No. _____

In The

Supreme Court of the United States

BONN CLAYTON,

Petitioner,

v.

HARRY NISKA,

and

OFFICE OF ADMINISTRATIVE HEARINGS,

Respondents.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In Minnesota, citizens face civil prosecution for making false political statements. Under the existing Minnesota statutory scheme, prosecutions occur for indirect and implicit false claims of political support. Despite recent U.S. Supreme Court decisions, Minnesota state courts continually uphold the constitutionality of Minnesota's statutory bans on false political speech.

The question presented is:

> Whether a state statute banning false political speech is narrowly tailored to meet a compelling state interest when such ban covers both implicit and indirect claims of political support.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bonn Clayton was the respondent-defendant in the initial proceedings in the Minnesota Office of Administrative Hearings (OAH). The administrative complaint was filed by the Respondent Harry Niska who was the OAH complainant-plaintiff.

On appeal to the Minnesota Court of Appeals, the Office of Administrative Hearings was included as a party to the appellate proceedings because of the court's procedural rules and because the constitutionality of a state statute, Minnesota Statute § 211B.02, was at issue.

CORPORATE DISCLOSURE STATEMENT

The Petitioners are not and do not represent a nongovernmental corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinions below.

OPINIONS BELOW

The court of appeals opinion is reported at *Niska v. Clayton*, Case No. A13-0622, 2014 WL 902680 (Minn. App. 2014), *review denied* (Minn. June 25, 2014). App. at 1-23.

JURISDICTION

The date of the Minnesota Supreme Court denial of review was June 25, 2014. The U.S. Supreme Court granted an extension to file this petition to October 15, 2014. Dkt. No. 14A302. Jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

In this case, Petitioner claims the following ban on political speech is not narrowly tailored to meet a compelling state interest.

211B.02 FALSE CLAIM OF SUPPORT.

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot

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

STATEMENT OF THE CASE

Political speech, including false claims of political support, is not a category of speech exempt from First Amendment protection. Yet, Minnesota state courts will not find such prosecutorial statutes unconstitutionally overbroad. In this case, the lower court upheld a statute banning false claims of political support under strict scrutiny, citing this Court's decision in *United States v. Alvarez,* 132 S.Ct. 2537 (2012), which does not apply to political speech.

Although the lower court decision is unpublished, the offending statute suppresses political speech by threat of civil and criminal prosecution. In *Alvarez,* this Court struck down the initial Stolen Valor Act which criminalized false claims about the receipt of military decorations or metals. This Court determined that the Stolen Valor Act violated the First Amendment. The justices disagreed about the level of scrutiny to apply. Four justices in the plurality opinion applied strict scrutiny. Two justices in the concurring opinion applied intermediate scrutiny. But, all

six justices who joined either the plurality opinion or concurring opinion did agree that false statements, as a general proposition, are not beyond constitutional protection.

Similar to the Stolen Valor Act, the Minnesota Statute at issue, § 211B.02, targets falsity, not legally cognizable harms such as fraud and defamation. Understandably, then, after the plurality and concurring opinions in *Alvarez,* some uncertainty in the lower courts exists as to whether strict scrutiny or intermediate scrutiny applies to bans on false speech and to how *Alvarez* might be applied to bans on false *political* speech.[1]

Importantly, *Alvarez* concerned a statute proscribing false speech, not a statute proscribing *political speech.* Minnesota Statute § 211B.02 is, in fact, a part of a statutory scheme to suppress *false political speech.* Thus, *Alvarez* is not directly applicable to a state statutory scheme to prosecute individuals for false claims of political support. Here, the Minnesota

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[1] *Cf. Riley v. Jankowski,* 713 N.W.2d 379, 398-99 (Minn. App. 2006), *review denied* (Minn. July 19, 2006) (upholding Minnesota ban on false political statements as constitutional) *with United States v. Alvarez,* 132 S.Ct. 2537 (2012) (holding particular federal ban on false statements unconstitutional); *Susan B. Anthony List, et al. v. Driehus, et al.*, No. 13-193 (June 16, 2014) (finding standing in case challenging Ohio's ban on false political statements); and *281 Care Committee v. Arneson,* 2014 WL 4290372 (Sept. 2, 2014) (holding Minnesota ban on false political speech regarding ballot questions unconstitutional).

courts have upheld the constitutionality of the ban on false claims of political support based on the statute being narrowly tailored to meet the compelling state interest of preventing electoral falsehoods. In other words, according to the Minnesota courts, if the banned speech is written to ban only false political speech, but not truthful speech, then the statute is constitutional as it is narrowly tailored to meet a compelling state interest.

The state court decision turns on its head core protections afforded by the First Amendment wherein strict scrutiny must be applied. In the realm of political speech, banning false speech in and of itself cannot be a compelling state interest; something more is required such as defamation or fraud. To ban false speech itself will still necessarily include truthful speech since not all political speech is truthful and nor is all purportedly false speech false. The threat of prosecution, and as here, to face fines for expressing political speech allows for the systematic chilling of political speech to challenge the truth of claimed falsity without the fear of prosecution.

Here, the Petitioner Bonn Clayton was prosecuted and fined for indirect and implied expressions of political support:

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not

> state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

Minn. Stat. § 211B.02.

A. Factual Background

There is little or no disagreement about the facts referenced in the lower court opinion which are referenced below. The only disagreement existing is whether Minnesota Statute Section 211B.02 satisfies the First Amendment of the U.S. Constitution by being narrowly tailored to meet a compelling state interest.

Bonn Clayton has held various positions in the Republican Party of Minnesota (RPM) since 1969. Most recently, Clayton served as a member of the First Judicial District Republican Committee. He also served as a member of the Judicial District Republican Chairs Committee (Chairs Committee) formed in 2005. The Chairs Committee met monthly to coordinate events in the state's various judicial districts, promote the judicial planks of the Republican platform, and develop strategy supporting judicial candidates.

The Chairs Committee has little power under the RPM constitution. Before each convention, the RPM forms a judicial election committee to investigate and report on appellate judicial candidates. The judicial

election committee reports its findings at the convention. Convention delegates vote on whether to endorse any candidate. If the vote is affirmative, the delegates vote on specific candidate endorsements. The RPM endorses only candidates receiving 60% of the convention vote.

Clayton served as a member of the 2012 judicial election committee and presented the committee report at the convention. The convention delegates voted in favor of making judicial endorsements, but after reconsideration following a discussion about whether to endorse one candidate, Tim Tingelstad, over the incumbent Justice David Stras, the convention voted by a two-to-one margin to overturn its previous decision to endorse any candidate. Clayton, who unsuccessfully lobbied the convention delegates to endorse Tingelstad, was present for that vote.

Despite knowing the convention's decision not to endorse any judicial candidate, Clayton sent an email to roughly 7,000 state Republicans on October 18, 2012, promoting a website, judgeourjudgesmn.org, that indirectly and implicitly suggested a different result:

> Dear Judicial District Delegates and Alternates,
>
> Just before every election, Party leaders begin to get many calls from voters wondering who they should vote for in the Minnesota Judicial races. So, we have put together a Voters' Guide, which we hope will be helpful.

> Just go to our website www.judgeourjudgesmn.org. It's just a new website, so it's still very simple. We currently have the names of our three recommended candidates for Supreme Court. . . .
>
> Please also send this link to all of your [basic political organizational unit's] precinct delegates and alternates and Caucus Attendees, so that Republican voters will be able to vote for the right candidates. And send the link to anybody else you can think of!
>
> . . . .
>
> Bonn Clayton, Convener
> Judicial District Republican Chairs
> Republican Party of Minnesota.

On the promoted website, Clayton posted a "2012 Minnesota Judicial Voters' Guide." The guide "*strongly recommended*" that Minnesota republicans vote for three supreme court candidates (Dan Griffith, Tim Tingelstad, Dean Barkley), although it never used the term "endorse" or "endorsement." The home page represented that the website was sponsored by the "Republican Party of Minnesota – Judicial District Chairs Committee." The bottom of the page stated, "Prepared and paid for by: Republican Party of Minnesota – Judicial District Republican Chairs." Clayton's name was also listed at the bottom, and his signature line designated, "Republican Party of Minnesota." Another page of the website gave a biography of Tingelstad with similar implications that the RPM supported his candidacy.

The RPM began receiving inquiries expressing confusion about the email and whether the RPM had endorsed judicial candidates. So the RPM sent out an email the following day explaining that it had not endorsed any judicial candidates. It directed readers to its own voters' guide. Clayton's website was shut down for fewer than 10 days.

Clayton continued to promote the website. He sent an email on October 28 to the same 7,000 addressees announcing that the website was back online. Although Clayton never referenced the "Republican Party of Minnesota" in this email, the website still implied that it was an RPM product. The RPM's legal counsel, Richard Morgan, sent Clayton an email the next day asking Clayton to remove "Republican Party of Minnesota" from the website and advise all email recipients that any reference to the RPM was mistaken. Clayton changed the statement on the website to "First Judicial District Republican Committee of the Republican Party of Minnesota" and asked Morgan if the change was acceptable. Morgan told him it was not and that the RPM would file a complaint.

Later, Clayton sent four additional emails to the same 7,000 addressees without referencing the RPM.

B. Legal Proceedings

RPM state convention delegate Harry Niska filed a complaint with the Minnesota Office of Administrative Hearings (OAH) responsible for the

civil prosecution of Minnesota's campaign financial reporting and fair campaign practices laws. Niska's OAH complaint alleged that Clayton falsely implied that the RPM endorsed three candidates violating Minnesota Statute § 211B.02.

Anyone can lodge a claim under § 211B.06 with the OAH within one year after the alleged occurrence of the act that is the subject of the complaint. Minn. Stat. §§ 211B.01, subd. 2; 211B.32, subd. 2. The OAH immediately assigns an administrative law judge (ALJ) to the matter, who then determines if there is a prima facie violation and, if so, probable cause supporting the complaint. Minn. Stat. § 211B.33, subd. 1, 2. If a complaint survives a probable cause assessment, the chief ALJ assigns the complaint to a three-judge panel for an evidentiary hearing, which could realistically necessitate the employment of legal counsel by the accused. Minn. Stat. § 211B.35, subd. 1. A final decision or civil penalty (up to $5,000) imposed by an ALJ panel is subject to judicial review. Minn. Stat. §§ 211B.35, subd. 2(d); 211B.36, subd. 5. Only when a complaint is finally disposed of by the OAH, is it subject to further criminal prosecution by the county attorney. Minn. Stat. § 211B.32, subd. 1. One possible resolution by the ALJ panel is to refer the complaint to the appropriate county attorney without rendering its own opinion on the matter, or in addition to its own resolution. Minn. Stat. § 211B.35, subd. 2(e).

A three-member ALJ panel decided that Clayton violated Minnesota Statute § 211B.02 by making a

false claim of political support. The OAH fined Clayton $600 for this violation. Clayton appealed to the Minnesota Court of Appeals by writ of certiorari. On March 10, 2014, the Minnesota Court of Appeals rejected Clayton's constitutional challenge on this statute. The Minnesota Supreme Court denied review on June 25, 2014.

C. Court of Appeals Opinion

The Court of Appeals did state that it applied strict scrutiny to Minnesota's statutory ban on false claims of political support. However, relying upon *Alvarez,* the lower court applied principles applicable to *non-political speech* to uphold Minnesota's statutory ban on *political speech*: "avoiding false speech that misleads the public regarding elections is a compelling interest." *Niska v. Clayton,* 2014 WL 902680 *7 (Minn. App. Mar. 10, 2014), *review denied* (Minn. Sup. Ct. June 25, 2014). App. 16. The appellate court found the offending statute as narrowly tailored to meet compelling state interests because it banned only false speech and it did not ban truthful speech.

First, in finding a compelling state interest, the appellate court relied upon *Alvarez* as a catalyst to find that false political speech could be "electorally toxic" and is, therefore, not within categories of protected speech. Accordingly, the appellate court held that banning false political speech – separate and apart from any intention to prevent defamation and defamation – was a compelling state interest:

> During the election season, "false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 349, 115 S.Ct. 1511, 1520, 131 L.Ed.2d 426 (1995). Section 211B.02 prohibits only those false statements that state or imply a false endorsement that may mislead the public and harm the political process. *See Schmitt,* 275 N.W.2d at 591. The state's interest in preventing electorate confusion is therefore compelling. *See McIntyre,* 514 U.S. at 344, 349, 115 S.Ct. at 1517, 1520; *Talley v. California,* 362 U.S. 60, 63-64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559 (1960). We repeat here that avoiding false speech that misleads the public regarding elections is a compelling interest.

Niska at *7. App. 16.

Second, the appellate court held the Minnesota statute was narrowly tailored to meet a compelling state interest because its ban on indirect and implicit false statements did not ban truthful statements and banned only banned false statements "knowingly" made:

> So construed, the statute does not prohibit or chill a "substantial amount" of protected speech. . . . By prohibiting only "knowingly" false speech, the statute does not touch on inadvertent falsehoods that contribute to the free expression of ideas.

Id.

