No. 16-1435

IN THE

Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL.,
Petitioners,

v.

JOE MANSKY, ET AL.,
Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF FOR CATO INSTITUTE, RUTHERFORD INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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July 3, 2017

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute, Rutherford Institute, Reason Foundation, and Individual Rights Foundation respectfully move for leave to file the attached brief as *amici curiae* supporting Petitioner. All parties were provided with timely notice of *amici*'s intent to file as required under Rule 37.2(a). Petitioner's counsel has filed blanket consent to the filing of amicus briefs. Counsel for respondents Virginia Gelms and Mike Freeman declined consent, and counsel for the remaining respondents did not respond to a request for consent.

The interest of *amici* arises from their shared mission to advance and support the rights that the Constitution guarantees to all citizens.

Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*, and files *amicus* briefs. Recent cases in which Cato has filed briefs in this Court relating to free speech rights include *Matal v. Tam*, --- S. Ct. --- (2017); *Walker v. Texas Division, Sons of Confederate Veterans*, 135 S. Ct. 2239 (2015); and *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

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

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as amicus curiae in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech, and therefore contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Individual Rights Foundation ("IRF") was founded in 1993. It is the legal arm of the David Horowitz Freedom Center ("DHFC"), a nonprofit 501(c)(3) organization (formerly known as the Center for the Study of Popular Culture). The mission of DHFC is to promote the core principles of free societies—and to defend America's free society—

through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property and limited government. In support of this mission, the IRF litigates cases and participates as amicus curiae in appellate cases, such as the case at bar, that raise significant First Amendment speech and issues.

None of *amici* has any direct interest, financial or otherwise, in the outcome of this case, which concerns them solely because of the infringement of voters' rights to engage in nondisruptive political expression.

For the foregoing reasons, *amici* respectfully request that they be allowed to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

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

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INTEREST OF THE *AMICI CURIAE*[1]

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

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[1] Rule 37 statement: No party's counsel authored any part of this brief and no person other than amici funded its preparation and submission. Parties were timely notified and petitioner has filed blanked consent. Respondents withheld consent, so a motion for leave to file has been included with this brief.

on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as amicus curiae in cases raising significant constitutional issues. This case involves a serious threat to freedom of speech, and therefore contravenes Reason's avowed purpose to advance "Free Minds and Free Markets."

The **Individual Rights Foundation** ("IRF") was founded in 1993. It is the legal arm of the David Horowitz Freedom Center ("DHFC"), a nonprofit 501(c)(3) organization (formerly known as the Center for the Study of Popular Culture). The mission of DHFC is to promote the core principles of free societies—and to defend America's free society—through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property and limited government. In support of this mission, the IRF litigates cases and participates as amicus curiae in appellate cases, such as the case at bar, that raise significant First Amendment speech and issues.

Amici are interested in this case because the fundamental constitutional guarantee of the right to engage in free speech protects the rights of voters to express themselves in the polling place through non-disruptive political speech. Minnesota's absolute ban on any form of expressive political speech in the polling site threatens the free speech protection the First Amendment is meant to guarantee.

INTRODUCTION AND SUMMARY OF ARGUMENT

Political speech, especially speech critical of the government, individual politicians, and political ideas, is essential to the continued viability of the democratic process. That's why this Court's First Amendment jurisprudence gives special protection to core political speech. Yet Minnesota has specifically targeted such speech, flatly banning all "political" badges, buttons, and insignia within every polling place in the state. Minn. Stat. § 211B.11. This targeting alone requires strict judicial scrutiny.

Minnesota's absolute ban on political insignia fails that judicial review. Whatever interest the state may have in preventing confusion or improper influence, such an interest is not furthered by a complete ban on all political speech. The law is thus not narrowly tailored to serve any compelling state interest. Further, this ban on all political speech is facially overbroad. It places enormous discretion in unaccountable election judges to define "political" speech and thereby chills the personal expression of every Minnesota voter. The Court should grant review so that the Eighth Circuit's lax protection of core political speech does not stand.

ARGUMENT

I. A COMPLETE BAN ON POLITICAL EXPRESSION WARRANTS STRICT SCRUTINY, REGARDLESS OF THE NATURE OF THE FORUM

When the government restricts expressive activity on its own property, this Court uses a difficult-to-apply

set of tools often referred to as "forum analysis." Forum analysis categorizes the physical location where the expressive activity takes place as either a "traditional public forum," a "designated public forum," a "limited public forum," or a "nonpublic forum." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467–70 (2009). The degree of protection afforded to speech varies depending on the category of the forum. *Id.*

Rigidly applying this forum analysis, the Eighth Circuit held that the polling place is a nonpublic forum and that strict scrutiny does not apply. Pet. App. A-5; D-7–8. But such a formulaic application of the forum analysis framework can sometimes fail to adequately protect important First Amendment interests. As this Court has acknowledged, looking only at the location covered by a speech ban may fail to consider the extent of the speech interests at stake.

