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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WYOMING GUN OWNERS, a Wyoming nonprofit corporation, *Plaintiff*, *v.* EDWARD BUCHANAN, in his official capacity as Wyoming's Secretary of State; KAREN WHEELER, in her individual and official capacities as Wyoming's Deputy Secretary of State; KAI SCHON, in his individual and official capacities as Election Division Director for the Wyoming Secretary of State; and BRIDGET HILL, in her official capacity as Wyoming Attorney General. *Defendants*.	Civil Action No. 21-CV-108-S **BRIEF IN SUPPORT OF WYOMING GUN OWNER'S MOTION FOR SUMMARY JUDGMENT** Oral argument scheduled for February 25, 2022 at 1:00 PM

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INTRODUCTION

Americans have the right to speak freely about candidates for elected office, including the right to publicly examine candidates' positions on salient policy issues. Americans also have a right to know what a law means, especially one that may sanction them for engaging in political speech. Vague campaign laws invite arbitrary enforcement and chill speech. Similarly, disclosure requirements must be narrowly tailored to avoid excessively burdening associational rights.

Wyoming's electioneering-communications regime is unconstitutional because it fails to tailor the scope of disclosure to earmarked contributions. It is also unduly vague in failing to define which contributions "relate to" an electioneering communication or when the "commentary" exception applies.

In considering the motion for preliminary injunction, this Court has already opined that Wyoming's regime fails exacting scrutiny. ECF No. 39 at 13 ("Turning then to whether Wyoming's electioneering communications regime withstands exacting scrutiny, the Court finds that it does not"). With discovery completed and the 2022 primary and general elections looming within months, Wyoming Gun Owners ("WyGO") respectfully requests that this Court now implement its opinion by declaring the regime unconstitutional and permanently enjoining it.

STATEMENT OF FACTS

WyGO is a non-profit corporation whose mission is "defending and advancing the 2nd Amendment rights of all law-abiding citizens in the state of Wyoming — and exposing legislators who refuse to do the same thing." ECF No. 30-1 (Declaration of Aaron Dorr), ¶ 4; ECN No. 46-1 (Stipulated Facts), ¶¶ 1-2; www.wyominggunowners.org. WyGO uses a variety of media and formats to promote its message, including posting information on its website, disseminating

and publishing candidate surveys, videos, emails to members and non-members, radio ads, digital ads, Facebook posts, and direct mail. ECF No. 30-1, ¶ 5.

WyGO targets its speech to reach voters, candidates, and elected officials in Wyoming and often promotes its messages during election season, when gun-policy issues are top of mind. *Id.* ¶ 6. WyGO lacks dedicated in-house lawyers or dedicated campaign finance compliance staff. *Id*.

WyGO considers anyone who donates to it to be a member. *Id.* ¶ 7; ECF No. 46-1, ¶3. In addition, anyone can sign up to receive emails from WyGO about gun policy and candidate positions. ECF No. 30-1. WyGO funds its operations mostly through small-dollar donations. *Id.* ¶¶ 7-8. Approximately 90% of WyGO's donations are for amounts under $100, with approximately 8% being for amounts between $100-200. *Id.* ¶ 8. Only about 2% are for larger amounts and large donations typically comprise only a small part of WyGO's annual budget. *Id.* ¶ 8.

WyGO does not provide donors a means to earmark contributions for specific purposes on their online donation platform or hard-copy donation form. *Id.* ¶¶ 9-12; ECF No. 46-1, ¶ 7. All WyGO donations go into one of two accounts—one for online donations, the other for mail-in donations. ECF No. 30-1, ¶ 10.

WyGO's never discloses its members, and numerous WyGO members have expressed concern to WyGOs principal, Aaron Dorr, about having their names disclosed. *Id.* ¶ 13; ECF No. 46-1, ¶ 8.

WyGO's 2020 Political Speech

During the 2020 election season, WyGO exercised its First Amendment rights to speak to its members and other Wyoming voters about salient political issues, including where candidates for office stood on Second Amendment issues. ECF No. 30-1, ¶ 15. It did so by way of paid-for radio advertising, email blasts, direct mail,

digital advertising and posting videos, surveys, and other commentary on its public website and social-media platforms. *Id*.

In August 2020, prior to the primary election, WyGO paid a commercial radio station about $1,229.10 to run a 60-second issue ad in the Cheyenne radio market. *Id.* ¶ 21; ECF No. 46-1 ¶ 13. The radio ad mentioned two opposing state senate candidates by name, extolling one candidate for supporting gun rights, and criticizing another for silence on the issue and potential hostility to gun rights. Dorr Dec. ¶ 21.

On July 15, 2020, WyGO sent its members an email blast entitled "WYGO's Primary Action Plan!" *Id.* ¶¶ 22-23; Ex. A (ECF No. 30-2). The email solicited donations for funding the plan. It also criticized certain gun-related policy proposals and included a description of several candidates' positions on Second Amendment issues. *Id*. However, the email did not urge that readers vote for a specific candidate. *Id*. The July 15 email was sent to both dues-paying WyGO members and non-members who had signed up to receive email communications from WyGO. *Id.* ¶ 26.

