No. 24-53

In the Supreme Court of the United States

Nathan Miller and Miller for SD9 (#18849)
Petitioners,

vs.

Republican Party of Minnesota,
Respondent,

Attorney General Keith Ellison,
Intervenor.

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

PETITIONERS' REPLY BRIEF

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The respondent briefs of Minnesota Attorney General (MAG) and Republican Party of Minnesota (RPM) in opposition are unpersuasive for at least four reasons. First, the respondents' briefs fail to refute the legal academics who agree that the Court has never considered whether lies in election speech can be regulated without violating the Free Speech Clause. Second, after *Alvarez* in 2012, federal and state appellate courts have conflicted decisions on whether broad statutory bans on election speech are constitutional. Third, the respondents peddle a fallacious waiver argument. Fourth, this petition and the petition in the *Minnesota RFL Republican Farmer Labor Caucus* related case, U.S. Supreme Court case no. 24-282, (Sept. 9, 2024), should be granted simultaneously to properly weigh—in light of a conflict between the First, Fifth, Eighth and Ninth Circuits— how necessary § 1983 First Amendment pre-enforcement complaints are.

I. The respondents' briefs fail to refute the legal academics who agree that the Supreme Court has never considered whether lies in election speech can be regulated without violating the Free Speech Clause.

Although the respondents acknowledge a checkerboard pattern of state laws banning false election speech, the respondents believe an *Alvarez*-like decision is not necessary to guide federal and state courts in prosecuting these state laws against the people. MAG Br. at 9–13; RPM Br. at 15–24. To the contrary, the legal academics (disagreeing with Respondents) believe the stage is set for the question

presented to be adjudicated by this Court. Legal academics agree that "[t]he Supreme Court has never considered whether lies in campaign speech can be regulated without violating the expressive rights of speakers." Catherine Ross, *Ministry Of Truth: Why Law Can't Stop Prevarications, Bullshit, And Straight-Out Lies In Political Campaigns*, 16 First Amend. L. Rev. 367, 391 (2017). And, "[t]he decision in *Susan B. Anthony List v. Driehaus* focused on justiciability issues: standing and mootness. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341–47 (2014). The Court did not reach the merits." *Id.,* n. 133. And, "[m]any scholars argue that campaign falsehood statutes are unlikely to survive constitutional review." *Id.* at 409. *See, e.g.*, Richard L. Hasen, *A Constitutional Right To Lie In Campaigns And Elections?*, 74 Mont. L. Rev. 53, 72–73 (2013); Jack Windsbro, *Misrepresentation In Political Advertising: The Role Of Legal Sanctions*, 36 Emory L.J. 853, 863–65 (1987) (pre-*Alvarez*); Lance Conn, *Mississippi Mudslinging: The Search For Truth In Political Advertising*, 63 Miss. L.J. 507, 514, n. 40 (1994); *Developments in the Law: Elections*, 88 Harv. L. Rev. 1111, 1296, 1296 n. 354 (1975) (questioning not the constitutionality but "rather the wisdom of a comprehensive approach encompassing all types of deceptive practices").

II. After *Alvarez* in 2012, federal and state appellate courts have conflicting decisions on whether broad statutory bans on election speech are constitutional.

The respondents' briefs fail to recognize, after *Alvarez* in 2012, that federal and state appellate courts following *Alvarez* have held statutory bans on

election speech unconstitutional, while the Minnesota appellate courts and the Nevada federal court have distinguished *Alvarez*, upholding the constitutionality of statutory bans on election speech. There are two legal issues central to the petition on which Respondents err. First, MAG's and RPM's briefs dispute that there is a conflict between the Sixth and Eighth Circuit and the Minnesota appellate courts on First Amendment application to statutory bans of false election speech. MAG Br. at 6–9; RPM Br. at 16–24. Second, both briefs claim that Minn. Stat. § 211B.02 is a narrow ban on election speech. MAG Br. at 9–13; RPM Br. at 11–12.

The best way to correct the Respondents' errors is to show that the Minnesota appellate courts and the other federal and state courts after the watershed First Amendment case, *U.S. v. Alvarez*, 567 U.S. 709 (2012), have made conflicting decisions regarding the constitutionality of statutory bans of false election speech. The Sixth Circuit summarizes best the post-*Alvarez* situation striking down statutory bans on false election speech similar to § 211B.02, "Other courts to evaluate similar laws post-*Alvarez* have reached the same conclusion." *Susan B. Anthony List*, 814 F.3d at 476 (listing cases).

