No. _____

In The Supreme Court of the United States

JOHN C. FRANK,

Petitioner,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Wyoming prohibits electioneering within 300 feet of any public entrance to a polling place while voting is being conducted on the day of a primary, general or special election. These no-electioneering buffer zones extend 200 feet further than those upheld in *Burson v. Freeman* and create areas of censorship that are 282,743 square feet, nine times larger than the zone upheld by this Court and most zones that account for the "long history" and "widespread and time-tested consensus" of such regulations. 504 U.S. 191, 203–04, 206, 211 (1992); App.87-91. The court below ruled that the Wyoming law is reasonable and does not significantly impinge upon free speech, even with its regulation of the size and quantity of candidate bumper stickers that may pass through or park in a buffer zone. The panel reasoned that to extend a buffer zone beyond 100 feet the government need not make any showing of necessity or reasonableness until it "effect[s] [a] complete ban[ ] on election-related conduct." App.33.

The questions presented are:

Whether the Tenth Circuit erred in upholding Wyoming's 300-foot election day buffer zone without requiring the state to meet any burden to support the law.

Whether the Tenth Circuit erred in upholding Wyoming's prohibition of certain candidate bumper stickers within 300 feet of a polling place on election day.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellee/cross-appellant below) is John C. Frank.

Respondents (defendants-appellants/cross-appellees below) are Debra Lee, in her official capacity as Laramie County Clerk; Charles Gray, in his official capacity as Wyoming Secretary of State; Sylvia Hackl, in her official capacity as Laramie County District Attorney.

CORPORATE DISCLOSURE STATEMENT

Petitioner John C. Frank is an individual.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to the case within the meaning of Rule 14.1(b)(iii):

- *Frank v. Lee*, Nos. 21-8058, 21-8059, and 21-8060 (10th Cir.), judgment entered on October 23, 2023.
- *Frank v. Buchanan*, No. 20-CV-138 (D. Wyo.), judgment entered on July 22, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner John C. Frank respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 84 F.4th 1119 and reproduced at App.1-62. The district court's opinion is reported at 550 F.Supp.3d 1230 and reproduced at App.63-80.

JURISDICTION

The Tenth Circuit entered judgment on October 23, 2023. App.1. The court denied a petition for rehearing *en banc* on November 20, 2023. App.81. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment, the Fourteenth Amendment and Wyoming Statutes § 22-26-113 are reproduced at App.83-84.

STATEMENT OF THE CASE

This case presents important First Amendment questions. Must a state evince a need for no-electioneering buffer zones some six and a half acres in size around polling places? Or may the state simply cite *Burson v. Freeman* to satisfy its burden? And where a state enacts a buffer zone that extends further than the 100 feet approved in *Burson*, does more traditional strict scrutiny apply to those provisions?

Resolving these questions is a matter of significant nationwide importance. Two circuit courts of appeals hold states to a burden of proof in First Amendment challenges to larger no-electioneering buffer zones. But the Tenth Circuit defers to governments simply citing *Burson* to support their need for sizeable no-electioneering zones—some 282,743 square feet in Wyoming. This creates contradiction and confusion about the standards governing the peaceful speech of citizens occurring near polling places across America every election day.

A. Legal and Historical Background

Wyoming law prohibited electioneering within 60 feet of a polling place from 1891 until 1973, when—for reasons unknown—the distance was extended to 300 feet.[1] 1890 Wyo. Sess. Laws ch. 80, § 174 ("No person whatsoever shall do any electioneering on election day

[1] Wyoming law measures the radius of its election day no-electioneering buffer zone in yards. For purposes of this briefing, yards will be converted to feet except when quoting sources.

within any polling place, or any building in which an election is being held, or within twenty yards thereof, nor obstruct the doors or entries there to, or prevent free ingress to and egress from such building or place."); 1973 Wyo. Sess. Laws ch. 251, § 1 ("Electioneering too close to a polling place consists of any form of campaigning on election day within 100 yards of the building in which the polling place is located, and includes also the display of signs or distribution of campaign literature."). Since then, the state legislature has broadened the definition of "electioneering" by prohibiting "the soliciting of signatures to any petition or the canvassing or polling of voters[.]" 1983 Wyo. Sess. Laws ch. 183, § 2. But after a lawsuit, the law was amended to include an exception for "exit polling by news media" from the canvassing or polling restriction. 1990 Wyo. Sess. Laws ch. 42, § 1; *see Nat'l Broadcasting Co. v. Karpan*, No. C88-320 (D. Wyo. 1988).

In 2006, the Wyoming Legislature passed a law that permits counties to create polling places for absentee voting, which must be "established in the courthouse or other public building which is equipped to accommodate voters from all districts and precincts within the county[.]" 2006 Wyo. Sess. Laws ch. 108, § 1 (codified at Wyo. Stat. § 22-9-125(a)(ii) (2006)). At the same time, the law was amended to prohibit electioneering within 300 feet of any absentee polling place. *Id.* (codified at Wyo. Stat. § 22-26-113 (2006)). In 2011, the restriction was amended to only apply "when voting is being conducted[.]" 2011 Wyo. Sess. Laws ch. 38, § 1

(codified at Wyo. Stat. § 22-26-113 (2011)). In 2018, the radius of buffer zones around absentee polling places was decreased to 100 feet. 2018 Wyo. Sess. Laws ch. 118, § 1 (codified at Wyo. Stat. § 22-26-113 (App.83-84)). Currently, buffer zones around absentee polling places are in effect for 28 days before any primary, general or special election—that is, for at least 56 days in an election year. 2023 Wyo. Sess. Laws ch. 177, § 2 (codified at Wyo. Stat. § 22-9-107)); *see How Do I Vote?*, LARAMIE COUNTY CLERK, https://elections.laramiecountyclerk.com/how-do-i-vote/ [https://perma.cc/P5ZT-LHKA] (last visited Feb. 14, 2024).

