CASE NO. 21-8059
(Consolidated with CASE NO 21-8058 for briefing)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEBRA LEE, Laramie County Clerk, in her official capacity; ED BUCHANAN, Wyoming Secretary of State, in his official capacity; LEIGH ANNE MANLOVE, Laramie County District Attorney, in her official capacity,	)
Defendants-Appellants,	)
v.	)
JOHN C. FRANK; GRASSFIRE LLC	)
Plaintiffs-Appellees	)

On Appeal from the United States District Court
for the District of Wyoming
The Honorable Judge Nancy D. Freudenthal
Wyo. No. 2:20-CV-138-F

APPELLANTS' OPENING BRIEF

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Oral Argument Requested

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PRIOR OR RELATED APPEALS

In accordance with Tenth Circuit Rule 28.2(C)(3), Defendants-Appellants represent that there are three separate pending cases in this Court related to this matter: Docket Nos. 21-8058, 21-8059, and 21-8060.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this case based on 28 U.S.C. § 1331 because it raised a federal question. On July 22, 2021, the district court entered an order on the parties' cross-motions for summary judgment and issued its judgment. (JA0405-16). [1] The government officials noticed their respective appeals of the district court judgment on August 20, 2021, within the time allowed by Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure. (D. Ct. ECF 71, 73). This appeal is from a judgment that disposes of all of the parties' claims. *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 541 (10th Cir. 2016) ("For appellate jurisdiction to exist, the order … must constitute a 'final decision,' which is a decision that disposes of all claims."). Accordingly, this Court has jurisdiction over this appeal from the district court's final judgment under to 28 U.S.C. § 1291.

[1] Citations to the Joint Appendix are referenced as (JA###).

STATEMENT OF ISSUES

I. Did the district court err by holding that Frank and Grassfire's 42 U.S.C. § 1983 claims were not barred by Eleventh Amendment immunity?

II. Did the district court err by holding that Frank and Grassfire had standing to bring their claims?

III. Did the district court incorrectly interpret *Burson v. Freeman* to require evidence to justify prohibiting electioneering within 100 yards of a polling place entrance on a general, special, or primary election day and to justify prohibiting one specific type of campaign sign—bumper stickers—at any distance?

STATEMENT OF THE CASE

This appeal arises out of a decision by the United States District Court for the District of Wyoming on the constitutionality of Wyo. Stat. Ann. § 22-26-113, which prohibits electioneering near a polling place. Plaintiffs John C. Frank and Grassfire, LLC brought this action arguing that the electioneering statute violated their First Amendment rights both facially and as applied.

On cross-motions for summary judgment, the district court held that the 100-yard area in which electioneering is prohibited on general, special, and primary election days, and the electioneering statute's prohibition on bumper stickers, violated the First Amendment. (JA0420). The district court order did not expressly state whether those portions of the statute were facially invalidated or whether the order was limited to the facts presented by Frank and Grassfire. But given the absence of a limiting construction, it appears the district court facially invalidated the above-referenced portions of the electioneering statute.

STATEMENT OF THE FACTS

I. Facts relevant to the issues submitted for review

Every state prohibits electioneering within an area around polling places on election days. (JA0092-94). In 1890, the Wyoming Legislature first enacted a law prohibiting electioneering within 20 yards, or 60 feet, of a polling place. (JA0056-57). Over time, the Wyoming Legislature expanded the physical area in

which electioneering was prohibited. (JA0065). The current prohibition on primary, general, or special election days—100 yards—has been in effect since 1973. (JA0065). At the same time, the Wyoming Legislature further clarified that "the display of signs" constituted electioneering. (JA0065). Violating the electioneering statute is a misdemeanor. Wyo. Stat. Ann. § 22-26-112(a)(i).

In 2018, the Wyoming Legislature amended the electioneering statute in two ways. The Legislature prohibited electioneering within 100 feet of the entrance to a polling place on absentee voting days. 2018 Wyo. Sess. Laws. 232, 237.[2] It also eased restrictions in all electioneering ban areas, or "buffer zones," to allow one specific type of campaign sign—bumper stickers meeting certain requirements—to be displayed within the prohibited area. *Id.* at 237-38. To qualify for the exemption, a campaign bumper sticker must be affixed to a vehicle parked within or passing through the buffer zone and: (1) there is only one bumper sticker per candidate on the vehicle, (2) the bumper sticker is not larger than four inches in height by six inches in length, and (3) the vehicle may only be parked within the buffer zone while the elector is voting. Wyo. Stat. Ann. § 22-26-113(a)(i)-(iii).

John C. Frank is a resident of Cheyenne, Wyoming. (JA0015). In the complaint, he alleged that he wanted to stand within 100 yards, or 300 feet, of the public entrance of his nearest polling place during the 2020 primary and general

[2] Available at: https://wyoleg.gov/2018/SessionLaws.pdf

elections to distribute campaign material. (JA0016-17). In addition, Frank alleged that he wanted to put two bumper stickers on his automobile for candidate Liz Cheney that were larger than 4 inches high by 6 inches wide. (JA0017). Frank now prefers a different candidate, but he still wants to express his preferences using bumper stickers. (JA0311-12). Frank has never engaged in electioneering activities in a buffer zone in Wyoming and has no current plans to do so in the future. (JA0366, 0317).

Grassfire, LLC was formed in January 2020 and provides nationwide signature gathering services. (JA0332, 0017). Grassfire alleged that it wanted to "offer its [signature gathering] services in Wyoming" for candidates, initiatives, and referenda. (JA0018). Grassfire requires its employees/contractors to abide by all state laws regarding signature gathering. (JA0363). Grassfire gathers signatures not only at polling places, but also at other locations with public traffic, as well as private locations. (JA0346-48). Grassfire has never provided signature gathering services in Wyoming, even in non-polling locations. (JA0346).

Neither Frank nor Grassfire has been convicted, cited, or threatened with legal sanction for violating Wyo. Stat. Ann. § 22-26-113. (JA0319, 0352, 0364, 0367). In fact, Frank and Grassfire do not allege that any person has ever been found guilty of a misdemeanor under the electioneering statute. (*See generally* JA0014-26). In addition, neither Frank nor Grassfire own, rent, or otherwise occupy property in a

buffer zone or have permission to electioneer on private property in a buffer zone. (JA0316-17, 0367, 0377).

II. Relevant Procedural History

Frank and Grassfire filed their complaint on July 24, 2020. (JA0014). They named as defendants Wyoming Secretary of State Edward Buchanan, Laramie County District Attorney Leigh Anne Manlove, and Laramie County Clerk Debra Lee, all in their official capacities. (JA0014).

Frank and Grassfire filed a motion for summary judgment, as did the Secretary and District Attorney. (JA0294-96). The County Clerk joined in the Secretary and District Attorney's motion. (D. Ct. ECF 55). The district court conducted oral arguments and issued a written decision shortly thereafter, on July 22, 2021. (JA0405-20). The Secretary and District Attorney filed their notice of appeal on August 20, 2021, as did the County Clerk. (D. Ct. ECF 71, 73). Frank and Grassfire filed their notice of appeal on August 23, 2021. (D. Ct. ECF 77).

III. Ruling Presented for Review

The sole order in this matter that is the subject of this appeal is the *Order on Cross-Motions for Summary Judgment* issued on July 22, 2021. (JA0405-20). In its order, the district court found that Frank and Grassfire's claims seeking declaratory and injunctive relief were not prohibited by Eleventh Amendment immunity

(JA0409-11). It appears the district court concluded the claims were proper under *Ex Parte Young*, 209 U.S. 123 (1908). (JA0410-11).

The district court also found that both Frank and Grassfire had standing for two reasons. (JA0411-13). First, the court found demonstrated sufficient future intent to engage in activities that would violate the statute at issue. (JA0412). Second, the court found they have a credible fear of enforcement because "both the Secretary of State and county clerks [have] authority over the election laws within the state." (JA0413).

