No. 16-1435

In the Supreme Court of the United States

MINNESOTAVOTERS 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 FOR THE STATES OF TENNESSEE, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, RHODE ISLAND, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici curiae—the States of Tennessee, Indiana, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Rhode Island, Texas, and Utah[1]—submit this brief in support of Respondents because the States have a significant interest in ensuring that the First Amendment overbreadth doctrine is applied in a manner that respects and furthers state sovereignty, including the authority of state courts to interpret state laws. *Amici* States also have a strong interest in preserving their ability to enact reasonable and viewpoint-neutral restrictions on speech inside nonpublic forums, including inside polling places to protect their citizens' right to vote.

[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission.

SUMMARY OF THE ARGUMENT

This Court should decline to hold Minnesota's statute regulating speech inside a polling place facially overbroad under the First Amendment.

1. When a *state* statute is challenged under the First Amendment as facially overbroad, our constitutional system of dual sovereignty requires that the State be afforded an opportunity to exercise its sovereign authority to definitively interpret its own law. Petitioners' overbreadth challenge rests on hypotheticals and conjecture about speech Minn. Stat. § 211B.11(1) might reach if it is interpreted expansively. But the mere plausibility that a statute might have some unconstitutional applications if interpreted broadly is insufficient to establish overbreadth; instead, the unconstitutional applications of a statute must be substantial in number, realistic, and grounded in actual fact. Minnesota officials have explained the meaning of Section 211B.11(1), and this Court should defer to that interpretation. If it declines to do so, the Court should at least certify the construction of the statute to the Minnesota Supreme Court before taking the extraordinary step of declaring Section 211B.11(1) facially overbroad. Nor should petitioners be permitted to base their overbreadth challenge on the very applications of the statute that were at issue in this case. The Eighth Circuit held Section 211B.11(1) constitutional as applied to petitioners, and petitioners strategically did not ask this Court to review that as-applied holding. If Section 211B.11(1) is in fact unconstitutional as applied to petitioners, then the strong medicine of the overbreadth doctrine is not warranted.

2. This Court should reject petitioners' invitation to abandon traditional forum analysis. Contrary to petitioners' assertions, this Court has consistently applied forum analysis in reviewing First Amendment challenges to regulations of speech on government property, including regulations that implicate political speech. Forum analysis is necessary because even protected speech is not equally permissible in all places. The First Amendment does not mandate that all government property be made available for unfettered First Amendment expression. Rather, the government, like a private owner of property, has the power to preserve the use of its property for its intended purpose, including by enacting reasonable and viewpoint-neutral limits on expression. Forum analysis ensures that the important functions served by properties under the control of state and local governments—polling places, prisons, police and fire stations, and public hospitals, just to name a few—will not be needlessly disrupted.

3. This Court should likewise reject petitioners' attempt to limit *Burson v. Freeman*, 504 U.S. 191 (1992), to laws prohibiting active electioneering. Like many other state laws, the Tennessee statute that was challenged in *Burson* prohibited—and still prohibits—not only active campaigning, but also the passive display of campaign materials, including shirts, buttons, and hats. The *Burson* Court was well aware of the statute's reach, and the reasoning it adopted in upholding the statute did not distinguish in any way between active and passive speech. Nor would such a distinction make sense; passive speech can be just as powerful as active speech. *Burson*'s reasoning instead reflected a reconciliation of two rights: the right to free

expression and the right to vote. That reasoning applies with equal force here and dictates that Minnesota's statute is a reasonable means of protecting the right to vote.

ARGUMENT

I. When Applied to a State Statute, the Overbreadth Doctrine Must Incorporate Deference to the State's Sovereignty.

As it comes before the Court, this case involves only a facial challenge to a state statute based on its alleged overbreadth. Overbreadth is manifestly "strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (internal quotation marks omitted). "[T]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Stevens*, 559 U.S. 460, 474 (2010) (quoting *Williams*, 553 U.S. at 293). But that step is fundamentally different when a *state* statute has been challenged. In our constitutional system of dual sovereignty, States retain the sovereign authority to interpret their laws definitively—authority this Court lacks. *See Webb v. Webb*, 451 U.S. 493, 500 (1981). Petitioners ignore this fundamental fact, but it has significant ramifications for the application of the overbreadth doctrine in this case and the propriety of this Court's review.

A. This Court's construction of a state statute as part of the overbreadth inquiry must account for the State's sovereign interpretation.

To demonstrate the overbreadth of Minn. Stat. § 211B.11(1), petitioners must show that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimately sweep." *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). In an attempt to meet that burden, petitioners have relied primarily on three types of evidence: (1) the "fanciful hypotheticals" that commonly infect overbreadth challenges, *Williams*, 553 U.S. at 301; (2) phrases—many of which are taken out of context—from the opinions below describing the potential applications of the statute or the plaintiffs' assertions about it; and (3) statements made in the context of this litigation in briefs and at oral argument, *cf. Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 398 (1988) (Stevens, J., concurring in part and dissenting in part) ("A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument[.]"). *See* Pet. Br. 23-29. All of this evidence culminates in petitioners' conclusion that "[t]he amount of protected speech that Section 211B.11(1) can *plausibly* ban . . . is truly staggering." Pet. Br. 28 (emphasis added).

