UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Voters Alliance, Mary Amlaw, Ken Wendling, and Tim Kirk,

Plaintiffs,

vs.

Keith Ellison, in his official capacity as Attorney General, and Brad Johnson, in his official capacity as Anoka County Attorney,

Defendants.

Court File No.: 0:23-cv-2774 (NEB/TNL)

THE ANOKA COUNTY ATTORNEY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

In his famous speech about the role of a prosecutor, then United States Attorney General and later Justice Robert H. Jackson wrote:

> In the enforcement of laws that protect our national integrity and existence, we should prosecute any and every act of violation, but only overt acts, not the expression of opinion, or activities such as the holding of meetings, petitioning of congress, or dissemination of news or opinions. Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 6 (1940). The same holds true for state prosecutors, especially those charged with protecting elections and the rights of individual citizens to vote. Plaintiffs' lawsuit undermines democracy and the proper role and discretion of prosecutors by challenging the constitutionality of Minn. Stat. § 211B.075.

In 2018, Plaintiff Minnesota Voters Alliance ("MVA") challenged a Minnesota law prohibiting certain political apparel inside a polling place on election day. The MVA prevailed in that First Amendment case. In the course of striking down the challenged law, however, the U.S. Supreme Court made clear that it was not imposing a blanket ban against state regulation of election procedures, even when those regulations might interfere with a voter's freedom of speech. To the contrary, the Supreme Court held that "we do not doubt that the state may prohibit messages intended to mislead voters about **voting requirements and procedures**." *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1889 n.4 (2018) (emphasis added). That is exactly what Minnesota has done through Section 211B.075-prohibit false speech intended to mislead voters about voting requirements.

Section 211B.075 prohibits individuals from using materially false statements to interfere with the right to vote. That is the paradigmatic example of a limitation that the Supreme Court said in *Mansky* would pass constitutional muster.

Plaintiffs want to spread false speech intended to mislead voters about their eligibility to participate in elections. Plaintiffs forthrightly acknowledged in their original Complaint that they intend to tell prospective voters that "felons still serving their sentences do not have a right to vote in Minnesota" (ECF 1, ¶ 12) and "felons who have not served their full sentences, or otherwise had their sentences discharged, cannot legally vote." (*Id.* at ¶ 3).[1] Those are verifiably false statements of Minnesota law, as Plaintiffs well know.

Effective June 1, 2023, Minn. Stat. § 201.014 restored voting rights to individuals with a felony conviction during any period when they are not incarcerated for the offense:

[1] On October 17 (after receiving County Attorney Johnson's Counterclaim pointing out Plaintiffs' admissions that they had made materially false statements in the past and intended to continue doing so in the future), Plaintiffs filed an Amended Complaint. (ECF 13). That Amended Complaint belatedly tries to distance Plaintiffs from the admissions contained in their original Complaint. That effort is thwarted, however, by the verifications that Plaintiffs attached to their first Complaint in which each Plaintiff verified "under penalty of perjury that the factual statements in this Complaint concerning Minnesota Voters Alliance, its activities, and its intentions are true and correct." Apparently realizing that the factual statements included in their original Complaint violated Section 211B.075, Plaintiffs have now amended that pleading to soften those allegations. For example, Plaintiffs now claim that they intend to say that "felons still serving their sentences do not have a right to vote in Minnesota because the Minnesota Constitution preempts the Felon Voting Law." (ECF 13, ¶ 18). Couching false statements in the language of an academic legal debate does not make them any more permissible. Section 211B.075 bars both the false statement that felons are not allowed to vote in Minnesota, and the false statement that felons are not allowed to vote in Minnesota because of Plaintiffs' misinterpretation of the law. Plaintiffs cannot un-ring the bell by trying to disclaim the verified statements they included in their original Complaint.

> **Felony conviction; restoration of civil right to vote.**
>
> An individual who is ineligible to vote because of a felony conviction has the civil right to vote restored during any period when the individual is not incarcerated for the offense. If the individual is later incarcerated for the offense, the individual's civil right to vote is lost only during that period of incarceration. For purposes of this subdivision only, an individual on work release under section 241.26 or 244.065 or an individual released under section 631.425 is not deemed to be incarcerated.

Plaintiffs obviously know that felons can legally vote in Minnesota because they have filed a separate lawsuit challenging the constitutionality of that new law. *See Minnesota Voters Alliance et al v. Tom Hunt et al.*, Minn. Dist. Ct. File No. 02-CV-23-3416. (Stover Decl., Ex. A). Plaintiffs now ask **this Court** to authorize them to deliberately mislead legal voters about Minnesota's voting requirements. That is exactly the type of communication that the Supreme Court in *Mansky* made clear could constitutionally be prohibited. This Court should grant Anoka County Attorney Johnson's motion for judgment on the pleadings.

II. FACTUAL BACKGROUND

It is important to recognize at the outset there is a sizeable distinction between a statement that felons **should not** be allowed to vote and a statement that felons **are not** allowed to vote. Section 211B.075 prohibits the latter, not the former. Plaintiffs alleged in their original Complaint that they have said (and will continue saying) that "felons who have not served their full sentences, or otherwise had their sentences discharged, cannot legally vote." (ECF 1, ¶ 3). Even more specifically, Plaintiffs allege that they "intend to convey, verbally and in writing, the information that felons on supervised release, probation, or work release do not have the right to vote in Minnesota under the Minnesota Constitution." (*Id.* at ¶ 47).

