

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,

Plaintiff,

V.

CHARLES GRAY, Wyoming Secretary of
State,
SYLVIA HACKL, Laramie County District
Attorney,
DEBRA LEE, Laramie County Clerk,
in their official capacities,

Defendants.

Case No. 2:20-cv-00138-KHR

Oral Argument Requested

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF
SECOND MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

On remand from the Tenth Circuit, this Court must “consider in the first instance whether [Wyoming’s 100-foot absentee polling place buffer zone] passes constitutional muster” and “in the first instance Plaintiff [John C. Frank]’s overbreadth claim.” *Frank v. Lee*, 84 F.4th 1119, 1152 (10th Cir. 2023) (ECF No. 94-1), *cert. denied*, 144 S. Ct. 1349 (2024). The no-electioneering absentee polling place buffer zone in Wyoming Statutes section 22-26-113 is unconstitutional under the First Amendment and the statute is unconstitutionally overbroad. U.S. Const. amend. I.

STATEMENT OF MATERIAL FACTS¹

1. Wyoming has permitted absentee voting for decades, but until 2006 it was accomplished exclusively by mailing or otherwise delivering a sealed ballot to a county clerk. *See* Wyo. Stat. §§ 22-9-101 through 22-9-124.

2. In-person absentee or early voting was “a relatively small phenomenon” until the late 20th century. **Exhibit 1** (Excerpts of JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS (2006)). Absentee and early voting did not begin to account for a significant portion of voting nationwide until the 1980s. *Id.*

3. After the 2002 elections, absentee voting by mail and early in-person voting continued to increase nationwide and election day voting decreased. **Exhibit 2** (Excerpt of CHARLES STEWART III, HOW WE VOTED IN 2022 (2023)).

4. In 2006, Wyoming law was amended to permit absentee polling places that, by law,

may be established in the courthouse or other public building which is equipped to accommodate voters from all districts and precincts within the county and shall be open the same hours as the courthouse on normal business days during the time period allowed for absentee voting.

Wyo. Stat. § 22-9-125(a)(ii); ECF No. 42-4 at 2 (Enrolled Act No. 45, Wyoming House of Representatives (2006)). In 2020, the law was amended to permit additional absentee polling places:

the county clerk may also establish in one (1) or more public buildings within the county additional satellite absentee polling places to accommodate voters. A satellite absentee polling place shall be open only on the dates and at the times specified by the county clerk during the time period allowed for absentee voting.

¹ Plaintiff’s counsel has endeavored to streamline this statement with facts pertinent to the remanded claims. Mr. Frank incorporates the previous statement of material facts by reference. ECF No. 42 at 2-10; *see* Fed. R. Civ. P. 56(c)(3).

Wyo. Stat. § 22-9-125(a)(ii); **Exhibit 3** (Enrolled Act No. 37, Wyoming Senate (2020)).

5. The same bill that created absentee polling places in 2006 placed 100-yard buffer zones around them. ECF No. 42-4 at 3. These absentee buffer zones were decreased to measure within 100 feet “of any public entrance to the building in which the polling place is located” in 2018. **Exhibit 4** (Excerpt of Enrolled Act No. 61, Wyoming House of Representatives (2018)).

6. Other Wyoming counties provide for in-person absentee voting. *See Exhibit 5*. While some county websites do not provide details for in-person absentee voting, other sources suggest it is more prevalent. *Compare* ABSENTEE BALLOT APPLICATION AND INFORMATION, SHERIDAN COUNTY, <https://perma.cc/8TM7-L45G>² with Joseph Beaudet, *Sheridan County voters hit the polls early*, THE SHERIDAN PRESS, Aug. 8, 2024, available at https://www.thesheridanpress.com/news/local/sheridan-county-voters-hit-the-polls-early/article_baba99ae-5597-11ef-858c-df7ce30fa420.html [<https://perma.cc/B5K2-K2FD>]. In-person absentee voting is almost exclusively conducted in government buildings that serve as, among other things, county clerk offices and courthouses. Exh. 5.

7. Since 2023, the time allowed for in-person absentee voting is 28 days, or 56 days total in a year with a primary and general election. Wyo. Stat. § 22-9-107; **Exhibit 6** (Enrolled Act No. 86, Wyoming Senate (2023)).

8. In 2024, the absentee polling place in Laramie County remains the Laramie County Governmental Complex (“the Complex”). ECF No. 116 at 1 (¶2). Under the law, electioneering is prohibited within 100 feet of any public entrance to the Complex from July 23 through August 19

²<https://cms2.revize.com/revize/sheridan/Document%20Center/Departments/Elected%20Office/Absentee/Absentee%20Ballot%20Application%20and%20Information%20for%20Web%20Page.pdf>.

during in-person absentee voting for the primary election and from October 8 through November 4 during in-person absentee voting for the general election. *Id.* at 2-3 (§§4-6).

