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United States Court of Appeals
Tenth Circuit

October 23, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN C. FRANK,

Plaintiff - Appellee/Cross-Appellant,

v.

DEBRA LEE, Laramie County Clerk, in her official capacity; CHARLES GRAY, Wyoming Secretary of State, in his official capacity; SYLVIA HACKL, Laramie County District Attorney, in her official capacity,

Defendants - Appellants/Cross-Appellees.

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

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Appeal from the United States District Court for the District of Wyoming (D.C. No. 2:20-CV-00138-NDF)

James Peters, Senior Assistant Attorney General (Mackenzie Williams, Senior Assistant Attorney General, State of Wyoming, Cheyenne, Wyoming, with him on the briefs), for Defendants-Appellants/Cross-Appellees Charles Gray and Sylvia Hackl.

J. Mark Stewart of Davis & Cannon, LLP, Cheyenne, Wyoming (Catherine M. Young, Davis & Cannon, LLP, with him on the briefs), for Defendant-Appellant/Cross-Appellee Debra Lee.

Stephen R. Klein of Barr & Klein PLLC, Washington, District of Columbia (Benjamin Barr of Barr & Klein PLLC, Chicago, Illinois, with him on the briefs) for Plaintiff-Appellee/Cross-Appellant.

Before **HOLMES**, Chief Judge, **MATHESON** and **ROSSMAN**, Circuit Judges.

ROSSMAN, Circuit Judge

Wyoming law prohibits electioneering within 300 feet of a polling place on an election day and within 100 feet of an absentee polling place during the 45-day period when absentee voting is being conducted. Wyo. Stat. Ann. § 22-26-113 (the electioneering statute); Wyo. Stat. Ann. § 22-6-107(b). At issue is whether these prohibitions violate the First Amendment.

Plaintiff John C. Frank[1] sued Wyoming state and local officials[2] in federal district court under 42 U.S.C. § 1983, contending the electioneering

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[1] During the pendency of this appeal, Plaintiff-Appellee/Cross-Appellant Grassfire LLC dissolved. On September 28, 2023, counsel for Grassfire LLC notified the court of this development and moved for partial voluntary dismissal with prejudice under Federal Rule of Appellate Procedure 42(b)(3). The court grants the unopposed motion, dismisses Grassfire as a party, and dismisses the portion of the appeal related to Grassfire only. Grassfire had separately challenged Wyoming's election day prohibition on signature gathering, Wyo. Stat. Ann. § 22-26-113, but the district court left this issue unaddressed without explanation. Mr. Frank concedes he does not have standing to pursue this claim himself.

[2] Plaintiff sued Debra Lee, the Laramie County Clerk; Ed Buchanan, the Wyoming Secretary of State; and Leigh Anne Manlove, the District Attorney of Larimer County. As of January 3, 2023, Charles Gray succeeded Mr. Buchanan as Wyoming Secretary of State and Sylvia Hackl succeeded

statute violated the First Amendment, facially and as applied. Mr. Frank, a Wyoming citizen, alleged the statute unconstitutionally prevented him from handing out campaign literature and displaying bumper stickers on his car within the 300-foot buffer zone. Mr. Frank also claimed the statute was overbroad because it violated the First Amendment rights of third parties who could not display campaign signs on private property falling within the statutory buffer zones.

The parties filed cross-motions for summary judgment. The district court granted each in part, striking down some parts of the electioneering statute and upholding the rest. Specifically, the district court held the ban on electioneering within 300 feet of polling places on election day was unconstitutional, as was the ban on bumper stickers within the election day and absentee period buffer zones. But the district court upheld the statute's prohibition on electioneering within 100 feet of absentee polling places. It

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Ms. Manlove as Laramie County District Attorney. Under Federal Rule of Appellate Procedure 43(c)(2), they are automatically substituted as parties in this matter.

Mr. Gray and Ms. Lee are the chief elections officers for the State and Laramie County, respectively. Ms. Hackl is responsible for prosecuting crimes in Laramie County, including violations of the electioneering statute. We refer to them collectively as "Defendants."

also concluded there was an insufficient factual basis to consider Plaintiff's overbreadth claim. All parties timely appealed.[3]

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm in part, reverse in part, and remand for further proceedings. We uphold the electioneering statute against Mr. Frank's First Amendment challenge to the size of, and conduct proscribed within, the 300-foot election-day buffer zone. We reverse and remand on Mr. Frank's constitutional challenge to the absentee buffer zone, including the electioneering conduct proscribed within that zone. Finally, we remand for the district court to adjudicate in the first instance Mr. Frank's facial overbreadth challenge.

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I

We begin by reciting the history of the electioneering statute and its enforcement in Wyoming. We then detail the factual and procedural background of the constitutional challenges now before us.[4]

[3] Defendant Lee's appeal was docketed in case number 21-8058; Defendants Gray and Hackl's in 21-8059; Plaintiff cross-appealed in 21-8060. We consolidated the appeals.

[4] These facts derive from Plaintiff's verified complaint and attachments thereto as well as the parties' summary judgment briefing.

A

1

The polling place is where the act of voting itself takes place. Like every other state and the District of Columbia, Wyoming regulates electioneering around polling places.[5] The state's electioneering statute provides:

> (a) Electioneering too close to a polling place or absentee polling place under W.S. 22-9-125 when voting is being conducted, consists of any

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[5] Most jurisdictions—thirty-five states and the District of Columbia—prohibit electioneering within 100 feet or less of the polling location. *See* Ala. Code § 17-9-50; Ariz. Rev. Stat. Ann. §§ 16-515, 16-1018(1); Ark. Code Ann. § 7-1-103(a)(8); Cal. Elec. Code §§ 319.5, 18370; Colo. Rev. Stat. § 1-13-714(1)(a); Conn. Gen. Stat. § 9-236; Del. Code Ann., tit. 15, § 4942; D.C. Code § 1-1001.10(b)(2); Idaho Code § 18-2318(1); 10 Ill. Comp. Stat. § 5/7-41(c); Ind. Stat. Ann. §§ 3-14-3-16, 3-5-2-10; Ky. Rev. Stat. Ann. § 117.235(3); Md. Code Ann. Elec. Law § 16-206(b); Mich. Comp. Laws Ann. § 168.931(1)(k); Minn. Stat. Ann. §§ 204C.06(1), 211B.11(b); Mo. Rev. Stat. § 115.637(18); Mont. Code Ann. § 13-35-211(1); Nev. Rev. Stat. § 293.740; N.H. Rev. Stat. Ann. § 659:43(II); N.J. Stat. Ann. § 19:34-15; N.M. Stat. Ann. § 1-20-16; N.Y. Elec. Law § 8-104(1); N.C. Gen. Stat. § 163-166.4; N.D. Cent. Code Ann. § 16.1-10-06(1); Ohio Rev. Code Ann. §§ 3501.30(A)(4), 3501.35(A); Or. Rev. Stat. § 260.695(3); 25 Pa. Stat. and Cons. Stat. Ann. § 3060(d); 17 R.I. Gen. Laws Ann. § 17-19-49; S.D. Codified Laws § 12-18-3; Tenn. Code Ann. § 2-7-111(a), (b)(1); Tex. Elec. Code Ann. §§ 61.003, 85.036; Vt. Stat. Ann., tit. 17, § 2508(a)(1); Va. Code Ann. § 24.2-604; Wash. Rev. Code Ann. § 29A.84.510; W. Va. Code §§ 3-1-37, 3-9-9; Wis. Stat. § 12.03.

The remaining fifteen states prohibit electioneering at further distances, from 150, 300, or even 600 feet. *See* Alaska Stat. §§ 15.15.170, 15.56.016(a)(2) (200 feet); Fla. Stat. Ann. § 102.031(4)(a) (150 feet); Ga. Code Ann. § 21-2-414(a) (150 feet, or within 25 feet of any voter standing in line); Haw. Rev. Stat. § 11-132(a), (d) (200 feet); Iowa Code § 39A.4(1)(a)(1) (300 feet); Kan. Stat. Ann. § 25-2430(a) (250 feet); La. Stat. Ann. § 18:1462 (600 feet); Me. Stat. tit. 21-A, § 682(2), (3) (250 feet); Mass. Gen. Laws Ann.

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

Wyo. Stat. Ann. § 22-26-113.[6] A knowing and willful violation of the statute is a misdemeanor. *Id.* § 22-26-112(a).

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Wyoming has regulated electioneering near the polls since statehood. In 1890, Wyoming recognized the need for "a clear space for the easy entrance and exit of all electors, to and from the polling place, without the hindrance or molestation of any one." 1890 Wyo. Sess. Laws 399. Wyoming initially prohibited electioneering within 20 feet of a polling place on an

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ch. 54, § 65 (150 feet); Miss. Code Ann. § 23-15-895 (150 feet); Neb. Rev. Stat. § 32-1524(3) (200 feet); Okla. Stat. Ann. tit. 26, § 7-108 (300 feet); S.C. Code Ann. § 7-25-180(A) (500 feet); Utah Code Ann. § 20A-3a-501(2)(a) (150 feet); Wyo. Stat. Ann. § 22-26-113 (300 feet).

[6] Although the statute says, "100 yards," we use "300 feet" to distinguish it more readily from the 100-foot buffer zone that applies to absentee polling places.

election day, *id.*, which was later expanded to a 20-yard (60 feet) radius, a measure intended to combat attempts to influence voting through threats of violence, bribery, or intimidation, *see* Joint App. at 119 (citing 1936 Wyo. Sess. Laws 43). In 1973, Wyoming increased the size of the election-day buffer zone to 100 yards (300 feet)—where it remains today. *Id.* at 65 (citing 1973 Wyo. Sess. Laws 87). The 1973 amendments banned "the display of signs or distribution of campaign literature" within the election-day buffer zone. *Id.* In 1983, the electioneering statute was amended again to ban "the soliciting of signatures to any petition" and "the canvassing or polling of voters" inside the election-day buffer zone. *Id.* at 70.[7]

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Wyoming also regulates electioneering around absentee polling places when voting is being conducted. Absentee voting has been available in Wyoming since the early 1900s, *see* Wyo. Stat. Ann., ch. 142 at 570, § 2093 (1910), but absentee polling places were only implemented in 2006, *see* 2006 Wyo. Sess. Laws ch. 108, § 1; Wyo. Stat. Ann. § 22-9-125(a)(ii). Absentee polling places are open for 45 days before an election—a time when qualified absentee voters who wish to vote in-person may do so. Wyo. Stat. Ann. §§ 22-6-107(b), 22-9-125.

[7] In 1990, the legislature carved out an exception permitting exit polling by the media. That exception is not relevant to this appeal.

In 2006, Wyoming again amended the electioneering statute, creating a 300-foot buffer zone around absentee polling places that would remain in place throughout the 45 days before an election. 2006 Wyo. Sess. Laws ch. 108, § 1. For about a dozen years, the election-day and absentee buffer zones around polling places remained identical—300 feet. In 2018, Wyoming reduced the size of the buffer zone around absentee polling places to 100 feet. 2018 Wyo. Sess. Laws 237–38.

The statutory buffer zones surrounding both election-day and absentee polling places in Wyoming are the subject of Plaintiff's facial challenge to the electioneering statute. Plaintiff's as-applied challenge centers specifically on absentee and election-day polling places in Laramie County, Wyoming. The county has several election-day polling places, including the Laramie County Community College ("LCCC"). Private property and public spaces (like sidewalks and parks) fall within the 300-foot election-day buffer zone. *Id.* The county's sole absentee polling place is located inside the atrium of the Laramie County Government Complex ("LCGC").[8]

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[8] The LCGC is only an absentee polling place; it is not an election-day polling place.

Wyoming enforces the electioneering statute. Poll workers are instructed to ask violators to move out of the statutory buffer zones and to call law enforcement if the violation persists. In August 2020, for example, Wyoming law enforcement cited Jennifer Horal[9] for violating the electioneering statute because she was gathering signatures on Election Day at the LCCC within the 300-foot buffer zone. Ms. Horal had a sign directing "registered voters" to come her way. According to law enforcement, she was stopping cars in the LCCC parking lot and harassing poll workers. Ms. Horal maintained she was more effective gathering signatures inside the 300-foot buffer zone and had less success contacting voters at "the 100-yard boundary." Joint App. at 292. Similar complaints of impermissible electioneering were lodged at three other election-day polling places in Laramie County during the August 2020 primary election.

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During prior instances of absentee voting at the LCGC, several vehicles parked within the electioneering-free buffer zone were asked to move because the cars displayed multiple campaign bumper stickers. Signature gatherers also have been asked to leave the buffer zone around the absentee-polling place.

[9] Ms. Horal is not a party in this litigation. Plaintiff submitted Ms. Horal's affidavit in support of his motion for summary judgment.

The electioneering statute also has been enforced against individuals whose private property falls within a statutory buffer zone. Poll workers have asked property owners to remove campaign signs displayed on private property or have removed the signs themselves.

3

Plaintiff Frank, though, has never violated the electioneering statute. Mr. Frank has previously engaged in electioneering activities including "distributing literature, knocking on doors, soliciting and placing yard signs." Joint App. at 303. But during the 2020 election cycle, Mr. Frank conducted no electioneering activities near a polling place. He claims he wants to distribute campaign literature and display more than one large campaign bumper sticker for a single candidate within the buffer zones. However, he has chosen not to do so out of fear he would violate the electioneering statute.

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B

Against this backdrop, we consider the case before us. On July 24, 2020, Plaintiff brought this civil-rights action in federal district court in Wyoming against Defendants in their official capacities. Plaintiff's complaint alleged in a single count that Wyoming's electioneering statute was "unconstitutional on its face and as applied." Joint App. at 23.

Mr. Frank claimed the statute violated his First Amendment right to distribute campaign literature and display large bumper stickers on his vehicle within the 300-foot buffer zone at the LCCC on election days. He also asserted the electioneering statute swept too broadly, violating the First Amendment rights of third parties who own private property within the statutory buffer zones. The complaint sought declaratory and injunctive relief under 42 U.S.C. § 1983 and costs and attorneys' fees under 42 U.S.C. § 1988.

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The parties filed cross-motions for summary judgment. Plaintiff contended Wyoming's election-day and absentee polling place buffer zones "abridged [his] rights to political speech" and "should be declared unconstitutional." Pl. Mot. Summ. J. 10. Specifically, he argued the undisputed facts established the breadth of the electioneering restrictions, including the geographic size and temporal scope of the buffer zones, was excessive; Defendants failed to prove the necessity of such restrictions; and the impingement on First Amendment rights was "significant." *Id.* at 16–25. Defendants contended Plaintiff's § 1983 claims were barred by Eleventh Amendment immunity; he lacked Article III standing to challenge the constitutionality of Wyoming's electioneering statute; and Defendants were entitled to summary judgment on Plaintiff's as-applied and facial

challenges based on controlling precedent from the Supreme Court. The district court heard oral argument on the motions.

On July 22, 2021, the district court granted each motion in part. The district court determined Plaintiff had standing and rejected Defendants' sovereign immunity defense. On the merits, the district court agreed with Plaintiff that the 300-foot election-day buffer zone was unconstitutional, as was the prohibition against displaying campaign bumper stickers within both buffer zones. The district court agreed with Defendants that the 100-foot buffer zone surrounding the absentee-polling place was constitutional. As to the overbreadth challenge, the district court determined "there is an absence of factual record in the case to consider this issue." Joint App. at 419.

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These timely appeals followed.

II

We begin by considering whether Plaintiff's claims are barred by Eleventh Amendment sovereign immunity and whether Plaintiff has Article III standing. As we explain, we agree with the district court's determinations on both fronts and thus proceed to the merits.

A

Under the doctrine of sovereign immunity, "a federal court generally may not hear a suit brought by any person against a nonconsenting State."

Allen v. *Cooper*, 140 S. Ct. 994, 1000 (2020). This immunity "extends to 'suit[s] against a state official in his or her official capacity' because such suits are 'no different from a suit against the State itself.'" *Hendrickson* v. *AFSCME Council 18*, 992 F.3d 950, 965 (10th Cir. 2021) (alteration in original) (quoting *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)). "However, there are three exceptions to the Eleventh Amendment's guarantee of sovereign immunity to states." *Levy* v. *Kan. Dep't of Soc. & Rehab. Servs.*, 789 F.3d 1164, 1168 (10th Cir. 2015).

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> First, a state may consent to suit in federal court. Second, Congress may abrogate a state's sovereign immunity by appropriate legislation when it acts under Section 5 of the Fourteenth Amendment. Finally, under *Ex parte Young*, a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief.

Id. at 1169 (citations omitted). The parties and district court analyzed only *Ex parte Young*; however, the second exception—involving express congressional abrogation of a state's Eleventh Amendment immunity, here, under § 1983—also comes into play.

Defendants Gray and Hackl contend sovereign immunity bars Plaintiff's claims against them.[10] The district court rejected this assertion,

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[10] Defendant Lee, the Laramie County Clerk, did not join this argument in district court or on appeal.

ruling the *Ex parte Young* exception applied. We review a district court's determination of state sovereign immunity *de novo*. *Arbogast* v. *Kan. Dep't of Lab.*, 789 F.3d 1174, 1181 (10th Cir. 2015). Like the district court, we conclude Defendants are not entitled to sovereign immunity against Plaintiff's claims.[11]

First, Defendants make a puzzling argument that *Ex parte Young* does not apply because Mr. Frank brought only a § 1983 claim. According to Defendants, injunctive relief is not available under § 1983, and therefore "§ 1983 is not the proper vehicle to bring an *Ex parte Young* action." Opening Br. at 15. Defendants insist § 1983 and *Ex parte Young* are distinct causes of action and merging them "would require this Court to find that the named government officials were 'persons' subject to suit under § 1983," contrary to the Supreme Court's holding in *Will* v. *Michigan Department of State Police*. Reply Br. at 7. Defendants' argument lacks merit. While *Will* did hold state officials were not "persons" under § 1983 *for purposes of*

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[11] None of the parties have suggested Defendant Hackl, the Laramie County District Attorney, is a *county* official to whom *state* sovereign immunity would not apply. *See Couser* v. *Gay*, 959 F.3d 1018, 1023 & n.4 (10th Cir. 2020). We assume she is a state official but need not decide the issue because we conclude sovereign immunity does not bar Plaintiff's claims. *See* Wyo. Stat. Ann. § 9-1-804(a) ("[E]ach district attorney has exclusive jurisdiction to . . . [a]ct as prosecutor *for the state* in all felony, misdemeanor and juvenile court proceedings arising in the counties in his [or her] district . . . .") (emphasis and second alteration added).

damages claims, it expressly recognized, "Of course a state official in his or her official capacity, *when sued for injunctive relief*, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" 491 U.S. at 71 n.10 (emphasis added) (citation omitted). Defendants seem to ignore this aspect of *Will*. In any case, as Plaintiff correctly observes, federal courts routinely consider the *Ex parte Young* doctrine in the context of § 1983 claims. *See, e.g.*, *Collins* v. *Daniels*, 916 F.3d 1302, 1315 (10th Cir. 2019).

Next, Defendants contend *Ex parte Young* does not apply because Plaintiff Frank seeks retroactive relief, including attorneys' fees under 42 U.S.C. § 1988. According to Defendants, attorneys' fees are akin to money damages, and thus Plaintiff is not seeking "only prospective relief," as *Ex parte Young* requires. We are not persuaded. The Supreme Court has generally held that attorneys' fees associated with prospective relief are authorized under § 1988 notwithstanding the Eleventh Amendment:

> Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the [Civil Rights Attorney's Fees Awards] Act [of 1976, 42 U.S.C. § 1988], Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities.

