No. _____

In the
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, et al.,
Petitioners,

v.

JOE MANSKY, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ERICK G. KAARDAL
Mohrman, Kaardal & Erickson
150 South Fifth Street
Suite 3100
Minneapolis, MN 55402
Telephone: (612) 465-0927
Email: kaardal@mklaw.com

WENCONG FA*
**Counsel of Record*
DEBORAH J. LA FETRA
OLIVER J. DUNFORD
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
E-mail: wf@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

Minnesota election law forbids voters from wearing political badges, political buttons, or other political insignia at the polling place. *See* Minn. Stat. § 211B.11. The ban broadly prohibits any material "designed to influence and impact voting," or "promoting a group with recognizable political views," even when the apparel makes no reference to any issue or candidate on the ballot.

The Eighth Circuit, aligned with the Fifth and D.C. Circuits, invoked *Burson v. Freeman*, 504 U.S. 191 (1992), to hold that a state can impose a "speech-free zone" without infringing on the Free Speech Clause of the First Amendment. There is deep tension between those decisions and the reasoning in decisions of the Fourth and Seventh Circuits, which hold that the First Amendment does not allow a state to prohibit all political speech.

The question presented is: Is Minnesota Statute Section 211B.11, which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

LIST OF ALL PARTIES

Petitioners are Minnesota Voters Alliance, Andrew E. Cilek, and Susan Jeffers. All were plaintiffs in the courts below. Three other organizations, Minnesota Majority, Minnesota North Star Tea Party Patriots, Election Integrity Watch, which are no longer active, and one individual, Dan McGrath, were also plaintiffs below. Petitioners sent notices required by Supreme Court Rule 12.6 to Minnesota Majority, Minnesota North Star Tea Party Patriots, Election Integrity Watch, and Dan McGrath. Respondents are Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Virginia Gelms, in her official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John Choi, in his official capacity as Ramsey County Attorney; and Steve Simon, in his official capacity as Secretary of State. All were defendants in the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Minnesota Voters Alliance is a nonprofit 501(c)(4) corporation incorporated under the laws of Minnesota. Minnesota Voters Alliance has no parent corporation, and no publicly held company owns 10% or more of its stock.

Table of Contents

Appendix

Table of Authorities

Cases

Constitution

Federal Statutes

State Statutes

Miscellaneous

PETITION FOR A WRIT OF CERTIORARI

Petitioners Minnesota Voters Alliance, Andrew E. Cilek, and Susan Jeffers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit affirming final judgment against Petitioners is reported at 849 F.3d 749 (8th Cir. 2017), and reprinted in Appendix A. The related opinion of the district court rejecting Petitioners' as-applied challenge and entering final judgment is unreported, but may be found at 0:10-cv-04401-JNE-SER, ECF No. 167 (D. Minn. Mar. 23, 2015), and is reprinted in Appendix B. An interim order of the district court, granting Defendant Mark Ritchie's motion for summary judgment in part, and denying the motion in part, is reported at 62 F. Supp. 3d 870 (2014), and reprinted in Appendix C. The Eighth Circuit's opinion rejecting Petitioners' facial challenge is reported at 708 F.3d 1051 (8th Cir. 2013), and reprinted in Appendix D. The Eighth Circuit's denial of rehearing en banc, over the dissent of Judge Smith and Judge Shepherd, on May 7, 2013, is reprinted in Appendix F. The district court opinion rejecting the facial challenge is reported at 789 F. Supp. 2d 1112 (D. Minn. 2011), and reprinted in Appendix E.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered final judgment in this case on February 28, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTITIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment, as incorporated against the states by the Fourteenth Amendment, provides that the states "shall make no law . . . abridging the freedom of speech."

Minnesota Statute Section 211B.11 provides, in relevant part: "A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."

STATEMENT OF THE CASE

This case presents an important and frequently recurring question of law: Does a statute that creates a "speech-free zone" at the polling place violate the First Amendment? Minnesota Statute Section 211B.11 forbids voters from wearing any kind of "political badge, political button, or other political insignia" at "the polling place on primary [and] election day." Minnesota defines "political" as "[i]ssue oriented material designed to influence or impact voting" and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." App. I-1–I-2. Petitioner Andrew Cilek, a Minnesota voter, was temporarily prevented from voting for wearing two items of political apparel: A t-shirt that states "Don't Tread on Me," with a picture of the Gadsden Flag and a small Tea Party logo; and an Election Integrity Watch

(EIW)[1] button that states "Please I.D. Me" with EIW's website and phone number. App. G-1, H-1–H-2.

The Eighth Circuit upheld the Minnesota law, holding that it did not violate the overbreadth doctrine of the First Amendment. App. D. The decision below aligns with the D.C. Circuit and the Fifth Circuit to hold that the government has *carte blanche* to ban political speech near polling places. By contrast, the Fourth and Seventh Circuits recognize that, regardless of location, a total ban on all speech the government deems "political," without any limiting principle, violates the First Amendment's overbreadth doctrine. The reasoning of those decisions would plainly invalidate the political apparel ban here. Moreover, the Oregon Court of Appeals and United States District Court for the District of Arizona have invalidated nearly identical laws as inconsistent with voters' free speech rights.

Resolution of the question presented is a matter of tremendous nationwide importance. Nine other states have nearly identical political apparel bans, *see infra* n.10, and Respondents candidly acknowledge that every state in the Union has created "speech-free zones."

"Speech-free zones" cannot be reconciled with the First Amendment's Free Speech Clause. Although this Court has permitted *campaign*-free zones that prohibit campaign materials and active solicitation, *see Burson*, 504 U.S. at 193-94, it has never endorsed a ban on all political speech. Instead, under this

---

[1] EIW was a joint project of three nonprofits: Minnesota Voters Alliance, Minnesota Majority, and North Star Tea Party Patriots. It is now defunct.

Court's precedents, a "virtual First Amendment Free Zone" in any forum, public or nonpublic, plainly violates the First Amendment. *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

A. Factual Background

Minnesota Election Code Chapter 211B prescribes a set of "Fair Campaign Practices," such as disclaimers on campaign literature, Minn. Stat. § 211B.04, and limits on corporate political contributions, Minn. Stat. § 211B.15. Section 211B.11, entitled "Election day prohibitions," bans various activities "near polling places." As relevant here, the third sentence of the statute provides that "[a] political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." *Id.*, subd. 1. Voters who violate this law are subject to the criminal penalties assessed for a petty misdemeanor, Minn. Stat. § 211B.11, subd. 4, and civil penalties of up to $5,000. Minn. Stat. § 211B.35, subd. 2(d).

Because the text of the statute itself does not define "political," Minnesota election officials, including the Secretary of State, the Ramsey County Election Manager, and the Hennepin County Election Manager, distributed an Election Day Policy in 2010 to help election judges make this determination. App. I. The Policy bans not only campaign-related material that advocates for the election of a candidate or the passage of a ballot initiative, but also "[i]ssue oriented material designed to influence and impact voting (including specifically the 'Please I.D. Me' buttons)" and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.Org, and so on)." App. I-1–I-2. Election

judges enforcing the Policy, including Petitioner Susan Jeffers, were instructed to allow perceived violators to vote, but also to record their names and addresses for potential prosecution. App. I-2–I-3.

Petitioner Andrew Cilek is a registered voter and Executive Director of the Minnesota Voters Alliance, a 501(c)(4) organization that seeks better government through election reforms. App. D-2, E-2–E-3. Just before the November 2010 election, Minnesota Voters Alliance joined forces with North Star Tea Party Patriots and Minnesota Majority to form Election Integrity Watch (EIW), "a grass roots effort to protect election integrity." App. E-16. None of these 501(c)(4) organizations "endorse[d] a candidate or ballot issue in the November 2010 Election." App. D-2, E-2–E-3. EIW produced a button that stated "Please I.D. Me" and included an image of a human eye, along with EIW's telephone number and website address. App. D-2.

During the November 2010 election, Cilek entered his polling place in Hennepin County wearing a "Please I.D. Me" button and a t-shirt made by the North Star Tea Party Patriots. The t-shirt featured a relatively small Tea Party logo alongside the shirt's primary message, "Don't Tread on Me," and an image of the Gadsden Flag. App. H-1 (exhibit of prohibited Tea Party shirts). An election worker twice refused to allow Cilek to vote because these items are prohibited by Minnesota Statute Section 211B.11. *See* App. E-7.

B. Procedural History

Shortly after the November 2010 election, Petitioners filed their First Amended Complaint, alleging that Minnesota Statute Section 211B.11, both

on its face and as-applied to Petitioners, violated the First Amendment. As relevant here, Petitioners objected that the ban on all "political" apparel, including Tea Party t-shirts and "Please I.D. Me" buttons, was substantially overbroad under the First Amendment.[2] Petitioners sought declaratory and injunctive relief against various state officials who prevented eligible voters from wearing buttons or clothing that did not endorse candidates or ballot questions in the polling place on Election Day. App. A-4–A-5.

The district court dismissed the case. The court acknowledged that the organizational plaintiffs, such as the North Star Tea Party Patriots and Election Integrity Watch, "do not endorse candidates" App. E-3. It also noted that with respect to the "Please I.D. Me" buttons, "there was no issue relating to voter identification on the November 2, 2010 ballot." App. E-3–E-4. Yet the district court, citing this Court's decision in *Burson v. Freeman* and the D.C. Circuit's decision in *Marlin v. D.C. Bd. of Election & Ethics*, 236 F.3d 716 (D.C. Cir. 2001), upheld Minnesota's political apparel ban. App. E-11–E-14, E-16–E-18, E-22–E-24, E-29. Addressing Petitioners' facial overbreadth argument, the court, relying on *Marlin*, concluded that a ban on apparel "expressing political ideology or beliefs, even those unrelated to a candidate or a ballot question," falls "within the [statute's] legitimate sweep." App. E-29.

---

[2] Besides Cilek's Gadsden Flag shirt, many other t-shirts were banned under Minnesota Statute Section 211B.11, including shirts with slogans such as "liberty," "Tea Party Patriots," or a picture of a Tea Party shield. *See* App. B-24–B-25.

On appeal, the government embraced the State's broad ban on "political" apparel. Dispelling any notion that Minnesota's ban was limited to the insignia at issue in this case, the government conceded that the statute also reaches the apparel of other organizations, such as the Chamber of Commerce and the AFL-CIO. Oral Argument at 19:48, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125).[3]

In a split decision, the Eighth Circuit upheld the ban against Petitioners' facial claim.[4] App. D. Relying on *Burson* and decisions of the D.C. Circuit, Fifth Circuit, and Eleventh Circuit, the panel held that even though the apparel did not belong to a "political party" or "endorse[] a candidate or ballot issue," a blanket ban on such apparel was nonetheless a constitutional means to further the government's interest in maintaining "peace, order, and decorum" at the polling place. App. D-2, D-8 (internal quotations omitted). Indeed, the panel suggested that even a "total ban on politicking," including "buttons and T-Shirts" within a 600-foot radius of the polling place would pose no constitutional problem. App. D-10. (citing *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993)).

Judge Shepherd, dissenting in relevant part, objected to the majority's sweeping conclusion that a categorical ban on all political insignia is "reasonable in light of the need to maintain 'peace, order and decorum,' to 'protect[ ] voters from confusion and

---

[3] http://media-oa.ca8.uscourts.gov/OAaudio/2012/2/112125.MP3.

[4] The Eighth Circuit Court reversed the district court's order dismissing the Petitioners' as-applied claim and remanded that claim to the district court. App. D-11–D-12.

undue influence,' and to 'preserv[e] the integrity of its election process' in the polling place." App. D-15 (alterations in original). He explained that *Burson* does not justify a ban on *all* political insignia in the polling place because this Court explicitly limited its holding to political insignia that endorsed either a candidate or a ballot issue in the election. App. D-16–D-17 (noting that the law in *Burson* banned only "the display of *campaign* posters, signs, or other *campaign* materials, distribution of *campaign* materials, and the solicitation of votes for or against any person or political party or position"). Finally, Judge Shepherd was considerably less sanguine about the implications of the panel's decision, observing that he simply could "not accept" the government's insistence that "the presence of a passive and peaceful voter who happens to wear a shirt displaying" merely the name of an organization, such as "'American Legion,' 'Veterans of Foreign Wars,' 'AFL-CIO,' 'NRA,' 'NAACP,' or the logo of one of these organizations (all of which have actively participated in the political process) somehow causes a disruption in the polling place or confuses or unduly influences voters." App. D-18 n.7.

Petitioners filed a petition for a writ of certiorari, arguing that the Minnesota statute is overbroad and has the effect of chilling protected speech. Petition for Writ of Certiorari, *Minnesota Majority v. Mansky*, 134 S. Ct. 824 (2013) (No. 13-185). After this Court called for a response, the State opposed certiorari, principally on the ground that "review of Petitioners' facial challenge [was] not appropriate because Petitioners' as-applied challenge [was] still pending." Opposition to Petition for Writ of Certiorari at 1, 9. The Court denied certiorari and the case proceeded in district court. On February 28, 2017, the Eighth

Circuit rejected Petitioners' as-applied challenge. This Petition, limited to the facial overbreadth claim, follows.

REASONS FOR GRANTING THE PETITION

This case presents the question of whether government may impose a blanket ban of all speech that it deems "political." In conflict with the reasoning of the Fourth Circuit and the Seventh Circuit; and the holdings of the Oregon Court of Appeals and the United States District Court for the District of Arizona; but in agreement with the D.C. Circuit and the Fifth Circuit, the Eighth Circuit held that speech-free zones raise no free speech problems.

The decision below should not stand. In *Burson v. Freeman*, this Court upheld a Tennessee statute that banned the "solicitation of votes" and "*campaign* materials" within 100 feet of the polling place. *Burson*, 504 U.S. at 193-94 (emphasis added). Although the Eighth Circuit joined the Fifth and D.C. Circuits in extending this Court's decision in *Burson* to ban passive political speech unrelated to candidates or ballot initiatives, *Burson* plainly does not endorse a categorical ban on *all* types of "political" speech.

Instead, a law is unconstitutionally overbroad if it punishes a substantial amount of protected free speech, judged in relation to the amount of speech that the government may legitimately curtail. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). The decision below departs from this Court's precedent on First Amendment overbreadth and effectively chills the free speech rights of millions of voters across the country by threatening criminal prosecution or civil penalties for voters who wear logoed t-shirts, caps, jackets,

buttons, and other apparel in state-declared speech-free zones.

I

THERE IS DEEP TENSION AMONG THE LOWER COURTS ON THE QUESTION OF WHETHER THE GOVERNMENT MAY IMPOSE A BLANKET BAN ON ALL POLITICAL SPEECH

The lower courts disagree on the issue presented: Does the First Amendment's Free Speech Clause permit the government to create categorical speech-free zones at the polling place?[5] In *Burson v. Freeman*, this Court endorsed a ban on campaign-related speech at the polling place. *Burson*, 504 U.S. at 193. Yet, although *Burson* upheld only some election-specific limits on speech, some states have read the decision as an unqualified mandate to ban all speech under the guise of regulating elections. This Court's guidance on this matter would thus clarify the bounds between election law and the First Amendment for voters nationwide.

A. The D.C. Circuit and the Fifth Circuit Share the Eighth Circuit's Expansive View of the Government's Power to Ban Speech

The Eighth Circuit expressly relied on the D.C. Circuit's decision in *Marlin v. D.C. Bd. of Elections and Ethics*, 236 F.3d 716, to uphold Minnesota's political apparel ban. In *Marlin*, the D.C. Circuit considered a District of Columbia regulation

[5] The First Amendment has been incorporated against the states by Section 5 of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

providing that "no partisan or nonpartisan political activity . . . shall be permitted in, on, or within a reasonable distance outside the building used as a polling or vote counting place." *Id.* at 718. Like Minnesota's political apparel ban, the District's election regulation in *Marlin* defined "political activity" to "include without limitation, any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." *Id.* (citing 3 D.C.M.R. § 708.8).

The D.C. Circuit upheld the statute, reasoning that because a polling place was a nonpublic forum, it need not be "available for general public discourse *of any sort*." *Id.* at 719 (emphasis added). Relying on *Burson*, the court reasoned that a speech ban comports with the First Amendment as long as "the only expressive activity" it allows is "carried out privately—by secret ballot in a restricted space." *Id.* The D.C. Circuit hastily concluded that the District's ban was a reasonable means by which to further governmental interests in orderly voting, and in boilerplate fashion, recited that even if "narrower regulations might be as effective or more so," that does "not invalidate the means the District has chosen." *Id.* at 720.[6]

The Fifth Circuit also countenances speech-free zones near polling places. In *Schirmer v. Edwards*,

---

[6] *Marlin* involved an as-applied challenge, but the D.C. Circuit found no constitutionally significant distinction between as-applied and facial challenges in analyzing whether a political speech ban is reasonable. *Marlin*, 236 F.3d at 720 n.5. The *Marlin* court's reasoning would uphold the Minnesota political apparel ban in this case. *Id.* at 719 (government is permitted to create forum in which the "only expressive activity" is voting).

2 F.3d 117 (5th Cir. 1993), the court upheld a Louisiana statute that imposed a "total ban on politicking," including "buttons and T-Shirts," within a 600-foot radius of the polling place. *Id.* at 122-23 (citing Louisiana statute that makes it illegal to "place or display political signs, pictures, or other forms of political advertising"). The *Schirmer* plaintiffs alleged that the Louisiana statute was facially overbroad because it banned both political speech concerning individuals not on the ballot and passive political speech such as buttons and t-shirts that carried no campaign-related message. *Id.* at 122. Although the Fifth Circuit recognized that the ban "singles out and sanctions public discourse on politics—an area deep within the confines of the First Amendment," *id.* at 120, it believed that voters must "compromise" their First Amendment rights to free speech so that the State can create "an environment free from intimidation, harassment, confusion, obstruction, and undue influence." *Id.* at 119.

