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

In the

United States Court of Appeals

for the

Tenth Circuit

JOHN C. FRANK; GRASSFIRE LLC,
Plaintiffs-Appellees/Cross-Appellants,

v.

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/Cross-Appellees.

On Appeal from the United States District Court for the District of Wyoming (Cheyenne), Case No. 2:20-CV-00138-NDF The Honorable Nancy D. Freudenthal, U.S. District judge

APPELLEES/CROSS-APPELLANTS' PRINCIPAL AND RESPONSE BRIEF

Oral Argument Requested

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Federal Rule of Appellate Procedure 26.1 Statement

Grassfire, LLC is a limited liability company. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Prior or Related Appeals

There are three separate pending cases in this Court for this matter: Docket Nos. 21-8058, 21-8059 and 21-8060.

Statement Regarding Oral Argument

Mr. Frank and Grassfire, LLC believe that oral argument will assist the Court in resolving the issues raised in this appeal.

Jurisdictional Statement

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Mr. Frank and Grassfire, LLC challenged Wyo. Stat. § 22-26-113 under the First and Fourteenth Amendments, raising a federal question. JA15 (Verified Compl. ¶2).[1] The district court entered an order on the parties' cross-motions for summary judgment on July 22, 2021. JA405-421. Secretary of State Buchanan, Laramie County District Attorney Manlove and Laramie County Clerk Lee filed timely notices of appeal on August 20, 2021. JA10 (D. Ct. ECF 71, 73); *see* Fed. R. App. P. 4(a)(1)(B). Mr. Frank and Grassfire, LLC filed a timely notice of cross-appeal on August 23, 2021. JA11 (D. Ct. ECF 77); Fed. R. App. P. 4(a)(3). The appeal and cross-appeal arise from a judgment that disposed of all of the parties' claims. *See Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1025 (10th Cir. 2008). Thus, this Court has jurisdiction under 28 U.S.C. § 1291.

[1] Citations to the Joint Appendix are referenced as JA____.

Statement of Issues Presented for Review

(1) Whether the 100-yard (300-foot) no-electioneering buffer zone around Election Day polling places in Wyo. Stat. § 22-26-113 is unconstitutional under the First Amendment.

(2) Whether the bumper sticker regulations in Wyo. Stat. § 22-26-113 are unconstitutional under the First Amendment.

(3) Whether the 100-foot no-electioneering buffer zone around absentee polling places for 90 days during absentee voting in Wyo. Stat. § 22-26-113 is unconstitutional under the First Amendment.

(4) Whether the prohibition of signature gathering within no-electioneering buffer zones in Wyo. Stat. § 22-26-113 is unconstitutional under the First Amendment.

(5) Whether Wyo. Stat. § 22-26-113 is facially overbroad under the First Amendment.

Statement of the Case

Laws that prohibit electioneering too close to a polling place are constitutional so long as they are reasonable and do not significantly impinge on First Amendment rights. *See Burson v. Freeman*, 504 U.S. 191, 209 (1992). Wyoming law unreasonably and unconstitutionally expands the size of the no-electioneering zone, the length of time the electioneering prohibition is in effect, and the types of speech activity that constitute electioneering. Wyo. Stat. § 22-26-113. These expansions significantly impinge on John C. Frank's electoral advocacy—down to the bumper stickers he would place on his car but for the law—the signature gathering efforts Grassfire, LLC would undertake but for the law, and the free speech rights of individuals across Wyoming. This Court should affirm the rulings of the court below that struck down the 100-yard Election Day prohibition and the law's bumper sticker restrictions. JA415-419. On cross appeal, this Court should reverse the district court's ruling upholding the 100-foot prohibition around absentee polling places, strike the law's prohibition of signature gathering and, with these and other unconstitutional applications of the law in mind, strike the entire statute as facially overbroad. *See* JA417-419.

I. The Legislative History of No-Electioneering "Buffer Zones" in Wyoming Statutes Section 22-26-113

From 1890 to 1973, Wyoming law prohibited electioneering within 20 yards, or 60 feet, of a polling place on Election Day. JA56-59 (1890 statute); *see* JA118-

119 (excerpt of 1936 election laws). In that time, enforcement barely registered as newsworthy, but was not moribund. Moreover, complaints were motivated by efforts far beyond election integrity, such as overturning an election entirely. *See, e.g.*, *Sundance Water Bond Election Protested*, CASPER STAR-TRIB., Mar. 27, 1963 at 18 (JA61). Nevertheless, with the passage of the omnibus Wyoming Election Code of 1973 the size of the Election Day "buffer zone" and the content of the regulated speech within it broadened: the zone's radius was expanded to 100 yards, the law was codified as Wyoming Statutes section 22-26-113 (where it remains today) and specifically included "the display of signs or distribution of campaign literature" as electioneering. JA65 (22.1-418, Wyo. Stat. 1957, 1973 Cum. Supp.).

In 1983, the legislature amended the statute to specifically prohibit "the soliciting of signatures to any petition or the canvassing of voters[.]" JA70. It was this addition—prohibiting the canvassing of voters—that led to the first and, until this case, only constitutional challenge against Wyoming's polling place buffer zones in 1988. As a general (including presidential) election approached, *National Broadcasting Company v. Karpan* was part of a nationwide broadside against buffer zones by the major television networks of the time—NBC, CBS and ABC. *See Judge strikes down exit polling law*, CASPER STAR-TRIB., Oct. 22, 1988, at 17 (JA72). The networks' news outlets strictly sought to engage in exit polling, and challenged the law as applied. *See Nat'l Broadcasting Co., et al. v. Karpan, et al.*, No. C88-0320,

slip op. at 3 (D. Wyo. Oct. 21, 1988) (order on request for permanent injunction, included as attachment and at JA74-84). Interestingly, in *Karpan* the court enjoined the enforcement of the zone itself—striking "one hundred (100) yards of"—reasoning that this would "leave[] the public sidewalks and streets, the traditional areas for election day discourse and news gathering, free for those activities." *Id.* at 10. But this did not affect the law for long.

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

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

Wyo. Stat. § 22-26-113 (1990) (emphasis added) (JA89). It was after this amendment that the United States Supreme Court addressed polling place buffer zones in *Burson v. Freeman*, upholding a 100-foot zone under Tennessee law. 504 U.S. 191 (1992). No amendments to Wyoming law were made in response.

In 2006, Wyoming implemented absentee polling places which, by law,

> may be established in the courthouse or other public building which is equipped to accommodate voters from all districts and precincts within the county and shall be open the same hours as the courthouse on normal business days during the time period allowed for absentee voting.

Wyo. Stat. § 22-9-125(a)(ii); *see* JA121-122 (Enrolled Act No. 45, Wyoming House of Representatives (2006)). In the same bill, absentee polling places were added to the no-electioneering provision. JA122. The time for absentee voting in Wyoming was 40 days until 2020, when it was increased to 45 days, meaning absentee buffer zones are in effect for at least 90 days total in an election year owing to primary and general elections. JA128 (Enrolled Act No. 36, Wyoming Senate (2020)); Wyo. Stat. § 22-6-107(a). This means that the electioneering ban lasts 45 times longer in an election year than it did prior to 2006.

Efforts were made to reform the law in recent years with poor results. Since 2018, the buffer zone statute has read as follows:

> (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. § 22-26-113 (2021). Knowing and willful violation of this law is a misdemeanor punishable by up to six months in a county jail and a fine of up to $1,000. Wyo. Stat. § 22-26-112(a).

II. The Reality of Buffer Zones Under Wyo. Stat. § 22-26-113

The Wyoming Secretary of State is the chief election officer for the State of Wyoming. Wyo. Stat. § 22-2-103. Secretary Buchanan is required to "maintain the uniformity in the applications and operations of the election laws of Wyoming." *Id.* He is also charged with promulgating rules as may be necessary to administer the Wyoming Election Code, including section 22-26-113. Wyo. Stat. § 22-2-121(b). County Clerks, including Laramie County Clerk Lee, are the chief election officers of their respective counties. Wyo. Stat. §§ 22-2-103, 22-12-101(a). They oversee judges of election at each Laramie County polling place, who in turn "have the duty and authority to preserve order at the polls by any necessary and suitable means." Wyo. Stat. § 22-13-103(a); *see also* Wyo. Stat. § 22-1-102(a)(viii). As a criminal provision, actual prosecutions of buffer zone violations are made by local prosecutors, including District Attorney Manlove. Wyo. Stat. § 9-1-804(a)(i). All three of these officials play a role in enforcing Wyoming's buffer zones.

A. Election Day Polling Places

In 2020, Laramie County, Wyoming had seven Election Day polling places. *See* JA136-143 (polling places overlay).[2] This was by directive of the Secretary of State, who ordered each county to "consolidate their polling places down to seven with the exception that any county could ask for as many polling places or vote centers that they deemed necessary to conduct the election in a safe manner" in response to COVID-19. JA154-155 (SecState 30(b)(6) Depo. 20:23-21:15). Historically, there are substantially more polling places across Wyoming. *See* JA37-53.

In Laramie County, a buffer zone is measured from every public entrance to each building in which a polling place is located. *See* JA136-143. In at least one county in a past election, the zone was measured from the line of the property on which the building in which the polling place was located. *See* JA157-159 (SecState 30(b)(6) Depo. 23:22-25:4); Patrick Filbin, *Foster Friess asked to leave Cam-Plex after he was seen campaigning*, GILLETTE NEWS RECORD, Aug. 21, 2018 (JA32). In Laramie County, Election Day buffer zones cover public roads, sidewalks, parks and

[2] An overlay of North Christian Church was produced twice, once with a buffer zone stemming from one entrance, and the other with zones stemming from two entrances. *See* JA140-141.

private property. *See* JA136-143. Buffer zones across Wyoming cover these traditional public fora. *See* JA37-53.

The Wyoming Secretary of State, Laramie County Clerk and Laramie County District Attorney (collectively, "the State" or "the state officials") disclaimed any governmental interest in Election Day buffer zones, respectively. JA194-195 (Lee Response to Frank Interrogatory #5); JA204 (Buchanan Response to Frank Interrogatory #6); JA209 (Manlove Response to Frank Interrogatory #5). Yet, these government officials remain eager to enforce the law. The State's witnesses expressed no concerns about police presence at polling places on Election Day. JA234-235 (Tory Munoz Depo. 32:23-33:2); JA159-160 (SecState 30(b)(6) Depo. 25:21-26:2). If someone refuses to comply with an order to move from a buffer zone, poll workers can "go ahead and call the cops if they need[] to." JA231 (Munoz Depo. 27:14-23). When asked if the 100-yard election day buffer zone is necessary, the Secretary of State's 30(b)(6) designee responded "[y]es, because the statute says what it says." JA400 (SecState 30(b)(6) Depo. 31:15-22). When asked if there are any other reasons, the deponent responded "[n]othing else comes to mind." JA401

(SecState 30(b)(6) Depo. at 32:4-5).[3] It is upon this diminutive record from the State that this matter must be judged.

B. Absentee Polling Places

In Laramie County, the absentee polling place is the atrium within the Laramie County Government Complex in downtown Cheyenne. JA246 (Complex overlay); JA219-220 (Munoz Depo. 12:7-13:8). A buffer zone is measured from every public entrance to the Complex. *See* JA246. Each zone covers sidewalks and streets. *Id.* The Complex contains several government agencies, including the County Clerk's office, the Laramie County District Court, the Board of County Commissioners, the District Attorney's office, the Public Defender's office, and the County Attorney's office. JA199 (Lee Answer to Grassfire Interrogatory #4). The Laramie County Jail is connected to the Government Complex via skywalk. JA246; JA225 (Munoz Depo. 21:20-22). For certain services at the County Clerk's office, one must appear in person, such as titling a vehicle, obtaining a marriage license, or registering to vote. JA218 (Munoz Depo. 10:12-23).

