No. 16-1435

In The
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE;
ANDREW E. CILEK; and SUSAN JEFFERS,
Petitioners,

v.

JOE MANSKY, in his official capacity
as Elections Manager for Ramsey County;
VIRGINIA GELMS, in her official capacity as
Elections Manager for Hennepin County;
MIKE FREEMAN, in his official capacity as
Hennepin County Attorney; JOHN CHOI,
in his official capacity as Ramsey County
Attorney; and STEVE SIMON, in his
official capacity as Secretary of State of Minnesota,
Respondents.

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

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

Other Authorities

INTRODUCTION

In the Respondents' brief (RB), the Government engages in the impossible task of minimizing the reach and constitutionally burdensome nature of Minn. Stat. Section 211B.11(1)'s ban on political apparel. It is undisputed that the variety of available political apparel—and the messages and logos that it conveys—is almost endless in today's society. It is also undisputed that people communicate through political apparel for many reasons, including purely for self-expression and identification of associational interests. Since Section 211B.11(1) prohibits all or almost all of this constitutionally protected speech in polling places on election days and for 46 days before at absentee voting locations, the ban is substantially overbroad and unconstitutional under a straightforward application of the First Amendment overbreadth doctrine.

The Government asserts three primary arguments to escape this conclusion: (1) it offers a last-minute attempt to re-define and narrow the term "political," (2) argues that Section 211B.11(1) survives under a "reasonableness" analysis, and (3) requests certification to the Minnesota Supreme Court. All lack merit. Nothing in the statute's text or the Government's prior, official constructions of the political apparel ban limit the ordinary and broad meaning of the term "political." The Government's attempt to reverse course now is improper and unpersuasive.

Its approach to the merits of the case suffers from the same defects. This is a First Amendment overbreadth case, not an ordinary, more limited, facial challenge. As such, it can and should be resolved

based on the extreme degree to which Section 211B.11(1) intrudes on protected, passive political speech, and the lack of obvious legitimate applications. *United States v. Stevens*, 559 U.S. 460, 472-73, 480 (2010); *Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-76 (1987). But even assuming a "reasonableness" test is pertinent, the statute is overbroad under that inquiry because it prohibits tremendous amounts of passive political self-expression and association that lacks any reasonable connection to the voter "disruption" and "intimidation" concerns underlying the statute.

Finally, in light of the nature and circumstances of this dispute, certification of this case to a state court is not an available or proper resolution to the controversy. Section 211B.11(1) must be declared facially invalid.

ARGUMENT

I.

THE GOVERNMENT CANNOT REDEFINE THE TERM "POLITICAL" NOW

Throughout this controversy, the Government contended that the term "political" in Section 211B.11(1) includes all views and groups that can be classified as political. 2011 Brief of Appellee Ritchie at 10 n.1 ("political" includes all political speech); *id*. at 11 ("Section 211B.11 applies to the entire class of badges, buttons and insignia that constitute political speech"); 2011 Brief of Appellee Mansky at 14 (statute bars "any politicization"). It did so out of deference to the statute's plain language and to avoid charges of viewpoint discrimination. But before this Court, the

Government seeks to redefine "political" to mean only messages "relating to questions of governmental affairs facing voters on a given election day." RB at 19.

This reformulation cannot be accepted. First, nothing in Section 211B.11(1)'s plain language limits the reach of the third sentence to only certain types of political material; it unreservedly covers all "political" insignia. Second, the Government's official election guidance materials confirm the broad meaning of the term, and that it goes beyond issues on the ballot. The Election Day Policy, which the Government concedes must be viewed as an authoritative construction, RB at 17, construes "political" to include: (1) "issue-oriented material designed to influence or impact voting," (2) "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, *and so on*)," and (3) current and past material referring to candidates, parties, or ballot issues. Pet. App. I-1-2 (emphasis added). Other documents from the Minnesota Secretary of State's Office add that "political" includes all "partisan references." Docket Entry (DE) at 20 (Appendix A to Declaration of Gary Poser). The Policy carefully notes that "political" apparel is "*not limited to*" the items in the Policy. *Id.* at I-1 (emphasis added).

