The Federalist Society — University of Michigan Law School Student Chapter
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Panic at the Poll Booth: Can States Ban Political Apparel at Polling Stations?

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We're lucky to be here in Ann Arbor. Across the country, thousands and thousands of Michigan fans are eager to watch the game this Saturday night between the Michigan Wolverines and the Michigan State Spartans.

Put yourself in their shoes for a second. Imagine you're in a place far away from here. Far away from Michigan Stadium. Maybe you're at a bar in Chicago. Maybe you're at home in New York. This Saturday night, you gaze intently at the television as the game is ready to start.

The screen pans to footage of the students walking across the diag. Then to a shot of our beautiful law school: First from the outside, and then inside our reading room. Imagine what you're feeling as the screen pans to aerial footage. Imagine, at first, when the footage shows a bird's eye view of the University of Michigan. You see the Burton Tower and the Hill Auditorium and the beautiful fall trees.

Now, imagine that the blimp is approaching over Michigan Stadium, so that at first you see that big sign with the Maize block M on the blue background. Then, I want you to think carefully about what you're feeling as the blimp flies over Michigan Stadium. And you're looking down. And you see a crowd. Of green and white.

What did you feel? Disgust. Disappointment. Maybe even fear.

The point is: every time we play the Spartans here in Ann Arbor, we make sure that something like that never happens. And how do we do that? Without saying a word to each other. Without even knowing each other. Michigan fans show up wearing maize shirts, so that when viewers see the aerial footage of Michigan Stadium this Saturday, they'll see a sea of maize.

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It's extraordinary, isn't it? We have maize-outs here in Ann Arbor, Michigan. Penn State will have what's called White Out, when our football team visits them in Happy Valley, Pennsylvania. And it's not just football teams. At weddings, the bride usually wears a white dress. Those mourning the departed at funerals usually wear black. James Bond often wears stylish tuxedos, just as sure as he gets his drink "shaken, not stirred." Law students wear suits to on campus interviews; lawyers wear them to court. Those suits are usually navy or charcoal. And I'd have to check the rules on this, but I don't think judges are even allowed to issue published opinions unless they heard oral argument in that case while wearing black robes.

And it's not just colors. Many people express their views and, in many cases, themselves, through shirts, hats, or buttons that feature words. For some, shirts that say "Love Wins." For others, hats that say "Make America Great Again." Still others wear buttons, stretching back hundreds of years, that say "Tippecanoe and Tyler too," "I like Ike," "Clinton/Gore" and "Bush/Cheney," just to name a few.

Must shirts, hats, and buttons express a view on important political issues or endorse any particular candidate? No. Just look around campus. You'll see shirts that express solidarity with the University; those are the ones that say Michigan. Other shirts express a person's affinity with other groups. You can find the American Outlaws — hardcore fans of the United States soccer teams — at soccer games by looking for shirts that say "Don't tread on me."

If you look long enough you might see other shirts; those that express very important viewpoints on very unimportant issues. Here's a personal anecdote. Every morning, I wake up, check Twitter, brush my teeth, and try, as hard as I can, not to talk to anyone — and I mean anyone — before I've had my first cup of coffee. I know that a fellow traveler in life shares my views when I see that person wearing a shirt that says "but first, coffee."

My client Andy Cilek was one of the millions of people who chose to express himself through his attire. Cilek is the president of the Minnesota Voters Alliance, a group concerned with election integrity. He shares many of the Tea Party's views, but I'm willing to bet that you'll like his case even if you've never heard of Minnesota Voters Alliance and even if you're not a member of the Tea Party. My organization, Pacific Legal Foundation, is asking the Supreme Court to take his case, *Minnesota Voters Alliance v. Mansky*, which will be considered by the Court at conference tomorrow.

The case exists because the Tea Party Patriots have quite the shirt-producing business. They have shirts with slogans like "Liberty" and "Fiscal Responsibility, Limited Government, Free Markets." Hardly the sort of stuff that is likely to intimidate or even encourage voters into casting their ballots for Hilary Clinton or Donald Trump.

On Election Day in 2010, Cilek showed up to a polling place in Ramsey County, Minnesota, which covers St. Paul. Cilek wore a Tea Party shirt that said "Don't tread on me," with a picture of the Gadsden Flag, you know the one with the coiled rattlesnake from the Revolutionary era? The shirt was created by the local tea party, and under the primary picture, had "Tea Party Patriots" printed in smaller letters.

Shouldn't be a problem right? Wrong. When Cilek showed up at the polling place, an election official told him to either take off his shirt or cover it up. Minnesota law, Section 211B.11, forbids voters from wearing political badges, buttons, or insignia at polling places within the State.

Here's the crucial question. What does Minnesota mean when it says "political"? Maybe it means apparel that endorse candidates. Snyder for Governor. McCormack for Michigan Supreme Court. Maybe it also means apparel that express certain views on ballot issue. Yes on Prop 2. No on Prop 4.

Bans of this nature are probably okay under a 1992 Supreme Court case called *Burson v. Freeman*. In *Burson*, the Supreme Court, in a 5-3 opinion, upheld a Tennessee law that prohibits the display and distribution of campaign materials within 100 feet of a polling place. The Tennessee law, in the Court's view, furthered an important governmental interest in preventing voter intimidation and election fraud.

So right now you're thinking: why did your client challenge the Minnesota law? Didn't you even read *Burson*?