In their Amended Complaint, Plaintiffs couch those same allegations in more legalistic language, claiming that they actually intend to communicate that felons are not allowed to vote in Minnesota because Plaintiffs believe the legislature lacked the authority under the Minnesota constitution to pass Section 201.014. (ECF 13, ¶ 67). But either way, the message is the same: they want to say felons cannot vote in Minnesota. Plaintiffs' clarification of the reason **why** they believe felons should not vote does nothing to change Plaintiffs' false message that certain legal voters are not entitled to cast a ballot.

No matter how that message is phrased, Plaintiffs' statements contradict Minnesota law as of June 1, 2023. On June 29, 2023, Plaintiffs filed their state-court Complaint in which they acknowledged that Section 201.014 "purports to restore the right to vote to those convicted of felony crimes who have not completed their sentence and are still on supervised release or probation." (Stover Decl., Ex. A, ¶ 12). Plaintiffs obviously recognize that Minnesota law currently **does** allow felons who are not incarcerated to vote; the whole premise of Plaintiffs' state-court lawsuit is that the Minnesota legislature lacked the constitutional authority to pass that law. However much Plaintiffs may believe that Minnesota law should be different, the statements Plaintiffs included in their Complaint and Amended Complaint are materially false statements of Minnesota law as it currently exists, and they are designed to discourage re-enfranchised felons from exercising their voting rights. County Attorney Johnson is entitled to judgment as a matter of law because Plaintiffs fail to state a viable claim that Section 211B.075 is unconstitutional, either facially or as applied to Plaintiffs' own statements.

III. ARGUMENT

A. Legal Standard

A Rule 12(c) motion for judgment on the pleadings is reviewed under the same standard as a Rule 12(b)(6) motion to dismiss. *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1233 (8th Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "While this court must accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party, a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012) (citations and internal quotation marks omitted).

B. Plaintiffs Have Failed to Adequately Plead a Facial Challenge

As an initial matter, this Court should winnow down Plaintiffs' expansive claims. Plaintiffs allege that Section 211B.075 is void for vagueness, but Plaintiffs have also brought a facial challenge, an as-applied challenge, and a prior-restraint challenge under the First Amendment. A straightforward application of law forecloses many of their claims and boils this case down to a single claim for consideration: an as-applied First Amendment challenge to Section 211B.075.

First, Plaintiffs have failed to plead sufficient facts supporting an overbreadth facial challenge. "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Overbreadth challenges run through hypothetical scenarios to determine whether a statute is overbroad as a matter of law. As quasi-advisory opinions, they are "employed by the Court sparingly and only as a last resort." *Id.* at 613.

There are social costs associated with striking down legislation based on theoretical applications. "[I]nvalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects." *United States v. Williams*, 553 U.S. 285, 292 (2008). To sustain such a costly, disfavored claim, a plaintiff must show "that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* The "law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." *United States v. Hansen*, 599 U.S. 762, 770 (2023).

Plaintiffs have failed to plead an overbreadth challenge. Plaintiffs wish to say that "felons still serving their sentences do not have a right to vote in Minnesota," and depending on when, where, how, and to whom they communicate that false statement, Plaintiffs may face prosecution or civil action pursuant to Section 211B.075. That's it.

This is a challenge based on the threat of applying Section 211B.075 to Plaintiffs' own conduct. That, of course, is a straightforward as-applied challenge.

To state a viable overbreadth challenge, Plaintiffs would have to offer something more than conclusory allegations that Section 211B.075 would sweep in a *substantial* amount of protected speech. *Hansen*, 599 U.S. at 781. But Plaintiffs did not, and Section 211B.075 does not. Section 211B.075 is limited to (1) material falsehoods (2) intentionally communicated (3) with intent to impede or hinder another person from voting (4) close in time to an election. Plaintiffs fail to plead any other examples of protected speech threatened by Section 211B.075, much less any other "realistic" applications to such a degree showing the statute would prohibit a substantial amount of protected speech.

Plaintiffs have also failed to plead a viable as-applied void for vagueness claim. As this Court knows, "'perfect clarity and precise guidance' are not required, 'even of regulations that restrict expressive activity.'" Order on Motion to Dismiss, *Final Exit Network, et al. v. James Stuart, et al.*, Civ. No. 21-01235 (NEB/HB), at *9 (Feb. 3, 2022, D. Minn.) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). In their Amended Complaint, Plaintiffs engage in abstract sophistry, claiming it is impossible to know what is prohibited under Section 211B.075 when it uses words like "hinder" or "impede" or "threat" or "advise." (*See* ECF 13, pp. 27–30). Plaintiffs are not, however, unsophisticated entities or individuals, as shown by MVA's extensive litigation surrounding issues related to election administration. By bringing this pre-enforcement as-applied challenge, Plaintiffs show they know full well what the words in Section 211B.075 mean. "What renders a statute vague is not the possibility that it will sometimes

be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306. Plaintiffs commenced this lawsuit precisely **because** they understand that their intended speech runs afoul of Section 211B.075. Plaintiffs might disagree with the statute on policy grounds, but they cannot credibly claim it is so vague they do not know what speech it affects. The only issue to be resolved is whether Plaintiffs have stated a viable as-applied challenge to Section 211B.075.

C. The First Amendment Does Not Prevent a State from Regulating its Own Elections Process

Plaintiffs claim that Section 211B.075 violates the First Amendment by infringing on their right to speak about whether felons **should be** allowed to vote in Minnesota. Not so. Section 211B.075 does not in any way prevent Plaintiffs from advocating about whatever they think the law **should be**. Instead, that statute only prevents Plaintiffs from misrepresenting what Minnesota law **actually says**. The first type of speech might be considered political, but the second plainly is not. Plaintiffs' proposed speech does not reach the merits of the political question of whether felons should be allowed to vote, it goes only to the non-political process by which Minnesota administers elections.

