UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-1563

Minnesota RFL
Republican Farmer Labor Caucus, et al.

Appellants

v.

Mary Moriarty, in her official capacity as County Attorney for Hennepin County, Minnesota, or her successor, et al.

Appellees

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

ORDER

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

Judge Stras did not participate in the consideration or decision of this matter.

August 26, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

United States Court of Appeals
For the Eighth Circuit

No. 23-1563

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

Plaintiffs - Appellants

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; 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 United States District Court
for the District of Minnesota

Submitted: June 11, 2024
Filed: July 19, 2024

Before LOKEN, ERICKSON, and GRASZ, Circuit Judges.

ERICKSON, Circuit Judge.

Minnesota RFL Republican Farmer Labor Caucus, Vincent Beaudette, Vince for Statehouse Committee, Don Evanson, Bonn Clayton, and Michelle MacDonald ("the RFL parties") brought this pre-enforcement challenge against Hennepin County attorney Mary Moriarty, Dakota County attorney Kathryn Keena, Carver County attorney Mark Metz, and Winona County attorney Karin L. Sonneman ("the county attorneys")[1] to enjoin Minnesota's Fair Campaign Practices Act as violative of the First Amendment. The Minnesota Attorney General intervened to defend the constitutionality of the statute.

In a prior appeal, the Court affirmed the district court's denial of the RFL parties' motion for preliminary injunction, finding *Ex parte Young* inapplicable because the county attorneys had neither enforced nor threatened to enforce the statute. Minn. 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) ("Minn. RFL I"). In this appeal, the RFL parties challenge the district court's[2] grant of the

[1] Moriarty and Keena were substituted as parties under Federal Rule of Civil Procedure 25(d) upon assuming office in January 2023 and May 2021, respectively.

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

county attorneys' motion for summary judgment, denial of their motion for partial summary judgment, and dismissal of their complaint. The Court's prior decision constitutes the law of the case. We affirm.

I. BACKGROUND

The RFL parties are political candidates, associations, and individuals engaged in political activities who allege that § 211B.02 of Minnesota's Fair Campaign Practices Act [3] violates the First Amendment by chilling their political speech. An administrative law judge disposing of a complaint asserting a violation of § 211B.02 may: (1) dismiss the complaint, (2) issue a reprimand, (3) impose a civil penalty of not more than $5,000, or (4) refer the complaint to the appropriate county attorney. Minn. Stat. § 211B.35, subdiv. 2(a)-(b), (d)-(e). The county attorney has discretion over the prosecution of any referral. Id. § 211B.16.

In July 2020, the RFL parties unsuccessfully moved for a preliminary injunction. While they claimed Minnesota's Office of Administrative Hearings had found violations of § 211B.02 and described how the statute chilled their political speech, the county attorneys responded with declarations stating that they had never prosecuted anyone under § 211B.02, were not currently investigating any alleged § 211B.02 violation, and had no present intention to prosecute anyone under the statute. This Court affirmed the district court's

[3] The statute prohibits a person or candidate from knowingly making a false claim of endorsement or making a claim of endorsement in written campaign materials without first getting written permission from the alleged endorser.

determination that *Ex parte Young* did not apply. Minn. RFL I, 33 F.4th at 992.

The RFL parties then moved for partial summary judgment and the county attorneys cross-moved for summary judgment, with all parties submitting the same or similar evidence as that offered at the preliminary injunction stage. The RFL parties now appeal the adverse grant of summary judgment.

II. DISCUSSION

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). Nothing the RFL parties have presented undermines the Court's prior decision in this case holding that the county attorneys provided sufficient assurance that they will not enforce § 211B.02. See Minn RFL I, 33 F.4th at 992. Because this Court previously resolved the legal question of *Ex parte Young*'s applicability and the parties have not presented evidence materially different from what was introduced during the preliminary injunction proceedings, the law of the case doctrine governs. See United States v. Bartsh, 69 F.3d 864, 866 (8th Cir. 1995) (explaining that the law of the case doctrine requires a panel to follow a decision in a prior appeal in later proceedings "unless

a party introduces substantially different evidence, or the prior decision is clearly erroneous and works a manifest injustice"); Howe v. Varity Corp., 36 F.3d 746, 752 (8th Cir. 1994) (finding that appellate review of the legal issues at the heart of a preliminary injunction decision constituted the law of the case).

