

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Court No.23-CV-02774 (NEB-TNL)

Plaintiffs,

vs.

**DEFENDANT ELLISON’S
MEMORANDUM OPPOSING
PRELIMINARY INJUNCTION**

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

Defendants.

Plaintiffs Minnesota Voters Alliance, Mary Amlaw, Ken Wendling, and Tim Kirk seek a preliminary injunction against enforcement of Minnesota’s election-integrity law. The Court should deny their motion because Plaintiffs cannot establish a likelihood of success on the merits. Instead, the election-integrity law reaches only unprotected speech, is not vague, and is not a prior restraint. It is therefore constitutional.

ARGUMENT

A preliminary injunction is an “extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In determining whether to grant a preliminary injunction, the Court must consider (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109,

113 (8th Cir. 1981). In cases alleging a First Amendment violation, the likelihood-of-success factor is often dispositive. *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). When challenging a state statute, this factor only supports a preliminary injunction if the movant can show that the party is “likely to prevail on the merits.” *Planned Parenthood of Minn., N.D., & S.D. v. Rounds*, 530 F.3d 724, 730 (8th Cir. 2008) (distinguishing injunctions against private conduct, which require only a “fair chance” of prevailing, and the heightened standard applicable to injunctions against statutes). The moving party bears the burden of proving the *Dataphase* factors. *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003); *see also Ness v. City of Bloomington*, 437 F. Supp. 3d 714, 720 (D. Minn. 2020) (placing burden on movant in First Amendment context).

I. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION.

Plaintiffs are not entitled to a preliminary injunction because they cannot meet their burden of establishing a likelihood of success on the merits. Moreover, the remaining factors the Court must consider also support denying the injunction.

A. Plaintiffs Bear the Burden of Establishing a Likelihood of Success on the Merits.

Plaintiffs argue they are entitled to an injunction against the election-integrity law’s enforcement without making any showing. (Doc. 35, at 2.) To support this position, they rely on *Ashcroft v. American Civil Liberties Union*. 542 U.S. 656 (2004). But in that case, it was undisputed that strict scrutiny applied, and thus the usual presumption of the constitutionality of statutes did not apply. *See id.* at 660. Put another way, it was presumed the challengers would succeed on the merits, and the government was required to show the

statute was constitutional. *Id.* Here, in contrast, whether strict scrutiny (or any other level of scrutiny) applies is disputed. Strict scrutiny's presumption of unconstitutionality therefore does not automatically apply. Instead, the statute is presumed constitutional, and Plaintiffs bear the burden of establishing the *Dataphase* factors. *Branson v. O.F. Mossberg & Sons, Inc.*, 221 F.3d 1064, 1065 n.4 (8th Cir. 2000).

B. Plaintiffs Cannot Prevail on the Merits.

As more fully briefed in the Attorney General's memoranda supporting his motion to dismiss, Plaintiffs claims are meritless. (*See generally* Docs. 25, 44.) To avoid needless repetition, those arguments are summarized here.

Plaintiffs are bringing a facial challenge against a state law. To succeed on their First Amendment claims, therefore, they must show that a substantial number of the election-integrity law's applications are unconstitutional as judged in relation to its plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460, 472 (2010). But here, the voter-intimidation prohibition covers only true threats, which are entirely outside the protection of the First Amendment. *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2004). And the election-disinformation provision prohibits only "messages intended to mislead voters about voting requirements and procedures," which the Supreme Court has explicitly held is a permissible restriction on speech. *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018). Likewise, the vicarious liability provisions in the Minnesota statute are constitutional because speech that incites violations of the law or advises how to commit them is not protected. *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978). Finally, with respect to Plaintiffs' First Amendment claims, even if some

protected speech is covered by the statute, the election-integrity law satisfies the *Anderson-Burdick* balancing test because it imposes only reasonable, nondiscriminatory burdens that further Minnesota's important election-integrity interests. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

With respect to Plaintiffs' vagueness claims, those allegations fail because the election-integrity law provides a person of ordinary intelligence fair notice of what is prohibited. *United States v. Williams*, 553 U.S. 285, 304 (2008). Moreover, the presence of an intent requirement will "relieve [a] statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws v. United States*, 325 U.S. 91, 102 (1945). The election-integrity law meets such requirements, and it is therefore not unconstitutionally vague.

Finally, Plaintiffs' contention that the election-integrity law imposes a prior restraint is false. Punishment for statements after the fact is not a prior restraint; only administrative or judicial orders issued before communications are. *Alexander v. United States*, 509 U.S. 544, 549–50 (1993). The election-integrity law is not such an order. And though the challenged statute creates procedures for the issuance of pre-speech orders, it is the orders themselves, not the statute that would constitute a prior restraint. *See Auburn Police Union v. Carpenter*, 8 F.3d 886, 903–04 (2d Cir. 1993). Thus, the mere existence of procedures for issuing such orders does not create a prior restraint subject to facial challenge.

For all these reasons, which are more fully elaborated in the Attorney General's prior briefing, Plaintiffs' claims are meritless. Accordingly, Plaintiffs cannot prevail on the merits.

C. The Other *Dataphase* Factors Favor the State.

In addition to establishing a likelihood of success on the merits, Plaintiffs must also establish the other *Dataphase* factors. Those factors are (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; and (3) the public interest. Plaintiffs satisfy none of them, and the factors weigh against injunctive relief.

The latter two factors are particularly relevant here. The public has a strong, indeed compelling, interest in ensuring that voters are not threatened or lied to keep them from voting. *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992). That interest is substantially injured if the election-integrity law is not enforced. Likewise, the Attorney General, as one of the people charged with vindicating that interest, is injured if that interest cannot vindicated through enforcement. With a presidential primary election less than three months away (and the possibility of other local elections even sooner), there is a significant risk that threats or misinformation may prevent voters from voting if the election-integrity law is enjoined. *See* Minn. Stat. §§ 205.10, subd. 3a, 207A.11(b) (2022) (establishing dates for special local elections and presidential nomination primary, respectively). That denial of voting rights is an irreparable injury to both the public and the individual voter.

Moreover, Plaintiffs also have not established any threat of irreparable harm to themselves. The harm they allege is that their speech will be suppressed. (Doc. 35, at 3.) But Plaintiffs do not identify any speech they wish to make but are refraining from making due to the election-integrity law. Moreover, because the law only reaches speech unprotected by the First Amendment, Plaintiffs would not have any right to engage in the

speech covered by the law. Consequently, there would be no right violated by its enforcement.

CONCLUSION

Plaintiffs cannot establish any of the *Dataphase* factors, and as a result, their motion should be denied.

Dated: December 19, 2023

Respectfully submitted,

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