Case Nos. 21-8058, 21-8059, 21-8060

In the

United States Court of Appeals

for the

Tenth Circuit

JOHN C. FRANK; GRASSFIRE LLC,
Plaintiffs-Appellees/Cross-Appellants,

v.

DEBRA LEE, Laramie County Clerk,
in her official capacity;
ED BUCHANAN, Wyoming Secretary of State,
in his official capacity;
LEIGH ANNE MANLOVE, Laramie County District Attorney,
in her official capacity,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court for the District of Wyoming (Cheyenne), Case No. 2:20-CV-00138-NDF · The Honorable Nancy D. Freudenthal, U.S. District judge

APPELLEES/CROSS-APPELLANTS' REPLY BRIEF
Oral Argument Requested

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To defend the constitutionality of the no-electioneering buffer zones as described in Wyoming Statutes section 22-26-113 against a First Amendment challenge, Wyoming Secretary of State Buchanan, Laramie County Clerk Lee and Laramie County District Attorney Manlove (collectively, "the State" or "the state officials") rely almost exclusively on *Burson v. Freeman* but present the case only after thorough cherry picking. 504 U.S. 191 (1992). To accept the State's record in this matter, one must ignore the fact that *Burson* was a strict scrutiny case. *Id.* at 199. To accept the state officials' legal arguments, one must ignore that the *Burson* plurality's tailoring analysis was rooted in legal history—that is, laws from the Progressive Era that reflected the temporal, geographic and content restrictions of the buffer zone at issue. *Id.* at 203–04 (discussing a 100-foot Election Day buffer zone under an 1888 New York law). One must also ignore that speech beyond electioneering—such as signature gathering for candidates and issues that are not on the ballot—was exempted from the modified burden of proof in that tailoring analysis. *Id.* at 207 ("[T]here is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses."). The court below correctly found the Wyoming law's obvious expansions of *Burson* to be unconstitutional under the First Amendment, and this Court should affirm. JA414-419. This Court should also go further, finding that the law's prohibitions on

signature gathering and electioneering within 100 feet of entrances to an absentee polling place are also unconstitutional. Alternatively, the Court should rule that the statute is facially overbroad.

I. The Signature Gathering Prohibition in Wyo. Stat. § 22-26-113 is Unconstitutional

The court below did not address the signature gathering prohibition, but this issue was appropriately preserved for this Court. *See* JA23-24 (Verified Compl. Prayer for Relief ¶¶1-2); *cf.* State's Reply and Response Brief ("State's Resp.") at 37 (suggesting the district court ruled on this issue).[1] The State contorts *Burson* and argues that "petitioning and signature solicitation raise the same concerns as *other forms of* electioneering that are specific to candidates on the ballot[.]" State's Resp. 37 (emphasis added); *cf. Burson*, 504 U.S. at 207. Their alleged evidence for this, accusations against Jennifer Horal, cherry-picks and distorts the record. *Cf.* State's Resp. 29-30 *with* JA289-293. They do not address just how this provision of the law, which prohibits "the soliciting of signatures to *any* petition," meets even the broadest definition of electioneering in the first place. Wyo. Stat. § 22-26-113(a) (emphasis added); *see electioneer*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/electioneer ("to take an active part in an election"). Instead,

[1] Citations to the State's Response Brief are to the page number stamped by electronic filing.

they rely on similar, erroneous reasoning from the Eleventh Circuit, which this Court should reject. *See Citizens for Police Accountability Political Cmte. v. Browning*, 572 F.3d 1213 (11th Cir. 2009).

The State relies on terse, bewildering reasoning in *Browning*:

> Plaintiffs claim that the plurality in *Burson* found no history of electoral abuse by and no history of election-reform efforts directed at exit solicitors. They cite as support the following language in the plurality opinion: "[T]here is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses." [*Burson*, 504 U.S. at 207.] But we believe that the plurality is referring in this dictum to "charitable and commercial solicitation" and not, as Plaintiffs suggest, to forms of political canvassing like exit solicitation. So we afford this argument little weight.

Id. at 1219 n.12. But, solicitation aside, what is *exit polling* but a form of "political canvassing"? Wyoming law makes the same reservation, even though exit polling consists of "individuals of the media asking [voters] questions about their voting experience and their preferences" in that day's election. Wyo. Stat. § 22-26-113(a); JA160 (SecState 30(b)(6) Depo. 26:3-7). Exit polling is more like electioneering than Grassfire's signature gathering, for it is speech about the election at issue, as opposed to efforts to acquire valid signatures for candidates and issues to be voted on another day. *See* JA342-343 (Grassfire 30(b)(6) Depo. 16:23-17:3). Indeed, the State offered no evidence that signature gathering is akin to electioneering: the record here shows only a signatory outside the Laramie County Community College polling place at the August, 2020 primary commenting that signature gathering is

"not electioneering." JA289 (Video at 01:54). Yet exit polling is permitted, while signature gathering is prohibited.

The state officials rely on the resulting calamity of the *Browning* opinion, concluding that they need not show a history of voter confusion or threats to the electoral process rooted in signature gathering, nor a historic legal precedent that reflects such threats. There is no "long history" of signature gathering prohibitions in buffer zones or "substantial consensus" about the same; the argument relies entirely upon "'common sense.'" State's Resp. 38 (quoting *Browning*, 572 F.3d at 1219); *cf. Burson*, 504 U.S. at 211. Considering the signature gathering ban was not added to Wyoming law until 1983 (and, then, only applied to Election Day polling places), it defies reality to suggest that evidence of the alleged interests here have been lost in antiquity. *See* JA70; *cf. Burson*, 504 U.S. at 208 ("The majority of these laws were adopted originally in the 1890s, long before States engaged in extensive legislative hearings on election regulations."). Such evidence simply does not exist, and the State made no effort to find it, in any case. The thought experiments of the *Browning* court are limitless if confined to common sense: a state could just as easily ban commercial solicitation by merely "envision[ing] polling places awash with . . . solicitors, some competing (albeit peacefully) for the attention of the same voters at the same time" to sell Girl Scout cookies. 572 F.3d at 1220. This, too, would not be permitted by *Burson*. *See also Aptive Env't, LLC v. Town of Castle Rock, Colorado*,

959 F.3d 961, 992–93 (10th Cir. 2020) (finding an "anecdotal and common-sense showing . . . woefully insufficient[.]").

Importantly, even within a polling place—a non-public as opposed to traditional public forum—political speech restrictions must be "'reasonable in light of the purpose served by the forum': voting." *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018). The Supreme Court recently ruled that, even acknowledging the interests and the legitimate sweep of *Burson*, absolute bans on wearing a "'political badge, political button, or other political insignia'" are unreasonable and thus unconstitutional. *Id.* at 1888. To be sure, the crux of *Mansky* is that such regulations must be discernible, and the bans in the Wyoming statute are clear. *Id.* at 1892. But even "objective, workable standards" in anti-electioneering regulations may not extend to National Rifle Association shirts, rainbow flag pins, or the text of the First Amendment. *Id.* at 1891. This is not to say Grassfire intends to gather signatures inside Wyoming polling places, but that outside a polling place, even in a buffer zone, the State may not simply classify signature gathering as electioneering: it is not, and to say it is without any factual record or demonstrated historic recognition is unreasonable. Because of this, the governmental interest at hand is entirely undermined, while the First Amendment interests of the parties remain solid.

The burdens of both the 100-yard and, particularly, the 100-foot absentee buffer zone on signature gathering is substantial. The 100-yard Election Day zone places a football field between solicitors and potential signatories in the one place where there "could be a hundred percent" validity for signatures. JA351 (Grassfire 30(b)(6) Depo. 25:1-13); Wyo. Stat. § 22-5-304 (requiring signatures from "registered electors" for nominating petitions). The State suggests there is some equivalence between approaching voters personally and flagging them down in their cars at the edge of a parking lot. State's Resp. 30. This is nonsense. *See* JA292 (Horal Aff. ¶¶11-12); JA289 (Video at 50:00-53:00). The State then hedges by claiming "the chance of success in gathering signatures" is irrelevant to a constitutional inquiry. State's Resp. 30. But relegating signature gathering to locations where it is more difficult to do so imposes a burden in the same way—arguably more than—onerous registration and reporting requirements on signature gatherers. *See Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999) ("[T]he First Amendment requires us to . . . to guard against undue hindrances to political conversations and the exchange of ideas."). Buffer zones work a constitutional harm by "forc[ing] [signature gatherers] away from *their preferred positions* outside the . . . entrances, thereby hampering their . . . efforts." *Verlo v. Martinez*, 820 F.3d 1113, 1136 (10th Cir. 2016) (emphasis added) (citing *McCullen v. Coakley*, 573 U.S. 464, 488 (2014)); *see also Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479

U.S. 238, 255 (1986) (while the law "does not remove all opportunities" for engaging in protected First Amendment conduct, "the avenue it leaves open is more burdensome than the one it forecloses."). This is a "serious burden"—a significant impingement—on Grassfire's speech activity. *Verlo*, 820 F.3d at 1136.

The 100-foot absentee zone at the Laramie County Government Complex—the center of local government—is a no-signature zone for nearly a quarter of an election year, a more significant temporal impingement to Grassfire. Wyo. Stat. §§ 22-9-125(a)(ii), 22-6-107(a); JA246. The burden here is manifest, as it prevents gathering signatures from hundreds of people on a given day who are not even voting, but titling a vehicle, getting a marriage license, going to court, attending a county commission meeting, or, importantly, registering to vote in the first place. JA199 (Lee Answer to Grassfire Interrogatory #4); JA218 (Munoz Depo. 10:12-23). Again, even for those who are voting, Grassfire would not address them with anything to do with the current election, but only to ask for separate civic engagement in what could (if enough valid signatures were gathered from registered voters) turn out to be a future election.

Prohibiting "the soliciting of signatures to any petition" too close to a polling place is an unreasonable regulation that significantly impinges First Amendment rights. Wyo. Stat. § 22-26-113(a). The Court should rule that the provision is unconstitutional.

II. The 100-foot Buffer Zone Around Absentee Polling Places in Wyo. Stat. § 22-26-113 is Unconstitutional

Wyoming's absentee buffer zone implements censorship that exceeds the approval of *Burson* and conflicts with other precedent from this Court and the Supreme Court, rendering it unconstitutional. The State does not address—barely acknowledges—the variety of uses of the Laramie County Government Complex and that, by law, Wyoming's absentee polling places are in courthouses or similar facilities. State's Resp. 40-43; Wyo. Stat. § 22-9-125(a)(ii). For these and other reasons, the traditional public fora surrounding absentee polling places under Wyoming law should not be abridged.

Under strict scrutiny,[2] the 100-foot absentee restriction is unreasonable. The State claims that Mr. Frank and Grassfire argue that "protecting absentee voters at absentee polling places . . . is less [of an interest] than at other polling places[.]" State's Resp. 40. This is but more obfuscation: there is no question that voters are entitled to protection while voting. But it is the action of Wyoming law—installing

[2] A courthouse is so distinct from a polling place and so rooted in other important First Amendment precedents that the Court should consider simply applying the doctrine of traditional public fora instead of *Burson*. *See Verlo*, 820 F.3d at 1139 (citing *U.S. v. Grace*, 461 U.S. 171, 180 (1983)). At a minimum, the Court should consider the application of this law to a traditional forum like the surroundings of a courthouse as a considerably greater burden than what the *Burson* plurality envisioned.

a polling place in the middle of a bustling government center—that seriously questions just how much protection voters need. Absentee voters who vote in person in Laramie County do so in the central atrium of the facility, in which county commissioners meet and debate contentious issues, and where court is in session, prosecuting defendants who may be escorted from the county jail via a nearby skywalk. *See* JA246. The atrium itself even features a café area, making it a multi-use *dining and voting* thoroughfare between buildings. This location does not reflect "the unique context of a polling place on Election Day [where] [m]embers of the public are brought together . . . at the end of what may have been a divisive election season, to reach considered decisions about their government and laws." *Mansky*, 138 S. Ct. at 1887–88. Absentee voting is instead an official act allotted less privacy than nearly all the other goings-on in the complex, none of which could justify banning political speech on the sidewalks and streets surrounding the building. *See id.* at 1887 ("Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation."); *see also Grace*, 461 U.S. at 182. In this context, a 100-foot buffer zone is unreasonable.[3]