Additionally, the lower court found that Section 211B.02 was not underinclusive. "A statute is unconstitutionally 'underinclusive' if it prohibits some speech for a compelling government interest but does not prohibit other speech that also impedes the government interest and the distinction is viewpoint based." *Id.* at *8. It concluded that because the statute refers only to "major political parties," "party units," and "organizations" but not to "minor political parties," it is not unconstitutionally underinculsive because Section 211B.02 does not govern "minor parties." *Id.*

REASONS FOR GRANTING THE PETITION

In Minnesota, civil prosecutions for political speech occur openly, often and with ease before Minnesota's Office of Administrative Hearings. Individuals are prosecuted for civil fines and then face the possibility of criminal conviction for making false political statements. Minnesota allows *any person* to prosecute for civil remedies up to $5,000 – be it a private individual or public governmental entity. The state may also prosecute for criminal sanctions inclusive of monetary remedies or incarceration or both under the same statutes.

The implications of this case reach beyond the borders of Minnesota since the basis for First Amendment political speech analysis mistakenly begins with this Court's recent decision in *United*

States v. Alvarez, a non-political speech case. After *Alvarez,* there is recent uncertainty as to how the First Amendment doctrine stated in *Alvarez* applies in a political speech context. *See, e.g., Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2342 (2014) (finding standing in case challenging Ohio's ban on false political statements); *Susan B. Anthony List, et al. v. Driehus, et al.*, 2014 WL 4472634 (Sept. 11, 2014) (granting permanent injunction from the enforcement of Ohio's political false-statement laws); *281 Care Comm. v. Arneson,* 2014 WL 4290372 (8th Cir. 2014) (holding Minnesota ban on false political speech regarding ballot questions unconstitutional); *Nord v. Walsh County,* 757 F.3d 734, 743 (8th Cir. 2014) ("[I]f some of Nord's campaign statements were untrue, as contended by [the complainant], they may be deserving of less protection and were likely more in Nord's personal interest than items of public concern. Stated differently, the First Amendment permits Nord to utter matters of personal concern as he may wish but such matters are not necessarily protected by the First Amendment.").

Both state courts and federal district courts have mistakenly and repeatedly reached erroneous conclusions that preventing false speech which misleads the public regarding elections is a compelling state interest. In the view of some of these lower courts, false political speech "can be electorally toxic." The question is how a statute may survive strict scrutiny when the political speech at issue occupies the core of the protection afforded by the First Amendment. This

case is an excellent vehicle for authoritatively resolving the critical constitutional question of whether false political speech can ever be the basis for civil or criminal prosecutions regarding claims of political support.

Prosecutions based upon false claims of political support is contrary to political speech protections.

The statute at issue governs false claims of political support which can lead a person to be subject to prosecution:

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

Minn. Stat. § 211B.02.

This is not a matter of protecting a person's right to lie, but rather whether the government has the unrestricted power to judge the statements of the speaker. The statute at issue targets political speech in that it seeks to restrict content-based statements regarding political support of candidates or ballot

questions. It is equally unclear as to what injury the statute is trying to prevent and the necessity of that "protection" to a particular political party. Further, the consequences of deceptive false claims of political support on elections is not easily quantified. It is especially significant since complaints of this nature lead to a hearing process which does not resolve in the time period prior to the election in order to preserve the integrity of the election process, as the Clayton state appellate court intimated: "The state's interest in preventing electoral confusion is therefore compelling. . . . [T]hat avoiding false speech that misleads the public regarding elections is a compelling interest." *Niska*, App. 16.

The First Amendment of the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The regulation of political speech or expression is, and always has been, at the core of the protection afforded by the First Amendment. *McIntyre v. Ohio Elections Commn.,* 514 U.S. 334, 346 (1995). "Political speech is the primary object of First Amendment protection and the lifeblood of a self-governing people." *McCutcheon v. Fed. Election Commn.,* 134 S.Ct. 1434, 1462 (2014) (Thomas, J., concurring) (internal quotations omitted). It is, particularly, at the heart of the protections of the First Amendment, *281 Care Comm. v. Arneson*, 638 F.3d 621, 635 (8th Cir. 2011) (*281 Care Committee I*) and is, "of course, . . . at the core of what the First Amendment is designed to protect." *Morse v. Frederick,* 551 U.S. 393, 403 (2007)

(internal quotation omitted). "Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail it." *Republican Party of Minn. v. White,* 416 F.3d 738, 749 (8th Cir. 2005) (en banc) (*White II*); *see also McIntyre,* 514 U.S. at 347.

A. Minnesota's prohibition of false political speech cannot survive strict scrutiny.

Applying the strict scrutiny analysis to Minnesota Statute § 211B.02, there is no narrow tailoring to meet a compelling state interest present that can be advanced to find the statute constitutional.

While defining what constitutes a compelling interest may not be easy, the analysis does require considerations of the impact of the regulation itself:

> The inquiry of whether the interest (the end) is 'important enough' – that is, sufficiently compelling to abridge core constitutional rights – is informed by an examination of the regulation (the means) purportedly addressing that end. A clear indicator of the degree to which an interest is 'compelling' is the tightness of the fit between the regulation and the purported interest: where the regulation [is underinclusive and] fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being 'compelling.'

281 Care Comm. v. Arneson, 2014 WL 4290372 at *9, *quoting Republican Party of Minnesota v. White,* 416 F.3d 738, 750 (8th Cir. 2005) (*White II*).

Certainly, a state's interest in preventing fraud "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre,* 514 U.S. at 349. The state has an interest "in preserving the integrity of its election process," *Eu v. San Francisco Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 231-32 (1989) (discussing several laws the Court has held furthered a state's interest in preserving the integrity of its election process) and to ensure the order and fairness of elections are conducted with integrity and reliability. *Burson v. Freeman,* 504 U.S. 191, 199 (1992). "Yet, when these preservation goals are achieved at the expense of public discourse, they become problematic" in the sense that the state does not have "carte blanche" to regulate the false statements regarding the political support of a candidate or ballot question. *281 Care Comm. v. Arneson,* 2014 WL 4290372 (8th Cir. 2014).

But, in the analysis of the overbreadth doctrine, the offending statute's reach must substantially sweep outside its plainly legitimate aim. *United States v. Williams,* 553 U.S. 285, 292 (2008). A significant problem exists with the application of the statutory ban on false claims of political support because the political speech ban is implemented through an established administrative hearings process. As noted above, *anyone* – private individual or governmental

entity – can file a complaint to prosecute an alleged violation of Minnesota Statute § 211B.02. It is at that time of the filing of the complaint that the OAH begins the inquiry of determining a violation. However, outside the administrative hearing room, it is at the point of filing the complaint that the damage to our democracy is done. At the time of the filing of the complaint, the respondent's political campaign speech is interrupted by the complainant's administrative lawsuit with all its attendant legal obligations, attorneys' fees and costs. It does not matter at that time of the filing of the complaint whether the speech complained of is prohibited under § 211B.02, since there is nothing to prevent the filing of the complaint against speech later found wholly protected.

The appellate court also contended that Minnesota Statute § 211B.02 only prohibits political statements that are "knowingly" false speech, and because of this claimed narrow application, does not interfere with other forms of speech such as the "inadvertent falsehoods that contribute to the free expression of ideas." *Niska* at *8. App. 18. It requires the speaker to know that it led others to believe wrongly that a candidate or a ballot question has the support of a party or an organization. *Id.* However, the statute as construed still requires an inquiry of the mens rea of the speaker necessarily demonstrating a need for an administrative action to inquire about the speaker's state of mind and to determine the result of the statement made. This means an inquiry of the election result itself, a revelation of the electorate's secret ballots,

and relating the impact back to prior political statements made before the election.

The statute is, therefore, a governmental prior restraint upon political speech based upon the complainant's presumption of falsity and the belief of a future indeterminative election result directly attributed to the statement. Thus, the administrative process cannot protect the integrity of the election process.

Rather, it is in political counterspeech that will find the most immediate remedy to an alleged falsity. "The preferred First Amendment remedy of more speech, not enforced silence . . . has special force." *Brown v. Hartlage,* 456 U.S. 45, 61 (1982). Thus, the test of truth in the competitive market of the political arena is within the power of the citizenry who can for themselves discern what the truth is, not the government for the people, and not through an after-the-fact administrative process. It is political counterspeech that is the least restrictive means to achieve the goal of election integrity.

Minnesota Statute § 211B.02 fails strict scrutiny because it is not a narrowly tailored regulation:

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance

> the interest as well with less infringement of speech (is the least-restrictive alternative).

White II, 416 F.3d at 751. Even accepting the state's alleged interests in mind, the First Amendment requires that the chosen restriction on the speech at issue be "actually necessary" to achieve them. *Brown v. Entm't Merchants Ass'n,* 131 S.Ct. 2729, 2738 (2011). Here, Minnesota cannot.

B. Prosecuting for symbolism or ideas attributed to political parties cannot occur under Minnesota statutes, thus is constitutionally underinclusive.

Minnesota Statute § 211B.02 is also underinclusive. The state appellate court asserted that because the statute regulates false political statements of support against major political parties or organizations, or other individuals, Minnesota Statute § 211B.02 could not be deemed unconstitutionally underinclusive. *Niska*, App. 20. Yet, adopting the ideas or ideals of an individual as a claim of political support is not subject to prosecution. This means ideas – whether conservative or liberal – that are readily identifiable to a political party or individual without mentioning the party name or the name of the individual would not be subject to prosecution. Symbolism of the donkey in blue for Democrats or the elephant in red for Republicans would exclude the prosecutorial threat to a potential defendant under the existing statute. Therefore, the complainant would have no basis to commence an action. A statute is unconstitutionally

underinclusive if it prohibits some speech but does not prohibit other speech resulting in impeding the government's compelling interest. *See RAV v. City of St. Paul*, 505 U.S. 377, 387 (1992).

The effect, if in fact the statute is meant to protect a governmental interest over the integrity of the election, fails with the expression of political speech through symbolism. The offending statute does not reach the protective interests of the state over the election process when symbols are used instead of words or statements such as: "Democratic support" or "Republican endorsed."

"It is in the political arena where robust discourse must take place." *281 Care Comm.,* 2014 WL 4290372 at *17. "[P]olitical speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre,* 514 U.S. at 357. However, the state may not position itself to prevent others from "resort[ing] to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement." *Cantwell v. Conn.,* 310 U.S. 296, 310 (1940). There must be room left for the rough and tumble of political discourse for the farfetched. *281 Care Comm.,* 2014 WL 4290372 at *17 (8th Cir. 2014).

Further, the statute does not ban false claims of support for a candidate's ideas, policies or platform, nor ban false claims of support for a ballot question's

wisdom, premises or logic. Yet, these different types of false claims of support appear to be so similar to be the same thing. After all, what is the difference between these two statements "the Republican Party supports the candidate" and "the Republican Party supports the candidate's ideas"? Very little. But, under Minnesota's statute, for the former statement, if false, there would be a fine; for the latter statement, if false, there would be no fine because the statute does not cover it. Not only is the statute underinclusive in this way, but it violates logic by banning some, but not all, false claims of support.

If false claims of support were an authentic compelling state interest, the state would ban all, not just some false claims of support. The statute is woefully underinclusive to support a claim that the compelling state interest behind the statute is to prevent the electorate from being misled by falsehoods.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0622

Harry Niska, complainant,
Respondent,

vs.

Bonn Clayton,
Relator,

Office of Administrative Hearings,
Respondent.

Filed March 10, 2014
Affirmed in part and reversed in part
Ross, Judge

Office of Administrative Hearings
File No. 68-0320-30147

David W. Asp, Lockridge Grindal Nauen, P.L.L.P., Minneapolis, Minnesota (for respondent Niska)

Peter A. Swanson, Golden Valley, Minnesota (for relator)

Lori Swanson, Attorney General, St. Paul, Minnesota (for respondent Office of Administrative Hearings)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Bonn Clayton distributed campaign material falsely indicating that the Republican Party of Minnesota endorsed three candidates for the Minnesota Supreme Court in the November 2012 election. His material also incorrectly stated that Justice Barry Anderson voted against former Governor Tim Pawlenty in a highly publicized supreme court case addressing the governor's unallotment authority. A panel of administrative law judges decided that Clayton violated Minnesota Statutes sections 211B.02 and 211B.06 (2012). Clayton appeals by writ of certiorari on constitutional and factual grounds. Because section 211B.02 is constitutional on its face and as applied to Clayton, and because sufficient evidence supports the panel's finding that Clayton violated it, we affirm in part. But because the panel received insufficient evidence to prove that Clayton acted with reckless disregard for the truth in making a false statement in violation of section 211B.06, we reverse in part.

FACTS

Bonn Clayton has held various positions in the Republican Party of Minnesota (RPM) since 1969. Most recently, Clayton served as a member of the First Judicial District Republican Committee. He also served as a member of the Judicial District Republican Chairs Committee (Chairs Committee) formed in

2005. The Chairs Committee met monthly to coordinate events in the state's various judicial districts, promote the judicial planks of the Republican platform, and develop strategy supporting judicial candidates.

The Chairs Committee has little power under the RPM constitution. Before each convention, the RPM forms a judicial election committee to investigate and report on appellate judicial candidates. The judicial election committee reports its findings at the convention. Convention delegates vote on whether to endorse any candidate. If the vote is affirmative, the delegates vote on specific candidate endorsements. The RPM endorses only candidates receiving 60% of the convention vote.

Clayton served as a member of the 2012 judicial election committee and presented the committee report at the convention. The convention delegates voted in favor of making judicial endorsements, but after reconsideration following a discussion about whether to endorse Tim Tingelstad over incumbent Justice David Stras, the convention voted by a two-to-one margin to overturn its previous decision to endorse any candidate. Clayton, who unsuccessfully lobbied the convention delegates to endorse Tingelstad, was present for that vote.