This is more than enough to confirm the term "political" in Section 211B.11(1) includes all political expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 618 (1973) ("[A] court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute."). Indeed, every court that has considered the issue has so construed the statute, Pet. App. E-15 (district court finds it bars "all manner of political views"); *id.* A-6 (Eighth Circuit: "all political

material is banned"), and those constructions are entitled to deference. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985).

Given the statutory text, the Government's policies and enforcement practices,[1] and the lower courts' decisions, the term "political" in Section 211B.11(1) cannot be construed to cover only an amorphous subset of speech related to "governmental affairs" at issue in an election. *Id.* It is little surprise, then, that the Government never previously advanced this definition. Its attempt to do so now is telling and futile. *Stevens*, 559 U.S. at 480 (The Government's claim that a law will be enforced "more restrictively than its language [allows] is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading."); *Bell v. Wolfish*, 441 U.S. 520, 561 n.42 (1979) (in determining scope of a rule, "we consider the rule in its present form and in light of the concessions made by [the government]"); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128-29 (2011) ("Arguments thus omitted [in prior briefing] are normally considered waived.").

Finally, upon examination, the Government's attempt to limit the term "political" to "governmental" concerns generally at issue in an election is not much of a change at all. The definition is so vague that it allows and invites unpredictable and broad enforcement—including to all things "political."

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[1] Petitioners' banned Tea Party shirts included no messages about governmental choices on the ballot. The shirts merely displayed political ideologies ("Don't Tread on Me," "Liberty") and a small group identification (the Tea Party logo). Pet. App. B-25.

Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (ambiguous meanings cause citizens to "'steer far wider of the unlawful zone,' than if the boundaries of the forbidden areas were clearly marked." (citation omitted)). The meaninglessness of the Government's shift is further confirmed by the fact that the Government fails to argue that any of the examples of "political" messages in the Policy or in MVA's brief would not qualify as political material under its new "governmental issues facing voters on election day" definition. Petitioners' Brief on the Merits at 24-28.

For all these reasons, the Court should analyze Section 211B.11(1) in light of the ordinary, broad meaning of the term "political," a meaning the Government accepted and promoted at all times relevant to this controversy.

II.

THE GOVERNMENT FAILS TO JUSTIFY ITS BROAD BAN ON ALL POLITICAL APPAREL

Despite the broad reach of its "political" apparel ban, the Government contends that Section 211B.11(1) is not facially unconstitutional because it reasonably advances governmental interests in "'maintain[ing] peace, order and decorum' in the polling place, 'protecting voters from confusion and undue influence' such as intimidation, and 'preserving the integrity of its election process.'" RB at 41. This position does not reflect the relevant inquiry and fails on its own terms.

A. This Case May Be Resolved on the Basis of Whether Section 211B.11(1) Burdens a "Substantial" Amount of "Protected" Speech

MVA's facial claim was litigated below under the First Amendment overbreadth doctrine, Pet. App. D-5, 10, the Petition for Certiorari presented that doctrine, and the Government's Opposition to the Petition addressed it. Pet. Opp. 11-15. Thus, the sole claim here is a facial one arising under the overbreadth doctrine.[2] Nevertheless, the Government seeks to litigate this case as a standard facial challenge; i.e., one largely constrained by the facts and parties in the case and resolved through means-ends testing. RB at 38; *see, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 198-99 (1992).

This approach is improper here, or at least very incomplete, because it gives short shrift to the standards and concerns of the First Amendment overbreadth doctrine. *See Stevens*, 559 U.S. at 472-73. That doctrine articulates a special, independent framework for facially scrutinizing a restriction that may burden the free speech rights of parties not before the Court. *Id.*; *New York v. Ferber*, 458 U.S. 747, 767-73 (1982). An affected plaintiff can invoke the doctrine regardless of the status of the plaintiff's as-applied claims, *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-58 (1984); *Jews for Jesus*, 482 U.S. at 574-76 (adjudicating a facial overbreadth

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[2] MVA agrees that MVA's as-applied claims are not before this Court, because MVA did not appeal a portion of the District Court's adverse ruling on those claims to the Eighth Circuit, Pet. App. A-1-7, and did not raise any as-applied claims in the Petition for Certiorari. Pet. at 9.

claim before resolution of an as-applied claim); or the nature of the forum in which the challenged law applies. *Id.* (applying doctrine in an airport without regard for whether it was a public or non-public forum); *Virginia v. Hicks*, 539 U.S. 113, 115-17 (2003) (applying doctrine to a rule regulating government-run housing, a non-public forum).

