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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

JOHN C. FRANK, Plaintiff, vs. 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

STATE DEFENDANTS' OPPOSITION TO
PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

Defendants Charles Gray, Wyoming Secretary of State, and Sylvia Hackl, Laramie County District Attorney, (State Defendants) submit this opposition to John C. Frank's second motion for summary judgment [ECF Nos. 118-19] pursuant to this Court's May 7, 2024 scheduling order. [ECF No. 107].

I. Introduction

This Court should deny Frank's second motion for summary judgment because Wyoming's prohibition on electioneering within absentee buffer zones is constitutional

both facially and as-applied to Frank. Furthermore, this Court should deny Frank's motion for summary judgment because Wyo. Stat. Ann. § 22-26-113 is not unconstitutionally overbroad.

II. Legal Standard

Summary judgment is appropriate under Rule 56(a) when the movant shows "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine 'if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way,' and it is material 'if under the substantive law it is essential to the proper disposition of the claim.'" *Van Dam v. Town of Guernsey*, 2021 WL 1774137, at *3 (D. Wyo. May 4, 2021) (quoting *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013)). When reviewing a motion for summary judgment, "the Court views the record and all reasonable inferences that might be drawn from it in the light most favorable to the party opposing summary judgment." *Id.* (citation omitted).

"Once a prima facie showing is made, the burden shifts to the party opposing the motion to present specific evidence, not mere allegations or denials, showing that there is a genuine issues of material fact. *Id.* "Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another." *Garcia v. Dep't of Health & Social Servs.*, 2020 WL 5629784, at *1 (D. Wyo. Aug. 25, 2020).

III. Argument

A. Wyoming Statute § 22-26-113's buffer zones are constitutional.

In addition to the arguments in support of Wyo. Stat. Ann. § 22-26-113 provided in State Defendants' supplemental brief [ECF No. 117], State Defendants also assert the following arguments in response to Frank's second motion for summary judgment.

1. This Court should apply the test articulated by the plurality in *Burson v. Freeman*.

In his motion, Frank argues that this Court should not apply the *Burson v. Freeman* analysis when considering whether regulations around absentee polling places are constitutional. [ECF No. 119 at 8-10]; 504 U.S. 191 (1992). Specifically, Frank argues that the "lack of history, consensus or common sense" that supported the *Burson* plurality's decision does not exist for restrictions around absentee polling places. [ECF No. 119 at 9]. Moreover, Frank asserts because Wyoming did not allow in-person absentee voting until 2006, the *Burson* test does not apply to absentee buffer zones and, instead, this Court should apply "traditional strict scrutiny." [ECF No. 119 at 9-10]. But Frank's argument are contrary to the rationale underlying the *Burson* decision.

In *Burson*, the plurality recognized that States have a "compelling interest in protecting voters from confusion and undue influence" and in preserving the integrity of the electoral process. 504 U.S. at 199; *Frank v. Lee*, 84 F.4th 1119, 1145 n.21 (10th Cir. 2023). Based on the country's history and rationale for regulating electioneering, the Court held that "some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud." *Burson*, 504 U.S. at 206.

Furthermore, the *Burson* plurality applied a modified burden of proof because "requiring proof that [the regulation] is perfectly tailored to deal with voter intimidation and election fraud 'would necessitate that a State's political system sustain some level of damage.'" *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986)). Importantly, the modified burden "applies only when the First Amendment right threatens to interfere with the act of voting itself . . . [or] in which the challenged activity physically interferes with electors attempting to cast their ballots." *Id.* at 209 n.11.

To the extent Frank asserts that the same State interests do not apply to in-person voting during the absentee polling period, this Court should reject his argument. The State has the same interests in protecting voters and preserving the integrity of the electoral process whether voters are casting ballots in person on election day or in person during the absentee polling period. Furthermore, to the extent Frank asserts that the *Burson* plurality's rationale that some restricted zone is necessary to protect the state's interests **only** applies to voting on an election day, that is not supported by *Burson*.

Based on the history of elections in the country, the *Burson* plurality concluded that some restricted zone around in-person voting is necessary to "prevent[] voter intimidation and election fraud." *Id.* at 192. Though Wyoming did not allow in-person absentee voting until 2006, the same state interests apply and the same rationale for establishing a buffer zone around absentee polling places applies because electioneering near an absentee polling place presents the same threats to "physically interfer[ing] with electors attempting to cast their ballots" as on election day. *Id.* at 209 n.11. Accepting Frank's position would require the State to undergo some harm to its electoral system before establishing a

restricted zone around absentee polling places—the exact consequence that the *Burson* plurality sought to avoid when it adopted the modified burden of proof. *See id.* at 209. As a result, this Court should reject Frank's argument that traditional strict scrutiny applies to the absentee buffer zones created by Wyo. Stat. Ann. § 22-26-113 and, instead, apply the test articulated in *Burson*.