The most recent amendment to the content provisions of the law was also made in 2018, prohibiting more than one bumper sticker "affixed to a vehicle while parked within or passing through" a zone per candidate and limiting the size of any candidate sticker to 4 inches height and 16 inches length. Wyo. Stat. § 22-26-113 (App.83-84). Before the final vote on reconciliation for this provision in the Wyoming Senate, the chairman of the Corporations, Elections and Political Subdivisions Committee quipped "nobody's going to give a rat's about this, anyway, so let's pass it!" Wyo. Senate Afternoon Session, March 9, 2018, http://wyoleg.gov/2018/Audio/senate/s030918pm1.mp3 (audio at 06:34-08:28).

Knowingly and willfully electioneering too close to a polling place is a misdemeanor, punishable by up to six months in a county jail and a fine of up to $1,000. Wyo. Stat. § 22-26-112. Wyoming law does not restrict police presence in or around polling places.

B. Facts and Procedural History

John C. Frank is a resident of Cheyenne, Wyoming, who believes in the efficacy of personally engaging voters one-on-one and inexpensive political speech such as bumper stickers. But for the prohibition in Section 22-26-113, Mr. Frank would distribute campaign literature and speak with voters about candidates and issues on the ballot within 300 feet of Wyoming polling places, particularly the one at Laramie County Community College ("LCCC"), on election days. App.3, 10-11, 65-66, 85. Mr. Frank would also, but for the law, affix bumper stickers and display signs from his car that are larger and more numerous per candidate than those permitted and park his car within 300 feet of the LCCC polling place on election days. App.3, 10-11, 65-66, 85. He would not approach voters or park his car within 100 feet of a polling place on election days.

Mr. Frank sued the Laramie County Clerk, Laramie County District Attorney and Wyoming Secretary of State (collectively, "the State") in their official capacities in July, 2020. He claimed that Section 22-26-113 is unconstitutional under the First Amendment and asked the court to enjoin its enforcement. The district court denied a motion for preliminary injunction by Mr. Frank and then denied the State's motion to dismiss. Discovery revealed nothing indicating a history of intimidation or voter confusion near Wyoming polling places, but instead petty complaints dating to the 1970s and 1980s about yard signs on private property within certain 300-foot election day buffer zones.

There is a recent history of enforcing the law that is equally petty. An employee of County Clerk Lee testified that polling place officials are authorized to demand property owners remove yard signs that are within a zone and have even removed them from private property themselves on election days without even notifying the property owner. Bumper stickers and signage on vehicles within zones have also led to warnings and demands from agents of county clerks that owners move the vehicles. On August 18, 2020, Jennifer Horal, who was gathering signatures to secure ballot access for presidential candidates near the LCCC polling place during the primary election, was cited by the police with a misdemeanor under the law for gathering signatures within 300 feet—but further than 100 feet—of the polling place entrance. She had not intimidated, confused, or obstructed any voter.

Mr. Frank testified that the election day buffer zone is so large that at LCCC the only place he might engage voters is when they are leaving the parking lot in their vehicles through the exit-only driveway. "[C]ampaigning for either an issue or a candidate in that little corner exit of the parking lot, that's totally pointless. They already voted." Photographs provided by Mr. Frank and an overlay created by the Laramie County Clerk's office also show that one-on-one communication is entirely foreclosed around the polling place. App.85-86. Mr. Frank cannot even park his car in the polling place lot with prohibited bumper stickers or signs, because he would have to pass through the restricted zone just to park in the few non-censored

spots. App.85. These effects of the 300-foot zone are much the same at every polling place, every election day across Wyoming.

As a factual matter, the State did not establish—much less assert—any governmental interest behind the election day buffer zone. The designee of the Wyoming Secretary of State's Office under Federal Rule of Civil Procedure 30(b)(6), himself the State Elections Director, was required to testify as to "factual bases for the necessity of the 100-yard election day polling place . . . radi[us]" under the law. When asked in his deposition if the 300-foot zone is necessary, the designee testified "[y]es, because the statute says what it says. So it's a policy decision of the legislature that needs to be followed." When asked if there are any reasons other than it being the law, he testified that "[n]othing else comes to mind."

At summary judgment, the district court assessed Mr. Frank's challenge to the law under *Burson v. Freeman*. App.73 (citing 504 U.S. 191). The court found that Section 22-26-113 is subject to strict scrutiny as a content-based restriction of speech. App.74 (quoting *Burson*, 504 U.S. at 198). It noted that *Burson* recognized a "modified burden of proof" when a "'First Amendment right threatens to interfere with the act of voting itself.'" *Id.* (quoting *Burson*, 504 U.S. at 209 n.11). This "requires that a voting regulation be 'reasonable and [to] not significantly impinge on constitutionally protected rights.'" *Id.* (quoting *Burson*, 504 U.S. at 209). Importantly, the court reasoned that "[a]lthough the modified burden as formulated in *Burson* does not

explicitly pronounce that a state must prove a regulation to be reasonable, that it is a modification of the narrow-tailoring prong of strict scrutiny analysis forces a logical conclusion that the burden to prove is still on the state." App.74-75.

Using this analysis, the district court made quick work of the State's lack of proof. The court ruled the 300-foot election day zone is unconstitutional because "Defendants have presented no argument—and offered no evidence—to explain why the statute requires an electioneering buffer zone much larger than the regulation upheld in *Burson*." App.76. It was thus unreasonable. Neither did the State rebut Mr. Frank's evidence that such a large buffer zone significantly impinges upon his speech by foreclosing one-on-one communication. Turning to the bumper sticker provision, the court noted the same problems with the State's lack of proof, but also reasoned that "the Court cannot see how bumper stickers on vehicles could lead to voter intimidation or election fraud." App.78 (citing *Burson*, 504 U.S. at 206).

The Tenth Circuit Court of Appeals interpreted *Burson* very differently than the trial court. App.28-33. Under *Burson*'s modified burden of proof, the court found, "[m]ore specific factual findings [are] not required for less-comprehensive electioneering regulations designed to protect voters engaged in the physical act of voting" until a law censors as comprehensively as the one addressed in cases such as *Mills v. Alabama*. App.32-33 (citing 384 U.S. 214 (1966)). "[C]ourts need only look for a state's explanation why

its restriction, whatever it may entail, is what it is." App.35. Under the Tenth Circuit's approach, government may, by its own *ipse dixit*, destroy the public forum status of sidewalks, streets, and parks close to polling places. *Contra U.S. Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 133 (1981).

