No. 23-535

In the Supreme Court of the United States

JILLIAN OSTREWICH,
Petitioner,
v.

TENESHIA HUDSPETH, IN HER OFFICIAL CAPACITY AS HARRIS COUNTY CLERK, ET AL.,
Respondents.

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

Brief of *Amici Curiae* Justice and Freedom Fund, World Faith Foundation, and The Rutherford Institute in Support of Petitioner

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
legal@rutherford.org

Deborah J. Dewart
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICI CURIAE[1]

Justice and Freedom Fund ("JFF"), World Faith Foundation ("WFF"), and The Rutherford Institute, as *amici curiae*, respectfully urges this Court to grant the Petition for Certiorari and reverse the decision of the Fifth Circuit.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, who has served as professor of law at Trinity Law School and Biola University in Southern California and is the author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*, including a brief supporting Petitioners in *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 (2018).

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

World Faith Foundation is a California religious non-profit, tax-exempt corporation formed to preserve and defend the customs, beliefs, values, and practices of religious faith and speech, as guaranteed by the First Amendment, through education, legal advocacy, and other means. WFF has an interest in this Petition because many current political issues are closely intertwined with religious faith and conscience. WFF has made several appearances in this Court as amicus curiae.

The Rutherford Institute is a nonprofit headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Texas has enacted three content-based statutes restricting core political speech. TEX. ELEC. CODE §§ 61.003, 61.010, 85.036. These statutes have serious flaws and cannot withstand constitutional scrutiny.

First, the rights of *voters* are the chief reason for these types of restrictions at the polls. Instead of protecting voters, Texas infringes their rights, both to vote and to express themselves in a peaceful, non-disruptive manner.

Second, there is substantial imprecision in these statutes. Texas sweeps in a considerable amount of vaguely defined "political" expression. TEX. ELEC. CODE § 61.010 limits its application to what appears on the ballot, but the words "relating to" are wildly imprecise. TEX. ELEC. CODE §§ 61.003, 85.036 are not even tethered to matters appearing on the ballot. Such imprecision grants officials discretion to place roadblocks in the path of voters who express viewpoints they dislike. This paves the road to impermissible viewpoint discrimination.

Finally, this case is about *passive*, non-verbal (silent) expression (t-shirts, badges, insignia, emblems), not *active* expression or campaigning. There is only a tenuous link between the Texas regulations and the intimidation, coercion, and election fraud that polling place restrictions are designed to prevent.

ARGUMENT

I. THE RIGHTS OF *VOTERS* ARE PARAMOUNT — THE RIGHT TO VOTE *AND* THE RIGHT TO FREE POLITICAL EXPRESSION.

The right to vote is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Freedom of expression is equally important, "especially expression of political views, [which] ranks near the top of the hierarchy of constitutional rights." *Cohen v. California*, 403 U.S. 15, 24 (1971). Election day regulations serve legitimate purposes but must always preserve these fundamental rights and never impede them. Although Texas may enact "reasonable and uniform regulations" regarding the "time and mode of exercising" the right to vote, that "afford[s] no warrant for such an exercise of legislative power, as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself." *Yick Wo v. Hopkins*, 118 U.S. at 371, quoting *Capen v. Foster*, 29 Mass. 485, 489 (1832).

The Fifth Circuit acknowledged that the Texas statutes, which prohibit "certain forms of electioneering and political apparel," clearly implicate "expression within the First Amendment's ambit." *Ostrewich v. Tatum*, 72 F.4th 94, 103 (5th Cir. 2023). This confronts the state with the "particularly difficult reconciliation" of the right to vote with the right to political expression. *Ibid.* (quoting *Mansky*, 138 S. Ct. at 1892 (quoting *Burson v. Freeman*, 504 U.S. 191, 198 (1992))). The Tennessee statute in *Burson* restricted a particular class of speakers—campaign workers, not voters. This

Court upheld the statute, focusing on the "fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past" and concluding that a "campaign-free zone outside the polls" protected the right to vote. *Mansky*, 138 S. Ct. at 1886; *see Burson*, 504 U.S. at 200-204. But when the state limits a voter's silent display of expression on personal clothing, it does little to serve these purposes.

