Freedom of Speech in the United States

eighth edition

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This update summarizes the free speech decisions issued by the U.S. Supreme Court during the 2017–2018 term. The complete text of this update and a library of landmark free speech decisions can be found on the web site for the book:

http://www.tedford-herbeck-free-speech.com

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In recent years, the Court has agreed to hear oral arguments in about 70 cases, a small fraction of the 7,000 petitions for review it receives each term, so it is significant that five of the 2017–2018 cases dealt with freedom of speech. Since John Roberts became chief justice in 2005, the Supreme Court has dramatically expanded the reach of the First Amendment and struck down a variety of statutes that encroached on the freedom of speech. In his role as chief

justice, Roberts either writes the majority opinion in any case where he votes with the majority or assigns it to another justice in the majority. An analysis conducted by FiveThirtyEight, a website that conducts political analyses, found that Roberts has authored "34 percent of the free speech decisions the court has handed down since he joined its ranks, and 14 percent of his majority opinions were devoted to the topic." Of the 38 Supreme Court cases related to free speech that were decided between 2005 and 2016, Justice Roberts was in the minority in only a single case. To many commentators, this record suggests Chief Justice Roberts views freedom of speech as his special legacy.

Chapter 3: Political Heresy: Sedition in the United States Since 1917

U.S. Supreme Court

Case: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 38 S.Ct. 1719, 2018 U.S. LEXIS 3386 (June 4, 2018); reversing *Craig and Mullins v. Masterpiece Cakeshop,* 370 P.3d 272, 2015 Colo. App. LEXIS 1217 (Colorado Court of Appeals, August 13, 2015).

Subject: Application of Colorado's public accommodations law compelling a baker to create a wedding cake celebrating a same-sex marriage violates the Free Exercise Clause of the First Amendment.

Summary of Decision: Charlie Craig and David Mullins planned to get married in 2012 in Massachusetts, a state that allowed same-sex marriage. They wanted to celebrate with their friends when they returned to their home in Colorado, so they went to the Masterpiece Cakeshop and ordered a cake. Jack Phillips, a devout Christian and the owner of the bakery, informed the couple that he did not "create" wedding cakes for same-sex weddings because it would conflict with his religious beliefs. Craig and Mullins complained to the Colorado Civil Rights Commission, which sided in their favor and ruled that Phillips had violated the Colorado Anti-Discrimination Act (CADA). If he baked cakes for opposite-sex weddings, the Commission held, Phillips had to do the same for same-sex weddings. When the Colorado Court of Appeals upheld the Commission's ruling, Phillips sought relief from the U.S. Supreme Court.

The petition for a writ of certiorari submitted by Masterpiece Cakeshop framed the issues as follows: "Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clause of the First Amendment." When the Supreme Court granted the petition on June 26, 2017, more than 100 friend-of-the court (or "amicus curiae") briefs were filed. Much of the scholarly debate prior to the Supreme Court hearing focused on whether forcing the baker to create a cake celebrating same-sex marriage constituted a form of compelled speech. For example, a nonprofit organization called the First Amendment Lawyers Association argued that custom wedding cakes are a form of creative expression protected by the First Amendment; thus, forcing a baker to create a cake for a same-sex wedding would constitute a form of compelled speech. Echoing this sentiment, a brief written by David Langdon, an Ohio attorney, and signed by 34 law professors, claimed that "[the Colorado] Court has refused to allow an unquestionably legitimate antidiscrimination law to be applied in a way that would seriously intrude on the freedom of expression." This brief cited the 1943 landmark decision in *West Virginia v. Barnette,* in which Justice Robert Jackson famously declared that "no official, high or petty, can prescribe what

shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

When the decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* was finally announced, the Supreme Court avoided the free speech question. In a 7-to-2 ruling, the justices handed a narrow victory to the cakeshop owner on free exercise grounds. Writing for the majority, Justice Anthony Kennedy affirmed the constitutionality of nondiscrimination statutes such as CADA, holding that these statutes applied to LGBTQ people. He went on, however, to note that the Colorado Civil Rights Commission violated the Free Exercise Clause because it demonstrated a "clear and impermissible hostility" towards the "sincere religious beliefs" that motivated Phillips to refuse to bake the wedding cake. This "hostility," he argued, was evident in public comments made by members of the Commission during public hearings on the case and in the Commission's treatment of cases in which other bakers had refused to make cakes including antigay messages. Finding that these comments constituted clear evidence of an antireligious animus, Justice Kennedy concluded that "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." The majority opinion set aside the Commission's order, but ended with an important qualifier, "the outcome of cases like this in other circumstances must await further elaboration in the courts."

In her dissenting opinion, Justice Ruth Bader Ginsburg (joined by Justice Sonia Sotomayor) agreed with the majority's claim that business owners cannot deny "protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." Unlike the majority decision, however, the dissent found that the Colorado Civil Rights Commission had not shown hostility to religion. Comments by one or two members of the commission during hearings, Justice Ginsburg concluded, did not overcome the baker's refusal to create a wedding cake for a gay couple in violation of the CADA.

Although free speech was not discussed in either the majority or dissenting opinion, this theme was taken up in a concurring opinion by Justice Clarence Thomas (joined by Justice Neil Gorsuch). "While Phillips rightly prevails on his free-exercise claim," Justice Thomas said, he felt compelled to "write separately to address his free-speech claim." He argued that Phillips was an artist and that wedding cakes communicate a message. Because the cake is clearly expressive, Justice Thomas continued, "Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny." He did not address whether the Colorado law could withstand a strict scrutiny analysis, but he was not impressed by the state's claim that it could punish protected speech that some members of the community might find offensive. "It is also hard to see," Justice Thomas concluded, "how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about 'dignity' and 'stigma' did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, *Virginia v. Black;* conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County v. Nationalist Movement;* or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to 'Bury the niggers,' *Brandenburg v. Ohio.*" Although the decision in *Masterpiece Cake* "vindicated Phillips' right to free exercise," Justice Thomas warned, "in future cases, the freedom of speech could be essential to preventing" the law from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy."

U.S. Supreme Court

Case: *Janus v. American Federation of State, County, and Municipal Employees,* Council 31, 138 S.Ct. 2448, 2018 U.S. LEXIS 4028 (June 27, 2018); reversing and remanding *Janus v. American Federation of State, County, and Municipal Employees,* Council 31, 851 F.3d 746, 2017 U.S. App. LEXIS 5058 (7th Circuit, March 21, 2017).

Subject: Requiring public employees who do not belong to a union to pay agency fees constitutes a form of compelled speech and violates the First Amendment.

Summary of Decision: Mark Janus, who works as a child support specialist for the Illinois Department of Healthcare and Family Services, is not a member of the local branch of the American Federation of State, County, and Municipal Employees (AFSCME) that bargains for his unit. Under the Supreme Court decision in *Abood v. Detroit Board of Education* (1977), nonmembers such as Janus must pay the union a fee to cover the cost of collective bargaining. Charging a "fair share" or "agency" fee was permissible, the Court reasoned in *Abood,* because nonmembers benefited from the union's effort to advocate for salaries, pensions, and benefits for government employees. Absent the fee, nonmembers would be the equivalent of "free riders," as they would benefit from union representation without contributing to the union's collective bargaining expenses.

This was the third challenge to agency fees in recent years. In *Harris v. Illinois* (2014), the Supreme Court held that home health aides, who worked for families but were paid by the state, were not government employees. The Supreme Court agreed to hear another case involving California public school teachers two years later, but Justice Antonin Scalia died before the decision in *Friedrichs v. California Teacher Association* (2016) was announced, leaving the eight-member Court evenly divided on the issue. This split affirmed the lower court decision that had applied *Abood* and upheld agency fees. Given this deadlock, Court watchers and constitutional scholars were not surprised when the Supreme Court granted certiorari in another agency fee case shortly after the Senate confirmed Justice Neil Gorsuch.

In a 5-to-4 decision, the Supreme Court held that assessing agency fees "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." Writing for the majority, Justice Samuel Alito dismissed the *Abood* decision. "*Abood* was poorly reasoned," he asserted. "It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled."

Having dispensed with the *Abood* precedent, Justice Alito moved to the First Amendment question. Most free speech decisions, he noted, deal with restrictions on what can be said, as opposed to measures that compel speech. It was nonetheless clear to Justice Alito that "Compelling individuals to mouth support for views they find objectionable violates . . . [a] cardinal constitutional command, and in most contexts, any such effort would be universally condemned." The agency fees were particularly offensive, he continued, because they required people who did not belong to the union to subsidize the speech of union members.

To assess the constitutionality of agency fees, Justice Alito applied a "strict scrutiny" test, which holds that a restriction must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." According to Justice

Alito, neither of the state interests offered in *Abood,* maintaining "labor peace" and preventing "free riders," was sufficient, as there were other, less restrictive means to achieve those ends. He also dismissed more recently expressed state interests such as stronger bargaining units and workforce efficiency, reasoning that unions could be effective advocates without agency fees.

Finally, Justice Alito acknowledged that the *Janus* decision "may cause unions to experience unpleasant transition costs in the short term, and may require unions to make adjustments in order to attract and retain members." These effects were more than offset, however, by the "many billions of dollars" that "have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely." The majority opinion held that public employee unions, such as AFSCME, cannot charge agency fees to nonmembers unless the nonmembers agree to pay them.

Justice Elena Kagan penned a spirited dissenting opinion that was joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor. "There are no special justifications for reversing *Abood*," Justice Kagan lamented. "It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched in both the law and the real world. More than 20 states have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees." She argued that the *Abood* decision had deftly balanced competing interests for four decades. "On the one hand," she explained, "employees could be required to pay fees to support the union in 'collective bargaining, contract administration and grievance administration,'" but "could not be compelled to fund the union's political and ideological activities. Outside the collective-bargaining sphere, the Court determined, an employee's First Amendment rights defeated any conflicting government interest." Disrupting this balance, Justice Kagan warned, could have unforeseen consequences. "The majority undoes bargains reached all over the country," she continued. "It prevents the parties from fulfilling other commitments they have made based on those agreements. It forces the parties—immediately—to renegotiate once-settled terms and create new tradeoffs. It does so knowing that many of the parties will have to revise (or redo) multiple contracts simultaneously. It does so knowing that these renegotiations will occur in an environment of legal uncertainty, as state governments scramble to enact new labor legislation. It does so with no real clue of what will happen next—of how its actions will alter public-sector labor relations. It does so even though the government services accepted—policing, firefighting, teaching, transportation, sanitation (and more)—affect the quality of life of tens of millions of Americans."

Chapter 8: Commercial Speech

U.S. Supreme Court

Case: *National Institute of Family and Life Advocates v. Becerra,* 138 S.Ct. 2361, 2018 U.S. LEXIS 4025 (June 26, 2018); reversing and remanding *National Institute of Family and Life Advocates v. Becerra,* 839 F.3d 823, 2016 U.S. App. LEXIS 18515 (9th Circuit, October 14, 2016).

Subject: A California law requiring crisis pregnancy centers to include certain information in their advertisements violates the First Amendment.

Summary of Decision: In response to the increasing number of crisis pregnancy centers sponsored by nonprofit groups that oppose abortion, California legislators adopted the

Reproductive Freedom Accountability, Comprehensive Care, and Transparency (FACT) Act in 2015. The law recognized two distinctly different types of centers and imposed different requirements, according to whether a center was licensed to provide medical services. If a pregnancy center is licensed, it must inform patients that they can obtain free or low-cost abortions and provide contact information for the county social service agency that maintains a list of such providers. If the pregnancy center is not licensed, its advertisements must include disclaimers in multiple languages that clearly state that the center does not provide medical services. After Governor Jerry Brown signed the FACT Act into law, the National Institute of Family and Life Advocates went to court and asked a federal judge to delay implementation of the law until it could be challenged. By design, the Institute argued, the law violated pregnancy centers' free speech rights by requiring the licensed centers to advertise the availability of abortions; moreover, requiring the unlicensed centers to include disclosures would undercut their anti-abortion messages.

Both a federal judge and the Ninth Circuit Court of Appeals refused the Institute's request on the grounds that it had not proven that it was likely to prevail on the merits of the challenge. The Supreme Court agreed to review the case in the Fall of 2017. On a 5-to-4 vote, the justices reversed the Ninth Court decision and held that the pregnancy centers "are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment."

