No. 16-1435

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AND ASSOCIATION FOR GOVERNMENT ACCOUNTABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 3, 2017

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2, the American Civil Rights Union and the Association for Government Accountability move for leave to file the accompanying brief as *amici curiae* in support of the Petitioners Minnesota Voters Alliance, Andrew E. Cilek, and Susan Jeffers. Petitioners have consented to the filing of this *amicus* brief. Respondent Secretary of State has also consented to this filing. However, the other Respondent has withheld consent.

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. The ACRU Policy Board sets the policy priorities of the organization, and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel, William Bradford Reynolds, the former Assistant Attorney General for the Civil Rights Division; J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State; and Commissioner Hans von Spakovsky, formerly of the Federal Election Commission. Ambassador Blackwell and Commissioner von Spakovsky are also Commissioners on the Presidential Advisory Commission on Election Integrity recently created by President Trump in Executive Order 13799.

The ACRU has participated as an *amicus* in numerous free speech cases in the context of elections, including *Citizens United v. FEC*, 558 U.S. 310 (2010). The ACRU also litigates a number of election law cases, including *American Civil Rights Union v. Philadelphia City Commissioners*, currently under advisement at the U.S. Court of Appeals for the Third Circuit. This Court would benefit from the ACRU's perspective and expertise in this case.

The Association for Government Accountability ("AGA") is a state-wide Minnesota association of citizens and taxpayers concerned about the accountability of government under the law. AGA seeks to promote the rule of law and does so by, among other things, filing and participating in lawsuits involving the government where it has strayed from the rule of law.

Amici agree with Petitioners that this case warrants review because it presents an important and recurring question of constitutional law. In addition, the Eighth Circuit's decision is in tension with the decisions of other federal and state courts. Indeed, in *amici*'s view, it conflicts with decisions of the Sixth Circuit. *Amici* will not repeat Petitioners' arguments. Instead, they will address the applicability and continued viability of this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), which is the foundation for the analysis of the Eighth Circuit majority.

Amici believe that the arguments set forth in its brief will assist the Court in resolving the issues presented by the petition. *Amici* have no direct interest, financial or otherwise, in the outcome of the case. Because of their lack of a direct interest, *amici*

believe that they can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, *amici* respectfully request that this Court grant leave to participate as *amicus curiae* and to file the accompanying *amicus curiae* brief in support of Petitioners Minnesota Voters Alliance, Andrew E. Cilek, and Susan Jeffers.

Respectfully submitted,

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July 3, 2017

QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. The ACRU Policy Board sets the policy priorities of the organization, and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel, William Bradford Reynolds, the former Assistant Attorney General for the Civil Rights Division; J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and former Ohio Secretary of State; and Commissioner Hans von Spakovsky, formerly of the Federal Election Commission. Ambassador Blackwell and Commissioner von Spakovsky also currently serve as Commissioners on the Presidential Advisory Commission on Election Integrity recently created by President Trump in Executive Order 13799.

The ACRU has participated as *amicus curiae* in numerous free speech cases in the context of elections,

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[1] No counsel for a party has authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37. All parties were notified of *amici*'s intention to file this brief at least 10 days prior to the filing of this brief. Petitioners have consented to the filing of this brief with a letter on file with the Clerk of Court. Respondent Secretary of State Steve Simon granted consent, but other Respondents withheld consent. A motion for leave to file accompanies this brief.

including *Citizens United v. FEC*, 558 U.S. 310 (2010). The ACRU also litigates a number of election law cases, including *American Civil Rights Union v. Philadelphia City Commissioners*, currently under advisement at the U.S. Court of Appeals for the Third Circuit. This Court would benefit from the ACRU's perspective and expertise in this case.

The Association for Government Accountability (AGA) is a state-wide Minnesota association of citizens and taxpayers concerned about the accountability of government under the law. AGA seeks to promote the rule of law and does so by, among other things, filing and participating in lawsuits involving the government where it has strayed from the rule of law. In this regard, AGA sponsored litigation that resulted in an injunction that blocked a Minnesota county's illegally authorized safe driving classes, and it has filed a mandamus petition in Minnesota state court seeking to compel the State to pay legislators their constitutionally authorized salaries notwithstanding the Governor's petulant line-item veto of the appropriation.

