UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Minnesota Voters Alliance; Mary Amlaw; Ken Wendling; Tim Kirk,

Plaintiffs,

vs.

Keith Ellison, in his official capacity as Attorney General; Brad Johnson in his Official capacity as Anoka County Attorney,

Defendants.

Court No.23-CV-02774 (NEB-TNL)

DEFENDANT ELLISON'S MEMORANDUM SUPPORTING MOTION TO DISMISS

In the face of rising threats against voters and surging election disinformation intended to prevent people from exercising the right to vote, Minnesota recently enacted a law prohibiting voter intimidation and the knowing and intentional dissemination of false election information. Plaintiffs Minnesota Voters Alliance, Mary Amlaw, Ken Wendling, and Tim Kirk seek to have the law declared unconstitutional, alleging that it violates their First and Fourteenth Amendment rights. The Court should dismiss Plaintiffs' complaint for three reasons: the only speech that the new law prohibits is speech unprotected by the First Amendment, the law provides clear notice of what it prohibits, and the law does not constitute a prior restraint on speech. More specifically, the law prohibits only threats and lies to voters that are intended to interfere with civil rights, it only prohibits intentional disinformation, and it does not authorize restraining speech absent an independent order by a court. Accordingly, the law is constitutional.

FACTS

To combat threats against voters and disinformation regarding polling times and locations and voter eligibility, in 2023, Minnesota enacted a new law to promote election integrity. 2023 Minn. Laws ch. 34, § 2 (to be codified at Minn. Stat. § 211B.075). During legislative hearings, multiple committees heard testimony that voters were being threatened in attempts to alter whether or how they voted. The legislature further heard reports that individuals and groups were giving potential voters false information, such as falsely indicating where polling locations were, when people could vote, or who was eligible to vote. *Hearing Before H. Pub. Safety, Fin., & Policy Comm.*, 2023 Leg., 93d Sess. Feb. 21, 2023, at 1:10:50–:11:15 (statement of Rep. Walter Hudson);[1] *Hearing Before H. Judiciary, Fin., & Civ. Law Comm.*, 2023 Leg., 93d Sess. Mar. 2, 2023, at 42:00–43:45 (statement of Rep. Emma Greenman);[2] *Hearing Before S. Elections Comm.*, 2023 Leg., 93d Sess. Feb. 2, 2023, at 48:35–:55 (statement of Khadar Muhumed, member of Muslim Coalition of ISAIAH);[3] *Hearing Before S. Judiciary & Pub. Safety Comm.*, 2023 Leg. 93d Sess. Mar. 10, 2023, at 23:45–24:00 (statement of Sen. Liz Boldon).[4] In response, Minnesota enacted the election-integrity law.

[1] Available at https://www.house.mn.gov/hjvid/93/896392.

[2] Available at https://www.house.mn.gov/hjvid/93/896457.

[3] Available at https://www.lrl.mn.gov/media/file?mtgid=1047186.

[4] Available at https://www.lrl.mn.gov/media/file?mtgid=1047668.

The election-integrity law has five provisions. Three of these provide substantive prohibitions, one establishes vicarious liability, and one establishes enforcement procedures:

- The voter-intimidation provision prohibits people from harming or threatening to harm a person with an intent to impact whether the person registers to vote, whether the person votes, how the person votes, or whether the person assists another person with election activities. 2023 Minn. Laws ch. 34 § 2, subd. 1.
- The election-disinformation provision prohibits people from transmitting statements that the person knows to be false with the intent of preventing a person from exercising the right to vote. *Id.*, subd. 2.
- The interference provision prohibits intentionally hindering, interfering with, or preventing a person from registering to vote, voting, or aiding another person in registering or voting. *Id.*, subd. 3.
- The vicarious-liability provision makes a person vicariously liable for violations if the person intentionally aids, advises, hires, counsels, abets, incites, compels, or coerces another (or attempts to do so) to violate the substantive provisions of the statute, or if the person conspires, combines, agrees, or arranges with another to do so. *Id.*, subd. 4.
- The enforcement provision allows the Attorney General, county attorneys, or any person injured by a violation to seek damages and injunctive relief. *Id.*, subd. 5.

Plaintiffs are a self-described "election integrity" organization and several of its individual members. (Doc. 13, ¶¶ 23, 25.) Despite their putative commitment to election

integrity, Plaintiffs oppose the election-integrity law. Plaintiffs claim that the election-integrity law is facially unconstitutional because it is overbroad, permits content-based discrimination, is vague, and amounts to a prior restraint.

ARGUMENT

The Court should dismiss Plaintiffs' complaint because it fails to state a claim upon which relief may be granted. A motion to dismiss must be granted when the complaint fails to state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In making this assessment, the Court must assume Plaintiffs' factual allegations are true, but it need not defer to any legal conclusion. *Bell Atl. Corp. v. Twombly*, 500 U.S. 544, 555 (2007). Moreover, when a plaintiff seeks, as Plaintiffs do here, to invalidate a statute as facially unconstitutional, the plaintiff faces a "heavy burden" and must (subject to limited First Amendment exceptions discussed below) establish that the statute is unconstitutional in all applications. *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).

Even accepting all of Plaintiffs' factual allegations as true, each of their claims fails as a matter of law. The election-integrity law is not overbroad, nor does it unconstitutionally discriminate based on speech's content, because the only speech it prohibits is speech entirely unprotected by the First Amendment. Additionally, the law is not void for vagueness because it provides fair notice of what it prohibits. Finally, it is not a prior restraint, because the election-integrity law does not—prior to speech being uttered—prohibit the utterance. Accordingly, the Court should dismiss Plaintiffs' complaint.

I. PLAINTIFFS' OVERBREADTH CHALLENGE FAILS BECAUSE THE ELECTION-INTEGRITY LAW PROHIBITS ONLY UNPROTECTED SPEECH.

Plaintiffs' first claim alleges that the election-integrity law is facially invalid because it is overbroad. (Doc. 13, ¶¶ 99–105.) This claim fails because there are plainly legitimate applications of the law and there are no applications (let alone a substantial number of them) that would be unconstitutional.

Facial challenges to statutes are disfavored. *Wash. State Grange*, 552 U.S. at 450. Outside the context of First Amendment challenges, a facial challenge can succeed only if there is no set of circumstances under which the law would be valid or the law has no "plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010). First Amendment cases alleging overbreadth are the exception to this general rule, but even then, a facial challenge can only succeed if a "substantial number" of the law's applications are unconstitutional as judged in relation to its plainly legitimate sweep. *Id.* at 473.

The first step in overbreadth analysis is to construe the challenged statute. *United States v. Williams*, 553 U.S. 285, 293 (2008). Here, the election-integrity law's speech prohibitions reach only true threats, statements of intentionally fraudulent election disinformation, and statements that counsel or encourage such threats or disinformation. All such statements are entirely unprotected by the First Amendment. Accordingly, the election-integrity statute is not overbroad.

A. The Voter-Intimidation Prohibition Prohibits Only True Threats that Are Unprotected by the First Amendment.

The voter-intimidation provision prohibits the use or threats of force, coercion, violence, restraint, damage, harm, or loss to (generally speaking) impact a person's voting

or their aid to another person's voting. 2023 Minn. Laws ch. 34 § 2, subd. 1(a). As an initial matter, insofar as the law prohibits the actual use of force (and other actions) it prohibits only conduct, not expression, which is not protected by the First Amendment. *Rumsfeld v. F. for Acad. & Institutional Rts.*, 547 U.S. 47, 65–66 (2006). Nor do Plaintiffs plead that this prohibition violates the First Amendment. Instead, Plaintiffs claim that the prohibition on threats of force violates the First Amendment because it is a content-based prohibition and is overbroad. (Compl. ¶¶ 98–116.) The Court should dismiss these claims because the voter-intimidation prohibition prohibits only true threats that are unprotected by the First Amendment. Plaintiffs do not have a constitutional right to threaten voters.

Not all content-based restrictions are prohibited by the First Amendment. In particular, true threats to cause harm to another may constitutionally be prohibited. *Riehm v. Engelking*, 538 F.3d 952, 963 (8th Cir. 2008). A statement is a true threat if a reasonable recipient would interpret the statement as a serious expression of an intent to harm or cause injury to another. *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 624 (8th Cir. 2004). Whether a statement is a true threat does not depend on the mental state of the speaker. *Counterman v. Colorado*, 600 U.S. 66, 74 (2023). But, to avoid chilling effects, states may only take action against such threats upon a showing of a mens rea of recklessness or greater. *See id.* at 78–82 (recognizing that "purposefully" and "knowingly" mens reas are higher standards and setting mens rea floor at recklessness).

Minnesota's voter-intimidation prohibition satisfies these requirements. First, the statute requires that a threat or attempted threat "would cause a reasonable person to feel intimidated." 2023 Minn. Laws ch. 34 § 2, subd. 1(b). This satisfies the reasonable-

recipient interpretation threshold necessary for such threats to be true threats. Second, the statute requires that the person making the threat have "intent" to alter voting or vote-aiding behavior. *Id.*, subd. 1(a)(1)–(2) (Supp. 2023). This satisfies the mens rea requirement. Indeed, it goes further than what the supreme court required in *Counterman*, because the voter-intimidation prohibition requires a specific intent, even though that case held that a lesser intent requirement (recklessness) passed constitutional muster. 600 U.S. at 79. And because the voter-intimidation provision prohibits only such true threats, it is a permissible content-based restriction. Moreover, because it reaches only unprotected speech, it is by definition not overbroad.

B. The Only Speech Prohibited by the Election-Disinformation Prohibition Is Fraudulent Election Disinformation that Is Unprotected by the First Amendment.

The election-disinformation prohibition prohibits making knowingly false statements with the intent of impeding another person from voting. 2023 Minn. Laws ch. 34 § 2, subd. 2(a). Plaintiffs fail to state a claim in challenging this provision because the supreme court has expressly held that states can prohibit these types of statements.

"The State may prohibit messages intended to mislead voters about voting requirements and procedures." *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018). This is exactly what the election-disinformation prohibition covers. This binding holding (in a case where Minnesota Voters Alliance was a plaintiff) puts to rest Plaintiffs' claim that false claims about election eligibility, voting times, or voting locations are subject to any First Amendment protection.