Under this paradigm, the appellate court found Wyoming's 300-foot zone is reasonable because it "is neither absolute nor limitless." App.46-47. The court did not recognize the elimination of one-on-one communications around polling places on election day as a significant impingement of speech; indeed, it rejected this because "individuals may engage in electioneering anywhere else in the state on Election Day" even though this is far less effective. App.47-48. Adding its own facts found nowhere in the record, the court found the 300-foot radius enacts but "a one-minute walk from the entrance to the polling place" that "Wyoming has decided . . . should be the voter's own." App.47-48. The election day zone thus triples the *Burson* radius and somehow quadruples the " 'last 15 seconds' before citizens enter the polling place[.]" App.48 (quoting *Burson*, 504 U.S. at 210). The court reversed the district court and upheld the 300-foot election day buffer zone.

The Tenth Circuit also reversed the district court's ruling as to bumper stickers. The appellate court found that "Wyoming's statute is . . . no broader than the Tennessee statute approved in *Burson*, which prohibited all campaign signs, including bumper stickers, within the buffer zone." App.49-50. Moreover, because

Section 22-26-113 allows one bumper sticker of a certain size per candidate in the election day zone, the court found the law "less restrictive than the statute upheld in *Burson*." App.53.

Also on appeal was the district court's rejection of Mr. Frank's challenge to the 100-foot buffer zones that the law places around absentee polling places and his overbreadth claim. App.77, 79. The Tenth Circuit reversed and remanded both of those issues. App.53-61. But the limit of *Burson*—that is, the application of the First Amendment—is fundamental to all issues in this case, and this Court should consider that precedent in light of the 300-foot election day zone and bumper sticker provisions now.

REASONS FOR GRANTING THE PETITION

In its opinion below, the Tenth Circuit forgot—or at least misplaced—the importance of free speech. *See* U.S. CONST. amend. I. To be sure, the panel noted familiar First Amendment precedent like "content-based restrictions on political speech in a public forum are subject to 'exacting,' or strict, scrutiny." App.33-34 (quoting *Minnesota Voters Alliance v. Mansky*, 585 U.S. 1, 11–12 (2018)). The court noted some important facts, too: "Mr. Frank has engaged in a variety of electioneering activities—he's been a campaign volunteer, door-to-door canvasser, precinct leader, and fundraiser" and Section 22-26-113 "prevent[s] him from handing out campaign literature and displaying bumper stickers

on his car within the 300-foot buffer zone." App.3, 21 n.14. But the precedent that affirms the significance of Mr. Frank's speech is missing.

It thus bears reaffirming this at the outset: "'[H]anding out leaflets in the advocacy of a politically controversial viewpoint . . . is *the essence of First Amendment expression*'; '*[n]o form of speech is entitled to greater constitutional protection*.'" *McCullen v. Coakley*, 573 U.S. 464, 488–89 (2014) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)) (emphasis added). Personal political engagement in a traditional public forum is, even today—especially today—part of "the most effective, fundamental, and perhaps economical avenue of political discourse, *direct one-on-one communication*." *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (emphasis added). Only by neglecting these principles could the court below conclude that an election day buffer zone may extend the length of a football field (and beyond) and regulate even the size and quantity of bumper stickers therein, enforced under threat of criminal penalties, without requiring the State to make any showing of necessity or even reasonableness. This Court should grant certiorari and reverse.

I. The Election Day Buffer Zone and Bumper Sticker Restrictions in Wyoming Statute § 22-26-113 Violate the First Amendment.

In *Burson*, this Court upheld Tennessee's election day buffer zone in a plurality opinion with two

concurrences and a starkly divergent dissent. 504 U.S. 191. The statute prohibited "'the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question'" within 100 feet of a polling place entrance. *Id.* at 193–94 (quoting Tenn. Code Ann § 2-7-111(b) (Supp. 1991)). The Court found this a restriction of free speech subject to the First Amendment under the Fourteenth Amendment. *Id.* at 196, 217; *see* U.S. CONST. amend. XIV. Assessing it, the plurality began with the importance of free speech: "'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" *Burson*, 504 U.S. at 196 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). Applying strict scrutiny owing to the law's regulation of speech based on its content, the plurality found it "a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote[.]" *Id.* at 198.

The plurality elaborated on the right to vote and, for purposes of strict scrutiny, summarized it as "a compelling interest in protecting voters from confusion and undue influence" and "a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id.* at 199 (citing *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 228–29 (1989); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). The plurality then conducted an "examination of the evolution of election reform[.]" *Id.* After illustrating the development of the

official ballot, polling places and polling booths as a response to "bribery, intimidation, disorder, and inefficiency," the plurality described how electioneering restrictions accompanied their adoption. *Id.* at 203. For instance, "New York . . . prohibited any person from 'electioneering on election day within any polling-place, or within one hundred feet of any polling place.'" *Id.* at 204 (quoting J. WIGMORE, THE AUSTRALIAN BALLOT SYSTEM AS EMBODIED IN THE LEGISLATION OF VARIOUS COUNTRIES 131 (1889)).

Tennessee implemented a 100-foot zone, the same sized zone as New York's,[2] but far more recently. The plurality described the Tennessee law's evolution from allowing "only voters and certain election officials . . . within the room where the election was held or within 50 feet of the entrance" in 1890 to prohibiting "any person, except the officers holding the elections, to approach nearer than 30 feet to any voter or ballot box" in 1901 to the state's 100-foot buffer zone in 1967. *Id.* at 205. Only in 1972 did Tennessee adopt "the direct precursor of the restriction challenged" in the case. *Id.* Nevertheless, the plurality found it part of a "widespread and time-tested consensus [that] demonstrates that some restricted zone is necessary in order to serve the State's compelling interests in preventing voter intimidation and election fraud." *Id.* at 206.

[2] As noted in the assembled table and later in this brief, in 1890 New York enacted a 150-foot no-electioneering zone, the single largest zone enacted by 1900. App.87-91.

