

LITIGATION BACKGROUNDER

Minnesota's Polling Place Dress Code Violates Voters' First Amendment Rights

Minnesota Voters Alliance v. Mansky

Pacific Legal Foundation (PLF) is asking the United States Supreme Court to review a government-sanctioned dress code that prohibits voters from wearing any apparel that the government considers “political.” Minnesota Statute Section 211B.11 (the political apparel ban) broadly prohibits voters from wearing “political badges, political buttons, or other political insignia” at the polling place.¹ The ban not only prohibits campaign-related apparel such as “Vote for Smith,” but also shirts with a logo of the Tea Party, AFL-CIO, National Rifle Association, American Legion, Veterans of Foreign War, the NAACP, or countless other organizations.

Minnesota's political apparel ban threatens the First Amendment rights of Americans from all corners of the Nation. Voters in every election proudly wear stickers and shirts with slogans like “I voted,” “liberty,” “proud Republican,” or “proud Democrat.” Yet laws in ten states: Minnesota, Delaware, Kansas, Montana, New Jersey, New York, South Carolina, Tennessee, Texas, and Vermont suppress this type of speech.² PLF is representing Andy Cilek and his nonprofit, Minnesota Voters Alliance, free of charge, in asking the Supreme Court to take this important First Amendment case.

PLF Clients

PLF client Andy Cilek is a Minnesota resident and executive director of Minnesota Voters Alliance, a nonprofit dedicated to election integrity. In the November 2010 election, Andy went to his polling place in Hennepin County, Minnesota. He wore a Tea Party shirt with the message “Don't Tread on Me” and an image of the Gadsden flag, which goes back to the time of the Revolutionary War. He also wore a “Please I.D. Me” button that was created in part by his group: Minnesota Voters Alliance. Neither the Tea Party t-shirt nor the “Please I.D. Me” button endorsed any political candidate or expressed a view on any issue on the ballot. But an election judge manning the polling place told Andy that Minnesota's political apparel ban required him to take off or cover up the shirt and the button. Mr. Cilek was prevented from voting for over five hours until the elections judge realized that she could not bar

him from voting. But Mr. Cilek was warned that he faced prosecution simply because of what he wore to the voting booth.

Andy challenged the constitutionality of this law, but endured multiple stages of litigation in which both the federal trial and appellate courts ruled against him.³ PLF now represents Mr. Cilek, Minnesota Voters Alliance, and former Minnesota election judge Sue Jeffers in asking the United States Supreme Court to hear this case.

**Minnesota’s law banning all “political” speech
is overbroad and unconstitutionally prohibits
speech that poses no threat of disruption at the polls**

The First Amendment, which protects the right to free speech, offers the broadest protection to political expression.⁴ The United States Supreme Court has allowed states to create “campaign-free” zones at or near a polling place,⁵ but *only if* necessary “to serve the States’ compelling interests in preventing voter intimidation and election fraud.”⁶ Unfortunately, many states have taken this decision as a mandate to create categorical “speech-free zones” that ban all passive political speech, even if the speech does not present any threat of voter intimidation and election fraud.

The First Amendment protects Americans from overbroad laws that prohibit more speech than is necessary to promote a legitimate governmental purpose.⁷ Yet the Minnesota political apparel ban punishes a substantial amount of protected free speech—namely t-shirts, badges, and buttons that do not advocate for any candidate or ballot issue—beyond what is necessary to maintain orderly elections.⁸

As part of its so-called “Fair Campaign Practices,” Minnesota Statute Section 211B.11 provides that a “political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day.”⁹ An official policy (Policy) issued by the Ramsey County Elections Manager (Respondent Joe Mansky) gave election judges “the authority to decide what is ‘political’” and furnished a non-exhaustive list of examples. In addition to apparel that actually included the name of any candidate or the support or opposition of any ballot question, the political apparel ban also prohibits:

- 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).

As Eighth Circuit Court of Appeals Judge Bobby E. Shepherd noted in his partial dissent below, the statute’s logic would apply to all sorts of badges, buttons, or other insignia by the American Legion, Veterans of Foreign Wars, AFL-CIO, National Rifle Association, and the NAACP.¹⁰ Even the government conceded that the statute reaches logos and insignia from groups like the Chamber of Commerce and the AFL-CIO.

In function, Section 211B.11 creates a zone in which “the only expressive activity” permitted is “carried out privately—by secret ballot in a restricted space.”¹¹ Or, as the Supreme Court would say, a “virtual First Amendment Free Zone.”¹²

But because “no conceivable governmental interest” could justify “such an absolute prohibition on speech,”¹³ Minnesota’s sweeping speech ban should be struck down as unconstitutionally overbroad. Banning all “political” apparel at or near the polling place has nothing to do with Minnesota’s purported interests in preventing voter intimidation and election fraud.¹⁴

This conclusion is reinforced when the political apparel ban is compared with the rest of Section 211B.11, which also precludes “campaign material” and activities intended to “induce or persuade a voter” at or near a polling place.¹⁵ These restrictions are at least geared toward protecting the state’s interests in preventing voter intimidation and voter fraud, whereas the political apparel ban sweepingly prohibits all “political” messages.

In short, because the Minnesota law prohibits far more speech than necessary to achieve the state’s interests, it is unconstitutionally overbroad.

