No. 16-1435

In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL., PETITIONERS,
v.
JOE MANSKY, ET AL.

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

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA IN SUPPORT OF PETITIONERS

LISA S. BLATT
ROBERT J. KATERBERG
AMANDA CLAIRE HOOVER
SALLY L. PEI
ARNOLD & PORTER KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001

TRENTON DAVID
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana Street
Suite 4000
Houston, TX 77002

DAVID D. COLE
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(212) 549-2611
dcole@aclu.org

LEE ROWLAND
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

JOHN B. GORDON
TERESA J. NELSON
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
2300 Myrtle Ave., Ste. 180
St. Paul, MN 55114

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

State Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union of Minnesota, an affiliate of the national ACLU with more than 32,000 members and supporters, is devoted to civil liberties and civil rights advocacy on behalf of all Minnesotans. This brief refers to *amici* collectively as "the ACLU."

Since its founding in 1920, the ACLU has vigorously defended both free speech and voting rights. Free speech is inextricably linked to protecting voting rights, just as voting rights can be important to enforce protections for speech. Seminal First Amendment cases including *NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), have helped protect organizations that work to expand voting rights and other civil rights from government interference. Restrictions on speech have always been a powerful tool to suppress voting rights, and First Amendment protections an important safeguard for activists expanding the franchise.

In furtherance of its interest in defending these important constitutional rights, the ACLU has appeared before this Court in numerous free speech

---

[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have provided blanket consent to the filing of amicus briefs in this case, and copies of the letters of consent are on file with the Clerk's Office.

cases as both direct counsel and *amicus curiae*. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (direct representation); *Matal v. Tam*, 137 S. Ct. 1744 (2017) (amicus); *Hill v. Colorado*, 530 U.S. 703 (2000) (amicus). Likewise, the ACLU has appeared before the Court as direct counsel in many voting rights cases, including *Husted v. A. Philip Randolph Institute* in the current Term. *See also Shelby Cty. v. Holder*, 570 U.S. 529 (2013). And it has appeared as an amicus in a series of voting rights cases, including *Gill v. Whitford* in the current Term. *See also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

The ACLU has filed legal challenges against strict voter identification requirements. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017). It opposes voter identification laws that suppress the right to vote. Thus, it does not support the cause for which some of the speakers challenging Minnesota's law advocate. It nonetheless supports their right to express those views, and opposes overbroad laws that suppress political speech, regardless of whether the ACLU approves or opposes the views expressed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Political speech lies at the core of the First Amendment's protection. It is essential to our representative democracy that citizens be able to communicate about matters of governance. This Court has therefore always subjected laws that prevent in-

dividuals from communicating about politics to the most exacting constitutional scrutiny.

The right to vote is also essential to our democracy. The government therefore has significant latitude to enact *narrowly* tailored restrictions on particular forms of speech at the polling place that pose a risk of direct intimidation and harassment, and thereby threaten the integrity of the franchise. Many states have enacted anti-electioneering statutes, which forbid direct advocacy at the polling place for a candidate or ballot initiative. But those statutes notably do not bar more general expression about political or social concerns.

Minnesota, along with a handful of other states, has gone much further, by broadly prohibiting voters from engaging in any form of "political" expression at the polling place on election day. Such content-based attempts to create a "politics-free zone" at the polling place are subject to strict scrutiny and fail that test. These laws are far broader than necessary to address the state's compelling interest in protecting the right to vote. The American electorate is surely hardy enough to vote their conscience even if they notice their fellow citizens wearing, say, a Black Lives Matter or AFL-CIO t-shirt, a Women's March hat, or a pro-life or peace-sign button.

Minnesota's law against political speech is also hopelessly and fatally vague. It bestows massive, unchecked discretion on election judges and poll workers to decide on the spot what is and is not "political," forcing voters into a Hobson's choice between two constitutional rights: voting or speaking. This Court should reverse.

