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

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

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

APPELLANT/CROSS-APPELLEES'
REPLY AND RESPONSE BRIEF

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Oral Argument Requested

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STATEMENT OF ISSUES ON RESPONSE

I. Did the district court correctly determine that prohibiting electioneering within 100-feet of a polling place entrance on absentee voting days complied with *Burson v. Freeman*?

II. Did the district court correctly determine that signature gathering was a form of electioneering and subject to restrictions near the entrance to a polling place?

III. Did the district court correctly decline to address Frank and Grassfire's third-party overbreadth claims?

SUMMARY OF THE ARGUMENTS

I. Reply Argument

As addressed in the government officials' opening brief, the district court erred in its order invalidating Wyo. Stat. Ann. § 22-26-113 for four reasons: (1) Frank and Grassfire's 42 U.S.C. 1983 claims were barred by Eleventh Amendment immunity; (2) Frank and Grassfire lacked Article III standing to bring their pre-enforcement claims; (3) the 300-foot zone around the entrance to a polling place on general, special, and primary election days complied with *Burson v. Freeman*, 504 U.S. 191 (1992); and (4) *Burson* expressly determined states could regulate campaign signs, including bumper stickers, near polling places. (Appellant Br. at 21-37).

First, 42 U.S.C. § 1983 and *Ex Parte Young*, 209 U.S. 123 (1908), claims are two separate actions. Frank and Grassfire improperly seek to bring an *Ex Parte Young* claim through their 42 U.S.C. § 1983 claims. Even if Frank and Grassfire properly brought an *Ex Parte Young* claim, they seek relief other than solely prospective injunctive relief. In addition, the Secretary of State and Laramie County Clerk do not have any enforcement authority over Wyo. Stat. Ann. § 22-26-113, and thus, they are not the proper officials for an *Ex Parte Young* claim because they did not take any action for the court to enjoin.

Second, Frank and Grassfire did not demonstrate all the requirements necessary to establish Article III standing. As it relates to the injury-in-fact requirement, Frank and Grassfire did not demonstrate that they have engaged in the type of speech affected by the challenged government action that is necessary to bring a pre-enforcement action. *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006). In addition, they did not demonstrate that any alleged injury-in-fact is traceable to the named governmental officials because the Secretary of State and Laramie County Clerk do not have any enforcement authority over Wyo. Stat. Ann. § 22-26-113 and the Laramie County District Attorney has never threatened to enforce the statute against Frank or Grassfire.

Third, Wyo. Stat. Ann. § 22-26-113 satisfies constitutional scrutiny based on *Burson*. Specifically, the 300-foot zone applicable on general, special, and primary election days is not akin to the absolute prohibitions on speech that the *Burson* plurality recognized as unconstitutional. Instead, Wyo. Stat. Ann. § 22-26-113 is comparable to the statute considered and approved in *Burson*. Furthermore, the record contains sufficient evidence to demonstrate that a 300-foot zone on primary, general, or special election days is necessary to protect voters from confusion and harassment. (JA0386, 391).[1] As a result, the statute meets the framework established by *Burson,* and this Court should reverse the district court's decision.

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

Finally, Frank and Grassfire incorrectly attempt to distinguish bumper stickers from other types of campaign signs. All campaign signs present the same potential concerns, and under *Burson*, states may regulate campaign signs and other forms of electioneering to protect voters from confusion, undue influence, and to preserve the integrity of the election process. *Burson*, 504 U.S. at 211. As a result, the district court incorrectly held the Wyo. Stat. Ann. § 22-26-113 was unconstitutional to the extent it regulated bumper stickers.

II. Response Argument

In their principal brief, Frank and Grassfire argue the district court incorrectly upheld portions of Wyo. Stat. Ann. § 22-26-113 for three reasons. First, Frank and Grassfire argue that the statute impermissibly categorizes signature gathering as electioneering. (Appellee/Cross-Appellant Br. at 53-55). But signature solicitation presents the same potential harms as other forms of electioneering, and courts have applied the *Burson* modified burden of proof to statutes prohibiting signature solicitation near polling places. *See e.g.*, *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1214 (11th Cir. 2009). Accordingly, this Court should find that *Burson* applies to signature solicitation and that Wyo. Stat. Ann. § 22-26-113 meets the modified burden of proof applied in *Burson*.

Second, Frank and Grassfire argue that the temporal duration of the absentee voting period is too long, resulting in a significant impingement on speech.

(Appellee/Cross-Appellant Br. at 55-58). Frank and Grassfire presented no evidence that electors choosing to vote in person during the absentee voting period are entitled to any lesser protection than those who vote on an election day. Additionally, the distance in which electioneering is prohibited near a polling place during the absentee voting period is the exact same distance considered and approved in *Burson*. *Burson*, 504 U.S. at 211. Accordingly, Frank and Grassfire's claims are without merit.

Finally, Frank and Grassfire argue that the district court improperly failed to consider their overbreadth claims. (Appellee/Cross-Appellant Br. at 58-64). But Frank and Grassfire have not demonstrated they properly brought *jus tertii* claims, and they have not shown that a substantial number of the statute's applications are unconstitutional. Thus, they have not demonstrated that Wyo. Stat. Ann. § 22-26-113 is overbroad and should be facially invalidated.

REPLY ARGUMENT

I. Frank and Grassfire's 42 U.S.C. § 1983 claims are barred by Eleventh Amendment immunity.[2]

Frank and Grassfire argue that because their 42 U.S.C. § 1983 claims also include a request for injunctive relief, those claims are not barred by Eleventh

[2] Defendant Debra Lee, Laramie County Clerk, did not join in Defendant Buchanan and Defendant Manlove's Eleventh Amendment immunity argument in the district court and likewise does not join in this portion of Appellants/Cross-Appellee's Reply and Response Brief on appeal.

Amendment immunity. (Appellee/Cross-Appellant Br. at 25). Specifically, they argue that § 1983 is the vehicle to bring an *Ex Parte Young* claim and that the two types of claims should not be analyzed separately. (Appellee/Cross-Appellant Br. at 26). Frank and Grassfire also argue that attorney's fees and costs under 42 U.S.C. § 1988 are not money damages, and therefore, are not barred by Eleventh Amendment immunity. (Appellee/Cross-Appellant Br. at 26-27).

There is no dispute that litigants may sue state officers for prospective injunctive relief under *Ex Parte Young*. *Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010) (citing *Ex Parte Young*, 209 U.S. at 159-60). The issue in this case, however, is whether Frank and Grassfire have properly brought an *Ex Parte Young* claim by pleading an action under § 1983.

Here, the complaint expressly states the claims are brought solely under 42 U.S.C. § 1983—there is no reference in the complaint to *Ex Parte Young*. (JA0014-0024). The only reference to injunctive relief in the complaint is in the "prayer for relief" section, which provides: "preliminary and permanent injunctive relief pursuant to 42 U.S.C. § 1983 against enforcement of Wyo. Stat. § 22-26-113." (JA0024). Through their § 1983 claims, Frank and Grassfire now argue that they have properly brought claims under *Ex Parte Young*.

As stated in the government officials' opening brief, the *Ex Parte Young* doctrine is a judicially created action, not a statutory cause of action under 42 U.S.C.

§ 1983. *Elephant Butte Irrigation Dist. of N.M. v. Dep't of the Interior*, 160 F.3d 602, 607-08 (10th Cir. 1998). If Congress had intended § 1983 to be a vehicle for individuals to seek prospective injunctive relief against state officials, it would have said so. Had § 1983 been the vehicle to seek prospective injunctive relief against state officials, there would have been no need for the Supreme Court to create a judicial cause of action in *Ex Parte Young* because there already would have been a statutory cause of action. In addition, officials acting in their official capacities are not "persons" subject to suit under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Accepting Frank and Grassfire's argument that § 1983 is the vehicle to bring an *Ex Parte Young* claim would require this Court to find that the named governmental officials were "persons" subject to suit under § 1983. As a result, Frank and Grassfire's § 1983 claims seeking prospective injunctive relief against governmental officials are inappropriate.

If this Court finds Frank and Grassfire have pleaded claims under *Ex Parte Young*, the question is whether those claims are barred by Eleventh Amendment immunity. Under *Ex Parte Young*, litigants may only seek prospective injunctive relief for violations of federal law. *Elephant Butte*, 160 F.3d at 607-08. When considering whether a claim for equitable relief is barred by Eleventh Amendment immunity, the operative consideration is whether the claimant is "seeking to impose

a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). If so, the claim is barred. *Id.*

While Frank and Grassfire do not seek money damages for alleged past wrongs, they seek costs and attorneys' fees associated with obtaining the prospective injunctive relief under 42 U.S.C. § 1988. (Appellee/Cross-Appellant Br. at 27). Those claims are not just claims for prospective injunctive relief—they are claims that must be paid from the state treasury. *Jordon v. Gilligan*, 500 F.2d 701, 704-05, 709-10 (6th Cir. 1974) (holding the court did not "have the power to award attorneys' fees against a state or its officials acting in their official capacities in a suit brought under 42 U.S.C. § 1983" because those claims were barred by Eleventh Amendment immunity). Moreover, attorneys' fees and costs under 42 U.S.C. § 1988 are only available in actions under the laws enumerated in subsection (b), including 42 U.S.C. § 1983. 42 U.S.C. § 1988(b). As discussed above, an *Ex Parte Young* claim is not brought under 42 U.S.C. § 1983. Thus, attorneys' fees and costs under 42 U.S.C. § 1988 are not proper in an *Ex Parte Young* action.

Additionally, Frank and Grassfire argue the Secretary of State and the Laramie County Clerk have "some connection to the enforcement of [Wyo. Stat. Ann. § 22-26-113]" and as a result, claims against these officials are proper under *Ex Parte Young*. (Appellee/Cross-Appellant Br. at 26). In support, Frank and Grassfire

cite *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014). But *Kitchen* is distinguishable.

Kitchen involved a challenge to the validity of Utah's same sex marriage ban. *Id.* at 1200. In that case, the plaintiffs brought an action against the Clerk of Salt Lake County, the Governor, and the Attorney General. *Id.* While not raised by the parties, the court analyzed whether each defendant had a connection with enforcement of the law sufficient to support Article III standing. *Id.* at 1201.

First, the Court found the county clerk was the official charged with issuing marriage licenses and had a clear connection with enforcing the statute. *Id.* at 1202. Second, the court found the Governor was statutorily charged with "supervis[ing] the official conduct of all executive and ministerial officers" and "see[ing] that all offices are filled and the duties thereof performed." *Id.* at 1202-03. Because of his oversight authority, the court found the Governor was sufficiently connected to enforcing the marriage ban. *Id.* at 1203. Finally, the court found the Attorney General was required to "exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices" and "when required by the public service or directed by the governor, assist any county, district, or city attorney in the discharge of his duties." *Id.* at 1202 (citations omitted). Knowingly issuing a license for a prohibited marriage is a misdemeanor in Utah and any charges would be filed by a county or district attorney under the supervision of the Attorney

General. *Id.* Thus, the Court found that all three defendants had a sufficient connection with enforcement of the law to support Article III standing. *Id.* at 1202-03.

Unlike the administrative task of issuing marriage licenses in Utah, violating Wyo. Stat. Ann. § 22-26-113 is a misdemeanor offense under Wyo. Stat. Ann. § 22-26-112(a)(i). Although the Secretary of State is the "chief election officer" in the state and the Laramie County Clerk is the "chief election officer" over Laramie County (Wyo. Stat. Ann. § 22-2-103), neither have any authority to issue citations or prosecute crimes.[3] Additionally, neither official has taken, or threatened to take, any enforcement action against Frank or Grassfire—notably because they have no legal authority to do so. (JA0319, 352, 367). Even if the Secretary of State and the Laramie County Clerk had disavowed any intent to "enforce" Wyo. Stat. Ann. § 22-26-113, it would not have prohibited local law enforcement from citing individuals who violated the statute. Neither official has authority to direct local law enforcement or local prosecutors to pursue or to prosecute individuals who electioneer within the proscribed zone. Thus, the role of "chief election officer" has

[3] The Laramie County District Attorney, of course, does have prosecution authority over Wyo. Stat. Ann. § 22-26-113—thus, this argument does not apply to her. Wyo. Stat. Ann. § 9-1-804(a) ("[E]ach district attorney has the **exclusive jurisdiction** to . . . [a]ct as prosecutor for the state in all felony, misdemeanor and juvenile court proceedings arising in the counties in his district, and prosecute such cases . . . .") (emphasis added).

no bearing on the enforcement of a criminal statute. While there is no dispute that both have a connection to elections and oversee elections according to their statutory duties, those duties do not include overseeing criminal prosecutions.