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

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 United States 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

[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 underinclusive 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

[2] On September 30, 2019, the county attorneys moved to dismiss the plaintiffs' complaint. The district court denied the motion, but it dismissed with prejudice the claims of plaintiffs Minnesota RFL Republican Farmer Labor Caucus, Bonn Clayton, and

preliminary injunction to enjoin the county attorneys 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 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

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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).

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]

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

"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, 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*, 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

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

[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."

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 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.

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

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 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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[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.

[8] *Cf. Whole Woman's Health*, 142 S. Ct. at 535–36 (plurality op.) ("[I]t appears that [Texas executive officials with specific

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

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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)).

[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.").

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 "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

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

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

Plaintiffs,

OPINION AND ORDER

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 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 Dakota County, Minnesota, or her successor*,

Defendants,

and

Attorney General's Office for the State of Minnesota,

Intervenor.

Erick G. Kaardal and William F. Mohrman, Mohrman, Kaardal & Erickson, P.A., Minneapolis, MN, for Plaintiffs Minnesota RFL Republican Farmer Labor Caucus, Vincent Beaudette, Vince for Statehouse Committee, Don Evanson, Bonn Clayton, and Michelle MacDonald.

Caroline Brunkow, Christiana Martenson, Kelly K. Pierce, Beth A. Stack, and Daniel P. Rogan, Hennepin County Attorney's Office, for Defendant Mary Moriarty.

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

William M. Topka, Dakota County Attorney's Office, Hastings, MN, for Defendant Kathryn Keena.

Amy Slusser Conners, Best & Flanagan, Minneapolis, MN, and Elizabeth C. Kramer, Minnesota Attorney General's Office, St. Paul, MN, for Intervenor Attorney General's Office for the State of Minnesota.

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, subdiv. 3.[1] 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)).

The parties have filed competing summary-judgment motions. Plaintiffs seek summary judgment on their claims that § 211B.02 violates their First Amendment free-speech rights and, if granted, an order that would "permanently enjoin Defendants from enforcing § 211B.02." Pls.' Mem. in Supp. [ECF No. 126] at 6. Defendants seek summary judgment based on Eleventh Amendment immunity.

This is the case's third round of dispositive motions. Defendants first moved to dismiss Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6). That motion was denied. *Minn. RFL Republican Farmer Lab. Caucus v. Freeman*, No. 19-cv-1949 (ECT/DTS), 2020 WL 1333154 (D. Minn. Mar. 23, 2020). Plaintiffs then sought a preliminary injunction under Rule 65(a). That motion was denied primarily because Plaintiffs failed to show that Defendants had threatened or were about to commence proceedings against them, an essential element of the exception to Defendants' Eleventh Amendment immunity created by *Ex parte Young*, 209 U.S. 123 (1908). *Minn. RFL*

[1] Mary Moriarty was elected Hennepin County Attorney in 2022 and began her term on January 2, 2023, succeeding former Hennepin County Attorney Mike Freeman. ECF No. 121 ¶ 1. Kathryn Keena was elected Dakota County Attorney in 2022, after serving as the acting Dakota County Attorney since May 11, 2021, following James Backstrom's retirement. ECF No. 122 ¶ 1; *see also* https://www.co.dakota.mn.us/News/Pages/keena-appointed-county-attorney.aspx (last visited Mar. 13, 2023). Pursuant to Fed. R. Civ. P. 25(d), Moriarty is substituted for Freeman, and Keena for Backstrom.

Republican Farmer Lab. Caucus v. Freeman, 486 F. Supp. 3d 1300, 1308–11 (D. Minn. 2020). Plaintiffs appealed, and the Eighth Circuit affirmed the motion's denial on this ground. 33 F.4th 985, 989–92 (8th Cir. 2022). Plaintiffs then petitioned for a writ of certiorari, which the Supreme Court denied. 143 S. Ct. 304 (2022). For efficiency's sake, this order presumes familiarity with the content of these earlier orders.

Defendants' summary-judgment motion will be granted, and Plaintiffs' motion will be denied (without addressing the merits of Plaintiffs' First Amendment claims). The short story is that the Eleventh Amendment immunity issue has been addressed before, both here and in the Eighth Circuit, and resolved in Defendants' favor. It is true that Defendants' summary-judgment motion presents a different procedural posture from Plaintiffs' preliminary injunction motion. It also is true that Plaintiffs have introduced new legal arguments and evidence in opposition to Defendants' motion. But the change in procedural posture and Plaintiffs' new legal arguments and evidence provide no basis to deny Defendants' motion.