Importantly, the Court in *Alvarez* considered the Stolen Valor Act, 18 U.S.C. § 704, which criminalized falsely representing yourself having received military decorations or medals:

> (b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or

> medal authorized by Congress for the Armed Forces of the United States ... shall be fined under this title, imprisoned not more than six months, or both…

The Court's majority held that "the Stolen Valor Act violated the First Amendment." *Alvarez*, 567 U.S. at 730 (concurring opinion). The plurality opinion stated that the government's strict scrutiny arguments failed to save the Stolen Valor Act as a content-based suppression of pure speech. *Id.,* 567 U.S. at 715.

As explained in the petitioners' principal brief, after *Alvarez,* the Sixth and Eighth Circuit have issued decisions striking down statutory bans on false election speech similar to § 211B.02 as unconstitutional. Pet. at 23–25. The petition at 23–25 explains the Sixth Circuit's decision in *Susan B. Anthony List v. Driehaus,* 814 F.3d 466 (6th Cir. 2016), which held that a ban on false campaign speech was facially unconstitutional. On page 25, the petition explains the Eighth Circuit's decision in *281 Care Comm. v. Arneson,* 766 F.3d 774, 785 (8th Cir. 2014) which held that a ban on false campaign speech was facially unconstitutional.

But, unlike these other federal and state appellate courts, after *Alvarez,* the Minnesota appellate courts distinguished *Alvarez* to uphold the constitutionality of § 211B.02, even though it is a broader restriction on the protected speech than the Stolen Valor Act:

> 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. Notably, the Stolen Valor Act applied narrowly to a person making "false claims about military declarations or medals" received by the same person. Whereas, Minnesota's § 211B.02 applies more broadly to persons making false claims of support by political organizations not only about themselves, but also about candidates and also about ballot questions.

First, in 2014, the Court of Appeals in *Niska v. Clayton*, No. A13-0622, 2014 WL 902680 (Minn. Ct. App. Mar. 10, 2014), distinguished *Alvarez* in application to § 211B.02, in part, because the "lie-defeating solution" in *Alvarez* did not apply to protecting an "accurately informed electorate":

> Unlike in *Alvarez,* where a plurality of the Court struck down a law prohibiting anyone from falsely claiming to be a medal-of-honor recipient because evidence in that case showed that "counterspeech, ... [and] refutation, can overcome the lie," *id.* at 2549, that lie-defeating solution is inadequate here. At stake in *Alvarez* was the dishonest speaker's reputation; at stake under the statute in this case is an accurately informed electorate.

2014 WL 902680, at *10.

Second, in 2017, the Court of Appeals in *Linert v. MacDonald,* 901 N.W.2d 664 (Minn. Ct. App. 2017), a published decision, relied on *Niska* to distinguish *Alvarez* again in upholding the constitutionality of §

211B.02 because "informed voting is 'essential in a free society'":

> Informed voting is "essential in a free society." *Daugherty*, 344 N.W.2d at 832. MacDonald has not demonstrated, and we are not persuaded, that counterspeech—even media statements and retractions—is an effective alternative means to combat false claims of support or endorsement. This is particularly true with respect to false claims made in the final days leading up to an election.

901 N.W.2d at 669–70.

Third, in 2024, the Court of Appeals in this case rejected Miller's arguments that the government had *Alvarez*-like counterspeech alternatives to applying § 211B.02 to Miller:

> 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.

Republican Party of Minnesota v. Miller, No. A23-0029, 2024 WL 159126, at *5 (Minn. Ct. App. Jan. 16, 2024).

Notably, prior to *Alvarez,* the Minnesota Supreme Court had upheld the constitutionality of the predecessor of § 211B.02 twice. In *Matter of Schmitt v. McLaughlin*, 275 N.W.2d 575, 590 (Minn. 1979), the Minnesota Supreme Court considered a predecessor statute of section 211B.02 that similarly prohibited a candidate from making a false claim of endorsement or support from a political party or sub-unit of a political party. 275 N.W.2d at 590. The Minnesota Supreme Court held that the contestee's use of initials "DFL" in his advertisements and on his lawn signs violated the statute by implying that contestee had endorsement or support of DFL party when in fact he did not. *Id.* Similarly, two years later, the Minnesota Supreme Court in 1982 held that use of the term "Secretary 47 Sen. Dist." in between the words "DFL" and "LABOR ENDORSED" was not a modifier to indicate that the candidate was merely affiliated with the DFL but rather implied DFL endorsement in violation of the same statute. *Matter of Ryan*, 303 N.W.2d 462, 467–68 (Minn. 1981).

