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United States Court of Appeals
Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WYOMING GUN OWNERS, a Wyoming nonprofit corporation, a/k/a WyGO,

Plaintiff – Appellee/Cross Appellant,

v.

CHARLES GRAY,[1] in his official capacity as Wyoming Secretary of State; BRIDGET HILL, in her official capacity as Wyoming Attorney General; KAI SCHON, individually and in his official capacity as Wyoming Secretary of State Election Division Director; KAREN WHEELER, individually and in her official capacity as Wyoming Deputy Secretary of State,

Defendants – Appellants/Cross Appellees.

CAMPAIGN LEGAL CENTER,

Amicus Curiae.

Nos. 22-8019 and 22-8021

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 2:21-CV-00108-SWS)

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[1] Charles Gray replaced Edward Buchanan as the Wyoming Secretary of State on January 2, 2023.

James Peters, Senior Assistant Attorney General (Brandi Monger, Deputy Attorney General; Mackenzie Williams, Senior Assistant Attorney General; and Carl Edelman, former Assistant Attorney General, with him on the briefs) Wyoming Attorney General's Office, Cheyenne, Wyoming, for Appellants-Defendants/Cross-Appellees.

Endel Kolde, Institute for Free Speech, Washington, D.C. (Stephen Klein, Barr & Klein PLLC, Washington, D.C. and Seth "Turtle" Johnson, Slow & Steady Law Off., PLLC, Saratoga, Wyoming, with him on the briefs) for Plaintiff-Appellee/Cross-Appellant.

Tara Malloy and Megan P. McAllen, Campaign Legal Center, Washington, D.C., filed an Amicus Curiae Brief of Campaign Legal Center.

Before **HOLMES**, Chief Judge, **TYMKOVICH**, and **CARSON**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Wyoming Gun Owners is a non-profit gun rights advocacy group that aired a provocative radio ad in the run-up to Wyoming's 2020 primary election. The ad extolled the pro-gun credentials of one candidate while branding the other as out of touch with Wyoming values.

Wyoming has a campaign finance scheme that requires organizations that spend over $1,000 on an "electioneering communication" to disclose contributions and expenditures related to that communication. Wyo. Stat. § 22-25-106(h). Under Wyoming law, an advertisement that refers to a candidate and advocates for his victory or defeat—or can only be reasonably understood in that way—generally constitutes an electioneering communication. *See* § 22-25-101(d)(i).

The Wyoming Secretary of State's Office flagged Wyoming Gun Owners' advertisement as an electioneering communication. The Secretary told WyGO it needed

to disclose which of its donors funded the ad. WyGO contested that the radio ad was an electioneering communication at all and refused to disclose its donors. But it later capitulated and decided to accept the $500 civil penalty rather than comply with the disclosure rules.

The organization subsequently sued the Secretary of State (and related parties) in federal district court, arguing that various provisions of the Wyoming statute were void for vagueness and that the disclosure scheme was not constitutionally justified. The district court agreed and determined that the disclosure regime failed exacting scrutiny as applied to WyGO and found a provision within the scheme void for vagueness as applied to WyGO. The Secretary appealed the latter two rulings and WyGO cross-appealed the rest.

We affirm the district court on most claims. The disclosure regime fails exacting scrutiny as applied to WyGO for lack of narrow tailoring. And the regime's requirement that expenditures for speech "related to" candidate campaigns must be disclosed is void for vagueness—again, as applied to WyGO. The district court also correctly dismissed the remaining vagueness challenges—save one—either for failure to sufficiently plead a vagueness challenge or because the statutory language clearly applied to WyGO. The district court did, however, erroneously deny WyGO's request for attorney's fees under 42 U.S.C. § 1988. We reverse and remand for an accounting of fees.

I. Background

A. Wyoming Campaign Finance Law

This appeal takes place against the backdrop of recently enacted Wyoming campaign finance law. Wyoming has adopted a campaign finance scheme that, among other things, requires organizations to disclose information about donors involved in political speech under select circumstances. In particular, Wyoming law requires organizations that spend over $1,000 to issue an "electioneering communication" to notify the state and file a statement identifying itself and the donors whose contributions made the communication possible. *See* § 22-25-106(h).

An "electioneering communication" is a message aimed at advocating for or against a candidate. Covered communications expressly refer to candidates or ballot propositions or are reasonably understood to refer to candidates or ballot propositions. More fully, an electioneering communication

> [r]efers to or depicts a clearly identified candidate for nomination or election to public office or a clearly identified ballot proposition and which does not expressly advocate the nomination, election or defeat of the candidate or the adoption or the defeat of the ballot proposition [and] [c]an only be reasonably interpreted as an appeal to vote for or against the candidate or ballot proposition.

§ 22-25-101(d)(i)(A)–(B).

An electioneering communication includes almost any method of communication:

> [A]ny communication, including an advertisement, which is publicly distributed as a billboard, brochure, email, mailing, magazine, pamphlet or periodical, as the component of an internet website or newspaper by the facilities of a cable

> television system, electronic communication network, internet streaming service, radio station, telephone or cellular system, television station or satellite system . . . .

§ 22-25-101(i)(d). Under this provision, when an organization issues an electioneering communication Wyoming law requires it to disclose donor information by filing a report with the Secretary of State.

In addition, the statutory scheme expressly exempts speech in two circumstances relevant to this appeal: it exempts speech contained in a (1) *newsletter*, or (2) *political commentary*.

The newsletter exemption frees organizations from reporting donors whose contributions fund communications made by that organization "as a component of a newsletter or other internal communication of the entity which is distributed only to members or employees of the entity." § 22-25-101(ii)(A).

And the commentary exemption excludes from the "electioneering communications" umbrella more traditional forms of political expression. More fully, it exempts

> [a] communication consisting of a news report, commentary or editorial or a similar communication, protected by the first amendment to the United States constitution and article 1, section 20 of the Wyoming constitution, which is distributed as a component of an email, internet website, magazine, newspaper or periodical or by the facilities of a cable television system, electronic communication network, internet streaming service, radio station, television station, or satellite system.

§ 22-25-101(d)(ii)(B).

When a Wyoming advocacy organization issues an electioneering communication, it finds itself subject to reporting and disclosure requirements. An organization that spends over $1,000[2] "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"—here, the Secretary of State's Office. § 22-25-106(h).

The required statement contains mandatory donor information. It must "list those expenditures and contributions which *relate to* an independent expenditure or electioneering communication." § 22-25-106(h)(iv) (emphasis added). After an organization determines which of its expenditures and contributions relate to the electioneering communication, it must submit a statement to the Secretary. Specifically, the statement must

> [s]et 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 $100 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 $100 shall be reported but need not be itemized. Should the accumulation of contributions from a person exceed the $100 threshold, all contributions from that person shall be itemized . . . .

§ 22-25-106(h)(v). These provisions make up the disclosure scheme challenged by WyGO.

[2] At the time of enforcement, the trigger value was $500. Wyoming later amended the statute.

B. Wyoming Gun Owners' Advocacy

WyGO describes its mission as "defending and advancing the 2nd Amendment rights of all law-abiding citizens in the state of Wyoming—and exposing legislators who refuse to do the same thing." App. 100. It considers itself a "small, high-impact operation" and lacks "dedicated in-house lawyers or campaign staff." *Id.* This is no surprise: its annual budget fluctuates between $50,000 and $100,000.

WyGO builds its budget with small-dollar donations. About 90% of its donations are under $100. And only 2% exceed $200.

Perhaps befitting a mom-and-pop style issue advocacy outfit, WyGO lacks a sophisticated bookkeeping system. It runs only two accounts. One houses online contributions while the other keeps mailed-in contributions. WyGO does not afford its donors a way to limit, or "earmark," what projects their donations will fund.

WyGO spreads it message across both legacy and new media platforms. It relies on radio ads, email blasts, direct mail, Facebook posts, YouTube videos, and the like. It avoids explicitly endorsing candidates on these platforms. But still, WyGO overtly disseminates its candidate surveys and offers its membership information relevant to assessing the Second Amendment bona fides of political candidates.

C. Wyoming Gun Owners' Radio Ad

This case arises from WyGO's advocacy during Wyoming's 2020 election cycle. In the run-up to both the August primaries and the November general election, WyGO disseminated emails, videos, direct-mail fliers, and online posts that offered its

perspective on candidates and policy proposals. Important to this appeal, WyGO funded and aired a radio ad about two Republican primary candidates:

> 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.

App. 343. The Greater Cheyenne Chamber of Commerce reported the ad (alongside various email blasts and newsletters) to the Wyoming Secretary of State's Elections Division Director. According to the Chamber, the radio ad (and a few other emails and mailers) amounted to an electioneering communication under Wyoming law, and WyGO had failed to comply with the disclosure requirements that accompany electioneering communications.

