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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

JOHN C. FRANK,
GRASSFIRE, LLC,

Plaintiffs,

v. CASE NO. 20-CV-00138-NDF

ED BUCHANAN, Wyoming Secretary of State,
LEIGH ANN MANLOVE, Laramie County
District Attorney,
DEBRA LEE, Laramie County Clerk,
in their official capacities,

Defendants.
_____________________________________/

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PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

> *Electioneering is 'illegal when voting is being conducted.' In other words, in Laramie County we have an atrium in between the historic county building and the new county courthouse. That's where all the absentee voting is. Somebody will come along and park their vehicle on the street right outside of that with a great huge magnetic sign. That's electioneering during the absentee voting.*
>
> – Senator Wayne Johnson, 2011[1]

[1] Wyoming Senate Afternoon Session, Jan. 17, 2011, *available at* http://wyoleg.gov/2011/Audio/senate/s0117pm1.mp3 (at 00:45:48); *see also* Wyo. Senate File 20 (2011), https://www.wyoleg.gov/Legislation/2011/SF0020.

> *I bring this in an interest of private property rights and free speech rights. If you have a home or a business within 100 yards of a polling place – a.k.a. the courthouse – then . . . there have been cases where it has been enforced that people cannot put up a yard sign for the entire 60-day period before the election.*
>
> – Representative Hans. Hunt, 2016[2]

Introduction

If one gives the government 100 feet of censorship, it will take 100 yards. If one gives it two days of censorship, it will take another 90. If one gives the state a narrow plurality opinion such as *Burson v. Freeman*, which, by its own terms, was "the rare case in which [the Supreme Court has] held that a law survives strict scrutiny," the legislative and executive branches will endeavor to do just about whatever they want with it. *Cf.* Doc. No. 17 at 6[3] ("[U]nless a state *concedes* that it has an impermissible ulterior motive in restricting electioneering around polling places, *all* electioneering bans satisfy the first two elements of strict scrutiny." (emphasis added)) *with Burson v. Freeman*, 504 U.S. 191, 210 (1992) (citing 384 U.S. 214 (1966) ("At 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*[.]"). This Court should not heed these efforts.

By Defendants' own account, Wyoming is one of three states that has a no-political-speech buffer zone radius the length of a football field on election days, while the overwhelming majority track the 100-foot zone upheld in *Burson*. *See* Doc. No. 17 at 21-22. Not content to

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[2] Wyo. House Morning Session, Feb. 11, 2016, *available at* http://wyoleg.gov/2016/Audio/house/h021116am1.mp3 (at 01:51:30); *see also* Wyo. House Bill 122 (2016), https://www.wyoleg.gov/Legislation/2016/HB0122; *cf. Burson*, 504 U.S. at 210 n.13.

[3] Defendants filed a motion to dismiss contemporaneously with its response to Plaintiffs' motion for preliminary injunction. Doc. Nos. 16, 17, 20. Because these documents cross-reference one another, the Plaintiffs endeavor to reply to the most pressing arguments in both in context of preliminary injunction.

multiply the area of the *Burson* election-day buffer zone by a factor of nine, the Defendants also urge this Court to extend the precedent to permit additional time, manner, place and content restrictions on speech, which would confirm that to censor speech or certain points of view somewhere, Wyoming need only designate it a polling place. *See* Doc. No. 14 at 13. The Court should not accept Defendants' argument that *Burson* is a rubber stamp; it is not. Wyoming Statutes section 22-26-113 is unconstitutional and should be enjoined.

Argument

I. Wyoming Statutes Section 22-26-113 Is Unconstitutional Under the First Amendment, Which Strongly Supports the Issuance of an Injunction

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Defendants interpret *Burson* with bravado, ignoring its distinctions from Wyoming law and the development of the law since. Importantly, section 22-26-113 has been significantly amended even since the ruling in 1992. If the size and circumstances of the zone were unchanged since *Burson*, the Defendants' reasoning could track its less restrictive requirements for establishing governmental interests. Doc. No. 17 at 6-7. But, when carving out certain bumper stickers from the prohibition and adding buffer zones to absentee polling places, the Wyoming Legislature had some duty to base this censorship (even the lack thereof) on voter intimidation and election fraud and establish how they relate to these regulations. *Burson*, 504 U.S. at 207. The limited legislative history that is available shows nothing of the sort: rather, it is political speech censorship for the sake of censoring political speech. *See, e.g.*, notes 1–2 and accompanying text; *see also* **Attachment A** (County Clerks' submission to the Joint Corporations Committee preceding the law's amendment in 2011). Fear of "great huge magnetic sign[s]" is not a recognizable basis for banning speech. *See supra* note 1 and accompanying text.

This Court should note that the only recognizable governmental interests viable here—maintaining the integrity of elections and protecting against voter intimidation or harassment—

mean the "right to cast a ballot free from threats or coercion." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015). It does not mean the right to cast a vote "free from distraction or opposing voices." *Id.* Thus, some ordinary chaos of day-to-day life is expected outside of polling places where Americans freely trade in the rough and tumble of ideas. It is our law and tradition that "more speech, not less, is the governing rule." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 361 (2010). Government has no legitimate claim to silencing electoral speech simply because it might be irritating or disturbing to others. *Coates v. City of Cincinnati*, 402 U.S. 611, 615–16 (1971).

Since *Burson*, the Supreme Court has also re-affirmed the fundamental freedoms of leafletting and signature gathering under the First Amendment. In *McIntyre v. Ohio Elections Commission*, the Court struck down a restriction on anonymous speech that led to charges against a woman for distributing handbills, tersely summarizing the First Amendment's applicability: "No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's." 514 U.S. 334, 347 (1995). Similarly, the Court struck down various regulations of signature gatherers in Colorado, emphasizing its unique import: "Petition circulation is the less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition . . . . That endeavor . . . 'of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.'" *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 421 (1988)). *Burson* acknowledges the collision between electioneering and voting rights at 100 feet; it does not—and cannot—be that the precedent allows the government free reign to tip this balance and smite one fundamental freedom in favor of the other. *Cf.* Doc. No. 20 at 4-5.

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This calls into focus the need for Wyoming to support its oversized electioneering buffer zone with some evidence of its necessity. Like Kentucky, Wyoming "presented no persuasive argument as to why *Burson*'s safe harbor is insufficient, and instead a 300-foot radius is required to prevent fraud and intimidation. Kentucky did not present any evidence—or even a non-evidentiary policy argument—to the district court justifying a no-speech zone nine times larger than the one previously authorized by the Supreme Court." *Russell,* 784 F.3d at 1053. Indeed, Wyoming simply recites that these laws act to protect the "integrity of their elections and to protect voters from intimidation and harassment." Doc. No. 20 at 12. But this is not enough to uphold the law. In this sense, Wyoming simply is like Kentucky. *Cf.* Doc. No. 17 at 13.

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In upholding Louisiana's 600-foot buffer zone, the Fifth Circuit acknowledged the tension: "It is difficult to demarcate the point where the state's compelling interest in a campaign-free zone ceases and beyond which any content-based infringement becomes unconstitutional." *Schirmer v. Edwards*, 2 F.3d 117, 121 (5th Cir. 1993). But far from using *Burson* as a rubber stamp to uphold a 600-foot zone, the court examined the evidence put before it and relied upon testimony of a legislator (the zone in question was only enacted in 1980) that established poll workers across the state were engaged in "widespread voter harassment or intimidation[.]" *Id.* at 122. Notably, the exemption of exit pollsters from the law was permitted because the state had not determined they were a problem. *Id.* (citing *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988); *NBC v. Cleland*, 697 F.Supp.1204 (N.D. Ga. 1988)). It cannot be that adding buffer zones around absentee polling places beyond election day, restricting signature gatherers who do not electioneer for the election in question, and even restricting citizens engaged in actual electioneering in traditional public fora beyond 100 feet from a polling

place may be swept up in *Burson*'s precedent without justification.[4] 504 U.S. at 207 ("In contrast [to electioneering], there is simply *no evidence* that political candidates have used *other forms of solicitation* or exit polling to commit such electoral abuses." (emphasis added)). When confronted with actually upholding the criminal prosecution in the same matter, the Supreme Court of Louisiana wisely agreed. *State v. Schirmer*, 646 So. 2d 890, 902 (La. 1994).

Since *Burson*, the Supreme Court has ruled that even within a polling place—a *nonpublic* forum—speech restrictions must be reasonable. *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1888 (2018). The Defendants present the 2018 bumper sticker amendment to section 22-26-113 as a clear carve-out that respects free speech—that it, in fact, "allows for *more* speech[.]" Doc. No. 20 at 9 (emphasis added). This is a dubious assertion. They correctly note that "[r]emoving a bumper sticker is . . . difficult and, in some cases, may damage a vehicle." *Id.* This only favors Mr. Frank: it is no saving grace to the law that, since 2018, it is more clearly a misdemeanor for him to drive past the Laramie County Governmental Complex or any facility where absentee voting is occurring with two bumper stickers for the same candidate on his car. *See* Doc. No. 1 at 7 (Compl. ¶25). This chill extends far beyond even a 300-foot buffer zone, effectively banning Mr. Frank from having two bumper stickers on his car for the same candidate in any Wyoming town during an election year.

The Defendants suggest that this Court in *Karpan* "did not concern itself with the question whether 300 feet was too broad a buffer zone, and therefore its decision in *Karpan* is of

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[4] The final distinction here is important. As opposed to the 100-yard buffer zone, on election day a 100-foot buffer zone is narrow enough that it often would *not* cover traditional public fora in Wyoming. *See* Doc. No. 1-5. Moreover, as Justice Scalia argued in his concurrence, fora covered by a 100-foot buffer were not traditionally public on election day, owing to the longevity of the restrictions. *Burson*, 504 U.S. at 215–16 (Scalia, J., concurring). This justification, as with the others, is attenuated as zones go far beyond 100 feet into unquestionably public fora and far beyond election day. *See* Doc. No. 14-1 (Wyoming's buffer zone in 1890 was 60 feet).

little precedential value in this case." Doc. No. 20 at 6 (citing *NBC v. Karpan*, No. 88-CV-0320 (D. Wyo. Oct. 21, 1988)). They even state that "this Court recognized in the *Karpan* case that setting aside the exit polling issue, the law is constitutionally acceptable." *Id.* at 6-7. Yet, the 100-yard provision is the precise—*only*—language enjoined by the Court in that case, "leav[ing] the public sidewalks and streets, the *traditional areas for election day discourse* and news gathering, *free for those activities*" and explicitly limiting the law to covering the polling place itself. Doc. No. 14-6 at 11-12 (emphasis added). To be sure, *Burson* did not go as far as *Karpan*, but it does overturn the precedent. The Court should, at the very least, note that by the Defendants' terms *Karpan* unleashed "unrestrained chaos outside Wyoming's polling places" in 1988, albeit with nothing in the record to actually illustrate that.

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The Defendants' entire defense is that *Burson*'s fundamental question—how large a buffer zone may be before it becomes unconstitutional—is no question at all. It may be 100 yards for two days, 100 feet for another 90, swallow public fora, regulate private property[5], discriminate between non-electioneering activities such as exit polling and signature gathering, and effectively reach far beyond even 100 yards to regulate a voter's bumper stickers. To do this, the government need only say "intimidation and harassment", or need not say it at all. Doc. No. 17 at 19; *see, e.g.*, Attach. A. "Enough is enough." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 478 (2007).

[5] Defendants argue that the fact the law applies to private property is not properly before this Court because neither Plaintiff alleged a desire to engage in electioneering on their own land. Doc. No. 20 at 8. Under existing First Amendment jurisprudence, plaintiffs are allowed to bring third-party, *jus tertii* overbreadth, claims to cure the chill the law may have on others not before the Court. *See, e.g.*, *Los Angeles Police Department v. United Reporting Pub. Corp.*, 528 U.S. 32, 39–40 (1999).

II. Mr. Frank and Grassfire's Motion Meets the Remaining Factors Needed to Issue a Preliminary Injunction

The Defendants concede that Mr. Frank and Grassfire are irreparably harmed by the censorship in section 22-26-113. Doc. No. 20 at 11. Paradoxically, this censorship transforms into "minor harm" when put up against the state's interests, which are never explained outside of an inapplicable recitation of *Burson*. *Id.* at 15-16. The Defendants also do not address and, in fact, contradict, how the law has been interpreted and enforced, and ignore fundamental requirements of signature gathering. The balance of harms and public interest also tip toward issuance of an injunction.

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As of August 18, 2020, this Court is not being "asked . . . to impose an injunction on the eve of an election." Doc. No. 20 at 12. The 100-foot absentee polling place buffer zones will not reactivate until September 21, 2020, and the 100-yard election day buffer zone on November 3, 2020. *See* Doc. No. 1 at 7 (Compl. ¶24). Surely, given the "unrestrained chaos" that the Defendants allege, the Secretary of State may prioritize "communicat[ing] information" in this matter to the 22 county clerks who are not party to this suit. Doc. No. 20 at 13-14. Election officials nationwide have shown creativity, responsibility and resilience in adapting elections to the outbreak of COVID-19; they can do the same for the First Amendment. There is no harm implicated by the current timing of this preliminary injunction.

Neither is the harm to Mr. Frank and Grassfire limited, and this is proven by comparing the Defendants' argument with the record. If "Frank may set up on the far side of the parking lot from the entrance to the CCI Building" at Laramie County Community College on an election day, then the law is being enforced arbitrarily statewide. *Id.* at 15. The law should be clear enough, as should its application. For example, the Cam-plex in Gillette is such a large facility that whichever building houses the polling place there should permit electioneering in its parking

lots. *See* Doc. No. 1-5 at 4. But at the 2018 primary, when a gubernatorial candidate endeavored to do just what the Defendants argue Mr. Frank could do at LCCC, the candidate was informed that "*the entire property of Cam-plex is technically the polling place*" and asked to leave. Doc. No. 1-3 at 2 (emphasis added).[6] Two of the candidate's supporters on the edge of the property (about a half a mile walk away) also "had to be asked to move off of Cam-plex property." *Id.* It is commendable that the Defendants do not interpret the law this way, but an injunction would not "result in . . . confusion among . . . volunteer poll workers, and election judges[,]" because confusion already exists among the county clerks who preside over them. Doc. No. 20 at 16. The law is already "uneven[ly] enforced[,]" censoring electioneering—core political speech—even further than 100 yards away from certain polling places. *Id.* at 12.

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As previously discussed, the Defendants overlook Supreme Court precedent relating to the right to petition, but also its reality. *Meyer*, 486 U.S. at 421–22. "[S]waths of sidewalk" that are one hundred feet away from the entrance to a county courthouse—and, as a result, far away from many entering and exiting the building—are not adequate alternatives for signature gathering. Approaching citizens with the ability to actually obtain a signature is one reason traditional public fora such as sidewalks and streets are almost immune to content-based censorship. *See Wells v. City and County of Denver*, 257 F.3d 1132, 1145 (10th Cir. 2001).

Finally, an injunction remains in the public interest. Particularly given the uneven application of the law statewide—at the very least, a stark difference in enforcement between Laramie County and Campbell County—an injunction that conforms buffer zone regulation to

[6] It also stands to reason that, under this interpretation of "polling place," county clerks and law enforcement may be surprised to learn of the Defendants' interpretation of the narrowness of the law prohibiting disturbances at polling places. Wyo. Stat. § 22-26-114; Doc. No. 20 at 13-14; Doc. No. 14-6 at 9-10.

Burson's confines would protect First Amendment rights and clarify how the law is to be enforced.

Mr. Frank and Grassfire meet all of the standards for the issuance of a preliminary injunction.

Conclusion

For the foregoing reasons, the Court should enter an order enjoining the enforcement of Wyoming Statutes section 22-26-113.

Respectfully submitted,

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Dated this 24th day of August, 2020.

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all registered ECF participants listed for this case.

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