[3] The Secretary of State's 30(b)(6) witness received notice of this topic and testified that he was prepared to attest to it. JA397-398, 402-403 (SecState 30(b)(6) Depo. at 7:23-8:11, Depo. Exh. 1) (requiring the 30(b)(6) designee to testify to "The Secretary of State's factual bases for the necessity of the 100-yard election day polling place and 100-foot absentee polling place electioneering radii in Wyo. Stat. 22-26-113.").

In the 2016 general election, 12,255 Laramie County voters voted at the Government Complex. JA222-225, 243-244 (Munoz Depo. 18:23-19:10; 20:22-21:1; Munoz Depo. Exh. 2). In the 2018 general election, 8,985 Laramie County voters voted at the Government Complex. *Id.* By these measures, roughly one quarter to one-third of Laramie County voters vote at the Government Complex during a general election. *See id.* (Munoz Depo. Exh. 2). In-person absentee voting is a frequent occurrence across Wyoming. JA151-154, 165-191 (SecState 30(b)(6) Depo. 17:22-18:9; 19:4-10; 20:8-11; Depo. Exh. 3).

The state officials also disclaimed any governmental interest in absentee polling place buffer zones. JA194-195 (Lee Response to Frank Interrogatory #5); JA204 (Buchanan Response to Frank Interrogatory #6); JA209 (Manlove Response to Frank Interrogatory #5). They did not disclaim any interest in government enforcement of the law. The State witnesses expressed no concerns about police presence at absentee polling places. JA225-226 (Munoz Depo. 21:23-22:2); JA151 (SecState 30(b)(6) Depo. 17:1-21). When asked if the 100-foot absentee buffer zone is necessary, the Secretary of State's 30(b)(6) designee responded "It's required by the statute. So it's necessary in that way." JA400-401 (SecState 30(b)(6) Depo.

31:23-32:3). When asked if there are any other reasons, the deponent responded "[n]othing else comes to mind." JA401 (SecState 30(b)(6) Depo. at 32:4-5).[4]

III. The Censorship of John C. Frank's Speech by Wyo. Stat. § 22-26-113

John C. Frank is a resident of Cheyenne, Wyoming. JA302 (Frank Depo. 6:3-4). His past political activities include "distributing literature, knocking on doors, [and] soliciting and placing yard signs." JA303 (7:18-24). In the 2020 election cycle, he displayed yard signs on his lawn for U.S. Rep. Liz Cheney and state senator Anthony Bouchard. JA307 (11:5-21). But for the 100-yard no-electioneering restriction, during the August 18, 2020 primary Mr. Frank would have "distribute[d] campaign literature and pamphlets highlighting some of the issues sponsored by candidates he believes in, including the protection of private property and Second Amendment rights" at Laramie County Community College. JA17 (Verified Compl. ¶13). He will perform similar activities on future election days around Laramie County polling places if the ruling of the court below is upheld. *See* JA16-17 (Verified Compl. ¶11); JA414-417. On an Election Day, the buffer zone at the college would only permit Mr. Frank to distribute literature near the exit to the parking lot of the polling place building. *See* JA139.

> If I'm standing at the exit and the people are leaving after they voted, you know, what's the point in trying to convince them, you know, gee, did you vote for my candidate or you should vote for my

[4] *See supra* note 3.

> candidate? . . . . [C]ampaigning for either an issue or a candidate in that little corner exit of the parking lot, that's totally pointless. They already voted.

JA323 (Frank Depo. 27:8-22). Mr. Frank would not electioneer closer than 100 feet to a polling place. JA310 (14:5-11). He photographed measurements in the fall of 2020 that illustrate the differences between the distances of 100 feet and 100 yards at the Laramie County Community College polling place. JA248-267.

Mr. Frank was also censored by the absentee polling place buffer zone. In 2020, he would have attached two bumper stickers to his car advocating for Liz Cheney measuring 16.25" by 4.5" but for the 100-foot absentee restriction covering lanes on 19th and 20th Streets and Carey Avenue in Cheyenne. *See* JA17 (Verified Compl. ¶13); JA246; JA269. Mr. Frank would have also utilized yard signs in his car, which is a station wagon, but was censored for the same reason:

> One of the things that I had intended to do was take two of Liz Cheney's and then alternate them on different days with signs, not stickers, but signs for Anthony Bouchard, Senator Bouchard. I have a Volkswagen station wagon and my intent was to put one sign in each side window of the back and, you know, as I was cruising around town, doing my little test and everything, having those in the windows.
>
> Now, I chose not to do those because frequently, I will go downtown and, you know, during the campaign and everything, was concerned that I might be driving by, you know, the Larimer [sic] County Complex, government complex down there, and inadvertently, you know, be in there and violate a law.

JA312-313 (Frank Depo. 16:20-17:24). To Mr. Frank, multiple signs or stickers for the same candidate or larger signs or stickers for a candidate means "I *really* support this person as opposed to I support this person." JA315 (20:9-20) (emphasis added). This speech will again censor Mr. Frank for months in future election years if the ruling of the court below is reversed as to bumper stickers. JA16-17 (Verified Compl. ¶11); JA418-419.

IV. The Censorship of Grassfire's Speech by Wyo. Stat. § 22-26-113

Grassfire, LLC ("Grassfire") is a Wyoming limited liability company that formed in January of 2020. JA332 (Grassfire 30(b)(6) Depo. 6:8-18). It provides services for political campaigns, including peer-to-peer texting, door-to-door canvassing, robocalls, political consulting, polling services and signature gathering for candidates, initiatives and referenda. JA376 (Grassfire Answer to Interrogatory #3). In 2020, Grassfire gathered signatures in Utah and Arizona to qualify initiative petitions and candidates for election. *Id.* (Grassfire Answer to Interrogatory #4). Its "core service is petitioning and signature gathering." JA342-343 (Grassfire 30(b)(6) Depo. 16:20-17:3).

To effectuate signature gathering Grassfire "hire[s] circulators, also called petitioners, and, you know, whether they be experienced or they could be new to that sort of an occupation, and we will provide a lot of training and hope that they succeed." JA343-344 (Grassfire 30(b)(6) Depo. 17:14-18:1). Circulators are

generally hired on a per-project basis. JA344 (18:12-17). Signature gathering "is a strange occupation. It's not easy for a lot of people to do it. And so there is – for every good, quality, effective circulator, we have to hire several other individuals that, you know, do not pan out[.]" JA345 (19:11-16); *see also* JA353-354 (27:13-28:2).

Circulator placement—where, precisely, one gathers signatures—"is the number one factor that impacts success[.]" JA347 (Grassfire 30(b)(6) Depo. 21:3-7). This includes places such as grocery stores and other commercial places, but to petition on such sites "require[s] permission of the property owner and that permission is often very difficult to obtain." *Id.* (21:17-21). Thus, "[h]alf to three-fourths of our signatures for any project anywhere will come from any kind of a public facility where essentially we cannot be kicked out due to our constitutional rights, the exercise, you know, free speech on public property." JA348 (22:3-14). Moreover, certain public facilities yield far more valid signatures that are legally acceptable: "In a location, for example . . . motor vehicle offices . . . [signatures] will run upwards of 90 percent validity, only a 10 percent rejection rate, versus, let's say, your typical Walmart may only be 65 percent valid and 35 percent rejection rate." JA350 (24:5-16).

Polling places, including early voting or absentee voting places, can provide even greater value:

> [I]f an election is occurring, you know, in the near term and there is early voting, we will work that location, locations, to the maximum extent possible because it's in our interest. Because every single person going in there is a registered voter and the rejection rate could be zero. They could be a hundred percent good at a polling location.

JA351 (Grassfire 30(b)(6) Depo. 25:1-13). Grassfire has declined to pursue business with signature campaigns (for either candidates or issues) in Wyoming because of the 100-foot ban around absentee polling places. JA377-378 (Grassfire Answer to Interrogatory # 7); JA352, 359-360 (Grassfire 30(b)(6) Depo. 26:12-21, 33:11-34:14).

> Politicking during the election at a polling place is one of the absolute best venues for collecting signatures, distributing literature, etc. Taking away these venues dramatically reduces the efficacy of the type of services that Grassfire provides. The Laramie County Government Complex is the #1 location Grassfire would target in Laramie County but for Wyoming Statutes section 22-26-113. Thus, until this prohibition is enjoined or amended, we will not solicit or accept clients for signature gathering services in Wyoming.

JA378 (Grassfire Answer to Interrogatory #7). Grassfire believes buffer zones are "totally unconstitutional" except for reasonable limits such as ensuring access to a building. JA357-358 (Grassfire 30(b)(6) Depo. 31:13-32:7). The law will continue to censor Grassfire's business unless the ruling of the court below that upheld the 100-foot absentee buffer zone is reversed. JA417-418.

V. The Censorship of Third Parties' Speech by Wyo. Stat. § 22-26-113

Since the enactment of the 100-yard Election Day buffer zone, citizens have faced complaints for placing stationary campaign signs on private property that is within a zone. *See, e.g.*, JA271-287 (excerpts of complaints). Today, if a campaign sign is on private property within 100 yards of a polling place on Election Day, the owner is asked to remove the sign. JA228-229 (Munoz Depo. 24:18-25:3). If the owner is not home or is unavailable, officials enter onto private property and remove the sign. JA234 (32:11-22); JA159 (SecState 30(b)(6) Depo. 25:5-20).

For the last two decades, in Laramie County there have been complaints about bumper stickers and political signs within the 100-yard zone. JA227-228 (Munoz Depo. 23:23-24:17). In the August 2020 primary in Laramie County, complaints of electioneering arose from signature gathering at the polling places at North Christian Church, the Storey Gym, and Laramie County Community College. JA232-233 (28:6-16; 29:6-14); *see* JA139, 141, 143. At the Pine Bluffs polling place, a complaint was lodged relating to election-related apparel. JA233 (29:15-18).

Since the absentee polling place buffer zone was enacted in 2006, during absentee voting at the Laramie County Government Complex "somebody parks in the area that we have to ask to leave." JA221 (Munoz Depo. 16:2-23). That is, someone "has a sticker on their truck, and they run into the building or something. Someone notices it, and they call the office, and we contact [them] . . . and ask them

to move so it's not an issue." *Id.* (16:16-23). During the 2020 primary, signature gatherers were also asked to leave the no-electioneering zone around the Government Complex. JA222 (18:5-11). This has occurred in past election cycles as well. *See* JA148-150 (SecState 30(b)(6) Depo. 14:13-15:6; 16:11-25).

Jennifer Horal was cited with a misdemeanor on August 18, 2020 at Laramie County Community College for violating the 100-yard Election Day buffer zone by signature gathering. *See generally* JA290-293 (Affidavit of Jennifer Horal). When first approached by a police officer while she gathered a signature, the signatory commented "she's not electioneering." JA289 (Video at 01:54). Measuring from the polling place entrance with a tape measure, after over a minute's walk the officer noted to Ms. Horal she was 178 feet away. *Id.* (Video at 09:50). After a heated exchange, the officer issued Ms. Horal a citation. *Id.* (Video at 44:20). Ms. Horal then relocated to the far end of the parking lot, near its exit. *See id.* (Video at 50:00). "The 100-yard no-electioneering boundary in Wyoming law makes signature gathering unnecessarily difficult." JA 292 (Horal Aff. ¶12). Horal was again cited later for disrupting a polling place, despite her efforts occurring beyond the 100-yard boundary. *Id.* (¶13).