Petitioners' fundamental error lies in the word "plausibly." Plausibility is insufficient. Petitioners bear the burden of demonstrating substantial overbreadth "from the text of [the law] *and from actual fact*." *Stevens*, 559 U.S. at 484 (Alito, J., dissenting)

(alterations and emphasis in original) (quoting *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)). And, "[s]imilarly, 'there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before Court.'" *Id.* (emphasis in original) (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). Petitioners seek to lighten their burden from "realistic" to "plausible" and, in so doing, subvert the overbreadth doctrine. Instead of proving "from actual fact" that a substantial number of "realistic" applications of Section 211B.11(1) would be unconstitutional, as judged in relation to its legitimate sweep, petitioners find it sufficient to demonstrate that a collection of cherry-picked phrases and responses to litigation hypotheticals make it "plausible" that the statute could be interpreted broadly.

Mere plausibility is particularly inadequate when this Court is asked to declare a state statute facially unconstitutional. Requiring petitioners' hypotheticals to be "realistic" and grounded in "actual fact" is vital to protecting the State's sovereign interests in the overbreadth inquiry. Relegated almost entirely to various string citations in petitioners' brief is the official state policy issued to provide guidance on the proper application of Section 211B.11(1). Pet. Br. 23-26. Petitioners barely address its text, let alone undertake an analysis of the "actual fact" of its application in the State of Minnesota. In a nod to their burden, petitioners do valiantly assert that "[n]one of [their evidence] is hyperbole," because "[r]eports abound of polling officials applying political apparel bans to turn away or penalize voters for wearing 'political' t-shirts at polling areas." Pet. Br. 27. But

none of those abundant "reports" involve Minnesota, let alone the Minnesota statute at issue here. And petitioners never demonstrate that similar applications would be "realistic" in Minnesota.

Respondents—who include the Secretary of State of Minnesota, the individual authorized by Minnesota law to provide guidance about Section 211B.11(1)—provide a specific, detailed interpretation of Section 211B.11(1) that is grounded in "actual fact" and "realistic." Resp. Br. 17-24. Before employing the "strong medicine" of the overbreadth doctrine to invalidate this state law in its entirety, *Williams*, 553 U.S. at 293 (internal quotation marks omitted), this Court must give due deference to that official interpretation. *See Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973) ("Surely a court cannot be expected to ignore [State officials'] authoritative pronouncements in determining the breadth of a statute."). Because no Minnesota court, let alone the Minnesota Supreme Court, has opined on the scope of the challenged law, "the prevailing construction is the one of the Executive Branch" of Minnesota's government, and "disregard[ing] the executive's views would raise profound questions in a federal system, one in which states, rather than the national government establish the meaning of state law." *Huggins v. Isenbarger*, 798 F.2d 203, 209 (7th Cir. 1986) (Easterbrook, J., concurring). The Minnesota Secretary of State issued an authoritative interpretation of Section 211B.11(1). *See* Minn. Stat. § 204B.27(2); Resp. Br. 22-23 & n.14. And based on this construction, which was consistent with prior interpretations of the statute, Minnesota officials implemented the law. Resp. Br. 22-24. Accordingly, this Court "should hesitate" before "conclud[ing] that

'[Minnesota's] Executive Branch does not understand state law.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 n.30 (1997) (quoting *Huggins*, 798 F.2d at 2010 (Easterbrook, J., concurring)).

The first step of the overbreadth inquiry—statutory construction—is, in large part, the determinative step in the inquiry. Even when a federal statute is at issue, this Court mandates that the construction include only realistic applications grounded in actual facts. When a *state* statute is at issue, those requirements assume paramount importance because they serve to protect the State's sovereign authority to construe and implement its own statutes. Out of respect for that sovereignty, this Court should hesitate before invalidating a state statute as facially unconstitutional based on petitioners' conjecture and carefully curated phrases.

B. This Court should ensure state courts have an opportunity to construe state statutes before invalidating them as overbroad.

Petitioners ask this Court to do something extraordinary: declare a state statute facially unconstitutional under the overbreadth doctrine without allowing the state court an opportunity to construe the statute and without definitive state court rulings on the scope of the statute. This Court should not take that radical step. *See Harrison v. NAACP*, 360 U.S. 167, 176 (1959) ("[T]he federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."). In *Stevens*, because the challenged provision

was "a federal statute, there [wa]s no need to defer to a state court's authority to interpret its own law." 559 U.S. at 474. Not so here. Section 211B.11(1) is a state statute, and thus there *is* "a need to defer to [the] state court's authority to interpret its own law." *Id.* As respondents point out, that option is readily available to the Court in the form of a certified question to the Minnesota Supreme Court. Resp. Br. 56-58.

From the inception of the overbreadth doctrine, this Court has ensured that it defers to a State's sovereign authority to interpret its law before declaring the law invalid. In *Thornhill v. Alabama*, widely regarded as the first overbreadth case, this Court granted certiorari to review an Alabama state court decision affirming a conviction under a loitering statute. 310 U.S. 88, 91 (1940); *see* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 863 & n.58 (1991). The Court held the law facially unconstitutional, but emphasized that it was relying on the State's interpretation of the statute, not the Court's own. The opinion first noted that the state "courts below expressed no intention of narrowing the construction put upon the statute by prior State decisions," *Thornhill*, 310 U.S. at 96, and then concluded that the statute as "authoritatively construed and applied" by Alabama courts was overbroad and left "room for no exceptions," *id.* at 99.

Many overbreadth challenges to state statutes have, like *Thornhill*, reached this Court on a writ of certiorari to a state court. *See, e.g.*, *Hicks*, 539 U.S. at 117-18; *Hill v. Colorado*, 530 U.S. 703, 711-14 (2000); *Osborne v. Ohio*, 495 U.S. 103, 107-08 (1990); *Massachusetts v. Oakes*, 491 U.S. 576, 580-81 (1989);

New York v. Ferber, 458 U.S. 747, 752 (1982). In those cases, the state court had already had an opportunity to construe the statute as part of its overbreadth analysis, and this Court considered itself bound by that construction. *See, e.g.*, *Hicks*, 539 U.S. at 121 (Virginia Supreme Court's determination that potentially unconstitutional part of the statute was not severable was a "matter of a state law"); *Oakes*, 491 U.S. at 594 (a "restrictive reading of the statute or its partial invalidation" was "beyond [the Court's] power" in light of the state court's construction); *Ferber*, 458 U.S. at 767 ("[T]he construction that a state court gives a state statute is not a matter subject to our review.").

