Nos. 21-8019, 21-8021

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)

APPELLEE'S PRINCIPAL AND RESPONSE BRIEF

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ORAL ARGUMENT REQUESTED

DISCLOSURE STATEMENT

Wyoming Gun Owners, Inc. is a non-profit corporation, has no parent company, and no publicly owned company owns more than 10 percent of its stock.

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Statement of Jurisdiction

Wyoming Gun Owners ("WyGO") agrees with Defendants' statement of jurisdiction. In addition, cross-appeal jurisdiction exists because the district court's Order Granting in Part, Denying in Part Defendants' Motion to Dismiss was entered on September 17, 2021 (JA243), but final judgment disposing of all claims was entered later, on April 1, 2022. JA510. The state timely filed its notice of appeal on April 29, 2022 (JA511), and Wyoming Gun Owners ("WyGO") filed its notice of cross appeal within 14 days, on May 9, 2022. JA514. This cross appeal is timely pursuant to Fed. R. App. P. 4(a)(3).

Statement of Issues

1. Whether the district court correctly held that Wyoming's electioneering-communications disclosure statute's use of "relate to" is vague, but should have granted broader relief and found other parts of the statute vague as well.

2. Whether the district court correctly held that Wyoming's electioneering-communications disclosure statute fails exacting scrutiny because it does not limit disclosure to earmarked contributions.

3. Whether the district court erred in holding that WyGO's federal civil rights claims seeking attorneys' fees and costs against official-capacity defendants are barred by the Eleventh Amendment.

STATEMENT OF THE CASE

WyGO accepts the Defendants' statement of the case as to their appeal, although it is somewhat argumentative, and supplements it with the following additional relevant facts. For WyGO's cross-appeal, the district court's order on the state's motion dismiss (JA243-272) is also relevant.

I. FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

WyGO is a non-profit corporation organized under the Internal Revenue Code and Wyoming law. JA100. WyGO and its predecessor organizations have been active in Wyoming since about 2010. *Id.* Aaron Dorr is the Treasurer and principal of Wyoming Gun Owners. *Id.*

WyGO's 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." *Id.*; *see* www.wyominggunowners.org. To advance its mission, 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. *Id.* WyGO targets its speech to

reach voters, candidates, and elected officials in Wyoming and often promotes messages during election season, when gun-policy issues are top of mind. *Id.*

WyGO considers anyone who donates to it in any amount to be a member. *Id.* In addition, anyone can sign up to receive emails from WyGO about gun policy and candidate positions. *Id.* WyGO funds its operations mostly through small-dollar donations received through Revv, an online platform, and can also mail in contributions. *Id.*

Approximately 90% of WyGO's donations are for amounts under $100, with approximately 8% being for amounts between $100-200. *Id.* Only about 2% are for larger amounts and these comprise only a small part of WyGO's annual budget. JA100-101. To the best of Mr. Dorr's recollection, the largest donation WyGO has ever received was for $1,000. JA101. The overwhelming majority of its total money comes from small-dollar donations of $100 or less. *Id.* WyGO does not provide donors a way to earmark or otherwise limit contributions for a specific purpose. *Id.*

WyGO never has as much money as it would like to use to get out its messages. All donations go into one of two accounts: one for online contributions and another for mailed-in contributions. *Id.* The money in these funds is used to execute WyGO's overall strategy and is also used to pay for overhead, without which it could not function. *Id.* Any given WyGO communication may be paid for by money that was raised many

months earlier and WyGO does not have a way for donors to tell it only to spend a donation for a limited purpose. *Id.* Historically, WyGO's annual budget was under $50,000, although recently it has experienced more frequent years in the $50,000-$100,000 range and even one that slightly exceeded $100,000. *Id.*

WyGO's members care deeply about gun rights. *Id.* WyGO does not publicly disclose its members, and numerous WyGO members have expressed concern to Aaron Dorr about having their names disclosed to the government. JA101-102.

During the 2020 election season, WyGO exercised its right to speak to its members and other Wyoming voters about political issues, including where candidates for state office stood on Second Amendment issues. JA102. WyGO did this 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. *Id.*

WyGO's communications to its members and Wyoming voters do not ask them to vote for or against certain candidates. *Id.* That does not mean that WyGO does not prefer some candidates to others. *Id.* WyGO tries to give its members and other Wyoming voters the information they need to make an informed decision for themselves, with a focus on gun-rights issues. *Id.*

One of WyGO's tools for doing that is its candidate survey on gun policies. *Id.* A candidate's refusal to return that survey is a red flag for WyGO, because it signals that the candidate may be trying to hide a pro-gun-control agenda. *Id.* When a candidate does that, WyGO wants its members to know. *Id.*

WyGO's communications that a candidate has not returned its survey is also meant to message the candidate that he or she needs to return it. *Id.* Also, WyGO wants other candidates to be aware that if they do not return the survey, WyGO will publicly call them out. *Id.*

The same is true for candidates who support gun-control proposals in the state legislature. JA103. WyGO wants candidates to know that it will hold them accountable for their votes by drawing attention to them. *Id.*

In August 2020, prior to the primary election, WyGO paid a commercial radio station to run a 60-second ad (the "radio ad") in the Cheyenne radio market. *Id.* The radio ad cost about $1,229. *Id.* It mentioned two opposing state senate candidates by name, was read by Dorr, and its script was previously described verbatim in the state's statement of the case. Op. Brief at 6-7; JA103. The radio ad was later subject to a campaign-finance complaint. JA129.

On July 15, 2020, WyGO sent an email blast to its members entitled "WYGO's Primary Action Plan!" JA110-115. The July 15 email was later subject to a campaign-finance complaint. JA129. The email

followed a format that WyGO often uses. JA103. It solicited donations for funding the plan. *Id.* It also criticized certain gun-related policy proposals and included a description of several candidates' positions on Second Amendment issues. *Id.* The email did not advocate that readers vote for a specific candidate in the August primary election. JA103-104.

The email contains a reference to the term "earmarked,", but Dorr was using that as a way to refer to money that WyGO had internally allocated for a specific purpose, not money that was restricted by donors to WyGO. JA104. 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. JA104.

On August 1, 2020, WyGO sent a direct mail piece to Wyoming residents on its mailing list that communicated information about two state senate candidates' positions on Second Amendment issues. JA117-120. The August 1 mailer was sent to both dues-paying WyGO members and people whose names were obtained from a list broker and identified as likely pro-gun voters who resided in Wyoming. JA104. The mailer was later subject to a campaign-finance complaint. JA129.

On September 24, 2020, WyGO sent an email blast to its members entitled "Big Tech is Trying to Censor Your Gun Rights!" JA104; JA122-127. This email was sent to both dues-paying WyGO members and non-members who had signed up to receive email communications from WyGO. JA104. The September 24 email was later subject to a

campaign-finance complaint and was referred to by then-Assistant Attorney General James LaRock as a possible electioneering communication under Wyoming law. JA 131; JA141-142 (describing the contents of the September 24 email).

In addition to these emails and direct-mail, WyGO also communicated similar messages through its website postings at www.wyominggunowners.org, and digital media ads on Facebook. JA105. The content posted on its website, and promoted by WyGO on Facebook 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." *Id.*

"White-board videos" feature Aaron Dorr discussing competing candidates in Wyoming races with Dorr listing on a white dry-erase board where each candidate stood on gun-related policy issues. JA105. As is typical of many of WyGO's communications, those videos often included a request to contact and thank pro-gun-rights candidates, and contact and criticize pro-gun-control candidates or candidates who would not return WyGO's questionnaire. *Id.* These videos never include an explicit appeal to vote for or against a specific candidate. *Id.* Anyone can view these videos and WyGO's other commentary on WyGO's website and one does not have to be a WyGO member to access that content. *Id.*

When communicating with WyGO's members and other people interested in Second Amendment issues, WyGO often uses attention-grabbing language. *Id.* This language resonates with WyGO members, who are interested in presenting their viewpoints in a way that can differ from other organizations. *Id.* This ability to speak to and for its members in a way that is authentic is one of the things that makes WyGO so effective. *Id.*

The Greater Wyoming Chamber of Commerce ("Chamber") typically supports candidates who have more moderate views on the Second Amendment than those of WyGO's members. *Id.* WyGO considers the Chamber to be a political opponent. *Id.*

Sometime in October 2020, Kai Schon of the Wyoming Secretary of State's Office informed Aaron Dorr that the Chamber had filed a campaign-finance complaint against WyGO. JA106. WyGO's attorney later got a copy of that complaint through a public records request. *Id;* JA129-131.

On October 14, 2020, Schon emailed Dorr, announcing that the Secretary of State's office had concluded that unspecified "advertisements" paid for by WyGO were electioneering communications that required reporting under Wyoming law. JA106; JA133-135. Schon threatened to fine WyGO for failing to comply, but did not explain which communications were the problem. JA134.

On November 2, 2020, Assistant Attorney General James LaRock responded to a letter by WyGO's attorney, purporting to explain why the Secretary of State's office had concluded WyGO had violated state law. JA106; JA140-142. LaRock set forth his analysis that the radio ad qualified as an electioneering communication, but also stated that "other exhibits to Mr. Steenbergen's complaint may be electioneering communications if they were sent to individuals outside of WyGO's membership." JA141. LaRock further warned that if WyGO distributed what appears to be the September 24 email "to the general public, in accordance with Wyoming law it must disclose contributions and expenditures related to this message." JA142. Dorr found LaRock's letter confusing. JA106.

On December 2, 2020, Defendant Deputy Secretary of State Karen Wheeler signed a "FINAL ORDER IMPOSING CIVIL PENALTY" against WyGO. JA144-147. The order included a determination that the radio ad qualified as an electioneering communication, and referenced the June 15 email as predicate evidence, but was otherwise silent as to the other communications the Chamber had complained about and LaRock had referenced. JA145. Dorr also found her order confusing. JA106. WyGO did not know what to include in the report, but paid the fine, even though it disagreed with it. JA106-107.

Prior to the district court's injunction, WyGO intended to continue its issue advocacy, but was planning to reduce its speech activity at

election time owing to the legal uncertainty about Wyoming's laws. JA107. During both non-election and election years, including within 30 days and 60 days of both primary and general elections, WyGO ordinarily plans to continue airing radio ads, posting website content, videos, digital ads, Facebook content and sending emails and direct mailers to Wyoming residents featuring similar content as WyGO has done in the past. *Id.*

Prior to the injunction, and even today, WyGO could not reasonably predict whether state officials would determine that one of its communications that merely criticizes a candidate or asks people to contact an elected official will make WyGO subject to Wyoming's electioneering communications regulations or predict whether any of the exceptions apply. *Id.*

The Wyoming Secretary of State does not provide a process to request advisory opinions on any of the campaign finance laws enforced by the Secretary. JA344. As of at least January 2022, the Secretary of State had not issued any regulations, limiting constructions, or written guidelines indicating how it determines what is and is not an "electioneering communication" under Wyoming law, or what is or is not a contribution "related to" and electioneering communication under Wyoming law. *Id.* The state's form for reporting electioneering communications requires a reporting party to list both expenditures and contributions. *Id.;* JA348-351.

