31 F.4th 1068
United States Court of Appeals, Eighth Circuit.

CHRISTIAN ACTION LEAGUE OF MINNESOTA;
Ann Redding, Plaintiffs - Appellants
v.
Mike FREEMAN, Hennepin County Attorney,
in his official capacity, Defendant - Appellee
Keith M. Ellison, Attorney General for the State of
Minnesota, Intervenor below - Appellee

No. 20-3618

Submitted: December 14, 2021

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Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

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Before SMITH, Chief Judge, GRUENDER and KOBES, Circuit Judges.

Opinion

KOBES, Circuit Judge.

Minnesota Statute § 609.748(2) allows victims to obtain restraining orders against their harassers. The Christian Action League of Minnesota (CAL), an anti-pornography advocacy group, and Ann Redding, its president, brought a pre-enforcement challenge against the Hennepin County Attorney, arguing that the Statute violated the First and Fourteenth Amendments. The district court[1] dismissed the complaint for lack of standing, concluding that CAL's intended conduct isn't proscribed by the Statute. We affirm.

I.

CAL is a non-profit run by Ann Redding that opposes pornography and sexual exploitation. Its roughly 150 members advocate against sexually oriented publications. One of those publications was *City Pages*, a Minneapolis newspaper owned by the Star Tribune. Since 2010, CAL has publicly opposed companies that advertise in *City Pages*. CAL's members believe that, since *City Pages* runs advertisements for sexually oriented businesses, companies that advertise in *City Pages* are tacitly endorsing those businesses. CAL primarily advocates through postcards, letters, and emails directed at *City Pages*' advertisers.

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[1] The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

R. Leigh Frost is a lawyer who advertised her firm in *City Pages*. After Redding noticed one of Frost's advertisements, she sent Frost a postcard asking her to stop buying ad space. The card said, "Porn tears families apart. City Pages promotes strip clubs and porn. As a woman, are you ok with that?" Not long after, Frost's firm received an email and another postcard expressing the same sentiment.

Despite Frost asking CAL to stop contacting her, she received yet another postcard about a week later. Fed up with CAL's messages, Frost filed a petition for a harassment restraining order (HRO) under Minnesota Statute § 609.748(2), which provides that "[a] person who is a victim of harassment . . . may seek a restraining order." Among other things, it defines harassment as "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(1)(a)(1). The day after Frost filed her petition, a state court judge issued an HRO against CAL. A few months later, the parties settled and the state court vacated the HRO.

In May 2020, nearly a year after the temporary HRO was vacated, CAL and Redding filed a preenforcement challenge against Mike Freeman, the Hennepin County Attorney. They argued that the Statute violates the First Amendment's guarantees of free speech and association, as well as the Fourteenth

Amendment's prohibition on unconstitutionally vague laws. They sought both declaratory relief and a permanent injunction prohibiting Freeman from prosecuting any HRO under the Statute.

Freeman moved to dismiss the complaint for lack of standing.[2] He argued that CAL's future plans—contacting businesses by mail and email to persuade them to stop advertising in *City Pages*—are not criminalized by the Statute. As a result, CAL had no injury in fact. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (to establish standing in a First Amendment case, a plaintiff must show that his "decision to chill his speech in light of the challenged statute was objectively reasonable") (quotation omitted).

The district court granted the motion to dismiss for two reasons. First, it agreed that CAL's planned conduct wasn't prohibited, so CAL didn't have standing to challenge the Statute. Second, it found that even if CAL had standing at the beginning of the litigation, the case had since been mooted. While Freeman's motion to dismiss was pending, *City Pages* permanently shut down due to a decline in advertising revenue during the COVID-19 pandemic. Because CAL's complaint primarily referenced *City Pages*, the court reasoned, the complaint "failed to demonstrate a live dispute involving the actual or threatened application of [the Statute] to bar particular speech." *Christian Action*

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[2] Keith Ellison, Attorney General for the State of Minnesota, also intervened to defend the constitutionality of the statute. *See* FED. R. CIV. P. 5.1(c) & 24(a)(1).

League of Minn. v. Freeman, Civil No. 20-1081 ADM/TNL, 2020 WL 6566402, at *5 (D. Minn. Nov. 9, 2020) (quoting *Renne v. Geary*, 501 U.S. 312, 320, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991)). CAL and Redding appealed.

II.

We review questions of standing and mootness *de novo*, *see Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016), and jurisdictional findings of fact for clear error, *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

"In order to satisfy Article III's standing requirements, [CAL] must have (1) suffered an injury in fact (2) that is fairly traceable to the challenged conduct and (3) [is] likely to be redressed by the proposed remedy." *Starr v. Mandanici*, 152 F.3d 741, 748 (8th Cir. 1998), *overruled on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). The parties dispute whether CAL has shown an injury in fact. To show an injury in fact in a First Amendment pre-enforcement case, a plaintiff must have "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (quotation omitted). So this appeal turns on a single question: is CAL's planned conduct criminalized by the Statute? If

it is, then CAL has standing, and we should reverse. But if the Statute doesn't prohibit CAL's conduct, then CAL isn't affected by the Statute and has no injury in fact. As then-Judge Barrett put it, "no harm, no foul." *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 331 (7th Cir. 2019).

The plain text of the Statute is ambiguous as to whether it criminalizes CAL's speech. CAL wants to repeatedly contact, via email and postcards, companies who support sexually oriented businesses. The Statute prohibits "harassment," which includes "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect . . . on the . . . privacy of another, regardless of the relationship between the actor and the intended target." § 609.748(1)(a)(1). CAL argues that this language criminalizes its plan to persuade advertisers to boycott *City Pages*. If that's true, then CAL has been injured because the Statute has chilled its arguably constitutionally protected speech. Freeman, however, argues that postcards and emails to advertisers don't have a "substantial adverse effect . . . on the safety, security, or privacy of another." *Id.* He claims that "[c]onduct that is only offensive, argumentative, or inappropriate," like CAL's, "does not constitute harassment." Freeman Br. at 14 (citing *Witchell v. Witchell*, 606 N.W.2d 730, 732 (Minn. Ct. App. 2000)). If Freeman is correct, then the Statute doesn't criminalize CAL's conduct, and CAL doesn't have standing. Because either interpretation is plausible, the Statute is ambiguous. *See Hansen v. Robert Half Int'l, Inc.*, 813 N.W.2d

906, 915 (Minn. 2012) ("A statute is ambiguous when the language is subject to more than one reasonable interpretation.").

When interpreting state law, we are bound by the interpretation of a state's highest court. *Missouri v. Hunter*, 459 U.S. 359, 368, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). But where, as here, a statute hasn't yet been interpreted by the state's highest court, "it is our responsibility to predict, as best we can, how that court would decide the issue." *Brandenburg v. Allstate Ins. Co.*, 23 F.3d 1438, 1440 (8th Cir. 1994). In making that prediction, we look to "relevant state precedent, analogous decisions, considered dicta, . . . any other reliable data," and the state's "rules of statutory construction." *In re Dittmaier*, 806 F.3d 987, 989 (8th Cir. 2015) (citation omitted) (cleaned up). All these factors point toward one conclusion—CAL's conduct is not prohibited by the Statute.

We begin by considering the constitutional savings canon, which dictates that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401, 36 S.Ct. 658, 60 L.Ed. 1061 (1916); *see also Matter of Welfare of A.J.B.*, 929 N.W.2d 840, 848 (Minn. 2019) (When a statute is ambiguous, "the canon of constitutional avoidance directs us to construe statutes to avoid meanings that violate constitutional principles."). This canon strongly supports Freeman's interpretation that CAL's speech isn't criminalized by the Statute. CAL wants to write advertisers to

encourage them to stop supporting sexually oriented businesses—what the Supreme Court has dubbed "core political speech." *Meyer v. Grant*, 486 U.S. 414, 421–22, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) ("Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' "). Accordingly, adopting CAL's interpretation would require us to cast doubt on the constitutionality of the Statute. This factor weighs heavily in favor of Freeman's interpretation that the Statute doesn't prohibit CAL's speech.

The *noscitur a sociis* canon also supports Freeman's interpretation. This canon, often expressed as "a word is known by the company it keeps," dictates that we should "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Yates v. United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (citation omitted). This is sometimes also referred to as the "word-association canon." *See State v. Friese*, 959 N.W.2d 205, 213 (Minn. 2021) ("Finally, Friese urges us to consider the word-association canon. Under this canon, the meaning of doubtful words in a legislative act may be determined by reference to their association with other associated words and phrases.") (citation omitted). For instance, a statute covering "motor vehicles, motorcycles, industrial and construction equipment, [and] farm tractors" would not cover electrical wiring, even though that is technically "industrial equipment." *Util.*

Elec. Supply, Inc. v. ABB Power T&D Co., Inc., 36 F.3d 737, 739, 740 (8th Cir. 1994).

This canon suggests that we should narrowly interpret the Statute's definition of "harassment." Harassment is defined as:

> (1) a single incident of physical or sexual assault, a single incident of harassment under [Minnesota's stalking statute], a single incident of nonconsensual dissemination of private sexual images under [Minnesota's revenge porn statute], or 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;
>
> (2) targeted residential picketing;[3] and
>
> (3) a pattern of attending public events after being notified that the actor's presence at the event is harassing to another.

Minn. Stat. § 609.748(1)(a). The items listed before repeated unwanted words—sexual assault, stalking, and revenge porn—make CAL's emails and postcards look

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[3] "Targeted residential picketing" is defined as "(1) marching, standing, or patrolling by one or more persons directed solely at a particular residential building in a manner that adversely affects the safety, security, or privacy of an occupant of the building; or (2) marching, standing, or patrolling by one or more persons which prevents an occupant of a residential building from gaining access to or exiting from the property on which the residential building is located." Minn. Stat. § 609.748(1)(c).

trivial by comparison. When considering the examples surrounding "repeated . . . unwanted acts [or] words . . . that have a substantial adverse effect . . . [on] privacy," it's clear 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.

Finally, the decisions of Minnesota's intermediate courts give Freeman's interpretation "extra icing on a cake already frosted." *Yates*, 574 U.S. at 557, 135 S.Ct. 1074 (Kagan, J., dissenting). In *Dunham v. Roer*, the Court of Appeals of Minnesota held that the Statute's definition of "harassment" does not include constitutionally protected speech. 708 N.W.2d 552, 566 (Minn. Ct. Ap. 2006). It reasoned that "the language of the statute is directed against constitutionally unprotected 'fighting words' . . . 'true threats' . . . and speech . . . that . . . is in violation of one's right to privacy." *Id.* at 566. As a result, the court held the Statute to be narrowly tailored and constitutional. *Id.* Because "state appellate court decisions are highly persuasive and should be followed when they are the best evidence of state law," *Baxter Int'l, Inc. v. Morris*, 976 F.2d 1189, 1196 (8th Cir. 1992), this weighs heavily in favor of Freeman's interpretation.

We are convinced that the Minnesota Supreme Court would not interpret the Statute's definition of "harassment" to cover CAL's speech. As a result, nothing CAL wants to do is criminalized by the Statute—it is free to encourage advertisers to oppose sexually oriented businesses. Accordingly, CAL's complaint does

not allege "an intention to engage in a course of conduct . . . proscribed by a statute," or "a credible threat of prosecution thereunder," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), and CAL lacks standing.

III.

The dissent argues that even if CAL's conduct isn't prohibited by Minnesota law, CAL still has standing to sue because it was previously subject to an HRO. There's certainly intuitive appeal to that argument. After all, the fact that a statute has been enforced against someone in the past can give rise to an inference of future enforcement. *See Driehaus*, 573 U.S. at 164, 134 S.Ct. 2334 ("Finally, the threat of future enforcement of the false statement statute is substantial. Most obviously, there is a history of past enforcement here. . . . We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical.") (quotation omitted).

Nevertheless, CAL does not have standing to seek an injunction. Unlike the cases listed in the dissent, here there is binding Minnesota caselaw holding that the Statute doesn't apply to speech like CAL's. *See Dunham*, 708 N.W.2d at 566 ("[T]he harassment statute only regulates speech or conduct that constitutes 'fighting words,' 'true threats,' or substantial invasions of one's privacy."); *State v. Chauvin*, 955 N.W.2d 684, 695 (Minn. Ct. App. 2021) ("Although parties, attorneys, district court judges, and the public may disagree

with this court's precedential decisions, district courts are bound to follow them.").