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

II. Frank and Grassfire lack Article III standing.

Frank and Grassfire allege that they satisfy all three requirements necessary to demonstrate Article III standing for pre-enforcement claims and that the district court properly found they had standing. (Appellee/Cross-Appellant Br. at 29-35). But they misconstrue the requirements necessary to demonstrate standing for a pre-enforcement claim.

A. Frank and Grassfire have not demonstrated an injury-in-fact.

First, Frank and Grassfire did not demonstrate that they had a sufficient intention to engage in conduct proscribed by the statute. This Court has stated that

> plaintiffs in a suit for prospective relief based on a 'chilling effect' on speech can satisfy the requirement that their claim of injury be 'concrete and particularized' by (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced. Though evidence of past activities obviously cannot be an indispensable element—people have a right to speak for the first time—**such evidence lends concreteness and specificity to**

> **the plaintiffs' claims, and avoids the danger that Article III requirements be reduced to the formality of mouthing the right words. If the plaintiffs satisfy these three criteria, it is not necessary to show that they have specific plans or intentions to engage in the type of speech affected by the challenged government action.**

Walker, 450 F.3d at 1089 (emphasis added). All three *Walker* criteria are necessary to establish an injury-in-fact in a pre-enforcement action. *Id.*

Frank and Grassfire's argument ignores an essential portion of this Court's analysis in *Walker*—that evidence of past conduct is necessary to show an injury is "concrete and particularized." *Id.* Here, the record contains no evidence that Frank has ever displayed or distributed campaign materials or otherwise engaged in electioneering near a polling place in any other state. Instead, Frank has only ever placed yard signs and distributed campaign literature door-to-door. (JA0313). Moreover, Frank has never been asked to move outside of a buffer zone or been threatened with prosecution for electioneering within a buffer zone in any state. (JA0318-19).

As it relates to Grassfire, the record demonstrates that it has never provided signature gathering services at any location in Wyoming. (JA0345-48). Additionally, a Grassfire designee testified that, since its formation in January 2020, he did not believe Grassfire had placed signature gatherers near polling places in any state. (JA0351). As a result, Frank's and Grassfire's activities fall short of the

evidence necessary to meet the first *Walker* criterion—that they have engaged in the type of speech affected by Wyo. Stat. Ann. § 22-26-113. *Walker*, 450 F.3d at 1089.

The second *Walker* criterion requires Frank and Grassfire to present "affidavits or testimony stating a present desire, though no specific plans, to engage in [] speech [prohibited by the statute." *Id.* Frank and Grassfire arguably meet the second criterion because the record demonstrates they both have provided testimony stating a present desire to engage in an activity proscribed by the statute. *Id.* (JA0018, 309-13; 345).

But Frank and Grassfire did not demonstrate the third criterion—that they have no intention to engage in those activities due to a **credible threat** of prosecution. *Walker*, 450 F.3d at 1089 (emphasis added). To establish the third *Walker* criterion, Frank and Grassfire essentially argue that if the government official has not disavowed an interest in enforcing a law, then any possible fears of prosecution are reasonable. (Appellee/Cross-Appellant Br. at 32-33). But this is an incorrect assertion.

Most pre-enforcement cases arise from a threat of criminal prosecution. *Walker*, 450 F.3d at 1089-90. A plaintiff must offer objective evidence to support the allegation of a credible threat of prosecution. *Phelps v. Hamilton*, 122 F.3d 1309, 1327 (10th Cir. 1997).

Walker did not involve a criminal statute or threat of criminal prosecution, but instead involved a challenge to a state constitutional requirement that a supermajority (two-thirds) vote was required for initiatives related to wildlife while only a majority vote was required for other types of initiatives. *Walker*, 450 F.3d at 1085. The *Walker* Court found there was no question on whether the law would be enforced against the plaintiffs because any initiative campaign involving wildlife management would be subject to the constitutional supermajority requirement. *Id.* at 1092. As a result, the court found a credible threat of enforcement. *Id.*

Here, it is undisputed that neither Frank nor Grassfire have ever been charged with electioneering near a polling place, prosecuted under the statute, or directly threatened with prosecution. Additionally, the record reflects that, in over a hundred years, only one person has been cited for violating Wyo. Stat. Ann. § 22-26-113. (JA0292). Further, the video of the encounter that led to that sole citation demonstrates local law enforcement's desire not to issue a citation to the individual. (JA0289). Unlike *Walker*, there exists a question about whether the statute would be enforced against Frank or Grassfire and neither has presented sufficient objective evidence demonstrating a credible threat of enforcement.

There is no dispute that the Laramie County District Attorney has enforcement authority over criminal misdemeanor statutes, but she has never threatened action against Frank or Grassfire or against anyone engaging in the conduct they describe

as part of their future plans. (JA319, 352, 364, 367). As it relates to the Secretary of State or Laramie County Clerk, any avowals are meaningless because they do not enforce the law. As a result, Frank and Grassfire have not demonstrated a "plausible claim that they presently have no intention to [act] *because* of a **credible threat** that the statute will be enforced" by any of the named government officials, and as a result, they have not demonstrated an injury-in-fact to support Article III standing. *Walker*, 450 F.3d at 1098 (some emphasis added).

B. Any alleged injury-in-fact is not traceable to the named officials.

Even if this Court finds that Frank and Grassfire have sufficiently demonstrated an injury-in-fact, they both have not shown that any alleged injury is traceable to the challenged conduct of the government officials. *Id.* at 1089. "The causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Kitchen*, 755 F.3d at 1201. Frank and Grassfire argue that the Secretary of State and Laramie County Clerk have "some connection" with the enforcement of Wyo. Stat. Ann. § 22-26-113, thus any alleged injury-in-fact is traceable to those officials. (Appellee/Cross-Appellant Br. at 33-34).

