEITH ELLISON

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QUESTION PRESENTED

Does Minnesota Statutes Section 211B.02 violate the Free Speech Clause of the U.S. Constitution, as-applied to Miller's statement that falsely implied he was endorsed by the Republican Party of Minnesota?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutes & Other Authorities

Cited Authorities

Page

INTRODUCTION

The local Republicans in Minnesota successfully prosecuted Petitioner for falsely implying they had endorsed his campaign. In response, Petitioner made an as-applied challenge to the state statute prohibiting that false speech and lost. He now asks this Court to turn this as-applied challenge to a narrow statute into a facial challenge on a different issue, despite the lack of participation of his opposing party below and the lack of a conflict in precedent.

Specifically, Petitioner asks this Court to determine "[w]hether state statutes broadly banning false campaign speech, such as Minnesota Statutes § 211B.02, are unconstitutional, if not narrowly tailored to meet a compelling state interest." (Pet. i (question presented).) Petitioner also tells the Court that there are at least sixteen states that regulate or criminalize false campaign speech. (Pet. 33.) But Minnesota Statutes Section 211B.02 does not broadly ban false campaign speech. Instead, it is a narrow statute that bans knowing and false statements of endorsement (which have associational implications). In that way, Section 211B.02 is unlike any of the other state statutes cited by Petitioner, every one of which is broader than Section 211B.02. Section 211B.02 does not fit the question Petitioner asks this Court to address.

Neither is there any split of authority regarding whether strict scrutiny applies to statutes that broadly ban false campaign speech. Petitioner cites four cases to support his split-of-authority argument. (Pet. i (question presented).) Even putting aside that one dealt with Minnesota's narrow ban on false statements of endorsement (and not false campaign speech broadly), each

of those four cases applied strict scrutiny. The Minnesota Court of Appeals likewise applied strict scrutiny in this case. Because the Petition seeks review of a question not presented in this case and there is no split of authority, the Petition should be denied.

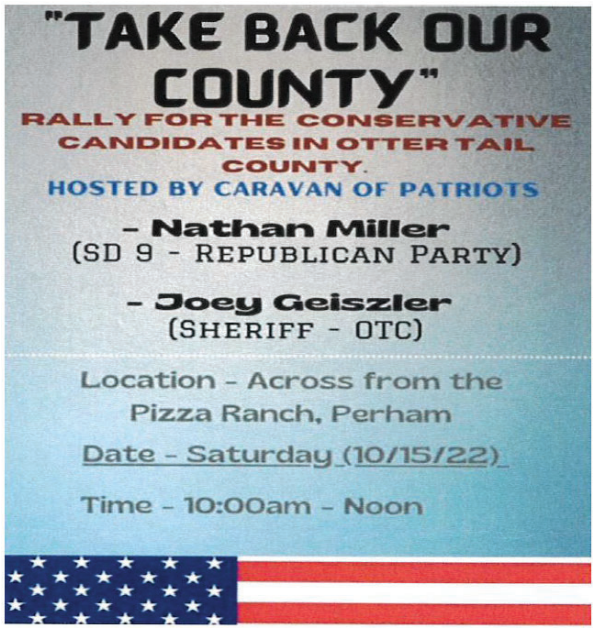
STATEMENT OF THE CASE

1. Since 1965, it has been illegal in Minnesota for a political candidate to falsely claim the support of a political party or organization. *See* Minn. Stat. § 211.081 (1974).

The process for alleging a violation is formal, with immediate notice to the respondent, and an opportunity to respond if the complaint is not dismissed at the prima facie stage. The process begins with a complaint alleging a violation being filed with the Minnesota Office of Administrative Hearings ("OAH").[1] Minn. Stat. § 211B.32, subd. 1(a); *see also* Minn. Stat. § 211B.31 (defining office). The complaint must "be in writing, submitted under oath, and detail the factual basis for the claim that a violation of law has occurred." Minn. Stat. § 211B.32, subd. 3. The office immediately notifies the respondent and provides a copy of the complaint. *Id.*, subd. 6. An administrative law judge ("ALJ") reviews the complaint and makes a preliminary determination regarding whether it sets forth a prima facie violation. That determination is made within one business day after the complaint was filed with the office, when practicable, but "never longer than three business days." Minn. Stat. § 211B.33, subd. 1.