Despite knowing the convention's decision not to endorse any judicial candidate, Clayton sent an email to roughly 7,000 state Republicans on October 18,

2012, promoting a website, judgeourjudgesmn.org, that implied a different result:

> Dear Judicial District Delegates and Alternates,
>
> Just before every election, Party leaders begin to get many calls from voters wondering who they should vote for in the Minnesota Judicial races.
>
> So, we have put together a Voters' Guide, which we hope will be helpful.
>
> Just go to our website
> www.judgeourjudgesmn.org.
>
> It's just a new website, so it's still very simple. We currently have the names of our three recommended candidates for Supreme Court. . . .
>
> Please also send this link to all of your [basic political organizational unit's] precinct delegates and alternates and Caucus Attendees, so that Republican voters will be able to vote for the right candidates. And send the link to anybody else you can think of!
>
> . . . .
> Bonn Clayton, Convener
> Judicial District Republican Chairs
> Republican Party of Minnesota.

On the promoted website, Clayton posted a "2012 Minnesota Judicial Voters' Guide." The guide "*strongly recommended*" that Minnesota republicans vote for three supreme court candidates (Dan Griffith, Tim

Tingelstad, Dean Barkley), although it never used the term "endorse" or "endorsement." The home page represented that the website was sponsored by the "Republican Party of Minnesota – Judicial District Chairs Committee." The bottom of the page stated, "Prepared and paid for by: Republican Party of Minnesota – Judicial District Republican Chairs." Clayton's name was also listed at the bottom, and his signature line designated, "Republican Party of Minnesota." Another page of the website gave a biography of Tingelstad with similar implications that the RPM supported his candidacy.

The RPM began receiving inquiries expressing confusion about the email and whether the RPM had endorsed judicial candidates. So the RPM sent out an email the following day explaining that it had not endorsed any judicial candidates. It directed readers to its own voters' guide. Clayton's website was shut down for fewer than 10 days.

Clayton continued to promote the website. He sent an email on October 28 to the same 7,000 addressees announcing that the website was back online. Although Clayton never referenced the "Republican Party of Minnesota" in this email, the website still indicated that it was an RPM product. The RPM's legal counsel, Richard Morgan, sent Clayton an email the next day asking Clayton to remove "Republican Party of Minnesota" from the website and advise all email recipients that any reference to the RPM was mistaken. Clayton changed the statement on the website to "First Judicial District

Republican Committee of the Republican Party of Minnesota" and asked Morgan if the change was acceptable. Morgan told him it was not and that the RPM would file a complaint.

Clayton sent four additional emails to the same 7,000 addressees without referencing the RPM. One of the emails urged voters to elect Dean Barkley to the supreme court to replace Justice Barry Anderson. Clayton asserted that Justice Anderson had voted against Governor Pawlenty's unallotment authority, referring to the supreme court decision *Brayton v. Pawlenty,* 781 N.W.2d 357 (Minn. 2010). The statement was false.

RPM state convention delegate Harry Niska filed a complaint with the Office of Administrative Hearings (OAH), alleging that Clayton falsely indicated that the RPM endorsed three candidates and made false statements about multiple candidates, violating Minnesota Statutes sections 211B.02 and 211B.06 (2012). The case was decided by an administrative law judge (ALJ) panel.

The three-member ALJ panel heard testimony indicating substantially the facts above. It decided that Clayton violated section 211B.02 (making a false endorsement), based on Clayton's website, and 211B.06 (making a false statement about a candidate), based on the email wrongly reporting Justice Anderson's position in *Brayton*. The OAH fined Clayton $600 for each violation. Clayton appeals the OAH's determination by writ of certiorari.

DECISION

Clayton appeals the OAH's decision on four grounds. He maintains that Niska lacked standing to complain to the OAH and that the panel did not have sufficient evidence to find that he violated either statute. He also challenges the constitutionality of Minnesota Statutes section 211B.06 (2012) as applied to him and section 211B.02 (2012) on its face and as applied to him.

I

We reject Clayton's contention that Niska lacked standing to complain to the OAH. Minnesota Statutes section 211B.32 (2012), which governs sections 211B.02 and 211B.06, does not restrict who may file an election complaint. It states passively only that "[a] complaint alleging a violation must be filed with the office." Minn. Stat. § 211B.32, subd. 1. It indicates a temporal restriction ("within one year"), *id.,* subd. 2, and a formal restriction ("in writing, submitted under oath, [and factually detailed]"), *id.* subd. 3. But it says nothing restricting or defining the class of complainants. The statute does not on its face support Clayton's argument.

Relying on caselaw, Clayton asserts that a person has standing to file a complaint only when standing is "conferred by statute or [when the court recognizes] a particular relationship between a person and an actionable controversy." (Quotation omitted.) Clayton cites *In re Sandy Pappas Senate Committee,* 488

N.W.2d 795, 797 (Minn. 1992), in support. Clayton misreads *Pappas*. *Pappas* addressed whether a person who complained to the Minnesota Ethical Practices Board had standing to challenge the board's decision that deemed the accused committee's violations to be merely unintentional and inadvertent. *Id.* at 796-97. It had nothing to do with the complainant's standing to file his complaint in the first place. *Id.* at 797-98 (distinguishing standing for judicial review of an agency decision from the ability to participate in an agency proceeding); *see also In re Decertification of Exclusive Representative Certain Emps. of Univ. of Minn., Unit 9,* 730 N.W.2d 300, 304 (Minn. App. 2007) ("[P]articipation in an agency proceeding does not guarantee standing to seek review of the agency's decision.").

Although chapter 211B says nothing to restrict who may lodge an administrative complaint, the legislature elsewhere provides broadly that "[a]ny eligible voter" may contest an election, Minn. Stat. § 209.02, subd. 1 (2012), or initiate a recall, *see* Minn. Stat. § 211C.03 (2012). Considering chapter 211B's silence and its context with these other statutes, we hold that the legislature intended at the very least that "any eligible voter" may file a complaint under chapter 211B. Clayton does not deny that Niska was an eligible voter.

Clayton separately contends that the OAH lacked jurisdiction over the complaint because the dispute was an internal party issue and Niska did not exhaust all intra-association remedies. Courts will

uphold organizational rules requiring members to solve disputes internally unless those rules violate the law or provide merely an illusory process. *See Rensch v. Gen. Drivers, Helpers & Truck Terminal Emps. Local No. 120,* 268 Minn. 307, 313-16, 129 N.W.2d 341, 345-47 (1964); *Peters v. Minn. Dept. of Ladies of Grand Army of Republic,* 239 Minn. 133, 135-36, 58 N.W.2d 58, 60 (1953). Requiring members to exhaust intra-association remedies respects the contractual obligations of the organization and its members and avoids undue governmental interference with private associations. *Rensch,* 268 Minn. at 313, 129 N.W.2d at 345-46.

But the rule of law developed in *Rensch* and *Peters* does not apply on our facts. Those cases interpreted organizational constitutional provisions that required members to resolve disputes internally. By contrast, Clayton does not identify any provision of the RPM constitution with that sort of requirement. Instead he broadly asserts that disputing party factions should be left to resolve their differences among members. He cites no authority for the proposition, and, in any event, the proposition overlooks the fact that the complaint does not expose a mere intraparty squabble; it claims a violation of law. Clayton's jurisdictional arguments fail.

II

Clayton contends that the evidence fails to prove that he violated Minnesota Statutes section 211B.06

because Niska did not provide clear and convincing evidence that Clayton made a false statement and that the statement was made with reckless disregard to its truth. *See* Minn. Stat. §§ 211B.06, subd. 1, 211B.32, subd. 4. We will reverse the administrative decision if Clayton meets his burden to demonstrate that the findings were not supported by substantial evidence. *See Fine v. Bernstein,* 726 N.W.2d 137, 142 (Minn. App. 2007), *review denied* (Minn. Apr. 17, 2007). To prevail, he must show that the record as a whole lacks evidence that a reasonable person would accept as adequate support for the panel's conclusion. *See id.*

Clayton admits that his statement characterizing Justice Barry Anderson's position in the *Brayton* case was false, but he contends that he did not act with reckless disregard for the truth. We have treated the reckless-disregard language in section 211B.06 as being synonymous with actual malice in defamation cases. *Riley v. Jankowski,* 713 N.W.2d 379, 398-99 (Minn. App. 2006), *review denied* (Minn. July 19, 2006). Actual malice requires more than mere "recklessness" generally applied to civil cases. *Chafoulias v. Peterson,* 668 N.W.2d 642, 654 (Minn. 2003). A complainant must demonstrate that the respondent made a false statement while subjectively believing the statement to be false or "probably false." *Id.* at 655. It is insufficient to show only that "a reasonably prudent man would [not] have published[ ] or would have investigated before publishing," *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 1325

(1968), or merely that a person failed to investigate, *Chafoulias,* 668 N.W.2d at 655.

To determine whether sufficient evidence of Clayton's disregard for the truth exists, we look at the sources of Clayton's information, the information he received, the reliability of his sources, and whether he had any sources at all. *See In re Charges of Unprofessional Conduct Involving File No. 17139,* 720 N.W.2d 807, 814 (Minn. 2006). Niska testified that Clayton was an "authority figure on judicial elections and judicial candidates" in the Republican party. He emphasized that the *Brayton* decision was highly publicized and that politically interested people likely heard about it. He also testified that Justice Anderson's decision to join the dissent in supporting Pawlenty's claim of unallotment authority was similarly well publicized. Niska conceded, however, that he had no evidence that Clayton knew that Justice Anderson had joined the dissenting opinion or that Clayton maintained serious doubts about Justice Anderson's position. Niska merely repeated that Justice Anderson's vote was easily ascertainable but that Clayton did not avail himself of the accessible information.

Clayton called witnesses who testified that they believed as he had about Justice Barry Anderson's position in the case. One witness expressed confusion given that two Andersons then sat on the supreme court, observing that "an Anderson voted for it and an Anderson voted against it." Clayton's witnesses also testified that the consensus at a Chairs Committee

meeting was that Justice Barry Anderson had opposed Pawlenty's position. And it was only after that meeting that Clayton sent his email representing that Justice Barry Anderson had voted against Pawlenty. Clayton testified that he had not read *Brayton* and could not recall the exact article in the Star Tribune on which he claimed to have based his erroneous belief.

The panel concluded that Clayton acted with reckless disregard for the truth because it discredited Clayton's testimony that his belief came from a Star Tribune article. It found his testimony incredible because it was vague while his recollections on other matters were clear, deeming his stated belief therefore "not plausible." In making its credibility determination, the panel relied heavily on the facts that Clayton "could have discovered that the statement was untrue by doing minimal research," that "[t]he *Brayton* decision was issued in 2010, two years before [Clayton's] statement," and that the decision had been "widely publicized." We generally defer to an ALJ panel's credibility determinations. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.,* 624 N.W.2d 264, 278 (Minn. 2001). But what purports to be a credibility analysis here reveals that the panel effectively penalized Clayton for failing to investigate, not that it believed he had investigated and knew his statement to be false. But failure to adequately investigate a statement does not equate to actual malice. That a person never read the newspaper account that he cites to support his erroneous

belief does not establish reckless disregard for the truth. It may show mistake, confusion, or carelessness, but the statute does not prohibit political advertisements that reflect mere flippancy or even negligence as to truth. Additionally, that Clayton had a lapse in memory regarding one event while he clearly recalls other events is not implausible, nor does it demonstrate that he knew his statement was false or probably false. Anyone with a less-than-perfect memory will recall some things precisely and other things in a fog.

The panel's credibility assessment rests exclusively on express factors that reveal the panel's legal error. Because the objectively flawed credibility assessment is the *only* support offered or relied on to prove actual malice, we hold that the record does not establish that Clayton acted with actual malice. We therefore reverse the panel's decision that Clayton violated section 211B.06. Because we reverse on this ground, we need not consider the contention that section 211B.06 is unconstitutional on its face or as applied here.

III

Clayton's next argument is that the panel did not receive substantial evidence that he violated section 211B.02. He appears to assert that the ALJ panel erred by concluding that his actions constituted a false endorsement. A person who promotes a candidate by including the initials or the name of a major

party without clarifying that the candidate is merely a member of the party violates section 211B.02 if he knows that the candidate is not also endorsed by the party. *See In re Ryan,* 303 N.W.2d 462, 465-66 (Minn. 1981) (holding that placing the terms "DFL" and "LABOR ENDORSED" on campaign materials violated the statute); *Schmitt v. McLaughlin,* 275 N.W.2d 587, 591 (Minn. 1979) (finding the use of the initials "DFL" would falsely imply endorsement or support). Clayton used the term "Republican Party of Minnesota" on multiple documents and on his website while promoting candidates who lacked the party's endorsement. Clayton attended the state Republican convention and knew that the party had not endorsed his preferred candidates. The ALJ panel had ample evidentiary support for its finding that his actions knowingly and falsely implied that the RPM endorsed the candidates.

IV

Clayton contends that section 211B.02 is unconstitutional on its face. A statute's constitutionality is a question of law, which we review de novo. *Riley,* 713 N.W.2d at 386. While statutes generally carry a presumption of constitutionality, a statute restricting speech does not; the burden rests with the government to demonstrate that a speech-restricting statute is constitutional. *Hornell Brewing Co. v. Minn. Dept. of Pub. Safety,* 553 N.W.2d 713, 716 (Minn. App. 1996).

Without dispute, section 211B.02 restricts speech:

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate . . . has the support or endorsement of a major political party or party unit or of an organization.

