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UNITED STATES DISTRICT COURT
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

DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants Edward A. Buchanan, Wyoming Secretary of State, and Leigh Anne Manlove, Laramie County District Attorney, submit this brief in support of their motion to for summary judgment pursuant to Fed. R. Civ. P. 56(a).

I. Introduction

Plaintiffs John C. Frank and Grassfire, LLC filed a complaint against the Wyoming Secretary of State, Laramie County District Attorney, and Laramie County Clerk under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, asserting that Wyo. Stat. Ann. § 22-26-113 violates

their First Amendment rights both as applied and facially. (Compl. ¶¶ 2, 35, 38). In addition, Frank and Grassfire claim that they also bring their suit on behalf of third parties not before this Court, but do not specifically name those parties. (*Id.* ¶ 37).

II. Statement of Facts

Frank is a resident of Cheyenne, Wyoming. (*Id.* ¶ 5). At the time the complaint was filed, he expressed a desire to stand within 300 feet of the public entrance of his nearest polling place during the 2020 primary and general elections for the purpose of distributing campaign material for candidates. (*Id.* ¶¶ 11, 13). In addition, Frank expressed a desire to attach two bumper stickers on his automobile for candidate Liz Cheney that are larger than 4 inches by 16 inches. (*Id.* ¶ 13). Frank has never electioneered within a buffer zone in Wyoming (Ex. D Frank Disc. Resp. at 4) and has no current plans to electioneer within a buffer zone in the future. (Ex. A. Frank Depo. at 9).

Grassfire, LLC is an entity formed in January 2020 (Ex. B. Grassfire Depo. at 3) that provides signature gathering services nationwide. (Compl. ¶ 14). Grassfire alleges that it "would like to offer its services in Wyoming" to gather signatures for candidates, initiatives, and referenda. (*Id.* ¶ 17). Grassfire requires all of its employees/contractors to abide by all state laws regarding signature gathering. (Ex. C at 1). Grassfire has never provided signature gathering services in Wyoming, despite operating in numerous non-polling locations. (Ex. B. at 4-5, 7, Ex. E Grassfire Disc. Resp. at 9-10).

Neither Frank nor Grassfire allege that they have been convicted, cited, or threatened with legal sanction for violating Wyo. Stat. Ann. § 22-26-113. (Ex. A at 16, Ex. B at 11, Ex. D at 4). In fact, Frank and Grassfire do not allege that any person has ever

been found guilty of a misdemeanor under the electioneering ban. (*See generally* Compl.). In addition, neither Frank nor Grassfire own, rent, or otherwise occupy property in a buffer zone or have permission to electioneer on private property in a buffer zone. (Ex. A 13-14, 21 Ex. E at 7, Ex. D at 4).

III. Legal Standard

A. Eleventh Amendment Immunity

A court may dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Eleventh Amendment immunity is a proper defense under Rule 12(b)(1) because it concerns the Court's subject matter jurisdiction. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). Subject matter jurisdiction can be raised at any time and cannot be waived. *City of Albuquerque v. Soto Enterprises, Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017) (citations omitted).

B. Article III Standing

Under Article III of the United States Constitution, federal courts may only decide "Cases" or "Controversies." U.S. Const. Art. III, Section 2; *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th. Cir. 2020). To establish Article III standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendants, and (3) that is likely to be redressed by a favorable judicial decision." *Baker*, 979 F.3d at 871 (citation omitted). Frank and Grassfire, as the parties invoking federal jurisdiction, bear the burden of establishing standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 57-58 (2014).

"At the summary-judgment stage, a plaintiff must set forth affidavits or other evidence demonstrating specific facts showing standing." *Clark v. Schmidt*, 493 F. Supp. 3d 1018, 1026 (D. Kan. Oct. 7, 2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Baker*, 979 F.3d at 871 (citation omitted). "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial' risk that the harm will occur." *Id.* (citation omitted).

C. Summary Judgment Standard

Summary judgment is appropriate under Rule 56(a) when the movant shows "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine 'if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way,' and it is material 'if under the substantive law it is essential to the proper disposition of the claim.'" *Van Dam v. Town of Guernsey*, 2021 WL 1774137, at *3 (D. Wyo. May 4, 2021) (quoting *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013). When reviewing a motion for summary judgment, "the Court views the record and all reasonable inferences that might be drawn from it in the light most favorable to the party opposing summary judgment." *Id.* (citation omitted).

