No. _____

In The Supreme Court of the United States

CHRISTIAN ACTION LEAGUE OF MINNESOTA; and ANN REDDING,

Petitioners,

v.

MIKE FREEMAN, Hennepin County Attorney, in his official capacity,

Respondent.

MINNESOTA RFL REPUBLICAN FARMER LABOR CAUCUS; VINCENT BEAUDETTE; VINCE FOR STATEHOUSE COMMITTEE; DON EVANSON; BONN CLAYTON; and MICHELLE MACDONALD,

Petitioners,

v.

MIKE FREEMAN, in his official capacity as County Attorney for Hennepin County, Minnesota, or his successor; MARK METZ, in his official capacity as County Attorney for Carver County, Minnesota, or his successor; KARIN L. SONNEMAN, in her official capacity as County Attorney for Winona County, Minnesota, or her successor; and JAMES C. BACKSTROM, in his official capacity as County Attorney for Dakota County, Minnesota, or his successor,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI (COMBINED)

ERICK G. KAARDAL
MOHRMAN, KAARDAL & ERICKSON, P.A.
150 South 5th Street, Suite 3100
Minneapolis, MN 55402
Telephone: 612-341-1074
kaardal@mklaw.com
Counsel of Record for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Two Minnesota statutes authorize private parties to commence civil actions against others based on their speech, but also authorize criminal prosecution by county attorneys. In two different cases, plaintiffs brought Free Speech Clause pre-enforcement lawsuits against county attorneys authorized to criminally prosecute the respective laws. In both cases, the county attorneys successfully defended on the ground they would not actually prosecute under the statutes authorizing them to do so. The Eighth Circuit affirmed the judgments in both cases.

> If a law authorizes both private and public enforcement, and a credible threat of private enforcement exists, may a plaintiff bring a pre-enforcement challenge to the law against a government official with enforcement authority?

PARTIES TO THE PROCEEDINGS

Petitioners seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in *Christian Action League of Minnesota v. Freeman*, 31 F.4th 1068 (8th Cir. 2022) are Christian Action League of Minnesota and Ann Redding. Both were plaintiffs in the courts below. Respondents in that case are Mike Freeman, Hennepin County Attorney, in his official capacity, and the Minnesota Attorney General's Office. Mike Freeman was the defendant in the courts below. The Minnesota Attorney General's Office was an intervenor in the courts below and an appellee in the court of appeals.

Petitioners seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in *Minnesota RFL Republican Farmer Lab. Caucus v. Freeman*, 33 F.4th 985 (8th Cir. 2022) are Minnesota RFL Republican Farmer Labor Caucus; Vincent Beaudette; Vince for Statehouse Committee; Don Evanson; Bonn Clayton; and Michelle MacDonald. All Petitioners were plaintiffs in the courts below. Respondents in that case are Mike Freeman, in his official capacity as County Attorney for Hennepin County, Minnesota; Mark Metz, in his official capacity as County Attorney for Carver County, Minnesota; Karin L. Sonneman, in her official capacity as County Attorney for Winona County, Minnesota; James C. Backstrom, in his official capacity as County Attorney for Dakota County, Minnesota; and the Minnesota Attorney General's Office. All Respondents were defendants in

PARTIES TO THE PROCEEDINGS—Continued

the courts below, except the Minnesota Attorney General's Office, which was an intervenor in the courts below and an appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Christian Action League of Minnesota is a Minnesota 501(c)(3) non-profit corporation. It does not have a parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Minnesota RFL Republican Farmer Labor Caucus is an unincorporated association that does not have ownership interests. Therefore, no publicly held company owns 10% or more of its stock. Minnesota RFL Republican Farmer Labor Caucus does not have a parent corporation and is not a unit of the Republican Party of Minnesota or the United States Republican Party.

Petitioner Vince for Statehouse Committee is an unincorporated association that does not have ownership interests. Therefore, no publicly held company owns 10% or more of its stock. Vince for Statehouse Committee does not have a parent corporation.

RELATED CASES

Christian Action League of Minnesota and Ann Redding v. Freeman, CV 20-1081 ADM/TNL, 2020 WL 6566402 (D. Minn. Nov. 9, 2020). Judgment was entered on November 16, 2020.

Christian Action League of Minnesota v. Freeman, 31 F.4th 1068 (8th Cir. 2022). Judgment was entered on April 21, 2022.

Christian Action League of Minnesota v. Freeman, 20-3618, 2022 WL 1912856 (8th Cir. June 3, 2022). En banc and panel rehearing were denied on June 3, 2022.

Minnesota RFL Republican Farmer Lab. Caucus v. Freeman, 486 F. Supp. 3d 1300 (D. Minn. 2020). Judgment was entered on September 14, 2020.

