

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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MINNESOTA VOTERS ALLIANCE, ET AL., )  
                                          ) Petitioners, )  
                                          ) v. ) No. 16-1435  
JOE MANSKY, ET AL., )  
                                          ) Respondents. )  
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Pages: 1 through 70  
Place: Washington, D.C.  
Date: February 28, 2018

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Petitioners, )  
v. ) No. 16-1435  
JOE MANSKY, ET AL., )  
Respondents. )

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Washington, D.C.  
Wednesday, February 28, 2018

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:04 a.m.

APPEARANCES:  
J. DAVID BREEMER, ESQ., Sacramento, California; on  
behalf of the Petitioners.  
DANIEL ROGAN, ESQ., Minneapolis, Minnesota; on  
behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 16-1435,  
5 Minnesota Voters Alliance versus Mansky.

6 Mr. Breemer.

7 ORAL ARGUMENT OF J. DAVID BREEMER

8 ON BEHALF OF THE PETITIONERS

9 MR. BREEMER: Mr. Chief Justice, and  
10 may it please the Court:

11 Minnesota's statute bans all  
12 conventional political expression on apparel to  
13 prevent a smaller class of material that can  
14 already be regulated under other election  
15 statutes. Shirts saying AFL-CIO, Chamber of  
16 Commerce, Moveon.cor -- Moveon.org -- excuse me  
17 -- and countless other examples are prohibited.  
18 Since a vast amount of the banned material is  
19 legitimate speech and the statute has plain --  
20 a few plainly justified applications, it is  
21 overbroad and unconstitutional.

22 JUSTICE GINSBURG: Which -- which are  
23 those -- which are the --

24 JUSTICE KENNEDY: I was just going to  
25 ask you -- I was just going to ask you, those

1 examples you gave, in your view, could be  
2 prohibited by a properly drawn statute?  
3 Moveon.org and so forth you say could be  
4 prohibited under a properly drawn statute?

5 MR. BREEMER: They can -- they are  
6 prohibited. They are prohibited.

7 JUSTICE KENNEDY: Could they be  
8 prohibited under a statute that was more  
9 narrowly drawn?

10 MR. BREEMER: No, I do not think they  
11 could. Under any test, that type of  
12 generalized political expression, associations  
13 NAACP, countless others, could -- could not be.  
14 And that --

15 JUSTICE KAGAN: Do you think more --

16 JUSTICE GINSBURG: Could you clarify  
17 the procedural posture of this case? I gather  
18 the first time around you went to the Eighth  
19 Circuit and they rejected the facial challenge,  
20 but they sent it back as-applied. District  
21 court said as-applied is also dismissed. And  
22 it went back to the Eighth Circuit.

23 So what -- are we dealing with a  
24 facial challenge, are we dealing with an  
25 as-applied challenge?

1           MR. BREEMER:  It's solely a facial  
2 challenge, Your Honor.  The as-applied claims  
3 were not appealed and they're not before the  
4 Court.  So the only question is whether this  
5 statute on its face violates the First  
6 Amendment overbreadth doctrine.  And it does  
7 violate the First Amendment doctrine -- First  
8 Amendment overbreadth doctrine because it  
9 sweeps in so much political expression in  
10 association that --

11           JUSTICE KAGAN:  Do you -- do you  
12 think, Mr. Breemer, that a statute could target  
13 only electoral speech, in other words, "Clinton  
14 for President," "Trump for President," that  
15 sort of thing?  Could a statute say that that  
16 speech cannot be worn in the polling place?

17           MR. BREEMER:  Yes, a statute does say  
18 that.  In Minnesota, the first sentence of this  
19 statute --

20           JUSTICE KAGAN:  No, I know.  But it --  
21 could a statute constitutionally say that?  If  
22 it were limited to that, would that be  
23 permissible, or is it impermissible?

24           MR. BREEMER:  Yes, Your Honor, it's a  
25 very close call, but it's not one that this

1 Court has to make in this particular case.

2 JUSTICE KAGAN: I know, but I'm just  
3 asking your view.

4 MR. BREEMER: I honestly don't know,  
5 Your Honor, whether that -- that line is so  
6 close, but the statute here, the first  
7 sentence, already prohibits that material, and  
8 it's unchallenged, that particular sentence  
9 here. And even assuming you could ban advocacy  
10 expression, this statute goes so far to take in  
11 so much material that isn't advocacy, that is  
12 simply self-expression of personal values and  
13 associations. So I agree it's a tough -- a  
14 very tough call, but it's not one this Court  
15 has to decide.

16 JUSTICE KENNEDY: Well, but it -- but  
17 it's important for us if -- we're going to have  
18 to write an opinion on this. You say, well, I  
19 don't know, I don't know.

20 (Laughter.)

21 JUSTICE KENNEDY: What about political  
22 buttons?

23 MR. BREEMER: Anything that --

24 JUSTICE KENNEDY: "Vote -- Vote for X"  
25 or "Vote for Y" and they're both on the ballot.

1 MR. BREEMER: Correct. As I mentioned  
2 before, the statute -- the first sentence  
3 already bans that, and so I think --

4 JUSTICE KENNEDY: We're asking about a  
5 hypothetical case. Could a statute that was  
6 limited to that be upheld? And would it be  
7 constitutional in your view?

8 MR. BREEMER: No, I don't think it  
9 would be. I don't think it would be.

10 JUSTICE KENNEDY: All right.

11 MR. BREEMER: Because of the passive  
12 and non-disruptive nature of the speech, people  
13 simply wearing that type of clothing as they go  
14 in and out of the polling place --

15 JUSTICE SOTOMAYOR: So you're --  
16 you're telling us to overrule Burson?

17 MR. BREEMER: No, Your Honor, I'm not  
18 saying that at all.

19 JUSTICE SOTOMAYOR: Burson basically  
20 said the opposite of what you're saying.

21 MR. BREEMER: Well, it's --

22 JUSTICE SOTOMAYOR: Directly and  
23 completely.

24 MR. BREEMER: Well, as we read Burson,  
25 it didn't deal with the passive wearing of a --



1 any kind of apparel, campaign or more general  
2 political apparel. It dealt with active  
3 campaigning and material used in conjunction  
4 with that conduct.

5 JUSTICE SOTOMAYOR: That's the line  
6 you're drawing? Because someone puts something  
7 on instead of handing it around, that's the  
8 line you want us to draw?

9 MR. BREEMER: Well, that's part of the  
10 line. It's not -- the passive nature of the  
11 material undercuts the state's interest in  
12 claiming that it's disruptive, but it's also --  
13 also intimidating speech can --

14 JUSTICE GORSUCH: Mr. -- Mr.  
15 Breemer --

16 MR. BREEMER: Yes.

17 JUSTICE GORSUCH: -- passive versus  
18 active sounds a lot like the act/omission  
19 distinction, and that has proven to be one of  
20 the most slippery concepts in all of law.

21 Is it an act to put on a button or is  
22 it an omission to not speak about what's on the  
23 button? A T-shirt, you say, is passive. What  
24 if it were instead a sign on my head, you know,  
25 flashing lights? Is that active or is that

1 passive? How are we supposed to police the  
2 line you're -- you're suggesting?

3 MR. BREEMER: Well, what I'm  
4 suggesting, Your Honor, is that the line is  
5 already policed. All the government's  
6 interests that it's claiming in polling places  
7 are already regulated by other statutes. For  
8 instance, Minnesota's anti-intimidation  
9 statute, Section 211B.07, could be utilized to  
10 get at intimidating and threatening messages in  
11 the polling place. Similarly --

12 CHIEF JUSTICE ROBERTS: They -- they  
13 talk about other interests like decorum and  
14 dignity, and those aren't addressed by the  
15 other statutes.

16 MR. BREEMER: No, they're not. Well,  
17 they are addressed by Section 2 -- 204C.06,  
18 Your Honor, which prohibits disorderly conduct  
19 and interference --

20 CHIEF JUSTICE ROBERTS: Well, there's  
21 a difference between interference with  
22 someone's right to vote or disorderly conduct  
23 and -- and decorum. They're not -- they're not  
24 the same. Decorum, obviously, reaches further  
25 than you can't intimidate someone.

1           MR. BREEMER: Yes, it probably would,  
2 Your Honor. That's true. But there's no right  
3 to vote -- as far as I understand it, the right  
4 to vote free of intimidation, but there's not a  
5 right to vote free of being bothered at all.  
6 Polling places are not pristine retreats from  
7 the real world, and I don't believe the  
8 government can sacrifice the First Amendment to  
9 make them that way.