On August 1, 2021, WyGO sent a direct mail piece to dues-paying WyGO members and people identified as likely pro-gun Wyoming residents, communicating that one candidate had supported "pro-gun legislation," while his opponent had refused to answer WyGO's candidate survey. *Id.* ¶¶ 27-28; Ex. B (ECF No. 30-3). The mailer exhorted readers to thank the first candidate for supporting gun rights, and to tell the second candidate that "trying to hide her views on an issue as important as our gun rights is flat-out unacceptable," but it did not urge readers vote for a specific candidate. *Id.* The mailer also criticized various policy proposals. *Id*.

On September 24, 2020, WyGO sent an email blast to dues-paying WyGO members and non-members who had signed up to receive WyGO's email communications, entitled "Big Tech is Trying to Censor Your Gun Rights!" *Id.* ¶¶ 30-32; Ex. C (ECF No. 30-4). The email communicated concerns that social media platforms such as Facebook were censoring pro-gun speech, while favoring other political speech. *Id.* In this email, WyGO also described the gun-rights policy positions of several candidates for state senate and the state house, but did not urge that readers vote for a specific candidate in the general election. *Id.*

WyGO's postings at www.wyominggunowners.org and digital media ads on Facebook expressed similar messages. *Id.* ¶¶ 33-37. WyGO's website and Facebook content during the 2020 election cycle included political commentary on gun-rights issues, candidates' answers to WyGO's questionnaire on gun-related policies, and "white-board videos" in which Dorr discussed competing Wyoming candidates' gun-related positions using a white dry-erase board. *Id.* The videos often included requests to contact and thank pro-gun-rights candidates, and contact and criticize candidates who supported gun-control or did not return WyGO's questionnaire. *Id.* Such videos never included an explicit appeal to vote for or against a specific candidate. *Id.*

The Regulatory Regime's Enforcement Against WyGO

The Greater Wyoming Chamber of Commerce typically supports candidates who differ from WyGO on Second Amendment rights. *Id.* ¶ 38. In October 2020, Chamber President and CEO Dale Steenbergen wrote Defendant Kai Schon, the Elections Division Director of the Wyoming Secretary of State's Office, alleging that WyGO had violated Wyoming campaign finance laws. *Id.* ¶¶ 39-40; Ex. D (ECF No. 30-5). Steenbergen claimed that the radio ad, the July 15 and September 24 emails, and the August 1 mailer were "electioneering communications,", and asked that

"actions be taken immediately" to prevent what he called further illegal interference with Wyoming elections. *Id.* Steenbergen also referenced WyGO's "digital ads" and "Facebook posts," but did not describe such communications in detail or provide specific examples. *Id.* In response to Steenbergen's letter, Defendant Buchanan's office initiated an investigation into WyGO's political speech. *Id.* ¶¶ 41-42; Ex. E (ECF No. 30-6).

Defendant Kai Schon, on behalf of Defendant Buchanan, subsequently emailed Dorr, declaring that unspecified "advertisements" paid for by WyGO were reportable electioneering communications and threatened to fine WyGO for failing to comply. *Id.* WyGO's counsel responded, noting that Schon had failed to provide the revised complaint or exhibits of the alleged communications, and asserting that WyGO's issue advocacy was not an "electioneering communication." *Id.* ¶¶ 43-44; Ex. F (ECF No. 30-7).

Then-Assistant Attorney General James LaRock responded to WyGO's counsel, purporting to explain why the Secretary of State's office deemed WyGO to have engaged in "electioneering communications." *Id.* ¶¶ 45-46; Ex. G (ECF No. 30-8). LaRock focused on the statement "tell Johnson that Wyoming gun owners need fighters, not country club moderates who will stab us in the back." *Id.* He also asserted that the radio ad "instructs listeners which candidate to support and oppose," although words to that effect are never spoken in the ad. *Id.* LaRock further speculated that other WyGO communications — including possibly the July 15 email, August 1 mailer, and September 24 email — may have been electioneering communications, if they were sent to persons outside of WyGO's membership. *Id.* WyGO did not file any reports in response because it believed that none of the communications were "electioneering communications." *Id.* ¶ 49; Ex. F (ECF No. 30-7); ECF No. 46-1, ¶ 21.

On December 2, 2020, Defendant Deputy Secretary of State Karen Wheeler signed a FINAL ORDER IMPOSING CIVIL PENALTY against WyGO. *Id.* ¶¶ 47-48; Ex. H (ECF No. 30-9). The Final Order expressed Wheeler's opinion that the radio ad was an electioneering communication because "the ad can only be reasonably interpreted as an appeal to vote for Senator Bouchard and to vote against Johnson." *Id.* Defendant Wheeler found that WyGO had failed to file the required reports and fined the group $500. *Id.* Notwithstanding the Chamber's complaints about the other communications, the Final Order was silent as to the July 15 email, August 1 mailer, or September 24 email. *Id.* The Final Order was also silent about digital ads and Facebook posts. *Id.*

