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March 4, 2024

ATTORNEY GENERAL OPINION NO. 2024-3

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Re: Elections—Election Crimes—Electioneering—Prosecution of Election
Crimes

Crimes and Punishments—Sentencing—Classification of
Misdemeanors and Terms of Confinement—Fines

Synopsis: County election officers may constitutionally prohibit electioneering on
private property within 250 feet of a polling place on election day.
Cited herein: K.S.A. 21-6602; 21-6611; 25-2430; 25-2435

* * *

As Atchison County Attorney, you ask for our opinion about the constitutionality of K.S.A. 25-2430, which prohibits electioneering within 250 feet of the entrance to a polling place. More precisely, you want to know whether the statute violates the Free Speech Clause of the First Amendment by prohibiting the display of a poster advocating the election of a candidate on private property within the buffer zone. We conclude that an election-day buffer zone that applies to both public and private property is facially constitutional.

All fifty States and the District of Columbia have laws regulating speech in and around polling places.¹ In Kansas, electioneering is defined, in relevant part, as:

Knowingly attempting to persuade or influence eligible voters to vote for or against a particular candidate, party or question submitted, including wearing, exhibiting or distributing labels, signs, posters, stickers or other materials that clearly identify a candidate in the election or clearly indicate support or opposition to a question submitted election within any polling place on election day or advance voting site during the time period allowed by law for casting a ballot by advance voting or within a radius of 250 feet from the entrance thereof²

Electioneering is a class C misdemeanor, which carries a maximum punishment of thirty days' confinement in county jail and a fine of \$500.³ Kansas election crimes, including K.S.A. 25-2430, may be prosecuted by the Attorney General, Secretary of State, or appropriate District or County Attorney.⁴

To answer your question, we must survey a number of decisions.

United States Supreme Court

The United States Supreme Court directly addressed the constitutionality of polling-place buffer zones in *Burson v. Freeman*.⁵ At issue there was a Tennessee statute prohibiting electioneering (including the display of campaign posters) within 100 feet of the entrance to a polling place on election day.⁶ The law presented “a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy.”⁷

The Court upheld the law.⁸ In a plurality opinion, the Court first said that the law regulated protected political speech in “quintessential public forums,” and was not content neutral because it prohibited only political speech.⁹ As a result, Tennessee

¹ Kansas Legislative Research Department, Elections and Ethics Publications, Electioneering Distances Chart (updated Oct. 28, 2022), *available at* <https://perma.cc/3JUF-SPYM> (cataloguing distances).

² K.S.A. 25-2430(a)(1)(A). Electioneering does “not include bumper stickers affixed to a motor vehicle that is used to transport voters to a polling place or to an advance voting site for the purpose of voting.” *Id.* at (a)(2).

³ *Id.* at (d); K.S.A. 2022 Supp. 21-6602(a)(3); K.S.A. 2022 Supp. 21-6611(b)(3).

⁴ K.S.A. 25-2435.

⁵ 504 U.S. 191 (1992).

⁶ *Id.* at 193–94 (plurality opinion) (*citing* Tenn. Code Ann. § 2-7-111(b) (1991 Supp.)).

⁷ *Id.* at 198.

⁸ *Id.* at 193–211.

⁹ *Id.* at 196–97.

had to show that the law was “necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end.”¹⁰

Despite the stringent standard, Tennessee prevailed. The statute advanced the “obviously” compelling interests of “preserving the integrity of its election process” and “protecting the right of its citizens to vote freely for the candidates of their choice.”¹¹ And the law was necessary to fulfill these interests. The plurality reached this conclusion after it examined the long and fraught history of American election reform beginning with voting by voice or showing of hands in the colonial period, thereafter transitioning to the chaotic party-ticket system, and eventually settling on the Australian (i.e., secret) ballot system in the late nineteenth century.¹² Some of the earliest laws enacting the Australian ballot system included prohibitions on electioneering within certain distances from polling places.¹³ The plurality believed “that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States’ compelling interests in preventing voter intimidation and election fraud.”¹⁴

On the question of narrow tailoring, the plurality adopted a unique standard. Because states have “such a compelling interest in securing the right to vote freely and effectively” without first sustaining some level of damage to its political system, the plurality said that states need not show that a buffer zone is “perfectly tailored to deal with voter intimidation and election fraud.”¹⁵ Instead, a legislature “should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not *significantly impinge* on constitutionally protected rights.”¹⁶

Applying this new standard, the plurality characterized the 100-foot buffer zone as a “minor geographic limitation” narrowly tailored to fulfill the state’s compelling interests.¹⁷ Notably, it disagreed with a lower court’s belief that the buffer zone would be constitutional only if it were reduced to twenty-five feet, stating this “is a difference only in degree, not a less restrictive alternative in kind.”¹⁸ At the same time, it observed that “[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden.”¹⁹

¹⁰ *Id.* at 198 (internal quotations omitted).