II. PROCEDURAL HISTORY

WyGO concurs with the state's description of the procedural history.

III. RULING PRESENTED FOR REVIEW

WyGO concurs, in part, with the state's presentation of its appeal as to the district court's order on the parties' cross motions for summary judgment. JA482-509. The order speaks for itself, and WyGO does not join in the state's argumentative characterizations.

In addition to challenging different aspects of the same order, WyGO's cross appeal challenges parts of the district court's Order Granting in Part, Denying in Part Defendants' Motion to Dimiss (JA243-272). That order dismissed WyGO's claims for attorneys' fees and costs against the official-capacity defendants (JA252), all claims for facial relief (JA261, JA267), the free-press claim (JA264), all claims pertaining to communications other than the radio ad (JA271-272), and the personal-capacity claims against defendants Schon and Wheeler. JA272.

Both orders under review are discussed in further detail below.

SUMMARY OF ARGUMENT

WyGO has a long-standing presence in Wyoming, where it has championed Second Amendment rights and spoken to voters on gun-related topics, including discussing legislators' voting records and gun-policy survey responses. This is core First Amendment activity that does not involve the use of magic words promoting the election or defeat

of candidates; but Wyoming officials still want WyGO to tell everyone who its donors are.

The state's electioneering regime is too vague and open-ended to be constitutional. First, it contains a disclosure provision that potentially requires disclosure of all donations, even those not tied to a specific electioneering communication by way of earmarking. Second, the disclosure provision is too vague for reasonable people to apply and might require overinclusive disclosure of donations never intended for a specific communication. Third, Wyoming's statutory regime, combined with the Secretary of State's failure to provide any written guidance, make it too difficult for speakers such as WyGO to determine whether various types of communications—including radio ads, emails, direct mail, digital ads, videos and other passively posted online content—could plausibly be deemed to be "electioneering communications" subject to reporting.

For example, there are no written criteria for determining what is an electioneering communication versus mere issue advocacy. This leaves WyGO, and similarly-situated speakers, exposed to the subjective whims of Wyoming's officials, who might determine that some communications around election time are just a little too effective to allow without investigation and compelled donor disclosure; especially if the communications are disfavored by incumbents allied with those officials.

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 re-instate 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 district court's holding that sovereign immunity bars the recovery of attorneys' fees and costs against official-capacity defendants.

ARGUMENT

I. STANDARD OF REVIEW

This court reviews the district court's rulings on motions for summary judgment, Rule 12(b)(6) motions to dismiss, and standing on a de novo basis. *Yassein v. Lewis*, No. 21-1436, 2022 U.S. App. LEXIS 19706, at *3 (10th Cir. July 18, 2022) (motions to dismiss); *Rocky Mt. Peace & Just. Ctr. v. United States Fish & Wildlife Serv.*, No. 21-1310, 2022 U.S. App. LEXIS 19842, at *17 (10th Cir. July 19, 2022) (standing); *Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1210 (10th Cir. 2013) (summary judgment and motions to dismiss).

II. WYOMING'S DISCLOSURE PROVISION FAILS EXACTING SCRUTINY

Wyoming's open-ended disclosure regime fails exacting scrutiny because it provides no clear mechanism for linking any donation to a

specific electioneering communication, and because less burdensome alternatives, such as an earmarking limitation, are readily available.

The district court correctly held that Wyo. Stat. § 22-25-106(h) (the "disclosure provision") does not withstand exacting scrutiny because it is not narrowly tailored to achieve the State's voter-informational interest. JA508. The court reasoned that the disclosure provision created a mismatch between the State's interest and the required disclosures because, in the absence of earmarking or some equivalent limitation, WyGO "must arbitrarily choose donors who 'contributed' to this ad funding, even they took money out their general donation fund." JA502-503. The court similarly noted that Wyo. Stat. § 22-25-106(h)(v) — the section requiring retroactive reporting when contributions accumulate beyond $100— "lacks any timeline for calculating the combination of donations which exceed the one-hundred-dollar threshold." JA501.

The Supreme Court provided the governing standard for compelled disclosure regimes such as Wyoming's in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2385 (2021) (*"AFPF"*). This case clarified that 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. *Id.* at 2383-85. This important opinion re-asserts that narrow tailoring is an

indispensable component of exacting scrutiny, placing the standard above intermediate scrutiny, albeit below strict scrutiny. *See id.* at 2383 (discussing the historical debate about the contours of exacting scrutiny); *see also Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 790 (10th Cir. 2013) (citing *Citizens United v. Fed. Election Comm'n,* 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).

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'"). Moreover, the administrative burdens associated with reporting and itemization burden speech rights, especially for smaller organizations without staff or in-house lawyers. *Sampson v. Buescher,* 625 F.3d 1247, 1255 (10th Cir. 2010); JA100.

Wyoming seeks to justify disclosure based on the electorate's purported informational interest, as well as the interest in preventing quid-pro-quo corruption. But WyGO's donations do not involve direct contributions to candidates, or coordinated expenditures, so the Court should focus strictly on the informational interest. The Supreme Court and the Tenth Circuit have both rejected application of the anti-corruption rationale in these circumstances. *Citizens United*, 558 U.S. at 357 (concluding that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption); *Citizens United v. Gessler,* 773 F.3d. 200, 211 (10th Cir. 2014) ("We reject, however, the Secretary's assertion of an anticorruption rationale for reporting independent expenditures").

Moreover, the state has provided no evidence of quid pro quo corruption as to WyGO or any other Wyoming entity making independent expenditures or electioneering communications. Showing that WyGO supports candidates who are friendly to its views on the Second Amendment is insufficient. Nor is it enough to claim that by making electioneering communications WyGO gains access to its political allies. Such a phenomenon is normal and salutary. "Democracy is premised on responsiveness." *Citizens United*, 558 U.S. at 359.

Turning to the government's informational interest in disclosure, this Court 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 this 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"); *Gessler,* 773 F.3d at 211-12 ("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 becomes more pronounced.

Accordingly, applying exacting scrutiny and relying on *AFPF,* the District of Colorado 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). 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 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.

Wyoming's electioneering-communications regime suffers from the same infirmity. As in *Lakewood,* Wyoming has a readily available, more narrowly tailored alternative: it could require only the disclosure of contributions earmarked for electioneering communications.

Moreover, the state's occasional suggestion that "relate to" is tantamount to a phantom earmarking provision is unpersuasive. The term "relate to" is undefined and not explicated in any regulatory guidance. *See* JA344 (¶ 22). 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.

Similarly, the state's effort to limit disclosable contributions to those made during the "election cycle" is too little, too late. The state first raised this purported limitation at oral argument before the district court, and it should have been considered waived. JA529-532; *See United States v. Hernandez-Calvillo,* Nos. 19-3210, 19-3211, 2022 U.S. App. LEXIS 19284, at *16 n.15 (10th Cir. July 13, 2022) (government waived limiting construction by raising it for the first time in a reply brief).

Moreover, as the district court correctly noted, and the state conceded at oral argument, nowhere does Wyoming's statute include such a limitation. JA531-532. It is not this Court's role to re-write poorly drafted statutes. *Iancu v. Brunetti,* 1389 S. Ct. 2294, 2296-97 (2019) ("But this Court cannot accept the Government's proposal [of a limiting construction], because the statute says something markedly different"); *Hernandez-Calvillo,* Nos. 19-3210, 19-3211, 2022 U.S. App. LEXIS 19284, at *16 n.15 (citing *Exby-Stolley v. Bd. of Cnty. Commissioners*, 979 F.3d 784, 791, 810 (10th Cir. 2020) (en banc)

(rejecting interpretation that "added language to the [statute's] plain text" because such interpretations are "generally impermissible"), *cert. denied* 141 S. Ct. 2858 (2021)).

This argument also contradicts the state's earlier stipulation that the Secretary of State "has not issued any regulations, limiting constructions, or written guidelines indicating how it determines . . . what is or is not a contribution 'related to' and electioneering communication under Wyoming law." JA344 (¶ 22). This belated, off-the-cuff limitation is not to be found in any binding, written guidance and could easily be changed by a future occupant of the Secretary of State's office.

Moreover, this supposed limitation would not cure the statute's overbreadth, because it would still arbitrarily force the disclosure of donors who contributed within the "election cycle," but may not have intended their donations to go to electioneering communications. Donors who might simply have supported WyGO's overall message would have their names disclosed as associated with expenditures for candidates personally unknown to them, or toward whom they might be agnostic. This arbitrary approach can trigger a form of false association, akin to compelled speech.

Similarly, the state's interpretations of the disclosure provision have been shifting and ephemeral. At other times in this litigation, the state has argued that, in the absence of earmarking, entities like WyGO

should disclose *all* their contributions. JA190. "If an organization does not provide for earmarking, then it is reasonable to presume that *any* donation to the organization would be in furtherance of the organization, including [its] communications." *Id.* (emphasis added). This would have the impermissible effect of converting all 501(c)(4) entities operating in Wyoming into political committees, who must report all donors as soon as they spend more than $500 when speaking about candidates within the electioneering-communications window. *See N.M. Youth Organized v. Herrera,* 611 F.3d 669, 679 (10th Cir. 2010) ($500 spending threshold cannot be used to automatically classify organizations as political committees). If anything, this broadening construction would make Wyoming's disclosure provision even more unconstitutional. It also contradicts the state's argument that the disclosure provision is narrowly tailored to contributions received within the "election cycle" or in any other way. Simply put: requiring disclosure of all donations is the opposite of narrow tailoring.

The district court also correctly noted that less burdensome alternatives are available. JA504-505. 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 as to exacting scrutiny, but the fact that Wyoming's regime can also apply to small-dollar donations further reduces the informational value here.

This Court 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. This Court 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,* this Court 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, this Court still found its regime too cumbersome to justify the minimal information interest.

On the other end of the spectrum, this Court 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 this case, the entity threshold is set at $500[1] 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 it 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

[1] The reporting threshold was recently raised to $1000. *See* Wyo. Stat. Ann. § 22-25-106(h).

(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.

The group's known brand and continuous presence makes WyGO much like Citizens United in the *Gessler* case. There, this Court 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).