"Once a prima facie showing is made, the burden shifts to the party opposing the motion to present specific evidence, not mere allegations or denials, showing that there is a genuine issues of material fact. *Id.* "Cross-motions for summary judgment are to be

treated separately; the denial of one does not require the grant of another." *Garcia v. Dep't of Health and Social Servs.*, 2020 WL 5629784, at *1 (D. Wyo. Aug. 25, 2020).

IV. Argument

A. The 42 U.S.C. § 1983 claims are barred by sovereign immunity.

The State of Wyoming, its agencies, and state officials acting in their official capacity are immune from suit under the Eleventh Amendment. U.S. Const. amend. XI. Specifically, the Eleventh Amendment guarantees state sovereign immunity from suits brought by their "own citizens, by citizens of other states, by foreign sovereigns, and by Indian Tribes." *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 838 (10th Cir. 2007). Likewise, courts will not entertain suits against state agencies or state officials, for the same reason, as those suits amount to actions against the state itself. *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1188-89 (10th Cir. 1998).

Courts have articulated three limited exceptions to the sovereign immunity doctrine. First, a state may consent to suit. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 159, 1166 (10th Cir. 2012). Second, Congress may expressly abrogate state sovereign immunity. *Id.* Third, litigants may sue state officers for prospective injunctive relief under the *Ex Parte Young* doctrine. *Chamber of Commerce of the United States v. Edmondson*, 592 F.3d 742, 760 (10th Cir. 2010) (citing *Ex Parte Young*, 2009 U.S. 123, 159-60 (1908)). For the following reasons, none of these exceptions apply.

First, the State of Wyoming has not consented suit under 42 U.S.C. § 1983. *Wyo. Guardianship Corp. v. Wyo. State Hosp.*, 2018 WY 114, ¶ 18, 428 P.3d 424, 433

(Wyo. 2018). Turning to the second exception, "Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and 'acts pursuant to a valid grant of constitutional authority.'" *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001). The Supreme Court has held that § 1983 does not abrogate the States' Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

Third and finally, under the *Ex Parte Young* doctrine, a party may sue a state official seeking only prospective equitable relief for violations of federal law. *Edmondson*, 594 F.3d at 760. To allege a proper claim under *Ex Parte Young*, the court "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal citation and quotation marks omitted) (alteration in original). To determine whether a complaint is sufficient, courts employee a three-pronged test: "(1) whether the case is against state officials or the state itself; (2) whether the complaint alleges an ongoing violation of federal law; and (3) whether the relief sought is prospective relief." *EagleMed, LLC v. Wyoming*, 227 F. Supp. 3d 1255, 1267 (D. Wyo. May 16, 2016) (reversed on other grounds).

Defendants do not dispute that Frank and Grassfire satisfy the first and third prongs of the *Ex Parte Young* test because the claims are against specific state officials (Compl. ¶¶ 7-9) and the relief sought is prospective. (*Id.* at 11, ¶ 3). But Frank and Grassfire fail to meet the second prong because they lack Article III standing to bring their claims and they do not demonstrate an ongoing violation of federal law. *See infra* Section IV.B-D. Even if

this Court finds Plaintiffs' declaratory judgment claims are properly before the Court, Frank and Grassfire's § 1983 claims are barred by sovereign immunity.

B. Frank and Grassfire lack standing to challenge the constitutionality of Wyo. Stat. Ann. § 22-26-113.

"When a plaintiff alleges injury from the potential enforcement of a law or regulation, courts find an injury in fact only 'under circumstances that render the threatened enforcement sufficiently imminent.'" *Baker*, 979 F.3d at 872 (citation omitted). The injury in fact requirement is satisfied where a plaintiff "alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Clark*, 493 F. Supp. 3d at 1027 (quoting *Susan B. Anthony List*, 573 U.S. at 159).

This Court must determine whether Frank and Grassfire have sufficiently demonstrated "(1) an intention to engage in activity prohibited by the electioneering statute, and (2) face a credible threat of enforcement as a result." *Id.* Because Frank and Grassfire fail to demonstrate an injury in fact, this brief will not address the traceability to Defendants' conduct or redressability requirements also necessary to demonstrate Article III standing. *Baker*, 979 F.3d at 871 (citation omitted).

1. Frank and Grassfire have not demonstrated an intention to engage in activity prohibited by Wyo. Stat. Ann. § 22-26-113.

"The Supreme Court has instructed that 'some day' intentions . . . do not support a finding of the 'actual or imminent' injury." *Id.* at 874. "When an injury in fact depends on a plaintiff's future conduct, a plaintiff must describe 'concrete plans,' and not merely a

'vague desire,' to undertake that conduct. *Id.* at 875. Whether a plaintiff has demonstrated "concrete plans" to undertake specific conduct is determined on a case-by-case basis. *Id.*

Here, Frank asserts that he desires "to distribute campaign literature and pamphlets" and to "attach two bumper stickers on his automobile that advocate for candidate Liz Cheney that are larger than 4 inches in height and 16 inches in width" within the area prohibited by Wyo. Stat. Ann. § 22-26-113. (Compl. ¶¶ 11, 13). Due to the statutory prohibition, Frank asserts that he will refrain from these activities unless the electioneering statute is declared unconstitutional and enjoined. (*Id.* ¶ 23).

In his deposition, Frank testified that he has never distributed campaign materials to members of the public nor intentionally electioneered near a polling place in Wyoming. (Ex. A at 4). Even if he had, previous conduct is not enough to prove "actual or imminent injury." *Baker*, 979 F.3d at 875; *Lujan*, 504 U.S. at 564-65 (holding that a member's "profession of an 'inten[t]' to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough" to establish standing). In addition, Frank testified that he does "not plan on supporting Liz Cheney," contradicting his previous assertion that he would like to attach two bumper stickers on his automobile advocating for Liz Cheney. (Ex. A at 9). When asked what activities Frank planned to engage in in the future, he said "possibly distribution of literature on election day" depending on the item or ballot item. (*Id.* at 10).

Similarly, Grassfire alleges that it "would like to offer its services in Wyoming to gather signatures for petitions for candidates, initiatives and referenda and for other forms

of electoral advocacy." (Compl. ¶ 17). But Grassfire asserts that it has not provided signature gathering services in Wyoming because Wyo. Stat. Ann. § 22-26-113 makes signature gathering "impracticable" and maintains it will not provide its services in Wyoming unless the statute is enjoined. (*Id.* ¶ 24; Ex. B at 4-5). When asked about plans to engage in signature gathering services in Wyoming, Grassfire expressly stated that it has "no specific plans" to engage in signature gathering in Wyoming, despite other locations to gather signatures being available. (Ex. B at 4, 7, 11). It appears Grassfire would just like the option of providing signature gathering services in Wyoming, which the Tenth Circuit has held is insufficient to establish "actual or imminent injury" for Article III standing purposes. *Baker*, 979 F.3d at 875 (holding that the plaintiff failed to allege "which 'options' she will choose, when she plans to exercise them, what concrete plans she has to pursue them, and what facts indicate an immediate threat of injury.").

There is no dispute that both Frank and Grassfire have alleged an abstract desire to engage in electioneering within the buffer zones established under Wyo. Stat. Ann. § 22-26-113. (Ex. A at 7; Ex. B at 4). Moreover, it is undisputed that neither Frank nor Grassfire have ever engaged in or attempted to engage in conduct prohibited by Wyoming's electioneering statute. (Ex. A at 4; Ex. B at 10). Although both Frank and Grassfire have generally asserted the type of conduct they would like to engage in, neither has expressed any "concrete plans" to undertake that conduct in the future. *Baker*, 979 F.3d at 875. Their reliance on speculative and hypothetical future activities is wholly insufficient to demonstrate an intention to engage in activity prohibited by Wyo. Stat. Ann. § 22-26-113.

2. Frank and Grassfire do not demonstrate a credible threat of enforcement.

In addition to an intention to engage in conduct prohibited by statute, a plaintiff challenging a law before its enforcement must also show that "there exists a credible threat of prosecution" for the proscribed conduct. *Susan B. Anthony List*, 573 U.S. at 159 (citation omitted). "A credible threat is 'well-founded,' and 'not imaginary or wholly speculative.'" *Baker*, 979 F.3d at 872. "The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." *Id.* Imaginary or speculative fears of state prosecution are not sufficient to demonstrate a credible threat of enforcement. *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 554 (10th Cir. 2016) (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979).

