Wearing Political Messages at the Polls in Minnesota

Minnesota Majority v. Mansky
(Joan N. Ericksen, D. Minn. 0:10-cv-4401)

On the Thursday before a general election, a federal complaint challenged proscriptions on wearing Tea Party shirts and "Please I.D. Me" buttons at the polls. On the following day, the plaintiffs filed a motion for a temporary restraining order. The district judge heard the case on Monday morning and denied immediate relief. Following nearly five years of additional litigation, including an appeal, the judge granted the defendants summary judgment, finding the proscriptions justified as promoting decorum at the polls. The court of appeals agreed that it was reasonable to ban political apparel to ensure a neutral, influence-free polling place, but the Supreme Court decided that the proscription on speech relating to issues not actually on the ballot was too broad.

Subject: Polling-place activities. *Topics:* Campaign materials; matters for state courts; news media; attorney fees.

At 4:55 p.m., five days before the 2010 general election, four organizations, a county election judge, and five other Minnesota voters filed a federal complaint in the District of Minnesota against Minnesota's secretary of state and election officials for the counties including Minneapolis and St. Paul, challenging a prohibition on wearing Tea Party shirts or "Please I.D. Me" buttons at the polls.[1] At approximately 3:00 p.m. on Friday, the following day, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.[2]

Judge Joan N. Ericksen heard the case in a crowded courtroom on Monday, November 1, and denied immediate relief.[3] "Plaintiffs have not met their burden of demonstrating that the Court would likely find in their favor on the abstention issue" established by *Railroad Commission v. Pullman Co.* and

1. Complaint, Minn. Majority v. Mansky, No. 0:10-cv-4401 (D. Minn. Oct. 28, 2010), D.E. 1; Minn. Voters Alliance v. Mansky, 585 U.S. ___, ___, 138 S. Ct. 1876, 1884 (2018); Interview with Hon. Joan N. Ericksen, Sept. 15, 2015; *see* Mike Kaszuba & James Walsh, *Voter Fraud Debate Escalates Loudly*, Minneapolis Star Trib., Oct. 29, 2010, at 5B.

Tim Reagan interviewed Judge Ericksen for this report by telephone.

2. Motion, *Minn. Majority*, No. 0:10-cv-4401 (D. Minn. Oct. 29, 2010), D.E. 2; Interview with Hon. Joan N. Ericksen, Sept. 15, 2015.

3. Opinion at 4, *Minn. Majority*, No. 0:10-cv-4401 (D. Minn. Nov. 1, 2010), D.E. 35 [hereinafter Nov. 1, 2010, Opinion], 2010 WL 4450798; Minutes, *id.* (Nov. 1, 2010), D.E. 34; *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1884; Minn. Majority v. Mansky, 708 F.3d 1051, 1055 (8th Cir. 2013); Minn. Majority v. Mansky, 789 F. Supp. 2d 1112, 1117; Interview with Hon. Joan N. Ericksen, Sept. 15, 2015 (noting also that the judge ruled from the bench and then filed an opinion at approximately 2:00 p.m.); *see* James Walsh & Mike Kaszuba, *Judge Rejects Appeal for Election Gear*, Minneapolis Star Trib., Nov. 2, 2010, at 3B.

Younger v. Harris.[4] Moreover, "prohibiting the buttons and apparel is reasonably related to the legitimate state interest of maintaining peace, order, and decorum at the polls."[5]

On election day,

> At least three [members of a plaintiff organization] were affected by the [policy at issue]. One was asked to cover or remove his t-shirt. Another who refused to cover or remove his button had his name and address recorded. Yet another who was wearing both a t-shirt and a button was delayed several hours before voting.[6]

Judge Ericksen dismissed an amended complaint on April 29, 2011.[7] "Minnesota's strong interest in creating a neutral zone where individuals can vote free from external influence is reasonably furthered by restricting the expression of political views within the narrow confines of the polling place."[8]

On March 6, 2013, the court of appeals substantially affirmed Judge Ericksen's decision, except that the court of appeals determined that Judge Ericksen considered matters outside of the pleadings in ruling on a motion to dismiss the complaint and remanded the case for summary-judgment consideration of the plaintiffs' as-applied First Amendment challenge.[9]

On remand, Judge Ericksen granted Minnesota's secretary of state summary judgment as to the buttons on October 15, 2014:

> The undisputed evidence before the Court . . . is both that Plaintiff Election Integrity Watch intended that their "Please I.D. Me" buttons be used as part of an orchestrated effort to falsely intimate to voters in line at the polls that photo identification is required in order to vote in Minnesota, and that Plaintiff Election Integrity Watch—whose name, website, and phone number are featured prominently on the buttons—is connected to a campaign that aims to change state and local laws such that voters would be required

4. Nov. 1, 2010, Opinion, *supra* note 3, at 4; *see id.* at 1, 3 (noting that the three-hour hearing began at 8:45 a.m.); *see also* Younger v. Harris, 401 U.S. 37 (1971) (determining that the federal courts should not enjoin a criminal prosecution for violation of a statute that may violate the First Amendment absent a showing of bad faith, because the state courts can adjudicate the constitutional claim); *id.* at 54 ("the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it"); R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941) (holding that if resolution of an uncertain state-law matter might moot a federal constitutional question, "In the absence of any showing that . . . methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.").

