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

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Rules

Other Authorities

PRIOR OR RELATED APPEALS

In accordance with Tenth Circuit Rule 28.2(C)(3), Defendants-Appellants represent that there is one separate pending case in this Court related to this matter: Docket No. 22-8021.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this case based on 28 U.S.C. § 1331 because the case raised a federal question. On March 21, 2022, the district court entered an order on the parties' cross-motions for summary judgment. (JA482-509).[1] The district court issued its judgment on April 1, 2022. (JA510). This judgment disposed of all of the parties' claims. *EEOC v. PJ Utah, LLC*, 822 F.3d 536, 541 (10th Cir. 2016) ("For appellate jurisdiction to exist, the order . . . must constitute a 'final decision,' which is a decision that disposes of all claims."). The State Officials filed their notice of appeal of the district court judgment on April 29, 2022, within the time allowed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. (JA511-13). Accordingly, this Court has jurisdiction over this appeal from the district court's final judgment under to 28 U.S.C. § 1291.

[1] Citations to the Joint Appendix are referenced as (JA###).

STATEMENT OF ISSUES

I. Did the district court err by holding that Wyo. Stat. Ann. § 22-25-106(h) was unconstitutionally vague?

II. Did the district court err by holding that Wyo. Stat. Ann. § 22-25-106(h) is not narrowly tailored?

STATEMENT OF THE CASE

This appeal arises out of a decision by the United States District Court for the District of Wyoming on the constitutionality of Wyo. Stat. Ann. § 22-25-106(h).[2] This statute establishes reporting requirements for certain electioneering communications. Plaintiff Wyoming Gun Owners, Inc. ("WyGO") brought this action asserting that the electioneering communication statute, Wyo. Stat. Ann. § 22-25-101(c), and the reporting requirements for electioneering communications in Wyo. Stat. Ann. § 22-25-106(h), violated the First Amendment both facially and as applied to WyGO.

On cross-motions for summary judgment, the district court held that the phrase "relate to" in Wyo. Stat. Ann. § 22-25-106(h)(iv) is unconstitutionally vague and that § 22-25-106(h) is unconstitutional as applied to WyGO. (JA509). Specifically, the district court found § 22-25-106(h) to be unconstitutional because it does not establish any temporal limits on contributions subject to reporting and because the statute "creates a mismatch between the State's interests and the required disclosures." (JA502-03). While the decision purported to be limited to WyGO's as-applied claims, the district court's analysis was not limited to the factual scenario

[2] Wyoming Statute § 22-25-106(h) was amended in 2022. 2022 Wyo. Sess. Laws 277-78. In relevant part, the reporting threshold increased from $500 to $1,000, which became effective April 1, 2022. *Id.* at 278. All citations to Wyo. Stat. Ann. § 22-25-106(h) in this brief refer to the statute that was in effect in 2020-2021.

in which the statutes were applied to WyGO and thus the district court's decision appeared to facially invalidate the statute.

I. Facts relevant to the issues submitted for review

In 2019, the Wyoming Legislature revised the state's campaign finance laws. 2019 Wyo. Sess. Laws 1-6.[3] As part of the revisions, the Legislature created a category of communications entitled "electioneering communications" and established reporting requirements for electioneering communications that met a certain monetary threshold. Wyo. Stat. Ann. §§ 22-25-101(c)(i)-(ii); -106(h). Organizations that spend greater than $500 in any primary, general, or special election on an electioneering communication are required to file a statement of contributions, which must list expenditures and contributions that relate to the electioneering communication. *Id.* § 22-25-106(h). Contributions related to the electioneering communication that are greater than or equal to $100 must be itemized and the itemization must include the date of the contribution, any expenditure or obligation, the name of the person from whom the contribution was received or to whom paid, and the purpose of each expenditure or obligation. *Id.* § § 22-25-106(h)(v). Contributions related to the electioneering communication that are under $100 must be reported but are not required to be itemized. *Id.* If, however,

[3] Available at: https://wyoleg.gov/2019/SessionLaws.pdf

a person or entity made multiple contributions during the election cycle and the total amount of that person or entity's contributions exceeded $100, all contributions from that person or entity during the election cycle must be itemized. *Id.* Failure to file the report required under Wyo. Stat. Ann. § 22-25-106(h) may expose the person to a civil penalty assessed by the applicable filing office. *Id.* § 22-25-108(f).

WyGO is a Wyoming non-profit corporation. (JA341). On June 15, 2020, Aaron Dorr, Treasurer and Principal of WyGO, sent an email to Rick Shaftan, Media Consultant at Neighborhood Research & Media, requesting the company create video advertisements for "the 8/18 GOP ***primary*** in Wyoming." (JA100, 373) (emphasis in original). One of the primary races Dorr requested a video for was for the Wyoming Senate District 6 race between Anthony Bouchard and Erin Johnson. (JA373). Dorr stated that he needed these videos completed, with editing, no later than July 24, 2020. (JA373). Door also explained that Anthony Bouchard was being "primaried" by Erin Johnson and directed Shaftan to "[h]it her as hard as possible, the whole state is watching." (JA373).

In August 2020, WyGO paid a commercial radio station $1,229.10 for a sixty second advertisement in the Cheyenne radio market. (JA342). The advertisement had the following script:

> America is under attack. Violent thugs are rioting, looting, and vandalizing—pushing socialism for America. Only a few brave champions will stand against them and fight for your gun rights. One of those champions is Anthony Bouchard—a nationally known

> conservative leader who has always led the fight for Wyoming gun owners.
>
> That's why the Left hates him. And that's why they are propping up liberal Erin Johnson in the August primary—hoping that this self-described country-club, chamber-of-commerce moderate will help them pass red-flag gun seizures in Wyoming.
>
> We all know Anthony Bouchard has fought like hell for gun owners. But Erin Johnson won't even mention gun rights on her website. That's pathetic. But that's Erin Johnson.
>
> Tell Johnson that Wyoming gun owners need fighters, not country-club moderates who will stab us in the back the first chance they get.
>
> This is Aaron Dorr and this ad is paid for by Wyoming Gun Owners.

(JA103, 342-43, 378).

The State of Wyoming held a primary election on August 18, 2020. (JA342). On October 12, 2020, the Wyoming Secretary of State's Office received a complaint from the Greater Cheyenne Chamber of Commerce alleging that WyGO violated Wyoming's campaign finance statute because it did not file the required report for the August 2020 radio advertisement. (JA129-31, 343). Following the complaint, Kai Schon, Election Division Director of the Wyoming Secretary of State, emailed Dorr and informed him that the Wyoming Secretary of State's Office had determined that WyGO engaged in electioneering communications in excess of $500 during the election cycle and that WyGO had not submitted the report required by Wyo. Stat. Ann. § 22-25-106(h). (JA133-35, 343).

