No. 25-____

IN THE

Supreme Court of the United States

MINNESOTA CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC., AND LAKETOWN ELECTRIC CORPORATION,

Petitioners,

v.

KEITH M. ELLISON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MINNESOTA, NICOLE BLISSENBACH, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE DEPARTMENT OF LABOR AND INDUSTRY, TIMOTHY WALZ, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MINNESOTA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Minnesota enacted a law prohibiting employers from requiring employees to attend meetings in which the employer discusses its views on political or religious matters – otherwise known as "captive-audience" meetings – and requiring them to post a notice written by the State notifying employees of this law. The law clearly violates this Court's precedent declaring that employers have a First Amendment right to communicate their views to employees. Petitioners brought suit in federal court against Respondents who maintain enforcement authority over the law. Reversing the district court, the Eighth Circuit ordered dismissal of Petitioners' suit, thereby conflicting with this Court's holding in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), and in further conflict with the Fifth, Sixth, Ninth, Tenth and Eleventh Circuits.

The question presented is whether state officials may disclaim enforcement authority over a law to avoid federal court review of the law's constitutionality where the statute places clear enforcement authority over, or an obligation to enforce, the law with those state officials.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court (plaintiffs-appellees in the Court of Appeals) are the Minnesota Chapter of Associated Builders and Contractors, the National Federation of Independent Business, and Laketown Electric Corporation.

Respondents in this Court (defendants-appellants in the Court of Appeals) are Keith Ellison, in his official capacity as the Attorney General of the State of Minnesota; Nicole Blissenbach, in her official capacity as the Commissioner of the Minnesota Department of Labor and Industry; and Timothy Walz, in his official capacity as Governor of the State of Minnesota.

CORPORATE DISCLOSURE STATEMENT

Petitioner Minnesota Chapter of Associated Builders and Contractors does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Laketown Electric Corporation does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner National Federation of Independent Business does not have a parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

There are no directly related proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Minnesota Chapter of Associated Builders and Contractors, National Federation of Independent Business, Inc., and Laketown Electric Corporation, respectfully petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The district court's order denying Respondents' Motion to Dismiss (Pet.App. 17a-58a) is unreported.

The Eighth Circuit's opinion reversing the district court's order and granting Respondents' Motion to Dismiss (Pet.App. 1a-15a) is at 153 F.4th 695.

The Eighth Circuit's order denying Petitioners' Petition for Rehearing En Banc (Pet.App. 16a) is at 2025 WL 3060300.

JURISDICTION

The Eighth Circuit issued its opinion in this matter on September 3, 2025, and denied Petitioners' Petition for Rehearing En Banc on November 3, 2025. This petition is filed under Supreme Court Rule 10, and the Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Minn. Stat. § 181.531; the First Amendment; and 29 U.S.C. § 158 are reprinted in the appendix. Pet.App. 59a-61a; 62a; 63a-74a.

I. INTRODUCTORY STATEMENT

This case presents an ideal vehicle for the Court to address a conflict in the Circuits as well as the meaning and application of the Court's holding in *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021). By allowing the state's enforcement officials to disclaim their statutory responsibility to enforce the state's law restricting exercise of the First Amendment, the Eighth Circuit's decision directly conflicts with *Whole Woman's Health*, as well as precedent from both the Sixth and Ninth Circuits, which hold when state officials have a statutory duty to enforce a law, that duty renders such officials proper parties under *Ex parte Young*, regardless of whether those officials planned imminent enforcement. *See Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (attorney general's *duty* to prosecute violations of challenged statute foreclosed Eleventh Amendment immunity); *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1040 (6th Cir. 2022) (district attorneys general not entitled to immunity where they had authority and *duty* to enforce challenged statute).

The Eighth Circuit decision is also inherently in conflict with precedent from the Fifth, Tenth and Eleventh Circuits. *See Okpalobi v. Foster*, 244 F.3d 405, 417 (5th Cir. 2001) ("[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."); *Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014) ("An officer need not have a special connection to the allegedly unconstitutional statute; rather, he need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.") (quotation omitted); *P.C. v. Pryor*, 180 F.3d 1326, 1339-40 (11th Cir. 1999) (applying *Ex parte Young* where defendants made clear they "do intend to prosecute violators", though they had not specifically threatened plaintiffs).

Finally, the Eighth Circuit decision conflicts with other decisions in the Sixth and Ninth Circuits. *See Doe v. DeWine*, 910 F.3d 842, 848–49 (6th Cir. 2018) (statewide official proper party under *Ex Parte Young* when official will take legal or administrative actions against the plaintiff's interests); *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (governor is a proper *Ex parte Young* defendant where his "duty to appoint judges to any newly created judicial positions" constituted connection to a challenged statute)

On May 17, 2023, Minn. Stat. § 181.531 ("the Act") became law, unconstitutionally infringing on the rights of Minnesota employers by prohibiting them from holding mandatory meetings with employees to discuss "religious or political matters". The Act was passed in plain defiance of the First Amendment as well as 29 U.S.C. § 158(c) ("Section 8(c)" of the National Labor Relations Act (NLRA)). Indeed, this

Court has repeatedly emphasized "an employer's free speech right to communicate his views to his employees is firmly established and *cannot be infringed*…." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (emphasis added); *see also Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 191 (2024) ("Ultimately, *Bantam Books*[1] stands for the principle that a government official cannot do indirectly what she is barred from doing directly. A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.").

To vindicate their Constitutional rights, Petitioners filed suit in this matter on February 20, 2024 against Respondents Nicole Blissenbach, the Commissioner of Minnesota's Department of Labor and Industry ("DOLI"), and Keith Ellison, Attorney General of Minnesota, alleging that the Act violated Petitioners' First Amendment rights and is preempted by the NLRA. Shortly after the initial Complaint was filed in the United States District Court for the District of Minnesota, Minnesota Governor, Tim Walz stated, "Minnesota was going to ban that practice, of having those captive anti-union meetings. *You go to jail now if you do that in Minnesota* because you can't intimidate people." (emphasis added). After that speech, Governor Walz later signed into law an amendment to the Act, requiring the Minnesota Commissioner of Labor and Industry to develop a poster that employers are required to post, notifying employees of their rights under the Act.

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[1] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

Petitioners amended the initial Complaint to add Governor Walz as a party because he expressed a strong interest and imminent threat in enforcing the Act, and added a reference to the Act as amended. After being added as a Defendant, Governor Walz doubled-down during the height of his campaign for the vice presidency of the United States, stating: "We banned those damn captive-audience meetings for good in Minnesota. Last time I said that at a union meeting, they sued me over it. It was the best thing to get sued over I ever said. *We're going to continue to ban those meetings.*"

Respondents moved to dismiss the Complaint claiming they were afforded sovereign immunity pursuant to the Eleventh Amendment. The district court ruled from the bench and properly denied the motion as to all Respondents pursuant to *Ex parte Young*'s exception to sovereign immunity. Indeed, the district court (applying this Court's holding in *Whole Woman's Health*) recognized that, while the Act's primary enforcement mechanism is through private action, there exist "state executive officials who retain the authority to enforce the law in some way, and we have steps taken affirmatively toward executing that authority…".

On interlocutory appeal, the Eighth Circuit, in a split-ruling, erred in reversing the district court's holding. The split panel held Governor Walz's ability to appoint and remove Commissioner Blissenbach did not give him a connection to the Act's enforcement under *Ex parte Young*. Further, the split panel held Commissioner Blissenbach's duties under the Act are "ministerial" because, in part, the Commissioner's duty to develop an education poster, "does not

facilitate any information enabling enforcement to flow back to the state." Lastly, the split panel held Attorney General Ellison's declaration disclaiming any intent to enforce the Act overrode his statutory obligations to the contrary, such that he is not threatening to commence proceedings against Plaintiffs. Critically, in his dissent to the panel holding, Judge Loken found that the record *fully supported* the district court's analysis and conclusions:

> – the Governor's authority to appoint and remove the Commissioner, and his speeches saying if you violate the law you will go to jail, "evince a commitment to enforcing the law and a threat of enforcing the law that is unique among all the cases I could find," a "robust tie to threatening to enforce the law";
>
> – the Commissioner has an adequate connection to enforcing or threatening to enforce the Act because "the statute is replete with examples of things the commissioner does in support of enforcement of this law"; and
>
> – the Attorney General "actually has enforcement ability"; he "has taken the least action but has the strongest connection with the enforcement of this statute."
>
> In this First Amendment case, the [district] court further observed, "there is something unique about public threats to

> enforce this law" that creates extra concern for chilling protected speech.

153 F.4th 695, 703-04 (8th Cir. 2025).

After the Eighth Circuit issued its opinion, Attorney General Ellison issued a press release highlighting the State actors' desire to suppress employer free speech and undermine employer rights under the NLRA, stating: "Employees should not be forced to attend meetings that push their boss' political or religious views." Thereafter, on November 3, 2025, the Eighth Circuit denied Petitioner's request for rehearing *en banc*, but Judges Shepherd and Grasz joined Judge Loken in voting for *rehearing en banc*. No. 24-3116, 2025 WL 3060300, at *1 (8th Cir. Nov. 3, 2025).

The Eighth Circuit's split ruling contravenes this Court's holding in *Whole Woman's Health*, conflicts with decisions of other Courts of Appeals, and conflicts with prior Eighth Circuit rulings. As this Court has repeatedly emphasized, States may not nullify Constitutional rights through "evasive schemes" designed to run-around federal judicial review. *Cooper v. Aaron*, 358 U.S. 1, 17–18 (1958). Yet Minnesota attempts to do so here.

The Eighth Circuit's split holding paves the way for States to enact unconstitutional statutes chilling First Amendment rights, while avoiding federal judicial review of these statutes by disclaiming an enforcement interest even though they possess the statutory authority and obligation to do so. Under the Eighth Circuit's split holding, no person would be able to challenge a blatantly unconstitutional statute prior

to enforcement – allowing for the unconstitutional chilling of First Amendment Rights.

The paramount importance of the question presented, this Court's earlier rulings, the conflict between the Circuits, and the Eighth Circuit's departure from its prior holdings warrant this Court's review.

A. Minn. Stat. § 181.531 and Respondents' Enforcement Authority

Minn. Stat. § 181.531 prohibits Minnesota employers from discharging, disciplining or otherwise penalizing or threatening to discharge, discipline, or otherwise penalize an employee "because the employee declines to attend or participate in an employer-sponsored meeting or declines to receive or listen to communications from the employer… if the meeting or communication is to communicate the opinion of the employer about religious or political matters."

The Act defines political matters as "matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulations, proposals to change public policy, and the decision to join or support any political party or political, civic, community, fraternal, or labor organization." It defines religious matters as "matters relating to religious belief, affiliation, and practice and the decision to join or support any religious organization or association."

Further, the Act requires employers to post a notice of employees' rights (i.e., notifying employees of the prohibited conduct by the employer) in places

where employee notices are customarily posted. Indeed, the Act commands Commissioner Blissenbach to create the notice poster for employers to use. Not only has she done so, but she also notified employers they are required to post the notice.[2] The notice poster notifies employees that they may bring a civil action to enforce the law and seek damages and lists the DOLI's phone number and e-mail address.

Employers face significant penalties for violating the Act by taking action against employees who refuse to attend employer-sponsored meetings or decline to listen to an employer's opinion on "political" or "religious" matters. Discharged or disciplined employees can sue employers for damages, including back pay, any other appropriate relief to make the employee whole, and attorneys' fees and costs. Minn. Stat. § 181.531, Subd. 2. Additionally, all three Respondents maintain authority to enforce the Act, despite Minnesota's arguments to the contrary.

First, with respect to Attorney General Ellison, Respondents do not dispute he has the authority to, and must, enforce the Act. Minn. Stat. § 8.31, subd. 1, commands that the attorney general "*shall* investigate violations of the law of this state respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade…". (emphasis added). By virtue of his powers under § 8.31, Attorney General Ellison is authorized – and required – to enforce the Act. Minn. Stat. § 181.1721.

The Act commands Commissioner Blissenbach to create a notice poster that employers are required

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[2] https://www.dli.mn.gov/posters.

to post. Further, Minn. Stat. § 175.20 gives Commissioner Blissenbach authority to "enter without unreasonable delay and inspect places of employment, during normal working hours, and investigate facts, conditions, practices or matters as the commissioner deems appropriate to enforce the laws within the Commissioner's jurisdiction and to carry out the purposes of this chapter and chapter 177, 181, 181A, or 184…". Commissioner Blissenbach may also issue subpoenas, collect evidence, interview witnesses, take testimony, and compel the attendance of witnesses to investigate violations of the Act. Moreover, Minn. Stat. § 181.1721 specifically reiterates the Minnesota Department of Labor and Industry's authority to enforce the Act: *"In addition to the enforcement of this chapter by the department*, the attorney general may enforce this chapter under section 8.31." (emphasis added). Commissioner Blissenbach may then refer violations to the Attorney General for enforcement or, as she has stated she will, refer individuals to private counsel.

Finally, with respect to Governor Walz, the Governor has authority to appoint and remove Commissioner Blissenbach at any time – including if she refuses to enforce the Act. Minn. Stat. § 4.04. subdiv. 1. Beyond such power, Governor Walz may, if in his opinion the public interest requires as such, "employ counsel to act in any action or proceeding if the attorney general is in any way interested adversely to the state." Minn. Stat. § 8.06.

In short, the Act blatantly restricts the free-speech rights of private employers as a content- and viewpoint-based restriction. It makes captive-audience meetings unlawful. In that vein, the Act is

preempted by the NLRA, which undoubtedly protects or prohibits captive-audience meetings relating to labor organizations. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) (holding that a state statute that regulates activity which is even arguably protected or prohibited by the NLRA is preempted); *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (NLRA Section 8(c) "implements the First Amendment" and "*expressly precludes regulation of speech about unionization so long as the communications do not contain a 'threat of reprisal or force or promise of benefit'*") (emphasis added).

To avoid federal judicial scrutiny, the Minnesota legislature has done as Texas did – it essentially delegated enforcement authority to private citizens in an attempt to insulate Minnesota from responsibility for implementing and enforcing the Act. Employers across Minnesota can no longer hold mandatory employee meetings for fear of costly litigation. Indeed, despite wanting to do so, Petitioner Laketown Electric Corporation ended its practice of mandatory employee meetings as a result of the Act.

Minnesota accomplished its goal – effectively ending employer free speech rights while also maintaining the position that its hands are clean, and that it takes no part in the Act's enforcement. This it simply cannot do – a Constitutional right that can be abridged at will by any State simply passing enforcement off to the populace at large is no Constitutional right at all.

