No. 16-1435

In The Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE;
ANDREW E. CILEK; and SUSAN JEFFERS,

Petitioners,

v.

JOE MANSKY, in his official capacity as Elections Manager for Ramsey County; VIRGINIA GELMS, in her official capacity as 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 of Minnesota,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, BEACON CENTER OF TENNESSEE, AND MISSISSIPPI JUSTICE INSTITUTE IN SUPPORT OF PETITIONERS

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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?

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1976, Southeastern Legal Foundation is a national nonprofit, public interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. For 40 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular representation of those challenging overreaching governmental actions in violation of their freedom of speech. *See, e.g., Bennie v. Munn*, 137 S. Ct. 812 (2017); *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Minority TV Project, Inc. v. FCC*, 134 S. Ct. 2874 (2014); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

The Beacon Center is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals. The Beacon Center has a vested interest in seeing the issue presented in this brief addressed by the Court.

Mississippi Center for Public Policy (MCPP) is an independent, nonprofit, public policy organization

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[1] All parties have consented to the filing of this brief by blanket consent or individual letter. *See* Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

based in Jackson, Mississippi, that was founded in 1991 by a small group of concerned citizens who wanted to protect the families of Mississippi. Over time the organization has grown to become a leading voice in Mississippi policy formation by informing the public to help them understand and defend their liberty. Mississippi Justice Institute (MJI) is the legal arm of MCPP and aims to represent Mississippians whose state or federal constitutional rights have been threatened or violated. MJI also works to defend the principles of MCPP in the courts, with a particular aim toward protecting liberty. This work takes many forms, including direct litigation on behalf of individuals, intervention in cases of importance to public policy, participation in regulatory and rulemaking proceedings, and filing *amicus curiae* briefs to give voice to the perspective of Mississippi families and individuals in significant legal matters pending in the courts.

Amici have an abiding interest in the protection of the freedoms set forth in the First Amendment – namely the freedom of speech. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions. *Amici* are profoundly committed to the protection of American legal heritage, which includes protecting the freedom of speech, a vital component to its system of laws.

SUMMARY OF ARGUMENT

In Minnesota, it is a crime to communicate political speech by wearing a shirt, hat, button or other apparel within a polling place or within 100 feet of a polling place for the entirety of early voting and election day. *See* Minn. Stat. § 211B.11. Minnesota claims that this complete ban on political speech is necessary to "keep the peace" – a claim that no doubt has our Founding Fathers, the very men who risked and gave their lives to ensure that Americans could forever engage in free discussion of political affairs, rolling in their graves. Even more shocking than Minnesota's criminalization of basic public discourse, is that the Eighth Circuit Court of Appeals upheld the ban. In doing so, the lower court applied an improper level of judicial scrutiny, disregarding this Court's First Amendment jurisprudence regarding content-based and political speech restrictions which requires the most exacting level of scrutiny.

This Court applies strict scrutiny review to laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). As Petitioners point out, the Court has repeatedly declared that "[c]ontent-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). This is because content-based restrictions are "the essence of censorial

power," *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 699 (1990) (Kennedy, J., dissenting), and as such, are nearly universally presumed to be invalid.

Nowhere are the threats of censorship more dangerous than when a content-based restriction prohibits public discourse on political issues. The freedom to publicly speak on political issues, especially those arising during elections, is critical to a functioning democracy. "[P]ublic discussion is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). The First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)). As a result, when a law burdens political or public issue speech, this Court traditionally applies the most exacting scrutiny available and will uphold such restrictions only if they are narrowly tailored to serve a compelling governmental interest. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976) (per curiam); *see also Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (applying strict scrutiny to law restricting political speech aired in a broadcast communication); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465 (2007) (same); *McConnell v. FEC*, 540 U.S. 93, 205-07 (2003) (same) (overruled on other grounds).

Amici agree with Petitioners that the Minnesota statute violates the overbreadth doctrine because it threatens the free speech rights of others and is thus facially unconstitutional. *Amici* write separately to further the point that should this Court find it necessary to weigh and apply a more formulaic approach, it should apply strict scrutiny.

