CASE NO. 22-8019
(Consolidated with CASE NO. 22-8021 for briefing)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EDWARD BUCHANAN, Wyoming Secretary of State, in his official capacity, KAREN WHEELER, Wyoming Deputy Secretary of State, in her official capacity, KAI SCHON, Election Division Director for the Wyoming Secretary of State, in his official capacity, BRIDGET HILL, Wyoming Attorney General, in her official capacity,

Defendants-Appellants,

v.

WYOMING GUN OWNERS, INC,

Plaintiff-Appellee.

On Appeal from the United States District Court for the District of Wyoming
The Honorable Judge Scott W. Skavdahl
Civil No. 2:21-CV-108-SWS

APPELLANTS/CROSS-APPELLEE'S REPLY AND RESPONSE BRIEF

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STATEMENT OF ISSUES ON RESPONSE

I. Did the district court correctly hold that the "commentary or editorial" exception in Wyo. Stat. Ann. § 22-25-101(a)(ii)(B) is not unconstitutionally vague?

II. Did the district court correctly dismiss Wyoming Gun Owners' (WyGO) vagueness challenge to Wyo. Stat. Ann. § 22-25-101(a)(ii)(A)?

III. Did the district court correctly dismiss WyGO's facial challenge to Wyo. Stat. Ann. § 22-25-106(h)?

IV. Did the district court correctly disregard WyGO's claim that the State should be prohibited from regulating the functional equivalent of express advocacy?

V. Did the district court correctly hold that WyGO's 42 U.S.C. § 1983 claims seeking attorneys' fees and costs were barred by Eleventh Amendment immunity?

SUMMARY OF THE ARGUMENTS

I. Reply Argument

As addressed in State Officials' opening brief, the district court erred in its order invalidating Wyo. Stat. Ann. § 22-25-106(h) for two reasons: (1) Wyo. Stat. Ann. § 22-25-106(h) is not unconstitutionally vague; and (2) Wyo. Stat. Ann. § 22-25-106(h) is sufficiently tailored to withstand exacting scrutiny. (Appellants' Br. at 15-46). To the extent WyGO contends that the district court's decision is unclear as to its analysis and its ultimate conclusions, State Officials concur. Specifically, while the district court purported to limit its vagueness analysis to WyGO's as-applied claims, it did not limit its analysis to WyGO's factual scenario. Rather, the district court appeared to facially invalidate the statute. Similarly, while the district court purported to only consider WyGO's as-applied challenge to Wyo. Stat. Ann. § 22-25-106(h), its analysis and ultimate conclusion that the statute is not narrowly tailored appeared to be a decision on a facial challenge.

First, although the district court had previously dismissed WyGO's facial vagueness claims, in its order on the cross-motions for summary judgment it did not tether its vagueness analysis to the circumstance in which Wyo. Stat. Ann. § 22-25-106(h) was applied to WyGO. Had the district court applied the principles of statutory interpretation and construction when reviewing § 22-25-106(h), it would have found the statute provided WyGO with reasonable notice of which

expenditures and contributions were subject to reporting. Even if the district court had considered WyGO's facial challenge, it would have found that WyGO did not demonstrate that the statute is unconstitutionally vague in a majority of its applications. As a result, the district court erred when it held § 22-25-106(h) to be unconstitutionally vague.

Second, the district court also erred when it held that § 22-25-106(h) failed exacting scrutiny. Unlike regulations that have been invalidated by other courts, § 22-25-106(h) does not require blanket disclosure of donors and is narrowly tailored to the state's informational and anti-corruption interests. Contrary to WyGO's assertions: (1) limiting reportable contributions to only those earmarked for electioneering communication is not required for a statute to be narrowly tailored; (2) the reporting thresholds in § 22-25-106(h) are appropriate given the smaller elections in Wyoming; and (3) disclosing donors that funded the electioneering communication directly furthers the state's interests, which are not negated as a result of WyGO's message or "brand." Accordingly, § 22-25-106(h) is sufficiently tailored to withstand exacting scrutiny.

II. Response Argument

While not clearly identified in the statement of the issues in its principal brief, WyGO appears to raise five separate issues. First, WyGO contends that the district court incorrectly held that the "commentary" exception in Wyo. Stat. Ann.

§ 22-25-101(a)(ii)(B) is not unconstitutionally vague. (Appellee/Cross-Appellant Br. at 26). But after applying principals of statutory interpretation and construction, the district court correctly found that § 22-25-101(a)(ii)(B) provided WyGO with sufficient notice of what type of communication fits within the "commentary or editorial" exception. (JA495-98). Applying the same principals, this Court should find that § 22-25-101(a)(ii)(B) is not unconstitutionally vague as applied to WyGO.

Second, WyGO asserts that the district court erred when it dismissed WyGO's claim that Wyo. Stat. Ann. § 22-25-101(a)(ii)(A) is unconstitutionally vague. (Appellee/Cross-Appellant Br. at 26, 34, 40-41). While the district court did not engage in a specific analysis of this statute, it correctly dismissed WyGO's claim because WyGO did not show that the alleged vagueness "reaches a substantial amount of constitutionally protected conduct." (JA266). Additionally, because WyGO did not send the 2020 radio advertisement by "newsletter or other internal communication," the district court correctly disregarded WyGO's as-applied challenge to § 22-25-101(a)(ii)(A). (JA267-69).

