

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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

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

Plaintiffs,

**THE ANOKA COUNTY
ATTORNEY’S REPLY**

vs.

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS**

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

Defendants.

1. Plaintiffs Challenge a Statute that Does Not Exist

In their opposition brief, Plaintiffs do not just rely on a straw man of their own creation, they construct an entire Potemkin village of laws that do not exist and innocuous statements that bear no relationship to the allegations actually made in their own Amended Complaint. Plaintiffs claim, for instance, that Section 211B.075 prevents them “from talking to their friends and neighbors about their views” in private (ECF 32, p. 32), or that it prohibits someone from “merely stat[ing] how they interpret the Minnesota Constitution.” (*Id.*, p. 27). They argue this case is just like *Mansky*, and all they intend to do is wear a proverbial button reading “felons should not be allowed to vote.” But that is not what the law actually prohibits, and it is not what Plaintiffs allege they have said in the past and intend to say in the future.

It takes until page twenty-eight, but Plaintiffs do finally get around to the real issue when they “acknowledge that intentional attempts to mislead voters about voting requirements and procedures may be barred.” (*Id.*, p. 28) (quoting *Mansky*, 138 S.Ct. at 1889 n. 4). That is exactly what Section 211B.075 does. Section 211B.075 does not bar newspaper editorials advocating that felons should not be allowed to vote. It does not prohibit poll challengers from challenging specific voters in the polling place. Nor does that statute allow just any member of the public to sue those who disagree with his or her politics. Instead, the statute prevents only the knowing use of materially false information to interfere with eligible voters’ exercise of their voting rights.

The *Alvarez* court surveyed numerous speech-limiting laws and concluded that permissible regulations are those that 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.

567 U.S. 709, 736. Constitutional statutes “insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.” *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.

Plaintiffs postulate a statute that does not contain any of those guardrails, but that is not what the legislature actually passed. Section 211B.075’s scope is greatly limited by its

application to only intentional statements. The statute is further limited by its application only to “materially false” information. (Subdivision 2). The statute does not regulate opinions; it extends only to statements of fact. Even then, it regulates only “materially false” characterizations of those facts. Finally, the statute grants a private right of action only to those persons “injured by an act prohibited by this section.” Only an individual who has been the subject of speech or conduct intended to interfere with that individual’s voting rights receives a private right of action. That is an extremely narrow class of prospective plaintiffs.

Nor is Section 211B.075 some radical new piece of legislation. That statute builds on Minn. Stat. § 204C.035, which has long provided that “no person shall knowingly deceive another person regarding the time, place, or manner of conducting an election or the qualifications for or restrictions on voter eligibility for an election, with the intent to prevent the individual from voting in the election.” That law has been on the books for seventeen years without any suggestion it is unconstitutional. Section 211B.075 merely builds on what has long been a non-controversial sentiment—the State can prevent the use of false information to interfere with an eligible voter’s right to vote.

When this Court considers the statute’s actual language rather than Plaintiffs’ mischaracterization, it is clear that Plaintiffs’ parade of horrors is pure fiction. Media reports about the arguments Plaintiffs have made in court do not even arguably fall within Section 211B.075 because they obviously are not “intend[ed] to impede or prevent another person from exercising the right to vote.” Plaintiffs’ own statements in their state court action do not fall within the statute either, because Plaintiffs do not argue in state court that

felons are not allowed to vote under existing law; they argue that the Minnesota legislature lacked the constitutional authority to pass the law restoring voting rights. Poll challengers operate under an entirely different statutory scheme than Section 211B.075. A poll challenge to a convicted felon would be denied because Minnesota law plainly allows felons to vote as of June 2023. There is no basis whatsoever to believe that the poll challenger would somehow face additional consequences under Section 211B.075.

Plaintiffs work hard to make this case just like *Mansky*, but it is plainly different. Plaintiffs are not wearing a button with a political message or otherwise trying to persuade the public that felons **should not** be allowed to vote. What Plaintiffs want to do is stand outside the proverbial polling place and tell convicted felons they are **actually not** allowed to vote even though the Minnesota legislature says they can. Plaintiffs concede “the *Mansky* Court may have meant that state laws can proscribe individuals from sending false messages to voters intentionally designed to mislead them as to, say, the hours or dates for voting,” and they appear to further concede that states can prohibit people from “misleading voters with false statements of readily verifiable and indisputable facts as to the nuts and bolts of Election Day (or early voting).” (ECF 32, pp. 28-29). But that is **exactly** what Section 211B.075 prohibits and **exactly** what Plaintiffs are doing. Plaintiffs admit they could not stand in the parking lot and redirect voters to the wrong polling place, tell voters the election is really tomorrow instead of today, or falsely tell voters that the polls have closed for the night. Speech falsely telling felons that Minnesota law does not allow them to vote is no different.

Plaintiffs disparage Johnson’s reliance on *Mansky* as a “quote-grab,” but it is telling just how much Plaintiffs must concede about a state’s ability to regulate its own elections process. Plaintiffs offer no logical reason why a state can permissibly regulate false speech about when and where an election takes place but not false speech about who may vote in that election.