Osborne is a paradigmatic example. There, reviewing a child pornography conviction, the Ohio Supreme Court adopted a narrowing construction of the challenged statute. 495 U.S. at 112-14. Accordingly, this Court found it unnecessary to resolve the challenger's arguments about the scope of the statute "as written" because "the statute, as construed by the Ohio Supreme Court on Osborne's direct appeal, plainly survive[d] overbreadth scrutiny." *Id.* at 112-13. This Court also rejected Osborne's argument that the Ohio Supreme Court could not narrow the statute in the context of his appeal, emphasizing that this Court "ha[d] long respected the State Supreme Courts' ability to narrow state statutes" and that an inability to "narrow the statute, affirm on the basis of the narrowing construction, and leave the statute in full force" would "require a radical reworking of our law." *Id.* 119-20.

By contrast, when this Court reviews an overbreadth challenge to a state statute on writ of

certiorari to a *federal* court, the "First Amendment overbreadth doctrine creates a serious risk of judicial error" because neither this Court nor the lower federal court can "hold a state statute unconstitutional without anticipating the meaning that a state court would assign." Fallon, *supra*, at 900. Certification eliminates that "serious risk of judicial error." *See Arizonans for Official English*, 520 U.S. at 76 (certification and abstention are "[d]esigned to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues"). As Justice O'Connor explained in the context of an overbreadth challenge to a Washington law, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring). If this Court has concerns about potential applications of Section 211B.11(1), the Minnesota Supreme Court "stands willing" to address questions about it. Minn. Stat. § 480.065(3); *cf. Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (certification was not appropriate "because California ha[d] no certification procedure"). Instead of "gratuitous[ly]" employing the "strong medicine" of overbreadth, this Court should certify a question to the Minnesota Supreme Court and avoid the "serious risk" of "federal-court error" that petitioners invite this Court to commit.

The reasons this Court has in the past rejected pleas for certification—or its analogue, abstention—do not apply here. In *Dombrowski v. Pfister*, this Court

declined to abstain because "the interpretation ultimately put on the [challenged statutes] by the state courts [would have been] irrelevant," and because "no readily apparent construction suggest[ed] itself as a vehicle" by which to cure the constitutional defect. 380 U.S. 479, 490-91 (1965). In *City of Houston v. Hill*, this Court declined to abstain or certify because the ordinance at issue was "unambiguous" and "not susceptible to a limiting construction," and because state trial courts had "regularly applied" the ordinance and had "had numerous opportunities to narrow the scope of the ordinance" but had not done so. 482 U.S. 451, 468, 470 (1987). And in *Jews for Jesus*, in addition to California's failure to provide for certification, this Court pointed to the fact that the "words of the resolution simply leave no room for a narrowing construction." 482 U.S. at 575.

These rationales do not apply here; thus "[a] more cautious approach [is] in order." *Arizonans for Official English*, 520 U.S. at 77. Even if this Court rejects respondents' interpretation of Section 211B.11(1), petitioners do not claim that the term "political" is "unambiguous"; indeed, they rely on its ambiguity as a key component of their argument. *See, e.g.*, Pet. Br. 14, 25, 35-36 (characterizing "political" as an "amorphous," "malleable" and "vague" term that has "no logical stopping point"). And because the overbreadth inquiry depends on the scope of Section 211B.11(1), the Minnesota Supreme Court's construction of it would not only be "relevant" but likely dispositive. Moreover, if this Court declines to accept respondents' interpretation of Section 211B.11(1), the statute is undoubtedly still "susceptible to a limiting construction" and includes ample "room for a

narrowing construction." Finally, no Minnesota courts have "regularly applied" Section 211B.11(1) or had an opportunity to adopt a narrowing construction. No Minnesota court has even had an opportunity to interpret it. Resp. Br. 4 n.2.

When a *state* statute is the subject of a facial overbreadth challenge, it is the State's prerogative to determine whether a narrowing construction, when possible, should be adopted. *See Arizonans for Official English*, 520 U.S. at 78-79 (the "cardinal principle" that a court should consider narrowing constructions "bear[s] heighted attention when a federal court is asked to invalidate a State's law"). This Court must "proceed with caution and restraint" when a state statute is at issue because "invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Accordingly, "the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts." *Id.* That is not the case here. As was the case in *Babbit v. United Farm Workers National Union*, if this Court rejects respondents' interpretation, the "uncertain issue of state law" that would remain in this case "[turns] upon a choice between one or several alternative meanings" of Section 211B.11(1). 442 U.S. 289, 308 (1979) (alteration in original) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964)). "Accordingly, . . . the [Minnesota] courts should be 'afforded a reasonable opportunity to pass upon' the section under review." *Id.* (quoting *Harrison*, 360 U.S. at 176).

If this Court declines to accept the construction provided by state and local officials as respondents or has concerns that "realistic" applications of the statute based in "actual fact" intrude substantially on protected speech, *see supra* Part I.A., it should certify a question to the Minnesota Supreme Court about the statute's application. Certification to that court for an authoritative interpretation of the statute is a more appropriate course than wholesale invalidation. To do otherwise would be to ignore—indeed, undermine—principles of state sovereignty. *See Arizonans for Official English*, 520 U.S. at 79 ("[A] federal tribunal risks friction-generating error when it endeavors to construe a . . . state Act not yet reviewed by the State's highest court.").