Minnesota RFL Republican Farmer Lab. Caucus v. Freeman, 33 F.4th 985 (8th Cir. 2022). Judgment was entered on May 10, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI (COMBINED)

Petitioners Christian Action League of Minnesota and Ann Redding, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Christian Action League of Minnesota v. Freeman*, 31 F.4th 1068 (8th Cir. 2022). The Eighth Circuit denied a petition for en banc and panel rehearing. *Christian Action League of Minnesota v. Freeman*, No. 20-3618, 2022 WL 1912856 (8th Cir. June 3, 2022).

Petitioners Minnesota RFL Republican Farmer Labor Caucus, Vincent Beaudette, Vince for Statehouse Committee, Don Evanson, Bonn Clayton, and Michelle MacDonald respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Minnesota RFL Republican Farmer Lab. Caucus v. Freeman*, 33 F.4th 985 (8th Cir. 2022).

OPINIONS BELOW

The Eighth Circuit's opinion affirming final judgment against Petitioners in *Christian Action League of Minnesota v. Freeman*—together with Chief Judge Smith's dissent—is reported at 31 F.4th 1068 (8th Cir. 2022), and reproduced at App. 1-15. The Eighth Circuit's denial of rehearing en banc or by panel in *Christian Action League of Minnesota v. Freeman* may be found at 2022 WL 1912856 (8th Cir. June 3, 2022), and

is reproduced at App. 31. The opinion of the District Court for the District of Minnesota granting Respondent's motion to dismiss Petitioners' complaint is unreported, but may be found at No. CV 20-1081 ADM/TNL, 2020 WL 6566402 (D. Minn. Nov. 9, 2020), *aff'd sub nom. Christian Action League of Minnesota v. Freeman*, 31 F.4th 1068 (8th Cir. 2022), and is reproduced at App. 16-30.

The Eighth Circuit's opinion affirming denial of Petitioners' motion for a temporary injunction in *Minnesota RFL Republican Farmer Lab. Caucus v. Freeman* is reported at 33 F.4th 985 (8th Cir. 2022), and reproduced at App. 34-48. The opinion of the District Court for the District of Minnesota denying Petitioners' motion for a temporary injunction is reported at 486 F. Supp. 3d 1300 (D. Minn. 2020), *aff'd*, 33 F.4th 985 (8th Cir. 2022), and reproduced at App. 49-67.

JURISDICTION

Both cases are Free Speech Clause pre-enforcement lawsuits brought under 42 U.S.C. § 1983.

The United States Court of Appeals for the Eighth Circuit entered final judgment in *Minnesota RFL Republican Farmer Lab. Caucus v. Freeman* on May 10, 2022.

The United States Court of Appeals for the Eighth Circuit denied rehearing en banc or by the panel in

Christian Action League of Minnesota v. Freeman on June 3, 2022.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

Both cases involve a challenge to the constitutionality of a statutory provision under the First Amendment, which applies to the states through the Fourteenth Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Petitioners seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in *Christian Action League of Minnesota v. Freeman*, 31 F.4th 1068 (8th Cir. 2022) challenged the constitutionality of Minn. Stat. § 609.748, subd. 1(a)(1), part of the definition "harassment" that is used to obtain a restraining order:

> (a) "Harassment" includes:
>
> (1) . . . repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended

> to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target.

Minn. Stat. § 609.748, subd. 1(intro.), (a)(1).

Petitioners seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in *Minnesota RFL Republican Farmer Lab. Caucus v. Freeman*, 33 F.4th 985 (8th Cir. 2022) challenged the constitutionality of both sentences of a section of the Minnesota Statutes:

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

Minn. Stat. § 211B.02.

STATEMENT OF THE CASE

This petition seeks review of the Eighth Circuit's decisions in two cases that both present what may be the most important procedural question facing the federal courts. It is a question that has been percolating

in the federal courts for some time and that rose to widespread public attention as a result of this Court's recent decision in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), but it is also a question that *Whole Woman's Health* ultimately left unanswered: If a law authorizes both private and public enforcement, and a credible threat of private enforcement exists, may a plaintiff bring a pre-enforcement challenge to the law against a government official with enforcement authority?

Many laws provide for both private and public enforcement of the same substantive prohibition or requirement. In our litigious society, a provision for private enforcement implies a credible threat of enforcement. But a plaintiff who desires to challenge a substantive provision's constitutionality because of the provision's chilling effect on the plaintiff's actions faces a problem: despite, or even because of, the huge number of potential private enforcers—some laws allow anybody to sue—the plaintiff may paradoxically have no potential private enforcer against whom to bring a pre-enforcement challenge. The credible threat of private enforcement comes from the huge number of private enforcers, but the plaintiff may not be able to show that any particular person poses a credible enforcement threat. And, as this Court held in *Whole Woman's Health*, federal courts lack authority to enjoin "'laws themselves'" or to issue an injunction against everybody in "the world at large." 142 S. Ct. at 535 (quoting *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021)).