Moreover, in addition to *Mansky's* explicit exclusion, the false statements prohibited by the election-disinformation prohibition also fall within the supreme court's more general exclusion of false statements intended to effect a fraud. "Where false claims are made to effect a fraud . . . it is well established that the Government may restrict speech without affronting the First Amendment." *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion); *see also United States v. Williams*, 690 F.3d 1056, 1061 (8th Cir. 2012) (applying *Alvarez* to hold that fraud prohibitions are permissible content-based restrictions). Fraud includes "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Black's Law Dictionary* 731 (9th ed. 2009) *see also Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781, 786 (8th Cir. 2021) ("[I]ntentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment."). Minnesota's election-disinformation prohibition fits squarely within this category. It prohibits transmitting information a person knows to be materially false (a knowing misrepresentation of the truth) to impede or prevent another person from exercising a fundamental right (an action to the person's detriment). *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966) (recognizing voting as fundamental right).

Because the only speech prohibited by the election-disinformation prohibition is speech intended to fraudulently impede voting rights, that prohibition does not proscribe any speech protected by the First Amendment. Accordingly, it does not reach any protected speech. It is therefore not overbroad, and the Court should dismiss Plaintiffs' claim to the contrary. *See United States v. Mackey*, No. 21-CR-80, 2023 WL 363595, at *20–22

(E.D.N.Y. Jan. 23, 2023) (holding First Amendment did not require dismissal of indictment for sending text messages falsely stating individuals could vote via text).

C. Speech That Advises, Counsels, or Incites Unprotected Speech Is Unprotected.

In addition to prohibiting true threats and fraudulent statements, the election-integrity law also prohibits individuals from intentionally advising, counseling, or inciting such threats or fraud.[5] Plaintiffs allege that these prohibitions sweep a substantial amount of protected speech. But it is well established that the First Amendment does not impede states from prohibiting actions that would aid or abet prohibited behavior, even if those actions are speech. Accordingly, these prohibitions in the election-integrity law do not reach any protected speech.

Conspiracies to violate the law are properly subject to prohibition, notwithstanding that conspiracies necessarily entail what would otherwise be First Amendment-protected associational and speech activities. *Scales v. United States*, 367 U.S. 203, 229 (1961). Likewise, speech that goes beyond merely advocating for changes in the law and provides advice of how to violate the law or incites violations is not protected. *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978). This is in part because such speech is intended to bring about an unlawful result, and therefore it is unprotected as having no societal value. *United States v. Hansen*, 599 U.S. 762, 783 (2023). Moreover, even if such prohibitions would violate associational First Amendment rights if they prohibited mere association

[5] The election-integrity law also provides for other forms of vicarious liability, but these three are the only ones Plaintiffs identify as supposedly problematic in their overbreadth claim. (Doc. 13, ¶ 103.)

with a particular group, the prohibition will withstand constitutional scrutiny if the prohibition only extends to those with an intent to accomplish the illegal act. *See Scales*, 367 U.S. at 229 (holding statute constitutional because it required "clear proof that a defendant 'specifically intend(s) to accomplish (the aims of the organization) by resort to violence'").

Minnesota's prohibitions on advising, counseling, and inciting violations of the election-integrity law meet these requirements. Like the statute at issue in *Scales*, these prohibitions all require that the vicariously liable party have an intent to further (either by advising, counseling, or inciting) the substantively prohibited acts of threating a voter or committing a fraud. That mens rea requirement satisfies the constitution because it ensures that only speech that is made with an intent to bring about an unlawful result is prohibited. *See Hansen*, 599 U.S. at 767 (rejecting overbreadth challenge to law prohibiting "encouraging or inducing" violations of law). The election-integrity law's vicarious liability provisions are therefore constitutional.

D. The Election-Integrity Law Satisfies the *Anderson-Burdick* Framework for Election Regulations.

For the foregoing reasons, the election-integrity law covers only unprotected speech. But even if the Court concludes that some First Amendment activity is burdened by the law, it is still facially constitutional. As an election-integrity law, the statute is constitutional if it satisfies the *Anderson-Burdick* framework applicable to such regulations. Because it does so, Plaintiffs failed to state a claim and the Court should dismiss their facial challenges.

Election laws are generally not subject to strict scrutiny, even when they burden First Amendment-protected speech. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Instead, "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). In light of this recognition, election laws are subject to strict scrutiny only if they severely burden First Amendment rights. Otherwise, a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Here, it is indisputable that Minnesota has important interests in preventing voters from being coerced into changing their voting behavior or being lied to in order to prevent them from voting. States have a compelling interest in protecting voters from confusion and undue influence. *Burson v. Freeman*, 504 U.S. 191, 199 (1992). Moreover, during legislative hearings, multiple committees heard reports of the rising threat of election disinformation, such as robocalls that gave potential voters false information about polling times or locations. *E.g.*, *Hearing Before H. Pub. Safety, Fin., & Policy Comm.*, 2023 Leg., 93d Sess. Feb. 21, 2023, at 1:10:50–:11:15 (statement of Rep. Walter Hudson).

The restrictions imposed by the election-integrity law are also nondiscriminatory. Under the *Anderson-Burdick* framework, a law is discriminatory if it "limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). But if there is a legitimate basis for treating different individuals

differently, then a law is nevertheless nondiscriminatory. *E.g., Am. Party of Tex. v. White*, 415 U.S. 767, 782 n.13 (1974). The statements proscribed by the election-integrity law are so differentiated. It distinguishes between people who make threats or falsehoods that interfere with election activities and those who do not. Such people are not similarly situated, and thus the law may permissibly distinguish between the two. Moreover, even if they were similarly situated, the election-integrity law does not "limit political participation." It merely ensures equal footing by prohibiting threats and falsehoods.

