

**YOUR SHIRT OR YOUR VOTE: WHY TEXAS’S
ELECTIONEERING LAW
UNCONSTITUTIONALLY INFRINGES VOTERS’
FREEDOM OF SPEECH**

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I. INTRODUCTION

Fey Dawson, a twenty-six-year-old graduate student attending Texas Tech University in Lubbock, Texas, is excited and cannot wait to exercise her right to vote in the upcoming election. Although she does not consider herself to be a “political person,” she understands the importance and privilege of voting—a right that women, as well as minorities, did not have the opportunity to exercise in the past. Further, given the recent police shootings and racial tensions in the United States, as a Black Lives Matter (BLM) supporter, Fey is especially motivated to cast her ballot on Election Day in another historic presidential election. If enough people, particularly young people, get out and exercise their right to vote, she is optimistic that their voices will ignite change within the country.

To express her support and personal views, Fey wishes to wear a BLM t-shirt to the polls on Election Day. Although she is aware that Texas has an electioneering law,¹ she genuinely does not think BLM attire constitutes electioneering. After all, it is a social movement, not a political party or candidate. Nevertheless, Fey decides to do her due diligence and research the subject matter. In doing so, she comes across a 2015 online blog where State Bar of Texas President Larry McDougal made offensive comments about BLM.² In particular, he stated: “Groups like Black Lives Matter [have] publicly called for the death of just not Police Officers but also White Americans. This is a terrorist group.”³ Upon further research, Fey discovered another post McDougal made in July 2020 in which he expressed that he believed a person who wore a BLM t-shirt to a polling place committed electioneering.⁴ After citing to an electioneering case involving a “Make America Great Again” (MAGA) hat, McDougal further stated: “I see no difference in that hat and this shirt.”⁵ With this in mind, Fey is now conflicted on whether she should wear a BLM t-shirt to vote this upcoming election. Although she disagrees with McDougal, she fears that if she wears a BLM

1. TEX. ELEC. CODE ANN. § 61.010(a).

2. Robert J. Fickman, *The Blue Code of Silence: Not All Good Cops Are Good Cops*, FICKMAN L., <https://fickmanlaw.com/the-blue-code-of-silence-not-all-good-cops-are-good-cops/> (last visited Sept. 14, 2021).

3. *Id.*

4. Debra Cassens Weiss, *Texas Bar President's Comments About Black Lives Matter Bring Calls for Resignation*, ABA J. (July 13, 2020, 2:45 PM), <https://www.abajournal.com/news/article/texas-bar-presidents-comments-about-black-lives-matter-bring-calls-for-resignation>.

5. *Id.*

t-shirt, a poll worker—especially a poll worker in a conservative city like Lubbock, Texas⁶—will force her to choose: Your shirt or your vote!

Similar to Fey, people are faced with having to make this decision in a number of states. When it comes to Election Day, states are allowed to regulate what voters can say, wear, and display at polling places.⁷ Although some states have minor restrictions or no restrictions at all, other states, including Texas, have broad restrictions that cover an inordinate amount of speech.⁸ In particular, broad political apparel bans, like the one in Texas, restrict silent expressions of speech—a right protected by the First Amendment.⁹ With such a sweeping restriction, Texas citizens, like Fey, are left wondering: What exactly is the standard to determine how “related” a shirt or hat is to a candidate, measure, or political party? And who gets to decide?

As this Comment will discuss, one should not have to forfeit one constitutional right to exercise another, especially when the exercise of the former is unaccompanied by disorder and disturbance. While some kinds of campaign-related clothing and accessories should stay outside the polls, Texas must draw a reasonable line. To be constitutional, not only must this statute avoid sweeping protected speech too broadly and be capable of reasonable application, but it must also avoid the risk of discriminatory, erratic, and arbitrary enforcement.¹⁰ To achieve this goal, this Comment proposes new statutory language that would render Texas’s political apparel ban constitutional by providing an objective, workable standard of what apparel must stay out of polling places from what apparel can come in.

Accordingly, Part II of this Comment will provide a historical background of the Supreme Court’s interpretation and application of the First Amendment’s Free Speech Clause. Part III of this Comment will analyze the constitutionality of Texas’s electioneering statute and propose new statutory language that would keep this statute within constitutional bounds.

6. Matt Dotray, *Thank or Blame West Texas for Keeping the State Red*, LUBBOCK AVALANCHE-J. (Nov. 10, 2018, 9:41 PM), <https://www.lubbockonline.com/news/20181110/thank-or-blame-west-texas-for-keeping-state-red> (“Lubbock County voted 71 percent straight ticket Republican in 2016.”); Matt Dotray, *No Blue Wave Here: Lubbock, South Plains Stay Very Red*, LUBBOCK AVALANCHE-J. (Nov. 7, 2020, 12:56 PM), <https://www.lubbockonline.com/story/news/2020/11/07/no-blue-wave-here-lubbock-south-plains-stay-very-red/6176286002/> (“The 2020 Elections proved Lubbock remains a solidly Republican county . . .”).

7. See 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, 62–66 (2006) (providing an overview of state electioneering laws).

8. See *id.* (explaining that ten states, including Texas, prohibit the wearing of political message buttons). See also James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 MERCER L. REV. 331, 333 (2014) (focusing on the wearing of political slogans and images within the campaign-free zone).

9. See *infra* Section II.C (emphasizing that the Supreme Court has recognized that the First Amendment affords protection to the silent, passive expressions of opinion and association).

10. See *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018) (invalidating Minnesota’s electioneering statute because it was too vague and not capable of reasonable application).

II. A RETROSPECT OF THE FREEDOM OF SPEECH

“For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.”¹¹

This background section will discuss the breadth of the First Amendment and the level of scrutiny the Court applies in free speech cases. This section will then examine the differences between unprotected speech and protected speech. Moreover, because the freedom of speech is not limited to spoken and written word, this section will examine the Court’s interpretation that the First Amendment affords protection to the freedom of expression and association. Next, this section will distinguish the three types of government-controlled spaces and the various regulations the government may apply depending on the forum in which speech takes place.

Furthermore, this section will discuss the nonpublic forum standard in the context of polling places on Election Day and will provide an overview of state passive electioneering laws, as well as discuss the Supreme Court’s decision in *Minnesota Voters Alliance v. Mansky*.¹² Lastly, this section will set out the Court’s standards for facial and as-applied First Amendment challenges to government regulations.

A. The First Amendment’s Free Speech Clause

The First Amendment of the United States Constitution provides: “Congress shall make no law . . . abridging the freedom of speech.”¹³ The Supreme Court has incorporated this right under the Due Process Clause of the Fourteenth Amendment, meaning that the fundamental right to free speech applies equally to the individual states as it does to the federal government.¹⁴ The Supreme Court has interpreted this right broadly to cover most forms of communication, holding that the amendment implicitly protects the right to not communicate or associate, freedom of thought, and freedom of expressive and private association.¹⁵ Generally, government

11. *NAACP v. Button*, 371 U.S. 415, 444–45 (1958).

12. *Mansky*, 138 S. Ct. at 1888.

13. U.S. CONST. amend. I.

14. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

15. *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 782 (1988) (“[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say.”); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977) (“These principles prohibit a [s]tate from compelling any individual . . . to associate . . .”); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that the First Amendment protects the right of freedom of thought); *Bd. of Dirs. v. Rotary Club*, 481 U.S. 537, 545 (1987) (emphasizing that the First Amendment affords protection to the right of expressive and private association).

restrictions on free speech are subject to strict scrutiny; however, the level of scrutiny depends largely on an analysis of whether the speech is constitutionally protected or unprotected, as well as an analysis of where the speech took place.¹⁶

B. Unprotected Speech v. Protected Speech

Although “the Supreme Court has interpreted the First Amendment’s guarantee of freedom of speech very expansively, and the constitutional protection afforded to freedom of speech is perhaps the strongest protection afforded to any individual right under the Constitution[,]” this right is not absolute.¹⁷ Some speech simply does not rise to the level of constitutional protection,¹⁸ while other speech may be subject to restrictions even though it is protected.¹⁹

There are certain categories of speech, known as “well-defined and narrowly limited classes of speech,” that fall outside the protections of the First Amendment.²⁰ The Supreme Court has continuously held that obscenity, defamation, fraud, child pornography, incitement, true threats, and speech integral to criminal conduct fall within these classes of speech as “the prevention and punishment of [such have] never been thought to raise any [c]onstitutional problem.”²¹ In such cases, the government may impose restrictions and even prohibit the unprotected speech if the restrictions satisfy rational basis review.²² Accordingly, the government prevails unless the claimant demonstrates that: (1) the government has no legitimate interest in regulating the speech, or (2) if a legitimate government interest is present, the regulation is not a rational means to further the interest.²³

On the other hand, the First Amendment protects all other types of speech, including speech that the public considers hateful.²⁴ However, this

16. See Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 884 (1991).

17. Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 379 (2006); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”).

18. See *Chaplinsky*, 315 U.S. at 571.

19. See *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

20. See *Chaplinsky*, 315 U.S. at 571.

21. *Id.* at 571–72; *United States v. Alvarez*, 132 S. Ct. 2537, 2539 (2012).

22. Galloway, *supra* note 16, at 894.

23. *Id.*

24. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (“We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citations omitted) (“The First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.”) Hate speech is generally aimed to attack an individual on the basis of ethnicity, race, color, gender, age,

freedom is not absolute as the government may still impose regulations.²⁵ To begin, the government may not create content-based restrictions of speech, which consist of favoring one type of content or idea by suppressing or otherwise burdening another type of content or idea.²⁶ The Supreme Court has held that “[d]iscrimination against speech because of its message is presumed to be unconstitutional” and thus, subject to the rigorous analysis of strict scrutiny.²⁷ To pass strict scrutiny, the government is required to prove that the regulation not only furthers a compelling government interest but also that the regulation is narrowly tailored to achieve that interest.²⁸

In contrast, if the government limits speech, but its purpose in doing so is not based on content, the Court then applies intermediate scrutiny.²⁹ These types of speech restrictions include: (1) time, place, or manner restrictions³⁰ and (2) incidental restrictions, which are restrictions aimed at conduct other than speech but that incidentally restrict speech.³¹ To satisfy intermediate scrutiny under the First Amendment, the government must prove that the regulation furthers an important governmental interest that is unrelated to the suppression of free expression, provided that the means chosen does not burden substantially more speech than is necessary to the furtherance of that interest.³²

C. Expressive Conduct and Expressive Association

Freedom of speech protection does not cease at spoken or written word.³³ Although not explicitly within the First Amendment, the Supreme Court has interpreted the freedom of speech expansively to protect expressive conduct and the freedom of association.³⁴ In doing so, the Court has recognized that the use of symbols and the ability to associate freely for expressive purposes are “short cut[s] from mind to mind.”³⁵ In essence, both involve communicative conduct that is the behavioral equivalent of speech—the conduct itself is the message or idea.³⁶

religion, or sexual orientation. *Matal*, 137 S. Ct. at 1764. Examples of such would be the use of Ku Klux Klan (KKK) robes, swastika symbol, and the confederate flag. *See id.*

25. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968).

26. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

27. *Id.* *See also Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015).

28. *Reed*, 576 U.S. at 171.

29. *O'Brien*, 391 U.S. at 377.

30. *See Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

31. *See O'Brien*, 391 U.S. at 377.

32. *Id.*

33. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

34. *Bd. of Dirs. v. Rotary Club*, 481 U.S. 537, 545 (1987) (emphasizing that the First Amendment affords protection to the right of expressive and private association); *Virginia v. Black*, 538 U.S. 343, 357 (2003) (holding that the First Amendment protects expressive conduct, such as cross burning, when it is not used as a direct threat).

35. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

36. *See id.*

Moreover, the freedom to engage in both of these protected activities has always been an indispensable characteristic of American society and vital to the democratic way of life.³⁷ In order to realize one's own capacities or to stand up to surrounding institutionalized forces, it is "imperative to join with others of like mind in pursuit of common objectives[.]" as well as use symbols to express opinions and ideas.³⁸

I. Expressive Conduct

There are numerous activities that do not necessarily involve the use of words, but the Supreme Court has held them to be speech.³⁹ Expressive conduct, also known as symbolic speech, refers to conduct that is "sufficiently imbued with elements of communication to fall within the scope of the [First Amendment]."⁴⁰ Essentially, if actions themselves are intended to communicate ideas, they may be given the same protection as actual words.⁴¹ Most times, as opposed to verbal speech, when individuals engage in expressive conduct, it is unaccompanied by any disorder or disturbance.⁴²

For instance, in *Tinker v. Des Moines Independent Community School District*, students wearing black armbands to protest the Vietnam War engaged in "silent, passive expression of opinion, unaccompanied by any disorder or disturbance."⁴³ In that case, although the Supreme Court reasoned that schools have an interest in maintaining order in an educational environment and routinely regulate what apparel students can wear, the Court ultimately held that students have the right to express their opinions regarding controversial issues at school.⁴⁴ However, the right to do so is not absolute.⁴⁵ Accordingly, as long as students do not materially and substantially disrupt classes, create substantial disorder, or invade the rights of other students, they possess the right to engage in expressive conduct.⁴⁶

Likewise, in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, a minister of the Gospel for Jews for Jesus distributing free religious literature engaged in expressive conduct, unaccompanied by

37. Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L. J. 1, 1 (1964).

38. *Id.*

39. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (holding that students wearing black armbands were protected under the First Amendment); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that the burning of the American flag was protected symbolic speech).

40. *Spence v. Washington*, 418 U.S. 405, 409 (1974).

41. See *id.*

42. See *Tinker*, 393 U.S. at 508; *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus*, 482 U.S. 569, 571–72 (1987).

43. *Tinker*, 393 U.S. at 508.

44. *Id.* at 512–14.

45. *Id.*

46. *Id.*

any disorder.⁴⁷ Despite this, an airport officer had warned the minister to stop distributing literature due to a resolution that the Petition Board of Airport Commissioners of Los Angeles adopted banning all First Amendment activities at the airport.⁴⁸ By relying on the overbreadth doctrine, plaintiffs challenged the resolution on its face.⁴⁹ Essentially, the overbreadth doctrine allows individuals, whose own speech or conduct may be prohibited, to facially challenge a statute “because it also threatens others not before the court—those who desire to engage in legally protected expression[,] but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.”⁵⁰ However, courts may only invalidate a statute on its face if the overbreadth is “substantial.”⁵¹ Ultimately, the Court held that the resolution was facially unconstitutional under the overbreadth doctrine because it reached “the universe of expressive activity, and, by prohibiting *all* protected expression, purport[ed] to create a virtual ‘First Amendment Free Zone’ at LAX.”⁵²

Both *Tinker* and *Jews for Jesus* support the idea that individuals should be allowed to engage in unfettered expressive conduct, as long as it is unaccompanied by disorder or disturbance.⁵³ Moreover, these cases also illustrate that the First Amendment protects printed material, whether on shirts, hats, or buttons.⁵⁴ Accordingly, much like the black armbands in *Tinker* and the religious literature in *Jews for Jesus*, the wearing of BLM apparel is a passive expression of opinion protected under the First Amendment.⁵⁵

2. Expressive Association in the Context of NAACP and BLM

In addition to protecting expressive conduct, the First Amendment also affords protection to the freedom of association, which encompasses expressive association.⁵⁶ Expressive association refers to the right to associate with groups for expressive purposes—often for political reasons.⁵⁷ A common example of this would be individuals identifying as Democratic, Republican, or Libertarian; the reason why people associate with these parties is likely because they share the same ideology or wish to demonstrate

47. *Jews for Jesus*, 482 U.S. at 571–72.

48. *Id.*

49. *Id.*

50. *Id.* at 574 (quoting *Brockett v. Spokane Arcades, Inc.*, 474 U.S. 491, 503 (1985)).

51. *Id.*

52. *Id.*

53. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969); *Jews for Jesus*, 482 U.S. at 574–75.

54. See *Tinker*, 393 U.S. at 508; *Jews for Jesus*, 482 U.S. at 574–75.

55. See *Tinker*, 393 U.S. at 508; *Jews for Jesus*, 482 U.S. at 574–75.

56. 16A AM. JUR. 2D *Constitutional Law* § 581 (1962).