If the law also provides for public enforcement, the plaintiff might bring a pre-enforcement challenge against a government official with enforcement authority, such as a prosecutor. But government enforcers have developed a strategy to defeat a meritorious constitutional challenge to a substantive provision that can be enforced publicly or privately: deny the existence of a credible threat of public enforcement, while allowing private enforcement to continue. This strategy allows government officials to avoid having to confront the merits of the constitutional challenge by defeating it on procedural grounds. Private enforcement can then continue, and, whatever the government official says, the threat of government enforcement will, in fact, continue to loom.

As the Eighth Circuit's two decisions show, the government official may characterize the lack of a credible threat of public enforcement as negating standing (as happened in *Christian Action League of Minnesota v. Freeman*) or as negating an element of a claim under *Ex parte Young*, 209 U.S. 123 (1908) (as happened in *Minnesota RFL Republican Farmer Lab. Caucus v. Freeman*). Which option the government official chooses will probably depend on the case's facts, the circuit's case law, or a government lawyer's cleverness.

The Eighth Circuit's decisions negate pre-enforcement First Amendment challenges under a fair reading of this Court's opinion in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164-66 (2014) and have created a split with a decision by the Eastern District of California, *see Nat'l Ass'n of Wheat Growers v. Zeise*, 309

F. Supp. 3d 842, 848-50 (E.D. Cal. 2018). Moreover, the Eighth Circuit's decisions stand in the way of petitioners vindicating their First Amendment rights despite a credible threat of private enforcement.

A. Facts and Procedural History: *Christian Action League*.

A state-court-issued harassment order stops Christian Action League's political-speech activities.

1. The Christian Action League (CAL) is a nonprofit organization with about 150 members. Its president is Ann Redding. App. 2. CAL is an anti-pornography group advocating against sexually oriented publications. *Id.* CAL members believe that companies who advertise in newspapers that run advertisements for sexually oriented businesses are tacitly endorsing those businesses by their paid advertisements. CAL advocated to those advertisers to stop advertising in the offending newspapers through postcards, letters, and emails.

In March 2019, Ms. Redding saw an advertisement of the law firm R. Leigh Frost Law, Ltd. in a Minneapolis, Minnesota newspaper, the City Pages. Ms. Redding then sent a postcard to the firm's attorney, R. Leigh Frost, that said, "Porn tears families apart. City Pages promotes strip clubs and porn. As a woman, are you ok with that?" App. 3. Soon after, Ms. Frost received another email and postcard from CAL members asking the law firm to end advertising in the City

Pages. *Id.* 20. Ms. Frost wrote back in a letter asking CAL and Ms. Redding to stop contacting her, writing that she found the postcards "misinformed and offensive." *Id.* Soon after, Ms. Frost received a third postcard from an unknown CAL member. *Id.*

On the day Ms. Frost received the third postcard, she filed in Minnesota state district court for an ex parte harassment restraining order (HRO) under Minnesota's harassment-restraining-order law, Minn. Stat. § 609.748, for herself and her law firm. *Id.* The part of § 609.748 challenged as unconstitutional provides the definition "harassment" that is used to determine eligibility for obtaining a restraining order:

> (a) "Harassment" includes:
>
> (1) . . . repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target.

Minn. Stat. § 609.748, subd. 1(intro.), (a)(1).

The court granted and issued the HRO. The HRO prohibited CAL and Ms. Redding from all direct or indirect contact with Ms. Frost and her law firm. App. 20. A provision in the HRO also threatened criminal prosecution:

> Violation of this Harassment Restraining Order may be treated as a misdemeanor, gross misdemeanor, or a felony. . . .

Id. (citing Ex. 12) (bold omitted).

CAL and Ms. Redding stopped all of their political activities upon receipt of the HRO. App. 20-21. They not only stopped communicating with the law firm to comply with the HRO, but stopped all communications with other businesses about newspaper advertising because they feared criminal prosecution and "did not want additional businesses to obtain HROs against them." App. 21-22.[1]

2. In May 2020, CAL and Ms. Redding[2] filed a pre-enforcement suit in federal district court to challenge Minn. Stat. § 609.748, subd. 1(a)(1) on the ground that it violated the First Amendment's protection for free speech, facially and as applied, App. 21-22, because the subdivision provided no exception for core political-speech activities "regardless of the relationship between the actor and the intended target," Minn. Stat. § 609.748, subd. 1(a)(1). CAL further alleged that offending provision was unconstitutionally vague under the Fourteenth Amendment and that it violated the First Amendment right of expressive association. App. 22. CAL sued Hennepin County

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[1] In July 2019, CAL and Ms. Redding settled with Ms. Frost and her law firm, on terms equivalent to an HRO and the state district court vacated the HRO. App. 21.

[2] References to "CAL" also include Redding unless otherwise noted.

Attorney, Mike Freeman in his official capacity because a violation of a restraining order is a crime, Minn. Stat. § 609.748, subd. 6, and Mr. Freeman thus has authority to enforce § 609.748.