Finally, the burdens imposed by the election-integrity law are reasonable, not severe. The voter-intimidation provision prohibits threats only if they are made with a specific intent to affect voting behavior. 2023 Minn. Laws ch. 34 § 2, subd. 1(a). And falsehoods are only prohibited by the election-disinformation prohibition if they are made with specific intent to interfere with voting rights *and* knowledge that the statement is false. *Id.*, subd. 1(b). As a result, the election-integrity law only prohibits speech whose result, if accomplished by physical action, would violate individuals' voting rights. The supreme court has recognized that such restrictions are reasonable and do not infringe the First Amendment. *See Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931) ("The constitutional guaranty of free speech does not protect a [person] from an injunction against uttering words that may have all the effect of force." (internal quotation marks omitted)). Moreover, the burden imposed is not severe. The election-integrity does not prevent people from advocating for changes to voter qualifications, polling locations, or polling times, nor would it (despite the obvious vitriol it entails) preclude someone from advocating that the government should enact laws threatening voters; it only prevents them from purposefully

making such threats themselves or spreading disinformation. It thus does not severely burden Plaintiffs' political speech.

In light of these characteristics, the election-integrity law is an acceptable regulation under *Anderson-Burdick* even if it does burden some protected speech. It imposes only reasonable burdens, furthers an important (indeed compelling) state interest, and is nondiscriminatory. Accordingly, even if the Court concludes that some First Amendment rights are implicated by the election-integrity law, Plaintiffs' First Amendment arguments still fail as a matter of law.

E. Plaintiffs' Facial Challenge Fails Because the Election-Integrity Law Does Not Prohibit a Substantial Amount of Protected Speech in Relation to Its Legitimate Sweep.

Even if the Court concludes that the election-integrity law covers some protected speech and is not within the scope of laws covered by *Anderson-Burdick*, Plaintiffs' overbreadth challenge still fails. Little protected speech is covered in comparison to the statute's legitimate sweep, and thus the statute is not overbroad.

Overbreadth challenges are "strong medicine" that "is not to be casually employed." *United States v. Hansen*, 599 U.S. 762, 770 (2023). To succeed, a plaintiff must prove that the statute prohibits a substantial amount of protected speech relative to its plainly legitimate sweep. *Id.* Moreover, such unlawful applications must be realistic, "not fanciful," and their number must be substantially disproportionate to the statute's lawful sweep. *Id.*

Plaintiffs' overbreadth claims do not meet this test. The election-disinformation narrowly prohibits only knowingly false speech made with the intent to interfere with

another person's voting rights. Even if the Court accepts that some protected speech would meet those criteria, those knowledge and intent guardrails ensure that such applications are narrow in relation to the statute's plainly legitimate sweep.

For example, the only statement Plaintiffs provide as potentially falling within the scope of the statute is their statement "[f]elons still serving their sentences do not have the right to vote in Minnesota." (Doc. 13, ¶ 1.) But Plaintiffs also claim they have "a good-faith belief" that this statement is true. (*Id.*, ¶ 18.) If Plaintiffs (or any speaker making such a statement) truly had such a good-faith belief, then the person is not in violation of the statute.[6] Knowledge that a statement is false requires "a state of mind in which a person has no substantial doubt about the [falsity] of a fact." *Black's Law Dictionary* 950 (9th ed. 2009). Thus, in instances where a party actually has a good-faith belief that a statement is true, then the party does not know it is false and is not prohibited from speaking by the statute. Courts have similarly held in other contexts that such mental state requirements prevent the application of statutes from being unconstitutional. *See, e.g.*, *United States v. McDermott*, 822 F. Supp. 582, 592 (N.D. Iowa 1993). And Plaintiffs' inability to identify any protected statements that actually fall within the scope of the statute indicates that it is

[6] A supposedly good-faith belief may of course erode over time. Or evidence may show that a party's belief was not in good-faith and the party knew a statement to be false. For example, Plaintiffs are currently challenging the Minnesota law restoring the right to vote to people with felony convictions in state court. *Minn. Voters Alliance v. Hunt*, No. 02-CV-23-3416 (Anoka Cty. Oct. 30, 2023). A decision adverse to Plaintiffs in that case would significantly call into question whether Plaintiffs could plausibly maintain that putative good-faith belief.

not overbroad, and thus Plaintiffs' facial challenge to the election-disinformation prohibition fails.

Similarly, with respect to the voter-intimidation prohibition, Plaintiffs' complaint does not provide any example of a threat that would be protected by the First Amendment but swept up by the law. And while one example would still not satisfy the supreme court's recognition that overbreadth challenges must a substantial number of impermissible applications, Plaintiffs' failure to identify any example at all demonstrates that the voter-intimidation prohibition is not overbroad.

II. PLAINTIFFS' FACIAL CONTENT-DISCRIMINATION CLAIM FAILS BECAUSE THERE ARE CONSTITUTIONAL APPLICATIONS OF THE ELECTION-INTEGRITY LAW.