57. David L. Hudson Jr., *Freedom of Association*, FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1594/freedom-of-association> (last visited on Sept. 14, 2021).

their support through association.⁵⁸ The Supreme Court first recognized this right in *NAACP v. Alabama*, holding that members of the civil rights group, National Association for the Advancement of Colored People (NAACP), had a right to associate together free from state interference.⁵⁹ There, Alabama sought to prevent the NAACP from conducting further business in the state and wanted the NAACP to produce records including names of its membership.⁶⁰ Justice Harlan, in delivering the majority opinion, emphasized that “[e]ffective advocacy of both public and private points of views, particularly controversial ones, is undeniably enhanced by group association” and “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by . . . [the] freedom of speech.”⁶¹ Justice Harlan further stated that “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.”⁶²

Similar to the NAACP,⁶³ Black Lives Matter is a civil rights organization whose mission is to eliminate white supremacy, as well as build local power to prevent states and vigilantes from inflicting violence on black communities.⁶⁴ Although BLM has pressured the Democratic Party to condemn police brutality, excessive force, and misconduct, BLM, like the NAACP, has never endorsed a candidate for president—it is not political in and of itself.⁶⁵ Rather, the presidential campaign is simply an easy avenue for these civil right organizations to get their message across to the public by promoting a national discussion.⁶⁶ Nevertheless, regardless of BLM’s political and controversial viewpoints, its supporters and members have the right to associate together free from undue interference.⁶⁷

58. *See id.*

59. *NAACP v. Alabama*, 357 U.S. 449, 466 (1958).

60. *Id.* at 450–52.

61. *Id.* at 460.

62. *Id.*

63. *NAACP Statement on Endorsement of Political Candidates or Parties*, NAACP (Feb. 11, 2016) [hereinafter *NAACP Statement*], <https://web.archive.org/web/20201208183311/https://www.naacp.org/la-test/naacp-statement-on-endorsements-of-political-candidates-or-parties/> (“The NAACP works to educate all political candidates to support policies that improve access to quality education and economic opportunity, criminal justice reform, the environment, healthcare and youth empowerment, with a dedication to removing race-based hatred and discrimination from society.”).

64. *About*, BLACK LIVES MATTER [hereinafter *About BLM*], <https://blacklivesmatter.com/about/> (last visited Sept. 14, 2021).

65. *See* Alison Hill, *Political Activism: Chicago Politicians’ Silence When Black Lives Matter*, 21 PUB. INT. L. REP. 72, 72 (2015); *NAACP Statement*, *supra* note 63 (“The [NAACP] . . . does not endorse candidates or political parties, or engage in direct campaigning.”).

66. Hill, *supra* note 65, at 72.

67. *See NAACP*, 357 U.S. at 466.

D. Three Types of Government-Controlled Spaces

When a court examines a law that burdens protected speech, location is essential because depending on where it takes place, the government may be able to regulate speech more easily.⁶⁸ The Supreme Court has recognized three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums.⁶⁹

Traditional public forums are “those places which ‘by long tradition or by government fiat have been devoted to assembly and debate.’”⁷⁰ Typically, public parks, streets, sidewalks, and the like fall within this category.⁷¹ Moreover, in a traditional public forum, the government may enforce reasonable time, place, and manner restrictions on private speech, but if the restriction is based on content, it must satisfy strict scrutiny.⁷² This standard also applies to designated public forums, which are created when the government designates a place or channel of communication for public use.⁷³ Typically, these places are for assembly and speech or for the discussion of certain topics.⁷⁴ These spaces have not traditionally been regarded as a public forum; rather, they become a public forum when the government intentionally opens them up for public discussion.⁷⁵ The Supreme Court has recognized a school board meeting, university meeting facilities, and municipal theater as designated public forums.⁷⁶ The government may reserve these spaces for their intended purpose, as long as restrictions are reasonable and not an effort to suppress expression based on viewpoint or content.⁷⁷

Conversely, a nonpublic forum is a space that is not by designation or tradition a forum for public communication.⁷⁸ In creating restrictions that limit speech in these areas, the government has much more flexibility than it has with regard to public forums and public designated forums.⁷⁹ After all, the Supreme Court has held that the First Amendment does not promise access to property merely because the government owns and controls it.⁸⁰ In other words, states—no less than private property owners—have the power

68. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

69. *Id.*

70. *Id.* (quoting *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

71. *Id.*

72. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

73. *Cornelius*, 473 U.S. at 802.

74. *Id.*

75. *See id.*

76. *See Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981); *City of Madison Joint Sch. Dist. v. Wis. Emp. Rels. Comm’n*, 429 U.S. 167, 175 (1976); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975).

77. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

78. *Id.*

79. *Id.*

80. *U.S. Postal Serv. v. Council of Greenburg Civic Ass’ns*, 453 U.S. 114, 129 (1981).

to preserve property under their control for the purpose they lawfully dedicated to it.⁸¹ Accordingly, examples of nonpublic forums include airport terminals, prisons, military bases, and polling places.⁸²

E. Nonpublic Forum Standard and Polling Places

In assessing speech restrictions in nonpublic forums, the Supreme Court employs a distinct standard of review.⁸³ Under the nonpublic forum standard, the government may reserve such a forum “for its intended purpose[], communicative, or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”⁸⁴ Supreme Court precedent has also recognized that states may impose *some* content-based restrictions on speech in nonpublic forums, including restrictions that prohibit political advocates and forms of political advocacy.⁸⁵

Prior to 2018, the Supreme Court had yet to address whether polling places qualify as a nonpublic forum.⁸⁶ Although the plurality opinion in *Burson v. Freeman* and Justice Scalia’s concurrence in the judgment came to different conclusions as to whether the public streets and sidewalks “surrounding a polling place qualify as a nonpublic forum, neither opinion suggested that the interior of the building was anything but.”⁸⁷ In that case, the treasurer of a city-council candidate’s campaign, who was involved in campaign activities for several years, challenged a Tennessee “campaign-free zone” law that regulated speech surrounding a polling place.⁸⁸ The Tennessee law prohibited, within 100 feet of the entrance of a polling place, “the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position.”⁸⁹ In reversing the Tennessee Supreme Court’s decision, the Court described the statute as constitutional content-based

81. *Id.* at 129–30 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

82. *Int’l Soc’y. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (“[T]he tradition of airport activity does not demonstrate that airports have historically been made available for speech. . . .”); *Adderley v. Florida*, 385 U.S. 39, 48 (1966) (holding that jailhouse grounds do not constitute public fora); *Greer*, 424 U.S. at 838 (holding that military reservations are nonpublic forums because the government did not intend to designate a public forum); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018) (holding that polling places are nonpublic forums).

83. *Perry*, 460 U.S. at 46.

84. *Id.*

85. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806–11 (1985); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (plurality opinion); *Greer*, 424 U.S. at 831–33, 838–39.

86. *Mansky*, 138 S. Ct. at 1886.

87. *Id.* (first citing *Burson v. Freeman*, 504 U.S. 191, 196–97 (plurality opinion); and then citing *Burson*, 504 U.S. at 214–216 (Scalia, J., concurring)).

88. *Burson*, 504 U.S. at 194.

89. *Id.* (citing TENN. CODE ANN. § 2-7-11(b) (1991)).

regulation subject to strict scrutiny.⁹⁰ Ultimately, the Court concluded that Tennessee’s interest in protecting voters from “confusion and undue influence” while voting was sufficient to preserve the integrity of the election process and therefore upheld the statute.⁹¹

In view of this, the Court, in *Minnesota Voters Alliance v. Mansky*, held that a polling place qualifies as a nonpublic forum, reasoning that “[i]t is, at least on Election Day, government-controlled property set aside for the sole purpose of voting.”⁹² Accordingly, unless a claimant alleges that a speech regulation discriminates on the basis of viewpoint or content, the question is: “[W]hether [the state’s] ban on [free speech] is ‘reasonable in light of the purpose served by the forum:’ voting.”⁹³

F. You Can’t Wear That: State Passive Electioneering Laws

Every state regulates the election process, including political activities in and around the polling places.⁹⁴ After all, it is a states’ duty to implement voting laws as long as election officials are conducting the elections in a fair and consistent manner.⁹⁵ The Supreme Court has also emphasized that every states’ goal in imposing restrictions on Election Day should be to prevent voter intimidation and fraud.⁹⁶ Although states differ on what they consider to be permissible or impermissible activities in and around the polls, most states’ restrictions outside the polling place typically include limiting the handing out of campaign literature, the display of signs, or soliciting votes within a certain distance of a polling place.⁹⁷ Conversely, some states restrict what apparel and accessories voters can wear *within* the polling place.⁹⁸

Accordingly, twenty-one states—Arkansas, California, Delaware, Indiana, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Rhode Island, South Carolina, Tennessee, Texas, and Vermont—prohibit voters from wearing political apparel at polling places on Election Day.⁹⁹ Using plain statutory language, some state laws explicitly prohibit apparel within the polling place; meanwhile, other states employ more generalized language and determine what apparel is prohibited through interpretation and

90. *Id.* at 198, 211.

91. *Id.* at 199, 211.

92. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018).