B. Proceedings in the District Court

In February 2024, Petitioners filed their initial Complaint, seeking a declaration from the district

court that the Act violates the Constitution and is preempted by the NLRA. Specifically, Petitioners sought relief because the Act regulates speech and therefore violates Petitioners' First Amendment rights. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Further, Petitioners sought relief because the Act attempts to regulate employer speech in a manner that Congress has prohibited under the NLRA. *See, e.g.,* 29 U.S.C. § 158(c) ("Section 8(c)" of the NLRA). Since 1947, this Court and the Courts of Appeals have unequivocally spoken: "[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed . . ." *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969) (emphasis added); *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008); *see also NLRB v. Prescott Indus. Products Co.*, 500 F.2d 6, 10 n.13 (8th Cir. 1974) ("The legislative history of § 8(c) . . . makes it clear that *its purpose was to effectuate employers' First Amendment rights as a response, in part, to the restrictions placed by the Board on captive audience speeches*" (emphasis added)).

After the initial Complaint was filed on April 23, 2024, Governor Walz gave a speech at a conference hosted by North America's Building Trades Unions, in which Governor Walz stated (referring to Act), "Minnesota was going to ban that practice, of having those captive anti-union meetings. *You go to jail now if you do that in Minnesota* because you can't intimidate people." (emphasis added). After that speech, Governor Walz later signed into law an amendment to the Act, requiring Commissioner Blissenbach to develop the notice Minnesota employers are required to post, notifying employees of their rights under the Act. *See* Minn. Stat. § 181.531,

subd. 3(a). Thereafter, on August 13, 2024, Governor Walz gave another speech at a convention held by the American Federation of State, County, and Municipal Employees. During his speech, Governor Walz stated: "We banned those damn captive-audience meetings for good in Minnesota. Last time I said that at a union meeting, they sued me over it. It was the best thing to get sued over I ever said. *We're going to continue to ban those meetings*." The Complaint was amended twice considering these events, adding Governor Walz as a Respondent.

Respondents moved to dismiss the Second Amended and Supplemental Complaint, arguing that they were entitled to Eleventh Amendment sovereign immunity. On September 16, 2024, the district court heard argument on a renewed motion to dismiss. At the conclusion of the hearing, the district court ruled from the bench and denied Respondents' motion to dismiss as to all three Respondents.

In making its bench ruling, the district court reviewed applicable case law and emphasized the importance of Eleventh Amendment immunity while noting there is an exception to that immunity under *Ex parte Young*. The district court acknowledged that it was required to determine whether a connection between the defendant and the enforcement of the law existed but noted "case law teaches that it need not be an exclusive enforcement responsibility. It need not be the only official with a connection to the enforcement of the law. It may not be the primary enforcement ability." Pet.App. 47a.

The district court also recognized case law is evolving as courts are presented with challenges to laws that are designed for enforcement through a

private right of action, particularly in light of this Court's decision in *Whole Woman's Health*. In fact, the district court acknowledged that in *Whole Woman's Health*, Mr. Chief Justice Roberts stated eight justices agreed the *Ex parte Young* exception applied in that case because there still existed state executive officials who retained authority to enforce the statute at issue, which was enforced primarily through a private cause of action. Pet.App. 51a. The district court further relied upon *Vullo*, 602 U.S. at 191, as being instructive on the *Ex parte Young* analysis, stating: "Ultimately, [the Supreme Court's decision in] *Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly. A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." Pet.App. 53a.

The district court ruled Governor Walz was not entitled to sovereign immunity, finding he has a requisite connection with the Act's enforcement because he can appoint and remove Commissioner Blissenbach. Additionally, the district court found the facts revealed Governor Walz is actually threatening to enforce the Act. Pet.App. 47a-49a. Rather than simply celebrate the passage of the Act, the district court found Governor Walz went a step further by his combination of speeches where he stated that if employers violate this law, they will go to jail and then later proudly mentioning this case. The district court found Governor Walz's comments at the two meetings evinced a robust commitment to enforcing the law and a threat of enforcing the law that is "unique among all the cases that [it] could find." *Governor Walz has*

never taken back or disclaimed his threats of enforcement.

Next, the district court found Commissioner Blissenbach was not entitled to sovereign immunity. As the district court found, the Act is replete with examples of things the Commissioner does in support of the enforcement of this law, and "there's no suggestion [in case law] that it has to be simply a pure traditional prosecutorial authority to count as sufficient tie to the enforcement of the law." Pet.App. 50a. The district court further noted that, for purposes of the *Ex parte* Young exception, enforcement cannot have as narrow a meaning as the Respondents suggest, particularly where enforcement is designed through a private cause of action. Pet.App. 52a. Moreover, the district court found the fact that Commissioner Blissenbach prepared and posted a notice informing employees of their rights under the Act on the DOLI website, and also acknowledged she would refer employees to private attorneys to enforce the Act, established enforcement, citing *Doe vs. DeWine,* 910 F.3d 842 (6th Cir. 2018), *Jones v. Jegley*, 947 F.3d 1100 (8th Cir. 2020), as well as *Whole Woman's Health*.

Lastly, the district court found Attorney General Ellison was not entitled to sovereign immunity. Of course, Respondents did and do admit that Attorney General Ellison has authority to enforce the Act. The district court found because Attorney General Ellison undisputedly retains authority to enforce the Act, and because his co-defendants are enforcing and threatening to vigorously enforce the Act, Attorney General Ellison fell within the *Ex parte*

Young exception pursuant to *Whole Woman's Health*. Pet.App. 50a.

C. Proceedings in the Court of Appeals

After the district court denied Respondents' motion to dismiss, they filed an interlocutory appeal to the Eighth Circuit Court of Appeals, reasserting they were entitled to sovereign immunity under the Eleventh Amendment. Pending the outcome of the appeal, the district court proceedings were stayed.

On September 3, 2025, a split panel of the Eighth Circuit issued a decision reversing the district court. *See Minnesota Chapter of Associated Builders & Contractors v. Ellison*, 153 F.4th 695 (8th Cir. Sept. 3, 2025). The split panel held Governor Walz's ability to appoint and remove Commissioner Blissenbach did not give him a connection to the Act's enforcement under *Ex parte Young*. *Id.* at 698-699. Further, the split panel held that Commissioner Blissenbach's duties under the Act are "ministerial" because, in part, the Commissioner's duty to develop an education poster, "does not facilitate any information enabling enforcement to flow back to the state." *Id.* at 700. Lastly, the split panel held Attorney General Ellison's declaration disclaiming any intent to enforce the Act overrode his statutory obligations to the contrary, such that he is not threatening to commence proceedings against Plaintiffs. *Id.* at 701.

Critically, Judge Loken dissented to the panel holding, stating that "the limited record on defendants' motion to dismiss *fully supports* the district court's analysis and conclusions." *Id.* at 702-703. Judge Loken noted that in rendering its decision, the district court correctly stated the standard of

applying the *Ex parte Young* exception before concluding that each defendant has an adequate connection to enforcing or threatening to enforce the Act and properly rejected the broad conflicting contentions of the Respondents. *Id.* at 703. Additionally, Judge Loken noted the district court's observation that in this First Amendment case, "there is something unique about public threats to enforce this law" that creates extra concern for chilling protected speech. *Id*. at 704.

After the Eighth Circuit panel issued its opinion, Attorney General Keith Ellison issued a press release, providing among other things:

> "Today's ruling is a win for working people across Minnesota," said Attorney General Ellison. "Employees should not be forced to attend meetings that push their boss' political or religious views. Similarly, *if workers are trying to form a union, management should not be able to hold mandatory meetings to spread anti-union propaganda* and retaliate against workers who refuse to attend. The whole purpose of unions is to create a more level playing field at the workplace by empowering workers to act collectively. It would be fundamentally unjust and unfair to allow management to weaponize the disproportionate power they have in the workplace to hold mandatory, anti-union meetings in an attempt to stop a union from forming in the first place . . . ".
>
> In Minnesota, if you face retaliation in the workplace for refusing to attend a meeting intended to push your employer's political

> agenda or thwart efforts to form a union, you can actually file a lawsuit and hold your employer accountable for violating your rights," added Ellison. "I am pleased to have won a ruling protecting that important right, and I will continue to defend Minnesota laws and the dignity of working people everywhere."[3]

Petitioners filed a timely Petition for Rehearing En Banc on September 17, 2025, and Respondents filed a responsive brief on October 3, 2025. On November 3, 2025, the Eighth Circuit denied Petitioners' Petitioner for Rehearing – though it noted that Judges Loken, Shepherd, and Grasz would have granted it.

II. REASONS FOR GRANTING THE WRIT

This petition provides the optimal vehicle for addressing conflicts within the Circuits as to whether an imminent threat of enforcement by a State actor is necessary to fall within the exceptions of *Ex parte Young*, as well as solidify the Court's holding in *Whole Woman's Health* that a State cannot insulate blatantly unconstitutional laws from challenge by simply passing primary enforcement authority to the populace at large.

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[3] https://www.ag.state.mn.us/Office/Communications/2025/09/03_CaptiveAudience.asp (last visited December 10, 2025) (emphasis added).

A. The Eighth Circuit's Holding Conflicts with this Court's Ruling in *Whole Woman's Health*, and Rulings in Numerous Other Circuits as to Attorney General Ellison.

The Court should grant the writ because the Eighth Circuit opinion conflicts with this Court's Opinion in *Whole Woman's Health* and opinions in numerous other circuits with respect to Attorney General Ellison, who is statutorily obligated to enforce the Act. *Whole Woman's Health* counsels that a state official who "may or must take enforcement actions" is a proper party pursuant to *Ex parte Young*. *Whole Woman's Health*, 595 U.S. 30 at 45. The Chief Justice's concurrence makes that holding's applicability to this situation abundantly clear:

> These provisions, among others, effectively chill the provision of abortions in Texas. Texas says that the law also blocks any pre-enforcement judicial review in federal court. On that latter contention, Texas is wrong. As eight Members of the Court agree, see ante, at ——, petitioners may bring a pre-enforcement suit challenging the Texas law in federal court under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), ***because there exist state executive officials who retain authority to enforce it.*** *See, e.g.,* Tex. Occ. Code Ann. § 164.055(a) (West 2021). Given the ongoing chilling effect of the state law, the district court should

> resolve this litigation and enter appropriate relief without delay.

Whole Woman's Health, 595 U.S. at 59-60 (emphasis added) (Roberts, C.J., concurring). And while *Whole Woman's Health* did not involve the First Amendment, "[t]he nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake." *Id.* at 62 (Roberts, C.J., concurring in part).

The Eighth Circuit erred in its failure to apply *Whole Woman's Health* with respect to Attorney General Ellison, finding his declaration to having "no present intention to commence" enforcement divests the district court of subject matter jurisdiction. *Ellison*, 153 F.4th at 702. But the Attorney General has no choice in the matter of enforcement – Minnesota law requires him to do so. Minn. Stat. § 8.31, subd. 1. And because the Attorney General is a State official who "must take enforcement actions" against Petitioners, he is a proper defendant under *Ex parte Young*. *Whole Woman's Health*, 595 U.S. 30 at 45.

The Eighth Circuit's holding hangs on the Attorney General's sworn declaration that he possesses no current intent to enforce the Act. It cites *Whole Woman's Health*, stating: "When a private citizen defendant 'supplied sworn declarations' attesting 'he possess[ed] no intention' to enforce the statute, a unanimous Supreme Court held that plaintiffs '[could not] establish "personal injury fairly traceable to [defendant's] allegedly unlawful conduct"' and remanded for the claims against this defendant to

be dismissed for lack of standing." *Ellison*, 153 F.4th at 701-702.

Of course, the private individual at issue in *Whole Woman's Health* was not a State actor, the Court was not analyzing claims against him under *Ex parte Young*, and was not analyzing the issue of subject matter jurisdiction with respect to the private individual. The Eighth Circuit does not address these obvious and critical distinctions, instead simply declaring that "[t]his case is similar," and holding that the Attorney General's declaration stating he possesses no present intent to enforce the Act is dispositive.

And moreover, the Eighth Circuit's holding contravenes holdings of other Circuits.[4] Both the Sixth and Ninth Circuits hold when state officials have a statutory duty to enforce the law, that duty renders such officials proper parties under *Ex parte Young*. *See Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (attorney general's duty to prosecute violations of challenged statute foreclosed Eleventh Amendment immunity); *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1040 (6th Cir. 2022) (district attorneys general not entitled to immunity where they had authority and *duty* to enforce challenged statute).

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[4] The Eighth Circuit's decision infringing on First Amendment rights has, like a cancer, begun metastasizing and is being used now to restrict constitutional rights in other jurisdictions like Illinois. *Illinois Policy Institute v. Flanagan,* No. 24-cv-06976, 2025 WL 0900516, at *7 (N.D. Ill. Sept. 30, 2025).

Similarly, the Eighth Circuit's decision is inherently in conflict with those of the Fifth and Ninth Circuits, which hold state officials cannot do an end-run around live controversies by halting their conduct in the face of litigation and claiming immunity. In *K.P. v. LeBlanc,* 729 F.3d 427 (5th Cir. 2013), state defendants argued the "ongoing" violation of the Constitution ceased mid-litigation, re-instituting their sovereign immunity. The Fifth Circuit disagreed: "Their theory, if accepted, would work an end-run around the voluntary-cessation exception to mootness where a state actor is involved." *Id*. at 439. The Ninth Circuit found the same in *Riley's Am. Heritage Farms v. Elsasser*, No. 23-55516, 2024 WL 1756101 (9th Cir. Apr. 24, 2024). There, the Court determined a state official's voluntary cessation of unlawful conduct does not moot the "ongoing" harm: "We…decline to let state actors end-run live disputes by voluntarily stopping conduct in the fact of litigation and then claiming immunity." *Id*.at *2.

Nor could Attorney General Ellison's disavowal here cure the chill to Petitioners' protected speech, even if he were not obligated to enforce the Act.[5] If courts deferred readily to State officers' pinky-promises that they will not exercise their undisputed authority to prosecute protected speech, "First Amendment rights would exist only at the sufferance of the State," and "constitutionally protected speech

[5] Indeed, Attorney General Ellison's press release highlights his underlying intent in filing a disavowal was to "defend" the Act and allow it to continue to impermissibly regulate activity under the NLRA as well as chill Petitioner's free speech rights under the First Amendment.

[would] be chilled as a result." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999).

Ex parte Young does not turn on whether a state officer is likely to commence an action to enforce a state law. Rather, *Ex parte Young* turns on whether the state officer has the legal capacity to enforce the state law. *See Whole Woman's Health*, 595 U.S. at 47-48 ("[T]his is enough at the motion to dismiss stage to suggest the petitioner will be the target of an enforcement action and thus allow this suit to proceed."). Of course, *Ex parte Young* applies when an officer is "about to commence proceedings," but the Court has never suggested that the doctrine applies only then. Rather, the core holding of *Ex parte Young* is that a state officer is properly subject to suit for prospective relief in federal court, notwithstanding sovereign immunity, when state law vests the officer with the capacity to enforce state law in violation of a plaintiff's federal constitutional rights. *See, e.g., Ex parte Young*, 209 U.S. at 161 ("His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States circuit court.").