Plaintiffs' second claim is a facial challenge to the election-integrity law, claiming that it prohibits speech based on content and viewpoint discrimination. (Doc. 13, ¶¶ 108–15.) But because Plaintiffs' overbreadth claim fails, any claim alleging facial invalidity short of overbreadth must, by definition, also fail.

As an initial matter, it is important to be clear on the type of challenge Plaintiffs assert. Plaintiffs do not expressly state whether the claim is facial or as-applied. While Plaintiffs' introduction to the complaint cursorily states they bring both facial and as-applied challenges, claim two does not seek relief with respect to particular enforcement actions by the Attorney General; instead, it seeks to enjoin the election-integrity law in toto. (*Id.* ¶¶ 22, 115.) Indeed, Plaintiffs do not allege that the Attorney General has ever enforced or threatened to enforce the statute against them. Plaintiffs thus seek relief that would "reach beyond the circumstances of these particular plaintiffs," which comes with

the consequent requirement to satisfy the standards for a facial challenge. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Plaintiffs cannot do so.[7]

As noted above, outside of an overbreadth challenge, a facial challenge to a statute fails unless the law is unconstitutional in all applications or has no plainly legitimate sweep. *Wash. State Grange*, 552 U.S. at 449. This is so because, in a facial challenge, state courts have not had the opportunity to construe the law in the context of actual disputes or accord the law any limiting construction that might be necessary to avoid constitutional questions. *Id.* at 450.

Here, the reasons for dismissing Plaintiffs' overbreadth facial claim justify dismissing their narrower facial claim. As established above, there are at least three bases for concluding that the election-integrity law is not overbroad. And if the law is not overbroad, then by definition the law has a plainly legitimate sweep. *See Stevens*, 559 U.S. at 473. Part of the test for overbreadth is weighing any unconstitutional applications against the statute's legitimate sweep; thus, if a law is not overbroad, it necessarily has such a legitimate sweep. Accordingly, Plaintiffs' non-overbreadth facial challenge fails and should be dismissed.

[7] Insofar as Plaintiffs' complaint could be construed as making an as-applied challenge against the Attorney General, that claim must necessarily fail because the Attorney General has never enforced or threatened enforcement against Plaintiffs for any statements they have made. And regardless of how Plaintiffs' claims are construed, the same arguments would apply—the only statements covered by the election-integrity law are entirely unprotected speech.

III. PLAINTIFFS' VAGUENESS CLAIM FAILS BECAUSE THE ORDINARY LANGUAGE OF THE STATUTE PROVIDES FAIR NOTICE OF THE CONDUCT IT PROHIBITS.

Plaintiffs' next claim that the election-integrity law is void for vagueness should also be dismissed. (Doc. 13, ¶¶ 118–32.) The election-integrity law provides fair notice of what conduct is prohibited, and it is therefore not unconstitutionally vague.

A. The Election-Integrity Law Reaches Only Unprotected Conduct and Is Not Unconstitutionally Vague in All Applications.

For a statute to be void for vagueness, it must fail to "provide a person of ordinary intelligence fair notice of what is prohibited" or be so standardless that "it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). If the statute implicates no constitutionally protected conduct, then a vagueness challenge can succeed only if the enactment is impermissibly vague in all applications. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494–95 (1982).

This is the case here. As discussed above, the election-integrity law reaches only true threats, speech intended to enact a fraud depriving individuals of their voting rights, and statements that induce illegal action. Such speech is entirely unprotected by the First Amendment. As a result, the election-integrity law would be unconstitutional only if it was impermissibly vague in all applications. But this is not the case.

Where a statute only proscribes conduct that is knowingly performed with the purpose of doing that which the statute prohibits, "the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *United States v. Lee*, 935 F.2d 952, 956 (8th Cir. 1991) (internal quotation, alteration, and citation

omitted). The election-integrity law meets these requirements. Each of the substantive acts prohibited by the law requires an intent, whether it is to interfere with election activities or to prevent the exercise of voting rights. Accordingly, there are indisputably applications in which the law is not impermissibly vague. As a result, the law is not impermissibly vague "in all applications." Plaintiffs' vagueness claim therefore fails.

B. Even If the Election-Integrity Law Reaches Some Protected Conduct, It Is Sufficiently Definite to Be Constitutional.

If the Court concludes that the election-integrity law reaches some constitutionally protected speech, the law is nevertheless constitutional if it incorporates a "high level of definiteness." *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 438 (8th Cir. 1998). Even so, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Courts thus uphold statutes impacting First Amendment rights where it is clear what the statute as a whole prohibits. *Id.*; *see also Fams. Achieving Indep. & Respect v. Neb. Dep't of Soc. Servs.*, 111 F.3d 1408, 1418 (8th Cir. 1997) (rejecting vagueness challenge where terms "may not satisfy those intent on finding fault at any cost [but] are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with") (internal quotation and citation omitted).

1. The Election-Integrity Law Prohibits Only Actions Carried Out With Intent, and Therefore Plaintiffs' Argument That It Punishes Without Notice Fails.

Plaintiffs' vagueness challenge fails as a matter of law because each of the election-integrity law's prohibitions requires intent. The intent requirement protects against

improper applications of the statute and provides notice of what is prohibited. *See Screws v. United States*, 325 U.S. 91, 102 (1945) (observing that intent requirement "relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware"). Thus, where a statute only prohibits conduct (speech or otherwise) that is knowingly done with the purpose of doing what the statute prohibits, the accused cannot complain about a lack of warning. *Id.; see also United States v. Eklund*, 733 F.2d 1287, 1303 (8th Cir. 1984) (concluding statute not vague where it included scienter requirement); *Labnet Inc. v. U.S. Dep't of Labor*, 197 F. Supp. 3d 1159, 1173 (D. Minn. 2013) (rejecting vagueness claim for agency rule requiring intent).

Intent is an essential element of all three substantive provisions of the election-integrity law, as well as the vicarious-liability provision. The voter-intimidation prohibition requires intent to compel or restrain voting. The election-disinformation prohibition requires intent to prevent a person from exercising the right to vote. The interference prohibition requires intent to interfere with voting, registering, or aiding another in the same. And the vicarious-liability provision requires intent to aid, advise, hire, counsel, abet, incite, compel, or coerce a violation.

As a result, there is no violation of the statute without intent. It therefore only punishes "for an act knowingly done with the purpose of doing that which the statute prohibits." *Screws*, 325 U.S. at 102. Plaintiffs' vagueness challenge fails for that reason alone.

2. The Ordinary Language Used in the Election-Integrity Law Provides Notice of What the Statute Prohibits.

Even if Plaintiffs' vagueness challenge survived despite the statute's intent requirement, it still fails because the ordinary terms used in the statute make clear what the statute prohibits. As addressed above, statutes are unconstitutionally vague when they fail to provide fair notice of what they prohibit and where they fail to include sufficient standards to guide enforcement. With respect to the first inquiry, statutes violate the fair notice requirement when they predicate violations on "wholly subjective judgment without statutory definitions, narrowing context, or settled legal meanings, such as whether the defendant's conduct was annoying or indecent." *Williams*, 553 U.S. at 306 (internal quotations omitted). A statute is not, however, rendered unconstitutionally vague because "it do[es] not mean the same thing to all people, all the time, everywhere." *Roth v. United States*, 354 U.S. 476, 491 (1957). Rather, for a statute to be vague it must have no standard of conduct specified at all. *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (finding statute unconstitutionally vague where it prohibited conduct "annoying to persons passing by").

Even for statutes that restrict expressive activity, the Constitution thus does not require that statutes provide perfect clarity or precise guidance. *See Williams*, 553 U.S. at 303. Instead, ordinary terms may be used to express ideas "which find adequate interpretation in common usage and understanding." *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 520 (8th Cir. 1999). Speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is valid in the vast majority of its intended applications. *Hill v. Colorado*, 530 U.S. 703, 733 (2000).

Plaintiffs' allegations that the phrases "impede," "threat to physical safety," "intent," "advise," "counsel," "incite," "damage, harm, or loss," and "hinder, interfere with, or prevent" are vague are implausible based on the commonly used definitions of the terms. (Doc. 13, ¶¶ 120–21, 123, 127–29.) Where, as here, the statute does not define or explain what its phrases mean, courts apply a word's common and ordinary meaning, taking into account the context in which it is used. *Calzone v. Summers*, 942 F.3d 415, 426 (8th Cir. 2019). When those common and ordinary meanings are considered, like the common words at issue in *Hill*, the likelihood that anyone would not understand any of these common words is "quite remote." 530 U.S. at 732.

(a) Impede

Impede means to "retard by obstructing; [to] hinder." *Oxford American Dictionary of Current English* 392 (1999). In context, the election integrity law therefore prohibits threats or false statements made with the intent of hindering voting or other election activities. A person of ordinary intelligence can discern what this prohibits, and it is not unconstitutionally vague.

(b) Threat to physical safety

As discussed above, "[t]hreats of violence are outside the protection of the First Amendment." *United States v. McDermott*, 29 F.3d 404, 410 (8th Cir. 1994). The statute's prohibition on threats to physical safety thus does not implicate the First Amendment. Even if it did, however, the statute is not vague. According to Merriam-Webster, a threat is "an expression of intention to inflict evil, injury, or damage." Threat, *Merriam-Webster*

(2023).[8] Similarly, Black's Law Dictionary defines "threat" as "a communicated intent to inflict harm or loss on another or on another's property, esp[ecially] one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or implied, of an intent to inflict loss or pain on another." Threat, *Black's Law Dictionary* (11th ed. 2019).

(c) Intent

"Intent" is "the state of mind accompanying an act, esp[ecially] a forbidden act." Intent, *Black's Law Dictionary*, (11th ed. 2019). It further clarifies that "intent is the mental resolution or determination to do" some act. *Id.* As noted above, whether someone "ha[s] an intent is a true-or-false determination, not a subjective judgment such as whether conduct is 'annoying' or 'indecent.'" *Williams*, 553 U.S. at 306. Thus, the person reading the statute will certainly know whether they are engaging in prohibited conduct because the person will know their own intent.

Plaintiffs' related assertion that the statute is vague because it does not address how intent (by the perpetrator) or "feeling intimidated" (by the victim) can be shown is also meritless. Myriad statutes have mental state requirements that do not statutorily define the evidence necessary to show that mental state. For example, Minnesota's threats of violence statute prohibits threats made with reckless disregard of causing terror, but does not state what evidence must be entered to establish recklessness. *See State v. Mrozinski*, 971

[8] *Available at* https://www.merriam-webster.com/dictionary/threat (last accessed Sept. 27, 2023).

