No. 13-185

IN THE

Supreme Court of the United States

MINNESOTA MAJORITY, *et al.*,
Petitioners,

v.

JOE MANSKY, in His Official Capacity as the Elections Manager for Ramsey County, *et al.*
Respondents.

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

BRIEF OF *AMICUS CURIAE* TEA PARTY PATRIOTS, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS

Tea Party Patriots, Inc., ("TPP")[1] is a non-profit organization, with a pending application to be

[1] TPP notified the parties at least 10 days prior to the due date of this brief of its intention to file this brief. The parties have provided written consent to the filing of this *amicus curiae* brief.

Listed counsel for TPP authored this brief in its entirety. Neither counsel nor any party made a monetary contribution to fund the preparation or submission of this brief, and no person other than TPP and its members has made such a monetary contribution.

recognized as tax-exempt under I.R.C. 501(c)(4). TPP empowers and represents more than 3,000 local groups throughout the United States, all working to advance three core values: (1) constitutional limited government; (2) fiscal responsibility; and (3) free markets. The philosophy undergirding those values is agnostic as to political party or candidates. The shirts that voting officials deemed to violate the Minnesota law at issue, Appendix to Petition ("App.") 4 & 27-28, bear TPP's registered trademarks of its name and shield. App. 68-69. TPP is the owner of U.S. Registration No. 4296739 for the mark "Tea Party Patriots," and is the owner of the following live U.S. Trademark Serial Nos. for its shield design mark: 85/900,046; 85/900,041; 85/900,035; 85/932,353; 85/901,101; 85/900,065; 85/900,064; and 85/900,055.

The petition does not seek review of the appellate court's ruling upholding Minnesota's campaign-free buffer zone, and TPP does not argue otherwise. TPP's concern is with the ban on undefined "political" insignia within the polling place, because that prohibition implicates core democratic freedoms. The broad sweep of the ban, which includes TPP's registered trademarks, threatens to chill the free speech rights of TPP's local supporters and complicate TPP's efforts to be recognized as a social welfare organization that is not substantially engaged in political activity.

RELEVANT FACTS

Minnesota law governing Election Day activities allows only designated officials and voters to be inside a polling place. Minn. Stat. § 204C.06, subd. 2 (2013). The law also prohibits anyone other than election officials, persons waiting to vote or register to vote, and persons conducting exit polls from standing

within 100 feet of the polling place. Minn. Stat. § 204C.06, subd. 1 (2013).

Minnesota law further states that, within that same 100-foot buffer zone, "[a] person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter . . . to vote for or refrain from voting for a candidate or ballot question." Minn. Stat. § 211B.11, subd. 1 (2013) (hereinafter "buffer zone restriction"). The sentence at issue in the current petition, the third sentence of the same subdivision, provides that "[a] political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." Minn. Stat. § 211B.11, subd. 1 (2013) (hereinafter "political insignia restriction"). Violation of either of these speech restrictions is a petty misdemeanor. Minn. Stat. § 211B.11, subd. 4 (2013). A petty misdemeanor under Minnesota law is not a crime, and may be punished by a fine of no more than $300. Minn. Stat. § 609.02, subd. 4a (2013).

Minnesota law does not define, and apparently has never defined, "political badge, political button, or other political insignia." Respondents, however, distributed identical Election Day policies, App. 25 & 25, n.3, that prohibited political materials "while in the polling place," App. 26, and designated individual election judges as the sole arbiter of what is "political." *Id.* The policies provided examples that included not only political parties, but "[i]ssue oriented material designed to influence or impact voting," and "[m]aterial promoting a group with recognizable political views (such as Tea Party, MoveOn.org and so on)." App. 3, 26. "Tea Party," of course, is not a political party, or even a single group, but an historical label adopted by grassroots organizations and citizens concerned about

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A. The Minnesota Statute Creates Additional Restrictions on Speech by Voters.

Any analysis of the Minnesota law must begin with the fact that the statute creates two restrictive zones: (1) a 100-foot zone within and around the polling station free of campaign literature or persuasive activity (the "buffer zone restriction"), Minn. Stat. § 211B.11, subd. 1 (2013); and (2) a zone within the polling station free of political badges, buttons, or insignia (the "political insignia restriction"). *Id.* See App. 7. ("The third sentence of the Minnesota statute applies only within ('at or about') the polling place."). Thus, the statute allows non-campaign political insignia *outside* the polling station and *within* the buffer zone.

Furthermore, the buffer zone restriction targets only election officials, voters, and exit pollsters, Minn. Stat. § 204C.06, subd. 1 (2013), while the political insignia restriction affects only designated officials and voters, Minn. Stat. § 204C.06, subd. 2 (2013). Accordingly, a voter or exit pollster could remain within the buffer zone, but outside the polling station itself, with as much non-campaign political insignia as he or she wished. However, a person wishing to actually vote or register to vote must give up progressively more free speech rights, first within the buffer zone and then within the polling place itself. Within the polling place, he or she would be forced to choose between (1) exercising the right to vote or (2) exercising rights to passive political speech and paying a fine. Under the guise of protecting voters, the State actually places more burdens on them.

B. A Statute that Forces a Choice Between Two Constitutional Rights Should Receive Strict Scrutiny.

In the seminal case about campaign literature around polling places, *Burson v. Freeman,* 504 U.S. 191 (1992), this Court used traditional forum analysis to uphold restrictions on traditional public forums, specifically sidewalks within a "buffer zone" outside the voting area. The *Burson* plurality, however, did not determine what level of scrutiny applied to the voting area itself. Subsequent appellate courts have determined without exception that polling places are nonpublic forums, and that speech restrictions in those areas should receive lessened scrutiny. *PG Pub. Co. v. Aichele,* 705 F.3d 91 (3d Cir. 2013); *United Food & Comm'l Workers Local 1099, et al. v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004); *Marin v. D.C. Board of Elections and Ethics*, 236 F.3d 716 (D.C. Cir. 2001); *Cotz v. Mastroeni,* 476 F.Supp. 2d 332 (S.D.N.Y. 2007); *Poniktera v. Seiler*, 181 Cal. App. 4th 121 (2010).

Few of those courts, however, considered restrictions on voters' free speech. The plaintiff in *Burson* was a candidate for office who wished to communicate with voters. *Burson*, 504 U.S. at 193. The court in *PG Pub. Co.,* 705 F.3d 91, considered the claims of a newspaper wishing to station reporters inside polling places. The plaintiffs in *United Food & Comm'l Workers Local 1099*, 364 F.3d 738, sought to solicit signatures outside six polling places. The plaintiffs in *Cotz,* 476 F.Supp. 2d 332, and *Poniktera*, 181 Cal. App. 4th 121, were poll watchers, not voters. Only *Marin*, 236 F.3d 716, considered the claims of a voter who wished to wear a campaign sticker.

Unlike *Burson*, and most subsequent cases, this case implicates two core Constitutional values: the

right to vote and the right to free speech. The "right to vote freely for the candidate of one's choice is the *essence of a democratic society*," *Burson*, 504 U.S. at 199, *quoting Reynolds v. Sims,* 377 U.S. 533, 555 (1964) (emphasis added). There is "no right [that] 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. Other rights, even those most basic, are illusory if the right to vote is undermined.'" *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964). Likewise, speech on matters of public concern is well "within the core of First Amendment protection." *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008). The protection of free speech "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick v. Myers*, 461 U.S. 138, 145 (1983) *quoting Roth v. United States*, 354 U.S. 476, 484 (1957). Political speech itself is "central to the meaning and purpose of the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 329 (2010).

Traditional forum analysis functions well for cases where a non-voter wishes to communicate with a voter. In such situations, the State may decide to guard against the risk that a speaker's exercise of rights might burden a voter's rights. Indeed, *Burson* itself was a case where "the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud." *Burson,* 504 U.S. at 211. It fell within the "narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Id.* at 213. (Kennedy, J., concurring).

Minnesota's restriction, however, does not protect the right to vote, but places additional burdens on it. Indeed, the state can hardly claim that it is trying to prevent voter intimidation from non-voters when only voters and exit pollsters are allowed within the buffer zone. Nor can the state claim that the political insignia prohibition protects voters from their fellow voters when that prohibition does not apply to a long line of voters outside the polling place but within the buffer zone. The state has concluded that, whatever protecting voters requires in the buffer zone, it does not require a ban on non-campaign political insignia. The record contains no evidence establishing how voters are protected by additional restrictions on their free speech rights within the polling place. If peace, order, and decorum can be maintained outside the polling place, despite voters' passive political speech, there is no logical reason to believe that peace, order, and decorum will suddenly deteriorate once those voters move into the polling place itself. Thus, the invocation of *Burson* does not adequately address the additional burdens that the Minnesota statute imposes.