The only person who has obtained an HRO against CAL is R. Leigh Frost, who is not a party to this litigation. If the dissent is correct that CAL has standing to sue County Attorney Freeman—who has never enforced the Statute against CAL—then surely CAL would have standing to sue *other* Minnesota residents who are allowed to seek an HRO under the Statute. *See* Minn. Stat. § 609.748(2) ("A person who is a victim of harassment . . . may seek a restraining order."). But we know from the Supreme Court's recent decision in *Whole Woman's Health v. Jackson* that this can't be the case. ___ U.S. ___, ___, 142 S.Ct. 522, 535, 211 L.Ed.2d 316 (2021) ("[U]nder traditional equitable principles, no court may lawfully enjoin the world at large, or purport to enjoin challenged laws themselves.") (quotations omitted).

Because there is no allegation that the Hennepin County Attorney has ever enforced the Statute against CAL's speech or similarly protected speech—or has any plans to do so in the future—CAL lacks standing.

IV.

The judgment of the district court is affirmed.[4]

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[4] Because CAL does not have standing to challenge the Statute, we don't consider the district court's finding that *City Pages*' closure mooted the case.

SMITH, Chief Judge, dissenting.

Establishing standing for a First Amendment pre-enforcement challenge is not a high hurdle to surmount. Applying the law to the instant facts, I would conclude that the appellants cleared it and should be able to proceed further in challenging Minnesota Statute § 609.748. As we have said,

> The relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was "objectively reasonable." *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009). Reasonable chill exists when a plaintiff shows "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution." *Babbitt* [*v. United Farm Workers Nat'l Union*], 442 U.S. [289,] 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 [(1979)].

281 Care Comm. v. Arneson, 638 F.3d 621, 627 (8th Cir. 2011) (first alteration in original). It is not merely arguable but factually undisputed that Redding and CAL showed an intention to engage in conduct with a constitutional interest. They have already engaged in protected First Amendment speech. The Statute proscribed that conduct, and a prosecution has already been initiated with a resulting restraining order.

In *Babbitt*, the Supreme Court's use of the term "arguably" clearly modified "constitutional interest." 442 U.S. at 298, 99 S.Ct. 2301. Subsequently, the Court has also connected the term "arguably" to the question of whether a statute proscribes the conduct at issue.

See Susan B. Anthony List v. Driehaus, 573 U.S. 149, 162, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). In *Driehaus*, the Court evaluated a pre-enforcement claim and concluded that "petitioners' intended future conduct is 'arguably . . . proscribed by [the] statute' they wish to challenge." *Id.* at 162, 134 S.Ct. 2334 (alterations in original) (quoting *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301). After recognizing that "the Ohio false statement law sweeps broadly," the Court noted that the facts showed a future intention to speak and, like here, an already- initiated prosecution under the statute. *Id*. The Court then stated, "Under these circumstances, we have no difficulty concluding that petitioners' intended speech is 'arguably proscribed' by the law." *Id*. For standing purposes, then, plaintiffs only need to show that their intended future conduct is "arguably" proscribed by a statute—not that it is certainly proscribed.

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.

Finally, injury-in-fact in the context of a First Amendment pre-enforcement challenge equates to "[r]easonable chill." *See Arneson*, 638 F.3d at 627.

Were Redding and CAL "objectively reasonable" in refraining from their intended course of conduct? *See id*. As they had recently been restrained by court order imposed under Minnesota Statute § 609.748, their decision to chill their speech would seem to meet that test.

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Only the Westlaw citation is currently available.
United States District Court, D. Minnesota.

CHRISTIAN ACTION LEAGUE OF MINNESOTA AND ANN REDDING, Plaintiffs,

v.

Mike FREEMAN, Hennepin County Attorney, in his official capacity, Defendant.
Keith Ellison, Attorney General for the State of Minnesota, Intervenor.

Civil No. 20-1081 ADM/TNL

Signed 11/09/2020

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MEMORANDUM OPINION AND ORDER

ANN D. MONTGOMERY, U.S. DISTRICT COURT

I. INTRODUCTION

This matter is before the undersigned United States District Judge for a ruling on Defendant Hennepin

County Attorney Mike Freeman's ("Freeman") Motion to Dismiss [Docket No. 10]. Plaintiffs Christian Action League of Minnesota ("CAL") and Ann Redding ("Redding") challenge the constitutionality of Minnesota Statute § 609.748, subd. 1(a)(1), an anti-harassment statute. Plaintiffs claim the statutory provision is unconstitutional under the First and Fourteenth Amendments, both facially and as applied to them. Plaintiffs have sued Freeman in his official capacity as the official responsible for prosecuting violations of Minn. Stat. § 609.748. The Minnesota Attorney General has intervened for the purpose of defending the constitutionality of Minn. Stat. § 609.748, subd. 1(a)(1). See Notice Intervention [Docket No. 26]. For the reasons set forth below, Freeman's Motion is granted.

II. BACKGROUND

A. The Harassment Restraining Order Statute

Plaintiffs challenge subdivision 1(a)(1) of Minnesota's harassment restraining order statute, Minn. Stat. § 609.748 (the "HRO Statute"). The challenged provision defines "harassment" as including "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. (a)(1).

A victim of harassment may seek a harassment restraining order ("HRO") from the state district court. Id. § 609.748, subd. 2. If the court has a reasonable belief the respondent's behavior is harassment, the court may issue a temporary HRO ordering the respondent to stop harassing or have no contact with the petitioner. Id. § 609.748, subd. 4. If an HRO is issued, it must be served on the respondent, who may request a hearing to challenge the HRO. Id. After a hearing, the Court may issue an HRO to apply for up to two years. Id. § 609.748, subd. 5(b)(3).

Violation of an HRO is generally characterized as a misdemeanor or gross misdemeanor. See Id. § 609.748, subd. 6(b), (c). However, violation of an HRO may be a felony if the defendant violates the order:

> (1) within ten years of the first of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency;
>
> (2) because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability as defined in section 363A.03, age, or national origin;
>
> (3) by falsely impersonating another;
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> (4) while possessing a dangerous weapon;
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> (5) with an intent to influence or otherwise tamper with a juror or a judicial proceeding or with intent to retaliate against a judicial officer, as defined in section 609.415, or a prosecutor, defense attorney, or officer of the court, because of that

> person's performance of official duties in connection with a judicial proceeding; or
>
> (6) against a victim under the age of 18, if the respondent is more than 36 months older than the victim.

Id. § 609.748, subd. 6(d). The HRO Statute provides that "[t]he court . . . shall refer the violation of the [HRO] to the appropriate prosecuting authority for possible prosecution." Id. § 609.748, subd. 6(i).

B. Plaintiffs

Plaintiff CAL is a non-profit corporation located in Minneapolis, Minnesota. Compl. [Docket No. 1] ¶ 3. CAL is not an organization with members but has 150 subscribers ("agents") with which CAL communicates. Id. ¶¶ 4, 39. Redding is the co-founder and president of CAL. Id. ¶ 13. CAL and its agents engage in advocacy against pornography, sexual exploitation, and sexually-oriented businesses. Id. ¶ 4. Since 2010, CAL and its agents have communicated with businesses that advertise in City Pages, a Minneapolis news publication, and asked those businesses to stop this advertising because City Pages also publishes advertisements for sexually-oriented businesses. Id. ¶¶ 35–38, 45–50, 53, 55.

C. Plaintiffs' Interactions with Frost Law Firm

In March 2019, Redding saw an advertisement in City Pages for R. Leigh Frost Law, Ltd., a Minneapolis

law firm. Id. ¶ 76. On March 15, 2019, Redding sent a postcard to the law firm's principal, R. Leigh Frost ("Frost"), asking Frost to stop advertising in City Pages. Id. ¶ 82, Ex. 11. The postcard stated, "Porn tears families apart. City Pages promotes strip clubs and porn. As a woman, are you ok with that?" Id. Around the same time, the Frost Law Firm received a nearly identical postcard from an unknown sender, as well as an email asking that the Frost Law Firm end advertising in City Pages. Id. ¶¶ 85, 86, Ex. 11. On March 20, 2019, Frost sent the postcards back to Plaintiffs with a letter asking them to stop contacting her. Id. ¶ 90, Ex. 11. In the letter, Frost wrote that she found the postcards "misinformed and offensive." Id. Ex. 11. On March 22, 2019, Frost responded to the email and told the sender to stop contacting her. Id. Ex. 11. On March 28, 2019, the Frost Law Firm received a third postcard from a CAL agent. Id. ¶ 86, Ex. 11.

Later that day, Frost filed a petition for an ex parte HRO under Minn. Stat. § 609.748 on behalf of herself and the Frost Law Firm. Id. ¶ 98, Ex. 11. The petition alleged that Frost and the Frost Law Firm were victims of harassment by CAL and its agents based on the three postcards and the email. Id. Ex. 11. The petition also stated that Frost was concerned CAL would harass her at her home and in her neighborhood. Id. On March 29, 2019, a Hennepin County District Court judge issued a temporary HRO against CAL and its agents. Id. Ex. 12. The HRO was served upon CAL on April 6, 2019, by leaving a copy with Redding. Martenson Decl. [Docket No. 13] Ex. C. After being served with

the HRO, Plaintiffs stopped communicating with the Frost Law Firm and all other businesses about their advertising in City Pages, because Plaintiffs did not want additional businesses to obtain HROs against them. Compl. ¶¶ 101–102, 111, 173–74.

On June 14, 2019, CAL moved to dismiss the temporary HRO, arguing CAL's conduct did not constitute harassment under subdivision 1(a)(1) of the HRO Statute. Martenson Decl. Ex. H at 8–12. CAL also argued the HRO Statute violates the First and Fourteenth Amendments of the U.S. Constitution. Id. at 12–21. On July 11, 2019, Frost and CAL reached a settlement, and the Hennepin County District Court vacated the HRO. Id. Ex. L. The Complaint does not allege that Freeman was aware of or involved in the civil harassment proceeding. See generally Compl. The Complaint also does not allege that CAL violated the HRO, or that Freeman prosecuted or threatened to prosecute CAL for violating the HRO. Id.

D. Present Lawsuit

In May 2020, Plaintiffs filed this pre-enforcement challenge to subdivision 1(a)(1) of the HRO Statute. See generally Compl. The Complaint alleges that although the HRO has been vacated, Plaintiffs have stopped protesting against businesses advertising in City Pages. Id. ¶ 173. The Complaint further alleges that Plaintiffs are planning to engage in the same activities as in the past to protest against businesses advertising in City Pages by contacting businesses

through mail and email and asking the businesses to cease their relationship with City Pages. Id. ¶¶ 45–49, 122, 177, 265. Their concern is a fear that this conduct will subject them to future HROs and later criminal prosecution. Id. ¶¶ 15–16, 22–23, 111, 127, 175.

Plaintiffs allege that subdivision 1(a)(1) of the HRO Statute violates the First Amendment's free speech protections, facially and as applied to Plaintiffs, because the provision does not include an exception for political speech activities. Id. ¶¶ 112–241 (Counts I, II, and III). Plaintiffs further allege that the HRO Statute is unconstitutionally vague under the Fourteenth Amendment. Id. ¶¶ 242–57 (Count IV). Lastly, Plaintiffs allege that the HRO Statute violates the First Amendment's right to association. Id. ¶¶ 258–79 (Count V).

As relief, Plaintiffs seek declarations that subdivision 1(a)(1) of the HRO Statute is unconstitutional facially and as applied, that any HRO issued under the statute is unconstitutional, and that their civil rights were violated. Id. at Relief Requested ¶¶ 1–6, 8. Plaintiffs also seek a permanent injunction against Freeman to prevent him from enforcing or threatening to enforce subdivision 1(a)(1) of the HRO Statute. Id. at Relief Requested ¶ 7. Additionally, Plaintiffs seek attorney fees and costs. Id. at Relief Requested ¶ 9.

Freeman moves to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, and under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The

Minnesota Attorney General adopts Freeman's argument that the Complaint must be dismissed under Rule 12(b)(6) for failure to state a claim because the HRO Statute is constitutional. See Notice Intervention at 4.