II. THE TEXAS STATUTES ARE CONTENT-BASED RESTRICTIONS ON CORE POLITICAL SPEECH THAT GRANT EXCESSIVE DISCRETION TO OFFICIALS, CREATING AN UNREASONABLE RISK OF VIEWPOINT DISCRIMINATION.

The government may not restrict speech because of "its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95 (1972). Political speech is unquestionably at the core of the First Amendment. "[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). "[D]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

The Texas statutes "implicate[] . . . central concerns in our First Amendment jurisprudence," through their "regulation of *political* speech . . . based on the *content*

of the speech." *Burson*, 504 U.S. at 196 (emphasis added). The discretion that officials must exercise in this context opens the door to viewpoint discrimination, "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

A. The statutes' lack of precision creates an unacceptable risk of viewpoint discrimination.

In today's politically polarized atmosphere, it is especially important that legislators guard against overstepping constitutional bounds. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). The Texas statutes illustrate the imprecision that characterizes many state laws regulating speech at the polls. They sweep in benign, passive expression that poses no threat. Instead of choosing "a less drastic way of satisfying its legitimate interests," Texas has enacted "a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973).

Texas broadly defines "electioneering" to include the "posting, use, or distribution of political signs or literature." TEX. ELEC. CODE § 61.003(b)(1). The section entitled "Wearing Name Tag or Badge in Polling Place," is not much better. Although the words "appearing on the ballot" add clarity, the words "relating to" are elusive, as shown by the t-shirt involved in this case.

> (a) . . . [A] person may not wear a badge, insignia, emblem, or other similar communicative device *relating to* a candidate, measure, or political party *appearing on the ballot*, or to the conduct of the election, in the polling place or within 100 feet of any outside door through which a voter may enter the building in which the polling place is located.

TEX. ELEC. CODE § 61.010 (emphasis added).

The Texas statutes are content-based because they only prohibit "political signs or literature" and wearing of items "relating *to* a candidate, measure, or political party appearing on the ballot." The statutes apply facially to all viewpoints but censure "an entire topic," political speech. *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980); *Burson*, 504 U.S. at 197; *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015). Without adequate guardrails to prevent the abuse of discretion, such regulations may lead to viewpoint discrimination.

This Court has long held it is "clearly unconstitutional" to empower government officials "to engage in invidious discrimination among persons or groups" through statutes granting them broad discretion to selectively enforce the law. *Cox v. La.*, 379 U.S. 536, 557-558 (1965). "A principle underlying many of our prior decisions in various doctrinal settings is that government officials may not be accorded unfettered discretion in making decisions that impinge upon fundamental rights." *Schall v. Martin*, 467 U.S. 253, 306–307 (1984) (Marshall, J., dissenting). This principle is particularly relevant to content-based

regulations. In *Reed v. Town of Gilbert*, this Court observed the possibility of "a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services." 576 U.S. at 167-168. The trademark provision this Court invalidated in *Matal v. Tam* gave the government carte blanche to render a "moral judgment[] based solely and indisputably on its moral judgment[] about the mark['s] expressive content." *In re Tam*, 808 F.3d 1321, 1338 (Fed. Cir. 2015). Here, Texas empowers election officials to deny the fundamental right to vote to prospective voters whose outward apparel displays a disfavored political view.

Some states use broad terms like "political" or "campaign" but restrict the reach of their statutes to the candidates, political parties, and measures that are on the ballot.[2] These criteria help curb the potential for unbridled discretion. Indeed, the Texas restriction concerning what voters may wear prohibits items "relating to" a matter on the ballot. But is that sufficiently precise?

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[2] Alaska Stat. § 15.56.016(a)(2)(B) ("political"); Ar. Code Ann. § 7-1-103(a)(9)(A) ("campaign"); Ar. Code Ann. §§ 16-411(H), 16-515(I); Cal. Elec. Code §§ 18370, 319.5; Colo. Rev. Stat. 1-13-714(1); Conn. Gen. Stat. § 9-236(a); Kan. Stat. Ann. § 25-2430(a) ("campaign"); Me. Rev. Stat. tit. 21-A, § 682 ("campaign); Rev. Stat. Mo. § 115.637(18); Mont. Code Ann. § 13-35-211(3); Nev. Rev. Stat. § 293.740; N.D. Cent. Code § 16.1-10-06 (prior version of this statute was found too broad in *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012)); R.I. Gen. Laws § 17-19-49 ("political").

A bare term like "political," without a limiting definition or other guidance, is highly susceptible to improper discretion. An extreme example that illustrates the danger is a "made-for-litigation definition" of the word as "any advocacy of a position of any politicized issue." *Am. Freedom Defense Initiative v. Suburban Mobility Auth. for Regional Transp.*, 978 F.3d 481, 495 (6th Cir. 2020). One official defined "politicized" as an issue on which "society is fractured . . . and factions of society have taken up positions on it that are not in agreement." *Id.* at 496. Such issues abound, and many are unrelated to government or politics.

In *Mansky*, this Court did not require "perfect clarity and precise guidance." *Mansky*, 138 S. Ct. at 1890, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). "[S]ome degree of discretion" is required for enforcement but it "must be guided by objective, workable standards," not "an election judge's own politics." *Mansky*, 138 S. Ct. at 1890. The "unmoored use" of the word "political," when combined with the "haphazard interpretations" found in official guidance, failed to provide a "sensible basis for distinguishing what may come in from what must stay out." *Id.* at 1888. The Minnesota statute did not define "political" when it prohibited voters from wearing a "political badge, political button, or other political insignia," although "the word can be expansive" and even a button or shirt urging others to vote would fit. *Ibid.* The Court also concluded it would be unreasonable to require election judges "to maintain a mental index of the platforms and positions of every

candidate and party on the ballot" to determine what is permissible for voters. *Id.* at 1889.

The risk of arbitrary application, resulting in viewpoint discrimination, easily results where a restriction lacks structure and clear policies. *Center for Investigative Reporting v. Se. Pa. Transp. Auth.*, 975 F.3d 300, 316–317 (3d Cir. 2020) (policy banning certain ads on buses "susceptible to erratic application" in the "absence of guidelines cabining SEPTA's General Counsel's discretion in determining what constitutes a political advertisement"). In this case, the ballot included an initiative about firefighter pay, and Petitioner Ostrewich wore a t-shirt that displayed the union logo and the words "Houston Fire Fighters" but did not mention the ballot measure. She was not allowed to vote until she turned her shirt inside out. Other voters wore t-shirts expressly supporting the ballot initiative. *Ostrewich*, 72 F.4th at 98. But the day after Ostrewich voted, election workers were advised that "only yellow firefighter t-shirts explicitly promoting Prop B needed to be covered up," while shirts like the one Ostrewich had worn were permissible. *Id.* at 99. In Texas, the presiding election judge has "*absolute* discretion" when enforcing electioneering laws at the polls. *Id.* at 100-101 (emphasis added); TEX. ELEC. CODE § 32.075. Absolute discretion is dangerous. *See, e.g.*, *Amalgamated Transit Union Local 1015 v. Spokane Transit Auth.*, 929 F.3d 643, 654 (9th Cir. 2019) (STA's CEO was "final arbitrator" as to what constitutes "public issue" advertising, but "her standard seemed entirely driven by what *she* believe[d] would reflect badly on STA"). The law must provide "objective, workable standards"

to pass constitutional muster. *Mansky*, 138 S. Ct. at 1891.

The district court upheld TEX. ELEC. CODE § 61.010, which is limited to apparel related to a candidate, measure, or political party "appearing on the ballot" and invalidated the two "electioneering statutes," TEX. ELEC. CODE §§ 61.003, 85.036, reasoning that these sections "contain no such limiting principle." *Ostrewich*, 72 F.4th at 103. But do any of the three statutes sufficiently limit the discretion of officials?

The words "relating to" are a "vague limiting construction" that "give [election] officials alone the power to decide in the first instance whether a given activity" is "related to" a matter on the ballot. *Bd. of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 576 (1987). Is the union logo on Ostrewich's shirt "related to" the ballot measure concerning firefighter pay? Would an opponent of the measure show up at the polls wearing this shirt? Such lack of clarity "compel[s] the speaker to hedge and trim" (*Thomas v. Collins*, 323 U.S. 516, 535 (1945)), perhaps by wearing plain clothing with no messages, lettering, pictures, or anything else that might disclose a specific viewpoint. It can be "a difficult inquiry to precisely define the point where showing support for a movement"—here, the Houston Fire Fighters—"is synonymous with endorsing a candidate or issue on the ballot." Rebecca M. Fitz, *Peering Into Passive Electioneering: Preserving the Sanctity of our Polling Places*, 58 Idaho L. Rev. 270, 285-286 (2022).

