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PEERING INTO PASSIVE ELECTIONEERING: PRESERVING THE SANCTITY OF OUR POLLING PLACES

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PEERING INTO PASSIVE ELECTIONEERING: PRESERVING THE SANCTITY OF OUR POLLING PLACES

REBECCA M. FITZ*

ABSTRACT

A century ago, our legislators took action to condemn voter intimidation, fraud, and violence occurring on Election Day. The concept of a neutral zone in polling places was implemented to protect the democratic values enshrined in our free and fair elections. In modern times, this policy interest is preserved in state statutes prohibiting electioneering within polling locations. The majority of states, including Idaho, restrict voters from introducing political messages into the voting environment. While active electioneering is easily identifiable, passive electioneering presents a more subtle and nuanced issue. In addressing this concern, state electioneering statutes must balance the considerations of potential infringements upon the First Amendment and the right to vote. A recent decision by the Supreme Court disfavors a state statute prohibiting passive electioneering, marking a shift from past precedent. Thus, a legislative solution is appropriate to defend the sanctity of our polling places and the integrity of our electoral process.

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I. INTRODUCTION

All fifty states have enacted some version of a statute prohibiting “electioneering” within or near a polling place.¹ “Electioneering” occurs when a person is actively supporting or campaigning for a candidate, political party, or issue. This paper will focus on electioneering within polling places, particularly passive electioneering, when a voter wears or displays campaign or political apparel or paraphernalia at the polling place. As opposed to active electioneering, where a person assertively approaches voters to hand out literature or makes oral exhortations—passive electioneering is simply the act of introducing a political message into the neutral polling place.² While the majority of states have clearly banned active electioneering in polling places, passive electioneering presents an issue that is more difficult to define and address. Electioneering statutes differ from state to state, and many do not clearly specify which type of apparel is restricted.³ This causes issues to arise with constitutionality, vagueness, and subjective enforcement by poll workers and election judge officials. As our rights to speak and vote are constitutionally cherished—a threat to either can quickly escalate into a serious infringement of a fundamental right. The policy rationale supporting electioneering statutes is to preserve a safe, neutral atmosphere that encourages voter participation while discouraging harassment and intimidation.

The two seminal cases governing electioneering within polling locations are *Burson v. Freeman* and *Minnesota Voters Alliance v. Mansky*.⁴ In *Burson*, decided in 1992, the Court upheld a facial challenge to a Tennessee electioneering statute prohibiting display of campaign materials within 100 feet of a polling place.⁵

1. *Electioneering Prohibitions*, NAT’L CONF. STATE LEGISLATURES (Apr. 1, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electioneering.aspx>.

2. *Passive Electioneering Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/p/passive-electioneering/> (last visited Mar. 7, 2022).

3. *Electioneering Prohibitions*, *supra* note 1.

4. *Burson v. Freeman*, 504 U.S. 191, 211 (1992); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1879 (2018).

5. *Burson*, 504 U.S. at 211.

However, more recently in *Minnesota Voters Alliance* in 2018, the Court held that a Minnesota statute banning the wearing of political insignia inside the polling place violated the First Amendment.⁶ This decision marks a clear shift in the Court's precedent and paves the way for more challenges to states' electioneering statutes in this context. A solution must be reached to protect the sanctity of our polling locations and prevent our country from returning to the boisterous and dangerous election days it is past. This is especially applicable in our current hyper-partisan and divisive political climate.

This paper details the historical background that prompted the enactment of electioneering statutes; explains the constitutional implications of the competing fundamental rights; compares different states' electioneering statutes and resulting litigation; and finally, proposes a model state electioneering statute that addresses frustrations and issues found in current statutes.

II. ANALYZING THE SHIFT TO A PROTECTED POLLING PLACE

Modern elections starkly contrast the unruly voting procedures utilized for much of this country's history. Voting during the nineteenth century was a dangerous undertaking that discouraged many citizens from participating.⁷ Comparable to sporting events, onlookers heckled and harassed the opponent's voters.⁸ Usually, a voter's attire displayed which party he supported which allowed observers to easily identify how voters aligned with each party.⁹ Tense verbal exchanges often escalated into physical violence or property damage, such as a clash between Whigs and Democrats that resulted in an entire city block burned to the ground.¹⁰ On another tragic Election Day, eighty-nine Americans were killed at the polls as a result of riots.¹¹ After the closely-contested presidential race of 1888, legislators introduced ballot reform measures to reduce the widespread violence, corruption, and voter intimidation that plagued the polls.¹²

Arguably the most systemic reform measure was the introduction of the secret ballot. Instead of political parties printing and distributing ballots followed by voters delivering the completed ballot through a "voting window,"¹³ voters

6. *Minn. Voters All.*, 138 S. Ct. at 1879.

7. Brief of National Ass'n of Counties et al. as Amici Curiae in Support of Respondents at 6, *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) (No. 16–1435) [hereinafter NAC Brief].

8. *Id.* at 8.

9. *Id.*

10. Jelani Cobb, *Our Long, Forgotten History of Election-Related Violence*, THE NEW YORKER, (Sept. 6, 2020), <https://www.newyorker.com/magazine/2020/09/14/our-long-forgotten-history-of-election-related-violence>.

11. Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, THE NEW YORKER, (Oct. 6, 2008), <https://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors>.

12. Daniel J. Moskowitz & Jon C. Rogowski, *Democracy Thrives in Secret? Ballot Reform and Representation in the United States 1* (Dec. 30, 2019) (unpublished manuscript), https://web.archive.org/web/20210124220653/https://scholar.harvard.edu/files/rogowski/files/moskowitz_rogowski.pdf.

13. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1882 (2018); RICHARD F. BENDEL, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY 11 (2004); see, e.g., CHESTER H. ROWELL, DIGEST OF CONTESTED-ELECTION CASES IN THE FIFTY-FIRST CONGRESS 224 (1891).

received and completed state-printed ballots at the polling locations.¹⁴ This new method of voting required a “sequestered space where voters could deliberate and make a decision in . . . privacy.”¹⁵ Accordingly, additional reform measures were needed to provide voters with this private, insulated zone to peacefully cast their ballots.¹⁶ In 1888, the municipal government of Louisville, Kentucky, passed legislation prohibiting candidates’ agents from persuading, influencing, or intimidating anyone “in the choice of his candidate, or to attempt doing so.”¹⁷ Thus, polling location electioneering statutes began to take shape.¹⁸ By 1900, thirty-four states had enacted viewpoint-neutral regulations that restricted certain speech within the polls on Election Day.¹⁹ Now, every state and the District of Columbia have statutes constraining different kinds of speech in this manner.

III. CONSTITUTIONAL FRAMEWORK

A state electioneering statute implicates three different rights. First, a person exhibiting political speech within a polling zone will likely maintain that censorship of this speech infringes upon his or her First Amendment right to freedom of speech. Second, although constitutionally prohibited, it is possible that a voter’s failure to adhere to an electioneering statute may jeopardize his or her right to vote. Finally, as electioneering statutes seek to preserve a neutral atmosphere to prevent influencing of voters, a violation of such a statute may affect other voters’ right to vote.

A. Electioneering Person’s Right to Speak

The First Amendment is a time-honored, treasured doctrine that is central to the core beliefs and founding principles of our country. Under the First Amendment, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”²⁰ Various scholars have theorized three main justifications underlying the Free Speech Clause.²¹ First, the protection of

14. *Burson v. Freeman*, 504 U.S. 191, 202 (1992); *Minn. Voters All.*, 138 S. Ct. at 1882.

15. *Minn. Voters All.*, 138 S. Ct. at 1883; Jerrold G. Rusk, *The Effect of the Australian Ballot Reform on Split Ticket Voting*, 64 AM. POL. SCI. REV. 1220, 1221 (1970); see ELDON C. EVANS, A HISTORY OF THE AUSTRALIAN BALLOT SYSTEM IN THE UNITED STATES 35 (1917); Act of Apr. 24, 1889, 1889 Minn. Laws ch. 3, §§ 27–28, 12, 21 (regulating, as part of Minnesota’s secret ballot law, the arrangement of voting compartments inside the polling place and around the ballot boxes).

16. See *Minn. Voters All.*, 138 S. Ct. at 1883.

17. *Burson*, 504 U.S. at 203.

18. See *id.*

19. *Id.* at 214–15 (Scalia, J., concurring).

20. U.S. CONST. amend. I.

21. Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 2 (2012).

speech aids the advancement of truth via a “marketplace of ideas.”²² Second, the ability to freely speak promotes individual autonomy and self-fulfillment.²³ Finally, particularly relevant to election law, freedom of speech is thought to further principles of self-governance and a participatory democracy.²⁴ Many scholars and jurists believe that self-governance theory is best and foundational to our country’s values. Famously expressed by Justice Brandeis, those “who won our independence” held freedom of speech to be “indispensable” to meaningful political discussion, and that such public discussion is a civic duty essential to American government.²⁵

Although written in absolutist language, the Court has repeatedly and expressly rejected the notion that freedom of speech is an absolute and limitless right.²⁶ While the government is prohibited from restricting expression because of its message, ideas, subject-matter, or content—content-based regulations may be upheld, but only after withstanding the difficult test of strict scrutiny.²⁷ As a content-based regulation, a statute restricting political apparel would generally have to be proven necessary to achieve a compelling government purpose.²⁸ However, since the ban only applies in the specific location of the interior of a polling place, a “forum-based” approach is applied to the challenged statute.²⁹

A polling place qualifies as a “nonpublic forum” or a government space that “is not by tradition or designation a forum for public communication.”³⁰ As such, the government is permitted to reserve such a forum for its intended purposes, communicative or otherwise, provided that the regulation on speech is reasonable and not an effort to suppress speech merely because government officials hold opposing viewpoints.³¹ The government is not required to freely grant access to a nonpublic forum without regard to potential “disruption that might be caused by the speaker’s activities.”³² Precedent has long established that the government may impose certain content-based restrictions on speech in nonpublic forums, including restrictions on political advocacy.³³ Therefore, an electioneering statute restricting political apparel within a polling place will be upheld as long as it is reasonable in

22. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW* 1180 (Rachel E. Barkow et al. eds., 6th ed. 2020).

23. See Bhagwat, *supra* note 21, at 32; Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 879 (1963); CHEREMINSKY, *supra* note 22, at 1183.

24. Bhagwat, *supra* note 21, at 2; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20–21 (1971).

25. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (discussing civic participation in politics).

26. See *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015).

27. CHEREMINSKY, *supra* note 22, at 1186.

28. *Id.*; *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994).

29. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018).

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

31. *Id.*

32. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985).

33. *Greer v. Spock*, 424 U.S. 828, 831–33 (1976); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974).

light of the purpose served by the forum and is not an effort to suppress an opposing viewpoint.³⁴

Two decisions help to illustrate the concepts of reasonability and government purpose regarding electioneering in the First Amendment context. In *Burson v. Freeman*, the Court found a Tennessee law imposing a campaign-free zone around a polling place to be constitutional.³⁵ Citing historical issues with fraud, voter intimidation, and disorder, the plurality held that the law was necessary to achieve the government's purpose of ensuring free and fair elections.³⁶ In his concurrence, Justice Scalia asserted that a "reasonableness" standard of review was more appropriate; however, he still maintained that the law was reasonable using the plurality's analysis.³⁷ More recently in *Minnesota Voters Alliance v. Mansky*, the Court struck down a statute prohibiting political apparel within a polling place.³⁸ Drawing a distinction between the "active-campaigning" analyzed in *Burson*, *Minnesota Voters Alliance* evaluated a scenario of "passive-campaigning."³⁹ The Court expressed disfavor about the vagueness of a statute that restricted "political" apparel without further defining the broadly applicable term "political."⁴⁰ The statute was found to be unreasonable because it required an election judge to enforce its vague terms and interpret his or her view of whatever "political" means.⁴¹ A reasonable statute "must be able to articulate some sensible basis for distinguishing what may come in from what must stay out."⁴² Thus, the vagueness of the statute impermissibly infringed upon the Minnesota voters' right to speak.⁴³ Read in conjunction, these decisions guide our current understanding of permissible electioneering laws and the related First Amendment considerations.

B. Electioneering Person's Right to Vote

The right to vote is illustrated in various constitutional amendments and has been repeatedly recognized as a fundamental right protected under the Equal Protection Clause.⁴⁴ The Court has noted that, "[n]o right is more precious in a free country than that of having a voice in the election of those who the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."⁴⁵ In sum, voting is a "fundamental political right" because it is "preservative of all rights."⁴⁶ Election laws that regulate a voter's

34. *Cornelius*, 473 U.S. at 799–800; *Minn. Voters All.*, 138 S. Ct. at 1880.

35. *Burson v. Freeman*, 504 U.S. 191, 195 (1992).

36. *Id.* at 206.

37. *Id.* at 214 (Scalia, J., concurring) (preferring a reasonableness standard).

38. *Minn. Voters All.*, 138 S. Ct. at 1892.

39. *Id.* at 1887.

40. *Id.* at 1888.

41. *Id.* at 1890.

42. *Id.* at 1888.

43. *Id.* at 1891–92.

44. CHEMERINSKY, *supra* note 22, at 1053.

45. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

46. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

experience or restrict expression at the polls directly impact a voter's participation in our democratic system.⁴⁷ Infringements upon the protected right to vote are usually evaluated under a strict scrutiny standard.⁴⁸ Generally, the government has the burden to prove that the contested election statute is necessary to achieve a compelling government interest.⁴⁹

However, despite being recognized as a fundamental right, not every state election law that places a burden on the right to vote is subject to strict scrutiny.⁵⁰ This reasoning stems from the fact that all election laws, including regulations of the voting process itself, will "invariably impose some burden upon individual voters."⁵¹ In *Anderson v. Celebrezze*, the Court held that a challenge to state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against the "precise interests" provided by the government as justifications for the burden imposed by its law.⁵² Under this test, the more heavily the challenged regulation burdens the First Amendment, the more likely strict scrutiny will be used.⁵³ In a narrower scope, when the challenged regulation imposes only "reasonable, nondiscriminatory restrictions" upon the First Amendment rights of voters, the government's "important regulatory interests" sufficiently justify the regulations.⁵⁴

It is important to distinguish that the *Anderson* test approaches electioneering statutes from a "right to vote" standpoint, whereas *Burson* and *Minnesota Voters Alliance* address similar statutes from a First Amendment perspective. As electioneering statutes must reconcile the right to engage in political discourse with the right to vote,⁵⁵ both analyses are necessary when evaluating constitutionality. *Anderson* adds another constitutional layer to the reasonableness requirement held in *Minnesota Voters Alliance*—preserving the neutrality of the polling place must equate to an "important regulatory interest" to justify the infringement upon the Free Speech Clause.⁵⁶ Balancing these considerations also helps reveal potential tensions and issues that may arise. It has been argued that electioneering statutes prohibiting political expression indirectly threaten the speaker's right to vote through promotion of impermissible enforcement.⁵⁷ In contrast, it can also be argued that these restrictions protect the speaker's right to vote.

47. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008).

48. *Burson v. Freeman*, 504 U.S. 191, 198 (1992); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

49. See CHEMERINSKY, *supra* note 22, at 1053–54.

50. *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992).

51. *Id.* at 433.

52. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (finding that a state's filing deadline for independent candidates was unconstitutional).

53. *Burdick*, 504 U.S. at 434 (finding that a state's ban on write-in voting does not violate First Amendment rights of free expression).

54. *Id.*

55. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 (2018) (citing *Burson v. Freeman*, 504 U.S. 191, 198 (1992)).

56. *Anderson*, 460 U.S. at 788.

57. See *Minn. Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013).

Electioneering statutes are enforced by a vast amount of poll workers and election judges across thousands of counties and precincts. A lack of clear policy and procedure for electioneering violations leads to varying, discretionary enforcement of the statutes. Evidenced in *Minnesota Majority v. Mansky*, multiple voters wore political buttons and party-affiliated t-shirts to different polling places.⁵⁸ While some election judges allowed these specified voters to cast their ballots without requesting removal, other electioneering voters faced significant hurdles.⁵⁹ One man was asked to remove his political apparel, then denied his right to vote on two occasions and for a total of five hours before election judges allowed him to cast his ballot.⁶⁰ Another man was interrupted as he was voting and asked to remove or cover his t-shirt accompanied by a warning of prosecution.⁶¹ Although no language in the Minnesota electioneering statute suggested that denying a person their right to vote was the appropriate remedy for a violation, the poll workers cited to the statute when incorrectly interfering with the voters' rights.⁶² This case exemplifies how such a statute may infringe upon an electioneering person's right to vote, even though the statute does not allow for such an infringement. This poll worker's unlawful denial of the right to vote highlights the need for express language in the electioneering statute condemning this action.

