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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

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DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants Edward A. Buchanan, Wyoming Secretary of State, and Leigh Anne Manlove, Laramie County District Attorney, (Defendants) submit this brief in opposition to Plaintiffs John C. Frank and Grassfire, LLC's motion to summary judgment.

I. Introduction

This Court should deny Frank and Grassfire's motion for summary judgment for three reasons. First, Frank and Grassfire's 42 U.S.C. § 1983 claims are barred by sovereign

immunity. Second, Frank and Grassfire lack Article III standing to bring their claims. Finally, Wyoming's electioneering statute, Wyo. Stat. Ann. § 22-26-113 is constitutional facially and as-applied to Frank and Grassfire.

II. 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).

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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).

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"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).

III. Argument

A. Frank and Grassfire's 42 U.S.C. § 1983 claims are barred by sovereign immunity.

As articulated fully in Defendants' brief in support of their motion to dismiss, Frank and Grassfire's 42 U.S.C. § 1983 claims are barred by sovereign immunity. (ECF 53 at 5-7). Specifically, Frank and Grassfire's § 1983 claims do not meet any of the three limited exceptions to sovereign immunity. (ECF 53 at 5-7). Because: (1) the State has not consented to suit; (2) Congress has not abrogated the State's Eleventh Amendment immunity by enacting § 1983; and (3) Frank and Grassfire fail to establish the requirements necessary under the *Ex Parte Young* doctrine, this Court should dismiss Frank and Grassfire's § 1983 claims in their entirety.

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

As articulated fully in Defendants' brief in support of their motion to dismiss, Frank and Grassfire lack Article III standing to bring their claims. (ECF 53 at 7-11). To establish Article III standing, a plaintiff must demonstrate that they 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 v. USD 229 Blue Valley*, 979 F.3d 866, 871 (10th Cir. 2020) (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 v. Schmidt*, 493 F. Supp. 3d 1018, 1027 (D. Kan. Oct 7, 2020) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

In this case, both Frank and Grassfire fail to demonstrate a sufficient intention to engage in activity prohibited by Wyoming's electioneering statute. While both express a desire to perform activities prohibited by the statute, neither has demonstrated concrete plans to undertake the conduct in the future. *Baker*, 979 F.3d at 878. "Vague desire" to engage in conduct in the future is not sufficient to support Article III standing. *Id.* at 871.

In addition, Frank and Grassfire fail to demonstrate a credible threat of prosecution for the conduct prohibited by Wyo. Stat. Ann. § 22-26-113. In their memorandum in support of their motion for summary judgment, Frank and Grassfire merely assert that their speech has been censored simply by the existence of the electioneering statute and that others have had some type of "enforcement action" taken against them. (ECF 42 at 5-10). But neither Frank nor Grassfire have ever been asked to move from a buffer zone, threatened with enforcement for electioneering within a buffer zone, or cited for electioneering within a buffer zone. (ECF 53-1 at 16, 53-2 at 11, 53-4 at 4). Because neither Frank nor Grassfire have ever had the electioneering statute enforced against them, they rely on alleged conduct of other parties not before this Court. (ECF 42 at 9-10).

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Specifically, Frank and Grassfire assert that individuals have been asked to remove campaign signs on private property within a buffer zone, "officials" have entered onto private property to remove campaign signs, and complaints have been received related to bumper stickers, political signs, signature gathering, and election-related apparel within buffer zones created by Wyo. Stat. Ann. § 22-26-113. (ECF 42 at 9). As it relates to private property, neither Frank nor Grassfire own, lease, or otherwise occupy property in a buffer zone or have permission to electioneer on private property in a buffer zone. (ECF 53-1 at

13-14, 21, ECF 53-5 at 7, ECF 53-4 at 4). The only factual scenario referenced by Frank and Grassfire in their memorandum in support of their motion for summary judgment is a statement from the Laramie County Election Manager, who asserted that they ask a homeowner to remove a sign that is on private property within 100 yards of a polling place on an election day. (ECF 42 at 9). The Election Manager testified that she did not recall any specific instances but knows that political signs have been removed from private property in the past. (ECF 42-11 at 23).