VI. Procedural History

Mr. Frank and Grassfire sued the state officials on July 24, 2020, seeking declaratory and injunctive relief against Wyo. Stat. § 22-26-113. JA14, 23-24.

Following discovery, the parties filed cross-motions for summary judgment. JA111, 294. The court below held oral arguments on July 19, 2021 and issued summary judgment ruling on July 22, 2021. JA422-458; JA405-421.

Secretary Buchanan and District Attorney Manlove filed a timely notice of appeal on August 20, 2021, as did the County Clerk. JA10 (D. Ct. ECF 71, 73) Mr. Frank and Grassfire filed a timely notice of cross-appeal on August 23, 2021. JA11 (D. Ct. ECF 77). These appeals all arise from the summary judgment ruling of the court below. JA405-421.

Summary of the Argument

Wyoming Statutes section 22-26-113 violates the First Amendment in myriad ways. John C. Frank and Grassfire, LLC sued the Wyoming Secretary of State, the Laramie County Clerk, and the Laramie County District attorney to enjoin the enforcement of the law owing to its censorship of their respective speech activities. Pursuant to *Ex parte Young*, because Mr. Frank and Grassfire alleged an ongoing violation of the First Amendment and sought strictly prospective relief, the state officials are not entitled to Eleventh Amendment immunity. Moreover, Mr. Frank and Grassfire established standing to make their claims by detailing the speech activities they would undertake but for the law. If it were not illegal, Mr. Frank would electioneer closer than 100 yards at a polling place on Election Days and would outfit his car with numerous bumper stickers and signs that exceed the

permissions in the statute. If it were not illegal, Grassfire would gather signatures within 100 feet of absentee polling places while voting is occurring and at Election Day polling places. This amply establishes First Amendment injuries, all of which are traceable to the state officials here through their oversight and enforcement of the Wyoming Election Code.

The court below correctly ruled that the law's 100-yard Election Day electioneering restriction is unconstitutional under the First Amendment. The State, offering nothing in the way of evidence and declining to even identify the governmental interests behind the law in discovery, rested its entire defense on the case *Burson v. Freeman* without accounting for why it is reasonable to implement a buffer zone nine times the area of the zone upheld by the Supreme Court in that case. *Burson* utilized strict scrutiny but adopted a modified burden of proof for narrow tailoring owing to the enactment of buffer zones at the same time as numerous other electoral reforms. The State must show that a regulation is reasonable and does not significantly impinge upon constitutional rights and, at least, is rooted in the history of election reform discussed in *Burson*. The state officials did none of these things, while Mr. Frank and Grassfire detailed that the 100-yard zone makes Election Day advocacy and signature gathering impossible, making the buffer zone a blackout zone. This Court should affirm the court's ruling that the 100-yard Election Day zone is unconstitutional.

The court below also correctly ruled that the bumper sticker provisions of the law are unconstitutional. Bumper stickers were specifically reserved for an as applied challenge by the *Burson* plurality and these provisions were appropriately overruled in the Wyoming statute because it facially restricts the quantity, size and presence of automotive signage within a buffer zone. Mr. Frank established how the absentee buffer zones censor him for 90 days during an election year: by covering three different thoroughfares in downtown Cheyenne, Mr. Frank risks criminal charges simply for driving downtown and through an absentee buffer zone with two bumper stickers for the same candidate on his car. Against this significant impingement of free speech rights, the State yet again offered no evidence to the contrary or convincing argument as to why this censorship is reasonable. This Court should affirm the court's ruling that the bumper sticker provisions of the law are unconstitutional.

On cross appeal, Mr. Frank and Grassfire raise three distinct but related arguments. First, as with bumper stickers, this Court should recognize that *Burson* reserved non-electioneering forms of speech such as exit polling from the permissible content bans in buffer zone statutes. This should also include signature gathering, which under Wyoming law is undertaken for issues and candidates that are not on the ballot during the election occurring at a given polling place. The State offered no evidence that signature gathering poses a threat of voter intimidation or

otherwise disrupts an election, failing again to meet its burden of proof. The Court should rule that the signature gathering provision of the statute is unconstitutional.

This Court should reverse the ruling of the court below that upheld the 100-foot absentee polling place buffer zone. By censoring electioneering in traditional public fora around courthouses and facilities such as the Laramie County Government Complex in downtown Cheyenne, the law significantly impinges free speech. This affects not only Mr. Frank's bumper stickers and Grassfire's signature gathering, but literally any electoral advocacy within and around the complex for 90 days during an election year simply because absentee voting is provided for in the atrium. This censors speech relating to everything from county commission meetings to idle chatter amongst government employees. *Burson* did not consider a zone that would last for 45 times longer in the center of a city, and this Court should rule such a zone is unreasonable, significantly impinges speech and is thus unconstitutional.

Finally, in light of all of these unconstitutional provisions, the Court should find the statute facially overbroad. Its plainly legitimate sweep—protecting the electoral process—is outweighed by the substantial number of unconstitutional applications that do not serve this purpose, such as censoring signage on private property that falls within a 100-yard Election Day zone. Wyoming Statutes section

22-26-113 is far beyond that statute upheld in *Burson* and does not endure strict scrutiny. This Court should rule that the law is facially invalid.

Argument

Wyoming's 100-yard no-electioneering buffer zone around Election Day polling places is, colloquially, "way the heck excessive." JA309 (Frank Depo. 13:3-7). It is unconstitutional, as is the 90-day, 100-foot buffer zone placed around absentee polling places such as the Laramie County Government Complex in downtown Cheyenne. JA246. This Court should affirm the ruling of the court below that 100 yards is unconstitutionally excessive and that it is unconstitutional to regulate electioneering bumper stickers. JA415-419. This Court should go further still and reverse the lower court's ruling that 100-foot absentee zone is constitutional. JA417-418. Moreover, this Court should recognize that Grassfire's signature gathering efforts may not be regulated as electioneering. Finally, the Court should recognize that, with so many unconstitutional deficiencies, the statute is facially overbroad. Section 22-26-113 is unreasonable and significantly impinges upon the First Amendment rights of John C. Frank, Grassfire and other speakers. The law is unconstitutional.

I. Standards of Review

The Court reviews *de novo* a district court's disposition of cross-motions for summary judgment. *See Constitution Party of Kansas v. Kobach*, 695 F.3d 1140,

1144 (10th Cir. 2012). This means the Court "make[s] an independent determination of the issues." *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10 Cir. 1991). "'Cross motions for summary judgment are treated separately; the denial of one does not require the grant of another.'" *Id.* (quoting *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010) (alteration, quotation marks, citation omitted)). "The court shall grant summary judgment if the movant shows 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).

Likewise, the Court reviews a district court's decision on standing *de novo*. *Aptive Env't, LLC v. Town of Castle Rock, Colorado*, 959 F.3d 961, 973 (10th Cir. 2020). So, too, does the Court review district court decisions on subject-matter jurisdiction *de novo*. *Finstuen v. Crutcher*, 496 F.3d 1139, 1144 (10th Cir. 2007). Finally, the Court also reviews *de novo* a district court's rulings on the constitutionality of a statute. *See Yes On Term Limits*, 550 F.3d at 1027. "'Additionally, First Amendment cases demand our rigorous review of the record.'" *Id.* (quoting *Chandler v. City of Arvada*, 292 F.3d 1236, 1240 (10th Cir. 2002)). All facets of the appeal and cross appeal are subject to *de novo* review.

II. The District Court Correctly Ruled That Mr. Frank and Grassfire's Claims Against the Unconstitutional Enforcement of Wyo. Stat. § 22-26-113 Are Not Barred by Eleventh Amendment Immunity

The court below correctly ruled that Mr. Frank's and Grassfire's claims are not barred by the Eleventh Amendment pursuant to *Ex parte Young*. JA409-411; 209 U.S. 123 (1908). The doctrine can be simply stated: a federal court is "not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." Wright & Miller, Scope of the Young Doctrine, 17A Fed. Prac. & Proc. Juris. § 4232 (3d ed.). This requires a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (citing *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002)).

Where plaintiffs bring First Amendment suits under 42 U.S.C. § 1983 against state officials that include a request for injunctive relief, an ongoing violation of federal law is apparent and sovereign immunity is not applicable. *See, e.g.*, *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015); *281 Care Committee v. Arneson*, 638 F.3d 621, 632–33 (8th Cir. 2011); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233–34 (10th Cir. 2001). Thus, so long as an individual defendant has "some

connection with the enforcement" of a challenged provision that implicates federally secured constitutional rights, plaintiffs challenging such a law will usually meet the requirements of *Ex parte Young*. *Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014). As noted in the verified complaint, each state official has some connection with the enforcement of section 22-26-113, which Mr. Frank and Grassfire alleged violates the First Amendment to the Constitution. *See* JA15-16 (Verified Compl. ¶¶ 2-3, 7-9). To this, the Civil Rights Act offers redress. 42 U.S.C. § 1983; *see* JA23-24 (Verified Compl. Prayer for Relief). Mr. Frank's and Grassfire's challenges satisfy sovereign immunity and *Ex parte Young* concerns, respectively.

The State aims to split *Ex parte Young* and suits brought under 42 U.S.C. § 1983. State's Br. 15-16. This is simply not how it's done. In section 1983 actions, this Court routinely considers "whether *Ex parte Young* allows [a plaintiff] to proceed against the state officials in their official capacities." *Collins v. Daniels*, 916 F.3d 1302, 1315 (10th Cir.); *see also Catanach v. Thomson*, 718 F. App'x 595, 597 (10th Cir. 2017); *Columbian Fin. Corp. v. Stork*, 702 F. App'x 717, 721–22 (10th Cir. 2017). If "Plaintiffs seek declaratory and injunctive relief and do not seek monetary damages" against an alleged "ongoing violation of federal law", the third prong of *Ex parte Young* is satisfied and Eleventh Amendment immunity does not apply. JA410-411. This is plainly the case here. *See* JA23-24 (Verified Compl. Prayer for Relief ¶¶1-7).

The State also aims to redefine attorney's fees under 42 U.S.C. § 1988 as "damages against the State." State's Br. 16-17. But, as the court below tersely recognized, damages and attorney's fees are two different things. JA410 ("Plaintiffs . . . do not seek monetary damages."). This is a celebrated aspect of American civil rights law: "Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). That is, "Congress recognized that reasonable *attorney's fees* under § 1988 are not conditioned upon and need not be proportionate to an award of money *damages*." *Id.* at 576 (emphasis added). It bears noting that the fees in this case would all arise from litigation in obtaining prospective relief. *See* JA23-24.

