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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

JOHN C. FRANK,
GRASSFIRE, LLC,

Plaintiffs,

v. CASE NO. 20-CV-00138-NDF

ED BUCHANAN, Wyoming Secretary of State,
LEIGH ANN MANLOVE, Laramie County District Attorney,
DEBRA LEE, Laramie County Clerk,
in their official capacities,

Defendants.
_____/

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Introduction

Wyoming's no-political speech buffer zones around polling places and absentee polling places are a product of incremental censorship. Beginning as a reasonable—and constitutional—regulation in the late 19th century, the buffer zones now enshrined in Wyoming Statutes section 22-26-113 have long failed to adhere to the narrow tailoring required by strict scrutiny under the First Amendment. The law is now a hodgepodge of content, distance, time, size and quantity

restrictions that may be—and are, in fact—readily weaponized against political speech throughout Wyoming, speech that should only be celebrated and not regulated. *See, e.g.*, Doc. No. 1-3 (Verified Complaint (hereinafter "Compl.") Exhibit 3) (interpreting "the entire property" of the Camp-plex in Gillette as a polling place and prohibiting electioneering in the parking lot even "100 yards away from the doors" of the actual building). In light of the Wyoming Legislature's recent failures to amend the law—indeed, they actually made the law *more unconstitutional* in its most recent amendment—it is imperative that this Court to strike down section 22-26-113 under the First Amendment.

Since at least 1890, Wyoming has regulated electioneering—or electoral advocacy—at and around polling places on election day:

> No person whatsoever shall do any electioneering on election day within any polling place, or any building in which an election is being held, or within twenty yards [60 feet] thereof, nor obstruct the doors or entries there to, or prevent free ingress to and egress from such building or place.

Wyo. Gen. Session Laws Ch. 80, § 174 (1890) (excerpt included as **Attachment A**). At the time, violation was imprisonment for up to six months and a fine of up to five hundred dollars. *Id.* For the better part of a century thereafter, enforcement barely registered as newsworthy, but was not quite moribund. Even then, complaints were motivated by efforts far beyond punishing violators, such as overturning an election entirely. *See, e.g.*, *Sundance Water Bond Election Protested*, CASPER STAR-TRIB., Mar. 27, 1963 at 18 (included as **Attachment B**). Nevertheless, by the passage of the omnibus Wyoming Election Code of 1973, the size of the election day buffer zone and the content of the regulated speech within it had broadened:

> Electioneering too close to a polling place consists of any form of campaigning on election day within 100 yards [300 feet] of the building in which the polling place is located, and includes also the display of signs or distribution of campaign literature.

22.1-418, Wyo. Stat. 1957, 1973 Cum. Supp. (excerpt included as **Attachment C**). The penalty of imprisonment remained up to six months, while the potential fine increased to $1,000. 22.1-417(a)(i), Wyo. Stat. 1957 (Attach. C). In 1983, the law was amended again, once again broadening the activity encompassed in "electioneering" and enshrining the statute in its current title, chapter and section:

> Electioneering too close to a polling place on election day consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, within one hundred (100) yards [300 feet] of the building in which the polling place is located.

Wyo. Stat. 22-26-113 (1984) (enactment included as **Attachment D**). It was the addition of the canvassing and polling of voters to the definition that led to the first—and, to date, only—constitutional challenge against Wyoming's polling place buffer zones.

In 1988, as a general (including presidential) election approached, *National Broadcasting Company v. Karpan* was part of a nationwide broadside against buffer zones by the major television networks of the time—NBC, CBS and ABC. *See Judge strikes down exit polling law*, CASPER STAR-TRIB., Oct. 22, 1988, at 17 (included as **Attachment E**). The networks' news outlets strictly sought to engage in exit polling, and narrowly challenged the law as applied. *See Nat'l Broadcasting Co., et al. v. Karpan, et al.*, No. C88-0320, slip op. at 3 (D. Wyo. Oct. 21, 1988) (order on request for permanent injunction, included as **Attachment F**). Interestingly, and of precedential concern, this Court enjoined the enforcement of the zone itself—striking "one hundred (100) yards of"—reasoning that this would "leave[] the public sidewalks and streets, the traditional areas for election day discourse and news gathering, free for those activities." *Id.* at 10. But this did not affect the law for long.

