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 AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Minnesota election law forbids voters from wearing political badges, political buttons, or other political insignia at the polling place. *See* Minn. Stat. § 211B.11. The ban broadly prohibits any material "designed to influence and impact voting," or "promoting a group with recognizable political views," even when the apparel makes no reference to any issue or candidate on the ballot.

The Eighth Circuit, aligned with the Fifth and D.C. Circuits, invoked *Burson v. Freeman*, 504 U.S. 191 (1992), to hold that a state can impose a "speech-free zone" without infringing on the Free Speech Clause of the First Amendment. There is deep tension between those decisions and the reasoning in decisions of the Fourth and Seventh Circuits, which hold that the First Amendment does not allow a state to prohibit all political speech.

The question presented is: Is Minnesota Statute Section 211B.11, which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

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## IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") was established 30 years ago as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are directly implicated.

GI devotes substantial resources to defending the vital constitutional principle of free speech. Specifically relevant here, GI attorneys successfully represented citizens challenging bans on speech at polling places in *Reed v. Purcell*, No. CV 10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), and *Wickberg v. Owens*, No. 3:10-cv-08177-JAT (D. Ariz. filed Sept. 20, 2010). GI has also litigated and won important victories for other aspects of free speech, including *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012); *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016), and has appeared

[1] Pursuant to Supreme Court Rule 37(6), counsel for amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than amicus, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. Blanket consent for the filing of amicus brief has been granted by all parties.

frequently as amicus curiae in this and other courts in free speech cases. *See, e.g.*, *Janus v. AFSCME* (No. 16-1466, pending); *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (2015).

Goldwater Institute scholars have also published extensively on the importance of free speech in various contexts, particularly involving regulations of "electioneering" or campaign finance restrictions that violate free speech rights. *See, e.g.*, Jon Riches, *An Informed Citizenry: Broadening the "Media Exemption" to Include Nonprofit Communications* (Goldwater Inst. July 13, 2017);[2] Stanley Kurtz, *et al., Campus Free Speech: A Legislative Proposal* (Goldwater Inst., 2017).[3] Amicus believes its litigation experience and policy expertise will aid this Court in consideration of this case.

## SUMMARY OF ARGUMENT

The state has a legitimate interest in maintaining order and decorum in the polling place. That can and should be accomplished by enforcing prohibitions on disruptions, assaults, and other ordinary torts and crimes. It should not be accomplished by restrictions on non-disruptive speech—let alone by the broad

[2] https://s3.amazonaws.com/licensure/An+Informed+Citizenry+w+Imagery+FINAL+.pdf.

[3] http://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf.

category of speech prohibited here: speech that might "persuade a voter." M.S.A. § 211B.11.

What this Court should *not* do is authorize the state to pursue the illegitimate interest that has become commonplace today: the effort to cleanse the realm of political expression of allegedly improper "influence" in order to obtain the "unbiased," "real" will of the people. *Cf. Arizona Free Enter. Club*, 564 U.S. at 749 (rejecting efforts to "level the playing field" as illegitimate). Other examples of laws that aim at that illegitimate purpose are disclosure mandates that force donors to nonprofit groups to provide their names, addresses, and even employers' identities, to the public whenever they support think tanks or political causes, *see, e.g.*, *Colorado Union of Taxpayers v. Denver* (Denver Cnty. 2d Jud. Dist., No. 2017-CV-034617, filed Dec. 13, 2017); *Center for Competitive Politics*, 784 F.3d 1307—or laws that forbid people from donating to political campaigns as they wish. *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

Such restrictions on free expression all rest on the erroneous premise that if only "improper" political influences were eliminated, democracy would reach the "right" result—the true will of the people, without bias. But this idea is wrongheaded. It is not possible to draw a principled distinction between speech that can be allowed to influence the public and speech that should not be. And any efforts to draw such a line invite biased enforcement and unconstitutional restrictions on free speech.