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 simple, 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.

Finally, the district court rightly rejected the state's attempt to shift the burden of saving Wyoming's disclosure provision onto WyGO. It is

not the Plaintiff's burden to fix the state's statute by unilaterally forcing earmarking on its donors or instituting an elaborate accounting system that seeks to divine the true scope and intent of the state's disclosure regime. Rather it is the state that must show its disclosure regime is narrowly tailored to begin with. Wyoming has not satisfied that burden.

III. THE DISTRICT COURT CORRECTLY HELD THAT PART OF WYOMING'S ELECTIONEERING-COMMUNICATIONS STATUTE IS VAGUE, BUT DID NOT GO FAR ENOUGH

A. The vagueness standard is based on notice

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)). Indeed, an indeterminate speech prohibition carries with it the opportunity for abuse. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (state officials' "discretion must be guided by objective, workable standards"); *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 132-33, 112 S. Ct. 2395, 2402-03 (1992) (county's implementation of ordinance for police

protection fees lacked narrowly drawn, reasonable, and definite standards).

Wyoming's electioneering-communications regime is vague because it (1) fails to define what contributions are to be considered "related to" an electioneering communication; (2) contains a broad "commentary" exception that swallows the rule; (3) does not define who is a member for purposes of the newsletter exception; and (4) has a subjective standard for determining what qualifies as an electioneering communication.

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 unduly vague 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) (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").

But one should not overstate the differences between facial and as-applied relief. Classifying a challenge as facial or as-applied affects the breadth of the remedy, "but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127-28 (2019); *Citizens United*, 558 U.S. at 331 (quoting Richard H. Fallon, *As-Applied & Facial Challenges & Third-Party Standing*, 113 Harv. L. Rev. 1321, 1327-28 (2000): "[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases");

see also Fallon, 113 Harv. L. Rev. at 1324 ("[T]here is no single distinctive category of facial, as opposed to as-applied litigation"). A binary (or antipodal) approach invites "pleading games." *Bucklew,* 139 S. Ct. at 1128. To hold "that choosing a label changes the meaning of the Constitution would only guarantee a good deal of litigation over labels." *Id.*

This Court has similarly held that a challenge to a state law does not have an "antipodal limitation;" that is, the challenge need not be *either* facial *or* as-applied. *United States v. Supreme Court*, 839 F.3d 888, 912 (10th Cir. 2016). It can have characteristics of both. *Id.* Accordingly, this Court should grant relief with a scope fitting this case's practical realities.

B. The district court correctly held that Wyoming's disclosure provision was vague, but it should have granted broader relief

Any entity spending over $500 on an "electioneering communication" in any primary or general election must report its contributions. Wyo. Stat. § 22-25-106(h). But Wyoming's disclosure provision is nobody's model of clarity:

> The statement shall . . . 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 statute does not explain how one is to determine which contributions "relate to" and electioneering communications.[2] 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. Such vagueness "offers no security for free discussion" and "compels the speaker to hedge and trim." *Id.* at 43. Wyoming's use of "relate to" is no less vague than Congress's and is equally unconstitutional.

[2] The statute also does not explain how to determine whether an expenditure relates to any particular communication that might be deemed to be an electioneering communication. To the extent that the state claims expenditures should always be easier to ascertain, a suggestion that WyGO contests, that still would not resolve WyGO's legal jeopardy, because Wyoming requires *one report,* listing *both* contributions and expenditures. JA348-351.

While one might relate a specific contribution to a specific communication via a donor's express earmark, such linkage is otherwise speculative, and potentially misleading. 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 or candidate 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 provides 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, or at least all donors within the "election cycle," however that is defined. *See* JA190.

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? Wyoming leaves reporting parties to speculate—and donors too.

Moreover, the confusion is exacerbated when the statute first appears to create a carve-out for contributions of less than $100, but then decrees that contributions of less than $100 will be "reported but need not be itemized," and also requires the aggregation of smaller

contributions, which then triggers a form of retroactive itemization. What this all means is anyone's guess. And the Secretary of State's Office hasn't provided any guidance. JA344.

Under these circumstances, the district court correctly held that Wyoming's disclosure provision is vague, because the statute provides no guidance for what contributions and expenditures "relate to" an electioneering communication and the statute could be read to encompass many indirect expenditures. JA494-495. "A reasonable person could read the statute and have trouble deciphering what 'relate to' means." JA494. The court noted that individuals and organizations would face confusion when compiling expenditure reports. *Id.* "Accordingly, the phrase 'relate to' as used in Wyo. Stat. Ann. § 22-25-101(h)(iv) is void for vagueness." JA495.

The court limited its injunction to the filing of the "electioneering report" by WyGO, but the court's underlying holding used the language of facial invalidation. *See* JA509. If a reasonable person would have difficulty understanding the statute, then the disclosure provision is vague as applied to everyone, not just WyGO. The problem here is that the district court did not go far enough.

The district court demonstrated that vagueness "permeates" the text of law; that it is vague in the vast majority of applications. *See Doctor John's*, 465 F.3d at 1157. In fact, the record contains no known applications of the disclosure law to electioneering communications. If

this law is so easily understood, one would have expected the state to come forward with evidence that WyGO is an outlier in its confusion or that other organizations were applying it successfully, even in the absence of earmarking.

WyGO is an outlier in one sense: it is the only entity that has been investigated and fined under this law. JA396-397. That fact alone demonstrates the risk that this disclosure provision can be enforced arbitrarily or discriminatorily. *See Jordan,* 425 F.3d at 824-25 (risk of arbitrary enforcement constitutes independent reason for vagueness invalidation). There are also some indications that WyGO was targeted for its use of attention-getting language in its communications. *See* JA141-142 (noting that WyGO referred to one candidate as a "country club moderate" and other candidates as "gun grabbers" and "radical socialists"). The risk of arbitrary enforcement also is not mitigated by any written criteria for determining what qualifies as an electioneering communication.

Moreover, the state has itself demonstrated that the risk of arbitrary enforcement by shifting its positions during this litigation. At one point, the state proposed a broadening construction (just disclose all contributions), then it attempted to slip in what it now calls a limiting construction: parties must disclose only contributions received during the "election cycle," however that is defined. *Compare* JA190 *with* JA529-532. None of this is tethered to any written guidance and

nothing prevents the state from changing its interpretation on a whim. Moreover, this Court should not accept a limiting construction that is at odds with the text of the statute. *Iancu,* 1389 at 2296-97; *Hernandez-Calvillo,* Nos. 19-3210, 19-3211, 2022 U.S. App. LEXIS 19284, at *16 n.15; *see also Legend Night Club v. Miller,* 637 F.3d 291, 294 (4th Cir. 2011) (federal courts must not re-write statutes to conform to constitutional requirements; a history of limited enforcement is insufficient to support a limiting construction when "the statute itself lacks any limitation on the scope of enforcement").

Even if this Court is hesitant to provide the remedy of facial invalidation, it should at least broaden the remedy to invalidate application of disclosure provision to the subset of speakers who are similarly situated to WyGO. *See Supreme Court,* 839 F.3d 915-16 (facial analysis need not "attempt to assay the constitutional validity of all or virtually all" applications, but can instead focus "only the constitutional validity of the subset of applications targeted by the plaintiffs' substantive claim"); *see also Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) ("A paradigmatic as-applied attack…challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance[.]")

In this case, that would invalidate the disclosure provision as applied to the subset of speakers who have not received donations earmarked for electioneering communications or who have a practice of

never doing so. Indeed, Wyoming has put forward no credible reason why the disclosure provision would be valid as applied to any other such speaker, and it is the state's burden to prove its validity, not the other way around.

C. Wyoming's definition of electioneering communication is vague as applied to the radio ad and other WyGO communications

WyGO's complaint asserted a pre-enforcement vagueness challenge to multiple aspects of Wyoming's electioneering communications regime, including that the regime leaves unclear which factors make speech qualify as an electioneering communication, how the state defines membership for purposes of the newsletter exemption, and whether WyGO's emails and other communications might qualify as commentary. JA034. But the district court mistakenly limited the scope of the case to the radio ad, because state's order addressed only the ad, and not the emails, direct mail, or any other communication. JA271-272.

By so doing, the court misconstrued WyGO's challenge as tantamount to a post-enforcement appeal to federal court, rather than accepting it for what it was: a pre-enforcement challenge to a statute that is inviting WyGO to self-censor because WyGO doesn't understand what speech is regulated and what is not. *See* JA106-107; *AFPF,* 141 S.

Ct. at 2389 (First Amendment protections are triggered by the risk of chilling associations even absent actual restrictions).

Indeed, WyGO faces a risk of enforcement that is more than speculative. The Chamber's complaint letter launched multiple salvos at WyGO, including allegations that its emails, direct mail, digital ads, and Facebook posts were problematic. JA129-131. Later, Assistant Attorney General James LaRock explicitly threatened WyGO with enforcement when he used one of WyGO's emails as an example and stated: "If WYGO distributed this message to the general public, in accordance with Wyoming law it must disclose contributions and expenditures related to this message." JA141-142. That Defendant Wheeler's final order only fined WyGO for the radio ad does nothing to dispel the threat of enforcement against it for other communications; in fact, it underscores WyGO's future jeopardy by leaving those questions open. JA144-147.[3]

Further, Wyoming's definition of electioneering communication is vague as applied to WyGO's radio ad, emails, direct mail and other communications because Wyoming provides no guidance as to what factors make a communication one that can "only be reasonably interpreted as an appeal to vote for or against the candidate[.]" While

[3] *See* Section IV., *infra,* for a further discussion of standing issues, including Wyoming's threats of enforcement and failure to disavow enforcement of its statute against WyGO.

those communications, in particular the radio ad, are more favorable toward pro-Second Amendment candidates than pro-gun control candidates, WyGO (and other speakers like it) cannot discern where the line is or how to avoid crossing it. *See* JA102-105. Is it because WyGO's communications are too effective or use attention-getting language? If so, then which words are off limits? Does any criticism or praise of a candidate equate with an electioneering communication? How much is too much?

The confusion is amplified by the absence of any regulatory guidance, written criteria, or advisory opinion process from the Secretary of State's Office. JA344. It should be self-evident that, especially in the area of political speech, official's "discretion must be guided by objective, workable standards[,]" or subjective political consideration will creep in. *Mansky,* 138 S. Ct. at 1891 (prohibition of political t-shirts at polling places, without guidelines, was too subjective); *see also Am. Freedom Def. Initiative v. Suburban Mobility Auth.,* 978 F.3d 481, 498 (6th Cir. 2020) (public transit agency's advertising guidelines adopted amorphous ban on political speech that could not be objectively applied). Wyoming has no standards to guide officials' discretion, nor has the Secretary of State attempted to explain how his officers determine what separates electioneering communications from permissible issue advocacy.