I

In its decision affirming the denial of Plaintiffs' preliminary injunction motion, the Eighth Circuit explained the *Ex parte Young* exception to Eleventh Amendment immunity and what Plaintiffs must show to establish the exception:

> "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*, --- U.S. ---, 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, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution.'" [*281 Care Comm. v. Arneson (*]*Care Committee II*[*)*], 766 F.3d [774,] 797 [(8th Cir. 2014)] (quoting *Ex parte Young*, 209 U.S. at 156).

Minn. RFL Republican Lab. Farmer Caucus, 33 F.4th at 989–90 (duplicative citations deleted).

The four county attorney Defendants have filed substantially similar declarations to demonstrate that they have no present intention of threatening or commencing civil or criminal proceedings under the challenged statute against any Plaintiff. Moriarty, for example, testifies she "ha[s] never filed, nor threatened to file, a complaint with the Minnesota Office of Administrative Hearings ("OAH") that alleges a violation of Minn. Stat. §211B.02," that she "ha[s] never enforced, nor threatened to enforce, a violation of Minn. Stat. § 211B.02 by any person or entity," that she "ha[s] never criminally prosecuted or threatened to criminally prosecute any person or entity for an alleged violation of Minn. Stat. § 211B.02," that she is "not currently investigating any person or entity for an alleged violation of Minn. Stat. § 211B.02," that she is "not about to commence civil or criminal proceedings against any person or entity for allegedly violating Minn. Stat. § 211B.02," and that she "ha[s] no present intention to threaten enforcement of a violation of Minn. Stat. § 211B.02 by any person or entity." Moriarty Decl. [ECF No. 121] ¶¶ 2–6. The other county attorneys' declarations are functionally equivalent. *See* Metz Decl. [ECF No. 64] ¶¶ 2–7; Sonneman Decl. [ECF No. 65] ¶¶ 2–7; and Keena Decl. [ECF No. 122] ¶¶ 3–9.

Faced with this same declaration testimony, and reviewing the Eleventh Amendment immunity determination *de novo*, the Eighth Circuit concluded: "The record here shows that the defendants have not enforced nor have threatened to enforce the challenged statute." *Minn. RFL Republican Lab. Farmer Caucus*, 33 F.4th at 989, 991. Addressing Plaintiffs' argument that the county attorneys' declarations were insufficient to defeat the *Ex parte Young* exception, the court explained that the county

attorneys' "failure to disavow future prosecutions is not fatal to their claim of Eleventh Amendment immunity." *Id.* at 992. The court explained that "[t]he proper standard in assessing [Defendants'] 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.'" *Id.* (quoting *Care Committee II*, 766 F.3d at 797) (third and fourth alterations in original). And the court determined that the county attorneys' declarations met this standard because they "all show that [the county attorneys] have not enforced or threatened to enforce § 211B.02." *Id.*

II

From the Eighth Circuit's analysis, I conclude that—barring a dispositive change in either (A) the law or (B) the evidentiary record showing the presence of a genuine issue of material fact—the entry of summary judgment in Defendants' favor based on Eleventh Amendment immunity would be appropriate. The Eighth Circuit gave no hint that, on the preliminary-injunction record, a reasonable trier of fact could find for Plaintiffs on the Eleventh Amendment immunity question.

A

Plaintiffs identify no change in the law but argue that the Eighth Circuit and I misunderstood the law and therefore applied the wrong legal standard to decide the Eleventh Amendment immunity question at the preliminary-injunction stage. *See* Pls.' Mem. in Opp'n [ECF No. 143] at 18–21. Plaintiffs argue that *Ex parte Young* may be met merely by showing that a state official holds a "threatening position in the legal

system," as distinguished from actually threatening legal proceedings. *Id.* at 19. Plaintiffs say that understanding *Ex parte Young* this way explains why "for decades, plaintiffs have been allowed to sue local prosecutors to challenge abortion restrictions—among other types of laws—as soon as they are enacted." *Id.* at 17. "In practice," Plaintiffs contend, "courts have not required plaintiffs to prove that a defendant enforcement official is planning to commence an enforcement action." *Id.*

Plaintiffs might have a reasonable take on what the law should be, but they do not accurately describe what the law is. *Ex parte Young* itself plainly required more than that a state official hold a "threatening position." For the exception it created to apply, *Ex parte Young* explicitly required that a state official (1) be "clothed with some duty in regard to the enforcement of the laws of the state" (that is, occupy a position capable of issuing a realistic enforcement threat) "*and*" (2) "threaten and [be] about to commence proceedings, either of a civil or criminal nature." 209 U.S. at 156 (emphasis added). In other words, *Ex parte Young* does not say that its exception to a state's Eleventh Amendment immunity applies whenever suit is brought against an official who merely occupies a position from which a threat might legitimately be issued. There must also be an issued threat. That is how the Eighth Circuit understands *Ex parte Young*. *See Minn. RFL Republican Lab. Farmer Caucus*, 33 F.4th at 990 (quoting *Care Committee II*, 766 F.3d at 797).