The plurality rejected the respondent's challenges to this conclusion. Specific laws prohibiting intimidation and interference "fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Id.* at 206–07 (quoting *Buckley v. Valeo*, 424 U.S. 1, 28 (1976)); *see* Tenn. Code Ann. §§ 2-19-101, 2-19-115 (Supp. 1991). The plurality also noted that, in Tennessee, "law enforcement offers generally are barred from the vicinity of the polls" and thus "many acts of interference would go undetected" without a restricted zone. *Burson*, 504 U.S. at 207; *see* Tenn. Code Ann. § 2-7-103(c) (current law restricting law enforcement from within ten feet of a polling place "except at the request of the officer of elections or the county election commission or to make an arrest or to vote"). The plurality also rejected underinclusivity concerns, noting "there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit . . . electoral abuses." *Burson*, 504 U.S. at 207. Finally, the plurality relied upon common sense to dismiss concerns of necessity, and again turned to history to "hold that *some* restricted zone around the voting area is necessary to secure the State's compelling interest." *Id.* at 207–08.

With this in mind, the plurality posited that "[t]he real question . . . is *how large* a restricted zone is permissible or sufficiently tailored." *Id.* at 208. But, reflecting on its historical presentation, the plurality found a fog that prevented a traditional tailoring analysis. *Id.* at 208–09. Laws in the late nineteenth

century were passed without "extensive legislative hearings" and "reenact[ed] without much comment." *Id.* at 208. Considering that these laws were passed among a bundle of reforms such as the secret ballot, "it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud." *Id.* Thus, the plurality found the government subject to a "modified 'burden of proof'" that only requires a showing that a law "'is reasonable and does not significantly impinge on constitutionally protected rights.'" *Id.* at 209, 209 n.11 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)).

Turning to Tennessee's 100-foot buffer zone, the plurality found it a "minor geographic limitation" that did not constitute a "significant impingement." *Id.* at 210. Moreover, it did "not view the question whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.'" *Id.* (quoting *Munro*, 479 U.S. at 197). In a footnote, the plurality reserved concerns regarding bumper stickers and zones where the "boundary falls in or on the other side of a highway" for "as applied" challenges. *Id.* at 210 n.13. Ultimately, it declined to "employ[] any 'litmus-paper test' that will separate valid from invalid restrictions." *Id.* at 210–11 (quoting *Anderson*, 460 U.S. at 789). "[I]t is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case." *Id.* at 211.

Of the two concurrences in the case, only Justice Scalia's meaningfully departed from the plurality's

analysis.[3] Instead of applying strict scrutiny, Justice Scalia found that the law, "though content-based, is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum." *Id.* at 214 (Scalia, J., concurring). He took issue with the plurality's conclusion that the streets and sidewalks around polling places are traditional public fora: "Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [Tennessee law] does not restrict speech in a traditional public forum[.]" *Id.* at 214. He noted, with an extensive footnote, that "[b]y 1900, at least 34 of the 45 States (including Tennessee) had enacted" either "viewpoint-neutral restrictions on election-day speech within a specified distance of the polling place—or on physical presence there[.]" *Id.* at 214–15 n.1.[4] Moreover, "most of the statutes banning

[3] Justice Kennedy concurred to elaborate his views on content-based analysis and that "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Id.* at 213 (Kennedy, J., concurring) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring)). "The State is not using this justification [protecting voting rights] to suppress legitimate expression." *Id.* at 214.

[4] Justice Scalia cited a Wyoming law that required "[a] space of twenty feet in every direction from the polls [to] be kept open and clear of all persons, except one challenger of good conduct and behavior, selected by each political party to detect and challenge illegal voters[.]" *Burson*, 504 U.S. at 215 n.1 (citing Act of Jan. 1, 1891, ch. 100, 1890 Wyo. Sess. Laws 392). The court below cited the same statute for the proposition that "Wyoming initially prohibited electioneering within 20 feet of a polling place on an election day[.]" App.7. But before and after the enactment of that

election-day speech near the polling place specified the same distance" as Tennessee, or 100 feet, "and it is clear that the restricted zones often encompassed streets and sidewalks." *Id.* at 215–16 n.2. Notably, the plurality cited Justice Scalia's summary of buffer zone statutes "passed before 1900[.]" *Id.* at 205. Acknowledging that the content-based nature of the Tennessee law would not fit into time, place and manner doctrine, Justice Scalia nevertheless found it "doctrinally less confusing to acknowledge that the environs of a polling place, on election day, are simply not 'a traditional public forum'—which means that they are subject to speech restrictions that are reasonable and viewpoint neutral." *Id.* at 216. Under this analysis, to Justice Scalia, Tennessee's 100-foot buffer zone also passed muster. *Id.*

In dissent, Justice Stevens, joined by Justices O'Connor and Souter, disagreed that "Tennessee has made anything approaching . . . a showing" that its law survived strict scrutiny. *Id.* at 217 (Stevens, J., dissenting). Justice Stevens agreed that orderly access to the polls is a compelling governmental interest but found the Tennessee law also served a much different and inappropriate interest, "prevent[ing] last-minute campaigning." *Id.* at 217–18 (citing *Mills*, 384 U.S. 214). Looking to Tennessee law and laws with even larger buffer zones, Justice Stevens found that their size

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statute Wyoming prohibited electioneering within 60 feet of a polling place. *See* 1890 Wyo. Sess. Laws ch. 80, § 174. Wyoming's smaller, content-neutral buffer zone endured for several decades but no longer exists.

"unmistakably identifies censorship of election-day campaigning as an animating force behind these restrictions." *Id.* at 218. He rejected the plurality's historic presentation, namely that history establishes necessity or "that a practice that was once necessary remains necessary until it is ended." *Id.* at 220. He also found it inappropriate that the plurality "dispense[d] with the need for factual findings" to determine necessity, noting that courts that undertook factfinding in the 1980s prior to the Court taking up the issue uniformly found buffer zones to be unconstitutional. *Id.* at 222–23 (collecting cases). Justice Stevens concluded that traditional strict scrutiny should apply and that the Tennessee law failed such scrutiny. *Id.* at 224–28.

The ruling of the court below extends *Burson* and heightens all of Justice Stevens's concerns. The Court should grant review here to clarify that *Burson* does not extend beyond traditional 100-foot buffer zones or, if it does, that a state must proffer some evidence or argument as to why it is reasonable to extend a buffer zone further, which the State failed to do here. The Court should do the same with the law's bumper sticker provisions.