ARGUMENT

I. This Court's traditional First Amendment jurisprudence subjects Minnesota's content-based restrictions to strict scrutiny.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).[2] "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980); *accord Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). The government has no business choosing "which issues are worth

[2] *See also Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times v. Sullivan*, 376 U.S. 254, 269-70 (1964); *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388-89 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

discussing or debating." *Id.* at 537-38 (internal quotations omitted). Allowing the government to choose permissible subjects for public debate and speech in general would restrict the very marketplace of ideas that our Founding Fathers fought to keep free and open. *Id.*

"Content-based restrictions are the essence of censorial power." *Austin*, 494 U.S. at 699 (Kennedy, J., dissenting). This Court has concluded time and time again that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citing *Carey v. Brown*, 447 U.S. 455, 463 (1980); *Mosley*, 408 U.S. at 95-96). Traditional First Amendment principles mandate that "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consol. Edison*, 447 U.S. at 540 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley*, 424 U.S. at 25). "A less stringent analysis would permit a government to slight the First Amendment's role 'in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Id.* at 541 (quoting *Bellotti*, 435 U.S. at 783).

As Justice Kennedy explained in his separate opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, "strict scrutiny . . . does not disable government from addressing serious

problems, but does ensure that the solutions do not sacrifice speech to a greater extent than necessary." 518 U.S. 727, 784-85 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, dissenting in part). Recognizing and dispelling concerns that strict scrutiny acts as a straightjacket, the Court has held that the government may proscribe certain categories of private speech which are not protected by the First Amendment[3] and that the government may regulate certain categories of speech because such regulations are narrowly tailored to serve a compelling governmental interest.[4]

II. Prohibitions of political speech demand the most exacting scrutiny.

When interpreting the First Amendment, "[w]e should seek the original understanding." *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring). Since 1724, freedom of speech has famously been referred to as the "great Bulwark of liberty." 1 John Trenchard & William Gordon, *Cato's*

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[3] Content-based restrictions on child pornography, incitement, obscenity, and fighting words are presumably valid because these categories of speech are not protected by the First Amendment. *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

[4] *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191 (1992) (holding that the First Amendment does not forbid creation of an area outside polling places that is off-limits to campaigning or solicitation).

Letters: Essays on Liberty, Civil and Religious 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (Oxford University Press 1988). Upon ratification, the First Amendment "was understood as a response to the repression of speech and the press that had existed in England[.]" *Citizens United*, 558 U.S. at 353. Through the First Amendment, our Founding Fathers sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 11 (Oxford University Press 1988). "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form." *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring).

A major purpose of the First Amendment was to protect public discourse, broadly defined. As this Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown*, 456 U.S. at 52 (quoting *Mills*, 384 U.S. at 218). " 'The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.' " *Meyer v.*

Grant, 486 U.S. 414, 421 (1988) (quoting *Thornhill*, 310 U.S. at 101-02).

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id.* (quoting *Roth*, 354 U.S. at 484). "For 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 (1964). This free discussion necessarily "includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills*, 384 U.S. at 218-19. Of these, the Court has observed that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot*, 401 U.S. at 272.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15. In finding a state law regulating the content of permissible speech during a judicial campaign unconstitutional, this Court explained that "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party v. White*, 536 U.S. 765, 781 (2002) (quoting *Eu v. San Francisco Cty.*

Democratic Cent. Comm., 489 U.S. 214, 222-23 (1989) (internal quotations omitted)).

When a law burdens political or public issue speech, this Court applies the most exacting scrutiny and upholds such restrictions only if they are narrowly tailored to serve a compelling government interest. *Buckley*, 424 U.S. at 44-45; *see also Consol. Edison*, 447 U.S. at 540-41; *Bellotti*, 435 U.S. at 786. "The people determine through their votes the destiny of a nation. It is therefore important – vitally important – that all channels of communication be open to them during every election. . . ." *United States v. Int'l Union United Auto., Aircraft and Agric. Implement Workers of Am.*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). Taking this a step further, in 2010, the Court reaffirmed the principle that "[p]olitical speech is indispensable to decisionmaking in a democracy[.]" *Citizens United*, 558 U.S. at 349 (internal quotations omitted).

Application of intermediate scrutiny or rational basis review – anything less than the most exacting scrutiny – "would permit a government to slight the First Amendment's role 'in affording the public access to discussion, debate, and dissemination of information and ideas.'" *Consol. Edison*, 447 U.S. at 541 (quoting *Bellotti*, 435 U.S. at 783). Thus, requiring the government to establish that its content-based restriction on political or public issue speech is narrowly tailored to serve a compelling interest, ensures that the American people "retain control over the quantity and range of

debate on public issues." *Buckley*, 424 U.S. at 57 (quoting *Roth*, 354 U.S. at 484).

CONCLUSION

For the foregoing reasons, and those stated by Petitioners, *amici* respectfully requests that this Court reverse the decision of the court below.

Respectfully submitted,

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