Nonpublic forum standard. Courts have applied a "reasonableness" standard to nonpublic forum restrictions, demanding more than a rational basis yet not requiring the narrow tailoring or compelling interest needed for strict scrutiny. *White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 198 (4th Cir. 2022). The reasons need only be "permissible." *Mansky*, 138 S. Ct. at 1886. But as in *Mansky*, "even a reasonable end must not be pursued by unreasonable means." *White Coat Waste* 35 F.4th at 199 ("the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out," citing *Mansky*, 138 S. Ct. at 1888). In *White Coast Waste*, Richmond Transit's policy banning political ads violated the First Amendment because it had "no formal definition" of "political" and "no written guidelines." 35 F.4th at 198.

In a nonpublic forum, discretion "must be upheld so long as it is reasonable in light of the characteristic nature and function of that forum." *Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 97 (1st Cir. 2004) (internal quotation marks omitted). Selectivity and discretionary access are "defining characteristics" of a nonpublic forum. *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323-24 (Fed. Cir. 2002). But viewpoint discrimination is impermissible in any forum, and "[w]hen a statute sweeps more broadly than is warranted by the evil at which it aims, a concern arises that the legislature . . . has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991).

B. The prohibition of viewpoint discrimination, firmly entrenched in Supreme Court precedent, is a necessary component of the Free Speech Clause.

Viewpoint discrimination is a critical component of the analysis in this case. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Even when the government's motives are innocent—as they may be in this case—there is a residual danger of censorship in facially content-based statutes because "future government officials may one day wield such statutes to suppress disfavored speech." *Reed v. Town of Gilbert*, 576 U.S. at 167. An imprecise policy not only risks viewpoint discrimination, but "intimidates [voters] into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

History demonstrates this Court's growing affirmation that the government must zealously guard against even the subtle viewpoint discrimination that might occur through restrictions of voters' apparel at the polls. A century ago, this Court affirmed a conviction under the Espionage Act, which criminalized publication of "disloyal, scurrilous and abusive language" about the United States when the country was at war. *Abrams v. United States*, 250 U.S. 616, 624 (1919). If that case came before the Court today, no

doubt "the statute itself would be invalidated as patent viewpoint discrimination." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 21. After *Abrams*, the Court shifted gears in *Barnette*, "a forerunner of the more recent viewpoint-discrimination principle." *Ibid*; *see West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). *Barnette*'s often-quoted "fixed star" passage was informed by "the fear of government manipulation of the marketplace of ideas." Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. 20, 21 (2019). Justice Kennedy echoed the thought: "The danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. . . . To permit viewpoint discrimination . . . is to permit Government censorship." *Matal v. Tam*, 582 U.S. 218, 252 (2017) (Kennedy, J., concurring). Justice Kennedy's comments "explain why viewpoint discrimination is particularly inconsistent with free speech values." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 36.

Since *Barnette*, courts have further refined the concept of viewpoint discrimination. In *Cohen v. California*, Justice Harlan warned that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." 403 U.S. at 26; *see* Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 22. A year later this Court affirmed that "government has no power to restrict expression because of its message, its ideas, its subject matter, or

its content" and "must afford all points of view an equal opportunity to be heard." *Mosley*, 408 U.S. at 95-96.

Further development occurred in the 1980's. Both the majority and dissent in *Perry Education Ass'n v. Perry Local Educators' Ass'n* agreed that viewpoint discrimination is impermissible, with the dissent explaining that such discrimination "is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). It became apparent that the Court considered viewpoint regulation an "even more serious threat" to speech than "mere content discrimination." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 23. Three years later, the Court struck down a viewpoint-based regulation based on coerced association with the views of other speakers. *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986) (plurality opinion). At the end of this decade, the Court affirmed the prohibition of viewpoint discrimination as a "bedrock principle underlying the First Amendment." *Texas v. Johnson*, 491 U.S. at 414 (striking down Texas statute that made it a crime to desecrate a venerated object, including a state or national flag).

Justice Scalia authored a key decision in the early 1990's striking down a Minnesota ordinance that criminalized placing a symbol on private property that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (burning

cross). At that point, this Court considered "the anti-viewpoint-discrimination principle . . . so important to free speech jurisprudence that it applied even to speech that was otherwise excluded from First Amendment protection." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25, citing *R.A.V.*, 505 U.S. at 384-385. The ruling defined viewpoint discrimination as "hostility—or favoritism—towards the underlying message expressed" (*id*. at 385 (citing *Carey v. Brown*, 447 U.S. 455 (1980)), effectively placing the principle "at the very heart of serious free speech protection." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 25. As Justice Scalia observed, the government may not "license one side of a debate to fight free style, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392. States must heed this caution when crafting restrictions at the polls and empowering officials to enforce them.

During this same time frame, this Court held that the government may not discriminate against speech solely because of its religious perspective. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (policy for use of school premises could not exclude film series based on its religious perspective); *Rosenberger*, 515 U.S. at 829 (invalidating university regulation that prohibited reimbursement of expenses to student newspaper that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality"); *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001) (striking down regulation that discriminated against

religious speech). This Petition does not implicate religious speech, but religious convictions are often relevant to voting decisions, and unbridled discretion could allow officials to discriminate against religious viewpoints.

In recent years, *Matal* "is the Court's most important decision in the anti-viewpoint-discrimination line of cases." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 29. Shortly after *Matal*, striking down the Lanham Act's prohibition of "disparaging" trademarks, the Court struck down a provision forbidding "immoral or scandalous" marks because the ban "disfavors certain ideas." *Iancu v. Brunetti.* 139 S. Ct. 2294, 2297 (2019). The Court's approach "indicated that governmental viewpoint discrimination is a per se violation of the First Amendment." Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. Rev. F. at 33.

III. THE PASSIVE VISUAL EXPRESSION OF VOTERS IS NOT AN APPROPRIATELY TARGETED EVIL.

The First Amendment extends beyond the literal spoken word to a wide variety of silent, visual expression.[3] This case is about *passive*, non-verbal,

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[3] *See, e.g.*, *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (paintings, drawings, engravings); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (photographs); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) ("art for art's sake"); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (original artwork); *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (paintings, drawings, original artwork); *Matal v. Tam*, 582 U.S. 218 (trademark); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023) (websites).

visual expression (badge, insignia, emblem, clothing), not the *active* expression at issue in *Burson*, an early seminal case involving campaign restrictions near the polls. Polling places are a unique environment. While some restrictions on active campaigning may be needed to preserve an orderly process for voters, the broad ban Texas imposes on political apparel tends to imperil the rights of voters rather than protecting those rights. There is only a tenuous link between the Texas statutes and the intimidation, coercion, and election fraud that past polling restrictions were designed to prevent. "The silent expression of political opinion is not coercive." *Picray v. Secretary of State*, 140 Or. App. 592, 600 (1996).

Clothing is a passive, visual means of communication protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15 (t-shirt containing offensive expletive). This Court's past decisions have noted the "nondisruptive" nature of expressive apparel, even in more mundane settings. *Mansky*, 138 S. Ct. at 1887, citing *Jews for Jesus, Inc.*, 482 U.S. at 576. One of the reasons this Court struck down the sweeping First Amendment activity ban in *Jews for Jesus* is that it would reach considerable non-disruptive speech, including "the wearing of campaign buttons or symbolic clothing"—a ban that could not be justified even in a nonpublic forum. *Id*. at 575. And just as "[t]he line between airport-related speech and nonairport-related speech" was "at best, murky" in that case (*id*. at 576), the line between "political" and non-political is like a line in the sand on a windy day.