Third, WyGO contends that the district court improperly dismissed its claim that § 22-25-106(h) is facially vague and asserts that the court should have "granted broader relief" after concluding the statute is unconstitutionally vague as applied to WyGO. (Appellee/Cross-Appellant Br. at 28). But WyGO did not demonstrate that the statute is unconstitutionally vague in a majority of its applications, which is

required to invalidate a statute through a facial challenge. Even more, State Officials contend that the district court erred in finding that the statute is unconstitutionally vague as applied to WyGO. WyGO's choice to not track funds does not make the statute unconstitutionally vague. Instead, when contributions are commingled and none are earmarked away from electioneering communications or tracked by other accounting tracking practices, a portion each contribution received within the particular election cycle is related to an electioneering communication. This Court should reject WyGO's facial vagueness challenge to § 22-25-106(h) and also find the district court erred in concluding the statute is unconstitutionally vague as applied to WyGO.

Fourth, WyGO appears to challenge the State's ability to regulate the functional equivalent of express advocacy. (Appellee/Cross-Appellant Br. at 26, 37-38). But WyGO correctly concedes that its argument is contrary to United States Supreme Court precedent on this issue. (Appellee/Cross-Appellant Br. at 26, 37). Accordingly, this Court should give no consideration to WyGO's unsupported disagreement with controlling precedent.

Finally, WyGO asserts that the district court improperly concluded that Eleventh Amendment immunity bars its 42 U.S.C. § 1983 claims seeking attorneys' fees and costs under 42 U.S.C. § 1988. (Appellee/Cross-Appellant Br. at 43). But 42 U.S.C. § 1983 and *Ex Parte Young*, 209 U.S. 123 (1908) claims are two separate

actions. Section 1983 is not the vehicle to bring *Ex Parte Young* claims and the district court correctly concluded WyGO's § 1983 claims against State Officials were are barred by Eleventh Amendment immunity. As a result, the district court correctly held that WyGO is unable to recover attorneys' fees and costs under 42 U.S.C. § 1988 because WyGO's § 1983 claims failed. This issue, however, is moot if this Court agrees with State Officials' contentions on appeal.

REPLY ARGUMENT

I. The phrase "relate to" in Wyo. Stat. Ann. § 22-25-106(h)(iv) is not unconstitutionally vague.

WyGO argues that Wyo. Stat. Ann. § 22-25-106(h) is unconstitutionally vague for two reasons. First, WyGO asserts that the disclosure provision "potentially requires disclosure of all donations, even those not tied to a specific electioneering communication by way of earmarking." (Appellee/Cross-Appellant Br. at 12). In particular, WyGO contends that § 22-25-106(h) is "too vague for reasonable people to apply and might require overinclusive disclosure of donations never intended for a specific communication." (Appellee/Cross-Appellant Br. at 12). Second, WyGO appears to contend that § 22-25-106(h) was arbitrarily or discriminatorily enforced against it, or that it could be arbitrarily or discriminatorily enforced in the future. (Appellee/Cross-Appellant Br. at 32-33).

This Court should find that the plain language of § 22-25-106(h) provides WyGO, and other entities, with sufficient notice of what expenditures and contributions are subject to reporting. Furthermore, WyGO's contentions are unsupported by the record.

A. Only expenditures and contributions related to the electioneering communication are required to be reported under Wyo. Stat. Ann. § 22-25-106(h).

WyGO contends that Wyo. Stat. Ann. § 22-25-106(h) requires disclosure of expenditures and contributions not related to a particular electioneering

communication. (Appellee/Cross-Appellant Br. at 12). This contention is misguided. Section 22-25-106(h)(iv) is clear—only expenditures and contributions that "relate to" the electioneering communication are required to be reported. Wyo. Stat. Ann. § 22-25-106(h)(iv). WyGO's argument, and its alleged difficulty in determining what it must report, is a creature of its own recordkeeping practices, not a result of any constitutional infirmities with the statute.

Moreover, it appears WyGO contends that the statute must specify what funds, contributions, or expenditures relate to the electioneering with absolute precision and, if it does not, it is unconstitutionally vague. (Appellee/Cross-Appellant Br. at 12, 31). But "[p]erfect clarity and precise guidance" are not required. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). The applicable test is whether the statute provides "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Faustin v, City & Cnty. of Denver, Colo.*, 423 F.3d 1192, 1202 (10th Cir. 2005) (citation omitted).

In relevant part, § 22-25-106(h)(iv) provides:

> An organization that expends in excess of five hundred dollars ($500.00) in any primary, general or special election to cause an independent expenditure or electioneering communication to be made shall file an itemized statement of contributions and expenditures with the appropriate filing office under W.S. 22-25-107. The statement shall:
>
> . . . .

