No. 16-1435

In The
Supreme Court of the United States

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

v.

JOE MANSKY, in his official capacity
as Elections Manager for Ramsey County;
VIRGINIA GELMS, in her official capacity as
Elections Manager for Hennepin County;
MIKE FREEMAN, in his official capacity as
Hennepin County Attorney; JOHN CHOI,
in his official capacity as Ramsey County
Attorney; and STEVE SIMON, in his
official capacity as Secretary of State of Minnesota,
Respondents.

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

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Is Minnesota Statute Section 211B.11(1), which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

CORPORATE DISCLOSURE STATEMENT

Minnesota Voters Alliance is a nonprofit 501(c)(4) corporation incorporated under the laws of Minnesota. Minnesota Voters Alliance has no parent corporation, and no publicly held company owns 10% or more of its stock.

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The Eighth Circuit's opinion rejecting Minnesota Voters Alliance's (MVA's) facial challenge is reported at 708 F.3d 1051 (8th Cir. 2013), and reproduced at Pet. App. D. The Eighth Circuit denied rehearing en banc, over the dissent of Judge Smith and Judge Shepherd, on May 7, 2013, in an order reproduced in Pet. App. F. The district court opinion rejecting the facial challenge is reported at 789 F. Supp. 2d 1112 (D. Minn. 2011), and reproduced in Pet. App. E.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered final judgment in this case on February 28, 2017. The petition for a writ of certiorari was filed on May 30, 2017, and granted on November 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment, as incorporated against the states by the Fourteenth Amendment, provides

that the states "shall make no law . . . abridging the freedom of speech."

Minnesota Statute Section 211B.11(1) provides, in relevant part: "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 full statute is reprinted in an appendix to this brief.

INTRODUCTION

This case involves a statutory restriction on political speech of breathtaking reach; one that suppresses perhaps the most peaceful method of political expression—the silent wearing of clothing and other apparel that conveys a political message, logo, or group affiliation.

The provision at issue, the third sentence of Section 211B.11(1), came to prominence when members of Minnesota Voters Alliance (MVA), and other Petitioners (collectively referred to as "MVA"), attempted to wear expressive t-shirts and buttons into polling places during the November 2010 Minnesota election. Pet. App. D-3-4. One representative t-shirt contained the image of the Gadsden flag and the message "Don't Tread on Me." Joint Appendix (JA) 114, ¶¶ 5-6; *id.* at 116, ¶¶ 16-19. None of the apparel solicited votes for or against candidates or issues on the ballot. *Id.* at 110-11, ¶¶ 16-19. Nevertheless, polling officials told MVA that Section 211B.11(1) prohibited such politically expressive apparel in the polling place. Pet. App. D-3-4.

Since then, the government Respondents (collectively, "the Government") have made clear that Section 211B.11(1) reaches—and indeed, criminalizes—all political speech that can be

communicated through shirts, hats, buttons, and other apparel. Pet. App. E-13, 25, 28, 29. The statute bars every item referring to any candidate, party (on the ballot or not), politically involved organization, political ideology, political message or symbol, and "all manner of political views." *Id.* at E-15; *see also* Pet. App. A-6 ("all political material is banned."). Moreover, the law gives polling place officials discretion to decide which messages are "political" and thus, illegal in polling places, and which messages are non-political and permissible. *Id.* at E-22-23. The opportunity for abusive application of the law to disfavored viewpoints, and to protected non-political speech, is obvious and untenable.

The Government believes that the public's interests in peace, order, and influence-free elections justify its broad ban on political apparel. They do not. No conceivable governmental interest can sustain a statute that prohibits, and chills, the entire realm of political speech that can be conveyed on apparel. *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 573-76 (1987).

Political speech must be jealously guarded—wherever it is encountered. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 (1999) (courts must be "vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas"). This is especially true when it is communicated through a common, affordable, and passive means of speech, one that imposes no demands or burdens on others. Partial restrictions on this form of speech will usually be unconstitutional. Statutes which totally prohibit it are plainly overbroad and unconstitutional. *Jews for*

Jesus, 482 U.S. at 576; *see also United States v. Grace*, 461 U.S. 171, 186-88 (1983) (Marshall, J., conc. in part, dis. in part). Minn. Stat. § 211B.11(1) is such a statute.

STATEMENT OF THE CASE

A. Factual Background

1. The Ban on "Political" Apparel and Statutory Context

Minnesota Election Code Chapter 211B prescribes a set of "Fair Campaign Practices." Section 211B.11, entitled "Election day prohibitions," regulates certain activities "near polling places." The first subdivision of the section, entitled "Soliciting near polling places," is relevant here.

The first sentence in Section 211B.11(1) forbids active campaigning at polling places. It declares that people "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 a polling place. The second sentence in the subsection bars people from "provid[ing] 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." Neither of these provisions is challenged here.

The third sentence of Section 211B.11(1) is at issue. It states: "[a] political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." Minn. Stat. § 211B.11(1). The Government recognizes that this provision includes political clothing and other "paraphernalia." Opposition to the Petition for Certiorari (Opp.) at 24, 35.

Section 211B.11(1) applies not only in polling places on primary and election days, but also for 46 days prior to an election in at least 87 county absentee voting areas. Minn. Stat. §§ 211B.11(1); 203B.081(1). If citizens wear political apparel when voting, a complaint may be filed against them in the Office of Administrative Hearings. Minn. Stat. § 211B.32. That Office may impose civil penalties of up to $5,000 against the offender, Minn. Stat. § 211B.35(2), and/or refer the case to county prosecutors for possible criminal charges, Minn. Stat. § 211B.11(4); *see also* JA 52-53.

The purposes underlying the political apparel ban are not apparent from the text of Section 211B.11(1). The Government contends that it is "designed to protect Minnesotans' right to vote in an orderly and controlled environment without confusion, interference, or distraction." Opp. at 4. The Eighth Circuit believed the law is meant to "maintain peace, order and decorum" in the polling place, to "protect[] voters from confusion and undue influence," and to "preserv[e] the integrity of its election process." Pet. App. D-8 (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992)).

At least nine other states have enacted similar restrictions on political apparel at polling places.[1] Many of these statutes, including Minnesota's, were passed in the late 1800's. At the time, the available political apparel was largely limited to campaign

[1] *See* Del. Code Ann. tit. 15, § 4942; Kan. Stat. Ann. § 25-2430(a); Mont. Code Ann. § 13-35-211(1); N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104(1); S.C. Code Ann. § 7-25-180(B); Tenn. Code Ann. § 2-7-111(b)(1); Tex. Elec. Code Ann. § 61.010(a); Vt. Stat. Ann. tit. 17, § 2508(a).

buttons and other candidate-specific items. *Picray v. Secretary of State*, 916 P.2d 324, 329 n.12 (Or. Ct. App. 1996) (quoting Roger A. Fischer, *Tippecanoe and Trinkets Too* vii-viii (1988)).[2]

Section 211B.11(1) is only one of many Minnesota statutes that regulate polling places. For instance, Section 211B.07 of the Election Code, entitled "Undue Influence on Voters Prohibited," prevents a person from "directly or indirectly" trying "to compel [an] individual to vote for or against a candidate or ballot question" through the use of force and influence. Another portion of this section bars the use of fraud "to obstruct or prevent the free exercise of the right to vote of a voter at a primary or election, or compel a voter to vote at a primary or election." Similarly, Minn. Stat. § 204C.035(1), entitled, "Deceptive Practices in Elections," states: "No person shall knowingly deceive another person regarding the time, place, or manner of conducting an election or the qualifications for or restrictions on voter eligibility for an election, with the intent to prevent the individual from voting in the election." Finally, Minn. Stat. § 204C.06 limits access to polling places and prohibits disorderly conduct.

