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

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech, previously known as the Center for Competitive Politics, is a nonpartisan, nonprofit organization that works to protect and defend the First Amendment rights of speech, assembly, and petition. As part of that mission, the Institute represents individuals and civil society organizations, *pro bono,* in cases raising First Amendment objections to burdensome regulation of core political activity. In addition, under its previous name, the Institute has participated as *amicus curiae* in many of this Court's most important First Amendment cases, including *McCutcheon v. Federal Election Commission,* 572 U.S. __; 134 S. Ct. 1434 (2014), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

SUMMARY OF THE ARGUMENT

In-person voting requires citizens, some of whom doubtless disagree on political questions, to share a communal space as they wait to cast their ballots. The State of Minnesota believes that apparel conveying any "political" idea threatens to destroy

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. Petitioner's blanket consent to the filing of *amicus* briefs was filed with the Court on November 27, 2017, and Respondent's blanket consent to such briefs was filed on December 7, 2017.

this harmony and cause chaos at the polling place. Consequently, it banned such messages.

Contrary to the State's view, Americans can tolerate messages they may disagree with, especially during the defining moment at which citizens collectively choose their representatives. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-272 (1971) (it is "conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people'") (quoting *Roth v. United States*, 352 U.S. 476, 484 (1957)). The illiberal assumption behind Minnesota's law—that Americans are incapable of knowingly being around those with whom they disagree—is unproven and irreconcilable with many of this Court's cornerstone First Amendment precedents.

These concerns are exacerbated by Minnesota's failure to precisely define the expression it wishes to ban. By regulating clothing displaying venerable symbols of the American Revolution itself, and not merely advocacy for or against candidates on the ballot, the State shows that the word "political" has lost any clear meaning. This vagueness, which is particularly troubling in the First Amendment context, poses a trap for the unwary that must be remedied.

The Court should facially invalidate the State's ban. But, failing that, First Amendment interests can be protected through a narrowing construction prohibiting only messages that expressly advocate for candidates on the ballot. *E.g. Buckley v. Valeo*, 424 U.S. 1, 79-81 (1976) (*per curiam*).

ARGUMENT

I. *Burson v. Freeman*, which is based on the government's interest in preventing polling places from descending into "scenes of battle, murder, and sudden death," does not control here.

Casting a ballot is an inherently political act "of the most fundamental significance under our constitutional structure." *Ill. State Bd. of Elections v. Socialist Workers' Party*, 440 U.S. 173, 184 (1979); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1439 (1987) ("th[e] single idea" of "the sovereignty of the People…informs every article of the Federalist Constitution, from the Preamble to Article VII"); *see also* U.S. Const. amend. X. After all, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___; 134 S. Ct. 1434, 1440-1441 (2014) (Roberts, C.J., controlling op.).

Nevertheless, Respondents posit that free expression may be broadly limited within the polling place itself, at the conclusion of "a campaign for political office" when First Amendment protections are especially important. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 233 (1989).

The Eighth Circuit agreed, relying heavily on this Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992). But that case approves only modest restrictions on electioneering which "'maintain peace, order[,] and decorum'" at the polls. 504 U.S. at 193

(quoting *Mills v. Ala.*, 384 U.S. 214, 218 (1966)). It cannot be read to reach the conduct at issue here.

a. Burson v. Freeman *cannot be divorced from its particular concern with preventing electoral fraud and political violence.*

Burson is a narrow exception to the general rule, enshrined in the First Amendment, that "[t]o permit the continued building of our politics and culture…our people are guaranteed the right to express any thought, free from government censorship." *Police Dep't of Chicago v. Mosley*, 408 U.S 92, 95-96 (1972). *Burson* upheld a Tennessee statute imposing a "minor geographic limitation," premised on the belief that "the[] last 15 seconds before its citizens enter the polling place should be their own…free from," the "'distribution of campaign materials[] and solicitation of votes for or against any person or political party or position on a [ballot] question." 504 U.S. at 210; *id.* at 193-194 (quoting Tenn. Code Ann. § 2-7-111(b) (Supp. 1991)).

The plurality only sanctioned this narrow campaign-free zone after a thorough historical review. In particular, it canvassed the safeguards implemented to ensure both the integrity of the franchise and the peaceful conduct of the balloting itself. *Burson*, 504 U.S. at 206. And the plurality noted that "all 50 States, together with numerous other Western democracies, settled on the same solution" to these "two evils…a secret ballot secured in part by a restricted zone around the voting compartments." *Id.* This historical review was essential to the plurality's articulation of the government interest. Nevertheless, Respondents

would use *Burson* to insulate activity that will disrupt neither pillar of voting security. *Id*., 504 U.S. at 220 (Stevens, J., dissenting) (noting the plurality's reliance on the "practice's long life" and "history"); *id*. at 214 (Scalia, J., concurring) ("…restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot").

