No. 13-185

In The
Supreme Court of the United States

MINNESOTA MAJORITY, ET AL.,
Petitioner,

v.

JOE MANSKY IN HIS OFFICIAL CAPACITY AS THE ELECTION MANAGER FOR RAMSEY COUNTY, ET AL.,
Respondent.

On Petition for Writ of Certiorari to the United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AND THE CATO INSTITUTE, *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Minn. Stat. § 211B.11, which prohibits all "political" speech in all physical media at or in the polling place, is facially unconstitutional because no conceivable governmental interest could justify such an absolute prohibition on this most highly protected form of speech.

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INTERESTS OF *AMICI CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case is of central concern to Cato because it relates to the chilling of political speech, the protection of which lies at the very core of the First Amendment.

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[1] Pursuant to Sup. Ct. R. 37.2(a), *amici* certify that counsel of record for the parties were notified of the intent of *amicus* to file this brief in support of the Petitioner more than 10 days before September 9, 2013. Counsel of record for the parties to this action have consented to the filing of this *amicus curiae* brief and letters providing such consent are filed in conjunction with this brief. Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel to any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel have contributed monetarily to its preparation or submission.

Amici are interested in the instant case because the fundamental constitutional guarantee of the right to engage in free speech protects the rights of voters to express themselves in the polling place through passive political speech. Minn Stat. § 211B.11's absolute ban on any form of expressive political speech in the polling site threatens the free speech protection the First Amendment is meant to guarantee. Granting *certiorari* is crucially important to properly define the rights of voters engaging in passive political speech in the polling site.

SUMMARY OF THE ARGUMENT

Minn. Stat. § 211B.11, which restricts all "political speech" within the polling place, is an unconstitutional restriction on the freedom of speech. This Court's First Amendment jurisprudence gives special protection to the core political speech at issue in this case. Political speech, especially speech critical of the government, individual politicians, and political ideas, is essential to the continued viability of the democratic process.

Minn. Stat. § 211B.11's absolute ban on all "political speech" is a content-based restriction that should fail strict scrutiny review. The statute is not narrowly tailored to serve any compelling government interest. The stated government interest in preventing confusion or improper influence over voters is not furthered by a complete ban on any and all political speech. Further, Minn. Stat. § 211B.11 is facially overbroad, and it cannot be saved by narrowly reading the statute to apply to only limited forms of political speech.

The Court should grant certiorari and invalidate Minn. Stat. § 211B.11 as an unconstitutional abridgment of the freedom of speech.

ARGUMENT

I. REGARDLESS OF THE TYPE OF FORUM THAT THE POLLING PLACE REPRESENTS, MINN. STAT. § 211B.11 SHOULD BE INVALIDATED BECAUSE IT REPRESENTS AN ABSOLUTE BAN ON THE MOST PROTECTED FORM OF SPEECH

In reviewing the constitutionality of restrictions of expressive activity on government-controlled property, this Court uses a difficult-to-apply set of tools often referred to as "forum analysis." Forum analysis categorizes the physical location where the expressive activity in question takes place as either a "traditional public forum," a "designated public forum," "limited public forum," or a "nonpublic forum." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-70 (2009). Depending on which of these categories the property falls into, the degree of protection afforded to the speech within that forum varies accordingly. *Id.*

Despite a fairly consistent application of the forum analysis approach in cases where speech on government property is at issue, this Court has never suggested that it should be rigidly applied in instances where application of the forum analysis does not adequately consider the speech interests at stake. Indeed, in some instances this Court has specifically acknowledged that a formulaic

application of the forum analysis framework would fail to adequately protect important First Amendment interests.

In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n. 32 (1984), this Court warned of the "limited utility" of focusing "on whether the tangible property itself should be deemed a public forum." This decision further noted that the traditional forum analysis generally provides a workable analytical tool, but that "the analytical line between a regulation of the 'time, place, and manner' in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges." *Id.* When political speech is being squelched, such as in this case, rigidly applying a categorical version of forum analysis can distract courts from giving political speech the protection it deserves.

