First Amendment — Freedom of Speech — Facial Challenges — Minnesota Voters Alliance v. Mansky

In *Minnesota Voters Alliance v. Mansky*,[1] the Supreme Court held that a Minnesota law that banned "political" apparel from being worn in polling places on Election Day facially violated the First Amendment because the term "political" was too indeterminate in context.[2] It did so despite the fact that the lower court had found the law valid as applied to the petitioner,[3] a decision the petitioner did not challenge, and also despite the fact that the Roberts Court has generally expressed skepticism toward facial rather than as-applied challenges.[4] Troublingly, the Court failed to engage directly with the question of *why* a facial challenge was appropriate in this case, and actively avoided mentioning the doctrine upon which its decision seemed to rest: vagueness. By glossing over the basis for its decision, the Court avoided grappling with the ways in which *Mansky* is in tension with recent vagueness cases, leaving future litigants unclear about whether there is renewed leeway to bring facial challenges to certain categories of vague statutes.

This case involved a century-old statute limiting campaigning at and around the ballot box.[5] Petitioners challenged only one provision of that law, the so-called "political apparel ban,"[6] which stated 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."[7] This ban was enforced by "election judges," temporary government employees installed at polling places on Election Day and imbued with the power "to decide whether a particular item falls within the ban."[8] If a person appeared at the polls wearing a forbidden item, the election judge was supposed to ask her to cover or remove it; if the person refused, the election judge was then required to inform her that the incident would be "recorded and referred to appropriate authorities."[9] The offending party was still

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[1] 138 S. Ct. 1876 (2018).

[2] *Id.* at 1888.

[3] *See id.* at 1885.

[4] Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 773 (2009) ("One recurring theme of the Roberts Court's jurisprudence to date is its resistance to facial constitutional challenges and preference for as-applied litigation.").

[5] *See Mansky*, 138 S. Ct. at 1897 (Sotomayor, J., dissenting) (stating the ban was enacted in the "late 19th century").

[6] *Id.* at 1883 (majority opinion).

[7] MINN. STAT. § 211B.11(1) (2009).

[8] *Mansky*, 138 S. Ct. at 1883. These judges were often private citizens who held the position solely for Election Day. Brief of *Amici Curiae* ACLU and ACLU of Minnesota in Support of Petitioners at 14, *Mansky*, 138 S. Ct. 1876 (No. 16-1435).

[9] *Mansky*, 138 S. Ct. at 1883 (quoting Petition for a Writ of Certiorari app. I at 2, *Mansky*, 138 S. Ct. 1876 (No. 16-1435)).

allowed to vote, but could later be required to appear for an administrative hearing and could suffer a reprimand or civil penalty.[10]

In 2010, a group called the "Election Integrity Watch" (EIW) challenged the political apparel ban on First Amendment grounds.[11] Their suit, filed just five days before the upcoming general election, requested a temporary restraining order and preliminary injunction, which the district court denied.[12] The lawsuit nonetheless prompted local officials to issue an "Election Day Policy" to clarify the contours of the ban for election judges.[13] The Policy specified the types of apparel covered, including, but not limited to, "[a]ny item in support of or opposition to a ballot question at any election," "[i]ssue oriented material designed to influence or impact voting," and "[m]aterial promoting a group with recognizable political views."[14] On Election Day, various members of the EIW ran afoul of the ban, including several who were asked to cover their apparel.[15] Named petitioner Andrew Cilek, wearing a "Please I.D. Me" button and a "Don't Tread on Me" shirt with the logo of the Tea Party Patriots, "was twice turned away from the polls altogether, then finally permitted to vote after an election judge recorded his information."[16]

After the election, the district court dismissed the petitioners' claims, which challenged the law both on its face and as applied to them.[17] The Eighth Circuit affirmed the dismissal of the facial challenge,[18] finding the Minnesota law constitutional by likening it[19] to a Tennessee statute the Supreme Court had upheld against a First Amendment challenge in *Burson v. Freeman*.[20] The Minnesota Voters Alliance (MVA), Cilek, and election judge Susan Jeffers, all members of EIW, petitioned for review of the facial challenge and the Court granted certiorari.[21]

In a 7–2 vote, the Court found the law unconstitutional. Writing for the Court, Chief Justice Roberts[22] noted that because the law was tied to a specific, government-controlled location, it implicated the Court's

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[10] *Id.*

[11] *Id.* at 1884.

