No. 13-185

In The Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, MINNESOTA MAJORITY, MINNESOTA NORTH STAR TEA PARTY PATRIOTS, ELECTION INTEGRITY WATCH, SUSAN JEFFERS, INDIVIDUALLY AND AS AN ELECTION JUDGE, DAN MCGRATH AND ANDY CILEK,

Petitioners,

vs.

JOE MANSKY IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS THE ELECTIONS MANAGER FOR RAMSEY COUNTY, RACHEL M. SMITH IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS THE ELECTIONS MANAGER FOR HENNEPIN COUNTY, MIKE FREEMAN IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS HENNEPIN COUNTY ATTORNEY, JOHN J. CHOI IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS RAMSEY COUNTY ATTORNEY, AND MARK RICHIE IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS SECRETARY OF STATE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

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The First Amendment will not tolerate an absolute ban of "political" speech in the polling place, when expressed passively through the wearing of apparel, that chills even innocuous speech for fear of prosecution.

The Petitioners are impelled to reply against the Respondents' request that this Court deny our Petition for a Writ of Certiorari.[1] The issue of protecting political speech on a facial challenge in the polling place is ripe for review. The statute at issue, Minnesota Statute § 211B.11, subd. 1, with its threat of prosecution,[2] is an absolute ban on all "political speech" – a content-based restriction that should fail strict scrutiny. The U.S. Court of Appeals for the Eighth Circuit understood and explicitly stated the statute to broadly apply to all "political" speech.[3] Hence, an agreement exists that the law's application is substantial "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications. . . ."[4] Suggesting, as do the Respondents, that an as-applied review is necessary before adjudicating the facial challenge because "[w]hatever overbreadth may exist could be cured through case-by-case analysis of the fact situations to which its

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[1] Resp. Br. 1 and 34.

[2] Minn. Stat. Ann. § 211B.11, subd. 4 (Westlaw through 2013).

[3] *Minnesota Majority v. Mansky,* 708 F.3d 1051, 1058 (8th Cir. 2013).

[4] *Virginia v. Hicks,* 539 U.S. 113, 119-20 (2003).

sanctions . . . may be applied,"[5] defies what this Court has resolved in invalidating other similar unconstitutional content-based restrictions.

In *Republican Party of Minnesota v. White,* this Court, while invalidating a judicial canon as an unconstitutional content-based restriction because the canon prohibited candidates for judicial office from announcing their views on "disputed legal or political issues,"[6] noted that "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."[7] The contested statute banning political apparel does the same thing: ban political speech. Minnesota Statute § 211B.11, subd. 1 bans "political" expression of any kind and provides for the prosecution of individuals accordingly – including for speech either unintended or unknown by the speaker: "A political badge, political button, or other political insignia may not be worn at or about the polling place

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[5] Resp. Br. 11, *quoting Broadrick v. Oklahoma,* 413 U.S. 601, 615-16 (1973). Further, the Respondents invite uncertainty in the application of the First Amendment to voters and costly litigation for wearing of passive expressive apparel under the type of broad content-based restrictions in Minnesota's contested statute, bringing to mind case-by-case First Amendment analysis of public school student apparel as found in *Tinker v. Des Moines Indep. Community Sch. Distr.,* 393 U.S. 503 (1969) and its progeny.

[6] *Republican Party of Minnesota v. White,* 536 U.S. 765, 768 (2002).

[7] *Id.* at 768.

on primary or election day."[8] Thus, delaying adjudication for an as-applied challenge would serve no purpose.

While this Court has suggested that as-applied challenges should be decided before overbreadth challenges,[9] this Court also has chosen to do otherwise.[10] Thus, this Court has a choice, but we believe it should choose to address the sweeping constitutional question – will the U.S. Constitution tolerate an absolute ban of "political" speech on voter apparel under the First Amendment? For every election cycle before adjudication, the contested statute is a prosecutorial threat chilling protected speech because it indiscriminately proscribes an entire array of wholly innocuous political speech.

The Respondents, through their own admission of institutionalized policies under Minnesota Statute § 211B.11, prove that the statute's application affects all political speech, even innocuous expressive speech on "passive" buttons or shirts including those not directly related to a candidate or ballot measure. It also shows the state's infinite application and infinite discretion to prohibit all forms of speech, inclusive of

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[8] Minn. Stat. § 211B.11, subd. 1. Minnesota Statute § 211B.11, subd. 4 is the penalty provision.

[9] *See, e.g., Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491 (1985).

[10] *See, e.g., Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987); *Houston v. Hill,* 482 U.S. 451 (1987).

protected speech. Finally, it must be emphasized that the Eighth Circuit did not limit the application of Minnesota Statute § 211B.11 to candidates or questions currently on the ballot.[11]

> Election judges have the *authority* to decide what is "*political.*" Examples include, *but are not limited to*:
>
> - Material promoting a *group* with *recognizable political views* (such as Tea Party, Moveon.org, *and so on*);
> - *Any item* including the name of a political party in Minnesota, *such as* the Republican, DFL, Independence, Green or Libertarian parties;[12] and
> - *Issue oriented material* designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).[13]

The announced and enforced written policies of the Respondents here are no different than this

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[11] *Mansky,* 708 F.3d at 1058.

[12] In Minnesota, state statutes specifically define "major" political parties under Minn. Stat. Ann. § 200.02, subd. 7 (Westlaw through 2013) and "minor" political under Minn. Stat. Ann. § 200.02, subd. 23 (Westlaw through 2013). However, state statutes also define "political party" to capture all others and is defined broadly to include any association of persons supporting a candidate for office: " 'Political party' means an association of individuals under whose name a candidate files for partisan office." Minn. Stat. Ann. § 200.02, subd. 6 (Westlaw through 2013).

[13] Pet. Br. App. 64-65 (emphasis added).

Court's reliance in *Republican Party of Minnesota v. White* upon the Office of Lawyer Professional Responsibility advisory opinions regarding the scope of the "announce clause" of the Minnesota Code of Judicial Conduct to adjudicate the clause there as violative of the First Amendment.[14] Respondents reliance upon *Bd. of Trustees of State Univ. of New York v. Fox,* to defer a facial challenge until an as-applied challenge is adjudicated in the lower court is misplaced.[15] This is not an issue regulating commercial speech that might reach to noncommercial speech. It is squarely about the sweep of a state statute prosecuting individuals for expressive passive "political speech." As Justice Stevens noted, "Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all."[16]

Here, the policy, juxtaposed with Minnesota Statute § 211B.11, subd. 1, finds the statute's overbreadth undoubtably substantial in relation to whatever legitimate scope it may have.[17] Minnesota Statute

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[14] *Republican Party of Minnesota,* 536 U.S. at 771.

[15] Resp. Br. 10-11, *quoting Bd. of Trustees of State Univ. of New York v. Fox,* 492 U.S. 469, 484-85 (1989).

[16] *R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 422 (1992) (Stevens, J., concurring).

[17] *See id.*

§ 211B.11, subd. 1 makes no effort to distinguish between political materials or items supporting a candidate on the ballot or the subject of a ballot question, or narrowing the scope to the perceived evil the statute is intended to address. These failures allow for the statute to sweep its reach into far more protected expression than is tolerable under the First Amendment.[18]

The Respondents assert that the application of Minnesota Statute § 211B.11 as a prohibition on wearing "political" paraphernalia has a "common-sense understanding."[19] Yet, it requires an election judge to analyze a voter's apparel and to inject his or her own interpretation of what is "political."[20] The discretion is virtually limitless. In *City of Houston, Tex. v. Hill,*[21] this Court, in invalidating a statute that made it illegal to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty," raised its concern about broad, sweeping statutes that 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.[22]

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[18] *See Thornhill v. Alabama,* 310 U.S. 88, 97 (1940); *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569 (1987).

[19] Resp. Br. 31.

[20] Pet. Br. App. 64-65.

[21] *City of Houston, Tex. v. Hill,* 482 U.S. 451, 455 (1987).

[22] *Id.* 465, n. 15.

Section 211B.11, on its face, is limitless in its application and therefore overbroad. The statute's language, without definition, does not conjure hypothetical applications, but describes the breadth and sweep of its reach. As Justice Thurgood Marshall wrote regarding his concern about government officials being accorded unfettered discretion in making decisions that impinge upon fundamental rights, "excessive discretion 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."[23]

CONCLUSION

Minnesota's law does not protect the sanctity of the polling place. Minnesota Statute § 211B.11 strikes no balance to any legitimate purpose because its sweep is so far reaching into the realm of protected speech that every person wearing any type of apparel is subject to the intrusiveness of the election judge – who has unfettered discretion to determine "political" intent of apparel and to subject the voter to prosecution for unwittingly picking the wrong t-shirt or piece of jewelry from the dresser drawer. The statute is facially overly broad. The court of appeals is not

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

correct. Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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