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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

JOHN C. FRANK, 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. 2:20-cv-00138-NDF

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Wyoming's 100-yard, or 300-foot, no-electioneering zone (hereinafter "buffer zone") around polling places on Election Day is "way the heck excessive." **Exhibit 1** (John C. Frank Depo. 13:3-7). It is unconstitutional, and so is the 90-day, 100-foot buffer zone placed around absentee polling places such as the Laramie County Government Complex. The factual record in this case is complete and undisputed, and this Court may now assess the unreasonableness of Wyoming Statutes section 22-26-113 and how it significantly impinges upon the First

Amendment rights of John C. Frank, Grassfire, LLC ("Grassfire") and other speakers. *See* Doc. No. 27 at 7 (quoting *Burson v. Freeman*, 504 U.S. 191, 209 (1992)). The law is unconstitutional.

STATEMENT OF MATERIAL FACTS

I. The Legislative History of the Wyoming Buffer Zone Provision and Other Relevant Statutes[1]

From 1890 to 1973, Wyoming law prohibited electioneering within 20 yards, or 60 feet, of a polling place. Doc. No. 14-1 at 3; *see* **Exhibit 2** (excerpt of 1936 election laws). In 1973, the distance was expanded to 100 yards and the law was codified as Wyoming Statutes section 22-26-113, where it remains today. Doc. No. 14-3 at 4. In 1983, the statute was amended to specifically prohibit "the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing of voters[.]" Doc. No. 14-4 at 4.[2] In 2006, absentee polling places were implemented which, by law, "may be established in the courthouse or other public building which is equipped to accommodate voters from all districts and precincts within the county and shall be open the same hours as the courthouse on normal business days during the time period allowed for absentee voting." Wyo. Stat. § 22-9-125(a)(ii); *see* **Exhibit 3** (Enrolled Act No. 45, Wyoming House of Representatives (2006)). In the same bill, absentee polling places were added to the buffer zone provision. Exh. 3. The time period generally allowed for absentee voting was 40 days until 2020, when it was increased to 45 days, or 90 days total for a primary and general election. **Exhibit 4** (Enrolled Act No. 36, Wyoming Senate (2020)); Wyo. Stat. § 22-6-107(a).

[1] Additional legislative history is available in the Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction and accompanying exhibits. Doc. No. 14 at 2-5.

[2] The "canvassing of voters" provision was amended in 1990 to permit exit polling following *Nat'l Broadcasting Co v. Karpan*, C88-0320 (D. Wyo. Oct. 21, 1988) (Doc. No. 14-6); Doc. No. 14-7.

Since 2018, the statute has read as follows:

> (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. § 22-26-113 (2021). Knowing and willful violation of this law 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(a).

II. The Reality of Buffer Zones Under Wyo. Stat. § 22-26-113

A. Election Day Polling Places

In 2020, Laramie County had seven polling places. *See* **Exhibit 5** (polling places overlay).[3] This was by directive of the Secretary of State, who ordered each county to "consolidate their polling places down to seven with the exception that any county could ask for as many polling places or vote centers that they deemed necessary to conduct the election in a safe manner" in response to COVID-19. **Exhibit 6** (SecState 30(b)(6) Depo. 20:23-21:15). In Laramie County, a buffer zone is measured from every public entrance to each building in which

[3] An overlay of North Christian Church was produced twice, once with a buffer zone stemming from one entrance, and the other with zones stemming from two entrances. *See* Exh. 5 at 5-6.

a polling place is located. *See* Exh. 5. In at least one county in a past election, the zone was measured from the property line of the building in which the polling place was located. *See* Exh. 6 (SecState 30(b)(6) Depo. 23:22-25:4[4]). In Laramie County, Election Day buffer zones include public roads, sidewalks, parks and private property. *See* Exh. 5.

The Defendants disclaimed any governmental interest in Election Day buffer zones. **Exhibit 7** (Lee Response to Frank Interrogatory #5); **Exhibit 8** (Buchanan Response to Frank Interrogatory #6); **Exhibit 9** (Manlove Response to Frank Interrogatory #5). Government witnesses expressed no concerns about police presence at polling places on Election Day. **Exhibit 10** (Munoz Depo. 32:23-33:2); Exh. 6 (SecState 30(b)(6) Depo. 25:21-26:2). If someone refuses to comply with an order to move from a buffer zone, poll workers can "go ahead and call the cops if they need[] to." Exh. 10 (Munoz Depo. 27:14-23).

B. Absentee Polling Places

In Laramie County, the absentee polling place is the atrium within the Laramie County Government Complex. **Exhibit 11** (Complex overlay); Exh. 10 (Munoz Depo. 12:7-13:8). A buffer zone is measured from every public entrance to the Complex. *See* Exh. 11. Each zone covers sidewalks and streets. *Id.* The Complex contains a number of government agencies, including the County Clerk's office, the Laramie County District Court, the Board of County Commissioners, the District Attorney's office, the Public Defender's office, and the County Attorney's office. Exh. 7 (Lee Answer to Grassfire Interrogatory #4). The Laramie County Jail is connected to the Government Complex via bridge. Exh. 10 (Munoz Depo. 21:20-22). For certain services at the County Clerk's office, one must appear in person, such as titling a vehicle, obtaining a marriage license, or registering to vote. *Id.* (Munoz Depo. 10:12-23).