Similarly, this Court has not hesitated from eschewing a rigid application of the forum analysis in other contexts, such as in instances where entire media of expression were threatened. Thus, in *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), the Court affirmed an invalidation of a city ordinance that prohibited property owners from displaying any signs on their property except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. *Id.* at 45. In upholding the judgment of the Eighth Circuit, this Court noted a "particular concern" with laws that invalidated an entire medium of expression. *Id.* at 55.

Moreover, it was acknowledged that even though "prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, . . ., the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* In other words, broader speech-protection interests outside of traditional forum analysis will trump the categorical approach in order to adequately protect, an important speech right.[2]

The restrictions found in Minn. Stat. § 211B.11 curtail an important speech right and rigid adherence to a categorical framework should be eschewed in favor of a searching and deliberate inquiry into the importance of the type of speech implicated, and the breadth of the speech right deprivation. Minn. Stat. § 211B.11 completely bans a loosely-defined genre of speech in all possible physical media of expression. Minn. Stat. § 211B.11; Pet. App. 64-65. If ever there were a case that threatened "the widest possible dissemination of information" and the "unfettered interchange of

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[2] "[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others . . . . To ensure 'the widest possible dissemination of information[,]' and the 'unfettered interchange of ideas,' the first amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression." *Gilleo*, 512 U.S at 55 n. 13.

ideas," it would certainly be this one. *Gilleo*, 512 U.S. at 55 n.13.

This Court strongly protects "core political speech" as a value that "occupies the highest, most protected position" in the hierarchy of constitutionally-protected speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). *See also Burson v. Freeman*, 504 U.S. 191, 217 (1992). ("The statute directly regulates political expression and thus implicates a core concern of the First Amendment"). In defining the core political speech worthy of this elevated level of protection, this Court has broadly included "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

Political speech gets higher protection because it is an essential part of the democratic process. Indeed, evaluating a statute that would have restricted all anonymous leafleting in opposition to a proposed tax, this Court reflected on the importance of specifically protecting such political speech:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346-47 (1995), quoting *Roth v. United States,* 354 U.S. 476, 484 (1957).

Recently, this Court made it abundantly clear that laws that burden political speech are subject to strict scrutiny review. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), invalidated a federal statute that barred certain independent corporate expenditures for electioneering communications. Highlighting the primacy of political speech, the Court noted that "political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United*, 558 U.S. at 340 (quoting *Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007)).

With this history in mind, there is little doubt that Minn. Stat. § 211B.11 is hostile to core political speech protections traditionally supported by this Court. By eliminating virtually all means of political expression in or around the polling place, the statute cuts off the "unfettered interchange of ideas" in an important place for individual political expression—the polling place. *McIntyre,* 514 U.S. at 346-47.

While this Court has acknowledged the importance of maintaining decorum and peace at the polling location and at preventing undue voter confusion or manipulation, it has always done so in as minimally a restrictive manner as possible, and has never done so in the form of an absolute bar on all political expression. *See Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 574 (1987) (invalidating a statute because it "reache[d] the universe of expressive activity, and,

by prohibiting *all* protected expression, purport[ed] to create a virtual 'First Amendment Free Zone.' ") (emphasis in original). Validating a sweeping ban on core political speech would seriously undermine this Court's stated goal of safeguarding the democratic process.

II. DESPITE THIS COURT'S DECISION IN *BURSON*, MINN. STAT. § 211B.11 CANNOT SURVIVE STRICT SCRUTINY REVIEW

In *Burson v. Freeman*, *supra*, this Court upheld under strict scrutiny review a content-based restriction on political campaigning speech in a public forum. *Burson*, 504 U.S. at 211. The Court cautioned, however, that it was a narrow holding and represented a rare occasion when a facially content-based law survived strict scrutiny. *Id.* The statute in *Burson* specifically prohibited "political speech," and the Court determined it was a content-based restriction on speech. *Id.* at 198. It could thus only survive review if it was necessary to serve a compelling state interest and was narrowly drawn to achieve that end. *Id.* Minn. Stat. § 211B.11 suffers from the same facial content-based purpose as the statute at issue in *Burson*. Unlike the *Burson* statute, however, Minn. Stat. § 211B.11 is not the "rare case" that withstands strict scrutiny. *Burson,* 504 U.S. at 211.

A. The Government's Interest In Prohibiting All Political Speech Is Not Sufficiently Compelling

In *Burson*, this Court determined that the statute creating "campaign-free" zones served two government interests. First, the state argued that it served the interest of allowing citizens to vote freely for their candidate of choice. *Burson*, 504 U.S. at 198. Second, it ensured the integrity and reliability of the election process. *Id.* Factored into the Court's analysis was the long history of restrictions against vote bribery and intentional voter confusion and suppression around polling locations during the Colonial period, as well as legislation aimed at "battl[ing] against two evils: voter intimidation and election fraud." *Id.* at 206. As a result, this Court ultimately concluded that Tennessee had a "compelling interest in protecting voters from confusion and undue influence," and in "preserving the integrity of its electoral process." *Id.* at 199.

The first section of Minn. Stat. § 211B.11—which prohibits any person from "ask[ing], solicit[ing] or in any matter try[ing] to induce or persuade a voter" within 100 feet of a polling place—uses similar language and has similar objectives as the Tennessee statute upheld in *Burson*. Both statutes implicate the same government interests of protecting voters from confusion and undue influence. Minn. Stat. § 211B.11. Indeed, the Eighth Circuit specifically identified and determined as much. *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1055-56 (8th Cir. 2013).

But the third sentence of Minn. Stat. § 211B.11—which prohibits wearing "[a] political badge, political

button, or other political insignia . . . at or about the polling place on primary election day"—starkly differs in both scope and objective from the previous section. By not specifically targeting solicitation and influence, the broader prohibitions in the third sentence cannot be fairly assumed to implicate the same accepted *Burson* governmental interests. Pet. App. 63. Indeed, by evaluating the first and third sentences of the statute separately, the Eighth Circuit tacitly acknowledged that the scope and purpose of the government interest differs between the two sentences. *Minnesota Majority,* 708 F.3d at 1057-58.

This Court will and should strictly scrutinize any stated governmental interest. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 777-779 (2002),l this Court determined that Minnesota's stated interests of "preserving the impartiality of the state judiciary" and "preserving the appearance of the impartiality of the state judiciary" were insufficiently compelling to support the statutory prohibition on candidates for judicial election from announcing their views on disputed legal and political issues. Minnesota has similarly failed to provide a compelling government interest here.

A total ban on political speech within the polling location is a drastic measure; such a broadly-worded prohibition must be closely examined with a specifically identified government interest in mind. This Court should accept certiorari to make it clear that drastic incursions into First Amendment freedoms require clear justification, and that the state interests of preventing confusion and influence and ensuring electoral integrity, while justified under *Burson* for a statute prohibiting *solicitation*

and *persuasion*, are insufficiently compelling to justify prohibiting *all* political speech in the polling place.

B. Minn. Stat. § 211B.11 Is Not Narrowly Tailored To Achieve Any Government Purpose

Even if this Court were to find that Minnesota had put forward a sufficiently valid government interest in restricting otherwise protected speech under § 211B.11, this Court must further evaluate a statute's "tailoring" to determine whether or not the proposed restrictions are sufficiently narrow in scope to minimally impact the affected speech interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). In examining the tailoring, this Court has required that the restriction "must be the least restrictive means among available, effective alternatives.'" *United States v. Alvarez*, 132 S.Ct. 2537, 2551 (2012), *quoting Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 666 (2004).

Minn. Stat. § 211B.11's ban is truly breathtaking in its scope. It facially prohibits all speech found on any "political badge, political button, or other political insignia" without any attempt to clearly define what constitutes "political" speech or to limit the scope of its potential application. Pet. App. 63. Indeed, a literal reading of the statute would seem to ban even "non-political" speech that was included alongside "political" speech.

The state's remedy of prohibiting all "political speech" is unconstitutionally overinclusive in banning political speech that would not meaningfully frustrate the state's objective of ensuring electoral integrity and preventing voter confusion.

Additionally, it is unconstitutionally underinclusive in that it continues to allow speech that is not "political," but may still actively frustrate the stated governmental purpose of the statute.

1. Minn. Stat. § 211B.11 Is Overinclusive In Disallowing Even Inert Political Speech

Within the context of considering the proper "fit" between a statute's prohibitions and the purpose it sets out to achieve, this Court has noted that it will consider how targeted the speech prohibition is, and will invalidate statutes that include too much protected speech. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.,* 502 U.S. 105, 121 (1991) (declaring that New York's "Son of Sam" law, by which income earned from book sales by convicted killers was forfeited to their victims, was "significantly overinclusive" and thus not narrowly tailored to the stated government interest); *Citizens United,* 558 U.S. at 362 (striking down a statute barring independent corporate expenditures for electioneering communications, in part, because it was overinclusive in barring both for-profit and non-profit corporations).

Minn. Stat. § 211B.11 is substantially and fatally overinclusive. The statute prohibits all speech deemed to be "political" as determined solely at the discretion of the on-site election judges, if it appears on any buttons, badges, or insignia. Pet. App. 64. Further, the interpretive provisions provided by the Ramsey County Election Manager advise election judges that the statute allows banning "hat[s], t-shirt[s]," and other materials. Pet. App. 65. While some "political" speech examples are given that are

arguably targeted at the legitimate government interests of preventing confusion, undue voter influence, or persuasion, many of the given examples do not implicate these concerns in any way. A hat or shirt bearing nothing more than the words "Democrat," "Republican," or "Tea Party," or displaying a picture of a blue donkey or red elephant without any context would clearly fall within the prohibited materials, despite a lack of any indicated intention to influence or persuade any voter.

Additionally, the interpretive provisions of the statute allow election judges to disallow any materials "promoting a group with recognizable political views." Pet. App. 65. Such a provision would seem to disallow the wearing of local or national union badges, buttons displaying the flag of any state or national government, or even a pin indicating support for the Catholic Church[3] or the Vatican—a fact that was recognized by the dissent:

> For example, how does the wearing of a button or shirt bearing an American flag or the Star of David, which could arguably be considered political under this statute, disrupt the 'peace, order, and decorum' of the voting booth? I do not accept that the presence of a passive and peaceful voter who happens to wear a shirt displaying, for example, the words "American Legion," "Veterans of Foreign Wars," "AFL–CIO," "NRA," "NAACP," or the logo of one of these

[3] The Catholic Church has an Episcopal jurisdiction, The Holy See, which is responsible for the diplomatic and political decisions of the Church.

> organizations (all of which have actively participated in the political process) somehow causes a disruption in the polling place or confuses or unduly influences voters."

Mansky, 708 F.3d at 1062 n.7 (Shepherd, J., concurring in part and dissenting in part).

Even without considering the interests in freedom of association obviously implicated by such a broad-based ban, it is difficult to imagine that such a dramatically overinclusive statute could pass constitutional muster.

2. Minn. Stat. § 211B.11 is Fatally Underinclusive

In addition to analyzing whether a statute prohibits too much speech, this Court will also consider whether the statute fails to restrict a significant amount of speech that is just as harmful to the stated interest as other speech restricted by the statute. *See Citizens United,* 558 U.S. at 362 (striking down a statute barring independent corporate expenditures for electioneering communications, because it was underinclusive in barring corporate speech in only select media, and only for a 30-to-60-day period before an election); *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2740 (2011) (invalidating as "wildly underinclusive" a state statute that imposed restrictions and labeling requirements on the sale of "violent videogames" to minors because it still allowed for purchases if parents approved, despite the stated government interest that such games were dangerously harmful to minors).

Minn. Stat. § 211B.11 suffers from an unconstitutional degree of underinclusion. By attempting to achieve the stated government interest of preventing undue confusion and persuasion by targeting only "political" speech, the statute leaves entirely unregulated non-political forms of persuasive or confusing speech that could be just as harmful. For example, the statute does not appear to prohibit individuals from wearing buttons or shirts declaring "election cancelled" or "election postponed," despite the fact that many voters might be confused about the actual vote date, or be persuaded not to vote after reading such buttons. Nonetheless, because such speech would not clearly implicate any "political" concern, it would be permissible under the language of § 211B.11.