Finally, the State endeavors to use sovereign immunity as a heightened standing requirement: "Frank and Grassfire . . . have not alleged an ongoing violation of federal law, because no government official has threatened to or taken any action against them." State's Br. 17-18. But "'[a]n officer need not have a special connection to the allegedly unconstitutional statute; rather, he need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *Kitchen*, 755 F.3d at 1201 (quoting *Chamber of Commerce of the U.S. v. Edmonson*, 594 F.3d 742, 760 (10th Cir. 2010)). Under Wyoming law the

Secretary of State is the chief election officer in the state and he is required by statute to "maintain the uniformity in the applications and operations of the election laws of Wyoming." Wyo. Stat. § 22-2-103. His office has, in fact, taken calls for advice on Election Day relating to buffer zones, and one informing the office that a candidate was asked to leave "the entire . . . grounds" on which a polling place was located. JA32; *cf.* JA39 (indicating the size of the Camplex grounds in Campbell County). The Secretary of State issued no guidance in response to this action. JA158-159 (SecState 30(b)(6) Depo. 24:6-25:4). Even in this egregious expansion of an already-expansive law, the Secretary of State has demonstrated willingness for subordinate election officers across Wyoming to enforce the statute. Similarly, the State claims that "the Laramie County Clerk cannot take any legal enforcement action." State's Br. 17. Yet she is the chief election officer over Laramie County, and her subordinates have shooed signature gatherers away from Election Day and absentee polling places and have even entered private property to remove signs that are within an Election Day buffer zone. Wyo. Stat. § 22-2-103; JA222; 234 (Munoz Depo. 18:5-11; 32:11-22). County Clerk Lee may not be able to prosecute Mr. Frank and Grassfire for misdemeanors under section 22-26-113, but she can certainly enforce the law against them both—whether demanding Mr. Frank move his car due to a bumper sticker or demanding Grassfire's signature gatherers maintain 100 feet from her office door—and has demonstrated willingness to do so. *See* JA246 (top circle

denoting the 20th Street absentee buffer zone at Laramie County Government Complex).

Mr. Frank and Grassfire's claims meet the standard of *Ex parte Young* and were appropriately brought under the Civil Rights Act. This Court should affirm the court below in this regard and assess the merits of Mr. Frank's and Grassfire's First Amendment claims.

III. The District Court Correctly Ruled That Mr. Frank and Grassfire Have Article III Standing to Challenge Wyo. Stat. § 22-26-113

The court below correctly ruled that Mr. Frank and Grassfire have standing to bring their claims. JA411-413. After identifying the elements of standing articulated in *Lujan v. Defenders of Wildlife*, the State only offers various misinterpretations and misapplications of standing doctrine, particularly in light of First Amendment challenges such as this. 504 U.S. 555, 560–61 (1992); State's Br. 18-23. Mr. Frank and Grassfire established both injury in fact and traceability to the defendants' conduct.[5]

A. Mr. Frank and Grassfire Demonstrated Injury-in-Fact

The State argues that "neither [Mr.] Frank nor Grassfire have demonstrated a sufficient intent to engage in the conduct prohibited by the statute." State's Br. 19.

[5] The government officials elected not to address redressability, and the Court should consider this argument waived. State's Br. 23 n.4.

This is untrue. In their verified complaint, Mr. Frank detailed his planned activities in the 2020 election cycle and that he would engage in similar activity in future elections but for the law, which he affirmed in sworn testimony. JA16-17, 20 (Compl. ¶¶10-13, 23); JA309-310 (Frank Depo. 13:13-14:11). Owing to developments since the 2020 election, Mr. Frank no longer supports Liz Cheney. *Cf.* JA16-17 (Compl. ¶11) *with* JA311 (Frank Depo. 15:19-23). But he has other candidates in mind for whom he'd distribute literature on Election Day (implicating the Election Day buffer zone) and for whom he would utilize his car for extra-large electioneering signage (implicating absentee polling place zones) but for section 22-26-113. *See* JA311-312 (Frank Depo. 15:19-16:4).

The State acknowledges that "Grassfire . . . has engaged in signature gathering near polling places in other states." State's Br. 21. Grassfire also articulated its activities in Wyoming but for the law: signature gathering for candidates, initiatives and referenda "on the sidewalks adjacent to the public entrances to the Laramie County Governmental Complex" and "throughout election years[.]" JA17-20 (Compl. ¶¶14, 16, 24).

To claim neither Mr. Frank or Grassfire have standing, the State first hangs its hat on *Initiative and Referendum Inst. v. Walker*. 450 F.3d 1082 (10th Cir. 2006); State's Br. 20. Focusing on the first prong of the injury-in-fact assessment in that matter, "evidence that in the past [plaintiffs] have engaged in the type of speech

affected by the challenged government action[,]" the State claims that Mr. Frank has no standing because (among other things) he has never electioneered near a polling place where it is legal. *Walker*, 450 F.3d at 1089; State's Br. 20. Grassfire somehow loses standing because it "has never provided signature gathering services in Wyoming, despite providing services in other public and private locations [in other states]." State's Br. 21. This emphasis on prong 1 ignores the sentence immediately following the articulation in *Walker*: "evidence of past activities obviously cannot be an indispensable element—*people have a right to speak for the first time*[.]" 450 F.3d at 1089 (emphasis added). Mr. Frank and Grassfire's past activities help establish standing, but it is satisfactory for their verified complaint and sworn testimony to articulate the free speech that they would engage in if were not subject to criminal penalties. *See id.*; *see supra* Statement of the Case parts III, IV.

In First Amendment litigation, it is all too common for state officials to argue that because plaintiffs lack precise and detailed plans to violate a law, there is no case or controversy. But this Court has expressly rejected this approach and has even gone so far as to state that a plaintiff "does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future." *Walker*, 450 F.3d at 1089. Rather, 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

> affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and . . . a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced.

Id. Thus, where plaintiffs meet these criteria, there is no requirement to show that they have specific plans or intentions to engage in the type of speech banned by the challenged provision. Grassfire and Mr. Frank's affidavits and testimony easily meet this standard.

Three further points should be addressed. The State cites an outlier case, *Baker v. U.S.D. 229 Blue Valley*, in support of its standing arguments. 979 F.3d 866 (10th Cir. 2020); State's Br. 18. But *Baker*, in the Tenth Circuit's own words, presented an "unusual standing theory"—arguing that a school district misapplied a religious exemption for vaccines that would cause distant, possible, theoretical damage. *Id.* at 873–74. And, most notably, the plaintiff "ha[d] not alleged a pre-enforcement claim." *Id.* Thus, the State's reliance on *Baker* is misplaced—it involves a case *outside* of pre-enforcement, First Amendment jurisprudence based on a highly "unusual standing theory" that has no sway here. *Id.* at 873.

The state officials suggest that Mr. Frank and Grassfire need to be specifically threatened with prosecution for standing to be proper. State's Br. 20-22. For First Amendment pre-enforcement claims, this is wholly untrue. As the Tenth Circuit recognized in *New Mexicans for Bill Richardson v. Gonzales*, even without a specific

threat of prosecution against the plaintiff, fears of prosecution were reasonable because the state had not disavowed an interest in enforcing the law. 64 F.3d 1495, 1501–02 (10th Cir. 1995). And in *Walker*, the Tenth Circuit reiterated that a plaintiff need not actually risk arrest, prosecution, or adverse consequences to satisfy standing. 450 F.3d at 1089. Rather, so long as a law carries a direct and immediate consequence on freedom of speech, a cognizable injury is present for standing purposes. *Id.* at 1090. To be clear, cases recognize that where plaintiffs allege speculation upon speculation that a government actor *might* act in a certain way and *might* enforce the law in a way that *might* damage plaintiffs, standing is certainly suspect. *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 12–13 (1972). But where a law, as here, is to be plainly applied against plaintiffs who have demonstrated a cognizable injury against their First Amendment rights, a credible threat of enforcement is met.

B. Mr. Frank and Grassfire Demonstrated Traceability to the State

The state officials argue that any alleged injury here is not fairly traceable back to their actions, precluding Article III relief. State's Br. 23. This argument is connected to the State's incorrect position that government must take overt steps to enforce a law that is already chilling speech for standing to be satisfied. Indeed, while "no state or local government actor has threatened or taken any action," they need not. *Id*. This is because the traceability requirement for standing is met where a law inhibits individuals from engaging in protected, First Amendment speech.

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 393 (1988) (actual fear that a law will be enforced causes self-censorship, which satisfies standing).

This Court has found traceability where an unconstitutional law simply exists and prevents people from engaging in protected First Amendment conduct. *Walker*, 450 F.3d at 1086. More recent holdings from courts nationwide agree. *See, e.g.*, *Black Lives Matter v. Town of Clarkstown*, 354 F.Supp.3d 313, 324 (S.D.N.Y. 2018) (chill establishes traceability); *Turner v. U.S. Agency for Global Media*, 502 F.Supp.3d 333, 360–61 (D.D.C. 2020) (chill from policies establishes traceability); *Final Exit Network, Inc. v. Ellison*, 370 F.Supp.3d 995, 1011–13 (D. Minn. 2019) (traceability satisfied even for government defendants who had "some connection" to enforcing the law).

The State also argues that the Secretary of State and Laramie County Clerk have no ability to take enforcement action, precluding traceability. State's Br. 23. While this Court has not issued a rule on traceability where Eleventh Amendment immunity and Article III issues overlap, the Eighth Circuit offers a helpful approach. *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 956–57 (8th Cir. 2015). What is required to satisfy dual Eleventh Amendment immunity and traceability concerns is that the named defendant have "some connection" with enforcement of the challenged law. *Id*. at 957. This is easily met for the government officials here. Secretary Buchanan is required to "maintain the uniformity in the

applications and operations of the election laws of Wyoming." Wyo. Stat. § 22-2-121(b). He is also charged with promulgating rules as may be necessary to administer the Wyoming Election Code, including section 22-26-113. *Id.* County Clerks, including Laramie County Clerk Lee, are the chief election officers of their respective counties. Wyo. Stat. §§ 22-2-103, 22-12-101(a). They oversee judges of election at each Laramie County polling place, who in turn "have the duty and authority to preserve order at the polls by any necessary and suitable means." Wyo. Stat. § 22-13-103(a); *see also* Wyo. Stat. § 22-1-102(a)(viii). The county clerks and Secretary of State bear more than "some connection" with enforcement of the law. Secretary Buchanan may issue rules affecting how the law is enforced. Laramie County Clerk Lee oversees election judges who have enforcement authority at the polls. Because of these connections, traceability concerns are resolved.

Mr. Frank and Grassfire have gone above and beyond the requirements to present a justiciable case to the court below and this Court. Because Mr. Frank and Grassfire properly pled a pre-enforcement, First Amendment challenge that implicates relaxed requirements, detailed their planned speech and evinced the statute's chill against it, standing is satisfied here.

IV. The District Court Correctly Ruled that the 100-yard Election Day Buffer Zone in Wyo. Stat. § 22-26-113 is Unconstitutional

The First Amendment to the U.S. Constitution commands that "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the

people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. This amendment is "made applicable to the states by the Fourteenth Amendment[.]" *Yes On Term Limits*, 550 F.3d at 1027; *see* U.S. CONST. amend. XIV. Because section 22-26-113 prohibits "the display of campaign signs or distribution of campaign literature[,]" as opposed to other signs such as those promoting yard sales or literature such as restaurant menus, the law is a content-based restriction of speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). Such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163. The court below recognized that a 100-foot no-electioneering buffer zone is among the few regulations to ever pass strict scrutiny at the Supreme Court, and correctly ruled that the case in which that occurred, *Burson v. Freeman*, cannot be extended to the 100-yard buffer zone under Wyoming Law. JA 415-417; *see also* JA23 (Compl. Prayer for Relief ¶1).

In *Burson*, in a plurality opinion from a panel of eight justices,[6] the U.S. Supreme Court upheld Tennessee's 100-foot buffer zone. 504 U.S. at 193–94 (quoting Tenn. Code. Ann. § 2-7-111(b) (Supp. 1991)). The law prohibited "'the display of campaign posters, signs or other campaign materials, distribution of

[6] Justice Thomas took no part in the consideration or decision. *Burson*, 504 U.S. at 211.

campaign materials, and solicitation of votes for or against any person or political party or position on a question[.]'" *Id.* The penalty for violating the law was 30 days of imprisonment and up to a $50 fine. *Burson*, 504 U.S. at 194 (quoting Tenn. Code Ann. §§ 2-19-119, 40-35-111(e)(3) (1990)). The Court found the law content based, because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Burson*, 504 U.S at 197; *see also id.* at 213 (Stevens, J. dissenting). Applying strict scrutiny, the plurality recognized "compelling interest[s] in [the state] protecting voters from confusion and undue influence" as well as "'preserving the integrity of its election process.'" *Burson*, 504 U.S. at 199 (quoting *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989)).

In examining the Tennessee law's tailoring, the plurality opinion of Justice Blackmun—joined by Chief Justice Rehnquist, Justice White and Justice Kennedy—explored "the evolution of election reform" in the late 1800s and early 1900s and found buffer zones to be one facet of a bundle of reforms. *Burson*, 504 U.S. at 200–06. Buffer zones began with a municipal law in Louisville, Kentucky that prohibited electioneering "within 50 feet of the voting room inclosure" that was soon followed by, among other provisions, a New York law prohibiting Election Day electioneering "within any polling-place, or within one hundred feet of any polling place." *Id.* at 203–04. Tennessee followed suit, implementing a 50-foot zone

for anyone but voters and certain election officials in "more highly populated counties and cities[,]" then a statewide 30-foot ban of a similar nature. *Id.* at 205. Only in 1967 did Tennessee implement a 100-foot buffer zone that targeted electioneering. *Id.* at 205–06. Nevertheless, this fit a "widespread and time-tested consensus" that "demonstrate[d] that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id.* at 206.

The plurality found the tailoring overcame concerns of overinclusivity, rejecting that these interests could be served by laws directly addressing violence or intimidation. *Id.* at 206–07. Underinclusivity, or the law's failure to regulate content within its ambit such as commercial speech, was rejected as well: "there is . . . ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses." *Id.* at 207. Finally, in response to the dissent, the plurality reiterated its reliance on the history of election reform and concluded that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter." *Id.* at 207–08. "The real question then is *how large* a restricted zone is permissible or sufficiently tailored." *Id.* at 208.

In considering the size of Tennessee's 100-foot buffer zone, the plurality adopted a modified burden of proof, requiring the government to show that the statute "'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 (1986)). It again reserved judgment for larger zones, noting that "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills v. Alabama*[.]" *Burson*, 504 U.S. at 210 (citing 384 U.S. 214 (1966); *Meyer v. Grant*, 486 U.S. 414 (1988)).

Justice Stevens wrote a dissent joined by Justices O'Connor and Souter. *Id.* at 217 (Stevens, J., dissenting). The dissent agreed with the application of strict scrutiny but diverged completely with the plurality and concluded "that Tennessee has [not] made anything approaching such a showing" of a compelling governmental interest and narrow tailoring. *Id.* at 217–18. The dissent posited that orderly access to the polls was the only governmental interest at issue and, importantly, that a state must demonstrate that orderly access laws do not unnecessarily hinder last-minute campaigning. *Id.* at 218. "That some States have no problem maintaining order with zones of 50 feet or less strongly suggests that the more expansive prohibitions are not necessary to maintain access and order." *Id.* Moreover, "on its face, Tennessee's statute appears informed by political concerns." *Id.* The dissent was troubled by the

"exceptionally thin" evidence introduced at trial and noted that the police-free zone of only 10 feet under state law further bolstered that "normal police protection is completely adequate to maintain order" beyond that point. *Id.* at 219. It also chastised the plurality for discerning so much from history: "more than mere timing is required to infer necessity from tradition." *Id.* at 220. The decision remains a sharply split 5-3 plurality, with the plurality itself divided on the basis for upholding a 100-foot buffer zone. *See id.* at 211–14 (Kennedy, J., concurring), 214–16 (Scalia, J., concurring).

In the wake of *Burson*, federal courts have largely ruled that buffer zones extending beyond 100 feet are unconstitutional under the First Amendment due to their harm to political speech. *See, e.g.*, *Anderson v. Spear*, 356 F.3d 651, 656–66 (6th Cir. 2004) (striking down a 500-foot buffer zone); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1054–55 (6th Cir. 2015) (striking down a 300-foot buffer zone); *Calchera v. Procarione*, 805 F.Supp. 716, 720 (E.D. Wisc. 1992) (striking down a 500-foot buffer zone); *see also See Nat'l Broadcasting Co.*, No. C88-0320, slip op. at 10 (striking down the 300-foot buffer zone in section 22-26-113 prior to the *Burson* decision). The Fifth Circuit upheld Louisiana's 600-foot buffer zone, but only after the state provided evidence demonstrating the need for so large a zone due to specific showings of corruption in the state. *Schirmer v. Edwards*, 2 F.3d 117, 121

(5th Cir. 1993). Even so, the Louisiana Supreme Court later invalidated that buffer zone. *State v. Schirmer*, 646 So. 2d 890, 902 (La. 1994).

Adhering to the plurality in *Burson*, the court below correctly ruled that the 100-yard Election Day buffer zone in section 22-26-113 is unconstitutional. JA416-417. As the record makes clear, the state officials "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*." *Id.* The court found the law's tailoring particularly lacking in light of the 100-foot absentee buffer zone. JA 417. The court was correct, and this Court may uphold its ruling in this regard or for several other reasons pursuant to *Burson*.

When states expand buffer zones to cover streets, sidewalks and other public fora commonly held out for speech and debate, the burden squarely rests with the government to demonstrate why such a large restriction is required. After all, this is where Americans go to talk about issues of the day. The State cannot justify a 300-foot radius as an outgrowth of electoral reform during the Progressive Era. There are few—if any—buffer zones beyond a 100-foot radius in that history. *See Burson*, 504 U.S. at 215 n.1-2 (Scalia, J. concurring). The State offered nothing to suggest that Wyoming was under any heightened threat of voter coercion or confusion—or any threat at all—when the Election Day buffer zone was expanded in size 1973 from 20 to 100 yards or expanded in the scope of its content bans in 1973, 1983 and 2018,

respectively. Nor has any history since indicated such a concern; instead, enforcement of the statute has often reflected the concern of political manipulation expressed by Justice Stevens's dissent. *See* JA276-283, 285-287 (Respective complaints about a county clerk's name appearing on a polling place sign and a candidate having a sign on his own front lawn within 100 yards of a polling place); *Burson*, 504 U.S. at 218 (Stevens, J., dissenting). As a factual matter, the State offered not a single governmental interest behind the statute in the court below, placing such responsibility solely on the legislature. JA194-195 (Lee Response to Frank Interrogatory #5); JA204 (Buchanan Response to Frank Interrogatory #6); JA209 (Manlove Response to Frank Interrogatory #5). And there is no legislative history justifying the law. But to sustain the law, the state officers must meet their modified *Burson* burden to show the law "'is reasonable and does not significantly impinge on constitutionally protected rights.'" 504 U.S. at 209; *see* JA417. The State neglected this task entirely.

The impingement of First Amendment rights by the Election Day buffer zone is significant. Mr. Frank's forgone activities at Laramie County Community College are a perfect example: he could only realistically address voters as they left the parking lot after they'd voted, a "totally pointless" exercise. JA323 (Frank Depo. 27:8-22). This is precisely the sort of damage section 1983 suits exist to vindicate. In Laramie County and across Wyoming the Election Day buffer zones yield much

the same result or foreclose voter engagement entirely. *See* JA136-143; *see also* JA38-53 (graphic overlays of buffer zones over various Wyoming polling places). The absurdity is visualized in Mr. Frank's photos; 100 feet amply protects polling place ingress and egress and affords voters the "sense of shared civic obligation at the moment it counts the most" long before they get to the voting booth. *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018); *see* JA262-263. The 100-yard buffer zone does not serve to protect voters from coercion or confusion from citizens like Mr. Frank, but from his last-minute campaigning, a concern reserved by the plurality in *Burson*. 504 U.S. at 210 (citing *Mills*, 384 U.S. 214).

The video of Jennifer Horal is also instructive as to the significant impingement of free speech by the 100-yard zone on herself and other signature gatherers such as Grassfire. This is evident by comparing the success of her signature gathering activities at around 178 feet away from the entrance to her banishment to the far end of the parking lot beyond the 100-yard boundary. JA289 (Video at 09:50; 50:00-53:00). Few, if any, voters park that far away at Laramie County Community College or likely any Election Day polling place. Horal was left to flag down cars as they departed, which law enforcement considered disrupting a polling place. JA292 (Horal Aff. ¶¶10-13). As with Mr. Frank's and Grassfire's forgone activities, the threats against, citation and removal of Ms. Horal from signature gathering did not address voter coercion or confusion, but significantly impinged upon signature

gathering in a place that could guarantee the gathering of legal signatures. *See* JA290-291 (Horal Aff. ¶¶3-4); *see also* JA351 (Grassfire 30(b)(6) Depo. 25:1-13); *see also* Wyo. Stat. § 22-5-304 (requiring signatures from "registered electors" for nominating petitions). The 100-yard Election Day buffer zone significantly impinges upon speech.

Assuming this Court recognizes the interests of voter coercion or confusion as a legal matter—as a matter of fact, it bears repeating that the State disclaimed any interest in defending the law—the law is not narrowly tailored. *See* JA416-417. It triples the radius and creates a zone nine times as large as the one upheld in *Burson*, serving no purpose but censorship. Other factors show ample less restrictive alternatives to such a sizable buffer zone, including developments in election law. For example, absentee voting, particularly by mail, is an alternative available to every Wyoming voter. Wyo. Stat. § 22-9-102(a). Because of this, any voter who does not wish to be solicited for a signature or to hear last-minute campaigning may vote at his or her leisure in the privacy of one's home. Due to this robust alternative method of voting, Wyoming need not censor so far beyond the 100-foot boundary upheld in *Burson* on Election Day; it is questionable that even the reasoning in the *Burson* plurality endures in light of Wyoming's option to vote absentee via U.S. Mail without excuse. This electoral reform questions the tailoring for but the most minimal Election Day buffer zones, certainly Wyoming's 100-yard radius.

There is another important distinction between Wyoming and Tennessee law: in *Burson* the plurality rejected Tennessee's general misdemeanor of voter intimidation as a less restrictive means to prevent intimidation in part "because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process, . . . [thus] many acts of interference would go undetected." 504 U.S. at 207 (citing Tenn. Code Ann. § 2–7–103 (1985)). This is still the law in Tennessee: "No police or other law enforcement officer may come nearer to the entrance to a polling place than ten feet (10') or enter the polling place except at the request of the officer of elections or the county election commission or to make an arrest or to vote." Tenn. Code Ann. § 2-7-103(c) (2021). Wyoming has no such law, and the State expressed no concerns over general police presence at polling places. JA234-235 (Munoz Depo. 32:23-33:2); JA159-160 (SecState 30(b)(6) Depo. 25:21-26:2). The Supreme Court noted this distinction when it struck down a 35-foot restriction around abortion clinics under Massachusetts law: the majority rejected reliance on *Burson* in part because "police maintain a significant presence outside Massachusetts abortion clinics." *McCullen v. Coakley*, 573 U.S. 464, 496 (2014). Police presence is significant at many absentee polling places in Wyoming and was, at the very least, apparent at Laramie County Community College on August 18, 2020 during the confrontation with Jennifer Horal. *See generally* JA289.

