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

Gary Emineth,	)	
	)	
PLAINTIFFm	)	**Judge**
	)	
v.	)	**Civil No.** 1:12-cv-139
	)	
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.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PERMANENT INJUNCTION

Introduction

Gary Emineth is a private individual and resident of Lincoln, North Dakota. Mr. Emineth challenges N.D. CENT. CODE § 16.1-10-06—a North Dakota statute banning "[e]lectioneering on election day" (the "Ban")—as an unconstitutional abridgement of his First Amendment right to free speech as incorporated against the states by the Fourteenth Amendment. The Ban prohibits "[a]ny person" from "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."[1] Thus, the plain language of the Ban criminalizes[2] *all speech* aimed at persuading a voter to cast (or not cast) his ballot in any particular way on an Election Day. It outlaws this conduct before it even takes place, thereby imposing a prior restraint on constitutionally protected speech.

Under the Ban, if a private individual advocates for or against a candidate, ballot measure, or party on an Election Day—to a family member, neighbor, friend, associate, or any other voter—that individual is subject to prosecution. The Ban contains no exceptions.[3]

In *Mills v. Alabama*,[4] 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"[5] on Election Day. The *Mills* court struck down that statute under the First Amendment's Press Clause. Its decision controls the

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[1] N.D. CENT. CODE § 16.1-10-06. The statute continues that any person engaging in such behavior "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."

[2] *See* N.D. CENT. CODE § 12.1-32-01 (recognizing seven types of criminal offenses, including "infractions," which a person violating the Ban is guilty of under § 16.1-10-06).

[3] Save under the Ban's limited exception for billboards and bumper stickers with particular adhesion qualities. *See* N.D. CENT. CODE §16.1-10-06.

[4] 384 U.S. 214 (1966).

[5] *Id.* at 220.

outcome of this case, since Plaintiff's claim is based on the Speech Clause (which requires even stricter scrutiny than Press Clause challenges).[6]

Under North Dakota law, "[t]he secretary of state must be, ex officio, supervisor of elections and may employ additional personnel to administer this title."[7] Thus, Plaintiff seeks to enjoin Secretary Jaeger, in his official capacity, from enforcing the Ban. State law also gives the North Dakota Attorney General the authority to prosecute criminal offenses[8], so Plaintiff seeks to enjoin Wayne Stenehjem, in his official capacity as Attorney General of North Dakota, from enforcing the Ban. Finally, the general statutory authority of North Dakota's state's

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[6] *See, e.g.*, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (Where a public broadcasting station would not allow a third party candidate to participate in a televised debate, the Court deferred to the station's "journalistic discretion," noting that "[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." By contrast, "[i]f the government excludes a speaker who falls within the class to which such a forum is made generally available, its action is subject to strict scrutiny." *Id.* at 677 (internal citations omitted); *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (subjecting "must carry" legislation requiring cable television stations to provide public access channels to intermediate scrutiny).

[7] N.D. CENT. CODE § 16.1-01-01.

[8] N.D. CENT. CODE § 54-12-01(5) provides that, "[t]he attorney general shall…[a]ttend the trial of any party accused of crime and assist in the prosecution when in the attorney general's judgment the interests of the state require it." The Attorney General also may enforce the Ban based on the Secretary of State's enforcement authority under N.D. CENT. CODE § 54-12-01(2), which provides that "[t]he attorney general shall…[i]nstitute and prosecute all actions and proceedings in favor or for the use of the state which may be necessary in the execution of the duties of any state officer."

attorneys may allow them to enforce the Ban.[9] Thus, Plaintiff also seeks to enjoin Richard J. Riha, in his official capacity as Burleigh County State's Attorney, from enforcing the challenged statute.

Facts

Gary Emineth is a private resident of Lincoln, North Dakota. He wishes to exercise his First Amendment right to engage in political speech on November 6th, 2012—Election Day. Mr. Emineth is currently engaged in constitutionally protected speech through his display of election-related yard signs on his private property, and does not wish to take those signs down this November 6th, as the Ban requires. 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. Moreover, 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. Since the Ban completely forbids Mr. Emineth from engaging in his desired activities (and prohibits any other election-related speech this Election Day), he respectfully moves this Court for a permanent injunction against its enforcement.