Almost 60 years ago, the Supreme Court explained:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964). The right to vote, in turn, means "the right to participate in an electoral process that is necessarily structured to maintain the integrity of

the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). Because the right to vote is so fundamental to American democracy, a state has a compelling interest in preserving the integrity of its elections process. That compelling interest extends to protecting prospective voters from confusion about their right to vote:

> [T]his Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence. The Court also has recognized that a State indisputably has a compelling interest in preserving the integrity of its election process. The Court thus has upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.

Burson v. Freeman, 504 U.S. 191, 199 (1992). The Supreme Court has "recognized that, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The Supreme Court has repeatedly upheld such restrictions against challenges that they violate the First Amendment:

> To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Id. at 789; *see also id.* at n.9. "Just as a State may take steps to ensure that its governing political institutions and officials properly discharge public responsibilities and maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982); *see also Eu v. San*

Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 231–32 (1989) ("A state indisputably has a compelling interest in preserving the integrity of its election process."); *281 Care Committee v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014) ("We concede 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.").

The state's interest in protecting the integrity of its electoral process is especially compelling when it comes to regulating false statements about who is allowed to participate in that process. After reviewing numerous federal court decisions, one commentator has concluded that "the strongest case for constitutionality is a narrow law targeted at false election speech aimed at disenfranchising voters." Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 Mont. L. Rev. 53, 71 (2013). Another commentator has noted the serious harm that can be inflicted on voters by those who lie about the elections process itself:

> By way of example, imagine a poll worker intentionally provides false instruction about how to operate a voting machine. Or a situation in which campaign volunteers, engaged in get-out-the-vote efforts, intentionally mislead prospective voters, whom they believe to oppose their preferred candidate, about their voting eligibility. These lies are uniquely harmful. Professor Richard Hasen, after providing the example of an individual falsely informing listeners that 'Republicans vote on Tuesday, Democrats vote on Wednesday,' sees little significance in such lies: "A state should have the power to criminalize such speech. The law would be justified by the government's compelling interest in protecting the right to vote.' As Professor James Weinstein notes in his contribution to this symposium, and in making a similar point, 'if government were powerless to stop such deception, the integrity of the election process might be badly compromised.' Typical concerns about chilling valuable speech are, in this circumstance, flimsy.

Joshua S. Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 Okla. L. Rev. 141, 159 (2018). The same holds true for false statements made by private actors about the election process generally, and the ability of an individual to participate in that process specifically:

> But what about intentional lies told by private actors, along the lines of the examples provided above (poll workers, campaign volunteers, and the like)? While such lies might be thought to be less coercive than government lies, they also pose a serious threat to democracy. Although private individuals must be guaranteed ample freedom to speak on matters of public concern, I believe intentional lies meant to undermine the right to vote may be regulated. The Supreme Court, albeit in another context, has relaxed First Amendment rights when weighed against the right to vote. [citing *Burson*, 504 U.S. 191]. Judicial deference is given to 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'

Id. at 160. It is with that background in mind that this Court must consider the constitutionality of Section 211B.075's prohibition against materially false statements made with the intent to impede an individual from exercising the fundamental right to vote.

D. The Court's Decision in *United States v. Mackey* Shows Why Minnesota's Law is Constitutional

In January 2023, the Eastern District of New York issued a comprehensive opinion addressing the interplay between the First Amendment and the government's compelling interest in prohibiting false statements designed to interfere with the fundamental right to vote. In *United States v. Mackey*, Crim. No. 21-80, 2023 WL 363595 (E.D.N.Y. 2023), defendant Mackey was indicted under 18 U.S.C. § 241 for his participation in an online conspiracy to make false statements about election procedures in the 2016 presidential election. Section 241 makes it illegal to interfere with the "free exercise or enjoyment of

any right or privilege" secured by the Constitution. A grand jury concluded that Mackey violated that statute by making social media posts designed "to trick [Hillary Clinton's] supporters into believing they could cast their ballots by sending a text message or posting on Facebook or Twitter." *Id.* at *1. Mackey moved to dismiss the indictment, arguing that Section 241 interfered with the exercise of his First Amendment rights. *Id.* at *3.

The district court held that Section 241 did not violate the First Amendment as applied to Mackey's dissemination of materially false information related to the voting process itself. The court began its analysis by noting that "false speech raises unique First Amendment concerns, and depending on the context of the false speech, may fall into categories historically exempted from First Amendment protection or warrant intermediate, not strict, scrutiny." *Id.* at *19. The *Mackey* court held that Mackey's objectively false speech (1) survived intermediate scrutiny and (2) fell within categories historically exempted from full First Amendment protection.

1. The Supreme Court's fragmented *Alvarez* decision

The *Mackey* court identified its task as analyzing "how the First Amendment interacts with verifiably factually false utterances made to gain a material advantage in the context of election procedures." *Id.* at *19. To answer that question, the court turned to the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012). The *Alvarez* court considered the constitutionality of the Stolen Valor Act of 2005 (18 USC § 704), which prohibited individuals from falsely claiming they had been awarded military decorations or medals. *Id.* at 714–15. Alvarez challenged that statute as a content-based restriction on speech that violated the First Amendment. *Id.*

The Supreme Court agreed that the Stolen Valor Act was unconstitutional but did not issue a true majority opinion. Instead, four justices signed on to the court's plurality opinion, with two other justices concurring in the result but writing separately to mark their disagreement with some of the plurality's reasoning. "Where, as in *Alvarez,* a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Mackey*, 2023 WL 363595, at *21 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

The court's plurality and concurring opinions must be read carefully to determine the true extent of the court's binding holding. The four-Justice plurality opined that "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar." *Alvarez*, 567 U.S. at 717. The two concurring justices explicitly disagreed with that limitation, however, meaning that a content-based restriction need **not** fall solely within those historical categories to pass muster under the First Amendment. *See Mackey*, 2023 WL 363595, at *21 ("[T]he *Alvarez* concurrence controls with regard to its rejection of the strict historical categorical approach, where exceptions to First Amendment protection are limited solely to the enumerated historical exceptions, as the plurality only secured four votes for that point").