[4] The exhibit utilized in this testimony was previously filed and is located at Doc. No. 1-3.

In the 2016 general election, 12,255 Laramie County voters voted at the Government Complex. Exh. 10 (Munoz Depo. 18:23-19:10; 20:22-21:1; Munoz Depo. Exh. 2). In the 2018 general election, 8,985 Laramie County voters voted at the Government Complex. *Id.* By these measures, roughly one quarter to one-third of Laramie County voters vote at the Government Complex during a general election. *See id.* (Munoz Depo. Exh. 2). In-person absentee voting is a frequent occurrence in Wyoming. Exh. 6 (SecState 30(b)(6) Depo. 17:22-18:9; 19:4-10; 20:8-11; Depo. Exh. 3).

The Defendants disclaimed any governmental interest in absentee polling place buffer zones. Exh. 7 (Lee Response to Frank Interrogatory #5); Exh. 8 (Buchanan Response to Frank Interrogatory #6); Exh. 9 (Manlove Response to Frank Interrogatory #5). Government witnesses expressed no concerns about police presence at absentee polling places. Exh. 10 (Munoz Depo. 21:23-22:2); Exh. 6 (SecState 30(b)(6) Depo. 17:1-21).

III. The Censorship of John C. Frank's Speech by Wyo. Stat. § 22-26-113

John C. Frank is a resident of Cheyenne, Wyoming. Exh. 1 (Frank Depo. 6:3-4). His past political activities include "distributing literature, knocking on doors, [and] soliciting and placing yard signs." *Id.* at 7:18-24. In the 2020 election cycle, he displayed yard signs on his lawn for Liz Cheney and Anthony Bouchard. *Id.* at 11:5-21. But for the 100-yard no-electioneering restriction, on August 18, 2020, at Laramie County Community College ("LCCC") Mr. Frank would have "distribute[d] campaign literature and pamphlets highlighting some of the issues sponsored by candidates he believes in, including the protection of private property and Second Amendment rights." Doc. No. 1 at 4 (Verified Compl. ¶13[5]). He would perform similar activities

[5] "[A] verified complaint may be treated as an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out in [Fed. R. Civ. P.] 56[(c)(4)]." *Conaway v. Smith*, 853 F.2d 789, 792 (10th Cir. 1988); *see* Doc. No. 1 at 12-13.

in future elections around Laramie County polling places but for the law. *Id.* (¶11). On an Election Day, the buffer zone at LCCC would only permit Mr. Frank to distribute literature near the exit to the parking lot of the polling place building. *See* Exh. 5.

> If I'm standing at the exit and the people are leaving after they voted, you know, what's the point in trying to convince them, you know, gee, did you vote for my candidate or you should vote for my candidate? . . . . [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.

Exh. 1 (Frank Depo. 27:8-22). Mr. Frank would not electioneer closer than 100 feet to a polling place. *Id.* at 14:5-11. He photographed measurements in the fall of 2020 that illustrate the differences between the distances of 100 yards and 100 feet at the LCCC polling place. **Exhibit 12**.

Mr. Frank was also censored by the absentee polling place buffer zone. He would have attached two bumper stickers advocating for Liz Cheney measuring 16.25" by 4.5" but for the 100-foot absentee restriction covering lanes on 19th and 20th Streets and Carey Avenue. *See* Doc. No. 1 at 4 (Verified Compl. ¶13); Exh. 11; **Exhibit 13** (Cheney bumper sticker). Mr. Frank would have also utilized yard signs in his car, which is a station wagon, but was censored for the same reason:

> One of the things that I had intended to do was take two of Liz Cheney's and then alternate them on different days with signs, not stickers, but signs for Anthony Bouchard, Senator Bouchard. I have a Volkswagen station wagon and my intent was to put one sign in each side window of the back and, you know, as I was cruising around town, doing my little test and everything, having those in the windows.
>
> Now, I chose not to do those because frequently, I will go downtown and, you know, during the campaign and everything, was concerned that I might be driving by, you know, the Larimer [sic] County Complex, government complex down there, and inadvertently, you know, be in there and violate a law.

Exh. 1 (Frank Depo. 16:20-17:24). To Mr. Frank, multiple signs or stickers for the same candidate or larger signs or stickers for a candidate means "I *really* support this person as opposed to I support this person." *Id.* at 20:9-20 (emphasis added). All of this speech was censored by the statute, which will continue to censor Mr. Frank in future election years. Doc. No. 1 at 3-4 (Verified Compl. ¶11).