9. These absentee buffer zones cover public sidewalks and streets. *See* ECF No. 42-12 at 2; *see Exhibit 7* at 3, 4, 7, 8.

10. The Complex contains several government agencies, including the County Clerk's office, the Laramie County District Court, the Board of County Commissioners, the District Attorney's office, the Public Defender's office, and the County Attorney's office. ECF No. 116 at 3 (§8). The Laramie County Jail is connected to the Complex via bridge. *Id.* (§10).

11. The Laramie County Board of Commissioners schedules meetings twice each month, including on August 6 and October 15, 2024. ECF No. 116 at 3 (§8); **Exhibit 8**.

12. In 2024, Laramie County Commissioners are subject to election. **Exhibit 9** (2024 PRIMARY ELECTION CANDIDATE ROSTER – LARAMIE COUNTY, LARAMIE COUNTY CLERK).

13. In 2024, judges in the First Judicial District (Laramie County) are subject to election. **Exhibit 10** (2024 GENERAL ELECTION STATEWIDE OFFICES ON THE BALLOT, WYO. SEC'Y OF STATE). So are judges in the Second through Ninth Judicial Districts. *Id.*

14. For certain services at the County Clerk's office, one must appear in person, such as titling a vehicle, obtaining a marriage license, or registering to vote. ECF No. 42-11 at 14 (Munoz Depo. 10:12-23); *see* Exh. 7 at 6. One may access the County Clerk's office from the entrance on West 20th Street. *See* Exh. 9 (West 20th Street Address).

15. The Complex is not a polling place on the day of the primary or general election. ECF No. 116 at 3 (§12). In 2024, the Laramie County election day polling places are at David R. Romero Park (*see* ECF No. 42-6 at 3), the Storey Gym (*see id.* at 9), the Kiwanis Community House, North Christian Church (*see id.* at 6, 7), Laramie County Community College (*see id.* at 5), the Event

Center at Archer (*see id.* at 4), and the Pine Bluffs Community Center (*see id.* at 8). **Exhibit 11** (*How to Vote*, LARAMIE COUNTY).

16. In 2024, County Clerk Lee designated three satellite absentee polling places: the Burns Plex for early primary voting on July 27 from 8AM to 11AM and for early general voting on October 12 from 8AM to 11AM; the Albin Community Center for early primary voting on July 27 from 1PM to 3PM and for early general voting on October 12 from 1PM to 3PM; and the Laramie County Library for early primary voting on August 4 from 1PM to 4:30PM and for early general voting on October 20 from 1PM to 3PM. ECF No. 116 at 1-2 (¶2).

17. Sealed absentee ballots may be deposited at any time during the absentee voting period in a drop box outside of the Complex on Carey Avenue. *Id.* at 3 (¶11); *see* Exh. 7 at 2.

18. On August 20, 2024 and November 5, 2024, Mr. Frank wishes to distribute literature and discuss his support of candidates within 100 yards (300 feet) of the Laramie County Community College polling place and discuss the merits of candidates one-on-one with voters. ECF No. 113 at 4, 9 (¶13, Verification).³

19. In the 2024 election cycle—including on dates within July 23 and August 19, 2024 and on dates within October 8 and November 4, 2024—Mr. Frank wishes to distribute literature in support of candidates, including Ann Lucas for the Wyoming House of Representatives and Kathy Scigliano for Laramie County Commission, and discuss their merits one-on-one with citizens. ECF No. 113 at 4 (¶14). Mr. Frank would do so on the sidewalk within 100 feet of the north entrance to the Complex on West 20th Street and on the sidewalk within 100 feet of the east entrance to the Complex on Carey Avenue. *Id.*; *see* Exh. 7 at 2, 3, 7, 8.

³ A verified complaint 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).

20. In the 2024 election cycle—including on dates within July 23 and August 20, 2024 and on dates within October 8 and November 5, 2024—Mr. Frank would like to attach two bumper stickers on his automobile that advocate for the same candidate and display two yard signs (that are larger than 4 inches by 16 inches) in the rear side windows of his car that support candidates. ECF No. 113 at 4-5 (¶¶15-16). With those stickers and signs displayed from his car, he would like to drive past the Complex on West 19th Street, West 20th Street, and Carey Avenue during the aforementioned dates and park within 100 feet of those entrances, respectively. *Id.* With those stickers and signs displayed from his car, he would like to park within 100 yards of the entrance to the Laramie County Community College polling place on August 20, 2024 and November 5, 2024. *Id.*

ARGUMENT

The standards of summary judgment have not changed since this Court's ruling in this case in 2021. *See* ECF No. 42 at 10-12. On remand, summary judgment remains appropriate because there is no genuine issue of material fact and the questions at issue are purely matters of law. Fed. R. Civ. P. 56(a). The law is unchanged since 2018:

(a) Electioneering too close to a polling place or absentee polling place under W.S. 22-9-125 when voting is being conducted, consists of any form of campaigning, including the display of campaign signs or distribution of campaign literature, the soliciting of signatures to any petition or the canvassing or polling of voters, except exit polling by news media, within one hundred (100) yards on the day of a primary, general or special election and within one hundred (100) feet on all other days, of any public entrance to the building in which the polling place is located. This section shall not apply to bumper stickers affixed to a vehicle while parked within or passing through the distance specified in this subsection, provided that:

- (i) There is only one (1) bumper sticker per candidate affixed to the vehicle;
- (ii) Bumper stickers are no larger than four (4) inches high by sixteen (16) inches long; and

(iii) The vehicle is parked within the distance specified in this subsection only during the time the elector is voting.