After constructing an artificial law different than the one actually enacted, Plaintiffs then mischaracterize their intended speech as no more than speech about “voter eligibility rules.” (*Id.*, p. 3). But later they admit that they “intend[] to continue arguing that felons still serving their sentences are not eligible to vote in Minnesota.” (*Id.*, pp. 8-9). Conflicting positions and arguments abound throughout Plaintiffs’ pleadings and briefs.

On these Rule 12 motions, this Court is not being asked to determine whether Plaintiffs’ statements actually violate Section 211B.075, with its intent and materiality requirements. For now, this Court need only decide whether the statements that Plaintiffs plead are sufficient to prevail on an as-applied challenge. They are not, because the First Amendment does not prohibit Minnesota from regulating those non-political false statements.

2. Plaintiffs’ Proposed Speech is Not Political at All

Plaintiffs claim their speech is “quintessential political speech” because it is on a “matter of public concern in Minnesota, as the Legislature just passed the new law.” (*Id.*, pp. 13-14). But not all speech about political issues constitutes political speech. (ECF 21, pp. 20-26). Courts have routinely upheld government regulation of speech that is related to politics only because it discusses election procedures:

[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.

Mackey, at * 23. Plaintiffs' speech is not political, for two reasons. First, Plaintiffs' false statements about who is eligible to vote in Minnesota relate squarely to Minnesota's election procedures. Laws that regulate the who, what, where, and when of an election do not target political speech.

Second, Plaintiffs inaccurately contend that Johnson argues that political speech extends only to ballot questions (ECF 32, p. 2), but that is simply not true. The County Attorney argued in his opening brief that political speech relates to the **substance** of an issue presented to voters—"policy issues, party preference, candidate credentials, candidate positions, putative facts about issues covered by ballot questions, and the like." *Mackey*, at * 23. Plaintiffs' speech is not political because it does not relate to the substance of a political issue that is before the voters in any way, through a ballot question or otherwise. Plaintiffs continue to deliberately conflate statements that felons **should not** be allowed to vote and statements that felons **are not** allowed to vote. No one has suggested that Plaintiffs would violate Section 211B.075 by advocating in any forum that the Minnesota legislature erred by allowing felons to vote. What is not political speech, however, is Plaintiffs' statement that "felons who have not served their full sentences, or otherwise had their sentences discharged, cannot legally vote." (ECF 13, ¶ 5).

If Plaintiffs' false statements cannot be proscribed, then what would stop Plaintiffs from telling voters that Minnesota elections take place on Wednesdays instead of Tuesdays? Or that Minnesota polls close at noon? Plaintiffs claim that their speech is political because the legislature only recently passed a law allowing felons to vote, but that makes no difference. If Minnesota in June 2023 changed election day to the first Tuesday in October, could Plaintiffs tell voters that the election will actually take place in November instead because they think the legislature's change is unconstitutional? Plaintiffs readily concede that they could not, because they admit that states can regulate false statements related to the time and place of an election. Plaintiffs' false speech does not magically become "political" just because it relates to the 'who' of an election rather than the 'when.' This Court is not required to endorse blatant election fraud.

3. Because Plaintiffs' Speech is Not Political, 281 Care Committee Does Not Control

It takes Plaintiffs twenty-eight pages before they get around to mentioning the *Mackey* decision, the case most closely analogous to this one. That is because Plaintiffs devote most of their substantive argument to claiming that the Eighth Circuit's decision in *281 Care Committee* controls this Court's First Amendment analysis. But the *281 Care Committee* court unequivocally limited its holding to just those cases involving political speech. 766 F.3d 774, 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). If Plaintiffs' speech

is not political, then *281 Care Committee* does not apply by its own terms. Plaintiffs simply assume that their speech is political, with no discussion of what happens if it is not.

4. The County Attorney's Counterclaim is Not Presently Before the Court

Plaintiffs argue that Section 211B.075 must be vague because the Attorney General and Johnson purportedly disagree about whether Plaintiffs have already violated the statute. That is a fabricated disagreement. Simply because the Attorney General has not yet brought its own enforcement action hardly means that the Attorney General agrees that everything alleged in Plaintiffs' Amended Complaint is permissible under all circumstances. But this Court need not resolve that red-herring issue now because Johnson's counterclaim is not yet before this Court. Plaintiffs have not brought a motion to dismiss; County Attorney Johnson has brought a motion to dismiss Plaintiffs' Amended Complaint. That distinction matters.

Plaintiffs' facial challenge to Section 211B.075 fails for all the reasons explained in Johnson's initial brief. As for Plaintiffs' as-applied challenge, the Amended Complaint contains allegations that (1) plausibly constitute a violation of Section 211B.075 in and of themselves and (2) provide a reasonable basis to suspect that Plaintiffs have made additional statements not described in their pleadings that also violate the law. Whether or not Johnson can prove an actual violation of Section 211B.075 (with its intent, materiality, and other requirements) is an issue that can be resolved when the merits of Johnson's counterclaim come before this Court. At that time, this Court will have the benefit of a fully-developed record showing exactly what statements Plaintiffs have made, to whom they have made them, the intent behind those statements, and the effect of those statements

on prospective voters. This Court should grant Johnson's motion because Minnesota can constitutionally prohibit the specific false statements of fact that Plaintiffs allege in their Amended Complaint. That is the only issue presently before the Court on Plaintiffs' as-applied challenge.

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Dated: December 19, 2023

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