The Eighth Circuit also accepted as a legitimate state interest the goal of "maintain[ing] peace, order, and decorum" in the polling place. *Mansky,* 708 F.3d at 1057. This stated purpose similarly suffers from an unconstitutional degree of underinclusion in that it leaves entirely unregulated a host of expression that would be much more likely to undermine peace, order, and decorum than any form of "political" speech. While buttons, pins, or shirts advocating for or against a candidate or ballot initiative have the potential to be inflammatory or controversial, there is no reason to believe that similar buttons or pins with disparaging language directed toward racial or religious groups would not result in a greater potential for violence or disruption within the polling location. Yet such speech remains entirely unregulated by Minn. Stat. § 211B.11.

Minn. Stat. § 211B.11 is not narrowly tailored to serve any legitimate state interest. By failing to

achieve a proper "fit" between what it seeks to regulate and what it actually regulates, the statute leaves as unregulated speech that would likely contribute to polling-place confusion and restricts speech that has no appreciable effect on voters. As such, the statute fails strict scrutiny review and should be invalidated.

III. MINN. STAT. § 211B.11 IS UNCONSTITUTIONALLY OVERBROAD

Beyond the universe of speech explicitly excluded by Minn. Stat. § 211B.11, it is also possible to imagine an even wider array of speech that could readily be declared "political" at the discretion of unguided and unaccountable election judges. In instances where a statute could result in the restriction of too much speech, this Court has applied the doctrine of overbreadth, invalidating statutes that sweep in a substantial amount of otherwise protected speech.

In *City of Houston, Tex. v. Hill*, 482 U.S. 451, 455 (1987), this Court struck down a statute that made it illegal to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." The *Hill* decision reasoned that such a statute "criminalizes a substantial amount of constitutionally protected speech," and did not provide enough "breathing room" to ensure that valid speech remained protected. *Id.* at 466. The Court also noted with concern that broad, sweeping statutes give too much discretion to "policemen, prosecutors, and juries to pursue their personal predilections," and "the moment-to-moment judgment[s]" of when to and when not to pursue

prosecution. *Id.* at 465, n. 15. Additionally, whether the statute reaches a substantial amount of protected expressive activity is "judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

Minn. Stat. § 211B.11 raises the same facial overbreadth concerns raised in *Hill*. By barring all political speech without distinction, the statute sweeps in far more speech than was intended or anticipated to be regulated. Popular buttons or stickers declaring "I voted," "Rock the vote," "Vote or die," or other similar advocacy for voting over non-voting could be deemed "political" and subject to censorship.

Similarly, because the statute has been interpreted by the Eighth Circuit as *not* limited to candidates or issues only on the current ballot, context-less buttons, shirts, or stickers showing a picture of a gun, a marijuana leaf, or even the iconic Gadsden flag could readily be interpreted as advocating for political issues like gun rights, drug legalization, or limited government, respectively. *Mansky*, 708 F.3d at 1058.

Because the discretion of the election judges to determine what is or is not political is virtually limitless under Minn. Stat. § 211B.11, a very real danger exists that individual election officials will target for suppression political expression they simply personally disagree with. Moreover, there is no review or appeal process for challenging the individual discretion of the election officials, and there is no comprehensive definition of what qualifies as "political" built into the statute. Pet. App. 63-66.

Indeed, identifying the danger of too much discretion over the granting or withholding of fundamental rights, Justice Thurgood Marshall had the following to say:

> A principle underlying many of our prior decisions in various doctrinal settings is that government officials may not be accorded unfettered discretion in making decisions that impinge upon fundamental rights. Two concerns underlie this principle: excessive discretion fosters inequality in the distribution of entitlements and harms, inequality which is especially troublesome when those benefits and burdens are great; and discretion can mask the use by officials of illegitimate criteria in allocating important goods and rights.

Schall v. Martin, 467 U.S. 253, 306-07 (1984) (dissenting).

The twin dangers recognized by Justice Marshall are particularly relevant in the instant case where the "fundamental right" being "protected" by election officials' discretion is the right to engage in speech, especially since such speech can touch on so many other fundamental interests that would otherwise be protected in other contexts. Shirts or hats reflecting support for the sanctity of life may suddenly become politicized "pro-life" statements subject to suppression at the polling booth, even though they would be protected speech in any other public place. Voters wearing pins or buttons stating support for traditional marriage, opposition to evolutionary

teachings, or other commonly held sincere religious beliefs would be at the mercy of the unreviewable "personal predilections" of a given election official. *Hill*, 482 U.S. at 465, n.15.