3. Shortly after CAL filed its complaint, Mr. Freeman moved to dismiss, and the district court granted his motion for lack of subject-matter jurisdiction because it held that CAL lacked standing to present its claims.[3] App. 22, 25-29. The court acknowledged that under Eighth Circuit caselaw, all that CAL needed to do to show an injury in fact was "'to establish that [s]he would like to engage in arguably protected speech, but that [s]he is chilled from doing so by the existence of the statute.'" App. 25 (quoting *281 Care Committee v. Arenson*, 638 F.3d 621, 627 (8th Cir. 2011) (alterations in original quotation). But the district court found CAL's decision to chill its speech was "not objectively reasonable" because, according to the district court, § 609.748 did not prohibit CAL's proposed activities.[4] App. 26.

In reaching this conclusion, the district court relied on state-court opinions that, according to the

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[3] Because the district court found it was without subject-matter jurisdiction, it did not rule on the county attorney's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). App. 22, 30.

[4] The district court also found the matter moot because the newspaper in question, the City Pages, went out of business during the pendency of the litigation. App. 28-29. But although both issues were appealed, the Eighth Circuit did not reach the mootness issue. App. 12 n.4.

district court, construed the challenged statutory language narrowly enough to exclude what CAL wants to do. App. 26-27 (citing *Dunham v. Roer*, 708 N.W.2d 552, 566 (Minn. App. 2006); *Witchell v. Witchell*, 606 N.W.2d 730, 732 (Minn. App. 2000)). The district court held that "[c]onduct that is merely argumentative or inappropriate does not constitute harassment," App. 26-27 (citing *Witchell*, 606 N.W.2d at 732), and concluded that "Plaintiffs do not allege that they intend to do anything that would constitute harassment, much less that they want to violate an HRO issued by a court." App. 28. Hence, CAL did not have Article III standing. App. 28 (citing *Republican Party of Minn., Third Cong. Dist. v. Kolbuchar*, 381 F.3d 785, 792-93 (8th Cir. 2004)).

The court gave no weight to the undisputed fact that somebody had obtained an HRO against CAL for its advocacy, and ignored that somebody had done this years after the supposedly reassuring state-court opinions were issued.

4. In a 2-1 split decision, the Eighth Circuit panel agreed the harassment statute is ambiguous, but affirmed the district court's determination that CAL had no standing. First, the panel found "[t]he plain text of the Statute is ambiguous as to whether it criminalizes CAL's speech." App. 6. Because Minnesota's highest court had not interpreted the provision, the panel took the responsibility to predict "how that court would decide the issue." App. 7. Using rules of statutory construction, such as the constitutional savings canon and the *noscitur a sociis* canon, App. 7-8, the

panel concluded "that the Minnesota legislature only meant to capture truly egregious conduct, not the political speech that CAL engages in. In short, stalking and a few political postcards are not birds of a feather." App. 10.

Like the district court, the panel also relied on *Dunham*, while ignoring that this opinion had, as a matter of historical fact, been impotent to prevent a Minnesota court from issuing a restraining order against CAL for doing what CAL wants to do again. App. 10 (citing *Dunham*, 708 N.W.2d at 566). The majority concluded that CAL had no standing to seek an injunction. App. 12.

Chief Justice Smith's dissent, in contrast, argued that CAL had standing under this Court's opinion in *Susan B. Anthony List*, which requires only that a plaintiff show that what the plaintiff wants to do is "'arguably'" prohibited by the law that the plaintiff challenges, not that it is, in fact, prohibited. App. 14 (quoting *Susan B. Anthony List*, 573 U.S. at 162). He identified that prosecution for protected First Amendment speech started with a court issued restraining order. App. 13. Hence, unlike the majority, Chief Justice Smith would have held that the history of successful enforcement, evidenced by the court issued HRO against CAL, established standing:

> I agree with the majority that the Statute is ambiguous. An admittedly ambiguous statute together with solid evidence that the statute has been construed—by a court—to forbid the conduct in question should suffice to show

> that such conduct is "arguably" proscribed by the Statute. Here, Redding and CAL have demonstrated that the Statute has *in fact* been construed to proscribe their conduct. Surely, this showing clears the relatively low hurdle needed for standing.

App. 14.

The majority acknowledged that this reasoning has "intuitive appeal" under *Susan B. Anthony List*, App. 11, but then made a counterargument that rests on the distinction between public and private enforcement of the same law and that thus shows why this petition presents an issue important enough for this Court to resolve.

The majority found that the Hennepin County Attorney, Mr. Freemen, had never enforced the HRO statute against "CAL's speech or similarly protected speech—or . . . plans to do so in the future." *Id*. 12. Challenging the dissent's rationale, the majority opined that because the offending statute allows private persons to obtain HRO, as did R. Leigh Frost, a non-party to the litigation, then if CAL had standing to sue the Couny Attorney then "surely CAL would have standing to sue *other* Minnesota residents. . . . But, we know from the Supreme Court's recent decision in *Whole Woman's Health v. Jackson* that this can't be the case. . . . ('Under traditional equitable principles not court may lawfully enjoin the world at large. . . .')." *Id.* App. 12. The majority treated the absence of an

imminent threat of prosecution by Mr. Freeman to be dispositive on the issue of standing. *Id*.