The Minnesota appellate courts are not alone in distinguishing *Alvarez* and upholding the constitutionality of broad bans on false campaign speech—conflicting with other post-*Alvarez* court decisions. The federal district court in *Make Liberty Win v. Cegavske,* 499 F.Supp.3d 794, 802 (D. Nev., 2020) distinguished *Alvarez* to support the constitutionality of a broad ban on false election speech:

> Nonetheless, "false speech may be criminalized if made 'for the purpose of material gain' or 'material advantage,' or if such speech inflicts a 'legally cognizable harm.' " *Animal Legal Def. Fund v.*

> *Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018) (quoting *Alvarez*, at 719, 723, 132 S.Ct. 2537). Falsely claiming to be the incumbent for a chance to improve odds of election would be for a material gain. Therefore, a state could rightfully outlaw a candidate from falsely claiming to be the incumbent or using "reelect" when he has never held the position because the speech is not protected.

Make Liberty Win, 499 F.Supp.3d at 802.

III. The Respondents peddle a fallacious waiver argument.

At the beginning of RPM's argument section, RPM peddles a fallacious waiver argument. RPM Br. at 8–11. RPM fails to recognize that the Court of Appeals was bound by Minnesota's *stare decisis* doctrine to follow the holding of the earlier decisions in *Matter of Schmitt v. McLaughlin*, 275 N.W.2d 575 (Minn. 1979), *Matter of Ryan*, 303 N.W.2d 462 (Minn. 1981) and *Linert v. MacDonald,* 901 N.W.2d 664 (Minn. Ct. App. 2017), published predecessor cases, which held that § 211B.02 was not overbroad in violation of the First Amendment and the threat of prosecution under campaign statute did not chill truthful speech. *Linert*, 901 N.W.2d at 670. Minnesota's doctrine of *stare decisis* directs the court of appeals to abide by the Minnesota Supreme Court and Court of Appeals earlier decisions unless the rationale for the rule of law that underlies the prior decision no longer exists or if the rule no longer applies because of clear social change. *Doe v. Lutheran High Sch. of Greater Minneapolis,* 702 N.W.2d 322, 330 (Minn. Ct. App. 2005), *review denied* (Minn. Oct.

26, 2005); *Koski v. Johnson,* 837 N.W.2d 739, 744 (Minn. Ct. App. 2013), *review denied* (Minn. Dec. 17, 2013). In Minnesota, both the Minnesota Supreme Court and Court of Appeals decisions are essentially un-reversable by the Court of Appeals unless those special circumstances apply—which didn't apply in Miller's case.

So, RPM's quote of Miller's counsel in the court of appeals was legally required when taking into account Minnesota's stare decisis doctrine and the earlier Supreme Court and Court of Appeals decisions being un-reversable precedent on the Minnesota Court of Appeals:

> 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?"
>
> Mr. Kaardal (Counsel for Petitioners): "No. We didn't in our principal brief."
>
> The Court: "So your challenge is only as-applied. OK."

RPM Br. at 8–9, n.2. For Miller's counsel to respond otherwise would have been legally irresponsible.

And, RPM's logical fallacy is that Miller cannot make an as-applied constitutional claim against § 211B.02 based on the Sixth and Eighth Circuit decisions holding similar statutes facially unconstitutional. But, if the Court agrees with the Sixth and Eighth Circuit decisions that such broad bans on false campaign speech are facially unconstitutional, then the similarly unconstitutional

§ 211B.02 cannot possibly be constitutionally applied to Miller.

In the petition, Miller details how Minnesota's adjudication of a statutory violation and imposition of a $250 fine under § 211B.02 violated Miller's First Amendment rights. Pet. at 15–21. Miller's argument in this regard was made plain enough in the Minnesota appellate courts and now in Miller's petition. Pet. at 22–36; A1, A11–17. There was no waiver. *Id.* Miller professionally threaded a needle here. Because of Minnesota's *stare decisis* doctrine, as explained above, Miller could not straightforwardly argue before the Minnesota Court of Appeals to overrule the previous appellate court decisions. Instead, Miller appropriately argued to the Minnesota appellate courts and in the petition to follow the Sixth and Eighth Circuit decisions and to hold § 211B.02 unconstitutional as applied to Miller. A1, A11–17. Pet. at 22–36; A1–31.