Moreover, it is undisputed that WyGO had multiple purposes in promoting the radio ad, as well as the emails, direct mail, and white-board videos. It can both be true that a communication can be more favorable toward some candidates than others without *only* being a de facto campaign ad for that candidate. It can serve as a message to all candidates of the importance of returning WyGO's gun-rights policy survey and votes taken as elected officials. JA102-103 (not returning the survey is a message to that candidate and other candidate, as well as WyGO members). Thus, neither the radio ad, nor the other communications, could *only* be understood as vote for or against a candidate.

Finally, WyGO wishes to preserve its facial challenge to the functional-equivalent-of-express advocacy standard, while acknowledging that it is probably still the controlling test, at least for now. While *Citizens United* acknowledged that this standard is the "controlling opinion," 558 U.S. at 324-25, as recently as 2007 three Justices offered that any "functional equivalency" test is hopelessly vague, *Fed. Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 483-84, 492-93 (2007) (Scalia, J., concurring in the judgment), and one Justice expressed openness to that idea, *id.* at 482 (Alito, J., concurring). Accordingly, and considering Defendants' manifest inability to distinguish between speech that expresses views about issues and candidates from speech advocating for a vote, WyGO

respectfully preserves its claim that Wyoming's "electioneering" law is unconstitutional on its face.

D. Wyoming's commentary exception is vague

Wyoming's definition of electioneering communication provides a broad exception for news reports and "commentary" that otherwise meets the definition of electioneering communications. Wyo. Stat. § 22-25-101(c)(ii)(B). But it is so broadly worded that the exception swallows the rule.

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. JA129 ("There is no dispute that WyGO paid for radio ads, digital ads, Facebook posts, and direct mail"). WyGO also distributes its communications by means enumerated in the exception, including electronically. As such, this provision can reasonably be read to apply to

WyGO, including the emails attached to the Chamber's complaint. JA110-115; JA 122-127.

In holding that the commentary exception does not apply to the radio ad, the district court opined that "a reasonable person would understand that commentary does not encompass paid advertisements comparing two candidates for office." JA497. But this same reasoning falls away for email communications or white-board videos and other Second-Amendment commentary posted on WyGO's website, and available for viewing there to anyone, including during close temporal proximity to elections. Other than staff time and an incremental portion of overhead, these modes of communication do not involve payments to third parties to promote messages.

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.").[4] That is what WyGO is – a collection of Wyoming residents expressing political commentary on issues that they care deeply about.

Wyoming's commentary exemption requires that the speech be "protected by the first amendment [sic]" or its state analogue, and WyGO's political speech indisputably meets this minimal threshold. Wyo. Stat. § 22-26-101(c)(ii)(B). The white-board videos and emails are also commentary, much like journalistic opinion pieces or so-called political analysis, which make few attempts at objectivity. At a minimum, this Court should hold that the commentary exception is vague as to these modes of communication.

E. Wyoming's newsletter exception is vague

Wyoming's regime also exempts newsletters or "other internal communications" distributed only to "members or employees of the entity." Wyo. Stat. § 22-25-101(c)(ii)(A). But Wyoming provides no guidance on how to determine who is a member of an organization. If

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[4] *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*.

the state defers to the organization to make that determination, then it has not said so.[5] Likewise, the state has provided no guidance on whether an email or direct-mail piece that goes mostly to an organization's members (as determined by WyGO, for instance), but that might include a few non-members harvested from a legacy mailing list or who voluntarily signed up, converts the email or mail from an exempted internal communication, to one of general circulation, subjecting it to Wyoming's electioneering communications regime. *See* JA104 (¶¶ 26, 29, 32). Similarly, WyGO's white-board videos and other commentary, posted on its website, and available for viewing by anyone is arguably subject to this exception. Yet the state avoids giving WyGO any definitive guidance, inviting potential self-censorship.

IV. THE STATE'S CLAIM THAT WYGO LACKS STANDING IS FRIVOLOUS

Although the state does not explicitly argue that WyGO lacks standing in the "Argument" section of its brief, it implies as much when describing the "Ruling Presented for Review." Op. Br. at 9. It argumentatively claims that the district court disposed of this issue "[w]ithout engaging in a complete standing analysis[.]" *Id.* This *sotto voce,* back-door attack on standing is frivolous.

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[5] Presumably an organization could define its members to include all Wyoming voters who are eligible to own a gun, or would like to be able to do so. Whether such a definition would draw an investigation or fine is an open question.

Indeed, WyGO's standing was never a subject of serious debate before the district court—nor should it have been. Standing requirements are relaxed in pre-enforcement challenges to speech restrictions, allowing for a hold-thy-tongue-and-sue-first approach. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006). Plaintiffs, such as WyGO, who allege a chilling effect may establish standing by showing:

> (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced.

Id.; see also Rio Grande Found. v. City of Santa Fe, 7 F.4th 956, 959 (10th Cir. 2021) (re-affirming *Walker* standard).

WyGO easily meets this standard because Aaron Dorr's declaration sets forth an undisputed past history of various forms of political speech—including radio ads, emails, direct mail, white-board videos, news commentary, and social media advertising—as well as a desire to speak during future electioneering windows, but an intention to reduce speech until regulatory clarity can be obtained. JA102-107 ("Unless we can obtain greater clarity about Wyoming's campaign finance laws, we intend to forego speaking during election season . . . .").

Further, this is not a case where the parties must wrangle about whether the state has disavowed enforcement of its regime against

WyGO because there is a history of *actual* enforcement against the plaintiff. JA144-147. And the state's legal representative also threatened further enforcement against WyGO for its emails. JA141-142 ("If WyGO distributed this message to the general public…it must disclose contributions and expenditures related to this message"). Finally, the state refused to provide further guidance about whether it considered WyGO's other communications—including white-board videos and communications the Chamber complained about—to be electioneering communications, or what criteria would be used to make such determinations. Such studious silence falls far short of an express disavowal of enforcement against WyGO. *See New Mexicans for Bill Richardson v. Gonzales,* 64 F.3d 1495, 1502 (10th Cir. 1995).

As such, WyGO has standing to challenge the full range of possible applications of Wyoming's regime to plaintiff's historic and planned communications, including the regime's application to radio ads, emails, direct mail, white-board videos, news commentary, and social media advertising. The district court's error was to limit its holdings to the radio ad only.

V. WyGO IS ENTITLED TO ATTORNEYS' FEES AND COSTS AS A PREVAILING PARTY UNDER 42 U.S.C. 1988

In ruling on the state's motion to dismiss, the district court incorrectly held that "Defendants correctly assert that Plaintiff's § 1983

claims seeking attorney's fees and costs against official capacity Defendants are barred by the Eleventh Amendment." JA252.[6]

42 U.S.C. § 1988(b) allows a prevailing § 1983 plaintiff to obtain "a reasonable attorney's fee as part of the costs." A prevailing party is a party in whose favor judgment is rendered regardless of the amount of damages awarded. *Xlear, Inc. v. Focus Nutrition, Ltd. Liab. Co.*, 893 F.3d 1227, 1236-37 (10th Cir. 2018). A plaintiff who has been awarded some relief by the court in a way that materially alters the relationship between the parties is a "prevailing party." *Id.*

This Court has long recognized that a preliminary injunction that provides at least some relief on the merits confers prevailing party status; unless that injunction is later "undone by a subsequent adverse decision on the merits[.]" *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1238 (10th Cir. 2011).[7] If that is true for a preliminary injunction, it is doubly so for an injunction granting final relief on the merits.

Furthermore, over forty years ago, the Supreme Court soundly rejected the proposition that the Eleventh Amendment bars recovery under 42 U.S.C. 1988 for successful injunctive claims against state

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[6] Plaintiff was granted leave to file a motion for attorneys' fees and a bill of costs after this appeal (JA017 (ECF No. 59)), but the court's earlier order seems to limit such relief and WyGO wishes to avoid any claim that it has waived this issue.

[7] The caption of this opinion indicates that the defendants, all state officials, were sued in their official capacities. *Kan. Judicial Watch v. Stout*, 653 F.3d at 1238.

officials. *Hutto v. Finney*, 437 U.S. 678, 700 (1978) ("[A]ttorney's fee awards should generally be obtained 'either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)'"); *Maher v. Gagne*, 448 U.S. 122, 130-31 (1980) (Eleventh Amendment defense foreclosed by *Hutto* in consent decree context); *Missouri v. Jenkins*, 491 U.S. 274, 280 (1989) (re-affirming *Hutto* and recognizing that "Eleventh Amendment did not apply to an award of attorney's fees ancillary to a grant of prospective relief."); *Battle v. Anderson*, 614 F.2d 251, 257 (10th Cir. 1980) (recognizing that *Hutto* foreclosed Oklahoma's claim of sovereign immunity); *see also Buffin v. California,* 23 F.4th 951, 959 (9th Cir. 2022) (affirming district court decision to require attorneys' fees be paid by state because "it correctly found that the Eleventh Amendment does not bar § 1988 attorney's fees awards and that the plaintiff class prevailed against the Sheriff for actions taken on behalf of the State").

It is undisputed that the district court awarded injunctive relief and a partial judgment in WyGO's favor. JA509-510. As such, WyGO is entitled to seek attorney's fees and costs under 42 U.S.C. § 1988, and the district court's holding barring such a recovery on sovereign immunity grounds was clear error.

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.

ORAL ARGUMENT STATEMENT

This case presents important issues regarding the First Amendment and Wyoming's attempts to regulate political speech when it matters most.

Dated: August 16, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This document complies with the type-volume limit of Fed. R. App. P. 28.1 (e)(2)(B)(i), excluding the parts exempted by Fed. R. App. P. 32(f), because this document contains 10,057 words, as calculated by Microsoft Word; and

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Dated: August 16, 2022

s/Endel Kolde

CERTIFICATE OF SERVICE

I hereby certify that today I electronically filed this brief using the appellate CM/ECF system and that all participants are registered CM/ECF users and will be served via that platform.

Dated: August 16, 2022

s/Endel Kolde

ATTACHMENT 1: DISTRICT COURT'S ORDER GRANTING IN PART, DENYING IN PART DEFENDANTS' MOTION TO DISMISS – FILED SEPTEMBER 17, 2021

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WYOMING GUN OWNERS, *a Wyoming nonprofit corporation, also known as WyGO*,

Plaintiff,

vs.

WYOMING SECRETARY OF STATE, *et al*,

Defendants.