The district court next held that the government officials failed to present evidence to justify Wyoming's election-day prohibition on electioneering being greater than 100 feet. (JA0417). The court first held that the defendants were required, under the analysis provided by *Burson v. Freeman*, 504 U.S. 191 (1992), to justify the reason that Wyoming prohibits electioneering further than 100 feet from the polling place entrance. (JA0415). The government officials disagreed with the court's interpretation of *Burson* and provided no additional evidence. (JA0416-17). Consequently, the court found that they had failed to show that Wyoming was justified in establishing a 100-yard electioneering ban. (JA0417).

In contrast, the district court upheld the 100-foot electioneering prohibition around in-person absentee voting locations. (JA0417-18). It appears the court assumed that the 100-foot distance was permissible because it was the same distance

considered in *Burson*. (*See* JA0417). The court found that Frank and Grassfire had failed to argue or show that the fact that the restriction would apply to more days would be legally significant. (JA0417-18).

Next, the district court, while questioning whether Wyoming's electioneering ban applied to bumper stickers, held that to the extent it does, Wyo. Stat. Ann. § 22-26-113 is unconstitutional. (JA0419). Reasoning that the government officials did not present evidence on how bumper stickers, specifically, could lead to the harms electioneering bans are intended to address, the court held that the ban on electioneering in the form of bumper stickers is unconstitutional. (JA0419).

Finally, the district court declined to address the question of whether Wyoming's electioneering ban violated the First Amendment rights of individuals whose private real property falls within the area of the electioneering ban. (JA0419).

SUMMARY OF THE ARGUMENTS

The district court erred in its order invalidating the Wyoming electioneering buffer zone statute for three reasons. First, Eleventh Amendment immunity bars Frank and Grassfire's 42 U.S.C. § 1983 claims. The government officials are all sued in their official capacities (JA0015-16) and state officials are not "persons" subject to suit under 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). A declaratory judgment action, not an action under 42 U.S.C. § 1983, is the proper vehicle to challenge the constitutionality of a statute. Additionally, an *Ex Parte Young* action is not brought under 42 U.S.C. § 1983. Even if this Court finds that Frank and Grassfire properly brought their claims under *Ex Parte Young*, any claims under 42 U.S.C. § 1983 must be dismissed.

Second, Frank and Grassfire lack standing to bring their claims. Specifically, each fail to demonstrate that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendants, and (3) that it is likely to be redressed by a favorable judicial decision." *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2020). Even if Frank and Grassfire are able to demonstrate a pre-enforcement injury in fact based on alleged chilled speech, neither is able to identify any conduct by the government officials that gave rise to this action. As a result, both fail to demonstrate any alleged injury is traceable to any government officials' conduct.

Finally, the district court misapplied the plurality's decision in *Burson*. In *Burson*, the plurality held that "facially content-based restriction[s] on political speech in a public forum . . . must be subjected to exacting scrutiny." *Burson*, 504 U.S. at 198. Exacting scrutiny requires the State to show the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* (citations omitted). The *Burson* Court recognized that most election reforms occurred long before states engaged in extensive legislative hearings and that it would be difficult for a state to prove precise tailoring without sustaining some damage. *Id.* at 208-09. As a result, the plurality applied a modified burden of proof when the "First Amendment right threatens to interfere with the act of voting itself." *Id.* at 209 n.11. A regulation satisfies the *Burson* modified burden of proof if the regulation is "reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.* at 209 (citation omitted).

While the district court cited the proper standard in its order, it disregarded the *Burson* plurality's express statement that it did not create a litmus-paper test, or bright-line rule, that 100 feet was the maximum buffer zone distance. *Id.* at 210-11. Instead, the district court required the government officials to present additional evidence demonstrating why the Wyoming Legislature selected a greater distance than was reviewed and approved by the plurality in *Burson*. (JA0416-17). Requiring the State to provide additional evidence is contrary to *Burson*. As a result, the district

court's holding that the law prohibiting electioneering within 100 yards of a polling place is unconstitutional should be reversed.

In addition, the district court held that the electioneering statute's prohibition on campaign bumper stickers within the protected zone violates the First Amendment. (JA0418-19). The district court's decision appears to be based on the lack of evidence presented on "how bumper stickers on vehicles could lead to voter intimidation or fraud." (JA0419). The district court's decision, however, incorrectly focuses on bumper stickers. Bumper stickers are only one kind of campaign sign, and the *Burson* plurality held campaign signs may be prohibited near polling places. *See Burson*, 504 U.S. at 211. Because the statute meets exacting scrutiny under the *Burson* framework, this Court should reverse the district court's decision that the statute's prohibition on campaign bumper stickers near polling places violates the First Amendment.

ARGUMENT

I. The district court erred in holding Frank and Grassfire's 42 U.S.C. § 1983 claims were not barred by Eleventh Amendment immunity.[3]

The district court held that Eleventh Amendment immunity did not prohibit Frank and Grassfire's 42 U.S.C. § 1983 claims. (JA0409-11). But the district court erred because courts have consistently held that suits against state officials under § 1983 are barred by Eleventh Amendment immunity. *Will*, 491 U.S. at 71. Additionally, to the extent Frank and Grassfire bring their claims under *Ex Parte Young*, those claims are also improper because they seek relief other than prospective injunctive relief and have not alleged the governmental officials took any action violating federal law. (JA0024).

A. Standard of Review

This Court reviews a district court's grant of summary judgment de novo, applying the same standards used by the district court. *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1145 (10th Cir. 2007). Eleventh Amendment immunity is a legal determination that can be decided by an appellate court on the record. *Williams v. Utah Dep't of Corrections*, 928 F.3d 1209, 1212 (10th Cir. 2019). Purely

[3] Defendant Debra Lee, Laramie County Clerk, did not join in Defendant Buchanan and Defendant Manlove's Eleventh Amendment Immunity argument in the district court and likewise do not join in this portion of Appellants' Brief on appeal.

legal determinations are reviewed de novo. *Manzanares v. Higdon*, 575 F.3d 1135, 1142 (10th Cir. 2009).

B. Eleventh Amendment immunity bars Frank and Grassfire's 42 U.S.C. § 1983 claims.

In its order, the district court acknowledged that the State did not consent to suit and that Congress did not expressly abrogate the State's Eleventh Amendment immunity. (JA0410). But, the district court held that Frank and Grassfire's claims were proper under *Ex Parte Young*. (JA0410-11). The district court erred in not dismissing the claims brought under 42 U.S.C. § 1983 and by holding that Frank and Grassfire's claims were appropriate under *Ex Parte Young*.

The State of Wyoming, its agencies, and state officials acting in their official capacity are immune from suit under the Eleventh Amendment. U.S. Const. amend. XI. The Eleventh Amendment guarantees sovereign immunity from suits brought by states' "own citizens, by citizens of other states, by foreign sovereigns, and by Indian Tribes." *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 827 (10th Cir. 2007).

Courts have articulated three exceptions to sovereign immunity. First, a state may consent to suit. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). Second, Congress may expressly "abrogate state sovereign immunity by appropriate legislation when it acts under Section 5 of the Fourteenth Amendment." *Id.* Third, litigants may sue state officers for prospective injunctive relief under *Ex*

Parte Young. *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010) (citing *Ex Parte Young*, 209 U.S. 123, 159-60 (1908)). Wyoming has not consented to suit under 42 U.S.C. § 1983, and § 1983 does not abrogate the State's Eleventh Amendment immunity. *Wyo. Guardianship Corp. v. Wyo. Stat. Hosp.*, 428 P.3d 424, 433 (Wyo. 2018); *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

Here, all of the government officials are sued under § 1983 in their official capacity. (JA0015-16). Claims against government officials in their official capacity are claims against the state itself. *Will*, 491 U.S. at 71. State officials are not persons subject to suit under § 1983. *Id.* Thus, Frank and Grassfire's § 1983 claims against state officials are barred by Eleventh Amendment immunity.

The last exception to Eleventh Amendment immunity, *Ex Parte Young*, allows a person to sue a state official seeking **only** prospective equitable relief for violations of federal law. *Edmondson*, 594 F.3d at 760. "The *Ex Parte Young* doctrine is not actually an exception to Eleventh Amendment state immunity because it applies only when the lawsuit involves an action against state officials, not against the state." *Elephant Butte Irrigation Dist. of N.M. v. Dep't of the Interior*, 160 F.3d 602, 607-08 (10th Cir. 1998). The *Ex Parte Young* doctrine is a judicially created action, not a statutory cause of action. *Id.* As a result, § 1983 is not the proper vehicle to bring an *Ex Parte Young* action.

If Congress intended § 1983 to include a cause of action for prospective injunctive relief against state officials, it would have done so. But the United States Supreme Court has been clear that Congress has not abrogated the State's Eleventh Amendment immunity through 42 U.S.C. § 1983. *Quern*, 440 U.S. at 342. To the extent Frank and Grassfire claim § 1983 is the vehicle by which they are asserting their *Ex Parte Young* claims, that argument is inconsistent with the statute.

To find that a claim is properly made under *Ex Parte Young*, a court "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). To determine whether a complaint is sufficient, courts employ a three-pronged test: "(1) whether the case is against state officials or the state itself; (2) whether the complaint alleges an ongoing violation of federal law; and (3) whether the relief sought is prospective relief." *EagleMed, LLC v. Wyo. Dep't of Workforce Servs.*, 227 F. Supp. 3d 1255, 1267 (D. Wyo. May 16, 2016) (citing *Muscogee (Creek) Nation*, 669 F.3d at 1167).

Frank and Grassfire's claims are prohibited under the *Ex Parte Young* doctrine because they seek retroactive relief, including attorney's fees, costs and expenses under 42 U.S.C. § 1988. (JA0024). Their claims are not just claims for injunctive relief—these are claims for money damages against the State. *Jordon v. Gilligan*,

500 F.2d 701, 704-05, 709-10 (6th Cir. 1974) (holding the court did not "have the power to award attorneys' fees against a state or its officials acting in their official capacities in a suit brought under 42 U.S.C. § 1983" because those claims were barred by Eleventh Amendment immunity). As a result, Frank and Grassfire's claims against government officials are effectively claims against the State and are barred by Eleventh Amendment immunity. *Will*, 491 U.S. at 71.

Moreover, Frank and Grassfire's claims are not challenging the constitutionality of state official's **actions** in enforcing state law. *Ex Parte Young*, 209 U.S. at 154. There is no dispute that the government officials have not taken any enforcement action against Frank or Grassfire. (JA0319, 352, 367). Indeed, as discussed below, the Secretary of State and the Laramie County Clerk cannot take any legal enforcement action. *See* infra Section II.B.1-2. "The [*Ex Parte Young*] doctrine is limited to that precise situation, and does not apply 'when the state is the real, substantial party in interest' . . . as when the 'judgment sought would expend itself on the public treasury or domain, or interfere with public administration.'" *Va. Office for Prot. and Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (some quotation marks and internal citations omitted).

To the extent Frank and Grassfire characterize their claims as appropriate under *Ex Parte Young*, they have not alleged an ongoing violation of federal law, because no governmental official has threatened to or taken any action against them.

(JA0319, 0352, 0364, 0367). Accordingly, this Court should reverse the district court's decision and dismiss Frank and Grassfire's §1983 and *Ex Parte Young* claims and only consider this matter as one seeking declaratory relief.

II. The district court erred in finding that Frank and Grassfire had Article III standing to bring their claims.

A. Standard of Review

This Court reviews a district court's decision on standing de novo. *Aptive Envtl., LLC v. Town of Castle Rock, Colo.*, 959 F.3d 961, 973 (10th Cir. 2020). Article III Standing is jurisdictional. *See Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007). District court decisions on subject-matter jurisdiction are also reviewed de novo. *Niemi v. Lasshofer*, 770 F.3d 1331, 1344 (10th Cir. 2014).

B. Frank and Grassfire lack Article III standing.

Under Article III of the United States Constitution, federal courts may only decide "Cases" or "Controversies." U.S. Const. art. III, section 2; *Baker*, 979 F.3d at 871. To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendants, and (3) that it is likely to be redressed by a favorable judicial decision." *Id.* (citation omitted).

1. Frank and Grassfire have not shown any injury in fact.

The district court concluded that Frank and Grassfire both demonstrated an intention to engage in the conduct prohibited by the statute. (JA0412). In addition,

the district court found that because the government officials had not disavowed any intent to enforce Wyo. Stat. Ann. § 22-26-113, and because there was evidence of one recent citation, Frank and Grassfire were subject to a credible threat of enforcement. (JA0413). But, the district court erred because neither Frank nor Grassfire have demonstrated a sufficient intent to engage in the conduct prohibited by the statute. Moreover, the Secretary of State and the Laramie County clerk have no enforcement authority, and the Laramie County District Attorney has never threatened any action against Frank or Grassfire.

To establish an injury in fact in a pre-enforcement challenge to a criminal statute, a plaintiff must demonstrate "(1) 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute,' and (2) 'that there exists a credible threat of prosecution thereunder.'" *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 545 (10th Cir. 2016) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)). "[T]hough a plaintiff need not expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights, allegations of possible future injury do not satisfy the injury in fact requirement." *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1087-88 (10th Cir. 2006). "[A] chilling effect on the exercise of a plaintiff's First Amendment rights may amount to a judicially cognizable injury in fact, as long as it 'arise[s]

from an objectively justified fear of real consequences.'" *Id.* at 1088 (citations omitted). This Court has held that:

> plaintiffs in a suit for prospective relief based on a 'chilling effect' on speech can satisfy the requirement that their claim of injury be 'concrete and particularized' by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced.

Id. at 1089.

Here, the record demonstrates that, in Colorado, Frank distributed literature, engaged in door-to-door campaigning, and placed campaign yard signs, but he has never displayed or distributed campaign materials or engaged in electioneering near a polling place. (JA0303, 0305-06). In Wyoming, the only form of electioneering Frank has engaged in is placing campaign yard signs. (JA0307, 0318).

Additionally, Frank expressed a desire to put bumper stickers on his car, yard signs in the yard, and "potentially distribut[e] literature" within 100 yards of a polling place on election day, but for the statutory prohibition. (JA0309-10). He also claimed he intended to place two campaign signs in the back windows of his vehicle, but had not done so just in case he inadvertently drove through the prohibited area on an absentee polling day. (JA0313). Frank testified that he had never been asked to move outside of a buffer zone or threatened with prosecution. (JA0318-19).

Grassfire, conversely, has engaged in signature gathering near polling places in other states, but has never provided signature gathering services in Wyoming, despite providing services in other public and private locations. (JA0346-48).

Frank and Grassfire's activities do not amount to a history of engaging in the type of speech affected by the governmental action. There is no evidence that Frank has ever engaged in electioneering near a polling place. Instead, Frank has only ever placed yard signs and distributed campaign literature door to door. (JA0313). Similarly, Grassfire has never engaged in signature gathering near a polling place in Wyoming or engaged in any electioneering in Wyoming. (JA0346). Frank and Grassfire's previous activities fall short of "evidence that in the past they have engaged in the type of speech affected by the challenged government action" because the only speech affected by the Wyo. Stat. Ann. § 22-26-113 is electioneering near a polling place. *Walker*, 450 F.3d at 1089.

While Frank and Grassfire arguably demonstrate a present desire to engage in an activity proscribed by the statute, they have not demonstrated plausible claims that they have no intention to engage in those activities due to a credible threat of prosecution. *Id.* The record reflects that, to date, only one person has been cited and criminally prosecuted for violating the electioneering statute that has existed in principle for over one hundred years. (JA0292). Additionally, because electioneering too close to a polling place is a misdemeanor offense under Wyo. Stat. Ann.

