20150280

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Appellee,

v.

Curtis Vernon Francis,

Defendant/Appellant.

Supreme Court No. 20150280

Stutsman Co. No. 47-2014-CR-00619

BRIEF OF AMICUS CURIAE NORTH DAKOTA ATTORNEY GENERAL

APPEAL FROM THE SEPTEMBER 30, 2015, JUDGMENT OF THE STUTSMAN COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT, AFTER A CONDITIONAL PLEA OF GUILTY AND THE JUNE 1, 2015, AND AUGUST 7, 2015, ORDERS OF THE STUTSMAN COUNTY DISTRICT COURT DENYING THE DEFENDANT/APPELLANT'S MOTION TO DISMISS

STUTSMAN COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT

THE HONORABLE THOMAS E. MERRICK, PRESIDING

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[¶3] Under N.D.C.C. § 32-23-11, when a statute is alleged to be unconstitutional, the Attorney General of the State of North Dakota must be served with a copy of the proceeding and is entitled to be heard. The North Dakota Attorney General has an interest in defending the constitutionality of North Dakota statutes and the State's interest in protecting the integrity and dignity of the election process.

[¶4] One of the most fundamental rights in a democratic society is the right to vote. Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

[¶5] AMICUS CURIAE STATEMENT OF THE ISSUE

[¶6] N.D.C.C. § 16.1-10-06.2 does not violate the First Amendment of the United States Constitution or article I, section 4 of the North Dakota Constitution.

[¶7] LAW AND ARGUMENT

[¶8] 1. Standard of review of constitutional claims.

[¶9] N.D.C.C. § 16.1-10-06.2 is presumptively constitutional. N.D.C.C. § 1-02-38(1).

> All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity. The power to declare a legislative act unconstitutional is one of the highest functions of the courts, and that power must be exercised with great restraint. The presumption of constitutionality is so strong that a

> statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt. The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity.

State v. Birchfield, 2015 ND 6, ¶ 5, 858 N.W.2d 302 (quotations omitted).

[¶10] This Court must construe statutes to avoid constitutional conflicts and, if a statute may be construed two ways, one that renders it of doubtful constitutionality and one that does not, this Court must adopt a construction that avoids the constitutional conflict. Ash v. Traynor, 1998 ND 112, ¶ 7, 579 N.W.2d 180. This Court must resolve any doubt as to a statute's constitutionality in favor of its validity. State v. Burr, 1999 ND 143, ¶ 9, 598 N.W.2d 147.

[¶11] Francis must provide persuasive authority and reasoning. Southern Valley Grain Dealers Ass'n v. Board of County Com'rs of Richland County, 257 N.W.2d 425 (N.D. 1977). He must bring the heavy artillery or forgo his claims. Riemers v. O'Halloran, 2004 ND 79, ¶ 6, 678 N.W.2d 547.

[¶12] Whether a statute is constitutional is a question of law, which is fully reviewable on appeal. Birchfield, 2015 ND 6, ¶ 5, 858 N.W.2d 302 (citing Simons v. State, 2011 ND 190, ¶ 23, 803 N.W.2d 587).

[¶13] 2. N.D.C.C. § 16.1-10-06.2 is constitutional.

[¶14] a. First Amendment Analysis.

[¶15] Francis alleges N.D.C.C. § 16.1-10-06.2 is unconstitutional because it violates the First Amendment. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." "'The freedom of speech . . . which [is] secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are

secured to all persons by the Fourteenth Amendment against abridgment by a State.'" Burson v. Freeman, 504 U.S. 191, 196 (1992) (citing Thornhill v. Alabama, 310 U.S. 88, 95 (1940)).

[¶16] Article I, section 4 of the North Dakota Constitution also recognizes this right and states, "Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege."

[¶17] A state may grant greater protections than the United States Constitution through its own constitution or by statute. State v. Kordonowy, 2015 ND 197, ¶ 14, 867 N.W.2d 690 (citing State v. Herrick, 1997 ND 155, ¶ 19, 567 N.W.2d 336; State v. Nordquist, 309 N.W.2d 109, 113 (N.D.1981)). Francis has not argued that the North Dakota Constitution provides greater protection than the First Amendment. In a previous case, this Court determined article I, section 4 of the North Dakota Constitution does not provide any greater rights than the United States Constitution. Dickinson Newspapers, Inc. v. Jorgensen, 338 N.W.2d 72, 79 (N.D. 1983). This Court held "the opinions of the United States Supreme Court on this topic have full application in this state." Id. This Court has also stated article I, section 4 of the North Dakota Constitution "is in harmony with the First Amendment to the United States Constitution." State v. Rivinius, 328 N.W.2d 220, 228-29 (N.D. 1982). In analyzing whether or not a person's freedom of speech rights have been violated, this Court has followed the various tests set out by the United States Supreme Court. See, e.g., Bolinske v. North Dakota State Fair Ass'n, 522 N.W.2d 426 (N.D. 1994); Fargo Women's Health

Organization, Inc. v. Lambs of Christ, 488 N.W.2d 401 (N.D. 1992); City of Jamestown v. Beneda, 477 N.W.2d 830 (N.D. 1991).

