IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JOHN C. FRANK and GRASSFIRE, LLC,

Plaintiffs,

vs.

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

Defendants.

Case No. 20-CV-138-F

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on the motion to dismiss of Defendants Wyoming Secretary of State and Laramie County District Attorney, filed August 17, 2020. (CM/ECF Document [Doc.] 16). Defendant Laramie County Clerk joined in the motion. (CM/ECF Document [Doc.] 18). Defendants move to dismiss all claims stated against them. Plaintiffs opposed the motion. (CM/ECF Document [Doc.] 26). Defendants did not file a reply. Having reviewed the pleadings and applicable law, the Court finds and orders as follows.

BACKGROUND

Plaintiffs John C. Frank and Grassfire, LLC bring this case as a challenge to the constitutionality of Wyoming Statute § 22-26-113, which regulates electioneering near polling places. According to Plaintiffs, this statute offends the First Amendment for failure to narrowly tailor its restrictions. They seek declaratory and injunctive relief.

The statute provides:

> (a) Electioneering too close to a polling place or absentee polling place under W.S. 22-9-125 when voting is being conducted, consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media, within one hundred (100) yards on the day of a primary, general or special election and within one hundred (100) feet on all other days, of any public entrance to the building in which the polling place is located. This section shall not apply to bumper stickers affixed to a vehicle while parked within or passing through the distance specified in this subsection, provided that:
>
> > (i) There is only one (1) bumper sticker per candidate affixed to the vehicle;
> >
> > (ii) Bumper stickers are no larger than four (4) inches high by sixteen (16) inches long; and
> >
> > (iii) The vehicle is parked within the distance specified in this subsection only during the time the elector is voting.

Wyo. Stat. Ann. § 22-26-113.

The statute was enacted in 1890, with amendments in 1973, 1983, 1990, 2006, 2011, and 2018. The most recent 2018 amendment implemented the 100-foot buffer zone around polling places on absentee voting days and added language exempting qualifying bumper stickers from the restrictions on campaigning within the buffer zone.

Plaintiff John C. Frank, a Cheyenne resident, wishes to display and share various campaign signs, literature, bumper stickers, and other materials within the limits of the 100-yard electioneering buffer zone during the 2020 election cycle and beyond. Specifically, Frank wants to engage in these activities (on the day of the general election) on the campus of the Laramie County Community College, a locale which is within 100 yards of the Center for Conferences and Institutes Building polling place.

Plaintiff Grassfire, LLC is a political consulting firm, registered in Wyoming, which offers services including signature gathering. Grassfire seeks to engage in this activity throughout Wyoming generally, and specifically on the sidewalks adjacent to the public entrances of the Laramie County Governmental Complex ("LCGC"). The LCGC is a designated absentee polling place, and the 100-foot, absentee electioneering buffer zone captures much of the sidewalk area around the complex. Grassfire hopes to gather signatures on the dates of the general election, and throughout election years, in these locations.

The times and areas in which Plaintiffs wish to engage in "electioneering" put them firmly within the zones where such behavior is prohibited. Complaint Ex. 1 and 2. But for Wyoming Statute § 22-26-113, Plaintiffs would engage in such First Amendment expression as enumerated above.

Additionally, Plaintiffs challenge Wyoming Statute § 22-26-113 as facially unconstitutional. They also raise *jus tertii* claims of unspecified third parties not before the

Court, including those who may want to display political signs on privately owned property within the electioneering buffer zone.

STANDARD OF REVIEW

The standard of review on a motion to dismiss is well-established. To survive a motion to dismiss, a plaintiff's "complaint must contain sufficient factual matter… to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)). For the claims of a complaint to meet the standard of plausibility, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This plausibility standard is "not akin to a 'probability requirement', but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, although the plaintiff does not need to provide detailed factual allegations, "mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' will not suffice." *Khalik v. United Air Lines* 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Twombly*, 550 U.S. at 555). A complaint that "tenders 'naked assertion[s]' devoid of 'further factual enhancement'" is deficient. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

When ruling on a motion to dismiss for failure to state a claim, it is not the Court's function "to weigh [the] potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565-66 (10th Cir. 1991). It must

accept all factual allegations in the complaint as true. *Twombly*, 550 U.S. at 572. The Court must also view the facts in the light most favorable to the non-moving party. *Sutton v. Utah State Sch. For Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). And, while factual assertions are accepted as true, legal conclusions are not. *Berneike v. CitiMortgage*, 708 F.3d 1141, 1144 (10th Cir. 2013).

DISCUSSION

This case revolves around whether Wyoming Statute § 22-26-113 imposes an unconstitutional restriction on the First Amendment right to free speech. Plaintiffs challenge the statute's constitutionality on its face, the constitutionality of the statute as applied to Plaintiffs, and raise *jus tertii* claims of unnamed third parties. We will examine the legal sufficiency of each claim in turn.

I. Constitutionality of Statute as Applied to Plaintiffs

The Supreme Court, in *Burson v. Freeman*, considered and upheld the constitutionality of a similar Tennessee electioneering regulation which imposed a 100-foot election-day "campaign-free zone" around polling places. 504 U.S. 191 (1992). Although there are several decisions from the circuits which also address electioneering buffer zones, *Burson* is the only binding precedent bearing on Plaintiffs' challenge to the Wyoming statute. As such, it will be our lodestar in assessing whether Plaintiffs have made a plausible claim for relief.

