United States Court Of Appeals
For The Eighth Circuit

No. 20-3618

Christian Action League of Minnesota;
Ann Redding,

Plaintiffs – Appellants,

v.

Mike Freeman, Hennepin County Attorney,
in his official capacity,

Defendant – Appellee,

Keith M. Ellison,
Attorney General for the State of Minnesota,

Intervenor below – Appellee.

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SUMMARY OF THE CASE

The Christian Action League of Minnesota and Ann Redding (a founding member of the League) are anti-pornography protestors, who have started a 42 U.S.C. § 1983 action to challenge the constitutionality of a specific provision of Minnesota's harassment statute, Minnesota Statutes § 609.748, subdivision 1(a)(1). It is a quasi-criminal statute. Section 609.748, subdivision 1(a)(1), allows any person, including the government and government officials, to obtain a harassment order—and with it, a threat of criminal prosecution—to stop political speech activities "regardless of the relationship between the actor and the intended target." There is no statutory exception to protect political activities.

The League and Redding uses various types of actions to persuade business entities to deter their advertising in the media that directly or indirectly support pornography, sexual exploitation, and sexually-oriented businesses. One such Twin Cities newspaper included the now defunct City Pages. The League's and Redding's protest lead to the advertising entity obtaining a temporary harassment restraining order causing the League and Redding to curtail their free speech activities. The district court dismissed the action opining that the League's chilling of speech was not objectively reasonable for Article III standing. Likewise, the court believed that because City Pages subsequently went out-of-business the issues asserted were now moot.

Appellants respectfully request 20 minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure, Rule 26.1 and Local Rule 26.1A of the United States Court of Appeals for the Eighth Circuit, Appellants Christian Action League of Minnesota and Ann Redding note that Ann Redding is an individual and is not a corporate entity nor affiliated with any corporate entity regarding her appeal.

The Christian Action League of Minnesota is a Minnesota 501(c)(3) non-profit corporation.

The Christian Action League of Minnesota does not own stock of any parent corporation.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Minnesota issued a judgment on November 16, 2020 (Dckt. No. 28) based upon the district court's Memorandum and Order granting Defendant Mike Freeman's Motion to Dismiss (Dckt. No. 10) for lack of standing and mootness. The order and judgment adjudicated all claims as to all parties. The district court's jurisdiction was established under 28 U.S.C. § 1331 (federal question). Under 28 U.S.C. § 1291, the court of appeals shall have jurisdiction from all final decisions of the federal district courts. The Appellants filed their Notice of Appeal on December 14, 2020. (Dckt. No. 29).

STATEMENT OF THE ISSUES

Minnesota's Harassment Statute § 609.748, subdivision 1(a)(1), allows any person, including the government and government officials, to obtain a harassment order—and with it, a threat of criminal prosecution—to stop political speech activities "regardless of the relationship between the actor and the intended target" in the context of "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another." There is no statutory exception in Minnesota Statutes § 609.748, subdivision 1(a)(1) to protect political activities. The questions presented are:

1. Whether an individual and a non-profit corporation's methods of political speech activities on matters of public concern protected under the First Amendment which are subject to civil and criminal prosecution under Minnesota Statutes § 609.748, subdivision 1(a)(1) "regardless of the relationship between the actor and the intended target…" resulting in the chilling of their speech is objectively reasonable for the basis of Article III standing.

   Apposite Cases:

   - *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *281 Care Comm. v. Arneson,* 638 F.3d 621, 627 (8th Cir. 2011).

2. Whether a newspaper's closing, that was an example of how an individual and non-profit corporation's protest against entities advertising in that paper resulted in their prosecution under Minnesota's harassment statute chilling their speech, has mooted their constitutional, declaratory, and civil rights claims.

   Apposite Cases:

   - *Midwest Farmworker Empl. and Training, Inc. v. U.S. Dept. of Lab.,* 200 F.3d 1198 (8th Cir. 2000); *Spencer v. Kemna,* 523 U.S. 1 (1998).

STATEMENT OF THE CASE

I. The Christian Action League and Redding engaged in core political activities and are subject to Minnesota's harassment statute and a restraining order and prosecution chilling their political speech.