The Regulatory Regime's Continuing Impact on WyGO's Speech

WyGO intends to continue its issue advocacy, but will reduce its activity owing to the legal uncertainty surrounding this speech. *Id.* ¶ 50. During both non-election and election years, including within 30 days and 60 days of both primary and general elections, WyGO would normally plan to continue airing radio ads, posting website content, videos, digital ads, Facebook content and sending emails and direct mailers to Wyoming residents featuring materially and substantially similar content as it has in the past. *Id.* ¶ 50. But WyGO cannot reasonably predict whether state officials—either independently or at the prompting of WyGO's political opponents—will determine that one of its communications that merely criticizes a candidate, or asks people to contact an elected official, would subject it to Wyoming's electioneering communications regime, or whether any of the exceptions would apply. *Id.* ¶ 51. Even if it determined that it made an electioneering communication, WyGO does not know which of its donors or contributions would "relate to" a particular electioneering communication and must therefore be disclosed. *Id.* ¶ 52. Moreover, the uncertainty about these provisions' application

makes WyGO a target for additional complaints by its political opponents, such that WyGO can reasonably expect to face further compliance costs for expressing itself even if it would ultimately prevail with respect to those complaints. *Id.* ¶ 53. In the absence of clarity about the contours of Wyoming's electioneering regime, WyGO intends to forgo speaking during election season, a time when its speech tends to have the greatest impact for members, the electorate, and candidates. *Id.* ¶ 54.

SUMMARY OF ARGUMENT

WyGO satisfies the requirements for a declaratory and permanent injunctive relief because Wyoming's electioneering-communications regime fails exacting scrutiny and is too vague. Wyoming's regime is unconstitutional because it (1) lacks the narrow tailoring required by *Americans for Prosperity Foundation v. Bonta,* 141 S. Ct. 2373 (2021) *("AFPF");* (2) targets small-dollar donations; (3) lacks an earmarking component; and (4) fails to consider that WyGO's viewpoint is readily apparent to most of the Wyoming electorate, therefore unduly burdening the rights of speakers and donors.

Wyoming's regime also includes a broad exception for political commentary that might apply to most of WyGO's speech and includes an incomprehensible requirement that speakers disclose contributions that "relate to" an electioneering communication.

This Court has already found Wyoming's regime fails exacting scrutiny. ECF No. 39 at 13. Similarly, this Court has already noted that the term "commentary," as used in Wyoming statute, remains undefined and that no other state utilizes the open-ended phrase "relate to" for its electioneering communications disclosure regime. ECF No. 38 at 28-29.

Despite its finding on exacting scrutiny, the Court withheld a preliminary injunction, because no election was imminent, and it anticipated being able to grant

final relief before the next election season. ECF No. 39 at 23. Since then, the parties have completed discovery and the 2022 election season is upon us. Accordingly, it is time for the Court to definitively adjudicate WyGO's claims for violation of its First Amendment rights.

ARGUMENT

I. LEGAL STANDARD FOR SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 32-23 (1986). The existence of some factual dispute is not enough; the dispute must pertain to a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

When cross-motions for summary judgment demonstrate a basic agreement concerning what legal theories and material facts are dispositive, they "may be probative of the non-existence of a factual dispute." *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983). "Where the facts are not in dispute and the parties only disagree about whether the actions were constitutional, summary disposition is appropriate." *Christian Heritage Acad. v. Oklahoma Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1030 (10th Cir. 2007). The issues before this Court are "'purely legal, and will not be clarified by further factual development.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). Summary judgment is appropriate at this time.

The standard for issuing a permanent injunction is remarkably similar to that for a preliminary injunction, with the exception that the plaintiff must show actual success on the merits, rather than a mere likelihood of success. *Amoco Prod. Co. v.*

Vill. of Gambell, 480 U.S. 531, 546 n.12 (1987); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence*, No. 18-4013, 2022 U.S. App. LEXIS 416, at *28-29 (10th Cir. Jan. 6, 2022).

To obtain a permanent injunction, the movant must show: (1) actual success on the merits; (2) irreparable harm absent the injunction; (3) the threatened injury outweighs the harm that the injunction may cause; and (4) the injunction, if issued, will not adversely affect the public interest. *Kitchen v. Herbert*, 755 F.3d 1193, 1208 (10th Cir. 2014) (citing *Sw. Stainless, LP v. Sappington,* 582 F.3d 1176, 1191 (10th Cir. 2009)). WyGO easily meets these requirements.

II. WyGO HAS SUCCEEDED ON THE MERITS.

A. Wyoming's electioneering communications regime fails exacting scrutiny.

Wyoming's law fails exacting scrutiny because it lacks the narrow tailoring that could be provided through an earmarking provision; and also because Wyoming does not have a legal reason for treating WyGO differently than other known speakers who publish "commentary" on Wyoming politics.