93. *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

94. See *State Laws Prohibiting Electioneering Activities Within a Certain Distance of the Polling Place*, NASS (Oct. 2020) [hereinafter *State Laws Prohibiting Electioneering Activities*], <https://www.nass.org/sites/default/files/surveys/2020-10/state-laws-polling-place-electioneering-Oct-2020-.pdf>.

95. Tucker, *supra* note 7, at 62.

96. *Id.*

97. *Electioneering Prohibitions, Table 2: State Statutes on Electioneering Apparel*, NCSL (Apr. 01, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx>.

98. Tucker, *supra* note 7, at 62.

99. *State Laws Prohibiting Electioneering Activities*, *supra* note 94.

enforcement.¹⁰⁰ However, in relying solely on interpretation and enforcement, some states risk invalidation due to violating the First Amendment rights of voters.¹⁰¹ A clear example of this is evidenced in the Supreme Court decision, *Mansky*.¹⁰²

I. Invalidating Minnesota's Political Apparel Ban

In *Mansky*, the Supreme Court struck down Minnesota's political apparel ban, which prohibited voters from wearing a "political badge, political button, or other political insignia" inside polling places on Election Day.¹⁰³ Not only did this ban encompass accessories and clothes with political insignia on them, but state election judges also had full discretion to decide whether a particular item fell within the ban.¹⁰⁴ Moreover, even though election officials would first approach the violating voter and ask that individual to conceal or remove the apparel, the statute imposed prosecution for a petty misdemeanor or a civil penalty.¹⁰⁵ Nevertheless, if voters refused to follow orders, the election officials had to allow them to vote.¹⁰⁶ In other words, election officials were not supposed to turn away voters, regardless of whether they wore impermissible attire or accessories.¹⁰⁷ Yet, the challengers who brought the litigation in *Mansky* ran into this very issue when they sought to wear buttons saying "Please I.D. Me" and a "Tea Party Patriots" shirt.¹⁰⁸ While wearing both of these items to the polls, an election official turned one of the challengers away twice, something that election officials, as noted above, were not allowed to do.¹⁰⁹ On his third attempt, the challenger was finally able to vote, but an election official reported the incident.¹¹⁰

In response to the lawsuit, Minnesota county officials gave election judges an "Election Day Policy," in an attempt to provide guidance on the enforcement of the political apparel ban.¹¹¹ In addition, the Minnesota Secretary of State also shared the policy to election officials in the state.¹¹² The policy provided that the apparel ban included, but was not limited to:

100. Tucker, *supra* note 7, at 62–63.

101. See *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 (2018).

102. See *id.*

103. *Id.* at 1882; MINN. STAT. § 211B.11(1) (2017).

104. *Mansky*, 138 S. Ct. at 1883; MINN. STAT. § 211B.11(1).

105. *Mansky*, 138 S. Ct. at 1883; MINN. STAT. § 211B.11(1).

106. *Mansky*, 138 S. Ct. at 1883; MINN. STAT. § 211B.11(1).

107. *Mansky*, 138 S. Ct. at 1883.

108. *Id.*

109. *Id.*

110. *Id.* at 1884. In their amended complaint, the challengers alleged that other voters ran into similar issues on Election Day. *Id.* In particular, a poll worker asked one person to cover up his Tea Party shirt, and when another person refused to conceal his "Please I.D. Me" button, an election judge took down his name and address for possible referral. *Id.*

111. *Id.*

112. *Id.*

- Any item including the name of a political party in Minnesota, such as the Republican, [Democratic–Farmer–Labor], Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.
- Issue oriented material designed to influence or impact voting (including specifically the ‘Please I.D. Me’ buttons).
- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).¹¹³

After concluding that polling places qualify as a nonpublic forum, the Court presented the question: “[W]hether Minnesota’s ban on political apparel is ‘reasonable in light of the purpose served by the forum’: voting.”¹¹⁴

Furthermore, in evaluating the facial challenge to the statute, the Court first considered whether the state was “pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place.”¹¹⁵ There, Minnesota asserted that it should be allowed to exclude some forms of advocacy from the polls, as this would allow voters to peacefully contemplate their choices.¹¹⁶ Accordingly, the Court acknowledged that voting is an important civic act; it is a time for selecting, not campaigning.¹¹⁷ Given the special purpose of the polling place itself, the Court further emphasized that states may choose to prohibit certain apparel or accessories based on the message they convey, so that voters are able to concentrate on the important decisions immediately at hand.¹¹⁸

However, the Court also stressed that states must draw a reasonable line.¹¹⁹ Even though under the nonpublic forum doctrine, regulations prohibiting speech are not subject to strict scrutiny, states “must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.”¹²⁰ Ultimately, the Court concluded that the term “political” in Minnesota’s ban, coupled with haphazard interpretations that Minnesota provided in its guideline, caused the state “to fail even this forgiving test.”¹²¹

To begin, the Court first reasoned that the failure to define the term “political,” a word that could have expansive meaning, rendered the

113. *Id.*

114. *Id.* at 1886 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

115. *Id.*

116. *Id.* at 1888.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

Minnesota statute incapable of reasonable application.¹²² In reviewing two definitions of this term, the Court noted that under a literal reading, a t-shirt or a button simply imploring others to “Vote!” would qualify.¹²³ Minnesota argued that its ban should not be read so expansively; instead, the state reasoned that it interpreted its statute to forbid “only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place.”¹²⁴ However, in considering Minnesota’s authoritative constructions in interpreting its law, the Court emphasized that Minnesota’s “electoral choices” construction introduced confusing line-drawing problems, as it required election judges, who had the discretion to decide what was political when screening voters at the polls, to “maintain a mental index of the platforms and positions of every candidate and party on the ballot.”¹²⁵ In simpler words, this would require election judges and officials to watch over and keep track of everything that a candidate or party on the ballot supports or opposes.¹²⁶ This would simply be unreasonable—almost impossible—because “[c]andidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import.”¹²⁷

Moreover, in looking at the specific examples of what was banned under the state’s guideline policy, the Court conceded that the first three examples were clear enough.¹²⁸ The state’s policy banned the names of political parties, the names of candidates, and the expressing of support or opposition to a ballot question.¹²⁹ However, the last two examples were problematically broad.¹³⁰ The Court reasoned that the state’s fourth guideline, which provided that the law prohibited “[i]ssue orientated material designed to influence or impact voting,” raised more questions than it answered because the word “issue” appeared to encompass any subject “on which a political candidate or party has taken a stance.”¹³¹ The reason that “Please I.D. Me” buttons were banned, even though voter identifications had not been on the ballots, was because Republican candidates for governor and secretary of state had taken positions on voter identification laws.¹³² Because state and federal candidates are likely to take positions on various subjects of local and national import, the Court emphasized that requiring an election judge to keep track of this

122. *Id.*

123. *Id.* (“It can encompass anything ‘of or relating to government, a government, or the conduct of governmental affairs’ . . . or anything ‘[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state[.]’”).

124. *Id.* at 1888–89 (quoting Brief for Respondents).

125. *Id.* at 1889.

126. *See id.*

127. *Id.* at 1889–90.

128. *Id.* at 1889.

129. *Id.*

130. *Id.*

131. *Id.* (quoting Transcript of Oral Arg. at 50).

132. *Id.*

was simply not reasonable.¹³³ The Court asked: “Would a ‘Support Our Troops’ shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a ‘#MeToo’ shirt, referencing the movement to increase awareness of sexual harassment and assault?”¹³⁴

As for the final category in Minnesota’s guideline, which provided that the ban prohibited materials “promoting a group with recognizable political views,” the Court noted that any number of groups might take positions on issues of public concern, from the American Association of Retired Persons (AARP), the World Wildlife Fund, the American Civil Liberties Union, to Ben & Jerry’s.¹³⁵ Although Minnesota asserted that the ban covered only apparel that promoted groups whose political positions were sufficiently “well-known,” the Court rejected this construction, reasoning that this requirement, if anything, only increased the potential for erratic application.¹³⁶ Essentially, this application would significantly rely on the background knowledge and media consumption of the particular election worker at the polls, which carried the opportunity for abuse.¹³⁷ The Court further emphasized that:

We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by *objective, workable standards*. Without them, an election judge’s own politics may shape his views on what counts as “political.” And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State’s interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.¹³⁸

Overall, the Court was not looking for precise guidance or perfect clarity, as other states have permissible electioneering laws, including apparel bans, in more lucid terms.¹³⁹ The *Mansky* Court stressed: “[I]f a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here.”¹⁴⁰ Thus, even though the Court respects a state’s choice in wanting to afford voters the opportunity to exercise their civic duty “in a setting removed from the clamor and din of electioneering,” the law preventing such must be capable of reasonable application.¹⁴¹

133. *Id.* at 1889–90.