The Secretary evaluated the complaint and concluded that WyGO had violated the disclosure requirement. He threatened WyGO with a $500 civil fine if it failed to promptly comply. But the Office did not specifically identify the speech it found covered or explain the exact nature of the infraction. After some back-and-forth, WyGO ultimately obtained the Chamber's complaint under the Wyoming Public Records Act.

After reviewing the Chamber's complaint, WyGO declined to comply with the disclosure requirements. It responded that none of its speech counted as an electioneering communication because the ads did not amount to express advocacy or its functional equivalent. Representing the Secretary, the State Attorney General marked its disagreement, singling out the radio ad as "the most salient example" of WyGO's non-compliance. App. 141. It noted that "other exhibits to [the Chamber's] complaint may be electioneering communications if they were sent to individuals outside of WyGO's membership," citing an email by way of example. *Id.*

WyGO disagreed with this analysis and declined to disclose its donors. The Secretary then issued a fine sanctioning WyGO. He identified only the radio ad as an offending electioneering communication.

D. District Court Proceedings

WyGO sued the Secretary and related parties under 42 U.S.C. § 1983 for violating its First and Fourteenth Amendment rights. It brought a variety of challenges to the campaign finance statute, some facial, some as applied, some pre-enforcement, some post-enforcement. In particular, it claimed that the disclosure regime failed exacting scrutiny and challenged a collection of provisions under void-for-vagueness theories.

The district court made several rulings on the government's motion to dismiss and on summary judgment. First, the district court dismissed WyGO's facial vagueness challenge to the commentary exemption. The court also dismissed its vagueness challenge as applied to the radio ad.

Second, the district court dismissed WyGO's facial vagueness challenge to the law's definition of "electioneering communications," finding its argument squarely foreclosed by Supreme Court precedent. The court also dismissed its vagueness challenge as applied to the radio ad.

Third, the district court dismissed WyGO's facial vagueness challenge to the scheme's requirement that speech "related to" candidate campaigns must be disclosed. But it ultimately determined that the phrase "relate to" is void for vagueness as-applied to WyGO.

Fourth, the court dismissed WyGO's pre-enforcement challenges to the functional-equivalent standard, the commentary exemption, and the newsletter exemption.

Fifth, the district court dismissed WyGO's facial attack on the disclosure scheme. But it handed WyGO a victory on its as-applied challenge, finding that the statute fails exacting scrutiny for lack of narrow tailoring.

Sixth, the district court did not grant WyGO's request for attorney's fees under 42 U.S.C. § 1988.

II. Analysis

Our analysis proceeds in three parts. First, we consider the vagueness claims. Second, we consider whether the disclosure regime survives exacting scrutiny. And third, we decide whether the district court erred in withholding WyGO's attorney's fees. We review each question de novo. *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1153 (10th Cir. 2023).

A. Void-for-Vagueness Claims

WyGO contends the district court erred in its vagueness evaluation of several provisions of the statute. It claims that the commentary exemption, the newsletter exemption, and the definition of "electioneering communications" are all void for vagueness. Wyoming similarly argues that the district court erred in its vagueness analysis, but only in finding the phrase "relate to" unconstitutionally vague.

The void-for-vagueness doctrine requires that statutory commands provide fair notice to the public. This is especially true for election speech provisions that impinge on First Amendment rights. *See Hynes v. Borough of Oradell*, 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review of laws dealing with speech."). Vagueness doctrine

> addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253–54 (2012) (internal citations omitted). Mirroring these concerns, a court may find a statute unconstitutionally vague "for either of two independent reasons. 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." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

But the "Constitution does not . . . impose impossible standards of specificity, and courts should remain ever mindful that general statements of the law are not inherently incapable of giving fair and clear warning." *Sperry v. McKune*, 445 F.3d 1268, 1271 (10th Cir. 2006) (internal quotation marks omitted). After all, "'[i]n most English words and phrases there lurk uncertainties,' [so] it is always easy to argue that words are incapable of expressing fixed and determinate concepts." *United States v. Evans*, 883 F.3d 1154, 1170 (9th Cir. 2018) (Ikuta, J., dissenting) (quoting *Robinson v. United States*, 324 U.S. 282, 286 (1945)). While a plaintiff faces a significant challenge to prove vagueness, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). For that reason, when a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Id.* at 499.