Rather than heed Judge Brimmer's injunction, in 1990 the legislature instead amended the law to only provide a carve-out for exit polling:

> Electioneering too close to a polling place on election day consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, *except exit polling by news media*, within one hundred (100) yards [300 feet] of the building in which the polling place is located.

Wyo. Stat. § 22-26-113 (1990) (emphasis added) (enactment included as **Attachment G**). It was after this amendment that the United States Supreme Court addressed polling place buffer zones in *Burson v. Freeman*, upholding a 100-foot zone under Tennessee law. 504 U.S. 191 (1992); *see infra* part I(A). No amendments to Wyoming law were made in response. But with the advent of absentee polling places in Wyoming in 2006, the locations and timeframe of the buffer zones expanded beyond election day to include buildings that contained absentee polling places. Wyo. Stat. § 22-26-113 (2006). In 2011, this was clarified to apply to either polling places or absentee polling places "when voting is being conducted[.]" Wyo. Stat. § 22-26-113 (2011).

In 2014, as part of its lobbying efforts the Wyoming Liberty Group ("WyLiberty") engaged the joint Corporations, Elections & Political Subdivisions committee of the Wyoming Legislature. This coincided with successful First Amendment challenges to certain campaign finance laws within the Wyoming Election Code, and advocated for the legislature to respect these cases and to also proactively enact amendments that would avoid future litigation. *See, e.g.*, *Draft Summary of Proceedings, Joint Corporations, Elections & Political Subdivisions Committee*, June 4-5, 2014, at 9, 15–16, *available at* https://wyoleg.gov/InterimCommittee/2014/07MIN0604.pdf. Buffer zones were not considered by the committee in that interim before the 2015 session, but some legislators moved to eliminate absentee polling places from the reach of the law in 2016 budget session. *See generally* House Bill 122 (2016), *available at* https://www.wyoleg.gov/Legislation/2016/HB0122. The bill did not survive introduction. *Id.* In the 2017-18 interim, WyLiberty specifically suggested that the law be amended to limit the buffer zones to 100 feet. Steve Klein, *Suggested Revisions to the Wyoming*

Election Code, May 18, 2017, at 1–3, *available at* https://wyoleg.gov/InterimCommittee/2017/07-0518APPENDIX12.PDF. Although this amendment was adopted by committee and introduced as part of a bill, the resilience of the provision proved weak against the legislative process, in which bumper stickers became a central concern and new censorship *celebré*. *See* Digest, House Bill 40 (2018), *available at* https://wyoleg.gov/2018/Digest/HB0040.PDF. In fact, the "yards" to "feet" provision was rejected upon introduction of the bill. *Id.* The final bill, approved almost unanimously, left the statute in its present form:

> (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 form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media, within one hundred (100) yards [300 feet] on the day of a primary, general or special election and within one hundred (100) feet on all other days, of any public entrance to the building in which the polling place is located. This section shall not apply to bumper stickers affixed to a vehicle while parked within or passing through the distance specified in this subsection, provided that:
>
> (i) There is only one (1) bumper sticker per candidate affixed to the vehicle;
>
> (ii) Bumper stickers are no larger than four (4) inches high by sixteen (16) inches long; and
>
> (iii) The vehicle is parked within the distance specified in this subsection only during the time the elector is voting.

Wyo. Stat. § 22-26-113 (2020). The penalties for violation remain unchanged since 1973. *See* Wyo. Stat. § 22-26-112(a)(i).

Section 22-26-113 has evolved from a reasonable regulation to oppressively overbroad. The election day buffer zone of 1890 would protect the integrity of elections while respecting free speech; the no-political-speech buffer zones of 2020 serve little purpose but censorship. The law is unconstitutional for myriad reasons and should be enjoined by this Court.