Clayton contends that this content-based restriction is facially unconstitutional because it is not narrowly tailored to its objective. Content-based speech restrictions will be upheld only if they pass strict scrutiny. *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 813, 120 S. Ct. 1878, 1886 (2000). To survive strict scrutiny, a law must be narrowly tailored to serve a compelling government interest. *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 340, 130 S. Ct. 876, 898 (2010). To be narrowly tailored, the statute must be the "least restrictive means among available, effective alternatives." *Ashcroft v. ACLU,* 542 U.S. 656, 666, 124 S. Ct. 2783, 2791 (2004). The Supreme Court has held that obscenity, defamation, fraud, incitement, and speech integral to criminal conduct are constitutionally unprotected categories of speech, and statutes restricting them serve a compelling government interest. *See United States v. Stevens,* 559 U.S. 460, 468-69, 130 S. Ct. 1577, 1584 (2010). Absent from these categories is merely "false speech," such as Clayton's.

False speech has traditionally received little protection, *see Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 52, 108 S. Ct. 876, 880 (1988); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340-41, 94 S. Ct. 2997, 3007

(1974), but it has never been deemed *categorically* unprotected, *United States v. Alvarez,* 132 S. Ct. 2537, 2547 (2012) (plurality opinion); *id.* at 2553 (Breyer, J., concurring); *id.* at 2563 (Alito, J., dissenting). Penalizing all falsehoods theoretically discourages open debate and chills speech. *Gertz,* 418 U.S. at 340-41, 94 S. Ct. at 3007. The Supreme Court has intimated that false statements are unprotected only when the statements are associated with related harms, such as defamation or fraud. *Alvarez,* 132 S. Ct. at 2544-45 (plurality opinion).

But false political speech can be electorally toxic. During the election season, "false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 349, 115 S. Ct. 1511, 1520 (1995). Section 211B.02 prohibits only those false statements that state or imply a false endorsement that may mislead the public and harm the political process. *See Schmitt,* 275 N.W.2d at 591. The state's interest in preventing electorate confusion is therefore compelling. *See McIntyre,* 514 U.S. at 344, 349, 115 S. Ct. at 1517, 1520; *Talley v. California,* 362 U.S. 60, 63-64, 80 S. Ct. 536, 538 (1960). We repeat here that avoiding false speech that misleads the public regarding elections is a compelling interest. We turn to Clayton's arguments that 211B.02 is not narrowly tailored to this compelling interest.

Overbreadth

Clayton first argues that the statute is not narrowly tailored because it is overbroad and therefore not the least restrictive means to serve the government's interest. A statute that limits speech is unconstitutionally overbroad "if a substantial amount of protected speech is prohibited or chilled" by the state's constitutional application of a statute. *Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 255, 122 S. Ct. 1389, 1404 (2002). To violate the Constitution, however, the overbreadth must substantially sweep outside the statute's plainly legitimate aim. *United States v. Williams,* 553 U.S. 285, 292, 128 S. Ct. 1830, 1838 (2008). We will not invalidate a statute merely because a challenger can predict or envision circumstances in which the statute might be applied unconstitutionally. *Broadrick v. Oklahoma,* 413 U.S. 601, 615-16, 93 S. Ct. 2908, 2917-18 (1973); *see N.Y. State Club Ass'n v. City of New York,* 487 U.S. 1, 14, 108 S. Ct. 2225, 2234 (1988) (requiring the challenger to demonstrate "from the text of [the law] and from actual fact that a substantial number of instances exist in which the Law cannot be applied constitutionally"). Unconstitutional overbreadth also does not occur when the overbreadth can be "cured through case-by-case analysis of the fact situations to which its sanctions . . . may not be applied." *Broadrick,* 413 U.S. at 615-16, 93 S. Ct. at 2918. Applying the overbreadth doctrine to invalidate a statute is a "strong medicine" that should be "used sparingly and

only as a last resort." *N.Y. State Club Ass'n,* 487 U.S. at 14, 108 S. Ct. at 2234 (quotation omitted).

Clayton gives two reasons why he believes the law is overbroad – it prohibits constitutionally protected false speech associated with free debate and it prohibits factually accurate statements that imply a false endorsement. We read the law differently. Section 211B.02 prohibits speakers from "knowingly mak[ing], directly or indirectly, a false claim stating or implying that a candidate . . . has the support or endorsement of a" party or organization. It punishes speech only when the speaker knows that it will lead others to believe wrongly that a candidate has the support of a party or organization. *In re Ryan,* 303 N.W.2d at 467. It prohibits only those statements that can be read as endorsements. *Schmitt,* 275 N.W.2d at 591; *see In re Contest of Election in DFL Primary Election Held on Tuesday, September 13, 1983,* 344 N.W.2d 826, 830-31 (Minn. 1984). The statute therefore prohibits only claims of support and only when those claims are false.

So construed, the statute does not prohibit or chill a "substantial amount" of protected speech. *See Williams,* 553 U.S. at 297, 128 S. Ct. at 1841. Clayton contends that section 211B.02 may chill speech because speakers may fear punishment if they make a false statement. He is correct that allowing false statements may benefit the marketplace of ideas, *Alvarez,* 132 S. Ct. at 2544-45 (plurality opinion), but Clayton's concern with respect to section 211B.02 is misplaced. By prohibiting only "knowingly" false

speech, the statute does not touch on inadvertent falsehoods that contribute to the free expression of ideas.

Clayton overstates the case by urging that prohibiting statements that "imply" false endorsements violates the Constitution because factually accurate statements might imply false support. We are aware of no circumstance in which the statute has been applied to punish a speaker for a string of true statements that merely implied a false endorsement. And the supreme court's limitation that the statute does not punish words of mere association undermines the argument further. Clayton does not convince us that section 211B.02 presents "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of City Council of L.A. v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S. Ct. 2118, 2126 (1984). He also has not presented any less restrictive alternatives that would appropriately serve the government's interest. The statute is not unconstitutionally overbroad.

Underinclusion

Clayton also argues that the statute fails strict scrutiny because it is underinclusive. A statute is unconstitutionally "underinclusive" if it prohibits some speech for a compelling government interest but does not prohibit other speech that also impedes the government interest and the distinction is viewpoint

based. *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 387, 112 S. Ct. 2538, 2545 (1992). Clayton specifically argues that because section 211B.02 refers only to "*major* political parties," "party units," and "organizations" but not to "*minor* political parties," it is unconstitutionally underinclusive. The argument fails on the mistaken premise that false endorsements about minor political parties are not governed by section 211B.02.

We ascribe meaning to statutorily undefined words based on "their common and approved usage." Minn. Stat. § 645.08(1) (2012). "Organization" is not defined in Minnesota Statutes section 200.02 (2012). But it is a simple word with a common usage that encompasses political parties, including minor political parties. When the words of a statute are explicit and unambiguous, the legislature has asked us to accept the statute as written. *See* Minn. Stat. § 645.16 (2012). Clayton reasonably observes that the term "organization," construed based on its plain meaning, might render the term "major political party" superfluous – a result that may itself suggest an ambiguity. *See Am. Family Ins. Grp. v. Schroedl,* 616 N.W.2d 273, 277 (Minn. 2000). He urges us to apply the interpretive doctrine *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) to avoid the superfluous result. Under that doctrine, when a statute lists certain terms but not others, the interpreting court should infer that the list is exclusive unless the context indicates otherwise. *See State v. Caldwell,* 803

N.W.2d 373, 383 (Minn. 2011); *see also* Minn. Stat. § 645.19 (2012).

But the doctrine is only an interpretive guide, not a syntactic straightjacket, and it does not apply here. Clayton asks us to apply the doctrine to infer that, by listing "major political party" without expressly listing "minor political party," the legislature purposefully excluded false endorsements of minor political parties from the statute. An inference arising from the doctrine is "justified [only] when the language of the statute supports such an inference." *Caldwell,* 803 N.W.2d at 383. As a whole, the statutory language here cannot support the inference. *See id.* (explaining that applying *expressio unius est exclusio alterius* "is not justified when the omitted term is encompassed by the enumerated terms"). The omitted term "minor political party" is encompassed by the enumerated term "organization" because political parties – major or minor – are of course organizations.

The legislature also asks courts to interpret any ambiguous statute in a manner that avoids "absurd" or "unreasonable" results. Minn. Stat. § 645.17(1) (2012). Clayton's reading of the statute, which would penalize a person for falsely claiming the political support or endorsement of *every* individual, *every* political party, and *every* conceivable organization *except only* "minor political parties" invites an absurd and unreasonable result. Recall that section 211B.02 has broad express reach to protect entities and even individuals from being falsely dubbed as supporters

of any candidate. It prohibits any person from "knowingly mak[ing] . . . a false claim stating or implying that a candidate . . . has the support or endorsement of a major political party or party unit or of an organization," or from "stat[ing] in written campaign material that the candidate . . . has the support or endorsement of an individual without first getting written permission." Minn. Stat. § 211B.02. What sense is there in punishing a campaign worker for falsely claiming the support of the International Falls Chamber of Commerce ("a membership-driven *organization* committed to providing a voice for [the International Falls] business community"[1] but not for falsely claiming the support of the Green Party of Minnesota ("a grassroots *organization*"[2] that is also a Minnesota *minor political party*)? How can we suppose that the legislature intended to allow a candidate to falsely claim the support of the Libertarian Party of Minnesota, another "minor political party," but to penalize her for falsely claiming the support of her next door neighbor, an "individual"?

We reject Clayton's request to infer an absurd, supposedly unconstitutional rendering of the statute, which, on its face, unambiguously seeks to protect the electorate from false statements of organizational and individual political endorsement.

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[1] Int'l Falls Area Chamber Com., http://ifallschamber.com (last visited Feb. 26, 2014) (emphasis added).

[2] Green Party Minn., http://mngreens.org (last visited Feb. 26, 2014) (emphasis added).

V

Clayton also makes an as-applied challenge to the ALJ panel's determination that he violated section 211B.02. We review the challenge de novo. *See In re Individual 35W Bridge Litig.,* 806 N.W.2d 820, 829 (Minn. 2011).

Clayton contends that section 211B.02 was unconstitutionally applied to him because it did not require the RPM to engage in counterspeech to rebut his falsehoods. When applying strict scrutiny, the government's restriction "must be the least restrictive means among *available, effective* alternatives." *Alvarez,* 132 S. Ct. at 2551 (emphasis added) (quotation omitted). Unlike in *Alvarez,* where a plurality of the Court struck down a law prohibiting anyone from falsely claiming to be a medal-of-honor recipient because evidence in that case showed that "counterspeech, . . . [and] refutation, can overcome the lie," *id.* at 2549, that lie-defeating solution is inadequate here. At stake in *Alvarez* was the dishonest speaker's reputation; at stake under the statute in this case is an accurately informed electorate. The state need not rely on media corrections to vindicate its interest in protecting the electorate from falsehoods and safeguarding the integrity of its elections. Clayton's as-applied challenge fails.

Affirmed in part and reversed in part.

OAH 68-0320-30147

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Harry Niska,

Complainant,

vs.

Bonn Clayton,

Respondent.

FINDINGS OF FACT, CONCLUSIONS AND ORDER

(Mar. 12, 2013)

The above-entitled matter came on for an evidentiary hearing at the Office of Administrative Hearings on February 7 and February 8, 2013, before a panel of three Administrative Law Judges: Jeanne M. Cochran (Presiding Judge), James E. LaFave, and Miriam P. Rykken. On February 15, 2013, the Parties filed post-hearing memoranda. On February 22, 2013, the Complainant filed a reply brief, and on February 26, 2013, the Respondent filed a reply brief.[1] The hearing record closed with the filing of the last submission on February 26, 2013.

David Asp, Attorney at Law, Lockridge Grindal Nauen, PLLP, appeared on behalf of Harry Niska, (Complainant).

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[1] The Respondent submitted his reply brief by email at 5:04 p.m. on Friday, February 22, 2013. The reply brief was received at the OAH by U.S. Mail on Tuesday, February 26, 2013.

Bonn Clayton (Respondent) appeared on his own behalf without assistance of counsel.

STATEMENT OF THE ISSUE

Did Respondent violate Minn. Stat. § 211B.02 by knowingly making statements that falsely implied that three Minnesota Supreme Court candidates had the endorsement or support of the Republican Party of Minnesota?

Did Respondent violated [sic] Minn. Stat. § 211B.06 by preparing and disseminating false campaign material that he knew was false or that he communicated with reckless disregard as to whether it was false?

The panel concludes that the Complainant has established that the Respondent violated both Minn. Stat. §§ 211B.02 and 211B.06 with respect to statements made in campaign material he prepared and disseminated.

Based on the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. Complainant Harry Niska is an attorney and is active in Republican Party of Minnesota (RPM) politics. Mr. Niska was a delegate to the RPM's May

2012 State Convention, as well as the Chair of the Convention's Platform Committee.[2]

2. Respondent Bonn Clayton is a long-time political activist and operative who has been deeply involved in RPM politics for over 50 years.[3] The Respondent is particularly interested in judicial elections and holds himself out as an authority on judicial candidates.[4]

3. Respondent is the Chair of the First Judicial District Republican Committee. The committee works to recruit judicial candidates to run for seats on the district court bench in the First Judicial District. Minnesota has 10 judicial districts. The First Judicial District is made up of Carver, Dakota, Goodhue, Le Sueur, McLeod, Scott and Sibley counties. The RPM permits interested members in each Judicial District to create and organize a committee to recruit judicial candidates.[5]

4. The RPM Constitution provides that if a Judicial District Committee is created, it is strictly auxiliary to the RPM and shall have no other powers except as provided by the RPM Constitution.[6] Judicial District Committees may search for judicial candidates

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[2] Testimony of Harry Niska; Ex. 2.