N.W.2d 233, 247 (Minn. 2022) (rejecting facial challenge to threats of violence statute. And this omission makes sense. Mental states are often proven by circumstantial evidence. *State v. Davis*, 656 N.W.2d 900, 905 (Minn. Ct. App. 2003). But those circumstances will necessarily vary from case to case. *E.g., United States v. Lopez*, 42 F.3d 463, 467 (8th Cir. 1994) (listing various circumstances that could prove intent to distribute narcotics). That the evidence proving a mental state may vary, however, does not mean that what must be proven—either intent or feeling intimidated—is vague.

Likewise, Plaintiffs' contentions regarding a supposed conflict between intent requirements is also illusory. Plaintiffs complain that, on the one hand, the voter-intimidation prohibition requires intent to affect voting behavior, but on the other hand it disclaims a need to show intent to cause the victim to feel intimidated. (Doc. 13, ¶ 122.) But these intents relate to different things and thus do not create a conflict that would make the statute impossible to comprehend. Instead, the voter-intimidation prohibition is clear: violations require an intent to affect voting behavior but a *different* intent (to cause the victim to feel intimidated) is not necessary.

(d) Advise, counsel, incite

"Advise" means "to give (someone) a recommendation about what should be done." Advise, *Merriam-Webster* (2023).[9] Similarly, to "counsel" is to "advise" or "consult." Counsel, *Merriam-Webster* (2023).[10] And "incite" is "to provoke or stir up" (Incite, *Black's*

[9] *Available at* https://www.merriam-webster.com/dictionary/advise (last visited Sept. 27, 2023).
[10] *Available at* https://www.merriam-webster.com/dictionary/counsel (last visited Sept. 27, 2023).

Law Dictionary, (11th ed. 2019)), or "to move to action" (Incite, *Merriam-Webster* (2023)).[11]

The ordinary meaning of these common words makes it clear what the statute prohibits. Because this ordinary language is sufficiently well-defined to be understandable by individuals of common intelligence, Plaintiffs' vagueness challenge fails.

(e) Damage, harm, or loss

"Damage" means "harm or loss." *Oxford American Dictionary of Current English* 195. "Harm" in turn means "hurt." *Id.* at 359. And "loss" in turn means "a person, thing, or amount lost." *Id.* at 469. With these definitions, a person of reasonable intelligence can tell what sort of threats of damage, harm, or loss are prohibited. Thus, Plaintiffs' vagueness challenge fails.

(f) Hinder, interfere with, or prevent

Finally, "hinder" is defined as "impede[or] delay." *Id.* at 370. "Interfere" means to "meddle[or] obstruct a process." *Id.* at 412. And "prevent" means "stop from happening or doing something." *Id.* at 626. These commonly understood definitions provide sufficiently definite notice of what the election-integrity law prohibits. The terms are accordingly not vague.

[11] *Available at* https://www.merriam-webster.com/dictionary/incite (last visited Sept. 27, 2023).

3. There is No Risk of Discriminatory Enforcement Because the Election-Integrity Law's Ordinary Language Provides a Standard of Enforcement.

With respect to the risk of discriminatory enforcement, a law must also provide explicit standards for those who will apply the law to reduce that risk. *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir. 2000). Statutes that fail this requirement are those whose application turns on subjective judgments or preferences either of officers or third parties. *See D.C. v. City of St. Louis*, 795 F.2d 652, 653 (8th Cir. 1986). In contrast, laws are not unconstitutionally vague when they provide "minimal guidelines" to govern law enforcement. *St. Croix Waterway*, 178 F.3d at 521. Even if a statute regulates expressive activity, no real risk of discriminatory enforcement exists when a statute makes clear what conduct it prohibits. *Thorburn*, 231 F.3d at 1121; *see also United States v. Kaylor*, 877 F.2d 658, 661 (8th Cir. 1989) (rejecting vagueness challenge where common meaning of phrases used in statute provided standards of enforcement).

Here, the statute uses common words to describe the conduct it prohibits. Moreover, the falsehoods covered by it are easily and objectively determinable facts, such as voting times and locations. Because the statute makes clear what conduct it prohibits, there is no real risk of discriminatory enforcement. The statute is thus both easily understood to people of ordinary intelligence and sets precise standards of enforcement. Count three should be dismissed as a matter of law.

IV. PLAINTIFFS' PRIOR-RESTRAINT CLAIM FAILS BECAUSE ANY RESTRAINTS IMPOSED BY THE ELECTION-INTEGRITY LAW ARE IMPOSED ONLY AFTER A JUDICIAL DETERMINATION.

Plaintiffs' fourth claim is that the election-integrity law amounts to a prior restraint of speech because it allows individuals to bring a civil action to enjoin violations. 2023 Minn. Laws ch. 34 § 2, subd. 5(b). But merely authorizing court action to obtain an injunction does not itself constitute a prior restraint. Moreover, even if the Court reaches whether such injunctions are prior restraints, they satisfy the "safeguards" necessary for the law to be constitutional.