Wyo. Stat. § 22-26-113; *see* Statement of Material Facts, *supra* (“SOF”) at ¶5. The Tenth Circuit ruled that the Supreme Court’s precedent in *Burson v. Freeman* permits a no-electioneering buffer zone on an election day to extend to 100 yards (300 feet) and that bumper stickers may be prohibited on that day within that zone in compliance with the First Amendment. *Frank*, 84 F.4th at 1141–48; *see generally* *Burson v. Freeman*, 504 U.S. 191 (1992). That is, the election day zone “‘is reasonable and does not *significantly impinge* on constitutionally protected rights.’” *Frank*, 84 F.4th at 1142 (quoting *Burson*, 504 U.S. at 209). But the court reversed this Court’s rulings as to the 100-foot absentee buffer zone and overbreadth and remanded those issues for consideration. *Id.* at 1148–52. This Court should rule that Section 22-26-113 is unconstitutional under both analyses and enjoin the Defendants (collectively “the State”) from enforcing the law.

The First Amendment reads, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I. This applies to Wyoming via Fourteenth Amendment. U.S. Const. amend. XIV; *Burson*, 504 U.S. at 196. It will require a substantial expansion of the *Burson* precedent for the State to prevail on the remaining claims, a decision that was by its own terms “the rare case in which [the Supreme Court has] held that a law survives strict scrutiny.” 504 U.S. at 211. As this Court considers both issues on remand, the importance of Mr. Frank’s free speech must not be diminished, because “‘handing out leaflets in the advocacy of a politically controversial viewpoint . . . is *the essence of First Amendment expression*’; ‘[n]o form of speech is entitled to greater constitutional protection.’” *McCullen v. Coakley*, 573 U.S. 464, 488–89 (2014) (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995)) (emphasis added). Personal political engagement in a traditional public forum is,

even today—especially today—part of “the most effective, fundamental, and perhaps economical avenue of political discourse, *direct one-on-one communication*.” *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (emphasis added). The State cannot further eclipse these rights with tenuous references to electoral integrity.

I. Wyoming’s 100-Foot Absentee Polling Place Buffer Zone is Unconstitutional

The Tenth Circuit provided guidance for considering the absentee buffer zone, also drawn from *Burson*:

Burson teaches that courts evaluating a state’s electioneering regulation must consider the burden on speech resulting from the state’s chosen method of protecting the right to cast a ballot. A meaningful analysis is not piecemeal; instead, it should account for every component of the restriction. Otherwise, a court cannot determine whether the electioneering regulation is narrowly tailored to protect the act of voting itself.

Frank, 84 F.4th at 1149. Moreover, the “question can be answered only after a holistic inquiry—one that grapples with size, conduct, and temporal scope as components of a regulatory act.” *Id.* at 1150. Under a holistic inquiry, the 100-foot absentee zone in Section 22-26-113 is unconstitutional owing to its lack of historic basis, its unreasonable placement, duration, and size, and its significant impingement of free speech.

A. A Buffer Zone Around a Courthouse or Other Busy Government Facility for 28 Days Preceding an Election is Unreasonable

Adding up all its facets, the absentee buffer zones are unreasonable. The first component this Court should consider is the lack of history, consensus or common sense for absentee buffer zones. The Tenth Circuit’s ruling affirmed that the history of polling place regulation is part of the reasonableness analysis of *Burson*’s modified burden of proof for purposes of considering narrow

tailoring in strict scrutiny. *Frank*, 84 F.4th at 1145.⁴ The appellate court found that Wyoming’s election day zone, though larger than historic zones, fits into the “long history, substantial consensus, and . . . common sense” relied upon by the Supreme Court. *Id.* (quoting *Burson*, 504 U.S. at 211). The State cannot say the same of absentee zones: in-person absentee or early voting did not gain traction until the 1980s, which is hardly a long history, and there is no substantial (if any) consensus as to placing buffer zones—of any size—around early voting locations. *See* SOF ¶¶2-3; *cf. Burson*, 504 U.S. at 206 (On election days, “all 50 States limit access to the areas in or around polling places.”).⁵ As to common sense, the lack of it is borne out in the other problems imposed by the restriction.

