No. 16-1435

IN THE

Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL.,
Petitioners,

v.

JOE MANSKY, ET AL.,
Respondents.

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

BRIEF FOR CATO INSTITUTE, RUTHERFORD INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Minn. Stat. § 211B.11, which prohibits all "political" garb at the polling place, is facially unconstitutional because no conceivable governmental interest could justify such an absolute ban on this most highly protected form of speech.

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INTEREST OF THE *AMICI CURIAE*[1]

The **Cato Institute** is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The **Rutherford Institute** is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its president, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

Reason Foundation is a nonpartisan 501(c)(3) organization. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Founded in 1978, Reason publishes *Reason* magazine and commentary on its website, reason.com, and issues policy research reports. Reason's personnel consult with public officials on the national, state, and local level. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a

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[1] Rule 37 statement: No party's counsel authored any part of this brief and no person other than *amici* funded its preparation and submission. Both parties filed blanket consent.

serious threat to freedom of speech, and therefore contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The **Individual Rights Foundation** ("IRF") is the legal arm of the David Horowitz Freedom Center ("DHFC"), a nonprofit 501(c)(3) organization (formerly the Center for the Study of Popular Culture). DHFC's mission is to promote the core principles of free societies—and to defend America's free society—by educating the public to preserve traditional constitutional values of individual freedom, the rule of law, and limited government. IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights. In support of this mission, IRF litigates and participates as *amicus* in cases that raise significant First Amendment speech and issues.

This case concerns *amici* because the fundamental constitutional guarantee of free speech protects voters' rights to express themselves in the polling place through non-disruptive political speech. Minnesota's absolute ban on any form of political speech at the polls threatens First Amendment freedoms.

INTRODUCTION AND SUMMARY OF ARGUMENT

Political speech, especially speech critical of the government, individual politicians, and political ideas, is essential to the continued viability of the democratic process. That's why this Court's First Amendment jurisprudence gives special protection to core political speech. Yet Minnesota has specifically targeted such

speech, flatly banning all "political" badges, buttons, and insignia within every polling place in the state. This targeting alone requires strict judicial scrutiny.

Minnesota's absolute ban on political insignia fails that judicial review. Whatever interest the state may have in preventing confusion or improper influence is not furthered by a complete ban on political speech. Moreover, without qualification, the idea of political speech as an "improper influence" is foreign to the First Amendment. Minnesota's law is thus not narrowly tailored to any compelling state interest. Further, the ban on *all* political speech is facially overbroad. It places enormous discretion in unaccountable election judges to define "political" speech and thus chills the personal expression of every voter. This Court should ensure that the Eighth Circuit's lax protection of core political speech does not stand.

ARGUMENT

I. A COMPLETE BAN ON POLITICAL EXPRESSION WARRANTS STRICT SCRUTINY, REGARDLESS OF THE FORUM

When the government restricts expressive activity on its own property, this Court uses a difficult-to-apply set of tools often referred to as "forum analysis." Forum analysis categorizes the physical location where the expressive activity takes place as either a "traditional public forum," a "designated public forum," a "limited public forum," or a "nonpublic forum." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467–70 (2009). The degree of protection afforded to speech varies depending on the category of the forum. *Id.*

Rigidly applying this forum analysis, the Eighth Circuit held that the polling place is a nonpublic forum and that strict scrutiny does not apply. Pet. App. A-5; D-7–8. But such a formulaic application of the forum analysis framework can sometimes fail to adequately protect important First Amendment interests. As this Court has acknowledged, looking only at the location covered by a speech ban may fail to consider the extent of the speech interests at stake.

In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984), this Court warned of the "limited utility" of focusing only "on whether the tangible property [where speech is restricted] should be deemed a public forum." Although the traditional forum analysis generally provides a workable analytical tool, "the analytical line between a regulation of the 'time, place, and manner' in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges." *Id.* (quoting *U.S. Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981)). In other words, focusing on the *location* of a speech ban and not on the *operation* of that ban fails to put the ban in its full context. When courts inflexibly apply a categorical version of forum analysis, they can distract themselves from giving speech the protection it deserves.