The Eleventh Circuit specifically has recognized that such a requirement – of truly imminent and impending prosecution – "would essentially render *Ex parte Young* a nullity". *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1338 (11th Cir. 1999). As that court explained:

> We are unable to understand how, as a practical matter, a potential plaintiff will ever be able to predict when prosecution is indeed "imminent." Certainly, a

> prosecutor has no obligation to inform a target that she is planning to bring criminal charges, or that prosecution is imminent…. In short, if a plaintiff were barred from airing his grievance in federal court while an investigation was pending before a grand jury or prosecutor because he did not know and could not prove that his prosecution was imminent, and if a plaintiff were similarly barred while the prosecution was pending in state court—as he plainly would be under *Younger v. Harris*—then the avenue for seeking prospective relief in a federal forum would be slender indeed.

Id. at 1339 (internal citations and quotations omitted).

Whole Woman's Health, along with authority from the Sixth and Ninth Circuits, make clear that, where a State official retains authority – indeed, an obligation – to enforce an unconstitutional statute enacted with intent to avoid federal judicial review, the question is simply whether the official "may or must" take enforcement action. This is especially true here where, despite Attorney General Ellison's pinky-promise to not enforce the Act against Petitioners, his statutory mandate is to the contrary. *King v. Youngkin*, 122 F.4th 539, 544–45 (4th Cir. 2024) ("[T]his Court has repeatedly rejected the claim that the *Ex parte Young* doctrine contains its own imminency requirement. Rather, [t]he requirement that the violation of federal law be ongoing is satisfied when a state officer's enforcement of an allegedly unconstitutional state law is threatened, *even if the*

threat is not yet imminent." (internal quotations omitted) (emphasis in original)).

And this must be the end-result – a contrary holding will essentially allow States to nullify Constitutional rights. "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States v. Peters,* 5 Cranch 115, 136 (1809). Minnesota's actions here, closely following Texas' enactment of S.B. 8, represent a disturbing pattern in which legislatures believe they can run-around federal judicial review to nullify, and chill, the federal rights of its citizenry.

This case provides the Court with the ideal vehicle to end the practice now and make clear that such gamesmanship of the Constitution's inalienable rights is not permissible – lest the pattern become a widespread practice.[6]

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[6] Indeed, 12 States other than Minnesota have now passed some version of a captive-audience ban statute. *See* Alaska Stat. § 23.10.450 (2024); Cal. Lab. Code § 1137 (2024); Conn. Gen. Stat. § 31-51q (2022); Haw. Rev. Stat. § 377-6(14) (2024); 820 ILCS 57/15 (2024); Me. Stat. tit. 26 § 600-B (2023); N.J. Stat. § 34:19-10 *et seq*. (2025); N.Y. Lab. Law § 201-D(2)(e) (2023); ORS § 659.785 (2009); R.I. Gen. Laws § 28-7-50 (2025); Vt. Stat. Ann. tit. 21, § 495o (2023); Wash. Rev. Code § 49.44.250 (2024). California's captive-audience ban was recently temporarily enjoined. *California Chamber of Com. v. Bonta*, No. 2:24-CV-03798-DJC, ___ F.Supp.3d ___, 2025 WL 2779355, at *14 (E.D. Cal. Sept. 30, 2025) (finding California's captive audience law unconstitutional under the First Amendment). Other than California's statute, each other State's version permits enforcement via a private cause of action.

B. The Eighth Circuit's Ruling Also Conflicts With this Court's Ruling in *Whole Woman's Health,* the Decisions of Other Circuits, and its Own Prior Holdings as to Commissioner Blissenbach and Governor Walz.

The Eighth Circuit further erred in finding that Commissioner Blissenbach and Governor Walz do not have a connection with enforcement of the Act for purposes of *Ex parte Young* and *Whole Woman's Health*. Indeed, the Eighth Circuit's holding conflicts with the decisions of other Circuits and departs from its own precedent as to what State conduct constitutes "enforcement". This case provides the Court with an ideal opportunity to address that open question now and resolve the Circuit split.

1. Commissioner Blissenbach Has a Direct Connection to Enforcement of the Act

Commissioner Blissenbach may enforce, and is enforcing, the Act for purposes of *Ex parte Young* and *Whole Woman's Health*. Nevertheless, the Eighth Circuit held the Act requiring her to develop a notice poster that employers must post is not sufficient connection to the Act's enforcement because it "does not facilitate any information enabling enforcement to flow back to the State." *Ellison*, 153 F.4th at 700. With respect to Commissioner Blissenbach's undisputed authority to "enter… and inspect places of employment" and to "investigate facts, conditions, practices or matters," the Eighth Circuit further held that "[i]nvestigating an employer may increase an employer's compliance with the Act, but it 'does not

rise to the level of compulsion or constraint needed' for enforcement." *Id*. at 701.

The Eighth Circuit's holding contravenes its prior holdings in *Worth v. Jacobson*, 108 F.4th 677, 684, n.3 (8th Cir. 2024) and *Jones v. Jegley*, 947 F.3d 1100, 1103 n.2 (8th Cir. 2020).

In *Jacobson*, the Eighth Circuit held making application forms available on the internet constituted sufficient connection with enforcement of a law. *Jacobson*, 108 F.4th at 684, n.3. But in this case, the split panel found that "developing an educational poster…does not facilitate any information enabling enforcement to flow back to the State. In other words, the State's enforcement machinery does not benefit from the development of the poster so it lacks 'some connection' with enforcement." *Ellison*, 153 F.4th at 700.

Contrary to the Eighth Circuit's holding, the Commissioner's poster *does* enable information enforcement to flow back to the State – the poster itself contains DOLI's phone number and e-mail address for individuals to contact DOLI and report violations. Once contacted by an individual, the Commissioner may (and she has stated she will) refer individuals to private attorneys to enforce the Act. The State's interest in enforcing the Act to unconstitutionally stifle employer speech is directly benefited by the Commissioner's poster.

In *Jegley*, the Eighth Circuit held that the power to investigate, as well as to levy fines and make referrals to law enforcement, was sufficient connection to enforcement of the law. *Jegley*, 947 F.3d at 1103 n.2. Importantly, in *Jegley*, the Eighth Circuit

recognized that it has repeatedly rejected the argument that a plaintiff must risk prosecution before challenging a statute under the First Amendment. *Id*.

Not only does the Eighth Circuit's holding contravene its own precedent, but it is also in direct conflict with other Circuits. In *Doe v. DeWine*, 910 F.3d 842, 848–49 (6th Cir. 2018), the Sixth Circuit made clear that "[L]ack of direct criminal enforcement authority does not foreclose [plaintiff's] reliance on *Ex parte Young*… enjoining a statewide official under *Young* is appropriate when there is a realistic possibility the official will take legal or administrative actions against the plaintiff's interests." (emphasis added) (cleaned up).

In other words, "enforcement" for *Ex parte Young* purposes need not mean direct enforcement via traditional prosecutorial authority. It can take differing forms – and in this instance, it takes forms that the Eighth Circuit, and other Circuits, have said is sufficient to constitute enforcement. In fact, the Eighth Circuit held the Commissioner's ability to investigate employers "may increase an employer's compliance with the Act". *Ellison*, 153 F.4th at 701. It is simply an obfuscation of reality to find that an action taken by the Commissioner which would increase compliance with an unconstitutional statute is somehow not enforcing the statute itself.

The Eighth Circuit's holding represents a split between Circuits and within its own prior rulings, and it warrants this Court's review.

2. Governor Walz Has a Direct Connection with Enforcement of the Act

The Eighth Circuit's decision is also in conflict with *Whole Woman's Health* and other Circuits because Governor Walz may take enforcement action. Indeed, Governor Walz may, if in his opinion the public interest requires as such, "employ counsel to act in any action or proceeding if the attorney general is in any way interested adversely to the state." Minn. Stat. § 8.06. Further, he has authority to appoint and remove Commissioner Blissenbach at any time – including if she refuses to enforce the Act. Minn. Stat. § 4.04. subdiv. 1. Notably, despite his public threats, at no time has Governor Walz ever disclaimed an interest in enforcing the Act.

Despite Governor Walz's undisputed authority, the Eighth Circuit held Governor Walz's power to remove Commissioner Blissenbach "does not have sufficient connection with enforcement of the Act" because it is an administrative or ministerial act. *Ellison*, 153 F.4th at 698-99. It further held that while employing counsel provides the requisite method of enforcement, that the Governor might in the future appoint outside counsel and the appointed counsel might undertake enforcement action was a series of hypotheticals that could not support an *Ex parte Young* suit. *Id*. at 699.

Whole Woman's Health, however, counsels that a State official who "may or must take enforcement actions" is a proper party pursuant to *Ex parte Young*. *Whole Woman's Health*, 595 U.S. 30 at 45. The Chief Justice's concurrence makes such finding clear:

> As eight Members of the Court agree, see ante, at ——, petitioners may bring a pre-enforcement suit challenging the Texas law in federal court under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), ***because there exist state executive officials who retain authority to enforce it.***

The Eighth Circuit's opinion also conflicts with the Ninth Circuit, which has held a governor is a proper *Ex parte Young* defendant where his "duty to appoint judges to any newly created judicial positions" constituted connection to a challenged statute. *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). Moreover, the Eighth Circuit, along with the Fifth, Tenth, and Eleventh Circuits have previously applied *Ex parte Young* where a state official has made statements indicating that they are willing to enforce a challenged statute. *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1339-40 (11th Cir. 1999) (applying *Ex parte Young* where defendants made clear they "do intend to prosecute violators", though they had not specifically threatened plaintiffs); *281 Care Comm. v. Arneson (Care Committee II),* 766 F.3d 774, 797 (8th Cir. 2014) (recognizing that a defendant state official who has a "demonstrated willingness" to enforce a statute is a proper *Ex parte Young* defendant); *Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014) ("An officer need not have a special connection to the allegedly unconstitutional statute; rather, he need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.") (quotation omitted); *Okpalobi v. Foster*, 244 F.3d 405, 417 (5th Cir. 2001) ("[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."). The Governor's statements evince a clear willingness to enforce the Act.

Finally, the split panel's citation to *Church v. Missouri*, 913 F.3d 736, 750 (8th Cir. 2019) and *Balogh v. Lombardi*, 816 F.3d 536, 546 (8th Cir. 2016) for the proposition that Governor Walz's ability to remove and appoint the DOLI Commissioner is an administrative act not connected with enforcement of the law is misplaced.

In *Church*, the Missouri governor could *appoint*, but not remove, public defender commission members. *Church*, 913 F.3d at 750; Mo. Stat. § 600.015 ("The commission shall be composed of seven members, four of whom shall be lawyers, appointed by the governor with the advice and consent of the senate."). The plaintiffs argued that the governor, along with a public defender commission and its members, violated the Sixth Amendment by failing to adequately fund the public defender commission and therefore failed to provide indigent defendants with adequate representation. The plaintiffs argued that the governor had sufficient connection with the statute's enforcement because of his ability to appoint members of the commission. *Church* did not concern the power of the governor to remove the commission's members, nor did it even concern a failure to enforce a challenged statute.

Balogh involved the Missouri Department of Corrections Director's ability to select state's execution team members, who in turn, were permitted

under Missouri law to sue any person who knowingly disclosed their identity. *Balogh*, 816 F.3d at 540. In that case, the Eighth Circuit held because the director's ability to select the execution team had "nothing to do with an execution team member's potential prosecution" of someone who disclosed their identity, the director did not have a sufficient connection to the statute's enforcement. *Id*. at 546.

The district court recognized the facts here stand in marked contrast to those set forth in *Balogh* and *Church*. Whereas in *Balogh*, the director's selection of the execution team had "nothing to do with an execution team member's potential prosecution," Governor Walz's ability to remove and appoint a new DOLI Commissioner has everything to do with the Commissioner's potential enforcement of the Act. Indeed, the *removal* power is what makes the ultimate difference. Wielded by the Governor, it is a power which may be used to ensure the Act's enforcement. If the Commissioner directs a subordinate to investigate wage theft violations in Minnesota, the Commissioner is still connected with enforcement even though she is not doing the investigation herself. It is the direction itself enabling enforcement which provides the requisite connection. The same is true here. The Governor's power to remove and appoint a DOLI Commissioner who will enforce the Act enables enforcement in the first instance. The enforcement flows directly from the Governor's act himself – and unlike Commissioner Blissenbach and Attorney General Ellison, the Governor has not filed any declaration in this case insisting he does not intend to enforce the law.

In sum, Governor Walz not only may enforce the Act, but he has gone well beyond a "demonstrated willingness" to enforce the Act. He has stated, explicitly, that he will ensure it is enforced. He has threatened violators with jail time (despite the Act not allowing criminal prosecutions). And he has extolled the virtues of being named in this lawsuit.

The Governor's fervor for enforcing the Act, combined with his power to remove any DOLI Commissioner who does not abide his wishes as well as his ability to appoint this own counsel constitutes sufficient connection with the enforcement of the Act. The Eighth Circuit's holding was therefore in clear error, and it warrants this Court's review.

C. This Case Presents a Fundamental Question About Federal Courts' Power to Protect Constitutional Rights in the Face of a State's Intentional Effort to Frustrate Federal Review

This case once again presents this Court with a fundamental question about the power of the federal judiciary to protect Constitutional rights in the face of intentional efforts to frustrate that power. Just as in *Whole Woman's Health,* the Court is asked whether States may effectively annul Constitutional rights by virtue of enacting statutes that pass off enforcement authority to the populace at large. As it has done before, the Court should conclusively answer the question in the negative. It is not an overstatement to recognize, as the Chief Justice already has, that "the role of the Supreme Court in our constitutional system" is at stake. *Whole Woman's Health*, 595 U.S. at 62 (Roberts, C.J., concurring in part).

Indeed, the statements by Governor Walz and Attorney General Ellison made throughout the litigation are unequivocally clear. Through the Act, the State officials seek to restrict employer's free speech rights under the First Amendment and regulate conduct under the NLRA. As Governor Walz stated, "*You go to jail now if you [have captive audience speeches] in Minnesota*" and "*We're going to continue to ban those meetings*." Similarly, as Attorney General Ellison stated, "*if workers are trying to form a union, management should not be able to hold mandatory meetings to spread anti-union propaganda*."

These statements make clear the State seeks to circumvent the First Amendment and this Court's precedent, which conclusively holds that laws such as the Act violate the First Amendment and are preempted by the NLRA. *See Chamber of Commerce v. Brown*, 554 U.S. 60 (2008); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

In *Terry v. Adams*, the Court considered whether Texas violated the Fifteenth Amendment by "circumvention" when it permitted a political organization to hold white-only primaries that effectively dictated who held office in a particular county. 345 U.S. 461, 469 (1953). The Court held it was "immaterial that the state [did] not control" the part of the elective process that it left for the organization to manage. *Id*. The primaries were "purposefully designed to exclude" Black people from voting "and at the same time to escape the Fifteenth Amendment's command." *Id*. at 463–64. This Court determined the primaries constituted reviewable state action and found Texas had engaged in "flagrant

abuse of [election] processes to defeat the purposes of" the Constitution. *Id*. at 469.