[3] Testimony of Bonn Clayton.

[4] Niska Test.; Clayton Test.

[5] Testimony of Ben Zierke; Ex. 24 (RPM Constitution at Art. 12, § 1).

[6] *Id.*

and may call conventions of its Judicial District and endorse for a judicial office in that district.[7]

5. In December 2011, the RPM's State Central Committee approved a $43,462 budget appropriation for the Party's Political department to assist the Judicial District Committees with expenditures, including $462 for costs associated with starting up a new website called judgeourjudgesmn.com.[8]

6. The Judicial District Republican Chairs Committee is made up of the Chairs of the various Judicial District Committees. This committee was formed approximately eight years ago and it coordinates efforts to find judicial candidates for district and appellate courts. The Judicial District Republican Chairs Committee met about once a month and more frequently during the legislative session.[9] Former Chairs of the RPM Ron Carey and Tony Sutton, and other Party Officials have on occasion attended meetings of the Judicial District Republican Chairs Committee.[10]

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[7] Ex. 24 at Art. 12, § 1.

[8] Exs. C and G; Zierke Test.; Wersal Test; Clayton Test. (In the end, the money was never allocated the RPM's financial difficulties.)

[9] Clayton Test.; Testimony of Ronald Niemala and Timothy Kinley.

[10] Clayton Test.

7. The Respondent has been a member of the Judicial District Republican Chairs Committee since it was formed in about 2005.[11]

8. In addition to the Judicial District Committees and the Judicial District Chairs Committee, the RPM Constitution provides for the creation of various convention committees to assist with carrying out the work of RPM State Convention.[12] Once the State Convention is over, these committees typically disband. One of the State Convention committees is the "Judicial Election Committee." Its purpose is to review and encourage possible candidates for endorsement as well as to prepare a voters' guide on all judicial candidates and incumbent justices of the Minnesota Supreme Court and Court of Appeals.[13]

9. The RPM began endorsing judicial candidates for statewide and district races in 2004. In 2010, for example, the RPM endorsed three candidates for appellate court positions: Greg Wersal and Tim Tinglestad for the Minnesota Supreme Court, and Dan Griffith for the Minnesota Court of Appeals.[14] All three candidates lost.

10. The RPM Constitution provides that the Party shall consider at its state convention whether

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[11] Clayton Test.

[12] Ex. 24 at Art. 6; Zierke Test.

[13] Ex. 24 at Art. 6B.

[14] Niska Test.; Ex. 3.

to endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals.[15] The Constitution states that the chair of the Judicial Election Committee will offer a report at the state convention regarding whether the Party should endorse candidates for the Minnesota Supreme Court and the Minnesota Court of Appeals[16] Following this report, the state convention delegates vote on whether endorsement should be considered. If the delegates vote in favor of endorsing candidates, then they vote on the endorsement of a person for the particular office of the Minnesota Supreme Court or Minnesota Court of Appeals.[17]

11. The RPM Constitution also states that within 14 days of the close of candidate filings for Minnesota Supreme Court and Minnesota Court of Appeals, the Judicial Election Committee will present its voters' guide for approval to the RPM Executive Committee for approval.[18]

12. Respondent was the Chair of the RPM's Judicial Elections Committee in 2008 and 2010. In 2012, Pat Shortridge, Chair of the RPM, removed Respondent as Chair of the Judicial Elections Committee. Respondent remained a member of the Judicial Elections Committee, however, and as a member

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[15] Ex. 24 at Art. 5, § 3C.

[16] *Id.* at Art. 6C.

[17] Ex. 24 at Art. 5, § 3C.

[18] *Id.* at Art. 6D and 6E.

he led the effort to recruit candidates for statewide judicial office.[19]

13. On or about April 24, 2012, Respondent sent an email to RPM Judicial District delegates requesting recommendations for statewide judicial candidates. Respondent indicated that the RPM State Convention Judicial Elections Committee would be making recommendations for endorsement at the May 2012 RPM State Convention and noted that the RPM needed more candidates for the Minnesota Supreme Court and Appellate Court races. The Respondent closed the email as follows: "Bonn Clayton, Republican Judicial District Chairs, RPM Judicial Election Committee."[20]

14. The three Minnesota Supreme Court seats that were up for election in 2012 were all held by jurists who had been appointed by former Republican Governor Tim Pawlenty: Chief Justice Lorie Gildea, Justice G. Barry Anderson, and Justice David Stras.

15. The RPM State Convention took place in St. Cloud on May 18 and 19, 2012.

16. During the convention, Respondent and the Convention's Judicial Elections Committee advocated for the RPM to endorse three Minnesota Supreme Court candidates at the convention. Specifically, they sought the RPM's endorsement for Tim Tinglestad,

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[19] Zierke Test.

[20] Ex. 1; Clayton Test.

Dan Griffith, and Dean Barkley. After a spirited discussion, the delegates at the RPM State Convention ultimately voted not to endorse any statewide judicial candidates.[21] As a result, no judicial candidate had the endorsement of the RPM in the November 2012 general election.

17. According to the RPM Constitution, only endorsements "made at a convention that is representative of the entire electorate for the office" may receive the commitment of party resources, finances and volunteers.[22] The RPM Constitution provides that an endorsement for public office at a convention below the level of the one representative of the entire electorate for the office "shall be no more than an expression of the sentiment of the convention"[23]

18. Respondent was unhappy with the decision by the delegates not to endorse judicial candidates.

19. On September 27, 2012, the Respondent sent an email to First Judicial District delegates informing them that the First Judicial District Republican Committee held an endorsing convention and unanimously endorsed Brian Gravely for First Judicial District Court judge, and Tim Tinglestad and Dan Griffin for the Minnesota Supreme Court.[24]

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[21] Niska Test.; Ex. 2.

[22] Ex. 24 at Art. 5 § 3A(6).

[23] *Id.*

[24] Ex. 19

20. The RPM Judicial Chairs Committee and the First Judicial District Committee do not have the authority under the RPM Constitution to endorse candidates for statewide judicial office.[25]

21. In mid-October 2012, the Respondent and members of the Judicial District Republican Chairs Committee created a website called: www.judgeourjudgesmn.com to provide information on judicial candidates that support Republican initiatives favored by the Judicial District Republican Chairs, such as removing the term "Incumbent" from judicial ballots and requiring that district court judges be elected by the people they serve.[26]

22. On October 18, 2012, the Respondent sent an email with the subject heading, "Which Judges should I vote for?," to a list of RPM Judicial District Delegates and Alternates. The Respondent obtained the list, which included more than 7,000 people, from local units of the RPM known as "Basic Political Operating Units" or BPOUs and from the Party Chairs of Congressional Districts (CDs).[27] (In the email, the Respondent stated that "Party leaders" had put together a Voters' Guide in response to many calls from voters wondering who they should vote for in the judicial races.[28] Respondent encouraged recipients

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[25] Zierke Test.

[26] Ex. 5; Testimony of Timothy Kinley.

[27] Clayton Test; Niska Test.

[28] Ex. 4.

of the email to go to the judgeourjudgesmn website and view the Voters' Guide. Respondent also requested that recipients of the email send the website link to "all of your BPOU precinct delegates and alternates and Caucus Attendees, so that Republican voters will be able to vote for the right candidates."[29] The Respondent signed the email: "Bonn Clayton, Convener, Judicial District Republican Chairs, Republican Party of Minnesota."[30]

23. Recipients of Respondent's October 18th email and others who viewed the judgeourjudgesmn website on or about October 18, 2012, saw centered at the top of the website's home page in approximately 11-point font the heading: "Republican Party of Minnesota – Judicial District Chairs Committee." Centered underneath that heading, in large 18-point font, was the caption: "2012 Minnesota Judicial Voters' Guide."[31] The text that followed was written in letter format and was authored by the Respondent, who identified himself at the end of the text as: "Bonn Clayton, Convener, Judicial District Republican Chairs, Republican Party of Minnesota."[32] To the right of the text was a list of three Minnesota Supreme

[29] Ex. 4.

[30] *Id.*

[31] Ex. 5.

[32] Ex. 5.

Court candidates and four district court candidates with links to information about each candidate.[33]

24. The text of the homepage of the judgeour judgesmn 2012 Minnesota Judicial Voters' Guide was written by Respondent and advocated for the election of the seven judicial candidates listed. Viewers were informed that the identified candidates were "*strongly recommended*" by the Judicial District Republican Chairs Committee and they were encouraged to vote for the candidates and to tell others to do the same. The Respondent included a disclaimer in 10-point font that ran across the very bottom of the web page and stated: "Prepared and paid for by: Republican Party of Minnesota – Judicial District Republican Chairs."[34]

25. Viewers of the website's homepage who selected the link leading to more information on candidate Tim Tinglestad were directed to a page dedicated to Mr. Tinglestad's candidacy.[35]

26. Like the judgeourjudgesmn home page, the Tinglestad page also had the heading "Republican Party of Minnesota – Judicial District Chairs Committee" centered at the top. Underneath that heading was a photo of Mr. Tinglestad followed by three paragraphs of text highlighting the difference between

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[33] Ex. 5.

[34] Ex. 5.

[35] Ex. 6.

him and his opponent, Minnesota Supreme Court Justice David Stras. Mr. Tinglestad drafted the text at the request of the Respondent, who asked Mr. Tinglestad to contrast himself with Justice Stras. Mr. Tinglestad submitted the text and his photo to the Respondent for publication on the website. In the text, Mr. Tinglestad, who serves as a Magistrate for the Ninth Judicial District, emphasizes his belief in a "constitutional right to meaningful judicial elections" and includes the following statement:

> David Stras supports the plan to replace our constitutional right to meaningful judicial elections with an impeachment process called Merit Selection with Retention Elections.[36]

27. Mr. Tinglestad has never spoken to Justice Stras and was unaware of any statements made by him regarding judicial elections that were published in candidate questionnaires or elsewhere. Mr. Tinglestad researched articles online and generally got the impression that Justice Stras was in favor of retention elections (recommended by the Quie Commission) over the current judicial election process.[37]

28. Mr. Tinglestad is unable to recall any specific article that he read that lead [sic] him to conclude

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[36] *Id.*

[37] Testimony of Timothy Tinglestad.

Justice Stras favors replacing the current judicial election process with retention elections.[38]

29. A disclaimer included at the bottom of the Tinglestad web page stated: "Prepared and paid for by Republican Party of Minnesota – Judicial District Republican Chairs. Bonn Clayton – busware@aol.com."[39]

30. Mr. Tinglestad did not draft or include the disclaimer in the material he submitted to the Respondent for publication on the website.[40]

31. Greg Wersal, an attorney and advisor to the Judicial District Republican Chairs Committee, believes that Justice Stras favors the retention election system proposed by the Quie Commission. Mr. Wersal attended a seminar at the University of Minnesota in April 2011 sponsored by the Federalist Society at which Justice Stras was the featured speaker. Mr. Wersal spoke with Justice Stras at a reception following his presentation. Based on this conversation, Mr. Wersal formed the opinion that Justice Stras supports the renewal of judicial terms through retention elections over the current judicial election process. Mr. Wersal may have communicated his opinion regarding Justice Stras to Mr. Tinglestad.[41]

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[38] Tinglestad Test.

[39] *Id.*

[40] Tinglestad Test.

[41] Testimony of Greg Wersal.

32. Ben Zierke, Executive Director of the RPM, received a number of telephone calls from people who had visited the judgeourjudgesmn website and/or had received Respondent's October 18th email and were confused about whether the RPM had endorsed judicial candidates.[42]

33. To address the confusion caused by the judgeourjudgesmn website and Respondent's email, the RPM decided to issue its own email to RPM activists clarifying that it had not endorsed any statewide judicial candidates in 2012.[43]

34. At the end of the day on October 19, 2012, Pat Shortridge and David Asp, Chair of the RPM Judicial Committee, sent an email to the Party's master list of RPM delegates clarifying that the RPM had not endorsed any statewide judicial candidates in 2012 in conformance with the express decision of the delegates at the state RPM convention. Mr. Shortridge and Mr. Asp referenced the recent dissemination of "misleading" emails and an unofficial "voter's guide" that imply the RPM is supporting three judicial candidates. Mr. Shortridge and Mr. Asp warned recipients to be wary of the information contained in the emails and unauthorized voter's guide as they include misleading statements and improperly imply that the RPM endorses particular candidates. In response to this misinformation, Mr.

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[42] Zierke Test.

[43] Zierke Test.; Ex. 8.

Shortridge and Mr. Asp announced that the RPM had created an "official judicial election guide" and included a link to it for voters to educate themselves generally about the judicial candidates. Mr. Shortridge and Mr. Asp closed the email by requesting recipients forward the official RPM voter guide to all interested Minnesotans.[44]

35. For approximately two days after October 25, 2012, the judgeourjudgesmn website was taken down and was not accessible on the internet. The site was back up on or about October 27, 2012. In an email announcing that the website was back up, the Respondent referred to himself as: "Bonn Clayton, Convener, MN Judicial District Republican Chairs" eliminating the reference to "Republican Party of Minnesota." However, as of October 27, 2012, the disclaimer stating that the site was prepared and paid for by the "Republican Party of Minnesota – Judicial District Republican Chairs" remained at the bottom of the site's home page.[45]

36. In a newspaper questionnaire directed at Minnesota Supreme Court candidates and posted online on October 26, 2012,[46] Justice David Stras stated that he took "no position" on the proposed judicial retention election system. Justice Stras

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[44] Ex. 8. *See also*, Ex. 9.