A. *Burson v. Freeman* Does Not Apply to Wyoming's 300-Foot Polling Place Buffer Zone and It Should Be Subjected to Traditional Strict Scrutiny.

Burson was a "rare case" that survived strict scrutiny. 504 U.S. at 211. By that conclusion alone it was

never meant to serve as a rubber stamp for polling place buffer zones. The plurality did not intend for its historic analysis to support zones beyond 100 feet. If it did apply to zones beyond 100 feet, that would reach into traditional public fora—nearby sidewalks and parks—and allow government to silence speech there. Nor did the plurality opinion suggest that the modified burden of proof applies to buffer zones beyond 100 feet. This would just destroy the special role of public fora—places held out for "purpose of assembly, communicating thoughts between citizens, and discussing public questions." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (internal quotations omitted). These and other distinctions, such as the lack of restrictions as to police presence at Wyoming polling places, leave Section 22-26-113 subject to traditional strict scrutiny and unconstitutional under the First Amendment.

The plurality in *Burson* strictly addressed a 100-foot buffer zone and made clear it was "the only restriction before" the Court. 504 U.S. at 194 n.1. The plurality explored the history of buffer zones and incorporated Justice Scalia's presentation of statutes enacted before 1900. *Id.* at 205. Justice Scalia noted that most of these jurisdictions enacted zones of 100 feet while the others, save New York, were substantially smaller.[5] *Burson* 504 U.S. at 215 n.2 (Scalia, J.,

[5] Massachusetts law did not specify a distance but prohibited campaign handbills and signage "in the building in which the polling place is located . . . or on the premises on which the building stands, or on the sidewalk adjoining the premises where such

concurring); *see* App.87-91. The "time-tested consensus" thus ended at 100 feet. *Burson*, 504 U.S. at 206. Although Tennessee enacted its 100-foot zone the better part of a century later, it comfortably fit within that consensus. Zones beyond that, like Wyoming's, do not, so the law should be subject to traditional strict scrutiny. This conclusion aligns with the plurality opinion and Justice Scalia's concurrence.

The plurality's tailoring analysis in *Burson*, utilizing the modified burden of proof, also plainly stopped at 100 feet. The modified burden of proof "applies *only when* . . . the challenged activity physically interferes with electors attempting to cast their ballots." *Id.* at 209 n.11 (emphasis added). This is a realistic concern within 100 feet of a polling place, though at its outermost distance Justice Stevens's dissent was apt. *Id.* at 218 ("That some States have no problem maintaining order with zones of 50 feet or less strongly suggests that the more expansive prohibitions are not necessary to maintain access and order"). Beyond 100 feet, ingress and egress are not an issue and voters are not subject to intimidation, confusion or obstruction any more than anywhere else. One need only observe Mr. Frank standing 100 feet from the entrance to the LCCC polling place to confirm this. App.86. Moreover, at 100 feet and beyond, efforts to intimidate, confuse, obstruct or otherwise "physically interfere[]" with voters are readily discernible by poll workers and law enforcement alike and punishable under other laws. *See*,

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election is being held." Act of Apr. 12, 1895, ch. 275, § 149, 1895 Mass. Acts 276, 276-77.

e.g., Wyo. Stat. §§ 22-26-109 (prohibiting bribery); 22-26-111 (prohibiting intimidation). Thus, *Burson* further supports applying traditional strict scrutiny to censorship beyond 100 feet from the entrance of a polling place.

There are other distinctions reserved by the *Burson* plurality that the court below did not consider. For example, the plurality expressed concern that "because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion . . . many acts of interference would go undetected" in Tennessee without a 100-foot buffer zone. *Burson*, 504 U.S. at 207. Wyoming has no such restriction on police presence, and the State has not expressed any concern about that; indeed, the police body camera footage of Jennifer Horal's citation for signature gathering at the LCCC polling place runs nearly an hour, capturing an extensive interaction between law enforcement and Ms. Horal in the parking lot between 100 and 300 feet from the polling place entrance while voting was being conducted. When this Court struck down a 35-foot buffer zone around Massachusetts abortion clinics, this distinction made a difference:

> [W]hile the police "generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," . . . they maintain a significant presence outside Massachusetts abortion clinics. . . . [G]iven the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.

McCullen v. Coakley, 573 U.S. 464, 467 (2014) (quoting *Burson*, 504 U.S. at 207); *see also Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 381–82 (1997) (upholding a 15-foot buffer zone around abortion clinic entrances based on a record that included harassment of police). The distinction matters here, too. A content-based restriction of political speech beyond 100 feet from a polling place on election day should not be governed by the *Burson* plurality and instead subjected to traditional strict scrutiny, which leaves such zones unconstitutional.

B. Even Under *Burson*, Wyoming's 300-Foot Polling Place Buffer Zone Is Unreasonable and Significantly Impinges Free Speech and Is Thus Unconstitutional.

If the plurality opinion in *Burson* applies, Wyoming's 300-foot zone is unconstitutional because it is unreasonable and significantly impinges upon Mr. Frank's free speech. 504 U.S. at 209. The zone implements an absolute ban on one-on-one communications and other political speech near polling places on election days. This Court should, at a minimum, grant certiorari to address how *Burson* should apply to the factual record in this case and future cases that address polling place buffer zones.

The *Burson* plurality includes one line on which the court below concluded, chillingly, that speech is not significantly impinged until a zone implements an

"absolute prohibition[.]" App.46. The Tenth Circuit drew this from the observation that "[a]t some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden akin to the statute struck down in *Mills v. Alabama*[.]" *Burson*, 504 U.S. at 210 (citing 384 U.S. 214). But following that very sentence, the plurality also cited *Meyer v. Grant*. *Id.* (citing 486 U.S. 414). While *Meyer* did "invalidat[e] [the] absolute bar against the use of paid circulators," *id.*, it also affirmed the value of one-on-one communication and that "[t]he First Amendment protects [one's] right not only to advocate [his] cause but also to select what [he] believe[s] to be the most effective means for so doing." *Meyer*, 486 U.S. at 424. Foreclosing one-on-one communication with voters at polling places on election days entirely, as done to Mr. Frank, is a significant impingement of his preferred method of engagement.

This Court has recognized that the *Burson* plurality was concerned with larger buffer zones:

> The law in *Burson* meant only that the last few seconds before voters entered a polling place were "their own, as free from interference as possible." . . . And the Court noted that, were the buffer zone larger than 100 feet, it "could effectively become an impermissible burden" under the First Amendment.

Packingham v. North Carolina, 582 U.S. 98, 108 (2017) (quoting *Burson*, 504 U.S. at 210). Against the impingement of speech beyond 100 feet from a polling place that was demonstrated by Mr. Frank, the modified

burden of proof must require something more than the State's counsel citing *Burson*. The district court correctly concluded that the State provided no proof whatsoever as to reasonableness, tipping the *Burson* analysis in favor of alleviating the significant infringement of Mr. Frank's speech. App.75-77.

Burson was a rare case, but the Tenth Circuit's holding is truly an aberration. Where free speech is in jeopardy, government must supply rationales that are "far stronger than mere speculation about serious harms." *Bartnicki v. Vopper*, 532 U.S. 514, 531 (2001). That is, government is consistently put to the task to make some showing of its need for a particular speech-censoring law. "Mere speculation of harm does not constitute a compelling state interest." *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 543 (1980). As other federal circuit courts of appeals have recognized, courts "are not at liberty simply to presume the evidence." *Buehrle v. City of Key West*, 813 F.3d 973, 980 (11th Cir. 2015). Wherever First Amendment interests are in peril, "government bears the burden of showing that the articulated concern has more than merely speculative factual grounds." *Id.* (internal quotations omitted). Unbelievably, only the Tenth Circuit permits sizeable no-electioneering buffer zones without requiring government to make such a basic showing. *Burson* did not reject this standard outright.

Indeed, *Burson* suggests elsewhere that the modified burden of proof is still a burden on the State. The Tenth Circuit dismissed the exception for exit polling

in Wyoming law as "not relevant to this appeal." App.8 n.7. Yet, exit polling was also an integral part the plurality's analysis in *Burson*: there, the Tennessee zone was not underinclusive when it only censored electioneering because "there is simply *no evidence* that political candidates have used other forms of solicitation or exit polling to commit electoral abuses." 504 U.S. at 207 (emphasis added). Just as a state may not censor, for example, exit polling or the sale of Girl Scout cookies within a 100-foot buffer zone without evidence the prohibition combats against intimidation or fraud, it may not increase the size of a zone beyond 100 feet without evidence that it is reasonable because it goes beyond the history of voting reform.

With *Meyer* in mind, even accepting the Tenth Circuit's paradigm, Wyoming's 300-foot zone eliminates one-on-one communication such as Mr. Frank's entirely within a distance far from a polling place, amounting to an absolute prohibition. One need only see Mr. Frank stationed 300 feet from a polling place entrance to understand. *See* App.86.[6] This Court also recognized this burden in *McCullen*:

> While the record indicates that petitioners have been able to have a number of quiet conversations outside the buffer zones, respondents have not refuted petitioners' testimony that the conversations have been far less frequent and far less successful since the buffer

[6] Though one may have to squint, counsel assures the Court that Mr. Frank is, in fact, in the 300-foot photograph.

> zones were instituted. It is thus no answer to say that petitioners can still be "seen and heard" . . . within the buffer zones.

573 U.S. at 489. Mr. Frank can have no one-on-one interactions with voters whatsoever outside Wyoming's 300-foot election day buffer zones, which are nearly ten times the distance addressed in *McCullen*. At LCCC he is left to flag down voters as they drive out of the parking lot, an alternative that is dangerous and useless—that is, no alternative at all. In the context of *Burson*, compared to a 100-foot buffer zone, a 300-foot zone imposes censorship that is a difference in kind and an "impermissible burden[.]" 504 U.S. at 210; *contra* App.47.

Against Mr. Frank's evidence, the State offered no refutation of this burden and nothing to suggest the law is reasonable. The applications of the law that were revealed in discovery go against reasonableness and further establish the significant impingement of a 300-foot zone: poll workers on election days in Wyoming pull campaign signs off private property that fall within the zone. This is just what concerned Justice Stevens in his dissent in *Burson*; that the law serves to "prevent last-minute campaigning." 504 U.S. at 218 (Stevens, J., dissenting). And elsewhere this Court summarized the distinction that Section 22-26-113 lacks: "the plurality [in *Burson*] concluded that it was faced with one of those 'rare case[s]' in which the use of a facially content-based restriction *was justified by interests unrelated to the suppression of ideas*[.]" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 n.8 (1992) (emphasis

added). Yard sign removal almost a football field away from a polling place is strictly the suppression of ideas.

If *Burson* applies to Wyoming's 300-foot buffer zone, the law is unreasonable and significantly impinges upon free speech. It is thus unconstitutional under the modified burden of proof. This Court should grant certiorari to address whether the First Amendment requires traditional strict scrutiny or tailoring that utilizes a modified burden of proof to assess a 300-foot buffer zone, and in either event rule that Wyoming's 300-foot buffer zone is unconstitutional.

C. Under Any Paradigm, Prohibiting Bumper Stickers Within 300 Feet of a Polling Place Is Unconstitutional.

Considering the advocacy Mr. Frank would undertake at LCCC, specifically, an appropriately sized election day buffer zone—even one extending to 100 feet—would make the bumper sticker provisions in Section 22-26-113 almost irrelevant. At LCCC, a 100-foot zone would barely enter the parking lot and censor no parking spaces. *See* App.86. This is largely the case with election day zones in Wyoming because those polling places are usually located in larger buildings with parking lots like LCCC. *See* App.85. When analyzed as part of the 300-foot zone, precise regulation of bumper stickers is, like poll workers' removal of yard signs from private lots, evidence of significant impingement of political speech that serves no purpose but suppressing ideas, which is, to say the least, unreasonable. But

even in isolation, it is unconstitutional to prohibit a bumper sticker that is too large—or two for the same candidate—from entering or parking in a 300-foot zone.