As in most states, polling places in Minnesota are established on election day in a wide variety of buildings and locations, including churches, city halls, and county offices. *See generally* Office of Minn. Sec'y of State, Polling Place Finder, http://pollfinder.sos.state.mn.us/ (last visited Dec. 21,

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[2] By most reports, the t-shirt itself was not invented until the early 20th century. *See* Tee Fetch, *History of the T-shirt*, http://www.teefetch.com/history-of-the-t-shirt/ (last visited Dec. 21, 2017).

2017). According to Respondent Mansky, voters are in a polling place for ten minutes or less. JA 56, ¶ 11.

2. The "Election Day Policy"

As the 2010 election approached, state and local election officials in Minnesota created and distributed an Election Day Policy (Policy) which provided guidelines for enforcement of Section 211B.11(1). *See* Pet. App. I-1-2. As Minnesota's Secretary of State explained below,

> officials from the [] county offices, in consultation with representatives of the Secretary of State's Office, drafted a sample letter to aid county election officials and election judges statewide in their application of Minn. Stat. § 211B.11 . . . . Gary Poser, the Office of Secretary of State's Elections Director, then sent the sample letter . . . via e-mail to county elections officials in each Minnesota county.

2011 Brief of Appellee Ritchie at 3-4 (8th Cir. Sept. 21, 2011); *see also* Declaration of Gary Poser dated Jan. 6, 2011 [Dist. Ct. Docket Entry No. 57] ¶¶ 5-7.

The Policy states that "Minnesota law prohibits persons from wearing 'political badges, political buttons, or other political insignia' *or* displaying campaign material at the polling place." Pet. App. I-1. (emphasis added). It notes that "[e]lection judges have the authority to decide what is 'political'" for purposes of Section 211B.11(1). *Id.*

The Policy then provides examples of impermissible "political" apparel. These "include, but are not limited to:"

> • 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.
>
> • [Any] [i]ssue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).
>
> • [Any] [m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.Org, and so on).

Pet. App. I-1-2.

In separate, pre-election communications with Petitioner Susan Jeffers, an election judge in Ramsey County, JA 34, Respondent Mansky confirmed that the statute prohibits Tea Party shirts and buttons in Ramsey County polling places. JA 34, ¶ 3; *id.* at 56, ¶ 9. He also indicated that the statute could bar a "Minnesota Vikings" shirt if there was an issue related to the football team on the ballot, such as construction of a new stadium. JA 34-35. In lower court arguments, the Government conceded that the "political" apparel ban extends to all politically-involved organizations, and would thus ban shirts referring to the Chamber of Commerce and the AFL-CIO. Oral Argument at 19:48, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125).[3]

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[3] http://media-oa.ca8.uscourts.gov/OAaudio/2012/2/112125.MP3.

Once an election official decides that a citizen is wearing illegal "political" material, the Policy directs the official to "[a]sk the individual to either cover up or remove the political material while in the polling place." Pet. App. I-2. If the person does not comply, the Policy directs election judges to allow the offender to vote, but also to record his or her name, address, and the nature of the offending "political" item for referral to "appropriate authorities" for potential fines and criminal prosecution. *Id.*

3. Enforcement of the "Political" Apparel Ban

Prior to the 2010 election, the North Star Tea Party Patriots created t-shirts and hats with a Tea Party emblem and slogans like "Fiscal Responsibility, Limited Government, Free Markets," "Liberty," "Remember Me in November," and "Don't Tread on Me." JA 71-72; Pet. App. H-1-2. The Tea Party did not endorse or oppose any candidates or issues on the 2010 ballot. JA 71-72. With assistance from MVA and other organizations, the Tea Party helped form Election Integrity Watch (EIW), "a grass roots effort to protect election integrity."[4] JA 70; Pet. App. E-3. EIW subsequently produced a small button that stated "Please I.D. Me" on a background image of a human eye, along with EIW's telephone number and website address. Pet. App. E-3, G-1.

During the 2010 election, MVA members and other citizens wore or planned to wear Tea Party shirts and/or EIW buttons when voting. JA 77-78,

[4] None of the organizations forming EIW "endorse[d] a candidate or ballot issue in the November 2010 Election." Pet. App. D-2, E-2-3.

¶¶ 72-75. For instance, the Executive Director of MVA, Petitioner Andrew Cilek, entered his polling place in Hennepin County wearing a t-shirt made by the Tea Party Patriots. *Id.* at 115, ¶¶ 10-11. The shirt featured a small Tea Party logo, a larger "Don't Tread on Me" message, and an image of the Gadsden Flag. JA 114, ¶ 5; *see also* Pet. App. H-1 (representation of Tea Party shirts). Cilek also wore a small "Please I.D. Me" button. JA 115, ¶ 9.

When Cilek entered the polling place, an election worker told him he could not vote unless he covered or removed the shirt and button. Cilek refused and left. *Id.* at 115, ¶ 10. A while later, he tried again to vote, but was once more denied entry to the polling place and told not to come back a third time. *Id.* at 115, ¶ 11.

Several hours later, Cilek made a final attempt to enter the polling place. This time, election officials allowed him to vote. However, as he did so, an election judge recorded Cilek's name and address for possible prosecution for wearing the "Don't Tread on Me" shirt and the button. *Id.*

Another citizen who wore a Tea Party Patriot shirt on election day was told to cover the shirt by a poll worker as he was casting a ballot, and was threatened with prosecution if he did not comply. JA 78, ¶ 73. Other citizens who wanted to wear Tea Party shirts and/or buttons when voting refrained from doing so out of fear of prosecution under Section 211B.11(1). *Id.* at 79, ¶¶ 79-82.

B. Procedural History

1. Initial Proceedings

Just prior to the November 2010 election, MVA, and entities that are no longer parties to this

litigation, filed a complaint against Ramsey County election officials and the Minnesota Secretary of State. JA 8-33. The complaint alleged that Minn. Stat. § 211B.11(1) violated the First Amendment on its face because it failed to advance legitimate interests and/or was overbroad. *Id.* at 30, ¶ 117. The complaint sought a declaration that "Minn. Stat. § 211B.11 is facially unconstitutional" and an order enjoining its enforcement. *Id.* at 32, ¶¶ C, D. Several weeks after the 2010 election, MVA filed an amended complaint that included additional facts related to the Policy and the enforcement of Section 211B.11(1) during the 2010 election. JA 63-92. The district court read the amended complaint to allege that Section 211B.11 is facially unconstitutional under both the United States and Minnesota Constitutions. Pet. App. E-8.

The Government soon filed a motion to dismiss the case under Federal Rule of Civil Procedure 12(b)(6). Upon review, the district court held that Section 211B.11(1) was constitutionally valid under the First Amendment and dismissed the facial claim. Pet. App. E-10-14, E-28-30. The court concluded that a ban on apparel "expressing political ideology or beliefs, even those unrelated to a candidate or ballot question," falls "within the [statute's] legitimate sweep." *Id.* at E-29. The court similarly dismissed MVA's as-applied First Amendment claim, holding that "prohibiting apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of 'maintain[ing] peace, order, and decorum' at the polls." Pet. App. E-18 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). MVA appealed.

2. Appellate Proceedings

During argument in the Eighth Circuit, the Government embraced the broad nature of the ban on "political" apparel. It conceded that Section 211B.11(1) is not limited to Tea Party apparel and that it prohibits items naming other organizations, like the "Chamber of Commerce" and the "AFL-CIO." Oral Argument at 19:48, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125). The Eighth Circuit also recognized that the political apparel ban reaches beyond campaign-related items. Pet. App. D-3, D-9-10. Nevertheless, it upheld the provision on the ground that it constitutionally advances the Government's interest in "peace, order, and decorum" at polling places. Pet. App. D-8-10. The Eighth Circuit also remanded MVA's as-applied claims for further factual development. *Id.* at D-10; D-12.