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[9]Under N.D. CENT. CODE § 11-09-18, the state's attorney must "act as counsel for the county in any suit instituted by or against it, and perform other duties…which are imposed on state's attorneys by general statute."

Argument

The Eighth Circuit considers four factors when determining whether a permanent injunction is appropriate: (1) whether the movant has demonstrated success on the merits, (2) the threat of irreparable harm to the movant, (3) the balance between that harm and any injury the injunction would inflict on other parties, and (4) whether the injunction will serve the public interest.[10] Here, all four factors favor the issuance of the requested injunction.

I. Mr. Emineth succeeds on the merits of his claim.

a. North Dakota's Ban is an unconstitutional prior restraint on protected speech, and therefore must be struck down.

The Ban outlaws "[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."[11] On its face, this is an unconstitutional prior restraint on protected speech, and consequently, a violation of long-standing Supreme Court precedent and general principles of First Amendment law. As a

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[10] *See, e.g., Entertainment Software Association v. Hatch*, 443 F. Supp. 2d 1065, 1068 (D. Minn. 2006) (citing *Dataphase System, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)). Notably, "[t]he standard for a permanent injunction is virtually the same as that for a preliminary injunction. The only substantive difference is that the moving party must show actual -- as opposed to a probability of -- success on the merits." *Id.* (citing *Bank One v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999).

[11] N.D. CENT. CODE § 16.1-10-06.

prior restraint, the Ban is subject to strict scrutiny—a test it fails because it is not narrowly tailored to a compelling government interest.

i. Prior restraints are strongly disfavored under the Constitution and Supreme Court jurisprudence.

"A prior restraint is generally any governmental action that would prevent a communication from reaching the public."[12] More specifically, it is a prohibition—statutory,[13] administrative,[14] judicial,[15] or otherwise[16]—that forecloses speech

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[12] *Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1325 (D. Minn. 1995) (rejecting a First Amendment challenge to city's exclusion of everyone except abortion clinic invitees from the sidewalk in front of that clinic for a period of ten days. The Court held that excluding protestors and activists from this sidewalk was a valid restriction since it was reasonable in time, place, and manner).

[13] *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003) (noting that the Court has thrice invalidated prophylactic statutes designed to combat fraud by imposing prior restraints on solicitation when fundraising fees exceeded specified levels).

[14] *Alexander v. United States*, 509 U.S. 544, 550 (1993) ("[t]he term 'prior restraint' is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.'") (citing MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, pp. 4-14 (1984) (emphasis in opinion)).

[15] *Id.*; *see also Near v. Minnesota*, 283 U.S. 697 (1931) (holding that a state may punish "abuses" of the freedom of the press—such as the illegal publication of malicious or defamatory material—but that a permanent injunction prohibiting all future publication of a newspaper was an unconstitutional prior restraint on the freedom of the press).

[16] The Court's prior restraint jurisprudence also includes *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (vacating an order enjoining petitioners from distributing leaflets anywhere in their town); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (reiterating the heavy presumption against Constitutional validity of prior restraint and holding that the government had not met its heavy burden to justify a prior restraint against publication of classified information); and *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (striking down a statute

before it takes place. In the words of the Supreme Court, "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."[17] And consistent with the Constitution, the doctrine of prior restraint recognizes "the time-honored distinction between barring speech in the future and penalizing past speech."[18]

For over 80 years, the Court has expressly condemned prior restraints. Indeed, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[19] Looking to first principles, the Court turns to Blackstone and the Framers in reiterating First Amendment protections: "[i]t has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraint upon

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authorizing courts to indefinitely enjoin exhibition of films that had not yet been found to be obscene).