In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.32 (1984), this Court warned of the "limited utility" of focusing only "on whether the tangible property [where speech is restricted] should be deemed a public forum." Although the traditional forum analysis generally provides a workable analytical tool, "the analytical line between a regulation of the 'time, place, and manner' in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal or real property owned or controlled by the government is in fact a 'public forum' may blur at the edges." *Id.* (quoting *U.S. Postal Service v. Greenburgh Civic Ass'ns.*, 453 U.S. 114, 132 (1981)). In other words, focusing on the *location* of a speech ban and not on the *operation* of that ban fails to put the ban in its full context. When courts inflexibly apply a categorical

version of forum analysis, they can distract themselves from giving speech the protection it deserves.

Here, the normal forum analysis has proven inadequate. The Eighth Circuit, after finding that the polling place is a nonpublic forum, held that the speech ban need only be viewpoint-neutral to pass constitutional scrutiny. Pet. App. D-8. But as this Court's precedents have shown, even regulations that are facially viewpoint neutral can sometimes have startlingly wide breadth. In such a situation, the Court has applied a level of scrutiny on par with that applied to speech regulations that discriminate based on viewpoint.

In *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994), the Court affirmed an invalidation of a city ordinance that prohibited property owners from displaying any signs on their property except "residence identification" signs, "for sale" signs, and signs warning of safety hazards. *Id.* at 45. In affirming the lower court, this Court noted a "particular concern" with laws that invalidated an entire medium of expression. *Id.* at 55. As the Court explained, even viewpoint neutrality cannot save speech restrictions of such a broad scope. Even though "prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination," the Court recognized that "the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* As *City of Ladue* shows, sweeping restrictions on speech, particularly political speech, require courts to set aside the tradi-

tional viewpoint-versus-content distinction. A categorical approach is simply inappropriate because it fails to adequately protect core speech rights.[2]

The restrictions found in Minnesota's polling-place regulation represent just such a sweeping prohibition of core First Amendment speech. The law completely bans a loosely defined genre of speech in all possible physical media of expression. If ever there were a regulation that threatened "the widest possible dissemination of information" and the "unfettered interchange of ideas," it is this one. *Gilleo*, 512 U.S. at 55 n.13.

Further, strict scrutiny is warranted because Minnesota's law explicitly targets political speech. This Court strongly protects "core political speech" as "occup[ying] the highest, most protected position" in the hierarchy of constitutionally protected speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). *See also Burson v. Freeman*, 504 U.S. 191, 217 (1992) ("The statute directly regulates political expression and thus implicates a core concern of the First Amendment."). This protection has been the same whether such speech is oral or, as here, takes the form of printed symbols and slogans. The Court has defined political speech broadly to include

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[2] "'[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others . . . . To ensure "the widest possible dissemination of information[,]" and the "unfettered interchange of ideas," the First Amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression.'" *Gilleo*, 512 U.S at 55 n.13. (quoting Geoffrey R. Stone, *Content-Neutral Distinctions*, 54 U. Chi. L. Rev. 46, 57–58 (1987)) (internal citations omitted).

all "interactive communication concerning political change." *Meyer v. Grant*, 486 U.S. 414, 422 (1988).

This Court has frequently applied strict scrutiny to political-speech bans, regardless of the forum affected. For example, when confronted with a law that would have restricted all anonymous leafleting in opposition to a proposed tax, the Court noted the importance of specifically protecting such political speech:

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

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

More recently, the Court reaffirmed that laws burdening political speech are subject to strict scrutiny. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Court invalidated a federal statute that barred certain independent expenditures for electioneering communications. Highlighting the primacy of political speech, the Court noted that "political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that

interest.'" *Citizens United*, 558 U.S. at 340 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

With this history in mind, there is little doubt that Minnesota's polling-place restriction is hostile to the protection that this Court has traditionally afforded core political speech. By eliminating virtually all means of political expression in or around the polling place, the statute cuts off the "unfettered interchange of ideas" in an important place for individual political expression. *McIntyre,* 514 U.S. at 346–47. By failing to apply strict scrutiny, the Eighth Circuit decision ignored the unique disfavor this Court gives to blanket bans on political expression. Such a ruling dangerously narrows First Amendment protections for political expression, requiring this Court's review to clarify that strict scrutiny should have been applied.

II. MINNESOTA'S BAN ON POLITICAL EXPRESSION CANNOT SURVIVE STRICT SCRUTINY REVIEW

In *Burson v. Freeman*, this Court upheld a content-based restriction on political campaign speech in the sidewalks and streets surrounding a polling place, which were indisputably a public forum. *Burson*, 504 U.S. at 211. Although the Court found that the particular statute at issue was narrowly drawn to serve a compelling state interest, it also cautioned that its holding was narrow, representing the rare case where a facially content-based law survived strict scrutiny. *Id.* at 211. For several reasons, Minnesota's speech ban is distinguishable from the law in *Burson*. This is not the "rare case" that withstands strict scrutiny.

