No. _____

In the Supreme Court of the United States

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

v.

Mary Moriarty, in her official capacity as County Attorney for Hennepin County, Minnesota, or her successor; Mark Metz, in his official capacity as County Attorney for Carver County, Minnesota, or his successor; Karin L. Sonneman, in her official capacity as County Attorney for Winona County, Minnesota, or her successor; and Kathryn Keena, in her official capacity as County Attorney for Carver County, Minnesota, or her successor,
Respondents,
Attorney General's Office for the State of Minnesota,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The petitioners brought a § 1983 First Amendment pre-enforcement complaint for declaratory judgment against county attorney enforcement of Minnesota Statutes § 211B.02's ban on false claims of political support. Although the petitioners satisfied the requirements for Article III standing, the Eighth Circuit, in conflict with existing Ninth Circuit precedent, imposed additional ripeness or imminence requirements under the *Ex parte Young* exception to Eleventh Amendment immunity in an action for declaratory relief beyond those already imposed by a general Article III standing prudential ripeness analysis. *Minnesota RFL Republican Farmer Labor Caucus*, 108 F.4th 1035, 1037–38 (8th Cir. 2022) (imposing additional *Ex parte Young* imminence requirements); *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 846–47 (9th Cir. 2002) (not imposing additional *Ex parte Young* imminence requirements).

> Whether there are additional ripeness or imminence requirements under the *Ex parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a general Article III and prudential ripeness analysis.

PARTIES TO THE PROCEEDINGS

The petitioners are Minnesota RFL Republican Farmer Labor Caucus, Vincent Beaudette, Vince for Statehouse Committee, Don Evanson, Bonn Clayton, and Michelle MacDonald. The petitioners were the plaintiffs and then appellants in the lower court proceedings. The Hennepin County Attorney Mary Moriarty, the Carver County Attorney Mark Metz, the Winona County Attorney Karin L. Sonneman, and the Dakota County Attorney Kathryn Keena were the defendants and subsequent appellees in the lower court proceedings. Minnesota Attorney General Keith Ellison has intervened in the proceedings.

CORPORATE DISCLOSURE STATEMENT

The non-individual petitioners are Minnesota RFL Republican Farmer Labor Caucus and Vince for Statehouse Committee. None of the petitioners are corporate entities, nor affiliated with corporate entities. Minnesota RFL Republican Farmer Labor Caucus is an unincorporated association that does not have any ownership interests. Minnesota RFL Republican Farmer Labor Caucus does not have a parent corporation, and no publicly held corporation owns any ownership interests in Minnesota RFL Republican Farmer Labor Caucus. Vince for Statehouse Committee is an unincorporated association that does not have any ownership interests. Vince for Statehouse Committee does not have a parent corporation, and no publicly held corporation owns any ownership interests in Vince for Statehouse Committee.

LIST OF RELATED CASES

Miller v. Republican Party of Minnesota, U.S. S. Ct. No. 24-53, is a related case with a petition for writ of certiorari simultaneously pending in this Court. Both the petitioners' complaint in this case, which was initiated by petitioners in 2019, and the constitutional defenses raised in Miller's case, which was initiated against Miller in 2022, challenge the constitutionality of the same Minnesota Statutes § 211B.02 banning false claims of political organizational support. Therefore, the two cases, under Supreme Court Rule 14(1)(b)(3), are inextricably intertwined, "directly related" cases. The question presented in Miller's case covers the same subject as the petitioners' First Amendment pre-enforcement complaint:

> Whether the State of Minnesota's adjudication and enforcement of a $250 fine for violating Minnesota Statutes § 211B.02, based on petitioner-write-in candidate's purported statement of Republican Party of Minnesota support, is constitutional error because § 211B.02 so broadly bans candidates' and non-candidates' false campaign speech to discourage open debate and truthful speech.

If the petitioners had prevailed in their First Amendment pre-enforcement complaint filed in 2019 to enjoin enforcement of Minnesota Statutes § 211B.02, Miller would never have been prosecuted in 2022-2024 for violating Minnesota Statutes § 211B.02. In Miller's case, the Minnesota Supreme Court issued an order of denial of petition for review on April 16, 2024. The Minnesota Court of Appeals issued its

opinion on January 16, 2024. *Republican Party of Minnesota v. Miller*, No. A23-0029, 2024 WL 159126 (Minn. Ct. App. Jan. 16, 2024). The Findings of Fact, Conclusions of Law and Order, issued by the Minnesota Office of Administrative Hearings, File No. 60-0320-38740, is dated December 9, 2023. The petition for writ of certiorari was filed in this Court on July 15, 2024. The opposition briefs were filed, including one by the Attorney General, an intervenor in this case, on August 30, 2024. The petition's appendix in Miller's case, App-1 through App-31, includes the legal decisions referenced above.

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PETITION FOR A WRIT OF CERITORARI

The Petitioners respectfully petition for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit issued an order of denial of petition for rehearing en banc on August 26, 2024. *Minnesota RFL Republican Farmer Labor Caucus v. Moriarty*, No. 23-1563, 2024 WL 3929990 (8th Cir. Aug. 26, 2024). This order is included in the appendix at A-1. The Eighth Circuit had issued its opinion on July 19, 2024. *Id.,* 108 F.4th 1035. This opinion is included in the appendix at A-2. The Eighth Circuit had previously issued a decision in the appeal for denial of a preliminary injunction motion on May 10, 2022; and, the Supreme Court denied the petition for writ of certiorari. *Id.*, 33 F.4th 985, 992 (8th Cir. 2022), *cert. denied sub nom. Christian Action League of Minn. v. Freeman*, 143 S. Ct. 304 (2022). The Eighth Circuit's opinion is in the appendix at A-7. The district court has previously denied the preliminary injunction motion and dismissed the case. *Id.,* 661 F.Supp.3d 891 (D. Minn. 2023); *id.,* 486 F.Supp.3d 1300 (D. Minn. 2020). These opinions are included in the appendix at A-21 and A-45, respectively.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254 which provides for petitions for writ of certiorari from cases arising in the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment, as incorporated against the states through the Fourteenth Amendment, provides that states "shall make no law…abridging the freedom of speech."

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Minnesota Statutes § 211B.02, provides in relevant part, "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."

STATEMENT OF THE CASE

This petition for writ of certiorari is warranted because an inter-circuit conflict exists on the unresolved, important question of whether there are additional ripeness or imminence requirements for the *Ex Parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a general Article III prudential ripeness standing analysis.