That faulty idea depends, in turn, on a misguided idea of what the First Amendment is designed to do—namely, the notion, now common in the legal community, that it exists to serve the purposes of *society as a whole* rather than to protect the freedom of *individual speakers*. That is an untenable notion, contrary to our constitutional tradition, which ultimately leads to irresolvable legal problems. It downplays the essential importance of individual conscience—which is the liberty the First Amendment aims to secure. And it leads to the conclusion that government can censor some individuals if (in the opinion of political leaders) doing so is good for society.

This Court should take this opportunity to make clear that the purpose of freedom of speech is *not* primarily to serve broad social goals, but to protect individuals in their expressive rights for *those individuals'* sake.

The relevance of these principles is plain when one considers the obvious point raised by the dissent in this case: the Minnesota statute goes far beyond preventing disruptions in the polling place. *See* Pet. App. D-18 n.7 (Shepherd, J., dissenting). It bans all speech that is categorized—according to vague criteria enforced by inadequately trained personnel—as "political," even if that speech does not relate to any issue or candidate on the ballot. Such a ban is actually *more* likely to lead to disruption and delay—as the facts in this case demonstrate—because it requires polling place workers to monitor voters' clothing and order them to remove buttons or cover their shirts, or to go

home. Such a ban also encourages voters themselves to monitor each other's behavior instead of minding their own business. All of this is *more* likely to provoke confrontations than simply letting a voter wear a button when she goes into the voting booth. Certainly the government cannot censor—even in a nonpublic forum—on the mere chance that speech might conceivably lead to disruption. *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) ("In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."); *Cohen v. California*, 403 U.S. 15, 20 (1971) (speech may not be curtailed without genuine evidence of disruption).

The bottom line is simple: just as "the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), so does the First Amendment. It does not allow states to restrict speech in order to achieve what political elites consider the "proper" form of democratic deliberation. While preserving order and quiet in a polling place is a legitimate objective, that should be achieved in the least censorious way possible, in order to respect the individual right of free expression.

## ARGUMENT

### I. FREEDOM OF SPEECH BELONGS TO THE INDIVIDUAL, NOT TO SOCIETY

#### A. This Court Should Explicitly Reject the "Civic Conception" of Free Speech and Make Clear that Individual Rights Take Precedence

Ever since Justice Holmes's dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919), it has been popular to describe the freedom of speech as a social construct designed to foster democratic deliberation and decision-making. Holmes believed that free speech is intended primarily to serve social goals, as opposed to the goals of individuals. While persecution for dissent was, in his view, "perfectly logical," the reason the Constitution bans persecution is in order to enable the public to find a "ground upon which [their] wishes safely can be carried out." *Id.* at 630 (Holmes, J., dissenting). This, he believed, is "better reached by free trade in ideas" than by censorship. *Id.* Free speech was thus a privilege given to the citizen by the state in order to achieve social goals—not a human right the state must respect.

This approach to the First Amendment—which holds that "the central constitutional goal" of free speech is "creating a deliberative democracy" instead of "protect[ing] preexisting private rights"—has been called the "civic conception" of free speech. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18, 28 (1993). It has proven extraordinarily influential.

*See, e.g.*, THOMAS HEALY, THE GREAT DISSENT 249 (2013) (noting pervasiveness of the marketplace theory). It is, however, profoundly flawed.

It is true, of course, that ideas are best tested in competition with other ideas, and that free speech aids democratic decision-making. But that is *not* the primary reason the First Amendment was written. The authors of that Amendment viewed free speech not primarily as a tool for accomplishing public goals, but as a protection for a critical facet of personal autonomy that must be secured against intrusion for the *individual's* sake. James Madison made this clear when he described freedom of opinion in terms of property rights: the word "property," he wrote, "embraces every thing to which a man may attach a value and have a right," and therefore "a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them." James Madison, *Property* (1792), *reprinted in* JAMES MADISON: WRITINGS 515 (Jack Rakove, ed. 1999). This approach to free speech might be called the individualistic conception.

The individualistic conception does not contradict the idea that free speech aids in democratic deliberation, or that competition is the best way to test ideas. Thomas Jefferson, for example, embraced the individualistic conception—arguing that opinions are private matters over which government can have no legitimate power—but also acknowledged that free speech is "the only effectual agent[] against error" and "the test of . . .

investigation" for ideas. Thomas Jefferson, *Notes on the State of Virginia* (1787) *reprinted in* THOMAS JEFFERSON: WRITINGS 285 (Merrill Peterson, ed. 1984). But to the framers, the protection of the individual was more important than these social benefits of free speech.