[12] Minn. Majority v. Mansky, No. 10-4401, 2010 WL 4450798, at *1, *4 (D. Minn. Nov. 1, 2010).

[13] *Mansky*, 138 S. Ct. at 1884.

[14] *Id.* (quoting Petition for a Writ of Certiorari, *supra* note 9, app. I at 2).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Minn. Majority v. Mansky, 708 F.3d 1051, 1058 (8th Cir. 2013).

[19] *Id.* at 1056–57.

[20] 504 U.S. 191 (1992). The law in *Burson* restricted campaign-related speech within 100 feet of a polling place, *id.* at 197, and passed strict scrutiny, *id.* at 211.

[21] *Mansky*, 138 S. Ct. at 1885. The court of appeals initially reversed the dismissal of the as-applied challenge; on remand the district court again found for the State and the court of appeals then affirmed. *Id.* at 1884–85. The petitioners did not seek certiorari on that decision. *See id.*

[22] Chief Justice Roberts was joined by Justices Kennedy, Thomas, Ginsburg, Alito, Kagan, and Gorsuch.

forum-based approach to First Amendment cases.[23] This approach breaks government-controlled spaces into three categories: traditional public forums,[24] designated public forums,[25] and nonpublic forums.[26] In traditional and designated public forums, content-based speech restrictions must pass strict scrutiny, and viewpoint-based speech restrictions are "prohibited";[27] by contrast, in nonpublic forums the government is afforded far greater latitude to limit speech "as long as the regulation . . . is reasonable" in light of the forum's "intended purpose[]," and is not "an effort to suppress expression" because of disagreement over views.[28] The Court found that polling places on Election Day are nonpublic forums because they are "government-controlled property set aside for the sole purpose of voting," with strict rules about who may be present, when, and why.[29] Thus, the standard the Court applied in evaluating the Minnesota law was not strict scrutiny, but whether the restriction was "reasonable in light of the purpose served by the forum,"[30] which, in this case, was voting.[31]

To perform this evaluation, the Court began by determining if the Minnesota legislature had "pursu[ed] a permissible objective" when it passed the political apparel ban.[32] It answered in the affirmative. Like the Eighth Circuit, the Court relied heavily on *Burson*. The Court in *Burson* emphasized the history of fraud and intimidation outside of polling places, concluding that it was reasonable for a state to insist on a small campaign-free zone to protect the right to vote.[33] While the *Mansky* petitioners attempted to distinguish *Burson*, arguing that the law in that case sought to regulate actively persuading voters rather than *passively* wearing a message, the Court noted that, in fact, the law in *Burson* was expansive, covering even the "display" of campaign material.[34] More fundamentally, the Court simply did not see a reason to "reject[] Minnesota's determination that *some* forms of advocacy should be excluded from the polling place,"[35] particularly in light of how many

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[23] *Mansky*, 138 S. Ct. at 1885.

[24] Areas such as sidewalks and parks. *Id.*

[25] Areas that are not traditionally public, but have been "intentionally opened up for that purpose." *Id.* (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009)).

[26] Areas neither traditionally nor by designation public. *Id*.

[27] *Id*.

[28] *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

[29] *Id.* at 1886.

[30] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

[31] *Mansky*, 138 S. Ct. at 1886. Because the political apparel ban did not make distinctions on the basis of political affiliation, petitioners did not claim it was facially viewpoint discriminatory. *Id.*

[32] *Id.*

[33] Burson v. Freeman, 504 U.S. 191, 206–08 (1992).

[34] *Mansky*, 138 S. Ct. at 1887 (quoting *Burson*, 504 U.S. at 210).