Notably, the Supreme Court has never answered this important question of an imminence requirement applicable to complaints for declaratory relief. But, the Supreme Court has answered the related question in actions for injunctive relief—

requiring additional ripeness and imminence requirements for the *Ex parte Young* exception to Eleventh Amendment immunity. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380–81 (1992). Consistently, the First Circuit has noted this Court in *Morales* did not divest the district court of jurisdiction, only that the district court had to issue a "narrower injunction." *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 65 (1st Cir. 2005), *overruled on other grounds, by Narragansett Indian Tribe v. Rhode Island,* 449 F.3d 16 (1st Cir. 2006) (en banc).

Meanwhile, a circuit conflict exists on whether the same imminence requirements, applicable to complaints for injunctive relief, apply to complaints for declaratory relief. *Compare Minnesota RFL Republican Farmer Labor Caucus*, 108 F.4th 1037–38 and *Minnesota RFL Republican Farmer Labor Caucus v. Freeman*, 33 F.4th 985, 992 (8th Cir. 2022), *cert. denied sub nom. Christian Action League of Minn. v. Freeman*, 143 S. Ct. 304 (2022) (imposing additional *Ex parte Young* imminence requirements) and *Mi Familia Vota v. Ogg*, 105 F.4th 313, 333 (5th Cir. 2024) (imposing additional *Ex parte Young* imminence requirements) with *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 846–47 (9th Cir. 2002) (not imposing additional *Ex parte Young* imminence requirements). *See Aroostook Band of Micmacs,* 404 F.3d at 65 (additional *Ex parte Young* imminence requirements "may be subject to debate").

A. Petitioners filed a First Amendment pre-enforcement challenge against enforcement of Minnesota Statutes § 211B.02's ban on false campaign speech.

Because of Minnesota Statutes § 211B.02's chilling effect on their political speech, the petitioners brought this First Amendment pre-enforcement suit in the United States District Court for the District of Minnesota by filing a seven-count complaint that challenged both sentences of § 211B.02 on multiple First Amendment theories. R. Doc. 1, at 1–48. The petitioners explained, in detail, ch. 211B's enforcement procedures, § 211B.02's enforcement history, and § 211B.02's chilling effect on their speech. R. Doc. 1 ¶¶ 1–7, 17–37, 45–152, at 1–3, 5–8, 9–30. The petitioners also explained that they were suing the county attorneys because the county attorneys have authority to enforce § 211B.02. R. Doc. 1 ¶¶ 38–44, 54–56, at 8–9, 11–12. And, of course, the petitioners explained why § 211B.02 violates the First Amendment. R. Doc. 1 ¶¶ 153–238, at 30–46. The petitioners sought a declaration that both sentences of § 211B.02 violate the First Amendment and an injunction barring the county attorneys from enforcing § 211B.02. R. Doc. 1, at 47.

B. Minnesota has a history of civilly and criminally enforcing Minnesota Statutes § 211B's bans on false campaign speech.

As background, Minnesota has a history of civilly and criminally enforcing Minnesota Statutes § 211B's bans on false campaign speech—including against the petitioners. The applicable administrative

complaint process and the threat of criminal prosecution chills truthful political speech because no election participant will risk civil and criminal fines.

The petitioner is challenging the constitutionality of Minn. Stat. § 211B.02 because the section limits what any person may say regarding the support or endorsement of a "major political party," "party unit," or any other organization:

> 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.

Anyone may file a complaint alleging a violation of § 211B.02 with the Minnesota Office of Administrative Hearings (OAH). *See* Minn. Stat. § 211B.31 (defining "office" to mean "the Office of Administrative Hearings" for purposes of Minn. Stat. §§ 211B.32–36), 211B.32, subd. 1(a) (requiring that a complaint alleging a violation of ch. 211B be filed with "the office," i.e., the OAH, but placing no limit on who may file); *281 Care Comm. v. Arneson*, 766 F.3d 774, 790 (2014) (recognizing "that *anyone* may lodge a complaint with the OAH alleging a violation of § 211B.06").

Within three business days after the OAH receives a complaint, an administrative law judge (ALJ) must make a preliminary determination about what to do with it. Minn. Stat. § 211B.33, subd. 1. The ALJ must dismiss the complaint if it fails to "set forth a prima facie violation of chapter 211A or 211B." *Id.*, subd. 2(a). If "the complaint sets forth a prima facie violation of" § 211B.02, and if "the complaint was filed within 60 days before the primary or special election or within 90 days before the general election to which the complaint relates, the [ALJ], on request of any party, must conduct an expedited probable cause hearing under section 211B.34." *Id.* § 211B.33, subd. 2(c). If "the complaint sets forth a prima facie violation of" § 211B.02, and if the complaint "was filed more than 60 days before the primary or special election or more than 90 days before the general election to which the complaint relates, the [ALJ] must schedule an evidentiary hearing under section 211B.35." *Id.* § 211B.33, subd. 2(d).

If, at the probable cause hearing, the ALJ determines that the complaint isn't supported by probable cause, the ALJ must dismiss the complaint. *Id.* § 211B.34, subd. 2(intro.)–2(a). If, at the hearing, the ALJ determines that the complaint is supported by probable cause, the chief ALJ must schedule an evidentiary hearing on the complaint under § 211B.35. *Id.*, subd. 2(intro.), 2(b).

If an evidentiary hearing is required, the chief ALJ must assign the complaint to a panel of three ALJs who will preside at the hearing. *Id.* § 211B.35, subd. 1. How soon the hearing must be held depends on several factors. *Id.*

After the hearing, the three-judge panel must make one of several dispositions, which include

dismissing the complaint, issuing a reprimand, imposing a civil penalty of up to $5,000, or referring the complaint to a county attorney. *Id.*, subd. 2.

A violation of § 211B.02 is a misdemeanor. Minn. Stat. § 211B.19 (providing that a violation of chapter 211B is a misdemeanor unless a different penalty is provided). Thus a violation of § 211B.02 is punishable by imprisonment for up to 90 days or a fine of up to $1,000. *See id.* § 609.03 (providing for punishment for crimes for which no other punishment is provided), 609.03(3) (describing the punishment for a misdemeanor); *id.* § 609.015, subd. 2 (providing that chapter 609 applies to crimes created by other provisions of the Minnesota Statutes).

A county attorney may prosecute any violation of chapter 211B, including a violation of § 211B.02, even without a panel referral. *Id.* § 211B.16, subd. 3.

Sections 211B.02 and 211B.06 were enacted as sections of the same article of the same statute. 1988 Minn. Sess. Law Serv. 578, art. 3 § 2 (enacting § 211B.02), § 6 (enacting § 211B.06). Section 211B.06 was later amended, 1998 Minn. Sess. Law Serv. 376 § 3, but the original version, like the amended version, restricted false statements about a candidate's "character or acts" or about "the effect of a ballot question," 1988 Minn. Sess. Law Serv. 578, art. 3 § 6.