Prior restraint refers to "forbidding certain communications . . . in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis omitted). The election integrity law's injunction provision is not such a restraint. On its own, it does not forbid communications in advance of them occurring. Instead, it only creates a procedure by which an order forbidding communication may be issued. But the creation of procedures for such an order is not itself an order. Moreover, any such an order would follow a proceeding that provides due process, including an opportunity to challenge the order's constitutionality. Therefore, the election-integrity law is not a prior restraint, and the Court should dismiss Plaintiffs' claim to the contrary.

Even if the election-integrity law did constitute a prior restraint, Plaintiffs' claim would still fail for two reasons. First, Plaintiffs' claim does not satisfy the criteria for facially challenging a prior restraint. And second, the procedures provided for by the election-integrity law satisfy the requirements of the First Amendment.

Again, it is important to be clear on the sort of claim Plaintiffs are bringing. With respect to the Attorney General, Plaintiffs bring a facial challenge to what they claim is a prior restraint. The Attorney General has never sought to enforce election-integrity law against Plaintiffs, nor has he threatened to do so.

Because the Attorney General has never threatened enforcement against Plaintiffs, Plaintiffs would ordinarily have to show that the law is an unconstitutional prior restraint in all its applications. *Wash. State Grange*, 552 U.S. 442 at 449. The supreme court, however, has recognized that (because prior restraints may keep a potential speaker from speaking in the first place) prior restraints may sometimes be subject to facial challenge. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757–58 (1988). Importantly, however, this exception is grounded in two justifications: first, that such laws may trigger self-censorship even if the censor's discretion and power are never actually abused; second, that censors often lack express standards that can make it difficult to differentiate "as applied" the difference between a licensor's legitimate denial of permission to express a message and an illegitimate use of censorial power. *Id.*

These justifications for permitting facial challenges are not present in this case, and therefore the Court should reject Plaintiffs' facial claim. First, unlike the licensing laws that typically trigger prior-restraint challenges, the election-integrity law imposes no consequences for speaking without obtaining prior permission. *E.g., City of Lakewood*, 486 U.S. at 753 (requiring license *before* placing news racks on public property). Absent someone obtaining a court order, nothing restrains Plaintiffs from spreading election disinformation before they speak it. And in cases where there is such an order, it is that

order—not the election-integrity law—that constitutes the prior restraint. Second, the election-integrity law provides express standards: the voter-intimidation prohibition requires that an actionable threat be intended to interfere with voting behavior, and the election-disinformation prohibition requires that a statement be knowingly false with intent to interfere with voting rights. As a result, there is no basis for the Court deviating from the usual course and permitting a facial challenge.

Moreover, even if the Court reaches this hypothetical question, the law is constitutional. Prior restraints are not always unconstitutional. Instead, they may be upheld so long as there are procedural safeguards to "obviate the dangers of a censorship system." *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 779 (2004). Those safeguards are: strict time limits leading to a speedy decision and minimizing any prior-restraint-type effects; a procedure that will assure a prompt final judicial decision to minimize the deterrent effect of an interim and possibly erroneous prior restraint; and imposing the burden of proof on the party seeking to restrain speech. *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965)).

Typically, ordinary state judicial-review procedures will satisfy the timeliness requirements of these safeguards. *Id.* at 781–82. Indeed, the court held that so long as "the courts remain sensitive to the need to prevent First Amendment harms and administer those proceedings accordingly," timeliness concerns are satisfied. *Id.* The court further recognized that whether courts were actually meeting timeliness concerns is "a matter normally fit for case-by-case determination rather than a facial challenge." *Id.* at 782.

These holdings are amply satisfied by Minnesota's procedures. If a Minnesota court were to grant a temporary restraining order ex parte, then the court would set a hearing on the matter "at the earliest practicable time" with the matter "tak[ing] precedence over all matters except older matters of the same magnitude." Minn. R. Civ. P. 65.01. Similarly, court rules give judges significant discretion to modify procedures as needed to address First Amendment sensitivities. *E.g.,* Minn. R. Gen. Prac. 1.02. Finally, an order granting an injunction under the election-integrity law would be immediately appealable to the Minnesota Court of Appeals, and that court could likewise expedite proceedings. Minn. R. Civ. App. P. 103.03, 126.02. These procedural features will generally satisfy the timeliness requirements—and to the extent there are concerns in particular cases, those issues are appropriately addressed on a case-by-case basis, as opposed to this hypothetical case. *See City of Littleton*, 541 U.S. at 782.

Minnesota's procedures also satisfy the burden-of-proof requirement. For temporary restraining orders and temporary injunctions, court rules are explicit that the party seeking the preliminary relief bears the burden of establishing entitlement to that relief. Minn. R. Civ. P. 65.01–.02. And the Minnesota Supreme Court has likewise recognized that for permanent injunctions, the burden of proof is on the party seeking the injunction. *St. Jude Med., Inc. v. Carter*, 913 N.W.2d 678, 684 (Minn. 2018).

Because Minnesota's injunctive procedures generally satisfy the timeliness requirements and place the burden of proof on the party seeking the injunction, they provide the requisite safeguards to make the election-integrity law's injunctive provision constitutional. Accordingly, the Court should dismiss Plaintiffs' prior-restraint claim.

CONCLUSION

Because the election-integrity law only prohibits unprotected speech, is not vague, and does not impose a prior restraint on speech, the Court should dismiss Plaintiffs' complaint.

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Respectfully submitted,

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