[17] *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. 376, 390 (1973) (holding city ordinance, as construed to forbid newspapers from publishing sex-designated help wanted ads for jobs where gender was not a bona fide occupational qualification, did not violate the First Amendment, but unequivocally reaffirming "the protection afforded to editorial judgment and to the free expression of views, however controversial." *Id.* at 391.).

[18] *Alexander v. United States*, 509 U.S. at 553 (holding that seizure of convicted criminal's adult-entertainment business did not prevent him from engaging in any future expressive activity).

[19] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (invalidating a state anti-obscenity commission that only had the authority to issue informal sanctions because the record demonstrated that the Commission set about to suppress publication of materials it deemed objectionable, with no safeguards to prevent suppression of constitutionally protected materials).

publication."[20] And reiterating one foundational principle of American democracy in the specific and very important context of speech, the Court has noted that "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."[21]

ii. North Dakota's Ban is a prior restraint on protected speech.

The Ban outlaws speech about candidates, parties, and ballot measures on Election Day.[22] Rather than punishing speech that interferes with the fair and orderly administration of elections once such speech takes place, the Ban was

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[20] *Near v. Minnesota*, 283 U.S. at 713-14 (citing 4 Bl. Com. 151, 152; Story on the Constitution, §§ 1884, 1889; Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543).

[21] *S.E. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559 (1975) (directors' rejection of theatre company's request to utilize a public forum for a performance constituted an unconstitutional prior restraint because adequate procedural safeguards were not in place to evaluate director decisions about who could utilize the public space). While there are exceptions to the long-standing prohibition against prior restraint, they are limited, few, and wholly inapplicable to this case. *See, e.g., C.B.S., Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (holding that prior restraint is justified "only where the evil that would result from the [speech] is both great and certain and cannot be militated by less intrusive measures"); *New York Times Co. v. United States*, 403 U.S. at 731 n. 1 (White, J., concurring in per curium opinion) (recognizing that "[t]he Congress has authorized a strain of prior restraints against private parties in certain instances," none of which are implicated here) (internal citations omitted); *Near v. Minnesota*, 283 U.S. at 716 (recognizing a national security exception to the freedom of the press, but nevertheless noting that "[p]ublic officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain [speech].") *Id.* at 718-719.

[22] N.D. CENT. CODE § 16.1-10-06.

"issued in advance of the time [the forbidden] communications are to occur."[23] Thus, the Ban prohibits speech both on its face *and* "by inducing excessive caution of the speaker."[24] Indeed, unless this Court issues the requested relief, Mr. Emineth will not engage in his constitutionally protected speech, since such activity will subject him to prosecution. Thus, plainly and by its terms, the Ban is a preemptive restriction on protected speech—a prior restraint.

The Supreme Court has invalidated statutes as prior restraints when they impose upon speakers "an uphill burden to prove their conduct lawful."[25] For example, the Court has thrice invalidated "laws that prohibited charitable organizations or fundraisers from engaging in charitable solicitation if they spent high percentages of donated funds on fundraising-- whether or not any fraudulent representations were made to potential donors. Truthfulness even of all representations was not a defense."[26] The proponents of these statutes argued that such measures combat fraud in the fundraising process. But the Court rejected these arguments, noting that such statutes are invalid when they employ a "broad

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[23] *Alexander v. United States*, 509 U.S. at 550 (distinguishing RICO forfeiture order levied against convicted criminal from an actual prior restraint, which forbids expressive activity outright).
[24] *Press Co. v. Pittsburgh Com. on Human Relations*, 413 U.S. at 390 (recognizing that inducing excessive caution in speakers can constitute invalid prior restraint).
[25] *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 620 (2003).
[26] *Id.* at 619.

prophylactic rule"[27] lacking any "nexus" to the likelihood that the prohibited speech would result in the activity the state sought to prevent.[28] Thus, there must be a sufficient "nexus" between rule and activity to situate statutory speech restrictions "on the constitutional side of the line the Court's cases draw between regulation aimed at fraud and regulation aimed at something else in the hope that it would sweep fraud in during the process."[29]