In 2003, Michael Fahey, who was then the Carver County Attorney, prosecuted a man named John Knight for violating Minn. Stat. § 211B.06. *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 787–88 (8th Cir. 2004) (discussing the prosecution as background to a civil-rights suit). Mr. Fahey initiated this prosecution after Amy Klobuchar, who was then the Hennepin County Attorney, referred a complaint to Mr. Fahey because

her office had a conflict of interest. *Republican Party*, 381 F.3d at 787–88.

In 2002, the Ramsey County Attorney prosecuted Eugene Copeland for violating § 211B.06 on the ground that he had falsely claimed to be "the only pro-life candidate" in a special election for a Minnesota state senate seat. *Minnesota v. Copeland*, Ramsey County (Minn.) District Court case no. 62-k1-02-003123 (2002).

Since 2014, the OAH has enforced § 211B.02 through a civil penalty in at least four cases, including Miller's 2022 related case. First, in *Niska v. Clayton*, which included petitioner Bonn Clayton as defendant, the OAH imposed a civil penalty of $600 on Bonn Clayton for violating § 211B.02 through statements on a website endorsing and recommending judicial candidates, and the Court of Appeals affirmed. *Niska v. Clayton*, No. A13-0622, 2014 WL 902680 (Minn. Ct. App. Mar. 10, 2014), *rev. denied* (Minn. 2014), *cert. denied*, 135 S.Ct. 1399 (2015).

Second, in *City of Grant v. Smith*, No. A16-1070, 2017 WL 957717 (Minn. Ct. App. Mar. 13, 2017), *rev. denied* (May 30, 2017), the Minnesota Court of Appeals upheld an OAH order under § 211B.02 imposing a civil penalty of $250 on John Smith for distributing a campaign flyer and campaign brochure that resembled the City of Grant, Minnesota's newsletters and other city documents.

Third, in *Linert v. MacDonald*, which included petitioner Michelle MacDonald as defendant, an OAH three-judge panel ruled that Appellant Michelle MacDonald "knowingly violated Minn. Stat. § 211B.02 by falsely claiming to be endorsed by the 'GOP Judicial Selection Committee 2016'" and ordered MacDonald to pay a $500 civil penalty. 901 N.W.2d 664 (Minn. Ct.

App. 2017). The Minnesota Court of Appeals affirmed the OAH's order. *Id.*

Fourth, in Miller's related case, *Republican Party of Minnesota v. Miller*, a three-judge OAH panel imposed a $250 penalty on Nathan Miller and his campaign committee for violating § 211B.02 in the 2022 race for a state senate seat. A-31 Findings of Fact, Conclusions of Law, and Order, *Republican Party of Minnesota v. Miller*, OAH 60-0320-38740 (Minn. OAH, Dec. 9, 2022). Miller had sought, but failed to obtain, the Republican Party's nomination. *Id*. The panel found that Miller violated § 211B.02 because he posted on his campaign website an image of someone else's flyer advertising a political rally that displayed Miller's name followed by the descriptor "(SD9 – Republican Party)":

> --Nathan Miller
> (SD 9 -- REPUBLICAN PARTY)

Id. The Panel concluded that "it is not likely that many voters were misled or confused":

> The Panel finds Respondent's violation was negligent and may have had some impact on voters. However, given that Respondent Miller was a write-in candidate, it is not likely that many voters were misled or confused. Moreover, Respondent Miller widely publicized the fact that he was a write-in candidate running against the RPM-endorsed candidate.

Id. The Panel penalized Miller $250 even though there was minimal or no impact on voters.

And, that is because the OAH's penalty scheme is intended to punish false campaign statements even when there is minimal or no impact on voters. According to OAH, even if the statement was negligent or inadvertent and had "minimal or no impact on voters"—as with Miller—the official OAH website threatens the public with civil fines and criminal prosecution for violating chapter 211B, including § 211B.02, as evidenced by the OAH's penalty matrix:

Possible Penalties

Every case is unique and each penalty will be selected to reflect the specific facts of the case. In order to assure some consistency from one case to the next, the three judge panel uses a presumptive penalty matrix as guidance. In any case, the three judge panel may depart from the presumptive penalty listed below and will explain the reasons for any departures.

Willfulness	Gravity of Violation		
	Minimal/no impact on voters, easily countered	Some impact on several voters, difficult to correct/counter	Many voters misled, process corrupted, unfair advantage created
Deliberate, multiple violations in complaint, history of violations, clear statute, unapologetic	$600 - 1,200	$1,200 – 2,400 and/or Refer to County Attorney	$2,400 – 5,000 and/or Refer to County Attorney
Negligent, ill-advised, ill-considered	$250 - 600	$600 - 1,200	$1,200 – 2,400 and/or Refer to County Attorney
Inadvertent, isolated, promptly corrected, vague statute, accepts responsibility	$0 - 250	$400-600	$600 - 1,200

Fair Campaign Practices, Minnesota Office of Administrative Hearings, https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp. That penalty matrix is what the Minnesota Office of Administrative Hearings (OAH) uses to guide a three-judge panel's imposition of penalties for chapter-211B violations, and the matrix provides for a criminal

referral to a county attorney as an appropriate penalty for certain categories of violations. *Id*.

The order imposing a civil penalty on Miller for violating § 211B.02 did not refer him to a county attorney, but the order did include the penalty matrix, thus implying that criminal prosecution is a credible threat in future cases. *Id.* The OAH notice informing Miller that the OAH was going to hold an evidentiary hearing to determine whether he had broken the law warned Miller that, after the evidentiary hearing, the panel might refer the complaint against him "to the appropriate county attorney." Notice of Panel Assignment and Order for Evidentiary Hearing, *Miller*, OAH 60-0320-38740 (Minn. OAH, Nov. 8, 2022)). The Notice stated "that the panel may refer the complaint to the appropriate county attorney":

BURDEN OF PROOF

The burden of proving the allegations in the complaint is on the complainant. The standard of proof for violations of Minn. Stat. § 211B.02 is a preponderance of the evidence.[6]

DISPOSITION OF COMPLAINT

At the conclusion of the evidentiary hearing, the panel must determine whether the violation alleged in the complaint occurred and must make at least one of the following dispositions:

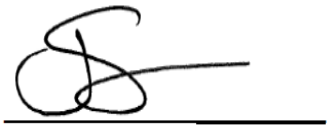
1. The panel may dismiss the complaint.
2. The panel may issue a reprimand.
3. The panel may impose a civil penalty of up to $5,000 for any violation of chapter 211A or 211B (2022).
4. The panel may refer the complaint to the appropriate county attorney.