WyGO did not seek judicial review of the Secretary of State's Office's October 14, 2020, determination that the radio advertisement was an electioneering communication and was subject to reporting. (JA344). On December 2, 2020, Deputy Secretary of State Karen Wheeler signed a Final Order Imposing Civil Penalty, which assessed WyGO a $500 civil penalty under Wyo. Stat. Ann. § 22-25-108(f) because WyGO did not file the report required by § 22-25-106(h) for the August 2020 radio advertisement. (JA144-47, 344). WyGO has never filed the report required by § 22-25-106(h). (JA343).

II. Relevant Procedural History

WyGO filed its complaint on June 1, 2021, in the United States District Court for the District of Wyoming. (JA18-37). The complaint named as defendants Wyoming Secretary of State, Edward Buchanan; Wyoming Deputy Secretary of State, Karen Wheeler; Election Division Director for the Wyoming Secretary of State, Kai Schon; and Wyoming Attorney General, Bridget Hill (State Officials) in their official capacities. (JA20-21). In addition, Wheeler and Schon were also named in their individual capacities. (JA20-21).

Defendants filed a motion to dismiss all claims. (JA39-66). In its order granting in part and denying in part Defendants' motion to dismiss, the district court dismissed the 42 U.S.C. § 1983 claims against State Officials and all claims against Schon and Wheeler in their individual capacities. (JA250-61). In addition, the court

dismissed WyGO's facial overbreadth, facial vagueness, and freedom of the press claims for failure to state a claim upon which relief can be granted. (JA259-71). Following the court's order, the only remaining claims were WyGO's as-applied challenge to Wyo. Stat. Ann. § 22-25-106(h) and the as-applied vagueness challenges to the phrases "relate to" in § 22-25-106(h) and "commentary" in § 22-25-101(c)(ii)(B). (JA272).

After limited discovery, State Officials filed a motion for summary judgment, as did WyGO. (JA316-18, 401-42). The district court heard arguments on the cross-motions and issued a written decision on March 21, 2022. (JA482-509). The district court issued its judgment on April 1, 2022. (JA510). State Officials filed their notice of appeal on April 29, 2022. (JA511-13). WyGO filed its notice of cross-appeal on May 9, 2022. (JA514-15).

III. Ruling Presented for Review

The sole order subject to this appeal is the *Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiff's Cross-Motion for Summary Judgment*. (JA482-509). In its order, the district court made five specific findings.

First, the district court *sua sponte* addressed the issue of standing. (JA491-92). Without engaging in a complete standing analysis, the district court concluded that WyGO met the first standing element—injury in fact—because WyGO was assessed

a $500 civil penalty for failing to file a report based on the August 2020 radio advertisement. (JA491-92). The court also opined that there was a risk disclosing donors would chill donations and the "potential infringement on WyGO members' constitutional right to freedom of association, coupled with WyGO's decision to forego speaking during election season rather than face another fine" was sufficient to establish standing. (JA491-92).

Second, the district court held that the phrase "relate to" in Wyo. Stat. Ann. § 22-25-106(h) is unconstitutionally vague. (JA492-95). Although the court previously dismissed WyGO's facial vagueness challenge to § 22-25-106(h), it did not limit its analysis to the factual scenario in which the statute was applied to WyGO. (JA492-95). Instead, the court simply reasoned that the phrase "relate to" was inherently vague and because the statute provided no guidance for what contributions "relate to" an electioneering communication, it could encompass "indirectly related expenditures." (JA494-95). It concluded that the statute did not "create a standard for organizations required to disclosure [sic] expenditures and itemized contributions" and that a reasonable person could have trouble deciphering what "relate to" means. (JA492-95). As a result, the court held the statute "void for vagueness." (JA495).

Third, the district court held that the phrase "commentary" within Wyo. Stat. Ann. § 22-25-101(c)(ii)(B) is not unconstitutionally vague. (JA495). Although it

rejected applying principles of statutory interpretation when it analyzed whether the phrase "relate to" is unconstitutionally vague, the court relied on canons of statutory construction and interpretation and "a dose of common sense" when interpreting the "commentary" exception. (JA495-98). It acknowledged that similar statutory provisions had also been found not to be unconstitutionally vague, citing *Colo. Right to Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d 1001, 1008 (D. Colo. 2005). (JA496). The court ultimately concluded that when read in context, a reasonable person was on notice of what communications fell under the "commentary" exception. (JA498).

Fourth, the district court determined that Wyo. Stat. Ann. § 22-25-106(h) is unconstitutional as applied to WyGO. (JA509). The court reviewed the statute under exacting scrutiny and found that the state had a sufficiently important interest in knowing who is speaking about a candidate. (JA498-501). But it held that the statute is not narrowly tailored to that interest. (*Id.*). It reasoned that without any temporal limitations on calculating donations under $100 to determine if the aggregate exceeds $100, the statute does not support the state's informational interest. (JA501-03). While the court acknowledged the Secretary of State's Office's interpretation that only contributions received within the election cycle need to be reported, and opined that the interpretation was reasonable, it concluded that the statute is not narrowly tailored because it does not expressly state a temporal

limitation. (JA502-03). In addition, the court found that there is a "mismatch" between the reporting requirement and the state's interest, similar to the regulations struck down in *Lakewood Citizens Watchdog Group v. City of Lakewood*, Civil Action No. 21-cv-01488-PAB, 2021 WL 4060630 (D. Colo. Sept. 7, 2021) and *Americans for Prosperity Found. v. Bonta*, — U.S. —, 141 S. Ct. 2373, 2382 (2021). (JA503-05). The court hypothesized that a donation to WyGO may be required to be reported regardless of the reason for the donation. (JA504). While the court did not state what would be required for the statute to be narrowly tailored, it opined that earmarking or other bifurcated disclosure regimes may be sufficient to demonstrate narrow tailoring. (JA506-07).

Finally, the district court addressed WyGO's claim for injunctive relief. (JA508-09). The court found that injunctive relief was appropriate and that under *Ex Parte Young*, it need not consider all factors required for a permanent injunction. (JA508-09). The extent of the injunction is unclear, but it appears that the court only enjoined the Secretary of State's Office from requiring that WyGO submit the report for the 2020 radio advertisement. (JA509).

SUMMARY OF THE ARGUMENT

The district court erred in its order invalidating Wyo. Stat. Ann. § 22-25-106(h) for two reasons. First, the district court incorrectly found § 22-25-106(h) is unconstitutionally vague. In fact, while it appeared WyGO's facial vagueness challenge was dismissed by the court in its order on the motion to dismiss, the court did not limit its analysis to the remaining as-applied claim when it issued its ruling on summary judgment. In an as-applied challenge, the reviewing court must tether its vagueness analysis to the limited circumstance in which the statute was applied. A statute is not unconstitutionally vague simply because it is ambiguous, or susceptible to multiple interpretations. *See Dickerson v. Napolitano*, 604 F.3d 732, 747 (2d Cir. 2010) (stating that a statute may be ambiguous and not unconstitutionally vague). In addition, the district court improperly disregarded principles of statutory interpretation and construction when determining whether the statute was unconstitutionally vague. Had the court limited its analysis to the facts in this case, it would have found Wyo. Stat. Ann. § 22-25-106(h) is not unconstitutionally vague as applied to WyGO.

Second, the district court incorrectly held that § 22-25-106(h) failed exacting scrutiny. In doing so, the district court did not consider the state's interest in preventing *quid pro quo* corruption. In addition, the court found § 22-25-106(h) to be similar to the regulations that were struck down in *Americans for Prosperity*

Foundation and *City of Lakewood*. But § 22-25-106(h) is distinguishable from those regulations because it does not require blanket disclosure of donors. Section 22-25-106(h) is narrowly tailored to further the state's interests and is targeted to obtain limited information on expenditures and contributions that relate to the electioneering communication that triggered the report. Despite WyGO's decision not to trace funds, Wyo. Stat. Ann. § 22-25-106(h) is sufficiently tailored to further the state's interests to withstand exacting scrutiny.

ARGUMENT

I. The district court erred in concluding that the phrase "relate to" in Wyo. Stat. Ann. § 22-25-106(h)(iv) is unconstitutionally vague.

In its previous order on the motion to dismiss, the district court ruled that WyGO's facial vagueness claim "lack[ed] any set of facts tending to show the vagueness 'reaches a substantial amount of constitutionally protected conduct.'" (JA266). Nevertheless, in its order on the cross-motions for summary judgment, the district court appeared to facially invalidate § 22-25-106(h)(iv) by declaring it is void for vagueness. (JA495). These seemingly inconsistent rulings have caused significant confusion about the status of § 22-25-106(h)(iv) and made it hard to tell if both facial and as-applied arguments are pertinent in this appeal. Accordingly, while WyGO's as-applied challenge was the only proper claim before the court at the summary judgment stage, this brief will present both facial and as-applied analyses.

A. Standard of Review

This Court reviews "the district court's grant of summary judgment de novo, applying the same standards used by the district court." *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1145 (10th Cir. 2007).

B. Summary Judgment Standard.

Summary judgment is appropriate under Rule 56(a) when the movant shows "there is no genuine dispute as to any material fact and the moving party is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and it is material "if under a substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013). When reviewing a motion for summary judgment, this Court "examine[s] the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Dahl v. Charles F. Dahl, M.D., P.C. Defined Benefit Pension Tr.*, 744 F.3d 623, 628 (10th Cir. 2014) (citation omitted).

C. The district court erred when it held § 22-25-106(h)(iv) is void for vagueness.

Whether Wyo. Stat. Ann. § 22-25-106(h)(iv) is unconstitutionally vague turns on the proper interpretation of statute. That statute 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:
>
> > (i) Identify the organization causing the electioneering communication or independent expenditure to be made and the individual acting on behalf of the organization causing the communication or expenditure to be made, if applicable;
> >
> > (ii) Be filed at least seven (7) days but not more than fourteen (14) days before any primary, general or special election. Any contribution received or expenditure made after the statement has been filed, through the day of the election, whether a primary, general or special election,

> shall be filed as an amendment to the statement within ten (10) days after the election;
>
> . . . .
>
> (iv) Only list those expenditures and contributions which relate to an independent expenditure or electioneering communication;
>
> (v) Set forth the full and complete record of contributions which relate to an independent expenditure or electioneering communication, including cash, goods or services and actual and promised expenditures. The date of each contribution of one hundred dollars ($100.00) or more, any expenditure or obligation, the name of the person from whom received or to whom paid and the purpose of each expenditure or obligation shall be listed. All contributions under one hundred dollars ($100.00) shall be reported but need not be itemized. Should the accumulation of contributions from a person exceed the one hundred dollar ($100.00) threshold, all contributions from that person shall be itemized;
>
> (vi) Be signed by both the chairman and treasurer of the organization, if those positions are present in the organization, or by the person who caused the independent expenditure or electioneering communication to be made.

Id.

As noted above, the district court purported to dismiss WyGO's facial vagueness claims in its order on the motion to dismiss. (JA266-67). But the district court's analysis in its order on the cross motions for summary judgment extended beyond the specific facts and circumstances applicable to WyGO. (JA492-95). This resulted in a confusing order in which the court declared the statute to be "void for vagueness." (JA495). The confusion is problematic because it is not clear from the

order whether the Wyo. Stat. Ann. § 22-25-106(h) is still valid and can be applied to other entities that cause electioneering communications or independent expenditures in the future or whether the statute as a whole was invalidated. The confusion aside, the district court erred in finding the phrase "relate to" in § 22-25-106(h)(iv) unconstitutionally vague on its face. (JA492-95).

To succeed on a facial vagueness challenge, a plaintiff must show that the statute is "vague in the ***vast majority of its applications***[.]" *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006) (citation omitted) (emphasis added). "[S]peculation about possible vagueness in hypothetical situations not before the [c]ourt will not support a facial attack on a statute when it is surely valid in the vast majority of intended applications." *Ward v. Utah*, 398 F.3d 1239, 1251 (10th Cir. 2005) (citation omitted). Statutes enjoy a presumption of constitutionality and must be upheld "unless the court is satisfied beyond all reasonable doubt that the legislature went beyond the confines of the Constitution." *United States v. LaHue*, 261 F.3d 993, 1004 (10th Cir. 2001) (citation omitted).

The vagueness doctrine is an outgrowth of the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2008). Whether a statute is unconstitutionally vague depends upon how the statute is interpreted. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *See Faustin v. City & Cnty. of Denver, Colo.*, 423 F.3d

1192, 1201 (10th Cir. 2005) (citation omitted). "Perfect clarity and precise guidance" are not required. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

The United States Supreme Court has recognized two independent tests for whether a statute is impermissibly vague: "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Faustin*, 423 F.3d at 1202 (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

When evaluating whether a statute provides fair notice, courts consider "the enactment's purpose, the harm it attempts to prevent, whether there is a scienter requirement, and the interpretations of individuals charged with enforcement." *Jordan v. Pugh*, 425 F.3d 820, 825 (10th Cir. 2005). Federal courts read the statute "as it is interpreted by the state's highest court." *United States v. Gaudreau*, 860 F.2d 357, 361 (10th Cir. 1988). When interpreting a state statute that has not been interpreted by the state's highest court, which is the case for § 22-25-106(h), this Court applies the state's rules of statutory construction to predict how the state's highest court would interpret the statute. *Ward*, 398 F.3d at 1248. "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 expression

is both real and substantial." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

When interpreting a statute, Wyoming courts first determine whether the statute is clear or ambiguous. *Wyodak Res. Dev. Corp. v. Wyo. Dep't of Revenue*, 2017 WY 6, ¶ 25, 387 P.3d 725, 732 (Wyo. 2017). To do so, they must "look first to the plain and ordinary meaning of the words to determine if the statute is ambiguous. A statute is clear and unambiguous if its wording is such that reasonable persons are able to agree on its meaning with consistency and predictability." *Id.* (quoting *RME Petroleum Co. v. Wyo. Dep't of Revenue*, 2007 WY 16, ¶ 25, 150 P.3d 673, 683 (Wyo. 2007)). "Conversely, a statute is ambiguous if it is found to be vague or uncertain and subject to varying interpretations." *Id.* (citation omitted). "If the statutory language is sufficiently clear and unambiguous, the Court simply applies the words according to their ordinary and obvious meaning." *Id.* ¶ 26, 387 P.3d at 732 (quoting *DB v. State* (*In re CRA)*, 2016 WY 24, ¶ 16, 368 P.3d 294, 298 (Wyo. 2016)).

Here, Wyo. Stat. Ann. § 22-25-106(h)(iv) requires a statement of contributions and expenditures to "[o]nly list those expenditures and contributions which relate to an independent expenditure or electioneering communication." "Relate" means "to have some relation (often fol. by *to*)." Webster's New Universal Unabridged Dictionary 1626 (1996) (fourth definition). In turn, "relation" means "an

existing connection; a significant association between or among things." *Id.* (first definition). Applying the plain and ordinary meaning of the words in the statute, the statute is clear and unambiguous: it requires that the required report list those expenditures and contributions that have an "existing connection" or "a significant association" between the expenditures or contributions and electioneering communications. *See* Wyo. Stat. Ann. § 22-25-106(h)(iv).

Expenditures associated with an electioneering communication can include the expenses incurred for creating the communication and for airing or publishing the communication. Conversely, contributions are associated with an electioneering communication if the contribution is used for, or in furtherance of, the electioneering communication. Section § 22-25-106(h) does not dictate how organizations must track expenditures and contributions, but the plain language of the statute is sufficient to put an organization on fair notice of what expenditures and contributions are associated with the electioneering communication and are subject to the reporting requirements.

The district court, however, concluded that § 22-25-106(h)(iv) is impermissibly vague because it provided "no guidance for what expenditures or contributions 'relate to' electioneering communications." (JA494). The court relied on a series of hypothetical scenarios and ultimately declared that that a reasonable person would have trouble deciphering what expenditures or contributions would

require disclosure. (JA494). It also relied on a series of cases interpreting Employee Retirement Income Security Act (ERISA) that commented on the use of the phrase "relate to" in a statute. (JA493-94) (citing *De Buono v. Nysa-lla Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997); *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 439 (8th Cir. 1997); *Overall v. Sykes Health Plan Servs., Inc.,* No. 3:05-CV-36-J, 2006 WL 1382301, at *2 (W.D. Ky. May 16, 2006); *Harris v. Canada Life Assur. Co.*, No. 2:06-CV-14402, 2008 WL 544996, at *2 (D. Nev. Feb. 26, 2008). Those cases focused on Congress's declaration that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" for purposes of a pre-emption analysis. 29 U.S.C. § 1144(a).

Despite the criticisms of the "relate to" language in ERISA, none of the cases cited by the district court engaged in vagueness analysis, much less held that § 1144(a) is unconstitutionally vague. Contrary to the district court's conclusion that the phrase is "inherently vague," many courts have considered and upheld statutes with the phrase "relate to" or other similar phrasing under facial and as-applied vagueness challenges. *E.g.*, *United States v. Morison*, 844 F.2d 1057, 1074 (4th Cir. 1988) (criminalizing publications of documents "relating to the national defense."); *United States v. Portanova*, 961 F.3d 252, 263 (3d Cir. 2020) (enhancing criminal sentences for activities "relating to" the exploitation of minors); *United States v. Barton*, 418 F. Supp. 3d 134, 140 (E.D. La. 2019) (prohibiting distribution of "any

drug or hormonal substance, chemically and pharmacologically related to testosterone"); *Jenkins v. N.J. Dep't. of Corr.*, 989 A.2d 854, 864 (N.J. Super. Ct. App. Div. 2010) (prohibiting "possession or exhibition of anything related to a security threat group").

The district court below erred when it did not apply the rules of statutory interpretation as part of determining whether Wyo. Stat. Ann. § 22-25-106(h)(iv) is unconstitutionally vague. Had it done so, it would have concluded the statute is not "vague in a vast majority of its applications." *Ward*, 398 F.3d at 125. Moreover, concluding that § 22-25-106(h)(iv) is void for vagueness in the order on cross motions for summary judgment also conflicted with the court's previous conclusion that WyGO could not meet the requirement to facially invalidate the statute in its order on the motion to dismiss. (JA266, 495). Furthermore, the record is devoid of any facts demonstrating widespread confusion or discriminatory application of § 22-25-106(h). As a result, to the extent the district court facially invalidated § 22-25-106(h)(iv), it erred and this Court should reverse the district court's decision.

D. The district court erred by not completing an as-applied analysis.

Because the district court dismissed WyGO's facial vagueness claims in its order on the motion to dismiss, it should have completed an analysis for WyGO's as-applied vagueness claims. (JA266-67, 70-72). While a facial challenge asks a

court to determine the application of the statute to all conceivable parties, an as-applied challenge to a statute must be restricted to the facts of the challenging party's "concrete case." *iMatter Utah v. Njord*, 774 F.3d 1258, 1264 (10th Cir. 2014); *see also Galbreath v. City of Okla. City*, 568 F. App'x. 534, 539 (10th Cir. 2014) ("For an as-applied vagueness challenge, we must tether our analysis to the factual context in which the ordinance was applied.").

Here the district court did not restrict its analysis to the facts in this case.[4] (JA494). The court did not analyze WyGO's accounting practices, the expenditures made, or contributions received by WyGO to determine whether WyGO was on fair notice of what it was required to report under the statute. It also disregarded the Secretary of State's interpretation of what contributions are required to be reported based on WyGO's accounting practices. Instead, it opined on hypothetical non-monetary costs and whether they would be required to be reported, noted the supposed "inherent vagueness" of the phrase "relate to," and simply concluded that the statute "could" encompass indirectly related expenditures. (JA494). The court also hypothesized that organizations such as WyGO may not be "well versed in the intricacies of the law or statutory interpretation" and may be confused when

[4] It is worth noting that WyGO never submitted a report and as a result, the Secretary of State's Office never determined whether the information contained in the report was sufficient to comply with the statute. While there is no dispute WyGO was required to submit a report, the Secretary never truly "applied" the statute to the contents of a WyGO report.

compiling reports. (JA494-95). As a result, the court concluded the statute did not create a standard for reporting, but "merely purports to under the guise of legalese." (JA495). While the court referenced WyGO in its analysis, it did not conduct a true as-applied analysis because it did not decide based on the facts in this particular case.

Had the district court restricted its analysis to the facts in this case, it would have concluded that Wyo. Stat. Ann. § 22-25-106(h) is not unconstitutionally vague as applied to WyGO. In relevant part, the statute requires the statement "only list those expenditures and contributions which relate to an . . . electioneering communication[.]" Wyo. Stat. Ann. § 22-25-106(h)(iv). Based on the August 2020 radio advertisement, the Secretary of State's Office determined that WyGO was subject to the reporting requirements because it engaged in an electioneering communication that exceeded the monetary threshold.[5] (JA144-47). As a result of spending greater than $500 on an electioneering communication, the reporting requirement was triggered. (JA342); Wyo. Stat. Ann. § 22-25-106(h). The only dispute is what was required to be on the report, which can be simplified to two main requirements.

First, the statute requires expenditures related to the electioneering communication to be reported. *Id.* § 22-25-106(h)(iv). The parties agreed what

[5] While WyGO initially disputed whether the August 2020 radio advertisement was an electioneering communication, the district court concluded that it met the definition of an electioneering communication. (JA268-69).

expenditures related to the August 2020 radio advertisement—WyGO paid a commercial radio station $1,229.10 to run the ad in the Cheyenne radio market. (JA342). At the time the expenditure to air the radio advertisement was incurred and at the time WyGO was required to submit a report under Wyo. Stat. Ann. § 22-25-106(h), WyGO had reasonable notice that the $1,229.10 expenditure **related to** the radio advertisement. WyGO cannot now claim that it did not have fair notice that the expenditure was required to be reported. *See West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1368 (10th Cir. 2000) (holding that where a plaintiff knew a school district policy prohibited a specific act, the plaintiff had fair warning that his conduct was prohibited). Yet the district court overlooked this undisputed fact in its analysis.

Second, the statute requires the reporting of certain contributions related to the electioneering communications. Wyo. Stat. Ann. § 22-25-106(h)(iv)-(v). To properly analyze the as-applied claim, the district court was required to analyze the statute and the contributions received by WyGO to determine whether WyGO had fair notice that it was required to report these contributions. While WyGO has never provided a report or list of contributions, the record reflects that all donations received by WyGO go into one of two accounts: one for online contributions and one for mail-in contributions. (JA101). WyGO does not provide a method for its donors to restrict contributions received for a specific purpose. (JA101).

In the absence of internal accounting practices to attribute specific contributions to specific expenditures, all contributions are commingled and lose their identity. In this scenario, with the exception of any funds earmarked away from electioneering communications, the Secretary of State's Office's has interpreted the statute and determined that a portion of all contributions received within the election cycle relate to the electioneering communication and are subject to reporting. (JA529, 531).[6] This interpretation offers the most flexibility to organizations based on their activities and donor preferences. Entities that do not engage in electioneering communications need not track contributions because no contributions are related to electioneering communications. Similarly, organizations that engage exclusively in electioneering communications need not track contributions because all contributions relate to electioneering communications. Entities that engage in both electioneering communications and other activities may choose to track donations, but are not required to do so.[7] If the entity chooses not to

[6] The district court did not give appropriate consideration to the Secretary of State's interpretation of the statute. *See Jordan*, 425 F.3d at 825 (stating that when evaluating whether a statute provides fair notice, the court often considers, inter alia, the interpretations of individuals charged with the statute's enforcement); *see also Indep. Inst. v. Williams*, 812 F.3d 787, 789 n.1, 797 (10th Cir 2016) (giving weight to the Colorado Secretary of State's interpretation of what is required to be reported).

[7] For example, an organization could determine that anonymity is unimportant to its donors, and not worth the administrative costs of tracking donation uses. In that

track donations, a portion of all donations not earmarked away from electioneering communications is related to the electioneering communication.

Allowing WyGO to evade the reporting requirements simply because it does not track funds circumvents the purpose of Wyo. Stat. Ann. § 22-25-106(h) and frustrates the legitimate state interests in requiring contributions and expenditures related to electioneering communications to be reported. Furthermore, simply because WyGO disagrees about whether its contributions must be reported does not render the statute unconstitutionally vague; instead, it is subject to judicial interpretation and construction. *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) ("[S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.").

WyGO is a sophisticated actor in the election arena that regularly engages in speech addressing candidates' positions. Sophisticated actors operating within a particular arena, such as WyGO, can discern what relates to a certain action based on expertise or experience. *Morison*, 844 F.2d at 1074 (considering the defendant's experience in the field when determining whether the statute is unconstitutionally vague as applied to the defendant). The record provides no facts suggesting that WyGO did not have fair warning of what it was required to report or that Wyo. Stat.

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case, it may do what WyGO has done and commingle funds.

Ann. § 22-25-106(h) fostered arbitrary and discriminatory application. Because WyGO did not track contributions it used for the August 2020 radio advertisement, a portion of all contributions received by WyGO during that election cycle "relate to" the electioneering communication and the district court erred in concluding §§ 22-25-106(h)(iv) and (v) are unconstitutionally vague as applied to WyGO.

II. The district court erred in concluding that Wyo. Stat. Ann. § 22-25-106(h) is unconstitutional as applied to WyGO's radio advertisement.

The district court determined that Wyo. Stat. Ann. § 22-25-106(h) fails exacting scrutiny. (JA501). Specifically, the court found that the statute is not narrowly tailored because it: 1) lacks a temporal relationship between the contributions that were required to be reported; and 2) creates a "mismatch" between the state's interest and the contributions required to be disclosed. (JA502-03). But Wyo. Stat. Ann. § 22-25-106(h) is unlike the regulations requiring blanket disclosures that have been held unconstitutional. It only requires an organization to report expenditures and contributions related to the electioneering communication and is therefore sufficiently tailored and withstands exacting scrutiny.

A. Standard of Review

This Court reviews "the district court's grant of summary judgment de novo, applying the same standards used by the district court." *Coffman*, 498 F.3d at 1145.

B. Summary Judgment Standard.

Summary judgment is appropriate under Rule 56(a) when the movant shows "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and it is material "if under a substantive law it is essential to the proper disposition of the claim." *Becker*, 709 F.3d at 1022. When reviewing a motion for summary judgment, this Court "examine[s] the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Dahl*, 744 F.3d at 628 (citation omitted).

C. Wyoming Statute § 22-25-106(h) satisfies constitutional scrutiny when reviewed under exacting scrutiny.

The district court found that Wyo. Stat. Ann. § 22-25-106(h) is not narrowly tailored for two reasons. First, the court found that § 22-25-106(h) lacks a temporal relationship between the contributions that were required to be reported and the state's interest. (JA501-03). Second, the court found the statute creates a "mismatch" between the state's interest and the contributions required to be disclosed. (JA502-03). The court was incorrect on both fronts.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. It also provides fundamental protections against contribution and expenditure limitations for

political campaigns. *Republican Party of N.M. v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013). Unlike restrictions on campaign spending, disclosure and disclaimer requirements "impose no ceiling on campaign-related activities" and do not "prevent anyone from speaking." *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (citations omitted). "Government[s] may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Id.* at 319. Moreover, disclosure requirements usually are the "least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam).

The First Amendment also protects political association, as group association may enhance effective advocacy. *Id.* at 15. Because compelled disclosure may infringe on the rights to associational privacy and belief, disclosure requirements must survive "exacting scrutiny," which requires a "substantial relation between the disclosure requirement and a 'sufficiently important' governmental interest." *Ams. for Prosperity Found.*, — U.S. at —,141 S. Ct. at 2383 (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (citation omitted)). "While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.*

1. Wyoming has sufficiently important governmental interests that are substantially related to the reporting requirements.

The district court correctly recognized that Wyoming has a sufficiently important governmental interest in knowing who is speaking about a candidate before an election—the informational interest. (JA501). This Court has expressly held that the informational interest is a sufficiently important governmental interest in the context of candidate elections. *Indep. Inst.*, 812 F.3d at 798-99. Disclosure of contributions and expenditures:

> allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of the candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitates predictions of future performance in office.

Sampson v. Buescher, 625 F.3d 1247, 1256 (10th Cir. 2010) (citation omitted). The public has an interest "in knowing who is speaking about a candidate shortly before an election." *Indep. Inst.*, 812 F.3d at 795 (quoting *Citizens United*, 558 U.S. at 369); *Gaspee Project v. Mederos*, 13 F.4th 79, 95 (1st Cir. 2021) ("[A] well informed electorate is as vital to the survival of a democracy as air is to the survival of human life[.]").

The definition of electioneering communication in Wyo. Stat. Ann. § 22-25-101(c) regulates the functional equivalent of express advocacy. Requiring entities causing electioneering communications over the statutory threshold to report

expenditures and contributions related to the electioneering communication directly furthers the electorate's interest in knowing who is speaking about candidates before elections. Thus, the informational interest is a sufficiently important interest that is substantially related to the reporting requirement in § 22-25-106(h).

Although argued in the briefing, the district court did not consider the fact that the anti-corruption interest also supports the state's interest in entities reporting expenditures and contributions related to electioneering communications. (JA440-41). "[P]ublicizing large contributions and expenditures can 'deter actual corruption and avoid the appearance of corruption' and can facilitate detection of post-election favoritism." *Sampson*, 625 F.3d at 1256 (citation omitted). "Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995). Although *quid pro quo* corruption cannot arise in a "ballot-issue campaign," it can arise in candidate campaigns. *Sampson*, 625 F.3d. at 1256. Because the electioneering communications statutes at issue in this case regulate the functional equivalent of express advocacy and require disclosure of contributions related to that communication, the possibility of *quid pro quo* corruption exists and the state has an important interest in requiring disclosure.

Without reporting requirements for electioneering communications, a donor may support or oppose specific candidates while circumventing candidate reporting disclosures through contributions to an entity that causes electioneering communications. Knowing WyGO causes electioneering communications that endorse specific candidate and attack others, a prospective donor may be aware that gun ownership could be a dispositive issue for some voters and donate to WyGO to conceal the donor's de facto contributions to a specific candidate. Alternatively, a candidate may promise an entity that he or she will support it after the election if it causes an electioneering communication to support that particular candidate. Without disclosing information about donors who contribute funds for electioneering communications, there is no way to ascertain whether *quid pro quo* corruption has occurred.

To deter actual corruption and the appearance of corruption, Wyoming has a legitimate interest in requiring the entity to report expenditures and contributions related to electioneering communications. The district court did not consider the state's anti-corruption interest, and this Court should find that Wyoming also has a sufficiently important interest in prohibiting *quid pro quo* corruption in candidate elections.

While not separately analyzed by the district court, the disclosure and reporting requirements are substantially related to the government interests

identified above. *Reed*, 561 U.S. at 196. Wyoming Statute § 22-25-106(h) requires organizations to disclose only those expenditures and contributions related to the electioneering communication that triggered the reporting requirements. Providing the electorate with information on who has provided resources to advocate for or against a particular candidate, and what expenditures have been made related to candidates before an election, directly advances both the anti-corruption interest and the information interest. Accordingly, those interests are substantially related to the disclosure and reporting requirements in Wyo. Stat. Ann. § 22-25-106(h).

2. The reporting requirements in Wyo. Stat. Ann. § 22-25-106(h) are narrowly tailored to achieve the state's interests.

Although it found that the state has a sufficiently important interest that had a substantial relation to the reporting requirements, the district court held that Wyo. Stat. Ann. § 22-25-106(h) fails exacting scrutiny because it is not narrowly tailored. (JA498-508). The court cited two reasons for its conclusion. (JA501).

First, the district court concluded that the last sentence in Wyo. Stat. Ann. § 22-25-106(h) "lacks any timeline for calculating the combination of donations which exceed the one-hundred-dollar threshold." (JA501). Second, the court concluded that the statute creates a "mismatch" between the State's interest and the contributions required to be disclosed. (JA502-03). This conclusion was based solely on the circumstance that WyGO created through its internal accounting. Because

donations to WyGO go into one of two general funds and because WyGO does not earmark contributions for specific expenditures, the court found that WyGO would be required to disclose some donations "even though none . . . were specifically intended to go towards electioneering communications." (JA502-03).

But contrary to the district court's conclusions, Wyo. Stat. Ann. § 22-25-106(h) is sufficiently tailored and is similar the statute that was upheld in *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021). The United States Court of Appeals for the First Circuit's analysis in that case is instructive. *Gaspee Project* involved Rhode Island's electioneering communications disclosure statute, which required entities spending $1,000 or more in any calendar year to disclose certain donor information. *Id.* at 82-83. In analyzing whether the statute was narrowly tailored, the court considered the following criteria: 1) the spending threshold that triggered reporting; 2) the temporal limitations on expenditures; 3) the limited communications defined as "electioneering communications;" and 4) the ability of a donor to opt-out from having their donations used for electioneering communications. *Id.* at 88-89. Each criterion considered in *Gaspee Project* is present in Wyo. Stat. Ann. § 22-25-106(h).

First, in considering the spending threshold, the *Gaspee Project* court noted that the "threshold tailors the Act to reach only larger spenders in the election arena and at the same time shapes the Act's coverage to capture organizations involved in

election-related spending as opposed to those engaged in more general political speech." *Id.* at 88. While the reporting threshold in Wyoming ($500) is lower than the Rhode Island statute considered in *Gaspee Project* ($1,000) and the Colorado statute considered in *Independence Institute* ($1,000), Wyoming has a significantly smaller population than both states. Wyoming's total population is approximately 50% of Rhode Island's population and 10% of Colorado's population.[8] In addition, Wyoming has a much smaller media market than both states.[9] Because Wyoming has a smaller population and fewer and smaller media markets, less expensive communications may have more impact than in larger, more populous, states. *Indep. Inst.*, 812 F.3d at 797 ("Smaller elections can be affected by less expensive communications."). As a result, the threshold in Wyo. Stat. Ann. § 22-25-106(h) is

[8] *Compare* Wyoming, United States Census Bureau, https://data.census.gov/cedsci/profile?g=0400000US56 (Wyoming's total population was 576,851) *with* Colorado, United States Census Bureau, (https://data.census.gov/cedsci/profile?g=0400000US08) (Colorado's total population was 5,773,714) and Rhode Island, United States Census Bureau (https://data.census.gov/cedsci/profile?g=0400000US44) (Rhode Island's total population was 1,097,379).

[9] *See* 2017 Nielson DMA Rankings – Full List, Lyons Public Relations Broadcast POR Solutions, https://www.lyonspr.com/latest-nielsen-dma-rankings/ (comparing the number of TV households by region and ranking Denver #17, Providence-New Bedford # 52, Casper-Riverton #197, Cheyenne-Scottsbluff #198); Top 100 Media Markets, News Generation, https://newsgeneration.com/broadcast-resources/top-100-radio-markets/ (ranking Denver #16, Providence-New Bedford #52, and Colorado Springs-Pueblo #82, while no Wyoming area was listed in the top 100).

proportionate to the state's population and media market, is intended to reach larger spenders in Wyoming elections, and only captures election-related spending.

Second, the *Gaspee Project* court acknowledged that the reporting requirements were only triggered when the organization "crosses the spending threshold and spends that money in a particular time frame." *Id.* at 88. The court found the temporal requirement "links the challenged requirements neatly to the [state's] objective of securing an informed electorate." *Id.* Similar to the Rhode Island statute, § 22-25-106(h) only requires reporting for expenditures and contributions related to electioneering communications that exceed the $500 threshold within a short period of time before a primary, general or special election. This temporal limitation directly furthers the state's information interest by informing the electorate on who is speaking about candidates before an election.

Third, the *Gaspee Project* court considered that the reporting requirements were narrowed by definition of "electioneering communication," which required the communication to be "targeted to the relevant electorate." *Gaspee Project*, 13 F.4th at 88-89. The court found that this limitation further tied the reporting requirements to the informational interest "by requiring disclosure only when the relevant electorate receives the communication." *Id.* at 89. The same limitation is present in the definition of "electioneering communication" in Wyoming, which requires that the communication "is targeted to the electors in the geographic area . . . the

candidate would represent if elected[.]" Wyo. Stat. Ann. § 22-25-101(c)(i)(D)(I). This limitation allows organizations to engage in political speech without requiring reporting when addressing audiences "disconnected from the upcoming election." *Gaspee Project*, 13 F.4th at 89. Only communications directed at a specific audience that will be voting in the particular candidate election implicate the reporting requirement. Wyo. Stat. Ann. § 22-25-101(c)(i)(D)(I).

Finally, the *Gaspee Project* court considered the ability for donors to opt out of having their donations used for electioneering communications and the ability to contribute funds without those funds being subject to the reporting requirements. *Id.* Both considerations are also present in Wyoming. Contributions from donors contributing less than $100 during the election cycle are not subject to reporting even if they are related to the electioneering communication, so long as total amount the person or entity donated within the election cycle does not exceed $100. Wyo. Stat. Ann. § 22-25-106(h)(v). This exemption provides an option for donors to further electioneering communications without their contributions being reported. *Id.* § 22-25-106(h). This carve-out furthers the electorate's interest in knowing who is contributing larger amounts on elections while limiting reports to only information that serves the State's interests.

In addition, although § 22-25-106(h) does not expressly provide an "opt-out" provision like the Rhode Island statute, it does allow opting out through the

requirement that only contributions that "relate to" the electioneering communication must be reported. *Id.* Any donor may earmark their donation for a specific purpose or may direct not to have their contribution used for electioneering communications—akin to "opting out." If a donor does so, the contribution would not "relate to" the electioneering communication and would not be subject to reporting under § 22-25-106(h).

Applying all of the *Gaspee Project* criteria, § 22-25-106(h) is narrowly tailored to only reach larger donors who contribute funds to election-related speech targeted at the relevant electorate leading up to an election. While the reporting requirements may not be the least restrictive means necessary of achieving the state's interest, the Supreme Court has been clear that "least restrictive means" is not the test. *Ams. for Prosperity*, — U.S. at —,141 S. Ct. at 2383.