ARGUMENT

THE MINNESOTA STATUTE VIOLATES THE FIRST AMENDMENT

A. The Minnesota Statute Is a Content-Based Restriction on Core Political Speech Subject to Exacting Scrutiny.

The protection of political speech is at the core of this Court's First Amendment jurisprudence. Above all else, the First Amendment safeguards the ability to debate issues pertinent to our nation's governance. "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. . . . For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Burson v. Freeman*, 504 U.S. 191, 196 (1992); *accord*, *e.g.*, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 375–76 (1984); *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (per curiam).

Because core political speech is "fundamental to our constitutional system," exacting scrutiny applies to government restrictions on such speech. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 666 (1990), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Restrictions on speech based on its political content must be "narrowly tailored" to serve a "compelling governmental interest." *Id.*; *see also, e.g.*, *Burson*, 504 U.S. 198; *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Speiser v. Randall*, 357 U.S. 513, 529 (1958). The narrow-tailoring prong requires that "a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Burson*, 504 U.S. at 199. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v.*

Playboy Entm't Group, 529 U.S. 803, 813 (2000). Few content-based restrictions are so essential as to be "necessary to serve the asserted [compelling] interest." *Burson*, 504 U.S. at 199. As a consequence, this Court has "readily acknowledge[d] that a law rarely survives such scrutiny." *Id.* at 200.

Where a sovereign seeks to regulate core political speech—indeed, where it imposes any content-based restrictions on speech—its regulation will be subject to strict scrutiny. The test for the regulation of core political speech, and for most content-based restrictions, remains largely unchanged over decades of jurisprudence. *See*, *e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011); *Citizens United*, 558 U.S. at 339–40.

Minnesota's polling-place speech restriction is content-based because it proscribes speech expressly because of its "political" content. Furthermore, it specifically identifies content that lies at the core of the First Amendment: political expression. The statute is not limited to advocacy of a particular candidate or issue on the ballot on that election day. Rather, the statute broadly calls for election judges to stop individuals from wearing apparel with "political badges," "political buttons," or "political insignia" in polling places. Minn. Stat. § 211B.11. As Minnesota interprets the statute, the word "political" includes any message considered to be "[i]ssue oriented material designed to influence or impact voting" or "[m]aterial promoting a group with recognizable political views." Pet. App. I-2. Minnesota thus construes the statute, for example, to bar "Please ID Me" designs, regardless of whether any voter identification issue is on the ballot. *See id*. Such messages bear on some of the most hotly contested issues in our society. By its plain language, the statute targets protect-

ed expression based on its political content while leaving non-political expression untouched. Therefore, the law is subject to strict scrutiny.

The court below bypassed the exacting standards of strict scrutiny by labeling a polling place a non-public forum, where regulations on speech face less searching review. Pet. App. A-5. But forum analysis is not useful for this case because individuals going to vote do not seek access to government property as a platform to engage in private speech. Rather, a polling place exists for voting; the challengers here simply want to express themselves in a non-disruptive manner while exercising their constitutional right to vote, in the only place where they are permitted to do so. A prohibition on doing so does not trigger forum analysis. Thus, this Court did not consider forum analysis necessary in *Cohen v. California*, 403 U.S. 15 (1971). Cohen's conviction for wearing a jacket proclaiming an anti-war message in a courthouse was deemed invalid because it prohibited speech based on its content, regardless of whether the courthouse might be considered a public or non-public forum.

Regardless, the Minnesota statute is unconstitutional under any standard. The flaws that doom the statute under strict scrutiny also render the statute unreasonable, viewpoint-discriminatory, and therefore unconstitutional even if viewed as a restriction on speech in a non-public forum. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). The government has an interest in ensuring that voters attempting to exercise their constitutional rights at the polling place are not subject to coercion or intimidation. *See infra*, Part B. But the government lacks any valid interest, much less a reasonable or compelling one, in cleansing the polling place of all political expression. The blanket ban on

political expression here is "facially unconstitutional . . . regardless of the proper standard." *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 573 (1987). Prohibiting passive displays of political opinions goes far beyond what is reasonable to protect other voters from coercion or intimidation.

Nor does the fact that the Minnesota statute regulates political messages in the form of words, symbols, or pictures on apparel rather than spoken communication weaken the First Amendment's protection. The First Amendment fully protects individuals' rights to express their political views through clothing. *See*, *e.g.*, *id.* at 576; *Cohen*, 403 U.S. at 18; *Tinker*, 393 U.S. at 508, 514; *Picray v. Sec'y of State*, 916 P.2d 324, 329 n.12 (Or. Ct. App. 1996) (describing the long historical pedigree of political clothing and paraphernalia). As discussed below, the state's interest in regulating expression through words, symbols, or pictures on clothing is, if anything, *less* substantial because such passive, "nondisruptive" displays pose no risk of the sort of intimidation or harassment that may justify limited restrictions on other forms of speech. *Jews for Jesus*, 482 U.S. at 576.

B. States Have a Compelling Interest in Preventing Coercion and Voter Intimidation at Polling Places on Election Day.

While content-based restrictions on political speech are subject to strict scrutiny, states still have considerable leeway to adopt limited and narrowly tailored restrictions on speech at the polling place on election day.

States have a compelling interest in preserving the integrity of the election process by preventing intimidation and fraud at polling places. *See Burson*,

504 U.S. at 199. This interest is compelling because "the 'right to vote freely for the candidate of one's choice is of the essence of a democratic society.'" *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). "[N]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Id.* (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

This compelling interest includes protecting the rights of citizens to vote freely for the candidates of their choice without being coerced or subjected to intimidating influences while they are at the polling place. *See id.* at 200–06 (examining the history of election regulation and concluding that it "reveals a persistent battle against two evils: voter intimidation and election fraud"). "The Court thus has upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* at 199.

For these reasons, the polling place on election day is one of the "rar[e]" contexts where certain content-based restrictions on speech may pass muster. *Id.* at 200. But this does not give states license to write all-encompassing laws that silence or punish more speech than necessary. After all, any content-based law that restrains polling-place speech must be "necessary to serve the asserted interest." *Id.* at 199. No matter the strength of the state interest asserted, a law that sweeps more broadly than necessary in its curtailment of core political speech cannot stand in our Republic.

C. Narrowly Tailored Prohibitions on Direct Electioneering at the Polling Place Protect the Compelling State Interest in Voting, Without Infringing the Right to Free Speech.

Most states have effectively protected the right to vote without intimidation, coercion, and harassment through laws that restrict only the specific forms of speech that actually give rise to those concerns: advocacy of a particular candidate or issue on the ballot on that election day, often referred to as "electioneering." *See*, *e.g.*, *Electioneer*, Merriam-Webster English Dictionary, https://goo.gl/GW71mC (last visited Jan. 12, 2018) (defining "electioneer" as "to take an active part in an election; specifically: to work for the election of a candidate or party"); *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 74, 75 (1988) (characterizing prohibition on churches from "participat[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office" as an "anti-electioneering provision"). It is this type of statute that this Court upheld under strict scrutiny in *Burson*.

The Tennessee statute at issue in *Burson* prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position . . . ." *Burson*, 504 U.S. at 193–94. Statutes appropriately tailored in this way do not violate the First Amendment because "some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id.* at 206.

Most states have adopted tailored anti-electioneering laws similar to the law upheld in *Bur-*

son. For example, California's election code prohibits electioneering, which is defined as "the visible display or audible dissemination of information that advocates for or against any candidate or measure on the ballot," within 100 feet of a polling place. Cal. Elec. Code. § 18370(d); *id.* § 319.5. Similarly, Colorado's election code defines electioneering to include "campaigning for or against any candidate who is on the ballot or any ballot issue or ballot question that is on the ballot," Colo. Rev. Stat. § 1-13-714(1), and Kentucky's statute prohibits "the solicitation of votes for or against any bona fide candidate or ballot question" in a manner that "expressly advocates" a particular outcome, Ky. Rev. Stat. Ann. § 117.235(3)(c). Most other states that restrict electioneering at or around the polling place define it in a similar, narrowly tailored fashion. *See* Alaska Stat. § 15.56.016(a); Conn. Gen. Stat. § 9-236(a); Ga. Code Ann. § 21-2-414(a); Ky. Rev. Stat. Ann. § 117.235(3); Me. Rev. Stat. Ann. tit. 21-A, § 682; Miss. Code Ann. § 23-17-55; Mont. Code Ann. § 13-35-211; N.H. Rev. Stat. Ann. § 659:43; R.I. Gen. Laws § 17-19-49; Or. Rev. Stat. § 260.695; Tex. Elec. Code Ann. § 61.010(a); Utah Code Ann. § 20A-3-501; Va. Code Ann. § 24.2-604; Wash. Rev. Code § 29A.84.510; Wis. Stat. § 12-03(2).[2]

---

[2] In addition, some states prohibit "electioneering" without defining the term, but there is no reason to think these states would construe the term, in the face of the canon of constitutional avoidance, as covering more speech than its customary and accepted meaning. *See* Ark. Code Ann. § 7-1-103(a)(9); D.C. Code § 1-1001.10(b)(1)(2)(A); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. § 5/7-41(c); Iowa Code § 39A.4(1); Md. El. Ann. Code § 16-206(a); Mo. Rev. Stat. § 115.637(18); Neb. Rev. Stat. § 32-1524; N.M. Stat. Ann. § 3-8-77; N.Y. Elec. Law § 8-

Tailored restrictions on electioneering at the polling place advance the compelling interest in maintaining electoral integrity without prohibiting more speech than necessary. However, a state may not, consistent with the First Amendment, seek to silence or punish *all* political speech in the name of preventing fraud or undue influence, as the Minnesota statute seeks to do.

D. The Minnesota Statute Is Overbroad and Unreasonable.

The Minnesota statute violates the First Amendment. States may forbid electioneering activity in order to prevent voter intimidation and fraud. But the prohibitions of the Minnesota statute far exceed what is necessary or reasonable to serve those interests. The government may be able to create a "campaign-free zone" at the polling place, *Burson*, 504 U.S. at 193, but it cannot create a "politics-free zone."

1. The Statute Unnecessarily Penalizes Vast Amounts of Protected Speech.

Rather than merely regulating speech that aims at disruption, active solicitation, or engagement of other voters on ballot issues or candidates, Minnesota has banned an entire category of expression, targeting any passive display of "political badges, political buttons, or other political insignia." Minn. Stat.

104(1); Okla. Stat. tit. 26 § 7-108. Other states define "electioneering" only slightly more broadly, to include expressing support for or opposition to a candidate, ballot question, or *political party* on the ballot. *See, e.g.*, Ariz. Rev. Stat. § 16-411(H); Ind. Code Ann. § 3-14-3-16(b); Kan. Stat. Ann. § 25-2430(a); Nev. Rev. Stat. § 293.361; 25 Pa. Cons. Stat. § 3060.

§ 211B.11. The First Amendment does not tolerate this heavy-handed approach. *See Jews for Jesus*, 482 U.S. at 575–76 (finding unconstitutional a resolution purporting to create a "First Amendment Free Zone" at Los Angeles International Airport); *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994) (striking down law banning most residential signs).

The Minnesota statute's overbreadth is all the more harmful because it targets a form of political speech—wearing or displaying political or "issue oriented" clothing or symbols—that is by its very nature "non-disruptive" and non-obtrusive. *Jews for Jesus*, 482 U.S. at 576; *cf. Burson*, 504 U.S. at 200–04 (explaining that anti-electioneering grew out of historical experience in which voters approaching the polls had to walk a gauntlet of peddlers and cajolers).

Unfortunately, Minnesota is not alone in attempting to regulate polling-place expression more extensively than the First Amendment and this Court's precedents permit. While most states draw the line at electioneering, *see supra* Part C, a few states follow Minnesota in imposing a sweeping ban on "political" expression. *See, e.g.*, Del. Code Ann. tit. 15, § 4942 (banning "political discussion of issues, candidates or partisan topics, the wearing of any button, banner or other object referring to issues, candidates or partisan topics"); N.D. Cent. Code § 16.1-10-03 (providing that no "political badge, button, or insignia may be worn within that same area while a polling place is open for voting"); Vt. Stat. Ann. tit. 17, § 2508(a) (providing that "no campaign literature, stickers, buttons, name stamps, information on write-in candidates, or other political materials are displayed, placed, handed out, or allowed to remain").

The Minnesota statute and others like it stray far beyond the limited latitude that states have under *Burson* to regulate in this area. A state's legitimate interest in "preventing voter intimidation and election fraud," *Burson*, 504 U.S. at 206, cannot justify blanket suppression of all expression at the polling place that may be deemed to relate in some way to politics or political issues, regardless of whether it is tied to any issue or individual on the ballot. Just as the restriction invalidated in *Jews for Jesus* went far beyond "regulat[ing] expressive activity . . . that might create problems such as congestion or the disruption of the activities of those who use LAX," 482 U.S. at 574, the Minnesota statute goes far beyond regulating speech that could coerce or intimidate voters or undermine the integrity of the election. "The silent expression of political opinion is not coercive." *Picray*, 916 P.2d at 329. Minnesota need not fear that Americans exercising their right to vote will be chilled by seeing that a neighbor has chosen to sport an Occupy Wall Street ball cap or a Moral Majority lapel button.

2. The Statute Confers Unchecked Enforcement Discretion and Invites Viewpoint Discrimination.

The Minnesota statute is particularly pernicious because it confers unbridled discretion on poll workers, inviting arbitrary enforcement and leading to inevitable viewpoint discrimination. The Election Day Policy specifically states that "[e]lection judges have the authority to decide what is 'political.'" Pet. App. I-1. This delegation of authority, combined with the breadth and vagueness of the terms "political" and "issue oriented," grants sweeping and final discretion to poll workers whose own viewpoints will inevitably

influence what they see as "political" or not. A phrase that one person may consider to be innocuous or non-political—like "#MeToo"—may appear to another to be an overtly political statement. The same goes for someone wearing a Colin Kaepernick jersey or t-shirts depicting pictures of Andrew Jackson, Bob Dylan, Beyoncé, or the official seal of the U.S. Chamber of Commerce.

Notably, poll workers are not typically veteran government employees with extensive training in the First Amendment. Minnesota invites its private citizens to become "temporary" poll workers for a day. *See* Office of the Minnesota Sec'y of State Steve Simon, *Become an Election Judge*, https://goo.gl/E2bKmH (last visited Jan. 12, 2018). Even "16 and 17-year-old students can work as election judge trainees" and "will be assigned the same duties as other judges, with the exception of tasks requiring party affiliation." *Id.* Yet Minnesota deputizes such temporary non-specialists with the immense responsibility of determining what messages conveyed by their fellow citizens' clothing are impermissibly "political." Pet. App. I-1.

A law that, in regulating expressive activity, "confers on police a virtually unrestrained power to arrest and charge persons with a violation . . . is unconstitutional because the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Jews for Jesus*, 482 U.S. at 576 (alteration in original). Such laws open the door to selective enforcement based on the content of the speech. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 465 & n.15 (1987). This Court has "repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for

words or conduct that annoy or offend them." *Id.* (citing numerous cases).

The dangers of excessive discretion are all the more acute here, where selective enforcement invites invidious viewpoint discrimination. "A government regulation that allows arbitrary application . . . has the potential for becoming a means of suppressing a particular point of view." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). For this reason, "viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints." *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cty. Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006) (citing *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 304–05 (2000)).

Neither the Minnesota statute's text nor the state's Election Day Policy contains safeguards against selective enforcement. The state attempts to create a façade of neutrality by drawing from both ends of the political spectrum when giving examples of prohibited expression. *See* Pet. App. I-2 (listing "the Tea Party, MoveOn.org, and so on"). But isolated examples cannot substitute for proper tailoring of speech regulations in the first instance. Poll workers are human beings with their own political views and perspectives. Even the most well-intentioned poll workers cannot be expected to put their perspective entirely aside merely because they are advised that the restriction covers messages from both ends of the political spectrum.

