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**UNITED STATES DISTRICT COURT**
**DISTRICT OF WYOMING**

JOHN C. FRANK,
GRASSFIRE, LLC,

Plaintiffs,

v. CASE NO. 2:20-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.
_____/



**PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS**

## Introduction

Defendants argue that "unless 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." Doc. No. 17 at 6 (emphasis added). Putting aside the fact that strict scrutiny only has two elements—a search for a compelling interest carried out in a narrowly tailored manner—it is the rare occurrence that government will openly announce an ulterior motive in restricting First Amendment rights. Rather, the history of First Amendment jurisprudence is of

government dressing up speech restrictions as advancing important government interests—restrictions that are frequently struck down given the importance of free speech in the American tradition. *See, e.g.*, *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 191–92 (2014) (public goal of reducing disparaging political advertisements incompatible with the First Amendment); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (laudable municipal injunction forbidding march to promote hatred invalid under the First Amendment).

Government rarely announces in broad daylight that it wishes to infringe upon free speech interests. All too often, it clumsily and accidentally infringes, and such laws are still invalidated. *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165–66 (2015). Innocuous justifications do not save unconstitutional laws from invalidation. And were Defendants' "ulterior motive" standard true, it would mean that citizens would be denied First Amendment relief whenever government proclaimed itself of innocent motive—making relief otherwise impossible.



## Argument

### I. Plaintiffs Demonstrate a Plausible Claim of Relief That Precludes Dismissal

To survive a motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6), a court will examine "well-pleaded factual allegations in the light most favorable to the plaintiff." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). This requires stating a plausible claim, and the plaintiff has the burden to frame a "complaint with enough factual matter (taken as true) to suggest that he is entitled to relief. *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This must show, at a minimum, that the plaintiff has a "reasonable likelihood" of mustering factual support for the

claims before the court. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

To determine whether a plausible claim for relief has been stated, courts "look for plausibility in the complaint." *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir.2007) (internal quotation marks omitted). Where well-pled facts in the complaint rise above the speculative level, dismissal should not be granted. *Id*. Here, both plaintiffs have pled plausible claims of relief in their complaint. In particular, John C. Frank alleged that he would like to stand on the sidewalks surrounding and on the campus of Laramie Community College within 100 yards of the public entrance of the Center for Conferences and Institutes Building polling place to display and hand out political campaign literature. *See* Doc. No. 1 at ¶13. He also alleged his desire to attach two bumper stickers in support of candidate Liz Cheney that are larger than 4 inches in height and 16 inches in width. *Id.* Similarly, Grassfire alleged that it would like to offer its signature gathering services in the state, in particular in public fora surrounding the Laramie County Governmental Complex. *See* Doc. No. 1 at ¶¶15-17.



Because plaintiffs included detailed, well-articulated facts in a verified complaint about their desire to engage in conduct prohibited by Wyoming's electioneering law, they have nudged their "claims across the line from conceivable to plausible." *Robbins*, 519 F.3d at 1247. In particular, *Burson v. Freeman* establishes that while a state may ban electioneering within 100 feet of the public entrance of a polling place, bans that go beyond that radius require a compelling governmental interest that is carried out in a narrowly tailored manner. 504 U.S. 191, 197, 217–18 (1992). That is, *Burson* establishes a 100-foot safe harbor and states have the burden to demonstrate why electioneering zones beyond that size are required. *Russell v. Lundergran-Grimes*, 784 F.3d 1037, 1053 (6th Cir. 2015). This stems from a fundamental principle—that

"more speech, not less, is the governing rule." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 361 (2010). To reiterate, because Wyoming's electioneering law targets speech based on its content, it is presumptively invalid, and the burden rests on the state to rebut that presumption. *Brandt v. City of Westminster*, 300 F.Supp.3d 1259, 1266 (D. Colo. 2018) (quoting *U.S. v. Stevens*, 559 U.S. 460, 468 (2010)).

That Plaintiffs' claims should survive Defendants' motion to dismiss is also supported by the fact that strict scrutiny applies here. *Burson*, 504 U.S. at 217. In such a procedural posture, it is the State of Wyoming that bears the "heavy burden of demonstrating that its silencing of political expression is necessary and narrowly tailored to serve a compelling state interest." *Id.* Both plaintiffs have pled well-articulated plans to engage in political speech protected at the very core of the First Amendment and which Wyoming bans. *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Rather than dismiss these claims, it is now appropriate for the case to proceed for Defendants to meet their heavy burden in proving why they need to ban political speech over incredibly large swaths of public fora.