C. The procedural posture of this case should preclude the Court from declaring the Minnesota statute overbroad.

The "strong medicine" of overbreadth is supposed to be the "last resort" for this Court, *Broadrick*, 413 U.S. at 613, an inquiry that permits this Court to consider applications of the law to third parties *only* when the statute may be constitutionally applied to the challengers in the case, *Brockett*, 472 U.S. at 502-04. If the statute's application to challengers is *not* constitutional, the case is "governed by the normal rule that partial, rather than facial, invalidation is the required course." *Brockett*, 472 U.S. at 504. Petitioners, through strategic maneuvering, have attempted to thwart that "required course" and, contrary to this Court's instruction, seek to "render inapplicable the rule that a federal court should not

extend its invalidation of a statute further than necessary to dispose of the case before it." *Id.* at 503.

This Court should not reward such gamesmanship with the overbreadth doctrine, particularly in a challenge to a state statute. Although petitioners have described hypothetical applications of Section 211B.11(1) that are outside of the facts in the complaint, their overbreadth argument relies principally on their position—rejected by the Eighth Circuit—that Section 211B.11(1) is unconstitutional as applied to passive political expression such as a "Tea Party" shirt—the precise facts of the sole claim remaining in this case. *See* Pet. Br. 24-25; Pet. App. A-3-A-6. If this Court determines that those applications are in fact unconstitutional, the "required course" is to invalidate the statute only *partially* as applied to the facts alleged in the complaint. *Brockett*, 472 U.S. at 504; *see also Ferber*, 458 U.S. at 769 n.24. That is because overbreadth analysis is not appropriate when the statute is susceptible to "partial invalidation." *Broadrick*, 413 U.S. at 613. But petitioners explicitly declined to seek certiorari from the Eighth Circuit's as-applied holding, Pet. i; instead they endeavor to "compel[]" this Court "to entertain an overbreadth attack when not required to do so by the Constitution," *Ferber*, 458 U.S. at 767.

Because petitioners have not challenged the Eighth Circuit's holding that Section 211B.11(1) is constitutional as applied to them, this case does not provide an appropriate vehicle for this Court to resolve the overbreadth question presented. *See Brockett*, 472 U.S. at 504. Considering the question of facial overbreadth is inappropriate if the Court is unable to

consider lesser extremes, such as partial invalidation based on the facts of a particular case. That is particularly true when a *state* statute has been challenged exclusively in federal courts, and the state courts have had no opportunity to construe the statute. *See Arizonans for Official English*, 520 U.S. at 79. Whatever the validity of the Eighth Circuit's as-applied holding, petitioners did not seek this Court's review of it. Neither is that question necessarily included in the question presented. *See* Resp. Br. 37 n.20. Accordingly, petitioners should not be permitted to reframe their as-applied challenge as one of overbreadth.

Overbreadth "do[es] not apply . . . where the parties fail to describe the instances of arguable overbreadth of the contested law." *Wash. State Grange*, 552 U.S. at 449 n.6. The primary examples of arguable overbreadth provided in petitioners' complaint are the same examples that form the basis for the as-applied challenge. *Compare* JA 82-84, *with* JA 87-89. And the Eighth Circuit ultimately found Section 211B.11(1) constitutional as applied to those facts. Pet. App. A-3-A-6. Accordingly, the Eighth Circuit was correct that petitioners' overbreadth challenge must fail because "the complaint does not allege that there were a 'substantial number' of . . . unreasonable applications in relation to the statute's reasonable applications." Pet. App. D-10.

By not seeking certiorari on that as-applied holding, petitioners seek to position themselves as plaintiffs to whom the statute may be applied constitutionally—thus allowing them to bring an overbreadth claim. At the same time, they continue to maintain that Section

211B.11(1) is unconstitutional as applied to them. *See* Pet. Br. 39-40 & n.11. They cannot have it both ways. Having failed to allow this Court to consider whether "partial invalidation" of Section 211B.11(1) is possible based on the "flesh and blood legal problem" presented by the facts of this case, *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 39 (1999) (quoting *Ferber*, 458 U.S. at 768), petitioners cannot claim overbreadth based on those same or substantially similar applications. Nor can they demonstrate a "substantial number" of unconstitutional applications of Section 211B.11(1), judged in relation to its "legitimate sweep," *Stevens*, 559 U.S. at 473 (internal quotation marks omitted), by pointing to applications of the statute judged legitimate by the Eighth Circuit when they have not sought review of that judgment.

Petitioners should not be permitted to circumvent the normal progression from as-applied challenge to overbreadth analysis by strategic gamesmanship, particularly when the facial validity of a state statute is at issue. Thus, even if this Court determines that "realistic" applications of Section 211B.11(1) present constitutional concerns, *see supra* Part I.A, and declines to certify the construction of Section 211B.11(1) to the Minnesota Supreme Court, *see supra* Part I.B, the appropriate resolution of this case would be to dismiss it as improvidently granted because petitioners have failed to provide this Court the opportunity to consider a necessary prerequisite to an overbreadth challenge: the application of Section 211B.11(1) to the "flesh and blood" of the facts of this case. *Cf.* Stephen M. Shapiro et al., *Supreme Court Practice* 361 (10th ed. 2013) (dismissal of a question as improvidently granted may occur where the Court

"conclude[s] that it cannot reach the question accepted for review without reaching a threshold question not presented in the petition"). At the very least, this Court should follow the "required course" in an overbreadth challenge and consider the as-applied challenge first, despite petitioners' failure to include it in the question presented. *See Broadrick*, 413 U.S. at 615-16 ("[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.").