IV. The Censorship of Grassfire's Speech by Wyo. Stat. § 22-26-113

Grassfire is a Wyoming limited liability company that formed in January of 2020. **Exhibit 14** (Grassfire 30(b)(6) Depo. 6:8-18). It provides services for political campaigns, including peer-to-peer texting, door-to-door canvassing, robocalls, political consulting, polling services and signature gathering for candidates, initiatives and referenda. **Exhibit 15** (Grassfire Answer to Interrogatory #3). In 2020, Grassfire gathered signatures in Utah and Arizona to qualify initiative petitions and candidates for election. *Id.* (Grassfire Answer to Interrogatory #2). Its "core service is petitioning and signature gathering." Exh. 14 (Grassfire 30(b)(6) Depo. 16:20-17:3).

To effectuate signature gathering Grassfire "hire[s] circulators, also called petitioners, and, you know, whether they be experienced or they could be new to that sort of an occupation, and we will provide a lot of training and hope that they succeed." *Id.* at 17:14-18:1. Circulators are generally hired on a per-project basis. *Id.* at 18:12-17. Signature gathering "is a strange occupation. It's not easy for a lot of people to do it. And so there is – for every good, quality, effective circulator, we have to hire several other individuals that, you know, do not pan out[.]" *Id.* at 19:11-16; *see also id.* at 27:13-28:2.

Circulator placement—where, precisely, one gathers signatures—"is the number one factor that impacts success[.]" *Id.* at 21:3-7. This includes places such as grocery stores and other

commercial places, but to petition on such sites "require[s] permission of the property owner and that permission is often very difficult to obtain." *Id.* at 21:17-21. Thus, "[h]alf to three-fourths of our signatures for any project anywhere will come from any kind of a public facility where essentially we cannot be kicked out due to our constitutional rights, the exercise, you know, free speech on public property." *Id.* at 22:3-14. Moreover, certain public facilities yield far more valid signatures that are legally acceptable: "In a location, for example . . . motor vehicle offices . . . [signatures] will run upwards of 90 percent validity, only a 10 percent rejection rate, versus, let's say, your typical Walmart may only be 65 percent valid and 35 percent rejection rate." *Id.* at 24:5-16.

Polling places, including early voting or absentee voting places, can provide even greater value:

> [I]f an election is occurring, you know, in the near term and there is early voting, we will work that location, locations, to the maximum extent possible because it's in our interest. Because every single person going in there is a registered voter and the rejection rate could be zero. They could be a hundred percent good at a polling location.

Id. at 25:1-13. Grassfire has declined to pursue business with candidate or issue signature campaigns in Wyoming because of the 100-foot ban on absentee polling places. Exh. 15 (Grassfire Answer to Interrogatory # 7); Exh. 14 (Grassfire 30(b)(6) Depo. 26:12-21; 33:11-34:14).

> Politicking during the election at a polling place is one of the absolute best venues for collecting signatures, distributing literature, etc. Taking away these venues dramatically reduces the efficacy of the type of services that Grassfire provides. The Laramie County Government Complex is the #1 location Grassfire would target in Laramie County but for Wyoming Statutes section 22-26-113. Thus, until this prohibition is enjoined or amended, we will not solicit or accept clients for signature gathering services in Wyoming.

Exh. 15 (Grassfire Answer to Interrogatory #7). Grassfire believes buffer zones are "totally unconstitutional" except for reasonable limits such as ensuring access to a building. Exh. 14 (Grassfire 30(b)(6) Depo. 31:13-32:7).

V. The Censorship of Third Parties' Speech by Wyo. Stat. § 22-26-113

Since the enactment of the 100-yard Election Day buffer zone, the law has been enforced against citizens who used stationary campaign signs on private property. *See, e.g.*, **Exhibit 16** (excerpts of early complaints). Today, if a campaign sign is on private property within 100 yards of a polling place on Election Day, the owner is asked to remove the sign. Exh. 10 (Munoz Depo. 24:18-25:3). If the owner is not home or unavailable, officials enter onto private property and remove the sign. *Id.* at 32:11-22; Exh. 6 (SecState 30(b)(6) Depo.) at 25:5-20.

For the last two decades, in Laramie County there have been complaints about bumper stickers and political signs within the 100-yard zone. Exh. 10 (Munoz Depo. 23:23-24:17). In the August 2020 primary in Laramie County, complaints of electioneering arose from signature gathering at the polling places at North Christian Church, the Storey Gym, and LCCC. *Id.* (Munoz Depo. 28:6-16; 29:6-14). At the Pine Bluffs polling place, a complaint was lodged relating to election-related apparel. *Id.* (Munoz Depo. 29:15-18).

Since the absentee polling place buffer zone was enacted in 2006, during absentee voting at the Laramie County Government Complex "somebody parks in the area that we have to ask to leave." Exh. 10 (Munoz Depo. 16:2-23). That is, someone "has a sticker on their truck, and they run into the building or something. Someone notices it, and they call the office, and we contact [them] . . . and ask them to move so it's not an issue." *Id.* at 16:16-23. During the 2020 primary, signature gatherers were also asked to leave the no-electioneering zone around the Government

Complex. *Id.* at 18:5-11. This has occurred in past election cycles as well. *See* Exh. 6 (SecState 30(b)(6) Depo. 14:13-15:6; 16:11-25).