The Christian Action League is a non-profit corporation that engages in advocacy and communications with community members, businesses, individuals, and others regarding matters of public concern such as pornography, sexual exploitation, and sexually oriented businesses.[1] Communications include its monthly publication of "The Beacon," post-cards, emails, and other methods.[2] The communications generally seek to encourage community members to support its mission, to educate, join in peaceful protests, send communications to others to initiate, to take action, and advocate for political debate on these matters of public concern.[3] In addition, League co-founder and president Ann Redding,[4] sent action alerts every Wednesday to encourage the League's subscribers to take action.[5] The requested actions could be in the form of letters to the editor, letters, or other methods of communication to the business entities.[6]

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[1] Plts. Compl. ¶¶ 3–4 (May 4, 2020). Dckt. No. 1. App. 16.
[2] *Id.* ¶ 5; *e.g.* Exs. 1 and 2. App. 16–17; 86–89.
[3] *Id.* ¶¶ 6–8, 39–45. App. 16, 25–27.
[4] *Id.* ¶ 3. App. 16.
[5] *Id.* ¶ 44. App. 26.
[6] *Id.* ¶ 45. App. 27.

It was also the League's and Redding's belief and opinion to issues of pornography, sexual exploitation, and sexually-oriented businesses involve questions of political, moral, and ethical importance in today's society.[7] Hence, non-profits and governmental organizations are and should be held to corporate social responsibility standards;[8] "[b]y whatever name, interests of organizations cannot long be at odds with mutual interest and common good of society."[9] The Christian Action League, its agents, and Redding agree with the concept that corporate social responsibility means ""that a company takes steps to ensure there are positive social and environmental effects associated with the way the business operates. Businesses that engage in active [corporate social responsibility] efforts take stock of the way they operate in the world to incorporate addressing cultural and social issues, with the aim of benefiting both in the process.""[10]

For example, communications would be sent to companies or other businesses asking them to reconsider placing their ads in newspapers that carry other advertisements relating to pornography and, hence, support directly or indirectly sexual exploitation or even sexually-oriented businesses. One such paper was the Star Tribune's "City Pages."[11]

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[7] *Id.* ¶ 62. App. 31.
[8] *Id.* ¶ 60. App. 31.
[9] *Id.*
[10] *Id.* ¶ 61 (citation omitted). App. 31.
[11] *Id.* ¶ 45. App. 27.

The League and Redding's communications to City Pages' advertisers was a protest to encourage their boycott and divestment of advertising dollars from City Pages as a matter of corporate responsibility, to change advertisement policies that directly or indirectly support pornography, sexual exploitation, and sexually-oriented businesses.[12] The communications were done through a variety of methods, including postcards, letters, and at times, emails to educate and encourage a boycott by passive persuasion.[13] And Redding was successful. Some companies contacted would stop their City Pages' advertising and thanked Redding accordingly.[14] The communications of protest to the Frost law firm were no different.

R. Leigh Frost Law, Ltd. advertised in the City Pages to offer its legal services.[15] The advertisement also identified R. Leigh Frost, the firm's principal attorney, the firm's street and email addresses.[16] The City Pages newspaper had advertisements that the Christian Action League and Redding believed supported pornography, sexual exploitation, and sexually-oriented businesses. To them, the City Pages' advertisements are issues of public concern: politically, morally, and ethically.[17]

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[12] *Id.* ¶¶ 46–49; 60–78. App. 27–28, 31–35.
[13] *Id. e.g.* ¶¶ 45, 50, 144–147; Ex. 2. App. 27, 28, 49–51, 88–89.
[14] *Id.* ¶¶ 55–59; Ex.4–6. App. 29–30; 92–95.
[15] *Id.* ¶ 80. App. 35.
[16] *Id.* ¶ 78; Ex. 10. App. 34–35; 99.
[17] *Id.* ¶¶ *e.g.* 46–48, 51–52; 61–62. *See* Ex. 7–9. App. 27–29, 31; 96–98.

Christian Action League activists and Redding sent the Frost law firm and Leigh a total of three pre-prepared post-cards and one email.[18] On March 20, 2019, Frost wrote to the League and requested it to stop sending the correspondence.[19] In that letter, Frost stated that she found the postcards "misinformed and offensive."[20] On March 28, 2019, Frost filed for and obtained an ex parte harassment restraining order.[21]

The harassment order directly caused the League and Redding to curtail, and in most cases, stop their political activities.[22] The Christian Action League and Redding seek to continue their political advocacy, but are genuinely fearful of future harassment orders and prosecutions.[23]

II. The district court granted the Defendant's motion to dismiss on the grounds that the Christian Action League and Redding had no Article III standing and mootness.