5. Nov. 1, 2010, Opinion, *supra* note 3, at 6 (quotation alterations omitted).

6. *Minn. Majority*, 708 F.3d at 1055; *see Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1884.

7. *Minn. Majority*, 789 F. Supp. 2d 1112; *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1884; *Minn. Majority*, 708 F.3d at 1055; *see* Amended Complaint, *Minn. Majority*, No. 0:10-cv-4401 (D. Minn. Nov. 18, 2010), D.E. 42.

8. *Minn. Majority*, 789 F. Supp. 2d at 1133.

9. *Minn. Majority*, 708 F.3d 1051, *cert. denied*, 571 U.S. ___, 134 S. Ct. 824 (2013); *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1884–85.

> to present photo identification at the polls. The Plaintiffs offer nothing in the way of evidence or argument to counter the obvious conclusion that flows from these facts: that precluding the Plaintiffs from wearing these buttons in the polling place—whether a voter identification measure is on the ballot or not—is rationally related to the state's interests in protecting voters from confusion and undue influence and in preserving the decorum of the polls and the integrity of elections.[10]

As to the shirts, however, the secretary did not present undisputed facts establishing that banning Tea Party apparel at polls would "maintain[] the decorum of the polls, preserv[e] the integrity of elections, and/or protect[] voters from confusion and undue influence."[11]

Because of a better factual record presented by the county election officials, Judge Ericksen granted them summary judgment on March 23, 2015, as to the Tea Party apparel proscriptions.[12] The county defendants established that the Tea Party apparel at issue unquestionably conveyed political messages that the state had a legitimate interest in protecting voters from at the polls.[13]

Appeals were heard on October 20, 2016, at the University of Minnesota Law School.[14] On February 28, 2017, the court of appeals affirmed the summary judgment, finding it reasonable to ban Tea Party apparel and all other political material to ensure a neutral, influence-free polling place.[15]

The Supreme Court decided on June 14, 2018, that Minnesota's apparel proscription went too far.[16]

> A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. . . .
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> . . .
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> [W]e see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Brief for Respondents 43. Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legisla-

10. Minn. Majority v. Mansky, 62 F. Supp. 3d 870, 876–77 (D. Minn. 2014).

11. *Id.* at 878–79.

12. Opinion, *Minn. Majority*, No. 0:10-cv-4401 (D. Minn. Mar. 23, 2015), D.E. 167.

13. *Id.* at 21.

14. Docket Sheet, Minn. Majority v. Mansky, No. 15-1741 (8th Cir. Apr. 13, 2015) (secretary's appeal); Docket Sheet, Minn. Majority v. Mansky, No. 15-1682 (8th Cir. Apr. 2, 2015) (plaintiffs' appeal); Oral Argument, *id.* (8th Cir. Oct. 20, 2016), media-oa.ca8.uscourts.gov/OAaudio/2016/10/151682.mp3 (audio recording).

15. Minn. Majority v. Mansky, 849 F.3d 749 (8th Cir. 2017); *see* Minn. Voters Alliance v. Mansky, 585 U.S. ___, ___, 138 S. Ct. 1876, 1885 (2018).

16. *Minn. Voters Alliance*, 585 U.S. ___, 138 S. Ct. 1876; *see* Minn. Voters Alliance v. Mansky, 898 F.3d 818 (8th Cir. 2018) (reversing the district court's grant of summary judgment for the defendants); *see also* Robert Barnes, *High Court Says Minnesota Ban on Political Apparel at Polls Is Too Broad*, Wash. Post, June 15, 2018, at A3; Adam Liptak, *Justices Say Law Barring Political Attire Is Too Broad*, N.Y. Times, June 15, 2018, at A11.

> tion. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.
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> . . . The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.
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> . . .
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> But the State must draw a reasonable line. . . .
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> [T]he statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive. . . .
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> . . .
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> A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. . . .
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> . . .
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> That is not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms.[17]

On January 8, 2019, the court of appeals awarded plaintiffs a total of $982,028.53 in attorney fees and costs.[18]

17. *Minn. Voters Alliance*, 585 U.S. at ___, 138 S. Ct. at 1886–89, 1891.

18. Order, *Minn. Majority*, No. 15-1682 (8th Cir. Jan. 8, 2019).