As discussed above, because the Secretary of State and Laramie County Clerk have no enforcement authority, any alleged injury Frank or Grassfire would suffer as a result of the statute or a subsequent citation, has nothing to do with those officials. Unlike the defendants in *Walker* who all had a role in denying a marriage

license, the Secretary of State and Laramie County Clerk have no role in citing or prosecuting an individual for violating Wyo. Stat. Ann. § 22-26-113. As a result, no causal relationship exists between the alleged injury and the Secretary of State and Laramie County Clerk. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1155 (10th Cir. 2005).

While the Laramie County District Attorney may have a connection to prosecuting citations issued for violating the electioneering statute in Laramie County, she would have no connection with violations in other counties in the state. For alleged injuries occurring in Laramie County, Frank and Grassfire arguably satisfy the traceability requirement necessary to demonstrate standing as it relates to the Laramie County District Attorney.

C. Any alleged injury-in-fact is not redressable by the relief Frank and Grassfire seek.

Finally, Frank and Grassfire argue that the state officials' failure to address redressability means the argument is waived. (Appellee/Cross-Appellant Br. at 29 n.5). But Article III standing is jurisdictional and cannot be waived by the parties. *Estate of Harshman v. Jackson Hole Mountain Resort Corp*, 379 F.3d 1161, 1164 (10th Cir. 2004) (citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). It can be raised by the parties or by the court *sua sponte*. *Id.*

Contrary to Frank and Grassfire's assertion, all three elements are necessary to demonstrate Article III standing and failure to demonstrate one of the elements is

fatal. *Nova Health Sys.*, 416 F.3d at 1154 ("At the summary judgment stage, the plaintiff must set forth by affidavit or other evidence specific facts that, if taken as true, establish each of [the Article III standing] elements."). As discussed above, Frank and Grassfire have not met the injury-in-fact and traceability elements of Article III standing. *See* supra section II.A and B. Consequently, it is unnecessary to address redressability because, without the first two elements, Frank and Grassfire are unable to demonstrate standing sufficient to invoke federal jurisdiction.

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

The crux of Frank and Grassfire's argument is that the State must provide evidence to support a larger buffer zone than was approved in *Burson* and that, because the State failed to do so, the district court properly found the 100-yard Election Day zone violated the First Amendment. (Appellee/Cross-Appellant Br. at 41); (JA0416-17). Specifically, Frank and Grassfire assert "the State offered nothing to suggest that Wyoming was under any heightened threat of voter coercion or confusion" when the zone was extended to 100 yards in 1973. (Appellee/Cross-Appellant Br. at 41). But their assertion, and the district court's conclusion, contradicts *Burson*.

Burson is clear—"[a]s a facially content-based restriction on political speech in a public forum, [the statute] must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and

that it is narrowly drawn to achieve that end.'" *Burson*, 504 U.S. at 198 (citations omitted). Due to the history behind election reforms, the plurality applied a modified burden of proof—instead of being required to prove the zone is "perfectly tailored to deal with voter intimidation and election fraud," the regulation must be "reasonable and [] not significantly *impinge* on constitutionally protected rights." *Id.* at 208-09 (citation omitted). This modified burden only applies when the "First Amendment right threatens to interfere with the act of voting itself" or where the "challenged physical activity physically interferes with electors attempting to cast their ballot." *Id.* at 209 n.11.

There is no dispute that the *Burson* plurality held that regulating electioneering near polling places is necessary to serve a compelling state interest. *Id.* at 206. Instead, the question is whether the area prohibited by Wyo. Stat. Ann. § 22-26-113 is narrowly drawn, and in light of the modified burden, is "reasonable and does not significantly *impinge* on constitutionally protected rights." *Id.* at 209.

Neither the modified burden of proof, nor the *Burson* plurality's analysis, require the State to present evidence to demonstrate why a regulation prohibits electioneering at a greater distance than that considered in *Burson*. *Id.* at 208. Requiring an additional showing directly contradicts the rationale for a modified burden of proof—it would require "that a State's political system [] sustain some level of damage before the legislature could take corrective action." *Id.* at 209.

Frank and Grassfire's argument solely focuses on the numerical size of the zone considered in *Burson* (100 feet) compared to Wyo. Stat. Ann. § 22-26-113 (100 yards/300 feet on an election day) and they simply conclude that the statute censors "a lot of political advocacy" and that the impingement on their rights is "significant." Appellee/Cross-Appellant Br. at 42, 47).

While the *Burson* plurality did not create a bright-line rule on what numerical distance prohibiting electioneering from the entrance to a polling place became unconstitutional, it did provide adequate guidance: "[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. This statement is critical to the analysis. *Mills* involved a statute making it a crime "to do **any** electioneering or to solicit **any** votes . . . in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidate or propositions is being held." *Mills v. Alabama*, 384 U.S. 214, 216 (1966) (emphasis added) (citation omitted). The statute at issue in *Mills* barred **all** electioneering on election day, regardless of proximity to a polling place. *Id.*

The 100-foot prohibition in *Burson* and the 100-yard Election Day prohibition in Wyo. Stat. Ann. § 22-26-113 do not come close to an absolute ban on electioneering. To the contrary, the limited area in which electioneering is prohibited

is minimal. To put it into perspective, the total area of a 100-yard buffer zone is approximately 282,743 sq. ft. In 2020, the Secretary of State's Office issued a directive for each county to have no more than seven Election Day polling places due to COVID-19. (JA0154-55). Counties were able to request additional polling places, but assuming each of the 23 counties had seven, there would have been a total of 161 polling places for the 2020 general election. (JA0154-55). Assuming each polling place had two entrances, and that each zone did not overlap, the total area in which electioneering was prohibited was approximately 91,043,246 sq. ft. or 3.2657 sq. mi.[4] The total area of the State of Wyoming is 97,813 sq. mi. G. Raymond Webster and Gregory Lewis McNamee, "Wyoming." *Encyclopedia Britannica.*[5] Thus, the total area in which electioneering was prohibited during the 2020 General election encompassed approximately 0.00334% of the total area of the state—less than four thousandths of a percent.[6] In light of the concrete numbers, Frank and

[4] The area of a circle is calculated by the following equation: Area = πr^2. Because Wyo. Stat. Ann. § 22-26-113 prohibits electioneering within 100 yards/300 feet of a polling place entrance on election days, 300 feet was used as the radius. Assuming each polling place has two public entrances and each county had seven polling places, the total area was calculated by the following equation: Area = $2*161*(\pi 300^2)$.

[5] https://www.britannica.com/place/Wyoming-state (Mar. 22, 2021)

[6] The total percentage identified by this calculation is higher than actual area outside of the polling place in which electioneering is prohibited because the total prohibited area includes the physical building where the polling place is located. *See* (JA0136-0143).

Grassfire's assertion that the 100-yard restriction is the measurable distance from the polls that "effectively become[s] an impermissible burden akin to the statute struck down in *Mills*" is unpersuasive. *Burson*, 504 U.S. at 210. It is, however, exactly the type of "minor geographic limitation" that the *Burson* plurality held was not a "significant impingement" to First Amendment rights. *Id.*

Importantly, contrary to Frank's assertion, the area in which electioneering is prohibited near polling places under Wyo. Stat. Ann. § 22-26-113 is necessary to protect voters from coercion or confusion. (Appellee/Cross-Appellant Br. at 43). While Frank and Grassfire cite the video of Jennifer Horal as evidence of the statute's alleged significant impingement of free speech, the record demonstrates the law was protecting voters at a distance greater than 100 feet from harassment and voter confusion.

Specifically, a witness reported to law enforcement that Horal had a sign directing "registered voters" toward her and that she was harassing election staff. (JA0386, 391). Voter confusion and harassment are exactly the harms the 100-yard buffer zone was intended to prevent. Even after Horal was asked to move beyond the 100-yard line, she was still able to perform her signature gathering activities within the same parking lot of the polling place. (JA00385, 390). Voters or other persons entering or exiting the parking lot could have stopped to engage with her and sign her petition if they chose. (JA0292). The evidence in the record

demonstrates the zone established by Wyo. Stat. Ann. § 22-26-113 was necessary to protect voters inside the buffer zone from being subjected to harassment and confusion.

Frank and Grassfire also assert that Horal's success of signature gathering was less effective than it was in a previous location. (Appellee/Cross-Appellant Br. at 43). While Horal may have gathered less verified signatures outside of the restricted area, neither Frank nor Grassfire cite any authority, nor can the governmental officials identify any, suggesting that the chance of success in gathering signatures in any particular location is relevant to a constitutional inquiry.

In addition, Frank and Grassfire argue that there are less restrictive alternatives to a 100-yard buffer zone that justify invalidating the statute. (Appellee/Cross-Appellant Br. at 44). Specifically, they assert that absentee voting by mail is an alternative for voters "who do[] not wish to be solicited for a signature or to hear last-minute campaigning" and those voters "may vote at his or her leisure in the privacy of one's home." (Appellee/Cross-Appellant Br. at 44). While there is no dispute that the right to vote and the right to engage in political speech are competing First Amendment interests, it appears Frank and Grassfire prioritize the right to engage in political speech over the right to vote free from harassment by asserting that voters must choose another forum if they do not want to be bothered while voting in person. (Appellee/Cross-Appellant Br. at 44).

"No right is more precious in a free county than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Burson*, 504 U.S. at 199 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). Electors should not be compelled to vote absentee in order to avoid harassment while exercising their right to vote. Frank and Grassfire's assertion that the ability to vote by mail negates the compelling state interest in prohibiting electioneering near a polling place should be afforded no weight, and this Court should disregard it.

Finally, Frank and Grassfire assert that because police are not prohibited near polling places in Wyoming, the 100-yard zone on election day is unnecessary. (Appellee/Cross-Appellant Br. at 45). In support, they cite *Burson* and argue that crimes such as voter intimidation are a less restrictive means to prevent voter intimidation and harassment. (Appellee/Cross-Appellant Br. at 45). But Frank and Grassfire misconstrue *Burson*.

The *Burson* plurality explicitly stated that "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Burson*, 504 U.S. at 207-08. Regardless of whether police may or may not be present, intimidation and interference statutes only serve to sanction the most severe acts, and even then, only after the harm has already occurred. *Id.*

Frank and Grassfire's position assumes the lack of a statute prohibiting police presence means that there is police presence at all polls to ensure voters are not subjected to intimidation or harassment. But nothing in the record suggests police are present at all polling places to prevent voter intimidation and harassment. Even if it were true, as the plurality suggested in *Burson*, police presence may only deter blatant acts. *Id.* at 207 ("[U]ndetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken."). Any assertion that the absence of a law prohibiting police presence near polling places means the area in which electioneering is prohibited should be reduced lacks merit.

IV. The district court incorrectly held prohibiting bumper stickers near polling places violated the First Amendment.

Frank and Grassfire argue that the district court correctly held that regulating bumper stickers was "outside the scope of what was considered 'electioneering' in *Burson*" because bumper stickers on a vehicle cannot lead to voter intimidation or election fraud and is therefore a violation of the First Amendment. (Appellee/Cross-Appellant Br. at 48); (JA0418). In support, they argue that government officials were required to "produce evidence or legislative reasoning supporting the need to ban an economical and efficient way for the average citizens to communicate their political views." (Appellee/Cross-Appellant Br. at 49). Frank and Grassfire assert that there is no "lengthy history of voter intimidation somehow tied to nefarious bumper stickers" and 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." (Appellee/Cross-Appellant Br. at 49-50). But their argument and the district court's analysis contradicts *Burson*.

Contrary to Frank and Grassfire's assertions, the Tennessee law in *Burson* encompassed bumper stickers because it prohibited campaign signs and a bumper sticker is nothing more than a campaign sign that is affixed to a vehicle. *Burson*, 504 U.S. at 193. While the plurality declined to entertain the specific facial challenge to bumper stickers (*id.* at 210 n.13), the oral argument transcript supports the conclusion that the statute regulated bumper stickers as a form of campaign sign:

> Question: Would the statute prohibit a person from driving down a public street that was within the 100-foot limit with a bumper sticker on the car that was in support of a candidate?
>
> Mr. Herbison: This statute would prohibit that. That would clearly be the display of campaign material.

Transcript of Oral Argument at 22, *Burson v. Freeman*, 504 U.S. 191 (1992) (No. 90-1056).[7]

> Question: And a bumper sticker on a car driving by on the street that happens to fall within the 100-foot limit?
>
> Mr. Burson: Yea. That is a hypothetical - -
>
> Question: Covered by the statute.

[7] https://www.supremecourt.gov/pdfs/transcripts/1991/90-1056_10-08-1991.pdf

> Mr. Burson: We would suggest that if someone were to get arrested for that, you'd have to look at it on an as-applied basis. We don't think that it implicates this statute.
>
> Question: There's no exception in the statute to take it out of it.
>
> Mr. Burson: No. There's not an exception to the statute.
>
> Question: Or the car that parks in the parking lot within the 100-foot limit and has bumper stickers on it for candidates.
>
> Mr. Burson: That is not an exception in the statute.
>
> Question: Of course - - perhaps with good reason. I mean, some people - - you know, maybe in Chicago, at least, somebody might intentionally drive down the street with a bumper sticker on, or intentionally park his car within 100 feet of the polling place. That might happen, mightn't it?
>
> Mr. Burson: Exactly. And what you're looking at is, is it campaign activity. Are they doing this to advocate the candidacy within that zone. That's exactly what we're looking at. Certainly, there may well be a due process problem in an as-applied situation or some other place as applied, but it doesn't implicate this statute facially.

Id. at 33-35.

The transcript demonstrates that at least some justices believed the Tennessee statute, which prohibited campaign material, would apply to bumper stickers because of the lack of exception to remove bumper stickers from the term campaign material. *Id.* During oral argument, Burson's statement that bumper stickers may not be encompassed by the statute was due to the fact that a bumper sticker may not be advocating "for or against any person or political party or position on a question"

and thus may not be prohibited by the statute. *See Burson*, 504 U.S. at 193-94 (quoting Tenn. Code Ann. 2-7-111(b) (1991)). Burson's statement was not that bumper stickers are not a type of campaign sign or material, but that whether a bumper sticker would be regulated by the statute would depend on whether it was "campaign activity." Transcript of Oral Argument at 34, *Burson v. Freeman*, 504 U.S. 191 (1992) (No. 90-1056). In the absence of an exception removing bumper stickers, the statute would have applied to bumper stickers considered to be campaign materials.

Unlike the Tennessee statute in *Burson*, the Wyoming Legislature chose to treat bumper stickers more favorably than other forms of campaign signs and to provide an exemption for bumper stickers in limited circumstances. Wyo. Stat. Ann. § 22-26-113. Bumper stickers not meeting the limited exception are treated as any other campaign sign and are considered electioneering under the statute. *Id.* Regulating all forms of campaign signs is consistent with the *Burson*, which recognized that states may regulate campaign signs and other material to protect voters from confusion, undue influence, and preserving the integrity of the election process. *Burson*, 504 U.S. at 198-99. Because bumper stickers, or campaign signs affixed to vehicles, can have the same effect as any other campaign sign, the district court incorrectly held that regulating bumper stickers near polling places facially violated the First Amendment.

Finally, Frank argues that the 100-foot absentee buffer zone prevented him from using bumper stickers and signs completely on absentee voting days. (Appellee/Cross-Appellant Br. at 51-52). He argues that the buffer zone's coverage of various thoroughfares is so substantial that it "censors Mr. Frank's speech even beyond the zones." (Appellee/Cross-Appellant Br. at 52).

Contrary to Frank's arguments, the record contains a map with the applicable restricted area. (JA0030). Only two small areas of two streets are encompassed within the zone—a small portion of Carey Avenue between West 19th Street and West 20th Street, and a small portion of West 20th Street between Carey Ave and Pioneer Avenue. (JA0030). Frank's attempt to characterize Wyo. Stat. Ann. § 22-26-113 as an absolute prohibition on bumper stickers while absentee voting was available is unsupported by the record. Because the statute is less restrictive than considered in *Burson,* and any infringement of Frank's First Amendment rights is minimal, this Court should find the statutory regulation of bumper stickers is reasonable and does not rise to the level of significant infringement of his First Amendment rights. *Burson*, 504 U.S. at 210.

RESPONSE ARGUMENT

I. Regulating signature gathering near polling places is appropriate under *Burson*.

Grassfire[8] argues that that the district court erred in finding that prohibiting signature gathering within the electioneering zone was appropriate under *Burson*. (Appellee/Cross-Appellant Br. at 53). Specifically, Grassfire cites the *Burson* plurality's statement that "there is no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses." *Burson*, 504 U.S. at 207. But Grassfire misconstrues the plurality's statement. Because petitioning and signature solicitation raise the same concerns as other forms of electioneering that are specific to candidates on the ballot, this Court should apply the reasoning in *Burson* to prohibitions on signature gathering near a polling places as courts in other jurisdictions have done.

In *Citizens for Police Accountability Political Committee v. Browning*, the Court of Appeals for the Eleventh Circuit reviewed a Florida statute that prohibited soliciting voters "within 100 feet of the entrance to any polling place . . . or early voting site." 572 F.3d 1213, 1215 (11th Cir. 2009) (citing Fla. Stat. §102.031(4)(a) (2008)). The statute defined "solicit" to include "seeking or attempting to seek a signature on any petition." *Id.* (citing Fla. Stat. § 102.031(4)(b) (2008)). Notably, the

[8] It appears that only Grassfire advances this argument related to signature gathering. (Appellee/Cross-Appellant Br. at 53-55).

plaintiffs only sought to obtain signatures by approaching voters "exiting the polling places," not those in line to vote. *Id.*

The court analyzed the statutes under *Burson* and first concluded that the State shared the same compelling interests as Tennessee in *Burson*: "(1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process." *Id.* at 1219. Next, the court considered whether the statutes were necessary to serve the compelling state interests. *Id.* Florida argued that it need not produce evidence showing that signature gatherers intimidated voters or interfered with the election process, but like *Burson*, relied on the "country's long history of election regulation, the widespread agreement that emerged from that history, and common sense to show that the ban on exit solicitation within 100 feet of a polling place is necessary to promote its compelling state interests." *Id.* The plaintiffs argued that exit solicitation was "a peaceful, non-disruptive activity targeting only those voters who have already voted," and that Florida was not entitled to rely on the historical evidence of election abuse as Tennessee did in *Burson*. *Id.*

The Eleventh Circuit held that

> [it] simply [could not] accept that exit solicitation is so different from the other political conduct highlighted in *Burson* to compel a different result[.] . . . [C]ommotion tied to exit solicitation is as capable of intimidating and confusing the electorate and impeding the voting process—even deterring potential voters from coming to the polls—as other kinds of political canvassing or political action around the polls.