Writing for the majority, Justice Clarence Thomas distinguished between the restrictions on the two types of pregnancy centers.

The restrictions on the licensed facilities, which required the pregnancy centers to disseminate a government-drafted notice that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women," was a content-based regulation on speech because it compelled individuals to express a particular message. As such, it was subject to a strict scrutiny analysis. Justice Thomas concluded that the FACT Act was unconstitutional for two reasons. First, the law is "wildly underinclusive" because it only applies to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services." The law does not apply to most of the community clinics in the state or to clinics that provide a full range of family-planning services. Second, "California could inform low-income women about its services 'without burdening a speaker with unwanted speech.'" For example, the state could sponsor public information campaigns or post information on public property near crisis pregnancy centers.

Justice Thomas was equally critical of the restrictions on unlicensed centers. He observed, "California has not demonstrated any justification for the unlicensed notice that is more than 'purely hypothetical.'" Even if the state elaborated such an interest, Justice Thomas said, the notice requirements were "burdensome." To illustrate the problem, he noted that the state had conceded that a billboard for an unlicensed facility that says "Choose Life" would have to "surround that two-word statement with a 20-word statement from the government, in as many as 13 different languages." This detail "drowns out" the facility's message and "effectively rules out" the possibility of using billboards to advertise unlicensed centers. He concluded that the pregnancy centers "are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment."

The majority opinion reversed the judgment of the Ninth Circuit Court of Appeals and remanded the case to the lower court for further proceedings.

In a brief concurring opinion, Justice Anthony Kennedy (joined by Chief Justice John Roberts, as well as Justices Samuel Alito and Neil Gorsuch) complained that the FACT Act "is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression."

Justice Stephen Breyer penned a dissenting opinion that was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. He felt both sections of the FACT Act, the one dealing with licensed facilities and the one dealing with unlicensed facilities, would likely pass constitutional scrutiny. With respect to the licensed facilities, he thought the issue was clear. "If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services," he asked, "why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context." So long as the law is consistently applied, Justice Breyer concluded, "What is sauce for the goose is normally sauce for the gander."

Turning to the notice requirements for unlicensed centers, Justice Breyer argued there was "no basis" for the majority's claim that the state's interest was hypothetical. Moreover, the law "did not distinguish between facilities that favor pro-life and those that favor pro-choice points of view." Finally, he said, "unduly burdensome disclosure requirements might offend the First Amendment." It was up to the clinics, however, to make these arguments once the state enforced the law.

Chapter 10: Special Problems of a Free Press

U.S. Supreme Court

Case: *Lozman v. City of Riviera Beach, Florida,* 138 S. Ct. 1945, 2018 U.S. LEXIS 3691 (June 18, 2018); vacating and remanding *Lozman v. City of Riviera Beach,* 681 Fed. Appx. 746, 2017 U.S. App. LEXIS 3577 (11th Circuit, February 28, 2017).

Subject: The existence of probable cause for Lozman's arrest for disrupting a city council meeting does not bar a retaliatory arrest claim brought under the First Amendment.

Summary of Decision: In early 2006, Fane Lozman towed his "floating home" to a marina owned by the city of Riviera Beach, Florida, where he had leased a boat slip. Shortly after establishing his residency in the community, Lozman learned that the city planned to use eminent domain to seize thousands of waterfront homes as part of a proposed $2.4-billion private redevelopment plan for the marina and the surrounding area. Lozman was opposed to both the plan and the perceived corruption in local government, and regularly voiced his concerns at meetings of the Riviera Beach City Council and the Riviera Community Redevelopment Agency. In June 2006, Lozman went a step further and filed a lawsuit charging that the city council had violated Florida's Sunshine Law, thereby invalidating the city's approval of the redevelopment plan on the grounds that the city had provided insufficient public notice before approving the plan.