North Dakota's Ban is analogous to these prior restraints on solicitation, which were based not on the truth or falsity of the forbidden statements, but on the broad assumption that some solicitous speech is fraudulent. Plaintiff must guess at the State's justification for the Ban, but certainly some Election Day speech can persuade voters in harmful ways. Examples include voter harassment and intimidation. But North Dakota's prior restraint on *all* Election Day speech lacks the required "nexus" to these undesired outcomes. It is "aimed at something else in the hope that it would sweep [the election-related effect North Dakota seeks to avoid] in during the process."[30]

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[27] *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 637 (1980) (one such case invalidating prior restraints in the context of solicitation) (internal citations omitted).
[28] *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 793 (1988) (another case invalidating prior restraint on solicitation).
[29] *Illinois ex rel. Madigan v. Telemarketing Assocs*, 538 U.S. at 619-20 (internal citations and quotation marks omitted).
[30] *Id.*

iii. Prior restraints are unconstitutional unless they satisfy strict scrutiny.

It is beyond dispute that prior restraints on speech are subject to strict judicial scrutiny.[31] The Supreme Court has held that prior restraint is justified "only where the evil that would result from the [speech] is both great and certain and cannot be militated by less intrusive measures."[32] In addition to being a prior restraint, the Ban is also a content-based restriction on speech, since it singles out election-related expression for prohibition.[33] This is particularly problematic

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[31] *See, e.g., Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. at 677 ("[i]f the government excludes a speaker who falls within the class to which such a forum is made generally available, its action is subject to strict scrutiny"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973) (noting that strict scrutiny applies where the government has "'deprived,' 'infringed,' or 'interfered' with the free exercise of some…fundamental personal right or liberty") (internal citations omitted); *Entertainment Software Association v. Hatch*, 443 F. Supp. 2d at 1069 ("where protected First Amendment speech is concerned, any regulation is subject to 'strict'…scrutiny") (internal citations omitted).

[32] *C.B.S., Inc. v. Davis*, 510 U.S. at 1317 (staying an injunction preventing broadcaster from airing footage taken inside a meat packing plant because the plant failed to show that the economic harm resulting from airing the footage could not be militated by less intrusive measures).

[33] In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court invalidated a statute prohibiting anonymous campaign literature because such a statute "does not control the mechanics of the electoral process. *It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech...Furthermore, the category of covered documents is defined by their content -- only those publications containing speech designed to influence the voters in an election." Id.* at 345-46 (internal citations and quotation marks omitted) (emphasis added). North Dakota's Ban targets campaign literature (and other speech) based on the same criteria the Court found unconstitutional in

because "[d]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution."[34] "Government entities are strictly limited in their ability to regulate private speech in traditional public fora. Reasonable time, place, and manner restrictions are allowed, but content-based restrictions must satisfy strict scrutiny, i.e., they must be narrowly tailored to serve a compelling government interest."[35]

iv. North Dakota's Ban fails strict scrutiny.

In order to satisfy strict scrutiny, laws "must be narrowly tailored to serve a compelling government interest."[36] North Dakota has articulated no compelling interest that the challenged Ban furthers. Moreover, any interest they might assert—even if compelling—would not render the statute constitutional. One can hardly conceive of a statute less narrowly tailored than a blanket prohibition on *all* election-related speech. Such broad restrictions on constitutional rights have never been found to be constitutional, regardless of the context.[37]

McIntyre: it is a viewpoint-neutral but content-based regulation on pure speech, rather than a law governing the "mechanics of the election process."

[34] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (holding that spending money to speak out about elections is constitutionally protected speech).

[35] *Pleasant Grove City v. Summum*, 555 U.S. 460 (parsing the distinction between government and private speech) (internal citations and quotation marks omitted).