In *Susan B. Anthony List*, the Supreme Court found that the petitioner had alleged a credible threat of enforcement because "[h]e had been **warned** to stop handbilling and **threatened with prosecution** if he disobeyed; he states his desire to continue handbilling . . . and his companion's prosecution showed that his 'concern with arrest' was not 'chimerical.'" *Susan B. Anthony List*, 573 U.S. at 159 (emphasis added). Conversely, in *Hickenlooper*, while the plaintiffs asserted the challenged statute criminalized certain conduct, they conceded that the acts would not "normally be prosecution priorities." *Hickenlooper*, 823 F.3d at 554. Based on that concession, the court found that no credible threat of enforcement existed and that any threat of prosecution was purely speculative. *Id.*

Here, neither Frank nor Grassfire assert they have ever been cited with violating the electioneering statute, threatened with prosecution under that statute, or asked leave a buffer zone in Wyoming. (Ex. A at 16, Ex. B. 11, Ex. D at 4). Instead, they simply allege that they would like to engage in activity prohibited by the statute but have not done so due to the statutory prohibition. (Compl. ¶¶ 23-24). Because speculative fear of state prosecution is insufficient, Frank and Grassfire have both failed to demonstrate the requisite "credible and imminent threat of enforcement" to support pre-enforcement standing to bring their claims. *Hickenlooper*, 823 F.3d at 554; *Baker*, 979 F.3d at 873.

C. Wyoming Statute § 22-26-113 does not violate Frank and Grassfire's First Amendment rights.

Frank and Grassfire's as-applied challenges are indistinguishable from their facial challenges to Wyo. Stat. Ann. § 22-26-113. (*Id.* ¶ 35). In support, Frank and Grassfire rely on the Supreme Court's decision in *Burson v. Freeman*, 504 U.S. 191 (1992) and the Sixth Circuit Court of Appeals' decisions in *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004) and *Russell v. Lundergan-Grimes* 784 F.3d 1037 (6th Cir. 2015). There is no dispute that *Burson* is binding authority in this jurisdiction on electioneering buffer zones.

1. Burson v. Freeman

In *Burson*, the Supreme Court articulated how courts should assess the constitutionality of electioneering buffer zones and upheld a Tennessee law that prohibited electioneering within 100 feet from the entrance to a polling place. *Burson*, 504 U.S. at 193-94, 211. The *Burson* plurality started its analysis by recognizing that laws that prohibit electioneering around polling places are generally subject to strict scrutiny. *Id.* at 198.

The Court expressly held that states have a compelling interest in protecting voters from confusion and undue influence and in preserving the integrity of their elections. *Id.* at 199. In addition, the Court also held that restricting electioneering around polling places is necessary to serve that interest. *Id.* at 200-08. Therefore, unless a court finds a state has an impermissible ulterior motive, statutes restricting electioneering around polling places satisfy the first two elements of the strict scrutiny analysis.

The only remaining question for the Court was "how large," not necessarily what specific distance, of a restricted zone is permissible or sufficiently tailored. *Id.* at 208. In general, determining whether a law is narrowly tailored is a fact-intensive analysis. But at the time of *Burson*, states had been prohibiting electioneering around polling places for over 100 years—and today, for 130 years—making it nearly impossible for any government to come forward with detailed proof that its restriction was perfectly and precisely tailored:

> The majority of these laws were adopted originally in the 1890s, long before States engaged in extensive legislative hearings on election regulations. The prevalence of these laws, both here and abroad, then encouraged their reenactment without much comment. The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who can testify as to what would happen without them.

Id. The Court further noted that it has never "held a State to the burden of demonstrating empirically the objective effects on political stability that [are] produced by [a] voting regulation." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (internal quotation marks omitted)). Requiring a state to prove that the distance it selects for its electioneering ban is perfectly tailored to meet its needs would, in effect,

require a state's elections to "sustain some level of damage before the legislature could take corrective action." *Id.* at 209 (quoting *Munro*, 479 U.S. at 195-96).

Analyzing the regulation based on the nature of the restriction, not the permissible distance, the Court held that a state need only show that its restriction is "reasonable and does not *significantly impinge* on constitutionally protected rights." *Id.* (emphasis in original). The plurality noted that "[a]t some measurable distance," a regulation could become constitutionally impermissible, but rejected any "litmus-paper test." *Id.* at 210-11 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). It is this rejected litmus-paper test that Frank and Grassfire appear to contend that this Court should apply here. *Id.*

2. Analysis of Wyo. Stat. Ann. § 22-26-113

The Wyoming electioneering 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. Under the statute, electioneering is only criminalized within a radius of "one hundred (100) yards on the days of a primary, general or special election and within one hundred (100) feet on all other days" when voting is being conducted. *Id.* The protected area is measured from any public entrance to the polling place. *Id.*

Analyzing the statute under *Burson*, the State is not required to put forward evidence justifying why precisely the Legislature chose to enact a 100-yard boundary on election days or 100 feet on all other days when voting is being conducted. *Burson*, 504 U.S. at 208. Instead, the State need only show that the regulation is **reasonable and does not significantly impinge** on Plaintiffs' First Amendment rights. *Id.* (emphasis added).

