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The Future of Electioneering in Wyoming

Alex Beezley*

Electioneering outside of polling places is a controversial topic, particularly during election years. Although different states have different definitions of electioneering, many states characterize it as the display of campaign signs or the distribution of campaign literature.¹ Most states have statutes prohibiting electioneering within a certain distance of a polling place.² This distance is typically 100 feet or less.³ For example, Missouri prohibits individuals from electioneering within twenty-five feet of a polling place.⁴ Wyoming's electioneering statute is among the most restrictive in the country, as it prohibits electioneering within 300 feet of the entrance to a polling place during election days and 100 feet in front of absentee polling places that are accepting votes.⁵ Recently, a lawsuit titled *Frank v. Wyoming Secretary of State* was filed in the United States District Court for the District of Wyoming. The lawsuit challenges the constitutionality of Wyoming's statute, claiming that it violates the free speech rights of those seeking to engage in electioneering.⁶ Based on the Supreme Court's decision in *Burson v. Freeman*,⁷ the challenge to Wyoming's electioneering statute will likely be successful.

In *Burson*, the Supreme Court held that a law prohibiting electioneering within 100 feet of a polling place was constitutional.⁸ In that case, a candidate for office argued that the law unconstitutionally abridged her right to free speech because it limited her ability to communicate with

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¹ See N.H. REV. STAT. ANN. § 659:43 (2016); WYO. STAT. ANN. § 22-26-113 (2019).

² NATIONAL ASSOCIATION OF SECRETARIES OF STATE, *State Laws Prohibiting Electioneering Activities Within a Certain Distance of the Polling Place*, (Aug. 11, 2020, 8:50 PM), <https://www.nass.org/sites/default/files/surveys/2017-10/state-laws-polling-place-electioneering-2016.pdf>.

³ *Id.*

⁴ MO. REV. STAT. § 115.637(18) (2016).

⁵ WYO. STAT. ANN. § 22-26-113 (2019).

⁶ Verified Complaint for Declaratory and Injunctive Relief at 8, *Frank v. Wyo. Sec'y of State* (No. 2:20-cv-00138) (D. Wyo. Jul. 24, 2020) (Aug. 11, 2020, 8:53 PM), <https://www.courtlistener.com/docket/17381941/1/frank-v-wyoming-secretary-of-state/>.

⁷ 504 U.S. 191 (1992).

⁸ *Id.* at 211.

voters.⁹ The Court noted that a strict scrutiny standard should be used to decide the case, under which “a [s]tate must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’”¹⁰ Furthermore, the statute must use the least restrictive means to serve the state’s interests.¹¹ The Court upheld the law because it was narrowly tailored due to the state having a compelling interest in preserving the right to vote freely and preventing fraud.¹² However, the Court noted that beyond a certain distance from a polling place, regulation of electioneering could become unconstitutional.¹³ Following the *Burson* decision, other courts have upheld 100-foot restrictions, including the Eighth Circuit in *Minnesota Majority v. Mansky*.¹⁴

The complaint in *Frank* asserts that Wyoming’s 300-foot electioneering restriction is unconstitutional because it restricts the plaintiffs from effectively communicating with voters.¹⁵ The plaintiffs want to engage in electioneering to inform voters of their views, which includes distributing campaign literature, but they cannot easily do so due to the electioneering restriction.¹⁶ The plaintiffs are also limited in their ability to gather signatures or display bumper stickers, as the statute prevents them from doing so within 300 feet of polling places on election days, and 100 feet of absentee polling places, which can accept votes up to forty-five days before an election.¹⁷ The lawsuit ultimately challenges the statute as a violation of the plaintiffs’ free speech rights.¹⁸

There are several differences between *Burson* and *Frank* that may lead the District of Wyoming to come to a different conclusion than the Supreme Court’s conclusion in *Burson*. First, the difference in the distance regulated by the statute in *Burson* and the distance regulated by the statute in *Frank* is

⁹ *Id.* at 194.

¹⁰ *Id.* at 198.

¹¹ *Id.* at 195.

¹² *Burson*, 504 U.S. at 211.

¹³ *Id.* at 210.

¹⁴ 708 F.3d 1051, 1058 (8th Cir. 2013), *aff’d sub nom*, 138 S. Ct. 1876 (2018).

¹⁵ Verified Complaint for Declaratory and Injunctive Relief, *supra* note 6, at 10.

¹⁶ *Id.*

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 8.

substantial.¹⁹ The statute in *Frank* imposes a limit that is three times greater in distance and nine times greater in surface area than that imposed by the statute in *Burson*.²⁰ As *Burson* notes, there is some measurable distance from a polling place that would make an electioneering statute impermissible.²¹ While the Court in *Burson* did not specify what this distance would be, the magnitude of Wyoming's electioneering statute suggests that the statute may be unconstitutional.²² Furthermore, the Court in *Burson* clarified that the strict scrutiny test should be used in challenges to electioneering statutes.²³ For a statute to survive strict scrutiny, a state must demonstrate that the law is necessary to assert a compelling state interest, that the law is narrowly tailored to serve that interest, and that the law is the least restrictive means for serving that interest.²⁴ This lawsuit is still in an early stage of development, so Wyoming has not yet given a defense of the statute. However, because strict scrutiny imposes such a stringent standard, laws rarely survive it when this level of review is applied.²⁵ The law in *Burson* met this standard because the state showed that the law was necessary to serve the interest of preventing fraud and harassment at polling places.²⁶ However, it is unlikely that Wyoming will be able to show that such a large restriction is necessary to serve those interests because they could likely be protected with a narrower and less restrictive law. Finally, the Wyoming statute is more expansive than the statute in *Burson* because it also regulates absentee polling places.²⁷ Beyond simply requiring a greater distance, the Wyoming statute covers more polling places over more days than that covered by the law in *Burson*, which makes it even more unlikely that the statute will be found to be constitutional.²⁸

Overall, the differences between the laws in *Frank* and the laws in *Burson* are likely significant enough for the Wyoming statute to be found unconstitutional. If the case goes to trial, Wyoming will likely argue that

¹⁹ *Id.* at 9.

²⁰ Verified Complaint for Declaratory and Injunctive Relief, *supra* note 6, at 9.

²¹ *Burson*, 504 U.S. at 210.

²² *Id.*

²³ *Id.* at 199.

²⁴ *Id.* at 195, 198.

²⁵ *Id.* at 211.

²⁶ *Burson*, 504 U.S. at 211.

²⁷ Verified Complaint for Declaratory and Injunctive Relief, *supra* note 6, at 6.

²⁸ *Id.*

the statute is necessary to protect the state's interests in preventing fraud and harassment. If the court accepts this argument, as the Supreme Court did in *Burson*, it will have two choices: the court can either uphold the law as a reasonable means to protect this interest, or strike it down as unconstitutional because the interest could be protected with a narrower and less restrictive law. Because the law will be subject to the strict scrutiny standard, the latter choice is the more likely outcome. Although the outcome of this case is currently unknown, the decision may have an impact on electioneering in Wyoming, and it could lead to further litigation in states with similarly restrictive electioneering laws.

Edited by Ben Davisson