10           CHIEF JUSTICE ROBERTS: Well, you --  
11 you say that, but I wonder if the state can  
12 make an opposite determination and say, you  
13 know, for however many months we've had this,  
14 you know, maybe bitter, sharp, political  
15 campaign going on, and maybe, just before you  
16 cast your vote, you should be able to have a  
17 time for some quiet reflection or to do that  
18 important civic obligation in peace and quiet  
19 without being bombarded by another campaign  
20 display.

21           And it -- you know, you say these are  
22 -- it's passive but not active, but, you know,  
23 a picture can be worth a thousand words, and  
24 people's apparel can convey very strong and  
25 shocking images that maybe the state can decide

1 that, just before you cast your vote, you  
2 should have at least a moment free of all the  
3 Sturm und Drang of the campaign.

4 MR. BREEMER: That -- that's true.  
5 And there are legitimate interests in the  
6 polling place. The problem here is that most  
7 of the material that it wants to get at, if not  
8 all of it, is already covered. And the small  
9 amount that you're suggesting is not covered --

10 JUSTICE GINSBURG: But you've answered  
11 -- you've answered that it's already covered,  
12 but it's no good.

13 JUSTICE KENNEDY: You've said it's no  
14 good.

15 MR. BREEMER: Excuse me, I'm sorry. I  
16 didn't --

17 JUSTICE GINSBURG: You said the  
18 coverage was no good, that you could not cover.

19 MR. BREEMER: If I'm -- yes, Your  
20 Honor. If I'm pressured to make the call on --  
21 on whether you could constitutionally proscribe  
22 campaign apparel, specifically advocacy  
23 apparel, I would say no.

24 JUSTICE KENNEDY: Well, you're  
25 pressured to come --

1           MR. BREEMER: But the statute here  
2 goes far beyond that.

3           JUSTICE KENNEDY: -- you're pressured  
4 to come up with a workable rule to guide us  
5 when we write this decision.

6           MR. BREEMER: Yes, Your Honor.

7           JUSTICE KENNEDY: And you're -- you're  
8 telling, in response to the Chief Justice,  
9 basically, that the state's interest in -- in  
10 -- in decorum and solemnity and the dignity of  
11 the voting process cannot be protected by rules  
12 relating to buttons and apparel.

13          MR. BREEMER: I'm saying, Your Honor,  
14 that it -- it's not reasonably protected in  
15 this instance because it sweeps in so much  
16 material that's not reasonably related to those  
17 interests -- interests.

18          JUSTICE ALITO: Well, suppose we think  
19 that it would be a different case and that a  
20 state could have a law that prohibits the  
21 wearing of buttons or any other -- or attire  
22 that contains the name of a candidate or refers  
23 to a ballot issue or the name of a political  
24 party that has candidates running for office in  
25 that election.

1           If we thought that that would be  
2 consistent with the First Amendment, would that  
3 doom your case or would you still have  
4 additional arguments?

5           MR. BREEMER: No, that -- Your Honor,  
6 that is one place where you can draw the line.  
7 And if the line is drawn there, this statute  
8 still fails. It's still overbroad because it  
9 sweeps in so much other -- all political --

10           JUSTICE KAGAN: And -- and what would  
11 be the justification for that line, in your  
12 view?

13           MR. BREEMER: Well, the justification  
14 --

15           JUSTICE KAGAN: In other words, why  
16 would we put one -- all the materials that  
17 Justice Alito talked about on one side of the  
18 line and all the materials that you think a  
19 state cannot restrict on the other side of the  
20 line? In your view, what's the difference?

21           MR. BREEMER: I think that you could  
22 arguably conclude that that type of apparel is  
23 reasonably related to the government's  
24 legitimate interest in preventing undue  
25 influence in polling places, but shirts that

1 simply say AFL-CIO, Chamber of Congress, NAACP,  
2 those are not related to the government's  
3 interests in --

4 JUSTICE SOTOMAYOR: How about issues  
5 on the ballot?

6 MR. BREEMER: Yes, Your Honor, I would  
7 -- that would be --

8 JUSTICE SOTOMAYOR: All right. So  
9 let's talk about a fiscal matter. Could  
10 someone then wear a button or a shirt or could  
11 the state ban a button or a shirt that said  
12 "Restrain Government Spending"?

13 MR. BREEMER: No, Your Honor, I don't  
14 believe it could, because the connection is so  
15 --

16 JUSTICE SOTOMAYOR: I think your  
17 adversary says they can because it's a  
18 political issue display.

19 MR. BREEMER: That's correct. I think  
20 they do --

21 JUSTICE SOTOMAYOR: And that's where  
22 you say they can't?

23 MR. BREEMER: No. We say --

24 JUSTICE SOTOMAYOR: Even though that's  
25 on the ballot?

1           MR. BREEMER: A fiscal issue? I think  
2 the connection would be too attenuated because  
3 then you could extrapolate forever.

4           JUSTICE SOTOMAYOR: To you. But do  
5 you think a reasonable observer would think  
6 it's too attenuated?

7           MR. BREEMER: I think a -- yes, I do  
8 think a reasonable observer would not see  
9 generalized political apparel as an influencing  
10 towards something on the ballot. And that's  
11 the problem with this statute. It seeks to  
12 silence so much peaceful conventional messaging  
13 by the blunt means of -- of outlying  
14 everything.

15           JUSTICE SOTOMAYOR: Can you --

16           JUSTICE GINSBURG: But they have a  
17 statute that covered one thing that is in this  
18 case, it's not hypothetical, it doesn't have to  
19 do with an issue on the ballot, but the "Please  
20 ID Me," the "Please ID Me" button, which was  
21 challenged and then you chose not to pursue  
22 that.

23                   But what is your position on that?  
24 Could a legitimately challenged statute stop  
25 you from having the "Please ID Me" button?



1           MR. BREEMER: Yes, it could. And I  
2 think the Minnesota's anti-deception,  
3 anti-fraud statute that is already on the books  
4 could be used -- could have been used and could  
5 be in the future, if similar circumstances come  
6 up, could be used to deal with that button.  
7 That's Section 20 -- 211B.07 again. That's the  
8 anti-intimidation statute.

9           There is also a fraud statute, which  
10 is 204C.035. All the government's interests  
11 can be already addressed through its election  
12 statutes. And that's what makes this statute  
13 so overbroad, is that it's trying -- they're  
14 trying to get at a small slice of potentially  
15 uncovered material by banning all political  
16 expression in association, even items that  
17 don't go to ballot issues, that don't go to  
18 candidates, that are just personal expression  
19 of political beliefs and political values.

20           JUSTICE KAGAN: It -- it just is a  
21 little bit hard, Mr. Breemer, to evaluate an  
22 argument of overbreadth unless we have a clear  
23 view from you as to how far you think a state  
24 could go.

25           So I'm not sure that you've given us

1 that view. I mean, are you -- do you want to  
2 accept Justice Alito's suggestion, or do you  
3 want to draw the line at some other place so  
4 that we know, okay, that's permissible, this is  
5 impermissible, how does this relate to that?  
6 That's the usual way overbreadth analysis goes.

7 MR. BREEMER: Yes, Your Honor. And  
8 it's -- it's -- it's very difficult, given the  
9 range of available material that's out there  
10 and the number of interests the government has  
11 here to be able to put every item in the -- in  
12 the appropriate box. I think it's very hard to  
13 draw a line, other than drawing a line through  
14 this particular sentence, which would allow the  
15 government to continue to pursue its interests  
16 but accommodate free speech. I agree --

17 JUSTICE KENNEDY: Well, if -- if the  
18 Court is concerned about preserving the dignity  
19 and the decorum and the solemnity of the voting  
20 process, and the statute is as difficult as you  
21 say, isn't that an argument for allowing good  
22 faith determination on a case-by-case basis by  
23 the polling officials?

24 MR. BREEMER: No, I wouldn't say that,  
25 Your Honor, because in the meantime free speech

1 would be chilled. All -- all the conventional  
2 political expression in association that no  
3 reasonable person would see as a threat to the  
4 polling place would be chilled in the process,  
5 as it's being chilled right now and will  
6 continue to be chilled unless this statute is  
7 invalidated.

8 So I agree that it's a possible line  
9 to draw at advocacy material, but, in any  
10 event, the statute would fail because it still  
11 sweeps in the rest of the conventional type --

12 JUSTICE KAGAN: If -- if that were  
13 where we drew the line, I mean, what -- what  
14 would be encompassed in advocacy material?  
15 Would it be only things that named a  
16 candidate's name?

17 MR. BREEMER: Your Honor, I think it  
18 would be anything that said for or against a  
19 candidate or an issue directly on the ballot.