The panel must dispose of the complaint within three (3) days after the hearing record closes.[7]

JUDICIAL REVIEW

A party aggrieved by a final decision on a complaint filed under section 211B.32 is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 -.69 (2022).

Dated: November 8, 2022



JENNY STARR
Chief Administrative Law Judge

Id. Miller was fined $250 for his 2022 election-related speech, but has not been prosecuted by the county attorneys yet.

In this way, as explained above in the related cases section, *Miller v. Republican Party of Minnesota,* No. 24-53, is a directly related case with a petition for

writ of certiorari simultaneously pending in this Court.

C. The petitioners brought a First Amendment pre-enforcement complaint against county attorney enforcement of Minnesota Statutes § 211B's bans on false campaign speech.

The petitioners filed their First Amendment pre-enforcement complaint on July 24, 2019. R. Doc. 1. The complaint identified the four county attorneys as the defendants. The complaint sought prospective declaratory and injunctive relief. *Id.* The Attorney General of Minnesota provided a Notice of Intervention in the district court proceedings on November 27, 2019. R. Doc. 30.

D. In ruling on the county attorneys' motion to dismiss, the district court held that the petitioners stated a claim under *Ex Parte Young*.

After the filing of the complaint, the county attorneys brought a joint motion to dismiss the complaint. R. Doc. 14, at 14-15 (the motion itself); R. Doc. 17, at 1–23 (the supporting brief). In support of their motion, the county attorneys made several arguments, none of which engaged the merits of any of the First Amendment theories presented in the complaint. R. Doc. 17, at 7–21. Conspicuously missing from the county attorneys' brief was any reference to *Ex parte Young*, 209 U.S. 123 (1908). *See id*. at 1–23. Only one of the county attorneys' arguments is worth discussing here: the argument that the complaint was

inadequately pleaded under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). *Id*. at 1–2, 7–17. The county attorneys contended (1) that the suit was really against the counties that employ them, and (2) that petitioners' claims against the counties failed because petitioners were challenging a *state* law, not a policy or practice of any of the *counties*. *Id*. at 1–2, 7–17. In support of their position, the county attorneys argued that the threats alleged in the complaint came exclusively from § 211B.02, not from a county policy. *Id*. at 16–17.

In their opposition brief, the petitioners explained that they were bringing an *Ex parte Young* pre-enforcement challenge, not *Monell* claims. R. Doc. 27, at 2–10. The brief's introduction contained the first reference to *Ex parte Young* in this suit. *Id*. at 2 (citing *Ex parte Young*, 209 U.S. 123 (1908)). The petitioners further explained that, under *Ex parte Young* and 42 U.S.C. § 1983, the county attorneys are proper defendants in a pre-enforcement challenge to § 211B.02 because, under § 211B.16, they have authority to enforce § 211B.02. *Id*. at 2–3, 3–10.

In its opinion and order denying the motion to dismiss, the district court correctly resolved this issue in favor of the petitioners. R. Doc. 35, at 2, 4–10. The court held that the complaint's explanation of the county attorneys' role in enforcing § 211B.02 was sufficient to state a claim for declaratory and injunctive relief against them under *Ex parte Young*, *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), and *281 Care Committee v. Arneson*, 766 F.3d 774 (8th Cir. 2014). R. Doc. 35, at 7–10.

E. After the petitioners moved for a preliminary injunction, the district court denied the motion, holding that although petitioners faced a sufficient risk of prosecution to establish standing, they failed to show a sufficiently imminent risk to prevail under *Ex parte Young* exception to Eleventh Amendment immunity.

After the district court had denied the motion to dismiss, the petitioners moved for a preliminary injunction barring the county attorneys from enforcing § 211B.02. R. Doc. 46. In support of their motion, the petitioners filed declarations containing detailed descriptions of the speech in which they wanted to engage and the reasons why § 211B.02 chills that speech. R. Docs. 51, 53–55.

Here is where this case took a strange turn. In response to petitioners' motion, the county attorneys filed declarations stating that they had never prosecuted anybody for violating § 211B.02, that they were not investigating any alleged § 211B.02 violation, and that they had "no present intention" of prosecuting anybody for violating § 211B.02. R. Doc. 63 ¶¶ 3–6, at 2; R. Doc. 64 ¶¶ 3–6, at 2; R. Doc. 65 ¶¶ 3–6, at 2; R. Doc. 66 ¶¶ 3–4, 8–9, at 2. The county attorneys did not, however, disavow future prosecutions.

The district court denied petitioners' motion, ruling that the petitioners would be unlikely to prevail on the merits because they would be unlikely to show a sufficient threat of enforcement to fit within *Ex parte Young*'s exception to Eleventh Amendment immunity. R. Doc. 71, at 10–14, 16.

Crucial to the court's ruling, was the court's distinction between standing and the *Ex parte Young* doctrine. Reviewing the record, including what the petitioners had informed the court about § 211B.02's enforcement history, the district court said that it was satisfied that the petitioners had standing because of a credible threat of § 211B.02 being enforced against them for the speech that they proposed to engage in: "The prospect of criminal sanctions, considered alongside the history of administrative enforcement, gives Plaintiffs' sufficient reason to fear repercussions from their political speech." R. Doc. 71, at 9; *see also* R. Doc. 71, at 4–9.

But, relying on the Eighth Circuit's opinion in *281 Care Committee*, the district court determined that the Eighth Circuit imposes a higher bar for applying *Ex parte Young*'s exception to Eleventh Amendment immunity than for finding Article III standing. R. Doc. 71, at 12–13 (citing *281 Care Committee*, 766 F.3d at 796–97). The district court held that a plaintiff bringing a pre-enforcement challenge against a state official cannot prevail without showing that the official is "'about to commence proceedings' against" the plaintiff, and that, because of the county attorneys' declarations disavowing a present intent to enforce § 211B.02, the petitioners had failed to satisfy that test. R. Doc. 71, at 13 (quoting *Ex parte Young*, 209 U.S. at 156).

F. The Eighth Circuit affirmed the district court's denial of the petitioners' preliminary injunction motion.

The petitioners appealed the district court's denial of their preliminary-injunction motion, and the

Eighth Circuit affirmed. R. Doc. 100, at 2. The Eighth Circuit held that the county attorneys' declarations "establish[ed] their 'unwillingness to exercise [their] ability to prosecute a § 211B.0[2] claim against Appellants'" and that "the *Ex parte Young* exception to Eleventh Immunity [was therefore] inapplicable." R. Doc. 100, at 11 (second and third alteration in original) (quoting *281 Care Committee*, 766 F.3d at 797).

G. The parties cross-moved for summary judgment, and the district court granted the county attorneys' motion because of an insufficient threat of prosecution.

The district-court proceeding was not yet over, but the petitioners faced an uphill battle because the district court had already decided that the petitioners were unlikely to prevail under *Ex parte Young*, and the Eighth Circuit had affirmed. Nevertheless, the petitioners moved for partial summary judgment, seeking judgment on their complaint's counts 1 and 3. R. Doc. 124, at 1 (the motion itself); R. Doc. 126, at 1-35 (the supporting brief). In support of their motion, the petitioners filed new declarations in which they expressed their continuing fear of prosecution for violating § 211B.02, explained the section's continuing chilling effect on their political speech, and called attention to 2022-2024 events showing OAH's $250 penalty and threats of referral for county attorney prosecution, under § 211B.02, against Miller. R. Doc. 136, at 1-5; R. Doc. 137, at 1–5; R. Doc. 138, at 1–6; R. Doc. 139, at 1–6.

The county attorneys moved for summary judgment on all of the petitioners' claims. R. Doc. 118, at 1 (the motion itself); R. Doc. 120, at 1–14 (the

supporting brief). The county attorneys who had replaced defendants in office filed their own declarations disavowing a "present intention" to enforce § 211B.02. R. Doc. 121 ¶ 6, at 2; R. Doc. 122 ¶ 6, at 2. But these declarations, like the ones from their predecessors, contained no promise not to prosecute in the future. The original defendants who had remained in office did not file new declarations. In their supporting brief, the county attorneys argued that the petitioners did not face an imminent threat of prosecution, and that the district court should therefore grant them summary judgment because of Eleventh Amendment immunity, among other reasons. R. Doc. 120, at 2, 6–11.

In opposing the county attorneys' motion, the petitioners made several arguments. First, the petitioners respectfully asked the district court to reconsider the test for being able to bring an *Ex parte Young* pre-enforcement challenge: the petitioners pointed out that, in practice, courts have treated the test as satisfied where the defendant enforcement official was in position to enforce the challenged law against a plaintiff, and that no court had ever applied the test in the demanding way that the district court had in denying the petitioners' preliminary-injunction motion. R. Doc. 143, at 1–2, 15–26. Second, the petitioners argued that the OAH's threats of referral for prosecution for chapter-211B violations, pursuant to Minnesota Statutes § 211B.35, subd. 2(3), demonstrated a sufficient threat of prosecution by the county attorneys. *Id*. at 26-27. Third, the petitioners argued that the past prosecutions for violations of § 211B.06 demonstrated a sufficient threat of prosecution because that section was enacted as part of the same session law as § 211B.02 and is a parallel

section that prohibits a different class of false statements. *Id*. at 2–4, 27–30. Finally, the petitioners argued that the county attorneys posed a sufficient enforcement threat under all relevant facts and circumstances. *Id*. at 30–31.

In its March 13, 2023 opinion and order on the cross-motions for summary judgment, the district court denied the petitioners' motion and granted the county attorneys' motion. R. Doc. 147, at 1–21. In doing so, the district court relied exclusively on Eleventh Amendment immunity. R. Doc. 147, at 3–21. The district court responded to the petitioners' argument regarding the level of threat needed for an *Ex parte Young* claim by taking a hard line and holding that, under the Eighth Circuit's opinion affirming the denial of the petitioners' preliminary-injunction motion, an enforcement official is immune from suit unless the official has actually issued a threat of enforcement against each particular plaintiff. The district court stated, "That is how the Eighth Circuit understands *Ex parte Young*." R. Doc. 147, at 7 (citing *Minn. RFL Republican Farmer Lab. Caucus*, 33 F.4th at 990).

The district court rejected the relevance of the OAH's threats of referral for prosecution because the district court was unwilling to impute the OAH's statements to the county attorneys. R. Doc. 147, at 17–18.

And, the district court rejected the relevance of the past prosecutions for section-211B.06 violations for several reasons: the prosecutions occurred approximately two decades ago, the prosecutions were brought by different-office holders, § 211B.06 is a different provision from the one being challenged by the petitioners, and, at the time of the prosecutions,

the version of § 211B.16 in effect required county attorneys to prosecute chapter-211B violations "'under the penalty of forfeiture of office.'" R. Doc. 147, at 18–19 (quoting Minn. Stat.§ 211B.16, subd. 1 (2002)). The court pointed out that, since a 2004 amendment, § 211B.16 has given county attorneys discretion to prosecute. R. Doc. 147, at 19.

But, Minnesota Statutes § 211B.35, subd. 2(3) makes it mandatory for OAH to consider a referral to the county attorney for prosecution pursuant to § 211B.16. And, violations of § 211B.02 are a misdemeanor under § 211B.19. None of these statutory directives mattered to the lower courts.

H. The Eighth Circuit affirmed the lower court decision based on the law of the case.

On March 22, 2023, the petitioners timely filed a notice of appeal under 28 U.S.C. § 1291. R. Doc. 149, at 1–2. On appeal, a panel of the Eighth Circuit affirmed the lower court decision based on law of the case arising from the Eighth Circuit's earlier decision in affirming the denial of the preliminary injunction motion. *Minnesota RFL Republican Farmer Labor Caucus,* 2024 WL 3465128, at *1. Then, the petitioners' petition for rehearing en banc was denied on August 26, 2024. *Id.*, 2024 WL 3929990.

Argument

The Court should grant this petition on whether there are additional ripeness or imminence requirements under the *Ex Parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a

general Article III and prudential ripeness analysis. The Eighth Circuit has answered "yes" to this important question of federal law that has not been, but should be, settled by this Court. *Minnesota RFL Republican Farmer Labor Caucus,* 33 F.4th at 992, *cert. denied sub nom. Christian Action League of Minn. v. Freeman*, 143 S. Ct. 304. The Eighth Circuit's decision, along with a recent Fifth Court decision, conflict with the Ninth Circuit's "no" on the same important matter. *See Mi Familia Vota*, 105 F.4th at 333 (5th Cir. 2024) (imposing additional imminence requirements); *National Audubon Society, Inc.*, 307 F.3d at 846–47 (9th Cir. 2002) (not imposing additional imminence requirements). Plus, the First Circuit has stated that such additional imminence requirements "may be subject to debate." *Aroostook Band of Micmacs*, 404 F.3d at 65. Additionally, this petition and the petition in Miller's related case, if both were granted, offer the Court a unique opportunity to simultaneously address the complimentary dual role of First Amendment pre-enforcement actions in federal court under 42 U.S.C. § 1983 and First Amendment constitutional defenses in state court.

I. The important question decided by the Eighth Circuit has not been addressed by the Court, but should be.

The important question decided by the Eighth Circuit in this case has not been addressed by the Court, but should be. The Court has never answered the question presented relating to actions for declaratory relief.

