IN THE UNITED STATES DISTRICT COURT

FOR THE 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

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case comes before the Court on cross-Motions for Summary Judgment. [ECF Nos. 117 & 118]. Plaintiff John Frank challenges Wyoming's electioneering statute and sues the state and local officials charged with enforcing that statute under 42 U.S.C. §1983. After the Tenth Circuit's remand, the remaining issues consist of the constitutionality of the absentee voting buffer zone and the overbreadth of the statute as a whole. After considering the parties' filings and the hearing held on October 16th, 2024, the Court, for reasons discussed below, denies Plaintiff's Motion and grants Defendants' Motion.

BACKGROUND

Wyoming's electioneering law provides:

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

Wyo. Stat. Ann. § 22-26-113. Plaintiff John Frank originally brought this case four years ago, challenging multiple provisions of the statute on the grounds that they infringed on his First Amendment rights. Specifically, Plaintiff attacked the election-day and absentee buffer zones, the prohibition on political campaign bumper stickers, and the entire statute for overbreadth. On cross-motions for summary judgment, this Court held that the 300-foot election day buffer zone was unconstitutional because the state failed to produce evidence that would demonstrate the 100-foot buffer zone already approved in *Burson v. Freeman* was insufficient.[1] 504 U.S. 191 (1992); *Frank v. Buchanan*, 550 F.Supp.3d 1230, 1239 (D. Wyo. 2021). This Court then upheld the 100-foot absentee voting buffer zone because it was identical to the zone upheld in *Burson*. *Id.* The Court also upheld the

[1]After this case was taken up by the Tenth Circuit, Judge Freudenthal retired and the case was reassigned in March of 2024.

ban on bumper stickers. *Id.* Finally, the Court concluded that, first, Plaintiff did not have standing to raise third party claims and, second, there was insufficient evidence to consider the overbreadth claim. *Id.* at 1240. Both parties appealed.

The Tenth Circuit reversed the District Court's determination as to both buffer zones. *Frank v. Lee*, 54 F.4th 1119, 1146 (10th Cir. 2023). The Tenth Circuit held that *Burson* did not require the state to make any particular evidentiary showing to justify its restrictions and that, instead, *Burson* only requires that a given restriction be "reasonable" and "not significantly impinge on constitutionally protected rights." *Id.*; *Burson v. Freeman*, 504 U.S. 191, 209 (1992). Applying this standard, the Tenth Circuit upheld the 300-foot buffer zone, as well as the prohibition on political bumper stickers. *Frank*, 84, F.4th at 1146, 1147. Turning to the 100-foot buffer zone, the Tenth Circuit held that this Court's failure to factor in the temporal breadth of the buffer zone was error and remanded the issue. *Id.* at 1140. Finally, the Tenth Circuit reversed this Court's determination as to the existence of standing and sufficiency of evidence for Plaintiff's overbreadth claim and remanded the issue for this Court to consider in the first instance. *Id.* at 1152. The sole issues on remand are therefore whether the absentee buffer zone, factoring in the temporal scope of the ban and the conduct prohibited, violates the Constitution as well as whether the statute is overbroad.

Plaintiff argues that the 100-foot buffer zone surrounding absentee polling places is unconstitutional because it is unreasonable as to its geographic and temporal breadth and impinges on free speech rights. Plaintiff further claims that the statute is overboard because it restricts speech on private property. Defendants respond that the 100-foot zone

is reasonable in light of *Burson* and that the statute is not overbroad because its constitutional applications far outweigh any potential restrictions on private property. Both parties move for summary judgment on these claims.

RELEVANT LAW

Rule 56 of the Federal Rules of Civil Procedure provides a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law." A fact is material if it is necessary to determine the outcome of the case. *Roberts v. Jackson Hole Mountain Resort Corp.*, 884 F.3d 967, 972 (10th Cir. 2018). A dispute is genuine if evidence exists that may lead a reasonable trier of fact to return a verdict for the non-moving party. *Olivero v. Trek Bicycle Corporation*, 291 F. Supp. 3d 1209, 1218 (D. Colo. 2017). When determining whether a genuine dispute of material fact exists, a court will draw all favorable inferences of factual ambiguities in favor of the non-movant. *Morlock v. United Parcel Service, Inc.*, No. 08-CV-44, 2008 WL 11411456, at *2 (D. Wyo. Oct. 9, 2008).