[3] If, instead, Wyoming law co-opted a room in a less busy facility for exclusive use as an absentee polling place—as they do Election Day polling places—a 100-foot buffer zone might be reasonable. This would at least be closer to reflecting "the unique context of a polling place on Election Day[.]" *Mansky*, 138 S. Ct. at 1887–88; *cf.* JA136-143 *with* JA246.

The State's appeals to history or consensus—at best, something like them—inch no closer to reasonableness. Wyoming did not implement absentee polling places or their buffer zones until 2006. Wyo. Stat. § 22-9-125(a)(ii); *see* JA121-122 (Enrolled Act No. 45, Wyoming House of Representatives (2006)). This was only a year following, to review one of the state officials' citations, Kentucky. State's Resp. 41 (citing Ky. Rev. Stat. § 117.235(3)(b)); *see* 2005 Kentucky Laws Ch. 176 (HB 26).[4] In this short history, the State (or any state) should not receive deference under *Burson* for placing absentee polling places in courthouses "or other public buildings" that contain a substantial portion of local government. Rather, the State should be *rebuked* for trying to use *Burson* to censor well-established public fora.[5] Wyo. Stat. § 22-9-125(a)(ii); *see generally Grace*, 461 U.S. 171. That is, the State cannot ignore

[4] The state officials cite to laws from four other states that allegedly permit in-person absentee voting and prohibit electioneering around the facilities in which this occurs. State's Resp. 41. They provide no information as to when these states implemented in-person absentee voting, or whether the polling places are required by law to be a courthouse or other public building that "shall be open the same hours as the courthouse on normal business days[.]" Wyo. Stat. § 22-9-125(a)(ii). Regardless, four states do not make a historic consensus from which the State may derive a compelling governmental interest in censorship.

[5] Even much of the interior of a courthouse is not a speech-free zone. It was "in the corridor outside division 20 of the municipal court" of Los Angeles County that one of the most celebrated First Amendment cases originated. *Cohen v. California*, 403 U.S. 15, 16 (1971).

the protections of *Grace* by loosely applying *Burson*: the special position that traditional public fora receive in First Amendment precedent under *Grace* must be harmonized with *Burson* in this matter. The State cannot, by its own *ipse dixit*, destroy a public forum. *Grace*, 461 U.S. at 180.

It is a pressing question for the State as to whether there is, in fact, a limit to just where the solemnity of Election Day polling places may be superimposed. The Court should recognize that Wyoming law is already long past that point. It is unreasonable to place buffer zones around absentee polling places in busy government facilities by declaring the same interests articulated in *Burson*: these laws are but shortcuts to significant impingement of First Amendment rights. The 100-yard absentee polling place buffer zone is unconstitutional.

III. Wyo. Stat. § 22-26-113 is Facially Overbroad

With so many First Amendment problems, it is appropriate to facially invalidate the statute under the overbreadth doctrine. Yet again, the State departs from First Amendment doctrine in an effort to avoid the merits of this case.[6] Properly construed, the censorship of the First Amendment activities of Mr. Frank, Grassfire and myriad third parties is substantial in comparison to the plainly legitimate sweep of the law under *Burson*, leaving it unconstitutionally overbroad.

[6] *See also* State's Resp. 19-25.

The State claims Mr. Frank and Grassfire do not have standing to assert *jus tertii* claims for overbreadth purposes. State's Resp. 44-45. In support of this, the state officials rely on *Kowalski v. Tesmer*, but, following their very quotation, that case re-affirms that "'[w]ithin the context of the First Amendment . . . the Court has enunciated other concerns that justify a lessening of prudential limitations on standing.'" 543 U.S. 125, 130 (2004) (quoting *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)). That is, "Litigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that *the statute's very existence* may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (emphasis added).

Turning to the merits, it is troubling that the State's "common sense" only leans in one direction: censorship. *See, e.g.*, State's Resp. 38. The record confirms not only that private property falls within Election Day buffer zones, but that County Clerk Lee's employees demand the removal of signs from private property and that local election officials have even removed signs themselves. JA228-229, 234 (Munoz Depo. 24:18-25:3, 32:11-22); *see also* JA159 (SecState 30(b)(6) Depo. 25:5-20). This is not necessary to make an overbreadth claim, but it demonstrates the extent to which the law is enforced. Indeed, the Court may make its own assessments of just how far the zones go beyond *Burson* by the law's very existence.

In *Ashcroft v. Free Speech Coalition*, for example, the Supreme Court considered how a law that banned the mere portrayal of what "appears to be" a minor engaging in "actual or simulated . . . sexual intercourse" could censor recent films that had won the Academy Award for Best Picture. 535 U.S. 234, 247 (2002). The Court did this even though the Free Speech Coalition was "a California trade association for the adult-entertainment industry," whose offerings are not typically nominated for Academy Awards. *Id.* at 243. Here, common sense shows substantial censorship.

The Election Day buffer zone extends hundreds of feet into traditional public fora and private property. *See generally* JA136-143. These zones generally cover almost the entire parking lot to a given polling place, surrounding sidewalks, streets, and property across those streets. Within Election Day zones, particularly on private property, unconstitutional applications are myriad. This infringement is not limited to yard signs, though that censorship is abhorrent enough: homeowners in the zone commit a crime if they endorse a candidate to a neighbor in a conversation over the fence on Election Day. *See, e.g.*, JA143. One spouse cannot even inquire of the other how he or she voted that day, as that would be "canvassing" a voter. Wyo. Stat. § 22-26-113. A child gathering signatures from her siblings for a petition for a later bedtime risks a misdemeanor, as that is "any petition." *Id.* So, too, must a homeowner remove an electioneering bumper sticker off his car on Election Day or avoid parking in the driveway or the adjacent street. *Id.* These are but a few

unconstitutional applications that are plainly illegal under the statute and have no connection to preventing voter confusion or intimidation.

The zones also censor people visiting private property within a buffer zone. On Election Day, the law prohibits delivering a newspaper onto private property if it contains a campaign ad—perhaps even an editorial endorsement—within it. *Id.* In this sense, on these properties the statute threatens to short-circuit *Mills v. Alabama*, the very precedent the *Burson* plurality was wary of infringing. 504 U.S. at 210 (*citing Mills v. Alabama*, 384 U.S. 214 (1966)). The same concern arises for someone going door-to-door gathering signatures for "any petition" from a homeowner—even if the owner is at home and not entering or exiting the polling place across the street. The applications of unconstitutional censorship of political speech on private property is apparent and substantial in relation to preventing voter confusion or intimidation and overwhelms these interests. These substantial applications are unjustifiable collateral damage from a zone nine times larger than necessary.

Within the Election Day zone, on either public or private property, the law is also unconstitutional by limiting exit polling to "news media." Wyo. Stat. § 22-26-113. The institutional press enjoys no special status under the First Amendment, and if a journalist is permitted to poll voters, then anyone should be. This might not be a clean case of equal protection, but an average citizen challenging the law could

easily establish that the statute is unreasonable here and significantly impinges upon an important person-to-person activity. *But see Riddle v. Hickenlooper*, 742 F.3d 922, 931–32 (10th Cir. 2014) (Gorsuch, J., concurring) (considering heightened scrutiny for such discrimination). This is another unconstitutional application that is plain on the face of the law. Owing to these and any number of other unconstitutional applications that have no bearing on election integrity, the Election Day buffer zone in Wyoming law is unconstitutionally overbroad.

The absentee polling place buffer zone also suffers from substantial unconstitutional applications, perhaps many more than the Election Day zone. Although the absentee zone is 100 feet, it is, by law, placed around a polling place that is in a "courthouse or other public building which is equipped to accommodate voters from all districts and precincts within the county" and operates during court business hours. Wyo. Stat. § 22-9-125(a)(ii); *see* Wyo. Stat. § 22-26-113. In Laramie County, this amounts to censorship not only over a polling place *per se* and its immediate surroundings, but most of the government complex as well. *See* JA246.

For the dozens—even hundreds—of persons who might vote in-person absentee at the complex (or any absentee polling place) on a given day during the absentee voting period, most persons working at and visiting the complex in that time are not voting at all. Thus, most censored electioneering in the absentee zone —from verbal electioneering to the distribution of literature to signature gathering—

does not serve to prevent voter intimidation or confusion.[7] For at least 90 days in an election year, one may not wear a campaign shirt to a meeting of the Laramie County Commission "when voting is being conducted" in the atrium of the complex. Wyo. Stat. § 22-26-113. Thus, the temporal burden here is some 90 times greater than that contemplated by *Burson*.

One may not gather signatures for "any petition" outside *or inside* the complex during absentee voting. *See* JA246. During this blackout, any employee at any agency in the complex who circulates any petition whatsoever—even one, perhaps, protesting conditions within a workplace—commits a misdemeanor. *See* Jim Angell, *Judges Accuse Laramie County DA Leigh Anne Manlove Of "Incompetence" & Violating Rules Of Conduct*, COWBOY STATE DAILY, June 16, 2021, https://cowboystatedaily.com/2021/06/16/laramie-county-da-leigh-anne-manlove-accused-of-violating-rules-of-conduct. It is illegal for a government employee to discuss her electoral choices on her lunch break with a fellow employee almost anywhere in the complex, or on one of the complex's surrounding benches or picnic tables. *See* JA246.

The unconstitutional applications of placing buffer zones throughout busy courthouses and other public buildings where dozens of other public activities (in

[7] It bears noting that, especially for signature gathering, signature gatherers *and* prospective signatories are deprived of political speech in the buffer zone.

addition to *governance*) is occurring are substantial. As discussed earlier, the very placement of a polling place in the middle of such a facility undermines the loftiest articulations of the law's legitimate sweep: the atrium of the complex is not "'an island of calm in which voters can peacefully contemplate their choices[.]'" *Mansky*, 138 S. Ct. at 1887 (quoting Brief for Respondents at 43). Wyoming Statutes section 22-26-113 is facially overbroad.

Conclusion

It cannot be the case that to ban speech in traditional public fora around government buildings such as courthouses and other busy government facilities that a state need only establish a polling place inside of it. Nor that the government may expand electioneering, an easily understood activity, to include signature gathering to *any* petition under the approval of one of the rare cases to surpass strict scrutiny. This Court may strike numerous parts of Wyoming Statutes section 22-26-113 without upsetting Wyoming's electoral process. *See* Wyo. Stat. § 22-27-101 (severability provision). But with myriad constitutional infirmities, the Court should strongly consider striking the statute facially and allow the Wyoming Legislature the opportunity to write it anew with First Amendment protections in mind.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(C), because it contains 4,165 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the typestyle requirements of Fed. R. App. P. 32(a)(6), and the font size requirement in 10th Cir. R. 32(A), because this brief has been prepared in Times New Roman 14-point font in Microsoft Word 2016, which is a proportionally spaced typeface that includes serifs.

Dated: January 31, 2022

/s/ Stephen Klein
Stephen R. Klein

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Counsel for Appellees/Cross-Appellants hereby certifies that all required privacy redactions have been made, which complies with the requirements of Fed. R. App. P. 25(a)(5).

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Dated: January 31, 2022

/s/ Stephen Klein
Stephen R. Klein

Certificate of Service

I hereby certify that on January 31, 2022, a true and exact copy of the foregoing was electronically filed with the United States Court of Appeals for the Tenth Circuit and served via the Court's CM/ECF filing system.

Dated: January 31, 2022

/s/ Stephen Klein
Stephen R. Klein