II. This Court Should Reject Petitioners' Invitation To Abandon Traditional Forum Analysis.

Petitioners and several of their *amici* urge this Court to subject Section 211B.11(1) to strict scrutiny even though it restricts political speech only in "a polling place," a location long considered a nonpublic forum. *See* Resp. Br. 29-31. This Court should reject that invitation and instead reaffirm the well-settled rule that laws regulating speech—even political speech—in a nonpublic forum are permissible as long as they are reasonable and viewpoint neutral.

A. This Court has consistently applied forum analysis in reviewing First Amendment challenges to laws regulating political speech.

Speech concerning governmental affairs—including "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes"—is undoubtedly

essential to a well-functioning democracy and uniquely deserving of First Amendment protection. *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). At the same time, this Court has long acknowledged that the "nature of the forum and the conflicting interests involved" remain "important in determining the degree of protection afforded" by the First Amendment to the particular speech at issue. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974) (plurality opinion).

The degree of scrutiny that a content-based regulation of political speech warrants thus depends on the particular forum in which the regulation applies. Laws that restrict political speech on government property that has long been devoted to public expression are subject to the most exacting scrutiny. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). But laws that restrict political speech only on government property that "is not by tradition or designation a forum for public communication" are subject to a more deferential standard: they will be upheld as long as they are viewpoint neutral and reasonable in light of the purpose served by the forum. *Id.* at 46; *see also Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007).

This Court's precedents foreclose any argument that forum analysis is inappropriate for laws regulating political speech. One of this Court's earliest cases employing forum analysis, *Adderley v. Florida*, involved political speech. 385 U.S. 39, 40-41 (1966). In *Adderly*, the Court upheld the trespass convictions of dozens of college students who engaged in anti-

segregation protests on the property of a county jail. *Id.* at 46-47. The Court squarely rejected the premise of the protestors' First Amendment argument, which was that "people who want to propagandize protests or views have a constitutional right to do so whenever and however they please." *Id.* at 48. "The State, no less than a private owner of property," the Court explained, "has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 47.

A plurality of this Court relied on *Adderley* a few years later in *Lehman*, which upheld a city's policy of prohibiting political advertising on its rapid transit vehicles. 418 U.S. at 303-04 (plurality opinion). The prohibition did not violate the First Amendment because the city, acting in its "proprietary capacity," could legitimately "limit[] access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." *Id.* at 304. Otherwise, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities would become Hyde Parks open to every would-be pamphleteer and politician." *Id.*

Just two years later, in *Greer v. Spock*, this Court again upheld under forum analysis a regulation of political speech. 424 U.S. 828 (1976). The regulation at issue banned "[s]peeches and demonstrations of a partisan political nature" at Fort Dix Military Reservation, an area over which the federal government exercised exclusive jurisdiction. *Id.* at 830-31. While civilians were "freely permitted to visit unrestricted areas of the reservation," the primary mission of Fort Dix was to "provide basic combat

training for newly inducted Army personnel." *Id.* at 830. The Court rejected as "historically and constitutionally false" the "notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens." *Id.* at 838. To the contrary, "the business of a military installation like Fort Dix" was to "train soldiers, not to provide a public forum." *Id.* The First Amendment therefore did not prevent Fort Dix from "objectively and evenhandedly" applying a policy of "keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind." *Id.* at 839.

Many of this Court's more recent cases applying forum analysis likewise have involved challenges to government regulations implicating political speech. In *Taxpayers for Vincent*, for example, a group supporting a candidate for political office brought a First Amendment challenge to a municipal ordinance that prohibited the posting of signs on public property. 466 U.S. at 792-93. This Court rejected the challenge, finding that the utility poles on which the candidate wished to post signs were a nonpublic forum and that the city's prohibition was reasonable and viewpoint neutral. *Id.* at 814-17. *United States v. Kokinda* involved political volunteers who challenged a U.S. Postal Service regulation that prohibited them from soliciting outside of a post office. 497 U.S. 720, 723-24 (1990). This Court determined that the sidewalk on which the volunteers were soliciting was a nonpublic forum and upheld the regulation as reasonable and viewpoint neutral. *Id.* at 730-37. And in *Arkansas Educational Television Commission v. Forbes*, this

Court concluded that a candidate debate aired on public television was a nonpublic forum and upheld the broadcaster's viewpoint-neutral decision to exclude from the debate a candidate with little popular support. 523 U.S. 666, 676-83 (1998).

Petitioners contend that "[t]he public forum doctrine has never been the *exclusive* analytical device for reviewing speech claims," Pet. Br. 19 (emphasis in original), but none of the cases they cite in support of that proposition involved a regulation of speech in a nonpublic forum. To be sure, the defendant in *Cohen v. California* was convicted of breach of the peace for wearing a "Fuck the Draft" jacket in the corridor of a public courthouse. 403 U.S. 15, 16 (1971). But the statute under which he was convicted "appl[ied] throughout the entire State" and was *not* an attempt to "preserve an appropriately decorous atmosphere in the courthouse." *Id.* at 19. Indeed, *Cohen* reaffirmed that "the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever and wherever he pleases or to use any form of address in any circumstances that he chooses" and noted the government's authority to draw "distinctions between certain locations." *Id.*

Contrary to petitioners' contention, this Court has consistently applied a more deferential standard of review to regulations of speech in a nonpublic forum, even when those regulations draw content-based distinctions and even when they implicate political speech. There is no reason to depart from that settled practice in this case.

B. Forum analysis appropriately takes into account the government's strong interest in preserving government property for its intended use.

The determination that particular speech is protected by the First Amendment "merely begins" the inquiry into whether the government may permissibly restrict that speech. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799 (1985); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677-78 (1992). That is because "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius*, 473 U.S. at 799. In particular, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* at 799-800; *see also Perry*, 460 U.S. at 46 ("[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." (internal quotation marks omitted)); *Taxpayers for Vincent*, 466 U.S. at 814 ("[T]he mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted."). Rather, the "Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Cornelius*, 473 U.S. at 800 (quoting *Greer*, 424 U.S. at 836)).

This Court adopted forum analysis "as a means of determining when the Government's interest in

limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry*, 460 U.S. at 49. Although such distinctions may be "impermissible in a public forum," where "all parties have a constitutional right of access," they are "inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Id.* at 49, 55. Accordingly, the purpose of forum analysis is not to devalue any particular category of protected speech; rather, it is to appropriately value the government's proprietary interest in preserving property under its control for its intended use, whether training soldiers, *see Greer*, 424 U.S. at 838; providing postal services, *see Kokinda*, 497 U.S. at 726-30; or facilitating air travel, *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 682.

The limited purpose served by the nonpublic forum at issue in this case—the interior of a polling place—is of course especially important. A polling place exists to allow each voter to communicate "his own elective choice . . . privately—by secret ballot in a restricted space." *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001). As a plurality of this Court recognized in *Burson v. Freeman*, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." 504 U.S. 191, 199 (1992) (plurality opinion) (alteration in original) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). To ensure that the environs of a polling place remain compatible with the limited and important purpose of

that property, all fifty States have enacted laws restricting who may access that property and what expression may occur there. *See Burson*, 504 U.S. at 206 (plurality opinion) (noting that "all 50 States limit access to the areas in or around polling places"); Resp. Br., App. A (compiling text of state polling place restrictions). Forum analysis dictates that these restrictions—even those that implicate core political speech—must be upheld as long as they are reasonable and viewpoint neutral.

C. Subjecting to strict scrutiny all laws regulating political speech in nonpublic forums would significantly interfere with the States' core government operations.

Lower federal courts and state courts have determined that a wide array of properties owned or otherwise controlled by state and local governments qualify as nonpublic forums under this Court's precedents. These properties include the interior of a polling place, *see Marlin*, 236 F.3d at 719 ("the interior of a polling place . . . is not available for general public discourse of any sort"); the interior of a courthouse, *see, e.g.*, *Huminski v. Corsones*, 396 F.3d 53, 91 (2d Cir. 2005) ("The function of a courthouse and its courtrooms is principally to facilitate the smooth operation of a government's judicial functions."); police stations, *see, e.g.*, *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 231 (2d Cir. 1996) (the "police purpose in permitting access [to its bulletin boards] is to promote its own internal objectives"); interrogation rooms, *see, e.g.*, *Carreon v. Ill. Dep't of Human Servs.*, 395 F.3d 786, 797 (7th Cir. 2005) ("It is clear that a room used to interview a

person suspected of committing a crime is not a public forum."); fire stations, *see, e.g.*, *Johnson v. City of Fort Wayne*, 91 F.3d 922, 941 (7th Cir. 1996) (a fire station's purpose, "performing a vital public safety function," is "obviously inconsistent with expressive activity" (internal quotation marks omitted)); and public hospitals, *see, e.g.*, *Low Income People Together, Inc. v. Manning*, 615 F. Supp. 501, 516 (N.D. Ohio 1985) (the "sole purpose" of hospital waiting rooms "is to serve patients, friends and families of patients, and the Hospital staff who provide medical care").

These government properties and others that this Court has previously deemed nonpublic forums, such as prisons, *see*, *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977), are integral to the States' ability to carry out their core government functions. To ensure that these functions are performed as effectively and efficiently as possible, the States must be able to preserve the use of these properties for the important purposes they are intended to serve, including by imposing reasonable and viewpoint-neutral limits on the expressive activities that may occur there. As *Lehman* recognized, were the rule otherwise, these properties "immediately would become Hyde Parks open to every would-be pamphleteer and politician." 418 U.S. at 304 (plurality opinion). The disruption that would ensue from such unfettered expression would significantly impede state and local governments from performing functions and delivering services that are critical to public health and safety. "This the Constitution does not require." *Id.*

III. This Court Should Reject Petitioners' Invitation To Limit *Burson v. Freeman* to Laws Prohibiting Active Electioneering.

In *Burson*, this Court applied traditional forum analysis to uphold a Tennessee statute that created a "campaign-free zone" inside and within 100 feet of polling places on election day. 504 U.S. at 193, 198-211 (plurality opinion). The facial, First Amendment challenge to the statute came from a political campaign worker who sought to communicate with voters in the campaign-free zone outside the polling place. *Id.* at 194. Viewing the streets and sidewalks outside the polling place as a public forum, the *Burson* plurality applied strict scrutiny to test the constitutionality of the statute. *Id.* at 196-98.

The inside of a polling place, on the other hand, is a quintessential nonpublic forum. *See, e.g.*, *Marlin*, 236 F.3d at 719; Resp. Br. 29-32. Petitioners do not dispute that fact. Thus, since the speech regulations in *Burson* survived the strict scrutiny applicable to a public forum, it can only follow that similar regulations would survive the more lenient scrutiny applicable to a nonpublic forum.[2]

To dissuade the Court from this inescapable result, petitioners and their *amici* strain to distinguish *Burson* by, among other things, proposing that there is a dichotomy between restrictions on "active electioneering"—which, they claim, was all that was involved in *Burson*—and the "passive display of

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[2] Justice Scalia made this very point in his concurring opinion in *Burson*. 504 U.S. at 216 (Scalia, J., concurring in the judgment).

speech"—which, they claim, is all that is involved here. Pet. Br. 15-16, 31, 36-37. But the distinction petitioners would like to draw between active and passive speech is unsupportable. Neither the statute at issue in *Burson* nor *Burson*'s analysis was limited to restrictions on active electioneering.