The cases Plaintiffs rely on to support their narrower understanding of *Ex parte Young* don't support Plaintiffs. Plaintiffs suggest that a Sixth Circuit case, *McNeilus Truck and Manufacturing., Inc. v. Ohio*, , adopts their view. 226 F.3d 429 (6th Cir.

2000). It doesn't. There, the court explicitly understood *Ex parte Young* to require "an imminent threat of enforcement" before it could be applied against a state actor. 226 F.3d at 437. The court explained: "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.* at 438. Plaintiffs' suggestion that *Ex parte Young*'s threat-of- prosecution element is—as a rule—not applied in abortion cases is not correct. *See, e.g.*, *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 444–46 (6th Cir. 2019) (holding that the Kentucky Attorney General was not a proper party to a suit challenging an abortion restriction because he "ha[d] not enforced or even threatened to enforce" the statute). Regardless, especially because a state may waive its Eleventh Amendment immunity, *see PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2262 (2021), it would be a mistake to understand the absence of *Ex parte Young*'s consideration in a case challenging an abortion restriction (or any case involving some other constitutional challenge to a state law) to mean that the doctrine could not have applied to the case or does not apply to cases addressing the same constitutional subject.

B

Factually, Plaintiffs have introduced new material in opposition to Defendants' summary-judgment motion. The new material, Plaintiffs argue, would permit a reasonable trier of fact to find that Defendants have threatened and are about to commence civil or criminal proceedings against Plaintiffs under Minn. Stat. § 211B.02.

This additional evidence includes the following:

A civil penalty imposed by the Minnesota Office of Administrative Hearings ("OAH") on a non-party for violating § 211B.02. In December 2022, a three-judge OAH panel imposed a $250 civil penalty on non-party Nathan Miller and his campaign committee for violating § 211B.02 during Miller's campaign for State Senate District 9. Miller Decl. [ECF No. 135] Exs. 1, 2. Miller considers himself a "constitutionally minded conservative," whose political ideology aligns primarily with the Republican Party. *Id.* ¶¶ 5–8. After Miller sought, but did not receive, the endorsement of the Republican Party of Minnesota, Miller launched a write-in campaign to run against the Republican-endorsed candidate. *Id.* Ex. 2. In October 2022, Miller agreed to attend a rally with the grassroots "Caravan of Patriots" to support conservative candidates in Otter Tail County. *Id.* The flyer for that event, created by the Caravan of Patriots, listed Miller's name as one of the candidates attending the rally with the descriptor "SD 9 – Republican Party" underneath Miller's name, and Miller posted the flyer on his campaign website. *Id.* The Republican Party of Minnesota filed a complaint alleging that Miller had violated § 211B.02, and the OAH ultimately agreed. It determined that Miller and his campaign violated the statute "by knowingly and falsely implying that Mr. Miller had the support or endorsement of the [Republican Party of Minnesota] for the office of SD9 in the general election held on November 8, 2022." *Id.* The OAH imposed a civil penalty of $250 but did not refer the matter to any county attorney. *Id.* ¶ 32. Miller testifies that he "fear[s] future [criminal] prosecutions" because he

could face a complaint "every time [he] run[s] for office and identif[ies] [him]self as a Constitutional Conservative in the Republican Party—in private or public." *Id.* ¶ 40. According to Miller, "the three-year statute of limitations for criminal misdemeanors adds to [his] fear." *Id.* Miller describes the chilling effect on his speech based not only on the civil penalty imposed on him, but also on penalties imposed on others he learned about in preparing for his OAH hearing. *Id.* ¶¶ 41–45. As a result of these incidents, he "will not be able to speak privately or publicly with [his] supporters without the threat of prosecution," and he will be forced to "curtail what [he] say[s] privately or publically [sic]" or fear prosecution. *Id.* ¶ 45. In the future, he says he "will be campaigning not to educate the electorate and potential supporters but to avoid . . . criminal prosecution." *Id.* ¶ 47. He goes on to explain the detriment a criminal prosecution would have to his future campaigns. *Id.* ¶ 48. As a result of these expressed concerns, Miller testifies that § 211B.02 "prevents [him] from speaking the truth about who [he is] and what [he] stand[s] for," or "being honest with [his] constituents, supporters and neighbors about [his] politics." *Id.* ¶ 49.