[¶18] The activity of soliciting signatures on a petition involves protected speech under the First Amendment. Bolinske, 522 N.W.2d at 431. "But, the federal constitution does not guarantee the right to communicate one's views at all times and places or in any manner desired." Id. (citing Fargo Women's Health Organization, Inc., 488 N.W.2d 401. "Even speech involving the discussion of governmental affairs, the essence of self-government, exercised in 'quintessential public forums' such as parks and sidewalks, may interfere with other important activities for which that public property is used, and the government may regulate the time, place, and manner of that expressive activity." Bolinske, 522 N.W.2d at 431 (citing Burson, 504 U.S. 191).

[¶19] The proper First Amendment analysis depends on the type of forum involved. In a traditional public forum, First Amendment protections are subject to heightened scrutiny. City of Jamestown, 477 N.W.2d at 837 (citing Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987)).

[¶20] Streets, parks and sidewalks are "quintessential" public forums. Fargo Women's Health Organization, Inc., 488 N.W.2d at 407 (citing Lee v. International Society for Krishna Consciousness, Inc., 505 U.S. 830 (1992)). In quintessential public forums, the government may not prohibit all communicative activity. City of Jamestown, 477 N.W.2d at 837 (citing Board of Airport Commissioners, 482 U.S. 569).

[¶21] For the State to enforce a content-based exclusion in a public forum, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Burson, 504 U.S. at 198.

[¶22] The State may also enforce regulations of the time, place, and manner of expression which "'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" City of Jamestown, 477 N.W.2d at 837 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). N.D.C.C. § 16.1-10-06.2 is a reasonable time, place, and manner restriction and does not violate the United States or North Dakota Constitutions.

[¶23] b. N.D.C.C. § 16.1-10-06.2 is content neutral.

[¶24] "Governmental regulation of expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.'" Fargo Women's Health Organization, Inc., 488 N.W.2d at 407 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (emphasis supplied)). A "facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." McCullen v. Coakley, 134 S.Ct. 2518, 2531 (2014). "'A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" Fargo Women's Health Organization, 488 N.W.2d at 407 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[¶25] Section 16.1-10-06.2, N.D.C.C., provides as follows:

> A person may not approach a person attempting to enter a polling place, or who is in a polling place, for the purpose of selling, soliciting for sale, advertising for sale, or distributing any merchandise, product, literature, or service. A person may not approach a person attempting to enter a polling place, who is in a polling place, or who is leaving a polling place for the purpose of gathering signatures for any reason. These prohibitions apply in any polling place or within one hundred feet [30.48 meters] from any entrance leading into a polling place while it is open for voting.

[¶26] N.D.C.C. § 16.1-10-06.2 is not a content-based prohibition on speech because it does not prohibit speech based on the content of what is said or distributed. This Court determined the regulation at issue in Bolinske was content neutral because it applied to "all persons and organizations desiring to distribute literature of any kind or gather signatures for any petitions." Bolinske, 522 N.W.2d at 433. N.D.C.C. § 16.1-10-06.2 is similar to the regulation in Bolinske – it applies to all persons or organizations desiring to solicit or distribute any merchandise, product, literature, or service, and prohibits a person from gathering signatures for any reason. The trial court determined N.D.C.C. § 16.1-10-06.2 is not "aimed at any specific speech content" and "[w]hether the law has been violated depends on where signatures are being gathered; it does not depend on the reason the signatures are being gathered." Appellee's Appendix A-10, ¶ 9. (*Stutsman County District Court Order Denying Motion to Dismiss, August 7, 2015.*) Like the regulation at issue in Bolinske, N.D.C.C. § 16.1-10-06.2 is content neutral.

[¶27] Francis concedes, "[o]n its face, the statute does not identify viewpoints that it restricts from being expressed." Francis Brief at ¶ 24. Francis then argues prosecutorial discretion "lowers the chance of prosecuting people whose

message is agreeable," id. at ¶ 25, and the "electioneering statute is incapable of being administered in a viewpoint-neutral manner." Id. at ¶ 26. Prosecutors have broad discretion in enforcing criminal laws. State v. Bear, 2015 ND 36, ¶11, 859 N.W.2d 595 (citing State v. Loughead, 2007 ND 16, ¶ 12, 726 N.W.2d 859). As long as the prosecutor has probable cause to believe the accused committed an offense, the decision whether to prosecute generally rests in the prosecutor's discretion. Id. Although prosecutors have discretion in whether to charge a person with a crime, this does not mean the statute is incapable of being administered in a viewpoint-neutral manner. The trial court determined:

> First, there has been no showing that anyone gathering signatures near a polling place in Stutsman County went unprosecuted. Second, there is no evidence that Mr. Francis was prosecuted because of the specific measure he was supporting or for any reason other than the prosecution's belief that there was probable cause to believe Mr. Francis committed an offense defined by statute.