Moreover, this Court's precedents do not support any suggestion that "passive" speech triggers an analysis under a legal standard other than the one applied to "active" speech. *See, e.g.*, *Lehman*, 418 U.S. at 304 (plurality opinion) (applying nonpublic forum analysis to passive display of political speech); *Morse v. Frederick*, 551 U.S. 393, 408-10 (2007) (applying lower level scrutiny to high school student's passive display of message on a banner).

A. The Tennessee law challenged in *Burson* prohibited both active electioneering and the passive display of campaign materials.

The Tennessee law challenged in *Burson,* like the laws of many other States, applied both to active electioneering and to the passive display of campaign materials. Included within its ban on the passive display of campaign materials was a prohibition on the wearing of buttons, caps, pin, shirts, and similar apparel within the statutorily set boundary.

The precise portion of the statute that was challenged as facially invalid under the First Amendment was Tenn. Code Ann. § 2-7-111(b), which provided:

> Within the appropriate boundary as established in subsection (a), and the building in which the

> polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party, or position on a question are prohibited. No campaign posters, signs or other campaign literature may be displayed on or in any building or on the grounds of any building in which a polling place is located.

Tenn. Code Ann. § 2-7-111(b)(1) (1990).

Petitioners maintain that *Burson* "did not involve a law restricting citizens' ability to wear political apparel when voting." Pet. Br. 36. Petitioners are incorrect. The statute upheld in *Burson* prohibited the passive display of campaign materials, the active distribution of campaign materials, and the active solicitation of votes, on and inside the polling place and within 100 feet of the polling place. 504 U.S. at 193-94. The dissenting opinion, oral arguments, decision below, and the briefing all confirm that the challenged statute applied to passive displays such as buttons and shirts and was enforced accordingly. *See id.* at 224 (Stevens, J., dissenting) (recognizing the statute applied to the "wearing of campaign buttons"); Oral Arg. Tr., 1991 WL 636253, at *33 , *Burson* (No. 90-1056) ("Tee-shirts and campaign buttons are restricted under this statute." (Statement of Tenn. Att'y Gen. Burson));[3]

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[3] The full exchange between General Burson and Justices Kennedy and O'Connor occurred during General Burson's rebuttal:

> JUSTICE KENNEDY: And what about tee-shirts and campaign buttons?

Freeman v. Burson, 802 S.W.2d 210, 213 (Tenn. 1990) (discussing the "solicitation of votes *and the display* or distribution of campaign materials" (emphasis added)); Br. of Resp. at 3, *Burson*, 504 U.S. 191 (No. 90-1056) (noting the law "even extends to the wearing of caps or shirts with a candidate's name on it").

Thus, petitioners are wrong when they claim that the statute at issue in *Burson* involved only active electioneering and did not involve the passive display of speech. The statute included, on its face, prohibitions on the passive display of speech, such as campaign apparel and buttons. And this Court was cognizant of that fact.

> MR. BURSON: Tee-shirts and campaign buttons are restricted under this statute.
>
> JUSTICE KENNEDY: So a voter cannot wear a little campaign button going into --
>
> MR. BURSON: A voter is asked to take the campaign button off as they go in. It's our position -- look, buttons and tee-shirts and hats and signs are all part of campaigning activity. They all implicate and invite the same problems. When you start --
>
> JUSTICE O'CONNOR: And a bumper sticker on a car driving by on the street that happens to fall within the 100-foot limit?
>
> MR. BURSON: Yeah. That is a hypothetical –

Oral Arg. Tr., 1991 WL 636253, at *33-*34, *Burson* (No. 90-1056).

B. *Burson*'s First Amendment analysis was not limited to regulation of active electioneering and did not turn on any distinction between active and passive speech.

Petitioners are equally wrong to claim that *Burson*'s legal analysis was limited to restrictions on active electioneering or that the legal analysis turned on any distinction between active and passive speech.

Burson held that regulations of political speech designed to protect access to the polling place are to be analyzed under the forum doctrine as regulations of government-controlled property. 504 U.S. at 196-97 (plurality opinion). Because, in the view of the plurality, Tennessee's statute regulated traditional public forums, namely public streets and sidewalks adjacent to a polling place, the law was "subject[] to exacting scrutiny." *Id.* at 198. The statute passed muster under that highest level of scrutiny because of the State's compelling interest in protecting its citizens' "fundamental . . . right to cast a ballot in an election free from the taint of intimidation and fraud" and because of the "long history" and "substantial consensus" that political-speech restrictions "around polling places [are] necessary to protect that fundamental right." *Id.* at 211.

Burson's legal analysis was not even remotely predicated or dependent on any distinction between passive speech and active electioneering. Indeed, *Burson* expressly identified the "central concerns" of the First Amendment that the Tennessee statute implicated: "regulation of political speech, regulation of speech in a public forum, and regulation based on the

content of the speech." *Id.* at 196. Nowhere does *Burson* limit its consideration only to regulation of "active campaigning" or electioneering. Pet. Br. 36. The Court simply applied the most stringent scrutiny to a statute that regulated political speech—undifferentiated by "active" versus "passive" manifestation of the expression—and held that the statute did not violate the First Amendment.