Judge Shepherd dissented from the majority's analysis of the facial claim. Pet. App. D-15-19 (Shepherd, J., conc. in part, dis. in part). He declared it impossible to

> see how this broad restriction, which prohibits a voter from wearing any political emblem, insignia, or slogan that is unrelated to an issue or candidate on the ballot, would rationally and reasonably help maintain the "peace, order, and decorum" of the polling place, "protect [ ] voters from confusion or undue influence," or "preserv[e] the integrity of [Minnesota's] election process."

Id. at D-18 (Shepherd, J., conc. in part, dis. in part). Maintaining the same theme, the dissent forcefully

rejected the idea that "the presence of a passive and peaceful voter who happens to wear a shirt" promoting the "'American Legion,' 'Veterans of Foreign Wars,' 'AFL-CIO,' 'NRA,' 'NAACP,' or the logo of one of these organizations (all of which have actively participated in the political process)" would disrupt or otherwise harm voters. *Id.* at D-18 n.7 (Shepherd, J., conc. in part, dis. in part).

MVA subsequently filed a petition for a writ of certiorari. Petition for Writ of Certiorari, *Minnesota Majority v. Mansky*, No. 13-185, 2013 WL 4027040 (U.S. Aug. 5, 2013). The Government opposed this petition on the ground that the "as-applied challenge [was] still pending." Opposition to Petition for Writ of Certiorari, *Minnesota Majority v. Mansky*, No. 13-185, 2013 WL 6021145, at *9-11 (U.S. Nov. 8, 2013). The Court denied certiorari, and MVA proceeded with the as-applied claims against Section 211B.11(1) in district court. Pet. App. B-1-34. Relying primarily on the Eighth Circuit's prior decision finding the statute constitutional, the district court eventually granted the Government's motions for summary judgment on the as-applied claims. *Id.* at B-33. MVA appealed once more, but limited its as-applied arguments to the prohibition on Tea Party shirts. Pet. App. A-1-7. The Eighth Circuit affirmed summary judgment in favor of the Government on this issue, creating a final judgment. *See id.* at A-7.

Once more, MVA filed a Petition for Certiorari, asking this Court to decide whether Section 211B.11(1) is facially unconstitutional under the First Amendment. On November 13, 2017, the Court granted the Petition.

SUMMARY OF ARGUMENT

The prohibition on "political" apparel in Section 211B.11(1) is unconstitutional under the First Amendment overbreadth doctrine because it bans and penalizes substantial amounts of passive political speech. To state the statute's reach is to confirm its unconstitutionality. The law prohibits and potentially criminally punishes every variety of political speech on clothing, from that which simply names a political group, to messages supporting political causes, to ideological or party references, to messages about current issues. Pet. App. E-13, 15, 18, 25, 27, 28, 29 (district court findings on scope of the statute); Pet. App. A-6 (Eighth Circuit declares: "all political material is banned"); 2011 Brief of Appellee Ritchie at 10 n.1 ("[T]he class of 'political' items that section 211B.11 restricts are those items that fit within the category of political *speech* within a First Amendment context."). Further, the broad and amorphous nature of the term "political" allows election officials to mistakenly or purposefully silence other forms of protected speech, such as religious or environmental messages.

The First Amendment needs breathing space to flourish, *National Ass'n for Advancement of Colored People* (*NAACP*) *v. Button*, 371 U.S. 415, 433 (1963), but Section 211B.11(1) positively suffocates it. The statute establishes political speech "safe zones" throughout the state on election days and for 46 days prior to the election at absentee voting offices. No conceivable governmental interest justifies such an expansive freeze on political speech. *Jews for Jesus*, 482 U.S. at 575; *Grace*, 461 U.S. at 187 (Marshall, J., conc. in part, dis. in part). Indeed, given Section

211B.11(1)'s remarkably deep intrusion into passive political speech, the statute is overbroad and unconstitutional even if it can be constitutionally applied to prohibit the Tea Party shirts and EIW buttons worn by MVA members and others.

Certainly, the Government's interest in "peace" and order" at polling places cannot sustain the statute. The wearing of clothing containing political messages and symbols is inherently "nondisruptive." *Jews for Jesus*, 482 U.S. at 576. Moreover, the statute bans far more than items bearing "fighting words" or similarly provocative material. It prohibits "all" politically expressive clothing, including that which peacefully conveys common political affiliations or aspirations. Pet. App. E-29 (the statute bans expressions of "political ideology or beliefs, even those unrelated to a candidate or ballot question"). Such a wide-ranging restriction on passive speech is unrelated to "peace and order." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969).

Similarly, Section 211B.11(1) fails to advance the governmental interest in protecting voters from "confusion" and "undue influence." The statute restricts t-shirts that make no attempt to persuade voters to take any action, such as those that merely name a political group or ideology. Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part). There is no danger of undue influence here.

The Government is likely to point to *Burson v. Freeman*, 504 U.S. 191, for support. But *Burson* is inapposite because it did not involve a restriction on voters' ability to silently wear expressive clothing while voting; it involved a restriction on active

campaigning. The *Burson* plurality held only that "requiring *solicitors* to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise." 504 U.S. at 211 (emphasis added).

Since *Burson* does not control here, Section 211B.11(1) must stand or fall based on its ability to advance the Government's interests in regulating elections. It falls. No interest justifies a law broadly banning *all* politically expressive apparel. The statute is therefore unconstitutionally overbroad whether or not polling places are a non-public forum. *Jews for Jesus*, 482 U.S. at 576. Citizens cannot constitutionally be compelled to give up their right to passively speak on political topics through a t-shirt at the polling places any more than in airports, *id.*, courthouses, *Cohen v. California*, 403 U.S. 15, 26 (1971), or schools, *Tinker*, 393 U.S. at 505-06, 514.

To save the statute, the Government may propose a construction that it believes would narrow its reach. But none exists. The law cannot plausibly be construed to ban only political items that may "influence" voters, given the provision's broad language, the statutory context, and the Government's interpretations and concessions. *Jews for Jesus*, 482 U.S. at 575-76. Moreover, a construction that allows the statute to prohibit all political advocacy on apparel is insufficiently tailored to the goal of preventing undue influence, overbroad, and unconstitutional in its own right.

There is no form of speech as protected as political speech and no medium of public expression that is as peaceful and unobtrusive as messages on clothing. The First Amendment cannot tolerate a law that penalizes and deters all political expression communicated through clothing—even in polling places. *Jews for Jesus*, 482 U.S. at 576 ("the wearing of a t-shirt or button that contains a political message . . . is still protected speech even in a non-public forum"). Section 211B.11(1) is facially unconstitutional.

ARGUMENT

I.

MINN. STAT. § 211B.11(1) BROADLY BANS ALL POLITICALLY EXPRESSIVE APPAREL

The First Amendment not only protects against violations of a particular individual's free speech rights; under the "overbreadth doctrine," it also guards against far-reaching laws that threaten the free speech rights of large segments of society. *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984). Section 211B.11(1) violates this doctrine because it punishes *all* political speech that can be conveyed through the passive medium of personal apparel. Pet. App. A-6 ("all political material is banned").

A. First Amendment Principles

The First Amendment to the Constitution declares that "Congress shall make no law . . . abridging the freedom of speech." This guarantee applies, of course, not only to oral communications, but also to written or symbolic expression. Speech silently conveyed through writing and symbols on t-shirts, buttons, and hats is just as protected as a literal oration. *Jews for Jesus*, 482 U.S. at 576; *Cohen*, 403 U.S. at 23-24 (imprint on jacket was a constitutionally protected "utterance"); *Tinker*, 393 U.S. at 505-06 (wearing a black armband is "akin to 'pure speech'" and "entitled to comprehensive protection").

In considering whether a restriction on protected speech violates the First Amendment, this Court has employed several different approaches. Here, the Government will likely urge the Court to utilize the public forum doctrine, and standards associated with the doctrine, in deciding whether Section 211B.11(1) goes too far. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). This is not necessary.

1. Forum Analysis

To be sure, in some cases, First Amendment scrutiny depends (at least in part) on whether a challenged speech restriction applies in a public or non-public forum. *Id.* In a "traditional public forum," such as a public sidewalk, or in a Government-"designated public forum," speech restrictions are subject to strict scrutiny. The government "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve

that end." *Id.* at 45. In some cases, content-neutral regulations that impose reasonable time, place and manner limitations on speech may be permissible in public forums, if they are narrowly drawn to achieve a substantial governmental interest, and leave open ample alternative channels of communication. *Id.*; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

At the same time, this Court has recognized that the government may sometimes restrict speech in non-public forums—even when the restriction is content based—as long as the regulation is "reasonable in light of the purpose served by the forum" and "viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *see also Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-29 (1995).

2. Content-Based and Political Speech Restrictions Are Subject to Strict Scrutiny

The public forum doctrine has never been the *exclusive* analytical device for reviewing free speech claims. In fact, in many cases, the type of review depends on the nature of the speech restriction, not the locus of its operation. For instance, the Court has repeatedly declared that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (It is usually "dispositive to conclude that a law is content-based and, in practice,

viewpoint-discriminatory."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (same); *Cohen*, 403 U.S. at 18 (The "State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-25 (1991) (Kennedy, J., concurring); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated . . . ."). A law is content-based and subject to strict scrutiny when it is content-based "on its face" or when its purpose is content-based. *Reed*, 135 S. Ct. at 2228. This includes laws that forbid "'discussion of an entire topic.'" *Id.* at 2230 (quoting *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)).

The Court's precedent also singles out political speech—"expression of editorial opinion on matters of public importance"—for individualized, robust protection. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375-76 (1984). Political speech is "central to the meaning and purpose of the First Amendment." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 329 (2010); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("at the core of what the First Amendment is designed to protect") (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)). For this reason, the Court has said that political speech is entitled to the "fullest and most urgent application" of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam). This typically means review under strict scrutiny tests. *Federal Election Comm'n v. Wisconsin Right To Life, Inc.* (*WRTL*), 551 U.S. 449, 464 (2007); *see generally Buckley*, 525 U.S. at 206

(Thomas, J., concurring) (cataloguing political speech cases adjudicated under strict scrutiny standards). A political speech restriction must be "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *see also Cohen*, 403 U.S. at 21-26 (applying heightened scrutiny to a criminal penalty arising from a political message displayed in a courtroom corridor).

3. Facial Challenges Under the Overbreadth Doctrine

The foregoing principles may come into play in either a facial or as-applied First Amendment challenge. When plaintiffs allege that a statute is unconstitutional on its face, they generally must show that the law lacks a "plainly legitimate sweep," *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in the judgment) (internal quotation marks omitted). However, the First Amendment "overbreadth doctrine" permits a second type of facial challenge. It allows "an individual whose own speech or conduct may be prohibited" to "challenge a statute on its face 'because it threatens [the free speech rights of] others.'" *Jews for Jesus*, 482 U.S. at 574; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

The overbreadth doctrine responds to "the threat [that] enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected

speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id.* (citation omitted); *see also Jews for Jesus*, 482 U.S. at 574. Thus, "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Munson Co., Inc.*, 467 U.S. at 958. By allowing a plaintiff to challenge a law because it endangers the free speech rights of others, the overbreadth doctrine ensures that the First Amendment has "'breathing space to survive.'" *WRTL*, 551 U.S. at 468-69 (quoting *NAACP v. Button*, 371 U.S. at 433).

Because the First Amendment overbreadth doctrine is "strong medicine," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), it is generally employed to facially invalidate a statute only (1) when its overbreadth is "substantial" in "relation to the statute's plainly legitimate sweep," and (2) where the law is not readily susceptible to a limiting construction. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008); *Broadrick*, 413 U.S. at 613, 615. This understanding derives from the doctrine's purpose. "While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *New York v. Ferber*, 458 U.S. 747, 772 (1982). In applying this framework, the Court may consider the extent to which a law "delegates overly broad discretion to the decisionmaker." *Forsyth County, Ga.*

v. Nationalist Movement, 505 U.S. 123, 129 (1992); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991) (Overbroad laws raise "a concern . . . that the legislature . . . has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden.").

B. Minn. Stat. § 211B.11(1) Bans a Vast Amount of Peaceful, Passive, Protected Speech

MVA's facial challenge to Section 211B.11(1) arises under the First Amendment overbreadth doctrine. The first step in analyzing such a claim is "to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). The Court must "ascertain whether the enactment reaches a substantial amount of constitutionally protected conduct." *Boos v. Barry*, 485 U.S. 312, 329 (1988). "The [government's] authoritative constructions of the [law], including its own implementation and interpretation of it" are pertinent in gauging the scope of a challenged speech restriction. *Forsyth County, Ga.*, 505 U.S. at 131.

1. Section 211B.11(1) Burdens an Astounding Amount of Protected Political Speech

On its face, Section 211B.11(1) is a content-based restriction on political speech, *Burson*, 504 U.S. at 197, a trait that places it in a precarious position from the start. *Reed*, 135 S. Ct. at 2226 (content-based restrictions are presumptively invalid). But the

statute's most remarkable—and most troubling—feature is its capacity to penalize all protected political speech. *Consolidated Edison Co.*, 447 U.S. at 537.

The political apparel ban in Section 211B.11(1) prohibits not only items that expressly advocate for or against candidates and issues (whether on the ballot or not),[5] it prohibits even the most general references to political issues, beliefs, and associations. Pet. App. E-25 (if people wear apparel that "express[es] a political statement they may be asked to cover or remove the item"); *id.* at E-29 (statute bars material expressing "ideology or beliefs"); Pet. App. I-1-2 (Policy); Opp. at 15.

Apparel messages referring to social, economic, immigration, healthcare, military, foreign affairs, taxation, or other political concerns fall within the statute's prohibited zone. Pet. App. E-27 ("innumerable issues" within statute's reach); *id.* at E-15 (The "Policy applies to [items] expressing all manner of political views."). The same is true of apparel communicating a political "ideology," *id.* at E-29, such as a shirt declaring, "Fiscal Responsibility, Limited Government, Free Markets." *Id.* at E-17-18 (district court reviews Tea Party shirts and concludes

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[5] In official election guidance documents, the Minnesota Secretary of State observed that Section 211B.11 bars all "partisan references" in a polling place. *See* Appendix A to Declaration of Gary Poser, dated October 29, 2010, DE 20. As a result, there would appear to be no expiration date on the statute's prohibition of candidate- and issue-based apparel. A shirt referring to former President Obama's 2008 Democratic Party candidacy would appear to be just as illegal, as "partisan" material, as one supporting a current candidate.

the statute bars "apparel that expresses support for a political ideology").

Section 211B.11(1) reaches farther still. It prohibits items referring to the name of any organization linked to politics. Pet. App. I-1-2. It bars clothing bearing the names and/or logos of the "AFL-CIO," "Chamber of Commerce," "MoveON.org," the "Tea Party" and "so on." There is no logical stopping point. "[A] shirt displaying . . . the words 'American Legion,' 'Veterans of Foreign Wars,' . . . 'NRA,' 'NAACP,' or the logo of one of these organizations (all of which have actively participated in the political process)" comes within the reach of Section 211B.11(1). Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part).

The statute also bans "any item containing the name of a political party in Minnesota," whether or not that party has any affiliated candidates on the ballot and whether or not it has endorsed any candidates. Pet. App. I-1-2 (Policy). The Government's enforcement of the provision against voters wearing shirts associated with the North Star Tea Party provides an example. The Tea Party is not a political party and did not field or endorse candidates during the 2010 election. JA 40-41, ¶¶ 8-9, Pet. App. E-18. Yet the political apparel ban barred Tea Party shirts at polling places. Pet. App. I-2; JA 115, ¶ 10. The provision would similarly prohibit apparel featuring the peace-dove symbol of the Peace and Freedom Party, a party that also fielded no candidates in Minnesota's 2010 election. Pet. App. I-2.

As Respondent Mansky put it, Section 211B.11(1) "prevents *any politicization* from entering the polling place." 2011 Brief of Appellee Mansky at 14 (emphasis

added). The Minnesota Secretary of State holds a similar view: "the class of 'political items' that section 211B.11 restricts are *those items that fit within the category of political speech within a First Amendment context*." 2011 Brief of Appellee Ritchie at 10 n.1 (emphasis added). These statements confirm the extraordinarily broad nature of the political apparel ban. It prohibits "all manner of political views," Pet. App. E-15, "any political viewpoints," *id.* at E-28, and "innumerable issues." *Id.* at E-27.

Political speech is vital to the health and success of a constitutional republic, *Buckley v. Valeo*, 424 U.S. at 14 ("Discussion of public issues" is "integral to the operation of the system of government established by our Constitution."), and expressive clothing plays an important role in American political discourse. *See, e.g., Tinker*, 393 U.S. at 513-14. *Tobey v. Jones*, 706 F.3d 379, 387-92 (4th Cir. 2013) (citizen stated a viable First Amendment retaliation claim based on the TSA's punitive reaction to a display of the text of the Fourth Amendment). While slogans on apparel may be brief, "powerful messages can sometimes be conveyed in just a few words." *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017). Section 211B.11(1) utterly silences peaceful political discourse on days when it should be celebrated, or at least tolerated.

2. The Provision Threatens Other Forms of Protected Speech

The statute's ability to shut out all political expression on apparel is sufficient to classify it as a dangerously broad speech restriction. But the provision threatens other forms of protected speech as well, due to the indefiniteness of the term "political," and the discretion which polling officials have to

define and apply that term. More than 30 years ago, this Court suggested that sayings like "Jesus Saves," "Abortion is Murder," and "Right to Choose," are *non-political* speech. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984). Yet, it is hardly a stretch to believe that many would see such speech as "political" today. A shirt that says "Life Begins at Birth" or "Family Research Council" and which a person wears as a religious statement could be perceived as "political" by a polling official and banned under Section 211B.11(1). Clothing with scientific or environmental messages would likely meet the same fate. A hat that says "Climate Change is Real" could, and very likely would, be considered "political." Patriotic clothing is not immune. Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part) (noting that a "shirt bearing an American flag or the Star of David" would likely be considered a prohibited "political" item). To some, an image of a national flag is a "political" statement, leading to the very real possibility that the statute could prevent American flag images at American elections. *Id.*; *see also Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 775, 778-79 (9th Cir. 2014) (upholding a prohibition on an American flag shirt at a school).

None of this is hyperbole. Reports abound of polling officials applying political apparel bans to turn away or penalize voters for wearing "political" t-shirts at polling areas. In one 2008 case, a poll worker temporarily prevented a citizen from voting because she was wearing an "Alaska" souvenir t-shirt that the

poll worker construed as support for Sarah Palin.[6] In 2014, a citizen attempting to vote in Georgia was ordered to remove an "NRA Instructor" hat because polling place officials associated the message with certain parties on the ballot.[7] In another well-known incident, polling officials stopped Massachusetts Institute of Technology students because officials thought their "MIT" shirts campaigned for Mitt Romney. James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 Mercer L. Rev. 331, 332 (2014). More recently, during last year's national election, Arkansas election officials made clear that shirts "reminiscent of a party," like "I miss Bill" or "Reagan/Bush" shirts would not be allowed at the polling place.[8]

The amount of protected speech that Section 211B.11(1) can plausibly ban—indeed, criminalize—is truly staggering. The statute suppresses the entire realm of political speech that can be passively conveyed through personal apparel. Pet. App. A-6 ("all political material is banned"); 2011 Brief of Appellee Mansky at 13 (conceding the law "bans all political

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[6] Jennifer Latson, *Houstonian wearing Alaska T-shirt nearly denied a vote*, Houston Chronicle (Nov. 4, 2008), http://www.chron.com/neighborhood/cyfair-news/article/Houstonian-wearing-Alaska-T-shirt-nearly-denied-a-1789897.php.

[7] Jessica Chasmar, *NRA demands Georgia county's elections board reverse ban on pro-gun clothing*, Wash. Times (Oct. 29, 2014), https://www.washingtontimes.com/news/2014/oct/29/nra-demands-georgia-countys-elections-boar/.

[8] Kathryn Gilker, *What Can You Bring To A Polling Place: Cellphones, Political T-shirts, Children?*, 5NEWS (Nov. 7, 2016), http://5newsonline.com/2016/11/07/what-can-you-bring-to-a-polling-place-cellphones-political-t-shirts-children/.

speech"). The provision is also a malleable tool for punishing a broad range of other types of speech. *See* JA 56, ¶ 9 (Respondent Mansky acknowledges that a Minnesota Vikings shirt could be banned). Given this reality, it is of little moment that the lower courts held the statute could constitutionally prohibit a few Tea Party Shirts and an EIW button worn by some of the MVA members in this case. Those items are a drop in the bucket of protected political speech punished by the statute.

Wearing inscribed clothing is a time-honored and affordable way for the average citizen to peaceably speak out about politics and other issues, *Picray*, 916 P.2d at 601 n.12, but Section 211B.11(1) runs roughshod over this passive and ordinary form of political expression and turns it into a punishable act. Minnesotans will naturally respond by refraining from wearing politically expressive (or arguably politically expressive) shirts, hats, and other clothing, causing freedom of speech to suffer. *Hicks*, 539 U.S. at 119; *Broadrick*, 413 U.S. at 612 (An overbroad statute "may cause others not before the court to refrain from constitutionally protected speech or expression.").

Indeed, the speech-chilling effects of the statute extend beyond the millions of people who vote on election day, as it forbids political apparel for 46 days before the election in at least 87 absentee voter areas in a variety of public buildings. Section 211B.11(1). Moreover, as a practical matter, the statute's impact does not end at polling places. Most people barred from wearing politically expressive clothes when voting will not put them on for the trip to the polls, or at all, on election day. *See, e.g.,* JA 64, ¶ 2; JA 77, ¶ 72; JA 79, ¶ 77. The overbreadth doctrine is designed to

prevent this type of deterrent to free speech. *Munson Co.*, 467 U.S. at 958.

II.

NO CONCEIVABLE INTEREST SUPPORTS A BAN ON ALL "POLITICAL" APPAREL

To determine whether the broad political apparel ban in Section 211B.11(1) passes constitutional muster, this Court need not decide whether polling places are a public or non-public forum, or whether the public forum doctrine is irrelevant in this context.[9] Because "no conceivable governmental interest" supports the criminalization of the entire class of political messages that can be conveyed through clothing, the statute's ban on political speech is unconstitutional under every possible test. *Jews for Jesus*, 482 U.S. at 576 ("[T]he wearing of a T-shirt or button that contains a political message . . . is still protected speech even in a nonpublic forum."); *Grace*, 461 U.S. at 187 (Marshall, J., conc. in part, dis. in part).