In *Burson,* the Court found the Tennessee law to be a "a facially content-based restriction on political speech in a public forum" which must be "subjected to exacting

scrutiny: [t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* at 198.

The Court makes clear that a state has two compelling interests in enacting electioneering statutes: protecting voters from confusion and undue influence and ensuring that an individual's right to vote is not undermined by fraud in the election process. *See id.* at 199 (citing *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228-229, 231 (1989)). And the opinion's examination of our nation's history of election regulation, voter intimidation, and election fraud also yields the finding that "*some* restricted zone around the voting area is necessary to secure the State's compelling interest." *Burson*, 504 U.S. at 208.

This leaves only the last prong of the strict scrutiny analysis in contention. As *Burson* frames it: "[t]he real question then is *how large* a restricted zone is permissible or sufficiently tailored." *Id.* However, the "Court has never held a state 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208, 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)). In the specific context—such as an electioneering regulation—where a First Amendment right "threatens to interfere with the act of voting itself," a modified burden of proof is applied. *Id.* at 209 n.11. To meet this burden, a state only needs to prove that the regulation in question is "reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.* at 209 (quoting *Munro*, 479 U.S. at 195-196).

The Supreme Court ultimately determined that the Tennessee regulation survived strict scrutiny. *Burson*, in effect, "created a 100-foot-radius safe harbor"—on election days—where electioneering regulations are safe from constitutional challenges. *Russell v. Lundergran-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015). Yet Wyoming Statute § 22-26-113 proscribes electioneering within 300 feet "on the day of the primary, general, or special election and within one hundred (100) feet on all other days, of any public entrance to the building in which the polling place is located." Plaintiffs claim that this statute lies beyond the bounds of the safe harbor established by *Burson*: it dictates a larger election-day buffer zone than the statute at question in *Burson*, and also adds a buffer zone during absentee voting periods, among other distinguishing features.

At this stage of the proceedings, it is not for the Court to weigh potential evidence that may later be presented, or to decide whether the statute is "reasonable" or a "significant impingement" on Plaintiffs' constitutional rights. It is enough to say that the allegation—that the statute is unconstitutional as applied to Plaintiffs—is legally sufficient to state a claim for relief.

II. Facial Constitutionality of Statute

To succeed in a facial attack on the statute's constitutionality, Plaintiffs would have to establish that "no set of circumstances exists under which [the statute] would be valid, or that the statute lacks any plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal citations omitted). However, in the context of free speech, the Supreme Court also recognizes a second type of facial challenge "whereby a law may be

invalidated as overbroad 'if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

Defendants move the Court to find that under *Burson*, it is "doubtful that any of the law's applications are unconstitutional, and therefore the law cannot be unconstitutionally overbroad." Defendants' Memorandum in Support of Motion to Dismiss, 14. Again, however, at this stage it is not for this Court to decide whether the Plaintiffs will likely succeed in proving facts sufficient for a facial challenge to Wyoming Statute § 22-26-113. And to dismiss the facial challenge because it is "doubtful" that enough applications of the statute are unconstitutional—so that the challenge succeeds—would be in contravention to our mandate to view the facts in the light most favorable to the non-moving party and to apply a plausibility—not probability—standard. The Plaintiffs have pled that the statute is unconstitutional as applied to them, and unconstitutional as to third parties who wish to engage in protected speech on private property within the buffer zone. Whether these applications, judged under the framework of *Stevens,* are "unconstitutional" or a "substantial number" is yet unknown. Therefore, the claim that Wyoming Statute § 22-26-113 is facially unconstitutional meets the plausibility standard and is sufficient to state a claim for relief.

III. Jus Tertii Claims of Third Parties

The Supreme Court generally allows third party standing if "the plaintiff has an injury in fact sufficient to create a concrete interest in the outcome, a close relation to the

third party, and that the third party is in some way hindered from being the plaintiff." *Victory Processing, LLC v. Michael*, 333 F. Supp. 3d 1263, 1268 (D. Wyo. 2018) (citing *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). Yet in a First Amendment case, the Supreme Court has laid out a different two-element test for third party standing: "whether the plaintiff can demonstrate an injury in fact and satisfactorily frame the issues of the case." *Victory Processing*, 333 F. Supp. 3d at 1268 (citing *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984)).

Plaintiffs' Art. III standing requirements have gone uncontested in the briefing. Whether Plaintiffs will be able to satisfactorily frame the issues of the case in relation to third parties was similarly not raised. Accordingly, the Court will not reach these issues here. Plaintiffs have alleged constitutional concerns over the application of Wyoming Statute § 22-26-113 to private property within the electioneering buffer zone. This is enough to render dismissal inappropriate at this juncture.

CONCLUSION

For the above-stated reasons, the Court determines that Plaintiffs' Complaint does not fail to state a claim on which relief can be granted. Accordingly, Defendants' Motion (Doc. 16) is DENIED.

Dated this 1st day of October, 2020.

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE