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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

JOHN C. FRANK, GRASSFIRE, LLC, Plaintiffs, vs. ED BUCHANAN, Wyoming Secretary of State, LEIGH ANNE MANLOVE, Laramie County District Attorney, DEBRA LEE, Laramie County Clerk, in their official capacities, Defendants.	Case No. 2:20-cv-00138-NDF

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Edward A. Buchanan, Wyoming Secretary of State, and Leigh Anne Manlove, Laramie County District Attorney, hereby respond to and request the Court deny Plaintiffs' Motion for Preliminary Injunction.

I. Background

Plaintiffs Frank and Grassfire filed a verified complaint for declaratory and injunctive relief against Defendants, asserting that Wyoming's no-electioneering buffer

zone violates their First Amendment rights. Frank and Grassfire further separately moved for a preliminary injunction, seeking to have the law enjoined for the current election cycle. The State explained the background of no-electioneering buffer zones and the Supreme Court case that held them to be generally constitutional in its motion to dismiss the complaint, filed contemporaneously with this response. (Defs.' Mem. in Support of Mot. to Dismiss at 1-4).

II. Legal Standard for Granting Preliminary Injunctions

A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted) (emphasis removed). The Tenth Circuit has generally characterized this standard as requiring a "clear and unequivocal" right to injunctive relief. *SCFC ILC, Inc. v. Visa USA*, 936 F.2d 1096, 1098 (10th Cir. 1991) (overruled on other grounds). A party seeking preliminary relief must demonstrate: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (citation omitted).

The Tenth Circuit has recognized "three types of specifically disfavored preliminary injunctions[:] (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *O Centro Espirita*

Beneficente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 975 (10th Cir. 2004) (*citing SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991)). If a plaintiff seeks one of these disfavored categories of injunctions, the plaintiff's claims "must be more closely scrutinized to assure that the exigencies of the case support granting of a remedy that is extraordinary even in the normal course." *Id.* The plaintiff must "make a strong showing both with respect to the likelihood of success on the merits and with regard to the balance of harms." *Id.* at 976.

The preliminary injunction Frank and Grassfire seek fits two disfavored categories. First, because granting the requested injunction would change how the state regulates its elections, granting an injunction in this case would alter the status quo. Second, because granting the injunction would allow Frank and Grassfire to leaflet and petition outside polling places, granting it would afford Frank and Grassfire all the relief that they could recover at the conclusion of a full trial on the merits. Frank and Grassfire must not only demonstrate their likelihood of success on the merits and that the balance of equities tips in their favor; they must make a "strong showing." *Id.* Because they cannot do so, the Court should deny their motion.

III. Argument

The only mandatory authority that binds this Court is the Supreme Court's opinion in *Burson*. And under that case, the only issue that is to be decided is whether, under *Burson*'s modified narrow-tailoring framework, Wyoming's buffer zone is reasonable or significantly impinges on Frank and Grassfire's First Amendment rights. *Burson*, 504 U.S. at 191-92. Applying the Supreme Court's test in *Burson*, the State's restricted zone is

reasonable and does not significantly implnge on Frank or Grassfire's rights. The little caselaw that exists applying *Burson* to electioneering buffer zones larger than 100 feet misapplies *Burson* or is otherwise unpersuasive. Frank and Grassfire cannot make a strong showing that this scant caselaw makes them substantially likely to succeed on the merits, and the Court should deny their motion for a preliminary injunction. Further, because the law is necessary to protect the integrity of the State's elections and to protect the State's voters, Frank and Grassfire cannot make a strong showing that the balance of harms weighs in their favor, and the Court should deny their motion.

A. Substantial likelihood of success on the merits

As explained in the contemporaneously filed Motion to Dismiss Plaintiffs' Complaint, Frank and Grassfire have failed to state a claim for relief which can be granted. This weighs strongly against a preliminary injunction in this case.

Moreover, Frank and Grassfire's argument that they are substantially likely to succeed is unavailing. Though they argue that "federal courts have routinely stricken similar laws that extend beyond 100 feet due to their damage to political speech," this exaggerates the weight of a scant body of caselaw. (Pls.' Mem. in Support of Mot. for Prelim. Inj. at 7). For this proposition, they cite two cases from the Court of Appeals for the Sixth Circuit that used reasoning that undermines *Burson*, an Eastern District of Wisconsin opinion striking down a substantially larger buffer zone, and an unpublished District of Wyoming opinion that did address the size of Wyoming's buffer zone.

As explained in the Defendants' contemporaneously filed Motion to Dismiss, the Sixth Circuit cases overturning Kentucky's buffer zones are not persuasive. Most relevant

here, in both cases, the Sixth Circuit sought to require Kentucky to explain why it chose to enact a buffer zone larger than the zone the Supreme Court sanctioned in *Burson*. *Anderson v. Spear*, 356 F.3d 651, 658 (6th Cir. 2004); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015). This is exactly what the Supreme Court sought to avoid when it held that it would not announce any "litmus-paper test." *Burson v. Freeman*, 504 U.S. 191, 210-11 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The Sixth Circuit's reasoning undermines *Burson* and should not be followed, nor is it good guidance on whether Wyoming's law is "plainly" unconstitutional, as Frank and Grassfire argue.

The Eastern District of Wisconsin opinion overturning Wisconsin's 500-foot buffer zone is also unpersuasive. In *Calchera*, Wisconsin's larger buffer zone covered a portion of the plaintiff's yard. *Calchera v. Procarione*, 805 F. Supp. 716, 717 (E.D. Wis. 1992). The plaintiffs sought to put up lawn signs to support candidates of their choice and alleged that the law violated their First Amendment rights because it prevented them from speaking on their own private property. *Id.* The town clerk ordered the signs removed, and the plaintiffs filed suit against the town, alleging that the law violated their First Amendment rights. *Id.* The town's attorney notified the state Attorney General's office of the suit, and the attorney general declined to intervene to defend the law, leaving the town to defend its actions. *Id.* The town itself then declined to defend the constitutionality of the statute. *Id.* Because no party defended the constitutionality of the law, the court's opinion lacks persuasive value. *See District of Columbia v. Heller*, 554 U.S. 570, 624 n.24 (2008) (holding that a decision arising out of an uncontested issue carries little precedential value). Further, neither Frank nor Grassfire claim that their private property is affected by the

buffer zone. Rather, they both allege that they want to electioneer on public property. Their claims differ from the claims the Eastern District of Wisconsin adjudicated in *Calchera*.

The unpublished District of Wyoming opinion that Frank and Grassfire cite is even less persuasive. In *NBC v. Karpan*, various national news agencies sued the Secretary of State seeking a preliminary injunction against enforcement of Wyoming's buffer zone against them for the purpose of conducting exit polling. *Nat'l Broadcasing Company v. Karpan*, Civ. No. C88-0320 (D. Wyo. Oct. 21, 1988) (unpublished slip op.). In addition to predating *Burnson*, that case centered entirely on the merits of prohibiting exit polling, not the width of Wyoming's buffer zone. The plaintiffs did not argue that the law violated the free speech of those who wished to electioneer; they argued instead that they were not electioneering because they only spoke to voters after they voted and did not talk to voters who refused to participate in exit polls. *Id.* at 2-3. This Court enjoined the State from enforcing the full width of the buffer zone because this was the only way the statute could be modified to allow for exit polling:

> For the Court to enjoin enforcement of all of § 22-26-113 would be going beyond the scope of the relief sought by the plaintiffs and would indeed, be precluding the enforcement of a statute that is, for the most part, constitutionally acceptable. **The Court will therefore only enjoin** the enforcement of **the words** of the statute **that will unconstitutionally inhibit the plaintiffs' exit polling activities**.

Id. at 9-10 (emphasis added). This Court did not concern itself with the question whether 300 feet was too broad a buffer zone, and therefore its decision in *Karpan* is of little precedential value in this case. To the extent that it is persuasive, this Court recognized in

the *Karpan* case that setting aside the exit polling issue, the law is constitutionally acceptable.

Frank and Grassfire raise other aspects of Wyo. Stat. Ann. § 22-26-113 that they argue significantly impinge on their First Amendment rights. They argue that the law applies to private property and therefore must be unconstitutional, and that the law's provisions regarding bumper stickers are "silly," "new censorship," and "silence political speech occurring on . . . a cheap and ubiquitous medium." (Pls.' Mem. in Support of Mot. for Prelim. Inj. at 5, 9, 12). These arguments are also unavailing.

First, it is far from clear that an electioneering ban that covers private property is presumptively unconstitutional. As explained in the contemporaneously filed Motion to Dismiss, the Sixth Circuit is the only court to have held as much, and its reasoning is cursory. *Anderson v. Spear*, 356 F.3d 651, 662 (6th Cir. 2004) (cursorily holding that electioneering bans must exempt private property, though the issue was not properly before the court because Kentucky's ban already exempted private property); *Russell*, 784 F.3d at 1051-53 (citing *Anderson*'s dicta). To satisfy *Burson*, this Court must already apply strict scrutiny to Wyoming's electioneering ban. Frank and Grassfire cite no case setting out how electioneering bans that cover private property must be evaluated; they simply argue that they are *per se* unconstitutional. The Supreme Court has never held as much, and neither should this Court.