True to the purpose of electioneering statutes, such restrictions also serve to protect an electioneering person's right to vote. Prohibiting political expression at the polling places can be viewed as an extension of the secret ballot. A voter's neutral attire does not provide the poll workers nor the surrounding voters with any indication of how they may vote. Whereas a voter wearing political attire clearly in support of a candidate or issue effectively informs observers how they are going to fill out their ballot; therefore, theoretically threatening his or her secret ballot. In the most recent presidential election, issues arose in Maricopa County, Arizona, where supporters of President Donald Trump claimed that poll workers provided them with Sharpie pens to fill out their ballot and that the ballot counting machines were unable to scan votes tallied by Sharpie.⁶³ Quickly named, the conspiracy of "Sharpiegate" rapidly spread over social media platforms and was further fueled by high-profile Republican leaders supporting the unfounded claims of voter fraud.⁶⁴ While some narratives claimed that Sharpies were provided at precincts with a large amount of historically Republican voters, other stories involved allegations that

58. *Id.* at 1055.

59. *Id.*

60. *Minn. Majority v. Mansky*, 789 F. Supp. 2d 1112, 1119 (D. Minn. 2011), *aff'd in part, rev'd in part*, 708 F.3d 1051 (8th Cir. 2013).

61. *Id.*

62. MINN. STAT. ANN. § 211B.11 (West 2022).

63. John D'Anna & Richard Ruelas, 'Sharpiegate' Has Not Halted Ballot Counting in Arizona, but the Debunked Theory Persists, AZCENTRAL (Nov. 6, 2020, 8:57 PM), <https://www.azcentral.com/story/news/politics/elections/2020/11/05/sharpiagate-hasnt-halted-arizona-count-but-theory-persists/6180778002/>.

64. Katie Shepherd & Hannah Knowles, Driven by Unfounded 'SharpieGate' Rumor, Pro-Trump Protesters Mass Outside Arizona Vote-Counting Centers, WASH. POST (Nov. 5, 2020), <https://www.washingtonpost.com/nation/2020/11/05/arizona-election-protest-votes/>.

Sharpies were specifically provided to voters wearing “Make American Great Again” hats and other political apparel meant to support President Trump.⁶⁵ Notably, Arizona is one of few states that permit voters to wear clothing with a political message inside the polling zone.⁶⁶

Unsurprisingly, “Sharpiegate” stirred a significant amount of controversy as the conspiracy went viral. Lawsuits were filed and the Arizona Attorney General’s office wrote an investigatory letter to the Maricopa County Elections Department.⁶⁷ Although later debunked as a falsity,⁶⁸ “Sharpiegate” evidences a scenario in which political expression at the polls would hypothetically allow poll workers to fraudulently tamper with votes counting towards a specific candidate or issue. Requiring neutrality in the polling places thwarts an ill-intentioned poll worker and removes this form of malfeasance from the realm of possibilities. A voter exhibiting no indication of how he or she may vote would be immune to this manner of election fraud. Thus, electioneering statutes also operate to protect the voting rights of the electioneering person in the context of fraud.

C. Other Voters’ Rights to Vote

Similar to the electioneering person’s right to vote, the surrounding voters present at the precinct also hold this right. It follows that any infringement upon another voter’s right to vote is likely to be disfavored by a court. The historical framework discussed previously provides guiding policy reasons for the enactment of electioneering statutes prohibiting partisan or political speech within the polling locations.⁶⁹ Reflecting the success of these statutes, our modern elections are conducted in a more orderly fashion that discourages disruption and intimidation.⁷⁰ Nonetheless, confrontations and other Election Day disorderly conduct continue to be an issue at our polling places.⁷¹ Evaluating an observing person’s right to vote, this presents a series of questions: (1) Does passive electioneering contribute to or cause voter intimidation or disruption within the polling place to the extent that it infringes upon a voter’s right to vote?; (2) Is there a constitutionally recognized right to vote in a neutral, peaceful polling location?; and (3) If not, should there be?

65. @AZWomenForTrump, TWITTER (Nov. 5, 2020, 3:28 PM), <https://twitter.com/AZWomenForTrump/status/1324478800952877056> (“I know two people who[se] vote was marked invalid. They were in line with all Trump supporters and were all given [S]harpies”); Jaea Geep (@JaeaGeep), TWITTER (Nov. 4, 2020, 11:06 AM), <https://twitter.com/JaeaGeep/status/1324050341407719424>; D’Anna & Ruelas, *supra* note 63.

66. ARIZ. REV. STAT. ANN. § 16-515(F) (2022) (prohibiting only election officials from wearing clothing with a political message inside a polling zone).

67. Letter from Michael Catlett, Deputy Solicitor General, Office of the Arizona Attorney General, to Scott Jarrett, Director of Elections Day and Emergency Voting, Maricopa County Elections Department (Nov. 4, 2020), https://www.azag.gov/sites/default/files/2020-11/LT%20Jarrett%20re%20Use%20of%20Sharpie%20Markers_Redacted.pdf.

68. Rachel Leingang & McKenzie Sadeghi, *Fact Check: Arizona Election Departments Confirm Sharpies Can Be Used on Ballots*, USA TODAY (Nov. 5, 2020, 10:58 AM), <https://www.usatoday.com/story/news/factcheck/2020/11/04/fact-check-sharpiegate-controversy-arizona-false-claim/6164820002/>.

69. See *supra* Part II.

70. NAC Brief, *supra* note 7, at 8.

71. Alan Neuhauser, *Voter Intimidation Complaints Surge*, U.S. NEWS (Nov. 8, 2016, 3:35 PM), <https://www.usnews.com/news/politics/articles/2016-11-08/voter-intimidation-complaints-surge>.