[35] *Id.* (emphasis added).

other states have broadly similar laws.[36] The actual moment of voting "is a time for choosing, not campaigning," and it is well within a state's right to protect the sanctity and tranquility of the voting booth.[37]

While a state may limit *some* forms of apparel in the polling context, it still "must draw a reasonable line," which means "be[ing] able to articulate some sensible basis for distinguishing" between what is and is not allowed.[38] In the eyes of the majority, the Minnesota law was so indeterminate that it could not even meet this flexible standard.[39] The statute's fundamental flaw was a failure to define the word "political."[40] A literal application of the dictionary definition — "relating to, or dealing with the structure or affairs of government, politics, or the state" — would sweep so broadly that even a "Vote!" sticker could conceivably fall within the ban.[41] The State argued that the statute relied on a narrower construction: the ban applied to "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place."[42] Nevertheless, it also indicated "political" reached further than purely campaign-related messages.[43] It offered up the 2010 Election Day Policy as the "authoritative guidance" as to how to construe the statute.[44]

However, even the State's attempts to limit the meaning of the word "political" were insufficient for the majority. For instance, the Policy described "[i]ssue oriented material designed to influence or impact voting,"[45] where "issue" seemed to mean "any subject on which a political candidate or party has taken a stance."[46] The majority found it unreasonable to have a rule that would require an election judge to keep track of every subject a candidate had taken a position on.[47] The Court had an even greater objection to another category in the Election Day Policy: items "promoting a group with recognizable political views."[48] The

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[36] *Id.* at 1888.

[37] *Id.* at 1887.

[38] *Id.* at 1888.

[39] *Id.*

[40] *Id.*

[41] *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1401 (3d ed. 1996)).

[42] *Id.* at 1888–89 (alteration in original) (quoting Brief of Respondents at 13, *Mansky*, 138 S. Ct. 1876 (No. 16-1435)).

[43] *Id.* at 1889. This is because the statute explicitly references "campaign material" in another section, implying "political" must have a different, and broader, meaning. *Id.*

[44] *Id.*

[45] *Id.* (alteration in original) (quoting Petition for a Writ of Certiorari, *supra* note 9, app. I at 2).

[46] *Id.* at 1889. At oral argument, the State suggested *any* issue-oriented apparel could be covered by the ban as long as a candidate had raised the topic. Transcript of Oral Argument at 64–65, *Mansky*, 138 S. Ct. 1876 (No. 16-1435), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1435_2c03.pdf [https://perma.cc/7TQZ-KWAR].

[47] *Mansky*, 138 S. Ct. at 1889.

[48] *Id.* at 1890 (quoting Petition for a Writ of Certiorari, *supra* note 9, app. I at 2).

State again attempted to limit the reach of its policy by construing this category to apply only to groups with views about "issues confronting voters in a given election,"[49] but the Court still found this far too broad, pointing out that it could cover any organization that has taken a public stance on an electorally relevant issue, from the AARP to Ben & Jerry's.[50] The Court similarly dismissed Minnesota's argument that the ban applied only to apparel that promoted groups whose position a "typical observer" would be aware of[51]: given differences in election judges' backgrounds, that standard would only make "erratic application" of the law more likely.[52] Finally, the Court dismissed, in a footnote, the suggestion from both the State and the dissent that the Court should certify any question about the statute's interpretation to the Minnesota Supreme Court.[53]

While "perfect clarity" is not required in statutes regulating expression, the majority added, laws that are too indeterminate are open to abuse.[54] Minnesota's law placed huge amounts of discretion in the hands of individual judges, and while some discretion may be "necessary" in this context, it needs to be "guided by objective, workable standards."[55] Otherwise, even the most well-intentioned judges may end up applying the ban in ways that are influenced by their own politics — and inconsistent application could lead to the very kinds of "distraction and disruption" the law was intended to avoid.[56] Thus, the Court found the statute violated the Constitution.[57]

Justice Sotomayor dissented.[58] The crux of her disagreement was with the Court's decision to declare the statute unconstitutional on its face without first certifying its construction to the Minnesota Supreme Court.[59] She agreed that polling places are nonpublic forums permitting

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[49] *Id.* (quoting Brief of Respondents, *supra* note 42, at 23).

[50] *Id.*

[51] *Id.* (quoting Brief of Respondents, *supra* note 42, at 21).

[52] *Id.*

[53] *Id.* at 1891 n.7. The Court noted that certification is discretionary, the State had made no such request until late in the litigation, and neither the State nor the dissent could suggest any plausible construction that would cure the statute's constitutional infirmity. *Id.*

[54] *Id.* at 1891 (alteration omitted) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).

[55] *Id.*

[56] *Id.*

[57] *See id.* at 1891–92.

[58] Justice Sotomayor was joined by Justice Breyer.

