

FILED
United States Court of Appeals
Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

October 23, 2023

Christopher M. Wolpert
Clerk of Court

JOHN C. FRANK,

Plaintiff - Appellee/Cross-
Appellant,

v.

DEBRA LEE, Laramie County Clerk,
in her official capacity; CHARLES
GRAY, Wyoming Secretary of State,
in his official capacity; SYLVIA
HACKL, Laramie County District
Attorney, in her official capacity,

Defendants - Appellants/Cross-
Appellees.

Nos. 21-8058, 21-8059, and 21-8060

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 2:20-CV-00138-NDF)

James Peters, Senior Assistant Attorney General (Mackenzie Williams, Senior Assistant Attorney General, State of Wyoming, Cheyenne, Wyoming, with him on the briefs), for Defendants-Appellants/Cross-Appellees Charles Gray and Sylvia Hackl.

J. Mark Stewart of Davis & Cannon, LLP, Cheyenne, Wyoming (Catherine M. Young, Davis & Cannon, LLP, with him on the briefs), for Defendant-Appellant/Cross-Appellee Debra Lee.

Stephen R. Klein of Barr & Klein PLLC, Washington, District of Columbia (Benjamin Barr of Barr & Klein PLLC, Chicago, Illinois, with him on the briefs) for Plaintiff-Appellee/Cross-Appellant.

Before **HOLMES**, Chief Judge, **MATHESON** and **ROSSMAN**, Circuit Judges.

ROSSMAN, Circuit Judge

Wyoming law prohibits electioneering within 300 feet of a polling place on an election day and within 100 feet of an absentee polling place during the 45-day period when absentee voting is being conducted. Wyo. Stat. Ann. § 22-26-113 (the electioneering statute); Wyo. Stat. Ann. § 22-6-107(b). At issue is whether these prohibitions violate the First Amendment.

Plaintiff John C. Frank¹ sued Wyoming state and local officials² in federal district court under 42 U.S.C. § 1983, contending the electioneering

¹ During the pendency of this appeal, Plaintiff-Appellee/Cross-Appellant Grassfire LLC dissolved. On September 28, 2023, counsel for Grassfire LLC notified the court of this development and moved for partial voluntary dismissal with prejudice under Federal Rule of Appellate Procedure 42(b)(3). The court grants the unopposed motion, dismisses Grassfire as a party, and dismisses the portion of the appeal related to Grassfire only. Grassfire had separately challenged Wyoming's election day prohibition on signature gathering, Wyo. Stat. Ann. § 22-26-113, but the district court left this issue unaddressed without explanation. Mr. Frank concedes he does not have standing to pursue this claim himself.

² Plaintiff sued Debra Lee, the Laramie County Clerk; Ed Buchanan, the Wyoming Secretary of State; and Leigh Anne Manlove, the District Attorney of Larimer County. As of January 3, 2023, Charles Gray succeeded Mr. Buchanan as Wyoming Secretary of State and Sylvia Hackl succeeded

statute violated the First Amendment, facially and as applied. Mr. Frank, a Wyoming citizen, alleged the statute unconstitutionally prevented him from handing out campaign literature and displaying bumper stickers on his car within the 300-foot buffer zone. Mr. Frank also claimed the statute was overbroad because it violated the First Amendment rights of third parties who could not display campaign signs on private property falling within the statutory buffer zones.

The parties filed cross-motions for summary judgment. The district court granted each in part, striking down some parts of the electioneering statute and upholding the rest. Specifically, the district court held the ban on electioneering within 300 feet of polling places on election day was unconstitutional, as was the ban on bumper stickers within the election day and absentee period buffer zones. But the district court upheld the statute's prohibition on electioneering within 100 feet of absentee polling places. It

Ms. Manlove as Laramie County District Attorney. Under Federal Rule of Appellate Procedure 43(c)(2), they are automatically substituted as parties in this matter.