These factual scenarios to not rise to the level of enforcement of the electioneering statute. Under Wyo. Stat. Ann. § 22-26-112(a)(i), electioneering too close to a polling place is a misdemeanor offense. Only law enforcement personnel have the authority to enforce a criminal statute. *See* Wyo. Stat. Ann. § 7-2-103(a) ("A citation may issue as a charging document for any misdemeanor."). Citations and criminal prosecution are the only enforcement mechanisms available under Wyo. Stat. Ann. § 22-26-112. Election officials and other members of the public have the ability to call law enforcement for suspected violations, but enforcement authority rests solely within the discretion of law enforcement personnel. Any alleged acts by local officials who do not have enforcement capabilities are not sufficient to demonstrate Article III standing. *Baker* 979 F.3d at 872 (requiring a "credible threat of prosecution" to support an injury in fact). Accordingly, their reliance on alleged conduct of other parties not before this Court is insufficient to demonstrate a credible threat of enforcement of the electioneering statute.

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Even if this Court finds Frank and Grassfire have demonstrated a credible threat of enforcement of the electioneering statute, they still lack Article III standing because they

have failed to demonstrate sufficient intention to engage in activity prohibited by Wyoming's electioneering statute. As a result, Frank and Grassfire's pre-enforcement claims challenging the constitutionality of Wyo. Stat. Ann. § 22-26-113 should be dismissed for lack Article III standing.

C. Frank and Grassfire's facial and as-applied challenges to Wyo. Stat. Ann. § 22-26-113 fail.

In addition to the facial and as-applied analysis in Defendants' brief in support of their motion to dismiss, Defendants also assert the following arguments in response to Frank and Grassfire's motion for summary judgment.

1. Defendants have not disclaimed any governmental interest in electioneering buffer zones.

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For the first time in their motion for summary judgment, Frank and Grassfire assert that "Defendants disclaimed any governmental interest in Election Day buffer zones" and "any governmental interest in absentee polling place buffer zones." (ECF 42 at 4-5). In support, Frank and Grassfire rely on objections to discovery requests asking Defendants to identify all governmental interests served by the electioneering statute. (ECF 42-8, 42-9 and 42-10). Defendants objected to the interrogatories on two bases: (1) that the questions called for a legal conclusion; and (2) that the questions would call for speculation as to the Wyoming Legislature's intent when it enacted the electioneering statute. (ECF 42-8, 42-9 and 42-10). Frank and Grassfire did not follow up on the discovery requests, contest the objections as invalid, or pursue the matter further after they received the discovery responses from Defendants.

Frank and Grassfire's assertion relies on the faulty premise that objecting to the interrogatories somehow resulted in Defendants "disclaiming" any governmental interests in the electioneering statute. Defendants have never "disclaimed" any governmental interest in the electioneering statute. To the contrary, Defendants have repeatedly asserted the governmental interests at stake in this case as early as Defendants' memorandum in support of their motion to dismiss (ECF 17) and Defendants' response to Frank and Grassfire's motion for preliminary injunction (ECF 20).

Moreover, the Supreme Court has expressly recognized two compelling interests in regulating electioneering within a certain area of a polling place: "protecting the right of its citizens to vote freely for the candidates of their choice" and "protect[ing] the right to vote in an election conducted with integrity and reliability." *Burson v. Freeman*, 504 U.S. 191, 198-99 (1992). The Supreme Court held these to be compelling interests because of the importance of protecting voters from confusion and undue influence, which had been previously recognized as compelling state interests by the Supreme Court. *Id.* at 199. The Court held that restricting electioneering around polling places is necessary to serve those compelling state interest. *Id.* at 200-08.

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It is these same interests that Defendants have asserted throughout this case and maintain are the compelling interests that support Wyoming's electioneering statute at issue in this case. (ECF 17, 20). While Frank and Grassfire assert that Defendants' have disclaimed any governmental interests, they also acknowledge these governmental interests were recognized by the Supreme Court as "compelling" in *Burson*. (ECF 42 at 13).