The plurality concluded that the Stolen Valor Act did not fall within any historical exception to the First Amendment and was therefore subject, fatally, to strict scrutiny. *Alvarez*, 567 U.S. at 724–30. But the plurality did acknowledge that there could be

constitutional content-based restrictions that prohibit "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law." *Alvarez*, 567 U.S. at 722 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

Importantly, however, only four justices believed that strict scrutiny was the proper standard to apply. Rather than applying strict scrutiny, the two-Justice concurrence held that the Court needed to "examine the fit between statutory ends and means." *Id.* at 730. The concurrence noted that "sometimes the Court has referred to this approach as 'intermediate scrutiny,' sometimes as 'proportionality' review, sometimes as an examination of 'fit,' and sometimes it has avoided the application of any label at all." *Id.* But, "regardless of the label, some such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as strict scrutiny implies) nor near-automatic approval (as is implicit in rational basis review)." *Id.* at 731. The concurrence concluded that "in this case, the Court's term 'intermediate scrutiny' describes what I think we should do." *Id.* Only intermediate scrutiny should be applied to verifiably false statements:

> As the dissent points out, there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual

> statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech.

Id. at 731–32. While the concurrence concluded the Stolen Valor Act was subject only to intermediate scrutiny, it nevertheless concurred with the judgment of the court and found that the Act was not sufficiently tailored to fit the government's interest. *Id.* at 739.

To summarize the *Alvarez* court's holding, a law regulating verifiably false speech receives **at most** intermediate scrutiny. If a law regulates false speech falling within a historical exception, then all nine justices (including the dissent) agreed that it would not implicate the First Amendment at all. While six justices in *Alvarez* invalidated the Stolen Valor Act under differing standards, the narrowest ground on which the court reached that result was that the Act failed the intermediate scrutiny described by the concurrence. That holds true because strict scrutiny is the most restrictive First Amendment test available to the court and necessarily encompasses the less restrictive intermediate scrutiny test. As required by *Marks*, federal courts applying *Alvarez* must rely on "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193; *Keefe v. Adams*, 840 F.3d 523, 545 (8th Cir. 2016). The "narrowest ground" on which five or more justices agreed in *Alvarez* was the application of intermediate scrutiny to verifiably false statements.

2. *Mackey's* application of intermediate scrutiny

Following *Alvarez*, the *Mackey* court applied intermediate scrutiny to the social media posts before it because the statements related to "easily verifiable facts" and were likely to "make a specific harm more likely to occur." *Mackey*, 2023 WL 363595, at *20.

That court rejected Mackey's argument that his social media posts constituted political speech and were therefore entitled to a higher degree of First Amendment protection. Recognizing that "vibrant political discourse is a prerequisite to this nation's successful maintenance of a thriving democracy," the *Mackey* court noted that "courts have long hesitated to uphold restrictions on political speech." *Id.* at *21. But that principle does not extend to speech that is not political but relates only to the administration of an election:

> Courts have, on the other hand, been deferential to government regulation of speech that is not *political* in nature and is instead related to politics only in so far as it proscribes the procedures governing elections.

Id. at *22. The court found that Mackey's social media posts were not political speech:

> [T]he definition of political speech cannot be one of unlimited scope. The Court's political speech cases have uniformly involved speech and expressive conduct relating to the *substance* of what is (or may be) on the ballot—policy issues, party preference, candidate credentials, candidate positions, putative facts about issues covered by ballot questions, and the like.

Id. at *23. Mackey's posts did not advocate for a policy position or a candidate—they sought only to interfere with voters' ability to cast a vote for the candidate of their choice.

Furthermore, even if Mackey's posts were treated as pure speech divorced from his intent to disenfranchise eligible voters, those false statements should still be examined under intermediate scrutiny. As the court explained:

> Like Mr. Alvarez's claims that he held the Congressional Medal of Honor, Mr. Mackey's claims that Democrats could vote for President by text were indubitably false, with no room to argue about interpretation or shades of meaning. But unlike Mr. Alvarez's claims, Mr. Mackey' tweets do not even arguably constitute pure speech. This prosecution targets only false speech intentionally used to injure other individuals' attempt to exercise their constitutionally guaranteed right to vote…despite Mr. Mackey's knowledge that the statements in his tweets were false.

Id. The *Mackey* court noted that even the plurality opinion in *Alvarez* recognized that "regulation of such speech regarding election procedures properly falls into the very different category of false speech regarding the efficient administration of government processes . . . ." *Id.* at *23.

Applying less restrictive intermediate scrutiny to Mackey's tweets, the court explained that the statute would survive First Amendment scrutiny so long as there was a fit between the statute and the government's interest in regulating the speech in question. *Id.* at *24. Starting with the government's interest, the court found that the state has a compelling interest in maintaining the integrity of its election procedures. *Id.* Those procedures extend to the mechanics of the voting process itself, including how to vote, when to vote, and where to vote. *Id.*[2] The statutory restriction fit the government's interest because it was limited to only verifiably false statements that could not be countered by true speech, given the potential to mislead voters about the voting process in the period immediately preceding an election. *Id.*

3. Categories of speech exempted from full First Amendment protection

The *Mackey* court further held the statute and prosecution in question would survive the narrower *Alvarez* plurality opinion because the tweets in question fit into two categories of speech historically exempted from full First Amendment protection. First, the tweets were merely a single element within the course of broader criminal conduct. *Id.* Second,

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[2] While the *Mackey* court only had occasion to address the "what", "when", and "where" of the voting process, its logic equally extends to the "who" of the voting process too, as in "who may legally vote in an election?"

the tweets implicated the fraud exception to First Amendment protection because they were intended to defraud otherwise eligible voters and prevent them from voting. *See id.* at *25 ("Regardless of its justification, fraud is not covered speech under the First Amendment."). The *Mackey* court concluded its opinion by suggesting that the tweets may also fall into a previously unrecognized exception, speech "injuring the integrity of Government processes." *Id.* Under any of those three exceptions, Mackey's speech was not entitled to full First Amendment protection even if the more restrictive analysis offered by the *Alvarez* plurality controlled.