Appellee's Appendix A-3, ¶ 12. (*Stutsman County District Court Memorandum and Order, June 1, 2015.*)

[¶28] c. N.D.C.C. § 16.1-10-06.2 is narrowly tailored to serve a significant government interest.

[¶29] "A valid time, place, and manner restriction must also serve a significant governmental interest." Bolinske, 522 N.W.2d at 434. In Burson v. Freeman, the United States Supreme Court addressed the constitutionality of a Tennessee statute that prohibited campaign activity within 100 feet of the entrance to a polling place and the building in which it was located. Burson, 504 U.S. at 193-94. Since the statute was a content-based restriction on political speech in a public forum, the statute was subject to "exacting scrutiny" which meant the

statute could survive only if it was "'necessary to serve a compelling state interest'" and was "'narrowly drawn to achieve that end.'" Id. at 198 (citations omitted). The court concluded a state has a "compelling interest in protecting voters from confusion and undue influence" and in "'preserving the integrity of its election process.'" Id. at 199 (citing Eu v. San Francisco County Dem. Cent. Comm., 489 U.S. 214, 228-229, 231 (1989)). The court upheld the constitutionality of the statute, concluding the "campaign-free zone" was necessary in order to serve the state's compelling interests and that the statute was narrowly drawn to achieve that interest. Burson, 504 U.S. at 208-211.

[¶30] Legislative history indicates North Dakota shares these compelling interests outlined by the Burson court. In 2007, N.D.C.C. § 16.1-10-06.2 was amended to add language which prohibits a person from being approached for gathering signatures. 2007 N.D. Sess. Laws ch. 196, § 2. Secretary of State Al Jaeger testified regarding the amendments to N.D.C.C. § 16.1-10-06.2, "[p]eople should be able to go to and from a polling location and not be concerned about being approached." Hearing on H.B. 1376 Before the House Government and Veterans Affairs Committee, 2007 N.D. Leg. (Jan. 25) (Testimony of Al Jaeger, Secretary of State). The 2007 legislative history also contained a summary of the discussion that took place during one of the hearings and states, "[t]he intention of not allowing interference with the election process was reiterated." Hearing on H.B. 1376 Before the Senate Government and Veterans Affairs Committee, 2007 N.D. Leg. (Feb. 23). The interests outlined in the 2007

legislative history are nearly identical to the compelling interests recognized by the United States Supreme Court in Burson.

[¶31] N.D.C.C. § 16.1-10-06.2 must also be narrowly tailored.

> For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward, 491 U.S., at 799, 109 S.Ct. 2746. Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of" serving the government's interests. Id., at 798, 109 S.Ct. 2746. But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id., at 799, 109 S.Ct. 2746.

McCullen, 134 S.Ct. at 2535.

[¶32] Similar to N.D.C.C. § 16.1-10-06.2, the Tennessee statute at issue in Burson established a 100-foot buffer zone around the polling place. Burson, 504 U.S. at 193. The court determined "*some* restricted zone around the voting area is necessary to secure the State's compelling interest." Id. at 208. In upholding the Tennessee statute, the United States Supreme Court determined, "it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line." Id. at 211. Like the Tennessee statute, N.D.C.C. § 16.1-10-06.2 falls "on the constitutional side of the line."

[¶33] Francis argues North Dakota has not shown a compelling interest for its prohibition on political speech outside polling places, Francis Brief at ¶ 39, and cites McCullen v. Coakley, 134 S.Ct. 2518 (2014), in support of his argument. The Massachusetts statute in McCullen did not involve a buffer zone around a polling place, but placed a buffer zone around a place where abortions were performed making it a crime to knowingly stand on a public way or sidewalk

within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions were performed. Id. at 2522. The United States Supreme Court determined the statute was not narrowly tailored to serve a significant governmental interest and violated the First Amendment. Id. at 2518. McCullen did not overrule Burson. The McCullen court explained that the buffer zones in Burson were justified because less restrictive measures were inadequate and Massachusetts hadn't shown that to be the case with its law. Id. at 2540. Although Massachusetts couldn't show its law was narrowly tailored to serve a significant government interest, the United States Supreme Court has already determined 100-foot buffer zones around polling places, identical to that of N.D.C.C. § 16.1-10-06.2, are "on the constitutional side of the line." Burson, 504 U.S. at 211.

[¶34] d. N.D.C.C. § 16.1-10-06.2 provides ample alternative channels of communication.

[¶35] "A regulation restricting protected expression must also leave open ample alternative channels for communication." Bolinske, 522 N.W.2d at 434. N.D.C.C. § 16.1-10-06.2 does not prohibit or restrict a person's ability to gather signatures from adjacent, public property outside the 100-foot buffer zone – it only prohibits soliciting or gathering signatures within 100 feet of the polling place. Since solicitors or signature gatherers can approach voters outside the 100-foot buffer zone, there are ample alternative channels of communication available to communicate or gather signatures. N.D.C.C. § 16.1-10-06.2 is a reasonable time, place, and manner restriction on speech which does not violate the First Amendment or article I, section 4 of the North Dakota Constitution.

[¶36] e. Even if N.D.C.C. § 16.1-10-06.2 is not content neutral, it is still constitutional.

[¶37] Francis alleges N.D.C.C. § 16.1-10-06.2 is a content-based restriction. Francis Brief at ¶ 29. Even if the statute is a content-based restriction, and the State does not concede this, the statute would still be constitutional based on the United States Supreme Court decision in Burson, 504 U.S. 191. In Burson, the Tennessee statute banned content-based speech in public forums, so it was subject to strict scrutiny which requires the state to show the restriction is necessary and narrowly tailored to achieve a compelling state interest. Id. at 198. The Supreme Court ruled this was the rare case where a law survived strict scrutiny. Id. at 211.

> Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.

Id. at 211.

[¶38] The United States Supreme Court has already determined a state has a "compelling interest in protecting voters from confusion and undue influence" and in "preserving the integrity of its election process." Burson, 504 U.S. at 199 (citing Eu, 489 U.S. at 228-229, 231). As stated previously in paragraph 30, 2007 legislative history supporting amendments to N.D.C.C. § 16.1-10-06.2 show North Dakota recognized these same compelling interests. Thus, even if

N.D.C.C. § 16.1-10-06.2 is a content-based restriction, it survives strict scrutiny and is constitutional.

[¶39] f. N.D.C.C. § 16.1-10-06.2 is not a prior restraint on speech.

[¶40] Francis alleges the "electioneering statute is a prior restraint on speech." Francis Brief at ¶ 4. "A prior restraint is generally any governmental action that would prevent a communication from reaching the public. Specifically, it is a statutory, administrative, judicial, or other prohibition that forecloses speech before it takes place." Emineth v. Jaeger, 901 F.Supp.2d 1138, 1143 (Dist. N.D. 2012). N.D.C.C. § 16.1-10-06, which was the statute at issue in the Emineth case, was a prior restraint on speech because it prohibited all electioneering on Election Day. N.D.C.C. § 16.1-10-06 was amended during the 2013 legislative session, 2013 N.D. Sess. Laws ch. 173, § 2, but Francis was not charged with violating N.D.C.C. § 16.1-10-06. Francis was charged with violating N.D.C.C. § 16.1-10-06.2 which is not a prior restraint on speech because people are not completely prevented from expressing their message; they are prohibited from expressing their message within the narrow area of the polling place or within 100 feet from any entrance leading into a polling place.

[¶41] Francis fails to meet his heavy burden of showing beyond a reasonable doubt N.D.C.C. § 16.1-10-06.2 violates the First Amendment or article I, section 4 of the North Dakota Constitution.

[¶42] CONCLUSION

[¶43] For the above reasons, the North Dakota Attorney General respectfully requests this Court affirm the decision of the Stutsman County District Court.

Dated this 17th day of February, 2016.

State of North Dakota
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STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Peggy A. Brunelle states under oath as follows:

[¶1] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶2] I am of legal age and on the 17th day of February, 2016, I served the attached BRIEF OF AMICUS CURIAE upon Thomas A. Dickson, Ariston E. Johnson, and Katherine Naumann by placing true and correct copies thereof in envelopes addressed as follows:

MR THOMAS A DICKSON
ATTORNEY AT LAW
PO BOX 1896
BISMARCK ND 58502-1896

MR ARISTON E JOHNSON
ATTORNEY AT LAW
PO BOX 1260
WATFORD CITY ND 58854-1260

KATHERINE NAUMANN
STUTSMAN COUNTY ASSISTANT STATES ATTORNEY
511 2ND AVE SE
JAMESTOWN ND 58401

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Peggy A. Brunelle

Peggy A. Brunelle

Subscribed and sworn to before me
this 17th day of February, 2016.

NOTARY PUBLIC

ALICE M. JOHNSON
Notary Public
State of North Dakota
My Commission Expires April 10, 2019