A. Minnesota Has Not Stated a Compelling Government Interest for Prohibiting All Political Expression

When confronted with a statute restricting a fundamental right, this Court must first ensure that a compelling government interest has been articulated. If a statute's stated or implied interest is not sufficiently compelling, that statute must be struck down. For example, in *Republican Party of Minnesota v. White*, 536 U.S. 765, 777–79 (2002), the Court rejected Minnesota's stated interests of "preserving the impartiality of the state judiciary" and "preserving the appearance of the impartiality of the state judiciary." Such interests were insufficiently compelling to support a law banning candidates for judicial election from announcing their views on disputed issues.

Here, Minnesota has failed entirely to provide a compelling government interest for its political speech ban. Although the state suggested during this litigation that the compelling interest supporting Minn. Stat. § 211B.11 is the same as the one accepted in *Burson*, a close reading of the statute shows that this cannot be the case.[3]

In *Burson*, this Court determined that the ban on campaign speech served two government interests. First, it accepted the state's argument that the statute served the interest of allowing citizens to vote freely for their candidate of choice. *Burson*, 504 U.S. at 198. Second, it likewise accepted the claim that the statute ensured the integrity and reliability of the election process. *Id.* The Court's analysis, however, was largely

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[3] The Eighth Circuit erred in uncritically accepting this argument. *See* Pet. App. A-5; D-8.

based on a very specific historical circumstance: the long history of bribery, intentional confusion, and intimidation that had occurred at polling locations during the Colonial period. This history explains why states had for centuries enacted legislation aimed at "battl[ing] against two evils: voter intimidation and election fraud." *Id.* at 206. Given that history, the Court concluded Tennessee had a "compelling interest in protecting voters from confusion and undue influence," and in "preserving the integrity of its electoral process." *Id.* at 199.

Although the part of Minn. Stat. § 211B.11 restricting solicitation and persuasion of voters serves goals similar to the Tennessee statute upheld in *Burson*, the third sentence of the statute—which prohibits wearing "[a] political badge, political button, or other political insignia . . . at or about the polling place on primary election day"—differs starkly in both scope and objective from the *Burson* statute. It does not specifically target solicitation and influence, nor does it mention confusion or intimidation.[4]

This statutory silence is damning. *Every* aspect of a ban on political speech restriction must be justified by a compelling interest. By failing to state an intent to target intimidation or undue influence in this third sentence, Minnesota has failed in its burden of showing that every speech restriction in the statute furthers a specific and compelling end. For this reason alone, the statute fails strict scrutiny.

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[4] Indeed, by evaluating the first and third sentences of the statute separately, the Eighth Circuit tacitly acknowledged that the scope and purpose of the government interests differ between the two sentences. *Compare* Pet. App. D-6–7 *with id.* at D-7–10.

B. Minnesota's Ban on Political Expression Is Not Narrowly Tailored to Achieve Any Government Purpose

Even if this Court were to find that Minnesota had put forward a sufficiently valid government interest, the statute still is not narrowly tailored to meet that interest while minimally affecting the speech interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). To be narrowly tailored, a speech ban "must be the 'least restrictive means among available, effective alternatives.'" *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (quoting *Ashcroft v. American Civil Liberties Union,* 542 U.S. 656, 666 (2004)).

Minnesota's ban does not come close to meeting this standard, being both overinclusive and underinclusive. It is overinclusive because it bans political speech that does not meaningfully frustrate the objectives of ensuring electoral integrity and preventing voter confusion. It is underinclusive because it allows speech in the polling place that could create voter confusion or intimidation, so long as that speech is not "political."

1. The ban is overinclusive because it disallows even innocuous political speech.

Minn. Stat. § 211B.11 is fatally overinclusive. The statute prohibits any insignia deemed to be "political"—as determined solely at the discretion of the on-site election judges. A hat or shirt bearing nothing more than the words "Occupy" or "Tea Party," or even a picture of a blue donkey or red elephant, would fall afoul of the ban. Yet such clothing is part of the normal tableau of public life; no reasonable voter would interpret such garb as an attempt to intimidate or cajole.

Additionally, the statute gives election judges the power to ban any materials "promoting a group with recognizable political views." Local union badges, national flag buttons, or even pins indicating support for the Catholic Church[5] could all run afoul of this provision. But banning such expression is unlikely to further any legitimate government interest. As the dissent explained in this case's first trip to the Eighth Circuit, it is hard to believe

> that the presence of a passive and peaceful voter who happens to wear a shirt displaying, for example, the words "American Legion," "Veterans of Foreign Wars," "AFL–CIO," "NRA," "NAACP," or the logo of one of these organizations (all of which have actively participated in the political process) somehow causes a disruption in the polling place or confuses or unduly influences voters.