4. A second Federal Court has agreed with *Mackey*'s reasoning

Just a few weeks after the *Mackey* decision, the Southern District of New York applied the same analysis to find that robocalls making false claims about voting procedures were not entitled to First Amendment protection. In *National Coalition on Black Civic Participation v. Wohl*, Civ. No. 20-8668, 2023 WL 2403012 (S.D.N.Y. 2023), Defendants recorded and transmitted a robocall that falsely advised its recipients that if they voted by mail (1) their personal information would be added to a public database used by police departments to track down old warrants, (2) their personal information could be used by credit card companies to collect outstanding debts, and (3) the Centers for Disease Control would use that information to "track people for mandatory vaccines." *Id.* at *3. Defendants argued that the calls were protected by the First Amendment.

The district court rejected that argument for two reasons. First, the court found that the robocalls constituted true threats and thus fell within a recognized exception to full First Amendment protection. *Id.* at *24. Second, the *Wohl* court found that at most only

intermediate scrutiny needed to be applied. *See id.* at *25 ("In *Alvarez*, where the Supreme Court issued a fragmented plurality decision, Justice Breyer's concurrence noted that when false statements are about easily verifiable facts, a reviewing court should apply intermediate scrutiny to assess whether the false statements are protected under the First Amendment"). The robocalls contained obviously false information. *Id.* The court thus considered whether a fit existed between the statute and the harm it sought to prevent. *Id.* at *26. The court found that "the federal government and the State of New York have an interest in protecting voting rights and maintaining the integrity of the election process, rising to the level of a compelling interest." *Id.* The statute at issue was tailored to fit that interest, and thus survived defendants' First Amendment challenge. *Id.* at *27.[3]

E. Section 211B.075 is Constitutional Under Intermediate Scrutiny

Section 211B.075 is constitutional for the reasons articulated by the *Mackey* and *Wohl* courts. It has always been the case that "demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements." *Hartlage*, 456 U.S. at 60. The dissent in *Alvarez* made that same point. *See Alvarez*, 567 U.S. at 746 ("Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value") (collecting cases). The essential holding of *Alvarez* is that false statements are not excluded categorically from First Amendment protection but simultaneously do not enjoy the same constitutional protection afforded to true statements. As applied to Plaintiffs, Section 211B.075 does not run afoul of the First

[3] In fact, the *Wohl* court found that the statute would survive even strict scrutiny if such an analysis were required. *Id.* at *27 n.29.

Amendment. The statements that Plaintiffs wish to make here are the same type of verifiably false statements that the *Mackey* and *Wohl* courts rejected.

As of June 1, 2023, felons who have not served their full sentences, including those on supervised release, probation, or work release, undeniably **do** have the right to vote in Minnesota. Whether Plaintiffs tell convicted felons that they cannot legally vote in Minnesota, or tell them that they cannot legally vote in Minnesota because the legislature's law giving them the right to vote is trumped by the Minnesota constitution, the effect is the same. It is a materially false statement for someone to communicate that felons who are still subject to supervised release, probation, or work release are not allowed to vote under Minnesota law. That statement is just as false as the statements considered in *Mackey* and *Wohl*, and should be evaluated under the same rubric.

Nor is Plaintiffs' proposed speech any more "political" than the speech considered in those two cases. Plaintiffs are not making substantive statements about what the law should be, or speaking about a candidate's position on an issue, or adding to the public discourse surrounding a ballot initiative. Instead, Plaintiffs are engaging in speech for the sole purpose of interfering with other citizens' exercise of their lawful right to vote. Plaintiffs' speech is political only in the sense that it relates to the administration of an election—the 'who,' 'what,' 'where,' and 'when.' A law regulating such speech is not evaluated under strict scrutiny because "the Court's political speech cases have uniformly involved speech and expressive conduct relating to the *substance* of what is (or may be) on the ballot—policy issues, party preference, candidate credentials, candidate positions, putative facts about issues covered by ballot questions, and the like." *Mackey*, 2023 WL

363595, at *23. Rather, courts are "deferential" to the regulation of "speech that is not *political* in nature and is instead related to politics only in so far as it proscribes the procedures governing elections." *Id.* at *22.

Plaintiffs' message is not communicated in a vacuum. The intended effect of Plaintiffs' false speech is to sow doubt among those with felony convictions whose right to vote has been restored by the Minnesota legislature. Speech designed to interfere with the lawful exercise of the right to vote is simply not political speech:

> Defendants' 'discourse' around this subject is a message that explicitly misleads voters about a particular method of voting in an attempt to suppress the vote. They communicate that certain harms will occur if one votes by mail in a deliberate effort to deter Black voters from participating in the election. The subject of mail-in voting is not inherently political, as it is not related to the actual substance of what may be found on a ballot, such as public policy issues, candidate backgrounds and positions, or other pieces of legislation. Instead, mail-in voting is about election procedures and administration, and Defendants' discourse around it embodies an attempt to disturb the election process itself.