Indeed, a $300 fine for exercising both constitutional rights is at least as burdensome as other voting restrictions that this Court has struck down. In *Harman v. Forssenius*, 380 U.S. 528 (1965) and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), this Court struck down poll taxes of only $1.50 per year. Even accounting for inflation, that unconstitutional burden on voting was far less than the penalty that the Minnesota statute imposes on free speech. In the poll tax cases, the state imposed a monetary burden. Minnesota imposes an ideological burden, requiring that voters simply shut up (or pay up) if they want to vote.

The *Burson* forum analysis, then, does not work in the instant case. A much better analysis is to simply recognize that the Minnesota statute is a content-based restriction that warrants strict scrutiny. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). "This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Burson*, 504 U.S. at 197, *citing Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 530, 537 (1980). Accord, *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (statute restricting speech about crime is content based).

Strict scrutiny is particularly appropriate when the prohibited voter speech is only passive political speech, the type of speech that is least likely to disrupt peace, order, and decorum.[2] As this Court noted in *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (U.S. 1987), "[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains

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[2] The fact that the Minnesota statue does not prohibit verbal expressions of political opinions, or even political discussions, within the voting area, actions that undoubtedly would threaten peace, order and decorum more than passive political insignia, illustrates a serious flaw in its drafting. The statue is underinclusive to a degree that makes it difficult to survive any level of constitutional scrutiny. "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entertainment Merch. Ass'n*, 564 U.S. ___, ___, 131 S.Ct. 2729, 2740 (2011). *See also, City of Ladue v. Gilleo*, 512 U.S. 43, 51-53 (1994) (*id.*).

a political message — may not be 'airport related,' but is still protected speech even in a nonpublic forum." *Id.* at 576, *citing, Cohen v. California,* 403 U.S. 15 (1971). Furthermore, even in a nonpublic forum, "no conceivable governmental interest would justify such an absolute prohibition of speech." *Jews for Jesus, Inc.,* 482 U.S. at 575. It is the height of irony, then, for appellate courts to conclude that the government may freely prohibit passive, non-disruptive speech about politics in the very heart of the democratic process by voters exercising a fundamental democratic right.

This case poses a question that the *Burson* court left unresolved, specifically what level of scrutiny applies to restrictions on speech within a polling place. The case also poses the new question of what level of scrutiny applies to restrictions on speech *by voters* within a polling place. Given the core values at stake, this case poses "an important question of federal law that has not been, but should be, settled by this Court." Rules of the U.S. Supreme Court, Rule 10(c).

II. Minnesota's Flat Prohibition on Passive Political Speech Within a Polling Place Is Unconstitutionally Overbroad.

This case also poses an important question about the breadth of a state's statutory authority. The appeals court did not properly analyze the question of the statute's overbreadth, and thus decided "an important federal question in a way that conflicts with relevant decisions of this Court." Rules of the U.S. Supreme Court, Rule 10(c).

Overbreadth is a standing doctrine, allowing a person whose speech legitimately may be prohibited "to challenge a statute on its face 'because it also threatens others not before the court — those who

desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'" *Jews for Jesus, Inc.*, 482 U.S. at 574, *quoting, Brockett v. Spokane Arcade, Inc.*, 472 U.S. 491, 503 (1985). The analysis requires comparing a statute's scope to its legitimate purpose. "[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[3] *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973). Thus, the initial question is what speech Minn. Stat. § 211B.11 reaches.

A. The Prohibition on "Political" Speech Has a Broad Sweep.

Minnesota does not define what it considers to be "political buttons, political badges or political insignia." The closest statutory definition is "political purposes," defined as an act "intended or done to influence, directly or indirectly, voting at a primary or other election." Minn. Stat. § 211B.01, subd. 6 (2013). That definition is functionally indistinguishable from the definition of "campaign materials," *to wit*, "any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election." Minn. Stat. § 211B.01, subd. 2 (2013).[4] TPP

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[3] The appeals court cited this standard, but in connection with its forum analysis. App. 11. The court's confusion of the two doctrines contributed in no small part to its misapplication of this Court's precedent.

[4] A federal court struck down a similar definition of "campaign materials" as unduly vague. *Minn. Citizens Concerned for Life, Inc. v. Kelly*, 291 F. Supp. 2d 1052, 1067 (D. Minn. 2003), *aff'd in part, rev'd in part and remanded on other grounds*, 427 F.3d 1106 (8th Cir. 2005).

shirts, which contain only the organization's marks or the marks combined with historic slogans, are outside the parameters of either definition. Using some other nebulous definition, Minnesota's Election Day Policy included "Tea Party" materials, App. 3, 26, and voting officials stopped voters wearing registered marks of Tea Party Patriots, Inc. App. 4, 27, 68-69.

TPP's inclusion in Minnesota's prohibition is ironic in light of its pending application for tax-exempt status under I.R.C. § 501(c)(4). The regulations governing those applications severely limit such an organization's involvement in any political campaigns, Treas. Reg. 1.501(c)(4)-1(a)(2)(ii) (1963). TPP has chosen to have no intentional involvement in such campaigns. By that definition, then, TPP is not a political organization. Indeed, its designation as an "organization with recognizable political views" is not only ironic, but troubling, in light of the recent revelations that the IRS apparently has delayed ruling on TPP's application specifically because it, too, believes that TPP has political views.[5]

TPP does not dispute that, if one uses a broad definition of "political" that equates politics with philosophy, it espouses political views. However, such a broad definition of "political" includes most speech in contemporary American life. According to Black's Law Dictionary, "political" means "of or relating to the conduct of government." BLACK'S LAW DICTIONARY 1178 (9th ed. 2009). An older edition of the same

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[5] That application has been pending for 993 days as of the filing of this *amicus* brief, and TPP is not oblivious to the fact that the Treasury Inspector General for Tax Administration (TIGTA) has exhaustively documented discriminatory treatment of groups with "tea party" or patriots" in their names. TIGTA Report Ref. No. 2013-10-053.

authority had a more expansive definition, including, "Pertaining or relating to the policy or the administration of government, state or national. Pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government." BLACK'S LAW DICTIONARY 1158 (6th ed. 1991).

Using either of those definitions, there is little speech that is *not* political. The reach of federal and state governments has grown in the years since the First Amendment was adopted. Many U.S. citizens, including those who support TPP, decry that growth, while others applaud it. But there can be little doubt that a government body, whether local, state, or federal, regulates virtually every aspect of an American citizen's life. Thus, it is almost impossible to find a topic that does not involve "the conduct of government" or "administration of government, state or national."

In that way, the statute is similar to another Minnesota prohibition that this Court found to be unconstitutional. In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), this Court invalidated a canon of judicial conduct that prohibited candidates for judicial office from announcing their views on "disputed legal or political issues." *Id.* at 768. In finding the canon to be an unconstitutional content-based restriction, this Court noted, "there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction." *Id.* at 772, *citing*, *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993).

The U.S. Code contains more than 39,000 pages of statutes governing American life. 1 U.S.C. § 1 (2013), *et seq.* The Code of Federal Regulations consists of 51 separate titles and a complete set spans over 25 feet

of shelf space. It includes regulations governing margarine, 21 C.F.R. 166.110 (2013); bakery products, 21 C.F.R. 136.110 (2013); frozen desserts, 21 C.F.R. 135.140 (2013); infant formula, 21 C.F.R. 184.1950 (2013); cosmetics, 21 C.F.R. 700, *et seq.* (2013); tobacco, 27 C.F.R. 1 (2013); postage stamps, 39 C.F.R 233.2 (2013); all aspects of education, 34 C.F.R. 1, *et seq.* (2013); air and water, 7 C.F.R. 2.16 (2013); housing, 24 C.F.R. 1, *et seq.* (2013); employment, 29 C.F.R. 1, *et seq.* (2013); grain inspection, 7 C.F.R. 800, *et seq.*, (2013); animals, 9 C.F.R. 301.1 (2013); local television broadcasting, 7 C.F.R. 2200 (2013); climate change, 10 C.F.R. 300.1, *et seq.*, (2013); and alternative fuels, 10 C.F.R. 490 (2013). One need only consider the far reaches of the Internal Revenue Code, 26 C.F.R. 1, *et seq.*, (2013), to realize how deeply the federal government intrudes into the lives of its citizens.