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[9] If it becomes necessary to weigh and potentially apply a more formulaic approach, MVA contends that Section 211B.11(1) is subject to strict scrutiny, regardless of forum analysis, because the statute is a content-based restriction on political speech. *Burson*, 504 U.S. at 207; *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1446 (2014); *Citizens United*, 558 U.S. at 330. The statute would be unconstitutional under this test for the reasons outlined in the following sections, namely, because the ban on political apparel is not sufficiently tailored to the Government's objectives.

A. The State's Interest in Fair and Orderly Elections Cannot Justify a Total Political Apparel Ban

The Government may claim that its interest in peaceful and orderly elections justifies a total ban on political apparel. This position seems to flow from the belief that allowing political expression at polling places could disrupt the voting process. While this concern might have some traction in cases dealing with *active* political solicitation, *Burson*, 504 U.S. at 211, it falls flat as applied to passive political speech communicated through apparel. After all, this Court has already held that this form of expression is "*non-disruptive* speech." *Jews for Jesus*, 482 U.S. at 576 (emphasis added). Moreover, unlike signs, speech communicated through personal apparel does not take up physical space. It is impossible to see how a "nondisruptive" and physically unobtrusive form of speech can disrupt voting, and "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

Not surprisingly, there is no evidence in this case that the t-shirts or other apparel worn by MVA or other voters caused a "disruption" in a polling place. The only polling place disruptions in this case arose from polling officials' attempt to *enforce Section 211B.11(1)* to suppress political speech. As is all too often the case, it is Government reactivity, not speech itself, that causes a commotion. *Cox v. Louisiana*, 379 U.S. 536, 543-44 (1965) (police fired tear gas to disperse a peaceful civil rights demonstration). In the voting context, requiring election officials to police apparel disrupts and delays voting. Thus, decorum at

polling places is advanced by *allowing* political apparel, not by banning it. Woodruff, 65 Mercer L. Rev. at 368. In cases of actual voter disruption, Minnesota's election code gives the Government plenty of tools to restore and maintain order. Minn. Stat. § 204C.06 (restricting access to polling places, lingering, and disorderly conduct). It need not punish peaceful speech "in order to keep the peace." *Texas v. Johnson*, 491 U.S. 397, 410 (1989) (citing *Boos v. Barry*, 485 U.S. at 327-29); *see also Grace*, 461 U.S. at 186.

The Government may also assert that the statute serves its interest in protecting voters from confusion and undue influence. But this rationale is as inapt as one premised on "order," given the wide reach of the "political" apparel prohibition. The ban is not limited to messages of "express advocacy" for or against a candidate or a ballot proposal; *i.e.*, messages that urge others to "vote for," "elect," or "support." *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 248-49 (1986). It bars references to political groups and philosophies that contain no advocacy or "explicit directive." *Id.* As Eighth Circuit Judge Shepherd observed, a t-shirt merely naming the AFL-CIO or Chamber of Commerce does not solicit or influence votes, and yet it is barred. Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part). Such a restriction does not reasonably advance the Government's interest in fair elections.[10] *Id.*; *Picray*,

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[10] The Government would fare no better if it claimed that its goal was to shield voters from "distractions" at the polling place. This is not a legitimate interest, as it would justify almost every speech restriction in every situation and thus swallow the right of free expression. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 201-11 (1975) ("Much that we encounter offends our

916 P.2d at 329 ("The silent expression of political opinion is not coercive. To the extent that such expression in the polling place might affect the votes of others, that influence cannot be deemed constitutionally 'undue.'"); Kimberly J. Tucker, *"You Can't Wear That to Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. Marshall L. Rev. 61, 81 (2006) ("A button worn during the brief period that a voter is actually in the polling place should not be viewed as intimidating or coercing other voters.").

Citizens are subjected to all sorts of passive speech on clothing, on the day of an election and throughout the year, in the ordinary course of life. Voters can ignore such influences, if they wish, or they can choose to pay attention. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (Free speech "embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad."). The choice is theirs, not the Government's. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read . . . .").

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esthetic, if not our political and moral, sensibilities," but "the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" (citation omitted)). In any event, Section 211B.11 bans not just potentially "distracting" political apparel—such as (perhaps) florescent colors, large print, or overtly provocative messages. It bans all politically expressive apparel, regardless of size, color or any other characteristic that might potentially "distract." Small buttons, small print, grey shirts, bland references to mainstream political groups—all are just as prohibited as blatantly provocative expressive clothing.

It is no different at polling places. "The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech," much less for totally barring passive political speech. *Brown v. Hartlage*, 456 U.S. at 60; *see also Vanasco v. Schwartz*, 401 F. Supp. 87, 100 (S.D.N.Y. 1975), *aff'd mem.*, 423 U.S. 1041 (1976) ("[W]hen the State through the guise of protecting the citizen's right to a fair and honest election tampers with what it will permit the citizen to see and hear even that important state interest must give way to the irresistible force of protected expression under the First Amendment.").

Ultimately, it is hard to escape the impression that the ban on politically expressive clothing hinges (at least in part) on fear of how people may react to such clothing. It devolves "to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis." *Johnson*, 491 U.S. at 408. But "the fact that society may find speech offensive is not a sufficient reason for suppressing it.'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)). Indeed, it is "a bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. This principle is especially strong when the speech at issue is passively conveyed through "nondisruptive" means, such as clothing. Whether worn at a college campus, an airport, or a polling place, clothing that expresses political ideas and affiliations may not be banned because of the possibility that a few viewers may be so "triggered" by

the messages that they cause a disturbance. The First Amendment will not bow to a "hecklers' veto" over political clothing any more than it will bow to one over political picketing. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (political speech cannot be restricted "simply because bystanders object to peaceful and orderly" expression).

B. The Statute's Vague Prohibition Invites Expansive Enforcement and Viewpoint Discrimination

Section 211B.11(1) is further undermined by its capacity to give poll workers broad and unpredictable discretion to suppress free speech. Such discretion extends the reach of the statute and invites viewpoint discrimination.

Enforcement of Section 211B.11(1) requires someone to decide what material worn at a polling place is "political" and forbidden, and which is non-political and allowed. The Election Day Policy recognizes that poll workers have effectively unreviewable authority to decide whether apparel is "political" and prohibited by the statute. *Jews for Jesus*, 482 U.S. at 576. Given the malleable nature of the word "political" and the reality that there is almost no issue, cause, or group in America that cannot be linked to politics at some level, Pet. App. E-27, the range of possible discretionary applications of the law is almost limitless. *See* Pet. App. I-1-2. It is hard to think of any social, religious, or environmental message that is *certainly* beyond the poll workers' discretionary power to suppress "political" material.

The poll workers' discretion to apply the vague term "political" not only enables them to broaden the

statute's reach, it raises a very real danger of viewpoint discrimination, as polling place officials are free to apply the "political" kiss of death to disfavored messages. Any statute that allows Government officials to selectively muzzle a wide array of protected, non-disruptive speech is a law that the First Amendment cannot tolerate. *Forsyth County*, 505 U.S. at 129; *City of Chicago v. Morales*, 527 U.S. 41, 52-60 (1999) (provision vaguely barring "loitering" for "no apparent purpose" held unconstitutional in part due to the discretion it gave police to apply the prohibition).

The "political" apparel ban in Section 211B.11(1) is grossly over-inclusive and dangerously standard-less. It sweeps in and prohibits every type of political message that can be passively conveyed on personal apparel, and invites interference with other types of speech. In so doing, the law goes far beyond what is needed to maintain order and fairness at elections, and does not come close to being "narrowly" tailored to those objectives. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735 (2011).