Plaintiffs' attempt to turn an objection to a discovery request into a "fact" that Defendants have "disclaimed" any governmental interests in regulating the area within which electioneering is prohibited by Wyo. Stat. Ann. § 22-26-113 is unsupported by law and should be disregarded by this Court. Defendants have identified multiple governmental interests since the outset of this case, which have been expressly recognized by the Supreme Court as "compelling" governmental interests. *Burson*, 504 U.S. at 198-99. There is no dispute that *Burson* is binding on this Court and as such, this Court should recognize the governmental interests asserted by Defendants are sufficient to satisfy the first prong of the strict scrutiny analysis.

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It is undisputed that in the late 1800s, Wyoming adopted the Australian ballot reforms discussed in *Burson* to protect voters from harassment and protect elections from corruption and fraud. (ECF 14-1 at 3). Similar to the 50-foot buffer zone adopted by Tennessee in the late 1800s, Wyoming adopted a 20-yard (or 60-foot) buffer zone prohibiting electioneering on election days. (*Id.*). The size of Wyoming's buffer zone was subsequently expanded to 100 yards in 1973, which occurred shortly after Tennessee expanded its buffer zone in 1967. *Burson*, 504 U.S. at 205-06. Although the exact buffer zone distances in Wyoming and Tennessee were not the same, Wyoming's prohibitions on electioneering within a specified distance of a polling place were developed and revised similarly to Tennessee and other states' electioneering statutes. *See Clark*, 493 F. Supp. 3d at 1030 (explaining Kansas' similar history of adopting and amending its electioneering buffer zone statute).

At least one other federal district court has recently applied the *Burson* analysis to another state's electioneering statute and determined that the governmental interests recognized in *Burson* applied with equal force due to the similarities in the development and revisions of the electioneering bans to the facts articulated in *Burson*. *Id.* While not binding in this jurisdiction, this Court should find the United States District Court for the District of Kansas' analysis in *Clark* to be persuasive. Accordingly, this Court should recognize the governmental interests asserted by Defendants, consistent with the plurality's decision in *Burson*, as sufficient to satisfy the compelling state interest requirement in the strict scrutiny analysis.

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2. The duration of absentee polling period does not render Wyo. Stat. Ann. § 22-26-113 unconstitutional.

Despite the buffer zone during the absentee polling period being the same distance approved by the Supreme Court in *Burson*, Frank and Grassfire assert the number of days the absentee polling period is available for voting in Wyoming renders the electioneering statute unconstitutional. (ECF 42 at 21-23). Specifically, Frank and Grassfire assert that Wyoming's electioneering statute restricts speech for a total of 90 days during the absentee polling period, whereas the Tennessee regulation upheld in *Burson* only applied for two voting days in an electoral cycle. (ECF 42 at 21-23). Defendants agree that *Burson* was not decided solely based on the size of the geographical area in which electioneering is restricted, but instead based on the statute's limitation on the ability to convey political messages. *See Burson*, 504 U.S. at 210 (holding that reducing the distance of the electioneering boundary is "a difference only in degree, not a less restrictive alternative in

kind."); 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).

Defendants do not dispute the distance of the restriction imposed by Wyoming's electioneering statute during the absentee polling period—100 feet—nor the duration of the absentee polling period in Wyoming—90 days. Wyo. Stat. Ann. § 22-26-113. The test articulated by the *Burson* plurality remains whether the regulation is **reasonable and does not significantly impinge** on Plaintiffs' First Amendment rights. *Burson*, 504 U.S. at 209. As it relates to the 100-foot distance during the absentee polling period, the *Burson* plurality specifically held that the minor geographic limitation of 100-feet does not constitute a significant impingement on an individual's First Amendment rights. *Id.* at 210. Neither Frank nor Grassfire make any argument that *Burson* was incorrectly decided and that the 100-foot distance, by itself, is unconstitutional. The remaining question is whether the number of days during the absentee polling period in which the Wyo. Stat. Ann. § 22-26-113 prohibits electioneering within 100 feet of the entrance to a polling place is reasonable and does not significantly impinge on frank and Grassfire's First Amendment rights. *Id.* at 209.

