CASE NO. 18-35115

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRAD TSCHIDA

Plaintiff-Appellant,

v.

JEFF MANGAN, in his official capacity as the Commissioner of Political Practices for the State of Montana; JONATHAN MOTL,

Defendants-Appellees.

On Appeal From A Final Judgment Of
The United States District Court for the District of Montana
Case No. CV 16-102-H-BMM
The Honorable Brian M. Morris, Presiding

APPELLANT'S OPENING BRIEF

Matthew G. Monforton (Montana Bar No. 5245)
Monforton Law Offices, PLLC
32 Kelly Court
Bozeman, Montana 59718
Telephone: (406) 570-2949
Facsimile: (406) 551-6919
matthewmonforton@yahoo.com

Attorney for Plaintiff-Appellant Brad Tschida

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 34 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant hereby requests oral argument on this appeal. Plaintiff-Appellant suggests that 20 minutes per side will be sufficient and productive.

DATED: May 25, 2018

Respectfully submitted,

Monforton Law Offices, PLLC

By: /s/ Matthew G. Monforton
Matthew G. Monforton

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

INTRODUCTION

This action arises from a state administrative official threatening a state legislator, Appellant Brad Tschida, with civil and criminal penalties for disclosing to fellow legislators a copy of an ethics complaint Tschida had filed against Montana Governor Steve Bullock and a member of Bullock's cabinet. Under Montana law, a citizen is prohibited from publicly disclosing an ethics complaint he or she has filed until the state's Commissioner of Political Practices has decided the complaint. The Commissioner at that time, Appellee Jonathan Motl, believed the ethics complaint was an unfair political attack upon Governor Bullock and refused to render a decision on the complaint until after Governor Bullock was re-elected in November 2016.

Tschida rejected Motl's attempt to suppress Tschida's ethics complaint and provided a copy of it to his fellow legislators a week before Election Day. The disclosure was part of a larger discussion among legislators to establish a special legislative committee to investigate misuse of state resources by Governor Bullock.

Motl responded by publicly threatening – days before the election – to impose "severe penalties" upon Tschida, including a criminal prosecution. Tschida refrained from criticizing Governor Bullock during the remaining days of the campaign out of fear that the State would make good on its threats.

The Montana statute prohibiting citizens from disclosing ethics complaints

they themselves file against government officials is patently unconstitutional. *Lind v. Grimmer*, 30 F.3d 1115, 1121 (9th Cir. 1994) (striking down confidentiality rule governing complaints alleging campaign finance violations); *Stilp v. Contino,* 613 F.3d 405, 415 (3d Cir. 2010) (striking down confidentiality rule governing ethics complaints filed under Pennsylvania Ethics Act). The State has never rescinded its threat to seek penalties against Tschida for disclosing his own ethics complaint to his fellow legislators. Tschida intends to file other ethics complaints against Bullock Administration officials and disclose them to the public but will not out of fear of additional retaliation by the State. Injunctive relief from this Court is therefore warranted. Moreover, Tschida is entitled to monetary damages for having his speech chilled during the final days of the campaign in 2016 as a result of Motl's thuggish threats.

STATEMENT OF JURISDICTION

Because Tschida filed suit under 42 U.S.C. § 1983 for violations of the First Amendment to the United States Constitution, the District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. ER 228, 263. The District Court entered judgment on February 14, 2018. ER 86. Tschida timely filed a notice of appeal later that day. ER 82. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. When an administrative official has unlimited time in which to issue a decision on an ethics complaint filed by a private citizen, and the citizen is prohibited from disclosing the ethics complaint until the official issues the decision, does that prohibition constitute a prior restraint?

2. In evaluating a content-based statute that restricts political speech based upon its content, may a district court apply intermediate scrutiny rather than strict scrutiny?

3. When a government official violates a candidate's clearly established First Amendment rights by threatening him with civil penalties and criminal prosecution for publicizing criticisms of a state governor, is the official entitled to qualified immunity?

STANDARD OF REVIEW

The District Court's partial grant of the State's motion for summary judgment, ER 26, must be reviewed *de novo*. *Nigro v. Sears Roebuck, and Co.*, 784 F.3d 495, 497 (9th Cir. 2015).

STATEMENT OF FACTS

I. Statutes Governing Montana Ethics Complaints

Montana has established a procedure by which persons may file a complaint if they believe a state officer, legislator, state employee, or county attorney has violated state ethics laws, such as accepting illegal gifts. Mont. Code Ann. § 2-2-136. Ethics complaints must be filed with the Commissioner of Political Practices, who reviews them to ensure they are (1) not frivolous, (2) sufficiently state a claim, and (3) that the claim involves issues not previously ruled upon by him. Mont. Code Ann. § 2-2-136(1)(a) & (b). He or she may summarily dismiss complaints failing to satisfy any of these requirements. *Id.*

A complainant is subject to a gag rule from the moment the complaint is filed until the Commissioner issues his or her decision. Mont. Code Ann. § 2-2-136(4). The gag rule encompasses the complaint itself and any related documents released to the parties by the Commissioner. *Id.* Violations of the gag rule result in penalties of $50 to $1,000. Mont. Code Ann. § 2-2-136(2)(a).

II. Tschida's Criticisms of Governor Bullock's Abuse of the State Plane

Appellant Brad Tschida was elected in November 2014 to the Montana House of Representatives and was re-elected on November 8, 2016. ER 146. He

has long criticized Governor Steve Bullock for using state-owned aircraft for personal and political purposes. ER 149-152.

Tschida decided in August 2016 to file an ethics complaint against Governor Bullock. ER 153. In preparing it, he relied upon articles published in the press. ER 154-155. This included an article published in May 2016 in the *Helena Independent Record* reporting that (1) Bullock and Meg O'Leary (who, at that time, was Bullock's Director of Commerce) had received $3,800 in travel expenses from the Democratic Governors Association (DGA) and (2) the only DGA event around that time was a policy conference in Puerto Rico. ER 109-115, 155-56. Tschida also relied upon an article published on the website of KGVO radio early in the morning on September 9, 2016, detailing Bullock's use of a state aircraft to fly himself and O'Leary to a Paul McCartney concert in Missoula (for which he received free tickets). ER 123-124.

