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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.)

- - - - -

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 those --

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 electoral --

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

24 So what -- are we dealing with a
25 facial challenge, are we dealing with an

1 as-applied challenge?

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

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

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

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

25 MR. BREEMER: Yes, Your Honor, it's a

1 very close call, but it's not one that this
2 Court has to make in this particular case.

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

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

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

21 (Laughter.)

22 JUSTICE KENNEDY: What about political
23 buttons?

24 MR. BREEMER: Anything that --

25 JUSTICE KENNEDY: "Vote -- Vote for X"

1 or "Vote for Y" and they're both on the ballot.

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

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

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

11 JUSTICE KENNEDY: All right.

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

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

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

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

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

23 JUSTICE SOTOMAYOR: Directly and
24 completely.

25 MR. BREEMER: Well, as we read Burson,

1 it didn't deal with the passive wearing of a --
2 any kind of apparel, campaign or more general
3 political apparel. It dealt with active
4 campaigning and material used in conjunction
5 with that conduct.

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

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

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

17 MR. BREEMER: Yes.

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

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

1 flashing lights? Is that active or is that
2 passive? How are we supposed to police the
3 line you're -- you're suggesting?

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

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

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

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

1 than you can't intimidate someone.

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

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

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

1 shocking images that maybe the state can decide
2 that, just before you cast your vote, you
3 should have at least a moment free of all the
4 Sturm und Drang of the campaign.

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

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

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

16 MR. BREEMER: Excuse me, I'm sorry. I
17 --

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

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

25 JUSTICE KENNEDY: Well, you're

1 pressured to come --

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

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

7 MR. BREEMER: Yes, Your Honor.

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

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

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

1 that election.

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

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

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

14 MR. BREEMER: Well, the justification
15 for --

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

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

1 influence in polling places, but shirts that
2 simply say AFL-CIO, Chamber of Congress, NAACP,
3 those are not related to the government's
4 interests in --

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

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

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

14 MR. BREEMER: No, Your Honor, I don't
15 believe it could, because the connection is so
16 --

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

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

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

24 MR. BREEMER: No. We say --

25 JUSTICE SOTOMAYOR: Even though that's

1 on the ballot?

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

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

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

16 JUSTICE SOTOMAYOR: Can you --

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

24 But what is your position on that?
25 Could a legitimately challenged statute stop

1 you from having the "Please ID Me" button?

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

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

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

1 So I'm not sure that you've given us
2 that view. I mean, are you -- do you want to
3 accept Justice Alito's suggestion, or do you
4 want to draw the line at some other place so
5 that we know, okay, that's permissible, this is
6 impermissible, how does this relate to that?
7 That's the usual way overbreadth analysis goes.

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

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

25 MR. BREEMER: No, I wouldn't say that,

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

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

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

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

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

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

1 JUSTICE KAGAN: "Make America Great
2 Again"?

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

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

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

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

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

1 JUSTICE GINSBURG: Was it an airport?

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

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

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

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

1 "Me Too" and so on. But that's exactly what
2 it's doing here. It's trying to silence all
3 this legitimate speech by -- to -- to go after
4 a small slice that it can already regulate
5 under its other statutes.

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

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

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

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

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

1 now?

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

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

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

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

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

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

1 JUSTICE SOTOMAYOR: So it's not all
2 that's being --

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

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

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

13 This Court has never upheld a
14 prohibition on political speech as broad as
15 this. And there's never --

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

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

1 reservation, in an airport, in a school. In
2 Cohen, Tinker, in Greer, in all these cases,
3 the Court wasn't willing to draw a line --

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

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

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

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

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

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

25 A lot of this material is not worn as

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

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

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

1 or you wouldn't like to say anything about it,
2 yet you're going to be identified; because you
3 don't have our button, you're not doing what
4 you should be doing to support the group.

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

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

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

19 JUSTICE GINSBURG: As-applied under
20 what?

21 MR. BREEMER: -- speech and conduct.

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

24 MR. BREEMER: Yes. And I -- and I'm
25 still referring to the other statutes that

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

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

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

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

1 that have similar this, and --

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

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

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

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

22 And that's part of the problem here,
23 is that disruption and intimidation is often
24 going to occur through the policing of
25 someone's shirt, not through the fact that

1 they're passively wearing it as they go in and
2 out of the polling place.