[45] Exs. 5 and 10; Niska Test; Zierke Test.

[46] Ex. 7 (posted on the *Mille Lacs Messenger* website at www.messengermedia.com).

stated that "the decision about how to select judges is committed to the people and the legislature, not the judicial branch." Justice Stras noted that the constitution's separation of powers provided a reason for judges and judicial candidates to decline to comment about matters "beyond the scope of the job."[47] Justice Stras made similar comments during a radio news program interview sometime in the weeks prior to the election.[48]

37. In late October and early November 2012, the Respondent sent additional emails to RPM Judicial District and Convention delegates encouraging them to vote for the judicial candidates identified on the judgeourjudgesmn website.[49] In the emails, the Respondent used the name "Republican Party of Minnesota" or the initials "RPM."[50] The Respondent also used terms like "delegates" and "BPOU," which have specific meanings to activists and members of the RPM and implied that the information was sanctioned by the RPM.[51]

38. On or about October 29, 2012, Richard Morgan, counsel for the RPM, sent the Respondent an email regarding the "2012 Minnesota Judicial Voters' Guide" on the judgeourjudgesmn website. Mr. Morgan

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[47] Ex. 7 at 13.

[48] Niska Test.

[49] Exs. 10, 14 and 15.

[50] Exs. 14 and 15.

[51] *Id.;* Niska Test.

reminded the Respondent that the RPM had not endorsed any judicial candidate in the November 2012 general election. Mr. Morgan expressed concern that use of the RPM name on the website would lead to confusion regarding the judicial endorsements. As a result, Mr. Morgan directed the Respondent to immediately remove the RPM disclaimer from the website and to advise all recipients of emails connected with the 2012 Minnesota Judicial Voters' Guide that the use of the RPM disclaimer was a mistake. Mr. Morgan warned the Respondent that his failure to do so might lead to a complaint being filed with the Office of Administrative Hearings.[52]

39. On October 30, 2012, the Respondent sent an email to Mr. Morgan informing him that the Judicial District Republican Chairs Committee had changed the wording of the disclaimer on the judgeourjudgesmn website. The revised disclaimer stated: "Prepared and paid for by the First Judicial District Republican Committee of the Republican Party of Minnesota."[53] The Respondent also noted in his email to Mr. Morgan that the Judicial District Republican Chairs Committee has existed for "more than 10 years," meets regularly, sometimes at the RPM headquarters, and has had budget items approved by the RPM.[54]

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[52] Ex. 11.

[53] Clayton Test.

[54] Ex. D.

40. In an email to the Respondent sent on October 31, 2012, Mr. Morgan informed the Respondent that the new disclaimer had been reviewed and was found to still be unacceptable. Mr. Morgan stated that the RPM would file a complaint.[55]

41. On November 2, 2012, the Respondent issued an email to the RPM "Judicial Delegates" on behalf of the Chairs of the "Minnesota Judicial District Republican Committees" encouraging them to vote for Dean Barkley over Justice Barry Anderson. The Respondent stated that the Minnesota Judicial District Republican Committees decided to recommend Dean Barkley because Justice Barry Anderson:

> voted against Pawlenty on unallotment, he voted against Sen. Scott Newman when Newman challenged the validity of a Ramsey County judge's [sic] establishing a State Government Budget during the government Shutdown in 2011, and he has consistently supported unconstitutional campaign restrictions on judicial candidates (enacted by the State Supreme Court) which the Republican Party has challenged all the way to the US Supreme Court (and we won!). He has generally sided with the liberal majority on the Court.[56]

42. The Respondent drafted the November 2, 2012, email himself. He did not research the three

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[55] Ex. E.

[56] Ex. 15.

cases he referenced because he felt he did not have the time to verify the accuracy of the statements so close to the election and he believed each of the statements was accurate.[57]

43. The Respondent indicated that he believed Justice Barry Anderson voted against Governor Pawlenty on the unallotment case based generally on something he read in the *Star Tribune* newspaper. Likewise, he believed Justice Barry Anderson voted against Senator Scott Newman and others based on something he read in the *Star Tribune* newspaper. The Respondent did not identify on what he based his belief that Justice Barry Anderson supported "unconstitutional campaign restrictions."[58]

44. Respondent's statement in the November 2nd email regarding the "unallotment case" refers to *Brayton v. Pawlenty*,[59] in which the majority of the Minnesota Supreme Court struck down then Governor Pawlenty's use of unallotment as a violation of the separation of powers. Justice Barry Anderson, however, joined Chief Justice Lorie Gildea's dissent in support of Governor Pawlenty's unallotment authority.[60]

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[57] Clayton Test.

[58] Clayton Test.

[59] 781 N.W.2d 357, 372 (Minn. 2010); See, Ex. 16.

[60] *Id.*

45. Respondent's statement in the November 2nd email regarding Senator Scott Newman refers to *Limmer et al. v. Swanson*,[61] a case brought by four Republican Minnesota Senators and two Republican members of the Minnesota House challenging a Ramsey County District Court Judge's authority to carry out budgetary functions and approve spending on behalf of the State during the state government shutdown in 2011. The Minnesota Supreme Court ultimately dismissed the case as moot once the legislature and governor resolved the government shutdown and appropriation bills for all state agencies were passed and signed into law. Justice Barry Anderson joined the six-justice majority in dismissing the lawsuit as moot.[62]

46. The Respondent's statement in the November 2nd email regarding campaign restrictions that the Republican Party challenged in the United States Supreme Court refers to *Republican Party of Minnesota v. White*.[63] This case was decided in 2002, two years before Justice Barry Anderson joined the Minnesota Supreme Court.[64]

47. On November 4, 2012, Greg Wersal sent an email to Richard Morgan in response to his October 29th request that Respondent remove the RPM

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[61] A11-1222 (Minn. Nov. 30, 2011); Ex. 17.

[62] *Id.*

[63] 536 U.S. 765 (2002); Ex. 18.

[64] Ex. 18.

disclaimer from the judgeourjudgesmn website and notify email recipients that use of the RPM disclaimer was a mistake. Mr. Wersal stated that "Minn. Stat. § 211B.02 does permit an organization within a major political party to issue a statement of support for a candidate."[65] Mr. Wersal noted that the term "organization" is not defined in Chapter 211B and he pointed out to Mr. Morgan that the Judicial District Chairs Committee has existed for 10 years and meets regularly. Mr. Wersal closed his correspondence by suggesting that the parties resolve their issues rather than "proceed down the road to endless litigation."[66]

48. Justices Lorie Gildea, Barry Anderson and David Stras were all re-elected on November 6, 2012.

49. The campaign complaint in this matter was filed with the Office of Administrative Hearings on November 7, 2012.

50. Mr. Wersal and members of the Judicial District Republican Chairs Committee met shortly after the filing of this complaint. Two members continued to express the erroneous belief that Justice Barry Anderson voted against Governor Pawlenty in the unallotment case.[67] Mr. Wersal informed the Respondent and the others at the meeting that

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[65] Ex. F.

[66] Ex. F; Wersal Test.

[67] Wersal Test.

Justice Barry Anderson did not vote against Governor Pawlenty in that case.[68]

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

CONCLUSIONS

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minnesota Statutes

> **§ 211B.02 provides: 211B.02 False Claim of Support.**
>
> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

3. The burden of proving the allegations in the Complaint is on the Complainant.

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[68] *Id*.

4. The standard of proof of a violation of Minn. Stat. § 211B.02 is a preponderance of the evidence.[69]

5. Minnesota Statutes Chapter 211B does not define the term "party unit." The term is defined in Chapter 10A, which governs the Campaign Finance and Public Disclosure Board, to mean "the state committee or the party organization within a house or the legislature, congressional district, county, legislative district, municipality or precinct."[70]

6. The Complainant has established by a preponderance of the evidence that Respondent violated Minn. Stat. § 211B.02 by knowingly making a false claim implying that the RPM, a major political party, supported or endorsed three candidates for the Minnesota Supreme Court in the November 2102 [sic] general election.

7. Minnesota Statutes § 211B.06, subd. 1, provides in part:

> A person is guilty of a misdemeanor who intentionally participates in the preparation, [or] dissemination . . . of . . . campaign material with respect to the personal or political character or acts of a candidate . . . that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office . . . , that is false, and that the person knows is false or communicates to

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[69] Minn. Stat. § 211B.32, subd. 4.

[70] Minn. Stat. § 10A.01, subd. 30.

others with reckless disregard of whether it is false.

8. The standard of proof of a violation of Minn. Stat. § 211B.06 is clear and convincing evidence.[71]

9. Minn. Stat. § 211B.01, subd. 2, defines "campaign material" to mean "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media."

10. The Respondent's emails at issue in this matter and the judgeourjudgesmn website are campaign material within the meaning of Minn. Stat. § 211B.01, subd. 2.

11. The Complaint alleged that the Respondent knowingly prepared and/or disseminated four factually false statements, or communicated these statements with reckless disregard as to whether they were false in violation of Minn. Stat. § 211B.06.

12. The Complainant has failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the first statement identified in the Complaint "David Stras supports the plan to replace our constitutional right to meaningful elections with an impeachment process called Merit Selection and Retention Elections."

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[71] Minn. Stat. § 211B.32, subd. 4.

13. The Complainant has established by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the second statement identified in the Complaint: "[Justice Barry Anderson] voted against Pawlenty on unallotment." The Complainant has shown that the statement is factually false and that Respondent prepared and disseminated the statement with reckless disregard as to whether it was false.

14. The Complainant has failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the third statement identified in the Complaint: "[Justice Barry Anderson] voted against Scott Newman when Newman challenged the validity of a Ramsey County judge's [sic] establishing a State Government Budget during the government shutdown in 2011."

15. The Complainant has also failed to establish by clear and convincing evidence that Respondent violated Minn. Stat. § 211B.06 with respect to the fourth statement identified in the Complaint: "[Justice Barry Anderson] has consistently supported unconstitutional campaign restrictions on judicial candidates . . . "

16. The attached Memorandum explains the reasons for these Conclusions and is incorporated by reference.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. §§ 211B.02 and 211B.06, Respondent Bonn Clayton shall pay a civil penalty in the amount of $1,200 by June 15, 2013.[72]

Dated: March 12, 2013

/s/ Barbara L. Neilson for
JEANNE M. COCHRAN
Presiding Administrative
Law Judge

/s/ James LaFave
JAMES E. LAFAVE
Administrative Law Judge

/s/ Miriam Rykken
MIRIAM P. RAYKKEN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

[72] The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, P.O. Box 64620, St. Paul, MN 55164-0620.

MEMORANDUM

The Complaint alleges that the Respondent, a long-time active member of the RPM, violated Minnesota Statutes §§ 211B.02 and 211B.06 in preparing and disseminating campaign material advocating for the election of three candidates for the Minnesota Supreme Court in the November 2012 general election.

False Implication of Endorsement or Support – 211B.02

The Respondent is an experienced and active member of the Republican Party of Minnesota. He is the Chair of the First Judicial District Republican Committee, and was a member of the RPM's 2012 Judicial Elections Committee. The Respondent attended the RPM State Convention and was aware that the delegates voted not to endorse any statewide judicial candidates in the 2012 general election. Despite the Party's decision not to endorse statewide judicial candidates, the Respondent prepared and disseminated emails and published material on the judgeourjudgesmn website that advocated for the election of three Minnesota Supreme Court candidates and included the name "Republican Party of Minnesota" or initials "RPM." In particular, the website's heading stated: "Republican Party of Minnesota – Judicial District Chairs Committee" and a disclaimer at the bottom read: "Prepared and paid for

by: Republican Party of Minnesota – Judicial District Republican Chairs."

The Complaint alleges that by preparing and publishing the emails and website using the RPM name and initials, the Respondent knowingly implied that the judicial candidates had the support or endorsement of the Republican Party of Minnesota in violation of Minn. Stat. § 211B.02.

The Respondent argues that he did not knowingly violate Minn. Stat. § 211B.02. First, he argues that his emails and the judgeourjudgesmn website were intended for RPM delegates and alternates and not for the "world at large." The Respondent asserts that the Party delegates and alternates are sophisticated Party members who were already aware that the RPM had not endorsed statewide judicial candidates and would not have read the material as implying RPM endorsement or support. The Respondent also points out that he never used the word "endorsed" in his material and instead used only the phrase "strongly recommended." In addition, the Respondent maintains that he modified references to the "RPM" by adding the title of the Judicial District Republican Chairs Committee to avoid an implication of official RPM endorsement. Finally, the Respondent asserts that the Judicial District Republican Chairs Committee is a "party unit" of the RPM and, as such, its communication of support for the judicial candidates did not violate § 211B.02.

Minn. Stat. § 211B.02 provides that a person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate has the support or endorsement of a major political party or party unit. In *Schmitt v. McLaughlin*,[73] the Minnesota Supreme Court held that an unendorsed candidate's use of the initials "DFL" violated the statute because it implied to the average voter that the candidate had the endorsement or at the very least the support of the DFL Party.