Every State has a highly "compelling interest in securing the right to vote freely and effectively." *Id.* at 208. Polling places are, first and foremost, dedicated to allowing voters to cast their ballots in secret, free from coercion, intimidation, and distraction. *Id.* at 206. Their core purpose is to provide a venue in which citizens may exercise their fundamental, constitutional right to vote. *Id.* at 213-14 (Kennedy, J., concurring). For these reasons, Justice Scalia argued in *Burson* that "the environs of a polling place, on election day, are simply not a 'traditional public forum'" and would have applied only intermediate scrutiny. *Id.* at 216 (Scalia, J., concurring in the judgment).

In their struggle to distance themselves from *Burson*, petitioners take the position that there is no compelling interest in regulating "passive" messages displayed on apparel, because passive speech is powerless to disrupt the peace of the polling place, intimidate others, or even influence others. Pet. Br. 15. In essence, petitioners are arguing that the written word is less powerful than the spoken word, that a passively displayed symbol is less powerful than a symbol accompanied by action.

But there is no logic to this argument, and it surely runs counter to common sense; we all know that the

pen is mightier than the sword. The Klansman's hood and the Nazi swastika are symbols that, even when silently displayed, are capable of arousing fear and intimidation. Clearly, "passive" displays of campaign messages can have strong and odious effects. *See, e.g.*, *Lehman*, 418 U.S. at 304 (plurality opinion) (holding that city could prohibit political advertising in streetcars to avoid subjecting riders to the unwelcome "blare of political propaganda"); *Burson*, 504 U.S. at 207 (plurality opinion) ("undetected or less than blatant acts" of intimidation or interference may "drive the voter away").

C. Petitioners' constitutional right to free speech must be reconciled with the State's compelling interest in protecting its citizens' constitutional right to vote.

Burson "present[ed this Court] with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." 504 U.S. at 198 (plurality opinion). The Court reached reconciliation by holding that Tennessee's "campaign-free-zone" regulation was a constitutionally permissible compromise of the conflict between the right of free speech and the right to vote. *Id.* at 211.

This case should be resolved by the same reconciliation. *Burson* held that Tennessee's statute survived strict scrutiny because its restrictions were "necessary to protect" the "fundamental right . . . to cast a ballot in an election free from the taint of intimidation and fraud." *Id.* at 211. Justice Kennedy concurred in that compromise resolution because "the First Amendment permits freedom of expression to

yield to the extent necessary . . . to protect the integrity of the polling place where citizens exercise the right to vote." *Id*. at 213-14 (Kennedy, J, concurring). Minnesota's statute, which is subject only to the more deferential standard of review applicable to regulations of speech in nonpublic forums, is a reasonable means of protecting the right to vote. *See id.* at 214-16 (Scalia, J., concurring in the judgment) (finding Tennessee's statute a "reasonable" regulation of a nonpublic forum).

Another of this Court's precedents provides an additional factor that, when considered, supports the compromise reached in *Burson* and requires a similar resolution of this case. In *Lehman*, a political candidate challenged on First Amendment grounds a city policy that allowed placard advertisements on the city transit system but prohibited political advertisements. 418 U.S. at 299-301 (plurality opinion). In petitioners' parlance, the candidate sought to exercise his right to political speech through a passive display.[4]

The candidate's challenge was unsuccessful. The plurality opinion emphasized that the Court had "been jealous to preserve access to public places for purposes of free speech," but that it had always looked to "the nature of the forum and the conflicting interests involved . . . in determining the degree of protection afforded by the [First] Amendment to the speech in

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[4] With a message that seems utterly innocuous in today's climate, the candidate's proposed placard contained his likeness and the following copy: "HARRY J. LEHMAN IS OLD FASHIONED! ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT." *Lehman*, 418 U.S. at 299 (plurality opinion).

question." *Id.* at 302-03. Because the forum in question—a public street car—was not an open space and its users were a "captive audience" with their own constitutional interests, the city's regulation of political speech did not violate the First Amendment. *Id.* at 303-04.

Justice Douglas, concurring, elaborated on the conflicting interests at stake. A streetcar is used by "people who because of necessity become commuters and at the same time captive viewers or listeners." *Id.* at 306-07 (Douglas, J., concurring). In his view, the candidate "clearly ha[d] a right to express his views to those who wish[ed] to listen," but "he ha[d] no right to force his message upon an audience incapable of declining to receive it." *Id*. at 307. Commuters' right to be free from forced intrusions on their privacy "preclude[d] the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience," which "has no choice but to sit and listen." *Id.*

The voter in the polling place is just as much, if not more, a captive audience. And her conflicting interest—the right to vote—is certainly as important as, and likely much more important than, a commuter's right to privacy. To exercise her fundamental, constitutional right to vote she "has no choice but" to be in her assigned polling place. She is, thus, the forced recipient of political messages displayed on the shirt or the cap of the voter across the room and on the button sported by the voter next to her in line. She cannot escape the sting of social pressure, intimidation, confusion, or distraction without leaving the polling place and thereby forfeiting her right to vote.

Indeed, the record in this case reveals that petitioners' "Please I.D. Me" buttons were intended to have just such effects on exactly this captive audience. At least part of petitioners' admitted purpose was to bluff voters in the polling place into believing they were legally required to produce IDs or else leave without voting. JA 104-105; Pet. App. D-12 (district court recognizing that "[t]his intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required").

In short, the reconciliation this Court reached in *Burson*—which, contrary to petitioners' assertions, did take into account individuals' right to display passive political expression—applies equally here. And that reconciliation is easier in this case because the interior of the polling place is a nonpublic forum that people must visit to exercise their fundamental right to vote.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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