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Hutto v. *Finney*, 437 U.S. 678, 693–94 (1978). Thus, Plaintiff's request for attorneys' fees under § 1988 does not implicate sovereign immunity, and Defendants have offered no contrary availing argument.

Finally, Defendants contend Plaintiff Frank failed to allege an ongoing violation of federal law, as *Ex parte Young* requires, "because no government official has threatened to or taken any action against [him]." Opening Br. at 17. Neither Defendant Gray, the Wyoming Secretary of State, nor Defendant Lee, the Laramie County Clerk, have the requisite connection to the enforcement of the statute, according to Defendants, because they lack the authority to issue citations or prosecute Mr. Frank.[12] However, Plaintiff maintains these defendants do "'have some connection with the enforcement' of the challenged statute," *Hendrickson*, 992 F.3d at 965, because they are the chief elections officers with statutory duties to administer elections consistent with Wyoming's elections laws. According to Plaintiff, claims against these officials are proper under *Ex parte Young*. We agree.

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"Under the *Ex parte Young* exception, a plaintiff may sue individual state officers acting in their official capacities if the complaint alleges an

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[12] Defendants concede Defendant Hackl, the Laramie County District Attorney, has a duty to enforce the challenged statute and this argument does not apply to her. In any event, as we will explain, Plaintiff has demonstrated a credible threat of prosecution for purposes of standing.

ongoing violation of federal law and the plaintiff seeks only prospective relief." *Id.* (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). "To satisfy this exception, the named state official 'must have some connection with the enforcement' of the challenged statute," *id.* (quoting *Ex parte Young*, 209 U.S. at 157)—"a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty," *id.* (quoting *Prairie Band Potawatomi Nation* v. *Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007)).

"The secretary of state is the chief election officer for the state and shall maintain uniformity in the applications and operations of the election laws of Wyoming." Wyo. Stat. Ann. § 22-2-103. To that end, the "secretary of state shall promulgate such rules as are necessary to maintain . . . orderly voting." Wyo. Stat. Ann. § 22-2-121(b). The Secretary of State also has the authority to "refer any suspected violation of the Election Code to the appropriate prosecuting authority." Wyo. Stat. Ann. § 22-26-121(d); *see also id.* § 22-9-125(c) ("[T]he secretary of state is authorized to adopt rules and regulations to guard against abuses of the elective franchise to include such matters as contained in W.S. 22-26-113 . . . ."). Because the Secretary of State has statutory duties and obligations to maintain uniformity in elections, ensure orderly voting, and refer election code violations for prosecution, the Secretary of State certainly has "some connection with the

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enforcement" of Wyoming's prohibition on electioneering too close to a polling place.

Though they acknowledge some of these statutory duties, Defendants insist they are nonetheless immune from suit because "those duties do not include overseeing criminal prosecutions." Reply Br. at 11. Defendants offer no authority for their assertion that overseeing criminal prosecutions is required, and it is clearly inconsistent with applicable law that demands a state official need only have "some connection with the enforcement" of the challenged statute. *Hendrickson*, 992 F.3d at 965. Here, in addition to Defendant Gray's statutory duties, there is evidence that the Secretary of State's office has specifically fielded calls for advice related to enforcement of the statute. *See* Joint App. at 150. And there is no dispute Laramie County Clerk officials have asked signature gatherers to leave buffer zones and have entered private property to remove campaign signs. Thus, according to applicable law and the record developed on summary judgment, the Secretary of State and Laramie County Clerk are responsible for enforcing Wyoming's electioneering statute. We agree with the district court: Defendants Gray and Lee may be sued under *Ex parte Young*.

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Accordingly, we affirm the district court's ruling that Defendants are not shielded by sovereign immunity.

B

Defendants contend the district court erred in concluding Plaintiff Frank had Article III standing to bring his First Amendment challenge.[13] We review the district court's rulings on standing *de novo*. *Aptive Env't, LLC* v. *Town of Castle Rock*, 959 F.3d 961, 973 (10th Cir. 2020).

"'The party invoking federal jurisdiction bears the burden of establishing' standing." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted). "[S]tanding generally has three requirements: (1) an injury in fact; (2) causation; and (3) redressability." *Colo. Outfitters Ass'n* v. *Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016); *see also Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (To establish Article III standing, a plaintiff must show (1) an "injury in fact," (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury "will be redressed by a favorable decision."). Addressing each in turn, we conclude Mr. Frank has standing.

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"To establish . . . an injury [in fact] in the context of a pre-enforcement challenge to a criminal statute, a plaintiff must typically demonstrate (1) 'an intention to engage in a course of conduct arguably affected with a

[13] We separately address Defendants' argument that Plaintiff lacks third-party standing to bring a facial overbreadth challenge. *See* Part VI.

constitutional interest, but proscribed by [the challenged] statute,' and (2) that 'there exists a credible threat of prosecution thereunder.'" *Colo. Outfitters Ass'n*, 823 F.3d at 545 (footnote omitted) (third alteration in original) (quoting *Susan B. Anthony List*, 573 U.S. at 159). "The threat of prosecution is generally credible where a challenged 'provision on its face proscribes' the conduct in which a plaintiff wishes to engage, and the state 'has not disavowed any intention of invoking the . . . provision' against the plaintiff." *United States* v. *Sup. Ct. of N.M.*, 839 F.3d 888, 901 (10th Cir. 2016) (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)).

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The district court found Plaintiff had alleged more than a vague desire to engage in proscribed activity—Mr. Frank specifically alleged the actions he would perform *but for* the electioneering statute. The court also found a credible threat of prosecution because Wyoming had not disavowed enforcing the statute as applied to Plaintiff's proposed conduct, and Ms. Horal had been cited for similar signature-gathering activities.

On appeal, Defendants argue Plaintiff lacks standing because he has not met the first and third requirements we set out in *Initiative and Referendum Institute* v. *Walker*: "(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." 450 F.3d 1082, 1089 (10th Cir. 2006) (*en banc*).

But as Plaintiff Frank correctly observes, a plaintiff need not establish all three elements to demonstrate an injury in fact. *Walker* held a plaintiff "can" satisfy the injury requirement by establishing these three elements, not that a plaintiff *must* do so to proceed. *Id.* Indeed, *Walker* recognized "evidence of past activities obviously cannot be an indispensable element—people have a right to speak for the first time." *Id.* This follows the first principle of pre-enforcement actions—an individual need not violate the law to challenge it. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023) (considering pre-enforcement challenge by plaintiff who "ha[d] yet to carry out her plans" because "she worrie[d] that, *if she enters* the wedding website business, the State will force her to convey messages inconsistent with her belief[s]" (emphasis added)). A plaintiff need only demonstrate "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a

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credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 159 (citation omitted).[14]

Plaintiff Frank has also adequately demonstrated "a credible threat that the statute will be enforced." *Walker,* 450 F.3d at 1089. As he correctly points out, a credible threat of prosecution can be found where no actual threats have been made. "The threat of prosecution is generally credible where a challenged 'provision on its face proscribes' the conduct in which a plaintiff wishes to engage, and the state 'has not disavowed any intention of invoking the . . . provision' against the plaintiff." *Sup. Ct. of N.M.*, 839 F.3d at 901 (quoting *United Farm Workers Nat'l Union*, 442 U.S. at 302).

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Here, the statute proscribes the conduct Plaintiff wishes to engage in—distributing campaign literature and displaying campaign bumper stickers—and Defendants have not affirmatively disavowed any intent to prosecute. The record confirms the statute is routinely enforced. There is no reason to believe Plaintiff Frank would escape prosecution for his proposed conduct.

Accordingly, we discern no error in the district court's conclusion that Plaintiff established an injury in fact.

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[14] In any event, Plaintiff persuasively contends he has been sufficiently involved in similar activities in the past. Mr. Frank has engaged in a variety of electioneering activities—he's been a campaign volunteer, door-to-door canvasser, precinct leader, and fundraiser.

2

Defendants contend the district court erred in concluding Plaintiff satisfied the causation element of standing. To that end, they reprise arguments that (1) the Secretary of State and County Clerk have no enforcement authority and (2) the District Attorney has not threatened prosecution. We have already rejected these contentions.

"[T]he causation element of standing requires the named defendants to possess authority to enforce the complained-of provision . . . . Whether the Defendants have enforcement authority is related to whether, under *Ex parte Young*, they are proper state officials for suit." *Kitchens* v. *Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014) (citation omitted).

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As we have explained, the Secretary of State and County Clerk are the proper state officials for suit because they have a sufficient connection to the enforcement of the challenged statute. They are the chief elections officials responsible for ensuring compliance with the elections laws and they have authority to refer violators for prosecution. *See* Wyo. Stat. Ann. § 22-2-103. For the same reasons, they have sufficient enforcement authority to satisfy the causation element of standing. *Kitchens*, 755 F.3d at 1201 (citation omitted).

As for the District Attorney, Defendants cite no authority to support their assertion that an *actual* threat of prosecution is required. Indeed, that

is not the standard. As we have explained, Plaintiff has established a credible threat of prosecution for his proposed conduct in Laramie County. Defendant Hackl is the Laramie County District Attorney with authority to prosecute crimes in Laramie County. Thus, the credible threat of prosecution is traceable to her.

Accordingly, we agree with the district court that Plaintiff also established the second element of standing.

3

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Neither party addressed redressability in the district court, and the district court noted it could not think of any potential redressability problems for Plaintiff. On appeal, Defendants expressly declined to address redressability, and Plaintiff contends we should consider this issue waived. In their reply brief, Defendants insist the issue is not waived because Article III standing is jurisdictional—yet they again expressly decline to offer any argument on redressability.