> (iv) Only list those expenditures and contributions which **relate to** an independent expenditure or electioneering communication;

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

As fully argued in State Officials' principal brief, applying the plain and ordinary meaning of the words "relate to" in § 22-25-106(h)(iv) requires an entity to report only those expenditures or contributions that have an "existing connection" or "significant association" to the electioneering communication. (Appellants' Br. at 21). It does not, as WyGO asserts, require reporting expenditures and contributions that do not relate to the electioneering communication.

In addition, WyGO did not show that Wyo. Stat. Ann. § 22-25-106(h)(iv) is unconstitutionally vague in the "vast majority of its applications[.]" *Dr. John's Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006) ("[A] party 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.'"). As a result, the district court correctly found, and this Court should find, that the statute is not void for vagueness.

Related to WyGO's as-applied claim, had the district court tethered its analysis to the facts of how § 22-25-106(h)(iv) was applied to WyGO, it would have found that the statute is not unconstitutionally vague. To properly analyze

§ 22-25-106(h)(iv) as applied to WyGO, the district court must look to WyGO's specific circumstances, which it did not do.

WyGO's contention that the statute is too vague to understand what expenditures are subject to reporting is not supported by the record. (Appellee/Cross-Appellant Br. at 12). The parties agreed that WyGO paid a commercial radio station $1,229.10 to run the 2020 radio advertisement in the Cheyenne radio market. (JA342). Thus, WyGO's purported disagreement about what expenditures related to the 2020 radio advertisement is without support. Instead, it appears WyGO argues that the statute is unclear what contributions "relate to" the electioneering communication. (Appellee/Cross-Appellant Br. at 29).

WyGO does not allow donors to earmark contributions. (JA101, 342). Instead, all contributions received by WyGO are put into one of two general accounts, one for online contributions and one for mail in contributions. (JA101). As a result, the funds are commingled and lose their identity. WyGO used its commingled funds to pay for the electioneering communication. (JA342). Because it does not earmark its funds, WyGO asserts that it is unable to discern what funds are used for or are associated with the expenditure. (Appellee/Cross-Appellant Br. at 30).

Allowing an entity to avoid reporting because it does not earmark or otherwise track contributions would allow an entity to avoid all reporting simply by making an organizational decision not to earmark or allow earmarked contributions. "[S]tatutes

should not be interpreted in a manner producing absurd results." *Corkill v. Knowles*, 955 P.2d 438, 445 (Wyo. 1998). The Wyoming Supreme Court will "not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation." *McGuire v. McGuire*, 608 P.2d 1278, 1285 (Wyo. 1980). Allowing WyGO, or other any organization to avoid the reporting requirements in Wyo. Stat. Ann. § 22-25-106(h) due to its organizational decision not to earmark or allow earmarked contributions would be an absurd result and would circumvent the state's interests in knowing who is speaking about candidates before an election.

Instead, State Officials' interpretation of the statute requires that, in the absence of earmarking or other accounting tracking practices, all contributions received within the election cycle relate to the electioneering communication. Contrary to WyGO's assertion, State Officials' position does not result in reporting of unrelated contributions or blanket disclosure of all donations.

While WyGO has not provided donor information for the election cycle relevant to the radio advertisement, it has provided percentages for contribution amounts it generally received. (JA100-01). Based on WyGO's estimated percentages, assuming WyGO received 200 donations during that time, only twenty contributions may be subject to reporting.[1] (JA100-01). This scenario demonstrates

[1] This scenario assumes none of the donors who contributed under $100 made multiple contributions that totaled over $100.

WyGO's claim that all contributions are required to be reported is incorrect. Had the district court tethered its analysis to the facts in which § 22-25-106(h)(iv) was applied to WyGO, it would have found the WyGO had reasonable notice of what contributions were subject to reporting.

B. Wyoming Statute § 22-25-106(h)(iv) does not encourage arbitrary or discriminatory enforcement

In its response, WyGO also asserts that Wyo. Stat. Ann. § 22-25-106(h) fosters arbitrary and discriminatory enforcement. (Appellee/Cross-Appellant Br. at 32). WyGO's assertions are not supported by the record and should be disregarded by this Court.

The statutes at issue in this case were enacted in 2019 and became effective on July 1, 2019. 2019 Wyo. Sess. Laws 1-8. WyGO is correct that the Secretary of State's Office had not received any complaints related to electioneering communications other than the complaint lodged against WyGO from the date of enactment to the date in which the Secretary of State's Office received a complaint regarding WyGO's radio advertisement. (JA396-97). Simply because WyGO is the first entity that was the subject of a complaint does not mean that the statute "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado* 530 U.S. 703, 732 (2000).

Also, WyGO contends that "[t]here are also some indications that WyGO was targeted for its use of attention-getting language in its communications."

(Appellee/Cross-Appellant Br. at 32). The only evidence WyGO cites is a letter informing WyGO that the 2020 radio advertisement was an electioneering communication that was subject to reporting under Wyo. Stat. Ann. § 22-25-106(h). (JA 140-42). It appears WyGO asserts that language in the letter, which reiterated the language in the 2020 radio advertisement, shows that WyGO was "targeted." (Appellee/Cross-Appellant Br. at 32). But no evidence in the record supports WyGO's assertion. The letter explains that the radio ad constituted an electioneering communication because it implicitly, but obviously, exhorted listeners to vote for one candidate over the other. (JA 140-42). Whether fiery rhetoric is used in a communication or not is irrelevant when determining whether that particular communication is an electioneering communication and there is no evidence in the record suggesting that the rhetoric affected the Secretary of State's decision to send the letter to WyGO. Accordingly, this Court should disregard WyGO's unfounded contentions that Wyo. Stat. Ann. § 22-25-106(h) was arbitrarily or discriminatorily applied to WyGO.