1. The Minnesota Office of Administrative Hearings conducts administrative hearings.

2. In this case, Miller sought the Republican Party endorsement for Senate District 9. (Pet. App. 20 ¶ 3 (Findings of Fact, Conclusions of Law, and Order, *Republican Party of Minnesota v. Miller*, OAH 60-0320-38740 (Minn. OAH, Dec. 9, 2022).) He was not selected as the endorsed candidate; the party endorsed a different candidate. (*Id.*) Miller thereafter participated in the Republican primary, which he lost. (*Id.* ¶ 4.) Miller then continued his campaign as a write-in candidate. (*Id.* ¶ 5.) On October 15, 2022, the Caravan of Patriots hosted a rally for conservative candidates in Otter Tail County. (*Id.* ¶ 7.) Miller agreed to participate in the event and the Caravan of Patriots created a flyer, which Miller posted on his campaign website. (*Id.* at 21 ¶¶ 8-10.) The flyer is reproduced here:



(*Id.* ¶ 9.)

The Republican Party of Minnesota filed a Section 211B.02 complaint against Miller and his campaign on October 14, 2022, less than one month before the November 8 election. (*Id.* at 22 ¶ 12.) Three business days later, an ALJ determined the complaint set forth a prima facie violation and scheduled the probable cause hearing for October 24, 2022. (*Id.* ¶ 13.) Three days after the probable cause hearing, the ALJ determined there was probable cause to believe Miller violated Section 211B.02, as alleged in the Complaint. (*Id.* ¶ 14.)

The case was assigned to a three-person panel with an evidentiary hearing to take place on November 18, 2022. (*Id.* ¶ 15.) Following a telephone prehearing conference, the ALJ cancelled the November 18 hearing, as the parties agreed to waive the evidentiary hearing. (*Id.* at 23 ¶ 17.) Oral closing arguments took place on December 6, 2022. (*Id.* ¶¶ 18-19.) The panel issued findings of fact and conclusions of law on December 9, 2022. (*Id.* at 18 -31.) The ALJ panel concluded Miller knowingly and falsely implied that he had the support or endorsement of a major political party in violation of Minn. Stat § 211B.02. (*Id.* at 24 ¶ 6.) The panel fined Miller $250.00 for the violation. (*Id.* at 25 ¶ 7.)

3. Miller appealed the OAH decision to the Minnesota Court of Appeals. (*Id.* at 2-17.) In relevant part, Miller argued Section 211B.02 "as applied to him, is unconstitutional because it violates his rights of free speech and association." (*Id.* at 3.)[2] The Minnesota Court

2. He likewise challenged the OAH decision on the merits—that is, he argued the OAH decision was affected by an error of law and was not supported by substantial evidence. (Pet. App. 7,

of Appeals concluded that, as applied to Miller, Section 211B.02 did not violate Miller's free speech or associational rights under the U.S. or Minnesota Constitution. (*Id.* at 11-17.) As for the level of scrutiny to apply, the Court of Appeals observed that it previously applied strict scrutiny to a facial challenge to the same statute. (*Id.* at 13 (citing *Linert v. MacDonald*, 901 N.W.2d 664 (Minn. Ct. App. 2017)).) It further concluded that it need not decide what level of scrutiny to apply if the statute satisfied strict scrutiny. (*Id.*) The Court of Appeals concluded the statute satisfied strict scrutiny. (*Id.* at 13-17.)

Miller filed a petition for review in the Minnesota Supreme Court, asking the court to assess "the constitutionality of Minnesota Statutes § 211B.02, as applied to political opinions of write-in candidates." Petition for Review 2, *Republican Party of Minnesota v. Miller*, No. A23-0029 (Minn. Feb. 15, 2024). The Minnesota Supreme Court denied Miller's petition. (Pet. App. 1.)