We will consider the issue ourselves. *See Dias* v. *City & Cnty. of Denver*, 567 F.3d 1169, 1176 (10th Cir. 2009) ("[S]tanding is a component of this court's jurisdiction, and we are obliged to consider it sua sponte to ensure the existence of an Article III case or controversy."). Redressability is established if "it is likely that the injury will be redressed by a favorable decision." *Kitchens*, 755 F.3d at 1201 (citation omitted). "Plaintiffs suing

public officials can satisfy the causation and redressability requirements of standing by demonstrating 'a meaningful nexus' between the defendant and the asserted injury." *Id.* Both requirements depend on "whether, under *Ex parte Young*, they are proper state officials for suit." *Id.*

As we explained, Defendants have a sufficient connection to the enforcement of the challenged statute and thus are the proper officials for suit. Moreover, Plaintiff seeks a declaratory judgment that the statute is unconstitutional and injunctive relief against its enforcement. A favorable decision against Defendants granting this relief is likely to redress Plaintiff's alleged constitutional injury. Accordingly, Plaintiff satisfies the redressability requirement.

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III

We now proceed to the merits of the district court's rulings on summary judgment. "We review the district court's grant of partial summary judgment *de novo*, and we apply the same legal standards as the district court." *Sup. Ct. of N.M.*, 839 F.3d at 906 (quotation omitted). "Where, as here, we are presented with cross-motions for summary judgment, we 'must view each motion separately,' in the light most favorable to the non-moving party, and draw all reasonable inferences in that party's favor." *Id.* at 906–07 (quotation omitted).

Our circuit has not yet passed on the constitutionality of Wyoming's electioneering statute.[15] In *Burson* v. *Freeman*, 504 U.S. 191 (1992), the Supreme Court considered a constitutional challenge to Tennessee's electioneering statute, which circumscribed the geographic scope of, and conduct proscribed within, an electioneering buffer zone surrounding a polling place on election day. The parties assert *Burson* is the applicable law, and we agree. Our analysis begins with a discussion of *Burson* and the key precedents that bookend that decision—*Mills* v. *Alabama*, 384 U.S. 214 (1966), and *Minnesota Voters Alliance* v. *Mansky*, 138 S. Ct. 1876 (2018).[16] Applying the principles derived from these cases, we analyze the constitutional challenges on appeal.

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[15] Nor has the Wyoming Supreme Court passed on the constitutionality of the electioneering statute.

[16] Our sister circuits have had some occasion to consider state electioneering prohibitions in and around the polling place, but the law has developed little since *Burson*. *See, e.g.*, *Schirmer* v. *Edwards*, 2 F.3d 117 (5th Cir. 1993) (upholding Louisiana's 600-foot campaign-free zone); *Russell* v. *Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015) (striking down Kentucky's 300-foot election-day buffer zone); *Minn. Majority* v. *Mansky*, 708 F.3d 1051 (8th Cir. 2013) (affirming in part and reversing in part dismissal of action challenging Minnesota's prohibition on electioneering conduct within 100 feet of a polling place); *Citizens for Police Accountability Pol. Comm.* v. *Browning*, 572 F.3d 1213 (11th Cir. 2009) (upholding Florida's 100-foot election-day buffer zone prohibiting plaintiffs from engaging in exit solicitation on non-ballot issues).

A

1

a. Mills v. *Alabama*

The Supreme Court first addressed the propriety of state electioneering regulations on speech in *Mills* v. *Alabama*. In November 1962, the city of Birmingham held an election to decide whether to replace the current form of government (a city commission) with a new one (mayor-council). *Mills*, 384 U.S. at 215. At the time, Alabama prohibited "any electioneering or . . . solicit[ation of] 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 candidates or propositions is being held." *Id.* at 216 (second alteration in original) (citing Ala. Code, tit. 17, § 285). Mr. Mills, an editor for a daily newspaper, was arrested and charged with violating Alabama's electioneering statute after he published an election-day editorial urging people to vote for the mayor-council government. *Id.* at 215–16. The trial court concluded the state statute abridged freedoms of speech and the press in violation of the Alabama and Federal Constitutions. *Id.* at 216. The Alabama Supreme Court reversed; it found the statute passed constitutional muster, holding it was "within the field of reasonableness" and "not an unreasonable limitation upon free speech." *Id.*

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Mr. Mills appealed and the United States Supreme Court reversed. In the Court's view, Mr. Mills had done "no more" than publish an editorial on election day. *Id.* at 218. He had not interfered with voters at the polls. Nor did the record indicate he was anywhere near the polls on election day. But Alabama's statute nonetheless purported to wholly restrict this speech, regardless of where and when it occurred. Thus, even assuming the statute was animated by compelling interests, the Court reasoned it failed to effectuate them: The prohibition "leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those 'last-minute' charges on election day, the only time they can be effectively answered." *Id.* at 220. Because Alabama "prevents any adequate reply to these charges, [the statute] is wholly ineffective in protecting the electorate 'from confusive last-minute charges and countercharges,'" *id.*, and thus, it was deemed unconstitutional.

The Court pointedly reserved the issue of polling-place electioneering conduct: "[T]his question [in *Mills*] in no way involves the extent of a State's power to regulate conduct in and around the polls in order to maintain peace, order and decorum there." *Id.* at 218. Two decades later, the Supreme Court visited that issue.

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b. Burson v. *Freeman*

In *Burson*, the Court considered the constitutionality of a Tennessee statute prohibiting "the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place [on election day]." 504 U.S. at 193.[17]

At the outset, the plurality explained Tennessee's electioneering statute imposed a content-based restriction on political speech in a

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[17] We directed the parties to submit supplemental briefing on a threshold question: "What standard should this court apply from [*Burson*] given there is no majority opinion in that case?" Order at 1, Apr. 25, 2022. The parties were ordered to address the *Marks* rule: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation omitted).

In their supplemental briefs, the parties agreed the *Burson* plurality opinion was the narrowest ground relied on by the Justices concurring in the judgment. As we will explain, the *Burson* plurality (written by Justice Blackmun and joined by Chief Justice Rehnquist and Justices White and Kennedy) concluded Tennessee's electioneering prohibition survived a modified version of strict scrutiny. 504 U.S. at 193, 211. Justice Kennedy joined the plurality but also wrote separately to "elaborat[e] on the meaning of the term 'content based.'" *Id.* at 212. Justice Scalia, concurring in the judgment, concluded the area around a polling place is not a "traditional public forum," and the statute "is constitutional because it is a reasonable, viewpoint-neutral regulation." *Id.* at 214. The dissent, authored by Justice Stevens and joined by two other Justices, concluded the statute failed strict scrutiny. *Id.* at 217. Justice Thomas took no part in the case. *Id.* at 211.

The plurality opinion is narrower than Justice Scalia's concurrence, and, as the parties agree, it must be deemed the holding under *Marks*.

traditional public forum and, thus, was subject to "exacting" scrutiny. *Id.* at 197–98. This meant the state would need to show the "regulation [was] necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end." *Id.* at 198 (quoting *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

Tennessee maintained its electioneering law was necessary to "protect[] the right of its citizens to vote freely for the candidates of their choice" "in an election conducted with integrity and reliability." *Id.* at 198–99. The Supreme Court agreed these interests are "obviously . . . compelling ones." *Id.* at 199 (first citing *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964); then citing *Eu* v. *S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). *Burson* thus made explicit what was assumed in *Mills*: "[T]hat a State has a compelling interest in protecting voters from confusion and

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Moreover, that seven of the eight Justices concluded strict scrutiny applied suggests it would be inappropriate to apply Justice Scalia's less exacting standard. *See United States* v. *Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) ("[T]he *Marks* rule produces a determinate holding 'only when one opinion is a logical subset of other, broader opinions.'" (quotation omitted)).

Our conclusion that the plurality in *Burson* controls aligns with the decision of the only other federal court of appeals to have expressly addressed the question. *See Citizens for Police Accountability Political Comm.*, 572 F.3d at 1217 n.9 (looking to the plurality opinion for guidance because Justice Scalia's rationale "seems to be broader"). Other circuits have applied the plurality opinion without discussion. *See Schirmer*, 2 F.3d at 120; *Russell*, 784 F.3d at 1050.

undue influence" and "in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id.*

Having decided the compelling interests inquiry in favor of the state, the Court still needed to determine whether Tennessee's 100-foot buffer zone was necessary to vindicate these interests. To answer this question, the Court "examin[ed] the evolution of election reform, both in this country and abroad," which "demonstrate[d] the necessity of restricted areas in or around polling places." *Id.* at 200. This history—beginning with the colonial-era *viva voce* voting method, or "by showing of hands," *id.*, to handwritten paper ballots produced for voters by political parties wishing to gain influence—"reveal[ed] a persistent battle against two evils: voter intimidation and election fraud," *id.* at 206. To combat these "two evils," all fifty states, including Tennessee, "settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments." *Id.* "[T]his widespread and time-tested consensus," *id.*, therefore, led the plurality to conclude "that *some* restricted zone around the voting area is necessary to secure the State's compelling interest," *id.* at 208.

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That left the matter of what sort of restriction around the polling place would be narrowly drawn for constitutional purposes. "The real question," the Court explained, was "*how large* a restricted zone is permissible or sufficiently tailored[?]" *Id.* at 208. To answer that question,

the *Burson* plurality considered whether the Tennessee legislature's "response is reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.* at 209 (quoting *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)). Tennessee did not have to prove "that a 100-foot boundary is perfectly tailored to deal with voter intimidation and fraud." *Id.* Instead, the Court described the state's obligation as a "modified 'burden of proof.'" *Id.* at 209 n.11. The Court cautioned this modified burden "applie[d] only when the First Amendment right threatens to interfere *with the act of voting itself*, *i.e.*, cases . . . in which the challenged activity physically interferes with electors attempting to cast their ballots." *Id.* (emphasis added).