¹¹ *Id.* at 198–99.

¹² *Id.* at 200–06.

¹³ *Id.* at 203–04 (discussing Louisville’s 50-foot buffer zone and New York’s 100-foot buffer zone).

¹⁴ *Id.* at 206.

¹⁵ *Id.* at 208–09.

¹⁶ *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)).

¹⁷ *Id.* at 210.

¹⁸ *Id.*

¹⁹ *Id.*

Justice Scalia concurred in the judgment but disagreed with the level of scrutiny the plurality applied.²⁰ In his view, Tennessee’s restriction on speech was “as venerable a part of the American tradition as the secret ballot.”²¹ He thus rejected the plurality’s premise that areas outside polling places were traditional public fora on election day.²² He would have held that the statute was constitutional “because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum.”²³

In the end, although Justice Scalia and the plurality employed different rationales, a majority of the Court voted to uphold Tennessee’s law.

Prior to *Burson*, the Supreme Court had invalidated an Alabama law prohibiting any electioneering on election day without any geographic limitation.²⁴ The law had been used to prosecute a newspaper editor who published an editorial urging readers to vote for a particular form of city government.²⁵ Since the case did not involve conduct near a polling place, Alabama’s interest in regulating conduct “in and around the polls” was not implicated.²⁶ The Court had no difficulty invalidating the law, particularly when it failed to serve the dubious state interest of preventing last-minute misinformation.²⁷

The Court also considered a challenge to Minnesota’s electioneering law in *Minnesota Voters Alliance v. Mansky*.²⁸ The law in question there prohibited voters from wearing political apparel inside a polling place on election day.²⁹ Relying heavily on *Burson*, the Court emphasized the importance of preventing “fraud, voter intimidation, confusion, and general disorder” in a location where voters are exercising “a weighty civic act.”³⁰ It held that states could reasonably decide to prohibit certain apparel based on the message it conveys.³¹ Nonetheless, the Court struck down the law because Minnesota could not articulate a sensible distinction between acceptable and unacceptable apparel due to the expansive meaning of the term “political” used in the statute.³²

²⁰ *Id.* at 214–16. (Scalia, J., concurring).

²¹ *Id.* at 214.

²² *Id.* at 215–16.

²³ *Id.* at 214.

²⁴ *Mills v. Alabama*, 384 U.S. 214, 216 (1966).

²⁵ *Id.* at 215–16.

²⁶ *Id.* at 218.

²⁷ *Id.* at 219–21; *see also Meyer v. Grant*, 486 U.S. 414, 427 (1988) (striking down law prohibiting the use of paid signature gatherers).

²⁸ 138 S. Ct. 1876, 1883 (2018).

²⁹ *Id.* at 1882 (citing Minn. Stat. § 211B.11(1) (Supp. 2017)).

³⁰ *Id.* at 1886, 1887.

³¹ *Id.* at 1886–87.

³² *Id.* at 1888–92. By contrast, the Kansas statute provides a more precise standard. A person may not wear items inside a polling place that “clearly identify a candidate in the election or clearly indicate support or opposition to a question submitted election.” K.S.A. 25-2430(a)(1)(A).

Tenth Circuit Court of Appeals

The Tenth Circuit recently considered a First Amendment challenge to a Wyoming statute that prohibits electioneering within 300 feet of a polling place on election day and 100 feet of an absentee polling place for the forty-five days before the election.³³ The challenger claimed, among other things, that the 300-foot buffer zone was too large and the forty-five-day absentee buffer zone lasted too long.³⁴ He also alleged that the law was overbroad because it prohibited individuals from displaying campaign signs on nearby private property.³⁵ The district court struck down the 300-foot zone, upheld the 100-foot absentee zone, and dismissed the private property challenge because the plaintiff did not own any private property within a buffer zone.³⁶

The Tenth Circuit reversed these judgments. It first upheld the size of the election-day buffer zone.³⁷ In doing so, the court seized upon *Burson*'s observation that a reduction of size “is a difference only in degree, not a less restrictive alternative in kind.”³⁸ The Court thought that *Burson* “was hardly concerned with the exact size of the buffer zone”³⁹ and that its reference to an outer limit did not “fall arbitrarily between 100 and 300 feet.”⁴⁰

The court next found it was error for the district court to completely disregard the temporal scope of the 100-foot absentee buffer zone. According to the Court, a “meaningful” tailoring analysis could not be completed without assessing the burden on free speech imposed by a forty-five-day prohibition.⁴¹ Finally, the Tenth Circuit construed the private-property challenge as a facial overbreadth claim, which the challenger had standing to assert.⁴² Rather than opine on these latter two issues for the first time, the circuit court returned them to the district court.⁴³

³³ *Frank v. Lee*, 84 F.4th 1119, 1127–28 (citing Wyo. Stat. Ann. § 22-26-113).