The unreasonableness demonstrated by the short history of absentee buffer zones is informed by other binding First Amendment precedent. A decade before *Burson*, the Supreme Court recognized that public sidewalks surrounding a courthouse—indeed, the United States Supreme Court itself—constitute traditional public fora. *U.S. v. Grace*, 461 U.S. 171, 180 (1983). In that case the Court reiterated that “that ‘Congress . . . may not by its own *ipse dixit* destroy the “public forum” status of streets and parks which have historically been public forums[.]’” *Id.* (quoting *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981)). Yet in 2006, Wyoming did just that by permitting absentee polling places in “the courthouse or other public building” that “shall be open the same hours as the courthouse on normal business days” and

⁴ In a similar fashion, modern Second Amendment jurisprudence also comports a rigorous examination of historical analogues in deciding whether a given law will survive Second Amendment scrutiny. *See, e.g., N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022). This places the burden on the government to affirmatively demonstrate sufficiently similar approaches to regulation in order to survive constitutional review.

⁵ The Supreme Court has emphasized the importance of the longevity and breadth of this consensus in many (of its few) discussions of *Burson*’s strict scrutiny analysis. *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765, 786–87 (2002); *Evenwel v. Abbott*, 578 U.S. 54, 73–74 (2016).

prohibiting electioneering on the surrounding sidewalks and streets for what currently amounts to 56 days. Wyo. Stat. §§ 22-9-125(a)(ii), 22-26-113. Nearly every absentee polling place in Wyoming, including the one in the Complex, is in a courthouse. Exh. 5. To claim that *Burson* permits such censorship under a law enacted years after the opinion that lacks any historic consensus is to simply wield *Burson* as limitless dogma—the very essence of *ipse dixit*.

The final reason that absentee zones are unreasonable under the history and consensus component is that in-person absentee voting is not synonymous with the right to vote that *Burson* recognized as a compelling governmental interest. *See* 504 U.S. at 198–99. The recent decrease of the timeframe for in-person absentee voting from 45 days to 28 days before an election in Wyoming is only appropriate if early voting is not part and parcel of the fundamental right to vote. SOF ¶7. And it is not. To be sure, when a state implements in-person absentee or early voting, it can implicate voting rights and other concerns such as equal protection. *See, e.g., Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 975 (D. Nev. 2016). But there is no *per se* right to in-person early voting. *Johnson v. Waller Cnty.*, 593 F. Supp. 3d 540, 561 (S.D. Tex. 2022) (“Neither the United States Constitution nor any other federal law requires a state to offer early voting.”). The interest against which the Court must measure the reasonableness of the zone is thus significantly attenuated. *See also Texas Democratic Party v. Abbott*, 978 F.3d 168, 188 (5th Cir. 2020) (“the right to vote in 1971 did not include a right to vote by mail.”). Moreover, there is a *per se* right to political speech in traditional public fora. *Burson*, 504 U.S. at 196. This suggests at a minimum that the absentee buffer zones are unreasonable and might even compel the Court to consider that *Burson* requires the application of traditional strict scrutiny to these absentee zones, the test that is applicable to traditional public fora. *See id.* at 199–206; *see also Frank*, 84 F.4th at 1142 n.19, 1145.

The second component of absentee polling places that this Court should consider is their placement, which is also unreasonable. The courthouse is the specific facility mentioned in the law that provides for absentee polling places, though this not required (a county may utilize any “other public building which is equipped to accommodate voters from all districts and precincts within the county”) and a county may also “establish in one (1) or more public buildings within the county additional satellite absentee polling places to accommodate voters[,]” as County Clerk Lee has done. Wyo. Stat. § 22-9-125(a)(ii); SOF ¶16. A courthouse is utilized in Laramie County and throughout Wyoming for the absentee polling place. Exh. 5. These are distinct from election day polling places. The atrium in the Complex or a room in another multi-purpose government building can accommodate a few voters at a time throughout the absentee voting period, but they are not equipped to serve as election day polling places because hundreds or thousands of votes are cast on election day. *See, e.g.*, ECF No. 42-7 at 22-48; Exh. 7 at 5-6. This is why election day polling places are set up at gyms, schools, churches and other facilities that are larger and more isolated—even considering a 300-foot buffer zone—and have dedicated parking lots. *See, e.g.*, SOF ¶15. The flipside of this is that during the 56 days of absentee voting the Complex and other facilities with absentee polling places are mostly populated with government officials and citizens who are not voting. It is unreasonable to censor the political speech of hundreds of people—thousands when measured over 56 days—who have no connection whatsoever to the voting occurring in one room of a large public facility.

