No. 16-1435

In the Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, *et al.*,
Petitioners,

v.

JOE MANSKY, in his official capacity as Elections Manager for Ramsey County, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Campaign Legal Center, Inc. ("CLC") is a nonpartisan, nonprofit legal organization whose mission includes implementing and defending laws that ensure fair and peaceful administration of the voting process. CLC generates public policy proposals and participates in state and federal court litigation throughout the nation on a range of election law topics. CLC has served as *amicus curiae* or counsel on numerous election law cases in this Court and in federal and state courts throughout the nation.

SUMMARY OF ARGUMENT

Minnesota possesses the constitutional authority to impose viewpoint-neutral limits on the display of political messages in its polling places, which are not public forums. As respondents ably explain, to pass constitutional muster, Minnesota need only show that its limits are "reasonable." Resps.' Br. at 40-41. *See also, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). In fact, the provisions at issue here would pass any level of constitutional scrutiny because they serve numerous compelling government interests, including the interests in protecting citizens' right to vote freely and ensuring that elections are conducted with integrity and reliability—interests this Court recognized in *Burson v. Freeman*, 504 U.S. 191, 198-

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

99 (1992) (plurality op.). These limits also serve the compelling interests of affording voters the opportunity to peacefully contemplate their choices, uniting citizens in the fulfillment of American democracy, and preventing discrimination against voters based on their political affiliation. Any burdens on expression arising from these reasonable restrictions are temporally, geographically, and functionally minimal. And the allegedly unconstitutional applications of this statute are almost entirely hypothetical, as well as insubstantial compared to the statute's plainly legitimate sweep.

Minnesota has a compelling interest in ensuring that its voters are afforded a few moments of tranquility and peaceful contemplation before they vote. This Court recognized such an interest in *Burson*, which deemed constitutionally permissible a Tennessee ban on political signage within 100 feet of polling places. Minnesota's provisions directly advance the same interest by helping voters remain undisturbed once inside the polling place, thereby giving them a chance to calmly contemplate their electoral choices at the culmination of the democratic process.

Minnesota's limits also serve its compelling interest in uniting the electorate and emphasizing the universality of the American polity. Election Day is often preceded by a lengthy period of campaign-induced partisan rancor and political tribalism. Election Day is therefore also the turning point at which campaign-induced tensions must begin to subside. Minnesota has a compelling interest in ensuring that its polling places serve as dignified reminders to all voters that electoral results—even if disappointing to some—reflect the collective judgment

of the fellow Americans with whom they just stood in line.

Moreover, Minnesota has a compelling interest in preventing discrimination—whether intentional or subconscious, overt or subtle—by poll watchers and poll workers against voters based on actual or perceived political affiliation. Minnesota's ban on political paraphernalia is an important prophylactic measure to prevent discriminatory tactics based on signals of how voters intend to cast their ballots.

These compelling interests far outweigh the statute's minimal burden on expression. Voters need only remove their political buttons or cover their shirts for the few minutes they spend in a polling place. They may display any message or electioneer however they wish until they enter and as soon as they leave the polls.

Finally, the provisions at issue here are not facially overbroad simply because there *might* be unconstitutional applications. This Court's overbreadth doctrine requires a plaintiff to show "that a statute's overbreadth [is] *substantial* . . . relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008). But petitioners and supporting *amici* rely almost entirely on hypothetical situations, few or none of which have ever actually happened, and most of which would not be covered on the face of the statute in any event. When considering overbreadth, this Court should "be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). To the extent this Court concludes that the statute sweeps too far, that concern can easily be addressed through

as-applied challenges or by imposing a limiting construction on respondents' implementing policies.

ARGUMENT

I. Compelling Government Interests Justify Limits on Political Expression in the Polling Place.

Minnesota's prohibition on political paraphernalia in the polling place serves a compelling state interest by fostering peaceful contemplation at the moment of voting. In *Burson*, this Court held that Tennessee had made a constitutionally permissible choice in "decid[ing] that the[] last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible." 504 U.S. at 210 (plurality op.). Just as Tennessee had an interest in preserving for Tennesseans those last fifteen seconds, so too does Minnesota have an interest in preserving for Minnesotans the serenity and contemplation of the last few minutes before and while they vote. Indeed, Minnesota's interest is stronger than Tennessee's: the interest in preserving serenity for voters for the fifteen seconds *before* they enter the polling place necessarily presumes that this serenity will not evaporate *inside* the polling place. This Court's recognition in *Burson* of Tennessee's interest in maintaining this time at or near the polling place as a voter's "own, as free from interference as possible," compels the recognition of Minnesota's interest here.