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In *Burson*, the plurality did not specifically address the number of days in which Tennessee's electioneering statute prohibited the proscribed conduct. *See generally id.* at 193-211. But analyzing Wyoming's electioneering statute under the *Burson* framework, the statute does not significantly limit Frank, Grassfire, or any member of the public's ability to convey political messages for three reasons. First, the geographic area of the

restriction is small. It is the same area that was held to be reasonable and not a significant impingement upon First Amendment rights in *Burson*. *Id.* at 210. Frank and Grassfire still have many locations in which they can lawfully electioneer near an absentee polling location while voting is being conducted. For example, the map attached to the complaint demonstrating the 100-foot radius around the entrances to the Laramie County Governmental Complex reveals there are numerous areas on the sidewalk immediately adjacent to the Complex in which Frank, Grassfire, or other persons interested in electioneering can engage in their conduct without running afoul of the Wyo. Stat. Ann. § 22-26-113. (ECF 1-2 at 2). In addition, there are numerous locations in which a person may engage in electioneering during an absentee polling period other than the location of a polling place. *Burson* is controlling and instructive, and Plaintiffs fail to cite any authority to the contrary.

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Second, the same interests that apply to voting on election days apply to voting during the absentee polling period. In its order denying the motion for preliminary injunction, this Court expressly recognized that "[a]s on an election day, the State has the same interest in preserving the credibility of the election process on absentee days." (ECF 25 at 5). Frank and Grassfire fail to offer any authority demonstrating that voters at absentee polling locations should be entitled to lesser protection than voters on election days. Frank and Grassfire do, however, assert that because absentee voting by mail is available, voters who do "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." (ECF 42 at 18). As this Court as already held, "[e]ven on absentee days, given the availability of other nearby public for a

for Plaintiffs' desired solicitation and advertisements, the Court cannot find that a buffer zone restricting Mr. Frank from displaying certain bumper stickers and Grassfire from collecting signatures 'significantly impinges' their rights in light of the State's serious interest in fair elections." (ECF 25 at 5).

Even though the Wyo. Stat. Ann. § 22-26-113 restricts electioneering in an absentee polling buffer zone for a total of 90 days in a given year, the restriction does not significantly limit Frank and Grassfire's ability to convey political messages. *See Burson*, 504 U.S. at 210. Because there are many areas in which Frank, Grassfire, and other persons may lawfully engage in electioneering near an absentee polling location, as well as any other location within the state, this Court should find that the statute imposes a reasonable regulation that does not significantly impinge on their First Amendment rights.

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Finally, the number of absentee polling locations within each county is significantly less than the number of election-day polling locations. For example, in Laramie County in 2020, there was only one absentee polling location located at the courthouse—the Laramie County Governmental Complex. *See* Wyo. Stat. Ann. § 22-9-125. During the absentee polling period, the statute only prohibits electioneering within 100 feet of any public entrance to an absentee polling location. Wyo. Stat. Ann. § 22-26-113. The electioneering statute does not prohibit Frank and Grassfire from displaying and distributing campaign literature or providing signature gathering services anywhere else in Laramie County.

Because the area in which electioneering is prohibited is minimal and is tailored to ensure fair elections and voter protection from intimidation and harassment, the buffer zone

around absentee polling locations is reasonable and does not significantly impinge on Frank, Grassfire, or any other person's First Amendment rights.

3. The lack of a statute prohibiting police presence at polling locations does not make Wyo. Stat. Ann. § 22-26-113 unconstitutional.

In their memorandum in support of their motion for summary judgment, Frank and Grassfire asserted that government witnesses "expressed no concerns about police presence at polling places" on election days or at absentee polling places. (ECF 42 at 4-5). Specifically, they argue that because Wyoming does not regulate police presence at polling locations, the Wyo. Stat. Ann. § 22-26-113 is unconstitutional because there is no lesser restrictive alternative available and the statute is not amenable to a limiting construction. (ECF 42 at 24). In support, Frank and Grassfire cite the Supreme Court's analysis in *Burson*. (ECF 42 at 23-24). But Frank and Grassfire misinterpret the *Burson* plurality's analysis.