They embraced the individualistic conception in conscious reaction *against* their own era's version of the civic conception, which was the British legal doctrine of "toleration." The ruler of toleration saw freedom of opinion (particularly religious opinion) as a privilege the king gave to the subject for public reasons, rather than as an individual right. The Constitution's authors rejected the principle of toleration for precisely this reason: because it subordinated the individual's freedom of opinion to social needs. The founders instead adopted the principle of *liberty of conscience*, which held that individuals are presumptively free to abide by and express their opinions.

Thomas Paine, for example, described toleration as "not the *opposite* of Intoleration, but . . . the *counterfeit* of it. . . . The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it." *Rights of Man: Part I* (1791), *reprinted in* THOMAS PAINE: COLLECTED WRITINGS 482 (Eric Foner, ed. 1995). George Washington, too, rejected toleration on the grounds that it assumed that "it [is] by the indulgence of one class of people, that another enjoy[s] the exercise of their inherent natural rights." George Washington, Letter to the Hebrew Congregation in Newport, R.I., Aug. 18, 1790, *in* GEORGE WASHINGTON: WRITINGS 767 (John Rhodehamel, ed. 1997). Today's

civic conception of free speech is essentially identical to the principle of toleration the founders repudiated.

One critical difference between the civic conception of speech and the individualistic conception is that the civic conception implicitly assumes that free speech may be curtailed to serve what political leaders consider to be the greater good. Thus for example, the two models of speech lead to different outcomes when considering the case of people who do not wish to participate in public deliberation, or to speak at all. The civic conception of speech "might well place no protection whatsoever on the right *not* to speak," writes one scholar, because if "forced expression might benefit the listener's self-governing decision making," compelling a person to speak "would actually seem to further [democratic] values." Martin H. Redish, *Freedom of Expression, Political Fraud, and the Dilemma of Anonymity*, *in* SPEECH AND SILENCE IN AMERICAN LAW 151 (Austin Sarat, ed. 2010) (emphasis added).

Thus in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), Justice Frankfurter, who embraced the civic conception of free speech, wrote for the Court in holding that the broader public good justified compelling school children to pledge allegiance to the flag. "[T]he freedom to follow conscience," wrote Frankfurter, "has . . . limits in the life of a society," as a consequence of the "principles which, as a matter of history, underlie[ ] protection of religious toleration." *Id.* at 594.

The Court repudiated that opinion only three years later in *West Virginia State Bd. of Educ. v.*

*Barnette*, 319 U.S. 624, 638 (1943), and embraced the individualistic conception of speech instead, when it declared that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects"—including free speech—"from the vicissitudes of political controversy" and "place them beyond the reach of majorities." *See also Cohen*, 403 U.S. at 24 (First Amendment was written "to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us").[4]

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[4] True, the civic conception of speech does recognize a limited role for dissent, since the dissenter can contribute to a more informed decision by the majority. But, again, the civic conception sees the value of dissent solely in terms of its contribution to public discussion. *See, e.g.*, CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 213 (2005) (arguing that democracies should "take steps to . . . promote dissent . . . partly to protect the rights of dissenters, but mostly to protect interests of their own"). People who simply do not want to participate in public discussion at all—who do not want to enter the "marketplace of ideas" in the first place—have no place in the civic conception. That explains why precedents based on the civic conception, such as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), have authorized the government to override the rights of dissenters in the service of allegedly democratic goals: "As long as [a union] act[s] to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees." *Id.* at 223. It also explains why Professor Sunstein, among the most prominent advocates of the civic conception of speech, has described *Barnette* as "too cavalier": because it was based on a "belief[ ] in individual immunity from communal ties." Cass R. Sunstein, *Unity and Plurality: The Case of Compulsory Oaths*, 2 YALE J.L. & HUMAN. 101, 111 (1998).