Examining whether a voter's passive electioneering rises to the level of an infringement upon another observing voter's right to vote is a difficult inquiry. Of course, if a large group of voters enters the polling place with apparel displaying political or campaign messages, and this causes another voter to feel intimidated or unwelcome to the point of leaving the polling place and not casting his or her vote—this is definitely a scenario that implicates a potential infringement upon the observing voter's right. However, imagine a similar scenario where the observing voter does not leave the polling place, but rather feels uncomfortable and hurriedly completes his or her ballot in a manner that is less attentive absent the distraction. Further, what if the level of discomfort discouraged the observing voter from participating in future elections? Considering these hypothetical situations, the level of interference with the observing voter's right to vote and the possible infringement of that right is challenging to ascertain. Reported by the Election Crimes Branch of the Justice Department, concrete evidence of intimidation is often lacking because it is "amorphous and largely subjective in nature."⁷²

A recent occurrence may assist in determining the effect of partisan political messaging on voters attempting to cast their ballots. On October 11, 2020, Trump supporters gathered outside a county government center in Nevada City, California, while early voting was being conducted both inside and outside the building.⁷³ This particular polling site happened to be one of the most popular drive-up ballot boxes in the county.⁷⁴ The supporters donned Trump merchandise while playing music and cheering through a megaphone.⁷⁵ As the relevant California statute prohibits electioneering within 100 feet of polling locations, this group was in violation of this law.⁷⁶ When interviewed by the *Washington Post*, one election official confirmed that citizens casting their ballots reported that "they did not feel comfortable," and some had issues accessing the ballot drop box because of the demonstration.⁷⁷ A slightly different message was provided by the county's director of elections who maintained that she was not aware of any voter intimidation issues surrounding this incident.⁷⁸ These conflicting statements from election officials from the same office speak to the difficulties election administration officials face in tangibly assessing levels of voter intimidation.

Although this scenario involves other contributing factors such as loitering and inaccessibility, the important takeaway is that an overt display of partisan support within a polling location can cause a voter to feel discomfort. While concrete statistical evidence is lacking on this matter, it can be inferred that discomfort does

72. ELECTION CRIMES BRANCH, U. S. DEP'T OF JUST., FEDERAL PROSECUTION OF ELECTION CRIMES 50 (Richard C. Pilger ed., 8th ed. 2017), <https://www.justice.gov/criminal/file/1029066/download#page=61>.

73. Joshua Partlow, *Shouting Matches, Partisan Rallies, Guns at Polling Places: Tensions High at Early-Voting Sites*, WASH. POST (Oct. 21, 2020), https://www.washingtonpost.com/politics/voter-intimidation-allegations/2020/10/20/6722d0ae-123e-11eb-82af-864652063d61_story.html.

74. *Id.*

75. *Id.*

76. CAL. ELEC. CODE § 319.5 (West 2022).

77. Partlow, *supra* note 73.

78. *Id.*

not encourage a person to exercise his or her right to vote. At the point that a person makes the choice to forgo this right due to electioneering, it is arguable that an infringement has occurred. It is possible that such an infringement upon one's right to vote may provide said person with an action of legal recourse.⁷⁹ Section 11(b) of the Voting Rights Act states that "no person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote."⁸⁰ However, this section is seldom used in litigation and there are very few cases exploring its scope.⁸¹ Furthermore, such a legal fix would not be able to remedy the voter's lost opportunity to vote.

In addition to potentially causing an infringement upon an observing voter's fundamental right, passive electioneering may also contribute to disruption within the polling place. A disruption such as a confrontation, harassment, or physical violence may also frustrate the surrounding voters' right to vote.⁸² In a 2008 study of relatively recent Wisconsin elections, the data suggested that an average of thirty disruptions, such as fighting and voter intimidation, occur during each election.⁸³ In a "heightened political environment" where "tensions are running rampant," election supervisors must protect all voters' rights to cast their ballots.⁸⁴

In 2008, two Pennsylvania county election officials sued their state election officials after the state issued an advisory memorandum allowing voters to wear political and campaign-related attire to the polls.⁸⁵ One of the lawsuit's claims alleged that permitting voters to exhibit partisan messages would "affect the health and safety of voters."⁸⁶ As has been demonstrated, the wearing of political apparel within the polling location exacerbates the potential for the above-mentioned problems to arise.⁸⁷ Thus, neutrality within a polling place is favored to minimize these incidents. However, does the protection of such neutrality rise to the level of a constitutionally safeguarded aspect of a voter's right to vote?

Currently, there is no precedent on this theory. Although many state electioneering statutes create a buffer zone insulating the polling locations,⁸⁸ there is no recognized right to cast one's vote in a zone of neutrality. As discussed, legislative history and intent behind implementation of polling place electioneering statutes support the preservation of an "island of calm in which voters can

79. Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 179 (2015) (arguing that people who have experienced voter intimidation may have a legal claim through § 11(b) of the Voting Rights Act).

80. Voting Rights Act of 1965 § 11(b), 52 U.S.C. § 10307(b).

81. Cady & Glazer, *supra* note 79, at 227 (discussing cases litigated under § 11(b)).

82. NAC Brief, *supra* note 7, at 9.

83. NAC Brief, *supra* note 7, at 10.

84. Mary Ellen Klas & Ana Ceballos, *New Tension at the Polls as Supporters Get Aggressive and Officials Call in Police*, MIAMI HERALD, <https://www.miamiherald.com/news/politics-government/state-politics/article246576963.html> (Oct. 30, 2020, 11:04 AM).

85. *Kraft v. Harhut, et al.*, ACLU PA., <https://www.aclupa.org/en/cases/kraft-v-harhut-et-al> (last visited Mar. 9, 2022).

86. *Id.*

87. NAC Brief, *supra* note 7, at 8.

88. *E.g.*, CAL. ELEC. CODE § 319.5 (West 2022) (prohibiting electioneering within 100 feet of polling locations).

peacefully contemplate their choices.”⁸⁹ *Minnesota Voters Alliance* marked a clear departure from previous cases supporting electioneering statutes and, given the current ideological makeup of the Court, it would not be surprising if future decisions viewed similar electioneering statutes unfavorably. If the pendulum of American history swings back to unruly polling places, perhaps we may see a second reform movement aimed at constitutionally securing a voter’s right to peacefully complete a ballot in a neutral-zone, free from partisan messaging. However, this solution would theoretically require the momentum from the opposing swing.

IV. COMPARING STATES’ DIFFERING APPROACHES

In striking down the Minnesota statute that prohibited voters from wearing “political” badges, buttons, or other insignia,⁹⁰ the Court emphasized its disapproval of the “unmoored use” of the word “political.”⁹¹ Without a narrower definition, banning all “political” attire is not only vague but also significantly overinclusive of apparel that would be unlikely to rise to the level of electioneering. Currently, fifteen states prohibit campaign apparel, buttons, and stickers, and thirty-seven states prohibit campaign materials, signs, banners, and literature.⁹² By comparing different states’ electioneering statutes and incidents stemming from the implementation thereof, one can appreciate the difficulties of drafting a clear electioneering statute that effectively balances free speech and voting considerations.

In Idaho, section 18-2318 of the state code addresses electioneering at the polls with two relevant provisions.⁹³ First, under section 18-2318(1)(a), “no person may . . . [d]o any electioneering” within 100 feet of a polling place.⁹⁴ No definition of electioneering is found in the Idaho Code.⁹⁵ Following in section 18-2318(1)(d), persons are also prohibited from “engag[ing] in any practice which interferes with the freedom of voters to exercise their franchise or disrupts the administration of the polling place.”⁹⁶ No person has ever been prosecuted under this statute and it has also never been litigated.⁹⁷ However, interestingly enough, in 2006, the legislature amended section 18-2318 by increasing the maximum penalty amount from \$100 to \$1,000.⁹⁸ With no statute violations and no explained accompanying reasons for increasing the fine, the legislative motive is slightly confusing—especially as the term “electioneering” has no clear definition.

89. Brief of Respondents at 43, *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018) (No. 16-1435).

90. MINN. STAT. ANN. § 211B.11(1) (West 2022), *declared unconstitutional by Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018).

91. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1880 (2018).

92. *Electioneering Prohibitions*, *supra* note 1.

93. IDAHO CODE ANN. § 18-2318 (West 2022).

94. *Id.* § 18-2318(1)(a).

95. *Id.* § 18-2318; *cf. id.* § 67-6602(7) (defining only “electioneering communication”).

96. *Id.* § 18-2318(1)(d).

97. Westlaw search under Notes of Decision and History produced no results.

98. Act of July 1, 2006, ch. 71, sec. 5, § 18-2318(3), 2006 Idaho Sess. Laws 216, 218 (codified as amended at IDAHO CODE § 18-2318(3)).

On October 27, 2020, the Idaho Attorney General, Lawrence Wasden, released an opinion clarifying guidance regarding passive electioneering through expressive attire.⁹⁹ Avoiding definite terms, the opinion states that section 18-2318 “most likely” prohibits active campaigning in polling places, as opposed to passive campaigning.¹⁰⁰ Regarding apparel, the opinion provided the following:

If a voter appears at the polls wearing a shirt or button with election-related slogans, graphics, or the like simply goes about their business to vote without interfering with anyone else, making a statement, or any other active conduct related to their message, this office recommends that they be allowed to vote without any discussion of the issue.¹⁰¹

Nevertheless, the day after this release was made, a man participating in early voting was asked to remove his baseball hat supporting President Trump.¹⁰² The governing county’s election office cited section 18-2318(1)(d) when explaining its poll worker’s request.¹⁰³ Upon learning of the freshly released Attorney General opinion, the county removed signs around the polling place that contained language instructing voters that clothing and accessories related to a candidate were not allowed.¹⁰⁴ A polling place actively changing its procedures in the midst of an election cycle speaks to the fluid and evolving nature of this debated issue.

Although Attorney General Wasden attempted to provide clarity on this issue, his guidance can also be construed as further misleading Idaho voters. An interpretation of the statute from one of Idaho’s highest legal authorities that active campaigning is “most likely” prohibited suggests that the prohibition is not absolute and effectively opens the door for a statutory challenge on vagueness. As shown in other state regulations, it is extremely difficult to enumerate acceptable voting practices without creating more confusion. For example, Attorney General Wasden explicitly stated that political shirts and buttons are allowed,¹⁰⁵ but what about a campaign baseball hat? Additionally, this opinion does not consider the idea that even a voter “go[ing] about their business” while wearing political attire could itself interfere with another voter’s right to vote through intimidation, discomfort, or doubt in the neutrality of the election process.¹⁰⁶ The Attorney General’s opinion evidences a need for more thorough guidance and, perhaps, renewed reflection on the legislative drafting of section 18-2318.

99. Associated Press, *County Ban on Political Apparel at Polls Incorrect*, U.S. NEWS (Oct. 28, 2020, 1:24 PM), <https://www.usnews.com/news/best-states/idaho/articles/2020-10-28/idaho-ag-county-ban-on-political-apparel-at-polls-incorrect>.

100. *Id.*

101. *Id.*

102. Taylor Viydo, *Post Falls Man Says He Was Asked to Remove Hat Supporting President Trump at the Polls*, KTVB7 (Oct. 29, 2020, 8:34 PM), <https://www.ktvb.com/article/news/politics/post-falls-man-asked-to-remove-trump-hat-polls/293-a2fea26f-1a9f-444e-bb7c-688479c1e636>.