20 JUSTICE KAGAN: How about if it said  
21 "Resist"?

22 MR. BREEMER: I think that would be  
23 constitutionally permitted, and should be, and  
24 -- and generalized slogans --

25 JUSTICE KAGAN: "Make America Great

1 Again"?

2 MR. BREEMER: That type of slogan,  
3 too, I think that should be constitutionally  
4 permissible. Any -- call it generalized --  
5 otherwise, you start to bleed over and pretty  
6 soon you have the problem that we have here of  
7 discretionary enforcement and you're swallowing  
8 all this other legitimate speech when you're  
9 trying to just stop that type of advocacy  
10 material.

11 JUSTICE KENNEDY: Why should there be  
12 speech inside the election booth at all, or  
13 inside the what you call the election room?  
14 Let's -- let's say that it's a small room. Why  
15 should there be any speech there at all?  
16 You're there -- you're there to vote.

17 MR. BREEMER: Your Honor, because the  
18 First Amendment doesn't stop at the polling  
19 place door, even -- even if it's a non --

20 JUSTICE KENNEDY: That's one of the  
21 questions in the case. What's your cite --  
22 citation for that?

23 MR. BREEMER: "Jews for Jesus," Your  
24 Honor.

25 JUSTICE GINSBURG: Was it an airport?

1           MR. BREEMER: It was an airport. It  
2 was a non-public forum, Your Honor. That's why  
3 I'm referring to -- that's why I'm referring to  
4 it.

5           JUSTICE GINSBURG: Justice Kennedy  
6 asked the question, could a state say that the  
7 polling place is off limits to any kind of  
8 advocacy or promotion of any point of view?

9           MR. BREEMER: A state could say that,  
10 yes, Your Honor, and Minnesota has said that.  
11 I'm sorry if I misunderstood. I thought your  
12 question was whether you could create an  
13 entirely First Amendment-free zone in the  
14 polling place. And -- and my answer to that  
15 would be, no, you -- you can't.

16           And this gets close to a First  
17 Amendment-free zone because political speech is  
18 such a core part of the First Amendment that  
19 it's a political speech-free zone. And while  
20 you may be able -- the government may be able  
21 to ban a certain small class of material, for  
22 instance, the advocacy material, it couldn't  
23 sweep in all the rest of the available  
24 political speeches out there, "Resist" shirts,  
25 "Me Too" and so on. But that's exactly what

1 it's doing here. It's trying to silence all  
2 this legitimate speech by -- to -- to go after  
3 a small slice that it can already regulate  
4 under its other statutes.

5 JUSTICE GINSBURG: So what -- what do  
6 you put in what the state can do in addition to  
7 vote for candidate X or vote against  
8 proposition Y?

9 MR. BREEMER: As a bright-line rule,  
10 Your Honor, I don't -- I don't see any other  
11 feasible bright line. I think that the state  
12 would have to -- if there's an intimidating  
13 message that comes in, I think the state would  
14 have to deal with that on an as-applied basis,  
15 as -- as events occur under its existing  
16 statutes like such --

17 JUSTICE SOTOMAYOR: You took the  
18 position that "Me Too" -- "Please ID Me" wasn't  
19 intimidating.

20 MR. BREEMER: No, Your Honor, I don't  
21 think I --

22 JUSTICE SOTOMAYOR: Or that it was  
23 free speech that should not be stifled,  
24 correct? Are you changing your mind on that  
25 now?

1           MR. BREEMER: No. Our position was  
2 that, as pure speech, just the words on that  
3 button were, yes, it was protected speech,  
4 that's correct.

5           JUSTICE SOTOMAYOR: So there's always  
6 line drawing, whether you call it intimidating  
7 speech or not, someone's going to have to draw  
8 a line.

9           So going back to Justice Kennedy's  
10 point, why, if this is not a public forum, why  
11 can't the state reasonably draw the line at  
12 saying political speech of any kind can be  
13 potentially intimidating in a voting place and  
14 we won't permit it?

15           MR. BREEMER: I think the -- the --  
16 the reason is that the First Amendment  
17 continues, as I mentioned before, continues to  
18 apply in polling places. And once we start to  
19 create these --

20           JUSTICE SOTOMAYOR: It does. You can  
21 vote. That's the permitted act, political  
22 activity.

23           MR. BREEMER: Correct. And, Your  
24 Honor, that's --

25           JUSTICE SOTOMAYOR: So it's not all

1 that's being --

2 MR. BREEMER: There -- there's an --

3 JUSTICE SOTOMAYOR: I mean, I suspect  
4 that on a military base we would say it would  
5 be okay for the Army to say on military grounds  
6 we're not going to permit political speech.

7 MR. BREEMER: Well, I'm not quite sure  
8 about that, Your Honor, because, in Greer, in  
9 the Greer decision, the Court said that  
10 conventional political speech would not be  
11 banned.

12 This Court has never upheld a  
13 prohibition on political speech as broad as  
14 this. And there's not --

15 JUSTICE ALITO: Have we ever said that  
16 it would be permissible to ban all political  
17 speech on military ground?

18 MR. BREEMER: No, Your Honor. In --  
19 in Greer, the Court said that conventional  
20 political speech was -- continued to be  
21 permitted. And -- and so I guess the answer to  
22 the question is that this Court has never  
23 upheld a prohibition this broad in -- even in  
24 non-public forums, even on a military  
25 reservation, in an airport, in a school. In



1 Cohen, Tinker, in Greer, in all these cases,  
2 the Court wasn't willing to draw a line --

3 JUSTICE SOTOMAYOR: Because there was  
4 not a state interest that would permit it?

5 MR. BREEMER: Well, that's -- that's  
6 correct. It -- there wasn't --

7 JUSTICE SOTOMAYOR: It wasn't a state  
8 interest, but here there is a state interest  
9 that was recognized in Burson as being quite  
10 important and very legitimate?

11 MR. BREEMER: It's true, they are  
12 important interests, and -- and we don't deny  
13 that. The problem is that the means being used  
14 is such a blunt means that it's swallowing a  
15 lot --

16 JUSTICE KENNEDY: You're -- you're --

17 MR. BREEMER: -- of political  
18 expression that doesn't have a reasonable  
19 connection to those particular interests, like  
20 simply wearing a shirt that identifies an  
21 organization that has political views or a hat  
22 or any other sort of apparel that simply  
23 identifies the wearer's personal beliefs.

24 A lot of this material is not worn as  
25 advocacy or to influence but simply as

1 self-expression on the day of election when  
2 people want to express their own political  
3 views when everyone is talking about them and  
4 -- and wear them in. So that type of material,  
5 I don't believe we -- our position -- it cannot  
6 be banned even under the -- the most lenient  
7 test because it's not related to these  
8 interests.

9 Now there's some -- is some material,  
10 threatening intimidating material, threats to  
11 particular classes, that could be under  
12 Minnesota's anti-intimidation statute, but the  
13 problem here -- we have here is that the  
14 statute doesn't stop there.

15 CHIEF JUSTICE ROBERTS: What about the  
16 -- the concern about coordination? You know,  
17 whatever the group is, you know, a big  
18 employer, the union, teachers, whatever, say  
19 we're all going to show up and we're all going  
20 to have, you know, these -- these buttons on or  
21 whatever, and maybe you're a member of the  
22 group and you don't agree with the position and  
23 you'll feel some pressure to transform your  
24 speech from what you really would like to say  
25 or you wouldn't like to say anything about it,

1 yet you're going to be identified; because you  
2 don't have our button, you're not doing what  
3 you should be doing to support the group.

4 MR. BREEMER: Yes, Your Honor. And if  
5 that situation did come up, it could be  
6 addressed under Section 204C.06, which  
7 prohibits voter interference and disorderly  
8 conduct and loitering in the polling place.

9 CHIEF JUSTICE ROBERTS: Well, but  
10 nobody would say that it's interference or  
11 disorderly conduct. It's subtle psychological  
12 pressure. I don't think that would be covered  
13 by any of those other statutory provisions.

14 MR. BREEMER: And in that case, Your  
15 Honor, then it would be -- could be dealt with  
16 on an as-applied basis as the circumstances  
17 come up, if it crosses the line between --

18 JUSTICE GINSBURG: As-applied under  
19 what?

20 MR. BREEMER: -- speech and conduct.

21 JUSTICE GINSBURG: Under what? You  
22 have to have a statute to apply.

23 MR. BREEMER: Yes. And I -- and I'm  
24 still referring to the other statutes that  
25 could be addressed as an as-applied challenge

1 under those situations -- under those existing  
2 statutes because it's crossing the line. In  
3 that kind of situation, it would cross the line  
4 between speech and conduct. And once you cross  
5 the line between speech and conduct -- or  
6 speech and electioneering, if you draw the line  
7 at advocacy, it would cross the line between  
8 electioneering, either one of those, and then  
9 you could deal with it on that situation.

10 I would mention, though, it is -- it  
11 is -- it is a fact that that type of behavior  
12 is already not allowed in polling places  
13 because of the other interests in statutes in  
14 there that try to keep it in a -- in a -- quiet  
15 decorum and limiting people for only the  
16 purpose of going in and out of the polling  
17 place.