Although Frank and Grassfire frame the issue as the length of the electioneering ban, the actual issue in question is not the size of the geographical area restricted, but the statute's limitation on the ability to convey political messages. This is evidenced by the *Burson* plurality's statement that a reduction in boundary is "a difference only in degree, not a less restrictive alternative in kind." *Id.* at 210; see also *Minnesota Voters All. v. Mansky*, 138 S.Ct. 1876, 1886-87 (2018) (acknowledging that the *Burson* test analyzes the limitation on ability convey the message, not the area of the restriction).

The *Burson* plurality contrasted the time of contact between the electioneer and a voter over a 75-foot walk—the difference between the 100-foot boundary the Court approved and the 25-foot boundary suggested by the lower court. *Id.* The *Burson* plurality concluded "[t]he State of Tennessee has decided that these last 15 seconds [the time to walk 75 feet] before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice." *Id.*

Defendants do not dispute that the *Burson* plurality noted that, at some distance, regulation of vote solicitation becomes impermissible. *Id.* at 210 (citing *Meyer v. Grant*, 486 U.S. 414 (1988). But comparing the 100-foot boundary approved in *Burson* to Wyoming's 300-foot boundary, Wyoming has expanded its citizens' time free from interference only by about 40 seconds.[1] The minor temporal limitation imposed by Wyoming's electioneering statute is a significantly different restriction than the absolute prohibition the Supreme Court found unconstitutional in *Meyer v. Grant*.

In *Meyer*, the Colorado statute at issue did not prevent signature gathering within a specific distance of a polling place, but instead imposed an absolute bar against using paid circulators to secure signatures for ballot referendums, regardless of proximity to a polling place. *See Meyer*, 486 U.S. at 428. The Court noted the absolute prohibition restricted political expression by the number of voices who will convey plaintiffs' messages, the hours they can speak, and the size of the audience they can reach. *Id.* at 422-23. The Court concluded the statute made it less likely that plaintiffs could gather the necessary signatures to place the matter on the ballot. *Id.* Consistent with *Meyer*, the *Burson* plurality analyzed the Tennessee statute's limitation on the ability to convey political messages instead of the geographical area restricted. *Burson*, 504 U.S. at 210.

Unlike *Meyer*, the 300-foot buffer zone established by Wyo. Stat. Ann. § 22-26-113 does not impose not an absolute restriction on speech. An additional 40 seconds to the limitation approved in *Burson* does not begin to approach the magnitude of speech

[1] Based on the *Burson* analysis that it takes approximately 15 seconds to walk 75 feet, an additional 200 feet would result in a 40 second increase. *Burson*, 504 U.S. at 210.

prevented by the Colorado law that was struck down in *Meyer*. The Wyoming Legislature's choice for a 300-foot boundary instead of a 100-foot boundary is reasonable and does not significantly impinge on Frank and Grassfire's First Amendment rights, especially in light of the State's compelling interests in protecting voters from confusion and undue influence and in preserving the integrity of the State's elections.

Frank and Grassfire cite decisions from courts in other circuits that have struck down statutes imposing buffer zones larger than 100 feet, but those cases are not controlling and this Court should reject them. In *Anderson v. Spear*, the Sixth Circuit Court of Appeal invalidated a Kentucky statute that prohibited electioneering within 500 feet of a polling place. 356 F.3d at 651. The court recognized the modified burden and absence of a litmus-paper test articulated in *Burson*, but found the evidence demonstrated the state legislature intended to prohibit "all electioneering on election day." *Id.* at 657-58, 660. The court found that the evidence made it clear that the purpose of Kentucky's electioneering statute was inconsistent with the purposes recognized in *Burson*, but that the statute was intended to prevent voters from being bothered with electioneering. *Id.* at 661-62.