In the Defendant Mike Freeman's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, he admitted that the Christian Action League and Redding engaged in protected free speech activities; yet, Freeman failed to explain

[18] *Id.* ¶¶ 81–86; Ex. 2; 11. App. 35–37; 88–89, 100–112 (Frost HRO Aff. Attach. Ex. C and D. App. 111–112).
[19] *Id.* ¶ 90; Ex. 11 App. 38 (Frost HRO Aff. Attach. Ex. A. App. 107).
[20] *Id.*
[21] *Id.* ¶¶ 98–100; Ex. 11 and 12. App. 39; 100–115.
[22] For example, The Beacon, is still published. However, direct communications to City Pages advertisers stopped. *Id.* ¶¶ 101-02, 111, 173–74, 227, 232, 235. App. 39, 41, 58–59, 71–73.
[23] *Id. e.g.* ¶¶ 122–125, 127. App. 44–45.

why they were subjected to a harassment order under Minnesota Statutes § 609.748, subdivision 1(a)(1)[24]:

> Plaintiffs' communications with Frost and her law firm were not "objectively unreasonable," nor did they have a substantial adverse effect on her "safety, security, or privacy."[25]

Meanwhile, Freeman did not state that his office would not prosecute a violation of a harassment order under 6(a).[26] Further, Freeman asserted the League's and Redding's allegations and claims as "too speculative and attenuated to be a concrete injury"[27] to suggest a risk of prosecution. Again, the League and Redding engaged in core political speech activities to which Freeman did not dispute and it is they who intend to pursue their political objectives.[28]

The district court in granting Freeman's motion to dismiss, opined that the "Plaintiffs' decision to chill their speech was not objectively reasonable because Plaintiffs have not shown that their intended course of conduct is proscribed by the HRO statute."[29] The court concluded that because the League's and Redding's decision to chill their speech was not objectively reasonable, there was no basis for

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[24] Freeman Memo. to Dismiss 8–10 (June 17, 2020). Dckt. No. 12.
[25] *Id.* at 9.
[26] Harris Decl. ¶ 4 (June 17, 2020). Dckt. No. 14. Although the Christian Action League and Redding reached a settlement agreement to avoid the expense of trial, the agreement mirrored prohibitions a harassment order would reflect
[27] Freeman Memo to Dismiss at 11. Dckt. No. 12.
[28] Plts. Compl. *e.g.* ¶¶ 10, 18. Dckt. No. 1. App. 17–18, 19.
[29] Memo. and Or. (Nov. 9, 2020). Dckt. No. 27. App. 8–9.

Article III standing.[30] The district court also concluded that because the City Pages closed, the alleged claims are moot.[31] Because the court concluded the Christian Action League and Redding did not have standing under Article III, it did not have subject matter jurisdiction to determine whether the Complaint stated a claim for relief under Rule 12(b)(6).[32]

SUMMARY OF THE ARGUMENT

The Christian Action League of Minnesota and Ann Redding filed a pre-enforcement challenge for prospective declaratory relief regarding the constitutionality of Minnesota's harassment statute, § 609.748, subdivision 1(a)(1). The provision at issue makes *no* exceptions for core political speech activities as a quasi-criminal statute. They have Article III standing. This Court has repeatedly rejected the argument that a plaintiff must risk prosecution before challenging a statute under the First Amendment. Hence, to establish an injury in fact for a First Amendment challenge to a state statute, neither the League nor Redding need face actual prosecution or be threatened with prosecution. Rather, the plaintiffs need only establish that they would like to engage in arguably protected speech, and that they are chilled from doing so by the existence of the challenged provision of the offending statute. Further, self-censorship can itself constitute injury in fact. The relevant

[30] *Id.* at 10. App. 10.
[31] *Id.* at 10–12. App. 10–12.
[32] *Id.* at 12. App. 12.

inquiry is whether a party's decision to withhold speech in light of the challenged statute was "objectively reasonable." Under the circumstances described in the underlying Complaint the League's and Redding's withholding of speech is "objectively reasonable."

Likewise, the constitutional issues are not moot as the district court has declared. The Christian Action League and Redding targeted their protests against advertisers of the closed City Pages newspaper. The circumstances of the City Pages advertisers and advertisements resulted in the prosecution under the offending harassment statute. The City Pages was only one medium wherein the League and Redding took action. They did not state the City Pages would be their only action against any other newspaper or media entity. Therefore, their constitutional claims remain ripe for adjudication and are not moot.

The district court's decision should be reversed and the case remanded for further proceedings.

ARGUMENT

I. The Christian Action League and Redding have standing to bring a pre-enforcement challenge to a statute that chills their political speech and causes self-censorship.

This Court reviews the question of Article III standing de novo.[33]

Standing is a "jurisdictional prerequisite" that a court must address before addressing merits questions.[34] "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of [Article III]. This is the threshold question in every federal case, determining the power of the court to entertain the suit."[35]

"Standing has three requirements: (1) an injury in fact; (2) a causal connection between the injury and the challenged law; and (3) a likelihood that a favorable decision will redress the injury."[36] Here, the court assumes that the allegations in the complaint are true and will view them in the light most favorable to the Christian Action League and Redding.[37] Under this standard, the League's and Redding's

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[33] *Carson v. Simon*, 978 F.3d 1051, 1057 (8th Cir. 2020) *citing Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1029 (8th Cir. 2014).
[34] *City of Clarkson Valley v. Mineta,* 495 F.3d 567, 569 (8th Cir. 2007).
[35] *Warth v. Seldin*, 422 U.S. 490, 498 (1975).
[36] *Jones v. Jegley,* 947 F.3d 1100, 1103 (8th Cir. 2020) *citing Telescope Media Grp. v. Lucero*, 936 F.3d 740, 749 (8th Cir. 2019) (*citing Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547 (2016)).
[37] *Id. citing Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 689 (8th Cir. 2003); *see also Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992) (explaining that "each element [of standing] must be supported in the same way as any other matter on which the

complaint has cleared this hurdle. They have, at a minimum, alleged their "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and ... a credible threat of prosecution thereunder."[38]

As the U.S. Supreme Court has opined in *Susan B. Anthony List v. Driehaus*, a person need not wait to be prosecuted to challenge the constitutionality of statute in which the person, seeking to exercise a constitutional right, is prescribed by law:

> When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. See *Steffel v. Thompson,* 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"); see also *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128–129 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"). Instead, we have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent. Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979).[39]

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plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation").

[38] *Id. quoting Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted) (explaining how to establish an injury in fact in a pre-enforcement constitutional challenge); *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (stating that "[s]elf-censorship can ... constitute [an] injury in fact" for a free-speech claim when a plaintiff reasonably decides "to chill [her] speech in light of the challenged statute").

[39] *Susan B. Anthony List v. Driehaus*, 573 U.S. at 158–59.

This Court has repeatedly rejected the argument that a plaintiff must risk prosecution before challenging a statute under the First Amendment.[40] To establish injury in fact for a First Amendment challenge to a state statute, the League or Redding need not have been actually prosecuted or threatened with prosecution.[41] Rather, the plaintiffs need only establish that they would like to engage in arguably protected speech, and that they are chilled from doing so by the existence of the statute.[42] Further, self-censorship can itself constitute injury in fact.[43] The relevant inquiry is whether a party's decision to withhold speech in light of the challenged statute was "objectively reasonable."[44]

Here, as this Court has explained in *281 Care Committee*, as long as there is no "evidence—via official policy or a long history of disuse—that authorities" have "actually" refused to enforce a statute, a plaintiff's fear of prosecution for illegal activity is objectively reasonable."[45] There is no evidence that Freeman, has refused to

[40] *Jones,* 947 F.3d at 1104, *citing e.g.*, *281 Care Comm.*, 638 F.3d at 627; *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006); *Ark. Right to Life State Political Action Comm. v. Butler*, 146 F.3d 558, 560 (8th Cir. 1998).
[41] *281 Care Comm. v. Arneson,* 638 F.3d 621, 627 (8th Cir. 2011) *citing St. Paul Area Chamber of Commerce v. Gaertner,* 439 F.3d 481, 487 (8th Cir. 2006).
[42] Plts. Compl. *e.g.* ¶¶122; 173–174; 181–83; 227; 230–32; 235; 270–72.
[43] *See Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393(1988).
[44] *Zanders v. Swanson,* 573 F.3d 591, 594 (8th Cir. 2009).
[45] *Jones,* 947 F.3d at 1104, *quoting 281 Care Committee,* 638 F.3d at 628.

enforce the statute.[46] In fact, Freeman stated before the district court that he has and that he will prosecute.[47]

While Freeman admitted that Redding engaged in protected free speech activities, he failed to explain why Redding was subject to a harassment order under Minnesota Statutes § 609.748, subdivision 1(a)(1)[48]:

> Plaintiffs' communications with Frost and her law firm were not "objectively unreasonable," nor did they have a substantial adverse effect on her "safety, security, or privacy."[49]

The issue relates to the fact that *anyone* can engage the court in obtaining a harassment order against another for engaging in core political activities in which the harassment statute does not make an exception as explained below. The statutory scheme under Minnesota Statutes § 609.748, subdivision 1(a)(1), wherein any person may file for a harassment order, exposes the Christian Action League and Redding to the accompanying attorney fees and civil and criminal penalties allowed under the harassment statute. Hence, the instigation of enforcement action is easy—as easy as the process in *281 Care* Committee—and almost exceedingly easy at the initial complaint stage.[50] The threat of prosecution exists at the moment the League and Redding exercise political speech activities, as allowed under the statute at issue.

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[46] Harris Decl. (Dckt. No. 14).
[47] *Id.*
[48] Freeman Memo. to Dismiss 8–10.
[49] *Id.* at 9.
[50] *See e.g.,* Plts. Compl. Ex. 11. Dckt. No. 1. App. 100–106.

Notably, they are genuinely fearful of future harassment restraining orders and subsequent criminal prosecution "because of their political activities."[51]

Under Minnesota Statutes§ 609.748, subdivision 1(a)(1), the phrase "regardless of the relationship between the actor and the intended target…" in the context of "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another," makes no exception for core political speech activities. It sweeps in a whole spectrum of constitutionally-protected core political speech activities as the League and Redding have contended. The statute actually prohibits the political activities the League and Redding engaged in if a complainant files a harassment complaint—as Ms. Frost and her law firm did ex parte.

The League and Redding contended that the phrase "regardless of the relationship between the actor and the intended target…" under Minnesota Statute § 609.748, subdivision 1(a)(1), in the context of "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another," makes no exception for core political speech activities and, thus, asserted that statute as unconstitutional.[52] Although the statutory provision may address

[51] *Id.* ¶ 127. App. 45.
[52] Plts. Compl. ¶¶ 112–279 (Count I: unconstitutional on its face and as applied; Count II: content-based; Count III: prior restraint; Count IV: unconstitutionally vague; Count V: violation of freedom of association). App. 42–83.

categories of speech fully outside the protection of the First Amendment, and those categories may be constitutionally subject to a harassment order, without the exception for core political speech, the statute unconstitutionally suppresses core political speech. The statute unconstitutionally suppresses "unwanted acts"--such as mail, postcards, or email—and "words" (such as pictures or comments) used to educate or persuade others on matters of public concern. There is no reason a written exception cannot be expressed in the offending statute to protect legitimate core political speech activities. Without such constraints, Minnesota's harassment statute allows for *any* person to file for a harassment order as a weapon to stop protected political speech.

Other federal and state statutes regulating speech make exceptions to protect core political speech activities. Notably, Minnesota Statutes § 609.749, a criminal statute governing harassment and stalking—similar topics addressed by § 609.748, subdivision 1(a)(1) contested in this case—has an express exception to protect core political speech activities:

> Conduct is not a crime under this section if it is performed under terms of a valid license, to ensure compliance with a court order, or to carry out a specific lawful commercial purpose or employment duty, is authorized or required by a valid contract, or is authorized, required, or protected by state, federal, or tribal law or the state, federal, or tribal constitutions. Subdivision 2, clause (2), *does not impair the right of any individual or group to engage in speech protected by the federal,*

> *state, or tribal constitutions, or federal, state, or tribal law, including peaceful and lawful handbilling and picketing.*[53]

Similarly, federal statutes, such as the Hatch Act, 5 U.S.C. § 1502, curtailing federal employee political activities, also express exceptions to avoid chilling protected First Amendment rights:[54]

> All State or local officers or employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this part. *A State or local officer or employee may participate in all political activity not specifically restricted by law and this part, including candidacy for office in a nonpartisan election and candidacy for political party office.*[55]

However, Minnesota Statutes § 609.748, subdivision 1(a)(1) in the context of the provision, "regardless of the relationship between the actor and the intended target…" has no similar exception to avoid chilling, deterring, or banning core political speech activities.