Argument

John C. Frank and Grassfire, LLC ("Grassfire") ask this Court to enjoin the enforcement of Wyoming Statute section 22-26-113 as applied and to invalidate the no-political-speech buffer zone on its face. *See* Doc. No. 1 at 10–11 (Prayer for relief ¶¶ 1-4). In order to obtain relief under Federal Rule of Civil Procedure 65(a), the "movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020). The Plaintiffs can demonstrate all of these factors.

I. Wyoming Statutes Section 22-26-113 is Unconstitutional, and The Plaintiffs Have a Substantial Likelihood of Success

Election day buffer zones with radii that exceed 100 feet have been almost uniformly declared unconstitutional in federal courts, and the 100-yard (300-foot) election day buffer zone in Wyoming Statutes section 22-26-113 should also be declared unconstitutional. But the additional absentee polling place buffer zones in section 22-26-113—which go far beyond election days and polling places—are also completely untethered from the First Amendment. *See generally* U.S. Const. amend. I. These restrictions affect both John C. Frank and Grassfire in similar but also distinct ways: Mr. Frank seeks to electioneer on election day, and aims to do so on the sidewalk—a traditional public forum—around his polling place. Doc. No. 1 at 4 (Compl. ¶13). He is prohibited from doing so under the 300-foot election day buffer zone. *See* Doc. No. 1-1 (Compl. Exh. 1 (Laramie County Community College)). Grassfire engages in signature gathering for candidates and causes, but cannot do so on sidewalks surrounding government buildings that serve as absentee polling places such as the Laramie County Governmental Complex from about July 6, 2020 through August 17, 2020 and from about September 21, 2020

through November 2, 2020 due to the 100-foot buffer zone in effect on those days. Doc. No 1 at 5 (Compl. ¶16); Doc. No. 1-2 (Compl. Exh. 2 (Laramie County Gov't Complex)); Doc. No. 1-4 (Compl. Exh. 4 (Laramie County Elections 2020 information)). Moreover, if Mr. Frank placed the desired bumper stickers on his car and passed by the Governmental Complex on 20th Street or Carey Ave in that timeframe, he would commit a misdemeanor. Doc. No. 1 at 7 (Compl. ¶25); Doc. No. 1-2 (Compl. Exh. 2). The law's censorship is clearly unconstitutional.

A. The 100-Yard Election Day No-Political-Speech Buffer Zone is Plainly Unconstitutional

In 1992, Justice Blackmun penned the plurality opinion in *Burson v. Freeman*, holding that a Tennessee law prohibiting the display or distribution of campaign material within 100 feet of the entrance to a polling place did not violate the First Amendment. 504 U.S. at 211. But in the wake of *Burson*, federal courts have routinely stricken similar laws that extend beyond 100 feet under the First Amendment due to their damage to political speech. *See, e.g.*, *Anderson v. Spear*, 356 F.3d 651, 656–66 (6th Cir. 2004) (striking down 500-foot buffer zone); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1054–55 (6th Cir. 2015) (striking down 300-foot buffer zone); *Calchera v. Procarione*, 805 F.Supp. 716, 720 (E.D. Wisc. 1992) (striking down a 500-foot buffer zone); *see also Karpan*, No. C88-0320, slip op. at 10 (Attach. F) (striking down the 300-foot buffer zone in section 22-26-113 prior to the *Burson* decision).

In *Anderson*, the Sixth Circuit considered whether Kentucky's 500-foot buffer zone violated the First Amendment. 356 F.3d at 651. There, the court explained that the *Burson* Court required exacting scrutiny to be applied to buffer zone cases. *Id.* at 656. Where the exercise of a First Amendment right could interfere with the act of voting itself, "the state must demonstrate that its response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* (internal quotations and citations omitted). Per *Burson*, two interests may be alleged

by the state to support buffer zones: (1) the state duty to protect the right of voting and (2) the state's interest in preserving the "integrity and reliability of the electoral process itself." *Id.* at 656–57 (internal citations omitted).