A. The Court has decided the related question of imminence requirements for complaints for injunctive relief, but has not decided the same question for complaints for declaratory relief.

The Court has answered the related question in actions for injunctive relief—requiring additional ripeness and imminence requirements for the *Ex parte Young* exception to Eleventh Amendment immunity. For example, the Supreme Court held:

> Before discussing whether § 1305(a)(1) pre-empts state enforcement of the challenged guidelines, we first consider whether, assuming that it does, the District Court could properly award respondents injunctive relief. It is a "'basic doctrine of equity jurisprudence that courts of equity should not act ... when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'" *O'Shea v. Littleton,* 414 U.S. 488, 499, 94 S.Ct. 669, 677–678, 38 L.Ed.2d 674 (1974); *Younger v. Harris,* 401 U.S. 37, 43–44, 91 S.Ct. 746, 750–751, 27 L.Ed.2d 669 (1971). In *Ex parte Young,* 209 U.S. 123, 156, 28 S.Ct. 441, 452, 52 L.Ed. 714 (1908), we held that this doctrine does not prevent federal courts from enjoining state officers "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." When enforcement actions are imminent—and at least when repetitive penalties attach to continuing or

> repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses—there is no adequate remedy at law. See *id.,* at 145–147, 163–165, 28 S.Ct., at 447–449, 455–456. We think *Young* establishes that injunctive relief was available here.

Morales, 504 U.S. at 380–81 (1992). Consistently, the First Circuit noted that the Court in *Morales* did not divest the district court of jurisdiction, only requiring a "narrower injunction":

> [I]n *Morales* the lack of "imminence" did not divest the district court of jurisdiction; it simply meant that the court should have issued a narrower injunction…

Aroostook Band of Micmacs, 404 F.3d at 65. And, the district court could still issue declaratory relief.

B. The legal standards for the 1908 *Ex parte Young* exception to Eleventh Amendment immunity must account for the 1934 Declaratory Judgment Act authorizing claims for declaratory relief.

This case presents an opportunity for the Court to consider whether the legal standards for the 1908 *Ex parte Young* exception to Eleventh Amendment immunity are affected by the 1934 enactment of the Declaratory Judgment Act, 28 U.S.C. § 2201. Specifically, the language from *Ex parte Young* on which the district court relied to require an "issued

threat," R. Doc. 147, at 7, doesn't make a threatened enforcement proceeding a requirement for an enforcement official to be subject to a pre-enforcement challenge for declaratory judgment, but rather makes a threatened proceeding a requirement to a pre-enforcement challenge *for an injunction* against the official:

> The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, … *may be enjoined by a Federal court of equity from such action*.

209 U.S. at 155–56 (emphasis added), *quoted approvingly by* R. Doc. 147, at 7.

When *Ex parte Young* was decided, an injunction was the only remedy available in a pre-enforcement challenge, so, at the time, the availability of injunctive relief was coextensive with a plaintiff's ability to prevail in a pre-enforcement suit. And it's true that, under the traditional notions of equity jurisdiction on which *Ex parte Young* is based, you can't get an injunction against a defendant merely because the defendant might violate one of your rights in the future: a plaintiff needs to show that the defendant is violating, or is about to violate, one of the plaintiff's rights. So it *might* have been true, when *Ex*

parte Young was decided, that a plaintiff in a pre-enforcement suit needed to go beyond pointing to a defendant enforcement official's authority to enforce a challenged law in showing that the official was threatening the plaintiff.

But that ceased to be true with the 1934 enactment of the Federal Declaratory Judgment Act, which, in its current form, provides, as a possible remedy in federal court, a declaration of "the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 USC § 2201(a). With this law, a new form of relief became available in pre-enforcement suits.

Previously, a court hearing an *Ex parte Young* challenge to a law's constitutionality would reach the merits of the constitutional challenge, if at all, only in determining the propriety of issuing an injunction. Under the Federal Declaratory Judgment Act, a declaratory judgment announcing a law's unconstitutionality is a distinct form of relief that is available regardless of whether an injunction or other "further relief is or could be sought." 28 USC § 2201(a). Under § 2201(a), a declaration of unconstitutionality can now be the primary relief sought, to which an injunction, if one is granted at all, is merely ancillary. *See* 28 USC § 2202.

A declaratory judgment doesn't require any showing of a threatened rights violation, beyond what is needed to establish standing. *See* 28 USC § 2201(a); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–61 (2014). And, it has long been held that prospective declaratory relief is an available remedy in an *Ex parte Young* pre-enforcement suit. *See, e.g.*, *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535

U.S. 635, 646 (2002); 8th Cir. R. Doc. 27, Appellees' Br. 13 (acknowledging that "[t]he *Ex parte Young* exception permits certain suits against state officers for prospective declaratory and injunctive relief").

So, under current law, an enforcement official's level of threateningness might be relevant for determining whether a pre-enforcement plaintiff can obtain an injunction, but threat level is not relevant for determining whether the plaintiff can obtain a declaratory judgment (if the plaintiff has established standing and if the official has specific enforcement authority that isn't contingent on somebody else's permission). *See* 28 USC § 2201(a). This distinction regarding remedies goes a long way to explain why, for decades, courts haven't required pre-enforcement plaintiffs to plead, let alone prove, that defendant enforcement officials have issued threatening announcements.

This understanding of the law is consistent with finding Eleventh Amendment immunity for an official with little or no enforcement authority, especially if the court allows the suit against at least one other official, which is all that this Court should require. And, a plaintiff needs to prevail against only one official enforcing the law to obtain a declaration that a challenged law is unconstitutional.

However, this understanding of the law is inconsistent with the Eighth Circuit's decision denying the petitioners the ability to prevail against a local prosecutor with undisputed authority to bring criminal charges for violations of the challenged law against them.

II. A circuit conflict exists on the question presented.

This petition for writ of certiorari is warranted because an inter-circuit conflict exists on this important question of additional ripeness or imminence requirements under the *Ex Parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a general Article III and prudential ripeness analysis. As explained above, the Court has never answered this question relating to actions for declaratory relief, even though the Court has answered the related question in actions for injunctive relief. *See Morales,* 504 U.S. at 380–81.

Meanwhile, a circuit conflict exists on whether the same imminence requirements apply to complaints for declaratory relief. *Compare Minnesota RFL Republican Farmer Labor Caucus v. Freeman*, 33 F.4th 985, 992 (8th Cir. 2022), *cert. denied sub nom. Christian Action League of Minn. v. Freeman*, 143 S. Ct. 304 (2022) (imposing additional requirements) and *Mi Familia Vota v. Ogg*, 105 F.4th 313, 333 (5th Cir. 2024) (imposing additional requirements) with *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 846–47 (9th Cir. 2002) (not imposing additional requirements). *See Aroostook Band of Micmacs*, 404 F.3d at 65 (imminence requirement "may be subject to debate").