Information posted on the OAH's website. The OAH website includes the following summary of its role with respect to Minnesota campaign-practices and campaign finance laws:

> Administrative Law Judges at the Office of Administrative Hearings are authorized to hear and decide complaints alleging violations of the Fair Campaign Practices and Finance Acts (Minnesota Statutes, Chapters 211A and 211B). These complaints are heard by a panel of three

> Administrative Law Judges. The panel may dismiss the matter, issue a reprimand, impose a civil penalty of up to $5,000 and/or refer the complaint to a county attorney for criminal proceedings. Complaints filed with the Office of Administrative Hearings must proceed to a final order before the alleged violation may be prosecuted by a county attorney.
>
> Please note that OAH may not consider and must dismiss claims alleging violations of Minn. Stat. § 211B.06 (false campaign material). The United States Court of Appeals for the Eighth Circuit determined that statute was unconstitutional in 281 Care Committee v. Arneson.

Fair Campaign Practices, Minnesota Office of Administrative Hearings, https://mn.gov/oah/self-help/administrative-law-overview/fair-campaign.jsp (last visited March 13, 2023). In addition, the OAH website includes the following chart listing the possible penalties for violations of the Fair Campaign Practices Act:

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

Id. (This penalty matrix was included in the OAH order imposing a civil penalty on Miller. Miller Decl. Ex. 2 at 9.)

Criminal enforcement of Minn. Stat. § 211B.06 against non-parties. In 2003, then- Carver County Attorney Michael Fahey prosecuted non-party John Knight for violating Minn. Stat. § 211B.06 because Knight's campaign had placed scripted telephone calls to potential voters falsely identifying Knight as the only Republican candidate in the race for Hennepin County Commissioner. *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785 (8th Cir. 2004); *see also* Kaardal Decl. [ECF No. 134] Exs. 3–6. The matter was referred to Carver County by then-Hennepin County Attorney Amy Klobuchar due to a conflict of interest. Separately, the Ramsey County Attorney prosecuted non-party Eugene Copeland in 2002 for violating § 211B.06 because Copeland falsely stated that he was the only pro-life candidate in the

special election for Minnesota State Senate District 67. *See* Kaardal Decl. Exs. 1–2.

Additional declaration of Plaintiff Bonn Clayton.[2] In his second declaration, Clayton describes how he is "frequently checking [him]self as to how [he] speak[s] in private or in public regarding [his] speech and relationships with the Republican Party" because he "remain[s] fearful that [he] will again be dragged into another OAH proceeding." ECF No. 136 ¶ 6. Clayton testifies that Defendants' declarations give him no comfort because "defendants don't actually promise that they will not enforce § 211B.02 in the future," and "the declarations don't bind the defendants," who are "free to prosecute persons for alleged section-211B.02 violations whenever they feel like doing so." *Id.* ¶ 7. To Clayton, the county attorneys' attestations that they have no present intention to criminally prosecute § 211B.02 violations are "not credible" in light of the § 211B.06 criminal prosecutions of John Knight and Eugene Copeland. *Id.* ¶¶ 9–14. Clayton also testifies that the § 211B.02 civil penalty imposed on Nathan Miller has "heightened [his] concern" because even though the OAH "didn't refer Mr. Miller to a county attorney," the penalty "implies that the threat of referral, and hence of criminal prosecution, for alleged section-211B.02 violations remains very real." *Id.* ¶¶ 15, 18; *see also* ¶ 19 (describing Miller's Notice of Panel Assignment's

[2] In support of their summary-judgment position, Plaintiffs re-filed the same declarations they submitted originally at the preliminary injunction stage. In these declarations, Plaintiffs describe the arguably protected speech in which each of them (and others) would engage but for the assertedly chilling effect of § 211B.02. *See* ECF Nos. 50, 128 (Nygard); ECF Nos. 51, 129 (MacDonald); ECF Nos. 52, 130 (Swanson); ECF Nos. 53, 131 (Clayton); ECF Nos. 54, 132 (Evanson); ECF Nos. 55, 133 (Beaudette).

reference "to the appropriate county attorney"). Clayton also perceives the OAH's "penalty matrix" as a "threat of criminal prosecution." *Id.* ¶¶ 17–18. As a result of "chapter 211B's criminal and administrative enforcement history," which "signal[] that people risk being criminally prosecuted for violating § 211B.02," Clayton testifies that the statute "continues to chill [his] political speech and RFL's political speech" and causes them to "polic[e] [them]selves in such a way that is chilling [their] speech." *Id.* ¶¶ 20–22.