In this brief, *amici* address both the applicability and continued viability of this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992), and also highlight a circuit split on what *Burson* requires. This case offers the Court an opportunity to make it clear that *Burson* does not reach as far as the lower courts have taken it. Instead, *Burson* should be limited to campaign-related activity, not all activity deemed "political" by States or election officials. Moreover, any of the discussion whether public ways and sidewalks are public fora in *Burson* should be reconsidered in the

light of the treatment of that question in *McCullen v. Coakley*, 134 S. Ct. 2513 (2014). Finally, the standard of review should be clarified: Is it *Burson*'s "exacting" scrutiny, which was no so exacting in fact, or something else as in *McCullen*?

SUMMARY OF ARGUMENT

This case offers this Court an opportunity to resolve a circuit split on the meaning of this Court's precedent in *Burson v. Freeman*, 504 U.S. 191 (1992), and possibly refine or reconsider aspects of *Burson*.

In addition to the tensions between the Eighth Circuit's decision and the decisions of other federal appellate courts discussed by Petitioner, the decision below created a clear split with the Sixth Circuit. The Sixth Circuit twice invalidated a buffer zone on overbreadth grounds, holding that the challenged statute failed under *Burson*. The Sixth Circuit noted this Court's subsequent precedents that must inform an inferior court's examination of buffer zones, precedents not included in the Eighth Circuit's analysis. The Sixth Circuit also held that the State bears the burden under *Burson*, not the challenger. Moreoever, while the State need not present the "strong basis in evidence" generally required by strict scrutiny, the State nonetheless has a "relaxed" evidentiary standard it still must meet to carry its burden.

Moreover, this case presents this Court with an opportunity to revisit and cabin the reach of the plurality's decision in *Burson v. Freeman*. *Amic*i agree that, while campaign speech in polling places can constitutionally be limited, the same should not be the

case for merely "political" speech or attire. The plurality's approval of a 100-foot bubble zone around polling places should be revisited in the light of this Court's decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), and its invalidation of a 35-foot bubble around abortion facilities. Finally, the plurality's review of the content-based restrictions on speech in *Burson* should be reexamined in the light of the more rigorous scrutiny applied to restrictions on speech in *McCullen* and in *Boos v. Barry*, 485 U.S. 312 (1988), and by the Sixth Circuit.

ARGUMENT

I. Introduction

This case arises from a challenge to a Minnesota Law and related policy that prohibit the wearing of certain clothing and buttons in polling places and within 100 feet of them. While Petitioners brought both facial and as-applied challenges below, only the facial challenge is presented by the Petition.

In rejecting Petitioners' facial challenge to the Minnesota law and the related policy, the U.S. Court of Appeals for the Eighth Circuit relied on *Burson v. Freeman*, 504 U.S. 191 (1992). It reasoned that *Burson* "defeats a facial attack" on the Minnesota law insofar as it spoke to areas outside the polling place. *Minnesota Majority v. Mansky*, 708 F. 3d 1051, 1057 (8th Cir. 2013). The court also explained, "Because a statute restricting speech related to a political campaign outside the polling place survives strict scrutiny [under *Burson*], the Minnesota statute, to the extent it restricts speech about a political campaign inside a polling place, is 'reasonable in light of the purpose

which the forum at issue serves.'" *Id*. (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). Accordingly, the Eighth Circuit's reading of *Burson* controlled its analysis.

In *Burson*, this Court rejected a challenge to a Tennessee law that prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" in polling places or within 100 feet of their entrances. Tenn. Code Ann. § 2-7-111(b) (Supp. 1991). The treasurer of a candidate for city council in Metropolitan Nashville-Davidson County complained that, on its face, the Tennessee law's restriction of her ability to communicate with voters violated, among other things, the First and Fourteenth Amendments to the United States Constitution.