E. City Pages' Closing

On October 28, 2020, while Freeman's motion to dismiss was under advisement with the Court, City Pages ceased its publication and permanently ended its operations due to a decline in advertising revenue during the COVID-19 pandemic. See "City Pages is closing, ending the era of alternative weeklies in Twin Cities," Evan Ramstad, StarTribune (Oct. 28, 2020), https://www.startribune.com/city-pages-is-closing-ending-era-of-twin-cities-alt-weeklies/572897771/(last visited Nov. 9, 2020).[1]

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[1] The Court takes judicial notice that City Pages is no longer operating. Under Federal Rule of Evidence 201(b), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." "A court may take judicial notice at any stage of the proceeding whether or not the notice is requested by the parties." Am. Prairie Const. Co. v. Hoich, 560 F.3d 780, 797 (8th Cir. 2009) (citing Fed. R. Evid. 201(c), (f)). Here, the closing of City Pages has been confirmed by multiple reliable news sources including the StarTribune newspaper, whose parent company StarTribune Media Company LLC owns City Pages. See "City Pages is closing, ending the era of alternative weeklies in Twin Cities," Evan Ramstad, StarTribune (Oct. 28, 2020), https://www.startribune.com/city-pages-is-closing-ending-era-of-twin-cities-alt-weeklies/572897771/

III. DISCUSSION

A. Rule 12(b)(1): Lack of Subject Matter Jurisdiction

Freeman argues the Complaint must be dismissed under Rule 12(b)(1) for Plaintiffs' failure to establish Article III standing, which is a prerequisite to subject matter jurisdiction. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992).

1. Rule 12(b)(1) Standard

"A court deciding a motion under Rule 12(b)(1) must distinguish between a 'facial attack' and a 'factual attack' " on the court's subject matter jurisdiction. Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990). A factual attack is presented when, as here, a defendant challenges the existence of the underlying jurisdictional facts. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). "In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards." Osborn, 918 F.2d at 729 n.6 (internal citation omitted).

(last visited Nov. 9, 2020); see also "City Pages closes after 41 years as Twin Cities alternative weekly," Frederick Melo, Pioneer Press (Oct. 28, 2020), https://www.twincities.com/2020/10/28/city-pages-closes-after-41-years-as-twin-cities-alternative-weekly/ (last visited Nov. 9, 2020).

2. Standing

"Article III standing is a threshold question in every federal court case." United States v. One Lincoln Navigator 1998, 328 F.3d 1011, 1013 (8th Cir. 2003). The party invoking federal jurisdiction has the burden of establishing standing. Lujan, 504 U.S. at 560. To meet this burden, a plaintiff must show: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct of the defendant; and (3) a likelihood that a favorable ruling will redress the alleged injury. Young Am. Corp. v. Affiliated Comput. Servs. (ACS), Inc., 424 F.3d 840, 843 (8th Cir. 2005) (citing Lujan, 504 U.S. at 560–61).

Freeman argues Plaintiffs cannot satisfy the injury-in-fact element of Article III standing because their claimed decision to chill their speech was not objectively reasonable. "To establish injury in fact for a First Amendment challenge to a state statute, a plaintiff need not have been actually prosecuted or threatened with prosecution. Rather, the plaintiff needs only 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." 281 Care Comm. v. Arneson, 638 F.3d 621, 627 (8th Cir. 2011) (internal citation omitted). In evaluating First Amendment standing, the relevant inquiry is whether the plaintiff's decision to chill her speech is "objectively reasonable." Id. "Reasonable chill" is established when (1) "a plaintiff shows 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute,'" and (2) "'there exists a

credible threat of prosecution.'" Id. (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)) (alteration in original).

Here, Plaintiffs' decision to chill their speech was not objectively reasonable because Plaintiffs have not shown that their intended course of conduct is proscribed by the HRO Statute. The HRO Statute defines harassment as "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. (a)(1). The Minnesota Court of Appeals has construed this provision as being "directed against constitutionally unprotected 'fighting words' likely to cause the average addressee to fight or [to] protect one's own safety, security, or privacy; 'true threats' evidencing an intent to commit an act of unlawful violence against one's safety, security or privacy; and speech or conduct that is intended to have a substantial adverse effect, i.e., is in violation of one's right to privacy." Dunham v. Roer, 708 N.W.2d 552, 566 (Minn. Ct. App. 2006). Additionally, for conduct to constitute harassment, (1) the harasser's conduct or intent must be "objectively unreasonable," and (2) the person subject to harassing conduct must have an "objectively reasonable belief" that the conduct was "substantially adverse" to their "safety, security, or privacy." Id. at 566–67. Conduct that is merely argumentative or inappropriate does

not constitute harassment. Witchell v. Witchell, 606 N.W.2d 730, 732 (Minn. Ct. App. 2000).

Plaintiffs' communications with Frost and her law firm were not "objectively unreasonable" and did not have a "substantially adverse effect" on Frost's "safety, security, or privacy." The communications did not substantially affect Frost's safety or security because they did not threaten Frost or the Frost Law Firm. Compl. ¶¶ 91–92, 95–96, 156–57. Rather, the communications merely requested the Frost Law Firm to stop advertising in City Pages. Id. ¶¶ 84–85, 105. Plaintiffs had no physical contact with Frost and did not invade her or the Frost Law Firm's personal space. Id. ¶ 97. The communications also did not have a substantially adverse effect on Frost's privacy. All of the communications were directed to the Frost Law Firm (located in a commercial building) using the street address provided in the firm's City Pages ad and the email address posted on the Frost Law Firm's publicly advertised website. Compl. ¶ 78. In other words, the communications were only sent to the addresses that Frost herself publicly advertised. None of the communications were sent to Frost's home or to her friends, family, or clients. Id. ¶¶ 93–94. The content of the communications did not include sensitive information about Frost or the Frost Law Firm. Id. ¶ 93.

Plaintiffs allege they want to engage in the same activities they engaged in before—sending anti-pornography postcards and emails to businesses asking them to reconsider their advertising in City Pages. Id. ¶¶ 103–110, 122. Because this conduct does not

have a "substantial adverse effect on the safety, security, or privacy of another," it is not harassment under the HRO Statute. Minn. Stat. § 609.748 subd. 1(a)(1). 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. Accordingly, Plaintiffs' decision to chill their speech was not objectively reasonable and cannot provide a basis for Article III standing. See Republican Party of Minn., Third Cong. Dist. v. Klobuchar, 381 F.3d 785, 792–93 (8th Cir. 2004) (affirming dismissal of First Amendment challenge for lack of standing because conduct was not proscribed by the challenged statute).

3. Mootness

The Court lacks jurisdiction over Plaintiffs' as-applied claims for the additional, independent reason that the permanent closing of City Pages has rendered the claims moot. "In order to invoke the jurisdiction of the federal courts, the parties must demonstrate an actual, ongoing case or controversy within the meaning of Article III of the Constitution." Id. at 789–90. "Federal courts are not empowered 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Id. at 790 (quoting Church of Scientology v. United States, 506 U.S. 9, 12 (1992)). "A case becomes moot if it can be said with some assurance that there is no reasonable expectation that the violation will recur or if interim relief or events have completely and irrevocably eradicated the

effects of the alleged violation." Id. A narrow exception to the mootness doctrine exists if a controversy is "capable of repetition, yet evading review." Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1976 (2016). This exception "applies only in exceptional situations, where (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." Id. (internal quotation marks omitted, alterations in original).

Plaintiffs' lawsuit is based on their desire to "engage in political speech activities to protest against businesses who advertise in . . . City Pages." Compl. ¶ 177. Because City Pages is the only publication addressed in the Complaint and is no longer being published, the Complaint "fail[s] to demonstrate a live dispute involving the actual or threatened application of [the HRO Statute] to bar particular speech." Renne v. Geary, 501 U.S. 312, 320 (1991). Additionally, the dispute does not fall within the mootness doctrine's narrow exception for controversies capable of repetition yet evading review. Even if there is a reasonable expectation that Plaintiffs will engage in future protests that allegedly implicate the HRO Statute, the controversy would not necessarily be too short in duration to evade timely review by a court. For example, Plaintiffs' protest of business advertisement in City Pages lasted nearly a decade. See Compl. ¶ 55 (stating CAL had been protesting business advertisement in City Pages "[s]ince 2010").

B. Rule 12(b)(6): Failure to State a Claim

Because the Court concludes that Plaintiffs lack standing under Article III, the Court is without subject matter jurisdiction to determine whether the Complaint states a claim for relief under Rule 12(b)(6).

IV. CONCLUSION

Based upon upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Defendant Hennepin County Attorney Mike Freeman's Motion to Dismiss [Docket No. 10] is **GRANTED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.[2]

[2] Entry of judgment will be stayed until Monday, November 16, 2020, in accordance with Fed. R. Evid. 201(d) and (e).

2022 WL 1912856
Only the Westlaw citation is currently available.
United States Court of Appeals, Eighth Circuit.

CHRISTIAN ACTION LEAGUE OF MINNESOTA and Ann Redding,
Appellants
v.
Mike FREEMAN, Hennepin County Attorney, in his official capacity and Keith M. Ellison, Attorney General for the State of Minnesota,
Appellees

No: 20-3618

Filed: June 3, 2022

Appeal from U.S. District Court for the District of Minnesota (0:20-cv-01081-ADM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-3083

Minnesota RFL Republican Farmer Labor Caucus; Vincent Beaudette; Vince for Statehouse Committee; Don Evanson; Bonn Clayton; Michelle MacDonald

Plaintiffs - Appellants

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; Kathryn Keena, in her official capacity as County Attorney for Dakota County, Minnesota, or her successor

Defendants - Appellees

Attorney General's Office for the State of Minnesota

Intervenor - Appellee

Appeal from U.S. District Court
for the District of Minnesota
(0:19-cv-01949-ECT)

JUDGMENT

Before SMITH, Chief Judge, GRUENDER, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 10, 2022

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
for the Eighth Circuit

No. 20-3083

MINNESOTA RFL REPUBLICAN FARMER LABOR CAUCUS; Vincent Beaudette; Vince for Statehouse Committee; Don Evanson; Bonn Clayton; Michelle MacDonald

Plaintiffs - Appellants

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; Kathryn Keena, in her official capacity as County Attorney for Dakota County, Minnesota, or her successor

Defendants - Appellees

Attorney General's Office for the State of Minnesota

Intervenor - Appellee

Appeal from U.S. District Court
for the District of Minnesota

Submitted: December 14, 2021
Filed: May 10, 2022

Before SMITH, Chief Judge, GRUENDER and KOBES, Circuit Judges.

SMITH, Chief Judge.

This case concerns a challenge to the constitutionality of a section of the Minnesota Fair Campaign Practices Act (MFCPA). The plaintiffs, described as "political candidates, political associations, and individuals who engage in political activities relating to political elections and campaigns in Minnesota" brought this case under 42 U.S.C. § 1983 to assert a pre-enforcement First Amendment challenge to Minn. Stat. § 211B.02. R. Doc. 1, at 5. The plaintiffs sued four Minnesota county attorneys with authority to criminally prosecute violations of § 211B.02. *See* Minn. Stat. § 211B.16, subd. 3. The plaintiffs moved for a preliminary injunction to enjoin the county attorneys from enforcing § 211B.02 pending the district court's[1] entry of final judgment. The district court denied the motion. The plaintiffs now appeal the district court's denial of their preliminary-injunction motion. We affirm.

I. *Background*

The relevant provision of the MFCPA provides that

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[1] The Honorable Eric C. Tostrud, United States District Judge for the District of Minnesota.

> [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.

The MFCPA defines "[c]ampaign material" as "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media." Minn. Stat. § 211B.01, subd. 2.

Minnesota law authorizes any person to file a written complaint alleging a violation of § 211B.02 with the Minnesota Office of Administrative Hearings (OAH). *See* Minn. Stat. § 211B.32, subd. 1(a) ("[A] complaint alleging a violation of chapter . . . 211B must be filed with the office."). An administrative law judge (ALJ) then "make[s] a preliminary determination for its disposition." *Id.* § 211B.33, subd. 1. "If the [ALJ] determines that the complaint does not set forth a prima facie violation of . . . [§] 211B[.02], the [ALJ] must dismiss the complaint." *Id.* § 211B.33, subd. 2(a). An ALJ who determines that the complaint sets forth a prima facie violation of the statute has two options: (1) hold a

probable cause hearing to determine if the violation occurred, or (2) permit the matter to proceed to a three-judge panel for final determination. *See id.* § 211B.33, subd. 2(b)-(c); *id.* § 211B.34, subd. 2; *id.* § 211B.35.