REASONS FOR DENYING THE PETITION

Petitioner has not identified any compelling reasons to grant certiorari. Instead, the Petition misrepresents the state of the law and articulates a question presented that bears little relation to the dispute below. The Minnesota Court of Appeals' decision does not conflict with any decision of a state court of last resort or of a United States court of appeals. The decision below also does not relate to

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8.) The Court of Appeals affirmed the OAH decision and Miller did not raise those factual issues before the Minnesota Supreme Court. (*Id.* at 6-11; Petition for Review 2, *Republican Party of Minnesota v. Miller*, No. A23-0029 (Minn. Feb. 15, 2024).) In other words, the decision that Miller violated the statute is a final decision.

"statutes broadly banning false campaign speech," (Pet. i (question presented)), but to a much narrower statute, that protects the associational rights of political parties and the transparency of campaigns. And while the question presented suggests the level of scrutiny is at issue, the decision below applied strict scrutiny and Petitioner cites no case applying a standard lower than strict scrutiny in cases that involve false political speech.

Even if there were a split in authority and the issue was fairly characterized, this case is a poor vehicle for considering the broad question presented because one party was not present below, Petitioner waived multiple arguments, and his theory as to his own speech is unclear.

I. The Minnesota Court of Appeals' Decision Does Not Conflict with any Decision of a State Court of Last Resort or of a United States Court of Appeals.

The Petition presents the following question: "Whether state statutes broadly banning false campaign speech, such as Minnesota Statutes § 211B.02, are unconstitutional, if not narrowly tailored to meet a compelling state interest." (Pet. i.)

Petitioner does not argue there is a circuit split on this issue. (Pet. 22.) Instead, he makes the unremarkable point that courts have reached different conclusions when applying strict scrutiny to assess the constitutionality of different state statutes. He argues that two circuit courts held statutes regulating false campaign speech were unconstitutional (*Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016); *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011)) and one state court appellate decision upheld a statute regulating false campaign speech

against a constitutional challenge (*Linert v. MacDonald*, 901 N.W.2d 664 (Minn. Ct. App. 2017)).[3] But, those cases are too dissimilar to create a split of authority warranting review because the circuit court decisions involve statutes that are much broader than the statute at issue in *Linert* and this case. In *Driehaus*, the Sixth Circuit analyzed Ohio Rev. Code § 3517.21(B)(10), which "prohibit[ed] persons from disseminating 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.'" 814 F.3d at 469-70 (quoting Ohio Rev. Code § 3517.21(B)(10)). In *281 Care Committee*, the Eighth Circuit analyzed Minn. Stat. § 211B.06, subd. 1, which proscribed false statements designed to or tending to promote or defeat a ballot question.[4] 638 F.3d at 625.

3. Petitioner's citation to *Make Liberty Win v. Cegavske*, 499 F. Supp. 3d 794 (D. Nev. 2020), is curious. First, a district court case does not create a circuit split. *See, e.g.*, Shapiro, Geller, Bishop, Hartnett & Himmelfarb, Supreme Court Practice § 4.8 (11th ed. 2019). Second, neither this decision nor the subsequent summary judgment decision has been cited by any federal court or any state court decisions available on Westlaw. Indeed, Petitioner never cited this case below. This district court case does not create a split of authority that warrants review.

4. The statute at issue in *Cegavske* is irrelevant to the Court's assessment of the test to apply to statutes that "broadly ban[] false campaign speech," as that statute dealt only with the use of the word "re-elect." 499 F. Supp. 3d at 798. That case also was in a preliminary injunction posture, so the court had a more limited record in front of it. Later, at summary judgment, the court again concluded the statutes were not facially unconstitutional but did conclude they were unconstitutional as-applied to a candidate who was previously elected to the office but is not the current

Further, to the extent Petitioner implies there is a split of authority regarding the level of scrutiny to apply, he has not identified any. All of the cases he cites for the supposed split of authority either concluded that strict scrutiny applies, or applied it without deciding.[5] *See Driehaus*, 814 F.3d at 473 (applying strict scrutiny); *281 Care Comm.*, 766 F.3d at 784 (same); *Linert*, 901 N.W.2d at 668 (same); *Make Liberty Win v. Cegavske*, 499 F. Supp. 3d 794, 802 (D. Nev. 2020) (same).[6]

Not only is there no split of authority, but the Minnesota Court of Appeals' decision in this case did not tread new ground. Instead, it applied the same strict scrutiny standard Petitioner proposes the Court adopt here. (*Compare* Pet. App. 14 ("'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.'" (quoting *Linert*, 901 N.W.2d at 668)), *with* Pet. i ("if not narrowly tailored to meet a compelling state interest").)