If a movant meets their burden in showing that no genuine dispute exists, the non-movant must submit sufficient evidence in specific factual form showing that a dispute does exist. *Id.* This requires more than a scintilla of evidence—providing more than mere assertions and conjecture. *Brennan v. Jackson Hole Snowmobile Tours, Inc.*, No. 08-CV-265, 2009 WL 10700292, at * 2 (D. Wyo. Aug. 4, 2009). "[S]ummary judgment is appropriate when the non-movant is unable to present facts on which a reasonable jury could find in his or her favor." *Id.* In sum, summary judgment is an opportunity to

determine the legal sufficiency of a claim to proceed to trial, not to balance or weigh factual disputes.

RULING OF THE COURT

As discussed, the issues to be decided are whether the 100-foot buffer zone surrounding absentee polling places, giving consideration to their temporal scope, are unconstitutional, as well as whether the statute is overbroad on its face. For reasons discussed below, the Court upholds the buffer zones surrounding absentee polling places, and finds that the Wyoming statute is not overbroad.

I. The absentee polling place buffer zone is constitutional.

"[B]ecause electioneering restrictions arise at the intersection of two fundamental rights – the First Amendment right to freedom of speech and the right to vote in an election free from interference and intimidation – content-based restrictions on political speech in a public forum are subject to 'exacting', or strict, scrutiny." *Frank v. Lee*, 84 F.4th 1119, 1140 (10th Cir. 2023) (citing *Minn. Voters All. v. Mansky*, 585 U.S 1, 11 (2018)). However, "when a state's electioneering prohibitions protect the act of voting, the Supreme Court recognize[s]…there are compelling state interests involved" and has applied a "relaxed burden of proof" to the narrow-tailoring inquiry in such situations. *Id.* In light of the deference extended to the states in conducting elections, this modified burden asks only if the state's chosen restriction is "reasonable and does not significantly impinge on constitutionally protected rights." *Id.* In other words, rather than requiring states to produce empirical evidence to justify their chosen restrictions, a court may look to the "state's explanation why its restriction, whatever it may entail, is what it is." *Id.*

At the outset, the parties disagree over the appropriate standard to apply to the buffer zones surrounding absentee polling places. Plaintiff contends that, although the standard articulated in *Burson v. Freeman* applies to buffer zones around election-day polling places, it should not apply to review of absentee buffer zones, and that this Court should apply traditional strict scrutiny. Defendants argue that absentee buffer zones implicate the same concerns as election-day buffer zones and should be evaluated under *Burson*'s modified burden.

Plaintiff argues that because there is a *per se* right to political speech in public fora and no *per se* right to absentee voting, "the interest against which the Court must measure the reasonableness of the zone is…significantly attenuated" and *Burson* should not apply here. This argument cannot stand simply because the Tenth Circuit already held that *Burson* is the applicable standard in assessing the absentee buffer zones. *Frank*, 84 F.4th at 1149. In fact, the very purpose of their remand was so that this Court could apply the *Burson* standard more correctly. *Id.* Even if the appellate court had not so held, *Burson*'s holding did not depend on the voter's *per se* right to any particular voting procedure. Rather, the modified burden applies where "there is a conflict between First Amendment rights" and "the act of voting." *Burson*, 504 U.S. at 228 n.11. There is evidence that citizens are voting at the absentee polling places, which implicates the *Burson* court's concerns about voter fraud and interference. The State of Wyoming is therefore entitled to create safeguards to protect the voting process, and those safeguards are to be judged under *Burson*'s modified burden.

With the correct standard re-enunciated, the Court turns to the *Burson* analysis. Under *Burson*, the state must show that a restriction around a polling place is "reasonable and does not significantly impinge on constitutionally protected rights." *Burson*, 504 U.S. at 200. This is a holistic inquiry that must account for geographic and temporal scope, as well as the speech regulated within the zone. *See Frank*, 84 F.4th at 1150.

Plaintiff contends that there is no historical support for Wyoming's regulation of electioneering around polling places, and goes so far as to argue that there is a burden on the government to show a sufficient number of historical analogues to its regulation of speech, similar to the Second Amendment context.