*Barnette*, *Cohen*, and other cases embracing the individualist conception were correct. The First Amendment's expression provisions do not contemplate freedom of speech as a privilege given to the individual for social purposes, but as a right enjoyed by the individual for her own sake. That is certainly true of its religion clauses, which protect freedom of religion not to serve broader social goals, but to protect individuals *per se*. There is no reason to view the expression clauses as different.

In fact, James Madison himself pointed this out when he explained that both the speech and religion clauses of the First Amendment were designed to repudiate the civic conception of individual rights. He refuted those who took a narrow view of the Amendment's speech clauses—who claimed that those clauses did no more than incorporate English common law relating to free speech, which was based on the civic conception—by pointing out that "[t]he freedom of conscience, and of religion, are found in the same [Amendment] which assert[s] the freedom of the press." *See* James Madison, *Report on the Alien and Sedition Acts, January 7, 1800, reprinted in* JAMES MADISON: WRITINGS 648 (Jack Rakove, ed. 1999). Yet it would "never be admitted, that the meaning of the former, in the common law of England, is to limit their meaning in the United States." *Id.* Thus the speech clauses should also be read more broadly—as giving individuals greater security than the miserly protections that the English civic conception provided.

### B. The Constitution Protects Free Speech to Secure Individual Freedom, Not Primarily to Serve Public Goals

What Justice Blackmun said of privacy rights is certainly true of free speech: the Constitution protects it "not because [it] contribute[s], in some direct and material way, to the general public welfare, but because [it] form[s] so central a part of an individual's life," and "embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) (citation omitted).

One indication that the First Amendment embraces the individualistic conception of speech instead of the civic conception is that the framers routinely referred to it as protecting freedom of *conscience*. The word "conscience" applies to individuals or to groups of individuals each expressing their shared individual opinions. *See, e.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (11th ed. 1797) (defining conscience as "[t]he knowledge or faculty by which we judge of the goodness or wickedness of our own actions," and "knowledge of our own thoughts"). Thus for example, James Wilson defined the "rights of conscience" as "[t]he right of private judgment. . . . To be deprived of it is insufferable. To enjoy it lays a foundation for that peace of mind, which the laws cannot give, and for the loss of which the laws can offer no compensation." 1 COLLECTED WORKS OF JAMES WILSON 539 (Kermit L. Hall, et al., eds. 2007). Thomas Jefferson wrote, in defense of his proposed Virginia Statute of

Religious Freedom, that "our rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit." *Notes on the State of Virginia*, *supra* at 285. These words demonstrate that the purpose of constitutional protections for freedom of conscience was not to facilitate collective decision-making, but to protect individual rights, full stop.

The same is true of the First Amendment's speech and press clauses. While free speech plays an essential role in democratic government, its primary purpose is to secure individual freedom. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 264–87 (2017) (explaining founders' conception of free speech as an individual right). The expression clauses were designed to protect "freedom of opinion," or as Jefferson called it, "the rights of thinking, and publishing our thoughts by speaking or writing." Letter to David Humphreys (Mar. 18, 1789), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 323 (Albert Ellery Bergh, ed. 1907). The *Barnette* Court later called this "freedom of mind." 319 U.S. at 637. It is why even an expression without public political significance—such as a private poem, or a Jackson Pollock painting, or an aesthetic judgment—falls within the freedom of speech guarantee. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995) ("[the] painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll" are "unquestionably shielded" by the First Amendment).

This is not to deny that free speech plays a critical role in democratic deliberation. But it is crucial to keep in mind that that is a secondary consequence—not the basis of the Constitution's protections. The purpose of free speech is to preserve the individual's sacrosanct freedom of mind. Where these priorities are reversed, the rights of dissent can too easily be overridden to serve allegedly greater public goods.

This happens routinely in the area of campaign finance regulation, where the rights of individuals to express and advocate for their own opinions, even in the political realm, are frequently violated in order to accomplish what political leaders claim are "democratic" goals. For example, the right of anonymous speech has been violated by statutes that compel individuals and groups to divulge their identities when contributing to a political campaign. *See, e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010) (upholding compulsory disclosure of identities of donors to political campaigns). Donors have been forbidden to contribute money to support political candidates as they wish, on the theory that such limits somehow make the outcome of a campaign more qualitatively democratic. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000). Citizens and activist groups have even been forced to obtain federal pre-approval before exercising their First Amendment rights. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 335–36 (2010) (invalidating campaign finance regulations that were so complicated that they amounted to a prior restraint on speech).