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incumbent. *Win v. Cegavske*, 570 F. Supp. 3d 936, 944-45 (D. Nev. 2021). *Cegavske* is not relevant to the rule of law Petitioner proposes in this case.

5. Below, the Minnesota Attorney General argued that a different standard of review applied. *See* Brief of Intervenor, *Republican Party of Minnesota v. Miller*, No. A23-0029 (Minn. Ct. App. June 7, 2023); *see also* Pet. App. 12-13. The Minnesota Court of Appeals concluded the law survived strict scrutiny, so it did not have to decide which level of scrutiny applied. (Pet. App. 13-17.)

6. At the summary judgment stage in *Cegavske*, the court expressly rejected the argument that a lower level of scrutiny applied; the court applied strict scrutiny. 570 F. Supp. 3d at 943.

Because no circuit court or state court of last resort has concluded state statutes "broadly banning false campaign speech" are *not* subject to strict scrutiny, there is no conflict for this Court to resolve.

II. Although Petitioner's Question Presented Implies Section 211B.02 is a Broad False Campaign Speech Ban, It is Actually Substantially Narrower Than all Sixteen State Statutes Cited by Petitioner.

Although Petitioner argues that there are sixteen states that regulate or criminalize false campaign speech, (Pet. 33), all of those statutes are broader than Minnesota's statute and almost none of them even mention false endorsements.[7] Section 211B.02 does not "broadly ban[] false campaign speech." (*See also* Pet. 27 (referring to "penalizing all campaign falsehoods").) To the contrary, it is narrow and bans only a knowing "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. There is no reason for this Court to evaluate other state statutes that "broadly ban[] false campaign speech" when the only issue preserved in *this* case is whether a statute that proscribes false statements *of endorsement* is unconstitutional as-applied to Miller.

Only six other states, in addition to Minnesota, have a statute that specifically proscribes false endorsements. *See* Cal. Elec. Code § 20007; La. Stat. Ann. § 18:1463(B)

7. Applying strict scrutiny, the Massachusetts Supreme Court declared the cited statute—which does not mention false endorsements—unconstitutional under the state constitution. *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015).

(2); N.H. Rev. Stat. Ann. § 666:6; Ohio Rev. Code Ann. § 3517.21(B)(8); Tenn. Code Ann. § 2-19-116; Wash. Rev. Code Ann. § 42.17A.335. No federal circuit court or state court of last resort has passed on the constitutionality of the current false-endorsement provisions, much less applied a standard lower than strict scrutiny, *and* concluded the statutes pass constitutional muster.

In Louisiana, the statute proscribes the distribution of an unofficial sample ballot containing a photograph that falsely alleges a candidate is endorsed by or supported by another candidate, group of candidates, or other person; but it also contains a broader false speech provision. *See* La. Stat. Ann. §§ 18:1463(B)(2), 18:1463(C)(1) ("No person shall cause to be distributed, or transmitted, any oral, visual, digital, or written material containing any statement which he knows or should be reasonably expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters."). No appellate court has passed on the constitutionality of the current version of the false endorsement language, but courts have clarified that for an injunction to pass constitutional muster, the petitioner must establish malice.[8] *Johnson v. Montero*, 215 So. 3d 479, 482 (La. Ct. App. 2017).[9] With little analysis, the Louisiana Supreme

8. A district court declared the statute was unconstitutional, but the Louisiana Supreme Court vacated the declaration as premature. *Badeaux v. Sw. Computer Bureau, Inc.*, 929 So. 2d 1211, 1219 (La. 2006).

9. Several courts have invalidated state statutes prohibiting false political advertising because they did not incorporate an actual malice standard. *Rickert v. State, Pub. Disclosure Comm'n*,

Court struck down as unconstitutional a previous version of the false-endorsement provision. *State v. Burgess*, 543 So. 2d 1332, 1336 (La. 1989). *Compare id.* at 1333, *with* La. Stat. Ann. § 18:1463(B)(2).