134. *Id.* at 1890.

135. *Id.*

136. *Id.* (quoting Transcript of Oral Arg. at 37).

137. *Id.* at 1891.

138. *Id.* (emphasis added).

139. *Id.*

140. *Id.*

141. *Id.* at 1892.

2. Texas's Electioneering Statute: Recent Litigation

Similar to Minnesota, the State of Texas has a political apparel ban.¹⁴² Section 61.010(a) of the Texas Election Code provides: “[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”¹⁴³ Furthermore, like Minnesota’s political apparel ban, Texas’s statute carries a criminal penalty as a Class C misdemeanor.¹⁴⁴ The statute also grants election workers broad authority; if an election worker concludes that a voter’s apparel violates this statute, the voter may be arrested if he refuses to remove it.¹⁴⁵ Although the Supreme Court has yet to decide whether Texas’s passive electioneering statute is unconstitutional, there recently has been litigation challenging its constitutionality.¹⁴⁶

For instance, during early voting in October 2018, Jillian Ostrewich went to a polling place with her husband in Houston, Texas.¹⁴⁷ Because her husband is a firefighter in the Houston Fire Department, she wore a yellow t-shirt, displaying “Houston Fire Fighters’ with an emblem for the AFL-CIO on the front and back.”¹⁴⁸ Upon arriving, an election worker informed Jillian that she would not be allowed to vote until she returned with her t-shirt inside out because Proposition B—an initiative measure concerning firefighter pay—was on the ballot.¹⁴⁹ However, her shirt did not make any reference to Proposition B.¹⁵⁰ Once Jillian “went to the restroom and turned her shirt inside out, . . . the election worker then allowed her to [cast her] vote.”¹⁵¹ Subsequently, Jillian filed suit in federal court against various state and county officials, challenging Texas’s electioneering statutes facially and as-applied.¹⁵² The parties then filed competing motions for summary judgment; thereafter, the district court referred the case to United States

142. See TEX. ELEC. CODE ANN. § 61.010(a).

143. *Id.* Although Texas has several electioneering statutes, this Comment solely focuses on § 61.010(a) because it is a more specific prohibition regarding what a person may wear to the polls. See *id.*

144. *Id.* § 61.010(c).

145. See Plaintiffs Jillian Ostrewich & Anthony Ortiz’s Original Complaint for Injunctive and Declaratory Relief & Nominal Damages (42 U.S.C. § 1983) at 4–12, *Ostrewich v. Trautman*, No. 19-cv-00715, 2019 WL 978183 (S.D. Tex. Feb. 28, 2019) [hereinafter Original Complaint] (“An election worker threatened Mr. Ortiz with arrest if Mr. Ortiz did not take off his ‘Make American Great Again’ hat.”).

146. See *id.* at 4. On July 9, 2020, counsel for plaintiffs filed a Stipulation of Dismissal of Anthony Ortiz’s Claims; thus, this Comment will only provide information relating to Jillian Ostrewich. See generally Stipulation of Dismissal of Anthony Ortiz’s Claims, *Ostrewich v. Trautman*, No. 19-cv-00715, 2020 WL 5228481 (S.D. Tex. July 9, 2020).

147. See Original Complaint, *supra* note 145, at 7–8.

148. *Id.* at 8.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 1–11.

Magistrate Judge Andrew M. Edison, who then granted in part and denied in part both of the parties' motions.¹⁵³

G. Facial and As-Applied Standards

The Supreme Court has long established that “overbroad regulation[s] may be subject to facial review and invalidation” in the area of freedom of expression.¹⁵⁴ Even if a regulation’s “application in the case under consideration may be constitutionally unobjectionable,” the Court has reasoned that this exception is based on “an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.”¹⁵⁵ Thus, under the overbreadth doctrine, individuals can challenge a law if: (1) every conceivable application of the law “creates an impermissible risk of suppression of ideas,” or (2) it seeks to prohibit such a broad range of protected activity.¹⁵⁶ This typically occurs when a statute delegates overly broad discretion to the decision maker¹⁵⁷ or in scenarios where a statute “sweeps too broadly, penalizing a substantial amount of speech that” the First Amendment protects.¹⁵⁸ Moreover, an as-applied First Amendment challenge consists of a challenge to a statute’s application only, as-applied to the party before the court.¹⁵⁹ If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable.¹⁶⁰

153. Plaintiff’s Motion for Summary Judgement at 5, *Ostrewich v. Hollins*, No. 4:19-cv-715, 2020 WL 5904590 (S.D. Tex. Sept. 9, 2020); Memorandum & Recommendation at 1, *Ostrewich v. Hudspeth*, No. 19-cv-00715, 2021 WL 4170135, at *1. *See also* Order Adopting Magistrate Judge’s Memorandum & Recommendation at 1–2, No. 19-cv-00715, 2021 WL 4480750, at *1 (“Specifically, [Jillian’s] challenge to section 61.010 of the Texas Election Code is denied . . . Moreover, sections 61.003 and 85.036 are struck down as unconstitutional infringements on the First Amendment right to free speech.”). While there was success in striking down § 61.003 in that case, this Comment, nevertheless, analyzes the constitutionality of § 61.010 and proposes statutory language that the Texas Legislature should adopt to avoid future litigation, like the *Ostrewich* case, entirely. *See infra* Part III (emphasizing that the Texas Legislature should rewrite its electioneering statute due to its unconstitutionality under the *Mankys* framework).

154. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

155. *Id.* (first citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984); then citing *Bd. of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987); then citing *New York v. Ferber*, 458 U.S. 747, 772 (1982); and then citing *Brockett v. Spokane Arcades, Inc.*, 475 U.S. 491, 503 (1985)).

156. *Forsyth Cnty.*, 505 U.S. at 129; *Taxpayers for Vincent*, 466 U.S. at 801.

157. *See, e.g., Forsyth Cnty.*, 505 U.S. at 129; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

158. *Forsyth Cnty.*, 505 U.S. at 130; *see, e.g., Jews for Jesus*, 482 U.S. at 574–75.

159. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758–59 (1988).

160. *See id.*

III. GIVEN THAT TEXAS'S ELECTIONEERING STATUTE IS UNCONSTITUTIONAL UNDER THE MANSKY FRAMEWORK, THE TEXAS LEGISLATURE SHOULD REWRITE THIS STATUTE TO PROVIDE AN OBJECTIVE, WORKABLE STANDARD OF WHAT POLITICAL APPAREL MAY COME INTO THE POLLING PLACES FROM WHAT MUST STAY OUT

On its face and as-applied, Texas's electioneering statute is unconstitutional under the *Mansky* framework because it is overly broad and incapable of reasonable and consistent application. However, Texas, unlike Minnesota, has the opportunity to ensure its statute passes constitutional muster. If the Texas legislature rewrites its political apparel ban in the manner in which this Comment suggests, this statute, as this section demonstrates, will remain within constitutional bounds under the *Mansky* framework.

A. Texas's Electioneering Statute Is Unconstitutional

Following its decision in *Mansky*, the Supreme Court would likely hold that Texas's electioneering statute, which prohibits the wearing of "a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot,"¹⁶¹ is unconstitutional because: (1) like Minnesota's political apparel ban in *Mansky*, Texas's electioneering statute, on its face, is too broad; (2) like Minnesota's statute in *Mansky*, Texas's statute, on its face, is subject to discriminatory application, as well as erratic and arbitrary enforcement; (3) as-applied, there was recent litigation due to enforcement inconsistent with free speech; and (4) as-applied, Texas's statute violates Fey Dawson's free speech rights.¹⁶²

1. Facial Challenge: Too Broad

A major issue surrounding this claim is: What exactly is the standard to determine how "related" a shirt or hat is to a candidate, measure, or political party appearing on the ballot? The fact that many Texas voters have to ask this difficult question, in and of itself, demonstrates that Texas's political apparel ban does not provide an objective, workable standard.¹⁶³ The Supreme Court has long established that overbroad regulations may be subject to facial review and invalidation in the area of freedom of expression.¹⁶⁴ Generally, any restrictions the government places on free speech will be subject to strict scrutiny; however, the level of review depends

161. TEX. ELEC. CODE ANN. § 61.010(a).

162. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018).

163. *See id.*

164. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

largely on an analysis of whether the speech is constitutionally protected, as well as an analysis of where the speech took place.¹⁶⁵

As discussed above, freedom of speech protection does not stop at the spoken word.¹⁶⁶ The Supreme Court has expansively interpreted the First Amendment to cover expressive conduct and expressive association.¹⁶⁷ Thus, voters engaging in silent, passive expression of opinion or association, by wearing a shirt, button, or hat to the polls, are afforded protection under the First Amendment.¹⁶⁸ Furthermore, the Supreme Court, in *Mansky*, held that a polling place qualifies as a nonpublic forum; “[i]t is, at least on Election Day, government-controlled property set aside for the sole purpose of voting.”¹⁶⁹ Thus, in analyzing the constitutionality of Texas’s electioneering statute under this standard, the question is: Whether Texas’s political apparel ban is reasonable in light of the purpose served by the forum, which is voting.¹⁷⁰

a. Texas’s Interests in Prohibiting Political Apparel

First, the Court must consider whether Texas is “pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling places.”¹⁷¹ Although, under the nonpublic forum standard, the Court does not require a state to show that its statute is narrowly tailored to achieve a compelling government interest (i.e., strict scrutiny), Texas must—as the *Mansky* Court emphasized—be able to “articulate some sensible basis for distinguishing what may come in from what must stay out.”¹⁷²

As the state of Minnesota argued in that case, Texas may argue that there are problems of voter intimidation, fraud, and general disorder that has overwhelmed polling places in the past.¹⁷³ Thus, a campaign-free zone within the polls is “necessary” to protect the right to vote and secure the advantages of the secret ballot.¹⁷⁴ After all, voting is a weighty civic act; it is not a time for campaigning, but rather a time for choosing.¹⁷⁵ Given the special purpose of the polling place itself, it is undisputed that some kinds of campaign-related clothing and accessories should stay outside the polls so

165. See Galloway, *supra* note 16, at 884.

166. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

167. See Section II.C (examining the Court’s interpretation that the First Amendment affords protection to the freedom of expression and association).

168. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969); *Bd. of Airport Comm’rs City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 571–72 (1987).

169. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018).

170. *Id.*

171. *Id.*

172. *Id.* at 1888.

173. *Id.* at 1886.

174. *Id.*

175. *Id.* at 1887.

that voters may focus on the important decisions on the ballot; however, Texas must draw a reasonable line.¹⁷⁶ Again, it must be able to articulate some sensible basis—an objective, workable standard—for distinguishing what kind of apparel may come in from what must stay out.¹⁷⁷

In addition, electioneering statutes, particularly those that limit expressive conduct and expressive association, present a difficult choice for voters: Your speech or your vote!¹⁷⁸ It would be difficult to say that the framers of the Constitution, in creating the Free Speech Clause of the First Amendment, and the Supreme Court, in incorporating this right under the Due Process Clause of the Fourteenth Amendment to apply to states, intended for the government to have such broad authority and control of voters' constitutional rights.

Another potential counterargument Texas may assert is that, in *Burson v. Freeman*, the Supreme Court fully upheld Tennessee's law, which swept broadly to ban even the simple display of a campaign-related message.¹⁷⁹ However, as the Court emphasized in its later opinion, *Mansky*, neither the plurality nor Justice Scalia expressly addressed the application of electioneering statutes *inside* the polling place.¹⁸⁰ Once again, although the polling place is very unique in that people only gather to reach considered decisions about their government and laws, Texas must draw a reasonable line.¹⁸¹ Additionally, it is safe to assume that by the time most people get *inside* the polling place, they have already decided—or at least have an idea—who they will vote for. Thus, the need to regulate electioneering, specifically passive electioneering, inside the polling place to prevent voter fraud and intimidation is very low in comparison to what is required outside.

b. No Objective, Workable Standard

Although Texas has the authority to regulate the polls and preserve the integrity of the election process, this authority must be guided by an objective, workable standard.¹⁸² In *Mansky*, the Court held that Minnesota's statute was incapable of reasonable application because of its failure to define the term political, which could have expansive meaning.¹⁸³ The phrase “candidate, measure, or political party” in Texas's political apparel ban has the same effect.¹⁸⁴ Although the Texas Secretary of State provided a statement advising voters that the statute includes materials expressing

176. *Id.* at 1888.

177. *Id.*

178. *Id.* at 1892.

179. *Burson v. Freeman*, 504 U.S. 191, 200–04 (1992) (plurality opinion).

180. *Mansky*, 138 S. Ct. at 1886 (emphasis added).

181. *Id.* at 1888.

182. *Id.* at 1891.

183. *Id.* at 1888.

184. *Id.*; TEX. ELEC. CODE ANN. § 61.010(a).

preference for or against candidates in past elections as well, this did nothing but raise more questions than it answered.¹⁸⁵ Rather than providing a definition for these terms or a guideline for election workers to reference, this statement merely expanded—rather than clarified—the statute to apply to any material related to a “candidate, measure, or political party” on present ballots, as well as past ones.¹⁸⁶

In reviewing the definitions of these terms—just as the Court did with the term “political” in *Mansky*—one can understand how these terms could have such expansive meaning.¹⁸⁷ To further illustrate this point, the dictionary definition of “candidate” is “one that aspires to or is nominated or qualified for an office, membership, or award.”¹⁸⁸ The dictionary definition of “measure” is “a step planned or taken as a means to an end.”¹⁸⁹ Lastly, the dictionary definition of “political party” is “an organization of people who similar political beliefs and ideas and who work to have their members elected to positions in the government *political* parties with opposing agendas.”¹⁹⁰ However, if one were to break up “political party” into two separate definitions: the term “political” could encompass anything “of or relating to government, a government, or the conduct of government,” and “party” is defined as “a person or group of persons organized for the purpose of directing the policies of a government.”¹⁹¹ Overall, a literal reading of these terms could lead to inconsistent enforcement, which in turn would prohibit a broad range of protected activity, including the freedom to engage in silent, passive expression of opinion and association.¹⁹²

185. Stephanie Whitfield, *Is MAGA Apparel Allowed in Polling Places?*, KHOU 11 (Oct. 30, 2018, 5:36 PM), <https://www.khou.com/article/news/local/is-maga-apparel-allowed-in-polling-places/285-609690946> (“This statute on electioneering [] makes no distinction as to whether or not the ‘candidate’ in question is on the current ballot or a previous one. Therefore, our office advises election officials that the statute prohibiting electioneering within 100 feet of a polling place also includes materials expressing preference for or against candidates in past elections as well.”); Keith Ingram, *Elec. Advisory No. 2018-33, Electioneering*, SOS (Oct. 14, 2018), <https://www.sos.state.tx.us/elections/laws/advisory2018-33.shtml>.

186. TEX. ELEC. CODE ANN. § 61.010(a).

187. *Mansky*, 138 S. Ct. at 1888.

188. *Candidate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/candidate> (last visited on Sept. 14, 2021).

189. *Measure*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/measure> (last visited on Sept. 14, 2021).

190. *Political Party*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/party#h1> (last visited Sept. 14, 2021).

191. *Political*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/political> (last visited Sept. 14, 2021); *Party*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/party> (last visited Sept. 14, 2021).

192. *Mansky*, 138 S. Ct. at 1888.

2. *Facial Challenge: Subject to Discriminatory Application and Erratic and Arbitrary Enforcement*

An equally important issue surrounding this claim is: Who gets to decide? The issue with Minnesota’s political ban was not solely that it failed to define the term “political,” but that the failure to define this term opened the door for an abuse of power when it came to application and enforcement.¹⁹³ In Texas, election judges and officials have the authority to determine what apparel is in violation of Texas’s electioneering statute.¹⁹⁴ Yet, without a statutory definition or, at the very least, a guideline distinguishing what apparel may come in from what must stay out, Texas’s statute runs the risk of discriminatory application, as well as erratic and arbitrary enforcement.¹⁹⁵ As the *Mansky* Court emphasized: “It is ‘self-evident’ that an indeterminate prohibition carries with it ‘[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation.’”¹⁹⁶

Because Texas’s political apparel ban does not provide an objective, workable standard, an election judge’s own politics may shape his views on what materials count as “a candidate, measure, or political party appearing on the ballot.”¹⁹⁷ The same applies to those working the polls on Election Day, as demographics may play a big role in interpretation. For instance, recall Fey Dawson’s situation.¹⁹⁸ She is a BLM supporter in a predominately conservative city, Lubbock, Texas.¹⁹⁹ The chances of a poll worker asking Fey to turn her BLM shirt inside out before she can vote—or even worse, turn her away—are most likely higher in a conservative city than in a liberal one.²⁰⁰ Ultimately, the Court, in analyzing the risk of erratic enforcement in *Mansky*, emphasized that “if voters experience or witness episodes of unfair or inconsistent enforcement” of a political apparel ban, a state’s interest “in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.”²⁰¹ Accordingly, if Texas wishes to set its polling places apart as areas free of political speech, it must employ a more discernible approach than the one offered today, so that the statute is more likely to be enforced fairly.²⁰²

193. *Id.* at 1889.