In *Russell v. Lundergan-Grimes*, the plaintiff owned private property within the 300-foot buffer zone and wished to display campaign signs on that property. 784 F.3d 1037, 1043-44 (6th Cir. 2015). While a previous version of Kentucky's buffer zone law exempted signs displayed on private property, the statute at issue in *Russell* provided no similar exemption. *Id.* In striking down Kentucky's statute, the court opined that the statute was overbroad because it did not exempt speech occurring on private property and that the statute "prohibits protected speech over an area greater than the State has demonstrated is

necessary to achieve the State's compelling interests." *Id.* at 1054. Specifically, the court held the state demonstrated compelling interests justifying the statute but "presented no persuasive argument as to why *Burson*'s safe harbor is insufficient." *Id.* at 1053. Moreover, the court held "that Defendants presented no argument—and evidently the legislature did not engage in fact finding and analysis—to carry their burden to explain why they require a no-political-speech area immensely larger than what was legitimized by the Supreme Court" in *Burson*. *Id.*

But *Burson* provides no basis for the Sixth Circuit's holdings. First, in *Burson*, the Supreme Court had to balance citizens' right to free speech—even speech in traditional public fora—with the state's interest in conducting elections with integrity. *Burson,* 504 U.S. at 208-09. That interest applies with equal force whether the speech occurs in a traditional public forum or on private property. Even if this Court wished to accept the Sixth Circuit's ruling in *Russell*, this case is distinguishable because neither Frank nor Grassfire state a desire to electioneer on private property within a buffer zone, and no property owner is before this Court to claim First Amendment protection for their speech.[2]

Second, in both *Russell* and *Anderson*, the Sixth Circuit sought to require Kentucky to explain why its legislature created a buffer zone larger than the size upheld in *Burson*. *See Russell*, 784 F.3d at 1053 ("Kentucky presented no persuasive argument why *Burson*'s safe harbor is insufficient."). This is contrary to the modified burden articulated in *Burson*, which merely requires states to show that the distance they prohibit electioneering is

[2] Frank and Grassfire allege claims on behalf of private property owners (Compl. ¶ 37), but they lack standing to bring these pre-enforcement claims. *See Supra* Section IV.B.

"reasonable" and "does not significantly impinge" on First Amendment rights. *Burson*, 504 U.S. at 209. The Supreme Court arrived at this conclusion because it recognized that states cannot prove exactly how far their no-electioneering zones must be to address their compelling interests. *Id.* at 208. Accordingly, this Court should not follow the reasoning in *Russell* and *Anderson*.

Finally, even if this Court finds the Sixth Circuit's line of cases persuasive, Wyoming's circumstances vary greatly from Kentucky's. In *Anderson*, that court held that larger buffer zones threatened to stifle more speech in "urban voting places" and in "crowded urban context[s]." *Anderson*, 356 F.3d at 662 (quotations omitted). This reasoning is intuitive: a buffer zone in a crowded urban context is likely to affect more people than the same size buffer zone in a rural context, and larger buffer zones are more reasonable in more rural areas. Wyoming has no crowded urban contexts. There is no city in Wyoming that compares to the size and density of Louisville or Lexington. Therefore, even if Kentucky's 300-foot restriction was unreasonable or significantly impinged on the plaintiff's First Amendment rights, it does not necessarily follow that Wyoming's does. For these reasons, the cases cited by Frank and Grassfire are not persuasive.

3. Analysis of Frank's as-applied claims.

As discussed above, Frank asserts two specific desires: (1) to stand within 300 feet of the public entrance of his nearest polling place on primary and general elections to distribute campaign literature and pamphlets for candidates; and (2) to attach two bumper stickers on his automobile for candidate Liz Cheney that are larger than 4 inches by 16 inches. (Compl. ¶¶ 11, 13). It appears that Frank's as-applied challenge for distributing

campaign literature is limited to the 300-foot buffer zone on primary and general election days and his bumper sticker challenge relates to the 100-foot buffer zone on absentee voting days. (*Id.* ¶¶ 23, 25).

Related to his desire to distribute campaign literature, Frank has ample opportunity to do so without running afoul of the electioneering statute. Frank is free to electioneer outside the 300-foot buffer zone at any time. No statute prevents Frank from displaying or distributing political campaign literature outside of the 300-foot zone near polling places. The electioneering statute only limits the place Frank may engage in electioneering when voting is being conducted. Wyo. Stat. Ann. § 22-26-113.