"A county attorney *may* prosecute a[] violation of [§ 211B.02]." *Id.* § 211B.16 (emphasis added); *see also id.* § 211B.32, subd. 1(a) ("The complaint must be finally disposed of by the office before the alleged violation *may* be prosecuted by a county attorney." (emphasis added)).

On July 24, 2019, the plaintiffs brought this pre-enforcement First Amendment challenge to § 211B.02. In their complaint, the plaintiffs alleged that the first sentence of § 211B.02 "violates the First Amendment right to free speech because it serves no compelling state interest, is not narrowly tailored, and is under-inclusive and overbroad" and "violates their First Amendment right to expressive association." R. Doc. 71, at 3-4. They also allege that the second sentence of § 211B.02 "suffers from these same problems and . . . imposes an impermissible prior restraint." *Id.* at 4 (citations omitted). The plaintiff's § 1983 claims are against four Minnesota county attorneys in their "'official capacity' only." *Id.* They seek "a declaration that § 211B.02 is unconstitutional and a permanent injunction against its enforcement." *Id.*

On July 20, 2020,[2] the plaintiffs moved for a preliminary injunction to enjoin the county attorneys

[2] On September 30, 2019, the county attorneys moved to dismiss the plaintiffs' complaint. The district court denied the

from enforcing Minn. Stat. § 211B.02 pending the entry of a final judgment. The county attorneys opposed the motion and submitted declarations in which they "testif[ied] . . . that they never have initiated civil or criminal proceedings for violations of § 211B.02, that they are 'not currently investigating' any such violations, and that they have 'no personal intention' to commence proceedings." *Id.* at 13 (quoting county attorneys' declarations).

After analyzing the *Dataphase*[3] factors, the district court denied the plaintiffs' preliminary-injunction motion. Although it concluded that the plaintiffs had Article III standing, it determined that the plaintiffs were not likely to succeed on the merits of their First Amendment claims because of their "inability to satisfy a prerequisite to their claims under *Ex parte Young*, 209 U.S. 123 (1908)." *Id.* at 10. In reaching its decision, the court observed that the *Ex parte Young* "exception [to Eleventh Amendment immunity] does not apply 'when the defendant official has neither enforced nor threatened to enforce the statute challenged as unconstitutional.'" *Id.* at 11 (quoting *281 Care Comm. v. Arneson (Care Committee II)*, 766 F.3d 774, 797 (8th

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motion, but it dismissed with prejudice the claims of plaintiffs Minnesota RFL Republican Farmer Labor Caucus, Bonn Clayton, and Michelle MacDonald based on their challenge to the first sentence of Minn. Stat. § 211B.02.

On November 27, 2019, the Minnesota Attorney General intervened in the case "for the limited purpose of defending the constitutionality of Minn. Stat. § 211B.02." R. Doc. 30, at 1.

[3] *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc).

Cir. 2014) (quoting *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6th Cir. 2000))). "Under this standard, and based on [the county attorneys'] uncontested affidavits," the district court held that the "[p]laintiffs have not shown that [the county attorneys] are 'about to commence proceedings' against them." *Id.* at 13 (quoting *Ex parte Young*, 209 U.S. at 156). The court acknowledged that the county attorneys' declarations "say only that they have 'no present intention' to prosecute" but concluded that their failure to "disavow[ ] all future prosecutions does not mean that they are 'about to commence proceedings' against the [p]laintiffs." *Id.* (quoting *Ex Parte Young*, 209 U.S. at 156).

The court also determined that the plaintiffs failed to show irreparable harm. It cited "the absence of threatened, much less imminent, enforcement by [the county attorneys]"; the plaintiffs' failure to "seek a preliminary injunction until almost one year" after filing their complaint; and the fact that "the harm [p]laintiffs identify as being attributable to [the county attorneys] seems slight—not irreparable—when one considers that Minn. Stat. § 211B.32 authorizes any person to file a complaint alleging a violation of § 211B.02." *Id.* at 14-15. Furthermore, the court concluded that "[t]he final two *Dataphase* factors do not change things." *Id.* at 15.

II. *Discussion*

On appeal, the plaintiffs argue that the district court abused its discretion in denying their preliminary-injunction motion. First, they challenge the district court's determination that they are not likely to prevail on their First Amendment claims because the county attorneys are entitled to Eleventh Amendment immunity. Second, they argue that the district court erred in determining that they failed to prove irreparable harm. "As to the remaining preliminary injunction factors," they assert that "the district court did not view the balance-of-harm factor as it would apply to First Amendment freedoms" and failed to consider that "the public interest favors protecting core First Amendment freedoms." Appellant's Br. at 25-26 (quoting *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999)).

We review for an abuse of discretion the district court's denial of the plaintiffs' preliminary-injunction motion. *See Phyllis Schlafly Revocable Tr. v. Cori*, 924 F.3d 1004, 1009 (8th Cir. 2019). "A district court abuses its discretion if it 'rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions.'" *Id.* (quoting *Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013)). We review de novo a district court's Eleventh Amendment immunity determination. *See Balogh v. Lombardi*, 816 F.3d 536, 541, 544 (8th Cir. 2016).[4]

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[4] As an alternative ground for affirmance, the county attorneys assert that the plaintiffs lack Article III standing to

"Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). The Supreme Court has "recognized a narrow exception grounded in traditional equity practice—one that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Id.* (citing *Ex parte Young*, 209 U.S. at 159-60). "In determining whether this exception applies, a court conducts 'a straightforward inquiry into whether [the] complaint alleges an *ongoing violation of federal law* and seeks relief properly characterized as prospective.'" *281 Care Comm. v. Arneson (Care Committee I)*, 638 F.3d 621, 632 (8th Cir. 2011) (alteration in original) (emphasis added) (quoting *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002)). "The *Ex parte Young* exception only applies against officials 'who threaten and are about to commence proceedings,

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challenge § 211B.02. "When faced with jurisdictional issues involving Eleventh Amendment immunity and Article III standing, the Court can decide which to address first." *WildEarth Guardians v. Bidegain*, 555 F. App'x 815, 816 (10th Cir. 2014) (unpublished per curiam), *as clarified* (Mar. 7, 2014) (citing *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)))); *see also Sinochem*, 549 U.S. at 532 (holding that courts may dismiss a case on forum non conveniens grounds before considering jurisdiction). Because we find Eleventh Amendment immunity dispositive of the present appeal, we need only address it. *See Sinochem*, 549 U.S. at 431.

either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution.'" *Care Committee II*, 766 F.3d at 797 (quoting *Ex parte Young*, 209 U.S. at 156).

In *Care Committee I*, the plaintiffs brought a First Amendment challenge to Minn. Stat. § 211B.06, subd. 1 (2008), which "ma[de] it a crime to knowingly or with reckless disregard for the truth make a false statement about a proposed ballot initiative." 638 F.3d at 625. The plaintiffs sued "four Minnesota county attorneys and the Minnesota attorney general, all . . . in their official capacities." *Id.* The district court dismissed the plaintiffs' complaint for lack of subject-matter jurisdiction based on standing and ripeness. *Id.* at 626. On appeal, we concluded that the plaintiffs had standing to assert their claims and that those claims were ripe for review. *Id.* at 631. But the Minnesota Attorney General argued that Eleventh Amendment immunity was "an additional and independent reason plaintiffs' claims against her [were] not justiciable." *Id.*[5] Because "no dispute" existed that the plaintiffs sought "prospective" relief, "[t]he only question [was] whether [the plaintiffs] . . . alleged that [the Minnesota Attorney General] [was], herself, engaged in an ongoing violation of federal law." *Id.* at 632.

"[W]e held that the attorney general was a proper defendant under the *Ex parte Young* . . . exception to Eleventh Amendment immunity." *Care Committee II*,

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[5] The county attorneys did not raise Eleventh Amendment immunity in *Care Committee I*.

766 F.3d at 796 (citing *Care Committee I*, 638 F.3d at 632). We explained that "some connection [must exist] between the attorney general and the challenged statute" and that such "connection does not need to be primary authority to enforce the challenged law." *Care Committee I*, 638 F.3d at 632. Moreover, "the attorney general need [not] have the full power to redress a plaintiff's injury in order to have 'some connection' with the challenged law." *Id.* at 633. We identified a three-fold connection[6] between the Minnesota attorney general and the statute's enforcement and held that it "was sufficient to make the attorney general amenable to suit under the *Ex Parte Young* exception to Eleventh Amendment immunity." *Care Committee II*, 766 F.3d at 796 (citing *Care Committee I*, 638 F.3d at 633).

Following remand in *Care Committee I*, the district court denied the plaintiffs' motion for summary judgment, granted summary judgment in the defendants' favor, and dismissed all claims with prejudice. The plaintiffs appealed. On appeal, "[t]he attorney general revisit[ed] the issue of Eleventh Amendment

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[6] We identified the three-fold connection as follows:

> (1) the attorney general "may, upon request of the county attorney assigned to a case, become involved in a criminal prosecution of section 21113.06," (2) "the attorney general is responsible for defending the decisions of the OAH—including decisions pursuant to section 21113.06—if they are challenged in civil court," and (3) "the attorney general appears to have the ability to file a civil complaint under section 211B.06."

Care Committee II, 766 F.3d at 796 (quoting *Care Committee I*, 638 F.3d at 632).

immunity" in support of affirmance. *Care Committee II*, 766 F.3d at 796. "[T]he attorney general reiterate[d] that she may initiate a prosecution for violation of § 21113.06 only '[u]pon request of the county attorney' and only if the attorney general then 'deems [it] proper.'" *Id.* (third and fourth alterations in original) (quoting Minn. Stat. § 8.01). County attorneys, not the attorney general, prosecuted violations of the statute. *Id.* (citing Minn. Stat. § 211B.16, subd. 3).

The Minnesota Attorney General, through a Deputy Minnesota Attorney General, stated in an affidavit that the office of the attorney general "ha[d] never initiated a prosecution" under § 211B.06, "would decline any request to prosecute . . . activities" like that in question, and "never ha[d] filed, and ha[d] no intention of ever filing, a complaint with the OAH alleging a violation of § 211B.06 . . . based upon any of the activities" described in the pleadings in that case. *Id.* at 796-97. Based on the summary-judgment record, the attorney general argued that no threat existed that she would enforce the statute. *Id.* at 797.[7]

We agreed with the attorney general and found that the attorney general was immune from suit under the Eleventh Amendment. Based on that conclusion, we dismissed the action as against the attorney general. Our decision rested on the attorney general's declared "unwillingness to exercise her ability to

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[7] As in *Care Committee I*, the county attorneys did not raise Eleventh Amendment immunity; therefore, we did not address whether they were entitled such immunity.

prosecute a § 211B.06 claim against Appellants." *Id.* We explained, "Now that the attorney general has testified with assurances that the office will not take up its discretionary ability to assist in the prosecution of § 211B.06, Appellants are not subject to or threatened with any enforcement proceeding by the attorney general." *Id.*

Here, just as in *Care Committee I*, plaintiffs seek prospective relief, and the core question is whether the plaintiffs proved that the county attorneys "engaged in an ongoing violation of federal law." *Care Committee I*, 638 F.3d at 632. In answering this question, the state of the record at this procedural stage of the case is dispositive. *See Care Committee II*, 766 F.3d at 797 ("At this stage in the proceedings we are no longer concerned with who is 'a *potentially* proper party for injunctive relief' but rather who in fact is the right party." (quoting *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1146 (8th Cir. 2005))).[8]

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[8] *Cf. Whole Woman's Health*, 142 S. Ct. at 535-36 (plurality op.) ("[I]t appears that [Texas executive officials with specific disciplinary authority over medical licensees] fall within the scope of *Ex parte Young*'s historic exception to state sovereign immunity. Each of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S.B. 8. Accordingly, we hold that sovereign immunity does not bar the petitioners' suit against these named defendants *at the motion to dismiss stage*." (emphasis added) (citations omitted)).

The record here shows that the defendants have not enforced nor have threatened to enforce the challenged statute. After the motion-to-dismiss stage and in response to the plaintiffs' preliminary-injunction motion, the four county attorneys filed substantially similar affidavits providing that they had "no present intention" to prosecute anyone for violating § 211B.02.[9] "Now that the [county attorneys] ha[ve] testified with assurances that [they] will not take up [their] discretionary ability to . . . prosecut[e] [violations] of § [211B.02], [the plaintiffs] are not subject to or threatened with any enforcement proceeding by the [county attorneys]." *Care Committee II*, 766 F.3d at 797.