2. Applying *Burson*, the location of absentee polling places does not render Wyo. Stat. Ann. § 22-26-113 unconstitutional.

Second, Frank argues that the placement of absentee polling is unreasonable and unconstitutional. [ECF No. 119 at 11-12]. Frank appears to argue that the Wyoming Legislature's decision to allow county commissioners to establish in-person absentee voting at courthouses that include other county offices is unconstitutional. [ECF No. 119 at 11-12]. Frank contends that absentee polling places located at courthouses "censor the political speech of hundreds of people . . . who have no connection whatsoever to the voting occurring in one room of a large public facility." [ECF No. 119 at 11]. Frank also takes issue with the location of the Complex because it is near downtown Cheyenne rather than a remote location in the county. [ECF No. 119 at 11-12].

Related to establishing absentee polling places, Wyoming law provides:

> The board of county commissioners may elect to adopt one (1) or both of the alternate procedures for casting, collecting and counting absentee ballots:
>
> > (i) Direct that absentee ballots shall be delivered to and counted by at least three (3) judges appointed for that purpose under W.S. 22-8-107 instead of the procedures specified in this chapter for the delivery of absentee ballots to the separate precincts or designated counting centers. However, if this alternate procedure is used, the judges shall record the results

> by precinct and shall immediately certify the results to the county clerk;
>
> (ii) Direct that an absentee polling place 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. If this alternate procedure is used, 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.

Wyo. Stat. Ann. § 22-9-125(a).

During the absentee polling period for the 2024 primary election, most counties declared the county courthouse as the absentee polling place. *See* [ECF No. 119-7 at 1-2]. The fact most absentee polling places are located in courthouses or county governmental buildings is not dispositive of whether the absentee buffer zones established by Wyo. Stat. Ann. § 22-26-113 are reasonable. As noted in State Defendants' supplemental brief, there are numerous locations immediately adjacent to the Complex that Frank or any person may electioneer during the absentee polling period when voting is available. [ECF No. 117 at 8; ECF No. 42-12].

Moreover, absentee buffer zones are measured from the public entrances to the polling place and, relevant to the Complex, the map in ECF 42-12 identifies three overlapping buffer zones. [ECF No. 42-12]. If the three buffer zones did not overlap, each

would cover 31415.93 square feet for a total of 94,247.79 square feet.[1] The total area of Laramie County is approximately 2,685 square miles or approximately 74,937,000,000 square feet.[2] Of the total county area, the absentee buffer zones encompass approximately one millionth (0.000001257) of the total area in the county. Because the zones around the Complex overlap, the total restricted area around the complex is even smaller. [ECF No. 42-12]. Regulating electioneering within a singular location in a county where in-person absentee voting occurs during the absentee polling period is reasonable and does not even begin to approach the type of absolute ban the *Burson* plurality recognized was unconstitutional. *See Burson*, 504 U.S. at 210-11. The fact that the building in which the polling place is located may also include other county offices does not change the nature of the restriction or make it a more restrictive regulation in kind.

Frank also appears to argue that the presence of law enforcement officers in or nearby the Complex negates the State's interest in regulating electioneering near absentee polling places. [ECF No. 119 at 12]. But Frank misinterprets *Burson*'s reference to police presence and how that factor applies when analyzing whether a regulation is constitutional.

In *Burson*, the respondents argued that the buffer zones were overinclusive because the State's compelling interests were satisfied by a criminal statute imposing a misdemeanor if an individual interfered with an election or used violence or intimidation

[1] The area of a circle is calculated buy the following equation: Area = π*Radius^2. The radius of the absentee buffer zones is 100 feet. So the total area of three non-overlapping zones is 94,247.79 square feet.

[2] United States Census Bureau, *Laramie County, Wyoming,* https://data.census.gov/profile/Laramie_County,_Wyoming?g=050XX00US56021 (last visited Aug. 28, 2024).

to prevent voting. *Id.* at 206. The *Burson* plurality disagreed and held that a statute criminalizing intimidation and interference only addressed concerns with the "most blatant and specific attempts" to interfere with elections. *Id.* at 207. The plurality further noted "because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process . . . many acts of interference would go undetected. These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken." *Id.*

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

The fact that Wyoming does not prohibit police presence at polling places or that the Complex is connected to the county jail does not change the reasonableness of the electioneering statute or affect whether the prohibitions imposed by the statute significantly impinge upon Frank or any other person's First Amendment rights. Furthermore, law enforcement's presence at the Complex does not negate the State's ability to regulate

electioneering near absentee polling places. Accordingly, this Court should reject Frank's argument related to police presence within or near absentee buffer zones.

Finally, Frank argues that an elector's possible interaction with other people who may be inside the Complex or nearby the physical location of in-person absentee voting renders the absentee buffer zone unreasonable and unconstitutional. [ECF No. 119 at 12-13]. Frank appears to argue that non-voting activity that may or may not occur within the within the Complex "undermine[s]" the State's interest in regulating electioneering near the Complex while in person absentee voting is available. [ECF No. 119 at 13]. But the activity prohibited within the absentee buffer zone—electioneering—is limited to only that activity that could "physically interfere[] with electors attempting to cast their ballots" and is tailored to protect voters from confusion and undue influence and preserve the integrity of the electoral process *Burson*, 504 U.S. at 199, 209 n.11; Wyo. Stat. Ann. § 22-26-113(a) (defining electioneering to include "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"). As the Supreme Court recognized in *Minnesota Voters Alliance v. Mansky*, voting in person is a "time for choosing, not campaigning." 585 U.S. 1, 15 (2018). Thus, State's regulation of electioneering activities near absentee polling places is reasonable, despite the presence of a café or other county officials' offices in the nearby vicinity.

3. Frank's argument that in-person absentee voting does not implicate the same state interests is misplaced.

Third, Frank argues that the temporal length of the absentee buffer zone makes it unreasonable and unconstitutional because "[n]either fraud nor 'last-minute misinformation' are implicated in a 28-day window." [ECF No. 119 at 13-14]. In support, Frank asserts that "any instances of actual voter intimidation or fraud during the absentee period will not meaningfully undermine a given election" because individuals subjected to malfeasance can simply "vote in another manner on another day and have that vote count in the very same election." [ECF No. 19 at 13-14]. But Frank's unsupported assertions disregard the significant State interests in preserving election integrity and protecting voters from the harassment and confusion that buffer zones near polling places are intended to prevent. *See supra* pages 3-5.

The Supreme has recognized that "[c]asting a vote is a weighty civil act' and that states may enact reasonable restrictions to protect voters from campaign-related advocacy at polling places. *Mansky*, 585 U.S. at 15. Despite acknowledging the Supreme Court's position, Frank appears to contend that electors exercising their right to vote in person during the absentee polling period are not entitled to the same protections as those casting votes in person on an election day. [ECF No. 119 at 13-15]. But Frank cites no authority to support his position, but instead relies on his unsupported assertion that the legal ability to cast a vote in a different manner (mail-in absentee voting), at a different location, or on a different day somehow negates the State's interests. Furthermore, no factual basis exists to support Frank's assertion that voters can exercise their right to vote in another manner

or a different day—this assertion is pure speculation based on the legal ability to do so. Moreover, Frank's position directly conflicts with the rationale underlying the *Burson* plurality's decision.

When the Wyoming Legislature authorized in-person absentee voting, it also extended Wyo. Stat. Ann. § 22-26-113 to apply to absentee polling places. [ECF No. 42-4 at 3]. This extension demonstrates that the Wyoming Legislature sought to afford the same protections for electors exercising their right to vote in person during the absentee polling period as those exercising their right to vote in person on election day, with the exception of reducing the size of the buffer zone during the absentee polling period in 2018. 2018 Wyo. Sess. Laws 237-38. The Wyoming Legislature's decision to extend the same protections signals its understanding that the same State interests apply to voting in-person during the absentee polling period as on election days. Though Frank contends that harassment or voter confusion during the absentee polling period would not "meaningfully undermine a given election," the Wyoming Legislature disagreed and established buffer zones around absentee polling places to protect voters and maintain the integrity of the electoral process. [ECF No. 119 at 13-14].

Furthermore, Frank's reliance on *McIntyre v. Ohio Elections Commission* to support his position that the state's interests in regulating electioneering on election day is not applicable to the absentee polling period is not persuasive. *McIntyre* involved an Ohio law that prohibited the distribution of anonymous campaign literature at any time. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 349-51 (1995). Reviewing the regulation under exacting scrutiny, the Supreme Court held that the Ohio's prohibition on **all anonymous**

election-related speech was not narrowly tailored to the State's interests in prohibiting fraudulent campaign material. *Id.* at 357.

McIntyre involved the absolute prohibition on anonymous campaign literature similar to the absolute bans rejected in *Mills v. Alabama*, 384 U.S. 214 (1966) and *Meyer v. Grant*, 486 U.S. 414 (1988). Unlike those cases, absentee buffer zones in Wyoming are only in effect for the limited timeframe that in-person absentee voting is available, and only prohibit electioneering within a small area immediately surrounding the entrances to absentee polling places. Wyo. Stat. Ann. § 22-26-113. As a result, this Court should find that the temporal breadth of the absentee buffer zone is reasonable and constitutional.