Here, the normal forum analysis has proven inadequate. The Eighth Circuit, after finding that the polling place is a nonpublic forum, held that the speech ban need only be viewpoint-neutral to pass constitutional scrutiny. Pet. App. D-8. But as this Court's precedents have shown, even regulations that are facially

viewpoint neutral can sometimes have startlingly wide breadth. In such a situation, the Court has applied a level of scrutiny on par with that applied to speech regulations that discriminate based on viewpoint.

In *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), this Court declared unconstitutional a city ordinance that prohibited property owners from displaying any signs except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. *Id.* at 45. In affirming the lower court, this Court noted a "particular concern" with laws that invalidated an entire medium of expression. *Id.* at 55. As the Court explained, even viewpoint neutrality cannot save speech restrictions of such a broad scope. Even though "prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination," the Court recognized that "the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* As *City of Ladue* shows, sweeping restrictions on speech, particularly political speech, require courts to set aside the traditional viewpoint-versus-content distinction. A categorical approach is inappropriate because it fails to protect core speech rights.[2]

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[2] "'[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others . . . . To ensure 'the widest possible dissemination of information[,]' and the 'unfettered interchange of ideas,' the First Amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression.'" *Gilleo*, 512 U.S at 55 n.13. (quoting Geoffrey R. Stone, *Content-Neutral Distinctions*, 54 U. Chi. L. Rev. 46, 57–58 (1987)) (internal citations omitted).

The restrictions found in Minnesota's polling-place regulation represent just such a sweeping prohibition of core First Amendment speech. The law completely bans a loosely defined genre of speech in all wearable means of expression. If ever there were a regulation that threatened "the widest possible dissemination of information" and the "unfettered interchange of ideas," it is this one. *Gilleo*, 512 U.S. at 55 n.13.

Further, strict scrutiny is warranted because Minnesota's law explicitly targets political speech. This Court strongly protects "core political speech" as "occup[ying] the highest, most protected position" in the hierarchy of constitutionally protected speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). *See also Burson v. Freeman*, 504 U.S. 191, 217 (1992) ("The statute directly regulates political expression and thus implicates a core concern of the First Amendment."). This protection has been the same whether such speech is oral or, as here, takes the form of printed symbols and slogans. The Court has defined political speech broadly to include all "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

This Court has frequently applied strict scrutiny to political-speech bans, regardless of the forum affected. For example, when confronted with a law that would have restricted all anonymous leafleting in opposition to a proposed tax, the Court noted the importance of specifically protecting such political speech:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.

> The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346–47 (1995) (quoting *Roth v. United States,* 354 U.S. 476, 484 (1957)).

More recently, the Court reaffirmed that laws burdening political speech are subject to strict scrutiny. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court invalidated a federal statute that barred certain independent expenditures for electioneering communications. Highlighting the primacy of political speech, the Court noted that "political speech must prevail against laws that would suppress it, whether by design or inadvertence. 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.'" *Id*. at 340 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

With this history in mind, there is little doubt that Minnesota's polling-place restriction is hostile to the protection that this Court has traditionally afforded core political speech. By eliminating virtually all means of political expression in or around the polling place, the statute cuts off the "unfettered interchange of ideas" in an important place for individual political expression. *McIntyre,* 514 U.S. at 346–47. By failing to apply strict scrutiny, the Eighth Circuit decision ignored the unique disfavor this Court gives to blanket

bans on political expression. Such a ruling dangerously narrows First Amendment protections for political expression, requiring this Court to clarify that strict scrutiny should have been applied.

II. MINNESOTA'S BAN ON POLITICAL EXPRESSION CANNOT SURVIVE STRICT SCRUTINY

In *Burson v. Freeman*, this Court upheld a content-based restriction on political campaign speech in the sidewalks and streets surrounding a polling place, which were indisputably a public forum. *Burson*, 504 U.S. at 211. Although the Court found that the particular statute at issue was narrowly drawn to serve a compelling state interest, it also cautioned that its holding was narrow, representing the rare case where a facially content-based law survived strict scrutiny. *Id.* at 211. For several reasons, Minnesota's speech ban is distinguishable from the law in *Burson*. This is not the "rare case" that withstands strict scrutiny.