§ 22-26-112(a)(i), neither the Wyoming Secretary of State nor the Laramie County Clerk have any ability to enforce the statute—only law enforcement personnel have the authority to enforce a criminal statute. *See* Wyo. Stat. Ann. § 7-2-103(a) ("A citation may issue as a charging document for any misdemeanor.").

The district court concluded that "election officials have authority over election laws and that the causation requirement of Article III standing does not require actual enforcement of criminal statutes." (JA0413). But election officials only have the ability to call law enforcement for suspected violations, just as any other member of the public. Enforcement authority is solely in the discretion of law enforcement personnel. Any alleged acts by the Secretary of State's Office or the Laramie County Clerk, who do not enforce criminal statutes, are not sufficient to demonstrate Article III Standing.

While there is no dispute that the Laramie County District Attorney has enforcement authority over criminal misdemeanor statutes, she has never threatened action against Frank or Grassfire. (JA0319, 0352, 0364, 0367). As discussed above, they have not demonstrated a "plausible claim that they presently have no intention to do so *because* of a credible threat that the statute will be enforced." *Walker*, 450 F.3d at 1098. Accordingly, they have no standing to mount a pre-enforcement challenge to Wyo. Stat. Ann. § 22-26-113.

2. There is no traceability to the government officials' conduct.

To establish an alleged injury is traceable to the challenged conduct of the defendants, Frank and Grassfire need to establish a causal connection between the injury and the conduct complained of. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 650 (1992). Even if this Court finds that Frank and Grassfire have sufficiently demonstrated an injury in fact, they both fail to show that any alleged injury is traceable to the challenged conduct of the government officials. *Walker*, 450 F.3d at 1089. As discussed above, no state or local government actor has threatened or taken any action against Frank or Grassfire. (JA0319, 0352, 0367). In fact, the Secretary of State and the Laramie County Clerk have no ability to take enforcement action of any kind. As a result, any alleged injury is not traceable to these government officials. As it relates to the Laramie County District Attorney, neither Frank nor Grassfire have alleged a causal connection between the claimed injury and any conduct of the Laramie County District Attorney. Accordingly, Frank and Grassfire cannot demonstrate the second prong necessary to establish Article III standing and their claims should be dismissed.[4]

[4] This brief will not address the redressability requirement of Article III standing. All three elements are necessary to demonstrate Article III standing and failure to demonstrate one of the elements is fatal. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005).

III. The district court erred when it incorrectly applied *Burson* to Wyo. Stat. Ann. § 22-26-113.

A. Standard of Review

This Court reviews a district court's grant of summary judgment de novo, applying the same standards used by the district court. *Colo. Right to Life Comm.*, 498 F.3d at 1145. In addition, this Court "review[s] the district court's findings of constitutional fact in a First Amendment claim and conclusions of law de novo." *Id.*

B. Summary Judgment Standard

Summary judgment is appropriate under Rule 56(a) when the movant shows "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and it is material "if under a substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013). When reviewing a motion for summary judgment, this Court "examine[s] the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Dahl v. Charles F. Dahl, M.D., P.C. Defined Ben. Pension Tr.*, 744 F.3d 623, 628 (10th Cir. 2014) (citation omitted).

This Court has "discretion to affirm a summary judgment on any ground adequately supported by the record, so long as the parties have had a fair opportunity

to address that ground." *Alfaro-Huitron v. Cervantes Agribusiness*, 982 F.3d 1242, 1249 (10th Cir. 2020) (citation omitted).

C. The 100-yard buffer zone on primary, general, and special election days complies with *Burson*.

In its analysis, the district court required the State to provide evidence or argument "to explain why the statute requires an electioneering buffer zone much larger than the regulation upheld in *Burson*." (JA0416-17). In support, the district court cited *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) and *Russell v. Lundergan-Grimes*, 784 F.3d 1053 (6th Cir. 2015), for the proposition that the State must present specific evidence justifying an electioneering buffer zone greater than 100 feet. (JA0416). But the district court improperly applied *Burson* and its reliance on those cases to support its conclusion is misplaced.

In *Burson*, the Supreme Court analyzed a Tennessee law prohibiting electioneering within 100 feet from the entrance to a polling place. *Burson*, 504 U.S. at 193-94. The plurality held that states have a compelling interest in protecting voters from confusions and undue influence and in preserving the integrity of their elections. *Id.* at 199. In addition, the plurality held that restrictions on electioneering around polling places were necessary to serve that interest. *Id.* at 200-08. The issue for the Court was "how large" of a restricted zone was sufficiently tailored to survive exacting scrutiny. *Id.* at 208. The Court recognized that states had been prohibiting electioneering near polling places for over 100 years, long before extensive

legislative hearings on election regulations. *Id.* As a result, the plurality understood that many electioneering statutes were enacted without comment. *Id.* at 208-09.

The plurality accommodated this unique difficulty in substantiating the states' interests by declining to place an evidentiary burden on the state legislatures to show the regulation is perfectly tailored. *Id.*; *Clark v. Schmidt*, 493 F. Supp. 3d 1018, 1032 (D. Kan. 2020) (applying *Burson* to Kansas's electioneering statute). Instead, the plurality applied a modified burden of proof for electioneering prohibitions in which the "First Amendment right threatens to interfere with the act of voting itself" or where the "challenged physical activity physically interferes with electors attempting to cast their ballot." *Burson*, 504 U.S. at 209 n.11. Under the modified burden of proof, a regulation withstands constitutional scrutiny if it is "reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.* at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

Neither the modified burden of proof nor the plurality's analysis require the State to present evidence to demonstrate why a regulation prohibits electioneering at a greater distance than considered in *Burson*. *Id.* at 208 (citation omitted) ("[T]his Court has never held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are produced]' by the voting regulation in question."). Requiring an additional showing directly contradicts the rationale for a modified burden of proof—it would require "that a State's political system to

sustain some level of damage before the legislature could take corrective action." *Id.* at 209. The plurality expressly stated that "States must come forward with more specific findings to support regulations directed at intangible 'influence,' such as the ban on election-day editorials struck down in *Mills v. Alabama*"—not to support regulations that are intended to ensure the act of voting is not interfered with. *Id.* n.11.

In striking down the 100-yard election day buffer zone in this case, the district court held that the government officials had the burden to explain why the zone established in Wyo. Stat. Ann. § 22-26-113 was larger than the regulation considered in *Burson*. (JA0416-17). The district court acknowledged that the government officials had the same compelling interests in regulating electioneering near a polling place that were recognized in *Burson*, but nonetheless held the 100-yard buffer zone was unconstitutional because the government officials did not assert an additional justification for a larger zone. (JA0416-17). The district court order and subsequent judgment creates the type of litmus-paper test expressly disavowed by the *Burson* plurality. *Burson*, 504 U.S. at 210-11. In essence, the district court required that the State conduct a comparative analysis, supported by legislative history, to explain why its buffer zone exceeds the 100-foot zone considered in *Burson*. (*See* JA0416-17).

But *Burson* did not establish the upper limit of a state's ability to create buffer zones incidental to its power to protect election integrity. Rather, the *Burson* plurality held that Tennessee's 100-foot buffer zone was a "minor geographic limitation" that did not constitute a "significant impingement" to First Amendment rights. *Burson*, 504 U.S. at 210. At no point did the *Burson* plurality suggest that a state would be subjected to an increased burden to defend its decision to restrict electioneering at distances greater than 100 feet.

To support its decision, the district court cited *Schirmer v. Edwards* and relied more heavily on *Russell v. Lundergan-Grimes*. (JA0418). But the district court's reliance on those cases for the proposition that a state must present specific evidence to support a regulation of a distance greater than 100 feet is misplaced.