Wohl, 2023 WL 2403012, at *27. As the *Mackey* and *Wohl* courts explain, laws regulating speech intended to interfere with individuals' exercise of their right to vote receive only intermediate scrutiny.

Section 211B.075 easily passes intermediate scrutiny. Minnesota plainly has an interest in regulating the procedures surrounding its elections process. Those procedures include establishing who may vote in Minnesota's elections. Just like the statutes at issue in *Mackey* and *Wohl*, Section 211B.075 directly impacts the state's interest in preventing false statements that may interfere with its citizens' fundamental right to participate in the election process. That is a compelling interest that has been recognized numerous times

by federal courts. *See, e.g.*, *Mansky*, 138 S. Ct. at 1888; ("The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth[.]"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788–89 (1978) (recognizing the state's interest in "preserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.").

Section 211B.075 fits the state's compelling interest because that statute is narrowly drawn to prevent the use of intimidation or deceptive practices to impede individuals from exercising their fundamental right to vote. When considering similar laws, federal courts have identified several characteristics that make a law constitutional. The concurrence in *Alvarez* traced the history of constitutionally acceptable statutes that limit speech in other contexts, including fraud, perjury, impersonation of public officials, and trademark infringement. *Alvarez*, 567 U.S. at 734–36. Those regulations are acceptable in large part because they are narrowly tailored:

> [I]n virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.

Id. at 736. A statute that "insist[s] upon a showing that the false statement caused specific harm or at least was material, or focus[es] its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm" is narrowly tailored. *Id.* at 738. A constitutional statute should also "contain at least an implicit requirement that the

statement be *knowingly* or *intentionally* false." *Mackey*, 2023 WL 363595 at *21 (emphasis in original). Section 211B.075 bears all those hallmarks.

1. Subdivision 2, Deceptive Practices

Subdivision 2 (which most directly regulates false speech) first applies only to information transmitted within 60 days of an election. That limitation makes the statute a very narrow one, targeted to prevent just those false statements that cannot readily be countered with true counter-speech because there is not sufficient time to widely circulate such true statements. Outside the 60-day window, subdivision 2 does not prevent the dissemination of even materially false statements about who may vote in an election. The legislature has determined that if a prospective voter receives such a false message outside that window, the state will have sufficient time to educate that individual about eligibility to vote. With less than 60 days remaining, however, the risk that an eligible voter might be misled into not voting becomes too great. That line-drawing shows that the legislature tailored this remedy carefully.

Second, the statute imposes an intent requirement. The statute applies only to false statements intended to interfere with a convicted felon's right to participate in an election. That limitation is significant because it exempts communications not intended to affect a third-party's exercise of the right to vote.

Third, the statute only prohibits statements known by the speaker to be materially false. The statute does not target false statements made with the good-faith belief that they are true. What the statute targets are statements like the very ones Plaintiffs describe in

their pleadings, where individuals know what the truth is and deliberately make a statement directly contrary to it.

Those three limitations significantly narrow the reach of Section 211B.075, subd. 2. Section 211B.075, subd. 2 bears all the hallmarks of the statutes cited favorably by the concurring opinion in *Alvarez*.

2. The remaining subdivisions

While Plaintiffs nominally challenge the constitutionality of the rest of the statute, it is clear that the statute's other subdivisions are equally tailored to fit the state's legitimate interest in preventing interference with the right to vote. Subdivision 1 prohibits the use of threats or force against "any person with the intent to compel that person to …vote or abstain from voting." To enforce subdivision 1, "the plaintiff must demonstrate that the action or attempted action would cause a reasonable person to feel intimidated." Subdivision 1 thus requires (1) either force or the threat of force or harm, (2) with the intent to compel an individual not to vote, (3) where the threat would make a reasonable person feel intimidated. Subdivision 1 falls squarely within the context of "true threats," defined as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." *United States v. Mabie*, 663 F.3d 322, 330 (8th Cir. 2011). Plaintiffs have no viable argument to challenge that regulation under the First Amendment. *See United States v. Williams*, 690 F.3d 1056, 1062 (8th Cir. 2012).

Subdivision 3 prevents individuals from "intentionally" interfering with another's exercise of the right to vote. That intentionality requirement narrows application of the statute just to those who deliberately seek to prevent an individual from voting. Likewise,

subdivision 4 extends vicarious liability under the statute to anyone who "intentionally" works with another to interfere with another's right to vote.

Subdivision 5 allows the attorney general or a county attorney to bring a criminal or civil action only if "there is a reasonable basis to believe that an individual or entity is committing or intends to commit a prohibited act." By imposing a reasonable basis requirement for the exercise of normal prosecutorial discretion, the legislature limited the statute to address only those situations that implicate the harm the legislature sought to address. Subdivision 5 also grants a narrow enforcement right to members of the public, but only to those persons "injured by an act prohibited by this section." Because the statute addresses interference with the exercise of the right to vote, only an individual who has been the subject of speech or conduct intended to interfere with that individual's participation in an election receives a private right of action. That limitation greatly narrows the universe of potential plaintiffs and fits the state's legitimate interest in protecting the electoral process.

F. *281 Care Committee* is Facially Distinguishable Because Section 211B.075 Does Not Prohibit or Restrict *Political* Speech—only Verifiably False Statements

Plaintiffs will surely cite *281 Care Committee*, 766 F.3d 774, in which the Eighth Circuit applied strict scrutiny to invalidate a Minnesota law restricting false statements about proposed ballot initiatives. That decision does not bind this Court here, however, because that case considered quintessential political speech that dealt with statements about the merits of a ballot initiative. *See id.* at 783 ("The key today, however, is that although *Alvarez* dealt with a regulation proscribing false speech, it did not deal with legislation

regulating false *political* speech. **This distinction makes all the difference** and is **entirely** the reason why *Alvarez* is not the ground upon which we tread.") (emphasis added). The most that can be said of *281 Care Committee* is that while ordinary false speech might be subject to intermediate scrutiny, the Eighth Circuit believes that truly political false speech must be reviewed under strict scrutiny.