A. Minnesota Has Not Presented a Compelling State Interest for Banning All Political Expression

When confronted with a statute restricting a fundamental right, this Court must first ensure that a compelling government interest has been articulated. If a statute's stated or implied interest is not sufficiently compelling, that statute must be struck down. For example, in *Republican Party of Minnesota v. White*, 536 U.S. 765, 777–79 (2002), the Court rejected Minnesota's stated interests of "preserving the impartiality of the state judiciary" and "preserving the appearance of the impartiality of the state judiciary."

Such interests were insufficiently compelling to support a law banning candidates for judicial election from announcing their views on disputed issues.

Here, Minnesota has failed entirely to provide a compelling state interest for its political speech ban. Although the state suggested during this litigation that the compelling interest supporting Minn. Stat. § 211B.11 is the same as the one accepted in *Burson*, a close reading of the statute shows that this cannot be the case. The Eighth Circuit erred in uncritically accepting this argument. *See* Pet. App. A-5; D-8.

In *Burson*, this Court determined that the ban on campaign speech served two government interests. First, it accepted the state's argument that the statute served the interest of allowing citizens to vote freely for their candidate of choice. *Burson*, 504 U.S. at 198. Second, it likewise accepted the claim that the statute ensured the integrity and reliability of the election process. *Id.* The Court's analysis, however, was largely based on a unique historical circumstance: the long history of bribery, intentional confusion, and intimidation at polling locations during the Colonial period. That history explains why states had for centuries enacted legislation aimed at "battl[ing] against two evils: voter intimidation and election fraud." *Id.* at 206. Given that history, the Court concluded Tennessee had a "compelling interest in protecting voters from confusion and undue influence," and in "preserving the integrity of its electoral process." *Id.* at 199. As discussed *infra*, while the state has an interest in preventing voter intimidation and "undue influence," properly and narrowly defined, it does not have a compelling interest in protecting voters from "influence."

Voter intimidation might be a species of "undue influence," but Minn. Stat. § 211B.11 cuts more broadly than that, prohibiting the wearing of "[a] political badge, political button, or other political insignia . . . at or about the polling place on primary election day." Thus, it differs starkly in both scope and objective from the *Burson* statute. Moreover, by defining "political" as "[i]ssue oriented material designed to influence or impact voting," Minnesota's law bans the very speech the First Amendment protects most stringently. It does not specifically target solicitation and "undue" influence, nor does it mention confusion or intimidation.[3]

This statutory silence is damning. *Every* aspect of a political-speech ban must be justified by a compelling interest. By failing to state an intent to target intimidation or actual undue influence, Minnesota has failed in its burden of showing that every speech restriction in the statute furthers a specific and compelling end. For this reason alone, the statute fails strict scrutiny.

B. Minnesota's Ban on Political Expression Is Not Narrowly Tailored to Achieve Any Government Purpose

Even if this Court were to find that Minnesota had put forward a sufficiently valid government interest, the statute still is not narrowly tailored to meet that interest while minimally affecting the speech interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). To be narrowly tailored, a speech

[3] Indeed, by evaluating the first and third sentences of the statute separately, the Eighth Circuit tacitly acknowledged that the scope and purpose of the government interests differ between the two sentences. *Compare* Pet. App. D-6–7 *with id.* at D-7–10.

ban "must be the 'least restrictive means among available, effective alternatives.'" *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (quoting *Ashcroft v. ACLU,* 542 U.S. 656, 666 (2004)).

Minnesota's ban does not come close to meeting this standard, being both overinclusive and underinclusive. It is overinclusive because it bans political speech that does not meaningfully frustrate the objectives of ensuring electoral integrity and preventing voter confusion. It is underinclusive because it allows speech in the polling place that could create voter confusion or intimidation, so long as that speech is not "political."

1. The ban is overinclusive because it disallows even innocuous political speech.

Minn. Stat. § 211B.11 is fatally overinclusive. The statute prohibits any insignia deemed to be "political"—as determined solely at the discretion of the onsite election judges. A hat or shirt bearing nothing more than the words "Occupy" or "Tea Party," or even a picture of a blue donkey or red elephant, would fall afoul of the ban. Yet such clothing is part of the normal tableau of public life; no reasonable voter would interpret such garb as an attempt to intimidate or cajole.

Additionally, the statute gives election judges the power to ban any materials "promoting a group with recognizable political views." Pet. App. I-1–2. Local union badges, national flag buttons, or even pins indicating support for the Catholic Church[4] could all run afoul of this provision. But banning such expression is unlikely to further any legitimate government interest.

[4] The Catholic Church has an episcopal jurisdiction, The Holy See, which is responsible for diplomatic and political decisions.

As the dissent explained in this case's first trip to the Eighth Circuit, it is hard to believe

> that the presence of a passive and peaceful voter who happens to wear a shirt displaying, for example, the words "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.

Pet. App. D-18 n.7.

It is telling that this Court has never found an absolute bar on all political expression to be necessary to further a government interest. *See, e.g.*, *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Even if preventing polling-place solicitation is a compelling government interest, Minnesota's speech ban is not narrowly tailored to address that interest and so fails strict scrutiny.

2. The ban is fatally underinclusive.

In addition to analyzing whether a law prohibits *too much* speech, tailoring analysis considers whether it *fails* to restrict speech that is just as harmful to the purported governmental interest. *See, e.g.*, *Citizens United,* 558 U.S. at 362 (striking down a statute barring independent expenditures for electioneering communications because it barred corporate speech in only select media and only for a 30-to-60-day period before an election); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) (invalidating as "wildly underinclusive" a state statute that imposed restrictions on

the sale of "violent video games" to minors because it still allowed purchases if parents approved).

Minn. Stat. § 211B.11 suffers from an unconstitutional degree of underinclusion. By targeting only "political" speech, it leaves non-political forms of persuasive or confusing speech entirely unregulated. For example, the statute apparently does not stop individuals from wearing buttons or shirts describing the futility of voting or advertising P.J. O'Rourke's book, *Don't Vote: It Just Encourages the Bastards* (2010).

The statute also has a purported goal of "maintain[ing] peace, order, and decorum" in the polling place. Pet. App. A-5; D-8. Even if we accept the dubious proposition that someone could start a fight by wearing a button, surely there are as many non-political statements that would do the trick as political ones. Yet the statute leaves entirely unregulated most non-political expression, even if it would be much more likely to undermine peace, order, and decorum.

Minnesota's speech ban is thus not narrowly tailored to serve any legitimate state interest. By failing to achieve a proper "fit" between what it seeks to achieve and what it actually regulates, the law leaves unregulated speech that would likely contribute to polling-place confusion, while restricting speech that has no appreciable effect on voters' decision-making.

III. THE FIRST AMENDMENT PROTECTS THE RIGHT OF SPEAKERS TO INFLUENCE VOTERS, SO CREATING AN "INFLUENCE-FREE" POLLING PLACE IS NOT A COMPELLING STATE INTEREST

Minnesota's law 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. Pet. App. I-1–2. The Eighth Circuit ruled that, even if "apparel is not election-related, it is not unreasonable to prohibit it in a polling place . . . [i]n order to ensure a neutral, influence-free polling place." *Minnesota Majority v. Mansky*, 849 F.3d 749, 752 (8th Cir. 2017) (referring to Tea Party apparel). The lower court's analysis turned the First Amendment on its head, so this Court should make clear that creating "influence-free" spaces is not a compelling interest under the First Amendment. Influencing voters is a constitutional virtue, not a harm.

Attempting to influence voters is the end of politics; the First Amendment is the means. Minnesota's ban on the passive act of displaying political speech at a polling place is an egregious violation of those means. "'Legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.'" *Meyer v. Grant*, 486 U.S. 414, 428 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 50 (1976). That premise is just as true at polling places as it is one hundred miles away.

"[T]he principle of the freedom of speech springs from the necessities of the program of self-government . . . . It is a deduction from the basic American agreement that public issues shall be decided by universal

suffrage." Alexander Mieklejohn, *Political Freedom* (1960). For democracy to function properly, voters must have access to as much information as possible so they may make the wisest choices at the ballot box. *See* Alexander Mieklejohn, *The First Amendment Is an Absolute*, 1961 Sup Ct. Rev. 245 (1961). Minnesota may not, by way of criminal sanctions, attempt to insulate the electorate from exposure to voices, views, and opinions, which it assumes will influence voters' free and informed choices. This notion is "incompatible with the First Amendment." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 706 (1990) (Kennedy, J., dissenting). Instead, Minnesota should respect the "right of citizens to inquire, to hear, to speak, and to use information to reach consensus." *Citizens United,* 558 U.S. at 339–40. A right which "is a precondition to enlightened self-government and a necessary means to protect it." *Id.*

A. The Vague Invocation of "Undue Influence" Cannot Save Minnesota's Ban

Citing "a compelling interest in 'protecting voters from confusion and undue influence,'" *Mansky*, 849 F.3d at 752, the Eighth Circuit endorsed the idea that some political insignias may "unduly" influence voters at a polling place. *Amici* do not understand how such political influence could be "undue," nor what part of the Constitution permits the government to protect voters from political influence.