Here, the district court relies upon a Minnesota appellate court decision as deciding the issue of the constitutionality of the provision at issue.[56] The Minnesota Supreme Court has not ruled on the issue.[57]

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[53] Minn. Stat. § 609.749, subd. 7 (emphasis added).
[54] *Bauers v. Cornett,* 865 F.2d 1517, 1524 (8th Cir. 1989).
[55] 5 C.F.R. § 151.111 (emphasis added).
[56] Memo. and Or. at 9. Dckt. No. 27. App. 9.
[57] Decisions from the state supreme court as to interpretations of state law are binding on this Court. *Contl. Cas. Co. v. Adv. Terrazzo & Tile Co., Inc.,* 462 F.3d 1002, 1007 (8th Cir. 2006) *citing Garnac Grain Co., Inc. v. Blackley,* 932 F.2d 1563, 1570 (8th Cir.1991). "Decisions of the various intermediate appellate courts are not, but they are persuasive authority, and we must follow them when they are the best evidence of what [the state] law is." *Id.* When a state's highest court has not decided an issue, it is

The district court suggested that *Dunham v. Roer*,[58] regarding the Christian Action League and Redding's constitutional challenge is closed because of the state's intermediate appellate court's finding that § 609.748, subdivision 1(a)(1) only refers to unprotected speech.[59] But, the appellate court also included protected speech:

> "[T]rue threats" evidencing an intent to commit an act or unlawful violence against one's safety, security, or privacy; *and sp*eech *or conduct that is intended to have a substantial adverse effect, i.e., is in violation of ones right to privacy.*[60]

In the context of the League's and Redding's claims, their political speech activities against City Pages' advertisers, and their future actions against others, are precisely within the "speech or conduct" cited within the statutory provision to arouse an intended target to act on matters of public concern because § 609.748, subdivision 1(a)(1) provides no exceptions as to the phrase "regardless of the relationship between the actor and the intended target." The *Dunham* court did not expound on the phrase at issue in the context of the relationship between the speaker and the targeted person as it relates to protected core political activities.

In this regard, although the statutory provision may address categories of speech fully outside the protection of the First Amendment, and constitutionally

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up to this Court to predict how the state's highest court would resolve that issue. *Sloan v. Motorists Mut. Ins. Co.,* 368 F.3d 853, 856 (8th Cir.2004) (citing *Jackson v. Anchor Packing Co.,* 994 F.2d 1295, 1301 (8th Cir.1993)).

[58] *Dunham v. Roer,* 708 N.W.2d 552 (Minn. App. 2006); Memo. and Or. at 9. Dckt. No. 27. App. 9.

[59] Freeman Memo. to Dismiss 23.

[60] *Dunham,* 708 N.W. 2d at 566; Freeman Memo. to Dismiss 17 (emphasis added).

subject to a harassment order, without an exception for core political speech the statute suppresses core political speech in all respects and in all situations as "unwanted acts" (conduct such as mail, postcards, or email) or "words" (speech such as pictures or comments) used to educate or persuade others on matters of public concern. Section 609.748, subdivision 1(a)(1), without an exception to protect core political speech, is unconstitutional in its applications judged in relation to its plainly legitimate sweep.[61]

By *Dunham's* own interpretation, it has included *all* speech and conduct as prohibited acts as subject to invasions of privacy because it will cause a substantial adverse effect. Protestors' objective(s) on matters of public concern are to have that effect—to cause the targeted person to feel insecure in their beliefs and to act. As much as the State's appellate court tried to narrow the interpretation of "repeated incidents of intrusive or unwanted acts, words, or gestures," it actually expanded the reach of the harassment statute to include protected speech when the rights of privacy are at issue. Thus, the appellate court's conclusion that the statute is narrowly tailored to ban or regulate unprotected words of conduct as to not implicate the First Amendment was in error as unfortunately, the Christian Action League and Redding found out.[62]

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[61] *United States v. Stevens,* 559 U.S. 460 (2010) (citation omitted). *Pence v. City of St. Louis, Mo.,* 958 F. Supp. 2d 1079, 1082 (E.D. Mo. 2013).
[62] *Dunham,* 708 N.W.2d at 565.