The setting is meaningfully distinct and unreasonable in other ways. The Complex is centrally located in town, and its buffer zones cover three busy one-way streets for 56 days. ECF No. 42-12 at 2. This includes every lane of West 19th and West 20th Streets, respectively, owing to public entrances to the Complex that do not directly connect to the polling place. *Id.* Any driver

“[parking] within or passing through” those zones with more than one bumper sticker that supports or opposes the same candidate risks a misdemeanor charge. Wyo. Stat. § 22-26-113. A citizen taking a walk, with no intention to even enter the Complex or engage with anyone in the buffer zone, cannot wear election apparel on certain sidewalks. *See* Exh. 7 at 9 (photo of a warning taped to a sidewalk outside the Complex). In addition to serving as a courthouse, with courtrooms that are attended by bailiffs and police officers testifying in criminal matters, the Complex is connected to the Laramie County Jail by a walkway. SOF ¶10. That is, people are literally voting in the vicinity of inmates while court is in session. In *Burson* the Supreme Court expressed concern that “because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process [under Tennessee law], many acts of interference would go undetected.” 504 U.S. at 207. An absentee polling place in a courthouse is in the place with perhaps more law enforcement officers than anywhere except the police station or jail. *See also McCullen*, 573 U.S. at 467 (supporting the importance of such a distinction). Those committing voter intimidation in such a setting would do so outside the very court where they would be tried and a block from the jail where they might serve time, with no shortage of law enforcement to effectuate an arrest.

The final problem with the setting is that it turns most of the principles in *Burson* and its progeny into platitudes. The Supreme Court reasoned that “[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter.” 504 U.S. at 207–08. Today, in Wyoming in-person absentee voting is accomplished in a small, open alcove in the atrium that connects Cheyenne’s busiest government buildings. *See* Exh. 7 at 5-6. When addressing the election day zone, the Tenth Circuit summarized that “[h]ere, Wyoming has decided the last minute should be the voters’ own.” *Frank*, 84 F.4th at 1146. Yet in the Complex, the last seconds can be

interrupted by, among other things, a line at the coffee shop in front of the polling area or a voter's desire to purchase a sandwich. Exh. 7 at 5-6. In *Minnesota Voters Alliance v. Mansky* the Supreme Court “emphasized the physical process of ‘[c]asting a vote is a weighty civic act’ entitling voters to ‘an island of calm’ to ‘peacefully contemplate their choices.’” *Frank*, 84 F.4th at 1140 (quoting *Mansky*, 585 U.S. 1, 15 (2017)). Having done everything else to undermine that concept inside the polling place, it is unreasonable for the State to claim that it needs to ban core First Amendment speech outside to maintain secrecy and peaceful contemplation.

The third component of the absentee buffer zone that the Court should consider is its longevity, which unreasonably lasts 28 days before a primary and general election or a total of 56 days in a given election year if there is no special election. Wyo. Stat. § 22-9-107. This dovetails with concerns over the setting of the absentee polling place, causing nearly two months of censorship in an election year not just around a polling place, but around active government offices that include elected officials, some of whom are candidates in the upcoming elections. SOF ¶¶10, 12-13. The Supreme Court acknowledged the importance of a temporal distinction in *McIntyre v. Ohio Elections Commission*, which struck down a law forbidding anonymous leafletting just a few years after *Burson*:

The temporal breadth of the Ohio statute . . . distinguishes it from the Tennessee law that we upheld in *Burson* The Tennessee statute forbade electioneering within 100 feet of the entrance to a polling place. *It applied only on election day*. The State’s interest in preventing voter intimidation and election fraud was therefore enhanced by the need to prevent last-minute misinformation to which there is no time to respond.

514 U.S. at 352 n.16 (emphasis added). Neither fraud nor “last-minute misinformation” are implicated in a 28-day window. Nor is the Supreme Court’s broader concern in *Burson* about “rerunning an election” implicated in this timeframe, because any instances of actual voter

intimidation or fraud during the absentee period will not meaningfully undermine a given election. 504 U.S. at 209. This is not to say malfeasance cannot occur in a buffer zone during absentee voting, just that individuals subjected to it can vote in another manner on another day and have that vote count in the very same election.

The final component of the absentee buffer zone that the Court should consider is its size. The Tenth Circuit ruled that “[t]he geographic scope of the absentee buffer zone is permissible.” *Frank*, 84 F.4th at 1150. Yet, as part of the holistic inquiry of the absentee zone, 100 feet is unreasonable. The Tenth Circuit held that the election day polling place “is ‘narrowly tailored to the immediate area around the entrance to the polling place[.]’” *Frank*, 84 F.4th at 1144 (quoting State’s Opening Appellate Brief at 33). Placing a polling place within a large government facility like the Complex or a courthouse, then prohibiting electioneering within 100 feet “of *any public entrance*” is not narrowly tailored. Wyo. Stat. § 22-26-113 (emphasis added). Perhaps, considering the Complex, the size of the buffer zone is reasonable as to the atrium entrance on Carey Avenue. But the additional zones around the entrances on West 19th and West 20th Street, respectively, are not. *See* ECF No. 42-12 at 2, Exh. 7 at 7-9. In light of the plethora of other functions of the Complex and the distance of these entrances from the atrium polling place, it is unreasonable to censor those buildings, sidewalks and the entire streets from electioneering. These areas are, after all, the very heart of American public discourse where First Amendment protection is traditionally at its zenith.

The components of the absentee buffer zone amount to an unwieldy and unreasonable application—and unprecedented expansion—of *Burson*. The historic basis of no-electioneering buffer zones is strictly as to election day and is not analogous to censoring every entrance of a busy government building for two months during an election year owing to the presence of a voting method that is optional to voters and the State alike. To accept that even the worst situations in an

absentee zone are as incurable a concern as they are on election-day implements a “prophylaxis-upon-prophylaxis” interest that is not consistent with strict scrutiny. *Fed. Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479 (2007); *see also Fed. Election Comm’n v. Cruz*, 596 U.S. 289, 291 (2022). The Court should rule that the absentee buffer zone is unreasonable and thus unconstitutional under the First Amendment.

B. A Buffer Zone Around a Courthouse or Other Busy Government Facility for 28 Days Preceding an Election Significantly Impinges Upon Free Speech

Unreasonableness alone is cause for this Court to declare that the absentee buffer zones in Section 22-26-113 are unconstitutional, but those zones also significantly impinge upon free speech. The Tenth Circuit ruled that an election day buffer zone does not significantly impinge speech until it approaches an “absolute [or] limitless” ban. *Frank*, 84 F.4th at 1145 (citing *Mills v. Alabama*, 384 U.S. 214, 216 (1966); *Meyer v. Grant*, 435 U.S. 414, 428 (1988)). But the placement and duration of absentee buffer zones are, unlike expanded election day zones, not merely “difference[s] . . . in degree” but differences in kind, and they significantly impinge upon speech. *Burson*, 504 U.S. at 210.

The Complex houses the offices of parts of Laramie County’s judicial, executive and legislative branches, all of which are led by officials who are subject to elections. *See* SOF ¶¶10, 12-13. Electioneering around the Complex reaches not only these officials but their employees and, most importantly, citizens who are interacting with government offices on a given day, from titling a vehicle to attending a county commission meeting. So, for example, as Mr. Frank supports Kathy Scigliano for Laramie County Commission, if it were not for the buffer zone he could engage in one-on-one communications with citizens who attended the Commission meeting that occurred just before the primary and just before the general election, respectively. *See* SOF ¶¶11, 19. More broadly, but no less importantly, Mr. Frank could advocate on behalf of Ann Lucas for

the Wyoming House by engaging one-on-one with government officials who might have thoughts on the relationship between the state and county government and even reach newly registered voters as they emerge from the Complex, or even as they are heading inside to register. *See* SOF ¶14. It bears reiterating that most (possibly all) of the people Mr. Frank would engage with in a Complex buffer zones are not voting that day. Yet all of his one-on-one engagement is censored within 100 feet of every public entrance. *See McCullen*, 573 U.S. at 489 (“When the government makes it more difficult to engage in these modes of communication, it imposes *an especially significant* First Amendment burden.” (emphasis added)). Mr. Frank’s speech is significantly impinged, and all of this engagement has no comparable alternative, even a block away, as he is not seeking to engage with citizens emerging from a bank or bagel shop.⁶ *See Meyer*, 486 U.S. at 424 (“The First Amendment protects [the peoples’] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.”).

The absentee buffer zones also significantly impinge upon Mr. Frank’s use of bumper stickers or campaign signs in the back of his station wagon. *See* SOF ¶20. A zone extends to any bumper sticker “within or passing through the distance specified in this subsection” unless a citizen limits their use to one sticker per candidate and only uses stickers or signage that does not exceed 4 inches by 16 inches in size. Wyo. Stat. § 22-26-113. The Complex buffer zone outside the atrium entrance covers most lanes of Carey Avenue, while the other zones foreclose passing through on West 19th or West 20th Streets, respectively. ECF No. 42-12 at 2. This is ridiculous. The streets

⁶ It bears conceding that outside the atrium entrance to the Complex Mr. Frank would likely encounter persons who are simply stopping in to buy a cup of coffee. *See* Exh. 7 at 5-6. This does not alleviate the significant impingement of his right to engage with citizens who are experiencing county government, but further decimates the State’s claim that these buffer zones are reasonable.

at issue are all one-way, and West 19th and West 20th Streets are east-west arteries through downtown Cheyenne, respectively. *Id.* Although the law requires a knowing and willful violation for culpability, any citizen who, like Mr. Frank, happens to know the law is effectively censored from utilizing restricted automotive signage anywhere in Cheyenne during the absentee voting period, lest he merely drive downtown. *See* Wyo. Stat. § 22-26-112(a)(i). The same goes for towns across Wyoming with absentee polling places—by extension, the entire state. *See* Exh. 5. This restriction is thus a nearly perfect parallel to the “proscription that extended across the state and barred entirely a category of constitutional speech” in *Mills*, since Mr. Frank and others are far less likely to speak in the first place than cover up or remove bumper stickers when they drive into a given town. *Frank*, 84 F.4th at 1145 (citing *Mills*, 384 U.S. at 216).

