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 OF RESPONDENTS


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## QUESTION PRESENTED

Whether Minnesota's restriction on individuals wearing "political badges, political buttons, or political insignia" in the polling place is a reasonable, viewpoint-neutral regulation of speech in a nonpublic forum.

## TABLE OF CONTENTS

**Page**

## APPENDIX

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Constitution**



**Laws, Statutes & Rules**

**Other Authorities**

## CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that government "shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I.

The provision of Minnesota law regulating conduct inside polling places on election days, Minnesota Statute section 211B.11(1), provides, in relevant part, that "[a] political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."

## INTRODUCTION

For democracy to thrive, the right to vote and the integrity of our elections must be jealously protected. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). Accordingly, there can be no serious debate that citizens' speech interests must yield to certain election restrictions enacted to preserve the collective right of self-governance. Section 211B.11(1) of Minnesota Statutes is such a restriction. It prohibits individuals from displaying campaign and political messages only while they are within the polling place. Minnesota's limited prohibition is a reasonable restriction of speech in a quintessential nonpublic forum that protects the integrity of elections by preserving order and decorum in the polling place and preventing voter confusion and intimidation.

Petitioners argue that the First Amendment forum doctrine should be jettisoned and that this Court should

either apply strict scrutiny because Section 211B.11(1) is a content-based restriction of political speech or declare the statute unconstitutional as a total ban on speech. Petitioners' arguments are predicated on a misapplication of this Court's First Amendment jurisprudence. This case can and should be decided by a straightforward application of the forum doctrine. Scrutinized pursuant to this doctrine, Minnesota's restriction on political apparel in the polling place is a reasonable, viewpoint-neutral restriction on speech in a nonpublic forum.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

#### A. The Text and Purpose of Section 211B.11(1)

Like every State, Minnesota has enacted laws to allow voters to cast ballots in peaceful, orderly polling places unhampered by coercive, intimidating, or disorderly conduct. The election day provisions of the Minnesota Fair Campaign Practices Act, Minn. Stat. § 211B.11(1), impose a set of regulations designed to make manifest the Minnesota Voter's Bill of Rights' guarantee that every eligible voter shall "have the right to vote without anyone in the polling place trying to influence [that] vote." Minn. Stat. § 204C.08(1)(10).

First, Section 211B.11(1) prohibits persons from displaying campaign material, posting signs, asking, soliciting, "or in any manner try[ing] to induce or persuade a voter within a polling place * * * to vote for or refrain from voting for a candidate or ballot question." Second,

Section 211B.11(1) proscribes providing "political badges, political buttons, or other political insignia to be worn at or about the polling place" on election days. Finally, Section 211B.11(1)'s third sentence—the only one at issue here—provides that a "political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."

The Act defines "political purposes" to mean "intended or done to influence, directly or indirectly, voting at a primary or other election." Minn. Stat. § 211B.01(6). The scope of Section 211B.11(1) was further crystalized in 2010, when election managers for the counties of Hennepin and Ramsey sent out identical memoranda—the "Election Day Policy"—to city clerks regarding Minnesota's statutory ban on political apparel in polling places. Pet. App. I1-I3.[1] The Election Day Policy enumerated examples of "political" insignia within the scope of the statutory ban:

- Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.
- Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).

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[1] At the same time, the Minnesota Secretary of State distributed the Election Day Policy to county election officials statewide. J.A. 93-94.

- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

Pet. App. I1-I2.

The Election Day Policy directs election judges to ask individuals to conceal or remove prohibited political insignias while inside the polling place. If a voter refuses to do so, the Policy requires election judges to permit the voter to receive a ballot and vote. *Id.* I2-I3. Violators of Section 211B.11(1) are subject to an administrative process in the Minnesota Office of Administrative Hearings ("OAH"). See Minn. Stat. § 211B.32(1)(a). If a complaint is filed, the OAH may dismiss it, issue a reprimand, or impose a civil penalty, *id.* §211B.35(2), and an aggrieved party may seek judicial review, *id.* § 211B.36(5). The OAH may also refer a complaint to a county attorney for potential prosecution. See Minn. Stat. § 211B.35(2); Minn. Stat. § 211B.16. If there is a prosecution, the penalty is a petty misdemeanor, see Minn. Stat. § 211B.11(4), which is not a crime under Minnesota law, see Minn. Stat. § 609.02(4a).[2]

### B. Minnesota's Ban on Political Badges, Buttons, and Insignia Has a Long Historical Pedigree

Minnesota's polling-place regulations date to 1893, shortly after Minnesota adopted the secret ballot. At that time, the Minnesota Legislature enacted robust

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[2] There are no OAH proceedings or published cases indicating that anyone has been referred for prosecution for violating Section 211B.11.

regulations designed to prevent corrupt election practices, including the establishment of a 25-foot buffer zone around the polling place within which no person was permitted to solicit votes. See 1893 Minn. Laws, Ch. 4, § 108. Nearly 20 years later, during a special session in 1912, the Legislature passed the Corrupt Practices Act, see 1912 Minn. Laws, 1st Spec. Sess., Ch. 3, which prohibited for the first time the wearing of any "political badge, button or other insignia" within the polling place on election day. *Id.* § 13 (now codified at Minn. Stat. § 211B.11(1)).

Minnesota's ban on political apparel was motivated by advancements in button technology. The celluloid button first appeared during the 1896 presidential election between William McKinley and William Jennings Bryan. Ted Hake, *Encyclopedia of Political Buttons: United States 1896-1972* (1974), at 13. Political buttons quickly became ubiquitous. *Id.*; see also Roger A. Fischer, *Tippecanoe and Trinkets Too: The Material Culture of American Presidential Campaigns 1828-1984* (1988), at 157-160.

The 1912 Corrupt Practices Act was heralded in Minnesota as creating an election environment in which voters could cast their ballots without being urged by campaign workers to wear badges and buttons to the polling place. See *Quiet Primary Greets City Voters Today*, Minneapolis Morning Tribune, 1, September 17, 1912; see also *Wearing Campaign Button Against the Law at Midnight*, Minneapolis Morning Tribune, 6, November 5, 1912 (discussing prohibition on wearing political buttons and describing a particular candidate's button that was "nearer the size of a small billboard than the average campaign button").

Minnesota is not alone in regulating speech inside polling places. All 50 States and the District of Columbia have laws that limit speech to some extent within the polling place.[3] Moreover, most jurisdictions (45 States and the District of Columbia) regulate speech on apparel inside polling places, to varying degrees. Eleven States (including Minnesota) have enacted statutes that prohibit individuals from wearing "political" apparel in the polling place.[4] An additional 16 States plus the District of Columbia have enacted statutes that prohibit individuals from wearing "campaign" apparel in the polling place.[5] Another 10 States have enacted statutes prohibiting some type of "electioneering" in polling places, a term that is usually understood to encompass the wearing of campaign apparel.[6] And eight States permit only voters to wear campaign apparel in the polling place.[7] Although States have varied in their approach, content-based regulations of speech in the polling place, including apparel, are the rule, rather than the exception.

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[3] See Appendix A1-A32.

[4] *Id.* (Colorado; Delaware; Louisiana; Minnesota; Nebraska, New Jersey; New York; North Dakota; Texas; Vermont; Wisconsin).

[5] *Id.* (Alaska; California; Georgia; Hawaii; Indiana; Kansas; Massachusetts; Michigan; Montana; Nevada; New Hampshire; New Mexico; Ohio; South Carolina; Tennessee; West Virginia; Washington, D.C.).

[6] *Id.* (Arkansas; Idaho; Illinois; Missouri; North Carolina; Oklahoma; Pennsylvania; Utah; Washington; Wyoming).

[7] *Id.* (Alabama; Florida; Iowa; Maine; Maryland; Rhode Island; South Dakota; Virginia).

### C. Petitioners' Political Apparel

Before the 2010 election, a political group in Minnesota called North Star Tea Party Patriots began distributing shirts created by the national Tea Party Patriots organization. J.A. 66, 72. The "Tea Party" is a well-known political organization in the United States with numerous affiliates in Minnesota.[8] *Id.* 66, 99-101. The Tea Party shirts included the national organization's logo and related political slogans, including "Don't Tread on Me," "Liberty," "We'll Remember in November," and "Fiscal Responsibility, Limited Government, Free Markets." Pet. App. H1; J.A. 72.

Around the same time, a coalition of three organizations in Minnesota—North Star Tea Party Patriots, Minnesota Majority, and petitioner Minnesota Voters Alliance—formed Election Integrity Watch, a "grass roots effort to protect election integrity."[9] J.A. 63, 70. Election Integrity Watch designed and disseminated a button with the phrase "Please I.D. Me" stamped in yellow letters above an image of a panoptic eye. Pet. App. G1. The button listed a toll-free telephone number and website where voters could report "suspicious activity" on election day. *Id.* Election Integrity Watch orchestrated a public campaign encouraging its supporters to wear the button inside the polling place as "a visible

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[8] In July 2010, the U.S. House of Representatives officially recognized a Tea Party caucus, consisting of 52 Republican members and headed by Representative Michele Bachmann from Minnesota's Sixth Congressional District. Pet. App. A6, E17.

[9] All three member organizations of Election Integrity Watch were initially plaintiffs in this action, but only the Minnesota Voters Alliance remains a party.

message to others that you are watching for voter fraud." J.A. 104. Election Integrity Watch explained that the goal of the "Please I.D. Me" campaign was to convey to voters queueing in polling places the false impression that Minnesota law required photographic identification to vote:

> When you go to vote on November 2, wear your Election Integrity Watch button and show your photo ID when you sign-in to vote. While Minnesota does not require an individual to show an ID, *let's act like it does*. This simple act of showing an ID will likely result in a spontaneous reaction from others in line behind you to show their ID as well. Any person in line thinking about committing voter impersonation will likely be dissuaded from doing so. (Although polls show that over 80% of Minnesotans support requiring a photo ID to vote, *this measure has been repeatedly block [sic] by leaders in the Minnesota state legislature*).

J.A. 104-105 (emphasis added).

As Election Integrity Watch acknowledged, Minnesota law does not require voters to show photo identification at the polling place. See Minn. Stat. § 204C.10. In 2010, however, the question whether Minnesota law ought to require photo identification to vote was "the subject of public and legislative debate," Pet. App. E3-E4, as well as proposed legislation, see*, e.g.*, 2011 Minn. Laws, Ch. 69, § 24 (the 21st Century Voting Act, vetoed on May 26, 2011, requiring voters "to present a photo identification document"); see also J.A. 57-61 (explaining political nature of buttons).

### D. Election Day 2010

On election day in 2010, petitioner Andy Cilek wore both a "Please I.D. Me" button and a Tea Party shirt to his polling place in Hennepin County. J.A. 78. Cilek alleges that he was deprived of his right to vote "for over five hours." J.A. 83.[10] Petitioners also allege that Dorothy Fleming and other unidentified individuals were not told to remove the "Please I.D. Me" button, J.A. 76-77, 81, and that Dan McGrath was asked by an election judge to cover or remove the button, which he refused to do. J.A. 80. No administrative complaint or prosecution was ever commenced against any person for wearing the "Please I.D. Me" button or Tea Party apparel.

## II. PROCEDURAL HISTORY

### A. The District Court Dismisses Petitioners' Suit against State and County Officials

Five days before the 2010 election, several individuals and organizations, including Minnesota Voters Alliance and Election Integrity Watch, sued the Minnesota Secretary of State, the Hennepin County Attorney and Elections Manager, and the Ramsey County Attorney and Elections Manager (hereinafter "Minnesota"). J.A. 8-33. The complaint alleged that Section 211B.11(1) was unconstitutional on its face and as applied to their buttons and apparel. J.A. 28-30. The district court denied a

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[10] Cilek initially alleged that "election judges refused to allow [him] to vote[.]" J.A. 78. Cilek later admitted that he was permitted to vote despite his political apparel, consistent with the Election Day Policy. Pet. App. E7 n.4.

temporary restraining order prior to the election, and after the election, plaintiffs amended their complaint to add allegations about how Section 211B.11(1) had been enforced on election day. J.A. 77-82.

The district court dismissed the amended complaint. Addressing plaintiffs' facial challenge, the district court held that, because Minnesota's polling places were nonpublic forums, Section 211B.11(1)'s restrictions on political apparel needed only to be "reasonable in light of the purpose served by the forum." Pet. App. E13 (internal citation omitted). The court held that Minnesota's restriction was "reasonably related to the legitimate state interest of 'maintain[ing] peace, order, and decorum'" at polling places. *Id.* (quoting *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966)). Having concluded that "wearing clothing or buttons expressing political ideology or beliefs" fell "within the [statute's] legitimate sweep," given the nonpublic forum, the court easily rejected plaintiffs' overbreadth challenge as well. *Id.* E29. The court also dismissed plaintiffs' as-applied claim, holding that Minnesota had "a well-established, legitimate interest in providing a safe, orderly, advocacy-free polling place," *id.* E15, that was threatened by the partisan Tea Party shirts, *id.* E17-E18, and by the "Please I.D. Me" buttons' capacity to "confuse voters" and cause them "to refrain from voting because of increased delays or the misapprehension that identification is required," *id.* E16.

### B. First Appellate Proceedings and Remand

The Court of Appeals for the Eighth Circuit affirmed the dismissal of plaintiffs' facial challenge. Pet. App. D5-D10. Rejecting plaintiffs' argument that polling places

were public forums, the court held that they were non-public forums in which a speech restriction "is not subject to strict scrutiny and is permissible if it is viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves.'" *Id.* D8 (quoting *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46-49 (1983)). The court first held that Minnesota's restriction was viewpoint-neutral because "it applies to all political material, regardless of viewpoint," and "does not define 'political' to include or exclude any view." *Id.* Next, the court identified three purposes served by the statute—(1) "a legitimate interest in 'maintain[ing] peace, order and decorum' in the polling place'"; (2) "a compelling interest in 'protecting voters from confusion and undue influence'"; and (3) a compelling interest in "preserving the integrity of [the] election process"—and held that Section 211B.11(1) reasonably served those purposes. *Id.* D8-D10 (internal citations omitted). The court also observed that constitutionality of Section 211B.11(1)'s regulation of speech in a *nonpublic* forum followed ineluctably from *Burson* v. *Freeman*, 504 U.S. 191 (1992), because there a similar restriction on speech "'related to a political campaign' in the *public* forum *outside* the polling place" survived more stringent strict scrutiny. *Id.* D8 (emphasis in original).

The court of appeals reversed the district court's dismissal of plaintiffs' as-applied challenge. *Id.* D12. This Court denied review. See 134 S. Ct. 824 (2013). On remand, the district court rejected plaintiffs' as-applied challenge regarding both the "Please I.D. Me" buttons and Tea Party shirts. The court found that the buttons were "part of an orchestrated effort to falsely intimate to voters in line at the polls that photo identification is

required in order to vote in Minnesota" and were "connected to a campaign that aim[ed] to change state and local laws" on voter identification. Pet. App. C13-C14. The court also found that there was no genuine dispute that Tea Party-branded apparel constituted a "political badge, political button, or other political insignia." *Id.* B32. The court therefore held that prohibiting the apparel was a reasonable means of achieving Minnesota's compelling interest in ensuring the "integrity of [its] elections," *id.* C14, by "preserving the decorum of the polls," *id.*, and protecting voters from "confusion and undue influence," *id.*, and "politicking at the polls," *id.* B32.

### C. Second Appellate Proceedings

Plaintiffs again appealed but abandoned their claim that Minnesota could not lawfully proscribe the "Please I.D. Me" buttons in polling places. The court of appeals affirmed, holding that Minnesota could lawfully proscribe Tea Party shirts in polling places, both because Tea Party apparel was indisputably "political" and because banning apparel with the organization's "name and logo is 'reasonable because it is wholly consistent with [Minnesota's] legitimate interest in preserving' polling place decorum and neutrality." Pet. App. A6 (quoting *Perry*, 460 U.S. at 50).

Petitioners filed a second petition for certiorari, asking this Court to decide only Section 211B.11(1)'s facial constitutionality. See Br. at I (defining question presented as whether Section 211B.11(1) is "facially overbroad under the First Amendment"). This Court granted review.

## SUMMARY OF ARGUMENT

I. Minnesota's restriction on political apparel reaches only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in that polling place.

Both the reach of the statute and its limits are evident from the plain and ordinary meaning of its words. A common-sense understanding of the term "political" extends beyond messages that explicitly identify a candidate or ballot question, but is still easily understood by voters, election officials, and others in the polling place, to prohibit other messages that are related to the election at issue. That interpretation is supported by the language, context, and purpose of the surrounding statutes in Minnesota's Fair Campaign Practices Act. It has also been consistently applied by Minnesota's election officials to prohibit not only "campaign" apparel, but also "political" apparel that is viewed objectively as conveying a message about voters' electoral choices.

II. Under longstanding First Amendment jurisprudence, Minnesota's regulation of speech in government-controlled property must be analyzed under the forum doctrine.

A. This Court has previously utilized the forum doctrine to consider the constitutionality of a content-based restriction of political speech outside the polling place. See *Burson*, 504 U.S. 191. The *interior* of the polling place is similarly government-controlled property, and the forum doctrine applies equally to speech regulations in that space. Because polling places are designed for the singular purpose of voting, there is no dispute that

they are nonpublic forums. As a result, Minnesota's regulation of speech inside the polling place need be only reasonable and viewpoint-neutral.

Contrary to petitioners' suggestions, a content-based regulation of political speech is not subject to strict scrutiny if the regulation applies in a nonpublic forum. And this Court has consistently applied the forum doctrine, even when considering content-based restrictions that reach political speech. The government can act to safeguard the use of its property, and its regulatory authority is at its peak in nonpublic forums, which are not designed for or dedicated to open expression and debate. Preserving a nonpublic forum for its intended use may require the government to draw distinctions among speakers based on content, and it may do so consistent with the First Amendment, so long as it is reasonable and viewpoint-neutral.

B. Petitioners cannot avoid the application of the forum doctrine through their claims of overbreadth. The overbreadth doctrine relaxes the traditional requirements of standing, but it does not alter the substantive requirements of the First Amendment, nor does it change the applicable constitutional standard.

III. Minnesota's restriction on political apparel in the polling place is viewpoint-neutral and a constitutionally reasonable method to serve critical government interests relating to elections.

A. Minnesota's restriction maintains peace, order, and decorum in the polling place, a space dedicated to the exercise of the fundamental right to vote. Controlling the atmosphere of this space permits voters to deliberate over their solemn task and permits election of-

ficials to focus on efficient administration of the electoral process. Permitting political advocacy to invade this dignified space would carry an obvious risk of disruption or disturbance, and Minnesota can exercise its constitutional authority to regulate elections and impose a reasonable prophylactic measure that prohibits political messaging inside the polling place.

Minnesota's restriction also protects voters from the confusion, undue influence, and intimidation that could result from the display of political messaging inside the confined quarters of a polling place. This risk could come to fruition through the singular display of a confusing or hostile political message by a voter, a partisan challenger, or an election judge, or through an intimidating show of force should voters (or campaigns) orchestrate an effort to flood polling places with political messages at the final critical juncture of an election. *Burson* recognized the prevention of voter intimidation as a compelling state interest, and it acknowledged the reality that less blatant acts of intimidation, which could discourage voters from participating in an election, would not be sufficiently addressed through statutory regulations of conduct.

By preserving a calm atmosphere in the polling place, and ensuring that voters can cast their votes free from any threat of confusion or intimidation, Minnesota's restriction serves the overarching, compelling objective of election integrity. Electoral results should reflect the will of the electorate, a goal that requires assuring citizens' ability to cast secret ballots without impediments. Safeguarding the dignity of the polling place and the voters within it promotes public confidence in electoral results and such confidence is a critical component of our democracy.

B. Minnesota's restriction is viewpoint-neutral on its face, and there is no evidence that it has been applied in a discriminatory manner. Although election officials must exercise some discretion to determine which apparel is political and therefore prohibited, such discretion is constitutionally permissible in a nonpublic forum, given the government's significant latitude to control its property.

IV. Because Minnesota's statute is a reasonable restriction in a nonpublic forum, it is not facially overbroad. Beyond their generalized arguments for application of strict scrutiny or against application of the forum doctrine, petitioners offer only outlandish hypotheticals that rely on an illogical reading of the statutory text. Speculative claims that the statute would prohibit, for example, shirts of a certain color cannot support any conclusion that the statute impermissibly reaches a substantial amount of protected speech when measured against its legitimate sweep.

V. If the Court has any constitutional concern about the statute's breadth or construction, it should certify a question to the Minnesota Supreme Court for a definitive interpretation. Deference to the Minnesota Supreme Court would serve the interests of federalism and judicial restraint in this facial challenge to a state law.

## ARGUMENT

### I. MINNESOTA'S RESTRICTION IS LIMITED TO APPAREL AN OBJECTIVELY REASONABLE OBSERVER WOULD RECOGNIZE AS POLITICAL

The Minnesota Supreme Court has not authoritatively interpreted Section 211B.11(1)'s prohibition on wearing "political badges, political buttons, or other political insignia" in the polling place, so this Court must "extrapolate its allowable meaning" by applying the traditional tools of statutory construction. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). The Court must also consider Minnesota's "authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth County, Ga.* v. *Nationalist Movement*, 505 U.S. 123, 131 (1992); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (a federal court must "consider any limiting construction that a state court or enforcement agency has proffered").

#### A. Section 211B.11(1)'s Meaning Is Plain

The scope of Section 211B.11(1)'s prohibition is clear from its text: because the statute refers to things "*worn* at" the polling place, it applies only to badges, buttons, and insignia printed on, affixed to, or used as apparel. Petitioners' facial challenge, then, raises only one interpretive question: what constitutes "political" apparel within the meaning of the statute?

The ordinary tools of statutory interpretation and Minnesota's longstanding practice in applying the statute supply a ready answer. Although petitioners assert

that the term "political" is "amorphous," with "no logical stopping point" (Br. 14, 25), that contention is wrong. The text, structure, and purpose of Section 211B.11(1) all point to a meaning of the term "political" that limits the scope of the statute to words or symbols conveying a message regarding the electoral choices facing Minnesota voters in the polling place, as determined by an objectively reasonable observer.

Chapter 211B does not define "political," so the term must be accorded its ordinary meaning within the context of the statute. See *Grayned*, 408 U.S. at 110. Leading dictionaries concur that "political" means "of or relating to government, a government, or the conduct of governmental affairs." Webster's Third New International Dictionary 1755 (1968); see also Merriam-Webster Collegiate Dictionary 899 (10th ed. 2001) (defining "political" as "of or relating to government, or the conduct of government" and "of, relating to, involving, or involved in politics, especially party politics"). The district court found that dictionary definitions like these "comport[ed] with the common understanding of the word political." Pet. App. E22. Hence, "political" apparel should, as a threshold matter, be understood as items that convey a message about government or the conduct of governmental affairs.

The statutory context further clarifies the meaning of "political" as Section 211B.11(1) employs the term. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Section 211B.11 is titled "Election Day Prohibitions." And the antecedent sentences in Section 211B.11(1) make clear that Minnesota's Election Day Prohibitions are concerned with ensuring that, on election day, a voter can travel to her polling place and

cast her ballot according to her own conscience, free from external coercion or suasion:

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place * * * to vote for or refrain from voting for a candidate or ballot question[, or wear a] * * * political badge, political button, or other political insignia[.]

The other regulated activities—displaying campaign materials and inducing or persuading a voter to vote for or against a candidate or ballot question—all relate specifically to voting at the polling place.[11] In context, then, the proscription on "political" apparel in Minnesota's Election Day Prohibitions applies not to *any* message regarding government or its affairs, but to messages relating to questions of governmental affairs facing voters on a given election day.

That construction is confirmed by the definition of related terms elsewhere in Minnesota's Fair Campaign Practices Act. See *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (provisions that "may seem ambiguous in isolation" should be clarified by reference to similar terms used elsewhere in the statute). The Act's definitional section does not separately define "political," but it does define the narrower phrase "political purposes": "An act is done for 'political purposes' when the act is intended or done to influence, directly or indirectly, voting at a primary or other election." Minn. Stat. § 211B.01(6). "Political" is

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[11] As petitioners point out (Br. 5), this would include areas designated for in-person absentee voting before election day. See Minn. Stat. § 211B.11(1).

used in Section 211B.01(6) as an adjective, to limit "purposes" to action undertaken to influence voting in an election. In Section 211B.11(1), then, "political" must be read to modify "badges," "buttons," and "insignia" in the same way: namely, by limiting the scope of the statute to messages related to voting, i.e., to the electoral choices at issue in the polling place. See *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007).

That common-sense construction of the term "political" is also consistent with this Court's treatment of that term in numerous related contexts. See*, e.g., Greer* v. *Spock,* 424 U.S. 828, 831-833 (1976) (applying forum analysis to uphold a restriction on speech on a military base that included "political speeches and similar activities," which the Court applied to campaign material and a meeting to discuss election issues); *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, 304 (1974) (upholding government's ban against "political" advertising on city buses, and construing the regulation to apply to "candidacy or issue-oriented advertisements"). The Court in those cases never expressed any reservations about applying the ordinary meaning of "political."

In addition, under Minnesota law, determining whether particular conduct falls within the scope of election regulations is determined objectively, by asking how a reasonable observer would perceive the conduct. See *Minnesota Voters All.* v. *Anoka-Hennepin Sch. Dist.*, 868 N.W.2d 703, 709 (Minn. Ct. App. 2015) (whether material "promoted" passage of ballot question is examined "according to an objective reasonable-voter standard"); see also *Abrahamson* v. *St. Louis Cty. Sch. Dist.*, 819 N.W.2d 129, 136 (Minn. 2012) (applying objective reasonableness to determine whether statements "promoted" adoption of ballot question); *Schmitt* v.

*McLaughlin,* 275 N.W.2d 587, 591 (Minn. 1979) (looking to "average voter" in evaluating whether election publication implied endorsement). So too here: in determining whether apparel is "political," Minnesota election officials ask how a reasonable observer would perceive its message. See Pet. App. E25.

So construed, the reach of the statute is far from "limitless," as petitioners suggest. Br. 35. First, it regulates only the interior of a polling place, and only for the ten minutes or less the average voter spends there. J.A. 56, ¶11. Political apparel can be worn up to the threshold of the polling place, then simply removed or concealed during a voter's short stay inside. In that respect, Section 211B.11(1) preserves abundant opportunities to blazon political apparel—including on any day and at any place outside the polling place itself. Second, the statute does not prohibit any conceivably "political" message, but only those a typical observer would understand to convey a message about the electoral choices facing voters inside the regulated polling place.[12] In combination, those limitations minimize the burden on speech.[13]

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[12] Petitioners repeatedly argue that the district court construed the statute to apply to a virtually limitless definition of "political." See Br. 2-3, 14-15, 24-25. Petitioners cherry-pick a few phrases from the district court's order while ignoring the court's actual construction of the statute and policy. In fact, the district court construed the statute to apply to apparel that could be reasonably understood as expressing a message about voting. Pet. App. E22-E23, E29.

[13] Petitioners are wrong when they assert that individuals who violate the statute face criminal penalties. See Br. 2, 5, 9, 14, 28, 30. Violating Section 211B.11(1) is a "petty misdemeanor," see Minn. Stat. § 211B.11(4), which "does not constitute a crime" in Minnesota. See *id.* § 609.02(4a).

### B. Section 211B.11(1) Has Been Applied Consistently With This Construction

Minnesota officials consistently have construed the plain meaning of the statute in the manner described above, as did the lower courts. On the eve of the 2010 election, in direct response to petitioners' motion for a temporary restraining order, respondents promulgated the Election Day Policy to provide additional guidance to election judges on the meaning of Section 211B.11(1). See Minn. Stat. § 204B.27(2) (recognizing Minnesota Secretary of State's authority to "transmit to the county auditors and municipal clerks detailed written instructions for complying with election laws relating to the conduct of elections, conduct of voter registration and voting procedures."); *Forsyth County*, 505 U.S. at 131 (the Court must consider the government's "implementation and interpretation" of a statute in resolving a facial challenge).

The Election Day Policy described several categories of apparel-borne messages that an objectively reasonable observer would recognize as conveying a message relating to electoral choices or tending to influence the election taking place, including messages: (1) containing "the name of a political party in Minnesota"; (2) including "the name of a candidate at any election"; (3) expressing "support of or opposition to a ballot question at any election"; (4) understood as "issue oriented material designed to influence or impact voting"; or (5) "promoting a group with recognizable political views" on electoral issues. See Pet. App. I2-I3; see also J.A. 58-61. The Minnesota Secretary of State also has issued an Election Judge Guide explaining that the restriction of polit-

ical material "includes displaying any political or campaign materials in the polling place, including literature or buttons." Office of the Minnesota Secretary of State, *2016 Election Judge Guide* at 31.[14]

The guidance provided in the Election Day Policy and Election Judge Guide belies petitioners' argument that the statute reaches all "political" speech, broadly construed. The first three categories set forth in the Policy describe campaign material—names of political parties and candidates, and messages about particular ballot propositions—that a reasonable observer would understand to relate directly to ballot choices. The fourth category describes apparel bearing messages that are understood as intended to influence voting directly. The "Please I.D. Me" button is paradigmatic of that class of political messages, as it was intended to discourage so-called "voter impersonation" in the polling place and, viewed objectively, expressed support for the political stance of certain candidates. J.A. 58-61, 104-105. And the fifth category is limited to "group[s] with recognizable political views" on the issues confronting voters in a given election—which, in 2010, clearly included the Tea Party, given its national prominence and connection to Minnesota electoral politics.

Respondents' litigation position has been consistent with the guidance provided by Minnesota election officials. See*, e.g.*, Hennepin County Reply Mem. (Dkt. 82, Feb. 17, 2011), at 4 (citing definition of "political pur-

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[14] See http://www.sos.state.mn.us/media/2090/election-judge-guide.pdf. The Secretary of State is required by law to distribute this guide to county auditors and election precincts. See Minn. Stat. § 204B.25; Minn. R. 8240.2000.

pose" and explaining that law is limited to political paraphernalia understood to be aimed at influencing voters); Hennepin County Appellees' Opening Br. (Sept. 21, 2011), at 34-35 (same). Respondents have never argued that the statute covers anything that conceivably could be political.[15] But neither have they accepted petitioners' paradoxical argument that "political" apparel must be limited to "campaign" apparel alone—a construction the courts below consistently rejected as untenable and contrary to the statutory text. See*, e.g.,* Pet. App. A5 (rejecting petitioners' argument that Tea Party shirts are not political); *id.* B23-B33 (same); *id.* E16 (same).

In sum, based on its plain language and context, Minnesota's consistent interpretation and application, and the lower courts' construction, Section 211B.11(1)'s restriction is limited to apparel an objectively reasonable observer would recognize as conveying a message related to the electoral choices in the polling place.

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[15] Petitioners make much of statements to the court of appeals during oral argument (Br. 8), but respondents' counsel argued only that the statute prohibits apparel from a group with recognizable views on the election, which could include AFL-CIO or Chamber of Commerce apparel *if* those groups had objectively recognizable views on an issue in the election at hand. In response to a hypothetical posed by the panel regarding Senator Ron Paul's presidential campaign, respondents' counsel further explained that the statute would not encompass a "Peace" shirt, because the word "Peace" would not be objectively understood to convey a political message about Senator Paul's campaign. See Oral Argument at 18:33 to 20:08, *Minnesota Majority* v. *Mansky*, 708 F.3d 1051 (8th Cir. 2013), available at http://media-oa.ca8.uscourts.gov/OAaudio/2012/2/112125.MP3. Respondents' counsel's analysis of those hypotheticals was consistent with the construction advanced here.

## II. SECTION 211B.11(1) REGULATES SPEECH IN A NONPUBLIC FORUM, AND IT IS THEREFORE CONSTITUTIONAL IF IT IS REASONABLE AND VIEWPOINT-NEUTRAL

### A. Forum Analysis Governs the Constitutionality of Section 211B.11(1)

Section 211B.11(1) regulates speech that occurs in polling places, which are property the government controls and has dedicated to enabling citizens to exercise their fundamental right to vote. Because "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property," this Court has long held that the "forum" doctrine governs the constitutionality of speech restrictions on government-controlled property. *Cornelius* v. *NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). Under that analysis, the Court determines whether "the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *United States* v. *Kokinda*, 497 U.S. 720, 726 (1990). Regulations of speech in traditional and designated public forums (sidewalks, parks, and the like) are subject to exacting scrutiny, while regulations of speech in nonpublic forums (government-controlled places not dedicated to speech-related purposes) are constitutional if reasonable and viewpoint-neutral. *Id.* at 726-727. In *Burson*, this Court applied the forum doctrine and held that a

prohibition on, among other things, displaying campaign material outside of polling places survived the exacting scrutiny applicable to public forums. 504 U.S. at 211 (plurality op.).

*Burson*'s First Amendment analysis applies with greater force to the *interior* of the polling place—an archetypal nonpublic forum. If such speech restrictions survive strict scrutiny when applied to a public forum, they are necessarily constitutional under the more lenient standard applicable to nonpublic forums. Seeking to avoid that conclusion, petitioners contend that this Court should discard the forum doctrine and subject Section 211B.11(1) to strict scrutiny because it regulates political speech. That argument flies in the face of this Court's numerous decisions holding that the government has broad leeway to regulate political speech in nonpublic forums. Accepting petitioners' position would have sweeping consequences, as the application of strict scrutiny would severely restrict the government's ability to limit political speech in a wide range of government facilities, from courtrooms to public hospitals.

### 1. *Burson* establishes that speech regulations of polling places should be analyzed under forum doctrine

In *Burson*, this Court held that regulations of political speech designed to protect access to the polling place should be analyzed under the forum doctrine as regulations of government-controlled property. 504 U.S. at 196-197 (plurality op.). The Court upheld a Tennessee statute that—much like Section 211B.11(1)—prohibited certain political speech within 100 feet of the entrance to a polling place and the building in which the polling

place was located. Specifically, the statute barred "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[.]" Tenn. Code Ann. § 2-7-111(b); *Burson,* 504 U.S. at 193-194 (plurality op.).

A four-Justice plurality concluded that the law regulated traditional public forums (streets and sidewalks) and should therefore be subject to exacting scrutiny. See *Burson*, 504 U.S. at 196 n.2, 198. The plurality further held that the forum inquiry must take into account two critical aspects of the polling place: first, the State's compelling interest in protecting its citizens' "fundamental * * * right to cast a ballot in an election free from the taint of intimidation and fraud"; and second, the "long history" and "substantial consensus" that political-speech restrictions "around polling places [are] necessary to protect that fundamental right." *Id.* at 211. Accordingly, the plurality gave the State some deference in its choice of regulations, explaining that the historical consensus concerning the need for polling-place speech restrictions relieved the State of any burden to "demonstrat[e] empirically" that its restriction was "perfectly tailored" to its compelling interests.[16] *Id.* at 208-209.

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[16] Petitioners contend (Br. 15-16) that the principles announced in *Burson* are irrelevant because Minnesota's restriction applies to what petitioners term "passive" speech, while the statute at issue in *Burson* encompassed "active" campaigning. Petitioners' distinction is contrived. As an initial matter, the statute at issue in *Burson* prohibited passive display of campaign signs as well as active campaigning, and the Court upheld the statute in full. More broadly, this Court has never suggested that different legal standards should apply to "passive" speech. See, *e.g., Lehman*, 418 U.S. at 304 (applying nonpublic forum analysis to passive

Justice Kennedy concurred that the speech restriction was constitutional because "the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right[,]" and "[t]hat principle can apply here without danger * * * for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote" and not "to suppress legitimate expression." *Id.* at 213-214 (internal citation omitted).

Recognizing the compelling interest in protecting the integrity of elections, Justice Scalia also concurred in the judgment, but would have given the State even more leeway to regulate political speech near the polling place. He agreed with the plurality that "restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot." *Id.* at 214. In view of that tradition, he concluded that the "environs of a polling place," including the sidewalks and streets outside of polling places, are a nonpublic forum, and that Tennessee's speech restriction was "at least reasonable" and therefore constitutional for the same reasons the plurality concluded the restriction survived exacting scrutiny. *Id.* at 216.

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display of advertisements); *Morse* v. *Frederick*, 551 U.S. 393, 408 (2007) (applying lower level of scrutiny applicable to student speech to display of banner).

### 2. Section 211B.11(1) regulates speech in a nonpublic forum and is therefore constitutional if reasonable and viewpoint-neutral

*Burson* and this Court's other precedents demonstrate that the constitutionality of Minnesota's restriction on political speech at the polling place must be analyzed under the forum doctrine. Section 211B.11(1), like the statute at issue in *Burson*, restricts political speech at the polling place in order to preserve the fundamental right to vote and the integrity of the voting process. Unlike *Burson*, however, the statute challenged here regulates only the *interior* of a polling place, a nonpublic forum.

This Court has defined nonpublic forums as facilities that are owned or controlled by the government and that are "not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46. Polling places are "owned or operated by the Government" on election day and on any day on which they are used for voting. *Greer*, 424 U.S. at 836; see also Minn. Stat. § 204B.16. Accordingly, the dispositive factor is the *purpose* a polling place serves either by specific "designation" or by "tradition." *Perry*, 460 U.S. at 46.

The full and effective exercise of the right to vote has long been understood to be inconsistent with electioneering within polling places themselves. Polling places are designed to enable voters to cast their ballots in secret. *Burson*, 504 U.S. at 205 (plurality op.). States, including Minnesota, have wide leeway to regulate all aspects of polling places, from how many people may enter at a time to the activities that may be conducted inside.

See *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932). Minnesota has never dedicated polling places to open expression or debate; rather, it has used them exclusively for enabling citizens to exercise "another constitutional right," *Burson*, 504 U.S. at 213-214 (Kennedy, J., concurring)—the fundamental right to vote. To protect and preserve a polling place's purpose, Minnesota not only limits political speech, see Minn. Stat. § 211B.11(1), it also prescribes who can be present, see *id.* §§ 204C.06-204C.07, and controls the physical movements of voters and others, *id.* §§ 204C.10, 204C.13. These objective characteristics provide "clear evidence" that the polling place is a nonpublic forum. *Cornelius*, 473 U.S. at 803; *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698-699 (1992) (Kennedy, J. concurring) (analyzing forum based on "objective" criteria).

Unchecked political speech would be inconsistent with the singular purpose of the polling place: conducting an election that is an accurate and trustworthy reflection of the will of the electorate, free from voter intimidation and disruption, both in perception and reality. See *Cornelius*, 473 U.S. at 803 (declining to "infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity"); *Marlin* v. *District of Columbia Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001) ("The only expressive activity involved [in a polling place] is each voter's communication of his own elective choice."). For well over a hundred years, Minnesota has limited speech in polling places to enable voters to cast ballots without disruption or intimidation. In deciding that property under the government's control is a nonpublic forum, the Court has placed great weight on the existence of historic government latitude to regulate the

property in question. See, *e.g., Greer*, 424 U.S. at 837-838 (emphasizing government's broad authority to regulate military bases in concluding that the base was not a public forum); *Cornelius*, 473 U.S. at 805-806 (federal employee charitable initiative was a nonpublic forum because of the government's wide latitude to regulate its personnel). Accordingly, just as there is a "venerable tradition" of restricting political speech on streets and sidewalks adjacent to polling places, there is, if anything, an even stronger tradition of imposing similar restrictions inside polling places. *Burson*, 504 U.S. at 214 (Scalia, J., concurring in the judgment); see Appendix (identifying polling-place speech restrictions in 50 States plus the District of Columbia).

For these reasons, every court of appeals to consider the question has concluded that the interior of a polling place is a nonpublic forum.[17] Petitioners do not contend otherwise. Section 211B.11(1) is therefore constitutional if it is reasonable and viewpoint-neutral.

### 3. Petitioners' contention that Section 211B.11(1) should be subject to strict scrutiny is irreconcilable with this Court's precedent

Seeking to avoid the lenient standard applicable in a nonpublic forum, petitioners argue that the Court should instead apply strict scrutiny because Section 211B.11(1) is a content-based restriction on political

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[17] See *Marlin*, 236 F.3d at 719; *PG Publ'g Co.* v. *Aichele*, 705 F.3d 91, 100 n.10 (3d Cir. 2013); *United Food & Commercial Workers Local 1099* v. *City of Sidney*, 364 F.3d 738, 749-750 (6th Cir. 2004); *Mansky*, 708 F.3d at 1057.

speech. This Court, however, has repeatedly upheld such restrictions in nonpublic forums if they are reasonable and viewpoint-neutral. Petitioners offer no reason to depart from that settled precedent. Indeed, by definition, nonpublic forums are government property as to which speech on defined subjects is excluded because such speech is not compatible with the purposes to which the forum is dedicated.

a. Petitioners first observe that forum analysis is not the "*exclusive* analytical device for reviewing free speech claims." Br. 19 (emphasis in original). That is true, but only insofar as not all speech takes place on government-operated property. When the speech at issue occurs on government property dedicated to a purpose other than speech—in other words, a nonpublic forum—the Court has invariably applied a reasonableness test. See, *e.g., Lee*, 505 U.S. at 679; *Kokinda*, 497 U.S. at 725; *Cornelius*, 473 U.S. at 805-806; *USPS* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 (1981); *Greer*, 424 U.S. at 838; *Adderley* v. *Florida*, 385 U.S. 39, 47-48 (1966).

Speech that occurs in a nonpublic forum is afforded less robust First Amendment protection because the government has the right, as proprietor of "property in its charge," "to preserve the property under its control for the use to which it is lawfully dedicated"—and to protect the ability of other citizens to use that property for its intended purpose. *Christian Legal Soc'y* v. *Martinez*, 561 U.S. 661, 679 (2010); *Cornelius*, 473 U.S. at 800; *Burson*, 504 U.S. at 213-214 (Kennedy, J., concurring). When the government restricts speech in a nonpublic forum, it acts in its managerial capacity to safeguard the purposes of the property. As a result, contrary to peti-

tioners' arguments (Br. 19), the "locus" of a speech restriction is critical in determining the degree of scrutiny that applies. "It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating" is "not the power to regulate or license, as lawmaker, * * * but, rather, as proprietor, to manage [its] internal operation[s].'"[18] *Kokinda*, 497 U.S. at 725 (internal quotation marks omitted).

b. Petitioners further contend (Br. 19-21, 30 n.9) that content-based restrictions on political speech are invariably subject to exacting scrutiny, regardless of the context. That contention is equally meritless.

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[18] The American Civil Liberties Union contends (Br. 6) that "forum analysis is not useful for this case because individuals going to vote do not seek access to government property as a platform to engage in private speech." But this Court has never suggested that the applicability of forum analysis turns on the intent of the *speaker*. Rather, forum analysis turns on the purpose for which the *government* uses the property. See *Kokinda*, 497 U.S. at 725. The sole decision on which the ACLU relies—*Cohen v. California*, 403 U.S. 15 (1971)—does not suggest that forum analysis may turn on the intent of the speaker. Cohen was convicted under a statute prohibiting "offensive conduct" in any location, for wearing a jacket displaying a vulgar expression in a courtroom. *Id*. at 16. In striking down the conviction, the Court acknowledged that the State would usually have an interest in preserving an "appropriately decorous atmosphere" in a courtroom. *Id.* at 19. But the Court declined to consider that interest because the statute did not provide notice that speech that would be permissible in a park would not be permissible in a courtroom. *Ibid*. Minnesota's statute, by contrast, is expressly limited to polling places. And in any event, petitioners here can hardly argue that they do not seek to use the polling place as a platform for private speech. The "Please I.D. Me" button has no purpose but to send a particular message in the specific context of the polling place.

The Court has applied the reasonableness analysis to numerous content-based restrictions banning political speech, but not other types of speech, in nonpublic forums. For instance, the Court has upheld as reasonable a prohibition on political speech at military installations, *Greer*, 424 U.S. at 838; a prohibition on political advertising in public transportation, *Lehman*, 418 U.S. at 304; and a prohibition on charitable solicitation of federal employees by political advocacy groups, *Cornelius*, 473 U.S. at 808-809. The Court has also applied the reasonableness analysis in evaluating the constitutionality of broader restrictions that capture political speech within their prohibitions. See *Kokinda*, 497 U.S. at 725 (upholding prohibition on solicitation outside post offices applied to political leafleting); *Adderley*, 385 U.S. at 44, 47-48 (upholding trespassing statute applied to political protesting at the entrance to a jail).[19]

Although petitioners suggest that content-based prohibitions on political speech are especially suspect, that is not so when the regulation pertains to nonpublic forums. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter"; such distinctions "are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry*, 460 U.S. at 49 (upholding rule limiting access to school mail system to bargaining union while excluding rival unions); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). As a result,

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[19] By contrast, petitioners rely on cases that did not involve nonpublic forums for their contention that strict scrutiny applies to content-based restrictions on political speech. See*, e.g.*, *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2224-2226 (2015); *Citizens United* v. *FEC*, 558 U.S. 310, 329 (2010).

content-based, viewpoint-neutral distinctions in the context of a nonpublic forum do not ordinarily raise any inference that the government is attempting to suppress disfavored speech. See *Burson*, 504 U.S. at 213-214 (Kennedy, J., concurring). The government therefore may permissibly prohibit political speech in a nonpublic forum, if it has reasonably determined that such speech is incompatible with the purpose of the nonpublic forum. *Greer*, 424 U.S. at 838; accord *Cornelius,* 473 U.S. at 809; *Lehman*, 418 U.S. at 304.

Indeed, the government often has sound reasons to conclude that political speech is particularly threatening to the relevant government functions, and that a content-based limitation on political speech (but not other speech) is a reasonable means of accomplishing the government's objectives. Political speech may threaten the cohesion of public workplaces, *Cornelius*, 473 U.S at 807-811, or create security risks that other speech would not, *Lehman*, 418 U.S. at 304; *Greer*, 424 U.S. at 839-840. Even "passive" political speech, in petitioners' phrasing, may threaten important government interests. For instance, permitting the display of political slogans in courtrooms could undermine public confidence in the courts' political neutrality. See *United States* v. *Grace*, 461 U.S. 171, 183 (1983); *Hodge* v. *Talkin*, 799 F.3d 1145, 1165 (D.C. Cir. 2015) (upholding prohibition on protesting on the Supreme Court's plaza); *Berner* v. *Delahanty*, 129 F.3d 20, 27 (1st Cir. 1997) (upholding prohibition on attorneys' political buttons in courtroom which "can reasonably be thought to compromise the environment of impartiality and fairness").

Subjecting these sorts of restrictions to strict scrutiny, as petitioners urge, would hamstring the government's ability to use a wide range of public facilities for

their designated purposes. Numerous political-speech restrictions—from the Hatch Act's regulation of political displays in government buildings, to this Court's restrictions on protesting within its courtroom—would be subject to strict scrutiny. That "would, in practical effect, invalidate," or at least severely curtail, legitimate and important restrictions imposed to protect government functions rather than to suppress disfavored speech. *Christian Legal Soc'y*, 561 U.S. at 681 (citing *Cornelius*, 473 U.S. at 806). "[P]ublic hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician." *Kokinda*, 497 U.S. at 726 (quoting *Lehman,* 418 U.S. at 304). "This the Constitution does not require." *Id.*

### B. Petitioners' Overbreadth Argument Provides No Independent Basis For Relief

In their attempt to bypass the forum doctrine, petitioners also argue that Section 211B.11(1) is "unconstitutionally overbroad whether or not polling places are a non-public forum." Br. 16. Overbreadth doctrine, however, does not furnish any additional, independent basis for invalidating the statute.

1. The overbreadth doctrine "alter[s the] traditional rules of standing" to permit a litigant to challenge a statute "not because their own rights of free expression are violated, but because * * * the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). The doctrine permits invalidation of a statute as void on its face—despite its constitutional application to the plaintiff—if its

unconstitutional applications are "substantial" in relation to its legitimate sweep. *Id*. at 615. Here, the court of appeals held that petitioners' own speech constitutionally could be prohibited, and petitioners did not seek review of that judgment.[20] Since their own conduct is not protected, petitioners invoke overbreadth doctrine to invalidate the statute on its face.

Petitioners also appear, however, to invoke overbreadth as an independent justification for invalidating the statute. Br. 30, 38-42. But while overbreadth doctrine addresses the situations in which the extreme remedy of facial invalidation is appropriate, it does not alter the substantive First Amendment standards that would otherwise apply in determining the scope of the statute's legitimate sweep in the first instance. See *Greer*, 424 U.S. at 838 (rejecting facial challenge by applying lenient nonpublic forum speech test); *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 548, 564, 580 (1973) (evaluating overbreadth challenge to certain Hatch Act revisions under the lower scrutiny applicable to restrictions on public employee speech); *Talkin*, 799 F.3d at 1171 (rejecting overbreadth argument because it is "analytically identical" to the claim that the statute was an unreasonable

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[20] Petitioners nonetheless attempt to revive their as-applied challenge, as they now contend that Minnesota's restriction cannot be constitutionally applied to their own apparel. Br. 39. Because petitioners could have, but did not, seek certiorari on that question, this Court should not consider it. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 938 n.2 (2017). Petitioners' as-applied challenge also is not fairly included within the question presented, which asks only whether the statute is "facially overbroad." Sup. Ct. R. 14.1(a); *Loughrin* v. *United States*, 134 S. Ct. 2384, 2389 n.3 (2014).

and "invalid restriction of speech in a government forum") (internal citation omitted). Petitioners' overbreadth argument therefore does not provide any basis for bypassing the forum analysis, or any independent substantive ground on which to invalidate the statute. The constitutionality of Section 211B.11(1) turns on whether the statute is a reasonable, viewpoint-neutral restriction of speech in a nonpublic forum. A conclusion that the statute, considering all its applications, is reasonably tailored to further the State's interests necessarily means that the regulation is not substantially overbroad. See *Talkin*, 799 F.3d at 1171 ("Having concluded that the government's means-ends fit is reasonable, we see no viable avenue for concluding nonetheless that § 6135 has too many unconstitutional applications to survive."); *Bryant* v. *Gates*, 532 F.3d 888, 894 n.** (D.C. Cir. 2008) (same).[21]

2. Petitioners also suggest, citing *Board of Airport Comm'rs of City of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), that the Court "need not decide whether polling places are a public or non-public forum,

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[21] Petitioners (Br. 32) and several amici also argue that Minnesota's restriction is unconstitutionally overbroad if it reaches any political speech beyond "express words of advocacy," *Buckley* v. *Valeo,* 424 U.S. 1, 44 n.52 (1976), and its functional equivalent, *FEC* v. *Wisconsin Right to Life, Inc.,* 551 U.S. 449, 469-70 (2007). However, this Court has explicitly "rejected the notion that the First Amendment requires [government] to treat so-called issue advocacy differently from express advocacy," and repudiated the line between them as "functionally meaningless." *McConnell* v. *FEC*, 540 U.S. 93, 193-194 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. at 365. Hence, Minnesota's political apparel restriction is constitutional if it is reasonable and viewpoint-neutral.

or whether the public forum doctrine is irrelevant" because "no conceivable governmental interest" could support a ban on "the entire class of political messages that can be conveyed through clothing[.]" Br. 30. This argument is deeply flawed. As the longstanding precedents discussed above show, the Court must first decide what level of scrutiny applies, and then determine whether the statute sweeps too widely to be adequately tailored under that standard.

*Jews for Jesus* does not suggest otherwise. There, the Court invalidated a Los Angeles International Airport rule that banned all "First Amendment activities by any individual and/or entity." 482 U.S. at 570-571. The ordinance thus prohibited "*all* protected expression," including "even talking and reading." *Id.* at 574-575. Contrary to petitioners' suggestions about the relevance of the forum doctrine, the *Jews for Jesus* Court acknowledged that forum analysis applied because the airport was government property, but the Court concluded that it need not determine whether the airport was a nonpublic forum, because the sweeping prohibition would be invalid as overbroad "regardless of the proper standard." *Id.* at 573-574. Thus, to the extent that petitioners contend *Jews for Jesus* created any separate test for overbreadth claims, they are mistaken. The Court utilized the forum doctrine, but simply concluded that the airport ordinance was unconstitutional even under the reasonableness test applicable to nonpublic forums.

## III. MINNESOTA'S POLITICAL APPAREL RESTRICTION IS REASONABLE AND VIEWPOINT-NEUTRAL

A restriction on speech in a nonpublic forum is constitutionally valid if it is "reasonable in light of the purpose which the forum at issue serves" and viewpoint-neutral. *Perry*, 460 U.S. at 49; *Cornelius*, 473 U.S. at 800. That is not a demanding standard. See *Lee*, 505 U.S. at 679 (describing "limited review"). The government's "decision to restrict" speech "need not be the most reasonable or the only reasonable limitation" that would advance the forum's purpose. *Cornelius*, 473 U.S. at 808. Thus, there is no requirement "that the restriction be narrowly tailored" to the advancement of the government's interests. *Id.* at 809; see *ibid.* ("In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated."). Instead, the restriction need only be "consistent" with the government's "legitimate interest in preserv[ing] the property * * * for the use to which it is lawfully dedicated." *Perry*, 460 U.S. at 50-51 (internal quotation marks omitted).

Minnesota's restriction, which applies only in a limited place and at limited times, readily satisfies that test. A polling place has a singular function: it is open to the public only for the purpose of permitting citizens to vote in a fair and secure manner. By design and necessity, it is a restricted location in which limits are placed on who can be present and on what they can do. See p. 30, *supra*; see generally *Kokinda*, 497 U.S. at 732 ("Consideration of a forum's special attributes is rele-

vant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.") (internal quotation marks and alteration omitted). Minnesota's restriction is reasonable in light of its purpose because it advances three critical government interests: "maintain[ing] peace, order and decorum" in the polling place, "protecting voters from confusion and undue influence" such as intimidation, and "preserving the integrity of its election process." Pet. App. D8 (quoting *Burson*, 504 U.S. at 199); see, *e.g.*, *Marlin*, 236 F.3d at 720. Moreover, Minnesota's restriction applies neutrally to political content regardless of the viewpoint being expressed.

### A. Section 211B.11(1) Reasonably Advances the State's Interests in Safeguarding the Polling Place

1.a. Minnesota's restriction of political apparel in the polling place reasonably advances Minnesota's powerful interest in maintaining an orderly and peaceful place where election activity can be conducted with decorum.

As this Court has frequently explained, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17; see, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society[.]"); *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our consti-

tutional structure."); *Burson*, 504 U.S. at 198-199 (plurality op.). The Constitution grants States authority to regulate elections so they can protect that fundamental right. See U.S. Const. Art. I, § 4, cl. 1.

Because voting rights are of such bedrock importance, a polling place—like a courtroom—can reasonably be restricted to reflect the solemn and weighty nature of the function that occurs there. See generally *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) (explaining that it is important that "order, rather than chaos, is to accompany the democratic processes") (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)); cf. *Grace*, 461 U.S. at 182 (acknowledging the government's interest in "proper order and decorum within the Supreme Court grounds"). This Court therefore has expressly recognized the "State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum" and its strong interest in enacting such regulation. *Mills*, 384 U.S. at 218; see *Smiley*, 285 U.S. at 366.

Minnesota's restriction reasonably serves that interest, and thereby protects and dignifies voters' fundamental right to make electoral choices. The prohibition on political apparel in the polling place ensures that voters are focused on the voting activity; that election judges can focus on their tasks, rather than policing altercations and disturbances; and that the voting process inside the polling place runs smoothly. Cf. *Kokinda*, 497 U.S. at 735. Absent Minnesota's restriction, the polling place would become another place (perhaps a primary place) where individuals could promote their views by inundating voters with political messages. Campaigns and other groups could even organize to have specially designed campaign or political apparel handed out at

the polling place. In fact, history shows that is exactly what they once did. See p. 5, *supra*; *Burson*, 504 U.S. at 203-205 (plurality op.).

By barring such advocacy from inside the polling place, the law carves out an island of calm in which voters can peacefully contemplate their choices, engage in sound deliberation, and carry out their civic responsibility. Whatever divisions separate the State's citizens, in a space free of political messages voters can be united in their participation in the democratic process—even when they are deciding on issues that may be controversial and evoke passionate feelings—rather than riven by dispute and debate up to the very moment they cast their votes. If, in contrast, voters must navigate a polling place environment in which they are bombarded with political messages, those advantages are lost, divisions among citizens are brought to the fore, and the ability to vote is needlessly impeded.

Moreover, although the law promotes Minnesota's interests in peace and decorum even absent the possibility of any fighting in the polling place, political messages on apparel could give rise to verbal disputes or even physical altercations. See, *e.g.*, *Marlin*, 236 F.3d at 720 (recognizing the District of Columbia's interest in "protecting the orderly conduct of elections by creating a neutral zone within the polling place" and "preventing altercations over hot-button issues") (internal quotation marks omitted). In order to vote, people of differing views—and, in some places, large numbers of such people—must necessarily come together and be processed through one physical location. Tensions may well be running high, particularly when the election has been a contentious one, or the issues at stake are particularly momentous.

Minnesota need not prove that it has experienced such problems in order to establish that its restriction reasonably advances the purpose of the polling place. See *Perry*, 460 U.S. at 52 n.12; cf. *Burson*, 504 U.S. at 209 (plurality op.) (stating that a legislature "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively"). Based on experiences in other States, however, the potential for political messages in the polling place to give rise to verbal and physical conflict is indisputable.[22] Minnesota's law thus helps ensure that polling places remain calm and dignified, so that voting can be carried out peacefully and efficiently, rather than becoming forums where the political tensions in our society boil over and the right to vote is degraded.

b. Minnesota's restriction also reasonably serves the State's compelling interest in "protecting voters from confusion and undue influence" such as intimidation. *Burson*, 504 U.S. at 199 (plurality op.).

This Court recognized in *Burson* that a state statute prohibiting display of campaign materials in the public forum outside the polling place is justified by the interest in avoiding voter intimidation and confusion. See *id.* at 197, 210 (plurality op.). The same concerns exist to an even greater extent inside the polling place, where voters congregate in a limited space that they must enter

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[22] See, *e.g.*, https://www.nbcmiami.com/news/local/Woman-Pepper-Sprays-Man-at-Jupiter-Polling-Place--400433541.html (recounting fights at two polling places, one involving pepper spray and one involving a gun) (last visited Feb. 1, 2018); http://www.mlive.com/news/ann-arbor/index.ssf/2016/11/man_shoves_woman_after_argumen.html (recounting physical fight at polling place over presidential election) (last visited Feb. 1, 2018).

and stay in for a period of time in order to vote, see *ibid.*; see also *id.* at 220 n.4 (Stevens, J., dissenting)—and it is therefore reasonable in that setting to extend the prohibition beyond campaign materials to encompass political apparel. Cf., *e.g.*, *Citizens for Police Accountability Political Comm.* v. *Browning*, 572 F.3d 1213, 1218-1219 (11th Cir. 2009) (applying strict scrutiny and recognizing that a viewpoint-neutral prohibition on political speech, and not just campaign speech, in buffer zone around a polling place advances government's goal of preventing intimidation and confusion); *Schirmer* v. *Edwards*, 2 F.3d 117, 122-123 (5th Cir. 1993) (relying on *Burson* and ruling that total ban on "politicking," including wearing political buttons and t-shirts within a 600-foot radius of polling place, was constitutional under strict scrutiny).

Assessment of the reasonableness of Minnesota's regulation in preventing voter confusion and intimidation is not limited to consideration of the effect that would result from only one or two voters wearing political apparel in a polling place, "[f]or if [petitioners are] given access, so too must other[s]." *Lee*, 505 U.S. at 685. Rather, the Court must consider the potential impact on voters if polling places become a location in which citizens are subject to a barrage of political and campaign messages.[23] Without this law, campaigns and advocacy

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[23] By the same token, the abundant other avenues for expression of speech outside of the polling place weigh in favor of Section 211B.11(1)'s reasonableness. See *Christian Legal Soc'y*, 561 U.S. at 690. Minnesota's restriction applies only within the confines of the polling place and is not onerous: individuals are informed by an election judge if their apparel violates the law and asked only to cover that political apparel while inside the polling place.

groups will be able to organize supporters to wear political apparel to the polling place in an effort to win elections, perhaps focusing on peak voting times.

A voter could well feel confused or intimidated if (for example) she walked into a polling place and discovered that every other voter held the opposite point of view on any number of controversial political issues related to electoral choices, as evidenced by the political messages displayed on other voters' apparel. That feeling would be amplified if the voter were forced to consult with an election judge, and that judge were displaying a partisan message with which the voter disagreed. The feeling also would be amplified by the presence of a partisan challenger, standing behind the election judge and prepared to question the voter's eligibility to vote, while wearing a t-shirt that brazenly announces a political position or affiliation. See *Burson*, 504 U.S. at 207 (plurality op.) (recognizing concern that "undetected or less than blatant acts" of intimidation or interference may "drive the voter away"). The voter could not escape or avoid those political messages or the accompanying feeling of confusion or intimidation without leaving the polling place where she must come to vote. *Lehman*, 418 U.S. at 302-304 (discussing First Amendment problems associated with subjecting a "captive audience" to "the blare of political propaganda").

Those are not imaginary risks (although proof that the State already has faced them is not necessary, see p. 44, *supra*). Particularly in an era of intense polarization, many aggressive, vulgar, or racially targeted campaign and political messages could seriously affect voters if displayed in a polling place. And the record in this very case demonstrates that petitioners' "Please I.D. Me" buttons were designed to be worn at the polling

place in part to confuse voters into thinking that voter identification was a requirement in Minnesota and that they had to either show photographic identification or leave without voting. J.A. 104-105; Pet. App. D12 (district court recognizing that "[t]his intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required"); cf. *Lee*, 505 U.S. at 684 (recognizing that the interference caused by solicitation is compounded by "the fact that, in an airport, the targets of such activity frequently are on tight schedules").[24] That is speech that "interfere[s] with the act of voting itself," *Burson*, 504 U.S. at 209 n.11 (plurality op.), and the State may reasonably restrict it.

c. Ensuring an atmosphere of peace, order, and decorum and protecting voters from confusion and intimidation are worthy goals in their own right. But in reasonably advancing those goals, thereby protecting the right of citizens to vote freely for the candidates of their choice, Minnesota's law also furthers the State's compelling interest in the integrity and reliability of its electoral process. See *Burson*, 504 U.S. at 198-199 (plurality

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[24] There is no doubt that an objectively reasonable observer at the 2010 election also would perceive the buttons as a political message, given that voter identification was a much-debated political issue nationally and an important campaign issue for statewide candidates in Minnesota at that time, J.A. 57-61 ¶¶18-26—but the buttons would not meet the definition of "campaign" apparel because voter identification was not (yet) a ballot question in Minnesota in 2010. The campaign to wear "Please I.D. Me" buttons in the polling place thus was prevented only by the fact that Minnesota's restriction extends beyond campaign apparel.

op.); see also *Williams-Yulee* v. *Florida Bar*, 135 S. Ct. 1656, 1671 (2015) (recognizing that "when the State's compelling interest is as intangible as public confidence in the integrity" of an important function of government, the government must be provided greater flexibility in drafting regulations to protect that interest).

A core state function is establishing a participatory process that ensures electoral results are an accurate reflection of the will of the electorate.[25] More than 100 years ago, at a time when the State's elections were chaotic, see, *e.g.*, *Burson*, 504 U.S. at 203-205 (plurality op.) (recounting free-for-all of American electoral scene leading up to reforms of the late 1800s), Minnesota concluded that a buffer zone outside the polling place was insufficient to protect the integrity of its electoral process and determined that a polling place free from political badges, buttons, and insignia was needed to free voters from disruptions and help ensure that the election process was fair and unbiased. As a result of the provision at issue in this case, Minnesota polling places have provided voters a protected space to participate in the election of their leaders. Those polling places also protect the secrecy of the ballot, see *ibid.* (discussing centrality of secret ballot to American electoral practice), by ensuring that voters are not treated disparately by election authorities based on the political preferences

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[25] That is, at least in part, why States possess such broad constitutional powers to control the conduct of elections, including "supervision of voting, protection of voters, prevention of fraud and corrupt practices," and authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366; see *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986).

displayed on the voters' apparel. Minnesota's restriction is an integral part of an electoral structure designed to guarantee that elections are conducted reliably and fairly with maximal citizen participation.[26] Cf. *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965) (recognizing State's prerogative to "adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence").

Minnesota's restriction also serves the State's compelling interest in election integrity because the law ensures that the public has confidence in the electoral process. A regime allowing election judges, election observers, and the majority of voters and others present at a polling place to all wear apparel strongly signaling support for one side of the conservative/liberal divide could well be viewed with suspicion by the public, who would wonder if the workings of the polling place (and the electoral results) have been unduly influenced by a particular political viewpoint. Minnesota's law assists in preventing this risk to the legitimacy of the elected branches of government from becoming a reality. This Court has accepted in several decisions the importance of protecting the judicial process from "the possibility of a conclusion by the public * * * that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *Cox*, 379 U.S. at 565 (upholding ban on courthouse-area demonstrations); see, *e.g.*, *Williams-Yulee*,

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[26] Minnesota often leads the country in voter turnout. See, *e.g.*, http://www.sos.state.mn.us/election-administration-campaigns/data-maps/historical-voter-turnout-statistics/ (last visited Feb. 2, 2018) (nearly 75 percent of eligible Minnesotans voted in the 2016 election).

135 S. Ct. at 1666 ("public perception of judicial integrity" is a governmental interest of "the highest order"); *Talkin*, 799 F.3d at 1164. Protection of the legitimacy of the electoral process from that kind of public judgment is of equal importance.

2. Although petitioners address the constitutionality of Minnesota's law under the test applicable to a nonpublic forum only in a perfunctory footnote (Br. 42 n.14), they do argue generally that the interests of the State are insufficient to justify restrictions on speech within a polling place. See *id.* at 30-35. Those arguments are inapposite, both because they incorrectly assume that strict scrutiny is the applicable standard and because they mistakenly attribute an extraordinarily broad scope to Minnesota's restriction. They are also wrong on their own terms.

First, petitioners insist that wearing political apparel is always a wholly passive act that cannot possibly interfere with the peacefulness of the polling place or cause a voter to feel pressured or intimidated. But that is demonstrably untrue—and, in any event, Minnesota could reasonably conclude otherwise. As petitioners themselves acknowledge, "powerful messages can sometimes be conveyed in just a few words," Br. 26 (quoting *Matal* v. *Tam*, 137 S. Ct. 1744, 1760 (2017)), and *Burson* recognized that passive displays of campaign messages can have harmful effects. See *Burson*, 504 U.S. at 210 n.13 (plurality op.) (rejecting argument that statute was overbroad because it reached "display" of a bumper sticker or similar displays); *id.* at 223-224 (Stevens, J. dissenting) (recognizing that the speech restriction applied to "wearing of campaign buttons," among other displays); see also *Morse*, 551 U.S. at 408 (public school

may prohibit speech advocating illegal drug use); Supreme Court of the United States, *Visitor's Guide to Oral Argument* (prohibiting individuals from wearing "display buttons and inappropriate clothing").[27]

There is no question that political apparel in polling places could lead to verbal or physical altercations, convey to particular voters the idea that they are unwelcome and that their vote does not matter, confuse voters about whether they can vote, or give rise to a public perception that an election is being conducted in an unfairly partisan way. And when people come together to make choices about the future of their government, thereby often confronting questions on which there is passionate disagreement, it is beneficial to carve out a narrow space for voting that is calm, dignified, and devoid of advocacy relating to electoral choices. Any other approach would permit political apparel such as petitioners' "Please I.D. Me" buttons, which were specifically intended to have *physical* effects in the polling place by disrupting the voting process.

The authorities cited by petitioners for the proposition that the wearing of apparel is always a passive act (*e.g.*, Br. 15) are readily distinguishable. None of those authorities involves the particular set of concerns, and the especially strong government interests, that are applicable to polling places, where an expressive act takes place that is the fount of all other democratic rights. And all of the authorities turn on particular facts that are not relevant to petitioners' facial challenge. In *Tinker* v. *Des Moines Independent Community School District*, for example, the Court—in the course of finding viewpoint

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[27] See https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx (last visited Feb.2, 2018).

discrimination because the school did not bar "wearing of all symbols of political * * * significance"—said only that "the wearing of armbands *in the circumstances of this case* was * * * divorced from actually or potentially disruptive conduct." 393 U.S. 503, 505-506, 510 (1969) (emphasis added); compare *Morse*, 551 U.S. at 408. And in *Jews for Jesus*, the Court characterized, in passing, the "wearing of a T-shirt or button that contains a political message" as "non-disruptive" to other passengers at an airport who were not themselves engaged in any political endeavor. 482 U.S. at 576.

Second, petitioners contend (*e.g.*, Br. 5-6) that the restriction on political apparel is not necessary to preserve the peace or to prevent confusion or intimidation because other state laws already forbid disorderly conduct, force, fraud, and deception in connection with voting. That argument—which was soundly rejected in *Burson* despite the exacting scrutiny applied in that case, see 504 U.S. at 206-207 (plurality op.)—lacks merit. Under the reasonableness test applicable in a nonpublic forum, the speech restriction "need not be the most reasonable or the only reasonable limitation" imposed in the forum, *Cornelius*, 473 U.S. at 808, and there is nothing "improper in [a legislature] providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest," *United States* v. *O'Brien*, 391 U.S. 367, 380 (1968); see, *e.g.*, *Talkin*, 799 F.3d at 1165-1166. In addition, with respect to protection of voting—the most central and sacred act in our democracy—the State need not restrict itself to addressing only actual physical disruption of the polling place, or actual intimidation of voters, that is witnessed by the authorities. As the *Burson* plurality explained, "[i]ntimidation and interference laws fall short of serving a

State's compelling interests because they deal with only the most blatant and specific attempts to impede elections" and do not adequately address attempts that go "undetected." 504 U.S. at 206-207 (plurality op.) (internal quotation marks omitted). Minnesota's restriction on political apparel is a reasonable effort to prevent acts that undermine citizens' ability to vote from ever taking place. See *ibid.*

### B. Section 211B.11(1) Does Not Discriminate On The Basis Of Viewpoint

As the court of appeals correctly recognized, Minnesota's restriction is viewpoint-neutral on its face: it bars political apparel from the polling place regardless of the *viewpoint* being expressed. See Pet. App. D8. Because petitioners' challenge is only a facial one, see Pet. i, the viewpoint-neutrality prong of the applicable test for a nonpublic forum is satisfied. See, *e.g.*, *Kokinda*, 497 U.S. at 736 (upholding prohibition on solicitation on postal office premises, in part because "nothing suggests the Postal Service intended to discourage one viewpoint and advance another") (citation and internal quotation marks omitted); see also *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 583 (1998) (upholding restriction that "do[es] not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face").

Petitioners nevertheless contend (*e.g.*, Br. 22, 35) that Minnesota's restriction leaves too much room for discretion in its enforcement. That contention is misplaced. In a nonpublic forum, the government's broad leeway to restrict particular categories of speech that threaten the forum's function and purpose necessarily

entails discretion to apply those restrictions to individual cases to determine whether or not speech falls within the scope of a content-based restriction. See, *e.g.*, *USPS*, 453 U.S. at 130-31 (explaining that a high degree of official discretion is tolerable in nonpublic forums); *Perry*, 460 U.S. at 47 (discretion over use of an interschool mail system); *Greer*, 424 U.S. at 838 n.10 (discretion to prohibit "political" speeches while allowing others); see also *Finley*, 524 U.S. at 576, 589-590 (approving broad discretion to take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" in NEA grant process); *Griffin* v. *Secretary of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002) ("Selectivity and discretion are some of the defining characteristics of the nonpublic forum.").

In some circumstances, a law may be vague enough that it gives officials too unfettered an opportunity to enforce their own viewpoint preferences. See *United States* v. *Williams*, 553 U.S. 285, 304 (2008) (claim that statute was so "standardless that it authorizes or encourages seriously discriminatory enforcement" was a vagueness claim analyzed under due process standards). But petitioners have not made a vagueness argument in this Court, or preserved such an argument in the lower courts. See Pet. App. B29-B30 n.7, D8 n.2 (holding that petitioners waived their vagueness challenge by failing to brief it on appeal).[28] Nor would such

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[28] Moreover, because Minnesota's restriction proscribed petitioners' own conduct, as the lower courts definitively ruled, Pet. App. A7, B29-B30, C19, they "cannot complain of the vagueness of the law as applied to the conduct of others." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (internal quotation omitted).

an argument have merit. Minnesota's restriction—which is not a criminal one—has a definite, ascertainable meaning. See Part I, *supra*; see also generally *Broadrick*, 413 U.S. at 608 (finding that statute was not unconstitutionally vague as to restrictions on partisan political conduct by state employees and stating that "the prohibitions * * * are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest") (quoting *Letter Carriers*, 413 U.S. at 578-579); see also *Ward,* 491 U.S. at 794 ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."). And this Court has previously upheld restrictions on "political" speech in nonpublic forums without suggesting that the term was incapable of a firm interpretation. See, *e.g.*, *Lehman*, 418 U.S. at 302-304; *Greer*, 424 U.S. at 838.

Petitioners have no evidence of any discriminatory enforcement of Minnesota's restriction, because none exists. Moreover, because Minnesota law requires each polling place to have election judges from different political parties, any risk of viewpoint discrimination is dramatically lessened. See Minn. Stat. § 204B.19(5). If the restriction were in fact enforced in a discriminatory manner in the future, then that problem could be dealt with through an as-applied challenge at that time.

## IV. MINNESOTA'S POLITICAL APPAREL RESTRICTION IS NOT FACIALLY OVERBROAD

Because Minnesota's political apparel restriction is a reasonable restriction on speech within a nonpublic forum, it is also not facially overbroad. As discussed in

Part II.B, *supra*, if the Court concludes that the provision's breadth is reasonable in light of the State's compelling interests, there is no "viable avenue for concluding nonetheless that [it] has too many unconstitutional applications to survive." *Talkin*, 799 F.3d at 1171. Petitioners' overbreadth argument therefore provides no separate basis for invalidating Section 211B.11(1).

Moreover, petitioners' overbreadth argument is premised on their assumption that Minnesota's restriction would reach "even the most general references to political issues, beliefs, and associations" (Br. 24)—including red and blue shirts. This absurd construction has never been applied by election officials, urged by the State, or adopted by any court—and it is wrong for the reasons discussed in Part I. Because the heartland of Section 211B.11(1)'s applications furthers Minnesota's interests, the "mere fact" that petitioners "can conceive of some impermissible applications of [the] statute is not sufficient to render it" unconstitutionally overbroad. *Williams*, 553 U.S. at 303; *Members of the City Council* v. *Taxpayer for Vincent*, 466 U.S. 789, 800 (1984). Petitioners have not shown "from the text of [the statute] and from actual fact that a substantial number of instances exist in which [the statute] cannot be applied constitutionally." *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 14 (1988).

## V. IN THE ALTERNATIVE, THIS COURT SHOULD CERTIFY A QUESTION TO THE MINNESOTA SUPREME COURT

Petitioners' constitutional arguments are premised on their assertion that the reach of Minnesota's restriction is virtually unlimited. Their construction of the

statute is farfetched and divorced from any actual application of the law. See Part I, *supra*. But if this Court concludes that petitioners have raised a substantial question about the proper interpretation of Section 211B.11(1), it should certify the statutory-construction question to the Minnesota Supreme Court.[29] See*, e.g., Virginia* v. *American Booksellers Ass'n, Inc.,* 484 U.S. 383, 393 (1988); *Bellotti* v. *Baird*, 428 U.S. 132, 151-152 (1976) (collecting cases). Affording that court the opportunity to issue a definitive interpretation would be most consistent with considerations of federalism and judicial restraint.

Because the statutory interpretation question is antecedent to the question whether the provision complies with the First Amendment, certification could obviate the need for this Court to pass judgment on the statute's constitutionality. The Minnesota Supreme Court could adopt a narrowing construction.[30] Certification would enable this Court to honor the "cardinal principle" that courts must "first ascertain whether a construction *** is fairly possible that will contain the statute within constitutional bounds" before striking it down. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 78 (1997);

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[29] Minnesota has authorized its supreme court to answer certified questions. See Minn. Stat. § 480.065(3).

[30] For example, in 1993, the prohibition on political apparel was extended to areas designated prior to election day for in-person absentee voting. See 1993 Minn. Laws ch. 223, § 25. If that application raises any concern of overbreadth, then the Minnesota Supreme Court could answer definitively whether that provision is severable. See Minn. Stat. § 645.20; *Leavitt* v. *Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) ("Severability is of course a matter of state law.").

see also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 509 (1985) (O'Connor, J., concurring).

Certification would also respect weighty state interests. *Id.* at 77. There can be no serious dispute that Minnesota's restriction serves compelling state interests in ensuring that citizens can exercise their fundamental right to vote without intimidation or interference. *Burson*, 504 U.S. at 198-199 (plurality op.). There is also no doubt that the statute has a wide range of constitutional applications. Indeed, as the court of appeals held, the statute was validly applied to petitioners' own expression. The State therefore has an overriding interest in applying the statute to that speech to which it can constitutionally be applied. Before invoking the "strong medicine" of facially invalidating the statute, the Court should permit the Minnesota Supreme Court to decide whether the statute is susceptible to a limiting instruction. *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). In other First Amendment cases, similarly substantial state interests have led this Court to conclude that the courts "should not attempt to decide the constitutional issues presented without first having the [State] Supreme Court's interpretation of key provisions of the statute." *American Booksellers*, 484 U.S. at 393; *Arizonans*, 520 U.S. at 77-79. This Court should not strike down Section 211B.11(1) as unconstitutional before deferring to the Minnesota Supreme Court for a definitive interpretation.

## CONCLUSION

The judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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FEBRUARY 5, 2018

# APPENDIX

## State Polling Place Restrictions

### Alabama

Any person at a primary election who shall * * * electioneer or attempt to electioneer with a voter or attempt to influence his or her vote by suggestion or otherwise, * * * shall be guilty, upon conviction, of a Class A misdemeanor.

Ala. Code § 17-17-55; see also Ala. Sec'y of State, *Frequently Asked Questions* (permitting campaign buttons or shirts), http://sos.alabama.gov/alabama-votes/faqs (last visited Jan. 31, 2018).

### Alaska

During the hours the polls are open, a person who is in the polling place or within 200 feet of any entrance to the polling place may not attempt to persuade a person to vote for or against a candidate, proposition, or question. * * *

Alaska Stat. Ann. § 15.15.170.

A person commits the offense of campaign misconduct in the third degree if … during the hours the polls are open … the person is within 200 feet of an entrance to a polling place, and (A) violates AS 15.15.170; or (B) circulates cards, handbills, or marked ballots, or posts political signs or posters relating to a candidate at an election or election proposition or question.

Alaska Stat. Ann. § 15.56.016(a)(2); see also State of Alaska, *Official Election Pamphlet* at 4 (Nov. 8, 2016) (prohibiting signs or buttons), http://elections.alaska.gov/election/2016/General/OEP-Books/20194%20AK%20Region%20II%20book.pdf.

**Arizona**

A. Except as prescribed in this section and § 16-580, a person shall not be allowed to remain inside the seventy-five foot limit while the polls are open, except for the purpose of voting, and * * * no electioneering may occur within the seventy-five foot limit. * * *

I. For the purposes of this section, electioneering occurs when an individual knowingly, intentionally, by verbal expression and in order to induce or compel another person to vote in a particular manner or to refrain from voting expresses support for or opposition to a candidate who appears on the ballot in that election, a ballot question that appears on the ballot in that election or a political party with one or more candidates who appear on the ballot in that election

Ariz. Rev. Stat. Ann. § 16-515.

**Arkansas**

(A) * * * Except as provided in subdivisions (a)(9)(B) and (C) of this section, no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever in the building or within one hundred feet (100′) of the primary exterior entrance used by voters to the building containing the polling place on election day.

(B) During early voting days, no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any

candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever during early voting hours in the building or within one hundred feet (100′) of the primary exterior entrance used by voters to the building containing the early voting site nor engage in those activities with persons standing in line to vote whether within or without the courthouse.

(C) When the early voting occurs at a facility other than the county clerk's office, no person shall hand out or distribute or offer to hand out or distribute any campaign literature or any literature regarding any candidate or issue on the ballot, solicit signatures on any petition, solicit contributions for any charitable or other purpose, or do any electioneering of any kind whatsoever in the building or within one hundred feet (100′) of the primary exterior entrance used by voters to the building containing the polling place[.]

Ark. Code Ann. § 7-1-103(a)(9).

**California**

No person, on election day, or at any time that a voter may be casting a ballot, shall, within 100 feet of a polling place, a satellite location under Section 3018, or an elections official's office: (a) Circulate an initiative, referendum, recall, or nomination petition or any other petition. (b) Solicit a vote or speak to a voter on the subject of marking his or her ballot. (c) Place a sign relating to voters' qualifications or speak to a voter on the subject of his or her qualifications except as provided in Section

14240. (d) Do any electioneering as defined by Section 319.5. * * *

Cal. Elec. Code § 18370.

"Electioneering" means the visible display or audible dissemination of information that advocates for or against any candidate or measure on the ballot within 100 feet of a polling place, a vote center, an elections official's office, or a satellite location under Section 3018. Prohibited electioneering information includes, but is not limited to, any of the following: (a) A display of a candidate's name, likeness, or logo. (b) A display of a ballot measure's number, title, subject, or logo. (c) Buttons, hats, pencils, pens, shirts, signs, or stickers containing electioneering information. (d) Dissemination of audible electioneering information. * * *

Cal. Elec. Code § 319.5.

**Colorado**

No person shall do any electioneering on the day of any election, or during the time when voting is permitted for any election, within any polling location or in any public street or room or in any public manner within one hundred feet of any building in which a polling location is located, as publicly posted by the designated election official. As used in this section, the term "electioneering" includes campaigning for or against any candidate who is on the ballot or any ballot issue or ballot question that is on the ballot. "Electioneering" also includes soliciting signatures for a candidate petition, a recall petition, or a petition to place a ballot issue or ballot question on a subsequent ballot. "Electioneering" does not include a respectful display of the American flag.

Colo. Rev. Stat. Ann. § 1-13-714(1); see also Colo. Sec'y of State, *Election Crimes, Rules, and Penalties FAQs* (prohibiting "pins, t-shirts, hats, or other apparel that displays a preference for a candidate, political party, or ballot question"), https://www.sos.state.co.us/pubs/elections/FAQs/crimesRulesFAQ.html, (last visited Jan. 31, 2018).

**Connecticut**

On the day of any primary, referendum or election, no person shall solicit on behalf of or in opposition to the candidacy of another or himself or on behalf of or in opposition to any question being submitted at the election or referendum, or loiter or peddle or offer any advertising matter, ballot or circular to another person within a radius of seventy-five feet of any outside entrance in use as an entry to any polling place or in any corridor, passageway or other approach leading from any such outside entrance to such polling place or in any room opening upon any such corridor, passageway or approach. * * *

Conn. Gen. Stat. Ann. § 9-236(a).

**Delaware**

(a) No election officer, challenger or any other person within the polling place or within 50 feet of the entrance to the building in which the voting room is located shall electioneer during the conduct of the election. * * *

(d) For the purposes of this section the following definition shall apply: "Electioneering" includes political discussion of issues, candidates or partisan topics, the

wearing of any button, banner or other object referring to issues, candidates or partisan topics, the display, distribution or other handling of literature or any writing or drawing referring to issues, candidates or partisan topics, the deliberate projection of sound referring to issues, candidates or partisan topics from loudspeakers or otherwise into the polling place or the area within 50 feet of the entrance to the building in which the voting room is located.

Del. Code Ann. tit. 15, § 4942.

**District of Columbia**

No person shall canvass, electioneer, circulate petitions, post any campaign material or engage in any activity that interferes with the orderly conduct of the election within a polling place or within a 50-foot distance from the entrance and exit of a polling place. The Board, by regulation, shall establish procedures for determination and clear marking of the 50-foot distance.

D.C. Code Ann. § 1-1001.10(b)(2)(A).

**Florida**

(a) No person, political committee, or other group or organization may solicit voters inside the polling place or within 100 feet of the entrance to any polling place, a polling room where the polling place is also a polling room, an early voting site, or an office of the supervisor of elections where vote-by-mail ballots are requested and printed on demand for the convenience of electors who appear in person to request them. Before the opening of the polling place or early voting site, the clerk or

supervisor shall designate the no-solicitation zone and mark the boundaries.

(b) For the purpose of this subsection, the terms "solicit" or "solicitation" shall include, but not be limited to, seeking or attempting to seek any vote, fact, opinion, or contribution; distributing or attempting to distribute any political or campaign material, leaflet, or handout; conducting a poll except as specified in this paragraph; seeking or attempting to seek a signature on any petition; and selling or attempting to sell any item. The terms "solicit" or "solicitation" may not be construed to prohibit exit polling.

Fla. Stat. Ann. § 102.031(4).

**Georgia**

No person shall solicit votes in any manner or by any means or method, nor shall any person distribute or display any campaign material, nor shall any person solicit signatures for any petition, nor shall any person, other than election officials discharging their duties, establish or set up any tables or booths on any day in which ballots are being cast: (1) Within 150 feet of the outer edge of any building within which a polling place is established; (2) Within any polling place; or (3) Within 25 feet of any voter standing in line to vote at any polling place.

Ga. Code Ann. § 21-2-414(a).

**Hawaii**

Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display or distribution of campaign

posters, signs, or other campaign materials for the purpose of soliciting votes for or against any person or political party or position on a question is prohibited. Any voter who displays campaign material in the polling place shall remove or cover that material before entering the polling place. The chief election officer may adopt rules pursuant to chapter 91 to address special circumstances regarding the display of campaign materials.

Haw. Rev. Stat. Ann. § 11-132(d); see also Haw. Code R. § 3-172-63 (prohibiting exhibiting or distributing "any communication which is in any way intended to directly or indirectly solicit, influence, or address any candidate race or question on the ballot…, [including on] clothing, button, hat, armband or other campaign material that is being exhibited by the person").

**Idaho**

On the day of any primary, general or special election, no person may, within a polling place, or any building in which an election is being held, or within one hundred (100) feet thereof: (a) Do any electioneering; (b) Circulate cards or handbills of any kind; (c) Solicit signatures to any kind of petition; or (d) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place.

Idaho Code Ann. § 18-2318(1); see also Idaho Code Ann. § 34-1012 ("Electioneering is prohibited at an early voting polling place as provided in section 18-2318, Idaho Code.").

**Illinois**

No person shall do any electioneering or soliciting of votes on primary day within any polling place or within one hundred feet of any polling place, or, at the option of a church or private school, on any of the property of that church or private school that is a polling place. * * *

10 Ill. Comp. Stat. Ann. 5/7-41(c).

**Indiana**

(a) As used in this section, "electioneering" includes expressing support or opposition to any candidate or political party or expressing approval or disapproval of any public question in any manner that could reasonably be expected to convey that support or opposition to another individual. The term includes wearing or displaying an article of clothing, sign, button, or placard that states the name of any political party or includes the name, picture, photograph, or other likeness of any currently elected federal, state, county, or local official. The term does not include expressing support or opposition to a candidate or a political party or expressing approval or disapproval of a public question in: (1) material mailed to a voter; or (2) a telephone or an electronic communication with a voter.

(b) A person who knowingly does any electioneering * * * on election day within * * * the polls * * * commits a Class A misdemeanor.

Ind. Code Ann. § 3-14-3-16.

**Iowa**

A person commits the crime of election misconduct in the third degree if the person willfully commits any of the following acts * * * on election day: (1) Loitering, congregating, electioneering, posting signs, treating voters, or soliciting votes, during the receiving of the ballots, either on the premises of a polling place or within three hundred feet of an outside door of a building affording access to a room where the polls are held, or of an outside door of a building affording access to a hallway, corridor, stairway, or other means of reaching the room where the polls are held. * * * (2) Interrupting, hindering, or opposing a voter while in or approaching the polling place for the purpose of voting.

Iowa Code Ann. § 39A.4(1)(a); see also Iowa Sec'y of State, *Election Day FAQ*, https://sos.iowa.gov/elections/voterinformation/edfaq.html (last visited Jan. 31, 2018) (permitting campaign button or clothing).

**Kansas**

Electioneering is knowingly attempting to persuade or influence eligible voters to vote for or against a particular candidate, party or question submitted. Electioneering includes wearing, exhibiting or distributing labels, signs, posters, stickers or other materials that clearly identify a candidate in the election or clearly indicate support or opposition to a question submitted election within any polling place on election day or advance voting site during the time period allowed by law for casting a ballot by advance voting or within a radius of 250 feet from the entrance thereof. Electioneering

shall not include bumper stickers affixed to a motor vehicle that is used to transport voters to a polling place or to an advance voting site for the purpose of voting.

Kan. Stat. Ann. § 25-2430(a).

**Kentucky**

(a) No person shall electioneer at the polling place on the day of any election, as established in KRS 118.025, within a distance of one hundred (100) feet of any entrance to a building in which a voting machine is located if that entrance is unlocked and is used by voters on election day.

(b) No person shall electioneer within the interior of a building or affix any electioneering materials to the exterior or interior of a building where the county clerk's office is located, or any building designated by the county board of elections and approved by the State Board of Elections for absentee voting, during the hours absentee voting is being conducted in the building by the county clerk pursuant to KRS 117.085(1)(c).

(c) Electioneering shall include the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any bona fide candidate or ballot question in a manner which expressly advocates the election or defeat of the candidate or expressly advocates the passage or defeat of the ballot question, but shall not include exit polling, bumper stickers affixed to a person's vehicle while parked within or passing through a distance of one hundred (100) feet of any entrance to a building in which a voting machine is located, private property as provided in subsection (7)

of this section, or other exceptions established by the State Board of Elections through the promulgation of administrative regulations.

Ky. Rev. Stat. Ann. § 117.235(3); see also 1984 Ky. Op. Atty. Gen. 2-102 (interpreting campaign buttons as not "signs").

**Louisiana**

A. The Legislature of Louisiana recognizes that the right to vote is a right that is essential to the effective operation of a democratic government. Due to a past, longstanding history of election problems, such as multiple voting, votes being recorded for persons who did not vote, votes being recorded for deceased persons, voting by non-residents, vote buying, and voter intimidation, the legislature finds that the state has a compelling interest in securing a person's right to vote in an environment which is free from intimidation, harassment, confusion, obstruction, and undue influence. The legislature, therefore, enacts this Subsection to provide for a six hundred foot campaign-free zone around polling places to provide to each voter such an environment in which to exercise his right to vote. Except as otherwise specifically provided by law, it shall be unlawful for any person, between the hours of 6:00 a.m. and 9:00 p.m., to perform or cause to be performed any of the following acts within any polling place being used in an election on election day or during early voting, or within a radius of six hundred feet of the entrance to any polling place being used in an election on election day or during early voting: (1) To solicit in any manner or by any means whatsoever any other person to vote for or against any candidate or proposition being voted on in such election.

* * * (3) To hand out, place, or display campaign cards, pictures, or other campaign literature of any kind or description whatsoever. (4) To place or display political signs, pictures, or other forms of political advertising. (5) To circulate a recall petition or seek handwritten signatures to a recall petition. * * *

D. No election official shall wear any badge, button, pin, or other insignia identifying him with any political candidate or faction.

La. Stat. Ann. § 18:1462; see also La. Sec'y of State, *Vote* (prohibiting "any campaign shirt, hat, and button or pin"), https://www.sos.la.gov/ElectionsAndVoting/Vote/Pages/default.aspx (last visited Jan. 31, 2018).

**Maine**

Advertising prohibited. A person may not display advertising material; operate an advertising medium, including a sound amplification device; or display or distribute campaign literature, posters, palm cards, buttons, badges or stickers containing a candidate's name or otherwise intending to influence the opinion of any voter regarding a candidate or question that is on the ballot for the election that day on any public property located within 250 feet of the entrance to either the voting place or the building in which the registrar's office is located. The term "sound amplification device" includes, but is not limited to, sound trucks, loudspeakers and blowhorns.

* * * This subsection does not apply to advertising material on automobiles traveling to and from the voting place for the purposes of voting. It does not prohibit

a person who is at the polls solely for the purpose of voting from wearing a campaign button when the longest dimension of the button does not exceed 3 inches.

Me. Stat. tit. 21-a, § 682(3).

**Maryland**

A person may not * * * canvass, electioneer, or post any campaign material in the polling place or beyond a line established by signs posted in accordance with subsection (b) of this section.

Md. Code Ann., Elec. Law § 16-206(a)(10); see also Md. State Bd. of Elections, *Summary Guide* at 70 (Aug. 2010), (prohibiting "clothing shirt, hat, sticker, or button that indicates support of or opposition to any candidate, question, or political party if worn by any person allowed to remain in the 'No Electioneering' zone. However, electioneering does not apply to a voter going to vote in his or her polling place. A person on his or her way to vote may wear campaign paraphernalia or carry campaign literature if the voter leaves the zone promptly after voting."), http://www.elections.state.md.us/pdf/summary_guide/summary_guide.pdf.

**Massachusetts**

At an election of state or city officers, and of town officers in towns where official ballots are used, * * * [no] poster, card, handbill, placard, picture or circular intended to influence the action of the voter shall be posted, exhibited, circulated or distributed in the polling place, in the building where the polling place is located,

on the walls thereof, on the premises on which the building stands, or within one hundred and fifty feet of the building entrance door to such polling place. * * *

Mass. Gen. Laws Ann. ch. 54, § 65.

**Michigan**

(1) * * * A person shall not place or distribute stickers, other than stickers provided by the election officials pursuant to law, in a polling room, in a compartment connected to a polling room, or within 100 feet from any entrance to a building in which a polling place is located. * * *

(3) On election day, a person shall not post, display, or distribute in a polling place, in any hallway used by voters to enter or exit a polling place, or within 100 feet of an entrance to a building in which a polling place is located any material that directly or indirectly makes reference to an election, a candidate, or a ballot question. Except as otherwise provided in section 744a, this subsection does not apply to official material that is required by law to be posted, displayed, or distributed in a polling place on election day.

Mich. Comp. Laws Ann. § 168.744 (footnote omitted); see also Mich. Sec'y of State, *Elections & Voting*, (prohibiting "election-related materials," including clothing, buttons, pamphlets, fliers and stickers), http://www.michigan.gov/sos/0,1607,7-127-29836-202488--F,00.html (last visited Jan. 31, 2018).

**Minnesota**

Soliciting near polling places. A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. This section applies to areas established by the county auditor or municipal clerk for absentee voting as provided in chapter 203B.

Minn. Stat. Ann. § 211B.11(1).

**Mississippi**

No candidate for an elective office, or any representative of such candidate, and no proponent or opponent of any constitutional amendment, local issue or other measure printed on the ballot may post or distribute cards, posters or other campaign literature within one hundred fifty (150) feet of any entrance of the building wherein any election is being held. No candidate or a representative named by him or her in writing may appear at any polling place while armed or uniformed, or display any badge or credentials except as may be issued by the manager of the polling place. * * *

Miss. Code Ann. § 23-15-895.

**Missouri**

The following offenses, and any others specifically so described by law, shall be class four election offenses and are deemed misdemeanors not connected with the exercise of the right of suffrage. Conviction for any of these offenses shall be punished by imprisonment of not more than one year or by a fine of not more than two thousand five hundred dollars or by both such imprisonment and fine: * * * Exit polling, surveying, sampling, electioneering, distributing election literature, posting signs or placing vehicles bearing signs with respect to any candidate or question to be voted on at an election on election day inside the building in which a polling place is located or within twenty-five feet of the building's outer door closest to the polling place, or, on the part of any person, refusing to remove or permit removal from property owned or controlled by him, any such election sign or literature located within such distance on such day after request for removal by any person[.]

Mo. Ann. Stat. § 115.637(18).

**Montana**

(1) A person may not do any electioneering on election day within any polling place or any building in which an election is being held or within 100 feet of any entrance to the building in which the polling place is located that aids or promotes the success or defeat of any candidate or ballot issue to be voted upon at the election. * * *

(3) A person may not buy, sell, give, wear, or display at or about the polls on an election day any badge, button, or other insignia that is designed or tends to aid or promote the success or defeat of any candidate or ballot issue to be voted upon at the election.

Mont. Code Ann. § 13-35-211; see also Mont. Admin. R. 44.11.606 (prohibiting solicitation of support or opposition to candidate or ballot question by "[p]ersonal persuasion, electronic amplification of the human voice, or the display or distribution of campaign materials").

**Nebraska**

No person shall do any electioneering, circulate petitions, or perform any action that involves solicitation within any polling place or any building designated for voters to cast ballots by the election commissioner or county clerk pursuant to the Election Act while the polling place or building is set up for voters to cast ballots or within two hundred feet of any such polling place or building except as otherwise provided in subsection (3) of this section.

Neb. Rev. Stat. Ann. § 32-1524(2); see also Neb. Sec'y of State, *Voter Information Frequently Asked Questions*, ("Wearing political badges or any political insignia into the polling place on Election Day is against the law."), http://www.sos.ne.gov/elec/voter_info.html (last visited Jan. 31, 2018).

**Nevada**

1. Except as otherwise provided in subsection 2, it is unlawful inside a polling place or within 100 feet from

the entrance to the building or other structure in which a polling place is located: (a) For any person to solicit a vote or speak to a voter on the subject of marking the voter's ballot. (b) For any person, including an election board officer, to do any electioneering on election day. * * *

4. As used in this section, "electioneering" means campaigning for or against a candidate, ballot question or political party by: (a) Posting signs relating to the support of or opposition to a candidate, ballot question or political party; (b) Distributing literature relating to the support of or opposition to a candidate, ballot question or political party; (c) Using loudspeakers to broadcast information relating to the support of or opposition to a candidate, ballot question or political party; (d) Buying, selling, wearing or displaying any badge, button or other insigne which is designed or tends to aid or promote the success or defeat of any political party or a candidate or ballot question to be voted upon at that election; or (e) Soliciting signatures to any kind of petition.

Nev. Rev. Stat. Ann. § 293.740.

**New Hampshire**

No person shall distribute, wear, or post at a polling place any campaign material in the form of a poster, card, handbill, placard, picture, pin, sticker, circular, or article of clothing which is intended to influence the action of the voter within the building where the election is being held.

N.H. Rev. Stat. Ann. § 659:43(I).

**New Jersey**

No person shall display, sell, give or provide any political badge, button or other insignia to be worn at or within one hundred feet of the polls or within the polling place or room, on any primary, general or special election day or on any commission government election day, except the badge furnished by the county board as herein provided. * * *

N.J. Stat. Ann. § 19:34-19.

**New Mexico**

A. Electioneering too close to the polling place consists of any form of campaigning within: (1) one hundred feet of the building in which the polling place is located on election day when voting at a school, church or private residence; and (2) one hundred feet of the door through which voters may enter to vote at the office of the county clerk, an alternate voting location, a mobile voting site or any location used as a polling place on election day that is not a school, church or private residence.

B. Electioneering includes the display or distribution of signs or campaign literature, campaign buttons, t-shirts, hats, pins or other such items and includes the verbal or electronic solicitation of votes for a candidate or question.

N.M. Stat. Ann. § 1-20-16.

**New York**

* * * While the polls are open no person shall do any electioneering within the polling place, or in any public

street, within a one hundred foot radial measured from the entrances designated by the inspectors of election, to such polling place or within such distance in any place in a public manner; and no political banner, button, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial. * * *

N.Y. Election Law § 8-104(1).

**North Carolina**

(a) Buffer Zone.--No person or group of persons shall hinder access, harass others, distribute campaign literature, place political advertising, solicit votes, or otherwise engage in election-related activity in the voting place or in a buffer zone which shall be prescribed by the county board of elections around the voting place. * * *

(b) Area for Election-Related Activity.--Except as provided in subsection (b) of this section, the county board of elections shall also provide an area adjacent to the buffer zone for each voting place in which persons or groups of persons may distribute campaign literature, place political advertising, solicit votes, or otherwise engage in election-related activity.

N.C. Gen. Stat. Ann. § 163A-1134.

**North Dakota**

No individual may buy, sell, give, or provide any political badge, button, or any insignia within a polling place or within one hundred feet [30.48 meters] from the entrance to the room containing the polling place while it is open for voting. No such political badge, button, or

insignia may be worn within that same area while a polling place is open for voting.

N.D. Cent. Code Ann. § 16.1-10-03.

**Ohio**

During an election and the counting of the ballots, no person shall do any of the following: (1) Loiter, congregate, or engage in any kind of election campaigning within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place, and if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line; (2) In any manner hinder or delay an elector in reaching or leaving the place fixed for casting the elector's ballot; (3) Give, tender, or exhibit any ballot or ticket to any person other than the elector's own ballot to the precinct election officials within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place, and if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line; (4) Exhibit any ticket or ballot which the elector intends to cast; (5) Solicit or in any manner attempt to influence any elector in casting the elector's vote.

Ohio Rev. Code Ann. § 3501.35(A); see also Ohio Sec'y of State, *Precinct Election Official Manual* at 45 (Jul. 2017) (prohibiting "all campaign garb and paraphernalia"), https://www.sos.state.oh.us/globalassets/elections/eoresources/peo-training/peomanual-2017general.pdf.

**Oklahoma**

No person shall be allowed to electioneer within three hundred (300) feet of any ballot box while an election is in progress, nor shall any person or persons, except election officials and other persons authorized by law, be allowed within fifty (50) feet of any ballot box while an election is in progress. No printed material other than that provided by the election board shall be publicly placed or exposed within three hundred (300) feet of any ballot box, while an election is in progress.

Okla. Stat. tit. 26, § 7-108.

**Oregon**

A person may not do any electioneering, including circulating any cards or handbills, or soliciting of signatures to any petition, within any building in which any state or local government elections office designated for the deposit of ballots under ORS 254.470 is located, or within 100 feet measured radially from any entrance to the building. A person may not do any electioneering by public address system located more than 100 feet from an entrance to the building if the person is capable of being understood within 100 feet of the building. The electioneering need not relate to the election being conducted. This subsection applies during the business hours of the building or, if the building is a county elections office, during the hours the office is open to the public, during the period beginning on the date that ballots are mailed to electors as provided in ORS 254.470 and ending on election day at 8 p.m. or when all persons

waiting in line at the building who began the act of voting as described in ORS 254.470 (10) by 8 p.m. have finished voting.

Or. Rev. Stat. Ann. § 260.695(2); see also Or. Sec'y of State, *Election Law Summary* at 42 (March 2016) ("The electioneering ban does not apply to the wearing of political buttons or other insignia (t-shirts, caps, etc.) which relate to the election in a polling place in a county clerk's office."), http://sos.oregon.gov/elections/Documents/elec_law_summary.pdf.

**Pennsylvania**

No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act.

25 Pa. Stat. Ann. § 3060(c).

**Rhode Island**

No poster, paper, circular, or other document designed or tending to aid, injure, or defeat any candidate for public office or any political party on any question submitted to the voters shall be distributed or displayed within the voting place or within fifty (50) feet of the entrance or entrances to the building in which voting is conducted at any primary or election. Neither shall any election official display on his or her person within the voting place any political party button, badge, or other device tending to aid, injure, or defeat the candidacy of

any person for public office or any question submitted to the voters or to intimidate or influence the voters.

17 R.I. Gen. Laws Ann. § 17-19-49; see also R.I. Bd. Of Elections, *Official Pollworker Manual* at 28 (2016) ("Voters are allowed to wear political campaign materials like buttons, pins, shirts, etc. However, they are expected to vote and leave the polling place."), http://www.elections.ri.gov/publications/Election_Publications/Pollworker_Training/REVISED%20Pollworker%20Training%20Guide%202016%20General%20REVISED.pdf.

**South Carolina**

(A) It is unlawful on an election day within two hundred feet of any entrance used by the voters to enter the polling place for a person to distribute any type of campaign literature or place any political posters. The poll manager shall use every reasonable means to keep the area within two hundred feet of any such entrance clear of political literature and displays, and the county and municipal law enforcement officers, upon request of a poll manager, shall remove or cause to be removed any material within two hundred feet of any such entrance distributed or displayed in violation of this section.

(B) A candidate may wear within two hundred feet of the polling place a label no larger than four and one-fourth inches by four and one-fourth inches that contains the candidate's name and the office he is seeking. If the candidate enters the polling place, he may not display any of this identification including, but not limited to, campaign stickers or buttons.

S.C. Code Ann. § 7-25-180; see also S.C. Election Comm'n, *Poll Managers Handbook* at Appendix-2 (April 2016) (prohibiting campaign materials, including but not limited to "buttons, hats, pins, t-shirts, literature, posters, signs," and "[a]ny material that advertises a candidate or political party"), https://www.scvotes.org/files/PMHandbook/SEC%20MNL%201100-201604%20Poll%20Managers%20Handbook.pdf.

**South Dakota**

Except for sample ballots and materials and supplies necessary for the conduct of the election, no person may, in any polling place or within or on any building in which a polling place is located or within one hundred feet from any entrance leading into a polling place, maintain a campaign office or public address system, or use any communication or photographic device in a manner which repeatedly distracts, interrupts, or intimidates any voter or election worker, or display campaign posters, signs, or other campaign materials or by any like means solicit any votes for or against any person or political party or position on a question submitted or which may be submitted. No person may engage in any practice which interferes with the voter's free access to the polls or disrupts the administration of the polling place, or conduct any petition signature gathering, on the day of an election, within one hundred feet of a polling place. For the purposes of this section, the term, polling place, means a designated place voters may go to vote on the day of the election or go to vote absentee. A violation of this section is a Class 2 misdemeanor.

S.D. Codified Laws § 12-18-3; see also S.D. Sec'y of State, *Election Day Precinct Manual* at 20 (Oct. 27, 2017) (prohibiting poll watchers and observers from wearing buttons or clothing that contain campaign information), https://sdsos.gov/elections-voting/assets/2017PrecinctManual.pdf.

**Tennessee**

(1) Within the appropriate boundary as established in subsection (a), and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person, political party, or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building in which a polling place is located. * * *

(3) Nothing in this section shall be construed to prohibit any person from wearing a button, cap, hat, pin, shirt, or other article of clothing outside the established boundary but on the property where the polling place is located.

Tenn. Code Ann. § 2-7-111(b).

**Texas**

[A] person may not wear a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election, in the polling place or within 100 feet of any outside door through which a

voter may enter the building in which the polling place is located.

Tex. Election Code Ann. § 61.010(a); see also Tex. Sec'y of State, *Qualifying Voters on Election Day* at 50 (Jul. 2017) (prohibiting wearing of a badge or other insignia, including a button, regarding a candidate, measure, or political party, or the conduct of the election), http://www.sos.state.tx.us/elections/forms/election_judges_handbook.pdf.

**Utah**

(1) As used in this section:

(a) "electioneering" includes any oral, printed, or written attempt to persuade persons to refrain from voting or to vote for or vote against any candidate or issue; and

(b) "polling place" means the physical place where ballots and absentee ballots are cast and includes the county clerk's office or city hall during the period in which absentee ballots may be cast there.

(2)(a) A person may not, within a polling place or in any public area within 150 feet of the building where a polling place is located:

(i) do any electioneering;

(ii) circulate cards or handbills of any kind;

(iii) solicit signatures to any kind of petition; or

(iv) engage in any practice that interferes with the freedom of voters to vote or disrupts the administration of the polling place.

Utah Code Ann. § 20A-3-501.

**Vermont**

The presiding officer shall ensure during polling hours on the day of the election that * * * [w]ithin the building containing a polling place, no campaign literature, stickers, buttons, name stamps, information on write-in candidates, or other political materials are displayed, placed, handed out, or allowed to remain[.]

Vt. Stat. Ann. tit. 17 § 2508(a)(1); Vt. Sec'y of State, *Voting Information Frequently Asked Questions* (prohibiting "shirt or button," or other "candidate paraphernalia"), https://www.sec.state.vt.us/elections/frequently-asked-questions/voting-information.aspx (last visited Feb. 1, 2018).

**Virginia**

A. During the times the polls are open and ballots are being counted, it shall be unlawful for any person (i) to loiter or congregate within 40 feet of any entrance of any polling place; (ii) within such distance to give, tender, or exhibit any ballot, ticket, or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote; or (iii) to hinder or delay a qualified voter in entering or leaving a polling place. * * *

K. The provisions of subsections A and D shall not be construed to prohibit a person who approaches or enters

the polling place for the purpose of voting from wearing a shirt, hat, or other apparel on which a candidate's name or a political slogan appears or from having a sticker or button attached to his apparel on which a candidate's name or a political slogan appears. This exemption shall not apply to candidates, representatives of candidates, or any other person who approaches or enters the polling place for any purpose other than voting.

Va. Code Ann. § 24.2-604.

**Washington**

During the voting period that begins eighteen days before and ends the day of a special election, general election, or primary, no person may:

(a) Within a voting center:

(i) Suggest or persuade or attempt to suggest or persuade any voter to vote for or against any candidate or ballot measure;

(ii) Circulate cards or handbills of any kind;

(iii) Solicit signatures to any kind of petition; or

(iv) Engage in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the voting center[.]

Wash. Rev. Code Ann. § 29A.84.510(1).

**West Virginia**

(a) As used in this section, "electioneering" means the displaying of signs or other campaign paraphernalia,

the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any bona fide candidate or ballot question in a manner which expressly advocates the election or defeat of the candidate or expressly advocates the passage or defeat of the ballot question. "Electioneering" does not include exit polling, so long as persons conducting exit polling are not otherwise engaging in electioneering activities described above, or bumper stickers or signs affixed to a person's vehicle which is parked within or passing through a distance of one hundred feet of the entrance to a polling place while such person is voting or transporting any voter to the polls. * * *

(c) No person may do any electioneering on election day within any polling place, or within one hundred feet of the outside entrance to the building housing the polling place. No person may do any electioneering in the polling place or within one hundred feet of the outside entrance of any polling place where early voting is conducted during the period in which early voting is offered during the hours while such early voting is actually taking place. Nothing in this subsection shall prohibit a citizen from doing any electioneering upon his or her own private property, regardless of distance from the polling place, so long as that electioneering conforms to other existing laws and ordinances.

W. Va. Code Ann. § 3-9-9.

**Wisconsin**

(2)(a)1. No person may engage in electioneering during polling hours on election day at a polling place. * * *

(4) In this section, "electioneering" means any activity which is intended to influence voting at an election.

Wis. Stat. Ann. § 12.03; see also Wisconsin Elections Commission, *Top 10 Things Wisconsin Voters Need to Know for the April 5 Spring Election and Presidential Preference Primary* (Mar. 24, 2016) ("Voters should not wear political clothing or paraphernalia to the polling place on Election day."), http://elections.wi.gov/node3909.

**Wyoming**

Electioneering too close to a polling place or absentee polling place under W.S. 22-9-125 when voting is being conducted, consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media, within one hundred (100) yards of the building in which the polling place is located.

Wyo. Stat. Ann. § 22-26-113.