Like the D.C. Circuit, the Fifth Circuit relied on *Burson* in upholding the Louisiana ban. The court noted that "the only known reference [in *Burson*] with regard to proscribing non-ballot campaigning around polling areas" came from isolated statements in Justice Stevens's dissent. Yet the Fifth Circuit believed that those statements suggested that this Court "would be more comfortable with an across the board ban on politicking in the campaign-free zone" to prevent "on-the-spot enforcement decisions about what was proscribed by the statute" and the need for "increased security . . . to weed out those engaged in ballot related speech." *Id.* at 123. In all, the Fifth Circuit concluded that a "total ban on politicking" was the "most defensible position" the State could adopt,

and one that "demonstrate[d] a reasonable compromise" between free speech rights and the State's interests in speech-free zones. *Id.* at 123-24.[7]

B. The Fourth Circuit and the Seventh Circuit Hold That a Complete Ban on Political Speech Cannot Be Reconciled with the First Amendment

In tension with the reasoning of decisions by the D.C. Circuit, Fifth Circuit, and Eighth Circuit, two circuit courts hold that a broad ban on political speech cannot be reconciled with the First Amendment. In invalidating state electioneering statutes, the Fourth and Seventh Circuits relied on this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), just as seven members of the Court did in *Burson*. *See Burson*, 504 U.S. at 206-07 (plurality opinion); *id.* at 217 (Stevens, J., dissenting).

The Fourth Circuit held that an unlimited ban on political speech was substantially overbroad under the First Amendment. In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the court invalidated two provisions of the North Carolina election code that subjected groups which neither supported nor opposed candidates for office to an intrusive set of reporting requirements. *Id.* at 712-13. The Fourth Circuit held that the statute was overbroad because it "blanket[ed] with uncertainty" the entire field of campaign politics, thereby

---

[7] The Eighth Circuit also suggested that the Eleventh Circuit's decision in *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1218-19 (11th Cir. 2009), endorsed the outcome below. While *Browning* may be distinguishable on the ground that it involved solicitation, if the Eighth Circuit is correct, it would only add to the tension among the lower courts.

"compel[ling] the speaker to hedge and trim." *Id.* at 713 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). It added that a law so severely burdening political speech was "unacceptable in an area of such crucial import to our representative democracy." *Id.* The same can be said of Minnesota's political apparel ban.

The Fourth Circuit also examined a statute that prohibited corporate expenditures or contributions for a "political purpose." *Id.* The court noted that although this Court permits "[r]egulation of corporate political activity," that jurisprudence reflects concern about "the potential for unfair deployment of wealth for political purposes," a concern that is "not omnipresent." *Id.* Rather than simply "reiterating [a] general concern," *id.*, the Fourth Circuit conducted a more nuanced analysis and held that by making "no exception for nonprofits that present a minimal risk of distorting the political process," the statute was substantially overbroad under the First Amendment. *Id.* at 714.

The Seventh Circuit reached a similar result in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). In that case, Wisconsin election laws defined "political purpose" as the "*purpose of influencing the election or nomination*" of any individual, and a "political committee" as "every committee which is formed primarily to *influence elections*." *Id.* at 833. The court regarded the "influence an election" language as the kind of "broad and imprecise language" that "risk[s] chilling" protected speech, and noted that a narrowing construction of the statute was required to cure

"persistent [ ] overbreadth" and conform the law with the First Amendment. *Id.*

The circuit courts are thus in tension on an issue of nationwide importance. Because the cases above lack any constitutionally significant difference, the lower courts cannot "create harmony" on the question presented. *See Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010).

C. The Oregon Court of Appeals and the United States District Court for the District of Arizona Have Invalidated Bans on Passive Political Speech at the Polling Place

Two other courts have invalidated statutes virtually identical to Minnesota Statute Section 211B.11 on grounds that such statutes are inconsistent with the right to free speech. In *Reed v. Purcell*, No. 10-CV-2324, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), a federal district court in Arizona entered a temporary restraining order enjoining Arizona's political apparel ban. That ban specified that "no political or electioneering materials may be displayed within" seventy-five feet of a polling place. *Id.* at *1 (citing Ariz. Rev. Stat. § 16-515). Mark Reed, an Arizona voter, sought to vote in the State's 2010 election while wearing a t-shirt that stated "Tea Party: Principles Not Politicians," with the insignia "Don't Tread on Me." *Id.* An Arizona Elections Director instructed poll workers to require anyone wearing a "Tea Party" t-shirt to remove or cover the shirt before voting, despite the fact that the "Tea Party" was not recognized as a political party in Arizona and did not appear on the ballot. *Id.*