## II. Plaintiffs' Electioneering Speech is Unconstitutionally Banned by Wyoming's Buffer Zone

As detailed in Plaintiffs' Verified Complaint, both Mr. Frank and Grassfire would engage in protected First Amendment expression but for the existence of Wyoming Statute section 22-26-113. Doc. No. 1 at ¶¶11, 13, 16-17, 23-25. Defendants argue that because Plaintiffs rely on precedent outside the Tenth Circuit, relief should not be afforded here and the extraordinary measure of dismissing the suit should instead occur. This is decidedly wrong.

Existing Tenth Circuit precedent demonstrates the time-honored principle that petition circulation and political expression occurring on traditional public fora are entitled to the highest protection under the First Amendment. *Independence Institute v. Gessler*, 936 F.Supp.2d 1256,

1277 (10th Cir. 2013). Whenever speech restrictions touch on public fora, such as the sidewalks and public areas referenced in Plaintiffs' Verified Complaint, they are subject to the "highest scrutiny." *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). This requires conducting an analysis of whether the law serves a compelling governmental interest and is narrowly tailored.

In *Verlo v. Martinez*, the Tenth Circuit examined whether a Colorado court's administrative order banning all pamphleteering and demonstrations around a courthouse violated the First Amendment. 820 F.3d 1113 (10th Cir. 2016). There, the court recognized that pamphleteering and one-on-one communication is one of the most effective and economical ways of engaging in First Amendment expression.[1] *Id.* at 1128 (quoting *McCullen v. Coakley*, 573 U.S. 464, 488 (2014)). It also instructed the lower court to make findings about the nature of the areas—sidewalks and plaza space—to decide how large a space was a public forum. Though *Verlo* involved a content-neutral ban of speech around the courthouse, the Tenth Circuit found its invalidation likely proper because the government had ample alternative ways to protect against violent protests and did not need to suppress speech occurring on traditional public fora to advance its interests. *Id.* at 1135.



Other district courts in the Tenth Circuit have stricken speech restrictions occurring on public fora. *Martin v. City of Albuquerque*, 396 F.Supp.3d 1008, 1033 (D. New Mexico 2019). In *Martin*, the City of Albuquerque banned "pedestrian activities" on traffic medians in the name of public safety. Though the law was content-neutral, the court still took to the task of assessing

[1] In very much the same way, Defendants suggest that Mr. Frank may just engage in political speech further away from interested voters in an ineffective way. Doc. No. 17 at 9. That just ignores the First Amendment principle that speakers are entitled to select the most effective method and manner to speak. That Wyoming laws leave open more burdensome avenues of communication—advocating from afar—does not relieve the law's burden on the First Amendment. *Federal Election Com'n v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 255 (1986).

whether the city needed to ban all pedestrian access on all traffic medians or whether it could address its concerns with safety in manner more narrowly tailored. *Id.* Because the plaintiffs in that challenge elected to use traffic medians as their most effective fora for speech and because government could have used a more tailored approach to solving its concerns about pedestrian safety, the court deemed that provision of the law unconstitutional.

The same tailoring analysis that occurred in *Verlo* and *Martin* should occur here. That is, Wyoming has taken the extraordinary measure of banning political speech in a content-based manner on public fora. Plaintiffs have articulated their desire to engage in protected speech on sidewalks and public fora. *See* Doc. No. 1 at ¶¶13, 16-17. Thus, a plausible claim for relief exists—that Wyoming's electioneering buffer zone is impermissibly large—precluding dismissal at this point.

*Burson* also demonstrates that states are free to enact a 100-foot electioneering buffer zone as a "safe harbor." *Russell*, 784 F.3d at 1053. Governments face the burden of establishing why restrictions going beyond the 100-foot *Burson* standard are necessary to achieve a compelling governmental interest in a way that is narrowly tailored. *Burson*, 504 U.S. at 217. Wyoming may be able to make a showing that its 300-foot ban of political expression around polling places is supported by evidence or valid legislative concerns. But Wyoming has, as the Supreme Court stated, a very "heavy burden" making a demonstration that the "silencing of political expression is necessary. . . ." *Id.* Plaintiffs have presented a plausible claim for relief under *Burson*, in that Wyoming has gone beyond its 100-foot safe harbor, and Wyoming must now demonstrate why such a large area of banned speech on traditional public fora is permissible.