Tschida attempted to send his original ethics complaint (hereinafter, the "Original Ethics Complaint") via email and facsimile to Motl late in the afternoon on September 9. ER 167. The Original Ethics Complaint named Bullock and O'Leary as respondents and alleged that they (1) used a state-owned aircraft to fly themselves to a concert in Missoula and (2) were reimbursed by the DGA for a trip to Puerto Rico. ER 249-252.

Tschida filed an amended ethics complaint on September 21, 2016 (hereinafter, the "Amended Ethics Complaint"). ER 165. Allegations concerning Puerto Rico were omitted from the Amended Ethics Complaint. ER 292-295.

III. Motl's Suppression of the Ethics Complaint Against Governor Bullock While Lobbying Governor Bullock to Extend His Term

Around the time Tschida filed the Amended Ethics Complaint, Motl met with Jim Molloy, one of Governor Bullock's attorneys, in the basement of the Capitol building in order to discuss Tschida's complaint. ER 192. Motl did not inform Tschida or his counsel of the meeting. ER 200.

On September 28, 2016, Andrew Huff, Governor Bullock's state-paid Chief Legal Counsel, filed with Motl a response to Tschida's Amended Ethics Complaint on behalf of Bullock. ER 87-101, 184. Sometime before October 9, 2016, Motl discussed with Huff an "interpretation" of a statute that would have enabled Motl to remain in office until 2019. ER 102-103, 200-210. Motl's term had been scheduled to end on January 1, 2017. ER 182.

On October 24, 2016, state Senators Dee Brown and Bob Keenan sent a letter to Tschida and other legislators seeking to convene an interim legislative committee to probe allegations of misuse of state funds by the Bullock Administration as well as retaliation against whistleblowers. ER 178, 286-287.

The letter outlined numerous incidents of misuse of state resources by the Bullock Administration as well as reports of retaliation against state employees. ER 286-287.

Tschida responded to the letter on November 1, 2016, and confirmed his support for an investigation. ER 126-144, 172-73. He included with that response a copy of the Amended Ethics Complaint. ER 138-144. Tschida explained in his response that one of the reasons for disclosing the Amended Ethics Complaint was to show Governor Bullock's misuse of state resources in having government attorneys defend him against the complaint:

> A state-paid attorney representing Gov. Bullock against an ethics complaint filed against him in his personal capacity, even for purposes of obtaining an extension of a deadline, constitutes yet another illegal use by Bullock of taxpayer resources. There is no provision under Montana law permitting Bullock or any other government official to mount a taxpayer-financed defense in response to an ethics complaint.

ER 130. Tschida also disclosed his Amended Ethics Complaint to show that Motl was deliberating suppressing it. ER 132-134.

Motl considered Tschida's disclosure of the Amended Ethics Complaint to be a "last-minute political press hit." ER 215. Motl told the *Great Falls Tribune* that "[i]f a sitting legislator has released an ethics complaint, it is a violation of law and it's outrageous anybody would breach a state statute in the last week of

campaign." ER 105, 221. He also told the *Tribune* that the "breach" was "serious because of the timing of it." ER 105, 222. Influencing the governor's race was, according to Motl, the only reason for Tschida to disclose. ER 227. Motl was upset when he spoke to the *Tribune* and admitted that he might have said he would "seek a severe penalty." ER 219. The *Tribune* reported that Motl did, in fact, threaten to "seek a severe penalty" against Tschida. ER 106.

In a radio interview on November 3, 2016, Motl told KGVO, a station in Tschida's legislative district, that Tschida's disclosure occurred "in the last days of a campaign, which I think magnifies the seriousness of what he did," and "it's just outrageous that he did what he did at the time that he did it." ER 224-225, 298. He also accused Tschida of having "personal responsibility for his actions; and so he'll need to deal with the consequences of breaking state law." ER 299. The following colloquy then occurred between Motl and an interviewer for KGVO:

Interviewer:	And what are those consequences?
Motl:	There's, uh, the main consequence that befalls an official who, um, violates a mandatory duty is official misconduct.
Interviewer:	And that would be a charge in civil court?
Motl:	No, it's criminal court.
Interviewer:	It's a criminal court charge?
Motl:	Yes.

ER 299. In response to Motl's threats in the press, Tschida refrained from further

communications with legislators concerning Governor Bullock's misconduct during the campaign. ER 352, ¶ 22.

The day after Election Day, Motl declared that he would not act on an ethics complaint filed against Tschida, or initiate a complaint on his own, "while this lawsuit is pending." ER 346. He issued a decision on November 21, 2016, rejecting the Amended Ethics Complaint – two months after Tschida filed it. ER 307-316. Most ethics complaints are rejected within days of being lodged. ER 256, ¶ 7. The Commissioner's docket had been cleared in October 2016. ER 104.

PROCEDURAL HISTORY

Tschida filed a complaint in District Court on November 4, 2016. Dist. Ct. Doc. 1. He filed an Amended Complaint on December 5, 2016. ER 263. The complaint named Motl as a defendant. The First Claim for Relief sought injunctive and declaratory relief against Motl in his official capacity. ER 274-75. The remaining claims for relief sought monetary damages from Motl in his personal capacity. ER 275-80.

On April 18, 2017, the District Court denied the parties' cross-motions for summary judgment with regard to Tschida's First Claim for Relief. ER 78-79. On that same day, the District Court granted Motl's motion to dismiss all claims for monetary damages based upon qualified immunity. ER 73.

Tshida filed a Second Amended Complaint on June 16, 2017. ER 228. The First Claim for Relief sought injunctive and declaratory relief against Jeff Mangan (Motl's replacement) in Mangan's official capacity as Commissioner of Political Practices. ER 240-241. The Second Amended Complaint included the same claims for monetary damages against Motl that were contained in the First Amended Complaint. ER 241-246. The District Court again dismissed the monetary claims against Motl on July 10, 2017, based upon qualified immunity. ER 51-52.

The parties filed a second round of cross-motions for summary judgment, which the District Court granted in part and denied in part on December 15, 2017. ER 50. The District Court issued an Amended Order on December 18, 2017. ER 1-26. It held in its Amended Order that the gag rule was a content-based restriction on speech and further held that the rule did not survive strict scrutiny with regard to ethics complaints filed against *elected* officials. ER 24-25. Inexplicably, the District Court applied intermediate scrutiny to the gag rule as applied to ethics complaints in which *non-elected* officials were named as respondents and held that the gag rule survived intermediate scrutiny in such cases. ER 18-24, 25-26. Thus, under the District Court's ruling, citizens who file ethics complaints against elected officials may promptly disclose those complaints to the public. A citizen who files an ethics complaint against a non-elected government

official, however, is required to keep it confidential until the Commissioner decides the complaint.

Tschida intends to file additional ethics complaints alleging misconduct by state officials appointed by Governor Bullock. ER 81, ¶ 6. He also intends to publicly disclose the complaints as soon as he files them. ER 81, ¶ 7. He will not do so, however, so long as he faces a threat of civil and criminal prosecution by the State. ER 81, ¶ 8.

SUMMARY OF ARGUMENT

This case involves a First Amendment challenge to a gag rule Montana imposes upon private citizens who file ethics complaints against government officials. Mont. Code Ann. § 2-2-136(4). A complainant is subject to the gag rule until the Commissioner of Political Practices makes a decision concerning the ethics complaint. Montana law provides the Commissioner an unlimited period of time in which to make this decision. In this case, Motl tried to suppress until after Election Day the disclosure of Tschida's ethics complaint, which Motl considered an unfair political attack on Governor Bullock. When Tschida disclosed his complaint on November 1, 2016, Motl responded by telling the press that Tschida would be subject to a "severe penalty" and criminal prosecution. Motl made these statements to the press, including a radio station in Tschida's legislative district, at

a time when Tschida was running for re-election.

Such gag rules are patently unconstitutional, as this Court and other circuits have held. *Lind*, 30 F.3d at 1121 (striking down confidentiality rule governing complaints alleging campaign finance violations); *Stilp,* 613 F.3d at 415 (3d Cir. 2010) (striking down confidentiality rule governing ethics complaints filed under Pennsylvania Ethics Act).

Because the gag rule enables the Commissioner, an administrative official, to suppress political speech indefinitely, it is an unconstitutional prior restraint. The District Court did not even address this argument.

The District Court correctly held that the gag rule is a content-based speech restriction, and correctly applied strict scrutiny to the gag rule for ethics complaints in which the named respondents are *elected officials*. But the court's decision took a bizarre turn when it applied intermediate scrutiny to the gag rule for ethics complaints involving *non-elected* government officials. Because the gag rule is a content-based speech restriction, it is subject to strict scrutiny in all of its applications. Had the District Court properly applied strict scrutiny rather than intermediate scrutiny, it would have been compelled to hold the gag rule facially unconstitutional.

Finally, the District Court granted qualified immunity to Motl because he

relied upon a state statute (*i.e.* the gag rule in Mont. Code Ann. § 2-2-136(4)). This Court, however, has made clear that a state statute does not entitle a government official to qualified immunity if the statute (1) "authorizes official conduct which is patently violative of fundamental constitutional principles," or (2) the official "unlawfully enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance." *Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994). The gag rule fails both tests.

ARGUMENT

I THE GAG RULE IS AN UNCONSTITUTIONAL PRIOR RESTRAINT

In ruling on Tschida's summary judgment motion, the District Court completely ignored one of the gag rule's biggest flaws: its function as a prior restraint. The term "prior restraint" describes "administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). A hallmark of a prior restraint is that "the enjoyment of protected expression is contingent upon the approval of government officials." *Clark v. City of Lakewood*, 259 F.3d 996, 1005 (9th Cir. 2001), citing *FW/PBS, Inc. v. City of*

Dallas, 493 U.S. 215, 223-24 (1990).

A prior restraint need not be an outright prohibition but simply one that "places unbridled discretion in the hands of a government official or agency." *Real v. City of Long Beach,* 852 F.3d 929, 935 (9th Cir. 2017), citing *FW/PBS*, 493 U.S. at 225. Prior restraints "are the most serious and least tolerable infringement on First Amendment rights" and therefore "bear a heavy presumption against their constitutionality." *Berger v. City of Seattle*, 569 F.3d 1029, 1059 (9th Cir. 2009); see also Alexander Bickel, *The Morality of Consent* 61 (1975) ("where a criminal statute chills, prior restraint freezes.").

An indefinite prior restraint does not pass constitutional muster because "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *FW/PBS,* 493 U.S. at 225. The Supreme Court and the Ninth Circuit have repeatedly struck down laws giving government officials unlimited time in which to suppress protected speech. *Id.* at 227 (ordinance requiring chief of police to issue license to adult businesses within 30 days of receiving license application was struck because ordinance also required approval from fire and health departments, which could be withheld indefinitely); *Riley v. National Federal of the Blind of N.C.*, 487 U.S. 781, 802 (1988) (state law requiring solicitors for

charities to obtain license did not impose any deadline upon officials for issuing licenses and was therefore unconstitutional); *City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 771 (1988) (city ordinance was a prior restraint because it allowed applications for permits to install newsracks on city property to "languish indefinitely"); *Real,* 852 F.3d at 936 n.3 (tattoo artist had standing to challenge ordinance giving city unlimited time to grant or deny application for tattoo shops).

The gag rule suppresses complainants' protected speech "until the Commissioner issues a decision." § 2-2-136(4).[1] It imposes no deadline whatsoever for the Commissioner to make this decision and therefore "creates the risk of indefinitely suppressing permissible speech." *FW/PBS,* 493 U.S. at 225. This renders the gag rule an unconstitutional prior restraint on its face.

This case is an example of how a government official can abuse a prior restraint to suppress political speech he detests. Shortly after Tschida filed his ethics complaint, Motl instructed him that the complaint would not be available for public inspection "unless some later action opens the documents to the public." ER 320. As the District Court correctly noted, Motl "admitted to having placed a

[1] The Commissioner's office interprets "decision" in § 2-2-136(4) as the initial acceptance or rejection of a complaint for filing. ER 315.

lower priority on reviewing Tschida's amended ethics complaint in favor of resolving campaign finance complaints." ER 15. Motl intended to suppress Tschida's Amended Ethics Compliant until after Election Day because he did not want its release to damage Governor Bullock's re-election campaign. He waited until two weeks after Election Day (and 61 days after receiving the Amended Ethics Complaint) before issuing a decision on November 21, 2016, ER 316, despite bragging in October 2016 about how he had cleared his docket. ER 104.

Additional evidence showing Motl was politically motivated when he slow-walked a decision concerning Tschida's Amended Ethics Complaint are his admissions concerning Tschida's disclosure of the complaint. Motl admitted being "upset" by it. Motl Depo. 62. Influencing the governor's race was, according to Motl, the only reason for Tschida disclosing the Amended Ethics Complaint when he did. Motl Depo. 105. Motl was particularly incensed by the timing of Tschida's disclosure, which he considered a "last-minute political press hit." ER 215; see also ER 221 ("[i]f a sitting legislator has released an ethics complaint, it is a violation of law and *it's outrageous anybody would breach a state statute in the last week of campaign.*"); ER 222 (Tschida's "breach" was "serious *because of the timing of it*"); ER 299 ("it's just outrageous that he did what he did *at the time that he did it*.") (emphasis added).

Still more evidence showing that Motl was politically motivated in slow-walking a decision concerning Tschida's Amended Ethics Complaint can be seen in Motl's lobbying of Andrew Huff, Bullock's Chief Legal Counsel, to extend Motl's term of office while Motl was reviewing Tschida's complaint against Bullock and Huff's response (on behalf of Bullock) to the complaint. ER 87-103, 184, 200-210. Compounding this conflict of interest was Motl's *ex parte* meeting with Jim Molloy, one of Governor Bullock's attorneys, in the basement of the Capitol building to discuss Tschida's complaint. ER 192, 200.

The District Court ignored Tschida's prior restraint argument, despite Tschida having repeatedly raised it.[2] Its refusal to grapple with the issue is particularly odd given its acknowledgement that the gag rule "contains no mechanism to prevent the Commissioner from suppressing a complainant's political speech regarding the filing of the complaint against an elected official for as long as the Commissioner deems appropriate" and, indeed, "the statute operated to allow the Commissioner to suppress Tschida's speech regarding his filing of the amended ethics complaint against the Governor at the time that it proved most relevant in violation of the First Amendment." ER 15-16.

[2] See Doc. 19 at 21-23; Doc. 37 at 15-16; Doc. 71 at 13-17; Doc. 83 at 8-10.

The gag rule in Mont. Code Ann. § 2-2-136(4) is a prior restraint that is unconstitutional on its face, one that former Commissioner Motl abused in order to aid Governor Bullock's re-election. The District Court erred by not crediting this argument, or even mentioning it.

II. THE DISTRICT COURT ERRED BY APPLYING INTERMEDIATE SCRUTINY TO A CONTENT-BASED STATUTE

The Supreme Court has held that "if the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizen, for simply engaging in political speech." *Citizens United v. FEC*, 558 U.S. 310, 349 (2010); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 606 (1976) (Brennan, J., concurring) ("Commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern"); *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982) ("expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values."). Courts therefore apply strict scrutiny to a content-based speech restrictions. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 882. Narrow tailoring requires that "if a less

restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813 (2000).

Speech restrictions are content-based, and therefore subject to strict scrutiny, if they "cannot be justified without reference to the content of the regulated speech." *Reed*, 135 S. Ct. at 2227; see also *United Brotherhood of Carpenters v. NLRB*, 540 F.3d 957, 964 (9th Cir. 2008) ("Rules are generally considered content-based when the regulating party must examine the speech to determine if it is acceptable.")

The gag rule applies only to ethics complaints. Mont. Code Ann. § 2-2-136(4). So in determining whether the gag rule applies, the Commissioner must "refer[ ] to the content of the regulated speech," *Reed*, 135 S.Ct. at 2227, and "examine the [document] to determine" whether it is, in fact, an ethics complaint. *United Brotherhood of Carpenters*, 540 F.3d at 964. The gag rule is therefore content-based, as are similar gag rules. See, *e.g.*, *Lind*, 30 F.3d at 1117-18; *Stilp,* 613 F.3d at 409.

In this case, the District Court correctly held that the gag rule in Mont. Code Ann. § 2-2-136(4) was content-based on its face. ER 6. And the District Court correctly subjected the gag rule to strict scrutiny for ethics complaints filed against

elected officials. ER 24.

The District Court's analysis then took a bizarre turn. For ethics complaints filed against *non-elected officials*, the District Court applied intermediate scrutiny. It based that portion of its ruling upon the government-purpose test described in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989):

> As the Supreme Court instructed in *Ward,* the "government's purpose" for adopting the regulation represents "the principal inquiry" in discerning content- neutrality. *Ward,* 491 U.S. at 791. With regard to state employees, the confidentiality provision marks no "disagreement with the message" that the ethics complaint may convey. *Id.* The confidentiality provision instead "serves purposes unrelated to the content of the expression" for ethics complaints against state employees. *Id.*

ER 20. The District Court concluded that the gag rule survived intermediate scrutiny with regard to ethics complaints filed against non-elected officials. ER 25.

The District Court's reasoning is patently erroneous because *Ward's* government-purpose test applies *only* to content-neutral laws. *Reed,* 135 S. Ct. at 2229 ("*Ward's* framework applies only if a statute is content-neutral."); see also *Free Speech Coalition, Inc. v. Attorney General*, 825 F.3d 149, 159 (3d Cir. 2016) ("*Ward*'s inquiry into the purpose of a law applies only if the law is content neutral on its face."). If, by contrast, the law is "content based on its face," then it is "subject to strict scrutiny regardless of the government's benign motive, content-

neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Reed,* 135 S. Ct. at 2228.

The District Court correctly held that the gag rule in Mont. Code Ann. § 2-2-136(4) was content-based on its face. ER 7. Therefore, it was not at liberty to apply *Ward's* government-purpose test because "*Ward's* framework applies only if a statute is content-neutral." *Reed*, 135 S. Ct. at 2229. Because the gag rule is content-based on its face, the District Court should have applied strict scrutiny across the board. As explained below, the rule cannot survive strict scrutiny.

III. THE GAG RULE FAILS STRICT SCRUTINY

A. The State Has No Compelling Interest in Protecting State Officials' "Privacy" From Disclosures By Private Citizens

The District Court held the gag rule satisfied intermediate scrutiny because protecting the privacy rights of non-elected state officials and employees is an important state interest achieved by the gag rule. ER 17-24. But the District Court should have considered only compelling state interests because, as stated previously, the gag rule is content-based and therefore subject to strict scrutiny.[3] State employee "privacy" does not constitute a compelling state interest in this case for several reasons.

[3] See *supra*, pp. 18-20.

First, the constitutional right of privacy recognized by the Ninth Circuit arises from the Fourth and Fourteenth Amendments, *Norman-Bloodsaw v. Lawrence Berkeley Laboratory,* 135 F.3d 1260, 1269 (9th Cir. 1998), and is therefore applicable only to *state* actors. Complainants such as Tschida who disclose their own complaints are not state actors. *Lind,* 30 F.3d at 1119 n.2 (rejecting argument that Hawaii's campaign finance gag rule "only restricts speech concerning information a speaker acquires with the assistance or intervention of the government" because "the fact that a complaint has been filed is in no meaningful sense information acquired only by virtue of the government's assistance or intervention."). Information that citizens possess about state officials does not become a state secret from which protectable privacy interests arise simply because the information is memorialized in an ethics complaint. The District Court never addressed this issue.

Second, the gag rule does not protect privacy because a complainant such as Tschida is free to publish any allegation contained in an ethics complaint at anytime. It is axiomatic that no privacy interest exists in information accessible to the public. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 494-95 (1975) ("the interests in privacy fade when the information involved already appears on the public record").

The gag rule only applies to the fact that a complaint has been filed. Mont. Code Ann. § 2-2-136(4). The harm caused by revealing to the world that an ethics complaint has been filed against an official "is too negligible and remote to justify a blanket prohibition on such disclosure." *Stilp*, 613 F.3d at 415; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978) ("injury to official reputation is an insufficient reason for repressing speech that would otherwise be free"). While this Court has recognized a constitutionally protected privacy right regarding extremely sensitive personal information, see, *e.g.*, *Norman-Bloodsaw,* 135 F.3d at 1270 (sensitive medical information); *Doe v. Attorney General,* 941 F.2d 780 (9th Cir. 1991) (HIV status); *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983) (personal sexual matters), a government official's status as a respondent in an ethics complaint simply does not rise to that level.

The District Court relied upon *NASA v. Nelson,* 562 U.S. 134 (2011) and *Whalen* v. *Roe,* 429 U.S. 589 (1977) to support its holding that the gag order "serves to protect these legitimate privacy interests for state employees." ER 19, 20-21, 25. But the Supreme Court in *NASA rejected* a challenge by federal contract employees to a government background check requiring disclosures the employees claimed were unconstitutionally intrusive. *NASA,* 562 U.S. at 138. Indeed, the Supreme Court punted on the threshold issue of whether the federal constitution

even protects such privacy. *Id.* ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen*…."). In *Whalen*, the Court *rejected* a privacy-based challenge to a New York statute requiring physicians to submit to a state agency the names of patients receiving prescriptions for certain drugs. *Whalen*, 428 U.S. at 603-604.

Neither *NASA* nor *Whalen* has anything to do with this case. Both decisions concerned *the government* using its authority to coerce private parties into surrendering private information to the government. The gag rule at issue in this case, by contrast, prohibits private citizens from publishing ethics complaints they themselves prepared containing information they themselves have obtained.

The District Court went even farther off the rails by citing quotes from the Montana Constitutional Convention in 1972 and state case law having no bearing the issues in this case. ER 19.[4] Moreover, these state authorities would be

[4] In *Billings Gazette v. City of Billings,* 313 P.3d 129, 131 (Mont. 2013), a newspaper requested the release of city-generated documents related to the city's investigations of city employees for improper computer. In *Moe* v. *Butte-Silver Bow County,* 371 P.3d 415, 420-21 (Mont. 2016), a former county employee sought discovery in her wrongful discharge suit of statements made about her by *other* employees during the county's investigation. This case, by contrast, involves a citizen desiring to disclose complaints that he himself prepared using information he himself had obtained.

unhelpful even if they were on point because state privacy rules have no bearing on the free speech rights guaranteed by the United States Constitution. *Cf. Nunez v. Pachman*, 578 F.3d 228, 229 (3d Cir. 2009) ("Even if the state recognizes a privacy interest in an expunged criminal record, we hold that such an interest is not cognizable under the *federal* constitution.") (emphasis in original); *McNally v. Pulitzer Pub. Co*., 532 F.2d 69, 76 (8th Cir. 1976) ("the constitutional right of privacy is not to be equated with the common law right recognized by state tort law").

The gag rule does not serve any compelling state interest concerning state employee privacy. The District Court's error on this issue, standing alone, warrants reversal.

B The Gag Rule is Not Narrowly Tailored Because It is Substantially Underinclusive

Tschida argued in his summary judgment motion that the gag rule was substantially underinclusive. Doc. 71, pp. 16-18. The District Court completely ignored this argument.

The Supreme Court has long held that a speech prohibition violates the First Amendment if it is substantially underinclusive:

> While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles. Thus, an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people. Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the permissible subjects for public debate and thereby to control the search for political truth.

City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) Underinclusiveness "diminishes the credibility of the government's rationale for restricting speech." *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002), quoting *City of Ladue*, 512 U.S. at 42. It may also "reveal that a law does not actually advance a compelling state interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015).

The Supreme Court has invalidated numerous statutes based solely upon underinclusiveness. See, *e.g., Reed*, 135 S. Ct. 2218, 2231-32 (ordinance that was purportedly enacted to enhance aesthetics and safety by restricting signs providing directions to churches was "hopelessly underinclusive" because it exempted signs conveying ideological messages); *Brown v. Entertainment Merchants Assn*., 131 S. Ct. 2729, 2740 (2011) (statute prohibiting sale of violent video games to minors in order to protect them from harm was unconstitutionally underinclusive because it did not apply to books, cartoons, and movies depicting violence).

Temporary speech restrictions, such as the gag rule in § 2-2-136(4), are

"woefully underinclusive." *White*, 536 U.S. at 780 (restriction on judicial candidates announcing their views on legal issues was fatally underinclusive because it allowed a candidate to opine on issues "up until the very day before he declares himself a candidate" as well as "after he is elected"). If disclosure of an ethics complaint truly injured state officials named as respondents, and if preventing such injuries was truly a compelling interest, the Montana Legislature would have enacted a permanent gag rule, thereby offering lasting protection against the supposed injuries resulting from disclosures of ethics complaints.

The gag rule is also substantially underinclusive because complainants may disclose the facts underlying those complaints in any forum at any time so long as they do not mention the existence of the complaints. Assuming, *arguendo*, that the disclosure of allegations contained in ethics complaints injures respondents' privacy interests, the State cannot credibly protect those interests when it leaves every other forum open for complainants to air those allegations. This underinclusiveness renders the gag rule constitutionally infirm.

C. The District Court Erred in Holding That the Availability of Alternative Forums Justified the Gag Rule

The District Court held the gag rule constitutional because alternative methods were supposedly available for Tschida to "get out his message." ER 22.

The District Court ignored Supreme Court cases holding that "the First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988); see also *California Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) ("consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.").

Not only does the gag rule conceal from the public the fact that an ethics complaint has been filed against a government official, it also prevents the public from evaluating how the government handles (or fails to handle) those complaints. *Stilp,* 613 F.3d at 415 (Pennsylvania's gag rule "impairs the public's ability to evaluate whether the Ethics Commission is properly fulfilling its statutory mission to investigate alleged violations of the Ethics Act.") In this case, for example, Tschida's "message" did not just consist of allegations contained within the Amended Ethics Complaint, but also include Motl's slow-walking of the complaint past Election Day as well as Governor Bullock's use of government-paid attorneys to respond to the complaint, as Tschida made clear in his disclosure to fellow legislators. ER 130-134. Tschida had a First Amendment right to communicate his entire message, and to do so effectively by disclosing to fellow legislators the

documents themselves rather than a summary of them. Indeed, it would have been nearly impossible to inform legislators of Motl's slow-walking the ethics complaint or Bullock's use of state attorneys to defend against the ethics complaint without also informing legislators of the existence of the ethics complaint.

The District Court reliance upon *Madsen v. Women's Health Center,* 512 U.S. 753 (1994), was misplaced. The 36-foot buffer zone at issue in that case arose from what the Supreme Court described as a "content-neutral injunction" for which strict scrutiny was not applicable. *Id.* at 767. Moreover, the Supreme Court distinguished "the type of focused picketing banned from the buffer zone" from the "type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation." *Id.* at 769. This case, by contrast, involves core political speech which is being suppressed by a gag rule that is not limited to a small geographical area. *Madsen* is therefore inapplicable.

IV. THE GAG RULE IS UNCONSTITUTIONAL AS APPLIED TO TSCHIDA'S AMENDED ETHICS COMPLAINT

A First Amendment facial challenge to a statute may be paired with an as-applied challenge. *Real*, 852 F.3d at 933, citing *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033-34 (9th Cir. 2006). In addition to the gag rule in § 2-2-136(4) being facially unconstitutional for the reasons stated

above, the rule is also unconstitutional as applied to Tschida's Amended Ethics Complaint because no compelling state interest was achieved by Motl's suppression of it. As stated previously, the Amended Ethics Complaint is protected political speech. The named respondents were not low-level state employees, but rather a sitting governor and one of his cabinet officers – officials who had no constitutional right of privacy regarding their actions as state officials. And the allegations, which centered on flights on state aircraft, free concert tickets, and travel expenses paid by the DGA, had been reported by the press prior to the filing of the Amended Ethics Complaint. ER 154-155, 109-115, 123-124. Neither those allegations nor the fact that a complaint had been filed were matters that the State had any business trying to suppress.

The District Court held that the gag rule could be constitutionally applied to Tschida's Amended Ethics Complaint because he named O'Leary as a respondent, and disclosure of the complaint somehow violated her privacy rights. This is nonsense. As explained in detail above, the gag rule does nothing to protect any privacy rights recognized by the federal constitution. Moreover, as a member of Governor Bullock's cabinet, O'Leary was a high-level government official and therefore had little, if any, expectation of privacy concerning her work. *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) ("One of the costs associated with participation

in public affairs is an attendant loss of privacy"). Even under the Montana Constitution's right to privacy, which is far broader than the federal constitution's, high-level state officials have virtually no privacy rights arising from their work. *Billings Gazette*, 313 P.3d at 140 ("Where the status of the employee necessitates a high level of public trust, such as an elected official or high level employee, the expectation of privacy in misconduct may be found to be significantly lower than for an administrative employee.").

The gag rule is not only unconstitutional on its face, but also unconstitutional as applied to Tschida's Amended Ethics Complaint, which named a governor and a member of his cabinet as respondents. The District Court erred in holding otherwise.

V. THE DISTRICT COURT ERRED IN DETERMINING MOTL WAS ENTITLED TO QUALIFIED IMMUNITY

The District Court granted Defendant Motl's motion to dismiss Tschida's claims for monetary damages based upon qualified immunity. ER 73. When "defendants assert qualified immunity in a motion to dismiss under Rule 12(b)(6), dismissal is not appropriate unless we can determine, based on the complaint itself, that qualified immunity applies." *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016). This involves two inquires: (1) whether, taken in the light most favorable

to the party asserting injury, the facts alleged show the officer's conduct violated a constitutional right and (2) if so, whether the right was clearly established in light of the specific context of the case." *Id.* As shown below, Tschida had a clearly established First Amendment right to be free from government retaliation for his disclosure of his ethics complaint against government officials.

A. Motl's Threat of Criminal Prosecution Made in Retaliation For Tschida's Criticism of Governor Bullock Violated the First Amendment

For decades, "the law [has been] settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006), citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). First Amendment retaliation is not limited to formal speech bans or physical seizures of writings but also includes "informal measures, such as the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). Such informal measures violate the First Amendment when they would "chill or silence a person of ordinary firmness from future First Amendment activities." *Id.,* quoting *Mendocino Environmental Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999).

The plaintiffs in *White* involved a group of neighbors in Berkeley, California, who opposed the conversion of a hotel into housing units for homeless persons. Their actions included expressing opposition during city council meetings, publishing and distributing newsletters in the area, and participating in a lawsuit in state court to revoke a building permit issued by the city. *Id.* at 1221. Federal housing officials initiated an investigation of the plaintiffs that included threats of a civil enforcement action if they continued publishing "discriminatory" statements as well as threats to subpoena them if they failed to produce records and submit to interviews. *Id.* at 1222, 1228-29. The harassment included an official telling the *San Francisco Examiner* that the plaintiffs had "broken the law." *Id.* at 1224. Even though federal authorities declined to file an enforcement action, the Ninth Circuit held that the threats of civil proceedings against the plaintiffs "would have chilled or silenced a person of ordinary firmness from engaging in future First Amendment activities." *Id.* at 1229.

The Ninth Circuit in *White* based its decision on the Supreme Court's ruling in *Bantam Books*. That case involved the constitutionality of Rhode Island's "Commission to Encourage Morality in Youth," an entity created by the state legislature to (1) educate the public concerning publications containing "obscene, indecent, or impure language, or manifestly tending to the corruption of the youth"

and (2) investigate and recommend prosecutions for distributing such publications. *Bantam Books*, 372 U.S. at 59-60. The commission sent letters to book distributors identifying objectionable books, thanking them in advance for their "cooperation," and reminding them of the commission's duty to recommend to the state attorney general prosecution of purveyors of obscenity. *Id.* at 61-62. The distributors often reacted by ceasing distribution of books identified by the commission. *Id.* at 62.

In striking down the commission, the Supreme Court noted that "it is a characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." *Id.* at 66. Thus, even though a book distributor "was 'free' to ignore the Commission's notices," in actuality, it could not because "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings." *Id.* at 68. The commission's "informal sanctions – the threat of invoking legal sanctions and other means of coercion, persuasion and intimidation," enabled "a scheme of state censorship effectuated by extralegal sanction." *Id.* at 68, 71.

As with the speech in *White*, the speech in this case involved criticism of the government, but Motl's threats against Tschida were more serious than those the Ninth Circuit held in *White* were sufficient to violate the First Amendment. Federal authorities in *White* threatened neighbors protesting a homeless project

with *civil* subpoenas and a *civil* enforcement action. Motl threatened Tschida with both *civil* penalties and *criminal* prosecution. He declared on KGVO on November 3, 2016, that the disclosure of the ethics complaint occurred "in the last days of a campaign, which I think magnifies the seriousness of what he did," and "it's just outrageous that he did what he did at the time that he did it." ER 224-225, 298. He had "personal responsibility for his actions; and so he'll need to deal with the consequences of breaking state law." ER 299. The following colloquy then occurred between Motl and an interviewer for KGVO:

Interviewer:	And what are those consequences?
Motl:	There's, uh, the main consequence that befalls an official who, um, violates a mandatory duty is official misconduct.
Interviewer:	And that would be a charge in civil court?
Motl:	No, it's criminal court.
Interviewer:	It's a criminal court charge?
Motl:	Yes.

ER 299. Motl then stated that he "wouldn't expect anybody would consider bringing something for or against Mr. Tschida until" after Election Day. ER 300.

The timing of Motl's threats -- five days before Election Day -- compounded their chilling effect. Motl expressed indignation over Tschida submitting a copy of the ethics complaint to fellow legislators in the last days of a campaign, but had no qualms about slandering Tschida, who was a candidate himself, with a false threat

of criminal prosecution five days before Election Day – and broadcasting that threat into his district.

The day after Election Day, Motl admitted he had no intention of pursuing criminal sanctions against Tschida. ER 346-347. The only purpose Motl's threat served was to silence Tschida from further criticizing Governor Bullock during the crucial last days of a fiercely contested gubernatorial campaign.

Motl's First Amendment violation was also more egregious than the one in *Bantam Books*. The Supreme Court enjoined the commission's sending letters to book distributors declaring certain books as "objectionable" and reminding the distributors of the commission's duty to recommend for prosecution the distribution of such books. Sending the letters violated the First Amendment because "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings." *Bantam Books*, 372 U.S. at 68.

In this case, there was no veil, thin or otherwise. Motl's statement was a direct threat of criminal prosecution against a sitting legislator five days before Election Day. And, unlike the private letters sent to book distributors by the Rhode Island morality commission in *Bantam Books*, Motl made his clear, unveiled threats of criminal prosecution in a radio broadcast.

Motl's threat of criminal prosecution against Tschida most certainly "would

have chilled or silenced a person of ordinary firmness from engaging in future First Amendment activities." *White*, 227 F.3d at 1228. Motl therefore violated the First Amendment.

B. The Right to Criticize Government Officials Without Threat of Criminal Prosecution Was Clearly Established in 2016

The doctrine of qualified immunity "protects government officials from suits for damages unless their actions violated clearly established statutory or constitutional rights of which a reasonable person would have known." *Demuth v. County of Los Angeles*, 798 F.3d 837, 839 (9th Cir. 2015). "While the law must be unambiguous to overcome qualified immunity, that doesn't mean that every official action is protected unless the very action in question has previously been held unlawful. *Id*., quoting *C.B. v. City of Sonora*, 769 F.3d 1005, 1026 (9th Cir. 2014).

The Ninth Circuit has repeatedly held that the right of citizens under the First Amendment to be free of official retaliation for criticizing their government is clearly established. *Welty*, 818 F.3d at 936 ("the constitutional right to be free from retaliation was clearly established at the time of defendants' actions"); *White*, 200 F.3d at 1239 (plaintiffs' retaliation claim was "founded on bedrock First Amendment principles and legal rules that this court and the Supreme Court have

applied for decades, if not centuries"). Moreover, in November 2016 it was clearly established that First Amendment retaliation could result from "informal measures, such as the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." *White*, 227 F.3d at 1228, quoting *Bantam Books*, 372 U.S. at 67. *White* made clear that threats of civil sanctions were sufficient for a First Amendment retaliation claim. *Bantam Books* clearly established that indirect, veiled threats by a state actor, even one with no prosecutorial authority itself, were sufficient to violate the First Amendment.

C. The District Court Erred in Relying Upon the Gag Rule to Grant Qualified Immunity to Motl

The District Court defined the issue at stake as "whether Tschida possessed a clearly established right to speak publicly about the fact that he had filed an ethics complaint *in light of the confidentiality provision in Mont. Code Ann. 2-2-136(4)*." ER 66 (emphasis added). But for the gag rule in Mont. Code Ann. 2-2-136(4), Tschida's disclosure of his ethics complaint against Governor Bullock and a member of his cabinet was clearly protected by the First Amendment. Thus, whether Respondent Motl was entitled to qualified immunity turns upon whether he was entitled to rely the gag rule to justify his threat of criminal prosecution against Tschida.

This Court has made clear that following a state statute does not entitle a government official to qualified immunity if the statute (1) "authorizes official conduct which is patently violative of fundamental constitutional principles," or (2) the official "unlawfully enforces an ordinance in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance." *Grossman v. City of Portland*, 33 F.3d 1200, 1209-10 (9th Cir. 1994). The District Court's analysis in this case failed both tests.

1. The Gag Rule is Patently Violative of Fundamental First Amendment Principles

Since its decision in *Grossman*, this Court has refused to grant qualified immunity to officials relying upon statutes authorizing conduct that is patently violative of fundamental constitutional principles. See, *e.g., Carey v. Nevada Gaming Control Bd*., 279 F.3d 873, 881-82 (9th Cir. 2002) (officer who relied upon statute statute permitting the arrest of suspects who refused to identify themselves during a *Terry* stop was not entitled to qualified immunity because statute violated prior Ninth Circuit case law).

The gag rule provides Montana's Commissioner of Political Practices an unlimited amount of time to make a "decision" with regard to whether a

respondent named in an ethics complaint has violated the law.[5] Motl used that provision to slow-walk a decision on Tschida's complaint in order prevent Governor Bullock from being embarrassed by it before Election Day.[6] A prior restraint that gives a government official the ability to suppress speech indefinitely the way that the gag rule in Mont. Code Ann. § 2-2-136(4) does is patently violative of First Amendment principles.

The gag rule is also content-based, and therefore subject to strict scrutiny. As explained previously, the gag rule does not achieve any compelling interest and is not narrowly tailored.[7] This is an additional reason why the gag rule was patently violative of fundamental First Amendment rights.

The District Court's reasoning is further undermined by its application of a reasonable *person* standard to Motl. Motl is a licensed attorney and a prosecutor, ER 180-182, and therefore his reliance upon a state statute for immunity must be evaluated from the perspective of a reasonable *prosecutor*. *Ewing v. City of Stockton,* 588 F.3d 1218, 1235 (9th Cir. 2009); see also *Schneyder v. Smith*, 653 F.3d 313, 331 (3d Cir. 2011) (qualified immunity denied because a "reasonable

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[5] See *supra*, fn. 1.

[6] See *supra*, pp. 15-17.

[7] See *supra*, pp. 21-29.

prosecutor" would not have kept a material witness incarcerated indefinitely without judicial authorization); *Harris v. Bornhorst*, 513 F.3d 503, 512 (6th Cir. 2008) (qualified immunity denied because a "reasonable prosecutor" would not have relied upon a suspect's involuntary confession to conclude probable cause supported his arrest). The District Court therefore erred in relying upon the gag rule in granting qualified immunity to Motl.

2. *Motl's Threat of Severe Penalties and Criminal Prosecution Exceeded the Bounds of the Statute*

As the Ninth Circuit held in *Grossman*, a state statute can support qualified immunity only if it authorizes the "particular conduct" underlying the § 1983 claim. *Grossman,* 33 F.3d at 1209. If the official's conduct "exceeds the bounds of the [statute]," the statute cannot serve as a basis for granting qualified immunity. See, *e.g.*, *Tarabochia v. Adkins*, 766 F.3d 1115, 1127-28 (9th Cir. 2014) (qualified immunity denied to fish and game officials because their suspicionless stop of vehicle exceeded the bounds of a state statute authorizing warrantless administrative searches).

Defendant Motl's threat of criminal prosecution exceeded the bounds of § 2-2-136(4). Nothing in the statute authorizes a Commissioner to conduct a radio interview in which the Commissioner threatens a candidate with criminal

prosecution five days before an election.

The District Court held that Motl's statement might have been justified under Mont. Code Ann. § 2-2-136(5), which states that "[w]hen a *complaint* is filed, the commissioner may issue statements or respond to inquiries to confirm that a complaint has been filed, to identify against whom it has been filed, and to describe the procedural aspects and status of *the case*." ER 71 (emphasis added). The references to "complaint" and "the case" in Mont. Code Ann. § 2-2-136(5) are to *ethics complaints* and cases initiated by ethics complaints. Nothing in Mont. Code Ann. § 2-2-136(5) authorizes a commissioner to threaten a candidate with criminal prosecution for official misconduct, something that would involve an entirely separate case that would have to be filed under an entirely separate criminal statute.[8] No such case was ever brought against Tschida.

The District Court also held that Motl's threat of criminal prosecution was protected because "Tschida's intentional disclosure of the existence of his ethics complaint, knowing of the prohibition on disclosure contained in Mont. Code Ann. § 2-2-136(4), potentially raises the question of official misconduct." ER 72. Even assuming Motl had probable cause to believe Tschida committed an act of official misconduct, that fact would not have justified Motl's retaliatory threats of criminal

[8] The crime of official misconduct is defined by Mont. Code Ann. § 45-7-401.

prosecution. *Cf. Ford v. City of Yakima*, 706 F.3d 1188, 1194-96 (9th Cir. 2013), (existence of probable cause to arrest motorist for noise violation did not entitle police officers to qualified immunity where motorist alleged that arrest resulted from retaliatory motive).

Even if Motl could have reasonably believed that the gag rule in Mont. Code Ann. § 2-1-136(4) was constitutional, no reasonable prosecutor would have relied upon a violation of this *civil* statute as a basis for publicly threatening a *criminal* prosecution. Such a threat is something "a reasonable [prosecutor] would recognize exceeds the bounds of [Mont. Code Ann. § 2-1-136(4)]." *Grossman*, 33 F.3d at 1210.

CONCLUSION

For all of the foregoing reasons, Appellant Brad Tschida respectfully requests this Court reverse the District Court's order granting the State's motion for summary judgment, enjoin the State from enforcing Mont. Code Ann. § 2-2-136(4), and remand this case to the District Court for further proceedings.

DATED: May 25, 2018

Respectfully submitted,
Monforton Law Offices, PLLC
By: /s/ Matthew G. Monforton

Matthew G. Monforton
Attorney for Appellant

CERTIFICATE OF COMPLIANCE RE CIRCUIT RULE 28-2.6

Appellant is not aware of any related cases pending in the Ninth Circuit**.**

DATED: May 25, 2018

Respectfully submitted,

Monforton Law Offices, PLLC

By: /s/ Matthew G. Monforton
Matthew G. Monforton

Attorney for Appellant

CERTIFICATE OF COMPLIANCE RE F.R.A.P. Rule 32(a)(7)(C) & CIRCUIT RULE 32-1

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i) and Circuit Rule 32-1, the attached Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 10,290 words, as determined by the word-count feature on Microsoft's Word program.

DATED: May 25, 2018

Respectfully submitted,

Monforton Law Offices, PLLC

By: /s/ Matthew G. Monforton
Matthew G. Monforton

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 25, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: May 25, 2018

Respectfully submitted,

Monforton Law Offices, PLLC

By: /s/ Matthew G. Monforton
Matthew G. Monforton

Attorney for Appellant