Case No. 21-CV-108-SWS

ORDER GRANTING IN PART, DENYING IN PART DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants Wyoming Secretary of State Edward Buchanan, Wyoming Deputy Secretary of State Karen Wheeler, Election Division Director for the Wyoming Secretary of State Kai Schon, and Wyoming Attorney General Bridgett Hill's *Motion to Dismiss*. (ECF No. 23.) Plaintiff Wyoming Gun Owners opposes the motion. (ECF No. 31.) Having reviewed the parties' briefing and otherwise being fully advised, the Court finds as follows:

BACKGROUND

Plaintiff Wyoming Gun Owners ("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

Attachment 1

No. 30 at 6.) WyGO is comprised of many members who subscribe to receive communications from WyGO about pertinent issues relevant especially to state and local Second Amendment legislation. According to WyGO, anyone who donates to the organization is designated as a member. (*Id.* at 7.) Anyone can sign up to receive emails from WyGO about gun policy and candidate positions. (*Id.*) WyGO uses a variety of media and methods to promote its messaging, including posts to its own website, dissemination of candidate surveys, videos, emails to members and non-members, radio ads, digital ads, Facebook and other social media posts, and direct mailings. (*Id.* at 6.) WyGO oftentimes increases its messaging during election season when gun-policy issues often peak public interest.

In August of 2020, just before Wyoming's primary election, WyGO paid a commercial radio station roughly $1,229 to run a minute-long "issue ad" in the Cheyenne radio market. (*Id.* at 7.) The radio advertisement mentioned two opposing state senate candidates by name, commending one candidate for supporting gun rights, and criticizing the other for silence on the issue and potential hostility to gun rights. (*Id.*) Around the same time, WyGO sent emails and direct mailings to its members soliciting donations for funding its "Primary Action Plan", communicating about "likely pro-gun Wyoming voters," and expressing concerns it had that social media platforms were censoring "pro-gun speech." (*Id.* at 7–8.) It posted similar messages, digital media ads, and videos on its website and social media pages. (*Id.* at 8–9.)

On October 14, 2020, WyGO received a notice from Kai Shon, the Election Division Director of the Wyoming Secretary of State's Office, indicating they had received

a complaint alleging WyGO had engaged in political activity requiring campaign finance reports, which WyGO had not filed. (*Id.* at 9, *see also* ECF No. 30-6.) Mr. Schon indicated in the letter that the Secretary of State's Office was aware WyGO had paid for unspecified advertisements and failed to comply with the requirements set forth in Wyo. Stat. § 22-25-106(h). (*Id.*) Because of its failure to comply, Mr. Schon explained WyGO had twenty-one days to comply with the reporting requirements in the statute, or be subject to a civil penalty of $500. (*Id.*) The Wyoming Secretary of State received the original complaint about WyGO's purported electioneering communications from the Greater Wyoming Chamber of Commerce, which WyGO alleges "typically supports candidates who differ from WyGO on Second Amendment rights." (*Id.*; *see also see* ECF No. 30-5.)

On October 21, 2020, counsel for WyGO responded to Mr. Schon, indicating that Mr. Schon failed to provide the actual complaint the Wyoming Secretary of State's Office had received or exhibits of the alleged electioneering communications. (ECF No. 30-7.) WyGO's counsel also stated his position that WyGO's issue advocacy was not an electioneering communication. (ECF No. 30-7.) The letter also asked the Wyoming Secretary of State's Office to "retract [its] threat against WyGO and dismiss the complaint of [the Greater Wyoming Chamber of Commerce] as baseless political bushwacking." (*Id.* at 2.)

On November 2, 2020, WyGO received a letter from James LaRock, Assistant Attorney General for Wyoming, explaining why the advertisements WyGO paid for were considered electioneering communications under Wyoming law. (ECF No. 30-8.) Mr. LaRock set forth the statutory definition of electioneering communications and specifically

explained how WyGO's radio advertisement was covered by that definition. (*Id.* at 2–3.) Mr. LaRock also indicated other exhibits attached to the complaint by the Greater Wyoming Chamber of Commerce "may be electioneering communications if they were sent to individuals outside of WyGO's membership." (*Id.* at 3.) Finally, Mr. LaRock directed WyGO to file a campaign finance report listing contributions and expenditures related to the radio advertisement "as well as any other electioneering communications WyGO caused to be made during the primary election." (*Id.* at 4.) WyGO declined to file a campaign finance report listing its contributions and expenditures related to the radio advertisement or any other communication or media it disseminated prior to the primary election.

Having received no campaign finance report from WyGO within the allotted time period, on December 2, 2020, Deputy Secretary of State Karen Wheeler signed a *Final Order Imposing Civil Penalty* against WyGO for only the radio advertisement. (ECF No. 30-9.) In imposing the penalty, the order explained, in part,

> 8. Before the 2020 primary election, Wyoming Gun Owners communicated with its members to express its intent to spend over $50,000 on digital ads, direct mail, email, and literature to support or oppose specific candidates in three state legislative races, including the race for the Republican nomination to represent State Senate District 6.
>
> 9. On August 7, 2020, Wyoming Gun Owners, through a third party, spent $1,229.10 for advertisement time on KGAB, a radio station that serves Cheyenne and southeast Wyoming.
>
> 10. Wyoming Gun Owners, through a third party, submitted an ad to run on KGAB. The ad expressly identified Senator Anthony Bouchard and Erin Johnson, candidates for the Republican nomination to represent State Senate District 6, a senate district that encompasses part of Cheyenne, eastern Laramie County, and part of Goshen County.

> 11. The ad described Senator Bouchard as a "brave champion" who will "fight for your gun rights" and "stand against" the "violent thugs [who] are rioting, looting, and vandalizing." The ad referred to Johnson as "pathetic" and warned that candidates like Johnson would "stab us in the back the first chance they get."

(*Id.* at 3) (internal references omitted). Finding the radio ad to be an electioneering communication under the meaning of the statute, and finding WyGO failed to file a report with the Secretary of State's Office listing itemized contributions and expenditures related to the radio ad, the Secretary of State determined a $500 civil penalty was required under Wyo. Stat. § 22-25-108(f). (*Id.* at 3–4.) The order was silent as to any other emails, mailers, or other communications by WyGO, penalizing WyGO only for the radio advertisement.

On June 1, 2021, WyGO filed a Complaint against Defendants Wyoming Secretary of State Edward Buchanan, Wyoming Deputy Secretary of State Karen Wheeler, Election Division Director for the Wyoming Secretary of State Kai Schon, and Wyoming Attorney General Bridgett Hill ("Defendants"). (ECF No. 1.) The Complaint alleges Wyoming's Electioneering Communications Statute is unconstitutional for several reasons. First, WyGO alleges the statutory scheme infringes on WyGO's First Amendment right of free speech both facially and as applied. (*Id.* at 12–15, Counts One and Two.) WyGO next alleges the statutory scheme violates WyGO's First Amendment right of free press. (*Id.* at 15–17, Count Three.) Finally, WyGO alleges the statute is unconstitutionally vague. (*Id.* at 17–18, Count Four.)

The Defendants have moved to dismiss WyGO's complaint under grounds of Eleventh Amendment Sovereign Immunity and for failure to state a claim. (ECF No. 23.)

First, Defendants argue WyGO's official capacity claims are barred by sovereign immunity since the state officials were acting in their official capacity, making them immune from suit. (*Id.* at 6.) Next the Defendants argue the individual capacity claims against Defendants Wheeler and Schon should be dismissed under qualified immunity. (*Id.* at 9.) Finally, Defendants assert WyGO has failed to state a claim for which relief can be granted on each of its constitutional claims.

LEGAL STANDARD

The standard of review on a motion to dismiss is well-established. To survive a motion to dismiss, a plaintiff's "complaint must contain sufficient factual matter... to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl Corp v. Twombly*, 550 U.S. 544, 570 (2007)). For the claims of a complaint to meet the standard of plausibility, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This plausibility standard is "not akin to a 'probability requirement', but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, although the plaintiff does not need to provide detailed factual allegations, "mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' will not suffice." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Twombly*, 550 U.S. at 555). A complaint that "tenders 'naked assertion[s]' devoid of 'further factual enhancement'" is deficient. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

When ruling on a motion to dismiss for failure to state a claim, it is not the Court's function "to weigh [the] potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565–66 (10th Cir. 1991). It must accept all factual allegations in the complaint as true. *Twombly*, 550 U.S. at 572. The Court must also view the facts in the light most favorable to the non-moving party. *Sutton v. Utah State Sch. For Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). And, while factual assertions are accepted as true, legal conclusions are not. *Berneike v. CitiMortgage*, 708 F.3d 1141, 1144 (10th Cir. 2013).

DISCUSSION

This case centers around whether Wyoming Statute § 22-25-106(h) imposes an unconstitutional restriction on First Amendment right to free speech. Plaintiff challenges the statute's constitutionality on its face and as applied to Plaintiff, justifying a claim under 42 U.S.C. § 1983. (ECF No. 1 at 12–15.) Plaintiff also contends the statutory scheme challenges Plaintiff's right to free press (*Id.* at 15–17) and is unconstitutionally vague, also justifying claims under § 1983. (*Id.* at 17–18.) The Plaintiff brings all four claims against Wyoming Secretary of State Edward Buchanan, Wyoming Deputy Secretary of State Karen Wheeler, Election Division Director for the Wyoming Secretary of State Kai Schon, and Wyoming Attorney General Bridgett Hill. However, Plaintiff also brings the claims against Karen Wheeler and Kai Schon in their individual capacities. Before addressing the plausibility of the four claims, the Court will first address the official-capacity and individual-capacity claims.

Official Capacity Claims

The Defendants argue Plaintiff's official capacity claims are barred by sovereign immunity, which protects the state and its respective agencies and officials from being sued. (*See* ECF No. 24 at 6.) The Eleventh Amendment guarantees state sovereign immunity from suits brought by their "own citizens, by citizens of other states, by foreign sovereigns, and by Indian Tribes." *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 838 (10th Cir. 2007). Likewise, courts will not entertain suits against state agencies or state officials, for the same reason, as those suits amount to actions against the state itself. *ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1188–89 (10th Cir. 1998).

However, there are three exceptions to the sovereign immunity doctrine. First, a state may consent to suit. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 159, 1166 (10th Cir. 2012). Second, Congress may expressly abrogate state sovereign immunity. *Id*. Third, litigants may sue state officers for prospective injunctive relief under the *Ex Parte Young* doctrine. *Chamber of Commerce of the United States v. Edmondson*, 592 F.3d 742, 760 (10th Cir. 2010) (citing *Ex Parte Young*, 2009 U.S. 123, 159–60 (1908)). The parties do not contest that the first and second exceptions do not apply to this case, but disagree as to whether the third exception allows suit in this case. (*See* ECF No. 31 at 6–7.) Defendants argue the third exception is not applicable because Plaintiff fails to satisfy the second prong of the *Ex Parte Young* test. (ECF No. 24 at 8.) After reviewing the complaint, the Court agrees with Plaintiff that the third exception applies.