5. CAL and Redding then petitioned the Eighth Circuit for an en banc review and panel rehearing, both of which were denied. App. 31.

B. Facts and procedural history: *Minnesota RFL*.

1. Petitioners in *Minnesota RFL* brought a section 1983 pre-enforcement suit against several Minnesota county attorneys to challenge a Minnesota campaign statutory provision:

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

Minn. Stat. § 211B.02. Indeed, the Eighth Circuit has already invalidated a closely related section of Minn. Stat. ch. 211B—Minn. Stat. § 211B.06—on First Amendment grounds. *281 Care Comm. v. Arneson*, 766 F.3d 774, 787, 789, 795-96 (8th Cir. 2014). Section 211B.06 prohibited knowingly making a false

statement about a candidate's "character or acts" or about "the effect of a ballot question." The Eighth Circuit held that because § 211B.06 restricted political speech, the section was subject to strict scrutiny, and the court struck the law down because it was not narrowly tailored. *281 Care Comm.*, 766 F.3d at 784, 787-96.

Section 211B.02 is essentially a parallel section that prohibits making a false statement about support or endorsement for a candidate or ballot question, rather than about a candidate's "character or acts" or about "the effect of a ballot question." *Compare* Minn. Stat. § 211B.02, *with id.* § 211B.06, *invalidated by 281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014). Section 211B.02 is likely unconstitutional for the same reasons that § 211B.06 is unconstitutional. Section 211B.02, like § 211B.06, is a content-based restriction on political speech and is thus subject to strict scrutiny. *See 281 Care Comm.*, 766 F.3d at 784. And, like the already invalidated § 211B.06, § 211B.02 is not narrowly tailored; on the contrary, § 211B.02 is overbroad for the same reasons that § 211B.06 was overbroad.

Under Minn. Stat. § 211B.32, anyone may file a complaint alleging a violation of § 211B.02 with the Minnesota Office of Administrative Hearings. *See* Minn. Stat. §§ 211B.31 (defining "office" to mean "the Office of Administrative Hearings" (the OAH) for purposes of Minn. Stat. §§ 211B.32-36), 211B.32, subd. 1(a) (requiring that a complaint alleging a violation of

ch. 211B be filed with "the office," i.e., the Office of Administrative Hearings, but placing no limit on who may file); *281 Care Comm*., 766 F.3d at 790 (recognizing "that *anyone* may lodge a complaint with the OAH alleging a violation of § 211B.06"). Although § 211B.32, subd. 1(a) requires that the OAH dispose of a complaint before a county attorney may prosecute the violation alleged in the complaint, nothing in ch. 211B precludes a county attorney from filing a complaint with the OAH. Again, anyone may file.

If an evidentiary hearing is required to resolve a complaint, the OAH's chief administrative law judge must assign the complaint to a panel of three ALJs who will preside at the hearing. Minn. Stat. § 211B.35, subd. 1. After the hearing, the three-judge panel must make one of several dispositions, which include dismissing the complaint, issuing a reprimand, imposing a civil penalty of up to $5,000, or referring the complaint to a county attorney. *Id*., subd. 2.

A county attorney may prosecute any violation of chapter 211B, including a violation of § 211B.02. Minn. Stat. § 211B.16, subd. 3. A violation of § 211B.02 is a misdemeanor. *See* Minn. Stat. § 211B.19 (providing that a violation of chapter 211B is a misdemeanor unless a different penalty is provided). A violation of § 211B.02 is thus punishable by imprisonment for up to 90 days or a fine of up to $1,000. *See id*. § 609.03 (providing for punishment for crimes for which no other punishment is provided), 609.03(3) (describing the punishment for a misdemeanor); *id*. § 609.015,

subd. 2 (providing that chapter 609 applies to crimes created by other provisions of the Minnesota Statutes).

The OAH has imposed civil penalties for violations of § 211B.02 in proceedings initiated by complaints from private persons and a Minnesota municipality, and when the persons subject to the penalties have, on appeal, challenged § 211B.02 on First Amendment grounds, the Minnesota Court of Appeals has upheld § 211B.02. *Linert v. MacDonald*, 901 N.W.2d 664 (Minn. App. 2017); *City of Grant v. Smith*, No. A16-1070, 2017 WL 957717 (Minn. App. Mar. 13, 2017), *rev. denied* (May 30, 2017); *Niska v. Clayton*, No. A13-0622, 2014 WL 902680 (Minn. App. Mar. 10, 2014), *rev. denied* (Minn. 2014), *cert. denied*, 135 S. Ct. 1399 (2015).

2. Not wanting to be fined, and knowing that they were blocked from vindicating their First Amendments rights in state court, the *Minnesota RFL* petitioners brought a pre-enforcement challenge in federal district court because they wanted to engage in political speech that would expose them to accusations of violating § 211B.02.

In response to the petitioners' move for a preliminary injunction the respondent county attorneys filed declarations disavowing a present intent to prosecute a violation of § 211B.02—though they did not promise to never enforce it—and argued that the lack of a credible threat of prosecution by the respondents deprived the petitioners of standing. App. 53, 56.

3. The district court held that, notwithstanding the respondents' declarations, the petitioners had standing based on the credible threat of administrative proceedings. App. 57-58. But the court then went on to deny petitioners a preliminary injunction because the court found that the petitioners would likely fail to show the imminent enforcement threat needed to prevail in an *Ex parte Young* suit. App. 60-64. Relying on Eighth Circuit caselaw, the district court held that the bar for establishing a credible threat of enforcement is higher for *Ex parte Young* purposes than for standing purposes, App. 62-63, and the Court held that the respondents' declarations likely defeated the petitioners' efforts to meet the *Ex parte Young* standard, even though the respondents did not declare that they would never enforce § 211B.02, App. 63-64.

4. Petitioners appealed to the Eighth Circuit, which affirmed the district court's denial of a preliminary injunction by agreeing with the district court's *Ex parte Young* analysis. App. 41-48.

REASONS FOR GRANTING THE PETITION

This combined petition for writ of certiorari seeks review of two judgments which involve identical or closely related questions. Sup. Ct. R. 12(4). These cases present the question of whether a pre-enforcement constitutional challenges to laws under the First Amendment may be brought against a government official with enforcement authority, when the offending

laws authorize both private and public enforcement, and a credible threat of private enforcement exists. The two Eighth Circuit judgments conflict with relevant decisions of this Court and another federal court.

A. Both of the Eighth Circuit's decisions conflict with a fair reading of this Court's opinion in *Susan B. Anthony List v. Driehaus*.

In *Susan B. Anthony List v. Driehaus*, this Court considered whether plaintiffs had standing to challenge the constitutionality of Ohio statutory provisions that, like Minn. Stat. § 211B.02, prohibited making certain false statements about a candidate for office. 573 U.S. 149, 151-52, 157-67 (2014). Like Minn. Stat. § 211B.02, the Ohio provisions could be enforced through both criminal prosecutions and private complaints to an administrative tribunal, specifically the Ohio Elections Commission. *Id*. at 152-53.

Plaintiff Susan B. Anthony List (SBA) sued the Commission and Mr. Driehaus in federal district court to challenge the Ohio provisions on First Amendment grounds after then-Congressman Steve Driehaus filed a complaint alleging that SBA had made a false statement about him. *Id*. at 153-54. Mr. Driehaus withdrew his complaint before the Commission made a final determination, but SBA proceeded with its federal suit. *Id*. at 155. The district court dismissed the suit for lack of standing, and the Sixth Circuit upheld the dismissal because the court found an insufficient threat of future

enforcement action against SBA or the other plaintiff. *Id*. at 156-57.

In a unanimous opinion, this Court reversed the Sixth Circuit's decisions and held that the plaintiffs had shown a sufficient threat of enforcement of the challenged provision to establish standing. *Id*. at 157-67, 168. In keeping with judicial minimalism, this Court explicitly declined to hold that the threat of enforcement through administrative proceedings before the Commission was sufficient to establish standing, and this Court instead held that the *combination* of the threat of administrative enforcement and the threat of criminal prosecution was sufficient:

> Although the threat of Commission proceedings is a substantial one, we need not decide whether that threat standing alone gives rise to an Article III injury. The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case.

Id. at 166.

But although that is what this Court said explicitly, this Court's opinion suggests that the threat of administrative proceedings brought through private complaints—i.e., the kind faced by petitioners in *Christian Action League* and *Minnesota RFL*—is alone sufficient. *See id*. at 164-66. Indeed, this Court's opinion emphasized the threat to speech posed by a system

that allows anybody to file a complaint with the Commission. *Id*. at 164. And this Court's opinion pointed to the history of false-statement complaints to the Commission and resultant Commission proceedings. *Id*. at 164-65. Finally, this Court explained the burdens involved in defending against a Commission proceeding. *Id*. at 165-66. This Court did not assess the actual risk of criminal prosecution.

With the hurdle of establishing standing behind them, the *Susan B. Anthony List* plaintiffs went on to win on the First Amendment merits: when the case was sent back to the district court to consider the merits, the court held the challenged provisions unconstitutional, granted the plaintiffs summary judgment, and permanently enjoined the Commission and its members from enforcing the provisions. *List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 779, 781 (S.D. Ohio 2014), *aff'd sub nom. Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016). By that time, the plaintiffs had dismissed all of their claims against Mr. Driehaus. *Id*. at 770 n.4. So the plaintiffs in *Susan B. Anthony List* ultimately obtained relief in a pre-enforcement challenge against government enforcement authorities—and nobody else—because of the threat of private enforcement.