18 JUSTICE ALITO: How many other states  
19 have laws that go as far as Minnesota's?

20 MR. BREEMER: Your Honor, we believe  
21 -- nine is our estimate. And the remainder  
22 deal with electioneering. They stop at  
23 electioneering at the advocacy material that we  
24 were discussing before. So there's nine states  
25 that have similar to this, and --

1 JUSTICE ALITO: And what has been the  
2 experience of these other case -- these other  
3 states? Have they had brawls in the -- in the  
4 polling place? Have they had disturbances in  
5 the polling place?

6 MR. BREEMER: No, Your Honor, there's  
7 no evidence of -- of disruption either in  
8 Minnesota or these other states caused by  
9 simply wearing --

10 JUSTICE ALITO: Well, the states that  
11 don't have laws that go as far as Minnesota's,  
12 what -- what has been the record there?

13 MR. BREEMER: As far as I know, Your  
14 Honor -- it's not in this record. As far as I  
15 know, that they -- that there hasn't been any  
16 instances of a disruption caused by people  
17 wearing apparel, except for when polling  
18 workers confront people wearing apparel and  
19 then stop the process to try and police their  
20 clothes.

21 And that's part of the problem here,  
22 is that disruption and intimidation is often  
23 going to occur through the policing of  
24 someone's shirt, not through the fact that  
25 they're passively wearing it as they go in and

1 out of the polling place.

2 JUSTICE ALITO: And does the record  
3 show how many officials would be making these  
4 determinations at a general election in  
5 Minnesota and how they're selected?

6 MR. BREEMER: The polling officials,  
7 Your Honor?

8 JUSTICE ALITO: Yeah, the polling  
9 officials.

10 MR. BREEMER: They're selected from  
11 the parties, various parties. Names -- a list  
12 is submitted, and they're selected. I don't  
13 know how many there are.

14 We know that there's more than one.  
15 We also know that there's -- there's other  
16 officials sometimes that go in there.

17 JUSTICE ALITO: So they're selected by  
18 the parties. So if a -- an official from one  
19 party thinks that the attire of a particular  
20 voter violates this law, what happens? That's  
21 the final decision?

22 MR. BREEMER: What happens at that  
23 point, Your Honor, is, yes, that's -- that's a  
24 final decision in -- in this respect. The --  
25 the voter with the apparel must either take off

1 their clothes or have their name and address --

2 JUSTICE GINSBURG: But if the other --  
3 the other election judge says I disagree, then  
4 what happens?

5 MR. BREEMER: Then I -- I think they  
6 would call the head judge, Your Honor, and  
7 there would be a decision -- head election  
8 judge and there would be a decision being made.  
9 And in the meantime, there would be a  
10 disruption going on in the polling place  
11 because apparel is being policed.

12 JUSTICE ALITO: And who --

13 MR. BREEMER: And, again --

14 JUSTICE ALITO: I'm sorry. And who  
15 selects the head election judge at any  
16 particular place?

17 MR. BREEMER: I'm sorry, Your Honor, I  
18 don't -- I don't know the answer to that  
19 question. My co-counsel may.

20 JUSTICE ALITO: Well, I'll ask -- I  
21 guess I'll ask the state. Do you know whether  
22 these -- these people have any training or are  
23 they all chosen to be the reasonable observer?  
24 Do they, you know, test them to see if they're  
25 -- they're the reasonable observer? Do we

1 know?

2 MR. BREEMER: I don't know. I know  
3 that they try to train them, Your Honor. And  
4 this is how the Election Day policy in this  
5 case came up. The election officials attempted  
6 to train the officials to -- polling officials  
7 to apply this very broadly to material that  
8 names an organization, advocacy material, party  
9 material, and not limited to that.

10 So there is some effort to train them,  
11 but the effort in this case confirmed that this  
12 statute sweeps so broadly that there's almost  
13 virtual -- there's virtually nothing political  
14 that it can't take in.

15 I'll reserve my remaining time.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Mr. Rogan.

19 ORAL ARGUMENT OF DANIEL ROGAN

20 ON BEHALF OF THE RESPONDENTS

21 MR. ROGAN: Mr. Chief Justice, and may  
22 it please the Court:

23 Minnesota's restriction on speech in  
24 the polling place does not violate the First  
25 Amendment. It is a reasonable and



1 viewpoint-neutral speech restriction in a  
2 quintessential nonpublic forum that protects  
3 the fundamental right to vote.

4 This Court has recognized that  
5 ensuring the integrity of our electoral process  
6 and protecting the fundamental right to vote  
7 are government interests of the highest order  
8 and that laws advancing these important  
9 interests may constitutionally limit speech.

10 Minnesota's prohibition on political  
11 apparel in the polling place is such a law.  
12 This law protects the integrity of the  
13 elections by preserving order and decorum in  
14 the polling place, and preventing voter  
15 confusion and intimidation.

16 CHIEF JUSTICE ROBERTS: It does reach  
17 quite a bit beyond what I think a reasonable  
18 observer would think is necessary. Do -- do  
19 you really think if someone has a shirt with  
20 the tiniest little logo or inscription here,  
21 that that's going to have any effect on  
22 decorum?

23 MR. ROGAN: Your Honor, the -- the --  
24 the test that Minnesota has is what a  
25 reasonable observer would understand is

1     advocating electoral choices.  So, in some  
2     ways, a tiny lapel pin that no one can see is  
3     -- is not --

4             CHIEF JUSTICE ROBERTS:  Well, you can  
5     see it.  I mean, you can see it and you know  
6     it's -- it's the logo of one of the campaigns.

7             MR. ROGAN:  Certainly, yes, Your  
8     Honor, I do -- I do think that that causes the  
9     -- the problems and is constitutionally  
10    proscribable, and it's for the reasons that --  
11    that you discussed, which is the intimidation  
12    that it -- that can occur is not just based on  
13    the plain meaning of what is -- what the  
14    apparel says, that it's somehow intimidating on  
15    its own.  It's -- it's -- it's a pro- -- it's a  
16    prophylactic measure designed to prevent the  
17    type of intimidation that you talked about,  
18    which is that having people identify with  
19    particular candidates allows them to then  
20    suddenly feel like they either have to comply  
21    or that they are going to be singled out, and  
22    that can lead to the intimidation.

23             And that's what the history of -- in  
24    Minnesota and in states in the late 1800s that  
25    led this Court in *Burson* to uphold exactly that

1 type of prohibition.

2 CHIEF JUSTICE ROBERTS: Well, I don't  
3 know if I discuss the issues. I ask questions.

4 But I just don't understand where the  
5 disruption of the decorum comes with respect to  
6 anything that qualifies as -- as political. I  
7 -- I mean, people going to vote certainly would  
8 expect that they would see people arguing for  
9 their candidates or the other candidates,  
10 though maybe not within 100 feet or whatever.  
11 But the idea that they're going to be protected  
12 from recognizing that other people support  
13 different candidates than they might, I think,  
14 is a bit more of a stretch.

15 MR. ROGAN: Certainly, Your Honor, and  
16 -- and I think -- I think Burson recognized  
17 that order and decorum can be called into  
18 question by simply wearing campaign material.  
19 All that Minnesota's law does is extend that  
20 line to political material.

21 And it's for the exact same reasons.  
22 It's that when you have a campaign that's gone  
23 on for months, and we end up at the Election  
24 Day in the polling place where we have asked  
25 people to come forward to exercise their right

1 to vote, that is a place where we want to  
2 ensure that there's order and decorum so that  
3 there is the solemnity that goes with voting.

4 And having people identify themselves  
5 with a pin that is a campaign or a political  
6 message on it reasonably could lead to  
7 disruption. And that disruption --

8 JUSTICE GINSBURG: How would -- how  
9 would -- well, how far does -- does this go?  
10 The -- the clear case is a pin that says "Vote  
11 For Candidate X." But we're told by the  
12 Petitioner that you can't wear a pin saying "Me  
13 Too," you can't wear a pin saying "ACLU Defends  
14 Free Speech"?

15 MR. ROGAN: Your Honor, the -- the  
16 line that we have drawn is campaign material  
17 plus political material, with the definition of  
18 political material being reasonably related --  
19 a reasonable person would understand that the  
20 message that's being delivered is one regarding  
21 electoral choices in the polling place.

22 And so --

23 JUSTICE GINSBURG: So where -- where  
24 does that limitation come in, electoral choices  
25 in the polling place?

1           MR. ROGAN: Your Honor, it comes from  
2 the definition of political, which is in an  
3 Election Day -- Election Day electioneering  
4 statute, and from the definition of political  
5 purpose, which is in the statute which  
6 describes -- that uses the word "political" to  
7 mean influencing voting in an election.