In assessing the validity of Kentucky's buffer zone, the *Anderson* court took to the legislative findings supporting it. In particular, the court looked for evidence to support the state's choice to draw a buffer zone so large. *Id.* at 657–58. Though Kentucky faced a history of vote-buying and other electoral fraud, it lacked justification for imposing so large a buffer zone that dampened First Amendment protected speech. *Id.* at 659–60. Other evidence pointed to the fact that Kentucky wanted to improve voter convenience by making it easier to vote. *Id.* at 660. However, "legislative preferences or beliefs respecting matters of public convenience" are insufficient bases upon which to limit First Amendment expression. *Id.* at 660–61. Also problematic for Kentucky's law was the simple fact that it banned political speech occurring on private property that was caught up in the buffer zones. *Id.* at 662.

Similar to *Anderson*, in *Russell* the Sixth Circuit determined that Kentucky's later-enacted 300-foot buffer zone was also unconstitutional. 784 F.3d 1037. There, the court repeated the constitutional standard from *Burson*. *Id.* at 1050–51. As the Sixth Circuit saw it, *Burson* established a 100-foot safe harbor that states could employ for permissible buffer zones. *Id.* at 1053. When buffer zones go beyond 100 feet, states face considerable evidentiary burdens to evince why such drastically large no-speech areas are needed. *Id.* Because the law in question reached so far to ban speech on traditional public fora—sidewalks and public property—and also prohibited political speech on private property, it was properly subject to facial invalidation under the overbreadth doctrine. *Id.* at 1054–55.

Although the Tenth Circuit has not had the opportunity to examine the constitutionality of a polling place buffer zone, the principles announced in *Burson*, *Anderson*, and *Russell* should apply here—indicating that Wyoming's 300-foot election day buffer zone is unconstitutional on its face. This is primarily because it reaches too far—it is nine times larger in surface area than what the Supreme Court upheld in *Burson*—and it prohibits private property owners caught in a buffer zone from engaging in political speech on their own property. Not to be outdone, Wyoming law adds insult to First Amendment injury by including what could only be deemed silly: a prohibition against displaying bumper stickers deemed too numerous or too large.

The Tenth Circuit has reaffirmed the age-old First Amendment principle that traditional public fora include parks, streets, and sidewalks. *Verlo v. City and County of Denver*, 741 Fed.Appx. 534, 544 (10th Cir. 2018). Speech occurring on traditional public fora is jealously guarded. Content-based restrictions on speech occurring there must survive strict scrutiny. *Wells v. City and County of Denver*, 257 F.3d 1132, 1145 (10th Cir. 2001). Under the standard set forth in *Burson* and followed by *Anderson* and *Russell*, this Court should apply strict scrutiny—the "most demanding test known to constitutional law." *Russell*, 784 F.3d at 1050 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). Courts applying this test use a modified burden of proof for states seeking to uphold a buffer zone and focus on whether such zones *significantly impinge* on constitutionally protected rights. *Burson*, 504 U.S. at 209. And every court considering the constitutionality of buffer zones acknowledges the importance for states to protect the right to vote and to protect the integrity of voting. What is left, then, is "*how large* a restricted zone is permissible or sufficiently tailored." *Russell*, 784 F.3d at 1051 (quoting *Burson*, 504 U.S. at 208).

In assessing whether a buffer zone is too large, we return to first principles. It is our "law and tradition that more speech, not less, is the governing rule." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 361 (2010). When it comes to debating ideas and political candidates and causes in public fora, the First Amendment has its "fullest and most urgent application. . . ." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). As the *Russell* court put it, the right to protect people to guard against voter intimidation is a narrow one, for it "is the right to cast a ballot free from threats or coercion; it is not the right to cast a vote free from distraction or opposing voices." *Russell*, 784 F.3d at 1051.