Reed moved for a temporary restraining order, alleging that Arizona's political apparel law "infringe[d] on [his] First Amendment rights by prohibiting [him] from voting while wearing a 'tea party' t-shirt." *Id.* Although the court did not explicitly enjoin the law on overbreadth grounds, it plainly conducted the same analysis that courts conduct in overbreadth cases. *See id.* at *4. For instance, the court was troubled by enforcement of Arizona's political apparel ban against voters who wear shirts that make "no mention of express support or opposition of any candidate on the ballot, party on the ballot, or proposition on the ballot." *Id.* The court prohibited the State from enforcing the statute because it could not "derive any clear standard from [ ] a case-by-case adjudication" of which shirts could be banned as "political" apparel. *Id.* Finally, the court expressed concern that the broad discretion given to election officials under Arizona's political apparel ban "chills protected First Amendment expression." *Id.* After all, "[m]essages pertinent to the election can be found everywhere if one looks hard enough," and even "a red and blue t-shirt may be prohibited because of the association of the color with the two major [political] parties." *Id.* The court granted the plaintiff's motion for a temporary restraining order. *See id.* at *5-6. Petitioners in this case could have worn a Tea Party t-shirt to the polling place if they lived in Arizona. The only reason they could not do so in Minnesota is because they lived on the other side of the conflict.

The Oregon Court of Appeals reached a similar result in *Picray v. Secretary of State*, 140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997). There, the court overturned a penalty imposed

under an Oregon statute that prohibited voters from wearing "political badge(s), button(s) or other insignia in polling places." *Id.* at 594 (citing Or. Rev. Stat. § 260.695(4)). The petitioner appeared at a polling place wearing two buttons, each approximately two inches in diameter, that criticized the Oregon Citizens Alliance, a major proponent of a ballot initiative. *Id.* Petitioner appealed after the State levied a $100 fine against him for violating Oregon's political apparel ban. *Id.* The Oregon court was asked to reconcile the Oregon Constitution's protection for free expression, *see* Or. Const. art. I, § 8,[8] and the State's role in regulating elections, just as federal courts must reconcile the First Amendment's protections for free speech and a state's role in regulating elections.

In reversing the fine, the court of appeals noted that the mere passive display of a political button or badge in a polling place constitutes "the silent expression of political opinion" and does not coerce or unduly influence anyone. *Picray*, 140 Or. App. at 600. While acknowledging the legislative prerogative in protecting voters from "undue influence" and "improper conduct," the court noted that both "are terms of constitutional limitation" and that the legislature cannot claim "absolute authority to prohibit any and all conduct relating to elections." *Id.* at 601. Referencing the historical approval of passive political speech, from "medalets, thread boxes, and bandanas promoting Andrew Jackson or John Quincy Adams in 1828 through [modern buttons and] bumper stickers[,]" the court held that the Oregon political apparel ban exceeded this constitutional limitation.

---

[8] The Oregon Constitution provides that "No law shall be passed restraining the free expression of opinion . . . ."

Id. at 601 n.12 (citing Roger A. Fischer, *Tippecanoe and Trinkets Too* vii-viii (1988)). Petitioners in this case plainly could have voted with their t-shirts and buttons without issue if they had been residents of Oregon, but because they lived in Minnesota they could not.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Laws are overbroad and thus unconstitutional under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). As this Court has explained, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate [ ] only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). If it were otherwise, a series of cases challenging specific applications of a law would result in a "chilling effect . . . on protected speech" during the proceedings. *Jews for Jesus*, 482 U.S. at 576.

"The first step in overbreadth analysis is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). Here, the statute prohibits voters from wearing "political badge[s], political button[s], or other political insignia" at "the polling place on primary or election day." Minn. Stat. § 211B.11. The Election Day Policy clarifies that Minnesota's sweeping ban covers "[i]ssue oriented material designed to influence or impact voting" and

"[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." The government conceded that the statute reaches apparel displaying logos from groups like the Chamber of Commerce and the AFL-CIO. And Judge Shepherd's dissent below (unanswered by either the panel or the Respondents) observed that the statute would apply to badges, buttons, or other insignia of the American Legion, Veterans of Foreign Wars, AFL-CIO, National Rifle Association, and the NAACP. App. D-18 n.7.[9]

As a result, Minnesota Statute Section 211B.11 creates a zone in which "the only expressive activity" permitted is "carried out privately—by secret ballot in a restricted space." *Marlin*, 236 F.3d at 719. Or, in this Court's parlance, a "virtual First Amendment Free Zone." *Jews for Jesus*, 482 U.S. at 574 (internal quotation marks omitted). "[B]ecause no conceivable governmental interest" could justify "such an absolute prohibition on speech," *id.* at 575, this Court may invalidate Minnesota's sweeping speech ban on overbreadth grounds regardless of whether the forum is public or nonpublic. *See id.* at 573-74.

Even if a polling place is a nonpublic forum, Minnesota Statute Section 211B.11 is still unconstitutionally overbroad. Speech restrictions in a nonpublic forum must be "reasonable in light of the

---

[9] Respondents have never argued that there is some "principled manner by which to narrow the plainly overbroad language." *See Florida Comm. for Liability Reform v. McMillan*, 682 F. Supp. 1536, 1540-41 (M.D. Fla. 1988) (enjoining a statute that forbids "soliciting or attempting to solicit any" opinion "for any purpose" despite defendants' contention that taking the plain text at face value would be "silly").

purpose which the forum at issue serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Thus, Minnesota Statute Section 211B.11 must be "consistent with" a "legitimate [governmental] interest[]" or ruled unconstitutional. *Id*. at 50. Throughout this litigation, Respondents have produced no more than conclusory statements that a ban on all political badges, buttons, and insignia furthers Minnesota's interest in conducting orderly elections.

What is more, the statute often requires election officials to rely on their own subjective judgments about whether certain apparel falls within the ambit of the law's ban on "political" speech. *See* Oral Arg. at 19:48 (No. 11-2125) (government's concessions that the statute bans political apparel from groups beyond those explicitly named in the Election Day Policy). Where an election official's subjective view might often diverge from the "objective meaning a third-party may ascribe" to apparel, a court will invalidate a statute—even under the reasonableness standard. *See Byrne v. Rutledge*, 623 F.3d 46, 59-61 (2d Cir. 2010) (invalidating State's denial of motorist's requested vanity license plate). If courts do not hesitate to protect vanity plates from unreasonable speech restrictions, then surely they should protect one's right to engage in political discourse—"the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

This Court's decision in *Burson v. Freeman* does not dictate otherwise. There, this Court did not retreat from the heightened protection that the First Amendment affords political speech. Instead, it reiterated that "[t]he First Amendment has its fullest

and most urgent application to" political speech. 504 U.S. at 196 (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). The decision in *Burson*, upholding a ban on campaign materials, was animated by concerns of election fraud and voter intimidation; concerns that do not exist with the non-campaign apparel at issue here. *See id.* at 201-06 (describing early problems with voter fraud and intimidation in the polling place). Moreover, the *Burson* plurality recognized that, at some point, "government regulation . . . could effectively become an impermissible burden" on speech. *Id.* at 210. Minnesota's legislature may not simply point to *Burson* to extend the sphere of its apparel ban, allowing the state to draw all apparel it deems political "into its impetuous vortex." The Federalist No. 48, at 333 (J. Madison) (J. Cooke ed., 1961).

In practice, enforcement of bans that do not further a state's interest in orderly elections comes at the expense of laws that do. Lower courts invalidating speech restrictions have pointed to many state laws that actually further an interest in orderly elections, such as those that empower the deputy sheriff to maintain "good order" at the polls, or prohibit the deprivation of voting rights. *CBS Inc. v. Smith*, 681 F. Supp. 794, 804 (S.D. Fla. 1988) (citing Florida statutes). States could also achieve the goal of preventing voter harassment by arranging polling places with separate entrances and exits and limiting the ability of people to approach voters on their way into the polls. *See Daily Herald Co. v. Munro*, 838 F.2d 380, 385 (9th Cir. 1988). These examples show that states interested in conducting orderly elections may focus their resources on alternatives that actually

further that interest, rather than broadly suppressing speech.

III

THIS CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO ADDRESS A RECURRING ISSUE CONCERNING CORE FIRST AMENDMENT RIGHTS

The issue presented is important, widespread, and recurring. At least nine other states have taken *Burson* as an unqualified mandate to enact broad political apparel bans at the polling place. *See* Kimberly J. Tucker, *"You Can't Wear That to Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. Marshall L. Rev. 61, 63 (2006).[10] Minnesota's political apparel ban covers an inordinate amount of speech, from Tea Party apparel to apparel with logos featuring the American Legion, NAACP, the National Rifle Association, and so on. App. D-18 n.7. Political apparel bans like the one here would have prevented voters from wearing any one of the tens of thousands of political artifacts featured in every presidential election since 1828. *See Picray*, 14 Or. App. at 601 n.12. Today, the same bans may reach common statements such as "God Bless America," "a shirt displaying the name of a religious school," or red and blue shirts, which may be construed to connote support for the Republican or Democratic Party. James J. Woodruff II, *Freedom of Speech & Election*

---

[10] *See* Del. Code Ann. tit. 15, § 4942; Kan. Stat. Ann. § 25-2430(a); Mont. Code Ann. § 13-35-211(1); N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104(1); S.C. Code Ann. § 7-25-180(B); Tenn. Code Ann. § 2-7-111(b)(1); Tex. Elec. Code Ann. § 61.010(a); Vt. Stat. Ann. tit. 17, § 2508(a).