8           JUSTICE ALITO: The problem is that so  
9 many things have political connotations, and  
10 the connotations are in the eye of the  
11 beholder.

12           And on Election Day, you're going to  
13 have hundreds, maybe thousands of officials in  
14 Minnesota, and every one of them probably  
15 thinks that he or she is the reasonable  
16 observer, and they're making a determination  
17 about whether something has political  
18 connotations.

19           And in one of your elections, in 2016,  
20 I think, you had the President was running,  
21 members of the House were running, members of  
22 the State Legislature were running, State  
23 Judges were running. There were local  
24 elections. There was one ballot question.

25           So the observer would have to know all

1 of the issues in all of those campaigns and  
2 would have to decide whether something had  
3 connotations regarding any of those issues.

4 It's -- it's an invitation for  
5 arbitrary and -- arbitrary enforcement and  
6 enforcement that's not even-handed. And I -- I  
7 have no idea where the line lies.

8 Some of the examples that were raised  
9 in the Eighth Circuit were really pretty -- and  
10 -- and the state said, yes, that would be  
11 prohibited. An AFL-CIO shirt, that would be  
12 prohibited?

13 MR. ROGAN: So, Your Honor, the -- I  
14 think the -- the answer is that it has two  
15 components to it. It has to be understood as  
16 relating to electoral choices and it has to be  
17 well-known.

18 So many of the examples that -- that  
19 you talked about simply wouldn't be well-known.  
20 It's -- it's a reasonable observer sitting in  
21 the polling place on Election Day, after  
22 there's been a campaign, after there's been the  
23 issues that have been raised that are relevant  
24 to the election, deciding whether or not they  
25 believe that it's reasonable to understand the

1 message being --

2 JUSTICE ALITO: Yeah. Well, that  
3 makes it worse, that it has to be -- well, it's  
4 not only does it have to be a political  
5 message, but it has to be well-known. What --  
6 what is well-known?

7 MR. ROGAN: Well, Your Honor, the  
8 political has a -- has a plain meaning in our  
9 statute based on that it -- it's influencing  
10 elections.

11 What I -- all that I'm describing is  
12 that something that is political, for example,  
13 that is known to only a few people but is  
14 clearly political, is not going to be something  
15 that's going to be reasonably understood by  
16 voters in the polling place.

17 JUSTICE ALITO: How about a shirt with  
18 a rainbow flag? Would that be permitted?

19 MR. ROGAN: A shirt with a rainbow  
20 flag? No, it would -- yes, it would be -- it  
21 would be permitted unless there was -- unless  
22 there was an issue on the ballot that -- that  
23 related somehow to -- to gay rights.

24 JUSTICE ALITO: How about a shirt that  
25 says "Parkland Strong"?

1 MR. ROGAN: No, that would -- that  
2 would be -- that would be allowed. I think --  
3 I think, Your Honor --

4 JUSTICE ALITO: Even though gun  
5 control would very likely be an issue?

6 MR. ROGAN: To the extent --

7 JUSTICE ALITO: I bet some candidate  
8 would raise an issue about gun control.

9 MR. ROGAN: Your Honor, the -- the --  
10 the line that we're drawing is one that is --  
11 is related to electoral choices in a --

12 JUSTICE ALITO: Well, what's the  
13 answer to this question? You're a polling  
14 official. You're the reasonable person. Would  
15 that be allowed or would it not be allowed?

16 MR. ROGAN: The -- the Parkland?

17 JUSTICE ALITO: Yeah.

18 MR. ROGAN: I -- I think -- I think  
19 today that I -- that would be -- if -- if that  
20 was in Minnesota, and it was "Parkland Strong,"  
21 I -- I would say that that would be allowed in,  
22 that there's not --

23 JUSTICE ALITO: Okay. How about an  
24 NRA shirt?

25 MR. ROGAN: An NRA shirt? Today, in



1 Minnesota, no, it would not, Your Honor. I  
2 think that that's a clear indication -- and I  
3 think what you're getting at, Your Honor --

4 JUSTICE ALITO: How about a shirt with  
5 the text of the Second Amendment?

6 MR. ROGAN: Your Honor, I -- I -- I  
7 think that that could be viewed as political,  
8 that that -- that would be -- that would be --

9 JUSTICE ALITO: How about the First  
10 Amendment?

11 (Laughter.)

12 MR. ROGAN: No, Your Honor, I don't --  
13 I don't think the First Amendment. And, Your  
14 Honor, I --

15 CHIEF JUSTICE ROBERTS: No -- no what,  
16 that it would be covered or wouldn't be  
17 allowed?

18 MR. ROGAN: It would be allowed.

19 CHIEF JUSTICE ROBERTS: It would be?

20 MR. ROGAN: It would be. And -- and I  
21 think the -- I understand the -- the idea, and  
22 I've -- I've -- there are obviously a lot of  
23 examples that -- that have been bandied about  
24 here --

25 JUSTICE ALITO: Yeah, well, this is

1 the problem. How about a Colin Kaepernick  
2 jersey?

3 MR. ROGAN: No, Your Honor, I don't  
4 think that that would be under -- under our  
5 statute. And I think --

6 JUSTICE ALITO: How about "All Lives  
7 Matter"?

8 MR. ROGAN: That could be, Your Honor,  
9 that could be -- that could be perceived as  
10 political. And I -- I think obviously, Your  
11 Honor, there -- there are some hard calls and  
12 there are always going to be hard calls. And  
13 that -- that doesn't mean that the line that  
14 we've drawn is -- is unconstitutional or even  
15 unreasonable.

16 JUSTICE ALITO: How about an "I Miss  
17 Bill" shirt?

18 (Laughter.)

19 MR. ROGAN: I'm sorry, Your Honor? I  
20 didn't --

21 JUSTICE ALITO: "I Miss Bill," or to  
22 make it bipartisan, a "Reagan/Bush '84" shirt?

23 MR. ROGAN: Yes, Your Honor, I believe  
24 that that's political.

25 JUSTICE BREYER: You can do this too,

1 I guess, with the -- can't you, with the need  
2 in state-run hospitals to restrict conversation  
3 in certain areas to medical matters, the need  
4 in law schools or other schools to restrict  
5 conversation in the class to the subject that  
6 is being taught, including politics, the need  
7 in -- I don't know, you make it up, but I --  
8 because that's what we're doing, that's what  
9 I'm doing, and I can think of many, many  
10 instances where thousands, perhaps millions, of  
11 people have to have the authority to operate a  
12 standard, to restrict the speech to the subject  
13 that's at hand.

14 And so, if, in fact, we are trying to  
15 have a place where a person has reflective  
16 thought for a moment after the hurly-burly of  
17 the campaign, this problem will inevitably  
18 arise.

19 One way of correcting mistakes is  
20 through as-applied challenges after the event.  
21 So my question is, how does that work?

22 MR. ROGAN: How does an as-applied  
23 challenge work, Your Honor?

24 JUSTICE BREYER: Suppose in the  
25 examples that you've heard there were mistakes

1 made. The person who's running it thought that  
2 the Rainbow Coalition was an issue in the case  
3 because one party wanted to have it and the  
4 other party was against it. Suppose he made a  
5 mistake and kept out the person with the sign  
6 or the T-shirt, either of which could have a  
7 rainbow on it.

8 Suppose he's mistaken. Is there any  
9 remedy in your state?

10 MR. ROGAN: The -- the -- what -- what  
11 occurs if there is speech that is pro --  
12 proscribable is the election judge will ask the  
13 person to cover it up. And the remedy for that  
14 then is, if the person can either cover it up  
15 and proceed to vote, and that ends it, or if  
16 they proceed to vote, their name will be  
17 identified in -- in a -- in an Election Day log  
18 indicating that they were wearing political  
19 material.

20 And that in all cases so far has ended  
21 the inquiry. There hasn't been any adverse  
22 actions. Ultimately, if somebody was -- a case  
23 was brought in the administrative hearing  
24 process, the penalty is up to a \$300 fine,  
25 which is a traffic ticket.

1 CHIEF JUSTICE ROBERTS: How -- but the  
2 -- I guess the issue is how do you know if a  
3 mistake has been made? You know, if someone  
4 makes a judgment and it's challenged, how do  
5 you know a mistake's been made? I mean,  
6 there's -- the question -- the concern, of  
7 course, it's what the case could be largely  
8 about, is whether or not there are standards  
9 that can be applied in a reasonable way.

10 And it's not a question really of  
11 review in an as-applied or other challenge to  
12 see if there's been a mistake, unless the  
13 courts are going to be in the position of  
14 deciding all of those -- those questions.

