

JUDICIARY of the DUKE STUDENT GOVERNMENT

Kristina Smith v. Shreya Bhatia



Office of the Justices

Docket No. 18-002

Case No. 23

Filed on

March 9, 2018

Heard on

March 19, 2017

Decided on

March 19, 2017

Overview

On March 8, 2017, Kristina Smith filed a petition with the Judiciary contesting the decision of Attorney General Shreya Bhatia to dock her campaign 200 votes after being found in violation of Section 6 of the Election Rules and Procedures. The Petitioner admitted to this violation, but contended the nature of the Attorney General's decision denied her procedural due process, as she was not afforded an in-person hearing as per Section 8 Clause 5 of the Election Rules and Procedures. Additionally, the Petitioner challenged Section 6 under Article VII § 1 Cl. 3 of the DSG Constitution, arguing that the rule is a prima facie intrusion on the freedom of expression. The Attorney General argued that the Petitioner had been made aware of the Election Rules and Procedures and that her decision to dock 200 votes from the Petitioner's campaign was fair and aligned with past precedent.

Parties

Parties of the Petitioner

Kristina Smith, Petitioner, Vice President, President Candidate
Luke Farrell, Advocate

Parties of the Respondent

Shreya Bhatia, Respondent, Attorney General

Held

DSG 2017–2018 Election Rules and Procedures § 6 Cl. 1 is a prima facie violation of the right of free expression guaranteed in Article 9 (Bill of Rights) § 3 of the Constitution. In addition, the procedure used by the Attorney General to assess the 200 vote penalty on the Petitioner was arbitrary and capricious.

Chief Justice Devavrat V. Dabke delivered the opinion of the
Judiciary.

Facts of the Case

On March 8, 2017 at 7:19 pm, Attorney General Shreya Bhatia was informed that DSG presidential candidate Kristina Smith was campaigning outside Marketplace and that there was an iPad and an open laptop on a nearby table. After sending a member of the DSG Board of Elections to confirm this information, Attorney General Bhatia found Smith in violation of Section 6 of the DSG 2017–2018 Election Rules and Procedures. This section states:

While polls are open, no student shall solicit votes for any candidate while possessing any laptop, tablet, or similar electronic device that can access the ballot. Mobile telephones with internet access are excluded from this general ban, but no student shall present or proffer a mobile telephone to another as part of a solicitation of votes.

As a result of this finding, the Attorney General decided to dock Smith 200 votes: one vote for every potential “unauthorized direct contact” as stated in Section 9 Clause 6 of the Election Rules and Procedures. The penalty was calculated in keeping with the Precedent set by *Geng v. Adair* (that this clause is to be interpreted to mean that for every potential unauthorized contact made with each person, a vote should be docked). Therefore, the Attorney General guessed that the Smith campaign contacted about 100 people as they entered and exited Marketplace (for a sum of 200 votes). Moreover, the Election Rules and Procedure also explicitly states actions authorized by a candidate on her behalf should be considered as performed by the candidate; therefore, the Attorney General reasoned actions by the nearby campaign staff while tabling at Marketplace should be treated like a violation by Smith herself, which is an uncontested reading of the Election Rules and Procedure.

Smith did not deny that an iPad was indeed on her table as she campaigned in front of Marketplace. She contents that the iPad sat on the table and was playing music, an assertion that the Attorney General also does not dispute.

Moreover, Smith asserted she never gave the iPad to a prospective voter in order to further a direct solicitation of votes, nor did a member of her campaign staff, another assertion that the Attorney General does not dispute.

In all, the facts remain uncontested and were stipulated to by both parties.

Questions Raised

1. Is Section 6 of the DSG 2017–2018 Election Rules and Procedure constitutional?
2. Was the figure of 200 votes properly tallied?

Decision

Free Expression

Article IX § 3 of the Constitution states, “All students have the right to free expression. Duke Student Government shall not abridge the freedom of speech, the press, petition, or peaceable assembly or protest.”

Though the regulation of campus campaigning may command import, especially to stave off the nuisance of adverts, flyers, and spam messages, we have historically been loathe to allow campaign restrictions to surmount the right of free expression. For example, in *Dinner and Wang v. Board of Elections*, we struck down campaign time limits.

Moreover, we take our cues from the Supreme Court of the United States, from which the usage of “free expression” in the DSG Constitution derives. Therefore, we find it appropriate to subject the contested statute to strict scrutiny.

Any law that inhibits student expression must be in furtherance of a compelling government interest. Moreover, it must also be narrowly tailored to achieve that interest. In this case, the compelling government interest is the prevention of voter coercion. DSG does not want candidates actively handing voters a ballot and requesting that they cast their vote in that moment. However, the first Clause of Section 6 applied by the Attorney General in this case, is not narrowly tailored to achieving this purpose. To ban the possession of all electronics which are capable of accessing a ballot (save for the exception of mobile telephones, which we need not deeply consider). Violation of this law may not always equate to voter coercion, something evinced in this very case (we found no evidence that Smith used the iPad to access the ballot or somehow coerce students into voting for her).

Furthermore, as this law is overly broad, it may deter constitutionally protected speech. Our specific concern is that the enforcement of this law may deter future campaigning as a broader consequence. In a world where electronic devices are ubiquitous, fear of possessing one in the midst of campaigning might discourage candidates from campaigning as much as they otherwise would. Therefore, due to its overbroad nature, we find that Section 6 is unconstitutional.

The Arbitrary and Capricious 200 Vote Penalty

Procedural due process is an important right

The Attorney General's decision to dock the Smith campaign 200 votes was both arbitrary and capricious. With the advice of the Board of Elections, the Attorney General concluded it was possible that the Smith campaign could have reached out to 100 people—and made two contacts with each—while in possession of the iPad. This number was not based on any sort of quantitative evidence or analysis, but instead was based on unsubstantiated estimate of how many students could be entering Marketplace for dinner from the hours of 7 pm to 8 pm.

Under any standard of review, these actions that, while the reasoning of the Attorney General to apply the *Geng* precedent may have been sound, the underlying “numbers” plugged into the formula were guesses, as mentioned by a member of the Board of Elections during the Hearing of this Case. This calculation is the definition of arbitrary and thus violates the procedural due process rights of all students.

Conclusion

Free expression is such an important and unambiguous right. From protecting minority students, to even distasteful opinions, we will continue to uphold rigorous protections of free expression.

A statute that imposes additional burdens on students willing to engage in political campaigning has no place on campus and is abhorrent to liberty as a speech code or any other penalization of expression.

Section 6 of the Election Rules and Procedure is hereby deemed unconstitutional and the penalty of 200 votes assessed against Smith is vacated. We remand the matter back to the Attorney General to determine if there were any other violations of the Elections Rules and Procedure by the Smith campaign or if the facts in this matter result in a violation under a different provision. With respect to the urgency and importance of a Presidential Election, we impose a time limit of 168 hours on the Attorney General to make the aforementioned determination on the penalty of a finding of contempt by the Judiciary.

It is so ordered.