The Tennessee law in *Burson* was a traditional no-electioneering statute. The plurality reserved hypothetical concerns about "prosecution of an individual for driving by in an automobile with a campaign bumper sticker" for "'as applied'" challenges that "[i]f successful, would call for a limiting construction rather than facial invalidation." *Burson*, 504 U.S. at 210 n.13. Wyoming law, however, facially restricts bumper stickers, and prohibits the two stickers larger than 4 inches by 16 inches that Mr. Frank would affix to his car in support of the same candidate. Wyo. Stat. § 22-26-113.[7] This is thus a facial challenge to a specific prohibition. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). The plurality nevertheless reserved serious free speech questions such as this one, and the Court should require the State to defend the regulation from Mr. Frank's challenge, which it failed to do and cannot do.

[7] In his verified complaint, Mr. Frank affirmed he would refrain from this display at a polling place on election day because of the law. The panel below asserted that his concerns were about "inadvertently driving through a buffer zone," but that is incorrect. App.52. Mr. Frank is aware of the law and, particularly at LCCC, if he parked or passed through the 300-foot zone on election day it would be a knowing and willful violation. *See* Wyo. Stat. § 22-26-112.

The fog of history that concerned the plurality in *Burson* is absent here. *Cf.* 504 U.S. at 208–09. The Wyoming Legislature implemented the precise regulation of bumper stickers in 2018. *See generally* House Bill 40 Digest (2018), https://wyoleg.gov/2018/Digest/HB0040.PDF [https://perma.cc/6U9C-PKFH]. Yet, neither the legislature then nor the State in this case evinced, much less articulated, any reason for this regulation. To be sure, the Wyoming Senate had a good laugh about it, but that weighs against the State. *See* Wyo. Senate Afternoon Session, March 9, 2018, http://wyoleg.gov/2018/Audio/senate/s030918pm1.mp3 (audio at 06:34-08:28). The court below found this provision "less restrictive than the statute upheld in *Burson*," even though 100-foot zones seldom reach streets and parking lots. App.53. But 300-foot bans of this kind are far more significant, applying to anyone coming to vote on election day. Practically, this censorship goes beyond even the 300-foot boundary since it puts someone like Mr. Frank in the position of removing his excess or excessively sized bumper stickers before he even leaves for the polling place, censoring him on streets and roads all over town. Even near a polling place, the district court's summation was terse and apt: "the Court cannot see how bumper stickers on vehicles could lead to voter intimidation or election fraud." App.78.

The bumper sticker regulation raises the same constitutional concerns as the 300-foot buffer zone in regards to *Burson*. A bumper sticker "affixed to a vehicle" is, like exit polling, an "other form[ ] of solicitation"

that "there is simply no evidence" has been linked to electoral abuse. Wyo. Stat. § 22-26-113; *Burson*, 504 U.S. at 207. It is also clear that laws which prevent inexpensive means of communication inflict serious constitutional injuries. *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994). Here, *Burson* either does not apply and this provision must be subjected to traditional strict scrutiny or, if *Burson* does apply, the State has some obligation to evince reasonableness and to dispel the regulation's significant infringement of free speech. The State did neither of those things here, leaving the regulation unconstitutional.

Burson is not a rubber stamp for either the size of polling place buffer zones or the activity that is regulated within those zones such as bumper stickers. This is evident in *Burson* itself and is the only appropriate reconciliation of the plurality opinion and Justice Scalia's concurrence. The Court should grant certiorari to address *Burson*'s confines, because under the opinion of the court below there are none until a zone amounts to an "absolute electioneering ban invalidated in *Mills* and *Meyer*." App.46. This not only contradicts *Burson* itself but splits markedly from every other circuit to address the size of polling place buffer zones.

II. The Decision Below Sharply Conflicts With Decisions From Other Lower Courts.

The Tenth Circuit's ruling conflicts with decisions of other circuit courts of appeals, specifically the Fifth

and Sixth Circuits. *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993); *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015). In *Schirmer*, the Fifth Circuit upheld a 600-foot buffer zone, 2 F.3d at 124, while in *Russell*, the Sixth Circuit struck down a 300-foot zone. 784 F.3d at 1053–55. But both rulings stand far apart from the Tenth Circuit's conclusion that a buffer zone is constitutional until it "effect[s] [a] complete ban[ ] on election-related conduct." App.33. Importantly, both circuits required that states make some effort to support their need for censorship. This Court should grant certiorari to resolve this circuit split.

In *Russell*, the Sixth Circuit did not merely strike down a 300-foot buffer zone because "Kentucky failed to 'present any evidence—or even a non-evidentiary policy argument'" in its favor, as the court below summarized. App.42 (quoting 784 F.3d at 1053). Rather, the Sixth Circuit did so because Kentucky failed to present evidence or an argument for a zone beyond what it called "*Burson*'s safe harbor" of 100 feet. *Russell*, 784 F.3d at 1053. Moreover, the Sixth Circuit noted that "evidently the legislature did not engage in *factfinding and analysis* . . . to carry their burden to explain why they require a no-political-speech area immensely larger than what was legitimized by the Supreme Court." *Id.* (emphasis added). This reasoning comports with *Burson* and traditional First Amendment jurisprudence—that government "bears the burden of proving the constitutionality of its actions." *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000); *see also Board of Trustees of State Univ. of N.Y. v. Fox*, 492

U.S. 469, 480 (1989) ("the State bears the burden of justifying its restrictions. . . .").

The Sixth Circuit's reasoning in *Russell* was in accord with its approach in *Anderson v. Spear*, which was also opposite that of the Tenth Circuit. 356 F.3d 651, 658 (6th Cir. 2004). In *Anderson*, the Sixth Circuit was concerned that a 500-foot zone adopted in the late 1980s was supported by "glaringly thin . . . *evidence*." *Id*. (emphasis added); *contra* App.42 n.20. As with *Russell*, or any other case implicating First Amendment conduct, the state must do something more than cite *Burson* to meet its burden. Kentucky presented evidence to support its need for buffer zones in general but failed to support its need for such large zones. *Anderson*, 356 F.3d at 658. It proffered evidence of vote-buying and examples of voter intimidation and tied that to the need for the challenged laws. *Id.* at 659–60. Even that was insufficient to uphold so large a zone.

