Nos. 22-8019, 22-8021

In the United States Court of Appeals for the Tenth Circuit

EDWARD BUCHANAN, et al.,

Defendants-Appellants / Cross-Appellee,

v.

WYOMING GUN OWNERS, INC.,

Plaintiffs-Appellees / Cross-Appellant.

Appeal from a Judgment of the United States District Court
for the District of Wyoming, The Honorable Judge Scott W. Skavdahl
(Dist. Ct. No. 2:21-CV-108-SWS)

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REPLY ARGUMENT

I. WYOMING'S DISCLOSURE PROVISION DOES NOT MEET EXACTING SCRUTINY

A. The state cannot meet its tailoring burden by shifting it to WyGO

The state argues that "WyGO's choice not to track funds does not make the statute unconstitutionally vague." Third Stage Br. at 5. But this argument turns the First Amendment on its head. It is Wyoming's burden to show that its statute regulating political speech is constitutional. *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1217 (10th Cir. 2021); *iMatter Utah v. Njord*, 774 F.3d 1258, 1263 (10th Cir. 2014). It is not WyGO's obligation to guess at the meaning of a statute and implement an internal book-keeping regime to save it from invalidation. Not surprisingly, the state has not cited a single case supporting its fanciful argument.

The district court correctly held that "relate to" as used in Wyo. Stat. § 22-25-106(h)(v) is vague and that "a reasonable person could read the statute and have trouble deciphering what 'relate to' means." JA494. Indeed, if that statute contains any language explaining to speakers what type of internal book-keeping system they are to adopt, the state has yet to tell us where that is.

The state asks WyGO, and similarly situated speakers, to read terms into the statute that do not exist. Moreover, in the absence of earmarking that would establish a clear linkage between a contribution and a particular communication, Defendants invite WyGO and similarly situated speakers to simply pick some contributions and contributors to disclose. That is unfair to donors who may not have given in support of any specific communication, issue, or candidate. JA502 ("WyGO must arbitrarily choose donors who 'contributed' to this ad funding, even though they took money out of their general donation fund"). If WyGO must adopt a new and unspecified internal tracking system to save Wyoming's statute, then that illustrates the problem.

B. The state has not refuted WyGO's assertion that earmarking is an important factor

Wyoming overstates WyGO's position as arguing that earmarking is required for Wyoming's disclosure regime to be constitutional (Third Stage Br. at 14), but WyGO actually asserted that "[i]n this circuit, earmarking matters." Second Stage Br. at 17. And the cases WyGO cited support that proposition. *Independence Institute v. Williams,* 812 F.3d 787, 797 (10th Cir. 2016); *Citizens United v. Gessler,* 773 F.3d 200, 211-12 (10th Cir. 2014). The significance of earmarking is amplified by the exacting scrutiny analysis, which requires Wyoming to consider alternatives to indiscriminate blanket disclosures. *See Ams. for Prosperity Found. v. Bonta,* 141 S. Ct. 2373, 2389 (2021) ("California

has not considered alternatives to indiscriminate up-front disclosure"). To be sure, Wyoming might have other ways to tailor its disclosure statute, but an earmarking limitation provides an off-the-shelf, less-burdensome option. *See Lakewood Citizens Watchdog Grp. v. City of Lakewood,* Civil Action No. 21-cv-01488-PAB, 2021 U.S. Dist. LEXIS 168731, at *35-36 (D. Colo. Sep. 7, 2021) ("A less intrusive alternative could be only requiring the disclosure of those who earmarked their donations for electioneering communications, as was the case in *Independence Institute*, 812 F.3d at 797."). Perhaps there are other options, but it is the state's burden to tailor its disclosure regime, not WyGO's burden to fix it.

II. THE DISTRICT COURT'S ANALYSIS OF THE "COMMENTARY EXCEPTION" WAS MISTAKEN

A. *Gessler* stands for the proposition that WyGO is a repeat speaker with a known brand much like other commentary outlets in corporate form

In *Gessler,* 773 F.3d at 212, this Court held that state officials cannot play favorites when it comes to exempting press entities from disclosure laws. "[W]e hold that the First Amendment requires the Secretary to treat Citizens United the same as the exempted media." *Id.; see also Citizens United v. FEC,* 558 U.S. 310, 352 (2010) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers"). In *Gessler,* the

State of Colorado construed the media exemption to apply to non-news opinion content (not including advertising), including blogs and publications with an ideological bias. 773 F.3d at 212. The state also considered opinions aired by broadcast media to be exempt. *Id.*

This Court held that Citizens United was not a drop-in speaker, but rather a known brand entitled to the benefits of the same media exemption from disclosure. *Id.* at 216-217. "Colorado's law, by adopting media exemptions, expresses an interest not in disclosures relating to *all* electioneering communications and independent expenditures, but only in disclosures by persons unlike the exempted media." *Id.* at 217.

WyGO is similarly entitled to access the "commentary exception," which appears to be Wyoming's variation on Colorado's media exemption. To be sure, as this Court noted, Colorado's media exemption did not include paid-for advertising placed by a media entity. *Id.* at 207. While *Gessler's* holding arguably would not extend to the paid-for radio ad placed by WyGO, its reasoning should extend to other content disseminated by WyGO, including political commentary and white-board videos posted on its website, and emails distributed to its members and others who signed up to be on WyGO's email lists. *See* JA103-105 (describing white-board videos and emails); *see also* Ampex/iNEXTV Advisory Op., AO 2000-13, at 3 (FEC June 23, 2000), https://www.fec.gov/files/legal/aos/2000-13/2000-13.pdf ("Moreover, the

web site is viewable by the general public and akin to a periodical or news program distributed to the general public").

Both the district court and the state have failed to grapple with the application of Wyoming's "commentary exception" to such content. There is no good reason why that exception should apply to opinion content appearing in the *Casper Star-Tribune,* but not on WyGO's website or in its emails to people interested in Second Amended issues.[1]

B. Reading the "commentary exception" in context reveals that it can reasonably read to apply to all First Amendment protected political commentary

The state urges this Court to read the "commentary exception" in context. Third Stage Br. at 22-24. Although it never explicitly says so, the state implies that the exception must be limited to content akin to "news reports" or "editorials." But both the state and the district court focus only on the first part of the commentary exception and ignore that the phrase "news report, commentary or editorial or a similar communication" also has appended to it the expansive phrase "protected by the first amendment [sic]" and state constitution, and then describes numerous modes of dissemination including radio and

[1] The state also mischaracterizes WyGO's presence in Wyoming as limited to its most recent statement of incorporation filed in 2016 (Third Stage Br. at 21). The state has not provided any evidence to refute WyGO's assertion that it has been active in Wyoming since about 2010. JA100 (¶ 2).

"electronic communication network[s]." *See* Wyo. Stat. § 22-25-101(c)(ii)(B). None of the other state exemption laws[2] the district court used as favorable comparators included a reference to the First Amendment, and WyGO submits that Wyoming's incorporation of the First Amendment in its exception serves to extend the coverage of "or similar communication" to all First Amendment protected political commentary that is distributed via the enumerated means. Otherwise, that phrase amounts to surplusage.

If words must be read with the company they keep, then they must be read with *all* the company they keep and not just a select few. Read as a whole, Wyoming's commentary exception is broad and open-ended. Even the state is not able to articulate its limits in a coherent manner, and the district court avoided doing so.

Moreover, the district court reasoned that political commentary is "discussion or criticism on current political events or the political climate." JA497. "[A]n editorial gives an opinion on topical issues, including politics." *Id.* WyGO's radio ad is all of those things. It offered

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[2] *See* JA495-96; *see also Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1108 (9th Cir. 2019) (quoting Montana exemption); *Colo. Right to Life Comm. v. Davidson,* 395 F. Supp. 2d 1001, 1018 (D. Colo. 2005) (analyzing Colorado periodical exemption later held unconstitutional).

an opinion about two candidates and their stances on Second Amendment rights. JA103.

The district court acknowledged the blurriness of these categories when it nevertheless opined that "a reasonable person would understand that commentary does not encompass paid advertisements comparing two candidates for office." JA497. Even if that might be so for paid ads, the coverage of the "commentary exception," as well as the district court's reasoning, can comfortably be extended to political commentary posted on WyGO's website, including white-board videos, and commentary disseminated to interested persons via email.

For example, if a WyGO video discusses some candidates' responses to its gun-policy survey and other candidates' failure to respond, that is not all that different from a newspapers' opinion piece comparing two candidates during a campaign. Perhaps WyGO's audience is more targeted and WyGO uses different language than corporate news outlets, but the videos unquestionably constitute political commentary and are covered by the First Amendment.

The same would be true for emails sent to persons on WyGO's email lists. And none of those communications could fairly be described as paid advertisements, although some incremental portion of overhead and staff time would be used to transmit them. By focusing on only the radio ad, both the Secretary of State and district court avoided difficult

line-drawing issues that WyGO's pre-enforcement challenge nevertheless appropriately presented for decision.

III. THE STATE ALL BUT IGNORES WYGO'S PRE-ENFORCEMENT CHALLENGE

The state's third stage brief does not meaningfully engage with WyGO's pre-enforcement challenge to Wyoming's definition of electioneering communication or its newsletter exception. Nor does it have much to say about WyGO's concerns of selective enforcement, other than to assert that the law has only been around since 2019.

Of particular concern here is that the Wyoming Secretary of State's office does not provide any regulations or guidance on what factors it uses to determine whether something qualifies as an electioneering communication or newsletter. *See* JA344 (¶¶ 22-23). Nor does the Secretary provide for means to seek advisory opinions. *Id.*

These circumstances exacerbate the vagueness of the Wyoming's statutory terms because they authorize excessive enforcement discretion and invite subjective enforcement decisions. *See Ctr. for Investigative Reporting v. SEPTA,* 975 F.3d 300, 313-14 (3d Cir. 2020) (absence of transit agency guidelines cabining discretion invited general counsel's own politics to shape what counts as "political" advertising); *People for the Ethical Treatment of Animals, Inc. v. Shore Transit*, 580 F. Supp. 3d 183, 195 (D. Md. 2022) (there are no additional guidelines to limit Defendants' discretion in determining what constitutes a transit

advertisement that is "political" or "controversial, offensive, objectionable, or in poor taste"); *Marshall v. Amuso*, 571 F. Supp. 3d 412, 424 (E.D. Pa. 2021) ("In parsing out these subjective terms, the School Board has presented no examples of guidance or other interpretive tools to assist in properly applying Policies 903 and 922 to public comments."); *see also Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1891 (2018) (cited by *SEPTA, Marshall,* and *People for the Ethical Treatment of Animals* for the proposition that officials' "discretion must be guided by objective, workable standards").

Accordingly, in *Marshall,* a school-board speech case, the court facially invalidated two speech policies on vagueness grounds: "Allowing little more than the presiding officer's own views to shape 'what counts' as irrelevant, intolerant, abusive, offensive, inappropriate, or otherwise inappropriate under the policies openly invites viewpoint discrimination." *Marshall,* 571 F. Supp. 3d at 424.

So too here, WyGO, and similarly situated entities, are left to guess how state officials will determine what is an electioneering communication and what is subject to the newsletter or commentary exceptions. If state officials provided meaningful guidance, the risk of selective enforcement would be reduced. As it is, many speakers won't know if their speech is an electioneering communication until an opponent complains and a state official makes a subjective judgment.

IV. THE RADIO AD CANNOT ONLY BE INTERPRETED AS A DIRECT APPEAL TO VOTE FOR OR AGAINST CERTAIN CANDIDATES

The state focuses on whether the functional-equivalent-of-express-advocacy test controls here, without actually engaging in any analysis of whether Wyoming's statute applies to the radio ad. Third Stage Br. at 27-28. Assuming, *arguendo,* that the radio ad is an appeal to vote for or against the identified candidates, that is not the ad's only message. *See* JA102-103 ("When we point out that a candidate has not returned our survey, it is also meant as a message to the candidate that they need to return it"). WyGO wants all candidates to know that if they do not return the survey, they risk being "called out" by WyGO. JA102. Defendants appear to concede that the radio ad has multiple purposes.

V. WYGO IS ENTITLED TO RECOVER FEES UNDER 42 U.S.C. § 1988 AS A PREVAILING PARTY

Defendants ignore well-established binding precedent when they argue that obtaining a prospective injunction against state officials does not make WyGO a prevailing party under either 42 U.S.C. § 1983 or 42 U.S.C. § 1988, and that such relief would be barred by state sovereign immunity. Third Stage Br. at 30-31. In so doing, the state attempts to summon from the dead sovereign-immunity arguments that the U.S. Supreme Court entombed decades ago.

Without question, binding precedent establishes that 42 U.S.C. § 1988 allows a prevailing party to recover attorneys' fees ancillary to

prospective injunctive relief. *See, e.g.*, *Missouri v. Jenkins,* 491 U.S. 274, 280 (1989) (attorneys' fees are part of costs and those have "traditionally been awarded without regard for the States' Eleventh Amendment immunity"); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) (recognizing same); *Hutto v. Finney*, 437 U.S. 678, 696-97 (1978) ("Just as a federal court may treat a State like any other litigant when it assesses costs, so also may Congress amend its definition of taxable costs…without expressly stating that it intends to abrogate the States' Eleventh Amendment immunity"). This question was decided long ago, and the state presents no basis to re-examine it.

Indeed, WyGO's complaint plainly brought official-capacity claims under § 1983 to block future enforcement of Wyoming's electioneering-communications regime against WyGO. JA030-035 (¶¶ 55, 58, 66, 72). Moreover, WyGO explicitly sought to enjoin "Defendants, their officers, agents, servants, [and] employees… from enforcing [Wyoming's electioneering-communications regime] against WyGO's publication of email communications, direct mail, website content, videos…." JA035. What the state derisively characterizes as "three magic words" (Third Stage Br. at 31), is rather a succinct and legally sufficient request for prospective injunctive relief. And while the district court did not go as far as WyGO had requested, it is undisputed that it granted WyGO relief when it prospectively enjoined the Secretary of State from

requiring the electioneering report under Wyo. Stat. § 22-25-106(h). JA509.

It is also well-established that the *Ex parte Young* doctrine allows 42 U.S.C. § 1983 to be used as a vehicle to bring official-capacity claims against state officials seeking prospective injunctive relief for unconstitutional state action. *See, e.g., Estate of Schultz v. Brown,* 846 F. App'x 689, 692 n.11 (10th Cir. 2021) (estate could make claims for prospective, but not retrospective injunctive relief against state officials; only prospective relief claims allow for recovery under 42 U.S.C. § 1983); *Columbian Fin. Corp. v. Bowman*, 768 F. App'x 847, 850-51 (10th Cir. 2019) (applying *Ex parte Young* in context of § 1983 claims for procedural rights regarding an insolvency determination); *Cressman v. Thompson*, 719 F.3d 1139, 1143, 1146 n.8 (10th Cir. 2013) (section 1983 civil rights lawsuit for injunctive relief against prison officials).

The state offers no authority for the proposition that the *Ex parte Young* doctrine creates a free-floating claim for relief, wholly independent of 42 U.S.C. § 1983, the federal statute which authorizes suits against state officials for constitutional rights depravations. Section 1983 expressly authorizes a "suit in equity" and also includes, but is not limited to, damages actions. Thus, equitable relief, such as injunctions, are expressly authorized under § 1983. The state is mistaken when it argues that "[i]f Congress had intended § 1983 to be a vehicle for individuals to seek prospective injunctive relief against state

officials, it would have said so." Third Stage Br. at 31. Congress did say so, when it provided for suits "in equity."

Thus, when WyGO brought claims for prospective injunctive relief under § 1983 and the district court granted an injunction, WyGO necessarily prevailed on part of its § 1983 claim. *See Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1238 (10th Cir. 2011) (preliminary injunction against state officials providing some relief on the merits renders plaintiff a "prevailing party" under 42 U.S.C. § 1983).

CONCLUSION

This Court should affirm, in part, the district court's judgment as to vagueness and lack of narrow tailoring of Wyoming's disclosure provision, but it should expand the remedy to include broader injunctive relief. In addition, this Court should reinstate WyGO's pre-enforcement challenge to other applications of Wyoming's regime and find that those, too, are unduly vague. Finally, this Court should reverse the holding that the Eleventh Amendment bars a recovery under 42 U.S.C. § 1988.

Dated: October 13, 2022

Respectfully submitted,

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Dated: October 13, 2022

s/Endel Kolde

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