194. TEX. ELEC. CODE ANN. § 61.010(a).

195. *See Mansky*, 138 S. Ct. at 1890.

196. *Id.* at 1886 (quoting Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987)).

197. *Id.* at 1888; TEX. ELEC. CODE ANN. § 61.010(a).

198. *See supra* Part I (providing a hypothetical scenario in which a Texas voter, Fey Dawson, wishes to wear her BLM shirt to the polls in a highly conservative city).

199. *See* sources cited *supra* note 6 (discussing Lubbock as a predominately Republican county).

200. *See* sources cited *supra* note 6 (detailing voting demographics in Lubbock, Texas).

201. *Mansky*, 138 S. Ct. at 1891.

202. *See id.*

3. *As-Applied Challenge: Recent Litigation*

An as-applied First Amendment challenge consists of a challenge to a statute's application only, as-applied to the party before the court.²⁰³ Essentially, it must be shown that Texas's statute is unconstitutional because of the way it is applied to the particular facts of each case. Although in *Mansky*, the as-applied challenges were not on review, in the original complaint, Minnesota Voters Alliance and other plaintiffs argued that Minnesota's political apparel ban was unconstitutional as-applied to their particular items of apparel.²⁰⁴ The apparel at issue was buttons saying, "Please I.D. Me" and a "Tea Party Patriots" shirt.²⁰⁵

Similarly, as evidenced in *Ostrewich v. Trautman*, there has been recent litigation challenging the Texas's electioneering statute.²⁰⁶ As applied to Jillian Ostrewich's case, the Supreme Court would likely hold that Texas's electioneering statute violates the First Amendment.²⁰⁷ Although in the October 2018 early voting ballot, Houston voters were presented with Proposition B, an initiative measure concerning firefighter pay, Jillian's yellow AFL-CIO union "Houston Fire Fighters" t-shirt made no reference to Proposition B or firefighter pay.²⁰⁸ Yet, an election worker informed Jillian that before casting her vote, she must go to the restroom and turn her shirt inside out.²⁰⁹

This speech was passive and not express advocacy; at most, Jillian was merely engaging in silent, passive expression of opinion, unaccompanied by any disorder or disturbance, much like the students in *Tinker* and the minister in *Jews for Jesus*.²¹⁰ Both those cases support the contention that individuals should be allowed to engage in unfettered expressive conduct, as long as it does not invade the rights of others and is without disturbance and disorder.²¹¹ However, given the circumstances, it is much more likely that Jillian's shirt does not reach the level of expressing an opinion simply because she was wearing a firefighter shirt.²¹² Rather, as a wife of a firefighter—or as she likes to call herself, a "fire wife"—she was showing her support and love for her husband and his career.²¹³ Nevertheless, because the Texas legislature has failed to provide an objective, workable standard, by either narrowly defining

203. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758–59 (1988).

204. *See Supra* Section II.F.1 (discussing how challengers who brought suit in *Mansky* attempted to wear buttons saying, "Please I.D. Me" and a "Tea Party Patriots" shirt).

205. *Mansky*, 138 S. Ct. at 1883.

206. *See* Original Complaint, *supra* note 145, at 7–8.

207. *See id.*

208. *See id.*

209. *See id.*

210. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969); *Bd. of Airport Comm'rs L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 571–72 (1987).

211. *See Tinker*, 393 U.S. at 508; *Jews for Jesus*, 482 U.S. at 571–72.

212. *See* Plaintiff's Motion for Summary Judgement, at 32–33, *supra* note 153.

213. *Id.* at 5.

terms within its political apparel ban or providing a better guideline as to the meaning of the statute, local election workers are expected to use their own discretion at individual polling places which has led to a record of inconsistency.²¹⁴

This inconsistency was evidenced in Jillian’s Motion for Summary Judgment.²¹⁵ When asked how Texas’s electioneering statute applies to her yellow Houston Firefighters t-shirt, Secretary of State Election Division Chief Keith Ingram, Harris County Administrator of Elections Sonya Aston, and election judges Kathryn Gray, Ruthie Morris, and Terry Barker, gave varying interpretations.²¹⁶

Ingram	Banned
Aston	Allowed
Gray	Banned
Morris	Unsure
Barker	Not Asked

4. *As-Applied Challenge: Fey Dawson*

Let us focus on Fey Dawson’s situation—a young graduate student who wishes to exercise her right to vote in the upcoming election. Further, recall that Fey wishes to wear a BLM t-shirt to the polls, but because of State Bar of Texas President Larry McDougal’s comments²¹⁷ in July 2020, she is worried that a poll worker will turn her away or give her the ultimatum: Your shirt or your vote! Now, imagine that despite her reservations at first, Fey decides to wear her BLM t-shirt to vote in the November election. Her fears come true as the election worker instructs her to turn her shirt inside out in exchange to vote.²¹⁸

As applied to Fey’s case, the Supreme Court would likely hold that Texas’s electioneering statute violates the First Amendment’s Free Speech

214. *See id.* at 14 (explaining that when Jillian voted in October 2018, there were ongoing issues with inconsistent enforcement at the polling places).

215. *See id.* at 15.

216. *See id.* (providing a chart based on testimony and depositions from various officials and judges regarding certain apparel, including BLM, Second Amendment, Texas Org. Proj., Jillian’s yellow Houston firefighters shirt, and a firefighter uniform).

217. *See Weiss, supra* note 4.

218. For the purposes of the scenario, assume that Fey subsequently filed suit, alleging a violation of her First Amendment right. This takes care of any standing issues.

Clause. To begin, the November 2020 election ballot—or any election as a matter of fact—did not present voters with an issue involving BLM. This is simply because BLM is not a candidate nor is it a political party.²¹⁹ Although the movement “has pressured Democratic politicians on the national stage to take a hard stance on police brutality, excessive force, and misconduct,” BLM, like the NAACP, has never endorsed one candidate for president.²²⁰ Rather, the presidential campaign and the political realm acts as an easy avenue for these civil rights movements to get their message to the masses by encouraging a national discussion.²²¹

Further, BLM formed in response to *Florida v. Zimmerman*—very similar to the direct-action campaign that postdated *Brown v. Board of Education* and other civil rights organizations throughout American history.²²² The movement grew very quickly, especially because the internet and social media facilitated national awareness.²²³ However, just because of its popularity and controversial viewpoints does not mean that BLM is a “candidate, measure, or political party appearing on the ballot.”²²⁴

Moreover, the fact that BLM puts pressure on a particular political party does not indicate that it is political in and of itself. It is merely a social movement whose mission is to eliminate white supremacy, as well as build local power to prevent states and vigilantes from inflicting violence on black communities.²²⁵ As Justice Harlan, in *NAACP v. Alabama*, emphasized: “Effective advocacy of both public and private points of views, particularly controversial ones, is undeniably enhanced by group association.”²²⁶ However, because it is beyond debate that the freedom to engage in association for the purpose of advancing one’s beliefs and ideas is an indispensable component of the freedom of speech, Fey has the right to wear her BLM shirt free from state interference—regardless if the movement is supported more by one political party and heavily opposed by another.²²⁷

But, unfortunately, similar to Jillian’s yellow firefighter t-shirt, Fey’s BLM t-shirt has a record of inconsistent interpretation. When asked how Texas’s electioneering statute applies to BLM apparel, there were varying interpretations of Secretary of State Election Division Chief Keith Ingram,

219. *About BLM*, *supra* note 64.

220. Hill, *supra* note 65, at 72; *NAACP Statement*, *supra* note 63 (“The [NAACP] . . . does not endorse candidates or political parties, or engage in direct campaigning.”).

221. Hill, *supra* note 65, at 72.

222. See Garrett Chase, *The Early History of The Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1092 (2018) (discussing how the catalyst of BLM was “George Zimmerman’s killing of Trayvon Martin and the jury’s verdict in [that] criminal trial”).

223. *Id.* at 1093–94.