II. The reporting requirement in Wyo. Stat. Ann. § 22-25-106(h) is narrowly tailored.

WyGO makes three different arguments to explain why the district court correctly held that Wyo. Stat. Ann. § 22-25-106(h) is not narrowly tailored. First, WyGO argues that the statute lacks an earmarking requirement, which it asserts is necessary to withstand exacting scrutiny. (Appellee/Cross-Appellant Br. at 17-19).

Second, WyGO argues that § 22-25-106(h)'s "low threshold for reporting" demonstrates the statute not sufficiently tailored. (Appellee/Cross-Appellant Br. at 22-23). Third, WyGO argues that the "informational value of disclosing WyGO's donors is low, because the position and viewpoints of WyGO and its members are well known." (Appellee/Cross-Appellant Br. at 24). None of these arguments support the conclusion that the § 22-25-106(h) is not narrowly tailored.

A. The lack of an earmarking requirement is not dispositive.

WyGO contends Wyo. Stat. Ann. § 22-25-106(h) is not narrowly tailored because "[t]he lack of earmarking is by itself conclusive as to exacting scrutiny." (Appellee/Cross-Appellant Br. at 17, 21-22). WyGO relies on this Court's decisions in *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016) and *Citizens United v. Gessler*, 773 F.3d 200 (10th Cir. 2014) to support this contention. (Appellee/Cross-Appellant Br. at 17). A close examination of those cases reveals that neither case supports WyGO's assertion that earmarking is constitutionally required.

Independence Institute involved a nonprofit corporation that intended to air an advertisement "that was critical of the state's failure to audit its new health care insurance exchange" and encouraged listeners to tell the current governor to support the exchange. 812 F.3d at 789. Colorado law required persons spending at least $1,000 per year on electioneering communications to "disclose the name, address,

and occupation of any person who donates $250 or more for such communications." *Id.* This Court analyzed whether Colorado's disclosure regime survived exacting scrutiny as applied to the Institute's advertisement and determined that it did. *Id.* at 796-99. Importantly, the Colorado statutes did not require only earmarked donations to be disclosed, but the Colorado Secretary of State interpreted the regulation to "apply only to donations *earmarked* for electioneering communications." *Id.* at 797 n.12 (emphasis in original).

WyGO misconstrues *Independence Institute* as holding that earmarking is required for a reporting law to be narrowly tailored. (Appellee/Cross-Appellant Br. at 17). WyGO's interpretation adds a requirement not articulated by this Court in *Independence Institute*. The only mention of earmarking in *Independence Institute* was the following statement: "And it is important to remember that the Institute need only disclose those donors who have specifically earmarked their contributions for electioneering purposes." *Indep. Inst.*, 812 F.3d at 787. While this Court recognized and noted the Colorado Secretary of State's position that only contributions specifically earmarked for electioneering purposes were required to be reported, it did not hold that the presence or lack of earmarking was dispositive. *Id.* at 796-99. Thus, *Independence Institute* did not hold that a statute must require earmarking to be narrowly tailored.

Gessler also is distinguishable. In *Gessler*, Citizens United was a nonprofit corporation that was involved in political activity, which included producing films on various political and religious topics. *Gessler*, 773 F.3d at 202. Citizens United brought an action challenging Colorado's disclosure provisions facially and as applied to Citizens United. *Id.* Colorado's regulations required donors to be disclosed only if the donation was earmarked for an electioneering communication. *Id.* at 204 (citing Colo. Code Regs. 1505-6:11-1 (2012)). While not in the text of the regulations, the Colorado Secretary of State, through counsel, asserted during oral argument that "[i]f a donor permits the recipient to use the donation for electioneering communications and other purposes, and the entire donation could be used for other purposes, the donor need not be disclosed." *Id.*[2]

Similar to *Independence Institute*, the *Gessler* Court noted that the Colorado regulations do not require donors to the general funding of an organization to be reported, but only those that are earmarked for the "*exclusive* purpose of electioneering communications." *Id.* at 211-12 (emphasis in original). But the central issue in *Gessler* was not whether earmarking is required for the regulation to be narrowly tailored. *Id.* at 208-09. Instead, the issue was whether the disclosure exemptions for print and broadcast media discriminated against certain "speakers on

[2] The Colorado Secretary of State's position is not articulated in the referenced regulation.

the basis of identity." *Id.* While earmarking was discussed in the analysis, this Court did not hold that earmarking was required for a disclosure requirement to be narrowly tailored. *Id.* at 211-12. To the extent that WyGO relies on *Independence Institute* and *Gessler* for the proposition that an earmarking requirement is necessary to withstand exacting scrutiny, that reliance is misplaced.

