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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 RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The most recent amendments to the no-electioneering buffer zones in Wyoming Statutes section 22-26-113 occurred in 2018. *See* ECF No. 119-6. Before the final vote on reconciliation in the Wyoming Senate regarding the current bumper sticker provision, the chairman of the Corporations, Elections and Political Subdivisions Committee quipped that "nobody's going to give a rat's about this, anyway, so let's pass it!" Wyo. Senate Afternoon Session, March 9, 2018, http://wyoleg.gov/2018/Audio/senate/s030918pm1.mp3 (audio at 06:34-08:28). Now in its fifth year, this case proves otherwise. The statute's 100-foot absentee buffer zones are unconstitutional,

the statute is facially overbroad under the First Amendment and, given the unique censorship imposed by the absentee zones, the Court should consider applying traditional strict scrutiny, under which the provision plainly fails.

ARGUMENT

Burson v. Freeman permits reasonable electioneering restrictions that do not significantly impinge upon free speech to protect the right to vote on an election day. 504 U.S. 191, 209 (1992) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986)); *see Minnesota Voters All. v. Mansky*, 585 U.S. 1, 15 (2018) (emphasizing "the unique context of a polling place *on Election Day*." (emphasis added)). No precedent supports the Defendants' (collectively, "the State's") unwritten conclusion that the right to vote may be haphazardly expanded at the cost of free speech. This is especially so given that the law imposes weeks of censorship blanketing various forms of political advocacy on sidewalks and streets around common government facilities that serve functions that have nothing to do with in-person voting and that overwhelm voting activity. This includes the Laramie County Government Complex (the "Complex") and other courthouses. *See Verlo v. Martinez*, 820 F.3d 1113, 1134 (10th Cir. 2016) (quoting *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460, 469 (2009)) ("*Content-based* restrictions [in public fora], however, 'must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.'"). Whether this is analyzed under a holistic application of *Burson*'s modified burden of proof or traditional strict scrutiny, Wyoming's no-electioneering buffer zones around absentee polling places are unconstitutional and Section 22-26-113 is facially overbroad. The Court should deny the State's motion for summary judgment and instead grant John C. Frank's second motion for summary judgment. ECF No. 118.

I. The Absentee Buffer Zones in Section § 22-26-113 Are Unconstitutional

The parties agree that "[w]hen considering whether the absentee buffer zones established by [Section] 22-26-113 are unconstitutional, this Court must consider the geographic scope, temporal scope, and conduct prohibited by the statute." ECF No. 117 at 6 (citing *Frank*, 84 F.4th at 1149). But the State does not address absentee buffer zones holistically—its argument is a divide-and-conquer approach to the law's components that threatens to obscure the problem. *Frank*, 84 F.4th at 1150; *see holistic*, MERRIAM-WEBSTER, ("2 : relating to or concerned with wholes or with complete systems rather than with the analysis of, treatment of, or dissection into parts"). But even the State's piecemeal approach is unconvincing. Wyoming's absentee buffer zones are unconstitutional.

Addressing the geographic scope of the absentee zones, the State focuses strictly on the size of each zone, or "100 feet from the entrance to absentee polling places when in-person voting is available." ECF No. 117 at 7 (citing Wyo. Stat. § 22-26-113). In its brief the State does not address, much less acknowledge, what lies within the area formed by this radius in Laramie County and throughout Wyoming; courthouses and government facilities that serve myriad purposes other than voting. ECF No. 116 at 3 (¶8); *see* ECF No. 119-7. An absentee polling place is not a polling place in the traditional sense because it is integrated into a facility where, among other things, a county commission legislates and enforces local laws, a district attorney and sheriffs execute state and local laws, and courts adjudicate state and local laws. No election day polling places share these characteristics. *See* ECF No. 42-6. It is unreasonable to enact content-based censorship within 100 feet of any entrance to such a facility given their recognized status in free speech jurisprudence as facilitating important public exchanges of ideas. *See U.S. v. Grace*, 461 U.S. 171, 173–74, 179–80 (1983). There is no "'long history, substantial consensus, and . . . common sense'"

basis to claim otherwise. *Contra* ECF No. 117 at 7 (quoting *Frank*, 84 F.4th at 1144–45); *see infra* part III.

The geographic scope of absentee buffer zones also rebukes the State's claim that it is reasonable to proscribe electioneering because it is "the exact same as the conduct prohibited in election day buffer zones[.]" ECF No. 117 at 8. But the conduct differs markedly as to audience: *who* is present in the absentee zones is as distinct as *what*. Mr. Frank would interact with some absentee voters in the buffer zones, but he would predominantly interact with citizens and government officials who are not voting on one of the 56 days of absentee voting. *See McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (Even under intermediate scrutiny, "the government . . . 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'"). It is unreasonable to censor interactions between hundreds of people who do not have the slightest connection to the interests of preventing election fraud or intimidation.[1] This is not only a different form of censorship in kind, but it diminishes the government's "interests in protecting voting", ECF No. 117 at 8, because Mr. Frank (or anyone) cannot readily tell the difference between voters and other citizens, alleviating the historic concern "that political candidates have used campaign workers to commit voter intimidation or electoral fraud." *Burson*, 504 U.S. at 207. The entire rationale for limiting speech per *Burson* is missing here. Even if fraud, intimidation or "less than blatant acts" occur during the absentee voting period, there is ample time—even a day before an election day—to take "remedial action" that is unavailable on election day. *Id.* Moreover, such broader censorship is especially unreasonable when the absentee polling

[1] Because that censorship falls upon one-on-one communication and leafletting, "it imposes an especially significant First Amendment burden." *McCullen*, 4981 U.S. at 489.

place is erected in a facility staffed by law enforcement officers and the county prosecutor and features a walkway to the county jail. *Contra id.*

So, too, does the geographic scope heighten the problem of censoring bumper stickers and automotive signage. Each are, indeed, "'a campaign sign on a car.'" ECF No. 117 at 9 (quoting *Frank*, 84 F.4th at 1147). But in the area surrounding the Complex, or other courthouses, these signs are—as with Mr. Frank's one-on-one interactions—predominantly reaching persons who are not voting on a given day of early absentee voting. Not only is the Complex busy with non-voters and activity bearing no relationship to voting, so are its surrounding streets, with three one-way arteries that pass through downtown Cheyenne. ECF No. 42-12 at 2. The only comparable street censored by election day zones in Cheyenne is Pershing Boulevard owing to zones from the Storey Gym. ECF No. 42-6 at 9. This one example of election day censorship does not support the censorship imposed by absentee zones censorship for 28 days before that election over busy streets. Moreover, as noted in Mr. Frank's opening brief, the effect of this censorship is likely to expand beyond 100 feet, as drivers must either chose to limit their speech to a single bumper sticker or avoid driving downtown for a month before an election. ECF No. 119 at 16-17.

The final component addressed by the State, the absentee zones' temporal scope of 56 days in an election year, has been repeatedly referenced in this response—appropriately, because dovetailing the components of the absentee zone is the only way to have a holistic view of it. *Frank*, 84 F.4th at 1149–50; *see* ECF No. 117 at 11-15. Here, the State repeats its claims that because "voters are physically present at a[n absentee] polling place and waiting for voting machines" the law may implement not only a buffer zone regardless of the other characteristics of the absentee polling place, but may do so for weeks at a time. Similarly, the state repeats that "the same interests that apply to voting on election days apply to in-person voting during the absentee

polling period," no matter the distinctions of how many people are voting and where they are doing it. ECF No. 117 at 11. This is only less convincing in light of the holistic result: 56 days of censorship around a courthouse.

Perhaps understanding this, the State offers that the absentee zone is not 300 feet anymore, but 100 feet. *Id.* at 12-13. Moreover, the absentee zone is not in effect for 90 days in an election year anymore, but 56—closer to two months instead of three. *Id.* at 13. The absentee zones are in effect during "'the same hours as the courthouse on normal business days during the time period allowed for absentee voting.'" *Id.* at 12-13 (quoting Wyo. Stat. § 22-9-125(a)(ii)). This amounts to nine hours a day, from 8:00 am to 5:00 am. This meandering reasonableness argument does not overcome that absentee zones impose a different kind of censorship and not merely a certain degree of it. And it is unconvincing in any event: there is no reason to limit engagement with "city and county employees" to when they "are arriving at work and . . . when [they are] are going home from work" just because one, some or even all of them might decide to vote that day. *Id.* at 13. Moreover, it significantly impinges upon free speech to censor engagement around a busy government facility when it is open, and this impingement is not relieved in any manner by the fact that one might engage around it when it is closed. *Contra id.* at 14.