The *Ex Parte Young* doctrine has evolved over the years. Under *Ex Parte Young*, a party may sue a state official seeking only prospective equitable relief for violations of

federal law. *See Edmondson*, 594 F.3d at 760. To allege a proper claim under *Ex Parte Young*, the court "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal citation and quotation marks omitted) (alteration in original). To determine whether a complaint is sufficient, courts employee a three-pronged test: "(1) whether the case is against state officials or the state itself; (2) whether the complaint alleges an ongoing violation of federal law; and (3) whether the relief sought is prospective relief." *EagleMed, LLC v. Wyoming*, 227 F.Supp.3d 1255, 1267 (D. Wyo. May 16, 2016) (reversed on other grounds).

In this case, the Defendants concede Plaintiff has satisfied the first and third prongs of the test. Defendants only contend the complaint does not allege an ongoing violation of federal law, but Plaintiffs have successfully pleaded this second prong as well. The complaint alleges the state officials are enforcing an unconstitutional statute against the Plaintiff and the Plaintiff has a non-frivolous, substantial claim for relief. This prong does not require the Court to ascertain whether state officials actually violated federal law. *See Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012). Instead, the Court only needs to "determine whether Plaintiffs state a non-frivolous, substantial claim for relief against the state officers that does not merely allege a violation of federal law solely for the purpose of obtaining jurisdiction." *Id.* (citing *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 866 (10th Cir. 2003) (internal quotations omitted). The Plaintiff claims against Wyoming state officials alleges Wyoming's electioneering communications disclosure regime is unconstitutional, facially

and as applied. Plaintiff is seeking prospective damages for this violation. Thus, the complaint satisfies the Ex Parte Young test and the official capacity claims are not barred by Eleventh Amendment sovereign immunity. *See EagleMed*, 227 F.Supp.3d at 1267–68.

However, part of the relief sought by the Plaintiff is retrospective. The Plaintiff requests nominal damages of $17.91 and attorney's fees, costs, and expenses pursuant to 42 U.S.C. § 1983. (ECF No. 1 at 19.) In fact, every claim in Plaintiff's complaint is lodged under § 1983. The request for payment of nominal damages suffered in the past will be denied, as it is not prospective and must fail. *See EagleMed*, 227 F.Supp.3d at 1267. Turning to the claims under § 1983 seeking awards for attorney's fees and expenses, and not just for injunctive relief, the Defendants seek dismissal, arguing § 1983 claims against state officials are barred by sovereign immunity since they are effectively against the state. (ECF No. 24 at 9, ECF No. 32 at 1–2.) Defendants cite to *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) for the proposition that state officials cannot be sued under § 1983. (ECF No. 32 at 2.)

In this instance, Defendants correctly assert that Plaintiff's § 1983 claims seeking attorney's fees and costs against official capacity Defendants are barred by the Eleventh Amendment. "The Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). The same theory applies when state officials are sued for damages in their official capacity. *Id.* (citing *Cory v. White*, 457 U.S. 85, 90 (1982)). Official-capacity suits, different than individual capacity suits, "generally represent only another way of pleading an action against an entity of which an officer is an

agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55 (1978). This makes sense because "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents . . ." *Graham*, 473 U.S. at 169. (internal citations omitted).

To recover under an official capacity action, a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation. *See Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (internal quotations omitted). Again, absent waiver by the state or valid congressional override, the Eleventh Amendment bars a damages action against a state in federal court. This bar remains in effect when State officials are sued for damages in their official capacity. *Cory*, 457 U.S. at 90. In this case, the official capacity claims against Defendants for damages—other than prospective relief under *Ex Parte Young*—cannot be maintained against any of the official-capacity defendants in this case. Accordingly, the § 1983 claims against Defendants Buchanan, Wheeler, Schon, and Hill in their official capacity must fail and the Court will only resolve the claims for declaratory relief. *See Graham*, 473 U.S. at 170 ("[Respondents] freely concede that money damages were never sought from the Commonwealth and could not have been awarded against it; respondents cannot reach this same end simply by suing State officials in their official capacity.").

Individual Capacity Claims against Defendants Wheeler and Schon

Next, the Defendants argue individual defendants Wheeler and Schon are entitled to qualified immunity. (ECF No. 24 at 9.) Defendants allege that Plaintiff has failed to meet its burden of establishing facts that demonstrate a violation of a constitutional right which

was clearly established at the time of the individual defendants' conduct. Actions under § 1983 can hold government employees or officials personally liable for money damages if they violate a federal constitutional right. 42 U.S.C. § 1983. Qualified immunity is a defense to a § 1983 claim. *See Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011). "[G]overnment officials are not subject to damages liability for the performance of their discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993)). Qualified immunity provides protection to all state officers unless they are obviously incompetent or purposely violate the law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Courts employ a two-part test to analyze a qualified immunity defense. "In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Leverington v. City of Colorado Springs*, 643 F.3d 719, 732 (10th Cir. 2011) (internal quotations omitted).

The Court has discretion to decide which of the two prongs should be addressed first in light of the circumstances. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Here, the Court will first address the prong analyzing whether there was a clearly established right. Whether a right is "clearly established" is an objective test: "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Stearns v. Clarkson*, 615 F.3d 1278, 1282 (10th Cir. 2010). "In order for the law to be clearly

established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.* (internal quotation omitted). If the right is not clearly established, the court may find qualified immunity without determining the constitutionality of the conduct. *Apodaca v. Raemish*, 864 F.3d 1071, 1076 (10th Cir. 2017).

Plaintiff argues that it was clearly established in the Tenth Circuit that "state authorities may not favor the institutional press over other similar speakers and that earmarking requirements are essential for narrow tailoring." (ECF No. 31 at 20.) In support, it first cites to *Citizens United v. Gessler*, 773 F.3d 200, 212 (2014). Relying on *Gessler*, Plaintiff asserts that WyGO "stands in the shoes of Citizens United" which was treated the same as the exempted media since the group was so functionally similar to the press. (ECF No. 31 at 22.) Arguing WyGO is the same as Citizens United, Plaintiff argues its communications are mostly all exempted from Wyoming's disclosure requirements. (*Id.*) WyGO also cites Tenth Circuit's decision in *Independence Institute* to support its argument that enforcing a statute requiring disclosure without an earmarking requirement is clearly established as unconstitutional. (*Id.*) Neither *Gessler* nor *Independence Institute* demonstrate precedent sufficiently on point to the facts of this case that it puts the constitutional issue "beyond debate." *See Mullenix v. Luna*, 577 U.S. 7, 11 (2015).

In *Gessler*, Citizens United, a political advocacy group, filed suit against Colorado's Secretary of State, challenging Colorado's electioneering disclosure provisions under the First Amendment. The suit came after the Secretary of State imposed certain electioneering

disclosure requirements on Citizens United for a production of a film titled *Rocky Mountain Heist* which centered around the alleged impact of various advocacy groups on Colorado government and policy. 773 F.3d at 202. Citizens United argued it was treated differently from the media, which was exempted from Colorado's disclosure requirements by statute. The Tenth Circuit determined Citizens United was akin to the media, which enjoyed an exemption in disclosure, primarily since it had "an extended history of producing substantial work, comparable to magazines or TB special news reports rather than advertisement sound bites," noting the film at issue was Citizen United's twenty-fifth film on political and religious topics over the course of ten years. *Id.* at 215.

However, while the Tenth Circuit agreed that Citizens United was exempted from providing electioneering communications disclosures under Colorado's statutory definition, it did note that "there could be challenging questions about what entities are entitled to the same relief as Citizens United[,]" leaving open the determination of those decisions to the Secretary of State. *Id.* at 217. Furthermore, and importantly to this case, the Tenth Circuit determined, while the film itself exempted Citizens United from disclosure requirements under the statutory definition, advertisements for the film "that mention a candidate or express support or opposition to election of a candidate" were not exempted. *Id.* at 217–18. This is because Citizens United failed to show that such advertisements were exempted under Colorado's media exception, and thus, Citizens United failed to show it was being treated differently from the media in that respect. Accordingly, the court granted no relief to Citizens United from disclosure requirements applied to its advertising. *Id.* at 218.

Plaintiff attempts to stretch the holding in *Gessler*, arguing it is entitled to the same treatment as Citizens United and should be exempted under Wyo. Stat. § 22-25-101(c)(ii)(B). However, the *Gessler* case does not support such a legal conclusion, because even if WyGO was equivalent to Citizens United, its advertisements would still be subject to disclosure under *Gessler*. Moreover, the Tenth Circuit recognized the inherent difficulty in determining which organizations were entitled to the same exemption as the free press under Colorado's statute. *See Gessler*, 773 F.3d at 217. WyGO attempts to argue that its "clearly established right" is to be treated like the exempted media, but the *Gessler* case does not stretch so far. Thus, it would not be clear to a reasonable officer, in this case, the individual defendants, that their imposing of a civil penalty for WyGO's failure to disclose was unlawful in this situation. *See Stearns*, 615 F.3d at 1282.

Nor would *Independence Institute* put the individual defendants on notice that disclosure statutes should contain an earmarking requirement, because that case did require an earmarking requirement. In Independence Institute, earmarking was only one of the factors the court considered in determining whether the statute was narrowly tailored, but alone was not dispositive. *See* 812 F.3d at 797. The Court also considered that the statute 1) "only demands disclosure for communications that unambiguously refer to a primary-election candidate within thirty days of a primary election or a general-election candidate within sixty days of a general election;" 2) that "[t]he message also must be targeted to the relevant electorate;" 3) that only certain means of communication were covered; and 4) the monetary amount triggering disclosure. *Id.* at 797–98. The Court held that while the disclosure requirements "undoubtedly chill potential donors to some extent, these

requirements are sufficiently drawn to serve the public's informational interest and are less restrictive than other alternatives." *Id.* at 798. Accordingly, despite Plaintiff's contention, *Independence Institute* and *Gessler* do not clearly establish that small-dollar donations should only be subject to disclosure in the presence of an earmarking component.

