

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

Gary Emineth,)
)
PLAINTIFF,)
)
v.)
)
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.)

Judge

Civil No. 1:12-cv-139

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


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JS 44 (Rev. 09/11)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Emineth, Gary</p> <p>(b) County of Residence of First Listed Plaintiff <u>Burleigh</u> <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys <i>(Firm Name, Address, and Telephone Number)</i> <i>(see attached)</i></p>	<p>DEFENDANTS Jaeger, Alvin A., Secretary of State of North Dakota</p> <p>County of Residence of First Listed Defendant _____ <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys <i>(If Known)</i></p>
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<p>II. BASIS OF JURISDICTION <i>(Place an "X" in One Box Only)</i></p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 3 Federal Question <i>(U.S. Government Not a Party)</i></p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 4 Diversity <i>(Indicate Citizenship of Parties in Item III)</i></p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES <i>(Place an "X" in One Box for Plaintiff and One Box for Defendant)</i></p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"><i>(For Diversity Cases Only)</i></td> <td style="width:10%;">PTF</td> <td style="width:10%;">DEF</td> <td style="width:33%;"></td> <td style="width:10%;">PTF</td> <td style="width:10%;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>	<i>(For Diversity Cases Only)</i>	PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
			SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN *(Place an "X" in One Box Only)*

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district *(specify)* 6 Multidistrict Litigation

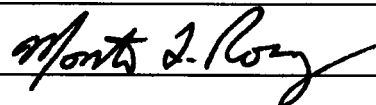
VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
 42 U.S.C. 1983

Brief description of cause:
 challenge to N.D. Cent. Code 16.1-10-06

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** _____ CHECK YES only if demanded in complaint: **JURY DEMAND:** Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):* JUDGE _____ DOCKET NUMBER _____

DATE: 10/16/2012 SIGNATURE OF ATTORNEY OF RECORD: /s/ Allen Dickerson /s/ Monte L. Rogneby 

FOR OFFICE USE ONLY: RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

ATTACHMENT TO CIVIL COVER SHEET

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*Admission to this Court *pro hac vice*
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