Moreover, neither Frank nor Grassfire allege that they control private property and wish to electioneer on it. They both allege that they wish to electioneer on public property. Therefore, they may only properly raise this issue in the context of a facial overbreadth

claim, attempting to prove that a "substantial number" of the law's applications are "unconstitutional, judged in relation to its plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472-73 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6). But as their own exhibits demonstrate, even if it is *per se* unconstitutional for the law to affect speech on private property, the law rarely reaches private property and, when it does, it affects at the very most no more than a handful of buildings. (Complaint Ex. 5). By contrast, the law's legitimate sweep covers roads and sidewalks and protects all voters.

It may be that in the proper case, a plaintiff seeking to protect their interest in speaking on their own private property could prevail in an as-applied challenge, and the State would be precluded from enforcing Wyo. Stat. Ann. § 22-26-113 against those persons. But that case is not before this Court. And even if that does come to pass, the law's legitimate sweep is not substantially outweighed by its purportedly unconstitutional applications.

Frank and Grassfire further argue that the law's application during the absentee polling period, extending the time it is in effect by 90 days every election year, makes it unconstitutional. There is no basis for making this distinction under *Burson*. During the absentee polling period, counties that choose to establish absentee polling locations allow voters to enter a secure area and cast their ballots just as they would on election day. Wyo. Stat. Ann. § 22-9-125. During the absentee voting period, voters who enter absentee polling locations are voting. They deserve the same protection as voters who vote on election day.

The State has a compelling interest in protecting those voters just as it does in protecting voters who vote on election day, and the buffer zone is just as necessary.

Finally, Frank and Grassfire argue that the law's provisions regulating bumper stickers are unconstitutional and evince the State's intent to restrict speech rather than protect voters. To reach this conclusion, Frank and Grassfire strain to interpret Wyo. Stat. Ann. § 22-26-113's last sentence and subsections, creating an exception that allows for more speech, as an example of petty tyranny.

Before 2018, Wyo. Stat. Ann. § 22-26-113 contained no provisions specifically addressing bumper stickers. As it does now, the only words it spoke on the subject merely prohibited all "display of campaign signs." Wyo. Stat. Ann. § 22-26-113. Many bumper stickers are campaign signs. Most, if not all, campaigns distribute campaign signs expressly advocating for the election of their candidate. Therefore, the plain text of the law would have criminalized the mere act of passing through the buffer zone with a bumper sticker on one's vehicle or parking within 300 feet of the polling place on election day, though no person had ever been prosecuted for doing so.

But bumper stickers are different in some respects from other campaign memorabilia. A citizen can take off a shirt, hat, or button that advocates for the election or defeat of a candidate. Removing a bumper sticker is more difficult and, in some cases, may damage a vehicle. The Legislature chose to amend Wyo. Stat. Ann. § 22-26-113 in order to avoid requiring a person to remove a bumper sticker or avoid passing by or parking next to a polling place. It added the last section and subsections of the statute to do so. Those provisions allow any person to attach one large bumper sticker per candidate, park their

vehicle outside a polling place, and go in to vote. *Id.* The law also expressly permits a person to drive past a polling place with a large bumper sticker without violating the law. *Id.* This is an exception to the law that expressly allows for more speech. Though it does not permit a person to include more than one bumper sticker per candidate, this is of little import to most voters, who generally only attach one bumper sticker per candidate, if they attach one at all. In order to challenge this provision, Frank has been forced to allege that he intends to put two bumper stickers for Liz Cheney on his vehicle. (Complaint at ¶ 13). At this stage of the proceedings, the Court must accept this allegation as true, but the Court may also note for the purposes of assessing Frank's facial overbreadth claim that it is certainly not typical of the vast majority of bumper sticker users.

In fact, the law's specifics, far from making it "silly," make it clear and easy for citizens to understand what conduct is permitted and what crosses the line. An over-vague restriction or exemption raises First Amendment concerns in its own right. *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Moreover, the law does not cover any bumper sticker that is not a "campaign sign." Wyo. Stat. Ann. § 22-26-113. Bumper stickers related to general political or ideological sentiments, such as Frank's interest in protecting private property and Second Amendment rights, are therefore permitted. (Complaint at ¶ 13). In total, the law allows for the vast majority of bumper stickers. It only prohibits cases of giant stickers directly advocating for a candidate, which are no different from large banners or placards that were already prohibited, or multiple stickers for the same candidate.