Additional declaration of Plaintiff Vincent Beaudette. In his second declaration, Beaudette incorporates his earlier declaration, ECF Nos. 55, 133, and goes on to describe his experience during the 2020 election cycle and how the "threat[] [by members of the Republican Party of Minnesota of] civil and criminal proceedings under § 211B.02 for anyone who verbally or in writing used the endorsement from . . . virtual conventions" caused him to "not engage in the types of political activities [he] would have historically done for endorsed candidates." ECF No. 137 ¶¶ 6–10. Beaudette describes the § 211B.06 criminal prosecutions of Copeland and Knight and testifies that the county attorneys' "increased [] charge" from a misdemeanor to a gross misdemeanor pursuant to § 211B.19 in those cases was "worrisome" and could "translate to a similar use of authority in the context of a § 211B.02 criminal indictment." *Id.* ¶¶ 13–18. Beaudette says that Defendants' declarations that they have "no present intention" to prosecute a § 211B.02 violation is of no consequence for the future, because "[t]hey could change their minds tomorrow." *Id.* ¶¶ 19–20. As a result, Beaudette "cannot exercise [his] freedom to be a political advocate as a Republican" and he has had to "curtail [his] political activities because [his] fear of prosecution . . . remains

real." *Id.* ¶ 22. Beaudette attributes his added fear of prosecution to the Nathan Miller civil penalty and the OAH "penalty matrix." *Id.* ¶¶ 24–27. All of these alleged threats have caused Beaudette to "significantly scale[] back from [his] political activities in support of candidates [he] wish[es] to promote, privately or publically [sic]." *Id.* ¶¶ 29–30.

Additional declaration of Plaintiff Don Evanson. In his second declaration, Evanson expresses his concern that "if [he] speak[s] privately or publically [sic] about the Republican local convention and its actions, anybody or any entity, can drag [him] before the [OAH] through a [§ 211B.02 complaint]." ECF No. 138 ¶ 10. Evanson testifies that he has "curtailed [his] political activities" because of his "fear of prosecution . . . [under] § 211B.02." *Id.* ¶ 12. Evanson testifies that his concerns have been "reaffirm[ed] and confirm[ed]" by the OAH penalty matrix and Nathan Miller's civil penalty for violating § 211B.02, including the potential that "the county attorney still has the option to prosecute in the future—whenever he or she wants." *See id.* ¶¶ 13–21. Evanson's concerns also stem from the criminal prosecutions of Knight and Copeland under § 211B.06, and he describes how in his view those prosecutions under § 211B.06 raise the possibility of criminal prosecution under § 211B.02. *Id.* ¶¶ 22–27. As a result, Evanson testifies that he "cannot exercise [his] freedom to be a political advocate as a Republican," and that he fears civil and criminal prosecution that will linger for the three-year statute of limitations if he "speak[s] [his] truth." *Id.* ¶ 30. Evanson expresses his fears regarding how a prosecution under § 211B.02 might affect him, both personally and professionally. *Id.* ¶ 32. Like the other declarants, Evanson testifies that he remains fearful of prosecution despite the

county attorneys' averments that they have "no present intent" to prosecute under § 211B.02. *Id.* ¶ 34.

Additional declaration of Plaintiff Michelle MacDonald. MacDonald describes her previous OAH civil penalty and how it "continues to have a profound effect on [her]" and causes her to fear "an allegation under § 211B.02, even if what [she] said were true." ECF No. 139 ¶¶ 4–6. MacDonald, who "align[s] with the Republican Party," has had to "curtail [her] political activities for fear of not only civil prosecution, but also the threat of criminal prosecution under Minn. Stat. § 211B.02." *Id.* ¶¶ 7–8. The OAH "penalty matrix" and Miller's civil penalty in December 2022 incorporating that matrix add to her fears, though she knows that "so far, Miller has not been criminally prosecuted." *See id.* ¶¶ 10–17. She finds the county attorneys' declarations of "no present intent" to prosecute meaningless in the face of the OAH matrix, which presents the "option" of criminal referral, and she finds the "irony . . . dripping." *Id.* ¶¶ 18–22, 31. McDonald testifies that the § 211B.06 prosecutions of Knight and Copeland add to her fear of prosecution. *Id.* ¶¶ 24–30, 32, 34–35. She fears that if she were "exposed to a criminal indictment" as Knight and Copeland were for "speak[ing] [her] truth," she "would have to wait four years before it could be expunged" and she "would have to hire a lawyer to have this type of legal work done." *Id.* ¶¶ 33–34.