Holistically, the absentee buffer zones are removed from all of *Burson*'s anchors. They are placed in buildings that ensure voters are surrounded by non-voters and non-voting activity, diluting the concern of "[i]ntimidation and interference" that is further diluted by the presence of security and law enforcement. *Contra Burson*, 504 U.S. at 207. Absentee zones are not "reenactment[s]" of traditional buffer zones, but expansions of a buffer zone's censorship and the length of that censorship. *Id.* at 208. Finally, because the absentee buffer zones only apply before an election day, any problems may be resolved without affecting that election—including with the

300-foot buffer zone that is in effect on actual election days. That is, problems that arise during in-person absentee voting do not pose the threat of "a tainted election[.]"[2] *Id.* at 209. These distinctions and the censorship imposed by absentee buffer zones leaves them unreasonable, and they significantly impinge upon the free speech of thousands of people in the months leading up to an election. Wyoming's absentee zones are unconstitutional under *Burson*.

II. Section 22-26-113 is Unconstitutionally Overbroad

The State asserts that it is "not clear from the amended complaint" whether "[Mr.] Frank intends to bring an overbreadth challenge[.]" ECF No. 117 at 15-16. An overbreadth challenge was appropriately asserted at the outset of this lawsuit and asserted in Mr. Frank's amended complaint because caselaw recognizes a distinct First Amendment overbreadth doctrine. ECF No. 113 at 6-7 (¶¶ 19, 25); *see, e.g.*, *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (plaintiffs need only demonstrate a "substantial risk that application of the provision will lead to the suppression of speech"). This overbreadth doctrine helps preserve the free discussion of governmental and public affairs for all people—not just those in a particular case. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) (the doctrine is employed to ensure protected speech of third parties will not be muted). The parties agree that a law is facially overbroad under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep." ECF No. 117 at 16 (quoting *U.S. v. Stevens*, 559 U.S. 460, 473 (2010)). The parties disagree as to how the Court

[2] The State claims that "counties are required by statute to establish one absentee polling location." ECF No. 117 at 15 (citing Wyo. Stat. § 22-9-125(a)(ii)). But that is only if the county commission "*elect[s] to adopt*" this "alternate procedure[] for casting, collecting and counting absentee ballots" in the first place. Wyo. Stat. § 22-9-125(a) (emphasis added).

should apply the test and, of course, the results of the test here. Section 22-26-113 is facially overbroad.

The State argues that the overbreadth doctrine does not apply where there is "no significant difference between the claim that the statute is invalid because of overbreadth and that the claim that is unconstitutional when applied to the plaintiff's own activities." *Id.* at 16. In support of this, the State cites *D.L.S. v. Utah*. 374 F.3d 971, 976 (10th Cir. 2004). But *D.L.S.* relates solely to a determination of whether the plaintiff had standing to pursue his own First Amendment claims in that challenge. Because D.L.S. could not establish an injury in fact, standing was not met and his pleadings did not support the invocation of overbreadth relief for third parties not before the court. *Id.* Here, Mr. Frank's standing has been established for his own claims and for third parties not before the Court—that is, for people who suffer other unconstitutional applications of Section 22-26-113. *Frank*, 84 F.4th at 1150–52.

On remand, the State seems to feign ignorance. The defendants can readily imagine (though decline to describe) "voter intimidation or election fraud" from a yard sign on a private lot nearly 300 feet away from the entrance of a polling place on an election day, but they cannot fathom that the law applies to thousands of individuals for 58 days[3] in an election year and in ways that are distinct from how the law censors Mr. Frank. ECF No. 117 at 16 ("[Mr.] Frank's overbreadth challenge appears to rely upon the same circumstances as his as-applied challenges."); *id.* at 17 ("Voter intimidation or election fraud . . . [can] originate[] from private property within a buffer zone."). In fairness, the State hedges a little and allows that Mr. Frank might argue the law is overbroad "because it regulates speech on private properties." *Id.* at 17; *see also* ECF No. 42-6 at

[3] 58 days is the total sum of the 28 days before a primary election and general election for in-person absentee voting with the election days themselves.

8, 9 (election day buffer zones covering private property). He does. *See* ECF No. 119 at 19. But that is hardly the end of the challenge: in an overbreadth claim the Court should consider any other citizen who is censored by the law, how they are censored and whether such censorship is legitimate.