Schirmer involved a Louisiana statute that prohibited electioneering within 600 feet of a polling place. *Schirmer*, 2 F.3d at 119. During trial, a state representative who drafted the statutory amendments over a decade earlier testified that the previous 300-foot limitation enacted in 1962 did not prevent hiring of poll workers to campaign for a specific candidate or issue at a polling place, but that the 600-foot limitation was enacted in 1980 to dissuade politicians from hiring poll workers. *Id.* at 122.

Citing *Burson*, the Fifth Circuit recognized that whether a boundary line could be somewhat tighter was not a question of constitutional dimension and reducing the

line "is a difference only in degree, not a less restrictive alternative in kind." *Id.* at 121-22 (citations omitted). The Fifth Circuit recognized these statements "reflect[] the difficulty that lies in determining the exact point at which to draw the line, and it suggests that the [*Burson*] plurality would have supported a 600-foot limitation." *Id.* at 122. Consistent with that analysis, the court upheld the regulation by finding it was "narrowly drawn and not an excessive infringement on the First Amendment." *Id.* at 124. While the record before the Fifth Circuit contained testimony of the legislative intent of the statute, the decision did not require the state to present that additional evidence. *Id.* at 121-22.

In *Russell v. Lundergan-Grimes*, the plaintiff owned private property within a 300-foot buffer zone and wished to display campaign signs on that property. 784 F.3d at 1043-44. While a previous version of Kentucky's electioneering statute exempted signs displayed on private property, the statute at issue in *Russell* provided no similar exemption. *Id.* In striking down Kentucky's statute, the court opined that the statute was overbroad because it did not exempt speech occurring on private property and that the statute "prohibits protected speech over an area greater than the State has demonstrated is necessary to achieve the State's compelling interests." *Id.* at 1054. Specifically, the court found the state "presented no persuasive argument as to why *Burson*'s **safe harbor** is insufficient" and held "that [d]efendants presented no argument—and evidently the legislature did not engage in fact finding

and analysis—to carry their burden to explain why they require a no-political-speech area immensely larger than what was legitimized by the Supreme Court" in *Burson*. *Id.* at 1053 (emphasis added).

But the *Russell* court ignored the modified burden of proof articulated in *Burson*, which merely requires states to show that the prohibition on electioneering is "reasonable" and "does not significantly impinge" on First Amendment rights. *Burson*, 504 U.S. at 209. The Supreme Court recognized that states cannot prove exactly how far their no-electioneering zones must be to address their compelling interests. *Id.* at 208. Requiring additional justification negates the *Burson* plurality's rationale for the modified burden of proof. Accordingly, *Russell* is inconsistent with *Burson*, and the district court should not have relied on *Russell*.

The district court made the same error by relying on *Schirmer* as it did with *Russell*. While additional legislative justification to support the 600-foot limitation was provided in *Schirmer*, the district court erred in finding it was required by *Burson*. (JA0417). The district court should not have relied on *Russell* for the same reason—the *Russell* court incorrectly required additional justification not provided for in *Burson*.

Here, Wyoming law has protected the area around polling places since 1890. (JA0057). In 1973, roughly nineteen years before *Burson*, the Wyoming Legislature expanded the buffer zone from 20 yards to 100 yards. (JA0057). Similar to the

Tennessee statute at issue in *Burson*, Wyoming's electioneering statute stems from "[a] long history, substantial consensus, and simple common sense." *Burson*, 504 U.S. at 211. There is little legislative history explaining the Wyoming Legislature's decision to arrive at 100 yards in 1973, but Wyoming's electioneering prohibition shares a similar genesis and has been expanded similarly to the Tennessee statute considered in *Burson* and other states like Kansas. *Clark*, 493 F. Supp. 3d at 1030.

A 100-yard prohibition on electioneering is not so wide as to become an "impermissible burden" equivalent to the absolute bar *Burson* forbids. *Burson*, 504 U.S. at 210 (citing *Mills v. Alabama*, 384 U.S. 214 (1966) and *Meyer v. Grant*, 486 U.S. 414 (1988)). Conducting a factual analysis regarding the 100-yard restriction shows the 100-yard does not come close to approaching an absolute bar in *Mills* and *Meyer*. Wyoming Statute § 22-26-113 merely prohibits electioneering on a primary, general, or special election day within a minute's walk of the polling place. *See Burson*, 504 U.S. at 210 (finding it takes roughly fifteen seconds to walk 75 feet).

Wyoming's circumstances are essential to understanding the reasonableness of the 100-yard restriction and its implications on the public's First Amendment rights. Wyoming is the least populated state in the United States and the least densely

populated state in the contiguous United States. United States Census Bureau, *Wyoming Remains Nation's Least Populous State* (Aug. 25, 2021).[5]

Treating Wyoming as equivalent to Tennessee or Kentucky does not account for the fact that the latter states are far denser and more populous, with a more crowded infrastructure. In *Anderson v. Spear*, a case predateding *Russell*, the Sixth Circuit held that larger buffer zones threatened to stifle more speech in "urban voting places" and in "crowded urban context[s]." 356 F.3d 651, 662 (6th Cir. 2004) (citing *Louisiana v. Schirmer*, 646 So. 2d 890, 901 (La. 1994)). This reasoning is intuitive: a buffer zone in a crowded urban context is likely to affect more people and speech than the same size buffer zone in a rural context, and larger buffer zones are more reasonable in more rural areas. As a result, the First Amendment concerns implicated by a buffer zone in Tennessee (*Burson*) or Kentucky (*Russell*) are distinctly different from Wyoming's. A 100-yard restriction in those states is likely to affect more speech than a 100-yard restriction in Wyoming. Looking to the distance itself and ignoring the context of how the buffer zone applies misunderstands the *Burson* analysis.

The 100-yard buffer zone seldom encompasses any other structures aside from the polling place and adjoining streets. (JA0038-53). In some instances

[5] Available at: https://www.census.gov/library/stories/state-by-state/wyoming-population-change-between-census-decade.html

reflected in the record, the zone does not even extend to the entire parking lot associated with the voting location. (JA0039, 0041, 0137, 0139). As a result, the 100-yard buffer zone only prohibits electioneering close to the polling place entrance for the limited purpose of protecting voters from confusion, undue influence, harassment, and to maintain election integrity. The area of prohibited electioneering is reasonable.

In addition, individuals may engage in electioneering anywhere else in the state on election day. This minimal restriction is exactly the type of "minor geographic limitation" that the *Burson* plurality held was not a "significant impingement" to First Amendment rights. *Burson*, 504 U.S. at 210. Correctly applying *Burson* shows that the Wyoming Legislature's decision to set a 100-yard buffer zone on primary, general, and special election days does not significantly impinge on First Amendment rights because the prohibited zone is narrowly tailored to the immediate area around the entrance to the polling place. Accordingly, Wyo. Stat. Ann. § 22-26-113 satisfies constitutional scrutiny.

D. Wyoming Statute § 22-26-113's prohibition on campaign signs satisfies constitutional scrutiny.

In its order on the cross-motions for summary judgment, the district court held that to the extent Wyo. Stat. Ann. § 22-26-113 prohibited bumper stickers, it did not survive constitutional scrutiny. (JA0419). It appears the district court's analysis was guided by the lack of evidence that "bumper stickers on vehicles could lead to voter

intimidation or election fraud." (JA0418). But the district court's analysis contradicts *Burson*.

It appears the district court facially invalidated Wyo. Stat. Ann. § 22-26-113 to the extent it prohibited bumper stickers. (JA0418). But the *Burson* plurality rejected facial challenges based on the fact that some signs were bumper stickers, and this Court should reject Frank and Grassfire's facial challenge as well. *Burson*, 504 U.S. at 210 n.13 (holding that the statute's applicability to campaign bumper stickers are "'as applied' challenges that should be made by an individual prosecuted for his or her conduct" and that [i]f successful, these challenges would call for a limiting construction rather than a facial invalidation"). As it relates to Frank and Grassfire's as-applied challenges, the statute's regulation of campaign signs, including bumper stickers, is a reasonable restriction that does not significantly infringe on Frank or Grassfire's First Amendment rights.