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The modified burden was the appropriate standard, the Court explained, "because a government has such a compelling interest in securing the right to vote freely and effectively." *Id.* at 208. The plurality observed the inherent difficulty a state would face in attempting to produce empirical evidence to justify the precise geographic scope of its chosen buffer zone. *Id.* at 209. In the plurality's view, "a State's political system" should not have to "sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does

not significantly impinge on constitutionally protected rights." *Id.* (quoting *Munro*, 479 U.S. at 195–96).

Applying the "modified 'burden of proof,'" *id.* at 209 n.11, the *Burson* plurality determined Tennessee's "minor geographic limitation" was not "a significant impingement. Thus, [the Court] simply d[id] not view the question whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.'" *Id.* at 210. "Reducing the boundary to 25 feet," for example, "is a difference only in degree, not a less restrictive alternative in kind." *Id.* Estimating it "takes approximately 15 seconds to walk 75 feet," the "State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. [The Court] d[id] not find that this is an unconstitutional choice." *Id.*

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To be sure, the plurality recognized, "At some measurable distance from the polls, . . . governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills*." *Burson*, 504 U.S. at 210. Or the statute in *Meyer* v. *Grant*, 486 U.S. 414 (1988), which invalidated Colorado's "absolute bar" against paying circulators to gather signatures in support of ballot initiatives. *Burson*, 504 U.S. at 210. *Mills* and *Meyer* involved legislation effecting complete bans on election-related conduct. By contrast, the "minor geographic limitation"

presented by the Tennessee statute at issue in *Burson* was "on the constitutional side of the line." *Id.* at 210–11. More specific state factual findings were not required for less-comprehensive electioneering regulations designed to protect voters engaged in the physical act of voting.

At bottom, the Court rejected any "'litmus-paper test' that will separate valid from invalid restrictions," and the plurality thought it "sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line." *Id.* (citation omitted).

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c. Minnesota Voters Alliance v. *Mansky*

In *Mansky*, the Court again considered the constitutionality of a state's electioneering regulations. This time, the Court held unconstitutional a Minnesota law prohibiting voters from "wear[ing] a political badge, political button, or anything bearing political insignia inside a polling place on Election Day." 138 S. Ct. at 1882. In doing so, the Court reaffirmed the compelling state interests underlying electioneering regulations as articulated in *Burson*—the prevention of "fraud, voter intimidation, confusion, and general disorder." *Id.* at 1886. And it emphasized the physical process of "[c]asting a vote is a weighty civic act" entitling voters to "an island of calm" to "peacefully contemplate their choices." *Id.* at 1887 (citation omitted). The Court held "Minnesota may choose to prohibit certain apparel [in the polling place] because of the

message it conveys" and thus permit "voters [to] focus on the important decisions immediately at hand." *Id.* at 1888.

What Minnesota could not do, however, was vindicate its interests by drawing an "[un]reasonable line" restricting voters' freedom of speech. *Id.* Under *Burson*'s "strict scrutiny [framework] applicable to speech restrictions in traditional public forums," *id.* at 1886, the *Mansky* Court concluded Minnesota's apparel ban—with its "unmoored use of the term 'political'" and "haphazard interpretations . . . in official guidance," *id.* at 1888—failed to "support its good intentions," *id.* at 1892. The problem, in other words, was not Minnesota's laudable goal. It was how the state sought to achieve it—"with a law [in]capable of reasoned application." *Id.* at 1892.

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From these precedents, we derive these principles.

First, because electioneering restrictions arise at the intersection of two fundamental rights—the First Amendment right to freedom of speech and the right to vote in an election free from interference and intimidation—content-based restrictions on political speech in a public forum are subject to "exacting," or strict, scrutiny. *Mansky*, 138 S. Ct. at 1885 (citing *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009)).

Second, when a state's electioneering prohibitions protect the act of voting, the Supreme Court recognized, first in *Mills* and *Burson* and then

in *Mansky*, there are compelling state interests involved. It is "obvious[]" the protection of voters from "confusion," "undue influence," "intimidation," and "election fraud" are compelling state interests. *Burson*, 504 U.S. at 199, 206.

Third, "some restricted zone around polling places" is permissible to achieve the state's compelling interests. *Id.* at 211. The restrictions chosen by the state, however, must be narrowly tailored. *Id.* at 197.

Fourth, to determine whether a chosen restriction is narrowly tailored, *Burson* posits a relaxed, or modified, "burden of proof." The regulation must be reasonable and not significantly impinge on constitutionally protected rights. *Id.* at 209. But a state is not "requir[ed] [to] pro[ve]," with empirical evidence, "that an election regulation is perfectly tailored." *Id.* Rather, in recognition of the deference due to states conducting elections, and because it would be "difficult to isolate the exact effect of these laws on voter intimidation and election fraud," *id.* at 208, courts need only look for a state's explanation why its restriction, whatever it may entail, is what it is. *See id.* at 209 (quoting *Munro*, 479 U.S. at 195–96) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.").

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Fifth, even state regulations designed to protect the act of voting may significantly impinge constitutional rights where they approach a total ban

on electioneering (like the regulation struck down in *Mills*) or where they do not clearly distinguish "what may come in from what must stay out" (like the regulation struck down in *Mansky*), *Mansky*, 138 S. Ct. at 1888. Generally, though, whether a voting regulation "could be somewhat tighter" or narrower "is not a question of constitutional dimension." *Burson*, 504 U.S. at 210.

Finally, where the "First Amendment right [does not] threaten[] to interfere with the act of voting itself," such as "regulations directed at intangible 'influence'" and other election-related conduct, the modified burden does not apply. *Id.* at 209 n.11. Instead, in those circumstances, "[s]tates must come forward with more specific findings to support [the] regulation[]." *Id.*

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With these general principles in mind, we turn to Plaintiff Frank's constitutional challenges to Wyoming's electioneering statute.

IV

First, we address the spatial scope of the 300-foot election-day buffer zone and the conduct Wyoming proscribes within it. As we explain, we find these aspects of the electioneering statute pass constitutional muster.

A

According to the district court, "Defendants have presented no argument—and offered no evidence—to explain why the statute requires an electioneering buffer zone much larger than the [100-foot] regulation upheld in *Burson*." Joint App. at 416–17. For this reason, the district court concluded Wyoming's 300-foot election-day buffer zone violated the First Amendment.

On appeal, Defendants contend the district court misunderstood *Burson*, which does not require a state to produce *empirical* evidence to show that an electioneering regulation that protects against interference with the act of voting itself is narrowly tailored. Rather, as Defendants explained before the district court, to establish that the geographic scope of the buffer zone around the polling place is constitutionally permissible, it simply must be reasonable and not a "significant impingement" on First Amendment rights.

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In response, Plaintiff Frank contends the district court correctly applied the "modified 'burden of proof'" in *Burson* and properly struck down the election-day buffer zone due to the state's failure to produce any evidence demonstrating why 300 feet is a narrowly tailored restriction.

Defendants have the better argument, and we reverse.

1

As we have explained, the Supreme Court has relaxed the demands of the narrow-tailoring inquiry when a state's electioneering regulations are designed to protect voters engaged in the act of voting. Here, though, the district court struck down the 300-foot buffer zone protecting election-day voters because Defendants failed to prove, with empirical evidence, that Wyoming's 300-foot buffer zone was necessary. This heightened burden imposed on Defendants by the district court is inconsistent with Supreme Court precedent.

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In the limited but vital context of polling-place restrictions, *Burson* modified the narrow-tailoring inquiry. Faithful application of *Burson*'s standard means a district court need only ask whether a state's legislative "response"—here, Wyoming's 300-foot election-day buffer zone—"is reasonable and does not *significantly impinge* on constitutionally protected rights." *Burson*, 504 U.S. at 209 (citation omitted). If the standard were otherwise, *Burson* explained, a state's ability to proactively protect the act of voting at the polls might be threatened. *Id.*; *see also Munro*, 479 U.S. at 195 ("To require States to prove actual voter confusion . . . as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by the State to prove the predicate."). "*Burson*'s solicitude for state sovereignty

regarding elections," therefore, "mitigates the evidentiary burden a State must satisfy." *Russell*, 784 F.3d at 1053; *see also Anderson* v. *Spear*, 356 F.3d 651, 656 (6th Cir. 2004) (*Burson*'s modified formulation of the narrow-tailoring inquiry was in "recognition of the deference due to the states in our federal system").

It is reasonable at first blush to assume a "modified 'burden of *proof*'" means an evidentiary burden of production. But *Burson* did not require Tennessee to put forth empirical evidence justifying the size of its buffer zone. Nor do our sister circuits, relying on *Burson*. *See Russell*, 784 F.3d at 1053 ("[I]n this context," "a State need not have a strong evidentiary basis for the law to withstand strict scrutiny."); *Anderson*, 356 F.3d at 656 (describing the modified burden as requiring only that "the state must demonstrate that its response is 'reasonable and does not *significantly impinge* on constitutionally protected rights'" (quoting *Burson*, 504 U.S. at 209)).[18]

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[18] *Burson*'s modification to the strict scrutiny test under the unique circumstances here—where "there is a conflict between First Amendment rights" and "the act of voting itself"—is not unusual. 504 U.S. at 209 n.11. Indeed, the Supreme Court has recognized the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000); *see also id.* at 390–91 (rejecting argument a state campaign finance statute is void "for want of evidence" when the state's asserted interests are "neither novel nor implausible"). "Modern First Amendment jurisprudence

Here, Defendants are not required—contrary to the district court's ruling—to produce any empirical evidence justifying the size of Wyoming's election-day buffer zone.[19] Instead, because the state seeks to "protect the act of ballot-casting[,] rather than the electoral process in some larger sense," it need only demonstrate the reasonableness of its response and its avoidance of significant impingements on constitutionally protected rights. Saul Zipkin, *The Election Period and Regulation of the Democratic Process*,

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is complex" precisely because it must "be applied in scores of different topical settings, resulting in . . . unique doctrinal tests tailored to the specific circumstances of each setting." 1 Smolla & Nimmer on Freedom of Speech § 4:5 (updated Apr. 2023). The Supreme Court, therefore, applies "specialized tests that displace the strict scrutiny formulation, while maintaining protection for speech equal to or greater than strict scrutiny," in a variety of areas. *Id.* § 4:3; *see, e.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (potential incitement to violence); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (prior restraints); *Richmond Newspapers, Inc.*, v. *Virginia*, 448 U.S. 555 (1980) (protection of press access to trials); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (protection of libelous speech involving public officials and public figures).