There is simply no precedent for this approach in the relevant caselaw. It is true that the Tenth Circuit found that Wyoming's 300-foot buffer zone surrounding election day polling places was reasonable due in part to the fact that the buffer zone had been in existence since 1973, followed common practice among the states, and was supported by statutory reasoning consistent with *Burson*. Plaintiff points out that these conditions are not present here, as the absentee buffer zone was not enacted until 2006 (and amended in 2018) and argues there is no similar consensus supporting the placement of electioneering buffer zones around absentee polling places. While the absentee buffer zones have not been in existence quite as long as election-day buffer zones, two decades of Wyoming regulating conduct around its absentee polling places is hardly nothing. Further, many other states have also established no-electioneering zones around absentee polling places or have buffer zones that apply equally to election-day and absentee polling places. *See* Colo. Rev. Stat. Ann. § 1-13-714(1)(a); Ala. Code § 17-9-50; Ariz. Rev. Stat. Ann § 16-

515(A); Cal. Elec. Code § 319.5(b)(2); Del. Code Ann. tit. 15, § 4942(a); Idaho Code Ann. § 18-2318(1); Ind. Code Ann. § 3-14-3-16(c)(2); Ky. Rev. Stat. Ann. § 117.235(3)(c); N.H. Rev. Stat. Ann. § 659:43; N.J. Stat. Ann. § 19:34-15; N.Y. Elec. Law § 8-104; N.C. Gen. Stat. Ann. § 163-166.4; Or. Rev. Stat. Ann. § 260.695(3); S.D. Codified Laws § 12-18-3; Tenn. Code Ann. § 2-7-111; Tex. Elec. Code Ann. § 61.003; Vt. Stat. Ann. tit. 17, § 2508; Va. Code Ann. § 24.2-604; Wash. Rev. Code Ann. § 29A.84.510; W. Va. Code Ann. § 3-1-37; Ga. Code Ann. § 21-2-414; Haw. Rev. Stat. Ann. § 11-132; Kan. Stat. Ann. § 25-2430; La. Stat. Ann. § 18:1462; Mass. Gen. Laws Ann. ch. 54, § 65; Miss. Code Ann. § 23-15-895; Neb. Rev. Stat. Ann. § 32-1524; Okla. Stat. Ann. tit. 26, § 7-108; S.C. Code Ann. § 7-25-180; Utah Code Ann. § 20A-3a-501.

And while the historical pedigree of the election-day buffer zones did play a role in both *Burson* and *Frank*, it was far from pivotal in either decision. *Burson* discussed "history, a substantial consensus, and simple common sense" as factors in holding that, in general, states were allowed to create buffer zones around polling places. *Burson*, 504 U.S., at 211. And in *Frank*, the history of the buffer zone mainly appeared in the court's discussion of the inapplicability of *Russell v. Lundergran-Grimes*, where the Sixth Circuit struck down Kentucky's electioneering because of evidence that it was enacted for impermissible purposes. 784 F.3d 1119 (6th Cir. 2015); *Frank*, 84 F.4th at 1143. Therefore, the relative lack of history behind Wyoming's absentee buffer zone is "not fatal to the reasonableness of" those restrictions. *Id.* at 1145. The Court concludes that while history and consensus are not dispositive of reasonableness, they weigh in Defendants' favor. The Court now turns to the other factors.

a. Geographic scope

It is clear that the 100-foot radius cannot be unreasonable *per se*, because that is the radius of the statute upheld in *Burson*. Plaintiff instead argues that the placement of these zones inside government complexes makes them unreasonably broad as to physical size. The Court will therefore address Plaintiff's arguments regarding size and placement together.

Plaintiff argues that the crowded nature of the Laramie County Government Complex makes it an inappropriate place to conduct elections. Plaintiff takes great issue with the fact that Wyoming designates public buildings like the Laramie County Government Complex as voting places but adduces little evidence indicating that this is an unusual practice. On the contrary, this Court's review of similar state statutes indicates that states grant broad discretion to county officials to designate placement of absentee and early voting places. Plaintiff's arguments that placing buffer zones in these ostensibly crowded areas renders the statute unconstitutional is therefore difficult to accept in light of the fact that *Burson* clearly contemplated that "[e]lections vary from year to year, and place to place." *Burson*, 504 U.S. at 208. Plaintiff cites *McCullen v. Coakley* as support, but that case is of little value in ascertaining the reasonableness of Wyoming's restrictions because it did not concern the election context. 573 U.S. 464 (2014). In fact, *McCullen* specifically distinguished *Burson* in discussing how the regulation of spaces surrounding abortion clinics differed from those surrounding polling places. *Id.* at 496.

Many polling places are on public property that does not exist solely for the purposes of polling, and most involve some degree of excluding specific kinds of speech

or, even more extreme, physically excluding non-voters. It would be entirely contrary to the leeway given to states to run their elections, and to logic, to hold that a state may conduct voting in a gym or church while excluding non-voters from those premises but that it cannot conduct voting on public property because non-voters are present. Should Wyoming be forced to ban all non-voters entry to the courthouse and the government building while polling is taking place? This Court thinks not.

Plaintiff further argues that the setting of the polling places, as it includes various businesses, defeats the underlying purposes of *Burson* because it does not guarantee calm to the voter. The omitted qualifier of that sentiment is that the voter should be free of influences on the voting decision, not free of all stimuli entirely. *Burson* clearly did not try to guarantee voters the right to vote in a sensory deprivation chamber, and, moreover, it is unclear why the sight of someone ordering a bagel would have any effect on the candidate for whom someone chooses to vote. Put simply, non-electioneering conduct falls outside *Burson*'s purview.

Plaintiff argues that, as a practical matter, the crowded nature of these buildings diminishes *Burson*'s concern about voter intimidation because it is more difficult to identify who in the building is there to vote and who is not. But *Burson* was also concerned with "undetected or less than blatant acts" that "may nonetheless drive the voter away before remedial action can be taken." *Burson*, 504 U.S. at 207. Even if it were true that a would-be intimidator is unable to identify and accost an absentee voter dropping off a ballot in the bustle of the courthouse, that is not the full extent of the interference from which *Burson* insulates voters. Such an actor need not specifically

know where a voter is to intimidate, distract or confuse them, as signs and stickers are visible to all. In light of the previous buffer zones upheld in binding precedent, the widespread practice of regulating absentee buffer zones, and the solicitousness given to states in conducting their own elections, the Court finds that Wyoming's electioneering law is reasonable as to geographic scope.

b. Conduct prohibited

Plaintiff does not direct any arguments specifically toward the conduct prohibited the statute. Like the geographic limitation, the statute's prohibition on electioneering has already been upheld, albeit in the context of an election-day buffer zone. Taking into account the forgoing analysis of the setting of the absentee buffer zones, the Court finds that the conduct prohibited is reasonable.

c. Temporal scope

The only remaining consideration, and the only remaining way in which the absentee buffer zone differs from the election-day buffer zone that has already been upheld, is its duration. The absentee buffer zone is, on paper, in effect for roughly 28 days out of the year, a greater length of time than the single-day zone upheld in *Burson*. However, the ban is not truly in effect for 28 days, as it applies only during normal business hours on normal business days and only when absentee voting is occurring, making the time period closer to 19 days. *See* [ECF No. 116]. But even if the restrictions were enforced for 28 days, a ban on a specific type of speech in a specific location that lasts for less than a month out of the year does not come near to the statutes struck down in *Mills v. Alabama* and *Meyer v. Grant*, which were unlimited in terms of speech and

geography. 384 U.S. 214, 219 (1966); 486 U.S. 414, 428 (1988). Here, the restriction is clearly tailored to the goal of protecting voting; the electioneering ban is in effect only when absentee voting is actually taking place, and only applies within a relatively small physical radius.

Plaintiff further invokes *Minnesota Voter's Alliance v. Mansky*, but that case cannot help him here. In *Mansky*, the Supreme Court held that a Minnesota law that prohibited any "political badge, political button or anything bearing a political insignia inside a polling place on Election Day" was unreasonable because it was "incapable of reasoned application." *Mansky*, 585 U.S. at 5. The majority focused on the "unmoored" use of the vague term "political," which they feared could prohibit something as general as "a button or T-shirt merely imploring others to 'Vote!'" *Id.* at 17. The Wyoming statute, already examined by the Tenth Circuit, does not have those defects. The parameters in Wyoming's statute are limited, capable of reasoned application, and tailored to protecting the activity of voting, in line with *Burson*'s requirements.

To the same effect, Plaintiff cites a footnote from *McIntyre v. Ohio Elections Commission* where the Supreme Court discusses the significance of temporal breadth in distinguishing an unconstitutional Ohio statue from the one upheld in *Burson*. 514 U.S. 334, 352 n.16 (1995). However, Plaintiff's use of this quotation is misleading for several reasons. First, the restrictions in *McIntyre* applied exclusively to election day polling places but extended temporally far beyond election day. *Id.* at 352. In other words, it applied when voting was not occurring. This is distinguishable to the present case, as Wyoming's buffer zone applies for only the days, and times of day, that absentee voting

is actually occurring. The second reason is that Plaintiff omits with clever placement of ellipses words like "also." *McIntyre* did not strike down the Ohio statute only because the state's restrictions applied beyond election day; rather, the statute forbade all electioneering with no geographic restrictions whatsoever. Moreover, *McIntyre* does not support the proposition that voter fraud and intimidation are not implicated by absentee or early voting. The Court in *McIntyre* found that last-second confusion was not implicated when voting was not actually taking place. For reasons already discussed, this is inapplicable to the present case.

Plaintiff makes frequent reference to the idea that absentee voting should not be afforded the same protections as election-day voting. This Court reads *Burson* as protecting the function of voting for pragmatic concerns in addition to rights-oriented ones. While *Burson* certainly based its holding on the fundamental nature of voting rights generally, it was also concerned with the practical consequences of voter intimidation and fraud. A state legislature is more than able to conclude that a vote cast in an absentee ballot is entitled to protection, as that vote is weighted the same as a vote cast at an election day polling place. Because the Tenth Circuit held that *Burson* is the applicable standard here, it would seem they agree with this assessment.

After conducting a holistic analysis, this Court finds that Wyoming's absentee buffer zones are reasonable. This ruling comports with the caselaw and the "solicitude for state sovereignty regarding elections" that underlies *Burson*. *Russell*, 784 F.3d at 1053.

II. The Wyoming electioneering statute is not overbroad.

Plaintiff contends that the Wyoming electioneering statute is overbroad because it censors a number of people unaffiliated with the election process, particularly those who own property within the buffer zones.

> [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 *United States v. Stevens*, 559 U.S. 460, 473 (2010); *Harmon v. City of Norman*, 981 F.3d 1141, 1153 (10th Cir. 2020)). Analyzing an overbreadth challenge is a two-step process: first, the Court must "construe the challenged statute" as "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Stevens*, 559 U.S at 473 (quoting *United States v. Williams*, 553 U.S. 285, 296 (2008)). Then, the Court must compare the statute's "plainly legitimate sweep" to its unconstitutional applications. The Court can only find a statute overbroad if there is a "significant imbalance" in the direction of the latter. *United States v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014). The plaintiff "bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (quoting *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988)).

Defendant argues that because the Tenth Circuit upheld the election day buffer zone, Plaintiff's overbreadth challenge can only be applied to the absentee buffer zone. Plaintiff appears to brief the issue with this understanding as well. However, *Frank* did

not contain any overbreadth analysis, and the Tenth Circuit remanded the case for this Court to "consider in the first instance Plaintiff's overbreadth claim." *Frank*, 84 F.4th at 1152. This Court therefore concludes that the Tenth Circuit only upheld the election day buffer zones as against Plaintiff's as-applied challenge, and performs the overbreadth analysis with respect to the entire statute.

Plaintiff argues that the statute's application to signature gathering render it overbroad because signature gathering was not expressly addressed in *Burson* and represents a particularly important form of political expression. But *Burson*'s holding was not limited to certain types of political activities; rather, it applies when the right to political speech interferes with the act of voting. *Burson* was fully aware of the fundamental importance of political expression, and nowhere attempted to diminish that right. The central focus of *Burson* was that such important forms of political expression needed to be balanced against the equally important need to conduct full and fair elections. Plaintiff cites no on-point authority that would indicate *Burson* should apply here with any less force. Signature gathering, like other types of electioneering, could clearly interfere with the voting process and holding otherwise would result in a significant limitation on *Burson*'s scope.

The Court first considers the scope of the statute, which has been essentially defined above. The statute applies to electioneering conduct, within the 100-foot zone, while voting is taking place. The absentee buffer zone differs from the election day zone only with respect to placement and time. It would prevent electioneering on the part of

anyone who is in the government complex during normal business hours and while voting is occurring.