The plaintiffs, however, assert that the present case is distinguishable from *Care Committee II* because, unlike the Minnesota Attorney General in that case, "the [c]ounty [a]ttorneys have not disavowed any *future* prosecutions of § 211B.02." Appellants' Br. at 19 (emphasis added). The plaintiffs argue that the

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[9] R. Doc. 63, at 1 (Freeman) ("I have no present intention to threaten enforcement of a violation of Minn. Stat. § 211B.02 by any person or entity, and have no present intention to commence civil or criminal proceedings against any person or entity for allegedly violating Minn. Stat. § 211B.02."); R. Doc. 64, at 2 (Metz) ("I am not about to and have no present intention to commence civil or criminal proceedings against any person or entity for allegedly violating Minnesota Statutes Section 211B.02."); R. Doc. 65, at 2 (Sonneman) ("I am not about to and have no present intention to commence civil or criminal proceedings against any person or entity for allegedly violating Minnesota Statutes Section 211B.02."); R. Doc. 66, at 2 (Backstrom) ("I have no present intention of threatening enforcement of Section 211B.02 against anyone, including Plaintiffs.").

"County Attorney declarations do not represent a policy disavowing the enforcement of § 211B.02," Appellants' Reply Br. at 3, because they "have not declared that they have 'no intention to ever' prosecute 'any of the activities' the [plaintiffs] would engage in under § 211B.02," *id.* at 4 (footnote omitted).

True, in *Care Committee II*, the Minnesota Attorney General did aver that the "the attorney general's office never has filed, and has no intention of *ever filing*, a complaint with the OAH alleging a violation of § 211B.06." *Care Committee II*, 766 F.3d at 796-97 (emphasis added). By comparison, the county attorneys here averred that they have "no present intention" to commence proceedings. But their failure to disavow future prosecutions is not fatal to their claim of Eleventh Amendment immunity. The proper standard in assessing their entitlement to such immunity is whether the county attorneys' affidavits establish their "unwillingness to exercise [their] ability to prosecute a § 211B.0[2] claim against Appellants." *Care Committee II*, 766 F.3d at 797. "The *Ex parte Young* doctrine does not apply when the defendant official has *neither enforced nor threatened to enforce* the statute challenged as unconstitutional." *Id.* (emphasis added) (quoting *McNeilus Truck & Mfg.*, 226 F.3d at 438). Here, the county officials' affidavits all show that they have not enforced or threatened to enforce § 211B.02. Therefore, the *Ex parte Young* exception to Eleventh Immunity is inapplicable. The district court did not abuse its discretion in denying the plaintiffs' motion for preliminary injunctive relief.

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MINNESOTA RFL REPUBLICAN FARMER LABOR CAUCUS, Vincent Beaudette, Vince for Statehouse Committee, Don Evanson, Bonn Clayton, and Michelle MacDonald,

Plaintiffs,

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 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,

Defendants.

Attorney General's Office for the State of Minnesota,

Intervenor.

File No. 19-cv-1949 (ECT/DTS)

OPINION AND ORDER

Erick G. Kaardal and William F. Mohrman, Mohrman, Kaardal & Erickson, P.A., Minneapolis, MN, for Plaintiffs.

Caroline Brunkow, Christiana Martenson, and Kelly K. Pierce, Hennepin County Attorney's Office, Minneapolis, MN, for Defendant Mike Freeman.

Abigail Rose Kelzer, Kristin C. Nierengarten, and Scott T. Anderson, Rupp, Anderson, Squires & Waldspurger, P.A., Minneapolis, MN, for Defendants Mark Metz and Karin Sonneman.

Jeffrey A. Timmerman and William M. Topka, Dakota County Attorney's Office, Hastings, MN, for Defendant James C. Backstrom.

Cicely R. Miltich and Elizabeth C. Kramer, Office of the Minnesota Attorney General, Saint Paul, MN; Amy Slusser Conners and Katherine S. Barrett Wiik, Best & Flanagan, Minneapolis, MN, for Intervenor Attorney General's Office for the State of Minnesota.

ERIC C. TOSTRUD, United States District Judge.

Plaintiffs, who describe themselves as "political candidates, political associations, and individuals who engage in political activities relating to political elections and campaigns in Minnesota," Compl. ¶ 17 [ECF No. 1], brought this case under 42 U.S.C. § 1983 to assert a pre-enforcement First Amendment challenge to a section of the Minnesota Fair Campaign Practices Act, Minn. Stat. § 211B.02. Defendants are four Minnesota county attorneys with authority to prosecute violations of the challenged statute. Minn.

Stat. § 211B.16, subd. 3. Under authority of federal law, the Attorney General for the State of Minnesota has intervened "for the limited purpose of defending the constitutionality of Minn. Stat. § 211B.02." ECF No. 30 at 1 (citing Fed R. Civ. P. 5.1(c) and 24(a)(1), and 28 U.S.C. § 2403(b)). Plaintiffs have moved for a "temporary restraining order and preliminary injunction" that, if issued, would enjoin Defendants from enforcing Minn. Stat. § 211B.02 pending the entry of a final judgment.[1] ECF No. 46 at 1. The motion will be denied

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[1] To the extent Plaintiffs seek a temporary restraining order, their motion does not comply with Fed. R. Civ. P. 65(b). Relevant here, Rule 65(b) provides:

> **(b) Temporary Restraining Order.**
>
> **(1)** ***Issuing Without Notice.*** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
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> **(A)** specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
>
> **(B)** the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

With respect to the requirements in subparagraph (b)(1)(A), Plaintiffs did not file a verified complaint, and their affidavits do not address the need for an *ex parte* hearing. With respect to subparagraph (b)(1)(B), Plaintiffs' attorney filed no certification. *See Buffalo Wild Wings Int'l, Inc. v. Grand Canyon Equity Partners, LLC*, 829 F. Supp. 2d 836, 837-38 (D. Minn. 2011) (stating that because the defendants received notice and the motion for a temporary restraining order was fully briefed, "the Court w[ould] treat [the motion] as one for a preliminary injunction"). Plaintiffs'

because Plaintiffs have not met the requirements to justify granting the extraordinary remedy of a preliminary injunction.

I

The challenged statute provides:

> 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. Plaintiffs claim the entire statute violates the First Amendment, though they divide their complaint into counts challenging the statute's first and second sentences. Compl. ¶¶ 153-238. Plaintiffs claim the first sentence violates the First Amendment right to free speech because it serves no compelling state interest, is not narrowly tailored, and is underinclusive and overbroad. *Id.* ¶¶ 153-185. Plaintiffs also claim the first sentence violates their First Amendment right to expressive association. *Id.* ¶¶ 186-197. Plaintiffs claim the statute's second sentence suffers from these same

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motion will be adjudicated as one seeking only a preliminary injunction.

problems, *id.* ¶¶ 198-224, 228-238, and that it imposes an impermissible prior restraint, *id.* ¶¶ 225-227. Plaintiffs allege that "[t]he Eighth Circuit has already invalidated a closely related section of Minn. Stat. ch. 211B—Minn. Stat. § 211B.06—on First Amendment grounds [in] *281 Care Comm. v. Arneson*, 766 F.3d 774, 787, 789, 795-96 (8th Cir. 2014) ["*Care Committee II*"]." *Id.* ¶ 8. Plaintiffs assert their claims under § 1983 against Defendants in their "official capacity" only. *Id.* at 1 (caption) and ¶¶ 38-41. Plaintiffs seek declaratory and injunctive relief—*i.e.*, a declaration that §211B.02 is unconstitutional and a permanent injunction against its enforcement. *Id.* at 1 (caption) ("**Complaint for Declaratory and Injunctive Relief**"), ¶¶ 14, 180-84, 197, 220-23, 227, 238, and 239-246. In their prayer for relief, Plaintiffs seek declaratory and injunctive relief, costs "allowed by law," and attorneys' fees and costs under 42 U.S.C. § 1988. *Id.* at 47-48, ¶¶ 1-5.

II

Defendants argue in opposition to Plaintiffs' motion for a preliminary injunction that Plaintiffs lack standing under Article III.[2] The general rules governing Article III standing are settled:

> Federal jurisdiction is limited by Article III, § 2, of the U.S. Constitution to actual cases and controversies. Therefore, the plaintiff's

[2] Notwithstanding this argument, Defendants have not moved to dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

> standing to sue "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an "injury-in-fact," (2) a causal relationship between the injury and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Steger v. Franco, Inc., 228 F.3d 889, 892 (8th Cir. 2000). An injury-in-fact is the "invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations and internal quotation marks omitted). Moreover, to have standing to obtain injunctive relief, the plaintiff also must show that he is likely to suffer future injury by the defendant and that the sought-after relief will prevent that future injury. *See City of L.A. v. Lyons*, 461 U.S. 95, 102-03 (1983). "[S]tanding is based on the facts as they existed at the time the lawsuit was filed." *Steger*, 228 F.3d at 893. Standing "must exist not only at the time the complaint is filed, but through all stages of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citations and internal quotation marks omitted).

To establish injury-in-fact in a pre-enforcement constitutional challenge, a plaintiff must allege, "at a minimum, that she has 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible

threat of prosecution thereunder.'" *Jones v. Jegley*, 947 F.3d 1100, 1103 (8th Cir. 2020) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted)). "[T]he plaintiff needs only to establish that he would like to engage in arguably protected speech, but that he is [reasonably] chilled from doing so by the existence of the statute. Self-censorship can itself constitute injury in fact." *281 Care Committee v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) ("*Care Committee I*") (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)). To show a credible threat of prosecution for Article III purposes, a plaintiff need not "actually violate[]" the challenged statute or "risk prosecution." *Jones*, 947 F.3d at 1104. "Total lack of enforcement of a statute" may defeat a plaintiff's attempt to show a credible threat of prosecution, "but only in extreme cases approaching desuetude." *Care Committee I*, 638 F.3d at 628 (citing *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 486 (8th Cir. 2006)); *see also Jones*, 947 F.3d at 1104 (recognizing that a plaintiff's fear of consequences and self-censorship are reasonable "as long as there is no 'evidence—via official policy or a long history of disuse—that authorities' have 'actually' refused to enforce [the] statute") (quoting *Care Committee I*, 638 F.3d at 628).

At this stage of the proceedings, Plaintiffs have shown Article III injury-in-fact. Plaintiffs have filed several declarations describing arguably protected speech in which each of them (and others) would engage but that is chilled by § 211B.02. *See* MacDonald Decl. [ECF No. 51] ¶¶ 22-71; Clayton Decl. [ECF No.

53] ¶¶ 17-84; Evanson Decl. [ECF No. 54] ¶¶ 17-83; Beaudette Decl. [ECF No. 55] ¶¶ 17-85. As noted, this type of self-censorship based on the chilling effect of a state law is a sufficient injury in fact as long as the plaintiff's fear of consequences is "'objectively reasonable.'" *Care Committee I*, 638 F.3d at 627 (quoting *Zanders v. Swanson*, 573 F.3d 591, 594 (8th Cir. 2009)). Defendants argue that, "[b]ecause no [Defendant] has ever enforced or threatened to enforce [§] 211B.02 against anyone, Plaintiffs do not face a 'credible threat of prosecution' under the statute." Def's Mem. in Opp'n [ECF No. 62] at 23. They say lack of enforcement has made the statute a dead letter. Defs.' Mem. in Opp'n at 25; *see Poe v. Ullman*, 367 U.S. 497, 501-02 (1961) (holding that plaintiffs lacked standing to challenge a state law because the lack of prosecutions over more than 75 years—despite flagrant violations of the law—showed that the state had an "undeviating policy of nullification"). Defendants have filed declarations in which each testifies that they have not initiated civil or criminal proceedings for violations of § 211B.02, that they are "not currently investigating" any such violations, and that they have "no present intention" to commence proceedings. *See* Backstrom Decl. [ECF No. 66]; Freeman Decl. [ECF No. 63]; Metz Decl. [ECF No. 64]; Sonneman Decl. [ECF No. 65]. Plaintiffs respond that, even if there have been no criminal prosecutions to date, there have been several administrative proceedings that have led to civil penalties, and there is nothing to stop Defendants from switching course and prosecuting violations in the future. Pls.' Reply Mem. at 3-6 [ECF No. 69].