Most shockingly, Americans have even been punished for displaying home-made signs advocating for candidates for public office, on the grounds that their signs constituted illegal in-kind contributions to a campaign—even though such signs are almost the prototypical instance of fully protected political speech. *See* Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All the Wrong Places*, 2003 CATO SUP. CT. REV. 187, 187–88 (2003) (detailing case of Texas Republicans Bill Liles, Mark Morton, and Don Bryant, who were charged with violating campaign finance rules for displaying a sign painted on a large plywood board, mounted to the side of a cotton trailer supporting presidential candidate Texas Governor George W. Bush).

All these violations of the First Amendment result from the civic conception of speech, because it regards speech as a privilege extended to citizens for some broader "democratic" goal—which necessarily implies that the speech rights of individuals may be cut or stretched to serve that goal. Proponents of the conception openly admit that they believe it is "necessary to restrict the speech of some elements of our society in order to enhance the relative voice of others." Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1425 (1986) (internal quotations omitted). In practice, this means censoring persons or groups who are thought to have "too much" political influence or to be too effective in expressing their views.

Recent political debates over "dark money" are a prime example. Advocates of campaign finance

restrictions allege that wealthy donors to political candidates or campaigns have a "disproportionate" effect on political debates, which "distorts" the democratic process. *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 671–87 (1997). They therefore support laws that deprive citizens of the right to participate in the political process in order to result in a more "balanced" or "fair" public debate which will presumably result in the "right" democratic outcome. *See* Smith, *supra* at 204. Even this Court once referred to the "distorting effects" on democracy purportedly caused by "immense aggregations of wealth," *Austin*, 494 U.S. at 660—implying that the ability to effectively persuade others in the marketplace of ideas is somehow a "distortion" of the democratic process.

In recent years, political leaders have even begun to force think-tanks and other non-profits that do *not* endorse candidates to disclose the identities of their donors, on the theory that these think-tanks are distorting the democratic process by promoting their views and seeking to persuade voters and politicians to act. *See, e.g.*, *Center for Competitive Politics*, 784 F.3d 1307; *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016).

In a case that the Goldwater Institute is currently litigating, the city of Santa Fe, New Mexico, adopted an ordinance forcing donors to non-profit organizations to publicly disclose their names, addresses, and other information, if the organizations to which they contribute spend $250 to support or oppose a ballot measure.

When the non-profit Rio Grande Foundation posted on its Facebook page a video opposing a citywide ballot measure to impose a $0.02 tax on large sodas, the city sent the Foundation a threatening letter complaining that it had "reached more than 100 eligible voters," and insisting that it provide the city with confidential information about its supporters. *See* Complaint, *Rio Grande Found. v. City of Santa Fe, et al.*, No. 1:17-cv-00768 at ¶¶ 19–22 (D. N.M., filed July 26, 2017).

These instances of censorship are all premised on the idea that the speech of some elements of society can be abridged to serve broader, more "democratic" purposes, because the goal of speech is to promote collective ends rather than individual ones. Because the civic conception of the First Amendment is flawed, has no constitutional foundation, and leads ultimately to censorship, this Court should reject it and decline to uphold the Minnesota statute on that basis.

## II. THE MINNESOTA STATUTE CANNOT BE JUSTIFIED ON THE BASIS OF MAINTAINING ORDER OR PREVENTING "INFLUENCE"

### A. Preventing "Persuasion" or "Influence"-by-Speech is Not a Legitimate Government Interest and Attempting to do so Inherently Amounts to Content-Based Censorship

The court below found that the statute aims "to ensure a neutral, influence-free polling place" by banning "all political material," Pet. App. at A-6, and all

"material designed to influence or impact voting." *Id.* at A-3. The statute itself forbids efforts to "persuade a voter." M.S.A. § 211B.11(1). But while eliminating disruption, violence, or bribery in a polling place is certainly a legitimate government interest, eliminating speech that merely influences or persuades is not. One of the main purposes of speech is to influence, and it is not possible to distinguish between speech that influences and speech that does not influence.