The same is true of other, similar cases this Court has heard. *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 568–69 (1974) (affirming injunction against a city policy granting segregated private schools "exclusive access to public recreational facilities"); *Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (holding unconstitutional a law providing as "one of the basic policies of the State" a private right to racially discriminate in the housing market because such a policy would "significantly encourage and involve the State in private discriminations"); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (enjoining requirement that a political candidate's race be listed on the ballot and emphasizing "that which cannot be done by express statutory prohibition cannot be done by indirection").

And just last year, this Court reaffirmed the fundamental maxim that ". . . a government official cannot do indirectly what she is barred from doing directly: [a] government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." *Vullo*, 602 U.S. at 190.

Indeed, in *Whole Woman's Health*, the petitioners warned that Texas' enactment of S.B. 8 would "set a dangerous precedent that other States will be sure to follow." *See* Petition for Writ of Certiorari at 26-27, *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021), No. 21-463, 2021 WL 4463052. That apt prediction has come to pass.

The use of a private-enforcement scheme is now the go-to method for States wishing to pass statutes

restricting Constitutional rights. Hailey Martin, *S.B. H(8): Battle of the Bills and Private Enforcement*, 92 U. Cin. L. Rev. 821 (2024) ("Across the nation, state legislators have introduced bills with similar enforcement schemes, covering a wide range of issues."); *see, e.g.*, Cal. Bus. & Prof. Code § 22949.61 *et seq*. (statute regulating assault weapons and providing it shall be "enforced exclusively through private civil actions"); Fla. Stat. § 1006.205 (providing a private cause of action to "[a]ny student who is deprived of an athletic opportunity" as a result of a violation of Florida's Fairness in Women's Sports Act).

The pattern being exhibited is quickly becoming common practice. The Court should seize the opportunity here to solidify its *Whole Woman's Health* holding, make clear to the States that private-enforcement schemes intended to bypass federal judicial review of unconstitutional statutes will not withstand scrutiny, and end the proliferation of similar statutes. Petitioners fear that failure to do so will end with "the constitution itself becom[ing] a solemn mockery." *Peters*, 5 Cranch at 136.

Petitioners respectfully request this Court grant this Petition, and reverse the Eighth Circuit's error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 15, 2026

APPENDIX

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 24-3116

Minnesota Chapter of Associated Builders and Contractors; National Federation of Independent Business, Inc.; Laketown Electric Corporation

Plaintiffs - Appellees

v.

Keith M. Ellison, in his official capacity as Attorney General of Minnesota; Nicole Blissenbach, in her official capacity as the Commissioner of the Minnesota Department of Labor and Industry; Timothy Walz, in his official capacity as Governor of the State of Minnesota

Defendants – Appellants

Chamber of Commerce of the United States of America; National Association of Wholesaler-Distributors; National Retail Federation; Coalition for a Democratic Workplace

Amici on Behalf of Appellee(s)

Appeal from United States District Court
for the District of Minnesota

Submitted: June 11, 2025
Filed: September 3, 2025

Before LOKEN, ERICKSON, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

The Minnesota Chapter of Associated Builders and Contractors and two other associations (MNABC) sued Attorney General Keith Ellison, Department of Labor and Industry Commissioner Nicole Blissenbach, and Governor Timothy Walz seeking to enjoin the defendants from enforcing the "Employer-Sponsored Meetings or Communication Act." The district court denied the defendants' motion to dismiss for lack of subject matter jurisdiction based on state sovereign immunity. We reverse.

The Act is an anti-captive audience law which prohibits employers from "tak[ing] any adverse employment action against an employee" for "declin[ing]" to attend meetings or receive communications where an employer disseminates its opinion "about religious or political matters." Minn. Stat. § 181.531, subd. 1(1). It provides a private right of action for "aggrieved employee[s]," *id.* at subd. 2, and requires employers to post a "notice of employee rights" under the Act "within the workplace," *id.* at subd. 3(b). It was amended to require the Commissioner to "develop an educational poster providing notice of employees' rights provided." *Id.* at subd. 3(a).

Immediately after MNABC filed this lawsuit, the Attorney General and the Commissioner filed

materially identical declarations stating each had "not enforced" or "threatened to enforce" the Act and had "no present intention to commence" enforcement proceedings. After it was amended, the Commissioner reaffirmed her previous declaration disavowing any intentions, past or present, to enforce the Act.

The Governor was not an original defendant, but after enactment, he told the audience at a trade union conference that "Minnesota was going to ban that practice, of having those captive anti-union meetings. You go to jail now if you do that in

Minnesota because you can't intimidate people." MNABC amended their complaint, adding the Governor as a defendant. While running for Vice President, the Governor continued to laud the Act: "We banned those damn captive-audience meetings for good in Minnesota. Last time I said that at a union meeting, they sued me over it. It was the best thing to get sued over I ever said. We're going to continue to ban those meetings." No one can be jailed under the Act, and everyone agrees that the Governor misstated the law.

The defendants asserted state sovereign immunity and moved to dismiss the complaint, factually attacking the court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The Governor and Commissioner argued they did not have "a sufficient connection to the Act's enforcement," and the Attorney General and Commissioner declared they did not have "present intent" to enforce the Act. The district court denied the motion, and the defendants bring this interlocutory appeal.

"We have jurisdiction over interlocutory appeals involving Eleventh Amendment immunity, which we

review *de novo*." *Wolk v. City of Brooklyn Ctr.*, 107 F.4th 854, 858 (8th Cir. 2024) (citations omitted). In a factual attack on subject matter jurisdiction, we consider "'matters outside the pleadings,'" such as declarations, and the nonmoving party does "not enjoy the benefit of the allegations in its pleadings being accepted as true." *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 915 (8th Cir. 2015) (citation omitted).

"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*, 595 U.S. 30, 39 (2021). However, *Ex parte Young* provides a "narrow exception" by "allow[ing] 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. 123, 159–60 (1908)). To be a proper *Ex parte Young* defendant, the official must have "some connection with the enforcement" of the challenged law and "threaten and [be] about to commence proceedings." *Ex parte Young*, 209 U.S. at 156–57. We consider each defendant's role—connection with enforcement and imminence—lest we "make the state a party" and violate its sovereign immunity. *Id.* at 157.

Beginning with the Governor, the district court held that his speeches "combined with the ability to remove a commissioner who might not feel as zealous about this law" is enough to make him an *Ex parte Young* defendant. *See* Minn. Stat. § 4.04, subd. 1 ("The governor shall appoint . . . all officers . . . whose selection is not otherwise provided for by law and, at pleasure, may remove any such appointee whose term of service is not by law prescribed."). But

removal power does not have sufficient connection with enforcement of the Act. The Governor's power to remove the Commissioner is "incident[al]" to his power to appoint her. *See Krakowksi v. City of St. Cloud*, 101 N.W.2d 820, 825 (Minn. 1960). And a governor "appointing members of [a commission] is an administrative act" which "does not give [him] some connection" to enforcement. *Church v. Missouri,* 913 F.3d 736, 750 (8th Cir. 2019). Appointment or selection is "an administrative or ministerial" act—not an enforcement action within the meaning of *Ex parte Young*—because it is "not analogous to enforcing the [statute] through a civil or criminal prosecution." *Balogh v. Lombardi*, 816 F.3d 536, 546 (8th Cir. 2016). We see no legally significant distinction between appointment and removal: both are "administrative or ministerial" acts with an insufficient connection to enforcement. *See id.* ("[D]irector's authority *to define* the members . . . is not an enforcement action." (emphasis added)).

The "fiction" of *Ex parte Young* confirms that removal is an administrative or ministerial act. *See Church*, 913 F.3d at 747 (quoting *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011)). An *Ex parte Young* suit is brought against a state officer in his official capacity. 209 U.S. at 157. "[T]he relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis v. Clarke*, 581 U.S. 155, 162 (2017). Even if the Governor were to remove the Commissioner for her lack of zeal to enforce the Act, her successor would "automatically assume [her] role in the litigation" and would be bound by any ruling enjoining the Commissioner from enforcing the Act. *Id.*

Appointing or removing a commissioner is "too far removed" from enforcement to bring the Governor within the *Ex parte Young* exception. *See McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 996 (6th Cir. 2019) (Sutton, J.).

MNABC also defends the decision below by arguing the Governor has some connection with enforcement because he "may employ counsel to act in any action or proceeding if the attorney general is in any way interested adversely to the state." Minn. Stat. § 8.06. Since all parties agree that the Attorney General has some connection with enforcement, it stands to reason that counsel appointed under § 8.06 would too. While appointing and removing the Commissioner is an "administrative or ministerial" act not rising to the level of enforcement, "employ[ing]" outside counsel goes beyond merely appointing or removing a person to fulfill a statutory role. The appointed counsel would serve at the Governor's "direct[ion]," which provides the requisite "*method[]* of enforcement." *Church*, 913 F.3d at 749. MNABC does not argue that the Governor has made any overtures to employ outside counsel, even though the Attorney General has disavowed any present intent to enforce the Act. That the Governor "might in the future" appoint outside counsel and the appointed counsel "might then undertake enforcement action" against MNABC "is a series of hypotheticals" which cannot support an *Ex parte Young* suit against the Governor at this time. *See Whole Woman's Health*, 595 U.S. at 44.

Shifting to the Commissioner, the district court held that she is a proper *Ex parte Young* defendant because enforcement need not be "pure traditional prosecutorial authority" and the Act is "replete with

examples of things that [she] does in support of the enforcement." Minnesota correctly argues that the Commissioner's duties under the Act are ministerial and not enforcement.

The Act empowers "[a]n aggrieved employee" to "bring a civil action to enforce this section." Minn. Stat. § 181.531, subd. 2. The Commissioner cannot. Instead, her only duty is to "develop an educational poster providing notice of employees' rights provided under this section." Minn. Stat. § 181.531, subd. 3(a). MNABC argues that this duty is like the one in *Worth v. Jacobson*, where we held that "making application forms available on the internet" is a "dut[y] connected with [a] statute's enforcement." 108 F.4th 677, 684 n.3 (8th Cir. 2024). That statute criminalized carrying handguns in public places without a permit, and an applicant had to be "at least 21 years old" to apply for a permit. *Id.* at 683 (quoting Minn. Stat. § 624.717, subd. 2(b)(2)). The application forms were "key" to the State's enforcement of the statute because they required applicants to provide their dates of birth. *Id.* at 684 n.3. But developing an educational poster, while informing potentially aggrieved employees of their rights, does not facilitate any information enabling enforcement to flow back to the State. In other words, the State's enforcement machinery does not benefit from the development of the poster so it lacks "some connection" with enforcement. *See Whole Woman's Health*, 595 U.S. at 41 (holding clerks who "set in motion the 'machinery' of court proceedings" are not connected to enforcement).

MNABC argued below that the prefatory clause to the "Attorney General Enforcement" provision of the employment chapter gives the Commissioner enforcement authority. It states that "*[i]n addition to the*

enforcement of this chapter by the department, the attorney general may enforce this chapter under section 8.31." Minn. Stat. § 181.1721 (emphasis added). But § 181.1721 "explicitly grant[s] *the Attorney General* power . . . to enforce the wage laws" of chapter 181. *Madison Equities, Inc. v. Off. of Att'y Gen.*, 967 N.W.2d 667, 672 (Minn. 2021) (emphasis added). The clause does not give the Commissioner independent authority to enforce the chapter, but instead refers to other provisions of the employment chapter where she is given explicit enforcement powers. *E.g.*, Minn. Stat. § 181.722, subd. 4(b) ("This section [prohibiting misrepresentation of employment relationship] may be investigated and enforced under the commissioner's authority under state law."); § 181.723, subd. 7(h) ("This section [prohibiting misclassification of construction employees] may be investigated and enforced under the commissioner's authority under state law.").

Moreover, the Act is not one of the enumerated sections of labor law with which the Legislature gave the Commissioner the power to "requir[e] an employer to comply" and to "bring an action in the district court . . . to enforce or require compliance." Minn. Stat. § 177.27, subds. 4, 5. Interpreting the Attorney General Enforcement provision to grant the Commissioner enforcement authority over the entire employment chapter would render the Legislature's choice to grant the Commissioner enforcement authority over specific sections in § 177.27 superfluous. *See State v. Culver*, 941 N.W.2d 134, 141 n.3 (Minn. 2020) ("Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant." (citation omitted)).

The Commissioner also has the authority to "enter . . . and inspect places of employment" and to "investigate facts, conditions, practices or matters as the commissioner deems appropriate to enforce the laws" within her jurisdiction. Minn. Stat. § 175.20. Although this section is titled "Enforcement" and gives the Commissioner power "to enforce" the laws within her jurisdiction, the use of "enforce" is not dispositive. The substance of the law is. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544–45 (2012). Section 175.20 allows the Commissioner to "investigate" employers. Investigating an employer may increase an employer's compliance with the Act, but it "does not rise to the level of compulsion or constraint needed" for enforcement. *Mi Familia Vota v. Ogg*, 105 F.4th 313, 332 (5th Cir. 2024); *see also Jones v. Jegley*, 947 F.3d 1100, 1103 n.2 (8th Cir. 2020) (holding that investigating when paired with "lev[ying] fines" and "mak[ing] referrals to law enforcement" is "a 'strong enough' connection" to enforcement (citation omitted)). So the Commissioner does not have "some connection with the enforcement" of the Act to make her a proper *Ex parte Young* defendant as her role in the Act is "ministerial or administrative."

Last, the Attorney General. There is no dispute that he has power to enforce the Act, *see* Minn. Stat. § 181.1721, but the parties disagree whether he has sufficiently threatened to enforce the Act to make him a proper *Ex parte Young* defendant. The district court rejected his declaration disclaiming any past or "present intent[]" to commence proceedings, finding that "the imminent threats related to enforcement" from the Governor were "enough" for the Attorney General

to have enforcement intent. Minnesota argues that the district court erred when it transferred the Governor's enforcement intent to the Attorney General.

Under *Ex parte Young*, "*such* officer must have some connection" with enforcement "by virtue of *his* office." 209 U.S. at 157 (emphasis added); *see also Whole Woman's Health*, 595 U.S. at 45 (holding that some "defendants f[e]ll within the scope of *Ex parte Young*'s historic exception to state sovereign immunity" based upon their connection to S.B. 8 while relief against others was "foreclose[d]"). *Ex parte Young* "rests on the premise" that "a federal court command[ing] a state official to do nothing more than refrain from violating federal law" does not violate a state's sovereign immunity. *Stewart*, 563 U.S. at 255. This has always required an analysis of the defendant's specific role in enforcement or else it would merely be an "attempt[] to make the state a party." *See Ex parte Young*, U.S. at 157–61. So we must address whether the Attorney General's declaration is sufficient to disclaim any intent to enforce the Act.

