

Federalist Society — Sacramento Lawyers Chapter
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Minnesota Voters Alliance v. Mansky: What Not To Wear - Voter's Edition

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Are you proud to be member of the Federalist Society? I remember when I was a college student. I was visiting Baylor Law School in Waco, Texas for a mock trial tournament. One of my classmates pointed to a Federalist Society poster, and said look, Wen, it's your organization. That made me curious, and after some research, I decided that I'd want to join the Federalist Society in law school.

That's what I did. I went to several Federalist Society events and, to my delight, the organization was well-run enough to provide non-pizza lunches. In particular, I remember an event with Alan Gura on *McDonald v. City of Chicago*. Naturally, the Federalist Society provided cheeseburgers from McDonald's. I remember the board meetings, and that time I ran for president of the Federalist Society, and suffered a prompt and humiliating defeat.

But here's what I remember the most about the Federalist Society. Every year, we got a Federalist Society t-shirt. From my three years of law school, we got two with quotes from James Madison, and one with a quote by Ronald Reagan. Now, those shirts were quite expressive. Most of the time they expressed my belief in limited government and the rule of the law. On the rare occasion, they expressed my preference for the hard work and intellectual rigors of my coursework over the even harder work and physical rigors of laundry.

My classmates thought those t-shirts was expressive too. You're in Federalist Society? I got a lot of that. So often that I joked to a friend that the official slogan of the Federalist Society should be "You're in the Federalist Society?" just as the official slogan for Pepsi should be the response you get sometimes when you ask for a Coke at a restaurant: "Is Pepsi okay?"

¹ I'm one of the attorneys for the petitioners in the Supreme Court. I was counsel of record at the petition stage and will be second chair for the oral argument on February 28, 2018.

Believe or not, if you wore any of those Federalist Society t-shirts to a polling place in Minnesota, you might be thrown in jail for a year or fined \$5,000. Just ask my client Andy Cilek, who is involved in PLF's latest case before the Supreme Court of the United States. Andy is the executive director of the Minnesota Voters Alliance, a nonprofit that advocates for election integrity. One cold November day in Minnesota, Andy went to vote wearing a t-shirt with a small Tea Party logo next to a Gadsden Flag and the words "Don't Tread on Me."

Shouldn't be a problem right? Wrong! He was met at the polling place by an election judge, who sounds fancy, but under Minnesota law, could be a 16-year-old volunteer. The election judge told Andy to 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.

There are two things that are quite odd about the statute. First, we've all heard of laws that criminalize the act of going up to people and harassing them to vote for your candidate. But this law deals with passive speech. Let me ask you a question, and no cheating. Some people at your table are wearing ties; what color are they? Chances are, many of you didn't notice. That, of course, is because passive speech provides a relatively distraction-free method for people to express their views. To be sure, I think that speech is speech and should be protected by the First Amendment in any instance. But if the First Amendment, as the Court has held multiple times, protects flag burning, then surely it also protects something like wearing black armbands. *Tinker v. Des Moines*. And what's the difference between wearing an armband and wearing a t-shirt, except for the fact that the adults wearing t-shirts in our case, unlike the high school students in *Tinker*, enjoy the full panoply of First Amendment rights?

Second, the law is extraordinarily broad --- way broader than banning speech that endorses a candidate: Vote for Arnold; Vote for Kamala Harris for example. Or speech that takes a position on a ballot measure: Yes on Prop 65; No on Prop 65. Don't take my word on how broad the law is. Let the government tell you. To clarify what the word "political" means, election officials in Minnesota enacted an Election Day Policy. According to the policy, Minnesota law prevents voter from wearing every single t-shirt, button, or badge that promotes a group with "recognizable political views," such as and I quote "Tea Party, MoveOn.org, and so on."

Which other groups have recognizable political views? What about the Chamber of Commerce? Let's get a show of hands. If you were a voter in Minnesota, how many of you would be comfortable wearing an "I Love the Chamber of Commerce" t-shirt? What about a union shirt? We see a lot of purple shirts that say SEIU. Let's get another

show of hands: How many people would feel comfortable wearing a shirt that says "AFL-CIO?"

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

As one judge on the panel that heard this case noted, the ban also applies to apparel featuring the logo of the NRA or 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 hot water.

Three months ago, when I was giving this speech at the University of Michigan Law School, I told the students that one of the questions you should always ask yourself as a lawyer is how would the logic of that precedent apply to the facts here? The district court in *Minnesota Voters Alliance* relied on a New York Times article in ruling that the Tea Party was a "political" organization. How would that rationale apply to the Federalist Society? By the way, Adam Liptak of the New York Times just posted an article that was pretty favorable to our case. But three months ago, the New York Times ran an article with the headline "Some Worry About Judicial Nominee's Tie to a Religious Group."

The article focuses on Amy Coney Barrett, now a judge on the Seventh Circuit. On Barrett, the New York Times article says: "She is a member of the conservative Federalist Society, a conduit for judicial nominees to the Trump White House. Highlights. Conservative. Trump. See the connection?"

That's the problem. 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. The First Amendment prohibits Minnesota from imposing criminal penalties on every voter who wears a shirt that says "Chamber of Commerce," "AFL-CIO," "NRA," "NAACP," "ACS," "The Federalist Society," and countless other possibilities. My favorable example? Poll workers in Colorado and Florida flagged college students wearing MIT sweatshirts, because they thought the students were campaigning for Mitt Romney.

Pacific Legal Foundation isn't just litigating for the free speech rights of voters in Minnesota that want to wear Tea Party shirts that say "liberty" or "don't tread on me." We're fighting for small business owners in Tennessee who want to wear Chamber of Commerce shirts. We're fighting for union members in New York who want to wear AFL-CIO shirts. We're fighting for sportsmen in Texas who want to wear NRA shirts. And we're fighting for civil rights advocates in Vermont who want to wear shirts that

say NAACP. We're fighting for all voters, no matter what their views, no matter where their live, for their First Amendment right to free speech.

That's the essence of the First Amendment doctrine of overbreadth. Whenever the government enacts laws that restrict speech, it cannot do so with a hammer, it must do so with a scalpel. This is a bipartisan issue: that's why a wide range of organizations from the Cato Institute to the ACLU have filed amicus briefs on our behalf.

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. In other words, a speech-free zone is incompatible with the Free Speech Clause.

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 unbridled 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 button that says ACLU. A liberal election worker may ascribe political meaning to a shirt that says Pacific Legal Foundation.

Second, 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 --- on college campuses for example. 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.

Third, 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; leave your Federalist Society lapel pin at home.

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 their own lawsuits. Not only is it an inefficient use of judicial resources, but common sense dictates that many people won’t bring any lawsuit at all — to the detriment of the First Amendment. Fortunately, the overbreadth doctrine allows one person, Andy Cilek, to vindicate the First Amendment rights of everyone. That’s why it is so fitting that Pacific Legal Foundation is representing Andy in his First Amendment challenge. PLF represents clients free-of-charge to vindicate the constitutional rights of everyone. That’s exactly what we’re planning on doing here. We have a pretty good record of protecting liberty in the Supreme Court of the United States: nine wins in our last ten case. Let’s make this ten out of eleven.

I say to you. There’s so much many of you have done to protect the First Amendment. I know that my fellow board members Brad Benbrook, Steve Duvernay, Ashlee Titus have all litigated First Amendment cases. My colleague Damien, who won a Supreme Court case 9-0 in *Sackett v. EPA*, worked with me on the last First Amendment cert petition that I filed, and my colleague Anastasia, will be arguing her First Amendment case in the Ninth Circuit on Monday. Today, Damien, Anastasia, Oliver, and I, along with a few more of our colleagues not in attendance, launched a First Amendment challenge to the FDA’s Deeming Rule, which allows unaccountable bureaucrats to censor truthful speech. So please, I encourage everyone, keep fighting for the First Amendment; keep fighting for free speech.

This is where I originally had thank you in my notes, but I just want to say one more thing really quickly, and I think this is the appropriate time to say it. Ashlee, you’re listed as the Vice President, but everyone on the Board knows that you’ve been the President of the Federalist Society all these years. I think I speak for everyone on the Board when I say that we are very grateful for your leadership, and especially your organizational skills. The Sacramento Lawyers Chapter truly could not have done what it did without you. Thank you for your leadership. To the rest of you, thank you for being here today. With that, I’ll take any questions you might have.