In *Matter* of *Ryan*,[74] a case with similarities to this one, a non-endorsed candidate for County Commissioner distributed campaign brochures and lawn signs with the initials "DFL" and the words "LABOR ENDORSED" in large capital block letters. Between "DFL" and "LABOR ENDORSED," in small lettering, was the phrase "47 'District 5' Secretary" or "47 'Secretary Sen. Dist.,'" which referred to a DFL party office the candidate held in the 47th Senate District. The candidate argued that the use of his party office on the campaign material was intended to modify "DFL" as an indication of party affiliation and not endorsement. The candidate insisted that he did not intend to violate the statute and that he made a conscious attempt to comply with the law.[75]

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[73] 275 N.W.2d 587.

[74] 303 N.W.2d 462 (Minn. 1981).

[75] 303 N.W.2d at 467.

The Court rejected the candidate's argument that his party office modified "DFL" and found that the use of the initials "DFL" without the modifying language authorized in *Schmitt* implied party endorsement. However, in determining whether the candidate's false implication of party support was made knowingly, the Court declined to interpret "knowingly" to mean "deliberate." Instead, the Court held that the candidate may be said to have "knowingly" violated the statute "if he knew that his literature falsely claimed or implied that he had party support or endorsement."[76] In order to make this determination, the Court explained that the candidate's testimony had to be examined together with the circumstances surrounding the preparation of the campaign material. The Court noted that the candidate was an experienced party regular who had run in a number of elections and had acknowledged familiarity with both the statute and the *Schmitt* case. Based on all of this, the Court held that by not using the precise modifying language authorized by the *Schmitt* court, the candidate consciously took the risk that his interpretation of the law was not correct.[77]

Finally, in *Daugherty v. Hilary*,[78] a candidate for alderman for the Third Ward of Minneapolis distributed

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[76] 303 N.W.2d at 467.

[77] 303 N.W.2d at 468. (Minn. Stat. § 210A.02 is the predecessor to Minn. Stat. § 211B.02.)

[78] 344 N.W.2d 826 (Minn. 1984).

"Official Sample Ballots," which the Court found falsely implied that the candidate was endorsed by the DFL party. The Court concluded that when taken as a whole, the candidate's sample ballot was a thinly disguised attempt to directly imply that the document was the DFL sample ballot, thus falsely implying the candidate was the DFL endorsed candidate. The Court concluded that the candidate "consciously undertook to derive as much benefit as possible from the voter's familiarity with party sample ballots short of an outright claim of endorsement."[79] Thus, the Court found the candidate's violation was committed knowingly.

The Panel concludes that by using the name "Republican Party of Minnesota" and "RPM" in the emails and on the website, the Respondent falsely implied to average voters that three Minnesota Supreme Court candidates had the endorsement or, at the very least, the support of the RPM – a major political party. The Panel rejects the Respondent's argument that because the email was intended for Party regulars, a false implication should not be found. There is no exception to the prohibition against false implications of support made only to party members. Moreover, the record established that the emails did cause confusion among Party members about whether the RPM had changed its position since the state convention and was now endorsing

[79] 344 N.W. 2d at 831.

these candidates. In addition, the Respondent encouraged the 7,000 email recipients to "send the link [to the website's voters' guide] to anybody else you can think of!" Given that directive, the Respondent cannot maintain that the email was only intended for a select audience and not for "the world at large."

The Panel also rejects the Respondent's claim that he did not violate Minn. Stat. § 211B.02 because the Judicial District Republican Chairs Committee, as a "party unit," could endorse statewide judicial candidates. Regardless of whether the Judicial District Republican Chairs Committee is a "party unit" within the meaning of 211B.02, Respondent implied that the RPM itself had endorsed or supported the candidates when he used the RPM's name and initials in the campaign material. The emails and website went beyond simply communicating the Committee's support and instead falsely implied the candidates had the support of the Republican Party of Minnesota.

The Panel finds further that Respondent knowingly violated the statute. The Respondent is an experienced Party regular who was well aware of the RPM's official position regarding endorsing statewide judicial candidates. Despite the delegates decision at the State Convention, the Respondent designed the website's "Judicial Voters' Guide" and used the Party's name and terms such as BPOU to imply that the material was authorized by the RPM and that the RPM supported the three identified judicial candidates.

The Respondent also raised the argument that the Complainant, Mr. Niska, lacked standing to bring this Complaint as this is a matter between the RPM and the Respondent. The Respondent asserts that allowing third parties to file complaints "on behalf of others" is an abuse of process that will chill free speech. The Fair Campaign Practices Act does not limit who may file a complaint.[80] However, Minnesota election law specifically provides that any eligible voter may contest the election of a person for whom they had to [sic] right to vote.[81] This suggests that the Legislature favors a broad interpretation of standing. And it seems logical that each eligible voter may be injured by false claims of endorsement or other false statements in campaign material. The Complainant is an eligible voter and a RPM member. As such, he may properly complain of violations of Minn. Stat. Ch. 211B.

Finally, as a general rule, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face. An administrative law judge or an agency may properly consider, however, whether a statute is unconstitutional as applied to the particular facts of a case.[82] With respect to the Respondent's general

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[80] See, Minn. Stat. § 211B.32.

[81] Minn. Stat. § 209.02, subd. 1.

[82] The power to declare a law unconstitutional in all settings is vested with the judicial branch of state government. *See, Neeland v. Clearwater Memorial Hosp.,* 257 N.W.2d 366, 368

(Continued on following page)

arguments that Minn. Stat. § 211B.02 is unconstitutional, the Panel notes that in *Schmitt v. McLaughlin*,[83] the Minnesota Supreme Court rejected a facial challenge to Minn. Stat. § 210A.02 (the predecessor to § 211B.02) concluding that since the statute regulates only false claims of endorsement, it was narrowly drawn to serve a governmental interest in protecting the political process.[84] Whether that decision remains good law in light of the U.S. Supreme Court's recent ruling in *United States v. Alvarez,*[85] is not for this Panel to decide.

False Campaign Material – 211B.06

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the preparation or dissemination of campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or

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(Minn. 1977); In *the Matter of Rochester Ambulance Serv.,* 500 N.W.2d 495, 499-500 (Minn. App. 1993). *See also,* G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998).

[83] 275 N.W.2d at 590-591.

[84] *Id,* discussing Minn. Stat. § 210A.02 (predecessor to § 211B.02).

[85] 567 U.S. ___ (June 28, 2012) (Supreme Court overturned law making it a crime to falsely claim to have earned a military decoration as an unconstitutional infringement on First Amendment right to free speech. Court held that First Amendment requires there be a direct causal link between the restriction imposed and the injury to be prevented.)

communicates to others with reckless disregard of whether it is false. As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate's conduct. In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.[86]

The burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.[87] A statement is substantially accurate if its "gist" or "sting" is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.[88]

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[86] *Kennedy v. Voss,* 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace,* 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan,* 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen,* 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

[87] *Jadwin,* 390 N.W.2d at 441.

[88] *Id.*

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard applicable to defamation cases involving public officials from *New York Times v. Sullivan*.[89] Based upon this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent either published the statements knowing the statements were false, or that he "in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.[90] A statement may have been made with actual malice if it is fabricated or is so inherently improbable that only a reckless man would put it in circulation.[91]

To be found to have violated section 211B.06, therefore, two requirements must be met: (1) a person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person preparing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false. As to the first element of the statute, the test is objective: The statute is directed against false statements of fact.

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[89] *New* York *Times v. Sullivan,* 376 U.S. 254, 279-80 (1964); *State v. Jude,* 554 N.W.2d 750, 754 (Minn. App. 1996).

[90] *See St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964); see also *Riley v. Jankowski,* 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).

[91] *St. Amant,* 390 U.S. at 732.

With respect to the second element of the statute – namely, Respondent's awareness surrounding the claims he made – the test is subjective: The Complainant must show that the Respondent "entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.[92] Otherwise, his claim for relief fails.

The Complaint identified four statements that were either prepared or disseminated by the Respondent that the Complainant contends are factually false. The Complainant maintains that the Respondent knew these statements were false or communicated them with reckless disregard as to their probable falsity.

A. First Statement: "David Stras supports the plan to replace our constitutional right to meaningful elections with an impeachment process called Merit Selection and Retention Elections"

The Complaint argues that the above statement which appeared on the judgeourjudgesmn website page devoted to Mr. Tinglestad's candidacy is false. The statement was drafted by Mr. Tinglestad and Respondent participated in publishing or disseminating

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[92] *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964). See *also Riley v. Jankowski,* 713 N.W. 2d 379 (Minn. App.) *review denied* (Minn. 2006).

it on the website. The Complainant contends the statement is false because Justice Stras has consistently declined to take any position on the proposed judicial election retention system, citing separation of powers principles. According to the Complainant, there is no evidence to support the claim that Justice Stras supports retention elections.

Mr. Tinglestad testified that he came to the conclusion that Justice Stras favors retention elections after conducting research on-line. Based on materials he read on-line, Mr. Tinglestad got the general impression that Justice Stras favors replacing the current judicial election system with the proposed merit selection and retention elections. Mr. Wersal, an advisor to the Judicial District Republican Chairs Committee, also formed the opinion that Justice Stras supports retention elections after talking to Justice Stras following a legal seminar at which Justice Stras was a featured speaker. Mr. Wersal indicated that he may have communicated his opinion regarding Justice Stras to Mr. Tinglestad.

The Respondent asserts that he accepted Mr. Tinglestad's text for the website and assumed the statement was true. He also argues that the exception for publishers provided at Minn. Stat. § 211B.06, subd. 2 should apply in this case because he relied on the good character of Mr. Tinglestad and simply published what he provided.

The Panel concludes that the Complainant has failed to show by clear and convincing evidence that

the statement is false. It is not enough for the Complainant to assert that there is no evidence to support the claim. The Complainant has the burden of coming forward with sufficient evidence to demonstrate that the statement is factually false. The fact that Justice Stras consistently took no position on the issue of judicial elections during the campaign is insufficient to establish that he did not support retention elections as claimed by Mr. Tinglestad. In addition, the Complainant has failed to establish that the Respondent disseminated the statement "with a high degree of awareness" of the statement's probable falsity. This allegation is dismissed.

The Panel notes, however, that the exception to Minn. Stat. 211B.06 provided for publishers would not apply in this case. The exception applies only if the person's *sole* act was the printing, manufacturing or dissemination of the false material. The exception would apply, for example, to a printing company or mailing center whose regular business is to print and produce materials for customers. The Respondent's role in creating, gathering and disseminating the information on the website went beyond the parameters of the exception contained in Minn. Stat. § 211B.06, subd. 2.

B. Second Statement: "[Justice Barry Anderson] voted against Pawlenty on unallotment"

The Complaint alleges that Respondent's statement in a November 2nd email to RPM Judicial Delegates that Justice Barry Anderson "voted against" Governor Pawlenty on unallotment is false and that Respondent communicated the statement with reckless disregard as to whether it was false. The statement refers to the case of *Brayton v. Pawlenty*,[93] in which the majority of the Minnesota Supreme Court struck down then Governor Pawlenty's use of unallotment as a violation of separation of powers. Justice Barry Anderson, however, joined Chief Justice Lorie Gildea's dissent in support of Governor Pawlenty's unallotment authority.[94] The *Brayton* decision was issued in May 2010, and the Complainant argues that the Respondent could have easily determined that his statement was false with very brief research. Instead, the Complainant argues, the Respondent willfully ignored the truth and disseminated a false claim about Justice Anderson's vote in *Brayton*.

The Respondent asserts that he thought Justice Barry Anderson did vote against Governor Pawlenty in the *Brayton* case based on "something" he read possibly in the *Star Tribune* newspaper. Other members

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[93] 781 N.W.2d 357, 372 (Minn. 2010); See, Ex. 16.

[94] *Id.*

of the Judicial District Republican Chairs Committee also thought that Justice Barry Anderson had voted against Governor Pawlenty. Because he believed the statement was true and because the election was only a few days away, the Respondent felt he did not have the time to verify his claims made in his November 2nd email. The Respondent explained that the remaining days before an election are a chaotic time and that decisions must be made in "the fog of war."

The statement is factually false. The issue before the Panel is whether the Respondent communicated it with reckless disregard as to whether it is false. As the U.S. Supreme Court has noted, there is not one precise definition of "reckless disregard." Inevitably, its outer limits must be marked through case-by-case adjudication. A respondent cannot automatically ensure a favorable decision by testifying that he published with a belief that the statements were true.[95] A statement may have been made with actual malice if it

> is fabricated by the defendant, is the product of his imagination, . . . is based wholly on an unverified anonymous telephone call [or if] the publisher's allegations are so inherently improbable that only a reckless man would

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[95] *St. Amant,* 390 U.S. at 732; *Eastwood v. National Enquirer, Inc.,* 123 F.3d 1249, 1253 (9th Cir. 1997) ("As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence.").

> have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report.[96]

In determining whether a respondent had serious doubts about the truth of his statement, the panel must assess the information available when the statement was made, including the identities of the sources and what those sources said. Evidence that there were no sources, that the sources were unreliable or uninformed, or that the information provided by the source was misrepresented may prove the requisite mental state.[97]

Here, the Respondent claims that he thought his statement regarding how Justice Barry Anderson voted in the unallotment case was true based on a vague recollection he had of something he read in the *Star Tribune.* The Panel finds Respondent's explanation is not plausible. The vagueness of his recollection on this point when he otherwise provided very detailed testimony on past events, demonstrates that the Respondent's claim that he had no doubt as to the statement's accuracy is not credible. The Respondent testified that he had no clear memory of the article on which his statement is based. Given this, the Panel concludes that the Respondent had serious doubts as

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[96] *St. Amant,* 390 U.S. at 732.