The test that governs claims, like that here, arising under the First Amendment overbreadth doctrine is whether the statute "prohibits a substantial amount of protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Some decisions add that any burden on protected speech should be judged in relation to the law's "plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 n.6 (2008).

A critical aspect of this standard is whether the speech affected by a challenged statute is constitutionally "protected." When it is, the overbreadth inquiry often hinges on the extent to which the subject statute intrudes upon the protected speech. *See Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (Substantial overbreadth only requires "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."). When the intrusion is extensive and plain, and legitimate

applications of the law are not, the Court may resolve the case based on the law's overreach, without searching analysis designed to map-out the statute's legitimate scope. *Stevens*, 559 U.S. at 472-73; *Jews for Jesus*, 482 U.S at 575; *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Given the overbreadth doctrine's focus on the free speech rights of parties not before the Court, the inquiry into a law's reach "take[s] into account possible applications of the statute in other factual contexts besides that at bar." *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963); *see also*, *Free Speech Coalition*, 535 U.S. at 247-48 (concluding, in an overbreadth case, that Shakespeare's *Romeo and Juliet* and the movie *Traffic* potentially fell within the reach of a child pornography prohibition); *Reno v. ACLU*, 521 U.S. 844, 878 (1997) (positing that the Communications Decency Act may "extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library" in holding it overbroad).

Here, the passive political speech prohibited by Section 211B.11(1) is plainly "protected" speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (political speech is at "the core of the protection afforded by the First Amendment"); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (striking down a law preventing a display of a flag in "opposition to organized government"). In *Cohen*, *Tinker*, and *Jews for Jesus*, this Court confirmed that protection for

passive political speech extends to non-public forums.[3] *Jews for Jesus* explicitly states: "the wearing of a T-shirt or button that contains a political message . . . is still *protected speech even in a nonpublic forum*." 482 U.S. at 576 (emphasis added) (citing *Cohen v. California*, 403 U.S. 15 (1971)); *see also*, *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013) (political apparel is a "clearly established" right in non-public forums).

Given the protected nature of the speech at issue here, MVA's overbreadth challenge to Section 211B.11(1) depends largely on the statute's reach into that area of speech. As MVA's opening brief showed, the provision swallows the entire realm of passive political self-expression and advocacy. Petitioners' Brief on the Merits at 23-30; Pet. App. I-1-2. The Government's contrary assertions notwithstanding, RB at 54, the vague reach of the term "political" confirms and extends the statute's overbreadth.[4] *Baggett*, 377 U.S. at 372; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.6 (1982) ("The vagueness of a law affects

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[3] MVA acknowledges that polling places are non-public forums, but contends that this is irrelevant to the analysis, *see* footnote 5, *infra*. Moreover, this acknowledgement is not meant to, and does not, concede that "reasonableness" review controls here. *See* footnote 8, *infra*.

[4] The Government's claim that MVA cannot point to vagueness because it did not bring a separate vagueness challenge is not consistent with the First Amendment overbreadth doctrine. Vagueness is always a relevant factor in that context. *United States v. Williams*, 553 U.S. 285, 304 (2008) (The Court has permitted "plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.").

overbreadth analysis."). Section 211B.11(1) intrudes on an entire class of important, protected speech. Conversely, the law has little "plainly legitimate" application beyond categorically unprotected speech, like "fighting words." This case does not present a close call on overbreadth. As a result, the statute can and should be held unconstitutionally overbroad without analysis designed to find and carve out a few possibly legitimate applications.[5] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017); *Stevens*, 559 U.S. at 474-82; *Lewis*, 415 U.S. at 133.