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

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

9 JUSTICE ALITO: Yeah, the polling
10 officials.

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

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

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

23 MR. BREEMER: What happens at that
24 point, Your Honor, is, yes, that's -- that's a
25 final decision in -- in this respect. The --

1 the voter with the apparel must either take off
2 their clothes or have their name and address --

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

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

13 JUSTICE ALITO: And who --

14 MR. BREEMER: And, again --

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

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

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

1 -- they're the reasonable observer? Do we
2 know?

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

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

16 I'll reserve my remaining time.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Rogan.

20 ORAL ARGUMENT OF DANIEL ROGAN

21 ON BEHALF OF THE RESPONDENTS

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

24 Minnesota's restriction on speech in
25 the polling place does not violate the First

1 Amendment. It is a reasonable and
2 viewpoint-neutral speech restriction in a
3 quintessential nonpublic forum that protects
4 the fundamental right to vote.

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

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

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

24 MR. ROGAN: Your Honor, the -- the --
25 the test that Minnesota has is what a

1 reasonable observer would understand is
2 advocating electoral choices. So, in some
3 ways, a -- a tiny lapel pin that no one can see
4 is -- is not going to be --

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

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

24 And that's what the history of -- in
25 Minnesota and in states in the late 1800s that

1 led this Court in Burson to uphold exactly that
2 type of prohibition.

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

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

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

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

1 people to come forward to exercise their right
2 to vote, that is a place where we want to
3 ensure that there's order and decorum so that
4 there is the solemnity that goes with voting.

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

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

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

23 And so --

24 JUSTICE GINSBURG: So where -- where
25 does that limitation come in, electoral choices

1 in the polling place?

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

9 JUSTICE ALITO: The problem is that so
10 many things have political connotations, and
11 the connotations are in the eye of the
12 beholder. 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: Alright how about a
18 shirt with a rainbow flag? Would that be
19 permitted?

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

25 JUSTICE ALITO: How about a shirt that

1 says "Parkland Strong"?

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

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

7 MR. ROGAN: To the extent --

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

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

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

17 MR. ROGAN: The -- the Parkland?

18 JUSTICE ALITO: Yeah.

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

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

1 MR. ROGAN: An NRA shirt? Today, in
2 Minnesota, no, it would not, Your Honor. I
3 think that that's a clear indication -- and I
4 think what you're getting at, Your Honor --

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

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

10 JUSTICE ALITO: How about the First
11 Amendment?

12 (Laughter.)

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

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

19 MR. ROGAN: It would be allowed.

20 CHIEF JUSTICE ROBERTS: It would be?

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

1 JUSTICE ALITO: Yeah, well, this is
2 the problem. How about a Colin Kaepernick
3 jersey?

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

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

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

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

19 (Laughter.)

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

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

25 MR. ROGAN: Yes, Your Honor, I believe

1 that that's political.

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

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

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

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

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

10 Suppose he's mistaken. Is there any
11 remedy in your state?

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

22 And that in all cases so far has ended
23 the inquiry. There hasn't been any adverse
24 actions. Ultimately, if somebody was -- a case
25 was brought in the administrative hearing

1 process, the penalty is up to a \$300 fine,
2 which is a traffic ticket.

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

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

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

25 And that the -- the speech here is

1 clearly within the heartland of the statute.

2 The "Please ID Me" --

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

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

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

23 Both make that decision because, if
24 the second decides that the first is wrong, he
25 simply goes in and continues to carry it. Then

1 his name appears in a book, all right? If he
2 does not want his name in a book, is there any
3 action he could bring in order to remove his
4 name from the book on the ground that it wasn't
5 political?

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

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

15 MR. ROGAN: Certainly, Your Honor.
16 Certainly.

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

19 MR. ROGAN: Yes.

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

23 MR. ROGAN: Yes, that's -- that's the
24 answer.

25 JUSTICE BREYER: Okay.

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

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

17 MR. ROGAN: Your Honor --

18 JUSTICE ALITO: That's the situation,
19 right?

20 MR. ROGAN: Your Honor, the -- if --
21 if the individual wore in a campaign shirt or a
22 political shirt, they would be asked to cover
23 it up or, if it was a button, to remove it.
24 And there is no evidence in Minnesota, and
25 certainly in the record, and no evidence at all

1 that we -- that there -- that this has been a
2 problem, that we've had people show up and say,
3 I don't have any other way to -- to move
4 forward except to -- to --

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

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

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

25 JUSTICE GORSUCH: Okay, 11. Whatever

1 number it is, it's a minority number. And
2 under your interpretation of "political," it
3 would forbid people from wearing certain
4 portions of the Bill of Rights into a polling
5 place but not other portions of the Bill of
6 Rights.

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

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

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

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

24 JUSTICE GORSUCH: Again, Burson was
25 electioneering, a different statute, and you're

1 asking us to go a step further than Burson.
2 And I'm just wondering what -- what do you
3 have? And if the answer is nothing further
4 than Burson, that's fine; that's an answer.

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

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

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

19 MR. ROGAN: Yes --

20 JUSTICE GORSUCH: Okay.

21 MR. ROGAN: -- beyond expressed
22 advocacy that is -- that would be defined as --
23 as campaign speech. And I think that the --
24 the First Amendment issue here, as -- as my
25 friend has described it, is whether or not

1 there is any ability to -- to ban what they
2 call passive speech.

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

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

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

1 JUSTICE KAGAN: Mr. Rogan, could you
2 explain that for me a little bit more?
3 Because, I mean, there are clearly some places
4 where we think -- you know, the courtroom is a
5 good example, where we don't want anybody to be
6 wearing buttons or wearing shirts of -- of the
7 kind that you're talking about.

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

12 Why -- why is a polling place that?
13 Why isn't it just the culmination of what is
14 often a rowdy political process?

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

23 And for that process to have
24 integrity, the beginning of the process, the
25 act of voting itself, has to have integrity.

1 And the integrity is not just actual integrity
2 that somebody -- that everybody who is entitled
3 to vote was able to vote. It has to be
4 perceived as having integrity.

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

22 JUSTICE ALITO: You --

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

24 JUSTICE ALITO: You exacerbate that
25 problem by opening up the possibility of

1 similarly partisan or seemingly partisan
2 applications of your very broad statute.

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

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

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

1 wear -- you've got to cover yourself up or go
2 home and get changed. Okay?

3 And now that person thinks that's
4 unfair. Then what happens?

5 MR. ROGAN: They --

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

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

18 JUSTICE ALITO: And who's the head
19 election judge?

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

1 processes.

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

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

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

25 This isn't just prohibiting speech in

1 the -- at the DMV or at the post office. This
2 is an election process that is incredibly
3 important to democracy. It's incredibly
4 important to the electoral branches of
5 government to make sure that it has the
6 integrity that's required so that when
7 individuals are elected, that they have the
8 legitimacy that's required to make sure that
9 citizens believe that they are the rightful
10 decision-makers.

11 JUSTICE ALITO: Let me ask you about
12 one of the interests that you assert in your
13 brief, and this is on page 46 of your brief.

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

22 Do you think that's a compelling state
23 interest? Do you think that's even a
24 legitimate state interest?

25 MR. ROGAN: Yes, Your Honor, I think

1 it's -- I think it's a legitimate state
2 interest in a polling place to prohibit
3 material that is going to make one voter feel
4 singled out, that -- that they could feel that
5 they are not welcome in that polling place
6 because they don't hold the same political
7 views as everybody else.

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

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

17 And I think to -- to go back to the --
18 the question of line-drawing, line-drawing
19 happens every single time in when there's a
20 content-based restriction. And the fact that
21 there are hard calls at the edges of the line,
22 at the margin, doesn't mean that the line that
23 was drawn is unreasonable. All that it means
24 is that there are hard cases. And there are
25 always going to be hard cases.

1 And, ultimately, that's what
2 as-applied challenges are for. And here the --
3 the material was --

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

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

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

24 CHIEF JUSTICE ROBERTS: That -- that
25 suggests to me that your interests might not be

1 terribly strong if someone's about to break the
2 law and you say, okay, go ahead, but, you know,
3 we're going to write your name down and, you
4 know, you might -- in other words, your
5 interests -- you've emphasized several times
6 the lack of, you know, nothing terribly bad
7 happens to you when you do this. And that
8 suggests to me that it's not that strong an
9 interest.