The question, then, boils down to this: is Defendants' evidence of the absence of both past prosecutions and present investigations enough to show that Plaintiffs' fear of consequences is not objectively reasonable and to deprive Plaintiffs of standing? The better answer for Article III purposes is "no." The plaintiffs in *Care Committee I*, for example, had standing to challenge Minnesota's prohibition on making false statements about a proposed ballot initiative even though there had been no criminal prosecutions in the five years since the statute had been amended. 638 F.3d at 628, 630; *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (holding that plaintiffs had standing to challenge a criminal statute because the statute clearly applied to their intended conduct and the state "ha[d] not disavowed any intention of invoking" it); *Jones*, 947 F.3d at 1104 (holding that a plaintiff had standing to challenge a campaign-finance law carrying criminal penalties without addressing whether anyone had ever actually been prosecuted for violating it). Defendants try to distinguish *Care Committee I*, noting that there was only a five-year history of non-prosecution for the provision at issue there, whereas here, Plaintiffs have shown no prosecutions for violations of § 211B.02 since it was enacted in 1988. Def's Mem. in Opp'n at 25. Even this longer period of non-enforcement, however, is not the type of dormancy or desuetude that deprived the plaintiffs of standing in *Poe*. *See Poe*, 367 U.S. at 501-02. This is especially true considering that § 211B.02 has been the subject of multiple administrative proceedings. *See Care Committee I*, 638 F.3d at 630 (explaining that "non-criminal

consequences . . . can also contribute to the objective reasonableness of alleged chill"); *accord Susan B. Anthony List*, 573 U.S. at 165. One of these proceedings even involved Plaintiff MacDonald. *See generally Linert v. MacDonald*, 901 N.W.2d 664 (Minn. Ct. App. 2017). It is no surprise, then, that the risk of enforcement is on Plaintiffs' minds. Other Eighth Circuit cases confirm that the statements in Defendants' declarations are not the type of official disavowal that would deprive Plaintiffs of Article III standing. *See United Food & Com. Workers Int'l Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 429 (8th Cir. 1988) (holding that plaintiffs had standing even though state law enforcement officials indicated that they had "no 'present plan'" to enforce the challenged provisions); *see also Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019) (explaining that a state's "in-court assurances do not rule out the possibility that it will change its mind and enforce the law more aggressively in the future"). The prospect of criminal sanctions, considered alongside the history of administrative enforcement, gives Plaintiffs' sufficient reason to fear repercussions from their political speech. Again, at this stage of the litigation, they have done enough to show a cognizable injury in fact.[3]

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[3] Defendants hint at another Article III standing question when they point out that an injunction against their enforcement of § 211B.02 won't stop other persons from filing complaints or charges against Plaintiffs under the statute. Plaintiffs place great emphasis on the risk of costly and politically damaging proceedings in the Office of Administrative Hearings (or "OAH"), whether or not those proceedings ever actually lead to a criminal

III

A preliminary injunction is an "extraordinary remedy." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted); *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). The Eighth Circuit's familiar *Dataphase* decision describes the list of considerations applied to decide whether to grant preliminary injunctive relief: "(1) the likelihood of the movant's success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to the other litigants; and (4) the public interest." *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 956 (D. Minn. 1999) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 112-14 (8th Cir. 1981) (en banc)). The core question is whether the equities "so favor[] the movant that justice requires the court to

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prosecution. Pls.' Mem. at 25-26 [ECF No. 48]. Anyone can file a complaint with OAH, so simply enjoining four county attorneys might do little to allay Plaintiffs' fears. One might wonder, then, whether the relief Plaintiffs seek would actually redress their injury. The Eighth Circuit has considered and rejected this redressability argument. *See Care Committee I*, 638 F.3d at 631. Plaintiffs need not "show that a favorable decision will relieve [their] *every* injury," as long as it would redress a "discrete portion" of their injury. *Id.* (quoting *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (emphasis in original)). An injunction here would eliminate the risk of a criminal prosecution—at least one initiated by these county attorneys—and Plaintiffs make clear that the risk of criminal sanction is at least part of the source of the alleged chilling effect. Pls.' Reply Mem. at 2. So even if the specter of civil proceedings initiated by private citizens would remain, Plaintiffs have cleared the Article III redressability hurdle.

intervene to preserve the status quo until the merits are determined." *Dataphase*, 640 F.2d at 113 (footnote omitted). "The burden of establishing the four factors lies with the party seeking injunctive relief." *CPI Card Grp., Inc. v. Dwyer*, 294 F. Supp. 3d 791, 807 (D. Minn. 2018) (citing *Watkins*, 346 F.3d at 844).

A

"While no single factor is determinative, the probability of success factor is the most significant." *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (citations and internal quotation marks omitted). Although this factor uses the term "probability," the movant need not show a greater than fifty percent likelihood of success. *Dwyer*, 294 F.Supp.3d at 807. The movant "need only show likelihood of success on the merits on a single cause of action, not every action it asserts[.]" *Id.* "[T]he absence of a likelihood of success on the merits strongly suggests that preliminary injunctive relief should be denied[.]" *CDI Energy Servs. v. W. River Pumps, Inc.*, 567 F.3d 398, 402 (8th Cir. 2009).

Plaintiffs are not likely to succeed on the merits, though this unlikeliness has nothing to do with the merits of Plaintiffs' First Amendment challenge and results instead from Plaintiffs' likely inability to satisfy a prerequisite to their claims under *Ex parte Young*, 209 U.S. 123 (1908). To recap, in response to Defendants' Rule 12(b)(6) motion to dismiss, Plaintiffs argued that they pleaded plausible *Ex parte Young* claims against Defendants in their capacities as state

officials. *See Minnesota RFL Republican Farmer Labor Caucus v. Freeman*, No. 19-cv-1949 (ECT/DTS), 2020 WL 1333154, at **2-3 (D. Minn. Mar. 23, 2020). Defendants' Rule 12(b)(6) motion was denied on the basis that "Plaintiffs plead[ed] passable *Ex parte Young* claims." *Id.* at *3. Of dispositive importance here, the opinion and order denying Defendants' motion noted that "the *Ex parte Young* exception only applies against officials *who threaten and are about to commence proceedings, either of a civil or criminal nature*, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." *Minnesota RFL*, 2020 WL 1333154, at *2 (cleaned up) (emphasis added). Conversely, the exception does not apply "when the defendant official has neither enforced nor threatened to enforce the statute challenged as unconstitutional." *Care Committee II*, 766 F.3d at 797 (quoting *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6th Cir. 2000)). The opinion also noted that, "at the Rule 12(b)(6) stage in the proceedings, a federal court need only concern itself with determining that the plaintiff has plausibly identified 'a potentially proper party for injunctive relief.'" *Minnesota RFL*, 2020 WL 1333154, at *2 (quoting *Care Committee II*, 766 F.3d at 797). At that stage, "[p]lausibly alleging some connection between the sued official and enforcement of the challenged statute [was] therefore enough." *Id.* By the very nature of the preliminary-injunction inquiry, evaluating Plaintiffs' likelihood of success on the merits of their *Ex parte Young* claims requires greater scrutiny at this stage than was applied to determine whether Plaintiffs' claims were

plausible at the Rule 12(b)(6) stage. To evaluate Plaintiffs' likelihood of success on the merits, the question is "no longer . . . who is 'a potentially proper party for injunctive relief' but rather who in fact is the right party." *Care Committee II*, 766 F.3d at 797 (quoting *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1146 (8th Cir. 2005)).

Though the relationship between *Ex parte Young*'s imminence requirement and Article III's requirement of a "credible threat of prosecution" is the subject of some debate, the Eighth Circuit seems to treat them as different things. At times, the Eighth Circuit has generally described the Article III and the Eleventh Amendment inquiries as "related." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015); *see also Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006) (holding that plaintiffs had "satisfie[d] the case or controversy requirement of Article III" by showing that the defendants fell within the *Ex parte Young* exception), *abrogated on other grounds by Obergefell v. Hodges*, 576 U.S. 644 (2015). *Care Committee II*, however, treated the two inquiries as distinct. *See* 766 F.3d at 796-97. The court there held that the plaintiffs had Article III standing based on a credible threat of prosecution, but it still dismissed the plaintiffs' claims as against the Minnesota attorney general based on her assurances that she would not assist in any prosecutions under the challenged statute. 766 F.3d at 797; *see also Okpalobi v. Foster*, 244 F.3d 405, 417 (5th Cir. 2001) (en banc)

("[A]ny probe into the existence of a *Young* exception should gauge (1) the ability of the official to enforce the statute at issue under his statutory or constitutional powers, and (2) *the demonstrated willingness of the official to enforce the statute.*" (emphasis added)).[4] Reading these cases together, the better understanding is that the Eighth Circuit applies an imminence standard that is higher for *Ex parte Young* claims than for Article III standing.[5]

Under this standard, and based on Defendants' uncontested affidavits, Plaintiffs have not shown that Defendants are "about to commence proceedings" against them. *Ex parte Young*, 209 U.S. at 156. As noted, Defendants testify in their declarations that they never have initiated civil or criminal proceedings for violations of § 211B.02, that they are "not currently investigating" any such violations, and that they have "no present intention" to commence proceedings. *See* Backstrom Decl.; Freeman Decl.; Metz Decl.;

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[4] At least one circuit seems to treat the two as indistinguishable. *See Nat'l Audobon Soc'y v. Davis*, 307 F.3d 835, 847 (9th Cir. 2002) ("We decline to read additional 'ripeness' or 'imminence' requirements into the *Ex parte Young* exception . . . beyond those already imposed by a general Article III and prudential ripeness analysis.").

[5] *Care Committee II* appears to treat this imminence standard as an Eleventh Amendment jurisdictional requirement. 766 F.3d at 797. Other circuits have suggested that it may be prudential, or simply a limit on equitable discretion. *See*, *e.g.*, *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 65 (1st Cir. 2005) (leaving this question open), *overruled on other grounds by Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) (en banc).

Sonneman Decl. Plaintiffs point out that the language in the Defendants' affidavits is more circumscribed than in *Care Committee II*. There, the Minnesota attorney general indicated that her office would refuse to participate in any prosecutions under the challenged statute. 766 F.3d at 797. Here, by contrast, the Defendants say only that they have "no present intention" to prosecute. But the fact that the Defendants have not disavowed all future prosecutions does not mean that they are "about to commence proceedings" against the Plaintiffs. *Young*, 209 U.S. at 156. Nor does it change the result that *Care Committee II* did not apply its *Ex parte Young* analysis to the county attorney defendants in that case. *See* Pls.' Reply Mem. at 4-5. The county defendants in both *Care Committee* cases limited their arguments to Article III standing and ripeness, never arguing that the Eleventh Amendment barred the claims against them. *See generally* Br. of Appellee County Attorneys, *281 Care Committee v. Arneson*, No. 13-1229 (8th Cir. Apr. 26, 2013); Br. of Appellee County Attorneys, *281 Care Committee v. Arneson*, No. 10-1558 (8th Cir. June 4, 2010).

B

"Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009). The harm must be "*likely* in the absence of an injunction," *Winter*, 555 U.S. at 22, "great[,] and of such imminence that there is a clear and present need for equitable relief," *Iowa Utils. Bd.*

v. FCC, 109 F.3d 418, 425 (8th Cir. 1996). A plaintiff must show more than a future risk of irreparable harm; "[t]here must be a clear showing of immediate irreparable injury." *Berkley Risk Adm'rs Co., LLC v. Accident Fund Holdings, Inc.*, No. 16-cv-2671 (DSD/KMM), 2016 WL 4472943, at *4 (D. Minn. Aug. 24, 2016) (citation omitted) (internal quotation marks omitted). "Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction." *Watkins Inc.*, 346 F.3d at 844; *see also Gamble v. Minn. State Indus.*, No. 16-cv-2720 (JRT/KMM), 2017 WL 6611570, at *2 (D. Minn. Dec. 1, 2017) (collecting cases).

