

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Gary Emineth,)	
)	
PLAINTIFF,)	Judge
)	
v.)	Civil No.
)	
Alvin Jaeger, Secretary of State of)	
North Dakota, in his official capacity;)	
Wayne Stenehjem, Attorney General of)	
North Dakota, in his official capacity;)	
Richard J. Riha, Burleigh County)	
State’s Attorney, in his official capacity)	
)	
DEFENDANTS.)	

PLAINTIFF’S VERIFIED COMPLAINT

NATURE OF ACTION

1. This case challenges N.D. CENT. CODE § 16.1-10-06, which bans “Electioneering on election day” (the “Ban”).
2. Plaintiff Gary Emineth is a private individual and resident of Lincoln, North Dakota, who wishes to exercise his First Amendment right to speak in support of political candidates on Election Day, November 6, 2012, as incorporated against the states by the Fourteenth Amendment.
3. Mr. Emineth wishes to engage in speech on election day by displaying yard signs on his private property, distributing flyers in public places, and

discussing the election with his family members, friends, associates, and neighbors.

4. Mr. Emineth reasonably fears that, if he engages in this speech, the North Dakota Secretary of State, North Dakota Attorney General, or Burleigh County State's Attorney will—either directly or by enlisting the help of other authorities—enforce the Ban against him. This fear has chilled his constitutionally protected speech.
5. Thus, Mr. Emineth seeks a permanent injunction against enforcement of the Ban.
6. Additionally, Mr. Emineth seeks a declaration that the Ban is facially unconstitutional under the First Amendment. In the alternative, Mr. Emineth seeks a declaration that the Ban is unconstitutional as applied to him and his desired activities.

JURISDICTION & VENUE

7. This Court has jurisdiction because this action arises under the First and Fourteenth Amendments to the United States Constitution. *See* 28 U.S.C. § 1331.
8. This Court also has jurisdiction under the Declaratory Judgment Act. *See* 28 U.S.C. §§ 2201-02.

9. This Court also has jurisdiction under the Civil Rights Act. *See* 42 U.S.C. § 1983.
10. This Court also has jurisdiction to, in its discretion, award attorney's fees in this action. *See* 42 U.S.C. § 1988(b).
11. Venue in this Court is proper under 28 U.S.C. §§ 1391(b)(1) and (b)(2).

PARTIES

12. Plaintiff Gary Emineth is a private individual and resident of Lincoln, North Dakota, who wishes to speak in support of candidates for office this Election Day.
13. Defendant Alvin A. Jaeger is the North Dakota Secretary of State, sued in his official capacity as the individual charged with enforcing North Dakota's election laws. N.D. CENT. CODE § 16.1-01-01.
14. Defendant Wayne Stenehjem is the Attorney General of North Dakota, sued in his official capacity as an individual with the authority to prosecute criminal offenses in the State. N.D. CENT. CODE, § 54-12-01.
15. Defendant Richard J. Riha is the Burleigh County State's Attorney, sued in his official capacity as an individual who could be enlisted to enforce the Ban. N.D. CENT. CODE, § 11-09-18.

FACTUAL BACKGROUND

16. Mr. Emineth is a private individual and resident of Lincoln, North Dakota.

17. Mr. Emineth is currently engaged in constitutionally protected speech through nis display of election-related yard signs on his private property. He does not wish to remove those signs in advance of November 6th, as the Ban requires.
18. Mr. Emineth also wishes to speak in support of candidates this Election Day by distributing flyers in public places, but the Ban prohibits him from doing so.
19. Mr. Emineth frequently discusses the upcoming election with his friends, family members, associates and neighbors. He wishes to continue this behavior on Election Day, but the Ban prohibits him from doing so.

COUNT 1

Declaratory Judgment concerning N.D. CENT. CODE § 16.1-10-06

20. Plaintiff realleges and incorporates by reference paragraphs 1-19.
21. The Ban prohibits “[a]ny 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.” N.D. CENT. CODE § 16.1-10-06. Thus, it is a prior restraint on protected speech.
22. Under *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Entertainment Software Association v. Hatch*, 443 F. Supp. 2d 1065 (D.

Minn. 2006), and other Supreme Court and Eight Circuit precedent, prior restraints on protected speech are subject to strict scrutiny.

23. Under *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) and other Supreme Court and Eighth Circuit precedent, a statute subject to strict scrutiny must be narrowly tailored to a compelling state interest.
24. North Dakota can offer no justification for its political speech Ban—let alone a compelling state interest. Moreover, North Dakota’s Ban is not narrowly tailored. Thus, the challenged statute cannot survive the strict scrutiny applicable here, and is unconstitutional on its face.
25. Additionally and in the alternative, the Ban is unconstitutional as applied to Mr. Emineth, since it prohibits him from engaging in activities that are specifically protected by the First Amendment and Supreme Court precedent: engaging in political discussions, displaying election-related yard signs on his private property, and distributing election-related flyers in public fora.
26. Additionally, in *Mills v. Alabama*, 384 U.S. 214 (1966), the Supreme Court invalidated a state statute making it illegal for a newspaper editor "to do no more than urge people to vote one way or another in a publicly held election" on election day. *Id.* at 220.

27. Since North Dakota's Ban criminalizes the very activity the Supreme Court found to be protected in *Mills*, it must also fail under that precedent.

COUNT 2

Preliminary and Permanent Injunctions concerning N.D. CENT. CODE § 16.1-10-06

28. Plaintiff realleges and incorporates by reference paragraphs 1-27.

29. N.D. CENT. CODE § 16.1-10-06 is contrary to the First Amendment to the United States Constitution.

30. Enforcement of N.D. CENT. CODE § 16.1-10-06 violates and would violate the constitutional rights of Plaintiff and other residents of North Dakota.

31. Consequently, Plaintiff asks that this Court issue preliminary and permanent injunctions prohibiting the enforcement of N.D. CENT. CODE § 16.1-10-06.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

- A. A declaration that N.D. CENT. CODE § 16.1-10-06 is facially unconstitutional as a violation of the First Amendment protection for political speech, as incorporated against the states by the Fourteenth Amendment.
- B. In the alternative, a declaration that N.D. CENT. CODE § 16.1-10-06 is unconstitutional as applied to Mr. Emineth.


- C. Preliminary and permanent injunctions pursuant to 42 U.S.C. § 1983 against enforcement of N.D. CENT. CODE § 16.1-10-06, and any such additional injunctive relief as this Court may direct.
- D. Costs and attorneys fees under 42 U.S.C. § 1988 and any other applicable statute or authority, and further relief this court may grant in its discretion.

Dated this 16th day of October, 2012.

Respectfully submitted,

/s/ Allen Dickerson
Allen Dickerson*
Anne Marie Mackin*
Center for Competitive Politics
124 West Street South, Suite 201
Alexandria, VA 22314
Telephone: 703-894-6800
Facsimile: 703-894-6811
adickerson@campaignfreedom.org
amackin@campaignfreedom.org

*Admission to this Court *pro hac vice* pending.


Monte L. Rogneby
VOGEL LAW FIRM
Monte L. Rogneby (ND ID #5029)
US Bank Building
200 North 3rd Street, Suite 201
P.O. Box 2097
Bismarck, ND 58502-2097
Telephone: 701-258-7899
Facsimile: 701-258-9705
mrogneby@vogellaw.com