B. Irreparable harm

"To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir.2003) (citations omitted). "Irreparable harm is not harm that is merely serious or substantial." *Id*. "[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id*. (citation and quotation marks omitted). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). The State concedes that Frank and Grassfire have demonstrated that they meet this element.

C. Balance of Harms

"The third preliminary-injunction factor involves balancing the irreparable harms identified above against the harm that the preliminary injunction causes [Defendant]." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019). "Under the heightened disfavored-injunction standard, the Plaintiffs need to make a strong showing that the balance of harms tips in their favor." *Id*. Here, the balance of harms weighs in favor of the State.

1. Granting the injunction will harm the State's electoral process.

Frank and Grassfire frame the harm the State will suffer if the injunction is granted as merely "administrative and ministerial in nature—needing to instruct election clerks that Wyoming's buffer zone does not reach 300 feet." (Pls.' Mem. in Support of Mot. for

Prelim. Inj. at 16). This is not the case. States adopt laws that create no-electioneering buffer zones to protect the integrity of their elections and to protect voters from intimidation and harassment. *Burson v. Freeman*, 504 U.S. at 198-208. The Supreme Court recognized this interest as a compelling state interest sufficient to withstand strict scrutiny. *Id.* at 199. Granting the proposed injunction, enjoining enforcement of the entire law against any person, would not merely permit Frank to hand out leaflets and campaign material to voters; it would open the door to unrestrained chaos outside Wyoming's polling places. *Id.* at 200-08 (reviewing the history of election interference before states passed laws prohibiting electioneering outside polling places). American electoral history teaches that these harms are not speculative. *Id.*

This is particularly the case when, as here, Frank and Grassfire asked the Court to impose an injunction on the eve of an election. Frank has lived in Wyoming for over a year and Grassfire incorporated in January, but both plaintiffs neglected to bring suit until the middle of the primary election's absentee polling period, heightening the potential for uneven enforcement of a sudden statewide injunction and for voter confusion. Though Frank and Grassfire characterize this process as merely "needing to instruct election clerks," this misapprehends the scope of the problem. The Secretary of State does not directly train or instruct election judges or poll workers. Rather, the Secretary of State communicates information about state election laws to the 23 county clerks, who then must separately inform and train election judges, appointed by local political parties, and volunteer poll workers. This process takes time. The Secretary concedes that this concern

is more attenuated if the Court grants an injunction only with respect to Election Day of the general election, but it still exists.

Additionally, there would be general confusion to the voting public, who have for many years enjoyed, and likely expected, the protections of the State's electioneering laws. As Franks admits, he wants to park his vehicle with bumper stickers close to the polling place and attempt to contact voters as they enter the polling places. If Frank and many other like him are now allowed to be within 300 feet of the polling places, it is likely that this will cause confusion and potentially lead to conflict at the polling places.

Frank and Grassfire attempt to downplay the threat of harassment or intimidation by arguing that other provisions of Wyoming's Election Code grant election judges authority to prevent voter harassment and intimidation, but the Supreme Court rejected similar arguments in *Burson*. It is true that the Election Code provides that election judges "have the duty and authority to preserve order at the polls by any necessary and suitable means," and the Code prohibits creating "any disorder or disruption at a polling place on election day." Wyo. Stat. Ann. §§ 22-13-103(a), 22-13-104. But Frank and Grassfire go too far when they argue that these laws "undoubtedly" cover "prohibiting electioneering with 100 feet of an entrance to the building in which a polling place is located." (Pls.' Mem. in Support of Mot. for Prelim. Inj. at 16).

As a matter of basic statutory interpretation, those laws do not prohibit electioneering outside of polling places. If they did, there would be no need for Wyo. Stat. Ann. § 22-26-113. *See Rodriguez v. Casey*, 2002 WY 111, ¶ 10, 50 P.3d 323, 326 (Wyo. 2002) ("Statutes must be construed so that no portion is rendered meaningless."). And the

text of the laws plainly limits their reach to "the polls" and "at a polling place." Wyo. Stat. Ann. §§ 22-13-103(a), 22-13-104. They do not cover any area outside the polling place, as Wyo. Stat. Ann. § 22-26-113 does.

Frank and Grassfire argue that *Burson* somehow grants those statutes a greater geographical scope than their plain text allows. (Pls.' Mem in Support of Mot. for Prelim. Inj. at 16). This does not follow, as the Court in *Burson* was analyzing a state law that expressly prohibited electioneering within 100 feet of a polling place, not whether a state law could be expanded beyond its plain text.

Moreover, the *Burson* Court expressly considered and rejected the argument Frank and Grassfire advance here. In *Burson*, the plaintiffs argued that Tennessee's buffer zone was overinclusive because states could simply prohibit election interference or using violence or intimidation to prevent voting. *Burson*, 504 U.S. at 206-07. Tennessee, in fact, already *did* prohibit those acts. *Id.* (citing Tenn. Code Ann. §§ 2-19-101, 2-19-115 (1991)). But as the Court explained, "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they deal with only the most blatant and specific attempts to impede elections." *Id.* (quotations omitted). "[U]ndetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken." *Id.* at 207. The no-electioneering buffer zone allows the State to ensure that voters can approach the building where polling occurs without fear of intimidation or harassment. A law that criminalizes the most serious forms of harassment only after they occur does not satisfy that interest. Therefore, Wyo. Stat. Ann. §§ 22-13-103(a) and 22-23-104 are not an

adequate substitute to prevent the harms that enjoining Wyo. Stat. Ann. § 22-26-113 could unleash.

2. Denying the injunction will do only minor harm to Frank and Grassfire.

While the State concedes that a law restricting speech generally creates an irreparable harm, that harm is not always so great that it outweighs the State's compelling interest in safeguarding its elections and protecting voters. Accordingly, the harm that Frank and Grassfire may be irreparable, but it is relatively minor.

First, as explained in the Memorandum in Support of the Defendants' Motion to Dismiss, filed contemporaneously, Frank has alternatives that will allow him to express himself while protecting the rights of voters to vote without fear of intimidation or harassment. Assuming that Laramie County Community College policies permit it, Frank may set up on the far side of the parking lot from the entrance to the CCI Building and distribute literature to voters that choose to engage with him. (Complaint Ex. 1 at 2). Frank may also display signs on public roads or sidewalks outside of the 300-foot zone. Because there are relatively few means of access to the CCI Building, Frank could display signs strategically to ensure that nearly every voter could see his message. Again, voters that choose to engage with him could do so, and voters that wish to simply vote could also do so. Because Frank has access to other avenues to spread his message, the law's harms to Frank are relatively minor.

Grassfire's harms are also minor. Grassfire alleges that it wishes to sell its services to collect signatures on sidewalks adjacent to the public entrances to the Laramie County Governmental Complex. (Compl. at ¶ 17). Grassfire's own exhibit demonstrates that

swaths of sidewalk remain available for its use during the absentee polling period, including the sidewalk between the Governmental Complex and every adjoining parking lot. (Compl. Ex. 2 at 2). If Grassfire has trouble collecting signatures on those sidewalks, it will principally be because citizens do not wish to talk to them, not because of the reach of Wyo. Stat. Ann. § 22-26-113.

For these reasons, the balance of harms weighs in the Secretary's favor. At the very least, Frank and Grassfire have not made the required "strong showing" that this factor weighs in their favor. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975-76 (10th Cir. 2004) (*citing SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098-99 (10th Cir. 1991)).

D. Adversely affect the public interest

The last preliminary injunction factor requires that the injunction not be against the public interest. *Free the Nipple*, 916 F.3d at 807. In this case, for the reasons explained above, granting Frank and Grassfire a preliminary injunction would result in, at a minimum, confusion among voters, volunteer poll workers, and election judges, and at worst, the intimidation and harassment of voters across the state, both of which would clearly be adverse to the public interest. It is true that vindicating First Amendment rights is typically considered to be in the public interest. *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1227 (10th Cir. 2005). But in this case, the Court must weigh Frank and Grassfire's First Amendment rights against the integrity of the state's elections. Frank and Grassfire argue that their right to speak freely is "an essential mechanism of democracy." (Pls.' Mem. in Support of Mot. for Prelim. Inj. at 16 (citing *Citizens United v. Federal*

Election Comm'n, 558 U.S. 310, 339 (2010)). So is an election that citizens can trust has been conducted with integrity and in which they can vote without intimidation or harassment. For this reason, the public interest weighs against granting a preliminary injunction.

CONCLUSION

The Court should deny Frank and Grassfire's Motion for Preliminary Injunction.

DATED this 17th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served this 17th day of August 2020, by the following means:

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