Some lower courts have concluded that political expression on clothing or accessories could be restricted under narrowly defined circumstances, depending on the place, the government's role, and whether other legal rights are implicated:

- Courtroom - *Berner v. Delahanty*, 129 F.3d 20, 27 (1st Cir. 1997) (upholding trial judge's order for attorney to remove political button in the courtroom, which must be an absolutely fair and neutral environment)

- Political Rally - *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996) (upholding ban on wearing pins for opposing candidate [Clinton] at a political rally [Bush]) (implicates rights of association)

- VA Medical Centers - *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1314 (Fed. Cir. 2008) (rejecting unbridled discretion challenge to ban on "demonstrations" at VA Medical Centers in light of the need "to maintain a place of healing and rehabilitation for veterans")

- National Cemeteries - *Griffin*, 288 F.3d at 1324-1325 (veterans denied right to display Confederate flag in national cemetery because the government had reasonable discretion to ensure preservation of the commemorative functions of national cemeteries) (implicates government speech)

But regardless of whether those four decisions are correct, the circumstances involved in those cases are far removed from the ban on politically themed clothing

at stake in this case. This Court has warned that a complete ban on a species of communication, "can be narrowly tailored . . . only if *each activity within the proscription's scope* is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (upholding residential picketing ordinance) (emphasis added). Unlike the ordinance in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), which punished only disruptive conduct around schools in session, Texas punishes passive, peaceful expression without any evidence of disruption, coercion, undue influence, intimidation, fraud, or similar results. This is contrary to "our system, [where] undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 508 (1969). Just as the students in *Tinker* did not surrender their First Amendment rights at the school gate, "*voters do not surrender such rights at the polling room door*." Kimberly J. Tucker, "*You Can't Wear That To Vote*": *The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. Marshall L. Rev. 61, 81 (Fall 2006) (emphasis added).

Citing *Burson*, the Fifth Circuit described the "bedlam" at polling places in the nineteenth century. "America's early elections were not a very pleasant spectacle for voters." *Ostrewich*, 72 F.4th at 97 (cleaned up); *Burson*, 504 U.S. at 202. Voters were intimated by "sham battles" where crowds gathered "to heckle and harass voters who appeared to be supporting the other side." *Ostrewich*, 72 F.4th at 97; *Burson*, 504 U.S. at 202; *Mansky*, 138 S. Ct. at 1882-83. But banning

disruptive conduct is far removed from banning a voter's clothing.

This Court has noted various state interests advanced to justify campaign-free zones in areas immediately surrounding the polls: "the right of . . . citizens to vote freely for the candidates" (*Burson*, 504 U.S. at 198); "the right to vote in an election conducted with integrity and reliability" (*id.* at 199); "protecting voters from confusion and undue influence" (*id.*); "preventing voter intimidation and election fraud" (*id.* at 206); "protect[ing] the integrity and reliability of the electoral process itself" (*Anderson v. Celebrezze*, 460 U.S. 780, 788, n. 9 (1983) (collecting cases)); "maintain[ing] peace, order, and decorum" at the polls (*Mills v. Alabama*, 384 U.S. 214, 218 (1966)). These are all designed to serve the voters and protect their right to vote freely and peacefully when they go to the polls. Voters also have the right to be fully informed as they cast their ballots. But while elections should be conducted in an orderly manner, the state lacks a legitimate interest in insulating voters from all Election Day campaigning or banning apparel that poses no threat to order. *Mills v. Alabama*, 384 U.S. at 219 (overturning conviction of newspaper editor who violated ban on election day editorial endorsements). The state's interests are subservient to the rights of voters.

The legitimate state interests described in past cases have only a tenuous connection to the passive speech of voters. Silent visual expression is not an appropriately targeted evil. It is hardly disruptive to the election process for a voter to quietly approach the

ballot box wearing a shirt or button an official deems "political," according to a nebulous state standard. Even in pursuit of legitimate interests, the state may not unnecessarily restrict constitutionally protected liberties. *Anderson v. Celebrezze*, 460 U.S. at 806. The constitutional violation is even more egregious where the state pursues illegitimate interests. *See Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004) (500-foot buffer zone around polling places was facially overbroad where the evidence suggested the government intended to cut off all electioneering speech rather than to prevent voter intimidation and corruption).

CONCLUSION

This Court should grant the Petition for Certiorari and declare all three of the Texas statutes unconstitutional.

Respectfully submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 101
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
legal@rutherford.org

Deborah J. Dewart
Attorney at Law
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

Counsel for Amici Curiae