Mr. Gray and Ms. Lee are the chief elections officers for the State and Laramie County, respectively. Ms. Hackl is responsible for prosecuting crimes in Laramie County, including violations of the electioneering statute. We refer to them collectively as "Defendants."

also concluded there was an insufficient factual basis to consider Plaintiff's overbreadth claim. All parties timely appealed.³

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in part, reverse in part, and remand for further proceedings. We uphold the electioneering statute against Mr. Frank's First Amendment challenge to the size of, and conduct proscribed within, the 300-foot election-day buffer zone. We reverse and remand on Mr. Frank's constitutional challenge to the absentee buffer zone, including the electioneering conduct proscribed within that zone. Finally, we remand for the district court to adjudicate in the first instance Mr. Frank's facial overbreadth challenge.

I

We begin by reciting the history of the electioneering statute and its enforcement in Wyoming. We then detail the factual and procedural background of the constitutional challenges now before us.⁴

³ Defendant Lee's appeal was docketed in case number 21-8058; Defendants Gray and Hackl's in 21-8059; Plaintiff cross-appealed in 21-8060. We consolidated the appeals.

⁴ These facts derive from Plaintiff's verified complaint and attachments thereto as well as the parties' summary judgment briefing.

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The polling place is where the act of voting itself takes place. Like every other state and the District of Columbia, Wyoming regulates electioneering around polling places.⁵ The state's electioneering statute provides:

(a) Electioneering too close to a polling place or absentee polling place under W.S. 22-9-125 when voting is being conducted, consists of any

⁵ Most jurisdictions—thirty-five states and the District of Columbia—prohibit electioneering within 100 feet or less of the polling location. *See* Ala. Code § 17-9-50; Ariz. Rev. Stat. Ann. §§ 16-515, 16-1018(1); Ark. Code Ann. § 7-1-103(a)(8); Cal. Elec. Code §§ 319.5, 18370; Colo. Rev. Stat. § 1-13-714(1)(a); Conn. Gen. Stat. § 9-236; Del. Code Ann., tit. 15, § 4942; D.C. Code § 1-1001.10(b)(2); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. § 5/7-41(c); Ind. Stat. Ann. §§ 3-14-3-16, 3-5-2-10; Ky. Rev. Stat. Ann. § 117.235(3); Md. Code Ann. Elec. Law § 16-206(b); Mich. Comp. Laws Ann. § 168.931(1)(k); Minn. Stat. Ann. §§ 204C.06(1), 211B.11(b); Mo. Rev. Stat. § 115.637(18); Mont. Code Ann. § 13-35-211(1); Nev. Rev. Stat. § 293.740; N.H. Rev. Stat. Ann. § 659:43(II); N.J. Stat. Ann. § 19:34-15; N.M. Stat. Ann. § 1-20-16; N.Y. Elec. Law § 8-104(1); N.C. Gen. Stat. § 163-166.4; N.D. Cent. Code Ann. § 16.1-10-06(1); Ohio Rev. Code Ann. §§ 3501.30(A)(4), 3501.35(A); Or. Rev. Stat. § 260.695(3); 25 Pa. Stat. and Cons. Stat. Ann. § 3060(d); 17 R.I. Gen. Laws Ann. § 17-19-49; S.D. Codified Laws § 12-18-3; Tenn. Code Ann. § 2-7-111(a), (b)(1); Tex. Elec. Code Ann. §§ 61.003, 85.036; Vt. Stat. Ann., tit. 17, § 2508(a)(1); Va. Code Ann. § 24.2-604; Wash. Rev. Code Ann. § 29A.84.510; W. Va. Code §§ 3-1-37, 3-9-9; Wis. Stat. § 12.03.

The remaining fifteen states prohibit electioneering at further distances, from 150, 300, or even 600 feet. *See* Alaska Stat. §§ 15.15.170, 15.56.016(a)(2) (200 feet); Fla. Stat. Ann. § 102.031(4)(a) (150 feet); Ga. Code Ann. § 21-2-414(a) (150 feet, or within 25 feet of any voter standing in line); Haw. Rev. Stat. § 11-132(a), (d) (200 feet); Iowa Code § 39A.4(1)(a)(1) (300 feet); Kan. Stat. Ann. § 25-2430(a) (250 feet); La. Stat. Ann. § 18:1462 (600 feet); Me. Stat. tit. 21-A, § 682(2), (3) (250 feet); Mass. Gen. Laws Ann.

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