Pet. App. D-18 n.7.

It is telling that this Court has never found an absolute bar on all political expression to be necessary to further a government interest. *See, e.g.*, *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 574 (1987). Even if preventing polling-place solicitation is a compelling government interest, Minnesota's speech ban is not narrowly tailored to address that interest, and so fails strict scrutiny.

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

2. The ban is also fatally underinclusive.

In addition to analyzing whether a law prohibits *too much* speech, tailoring analysis considers whether it *fails* to restrict speech that is just as harmful to the purported governmental interest. *See, e.g.*, *Citizens United,* 558 U.S. at 362 (striking down a statute barring independent expenditures for electioneering communications because it barred corporate speech in only select media, and only for a 30-to-60-day period before an election); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011) (invalidating as "wildly underinclusive" a state statute that imposed restrictions on the sale of "violent video games" to minors because it still allowed purchases if parents approved).

Minn. Stat. § 211B.11 suffers from an unconstitutional degree of underinclusion. By targeting only "political" speech, it leaves non-political forms of persuasive or confusing speech entirely unregulated. For example, the statute apparently does not stop individuals from wearing buttons or shirts declaring "election canceled" or "election postponed," despite the fact that many voters could be confused about the election date or persuaded not to vote after reading such buttons.

The statute also has a purported goal of "maintain[ing] peace, order, and decorum" in the polling place. Pet. App. A-5; D-8. Even if we accept the dubious proposition that someone could start a fight by wearing a button, surely there are as many non-political statements that would do the trick as political ones. Yet the statute leaves entirely unregulated most non-political expression, even if it would be much more likely to undermine peace, order, and decorum.

Minnesota's speech ban is therefore not narrowly tailored to serve any legitimate state interest. By failing to achieve a proper "fit" between what it seeks to achieve and what it actually regulates, the law leaves unregulated speech that would likely contribute to polling-place confusion, while restricting speech that has no appreciable effect on voters' decision-making.

III. MINNESOTA'S SPEECH BAN IS UNCONSTITUTIONALLY OVERBROAD

When a statute is written so generally that it could plausibly be enforced against vast swaths of speech, this Court has applied the doctrine of overbreadth, invalidating the statute for placing too much discretion in the hands of government agents. Minnesota's law, which simply bans "political" insignia, suffers from precisely this constitutional defect. Its potential sweep extends to any speech that could be declared "political" at the discretion of unguided and unaccountable election judges.

In *City of Houston, Tex. v. Hill*, 482 U.S. 451, 455 (1987), this Court struck down a statute that made it illegal to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty." As the *Hill* Court explained, the broad wording of this statute "criminalize[d] a substantial amount of constitutionally protected speech," and did not provide enough "breathing room" to ensure that valid speech remained protected. *Id.* at 466. Such sweeping statutes give too much discretion to "policemen, prosecutors, and juries to pursue their personal predilections," and their "moment-to-moment judgment[s]" of when and when not to pursue prosecution. *Id.* at 465 n.15.

Minnesota's speech ban raises precisely the same facial overbreadth concerns. A wide array of speech could readily be declared "political" at the discretion of election judges, even if doing so would sweep in far more speech than was intended or anticipated. For example, popular buttons or stickers declaring "I Voted," "Rock the Vote," "Vote or Die," or other similar advocacy for voting over non-voting could be deemed "political" and subject to censorship. Similarly, context-less buttons, shirts, or stickers showing a picture of a gun, a marijuana leaf, or even the iconic Gadsden flag could readily be interpreted as advocating political stances regarding gun rights, drug legalization, or limited government, respectively. Even pictures of famous cultural figures are not safe from regulation if they have the potential to be interpreted as "political." Iconic photographs of Gandhi, Martin Luther King Jr., or John Lennon might be seen to represent anti-war sentiments and thus summarily restricted.

The discretion given election judges to determine what is or is not "political" is thus virtually limitless. Moreover, there is no review or appeal process for challenging the election officials' discretion—and even if there were, it is difficult to see how an election judge's ruling could be proven "wrong" given the lack of a comprehensive definition of what qualifies as "political" in the text of the statute itself. Thus, there is a very real danger that individual officials will target for suppression political expression they simply disagree with.

Identifying just this danger, Justice Thurgood Marshall once wrote:

> A principle underlying many of our prior decisions in various doctrinal settings is

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

Schall v. Martin, 467 U.S. 253, 306–07 (1984) (Marshall, J., dissenting).

The Court should heed Justice Marshall's warning and grant review here, so that unaccountable election officials may no longer allocate the important right of individual expression.

CONCLUSION

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

Respectfully submitted,

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