The Supreme Court recently clarified that, in the First Amendment context, exacting scrutiny requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest; *and* that the disclosure requirement must be narrowly tailored to the interest it promotes. *AFPF,* 141 S. Ct. 2373 at 2383-85. This important opinion re-asserts that narrow tailoring is an indispensable component of exacting scrutiny, placing the standard above intermediate scrutiny, but slightly below strict scrutiny. *See id.* at 2383 (discussing the historical debate about the contours of exacting scrutiny), *see also Free Speech v. FEC*, 720 F.3d 788, 790 (10th Cir. 2013) (citing *Citizens United v. FEC,* 588 U.S. 310, 366-67 (2010); *Coal. for Secular Gov't v. Williams,* 815 F.3d

1267, 1276 (10th Cir. 2016) (applying exacting scrutiny standard without the narrow tailoring component).

The Supreme Court held that although "exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *AFPF,* 141 S. Ct. at 2383. Wyoming's regime is too open-ended to pass this test. It is well-established that disclosure of contributions burdens First Amendment rights. *Buckley v. Valeo,* 424 U.S. 1, 658 (1976) (public disclosure of contributions will deter some individuals who otherwise might contribute); *AFPF*, 141 S .Ct. at 2388 ("Our cases have said that disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public'"). Also, the administrative burdens associated with reporting and itemization also burden speech rights, especially for smaller organizations without staff or in-house lawyers. *Sampson v. Buescher,* 625 F.3d 1247, 1255 (10th Cir. 2010); *see* ECF No. 30-1¶¶ 3, 6.

Governments often seek to justify disclosure because of the electorate's purported informational interest, as well as the prevention of quid-pro-quo corruption. Since WyGO's donations do not involve direct contributions to candidates, or coordinated expenditures, the Court's focus here should be on the degree of the informational interest in disclosure only. *See also* ECF No. 39 at 13 ("Accordingly, the Court finds, at this preliminary stage, the informational interest supports disclosure requirements in the statutes at issue, but the anti-corruption interest does not").

In weighing the government's informational interest in disclosure, the Tenth Circuit considers several factors including: (1) whether the donations are earmarked for a specific purpose, such as electioneering communications; (2) the dollar value of the donations to be disclosed; and (3) whether the speaking entity has a viewpoint or "brand" that is known to the audience, so that revealing the

identity of donors does or does not significantly benefit the audience in assessing who is speaking. These factors all break in WyGO's favor. Moreover, the open-ended nature of Wyoming's regime fails the narrow tailoring requirement articulated in *AFPF*.

In the Tenth Circuit, earmarking matters. *Independence Institute v. Williams,* 812 F.3d 787, 797 (10th Cir. 2016) ("And it is important to remember that the Institute need only disclose those donors who have specifically earmarked their contributions for electioneering purposes"); *Citizens United v. Gessler,* 773 F.3d 200, 211-12 (10th Cir. 2014) ("The only donors who must be disclosed (by name and occupation) are those who earmark contributions for the specific, exclusive purpose of electioneering communications or expenditures regarding Colorado candidates"). Here, this important tailoring factor is absent from the statute and, as a practical matter, WyGO does not provide for earmarking of donations; so, tailoring is functionally absent from this case altogether. *See* Wyo. Stat. § 22-25-106(h). It is also noteworthy that both *Gessler* and *Independence Institute* were decided without application of the narrow tailoring standard now required by *AFPF*. When narrow tailoring is overlaid on this analysis, the absence of an ear-marking component only becomes more pronounced.

Accordingly, applying exacting scrutiny and relying on *AFPF,* another district court in this circuit recently struck down a municipal electioneering-disclosure requirement in *Lakewood Citizens Watchdog Grp. v. City of Lakewood,* Civil Action No. 21-cv-01488-PAB, 2021 U.S. Dist. LEXIS 168731, at *36 (D. Colo. Sep. 7, 2021). Specifically, the court reasoned that the Lakewood ordinance did not have an earmarking requirement, which would have the practical effect of forcing the overinclusive disclosure of donors who may not have contributed intending to support election-related press coverage. *Id.* at *34-35 ("This creates a 'mismatch'

between the interest served–knowing who is speaking about a candidate–and the information given"). The Colorado district court concluded that the lack of an earmarking component caused the ordinance to fail exacting scrutiny, because requiring disclosure of only earmarked donations would be a less-intrusive alternative. *Id.* at *36.

The Wyoming electioneering-communications regime suffers from the same infirmity, as was appropriately noted by this Court in its prior order on the motion for preliminary injunction. ECF No. 39 at 17-19 ("A donor may have no interest in speaking about a candidate at all, but their name and association with WyGO would still be disclosed").[1] As in *Lakewood,* Wyoming has a readily available, more narrowly tailored alternative: it could require only the disclosure of contributions earmarked for electioneering communications.

As in *AFPF* and *Lakewood,* Defendants may not rely on the administrative convenience of the blanket disclosure of all donations without considering more narrowly tailored options. *AFPF,* 141 S. Ct. at 2389 ("California has not considered alternatives to indiscriminate up-front disclosure."); *Lakewood*, 2021 U.S. Dist. LEXIS 168731 at *35-36. The lack of earmarking is by itself conclusive on exacting scrutiny, but the fact that Wyoming's regime can also apply to small-dollar donations further reduces the informational value here.