10 MR. ROGAN: Your Honor --

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

17 MR. ROGAN: Your Honor, our the -- the
18 enforcement of this statute is done primarily
19 by election judges telling people to cover up
20 the material. And that has been sufficient in
21 Minnesota to deal with the problem. We have
22 100 years of elections in Minnesota.

23 JUSTICE KENNEDY: Are those election
24 officials inside the room?

25 MR. ROGAN: Yes, Your Honor.

1 JUSTICE KENNEDY: In other words,
2 there's the voting booth and the table where
3 you give your registration. And so do other
4 voters see this going on, they see the shirt
5 and they hear the argument, or is that in some
6 different room?

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

9 JUSTICE KENNEDY: Well, it seems to me
10 that's more disruptive than wearing the shirt.

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

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

17 MR. ROGAN: Certainly, Your Honor.

18 JUSTICE KENNEDY: And we just said
19 that -- you say a quick conversation, then the
20 other judge comes over, then the intervening
21 judge. That's got to take at least 10 minutes.
22 And so I'm sitting there waiting in line for my
23 vote, and I hear all of this stuff?

24 MR. ROGAN: Your Honor, if -- if there
25 was -- if there was such a discussion as that,

1 what would happen is it would -- they would
2 take it to a different -- a different area to
3 talk about that.

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

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

25 This statute has worked. It's worked

1 well for more than 100 years. And the -- the
2 -- the rule that is laid out makes it clear
3 that it's only political material that is going
4 to be something that is advocating for
5 electoral choices, because it --

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

12 Would that be allowed?

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

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

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

1 political -- or to -- to -- to be something
2 that would be, under the statute, understood as
3 a political badge, button, or insignia.

4 JUSTICE ALITO: So, if a -- if a shirt
5 has "#metoo" that would be allowed or not
6 allowed?

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

12 JUSTICE ALITO: So if people want --

13 JUSTICE GINSBURG: How do we determine
14 if it's an issue?

15 MR. ROGAN: I'm sorry, Your Honor, I
16 didn't --

17 JUSTICE GINSBURG: How do we know if
18 it's an issue?

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

1 This -- this statute's limited in the
2 same way that campaign speech is limited. It's
3 limited by those individuals who are on the
4 ballot, and it -- and the issues that -- that
5 they've brought up.

6 For example, the -- the --

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 JUSTICE KAGAN: Maybe you should make
18 it broader.

19 (Laughter.)

20 MR. ROGAN: May I, Your Honor?

21 Your Honor, I think constitutionally
22 we could. I think that -- that that's exactly
23 what the -- the plaza rule for this Court is,
24 is that you can make it broader. In a
25 non-public forum, you can make it broader than

1 the -- the line that Minnesota's drawn. It's
2 just the line that we have drawn.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Breemer, you have four minutes
6 remaining.

7 REBUTTAL ARGUMENT OF J. DAVID BREEMER
8 ON BEHALF OF THE PETITIONERS

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

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

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

1 Their position for seven years has been it
2 covers all political views. And I believe they
3 said that here as well. And the Election Day
4 policy and both the statute are clear that it
5 covers everything political. There's no
6 qualification on the term "political."

7 As-applied challenges, to deal with
8 this, would result in an endless series of
9 adjudications, either in the polling place
10 itself or in courts later on. And in the
11 meantime, legitimate protected speech and
12 self-expression, like the Second Amendment on a
13 shirt, would be chilled. And that's the
14 purpose of the overbreadth 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 -- the election judge or whomever
23 tells the wearer please cover up your button or
24 take it off, and people do that. So do we rule
25 for 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 the 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.

5 It won't always work. Maybe it hardly
6 ever works. But they're trying. And they're
7 saying, of course, there will be some problems,
8 though there have been none or virtually none
9 in Minnesota for 100 years?

10 My -- you see my question?

11 MR. BREEMER: Yes, Your Honor. And
12 there -- and 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

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