States are free to enact 100-foot election day buffer zones within the "safe harbor" established under *Burson*. *Russell*, 784 F.3d at 1051–52. But when states seek to expand those zones to cover streets, sidewalks and other public fora commonly held out for speech and debate, the burden squarely rests with the government to demonstrate why such a large restriction is required. Even Kentucky, with a demonstrated history of vote coercion and intimidation, could not demonstrate why 300- and 500-foot restrictions were needed. Wyoming's law suffers a similar problem.

In scouring both public records and legislative history, there is no apparent basis for Wyoming to maintain a 300-foot election day buffer zone. Wyoming history does not demonstrate regular investigations, let alone convictions, for vote coercion or vote buying. *See, e.g.*, *Attorney probes possible violations*, CASPER STAR-TRIB., Mar 4, 2008, at 13 (included as **Attachment H**) (investigating harassment and, separately, "displaying signs near a polling place urging people to vote against [a] proposal."). Nor is Wyoming, for example, a state featuring a lengthy history of vote discrimination. Rather, Wyoming has maintained orderly elections with little history of malfeasance. Moreover, the legislative history does not present a record upon

which Wyoming can be said to have weighed serious concerns about vote coercion and intimidation occurring within 300 feet of a polling place. Much like *Anderson* and *Russell*, 300 feet seems to be a distance selected to keep voters safe from constitutionally protected political speech.[1] *Anderson*, 356 F.3d at 651–52.

Under the holdings of *Burson*, *Anderson*, and *Russell*, Wyoming's election day buffer zone extends entirely too far. The zone bans political speech over traditional public fora for no apparent reason other than distancing citizens from another's political opinion. This is not constitutionally permissible in a free society. This Court should invalidate the law on its face and as applied to the Plaintiffs here as a result.

Not to be outdone by Kentucky's experiments with 300- and 500-foot zones, Wyoming's election day buffer zone suffers from two other constitutional maladies. First, the law does not include any exemption for political speech occurring on private property. So, where private homeowners decide to put up a common yard sign in favor of the candidate they support, but live within 300 feet of the public entrance of a polling place, they are silenced on election day. Under *Russell*, this alone is a sufficient basis to facially invalidate the law. 784 F.3d at 1054 (supporting facial invalidation because the buffer zone captured private property). Second, section 22-26-113 bans certain forms of electioneering bumper stickers. In precise detail, Wyoming law provides that the only permissible electioneering bumper stickers in a buffer zone are: (1) limited to one per candidate, per vehicle, (2) no larger than four inches high by sixteen inches long, and (3) may only be in the buffer zone when the driver is voting. Wyo. Stat. § 22-26-113(a)(i)-(iii). In a

[1] That Wyoming recently extended its buffer zone law to place restrictions not just on activities around a polling place but against electioneering bumper stickers suggests the state's purpose was to limit and control expressions of political opinion, and not to protect against vote coercion. *See* Digest, House Bill 40 (2018), *available at* https://wyoleg.gov/2018/Digest/HB0040.PDF.

variety of contexts, courts have held that bumper stickers addressing items of public concern are fully protected under the First Amendment. *See, e.g.*, *Fire Fighters Ass'n v. Barry*, 742 F.Supp. 1182, 1189 (D.D.C. 1990); *Cunningham v. State*, 400 S.E.2d 916 (Ga. 1991).

Although the law permits a voter to temporarily park a car with one electioneering bumper sticker per candidate of government-ordained correct size, it is otherwise illegal to:

- Park one's car on his own driveway within a zone with two bumper stickers featuring the same candidate on election day;
- Park one's car within a zone with a bumper sticker larger than sixteen inches in length, even while voting;
- Drive one's car through any buffer zone with two electioneering bumper stickers featuring the same candidate;
- Feature more than one bumper sticker per candidate on a vehicle while voting.

Even a cursory examination of the bumper sticker provisions raises serious First Amendment concerns. Wyoming simply lacks the authority to silence political speech occurring on such a cheap and ubiquitous medium.