2

This additional factual record will be evaluated with the familiar summary- judgment standards in mind. Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute

over a fact is "material" only if its resolution "might affect the outcome of the suit" under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

With respect to Defendants' motion, the issue is whether, based on the expanded summary-judgment record, a trier of fact could reasonably determine that Defendants have "'threaten[ed] and are about to commence proceedings, either of a civil or criminal nature, to enforce'" Minn. Stat. § 211B.02 against Plaintiffs. *Minn. RFL Republican Farmer Lab. Party*, 33 F.4th at 990; *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))). The record evidence shows as a matter of law that Defendants have neither enforced nor threatened to enforce the challenged statute; the evidence Plaintiffs cite cannot reasonably be construed to undermine Defendants' declarations and sworn assurances of non-prosecution.

Evidence of civil penalties imposed by the Minnesota Office of Administrative Hearings under § 211B.02 does not create a genuine issue of material fact regarding the county attorneys' intentions. The notion that OAH's past actions show that it recently has threatened and is about to commence enforcement action against Plaintiffs seems questionable. Regardless, assuming OAH's past actions are sufficient

to make that showing as to *OAH*, that says nothing about *Defendants'* enforcement activities or intentions. OAH and the county attorneys are separate, distinct organizations. Plaintiffs identify no legal authority that might justify attributing OAH's actions to Defendants. Plaintiffs cite no case in which, for example, the actions of one state actor were attributed to another—whether owing to shared enforcement responsibility or for any other reason— for *Ex parte Young*'s purposes. Courts seem careful to respect state actors' separateness when evaluating *Ex parte Young* issues. *See, e.g.*, *McNeilus Truck and Mfg.*, 226 F.3d at 437–38. Nor do Plaintiffs identify evidence that might factually connect OAH's past actions to Defendants in a way that might, in turn, warrant finding (based on the OAH's past actions) that Defendants have threatened or are about to commence enforcement activities against Plaintiffs. Plaintiffs identify no evidence showing that any Defendant played any role whatsoever in these past prosecutions. None of the past administrative matters Plaintiffs identify were, for example, referred to a county attorney for further action. Finally, it seems important to note that Plaintiffs cited evidence of OAH's past § 211B.02 enforcement activities in support of their motion for a preliminary injunction. *See* ECF No. 48 at 4–5. The presence of this evidence did not figure explicitly in the Eighth Circuit's opinion, but it also did not keep the Eighth Circuit from finding: "The record here shows that the defendants have not enforced nor have threatened to enforce the challenged statute." *Minn. RFL Republican Farmer Lab. Caucus*, 33 F.4th at 991. In other words, finding that this same evidence now creates a genuine issue of material fact as to the *Ex parte Young* question would risk nonadherence to the Eighth Circuit's decision.

The passages Plaintiffs call out from the OAH's website create no genuine fact dispute regarding Defendants' enforcement intentions, either. This is so for reasons explained already—the fact that OAH and the county attorneys are separate organizations, and the absence of record evidence connecting them together to any enforcement of § 211B.02 against Plaintiffs. There is more. The passages Plaintiffs cite provide truthful information regarding OAH's role in adjudicating violations of the Fair Campaign Practices and Finance Acts and presumptive penalties that may be imposed if the OAH were to find a violation. It is difficult to distinguish these passages from innumerable places where the government (state or federal) publishes information regarding adjudicatory processes or consequences relevant to civil or criminal legal regimes. Plaintiffs cite no case or other legal authority suggesting that this kind of ubiquitous information might reasonably be understood to show an enforcement threat. If that were the law—in view of the vast amount of such information state governments routinely provide—*Ex parte Young*'s threat-of-enforcement requirement would prove to be virtually meaningless.

