No. 16-1435

In The

Supreme Court of the United States

MinnesotaVoters 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 THE AMERICAN CIVIL RIGHTS UNION AND ASSOCIATION FOR GOVERNMENT ACCOUNTABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Kenneth A. Klukowski
American Civil Rights Union
3213 Duke Street #625
Alexandria, Virginia 22314
(877) 730-2278
kklukowski@theacru.org

John J. Park, Jr.
Counsel of Record
Strickland Brockington Lewis LLP
1170 Peachtree Street NE
Suite 2200
Atlanta, Georgia 30309
(678) 347-2208
jjp@sbllaw.net

Attorneys for *Amici Curiae*

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU has participated as *amicus curiae* in numerous free speech cases in the context of elections, including *Citizens United v. FEC*, 558 U.S. 310 (2010). The ACRU also litigates election law cases nationwide.

The Association for Government Accountability ("AGA") is a statewide 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

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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 consented to the filing of this brief.

regard, AGA sponsored litigation that resulted in an injunction that blocked a Minnesota county's illegally authorized safe driving classes, and it filed a mandamus petition in Minnesota state court seeking to compel the State to pay legislators their constitutionally authorized salaries notwithstanding the Governor's line-item veto of the appropriation.

SUMMARY OF ARGUMENT

"Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007) (opinion of Roberts, C.J.).

Here, the Eighth Circuit erroneously let Minnesota and the local-government Respondents (collectively "Minnesota") play the censor. Minnesota did not like what some members of the Minnesota Voters Alliance were wearing when they went to the polls because the clothing and accessories were political. Neither the clothing nor the accessories encouraged other voters to vote for or against a particular candidate. Instead, it just raised issues the wearers thought important.

The Eighth Circuit relied on this Court's fractured decision in *Burson v. Freeman*, 504 U.S. 191 (1992). There, this Court upheld a ban on campaign-related activity in and near polling places at election time. No rationale generated a majority, which begs the question: What deference should this Court give to such a decision that does not generate a majority rationale? The answer is none; this Court writes on a blank slate, giving respect to the persuasive power of all opinions in the majority and due concern for the

points raised in dissent. Stare decisis does not protect *Burson*, and even the statute upheld in *Burson* might not survive under the Court's modern free-speech jurisprudence. The Court should clarify *Marks v. United States*, 430 U.S. 188 (1977), and hold that this Court regards no opinion in *Burson* as precedent.

Minnesota Voters Alliance should prevail, no matter how that important doctrinal point is resolved. Minnesota wishes to suppress all manner of political speech. Even if *Burson* is good law, it applies only to campaign-related activity, not to the infinitely elastic term "political," and thus does not control here.

But even if *Burson* were to control here, the statute would still fail. Under the *Burson* plurality, this statute fails strict scrutiny for two reasons: First, because Minnesota fails to explain how a categorical ban on political thought is narrowly tailored. Second, even if it offered an explanation, Minnesota failed to support its premise by a "strong basis in evidence."

ARGUMENT

I. This case differs from *Burson* in significant ways.

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). The appellate court reasoned that *Burson* "defeats a facial attack" on the Minnesota law insofar as it spoke to areas outside the polling place. App. D-7. 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*. at D-9 (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 n.2 (plurality opinion); *see also id*. at 214 (Scalia, J., concurring in the judgment).

Justice Blackmun's opinion for the four-Justice plurality recognized that the Tennessee law "implicate[d]" political speech in a public forum based on its content. *Id.* at 196 (plurality opinion). The speech impacted by the statute was limited to "speech related

to a political campaign." *Id*. at 197. Even so, the law was a "facially content-based restriction on political speech in a public forum." *Id*. at 198. Accordingly, the plurality applied what it called "exacting scrutiny," requiring the State to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id*. (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

Tennessee asserted two interests that the plurality found compelling. First, it argued that the law protected "the right of its citizens to vote freely for the candidates of their choice." *Id*. at 198. Second, Tennessee contended that its law vindicated its interest in protecting the integrity of the electoral process. As the plurality noted, the Court "has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id*. at 199.

The plurality explained that the "history of election regulation" showed that the States were engaged in a "persistent battle against two evils: voter intimidation and election fraud." *Id*. at 206. Those evils were addressed by "a secret ballot secured in part by a restricted zone around the voting compartment." *Id*. Significantly, that restricted zone was a response to "ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud." *Id*. at 207; *cf*. *Russell v Lundergan-Grimes*, 784 F.3d 1036, 1051 (6th Cir. 2015) (reasoning that in *Burson*, 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").

The plurality held that the Tennessee ban on campaign speech in and near polling places survived some form of strict scrutiny. 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.[2] That said, the plurality recognized that its ruling in favor of such a speech restriction was "a rare case." *Id.*

Justice Stevens wrote the dissent for three Justices, noting that Tennessee's law "raise[d] constitutional concerns of the first magnitude." *Id*. at 217 (Stevens, J., dissenting) He explained that the law "directly regulates political expression," "targets only a specific subject matter (campaign speech) and a defined class of speakers (campaign workers)," and "somewhat perversely disfavors speech that normally is accorded greater protection than the kinds of speech that the statute does not regulate." *Id*. Accordingly, Tennessee had to show the necessity and narrow tailoring of its regulation.

Justice Stevens argued that Tennessee had failed to make the necessary showing. In particular, he criticized the plurality's application of "exacting"

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[2] 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). Justice Scalia concurred in the judgment only. He reasoned that, because "the portions of streets and sidewalks adjacent to polling places are not public forums *at all times*, *Burson*, 504 U.S. at 261 (Scalia, J., concurring in the judgment) (emphasis in original), any limitations on speech in those locations need only be reasonable and viewpoint-neutral to be constitutional.

scrutiny. As Justice Stevens 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. The plurality also "effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff." *Id*. The result of the plurality's solicitude for the State was to make its scrutiny "neither exacting nor scrutiny." *Id*.

The dissenters asserted that Tennessee 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). Justice Stevens 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 cars 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*.

Burson's plurality opinion may be correct to the extent that it applies to campaign activities. Nonetheless, it is sufficiently *sui generis* that it should not be extended to cover the elastically defined and applied "political." 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." App. D-16 (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 v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

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), that does not save the statute, because speech restrictions in a nonpublic forum still must be viewpoint-neutral and "reasonable in light of the purpose served by the forum." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (internal quotation marks omitted). Minnesota's ban on apparel displaying a political message and small lapel buttons supporting election-integrity measures such as voter-ID laws does nothing to prevent election fraud or voter intimidation. It is thus unreasonable in light of the polling location's purpose.

II. This Court should clarify *Marks* and hold that stare decisis does not counsel treating *Burson* as precedent.

Stare decisis is typically on the table when the Court is debating whether to overrule precedent. However, when considering cases in which *Marks* was followed, it is also relevant when the Court is determining whether to follow a cited case as one that must be reconciled with the Court's reasoning in one or more subsequent cases. Several principles the Court considers when deciding whether to overrule a precedent are implicated when the Court determines how much weight to afford a prior case.

The Court of Appeals below rightly determined that, if *Burson* controlled this case, that lower court was bound by *Marks*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (internal quotation marks omitted). *Marks* requires lower courts to treat the words of whichever opinion of a fractured Supreme Court decision delivers the deciding vote as if it were a majority opinion. That rule of decision governs inferior courts, but does not apply in this Court.

Instead, when this Court reviews a judgment wherein *Marks* dictated the analytical method of the lower court, this Court should treat the question as one of first impression beyond the actual judgment in the earlier case if the case finally arrives here. Stare decisis may afford some measure of protection for the prior judgment, but does not protect any opinion in that prior decision.

Stare decisis is a judicial policy "of fundamental importance to the rule of law." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). It "avoids the instability and unfairness that accompany disruption of settled legal expectations." *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.). These features are central to the rule of law, such that this Court "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Stare decisis therefore counsels the Court to adhere to precedent "unless the most convincing of reasons

demonstrates that adherence to it puts [this Court] on a course that is sure error." *Citizens United v. FEC*, 558 U.S. 310, 362 (2010). Indeed, Chief Justice Roberts's explanation that the decisional process informing the Court's determination in *Citizens United* that stare decisis does not protect errant First Amendment precedents from being overruled also counsels against invoking stare decisis where *Burson* is concerned. *See id*. at 376–85 (Roberts, C.J., concurring).

"Under this judicial policy, a federal court will generally adhere to the conclusion and central reasoning of a previous case presenting the same legal question." Curt A. Levey & Kenneth A. Klukowski, *Take Care, Now: Stare Decisis and the President's Duty to Defend Acts of Congress*, 37 Harv. J.L. & Pub. Pol'y 377, 396 (2014). But when *Marks* is in play, it means there is a previous judgment, but no previous majority rationale that was essential to reaching the judgment. Even if the Court adheres to the prior judgment, the Court should give each of the decisions from the prior decision whatever persuasive value the Court deems each to have, without regarding any as a precedent to be followed. *See generally id.* at 393–406.

The principles undergirding stare decisis are inapposite to *Burson* here. One is that "only by following the reasoning of previous decisions can the courts provide guidance for the future, rather than a series of unconnected outcomes in particular cases." Daniel A. Farber, Essay, *The Rule of Law and the Law of Precedents*, 90 Minn. L. Rev. 1173, 1179 (2006). Here, there is no reasoning from the previous decision beyond bare agreement that some speech can be restricted within some modest distance of a polling

location on Election Day to prevent fraud and intimidation. Because the Justices' reasons for that narrow assertion differ from one another, it does not justify an expansive ban on passive political thought. Invalidating the Minnesota statute as overbroad does not disturb *Burson*, and *Burson*'s tension with later cases means that reducing *Burson*'s weight would help minimize the impact this "rare" case has on the law.

Another principle is "the evenhanded, predictable, and consistent development of legal principles." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). As discussed elsewhere in this brief, aspects of *Burson*'s plurality opinion are in tension with the Court's more recent cases pertaining to strict scrutiny, and also to modern free speech jurisprudence. Treating *Burson*'s plurality as a majority holding could undermine the development of relevant legal principles, not help them move along a predictable and consistent course.

Other "relevant factors" are "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009). *Burson* was decided 26 years ago. That is not a recent decision, but also not one shrouded in the mists of time like those forming many English common-law rules. Respondents make no argument that anyone actually relies upon *Burson*. No voter signed an affidavit swearing that he entered the polling location only because he is confident that he knew no one would ask for his vote, to say nothing of being confident that he would not catch a glimpse of a Tea Party T-shirt or an NRA hat. And the Court had no reasoning in *Burson*. Justice Blackmun reasoned, Justice Scalia reasoned, and three

Justices picked between them, but the Court agreed on no reasoning, only a judgment.

Moreover, "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Id.* at 792. No one is asking the Court to overrule *Burson*. But expanding *Burson*'s rationale to the facts of this case would create a hypersensitive voting environment where the Court paternalistically shields more delicate citizens from passive logos they might disagree with. Such a move makes a mockery of the sort of bold citizenship required on Election Day for an advanced democracy. This Court should not facilitate the growth of that sort of environment, and expanding the *Burson* plurality's rationale to that extent would create such an unworkable rule that some frustrated litigants might begin to question *Burson*. Better to leave *Burson* where the Court finds it today, and not expand it to the breadth required to salvage Minnesota's statute.

III. The Minnesota law, like Tennessee's, targets speech based on its content and must satisfy strict scrutiny to be constitutional.

Under the First Amendment, content-based laws, "those that target speech based on its communicative content," are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). To be upheld, those laws must satisfy strict—not "exacting"—scrutiny.

Minnesota's law is plainly content-based. It covers "speech because of the topic discussed or the idea or message expressed." *Id*. at 2227. Minnesota doesn't

want to hear pleas for voter-ID or look at clothing bearing the words "AFL-CIO" or "NRA" much less some bearing the Gadsden flag. That clothing is involved does not undercut the fact that the message is at issue. *See Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (The wearing of a black arm band "was closely akin to 'pure speech' which, as we have repeatedly held, is entitled to comprehensive protection under the First Amendment."). To the contrary, the fact that the offending medium is apparel showcases how passive the speech is, and thus how strained is the claim that the clothing could somehow be a pernicious threat that intimidates voters or defrauds the election process.

"[P]resumptively unconstitutional" content-based limitations on speech must be narrowly tailored to serve a compelling state interest. The *Burson* plurality pointed to that standard, but called it "exacting." *See Burson*, 504 U.S. at 198. Its execution of that standard of review was less than rigorous.

Even though the plurality said that it was employing "exacting" scrutiny, it did not require the State to do much more than point to history. The State did not have to rely on other criminal statutes or demonstrate the need for the restrictions. Likewise, it did not have to regulate all speech, just some that it disfavored. *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).

In contrast, "[w]hen applying strict scrutiny outside the context of conducting elections, courts generally require a 'strong basis in evidence'" from a State

seeking 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.*, in several ways, as set forth above. Indeed, while the *Burson* plurality recognized that the State "must demonstrate that its law is necessary to serve the asserted interest", it deemed that showing satisfied by "an examination of the evolution of election reform." *Id*. at 199–200.

With respect to the buffer zone outside polling places, the *Burson* plurality did not "require[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).

Before *Burson* is extended to cover the full range of political thought, this Court should require more from Minnesota than the *Burson* plurality did from Tennessee. Put simply, the Minnesota law should be subjected to true strict scrutiny.

IV. *Burson* cannot 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.

Chief Justice Roberts's opinion in *WRTL*, in which Justice Alito joined, drives the distinction home. Chief Justice Roberts noted that, in order to protect freedom of speech, "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id*. at 469–70.

In this case, the clothing and button to which the Minnesota election officials objected constitute issue advocacy protected by the First Amendment. 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 *WRTL* holds that advocacy is protected by the First Amendment.

In contrast, *Burson* and *Marlin v. Dist. of Columbia Bd. of Elections*, 263 F.3d 716 (D.C. Cir. 2001), involve unambiguously campaign-related activity, which constitutes express advocacy and can be regulated. 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 asked, "[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?" App. D-18 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 D-16.

Plainly, the Minnesota law reaches broadly. Even if it were not too broad, the Court's modern doctrines require that it must be narrowly tailored to serve the compelling state interest involved.

V. The Minnesota law is not narrowly tailored to serve the State's interests.

Even if suppressing speech may "sometimes" be constitutional, "by demanding a close fit between means and ends, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency." *McCullen v. Coakley*, 134 S. Ct. 2513, 2534 (2014) (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). One way of enforcing the limits on government is to demand that, when it acts in a constitutionally sensitive area, it has a strong basis in evidence for doing so. Accordingly, "[w]hen applying strict scrutiny outside the context of conducting elections, courts generally require "a strong basis in evidence'" from the state. *Russell*, 784 F.3d at 1051; *see also Ricci v. DiStefano*, 557 U.S. 557, 582–83 (2009). Any limitation on speech also needs to be tied to a state interest of the magnitude required for the applicable level of scrutiny.

In *Burson*, the plurality recognized that the State had compelling interests in the integrity of the vote, as to preventing both vote fraud and the intimidation of voters. The Eighth Circuit also identified a "legitimate" state interest in "maintain[ing] peace, order, and decorum in the polling place." App. A-5 (internal quotation marks omitted).