We have held that the "proper standard" in assessing whether an officer is entitled to Eleventh Amendment immunity is whether his affidavit establishes his "'unwillingness to exercise [his] ability to prosecute'" a claim against the plaintiffs. *Minn. RFL Republican Farmer Lab. Caucus v. Freeman*, 33 F.4th 985, 992 (8th Cir. 2022) (citation omitted). In a factual attack, like the review of the preliminary injunction in *Freeman*, we "look outside the pleadings to affidavits or other documents" to establish jurisdictional facts by a preponderance of the evidence. *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018). In *Whole Woman's Health*, the Supreme Court

did just that. When a private citizen defendant "supplied sworn declarations" attesting "he possess[ed] no intention" to enforce the statute, a unanimous Supreme Court held that plaintiffs "[could not] establish 'personal injury fairly traceable to [defendant's] allegedly unlawful conduct'" and remanded for the claims against this defendant to be dismissed for lack of standing. *Whole Woman's Health*, 595 U.S. at 48 (citation omitted).[1] This case is similar. The Attorney General's declaration attests to having "no present intention to commence" enforcement, so MNABC lacks standing to sue, divesting the district court of subject matter jurisdiction. *Auer v. Trans Union, LLC*, 902 F.3d 873, 877 (8th Cir. 2018); *see Yeransian v. B. Riley FBR, Inc.*, 984 F.3d 633, 637 (8th Cir. 2021) (affirming 12(b)(1) dismissal based on a factual attack because plaintiff lacked standing).

MNABC argues that the Attorney General's declaration does not "override" his statutory obligations. "[S]ome duty in regard to the enforcement" is not enough: *Ex parte Young* also requires the officer to "threaten and [be] about to commence proceedings." 209 U.S. at 156. By ignoring this "about to commence proceedings" requirement, MNABC's position effectively collapses the *Ex parte Young* exception to req-

[1] Although this defendant was a private individual, the Fifth Circuit had held that his appeal was "inextricably intertwined" with the state defendants' Eleventh Amendment immunity claims. *Whole Woman's Health v. Jackson*, 13 F.4th 434, 447 (5th Cir. 2021) (per curiam). Before the Supreme Court, "no one contest[ed] this decision." *Whole Woman's Health*, 595 U.S. at 48. As the Eleventh Amendment provided appellate jurisdiction and the Supreme Court analyzed his defense in the same manner as other state defendants, we find the law apposite for a state officer.

uire only "some connection with the enforcement" of the Act.

Amicus refines MNABC's argument, asserting that the imminence of enforcement proceedings is irrelevant at the motion to dismiss stage. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court *need only* conduct a 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (quotation omitted) (cleaned up)); *Whole Women's Health*, 595 U.S. at 45 (official "who *may* . . . take enforcement actions" is proper *Ex parte Young* defendant (emphasis added)). This is true for facial attacks on jurisdiction where "the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (citation omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (plaintiffs must only plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (citation omitted)). The same is not true for factual attacks where we "consider[] matters *outside* the pleadings." *Carlsen*, 833 F.3d at 908 (emphasis added). A defendant supplying a declaration is relevant to whether plaintiffs have standing.

We reverse and remand with instructions to dismiss with prejudice the claims against the Governor and Commissioner and to dismiss without prejudice the claim against the Attorney General.

LOKEN, Circuit Judge, dissenting.

This is a pre-enforcement action by private parties to enjoin the Minnesota Governor, Attorney General, and Commissioner of the Department of Labor and Industry (the Commissioner) from enforcing the Employer-Sponsored Meetings or Communication Act, Minn. Stat. § 181.531, an anti-captive audience law that prohibits Minnesota employers from discharging or otherwise penalizing an employee who declines to attend or participate in an employer-sponsored meeting or communication "to communicate the opinion of the employer about religious or political matters," as broadly defined. Under the Act, private individuals may bring a civil action to enforce its provisions, and the Attorney General and the Commissioner have independent enforcement authority. During a speech at a public employees convention in August 2024, the Governor stated, "We banned those damn captive-audience meetings for good in Minnesota. Last time I said that at a union meeting, they sued me over it. . . . We're going to continue to ban those meetings." Plaintiffs claim the Act regulates employer speech in violation of the First Amendment and is preempted by the federal National Labor Relations Act. Defendants argue they are entitled to Eleventh Amendment sovereign immunity.

As the court acknowledges, this interlocutory appeal turns on whether the "narrow exception" to Eleventh Amendment immunity that the Supreme Court adopted in *Ex parte Young* applies to permit plaintiffs to seek a federal court order preventing the defendant executive officials from enforcing a state law that is contrary to federal law. Under prevailing Supreme Court authority, the answer to that difficult question turns on whether each official has "some connection with the enforcement" of the Act and has

threatened or is about to commence enforcement proceedings. 209 U.S. 123, 156-57 (1908). *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535-36, 544 (Roberts, C.J., concurring in the judgment and dissenting in part), 545 (Sotomayor, J., concurring in the judgment in part and dissenting in part). This is a complex, fact-intensive inquiry. In *Jones v. Jegley*, 947 F.3d 1100, 1103 n.2 (8th Cir. 2020), we concluded "a 'strong enough' connection" to enforcement was shown. In *Minnesota RFL Repub. Farmer Labor Caucus v. Freeman*, 33 F.4th 985, 992 (8th Cir. 2022), we concluded the defendants' showing that they had not enforced or threatened to enforce the statute at issue and affidavits stating they have no present intention to commence enforcement proceedings were sufficient to entitle them to immunity.

The district court ruled from the bench at the end of a lengthy hearing on defendants' motion to dismiss. The transcript of that hearing, RDoc 62, was filed September 20, 2024. After correctly stating the above-summarized standard for applying the *Ex parte Young* exception -- that each defendant has an adequate connection to enforcing or threatening to enforce the Act -- the court rejected the broad conflicting contentions of plaintiffs and the three defendants, denied plaintiffs' request that the court *sua sponte* grant summary judgment in their favor, and emphasized that further developments as the case progresses, including discovery, could change the landscape and cause the applicability of the *Ex parte Young* exception to be re-appraised. On the record before it, the court then concluded:

-- the Governor's authority to appoint and remove the Commissioner, and his speeches saying if you violate the law you will go to jail, "evince a commitment to

enforcing the law and a threat of enforcing the law that is unique among all the cases I could find," a "robust tie to threatening to enforce the law;"

-- the Commissioner has an adequate connection to enforcing or threatening to enforce the Act because "the statute is replete with examples of things the commissioner does in support of enforcement of this law;" and

-- the Attorney General "actually has enforcement ability;" he "has taken the least action but has the strongest connection with the enforcement of this statute."

In this First Amendment case, the court further observed, "there is something unique about public threats to enforce this law" that creates extra concern for chilling protected speech. *Minnesota Chapter of Associated Builders and Contractors v. Timothy James Walz et al.*, File No. 24-cv-536, RDoc 62, Motion Hearing Tr. 35-44 (D. Minn. Sept. 20, 2024).

In my view, the limited record on defendants' motion to dismiss fully supports the district court's analysis and conclusions. Whether the standard of review is *de novo* or abuse of discretion, I would affirm the denial of defendants' motion to dismiss based on state sovereign immunity for the reasons stated by the district court. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-3116

Minnesota Chapter of Associated Builders and Contractors, et al.

Appellees

v.

Keith M. Ellison, in his official capacity as Attorney General of Minnesota, et al.

Appellants

Chamber of Commerce of the United States of America, et al. Amici on Behalf of Appellee(s)

Appeal from U.S. District Court
for the District of Minnesota
(0:24-cv-00536-KMM)

ORDER

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

Judge Loken, Judge Shepherd, and Judge Grasz would grant the petition for rehearing en banc.

November 03, 2025

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

/s/ Susan E. Bindler

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

File No. 24-CV-536
(KMM/ECW)

Minneapolis, Minnesota
September 16, 2024
1:57 p.m.

Minnesota Chapter of Associated Builders and Contractors, Inc., National Federation of Independent Business, Inc., and Laketown Electric Corporation,

Plaintiffs,

vs.

Timothy James Walz, in his official capacity as Governor of the State of Minnesota, Keith Ellison, in his official capacity as Attorney General of State of Minnesota, Nicole Blissenbach, in her official capacity as the Commissioner of the Minnesota Department of Labor and Industry,

Defendants.

BEFORE THE HONORABLE KATHERINE M. MENENDEZ UNITED STATES DISTRICT COURT JUDGE **(MOTION HEARING)**

Proceedings reported by certified stenographer; transcript produced with computer.

APPEARANCES:

For the Plaintiffs:	Littler Mendelson THOMAS R. REVNEW, ESQ. KURT J. ERICKSON, ESQ. 80 South Eighth Street Suite 1300 Minneapolis, Minnesota 55402
For the Defendants:	Minnesota Attorney General's Office NICHOLAS J. PLADSON, ESQ. BENJAMIN HARRINGA, ESQ. 445 Minnesota Street Suite 1400 St. Paul, Minnesota 55101
Court Reporter:	PAULA K. RICHTER, RMR-CRR-CRC 300 South Fourth Street Minneapolis, Minnesota 55415

PROCEEDINGS
IN OPEN COURT

THE COURT: Welcome, everyone. We are here for a first hearing on a second motion related to dismissing in this matter. Let's get appearances on the record, first on behalf of the plaintiffs.

MR. REVNEW: On behalf of the plaintiffs, Tom Revnew, appearing with my co-counsel, Kurt Erickson.

THE COURT: All right. Great. Welcome to both of you. You've been around a long time. I'm surprised you didn't stand up.

MR. REVNEW: I apologize, Your Honor.

THE COURT: Don't worry about it. My whole career was in federal court, so the whole idea of ever sitting in court, I didn't even know that was a thing until I started working with some people who would come over from state court. I'm just giving you a little grief.

And are you going to be arguing, sir?

MR. REVNEW: I am, Your Honor.

THE COURT: Great. Thank you.

And here on behalf of the defendants.

MR. PLADSON: Nick Pladson and my colleague, Ben Harringa.

THE COURT: Okay. Great. And are you going to be [4] arguing, Mr. Pladson?

MR. PLADSON: Yes.

THE COURT: Thank you.

Let's go ahead and get started. So my hope for today's argument is that we can focus on any things that have changed since the last time we had this conversation and really kind of focus in on any new case law or new authority that anyone would like to draw to my attention and certainly the changed and evolved factual landscape.

I would like our conversation to include all of the things that are now before me, so both the amended complaint and the supplemented complaint. And I didn't look today. There's nothing new?

MR. PLADSON: (Shakes head.)

THE COURT: Okay. So I'd just like to have a conversation about that.

It is my intention to very likely rule from the bench today because I'd like to get this matter tied up.

So let's go ahead and get started, and I think I'll begin with you, Mr. Pladson, if you don't mind coming to the podium.

MR. PLADSON: Good afternoon, Your Honor. THE COURT: Good afternoon. How are you? MR. PLADSON: I'm all right.

THE COURT: So we are in factual attack land [5] again, correct?

MR. PLADSON: Correct.

THE COURT: That means you don't get the normal benefit of – or that the plaintiffs don't get the normal benefit of assuming that the facts in the pleading are correct as to this question, right?

MR. PLADSON: That's right.

THE COURT: Tell me how you think I assess that, what difference you think that makes to the calculus.

MR. PLADSON: Well, I think the calculus, you have to look at what facts have been submitted and properly either authenticated or submitted and are admissible for consideration at this juncture. Right now we have affidavits regarding two statements made by Governor Walz that are in the record, and I don't dispute that those are – they are what they are.

THE COURT: You're not raising an evidentiary challenge to the fact that these things have been said. MR. PLADSON: No, not at all.

And the other thing, though, is that there aren't any other statements of, you know, admissible facts in the record. Right now we've got an unverified complaint, which is insufficient to oppose a dispositive motion.

THE COURT: Is this in your brief?

MR. PLADSON: Yep.

[6]

THE COURT: Okay. So what would it need to do to be verified and sufficient to avoid a motion?

MR. PLADSON: Well, I think in this context, they would have to submit evidence that they have – they, the defendants – or the plaintiff, excuse me, have been threatened or that the defendants here are about to commence proceedings to enforce the act against them specifically.

THE COURT: Oh, I understand what you think the showing has to be. Are you arguing that I can't consider anything – so, for instance, I've got the allegations in the complaint that include the amendment to the law and the requirement of the website notifying people to hang posters. You agree I can consider that?

MR. PLADSON: You can consider that. I think that exists outside of the – it's a matter of public record what the law is and what the amendment is and what has transpired there. I think where the factual deficiencies are are with what the plaintiffs have demonstrated as to themselves.

THE COURT: And tell me what you think – you mean you think that this factual record that I have before me isn't enough to show threatened enforcement.

MR. PLADSON: Yes, that's exactly right.

THE COURT: But you're not asking me to hold an evidentiary hearing to require them to introduce, say, the new website, the Walz tapes, any of that?

[7]

MR. PLADSON: No. We're fine with those being in there. They speak for themselves.

THE COURT: Okay. I'm just trying to make sure we are all in agreement about what the record before the Court is and we're talking about the significance or the weight to afford to that record, right?

MR. PLADSON: That's right.

THE COURT: Very good. So tell me why you think the Walz speeches don't matter.

MR. PLADSON: They don't contain a threat of any kind. They simply –

THE COURT: What about, "You'll go to jail"?

MR. PLADSON: It's inaccurate. It's not true.

THE COURT: I recognize that, but it's also far harsher than the reality of remedy that's available. I mean, threat of enforcement, why doesn't that count?

MR. PLADSON: Number one, it's not threatened towards these plaintiffs, so that's part of our argument.

Number two, the governor has no connection with the enforcement of the law. He's charged with ensuring that the laws are faithfully executed under the state constitution. He has no specific or even general authority to enforce Section 181.531 or any of its parts. And there's no indication that any of the other things that might have happened that could

get, you know, his hands deeper involved [8] in this case, such as a directive to a cabinet member or a directive to the attorney general, there's no evidence that any of that has happened or that he's taken any of those steps. All we have are these two statements, these sort of soapbox campaign speeches, essentially.

THE COURT: What about him saying, I got sued for this; there's nothing I'd rather get sued for? That, you know, really intimately kind of ties himself up with the law and, frankly, recognizes that there's a lawsuit about this law that he's kind of saying, bring it on, and yet you're standing here saying, do not bring it on.

MR. PLADSON: Well, I'm saying that he is not a proper defendant in this case because he has no connection to actually enforcing this law. So let's say that we go forward and the Court is about to enter an injunction of declaratory relief. What would the injunction do to Governor Walz? It would have to apply to him in some way that stops him from doing something that he's allowed to do. There's nothing that he's allowed to do under the state law or that he's even shown an indication of that would connect him with the enforcement, it would be purely illusory.