Additionally, Wyo. Stat. Ann. § 22-25-106(h) is similar to the Colorado statute that this Court upheld in *Independence Institute v. Williams*. 812 F.3d 787 (10th Cir. 2016). *Independence Institute*, involved a Colorado law that 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 and determined that it did. *Id.* at 796-99. The statute did not expressly require only earmarked donations to be

disclosed, but the Colorado Secretary of State interpreted the statute to "apply only to donations *earmarked* for electioneering communications." *Id.* at 787 n.12 (emphasis in original). Though this Court considered the Colorado Secretary of State's interpretation, it did not hold that the presence or lack of earmarking was dispositive. *Id.* at 796-99. Instead, it was instead a factor considered when determining whether the statute was sufficiently tailored. *Id.*

Similar to the Colorado regulation in *Independence Institute*, Wyo. Stat. Ann. § 22-25-106(h) only requires reporting for those expenditures and contributions related to the electioneering communication. It leaves operations decisions, like whether or not to earmark contributions, to the organization and only requires expenditures and contributions associated with the electioneering communication to be reported. This nexus directly furthers the state's interest and does not require unrelated expenditures or contributions to be reported. The district court should have found that § 22-25-106(h) is sufficiently tailored.

When properly analyzing § 22-25-106(h), neither of the two reasons articulated by the district court support its conclusion the statute is not narrowly tailored. First, contrary to the court's conclusion, § 22-25-106(h) does have a temporal limitation on what contributions must be reported. Reporting is only triggered when an entity expends in excess of $500 on electioneering communications in any primary, general, or special election within a short period of

time before the election. Wyo. Stat. Ann. § 22-25-106(h). Reports are required to be submitted before the election and supplemented if expenditures or contributions are received after the report is submitted. *Id.* § 22-25-106(h)(ii). When read together, § 22-25-106(h) limits what expenditures and contributions are required to be reported to the particular election cycle, so as to inform the public on who is speaking about candidates leading up to the applicable election. Consistent with the statutory framework, the Secretary of State interpreted reporting to be limited to expenditures made/contributions received within the election cycle. (JA348-49, 531). The statute's temporal limitation supports the conclusion that § 22-25-106(h) is narrowly tailored.

Second, the district court incorrectly determined that there is a "mismatch" between the reporting requirements and the State's interests. (JA503). Because all donations to WyGO go to its general fund, it opined that WyGO may be required to disclose donations that were not specifically intended to go to electioneering communications. (JA502, 05). But Wyo. Stat. Ann. § 22-25-106(h) is distinguishable from two cases cited by the district court that found a "mismatch" between the reporting requirement and the governmental interest. First, *Americans for Prosperity Foundation* involved a California regulation requiring charitable organizations to disclose IRS forms containing names and addresses of major donors as part of renewing their registration with the state Attorney General. *Ams. for*

Prosperity Found., — U.S. at —, 141 S. Ct. at 2380. While the United States Supreme Court found the state had a substantial interest in protecting the public from fraud, it found requiring all entities to provide the IRS forms during renewal did not further its fraud detection efforts. *Id.* at 2386. Moreover, the Court found that the record did not support the finding that a "pre-investigation collection" of the forms "did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." *Id.* Because the state did not demonstrate "its need for universal production in light of any less intrusive alternatives," the Court found that the regulation was not narrowly tailored and that a "mismatch" existed between the reporting requirement and the state's interest. *Id.*

Similarly, *City of Lakewood* involved a city ordinance requiring publishers of certain electioneering communications to disclose the name and address of people who donated more than $250 annually to the publisher. *City of Lakewood*, 2021 WL 4060630, at *9 (D. Colo. 2021). The ordinance required that all donations over the monetary threshold to be disclosed, regardless of whether or not the donations were related to the electioneering communication. *Id.* In its analysis, the *City of Lakewood* court noted the lack of an earmark requirement in the ordinance and concluded the ordinance was not narrowly tailored to the city's informational interest because it would require funds unrelated to the electioneering communication to be reported. *Id.* at *10, 12-13.

Here, Wyo. Stat. Ann. § 22-25-106(h) specifically limits disclosure to expenditures and contributions that are related to the electioneering communication; it does not require blanket disclosure of all donations. Wyo. Stat. Ann. § 22-25-106(h). The requirement to only disclose expenditures and contributions related to the electioneering communication serves the same purpose as earmarking, it limits reporting to expenditures and contributions associated with the electioneering communication. Section 22-25-106(h) does not prohibit earmarking, but instead allows organizations to determining how to account for its contributions and expenditures. If contributions are earmarked as not to be used for electioneering communications, they are not subject to reporting. *Id.* In some circumstances, all contributions received within the election cycle may be related to the electioneering communication. In that circumstance, § 22-25-106(h) requires all contributions received within the election cycle to be reported—not because it requires blanket disclosure of all contributions, but only because those contributions "relate to" the electioneering communication.

In addition, the reporting requirement in § 22-25-106(h) directly furthers Wyoming's interests in informing the electorate and preventing *quid pro quo* corruption. Unlike the assertion that collecting IRS forms at the time of renewal furthers California's interest in investigating charitable conduct, the reporting requirements in § 22-25-106(h) are necessary to advance the state's interests. *Ams.*

for Prosperity Found., — U.S. at —, 141 S. Ct. at 2386. The only way to inform the electorate of who is speaking about candidates before an election is to require entities to report contributions and expenditures related to electioneering communications. Without knowing who funded an electioneering communication, the electorate will be unable to determine whether *quid pro quo* corruption has occurred. Rather than creating a "mismatch," the reporting requirements in § 22-25-106(h) directly further the state's interests.

Here, WyGO made a deliberate choice not to earmark or offer that option to donors because "doing so is not legally required and it would create an administrative burden for WyGO, taking up staff time and reducing its effectiveness." (JA382). Because all contributions received by WyGO are commingled and are not traceable, a portion of all contributions received during the election cycle are related to the electioneering communication and are subject to reporting. Wyoming law does not require blanket reporting. Rather, WyGO must simply report expenditures and contributions related to the electioneering communication, which, based on WyGO's accounting practices, constitute all contributions received within the election cycle. The limited disclosure required by § 22-25-106(h) directly furthers the state's interest and is sufficiently tailored to survive exacting scrutiny.

CONCLUSION

For the foregoing reasons, 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.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the issues presented, counsel thinks oral argument may be helpful to the Court.

Dated this 18th day of July, 2022.

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Dated this 20th day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 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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ATTACHMENT 1

District Court Order Granting In Part and Denying in Part Defendants' Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiff's Cross-Motion for Summary Judgment-Filed March 21, 2022