Id. The court noted that given the diverse size and shape of polling places, often voters use the same doors to enter and exit the polling place, so that voters waiting to cast their ballot would be indistinguishable from those who had already voted. *Id.*

The *Browning* court also gave little weight to the *Burson* plurality's statement that there was "no evidence that political candidates have used other forms of solicitation or exit polling to commit [] electoral abuses." *Id.* at 1219 n.12 (quoting *Burson*, 504 U.S. 207). It believed that the plurality was referring in dictum to "**charitable and commercial solicitation"** and not to forms of political canvassing like exit solicitation. *Id.* (emphasis added). The court added that

> [g]iven the example of history, if exit solicitation must be allowed close to the polls, it takes little foresight to envision polling places awash with exit solicitors, some competing (albeit peacefully) for the attention of the same voters at the same time to discuss different issues or different sides of the same issue. And [the court] accept[s] it as probable that some—maybe many—voters faced with *running the gauntlet* will refrain from participating in the election process merely to avoid the resulting commotion when leaving the polls.

Id. at 1220 (emphasis in original).

Furthermore, the court stated that it "is hard for State election officials to know the precise moment just before solicitation becomes interference in the election process. And if an election is disturbed, it is hard to know what the impact was on the election." *Id.* at 1221. "The cost of a disturbed election is too high to allow the State only to react to disturbances but not to prevent disturbances. [So the court], therefore, reject[s] the contention that the State must offer its own evidence

demonstrating that the ban on exit solicitation is necessary to serve its compelling interests." *Id.* [O]ur country's long history of election regulation, the consensus emerging from that history, and the practical need to keep voters and voting undisturbed all prove that the ban is warranted. *Id.* Ultimately, the *Browning* court found that the statute at issue did not significantly impinge on First Amendment rights. *Id.*

For all of the same reasons articulated in *Browning*, this Court should find that *Burson* applies to signature gathering, and this Court should find Wyo. Stat. Ann. § 22-26-113 properly regulates signature gathering near polling places.

II. The 100-foot zone around absentee polling places complies with *Burson*.

Frank and Grassfire argue that due to the length of time absentee voting is available, the temporal breadth of the zone exceeds what was considered and approved in *Burson*. (Appellee/Cross-Appellant Br. at 55). Additionally, they argue that the State's interest in protecting absentee voters at absentee polling places located at governmental complexes is less than at other polling places based on the variety of building uses and the number of visitors who frequent the facility. (Appellee/Cross-Appellant Br. at 56). But Frank and Grassfire cite no authority to support their position, and the district court properly concluded that the 100-foot zone around absentee polling places complied with *Burson*.

Importantly, the district court acknowledged that electors voting at an absentee polling place are entitled to the same protection from undue influence and confusion as regular election-day voters. (JA417). All electors, whether voting at an absentee polling place or on an election day, are equally critical to a fair and free election. Regardless of the when votes are cast, the State has a significant interest in protecting voters from undue influence, harassment, and maintaining election integrity. *Burson*, 504 U.S. at 198-99. To advance these interests, prohibiting electioneering near polling places is necessary on both absentee voting days and election days.

What's more, the 100-foot prohibition around absentee polling places created by Wyo. Stat. Ann. § 22-26-113 is exactly the same distance considered and approved by *Burson*. *Burson*, 504 U.S. at 193. Thus, the size of the zone is exactly the type of "minor geographic limitation" that the *Burson* plurality held was not a "significant impingement" to First Amendment rights. *Id.* at 210.

Recognizing the importance of protecting absentee voters from interference, harassment, and undue influence, many states prohibit electioneering at polling places for in-person absentee or early voters. *See, e.g.*, Ky. Rev. Stat. Ann. § 117.235(3)(b); Mich. Comp. Laws § 168.744(1); S.D. Codified Laws § 12-18-3; Minn. Stat. § 204C.06; Okla. Stat. tit. 26 § 16-111. Many states employ similar or longer absentee voting periods when compared to Wyoming. *See, e.g.*, Minn. Stat.

§ 203B.081 (46 days); S.D. Codified Laws § 12-19-1.2 (46 days); Mich. Const. art. II, §4(g) (40 days); Va. Code Ann. § 24.2-701.1 (45 days); 25 Pa. Cons. Stat. § 3146.2a (50 days). Wyoming's 45-day absentee voting buffer zone is hardly unique or unreasonably prescriptive in its duration.

In *Burson*, the plurality did not premise its holding on the duration or length of the buffer zone; rather, it focused on the amount of speech the state could regulate to protect the fundamental right to vote. *Burson*, 504 U.S. at 210. Here, Frank and Grassfire seek to distinguish *Burson* by arguing that the duration component invalidates an otherwise conventional buffer zone. (Appellee/Cross-Appellant Br. at 56). While Frank and Grassfire contend more speech is restricted due to the number of absentee voting days, they have not justified why electors voting during the absentee voting period are entitled to lesser protections. (Appellee/Cross-Appellant Br. at 56).

Furthermore, Frank and Grassfire have not demonstrated how the absentee voting buffer significantly impinges on First Amendment rights or why *Burson* does not apply. Individuals who wish to engage in electioneering on absentee voting days are permitted to electioneer freely anywhere in the state outside a select group of small zones where voting occurs in each county. *See* Wyo. Stat. Ann. § 22-26-113. Potential electioneers can display campaign material, solicit signatures, and

distribute literature however they like, provided it is not within a buffer zone during the absentee voting period.

Even in light of the total number of days in which electioneering is prohibited in the immediate vicinity of the entrance to an absentee polling place, the burden on First Amendment rights remains minor and in line with *Burson*. As a result, this Court should affirm the district court's decision upholding the prohibition on electioneering near an absentee polling place because it falls squarely within *Burson*.

III. Wyo. Stat. Ann. § 22-26-113 is not facially overbroad.

Finally, Frank and Grassfire argue Wyo. Stat. Ann. § 22-26-113 is overbroad for three reasons. (Appellee/Cross-Appellant Br. at 58). First, Frank and Grassfire argue they raised "important *jus tertii*[9] concerns." (Appellee/Cross-Appellant Br. at 58). Second, they argue the law is not subject to a narrowing construction. (Appellee/Cross-Appellant Br. at 61). And third, they argue that a substantial number of applications are unconstitutional. (Appellee/Cross-Appellant Br. at 62).

Facial overbreadth challenges are disfavored by courts. *United States v. Brune*, 767 F.3d 1009, 1019 (10th Cir. 2014); *Sabri v. United States*, 541 U.S. 600, 609 (2004). However, "[i]t has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First

[9] A *jus tertii* claim is one in which a litigant asserts a law "both injures him and impinges upon the constitutional rights of third persons." Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 432 (1974).

Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973) (citations omitted). So, in limited instances, where the very existence of an overbroad statute produces a chilling effect on First Amendment rights, courts have altered the traditional rules of standing to permit the person making the attack to assert the First Amendment rights of third parties to establish standing. *Id.* at 612. Overbreadth, *jus tertii,* standing, even in a First Amendment context, has been employed "sparingly and only as a last resort." *Id.* at 613. "Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Id.*

First, to support their *jus tertii* claim, Frank and Grassfire cite *Broadrick v. Oklahoma*. (Appellee/Cross-Appellant Br. at 58). Specifically, they argue that "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." (Appellee/Cross-Appellant Br. at 59).

For a *jus tertii* argument to succeed, the plaintiffs must show: (1) a "close" relationship with the person who possesses the right; and (2) a "hindrance" to the possessor's ability to protect his own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (citing *Powers v. Ohio*, 499 U.S. 400 (1991)).

Neither Frank nor Grassfire have demonstrated evidence showing either has a "close" relationship with private property owners potentially affected by Wyo. Stat. Ann. § 22-26-113. To the contrary, the record demonstrates that neither Frank nor Grassfire own or have permission to electioneer on any private property near a polling place. (JA0316-17, 0367, 0377). While Frank and Grassfire claim to stand "in mutual interest with these private property owners," their relationship is merely hypothetical in nature, with no facts in the record supporting their assertion. (Appellee/Cross-Appellant Br. at 60).

Further, neither Frank nor Grassfire show a "hindrance" to a private property owner's ability to protect their interest. Without citing any evidence, Frank and Grassfire assert the homeowners whose properties are subject to Wyo. Stat. Ann. § 22-26-113 lack the resources or sophistication to challenge the statute. (Appellee/Cross-Appellant Br. at 59). Threadbare assertions are insufficient to show an actual hindrance and the record contains no facts supporting their assertions. *Sussman v. Soleil Mgmt., LLC*, No. 2:18-cv-02218-JAD-BNW, 2020 WL 87022, at *2-3 (D. Nev. Feb. 21, 2020). As a result, they have not asserted a valid basis to support *jus tertii* standing.

Second, Frank and Grassfire argue overbreadth should be considered because of the difficulty of a narrowing construction. (Appellee/Cross-Appellant Br. at 61). Specifically, they assert the buffer zones established by Wyo. Stat. Ann. § 22-26-113

"reach too far, last too long, and capture speech irrelevant to protecting voting integrity." (Appellee/Cross-Appellant Br. at 61). As a result, they argue that the simplest remedy is to declare the law facially invalid. (Appellee/Cross-Appellant Br. at 61).

While there is no need for a narrowing construction because the Wyo. Stat. Ann. § 22-26-113 complies with *Burson*, if this Court were to find that a portion of the statute was overbroad, it could certainly apply a limiting construction and preserve the remainder of the statute. Frank and Grassfire's argument is premised on the belief that all parts of Wyo. Stat. Ann. § 22-26-113 are unconstitutional, which is not supported by *Burson*.

Addressing a statute, the Supreme Court has said if the "statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated." *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (citing *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971)). The same concept should be applied when reviewing state statutes. If this Court finds that a portion of the statute is overbroad, it should only invalidate the unconstitutional portion instead of facially invalidating the whole statute as Frank and Grassfire suggest.

Finally, Frank and Grassfire argue that a substantial number of applications of Wyo. Stat. Ann. § 22-26-113 are unconstitutional. (Appellee/Cross-Appellant Br. at 62). In support, they cite that complaints have been lodged for placing signs on private property, that at least one homeowner has been asked to remove a sign from private property, and that in at least one instance, an election official has removed a sign from private property. (Appellee/Cross-Appellant Br. at 62-63). Additionally, Frank and Grassfire cite bumper stickers and signature gathering as unconstitutional applications. (Appellee/Cross-Appellant Br. at 63).

To prevail on an overbreadth challenge, Frank and Grassfire must demonstrate that a substantial number of applications of the statute are unconstitutional. *Brune*, 767 F.3d at 1019. Universal and long-standing traditions of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional. *Id.* at 1018 (citing *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011)). Even if a statute reaches some protected speech, facial invalidation is not appropriate when the remainder of the statute permissibly restricts speech. *Id.* at 1019 (quoting *Osborne v. Ohio*, 495 U.S. 103, 112 (1990)). For overbreadth standing to be granted, courts require that the law's application to protected speech be substantial both in an absolute sense and in relation to the scope of the law's plainly legitimate applications. *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003); *Brune*, 767 F.3d at

1018. Finding overbreadth alone is insufficient; the overbreadth must be substantial. *Brune*, 767 F.3d at 1018

Here, there is no dispute that laws have regulated conduct around polling places for over a century. *See Burson*, 504 U.S. at 203-06. Wyoming Statute § 22-26-113 regulates electioneering near polling places and is intended to prevent behaviors aimed at interfering with election integrity, which has been expressly approved in *Burson*. *Burson*, 504 U.S. at 199. With the exception of the 300-foot prohibition on general, special, or primary election days, the statute regulates the same conduct that was considered by the plurality in *Burson*. For the reasons discussed in Section III in the Reply Argument above, the 300-foot zone on election days complies with *Burson* and therefore, satisfies constitutional scrutiny.

To the extent that Frank and Grassfire argue Wyo. Stat. Ann. § 22-26-113 affects private property owners, they have not demonstrated how or why a substantial number of applications exceed its legitimate application. Merely alleging that the zones encompass some private property is not sufficient to demonstrate the statute is facially overbroad. Moreover, the record demonstrates only a few polling places have zones that cover some private property. (JA0038-53). As a result, this Court should not entertain Frank and Grassfire's overbreadth claims.

CONCLUSION

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

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the issues presented, the government officials believe oral argument will assist the Court in this case.

DATED this 10th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2022, I electronically filed the foregoing with the court's CM/ECF system, which will send notification of such filing to the following:

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