Here's what you don't know. In 2010, the Minnesota Secretary of State and election managers in various counties distributed an Election Day Policy. The Policy didn't just outlaw apparel that endorsed a candidate or expressed a view on a ballot issue. It also outlawed, and I quote: "Materials promoting a group with recognizable political views (such as the Tea Party, Moveon.Org, and so on.)." That's certainly more restrictive of speech than *Burson*. Yet the Eighth Circuit, in a 2 to 1 decision, said that because the State could ban some speech (vote for Bush, vote for Gore), it can ban even political speech that doesn't campaign for a candidate or express a view on a ballot issue.

If you wear "material promoting a group with recognizable political views," you're subject to criminal prosecution or civil penalties of up to $5,000. But outside of the groups enumerated in the Election Day Policy, which other groups promote recognizable views? And are you willing to put 5,000 dollars on it?

What about a T-Shirt that says "I love the Chamber of Commerce." Let's get a show of hands: if you were a voter in Minnesota or if your state had the same law and the same Election Day Policy, how many of you would be comfortable wearing such a shirt? What about a union shirt? Would you wear one of those common purple shirts by the SEIU? Or a shirt that says AFL-CIO? How many of you would be comfortable wearing those shirts to a polling place? A few more people.

In fact, wearing those shirts to a polling place in Minnesota would make you a criminal! The State's attorney admitted during oral argument that Minnesota's ban applies to t-shirts, buttons, and badges featuring the logo of the Chamber of Commerce and the AFL-CIO.

As one judge on the panel that heard this case in the circuit court noted, the ban also applies to the NRA and the NAACP. And I don't think it's a stretch to say that even wearing your Federalist Society t-shirt to a polling place in Minnesota could land you in very warm water. I see you don't have Federalist Society t-shirts this year. They had them when I was in school, so you should definitely talk to someone about getting them.

After all, the district court relied on a New York Times article in ruling that the Tea Party was a "political" organization. As a lawyer, you always have to ask yourself, how would that logic apply here? How would it apply to the Federalist Society? Well, it turns out, exactly a week ago today, there's a New York Times article by Laurie Goodstein: "Some Worry About Judicial Nominee's Tie to a Religious Group."

Don't worry, it's not about Professor Larsen.

The article focuses on Amy Coney Barrett, a professor at Notre Dame Law School who has been nominated to be a judge on the Seventh Circuit. On Barrett, the New York Times says: "She is a member of the conservative Federalist Society, a conduit for judicial nominees to the Trump White House. Highlights. Conservative. Trump. See?

Let's get real. If someone shows up at the polling place in a Federalist Society or an ACS shirt, it's highly unlikely that the shirt reveals some burning desire to intimidate voters or engage in voter fraud. And Minnesota cannot use the Supreme Court's endorsement

of a ban on campaign material to impose criminal penalties on voters who wear shirts that say "Chamber of Commerce," "AFL-CIO," "NRA," "NAACP," "ACS," "The Federalist Society," and countless other possibilities.

That's the essence of the First Amendment overbreadth doctrine. Whenever the legislature enacts laws that restrict speech, it cannot do so with a hammer, it must do so with a scalpel.

And the Supreme Court has used the First Amendment's overbreadth doctrine to invalidate laws time and again. For instance, when people think of places they go to exercise their First Amendment rights, their mind conjures up images of public parks and street corners. Few, if any, would think of an airport. Indeed, the Supreme Court has held that an airport is a nonpublic forum, where speech restrictions need only be reasonable and viewpoint-neutral. Yet in *Board of Airport Commissioners v. Jews for Jesus*, the Supreme Court held that a ban on "First Amendment activities" at the airport was nonetheless unconstitutionally overbroad under the First Amendment.

There are several problems with overbroad laws in the First Amendment context.

First, although overbroad laws, as drafted, do not necessarily discriminate against particular viewpoints, they invite viewpoint discrimination. If those who are enforcing the law have unbounded discretion in doing so, they may, wittingly or not, enforce the law in a way that discriminates on the basis of viewpoint.

It's like that phrase says, to the hammer everything looks like a nail. A conservative election worker may see liberal overtones in a blue shirt. A liberal election worker may ascribe political meaning to a red one.

Second, overbroad laws chill the speech of those who do not have the resources to litigate their First Amendment rights in court. Litigation is expensive, time-consuming, and just not an option for most Americans. So the ordinary citizen must decide whether her conduct is covered by an overbroad law. In this case, whether her apparel "promotes a group with recognizable political views." Better safe than sorry. Don't wear your union button, don't wear your Fed Soc shirt, don't dress in red even if you're a Democrat, don't wear blue even if you're a Republican.

That's what chilling speech is all about, and it is not a good thing. Fortunately, the First Amendment doesn't require all of the individuals subject to an overbroad law to bring independent enforcement actions. Not only is it an inefficient use of judicial resources, but common sense dictates that many people won't bring any action at all — to the

detriment of the First Amendment. Fortunately, the overbreadth doctrine allows one person, Paul Clement, Jeff Fisher, or — in this case, a very handsome lawyer — to vindicate the free speech rights of everyone.

Finally, the overbreadth doctrine is designed to ensure that the fact government can restrict some speech doesn't mean that it can ban all speech. This has profound implications in the real world.

The government can criminalize threats, but it can't ban all offensive speech. The government can impose decibel limits, but that doesn't mean it can ban talking as well. Laws criminalize perjury, but that's different from a law that requires a lawyer to affirmatively argue for the other side.

And that's what the First Amendment ensures: that there are islands of laws and an ocean of liberty; not islands of liberty and an ocean of laws. When the government says a law that restricts speech is necessary to further some important interest, we need to make sure that it actually furthers that interest.

Thank you.