The Court rejected that claim. It reversed the decision of the Tennessee Supreme Court, which had upheld the law as it applied to polling places, but not as to the 100-foot bubble around them. Significantly, that bubble "sometimes encompasse[d] streets and sidewalks adjacent to the polling places." *Burson*, 504 U.S. at 196 (plurality), n. 2; *see also id*. at 214 (Scalia, J., concurring in the judgment).

The Court's decision is a fractured one, with a plurality opinion, an opinion by Justice Scalia concurring in the judgment, and a dissent by Justice Stevens, joined by Justices O'Connor and Souter.[2]

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[2] Justice Thomas did not participate in the decision.

Justice Blackmun's opinion for the plurality, joined by Chief Justice Rehnquist and Justices White and Kennedy, recognized that the Tennessee law "implicate[d]" political speech in a public forum based on its content. *Id.* at 196 (plurality). Even so, it concluded that Freeman's First Amendment rights had to yield to the "right to cast a ballot in an election free from the taint of intimidation and fraud." *Id*. at 211.[3]

The plurality found that the history of "election reform, both in this country and abroad" showed "that some restricted zone is necessary to serve the States' compelling interest in preventing voter intimidation and election fraud." *Id*. at 199, 206. Accordingly, even though the Tennessee law was a "facially content-based restriction on political speech in a public forum," that speech could still be prohibited. *Id*. at 198. The plurality concluded that the 100-foot boundary falls "on the constitutional side of the line" even as it acknowledged that "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden." *Id*. at 210–11; *see also Packingham v. North Carolina*, No. 15-1194, slip op. at 4 (U.S. June 19, 2017) ("[A] street or park is a quintessential forum for the exercise of free rights.").

Concurring in the judgment only, Justice Scalia relied on the history in expressing the view that "the portions of streets and sidewalks adjacent to polling places are not public forums *at all times*." *Burson*, 504

[3] Justice Kennedy separately concurred, reasoning that the balancing of constitutional interests can be reconciled with the general bar on restricting speech based on its content. *Burson*, 504 U.S. at 213–14 (Kennedy, J., concurring).

U.S. at 216 (Scalia, J., concurring in the judgment) (emphasis in original). As such, he concluded limitations of speech on those streets and sidewalks need only be reasonable and viewpoint-neutral to be sustained.

Dissenting, Justice Stevens, joined by Justices O'Connor and Souter, asserted that Tennessee had failed to satisfy its burden of "demonstrating that its silencing of political expression is necessary and narrowly tailored to serve a compelling state interest." *Id.* at 217 (Stevens, J., dissenting). He observed that the "campaign-free zone" was notable for its "broad antiseptic sweep." *Id*. at 218. In addition, the Tennessee law's wide reach entailed a ban on "[b]umper stickers on parked care and lapel buttons on pedestrians." *Id*. at 219. "The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd." *Id*.

Significantly, Justice Stevens also criticized the plurality's application of "exacting" scrutiny. As he noted, the plurality "decline[d] to take a hard look at whether the state law is in fact 'necessary.'" *Id*. at 225. In addition, the plurality "lighten[ed] the State's burden of proof in showing that a restriction on speech is 'narrowly tailored.'" *Id*. at 226. Third, the plurality "effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff." *Id*.[4] The result of the plurality's solicitude for

[4] As explained in Part II, *infra*, the Sixth Circuit holds that the burden is still on the State under even *Burson*'s version of heightened scrutiny.

the State was to make its scrutiny "neither exacting nor scrutiny." *Id*.

Burson's plurality opinion is sufficiently sui generis that it should not be extended. Indeed, Judge Shepherd, who concurred in part and dissented in part below, did not "agree that *Burson* may be applied to this statute to uphold the restrictions on the wearing of any political insignia in the polling place." *Minnesota Majority*, 708 F. 3d at 1061 (Shepherd, J., concurring in part and dissenting in part). Moreover, this Court in *Packingham* rejected North Carolina's attempt to use *Burson* as an "analogy" for a wide ranging limitation on speech. *Packingham*, No. 15-1194, slip op. at 9.

