

SUPREME COURT SAYS NO TO POLITICAL FASHION POLICE

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A new decision from the United States Supreme Court may limit the ability of states to ban certain types of political clothing at polling places.

On June 14, 2018, the Court decided *Minnesota Voters Alliance et. al. v. Mansky*, a First Amendment case challenging a Minnesota law (Minn. Stat. § 211B.11(1)) prohibiting voters from wearing a “political badge, political button, or anything bearing political insignia inside a polling place on Election Day.” Minnesota employed temporary election judges to determine whether or not a particular item fell within the “political insignia” designation. The Court struck down the law for violating the First Amendment’s Free Speech Clause because the portion of it referring to “political insignia” is too vague.

All fifty states and the District of Columbia have passed laws to protect the sanctity of the secret ballot process and the ability for voters to make a decision when voting in private, free of intimidation from supporters or opponents of candidates and causes. For example, some states have laws preventing people from protesting within one hundred feet of a polling place, or other restrictions that protect the secret ballot and free choice that is associated with the civic duty of voting. These types of restrictions are considered constitutional—and do not violate the First Amendment right to free speech—because the Court considers a polling place to be a nonpublic forum, or a “space that is not by tradition or designation a forum for public communication.” This allows states some flexibility to limit speech to protect the voting process, including content-based restrictions such as political expressions. As the Court noted, a polling place is a nonpublic forum on Election Day, as it is a “government controlled property set aside for the sole purpose of voting.” But, restrictions cannot make distinctions based on the speaker’s political persuasion. Further, “the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out.” In other words, a person entering the polling place must be able to determine the difference.

In a 7-2 decision written by Chief Justice Roberts, the Court held Minnesota’s law to be unconstitutional because it failed to adequately define the word “political,” making the law too vague and susceptible to abuse. In particular, the Court feared that such a broad designation would allow for the election judge’s own political beliefs to affect his or her decision making, which in turn clouds the free

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environment in a polling place. It also fails to reasonably advise voters of what clothing is allowed in a polling place, and what is not.

Minnesota had defined political insignia as “[i]ssue oriented material designed to influence or impact voting.” The Court found this to be problematic, asking whether a “Support Our Troops” shirt would be too political, if one candidate had expressed a view on military funding? Would a “#MeToo” shirt be too political if one candidate expressed awareness over sexual assault? Would a Boy Scouts uniform be too political, since candidates had expressed views regarding the exclusion of members of the Boy Scouts of America based on their sexuality? These unanswered questions further highlighted the vagueness of the Minnesota law, as well as the potential for election judges to arbitrarily pick and choose which clothing violates the law and which clothing does not.

Minnesota had argued that the apparel ban only covered political messages or groups with political views that were “well-known.” But the Court concluded that such an argument means that the media consumption of an election judge would dictate his or her decision, creating the potential for bias or abuse. The Court reasoned that “discretion must be guided by objective, workable standards.” Although Minnesota’s law was well intentioned, it had no discernible approach or reasoned application of determining what was “political.”

Ultimately, states and governments seeking to impose similar political clothing restrictions that are compliant with the ruling in *Minnesota Voters Alliance* must: (1) not discriminate against the speaker’s political persuasion; and (2) ensure that the restriction is specific enough to articulate some sensible basis for distinguishing what may come in from what must stay out. Otherwise, the restriction will be struck down as unconstitutional.

Melissa Kathan, Law Clerk, assisted with this article.