Taken in its entirety, Wyoming Statutes section 22-26-113 lacks any constitutional justification. Per *Burson*, *Anderson*, and *Russell*, the state cannot demonstrate why a 300-foot election day buffer zone banning core political speech is permissible, especially over traditional public fora. In addition, the law sweeps broadly to prohibit speech on private property within these zones. Either of these reasons are sufficient to facially invalidate the law. *Russell*, 784 F.3d at 1053–55; *Karpan*, No. C88-0320, slip op. at 10 (Attach. F). Wyoming's added offense to the First Amendment is that the law bans certain political bumper stickers without any serious justification. As a result, Plaintiffs ask the Court to invalidate the law on its face or as applied.

B. The 100-Foot No-Political-Speech Absentee Polling Place Buffer Zone is Plainly Unconstitutional

The writer Kevin Williamson recently quipped that "[i]f you wish to suppress certain speech or certain points of view, then all that you have to do is construct a crowded theater around it." KEVIN WILLIAMSON, THE SMALLEST MINORITY (2019). All speech inside the metaphorical theater is considered a false warning of a fire, and is thus not free speech, culturally or constitutionally. *See Schenck v. U.S.*, 249 U.S. 47, 52 (1919). Section 22-26-113 abuses the Supreme Court's ruling in *Burson* in a similar fashion, providing the suppression of certain speech by constructing polling places inside venues that serve a variety of other functions. In *Burson*, the 100-foot election day buffer zone was "the rare case in which we have held that a law survives strict scrutiny." 504 U.S. at 211. As discussed, election day buffer zones beyond 100 feet do not survive strict scrutiny. *See supra* part I(A). Neither do 100-foot buffer zones beyond election days.

Absentee polling places are one of two approaches to absentee balloting in Wyoming. *See* Wyo. Stat. § 22-9-125. But an absentee polling place, if implemented by a county, must be "established in the courthouse or other public building . . . and shall be open the same hours as the courthouse on normal business days during the time period allowed for absentee voting." Wyo. Stat. § 22-9-125(a)(ii). The time period allowed for absentee voting is 45 days before an election. Wyo. Stat. § 22-6-107(a). So, in 2020, "voting is being conducted" at absentee polling places during business hours from about July 6 through August 17 and from about September 21 through November 2. The no-political speech buffer zone is 100 feet on these days. Wyo. Stat. § 22-26-113(a). One hundred feet is an appropriate radius for polling places on election days—that is, two days out of the year. It is not an appropriate radius around the entrances of a multi-use public building for *three months during an election year*.

By definition, an absentee polling place is established in a "courthouse or other public building." Wyo. Stat. § 22-9-125(a)(ii). It is all but guaranteed that other public business occurs in the building during the time period for absentee voting. That is certainly the case of the Laramie County Governmental Complex ("the Complex"), which is not only a courthouse, but the location of the Laramie County Clerk's office and the meeting room for the Laramie County Commission.[2] *See* Doc. No. 1-4 (Compl. Exh. 4). Moreover, citizens going to and from these buildings—whether to court or other purposes—likely outnumber absentee voters by a substantial margin. Nevertheless, the no-political-speech buffer zone prohibits electioneering around these buildings for three months, including "the soliciting of signatures to any petition or the canvassing or polling of voters[.]" Wyo. Stat. § 22-26-113. At the Complex, the 100-foot buffer zones of the public entrances restrict nearly the entire stretch of the sidewalks on 20th Street and Carey Avenue. *See* Doc. No. 1-2 (Compl. Exh. 2). In an election year, it cuts off access to citizens coming and going from hubs of civic engagement for the majority of Wyoming's summer and fall months, about the only times one is willing to stand outside to electioneer—and in which a citizen is willing to stop and listen.