The Minnesota statute and the Election Day Policy create the risk that unpopular or unorthodox

opinions or beliefs will be deemed "political" and unfairly excluded from the polling place. As the Court has warned on multiple occasions, imprecise, standardless statutory language "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972). Such language is "an obvious invitation to discriminatory enforcement against those whose . . . ideas, . . . lifestyle, or . . . physical appearance [are] resented by the majority of their fellow citizens." *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971); *accord Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("imprecise" regulation of speech raises specter of "discriminatory enforcement"). The risk of content and viewpoint discrimination is "at its zenith" when, as here, "the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988).

3. The Statute Is Impermissibly Vague.

The Minnesota statute's imprecise language not only heightens the threat it poses to voters' First Amendment rights; it also raises serious due process concerns. The statute both "authorizes or even encourages arbitrary and discriminatory enforcement" and "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill*, 530 U.S. at 732. In the First Amendment context, this Court has shown particular concern for the potential chilling effects of vague legal prohibitions. This Court has struck down statutes that are so vague as to create confusion or uncertainty for the average person. *See Reno*, 521 U.S. at 871

(holding vagueness of words "indecent" and "patently offensive" will create uncertainty among speakers).

At a time of heated political debate on many fronts in our society, it is inconceivable that a voter could be expected to discern from the Minnesota statute or the Election Day Policy whether a particular message on his or her clothing is banned (or might be selectively banned by a poll worker). Minnesota treats the violation of Section 211B.11 as a petty misdemeanor carrying a fine of up to $300. *See* Minn. Stat. §§ 609.02, 609.03. Violations may also be subject to civil penalties. *See* Minn. Stat. §§ 211B.32, 211B.35. Some voters who have unwittingly chosen apparel that runs afoul of the Election Day Policy may elect not to cast a ballot rather than enter a polling place and risk these sanctions.

4. The Statute Forces Voters to Choose Between Two Constitutional Rights.

Minnesota's statute forces voters into a Hobson's choice: they must sacrifice their First Amendment right to free expression in order to secure their constitutional right to vote. Voters who know or fear their expressive apparel will be swept up in Minnesota's ban may opt not to wear it to ensure they are able to vote on election day—leaving their freedom of speech at the door. In other cases, voters who neglect to leave their expressive apparel at home may not be able to exercise the right to vote. While it is Minnesota's policy to allow voters who wear banned apparel to cast their ballot (and be fined later for their choice of Election Day dress), Petitioners' complaint alleged at least one instance of a voter who was unable to vote, suggesting poll workers do not reliably obey this policy. J.A. 78. Moreover, because the statute provides for a future (and significant) fine, it is also

likely that voters who inadvertently violated the policy on Election Day will leave their polling place without casting a ballot rather than risk being punished.

Forcing a citizen to choose between her fundamental rights to speak or vote is impermissible. This Court has long found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968); *see also Garrity v. New Jersey*, 385 U.S. 493, 497 (1967); *Green v. United States*, 355 U.S. 184, 191–92 (1957). Nowhere is this principle more sacrosanct than in the First Amendment context. *See Lefkowitz v. Cunningham*, 431 U.S. 801 (1997) (holding it improper to force choice between invoking Fifth Amendment right against self-incrimination and First Amendment associational right to hold public office); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (improper to force choice between freedom to travel and freedom of association). Our Constitution protects both freedom of speech and the right to vote. Minnesota's law forcing a choice between the two should be invalidated.

CONCLUSION

The decision below should be reversed.

Respectfully Submitted,

LISA S. BLATT
ROBERT J. KATERBERG
AMANDA CLAIRE HOOVER
SALLY L. PEI
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Mass. Ave., NW
Washington, DC 20001

TRENTON DAVID
ARNOLD & PORTER
KAYE SCHOLER LLP
700 Louisiana Street
Suite 4000
Houston, TX 77002

DAVID D. COLE
Counsel of Record
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(212) 549-2611
dcole@aclu.org

LEE ROWLAND
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

JOHN B. GORDON
TERESA J. NELSON
AMERICAN CIVIL LIBERTIES
UNION OF MINNESOTA
2300 Myrtle Ave., Ste. 180
St. Paul, MN 55114

Counsel for Amici Curiae

January 12, 2018