Courts have recognized that the government has an interest in promoting a "tranquil" environment at public monuments in order to preserve their "contemplative mood." *Henderson v. Lujan*, 964 F.2d

1179, 1184 (D.C. Cir. 1992); *cf. Oberwetter v. Hilliard*, 639 F.3d 545, 552-53 (D.C. Cir. 2011) (noting that monument grounds serve "solemn commemorative purpose" and are not "freewheeling forums"). There is perhaps no site more important than the polling place where the government has a compelling interest in maintaining a "contemplative mood," free from the distractions of both overt and subtle partisan rancor. The voting process is nothing short of sacrosanct. When voters cast their ballots, they convey enormous responsibility and power to those who will govern them. The act of casting a ballot "is preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Minnesota therefore has a compelling interest in ensuring that, when a voter undertakes this act, she is afforded the opportunity to peacefully contemplate the substance of her decision. Subjecting the voter to a "visual assault" of political slogans, *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984), is at odds with safeguarding her opportunity to contemplate her decision as a participant in the democratic system of self-government.

Minnesota's restrictions also serve a compelling state interest in uniting the electorate. Our country is increasingly polarized; more than ever, citizens doubt the good faith of their political counterparts in other parties. *See* Pew Research Ctr., *The Partisan Divide on Political Values Grows Even Wider* 1-4, 65-66 (2017); *see also*, Pew Research Ctr., *Political Polarization in the American Public* (2014). Simply put, there are ever more obstacles to Americans' sense

that they are part of a unified and indivisible polity. Election Day is often the culmination of months of intense political divisions. Ideally, it is also the inflection point at which Americans leave their tribal corners. Some celebrate. Others lick their wounds. But, at its best, Election Day is the beginning of the end of the rancor and a time for a unified look towards the future. This Court has explicitly recognized the government's interest in preserving this form of national unity. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014) (rejecting challenge to prayer at legislative sessions and holding that such prayer "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society").

The voting process is a crucial component of this unity and healing. On Election Day, every citizen who votes in person—irrespective of race, religion, wealth, or political ideology—stands with other citizens at the polls and is afforded an equal say in her government. Minnesota has an interest in ensuring that the several minutes that each voter spends at her polling site, consistent with her country's proud tradition of democratic self-governance, unite her not only with those who share her political beliefs, but also with those who oppose them. Even if the voter's preferred candidate loses, she knows that disappointing result reflects the collective judgment of her fellow citizens, next to whom she had just waited to cast her ballot. The State may permissibly act to protect polling places as celebratory of our democratic system, rather than any particular political party, group, or opinion on a divisive issue. Minnesota has a compelling

interest in safeguarding this element of Election Day, as opposed to allowing the polling place to become yet another site of tension, acrimony, and tribal self-segregation.

Finally, states have a compelling interest in ensuring that poll watchers[2] and poll workers do not engage in discrimination due to conscious or subconscious bias. Minnesota's restriction on political paraphernalia inside the polling place serves as an important prophylaxis in this effort.

Permitting voters to display their political preferences at the polls enables poll watchers to

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[2] While Minnesota does not allow poll watchers *per se*, it does allow party-appointed (in partisan elections) or candidate-appointed (in non-partisan elections) "challengers of voters" to be present at voting precincts. Minn. Stat. § 204C.07(1)-(2). Other states have less restrictive poll-watching regulations, leading many to raise alarms about potential malfeasance by partisan poll watchers. *See, e.g.,* Jocelyn Benson, *When Poll-Watching Crosses the Line*, Politico (Aug. 25, 2016), https://www.politico.com/magazine/story/2016/08/poll-election-monitor-challengers-vote-laws-watchers-214189; Patrick G. Lee, *Trump's Call for a Flood of Poll Watchers Could Disrupt Some Voting Places*, ProPublica (Sept. 14, 2016), https://www.propublica.org/article/trumps-call-for-a-flood-of-poll-watchers-could-disrupt-some-voting-places; Ben Rosen, *Why Trump Wants His Supporters to Monitor the Polls in 'Certain Areas',* Christian Sci. Monitor (Oct. 2, 2016), https://www.csmonitor.com/USA/Politics/2016/1002/Why-Trump-wants-his-supporters-to-monitor-the-polls-in-certain-areas; Editorial, *Who Watches the Poll Watchers?*, Balt. Sun (Oct. 9, 2016), http://www.baltimoresun.com/news/opinion/editorial/bs-ed-poll-observers-20161009-story.html.