Plaintiffs have not shown irreparable harm. For starters, the earlier discussion concerning the absence of threatened, much less imminent, enforcement by Defendants is just as relevant to showing the absence of immediate irreparable injury as it was to showing that Plaintiffs are not likely to prevail on the merits. There is more. Plaintiffs commenced this case by filing their complaint on July 24, 2019. ECF No. 1. Plaintiffs did not seek a preliminary injunction until almost one year later, on July 20, 2020. ECF No. 46. They did not request an expedited briefing schedule, meaning the motion was briefed and heard in the usual course of dispositive motions. *See* ECF Nos. 46, 60, 62, 69, and 70. But Plaintiffs have identified no particular circumstances that prompted them to seek a preliminary injunction at this time that were not present when they first filed their complaint. It is true that § 211B.02 regulates political speech and that a general election looms, but Plaintiffs acknowledged at the hearing on

this motion that their claims concern political activities broadly and are not tied specifically to this election. Finally, the harm Plaintiffs identify as being attributable to Defendants seems slight—not irreparable—when one considers that Minn. Stat. § 211B.32 authorizes any person to file a complaint alleging a violation of § 211B.02, and the injunction Plaintiffs request would not address the universe of possible complaints that might be filed by persons other than Defendants.

C

The final two *Dataphase* factors do not change things. The balance-of-harms factor involves "assess[ing] the harm the movant would suffer absent an injunction," as well as the harm the other parties "would experience if the injunction issued." *Katch, LLC v. Sweetser*, 143 F. Supp. 3d 854, 875 (D. Minn. 2015). This factor favors no party. Accepting their declaration testimony as true, Plaintiffs would suffer harm in the form of chilled political speech, but that harm must be weighed against Defendants' testimony that they have no present intention of prosecuting alleged § 211B.02 violations and the fact that any injunction restraining Defendants could have no effect on many other persons who may file a complaint under § 211B.32. In other words, if the issuance of the requested injunction offers so little protection, then it seems very difficult to say that the harm Plaintiffs would suffer absent an injunction is meaningful. The public interest also is neutral. The public, of course, has an interest in the freedoms of speech and association, and this is especially true in the political context. These are most important public

rights. At the same time, as the Attorney General argued in his brief, "Plaintiffs seek to modify the status quo of Minnesota's election law just months before the 2020 general election[,]" and "the Supreme Court has repeatedly emphasized that 'lower federal courts should ordinarily not alter the election rules on the eve of an election.'" Intervenor's Opp'n Mem. [ECF No. 60] at 12 (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, ___ U.S. ___, 140 S. Ct. 1205, 1207 (2020)). This public interest is well established and, under the circumstances of this case, counterbalances the public interests identified by Plaintiffs. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED THAT** Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction [ECF No. 46] is **DENIED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 14, 2020

s/ Eric. C. Tostrud
Eric C. Tostrud
United States District Court

2020 WL 1333154
Only the Westlaw citation is currently available
United States District Court, D. Minnesota.

MINNESOTA RFL REPUBLICAN FARMER LABOR CAUCUS, Vincent Beaudette, Vince for Statehouse Committee, Don Evanson, Bonn Clayton, and Michelle MacDonald, Plaintiffs,
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 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, Defendants.

File No. 19-cv-1949 (ECT/DTS)
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Signed 03/23/2020

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OPINION AND ORDER

Eric C. Tostrud, United States District Court Judge

Plaintiffs, who describe themselves as "political candidates, political associations, and individuals who engage in political activities relating to political elections and campaigns in Minnesota," Compl. ¶ 17 [ECF No. 1], brought this case under 42 U.S.C. § 1983 to assert a pre-enforcement First Amendment challenge to a section of the Minnesota Fair Campaign Practices Act, Minn. Stat. § 211B.02. The challenged statute prohibits political speech based on its content and is two sentences long. Plaintiffs challenge the constitutionality of each sentence. *See id.* ¶¶ 153–197, 198–238. Defendants, four Minnesota county attorneys with authority to prosecute violations of the challenged statute, seek dismissal of Plaintiffs' complaint on two grounds pursuant to Federal Rule of Civil Procedure 12(b)(6). First, Defendants argue that the case must be dismissed because Plaintiffs do not allege that

the First Amendment violation resulted from a policy or custom, a prerequisite to municipal liability under § 1983. *See* Mem. in Supp. at 7–17 [ECF No. 17]. Second, Defendants argue that Plaintiffs' claims challenging the constitutionality of § 211B.02's first sentence are barred by the doctrine of issue preclusion because two Plaintiffs already litigated and lost this same First Amendment challenge in the Minnesota state courts. *See id.* at 19–21. Defendants argue that those Plaintiffs who did not litigate this challenge are in privity with the two who did. Defendants' motion will be denied. Plaintiffs need not plead a policy or custom because they plead plausible *Ex parte Young* claims, and issue preclusion does not bar all Plaintiffs' claims because it has not been shown that all Plaintiffs are in privity.

I[1]

Defendants' motion does not implicate the merits of Plaintiffs' claims, but describing the claims puts things in context. The challenged statute provides:

> A person or candidate may not knowingly make, directly or indirectly, a false claim

[1] Defendants' motion will be adjudicated with Rule 12(b)(6)'s standards always in mind. The complaint's factual allegations and reasonable inferences from those allegations must be accepted as true. *Gorog v. Best Buy Co.*, 760 F.3d 787, 792 (8th Cir. 2014). The complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The factual allegations in the complaint need not be detailed but must "raise a right to relief above the speculative level." *Id.* at 555.

> 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. Plaintiffs claim the entire statute violates the First Amendment, though they divide their complaint into counts challenging the statute's first and second sentences. Compl. ¶¶ 153–238. Plaintiffs claim the first sentence violates the First Amendment right to free speech because it serves no compelling state interest, is not narrowly tailored, and is underinclusive and overbroad. *Id.* ¶¶ 153–185. Plaintiffs also claim the first sentence violates their First Amendment right to expressive association. *Id.* ¶¶ 186–197. Plaintiffs claim the statute's second sentence suffers from these same problems, *id.* ¶¶ 198–224, 228–238, and that it imposes an impermissible prior restraint, *id.* ¶¶ 225–227. Plaintiffs allege that "[t]he Eighth Circuit has already invalidated a closely related section of Minn. Stat. ch. 211B—Minn. Stat. § 211B.06—on First Amendment grounds [in] *281 Care Comm. v. Arneson*, 766 F.3d 774, 787, 789, 795–96 (8th Cir. 2014)." *Id.* ¶ 8. Plaintiffs assert their claims under § 1983 against Defendants in their "official capacity" only. *Id.* at 1 (caption) and ¶¶ 38–41. Plaintiffs allege often that they seek declaratory and injunctive relief—*i.e.*, a declaration that § 211B.02 is unconstitutional

and a permanent injunction against its enforcement. *Id.* at 1 (caption) ("**Complaint for Declaratory and Injunctive Relief**"), ¶¶ 14, 180–84, 197, 220–23, 227, 238, and 239–246. In their prayer for relief, Plaintiffs seek declaratory and injunctive relief, costs "allowed by law," and attorneys' fees and costs under 42 U.S.C. § 1988. *Id.* at 47–48, ¶¶ 1–5. The most natural reading of these many assertions is that Plaintiffs seek *only* declaratory and injunctive relief. However, Plaintiffs twice allege that "Defendants' violations of Plaintiffs' constitutional rights have resulted in *damages* and this Court should grant all available relief under 28 [sic] U.S.C. § 1983." *Id.* ¶¶ 185, 224 (emphasis added).

II

A

If Plaintiffs asserted § 1983 claims against Defendants in their official capacities as county representatives, it would be debatable whether those claims should be dismissed under *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). *Monell*'s basic rule is "that civil rights plaintiffs suing a municipal entity under 42 U.S.C. § 1983 must show that their injury was caused by a municipal policy or custom." *Los Angeles County v. Humphries*, 562 U.S. 29, 30–31 (2010). In other words, a municipality cannot be held liable under § 1983 because it employed a tortfeasor, but it may be "sued directly under § 1983 for monetary, declaratory, or injunctive relief . . . [only if] the action that is alleged to be unconstitutional implements or executes a

policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690. Municipalities also "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690–91. Thus, the "first inquiry in any case alleging municipal liability under § 1983 is . . . whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). What if the only "policy or custom" alleged in a complaint is the municipality's role as enforcer of an allegedly unconstitutional state law? In their opening brief, Defendants do a good job of describing the law and explaining there is no settled answer to this question. The short story is that the Supreme Court has not decided the issue. Nor has the Eighth Circuit. And the other circuits are split. *See Slaven v. Engstrom*, 710 F.3d 772, 781 n.4 (8th Cir. 2013) ("Whether, and if so when, a municipality may be liable under § 1983 for its enforcement of state law has been the subject of extensive debate in the circuits."); *Duhe v. City of Little Rock*, 902 F.3d 858, 863 n.2 (8th Cir. 2018) ("Whether municipal defendants may be liable under § 1983 for enforcing a state criminal statute is a thorny issue."). Some circuits say that a municipality's enforcement of a state law cannot meet *Monell*'s policy-or-custom requirement. As the Seventh Circuit explained in *Bethesda Lutheran Homes and Servs., Inc. v. Leean*, for example:

> When the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury. Apart from this rather formalistic point, our position has the virtue of minimizing the occasions on which federal constitutional law, enforced through section 1983, puts local government at war with state government.

154 F.3d 716, 718 (7th Cir. 1998). Other circuits say that a municipality's choice to enforce a state statute may satisfy *Monell*. For example, in *Vives v. City of New York*, the Second Circuit held that a municipality may trigger liability under *Monell* if it "decides to enforce a statute that it is authorized, but not required, to enforce" and if the enforcement decision was "focused on the particular statute in question" as opposed to a decision simply to enforce all state statutes. 524 F.3d 346, 353 (2d Cir. 2008). Here, Defendants observe that Plaintiffs identify no policy in their complaint and argue that "the very nature of plaintiffs' facial challenge to § 211B.02 renders a *Monell* claim impossible[]" because "[p]olicy responsibility in this scenario lies with the legislature only." Mem. in Supp. at 14, 15.

In response to Defendants' argument that they have not—and cannot—satisfy *Monell*, Plaintiffs say they don't assert *Monell* § 1983 claims against Defendants in their capacity as county officials, but rather *Ex parte Young* claims against Defendants in their capacity as state officials: "Contrary to what the defendants contend, the plaintiffs' complaint does not present

defectively pleaded *Monell* claims—the complaint presents well-pleaded *Ex parte Young*, 209 U.S. 123 (1908) claims." Mem. in Opp'n at 2 [ECF No. 27]. Plaintiffs put it more directly later in their brief when "they hereby declare that they aren't bringing a *Monell* claim." *Id.* at 6.[2]

"In *Ex parte Young*, the Supreme Court recognized [Eleventh Amendment] sovereign immunity does not bar 'certain suits seeking declaratory and injunctive relief against state officers in their individual capacities' based on ongoing violations of federal law." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1131 (8th Cir. 2019) (internal citation omitted) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997)).[3] "The *Ex parte Young* doctrine rests on the

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[2] Defendants reasonably understood Plaintiffs' complaint to assert *Monell* claims. The complaint refers to § 1983, Compl. ¶¶ 15, 185, 224, and 249, never mentions *Ex Parte Young*, and contains no explicit allegation that Defendants act as "state" rather than county officials when they prosecute violations of § 211B.02. As will be discussed, these considerations do not mean Plaintiffs have failed to plead plausible *Ex parte Young* claims.

[3] The Supreme Court sometimes has said that *Ex parte Young* permits suits against state officers in their "official" capacities to enjoin action that would violate federal law. *See, e.g.*, *Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) ("Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*." (citation omitted)); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (recognizing that *Ex parte Young* permits "official-capacity actions for prospective relief" against state officers) (quotation and citation omitted). Regardless, though it certainly matters in other contexts, the individual-versus-official-capacity distinction seems insignificant in these cases. The point is that *Ex parte Young* permits suits against state

premise 'that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes.'" *Kodiak Oil*, 932 F.3d at 1131 (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011)). Whether one is a "state official" depends on whether, in relation to the challenged statute, the person represents the state. *McMillian v. Monroe County*, 520 U.S. 781, 785–86 (1997); *see also Evans v. City of Helena-West Helena*, 912 F.3d 1145, 1146–47 (8th Cir. 2019) (concluding that "the complaint states at least a plausible claim that the [court] clerk was a city official at the time of the alleged wrongdoing"). To determine whether *Ex parte Young*'s exception to Eleventh Amendment immunity applies, a federal district court is to conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring). It also is necessary to determine whether the complaint alleges that the sued state officer has "some connection with the enforcement of the [challenged] act." *281 Care Committee v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) ("*Care Committee I*") (quoting *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145–46 (8th Cir. 2005)). It is true that "[t]he *Ex parte Young* exception only applies against officials 'who threaten and are about to commence proceedings, either of a

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officers for prospective declaratory and injunctive relief—not damages—the Eleventh Amendment notwithstanding.

civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution.'" *281 Care Committee v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014) ("*Care Committee II*") (quoting *Ex parte Young*, 209 U.S. at 156). However, the Eighth Circuit seems to say that, at the Rule 12(b)(6) stage in the proceedings, a federal court need only concern itself with determining that the plaintiff has plausibly identified "a potentially proper party for injunctive relief." *Care Committee II*, 766 F.3d at 797 (quoting *Reprod. Health Servs.*, 428 F.3d at 1145). Plausibly alleging some connection between the sued official and enforcement of the challenged statute is therefore enough. *Compare Care Committee I*, 638 F.3d at 632v33 (Rule 12(b)(6)), *with Care Committee II*, 766 F.3d at 796–97 (summary judgment).

