No. 24-3116

In the
United States Court of Appeals
for the Eighth Circuit

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

Plaintiffs - Appellees

v.

KEITH M. ELLISON, in his official capacity as Attorney General of Minnesota; NICOLE BLISSENBACH, in her official capacity as Commissioner of the Minnesota Department of Labor and Industry; TIMOTHY WALZ, in his official capacity as Governor of the State of Minnesota

Defendants - Appellants

On Appeal from the United States District Court for the District of Minnesota
No. 24-cv-536, The Honorable Katherine M. Menendez

Brief of *Amici Curiae* the Chamber of Commerce of the United States of America, National Association of Wholesaler-Distributors, the National Retail Federation, and the Coalition for a Democratic Workplace in Support of Appellees and Affirmance

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Local Appellate Rule 26.1A, the Chamber of Commerce of the United States of America, National Association of Wholesaler-Distributors, the National Retail Federation, and the Coalition for a Democratic Workplace state that they are not publicly held corporations, that they do not have parent corporations, and that no publicly held corporation owns 10% or more of their stock.

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INTERESTS OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

National Association of Wholesaler-Distributors ("NAW") is an employer and a nonprofit, non-stock, incorporated trade association that represents the wholesale distribution industry—the essential link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is made up of direct-

1 All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for any party authored this brief in whole or part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

member companies and a federation of national, regional, and state associations across 19 commodity lines of trade, which together include approximately 35,000 companies operating nearly 150,000 locations throughout the nation. The overwhelming majority of wholesaler-distributors are small-to-medium-size, closely held businesses. As an industry, wholesale distribution generates more than $8 trillion in annual sales volume, providing stable and well-paying jobs to more than 6 million workers.

Established in 1911, the **National Retail Federation** ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Retail is the largest private-sector employer in the United States. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers. The NRF provides courts with the perspective of the retail industry on important legal issues impacting its members. To ensure that the retail community's position is heard, the NRF often files *amicus curiae* briefs expressing the views of the retail industry on a variety of topics.

The **Coalition for a Democratic Workplace** ("CDW") represents millions of businesses that employ tens of millions of workers across the

country in nearly every industry. Its purpose is to combat regulatory overreach by the National Labor Relations Board, which through expansive interpretations of its own authority has threatened the wellbeing of employers, employees, and the national economy.

Amici curiae have a strong interest in ensuring that their members have access to federal courts when state and local regulations infringe on their federal rights. The arguments Defendants raise on appeal are part of a concerning trend: nationwide, state officers are tactically disavowing enforcement of challenged laws to frustrate judicial review. *Amici* have an interest in discouraging such gamesmanship. State officers cannot close the courthouse doors to pre-enforcement challenges of unconstitutional state laws simply by responding to a complaint with a nonbinding disavowal of present intent to enforce the law. These tactics are particularly egregious in the First Amendment context, where laws may chill protected speech and expressive conduct.

Amici respectfully submit that the Court should review Defendants' disavowals, not as related to Plaintiffs' standing or Defendants' sovereign immunity, but under the familiar framework of mootness. Courts rightfully presume that state officers will enforce newly enacted laws. A disavowal proffered *in response to* a complaint is best analyzed as a question

of mootness—whether the disavowal eliminates the credible threat of enforcement that justified the plaintiff's suit and, if so, whether the court should nonetheless continue to exercise jurisdiction notwithstanding the disavowal. There, the voluntary cessation exception allows courts to scrutinize whether a defendant's disavowal in fact conclusively resolves a dispute or leaves open a risk that the defendant will violate the plaintiff's rights after securing a dismissal.

The Court should confirm that the mootness framework applies and hold that this case is not moot.

ARGUMENT

I. State officers tactically disavow enforcement to avoid judicial review.

Defendants' arguments here closely resemble those offered by state defendants in a pre-enforcement challenge to an earlier Connecticut statute banning mandatory employee meetings. And both cases fit within a broader trend of state and local official defendants attempting to evade judicial review by casting doubt on and even disclaiming enforcement. *Amici* offer the following examples to situate this case in context and illustrate the confusion around how threats and disavowals of enforcement bear upon Article III standing, the *Ex parte Young* exception to sovereign immunity, and mootness.

***Chamber of Commerce of the United States of America v. Bartolomeo*, No. 22-cv-1373 (D. Conn. 2023).** When plaintiffs brought a constitutional challenge to a recently amended Connecticut statute closely resembling Minnesota's "Employer-Sponsored Meetings or Communication Act" (the Act), the state defendants moved to dismiss on various threshold, jurisdictional grounds—all boiling down to the notion that "future enforcement" of the new law was "speculative." Defs.' Mot. to Dismiss, *Bartolomeo*, No. 22-cv-1373 (D. Conn. Dec. 27, 2022), ECF No. 36-1, at 22-23.

The defendants submitted a declaration from a state employee who averred that he was "not aware of any instance, since 2004," of an employee filing a complaint alleging a violation of the law, or the relevant division of the department "ever investigating an employer for alleged violations." Wydra Decl., *Bartolomeo*, No. 22-cv-1373 (D. Conn. Dec. 27, 2022), ECF No. 36-2, ¶¶ 20-21. The defendants argued that the court lacked jurisdiction because, in light of the declaration, the plaintiffs had "fail[ed] to establish a credible threat of enforcement" as required "to warrant application of *Ex parte Young*." Defs.' Mot to Dismiss, *Bartolomeo*, No. 22-cv-1373 (D. Conn. Dec. 27, 2022), ECF No. 36-1, at 26.

The district court disagreed. *See* Oral Arg. Tr., *Bartolomeo*, No. 22-cv-1373 (D. Conn. July 6, 2023), ECF No. 64. The court explained that "the fact that the statute has never been enforced gives no pause," and the court would not credit any disavowal of enforcement because "there is nothing that prevents the state from changing its mind." *Id.* at 45:14-17. The plaintiffs had thus adequately "alleged the requisite credible threat of enforcement in order to establish an injury in fact." *Id.* at 46:6-8. The *Ex parte Young* exception to sovereign immunity applied for similar reasons: notwithstanding the state's disavowal, "there exist state executive officials who retain authority to enforce" the law, so *Ex parte*

Young allowed the plaintiffs to challenge it. *Id.* at 49:15-17 (quoting *Whole Woman's Health v. Jackson*, 595 U.S. 30, 60 (2021) (Roberts, C.J., concurring in part and dissenting in part)). The district court accordingly denied the motion to dismiss. *Id.* at 49:18-19.

Since losing that argument, the Connecticut defendants have submitted new disavowals of enforcement. The same state employee filed a second declaration specifically averring that the state agency would not seek to apply the law to the plaintiffs' relevant conduct. Wydra Decl., *Bartolomeo*, No. 22-cv-1373 (D. Conn. May 24, 2024), ECF No. 100-6, ¶ 24. The defendants again argued that, in light of the declaration, the district court lacked jurisdiction because the disavowal supposedly proved that the plaintiffs face no "'credible threat' of State enforcement" and thus lack Art. III standing. Defs.' Opp. to Mot. for Summ. J., *Bartolomeo*, No. 22-cv-1373 (D. Conn. May 24, 2024), ECF No. 100-1, at 19. The district court heard oral argument on the parties' cross-motions for summary judgment in November. Minute Entry, *Bartolomeo*, No. 22-cv-1373 (D. Conn. Nov. 18, 2024), ECF No. 115. Those motions remain pending.

***New Jersey Civil Justice Institute v. Grewal*, No. 19-cv-17518, 2020 WL 4188129 (D.N.J. July 21, 2020).** In 2019, New Jersey enacted a stat-

ute purporting to forbid pre-dispute arbitration agreements between employers and employees. *Id.* at *1. The Chamber and a state business organization sued to enjoin enforcement of the law as preempted by the Federal Arbitration Act. *Id.* The defendant, the Attorney General of New Jersey, moved to dismiss, asserting among other things that the plaintiffs lacked standing. He argued that the plaintiffs had not adequately alleged an imminent injury or credible threat of prosecution, both because he had not previously enforced the law against the plaintiffs' members and because the challenged statute gave him discretion but no duty to enforce it. *Id.* at *4-5.

The district court rejected these challenges to the plaintiffs' standing. First, the court explained that "standing for a pre-enforcement action" requires a "threat of future harm," not evidence of past enforcement, and ruled that the plaintiffs had adequately alleged that some of their members faced such a threat because they had continued to enter into pre-dispute arbitration agreements arguably prohibited by the statute. *Id.* at *4 (citation omitted). The court added that members who complied with the statute also suffered a cognizable injury by forgoing a federally protected right to avoid penalties under state law. *Id.* at *5. The district court also concluded that some of the plaintiffs' members faced a credible

threat of prosecution "even if the Attorney General [did] not assert its intent to enforce" the statute because nothing prevented him from exercising his discretion to begin enforcement. *Id.* at *6. The court accordingly denied the motion to dismiss, and went on to grant the plaintiffs' motion for summary judgment after rejecting another round of similar arguments from the defendants. *See N.J. Civ. Just. Inst. v. Grewal*, No. 19-cv-17518, 2021 WL 1138144 (D.N.J. Mar. 25, 2021).

***Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024).** After opening a new concert venue in 2018, the City of Brandon, Mississippi enacted ordinances to facilitate events there, including one designating a dedicated protest area and regulating modes of demonstration, such as by prohibiting signs on poles or sticks and forbidding sound amplification. *Id.* at 296-97. A Christian group sought to evangelize near the venue during an event and were met by the chief of police, who handed them a copy of the ordinance and warned them to stay within the designated area. *Id.* at 298. A member of the group sued to enjoin enforcement of the ordinance, which she argued chilled her religious speech. *Id.* at 299. The district court denied a preliminary injunction, reasoning that the ordinance was a permissible content-neutral regulation of speech and that the plaintiff was unlikely to succeed on the merits. *Id.*

On appeal, the City raised a new defense, that the plaintiff lacked standing because the police chief had sought to enforce the ordinance only against other members of the group and that the plaintiff's individual conduct would not necessarily violate the law or prompt enforcement. *See id.* at 299-300. The Fifth Circuit rejected that maneuver, agreeing with the plaintiff "that Brandon's position on appeal" was "surprising and apparently driven by appellate strategies." *Id.* at 300. The court reasoned that the City's "waffl[ing] on appeal on the behavior it might enforce" did not defeat the plaintiff's standing. *Id.*

***Darren Patterson Christian Academy v. Roy*, 699 F. Supp. 3d 1163 (D. Colo. 2023).** Beginning in 2022, Colorado enacted legislation and regulations funding a statewide universal preschool program. *Id.* at 1169-70. One regulation required participating preschools to agree not to discriminate based on gender, gender identity, sexual orientation, and religion. *Id.* at 1170-71. A Christian preschool applied to participate in the program and sought an exemption from the nondiscrimination requirement as incompatible with aspects of its religious worldview, such as the school's policy of "only hir[ing] employees who share its faith." *Id.* at 1171-72. After a program administrator denied the exemption, the preschool filed suit. *Id.* at 1172.

The state defendants moved to dismiss for lack of standing, arguing that the plaintiff preschool did not face a credible threat of enforcement. *Id.* at 1173, 1176-77. Despite denying the exemption, the defendants "suggest[ed] that they might withhold enforcement of [the nondiscrimination] provisions until an aggrieved party files a complaint." *Id.* at 1175. And the state officer with enforcement authority submitted a declaration disavowing any intent to enforce the nondiscrimination requirement against religious preschools that consider religion when making employment decisions as permitted by federal law. *Id.* at 1177.

The district court was not persuaded. The court observed that the defendants disavowed enforcement only "after the operative complaint was filed" and only in moving to dismiss, which caused the "disavowal's assurances [to] weaken," especially in light of the defendants' "pre-litigation refusal to grant [the p]laintiff an exemption." *Id.* at 1178. The court also contrasted the disavowal with public statements by state officers, including the governor, who embraced the program's nondiscrimination requirement and emphasized that they would defend it. *Id.* at 1179. The plaintiffs thus faced a credible threat of enforcement notwithstanding the disavowal and cleared the relatively low bar for standing. *Id.* at 1180. The district court went on to issue a preliminary injunction. *Id.* at 1189.

White Hat v. Landry, No. 20-cv-983, 2023 WL 3854717 (W.D. La. June 5, 2023). In 2018, Louisiana enacted legislation criminalizing unauthorized entry to pipelines and expressly excluding protected First Amendment activities from the statute's scope. *Id.* at *2. Shortly after, a group protested the construction of a pipeline on private property surrounding it. *Id.* at *1. An owner of the property ordered the protestors to leave, and they were eventually arrested. *Id.* The group filed a lawsuit and sought to enjoin the state from enforcing the law. *Id.* at *3.

