IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JOHN C. FRANK and GRASSFIRE, LLC,

Plaintiffs,

vs.

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

Defendants.

Case No. 20-CV-138-F

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross-motions for summary judgment. Plaintiffs John C. Frank and Grassfire, LLC filed a motion for summary judgment and a memorandum in support (CM/ECF Documents [Docs.] 41, 42). Defendants Buchanan et al. filed a response to the motion. (Doc. 56). Defendants also filed a motion for summary judgment and a memorandum in support. (Docs. 52, 53). Plaintiffs filed a response to the motion. (Doc. 60). The Court has carefully considered the motions, responses, and the parties' oral arguments from the hearing which took place on July 19, 2021.

FACTUAL BACKGROUND

The cross-motions before the Court regard the constitutionality of Wyoming Statute § 22-26-113, which regulates electioneering near polling places. Plaintiffs seek declaratory and injunctive relief on the basis that the statute is unconstitutional (facially and as-applied to Plaintiffs and third parties) and significantly impinges First Amendment rights. Defendants seek judgment that Plaintiffs' claims are barred by sovereign immunity under the Eleventh Amendment, that Plaintiffs lack standing to bring suit, and that Wyo. Stat. § 22-26-113 is a reasonable, not significant impingement to First Amendment rights, and is therefore a constitutional content-based restriction on speech.

The statute provides:

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

Wyo. Stat. Ann. § 22-26-113.

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

The following facts are undisputed. Plaintiff John C. Frank, a Cheyenne resident, wishes to display and share various campaign signs, literature, bumper stickers, and other materials within the limits of the 100-yard electioneering buffer zone in future election cycles. Specifically, Frank wants to engage in these activities on the campus of the Laramie County Community College ("LCCC"), a locale which is within 100 yards of the Center for Conferences and Institutes Building polling place. But for Wyo. Stat. § 22-26-113, he would distribute campaign literature, affix bumper stickers and/or signs larger than those allowed by the statute to his vehicle (which would be driven into buffer zones) and engage in other acts considered electioneering in the future during and in the areas and times proscribed by the statute. Frank has not electioneered within buffer zones in Wyoming in the past.

Plaintiff Grassfire, LLC is a political consulting firm, registered in Wyoming, which offers services including signature gathering. Grassfire has not gathered signatures in Wyoming in the past. However, Grassfire seeks to engage in this activity throughout Wyoming generally, and specifically on the sidewalks adjacent to the public entrances of the Laramie County Governmental Complex ("LCGC"). Grassfire hopes to gather signatures for petitions for candidates, initiatives, and referenda. The LCGC is a designated

absentee polling place, and the 100-foot, absentee electioneering buffer zone captures much of the sidewalk area around the complex. But for the contested statute, Grassfire would offer its signature gathering services in Wyoming in the areas and during the times proscribed by Wyo. Stat. § 22-26-113.

Neither Frank nor Grassfire allege that they have been cited, convicted, or threatened with a citation for violating Wyo. Stat. § 22-26-113. They do not own or rent property within any buffer zone and do not currently have permission to engage in electioneering on private property within any buffer zone. Plaintiffs do not allege that any person has been found guilty of a misdemeanor under the statute.

They do, however, present evidence that campaign signs on private property have been forcibly removed on past election days, and that there have been complaints about offending bumper stickers on vehicles within the buffer zones which have been resolved by asking the owner to move the vehicle. During the 2020 primary season, and in past election cycles, signature gatherers have been asked to leave buffer zones. They present specific evidence of this occurring to non-party Jennifer Horal, who was cited on August 18, 2020 at the LCCC for violating the 100-yard election day buffer zone while signature gathering. After relocating to a spot outside the zone, she attempted to flag down vehicles entering and exiting the buffer zone and was cited for disrupting a polling place. Defendants do not dispute these assertions.

STANDARD OF REVIEW

The Court shall grant a motion for summary judgment if the movant has demonstrated that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). This standard requires more than the "mere existence of some alleged factual dispute between the parties." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Rather, it requires "there be no genuine issue of material fact." *Id*. "A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530, 538 (10th Cir. 2014) (citing *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1215 (10th Cir. 2013)). Conversely, summary judgment is inappropriate where there is a genuine dispute over a material fact, i.e., "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Roberts v. Jackson Hole Mountain Resort Corp*., 884 F.3d 967, 972 (10th Cir. 2018) (quoting *Anderson*, 477 U.S. at 248).

DISCUSSION

Defendants assert that Plaintiffs lack standing and that the case is barred by the Eleventh Amendment. The Court will address these issues first.

I. Eleventh Amendment

Defendants argue that the State of Wyoming, its agencies, and its officials acting in their official capacity are immune from suit under the Eleventh Amendment. They acknowledge that there exist three exceptions to the doctrine (consent to suit, abrogation,

and *Ex parte Young*) but assert that none apply to the case at hand. The Court agrees that the State has not consented to suit in this instance, nor has Congress expressly abrogated immunity. However, the argument regarding *Ex parte Young* requires more analysis.

In *Ex parte Young,* 209 U.S. 123 (1908), "the Court held that the Eleventh Amendment generally will not operate to bar suits so long as they (i) seek only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law, and (ii) are aimed against state officers acting in their official capacities, rather than against the State itself." *Hill v. Kemp*, 478 F.3d 1236, 1255-56 (10th Cir. 2007). "[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a 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." *Id.* (quoting *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002)).

Plaintiffs seek declaratory and injunctive relief and do not seek monetary damages. The suit is also aimed against state officers acting in their official capacities. Thus, the remaining inquiry is whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. Defendants argue that Plaintiffs do not "demonstrate" an ongoing violation of federal law. But that is not the test. "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md.*, 535 U.S. at 646 (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) ("An *allegation* of an ongoing violation of federal law . . . is

ordinarily sufficient")). Plaintiffs allege an ongoing violation of federal law (a violation of the Constitution). And the relief sought is certainly prospective.

Accordingly, the Court finds that this suit is not barred by the Eleventh Amendment.

II. Plaintiffs' standing

To satisfy Article III's case-or-controversy requirement, "a plaintiff must demonstrate standing to sue by establishing (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Colorado Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 543 (10th Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted)). The first element (injury) "must be concrete, particularized, and actual or imminent." *Id.* at 544. "To establish such an injury in the context of a pre-enforcement challenge to a criminal statute, a plaintiff must typically demonstrate (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute," and (2) "that there exists a credible threat of prosecution thereunder." *Id.* at 545 (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

Defendants argue that Plaintiffs have not demonstrated an intention to engage in prohibited activity, or if they have, that it is not a "concrete plan" but only a "vague desire." *See Baker v. USD 229 Blue Valley*, 979 F.3d 866, 875 (10th Cir. 2020) (quoting *Lujan*, 504 U.S. at 564). But this language regarding "concrete plans" and "vague desires" in *Lujan* was centered on a plaintiff's expression of a desire to return to Sri Lanka *someday* to

observe elephants. And in *Baker,* the court found that the Plaintiff's desire to have "options" available to her child was a "some day intention that does not establish actual or imminent injury" as she did not allege which options she would choose from or when she plans to exercise them. 979 F.3d at 875.

Here, Frank's failure to know which exact stickers he plans to place on his vehicle or which materials he hopes to distribute does not make his future plans a vague desire. He wishes to engage in electioneering in future election cycles. To require more specific detail at this point would be to invite fanciful projections. Similarly, Grassfire offered detailed testimony that it would engage in signature gathering but for the Wyoming statute. The plaintiffs have shown "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the challenged statute." *Colorado Outfitters Ass'n*, 823 F.3d at 545.

Next, we assess whether Plaintiffs are subject to a credible threat of prosecution. "The threat of prosecution is generally credible where a challenged 'provision on its face proscribes' the conduct in which a plaintiff wishes to engage, and the state 'has not disavowed any intention of invoking the… provision' against the plaintiff." *United States v. Supreme Court of N.M.*, 839 F.3d 888, 901 (10th Cir. 2016) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)). There is no evidence that the State has disavowed any intention of enforcing Wyo. Stat. § 22-26-113. That parties in violation of the statute in the past ceased their proscribed behavior and escaped prosecution does not indicate that an individual who refused to cease their behavior would share the same fate.

And, Plaintiffs offer evidence of Jennifer Horal's recent citation under the statute for signature gathering. "Past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical." *Susan B. Anthony List*, 573 U.S. at 164. This is adequate for the Court to find that Plaintiffs were subject to a credible threat of prosecution. Therefore, Plaintiffs have demonstrated an injury in fact.

At oral argument, and on the issues of causation and credible threat of enforcement, Defendants argued that neither the Wyoming Secretary of State nor the Laramie County Clerk have enforcement power or prosecution authority related to Wyo. Stat. § 22-26-113. However, under Wyo. Stat § 22-2-103, the Secretary of State is the chief election officer for the state and "shall maintain uniformity in the applications and operations of the election laws of Wyoming." Similarly, "each county clerk is the chief election officer for the county." *Id.* The statute clearly gives both the Secretary of State and county clerks authority over the election laws within the state. And, the Court does not believe the causation prong of standing analysis requires that the Secretary of State or a county clerk personally be the individuals issuing citations for violations of the statute. It is enough that they are significantly related.

Defendants put forth no arguments that Plaintiffs' standing fails on the redressability prong, and the Court cannot think of one. Because injury-in-fact and causation have also been established, the Court finds that Plaintiffs have demonstrated standing to sue on the issues of the statute's constitutionality.

III. Challenge to the constitutionality of Wyo. Stat. § 22-26-113

We turn now to the merits. "Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Russell v. Lundergran-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Wyo. Stat. § 22-26-113 burdens political speech and is therefore subject to strict scrutiny. The parties agree that the case controlling our analysis here is *Burson v. Freeman*, 504 U.S. 191 (1992).

It is commonly emphasized that "it is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015) (citing *Burson,* 504 U.S. at 211). However, "those cases do arise." *Id.* In *Burson*, the Supreme Court considered and upheld the constitutionality of a Tennessee electioneering regulation (similar to Wyo. Stat. § 22-26-113) which imposed a 100-foot election-day "campaign-free zone" around polling places. 504 U.S. 191. The Court found the Tennessee law to be a "facially content-based restriction on political speech in a public forum" which was subject to strict scrutiny. *Id.* at 198. But the case presented "a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote – a right at the heart of our democracy." *Id.*

The *Burson* court concluded that "a State has a compelling interest in protecting voters from confusion and undue influence" and "in preserving the integrity of its election

process." *Id.* at 199. Noting that the Court "never has held a State to the burden of demonstrating empirically the objective effects on political stability that are produced by the voting regulation in question," they found that a modified burden of proof should apply in cases where a "First Amendment right threatens to interfere with the act of voting itself." *Id.* at 209, 209 n. 11 (quoting *Munro v. Socialist Workers Party,* 479 U.S. 189, 195 (1986)). This modified burden of proof—which will be the focus of our analysis—requires that a voting regulation be "reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 209. This burden is, essentially, a modified way for an electioneering law to satisfy strict scrutiny's narrow-tailoring prong. *See Lundergran-Grimes*, 784 F.3d at 1050-1051. Although the modified burden as formulated in *Burson* does not explicitly pronounce that a state must prove a regulation to be reasonable, that it is a modification of the narrow-tailoring prong of strict scrutiny analysis forces a logical conclusion that the burden to prove is still on the state. [1]

There is no dispute here that the State has compelling interests in regulating electioneering. As such we shall proceed by applying the modified burden test to the various challenged aspects of Wyo. Stat. § 22-26-113.

a. 100-yard election day buffer zone

The statute proscribes electioneering within one hundred yards (300 feet)—on the day of a primary, general or special election—of any public entrance to the building in which the polling place is located. The regulation in *Burson* had a 100-foot electioneering

[1] Defendants do not agree with this analysis. *See* Doc. 53, p. 14 ("[T]he State is not required to put forward evidence justifying why precisely the Legislature chose to enact a 100-yard boundary on election days").

buffer zone. Exceeding the dimensions considered in *Burson* is not necessarily unconstitutional, although "at some measurable distance from the polls … governmental regulation … could effectively become an impermissible burden[.]" *Schirmer v. Edwards*, 2 F. 3d 117, 121 (5th Cir. 1993) (quoting *Burson*, 504 U.S. at 210).

In *Schirmer*, the Fifth Circuit upheld the constitutionality of a Louisiana electioneering regulation which established a 600-foot campaign-free zone. At trial, the state representative who had authored the amended legislation testified to the necessity of the 600-foot limitation and asserted that the previous iteration of the electioneering law—which set the buffer zone at 300 feet—did not adequately serve to deter poll workers from intimidating and harassing voters. 2 F.3d at 122.

In *Russell v. Lundergran-Grimes*, the Sixth Circuit applied the modified burden from *Burson* to a Kentucky statute proscribing electioneering within a 300-foot radius, and noted that a "State need not have a strong evidentiary basis for the law to withstand strict scrutiny." 784 F.3d at 1053. But the court found that the State had not carried even the relaxed burden to demonstrate that the statute withstood strict scrutiny: "[W]e hold that Defendants presented no argument—and evidently the legislature did not engage in factfinding 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." *Id.* As a result, the court found that the Kentucky statute violated the First Amendment.

Our instant case is closely aligned with the scenario in *Lundergran-Grimes.* Defendants have presented no argument—and offered no evidence—to explain why the

statute requires an electioneering buffer zone much larger than the regulation upheld in *Burson.* They did not meet their burden to demonstrate that the statute's 100-yard electioneering buffer zone is "reasonable and does not significantly impinge on constitutionally protected rights." *Burson,* 504 U.S. at 209. This is particularly true here given that the legislature established a 100-foot electioneering buffer zone for the period within which absentee voters may cast their votes. The record is silent as to why a different zone was selected by the legislature for this period given that the State concedes its interests are no different. Accordingly, the Court holds that Wyo. Stat. § 22-26-113's election day buffer zone violates the First Amendment.

b. 100-foot absentee voting period buffer zone

Wyo. Stat. § 22-26-113 proscribes electioneering within 100 feet of an absentee polling place when voting is being conducted. In Wyoming, the absentee voting period encompasses 90 days per year. Noting that the electioneering regulation in *Burson* was only effective for two days per year, Plaintiffs assert that the duration of Wyoming's electioneering prohibition during absentee periods renders that section of the statute unconstitutional.

Even though Plaintiffs advance this argument, no specific arguments were presented to the Court as to why the State's interest in protecting absentee voters from confusion and undue influence should be any less than it is for election-day voters. *Burson* did not premise its holding on a factual scenario where a regulation is only effective for two days a year. The absentee buffer zone proscription does not go beyond the bounds of the holding in our

controlling case; thus, we do not need to apply the modified burden of proof. The Court finds that Wyo. Stat. 22-26-113's absentee electioneering buffer zone does not violate the First Amendment.

c. Bumper stickers

Wyo. Stat. § 22-26-113's ban on electioneering within the buffer zones "shall not apply to bumper stickers affixed to a vehicle while parked within or passing through [the buffer zone], 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."

As a matter of housekeeping, the statute under its plain language does not seem to consider bumper stickers to be electioneering. Defendants have asserted that bumper stickers are considered to be "campaign signs" under the statute, an interpretation which, although showing evidence of its acceptance (in the form of affidavits of some forms of enforcement), is still tenuous at best. Perhaps the Court is to infer that large bumper stickers are prohibited signs on the basis that smaller bumper stickers are allowed.

Regardless, Plaintiffs assert that Wyo. Stat. § 22-26-113's ban on bumper stickers (which do not satisfy the proviso) is outside the scope of what was considered "electioneering" in *Burson* and is therefore a violation of the First Amendment. The purpose of regulating electioneering is delineated by a state's interest in preventing voter intimidation and election fraud. *See Burson*, 504 U.S. at 206. Here, the Court cannot see

how bumper stickers on vehicles could lead to voter intimidation or election fraud. And, Defendants have presented no evidence that the statute's ban on bumper stickers which don't meet the proviso is "reasonable and does not significantly impinge on constitutionally protected rights." *Burson*, 504 U.S. at 209.

Accordingly, the Court finds that Wyo. Stat. § 22-26-113's ban on bumper stickers (insofar as the statute actually does so) is a violation of the First Amendment.

d. Wyo. Stat. § 22-26-113's application to private property

Neither of the Plaintiffs own, rent, or have permission to electioneer on private property within electioneering buffer zones in Wyoming. The Court finds that there is an absence of factual record in the case to consider this issue, and we will not entertain this challenge.

CONCLUSION

Plaintiffs' motion for summary judgment (Doc. 41) and Defendants' motion for summary judgment (Doc. 52) are GRANTED IN PART AND DENIED IN PART. Wyo. Stat. § 22-26-113 violates the First Amendment and shall be invalidated as it pertains to: (i) the 100-yard, election day electioneering buffer zone, and (ii) bumper stickers affixed to vehicles. The statute survives constitutional challenge in all remaining aspects.

Judgment shall be entered accordingly and the Clerk of Court is directed to close the case.

IT IS SO ORDERED.

Dated this 22nd day of July, 2021.

Nancy D Freudenthal

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE