Stephen R. Klein (*Pro Hac Vice*)
BARR & KLEIN PLLC
1629 K St. NW Ste. 300
Washington, DC 20006
202-804-6676
steve@barrklein.com

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 RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants argue that this Court should expand *Burson v. Freeman* to permit no-electioneering buffer zones that are far greater in size, last far longer in duration and censor a much broader scope of speech than the zones narrowly upheld by the Supreme Court thirty years ago. 504 U.S. 191 (1992). But the Defendants cannot rely on either the historic record or "modified 'burden of proof'" in *Burson* to support the necessity of a 100-yard (300-foot) Election Day zone or a 100-foot, 90-day absentee zone. Few—if any—buffer zones exceeded 100 feet in the reforms of the late 1800s and early 1900s. *Id.* at 208; *see also id.* at 215 n.1-2 (Scalia, J., concurring). Nor were these zones implemented at courthouses and other busy public

offices and their surroundings for a quarter of an election year. *See U.S. v. Grace*, 461 U.S. 171 (1983). Finally, *Burson* recognized "there is simply *no evidence* that political candidates have used other forms of solicitation or exit polling to commit . . . electoral abuses." *Id.* at 207 (emphasis added).[1] The Defendants have made next to no evidentiary record and have disclaimed governmental interests as a factual matter. *See* **Exhibit 1** (SecState 30(b)(6) Depo. 7:16-8:11, 31:13-32:7, Depo. Exh. 1). Thus, they cannot rely on *Burson* or one of the few appellate cases that upheld a buffer zone beyond 100 feet. *Schirmer v. Edwards* ("*Schirmer I*"), 2 F.3d 117, 121–24 (5th Cir. 1993) (citing legislative testimony illustrating the extent of harassment at polls in Louisiana); *but see State v. Schirmer* ("*Schirmer II*"), 646 So.2d 890, 898–902 (La. 1995) (striking down Louisiana's buffer zones as unconstitutionally overbroad). The zones in Section 22-26-113 are unreasonable.

John C. Frank and Grassfire, LLC ("Grassfire") have established the significant impingement of the 100-yard Election Day zone and 100-foot absentee polling place zone onto their free speech rights, respectively. Mr. Frank may not realistically reach voters at polling places on Election Day—at Laramie County Community College ("LCCC"), certainly not before they have voted, which is the entire point of electioneering. *See* Doc. No. 42-2 at 13 (Frank Depo. 27:4-22); Doc. No. 42-6 at 5; Doc. No 42-13 at 14-19. The 100-yard zone is thus more akin to the editorial blackout struck down in *Mills v. Alabama* than the "minor geographic limitation" upheld in *Burson*. 504 U.S. at 210 (*citing Mills*, 384 U.S. 214 (1966)). Grassfire is prohibited from reaching hundreds of non-voting Wyomingites in a central, public location that includes the courthouse and other offices within Laramie County Government Complex

[1] Even *within* a polling place itself—a nonpublic forum—content regulations must be reasonable. *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1892–93 (2018).

("LCGC")—including signature gathering outside of the office where citizens register to vote—for at least 90 days of an election year. *See* Doc. No. 41-11 at 7 (Munoz Depo. 10:12-23). Placing 100 feet between a signature gatherer (and her petition) and a potential signatory is a significant impingement on the "direct one-on-one communication" required for signature gathering. *Meyer v. Grant*, 486 U.S. 414, 424 (1988); *cf.* Doc. No. 56 at 19. The Election Day and absentee zones are also facially overbroad because they censor far too much speech across Wyoming that has no bearing on voter integrity. This Court should recognize *Burson*'s limits, deny the Defendants' motion for summary judgment and rule that Wyoming Statutes section 22-26-113 is unconstitutional under the First Amendment. U.S. CONST. amend. I.

FACTUAL CLARIFICATIONS AND ADDITIONS

The Defendants' statement of facts is largely accurate, but there is an important omission. Doc. No. 53 at 2-3. John C. Frank has no "current plans to electioneer within a buffer zone in the future" only because of the statute and because Wyoming's next primary election is more than a year away. *Id.* at 2; *see* Doc. No. 53-4 at 3 (Frank Response to Interrogatory #4). Plaintiffs' verified complaint detailed Mr. Frank's planned activities in the 2020 election cycle and that he will engage in similar activity in future elections, which he affirmed in sworn testimony. Doc. No. 1 at 3-4, 7 (Compl. ¶¶10-13, 23); Doc. No. 53-1 (Frank Depo. 13:13-14:11). That he no longer supports Liz Cheney does not affect his standing: he'd distribute literature and utilize his car for extra-large electioneering but for Section 22-26-113. *See* Doc. No. 53-1 (Frank Depo. 15:19-16:4); *see infra* part I.

Of most concern, in their response to Mr. Frank's and Grassfire's memorandum in support of summary judgment the Defendants endeavor to argue that they did not disclaim their defense of the statute as a factual matter (while arguing that they do not need facts, anyway).