WyGO also relies on *Lakewood Citizens Watchdog Grp. v. City of Lakewood*, Civil Action No. 21-cv-01488-PAB, 2021 WL 4060630 (D. Colo. Sept. 7, 2021) to support its conclusion that an earmarking requirement is necessary for a statute to be narrowly tailored. (Appellee/Cross-Appellant Br. at 18). But Wyo. Stat. Ann. § 22-25-106(h) is distinguishable from the regulation considered in *City of Lakewood* for the reasons articulated in State Officials' principal brief. (Appellants' Br. at 43-45).

Contrary to WyGO's assertions, Wyo. Stat. Ann. § 22-25-106(h) only requires reporting of contributions that are sufficiently connected to the electioneering communication. None of the cases cited by WyGO established a general rule that earmarking is required for a statute to be narrowly tailored. For the reasons articulated in State Officials' principal brief, this Court should find the district court erred in holding that Wyo. Stat. Ann. § 22-25-106(h) is not narrowly tailored. (Appellants' Br. at 35-45).

B. The contributions subject to reporting in Wyo. Stat. Ann. § 22-25-106(h) directly further the state's interests.

WyGO also contends that Wyo. Stat. Ann. § 22-25-106(h) is not narrowly tailored to the government's interest because most of its donations are "small-dollar donations" and therefore the informational value of disclosure is limited. (Appellee/Cross-Appellant Br. at 22-23). In support, WyGO relies on *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). (Appellee/Cross-Appellant Br. at 22-23). But WyGO's reliance on *Sampson* is misplaced because *Sampson* involved a ballot issue and this Court specifically distinguished ballot issues from candidate elections.

Sampson involved a Colorado law requiring "any group of two or more persons that has accepted or made contributions or expenditures exceeding $200 to support or oppose a **ballot issue** must register as an issue committee and report the names and addresses of anyone who contributes $20 or more." *Sampson*, 625 F.3d at 1249 (emphasis added). In its opinion, this Court differentiated between ballot initiatives and candidate elections:

> At issue on this appeal is a different type of campaign committee, not one seeking to elect or defeat a candidate, but one seeking to prevail on a ballot initiative. A citizen voting on a ballot initiative is not concerned with the merit, including the corruptibility, or a person running for office, but with the merit of a proposed law or expenditure, such as a bond issue. **As a result, the justifications for requiring disclosures in a candidate election may not apply, or may not apply with as much force, to a ballot initiative.** Disclosure may facilitate ad hominem arguments [. . .] on the merits of the ballot initiative; but there is no need for concern that contributors can change a law enacted

> through a ballot initiative as they can influence a person elected to office.

Id. (alteration and emphasis added).

As the State Officials pointed out in their principal brief, Wyoming has a smaller population and media market than Colorado. (Appellants' Br. at 37). As a result, the lower threshold for contributions to be subject to reporting in Wyoming is justified because "[s]maller elections can be influenced by less expensive communications." *Indep. Inst.*, 812 F.3d 797. Furthermore, Wyo. Stat. Ann. § 22-25-106(h) differs from the Colorado law considered in *Sampson* because it applies in this case to candidate elections, which this Court has been clear that the state has a significant interest in informing the electorate on who is communicating about candidates shortly before an election. *Indep. Inst.*, 812 F.3d at 795; *Sampson*, 625 F.3d at 1256.

Additionally, the Colorado law considered in *Sampson* required blanket disclosure of donor who contributed $20 as part of registering as an issue committee. *Sampson*, 625 F.3d at 1250. Conversely, § 22-25-106(h) sets the threshold to report contributions related to the electioneering at $100. Wyo. Stat. Ann. § 22-25-106(h). Smaller contributions are only required to be reported if a particular donor made multiple contributions totaling $100 or more, which prevents a donor from circumventing the reporting threshold by making multiple smaller contributions. *Id.*

These factors support the opposite conclusion advanced by WyGO and support State Officials' conclusion that Wyo. Stat. Ann. § 22-25-106(h) is narrowly tailored.

C. WyGO's viewpoint does not reduce the value of disclosure.

Finally, WyGO argues that the state's interest in disclosure is reduced because WyGO 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." (Appellee/Cross-Appellant Br. at 17). WyGO relies on *Gessler* to support this argument but, again, *Gessler* is distinguishable because WyGO is treated the same as any other organization that engages in electioneering communications.

In considering a challenge to the Colorado electioneering communication disclosure statutes, the *Gessler* court opined that "[w]hen a speaker 'drops' in on an election and starts talking about candidates and issues, the electorate wants to know who the speaker is to better enable to evaluate the message." *Gessler*, 773 F.3d at 215. Further, this Court stated, "when the speaker belongs to the media, the electorate has ample means of making the evaluation." *Id.*

In *Gessler*, the Colorado Secretary of State asserted that the media exemptions were justified because the state's informational interest was "adequately satisfied by their history of reporting and offering opinions." *Id.* This Court found Citizens United had an

> extended history of producing substantial work, comparable to magazines or TV special news reports rather than advertisement sound bites. *Rocky Mountain Heist* is its 25th film on political and religious topics over the course of 10 years. This history provides information about Citizens United that is at least accessible to the public as donor lists reported to the Secretary.