Judged against these rules and Rule 12(b)(6)'s plausibility standard, Plaintiffs plead passable *Ex parte Young* claims.[4] Plaintiffs' complaint "alleges an ongoing

[4] It is true that Plaintiffs don't mention *Ex parte Young* by name in their complaint. That kind of omission might be a problem in a different case. It's not—or at least it seems like it shouldn't be—here. The authorities described above make clear that the plausibility of an *Ex parte Young* claim is determined by Plaintiffs' factual allegations and not labels. Research has not disclosed, and Defendants have not cited, authority holding that a complaint's failure to refer explicitly to *Ex parte Young* forbids its assertion. Defendants have not suffered prejudice as a result of the omission. This is not, for example, a case where *Ex parte Young* was sprung late in the litigation's course. It would make little practical sense to dismiss the complaint on this basis. Fed. R. Civ. P. 1. No doubt Plaintiffs would amend to add references to *Ex parte Young*, Defendants appropriately would refile their motion, and the result would be that the merits of that motion would

violation of federal law and seeks relief properly characterized as prospective[.]" *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., concurring). There is no dispute about this. Plaintiffs allege that § 211B.02 violates the First Amendment, and the complaint's many references to declaratory and injunctive relief all but confirm that Plaintiffs seek only prospective relief.[5] The complaint plausibly alleges that Defendants are state officials when they prosecute violations of § 211B.02. The complaint describes § 211B.02's enforcement procedures in some detail. Compl. ¶¶ 45–56. It alleges that county attorneys have authority to prosecute "any violation" of chapter 211B, including a violation of § 211B.02. Compl. ¶¶ 38–41, 53–54; Minn. Stat. § 211B.16. The complaint alleges also that county attorneys receive referrals for violations of § 211B.02 from a state office—the Minnesota Office of Administrative Hearings. Compl. ¶¶ 45–46, 53–54. Defendants

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have to be decided later rather than sooner. Importantly, this is not a situation where a plaintiff seeks to add factual allegations to a complaint by raising them in a memorandum in opposition to a motion to dismiss, a practice the Eighth Circuit prohibits. *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989). Plaintiffs do not raise or rely on any facts in their opposition brief that aren't alleged in the complaint.

[5] Plaintiffs' two allegations that "Defendants' violations of the Plaintiffs' constitutional rights have resulted in damages and this Court should grant all available relief under 28 [sic] U.S.C. § 1983," Compl. ¶¶ 185, 224, seem too fleeting to warrant a different conclusion, especially since Plaintiffs do not request damages in their prayer for relief. Compl. at 47–48, ¶¶ 1–5. Regardless, Plaintiffs' reliance on *Ex parte Young* means they cannot recover damages and renders these assertions, if they might be understood as damages requests, pointless.

do not seem to dispute—and certainly do not mount a serious opposition to the assertion—that they act as state officials when they prosecute violations of § 211B.02. To their credit, Defendants acknowledge that a "court in this District has concluded that a Minnesota county attorney may be considered a state actor when performing a prosecutorial function, under the test identified in *McMillian* and based upon an analysis of Minnesota law." Defs.' Reply Mem. at 9, n.3 [ECF No. 29] (citing *St. James v. City of Minneapolis*, No. 05-cv-2348 (DWF/JJG), 2006 WL 2591016, at *4–5 (D. Minn. June 13, 2006)). That same conclusion is appropriate here. Finally, though the litigation process may yield assurances that Defendants "will not take up [their] discretionary ability to assist in the prosecution of [§ 211B.02]," *Care Committee II*, 766 F.3d at 797, the complaint's description of Defendants' connection to the enforcement of § 211B.02 is enough to plausibly show that Defendants are proper parties for prospective declaratory and injunctive relief, *Care Committee I*, 638 F.3d at 632–33.

Defendants advance other arguments for dismissal, but none justify granting their motion. Defendants argue that "*Ex parte Young* by itself does not create a cause of action." Def. Reply Mem. at 5. That's debatable. It is true that some federal courts have said that. *E.g.*, *Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 905 (6th Cir. 2014) ("*Ex parte Young* by itself does not create such a cause of action. Put another way, *Ex parte Young* provides a path around sovereign immunity *if* the plaintiff already has a cause of action

from somewhere else." (citing *Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 603 F.3d 365, 392–93 (7th Cir. 2010) (en banc) (Easterbrook, J., dissenting on other grounds))). But some Supreme Court cases can only be read as understanding *Ex parte Young* to implicitly create a cause of action. James Leonard, *Ubi Remedium Ibi Jus, Or, Where There's a Remedy, There's a Right: A Skeptic's Critique of Ex Parte Young*, 54 Syracuse L. Rev. 215, 279 (2004). Whether *Ex parte Young* creates a cause of action need not be resolved here because Plaintiffs have "a cause of action from somewhere else"—§ 1983. Plaintiffs assert claims under § 1983. Compl. ¶¶ 15, 185, 224, and 249. And there is no question § 1983 provides Plaintiffs a cause of action in view of the nature of their claims: "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (quotation omitted). Defendants also argue that Plaintiffs must, but have failed to, allege the existence of a policy or custom because "the *Monell* requirement applies in equal measure to claims for prospective injunctive relief under *Ex parte Young*." Defs.' Reply Mem. at 8. This is not correct. *Monell*'s policy or custom requirement is "a liability standard for suits against municipalities . . . and it has no applicability to state officers who are immune from suit for damages but susceptible to suit under *Ex parte Young* for injunctive relief." *Rounds v. Clements*, 495 Fed. App'x 938, 941 (10th Cir. 2012) (Gorsuch, J.); *see also*

Ambrose v. Godinez, 510 Fed. App'x 470, 471–72 (7th Cir. 2013).

B

This is not the first time Plaintiffs Bonn Clayton and Michelle MacDonald have challenged § 211B.02's first sentence on First Amendment grounds, and Defendants argue that Clayton and MacDonald's previous challenges bar all Plaintiffs from challenging § 211B.02's first sentence here under the collateral-estoppel doctrine. Mem. in Supp. at 19–21. In separate cases, the Minnesota Office of Administrative Hearings determined that Clayton and MacDonald violated § 211B.02's first sentence; Clayton and MacDonald challenged those determinations before the Minnesota Court of Appeals, arguing among other things that the first sentence of § 211B.02 is facially unconstitutional in violation of the First Amendment. *Niska v. Clayton*, No. A13-0622, 2014 WL 902680 (Minn. Ct. App. Mar. 10, 2014), *review denied* (Minn. June 25, 2014); *Linert v. MacDonald*, 901 N.W.2d 664 (Minn. Ct. App. 2017). The Minnesota Court of Appeals rejected both Clayton and MacDonald's First Amendment challenges. *Clayton*, 2014 WL 902680, at *6–10; *MacDonald*, 901 N.W.2d at 667–70. In response to Defendants' collateral-estoppel argument, Plaintiffs "Clayton, MacDonald, and the Minnesota RFL Republican Farmer Labor Caucus agree to the dismissal with prejudice of all of their claims based on § 211B.02's first sentence under

Fed. R. Civ. P. 41(a)." Mem. in Opp'n at 11.[6] The issue for decision, then, is whether Clayton and MacDonald's prior challenges to § 211B.02's first sentence bar the remaining Plaintiffs' challenges to that sentence in this case.

"Under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts 'must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'" *Finstad v. Beresford Bancorporation, Inc.*, 831 F.3d 1009, 1013 (8th Cir. 2016) (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984)). "Under Minnesota law, collateral estoppel is appropriate when the following four elements are met: (1) the issue [is] identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue." *Illinois Farmers Ins. Co. v. Reed*, 662 N.W.2d 529, 531–32 (Minn. 2003) (quotation omitted). Under Minnesota law:

> Privity exists where a non-party's "interests are represented by a party to the action," or where a party is "otherwise so identified in interest with another that he represents the

[6] This statement will be construed as "a notice of dismissal" under Rule 41(a)(1)(A)(i). Though it is not necessary under Rule 41(a), for clarity's sake, an order will be entered dismissing these claims in accordance with Plaintiffs' statement.

> same legal right" with respect to a previously asserted claim. *Rucker v. Schmidt*, 794 N.W.2d 114, 118 (Minn. 2011) (internal quotation marks omitted). It is not enough that two individuals both wish to prevail in litigation; their legal interests must be aligned to the point of being "similarly affected by the outcome of a legal proceeding." *Id.* at 120. The Minnesota Supreme Court has emphasized that privity has no per se definition and that privity determinations "require[ ] a careful examination of the circumstances of each case." *Id.* at 118.

Anderson v. City of St. Paul, 849 F.3d 773, 778 (8th Cir. 2017). Add to Minnesota law an important federal procedural point: collateral estoppel is an affirmative defense, and affirmative defenses ordinarily do not subject a complaint to dismissal under Rule 12(b)(6). *Roiger v. Veterans Affairs Health Care Sys.*, No. 18-cv-00591 (ECT/TNL), 2019 WL 572655, at *7 (D. Minn. Feb. 12, 2019) (citing 5B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 1357 (3d ed. & Nov. 2018 Update)). Collateral estoppel may justify a Rule 12(b)(6) dismissal only if the complaint or materials that appropriately may be considered on a Rule 12(b)(6) motion establish the defense beyond dispute. *Roiger*, 2019 WL 572655, at *7; *see also Austin v. Downs, Rachlin & Martin Burlington St. Johnsbury*, 270 Fed. App'x 52, 53 (2d Cir. 2008) ("When a defendant raises the affirmative defense of . . . collateral estoppel and it is clear from the face of the complaint that the plaintiff's claims are

barred as a matter of law, dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate." (quotation omitted)). This consideration seems particularly important in view of the Minnesota Supreme Court's admonition that privity decisions "require[] a careful examination of the circumstances of each case." *Rucker*, 794 N.W.2d at 118.

Clayton and MacDonald's prior challenges to § 211B.02's first sentence do not warrant the Rule 12(b)(6) dismissal of the remaining Plaintiffs' challenges to that sentence in this case. Defendants identify no law or facts suggesting that Clayton or MacDonald in their prior cases represented the interests of Vincent Beaudette, the Vince for Statehouse Committee, or Don Evanson. Nothing suggests any of these three had anything to do with Clayton or MacDonald's cases. No facts suggest that Beaudette, the Vince for Statehouse Committee, or Evanson's legal interests are aligned with Clayton's or MacDonald's in relation to the prior suits. Nothing shows any of these three controlled Clayton or MacDonald's prior cases. Defendants' argument that "the outcome of that litigation has the same impact on [Clayton and MacDonald] as it does on all Minnesotans, including the remaining plaintiffs," Def. Mem. at 20, seems the same thing as saying that the Minnesota Court of Appeals' decisions in *Clayton* and *MacDonald* are persuasive precedents. That is not enough to establish collateral estoppel. Finally, nothing shows that Beaudette, the Vince for Statehouse Committee, or Evanson had a "full and fair opportunity

to be heard on the adjudicated issue" in the prior suits. *Illinois Farmers*, 662 N.W.2d at 531.

ORDER

Based upon all the files, records, and proceedings in this case, **IT IS ORDERED** that:

1. Pursuant to Fed. R. Civ. P. 41(a) the claims of Plaintiffs Minnesota RFL Republican Farmer Labor Caucus, Bonn Clayton, and Michelle MacDonald based on the first sentence of Minn. Stat. § 211B.02 are **DISMISSED WITH PREJUDICE**.

2. Defendants' Joint Motion to Dismiss [ECF No. 14] is **DENIED**.