15 MR. ROGAN: Your Honor, I think the  
16 history of Minnesota's statute shows that we  
17 have a workable definition. For over 100 years  
18 we've had this statute in place and we haven't  
19 -- this is the first time that it's been  
20 challenged by anybody objecting to an argument  
21 that they believe that their speech was not  
22 political.

23 And that the -- the speech here is  
24 clearly within the heartland of the statute.  
25 The "Please ID Me" --

1 JUSTICE KAGAN: Do you know how often,  
2 Mr. Rogan, people are asked to cover things up?  
3 I mean, do people know about this statute and  
4 act accordingly, or do you often find, is it,  
5 you know, every other voter is wearing  
6 something? What -- what -- or something in  
7 between?

8 MR. ROGAN: It is -- it is for the  
9 most part complied with, that Minnesotans  
10 understand that they're not allowed to wear  
11 political or campaign material at the polling  
12 stations.

13 JUSTICE BREYER: So let's continue on  
14 this because I -- I'm finding it useful. It  
15 sounded to me from your response, both to the  
16 Chief Justice and to me, that there are two  
17 people who make the decision as to whether it  
18 is or is not political. One is the election  
19 official, and the other is the person carrying  
20 the sign or wearing the T-shirt.

21 Now both make that decision because,  
22 if the second decides that the first is wrong,  
23 he simply goes in and continues to carry it.  
24 Then his name appears in a book, all right? If  
25 he does not want his name in a book, is there

1 any action he could bring in order to remove  
2 his name from the book on the ground that it  
3 wasn't political?

4 MR. ROGAN: There -- there isn't any  
5 -- any statute in Minnesota that allows  
6 somebody to change an official record of what  
7 happened. But that person could bring a  
8 lawsuit. They could bring a declaratory  
9 judgment action to see it --

10 JUSTICE BREYER: They bring an APA  
11 action or, you know, that -- saying that this  
12 was unreasonable and improper listed.

13 MR. ROGAN: Certainly, Your Honor.  
14 Certainly.

15 JUSTICE BREYER: So they could get a  
16 judge to do it, you think?

17 MR. ROGAN: Yes.

18 JUSTICE BREYER: But it's never  
19 happened because it's never been a problem. Is  
20 that the answer?

21 MR. ROGAN: Yes, that's -- that's the  
22 answer.

23 JUSTICE BREYER: Okay.

24 JUSTICE ALITO: I mean, people go to  
25 vote after work, before work, in the middle of

1 doing chores for the day, taking kids to  
2 school. So somebody goes to the polling place  
3 and is wearing a shirt, doesn't say anything  
4 about a candidate or a ballot issue, but a  
5 particular election judge, one of these people  
6 picked by one of the two parties, says, oh,  
7 that's political, you -- so now this person has  
8 a choice.

9 The person can wear a bathrobe or some  
10 kind of coverup to go in and vote. You think  
11 that's not kind of humiliating? Or the person  
12 can be listed as a bad Minnesotan and, at some  
13 point down the road, potentially fined \$300,  
14 found to have committed a petty offense.

15 MR. ROGAN: Your Honor --

16 JUSTICE ALITO: That's the situation,  
17 right?

18 MR. ROGAN: Your Honor, the -- if --  
19 if the individual wore in a campaign shirt or a  
20 political shirt, they would be asked to cover  
21 it up or, if it was a button, to remove it.  
22 And there is no evidence in Minnesota, and  
23 certainly in the record, and no evidence at all  
24 that we -- that this has been a problem, that  
25 we've had people show up and say, I don't have



1 any other way to -- to move forward except to  
2 -- to --

3 JUSTICE GORSUCH: Is there -- is there  
4 any evidence -- usually, in First Amendment  
5 cases, we're concerned about overbreadth  
6 because of the chilling effect that's often  
7 undocumented. And the burden is usually on the  
8 state to justify a compelling interest rather  
9 than the other way around.

10 And so I guess my question for you is  
11 it sounds like Minnesota's law is a bit of an  
12 outlier compared to most of the country's.  
13 There may be nine states or so with -- with a  
14 statute that goes this far. Is there any  
15 documented need for a statute to go this far as  
16 opposed to what happens in most other states,  
17 which is limited to electioneering?

18 MR. ROGAN: Your Honor, I think the  
19 premise of your question is -- is -- is  
20 Minnesota's use of the word "political." And  
21 there are 11 states that use the word  
22 "political."

23 JUSTICE GORSUCH: Okay, 11. Whatever  
24 number it is, it's a minority number. And  
25 under your interpretation of "political," it

1 would forbid people from wearing certain  
2 portions of the Bill of Rights into a polling  
3 place but not other portions of the Bill of  
4 Rights.

5 And I guess I'm just wondering what  
6 compelling interest Minnesota has identified  
7 that requires a statute that goes so much  
8 further than the vast majority of states?

9 MR. ROGAN: Your Honor, the -- the --  
10 the forum analysis would indicate that the  
11 burden on the state is only to show  
12 reasonableness and that -- that our statute  
13 must --

14 JUSTICE GORSUCH: What evidence do we  
15 have? What record is there? What facts can  
16 you point to?

17 MR. ROGAN: Your Honor, it's the  
18 history of elections that was sufficient in  
19 Burson to show that wearing campaign material  
20 would have a detrimental effect on the polling  
21 place.

22 JUSTICE GORSUCH: Again, Burson was  
23 electioneering, a different statute, and you're  
24 asking us to go a step further than Burson.  
25 And I'm just wondering what -- what do you

1 have? And if the answer is nothing further  
2 than Burson, that's fine; that's an answer.

3 MR. ROGAN: Your Honor, the -- the  
4 evidence that we have is the same as what was  
5 in Burson. And Burson is a case that did  
6 involve campaign speech. What was involved  
7 there was clearly understood to be -- by this  
8 Court to be campaign material related to  
9 buttons and T-shirts worn in the polling place  
10 and within 100 feet of the polling place.

11 All that Minnesota's law does is  
12 expand the scope of what is prohibited from  
13 campaign speech to additional political speech.

14 JUSTICE GORSUCH: Political speech  
15 beyond solicitation for candidates or things on  
16 the ballot, right?

17 MR. ROGAN: Yes --

18 JUSTICE GORSUCH: Okay.

19 MR. ROGAN: -- beyond expressed  
20 advocacy that is -- that would be defined as --  
21 as campaign speech. And I think that the --  
22 the First Amendment issue here, as -- as my  
23 friend has described it, is whether or not  
24 there is any ability to ban what they call  
25 passive speech.

1           The line that they've drawn here is  
2 not one about campaign speech or political  
3 speech or the way that -- that this Court has  
4 described it, which is that there are instances  
5 where you can ban any type of speech, including  
6 on this Court's plaza, where any speech or any  
7 message on a banner, flag, or device is  
8 prohibited.

9           Those are the types -- it's clear that  
10 this Court has allowed the states to prohibit  
11 what they call passive speech, and instead of  
12 describing what the category is of speech,  
13 whether it's campaign, political, or all  
14 speech, their rule is, if it's on a T-shirt, it  
15 doesn't matter what it says, that you can wear  
16 it in a polling place.

17           And that was squarely rejected in  
18 Burson. And it was for the reasons that it  
19 impacts the integrity of the election by having  
20 political or campaign speech and it impacts the  
21 decorum and solemnity of the polling place to  
22 have that type of speech in the -- in the  
23 polling place.

24           JUSTICE KAGAN: Mr. Rogan, could you  
25 explain that for me a little bit more?

1     Because, I mean, there are clearly some places  
2     where we think -- you know, the courtroom is a  
3     good example, where we don't want anybody to be  
4     wearing buttons or wearing shirts of -- of the  
5     kind that you're talking about.

6             But why should a polling place be that  
7     sort of place? In other words, you talk about  
8     the decorum, the solemnity. Makes it sound a  
9     little bit church-like.

10            Why is a polling place that? Why  
11     isn't it just the culmination of what is often  
12     a rowdy political process?

13            MR. ROGAN: So for two reasons, Your  
14     Honor. I think -- I think the rowdy political  
15     process ends before you get into the polling  
16     place so that we can have an election that has  
17     integrity, that citizens -- we have to -- what  
18     we're doing is we're taking the citizens'  
19     decisions about who to vote for and turning it  
20     into electoral choices.

21            And for that process to have  
22     integrity, the beginning of the process, the  
23     act of voting itself, has to have integrity.  
24     And the integrity is not just actual integrity  
25     that somebody -- that everybody who is entitled

1 to vote was able to vote. It has to be  
2 perceived as having integrity.