Obviously one primary reason people engage in expression is to influence others. This is not improper, nor is there any legitimate basis for drawing the line at the polling place. Just as a student does not lose her First Amendment at the schoolhouse gate, *Tinker*, 393 U.S. at 506, so a voter does not surrender his right to speak when he participates in voting. So long as expression is not disruptive, does not interfere with public employees' duties, and does not amount to intimidation, assault, bribery, or some other tort or crime, the state has no legitimate basis for banning it.

In fact, speech designed to "influence" occurs in the polling place all the time: voters carry voting guides into the voting booth, which recommend voting one way or other and include "pro" and "con" statements regarding candidates and ballot initiatives. *See Cotham v. Garza*, 905 F. Supp. 389 (S.D. Tex. 1995) (invalidating ban on voting guides in the voting booth). The ballot itself can contain language chosen by candidates in an effort to influence voters—such as the way the candidate chooses to describe his profession. *See* Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693,

705–08 (2016). Voters can enter the polling booth with smart phones, and use them to text message friends or family members to ask how they should vote. In Minnesota and other states that allow voting by mail, *see* M.S.A. § 204B.45,[5] voters can fill out their ballots in their kitchens while listening to Rush Limbaugh or Rachel Maddow. Disabled voters can even vote in their cars in Minnesota, M.S.A. § 204C.15, while a talk show plays on the radio. In Oregon, *all* voting is done by mail—meaning that all of the state's voters can be subjected to "influence" or "persuasion" during the voting process. O.R.S. § 254.470.

"Influence" of this sort occurs frequently in other voting contexts. At shareholder meetings, City Council or Town Hall meetings, board of trustee meetings, jury deliberations, and other places, votes are often cast immediately after or even during discussions about how to vote. Candidates themselves vote, often with the media photographing them doing so, despite the fact that their very faces are associated with "recognizable political views," and their very presence at the polling place must inevitably "influence" voters. *See, e.g.*, CNN, *Man to Obama: Don't Touch My Girlfriend* (Oct. 21, 2014).[6] In a 1966 case, the Arizona Court of Appeals found that a person violated the electioneering merely

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[5] This option is quite popular in Minnesota. *See* Rachel E. Stassen-Berger, *Absentee Ballot Update: Minnesota Records Smashed*, TWIN CITIES PIONEER PRESS (Nov. 3, 2016), http://www.twincities.com/2016/11/03/nearly-416000-absentee-ballots-have-already-voted-13-percent-of-registered-voters/.

[6] https://www.youtube.com/watch?v=N1DHfOuXilc.

by serving as a poll worker on election day and introducing herself to voters, because her name also appeared on the ballot. *Fish v. Redeker*, 411 P.2d 40 (Ariz. App. 1966).

But influencing and persuading voters is what elections are *for*. At the time the First Amendment was written, this was the ordinary practice for federal and state elections, which were typically held in the open; after both candidates spoke to the crowd, voters would immediately and openly express their preferences. *John Doe No. 1*, 561 U.S. at 224–26 (Scalia, J., concurring).

The effort to eliminate "influence"—as opposed to the proper elimination of bribery, intimidation, etc.—is the product of a more recent era, and one guided by the flawed civic conception of free speech, which imagines that there is some correct, objective democratic outcome that would result if the process were cleansed of improper "influences." This is inevitably doomed, because "[t]here is always more speech out there, giving some people 'undue' influence and thereby posing at least the threat of the appearance of corruption," and therefore always another round of further restrictions on speech in an effort to stamp out such influence. Bradley A. Smith, *The John Roberts Salvage Company: After* McConnell*, A New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891, 903 (2007).

As James Madison warned, it would be "folly to abolish liberty, which is essential to political life, because it nourishes faction." THE FEDERALIST No. 10 at 58 (J. Cooke,0 ed. 1961). Attempts to restrict free

speech in order to prevent vaguely-defined bad "influences" on voters is exactly that.