And so when we're looking at the remedies and who the proper parties are here, I think you need to look at what the action is that they otherwise could take that the injunction would do to either prevent or limit or modify.

[9]

THE COURT: So in *Whole Woman's Health,* one of the things the Court grappled with at length is the extent to which the various defendants or hypo-

thesized defendants were appropriate defendants. And the Court landed on these licensing agents who had, arguably, pretty tangential, if any, tie to enforcement of the law, and the Court found that that was enough to create a connection.

Help me understand why that doesn't strengthen the claim that Governor Walz is, at least at this stage where he retains the ability, for instance, to instruct his commissioner to take action that's consistent with his campaign speeches, discipline his commissioner for not taking action that's consistent with his campaign speeches, where is the daylight between Governor Walz and the licensing agents in *Whole Woman's Health?*

MR. PLADSON: I think in *Whole Woman's Health,* we're on a 12(b)(6). That's what they confronted there. Here, we're on a 12(b) (1). We're looking at the fact of the matter and what the connection is. And here there is no steps that have been taken to create a connection.

You know, one of the arguments is that he could hire his own attorneys if he had a disagreement with the attorney general. He hasn't done that. There's no evidence that that's imminent or forthcoming, much less that he could enforce that specific portion of the law under that [10] particular provision should there be a conflict between himself and the attorney general.

I also think that in that case in particular, when *Whole Woman's Health* was remanded to the Fifth Circuit, they then certified the question to the Louisiana Supreme Court or maybe it's the Texas Supreme Court, whichever one –

THE COURT: Texas.

MR. PLADSON: Yeah. And they determined that there wasn't, in fact, a connection. So looking at more of a merits factual question that the licensing officials weren't, in fact, the proper parties to be sued or to be defendants for that. So that's sort of how that case ended up playing out.

THE COURT: Thank you. One of the things that I think is interesting in the language about the *Ex parte Young* doctrine is it always uses the word "threaten," and I'm sort of struggling with what that means when it comes to Governor Walz because he can be heard to sort of be threatening enforcement of this law. He's bragging about it, and he is saying, if you run afoul of this law, you will go to jail. It feels threaty. But in the language of *Ex parte Young,* the threat tends to be read hand in hand with enforcement, threatened to enforce. So I'm trying to decide – there are places, though, that when you read the standard articulated, it includes to "threaten or enforce," [11] so threatening is enough.

And that was a big warmup to the observation that in the First Amendment context, we always have concerns about chilling, so that threats, even when more remote or tethered to less robust ability to enforce, has the effect of chilling.

And then we have the overlay of a private cause of action statute, which is what caused Chief Justice Roberts, I think such agita in *Whole Woman's Health,* is that you have a statute that has an enforcement mechanism that drives around some of the traditional actors in enforcing laws.

So tell me what you think I do with that and with the idea of threats and chilling, aside from the specific initiation of an enforcement action.

MR. PLADSON: I think the concept of chilling is appropriate in the Article III standing context, but it's a concept that is not applicable to the *Ex parte Young* standard. And as we know from *Freeman* –

THE COURT: Do you have any case law for that idea?

MR. PLADSON: Yes.

THE COURT: I mean, I do see that it arises in that context, but do you have any case law drawing that line?

MR. PLADSON: Well, *Freeman vs. RFL,* is Republican [12] Farmer Labor Party of Minnesota, this case has been up and down to the Eighth Circuit a couple of times, and in both the district court decisions from Judge Tostrud, they discuss how the imminent standard is higher for an *Ex parte Young*. The Eighth Circuit recognized an imminence of threat that is much higher. You've got to meet a higher standing than just plain Article III standing.

So it would be – the most recent one would be Judge Tostrud's district court decision from I think 2022, after the first remand.

THE COURT: 2022 is the Eighth Circuit's decision. So then he got another decision now?

MR. PLADSON: '23, yeah.

THE COURT: Okay.

MR. PLADSON: And incidentally, it was appealed again and affirmed in July by the Eighth Circuit.

THE COURT: Okay. Thanks. That's a good answer.

You don't seem to dispute, particularly, that Attorney General Ellison could be an appropriate

defendant if he had threatened action or was taking enforcement action?

MR. PLADSON: Yes. I think it's clear the statute gives him authority to do that if he chose to do so.

THE COURT: And then Commissioner Blissenbach is the sort of in between?

[13]

MR. PLADSON: Right.

THE COURT: You'd concede that there's all kinds of duties that the statute has given her related to, if not directly enforcing in terms of bringing a lawsuit, certainly encouraging enforcement or doing things that have to do with the enactment of the law.

Tell me why that isn't enough. Why do we have to hue, in this era – no disrespect to legislatures intended, but they are clearly learning to carve statutes to avoid pre-enforcement lawsuits. I think it's kind of hard to deny that. And in that era, why isn't it enough to strike as actionable all of the trappings that go around a traditional enforcement action but aren't that traditional, "I'm going to bring a lawsuit" or "I'm going to enjoin you." Instead, it's advertising. It's referring people to attorneys. It's inspecting properties with or without advance notice. It's running a website telling people what their rights are. It's doing all of the things to facilitate and elevate those private rights of action, but it's not being on the front of the V.

So help me understand why you still think Blissenbach isn't an appropriate defendant.

MR. PLADSON: Right. Well, if you look at the *Balogh vs. Lombardi* case from the Eighth Circuit – I think it's 2013 or '15; it's in the briefs – we have a

situation [14] there where the bureau – the director of the Bureau of Prisons is appointing a panel, and he's engaged in selection of individuals who will be on this panel regarding – I think it's carrying out the death penalty or certain determinations, and there's a law that precludes individuals from disclosing information about who those individuals are, and those panelists have a right of action if somebody discloses.

Now, they attempted to – ACLU or somebody was attempting to sue the governor – or excuse me, the director of the prisons for his connection to this because but for him appointing people, there wouldn't be individuals there to enforce this.

And here, I think what the Court says is that that type of administrative or ministerial work in implementing the statute is not the type of enforcement that is envisioned by *Ex parte Young,* and it's taking action to actually bring about or coercing change forcibly, you know, an affirmative step to do so.

Now, here, the DLI commissioner – this is not the only law that the DLI commissioner has this authority over. She has general authority over five or six different chapters of Minnesota law, so effectively hundreds of laws. She provides information about many laws, including those she doesn't enforce. That doesn't make her a proper [15] defendant for the federal laws that are listed on the website.

She refers people to attorneys if they call her, but it's primarily – to be clear, it's not saying, go talk to an attorney. It's, I can't provide you legal advice; you know, we are not taking claims here; we're not –

THE COURT: Well, it's actually in the statute that they will refer to attorneys, right? It's not just, oh, I can't answer this call, you've got to call a lawyer, my standard answer when I make the mistake of answering my phone. It is actually more than that. One of the things she does is channel people to attorneys through whom they can vindicate their right.

MR. PLADSON: Sure. It's actually not in the statute. Where you find that – and this is where I was getting clever was submitting exhibits – but the legislative history, when the law was passed in 2023 – you'll see these attached in our first round of briefing – the DLI commissioner was asked for input on how this law would affect their operations. The commissioner that – the agency responded that we don't believe we have enforcement authority over this; if people call us, we will simply refer them to attorneys. Sort of not our – not our bailiwick here.

THE COURT: Got it.

[16]

MR. PLADSON: Get legal advice elsewhere.

So that is the extent of it, so I don't want that to be overstated.

THE COURT: Thank you. So you don't think that the website requiring posters is part of an enforcement action here? I mean, the case law from *Minnesota RFL vs. Dayton, Care Committees I* and *II, Whole Woman's Health,* other cases, the case law includes, you don't need to be the primary enforcer; you don't need to be the exclusive enforcer; there just must "be some connection," right? I've drawn those from multiple sources, but they don't require the

best, the only, the absolute, the sole. And through those together, you can imagine kind of a patchwork: This person is involved in this way, this person is involved in a different way.

So why don't things like running a – putting on a website that you have to put up posters telling people that they can't be required to attend these meetings and telling people what their rights are if they are required to attend these meetings, why isn't that part of a connection between the defendant and enforcement of the law?

MR. PLADSON: So with respect to the first prong of the *Ex parte Young* standard, I think that certainly comes closer, and I think that was important for us to notify the Court back in May of the change.

[17]

I think when you look at that particular provision, it simply requires the DLI commissioner to create the notice – notice of rights poster. The DLI commissioner creates many other notice of rights posters. It doesn't make them connected to the enforcement of the law simply because when you look at that subdivision, Subdivision 3 of the law, the new amendment when it becomes effective next month, when you look at that subdivision, it simply requires her to create a poster. It doesn't say anything about her requirement to enforce that law or go out and investigate.

Now, in her affidavit, she disclaims any intent to investigate or enforce the notice posting requirement as well, and so –

THE COURT: What's the point of having this law if its primary actor is refusing to enforce it?

MR. PLADSON: Well, it's not the primary actor. The primary mechanism for enforcement is the public through the right of action. There's not an administrative sort of prerequisite investigation like you might have at EEOC or something where you have to go to an administrative agency for an investigation first. You can go right to court.

And so what the officials here have chosen to do is to see, you know, to what extent is this private right of action going to be sufficient to carry out the purposes? Why do we need to invest state resources enforcing this [18] particular law at this time? That's within their discretion as state officials to choose and prioritize different things.

And I think in this case, particularly where they've disclaimed any interest to do so, you know, any particular official who's in that position is going to have different priorities, is going to have different interests and going to have different plans for what they're going to do in office. And I think the prudent decision that they believe they've made is, let's see what kind of a problem this is, and if the private right of action is insufficient to address it, then we can maybe revisit whether we need to take a more bold step or whether the AG, for example, needs to take more aggressive action.

THE COURT: Let me ask a theoretical, academic type of question here, as you know I want to do. One of the things I have been thinking a lot about in this new legislative model with private right of action is that if we get to the merits of the constitutionality of this law now in this lawsuit, we will have excellent lawyers on both sides, we will have somebody whose job is to defend the constitutionality of a statute and understands it very well.

If we continue to say, oh, no, it's a private right of action, there can never be *Ex parte Young* satisfying pre-enforcement lawsuit. We have to wait until [19] an employer takes action, terminates or disciplines an employee, gets sued, and then see how well that lawyer versus that employer can litigate this important constitutional issue.

One of the things that I feel like was going on with the Court in *Whole Woman's Health* is kind of a concern that if you – you're avoiding – you are essentially evading constitutional review or you risk evading constitutional review. So then it requires – that employer might be a small unsophisticated employer – to understand that they can bring a First Amendment challenge in an employment case.

Isn't this better?

MR. PLADSON: No, because we don't have – what is functional – what *Ex parte Young* requires is sort of the functional equivalent of ripeness. And here, because we have no threatened action, we have just the hypothetical of how this law might apply. And the Court in *Whole Woman's Health* reiterates that there's no unequivocal right to a pre-enforcement challenge.

And just because, you know, the traditional route is to raise it as an affirmative defense – and I will say that in Minnesota, if it is raised as an affirmative defense and somebody challenges it, they've got to notify the attorney general so the attorney general can choose to [20] defend the law. And in that context, you have an actual fact pattern to work with. We're not talking in the theoretical or the meta-physical about whether this – you know, how does

this play out and how does the First Amendment intersect with this.

And so all we're simply saying is that at this point under *Ex parte Young,* this is not ripe for federal court adjudication. It doesn't mean there couldn't be a cause of action in state court. It's possible. I don't specifically know, and I'm not going to go over my skis here in trying to describe how it might come up. But I think here, where you've got nobody who has expressed a threat or an intent to – who has a connection to the law, that has not expressed an intent or threat to commence proceedings to enforce it, you don't have a ripe action under *Ex parte Young.* And that's not the language they use. That's conflating it with ripeness and –

THE COURT: Yeah, yeah, but it's an interesting analogy.

MR. PLADSON: You've got to have an imminent threat, and the Eighth Circuit says that imminent threat has to be something more than ripeness under Article III. So that's where we land.

THE COURT: Okay. What else do you want me to know?

[21]

MR. PLADSON: I would like you to grant our motion to dismiss entirely.

THE COURT: I didn't mean to be flip. Is there anything else you want to share that you think I am misperceiving or that has changed since our last conversation?

MR. PLADSON: No, I don't think there's been anything – well, the last conversation was before the statute was amended. We think that still doesn't

change the ultimate outcome. This case fails on prong two of *Ex parte Young* under any analysis, whether you buy my argument about Commissioner Blissenbach or not, that there's no imminent threat of enforcement here.

THE COURT: Can I ask you one last question about the Governor Walz thing? You raise an interesting point about thinking of the connection to the statute through the lens of declaratory relief or an injunction or something like that, and I'll be the first to admit that I'm just starting to understand how difficult it is to actually grant injunctive relief, to figure out what that looks like, what it means.

But what difference does it make, as a practical matter, if – let's hypothesize that I allow this case to go forward and that Commissioner Blissenbach and Attorney General Ellison are easy to – more obvious to remain in the [22] case but that Governor Walz is more difficult and I am on the fence.

If I allow him to remain in the case and it turns out he's unaffected if the plaintiffs are successful and if there is injunctive relief, then the injunction just doesn't tie his hands in the end. If I determine that there is action he could take, that his hands should be tied if the plaintiffs are successful and if there's injunctive relief, then I include it.

Why does it matter? And I'm not talking Law Review article. Why does it matter practically in this case?

MR. PLADSON: If I understand the question correctly, and correct me if I'm wrong, but if he does not have the ability to – he doesn't have the ability to carry out what is specifically permitted to be enjoined under *Ex parte Young* and sovereign immunity,

which is the direct enforcement. I take the point earlier about, you know, role in the process and you could have, say, two entities or two officials who have some, you know, complementary roles in the enforcement mechanism, but he has no role at all. You would not be able to bind him in any sort of action whatsoever. The declaration would be either – the injunction would be illusory.

And I think there's a helpful analog to –

[23]

THE COURT: But what difference does it make now? I mean, that's what I'm trying to sort out. So let's say you lose and I leave him in, and at the end, you're right. Let's say also the plaintiffs win on the merits, which I am not at all presupposing. And then it comes time to draft that injunction and I'm like, oh, yeah, there's really nothing to tie Governor Walz's hands with. And I'm not being cavalier about this. But he's got the same set of lawyers. It's no extra skin off our governor's nose whether he is one of these three defendants or not. Why does this matter in the universe?

MR. PLADSON: Well, because under the Eleventh Amendment jurisprudence, state officials have a constitutional right to not be drug into federal court, and federal court is court of limited jurisdiction, and this – subject matter jurisdiction, Eleventh Amendment questions are supposed to be decided early on to prevent state officials from being – sort of the flowery language is ensnared in ongoing litigation and that sort of thing, these concepts that have been reiterated throughout the last century.