3 And one of the problems with allowing  
4 campaign or political material into the polling  
5 place is it creates a perception problem. The  
6 example is, if you have two people, one wearing  
7 a "Make America Great Again" hat and one not  
8 wearing one -- in Minnesota, we have  
9 challengers who can challenge the eligibility  
10 of someone to vote. If somebody challenges the  
11 "Make America Great Again" voter but not the  
12 other voter, the perception is, did they do  
13 that because of partisan reasons? How about  
14 the election judge who asks extra questions of  
15 the person wearing the "Make America Great  
16 Again" hat? Are they being singled out because  
17 of their political message? And, ultimately,  
18 it -- it impacts that voter, the voter next to  
19 them, and everybody in the polling place --

20 JUSTICE ALITO: You --

21 MR. ROGAN: -- who now wonders --

22 JUSTICE ALITO: You exacerbate that  
23 problem by opening up the possibility of  
24 similarly partisan or seemingly partisan  
25 applications of your very broad statute.

1           MR. ROGAN: Your Honor, there is no  
2 evidence of any viewpoint discrimination in  
3 Minnesota in its 100 years. And as you had  
4 earlier asked, the -- the way that this process  
5 works is that there are at least four poll  
6 workers in every single precinct in Minnesota,  
7 and when they're busy, there are more. And  
8 they are from different political parties.

9           And so any viewpoint discrimination  
10 that -- that -- that could occur is likely to  
11 be self-corrected by others in the polling  
12 place. And, ultimately, the decision about  
13 whether or not to move forward with any type of  
14 -- of prosecution under the Office of  
15 Administrative Hearings is actually done either  
16 by the chief election judge or by the city  
17 clerk.

18           JUSTICE ALITO: All right. How is  
19 that going to happen? So let's say the --  
20 there's an election judge who's a Republican  
21 and this Republican election judge thinks that  
22 a particular shirt has political connotations  
23 and says no, you can't go in; you've got to  
24 wear -- you've got to cover yourself up or go  
25 home and get changed. Okay?

1                   And now that person thinks that's  
2                   unfair. Then what happens?

3                   MR. ROGAN: They --

4                   JUSTICE ALITO: A Democrat -- a  
5                   Democratic judge intervenes and then you have a  
6                   -- you have an argument between these two  
7                   judges?

8                   MR. ROGAN: Your Honor, what -- what  
9                   would happen in that instance is -- is either  
10                  the person would -- would cover it up or there  
11                  -- or there could be a discussion to say I  
12                  don't -- this isn't political and I want to  
13                  talk to the head election judge. And then it  
14                  would be resolved and it would be resolved by  
15                  the --

16                  JUSTICE ALITO: And who's the head  
17                  election judge?

18                  MR. ROGAN: The head election judge is  
19                  a judge who's selected by the city clerk  
20                  because they are -- they -- they have more  
21                  training and -- and usually they've been an  
22                  election judge for -- for a long period of time  
23                  so that they're familiar with all the  
24                  processes.

25                  And I think, you know, one of the



1 things that -- that -- that I think is  
2 important to understand is election judges have  
3 discretion to make a lot of different decisions  
4 in polling places. In Minnesota, we have  
5 same-day registration. They make decisions  
6 about whether or not somebody's qualified, has  
7 -- has met their requirements to -- to  
8 register.

9 We also have challenge voters, when  
10 somebody is challenged because for -- are they  
11 a felon or are they somehow not eligible to  
12 vote, the election judge puts them under oath  
13 and asks them questions and makes a  
14 determination about whether or not they're  
15 eligible to vote.

16 So the idea that -- that making a -- a  
17 -- a decision about whether or not something is  
18 political or not is well within the  
19 understanding of -- of a -- of an election  
20 judge in Minnesota. And I think that the --  
21 the important issue here is the state's  
22 interest is the fundamental right to vote.

23 This isn't just prohibiting speech in  
24 -- the -- at the DMV or at the post office.  
25 This is an election process that is incredibly

1 important to democracy. It's incredibly  
2 important to the electoral branches of  
3 government to make sure that it has the  
4 integrity that's required so that when  
5 individuals are elected, that they have the  
6 legitimacy that is required to make sure that  
7 citizens believe that they are the rightful  
8 decision maker.

9 JUSTICE ALITO: Let me ask you about  
10 one of the interests that you assert in your  
11 brief. And this is on page 46 of your brief.

12 "A voter could well feel confused or  
13 intimidated if she walked into a polling place  
14 and discovered that every other voter held the  
15 opposite point of view, on any number of  
16 controversial political issues related to  
17 electoral choices, as evidenced by the  
18 political messages displayed on other voters'  
19 apparel."

20 Do you think that's a compelling state  
21 interest? Do you think that's even a  
22 legitimate state interest?

23 MR. ROGAN: Yes, Your Honor. I think  
24 it's -- I think it's a legitimate state  
25 interest in a polling place to prohibit

1 material that is going to make one voter feel  
2 singled out, that -- that they could feel that  
3 they are not welcome in that polling place  
4 because they don't hold the same political  
5 views as everybody else.

6 And ultimately it could lead to the  
7 type of subtle intimidation that Burson found  
8 could be -- could be found just by wearing a  
9 vote for, pick your candidate.

10 The -- the interests of making sure  
11 that the polling place doesn't have political  
12 material is the exact same interest that this  
13 Court found was sufficient to prohibit campaign  
14 material.

15 And I think to -- to go back to the --  
16 the question of line drawing, line drawing  
17 happens every single time when there is a  
18 content-based restriction.

19 And the fact that there are hard calls  
20 at the edges of the line, at the margin,  
21 doesn't mean that the line that was drawn is  
22 unreasonable. All that it means is that there  
23 are hard cases. And there always going to be  
24 hard cases.

25 And ultimately that's what as-applied

1 challenges are for. And here the material  
2 that's --

3 JUSTICE ALITO: Well, how would an  
4 as-applied challenge work on -- on Election  
5 Day? You're not going to have an as-applied  
6 challenge when somebody goes to vote.

7 MR. ROGAN: Your Honor, the -- the  
8 as-applied challenge could happen the way it  
9 happened in this case, where somebody brings a  
10 lawsuit, but -- but in the -- in the case where  
11 somebody wears material, they either -- they --  
12 they can continue to wear it as -- as the  
13 Petitioners did here, and then go into an  
14 administrative process and say it's not  
15 political; I -- I have a right to wear this.

16 So there is -- there is an easy way  
17 for somebody who believes that the material  
18 that they're wearing is not political to have  
19 an administrative review of that, if they  
20 believe that the -- that the election judges  
21 are acting inappropriately.

22 CHIEF JUSTICE ROBERTS: That suggests  
23 to me that your interests might not be terribly  
24 strong if someone's about to break the law and  
25 you say, okay, go ahead, but, you know, we're

1 going to write your name down and, you know,  
2 you might -- in other words, your interests --  
3 you've emphasized several times that the lack  
4 of, you know, nothing terribly bad happens to  
5 you when you do this.

6 And that suggests to me that it's not  
7 that strong an interest.

8 MR. ROGAN: Your Honor --

9 CHIEF JUSTICE ROBERTS: Aren't you  
10 worried -- if you are not worried about  
11 intimidation, why do you let somebody go in  
12 with a button that violates your -- your  
13 policy, or why is the only thing you do is  
14 write his name down?

15 MR. ROGAN: Your Honor, the  
16 enforcement of the statute is done primarily by  
17 election judges telling people to cover up the  
18 material. And that has been sufficient in  
19 Minnesota to deal with the problem. We have  
20 100 years of elections in Minnesota.

21 JUSTICE KENNEDY: Are those election  
22 officials inside the room?

23 MR. ROGAN: Yes, Your Honor.

24 JUSTICE KENNEDY: In other words,  
25 there's the voting booth and the table where

1 you give your registration, and so do other  
2 voters see this going on, they see the shirt  
3 and they hear the argument, or is that in some  
4 different room?

5 MR. ROGAN: No, Your Honor, it happens  
6 -- it happens right in the same room.

7 JUSTICE KENNEDY: Well, it seems to me  
8 that's disruptive than wearing the shirt.

9 MR. ROGAN: Your Honor, Minnesota  
10 hasn't found it to be disruptive, that it's --  
11 that it's a quick conversation, and it --

12 JUSTICE KENNEDY: Well, we're -- we're  
13 -- we're trying to understand how this thing  
14 works.

15 MR. ROGAN: Certainly, Your Honor.

16 JUSTICE KENNEDY: And we just said  
17 that -- you say a quick conversation and then  
18 the other judge comes over, then the  
19 intervening judge. That has got to take at  
20 least ten minutes. And so I'm sitting there  
21 waiting in line for my vote, and I hear all of  
22 this stuff?

23 MR. ROGAN: Your Honor, if -- if there  
24 was -- if there was such a discussion as that,  
25 what would happen is it would -- they would

1 take it to a different -- a different area to  
2 talk about it.