Thus, the "peace, order, and decorum" interest must be understood as an outgrowth of the bloody history of Nineteenth Century American elections, which were "not a very pleasant spectacle for those who believed in democratic government." *Burson*, 504 U.S. at 202 (citation and quotation marks omitted). Before the adoption of the secret ballot and the campaign-free zone, outright vote purchasing and political violence were common practice. *Id.* at 201-202. Indeed, naked "bribery of voters" was both "sufficient to determine the results of" the 1888 Presidential election in Indiana, *id*. at 201, n.6,[2] and so widely known that it inspired a schoolyard ditty. Paul F. Boller, *Presidential Campaigns: From George Washington to George W. Bush* 160 (2004) ("Steamboat coming 'round the bend; Goodbye, old Grover, goodbye[;] Filled up full with Harrison's men; Goodbye, old Grover, goodbye!").

Perfidious campaign workers pressing party tickets hounded voters "[a]pproaching the polling place," resorting to "[s]ham battles…to keep away elderly and timid voters of the opposition." *Burson*,

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[2] Benjamin Harrison defeated Grover Cleveland in Indiana by a mere 2,348 votes in 1888. *1888 Presidential Election Results -- Indiana*, United States Election Atlas, https://uselectionatlas.org/RESULTS/state.php?year=1888&fips=18&f=0&off=0&elect=0.

504 U.S. at 202. "[C]oats were torn off the backs of voters…ballots of one kind…snatched from voters' hands and others put in their places, with threats against using any but the substituted ballots." *Id.* at 204, n.8. At this time, American "polling places were frequently, to quote the litany, 'scenes of battle, murder, and sudden death.'" *Id.* at 204 (citation and quotation marks omitted).[3]

Given this history, the *Burson* plurality determined that immunizing the fifteen-second walk to the polling place from partisan warfare did not unduly offend the First Amendment. But that determination, rooted as it is in a history of campaign workers chasing and assaulting voters, cannot be rotely applied to Minnesota's blanket ban on the wearing of all "political" apparel by voters themselves.

Had the court of appeals properly applied *Burson*, it would have demanded that Respondents prove that the wearing of politically-themed garments threatened to revert the State's polling places to "scenes of battle, murder, and sudden death." *Id.* at 204 (citation and quotation marks omitted). It did not do so, which, in and of itself, is fatal. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995)

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[3] Indeed, one of the more widely accepted theories regarding the death of American poet Edgar Allan Poe involves Election Day violence. Natasha Geiling, *The (Still) Mysterious Death of Edgar Allan Poe,* Smithsonian Magazine, Oct. 7, 2014 ("Others believe that Poe fell victim to a practice known as cooping, a method of voter fraud practiced by gangs in the 19th century where an unsuspecting victim would be kidnapped, disguised[,] and forced to vote for a specific candidate multiple times under multiple disguised identities"), https://www.smithsonianmag.com/history/still-mysterious-death-edgar-allan-poe-180952936/

("…when the Government defends a regulation on speech as a means…to prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural…") (citation and quotation marks omitted, punctuation altered for clarity).

b. There is a general presumption, not countered here, that individuals can encounter speech they oppose without recourse to violence.

Restrictions on speech, following *Burson,* must directly protect "peace, order, and decorum" at the polling place. But there is little to no evidence that mere political apparel poses any risk to that interest, especially where a ban extends far beyond messages whose "very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace." *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942); *see* Pet. App. I-1-2 (barring "promoting a group with recognizable political views"); *Tex. v. Johnson*, 491 U.S. 397, 416 (1989) ("[T]he distinction between written or spoken words and nonverbal conduct…is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here"). The issue speech regulated here, by its very nature, has tremendous "social value" and constitutes an "essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572; *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence"). It cannot be reasonably regulated as though it is inherently dangerous.

In fact, many of this Court's First Amendment precedents are grounded in an underlying presumption that Americans, uncomfortable with another's message though they may be, can perform their civic duties and go about the day without resort to violence. *Cohen v. Calif.*, 403 U.S. 15, 21 (1971) ("Of course, the mere presumed presence of unwitting listeners or views does not serve automatically to justify curtailing all speech capable of giving offense"); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability").