224. See TEX. ELEC. CODE ANN. § 61.010(a).

225. See *About BLM*, *supra* note 64.

226. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

227. See *id.* at 461.

Harris County Administrator of Elections Sonya Aston, and election judges Kathryn Gray, Ruthie Morris, and Terry Barker.²²⁸

Ingram	Allowed
Aston	Maybe
Gray	Allowed
Morris	Banned
Barker	Banned

While it is acknowledged that election judges have discretion in how they run their polling locations, polling places are not exempt from the First Amendment.²²⁹ Under the nonpublic forum standard, Texas may reserve the polling place for its intended purpose—voting—as long as its electioneering statute is *reasonable* and not an effort to suppress expression merely because officials oppose the speaker’s views.²³⁰ Yet, Texas has clearly indicated its inability to do so. Further, because of its ambiguities, the statute will be inconsistently applied throughout the state; what is lawful in one part of Texas is unlawful in another based upon the opinions of local election officials and part-time precinct workers.

B. Proposed Statutory Language

As mentioned in the background section of this Comment, every state regulates activities in and around polling places on Election Day.²³¹ In particular, twenty-one states have political apparel bans.²³² Although the definition of “electioneering” varies greatly from state to state, it is safe to say that states *can* reasonably regulate speech within the polls *without* infringing on the First Amendment rights of voters.²³³ After all, the Court in

228. Plaintiff’s Motion for Summary Judgment, *supra* note 153, at 15 (providing a chart based on testimony and depositions from various officials and judges regarding certain apparel, including BLM, Second Amendment, Texas Org. Proj., Jillian’s yellow Houston firefighters shirt, and a firefighter uniform).

229. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969); *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 571–72 (1987).

230. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

231. *See supra* Section II.F (providing an overview of state passive electioneering laws).

232. *See supra* Section II.F (listing out the states with electioneering statutes that govern what voters can and cannot wear to the polls on Election Day).

233. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018).

Mansky, was not looking for precise guidance or perfect clarity.²³⁴ Accordingly, Texas should adopt language similar to other states' electioneering statutes in order to keep its political apparel ban within constitutional bounds.

This Comment, in proposing new statutory language, focuses on the language of Kansas's electioneering statute.²³⁵ Kansas defines electioneering as "*knowingly attempting to persuade or influence* eligible voters to vote for or against a particular candidate, party or question submitted."²³⁶ The statute further provides that electioneering "includes wearing, exhibiting or distributing labels, signs, posters, stickers or other material that *clearly identify* a candidate in the election or *clearly indicate* support or opposition to a question submitted election within any polling place on election day."²³⁷ By including the language "knowingly attempting to persuade or influence," the Texas legislature will provide a discernable standard as required under the *Mansky* framework.²³⁸ When voters wear apparel to signify association with a particular group or movement, they are not doing it in an attempt to persuade or influence eligible voters to vote for or against a particular candidate, measure, or political party. Rather, they are doing it as a means of self-expression and association—a right that the Constitution protects.²³⁹

Additionally, by including phrases like "clearly identify" and "clearly indicate," Texas's statute will not be overly broad. Texas needs to adopt language that will allow for consistent application of its law.²⁴⁰ Thus, taking a step further than Kansas did, Texas should specify what those phrases mean. For instance, Minnesota's proposed legislation defines "clearly identified" or "clearly identifies" to mean the following:

- (1) a communication states a candidate's name, makes unambiguous reference to a candidate's office or status as a candidate, or unambiguously describes a candidate in any way; or (2) a communication makes unambiguous reference to some well-defined characteristic of a group of candidates, even if the communication does not name each candidate.²⁴¹

However, this is still not enough. Ultimately, the issue with Texas's statute comes down to the application and interpretation of "candidate,

234. *Id.*

235. KAN. STAT. ANN. § 25-2430(a) (2020). On October 7, 2020, Kansas won a motion for summary judgment on an overbreadth challenge to its electioneering statute. *Clark v. Schmidt*, 493 F. Supp. 3d 1018, 1038 (D. Kan. 2020). There, aside from standing issues, the court held that § 25-2430 was "constitutional under the reasoning of *Burson v. Freeman*." *Id.*

236. KAN. STAT. ANN. § 25-2430(a) (2020) (emphasis added).

237. *Id.* (emphasis added).

238. *Id.*; *Mansky*, 138 S. Ct. at 1891.

239. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969); *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–75 (1987).

240. See *Mansky*, 138 S. Ct. at 1891.

241. Minn. S. File No. 2040, at 2 (2019).

measure, or political party.”²⁴² Texas needs to provide a definition for each of these terms in order to avoid discriminatory, erratic, and arbitrary enforcement. Or better yet, Texas needs to provide a clear guideline of what these terms do not mean. For instance, including language that indicates that these terms do not mean social movements, groups, or organizations would allow citizens, like Fey and Jillian, the opportunity to engage in self-expression and affiliation without having to forfeit their right to vote.

Accordingly, this Comment proposes that Texas’s new political apparel ban incorporate the following language:

- “Electioneering” is defined as *knowingly attempting to persuade or influence* eligible voters to vote for or against a particular candidate, measure, or political party.²⁴³
- A person may not wear a badge, insignia, emblem, or other communicative device that *clearly identifies* or *clearly indicates* a candidate, measure, or political party appearing on the ballot.
- “Clearly identifies” or “clearly indicates” means:
 - (1) a badge, insignia, emblem, or other communicative device that states a candidate’s name, makes unambiguous reference to a candidate’s office or status as a candidate, or unambiguously describes a candidate in any way; or
 - (2) a badge, insignia, emblem, or other communicative device that makes unambiguous reference to some well-defined characteristic of a group of candidates, even if the communication does not name each candidate.
- For the purposes of this statute, “candidate, measure, or political party” does not include the name, reference, or description of social movements, groups, or organizations—regardless of their controversial viewpoints or whether a candidate or political party supports or opposes them.

242. See TEX. ELEC. CODE ANN. § 61.010(a).

243. The Texas Election Code defines electioneering to include “the posting, use, or distribution of political signs or literature” but does not define what exactly it means to electioneer. TEX. ELEC. CODE ANN. § 61.003(b)(1).

C. Application of New Language

With this new proposed language, Texas's electioneering statute would fit within constitutional bounds.²⁴⁴ To begin, it would survive the overbreadth doctrine because there is an objective, workable standard, rendering it capable of consistent and reasonable application.²⁴⁵ Even more importantly, it would also prevent situations like Jillian and Fey's from happening altogether. Apparel such as a yellow firefighter t-shirt or a BLM shirt would not implicate this statute because election poll workers and judges will be informed and understand that this type of silent, passive expression of opinion and association, unaccompanied by disturbance or disorder, does not implicate the language of Texas's new and improved electioneering statute.²⁴⁶

IV. CONCLUSION

When the Supreme Court, through its well-established precedent, broadly interpreted the First Amendment's Free Speech Clause to afford protection to most forms of communication, it did not intend for this protection to stop at polling places on Election Day.²⁴⁷ Although freedom of speech is not absolute and Texas has legitimate interests in regulating and preserving the integrity of the election process, Texas must draw a reasonable line.²⁴⁸ It must be able to articulate some sensible basis—an objective, workable standard—for distinguishing what kind of apparel may come in from what must stay out.²⁴⁹ Without this, election judges' and poll workers' own politics may shape their views on what materials count as a "candidate, measure, or political party appearing on the ballot."²⁵⁰ Recent litigation, as well as this Comment, has demonstrated that the lack of a statutory definition or, at the very least, a distinguishing guideline, has led and will continue to lead to a record of inconsistency.²⁵¹

To ensure that its statute passes constitutional muster, Texas should rewrite and adopt language proposed in this Comment, which is guided by Kansas's current electioneering statute and Minnesota's proposed legislation. In doing so, Texas's political apparel ban would provide election judges and

244. See *Mansky*, 138 S. Ct. at 1891.

245. See *id.*; *Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 546, 574–77 (1987).

246. See *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 508 (1969); *Jews for Jesus*, 482 U.S. at 571–72.

247. See *Tinker*, 393 U.S. at 508; *Jews for Jesus*, 482 U.S. at 571–72; *Mansky*, 138 S. Ct. at 1888.

248. *Mansky*, 138 S. Ct. at 1888 (citing *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality opinion)).

249. *Id.*

250. See TEX. ELEC. CODE ANN. § 61.010(a).

251. See *supra* Sections III.A.3–4 (providing charts of the inconsistent interpretations of various election judges and officials regarding two types of apparel).

poll workers an objective, workable standard to ensure consistent application and enforcement. Lastly, this proposed language will prevent Texas voters—particularly those who wish to engage in silent, passive expressions of controversial opinion and association, unaccompanied by disturbance or disorder—from being faced with the ultimatum: Your shirt or your vote!