B. Wyoming Statute § 22-26-113 is not facially overbroad.

In support of his argument that Wyo. Stat. Ann. § 22-26-113 is facially overbroad, Frank argues that the statue unconstitutionally regulates signature gathering near entrances to absentee polling places. [ECF No. 119 at 18]. To the extent that Frank contends that the statute's regulation of signature gathering on election days is unconstitutional, that issue has already been resolved by the Tenth Circuit when it upheld the 300-foot election day buffer zone in *Frank*. 84 F.4th at 1146. The regulation of signature gathering near absentee polling places similarly is constitutional and, as a result, this Court should reject Frank's claims the statute is unconstitutionally overbroad because it regulates signature gathering.

In *Citizens for Police Accountability Political Committee v. Browning*, the Court of Appeals for the Eleventh Circuit reviewed a Florida statute that prohibited soliciting voters "within 100 feet of the entrance to any polling place . . . or early voting site." 572 F.3d 1213, 1215 (11th Cir. 2009) (citing Fla. Stat. §102.031(4)(a) (2008)). The statute defined

"solicit" to include "seeking or attempting to seek a signature on any petition." *Id.* (citing Fla. Stat. § 102.031(4)(b) (2008)). Notably, the plaintiffs only sought to obtain signatures by approaching voters "exiting the polling places," not those in line to vote. *Id.*

The court analyzed the statutes under *Burson* and first concluded that the State shared the same compelling interests as Tennessee in *Burson*: "(1) protecting voters from confusion and undue influence; and (2) preserving the integrity of the election process." *Id.* at 1219. Next, the court considered whether the statutes were necessary to serve the compelling state interests. *Id.* Florida argued that it need not produce evidence showing that signature gatherers intimidated voters or interfered with the election process, but like *Burson*, relied on the "country's long history of election regulation, the widespread agreement that emerged from that history, and common sense to show that the ban on exit solicitation within 100 feet of a polling place is necessary to promote its compelling state interests." *Id.* The plaintiffs argued that exit solicitation was "a peaceful, non-disruptive activity targeting only those voters who have already voted," and that Florida was not entitled to rely on the historical evidence of election abuse as Tennessee did in *Burson*. *Id.*

The Eleventh Circuit held that

> [it] simply [could not] accept that exit solicitation is so different from the other political conduct highlighted in *Burson* to compel a different result[.] . . . [C]ommotion tied to exit solicitation is as capable of intimidating and confusing the electorate and impeding the voting process—even deterring potential voters from coming to the polls—as other kinds of political canvassing or political action around the polls.

Id. The court noted that given the diverse size and shape of polling places, often voters use the same doors to enter and exit the polling place, so that voters waiting to cast their ballot would be indistinguishable from those who had already voted. *Id.*

The *Browning* court also gave little weight to the *Burson* plurality's statement that there was "no evidence that political candidates have used other forms of solicitation or exit polling to commit [] electoral abuses." *Id.* at 1219 n.12 (quoting *Burson*, 504 U.S. 207). It believed that the plurality was referring in dictum to "**charitable and commercial solicitation"** and not to forms of political canvassing like exit solicitation. *Id.* (emphasis added). The court added that

> [g]iven the example of history, if exit solicitation must be allowed close to the polls, it takes little foresight to envision polling places awash with exit solicitors, some competing (albeit peacefully) for the attention of the same voters at the same time to discuss different issues or different sides of the same issue. And [the court] accept[s] it as probable that some—maybe many—voters faced with *running the gauntlet* will refrain from participating in the election process merely to avoid the resulting commotion when leaving the polls.

Id. at 1220 (emphasis in original).

Furthermore, the court stated that it "is hard for State election officials to know the precise moment just before solicitation becomes interference in the election process. And if an election is disturbed, it is hard to know what the impact was on the election." *Id.* at 1221.

> The cost of a disturbed election is too high to allow the State only to react to disturbances but not to prevent disturbances. [So the court], therefore, reject[s] the contention that the State must offer its own evidence demonstrating that the ban on exit solicitation is necessary to serve its compelling interests; our country's long history of election regulation, the

> consensus emerging from that history, and the practical need to keep voters and voting undisturbed all prove that the ban is warranted.

Id. Ultimately, the *Browning* court found that the statute at issue did not significantly impinge on First Amendment rights. *Id.*

For all of the same reasons articulated in *Browning*, this Court should find that States may regulate signature gathering near polling places under *Burson*. Furthermore, this Court should find that Wyo. Stat. Ann. § 22-26-116 is not unconstitutionally overbroad for the reasons articulated in this opposition as well as those articulated in State Defendants' supplemental brief [ECF No. 117].

IV. CONCLUSION

For the foregoing reasons, as well as those articulated in State Defendants' supplemental brief, State Defendants request that this Court grant its motion for summary judgment upholding Wyo. Stat. Ann. § 22-26-113 and deny Frank's motion for summary judgment.

DATED this 30th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served this 30th day of August, 2024, by the following means:

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