Defendants give little import to precedent from sister circuits addressing similar issues. While non-binding, the Tenth Circuit has frequently looked to the holdings of sister circuits to help

inform its reasoning. *See, e.g.*, *Ullery v. Bradley*, 949 F.3d 1282, 1291 (10th Cir. 2020) (examining consensus of Eighth Amendment precedent from sister circuits); *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1209 n.14 (10th Cir. 2015) (examining statutory construction of sister circuits in deciding Fair Labor Standards Act claim); *Griess v. State of Colorado*, 841 F.2d 1042, 1046 (10th Cir. 1988) (looking to sister circuits in deciding question of constitutional immunity). This Court should do the same. Here, the Sixth Circuit has the most abundant caselaw interpreting *Burson*—making it natural to consult for constitutional reasoning.

The reasoning of *Russell* and *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), both flow from *Burson*—banning political speech near a polling place is an extraordinary measure subject to the highest scrutiny.[2] These cases do not signal the automatic death knell of an electioneering buffer zone, but they do invoke the strict constitutional protection called for by *Burson*, and which should be applied here. Importantly, they hold, consistent with *Burson*, that a government silencing political expression must have some evidentiary record for doing so and must be able to demonstrate that the size of zone selected is narrowly constructed to reach its legislative concerns. *Russell*, 784 F.3d at 1053 (failure to present evidence in support of electioneering buffer zone rendered tailoring problematic); *Anderson*, 356 F.3d at 658–60 (desire to make voting more convenient insufficient to uphold electioneering buffer zone).



*Burson* recognized that at some "measurable distance from the polls . . . governmental regulation of vote solicitation could effectively become an impermissible burden." 504 U.S. at 210. Plaintiffs have pled that Wyoming's oversized electioneering zone establishes such an

[2] Only the Fifth Circuit has upheld a buffer zone extending beyond *Burson's* 100-foot safe harbor because the state introduced evidence that poll workers created problems related to harassment and intimidation, necessitating a larger zone. *See Schirmer v. Edwards*, 2 F.3d 117, 122 (5th Cir. 1993). Defendants have not alleged the existence of similar evidence or legislative concerns in Wyoming.

impermissible burden. *See* Doc. No. 1 at ¶¶ 11, 13, 15-17, 23-24, 27, 40. Wyoming has elected to embrace a 300-foot radius banning political speech near polling places—nine times larger than the zone upheld in *Burson*. The burden is not on Plaintiffs to support why they should have the right to speak. *See generally* U.S. CONST. amend. I. The burden rests on Wyoming to prove why it needs an enormous buffer zone to protect against voter intimidation and harassment. These issues will be fleshed out as this case develops, but for now, in surviving against a motion to dismiss, it is sufficient that Mr. Frank and Grassfire have pled enough factual detail that they are entitled to relief.

## III. Other Remaining Issues Favor a Denial of the Motion to Dismiss

Section 22-26-113 is additionally problematic. Not bound by *Burson's* 100-foot safe harbor, it also includes an odd and unsupportable ban on political bumper stickers. That is, in precise detail, it limits the number and type of electioneering bumper stickers one may affix to a car that one might drive through, or park in, a zone. It goes yet further than *Burson* in not just targeting actual political electioneering, but in also prohibiting signature gathering protected at the core of the First Amendment. And it bans political expression occurring on one's own private property within the zone. These all point to serious flaws in the law's design, suggesting it is imprecise, prophylactic, and overbroad.

Political messages written on bumper stickers are entitled to First Amendment protection. *See, e.g.*, *Fire Fighters Association, District of Columbia v. Barry*, 742 F.Supp. 1182, 1190 (D.D.C. 1990); *Connealy v. Walsh*, 412 F.Supp. 146, 154 (W.D. Missouri 1976). Defendants suggest that recent amendments to Wyoming law are speech friendly, because they actually allow for one government-approved bumper sticker. Doc. No. 17 at 9-10. In doing so, the legislature decided to limit the "number of bumper stickers allowed on any vehicle to one bumper sticker per

candidate." *Id.* at 10. However, Wyoming possesses no such authority to ban one, two, or three bumper stickers featuring political messages in the first place. Rather, Wyoming must now defend its law as a prior restraint against political expression—one that is presumptively unconstitutional. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69-70 (1963). Wyoming faces an additional "heavy burden" to justify its prior restraint. *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971). Because plaintiffs have articulated a plausible claim for relief against the censoring of political bumper stickers in Wyoming, this case should proceed for the Defendants to demonstrate why this ban is permissible. *See* Doc. No. 1 at ¶13.