³⁴ *Id.* at 1126–27, 1149.

³⁵ *Id.*

³⁶ *Id.* at 1130, 1150.

³⁷ *Id.* at 1141–46.

³⁸ *Id.* at 1141–43 (quoting *Burson*, 504 U.S. at 210).

³⁹ *Id.* at 1145.

⁴⁰ *Id.*

⁴¹ *Id.* at 1148–50. In Kansas, a county election officer must provide for advance in-person voting during the seven days before an election. K.S.A. 2023 Supp. 25-1122(g). But a county election officer has the discretion to extend advance in-person voting up to 20 days before an election. K.S.A. 25-1123(a). While someone might challenge the buffer zone's duration, we limit our analysis to a hypothetical challenge based on the facts you have provided, which involve only the display of a sign on election day.

⁴² *Id.* at 1150–52.

⁴³ *Id.* at 1152. The challengers have filed a petition for writ of certiorari, which is currently pending before the Supreme Court.

District of Kansas

Shortly before the Tenth Circuit issued its decision, the District of Kansas considered a challenge to K.S.A. 25-2430. In *Clark v. Schmidt*,⁴⁴ a group of individuals and organizations sued the former Attorney General and the Johnson County Election Commissioner, claiming the electioneering statute violated their right to free speech.⁴⁵

The challengers advanced three arguments that are relevant here: (1) the State could not justify the size of the buffer zone; (2) the statute is not appropriately tailored; and (3) the statute is unconstitutionally overbroad because it applies to political speech occurring on private property. Like the Tenth Circuit, the district court upheld the size of the buffer zone, relying on *Burson*'s explanation that the size of a zone is “not a question of ‘constitutional dimension.’”⁴⁶ It also distinguished two Sixth Circuit cases in which buffer zones were struck down under unusual circumstances.⁴⁷

On the petitioners' claim that the law was not sufficiently tailored because it applied to “passive, non-disruptive speech’ that could not confuse or intimidate voters,” the district court turned to *Mansky*'s treatment of passive political apparel, explaining that “a state ‘may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most,’ including by prohibiting ‘displays that do not raise significant concerns in other such situations,’ such as nondisruptive expression.”⁴⁸ The court thus found the law was appropriately tailored.⁴⁹

Lastly, the district court held that the one plaintiff who alleged the law was unconstitutional as applied to private property lacked standing because he had stated only a “vague desire” to place signs on private property and there was therefore no credible threat that he would be prosecuted under the statute.⁵⁰ As a result, the court did not address whether K.S.A. 25-2430's prohibition on electioneering may be constitutionally applied to political activity on private property.⁵¹

⁴⁴ 493 F. Supp. 3d 1018 (2020).

⁴⁵ *Id.* at 1020–21.

⁴⁶ *Id.* at 1031 (quoting *Burson*, 504 U.S. at 1031).

⁴⁷ *Id.* at 1031–32 (citing *Anderson v. Spear*, 356 F.3d 651, 656 (6th Cir. 2004) (striking down 500-foot buffer zone); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1045 (6th Cir. 2015) (striking down same state's amended law that reduced zone to 300 feet)).

⁴⁸ *Id.* at 1032 (quoting *Mansky*, 138 S. Ct. at 1887–88).

⁴⁹ *Id.* at 1033.

⁵⁰ *Id.* at 1034–35.

⁵¹ *Id.* at 1035.

Analysis

We turn now to the question you raise: May K.S.A. 25-2430 be constitutionally applied to private property that falls within its 250-foot buffer zone? For the purpose of this analysis, we assume a hypothetical challenger would claim that the statute is facially overbroad because it applies to private property within the buffer zone. To prevail, the challenger would have to show that “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”⁵² Although none of the cases previously discussed reached the merits of this question, we think *Burson* controls; and the statute is facially constitutional.

To begin, *Burson*’s analysis applies. The Supreme Court said that Tennessee’s electioneering law implicated “three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech.”⁵³ Likewise, K.S.A. 25-2430 is not content neutral, and it regulates political speech. And while private property is not a traditional public forum, it is afforded significant constitutional protection in other contexts.⁵⁴ As a result, the law must be “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.”⁵⁵

A court applying this standard would find that K.S.A. 25-2430 is necessary to serve compelling state interests. It fulfills the “obviously” compelling interests of “preserving the integrity of its election process” and “protecting the right of its citizens to vote freely for the candidates of their choice.”⁵⁶ And the law is necessary to fulfill these objectives. The Supreme Court thoroughly detailed our country’s history of election fraud and voter intimidation,⁵⁷ to which states have responded with an “overwhelming consensus” of “common sense” campaign-free zones around polling places.⁵⁸ Indeed, Kansas has had an electioneering buffer zone since shortly after statehood.⁵⁹ And regardless of whether voters encounter electioneering on public or private property when approaching polling places, the State’s compelling interests in protecting voters from intimidation and preventing fraud remain unchanged.

⁵² *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quotation omitted).

⁵³ *Burson*, 504 U.S. at 196.

⁵⁴ *Cf. Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals.”).

⁵⁵ *Burson*, 504 U.S. at 198 (quoting *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983)).

⁵⁶ *Id.* at 198–99.

⁵⁷ *Id.* at 200–06.

⁵⁸ *Mansky*, 138 S. Ct. at 1886.

⁵⁹ Our state originally adopted a 100-foot buffer zone. L. 1897, Ch. 129 § 26. In 1965, the legislature extended it to 250 feet. L. 1965, Ch. 250.

The closer question is whether *Burson*'s tailoring analysis would apply to a private property challenge.⁶⁰ Recall that the Court adopted a lesser burden so states could proactively police their polls. Under *Burson*, a zone need not be perfectly tailored to address voter intimidation and election fraud; it must only be reasonable and not significantly impinge on constitutionally protected rights.⁶¹

One might claim that *Burson*'s framework would not extend to political speech on private property. Yet in other contexts, the Supreme Court has upheld government regulation of speech on private property.⁶² And *Burson* said its tailoring analysis applies “when the First Amendment right threatens to interfere with the act of voting itself, *i.e.*, . . . cases such as this one, in which the challenged activity physically interferes with electors attempting to cast their ballots.”⁶³ Like electioneering on public property, electioneering on private property within the buffer zone interferes with the act of voting itself. Similarly, *Frank* observed that *Burson*'s tailoring analysis is founded in “recognition of the deference due to the states in our federal system.”⁶⁴ Voter intimidation or election fraud that originate from private property undermine a state's sovereignty as much as voter intimidation and fraud originating from public property, so the state's compelling interests remain the same. Moreover, it is common for polling to occur on private property such as church buildings or other private facilities. To hold that the First Amendment exempts private property from buffer zones would allow for electioneering at polls in these locations. When it comes to electioneering, then, we believe a court would find that the distinction between public and private property is immaterial.⁶⁵

With regard to proper tailoring, we presume a hypothetical challenger displaying a campaign sign would stress the passive nature of such conduct. As *Clark* explained, however, *Mansky* drew no line between active and passive electioneering.⁶⁶ “Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning.”⁶⁷ Given that a state need not perfectly tailor its electioneering buffer zone, we think that an

⁶⁰ See *Burson*, 504 U.S. at 208 (explaining that the size of the buffer zone is a question of tailoring).

⁶¹ *Id.* at 209.

⁶² See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 107–08 (1972) (upholding Chicago ordinance that prohibited individuals on public or private property adjacent to a school from making noise or diversions that disturbed the peace or good order of a school).

⁶³ 504 U.S. at 209 n. 11. The plurality in *Burson* said that a state would have to produce more proof in a tailoring analysis in cases where the state seeks to regulate “intangible ‘influence,’ such as the ban on election-day editorials struck down in *Mills*.” *Id.*

⁶⁴ *Frank*, 84 F.4th at 1142 (internal quotes omitted); accord *Clark*, 493 F. Supp. 3d at 1033.

⁶⁵ In addition, *Mansky*'s heavy reliance on *Burson* suggests it has a broader application beyond its particular circumstances. See *Mansky*, 138 S. Ct. at 1886. And the Tenth Circuit's approval of Wyoming's 300-foot buffer zone—which necessarily dictates the amount of private property the zone encompasses—suggests *Burson* would apply to private property.

⁶⁶ *Clark*, 493 F. Supp. 3d at 1032.

⁶⁷ *Mansky*, 138 S. Ct. at 1887.

Sherri Becker

Page 9

election-day prohibition on electioneering is reasonable and does not significantly impinge on the constitutional rights of nearby private property owners who wish to display a campaign sign.⁶⁸

Sincerely,

/s/ Kris W. Kobach

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Attorney General

/s/ Kurtis K. Wiard

Kurtis K. Wiard
Assistant Solicitor General

⁶⁸ *Burson*, 504 U.S. at 209.