This Court reaffirmed this general principle just last Term. *Matal v. Tam*, 582 U.S. __; 137 S. Ct. 1744, 1763 (2016) (Alito, J., controlling op.) ("Giving offense is a viewpoint. We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'") (quoting *Street v. N.Y.*, 394 U.S. 576, 592 (1969)). It should continue to hold the line against the illiberal fantasy that individuals cannot help but violently react to disfavored speech. *See* Greg Lukianoff and Jonathan Haidt, *The Coddling of the American Mind*, The Atlantic, Sept. 2015 ("When speech comes to be seen as a form of violence, vindictive protectiveness can justify a hostile, and perhaps even violent, response").[4]

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[4] https://www.theatlantic.com/magazine/archive/2015/09/thecoddling-of-the-american-mind/399356/

Freedom of expression lies at the foundation of our rights as a self-governing people. It should not be banished at the ballot box because of an unproven and irrational misconception.[5] *Whitney v. Calif.*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of free speech to free men from the bondage of irrational fears").

II. Even if the apparel ban furthered legitimate ends, its application here demonstrates its unconstitutional vagueness.

In addition to being tailored to a particular history, the Tennessee ban upheld in *Burson* had the virtue of being straightforward and easily understood. Tennessee banned the display and distribution of *campaign*, as opposed to merely *political*, materials, and expressly prohibited the "'solicitation of votes for or against'" candidates, parties, and ballot measures. *Burson*, 504 U.S. at 193-194 (quoting Tenn. Code Ann. § 2-7-111(b) (Supp. 1991)).

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[5] *See* Elizabeth Nolan Brown, *Hate Crimes, Hoaxes, and Hyperbole: A reality check for all sides*, Reason, Nov. 18, 2016 ("The bottom line is that when it comes to physical aggression inspired by this election, we are looking at a little more than a dozen incidents reported, over a 10 day period, in a country of roughly 318.9 million people—none of which resulted in serious injuries"), http://reason.com/blog/2016/11/18/election-hate-crimes-hoaxes-hyperbole.

This case touches on First Amendment free political expression, and "[p]recision of regulation must be the touchstone in an area so closely touching on our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 (1963); *Buckley v. Valeo*, 519 F.2d 821, 874 (D.C. Cir. 1975) (*en banc*) ("'Vague laws in any area suffer a constitutional infirmity,' and commonly in the First Amendment area doubly so") (quoting *Ashton v. Ky.*, 384 U.S. 195, 200 (1966)). Precise language ensures that laws seeking to regulate the act of campaigning do not reach individuals "whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance." *Buckley*, 519 F.2d at 870.

Here, Respondents have expanded the term "political insignia," Minn. Stat. Ann. § 211B.11(1), to cover the wearing of apparel that merely contains "classic American phrases such as 'Liberty' and 'Don't [T]read on [M]e'" or portrays the Gadsden flag, a symbol of the very war that won the franchise in the first place. Pet. Reply Br. in Supp. of *Cert.* at 8. Threatening individuals with prosecution for wearing venerable symbols of the Republic, as happened here, demonstrates that Minnesota's law lacks a cognizable limiting principle. *See United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972) ("On the Government's thesis, every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another…The dampening effect on [F]irst [A]mendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable").

Whether a voter's apparel is "[i]ssue oriented material designed to influence or impact voting," Pet. App. I-2, will turn, inevitably, on the opinions of the viewer. Here, the danger of inconsistent interpretation and enforcement is compounded by Minnesota's decision to leave its intent-and-effect test to the judgment of poll workers. *Cf. Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) ("No reasonable speaker would choose to" act if the "only defense to a criminal prosecution would be that its motives were pure. An intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion'") (quoting *Buckley*, 424 U.S. at 43). Given such a "standard," all sorts of non-electoral speech will be banned, even speech that the wearer did not intend to carry a partisan message.[6]

The Gadsden flag itself can inspire conflicting responses. Its image is reflected in the motto and insignia of the 369th Infantry Regiment, an African-American unit that fought in the First World War and whose soldiers were "the first Americans of any race to receive the coveted Croix de Guerre." Henry Louis Gates, Jr., *Who Were the Harlem Hellfighters?*, The

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[6] *See* Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early American Republic* 163 (2010) (recounting that the 1790s era Federalist Party encouraged citizens to wear a black cockade as a show of solidarity during the Quasi-War, and initially viewed the positive citizen response "as evidence of a rise in the popularity" of the Adams administration, but "it seems likely that many citizens adopted the badge as evidence of their patriotism" during the crisis, as "[w]ith the end of the Quasi-War, the popularity of the black cockade faded rapidly…").