The statute in Ohio is likewise much broader than Section 211B.02. No court has passed on the constitutionality of the endorsement language, except in a tangential way. *See Walter v. Cincione*, No. C-2-00-1070, 2000 WL 1505945, at *3 (S.D. Ohio Oct. 6, 2000) (concluding the plaintiff—who was found to have violated the law by falsely stating he was endorsed by a party—had not established an exception to *Younger* abstention because he had not shown bad faith or "that the Ohio Elections law under which he was charged is flagrantly unconstitutional").

So too in Washington. Unlike Section 211B.02, the Washington statute covers other false speech as well. No court has cited or evaluated the false-endorsement provision, although it has addressed other parts of the statute. *See Rickert v. State, Pub. Disclosure Comm'n*, 168 P.3d 826, 827 (Wash. 2007) (concluding statute that proscribes "sponsoring, with actual malice, a political advertisement containing a false statement of material fact about a candidate for public office" was unconstitutional on its face); *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 693 (Wash. 1998) (same, as to predecessor version). No court has analyzed the constitutionality of the false-endorsement provisions in California, New Hampshire, or Tennessee.

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168 P.3d 826, 839-40 (Wash. 2007) (Madesen, dissenting) (citing cases).

Even the statutes Petitioner cites are diverse in their language, and at least one appears to directly address a concern this Court has raised regarding when falsehoods can or cannot be proscribed consistent with the First Amendment.[10]

- "A candidate ***who is damaged*** as the result of a false statement about the candidate made with knowledge that it was false, or with reckless disregard for whether it was false or not, made as part of a telephone poll or an organized series of calls, and made with the intent to convince potential voters concerning the outcome of an election in which the candidate is running may recover damages in an action in superior court under this section against the individual who made the telephone call, the individual's employer, and the person who contracted for or authorized the poll or calls to convince." Alaska Stat. Ann. § 15.13.095 (emphasis added).

- "Any candidate who, in a primary election or other election, with actual malice makes or causes to be made any statement about an opposing candidate which is false is guilty of a violation of this code." Fla. Stat. Ann. § 104.271.

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10. The cited Illinois statute does not proscribe false statements. *See* 10 Ill. Comp. Stat. Ann. 5/29-4 ("Any person who, by force, intimidation, threat, deception or forgery, knowingly prevents any other person from (a) registering to vote, or (b) lawfully voting, supporting or opposing the nomination or election of any person for public office or any public question voted upon at any election, shall be guilty of a Class 4 felony.").

- "No person, including a candidate, shall publicly or privately make, in a campaign then in progress, any charge or charges reflecting upon the honesty, integrity or moral character of any candidate, so far as his or her private life is concerned, unless the charge be in fact true and actually capable of proof." Miss. Code Ann. § 23-15-875.

The existence of statutes on the books in other states does not support this Court granting certiorari in this case as the statutes are all broader than Section 211B.02 and the lack of case law regarding false statements of endorsement undermine Petitioner's argument that there is a split of authority. In short, this Court deciding that Section 211B.02 can or cannot be constitutionally applied to Miller would not advance case law regarding general statutes that prohibit falsehoods.

III. The Minnesota Court of Appeals did not Adopt or Endorse a Categorical Exception to the First Amendment for False Statements of Endorsement.

Petitioner argues "[i]n conflict with decisions in the Sixth Circuit and in the Eighth Circuit, including precedent of this Court, the Minnesota Court of Appeals holds a conflicting principle that false campaign speech is categorically outside the protection of the First Amendment when it involves political parties." (Pet. 21.) Petitioner is wrong as the Court of Appeals' decision is silent on that issue.

As a preliminary matter, this Court has already concluded that false statements as a category are not outside the protection of the First Amendment, so there

is no need to clarify that point. In *Alvarez*, a defendant convicted of violating the Stolen Valor Act challenged the constitutionality of the statute. *United States v. Alvarez*, 567 U.S. 709 (2012). The plurality and concurrence agreed there was no false-statement exception to the First Amendment. Although the plurality observed that there are "instances in which the falsity of speech bears upon whether it is protected," it expressly "reject[ed] the notion that false speech should be in a general category that is presumptively unprotected." *Id.* at 721-22 (plurality). It also distinguished statutes that prohibit falsehoods attendant to some "legally cognizable harm" from the Stolen Valor Act, which "targets falsity and nothing more." *Id.* at 719.