But that's why. If he has not got a sufficient connection, and we don't think he does, then he deserves

his right to be out of the suit – the Office of the Governor deserves to be out of the suit.

[24]

THE COURT: Is there nothing that he could say in a speech that would put him in this suit?

MR. PLADSON: I think it's – well –

THE COURT: I mean, "You're going to jail" isn't enough?

MR. PLADSON: No, because, number one, it's not true, and number two, it doesn't – it wasn't directed at any particular individual. It wasn't directed at the plaintiffs. The plaintiffs haven't indicated that they're further – or provide any admissible evidence that they've felt threatened or chilled in any manner, and he doesn't have a connection to the enforcement. If he said, tomorrow morning I'm going to go out and I'm going to direct Commissioner Blissenbach to start investigating and I'm going to ask Governor Walz to – Attorney General Ellison –I've got too many clients here – Attorney General Ellison to reconsider his statement that he has no intent to enforce it and we're going to push it, I think that's a much closer question. I think it's much harder for us to say that that involvement is not enough.

I still think there's a question with whether functionally he could, absent somebody else – like without Commissioner Blissenbach, he can't investigate the law. He can appoint the DLI commissioner, just like the director in *Lombardi.*

[25]

THE COURT: And he can fire Commissioner Blissenbach if he continues to emphasize this in his own – forget politics – in his own set of policy

priorities. If he continues to emphasize this and she continues to say, I'm not going to inspect anyone, he could fire her.

MR. PLADSON: Right.

THE COURT: Okay.

MR. PLADSON: And that's not the facts that are here, though. We don't have any facts that he's threatened or that he's directed –

THE COURT: Right, but he can.

MR. PLADSON: Yep.

THE COURT: He can. He could remove her. She is appointed at his discretion.

MR. PLADSON: And I think, going back to *Lombardi,* she's the one that still has the – to the extent that there is – and I know we disagreed about whether she's close enough, but assuming she is, she is the one that has that right to do the investigation. He still doesn't. He gets to a point, but he still isn't the person.

THE COURT: And he gets to terminate.

MR. PLADSON: And he gets to terminate, yeah. But then he's got to appoint somebody else and got to make sure that they're going to go forward, and they must actually threaten or be about to commence proceedings under prong [26] two.

THE COURT: Okay. Thank you very much.

MR. PLADSON: Thank you.

All right. Mr. Revnew. Give me one second. Let me get my ducks in a row here.

Go ahead. Same lens. I still know all the stuff I learned last time, and I guess our focus should be more on what's changed or what's grown or what's evolved.

MR. REVNEW: Yeah. Good afternoon, Your Honor.

The Court is well aware of the new facts. And when we first filed our complaint, we did not have the existing statement by Governor Walz that you go to jail if you violate this law.

THE COURT: Does it matter that that's hogwash? No disrespect to anyone with the term "hogwash," but nobody is going to jail, no matter who violates this law.

MR. REVNEW: I think it does matter, Your Honor. We are talking about a First Amendment issue here, and it is an issue with regard to – if you point discrimination and we have the chief executive of the State of Minnesota saying that if you engage in this conduct, you will go to jail, the average person in the general public has no idea whether they're going to go to jail or not. That in and of itself is, in fact, a threat. So I think it does matter that he made that comment.

[27]

And I understand defendants' counsel is claiming, well, it's a misstatement of what the law provides, but it is still a threat. And it shows an intent to enforce the law, which is what we're looking at, and an intent to enforce the law.

THE COURT: What about the admonitions including from *Whole Woman's Health* but also I think from Minnesota, *RFL vs.* – I guess it's *Freeman,* that it's not enough just to have a theory of chilling, that

Ex parte Young isn't just about a theory of chilling and that it has to be more in – as to any constitutional right. And I think it's *Whole Woman's Health* that lists the First Amendment but also other constitutional amendments and says that as to any of them, it's not enough to just say, I'm nervous about exercising my right because this might happen. That isn't enough. There has to be more.

MR. REVNEW: Well, I think there is more here. And I go back to the sitting governor's statement that "You will be arrested."

And it goes beyond that, Your Honor, because in this instance, the governor knew that this case was ongoing. The governor knew that the complaint – this Court allowed us to amend the complaint to name Governor Walz as a defendant to this case.

And in addition, Your Honor, the governor would [28] know as to the nature of this case that he was served, that there was a threat, that the plaintiffs perceived that he was threatening enforcement of this case.

Despite that, the governor does not sign a declaration saying, I have no intent and will never enforce this statute. He didn't say that. In fact, he said the opposite, where roughly a month ago, August 14th, he stood up in front of a group and he doubled down. And it wasn't that I'm going to disclaim that folks would be arrested. He doubled down and said, the last time I talked about captive audience speeches, I was sued and it was the best thing that ever happened to me and we're going to continue to ban those captive audience speeches.

THE COURT: Does it matter that he has actually no authority to do any of that? That he doesn't have

the authority to send someone to jail? That he doesn't have the authority to ban it? That's something the legislature did. And that he's not the actor who has any enforcement authority?

MR. REVNEW: Well, I think that the question assumes something that I disagree with, and that is I do think Governor Walz does have an enforcement mechanism here. And we can piece it all together, Your Honor, with regard to, first, we can start with the Minnesota Constitution that he has the authority that he needs to ensure that the laws [29] are faithfully executed. And I'll concede that that in and of itself is not going to be enough, Your Honor.

But two, under the Minnesota statutes, he has the right to employ counsel to act in any action or proceeding if the attorney general is in any way adverse to the State.

So you have this dilemma where you have the attorney general saying, I'm not going to enforce, which is directly adverse to what Walz is saying, that he wants to enforce it. And so I think you have to tie in Minnesota Statute Section 806, tie that together with his constitutional duties, but also tie in –

THE COURT: We have to be careful though, right, sir, because – putting aside the speeches for just a moment, your sewing together different important statutory and constitutional provisions would apply to any statute and would mean that any statute that had a risk of First Amendment chilling would be amenable to a pre-enforcement lawsuit, regardless of expressed intent to enforce or bringing enforcement actions, based instead on the strength of the ability to enforce. And I think the law is pretty clear that something more is required. Otherwise, Chief Justice

Roberts wouldn't have reminded us that chilling alone isn't enough.

So isn't there some risk when you are pointing to things in the statute that require enforcement that it ends [30] up kind of vitiating the imminent threat part of *Ex parte Young?*

MR. REVNEW: So, Your Honor, I think there's one important factor here. In all of the cases that have been presented to the Court in the briefing, there is not one case where a governor has made the statements that Governor Walz has made. Not one case. Pretty egregious statements that he's going to shut down free speech, because what does the law provide? The law provides that you can't talk about political speech or religious speech, and political speech is very broadly defined.

And I hear what you're saying, Your Honor, but in the cases that are cited – I believe the defense counsel cited the Eighth Circuit case in *Church.* And as you dig into that particular case in *Church,* it goes on and it cites another Eighth Circuit case, *Citizens for Equal Protection vs. Bruning,* 455 F.3d. 859. And the Eighth Circuit in that case specifically said that general enforcement authority means that you have some connection if that authority gives the governor methods of enforcement. And what I submit to the Court here is that the statutory framework, the constitutional framework, gives Governor Walz the method of enforcement.

THE COURT: But that's not enough by itself, right? You would agree that just because he has the method, [31] if he's not acting on it, using it, or threatening it, the fact that he has the authority isn't enough. The fact that Attorney General Ellison has

the authority, the fact that Commissioner Blissenbach has the authority, on paper that is not enough. Something more has to be present.

MR. REVNEW: So, Your Honor, I agree with you that – I mean, when we're talking about *Ex parte Young,* it's a two-part analysis, right? Do you have the ability to enforce? And are you, in fact, threatening to enforce the law?

And I submit to the Court, as our briefs have laid out and our complaint has laid out, that all three defendants, Commissioner Blissenbach, Attorney General Ellison, and Governor Walz, they all have the ability to enforce, and there is a threat here.

And what I'd like to point out to the Court – because you asked me – at the last oral argument, you had asked a question of me with regard to the declarations that were submitted. And within the declarations, the defendants state they have no present intent to enforce. And I believe as part of our discussion during the last oral argument, I believe the Court noted that, well, if we looked at *Care Committee,* in that case, the declarations actually had a little bit more, which said, "I will not enforce."

THE COURT: Right.

[32]

MR. REVNEW: And what I wanted to point out to the Court is that if we look at the *Freeman* case, and the *Freeman* case that was decided by the district court, so 486 F.Supp.3d. 1300.

THE COURT: What's the date on that?

MR. REVNEW: 2020.

THE COURT: Okay. So this is before it went up to the Eighth?

MR. REVNEW: It's before it went up to the Eighth. But what I wanted to point out to the Court is in that case, the district court did look at the case that I mentioned during the last oral argument, the *UFCW vs. International Beef Processors,* 857 F.2d. 422, to say, I can, as a district court, ignore these declarations that don't contain the language. I have no intention – or I will not enforce the statute ever.

THE COURT: But didn't the Eighth Circuit squarely disagree – I mean, if not squarely disagree, the Eighth Circuit in the *Minnesota RFL vs. Freeman* case specifically said that a disavowal of future prosecution is not required. No present intention is enough.

MR. REVNEW: But, Your Honor, I think that's the point I'm trying to make –

THE COURT: Okay.

MR. REVNEW: – which is there's a factual [33] distinction here, right? And *Republican Farmer Labor vs. Freeman,* you didn't have a governor who not once but twice made statements that were threatening in nature, and we do in this case.

And what I'm trying to point out to the Court is the district court acknowledged that it can ignore declarations based upon the factual layout of what has happened in a particular case.

And in this case, what I want to point out to the Court is not only did Governor Walz not submit a declaration saying he has no present intent to enforce and will never enforce, but the two other defendants doubled down and submitted the same declaration, "I

have no present intention to enforce." It's wishy-washy. It's squishy.

And remember, the general public, when we're talking about a free speech right, when a sitting governor says you're going to go to jail, and you have the commissioner and the attorney general saying, well, I have no present intent to enforce, that really sends a bad message. In fact, I believe that the Court can ignore the declarations that have been submitted by the two other defendants, Attorney General Ellison as well as Commissioner Blissenbach.

THE COURT: Okay. What else? Anything else you want me to keep in mind? Answer one of – that same [34] question that I subjected opposing counsel, Mr. Pladson, to. What difference does it make, as a practical matter – let's hypothesize that I was going to deny the motion to dismiss as to Commissioner Blissenbach and Attorney General Ellison. What difference does it make if Governor Walz is in the case?

MR. REVNEW: Hypothetically speaking – I mean, first, I believe that the governor should be in, so I'm taking your hypothetical question that the Court were to say, you know, it's too tenuous as far as a connection or there's no threat whatsoever. Regardless, Your Honor, we end up getting to the merits of the case, right, with regard to Nicole Blissenbach as well as to Attorney General Ellison and the constitutionality of the statute. So from a practical standpoint, I don't think it makes a difference.

THE COURT: Okay. Thank you. Anything else?

MR. REVNEW: No. Thank you, Your Honor.

THE COURT: Okay. Mr. Pladson, you want the last word?

MR. PLADSON: Sure. Just quickly, the fact that Governor Walz didn't submit a declaration I don't think matters. It's the plaintiffs' burden to prove subject matter jurisdiction here, and they have not submitted sufficient evidence.

Lastly, with respect to the RFL district court [35] case from 2020, that was a 12(b)(6) motion, and Judge Tostrud specifically ends his analysis on the first prong of *Ex parte Young*. So he is – it doesn't matter for that stage, and we acknowledge that. That's why we brought the motion the way we did.

And then I would just caution any reliance on *Citizens vs. Bruning,* the Eighth Circuit case. I think if you follow the subsequent Eighth Circuit decisions, they identify a very unique situation there with the Nebraska Constitution, the gay marriage amendment and enforcement structure and they've cabined that sufficiently. So that's all I have.

THE COURT: Thank you. I am going to rule from the bench. And I am going to deny the motion to dismiss as to all three of the defendants. I am going to explain my ruling in detail.

I'm also denying the plaintiffs' request that I sua sponte grant summary judgment in their favor. That is premature. I have no briefing before me on which I could hang my hat, and we'll talk about next steps at the end of my explanation of my ruling.

I am doing this from the bench specifically because I don't want to continue to delay. In tongue-in-cheek candor, I worry that the factual landscape will continue to evolve and speeches will continue to be

[36] made, and we don't need to continually talk about whether one or the other of these things has tipped us over into the appropriate land where the case can move forward.

So I appreciate the excellent briefing, and everybody is on the same page, more or less, about what the standard is.

Eleventh Amendment immunity is really important. I don't make light of it. It's part of why I have spent a lot of energy really thinking about these issues. And I really resist any hint that chilling alone is enough, and I resist any hint that if it involves the First Amendment, it doesn't matter if there's a threat to enforce. Nothing I'm saying should be taken to suggest that I'm weakening or intending to weaken these requirements.

But there is this expert – I'm sorry, there is this exception under *Ex parte Young,* and I have to ask two questions: Is the relief sought prospective? And if there are officials with the ability to enforce that statute that either have threatened or are about to commence proceedings, then the exception to the sovereign immunity kicks in.

I've read the cases carefully, frankly, over and over again. I want to make a couple of preliminary observations.

This is a strange procedural posture in the case law because it is a factual attack. It is a motion to [37] dismiss, but it isn't a 12(b)(6), and that does make a difference in these decisions. That is what explains the difference between *281 Care Committee I* and *281 Care Committee II*. And I think it's part of what informed the Court in *Whole Woman's Health,* although I think we could have a three-day seminar

on what the holdings of *Whole Woman's Health* actually are and how to apply them moving forward.

So I recognize this is a factual attack, and the claims in the complaint aren't entitled to deference and I have to look at evidence. But I also recognize that, you know, there are likely to be additional developments of facts about who does what with respect to the statute as the case moves forward.

So although I am not suggesting this is a preliminary facial ruling, I am observing that if the landscape should change, if new things come up about the applicability of the *Ex parte Young* exception, those can be re-raised. This door is not slammed. The Court has the obligation to keep its jurisdiction in mind at every stage.

So the first question I have to answer is whether there is a connection between the defendant and the enforcement of the law. And the case law teaches that it need not be an exclusive enforcement responsibility. It need not be the only official with a connection to the [38] enforcement of the law. It may not be the primary enforcement ability. In fact, if anything, *Whole Woman's Health* really brings that home. But there must be some connection.

And so based on my review of the same cases I'm going to repeat over and over, *Minnesota RFL, Care Committee I, Care Committee II,* and *Whole Woman's Health,* I am going to determine that all three of these defendants have an adequate connection to enforcement or threatening enforcement of the law.

Let's start with Governor Walz. Governor Walz can appoint and can remove Commissioner Blissenbach. That is a distinction from the *Balogh* case and I think from the *Church* case as well. I apologize if I'm

mixing up my citations. It is something that makes this different from simply having appointing ability.