determine far more easily how a voter intends to vote. If the voter wears a button that signals she is going to vote the "right" way, in the poll watcher's eyes, her voting credentials might receive less scrutiny. If, however, she wears a shirt that conveys the "wrong" choice, the poll watcher might challenge her credentials. Discrimination by poll watchers could affect not only the voter who wears the "wrong" garb, but also the voter who prefers not to signal her preferences. If the people around her wear buttons or shirts emblazoned with the "right" political messaging and she does not, a partisan poll watcher might view her suspiciously and err on the side of challenging her credentials.

Functionally, this scrutiny might disenfranchise voters without legal cause. In many states, poll workers who challenge a voter's credentials need not substantiate their claims. *See* Nicolas Riley, *Voter Challenges*, Brennan Ctr. for Justice 15-16 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Challengers.pdf. In fact, a challenge will often place the burden on the voter to prove her credentials. *Id.* In some cases, the voter may not be able to provide the necessary documentation in the time she has set aside to vote. In other cases, the voter may deem the process more trouble than it is worth and choose not to vote. These challenges also cause voting delays for everyone, which may lead some to leave the line before voting. *See, e.g.*, Erick Trickey, *How Hostile Poll-Watchers Could Hand Pennsylvania to Trump*, Politico (Oct. 2, 2016), https://www.politico.com/magazine/story/2016/09/2016-election-pennsylvania-polls-voters-trump-clinton-214297 (recounting how aggressive voter challenges

led to long voting delays in some precincts in 2004). In any of these instances, qualified, registered, and desirous voters are functionally disenfranchised. Minnesota's regulation of political paraphernalia in polling places therefore furthers its compelling interests in protecting voters from discrimination and promoting efficient election administration. "The principal object of [the secret ballot] is to enable the elector to express his opinion . . . without being subject to be overawed, or to any ill will or persecution on account of his vote . . . ." *Temple v. Mead*, 4 Vt. 535, 541 (Vt. 1832). The State's interest in preventing disenfranchisement through "overaw[ing]" or "ill will" by poll watchers goes to the core of 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. . . . for under the statute the State acts to protect the integrity of the polling place where citizens exercise the right to vote." *Burson*, 504 U.S. at 213-14 (Kennedy, J., concurring) (citation omitted).

In addition to helping prevent discrimination by poll watchers, restricting political paraphernalia in the polling place is an important prophylaxis against subconscious poll worker discrimination. Minnesota, like many states, hires private citizens to serve as poll workers. *See* Office of Minn. Sec'y of State, *Become an Election Judge*, http://www.sos.state.mn.us/elections-voting/get-involved/become-an-election-judge (last visited Feb. 8, 2018). These poll workers, like anyone else, may have deep political convictions. Absent a ban on political paraphernalia, these workers might unintentionally exhibit unconscious bias against voters who wear the "wrong" paraphernalia. For

example, when verifying whether voters' signatures match the voter registration database, a poll worker might unknowingly scrutinize voters differently based on the tribal affiliations the voters signal. The poll worker might subconsciously view a voter with the "right" political button as legitimate and properly credentialed; that voter's signature might receive a cursory glance. The signature of a voter with the "wrong" political t-shirt or without a discernible political signal, however, might face a more stringent inspection. Even relatively muted discrimination is problematic. A voter should be free from *any* type of pressure at the polling place, even if that pressure is as subtle as greeting a stone-faced clerk who had smiled widely at others wearing the "right" paraphernalia. *Cf. Burson*, 504 U.S. at 206-07 (plurality op.) ("Intimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections."). This, too, can be disenfranchising or intimidating and states have compelling reasons to prevent it by restricting political paraphernalia in the polling place.