On appeal, the state officials do little more than try to argue that *Burson* was not a strict scrutiny case but a rational basis case. State's Br. 25-33. They acknowledge that *Burson* poses the question of a buffer zone's size, but then seek to circumvent any obligation to answer it. The State endeavors to lean on history, but points to no buffer zone from the Progressive Era that exceeded 100 feet. Indeed, there are probably none. *See Burson*, 504 U.S. at 215 n.1-2 (Scalia, J. concurring). The law's expansion of the precedent requires justification such as legislative findings and does not require re-litigating *Burson* itself. *Cf.* State's Br. 27-28. The court below correctly rejected the state officials' effort to wield *Burson* as a rubber stamp.

Otherwise, the State argues that Wyoming is big and "is the least populated state in the United States[.]" State's Br. 31-32. Without any evidence—again, something the state officials had every opportunity to present in the court below—the State offers "intuitive[ly]" that "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[.]" *Id.* at 32. Yet the evidence is clear that a large number of Election Day polling places in Wyoming are in "urban context[s]", and even ones in "rural context[s]" have buffer zones that cover traditional public fora such as streets, sidewalks and parks. *See* JA37-53; JA136-143. Several also censor private property. *Id.* In any event, Mr. Frank's and Grassfire's respective testimony—along with Jennifer Horal's

affidavit—amply illustrate that the 100-yard Election Day zone is substantially censoring a lot of political advocacy.

Finally, the State leaves unaddressed one aspect of the reasoning of the court below: that the 100-foot absentee zone works and, thus, the radius of the Election Day zone is 200 feet too long. JA417. This Court should also rule that the absentee polling place buffer zone under Wyoming law is unconstitutional, but at the very least the 100-foot absentee zone dispels the idea that Wyoming will "'sustain some level of damage'" with a smaller Election Day zone. State's Br. 26-27 (quoting *Burson*, 504 U.S. at 209); *see infra* part VII.

Burson made clear that the burden rests on government to demonstrate through evidence or legislative findings that an Election Day buffer zone beyond 100 feet is truly necessary. Instead, the state officials

> presented no persuasive argument as to why *Burson's* safe harbor is insufficient, and instead a 300-foot radius is required to prevent fraud and intimidation. [Wyoming state officials] did not present any evidence—or even a non-evidentiary policy argument—to the district court justifying a no-speech zone nine times larger than the one previously authorized by the Supreme Court.

Russell, 784 F.3d at 1053; JA416-417. Indeed, the State has simply recited that these laws act to "protect[] voters from confusion, undue influence, harassment, and to maintain election integrity." *See, e.g.*, State's Br. 33. But rote recitations are not enough to uphold the law under *Burson*'s standards. Indeed, such speculation fails

to satisfy the government's burden and cannot justify the denial of the First Amendment right to communicate one's political viewpoints near a polling place. This Court should affirm the ruling of the court below that the 100-yard Election Day buffer zone is unconstitutional.

V. The District Court Correctly Ruled that the Bumper Sticker Provisions in Wyo. Stat. § 22-26-113 Are Unconstitutional

The court below also correctly held that the law's bumper sticker regulation is "outside the scope of what was considered 'electioneering' in *Burson* and is therefore a violation of the First Amendment." JA 418; *see Burson*, 504 U.S. at 210 n.13. This arose from Mr. Frank's challenge, as he would utilize more than one bumper sticker per candidate on his vehicle, utilize stickers (even yard signs) larger than four inches by sixteen inches on his vehicle, and would pass through or park within Election Day and absentee zones with these messages but for the ban. *See* Wyo. Stat. § 22-26-113(a)(i)-(iii); JA17, 20 (Compl. ¶¶ 13, 25); JA313 (Frank Depo. 17:2-24). The court could not "see how bumper stickers on vehicles could lead to voter intimidation or election fraud." JA 418-419; *see Burson*, 504 U.S. at 206. Yet again, the court noted that the state officials "presented no evidence that the statute's ban on bumper stickers . . . is 'reasonable and does not significantly impinge on constitutionally protected rights.'" JA419 (quoting *Burson*, 504 U.S. at 209).

In a variety of contexts, courts have held that bumper stickers addressing items of public concern are fully protected under the First Amendment. *See, e.g.*, *Fire*

Fighters Ass'n v. Barry, 742 F. Supp. 1182, 1189 (D.D.C. 1990); *Cunningham v. State*, 400 S.E.2d 916 (Ga. 1991); *Connealy v. Walsh*, 412 F. Supp. 146 (W.D. Mo. 1976). None have addressed this issue within the context of buffer zones. To survive review, the state officials were required to produce evidence or legislative reasoning supporting the need to ban an economical and efficient way for average citizens to communicate their political views. Although *Burson* and other rulings have sustained limited bans of electioneering within 100 feet of an Election Day polling place, they have never gone so far as to permit bans of communications featured on vehicles within or temporarily passing through these zones. And courts have regularly upheld the First Amendment right to use bumper stickers to communicate one's political opinions.

In scouring both public records and legislative history, there is no apparent basis for Wyoming to maintain a ban against bumper sticker political messaging. Wyoming history does not demonstrate regular investigations, let alone convictions, for vote coercion or vote buying—or a single one related to large and numerous bumper stickers. Nor is Wyoming a state featuring a lengthy history of voter intimidation somehow tied to nefarious bumper stickers. Moreover, the legislative history does not present a record upon which the state can be said to have weighed serious concerns about vote coercion and intimidation because people might feature

effective messages on bumper stickers. On this record, this Court should affirm the court below.

The State confuses *Burson*'s applicability. They argue that "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." State's Br. 34. The Tennessee law at issue in *Burson* did not discuss bumper stickers, and the Court specifically reserved the application of the law or another general no-electioneering provision to such speech. 504 U.S. at 201 n.13. This was because the state "denied that the statute would reach" bumper stickers and owing to "the absence of any factual record . . . that the statute has been applied to reach such circumstances[.]" *Id.* That is not the case here: the law applies *facially* to the way Mr. Frank would use bumper stickers and stationary campaign signs on his car. *See* JA17, 20 (Verified Compl. ¶¶13, 25); JA269 (graphic of Liz Cheney bumper sticker); JA312-313 (Frank Depo. 16:20-17:24). It prohibits the use of automotive signage "within or passing through" a buffer zone unless there is only one bumper sticker per candidate, it is less than four inches high by sixteen inches long, and one only parks the car in the zone when voting. Wyo. Stat. § 22-26-113(a)(i)-(iii). Moreover, the law has been enforced against bumper stickers, and the state officials have not disclaimed enforcement. *See, e.g.*, JA221 (Munoz Depo. 16:2-23). There is no narrowing construction to be had for this provision, and facial relief is

appropriate. *See Colorado Right To Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007).

The State then argues that "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." State's Br. 35. This again ignores that bumper stickers were reserved by the plurality for another day. *Burson*, 504 U.S. at 201 n.13. The State had a duty here to show how bumper stickers threaten to "confus[e], undu[ly] influence" voters or otherwise threaten "the integrity of the election process[.]" State's Br. 35. They declined to do so, relying on *Burson* which drew just the opposite conclusion.

The substantial censorship of buffer zones is most apparent in the absentee zone. The State claims that "[o]utside 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." State's Br. 36. But this is an absurd statement in light of absentee polling places being "established in the courthouse or other public building" (that is, typically centrally located in town) and the factual record. Wyo. Stat. § 22-9-125(a)(ii); *see* JA246. As Mr. Frank testified—and the State did not counter—the 90-day absentee buffer zone in downtown Cheyenne prevented him from using his bumper stickers and signs *completely* during that timeframe:

> Now, I chose not to do those because frequently, I will go downtown and, you know, during the campaign and everything, was concerned that I might be driving by, you know, the Larimer [sic] County Complex, government complex down there, and inadvertently, you know, be in there and violate a law.
>
> I particularly like the Crooked Cup downtown. It's a coffee shop. Well, to me, in my mind, they're close enough to raise a question in my mind of, geez, if I drive by and I get my cup of coffee with my signs in the window, am I in violation?
>
> So those are the kinds of things, one example of the kind of things that I did not do that because of the restriction, and again -- well, because of the restrictions.

JA313 (Frank Depo. 17:10-24). The State's reliance on the strange speech alchemy that led to the specific bumper sticker prohibitions is of no moment:[7] the censorship of the 90-day buffer zone in the center of Cheyenne that covers various thoroughfares is so substantial that it censors Mr. Frank's speech even *beyond* the zones. This is the very essence of unreasonable.

Unlike the absentee buffer zones, it bears noting that appropriate, 100-foot radius for Election Day zones would mostly resolve the bumper sticker provision as to Election Day polling places. One-hundred-foot zones may reach into parking lots, but seldom very far. *See* JA38-53. At the Laramie County Community College polling place, where Mr. Frank seeks to electioneer, a 100-foot zone would not cover

[7] The audio linked by the State as legislative history was not presented to the court below. *See* State's Br. 36 n.6-7.

a single legal parking space. *See* JA248-250. This is not the case for 100-foot zones around absentee polling places. *See* JA246. The court below correctly ruled that the bumper sticker provisions in the statute are unconstitutional, and this Court should affirm.

VI. The District Court Erred in Upholding the Signature Gathering Prohibition in Wyo. Stat. § 22-26-113

On cross appeal, Grassfire renews its challenge to the ban in the statute of "the soliciting of signatures to any petition" within a buffer zone. Wyo. Stat. § 22-26-113. The court below did not specifically address this provision in summary judgment, though it was briefed and argued at oral argument. *See* JA426 ("Grassfire . . . doesn't really engage in electioneering at all by any stretch of the imagination, certainly not under *Burson* standards[.]"). It is an appropriate part of Grassfire's challenges to both the 100-yard and 100-foot zones. *See* JA17-19, 20, 23-24 (Verified Compl. ¶¶14-17, 24, Prayer for Relief ¶¶1-2). Signature gathering meets another reservation in *Burson*: the Court ruled that banning electoral advocacy was not underinclusive because "there is simply no evidence that political candidates have used *other forms of solicitation* or exit polling to commit such electoral abuses." 504 U.S. at 207 (emphasis added). The State again presented no evidence supporting the reasonableness of this ban, while Grassfire showed the buffer zones significantly impinge upon its free speech rights.

Placing 100 yards or even 100 feet between a signature gatherer (and her petition) and a potential signatory is a significant impingement on the "direct one-on-one communication" required for signature gathering. *Meyer*, 486 U.S. at 424. This was supported by ample testimony from Grassfire and by the Jennifer Horal video. *See supra* Statement of the Case parts IV, V. Although one might conceivably gather signatures for a candidate or an issue already on a ballot during an election cycle, this is unrealistic under Wyoming law: one gathers signatures at a polling place for candidates, initiatives or referenda *in order that they might appear on a future ballot*, and thus these candidates or items are not on the ballot of the election where signatures are being gathered. *See, e.g.*, Wyo. Stat. §§ 22-24-301 *et seq.* (detailing signature gathering requirements for initiatives), 22-24-401 *et seq.* (detailing signature requirements for referenda), 22-4-402 (detailing petition requirements for forming a new political party); 22-5-301 *et seq.* (detailing petition requirements for independent candidates). Signature gathering is thus an *other form of solicitation* that must be independently justified by the State. The State offered no evidence whatsoever to justify this censorship.