[59] *Mansky*, 138 S. Ct. at 1893 (Sotomayor, J., dissenting). Certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court." Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997).

reasonable regulations of speech.[60] However, she rearticulated her position — formerly taken in her concurrence in *Expressions Hair Design v. Schneiderman*[61] — that when a state statute has yet to be construed by the state's highest court, certification is the preferred step.[62] Certification, she argued, "save[s] time, energy, . . . and helps build a cooperative judicial federalism."[63] She dismissed the majority's reasons for declining to certify, arguing that certification is not a use-it-or-lose-it advantage, but rather a tool of judicial economy that the Court is free to employ sua sponte,[64] and that the majority's skepticism that certification could save the statute was "'gratuitous' 'speculation,'" expressly disfavored by the Court's past precedent.[65] She also emphasized the Court's prior determination that "the 'mere fact' that petitioners 'can conceive of some impermissible applications of [the] statute is not sufficient to render it' unconstitutional."[66] Furthermore, the statute's previous hundred-year record of being unchallenged "offers some assurance that the statute has not been interpreted or applied in an unreasonable manner."[67] Thus, given what Justice Sotomayor saw as compelling reasons to certify and the lack of reasons not to, she dissented.

On its surface, the majority opinion proceeds in an orderly, logical fashion, but that superficial clarity belies the opacity of the actual basis on which the opinion rests. As the debate over certification somewhat obliquely highlights, this case centers on a facial challenge — one the Court upholds with very little comment, an odd omission in light of the Roberts Court's general preference for as-applied challenges.[68] The majority ignores the briefs' and lower courts' invitation to frame this case as one dealing with an unconstitutionally overbroad statute, instead grounding the case in the logic that the Court has used to uphold facial challenges on vagueness grounds in the past. However, it purposefully avoids saying that is what it is doing, thus avoiding confronting a conflict with its recent precedent. In doing so, it leaves unclear whether — and, if so, why — facial vagueness challenges are permitted in some

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[60] *Mansky*, 138 S. Ct. at 1894 (Sotomayor, J., dissenting). She also agreed that the State had a legitimate interest in maintaining orderly, free voting by regulating expressive apparel at the polling place. *Id.*

[61] 137 S. Ct. 1144 (2017).

[62] *Mansky*, 138 S. Ct. at 1895 (Sotomayor, J., dissenting); *see Expressions Hair Design*, 137 S. Ct. at 1156–57 (Sotomayor, J., concurring in the judgment).

[63] *Mansky*, 138 S. Ct. at 1895 (Sotomayor, J., dissenting) (first alteration in original) (quoting Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974)).

[64] *Id.*

[65] *Id.* at 1895–96 (first alteration in original) (internal quotation marks omitted) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997)).

[66] *Id.* at 1896 (alteration omitted) (quoting United States v. Williams, 553 U.S. 285, 303 (2008)).

[67] *Id.*

[68] *See* Metzger, *supra* note 4, at 786–87.

circumstances but not others, creating an uncertain path forward for future litigants confronted with vague statutes.

At both the Circuit[69] and briefing[70] stages, this case was generally understood to involve a First Amendment overbreadth challenge to the Minnesota statute, perhaps out of a sense that it was the only way to bring a facial challenge, particularly after the petitioners decided not to appeal the lower court's decision in favor of the State on their as-applied challenge. Overbreadth doctrine allows a plaintiff whose own conduct can, constitutionally, be forbidden to nonetheless challenge a statute for also sweeping in conduct that *cannot* be proscribed.[71] Thus, the statute is challenged not because of the way it was applied to the plaintiff, but because it "threatens others not before the court."[72] This doctrine is often framed as an *exception* to the general rule that facial challenges are disfavored and third-party standing[73] disallowed,[74] and is generally justified by the special concern that overbroad regulations in the First Amendment context will have the effect of chilling constitutionally protected expression.[75] However, the *Mansky* majority did not seem to take up the invitation to treat the statute as presenting an overbreadth problem: the majority did not explicitly mention overbreadth at all, did not express concern over chilling of speech, and certainly did not grapple with any of the complex rules that the Court has set up to cabin the "strong medicine"[76] of overbreadth doctrine.[77]

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[69] Minn. Majority v. Mansky, 708 F.3d 1051, 1056 (8th Cir. 2013).