[36] *Id.*

[37] *See, e.g., Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 577 (1987) (finding regulation prohibiting "all 'First Amendment activities'" at an airport *substantially* overbroad) (emphasis added); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (holding that "[e]ven under the First Amendment's

1. North Dakota has no compelling interest that might be furthered by the Ban.

The only ascertainable state interest in enacting and enforcing the Ban was articulated in a case construing it. In *District One Republican Comm'n v. District One Democrat Comm'n*, the plaintiffs argued that the court should read N.D. CENT. CODE §16.1-10-06 to prohibit distribution of election-related flyers the night *before* the election in order to "prevent last minute election tactics…and promote an election system where each candidate is fairly and equitably allowed time to respond to issues and statements raised by the opposition."[38] While those plaintiffs did not persuade the court to extend the Ban's speech prohibition to apply the evening before an election, their argument might provide insight into the Ban's underlying legislative intent.

North Dakota may have wanted to ensure that if someone made a false accusation about a candidate (or ballot measure or party), that candidate (or the supporters or that measure or party) would have adequate time to refute the allegation before voters cast their ballots. If this was their intention, the legislature presumably concluded that allowing virtually *any* election-related speech on

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somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest"); *United States v. Williams*, 553 U.S. 285, 289 (2008) (holding that, even "[t]he broad authority to proscribe child pornography is not…unlimited").

[38] 466 N.W.2d 820, 832 (N.D. 1991).

Election Day would foreclose the opportunity for a timely response, undermining the election's integrity if such last-minute allegations proved influential but false.

But the Supreme Court expressly rejected this "confusive tactics" rationale in *Mills v. Alabama*,[39] noting that "[t]his argument, even if it were relevant to the constitutionality of the law, has a fatal flaw. The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law…then goes on to make it a crime to answer those 'last-minute' charges on Election Day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges.'"[40] The Court went on to conclude that "no test of reasonableness" could save that "law from invalidation as a violation of the First Amendment."[41] If it was indeed enacted to prevent such last minute mud-slinging, North Dakota's Ban suffers from this same "fatal flaw."

The Court has recognized one state interest as sufficiently compelling to justify Election Day prohibitions on speech: preserving the right of individuals to vote freely, effectively, and in secret by "regulating conduct in and around the

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[39] 384 U.S. at 220.
[40] *Id.* (internal citations omitted).
[41] *Id.*

polls in order to maintain peace, order and decorum there."[42] But North Dakota does not assert that its Ban furthers such an interest. Moreover, even if they did, any legislation in furtherance of this interest must still be narrowly tailored thereto.

2. Even if North Dakota's Ban furthered the compelling government interest of "regulating conduct in and around the polls in order to maintain peace, order, and decorum there," it is not narrowly tailored.

In the specific context of restricting Election Day speech, the Court found the requisite narrow tailoring in *Burson v. Freeman*, based on the state's compelling interest in "regulating conduct in and around the polls in order to maintain peace, order and decorum there."[43] *Burson* held 5-4 that Tennessee's statutory "campaign free zones," which prohibited vote solicitation within 100 feet of the polls, constituted "the rare case in which we have held that a law survives strict scrutiny."[44] Consistent with this ruling, several states have campaign or electioneering-free zones within a limited geographical radius of polling places.[45] But the *Burson* Court was careful to note that "[a]t some measurable distance from

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[42] *Burson v. Freeman*, 504 U.S. 191, 193 (1992).
[43] *Id.*
[44] *Id.* at 211. In the context of flyers, *see also Martin v. City of Struthers*, 319 U.S, 141 (1943) (striking down an ordinance prohibiting door-to-door distribution of handbills because, even though "burglars frequently pose as canvassers", door-to-door distribution is "useful [to] members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion," and the "dangers of distribution can so easily be controlled by traditional legal methods") *Id.* at 145; 147.
[45] *See, e.g.,* Robert Brett Dunham, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*, 77 GEO. L.J. 2137, 2143 (1989).

the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden."[46]

North Dakota's Ban is such a case. Rather than being limited to "conduct in and around the polls,"[47] it extends to "[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."[48] Thus, for its lack of limitations, it does not exhibit the required tailoring.

There is also abundant evidence that the free, fair, and orderly administration of elections can "be militated by less intrusive measures"[49] than North Dakota's Ban. Many states regulate conduct at or near the polls, and this appears sufficient to preserve the right of individuals to vote freely, effectively, and in secret.[50] North Dakota's virtually unlimited Ban on election-related speech goes well beyond these "less intrusive measures," further demonstrating that—regardless of the state

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[46] *Burson*, 504 U.S. at 210-211 (citing *Mills v. Alabama*, 384 U.S. 214; *Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating an absolute ban on paid circulators)).
[47] *Burson v. Freeman*, 504 U.S. at 193.
[48] N.D. CENT. CODE § 16.1-10-06. The statute continues that any person engaging in such behavior "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."
[49] *C.B.S., Inc. v. Davis*, 510 U.S. at 1317.
[50] *See generally,* Dunham, *supra* n. 45.

interest in preserving the right of individuals to vote—this Ban is not narrowly tailored.

b. The Supreme Court struck down a state statute making it illegal "to do no more than urge people to vote one way or another in a publicly held election" on Election Day, and that reasoning controls here.

i. In *Mills v. Alabama*, the Court invalidated a prohibition on Election Day editorials under the First Amendment's Press Clause.

An Alabama statute outlawed the publication of election-related newspaper editorials on Election Day. In striking down the statute, the Court noted that this prohibition "silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press."[51] The Court continued, "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[52] The Court also reiterated that "this question in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there,"[53] the issue posed by the statute upheld in *Burson*.[54]

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[51] *Mills v. Alabama*, 384 U.S. at 219.
[52] *Id.* at 220.
[53] *Id.* at 218.

The *Mills* reasoning controls this case. North Dakota's Ban is an even more sweeping prohibition on speech than the one invalidated in *Mills v. Alabama*. Like that Alabama statute, North Dakota's Ban is particularly egregious because of its specific application on Election Day, when political speech "can be most effective."[55] But the North Dakota provision goes even further than the law struck down in *Mills*. While Alabama limited just one form of speech (editorials), North Dakota prohibits all conceivable means of attempted or actual persuasion (save fixed and permanent billboards and bumper stickers with particular adhesion qualities).

ii. Laws that ban speech are subject to the searching "strict scrutiny" analysis, while laws abridging Press Clause freedoms may subject to less rigorous review.

It is noteworthy that the statute invalidated in *Mills v. Alabama* was struck down based on the First Amendment's Press Clause rather than its Speech Clause (which is the basis of Mr. Emineth's claim). The *Mills* Court never specifically articulated the level of scrutiny it applied in striking down the Alabama statute, but the scrutiny applicable in constitutional challenges based on these two clauses sometimes differs. While these differences are not always clear, to the extent that they exist, outright bans on speech challenged under the Speech Clause are subject

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[54] Courts have upheld restrictions on electioneering on Election Day when such restrictions are limited to a narrow zone surrounding polling places. See *supra* n. 45 and accompanying text.

[55] *Mills v. Alabama*, 384 U.S. at 219.

to strict scrutiny, while restrictions on the press challenged under the Press Clause sometimes need only survive intermediate scrutiny.[56] And the few times the Court has relied on the Press Clause alone in assessing the constitutionality of a law, it could have reached the same result under the Speech Clause.[57] In any case, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."[58]

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[56] *See, e.g.*, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. at 674 (Where a public broadcasting station would not allow a third party candidate to participate in a televised debate, the Court deferred to the station's "journalistic discretion," noting that "[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." By contrast, "[i]f the government excludes a speaker who falls within the class to which such a forum is made generally available, its action is subject to strict scrutiny." *Id.* at 677.); *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (evaluating "must carry" legislation requiring cable television stations to provide public access channels under intermediate scrutiny).

[57] *See, e.g.,* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) ("[m]ost of the freedoms the press receives from the First Amendment are no different from the freedoms everyone enjoys under the Speech Clause").

[58] *Mills v. Alabama*, 384 U.S. at 218-219.

iii. Since the statute invalidated in *Mills* failed under an unspecified level of scrutiny, the Ban—which abridges First Amendment freedoms even more significantly than the statute at issue in *Mills*—must fail strict scrutiny.