The Fifth Circuit embraced a similar approach in *Schirmer*. Although it upheld a 600-foot buffer zone, it did so because it relied—repeatedly—on a trial record that demonstrated the problem of "poll workers[ ] who bombarded voters in and around the polls." 2 F.3d at 122–23. It determined that even a 300-foot zone that Louisiana previously utilized "did not prevent the continued hiring of poll workers" who engaged in harassment. *Id*. The court below read this as the Fifth Circuit merely "reinforc[ing] its conclusion" rather than part and parcel of *Burson*'s precedent and the Fifth Circuit's analysis. App.43. But the *Schirmer* tailoring analysis concludes that "[o]nly after the 300-foot

limitation failed to remedy the poll worker problem did the legislature take the next step of 600 feet. *Therefore*, we find that [Louisiana's] geographic limitation is narrowly tailored to achieve a compelling governmental interest." 2 F.3d at 122 (emphasis added). Moreover, the Fifth Circuit acknowledged other cases that had found zones beyond 100 feet unconstitutional and its reliance on different "evidence in the record before [the court]." *Id.* at 122 n.12. This does not square with the State's mere citations to *Burson* and testimony that the law is reasonable merely because it exists.

Both the Fifth and Sixth Circuit hold that some measure of reasonableness must be put forward by a state censoring political speech outside of 100 feet from polling places. That is, consistent with black letter, First Amendment caselaw, the state always has the burden to support its need for a speech restriction. *Playboy Entertainment Group, Inc.*, 529 U.S. at 816. True enough, the Tenth Circuit suggested its approach would still police absolute prohibitions against political speech like the bans on paid circulators in *Meyer v. Grant*, 486 U.S. 414. But such an approach protects very little speech at all and ignores the central holding of *Meyer*. That holding is simple: the First Amendment protects the right of speakers to decide the most effective means to communicate their message. *Id.* at 424. This includes Mr. Frank's decision that his speech would be most effective on a one-on-one basis just outside of a traditional 100-foot buffer zone.

The Fifth and Sixth Circuits agree that states do not have to go so far as to demonstrate their buffer

zones are "perfectly tailored." *Burson*, 504 U.S. at 209. But this does not mean states are free to censor speech without any burden to demonstrate a compelling governmental interest that is properly tailored. The district court understood this when it explained that "Defendants have presented no argument—and offered no evidence—to explain why the statute requires an electioneering buffer zone much larger than the regulation upheld in *Burson*." App.76. Without requiring states do some work to support speech-censoring laws, a state need only shout "*Burson*" in crowded public fora to transform protected speech into unprotected speech and gut the First Amendment.

The Tenth Circuit's approach not only creates conflict with the Fifth and Sixth Circuits, it also threatens the holdings of several lower courts in related cases. These cases often involve non-profits that assist disabled people and members of marginalized communities registering to vote or offering assistance with the voting process. For example, in *Tennessee State Conference of N.A.A.C.P. v. Hargett*, 420 F.Supp.3d 683 (M.D. Tenn. 2019), the NAACP challenged Tennessee's enactment of additional restrictions and rules governing voter registration drives. Included in this reform was the requirement that non-profits had to submit details of their voter registration activities to the government or that organizations that receive renumeration for voter registration drives must engage in state-mandated training. *Id*. at 704–05. Though the government argued it had an inherent need to police against fraud, it offered no evidence to support its particular

restrictions, leading to the issuance of a preliminary injunction against their operation. *Id.* This is how First Amendment scrutiny traditionally works, even when the challenged law relates to election integrity. Weakening that standard, as the Tenth Circuit did, only serves to undermine First Amendment protection in related cases like this.[8]

This conflict among the lower courts should be resolved now. *See* App.76. Without resolution, states are free to create no-electioneering zones immensely larger than what was legitimized by *Burson* without any need to explain why. That is, the ruling below ensures that states may silence constitutionally protected political speech covering six and a half acres with a radius the length of a football field—and beyond—without any meaningful First Amendment oversight. The Tenth Circuit's upholding of Wyoming's broad, prophylactic rule cannot be squared against the holdings of other lower courts, necessitating review here.

[8] *See also American Ass'n of People with Disabilities v. Herrera*, 690 F.Supp.2d 1183 (D. N.M. 2010); *VoteAmerica v. Schwab*, 576 F.Supp.3d 862 (D. Kan. 2021); *Democracy North Carolina v. North Carolina State Board of Elections*, 590 F.Supp.3d 850 (M.D.N.C. 2022).

III. The Questions Presented Raise Serious Questions of National Importance Concerning the Authority of States to Censor Speech in the Name of Convenience.

How states may guard against voter intimidation and fraud near polling places is an important national question. With that governmental power must come a reciprocal respect for First Amendment conduct occurring near the polls. Americans should not lose their right to speak out about their favorite cause or candidate simply because the government says "*Burson*." Exactly what burden states must sustain to uphold no-electioneering zones is of national significance, with the Fifth and Sixth Circuits requiring a demonstration of reasonableness or otherwise adhering to traditional First Amendment standards and the Tenth Circuit deferring wholly to a state's proffered need for censorship. Clarifying these standards will address the rights of real citizens—like Mr. Frank—hoping to exercise one-on-one communication on an election day. *See* App.86.

The Tenth Circuit remanded two questions to the district court: whether the 100-foot buffer zone around absentee polling places in Section 22-26-113 is unconstitutional and whether the law is overbroad under the First Amendment. App.62. These are important questions. They should not be addressed under the appellate panel's "complete ban" standard, whether for purposes of narrow tailoring, assessing the law's unconstitutional applications, or considering the law's plainly legitimate sweep. App.33; *see U.S. v. Stevens*,

559 U.S. 460, 473 (2010). The questions presented here and the two that were remanded by the court below all depend on where *Burson* ends and traditional First Amendment protection resumes. They all depend on whether content-based restrictions of political speech may be expanded all the way to the complete ban in *Mills v. Alabama* based on "the issue carefully left open" in *Burson*. 504 U.S. at 193. The Court should address this now and bring clarity to the confusion below.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for certiorari.

Respectfully submitted,

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