Overbreadth challenges too often amount to a numerical analysis: that is, courts determine if there are unconstitutional applications, add them up, and then compare the total to a number that accounts for the law's plainly legitimate sweep. But in the broader context of overbreadth jurisprudence courts frequently take—to borrow a bit from *Burson*—a more common-sense view of a given law to determine if a law is overbroad. The core focus of an overbreadth inquiry is whether a challenged law damages a substantial amount of speech "not tied to the Government's interest. . . ." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002). In *Ashcroft*, the Supreme Court did not perform a numerical analysis as to how an anti-child pornography law might be appropriately applied.[4] Imposing that burden on the challenging party would make the review of such speech restrictions all but impossible. A numerator and denominator approach to overbreadth might find hundreds of thousands of legitimate applications of the law applied to child pornography but perhaps only dozens of examples of its inappropriate reach. But those few examples of censorship can occupy the most important point of concern for overbreadth analysis. *See id.* at 246–48 (noting that recent Academy Award winning films could run afoul of a federal obscenity law); *see also U.S. v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014) ("An imprecise law that criminalizes access to Nabokov's *Lolita* or Woody Allen's *Manhattan* will not survive constitutional scrutiny even if it also bans access to actual hardcore images of underage victims.").

[4] Neither did the Supreme Court do so in *Stevens*, where it found myriad applications of a prohibition against "depictions of animal cruelty" unconstitutional. 559 U.S. at 464, 481–82.

In *Ashcroft*, the Supreme Court invalidated the challenged law on its face under the overbreadth doctrine.

Several circuits caution that an examination of overbreadth should not be performed as an exercise in "mathematical calculation or numerical comparison." *Free Speech Coalition, Inc. v. Attorney General, U.S.*, 787 F.3d 142, 161 (3d Cir. 2015) (overruled on other grounds). The Sixth Circuit explains that substantial overbreadth is not determined by "placing, say, the number of overall applications of the statute in the denominator and the number of unconstitutional applications of the statute in the numerator." *Connection Distributing Co. v. Holder*, 557 F.3d 321, 340 (6th Cir. 2009). The Supreme Court has never called for this kind of artificial, mathematical calculation—and for good reason. Requiring challengers to pore over each and every legitimate application of the law is a burdensome, perhaps impossible, exercise that is more appropriately placed upon the government body defending the law's constitutionality. Rather, common sense examinations of the numerical comparisons along with assessments of relative burdens and scope of the law's application make up the staff of overbreadth analysis.

In considering the plainly legitimate sweep of the law, *Burson* establishes that an electioneering buffer zone for an election day is permissible. 504 U.S. at 193. It did not rule that electioneering prohibitions that last a total of 56 days in an election year are similarly permissible; indeed, few (if any) such prohibitions even existed in the early 1990s. *See infra* part III. *Burson* reached its conclusion by establishing a history and tradition of applying day-of-the-election electioneering bans. 504 U.S. at 206. First Amendment caselaw informs this Court that the "history and tradition of regulation" are relevant when considering the scope of First Amendment protection. *See Williams-Yulee v. Florida Bar*, 575 U.S. 433, 446 (2015); *see also Burson*, 504 U.S. at 206. History and tradition within First Amendment caselaw does not support weeks-long

bans of political speech. *See infra* part III. Thus, Wyoming's ahistorical approach to banning electioneering speech for 56 days in an election year is inconsistent with the history and tradition of regulation in this area. In any event, Wyoming's unsupported approach sweeps broadly beyond *Burson*'s permissible election-day formula and burdens a substantial amount of constitutionally protected speech.

Even if the Court rules that *Burson* permits the application of its modified burden of proof to censorship beyond election days, the number of unreasonable applications of Section 22-26-113 overwhelm its reasonable applications. A non-exhaustive list of unconstitutional applications can begin within the Complex or any absentee polling place. While Mr. Frank seeks to electioneer on the sidewalks and streets that are adjacent to the Complex—censorship that applies to anyone who wishes to do so, along with signature gatherers—the zones also prohibit anyone *inside* the Complex from electioneering in any manner. Although government employees are generally restricted from electioneering while serving in an official capacity, they are human and are allowed to some personal conversations in the workplace. So, on a lunch break or during an informal conversation with a fellow employee around the water cooler, the law unreasonably prohibits one from saying "You should vote for Judge Lee" or even asking "who do you think will win the election?" The latter, after all, is "canvassing or polling of voters[.]" Wyo. Stat. § 22-26-113. The law's signature gathering prohibition applies, too, and even more broadly, censoring "the soliciting of signatures to *any* petition[.]" *Id.* (emphasis added). So, this prohibits not only election-related petitions, but petitions relating to labor conditions or other matters that have nothing to do with the election or voting. Such censorship exists throughout the Complex for 56 days in an election year. These examples alone indicate the extreme overbreadth of the absentee zones. But even numerically, they add up to thousands, perhaps tens of thousands, of unreasonable applications

that significantly impinge upon free speech compared to reasonable regulation that might occur within an absentee buffer zone.

Citizens fare no better inside the Complex: someone wishing to attend a County Commission meeting in the weeks before an election can park on West 19th Street, enter the Complex through the entrance on that street, walk upstairs, attend the meeting, and then leave through the same building entrance, having never laid eyes on the absentee polling place, its Carey Avenue entrance or the external buffer zone on Carey Avenue. If she's wearing a "Make America Great Again" t-shirt, she risks a misdemeanor charge. A private defense attorney might go to the Complex for a short meeting with a prosecutor outside of a courtroom by parking on West 20th Street, entering the Complex through that entrance and proceeding upstairs, also out of view of anyone in the atrium polling place or its Carey Avenue buffer zone. If he has on a small "Vote Libertarian" lapel pin, it might be an even shorter meeting with the prosecutor than he intended. Such censorship falls upon every citizen having business inside the Complex for 56 days in an election year, most of which has nothing to do with the in-person absentee voting occurring in the atrium for an election that is days or even weeks away.

Outside the Complex, the absentee zones censor apparel as unreasonably and significantly as they censor bumper stickers or other automotive signage. *See* ECF No. 119 at 16-17 (noting that the difficulty of concealing a bumper sticker for purposes of driving past an absentee polling place makes one far less likely to have such speech on one's car in the first place). County Clerk Lee's specific warning outside the Complex requires citizens walking past on West 19th Street, West 20th Street or Carey Avenue to "remove campaign hats, buttons, pins, etc., and cover or turn campaign shirts inside out." ECF No. 119-9 at 9. This applies to citizens who are just going about their everyday lives, walking about downtown Cheyenne while wearing a "campaign shirt" that

might read, for example, "Kamala Harris For the People." Even if they are just walking by the Complex, within 100 feet of an entrance they must "cover" the shirt (a more difficult task in August before the primary, since it is summer, when citizens will often wear just one layer of clothing) or "turn [it] inside out." *Id.*[5] These requirements are unreasonable and significantly impinge speech, along with the alternative of requiring these citizens turn around and use a different sidewalk just to get to where they are going.

The satellite absentee polling places also come equipped with satellite buffer zones for a few hours on given days during absentee voting before both the primary and general election. ECF No. 117 at 4, 15. Though of shorter duration, these, too, raise problems akin to the Complex and absentee polling places generally. If one were going to go swimming or to use a meeting room at the Albin Community Center, he might be turned away or threatened with prosecution for wearing the wrong apparel, owing to the pop-up polling place. It is no better at the Laramie County Library, where the same direct and indirect forms of election advocacy are shut down in and around the building because of a satellite polling place in the Cottonwood Room. These facilities also serve functions mostly unrelated to elections and the zones censor patrons who are mostly there for purposes unrelated to the election or voting—that is, those who could be reached with political speech that does not implicate election fraud or intimidation. The buffer zones around satellite absentee polling places indicate that censorship is plainly taken for granted by the State. *McCullen*, 573 U.S. at 486 ("The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least

[5] The sight of citizens making the adjustment of turning a campaign shirt inside out on a public sidewalk might raise more immediate concerns than voter fraud or election intimidation. But these are not implicated by *Burson*.

resistance."). The unconstitutional applications of the absentee buffer zones in Section 22-26-113 leave the law unconstitutionally overbroad under traditional strict scrutiny or *Burson*'s modified burden of proof.

Turning to the election day zone, as noted previously, the one area the State addressed in its opening brief as to overbreadth that does not apply to Mr. Frank is censorship of private property. ECF No. 117 at 17-18.[6] They cite to footnote 11 of the plurality opinion in *Burson* but do not explain how yard signs on private lots "physically interfere[] with electors attempting to cast their ballots." *Burson*, 504 U.S. at 209 n.11; *see* ECF No. 117 at 17. Instead, the State broadens the argument to suggest that such a challenge requires the elimination of any buffer zone "for a *polling place* . . . located on private property, such as church buildings[.]" ECF No. 117 at 18 (emphasis added). Mr. Frank has made no such argument in years of litigation, and it is plain that *Burson* reserved the question of censorship of private property *adjacent* to the polling place. *See Burson*, 504 U.S. at 210 n.13.[7] This matter has a robust "factual record to support [the] contention that the statute has been applied to reach such circumstances[,]" though this is unnecessary for purposes of an overbreadth challenge. *Id.*; *see* ECF No. 119 at 19. It is an unreasonable application of a no-electioneering law to uproot yard signs on private property across the street from a polling place, be it on election day or during in-person absentee voting.