Minnesota is an enthusiastic follower of the federal example. Among Minnesota's 560 different statutes are laws governing cows and milk quality, Minn. Stat. § 343.21 (2013); greased pig contests and turkey scrambles, Minn. Stat. § 343.36 (2013); academic excellence, Minn. Stat. § 124D.94 (2013); stairway chairs in public buildings, Minn. Stat. § 471.47 (2013); births, Minn. Stat. § 144.615 (2013); traffic control, Minn. Stat. § 169.15 (2013); electronic mail and the internet, Minn. Stat. § 325F.694 (2013); food, Minn. Stat. § 41A.11 (2013); adult mental health, Minn. Stat. § 245.461 (2013); farm equipment, Minn. Stat. § 325E.061 (2013); death (anatomical gifts), Minn. Stat. § 525A.01 (2013); blind persons' literacy, Minn. Stat. § 148E.290 (2013); businesses, Minn. Stat. § 302A.001 (2013); child labor, Minn. Stat. § 181.01 (2013); clean air, Minn. Stat. § 144.411 (2013); clean water, Minn. Stat. § 103G.2241 (2013); fishing and hunting, Minn. Stat. § 97A.011 (2013); marriage,

Minn. Stat. § 517.01 (2013); Minnesota folk life, Minn. Stat. § 138.81 (2013); liquor, Minn. Stat. § 340A.311 (2013); student organizations, Minn. Stat. § 1240.34 (2013); potluck dinners, Minn. Stat. § 157.22 (2013); driving, Minn. Stat. § 169A.01 (2013); pollution, Minn. Stat. § 116G.151 (2013); smoking, Minn. Stat. § 144.391(2013); noxious weeds, Minn. Stat. § 18.76 (2013); art in public buildings, Minn. Stat. § 16B.35 (2013); home value, Minn. Stat. § 273.11 (2013); school choice, Minn. Stat. § 124D.03 (2013); cemeteries, Minn. Stat. § 307.08 (2013); and the number of toilets in certain buildings ("Potty Parity" laws), Minn. Stat. § 326B.109 (2013). Any discussion about government decisions on any of those topics, then, is "political."

Even speech that is not intended to be a comment about government can become political. For example, Chick-Fil-A found itself in the midst of a political firestorm when one of its executives made a comment opposing gay marriage. Not only individual citizens, but local governments reacted, threatening to prevent the chain from opening restaurants in their localities. Kim Severson, *Chick-fil-a Thrust Back Into Spotlight on Gay Rights*, N.Y. TIMES, July 26, 2012, at A13.

Labor unions, not specified in Minnesota's Election Day Policy as organizations with political views, have actively worked to support or oppose legislation in various states. Steven Greenhouse, *Organized Labor Hopes Attacks by Some States Help Nurture Comeback*, N.Y. TIMES, March 6, 2011, at A18. Several unions actively worked to recall the Wisconsin governor. Steven Greenhouse, *Labor Leaders Plan Door-to-Door Effort for Obama,* N.Y. TIMES, March 12, 2012, at A13.

Even clothing without insignia can become a political statement, as it did when Rep. Bobby Rush

wore a hoodie in the U.S. House of Representatives while decrying racial profiling and "Stand Your Ground" self-defense laws. Emmarie Huetteman, *The Caucus: Breaching Decorum to Make a Point*, N.Y. TIMES, March 29, 2012, http://nyti.ms/17nTA3I.

Thus, a voter wearing a Chick-Fil-A sticker, a union T-shirt, or a hoodie could be prevented from voting in Minnesota, without any prior notice. Even the depiction of a pig, Minn. Stat. § 343.36, or a toilet seat, Minn. Stat. § 326B.109, could be "political." As the dissent noted in the court below, Minnesota's prohibition would reach to an American flag, a Star of David, or insignia of the NAACP. The same is true for a Malcolm X or Che Guevera shirt, a Planned Parenthood ribbon, a Sierra Club hat, or a military pin. "The mere fact that the ordinance covers so much speech raises constitutional concerns." *Watchtower Bible and Tract Soc. of N.Y., Inc., et al. v. Village of Stratton, et al.*, 536 U.S. 150, 165 (2002).