[1] Moreover, Defendants' belated claim that "relate to" is tantamount to an earmarking provision is not well taken. The term "relate to" is undefined and not explicated in any regulatory guidance. And other jurisdictions have been explicit in defining and using the term "earmark" or imposing a limiting construction *See, e.g.*, C.R.S. 1-45-103(7.5) (defining "earmark"); *Independence Institute,* 812 F.3d at 797, n.12 (discussing limiting construction); A.R.M. 44.11.404 (defining earmarked contribution by administrative rule). If Wyoming lawmakers wish to impose an earmarking requirement, they know how to do so: by using plain language.

The Tenth Circuit employs a sliding scale with respect to the informational interest in disclosure, factoring in the size of the donation and the context of the race or ballot proposition. *Sampson,* 625 F.3d at 1260 ("We agree with the Ninth Circuit that '[a]s a matter of common sense, the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.'"). In *Sampson,* the thresholds at issue included registration of issue committees upon gathering over $200 in contributions or expenditures, as well as different disclosure requirements for contributions of $20 and over and $100 and over. *Id.* at 1249-50. The Tenth Circuit concluded that there was "virtually no proper governmental interest in imposing disclosure requirements on ballot-initiative committees that raise and expend so little money," and that the burdens outweighed the informational interest. *Id.* at 1249.

Similarly, in *Coal. for Secular Gov't v. Williams,* the Tenth Circuit held that Colorado's onerous reporting requirements for small-scale issue committees were not justified by the modest informational value to voters. 815 F.3d at 1280. Even after the Secretary of State provided more guidance, the court still found its regime too cumbersome to justify the minimal information interest.

On the other end of the spectrum, the Tenth Circuit upheld Colorado's disclosure requirements for groups who annually spend $1,000 or more to disclose donors of $250 or more and noted that the size of the election matters, relative to the disclosure thresholds. *Independence Institute,* 812 F.3d at 797-98.

In the case at bar, the entity threshold is set at $500 spent on electioneering communications in any primary or general election, including state-wide races. Wyo. Stat. § 22-25-106(h). The disclosure threshold is initially set at $100 per donor, but can be retroactively applied to smaller amounts if they aggregate to over $100.

Wyo. Stat. § 22-25-106(h)(v). Thus, the dollar amounts at issue here are on the lower end of the informational-value spectrum.

The informational interest should also be evaluated in light of whether the disclosures tell voters anything meaningful about the speaker's nature. *Gessler*, 773 F.3d at 215-216 (refuting contention that Citizens United was a "drop-in" speaker and unknown quantity). It may be that in some situations learning who donates can tell the electorate where an organization is on the political spectrum or what viewpoint is being promoted, but such interests are absent here. As the name implies—Wyoming Gun Owners—is an organization that takes unflinchingly pro-Second Amendment positions, and its donors (members) are in fact people in Wyoming who own guns, care deeply about gun rights, and oppose gun control. This will not be news to the Wyoming electorate.

This known brand and continuous presence makes WyGO much like Citizens United in the *Gessler* case. There, the Tenth Circuit reasoned that by discriminating against Citizens United and not treating it like other exempted media, Colorado's regime failed exacting scrutiny because the purported government interest was absent. "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 (emphasis in original).

Similarly, Wyoming's regime expresses an interest only in regulating electioneering communications made by entities unlike those meeting the "commentary" exception. The radio ad at issue here was political commentary. Since WyGO's radio ad met the requirements of that exception, Wyoming's interest in requiring disclosure here is minimal, and arguably non-existent, because WyGO should be treated like any other similar speaker.

Thus, the Tenth Circuit's reasoning in *Gessler* provides a freestanding basis, uncoupled from narrow tailoring, for invalidating this regime under exacting scrutiny. That is because, under *Gessler,* Wyoming's regime also fails the important-interest prong, as-applied to WyGO, a known speaker, that is entitled to the benefit of the "commentary" exception that journalists, social media posters, and other commentators rely upon.

Taking all of these factors together, Wyoming's electioneering-communications regime fails exacting scrutiny. First, Wyoming's regime lacks an earmarking requirement, which is a more narrowly tailored alternative. Second, it has a relatively low threshold for reporting, both as an entity and for individual donations, potentially requiring the itemization of donations under $100 and the un-itemized reporting of sub-$100 donations. Third, the informational value of disclosing WyGO's donors is low, because the position and viewpoints of WyGO and its members are well known. And finally, Wyoming's informational interest is here limited to disclosing contributions only to speakers who are not subject to the "commentary" exemption.

B. Wyoming's "commentary" exemption and requirement to disclose contributions that "relate to" an electioneering communication are too vague to pass constitutional muster.

In addition to failing exacting scrutiny, important components of Wyoming's electioneering communications regime are also too vague to be lawful. The axiom that laws must provide the governed with adequate notice rings particularly true when the government regulates how Americans speak about it. The potential for chilling speech heightens vagueness concerns in the First Amendment context. *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620 (1976)). Wyoming's electioneering-

communications regime is vague because it (1) contains a broad "commentary" exception that swallows the rule and (2) fails to define what contributions are to be considered "related to" an electioneering communication.[2]

As with all laws burdening First Amendment rights, the government bears the burden of proving the electioneering scheme's constitutionality. *Association of Community Organizations for Reform Now v. Golden*, 744 F.2d 739, 746 (10th Cir. 1984). "As a basic matter of due process, a law is 'void for vagueness' if it does not clearly define its prohibitions." *Doctor John's,* 465 F.3d at 1157 (citing *Grayned*, 408 U.S. at 108). The void-for-vagueness doctrine "put[s] the public on notice of what conduct is prohibited" and "guard[s] against arbitrary enforcement." *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1179 (10th Cir. 2009). A statute is therefore impermissibly vague and void if it (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," *or* (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). These are two independent reasons for a court to invalidate a statute for vagueness. *Jordan v. Pugh*, 425 F.3d 820, 824-25 (10th Cir. 2005).

A plaintiff can argue that a statute is void for vagueness either facially or as applied. *Ward v. Utah*, 398 F.3d 1239, 1246-47 (10th Cir. 2005). To succeed on a facial challenge, a plaintiff "must show, at a minimum, that the challenged law would be vague in the vast majority of its applications; that is, that 'vagueness *permeates* the text of [the] law.'" *Doctor John's*, 465 F.3d at 1157 (emphasis added)

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[2] WyGO has also asserted that additional terms are vague, both facially and as-applied, including the newsletter exception and the definition of electioneering communications, but this Court previously dismissed those claims. ECF No. 38 at 25, 27, 29-30. Thus, WyGO limits its arguments to the remaining claims only, without waiving its rights to contest the other claims on a possible appeal.

(quoting *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999)). In as-applied challenges, courts "must tether [their] analysis to the factual context in which the ordinance was applied." *Galbreath v. City of Oklahoma City*, 568 F. App'x 534, 539 (10th Cir. 2014); *see also United States v. Franklin-El*, 554 F.3d 903, 910 (10th Cir. 2009) (court must "consider th[e] statute in light of the charged conduct").

1. The "commentary" exception swallows the rule.

Wyoming's regime affirmatively defines what constitutes an "electioneering communication," but then provides for exceptions. Among these is an exception for news reports and "commentary" that otherwise meet the definition of electioneering communications. Wyo. Stat. § 22-25-101(c)(ii)(B). Because the "commentary" exception is so broad, it hollows out the definition of "electioneering communication," making it too vague to provide reasonable notice.

After all, the plain meaning of "commentary" includes "an expression of opinion," *"Commentary."* Merriam-Webster, https://www.merriam-webster.com/dictionary/commentary (last visited May 17, 2021)—and what more-obvious example of "an expression of opinion" could be offered than a political opinion about a candidate or policy?

Almost any of the communications published by WyGO within 30 days of a primary, or 60 days of a general election, would qualify as "commentary," and that description also fits the specific communications Mr. Steenbergen mentioned in his complaint to Defendants. WyGO also distributes its communications by means enumerated in the exception, including electronically. As such, it is unclear why this exception would not apply to Plaintiff.

In WyGO's particular case, the commentary is almost exclusively focused on the topic of gun policy, including how state lawmakers voted, and what candidates said in response to WyGO's policy surveys (or whether they responded to the surveys at

all). Based on this information, WyGO often categorizes a candidate as "pro-gun" or "anti-gun," sometimes using more colorful language to maximize its speech's impact. Other speakers might focus on different policy issues or viewpoints altogether. But all speakers who wish to engage in political commentary should enjoy their right to do so without worrying about complaints from opponents or competitors.

The Constitution does not favor the corporate media over other speakers. Any American is free to post her opinions on social media, fasten a bumper sticker on her car, or place a yard sign in front of her house, whether she works for a newspaper or not. And any "individual person's right to speak includes the right to speak *in association with other individual persons." Citizens United,* 558 U.S. at 391 (Scalia, J., concurring); *see also First Nat'l Bank v. Bellotti,* 435 U.S. 765, 795-802 (1978) (freedom of the press is not limited to the institutional press and "does not 'belong" to any definable category of persons or entities: it belongs to all who exercise its freedoms.") (Burger, C.J., concurring); *Gessler*, 773 F.3d at 212 (2014) ("we hold that the First Amendment requires the Secretary to treat Citizens United the same as the exempted media.").[3] That is what WyGO is – a collection of Wyoming residents expressing political commentary on issues that they care deeply about.

The commentary exemption requires that the speech be "protected by the first amendment [sic]" or its state analogue, and WyGO's political speech indisputably

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[3] *See also* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today,* 160 U. Pa. L. Rev. 459, 463 (2012) ("[p]eople during the Framing era likely understood the text as fitting the press-as-technology model - as securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry."). As such, WyGO and speakers like it are no less entitled to the Press Clause's protection than the *Casper Star-Tribune*.

meets this minimal threshold. Wyo. Stat. § 22-26-101(c)(ii)(B). And the Supreme Court and Tenth Circuit precedent cited above preclude Defendants from favoring the corporate media and discriminating against other commentators such as WyGO or a small-scale political blogger. Yet this did not prevent WyGO from running afoul of the Chamber of Commerce or the Secretary of State.

This puts WyGO in a difficult position in advance of the 2022 election season, because it does not know which of its political messages will invite third-party complaints or enforcement by the Secretary of State. As a result, WyGO will reduce its speech and may well avoid speaking 30 days before a primary election or 60 days before a general election, altogether, thereby chilling core political speech and watering down the impact of its messages. ECF No. 30-1, ¶¶ 50-54. In addition to depriving WyGO of its right to speak when its messages matter the most, the regulatory regime deprives Wyoming gun owners, and the wider electorate, of the opportunity to learn WyGO's viewpoints on issues that they care about. While Wyoming's electioneering-communications regime is indeed vague enough to deserve facial invalidation, at a minimum, it should be struck down as applied to WyGO.

2. Wyoming's electioneering-communications regime is vague because it does not adequately define which contributions "relate to" an electioneering communication.

Any person or entity spending over $500 on an "electioneering communication" in any primary or general election must report its contributions. Wyo. Stat. § 22-25-106(h). The problem is that this law does not tell reporting entities *which* contributions must be reported. In addition, Wyoming's regime does not acknowledge the possibility that donors might not earmark their contributions for specific communications, let alone require that they do so.

What the statute does provide is that reporting entities must disclose only "those . . . contributions which *relate to* an…electioneering communication." *Id.* (emphasis added). Such vague wording has been subject to judicial approbation going back to the days of *Buckley v. Valeo*, where the Supreme Court expressed exasperation with the Federal Election Campaign Act's vague relative-to-a-clearly-defined-candidate standard. 424 U.S. at 41-43. The "use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech," unless clarified elsewhere in the statute. *Id.* at 41-42; *see also* ECF No. 38 at 28-29 (collecting other cases criticizing the vagueness of "related to"). Such vagueness "offers no security for free discussion" and "compels the speaker to hedge and trim." *Id.* at 43. Wyoming's use of "related to" is no less vague than Congress's, and equally unconstitutional.

While one might relate a specific contribution to a specific communication via a donor's express earmark, such linkage is often otherwise impossible. Many, perhaps most, donors to small-scale organizations such as WyGO simply donate to support the organization's overall message, without a single specific communication in mind. One is left to speculate about how to determine which contributions "relate to" email blasts—which involve use of staff time, electricity, computers, internet connectivity, and other overhead, but do not require the purchase of time from a radio station or similar vendor. Defendants provide no guidance on how to determine whether a contribution relates to an electioneering communication, other than to suggest that WyGO should just disclose *all* donors. ECF No. 33 at 9 ("If an organization does not provide for earmarking, then it is reasonable to presume that *any* donation to the organization would in furtherance of the organization, including the organization's [electioneering] communications") (emphasis added).

Nevertheless, the disclosures demanded by the challenged scheme are far from clear:

> Set forth the *full and complete record of contributions which relate to an* independent expenditure or *electioneering communication,* including cash, goods or services and actual and promised expenditures. *The date of each contribution of one hundred dollars ($100.00) or more*, any expenditure or obligation, *the name of the person from whom received or to whom paid and the purpose of each expenditure or obligation shall be listed. All contributions under one hundred dollars ($100.00) shall be reported but need not be itemized.* Should the accumulation of contributions from a person exceed the one hundred dollar ($100.00) threshold, all contributions from that person shall be itemized;

Wyo. Stat. § 22-25-106(h)(v) (emphasis added).

The contribution disclosure requirement is nearly incomprehensible. What does it mean for a contribution to "relate to" an electioneering communication, especially where neither the entity nor its contributors have a practice of earmarking or otherwise specifying how donations will be utilized? Is the entity required to report no contributions because they do not sufficiently "relate to" the electioneering communication? Or must it report all contributions? Reporting parties are left to speculate—and donors are too.

Moreover, the contribution disclosure requirement exacerbates its incomprehensibility by first appearing to create a carve-out for contributions of $100 or more, but then decreeing that contributions of less than $100 will be "reported but need not be itemized," and also requiring the aggregation of smaller contributions, which then triggers retroactive itemization. What this all means is anyone's guess, but they might be fined $500, anyway.

For example, what does it mean to report, but not itemize a contribution? What is WyGO to do if a small-dollar donor does not earmark her contributions? Must WyGO infer a specific purpose that may not have been intended and itemize that

purpose after the fact? How must all of the small dollar contributions relate to an electioneering communication, especially where they have not been earmarked? Do all small-dollar donations from one contributor that were used for other purposes also need to be itemized if some were used for electioneering communications and the total of all exceeds $100?

These requirements are particularly confusing for WyGO, or any entity, that does not provide for the earmarking of contributions and relies heavily on small-dollar contributions. ECF No. 30-1¶¶ 10. As a result, WyGO is in a particularly poor position to provide the information demanded by the Secretary of State, even if it could discern the meaning of "related to" as used in Wyo. Stat. § 22-25-106(h)(v). In addition, WyGO's members tend to highly value their privacy, and are particularly averse to having their names disclosed. *Id.* ¶ 13. Consequently, should WyGO be required to disclose its donors, likely fewer will donate to WyGO. That may be fine with the Greater Cheyenne Chamber of Commerce, but it would result in less speech, not more, and would undermine First Amendment values.

Finally, should this Court find that the terms "relate to" and "commentary" are unduly vague, WyGO would urge the Court not just to invalidate those provisions as-applied to WyGO, but to invalidate the whole electioneering-communications regime as-applied to WyGO. That is because these vague provisions cannot be read in isolation, or surgically excised from the statute.

In addition to protecting WyGO, the commentary exception provides important protection to bloggers, social media users, and journalists from what would otherwise be the excessive reach of Wyoming's regime. Without some sort of commentary exception, the regime becomes even more overbroad because it would reach all sorts of conduct that is commonly understood to be free from government regulation. For example, striking down only the commentary exception as vague,

but leaving the rest of the regime in place, would potentially mean that the *Casper Star-Tribune* (or a similar entity) would have to report some of its election coverage as "electioneering communications," and potentially list all of its paid subscribers. Arguably, hard-hitting editorials or election coverage can sound a lot like an appeal to vote for or against a candidate or ballot proposition.

Similarly, the contribution disclosure provision is an integral part of Wyoming's regime. Without a comprehensible disclosure provision, the definition of "electioneering communication" is irrelevant and is of no legal consequence. As a result, removing these two provisions would cause the entire statutory regime to collapse, and this Court should so hold.

III. THE VIOLATION OF WYGO'S FIRST AMENDMENT RIGHTS INFLICTS IRREPARABLE HARM.

The second requirement for injunctive relief, that WyGO suffer irreparable harm, *NRDC*, 555 U.S. at 20, is also met. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *accord Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020). Indeed, "irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim." *Sindicato Puertorriqueño de Trabajadores v. Fortuno*, 699 F.3d 1, 10-11 (1st Cir. 2012). "The harm is particularly irreparable where, as here, a plaintiff seeks to engage in political speech, as 'timing is of the essence in politics' and '[a] delay of even a day or two may be intolerable.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (quoting *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1020 (9th Cir. 2008)).

This Court previously declined to issue a preliminary injunction because no election was imminent. ECF No. 39 at 24. But the election-countdown clock has advanced considerably since then, and WyGO is entitled to have its right to speak

adjudicated on the merits. That is particularly true given the pre-enforcement nature of this challenge.

In the First Amendment realm, our Supreme Court has endorsed a hold-your-tongue-and-challenge-now approach, to avoid the problem of self-censorship on the one hand, or risking prosecution on the other. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"); *Ward,* 321 F.3d at 1267 (credible threat of future prosecution causes ongoing injury in the form of chilling effect). Indeed, in this case, WyGO's fear of prosecution is further justified by the fact that Defendants have already levied a fine and collected it.[4]

As with the nonprofit organizations who refrained from fundraising in California lest they be required to indiscriminately disclose their donors, WyGO is appropriately requesting that this matter of disclosure be resolved before the election season arrives. "Exacting scrutiny is triggered by state action which *may* have the effect of curtailing the freedom to associate and by the *possible* deterrent effect of disclosure." *AFPF* 141 S. Ct. at 2388 (cleaned up, internal citations and quotation marks omitted; emphasis in original).[5]

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[4] Alas, this Court's suspension of payment of the fine came too late, as the fine was paid prior to filing this suit. ECF No. 30-1, ¶ 49 ("Although we disagreed with the fine, we did pay it recently"). ECF No. 46-1, ¶ 21 ("WyGO paid the $500 civil penalty required by the order. That penalty has not been refunded."). As such, WyGO has already suffered direct harm, aside from the harm of imminent self-censorship.

[5] Indeed, it is not just the privacy rights of WyGO's donors and members that are at issue here, but WyGO's own right to associate with its donors for the purposes of collective political speech. *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (striking down Virginia's attempt to use lawyer anti-solicitation rules to prevent the NAACP

III. THE EQUITIES BALANCE IN FAVOR OF WYGO.

In balancing the equities, courts "must give the benefit of any doubt to protecting rather than stifling speech . . . [w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007); *see also Awad v. Ziriax,* 670 F.3d 1111, 1131-32 (10th Cir. 2012) ("But when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad's in having his constitutional rights protected."). The State of Wyoming's interest in disclosures about electioneering communications does not outweigh the burden on WyGO's right to associate for the purposes of speaking about political issues.

IV. ENFORCING THE FIRST AMENDMENT IS IN THE PUBLIC INTEREST.

The public's interest favors the enforcement of constitutional rights, especially when it comes to political speech. *Gessler*, 773 F.3d at 218-19. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad,* 670 F.3d at 1132 (internal quotation marks omitted).

CONCLUSION

WyGO's motion for a permanent injunction should be granted because it has succeeded in showing that Wyoming's electioneering-communications regime is unduly vague and fails exacting scrutiny. In addition, the other injunction factors favor WyGO.

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from associating with clients for the purposes of *pro bono* litigation). Thus, the right to associate is a two-way street.

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Respectfully submitted,

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