The Minnesota law fails the strong basis in evidence test in several respects. The fit between the law and the State's interests are attenuated at best. Both within the polling place and within the bubble zone outside it, the suppression of speech bears no relation to the State's interests. In addition, there has been no showing that less intrusive measures are inadequate.

As Judge Shepherd notes in his dissent below, the record was "devoid of facts which demonstrate that any disruption of the 'peace, order, and decorum' of the Minnesota election process has occurred by virtue of voters wearing a political emblem, insignia, or slogan that is unrelated to an issue on the ballot." App. D-18 (Shepherd, J., concurring in part and dissenting in part). The absence of any such evidence is dispositive that Respondents failed to carry their burden of proving by a strong basis in evidence that Minnesota's law is narrowly tailored.

A. Neither the Gadsden Flag shirt nor the Please-ID Me button interfered with the State's interests in preventing vote fraud and intimidation.

In this case, there is no suggestion that Cilek was interfering with the integrity of the election process or blocking access to the polls. Absent such evidence, it is difficult to see any fit between the State's interests and its overly broad suppression of speech.

The Eighth Circuit drew on the plurality opinion in *Burson* to infer that, if political campaign speech within a certain distance outside the polling place could be banned, a parallel ban on political campaign speech inside the polling place was *ipso facto* constitutional. App. D-9 ("Because a statute restricting speech related to a political campaign outside the polling place survives strict scrutiny, the Minnesota statute, to the extent it restricts speech about a political campaign inside the polling place, is reasonable in light of the purpose which the forum at issue serves.") (internal quotation omitted). That reasoning blurs the distinction between campaign-related speech and other

political speech. Even so, its *ipso facto* reasoning runs the other way, such that what cannot be prohibited inside the polling place cannot be prohibited outside either.

The Eighth Circuit's reasoning is also upside down. The interests that most closely relate to the State's legitimate interests are those within the polling place. They need protection far more than the same interests outside the polling place. As a society, we do not want others telling us who to vote for or looking over our shoulders as we vote.

Thus, 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.

Banning campaign-related speech inside the polling place limits the potential effect of intimidation tactics and other coercive measures. Such tactics and influences can impact how the voter actually marks his ballot, thus corrupting his choice of who he votes for.

In contrast, 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 Cty. 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 court 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.

Because such a law does not even exist in Minnesota and was not a question on the ballot, advocating it is irrelevant. The Court's precedent does not require infantilizing adult citizens to the extent necessary to think that they must be shielded from messages irrelevant to their voting decisions during an election. When examining the T-shirt instead, or similar shirts such as one with an NRA logo, the claim that the ban is truly essential to preventing intimidation and fraud becomes patently absurd. Voters in an advanced democracy are not delicate squash blossoms. "Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate [speech] delivered by a person of a different [belief]." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014).[3]

"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 apparel here need not even be regarded as an opposing voice,

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[3] The fact that *Town of Greece* was an Establishment Clause case is of no moment. The Court's reasoning regarding adult citizens not being coerced by merely observing speech they disagree with is true regardless of whether the speech in question is religious or political.

because it was irrelevant to what was on the ballot. An opposing voice would be messages advocating an opposition-party candidate or an opposing position on a ballot question. The apparel here is 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, even if stare decisis counsels this Court to give any weight to *Burson*.

Minnesota and the local Respondents have provided no such evidence that a law sweeping so broadly as to forbid Gadsden flag shirts or 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.* When coupled with the fact that the Court's subsequent cases make clear that the burden is not relaxed when political speech is barred, it becomes clear that the Eighth Circuit must be reversed.

B. *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.

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.

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 Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *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 served casts doubt on the continuing vitality of the legal rationale supporting the 100-foot limitation on political speech imposed by the Eighth Circuit.