In addition, the maps attached to the complaint identifying the applicable buffer zones around several polling places in Wyoming support the reasonableness of the prohibited area because many of the buffer zones do not even cover the parking area voters would use to access the polling place. For example, the 300-foot zone around the Laramie County Community College's (LCCC) Center for Conferences and Institutes building on primary and general election days does not cover the building's entire parking lot. (Compl. Ex. 1). The buffer zone does not prohibit Frank from standing near the entrance of the parking lot outside of the buffer zone and displaying campaign literature or discussing political issues with voters who choose to engage with him. That arrangement protects Frank's right to speak and express his views while also preserving state's interest in protecting voters from confusion, undue influence, and harassment and preserving the integrity of the State's elections. *Burson*, 504 U.S. at 199. Because Frank has ample

opportunity to express his views outside of the buffer zones, the restrictions do not significantly impinge on Frank's right to engage in electioneering.

As it relates to Frank's desire to attach two bumper stickers on his automobile for candidate Liz Cheney that are larger than 4 inches by 16 inches, Frank challenges the 100-foot buffer zone on absentee voting days. (Compl. ¶ 13). Specifically, Frank's proposed bumper sticker was only .25 inches larger in length and .5 inches larger in width than the size authorized by the statute (ECF 42-14 at 2) and Frank testified that the bumper sticker was larger than those available from candidate Liz Cheney's campaign. (Ex. A at 12).

The 100-foot buffer zone in effect during the absentee voting period is consistent with the Supreme Court's holding in *Burson*, and Frank does not allege *Burson* was wrongly decided. *Burson*, 504 U.S. at 210. To the contrary, Frank testified that "there is an appropriate zone around which or within which there is no electioneering" and that a 100-foot buffer zone is "absolutely adequate." (Ex. A at 6-7). Even if Frank believed *Burson* was wrongly decided, the Supreme Court's decision remains binding on this Court. During the absentee polling period, voters who choose to use absentee polling locations are voting just like voters on an election day, and they deserve appropriate protection from harassment, confusion, and undue influence.

Before 2018, all electioneering within 100 yards of a polling place or absentee polling place when voting was being conducted was prohibited. 2018 Wyo. Sess. Laws ch. 118, § 1. In 2018, the Wyoming Legislature amended the statute to specifically **allow** bumper stickers on vehicles within the buffer zone. *Id.* Without that exception, bumper

stickers would be a "campaign sign," and a voter could run afoul of the law by parking their vehicle outside the polling place while voting.

Though no voter had ever been cited or arrested for doing so, as far as Defendants are aware, the Wyoming Legislature re-balanced the state's interests against the rights of individual persons and determined the pre-2018 statute to be too burdensome/restrictive. In response, the Legislature explicitly carved out an exception and allow for more speech but limited the number of bumper stickers allowed on any vehicle to one bumper sticker per candidate and limited the size to a maximum of 4 inches in height by 16 inches in width while parked or passing through a buffer zone. Wyo. Stat. Ann. § 22-26-113(a)(i).

Frank may drive around the state with as many campaign bumper stickers and signs on his vehicle as he would like, at any size, as long as he does not drive within the area proscribed by the electioneering statute on election or absentee voting days. Wyo. Stat. Ann. § 22-26-113. Preventing Frank from displaying multiple similar campaign messages or oversized campaign messages within 100-feet of the entrance to a polling place during absentee voting does not prohibit Frank from expressing his support for a particular candidate. It merely creates a reasonable regulation that does not significantly impinge on his Frist Amendment rights. As a result, the law stands when the modified standard articulated in *Burson* is applied.

4. Analysis of Grassfire's as-applied claims.

As discussed above, Grassfire simply desires to offer its services in Wyoming to gather signatures for candidates, initiatives, and referenda. (Compl. ¶ 17). But Grassfire asserts Wyo. Stat. Ann. § 22-26-113 makes signature gathering "impracticable" and

maintains it will not provide its services in Wyoming unless the statute is enjoined. (*Id.* ¶ 24; Ex. B at 4). Contrary to its initial representations, Grassfire testified that Department of Motor Vehicles, vehicle registration, offices, libraries, and other governmental buildings are primary locations to gather signatures. (Ex. B at 7). Despite all of these types of facilities being located in Wyoming, Grassfire maintains that it is still "impracticable" to gather signatures in Wyoming. (Compl. ¶ 4).

Petitioning and signature solicitation raise the same concerns as other forms of electioneering that are specific to candidates on the ballot, and this Court should apply the reasoning in *Burson* to signature gathering prohibitions, as many other courts have done. *E.g.*, *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1216, 1219 (11th Cir. 2009) (holding although *Burson* did not directly apply, that a Florida statute prohibiting signature solicitation within 100 feet of polling places was narrowly tailored under *Burson* to ensure the "integrity and dignity of the voting process."); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004) (holding an Ohio law prohibiting signature gathering within 100-feet of a polling place on election days to be constitutional); *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) (holding a Louisiana statute prohibiting signature gathering within 600 feet of polling places to be narrowly tailored and not an excessive infringement on the First Amendment).