A district attorney defendant challenged the plaintiffs' standing, filing an affidavit disavowing any intent to prosecute them for their conduct. *Id.* at *5. The district court rejected the standing challenge, reasoning that the district attorney's disavowal "implicate[d] the mootness doctrine, not standing." *Id.* The plaintiffs argued that their claims were not moot because the defendant's disavowal was "not legally binding" and left him free to "reverse course." *Id.* The district court agreed, concluding that the defendant's disavowal fell within the "voluntary cessation" to the mootness doctrine and that the plaintiffs "continue[d] to have a stake in th[e] litigation based on the statute's 'chilling' effect on future protests." *Id.* at *6.

* * *

As these examples illustrate, Defendants here are far from the only state officers to argue that their nonbinding statements insulate laws from judicial review. Owing to the increasing frequency of these tactical disavowals, the Court should clearly delineate the difference between standing, sovereign immunity, and mootness and should announce a rule that preserves regulated parties' access to federal court to vindicate their federal rights.

II. Disavowals of enforcement implicate justiciability, not sovereign immunity, and under the applicable framework of mootness, this case is justiciable.

Official disavowals of enforcement cannot remedy a citizen's harms. When a plaintiff reasonably believes that a law affects his conduct, a prosecutor's mere assertion to the contrary provides little comfort. The prosecutor "may change his mind about the meaning of the statute," or "he may be replaced in office." *Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990). "[S]trategic concessions" in litigation offer especially cold comfort: "there is 'nothing that prevents the State from changing its mind,' as it is not 'forever bound, by estoppel or otherwise, to the view of the law that it asserts in th[e] litigation.'" *Picard v. Magliano*, 42 F.4th 89, 99 (2d Cir. 2022) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221

F.3d 376, 383 (2d Cir. 2000)). If courts deferred readily to officers' assurances that they will not exercise their apparent authority to prosecute protected speech, "First Amendment rights would exist only at the sufferance of the State," and "constitutionally protected speech [would] be chilled as a result." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999).

Defendants' disavowals here do not cure the chill to Plaintiffs' protected speech. The Minnesota Legislature enacted the Act in 2023 and amended it in 2024. *See* Pls.' Br. at 1-4. The Legislature vested Attorney General Ellison and Commissioner Blissenbach with authority to enforce the new law, and legislators and voters presumably expect Defendants to exercise their enforcement authority, including against Plaintiffs' protected speech. Absent judicial review, the only impediment to applications of the Act—and violation of Plaintiffs' First Amendment rights—is Defendants' bare assertion that they "have no present intention to commence a civil action or other enforcement proceedings under Section 181.531 against anyone, including [Plaintiffs]." Defs.' Br. at 29. Defendants made this statement only in declarations tailored for this litigation—hardly an adequate assurance that Plaintiffs may exercise their constitutional rights without fear. *See Siders*, 123 F.4th at 300 ("Of

course, the government's disavowal must be more than a mere litigation position." (quoting *Lopez v. Candaele*, 630 F.3d 775, 788 (9th Cir. 2010))).

Defendants contend that their disavowals remove this case from the *Ex parte Young* exception to sovereign immunity and thus preclude judicial review of the Act. But Defendants misapprehend that doctrine, which focuses on an official defendant's *capacity* to enforce state law—not the probability or imminence of an enforcement action. Indeed, their approach would effectively overrule *Ex parte Young* altogether. An officer's disavowal of enforcement bears on a claim's justiciability, not the officer's entitlement to immunity. Furthermore, disavowals of recently enacted laws, made in response to pre-enforcement challenges, are most appropriately analyzed under the framework of mootness because they do not speak to whether the plaintiff faced a credible threat of enforcement *at the time the suit was filed*. Applying the mootness doctrine here, particularly the voluntary cessation doctrine, Defendants cannot carry their burden to defeat federal jurisdiction with their tepid disclaimer that they do not plan to enforce the Act at this moment, while litigation is ongoing.

A. The *Ex parte Young* exception to sovereign immunity applies based on an official defendant's capacity to enforce a state law, not the probability or imminence of an enforcement action.

Ex parte Young, 209 U.S. 123 (1908), established a narrow but important exception to state sovereign immunity, flowing from the "supreme authority" of the U.S. Constitution, that allows federal courts to enjoin state officers from enforcing unconstitutional state laws. *Id.* at 167. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quotation and alteration omitted). The complaint here meets both requirements, so the district court correctly applied *Ex parte Young* to deny Defendants' motion to dismiss.

Defendants contend that *Ex parte Young* cannot apply because Attorney General Ellison and Commissioner Blissenbach submitted declarations disavowing the "present intention" to commence a specific proceeding to enforce the Act. Defs' Br. at 28-30. But Defendants make too much

of what they call "*Ex parte Young*'s 'about-to-commence-proceedings' second element." *Id.* at 29. *Ex parte Young* does not turn on the quantitative question whether a state officer is *likely* to commence an action to enforce a state law. Rather, *Ex parte Young* turns on the qualitative question whether the state officer has the legal *capacity* to enforce the state law. *See Whole Woman's Health*, 595 U.S. at 47-48 ("[T]his is enough at the motion to dismiss stage to suggest the petitioner will be the target of an enforcement action and thus allow this suit to proceed.").

Of course, *Ex parte Young* applies when an officer is "about to commence proceedings," but the Court has never suggested that the doctrine applies *only* then. Rather, the core holding of *Ex parte Young* is that a state officer is properly subject to suit for prospective relief in federal court, notwithstanding sovereign immunity, when state law vests the officer with the capacity to enforce state law in violation of the federal plaintiff's federal constitutional rights. *See, e.g.*, *Ex parte Young*, 209 U.S. at 161 ("His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States circuit court."). Just so here.

Defendants (Br. at 29) point to *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), but the Court did not create any imminence requirement there, either. *Morales* concerned a district court finding that federal law preempted certain state guidelines that regulated airline advertising, and enjoining state officers from enforcing those guidelines. *Id.* at 379-80. The Supreme Court held that the district court had properly enjoined officers from enforcing specific "fare advertising sections of the guidelines," but had "disregarded the limits on the exercise of its injunctive power" in going further and enjoining "any enforcement action … which would seek to regulate or restrict any aspect of the … plaintiff airlines' air fare advertising or the operations involving their rates, routes, and/or services." *Id.* at 382 (citation omitted). The Court explained that the district court had gone too far in purporting "to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable." *Id.* (citations omitted). In other words, the imminence of an enforcement action related only to the defendant's authority under state law to regulate the situations hypothesized by the district court.

Whole Woman's Health underscores that the *Ex parte Young* exception applies here. The Supreme Court, as relevant here, held that the *Ex*

parte Young exception permitted the plaintiffs' claims against three "executive licensing official[s] who *may* or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code." *Whole Woman's Health*, 595 U.S. at 45-46 (emphasis added). So too here. The Plaintiffs have sued state official "who may … take enforcement actions" against them and thus sovereign immunity does not bar this suit.

Defendants' two asserted examples (Br. at 28) of courts applying an imminence requirement are distinguishable.

- In *Minnesota RFL Republican Farmer Labor Caucus v. Freeman*, 33 F.4th 985 (8th Cir. 2022), this Court considered a pre-enforcement challenge to a statute enacted more than *thirty years earlier*. *See* Minn. Laws 1988, c. 578, art. 3, § 2 (eff. July 1, 1988). In disavowing enforcement of that particular law, the state officers argued that decades-long "lack of enforcement ha[d] made the statute a dead letter." *Minn. RFL Repub. Farmer Lab. Caucus v. Freeman*, 486 F. Supp. 3d 1300, 1307 (D. Minn. 2020). Because of the challenged law's desuetude, *Freeman* does not support Defendants' position that they may

strip the court of jurisdiction by disavowing enforcement of a newly enacted statute.[2]

- *Mi Familia Vota v. Ogg*, 105 F.4th 313 (5th Cir. 2024), does not help Defendants. There, the Fifth Circuit considered three "guideposts" from circuit precedent, one of which encompassed a state officer's disavowal of future enforcement, *id.* at 325, and concluded that the three *together* showed that officer was "not a proper *Ex parte Young* defendant," *id.* at 326 n.12. But the court explicitly declined to "resolve whether statements made during the course of litigation about future behavior, by themselves, are sufficient to insulate state officials from *Ex parte Young*'s exception to sovereign immunity." *Id.*

If ratified by this Court, Defendants' approach would gut *Ex parte Young*. State officers could cloak themselves in sovereign immunity simply by telling a court that they do not presently plan to violate the U.S. Constitution. The Supreme Court has consistently reaffirmed the continuing vitality of the *Ex parte Young* exception. *See, e.g.*, *Reed v.*

2 *Freeman* appealed a denial of a preliminary injunction, which the district court had denied on every one of the traditional four equitable factors. In that posture, questions of jurisdiction, injury, and imminence were intermingled; indeed, this Court *declined* to address whether the plaintiff had Article III standing. *See Freeman*, 33 F.4th at 989 n.4.

Goertz, 598 U.S. 230, 234 (2023). This Court should do the same and reject Defendants' request to render the doctrine a dead letter.

As explained below, disavowals implicate the imminence of a plaintiff's injury, and imminence is fundamentally part of Art. III's "case or controversy" requirement, not part of sovereign immunity.

B. Disavowals are best analyzed under justiciability doctrines—here, mootness—and this case is justiciable.

Official disavowals of enforcement are better understood as implicating justiciability. "Justiciability is the term of art employed to give expression to th[e] dual limitation placed upon federal courts by [Article III's] case-or-controversy requirement." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). That requirement "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and also "define[s] the role assigned to the judiciary … to assure that the federal courts will not intrude into areas committed to the other branches of government." *Id.*

Arguments like Defendants' appeal to these limits on federal courts power. A disavowal of enforcement, the argument goes, demonstrates

that a plaintiff suffers no imminent injury. Depending on when a disavowal is announced—before or after the complaint is filed—the disavowal could show that the plaintiff was never injured (and thus has no standing) or that the injury the plaintiff may have suffered has ceased (and thus the case is moot). Where a history of nonenforcement may undermine a plaintiff's standing, post-suit disavowals of enforcement are more appropriately analyzed under the framework of mootness. Even still, this case remains live as Defendants have not carried their burden of showing the conduct that Plaintiffs challenge is not reasonably likely to occur in the future.

1. Mootness is the appropriate framework for mid-litigation disavowals of enforcement.

Standing and mootness are related aspects of justiciability. Article III standing requires a plaintiff to have suffered (1) an "injury in fact" that is (2) "fairly traceable to the challenged action of the defendant" and (3) "redress[able] by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and alterations omitted). Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *U.S. Parole Comm'n v.*

Geraghty, 445 U.S. 388, 397 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)).

Mid-litigation disavowals of enforcement, like Defendants' here, have no bearing upon whether a plaintiff had standing at the time of filing. "To establish injury in fact for a First Amendment challenge to a state statute, a plaintiff need not have been actually prosecuted or threatened with prosecution," but rather "needs only to establish that he would like to engage in arguably protected speech" and "is chilled from doing so by the existence of the statute." *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). A chilling effect must be "[r]easonable," which typically means that "'there exists a credible threat of prosecution.'" *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). In pre-enforcement challenges, "courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund." *Vitagliano v. County of Westchester*, 71 F.4th 130, 138 (2d Cir. 2023) (quotation omitted).

A plaintiff thus has standing to assert a pre-enforcement First Amendment challenge to a state statute that arguably regulates her expressive conduct: a court will presume there is a credible threat that the

government will prosecute conduct that it deems to violate the law. A government defendant who disavows enforcement is trying to rebut that presumption—to present evidence that the plaintiff need not fear enforcement. That argument sounds in mootness. A defendant who submits a post-complaint disavowal does not argue that the plaintiff *never* needed to fear enforcement of the law and thus *never* suffered any injury and so lacks standing. *Cf. Arneson*, 638 F.3d at 628 (explaining that "a long history of disuse … undermines [a law's] chilling effect," the source of an asserted First Amendment injury to establish standing in a pre-enforcement challenge). Rather, the disavowing defendant contends that the plaintiff *no longer* needs to fear enforcement of the law and thus *no longer* has an injury for a court to redress; the defendant claims that his disavowal has redressed the injury asserted the complaint, so judicial intervention is no longer necessary. Mootness is a more appropriate framework for analyzing justiciability where, as here, a state defendant disavows enforcement after a lawsuit.

2. This case is not moot.

Mootness is an especially appropriate framework here because the doctrine allows courts to inquire whether an officer's disavowal genuinely

resolves the controversy or merely reflects an attempt to frustrate judicial review. The Court's decision in *FBI v. Fikre*, 601 U.S. 234 (2024), illustrates the point. The plaintiff, a U.S. citizen, filed a complaint alleging that the government had placed him on the No Fly List based on unconstitutional religious animus. The government then removed him from the list. *Id.* at 238-39. The parties continued to litigate whether a live dispute persisted, and an officer eventually submitted a declaration attesting that the plaintiff would "not be placed on the No Fly List in the future based on the currently available information." *Id.* at 240.