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[19] As in *Burson*, our analysis is also informed by the state's history of polling place regulations. *Burson* explained "Tennessee's regulation can be traced back to" provisions enacted in 1890 and 1901 that limited who could be within a certain distance of the polling room (50 feet) and criminalized certain offenses within 30 feet." 504 U.S. at 205. In 1967, Tennessee amended its laws to prohibit "the distribution of campaign literature" within 100 feet of a polling location, and in 1972 it added proscriptions on campaign displays and vote solicitation. *Id.* at 205–06. Similarly, Wyoming's first buffer zone was enacted in 1890, increased to 60 feet in 1936, and to 300 feet in 1973. Like Tennessee's, Wyoming's laws "have been in effect for a long period of time," which "makes it difficult for the States to put on witnesses who can testify as to what would happen without them." *Id.* at 208.

18 Wm. & Mary Bill Rts. J. 533, 564 (2010). Accordingly, Defendants did not need to provide empirical evidence supporting a *300-foot* buffer zone. Nor did they have the burden of proving that the *Burson*-approved *100-foot* buffer zone was insufficient. *Burson* explained that the Court "simply d[id] not view the question of whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.' Reducing the boundary to 25 feet . . . is a difference only in degree, not a less restrictive alternative in kind." *Id.* at 210. Tennessee was not required to prove that 25 feet was insufficient, and that the extra 75 feet was necessary. The same is true here.

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The district court relied on two out-of-circuit decisions—*Russell* and *Schirmer*—to conclude Defendants "did not meet their burden to demonstrate that the statute's 100-yard electioneering buffer zone is 'reasonable and does not significantly impinge on constitutionally protected rights.'" Joint App. at 416–17 (citation omitted). Neither *Russell* nor *Schirmer* is, of course, binding in this circuit. In any case, both are distinguishable, as Defendants persuasively explain.

In *Russell*, the Sixth Circuit evaluated a challenge to Kentucky's successor electioneering statute, after the prior version—including a 500-foot buffer zone—had been struck down because evidence in the record

suggested it had been passed to eliminate as much electioneering as possible, not to prevent voter fraud and intimidation at the polls. *See Anderson*, 356 F.3d at 657–59, 661–62 (striking down prior statute). The successor-statute at issue in *Russell* created a "300-foot no-political-speech buffer zone around polling locations on Election Day." 784 F.3d at 1043. Even though the original statute had been struck down for lack of a sufficient justification, and even though the Sixth Circuit recognized that, under *Burson*, "the State's evidentiary burden is relaxed," it held the statute unconstitutional because Kentucky failed to "present any evidence—or even a non-evidentiary policy argument" justifying its revised 300-foot buffer zone. *Id.* at 1053. The circumstances of *Russell* are unique, and therefore, distinguishable.[20] There, Kentucky offered *no justification* for the revised statute even though the prior version had recently been struck down because it was animated by impermissible purposes.

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[20] *Russell* may also be distinguished on the basis of its relation to *Anderson*. In *Anderson*, the Sixth Circuit invalidated the 500-foot buffer because the state failed to justify its size based on the permissible purposes of "prevention of voter intimidation and [] prevention of corruption." 356 F.3d at 661. Instead, Kentucky presented witnesses who said the "extreme geographic distance" was "intended to prevent voters from being bothered by constitutionally protected speech," which the court explained "*Burson* does not permit." *Id.* at 661–62. When Kentucky came back in *Russell* with a 300-foot buffer and *no justification at all*, the court invalidated that buffer, requiring "[t]he State [to] do more than split the difference to carry its burden." 784 F.3d at 1053.

By contrast, Wyoming's electioneering statute was first enacted in 1890 and the 300-foot buffer zone has been in place since 1973—almost 50 years. And early statutory reasons given for Wyoming's buffer zone—to "leave a clear space for the easy entrance and exit of all electors, to and from the polling place, without the hindrance or molestation of any one," 1890 Wyo. Sess. Laws 399—are consistent with those upheld in *Burson*. As Defendants correctly point out, "states cannot prove exactly how far their no-electioneering zones must be to address the[se] compelling interests." Defs.' Mot. Summ. J. at 18 (citing *Burson*, 504 U.S. at 208).

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In *Schirmer*, the Fifth Circuit considered, and rejected, a challenge to Louisiana's electioneering statute creating a campaign-free zone of 600 feet around polling places. 2 F.3d at 118. The court first concluded Louisiana "undoubtedly" had a compelling interest "to protect its citizens' right to vote." *Id.* at 121. As to whether the buffer zone was narrowly tailored to protect that interest, the court described *Burson*'s modified "burden" framework and recognized the likelihood "the [*Burson*] plurality would have supported a 600-foot limitation." *Id.* at 122. The *Schirmer* court reinforced its conclusion by pointing to testimony from a state representative who had authored the statute, describing that a 600-foot buffer zone was necessary because the state's previous 300-foot buffer zone failed to dissuade

politicians from hiring campaign workers to intimidate and harass voters. *Id.* at 121.

Contrary to the district court's understanding, *Schirmer* credited—but did not *require*—this evidence. Thus, *Schirmer* is not inconsistent with our holding today—nothing would bar this court from considering similar evidence were Wyoming to provide it, but nothing in *Burson* requires a state to proffer such evidence to justify the reasonableness of its buffer zone.

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For these reasons, the district court erred in assigning Defendants the burden of producing evidence demonstrating the 100-foot buffer zone approved in *Burson* was insufficient and that a 300-foot zone was necessary. Instead, Wyoming's choice to impose a 300-foot buffer zone is permissible "provided that [it] is reasonable and does not *significantly impinge* on constitutionally protected rights." *Burson*, 504 U.S. at 209 (quoting *Munro*, 479 U.S. at 195). Having clarified the correct legal standard that applies to the narrow-tailoring inquiry, we now apply it.

3

Defendants contend Wyoming's 300-foot election-day buffer zone complies with *Burson* because it "is not so wide as to become an 'impermissible burden,'" Opening Br. at 31, and it is "narrowly tailored to

the immediate area around the entrance to the polling place," *id.* at 33. We agree the 300-foot buffer zone is constitutional.

There is no dispute Wyoming has a compelling interest in regulating electioneering.[21] The only question before us is whether Wyoming's 300-foot election day buffer zone is narrowly tailored to serve that interest. Under the "modified burden" in *Burson*, we ask whether the "geographic limitation" prescribed by § 22-26-113 is "reasonable" and does not "*significantly impinge* on constitutionally protected rights." 504 U.S. at 209.

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There is an absence of "legislative history explaining the Wyoming Legislature's decision to arrive at 100 yards in 1973," Opening Br. at 31, but that is neither surprising nor fatal to the reasonableness of the statute's 300-foot buffer zone. After all, "[t]he majority of [electioneering] laws were adopted originally in the 1890s," including in Wyoming, "long before States engaged in extensive legislative hearings on election regulations." *Burson*, 504 U.S. at 208; *see also id.* at 215 n.1 (Scalia, J. concurring). "The

[21] As the district court correctly observed, "[t]here is no dispute here that the State has compelling interests in regulating electioneering." Joint App. at 415. Defendants explain the 300-foot prohibition "only prohibits electioneering close to the polling place entrance for the limited purpose of protecting voters from confusion, undue influence, harassment, and to maintain election integrity." Opening Br. at 33. These are compelling interests recognized by the Supreme Court. *See Burson*, 504 U.S. at 199 (recognizing compelling interests in "protecting voters from confusion and undue influence" as well as "preserving the integrity of the election process" (citation omitted)).

prevalence of these laws, both [in the U.S.] and abroad, then encouraged their reenactment without much comment." *Id.* at 208 (plurality opinion). We are thus persuaded, as Defendants argue, that the reasonableness of Wyoming's 300-foot buffer zone is evident from a "long history, substantial consensus, and . . . common sense," notwithstanding the absence of well-developed legislative history. Opening Br. at 31 (quoting *Burson*, 504 U.S. at 211).

Defendants also assert Wyoming's election-day buffer zone does not "significantly impinge on constitutionally protected rights." Opening Br. at 34. Again, we agree.

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Burson was hardly concerned with the exact size of the buffer zone. It "simply d[id] not view the question whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.'" 504 U.S. at 210. That is, of course, so long as the distance was not so expansive that it constituted a total ban on electioneering. *See id.* The Court cautioned that "[a]t some measurable distance from the polls . . . government regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in [*Mills*]." *Id.* But that is not the statute before us.

Wyoming's electioneering statute does not approach the absolute electioneering ban invalidated in *Mills* and *Meyer*. By pointing us to these

cases, the *Burson* plurality provided useful guidance on what it means to "*significantly impinge* on constitutionally protected rights." 504 U.S. at 209. Recall in *Mills*, the Court struck down an Alabama statute criminalizing the publication of *any* election-related newspaper editorials on Election Day—a proscription that extended across the state and barred entirely a category of constitutional speech. 384 U.S. at 216. And in *Meyer*, the Court struck down a Colorado statute that prohibited signature gathering by paid circulators *regardless* of proximity to a polling place. 486 U.S. at 428. This absolute prohibition, disconnected from a state's protection of physical ballot casting, violated the First Amendment. *Id.* By contrast, Wyoming's 300-foot election-day buffer zone is neither absolute nor limitless.