Doc. No. 56 at 7-10. Their disclaimer was not merely a matter of interrogatories. Doc. Nos. 42-8 at 3-4; 42-9 at 3; 42-10 at 3.[2] The Wyoming Secretary of State—the chief election officer of the State of Wyoming—was deposed pursuant to Federal Rule of Civil Procedure 30(b)(6), and his designee was the state elections director who has served under three Wyoming secretaries of state. Exh. 1 (SecState 30(b)(6) Depo. 8:12-14, 9:3-5). Matters for examination in the deposition included "[t]he Secretary of State's factual bases for the necessity of the 100-yard Election Day polling place and 100-foot absentee polling place electioneering radii in Wyo. Stat. 22-26-113." *Id.* (Depo. Exh. 1 at 2). "The person[] designated *must* testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6) (emphasis added). The designee offered the following testimony on this subject:

> Q. Is the 100-yard election day buffer zone necessary?
> MR. PETERS: Object as to the form of the question to the extent it calls for a legal conclusion or speculation. Apologize.
> THE WITNESS: Do I answer?
> MR. PETERS: You can go ahead.
> A. Is it necessary? Yes, because the statute says what it says. So it's a policy decision of the legislature that needs to be followed.
> Q. (BY MR. KLEIN) Is the 100-foot absentee polling place buffer zone necessary?
> MR. PETERS: Object as to the form of the question to the extent it calls for speculation.
> A. The same answer essentially. It's required by the statute. So it's necessary in that way.
> Q. (BY MR. KLEIN) Any other reasons other than because it's the law?
> MR. PETERS: Same objection.
> A. Nothing else comes to mind.

Exh. 1 (SecState 30(b)(6) Depo. 9:3-5, 31:13-32:7). It is not the Plaintiffs' obligation to compel an answer the Defendants (or, at least, their counsel) might prefer instead, and the candor of the

[2] However, "[e]ach interrogatory must, *to the extent it is not objected to*, be answered separately and fully in writing under oath." Fed. R. Civ. P. 33(b)(3) (emphasis added). When one objects on grounds of speculation and offers nothing further, an opposing party may accept that, and this Court should, too. Plaintiffs need not compel the Defendants' defense when nothing is offered.

Secretary of State's designee here was appreciated. The Defendants themselves disclaimed any governmental interest or justification behind Section 22-26-113 as a factual matter.

ARGUMENT

I. Mr. Frank's and Grassfire's Claims Are Not Barred by Sovereign Immunity

The doctrine of *Ex parte Young* can be simply stated. A federal court is "not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally, either because their action is alleged to violate the Constitution directly or because it is contrary to a federal statute or regulation that is the supreme law of the land." Wright & Miller, Scope of the Young Doctrine, 17A FED. PRAC. & PROC. JURIS. § 4232 (3d ed.); *Ex parte Young*, 755 F.3d 1193 (10th Cir. 2014). This requires a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Tarrant Regional Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (citing *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002)).

Where plaintiffs bring First Amendment suits against state officials that include a request for injunctive relief, an ongoing violation of federal law is apparent and sovereign immunity is not applicable. *See, e.g.*, *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015); *281 Care Committee v. Arneson*, 638 F.3d 621, 632–33 (8th Cir. 2011); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1233–34 (10th Cir. 2001). Thus, so long as an individual defendant has "some connection with the enforcement" of a challenged provision that implicates federally secured constitutional rights, plaintiffs challenging such a law will usually meet the requirements of *Ex parte Young*, 755 F.3d at 1201. As noted in the verified complaint, each Defendant has some connection with the enforcement of Wyoming Statutes section 22-26-113, which Mr. Frank and Grassfire allege violate the First Amendment to the Constitution. *See* Doc. No. 1 at 2-3 (Compl.

¶¶ 2-3, 7-9). To this, the Civil Rights Act offers redress. 42 U.S.C. § 1983; *see* Doc. No. 1 at 10-11 (Prayer for Relief). Mr. Frank's and Grassfire's challenges satisfy sovereign immunity and *Ex parte Young* concerns, respectively.

II. Mr. Frank and Grassfire, Respectively, Have Standing to Challenge the Buffer Zone Restrictions

In First Amendment jurisprudence, the Supreme Court recognizes relaxed rules of standing. *See, e.g.*, *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 985 n.7 (1984).[3] The Defendants largely rely on non-First Amendment case law to attack standing here and ignore *Broadrick v. Oklahoma* and its progeny, which affirm that standing may be met based on the chilling effect of a law on one's exercise of free speech. 413 U.S. 601 (1973). For a federal court to exercise jurisdiction under Article III, plaintiffs must allege and prove that they have "suffered an 'injury in fact,' that the injury is fairly traceable to the challenged action of the Defendants, and that it is redressable by a favorable decision." *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, (1992)). The Supreme Court has defined an injury in fact as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

The Tenth Circuit has also affirmed that a law which creates a chilling effect on speech may amount to a judicially cognizable injury in fact provided it is objectively justified. *See, e.g.*, *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004); *Ward v. Utah*, 321 F.3d 1263, 1267 (10th

[3] This is doubly true where a plaintiff brings facial overbreadth claims vindicating the rights of others not before the court. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) ("The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted").

Cir. 2013); *Walker*, 450 F.3d at 1088–89. Although subjective chill is never sufficient to sustain a challenge, standing is satisfied wherever a credible threat of prosecution or other consequences flow from the statute's enforcement. *Id.* at 1088.

In First Amendment litigation, it is all too common for government defendants to argue that because plaintiffs lack precise and detailed plans to violate a law, there is no case or controversy. But the Tenth Circuit has expressly rejected this approach and has even gone so far as to state that a plaintiff "does not—indeed, should not—have a present intention to engage in that speech at a specific time in the future." *Id.* at 1089. Rather, plaintiffs in a suit for prospective relief based on a chilling effect on speech can satisfy the requirement that their claim of injury be "concrete and particularized" by

> (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action[4]; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced.

Id. Thus, where plaintiffs meet these criteria, there is no requirement to show that they have specific plans or intentions to engage in the type of speech banned by the challenged provision.

Here, Mr. Frank previously resided in Colorado where he was active in an array of First Amendment protected political speech, though, to his knowledge, not near polling places. Doc. No. 1 at 3-4 (Compl. ¶¶10-11); Doc. No. 42 at 5-7. Plaintiff Grassfire has operated in other states and has engaged in signature gathering near polling places, but never in Wyoming because of the law. Doc. No. 1 at 4-5 (Compl. ¶¶14-17, 24); Doc. No. 42 at 7-9. Both plaintiffs have offered evidence stating a present desire to engage in "electioneering" near polling places in Wyoming.

[4] The first element is not absolutely necessary—as plaintiffs enjoy the right to speak for a first time. *Walker*, 450 F.3d at 1089.

Doc. No. 42 at 5-9. This includes a verified complaint, which should be treated as "an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out in [Federal Rule of Civil Procedure] 56[(c)(4)]." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1019 (10th Cir. 2002). Mr. Frank offered detailed deposition testimony that he would engage in electioneering speech but for the law, including candidates other than Liz Cheney. *See* Doc. No. 53-1 at 12-16 (Frank Depo. 12:22-16:19). Grassfire offered detailed deposition testimony that it would engage in signature gathering but for the law. *See* Doc. No. 53-2 at 33-34 (Grassfire Depo. 33:11-34:14). The Plaintiffs present a plausible claim that they have not and will not engage in speech because of the existence of Section 22-26-113. They have reason to fear that their speech will trigger criminal penalties given that the state enforces the law and has not disavowed it. *See, e.g.*, Doc. No 42-19 at 3 (Horal Aff. ¶12); Doc. No 42-11 at 17-18, 23 (Munoz Depo. 24:18-25:3, 32:11-22); Doc. No. 42-17. Under the Tenth Circuit's formulation in *Walker*, standing for a pre-enforcement, First Amendment challenge is abundantly satisfied here.

Three further points should be addressed. Defendants copiously rely on an outlier case, *Baker v. U.S.D. 229 Blue Valley*, in support of its standing arguments. 979 F.3d 866 (10th Cir. 2020). But *Baker*, in the Tenth Circuit's own words, presented an "unusual standing theory"—arguing that a school district misapplied a religious exemption for vaccines that would cause distant, possible, theoretical damage. *Id.* at 873–74. And, most notably, the plaintiff "ha[d] not alleged a pre-enforcement claim." *Id.* Thus, Defendants' reliance on *Baker* is misplaced—it involves a case *outside* of pre-enforcement, First Amendment jurisprudence based on a highly "unusual standing theory" that has no sway here. *Id.* at 873.

The Defendants also try to transmogrify *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), and suggest that plaintiffs need to be specifically threatened with prosecution for

standing to be proper. Doc. No. 53 at 10-11. For First Amendment pre-enforcement claims, this statement is wholly untrue. As the Tenth Circuit recognized in *New Mexicans for Bill Richardson v. Gonzales*, even without a specific threat of prosecution against the plaintiff, fears of prosecution were reasonable because the state had not disavowed an interest in enforcing the law. 64 F.3d 1495, 1501–02 (10th Cir. 1995). And in *Walker*, the Tenth Circuit reiterated that a plaintiff need not actually risk arrest, prosecution, or adverse consequences to satisfy standing. 450 F.3d at 1089. Rather, so long as a law carries a direct and immediate consequence on freedom of speech, a cognizable injury is present for standing purposes. *Id.* at 1090. To be clear, cases recognize that where plaintiffs allege speculation upon speculation that a government actor *might* act in a certain way and *might* enforce the law in a way that *might* damage plaintiffs, standing is certainly suspect. *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972). But where a law, as here, is to be plainly applied against plaintiffs who have demonstrated a cognizable injury against their First Amendment rights, a credible threat of enforcement is met.

Finally, Defendants suggest that resolving Section 22-26-113's application to political signs on private property is inappropriate here because neither Mr. Frank or Grassfire have property where signs would be posted. This ignores the central truths of *Broadrick*, where the Supreme Court recognized that traditional standing rules are modified for overbreadth claims. 413 U.S. at 612. This allows "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Id*. (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). Where it appears on the face of a law that hosts of innocent actors may be muted by a statute, courts generally recognize the standing of one plaintiff to represent the related constitutional interests of other parties not before the court. *See, e.g.*, *Craig v. Boren*, 429 U.S.

190, 196 (1976); *East Coast Test Prep LLC v. Allnurses.com, Inc.*, 167 F.Supp.3d 1018, 1022 (D. Minn. 2016) (a plaintiff "may litigate the interests of the pseudonymous users of its website because they 'may not have the financial resources or sophistication' to litigate on their own behalf"); *Reese Brothers, Inc. v. U.S. Postal Service*, 531 F.Supp.2d 64, 69–70 (D. D.C. 2008) (where mutual interest existed in challenge to Postal Service practice injuring First Amendment interests, *jus tertii* standing was appropriate); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295–96 (6th Cir. 1998) (third-party standing appropriate for First Amendment claim where the plaintiff can demonstrate that it has suffered a concrete, redressable injury, that it has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests). Here, homeowners who own properties subject to Section 22-26-113's private property application are disparate, uncoordinated, distant, and likely lack the resources or sophistication to challenge the speech suppressive effects of this law. The same goes for numerous would-be speakers within absentee buffer zones. Mr. Frank and Grassfire seek to eradicate the First Amendment injuries attendant in Section 22-26-113 and stand in mutual interest with others who may wish to gather signatures or communicate electoral messages but are censored by Wyoming's blunderbuss buffer zones. As such, it is appropriate to resolve this claim under principles of *jus tertii* standing.

Mr. Frank and Grassfire have gone above and beyond the requirements detailed in *Susan B. Anthony List* and *Walker* to present this Court with a justiciable case. Because Plaintiffs have properly pled a pre-enforcement, First Amendment challenge that implicates relaxed requirements, detailed their plans for speech and evinced the chill they suffer, standing is satisfied here.

III. Wyoming Statutes Section 22-26-113 is Unconstitutional Under the First Amendment

A. *Burson*: Strict Scrutiny Is Not a Rubber Stamp

The Defendants' presentation of *Burson* is wrong for several reasons. They suggest without support that "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." Doc. No. 53 at 12. "Ulterior motive" presumably refers to viewpoint discrimination, which is independent from content-based strict scrutiny. *See Reed v. Town of Gilbert*, *Ariz.*, 576 U.S. 155, 168–69 (2015). Moreover, there are *only* two elements of strict scrutiny analysis: (1) whether the law serves a compelling governmental interest and (2) whether the law is narrowly tailored to serve that interest. *See id.* at 171. *Burson* concluded that electioneering prohibitions are content-based restrictions subject to strict scrutiny and found that a 100-foot Election Day radius was narrowly tailored to protect against voter confusion and intimidation. 504 U.S. at 199, 208–11; *see Schirmer I*, 2 F.3d at 124. *Burson* does *not* conclude that every buffer zone is narrowly tailored.

For the tailoring analysis, the Defendants appeal to history, where, bundled with other electoral reforms, it is allegedly impossible to distinguish between the effects of a reforms such as the Australian (secret) ballot and buffer zones. Doc. No. 53 at 12. Yet in history there is little to no historic basis for a radius beyond 100 feet. *See Burson*, 504 U.S. at 215 n.2 (Scalia, J., concurring). It was one thing for Tennessee to later reflect the historic concerns of New York when enacting a 100-foot boundary in the 1970s, but quite another for Wyoming to enact 300 feet with no historic basis whatsoever. *See id.* at 204. To go beyond a 100-foot radius—or to extend a buffer zone's duration, or to censor content far broader than the prohibitions enacted in the Progressive Era—requires something more: evidence demonstrating the necessity of the

breadth of the law. This is precisely what the *Schirmer I* court did in upholding a 600-foot ban because the state presented evidence that "it was common practice to use poll workers to inundate voters just prior to their entry to the polls." 2 F.3d at 121. *Burson* requires some effort by the state to show evidence or a proper legislative determination about the need for ahistorical speech suppression. Where that is lacking, speech restrictions fail.

The Defendants further assert that, per *Burson*, they have no obligation to prove anything, anyway—that it is "nearly impossible" "to prove that the distance [Wyoming] selects for its electioneering ban is perfectly tailored to meet its needs[.]" Doc. No. 53 at 12. Yet the plurality opinion cautioned that

> [t]his modified "burden of proof" does not apply to all cases in which there is a conflict between First Amendment rights and a State's election process—instead, it applies only when the First Amendment right threatens to interfere with the act of voting itself, *i.e., . . . cases such as this one, in which the challenged activity physically interferes with electors attempting to cast their ballots*.

Burson, 504 U.S. at 209 n.11 (emphasis added). There may be no "'litmus-paper test'" for where this modified burden ends, but it is "[a]t some measurable distance from the polls" and there are other qualifications. *Id.* at 210 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). It is dubious to even suggest there is "physical interfere[nce]" with casting a ballot or intimidation or confusion more than 100 feet from a public entrance to the building in which a polling place is located, so Defendants reject an obligation to evince this. Moreover, relatedly, the Supreme Court noted that *what* may be restricted in a buffer zone was limited, too, as "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. Banning broader swaths of speech than electioneering also requires evidence of historic basis or evidence of interference with electors: further content restrictions such as exit polling, signature gathering and any speech restrictions beyond 100 feet

need some justification. To mitigate an evidentiary burden is not to eliminate it, and *Burson* only mitigated the evidentiary burden for a 100-foot zone that targeted electioneering. *See Russell*, 784 F.3d at 1052–53.

The nuances and reservations throughout the plurality opinion bolster *Burson*'s exceptional nature as "the *rare* case in which we have held that a law survives strict scrutiny." *Id.* at 211 (emphasis added). *Burson*'s progeny that consistently strikes down speech restrictions beyond 100 feet affirms this. There is no basis to make Section 22-26-113—which expands the *Burson* buffer zone in every conceivable way—another rare exception to strict scrutiny. It is not.

B. Wyoming Statutes Section 22-26-113 Does Not Survive Strict Scrutiny Under *Burson*

The facial challenge in this case is distinct from Mr. Frank and Grassfire's respective as-applied challenges, particularly as to overbreadth. *See infra* part III(C); *cf.* Doc. No. 53 at 11. But the Court should find Section 22-26-113 facially unconstitutional under strict scrutiny analysis or unconstitutional as applied to Mr. Frank and Grassfire's activities, respectively. In their analysis of the law, the Defendants again diverge from *Burson*. Doc. No. 53 at 14-16. They argue that "the actual issue in question is not the size of the geographical area restricted" before acknowledging later that "at some distance regulation of vote solicitation becomes impermissible." *Id.* at 14-15. The length of a zone's radius obviously has implications on the reasonableness of a buffer zone's ban and its impingement on free speech. *Burson*, 504 U.S. at 208.

The Defendants then attempt to distinguish appropriate applications of *Burson* such as *Anderson v. Spear* and *Russell v. Lundergan-Grimes*. Doc. No. 53 at 16-18; *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004); *Russell*, 784 F.3d 1037. To distinguish *Russell*, which focused on the censorship of political signage on private property within a 300-foot buffer zone, they

ultimately argue that election integrity "applies with equal force whether the speech occurs in a traditional public forum or on private property." *Id.* at 17. But the *Burson* plurality reserved both stationary yard signs and cars passing with bumper stickers as appropriate for as-applied challenges to a general electioneering ban. 504 U.S. at 210 n.13. The Court noted, for purposes of the case, the "absence of any factual record to support [the] contention that the statute has been applied to reach such circumstances[.]" *Id.* The record here demonstrates the censorship of yard signs on private property, the law itself facially restricts bumper stickers, and the Defendants note without reservation that Frank may not "drive within the area proscribed by the electioneering statute on election or absentee voting days."[5] Doc. No. 53 at 21; *see* Doc. No. 42 at 9. The extension of the Wyoming ban to speech that does not "physically interfere[] with electors attempting to cast their ballots" plainly puts the case beyond the approval of *Burson*, beyond reasonable and into areas where a buffer zone does not survive strict scrutiny. *See* 504 U.S. at 209 n.11; *see also Mansky*, 138 S.Ct. at 1887–88 (quoting *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987)). *Russell* was thus correct, and by reaching both "campaign signs" on private property and "bumper stickers"—such as Mr. Frank's—Section 22-26-113 is unconstitutional.

The Defendants' rejection of *Anderson* is also misplaced. They assert that Wyoming's population density saves a 300-foot zone since less people and fora are censored, and that the Sixth Circuit incorrectly required an evidentiary basis to go beyond 100 feet, anyway. Doc. No. 53 at 16-18. As discussed previously, some evidentiary basis is required to go so far beyond the boundaries of the Progressive Era election reforms. This relates not merely to zone sizes at issue

[5] This is also contrary to *Burson*, where "[a]t oral argument, petitioner denied that the statute would reach" bumper stickers on cars passing a polling place. 504 U.S. at 209 n.11.

in Section 22-26-113 but expanding its censorship to content unaccounted for in *Burson*, designating courthouses and government office complexes as absentee polling places, and implementing these broader prohibitions for a full quarter of an election year. *See Grace*, 461 U.S. at 180–84. These problems echo the concerns in *Anderson* and Wyoming law is substantially censorious and unreasonable.

Burson's limits are further bolstered by the plurality opinion, shedding more light on the infirmities of Section 22-26-113. In rejecting the underinclusiveness of banning just electioneering, the plurality concluded that "[i]n contrast, there is simply no evidence that political candidates have used *other forms of solicitation or exit polling* to commit such electoral abuses." *Burson*, 504 U.S. 191 at 207 (emphasis added). Section 22-26-113 bans not only electioneering, but "the soliciting of signatures to *any* petition or the canvassing or polling of voters[.]" (Emphasis added.) When Wyoming added these bans were added in 1983, it could not justify them as akin to electioneering and this Court presciently ruled in favor of a challenge to the law's outright ban on exit polling. *See Nat'l Broadcasting Co. v. Karpan*, C88-0320 (D. Wyo. Oct. 21, 1988) (Doc. No. 14-6). There are myriad distinctions between the Tennessee law upheld in *Burson* and Section 22-26-113, and the latter does not survive strict scrutiny.

1. Mr. Frank's As-Applied Claims

The law is unconstitutional as applied to Mr. Frank's distribution of literature between 100 and 300 feet from the public entrance to the polling place on Election Day. *See* Doc. No. 53-1 at 12-13 (Frank Depo. 12:22-13:16); Doc. No. 42-13 at 2-4, 8-13. The Election Day buffer zone places an American football field between Mr. Frank and a polling place entrance, prohibiting engagement with everyone in between. This zone covers traditional public fora at LCCC and at polling places throughout Wyoming. *See generally* Doc. No. 1-5. The substantial

abridgment of free speech is apparent at LCCC alone: the zone does not "cover the parking area" *entirely* but includes all but the very back row of parking spaces in the lot.[6] *Cf.* Doc. No. 53 at 19 *with* Doc. No 41-13 at 10-11, 13, 19. Moreover, it otherwise relegates Mr. Frank to the lot's exit, where he can only directly engage voters after they've voted unless they decline to obey the signage or opt to get some exercise after parking. *See* Doc. No. 41-13 at 20-21. Foreclosing all direct, in-person engagement by Frank or anyone else with any voter on Election Day is a substantial abridgement not tailored to preventing voter intimidation or confusion, but to prevent last-minute campaigning, an unreasonable interest. *See Burson*, 504 U.S. at 217–18 (Stevens, J., dissenting); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346–47 (1995). A 100-foot radius would permit Mr. Frank to approach every parking spot while preserving an ample buffer zone for voters around the polling place.[7] *See* Doc. No. 41-13 at 16, 18.

The law is also unconstitutional as applied to Mr. Frank's bumper stickers. This, as previously discussed, was specifically reserved by the *Burson* plurality for an as-applied exception to an electioneering ban. 504 U.S. at 210 n.13. But the statute arguably cannot be saved with a narrowing construction because the law censors bumper stickers in detail by content, quantity, and size. Wyo. Stat. § 22-16-113(a)(i)-(iii); *see Colorado Right To Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007). The censorship here is substantial, particularly as applied to absentee polling places: the chilling effect of placing buffer zones in the middle of town—by law, "the courthouse or other public building which is equipped

[6] Unsurprisingly, the back row of spaces is the least likely to be used. *See* Doc. No. 42-18 (Martinez body camera footage at 51:05-51:15) (Martinez: "I just don't understand why you can't do business right over here and comply with our law." Horal: "Obviously, officer, use your freakin'—obviously, officer; are you kidding me?").

[7] Notably, 100-foot zones would handily solve the censorship of bumper stickers at LCCC and most polling places. *See generally* Doc. No. 1-5.

to accommodate voters from all districts and precincts within the county"—effectively censors anyone with knowledge of the law from having more than one bumper sticker for a candidate, or too large of a sticker or sign, as they will inevitably drive through an absentee zone during absentee voting. Wyo. Stat. § 22-9-125(a)(ii); *see* Doc. No. 53-1 at 17 (Frank Depo. 17:2-24); *see also* Doc. No. 53 at 21 (acknowledging Mr. Frank's bumper stickers and signage on his car would be legal only "so long as he does not drive within the area proscribed by the electioneering statute"). This serves no governmental interest whatsoever. Section 22-26-113 is facially unconstitutional, or at the very least unconstitutional as applied to Mr. Frank's activities.

2. Grassfire's As-Applied Claims

Grassfire specifically seeks to gather signatures around absentee polling places during absentee voting. Doc. No. 1 (Compl. ¶¶16-17). There is business to be had here. *See, e.g.*, Doc. No. 41-18. To this as-applied challenge, the Defendants offer nothing more than cases upholding 100-foot Election Day buffer zones. Doc. No. 53 at 22. They provide nothing to dispel *Burson*'s qualification that "there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses" and made next to no evidentiary record in this case. 504 U.S. at 207. Nor do the Defendants provide any authority that the confines and surroundings of a busy courthouse or public office building—the LCGC is both—may be subject to such broad censorship for a quarter of an election year simply because voting is occurring in its atrium. *See Grace*, 461 U.S. at 180–84. They cherry-pick from Grassfire's extensive testimony that notes the importance of public buildings, ignoring that Grassfire is even prohibited from soliciting signatures outside of the Laramie County Clerk's office (within the LCGC) where one must literally register to vote in person and thereby become eligible to sign Wyoming petitions for candidates and initiatives. *See* Doc. No 53 at 22-23.

The censorship against Grassfire around absentee polling places for a quarter of each election year is substantial, and the law is unreasonable. Section 22-26-113 is unconstitutional as applied to signature gathering around absentee polling places.

C. Wyoming Statutes Section 22-26-113 is Facially Overbroad

A law is unconstitutionally overbroad under the First Amendment if "'a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep.'" *U.S. v. Stevens*, 559 U.S 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). Because the Defendants established no other interests behind Section 22-26-113, the legitimate sweep of the law is limited to protecting voters from intimidation or confusion—that is, the physical act of voting. *Burson*, 504 U.S. at 206, 209 n.11. The Defendants deny that John C. Frank and Grassfire have *jus tertii*, or third party standing, but that is inherent in the overbreadth analysis: if the plaintiffs in a case needed standing to challenge every or many unconstitutional applications, the overbreadth doctrine would be superfluous. *Cf.* Doc. No 53 at 24-25. The Defendants further claim there is "no significant difference" from Mr. Frank's and Grassfire's as applied challenges, but the Plaintiffs properly challenged the law under the First Amendment and this Court should assess this concern. *See Susan B. Anthony List*, 573 U.S. at 167 ("[A] federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." (cleaned up)). The breadth of unconstitutional applications to both the Election Day and absentee zones is substantial—indeed, staggering.

1. The Election Day Buffer Zone is Overbroad

The Election Day buffer zone extends hundreds of feet into traditional public fora and private property. *See generally* Doc. No. 42-6. These zones generally cover almost the entire

parking lot to a given polling place, surrounding sidewalks, streets, and property across the streets. Within Election Day zones, particularly on private property, unconstitutional applications are myriad. This infringement is not limited to yard signs, though that censorship is abhorrent enough: homeowners in the zone commit a crime if they endorse a candidate to a neighbor in a conversation over the fence on Election Day. *See, e.g.*, Doc. No. 42-6 at 9. One spouse cannot even inquire of the other how he or she voted that day, as that would be "canvassing" a voter. Wyo. Stat. § 22-26-113. A child gathering signatures from her siblings for a petition for a later bedtime risks a misdemeanor, as that is "any petition." *Id.* So, too, must a homeowner remove an electioneering bumper sticker off his car on Election Day or avoid parking in the driveway or the adjacent street. *Id.* These are but a few unconstitutional applications that are plainly illegal under the statute and have no connection to preventing voter confusion or intimidation.

The zones also censor people visiting private property within a buffer zone. On Election Day, the law prohibits delivering a newspaper onto private property if it contains a campaign ad—perhaps even an editorial endorsement—within it. *Id.* In this sense, on these properties the statute threatens to short-circuit *Mills v. Alabama*, the very precedent the *Burson* plurality was wary of infringing. *Burson*, 504 U.S. at 210 (*citing Mills*, 384 U.S. at 214).[8] The same concern arises for someone going door-to-door gathering signatures for "any petition" from a homeowner—even if he is at home and not entering or exiting the polling place across the street. The applications of unconstitutional censorship of political speech on private property is apparent and substantial in relation to preventing voter confusion or intimidation and

[8] It is no defense to claim a law merely restricts delivery of an editorial endorsing a candidate instead of restricting its printing. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process.").

overwhelms these interests. These substantial applications are unjustifiable collateral damage from a zone nine times larger than necessary. *See supra* part III(B).

Within the Election Day zone on either public or private property, the law is also unconstitutional for limiting exit polling to "news media." Wyo. Stat. § 22-26-113. The institutional press enjoys no special status under the First Amendment, and if a journalist is permitted to poll voters, then anyone should be. This might not be a clean case of equal protection, but an average citizen challenging the law could easily establish that the statute is unreasonable here and significantly impinges upon an important person-to-person activity. *But see Riddle v. Hickenlooper*, 742 F.3d 922, 931–32 (10th Cir. 2014) (Gorsuch, C.J., concurring) (considering heightened scrutiny for such discrimination). This is another unconstitutional application that is plain on the face of the law.

Owing to these and any number of other unconstitutional applications that have no bearing on election integrity, the Election Day buffer zone in Section 22-26-113 is unconstitutionally overbroad.

2. The Absentee Polling Place Buffer Zone is Overbroad

The absentee polling place buffer zone also suffers from substantial unconstitutional applications, perhaps many more than the Election Day zone. Although the absentee zone is 100 feet, it is by law placed around a polling place that is in a "courthouse or other public building which is equipped to accommodate voters from all districts and precincts within the county" and operates during court business hours. Wyo. Stat. § 22-9-125(a)(ii); *see* Wyo. Stat. § 22-26-113. In Laramie County, this amounts to censorship not only over a polling place *per se*, but most of the LCGC as well. *See* Doc. No. 42-12.

For the dozens—even hundreds—of persons who might vote in-person absentee at LCGC (or any absentee polling place) on a given day during the voting period, most persons working at and visiting the complex in that time are not voting at all. Thus, most censored electioneering in the absentee zone —from verbal electioneering to the distribution of literature to signature gathering—does not serve to prevent voter intimidation or confusion.[9] For at least 90 days in an election year, one may not wear a campaign shirt to a meeting of the Laramie County Commission "when voting is being conducted" in the atrium of the LCGC. Wyo. Stat. § 22-26-113.[10] Even the most uncouth political speech may not be criminalized "in the corridor outside" of a courtroom, but the absentee zone prohibits electioneering within the entire historic courthouse. *Cohen v. California*, 403 U.S. 15, 16 (1971); *see* Doc. No. 42-12. Free speech may not be circumvented by simply adding a polling place in a room of a government building. *See Mansky*, 138 S.Ct. at 1887–88.

One may not gather signatures for "any petition" outside *or inside* the complex during absentee voting. *See* Doc. No. 42-12. During this blackout, any employee in the LCGC who circulates any petition whatsoever—even one, perhaps, protesting conditions within a workplace—commits a misdemeanor. *See* Jim Angell, *Judges Accuse Laramie County DA Leigh Anne Manlove Of "Incompetence" & Violating Rules Of Conduct*, COWBOY STATE DAILY, June 16, 2021, https://cowboystatedaily.com/2021/06/16/laramie-county-da-leigh-anne-manlove-accused-of-violating-rules-of-conduct. It is illegal for a government employee to discuss her

[9] It bears noting that, especially for signature gathering, signature gatherers *and* prospective signatories are deprived of political speech in the buffer zone.

[10] Following the County Commission's current schedule, these meetings occur while voting is being conducted. *See* https://www.laramiecountywy.gov/_officials/CountyCommissioner/index.aspx (last visited June 25, 2021).

electoral choices on her lunch break with a fellow employee almost anywhere in the LCGC, or on one of the complex's surrounding benches or picnic tables.

The unconstitutional applications of placing buffer zones throughout busy courthouses and other public buildings where dozens of other public activities (in addition to *governance*) is occurring are substantial. The very placement of a polling place in the middle of such a facility undermines the loftiest articulations of the law's legitimate sweep: if the annex of the LCGC is "'an island of calm in which voters can peacefully contemplate their choices'", then surely a signature gatherer outside is not going to disrupt or confuse voters electing to vote by that method. *Mansky*, 138 S.Ct. at 1887 (quoting Brief for Respondents at 43). Wyoming Statutes section 22-26-113 is facially overbroad.

CONCLUSION

Wyoming Statutes section 22-26-113 is unconstitutional by expanding a no-electioneering buffer zone to an area of substantial censorship—transforming a buffer zone to a blackout zone. Moreover, the law censors non-electioneering content and methods of speech that do not implicate voter intimidation or confusion, and censors far too long of a time and distance at important public buildings such as the LCGC. This Court should deny the Defendants' motion for summary judgment, enter declaratory judgment that Wyoming Statutes section 22-26-113 is unconstitutional, grant the relief requested in Mr. Frank's and Grassfire's verified complaint, Doc. No. 1 at 10-11, and grant any further relief the Court believes just and appropriate.

Respectfully submitted,

/s/ Stephen R. Klein
Stephen R. Klein (*Pro Hac Vice*)
BARR & KLEIN PLLC
1629 K St. NW, Ste. 300
Washington, DC 20006
202-804-6676
steve@barrklein.com

/s/ Benjamin Barr
Benjamin Barr (*Pro Hac Vice*)
BARR & KLEIN PLLC
444 N. Michigan Ave. #1200
Chicago, Illinois 60611
202-595-4671
ben@barrklein.com

Counsel for Plaintiffs

/s/ Seth Johnson
Seth "Turtle" Johnson (WBA 7-5748)
SLOW AND STEADY LAW OFFICE, PLLC
1116 W. Farm Ave.
P.O. Box 1309
Saratoga, WY 82331
307-399-6060
Turtle@SlowandSteadyLaw.com

Dated this 2nd day of July, 2021

CERTIFICATE OF SERVICE

I, Stephen Klein, hereby certify that on this 2nd day of July, 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