Day at the Polls: Thou Doth Protest Too Much, 65 Mercer L. Rev. 331, 346 nn.120-122 (2014). In 2012, election workers in Colorado and Florida flagged down Massachusetts Institute of Technology students for wearing "MIT" shirts, because the workers had mistakenly thought the shirts evinced support for political candidate Mitt Romney. *See MIT Voters Flagged at Polls for Suspected Electioneering, Explain They're Not Shilling for Mitt Romney*, Huffington Post, Nov. 6, 2012.[11] In any event, the primary danger presented by an overbroad statute is not the potentially selective enforcement, but the overriding chilling effect that inhibits voters from exercising their First Amendment rights of expression. *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985).[12]

---

[11] http://www.huffingtonpost.com/2012/11/06/mit-voters-flagged-at-polls-for-suspected-electioneeringexplain-not-shilling-for-romney_n_2084332.html.

[12] The Eighth Circuit's disposition of Petitioners' as-applied challenge only highlights the problem with the statute's facial overbreadth. After all, when a statute sweeps more broadly than is warranted by the evil at which it aims, "a concern arises that the legislature . . . has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991); *see also Heffron v. Int'l Soc'y for Krishna Consciousness Inc.*, 452 U.S. 640, 649 (1981) (discussing how some rules that are open for arbitrary application and inherently inconsistent with a valid time, place, and manner regulation are unconstitutional because such discretion has the potential for becoming a means of suppressing a particular point of view). If Minnesota officials decided to enforce the political apparel ban against voters who wore Tea Party shirts, but not against voters who wore AFL-CIO shirts, their actions would surely have violated the First Amendment's prohibition on viewpoint discrimination. *See Reed*, 2010 WL 4394289, at *1 ("[T]here is no viewpoint neutral

This case presents an excellent vehicle for this Court to resolve the conflict between a state's creation of a speech-free zone and a voter's right to free speech. To aid this Court in its deliberations, Minnesota's written Election Day Policy defines "political speech," and the State's concessions provide the Court with concrete evidence of the statute's overbreadth. Respondents vigorously defended the Minnesota statute through multiple stages of litigation and have candidly confirmed the statute's expansive scope by acknowledging that the statute applies not just to the Tea Party, Election Integrity Watch, and MoveOn.Org, but also to the Chamber of Commerce and AFL-CIO. Oral Arg. at 19:48 (No. 11-2125). And although Judge Shepherd's separate opinion in 2013 notified Respondents that Minnesota's political apparel ban could apply to all sorts of groups (American Legion, NAACP, and so on), the State conceded at a recent oral argument that its policy remains unchanged. Oral Arg. at 23:16, *Minnesota Majority v. Mansky*, 849 F.3d 749 (8th Cir. 2017) (No. 15-1682).[13]

Finally, the procedural posture of this case is ideal for this Court's review. Petitioners' first petition for certiorari to this Court was filed in 2013, when their as-applied claim was still pending before the district court. Although litigants are permitted to raise both as-applied and overbreadth challenges in First Amendment cases, "the lawfulness of the particular

---

principle to distinguish between 'tea party' apparel and AFL-CIO apparel."). Now that the lower courts have rejected any suggestion of selective enforcement, *see* App. A-6–A-7, this Court should invalidate the ban as substantially overbroad under the First Amendment.

[13] http://media-oa.ca8.uscourts.gov/OAaudio/2016/10/151682.mp3.

application of the law should ordinarily be decided first." *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989). Perhaps for that reason, Respondents previously opposed certiorari on the basis that "review of Petitioners' facial challenge [was] not appropriate because Petitioners' as-applied challenge [was] still pending." Opposition to Petition for Writ of Certiorari at 1, 9, *Minnesota Majority v. Mansky*, 134 S. Ct. 824 (2013) (No. 13-185). The Eighth Circuit has now resolved Petitioners' as-applied challenge and the interlocutory posture no longer presents a barrier to this Court's review. *See Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in the denial of certiorari).

CONCLUSION

This Court should grant the Petition.

DATED: May 2017.

Respectfully submitted,

ERICK G. KAARDAL
Mohrman, Kaardal & Erickson
150 South Fifth Street
Suite 3100
Minneapolis, MN 55402
Telephone: (612) 465-0927
Email: kaardal@mklaw.com

WENCONG FA*
**Counsel of Record*
DEBORAH J. LA FETRA
OLIVER J. DUNFORD
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
E-mail: wf@pacificlegal.org

Counsel for Petitioners