Because it is impossible to define "influence" with precision, efforts to enforce this prohibition will inevitably end with bias and discrimination, perhaps unconsciously so. Vague speech restrictions encourage discriminatory enforcement. *See, e.g.*, *Miller ex rel. Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 629 (E.D. Pa. 2008) (finding ban on T-shirts that cause "distraction" to be unconstitutionally vague). In the *Purcell* case, for example, a Maricopa County official instructed poll workers that they could not allow voters to wear shirts that said "Don't Tread on Me"—a phrase that appeared on one of the nation's earliest flags—because, in that official's opinion, the flag had been "co-opted" by "the Tea Party." Complaint, *Reed v. Purcell*, No. CV 10-2324-PHX-JAT (D. Ariz. Oct. 28, 2010), Doc. No. 1 at ¶¶ 28–29. Here, the risk of arbitrary and discriminatory enforcement is greater, given the extraordinary breadth of the prohibition. The court below even held that the state could forbid a person from wearing a button that simply says "Liberty" Pet. App. D-2. Suffice it say that any rule that forbids a voter from wearing the nation's flag or the word "liberty" while casting a ballot is probably unconstitutional.

### B. Maintaining Order is a Legitimate Government Interest, But the Minnesota Ban Does not Appropriately Serve that Interest

The state also asserts that the statute serves a legitimate interest in maintaining the orderly operation of a polling place. But while that interest is legitimate, the state may not serve that interest in a way that curtails more speech than necessary. The correct path was laid out in *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1216–17 (9th Cir. 1996), which held that the state violated the First Amendment when it prohibited "religious advocacy" and the display of religious materials outside the employees' cubicles and offices. Offices in a government building are a non-public forum. *Id*. at 1214–15. Yet the court still found the ban overly broad. While maintaining order and decorum in a government workplace is a legitimate government interest, the state still could not impose an across-the-board ban on speech to serve that interest. "[T]he undefined term 'religious advocacy' encompasses a wide range of speech," the court found, "much of it permissible." *Id*. at 1217.

Exactly the same analysis applies here. Minnesota has a legitimate interest in preserving order in the polling place, but that cannot justify an absolute prohibition on political clothing or buttons—a ban so broadly worded that it encompasses a wide range of permissible speech. The court below concluded that the ban is viewpoint-neutral because it prohibits all speech by "a group with recognizable political views."

Pet. App. A-3. But the *breadth* of this prohibition cannot cure its *vagueness*. As the dissent below observed, even a flag depicting a Star of David might qualify as "political" and therefore "influential" under this statute. Pet. App. D-18 n.7 (Shepherd, J., dissenting). Is a person who wears a shirt saying "Build the Wall" in violation of the statute? Or "#MeToo"? Or a shirt with a picture of a marijuana leaf?[7] Or a humorous shirt that says "Nixon in 2020: Tanned, Rested, Ready"?[8] It's anybody's guess.

Also instructive here are *Cohen* and *Tinker*. In *Cohen*, this Court found that the state could not prosecute a man who wore a jacket saying "fuck the draft" in a courthouse, notwithstanding that a courthouse hallway is certainly not a public forum, and the state has authority to preserve propriety and order there. Yet the Court found it excessive for the state to forbid such expression on the mere possibility that disruption might result. 403 U.S. at 20 (there was "no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result").

Similarly, in *Tinker*, there was no denying that the state has a legitimate interest in maintaining order, decorum, and discipline on a public school campus—more so, even, than it has over a polling place, since the state stands *in loco parentis* over schoolchildren, but

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[7] In *Purcell*, 2010 WL 4394289 at *4, poll workers in Maricopa County, Arizona, were instructed that a T-shirt with a picture of a marijuana leaf would be prohibited, because an initiative regarding medical marijuana was on the ballot.

[8] https://goo.gl/W6Vk6s.

not over voters. Yet this Court held that students have a First Amendment right to express themselves by wearing clothing that conveys a political message, "unless it 'materially and substantially interfere(s) with the requirements of appropriate discipline in the operation of the school.'" 393 U.S. at 505 (citation omitted). And even then, school officials bear the burden of bringing forth "evidence that [a prohibition] is necessary to avoid material and substantial interference with schoolwork or discipline." *Id*. at 511.