The city council held a closed-door meeting to discuss the lawsuit. A transcript of the meeting showed that one council member had suggested using the city's resources to "intimidate" Lozman and those who had sued the city, and that other council members had agreed. The city maintained, however, that the only agreement reached during the meeting

was to invest the resources necessary to defend against the lawsuits. In the years that followed, the relationship between Lozman and the city continued to deteriorate. In 2013, for example, the city tried to evict Lozman from the marina. That effort was ultimately defeated in the Supreme Court. On a 7-to-2 decision involving admiralty law, the justices ruled for Lozman, concluding his houseboat was more house than boat, and therefore not subject to federal maritime law.

The incident that led to a second trip to the U.S. Supreme Court occurred during a public meeting of the city council in November 2006, five months after the closed-door meeting. The agenda included a public comment period during which citizens could address the council for three minutes on issues related to the city. As he had done on previous occasions and would do more than 200 times in subsequent years, Lozman mounted the podium and launched into a speech on his favorite topic: corruption in Palm Beach County. The presiding officer interrupted and demanded that Lozman cease his remarks because he was not speaking about an issue related to the city. When Lozman said, "I have a right to make my public comment," the presiding officer directed a police officer on the scene to "carry him out." The police officer handcuffed Lozman and escorted him from the building. Lozman was later charged with disorderly conduct and resisting arrest. The city defended the arrest, arguing that Lozman violated the rules of procedure by discussing issues unrelated to the city and by refusing the order to suspend his speech. The state's attorney concluded that there was probable cause to arrest Lozman, but declined to press charges because a conviction was unlikely.

Lozman filed a lawsuit under Section 1983 of the U.S. Code, arguing that his arrest was retaliation for his criticism of the city council and for his lawsuit under the Sunshine Law. The jury returned a verdict for the city. The Eleventh Circuit Court of Appeals upheld the jury's verdict, reasoning that the existence of probable cause defeated Lozman's First Amendment claim of a retaliatory arrest. Lozman appealed to the Supreme Court, acknowledging that the police officer might have had probable cause, but asserting his arrest violated the First Amendment. The Supreme Court granted certiorari.

In an 8-to-1 decision, the Court concluded that a finding of probable cause did not bar Lozman's First Amendment claim. Writing for the majority, Justice Anthony Kennedy acknowledged that retaliatory arrest prosecution claims were challenging, as it was hard to draw a "causal connection between the defendant's alleged animus and the plaintiff's injury." In this case, for example, it was difficult to ascertain whether Lozman had been arrested because he violated the rules of procedure during the November 2006 meeting or because of his longstanding criticism of the council and the redevelopment plan.

Justice Kennedy set out several reasons why the probable cause argument was inappropriate in this instance. Lozman had not sued the arresting officer, but rather had argued that "the City itself retaliated against him pursuant to an 'official municipal policy' of intimidation." Justice Kennedy called such a policy "a particularly troubling and potent form of retaliation," but said Lozman's claim would "require objective evidence of a policy motivated by retaliation to survive summary judgment." Finally, Justice Kennedy emphasized that the Supreme Court has recognized the "right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights." Consequently, Justice Kennedy concluded, "Lozman's speech is high in the hierarchy of First Amendment values."

The justices remanded the case to the lower court to determine "whether any reasonable juror could find that the City actually formed a retaliatory policy" against Lozman, "whether

any reasonable juror could find that the November 2006 arrest constituted an official act by the City," and whether "City has proved that it would have arrested Lozman regardless of any retaliatory animus." The outcome was widely regarded as a victory for Lozman, as it allows him to continue his case in a lower court applying more favorable rules. The outcome may also benefit other parties challenging retaliatory arrests on First Amendment grounds, but the holding is limited because of the specialized facts in the *Lozman* case.

Justice Clarence Thomas filed a dissenting opinion in which he scolded the majority for failing to determine "whether the existence of probable cause defeats a First Amendment claim for retaliatory arrest." Unlike the majority, Justice Thomas asserted that "plaintiffs bringing a First Amendment retaliatory-arrest claim must plead and prove the absence of probable cause." He justified this stance on two grounds. First, he argued that courts had historically emphasized the "importance of probable cause" when assessing arrests for false imprisonment, malicious prosecution, and malicious arrest. Second, absent the requirement to prove probable cause, plaintiffs could use the threat of retaliatory-arrest lawsuits to harass police officers. Because Lozman had conceded there had been probable cause for his arrest, Justice Thomas would have upheld the lower courts and dismissed the lawsuit.