[70] *See, e.g.*, Petitioners' Brief on the Merits at 21–23, 26–30, *Mansky*, 138 S. Ct. 1876 (No. 16-1435) (describing overbreadth doctrine and its application in this case); Respondents' Joint Brief in Opposition at 11–12, *Mansky*, 138 S. Ct. 1876 (No. 16-1435) ("There is no compelling reason for this Court to consider a facial overbreadth challenge . . . .").

[71] Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (describing overbreadth doctrine).

[72] *Id.* (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985)).

[73] That is, when one party attempts to bring a challenge asserting the rights of another person who is not a party to the suit. *See* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1326–27 (2000).

[74] *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) ("We have fashioned this exception to the usual rules governing standing . . . ."). For an argument that this distinction is not as sharply drawn as stated doctrine would make it appear, see generally Fallon, *supra* note 73.

[75] *See, e.g.*, Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed . . . to prevent the statute from chilling the First Amendment rights of other parties not before the court."). Some cases also express concern that certain overbroad statutes give the statute's enforcers too much leeway to allow content or viewpoint to influence enforcement. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 129 (1992) ("[T]he Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker . . . .").

[76] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

[77] Such rules include the requirements that there be "real" and "substantial" overbreadth, *id.* at 615, and that there not be a readily available limiting construction, Erznoznik v. City of Jacksonville,

Instead, the Court seems to have drawn much of its animating logic from a different, though often interrelated, line of cases involving facial invalidation: vagueness doctrine. This doctrine holds that a statute can be found facially "void for vagueness if its prohibitions are not clearly defined."[78] Unlike overbreadth, vagueness doctrine is rooted in due process,[79] and is centered on two concerns: first, that laws that do not afford a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" fail to provide constitutionally adequate notice;[80] and second, that vague laws can delegate too much discretion on "basic policy matters to policemen, judges, and juries . . . with the attendant dangers of arbitrary and discriminatory application."[81] Despite these due process roots, vagueness challenges have sometimes been given a distinctive bite when the challenged statute "abut[s] upon sensitive areas of basic First Amendment freedoms,"[82] and have often been seen as connected to First Amendment overbreadth doctrine because of the concern that vague speech-targeted statutes can similarly chill constitutionally protected expression.[83]

It is hard to read the majority in *Mansky* as doing anything other than vagueness analysis in its assessment of whether there can be a rationally defined meaning of the term "political" in the context of the Minnesota statute. The decision rests on the logic that the law does not present "some sensible basis for distinguishing what may come in from what must stay out" of the polling place because of the indeterminacy of the term "political"[84] — and what is that but another way of saying the law is vague? Furthermore, the majority explained that the problem with the Minnesota statute's "indeterminate prohibition" is "[t]he opportunity for abuse" it creates.[85] The Court worried the lack of clarity could lead to a situation where the election judges allow their personal biases to influence what they consider political, leading to "unfair or inconsistent

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422 U.S. 205, 216 (1975). For an example of what it looks like when the Court *does* engage with the details of overbreadth doctrine, see *Jews for Jesus*, 482 U.S. at 574–76.

78 Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

79 *See, e.g.*, *id.* (describing vagueness doctrine as "a basic principle of due process").

80 *Id.*

81 *Id.* at 109. A statute can be found "impermissibly vague" for either reason. Hill v. Colorado, 530 U.S. 703, 732 (2000).

82 *Grayned*, 408 U.S. at 109 (alteration in original) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

83 *See, e.g.*, Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 904–05 (1991) ("First Amendment vagueness doctrine . . . is best conceptualized as a subpart of First Amendment overbreadth doctrine." *Id.* at 904.).

84 *Mansky*, 138 S. Ct. at 1888.

85 *Id.* at 1891 (alteration in original) (quoting Bd. of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987)).

enforcement of the ban."[86] This rationale echoes one of the traditional justifications for invalidating vague statutes — that they "may authorize and even encourage arbitrary and discriminatory enforcement."[87]

While the decision sounds in vagueness, the Court decidedly avoids mention of that doctrine. Indeed, the word "vague" never comes up in the majority. Why the obfuscation? The answer may lie in the apparent tension this decision creates with the Roberts Court's repeated insistence that vagueness doctrine, unlike overbreadth, *cannot* apply in cases where a statute is constitutional as applied to the plaintiff. While the two doctrines have not always been applied distinctly[88] — and in some cases the Court has explicitly allowed a third-party vagueness challenge in the First Amendment context[89] — the Court took pains to distinguish them in *Holder v. Humanitarian Law Project*,[90] where Chief Justice Roberts wrote that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,"[91] even when raising a First Amendment challenge.[92] In *Holder*, the Court even took the Ninth Circuit to task for speculating about how the statute in question might apply to situations not presented by the facts[93] — exactly the kind of reasoning relied on in *Mansky*.[94]

This apparent disconnect between the Court's stated rule and the seeming application of vagueness analysis in *Mansky* may, in fact, be resolvable because of one major distinction between the cases: while the concern in *Mansky* is with vagueness leading to arbitrary enforcement, in *Holder* the Court was focused on the other justification for striking down vague statutes — fair notice.[95] This difference is potentially

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[86] *Id.* ("[T]hat discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as 'political.'").

[87] City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

[88] *See, e.g.*, *Jews for Jesus*, 482 U.S. at 575–76 (intermingling overbreadth and vagueness concerns); Houston v. Hill, 482 U.S. 451, 465–67 (1987) (same); Kolender v. Lawson, 461 U.S. 352, 370 (1983) (White, J., dissenting) (complaining the majority "confuse[s] vagueness and overbreadth").

[89] United States v. Williams, 553 U.S. 285, 304 (2008) ("[W]e have relaxed [the rule against a plaintiff engaging in clearly covered conduct bringing a third-party vagueness challenge] in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.").

[90] 561 U.S. 1 (2010).

[91] *Id.* at 20 (alteration in original) (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495 (1982)).

[92] *Id.* The Court re-emphasized this point last Term in *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151–52 (2017).

[93] *Holder*, 561 U.S. at 19 ("By deciding how the statute applied in hypothetical circumstances, the Court of Appeals' discussion of vagueness seemed to incorporate elements of First Amendment overbreadth doctrine.").

[94] *See Mansky*, 138 S. Ct. *passim*.

[95] The *Holder* court explicitly noted that enforcement discretion was not at issue there, *see* 561 U.S. at 20–21, and while it did not always draw a distinction between justifications, it summed up

meaningful. *Holder*'s main concern with upholding facial vagueness challenges when a statute is not vague as applied to the plaintiff was that doing so blurs vagueness and overbreadth by allowing a court to consider situations outside those presented by the facts.[96] This framework tracks in the fair notice context: if the plaintiff's speech is clearly proscribed by the statute, then *the plaintiff* had fair notice in compliance with due process, even if the statute is vague as to other speech. However, when the concern is that the statute is so vague that it does not properly cabin enforcers' discretion, the calculus is different: the constitutional defect in these cases is not that the plaintiff had no way of discerning if the statute applied to her, but that it may have been enforced against her for arbitrary or illegitimate reasons.[97] Thus, the statute's *overall* vagueness is directly relevant to the plaintiff, because the overall vagueness is what creates the condition for unconstitutionally unbridled enforcement discretion. Perhaps, then, in enforcement-discretion cases there remains added leeway, even after *Holder*, for considering a statute's potential vagueness outside the specific facts of the case.

Because the Court did not acknowledge that it was upholding a facial challenge on vagueness grounds — perhaps out of a desire to avoid the appearance of tension with *Holder* — and therefore certainly did not explain its reasons for doing so, it is hard to know if this potential distinction between fair-notice and enforcement-discretion challenges was truly the driving logic behind this decision. By dodging the hard question of why a facial challenge was appropriate here, the Court opened up a potential new line of attack for facial vagueness challenges — but gave future litigants no hint of whether that was intentional, or whether those challenges are likely to succeed again.

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the rule as "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment *for lack of notice*," *id.* at 20 (emphasis added).

[96] *See id.* (explaining that if a vagueness plaintiff whose own speech is clearly covered by a given statute could nonetheless raise a third-party vagueness claim, vagueness and overbreadth doctrines would become "redundant").

[97] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 (1983) (worrying that a vague "statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute," leaving the decision to abridge important rights to "the whim of any police officer" (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965))); Smith v. Goguen, 415 U.S. 566, 575 (1974) ("Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections.").