The sidewalks and streets around the Complex are traditional public fora, which "pedestrians . . . generally use . . . as a throughway to another destination." *Hawkins v. City & Cty. of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999). Grassfire would gather signatures on the sidewalk, and, as a Cheyenne resident, Mr. Frank would likely drive to and from—certainly

[2] Other absentee polling places throughout Wyoming are similarly situated. *See, e.g.*, *Absentee Voting*, TETON COUNTY WYO., http://www.tetonwyo.org/269/Absentee-Voting [https://perma.cc/4632-ZZRA] (last visited July 25, 2020); *Absentee Voting*, ALBANY COUNTY WYO., http://www.co.albany.wy.us/absentee-ballot-requests.aspx [https://perma.cc/W9U9-NR72] (last visited July 25, 2020); *Absentee Voting*, CARBON COUNTY WYO., https://www.carbonwy.com/996/Absentee-Voting [https://perma.cc/A23Y-XC8C] (last visited July 25, 2020).

past—the Complex during the restricted business hours this summer and fall with electioneering bumper stickers on his car. These activities are all misdemeanors. Traditional public fora may be regulated in a content-based fashion—here, political speech—only if they surpass strict scrutiny. The conditions of the absentee polling place buffer zones in Section 22-26-113 are so far removed from elections that *Burson*'s approval of a 100-foot zone is plainly inapplicable or, if it is applicable, three month absentee zones are an "impermissible burden" that nevertheless goes too far. 504 U.S. at 210. The 100-foot buffer zone around absentee polling places is unconstitutional and should be enjoined.

II. Plaintiffs Will be Irreparably Harmed if Section 22-26-113 is Not Enjoined

Where First Amendment rights are abridged, irreparable harm is established: "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976); *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (meeting irreparable injury requirement due to deprivation of speech rights). Plaintiffs have largely silenced themselves during this electoral season, under threat of criminal penalties. Grassfire has decided not to commence operations in the state of Wyoming due to the unconstitutional reach of the law on signature-gathering efforts. Mr. Frank will not engage the public near polling places about candidates and issues he cares about or place illegal bumper stickers on his vehicle given the impact of the law. If an injunction is not issued, it will only result in further irreparable harm.

III. The Balance of Harms Tips in Plaintiffs' Favor

The balance of harms requirement is usually met once a First Amendment plaintiff demonstrates a likelihood of success on the merits. A threatened injury to a plaintiff's constitutionally protected speech outweighs the harm, if any, the defendants may incur from being unable to enforce what appears to be an unconstitutional statute. *See Am. Civil Liberties*

Union v. Johnson, 194 F.3d 1149, 1163 (10th Cir. 1999). Here, both plaintiffs are unable to engage in protected First Amendment conduct near polling places and absentee polling places. This removes information from the stock of knowledge for the public and works First Amendment injuries against the speakers and would-be listeners. Any harm suffered by the Defendants may be categorized as administrative and ministerial in nature—needing to instruct election clerks that Wyoming's buffer zone does not reach 300 feet from any public entrance of a polling place. Within, and even around, polling places on election day, election judges "have the duty and authority to preserve order at the polls by any necessary and suitable means." Wyo. Stat. § 22-13-103(a). In addition, Wyoming law further protects elections by prohibiting creation of "any disorder or disruption at a polling place on election day." Wyo. Stat. § 22-13-104. Per *Burson*, this undoubtedly includes prohibiting electioneering with 100 feet of an entrance to the building in which a polling place is located on election day. The balance of harms overwhelmingly weighs in Plaintiffs' favor.

IV. Issuing an Injunction Works in Favor of the Public Interest

Vindicating First Amendment liberties is "clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest"). Thus, permitting Plaintiffs to speak freely in traditional public fora near polling places and absentee polling places about candidates and issues they believe in serves the important goal of protecting an "essential mechanism of democracy" and our safeguard to "hold officials accountable to the people." *Citizens United*, 558 U.S. at 339.

Conclusion

For the foregoing reasons, Plaintiffs John C. Frank and Grassfire, LLC respectfully request the Court enjoin the enforcement of Wyoming Statute section 22-26-113 and declare it constitutionally invalid, either on its face or as applied to the Plaintiffs.

Respectfully submitted,

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Dated this 25th day of July, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020, the foregoing memorandum in support of plaintiffs' motion for preliminary injunction and all attachments were served on all parties with the pleadings by hand delivery pursuant to Federal Rule of Civil Procedure 5(b)(2).

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