Governor Walz continues to make speeches celebrating the passage of the law but going a step further. It isn't just enough to say, this is an accomplishment during my administration of which I am very proud, we passed this law. It is going a step further and saying, and if you violate this law, you will go to jail.

It does seem that there is a disconnect between the actual sanctions for alleged violations of the law and what he made his speech about, but it nonetheless evinces a [39] commitment to enforcing the law and a threat of enforcing the law that is unique among all the cases that I could find. I've never seen a case where a defendant advocating for dismissal is simultaneously having the chief executive of the state threatening enforcement of the law. Making your jobs a little difficult, I realize, but it matters in this context.

I disagree that this is meaningless politics. I think it would be closer – and I'm not saying you meant it was meaningless politics, but I disagree that there's an exception here for things that are said from the campaign trail. This particular combination of speeches is more than just celebrating the passage of the law or the good idea behind the law. It is threatening enforcement, and it is proudly mentioning that I'm going to keep talking about this even though I am getting sued for it. It elevates the robustness of the commitment.

I think it's interesting that this case law doesn't always just talk about imminent enforcement, as in we've gotten a call, they've executed a search war-

rant, they've brought a complaint. It also talks about threats, and this is as close to a threat in the case law as I have seen.

So even though I think Governor Walz has a less robust tie to the enforcement of the law, he has the most [40] robust tie to threatening to enforce the law, and he has a sufficient tie to enforcement of the law to make him an appropriate defendant.

This is the closest call of the three defendants, and I'm mindful of the wise council of defense counsel that if you can't think of how you would bind the defendant with injunctive relief, that could be an observation that he should not be an appropriate defendant. But here, there is enough of a showing of his connection to the enforcement and the threatening of the enforcement of the law, and he has demonstrated a unique interest in enforcing this law, such that things that might otherwise be dormant on the books, like the ability to fire the commissioner or the ability to take other action in enforcement of the law, are elevated in this case in a way they might not be.

I want to be very clear. I think that some of the argument from the plaintiffs here go too far and would make the governor or certain agents subject to the *Ex parte Young* exception simply because you can articulate an ability to enforce the law without actually any threatened enforcement. And I'm not suggesting that Governor Walz or any governor is always the appropriate defendant in a case like this. But here, those speeches, combined with the ability to remove a commissioner who might not feel as zealous about this law as he does, is enough to move forward.

[41]

With respect to Commissioner Blissenbach, I also find that the commissioner has an adequate tie to enforcement of the law. I think that this case law is going to continue to evolve as we have more cases that are designed for enforcement through a private right of action. That makes the role of the state executives different from simply being the person who brings the lawsuit, brings the criminal complaint, brings the enforcement action. But here, the statute is replete with examples of things that the commissioner does in support of the enforcement of this law, and there's no suggestion that it has to be simply a pure traditional prosecutorial authority to count as sufficient tie to the enforcement of the law. I'd point to *Doe vs. DeWine* and *Jones vs. Jegley,* J-E-G-L-E-Y, as well as *Whole Woman's Health,* in support of this observation.

I'd also note that the statute itself uses the term "enforcement," enforcement of this chapter by the department, and so that means something in the statutory scheme about her connection to the law.

The referrals to the attorneys, I think I had a slight misapprehension about how that worked, but certainly the website that's telling people to put up posters that advertise to the employees what the nature of their rights are under the law is an additional fact.

And then with respect to Attorney General Ellison, [42] I don't think there's any real dispute that he actually has enforcement ability, so as to prong one, that one is easier.

The second question then is, is there any threat of enforcement? There has to be more than just the ability to enforce. There has to be something else.

I'm going to note that I don't agree with either side's characterizations entirely of how to apply *Whole Woman's Health.* I feel like the defendants sort of want me to kind of disregard what it suggests for pre-enforcement litigation, and the plaintiffs want, even though they disavow this in their briefing very credibly, are really advocating for an application that heavily reduces the requirement that they're being threatened or imminent enforcement. But I think somewhere in the middle, *Whole Woman's Health* represents a shift in the application of *Ex parte Young,* or certainly could do so.

I note that the *Minnesota RFL* case involves a different statutory scheme and barely grapples with *Whole Woman's Health* and its impact on the questions there. It mentions it twice, once in a footnote and once in the body of the opinion, but it doesn't do the wrestling with the case that I think we've done here, and perhaps that's because it was so much more recent at the time.

The Chief Justice in *Whole Woman's Health* says that eight justices agree that *Ex parte Young* applies there [43] because there exists state executive officials who retain authority to enforce the law.

We have much more than that here. We have state executive officials who retain the authority to enforce the law in some way, and we have steps taken affirmatively toward executing that authority, including Commissioner Blissenbach's being instructed to put up the website and advertise for the posters, but also including the chief executives repeatedly talking about this law and threatening explicitly to enforce it.

I disagree that enforcement has as narrow a meaning as the defendants suggest, given the private right of action nature of this scheme, and Commissioner Blissenbach is already taking steps to do their part to enforce the scheme.

I also note that threatening and talking about enforcement goes an extra step, which is encouraging individual citizens in this private right of action to take their steps toward enforcing the scheme. That's where *Whole Woman's Health* and this case have more in common than either the *RFL* case or the *Care Committee 281* case. Although one of those does have the capacity for private right of action, it also has direct state enforcement possibility. This case is different. This statute is designed differently. I don't know vet if I'm convinced that this statute was [44] designed in this way specifically to avoid pre-enforcement litigation or because, as you say, thinking of a more useful allocation of resources, but I don't know that it matters at this stage.

I'll note that Attorney General Ellison has taken the least action but has the strongest connection with the enforcement of this statute. And, therefore, with the imminent threats related to enforcement, I find that there is enough for this litigation to proceed.

The third observation I want to make is that this is a First Amendment case. And in *Jones vs. Jegley,* which was an Eighth Circuit 2020 case, it rejected the argument that a plaintiff must first get prosecuted before challenging a First Amendment statute. And here, getting prosecuted is getting sued, given the statutory design, and the concern there was chilling speech. I don't agree that anytime a law has the effect of chilling speech, the Eleventh Amendment immunity issues go out the window. That can't

be. Otherwise, we could never see the application of this in the context of the First Amendment, and we see this analysis over and over again in First Amendment cases. But here, there is something unique about public threats to enforce this law that has an extra concern for chilling.

I'm going to quote *NRA vs. Vullo*. "Ultimately, *Bantam Books* stands for the principle that a government [45] official cannot do indirectly what she is barred from doing directly. A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." It's not a perfect analogy for a lot of reasons, but it is instructive to me about the way the fact that we risk chilled speech here plays into the *Ex parte Young* analysis.

So I think I've explained my reasoning. I know you don't agree with it, Mr. Pladson. Is there anything else that needs explanation with respect to the motion to dismiss?

MR. PLADSON: I don't think so. I was going to raise a more pragmatic question about current events.

THE COURT: Okay. So lets get to that in just a second.

Any further explanation needed with respect to my ruling on the motion to dismiss?

MR. REVNEW: No, Your Honor.

THE COURT: Okay. I am not going to write an order. I'm buried in orders right now. I'll capture the fact of this in the minutes, but that's part of why I really prepared my thoughts in advance, so that you all could have a ruling right away.

Let's talk about next steps. So why don't you go ahead. Come on up to the podium and tell me what your [46] concerns are.

MR. PLADSON: One of my clients happens to be running for Vice President of the United States.

THE COURT: I've noticed.

MR. PLADSON: So should a month and a half from now, eight weeks, whatever it is, should that election happen and he will take office in January, now I think – you know, as you mentioned before, the facts on the ground are very much shifting and changing and he, if that happens, would not be the governor any longer. We would have a different governor, and my understanding would be that the threats no longer apply because they're not articulated by the same person.

I just wanted to raise that as a point of what is our – in order to move forward –

THE COURT: So you're saying could you renew the motion to dismiss once you have a different governor who might not be making speeches?

MR. PLADSON: Yes, and I probably would. But I wanted to see pragmatically if – were we to agree to a stay just until November 6th or the day after or – well, hopefully we know, but just which way we're going.

THE COURT: You should probably stop talking now. No, I'm just kidding.

Okay. Let me ask you a couple questions that [47] might help with that set of questions.

MR. PLADSON: Sure.

THE COURT: Do you believe that discovery is required in this case?

MR. PLADSON: I do.

THE COURT: Okay. Judge Wright is the magistrate judge in this case, and it is my intention to send the parties to Judge Wright to talk about what the next steps are. What discovery is needed, what schedule is appropriate, and when and how to tee this up for ultimate ruling. I know that plaintiffs are eager for summary judgment. I'm going to allow Judge Wright to grapple with those questions in the first instance.

I think as a practical matter, you know, November 6th is right around the corner, and so depending on where Judge Wright goes with those considerations, we may be worrying about a tempest in a teapot prematurely.

MR. PLADSON: That's fine. I just kind of wanted to flag that.

The other piece, too, is that my understanding is that my clients have an immediate right to appeal the sovereign immunity denial. I haven't talked to them yet. I will be following up. But that may – also just for pragmatic reasons, and I will let them know if we end up going that route because it's an immunity question and –

[48]

THE COURT: Yeah, I kind of lost sight of that. Okay. Well, I hope I explained myself well enough for appeal purposes.

MR. PLADSON: We'll be getting a transcript. I've got to get a contract in place first because it's government. Anyway, so I wanted to flag that as well.

THE COURT: Okay. And can you give me just a thumbnail sketch – I'm trying to resist my old magistrate judge inclinations and not wonder about the discovery – but what kind of discovery do you think is necessary?

MR. PLADSON: I think we need to know what the threat is, how do they understand the law, and why do they think that there's chill here? It's a retaliation statute. If you don't fire somebody for attending, then you have no issue. And it doesn't prohibit speech. We don't have to get into the dispute or the merits but –

THE COURT: But that's merits-related discovery. MR. PLADSON: Yes. THE COURT: Okay. MR. PLADSON: So I think there's that. I think we may look at retaining an expert or two.

THE COURT: Great. Thank you.

Mr. Revnew?

MR. REVNEW: Thank you, Your Honor. No surprise, we do not want any delay here. We do not believe discovery [49] is necessary. Certainly if the defendants have an appeal right, they have the appeal right. They also, if they don't appeal, they have the duty to answer the complaint, I believe it's within 14 days at this point. I just want to make that clear for purposes of the record.

THE COURT: Okay. So you disagree that discovery is necessary. If they choose to exercise their right to appeal, they do so. You would presumably bring up your thoughts about whether any discovery is needed at that pretrial conference before Judge Wright?

MR. REVNEW: Yes, Your Honor. And I know you're delegating it to the magistrate judge, but I would be remiss if I didn't raise that we do not

believe that discovery is necessary. We believe this is a pure legal issue, and we believe the Court should decide that pure legal issue as expeditiously as possible because we are talking about a First Amendment issue.

THE COURT: Great. Thank you.

MR. REVNEW: Thank you.

THE COURT: All right. So I will wait with bated breath to see if there's going to be an appeal or not.

I'm going to connect with Judge Wright and let her know this will be coming her way and that the plaintiffs are looking for some speedy action. And then at her discretion in terms of this schedule – and I'm sure she'll be [50] consulting with me about – you know, my general practice, is not to allow early summary judgment. My general practice, though, is to encourage people to expedite discovery to facilitate early summary judgment where that's appropriate, and I'll let her sort through those things with counsel for both sides.

Thank you for an excellent argument, again, and for answering all my questions, again.

In terms of your question about what happens if your client changes, I think we cross that bridge when we come to it. So if you file a motion, we'll see what happens with it, and who knows where the case will be at that point.

Thank you.

(Court adjourned at 3:02 p.m.)

* * *

I, Paula K. Richter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Paula K. Richter*
Paula K. Richter, RMR-CRR-CRC

APPENDIX D

Minnesota Statutes
Chapter 181 – Employment

Section 181.531 – Employer-sponsored meetings or communication

Subdivision 1. Prohibition. An employer or the employer's agent, representative, or designee must not discharge, discipline, or otherwise penalize or threaten to discharge, discipline, or otherwise penalize or take any adverse employment action against an employee:

(1) because the employee declines to attend or participate in an employer-sponsored meeting or declines to receive or listen to communications from the employer or the agent, representative, or designee of the employer if the meeting or communication is to communicate the opinion of the employer about religious or political matters;

(2) as a means of inducing an employee to attend or participate in meetings or receive or listen to communications described in clause (1); or

(3) because the employee, or a person acting on behalf of the employee, makes a good-faith report, orally or in writing, of a violation or a suspected violation of this section.

Subd. 2. Remedies. An aggrieved employee may bring a civil action to enforce this section no later than 90 days after the date of the alleged violation in the district court where the violation is alleged to have occurred or where the principal office of the employer is located. The court may award a prevailing employee all appropriate relief, including injunctive relief, reinstatement to the employee's former pos-

ition or an equivalent position, back pay and reestablishment of any employee benefits, including seniority, to which the employee would otherwise have been eligible if the violation had not occurred and any other appropriate relief as deemed necessary by the court to make the employee whole. The court shall award a prevailing employee reasonable attorney fees and costs.

Subd. 3. Notice. (a) The commissioner shall develop an educational poster providing notice of employee rights provided under this section. The notice shall be available in English and the five most common languages spoken in Minnesota.

(b) An employer subject to this section shall post and keep posted the notice of employee rights created pursuant to this subdivision in a place where employee notices are customarily located within the workplace.

Subd. 4. Scope. This section does not: (1) prohibit communications of information that the employer is required by law to communicate, but only to the extent of the lawful requirement; (2) limit the rights of an employer or its agent, representative, or designee to conduct meetings involving religious or political matters so long as attendance is wholly voluntary or to engage in communications so long as receipt or listening is wholly voluntary; or (3) limit the rights of an employer or its agent, representative, or designee from communicating to its employees any information, or requiring employee attendance at meetings and other events, that is necessary for the employees to perform their lawfully required job duties.

Subd. 5. Definitions. For the purposes of this section:

(1) "political matters" means matters relating to elections for political office, political parties, proposals to change legislation, proposals to change regulations, proposals to change public policy, and the decision to join or support any political party or political, civic, community, fraternal, or labor organization; and

(2) "religious matters" means matters relating to religious belief, affiliation, and practice and the decision to join or support any religious organization or association.

APPENDIX E

United States Constitution
Amendment I

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

APPENDIX F

United States Code
Title 29 – Labor
Chapter 7 – Labor-Management Relations
Subchapter II – National Labor Relations

§ 158. Unfair Labor Practices.

(a) Unfair labor practices by employer.

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in

section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization.

It shall be an unfair labor practice for a labor organization or its agents –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or

retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is–

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business

with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers

and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit.

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively.

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification–

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the parti-

cular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception.

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other

employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible1 and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry.

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in

subsection (a) as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution.

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of

subsection (d). The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.