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FEBRUARY 17, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota	)	**Supreme Court No.**
Plaintiff & Appellee	)	**20150280**
	)	
v.	)	**Stutsman County No.**
	)	**47-2015-CR-619**
Curtis Francis	)	
Respondent & Appellant	)	

APPELLEE'S BRIEF

Appeal from the Judgment
of the District Court
Entered September 30, 2015,
Issued in Stutsman County District Court
by the Honorable Thomas E. Merrick
Judge of the Southeast District Court

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[¶5] JURISDICTIONAL STATEMENT

[¶6] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

> "An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:
>
> 1. A verdict of guilty;
>
> 2. A final judgment of conviction;
>
> 3. An order refusing a motion in arrest of judgment;
>
> 4. An order denying a motion for new trial; or
>
> 5. An order made after judgment affecting any substantial right of the party."

N.D.C.C. § 29-28-06.

[¶7] STANDARD OF REVIEW

[¶8] The standard of review for constitutional issues is de novo. State v. Campbell, 2006 ND 168, ¶ 6, 719 N.W.2d 374. In State v. Baxter, 2015 ND 107, ¶ 5, 863 N.W.2d 208 (quoting Beylund v. Levi, 2015 ND 18, ¶ 17, 859 N.W.2d 403), we explained our standard for reviewing constitutional challenges to a statute:

> The determination whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. 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.

[¶9] STATEMENT OF THE CASE

[¶10] On October 20th, 2014, a complaint was filed against Defendant Curtis Francis (herein referred to as "Francis") for violating N.D.C.C. §16.1.10-06.2. A motion to dismiss was filed by Francis on February 16th, 2015 alleging the law was (1) unconstitutional as applied to Francis; (2) Francis was selectively prosecuted; and (3) the law violates Francis' right to amend the state constitution

by initiated measure. An evidentiary hearing was held on May 13th, 2015 on the second and third allegations. Judge Merrick issued a memorandum and an order denying the motion to dismiss on the second and third allegations on June 1st, 2015.

[¶11] On August 7th, 2015, at the request of both parties, Judge Merrick issued a memorandum and an order denying the motion to dismiss on the first allegation. A conditional offer to plead guilty was filed with the district court on September 14th, 2015. Notice of appeal was filed on September 24th, 2015. The district court entered judgment on September 30th, 2015.

[¶12] STATEMENT OF THE FACTS

[¶13] On June 10th, 2014, Sandy Eckelberg was working during the primary election at a vote center as a clerk; the vote center was at the Jamestown Civic Center. Tr. p. 81, ll 7-13. In the course of her duties that day, a woman approached Ms. Eckelberg, saying something to the effect that there's something happening outside and that the woman was surprised that it was allowed to be done. Tr. p. 85, ll 6-23. The woman did not specify the kind of activity she was concerned about. Id. Ms. Eckleberg noted that the woman was clearly upset about whatever it was. Tr. p. 86, ll 22-25. Ms. Eckelberg went and told her immediate supervisor, deputy auditor Linda Chadduck. Tr. p. 86, ll 1-10. Ms. Chadduck then went and alerted Casey Bradley, the county auditor. Tr. p. 86, ll

1-10.

[¶14] Mr. Bradley was present at the primary polling in the Jamestown Civic Center on June 10th, 2014. Tr. p. 130, ll 1-4. He was serving in his capacity as the chief elections officer for the county. Id. He was notified by Ms. Chadduck that there were some complaints from voters that there were people getting petitions signed in the entryway of the civic center. Tr. p. 130, ll 6-25. When asked if there was any mention of what petition was being circulated or the content of speech, Mr. Bradley said not to his knowledge. Id. Mr. Bradley and Special Deputy Bruce Hanson went to investigate. Tr. p. 131.

[¶15] Deputy Hanson was helping out that day as a greeter and also helping with security issues. Id. Mr. Hanson testified that Deputy Hanson is not asked to be in uniform when he works. Id. He is not asked to carry a gun or display a badge. Tr. p. 132, ll 7-14. When Mr. Bradley and Deputy Hanson went outside, they saw two petitioners; one standing on each side of the "vote here" sign, so the voters were actually walking around them to get into the vote center. Tr. p. 133, ll 1-25.

[¶16] When asked what they were doing, the petitioners said they were getting petitions and showed Mr. Bradley and Deputy Hanson the petitions. Id. At that point, the petitioners were told that they couldn't be in the entryway to the civic center, but they had to be 100 feet away. Id. Mr. Bradley testified that the

situation then escalated, with one petitioner more vocal than the other. Tr. p. 133, ll 1-25. The other petitioner wandered off to the left and was still approaching voters trying to get their signatures of the petition. Id. Mr. Bradley said the latter petitioner was Francis. Tr. pp. 133-134, ll 24-25; 1-3. Mr. Bradley said that Francis continued to approach voters and get signatures after being told to stop. Tr. p. 146, ll 12-22.

[¶17] The former petitioner, Mr. Dax (herein after referred to as "Dax"), was yelling that his constitutional rights were being violated, that he had a right to be standing where he was and that Mr. Bradley and Deputy Hanson were wrong. Tr. p. 134-135, ll 16-25; 1-7. Dax said that he was aware of the law in question and what it said. Tr. p. 135, ll 12-22. At that point, Deputy Hanson showed his badge to de-escalate the situation. Id. Dax then calmed down and the conversation then turned to a debate about what the distance was. Id. Deputy Hanson then went and got his laser range finder to settle the dispute, establishing that the distance of 100 feet was actually in the middle of the road parallel to the civic center. Tr. pp. 135-136, ll 23-25; 1-7. Mr. Bradley testified that the petitioners were told they could go to the other side of the road and get signatures. Id.

[¶18] Lt. Robert Opp was called to the Jamestown Civic Center on June 10th, 2014 for a report of a couple of individuals collecting signatures in front of the civic center. Tr. p. 111, ll 3-17. Lt. Opp was informed that the individuals were

collecting signatures for initiative measures. Tr. p. 112, ll 3-9. When asked if he knew which measure, Lt. Opp said no. Id. When asked if that made any difference to him, Lt. Opp said no. Id.

[¶19] Lt. Opp spoke with Mr. Bradley and Deputy Hanson. Tr. p. 113, ll 2-4. He then spoke with the two individuals that had been collecting the signatures. Id. He also took photographs of the area where the signature collecting had occurred. Tr. p. 113, ll 20-23. Lt. Opp noted that he spoke with Dax and that Francis didn't say much of anything aside from answering questions asked by Lt. Opp. Tr. p. 120-121, ll 20-25; 1-7. Mr. Bradley and Deputy Hanson were asked to stand in the approximate positions that the two individuals had been standing when they were collecting signatures. Tr. p. 115, ll 4-17.

[¶20] Lt. Opp testified that Deputy Hanson used a laser range finder to determine where 100 feet was from the front of the building, which ended up being in the center of the street to the north of the parking lot. Tr. p. 116, 1-10. Dax told Lt. Opp that they were under the canopy. Tr. p. 122, ll 7-25. Mr. Dax also told Lt. Opp that he (Dax) had misinterpreted the statute and that he thought it was 100 feet from the actual polling place. Tr. p. 122, ll 7-25. He then apologized to Lt. Opp for his misinterpretation. Tr. pp. 122-123, ll 25; 1. Dax also said that Francis was there under his (Dax's) supervision. Tr. p. 123, ll 2-6.

[¶21] Lt. Opp did not make any arrests that day, and forwarded his report to

the Stutsman County State's Attorney's Office. Tr. p. 116, ll 14-18. When asked if Lt. Opp's activities on June 10th, 2014 had anything to do with the content of the speech involved, Lt. Opp said no. Tr. p. 125, ll 17-19.

[¶22] As a follow-up, Officer Nick Hardy was asked to interview people who were at the polling station on the day of the incident. Tr. p. 98, ll 13-24. He was asked by the Stutsman County State's Attorney's Office to do this. Id. Officer Hardy received a list from Mr. Bradley and it consisted of names of people who had gone to the polling place from 2pm-3pm, the approximate time of the incident. Id. When asked if it was suggested to him to find people that were against Measure 5, Officer Hardy said no. Tr. p. 100, ll 19-25. When asked if it was suggested to him to find people who were bothered by what the people with the clipboards were saying, Officer Hardy said he was unsure of that. Id.

[¶23] When asked if it was suggested to him to find people who were for Measure 5, Officer Hardy said he didn't remember any certain criteria he had to have for people. Tr. p. 101, ll 1-5. Officer Hardy did contact two people; Carla Edinger and Chris Housh. Tr. p. 103 ll 11-25. Mr. Housh informed Officer Hardy that he had signed the petition and then crossed his name off of it. Tr. p. 107, ll 14-22.

[¶24] Mr. Bradley also testified that they had never had any issues with enforcing the 100 foot provision before and were not anticipating having any

issues about it that day. Tr. p. 136, ll 11-17. Mr. Bradley testified that he had compiled a list of voters to establish a parameter of who possibly could have witnessed the incident with the petitioners. Tr. p. 137, ll 11-25. Mr. Bradley did not interact with any of the voters on the day of the incident, as he was trying to handle the situation. Tr. p. 140, ll 1-10. He was not able to capture any names of voters at the time of the incident. Id. Mr. Bradley testified in the affirmative when asked if the contents of the compiled list were an open record and that anyone can ask for this information. Tr. p. 138 ll 7-12.

[¶25] LAW AND ARGUMENT

[¶26] **I. N.D.C.C. 16.1-10-06.2 is constitutional**

[¶27] Francis argues that N.D.C.C. 16.1-10-06.2 is unconstitutional in that it violates the First Amendment of the U.S. Constitution. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech...." U.S. Const. am. 1. The U.S. Supreme Court in Thornhill v. Alabama, 60 S.Ct. 736, 740 (1940), said: "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." "For speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 85 S.Ct. 209, 216 (1964). Accordingly, the Court has

recognized that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." Eu v. San Francisco Cty. Democratic Central Comm., 109 S.Ct. 1013, 1020 (1989) (quoting Monitor Patriot Co. v. Roy, 91 S.Ct. 621, 625 (1971)). Such speech has occurred in public forms to include those places "which by long tradition or by government fiat have been devoted to assembly and debate," such as parks, streets, and sidewalks. Perry Ed. Assn. v. Perry Local Educators' Assn., 103 S.Ct. 948, 955 (1983).

[¶28] The trial court in the instant case found that the 100 foot polling place buffer zone in effect at the Jamestown Civic Center encompasses part of a public sidewalk and part of 3rd Street NE, both of which are "traditional public fora." Pleasant Grove City v. Summum, 555, U.S. 460, 469 (2009) (Appellee's Appendix at A-10). The trial court also recognized the Jamestown Civic Center itself to be a public forum. City of Jamestown v. Beneda, 477 N.W.2d 830 (N.D. 1991) (Appellee's App. at A-10). The use of such public forms has long been recognized to have been a part of the privileges, immunities, rights, and liberties of citizens." Hague v. CIO, 59 S.Ct. 954, 964 (1939). At the same time, however, expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used. Burson v. Freeman, 112 S. Ct. 1846, 1850 (1992). Accordingly, the U.S. Supreme Court has held that the government may regulate the time, place, and manner of the expressive activity,

so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication. United States v. Grace, 103 S.Ct. 1702, 1707 (1983). If a regulation is "neither content nor viewpoint based, it need not be analyzed under strict scrutiny." McCullen v. Coakley, 134 S.Ct. 2518, 2522 (2014).

[¶29] **A. N.D.C.C. 16.1-10-06.2 is content neutral**

[¶30] The election law in question is constitutional in that it is content neutral, because whether the law is violated depends on whether someone was gathering signatures and not why someone was gathering signatures. Francis was charged with violating N.D.C.C. § 16.1-10-06.2, which says in part, that:

> ". . .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."

[¶31] As the U.S. Supreme Court has recognized in the context of regulations of the time, place, or manner of speech, "[g]overnment regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 109 S.Ct. 2746, 2754, (1989) (quoting Clark v. Community for Creative Non–Violence, 104 S.Ct. 3065, 3069 (1984)). The principal inquiry in determining content neutrality, in

speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. Community for Creative Non-Violence, at 3070. The government's purpose is the controlling consideration. Ward at 2754. 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. Id. This justification for the guideline "ha[s] nothing to do with content," (quoting Boos v. Barry, 108 S.Ct. 1157, 1160 (1988)), and it satisfies the requirement that time, place, or manner regulations be content neutral. Id.

[¶32] In the instant case, the trial court determined that the N.D.C.C. §16.1-10-06.2 is content neutral because it while it applies to petitions such as the one for which Francis was collecting signatures, it would also apply to other non-political endeavors. (Appellee's App. at A-10). The law says that a person cannot gather signatures for any reason, so whether the law was violated depends on whether someone was gathering signatures, rather than depending on the reason for the signatures being gathered. (Id.) Therefore, the law is content neutral.

[¶33] **B. N.D.C.C. 16.1-10-06.2 is narrowly tailored to serve significant governmental interests**

[¶34] Even though the election law in question is content neutral, it still must

be "narrowly tailored to serve a significant government interest." Ward at 2746. The U.S. Supreme Court has recognized sufficiently compelling state interests to justify prohibitions on speech in the form of preserving the right of individuals to vote freely, effectively, and in secret by "regulat [ing] conduct in and around the polls in order to maintain peace, order and decorum there." Burson v. Freeman, 112 S.Ct. 1846, 1848 (1992). In establishing a 100-foot boundary, the Court has recognized that the state is on the constitutional side of the line. Id. The Court also has recognized that a State "indisputably has a compelling interest in preserving the integrity of its election process." Id. at 1852. The Court thus has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." Anderson v. Celebrezze, 103 S.Ct. 1564, 1570 (1983).

[¶35] In the instant case, one of the purposes of the election law under N.D.C.C. §16.1-10-06.2 in the eyes of the North Dakota legislators is to avoid the intimidation of voters (Appellant's App. at A.20, A.24, A.34, A.49). The U.S. Supreme Court has recognized that it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud. Burson at 1856. Voter intimidation and election fraud are successful precisely because they are difficult to detect and [the] Court has never held a state "to the burden of demonstrating empirically the objective effects on political stability that [are] produced by the

voting regulation in question." Id. (quoting Munro v. Socialist Worker's Party, 107 S.Ct. 533, 537 (1986). The election law in this case is narrowly tailored to serve the compelling government interests of preventing voter intimidation and maintaining the integrity of the electoral process.

[¶36] **C. N.D.C.C. 16.1-10-06.2 leaves open ample alternatives for communication**

[¶37] The election law in this case left open ample alternatives for communication and did not stifle Francis from conveying his message. The trial court in this case denied Francis' motion to dismiss, holding that while the regulation does restrict volunteers like Francis in gathering petition signatures, the restriction is relatively minor in that it involves a small geographic area for a limited time. (Appellee's App. at A-12). The trial court concluded that Francis had access to civic minded citizens in spite of the 100 foot buffer zone, so his message was not effectively stifled as it was in McCullen v. Coakley, 134 S. Ct. 134 2518 (2014). (Appellee's App. at A-12). In McCullen, the U.S. Supreme Court held that a Massachusetts law proscribing 35 foot buffer zone around abortion clinic entrances was in violation of the First Amendment rights of sidewalk counselors. McCullen at 2451.

[¶38] The sidewalk counselors argued that their objective in being in contact with women at the clinic was to inform them of various alternatives and to

provide help in pursuing them. Id. at 2537. These interactions, in contrast to chanting and holding signs, were meant to be close, personal conversations and distributions of literature. Id. at 2523. The Court found that the 35 foot buffer effectively stifled the sidewalk counselors' message because it kept them from delivering their message in they way they wanted to the very audience for which it was intended. Id. Polling zone buffers, in contrast, do not have the same effect. Id. at 2540.

[¶39] In the instant case, the trial court points out that the sponsors of the initiated measure were given a year to collect signatures throughout the state as indicated in Defendant's Exhibit 12. (Appellee's App. at A-12). The trial court also indicates that Francis could have collected signatures outside of the buffer zone or in any other public forum on the day of the incident. (Appellee's App. at A-12). Francis therefore had ample alternatives for communicating his message and was not effectively stifled in doing so.

[¶40] **II. N.D.C.C. 16.1-10-06.2 is constitutional as applied to the Defendant**

[¶41] Francis argues that the statute as applied to him is unconstitutional in that the statute is overly broad. This Court summarized the overbreadth doctrine in City of Fargo v. Stensland, 492 N.W.2d 591, 593 (N.D.1992)):

> The doctrine of overbreadth prohibits the law from criminalizing constitutionally protected activity. State v. Tibor, 373 N.W.2d

> 877, 880 (N.D.1985)[.] "A governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broad and thereby invade the area of protected freedoms." Zwickler v. Koota, 88 S.Ct. 391, 396 (1967). In reviewing overbreadth claims, we first consider whether the statute infringes upon a "substantial amount of constitutionally protected conduct." Village of Hoffman Estates v. Flipside, 102 S.Ct. 1186, 1190 (1982).

[¶42] Broad restriction[s] on constitutional rights ha[ve] rarely, if ever, been found to be constitutional, regardless of the context. Emineth v. Jaeger, 901 F.Supp.2d 1138, 1144 (2012). In Emineth, a North Dakota resident challenged the constitutionality of an state electioneering law, which provides that:

> Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people, is guilty of an infraction. The display upon motor vehicles of adhesive signs which are not readily removable and which promote the candidacy of any individual, any political party, or a vote upon any measure, and political advertisements promoting the candidacy of any individual, political party, or a vote upon any measure which are displayed on fixed permanent billboards, may not, however, be deemed a violation of this section.

N.D.C.C. §16.1-10-06. The court found that the electioneering law was a content-based restriction on speech, since it singles out election-related expression for prohibition. Emineth at 1144. This law was not considered to be narrowly tailored because it was found to be a blanket prohibition on all election-related speech. Id. The Emineth court found that the electioneering law

was "overly broad and not limited to conduct in and around the polls." Id. The court also acknowledged that many states regulate conduct near or at the polls and this appears sufficient to preserve the right of individuals to vote freely, effectively and in secret. Id.

[¶43] In the instant case, N.D.C.C. §16.1-10-06.2 is limited to conduct in and around the polls. The statute proscribes that a person cannot approach people coming or going from a polling place for the purpose of gathering signatures for any reason and that it cannot happen within 100 feet of a polling place while it is open for voting. On June 10th, 2014, Francis was one of two petitioners at the Jamestown Civic Center while it was open for voting for a primary election. He was standing under the canopy of the entrance to the civic center, which is well within the 100 foot zone laid out in §16.1-10-06.2. It was reported by Mr. Bradley and Deputy Hanson that he was collecting signatures.

[¶44] Francis admitted to gathering signatures. He continued to gather signatures despite being told by Mr. Bradley and Deputy Hanson to stop. Francis' conduct was in violation of N.D.C.C. §16.1-10-06.2. The statute is limited to conduct in and around the polls and specific to time, place and manner. The statute is therefore not unconstitutional as applied to Francis.

[¶45] **III. N.D.C.C. 16.1-10-06.2 does not violate Article III, Section 1 of the North Dakota Constitution**

[¶46] Francis also argues that N.D.C.C. §16.1-10-06.2 is unconstitutional because it interferes with his right to amend the state constitution by initiated measure. Article III, Section 1, of the North Dakota Constitution states, "Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair these powers." However, the power of the people to refer and initiate laws is not absolute; it is subject to reasonable regulation through laws meant to facilitate those powers. Wood v. Byrne, 60 N.D. 1, 232 N.W. 303 (1930). The trial court in this case notes that the ND Supreme Court has upheld statutory restrictions "if their intent was to discourage fraud and abuse, and minimize mistakes that might occur in the referral process. Husbye v. Jaeger, 534 N.W.2d. 811, 815 (N.D. 1995) (Appellee's App. at A-4).

[¶47] The trial court also indicated that, with the exception of Bolinske, litigation over the scope of Article III, Section 1 has involved statutes or policies which directly regulate the referral or initiative process. (Appellee's App. at A-4). The statute under which Francis was charged prohibits gathering signatures for any reason within 100 feet of the entrance to a polling place. The trial court noted that while the statute applies to initiative and referral, it would also apply to petitions regarding matters unrelated to initiative and referral. (Id.)

[¶48] In Bolinske v. North Dakota State Fair Ass'n, the petitioner asserted that his rights to propose laws by the initiative process under Article III, Section 1,

were violated by the State Fair Association's regulation, which prohibited freely circulating initiative petitions for signatures on the state fair grounds. 522 N.W.2d, 426, 429 (1994). The U.S. Supreme Court recognized the petition process as a highly protected form of expressive activity. Id. at 431 (citing Meyer v. Grant, 108 S. Ct. 1886 (1998). However, this Court found that even political expression, one of the highest forms of protected free speech, being exercised in quintessential public fora such as parks and public sidewalks, is subject to reasonable time, place. and manner regulations. Bolinske at 431 (citing Burson v. Freeman, 112 S.Ct. 1846 (1992)). This Court held that Article III, Section 1 does not prohibit any regulation of the initiative process on public property and that doing so would place that activity on a higher plan than all other forms of constitutionally protected expression. Bolinske at 437.

[¶49] The trial court in the instant case held that because statute in question impinges on both the public forum and the initiative and referral process, for N.D.C.C. §16.1-10-06.2 fall within the bounds of Article III, Section 1, it must provide both a "countervailing enhancement" to the initiative and referral process and to reasonable time, place and manner restrictions. (Appellee's App. at A-5, A-6). The trial court defined the countervailing enhancement as the preservation of the right to vote without being subjected to intimidation or fraud, citing Fitzmaurice v. Willis, which says that the state legislature "may prescribe

reasonable regulations to prevent fraud, preserve order and insure a fair election." 20 N.D. 372, 127 N.W. 95, 98 (1910). The trial court in this case found the countervailing enhancement in N.D.C.C. §16.1-10-06.2 to be that it preserves order and provides for unimpeded access to the polling place, therefore facilitating a citizen's right to vote. (Appellee's App. at A-7). The trial court also points out that if a voter is denied access to the polling place, the value of placing a measure on the ballot by initiative or referral would be diminished. (Id.) The U.S. Supreme Court has already found 100 foot buffer zones around polling places to be constitutional in Burson, recognizing that the state has the compelling interest of preserving the right to vote unimpeded and maintaining order at the polling place. Burson at 1848. N.D.C.C. §16.1-10-06.2 is reasonable in time, place and manner and does not hamper, restrict, or impair the initiative process as described in Article III, Section 1. It is therefore not unconstitutional as related to Article III, Section 1.

[¶50] **IV. The Defendant was not selectively prosecuted**

[¶51] Francis argues that he was selectively prosecuted under N.D.C.C. §16.1-10-06.2, saying that he was prosecuted because of why he was gathering signatures. The U.S. Supreme Court has held that prosecutors generally have broad discretion to enforce criminal laws. United States v. Armstrong, 517 U.S. 456, 464 (1996). There is a presumption of regularity in prosecutorial misconduct

and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." Id. (quoting United States v. Chem. Found, Inc., 272 U.S.1, 14-15 (1926)). Selective enforcement of the laws, without evidence of an improper motive, is not a constitutional violation. Gray v. N.D. Game & Fish Dep't., 2005 ND 204, ¶ 32, 706 N.W.2d 614. "In the ordinary case, 'so long as the prosecutor has probable cause to believe . . . the accused committed an offense defined by statute, the decision whether . . . to prosecute, and what charge to file . . . generally rests entirely in [the prosecutor's] discretion.'" Armstrong, at 464 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

[¶52] The prosecutor's discretion, however, is subject to constitutional restraints. Id. The Due Process Clause prohibits prosecutors from basing a decision to prosecute on "an unjustifiable standard such as race, religion, or other arbitrary classification." Armstrong at 464. " A defendant claiming selective prosecution must establish other similarly situated individuals have not been prosecuted and the prosecution of the defendant is based upon constitutionally impermissible considerations. Gray at ¶ 32.

[¶53] The trial court in this case denied Francis' motion to dismiss on these grounds, ruling that (1) there was no showing that anyone gathering signatures near a polling place in Stutsman County went unprosecuted; and (2) There was no

evidence that the 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 that Francis committed an offense defined by statute. (Appellee's App. at A-3).

[¶54] N.D.C.C. §16.1-10-06.2 proscribes that a person cannot approach people coming or going from a polling place for the purpose of gathering signatures for any reason and that it cannot happen within 100 feet of a polling place while it is open for voting. Back on June 10th, 2014, Francis was one of two petitioners standing at an entrance to Jamestown Civic Center while it was open for voting for a primary election. He was standing under the canopy of the entrance to the civic center, which is within the 100 foot zone laid out in §16.1-10-06.2. It was reported by Mr. Bradley and Deputy Hanson that he was collecting signatures.

[¶55] Francis admits to gathering signatures. He continued to gather signatures despite being told by Mr. Bradley and Deputy Hanson to stop. Based on the circumstances of the case, the prosecution had probable cause to believe that Francis was in violation of N.D.C.C. §16.1-10-06.2.

[¶56] At the evidentiary hearing back on May 13th, 2015, Francis presented witness testimony and several exhibits pertaining to Measure 5, the initiative for which Francis was collecting signatures. Francis presented a copy of a letter to Burleigh County Sheriff Pat Heinert from North Dakotans for Clean Water,

Wildlife and Parks (hereinafter referred to as "ND Clean Water") asking for prosecution of an opposition group for publication of false information under N.D.C.C. 16.1-10-04 (Appellant's App. at A.83). However, there was no evidence presented that ND Clean Water ever asked Stutsman County to prosecute their opposition. Tr. p. 46-47, ll 17-25; 1. Francis also produced a copy of an email to Peter Welte, who was Grand Forks County State's Attorney at that time, from Jon Godfread of North Dakotans for Common Sense Conservation (Appellant's App. at A.80). The content of the letter is asking Mr. Welte to prosecute ND Clean Water for violations under N.D.C.C. §16.1-10-06.2. There was no evidence presented that the Stutsman County State's Attorney's Office was contacted for such a request. Tr. p. 47, ll 9-21.

[¶57] There was no evidence presented on Francis being prosecuted because of the message or the measure itself. Tr. p. 47-49. Witness testimony indicated there was no reason to think that either prosecutor in this case or the Stutsman County State's Attorney's Office was linked with ND Clean Water or opposing groups. Id. There was also no knowledge or indication from witness testimony that the Stutsman County State's Attorney's Office was in any way aware of the tenor of the campaign for the measure for which Francis was collecting signatures. Id.

[¶58] The prosecution had probable cause to prosecute Francis under N.D.C.C.

§16.1-10-06.2. There is nothing to indicate that anyone gathering signatures near a polling place went unprosecuted. There is also nothing to indicate that Francis was being prosecuted other than the prosecutor's belief that there was probable cause to believe that Francis committed an offense defined by statute. Therefore, Francis was not selectively prosecuted.

[¶59] CONCLUSION

[¶60] For the foregoing reasons, plaintiff and appellee the State of North Dakota respectfully requests that the district court's order denying Francis' motion to dismiss be affirmed.

RESPECTFULLY SUBMITTED this 17th day of February, 2016.

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STATE OF NORTH DAKOTA COUNTY OF STUTSMAN		IN DISTRICT COURT SOUTHEAST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA Plaintiff/Appellee v. CURTIS FRANCIS, Defendant/Appellant	)))))))))	**Supreme Court No. 20150280** **Stutsman Cty No. 47-2015-CR-619** **CERTIFICATE OF SERVICE**

1. On February 17th, 2016, a copy of the document "Appellee's Brief: Appeal from the Judgment of the District Court Entered September 30th, 2015, Issued in Stutsman County" was e-served on the following individuals:

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