II. Any Burdens on Speakers Are Exceedingly Minimal.

Any burden on speakers from complying with Minnesota's law is exceedingly minimal. Unlike the law at issue in *Burson*, which implicated the "quintessential public forums" of streets and sidewalks, *id.* at 196 (plurality op.), Minnesota's law is directed to polling places, which are not traditional speech forums. On the contrary, "restrictions on speech around polling places on election day are as venerable a part of the American tradition as the

secret ballot." *Id.* at 214 (Scalia, J., concurring); *cf. PG Publ'g Co. v. Aichele*, 705 F.3d 91, 113 (3d Cir. 2013) ("[A] polling place is a nonpublic forum . . . ."); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 749 (6th Cir. 2004) ("By opening up portions of school and private property for use as polling places on election day, Ohio has not opened up a nontraditional forum for public discourse."); *Marlin v. D.C. Bd. of Elections & Ethics,* 236 F.3d 716, 719 (D.C. Cir. 2001) ("[T]he interior of a polling place, is neither a traditional public forum nor a government-designated one.").

Nor are polling places the type of public forums opened by government designation to general public expression, *see, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), since the "only expressive activity involved is each voter's communication of his own elective choice," conveyed privately through secret ballot. *Marlin*, 236 F.3d at 719. A state "does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse," *Cornelius*, 473 U.S. at 802. It is certainly not the case here that Minnesota intentionally opened its polling places as forums for open public discourse. Finally, because polling places are clearly demarcated as such, there is no serious concern of insufficient "indication . . . to persons . . . that they have entered some special type of enclave." *United States v. Grace*, 461 U.S. 171, 180 (1983).

The First Amendment permits Minnesota to impose reasonable restrictions on expressive activity in this non-public forum, and such restrictions "need only be *reasonable;* [they] need not be the most

reasonable or the only reasonable limitation[s]." *Cornelius*, 473 U.S. at 808. The fact that Minnesota's restriction extends to non-verbal expression does not alter that standard. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828, 831 (1976) (upholding army base regulation prohibiting "posting" without "prior written approval" of, *inter alia*, "handbills, flyers, circulars, pamphlets or other writings, . . . prepared by any person"); *Hodge v. Talkin*, 799 F.3d 1145, 1162 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016) (upholding 40 U.S.C. § 6135, which bans on Supreme Court grounds, *inter alia*, "a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement"). Given Minnesota's strong interests in protecting the integrity of its elections and the free choice of its voters, as discussed above, its restriction on non-verbal expression certainly passes constitutional muster as a reasonable means of achieving those goals.

Moreover, the regulation at issue here presents only a minor burden. In Minnesota, the average voter waits approximately six to eight minutes to vote. *See* Gov't Accountability Office, *Observations on Wait Times for Voters on Election Day 2012*, at 88 (2014); Philip Bump, *Planning to Vote? Here's How Long You Could Wait*, Wash. Post (Nov. 3, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/11/03/planning-to-vote-tomorrow-it-should-take-15-minutes/?utm_term=.bab36b85e8b7; Anand Katakam, *Map: How Long Does Voting Take in Your State?*, Vox (Oct. 9, 2014), https://www.vox.com/2014/10/9/6951251/map-voting-time-by-state. It is hardly burdensome to remove a button or to cover a shirt with outerwear for several minutes. Until a

voter enters a polling place, and as soon as she leaves the protected zone around it, she is free to stand on the sidewalk—which *is* a traditional public forum—with the button attached to her lapel or the t-shirt visible for all to see. *See Hodge*, 799 F.3d at 1169 ("[I]t is a mark in favor of the statute's reasonableness that the barred activity can be undertaken in an adjacent forum—the sidewalk running along First Street Northeast."). She is free to march up and down Main Street with signs urging that others vote a certain way. She is free to spend the day making phone calls on behalf of her preferred candidate or volunteering to knock on doors or drive voters to the polls. For perhaps 23 hours and 52 minutes of Election Day, she may proselytize as she wishes. The provision at issue here merely furthers Minnesota's compelling interest in protecting the integrity and order of its elections for the approximately eight minutes that she spends at the polling place. Restricting the wearing of political paraphernalia during this short time in one small area is an insubstantial burden.