Banning broader swaths of speech than electioneering requires evidence of historic bases or evidence of interference with electors: further content restrictions such as exit polling, signature gathering (or *any* speech restrictions beyond 100 feet on Election Day) need actual justification. To mitigate an evidentiary burden is not

to eliminate it, and *Burson* only mitigated the evidentiary burden for a 100-foot Election Day zone that targeted electioneering. *See Russell*, 784 F.3d at 1052–53. This Court should rule that the statute's ban on signature gathering is unconstitutional.[8]

VII. The District Court Erred in Upholding the 100-foot Buffer Zone Around Absentee Polling Places in Wyo. Stat. § 22-26-113

For the second issue on cross-appeal, the Court should reverse the lower court's ruling upholding the 100-foot buffer zone around absentee polling places in Wyoming. *See* JA417-418; *see also* JA24 (Verified Compl. Prayer for Relief ¶2). The court below ruled that evidence was not presented "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" and ruled that the 100-foot zone approved in *Burson* may be applied for 90 days per election year. JA417. The evidence here was more nuanced, but compellingly showed that it is unreasonable to ban speech within and around a multi-use public building or courthouse just because voting is occurring in one room. *See* JA246.

Evolution in election law must be considered. In 2020, Wyoming extended absentee voting such that voters may now vote during a total of 90 days during an

[8] Alternatively, the Court should remand to the court below to address this specific portion of the law.

absentee electoral cycle. JA128 (Enrolled Act No. 36, Wyoming Senate (2020)); Wyo. Stat. § 22-6-107(a). This means that the law now increases the temporal breadth of the buffer zone's reach to protected speech. For absentee voting, Wyoming's buffer zones last 45 times longer in duration than the zone upheld in *Burson*. *Forty-five times longer*. This dramatic increase in scope comes with a constitutional consequence: speech occurring on a variety of public fora are damaged more significantly.

This Court has been clear that government bodies may place certain restrictions within government property—say, on courthouse or town council grounds—but *not* on abutting sidewalks or roads. *Verlo v. City and County of Denver*, 741 Fed.Appx. 534 (10th Cir. 2018). Wyoming, too, may place sensible restrictions on electioneering within or on government property, but it is severely curtailed in its ability to maintain a ban against political speech occurring on traditional public fora abutting such property. And this, then, is the crux of this argument: Wyoming outlaws important political speech in the most public of fora near absentee polling places for extensive time periods without a compelling reason.

The strongest reason that the State's interest in "protecting" absentee voters at absentee polling place is less than at polling places on Election Day is based on the variety of uses and visitors to the facility. The Laramie County Government Complex alone features county commission meetings, court hearings, and is even

where Laramie County residents register to vote in the first place. *See* JA99 (Lee Answer to Interrogatory #4); JA218 (Munoz Depo. 10:12-23). These activities occur while absentee voting is available elsewhere within the complex, but electioneering (so broadly defined as to include signature gathering unrelated to said election) is completely banned within 100 feet of the entrance to the facility and thus, within and around almost the entire complex. *See* JA246. It cannot be the case that the ground surrounding the center of local governments throughout Wyoming may be immune from electioneering and other political speech simply by placing a polling place within the facility. The bans here are substantial for both Mr. Frank and Grassfire and are unreasonable in light of the amount of non-electoral activity occurring within the absentee voting facilities. *See supra* parts V, VI.

The *Burson* plurality's reservation regarding police presence under Tennessee law is almost comic in light of Wyoming's absentee polling places, which are courthouses by default under the law and include the presence of at least some security guards or bailiffs during voting hours. Wyo. Stat. § 22-9-125(a)(ii); *see supra* part IV. At the Laramie County Government Complex, the atrium with the absentee polling place is adjacent to a skywalk that leads to the very jail that would house electioneering violators. *See* JA246; JA225 (Munoz Depo. at 21:20-22). It is unreasonable to parallel Tennessee, a state with laws that still ban police presence in polling places, with Wyoming, where absentee voting occurs amongst police and

just a skywalk away from the county jail. The 100-foot absentee polling place buffer zone is unconstitutional.

VIII. Wyo. Stat. § 22-26-113 is Facially Overbroad

The court below ruled that "there is an absence of factual record in the case" to consider the statute's application to private property. JA419. But these arguments were meant to bolster Mr. Frank and Grassfire's claims that the law in controversy suffers from overbreadth and is facially unconstitutional. *See* JA23-24 (Verified Compl. Prayer for Relief ¶¶1-2). This should be considered for three separate reasons, and the Court should find the statute unconstitutionally overbroad.

First, Mr. Frank and Grassfire raised important *jus tertii* concerns. *See* JA23 (Verified Compl. ¶37). True, neither of them own private property where the buffer zones forbid landowners from erecting electioneering signs. But because the ban on placing electioneering signs on one's own property is blatantly unconstitutional, along with numerous other applications of the law, resolution through the overbreadth doctrine is appropriate. In *Broadrick v. Oklahoma*, the Supreme Court recognized that traditional standing rules are modified for overbreadth claims. 413 U.S. 601, 612 (1973). This allows "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id.* (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

Where it appears on the face of a law that hosts of innocent actors may be muted by a statute, courts generally recognize the standing of one plaintiff to represent the related constitutional interests of other parties not before the court. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 196 (1976); *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 167 F.Supp.3d 1018, 1022 (D. Minn. 2016) (a plaintiff "may litigate the interests of the pseudonymous users of its website because they 'may not have the financial resources or sophistication' to litigate on their own behalf"); *Reese Brothers, Inc. v. U.S. Postal Service*, 531 F.Supp.2d 64, 69–70 (D. D.C. 2008) (where mutual interest existed in challenge to Postal Service practice injuring First Amendment interests, *jus tertii* standing was appropriate); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295–96 (6th Cir. 1998) (third-party standing appropriate for First Amendment claim where the plaintiff can demonstrate that it has suffered a concrete, redressable injury, that it has a close relation with a third party, and that there exists some hindrance to the third party's ability to protect his or her own interests). Here, homeowners who own properties subject to the law's private property application are disparate, uncoordinated, distant, and likely lack the resources or sophistication to challenge the speech suppressive effects of this law. In addition, considerable time and effort would be required to eliminate a facially unconstitutional law by various landowners around the state. Resolution is appropriate here.

There is little doubt as to the unconstitutionality of a political sign ban on private property. With "rare exceptions, content discrimination in regulations of the speech of private citizens on private property [. . .] is presumptively impermissible, and this presumption is a very strong one." *City of Ladue v. Gileo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). It has thus been the norm that where state actors prohibit or penalize the use of signs, especially those espousing political views, on private property, that such regimes are unconstitutional. *See, e.g.*, *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1407–09 (8th Cir. 1995) (invalidating durational sign limits and other provisions for election signs on private property); *Dimas v. City of Warren*, 939 F. Supp. 554 (E.D. Mich. 1996) (invalidating durational limit on temporary election signs on private property); *Anderson*, 356 F.3d at 662 (invalidating political sign prohibition in buffer zone on private property); *Calchera*, 805 F.Supp. at 720 (invalidating ban of political posters and signs on private property due its "sweeping zone").

Mr. Frank and Grassfire seek to eradicate the First Amendment injuries attendant in section 22-26-113. That is, they seek to rid the law of its constitutional infirmities. Thus, they stand in mutual interest with others who wish to place political yard signs on their property, and who would wish to defend their First Amendment rights. It is in these types of situations where the Supreme Court has permitted use of the overbreadth doctrine with its related *jus tertii* standing because

of the harm that "others may be muted" due to the unwieldly reach of a law. *Broadrick*, 413 U.S. at 612.

A second reason the overbreadth doctrine should be invoked is due to the inherent difficulty of narrowing the law under review. With a host of constitutional frailties, all specifically articulated within the law, it is difficult to imagine how a court could narrowly construe or limit the reach of Wyo. Stat. § 22-26-113. The buffer zones reach too far, last too long, and capture speech irrelevant to protecting voting integrity—such as bumper stickers, yard signs on private property and signature gathering. *See Burson*, 504 U.S. at 210 n.13. The simplest remedy here is to declare the law facially invalid. As the Supreme Court noted in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984), facial invalidation is appropriate where the law before the court is "incapable of limitation."

Where a federal court faces an unconstitutional state statute, narrowing constructions are only permissible where they are reasonable and readily apparent. *Boos v. Barry*, 485 U.S. 312, 330-31 (1988). The Wyoming legislature made hodgepodge of the law following amendments in 1973, 1983, and 2018. Its reach has grown, its temporal length substantially increased, and piecemeal oddities have been added such as the bumper sticker and political sign bans. To construe the law such that it simply performs what *Burson* commands would take intricate redrafting

of its provisions. This is not, for example, as easy as changing "300 feet" to "100 feet" or excising a lone problematic clause. Rather, it would involve a veritable rewrite of the law, making it effective Swiss cheese legalese. This is a task best left to the Wyoming Legislature. Because no narrowing construction is reasonable or readily apparent, this Court should simply invalidate the law on its face.

Finally, the First Amendment overbreadth doctrine requires that courts examine if a substantial number of a law's applications are unconstitutional, "judged in relation to the statute's plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460, 473 (2010). The focus of an overbreadth inquiry is whether a challenged law damages a substantial amount of speech "not tied to the Government's interest. . . ." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002). This is usually done by examining whether there are a substantial number of applications that would damage free speech interests beyond the parties before the court. Here, the record of past and present enforcement of the law demonstrates the substantial overbreadth of section 22-26-113.

As to overbreadth concerning political signs, citizens have faced complaints for placing campaign signs on private property that is within a zone. *See, e.g.*, JA271-287 (excerpts of complaints). If a campaign sign is on private property within 100 yards of a polling place on Election Day, the owner is asked to remove the sign. JA228-229 (Munoz Depo. 24:18-25:3). If the owner is not home or is unavailable,

officials enter onto private property and remove the sign. JA234 (32:11-22); JA159 (SecState 30(b)(6) Depo. 25:5-20). Moreover, electioneering complaints have occurred for the past two decades in Laramie County within 100-yard zones. JA227-228 (Munoz Depo. 23:23-24:17). In the August 2020 primary in Laramie County, complaints of electioneering arose from signature gathering at the polling places at North Christian Church, the Storey Gym, and Laramie County Community College. JA232-233 (28:6-16; 29:6-14); *see* JA139, 141, 143. At the Pine Bluffs polling place, a complaint was lodged relating to election-related apparel. JA233 (29:15-18).

As to overbreadth relating to bumper stickers and signature gathering, during absentee voting at the Laramie County Government Complex "somebody parks in the area that we have to ask to leave." JA221 (Munoz Depo. 16:2-23). That is, someone "has a sticker on their truck, and they run into the building or something. Someone notices it, and they call the office, and we contact [them] . . . and ask them to move so it's not an issue." *Id.* (16:16-23). During the 2020 primary, signature gatherers were also asked to leave the no-electioneering zone around the Government Complex. JA222 (18:5-11). This has occurred in past election cycles as well. *See* JA148-150 (SecState 30(b)(6) Depo. 14:13-15:6; 16:11-25).

This Court is tasked to weigh the law's valid and invalid applications. It implements a buffer zone that triples the radius and creates a zone nine times as large

as the one upheld in *Burson*. The State has not disavowed enforcement of the law and is eager to respond to related speech complaints as they arise. As for its proper applications, section 22-26-113 would appear to be legitimate so far as it regulated actual electioneering on Election Day within a radius of 100 feet. But the zone challenged goes nine times beyond this legitimate application, adds political sign and bumper sticker bans, bans on signature gathering, and applies during absentee voting at a busy government complex. This all renders the law overbroad and presents an appropriate circumstance to facially invalidate it. This will give the Wyoming Legislature the opportunity to craft a new buffer zone mindful of constitutional constraints.