Adult voters participating in an election—during which they have presumably participated in public deliberation on the merits of candidates or ballot measures—certainly have broader expressive rights than students in a public school classroom. The government bears the burden of providing *some* evidence that the restriction here is necessary. *Cf. Rideout v. Gardner*, 838 F.3d 65, 73 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (April 3, 2017) (invalidating law against "ballot selfies" and noting that "[t]he government's burden is not met when a 'State offer[s] *no* evidence or anecdotes in support of its restriction.'" (citation omitted)). Yet the court below made no effort to determine whether there was *any* basis for believing that an absolute prohibition on speech that might be construed by polling place workers as "political" is necessary to preserve order.

On the contrary, the prohibition here is *more likely to provoke a disturbance* than a citizen wearing a T-shirt or a button. The statute encourages busybody monitoring of the clothing voters wear, and the record

shows that in some instances this did result in disorder and indecorum. One voter was ordered to remove his T-shirt. Another was "delayed several *hours*" before he was allowed to vote. Pet. App. D-3 (emphasis added). Still another was forced to turn over his name and address. *Id.*

Such disruption has also occurred in other, similar cases. In *Wickburg*, *supra*, an Arizona voter went to her polling place on election day wearing a white T-shirt with a picture of the U.S. flag and the Constitution and the words "Flagstaff Tea Party-Reclaiming Our Constitution Now." *See* Complaint, *Wickburg v. Owens*, No. 3:10-cv-08177-JAT, Doc. No. 1 at ¶¶ 12–13 (D. Ariz. filed Sept. 20, 2010). She was ordered to turn her shirt inside out or "go out and get a jacket" to cover it before she would be allowed to vote. *Id.* ¶ 15. Poll workers intimidated and scolded her, then allowed her to vote "only because" no other voters were present at the time. *Id*. ¶ 18. At the next election, she again wore her shirt, and poll workers allowed her to vote only after she covered it with a sweater. *Id.* ¶¶ 30–31. As she left, poll workers told her she would not be allowed to vote if she wore the shirt again. *Id.* at ¶ 33.[9]

These incidents demonstrate that prohibitions on the non-disruptive wearing of a T-shirt or button are *more* likely to lead to confrontation, intimidation, harassment, confusion, delay, and disruption than simply

[9] The voter then sued. After a federal judge enjoined another Arizona county from enforcing a similar ban (*Purcell*, *supra*), her case was settled and the government agreed not to enforce the ban.

respecting the right of voters to wear what they like. That problem is accentuated by the breadth of the ban in this case, because it is more likely the people wearing T-shirts that are only marginally "political"—such as a Star of David or a marijuana leaf—will object to being commanded to cover their shirts or turn them inside-out. Unreasonably broad bans of this sort will inevitably provoke *more* confrontations—and did, in fact, in this case—thereby leading to greater disruption in the polling place.

The Minnesota ban therefore must fail under the order-and-decorum theory because it is too broad to serve that purpose without also intruding on constitutionally protected speech; it lacks an evidentiary basis to show that disruption is really likely to follow voters wearing T-shirts or buttons, and it is not reasonably designed because it is likely to cause—and in fact *has* caused—more disturbance at the polls, not less.

## CONCLUSION

The state has a legitimate interest in prohibiting disorder, violence, intimidation, bribery, threats, and other crimes and torts at the polls. But it cannot seek to prevent the mere possibility of such things by prohibiting speech, without at least providing some evidence that this risk is genuine. *Tinker*, 393 U.S. at 738; *Cohen*, 403 U.S. at 20. And it has *no* legitimate interest in preventing, restricting, or shaping "influence." That objective is based on the flawed assumption that the

freedom of speech is designed to further collective aims instead of individual ones. The government has no legitimate interest in "democratiz[ing] . . . influence[s]" by restricting who may speak and about what and where. *Nixon*, 528 U.S. at 401 (Breyer, J., concurring). And efforts to do so will inevitably encourage arbitrary and discriminatory enforcement, at the expense of First Amendment protections.

The judgment should be *reversed*.

Respectfully submitted,
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