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Moreover, we do not understand *Burson*'s "at some measurable distance" line-drawing to fall arbitrarily between 100 and 300 feet. Here, the 300-foot buffer zone, while larger than the 100-foot zone at issue in *Burson*, still does not come close to a total ban on electioneering around the polls on election day. Reducing the 300-foot boundary to 100 feet "is a difference only in degree, not a less restrictive alternative in kind." *Burson*, 504 U.S. at 210.

Yet Plaintiff Frank maintains there is record evidence showing the additional 200-foot radius—beyond the boundary upheld in *Burson*—constitutes a significant impingement. For instance, Mr. Frank testified in

his deposition the buffer zone meant he could only address voters after they voted, which would be "totally pointless." Joint App. at 323. He also points to Ms. Horal's affidavit, arguing she was far more effective at gathering signatures before she was banished to the far corner of the parking lot. And Plaintiff contends the statute is not narrowly tailored because voters have the option to vote absentee via a mail-in ballot if they do not wish to be subjected to any electioneering near the polling place.

Wyoming's statute only prohibits electioneering within a one-minute walk from the entrance to the polling place; individuals may engage in electioneering anywhere else in the state on Election Day. In *Burson*, Tennessee decided the "last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible," which was not "an unconstitutional choice." *Burson*, 504 U.S. at 210. Here, Wyoming has decided the last minute should be the voters' own. Wyoming has endeavored to accomplish a "particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." *Id.* at 198. We agree with Defendants that in establishing a 300-foot election-day buffer zone, Wyoming—like Tennessee—"is on the constitutional side of the line." *Id.* at 211.

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B

Having concluded the size of Wyoming's election-day buffer zone is constitutional, we consider Plaintiff's challenge to the conduct proscribed within that zone, specifically, displaying bumper stickers.

Recall that Wyoming's electioneering statute generally applies to "any form of campaigning, including the display of campaign signs." Wyo. Stat. Ann. § 22-26-113(a). But there is an exception for bumper stickers:

> 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.

Id. This exception was added to the statute in 2018.

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The district court held Wyoming's so-called "ban on bumper stickers" violated the First Amendment and was facially invalid under *Burson*. Joint App. at 419. Because "Defendants ha[d] presented no evidence that the statute's ban on bumper stickers . . . is 'reasonable and does not significantly impinge on constitutionally protected rights,'"[22] *id.* at 419

[22] As we explained, we reject this interpretation of the *Burson* standard.

(quoting *Burson*, 504 U.S. at 209), the court held Wyoming's ban on bumper stickers was unconstitutional.[23]

On appeal, Defendants contend that a bumper sticker is no different from any other campaign sign—it is merely a campaign sign affixed to a car. According to Defendants, Wyoming's statute is thus no broader than the Tennessee statute approved in *Burson*, which prohibited all campaign signs, including bumper stickers, within the buffer zone. Thus, Defendants contend *Burson* squarely controls and the district court's ruling should be reversed. We agree.

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We review *de novo* a district court's determination of state law. *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 231 (1991). Under Wyoming law, "if the language is clear and unambiguous, we must abide by the plain meaning of the statute; if a statute is ambiguous, we may resort to general principles of construction." *Abeyta* v. *State*, 42 P.3d 1009, 1011–12 (Wyo. 2002) (quoting *Amrein* v. *State*, 836 P.2d 862, 864–65 (Wyo. 1992)).

First, we agree with Defendants that a political bumper sticker is a "campaign sign." As they correctly observe, it is essentially a campaign sign on a car. *See Int'l Bhd. of Elec. Workers, AFL-CIO, Local No. 1* v. *St. Louis*

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[23] The district court discussed, but did not decide, the overlap between "campaign signs" and "bumper stickers" under Wyoming law.

County, 117 F. Supp. 2d 922, 932 (E.D. Mo. 2000) (upholding county rules and guidelines restricting political activities by employees, including distributing campaign literature, making telephone calls, driving voters to the polls, and displaying bumper stickers on cars used for work or parked in county-owned lots); *Frumer* v. *Cheltenham Township*, 545 F. Supp. 1292, 1296 n.9 (E.D. Pa. 1982), *aff'd*, 709 F.2d 874 (3d Cir. 1983) (noting "cars with bumper stickers travelling the rights-of-way continually disseminate a political message within the rights-of-way"). By carving out an exception for a single bumper sticker of a certain size, the statute makes clear that bumper stickers are plainly encompassed within "campaign signs" under Wyo. Stat. Ann. § 22-26-113.

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Plaintiff Frank contends the Tennessee law in *Burson* did not apply to bumper stickers. Rather, he says, *Burson* left open whether a prohibition on campaign bumper stickers would be constitutional. *See* Resp. Br. at 50 (citing *Burson*, 504 U.S. at 201 n.13). As to that open question, Plaintiff insists Wyoming's bumper sticker ban on election day is unconstitutional on its face and as-applied because it covers cars merely "pass[ing] through" or "park[ing]" within the 300-foot buffer zone. Resp. Br. at 50.

But bumper stickers *were* encompassed in the Tennessee statute upheld in *Burson*, which applied to the "display" of "campaign materials."[24] *Burson*, 504 U.S. at 193. The question the plurality left open in *Burson* is a limited one—whether the statute would be constitutional as applied to a motorist who inadvertently violated the statute by driving on the street through a buffer zone with a campaign bumper sticker. *Id.* at 210 n.13. In a footnote, the plurality declined to address the issue because the state had "denied that the statute would reach this latter, inadvertent conduct, since this would not constitute 'display' of campaign material." *Id.*

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Here, Mr. Frank expressed concern about inadvertently driving through a buffer zone and violating the bumper sticker ban, but the record reflects he "chose not to do" so. Joint App. at 313. And while Defendants have not disavowed prosecution, a plain reading of Wyoming's statute indicates inadvertent conduct is not covered. Section 22-26-112(a) expressly provides that "[e]lectioneering too close to a polling place" is a criminal

[24] Indeed, bumper stickers were discussed at oral argument and the dissent expressly recognized the statute applied to bumper stickers on parked cars. *See* 504 U.S. at 218–19 (Stevens, J., dissenting) ("[T]he Tennessee statute does not merely regulate conduct that might inhibit voting; it bars the simple 'display of campaign posters, signs, or other campaign materials.' Bumper stickers on parked cars and lapel buttons on pedestrians are taboo."); *see also Mansky*, 138 S. Ct. at 1887 (describing how "Tennessee's law *swept broadly* to ban even the plain 'display' of a campaign-related message, and the Court upheld the law in full" (emphasis added)).

offense only if "knowingly and willfully committed." Inadvertently violating the statute by driving through a buffer zone with more than one large bumper sticker per candidate could not reasonably be considered willful.[25]

With *Burson* guiding our analysis, we conclude Wyoming's prohibition on campaign bumper stickers within the Election Day buffer zone is permissible both facially and as applied. *Burson* recognized that states may regulate campaign signs to protect voters engaged in the act of voting from confusion, undue influence, and to preserve the integrity of the election process. 504 U.S. at 198–99. Unlike the Tennessee statute in *Burson*, Wyoming's statute is not an absolute prohibition on all campaign bumper stickers within 300 feet of an election day polling place.[26] Wyoming's scheme

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[25] *See Reyes* v. *State*, 505 P.3d 1264, 1270–71 (Wyo. 2022) ("[The Supreme Court of Wyoming has] held that 'knowingly' and 'willfully' do not have technical legal meanings, and their ordinary meanings apply. 'Knowingly' means 'with awareness, deliberateness, or intention as distinguished from inadvertently or involuntarily.' . . . '[W]illfully' means 'intentionally, knowingly, purposely, voluntarily, consciously, deliberately, and without justifiable excuse, as distinguished from carelessly, *inadvertently*, accidentally, negligently, heedlessly or thoughtlessly.'" (emphasis added) (quotations omitted)).

[26] This was not always the case, however. Wyoming's statute—just like Tennessee's—expressly prohibited the display of all campaign signs from 1973 until 2018. In 2018, the Wyoming legislature amended the statute to permit bumper stickers in certain circumstances. 2018 Wyo. Sess. Laws 237–38. Defendants explain the legislature "eased restrictions in all electioneering ban areas . . . to allow one specific type of campaign sign—bumper stickers meeting certain requirements—to be displayed within the prohibited area." Opening Br. at 5.

is, therefore, less restrictive than the statute upheld in *Burson*. And unlike the Minnesota prohibition in *Mansky*, Wyoming's electioneering statute is capable of reasoned application, 138 S. Ct. at 1892. Taken together, we conclude the electioneering statute's general prohibition on bumper stickers on election day is reasonable and does not rise to the level of a significant impingement of First Amendment rights.

V

Section 22-26-113 also prohibits electioneering within 100 feet of an absentee polling place. While it struck down the 300-foot election-day buffer zone, the district court sustained the 100-foot absentee buffer zone against Plaintiff Frank's constitutional challenge. We now turn to this issue, vacate the district court's determination, and remand.

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A

In Wyoming, recall, absentee polling places are open for 45 days before an election. *See* Wyo. Stat. Ann. §§ 22-6-107(b), 22-9-125. Absentee voters have the option to receive and return a mail-in ballot or vote in-person at an absentee polling place. The record suggests Wyoming citizens are "actually voting at the absentee voting place[s]" in which the 45-day, 100-foot buffer zones apply. *See* Joint App. at 34, 152–54, 224–25.