B. Section 211B.11(1) Fails to Reasonably Advance the Government's Interests in a Substantial Number of Applications

In contrast to the foregoing analysis, the Government seeks to directly apply the "reasonableness" and "viewpoint neutrality" tests often associated with non-public forums to decide whether Section 211B.11(1) is facially unconstitutional. This approach overlooks the "substantial burden on protected speech" standard in the overbreadth doctrine and unnecessarily complicates this case.[6] *Stevens*, 559 U.S. at 472-73.

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[5] Under this path to resolution of this case, it is unnecessary for this Court to apply forum analysis and/or to decide what First Amendment mean-ends test applies in this matter based on that analysis. *See* footnotes 3, *supra*, and 8, *infra*.

[6] The Government fails to recognize that the possibility of some legitimate applications will not save a speech restriction in an overbreadth case if the statute also frustrates a substantial amount of protected speech. *Stevens*, 559 U.S. at 472-73, 481; *Ashcroft*, 535 U.S. at 244, 255. That is why overbreadth analysis often focuses on, and is resolved based on, a law's *impermissible* reach. *Id.*

However, even assuming the Government's approach is relevant, it cannot save Section 211B.11(1) because the statute does not reasonably advance the Government's interests in a substantial number of applications.[7] Put another way, the Government's election interests do not reasonably justify its sweeping ban on political apparel.[8] *United States v. Grace*, 461 U.S. 171, 187 (1983) (Marshall, J., conc. in part, dis. in part) ("So sweeping a prohibition [on display of flags, banners and devices] is scarcely necessary to protect the operations of this Court . . . .").

1. A Total Political Apparel Ban Does Not Reasonably Advance the Interest in Focused and Smooth Voting

The Government contends that Section 211B.11(1) reasonably advances peace and order at polling places for two reasons: (1) it ensures "voters are focused on the voting activity; that election judges can focus on their tasks, rather than policing altercations and disturbances," and that "the voting process inside the polling place runs smoothly;" and it (2) protects against "verbal disputes or even physical

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[7] The Government implicitly concedes that such a conclusion would render the statute overbroad and unconstitutional. RB at 38 (The statute is not overbroad if "considering *all its applications*, [it] is reasonably tailored to further the State's interests . . . ." (emphasis added)).

[8] Alternatively, the Court should analyze the statute under strict scrutiny because (regardless of forum considerations) that standard, not reasonableness review, is a more appropriate test given the political and categorical nature of the speech restriction here. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 67 (1981) ("exclusion of a broad category" of speech demands heightened scrutiny).

altercations" that may arise from political apparel. RB at 42-43. These claims fail.

It is true that the Government has a legitimate interest in maintaining an efficient and focused voting process. But this interest does not reasonably justify Section 211B.11(1) because most of the passive political speech it prohibits does not reasonably implicate the interest. The passive nature of the speech alone deeply undercuts the strength of the "peace" interest. This case does not deal with yelling, picketing, marching, leafletting, or other types of active speech that might reasonably threaten a calm environment. It is concerned with expression that is totally silent, and thus, highly unlikely to attract attention. *Hodge v. Talkin*, 799 F.3d 1145, 1169 (D.C. Cir. 2015) ("The passive bearing of [such] a logo or name on a t-shirt, without more, normally would not cause the public to pause and take notice . . . ."); *see also*, *Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (passive nature of a monument limited its effect on others).

Further, substantial amounts of the passive political messaging prohibited by Section 211B.11(1) is ordinary, common, and noncontroversial expression that raises no reasonable threat of diverting voters or election officials. Perhaps the clearest example is the ban on "group[s] with recognizable political views," Pet. App. I-1-2, which bars the identification of innumerable mainstream organizations, like "NAACP," "Chamber of Commerce," "AFL-CIO," and "ACLU." *See* Pet. App. D-18 n.7 (Shepherd, J., conc. in part, dis. in part). Clothing displaying the names of these and similar associations is ubiquitous in society. It poses no stumbling block to voters continuing on

with their business in polling places, and the Government has no evidence it has such an effect. *See, e.g., Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505, 514 (1969).