C. *Burson* Does Not Support the Statute

To sustain Section 211B.11(1), the Government will point to *Burson*. But *Burson* provides no support because that case did not involve a law restricting citizens' ability to wear political apparel when voting. It dealt with restrictions on active campaigning for candidates and issues on a ballot. 504 U.S. at 193. The case was brought by a campaign worker who wanted to communicate with voters as they went into polling places. The plaintiff objected to a statute that created a "campaign free zone" in which one could not engage

in "solicitation of votes" or the "'display or distribution" of "campaign materials" near a polling place. *Id.* at 193-94. Characterizing the statute as a "facially content-based restriction on political speech in a public forum," a plurality of the Court applied "exacting scrutiny." *Id.* at 198. It held that the law served compelling interests in seeking to protect against voter "fraud" and "intimidation." *Id.* at 199; *id.* at 198 n.4. The plurality further concluded that the statute served these interests because of the nation's election history. *Id.* at 206. Finally, it held that a 100-foot campaign-free zone was sufficiently tailored. *Id.* at 209-10. Justice Scalia concurred in the result, but on different grounds. *Id.* at 216 (Scalia, J., concurring in the judgment).

Burson held that the First Amendment does not forbid creation of an area outside polling places that is off-limits to campaigning or solicitating. *Id.* at 211. The decision did *not* hold that the Government may constitutionally bar citizens from silently wearing campaign-related clothing while voting, much less that it may prohibit apparel bearing more general political messages. It therefore does not control or significantly guide this dispute. Nothing in *Burson* prevents this Court from concluding that banning all political apparel is insufficiently connected to the goal of free and orderly voting.

D. The Statute Has No Legitimate Sweep or Is Substantially Overbroad

In the end, resolving overbreadth claims involves comparing a law's impermissible applications with those that are plainly legitimate to see if the former substantially exceeds the latter. *Washington State Grange*, 552 U.S. at 449 n.6. Here, it is difficult to find *any* plainly legitimate range of application for Section 211B.11(1), given the highly protected nature of political speech and the fact that political apparel is passive, unobtrusive, and not disruptive. Silently wearing clothing with political slogans and names while voting is simply not "incompatible with the normal activity" in polling places. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (silent protest in library protected); *Jews for Jesus*, 482 U.S. at 576 ("[T]he wearing of a T-shirt or button that contains a political message . . . is still protected speech even in a nonpublic forum.").

Certainly, nothing in America's electoral history suggests that polling places were off-limits to peaceful political speech, or even electioneering, at the time of the First Amendment's adoption. In fact, at the time, elections were conducted by voice voting, *i.e.*, *through speech*, a system that provided ample opportunity for political expression. *John Doe No. 1 v. Reed*, 561 U.S. 186, 225 (2010) (Scalia, J., concurring) ("Any suggestion that *viva voce* voting infringed the accepted understanding of the pre-existing freedom of speech . . . is refuted by the fact that several state constitutions that required or authorized *viva voce* voting *also* explicitly guaranteed the freedom of speech."); Woodruff, 65 Mercer L. Rev. at 360 ("Based

on the election laws and methods of the eighteenth century, it would appear that those who ratified the Free Speech Clause would have found the restriction of passive electioneering offensive.").

Nevertheless, the Government will likely point to (1) campaign-related apparel and (2) the lower courts' application of Section 211B.11(1) to a few Tea Party shirts and an EIW button in an attempt to create some legitimate applications for the statute. But this effort fails. First, MVA does not concede that the First Amendment allows the Government to forbid voters from wearing campaign-related shirts, buttons and the like while voting. Such a restriction is not necessary for fair and orderly voting, or even reasonably related to that interest, given the passive and transitory nature of such expression.

Second, MVA does not believe the First Amendment permits the banning of Tea Party shirts and the EIW button, when peacefully worn without disruptive conduct. *Tinker*, 393 U.S. at 508. While the lower courts held such items could be prohibited—based on the Eighth Circuit's prior ruling sustaining the facial validity of the statute (*see* Pet. App. B-10-12)—that outcome is neither correct[11] nor binding on

[11] MVA recognizes that it did not appeal the district court's rejection of its as-applied claims based on the EIW buttons. It does not, however, concede that this lower court ruling was correct (it was not), and the district court's findings and rulings are not conclusive in this Court, regardless of case history. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995) ("[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection.").

this Court.[12] *Hurley*, 515 U.S. at 567 (In First Amendment cases, this Court has "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court."); *see also Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 501, 503, 510 (1984) (same); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("Law of the case" doctrine cannot bind this Court because a petition for writ of certiorari exposes the entire case to review.). The speech conveyed through the Tea Party shirts and the EIW button is not within the "*plainly* legitimate sweep" of Section 211B.11(1).

Yet, even if it was clear that campaign items and the Tea Party material at issue below could be constitutionally barred, the statute remains unconstitutionally overbroad. Such a small class of (purportedly) proscribable material is dwarfed by the wide range of passive political speech the statute illegitimately burdens. The provision would still impede the vast amount of political expression that has nothing to with either campaigning or the Tea Party. Just as a law is not rendered overbroad because of a few "possibly impermissible applications," when it "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct,'" *Munson Co.*, 467 U.S. at 964-65, a statute that burdens a wide swath of protected speech is not made constitutional simply because the Government can posit a few possibly proscribable situations. *Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine

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[12] Cases decided on distinctions between as-applied and facial claims are particularly appropriate for holistic review in this Court. *Citizens United*, 558 U.S. at 331.

prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); *United States v. Stevens*, 559 U.S. 460, 475, 480 (2010) (an unconstitutionally broad ban on depiction of animal killings was not rendered constitutional because it might cover some instances of "illegal" and "extreme" animal cruelty).

Section 211B.11(1) either has no legitimate sweep, or its invasion of protected speech is substantial[13] in relation to the little it might legitimately prohibit. Section 211B.11(1) suppresses an entire category of highly protected speech—passive political expression—in a manner that allows for discriminatory enforcement and harmful spill-over into other areas of speech. It accordingly functions as an obvious and unacceptable deterrent to protected speech. *See NAACP v. Button*, 371 U.S. at 433 ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions."). In short, in this case, the Government's desire to protect voters from politics operates "to suppress legitimate expression."

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[13] The requirement of "substantial" overbreadth (as opposed to "real" overbreadth) is most proper "where conduct and not merely speech is involved." *Broadrick*, 413 U.S. at 615. This case deals, of course, with pure speech, not conduct. Thus, MVA is entitled to the benefit of any doubt (there should be none) as to whether the statute's overbreadth rises to an unconstitutional level. *Id.; see also WRTL*, 551 U.S. at 469 (opinion of Roberts, C.J.) (First Amendment analysis "must give the benefit of any doubt to protecting rather than stifling speech.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964)).

Burson, 504 U.S. at 214 (Kennedy, J., concurring). The law is overbroad and unconstitutional.[14]

III.

NO POSSIBLE NARROWING CONSTRUCTION CAN SAVE THE STATUTE

To avoid the conclusion that Minn. Stat. § 211B.11(1) is overbroad, the Government will likely propose a narrower, and (in its view) more permissible construction. In particular, it may contend that the statute can and should be limited to political material designed to influence voting. It may hope that this will bring the law under *Burson* or otherwise render it constitutional. Opp. at 21. But this strategy fails. The statute cannot be so limited, and in any event, such a reading would not diminish the law's unconstitutional reach. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 469 n.18 (1987); *Jews for Jesus*, 482 U.S. at 576.

The Court will consider a limiting construction for a statute only if the law is "'readily susceptible' to such a construction." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884 (1997). The ban on "political" apparel is not susceptible to any plausible narrowing construction. The "language is plain," *Hill*, 482 U.S.