The Supreme Court held that this mid-litigation assurance did not moot the case. The Court explained that "a defendant's 'voluntary cessation of a challenged practice' will moot a case only if the defendant can show that the practice cannot 'reasonably be expected to recur.'" *Id.* at 241 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The voluntary cessation doctrine places a heavy burden on defendants—"governmental defendants" and "private ones" alike—to ensure that "a federal court's constitutional authority cannot be … readily manipulated"; otherwise, "a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off." *Id.*

Significantly, the officer's declaration that the government did not presently intend to place the plaintiff back on the No Fly List did not carry the government's burden of showing that its voluntary cessation mooted the case. The plaintiff alleged "that the government placed him on the No Fly List for constitutionally impermissible reasons, including his religious beliefs," and he supported that claim with allegations that the government had interrogated him about attending a mosque and tried to coerce him "to serve as an informant against his co-religionists." *Id.* at 242. The declaration did not "speak[] to whether the government might relist him if he does the same or similar things in the future—say, attend a particular mosque or refuse renewed overtures to serve as an informant." *Id.* The government thus failed to show that it could not "reasonably be expected to resume its challenged conduct"—"whether the challenged conduct might recur immediately or later at some more propitious moment"—and the case was not moot. *Id.* at 243 (emphasis omitted).

Similar principles should govern here. Courts should analyze government efforts to rebut the presumption of enforcement, *see Vitagliano*, 71 F.4th at 138, much like they assess defendants' efforts to show that their challenged conduct cannot reasonably be expected to recur. A voluntary

disavowal of enforcement coupled with binding official action might persuasively rebut the presumption. *See Kentucky v. Yellen*, 54 F.4th 325, 341 (6th Cir. 2022) (holding that pre-enforcement challenge to federal agency's broad interpretation of statute was mooted when agency not only disavowed that interpretation during litigation, but also promulgated binding regulation embracing narrower reading).

And under certain circumstances, a disavowal alone may be enough. *See, e.g.*, *Gordon v. Lynch*, 817 F.3d 804, 807 (D.C. Cir. 2016) (holding pre-enforcement challenge moot where government categorically disavowed future enforcement as "inconceivable," conceded constitutional doubts about statute, and represented that it would not seek to impose any liability on plaintiff). But where, as here, state officers refuse to concede constitutional doubts about a statute and merely disavow any present intent to enforce it against "[Plaintiffs] or any other Minnesota employer," Defs.' Br. at 14, courts should carefully scrutinize whether the disavowal reflects a reliable policy commitment or a litigation tactic to frustrate judicial review. *See, e.g.*, *Minn. Chamber of Commerce v. Gaertner*, 710 F. Supp. 2d 868, 873 (D. Minn. 2010) (ruling that disavowal did not moot pre-enforcement challenge where state officer "or her successors could at any time decide to pursue" enforcement).

Defendants here have pointedly refused to provide any assurance that they will not apply the Act to Plaintiffs' protected speech as soon as the courthouse doors close. Defendants' declarations about their "present intention" say nothing about their future conduct. "'The Constitution deals with substance,' not strategies," and Defendants have not even tried to show that their disavowals are anything more than a litigation tactic. *Fikre*, 601 U.S. at 241 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)). They have not carried their burden of showing their voluntary present non-enforcement moots this case, so this Court should allow Plaintiffs to continue to litigate their claims.

CONCLUSION

The Court should affirm the district court's order denying Defendants' motion to dismiss.

Respectfully submitted,

s/ Bryan Killian

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with type-volume limits because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,511 words.

I further certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Century 14-point font.

In accordance with Circuit Rule 28A(h)(2), I certify that this brief has been scanned for viruses and is virus-free.

s/ Bryan Killian

CERTIFICATE OF SERVICE

I certify that, on this February 7, 2025, I electronically filed BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, THE NATIONAL RETAIL FEDERATION, AND THE COALITION FOR A DEMOCRATIC WORKPLACE IN SUPPORT OF APPELLEES AND AFFIRMANCE with the Clerk for the United States Court of Appeals for the District of Columbia Circuit. I used the Court's CM/ECF system, which serves registered CM/ECF users. All attorneys in this case are registered CM/ECF users and were served accordingly.

s/ Bryan Killian