Lozman v. City of Riviera Beach, Florida is included in Chapter 10, "Special Problems of a Free Press," because several media organizations have reported that journalists and photographers have been arrested for engaging in investigative journalism and taking photographs. Although there have been only a few incidents, the organizations worry that authorities might use retaliatory arrests to silence critics. One way to prevent this from happening would be for the Supreme Court to hold that probable cause does not serve as an absolute bar to First Amendment retaliation claims.

Chapter 11: Constraints of Time, Place, and Manner

U.S. Supreme Court

Case: *Minnesota Voters Alliance v. Mansky,* 138 S. Ct. 1876, 2018 U.S. LEXIS 3685 (June 14, 2018); reversing and remanding *Minnesota Majority v. Mansky,* 849 F.3d 749, 2017 U.S. App. LEXIS 3585 (8th Circuit, February 28, 2017).

Subject: Minnesota's law prohibiting political apparel at polling places violates the Free Speech Clause of the First Amendment.

Summary of Decision: In 2010, Andrew Cilek went to his polling place in Hennepin County, Minnesota, wearing a T-shirt bearing a small Tea Party logo, an image of the Gadsden Flag (depicting a coiled rattlesnake and the phrase "Don't Tread on Me"), and a button that said "Please I.D. Me." Because Minnesota state law prohibited individuals, including voters, from wearing a "political badge, political button, or other political insignia" inside a polling place on Election Day, an election worker informed Cilek that he would either have to remove the shirt or cover the political messages. Cilek refused to comply, but when he persisted, he was allowed to vote. The election worker did photograph Cilek and record his name and address for potential prosecution.

After the election, Cilek and the Minnesota Voters Alliance challenged the Minnesota law as an unconstitutional restriction on the freedom of speech guaranteed by the First Amendment. The U.S. Court of Appeals upheld the law, but on a 7-to-2 vote, the Supreme Court held that the law was unconstitutional.

Writing for the majority, Chief Justice John Roberts built on the public forum doctrine, which recognizes three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forms. "A polling place in Minnesota," the chief justice continued, "qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is 'a special enclave, subject to greater restriction.'" As such, the standard for assessing the law is whether "Minnesota's ban on political apparel is 'reasonable in light of the purpose served by the forum': voting."

Chief Justice Roberts readily acknowledged that Minnesota had a legitimate interest in maintaining "peace, order, and decorum" in polling places and could therefore restrict political badges, buttons, or insignia "so that voters may focus on the important decisions immediately at hand." The law must, however, draw a "reasonable line" for "distinguishing what may come in from what must stay out" of the polling place. The Minnesota law was fatally flawed, the chief justice continued, because it failed to define the term "political." "It can encompass anything 'of or relating to government, a government, or the conduct of governmental affairs,'" he said, "or anything 'of, relating to, or dealing with the structure or affairs of government, politics, or the state.'"

Absent a clear definition, it was impossible to determine the specific advocacy that the law prohibited. To illustrate the problem, the chief justice offered a range of examples: a shirt declaring "All Lives Matter," a shirt bearing the name of the National Rifle Association, and a shirt displaying a rainbow flag. Depending on the breadth of the definition used to assess such expression, a button or T-shirt merely imploring others to "Vote!" might be suppressed on the grounds that it was "political."

This did not mean, Chief Justice Roberts added, that the state had "an impossible task." In *Burson v. Freeman* (1992), the Supreme Court had upheld the constitutionality of "campaign free zones" around polling places. Many states also restrict displays (including apparel) near polling places. The difference, according to Justice Roberts, was that those laws employed a "more discernible approach than the one that Minnesota has offered here."

In a dissenting opinion, Justice Sonia Sotomayor (joined by Justice Stephen Breyer) argued that the case should be remanded to the Minnesota courts to determine whether the political apparel ban is "capable of reasoned application." The dissenters would have preserved the "states' discretion to determine what measures are appropriate to further important interests in maintaining order and decorum, preventing confusion and intimidation, and protecting the integrity of the voting process."