As discussed above, the exacting scrutiny applied in *Burson* required the state to show the "regulation is necessary to serve a compelling state interest and that is narrowly drawn to achieve that end." *Burson*, 504 U.S. at 198 (citations omitted). Under the modified burden of proof applied in *Burson*, the restriction survives constitutional scrutiny if the regulation is reasonable and does not significantly impinge on constitutionally protected rights. *Id.* at 209.

It appears the district court concluded that restricting campaign bumper stickers was not necessary to serve a compelling state interest. (JA0418-19). But the district court incorrectly distinguished campaign bumper stickers from other types of campaign signs. The *Burson* plurality recognized states may regulate campaign signs and other material to protect voters from confusion, undue influence, and preserving the integrity of the election process. *Id.* at 198-99. The district court ignored this discussion when it focused on the limited exception for bumper stickers provided by the electioneering statute.

Similar to the Tennessee statute at issue in *Burson*, Wyo. Stat. Ann. § 22-26-113 prohibits displaying campaign signs and other campaign materials in the buffer zone. *Burson*, 504 U.S. at 193. Unlike Wyo. Stat. Ann. § 22-26-113, the Tennessee statute did not carve out any exception for bumper stickers. Tenn. Code Ann. § 2-7-111(b)(1) (1987); *Burson,* 504 U.S. 191. The *Burson* plurality was aware of the scope of the Tennessee statute, which prohibited **all** campaign signs within the applicable area, but the plurality upheld the statute without reservation. *Burson,* 504 U.S. at 210-11. There is no difference between a bumper sticker advocating for a specific candidate and any other sign advocating for or against a specific candidate.

Since 1973, Wyoming's electioneering statute has expressly prohibited displaying signs or campaign literature within the area proscribed by statute. (JA0065). Rather than continue prohibiting all electioneering bumper stickers, the

Wyoming Legislature amended the electioneering statute in 2018 to exempt bumper stickers in limited circumstances. 2018 Wyo. Sess. Laws at 237-38. Due to the way bumper stickers are affixed to vehicles, the Legislature determined they are more difficult to remove than other types of campaign signs. Wyo. Senate Afternoon Audio Recording, Feb. 28, 2018 at 1:31:28-1:32:40.[6] As a result, the Legislature determined that one bumper sticker per candidate was allowable within the buffer zone on the condition that it be the same size or smaller than the largest available size the Legislature was able to find and that the car be parked only while the voter was voting. Wyo. House of Representatives. Morning Audio Recording, Mar. 9, 2018 at 1:53:15-1:57:30.[7]

Moreover, the electioneering statute only prohibits campaign signs within the proscribed zone on election or absentee voting days. Outside of the proscribed zones, a person may have as many campaign bumper stickers or campaign signs on his or her vehicle, at any size, as the individual pleases. While the electioneering statute places a minor burden on Frank's First Amendment rights, the statute does not create an absolute prohibition that the *Burson* plurality cited as rising to the level of a significant infringement on First Amendment rights. *Burson*, 504 U.S. at 210 (citing *Mills*, 384 U.S. at 214 and *Meyer*, 486 U.S. at 414). The prohibition on campaign

[6] Available at: https://wyoleg.gov/2018/Audio/senate/s022818pm1.mp3

[7] Available at: https://wyoleg.gov/2018/Audio/house/h030918am1.mp3

signs within the area proscribed by the electioneering statute is significantly less restrictive than the absolute prohibitions noted in *Burson*. Similar to the 100-foot prohibition considered by *Burson*, the 100-foot area in which electioneering is prohibited on absentee voting days and the 100-yard area in which electioneering is prohibited on general, special, or primary election days is merely a "minor geographic limitation" that does not significantly impair First Amendment rights. *Burson*, 504 U.S. at 210.

Given the concerns articulated about possible electioneering gamesmanship using bumper stickers, the regulations are reasonable. By permitting a subset of electioneering signs while the elector is voting, Wyo. Stat. Ann. § 22-26-113 minimizes its regulation of speech. Accordingly, the more limited regulations in Wyo. Stat. Ann. § 22-26-113 fall within the permissible scope of *Burson*.

Finally, to the extent Frank and Grassfire argue empirical evidence and legislative reasoning are required for the electioneering statute to survive constitutional scrutiny, *Burson* does not require the findings that they suggest. *See supra* Section III.C. As a result, this Court should reverse the district court's decision on the constitutionality of the electioneering's statutes restriction on bumper stickers and uphold the statutory prohibition.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the issues presented, the government officials request oral argument in this case.

CONCLUSION

For the reasons discussed above, the government officials respectfully request that this Court reverse the district court's ruling on the constitutionality of the 100-yard buffer zone on election days, including its application to bumper stickers, and find Wyo. Stat. Ann. § 22-26-113 satisfies constitutional scrutiny. In addition, the government officials request this Court affirm the district court's ruling related to all other aspects of Wyo. Stat. Ann. § 22-26-113.

DATED this 10th day of November, 2021.

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Date: November 10, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2021, I electronically filed the foregoing with the court's CM/ECF system, which will send notification of such filing to the following:

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ATTACHMENT 1

District Court Order on Cross Motions for Summary Judgment Filed 07/22/2021

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JOHN C. FRANK and 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. 20-CV-138-F

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross-motions for summary judgment. Plaintiffs John C. Frank and Grassfire, LLC filed a motion for summary judgment and a memorandum in support (CM/ECF Documents [Docs.] 41, 42). Defendants Buchanan et al. filed a response to the motion. (Doc. 56). Defendants also filed a motion for summary judgment and a memorandum in support. (Docs. 52, 53). Plaintiffs filed a response to the motion. (Doc. 60). The Court has carefully considered the motions, responses, and the parties' oral arguments from the hearing which took place on July 19, 2021.

FACTUAL BACKGROUND

The cross-motions before the Court regard the constitutionality of Wyoming Statute § 22-26-113, which regulates electioneering near polling places. Plaintiffs seek declaratory and injunctive relief on the basis that the statute is unconstitutional (facially and as-applied to Plaintiffs and third parties) and significantly impinges First Amendment rights. Defendants seek judgment that Plaintiffs' claims are barred by sovereign immunity under the Eleventh Amendment, that Plaintiffs lack standing to bring suit, and that Wyo. Stat. § 22-26-113 is a reasonable, not significant impingement to First Amendment rights, and is therefore a constitutional content-based restriction on speech.

The 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 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 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. Ann. § 22-26-113.

The statute was enacted in 1890, with amendments in 1973, 1983, 1990, 2006, 2011, and 2018. The most recent 2018 amendment implemented the 100-foot buffer zone around polling places on absentee voting days and added language exempting qualifying bumper stickers from the restrictions on campaigning within the buffer zone.

The following facts are undisputed. Plaintiff John C. Frank, a Cheyenne resident, wishes to display and share various campaign signs, literature, bumper stickers, and other materials within the limits of the 100-yard electioneering buffer zone in future election cycles. Specifically, Frank wants to engage in these activities on the campus of the Laramie County Community College ("LCCC"), a locale which is within 100 yards of the Center for Conferences and Institutes Building polling place. But for Wyo. Stat. § 22-26-113, he would distribute campaign literature, affix bumper stickers and/or signs larger than those allowed by the statute to his vehicle (which would be driven into buffer zones) and engage in other acts considered electioneering in the future during and in the areas and times proscribed by the statute. Frank has not electioneered within buffer zones in Wyoming in the past.

Plaintiff Grassfire, LLC is a political consulting firm, registered in Wyoming, which offers services including signature gathering. Grassfire has not gathered signatures in Wyoming in the past. However, Grassfire seeks to engage in this activity throughout Wyoming generally, and specifically on the sidewalks adjacent to the public entrances of the Laramie County Governmental Complex ("LCGC"). Grassfire hopes to gather signatures for petitions for candidates, initiatives, and referenda. The LCGC is a designated

absentee polling place, and the 100-foot, absentee electioneering buffer zone captures much of the sidewalk area around the complex. But for the contested statute, Grassfire would offer its signature gathering services in Wyoming in the areas and during the times proscribed by Wyo. Stat. § 22-26-113.