3 JUSTICE KAGAN: Mr. Rogan, I assume  
4 that the real work of this statute is being  
5 done by the fact that people know about it and  
6 so people just don't wear these things for the  
7 most part. And you're always going to have  
8 cases where people don't know about it or maybe  
9 they want to challenge it, but those are going  
10 to be few and far between, and -- and the real  
11 work is that people just approach the polling  
12 place in a different kind of way.

13 MR. ROGAN: That's correct, Your  
14 Honor. And -- and in Minnesota that -- that is  
15 exactly what happens. And it's -- and it makes  
16 it so that the voting process is one that  
17 Minnesotans can be proud of. We often lead the  
18 nation in electoral turnout. We have elections  
19 that have a high degree of integrity. We've  
20 had multiple state-wide recounts that have not  
21 had any issues regarding whether or not  
22 somebody was -- whether or not political  
23 material was -- was in the polling place.

24 This statute has worked. It's worked  
25 well for more than 100 years. And the -- the

1 -- the rule that is laid out makes it clear  
2 that it's only political material that is going  
3 to be something that is advocating for  
4 electoral choices, because it --

5 JUSTICE ALITO: Suppose a group of  
6 people want to make a statement about a  
7 political issue, not a political candidate, but  
8 a political issue, and they say we're going to  
9 do that by wearing all white on Election Day  
10 when we go to the polls.

11 Would that be allowed?

12 MR. ROGAN: Under the statute, yes.  
13 It's not a political badge, button or insignia.  
14 That -- that it has to be --

15 JUSTICE ALITO: That doesn't express a  
16 view on a political issue?

17 MR. ROGAN: It -- under -- it -- it  
18 might -- it might express a view on a political  
19 issue but it's not a political badge, button or  
20 insignia. An insignia is a -- is a  
21 distinguishing mark. It would have to have  
22 symbols or -- or letters associated with it.  
23 So an article of clothing by itself in general  
24 is not going to -- to be sufficient to be a  
25 political -- or to -- to be something that



1 would be, under the statute, understood as a  
2 political badge, button or insignia.

3 JUSTICE ALITO: So if a shirt has  
4 "#metoo" that would be allowed or not allowed?

5 MR. ROGAN: Your Honor, that would be  
6 -- that -- that would be an insignia. And if  
7 that was an issue in the -- in -- in -- in  
8 elections in that polling place, that would be  
9 political.

10 JUSTICE ALITO: So if people --

11 JUSTICE GINSBURG: How do we determine  
12 if it's an issue?

13 MR. ROGAN: I'm sorry, Your Honor, I  
14 didn't --

15 JUSTICE GINSBURG: How do we know if  
16 it's an issue?

17 MR. ROGAN: We know it from -- from  
18 the campaigns that have -- that have occurred,  
19 that this is not done in a vacuum. This is  
20 done on Election Day by election judges who are  
21 in that community, who are aware of what the  
22 political issues are, and what the political  
23 candidates are.

24 This -- this statute's limited in the  
25 same way that campaign speech is limited. It's

1 limited by those individuals who are on the  
2 ballot, and it -- and the issues that -- that  
3 they've brought up.

4 For example, the -- the --

5 JUSTICE ALITO: So if the group said,  
6 well, okay, we're not going to be able to wear  
7 our "Me Too" shirt but we're going to convey  
8 the same message by wearing all white, that  
9 would be okay?

10 MR. ROGAN: Your Honor, that, under  
11 our statute, I don't believe that would be a  
12 political insignia.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 JUSTICE KAGAN: Maybe you should make  
16 it broader.

17 (Laughter.)

18 MR. ROGAN: May I, Your Honor? Your  
19 Honor, I think constitutionally we could. I  
20 think that that's exactly what the -- the plaza  
21 rule for this Court is, is that you can make it  
22 broader. In a non-public forum, you can make  
23 it broader than the -- the line that  
24 Minnesota's drawn. It's just the line that we  
25 have drawn.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Breemer, you have four minutes  
4 remaining.

5 REBUTTAL ARGUMENT OF J. DAVID BREEMER  
6 ON BEHALF OF THE PETITIONERS

7 MR. BREEMER: The statute does affect  
8 millions of people that go to the polls in  
9 Minnesota, at polling places, absentee ballot  
10 locations throughout the state for 46 days  
11 prior to the election, and so what you just  
12 heard, I believe, is that there'S going to be  
13 an effect of chilling all this legitimate  
14 speech, Me Too, Resist, Black Lives Matter,  
15 American Legion, Americans For Tax Reform, and  
16 the list goes on.

17 And --

18 JUSTICE GINSBURG: But we were just  
19 told by Respondent that it has to be connected  
20 to an electoral choice in that election.

21 MR. BREEMER: Yes, Your Honor. And --  
22 and that's what they're saying now, but  
23 throughout this litigation the lower courts  
24 view this as going towards all political views.  
25 Their position for seven years has been it

1 covers all political views. And I believe they  
2 said that here as well. And the Election Day  
3 policy and both the statute are clear that it  
4 covers everything political.

5 There is no qualification on the term  
6 "political." As-applied challenges, to deal  
7 with this, would result in endless series of  
8 adjudications, either in the polling place  
9 itself or in courts later on.

10 And in the meantime legitimate  
11 protected speech and self-expression like the  
12 Second Amendment on a shirt would be chilled.  
13 And that's the purpose of the overbreadth  
14 doctrine.

15 JUSTICE SOTOMAYOR: Do you have any  
16 proof? You have one person who says that this  
17 process delayed him five hours. Any process  
18 you institute there's going to be an  
19 aberration.

20 Your adversary says that most of the  
21 time this goes by very quickly. Most of the  
22 time the election judge or whomever tells the  
23 wearer to please cover up your button or take  
24 it off, and people do that. So do we rule for  
25 the aberration or do we rule for the norm?

1           MR. BREEMER: I think you have to look  
2           at the evidence in the record, Your Honor. And  
3           this is the evidence we have on enforcement.  
4           We have two people that were told they either  
5           had to remove their clothing or have their name  
6           and address taken down for potential  
7           prosecution in order to vote.

8           We also have a number of other people  
9           after the 2010 election that didn't even try to  
10          wear apparel because they were afraid of  
11          enforcement. That's at the joint appendix at  
12          page 117.

13          JUSTICE SOTOMAYOR: I'm sorry. Let's  
14          not forget who these people were and what they  
15          were wearing, "Please ID me," which for some  
16          people was a highly charged political message,  
17          which was found, on remand, was intended to  
18          intimidate people to leave the polling booth --  
19          other people to leave the polling booth. So --

20          MR. BREEMER: That's true. And there  
21          are -- and there are concerns there. And  
22          that's -- and -- and it's not before the Court,  
23          but it wasn't just buttons.

24          JUSTICE SOTOMAYOR: But -- but --

25          MR. BREEMER: It wasn't just the

1 buttons, Your Honor.

2 JUSTICE SOTOMAYOR: How many  
3 incidences involving the examples that Justice  
4 Alito raised have been reported, of people --  
5 in Minnesota, of people wearing a button like  
6 an organizational -- Chamber of Commerce?

7 MR. BREEMER: We don't -- we don't  
8 have record evidence of a button that would say  
9 that, but we do have record evidence of slogans  
10 like "Don't tread on me," "Liberty," that type  
11 of thing, with the Tea Party. And we also have  
12 the Election Day policy, which the state says  
13 we are going to enforce this --

14 JUSTICE BREYER: Right. Is that -- is  
15 that enough? I mean, the -- read the whole  
16 First Amendment. You have freedom of thought,  
17 of expression, of communication, of petition.  
18 It's a process. And part of a process that  
19 allows ideas to flourish and get arguments back  
20 and forth, part of a process, I think, should  
21 be. And the founders meant it to be some  
22 thought and reflection.

23 And so here they've said the last  
24 moment in a world where we know how much  
25 argument there is in an election. It starts 19

1 years before and ends up in every conceivable  
2 place. We want to carve out 100 feet where  
3 this decision is going to be made and say to  
4 the person making it: Think. It won't always  
5 work. Maybe it hardly ever works.

6 But they're trying. And they're  
7 saying, of course, there will be some problems.  
8 So there have been none or virtually none in  
9 Minnesota for 100 years?

10 My -- you see my question?

11 MR. BREEMER: Yes, Your Honor. And  
12 there -- an there are legitimate interests in  
13 the polling place and in the right to vote. No  
14 one questions that. The problem here is this  
15 statute just goes too far.

16 The appropriate result in this case is  
17 to invalidate the third sentence of the  
18 statute, give the Minnesota legislature another  
19 chance to draw up -- draw up a more narrowly  
20 drawn statute, if it wants to continue to have  
21 an apparel ban.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24 (Whereupon, at 11:06 a.m., the case in  
25 the above-entitled matter was submitted.)

## Official - Subject to Final Review

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