II. The Sixth Circuit's differing approach to buffer zones shows that this Court's review is needed to resolve the circuit split.

The Sixth Circuit confronted a similar situation in two cases, *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), and *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015), and took a conflicting approach that cannot be reconciled with the Eighth Circuit's decision below. Judge Batchelder authored those decisions, in both of which that court invalidated the challenged buffer zones under *Burson*. The Sixth Circuit's decisions regarding buffer zones create a circuit split with the Eighth Circuit, employing reasoning consistent with Judge Shepherd's dissenting opinion in this case. This Court should grant the Petition to resolve this split among the circuits.

"Buffer-zone laws prohibit political speech around polling places on Election Day." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015). "Laws

that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). This Court held that a State's two compelling interests justifying buffer zones are "preventing voter intimidation and election fraud." *Burson*, 504 U.S. at 206 (plurality). "The Court sought to protect free speech on the one hand, while preventing speech from being used as a means to effectuate fraud or intimidation." *Russell*, 784 F.3d at 1051.

The question in *Burson* was "*how large* a restricted zone is permissible or sufficiently tailored." *Burson*, 504 U.S. at 208. Similarly, the question here is *how broad* a restricted zone is permissible or sufficiently tailored. That is, *how many* species of speech must be restricted to satisfy the State's compelling interests.

In answering that question, central to any judicial inquiry is the principle that the Free Speech Clause is [p]remised on mistrust of government power." *Citizens United*, 558 U.S. at 340. Speech "concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1974). In elections, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361. The Eighth Circuit here failed to follow those instructions from the Court's precedents when considering whether a speech restriction so broad that it forbids overt support for fair and legal elections passes constitutional muster.

"The right against voter intimidation is the right to cast a ballot free from threats or coercion; it is not the

right to cast a vote free from distraction or opposing voices." *Russell*, 784 F.3d at 1051. The voter-ID buttons here need not even be regarded as an opposing voice, because voter ID was not on the ballot. An opposing voice would be a button advocating an opposition-party candidate or an opposing position on a ballot question. The button and T-shirt here are a distraction at worst—and a minimal one at that. There is no intimidation, no threat, and no coercion of any sort whatsoever. It is not encompassed by *Burson*'s holding regarding the extent to which political speech may be banned or restricted.

The Eighth Circuit's decision here is incorrect under any of the opinions that together formed a majority in *Burson*. Even if polling places are nonpublic fora, as Justice Scalia believed, *Burson*, 504 U.S. at 214–16 (Scalia, J., concurring in the judgment), Minnesota's ban on small lapel buttons supporting election-integrity measures such as voter-ID laws would still fail, because such a restriction does nothing to prevent voter fraud or voter intimidation. It is thus unreasonable. But under *Burson*'s public-forum rationale, the fact that a passive button supporting voter ID does not coerce any voter at the polling location makes it clear that the State's censorship regime here does not advance any compelling interests of preventing fraud or intimidation.

"Buffer zones arise from States' attempting to minimize the interference voters face in exercising the franchise." *Russell*, 784 F.3d at 1052. The idea is that intimidation tactics or other coercive influences can impact how the voter actually marks his ballot, thus corrupting his choice of who he votes for. The button

and T-shirt at issue here have no impact on any voter's electoral choice. To the contrary, the button means, "Let's make sure everyone's legal vote for their preferred candidate is legally counted." Such a message has nothing to do with the cases and scholarly authorities this Court considered in determining when to sustain buffer zones. *See Burson*, 504 U.S. at 206–11 (plurality).

Voter-ID buttons are also consistent with the Court's later decisions, including the Court's upholding of voter-ID laws. This Court's decisions subsequent to *Burson* "suggest that citizens should be expected to overcome minimal obstacles when voting." *Russell*, 784 F.3d at 1052 (citing, *e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203–04 (2008) (plurality opinion)). The right to cast a ballot is accompanied by a concomitant right to have that vote not corrupted by fraudulent or otherwise illegal ballots. J. Kenneth Blackwell & Kenneth A. Klukowski, *The Other Voting Right: Protecting Every Citizen's Vote by Safeguarding the Integrity of the Ballot Box*, 28 Yale L. & Pol'y Rev. 107, 109–10 (2010). This Court's more recent *Crawford* decision was predicated upon the importance of such a right to undiluted and uncorrupted vote tallies. *See Crawford*, 553 U.S. at 203 (plurality).

Moreover, voting is not only a right, it is a citizen's duty. Blackwell & Klukowski, *supra*, at 110–15. Judge Batchelder reasoned for the Sixth Circuit that "citizens cannot demand as a constitutional entitlement an environment in which fulfilling this civic duty is effortless." *Russell*, 784 F.3d at 1052. To the contrary, the Constitution permits "election officials to presume that public-spirited citizens with due concern for the

course of state and national policy should be willing to satisfy reasonable regulations and shoulder incidental burdens in the fulfillment of their civic duty." Blackwell & Klukowski, *supra*, at 115. Given that voter-ID laws epitomize that principle, a button calling for the faithful enforcement of such laws to safeguard the integrity of the electoral process cannot be regarded as part of the evil that buffer zones are designed to combat.

"When applying strict scrutiny outside the context of conducting elections, courts generally require a 'strong basis in evidence'" that a State must satisfy to carry its burden under that demanding test. *Russell*, 784 F.3d at 1051 (citing *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2423 (2013) (Thomas, J., concurring)). But "*Burson*'s solicitude for state sovereignty regarding elections mitigates [the requisite] evidentiary burden," *id.*, such that the Constitution does not "requir[e] proof that [a particular buffer zone] is *perfectly* tailored," *Burson*, 504 U.S. at 209 (plurality) (emphasis added). Nonetheless, the State's mitigated burden is still a burden: the State must still provide "evidence demonstrating that the strictures of the law are 'reasonable' and do not 'significantly impinge on First Amendment rights.'" *Russell*, 784 F.3d at 1053 (quoting *Burson*, 504 U.S. at 209).

Minnesota and other Respondents have provided no such evidence that a law sweeping so broadly to forbid voter-ID buttons serves the State's compelling interests in preventing voter intimidation and election fraud. As a consequence, this Court "cannot find that the State carried even this relaxed burden in its effort to

demonstrate that the [this statute] withstands strict scrutiny." *Id.*

This Court should grant certiorari to resolve the clear conflict between the Sixth and Eighth Circuits regarding this important constitutional question.

III. *Burson* should not be read to reach "political" speech either inside polling places or within a specified distance outside them.

In *Burson*, as noted above, this Court considered the constitutionality of a Tennessee law that barred "the display of *campaign* posters, signs or other *campaign* materials, distribution of *campaign* materials, and solicitation of votes *for or against* any person or political party or position on a question" in polling places or within 100 feet of their entrances. *Burson*, 504 U.S. at 193 (plurality) (quoting Tenn. Code Ann § 2-7-111(b) (Supp. 1991) (emphasis added). The Eighth Circuit's extension of that limited prohibition to "political" materials is fraught with constitutional problems.

This Court and federal election law distinguish between campaign-related speech and political speech, and give greater protection to the latter. For example, in *Buckley*, the Court avoided overbreadth concerns by "reading [the Federal Election Campaign Act of 1971, as amended] as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (per curiam). And, it identified the words that signal express campaign advocacy: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress,"

"vote against," "defeat," and "reject." *Id*. at 44 n. 52. The Court explained, "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id*. at 45.

In this case, the clothing and button to which the Minnesota election officials objected should be viewed as issue advocacy that is protected by the First Amendment. In contrast, *Burson* and *Marlin v. Dist. of Columbia Bd. of Elections*, 236 F.3d 716 (D.C. Cir. 2001), involve campaign-related activity that should be classified as express advocacy, which can be regulated.

Here, Cilek wanted to wear a Tea Party-associated Gadsden Flag T-shirt and a "Please I.D. Me" button. There is no suggestion that Cilek was interfering with the integrity of the election process or blocking access to the polls. There were no Tea Party candidates on the ballot, so no last-minute campaigning was going on. Likewise, voter ID is not required by Minnesota law. Accordingly, Cilek was engaged in issue advocacy, and that advocacy should be protected by the First Amendment.

In contrast, both *Burson* and *Marlin* involved unambiguously campaign-related activity. In *Burson*, the treasurer of a candidate for city council wanted to encourage voters to vote for her candidate. In *Marlin*, the Board enforced regulations that prohibited all "partisan or nonpartisan political activity, or any other activity which, in the judgment of the Precinct Captain, may directly or indirectly interfere with the orderly conduct of the election . . . in or within a reasonable distance outside the building used as a polling or vote

counting place." *Marlin*, 236 F.3d at 718. Political activity was defined in terms of express advocacy as "any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." *Id*. Marlin was prohibited from entering the polling place while wearing a campaign sticker in support of a mayoral candidate. Viewing the polling place and its vicinity as a nonpublic forum, the appeals court reasoned, "[T]he district's decision to ban *campaign paraphernalia* from polling places is a reasonable means of ensuring an orderly and peaceful voting environment, free from the threat of contention or intimidation." *Id.* at 720 (emphasis added).

The Minnesota policy's application to political insignia is also overbroad. As Judge Shepherd observed, "[H]ow does the wearing of a button or a shirt bearing the American Flag or the Star of David, both of which could arguably be considered political under this statute, disrupt the 'peace, order, and decorum' of the voting booth?" *Minnesota Majority*, 708 F.3d at 1062 n.7 (Shepherd, J., concurring in part and dissenting in part). Likewise, he noted that the statute could reach a shirt bearing words or the logo of an organization that participates in political activity like the "AFL-CIO" or the "NRA." *Id*. The problem comes from extending *Burson* to reach "the wearing of any political insignia in the polling place." *Id*. at 1061.

Amici note further that any limitation on speech needs to be tied to a state interest of the magnitude required for the applicable level of scrutiny. In *Burson*, the State interests found compelling were the interests in "protecting voters from confusion and undue influence" and in "preserving the integrity of the

election process." *Burson*, 504 U.S. at 199; *see also id*. at 217–18 (Stevens, J., dissenting) (identifying "provid[ing] orderly access to the polls and . . . prevent[ing] last-minute campaigning" as the interests protected). In this case, there is no suggestion that Cilek was interfering with the integrity of the election process or blocking access to the polls. Accordingly, the fit between the State's interests and the overbroad limitation of political speech is missing.

IV. *Burson*'s protection of the area around the polling place from any political activity is inconsistent with this Court's understanding of the First Amendment protection given to sidewalks and other public ways.

In *McCullen v. Coakley*, this Court noted that our "public way[s]" and "sidewalk[s] . . . 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *McCullen v. Coakley*, 134 S. Ct. at 2529 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (quoting in turn *Perry Ed. Assn. v. Perry Local Educators Assn*., 460 U.S. at 45); *see also Boos v. Barry*, 485 U.S. 312, 318 (1988). Notwithstanding the fact that *Burson* sustained a 100-foot buffer zone, *McCullen*'s holding that Massachusetts' 35-foot limit on speech was not sufficiently tailored to the government interest it was to serve casts doubt on the validity of the 100-foot limitation on political speech imposed by the Eighth Circuit. This Court should grant certiorari to

determine if such large 100-foot zones are still regarded as compatible with the First Amendment.

As noted above, the Eighth Circuit relied on *Burson* for its holding. The *Burson* plurality and Justice Scalia rested their conclusions on a recitation of history that suggested that sidewalks and public ways in the vicinity of polling places were not traditionally open to political activity. As Justice Stevens observed in dissent, however, reliance on history is misplaced because "it confuses history with necessity, and mistakes the traditional for the indispensable." *Burson*, 504 U.S. at 220 (Steven, J., dissenting). In addition, given the history of restriction, the conclusion has the air of a self-fulfilling prophesy. As the plurality recognized, "[T]he long, interrupted, and prevalent use of these statutes makes it difficult for States to come forward with the sort of proof the dissent wishes to require." *Id*. at 208 (plurality)

In *McCullen*, this Court unanimously found that a Massachusetts law which prohibited any person from "knowingly enter[ing] or remain[ing] on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit, or driveway" of the facility was unconstitutional. *McCullen*, 134 S. Ct. at 2526 (quoting Mass. Gen. Laws, ch. 266, § 120E 1/2(b)(West 2012)). A majority of the Court held that, even though the limitation on speech was content neutral, it failed intermediate scrutiny. *Id.* at 2534–40.

Likewise, in *Boos v. Barry*, this Court held that a District of Columbia ordinance prohibiting the display of disparaging signs and the gathering of three or more people within 500 feet of a foreign embassy violated the

First Amendment. It noted that by prohibiting disparaging signs "on public streets and sidewalks", it reached places that "occupy a 'special position in terms of First Amendment protection'" in which "the government's ability to restrict expressive activity 'is very limited.'" *Boos*, 485 U.S. at 318 (quoting *United States v. Grace*, 461 U.S. 171, 177, 180 (1983)). While the bubble involved is larger than the one here, that bubble was not necessary to vindicate the governmental interest in protecting the dignity of foreign diplomats. Rather, a federal law applicable to the United States outside of the District of Columbia, where the embassies were located, prohibited only activity intended to "intimidate, coerce, threaten, or harass" a foreign official, represented a narrowly tailored alternative sufficient to pass constitutional muster. *Id*. at 326 (quoting 18 U.S.C. § 112).

V. This Court should grant the Petition and use this case to clarify the standard of review applicable to speech limitations like those imposed by Minnesota.

In *Burson*, even though the plurality said that it was employing "exacting" scrutiny, it did not require the State to do much other than point to history. The State didn't have to rely on other criminal statutes or demonstrate the need for the restrictions. Likewise, it did not have to regulate all speech. *See Burson*, 504 U.S. at 206–08. As Justice Stevens observed, that scrutiny "appear[ed] by the end of [the plurality's] analysis to be neither exacting nor scrutiny." *Id*. at 226 (Stevens, J., dissenting).

More to the point, that form of scrutiny is not consistent with this Court's approach to governmental

attempts to restrict the content of speech. The Eighth Circuit's approach here once again conflicts with the Sixth Circuit in *Russell* as discussed in Part II, *supra*, highlighting the need for this Court's review.

But this Court's precedent should have foreclosed the possibility of a circuit split. In *McCullen*, for example, even though the Massachusetts law was found to be content-neutral, it nonetheless violated the First Amendment because it was not narrowly tailored. That conclusion followed from the fact that the Massachusetts law "burden[ed] substantially more speech than necessary to achieve the Commonwealth's asserted interests." *McCullen*, 134 S. Ct. at 2537. The law also contained a criminal subsection that specifically addressed the Commonwealth's interests in "ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances." *Id*. The Court dismissed claims that the alternatives available to Massachusetts didn't work, noting that the Commonwealth couldn't point to any prosecutions under those allegedly unworkable laws. *Id*. at 2539.[5] Put simply, "Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked." *Id*. at 2540.

In the same way, in *Boos v. Barry*, this Court pointed to other statutes and to legislative changes as a reason for invalidating a prohibition on the display of

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[5] The Court distinguished *Burson* and its approach. *McCullen*, 134 S. Ct. at 2540. If so, *Burson's* use of "exacting' scrutiny is a one-off and should be revisited. At the very least, it should not be extended to cover speech that election officials deem political.

disparaging signs within 500 feet of a foreign embassy. *Boos*, 485 U.S. at 324–29. In particular, the "congressional development of a significantly less restrictive statute" that protected the governmental interests at stake counseled against "giv[ing] deference to a supposed congressional judgment that the [Vienna] Convention [on Diplomatic Relations] demands the more problematic approach reflected in the display clause." *Id*. at 236–27.

Before *Burson* is extended, this Court should require more from the State than the plurality did there. At the very least, this Court should rethink the plurality's rejection of any criminal laws targeting disruptive or obstructive behavior.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amicus* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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