Wyoming's buffer zones also extend into private property—a point to which the Defendants agree. Doc. No. 17 at 13 (citing Compl. Ex. 1 at 2; Ex. 2 at 2; Ex. 5 at 3-18 and noting they "cover a handful of houses or stores"). This admission by Defendants belies their argument that because Cheyenne is not as dense as Louisville, different results should occur here. That is, Wyoming law *does* reach private property, even if it is not dense, and causes the same constitutional harms described by the *Anderson* and *Russell* courts. To uphold this portion of the law would mean that the state has the authority to deny a homeowner the right to place political signs in his front yard[3], or to invite campaign worker to advocate for his preferred candidate on that property. *Anderson*, 356 F.3d at 662; *Russell*, 784 F.3d at 1053. This is a dubious proposition under the First Amendment.

That Plaintiffs have not alleged they wish to engage in electioneering on their own property is not problematic for this suit. *See* Doc. No. 17 at 11. This Court recognizes the Supreme Court's rules for third-party standing in First Amendment cases. *Victory Processing, LLC v. Michael*, 333

[3] *See Ronald D. Williams v. City of Cheyenne*, 2:14-cv-00006-SWS, Doc. No. 14 ("Order and Preliminary Injunction" issued Feb. 4, 2014, enjoining City of Cheyenne political sign ordinance on First Amendment grounds).

F.Supp.3d 1263, 1268 (D. Wyo. 2018). That is, so long as injury-in-fact is met and the plaintiffs can frame the issues wishing to be resolved, they may litigate claims on behalf of third parties in order to prevent the law from chilling others not before the court. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 957 (1984). Here, Plaintiffs have alleged concerns over the facial unconstitutionality of the law applying to private land and a plausible claim for relief. *See* Doc. No. 1 at ¶19. This matter should proceed for the state to present evidence why a ban so outsized as to prohibit political speech on a landowner's private property should survive constitutional review.

Wyoming Statutes section 22-26-113 is also constitutionally infirm because it does damage not just to electoral speech near a polling place, but also to signature gathering. Defendants cite approvingly of three cases for the proposition that *Burson* allows state to limit signature gathering around polling places. *See, e.g.*, *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213 (11th Cir. 2009); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004); *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993). The first two of these cases, *Browning* and *City of Sidney*, involved electioneering buffer zones that fell within *Burson*'s 100-foot election day safe harbor. And *Schirmer* involved litigation where the state presented evidence that real harassment and intimidation occurred, often by poll workers, and the state needed additional space to protect against this. Here, Grassfire has pled a plausible claim of relief—that Wyoming need not ban signature gathering for so large a radius and so long beyond election day—which should preclude dismissal here under *Burson*. *See* Doc. No. 1 at ¶¶ 15-17, 29.

To be certain, even outside the context of electioneering buffer zone cases, the Supreme Court has repeatedly upheld the fact that sidewalks serve as the "archetype of a traditional public forum." *Frisby v. Schulz*, 487 U.S. 474, 480 (1988). "Time out of mind public streets and sidewalks

have been used for public assembly and debate . . . ." *Id.* (internal quotations marks omitted). Wherever the title of "streets and parks may rest, they have immemorially been held in trust for use of the public." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (Roberts, J.). Because of this, we allow for all sorts of disruptive, controversial, even hateful speech to occur over these places held in trust for use by the public. *See Village of Skokie*, 432 U.S. 43; *McCullen*, 573 U.S. 464 (buffer zones around abortion clinics invalidated due to lack of narrow tailoring).

Sidewalks and streets carry a special place in First Amendment jurisprudence, for when government attempts to limit speech in these places, its ability is "very limited." *U.S. v. Grace*, 461 U.S. 171, 177 (1983). Plaintiffs have alleged they wish to engage in speech protected at the very core of the First Amendment—signature gathering and political speech—in places where government is usually not allowed to ban such conduct. *See* Doc. No. 1 at ¶¶13, 15, 17, 23-24, 29. Because Plaintiffs have a plausible claim for relief under this theory properly alleged in their verified complaint, dismissal is not appropriate at this juncture.



**Conclusion**

For the foregoing reasons, Plaintiffs John C. Frank and Grassfire, LLC respectfully request the Court to deny the motion to dismiss.

Respectfully submitted,

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Dated this 31st day of August, 2020.

**CERTIFICATE OF SERVICE**

I, Benjamin Barr, hereby certify that on this 31st day of August, 2020, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Benjamin Barr