More specifically, what is the harm from a voter's being influenced at the polling place? We may hope that voters will form their opinions and cast their ballot based on facts, evidence, logic, and reason well before they arrive at their precinct, but the government cannot command them to do so. People who are swayed

by the appearance of a campaign button or other attire may not be the "ideal voter," but they are entitled to base their voting decisions on whatever they wish. This is not a harm that requires a remedy.

"Undue influence" suggests an improper or overpowering influence which overcomes the free will of a voter. But one voter's donning political garb at or near the polling place possesses no magical power to compel voter behavior. If anything, Minnesota has used *its* overpowering influence to overcome the free will of the voter by restricting the voters' right to free expression and the right to judge for themselves. This Court should be wary of the government's professed capability to determine whether a particular form of political speech is "undue" or unfair. "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson v. Celebrezze*, 460 U.S. 780, 798 (1983).

Undue influence "may represent no more than [the] convincing weight of [an] argument fully presented, which is the very thing the [First] Amendment and the electoral process it protects [are] intended to bring out." *United States v. CIO*, 335 U.S. 106, 145 (1948) (Rutledge, J., concurring). Whether that speech consists of money spent, persuasive speech uttered, or convincing political apparel worn is irrelevant. The mere fact that a particular argument—or in this case a t-shirt—may have a considerable persuasive effect is not a reasonable basis for Minnesota's ban. In fact, it is the exact opposite: potentially persuasive political speech should receive the highest protection under the First Amendment. *See Citizens United*, 558 U.S. at 382 ("A speaker's ability to persuade…provides no basis for

government regulation of free and open public debate on what the laws should be.").

"The premise of our Bill of Rights . . . is that there are some things . . . that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate." *Austin*, 494 U.S. at 692 (Scalia, J., dissenting). Minnesota's ban is such a restriction. Citizens must be trusted and empowered to think for themselves, free of government intervention which disrespects their intelligence and capacity for reason. "[T]he people are not foolish but intelligent, and will separate the wheat from the chaff." *Id.* at 695. Justice Scalia's reasoning was vindicated in *Citizens United*, in which the Court recognized that "[t]he First Amendment confirms the freedom to think for ourselves." 558 U.S. at 357. When the government uses its power "to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought . . . [t]his is unlawful." *Id.*

Voters must be free to use their own judgment—not that of government officials—to determine which forms of political expression are most convincing and to exercise the franchise accordingly. Minnesota infringes upon the natural truth that "[j]udgment is given to men that they may use it." John Stuart Mill, *On Liberty* (1859). The question is, "[b]ecause [that judgment] may be used erroneously, are men to be told that they ought not to use it at all?" *Id.* The answer is a resounding no. "The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United*, 558 U.S. at 341.

B. Blanket Bans on Political Speech May be Justified to Prevent Actual Intimidation, Confusion, and Chaos—Not Influence

While Minnesota has no compelling interest in preventing voter influence, it does have an interest in preventing voter intimidation and confusion. Such intimidation can take the form of election judges illegally offering interpretations of ballot initiatives, James Nord, *Scattered Polling-Place Disruptions and Problems Reported*, MinnPost (Nov. 6, 2012), http://bit.ly/2Apx3nx, or of unruly poll-watchers asking voters of IDs or misrepresenting their credentials. Jocelyn Benson, *When Poll-Watching Crosses the Line*, Politico (Aug. 25, 2016), http://politi.co/2E5Ro3d. To counter those issues, Minnesota could reasonably restrict soliciting votes, giving speeches, or conducting debates inside the polling place in order to prevent voter intimidation and outright chaos. Without some level of order, calm, and quiet, it would be difficult to verify voter eligibility and for voters to concentrate and decide on their ballot. But "people sometimes invoke a carelessly formulated notion of coercion to justify regulation of behavior, or speech, of which they do not approve." C. Edwin Baker, *The Scope of the First Amendment*, 25 UCLA L. Rev. 964, 999 (1978).

Minnesota's ban is carelessly formulated. The passive acts it restricts do not cause any chaos. Nor do they intimidate or coerce—even if the apparel or insignias directly advocate for the election or defeat of a specific candidate or ballot initiative. "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." *Burson v. Freeman*, 504 U.S. 191, 218-19 (1992) (Stevens, J., dissenting)

(referring to "the simple 'display of campaign posters, signs, or other campaign materials'"). The ban "does not concern aggressive, disruptive action or even group demonstrations." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (holding that banning and punishing students for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance violates the First Amendment).

Minnesota seeks to prevent harms which are not even caused by the free expression the law restricts. "[S]peech harms occur only to the extent people 'mentally' adopt perceptions or attitudes." Baker, *supra*, at 998. By assuming that voters cannot handle the sight of a political button or a shirt bearing a candidate's name, Minnesota violates the autonomy of its citizens. "[R]especting the listener's integrity as an individual normally requires holding the listener responsible for her conduct unless she has been coerced or forced into the activity." *Id.* The fact that Minnesota's restriction applies in the unique location that is the polling place on election-day does not save it from the strictures of the First Amendment. "Tradition notwithstanding, the State does not have a legitimate interest in insulating voters from election-day campaigning." *Burson*, 504 U.S. at 227 (Stevens, J., dissenting) (citing *Mills v. Alabama*, 384 U.S. 214 (1966)).

IV. THE FIRST AMENDMENT PROTECTS SELF-EXPRESSION QUA SELF-EXPRESSION, AND POLITICAL APPAREL IS A FORM OF SELF-EXPRESSION

By preoccupying itself with concerns of undue influence and attempts to communicate political messages, Minnesota ignores the importance of individual

autonomy, self-expression, and tolerance inherent in the First Amendment. "The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity." *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

Individuals wear specific clothing in an effort to define themselves to the world. C. Edwin Baker refers to the Vietnam War protestor who shouts about stopping the war not to "communicate anything to people in power," but to "*define* herself publicly in opposition to the war." Baker, *supra*, at 994. The students who wore black armbands in opposition to the Vietnam War did the same. *See, e.g.*, *Tinker*, 393 U.S. 503. The mere fact that the sight of one of those armbands may inspire reaction from those who disagree with its message was not enough to support banning expression. This was because "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. That freedom is the "basis of our national strength." *Id.*

Minnesota's ban could reasonably be interpreted to include clothing with rainbow symbols worn by LGBT voters who refuse to hide in the closet, flag pins worn by patriotic voters who cherish their military service, or crosses worn by religious voters who find strength in their faith. Many voters wear these things not to influence or intimidate others, but to claim membership in a group and assert their identity. They seek only to exercise their right to freedom of expression. A right that "is justified first of all as the right of an individual purely in his capacity as an individual . . . [and that]

derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 879 (1963). By restricting the freedom of speech and expression, Minnesota violates that premise, invades voters' autonomy, and degrades their self-worth.

The ban also denies citizens' capacity for tolerance of differing views. We live in "a large and complex society, with people of varied beliefs and interests. Providing some accommodation of these varied beliefs is a critical and basic task of the society." Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 Colum. L. Rev. 979, 984 (1990). Allowing for the passive wearing of clothing and accessories with a political message promotes this basic task. "In this sense, free speech may simply function as a zone of extreme toleration…because as a practical matter living with divergent behavior is necessary." *Id.* Minnesota's ban is the type that prevents "people from engaging in substantively valued behavior," and which "drastically limit[s] the possibility of popular participation in change." Baker, *supra,* at 1016. That participation in change is what our elections are all about. For these reasons, the Court should invalidate Minnesota's ban. Limits on direct advocacy or political messages in or about the polling place—in passive form without intimidation, disturbance, or confusion—should be deemed unconstitutional.

CONCLUSION

For the reasons set forth above, *amici* ask the Court to strike down Minnesota's unconstitutional ban on all "political" speech within the polling place.

Respectfully submitted,

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