As the League and Redding presented in their underlying Complaint, although the harassment statute may reflect a state's interest of regulating unprotected speech as compelling, the statute must nevertheless be narrowly tailored to serve that interest.[63] "As with a compelling interest determination, whether or not a [statute] is narrowly tailored is evidenced by factors of relatedness between the [statute] and the stated governmental interest. A narrowly tailored [statute] 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 [statute] that could advance the interest as well with less infringement of speech (is the least-restrictive alternative)."[64] Here, the harassment statute fails. Without the exception to protect core political speech, the phrase "regardless of the relationship between the actor and the intended target," sweeps too broadly. "In short, the seriousness with which the regulation of core political speech is viewed under the First Amendment requires such [statutory provisions] to be as *precisely* tailored as possible."[65]

While the government's interest might suggest the objective to defend individual privacy, Redding's political speech activities will continue to be subject to

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[63] *Republican Party of Minnesota v. White*, 416 F.3d 738, 751 (8th Cir. 2005) (citation omitted). *E.g.* Plts. Compl. ¶¶ 129, 184, 185, 207, 264. Dckt. No. 1. App. 45, 61, 66, 79.
[64] *Id. See also, 281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014).
[65] *Id.*

the harassment statute by stating, as an alternative means of communication, to do as they have—sending emails, postcards, and letters—but, not so much.[66] If Redding does engage in too much of this kind of political speech, then Redding's conduct is "objectively unreasonable or intentionally harassing conduct."[67] By arguing in this way, Freeman leaves Redding no "ample alternative channel" to avoid prosecution under the harassment statute.[68]

As previously observed, during the district court proceedings, Freeman agreed that protected speech activities are subject to the harassment statute.[69] For instance, Freeman suggested, referencing Redding's examples in her complaint, that the Governor could obtain a harassment order for core political speech activities "if they are repeated, intrusive, or unwanted" if, intended to have a substantive adverse effect on the Governor's privacy—"or objectively unreasonable."[70] Hence, any and all intentional free speech conduct—that is, protests—are subject to prosecution under § 609.748, subdivision 1(a)(1). The effect of suppressing protected speech is not incidental when it is "unwanted" or "objectively unreasonable" to allow the free flow

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[66] Freeman's Memo. to Dismiss at 22. Dckt. No. 12. ("They can do this [sending postcards and emails] without engaging in objectively unreasonable or intentionally harassing conduct.")
[67] *Id.*
[68] *Id.* (citations omitted).
[69] *Id.* at 25.
[70] Freeman Memo. to Dismiss 25. Dckt. No. 12.

of ideas and opinions on matters of public concern or because the speech in question might have an emotional impact on its audience.[71]

In short, the Christian Action League and Redding asserted that § 609.748, subdivision 1(a)(1) could have been more narrowly drafted to avoid the application of the statute to protected speech activities.[72] It does prescribe protected political speech. It is unconstitutional.

II. A newspaper's closing, which was an example of how an individual and a non-profit corporation will protest against entities advertising in that paper resulting in their prosecution under Minnesota's harassment statute chilling their speech, does not moot asserted constitutional, declaratory, and civil rights claims.

This Court will review the mootness question *de novo*.[73]

The district court determined that "[b]ecause the City Pages is the only publication addressed in the Complaint and is no longer being published, the

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[71] *New York Times Co. v. Sullivan,* 376 U.S. 254, 271(1964) (the fundamental importance of the free flow of ideas and opinions on matters of public concern is the core of the First Amendment protections, even where speech includes "vehement caustic and sometimes unpleasantly sharp attacks."); *Boos v. Barry,* 485 U.S. 312, 322 (1988) (refusing to uphold a statute that restricted the use of displays critical of foreign governments in front of embassies or consulates in light of a "longstanding refusal to [punish speech] because the speech in question might have an emotional impact on its audience.").