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 sidewalks and public ways in the vicinity of polling places were not traditionally open to political activity. But this does not alleviate the evidentiary burden this Court requires when governmental burdens on certain fundamental rights trigger strict scrutiny. As Justice Stevens observed in dissent, 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).

States still must proffer such proof, however, when they forbid citizens from speaking. It is certainly plausible that Minnesota could present evidence to support the concept of a buffer zone restricting active politicking and campaigning such as in *Burson*. Expert analyses from political scientists, psychologists, and other social behavior experts might provide support for something of this nature. But Minnesota must present very different evidence to carry its burden proving that campaigning bans are insufficient, and that the government must instead ban NRA hats and Gadsden flag T-shirts.

In *McCullen*, this Court unanimously held 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)). Much less demanding than strict scrutiny, a majority of the Court held that the limitation on speech was content-neutral, but it failed intermediate scrutiny. *Id.* at 2534–40.

Likewise, in *Boos*, 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. Put differently, the District of Columbia's 500-foot bubble failed the narrow tailoring test.

This Court should, likewise, look at whether Minnesota's restriction on political speech within a 100-foot bubble around polling places is narrowly tailored to protecting the State's interests.

C. Minnesota did not show that any less intrusive alternatives were inadequate to serve its interests.

"To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540. Yet again, the Court emphasized that the burden is on the government to show the need for its burden on speech. Minnesota's invocation of general considerations to justify its overly broad suppression of speech represents the choice of an easier route.

Subsequent to *Burson*, this Court's decisions have looked skeptically at whether less intrusive alternatives are adequate to protect the state's interests. In *McCullen*, for example, the Court rejected the contention that criminal laws were unworkable in preventing congestion around abortion facilities. It noted that obstruction could be addressed through local ordinances and by enforcing the state's criminal laws when warranted. *Id.* at 2538–39. The lack of criminal prosecutions and attempts to obtain injunctive relief demonstrated that Massachusetts could not show "that it seriously undertook to address the problem with less obtrusive tools readily available to it." *Id*. at 2539. "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 *McCullen*, the Court distinguished *Burson* and its approach. *Id.* at 2540. The *Burson* plurality rejected the contention that Tennessee should have relied on laws prohibiting intimidation and interference. *Burson*,

504 U.S. at 206–07. The *McCullen* Court found reliance on *Burson* to be "misplaced," explaining that the problem near abortion clinics and around polling places differed. *Id*. That said, the Court pointed to a number of potential criminal and administrative alternatives. *Id*. at 2538–39.

The Court explained,

> "The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

Id. at 2539.

In the same way, this Court in *Boos* struck down a provision in the District of Columbia Code making it unlawful to display signs to which a foreign government might object within 500 feet of the country's embassy. It pointed to an "analogous" federal criminal law that criminalized willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties." *Id*. at 325 (quoting 18 U.S.C. § 112(b)(2)). The Court explained that the federal statute was "considerably less restrictive" than the District of Columbia Code provision. *Id*. at 326. Moreover, the federal statute represented the judgment of Congress, arrived at "after a careful balancing of our country's international obligations with our Constitution's protection of free expression," of how best to "satisf[y] the Government's interest in

protecting diplomatic personnel outside the District of Columbia." *Id*. In short, 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 326–27.

Instead of hiding behind *Burson*, the Eighth Circuit should have required Minnesota to show that less intrusive alternatives were not adequate. Respondents failed to do so.

CONCLUSION

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

Respectfully submitted,

JOHN J. PARK, JR.
Counsel of Record
STRICKLAND BROCKINGTON
LEWIS LLP
1170 Peachtree Street NE
Suite 2200
Atlanta, Georgia 30309
(678) 347-2208
jjp@sbllaw.net

KENNETH A. KLUKOWSKI
AMERICAN CIVIL RIGHTS UNION
3213 Duke Street #625
Alexandria, Virginia 22314
(877) 730-2278
kklukowski@theacru.org

Attorneys for *Amici Curiae*

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