[6] This portion of the State's brief is very similar to a recent advisory opinion from the attorney general of Kansas. Kan. Att'y Gen. Op. No. 2024-3, 2024 WL 1200171 at *6 (Mar. 4, 2024).

[7] Beyond *Burson*, the Supreme Court's body of First Amendment jurisprudence generally recognizes that signs placed on private property represent a "venerable means of communication" that is highly protected. *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994). Laws barring an "entire medium of expression[,]" such as political yard signs, are commonly found to be overbroad and particularly offensive to the First Amendment. *Id.* at 55.

The censorship of third parties by the election day zone does not end with yard signs. The State glibly summarizes this as "potential" censorship but has disclaimed no manner of enforcement. ECF No. 117 at 18. So, bumper stickers or signage on one's own car are a crime even if it is parked in a private driveway or parking lot that is off the polling place property but within the zone. *See* ECF No. 42-6 at 8, 9. The football-field-sized radius *enters* private homes and other facilities, too. *Id.* A casual conversation about the election between neighbors who happen to come across one another at the NAPA Auto Parts in Pine Bluffs (at 511 West 8th Street) on an election day is criminalized. *Id.* at 8. Plenty of family conversations in houses across from the Storey Gym on East 28th Street in Cheyenne are censored, too. *Id.* at 9. If the local paper contains endorsements on election day, delivery to those homes "when voting is being conducted" is a crime. *Id.* The only thing standing in the way is the State's motivation to enforce, but that is not part of the overbreadth analysis. *See Ashcroft*, 535 U.S. 234, 257–58; *see also Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) ("[T]he value of a sword of Damocles is that it hangs—not that it drops."). Overbreadth invalidation is particularly appropriate here given that *Burson* reserved the issue of censorship occurring on private property adjacent to polling places. 504 U.S. at 210 n.13.

Section 22-26-113 imposes a substantial amount of unconstitutional censorship compared to its plainly legitimate sweep. Whatever that legitimate sweep, it does not include the censorship of a citizen handing out literature outside a courthouse weeks before an election. This and other examples of the censorship imposed in the name of election integrity for weeks leading up to an election—from bumper stickers to election apparel—are as jarring as censoring the movie *American Beauty* in the name of combatting child pornography. *See Ashcroft*, 535 U.S. at 256. Section 22-26-113 is unconstitutionally overbroad.

III. The Court Should Apply Traditional Strict Scrutiny to Absentee Buffer Zones in Section 22-26-113

The State does not establish the reasonableness of absentee buffer zones in its briefing and barely addresses its impingements of free speech, bearing *Burson* as limitless dogma. This is not appropriate for any precedent that requires strict scrutiny, even with a modified burden of proof. Moreover, *Burson* itself suggests that this Court should apply traditional strict scrutiny to absentee buffer zones because Wyoming's 56-day absentee buffer zones are not of a similar pedigree as the election-day buffer zones upheld in *Burson*.

The State neglected to address whether *Burson* and its progeny permit the application of the modified burden of proof to absentee buffer zones. The State notes, twice, that "[e]very state regulates electioneering near polling places." ECF No. 117 at 6 (citing *Frank*, 84 F.4t at 1127 n.5); *id.* at 9. The State also notes that "[a]lmost all states have early voting or in-person absentee voting." *Id.* at 12 n.3 (citing *Early In-Person Voting*, NAT'L CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/elections-and-campaigns/early-in-person-voting). But the State does not establish, much less assert, whether other states regulate electioneering around early voting or in-person absentee voting—a history or consensus, for purposes of *Burson*.

Other states do have absentee buffer zones. In the one case that has addressed them "front and center," *Lyons v. Secretary of the Commonwealth*, the highest court in Massachusetts identified 23 states with forms of absentee buffer zones, including the commonwealth. 192 N.E.3d 1078, 1102 (Mass. 2022). What the court there neglected to do, as the State does here, was to address the history of such zones. Massachusetts did not adopt an absentee buffer zone until 2022. *See* **Exhibit 1-J.** Although Mr. Frank's counsel has been unable to determine the date of enactment of some of the other state statutes, the earliest of the sampling in *Lyons* appear to date from the mid 1990s to, like Massachusetts, much more recently. *Id.* This makes sense, as in-person absentee

and early voting was uncommon until the 1980s. ECF No. 119 at 2 (¶¶2-3). Absentee buffer zones are thus not of historic vintage. With that in mind, the "*long, uninterrupted* and prevalent use of [election day buffer zone] statutes" that the *Burson* plurality relied upon falters, at a minimum. 504 U.S. at 208 (emphasis added). "This practice, relatively new to . . . elections and still not universally adopted, does not compare well with the traditions deemed worthy of our attention in prior cases." *Republican Party of Minnesota v. White*, 536 U.S. 765, 786 (2002) (citing *Burson*, 504 U.S. at 205–06). Below is a breakdown of each statute cited in *Lyons*:

State	Statute	Year and Bill Number for Absentee / Early Voting Buffer Zones
Arkansas	Ark. Code § 7-1-103(a)(8)	1997 Arkansas Laws Act 1121 (H.B. 1041) **Exhibit 1-A**
California	Cal. Elec. Code § 18370(a)	1998 Cal. Legis. Serv. Ch. 554 (S.B. 7) **Exhibit 1-B**
Colorado	Colo. Rev. Stat. § 1-5-105(1):	2013 Colo. Legis. Serv. Ch. 185 (H.B. 13-1303) **Exhibit 1-C**
Florida	Fla. Stat. § 102.031(4)(a)-(b)	2005 Fla. Sess. Law Serv. Ch. 2005-277 (H.B. 1567) **Exhibit 1-D**
Hawaii	Haw. Rev. Stat. § 11-132(a)	2019 Hawaii Laws Act 136 (H.B. 1248) **Exhibit 1-E**
Indiana	Ind. Code § 3-14-3-16(c)	2021 Ind. Legis. Serv. P.L. 209-2021 (H.E.A. 1485) **Exhibit 1-F**
Kansas	Kan. Stat. § 25-2430	2001 Kansas Laws Ch. 125 (S.B. 128) **Exhibit 1-G**
Kentucky	Ky. Rev. Stat. § 117.235(3)	2021 Kentucky Laws Ch. 197 (HB 574) **Exhibit 1-H**
Louisiana	La. Rev. Stat. § 18:1462	1995 La. Sess. Law Serv. Act 300 (H.B. 1950) **Exhibit 1-I**
Massachusetts	Mass. Gen. Laws ch. 54, § 65	2022 Mass. Legis. Serv. Ch. 92 (S.B. 2924) **Exhibit 1-J**

State	Statute	Year and Bill Number for Absentee / Early Voting Buffer Zones
Nebraska	Neb. Rev. Stat. § 32-1524	2006 Nebraska Laws L.B. 940 **Exhibit 1-K**
Nevada	Nev. Rev. Stat. § 293.361(1)	(Unknown)
New York	N.Y. Elec. Law § 8-104(1)	2019 Sess. Law News of N.Y. Ch. 6 (S. 1102) **Exhibit 1-L**
North Carolina	N.C. Gen. Stat. § 163-166.4(e)	2007 North Carolina Laws S.L. 2007-391 (H.B. 1743) **Exhibit 1-M**
Oregon	Or. Rev. Stat. § 260.695(3)	2001 Oregon Laws Ch. 805 (H.B. 2584) **Exhibit 1-N**
South Carolina	S.C. Code § 7-25-180	2022 South Carolina Laws Act 150 (S.108) **Exhibit 1-O**
South Dakota	S.D. Codified Laws § 12-18-3	2014 South Dakota Laws Ch. 71 (HB 1074) **Exhibit 1-P**
Utah	Utah Code § 20A-3a-501	2020 Utah Laws Ch. 31 (H.B. 36) **Exhibit 1-Q**
Vermont	Vt. Stat. tit. 17, § 2508(a)	2017 Vermont Laws No. 50 (H. 512) **Exhibit 1-R**
Washington	Wash. Rev. Code § 29A.84.510	2011 Wash. Legis. Serv. Ch. 10 (S.S.B. 5124) **Exhibit 1-S**
West Virginia	W. Va. Code § 3-9-9	2017 West Virginia Laws Ch. 83 (H.B. 2364) **Exhibit 1-T**
Wisconsin	Wis. Stat. § 12.03(2)	2005 Wisconsin Senate Bill No. 612, Wisconsin Ninety-Seventh Legislature - 2005-2006 Regular Session **Exhibit 1-U**

None of these statutes have even been assessed holistically, as is now required of this Court. But their emergence after *Burson*, censoring core political speech at various public facilities *before* an election day, is distinct enough to require traditional strict scrutiny of absentee buffer zones around courthouses such as the Complex and throughout Wyoming.

Traditional strict scrutiny is easy enough to apply here. Content-based laws against electioneering must be narrowly tailored to a compelling governmental interest, meaning it must be the least restrictive means of regulation. *W. Watersheds Project v. Michael*, 353 F. Supp. 3d 1176, 1187 (D. Wyo. 2018). Here, censorship within the absentee zone is not even close. One can protect ingress and egress into the Complex—more appropriately, strictly the atrium—with a shorter, content-neutral restriction that prevents anyone from blocking the doors for any reason. Even less restrictive than that, Wyoming law would place absentee polling places in locations akin to election day polling places instead of the Complex. Moreover, the longevity of absentee voting means that people who misbehave can be subjected to "individual prosecutions and injunctions" without any effect on the election, owing in part to the election day zone, negating any reason to have a buffer zone anywhere during absentee voting. *McCullen*, 573 U.S. at 494 (applying intermediate scrutiny).

Wyoming could embrace any number of other alternative, less restrictive means to protect the integrity of its elections at absentee polling places. The State may elect to enhance its polling place security efforts to better monitor voter intimidation and fraud. It could launch election integrity campaigns for the public to better understand their rights and to learn about resources available to them. Wyoming could also improve its mechanisms for responding to and reporting voter intimidation or fraud, like setting up hotlines, mobile phone apps, or implementing other rapid-response systems. What Wyoming lacks the authority to do is take the easy and unconstitutional way out by banning speech broadly for 56 days a year. *McCullen*, 573 U.S. at 486 ("The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience.").

Particularly relevant for this Court's attention in weighing the law under strict scrutiny is the relative burden described in this briefing. Indeed, the greater body of First Amendment case law demonstrates that even short, temporal bans on speech are rarely upheld given their severity. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 337–41 (30- and 60-day ban on particular electioneering communication advertisements facially invalid); *New York Times Co. v. U.S.*, 403 U.S. 713 (1971) ("Pentagon Papers" denial of temporary injunctions barring speech given the temporal importance of such discussion); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (bans on picketing during temporary labor disputes invalid); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (finding invalid a judicial gag order that prohibited press entities from publishing certain information before and during a trial). It is an important observation that timeliness of speech is a protected First Amendment consideration. Just as the state is concerned about election integrity, Mr. Frank is concerned about being free to speak at places and times that make the exercise of his rights meaningful, not ornamental.

The State argues that citizens still enjoy the right to all sorts of ineffectual speech. ECF No. 117 at 13. Indeed, people may electioneer at 5:00 AM or 9:00 PM when government facilities are veritable ghost towns. Similarly, the State argues that people might exercise their First Amendment rights in places where no one cares about their speech, like the local 7-Eleven store. ECF No. 117 at 14. This all ignores the primary importance of the First Amendment and its relevance, particularly in a less-populated state like Wyoming. Speakers have the right to choose when and where they speak—their freedom of speech is not less important than government rules. *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Being able to interact with fellow citizens at central civic hubs and in traditional public fora is important to Mr. Frank and is protected by the First Amendment. Under strict scrutiny, the State should have employed less restrictive means to police

its concerns about election integrity than to enforce 56-day blackout periods in places that are integral to public debate.

CONCLUSION

"[I]t is sufficient to say that in establishing a 100–foot [election day] boundary, Tennessee is on the constitutional side of the line." *Burson*, 504 U.S. at 211. So, too, did the Tenth Circuit rule as to Wyoming's 300-foot election day boundary. *Frank*, 84 F.4th at 1146. But, holistically, the components of the absentee buffer zone in Section 22-26-113 add up to a 2-month, 100-foot radius of censorship around all entrances to a courthouse and myriad other government offices. This falls on the unconstitutional side of the line. For the foregoing reasons, the Court should deny the State's motion for summary judgment (ECF No. 52) and grant Mr. Frank's second motion for summary judgment (ECF No. 118).

Respectfully submitted,

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Dated this 30th day of August, 2024.

CERTIFICATE OF SERVICE

I, Stephen Klein, hereby certify that on this 30th day of August, 2024, the foregoing document and its attachment 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