Jennifer Horal was cited on August 18, 2020 at LCCC for violating the 100-yard Election Day buffer zone while signature gathering. *See generally* **Affidavit of Jennifer Horal**. When first approached by a police officer while she gathered a signature, the signatory commented "she's not electioneering." **Exhibit 17** (Video at 01:54). Measuring from the polling place entrance with a tape measure, after over a minute's walk the officer noted to Ms. Horal she was 178 feet away. *Id.* at 09:50. After a heated exchange, the officer issued Ms. Horal a citation. *Id.* at 44:20. Ms. Horal then relocated to the far end of the parking lot, near its exit. *See id.* at 50:00. "The 100-yard no-electioneering boundary in Wyoming law makes signature gathering unnecessarily difficult." Horal Aff. ¶12. Horal was later cited for disrupting a polling place, despite her efforts occurring beyond the 100-yard boundary. *Id.* ¶13.

ARGUMENT

The First Amendment states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. CONST. amend. I. The First Amendment is applicable to state law pursuant to the Fourteenth Amendment. U.S. CONST. amend XIV; *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1065 (10th Cir. 2020). Wyoming Statutes section 22-26-113 abridges the rights to political speech of John C. Frank, Grassfire and third parties and should be declared unconstitutional by this Court.

I. Summary Judgment Standard Is Appropriate At This Time

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "[T]he mere existence

of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). An issue is genuine and a fact is material if, under the substantive law of the case, resolution of the factual dispute could affect the outcome "such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The movant bears the initial burden of either establishing that no genuine issue of material fact exists or that a material fact essential to the non-movant's claim is absent. *Celotex Corp.*, 477 U.S. at 322–24. Once the movant has met his burden, the onus is on the non-movant to establish that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In cases in which there are cross-motions for summary judgment, they are treated independently. *Philadelphia Indem. Ins. Co. v. Lexington Ins. Co.*, 845 F.3d 1330, 1336 n.4 (10th Cir. 2017). When cross-motions for summary judgment demonstrate a basic agreement concerning what legal theories and material facts are dispositive, they "may be probative of the non-existence of a factual dispute." *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983). "Where the facts are not in dispute and the parties only disagree about whether the actions were constitutional, summary disposition is appropriate." *Christian Heritage Acad. v. Oklahoma Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007).

In a First Amendment challenge, it is the burden of the government to defend the constitutionality of the law being challenged. In a buffer zone case, that means demonstrating the zone is reasonable and "'does not significantly impinge on constitutionally protected rights.'" *Burson*, 504 U.S. at 209 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)). Where government actors fail to articulate the governmental interest at stake or defend

its reasonableness, it is appropriate to rule in favor of First Amendment claims. *See, e.g.*, *Occupy Fresno v. County of Fresno*, 835 F.Supp.2d 849, 868–69 (E.D. Cal. 2011) ("In the absence of any articulated interest—substantial or otherwise—and because the Court can imagine none, the Court concludes that the section is not narrowly tailored"); *Lamar Outdoor Advertising, Inc. v. Miss. State Tax Comm'n*, 701 F.2d 314, 332–33 (5th Cir. 1983) (citing *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 95–96 (1977)) (although ban on alcohol advertising law might be remotely tied into concerns about health and safety, the "state is required to establish this relationship by record evidence" to justify infringement of First Amendment rights).

The facts summarized above demonstrate the standing of John C. Frank and Grassfire, LLC, respectively, *jus tertii* (third-party) standing,[6] the ripeness of the case and the merits of the Plaintiffs' claims. Their political speech near polling places and absentee polling places is censored under a law that they have challenged under the First Amendment. The issues before this Court are "'purely legal, and will not be clarified by further factual development.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). Summary judgment is appropriate at this time.

II. A Summary of *Burson v. Freeman* and Related Authority

In *Burson*, in a plurality opinion from eight justices,[7] the U.S. Supreme Court upheld a 100-foot buffer zone under Tennessee law. 504 U.S. at 193–94 (quoting Tenn. Code. Ann. § 2-7-

[6] The core focus of an overbreadth inquiry is whether a challenged law damages a substantial amount of speech "not tied to the Government's interest. . . ." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002). This is usually done by examining whether there are a substantial number of applications that would damage free speech interests beyond the parties before the court. Here, the record of past and present enforcement of the law demonstrates the substantial overbreadth of section 22-26-113.

[7] Justice Thomas took no part in the consideration or decision. *Burson*, 504 U.S. at 211.

111(b) (Supp. 1991)). The law 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[.]'" *Id.* The penalty for violating the law was 30 days of imprisonment and up to a $50 fine. *Burson*, 504 U.S. at 194 (quoting Tenn. Code Ann. §§ 2-19-119, 40-35-111(e)(3) (1990)). The Court found the law content based, because "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Burson*, 504 U.S at 197; *see also id.* at 213 (Stevens, J. dissenting). The statute was thus subject to strict scrutiny, under which "[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 191 (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)). The plurality recognized "compelling interest[s] in protecting voters from confusion and undue influence" as well as "'preserving the integrity of its election process.'" *Burson*, 504 U.S. at 199 (quoting *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989)).

In examining the law's tailoring, the plurality opinion of Justice Blackmun—joined by Chief Justice Rehnquist, Justice White and Justice Kennedy—explored "the evolution of election reform" in the late 1800s and early 1900s and found buffer zones to be one facet of a bundle of such reforms. *Burson*, 504 U.S. at 200–06. This began with a municipal law in Louisville, Kentucky that prohibited electioneering "within 50 feet of the voting room inclosure" that was soon followed by, among other provisions, a New York law prohibiting Election Day electioneering "within any polling-place, or within one hundred feet of any polling place." *Id.* at 203–04. Tennessee followed suit, implementing a 50-foot zone for anyone but voters and certain election officials in "more highly populated counties and cities[,]" then a statewide 30-foot ban

of a similar nature. *Id.* at 205. Only in 1967 did Tennessee implement a 100-foot buffer zone that targeted electioneering. *Id.* at 205–06. Nevertheless, this was part of a "widespread and time-tested consensus" that "demonstrate[d] that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Id.* at 206.

The plurality found the tailoring overcame concerns of overinclusivity, rejecting that these interests could be served by laws directly addressing violence or intimidation. *Id.* at 206–07. Underinclusivity, or the law's failure to regulate content such as commercial speech, was rejected as well: "there is . . . ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses." *Id.* at 207. Finally, in response to the dissent, the plurality reiterated its reliance on the history of election reform and concluded that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter." *Id.* at 207–08. "The real question then is *how large* a restricted zone is permissible or sufficiently tailored." *Id.* at 208.

In considering the size of Tennessee's 100-foot buffer zone, the plurality adopted a modified burden of proof, requiring the government to show that the statute "'is reasonable and does not significantly impinge on constitutionally protected rights.'" *Id.* at 209 (quoting *Munro*, 479 U.S. at 195). It reserved judgment on larger zones, noting 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 (1966); *Meyer v. Grant,* 486 U.S. 414 (1988)).

Justice Stevens wrote a dissent joined by Justices O'Connor and Souter. *Id.* at 217 (Stevens, J., dissenting). The dissent agreed with the application of strict scrutiny but diverged

completely with the plurality and concluded "that Tennessee has [not] made anything approaching such a showing" of a compelling governmental interest and narrow tailoring. *Id.* at 217–18. The dissent posited that orderly access to the polls was the only governmental interest at issue and, importantly, that a state must demonstrate that orderly access laws do not unnecessarily hinder last-minute campaigning. *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." *Id.* Moreover, "on its face, Tennessee's statute appears informed by political concerns." *Id.* The dissent was troubled by the "exceptionally thin" evidence introduced at trial and noted that the police-free zone of only 10 feet under state law further bolstered that "normal police protection is completely adequate to maintain order" beyond that point. *Id.* at 219. It also chastised the plurality for discerning so much from history: "more than mere timing is required to infer necessity from tradition." *Id.* at 220. The decision remains a sharply split 5-3 plurality, with the plurality itself divided on the basis for upholding a 100-foot buffer zone. *See id.* at 211–14 (Kennedy, J., concurring), 214–16 (Scalia, J., concurring).

In the wake of *Burson*, federal courts have largely stricken buffer zones that extend beyond 100 feet under the First Amendment due to their damage to political speech. *See, e.g.*, *Anderson v. Spear*, 356 F.3d 651, 656–66 (6th Cir. 2004) (striking down a 500-foot buffer zone); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1054–55 (6th Cir. 2015) (striking down a 300-foot buffer zone); *Calchera v. Procarione*, 805 F.Supp. 716, 720 (E.D. Wisc. 1992) (striking down a 500-foot buffer zone); *see also See Nat'l Broadcasting Co.*, No. C88-0320, slip op. at 10 (Doc. No 14-6) (striking down the 300-foot buffer zone in section 22-26-113 prior to the *Burson* decision). The Fifth Circuit upheld Louisiana's 600-foot buffer zone, but only after the state

provided evidence demonstrating the need for so large a zone due to corruption in the state. *Schirmer v. Edwards*, 2 F.3d 117, 121 (5th Cir. 1993). Even so, the Louisiana Supreme Court later invalidated the buffer zone. *State v. Schirmer*, 646 So. 2d 890, 902 (La. 1994).

III. The 100-yard Election Day Buffer Zone in Wyo. Stat. § 22-26-113 is Unconstitutional

Under the plurality in *Burson*, the 100-yard Election Day buffer zone under section 22-26-113 is unconstitutional. The law is subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest such as the prevention of voter coercion or confusion. *Burson*, 504 U.S at 197; *see also id.* at 213 (Kennedy, J. concurring). When states seek to expand buffer zones to cover streets, sidewalks and other public fora commonly held out for speech and debate, the burden squarely rests with the government to demonstrate why such a large restriction is required.

The Defendants cannot justify a 100 yard, or 300-foot, radius as an outgrowth of electoral reform: there are few—if any—buffer zones beyond a 100-foot radius in that history. *See id.* at 215 n.1-2 (Scalia, J. concurring). The Defendants have offered nothing to suggest that Wyoming was under any heightened threat of voter coercion or confusion—or any threat at all—when the Election Day buffer zone was expanded in size 1973 from 20 to 100 yards or expanded in the scope of its content ban in 1983 and 2018. Nor has any history since indicated such a concern; rather, early enforcement of the statute reflected the concern of political manipulation expressed by Justice Stevens's dissent. *See* Exh. 16 at 5-11, 13-15 (Respective complaints about the County Clerk's name appearing on a polling place sign and a candidate having a sign on his own front lawn within 100 yards of a polling place); *Burson*, 504 U.S. at 218 (Stevens, J., dissenting). As a factual matter, the Defendants offered not a single governmental interest behind the statute in discovery, placing such responsibility solely on the legislature. Exh. 7 (Lee Response to Frank

Interrogatory #5); Exh. 8 (Buchanan Response to Frank Interrogatory #6); Exh. 9 (Manlove Response to Frank Interrogatory #5). And there is no legislative history justifying the law. But to sustain the law, Defendants must meet their modified *Burson* burden to show the law "'is reasonable and does not significantly impinge on constitutionally protected rights.'" 504 U.S. at 209. They have neglected this task entirely.

The impingement on First Amendment rights by the Election Day buffer zone is significant. John C. Frank's forgone activities at LCCC are a perfect example: he could only realistically address voters as they left the parking lot after they'd voted, a "totally pointless" exercise. Exh. 1 (Frank Depo. 27:8-22). In Laramie County and across Wyoming the Election Day buffer zones yield much the same result or foreclose voter engagement entirely. *See* Exh. 5; *see also* Doc. No. 1-5 (graphic overlays of buffer zones over various Wyoming polling places). The absurdity is visualized in Mr. Frank's photos; 100 feet amply protects polling place ingress and egress and affords voters the "sense of shared civic obligation at the moment it counts the most" long before they get to the voting booth. *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018); *see* Exh. 12 at 15-16. The 100-yard buffer zone does not serve to protect voters from coercion or confusion from citizens like Mr. Frank, but from his last-minute campaigning, a concern reserved by the plurality in *Burson*. 504 U.S. at 210 (citing *Mills*, 384 U.S. 214).

The video of Jennifer Horal is also instructive as to the law's significant impingement of free speech, from the success of her signature gathering activities at around 178 feet away from the entrance to her banishment to the far end of the parking lot beyond the 100-yard boundary. Exh. 17 at 09:50; 50:00-53:00. Few, if any, voters park that far away. She was left to flag down cars as they departed, which law enforcement considered disrupting a polling place. Horal Aff.

¶¶10-13. As with Mr. Frank's forgone activities, the threats, citation and removal of Ms. Horal from signature gathering did not address voter coercion or confusion, but significantly impinged upon signature gathering in a place that could guarantee the gathering of legal signatures. *See id.* ¶¶3-4; *see* Exh. 14 (Grassfire 30(b)(6) Depo. 25:1-13); *see also* Wyo. Stat. § 22-5-304 (requiring signatures from "registered electors" for nominating petitions). The 100-yard Election Day buffer zone significantly impinges upon speech.

Assuming this Court recognizes the interests of voter coercion or confusion as a legal matter—as a matter of fact, it bears repeating that the Defendants disclaimed any interest in defending the law—the law is not narrowly tailored. It triples the radius and creates a zone nine times as large as the one upheld in *Burson*, serving no purpose but censorship. Other factors show ample less restrictive alternatives to such a sizable buffer zone, including developments in election law. For example, absentee voting, particularly by mail, is an alternative available to every Wyoming voter. Wyo. Stat. §§ 22-9-102(a). Because of this, any voter who does not wish to be solicited for a signature or to hear last-minute campaigning may vote at his or her leisure in the privacy of one's home. Due to this robust alternative method of voting, Wyoming need not censor so far beyond the 100-foot boundary upheld in *Burson*; it is questionable that even the reasoning in the *Burson* plurality endures in light of Wyoming's option to vote absentee via the U.S. mail without excuse. This electoral reform questions the tailoring for but the most minimal Election Day buffer zones, certainly Wyoming's 100-yard radius.

In all of this, *Burson* made clear that the burden rests on government to demonstrate through evidence or legislative findings that a buffer zone beyond 100 feet is truly necessary. The Defendants have

> 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. [Defendants] 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, the Defendants have simply recited 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 rote recitations are not enough to uphold the law under *Burson*'s standards. Indeed, such speculation fails to satisfy the government's burden and cannot justify the denial of the First Amendment right to communicate one's political viewpoints near a polling place.

The plurality in *Burson* reserved judgment over when a buffer zone intrudes upon private property because there was not a proper factual record to consider the issue. 504 U.S. at 201 n.15. However, with "rare exceptions, content discrimination in regulations of the speech of private citizens on private property [. . .] is presumptively impermissible, and this presumption is a very strong one." *City of Ladue v. Gileo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring). It has thus been the norm that where state actors prohibit or penalize the use of signs, especially those espousing political views, on private property, that such regimes are unconstitutional. *See, e.g.*, *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1407–09 (8th Cir. 1995) (invalidating durational sign limits and other provisions for election signs on private property); *Dimas v. City of Warren*, 939 F. Supp. 554 (E.D.Mich.1996) (invalidating durational limit on temporary election signs on private property); *Anderson*, 356 F.3d at 662 (invalidating political sign prohibition in buffer zone on private property); *Calchera*, 805 F.Supp. at 720 (invalidating ban of political posters and signs on private property due its "sweeping zone"). Wyoming may undoubtedly protect the right to vote or the integrity of the ballot box. But it may not enact sweeping restrictions on speech that ban average citizens from placing political posters or signs

in their own yards in doing so. Per *Burson*, the state enjoys a 100-foot safe harbor to do so. Anything beyond that—indeed, anything so far reaching as to intrude on the sanctity of what people express on their own real estate—requires substantial proof from Defendants of its necessity, which they failed to plead or provide.

Not to be outdone in banning speech occurring on private property, Wyoming law provides that the only permissible electioneering bumper stickers in a buffer zone are: (1) limited to one per candidate, per vehicle, (2) no larger than four inches high by sixteen inches long, and (3) may only be in the buffer zone when the driver is voting. Wyo. Stat. § 22-26-113(a)(i)-(iii). In a variety of contexts, courts have held that bumper stickers addressing items of public concern are fully protected under the First Amendment. *See, e.g.*, *Fire Fighters Ass'n v. Barry*, 742 F. Supp. 1182, 1189 (D.D.C. 1990); *Cunningham v. State*, 400 S.E.2d 916 (Ga. 1991); *Connealy v. Walsh*, 412 F. Supp. 146 (W.D. Missouri 1976). None have addressed this issue within the context of buffer zones. To survive review, Defendants must produce evidence or legislative reasoning supporting the need to ban an economical and efficient way for average citizens to communicate their political views. While *Burson* and other courts have sustained limited bans of electioneering within 100 feet of a polling place, they have never gone so far as to permit bans of communications featured on vehicles temporarily passing through these zones. And courts have regularly upheld the First Amendment right to use bumper stickers to communicate one's political opinions. In scouring both public records and legislative history, there is no apparent basis for Wyoming to maintain a ban against bumper sticker political messaging. Wyoming history does not demonstrate regular investigations, let alone convictions, for vote coercion or vote buying—or a single one related to large and numerous bumper stickers. Nor is Wyoming a state featuring a lengthy history of voter intimidation tied to, somehow, nefarious bumper

stickers. Moreover, the legislative history does not present a record upon which the state can be said to have weighed serious concerns about vote coercion and intimidation because people might feature effective messages on bumper stickers. On this record, the bumper sticker ban must be stricken.

IV. The 100-Foot, 90-Day Absentee Polling Place Buffer Zone in Wyo. Stat. § 22-26-113 is Unconstitutional

The expansion of the duration of a buffer zone compared to that upheld in *Burson* is just as concerning as the expansion of the size of the zone on an Election Day. *Burson* framed the relevant constitutional inquiry as "*how large* a restricted zone is permissible or sufficiently tailored." *Burson*, 504 U.S. at 208. This case presents larger concerns: not merely how large a zone is permissible (*Burson*: 100 feet; Wyoming: 100 to 300 feet), but how long (*Burson*: two voting days in an electoral cycle; Wyoming: 90 voting days), and how extensive (*Burson*: limited to narrowly identified electioneering within 100 feet of a polling place; Wyoming: capturing yard signs and bumper stickers). Whatever interest Wyoming may have in securing the integrity of its elections surely can be achieved with a less colossal approach that respects free speech.

Evolution in election law must also be considered. In 2020, Wyoming extended absentee voting such that voters may now vote during a total of 90 days during an absentee electoral cycle. Pragmatically, this means that the law now increases the breadth of the buffer zone's reach to protected speech. For absentee voting, Wyoming's buffer zones last 45 times longer in duration. For regular voting, they are nine times larger in surface area than those upheld in *Burson*. This dramatic increase in size and scope from *Burson* comes with a constitutional consequence: speech occurring on a variety of public fora are damaged considerably greater.

For example, regarding LCCC, open campuses usually constitute limited public fora where the free exchange of ideas should be protected. *See, e.g.*, *Bowman v. White*, 444 F.3d 967,

978 (8th Cir. 2006); *Giles v. Garland*, 218 Fed.Appx 501 (6th Cir. 2008). Likewise, streets and parks abutting polling places are "quintessential public forums." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see* Exh. 5. These are the places where Americans gather to peacefully exchange ideas about politics, policy, and the betterment of this nation. These are also places that Americans happen to visit frequently, whether to attend class or a community event at LCCC or title a vehicle at the Laramie County Governmental Complex.