Id. (emphasis in original). "Because Colorado has determined that it does not have a sufficient informational interest to impose disclosure burdens on media entities, it does not have a sufficient interest to impose those requirements on Citizens United." *Id.* at 216. Due to the lack of governmental interest, this Court found the film was exempt from treatment as an electioneering communication or independent expenditure. *Id.*

Unlike Citizens United, WyGO has only been registered to do business in the state since December 13, 2016. (JA021, 306). While WyGO has distributed candidate surveys, published the results of the surveys, and advocated for specific candidates, it has not spoken "sufficiently frequently and **meaningfully** . . . over an extended period of time." *Id.* at 215 (emphasis added). The one minute 2020 radio advertisement was more similar to the "sound bites" referenced in *Gessler* than Citizens United's "extended history of producing substantial work." *Id.* at 215. Thus, WyGO is not similarly situated to Citizens United such that the state's interest in disclosing contributions would be reduced. Accordingly, WyGO's contention that the state's interest in disclosure is reduced because of WyGO's "brand," thereby making Wyo. Stat. Ann. § 22-25-106(h) insufficiently tailored, is erroneous.

RESPONSE ARGUMENT

I. The district court correctly held the "commentary or editorial" exemption in Wyo. Stat. Ann. § 22-25-101(a)(ii)(B) is not unconstitutionally vague.

WyGO argues that the district court erred in concluding that the "commentary or editorial" exemption is not unconstitutionally vague. (Appellee/Cross-Appellant Br. at 38-40). Specifically, WyGO contends that the 2020 radio advertisement, and other communication WyGO engages in, falls within the plain meaning of the word "commentary." (Appellee/Cross-Appellant Br. at 39-40). Furthermore, WyGO argues that the exception is so broad that it swallows the rule on what is an electioneering communication under Wyo. Stat. Ann. § 22-25-101(c)(i). (Appellee/Cross-Appellant Br. at 39-40). But WyGO does not read the word "commentary" in context with the other words in the statute. When doing so, as the district court did, the type of communication that is subject to the exemption is apparent. Thus, the district court properly concluded that the statute is not unconstitutionally vague. (JA495-98).

Under Wyo. Stat. Ann. § 22-25-101(a)(ii)(B), the following is exempted from the definition of "electioneering communication:"

> **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[.]

Wyo. Stat. Ann. § 22-25-101(c)(ii)(B) (emphasis added).

Federal courts apply state law rules of statutory interpretation when interpreting state statutes. *See United States v. DeGasso*, 369 F.3d 1139, 1145-46 (10th Cir. 2004). When interpreting statutes, each provision should be interpreted in context with other statutes on the same subject of possessing the same general purpose. *Sherr-Thoss v. Teton Cnty. Bd. of Cnty. Comm'rs*, 2014 WY 82, ¶ 17, 329 P.3d 936, 944 (Wyo. 2014). Each component of the statue must be given effect and related statutes will not be construed in a manner that conflicts with each other. *Id.*; "[A]ll portions of an act must be read in pari materia, and every word, clause and sentence of it must be considered so that no party will be inoperative or superfluous." *Hamline v. Transcon Lines*, 701 P.2d 1139, 1143 (Wyo. 1985).

The Wyoming Supreme Court has recognized the doctrine of *noscitur a sociis*, which it applies when discovering the meaning of ambiguous terms. *Gordon v. State by and through Capitol Bldg. Rehab.*, 2018 WY 32, ¶ 48, 413 P.3d 1093, 1107 (Wyo. 2018). The doctrine provides "that general and specific words are associated with and take color form each other, restricting general words to a sense analogous to the less general." *Id.* (citation omitted).

The term "commentary" is part of the phrase "commentary or editorial." Wyo. Stat. Ann. § 22-25-101(a)(ii)(B). Furthermore, the term is part of the following list:

"news report, commentary or editorial or a similar communication." *Id.* Rather than applying the broad definition of commentary cited by WyGO, the district court correctly construed the word WyGO in light of the surrounding words. (Appellee-Cross-Appellant/s Br. at 38; JA497).

When read in context, the district court correctly concluded, as at least one other court has done with a similar statute, that a "person of ordinary intelligence" would understand what communications fit within the exception in Wyo. Stat. Ann. § 22-25-101(a)(ii)(B). (JA495-96) (citing *Colo. Right to Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d. 1001, 1008 (D. Colo. 2005)). For these reasons, this Court should find that Wyo. Stat. Ann. § 22-25-101(a)(ii)(B) is not unconstitutionally vague.

II. The district court correctly dismissed WyGO's claims that Wyo. Stat. Ann. § 22-25-101(a)(ii)(A) is unconstitutionally vague.

As part of its claim that the district court erred in dismissing certain claims, WyGO contends that the "newsletter exception" in Wyo. Stat. Ann. § 22-25-101(a)(ii)(A) is unconstitutionally vague. (Appellee/Cross-Appellant Br. at 40-41). Specifically, WyGO contends that the statute provides no guidance on who is considered a "member" of the organization. (Appellee/Cross-Appellant Br. at 41). As a result, WyGO contends it is unable to determine whether a specific communication fits within the exception. (Appellee/Cross-Appellant Br. at 41)

Under Wyo. Stat. Ann. § 22-25-101(a)(ii)(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" is exempt from the definition of "electioneering communication." In analyzing a facial vagueness challenge, "a statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts . . . and its deterrent effect on legitimate express is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). Additionally, the plaintiff must show the statute is "vague in the vast majority of its applications. *Dr. John's, Inc.*, 465 F.3d at 1157.

The district court dismissed all of WyGO's facial vagueness claims because it found WyGO did not "allege any 'real and substantial' chilling effect on protected expression to justify invalidation." (JA266). It also found that WyGO failed to show the alleged vagueness "reaches a substantial amount of constitutionally protected conduct." (JA266). For the same reasons, this Court should find the district court correctly dismissed WyGO's facial vagueness challenge to Wyo. Stat. Ann. § 22-25-101(a)(ii)(A).

In addition, the district court dismissed WyGO's as-applied vagueness challenge to § 22-25-101(a)(ii)(A) because the 2020 radio advertisement was run through a commercial radio station, not through a newsletter or internal

communication. (JA268). As a result, the challenged statute had never been applied to WyGO and the district court properly disregarded WyGO's as-applied claim.

III. The district court correctly dismissed WyGO's facial challenges to Wyo. Stat. Ann. § 22-25-106(h).

WyGO contends the district court improperly dismissed its claim that § 22-25-106(h) is facially vague. (Appellee/Cross-Appellant Br. at 28). WyGO asserts that many donors "simply donate to support the organization's overall message" and organizations are "left to speculate about how to determine which contributions 'relate to' [certain communications]." (Appellee/Cross-Appellant Br. at 30) (alteration added). Furthermore, WyGO argues that the district court "demonstrated" that the statute is vague in the vast majority of its application. (Appellee/Cross-Appellant Br. at 31). But contrary to WyGO's assertions, the district court correctly determined that WyGO did not make the requisite showing to support facial invalidation.

To invalidate a statute due to vagueness, WyGO must demonstrate the statute was "vague in the vast majority of its applications." *Dr. John's Inc.*, 465 F.3d at 1157. Instead, the district court found that WyGO lacked "any set of facts tending to show the vagueness 'reaches a substantial amount of constitutionally protected conduct.'" (JA266). More directly, the district court found WyGO "does not allege any amount of constitutionally protected conduct was impacted by the apparently vague statutory provisions besides its own." (JA266). Based on WyGO's complaint,

the district court correctly found that WyGO did not demonstrate § 22-25-106(h) is "vague in the vast majority of its applications." *Dr. John's Inc.*, 465 F.3d at 1157. Thus the district court correctly dismissed WyGO's facial vagueness claim.

WyGO alternatively argues that this Court should "invalidate application of [the] disclosure provision to the subset of speakers who are similarly situated to WyGO." (Appellee/Cross-Appellant Br. at 33). Specifically, WyGO contends injunctive relief should be extended to entities that "have not received donations earmarked for electioneering communications or who have a practice of never doing so." (Appellee/Cross-Appellant Br. at 33-34). For the same reasons that State Officials contend the district erred in finding § 22-25-106(h) to be unconstitutionally vague as applied to WyGO, this Court should reject WyGO's alternative argument. *See* supra Reply Argument Section II).

IV. The functional equivalent of express advocacy test is settled law.

Without much argument, WyGO appears to challenge Wyo. Stat. Ann. § 22-25-101(c)(i) because it regulates the functional equivalent of express advocacy. (Appellee/Cross-Appellant Br. at 37). Specifically, WyGO argues the "test is hopelessly vague" due to the "inability to distinguish between speech that expresses views about issues and candidates from speech advocating for vote." (Appellee/Cross-Appellant Br. at 37-38). In support, WyGO relies on a concurring opinion in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

(Appellee/Cross-Appellant Br. at 37). But WyGO expressly acknowledges that the functional equivalent of express advocacy standard is controlling law, and was subsequently reaffirmed in *Citizens United v. FEC*, 558 U.S. 310, 324-25 (2010).

In *Citizens United*, the United States Supreme Court held that issue advocacy that can only be interpreted as a call to vote for or against a particular candidate to be the functional equivalent of express advocacy, which may be subject to reporting and disclosure requirements. *Citizens United*, 558 U.S. at 324-35. Wyoming Statute § 22-25-101(c)(i)(B) only regulates the functional equivalent of express advocacy. As a result, this Court should disregard WyGO's argument as contrary to controlling law.

V. The district court correctly held 42 U.S.C. § 1988 does not apply.

WyGO asserts that the district court erred in holding that WyGO's § 1983 claims seeking attorneys' fees and costs were barred by Eleventh Amendment immunity. (Appellee/Cross-Appellant Br. at 43-44). WyGO argues that because it was awarded injunctive relief, it prevailed on its § 1983 claims and is entitled to "a reasonable attorney's fee as part of its costs" under 42 U.S.C. § 1988. (Appellee/Cross-Appellant Br. at 44-45). While State Officials dispute the district court's holding on Wyo. Stat. Ann. § 22-25-106(h) (*see* supra Reply Argument Section II), the district court did enjoin the Secretary of State from requiring the electioneering report for the 2020 radio advertisement. (JA509). But relief under *Ex*

Parte Young does not make WyGO a prevailing party under 42 U.S.C. § 1983, which in turn would make it eligible to be awarded attorneys' fees and costs under 42 U.S.C. § 1988.

The State of Wyoming, its agencies, and state officials acting in their official capacity are immune from suit under the Eleventh Amendment. U.S. Const. amend. XI; *Rigler v. Lampert*, 248 F. Supp. 3d 1224, 1241-42 (D. Wyo. 2017). Specifically, 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. Wagnon*, 476 F.3d 818, 838 (10th Cir. 2007).

Three limited exceptions apply to the sovereign immunity doctrine. First, a state may consent to suit. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). Second, Congress may expressly abrogate state sovereign immunity. *Id.* Third, a plaintiff may bring suit under the *Ex Parte Young* doctrine if the suit is "against individual state officers acting in their official capacity if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Id.* (citation omitted).

The State of Wyoming has not consented to suit under 42 U.S.C. § 1983. *Wyo. Guardianship Corp. v. Wyo. Stat. Hosp.*, 2018 WY 114, ¶ 18, 428 P.3d 424, 433 (Wyo. 2018). In addition, 42 U.S.C. § 1983 does not abrogate States' Eleventh

Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 345 (1979); *Ellis v. Univ. of Kan. Med. Ctr.*, 163 F.3d 1186, 1196 (10th Cir. 1998). The only remaining exception is *Ex Parte Young*. *Chamber of Com. of the U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010). But WyGO did not properly bring its *Ex Parte Young* claims. Even if this Court finds WyGO properly asserted its claims, any injunctive relief granted did not make WyGO a prevailing party under § 1983 that would render it eligible for attorney's fees under 42 U.S.C. § 1988.[3]

WyGO pled all of its claims under 42 U.S.C. § 1983 and the only reference to injunctive relief in its complaint is in the prayer for relief section. (JA029-36). Though pled under § 1983, WyGO's suit essentially sought a declaration that the applicable statues are unconstitutional. (JA035-36). WyGO appears to argue that it properly brought *Ex Parte Young* claims through its § 1983 claims and because the district court granted WyGO injunctive relief, it was a prevailing party under its § 1983 claims. (Appellee/Cross-Appellant Br. at 43-45).

But the *Ex Parte Young* doctrine is a judicially created action. *Elephant Butte Irrigation Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602, 607-08 (10th Cir. 1998). This Court has been clear that *Ex Parte Young* created an implied cause of action that is based on the Supremacy Clause, not a statutory cause of action. *Joseph A. ex*

[3] Section 1988 grants the district court discretion to award attorneys' fees to a prevailing party in a § 1983 claim. 42 U.S.C. § 1988(b).

rel. Corrine Wolfe v. Ingram, 275 F.3d 1253, 1265 (10th Cir. 2002) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). If Congress had intended § 1983 to be a vehicle for individuals to seek prospective injunctive relief against state officials, it would have said so.

If this Court accepts WyGO's position, a plaintiff could transform a declaratory judgment action challenging the constitutionality of a statute into in an *Ex Parte Young* matter by pleading a § 1983 claim and adding "and injunctive relief" into the prayer for relief section, whether warranted or not. Allowing a plaintiff to convert a declaratory judgment into an *Ex Parte Young* claim, plead through § 1983, would result in the prevailing party potentially being eligible for attorneys' fees and costs under 42 U.S.C. § 1988 by simply adding three magic words. The addition of injunctive relief in the context of a challenge to the constitutionality of a statute is redundant—an injunction does nothing that is not already taken care of by a declaratory judgement in favor of the plaintiff. As applicable here, the only issue is whether WyGO is required to submit the report. A declaratory judgment in WyGO's favor resolves the issue, additional injunctive relief is superfluous.

Even if this Court finds that WyGO properly brought claims under *Ex Parte Young*, this Court should find that the district court correctly dismissed WyGO's § 1983 claims against State Officials. (JA253). Consequently, this Court should find that the district court also correctly concluded WyGO's claims for attorney's fees

under § 1988 failed because its § 1983 claims were dismissed. As acknowledged by the district court, it should have only considered WyGO's claims for declaratory relief. (JA253).

CONCLUSION

For the reasons discussed above and in State Officials' principal brief, State Officials respectfully request that this Court reverse the district court's decisions declaring that Wyo. Stat. Ann. § 22-25-106(h) is unconstitutionally vague and that § 22-25-106(h) is unconstitutional as applied to WyGO. In addition, State Officials request this Court affirm the district court's decision to dismiss WyGO's facial challenges to Wyo. Stat. Ann. §§ 22-25-101(a)(ii)(A)-(B) and 22-25-106(h) and WyGO's § 1983 claims seeking attorneys' fees and costs.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

State Officials believe oral argument may assist the Court because the issues in this case involve important state interests.

Dated this 15th day of September, 2022.

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Dated this 15th day of September, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2022, I electronically filed the foregoing with the court's CM/ECF system, which will send notification of this filing to the following:

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