The Ban's language does not exempt the press from its prohibition on speech, so—at least insofar as it applies to the press—the Ban must fail under *Mills v. Alabama*. Moreover, to the limited extent that the appropriate level of scrutiny differs under the Speech and Press clauses, bans on private speech are subject to at least as rigorous an analysis as restrictions on the press.[59] Thus, since Alabama's prohibition of Election Day editorials did not survive Press Clause scrutiny, North Dakota's (even broader) Ban cannot survive the most intense "strict" scrutiny, which is required in this Speech Clause challenge. Moreover, the Ban flies in the face of the general constitutional principles the Supreme Court has articulated in the context of both the Speech and Press clauses, and violates the precept that legislation should enhance these First Amendment values, rather than impede them.

c. There is no possible saving interpretation of the Ban.

Plaintiff recognizes that the judiciary will uphold a statute if it can be read in a manner that is both lawful and logical. But there is no possible construction of the Ban that does not render it a prior restraint: "[a]ny manner" of inducement or persuasion (attempted or otherwise) is prohibited under N.D. CENT. CODE § 16.1-

[59] *See supra* n. 56-58 and accompanying text.

10-06. Moreover, only two cases have construed the statute, and neither addresses the prior restraint issue that gives rise to this challenge.[60]

The North Dakota Code specifies that "its provisions and all proceedings under it are to be construed liberally,"[61] eliminating the possibility of a limited reading of the phrase "any manner" (if one were even conceivable). Moreover, the Code's rule of severability[62] does not affect the outcome of this case. The Ban is comprised solely of (1) its prohibition (on "any manner" of attempted inducement or persuasion), and (2) its exception (for fixed and permanent billboards and bumper stickers with particular adhesion qualities). As established herein, there is no possible reading of any part of the prohibition that is consistent with the Constitution of the United States —it is a wholesale ban on protected speech, and

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[60] The only cases citing N.D. CENT. CODE § 16.1-10-06 are *District One Republican Comm'n v. District One Democrat Comm'n*, 466 N.W.2d 820 (finding that requiring campaign fliers to be personally handed to prospective voters would impose a requirement not included in the statute, and also holding that the statute does not prohibit any conduct that takes place the day before an election) and *Nelson v. Gass*, 27 N.D. 357 (1914) (noting that it would be a harsh construction of the Ban to render any person who assists a voter in casting his ballot subject to prosecution thereunder).

[61] N.D. CENT. CODE § 1-02-01.

[62] North Dakota law contains the following rule of severability: " [i]n the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section, or part of such title, but is confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment has been rendered." N.D. CENT. CODE § 1-02-20.

the Code's rule of construction requires it to be applied as liberally as possible.[63] If the Ban's prohibition is invalidated, the Ban's exception becomes meaningless. That being said, Plaintiff naturally has no objection to the Court issuing a declaratory judgment that reiterates the legality of fixed and permanent billboards and bumper stickers that contain election-related messages on Election Day.

II. Plaintiff will suffer irreparable harm if this Court does not issue the requested injunction, because North Dakota's Ban will prevent him from speaking on Election Day.

It is axiomatic to say that the "protection [of political speech] lies at the heart of the First Amendment."[64] The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[65] In this case, North Dakota's enforcement of the Ban will prevent Plaintiff from expressing his support for candidates in the overall context of the 2012 election cycle—specifically, on the very *day* of the election. Elections are, by nature, time sensitive and finite. While there will be other elections, no future election will be *this* election. Plaintiff wishes to voice his support for the specific candidates running on November 6, 2012 in the unique context of the current political situation, and at the uniquely urgent moment of that particular Election Day. If he is forbidden from

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[63] N.D. CENT. CODE §1-02-01.
[64] *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J; concurring).
[65] *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal citations omitted).

doing so, no court can offer the equitable relief of going back to November 6, 2012 once that day has passed. Thus, the harm Mr. Emineth suffers will be irreparable.