Burson upheld a 100-foot buffer zone that applied for but two days during an election year. On an Election Day, Wyoming's buffer zones reach further, covering important forms of public fora transforming them into "First Amendment Free Zones." *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). Streets, parks, and sidewalks no longer welcome a vibrant exchange of ideas. Likewise, Wyoming's absentee buffer zone lasts 45 times longer in duration than the zone at issue in *Burson* and covers sidewalks and streets. Wyoming thus bans important political speech occurring near a public building—the courthouse, no less—for almost 25 percent of the year whereas in *Burson* the zone only operated for one half of one percent of the year. Whereas in *Burson*, Tennessee employed a scalpel to protect vote integrity, Wyoming employs a bludgeon.

The Tenth Circuit has been clear that government bodies may place sensible restrictions within government property—say, on courthouse or town council grounds—but not on abutting sidewalks or roads. *Verlo v. City and County of Denver*, 741 Fed.Appx. 534 (10th Cir. 2018). Wyoming may place sensible restrictions on electioneering within or on government property, but it is severely curtailed in its ability to maintain a ban against political speech occurring on traditional public fora abutting such property. And this, then, is the crux of this case: Wyoming outlaws important political speech in the most public of fora near polling places for extensive

time periods without a compelling reason.

V. Outstanding Constitutional Concerns With The Election Day and Absentee Polling Place Buffer Zones

For independent reasons, the Election Day and absentee polling place buffer zones under section 22-26-113 are unconstitutional. *See supra* parts III, IV. But they are both unconstitutional for additional reasons that apply to both types of zones: first, a prohibition of signature gathering is not a reasonable application of anti-electioneering interests and, second, because Wyoming law does not regulate police presence at polling places and the Defendants have no concerns with such presence.

The Tennessee law at issue in *Burson* did not include signature gathering. Although one might gather signatures for a candidate or an issue on a ballot, this is unrealistic under Wyoming law: one gathers signatures at a polling place for candidates, initiatives or referenda in order that they might appear on the ballot, and they are thus not on the ballot of that election. The plurality in *Burson* limited itself to bona fide electioneering, in part because "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 (emphasis added). There is no such evidence here.

In *Burson*, the plurality rejected Tennessee's general misdemeanor of voter intimidation as a less restrictive means to prevent intimidation, in part "because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process, . . . [thus] many acts of interference would go undetected." 504 U.S. at 207 (citing Tenn.Code Ann. § 2–7–103 (1985)). This is still the law in Tennessee: "No police or other law enforcement officer may come nearer to the entrance to a polling place than ten feet (10') or enter the polling place except at the request of the officer of elections or the county election commission or to make an arrest or to vote." Tenn. Code Ann. § 2-7-103 (2021).

Wyoming has no such law, and the Defendants expressed no concerns over general police presence at polling places. Exh. 10 (Munoz Depo. 32:23-33:2); Exh. 6 (SecState 30(b)(6) Depo. 25:21-26:2). This is almost comic as it pertains absentee polling places, which are courthouses by default under the law and come with at least some security guards or bailiffs. Wyo. Stat. § 22-9-125(a)(ii). At the Laramie County Government Complex, the atrium with the absentee polling place is adjacent to a skywalk that leads to the very jail that would house electioneering violators. *See* Exh. 11; Exh. 10 (Munoz Depo. at 21:20-22). The Supreme Court noted this distinction in striking down a 35-foot restriction around abortion clinics under Massachusetts law: the majority rejected reliance on *Burson* in part because "police maintain a significant presence outside Massachusetts abortion clinics." *McCullen v. Coakley*, 573 U.S. 464, 496 (2014). Police presence is significant at many absentee polling places in Wyoming and was, at the very least, apparent at LCCC on August 18, 2020. *See generally* Exh. 17.

The Election Day buffer zone in section 22-26-113 is too large to be upheld under *Burson*. The absentee polling place buffer zones, which are placed around public buildings such as the Laramie County Government Complex for 90 days during election years, are likewise unconstitutional. These other concerns support, at a minimum, as applied relief for signature gathering but also support a ruling that the law is facially unconstitutional.

With a host of constitutional frailties, it is difficult to imagine how a court could narrowly construe or limit the reach of Wyo. Stat. § 22-26-113. The buffer zones reach too far, last too long, and capture speech irrelevant to protecting voting integrity—such as bumper stickers, political yard signs and signature gathering. *See Burson*, 504 U.S. at 210 n.13. The simplest remedy here is to declare the law facially invalid. As the Supreme Court noted in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984), facial

invalidation is appropriate where the law before the court is "incapable of limitation." Facial invalidation also permits the Wyoming Legislature the opportunity to draft a constitutionally appropriate buffer zone anew rather than let its hodgepodge of amendments dating back decades to control how people express themselves near polling places today. While Plaintiffs welcome any relief, as applied or facial, in this matter, facial invalidation is especially appropriate here.

CONCLUSION

For the foregoing reasons, this Court should enter declaratory judgment that Wyoming Statutes section 22-26-113 is unconstitutional, grant the relief requested in Plaintiffs' verified complaint, Doc. No. 1 at 10-11, and any further relief the Court believes just and appropriate.

Respectfully submitted,

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Dated this 21st day of May, 2021

CERTIFICATE OF SERVICE

I, Stephen Klein, hereby certify that on this 21st day of May, 2021, the foregoing document and its attachments were 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/ Stephen Klein