103. *Id.*

104. *Id.*

105. Associated Press, *supra* note 99.

106. Associated Press, *supra* note 99.

Along the same lines, Pennsylvania election law forbids a person from electioneering or soliciting votes within polling places but also fails to further define the term “electioneer”.¹⁰⁷ In 2008, two voters in a Pennsylvania primary election were denied entry to the polling place after sporting t-shirts that endorsed specific candidates.¹⁰⁸ Representing these voters, the ACLU wrote the Pennsylvania Secretary of State a letter requesting that clarification be provided to election officials.¹⁰⁹ As a result, the Commissioner of the Pennsylvania Department of State’s Bureau of Commissions, Elections and Legislation sent a memorandum to all county elections boards providing that voters who “take no additional action to attempt to influence other voters in the polling place” rather than “wearing of clothing or buttons” supporting a political party or candidate are not in violation of the state’s electioneering statute.¹¹⁰ When a few county officials challenged the Commissioner’s memorandum, the trial court ruled that state officials had the right to provide such guidance, but it declined to decide whether political apparel rose to the level of electioneering.¹¹¹ Although the court expressed concern about the state official’s guidance, it maintained that “a court cannot mandate common sense or good taste.”¹¹² As this decision was released just days before the general election, election officials entered Election Day with a frustratingly ambiguous interpretation of the statute.¹¹³

In theory, an electioneering statute may seem plausible. However, in practice, enforcing an electioneering statute may present unforeseen challenges that essentially defeat the purpose of the statute. For example, consider a polling place that is so overwhelmed with voters that the line extends beyond the limits of the protected neutral sphere. In 2004, the Sixth Circuit declared a Kentucky state law that restricted electioneering within 500 feet of polling places as unconstitutionally overbroad in violation of the First Amendment.¹¹⁴ Kentucky’s current and revised anti-electioneering statute bars campaigning within a 100-foot distance.¹¹⁵ With social distancing and long line concerns as a result of the COVID-19 pandemic, the Kentucky Secretary of State sought clarification from the Kentucky Attorney General on where the restricted zone would begin.¹¹⁶ In response, the Kentucky Attorney General’s Office provided guidance that “the 100 feet would be measured

107. 25 PA. STAT. AND CONS. STAT. § 3060(c) (West 2022).

108. *Kraft v. Harhut, et al.*, *supra* note 85.

109. *Kraft v. Harhut, et al.*, *supra* note 85.

110. *Kraft v. Harhut, et al.*, *supra* note 85.

111. Leo Strupczeski, *Judge Dodges Ban on Political T-Shirts, but Rejects GOP Bid for ACORN List*, LAW.COM (Nov. 03, 2008, 12:00 AM), <https://www.law.com/almID/1202425715113/?slreturn=20201101202720>.

112. *Id.*

113. *Id.*

114. *Anderson v. Spear*, 356 F.3d 651, 656–66 (6th Cir. 2004).

115. KY. REV. STAT. ANN. § 117.235 (West 2022).

116. Josh James, *Kentucky Forbids Electioneering 100 Feet From the Polls. But What if Lines Are Longer?*, WUKY (Nov. 2, 2020), <https://www.wuky.org/post/kentucky-forbids-electioneering-100-feet-polls-what-if-lines-are-longer#stream/0>.

from the front of the polling location.”¹¹⁷ Governor Andy Beshear expressed concern about this opinion, stating that “people who show up in line to vote should not have anybody trying to either get their vote, either in a positive or a negative way.”¹¹⁸ This scenario presented in Kentucky again stresses the ambiguities in real world applications of anti-electioneering statutes.

Anticipating electioneering issues in the 2020 Presidential Election, California election officials proactively released a memorandum explaining which expressive materials would potentially constitute electioneering.¹¹⁹ Section 319.5 of the California Elections Code defines “electioneering” as “the visible display or audible dissemination of information that advocated for or against any candidate or measure on the ballot within 100 feet of a polling place.”¹²⁰ Per the memorandum issued on September 28, 2020, Jana M. Lean, Chief of the Elections Division, instructed all county clerks and registrars of voters with a non-inclusive list of prohibited materials within polling locations.¹²¹ The prohibited materials encompass displays of a candidate’s name, likeness, or logo or a ballot measure’s number, title, subject, or logo.¹²² Following the list is a statement of permitted expressions:

It should be noted that a campaign slogan or a political movement slogan (or the initials representing the campaign or political movement) *does not constitute electioneering* under the legal definition of electioneering as stated above. Accordingly, the display of slogans on clothing, face coverings, and/or buttons is not prohibited. Examples of campaign slogans or political movement slogans include but are not limited to: Make America Great Again (MAGA), Black Lives Matter (BLM), Keep America Great (KAG), Vote for Science, and Build Back Better.¹²³

This interpretation of the statute allowed California voters to bring political expression into the polling locations so long as it did not explicitly display the candidate or measure.¹²⁴ However, arguably, a widely known slogan can be seen as synonymous with endorsing a specific candidate. The infamous red baseball cap emblazoned “Make America Great Again” entered popular culture as Donald Trump’s political career gained momentum. If a campaign slogan so clearly supports a candidate, how can it meaningfully be separated from an item that plainly states the candidate’s name or likeness? At this point, does the statute even accomplish its aim?

117. *Id.*

118. *Id.*

119. Memorandum from Jana M. Lean, Chief, Elections Div., to All Cnty. Clerks/Registrars of Voters (Sept. 28, 2020), <https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/september/20222jl.pdf>.