Root, Nov. 11, 2013[7]; Jeffrey T. Sammons and John F. Morrow, Jr., *Harlem's Rattlers and the Great War: The Undaunted 369th Regiment and the African-American Quest for Equality* 2 (2014) ("[The regiment's] adopted symbol, the rattlesnake…identified these citizen-soldiers with a Revolutionary War icon of indigenous power, defiance, and independence…indelibly captured in the motto of the Gadsden flag, 'Don't Tread on Me'"). By contrast, others have asserted that the flag denotes anti-black racism. See Eugene Volokh, *Wearing "Don't Tread on Me" insignia could be punishable racial harassment*, The Washington Post, Aug. 3, 2016 (describing complaint filed with the Equal Employment Opportunity Commission regarding a co-worker's display of a Gadsden flag).[8]

The United States Navy, on the other hand, takes the sensible position that a variant of that flag is a "symbol of resolve," and flies it in time of war. Corwin Colbert, *"First Navy Jack" Flies in Hawaii to Honor 17 Sailors Lost in Collisions*, U.S. Dep't of Defense, Jan. 3, 2018[9]; *see also* SECNAV Instruction 10520.6 (May 31, 2002) ("To provide for the display of the first navy Jack on board all U.S. Navy ships during the Global War on Terrorism…a flag consisting of 13 horizontal alternating red and white

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[7]https://www.theroot.com/who-were-the-harlem-hellfighters-1790898837.

[8]https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/wearing-dont-tread-on-me-insignia-could-be-punishable-racial-harassment/?utm_term=.90bd484313b8.

[9]https://www.defense.gov/News/Article/Article/1408008/first-navy-jack-flies-in-hawaii-to-honor-17-sailors-lost-in-collisions/

stripes bearing diagonally across them a rattlesnake in a moving position with the motto 'Don't Tread On Me'").

Simply put, the venerable Gadsden flag, like any historical symbol, may be perceived as having any number of messages, and should not be taken to convey granular political views such as support for a particular candidate.[10] Nevertheless, Minnesota has chosen to force those wearing such classic emblems to risk prosecutions that will inevitably reflect the human tendency to see patterns that may not be there and to read messages into even the most universal symbols. This poses a classic trap for the unwary that must be remedied. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

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[10] Indeed, quite recently, the mere act of wearing the national ensign itself on one's lapel was seen by some as support for the incumbent President or for the Iraq war. Gilbert Cruz, *A Brief History of the Flag Lapel Pin*, Time Magazine, July 3, 2008, ("But it was Richard Nixon who brought the pin to national attention…Nixon commanded all of his aides to go and do likewise. The flag pins were noticed by the public, and many in Nixon's supposed 'silent majority' began to similarly sport flags on their lapels"), http://content.time.com/time/nation/article/0,8599,1820023,00.html; David Wright and Sunlen Miller, *Obama Dropped Flag Pin In War Statement*, ABC News, Oct. 4, 2007 ("'You know, the truth is that right after 9/11, I had a pin,' [then-Sen. Barack] Obama said. 'Shortly after 9/11, particularly because as we're talking about the Iraq War, that became a substitute for I think true patriotism…'"), http://abcnews.go.com/Politics/story?id=3690000.

III. To avoid "the shoals of vagueness," this Court may apply a construction limiting the apparel ban to speech constituting express advocacy for or against a candidate or issue on the ballot.

As this case shows, Minnesota's use of the bare term "political insignia" does not adequately describe the speech it seeks to ban. This is especially dangerous since political speech lies at the core of the First Amendment's protections. *Buckley*, 519 F.2d at 873 ("[I]ssue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society…")

This is not a new problem. In *Buckley v. Valeo,* the Court encountered a $1,000 limit on expenditures "relative to a clearly identified candidate"—arguably a clearer phrase than "political insignia." *Buckley*, 424 U.S. at 39 (citation and quotation marks omitted). Nevertheless, the Court held that this phrase was unconstitutionally vague because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id*. at 42.

Just so here. A central problem with Minnesota's approach is that it conflates "political" messages about the election with "political" messages generally. In *Buckley*, the Court solved this problem by adopting a limiting construction: the expenditure limit would apply "only to expenditures for communications that, in express terms advocate the

election or defeat of a clearly identified candidate for federal office." *Id.* at 44.

The Court in *Buckley* nevertheless invalidated that provision, even as so narrowed. *Id.* at 51. And *Amicus* believes that the Court should do the same here. But "the shoals of vagueness" may be avoided, "consistent with the legislature's purpose," by adopting *Buckley*'s limiting construction. *Buckley*, 424 U.S. at 78. The State's interest in avoiding politicking at the polls can be fulfilled by reading "political" to mean "express advocacy for or against a candidate or question appearing on the ballot."

In the years after *Buckley,* the "express advocacy" standard has been routinely applied in the campaign finance context. *Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 555 (4th Cir. 2012) (upholding federal express advocacy requirements against vagueness challenge); *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788 (10th Cir. 2013) (same). There is little reason to suspect that it could not be applied here.

Not only would this reading of "political" provide vital clarity, it would limit the government's ban to obvious campaigning for and against candidates for office. This approach both prevents subjective determinations of symbolic meaning by low-level state workers and narrows the State's regulation to more closely fit the specific governmental interest identified by the *Burson* plurality.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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