In the district court, Plaintiff Frank contended Wyoming's absentee polling place buffer zone was unconstitutional because its "dramatic

increase in size and scope from *Burson*" had the "constitutional consequence" of "damag[ing]" "speech occurring [in] a variety of public fora" to a "considerably greater" extent. Pl. Mot. Summ. J. at 21. That is, the buffer zone "reach[es] too far, last[s] too long, and capture[s] speech irrelevant to protecting voting integrity." *Id.* at 24. The district court rejected this argument, ruling Wyoming's absentee buffer zone was the same size as that approved in *Burson* and, for that reason, "d[id] not go beyond the bounds of the holding in [that] controlling case." Joint App. at 417–18. Reasoning *Burson* "did not premise its holding on a factual scenario where a regulation is only effective for two days a year," the court did not consider the temporal scope of the absentee polling buffer zone in the narrow-tailoring inquiry. Joint App. at 417. For these reasons, the district court concluded the 100-foot absentee buffer zone did not violate the First Amendment.

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On appeal, Plaintiff Frank reprises his argument that the size and scope of the absentee buffer zone together render it unreasonable and a significant impingement on First Amendment rights. Defendants respond that absentee voters are "entitled to the same protection from undue influence and confusion as regular election-day voters" and the district court "properly concluded" the buffer zone "complied with *Burson*." Reply Br. at 32–33.

We agree with Plaintiff the district court erred by failing to factor in the temporal scope when evaluating the constitutionality of the buffer zone's size and the proscribed conduct within it.

The statute in *Burson* entailed a combination of restrictions designed to protect the act of voting: It "prohibit[ed] the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place" on election day. 504 U.S. at 193. The plurality upheld this statute in full, concluding Tennessee's legislative response, *i.e.*, the combination of electioneering restrictions around a polling place, were "reasonable and [did] not significantly impinge on constitutionally protected rights." *Id.* at 209 (emphasis and citation omitted).

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In Defendants' view, *Burson* "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." Reply Br. at 34. We agree. Where we diverge from Defendants, and the district court, is on what this means for the narrow-tailoring inquiry. As we understand it, *Burson* teaches that courts evaluating a state's electioneering regulation must consider the burden on speech resulting from the state's chosen method of protecting the right to cast a ballot. A meaningful analysis is not piecemeal; instead, it should account for every component of the restriction. Otherwise, a court cannot determine whether

the electioneering regulation is narrowly tailored to protect the act of voting itself.

The absentee buffer zone at issue here, like that in *Burson*, is a combination of size, time, and conduct prohibitions: Wyoming seeks to prohibit "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" [conduct] "within one hundred (100) feet" of an absentee polling place [size], for "forty-five (45) days before the election" [time]. Wyo. Stat. Ann. §§ 22-26-113, 22-6-107.

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The geographic scope of the absentee buffer zone is permissible. Indeed, it is identical to that approved by the Supreme Court in *Burson*. 504 U.S. at 221. But we cannot resolve whether Wyoming's electioneering restrictions around absentee polling places constitute an impermissible restraint on First Amendment speech by looking only at the physical size of the buffer zone. Rather, that question can be answered only after a holistic inquiry—one that grapples with size, conduct, *and* temporal scope as components of a regulatory act.

The district court declined to address this issue because it believed *Burson*'s holding was not premised on the temporal scope of Tennessee's election-day buffer zone. That *Burson* did not address the temporal scope of Tennessee's statute, as we explained, does not make it irrelevant. A

restriction on speech lasting 45 days, Plaintiff contends, may be "more significant[]" than one applying only on an election day. *See* Resp. Br. at 56. The temporal scope of Wyoming's electioneering statute, as applied to the absentee voting period and the prohibited electioneering activities within that zone, including the ban on bumper stickers and signature gathering, should be considered by the district court on remand.[27]

VI

Finally, Plaintiff Frank's verified complaint "raise[d] *jus tertii* claims of third parties not before this Court who should be allowed to engage in First Amendment protected electioneering near polling places and absentee polling places." Joint App. at 23. This allegation specifically included "those who have the right to post political signs on their property within a buffer zone, but who cannot [do so] due to the reach of Wyoming law." *Id.* The district court expressly declined to consider this claim, ruling, in full, "Neither of the [then-]Plaintiffs own, rent, or have permission to electioneer on private property within electioneering buffer zones in Wyoming. The

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[27] The parties briefed this issue on appeal. "Rather than examining and resolving the merits of the[ir] contentions, . . . we adopt the better practice of leaving the matter to the district court in the first instance." *Day*, 45 F.4th at 1193 (alteration in original) (quoting *Evers* v. *Regents of Univ. of Colo.*, 509 F.3d 1304, 1310 (10th Cir. 2007)).

Court finds that there is an absence of factual record in the case to consider this issue, and we will not entertain this challenge." *Id.* at 419.

To the extent the district court concluded Plaintiff Frank lacked *jus tertii* standing, we agree. "In a *jus tertii* case, a litigant is permitted to challenge the enforcement of a statute against himself and also assert that the legal duties imposed on the litigant operate to violate third parties' rights." *Mata Chorwadi, Inc.* v. *City of Boynton Beach*, 66 F.4th 1259, 1265 (11th Cir. 2023). That is, "[t]he key to *jus tertii* standing is the causal connection between the litigant's injury and the violation of the third parties' constitutional rights." *Id.* at 1266. For purposes of *jus tertii* standing, a plaintiff "must show that 'the party asserting the right has a "close" relationship with the person who possesses the right,'" and "there is a 'hindrance' to the possessor's ability to protect his own interests." *Aid for Women* v. *Foulston*, 441 F.3d 1101, 1111–12 (10th Cir. 2006) (citations omitted). Here, despite repeatedly invoking the words "*jus tertii*," Plaintiff never made this two-part showing. And on the record before us, we cannot discern how—beyond arguments of counsel—such a showing could be made.

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But this does not doom Plaintiff's claim, as the district court may have believed.[28] This is because we understand Plaintiff Frank to have actually raised a facial overbreadth claim, a claim for which he does have standing.

The overbreadth doctrine "enable[s] persons who are themselves unharmed by the defect in a statute nevertheless 'to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.'" *Bd. of Trs. of State Univ. of N.Y.*, 492 U.S. at 848 (quoting *Broadrick* v. *Oklahoma*, 413 U.S 601, 610 (1973)). The "normal rule [is] that partial, rather than facial, invalidation is the required course." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). However, where a statute is facially overbroad—that is, "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *United States* v. *Stevens*, 559 U.S. 460, 473 (2010) (quotation omitted)—facial invalidation of the statute may be appropriate if it cannot be "cured by giving the statutory language a limiting construction," *Harmon* v. *City of Norman*, 981 F.3d 1141, 1153 (10th Cir. 2020). *See also* Smolla & Nimmer, *supra* note 18, § 6:6

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[28] *See City of Chicago* v. *Morales*, 527 U.S. 41, 55 n.22 (1999) (describing *jus tertii* standing as "a prudential doctrine and not one mandated by Article III of the Constitution").

("The substantial overbreadth doctrine in First Amendment law is a balance of competing social interests.").

Here, we struggle to see how Plaintiff would not have standing under *Broadrick*. "The traditional rules governing constitutional adjudication are largely inverted when it comes to litigation over First Amendment rights." Smolla & Nimmer, *supra* note 18, § 6:6. When compared to "as applied" challenges, "facial" challenges to statutes are typically strongly disfavored. *Id.* But in cases like this, "[t]he challenged law need not have been applied against the challenger *at all*; as long as the barebones requirements of Article III standing are met, the elements of prudential standing are presumed satisfied in an overbreadth challenge." *Id.* (emphasis added); *see also Broadrick*, 413 U.S. at 612 ("[T]he Court has altered its traditional rules of standing to permit—in the First Amendment area—'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.'" (citation omitted)).

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To the extent Plaintiff seeks to challenge the electioneering statute as unconstitutionally overbroad because it chills the speech of third-party property owners, we conclude *Broadrick*'s narrow exception for standing applies. Thus, any contrary determination by the district court was erroneous.

The district court's order did not end there, however. The court's ruling also perceived "an absence of factual record in the case to consider th[e] issue" on the merits. Joint App. at 419. On *de novo* review, we disagree.

The district court correctly observed Plaintiff does not "own, rent, or have permission to electioneer on private property within electioneering buffer zones in Wyoming." *Id.* However, it does not necessarily follow there was an insufficient record to address Plaintiff Frank's overbreadth challenge based in part on the statute's application to property owners. As Plaintiff correctly points out, he did present evidence that state actors had enforced the statute against individuals for speech on their own property. For example, an employee of the Laramie County Clerk's Office testified that a campaign sign on private property within a buffer zone violates the law. She testified that she has asked homeowners to remove such signs, and if the homeowners are not there, poll workers will remove the signs themselves. A representative of the Secretary of State's Office confirmed this general practice. Thus, there was a factual record to consider the merits of Plaintiff's claim that the statute was unconstitutionally overbroad because, among other reasons, it captured campaign signs on private property.

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Rather than consider this claim in the first instance, we remand to the district court. *See Apartment Inv. & Mgmt. Co.* v. *Nutmeg Ins. Co.*, 593 F.3d 1188, 1198 (10th Cir. 2010).

VII

We **AFFIRM** the district court's rulings that Defendants are not entitled to sovereign immunity and Plaintiff has Article III standing.

We **REVERSE** both the district court's ruling that the geographic scope of the 300-foot buffer zone at election-day polling places is unconstitutional, and its holding on the display of bumper stickers within that zone. That election-day regulation, too, is constitutional.

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We **VACATE** the district court's ruling on the constitutionality of the 100-foot absentee polling place buffer zone. On remand, the district court should consider in the first instance whether this buffer zone passes constitutional muster. It should do so after considering both the geographic *and the temporal scope*, as well as the conduct proscribed within.

We also **REMAND** for the district court to consider in the first instance Plaintiff's overbreadth claim.