III. The Possibility of Unconstitutional Applications of the Statute Does Not Justify Holding It Facially Overbroad.

The hypothetical possibility of unconstitutional applications of Minnesota's electioneering statute does not justify holding it facially overbroad. "[T]o prevail in a facial challenge, . . . it is not enough for a plaintiff to show 'some' overbreadth. Rather, the overbreadth of statute must not only be real, but substantial as well." *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002) (quotation marks and citation omitted) (bracket in original). This Court has "vigorously enforced the requirement that a statute's overbreadth

be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams*, 553 U.S. at 292. And in determining the scope of a statute's potential overbreadth, the Court must be guided by the statute's realistic reach: "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange*, 552 U.S. at 449-50.

Petitioners no longer challenge the application of Minnesota's statute to the items they *actually wore* in the voting booths in 2010—the "Please I.D. Me" buttons and the Tea Party shirt. Rather, they and their supporting *amici* imagine a host of cases they say would impermissibly fall within the statute's scope. Petitioners wonder whether the United States flag would violate the statute. Pets.' Br. at 27. *Amici* ACLU *et al.* posit that "wearing a Colin Kaepernick jersey or t-shirts depicting pictures of Andrew Jackson, Bob Dylan, [or] Beyoncé" could run afoul. ACLU Br. at 14. *Amicus* the Goldwater Institute offers a "#MeToo" shirt, or "a picture of a marijuana leaf." Goldwater Br. at 23.

But these imagined scenarios do not arise from the face of the statute: none of these items involves political insignia. Nor have any of these hypotheticals ever actually triggered the law. And even if such examples did fall within the ambit of the statute—which is not at all obvious—the law is not overbroad merely because one can identify specific potential applications that exceed the scope of the State's legitimate regulatory interests. Rather, the question is whether such applications are *substantial* when

compared to the law's legitimate reach. They are not.

The legitimate reach of Minnesota's statute is significant. There is no dispute that it legitimately prohibits all campaign-related political badges, buttons, and insignia in polling places—the most obvious (and likely the largest) category of political buttons someone seeking to influence voters would wear in a polling place. There is also no dispute that the statute may constitutionally be applied to non-campaign political badges, buttons, and insignia that could threaten, intimidate, or confuse voters. Take, for example, the "Please I.D. Me" buttons that motivated this case. As respondents note, these buttons are not only intended to influence voters' choices, but they are also likely to foster voter intimidation or confusion. Resps.' Br. at 46-47. This is especially so in Minnesota, where voters rejected a ballot measure seeking to impose a photo ID requirement. Moreover, consider shirts displaying the names of groups with recognizable political views such as the KKK, or an image of a swastika. Surely, Minnesota has an interest in preventing voters from enduring the intimidation and polling-place chaos that such messages would engender. These many applications directly advance Minnesota's legitimate interest in order, peace, and decorum at polling places.

In contrast to these plainly legitimate applications of the provision, petitioners offer the strained hypotheticals noted above. Those hypotheticals cast no doubt on the facial validity of the provision, which is the only issue before the Court. *See* Petition for Writ of Certiorari, Question Presented. If Minnesota were to declare that it planned to enforce its law by barring blue shirts or by

requiring voters to cover up American flag lapel pins in the voter booth, then the statute might well be subject to an as-applied challenge. But the *real* (not imagined) applications of Minnesota's law in the record do not come close to warranting a "last resort" application of the overbreadth doctrine's "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Moreover, even if this Court concludes that the statute could sweep too far (which it does not), the appropriate response would be to adopt a limiting construction rather than invalidate it, particularly in light of its important, legitimate reach. "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Any such limiting construction must preserve the State's constitutional ability to apply its statute to disruptive messages such as the "Please I.D. Me" buttons, and those meant to confuse or intimidate voters. Likewise, it must preserve the ability to prohibit buttons related to candidates, parties, and the like. To the extent a limiting construction is needed, it could be achieved by construing the statutory prohibition on "political badges, buttons, and insignia," Minn. Stat. § 211B.11, as not reaching the last category of the County's Election Day policy—insignia of groups with "recognizable political views," s*ee* Pet. App. I-2—except to the extent such insignia also fall within the other prongs of the policy, such as by affecting the voting process. The text of the statute could support

such a construction under the theory that apparel referring only to groups such as the Chamber of Commerce or Planned Parenthood are not, without more, "political insignia" for purposes of the statute.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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