In examining the conduct that would fall within this scope, this Court cannot conclude that a substantial amount is unconstitutional in relation to the statute's legitimate sweep. Plaintiff's primary argument on overbreadth is that the statute unconstitutionally applies to third-party private property. Plaintiff does introduce evidence that this speech is being restricted, including testimony that it was the general policy of local officials to request that private property owners removed campaign signs from portions of their property, and that those provisions of the statute were actually enforced. [ECF Nos. 42-11 & 42-17]. It is not immediately clear that these are unconstitutional applications, as political speech on private property close to polling places could implicate fraud, confusion, or intimidation, and the State is permitted to regulate that conduct as long as the regulation is narrowly tailored under *Burson*. And, in the Court's view, the statute is narrowly tailored because it would apply only when voting is being conducted, only on the specific parts of the property that fall within the buffer zone, and only to a specific type of political speech. A resident could still display their desired sign, just during times of the day when voting is not occurring, or on different parts of their property.

Even if these are unconstitutional applications, there is insufficient evidence to conclude that they are substantial in comparison with the constitutional sweep of the statute. A policy and several instances of enforcement does not create the sort of imbalance that results in a statute being struck down for facial overbreadth. *See*

Broadrick v. Oklahoma, 413 U.S. 601, 618 (1973) (declining to strike down a statute because "some persons" arguably protected conduct may or may not be caught or chilled by the statute"); *Speet v. Schuette*, 726 F.3d 867, 880 (6th Cir. 2013) (finding overbroad a Michigan statute that criminalized all begging when the statute's professed purpose was to prevent fraudulent begging). The statute's application is significantly cabined by the temporal and geographical limitations contained within its provisions.

Plaintiff also claims the statute is overbroad because it places absentee buffer zones in a crowded, multi-use government facility. This claim substantially retreads Plaintiff's arguments concerning the reasonableness of the zone, as he argues it would apply to anyone present in the government complex regardless of their affiliation with the voting process.[2] This placement does not render the statute overbroad because it is constitutional for states to regulate expression in areas surrounding the polling place. The remainder of Plaintiff's arguments amount to logistical criticisms that are simply not questions of constitutional dimension. The Court agrees that there are likely other locations where the buffer zones would have a more focused effect, but that is not the standard that is to be applied. Because the statute does not reach a substantial number of unconstitutional applications, the Court holds that it is not overbroad.

[2] The Tenth Circuit's opinion leaves some question as to whether Plaintiff has standing to bring these claims with respect to their overbreadth challenge. The court held that Plaintiff has standing to raise the third-party property issue but did not address his standing as to any other aspect of overbreadth. *See Frank*, 84 F.4th at 1151 ("To the extent Plaintiff seeks to challenge the electioneering statute as unconstitutionally overbroad because it chills the speech of third-party property owners, we conclude *Broadrick*'s narrow exception for standing applies."). It is therefore possible that Plaintiff has standing to bring a claim concerning third-party property owners but not other claims. The procedural history of this case also provides support for that understanding, as Plaintiff did not originally raise an overbreadth claim at all but rather raised the issue of the restriction of third-party property owners speech as a jus tertii claim that was later determined to be an overbreadth claim by the Tenth Circuit. *See* [ECF No. 42, at 19]; *Frank*, 84 F.4th at 1150. For the sake of thoroughness, the Court assumes that the Tenth Circuit found standing as to overbreadth generally and addresses Plaintiff's claims on the merits.

"The [overbreadth] doctrine seeks to strike a balance between competing social costs… On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech…. On the other hand, invalidating a law that in some of its applications is perfectly constitutional…has obvious harmful effects." *Williams*, 533 U.S. at 292. That is why courts must "vigorously enforce the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also in relation to the statute's plainly legitimate sweep." *Id.* In *Burson*, the Supreme Court struck a similarly difficult balance between the need for fair elections and the First Amendment right to political speech, and ultimately concluded that this difficulty necessitated a degree of deference toward how states choose to conduct their elections. Plaintiff has not submitted evidence sufficient to overcome either burden.

CONCLUSION

After conducting a holistic analysis, this Court finds that the absentee buffer zone is constitutional, both facially and as applied.

NOW, THEREFORE, IT IS ORDERED THAT Plaintiff's Motion for Summary Judgment [ECF No. 118] is DENIED.

IT IS FURTHER ORDERED THAT Defendants' Motion for Summary Judgment [ECF No. 117] is GRANTED.

Dated this 29th day of October, 2024.

Kelly H. Rankin
United States District Judge