Here, the State's interest in preventing solicitation and signature gathering outside polling places is the same interest it has in preventing other forms of electioneering: to prevent voter harassment and intimidation and ensure integrity of elections. Restricting signature gathering, and other forms of electioneering, within the buffer zone is necessary

to achieve that interest. Further, unlike the plaintiffs in *Browning*, Grassfire does not allege that it intends to limit its solicitation solely to those who have already voted, increasing the risk of voter harassment and intimidation. (Compl. ¶¶ 14-17). States must balance citizens' rights to associate, speak, and petition their government with other citizens' right to vote without fear of intimidation or harassment. That balancing act informed the Supreme Court's reasoning in *Burson*, and it is the same balance that Wyoming has sought to achieve in prohibiting petitioning and signature gathering near polling places during election and absentee voting days under Wyo. Stat. Ann. § 22-26-113. The Court should, like the Eleventh and Sixth Circuits, apply *Burson* to laws that regulate petition gathering outside of polling places. When it does, this Court should find that the nature of the restriction on speech is reasonable and is not a significant impingement.

As testified by Grassfire, it has many other viable locations to gather signatures in the state on election an absentee voting days. (Ex. B. at 7). Moreover, Wyo. Stat. Ann. § 22-26-113 does not prohibit Grassfire from gathering signature at any distance on days other than election or absentee voting days. In addition, during absentee voting days, Grassfire is only prohibited from signature gathering within 100 feet of the entrance to the polling place—the same distance held constitutional in *Burson*. Wyo. Stat. Ann. § 22-26-113. Extending the rationale expressed in *Burson* to signature gathering, Grassfire's claims fail because the limited area in which Grassfire is prohibited from engaging in signature gathering services on election and absentee voting days is a reasonable restriction and does not a significantly impinge on Grassfire's First Amendment rights.

D. Wyoming Statute § 22-26-113 is not unconstitutionally overbroad.

A law that a state may constitutionally apply to an individual may still be invalid if it is unconstitutionally overbroad. *United States v. Stevens*, 559 U.S. 460, 473 (2010). Generally, facial challenges based on overbreadth are disfavored and statutes are presumed to be constitutional. *Clark*, 493 F. Supp. 3d at 1033 (citations omitted). In the First Amendment context, a law may be invalidated as unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep." *Stevens*, 559 U.S at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). Thus "even where a fair amount of constitutional speech is implicated, [courts] will not invalidate the statute unless **significant imbalance exists**." *United States v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014) (internal quote and citation omitted) (emphasis added). Further, the overbreadth doctrine does not apply where there is no significant difference between the claim that the statute is invalid because of overbreadth and the claim that is unconstitutional when applied to the plaintiff's own activities. *D.L.S. v. Utah*, 374 F.3d 971, 976 (10th Cir. 2004) (citation omitted).

The first step in analyzing an overbreadth challenge is to "construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S at 473 (quoting *United States v. Williams* 553 U.S. 285, 296 (2008)). Frank and Grassfire's overbreadth challenges rely upon the same circumstances as their as-applied challenges. The only difference between their as applied and overbreadth claims is their attempt to bring claims on behalf of third parties who desire

to "post political signs on their property within a buffer zone." (Compl. ¶ 37). As discussed above, Frank and Grassfire's as-applied challenges fail because Wyoming's electioneering statute is reasonable and does not significantly impinge upon their First Amendment rights. Because there is no significant difference between their as-applied and facial challenges, the overbreadth doctrine does not apply. *D.L.S.*, 374 F.3d at 976 (citation omitted). Accordingly, Frank and Grassfire have failed to demonstrate Wyo. Stat. Ann. § 22-26-113 is unconstitutionally overbroad.

V. Conclusion

Based on the foregoing, this Court should dismiss the 42 U.S.C. § 1983 claims because those claims are barred by sovereign immunity. In addition, this Court should dismiss all claims because Frank and Grassfire lack Article III standing. Alternatively, Defendants are entitled to summary judgment on Frank and Grassfire's as applied and facial constitutional challenges.

DATED this 18th day of June, 2021.

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