Moreover, under Eighth Circuit precedent, "if [plaintiff] can establish a sufficient likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm."[66] Since Plaintiff has already demonstrated success on the merits, the irreparable harm prong of the test for a permanent injunction is satisfied.

III. The harm Plaintiff will suffer if this court does not issue the requested injunction outweighs the injury such an injunction might cause North Dakota.

In the context of injunctions, the Eighth Circuit has noted that, as a general matter, "[t]he balance of equities…favors the constitutionally-protected freedom of expression."[67] This case is based upon the First Amendment freedom of speech on a crucial occasion: Election Day 2012. And while it involves the very real and important rights the First Amendment guarantees, it examines only a small portion

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[66] *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (citing *Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1140-41 (8th Cir. 1996); *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995)). *Phelps-Roper* was decided in the context of a preliminary—rather than permanent—injunction. But to obtain a preliminary injunction, the movant bears the lesser burden of demonstrating likely (rather than actual) success on the merits. *See supra* n.10. Since Plaintiff has demonstrated actual merits success, he has implicitly also demonstrated likely merits success.

[67] *Phelps-Roper v. Nixon*, 545 F.3d at 690.

of state election law, a provision unique to North Dakota.[68] It stands to reason that this provision is unique at least in part because it is unconstitutional, and at least in part because it lacks any legitimate justification. Thus, while the public interest in upholding Plaintiff's speech rights is great, no party has an interest in the enforcement of an unconstitutional law. Thus, the balance of harms thus favors the Plaintiff.

IV. A permanent injunction would not be adverse to the public interest, but instead serves the public's interest in safeguarding the political speech rights guaranteed by the First Amendment.

The First Amendment is foundational to our political process. Thus, vindication of the rights it guarantees would rarely serve the public more than *on an Election Day*. And in the injunction context, "the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights."[69] Since it is undisputed that "the

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[68] Indeed, many states prohibit electioneering activities within a certain distance of the polls. *See, e.g.,* Robert Brett Dunham, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*, 77 GEO. L.J. 2137, 2143 (1989). Hawaii law, for example, prohibits campaigning—including the use of entertainment troupes for political persuasion—within 200 feet of polling places. HAW. REV. STAT. §§ 11-132; 19-6(7) (2012).

[69] *Phelps-Roper v. Nixon*, 545 F.3d at 690 (citing *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Kirkeby v. Furness*, 52 F.3d at 775 (citing *Frisby v. Schultz*, 487 U.S. 474, 479 (1988))). *See also Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, *19 (8th Cir. 2012) (noting that a likely First Amendment violation "means that the

public interest favors protecting core First Amendment freedoms,"[70] and the Ban abridges these freedoms, it serves the public interest to issue the injunction requested here.

Conclusion

In light of the Ban's unconstitutional prior restraint on Mr. Emineth's constitutionally protected speech, he respectfully moves this Court to issue an injunction against its enforcement. He requests this injunction because he succeeds on the merits of his claim—the Ban is unconstitutional on its face under the First Amendment, and is also invalid in light of the precedent set by *Mills v. Alabama*. Further, Mr. Emineth will suffer irreparable harm if he is not allowed to engage in speech on Election Day. There is no other party who will be injured by the issuance of the injunction, and enjoining enforcement of the Ban serves the public's interest in vindicating core constitutional freedoms.

Mr. Emineth requests that this injunction issue against North Dakota Secretary of State Alvin Jaeger, North Dakota Attorney General Wayne Stenehjem, and Burleigh County State's Attorney Richard J. Riha. He further

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public interest and the balance of harms (including irreparable harm…) favor granting the injunction").

[70] *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999). *See also Kirkeby v. Furness*, 52 F.3d at 775 ("the public interest, as reflected in the principles of the First Amendment, is served by free expression on issues of public concern") (citing *Frisby v. Schultz*, 487 U.S. at 479)).

requests a declaration that the Ban is unconstitutional, both on its face and as applied to his desired activities.

Dated this 16th day of October, 2012.

Respectfully submitted,

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

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