To heighten the perceived risk of voter distraction, the Government imagines a "bombardment" of constant, campaign-like political messaging by individuals and coordinated groups. RB at 42-43. But this vision is plausible only if one ignores the many other, unchallenged polling places regulations that directly and effectively control the voting environment. Under these regulations, voters cannot loiter in polling places in groups or alone with apparel on display. Opp. at 30 (citing Minn. Stat. § 204C.06). No one can approach voting booths. Minn. Stat. § 204C.06(2). Soliciting and other interactive campaigning is prohibited. *Id.* § 211B.11(1). People must vote and leave. *Id.* § 204C.06(1). The existence of this regime means that the political apparel ban rests on the alleged need to wipe out the infinitesimal threat of distraction that allegedly arises from political apparel, after enforcement of other restrictions directly securing order and space for voters. This minimal interest is further reduced by the fact that voters can go quickly into their private voting booth, avert their eyes, or vote early by absentee ballot[9] to avoid the fleeting presence of political

[9] Minnesota allows and encourages absentee and early voting by mail. https://www.sos.state.mn.us/elections-voting/other-ways-to-vote/ (last visited Feb. 13, 2108). Nearly 30% of voters 65 and older voted absentee in the 2016 election. http://www.sos.state.mn.us/election-admininistration-campaigns/data-maps/historical-voter-turnout-statistics/ (last visited Feb. 13, 2018).

apparel. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) ("[T]he burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'") (citation omitted). There is neither a harassing campaigner nor captive audience problem here. *Spence v. Wash.*, 418 U.S. 405, 414 (1974). It defies all logic to claim that banning clothing that silently conveys an easily avoided political expression for a few minutes, in a context that already ensures privacy for voters, is reasonably required for "peace and decorum."

2. A Total Ban Does Not Reasonably Address the Speculative Fear of Disruption

Also without merit is the Government's claim that a total ban on political apparel reasonably serves the need to avoid "disruptions" and "altercations" in polling places. It points to the possibility of people wearing "aggressive, vulgar, or racially targeted campaign and political messages." RB at 46. Certain amici warn of the presence of Nazi and KKK material. To the extent this small subset of speech amounts to "fighting words" and "true threats," it can already be prohibited under the state's police powers. But Section 211B.11(1) prohibits much more than categorically unprotected speech. It prohibits all other types of political self-expression and association as well, like shirts that say "MoveON.org," Pet. App. I-1-2, or "Minnesota Vikings." JA at 56 ¶ 9. These items raise no reasonable risk of a disruption. *Eagle Point Educ. Ass'n/SOBC/OEA v. Jackson County School Dist. No. 9*, Nos. 15-35704, 15-35972, 2018 WL 560527 (9th Cir. Jan. 26, 2018) (an anti-picketing policy that banned inflammatory signs did not reasonably serve the goal

of preventing "disruption of classes" because it also banned non-inflammatory ones).

The Government's contrary position rests on nothing but speculative, unsupported fear. It has no evidence that a political shirt or hat ever triggered a disruption in Minnesota polling places or any other state. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("The Court ha[s] never accepted mere conjecture [from the government] as adequate to carry a First Amendment burden"). It references fights in two out-of-state news stories, RB at 44 & n.22, but the altercations there *did not arise from apparel and they were not in polling places*. They arose from active electioneering outside polling places, something not at issue here. "Generalized fear of 'disruption' is not enough" to restrict speech, even in a nonpublic forum. *Eagle Point Educ. Ass'n*, 2018 WL 560527, at *7; *see also Tinker*, 393 U.S. at 514. But that is all the Government can point to. *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (A "'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms.").

Still, the Government requests deference to its fears because "[t]ensions may well be running high [at polling places], particularly when the election has been a contentious one, or the issues at stake are particularly momentous." RB at 43. This does not elevate its fears enough to justify a broad ban on political apparel. That ban applies in all polling places, rural and urban, large and small, including absentee ballot stations open for 46 days prior to an election, Minn. Stat. §§ 211B.11(1), 203B.081(1), without respect to the nature of the election or the

psychological atmosphere. Moreover, peaceful political speech is *most* valued and protected in times of "tension." *Cohen v. California*, 403 U.S. at 24-25. The Vietnam War era was marked by tension and even violence and yet this Court confirmed that the First Amendment right to controversial self-expression outweighs any fears of a potential disruption. *See id.*; *Tinker*, 393 U.S. at 508, 514. The principle has not lost its force with time.[10]

C. Banning All Political Apparel Does Not Reasonably Address the Danger of Voter Intimidation

The Government also fails to support its claim that banning political apparel reasonably advances the goal of protecting voters from "undue influence," which it defines as "confusion" and "intimidation."[11]

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[10] The Government's suggestion that political speech on apparel may impede the work of election judges derives from its fear that such apparel will trigger voter disturbances that judges must constrain. RB at 42 ("judges [must be able to] focus on their tasks, rather than policing . . . disturbances"). But since fear of speculative disturbance does not reasonably justify banning all political apparel, the ancillary and even more disconnected fear that judges might have to police those speculative disturbances fails as well.

[11] The Government declines to claim that banning political apparel is justified by a need to shield voters from any generalized influence arising from political apparel as this is tantamount to saying the Government has a valid interest in protecting people from free speech itself. It does not. *Sorrell v. IMS Health, Inc.*, 564 U.S. 553, 576 (2011) ("[T]he fear that speech might persuade provides no lawful basis for quieting it."); *Citizens United v. FEC*, 558 U.S. 310, 382 (2010) ("A speaker's ability to persuade . . . provides no basis for government regulation of free and open public debate on what the laws should be."); *Mills v. Alabama*, 384 U.S. 214, 219-20 (1966) (striking

RB at 44; *see also United States v. CIO*, 335 U.S. 106, 143 (1948) (Rutledge, J., concurring) ("undue influence" refers to "disproportionate sway" and "bloc power"). For support, it points to *Burson*, asserting that the case holds "that a state statute prohibiting display of campaign materials in the public forum outside the polling place is justified by the interest in avoiding voter intimidation and confusion. The same concerns exist to an even greater extent inside the polling place . . . ." RB at 44 (citation omitted).

This view is flawed in two important ways. First, *Burson* did not hold that the goal of preventing voter intimidation justified a prohibition on the passive, silent, and fleeting display of campaign speech. It held that such an interest justified banning campaign workers from *interacting with, and soliciting*, people entering the polling place. 504 U.S. at 211; *Packingham*, 137 S. Ct. at 1737-38. Second, unlike *Burson*, Section 211B.11(1) is not limited to "*campaign* material." The law at issue here bars that *and* all other "political" expression. *Burson* offers no support for the claim that banning passive political speech on apparel is reasonable to prevent voter intimidation.

The Government's final effort to find "undue influence" in passive speech on apparel is to repeat its fear of a coordinated "barrage of political and campaign messages." RB at 45. Without Section 211B.11(1), it claims, "campaigns and advocacy groups will be able to organize supporters to wear political apparel to the polling place in an effort to win elections, perhaps focusing on peak voting times." *Id.*

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down a law designed to shield voters from last minute "influence" related to campaign advocacy).

at 45-46. It might confuse or intimidate voters, it asserts, if a voter sees "that every other voter [in the polling place] held the opposite point of view," as evidenced by their apparel.[12] *Id.* at 46.

This picture also ignores existing laws that directly regulate behavior in the polling places. If a large group of apparel-wearing individuals ever tried to stand in a polling place to jointly pressure voters, thus crossing the line between passive speech and electioneering, existing regulations prohibiting active campaigning, Minn. Stat. § 211B.11(1) (first sentence), undue influence, *id.* § 211B.07, and loitering, are available to control the activity.