Pictures of famous popular culture figures are also not safe from regulation if they have the potential to be interpreted as "political." Iconic photographs of Ghandi, Martin Luther King Jr., or John Lennon might be seen to represent anti-war sentiments and thus summarily restricted.

As an added concern, this Court has considered the extent to which the overregulation of some speech may "chill," or prevent a speaker from speaking altogether when the statute doesn't include an explicit requirement that a speaker intended to knowingly engage in "speech." Citing these "chilling" concerns, this Court has invalidated statutes on the grounds that they did not include any intent element, and thus threatened far too much protected speech by encouraging uncertain speakers to engage in self-censorship. *Smith v. California*, 361 U.S. 147, 152 (1960) (invalidating a statute that held bookshop owners liable for any obscene content of the books in their possession on the grounds that the ordinance's "strict liability" feature would have the unavoidable effect of causing booksellers to self-censor in order to avoid liability); *United States v. Alvarez*, 132 S.Ct. 2537, 2551 (2012) (construing a statute to regulate only "knowing and intentional" falsehood, specifically in order to "reduc[e] the risk that valuable speech is chilled," before invalidating the statute on other grounds).

Indeed, Minn. Stat. § 211B.11 raises these very chilling concerns. By broadly banning all "political"

speech without any clear definition of the term, speech that is wholly unintended to convey any message at all can be deemed "political" by an election judge. Single black leather gloves may suddenly become civil rights-era protest symbols, and black armbands may become censorable anti-war cries. *See Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503 (1968). While this Court has cautioned against the invocation of "fanciful hypotheticals" in support of overbreadth challenges, there is little doubt that a straightforward application of the broad language of Minn. Stat. § 211B.11 would lead to these and other similarly speech-restrictive applications of the statute. *United States v. Williams*, 553 U.S. 285, 301 (2008).

IV. A NARROWING CONSTRUCTION CANNOT SAVE THE STATUTE FROM ITS FACIAL OVERBREADTH

In order to save a statute from a facial overbreadth challenge, on some occasions this Court will apply a limiting construction to the statute, interpreting a facially unclear or vague statute narrowly in order to maintain its constitutionality. *Boos v. Barry*, 485 U.S. 312, 331 (1988). This Court has made clear, however, that limiting constructions are "appropriate only where the statute is 'fairly susceptible' " to narrowing, and that it will not apply narrowing in instances that "require[] rewriting, not just reinterpretation." *Stenberg v. Carhart*, 530 U.S. 914, 945 (2000); *United States v. Stevens*, 130 S.Ct. 1577, 1592 (2010).

Indeed, this Court has specifically cautioned against the incentives that would result from the

overuse of narrowing constructions to save facially overbroad statutes:

> If the promulgation of overbroad laws affecting speech was cost free . . . that is, if no conviction of constitutionally proscribable conduct would be lost, so long as the offending statute was narrowed before the final appeal . . . then legislatures would have significantly reduced incentive to stay within constitutional bounds in the first place. When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be 'chilled' as a consequence.

Osborne v. Ohio, 495 U.S. 103, 120-21 (1990) (*quoting Massachusetts v. Oakes*, 491 U.S. 576, 586 (1989) (Scalia, J., concurring in part and dissenting in part)).

No such potential for a limiting construction exists in this case. The language of Minn. Stat. § 211B.11 intentionally covers the entire universe of all "political" speech. In fact, the Eighth Circuit was explicit in its findings that it understood the statute to broadly apply to all "political" speech, not just campaigning speech for or against a particular candidate, or for speech related to specific measures on the ballot. *Mansky,* 708 F.3d at 1058.

Based on the expansive facial breadth of Minn. Stat. § 211B.11 in restricting all political speech, including speech that was either unintended or unknown to be political by the speaker, this Court

should find that "a validating construction is simply impossible here," and strike down the statute on the grounds that it has a clearly impermissible purpose. *Grace v. Burger,* 665 F.2d 1193, 1206 (D.C. Cir. 1981).

CONCLUSION

For the reasons set forth above, *amici* ask this Court to grant certiorari in order to review and rectify Minn. Stat. § 211B.11's unconstitutional restriction on all "political" speech within the polling location.

Respectfully submitted,

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