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In *Burson*, the respondents argued that the buffer zones were overinclusive because the State's compelling interests were satisfied by a criminal statute imposing a misdemeanor if an individual interfered with an election or used violence or intimidation to prevent voting. *Burson*, 504 U.S. at 206. The *Burson* plurality disagreed and held that a statute criminalizing intimidation and interference only addressed concerns with the "most blatant and specific attempts" to interfere with elections. *Id.* at 207. The plurality further noted "because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process . . . many acts of interference

would go undetected. These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken." *Id.*

Nowhere in the *Burson* decision did the plurality express constitutional concerns over the ability for police to have a presence at polling locations. *Id.* at 206-07. At no point did the Court suggest that a state is forced to choose between an electioneering ban and posting law enforcement officers at polling places. *See id.* The plurality specifically concluded that relying on a criminal statute prohibiting interference and intimidation was insufficient to serve the State's compelling interest in ensuring election integrity. *Id.* at 206. While Tennessee's law prohibiting police presence at polling places was a factor considered by the Court, it was not dispositive in determining whether Tennessee's electioneering statute passed constitutional muster. *Id.* at 206-07.

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Wyoming's lack of a statute prohibiting police presence at polling locations does not change the reasonableness of the electioneering statute or affect whether the prohibitions imposed by the statute significantly impinge upon an individual's First Amendment rights. Even though law enforcement personnel are not precluded from the being in the buffer zone established by Wyo. Stat. Ann. § 22-26-113 on election days or during the absentee polling period, that fact does not make Wyoming's electioneering statute any less constitutional.

Accordingly, Frank and Grassfire's assertion that police presence at polling places raises constitutional concerns is without merit. The ability of law enforcement personnel to be within a buffer zone established by Wyo. Stat. Ann. § 22-26-113 does not make the statutory prohibition any less reasonable nor does not increase the impingement upon an

individual's First Amendment rights. Moreover, if law enforcement personnel were prohibited from entering a buffer zone, they would be unable to enforce the statute to ensure fair elections and to protect voters from harassment and intimidation by virtue of their inability to enter that specific location—thus thwarting the purpose of the electioneering statute.

4. Wyoming Statute § 22-26-113 is not unconstitutionally overbroad based on alleged prohibitions on third parties' speech.

Frank and Grassfire's assertions that third parties' speech has been censored relate to their claim that Wyo. Stat. Ann. § 22-26-113 is facially unconstitutional. (ECF 42 at 9-10, 16-23). Specifically, Frank and Grassfire allege that Wyoming's electioneering statute is overbroad because the election-day and absentee polling buffer zone can encompass speech that occurs on private property and thus, impermissibly restricts speech protected by the First Amendment. (ECF 42 at 9-10, 16-23).

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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).

In addition to their own factual circumstances, which are addressed in full in Defendants' brief in support of their motion to dismiss (ECF 53 at 18-23), Frank and Grassfire cite examples of "enforcement" of the Wyoming electioneering statute. (ECF 42 at 9-10). Specifically, Frank and Grassfire cite requests to remove campaign signs on private property, physical removal of campaign signs, and complaints related to bumper stickers and political signs and electioneering within buffer zones. (ECF 42 at 9). For the reasons articulated in section III.B above, and in Defendants' brief in support of their motion to dismiss (ECF 53 at 7-11), Frank and Grassfire lack Article III standing. To the extent the Court finds Frank and Grassfire have Article III standing, Wyo. Stat. Ann. § 22-26-113 is not unconstitutionally overbroad and passes the modified burden established in *Burson*. *Burson*, 504 U.S. at 209.

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Even if this Court finds there is a credible threat of enforcement of Wyo. Stat. Ann. § 22-26-113 based on the conduct of election officials, the Tenth Circuit has stated that "even where a fair amount of constitutional speech is implicated, [courts] will not invalidate the statute unless significant imbalance exists." *Brune*, 767 F.3d at 1018 (10th Cir. 2014) (internal quote and citation omitted). Even though the buffer zones created by Wyo. Stat. Ann. § 22-26-113 may cover a small portion of private property depending on the specific polling place, any conduct restricted would be minimal. The potential for some speech to be restricted on private property does not create the significant imbalance contemplated by the Tenth Circuit that would justify invalidating Wyoming's

electioneering statute. *Id.* Accordingly, Frank and Grassfire's arguments on behalf of third parties not before this Court related to restrictions on speech occurring on private property are not sufficient to find Wyo. Stat. Ann. § 22-26-113 unconstitutionally overbroad.

While Frank and Grassfire cite "complaints" about conduct occurring within buffer zones, the only known enforcement action to Defendants' knowledge, and cited by Frank and Grassfire, was a citation issued to Jennifer Horal for electioneering too close to a polling place on August 18, 2020. (ECF 42 at 10). Frank and Grassfire cite Horal's activities to support their position that the statute is overbroad. (ECF 42 at 10, 17). But a close examination of the activities that led to Horal being cited reveal that Wyo. Stat. Ann. § 22-26-113 is being properly implemented in accordance with the governmental interests it is intended to further.

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As the video recording cited in Frank and Grassfire's memorandum in support of their motion for summary judgment displays, local law enforcement contacted Horal for reports that she was electioneering within the area prohibited by Wyo. Stat. Ann. § 22-26-113. (ECF 42-18 at 2:40). While the video does not capture express voter intimidation or harassment, the conduct reported by a witness was that Horal had a sign directing "registered voters" toward her. (Ex. A Deputy Martinez Police Report at 3). Also, election officials reported to local law enforcement was that Horal was harassing election staff. (Ex. A at 8. When approached, local law enforcement informed Horal of the buffer zone created by Wyo. Stat. Ann. § 22-26-113 and asked Horal to conduct her signature gathering activities outside of that zone. (ECF 42-18 at 2:40). Based on the reports from election officers, and law enforcement's personal observations of Horal violating the

electioneering statute after multiple requests for her to comply, Horal was ultimately cited for violating Wyo. Stat. Ann. § 22-26-113 and later cited for disturbing a polling place. (ECF 42-18 at 44:20); (Ex. B at 3).

Under Wyo. Stat. Ann. § 22-26-113, Horal was still able to perform her signature gathering activities within the same parking lot of the polling place. (ECF 42-18 at 11:50). While voters drove into the parking lot and observed Horal, they could have stopped and chose to engage with her and sign her petition if they so choose.

This citation is the only known enforcement action of the electioneering statute to Defendants' knowledge. This single enforcement action demonstrates that the statute is being constitutionally applied for the express purpose of furthering the State's interest in ensuring election integrity and preventing voters from harassment and intimidation. As a result, the electioneering statute meets the test articulated in *Burson*; it is reasonable and does not significantly impinge upon individuals' First Amendment rights. *Burson*, 504 U.S. at 209. Moreover, because a substantial number of the statute's applications are not unconstitutional, this Court should find that it is not overbroad. *Stevens*, 559 U.S at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

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V. Conclusion

For the foregoing reasons, Frank and Grassfire's 42 U.S.C. § 1983 claims are barred by sovereign immunity. In addition, Frank and Grassfire lack standing to bring their claims because they have not sufficiently demonstrated an intention to engage in activity prohibited by the Wyoming electioneering statute. Even if this Court finds Frank and

Grassfire have standing, their First Amendment claim fail because Wyo. Stat. Ann. § 22-26-113 is reasonable and does not significantly impinge on Frank and Grassfire's rights. In addition, the Wyo. Stat. Ann. § 22-26-113 is not unconstitutionally overbroad. Based on the foregoing as well as Defendants' memorandum in support of their motion to dismiss, this Court should Grant Defendants' motion for summary judgment and deny Frank and Grassfire's motion.

DATED this 18th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served this 18th day of June, 2021, by the following means:

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