Even if one entertains the dubious assumption that the passive and temporary presence of speech on apparel could assert undue influence on voters, the broad nature of the political apparel ban renders it unreasonable as a tool to address that concern. After all, the statute prohibits or chills a substantial amount of non-advocacy self-expression, like

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[12] The Government also suggests that intimidation might occur if official election workers wore political apparel. RB at 46. MVA acknowledges that Minnesota can bar official polling place workers and observers from wearing partisan apparel as a narrowly tailored means to secure government impartiality—and the appearance of impartiality. However, an all-encompassing ban on political apparel, one sweeping in material referencing the names of organizations, is overbroad even with respect to poll workers and officials who work in absentee ballot locations. Further, the Government has not raised an interest in impartiality to justify the political apparel ban, most likely because the ban predominately regulates voters, not poll workers.

ideological statements ("Make Speech Free Again"),[13] group identifications, partisan material referring to former political personalities ("I Miss Bill"),[14] and statements of personal concern and association ("Basket of Deplorables"),[15] that cannot be reasonably construed as voter pressure.[16] *Talley v. California*, 362 U.S. 60, 64 (1960) (a ban on handbills that failed to disclose the author was not justified by an interest in preventing fraud and libel because it was not limited to items with such traits); *CIO*, 335 U.S. at 146 (Rutledge, J., concurring) (a statute barring unions from spending money on political publications to prevent "undue influence" was too broad).

To minimize the consequences of its unreasonably broad ban on passive political expression, the Government assures the Court that the restriction on free speech operates only for the ten minutes or so

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[13] https://shop.gab.ai/products/hat-make-speech-free-again-coming-soon (last visited Feb. 16, 2018).

[14] *See* http://5newsonline.com/2016/11/07/what-can-you-bring-to-a-polling-place-cellphones-political-t-shirts-children/.

[15] In 2016, a man wearing a shirt stating "Basket of Deplorables" was arrested for refusing to take it off after being ordered to do so at a Texas polling place. https://www.washingtonpost.com/news/morning-mix/wp/2016/10/28/he-wore-a-trump-hat-and-deplorables-shirt-to-vote-texas-police-arrested-him/?utm_term=.069bfa940078.

[16] The law is also unreasonable as a means to address political advocacy in polling places because it is underinclusive. No Minnesota law bars a voter from carrying a voting guide, newspaper, magazine, book, phone, or computer tablet that conveys a potentially "influential" political message into a polling place. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979).

people are in polling places. RB at 21. It is, however, a substantial affront to personal autonomy and expression to be told by the Government that one cannot peacefully speak about the government, particularly during an election, whether that restriction lasts ten minutes or ten hours.[17] Moreover, common sense and evidence in the record confirms that people who cannot wear political apparel when actually voting will be deterred from wearing it when going to and from polling places. JA 119, ¶ 27; *id.* at 122, ¶ 9. Finally, the Government's argument ignores the political apparel ban's application to absentee voting locations.

People want to wear apparel communicating personal beliefs at times and places where it matters. JA 109, ¶ 6, 16; *id.* at 41, ¶ 16. The desire and value of expressing one's own political beliefs is naturally heightened in election season, when everyone is discussing political topics. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (The First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office.). Section 211B.11(1) imposes a sweeping and unreasonable suppressant on the use of apparel to peacefully convey political self-expression at a time when its value as speech is at its zenith and its protection is most needed. *Id.*; JA 117 at 24, *id.* at 119, ¶ 27; JA 122, ¶ 9 (affidavits documenting Section 211B.11(1)'s chilling effect on individual self-expression).

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[17] *See* http://www.statesman.com/news/williamson-county-asked-apologize-voter-told-cover-vote-the-bible-shirt/BuA5hwShbbVDjITrFRGF0O/ (a woman forced to remove her "Vote the Bible" shirt when voting in Texas in the 2012 election recounts how the order made her feel "embarrassed, humiliated and intimidated").

D. The Statute Cannot Be Considered Viewpoint Neutral Due to Lack of Constraints on Discretionary Application of the Term "Political"

The Government wrongly contends that Section 211B.11(1) raises no viewpoint discrimination concerns. RB at 54-55 (mistakenly viewing the inquiry into viewpoint discrimination as a superficial one). In addition to considering whether a law discriminates against certain views on its face, the Court considers—even in facial disputes—whether the law may have a discriminatory effect in practice. *See Sorrell*, 564 U.S. at 564 (the "inevitable effect of a statute on its face may render it unconstitutional") (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968))). The danger that a law may be used for viewpoint discrimination is highest when it hinges on standards that are susceptible to shifting and discriminatory application. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n.19 (1993) (because "the distinction between a 'newspaper' and a 'commercial handbill' is by no means clear . . . the responsibility for distinguishing between the two carries with it the potential for invidious discrimination of disfavored subjects"); *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (directing remand as to one portion of a forum access policy because it was "unclear . . . what protection, if any, there is for viewpoint neutrality" given officials' discretion to apply it in a discretionary manner).

These principles apply here. Due to the uncertain reach of "political," and the lack of constraints on expansive and shifting applications of the term to ban disfavored viewpoints, Section 211B.11(1) is not truly

viewpoint neutral. *Discovery Network, Inc.*, 507 U.S. at 423 n.19. The bottom line is that Section 211B.11(1) imposes an expansive, substantial, and potentially discriminatory burden on passive and protected self-expression, free association, and generalized political speech[18] without sufficient justification. It is therefore unconstitutionally overbroad.

III.

THIS CASE IS NOT APPROPRIATE FOR STATE COURT CERTIFICATION

The Government's final request seeks certification of this case to the Minnesota Supreme Court so that the state court may issue a "definitive interpretation" of Section 211B.11(1). RB at 57. This is inappropriate for three reasons. First, this Court will rarely halt proceedings in a case involving a facial First Amendment claim for the purpose of allowing state courts to weigh in because such a delay would itself chill freedom of speech. *Sorrell*, 564 U.S. at 563 (citing *Zwickler v. Koota*, 389 U.S. 241, 252 (1967)); *City of Houston v. Hill*, 482 U.S. 451, 467 (1987) (citing *Dombrowski v. Pfiste*r, 380 U.S. 479, 489-90 (1965)).

Second, even in non-First Amendment cases, certification is proper only when a statute is "readily susceptible" to a narrowing interpretation that might nullify the constitutional dispute. Here, there is no obvious, potentially narrowing construction of Section 211B.11(1) that could do so. The Government

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[18] The Government's attempt to minimize the penalties arising from a violation of its political apparel ban fails to reduce its chilling effect, as "even minor punishments can chill protected speech." *Free Speech Coalition*, 535 U.S. at 244 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)).

certainly has not identified one. *See Harman v. Forssenius*, 380 U.S. 528, 536 (1965). Its only suggestion is that a state court might decide to strike out the portion of Section 211B.11(1) that extends the political apparel ban to absentee ballot stations. RB at 57 n.30. Even if this were possible under state law,[19] it would not negate the constitutional controversy because the question would remain whether the political apparel ban violates the First Amendment as applied to polling places on election days.

Finally, the City has never previously raised the issue of certification or abstention, despite having opportunities to do so twice in the Eighth Circuit and in its Opposition to the Petition for Certiorari. Its "tardy decision to urge abstention is remarkable given its acquiescence for more than [seven] years to federal adjudication of the merits and its insistence before the district court and the panel that the ordinance was both unambiguous and constitutional on its face." *Hill*, 482 U.S. at 467 n.16; Sup. Ct. R. 15.2. The delay undercuts the Government's argument, *id.*; *see also*, *Mayor of Philadelphia v. Educ. Equality League*, 415 U.S. 605, 628 (1974), and in combination with precedent, confirms this case is appropriately resolved in this forum.

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[19] The Government seems to suggest that the state court might strike the absentee ballot provision on overbreadth grounds. RB at 57 n.30. But this requires application of Constitutional law, not state law. As such, the suggestion is not a proper basis for certification.

CONCLUSION

The Court should declare Section 211B.11(1) facially unconstitutional under the First Amendment and remand the case to the district court with directions to enter judgment for Plaintiffs. *See* 28 U.S.C. § 2106.

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