A. The Ninth Circuit has authoritatively stated that there are no additional "ripeness" or "imminence" requirement under the *Ex Parte Young* exception to Eleventh Amendment immunity.

On one hand, the Ninth Circuit has authoritatively stated that there are no additional "ripeness" or "imminence" requirement under the *Ex Parte Young* exception to Eleventh Amendment immunity. *National Audubon Society, Inc.,* 307 F.3d at 846–47.

In the Ninth Circuit case, several non-profit organizations that supported protection and conservation of bird life filed a complaint against state officials and agencies for injunctive and declaratory relief, challenging provision of Fish and Game Code, adopted by the California voters, which banned the use of any steel-jawed leghold animal trap by any person including a federal employee. *Id.* at 835. After several federal officials were named as necessary parties, sponsors of the legislation intervened, as did trapper associations and individual trappers. *Id.* The Ninth Circuit held that: (1) the Eleventh Amendment did not preclude claims against the Director of the California Department of Fish & Game, who had authority to enforce the Code provision; (2) organizations had standing, and their claims were ripe for decision; (3) the statute was preempted by the ESA; (4) the statute was preempted by NWRSIA; and (5) the statute did not violate the Commerce Clause. *Id.*

In its decision, the Ninth Circuit acknowledged the Eleventh Amendment arguments of the state parties, but stated that the cases only supporting

dismissing state officials without enforcement authority:

> However, the cases cited by the state parties primarily address the question of whether a named state official has direct authority and practical ability to enforce the challenged statute, rather than the question of whether enforcement is imminent. These cases are concerned with plaintiffs circumventing the Eleventh Amendment under *Ex Parte Young* simply by suing *any* state executive official. That is, they are concerned with the question of "who" rather than "when."

National Audubon Society, Inc., 307 F.3d at 846 (citations omitted). Then, the Ninth Circuit stated that there are no additional "ripeness" or "imminence" requirement under the *Ex Parte Young* exception to Eleventh Amendment immunity:

> We decline to read additional "ripeness" or "imminence" requirements into the *Ex Parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a general Article III and prudential ripeness analysis. The Article III and prudential ripeness requirements, which we apply *infra* Part II.B.2, are tailored to address problems occasioned by an unripe controversy. There is thus no need to strain *Ex Parte Young* doctrine to serve that purpose.

National Audubon Society, Inc., 307 F.3d at 846–47. Then, the Ninth Circuit, as to the claims for declaratory judgment, held that state official, Director of the California Department of Fish & Game with enforcement authority, was a proper defendant under *Ex parte Young* and the other state officials, the Governor and the state Secretary of Resources, without enforcement authority were not proper defendants because of Eleventh Amendment immunity:

> Based on this view, we hold that suit is barred against the Governor and the state Secretary of Resources, as there is no showing that they have the requisite enforcement connection to Proposition 4…However, the Eleventh Amendment does not bar suit against the Director of the California Department of Fish & Game, who has direct authority over and principal responsibility for enforcing Proposition 4.

National Audubon Society, Inc., 307 F.3d at 846–47.

B. The Eighth Circuit has authoritatively stated that there are additional "ripeness" or "imminence" requirement under the *Ex Parte Young* exception to Eleventh Amendment immunity.

On the other hand, the Eighth Circuit applied to petitioners' declaratory judgment claims against the

four county attorneys, who have law enforcement authority to enforce Minnesota Statutes § 211B.02, additional "ripeness" or "imminence" requirement into the *Ex Parte Young* exception to Eleventh Amendment immunity beyond those already imposed by a general Article III and prudential ripeness analysis:

> "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).

Minnesota RFL Republican Farmer Labor Caucus, 33 F.4th at 992. The Eighth Circuit in its 2024 opinion repeated that *Ex parte Young* only applies to officials who threaten and are about to commence civil or criminal proceedings to enforce unconstitutional policies:

> The doctrine of *Ex parte Young* is a narrow exception to Eleventh Amendment immunity that permits suits for prospective declaratory and injunctive relief against state officials sued in their official capacities. Monroe v. Ark. State Univ., 495 F.3d 591, 594 (8th Cir. 2007). *Ex parte Young* only applies to officials who threaten and are about to commence civil or criminal proceedings to enforce unconstitutional policies. 281 Care Committee v. Arneson, 766 F.3d 774, 797 (8th Cir. 2014).

Minnesota RFL Republican Farmer Labor Caucus, 108 F.4th at 1037–38. In this way, the Eighth Circuit authoritatively contradicts the Ninth Circuit's opinion.

Importantly, in this Eighth Circuit case, Article III and prudential ripeness analysis had already been established. In its opinion and order on the motion to dismiss, the district court correctly resolved these issues in favor of the petitioners. R. Doc. 35, at 2, 4–10. The court held that the complaint's explanation of the county attorneys' role in enforcing § 211B.02 was sufficient to state a claim for declaratory and injunctive relief against them under *Ex parte Young* and *281 Care Committee*. R. Doc. 35, at 7–10.

In other words, the petitioners only lost because of the Eighth Circuit's additional "ripeness" or "imminence" requirements related to the *Ex Parte Young* exception to Eleventh Amendment immunity. By contrast, hypothetically, had the petitioners brought their complaint for declaratory relief in the Ninth Circuit, the petitioners' case would have continued because the Ninth Circuit does not recognize the Eighth Circuit's additional "ripeness" or "imminence" requirements related to the *Ex Parte Young* exception to Eleventh Amendment immunity. *National Audubon Society,* 307 F.3d at 846–47.

C. The Fifth Circuit has authoritatively stated that there are additional "ripeness" or "imminence" requirement under the *Ex Parte Young* exception to Eleventh Amendment immunity.

A 2024 decision of the Fifth Circuit confirms a circuit conflict. *Mi Familia Vota*, 105 F.4th at 333. In that Fifth Circuit case, civil rights groups, voters, and election official brought actions against district attorney and state officials alleging that amendments to Texas Election Code violated United States Constitution and federal statutes. *Id.* at 313. The Fifth Circuit held that the district attorney Ogg was not a proper defendant under *Ex parte Young* because "the existence of the challenged statutes coupled with Ogg's authority to prosecuted criminal cases…is insufficient to demonstrate compulsion or constraint under our *Ex parte Young* precedent":

> Here, the Plaintiffs allege the existence of the challenged statutes coupled with Ogg's authority to prosecute criminal cases constrained the Plaintiffs because of their fear of prosecution. Although this fear of prosecution may be sufficient for standing, it is insufficient to demonstrate compulsion or constraint under our *Ex parte Young* precedent.