120. CAL. ELEC. CODE § 319.5 (West 2022).

121. Memorandum from Jana M. Lean, Chief, Elections Div., to All Cnty. Clerks/Registrars of Voters (Sept. 28, 2020), <https://elections.cdn.sos.ca.gov/ccrov/pdf/2020/september/20222jl.pdf>.

122. *Id.*

123. *Id.* (emphasis added).

124. *Id.*

V. IMPLEMENTING A HEIGHTENED REASONABLE PERSON STANDARD

The variety of electioneering statutes among the states paired with their problematic vagueness presents issues of tension in polling locations, subjective enforcement based on partisanship, and plain avoidance of enforcement. In addition, there is no federal law or regulation that provides guidance. This contention is ripe for a solution.

The concept of “reasonability” is widely accepted and found in numerous governing legal doctrines. A fundamental tort principle ascertains negligence based on what a reasonable person might do under similar circumstances.¹²⁵ Some criminal statutes require a reasonable explanation of belief to prove culpability or to excuse the offense.¹²⁶ When interpreting contract disputes, courts will determine “what a reasonable person in the position of the parties would have thought the disputed [contract’s] language meant.”¹²⁷ In addition, certain evidentiary standards require proof “beyond a reasonable doubt.”¹²⁸ The theory of reasonableness is undoubtedly enshrined in modern jurisprudence.

States’ electioneering statutes attempt to define which expression affects the neutrality of the polling place, while simultaneously balancing First Amendment and voting rights. In considering the previously discussed constitutional implication, drafting these statutes is no simple feat. As illustrated through analyzing different states’ approaches, the statutes tend to be either overinclusive, underinclusive, or muddled by state officials’ interpretations. My proposal seeks to address these issues by incorporating four key components: (1) a “no reasonable person” standard; (2) statutory language protecting the electioneering person’s right to vote; (3) a citation issued by a poll worker; and (4) an adjudication after Election Day, in which there is an option to elect for a jury to hear the proceeding.

Although well-suited for other seemingly imprecise doctrines, a plain reasonable person standard allows greater deference to poll workers enforcing the statute. Such a standard may result in a poll worker imposing his or her bias or viewpoint on the situation. As discussed, it is impermissible for a government actor to place a viewpoint restriction on speech.¹²⁹ For example, a reasonable person standard may create a situation where a poll worker, noticing a “Black Lives Matter” pin on a voter, makes a decision that this pin was reasonably associated with a democrat-candidate’s campaign. Thus, resulting in a voter’s citation. Although different political movements may align ideologically with either party, it is a difficult inquiry to precisely define the point where showing support for a

125. 57B AM. JUR. 2D *Negligence* § 825, Westlaw (database updated Feb. 2022).

126. Reasonable person language is used in manslaughter and the necessity defense. See MODEL PENAL CODE § 210.3 (AM. L. INST. 1962) (manslaughter definition requires a reasonable explanation or excuse); *Nelson v. State*, 597 P.2d 977, 979 (Alaska 1979) (necessity defense available if a person acted in the reasonable belief that an emergency existed).

127. *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982).

128. 4 CHRISTINE P. COSTANTAKOS, *NEBRASKA JUVENILE COURT LAW AND PRACTICE* § 13:13 (2021-2022 ed. 2021).

129. See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 55 (1983).

movement is synonymous with endorsing a candidate or issue on the ballot. However, by rephrasing the reasonable person standard conversely, this narrows the scope of the application. If the standard required that “no reasonable person” could deny that the voter’s speech was meant to support a candidate or ballot initiative, this greatly reduces the potential for a subjective application of viewpoint. Using the same example, because a reasonable person could deny that the “Black Lives Matter” pin was not meant to support a democrat-candidate, this would not rise to the level of passive electioneering within the polling place.

The second component of this proposed statute is that it must contain express language that preserves the electioneering person’s right to vote. An example of this would be: “If a citizen violates this statute, he or she must first be afforded his or her right to vote before issuance of a citation. A violation of this statute results in a misdemeanor citation only. Election administration officials may not interfere with this right.” Another potential addition could be assigning criminal liability to poll workers that knowingly chose to deny a person the right to vote. This component seeks to eliminate the actions of an uninformed or intentionally wrongful poll worker that seriously infringe upon the voter’s fundamental right. By explicitly stating the exact procedures a poll worker is to take, this gives clear guidance that can be instructed in poll worker training.

The final components outline the penalty and judicial proceeding stemming from a violation of this proposed statute. Under this statute, if a poll worker deems a person to be passively electioneering within the polling place, after voting, the person is issued a citation specifying a date for a court appearance. No fine is imposed in the interim. At the judicial proceeding, the person may elect to have a jury determine the outcome of his or her proceeding. This ensures that the “no reasonable person” standard is implemented by a group of the electioneering person’s community members and adds an additional safeguard to the potential subjective enforcement of a poll worker or a judge’s sole determination.

These components attempt to balance the critical rights at play while still honoring and upholding the neutrality of the polling place. Implementation of such a statute would require each individual state legislature to adopt and sign it into law. While such an idea may seem far-fetched and slightly impossible with the current state of affairs, if the Court returns another opinion rejecting the constitutionality of a polling place electioneering statute—states desiring to preserve neutral polling places will be newly motivated to take creative legislative steps to solve this issue.

VI. CONCLUSION

In sum, passive electioneering introduces subtle political campaigning into our polling locations. As demonstrated by the examples provided, state statutes present various vagueness and enforceability issues. This current shift in the Court’s rhetoric is concerning and may call for swift legislative action from either Congress or the states. The key components of my proposed electioneering statute address the competing constitutional interests of freedom of speech and the right to vote, while shielding our voting process from partisan messaging. To preserve the time-

honored and sacred tradition of neutrality in our polling places and to restrict such inappropriate political interference, a solution is necessary.