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[14] Section 211B.11(1) is unconstitutional even if gauged under the standards of review sometimes associated with non-public forums. The law is not a reasonable means for advancing the Government's interest, for the reasons discussed in the text. The statute is also not viewpoint neutral because it gives poll workers unfettered discretion to selectively apply the "political" ban and thus, to prohibit disfavored messages. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988) (The danger of "viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.").

at 468, and provides no basis for limiting the prohibition to certain *types* of political material. *Id.*; *Jews for Jesus*, 482 U.S. at 575. The Government has made abundantly clear that it construes the provision as a total ban on "political" apparel. 2011 Brief of Appellee Ritchie at 10 n.1; 2011 Brief of Appellee Mansky at 13.

The Government has specifically acknowledged that the political apparel prohibition covers more than campaign and ballot-related apparel. Pet. App. I-1; (Policy) (noting the statute bars the display of "political or campaign material"); Opp. at 15 (observing that Section 211B.11(1) prevents "both wearing 'campaign' material and 'political' material"); *see also* Pet. App. E-23 (district court opinion "finding" that "the ban on 'political' material is easily understood to include issues beyond those directly applicable to the ballot"). Consequently, any proposal to limit the statute to campaign material is unavailable, as well as implausible. *Republican Party of Minn. v. White*, 536 U.S. 765, 773 (2002) (a government concession helped establish the broad scope of a speech restriction); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 817 (1989) (ruling adopted party concession).

In light of its concessions, the Government may argue for a construction that takes the law a step beyond campaign material, into the area of more general "influential" political advocacy, yet stops there. Opp. at 15. However, this construction is also not possible given the statute's broad and unqualified language, the statutory context, the Policy, and the Government's representations. All of these considerations show that the law bans far more than

apparel urging voters to side with certain political causes. It prohibits, for example, items identifying "a group with recognizable political views" without any accompanying plea for support from voters. Pet. App. I-2. To remake the provision into one that prohibits only advocacy apparel, the Court would have to add new language to the statute. This is improper. The Court "'will not rewrite a . . . law to conform it to constitutional requirements.'" *Stevens*, 559 U.S. at 481. The "political" apparel ban cannot be sensibly "limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable." *Jews for Jesus*, 482 U.S. at 575-76.

Even if Section 211B.11(1) was susceptible to a construction limiting it to political material that seeks to influence voters (it is not), this would not cure the statute's overbreadth and unconstitutionality. *See, e.g., Free Speech Coalition*, 535 U.S. at 256.[15] Such a construction would sweep in not just candidate- and ballot-related messages, but also apparel supporting general political ideologies, goals, and beliefs. As a result, it would still be over-inclusive and

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[15] Again, *Burson* offers no shelter for a ban on potentially "influential" political apparel—or even for a ban on campaign clothing—since it did not consider those forms of passive speech. *Burson* does confirm, however, that any restriction on political speech on apparel is subject to strict scrutiny. *Burson*, 504 U.S. at 207 (a restriction that requires "distinguishing among types of speech" triggers strict scrutiny); *WRTL*, 551 U.S. at 464 (political speech restrictions are subject to strict scrutiny). The Government would have to prove that a prohibition on politically influential apparel is narrowly tailored to serve a compelling governmental interest. *Id.* It could not do so.

insufficiently tailored to the Government's interest in protecting voters from undue influence. *McIntyre*, 514 U.S. at 345-46 (a restriction on political speech "designed to influence the voters in an election" "'involves a limitation on political expression subject to exacting scrutiny'" (citation omitted)); *see also id.* at 357 ("[The State] cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented."); *Hill*, 482 U.S. at 469 n.18 (rejecting limiting proposals that "are either at odds with the ordinance's plain meaning, or do not sufficiently limit its scope"); *Free Speech Coalition*, 535 U.S. at 255 ("The Government may not suppress lawful speech as the means to suppress [purportedly] unlawful speech.").[16]

Apparel reflecting generalized support for political causes or groups is not akin to electioneering, nor does it pose a risk of confusing voters charged with making decisions on specific ballot issues. *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 785-88 (7th Cir. 1988) (wearing a cap supportive of a union at a polling place is not "objectionable conduct" capable of tainting a union certification election); *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097-98 (8th Cir. 2005) (wearing a union t-shirt is not prohibited "solicitation" but "the passive inoffensive advertisement of organizational aims and interests.")

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[16] A construction limiting the statute to political material designed to influence others would anomalously allow the Government to prohibit the same black armbands this Court upheld as protected speech on school grounds in *Tinker*, 393 U.S. at 508. Those bands were worn, after all, in part "to influence others." *Morse v. Frederick*, 551 U.S. at 403 (quoting *Tinker*, 393 U.S. at 514).

(quoting *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577, 585 (8th Cir. 1965)).

The Government is free to ban active political solicitation, campaigning, picketing, and other conduct that engages and detains voters, and it already does. As noted above, under the first, unchallenged, sentence in Section 211B.11(1), it is already unlawful to "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." But a law that bans people from wearing clothing supporting political causes as they silently go about their business is not necessary to prevent undue influence and has no support in precedent.[17] *Free Speech Coalition*, 535 U.S. at 245 ("As a general principle, the First Amendment bars the government from dictating what we see or read . . . ."); *see also Grace*, 461 U.S. at 182; *id.* at 185-86 (Marshall, J., conc. in part, dis. in part) (a law prohibiting the peaceful display of political messages on Supreme Court grounds held unconstitutional); *Cohen*, 403 U.S.

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[17] The final blow to such a proposed limiting construction is that it simply piles one vague, discretion-conferring standard—"may influence voters"—on top of another—"political." The line between politically expressive clothing that may influence and that which may not, is "at best, murky." *Jews for Jesus*, 482 U.S. at 576. In all but the most overt cases of vote solicitation, enforcing such a restriction would require polling officials to guess at the motive behind political messages or their potential effect on viewers. *Cf. United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994) (declining to adopt a rule that would "require district courts to speculate as to the motives of, or to ascribe motives to, law enforcement authorities").

at 21 ("F--- the Draft" message on a jacket did not unduly disrupt court proceedings).

It is disconcerting to think that America trusts its citizens to resolve critical political issues by expressing individual choices in the voting booth, yet does not believe Americans are capable of voting their conscience if a political hat or button is present. Indeed, Americans may vote a particular way for any reason or no reason at all. A t-shirt will not destroy democracy. In any event, the cost of a paternalistic impulse in this area is simply too high. *Buckley v. Valeo*, 424 U.S. at 14 (per curiam) ("Discussion of public issues and debate on . . . candidates are integral to the operation" of government.). "The First Amendment does not permit [the Government] to achieve its goal[s] by leaving the principle of elections in place while preventing [speech of] what the elections are about." *White*, 536 U.S. at 788. The First Amendment protects the wearing of politically expressive clothing and other apparel at polling places.

CONCLUSION

The Court should the affirm the value and vitality of free, peaceful, political speech by declaring the third sentence of Minnesota Statute Section 211B.11(1) overbroad and unconstitutional under the First Amendment.

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Minn. Stat. § 211B.11 provides:

211B.11 ELECTION DAY PROHIBITIONS.

Subdivision 1. 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.

Nothing in this subdivision prohibits the distribution of "I VOTED" stickers as provided in section 204B.49.

Subd. 2. [Repealed, 1997 c 147 s 79]

Subd. 3. Transportation of voters to polling place; penalty. A person transporting a voter to or from the polling place may not ask, solicit, or in any manner try to induce or persuade a voter on primary or election day to vote or refrain from voting for a candidate or ballot question.

Subd. 4. Penalty. Violation of this section is a petty misdemeanor.