Mi Familia Vota, 105 F.4th at 332. Similar to the Eighth Circuit opinion, the Fifth Circuit relied on the district attorney not enforcing the challenged statutes against anyone nor threatening to do so:

> Ogg has neither enforced the challenged statute against anyone nor threatened to do so. Ogg has authority to prosecute those that violate the election code; the threat of criminal prosecution may be the pinnacle of compulsion or control. *See Steffel v. Thompson*, 415 U.S. 452, 475, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). We have held, however, that "the mere fact that the [state official] *has* the authority to enforce [the challenged statute] cannot be said to 'constrain' " the party challenging the statute. *City of Austin*, 943 F.3d at 1001 (emphasis in original). Furthermore, to the extent the Plaintiffs argue Ogg's ability to *investigate* election code violations compels or constrains their conduct, that power does not rise to the level of compulsion or constraint needed. *Ostrewich*, 72 F.4th at 101. Thus, the Plaintiffs have failed to demonstrate that Ogg has acted or will likely act in a way that would compel or constrain the Plaintiffs in order to "strip" Ogg of her sovereign immunity. *Id.* We conclude Ogg is not a proper *Ex parte Young* defendant.

Mi Familia Vota, 105 F.4th at 332–33.

The Fifth Circuit decision conflicts with both the Ninth Circuit and the Eighth Circuit decisions. First, the Fifth Circuit decision conflicts with the Ninth Circuit decision, which would not apply additional *Ex parte Young* imminence requirements in any case where the ripeness or imminence requirements imposed by a general Article III and

prudential ripeness standing analysis have already been satisfied. *National Audubon Society, Inc.*, 307 F.3d at 846–47. Second, unlike the Eighth Circuit, the Fifth Circuit claims that a case-by-case approach to the application of additional imminence requirements of the *Ex parte Young* exception was necessary despite the apparent "contradictory" results:

> We recognize that this may seem contradictory because we often have said "local officials" likely would be proper *Ex parte Young* defendants in the context of other election law cases. *See, e.g.*, *Mi Familia Vota*, 977 F.3d at 468. Nevertheless, a "case-by-case approach to the *Young* doctrine has been evident from the start." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). We continue that approach today.

Mi Familia Vota, 105 F.4th at 332–33. The Eighth Circuit did not state that it would be adopting a "case-by-case approach" despite apparently contradictory results. Third, the Fifth Circuit, like the Eighth Circuit, made no consideration of different approaches for claims for declaratory relief, as opposed to claims for injunctive relief, as the Ninth Circuit did.

D. The First Circuit has declared additional "ripeness" or "imminence" requirements under the *Ex parte Young* exception to Eleventh Amendment immunity "may be subject to debate."

The First Circuit in *Aroostook Band of Micmacs v. Ryan* considered an Indian tribe challenging a state's authority to enforce state employment discrimination laws against it. The First Circuit held that (1) court had federal question jurisdiction over tribe's claim that state's conduct violated tribe's federal rights; (2) the tribe's challenge to state's attempted application of Title VII to the tribe was not rendered moot by the state's concession that tribe was exempt; and (3) *Pullman* abstention was not warranted. In making its decision, the First Circuit recognized that the additional imminence requirement for *Ex parte Young* actions "may be subject to debate," but did not reach a decision on this point because "the Band has adequately alleged a threat of enforcement which would satisfy any jurisdictional requirement":

> We have recognized an imminence requirement in *Ex parte Young* actions, though the extent to which it is *jurisdictional* (rather than just a substantive element of the action or a limit on equitable discretion) may be subject to debate…Indeed, in *Morales* the lack of "imminence" did not divest the district court of jurisdiction; it simply meant that the court should have issued a narrower injunction…But we need not

> resolve here the question of whether "imminence" is purely a merits question or also required for jurisdiction, because the Band has adequately alleged a threat of enforcement which would satisfy any jurisdictional requirement.

Aroostook Band of Micmacs, 404 F.3d at 65 (citations and footnote omitted).

III. This petition and the petition in Miller's related case offer the Court a unique opportunity to simultaneously address the important dual role of First Amendment pre-enforcement actions in federal court and First Amendment constitutional defenses in state court.

Additionally, this petition and the petition in Miller's related case, if both were granted, offer the Court a unique opportunity to simultaneously address the complimentary dual role of First Amendment pre-enforcement actions in federal court and First Amendment constitutional defenses in state court. For decades, the Court has supported, under 42 U.S.C. § 1983, plaintiffs bringing First Amendment pre-enforcement challenges.

Now, the Fifth Circuit's and Eighth Circuit's decisions imposing additional imminence requirements to satisfy the *Ex parte Young* exception to Eleventh Amendment immunity threatens that progress. To be sure, election participants charged with violations of Minnesota Statutes § 211B can still make their constitutional defenses in Minnesota state courts as the petitioners Clayton and

MacDonald did in their state court proceedings and Miller did in the related case. However, as the Court knows, such constitutional defenses, even if successful, rarely result in an invalidation of unconstitutional state statutes regulating political speech. Typically, the state court will find "no probable cause" before invalidating a state statute as unconstitutional. Because of this fact, the Court has for decades supported § 1983 First Amendment pre-enforcement challenges to ensure maximum protection of First Amendment rights. There is no reason for the Court to change now.

Notably, there are at least five procedural advantages in granting both petitions now instead of waiting for the same situation to arise again in the future. First, the same undersigned counsel and law firm represent the petitioners in both this, and the Miller cases. Second, the Minnesota Attorney General is an intervenor in both this proceeding arising from the U.S. Court of Appeals and Miller's related proceeding arising from the Minnesota appellate courts. Third, there is a clear benefit to the Court of having the same counsel on each sides of both cases. The petitioners' counsel will argue on behalf of both the First Amendment pre-enforcement action filed in federal court and the First Amendment constitutional defenses raised in state court because both were directed at the unconstitutionality of Minnesota Statutes § 211B.02. The Attorney General will argue against both, supporting the constitutionality of Minnesota Statutes § 211B.02. Fourth, if both petitions are granted, although separate briefing on the merits would be required because of different parties, both cases on the merits could be addressed at a single

oral argument. Fifth, if both petitions are granted, although separate opinions on the merits would be required, there is sufficient legal and factual overlap in the two cases—e.g., the ever-present Minnesota Statutes § 211B.02 and its application to the petitioners in both cases—to make for economical use of judicial resources to resolve the important questions involved in both petitions.

CONCLUSION

The Court should grant the petition for the foregoing reasons.

Respectfully submitted,

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