B. Minnesota's Flat Prohibition on Passive Political Speech Within a Polling Place Is Overbroad.

There is no doubt that one's choice of clothing is protected by the First Amendment. The passive expression of one's views displayed on one's clothing is "closely akin to 'pure speech'" and "is entitled to comprehensive protection under the First Amendment." *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 505-506 (1969). "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact . . . This provision means what it says." *Id.* at 513 (ban on the "silent witness of armbands" is an unconstitutional restriction of free speech). *See also,*

Jews for Jesus, Inc., 482 U.S. at 576 ("[N]ondisruptive speech — such as wearing a T-shirt or button that contains a political message" is protected speech); *see also Smith* v. *Goguen*, 415 U.S. 566, 588 (1974) (White, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct); *Stromberg* v. *California*, 283 U.S. 359 (1931) (flying a red flag is protected speech); *Chandler v. McMinnville School District,* 978 F. 2d 524 (9th Cir. 1992) (wearing of buttons "used to silently convey an idea, message, or political opinion to the community" is protected speech).

There is little doubt that the Minnesota ban on all things "political" is effectively a total ban on passive political speech. Just as the Court noted in *Jews for Jesus, Inc., supra,* the Minnesota statute creates a "First Amendment free zone" at or about the polling place by prohibiting the passive expression of "pure speech" in the form of all "political" buttons, badges or insignia. The Minnesota statute is just as unconstitutionally overbroad.

A court's main task in an overbreadth challenge "'is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.'" *City of Houston v. Hill,* 482 U.S. 451, 458 (1987), *citing Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982). Moreover, a regulation will be found unconstitutional when the principle contended by the state is "inherently boundless." *Cohen,* 403 U.S. at 25. *See also, Reno v. ACLU,* 521 U.S. 844, 864 (1997) (considering vagueness of statute in determining overbreadth).

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to

> remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen, 403 U.S. at 24.

Minnesota's ban on all "political" buttons, badges and insignia, is as "inherently boundless" as the statute in *Cohen, supra.* In today's society, the scope of "political" is virtually limitless. There is no way for a Minnesota voter to know before reaching the polling place if his or her clothing falls within the prohibition. There is no way to predict whether an election judge will consider "Don't Tread on Me" to be historical or political. App. 3, 23-24.

Whether or not a voter violates the statute "depends upon the necessarily unknowable effect that the speaker's communication has upon others," *Minn. Citizens Concerned for Life, Inc.,* 291 F. Supp. 2d at 1067, in this case the election officials. "[A] speaker cannot be placed "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Thomas v. Collins*, 323 U.S. 516, 535 (1945); *see also, Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (invalidating ordinance that made it a crime for persons to "conduct themselves in a manner annoying to persons passing by").

In *Hill, supra.,* this Court struck down a criminal statute finding that the enforceable portion of the

offending statute did not deal with "core criminal conduct, but with speech" punishing only spoken words that "in any manner... interrupts" an officer." *Hill,* 482 U.S. at 462. Where, as here, the restriction gives enforcement officials "virtually unrestrained power to arrest and charge persons with a violation" it is unconstitutional because "the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident" and is therefore, "substantially overbroad and not fairly subject to a limiting construction." *Id.,* at 481 (Powell, J., concurring), citing *Lewis v. City of New Orleans,* 415 U.S. 130, 135-136 (1974). The Minnesota statute requires the very "unconstitutional enforcement discretion" that this Court prohibited in *Jews for Jesus, Inc.* and *Lewis.*

Given the statute's broad reach, the state cannot justify it based simply on a desire to protect voters from themselves. This Court's precedent makes clear that absolute bans on speech are not acceptable. After the decision at issue here, however, that principle no longer governs in the seven (7) states where the U.S. Court of Appeals for the Eighth Circuit sets precedent. Thus, review by this Court is necessary to stem the tide of overbroad restrictions on speech about government.

CONCLUSION

For all of the foregoing reasons, *amicus* Tea Party Patriots, Inc. respectfully urges this Court to grant *certiorari* to review the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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