Thus under a fair reading of *Susan B. Anthony List*, the Eighth Circuit's decisions are erroneous because they required a showing of a credible enforcement threat from a government defendant, rather than a credible enforcement threat from private enforcement actions that relied on a law that a government

defendant could enforce, if the defendant wanted to. It is true that the issue of a credible enforcement threat in *Susan B. Anthony List* arose in the context of a fight over standing rather than over the elements of an *Ex parte Young* claim, but the same issue could have been analyzed under *Ex parte Young*: the plaintiffs were bringing a pre-enforcement challenge, i.e., an *Ex parte Young*, challenge—one on which they ultimately prevailed.

B. The Eighth Circuit's decisions create a direct conflict with at least one lower court decision.

Not surprisingly given how strongly pro-pre-enforcement-challenge this Court's opinion in *Susan B. Anthony List* is, at least one lower court has held that a plaintiff may sue a government official who has authority to enforce a law, even if the official does not, in fact, pose a threat of enforcement against the plaintiff's desired conduct—and that the plaintiff may do this because of the threat of private lawsuits.

In *Nat'l Ass'n of Wheat Growers v. Zeise*, associations representing suppliers of crops grown with the herbicide glyphosate sued California officials to challenge, on First Amendment grounds, the warning requirement that resulted from California's classification of glyphosate as a carcinogen. 309 F. Supp. 3d 842, 845-46, 845 n.1 (E.D. Cal. 2018). Under California's Proposition 65, the state was required to maintain a list of human carcinogens, and the law prohibited

anybody from exposing a person to a listed chemical without a warning of the chemical's classification as a carcinogen. *Id*. at 846. The warning requirement could be enforced through actions brought by the California Attorney General, certain local prosecutors, or private persons. *Id*. The plaintiffs challenged the warning requirement as applied to glyphosate on the ground that glyphosate is not carcinogenic and that the required warning is thus false or misleading. *Id*. at 845-46, 850-53.

Of course the plaintiffs could not sue everybody who could bring an enforcement action and did not sue any local prosecutors with enforcement authority. Instead, the plaintiffs sued only two defendants: the director of the Office of Environmental Health Hazard Assessment, which is the agency responsible for implementing Proposition 65, *id*. at 846 n.5, and the California Attorney General.

In the case, the defendants took an aggressive approach by not only alleging a lack of a credible enforcement threat, but also characterizing the issue as one of ripeness. *See id*. at 848-49. The defendants argued that the plaintiffs' products likely contained a level of glyphosate below what would be declared a safe-harbor amount so that no warning would be required, and the defendants went on to claim that if private person sued despite the level being below the safe-harbor amount, the California Attorney General would likely publicly announce that the suit had no merit. *Id*. So, the California Attorney General went much further than the defendant prosecutors in *Christian Action*

League and *Minnesota RFL*: he did not merely argue against a credible threat of public enforcement, but represented to the court that he would likely take a public stance against private enforcement actions, thus actually aiding the plaintiffs' position. *Id*. at 849.

Nonetheless, the district court held that the plaintiffs faced a credible threat of private suits and issued a temporary injunction against the defendants based on that threat. *Id*. at 848-50, 854. At the summary-judgment stage, the California Attorney General again argued that the plaintiffs' case was not ripe because of a lack of a credible enforcement threat. *Nat'l Ass'n of Wheat Growers v. Becerra*, 468 F. Supp. 3d 1247, 1254-56 (E.D. Cal. 2020). In again rejecting that argument because of the credible threat of private suits, the court relied on this Court's opinion in *Susan B. Anthony List* and a Ninth Circuit opinion. *Id*. at 1255 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 (2014); *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1173 (9th Cir. 2018)). The court granted plaintiffs summary judgment and permanently enjoined the California Attorney General from enforcing the warning requirement for glyphosate against defendants, *id*. at 1266, even though the enforcement threat that the court relied on came exclusively from the prospect of private suits not supported by—and likely to be publicly denounced by—the California Attorney General, i.e., the person against whom the injunction was issued, *see id*. at 1254-56.

It would be difficult to imagine a case more strongly opposed to the reasoning of the Eighth

Circuit's opinions. Again, the court enjoined a government official from enforcing an unconstitutional law not because the official posed a credible enforcement threat—he did not—but because he had authority to enforce the law and because private enforcement actions posed a credible enforcement threat. The court analyzed the issue as one of ripeness, a component of standing, *id*. at 1254, but the issue could have been analyzed under *Ex parte Young*—because the suit, like *Susan B. Anthony List*, *Christian Action League*, was a pre-enforcement challenge.

Implicitly, *Nat'l Ass'n of Wheat Growers* stands for the proposition that if a government official has authority to enforce a law, and if a credible threat of private enforcement of that law exists, then the official can be named as a defendant in a pre-enforcement challenge regardless of the official's own future intentions regarding enforcement when a credible threat of private enforcement exists. This is particularly true since government officials have the option to change positions on criminal prosecution at any time. Meanwhile, plaintiffs who are subject to prosecution by private parties have no other recourse to pre-enforcement challenges based on laws that offend First Amendment protections.