[72] *United States v. Popa,* 187 F.3d 672, 677 (D.C.Cir.1999) (holding that a criminal statute prohibiting making anonymous phone calls with the intent to annoy could have been more narrowly drafted as applied to a defendant, who made calls to the U.S. Attorney's Office containing racial epithets and complaints about police brutality, without loss of utility to the government by excluding individuals engaging in public or political discourse).

[73] *Abdurrahman v. Dayton,* 903 F.3d 813, 816 (8th Cir. 2018).

Complaint 'fail[s] to demonstrate a live dispute involving the actual or threatened application of the HRO statute to bar particular speech.'"[74] The mootness doctrine is not applicable.[75]

The underlying Complaint challenges the constitutionality of one provision of Minnesota's harassment statute, § 609.748, subdivision (a)(1). The Complaint demonstrated how the harassment statute has been used against the Christian Action League and Redding by an entity advertising in a newspaper medium. The Complaint also demonstrated how the League and Redding and the League's agents protest against those advertising entities, such as the Frost Law Firm:

> The Christian Action League's actions could be in the form of letters to the editor, letters, or other methods of communication to the business entities. For example, communications would be sent to companies or other businesses asking them to reconsider placing their ads in newspapers that carry other advertisements relating to pornography and, hence, support sexual exploitation or even sexually-oriented businesses. One such paper is the Star Tribune's "City Pages."[76]

Nowhere in the Complaint does it suggest that other newspapers or other media (such as television stations or internet hosts, such as Google, since it either began advertising PornHub or some other pornographic website) would not be targeted by the League or Redding if the media revenue stream directly or indirectly supported pornography and, hence, supported sexual exploitation or sexually-oriented

[74] Memo. and Or. at 11. Dckt. No. 27. App. 11.
[75] Memo. and Or. 10–12. Dckt. No. 21. App. 10–12.
[76] *E.g.,* Plts. Compl. ¶ 45. Dckt. No. 1. App. 27.

businesses. It would certainly be consistent with their position of exerting force by protesting under their belief of corporate social responsibility:

> The Christian Action League, its agents, and Redding agree with the concept that corporate social responsibility means "that a company takes steps to ensure there are positive social and environmental effects associated with the way the business operates. Businesses that engage in active [corporate social responsibility] efforts take stock of the way they operate in the world to incorporate addressing cultural and social issues, with the aim of benefiting both in the process."[77]
>
> While there may be disagreement regarding what is the common good of society and the role of corporations in the interchange between beliefs within the marketplace of ideas, the Christian Action League, its agents, and Redding believe issues of pornography, sexual exploitation, and sexually-oriented businesses involve questions of political, moral, and ethical importance in today's society.[78]

Furthermore, using Freeman's own example provided to the district court regarding how the Governor could use the harassment statute to suppress core political activities, if a politician was seen as supporting pornography or sexual exploitation or sexually-oriented businesses, then the League and Redding would be justified to target that politician, but at risk of prosecution under the harassment statute at issue. Regardless, the actions of the Frost Law Firm in obtaining an ex parte harassment restraining order was sufficient to curtail the free speech activities of the

[77] *Id.* ¶ 61 (citation omitted). App. 31.
[78] *Id.* ¶ 62. App. 31.

Christian Action League and Redding to determine the reach of § 609.748, subdivision 1(a)(1) in federal court for fear of future prosecutions.[79]

CONCLUSION

The district court's decision to grant the Defendant Mike Freeman's motion to dismiss should be reversed and the matter remanded for disposition of the constitutional claims asserted in the Plaintiffs Christian Action League of Minnesota and Ann Redding's Complaint consistent with the adjudication of this Court.

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[79] *E.g. id.,* ¶ 127. App. 45.

CERTIFICATE OF COMPLIANCE

WITH FED. R. APP. P. 32 (a)(7)

The undersigned certifies that the Brief submitted herein contains 5,782 words and complies with the type/volume limitations of the Federal Rules of Appellate Procedure 32(a)(7). This Brief was prepared using a proportionally spaced typeface of 14-point. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this Brief.

/s/Erick G. Kaardal
Erick G. Kaardal