The broad ban on “political” apparel chills free speech

Petitioners’ case reaches far beyond Hennepin County, Minnesota. All fifty states limit access to the areas in or around polling places.¹⁶ And at least nine other states have statutes that are virtually identical to Minnesota’s law: Delaware, Kansas, Montana, New Jersey, New York, South Carolina, Tennessee, Texas, and Vermont.¹⁷

Therefore, Minnesota’s law—and those like it in other states—effectively chills the free speech rights of millions of voters across the country by threatening criminal prosecution for the passive wearing of logoed t-shirts, caps, jackets, buttons, and other apparel of any variety. The astonishingly wide reach of the “political”-speech ban could conceivably be applied to the wearing of a red or blue shirt, “because of the association of the color with the two major political parties.”¹⁸

Any union member wearing union logos (AFL-CIO, SEIU); enthusiastic voters (wearing apparel sporting, say, an elephant or donkey); veterans wearing American Legion or POW-MIA insignia; individuals passively expressing patriotism (an American flag shirt) or dissent (an “anarchy” logo) or less government (Tea Party logo) or more government (MoveOn.org logo), are subject to the criminal penalties assessed for a petty misdemeanor¹⁹ or civil penalties up to \$5,000.²⁰

Further, political apparel bans like the one here would have banned tens of thousands of political artifacts that have been featured in every presidential election since 1828.²¹ Today, the same bans may reach common statements such as “God Bless America,” or “a shirt displaying the name of a religious school.”²² In 2012, election workers in Colorado and Florida flagged down Massachusetts Institute of Technology students for wearing “MIT” shirts, because the workers had mistakenly thought that such shirts evinced support for political candidate Mitt Romney.²³

These overbroad statutes, backed by criminal penalties, threaten precious First Amendment freedoms because they inhibit voters’ exercise of their First Amendment rights.

Litigation Team

PLF attorneys Wencong Fa, Deborah J. La Fetra, and Oliver Dunford, along with local counsel Erick Kaardal, represent Andy Cilek, Sue Jeffers, and Minnesota Voters Alliance in their petition to the Supreme Court. The Petitioners ask the Supreme Court to review their case and rule that Minnesota’s ban on “political” apparel is unconstitutionally overbroad under the First Amendment.

Established in 1973, Pacific Legal Foundation (www.pacificlegal.org) is the nation’s most experienced public-interest law firm dedicated to individual

liberty, private property rights, and limited government. It represents the Clients without charge.

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¹ Minn. Stat. § 211B.11.

² 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, 63 (2006). See Del. Code Ann. tit. 15, § 4942; Kan. Stat. Ann. § 25-2430(a); Mont. Code Ann. § 13-35-211(1); N.J. Stat. Ann. § 19:34-19 (2005); N.Y. Elec. Law § 8-104(1); S.C. Code Ann. § 7-25-180(B); Tenn. Code Ann. § 2-7-111(b)(1); Tex. Elec. Code Ann. § 61.010(a); Vt. Stat. Ann. tit. 17, § 2508(a).

³ The district court rejected both facial and as-applied challenges to the Minnesota statute. The Eighth Circuit affirmed the ruling on the facial challenge, but reversed the ruling on the as-applied challenge and remanded that claim to the district court. *Minnesota Majority v. Mansky*, 789 F. Supp. 2d 1112 (D. Minn. 2011), *aff’d in part and rev’d in part*, 708 F.3d 1051 (8th Cir. 2013). On remand, the district court ruled against the as-applied challenge, and the Eighth Circuit affirmed. *Minnesota Majority v. Mansky*, No. 10-cv-401-JNE-SER, ECF # 167 (D. Minn. Mar. 23, 2015), *aff’d*, 849 F.3d 749 (8th Cir. 2017).

⁴ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

⁵ *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality op.) (upholding ban on electioneering within 100 feet of polling place). Cf. *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015) (acknowledging general rule but concluding that statute banning electioneering within 300 feet of polling place was unconstitutionally overbroad).

⁶ *Burson*, 504 U.S. at 206. See also *Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 1219 (11th Cir. 2009) (describing the state’s compelling interests as “(1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process”).

⁷ *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

⁸ *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003).

⁹ Minn. Stat. § 211B.11, subd. 1.

¹⁰ 708 F.3d at 1062 n.7 (Shepherd, J., concurring in part and dissenting in part).

¹¹ *Marlin v. D.C. Bd. of Election & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001).

¹² *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (internal quotation marks omitted).

¹³ *Jews for Jesus*, 482 U.S. at 575.

¹⁴ *See Picray v. Secretary of State*, 140 Or. App. 592, 594, 600 (1996) (overturning a penalty imposed under statute that prohibited voters from wearing “political badge(s), button(s) or other insignia in the voting place[]” because the mere passive display of a political button or badge in a polling place constituted “the silent expression of political opinion” that does not coerce or unduly influence anyone), *aff'd by an equally divided court*, 325 Or. 279 (1997).

¹⁵ Minn. Stat. § 211B.11, subd. 1.

¹⁶ *Burson*, 504 U.S. at 206.

¹⁷ See *supra*, footnote 2.

¹⁸ *Reed v. Purcell*, 10-CV-2324, 2010 WL 4394289, at *4 (D. Ariz. Nov. 1, 2010) (commenting that “[m]essages pertinent to the election can be found everywhere if one looks hard enough”).

¹⁹ Minn. Stat. § 211B.11, subd. 4.

²⁰ Minn. Stat. § 211B.35, subd. 2(d).

²¹ *See Picray*, 14 Or. App. at 601 n.12.

²² James J. Woodruff II, *Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much*, 65 Mercer L. Rev. 331, 346 nn.120-122 (2014).

²³ *See MIT Voters Flagged at Polls for Suspected Electioneering, Explain They're Not Shilling for Mitt Romney*, Huffington Post (updated Nov. 6, 2012, 8:23 PM), available here: http://www.huffingtonpost.com/2012/11/06/mit-voters-flagged-at-polls-for-suspected-electioneeringexplain-not-shilling-for-romney_n_2084332.html.