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U.S. Supreme Court takes up Minnesota voting case

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Six of the 44 cases pending at the U.S. Supreme Court are about First Amendment free speech rights.

That includes Minnesota Voters Alliance, et al., v. Mansky, which was granted cert on Monday, Nov. 13. (See "Free speech dominates at U.S. Supreme Court," Page 4)

"When we started this case seven years ago, who would have thought [the case would end up at the Supreme Court]," said attorney Eric Kaardal, who represents the petitioners challenging a Minnesota statute restricting what people wear to vote. (See sidebar.) They want the Supreme Court to reverse the 8th U.S. Circuit Court of Appeals, which said Minn. Stat. sec. 211B.11 is viewpoint-neutral and facially reasonable.

First Amendment attorney Mark Anfinson thinks the petitioners are correct. "If I were a betting man, I know where my money would be, and that's not on the Minnesota statute. I think that statute is of dubious constitutionality and I suspect that the reason the Supreme Court took it is because four justices agree with me."

The petitioners are the Minnesota Voters Alliance, Andrew Cilek and Susan Jeffers. Cilek is the co-founder of Minnesota Voters Alliance. Jeffers is an election judge and former candidate for Ramsey County commissioner and governor. Kaardal is joined by the Pacific Legal Foundation in Sacramento, California.

The defendants are Ramsey County Elections Manager Joe Mansky, Hennepin County Elections manager Virginia Gelms, Hennepin County Attorney Mike Freeman, Ramsey County Attorney John Choi and Secretary of State Steve Simon. The amici curiae, to date, are Cato Institute et al., American Civil Rights Union et al. and the Center for Competitive Politics.

'Recognizable political views'

It started with the 2010 election, when the 2008 recount of the Norm Coleman-Al Franken race was still a sore spot. That's when the kind of earnest enforcement of the statute at issue here began, Kaardal said. An Election Day policy said that the ban included not only campaign insignia but also issue-oriented insignia. It also included political apparel, which it said meant material promoting a group with recognizable political views. That encompassed Cilek's North Star Tea Party Patriots T-shirt and a button he wore that said "Please I.D. Me."

The suit was first brought shortly after the election, but the District Court dismissed the case. The 8th Circuit affirmed in part, upholding the dismissal of the facially unconstitutional claim, citing the government's interest in peace, order and decorum at the polls. It remanded the as-applied claim. The petitioners requested a writ of certiorari, which was denied. The District Court granted summary judgment on the as-applied claim and last February, the 8th Circuit affirmed. The current petition for certiorari is limited to a facially unconstitutional claim and concerns only the Tea Party shirt, not the Please I.D. Me button.

A split in the circuits

The petitioners noted that the Supreme Court's 1992 opinion in Burson v. Freeman endorsed a ban on campaign-related speech at the polling place. Some courts have read Burson to ban all "political" speech and the court should clarify the boundaries between election law and the First Amendment, their petition continues.

The 8th Circuit relied on the D.C. Circuit's 2001 opinion in Marlin v. D.C. Bd. of Elections and Ethics and the 5th Circuit's opinion in Schirmer v. Edwards in 1993, the petitioners point out. But the 4th and 7th Circuits hold that a complete ban on political speech cannot be reconciled with the First Amendment, they continue. The 4th Circuit in North Carolina Right to Life v. Bartlett came down in 1999, and the 7th Circuit's decision in Wisconsin Right to Life, Inc. v. Barland in 2014, following Citizen's United v. FEC from 2010.

The decision also conflicts with the Supreme Court's jurisprudence, including its 1987 opinion in Bd. of Airport Comm'rs. v. Jews for Jesus, Inc. where an ordinance banned all "First Amendment activities" at the airport, the petitioners assert. It was held unconstitutional because it created a virtual "First Amendment Free Zone" at LAX.

Favorite T-shirt

At a press conference on Nov. 14, Cilek said he voted at St. Andrews Church in Eden Prairie. "Lo and behold, when I went to vote, immediately the election judge extended an invitation for the head election judge to come over. Like, we had a serious problem here. We had somebody that had a Tea Party T-shirt on trying to vote."

After twice being told he could not vote unless he took off his t-shirt, Cilek said, "That's when the media got involved. And here we are seven years later, going to the United States Supreme Court."

Cilek told Minnesota Lawyer he wore the T-shirt because it's his favorite shirt and he likes to wear it. He also said, "This is an important free speech/First Amendment case. Several states have had issues with similar statutes. This has been in dispute for a long time. I'm grateful the Supreme Court is going to weigh in on this."

He also said it would be "fantastic" if the case was resolved but he believes the respondents have "dug in their heels" and "want to protect this ridiculous policy. I ask myself, 'Why would they fight this?' I think people are interested in their careers. They don't want to be seen as giving in.

“If you showed 20 election judges various logos and T-shirts and asked them if they were allowed under the statute, you’d get 20 different answers,” Cilek said.

Kaardal agrees that it would be fantastic if the case settled. “I would hope we could agree, we should welcome voters and accept them as they are. If you want calm (voting practices), we need to get together across the table and do what’s reasonable. But the secretary of state and the election managers don’t want to do that.”

‘Strong medicine’

The respondents say in their brief in opposition to the cert petition that the statute is a reasonable and viewpoint-neutral regulation of speech in a nonpublic forum. They also say that it does not involve the creation of a “speech-free zone,” nor does it involve a statute with substantial overbreadth. The overbreadth doctrine is “strong medicine” which courts use sparingly and as a last resort, the brief says.

Because a polling place is a nonpublic forum, the statute is subject only to a reasonableness test, respondents argue. The petitioners say the statute must pass strict scrutiny, whether or not the public forum designation is applied.

The law’s application to protected speech must be “substantial,” respondents further assert. The petitioners must demonstrate from the text of a statute and from actual fact that a substantial number of instances exist in which the statute cannot be applied constitutionally.

Respondents also argue that the petitioners are “manufacturing” a circuit court split or a conflict with Citizens United v. FEC. The respondents distinguish the cases from the 4th and 7th circuits upon which the petitioners rely because they concerned campaign finance, and Citizens United concerned the general public dialogue around an election and was not limited to the interior of the polling place.

Potentially disruptive activity

Daniel Rogan of the Office of the Hennepin County Attorney said he was surprised that the Supreme Court took the case and that it had been relisted four times. Rogan represents Freeman and Gelms. The Ramsey County Attorney represents Choi and Mansky, and the attorney general’s office represents Simon.

The question is whether a law that has been in place since 1893, that is a reasonable restriction on the polling place and designed to allow voting free of political influence should be invalidated, Rogan said. It governs activity that is potentially disruptive, he said. “‘The Please I.D. Me’ button was designed to get people to do something the law didn’t require,” he noted. Rogan is untroubled by the potential difficulty of drawing the correct line between what is prohibited and what is not. “The statute and policy have been around for more than 100 years, we haven’t had any issues. Election judges can determine what is political material. The Tea Party was a political organization that had recognizable views.”

Rogan continued, “This is a clash between the petitioners’ view of the breadth of the First Amendment and what we believe is the government’s role in protecting the right to vote. We’ve fought for this before and prevailed,” he said.