C. Granting the petition will allow this Court to resolve a question that was left unanswered by its opinion in *Whole Woman's Health*.

In *Whole Woman's Health*, this Court analyzed who, if anybody, plaintiffs could sue in a pre-enforcement challenge to Texas's anti-abortion law, which provided for enforcement through private suits against abortion providers. 142 S. Ct. at 529-30, 531-36. This Court held that federal courts lacked authority to enjoin "any and all unnamed private persons who might seek to bring their own" enforcement actions. *Id*. at 535. Petitioners want to emphasize that they are not challenging this conclusion; on the contrary, they agree with it entirely that federal courts may not order around persons who are not even parties. This Court also held that the plaintiffs could not proceed against the Texas Attorney General because he lacked any authority to enforce the law being challenged. *Id*. at 534. Petitioners also do not challenge this holding, and it presents no problem for them because petitioners in both cases, *Christian Action League* and *RFL* are suing prosecutors who indisputably have statutory authority to enforce the challenged provisions.

But petitioners do rely on what this Court determined about the defendant licensing officials. *Id*. at 535-36. Based on its understanding that these officials could revoke the plaintiff abortion-providers' medical or other licenses for violating the challenged law, this Court allowed the suit to proceed against those officials under *Ex parte Young*. *Id*.

After the case was remanded to the Fifth Circuit, the circuit court certified to the Texas Supreme Court the question of whether those licensing officials really did have authority to discipline the plaintiffs for

violating the challenged law. *Whole Woman's Health v. Jackson*, 23 F.4th 380, 389 (5th Cir. 2022), *certified question accepted* (Jan. 21, 2022), *certified question answered*, 642 S.W.3d 569 (Tex. 2022). The Texas Supreme Court answered that question by holding that none of those officials have any enforcement authority and that private suit is the exclusive method of enforcing the challenged abortion ban. *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 574-77, 583 (Tex. 2022). That decision effectively ended the suit, *see Whole Woman's Health v. Jackson*, 31 F.4th 1004, 1006 (5th Cir. 2022) (per curiam) (remanding with instructions to dismiss all remaining claims challenging the private-enforcement provisions) and left unanswered what would have happened if the licensing officials had possessed enforcement authority under Texas law, but had, like the defendant prosecutors in *Minnesota RFL*, disavowed a present intention to enforce the law.

Under *Nat'l Ass'n of Wheat Growers*' interpretation of this Court's opinion in *Susan B. Anthony List*, the answer would have been that the plaintiffs can proceed with their suit against the licensing officials because of the threat of private suits.

D. The question presented warrants this Court's review.

Pre-enforcement challenges have a crucial role in the American legal system because they allow a person to challenge a law's constitutionality before taking an action that the law "arguably" prohibits, *Susan B.*

Anthony List, 573 U.S. at 162, thus allowing a person to test a law before risking liability for violating it. Allowing plaintiffs to sue a public official who has authority to enforce a law that can also be enforced by a private suit serves this function: victory against the official yields a declaration of the law's unconstitutionality, which inhibits private enforcement.

To be sure, a federal court's declaratory judgment against a public official will not directly preclude future private party actions before state courts and agencies—since such a declaratory judgment could not preclude the "world at large." 142 S. Ct. at 535 (quoting *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021)). However, experience shows that the federal court decision is persuasive authority upon the state court or agency to immediately dismiss any private action, even *sua sponte*, based on the law held unconstitutional by the federal court. For example, after the Eighth Circuit held Minnesota Statutes § 211B.06 unconstitutional, 766 F.3d 774 (8th Cir. 2014), although the law has not been repealed, the Minnesota Office of Revisor of Statutes, has added the following note into the on-line code:

> **NOTE:** See 281 Care Committee v. Arneson, 766 F.3d 774 (8th Cir. 2014) for discussion of constitutionality.

See https://www.revisor.mn.gov/statutes/cite/211B.06#:~:text=(a)%20A%20person%20is%20guilty,ballot%20question%2C%20that%20is%20designed (last visited Aug. 4, 2022).

Granting the petition will allow this Court to address the question of what happens if the government official denies a credible threat of public enforcement, while allowing private enforcement to continue—an issue that rose to prominence in *Whole Woman's Health*, but that was left unanswered by that case. Granting the petition will also allow this Court to clarify the relationship between the injury-in-fact element of standing in a pre-enforcement challenge and the credible-threat element of the *Ex parte Young* exception to sovereign immunity.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ERICK G. KAARDAL
MOHRMAN, KAARDAL & ERICKSON, P.A.
150 South 5th Street, Suite 3100
Minneapolis, MN 55402
Telephone: 612-341-1074
kaardal@mklaw.com
Counsel of Record for Petitioners