The then-Carver County Attorney's 2003 prosecution of John Knight and the then- Ramsey County Attorney's 2002 prosecution of Eugene Copeland, both under Minn. Stat. § 211B.06, bear no rational relationship to Defendants' prosecutorial intentions concerning Plaintiffs under § 211B.02. This is so for common-sense reasons. Those prosecutions occurred roughly two decades ago. The prosecutions were brought by different elected officials. And the prosecutions occurred under a different statute from the statute Plaintiffs challenge in this case. It is difficult to understand how a reasonable person might

think these decades-old events are in any way revealing of Defendants' present-day prosecutorial intentions with respect to Plaintiffs under any statute, including § 211B.06, and this case is about § 211B.02. In addition to these common-sense reasons, two legal reasons deserve mention. First, there is a substantial legal difference between the version of § 211B.06 in effect when Knight and Copeland were prosecuted and the current version of § 211B.02. As Defendants point out, *see* Defs.' Reply Mem. [ECF No. 144] at 11–12, the Knight and Copeland prosecutions occurred at a time when county attorneys possessed no discretion. The then-operative version mandated that the county attorney "shall prosecute all violations of this chapter" "under the penalty of forfeiture of office." Minn. Stat. § 211B.16, subdiv. 1 (2002). As amended in 2004, the county attorney's decision to prosecute became, and remains, discretionary. *See* Minn. Stat. § 211B.16, subdiv. 1 (2004) ("A county attorney may prosecute any violation of this chapter."). Second, the Eighth Circuit has understood *Ex parte Young* to require enforcement or a threat of enforcement of "'the statute challenged as unconstitutional.'" *Minn. RFL Republican Farmer Lab. Caucus*, 33 F.4th at 992 (quoting *Care Committee II*, 766 F.3d at 797). When it comes to constitutional challenges generally, different statutes do not present the same issues merely because they appear in the same section or chapter. Here, Plaintiffs draw no meaningful legal connection between § 211B.06 and § 211B.02 that might, in turn, justify concluding that enforcement of the former shows an enforcement threat of the latter.

Plaintiffs' additional declarations give no reason to think the *Ex parte Young* exception applies here. Plaintiffs testify essentially that their fear of

prosecution is justified based on the same evidence they cite to show Defendants' prosecutorial intentions: earlier OAH proceedings, information published by OAH, and the Knight and Copeland prosecutions. If this same evidence cannot independently create a fact question concerning Defendants' prosecutorial intentions, then it follows logically that Plaintiffs cannot rely on this evidence to show they reasonably fear prosecution. Plaintiffs also testify that they reasonably fear prosecution because Defendants have not disavowed all future prosecutions. The Eighth Circuit rejected this notion. Specifically, the court rejected Plaintiffs' attempt to distinguish *Care Committee II* on the ground that the County Attorneys here had not disavowed future prosecutions of § 211B.02. *Id*. The Eighth Circuit explained:

> [Defendants'] 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.

Id.

*

Defendants "ha[ve] testified with assurances that [their] office will not take up [their] discretionary ability to assist in the prosecution of § 211B.0[2.]" *Id*. Plaintiffs have identified no evidence reasonably supporting a finding that they are subject to or threatened with any enforcement proceeding by Defendants. Defendants therefore enjoy Eleventh Amendment immunity, making it unnecessary to address Defendants' law-of-the-case arguments or the merits of Plaintiffs' constitutional challenges to § 211B.02.

ORDER

Based on the foregoing, and on all the files, records, and proceedings herein, **IT IS ORDERED THAT**:

1. Defendants' Motion for Summary Judgment [ECF No. 118] is **GRANTED**.

2. Plaintiffs' Motion for Partial Summary Judgment [ECF No. 124] is **DENIED.**

3. Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**.[3]

[3] *See Riemers v. State*, 185 Fed. App'x 551 (8th Cir. 2006) (rejecting the plaintiff's contention that dismissal based on Eleventh Amendment immunity should be without prejudice (citing *Tex. Cmty. Bank v. Mo. Dep't of Soc. Serv.,* 232 F.3d 942, 943 (8th Cir. 2000))).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: March 13, 2023 s/ Eric C. Tostrud
Eric C. Tostrud
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

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

Plaintiffs,

OPINION AND ORDER

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,

and

Attorney General's Office for the State of Minnesota,

Intervenor.

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.

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 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

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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:
>
> **(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' motion will be adjudicated as one seeking only a preliminary injunction.

> 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) ["*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 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

[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).

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]

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*

[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 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.

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 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]

[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'

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.; 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

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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).

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