The placement and duration of the absentee buffer zones such as the one at the Complex significantly impinge upon free speech. They foreclose a significant amount of one-on-one communication for two months during an election year and censor automotive signage far beyond the zones. Because the absentee zones are unreasonable and significantly impinge upon free speech, they cannot withstand strict scrutiny even under *Burson*’s modified burden of proof.

II. Wyoming Statutes Section 22-26-113 Is Facially Overbroad

Section 22-26-113 is also facially overbroad under the First Amendment. The analysis is as follows:

“[W]here a statute is facially overbroad—that is, ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep’ . . . —facial invalidation of the statute may be appropriate if it cannot be ‘cured by giving the statutory language a limiting construction[.]’”

Frank, 84 F.4th at 1151 (quoting *U.S. v. Stevens*, 559 U.S. 460, 473 (2010); *Harmon v. City of Norman*, 981 F.3d 1141, 1153 (10th Cir. 2020)). “The overbreadth doctrine ‘enable[s] persons who are themselves unharmed by the defect in a statute nevertheless “to challenge that statute on

the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.”” *Id.* (quoting *Bd. of Trs. Of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484 (1989) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973))). Following the Tenth Circuit’s ruling, the plainly legitimate sweep of the statute is for election day buffer zones that do not completely ban electioneering. *Id.* at 1145–46 (citing *Mills*, 384 U.S. at 216). Compared to this, the absentee zone alone makes the law facially overbroad because it unreasonably censors thousands of people for nearly two months in an election year around a busy government facility versus one day around a dedicated polling place. But there are other unconstitutional applications.

The law’s signature gathering prohibition confronts another reservation in *Burson*. The Supreme Court ruled that banning electoral advocacy was not underinclusive because “there is simply no evidence that political candidates have used *other forms of solicitation* or exit polling to commit such electoral abuses.” 504 U.S. at 207 (emphasis added). Placing 100 yards or even 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*, 486 U.S. at 424. This was supported by ample testimony from Grassfire and by the Jennifer Horal video. *See* ECF Nos. 53-2 at 33-34; 42-18. Although one might conceivably gather signatures for a candidate or an issue already on a ballot during an election cycle, this is unrealistic under Wyoming law: one gathers signatures for candidates, initiatives or referenda in order that they might appear on a future ballot, and so these candidates or items are not on the ballot of the election occurring where signatures might be gathered. *See, e.g.*, Wyo. Stat. §§ 22-24-301 *et seq.* (detailing signature gathering requirements for initiatives), 22-24-401 *et seq.* (detailing signature requirements for referenda), 22-4-402 (detailing petition requirements for forming a new political party); 22-5-301 *et seq.* (detailing petition requirements for independent candidates). Signature

gathering is thus an “other form of solicitation” that must be independently justified by the State, which it cannot do.

Finally, for overbreadth purposes the Court should also consider the extent of the law’s signage ban on election days. This is probably the lowest amount of censorship inflicted by Wyoming’s buffer zones because election day polling places are usually isolated. *See* SOF ¶15. But the record demonstrates that County Clerk Lee’s agents will remove election signs even from private property if they are in a buffer zone. ECF No. 42-11 at 17-18, 23. Private property, too, was reserved by the Supreme Court in *Burson* and the record demonstrates it is an unconstitutional application. 504 U.S. at 210 n.13 (reserving concerns for buffer zones with boundaries that “fall[] in or on the other side of a highway.”). It is a significant impingement of free speech to rip political signage off one’s private property.

“Both [a lack of a private property exemption and the infringement of traditional public fora] substantially burden protected speech beyond what the State has shown is necessary to achieve any compelling public interest.” *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1054–55 (6th Cir. 2015) (finding Kentucky’s buffer zone facially overbroad). The absentee buffer zone, in and of itself, accounts for unconstitutional applications that overwhelm the legitimate sweep of Section 22-26-113. All of its applications are specifically required in the law, so there is no limiting construction that can remove the absentee zones, signature or signage restrictions. Owing to these and other unconstitutional applications, the Court should rule that the law is facially overbroad.

III. The Court May Remedy the Unconstitutional Provisions of Section 22-26-113 in Several Ways

This Court may choose from several remedies following its ruling on the merits, which include but are not limited to those discussed here. Mr. Frank requests that the Court consider severing the unconstitutional provisions or, alternatively, finding the law unconstitutional as

applied to the Complex and other courthouses or, at a minimum, finding the law unconstitutional as applied to the West 20th Street entrance to the Complex.

A. The Court Should Sever the Unconstitutional Provisions from the Law

Section 22-26-113 is part of the Wyoming Election Code, and is thus included in the code's severability provision:

If any provision of this act [§§ 22-1-101 through 22-27-101] or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application; and to this end the provisions of this act are severable.

Wyo. Stat. § 22-27-101. The Wyoming Supreme Court has adhered to statutory severability provisions as “binding directive[s] from the legislature.” *Air Methods/Rocky Mountain Holdings, LLC v. State ex rel. Dep’t of Workforce Servs., Workers’ Comp. Div.*, 432 P.3d 476, 485 (Wyo. 2018); *see also Jones v. State*, 173 P.3d 379, 384 (Wyo. 2007) (favorably discussing a severability provision in federal law). And this Court has severed a provision of Section 22-26-113 before. *See* ECF No. 14-6 at 10-12 (opinion and order in *Nat’l Broadcasting Co. v. Karpan*, C88-0320 (D. Wyo. Oct. 21, 1988)).

The best remedy for the remaining issues is for this Court to sever three portions of the statute:

(a) Electioneering too close to a polling place [1] ~~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 [2], ~~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 [3] ~~and within one hundred (100) feet on all other days~~, of any public entrance to the building in which the polling place is located. This section shall not apply to bumper stickers affixed to a vehicle while parked within or passing through the distance specified in this subsection, provided that:

- (i) There is only one (1) bumper sticker per candidate affixed to the vehicle;
- (ii) Bumper stickers are no larger than four (4) inches high by sixteen (16) inches long; and
- (iii) The vehicle is parked within the distance specified in this subsection only during the time the elector is voting.

Wyo. Stat. § 22-26-113. Brackets 1 and 3 will entirely resolve the unconstitutionality of absentee zones. Bracket 2 will remove the unconstitutional prohibition on signature gathering, a wholly unconstitutional application of anti-electioneering provisions in either an absentee or election day zone.⁷ What will remain of the statute is wholly consistent with the Tenth Circuit’s ruling in this matter. *Frank*, 84 F.4th at 1141–48.

B. Alternatively, the Court Should Rule Section 22-26-113 Unconstitutional as Applied to the Laramie County Government Complex and Other Courthouses

If the Court finds that an absentee buffer zone can be constitutional in some contexts, it should nevertheless rule that the law is unconstitutional as applied to the Complex and other courthouses. *See* ECF No. 42-12 at 2; Exh. 5. As previously discussed, the absentee zone around the Complex unreasonably prohibits not simply electioneering close to a polling place, but myriad government offices—executive, legislative, and judicial bodies—for nearly two months in an election year. SOF ¶10. It censors one-on-one engagement with government officials and citizens, most of whom are present in the Complex for reasons other than voting, significantly impinging free speech. Under this as applied remedy, the State must select a more appropriate “public building which is equipped to accommodate voters from all districts and precincts within the county[.]” Wyo. Stat. § 22-9-125(a)(ii).

⁷ If the Court finds that signature gathering may be prohibited in an election day buffer zone as opposed to an absentee zone, brackets 1 and 3 will resolve the issue.

C. At a Minimum, the Court Should Find the Law Unconstitutional as Applied to the Entrance to the West 20th Street Entrance to the Laramie County Government Complex

Among the places Mr. Frank seeks to engage voters and electioneer is the north entrance to the Complex during absentee voting on West 20th Street. Exh. 7 at 7-8. That entrance is not a direct entrance to the atrium but provides access to the County Clerk's office and courtrooms. SOF ¶14. That entrance is more than 100 feet away from the external entrance to the atrium. ECF No. 42-12 at 2. Unlike the atrium entrance it does not feature a "Vote Here" sign or directions to the atrium entrance. Exh. 7 at 3, 7. Its only feature during absentee voting is a sign taped to the sidewalk that directs "remov[ing] campaign hats, buttons, pins, etc., and [to] cover or turn campaign shirts inside out" just to use that sidewalk. *Id.* at 8-9. This remedy will provide at least some relief for "the most effective, fundamental, and perhaps economical avenue of political discourse[.]" *Meyer*, 486 U.S. at 424. But, with that in mind, the Court should do more.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Frank's motion for summary judgment and enjoin the enforcement of the unconstitutional provisions of Section 22-26-113.

[Remainder of this page intentionally left blank]

Respectfully submitted,

/s/ Stephen 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/ Seth “Turtle” Johnson
Seth “Turtle” Johnson (Wyo. Bar # 7-5748)
SLOW AND STEADY LAW OFFICE, PLLC
1116 W. Farm Ave., P.O. Box 1309
Saratoga, Wyoming 20006
(307) 399-6060
turtle@slowandsteadylaw.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

Dated this 16th day of August, 2024.

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I, Stephen Klein, hereby certify that on this 16th day of August, 2024, 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

RETRIEVED FROM DEMOCRACYDOCKET.COM