Plaintiff fails to satisfy its burden under the second prong of qualified immunity. No reasonable officer of the state would have known it was unlawfully imposing a penalty due to WyGO's failure to adhere to disclosure requirements for its radio advertisement. The alleged defendants did not knowingly violate a law or act in a "plainly incompetent" manner. *Malley*, 475 U.S. at 341. Accordingly, the Court finds the individual defendants are entitled to qualified immunity. *Apodaca*, 864 F.3d at 1076 ("But if the right were not clearly established, we may find qualified immunity without deciding the constitutionality of the conduct.") (citing *Pearson v. Callahan*, 555 U.S. 223, 236–42 (2009)).

Failure to State a Claim

Defendants finally argue that, in addition to the jurisdiction deficiencies in Plaintiff's § 1983 claims, all of Plaintiff's declaratory claims fail to state a claim for which relief can be granted. Plaintiff asserts four claims involving the definition of electioneering communications and associated reporting and disclosure requirements. First, WyGO claims that the definition of an electioneering communication in Wyo. Stat. Ann. § 22-25-101(c) is overbroad. Second, WyGO asserts Defendants' enforcement of the electioneering communications statute and reporting requirement in Wyo. Stat. Ann. § 22-25-106(h) violates its First Amendment rights as applied to WyGO. Third, WyGO asserts it has been deprived of the right to free press because its communications are "commentary" and thus,

not electioneering communications. Finally, WyGO claims the statutes are unconstitutionally vague.

1. **Claim I: Facial Overbreadth Challenge to Wyo. Stat. § 22-25-101(c)(i)-(ii) and 106(h)**

To assert a facial overbreadth claim, a plaintiff must demonstrate that the challenged law (1) "could never be applied in a valid manner," or (2) even though it may be validly applied to some, "it nevertheless is so broad that it may inhibit the constitutionally protected speech of third parties." *Western Watersheds Project v. Michael*, 196 F.Supp.3d 1231, 1243 (D. Wyo. 2016) (citing *N.Y. State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 11 (1988)). A facial challenge is a difficult argument to successfully make, because the challenger must show that there is no scenario under which the law would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *United States v. Williams*, 553 U.S. 285, 301 (2008) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). However, in the context of free speech, the Supreme Court also recognizes a second type of facial challenge "whereby a law may be invalidated as overbroad 'if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

Plaintiff challenges the definition of electioneering communications found in Wyo. Stat. § 22-25-101(c) as facially overbroad, "treating issue advocacy as express advocacy

and thus as an expenditure under Wyoming campaign finance law for mentioning a candidate within 30 days of a primary election, or 60 days of a general election, in a way that only be reasonably interpreted as an appeal to vote for or against the candidate." (ECF No. 1 at 13.) Even if taken as true, though, "no realistic danger exists that [the statute's definition] will significantly compromise First Amendment protections of parties not before the court." *West*, 206 F.3d at 1367 (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (internal quotations omitted)). The definition Plaintiff asserts to be facially overbroad reads:

> "Electioneering communication" means, except as otherwise provided by paragraph (ii) of this subsection, any communication, including an advertisement, which is publicly distributed as a billboard, brochure, email, mailing, magazine, pamphlet or periodical, as the component of an internet website or newspaper or by the facilities of a cable television system, electronic communication network, internet streaming service, radio station, telephone or cellular system, television station or satellite system and which:
>
> (A) Refers to or depicts a clearly identified candidate for nomination or election to public office or a clearly identified ballot proposition and which does not expressly advocate the nomination, election or defeat of the candidate or the adoption or defeat of the ballot proposition;
>
> (B) *Can only be reasonably interpreted as an appeal to vote for or against the candidate or ballot proposition*;
>
> (C) Is made within thirty (30) calendar days of a primary election, sixty (60) calendar days of a general election or twenty-one (21) calendar days of any special election during which the candidate or ballot proposition will appear on the ballot; and
>
> (D) Is targeted to the electors in the geographic area:
>
> (I) The candidate would represent if elected; or
>
> (II) Affected by the ballot proposition.

Wyo. Stat. § 22-25-101(c)(i) (emphasis added).

Plaintiff's overbreadth claim relates to the state treating issue advocacy as express advocacy, which it concedes is consistent with controlling precedent. Plaintiff takes issue

with the emphasized portion of the definition. (*See* ECF No. 1 at 14.) In *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), the Supreme Court upheld the functional-equivalent test, which says that "[a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 324–25. Plaintiff appears to acknowledge Wyoming's statute applies this test, which is currently consistent under controlling law. (ECF No. 1 at 14.) Nevertheless, due to recent Supreme Court cases where Justices have offered opinions indicating their wariness about the vagueness of the test, Plaintiff seeks to preserve the question of constitutionality. (*Id.*)

This falls short of stating a claim upon which relief can be granted for a facial vagueness challenge. Plaintiff does not allege *any* impermissible applications of the statute, including against WyGO, conceding "current controlling precedent allows issue advocacy that is deemed as 'the functional equivalent of express advocacy' to be regulated as such, if the speech can only be interpreted as a call to vote for or against a particular candidate." (*Id.*) Plaintiff fails to allege anything in its complaint about how the statute's definition will significantly compromise First Amendment protections of parties not before the court. Nor has Plaintiff alleged any number of applications of the statute's definition have been unconstitutional. Plaintiff alleges no additional facts pertaining to the overbreadth of Wyo. Stat. § 22-25-101(c)(ii) or 106(h). Plaintiff's facial overbreadth challenge of Wyoming's definition of electioneering communications fails to state a claim upon which relief can be granted.

2. Claim II: As-Applied Challenge to Wyo. Stat. § 22-25-101(c)(i)-(ii) and 106(h).

Next, Plaintiff asserts in its complaint that Wyoming's electioneering disclosure regime is unconstitutional as applied to WyGO by applying and threatening to apply the definition of electioneering communications to WyGO's speech which it alleges "can reasonably be interpreted in various ways[.]" (ECF No. 1 at 15.) Plaintiff specifically takes issue with Wyoming's electioneering definition which reaches communications that "[c]an only be reasonably interpreted as an appeal to vote for or against the candidate or ballot proposition." Wyo. Stat. § 22-25-101(c)(i)(B). Citing to *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, Plaintiff argues the statute is unconstitutional as applied to WyGO's speech. *See* 551 U.S. 449 (2007).

The only facts alleged in Plaintiff's complaint indicating the statute was ever applied to WyGO is the Secretary of State's imposition of a civil penalty against WyGO for its radio advertisement mentioning two opposing state senate candidates. (*See* ECF No. 1 at 7, 11.) Plaintiff argues this was an unconstitutional application of the statutory definition, as WyGO's radio advertisement "had multiple purposes, including prompting candidates to state their positions on gun rights and influencing the candidates to support gun rights. Thus, it could not *only* be understood as an appeal to vote for or against a certain candidate." (ECF No. 31 at 9) (internal citations omitted) (emphasis in original).

Plaintiff's factual allegations in the complaint, while brief, are sufficient to assert a plausible claim for an as applied challenge to the constitutionality of Wyo. Stat. § 22-25-101(c)(i)-(ii) and 106(h). Without further factual development the Court declines to determine the merits of the charges against the Defendants at this stage of the litigation.

Claim III: Right of Free Press

Plaintiff's next claim relates to its as-applied challenge, specifically as to the electioneering communications definition which sets forth certain exemptions. Plaintiff continues to argue its radio advertisements and other communications are exempt under the definition. It argues the Defendants' finding that the radio advertisement was not exempt, in addition to the Defendants' letter indicating other WyGO communications could be categorized as electioneering communications, "amounted to arbitrary enforcement and unconstitutionally burdened WyGO's press rights." (ECF No. 1 at 16.)

Plaintiff fails to set forth facts in its complaint to allege that the Defendants' enforcement of its electioneering disclosure statute was arbitrary or burdensome to WyGO's press rights. Nor does Plaintiff set forth authority to support such a proposition. Plaintiff alleges WyGO's communications meet the definition of the exemption of electioneering communications, which is nothing more than a legal conclusion this Court need not accept as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Following this, Plaintiff claims the Defendants' finding to the contrary violated its rights to freedom of the press. Again, Plaintiff does not have any facts to support this argument.

The facts asserted in the complaint allege the Defendants categorized WyGO's radio advertisement as an electioneering subject to disclosure requirements under Wyo. Stat. § 22-25-106(h), Defendants informed Plaintiff of their position on the matter, provided Plaintiff time to comply with the disclosure requirement, and imposed a civil penalty after Plaintiff failed to do so. (ECF No. 1 at 10–11.) None of these actions taken by Defendant

rise to the level of a freedom of the press violation. "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940). The Defendants did not restrain WyGO's speech, nor did their categorization of WyGO's radio advertisement rise to the level of "subsequent punishment." Plaintiff was not restricted from publishing the radio advertisement, nor was it subsequently punished for doing so. *See, e.g.*, *Citizens United*, 558 U.S. at 390 n. 6 (Scalia, J., concurring) (citing 2 American Dictionary of the English Language (1828) (reprinted 1970) ("Liberty of the press, in civil policy, is the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state."). Plaintiff cites no authority under which a disclosure requirement is an imposition of punishment or restraint on speech, nor does this Court find one. *See id.* (finding a Government may impose disclosure requirements on speech). Accordingly, Plaintiff fails to state a claim for violation of freedom of the press.

3. Claim IV: Vagueness

Plaintiff's final claim alleges Wyoming's electioneering statute is unconstitutionally vague, both facially and as applied to WyGO. (ECF No. 1 at 17.) In support, Plaintiff cites to four areas where it contends the statutes at issue are vague. First, Plaintiff asserts it is "unclear which speech does or does not qualify as 'electioneering.'" Second, Plaintiff asserts it is unclear how "publicly distributed . . . email[s and] mailing[s]" may be

distinguished from speech that would fall under the exception for "newsletter[s] or other internal communication[s]. Third, Plaintiff asserts it is unclear whether WyGO's email communications and other publications qualify for the exemption as "commentary . . . or a similar communication, protected by the first amendment." Finally, Plaintiff asserts it is unclear how donors and contributions are deemed to "relate to" a particular electioneering communication and what must therefore be disclosed. (*Id.*)

The vagueness doctrine is not an outgrowth of the First Amendment, but of the Fifth Amendment Due Process Clause. *United States v. Williams*, 553 U.S. 285, 304 (2008). A statute may be found impermissibly vague: (1) "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Faustin v. City and Cty. of Denver, Colo.*, 423 F.3d 1192, 1201 (10th Cir. 2005). Similar to an overbreadth argument, this is a difficult challenge to raise successfully. *See Salerno*, 481 U.S. at 745. "Perfect clarity and precise guidance" are not required. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). "The Supreme Court has cautioned that 'speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a state when it is surely valid in the vast majority of intended applications.'" *Ward v. Utah*, 398 F.3d 1239, 1251 (10th Cir. 2005) (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, . . . the more important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* (quoting *Kolender v. Lawson*,

461 U.S. 352, 357 (1983)). Thus, this Court must consider whether the challenged statutes lack fair notice or sufficient law-enforcement guidance.

To begin with Plaintiff's facial vagueness challenge, the Court notes a similarity in standard to Plaintiff's facial overbreadth challenge. Both the vagueness and overbreadth questions involve the same preliminary inquiry into whether the statute will have a substantial effect on constitutionally protected activity. *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 479 (7th Cir. 2012). "In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Id.* (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982)). If it does not, then under either theory, the facial challenge must fail.

Plaintiff's facial vagueness claim is like its facial overbreadth claim, except for it takes issue with more terms and definitions in Wyoming's electioneering disclosure statutes. Despite the additional challenges, however, it still lacks any set of facts tending to show the vagueness "reaches a substantial amount of constitutionally protected conduct." Plaintiff does not allege any amount of constitutionally protected conduct was impacted by the apparently vague statutory provisions besides its own. (*See* ECF No. 1 at 17–18.) Plaintiff does note the statute "may trap the innocent by not providing fair warning or foster arbitrary and discriminatory application, and it can also chill speech by operating to inhibit protected expression." (*Id.* at 17.) But this is no more than a hypothetical situation not presently before the Court. *See Ward*, 398 F.3d at 1251. In sum, Plaintiff fails to set forth facts to state a claim for a facial vagueness challenge to Wyoming's electioneering

disclosure statutes, as it fails to allege any "real and substantial" chilling effect on protected expression to justify invalidation on that basis. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Accordingly, Plaintiff's facial vagueness challenge fails to state a claim for which relief can be granted.

Turning to Plaintiff's as-applied challenges, the Court must "tether [its] 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). "An as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case." *United States v. Carel*, 668 F.3d 1211, 1217 (10th Cir. 2011). In the circumstances of this case, the Defendants only applied the electioneering disclosure statutes to one of Plaintiff's communications–the radio advertisement.

Wyoming's definition of electioneering communications states:

> "Electioneering communication" means, except as otherwise provided by paragraph (ii) of this subsection, any communication, including an advertisement, which is publicly distributed as a billboard, brochure, email, mailing, magazine, pamphlet or periodical, as the component of an internet website or newspaper or by the facilities of a cable television system, electronic communication network, internet streaming service, radio station, telephone or cellular system, television station or satellite system and which:
>
> (A) Refers to or depicts a clearly identified candidate for nomination or election to public office or a clearly identified ballot proposition and which does not expressly advocate the nomination, election or defeat of the candidate or the adoption or defeat of the ballot proposition;
>
> (B) Can only be reasonably interpreted as an appeal to vote for or against the candidate or ballot proposition;
>
> (C) Is made within thirty (30) calendar days of a primary election, sixty (60) calendar days of a general election or twenty-one (21) calendar days of any special election during which the candidate or ballot proposition will appear on the ballot; and
>
> (D) Is targeted to the electors in the geographic area:
>
> (I) The candidate would represent if elected; or

(II) Affected by the ballot proposition.

Wyo. Stat. § 22-25-101(c)(i). The definition continues by explaining what an electioneering communication is not:

> "Electioneering communication" does not mean:
>
> (A) A communication made by an entity as a component of a newsletter or other internal communication of the entity which is distributed only to members or employees of the entity;
>
> (B) A communication consisting of a news report, commentary or editorial or a similar communication, protected by the first amendment to the United States constitution and article 1, section 20 of the Wyoming constitution, which is distributed as a component of an email, internet website, magazine, newspaper or periodical or by the facilities of a cable television system, electronic communication network, internet streaming service, radio station, television station or satellite system;
>
> (C) A communication made as part of a public debate or forum that invites at least two (2) opposing candidates for public office or one (1) advocate and one (1) opponent of a ballot proposition or a communication that promotes the debate or forum and is made by or on behalf of the person sponsoring or hosting the debate or forum;
>
> (D) The act of producing or distributing an electioneering communication.

Wyo. Stat. § 22-25-101(c)(ii).

This definition was applied to WyGO's radio advertisement by Defendants, who determined the advertisement was an electioneering communication. The Plaintiff does not contest it ran a radio advertisement through a commercially run station which referred to two opposing state senate candidates within thirty days of the primary election in a geographic area where the elected candidate would represent. (ECF No. 1 at 7.) Thus, the only allegedly vague portion of the definition is subsection (B) which requires an electioneering communication be one that "can only be reasonably interpreted as an appeal to vote for or against the candidate or ballot proposition." The Plaintiff does not contest

that the radio advertisement "described Senator Bouchard as a 'brave champion' who will 'fight for your gun rights' and 'stand against' the 'violent thugs [who] are rioting, looting, and vandalizing.' The ad referred to Johnson as 'pathetic' and warned that candidates like Johnson would 'stab us in the back the first chance they get.'" (ECF No. 30-9 at 3.) Under an objective reading or listening of the advertisement, it can only be reasonably interpreted as an appeal to vote for Senator Bouchard and against Senator Johnson. *See* Wyo. Stat. § 22-25-101(c)(i)(B). The words used to describe the two senators, combined with WyGO's mission to strongly advocate for gun rights and candidates who support them, can be reasonably understood in no other way. Thus, it was appropriate for the Defendants to find the radio advertisement was an electioneering communication under Wyoming's disclosure regime.

Plaintiff argues the radio advertisement was a commentary, and thus exempted from the definition of an electioneering communication. (ECF No. 24 at 22.) Plaintiff cites to the Merriam-Webster Dictionary, arguing that commentary can include something as generic as "expression of opinion." (ECF No. 30 at 9.) Defendants counter that the word must be read in the context it demands, and "it is apparent" that this word is simply meant to exempt media from the statute. (ECF No. 33 at 5.) Defendants continue, saying that merely because a communication expresses an opinion does not mean it meets the definition of "commentary" under § 22-25-106(h). (ECF No. 30 at 9-10).

This is not so obvious. No prior case law provides a definition of "commentary," nor does Wyoming's statutory scheme give a more specific understanding of the word in context. The definition for "commentary" in the Merriam-Webster dictionary includes

three possible definitions, including additional subparts, leaving a reader with five possible interpretations of what this word could mean. *Commentary*, Merriam-Webster Online (last accessed Sept. 17, 2021) https://www.merriam-webster.com/dictionary/commentary. Oxford Dictionary also includes three possible definitions of the word, including the definition "a criticism or discussion of something." *Commentary*, Oxford Learner's Dictionary (last accessed Sept. 17, 2021) https://www.oxfordlearnersdictionaries.com/us/definition/american_english/commentary#:~:text=commentaries)%20commentary%20(on%20something),results%20as%20they%20are%20announced. Based on the numerous dictionary definitions alone, it is not clear that a person of ordinary intelligence would know what is allowed and what is prohibited. *Faustin,* 423 F.3d at 1201. Nor is it clear to this Court that the statute couldn't be arbitrarily or discriminately enforced. *Id.* Accordingly, Plaintiff has stated sufficient facts upon which relief can be granted, surviving the motion to dismiss on this claim.

Plaintiff also contends that § 22-25-106(h) uses "relate to" to encompass a large amount of communications but does not clearly define what "relating to electioneering communications" actually means. (ECF No. 30 at 12.) Plaintiff claims the language does not give sufficient guidance on which communications must be reported, because "relate to" is a vague term. (*Id.*) Defendants do not offer a pointed counterargument for this term, but merely cite other electioneering statutes that they contend are more burdensome but have still been upheld. (ECF No. 33 at 14-15.)

Other courts have struggled with the phrase "relate to," acknowledging that it can be difficult to interpret exactly what legislators intend. *Overall v. Sykes Health Plan*

Services, Inc., No. 3:05-CV-36-H, 2006 WL 1382301, at *2 (W.D. Ky. May 16, 2006) ("Because of the somewhat vague nature of the phrase 'relates to,' courts . . . have struggled to establish generally applicable rules for establishing which state laws "relate to" or have a "connection with" an employee benefits plan."); *Harris v. Canada Life Assur. Co.*, No. 2:06-cv-1402-ECR-GW, 2008 WL 544996 at *2 (D. Nev. Feb. 26, 2008) ("[t]he statutory phrase "relate to" is vague[.]"). The United States Supreme Court even expressed frustration at the statutory use of "relate to" when analyzing the Employee Retirement Income Security Act. *See De Buono v. NYSA-ILA Med. & Clinical Services Fund*, 520 U.S. 806, 813-14 (1997). In fact, in a review of other state electioneering statutes, no other state uses the phrase "relate to an electioneering communication" in the same way as § 22-25-106(h). Because of the uncertainty surrounding this phrase, Plaintiff has stated a claim upon which relief may be granted.

The remainder of Plaintiff's as applied vagueness claim notes the Defendant's failure to clarify "whether the July 15 email, August 1 mailer, and September 24 email were 'electioneering communications'" which "contributed to the chilling effect that these vague enactments have on WyGO's speech." (ECF No. 17 at 1.) However, Defendants imposed no disclosure requirements on those communications—only to the radio advertisement. Thus, it follows that the Defendants determined those other communications were not electioneering communications subject to disclosure and never "applied" the statutory disclosure regime to them. When considering an as applied challenge, a court must consider the challenged statute "in light of the charged conduct." *United States v. Franklin-El*, 554 F.3d 903, 910 (10th Cir. 2009). Because Defendants did

not impose any disclosure requirements as to those communications other than the radio advertisement, there can be no as-applied challenge. *See Galbreath*, 568 F.App'x at 539. Accordingly, Plaintiff's remaining vagueness challenges fail to state a claim for which relief can be granted.

CONCLUSION

In accordance with the foregoing discussion, the only available remedy Plaintiff can seek is declaratory relief under the *Ex Parte Young* doctrine against Defendants Buchanan, Wheeler, Schon, and Hill in their official capacity. The only claims that remain in this action are WyGO's claims that: (1) "relate to" (§ 22-25-106(h)) and "commentary" (§ 22-25-101(c)(ii)(B)) are unconstitutionally vague under the First Amendment; and (2) Wyoming Statute § 22-25-106(h) is unconstitutional as applied to WyGO.

ORDERED that Defendants' *Motion to Dismiss* (ECF No. 23) is DENIED with respect to the as-applied first amendment challenge to Wyoming Statute § 22-25-106 and the vagueness challenges regarding "related to" and "commentary," and GRANTED as to all other claims.

Dated this 17th day of September, 2021.

Scott W. Skavdahl
United States District Judge