Neither Frank nor Grassfire allege that they have been cited, convicted, or threatened with a citation for violating Wyo. Stat. § 22-26-113. They do not own or rent property within any buffer zone and do not currently have permission to engage in electioneering on private property within any buffer zone. Plaintiffs do not allege that any person has been found guilty of a misdemeanor under the statute.

They do, however, present evidence that campaign signs on private property have been forcibly removed on past election days, and that there have been complaints about offending bumper stickers on vehicles within the buffer zones which have been resolved by asking the owner to move the vehicle. During the 2020 primary season, and in past election cycles, signature gatherers have been asked to leave buffer zones. They present specific evidence of this occurring to non-party Jennifer Horal, who was cited on August 18, 2020 at the LCCC for violating the 100-yard election day buffer zone while signature gathering. After relocating to a spot outside the zone, she attempted to flag down vehicles entering and exiting the buffer zone and was cited for disrupting a polling place. Defendants do not dispute these assertions.

STANDARD OF REVIEW

The Court shall grant a motion for summary judgment if the movant has demonstrated that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). This standard requires more than the "mere existence of some alleged factual dispute between the parties." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Rather, it requires "there be no genuine issue of material fact." *Id*. "A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530, 538 (10th Cir. 2014) (citing *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1215 (10th Cir. 2013)). Conversely, summary judgment is inappropriate where there is a genuine dispute over a material fact, i.e., "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Roberts v. Jackson Hole Mountain Resort Corp*., 884 F.3d 967, 972 (10th Cir. 2018) (quoting *Anderson*, 477 U.S. at 248).

DISCUSSION

Defendants assert that Plaintiffs lack standing and that the case is barred by the Eleventh Amendment. The Court will address these issues first.

I. Eleventh Amendment

Defendants argue that the State of Wyoming, its agencies, and its officials acting in their official capacity are immune from suit under the Eleventh Amendment. They acknowledge that there exist three exceptions to the doctrine (consent to suit, abrogation,

and *Ex parte Young*) but assert that none apply to the case at hand. The Court agrees that the State has not consented to suit in this instance, nor has Congress expressly abrogated immunity. However, the argument regarding *Ex parte Young* requires more analysis.

In *Ex parte Young,* 209 U.S. 123 (1908), "the Court held that the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself." *Hill v. Kemp*, 478 F.3d 1236, 1255-56 (10th Cir. 2007). "[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* (quoting *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002)).

Plaintiffs seek declaratory and injunctive relief and do not seek monetary damages. The suit is also aimed against state officers acting in their official capacities. Thus, the remaining inquiry is whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. Defendants argue that Plaintiffs do not "demonstrate" an ongoing violation of federal law. But that is not the test. "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md.*, 535 U.S. at 646 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("An *allegation* of an ongoing violation of federal law . . . is

ordinarily sufficient")). Plaintiffs allege an ongoing violation of federal law (a violation of the Constitution). And the relief sought is certainly prospective.

Accordingly, the Court finds that this suit is not barred by the Eleventh Amendment.

II. Plaintiffs' standing

To satisfy Article III's case-or-controversy requirement, "a plaintiff must demonstrate standing to sue by establishing (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 543 (10th Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted)). The first element (injury) "must be concrete, particularized, and actual or imminent." *Id.* at 544. "To establish such an injury in the context of a pre-enforcement challenge to a criminal statute, a plaintiff must typically demonstrate (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute," and (2) "that there exists a credible threat of prosecution thereunder." *Id.* at 545 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

Defendants argue that Plaintiffs have not demonstrated an intention to engage in prohibited activity, or if they have, that it is not a "concrete plan" but only a "vague desire." *See Baker v. USD 229 Blue Valley*, 979 F.3d 866, 875 (10th Cir. 2020) (quoting *Lujan*, 504 U.S. at 564). But this language regarding "concrete plans" and "vague desires" in *Lujan* was centered on a plaintiff's expression of a desire to return to Sri Lanka *someday* to

observe elephants. And in *Baker,* the court found that the Plaintiff's desire to have "options" available to her child was a "some day intention that does not establish actual or imminent injury" as she did not allege which options she would choose from or when she plans to exercise them. 979 F.3d at 875.

Here, Frank's failure to know which exact stickers he plans to place on his vehicle or which materials he hopes to distribute does not make his future plans a vague desire. He wishes to engage in electioneering in future election cycles. To require more specific detail at this point would be to invite fanciful projections. Similarly, Grassfire offered detailed testimony that it would engage in signature gathering but for the Wyoming statute. The plaintiffs have shown "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute." *Colorado Outfitters Ass'n*, 823 F.3d at 545.

Next, we assess whether Plaintiffs are subject to a credible threat of prosecution. "The threat of prosecution is generally credible where a challenged 'provision on its face proscribes' the conduct in which a plaintiff wishes to engage, and the state 'has not disavowed any intention of invoking the… provision' against the plaintiff." *United States v. Supreme Court of N.M.*, 839 F.3d 888, 901 (10th Cir. 2016) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)). There is no evidence that the State has disavowed any intention of enforcing Wyo. Stat. § 22-26-113. That parties in violation of the statute in the past ceased their proscribed behavior and escaped prosecution does not indicate that an individual who refused to cease their behavior would share the same fate.

And, Plaintiffs offer evidence of Jennifer Horal's recent citation under the statute for signature gathering. "Past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical." *Susan B. Anthony List*, 573 U.S. at 164. This is adequate for the Court to find that Plaintiffs were subject to a credible threat of prosecution. Therefore, Plaintiffs have demonstrated an injury in fact.

At oral argument, and on the issues of causation and credible threat of enforcement, Defendants argued that neither the Wyoming Secretary of State nor the Laramie County Clerk have enforcement power or prosecution authority related to Wyo. Stat. § 22-26-113. However, under Wyo. Stat § 22-2-103, the Secretary of State is the chief election officer for the state and "shall maintain uniformity in the applications and operations of the election laws of Wyoming." Similarly, "each county clerk is the chief election officer for the county." *Id.* The statute clearly gives both the Secretary of State and county clerks authority over the election laws within the state. And, the Court does not believe the causation prong of standing analysis requires that the Secretary of State or a county clerk personally be the individuals issuing citations for violations of the statute. It is enough that they are significantly related.

Defendants put forth no arguments that Plaintiffs' standing fails on the redressability prong, and the Court cannot think of one. Because injury-in-fact and causation have also been established, the Court finds that Plaintiffs have demonstrated standing to sue on the issues of the statute's constitutionality.

III. Challenge to the constitutionality of Wyo. Stat. § 22-26-113

We turn now to the merits. "Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Russell v. Lundergran-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Wyo. Stat. § 22-26-113 burdens political speech and is therefore subject to strict scrutiny. The parties agree that the case controlling our analysis here is *Burson v. Freeman*, 504 U.S. 191 (1992).