Not only did *Alvarez* reject a categorical falsehood exception to the First Amendment, but the Minnesota Court of Appeals *did not* endorse, cite, or rely on any categorical exception to the First Amendment, whether as to falsehoods generally or falsehoods that "involve[] political parties." Instead, the Minnesota Court of Appeals applied strict scrutiny. (Pet. App. 13-17.)

This Court has already determined there is no categorial exception to the First Amendment for falsehoods, and the Minnesota Court of Appeals did not adopt one.

Accordingly, certiorari is not warranted.

IV. This Case Is a Poor Vehicle to Consider This Issue.

This appeal is not an ideal vehicle for this Court to decide the question presented for three additional reasons.

First, the party who brought the complaint, the Republican Party of Minnesota, did not participate below.

Second, Petitioner forfeited many of the arguments he now makes. For example, below, he brought an as-applied challenge. Petitioners' Principal Brief 17, *Republican Party of Minnesota v. Miller*, No. A23-0029 (Minn. Ct. App. May 8, 2023) ("Minnesota Statutes § 211B.02 is unconstitutional as applied to Miller's factual circumstances under the Minnesota and U.S. Constitutions as it violates free speech and associational rights."); Petition for Review 2, *Republican Party of Minnesota v. Miller*, No. A23-0029 (Minn. Feb. 15, 2024) ("The Petitioner Nathan Miller challenges the constitutionality of Minnesota Statutes § 211B.02, as applied to political opinions of write-in candidates."). Now, he argues that the statute is facially unconstitutional. (Pet. 22.) Petitioner did not preserve a facial challenge to the statute. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (the Court's traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below" (citation and quotation marks omitted)). Additionally, Petitioner did not cite *Driehaus* or *281 Care Committee* below. And he never argued that there was any constitutional implication associated with the administrative process whatsoever, including regarding timing, whether it affords relief to the victim campaigns, etc. (*See* Pet. 30.) This argument is forfeited. *Williams*, 504 U.S. at 41.

Third, Petitioner's alterations to his legal theory undermine his argument that this case presents important legal questions this Court should evaluate. For example, Petitioner now argues he wanted to convey that he had Republican values, but he was independent from

Republican Party politics. (Pet. 16.) Below, however, he argued that he specifically was associating himself with the national Republican Party. Petitioners' Principal Brief 22, *Republican Party of Minnesota v. Miller*, No. A23-0029 (Minn. Ct. App. May 8, 2023). These two statements conflict such that there is no clarity regarding precisely how Petitioner characterizes his speech.

Stunningly, Petitioner now appears to concede that Minnesota's statute is constitutional: "Perhaps a state may seek to curtail fraudulent statements during campaigns regarding endorsements or support as a compelling governmental interest[.]" (Pet. 4.) That is exactly what Section 211B.02 does:

> 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.

Petitioner likewise concedes that the Minnesota Court of Appeals applied the correct standard. (Pet. 31.) And Petitioner no longer challenges the factual finding that he violated Section 211B.02.

In addition to altering his legal theories, he appears to want to litigate an entirely different case on appeal. Petitioner argues to this Court that this case is about "expressing [philosophical] alignments" with national

political parties. (Pet. 4, 7.) But this case is not about philosophy. It is undisputed at this stage that Petitioner posted a flyer that falsely stated he had the endorsement of the Republican Party of Minnesota.[11] In contrast, it was not a violation, for example, for Petitioner to have the following on his Facebook page: "Vote August 9 – Nathan Miller – Republican-Constitutionally minded conservative running for SD9." (Pet. 16.)

CONCLUSION

For all of these reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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11. As the OAH's decision on the merits is final, it is likewise too late for Miller to argue that he was fined for a "truthful statement" or that the statement was "non-falsifiable." (Pet. 4, 5, 28.)