Conclusion

This Court is presented with myriad First Amendment problems in Wyo. Stat. § 22-26-113. The court below correctly ruled that Wyoming's 100-yard Election Day buffer zone and bumper sticker regulations are unconstitutional, and this Court should affirm those decisions. The Court should further find the law's signature gathering prohibition and 100-foot absentee buffer zone unconstitutional. Finally, with such a substantial number of unconstitutional applications compared to

Burson's legitimate sweep, the Court should rule that the statute is facially overbroad.

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Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i), because it contains 15,234 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the font size requirement in 10th Cir. R. 32(A), because this brief has been prepared in Times New Roman 14-point font in Microsoft Word 2016, which is a proportionally spaced typeface that includes serifs.

Dated: December 10, 2021

/s/ Stephen Klein
Stephen R. Klein

ADDENDUM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

NATIONAL BROADCASTING COMPANY, INC., CBS INC. and AMERICAN BROADCASTING COMPANIES, INC.,	)	
Plaintiffs,	)	
vs.	)	NO. C88-0320
KATHY KARPAN, in her official capacity as Secretary of State of the State of Wyoming, and JOSEPH MEYER, in his official capacity as Attorney General of the State of Wyoming,	)	
Defendants.	)	

ORDER ON REQUEST FOR PERMANENT INJUNCTION

This matter comes before the Court on plaintiffs' Motion for a Preliminary Injunction. The parties have agreed among themselves to submit the matter to the Court on the record as it currently stands. The parties also agreed that the trial on the merits should be combined with the hearing on the motion for a preliminary injunction, pursuant to Rule 65(a)(2), Fed. R. Civ. P. The Court having reviewed the record, and being fully advised in the premises, FINDS and ORDERS as follows:

The following facts are taken from the record and are

undisputed. Wyoming law provides that:

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

Wyo. Stat. § 22-26-113 (Supp. 1988).

The plaintiffs in this case are national broadcast networks engaged in the gathering and reporting of news to the public. As part of their coverage of national elections, plaintiffs conduct election day polls of voters as they leave voting places. These polls, often called exit polls, involve asking the voter to fill out a short questionnaire. The questions often involve demographic information as well as questions involving the political topics of the day. These questionnaires also contain questions pertaining to how the voter actually cast his or her vote.

The information obtained from these polls is used by plaintiffs in reporting on the election. The information is also used by the plaintiffs in analyzing and reporting on how and why people voted as they did. There is also evidence that the information is used by academics and scholars in researching and studying the political process.

The plaintiffs have brought this suit, alleging that the

above statute inferferes with their right to free speech as guaranteed by the First Amendment to the United States Constitution. Plaintiffs claim the statute will make it illegal for plaintiffs to conduct exit polls in connection with their news gathering activities. Plaintiffs are currently before the Court seeking a permanent injunction enjoining the defendants from enforcing the statute as it relates to canvassing or polling.

The Plaintiffs' Right to An Injunction

The Tenth Circuit has held that four prerequisites must be met before a court may issue a preliminary injunction: 1) There is a substantial likelihood the party requesting the injunction will prevail on the merits; 2) the moving party will suffer irreparable harm if the injunction is not granted; 3) the injury to the moving party if the injunction is not issued outweighs whatever damage the injunction would cause the non-moving party if the injunction is issued; and, 4) the public interest will not be harmed if the injunction is issued. See Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268, 1270 (10th Cir. 1988); Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 355 (10th Cir. 1986).

Where these four prerequisites have been resolved in favor of the moving party at a trial on the merits, a permanent

injunction may be issued. See Atomic Oil Co. of Oklahoma v. Bardahl Oil Co., 419 F.2d 1097, 1103 n.11 (10th Cir. 1969). The trial on the merits was held in this case. Therefore, to issue a permanent injunction in favor of plaintiffs, I must resolve the four prerequisites in favor of the plaintiffs. I will now discuss the prerequisites individually.

a. The merits.

The activity of exit polling requires a discussion between the individual taking the poll and the voter providing the answer. The discussion of political events is precisely the kind of discourse the First Amendment was intended to protect. See Daily Herald Co. v. Munro, 838 F.2d 380, 384 (9th Cir. 1988) (citing Brown v. Hartlage, 456 U.S. 45 (1982)). The Court concludes therefore, that polling as conducted by the plaintiffs in this case, is constitutionally protected speech under the First Amendment. Accord Daily Herald Co., supra, at 384; CBS Inc. v. Smith, 681 F.Supp. 794 (S.D. Fla., 1988); National Broadcasting Co. v. Cleland , 1:88-CV-320-RHH, slip op. (N.D. Ga. June 13, 1988; National Broadcasting Co. v. Colburg, No. CV 88-44-H-CCL, slip op. (D. Mont. June 2, 1988).

The Court also finds that the plaintiffs have proven that the statute infringes on the plaintiffs' right to exercise their

constitutionally protected right to conduct exit polling, as the statute proscribes polling within a one-hundred (100) yard radius of the voting location. This radius is likely to encompass public streets and sidewalks which "traditionally are open to the public for expressive purposes, including random interviews by reporters . . . ." Daily Herald Co., supra, 838 F.2d at 384.

The Court also finds that the statute in question is content-based because it "regulates a specific subject matter, the discussion of voting." Daily Herald, supra, 838 F.2d at 385. Where a statute regulates the content of speech in a public forum, like the public streets and sidewalks, it will be upheld only if the Court finds that "it is narrowly tailored to accomplish a compelling government interest . . . and is the least restrictive means available. Id. (citations omitted). In order for plaintiffs to prevail on the merits, the Court must determine that the statute in question is not narrowly tailored to accomplish a compelling government interest by the least restrictive means available. I turn now to the possible reasons the State might advance in justifying the statute.

To the extent the statute is designed to maintain order around the polling place, the statute is unconstitutionally broad. As the Ninth Circuit concluded when reviewing a statute

similar to Wyoming's: "[T]he statute prohibits all exit polling, including nondisruptive exit polling. Prohibiting nondisruptive exit polling therefore does not advance the state's interest, and also renders the statute overbroad because it applies to activities not implicating the interest." Daily Herald, supra, 838 F.2d at 385.

To the extent the the statute was intended to be a means for protecting voter privacy, again the statute is unconstitutional. Voters who wish to avoid discussing their vote may simply refuse to talk to the pollsters. See National Broadcasting Co. v. Colburg, supra. This implies that there is little need for the government to enact a statute as broad as the one-hundred yard restriction to protect voter privacy. The Court concludes, therefore, that this statute is not the least restrictive means of protecting the state's interest in protecting voters' privacy.

Finally, the statute is unconstitutional to the extent it is designed to encourage voter participation. The Court recognizes that states have felt compelled to take steps to insure voters in the Western part of the country will not feel as if their votes do not count because of early election result projections made by the media based on exit polls taken in the East. However, as the Ninth Circuit stated in addressing this argument: "[A] general

interest in insulating voters from outside influences is insufficient to justify speech regulation." Daily Herald, supra, 838 F.2d at 387. The Court concludes that protecting voter participation does not justify the infringement on plaintiff's First Amendment rights imposed by the one-hundred yard provision of § 22-26-113.

As no other possible justifications for the statute appear in the record, the Court now finds that plaintiffs have a constitutionally protected free speech interest that is infringed upon by this statute.

b. Irreparable harm.

"'To the extent that First Amendment rights are infringed, irreparable injury is presumed.'" Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1376 (10th Cir. 1981) (citations omitted), cert. dismissed, 456 U.S. 1001 (1982). Furthermore, plaintiffs seek to conduct polls at the upcoming general election. If they are hampered in their efforts, they will lose their ability to quickly and accurately report how and why the people of Wyoming voted. Given the unique advantages of exit polling, as revealed in the record, the Court concludes that if the plaintiffs lose their ability to conduct exit polling, they could not gather the same information through other means. The

Court also has doubts whether the harm of lost exit polling opportunities could be recompensed with money damages. Therefore, the Court concludes that failing to issue a permanent injunction would result in irreparable harm to the parties seeking the injunction.

c. Balance of the harms.

Having determined that the plaintiffs will be irreparably harmed if the injunction is not issued, the Court must now determine whether the harm plaintiffs face if the injunction is not issued, outweighs the harm the defendants will suffer should the injunction be issued.

Wyoming currently has on the statute books a provision that adequately protects the state's interest in insuring an orderly election. See Wyo. Stat. § 22-26-114 (1977). The Court also notes that any injunction in this case would only be targeted at the offensive language of § 22-26-113. The balance of the statute would remain intact and available for use by public officials in protecting the voting process. The Court concludes that an injunction in this case will leave the defendant with adequate means of insuring that there is a fair, orderly, and honest election. Because the defendants will be left with adequate means of carrying out their duties with regard to the election,

the Court concludes the injunction will not cause the defendants harm. Therefore, the plaintiffs will suffer harm if the injunction is not issued, that exceeds the harm defendants will suffer if the injunction is issued.

d. Public interest.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). Any injunction that this Court might issue in the furtherance of this purpose will certainly be in the public interest.

Therefore, in light of the above, the Court concludes that the four prerequisites for a preliminary injunction have been resolved in favor of the plaintiffs thereby entitling them to a permanent injunction. The next question the Court must address is the scope of the injunction.

Scope

"An injunction must be narrowly tailored to remedy the specific harm shown." Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 108 (D.C. Cir. 1976). For the Court to enjoin the 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. The offensive words of the statute read: "one hundred (100) yards of." The Court will enjoin the enforcement of these words. This leaves the enforceable language of the statute as follows:

> Electioneering too close to a polling place on election day consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signature to any petition or the canvassing or polling of voters within the building in which the polling place is located.

The enforceable language of the statute leaves the public sidewalks and streets, the traditional areas for election day discourse and news gathering, free for those activities. The remaining effective language also precludes the canvassing or polling of voters within the building housing the voting booths. The Court notes that the record does not reflect any contention that the areas within the polling building are traditionally used for the exchange of conversation or ideas concerning elections, nor have there been allegations that news gathering has traditionally occurred in these areas. The Court concludes

that the effective language of the statute will allow the state the ability to carry out its legitimate interest in running an orderly polling area, free from distractions. At the same time, this injunction will allow the plaintiffs to conduct their news gathering activities.

Therefore, it is

ORDERED that the defendants are hereby enjoined from enforcing the language of Wyo. Stat. § 22-26-113 (Supp. 1988) that reads: "one hundred yards of." The balance of the statute shall not be affected by this order.

Dated this 21st day of October, 1988.

CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF DIGITAL SUBMISSION

Counsel for Appellees hereby certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rules of Appellate Procedure 25(a)(5).

Counsel also certifies that the hard copies submitted to the Court are exact copies of the ECF filing of December 10, 2021.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 12.2.8079; Definitions version 97564 – 7.90482 [December 10, 2021]; Vipre engine version 5.6.7.7 – 3.0), and according to the program, is free of viruses.

Dated: December 10, 2021

/s/ Stephen Klein
Stephen R. Klein

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2021, a true and exact copy of the foregoing was electronically filed with the United States Court of Appeals for the Tenth Circuit and served via the Court's CM/ECF filing system.

Dated: December 10, 2021

/s/ Stephen Klein
Stephen R. Klein