It is commonly emphasized that "it is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015) (citing *Burson,* 504 U.S. at 211). However, "those cases do arise." *Id.* In *Burson*, the Supreme Court considered and upheld the constitutionality of a Tennessee electioneering regulation (similar to Wyo. Stat. § 22-26-113) which imposed a 100-foot election-day "campaign-free zone" around polling places. 504 U.S. 191. The Court found the Tennessee law to be a "facially content-based restriction on political speech in a public forum" which was subject to strict scrutiny. *Id.* at 198. But the case 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." *Id.*

The *Burson* court concluded that "a State has a compelling interest in protecting voters from confusion and undue influence" and "in preserving the integrity of its election

process." *Id.* at 199. Noting that the Court "never has held a State to the burden of demonstrating empirically the objective effects on political stability that are produced by the voting regulation in question," they found that a modified burden of proof should apply in cases where a "First Amendment right threatens to interfere with the act of voting itself." *Id.* at 209, 209 n. 11 (quoting *Munro v. Socialist Workers Party,* 479 U.S. 189, 195 (1986)). This modified burden of proof—which will be the focus of our analysis—requires that a voting regulation be "reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 209. This burden is, essentially, a modified way for an electioneering law to satisfy strict scrutiny's narrow-tailoring prong. *See Lundergran-Grimes*, 784 F.3d at 1050-1051. Although the modified burden as formulated in *Burson* does not explicitly pronounce that a state must prove a regulation to be reasonable, that it is a modification of the narrow-tailoring prong of strict scrutiny analysis forces a logical conclusion that the burden to prove is still on the state. [1]

There is no dispute here that the State has compelling interests in regulating electioneering. As such we shall proceed by applying the modified burden test to the various challenged aspects of Wyo. Stat. § 22-26-113.

a. 100-yard election day buffer zone

The statute proscribes electioneering within one hundred yards (300 feet)—on the day of a primary, general or special election—of any public entrance to the building in which the polling place is located. The regulation in *Burson* had a 100-foot electioneering

[1] Defendants do not agree with this analysis. *See* Doc. 53, p. 14 ("[T]he State is not required to put forward evidence justifying why precisely the Legislature chose to enact a 100-yard boundary on election days").

buffer zone. Exceeding the dimensions considered in *Burson* is not necessarily unconstitutional, although "at some measurable distance from the polls … governmental regulation … could effectively become an impermissible burden[.]" *Schirmer v. Edwards*, 2 F. 3d 117, 121 (5th Cir. 1993) (quoting *Burson*, 504 U.S. at 210).

In *Schirmer*, the Fifth Circuit upheld the constitutionality of a Louisiana electioneering regulation which established a 600-foot campaign-free zone. At trial, the state representative who had authored the amended legislation testified to the necessity of the 600-foot limitation and asserted that the previous iteration of the electioneering law—which set the buffer zone at 300 feet—did not adequately serve to deter poll workers from intimidating and harassing voters. 2 F.3d at 122.

In *Russell v. Lundergran-Grimes*, the Sixth Circuit applied the modified burden from *Burson* to a Kentucky statute proscribing electioneering within a 300-foot radius, and noted that a "State need not have a strong evidentiary basis for the law to withstand strict scrutiny." 784 F.3d at 1053. But the court found that the State had not carried even the relaxed burden to demonstrate that the statute withstood strict scrutiny: "[W]e hold that Defendants presented no argument—and evidently the legislature did not engage in factfinding and analysis—to carry their burden to explain why they require a no-political-speech area immensely larger than what was legitimized by the Supreme Court." *Id.* As a result, the court found that the Kentucky statute violated the First Amendment.

Our instant case is closely aligned with the scenario in *Lundergran-Grimes.* Defendants have presented no argument—and offered no evidence—to explain why the

statute requires an electioneering buffer zone much larger than the regulation upheld in *Burson.* They did not meet their burden to demonstrate that the statute's 100-yard electioneering buffer zone is "reasonable and does not significantly impinge on constitutionally protected rights." *Burson,* 504 U.S. at 209. This is particularly true here given that the legislature established a 100-foot electioneering buffer zone for the period within which absentee voters may cast their votes. The record is silent as to why a different zone was selected by the legislature for this period given that the State concedes its interests are no different. Accordingly, the Court holds that Wyo. Stat. § 22-26-113's election day buffer zone violates the First Amendment.

b. 100-foot absentee voting period buffer zone

Wyo. Stat. § 22-26-113 proscribes electioneering within 100 feet of an absentee polling place when voting is being conducted. In Wyoming, the absentee voting period encompasses 90 days per year. Noting that the electioneering regulation in *Burson* was only effective for two days per year, Plaintiffs assert that the duration of Wyoming's electioneering prohibition during absentee periods renders that section of the statute unconstitutional.

Even though Plaintiffs advance this argument, no specific arguments were presented to the Court as to why the State's interest in protecting absentee voters from confusion and undue influence should be any less than it is for election-day voters. *Burson* did not premise its holding on a factual scenario where a regulation is only effective for two days a year. The absentee buffer zone proscription does not go beyond the bounds of the holding in our

controlling case; thus, we do not need to apply the modified burden of proof. The Court finds that Wyo. Stat. 22-26-113's absentee electioneering buffer zone does not violate the First Amendment.

c. Bumper stickers

Wyo. Stat. § 22-26-113's ban on electioneering within the buffer zones "shall not apply to bumper stickers affixed to a vehicle while parked within or passing through [the buffer zone], 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."

As a matter of housekeeping, the statute under its plain language does not seem to consider bumper stickers to be electioneering. Defendants have asserted that bumper stickers are considered to be "campaign signs" under the statute, an interpretation which, although showing evidence of its acceptance (in the form of affidavits of some forms of enforcement), is still tenuous at best. Perhaps the Court is to infer that large bumper stickers are prohibited signs on the basis that smaller bumper stickers are allowed.

Regardless, Plaintiffs assert that Wyo. Stat. § 22-26-113's ban on bumper stickers (which do not satisfy the proviso) is outside the scope of what was considered "electioneering" in *Burson* and is therefore a violation of the First Amendment. The purpose of regulating electioneering is delineated by a state's interest in preventing voter intimidation and election fraud. *See Burson*, 504 U.S. at 206. Here, the Court cannot see

how bumper stickers on vehicles could lead to voter intimidation or election fraud. And, Defendants have presented no evidence that the statute's ban on bumper stickers which don't meet the proviso is "reasonable and does not significantly impinge on constitutionally protected rights." *Burson*, 504 U.S. at 209.

Accordingly, the Court finds that Wyo. Stat. § 22-26-113's ban on bumper stickers (insofar as the statute actually does so) is a violation of the First Amendment.

d. Wyo. Stat. § 22-26-113's application to private property

Neither of the Plaintiffs own, rent, or have permission to electioneer on private property within electioneering buffer zones in Wyoming. The Court finds that there is an absence of factual record in the case to consider this issue, and we will not entertain this challenge.

CONCLUSION

Plaintiffs' motion for summary judgment (Doc. 41) and Defendants' motion for summary judgment (Doc. 52) are GRANTED IN PART AND DENIED IN PART. Wyo. Stat. § 22-26-113 violates the First Amendment and shall be invalidated as it pertains to: (i) the 100-yard, election day electioneering buffer zone, and (ii) bumper stickers affixed to vehicles. The statute survives constitutional challenge in all remaining aspects.

Judgment shall be entered accordingly and the Clerk of Court is directed to close the case.

IT IS SO ORDERED.

Dated this 22nd day of July, 2021.

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE

ATTACHMENT 2

District Court Judgment
Filed 07/22/2021

United States District Court
For The District of Wyoming

JOHN C. FRANK and 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.	Civil No. 20-CV-138-F

JUDGMENT IN A CIVIL ACTION

The Court having granted in part and denied in part, Plaintiffs' Motion for Summary Judgment and having granted in part and denied in part Defendants' Motion for Summary Judgment on July 22, 2021, and having ordered that Judgment be entered as follows:

Plaintiffs, John C. Frank and Grassfire, LLC are entitled to judgment in their favor with the Court finding that Wyo. Stat. § 22-26-113 violates the First Amendment and shall be invalidated as it pertains to (i) the 100-yard, election day electioneering buffer zone, and (ii) bumper stickers affixed to vehicles.

Defendants, Ed Buchanan, Wyoming Secretary of State, Leigh Anne Manlove, Laramie County District Attorney, and Debra Lee, Laramie County Clerk, in their official capacities are entitled to judgment in their favor with the Court finding that the statute survives constitutional challenge in all remaining aspects.

Dated this 22nd day of July, 2021.

Clerk of Court or Deputy Clerk