As discussed above, however, the speech affected by Section 211B.075 is not political speech at all. Speech (even false speech) directed at persuading voters to accept or reject a question appearing on the actual ballot itself is far different than false and misleading speech intended to prevent voters from participating in the electoral process at all. It is certainly not political speech to falsely inform a prospective voter that he or she is not eligible to vote. That type of speech affects only the administration of the electoral process. Because intermediate scrutiny must be applied to this non-political speech, *281 Care Committee* does not apply.[4]

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[4] The Eighth Circuit again considered *Alvarez* in *Animal Legal Defense Fund v. Reynolds*, 8 F.4th 781 (2021). In that case, the court considered a challenge to an Iowa law regulating false statements made to obtain access to an agricultural production facility. The Eighth Circuit commented that it could not identify a clear holding from *Alvarez*, but nonetheless applied *Alvarez* and held "The better rule in light of *Alvarez* is that intentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment." *Id.* at 786. *See also id.* at 787 ("Under either approach in the *Alvarez* majority, the scope of the Employment Provision is too broad to satisfy the First Amendment"). While the *Reynolds* court suggested in passing that it might not be bound by *Alvarez*, it is far more significant that the *Reynolds* court actually chose to follow that decision.

G. Section 211B.075 Prohibits Statements that Fall Within Recognized Exceptions to Full First Amendment Protection

Even if Section 211B.075 did not survive intermediate scrutiny, or even if the *Alvarez* plurality alone controlled, this Court should still uphold Section 211B.075 would still be constitutional because it regulates speech that falls within three recognized exceptions to full First Amendment protection. Just like in *Mackey*, "[t]his case is about conspiracy and injury, not speech." *Mackey*, 2023 WL 363595, at *19. The speech prohibited by Section 221B.075 falls within "the few historic and traditional categories of expression" which lack First Amendment protection. *Alvarez*, 567 U.S. at 717. The government may restrict those categories of speech because they contribute nothing of value to our democracy's exchange of ideas. *See generally, id.*; *Stevens*, 559 U.S. at 470.

1. Fraud

"[T]he First Amendment does not shield fraud." *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003); *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980). States need not "sit idly by and allow their citizens to be defrauded." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988).

Imposing consequences for fraud has "never been thought to raise any Constitutional problem." *Stevens*, 559 US at 468 (quoting *Chaplinsky*, 315 U.S. at 571-572). "Fraudulent misrepresentations can be prohibited." *Vill. of Schaumburg*, 444 U.S. at 637. The *Alvarez* concurrence agrees, noting that "many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful." 567 U.S. at

734. Statutes criminalizing fraud, defamation, or perjury all pass constitutional muster because they are limited "to a subset of lies where specific harm is more likely to occur." *Id.* at 736. As one federal court has noted, "fraudulent misrepresentations of fact are unprotected by the First Amendment . . . ." *Aitken v. Commc'ns Workers of Am.*, 496 F. Supp. 2d 653, 665 (E.D. Va. 2007).

At its essence, Section 211B.075 prohibits fraud. It prohibits actors from (1) causing information to be transmitted (2) with the intent to impede or prevent another person from exercising the right to vote, and which the actor (3) knows to be (4) materially false. Those elements track with the common law elements of fraud and fraudulent misrepresentation. In Minnesota, the common law elements of fraud are "(1) a false representation of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce action in reliance thereon; (4) that the representation caused action in reliance thereon; and (5) pecuniary damages as a result of the reliance." *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 373 (Minn. 2011). *See also Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1493 (8th Cir. 1992) (applying Minnesota law for fraudulent misrepresentation claim).

The statute clearly incorporates the first three elements in the definition of fraud. The statute addresses the last two elements (reliance and harm) as well. The harm occurs when citizens are told they cannot exercise their lawful right to vote. The "intentional lie [does not] materially advance[] society's interest in uninhibited, robust, and wide-open debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (citation

and internal quotation marks omitted). To the contrary, within the sharply drawn lines of Section 211B.075, the intentional lie does the opposite. It poisons the well of democracy. The fraud prohibited under Section 211B.075, subdivision 2 is perfected when the listener receives the materially false statement that the voter is not allowed to participate in an election.

To be clear, nothing prohibits Plaintiffs or anyone else from expressing opinions about who they think **should be** allowed to vote. Section 211B.075 only applies when an actor intentionally communicates false statements about "information regarding the time, place, or manner of holding an election; the qualifications for or restrictions on voter eligibility at an election; and threats to physical safety" within 60 days of an election. Plaintiffs can still offer their subjective opinions about who should vote. They can challenge the policy, impact, or wisdom of re-enfranchising voters. Under Section 211B.075, subd. 2, however, they cannot fraudulently tell enfranchised voters they are, in fact, disenfranchised voters. That is a form of fraud on the public.

In *Schneider v. State of New Jersey*, *Town of Irvington*, 308 U.S. 147 (1939), the Supreme Court considered four separate ordinances which prohibited leafletting on public streets and sidewalks. The court struck them down under a straightforward application of the First Amendment:

> For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets.

> Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

Id. at 160–61. Six decades later, the Supreme Court would favorably cite *Schneider* for the baseline proposition that free speech necessarily has limits. *See Illinois*, 538 U.S. at 612. The court in *Illinois* held that states and local municipalities may prohibit fraudulent solicitation, even when the speech is dressed in the sheep's clothing of religion, charity, or even politics. "Frauds including fraudulent appeals . . . *made in the name of charity and religion*, may be denounced as offenses and punished by law." *Id.* (quoting *Schneider*, 308 U.S. at 164) (quotation marks omitted). The same holds true here. The State need not sit idly by while individuals spread targeted misinformation about who can and cannot vote.

The Eighth Circuit has made clear that states can proscribe this type of fraudulent speech. In *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011), the Eighth Circuit took pains to note that, "We do not, of course, hold today that a state may never regulate false speech in this context." *Id.* at 636. In *Williams*, 690 F.3d 1056, in the context of federal statutes criminalizing false and malicious statements about the commission of serious crimes, the court cited the plurality opinion from *Alvarez* and commented, "The falsities governed here have no value in and of themselves, are necessarily injurious and do not 'chill' otherwise valuable or protected speech." *Id.* at 1063. This Court stands on solid legal ground in denying a First Amendment challenge to a statute prohibiting false, fraudulent speech in the context of who is allowed to vote.

That is exactly what the *Mackey* court did, finding that even if the *Alvarez* plurality opinion controlled, the tweets at issue fell outside the protection of the First Amendment

because they were fraudulent statements. The court found that "Mr. Mackey's Deceptive Tweets, though far from the typically commercial instance of fraud, implicate the Court's fraud exception" and therefore fell outside the First Amendment. *Mackey*, 2023 WL 363595, at *25.

It is important to note that the present motion for Judgment on the Pleadings does not call upon the Court to weigh evidence or make factual findings on how Plaintiffs' speech could impact putative voters. County Attorney Johnson is not asking this Court to decide whether Plaintiffs' fraudulent statements have caused a particular voter to stay home on election day. Rather, the legal question is whether the scope of speech prohibited by the plain text of Section 211B.075 is limited to fraudulent misrepresentations. If it is, then dismissal is appropriate because Section 211B.075, subdivision 2 prohibits fraudulent misrepresentations, and "[f]raudulent misrepresentations can be prohibited." *Vill. of Schaumburg*, 444 U.S. at 637.

2. False statements leading to harm

The *Alvarez* court also recognized that states can regulate "false speech undertaken to accomplish a legally cognizable harm," *Reynolds*, 8 F.4th at 786. To the extent Section 211B.075 could include speech beyond pure fraud, it still falls within this class of nonprotected speech.

The leading Eighth Circuit case on this class of speech is *Reynolds*, which considered a statute imposing criminal penalties on anyone who willfully "[o]btains access to an agricultural production facility by false pretenses." 8 F.4th at 783. The Eighth Circuit surveyed *Alvarez* and concluded that while "falsity alone may not suffice to bring speech

outside the First Amendment, . . . [t]he better rule in light of *Alvarez* is that intentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment." *Id.* at 786. The court applied *Alvarez's* "false speech + legal harm" rubric and upheld the statute because it prohibited false speech undertaken to accomplish trespass. *Id. See also 281 Care Comm.*, 766 F.3d at 783 (noting the "legally cognizable harm" distinction in *Alvarez*).

Section 211B.075 prohibits false speech made with the intent to inflict the harm of interfering with the right to vote. "Courts routinely recognize that restrictions on voting rights constitute irreparable injury." *Craig v. Simon*, 493 F. Supp. 3d 773, 786 (D. Minn.), *aff'd*, 980 F.3d 614 (8th Cir. 2020). The "right to vote is 'the most basic of political rights,'" *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) (quoting *FEC v. Akins*, 524 U.S. 11, 25 (1998)). The "deprivation of the right to vote is just such a concrete [injury in fact]." *Id.* at 425.

Section 211B.075 also prevents a second type of harm—interference with government election procedures. *See Mackey*, 2023 WL 363595, at *25 ("[T]he *Alvarez* plurality appears to essentially describe one such category without naming it—that of false speech injuring the integrity of Government processes"). False speech about who is eligible to vote in an election not only injures prospective voters, it directly injures the government's interest in conducting a free and fair election. Because the proscriptions of Section 211B.075 are limited to false speech undertaken to accomplish legally cognizable harms, that statute passes constitutional muster under *Alvarez's* "false speech + legal harm" rubric.

3. True threats

Finally, Section 211B.075 is constitutional because it prohibits another historical category of speech not entitled to First Amendment protection: true threats. "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Courts certainly differentiate "political hyperbole" from "true threats," but it is equally true that "political context alone will not excuse a threat." *United States v. Dierks*, 978 F.3d 585, 589 (8th Cir. 2020).

In *Wohl*, 2023 WL 2403012, the court held that defendants' robocalls constituted true threats. "The Robocall, that is, the speech at issue, put a reasonable recipient familiar with the context of the Robocall in fear that an injury of a legal (arrest), economic (debt collection), or physical (mandatory vaccination) nature would occur if the recipient voted by mail." *Id.* at *25. The facts and statute here fit within that framework. The law does not demand that governmental restraints on true threats can only protect individuals from physical violence; they can "protect individuals from the fear of violence and the *disruption that fear engenders*." *Id.* at *24 (citing *Virginia*, 538 U.S. at 359) (emphasis in original). The subtext of telling a voter "you cannot vote legally" is obvious: "if you vote, you will commit a felony." *See* Minn. Stat. § 201.014, subd. 3. Saying the former is saying the latter. And the latter is a threat of arrest, prosecution, and jail time. Section 211B.075 prohibits just those sorts of true threats.

IV. CONCLUSION

For the foregoing reasons, County Attorney Johnson asks this Court to enter judgment on the pleadings. This Court can confidently decline to participate in Plaintiffs' effort to deter eligible citizens from voting.

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