[97] *See In re Charges of Unprofessional Conduct Involving File No. 17139,* 720 N.W.2d 807, 815-16 (Minn. 2006).

to the content of the article and the accuracy of his statement. Moreover, as this Office has held in *Martin v. Republican Party of Minnesota*[98] and *Olseen v. Barrett*,[99] the Panel finds that by citing to the *Brayton* decision, the Respondent is charged with knowing it. The Respondent could have discovered that the statement was untrue by doing minimal research. The *Brayton* decision was issued in 2010, two years before Respondent's statement. It was a widely publicized decision. Instead of verifying how Justice Barry Anderson voted in the case, the Respondent made and disseminated the claim without regard to whether it was false or not. For the above reasons, the Panel finds that the Respondent violated Minn. Stat. § 211B.06.

C. Third Statement: [Justice Barry Anderson] voted against Scott Newman when Newman challenged the validity of a Ramsey County judge's establishing a State Government Budget during the government shutdown in 2011."

The Complainant contends that this statement is false because Justice Barry Anderson did not "vote" against Senator Newman's suit in *Limmer et al v. Swanson,* but instead voted with the majority that

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[98] OAH Case No. 7-0320-30106 (Dec. 7, 2012).

[99] OAH Case No. 60-0320-30172 (Feb. 5, 2013).

the suit was rendered moot by the subsequent budget agreement.

The Respondent asserts that the statement is not false but rather a fair interpretation of the ultimate outcome of the case. By having their suit dismissed, the legislators, including Senator Newman, lost. The Respondent argues that, as a non-lawyer, he may not have gotten the language precisely correct but he accurately conveyed how the average person would interpret the Court's decision. In addition, the Respondent maintains that there is no evidence that he entertained serious doubts when he published the statement.

The Panel concludes that the Complainant has failed to show by clear and convincing evidence that the statement is factually false. The statement reflects the interpretation that a vote to dismiss Senator Newman's lawsuit as moot, was a vote against Senator Newman. The statement may not be literally true in every detail, but the gist and sting is true.[100] In addition, the Complainant has failed to show that the Respondent acted with a "high degree of awareness" that the statement was probably false. The Minnesota Supreme Court has noted that "even a 'highly slanted perspective' . . . is not enough by itself

[100] *Jadwin,* 390 N.W.2d at 441.

to demonstrate actual malice."[101] This allegation is dismissed.

D. Fourth Statement: [Justice Barry Anderson] has consistently supported unconstitutional campaign restrictions on judicial candidates (enacted by the State Supreme Court) which the Republican Party has challenged all the way to the US Supreme Court (and we won!)."

The Complainant argues that this statement is false because the U.S. Supreme Court case referenced, *Republican Party of Minnesota v. White,* was decided in 2002, two years before Justice Barry Anderson joined the Minnesota Supreme Court. The *White* case struck down certain rules imposed on judicial candidates by the State's Code of Judicial Conduct.

The Respondent argues that the fact that Justice Barry Anderson was not a member of the Minnesota Supreme Court when the *White* decision was issued, is not dispositive of whether the statement is false. The Respondent points out that no evidence was presented as to whether Justice Anderson supported the ethics rules at issue in the *White* case prior to joining the bench. Without some evidence regarding Justice Anderson's position on the ethics rules, the

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[101] *Chafoulias v. Peterson,* 668 N.W.2d 642, 655 (Minn. 2003).

Respondent maintains that the statement cannot be found to be factually false. Respondent also contends that he thought the statement was true when he disseminated it, and that he did not entertain serious doubts as to its truth.

The Panel concludes that the statement is too vague to form the basis of a Section 211B.06 claim. It is unclear what precisely the Respondent is referring to when he states that Justice Anderson has "consistently supported unconstitutional campaign restrictions." The Respondent did not state that Justice Anderson voted in a certain manner, which is a claim capable of being proven true or false. He states that Justice Anderson "consistently supported" campaign restrictions that the RPM challenged. While the U.S. Supreme Court did rule in the *White* case that the restrictions placed on judicial candidates regarding stating their views on legal or political issues violated candidates' First Amendment rights, the case was remanded for further consideration and the litigation did not end until 2006. It may be that the Respondent is stating that Justice Barry Anderson supported the ethics rules that were challenged in the *White* case prior to joining the bench. There is no evidence in the record as to Justice Anderson's position regarding the challenged ethics rules and the fact that he was not yet on the Minnesota Supreme Court when the *White* case was handed down is not enough to show that the statement is factually false. This allegation is dismissed.

Respondent's Constitutional Challenge

Finally, the Respondent argues that Minn. Stat. § 211B.06 is unconstitutionally overbroad. As discussed above, neither an administrative law judge nor an administrative agency has authority to declare a statute unconstitutional on its face.[102] The panel notes, however, that in a recent challenge to the restrictions on knowingly or recklessly false campaign speech under Minn. Stat. § 211B.06,[103] the Eighth Circuit held that knowingly false campaign speech falls within the protections of the First Amendment's right to free speech and, therefore, any regulation must satisfy the strict scrutiny test: that the restrictions be narrowly tailored to meet a compelling state interest.[104] The court remanded the case to the district court for further proceedings and in a subsequent decision, the U.S. District Court for the District of Minnesota recently held that Minn. Stat. § 211B.06 was not unconstitutionally overbroad with respect to its restrictions on false speech about ballot

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[102] G. Beck, Minnesota Administrative Procedure § 11.5 (2d ed. 1998).

[103] *281 Care Committee v. Arneson,* 638 F.3d 621 (8th Cir. 2011).

[104] 638 F.3d at 636. (The court remanded the case to the district court for further proceedings consistent with its order.) In *Schmitt v. McLaughlin,* 275 N.W.2d 587, 590-591 (Minn. 1979), the Minnesota Supreme Court rejected a facial challenge to Minn. Stat. § 211B.02's predecessor statute (§ 210A.02) holding that since the regulation was directed at false claims of endorsement, it was narrowly drawn to serve a governmental interest in protecting the political process.

questions.[105] The Court held that the ballot provisions of Minn. Stat. § 211B.06 reflect a legislative judgment on behalf of Minnesota citizens to guard against the "malicious manipulation of the political process" and that the statute's provisions are narrowly tailored to serve this compelling interest. Whether the restrictions at issue in this case would withstand strict scrutiny and be found constitutional is not for this Panel to decide.

The Panel finds that a $600 penalty for each statutory violation is appropriate in this case.

J.M.C., J.E.L, M.P.R.

[105] *281 CARE Committee v. Arneson,* Case No. 08-5215, 2013 WL 308901 (D.Minn. Jan. 25, 2013).

OAH 68-0320-30147

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Harry Niska,

Complainant,

vs.

Bonn Clayton,

Respondent.

ORDER ON MOTION TO REASSESS PENALTY AMOUNT BASED ON COURT OF APPEALS' RULING

(Filed Sep. 24, 2014)

The above-entitled matter is pending before Administrative Law Judges Jeanne M. Cochran (Presiding Judge), James E. LaFave, and Miriam P. Rykken on the Respondent's Motion to Reassess Penalty Amount Based on Court of Appeals' Ruling (Motion). The Motion was filed September 8, 2014. Complainant Harry Niska filed a response on September 17, 2014.

Peter Swanson, Attorney at Law, appeared on behalf of Bonn Clayton (Respondent).

David Asp, Lockridge Grindal Nauen, PLLP, appeared on behalf of Harry Niska (Complainant).

Based on the Court of Appeals' decision and for the reasons set forth in the attached Memorandum, the Panel makes the following:

ORDER

1. The **$600 penalty** assessed by the Panel against the Respondent for the violation of **Minn. Stat.** § **211B.02** in its March 12, 2013 Findings of Fact, Conclusions, and Order **REMAINS DUE AND PAYABLE**.

2. The **$600 penalty** assessed by the Panel against the Respondent for the violation of **Minn. Stat.** § **211B.06** in its March 12, 2013 Findings of Fact, Conclusions and Order **IS RESCINDED**.

3. The Respondent's Motion is **DENIED** in all other respects.

Dated: September 24, 2014

s/Jeanne M. Cochran
JEANNE M. COCHRAN
Presiding Administrative Law Judge

s/James E. LaFave
JAMES E. LAFAVE
Administrative Law Judge

s/Miriam P. Rykken
MIRIAM P. RYKKEN
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

On March 12, 2013, the Panel issued its Findings of Fact, Conclusions and Order (Order) in the above captioned proceeding. The Panel determined that Respondent, Bonn Clayton, violated Minn. Stat. § 211B.02 and Minn. Stat. § 211B.06.[1] The Panel imposed a $600 penalty for each statutory violation, for a total penalty of $1,200.[2]

The Respondent appealed the Panel's decision to the Minnesota Court of Appeals. On March 10, 2014, the Court of Appeals issued its opinion.[3] The Court of Appeals upheld the Panel's determination that the Respondent violated Minn. Stat. § 211B.02, but reversed the Panel's determination that the Respondent violated Minn. Stat. § 211B.06.[4] The Court of Appeals *did not* remand the matter back to the Office of Administrative Hearings for any further determination.[5]

On September 8, 2014, the Respondent filed his Motion asking the Panel to reassess the $1,200 penalty imposed in its March 12, 2013 Order. The Respondent asserts that the penalty should be

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[1] Findings of Fact, Conclusions, and Order at 13 (March 12, 2013).

[2] *Id.* at 23.

[3] *Niska v. Clayton,* 2014 WL 902680 (Minn. Ct. App., March 10, 2014, *review denied,* June 25, 2014).

[4] *Id.* at *1.

[5] *Id.* at *1-*10.

reassessed based on the subsequent ruling of the Court of Appeals. The Respondent argues that the penalty should not simply be reduced to $600 based on the reversal of the Minn. Stat. § 211B.06 determination, but rather, should be further reduced to a minimal amount or reduced to $0. The Respondent argues for a further reduction based on: 1) his assumption that the Panel based the $600 figure for each statutory violation on "multiple violations"; 2) his view that the Court of Appeals' ruling suggests that Minn. Stat. § 211B.02 is "vague"; and 3) a recent decision by a panel of the Eighth Circuit Court of Appeals holding that Minn. Stat. § 211B.06 is unconstitutional. The Respondent also requested that the matter be referred to the appropriate county attorney so that he could pursue a constitutional challenge to Minn. Stat. § 211B.02.

On September 17, 2014, the Complainant, Harry Niska, filed his response. The Complainant asserts that the Respondent's request to reassess the penalty amount is in fact a request to re-litigate the underlying issues in the case. The Complainant maintains that those issues have already been fully litigated and resolved. The Complainant states that if the Panel does re-examine the penalty assessed for the violation of Minn. Stat. § 211B.02, the Panel should consider imposing a $1,200 penalty for that violation. The Complainant argued that an increase in the penalty is warranted because: (1) the Respondent acted willfully; (2) the Respondent was unapologetic;

and (3) the Respondent's actions created confusion among voters.

Having reviewed the Court of Appeals' decision and considered the arguments of the parties, the Panel concludes that the penalty the Panel imposed for the violation of Minn. Stat. § 211B.06 should be rescinded but that the penalty imposed for the violation of Minn. Stat. § 211B.02 should remain at $600. The Panel's March 12, 2013, Order makes clear the Panel imposed separate $600 penalties for each of the two statutory violations.[6] Because the Court of Appeals reversed the Panel's determination that the Respondent violated Minn. Stat. § 211B.06, the $600 penalty for that violation is no longer valid or enforceable. For that reason, the Panel rescinds the $600 penalty it assessed for the violation of Minn. Stat. § 211B.06.

Conversely, the Panel finds no valid basis for reassessing the penalty for the violation of Minn. Stat. § 211B.02. The Court of Appeals affirmed the Panel's decision that the Respondent violated Minn. Stat. § 211B.02. Moreover, the Court of Appeals did not remand the matter back to the Office of Administrative Hearings for any further proceedings or any further consideration of the penalty amount. In addition, the Court of Appeals specifically upheld the

[6] Findings of Fact, Conclusions, and Order at 23.

constitutionality of Minn. Stat. § 211B.02.[7] Because the matter has been fully and finally decided by the Court of Appeals, there is no reason to reexamine the $600 penalty assessed for the violation of Minn. Stat. § 211B.02. Nor has the Respondent pointed to any authority that would allow the Panel to reassess a penalty where, as here, the violation has been affirmed by the Court of Appeals. For these reasons, the $600 penalty for the violation of Minn. Stat. § 211B.02 stands and is now due and payable.

J.M.C., J.E.L., M.P.R.

[7] *Niska v. Clayton*, A13-0622, 2014 WL 902680 (Minn. Ct. App. March 10, 2014).

STATE OF MINNESOTA

IN SUPREME COURT

A13-0622

Harry Niska, complainant,

Respondent,

vs.

Bonn Clayton,

Petitioner,

Office of Administrative Hearings,

Respondent.

ORDER

(Filed Jun. 25, 2014)

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Bonn Clayton for further review be, and the same is, denied.

Dated: June 25, 2014

BY THE COURT:

/s/ Alan C. Page

Alan C. Page
Acting Chief Justice

GILDEA, C.J., ANDERSON, STRAS, and LILLEHAUG, JJ., took no part in the consideration or decision of this case.