Noticeably, there is only a single relevant reference to "facially" or "facial" in the petition, found on page 22. Preceding this text is the argument section heading "I" for pages 22–27 of the argument section:

> I. A conflict exists in the lower courts on whether bans on false campaign speech are content-based restrictions violating the Free Speech Clause.

Pet. at 22. The petition's single relevant reference to "facially," is part of a long sentence, making the point that if the Sixth and Eighth Circuits have held similar statutes facially unconstitutional, then the similarly unconstitutional § 211B.02 cannot constitutionally be applied to Miller:

> The petitioner, agreeing with the Sixth and Eighth Circuit, alleges that the State of Minnesota's adjudication and enforcement of a $250 fine against him for violating Minnesota Statutes § 211B.02 is facially unconstitutional because § 211B.02 broadly bans candidate and non-candidate false political speech relating to political party and organizational support for a candidate.

Pet. at 22. After this single relevant reference to "facially," the petition on pages 23–25 explains the Sixth Circuit's decision in *Susan B. Anthony List v. Driehaus,* 814 F.3d 466 (6th Cir. 2016) and explains the Eighth Circuit's decision in *281 Care Comm. v. Arneson,* 638 F.3d 621, 633–34 (8th Cir. 2011) which held that Ohio's and Minnesota's respective bans on false campaign speech were facially unconstitutional. On page 26, the petition explains that the Minnesota appellate court decisions on § 211B.02 are in conflict with the Sixth and Eighth Circuits' decisions.

Against this background, RPM makes the proverbial "mountain out of a molehill" by quoting the single relevant reference to "facially" in the petition out of context—even adding its own emphasis on the single reference to "facially unconstitutional":

> While Petitioners claim that "Minnesota Statutes § 211B.02 is **facially unconstitutional"…**

RPM Br. at 8. But, RPM engages in a logical fallacy because, if the Sixth and Eighth Circuits are correct that such broad bans on false campaign speech are unconstitutional, a similarly facially unconstitutional

§ 211B.02 cannot be constitutionally applied to Miller—as Miller argued, not waived.

Finally, MAG brief raises a similar waiver argument. MAG Br. at 15. Again, the unpersuasive argument is "Petitioner did not preserve a facial challenge to the statute." *Id.* But, MAG's waiver argument shares in the same fallacious reasoning as the RPM's waiver argument—as detailed above.

IV. This petition and the petition in the *Minnesota RFL Republican Farmer Labor Caucus* related case should be granted simultaneously to properly weigh how necessary § 1983 First Amendment pre-enforcement complaints for declaratory judgment are.

This petition and the petition in the *Minnesota RFL Republican Farmer Labor Caucus* related case, U.S. Supreme Court case no. 24-282 (Sept. 9, 2024), should be granted to properly weigh how necessary § 1983 First Amendment pre-enforcement complaints for declaratory judgment are. In the related case, the government attorneys, including the Minnesota Attorney General, and the Eighth Circuit believe that § 1983 First Amendment pre-enforcement complaints for declaratory judgment are not so necessary—as Miller and Minnesota Republican Farmer Labor Caucus believe. In the related case, the petitioners brought a § 1983 First Amendment pre-enforcement complaint for declaratory judgment against enforcement of § 211B.02. Although the petitioners satisfied the requirements for Article III standing, the Eighth Circuit, in conflict with existing Ninth Circuit precedent, imposed additional ripeness or imminence requirements under the *Ex parte Young* exception to

Eleventh Amendment immunity in an action for declaratory relief. *Minnesota RFL Republican Farmer Labor Caucus v. Moriarty*, 108 F.4th 1035, 1037–38 (8th Cir. 2024) (imposing additional *Ex parte Young* imminence requirements); *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 846–47 (9th Cir. 2002) (not imposing additional *Ex parte Young* imminence requirements). *See Mi Familia Vota v. Ogg*, 105 F.4th 313, 333 (5th Cir. 2024) (imposing additional *Ex parte Young* imminence requirements); *Aroostook Band of Micmacs,* 404 F.3d 48, 65 (1st Cir. 2005) (additional *Ex parte Young* imminence requirements "may be subject to debate"). From the perspective of Miller, the Court should grant both petitions to consider ensuring Free Speech Clause protection for himself—and nationwide— either by constitutional defense in this case or by § 1983 action in the related case.

Respectfully submitted,

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