Some vagueness challenges contend a statute is facially vague, such that "no set of circumstances exists under which the [statute] would be valid." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 741 (1987)). Other vagueness challenges claim statutes are vague as applied to particular parties in particular circumstances. "As-applied vagueness challenges involve a factual dimension in that vagueness is determined 'in light of the facts of the case at hand.'" *United States v. Ochoa-Colchado*, 521 F.3d 1292, 1299 (10th Cir. 2008) (quoting *United States v. Bennett*, 329 F.3d 769, 777 (10th Cir. 2003)). This appeal primarily concerns as-applied vagueness challenges.

1. The commentary exemption

WyGO first contends that its radio ad should fall under the commentary exemption, and Wyoming arbitrarily denies that protection. WyGO argues the exemption is so vague that ordinary speakers are unable to discern its scope and boundaries. We disagree.

The commentary exemption removes a "communication consisting of a *news report, commentary or editorial or a similar communication*, protected by the first amendment to the United States constitution and article I, section 20 of the Wyoming constitution" from the ambit of "electioneering communications," and therefore from disclosure requirements. § 22-25-101(d)(ii)(B) (emphasis added).

The commentary exemption gave WyGO proper notice that the radio ad was not covered by it. First of all, while the word "commentary" standing alone sweeps broadly, its statutory context restrains the term from covering the ad. We read "commentary" given the surrounding words and phrases: "news report" and "editorial." § 22-25-101(d)(ii)(B); *see Yates v. United States*, 574 U.S. 528, 543 (2015) ("[W]e rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." (internal quotation marks omitted)). Read in context, the commentary exemption plainly provides independent media companies and issue advocacy organizations breathing room to air perspectives on political candidates that are not expressly advocating the election or defeat of specific candidates. We agree with the district court that a paid-for political

advertisement like WyGO's radio ad does not plausibly fall within the exemption's ambit.

WyGO alternatively argues that the exemption, plainly construed, covers its radio ad. After all, its radio ad seems like "commentary"; it expresses a view about a couple different candidates and their policy preferences. *See* Commentary, Oxford English Dictionary Online, www.oed.com/view/Entry/37060 (last visited April 8, 2023) ("Anything that serves for exposition or illustration; a comment, remark; a running commentary."). The radio ad, WyGO argues, is no different from an op-ed in the local paper. It should receive the same protections.

While this argument also runs headfirst into the *noscitur a sociis* canon, WyGO suggests that the following language sweeps in *all* constitutionally protected speech distributed via those means and protected by the Constitution or state law:

> [Speech] [p]rotected by the first amendment to the United States constitution and article I, section 20 of the Wyoming constitution, which is distributed as a component of an email, internet website, magazine, newspaper or periodical or by the facilities of a cable television system, electronic communication network, internet streaming service, radio station, television station, or satellite system.

§ 22-25-101(d)(ii)(B). This interpretation, WyGO concedes, would "swallow the rule." 2nd Cx-App. Br. at 26.

WyGO's reading is implausible. The reference to the free speech provisions does not create a stand-alone descriptor of additional communications exempted by the statute. Instead, it clarifies the sort of communications the statute does *not* mean to protect that *might otherwise* fall under the exemption: constitutionally unprotected speech, like libel.

This interpretation comports with the text and purpose of the statute, and unlike WyGO's recommended reading, it does not gut the provision.

WyGO's radio ad falls outside the commentary exemption, and its as-applied vagueness challenge fails.

2. The functional-equivalent standard

WyGO next argues that the statute's definition of "electioneering communications" is vague as applied to its radio ad.

WyGO finds vagueness in the definition's incorporation of the functional-equivalent-of-express-advocacy standard. The law defines "electioneering communications" as encapsulating a communication that,

> [r]efers to or depicts a clearly identified candidate for nomination or election to public office or a clearly identified ballot proposition and which does not expressly advocate the nomination, election or defeat of the candidate or the adoption or the defeat of the ballot proposition [and] [*c*]*an only be reasonably interpreted as an appeal to vote for or against the candidate* or ballot proposition.

§ 22-25-101(d)(i)(A)–(B) (emphasis added). The italicized text essentially codifies the "functional equivalent of express advocacy" standard.

The functional-equivalent standard is based on the Supreme Court's attempt to draw a line between issue advocacy and candidate advocacy. In *Buckley v. Valeo*, the Supreme Court recognized a constitutionally significant distinction between issue advocacy and advocacy that expressly advocates for or against a candidate. 424 U.S. 1, 43–44 (1976). It established that "communications containing express words of advocacy . . . such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for

Congress,' 'vote against,' 'defeat,' [and] 'reject'" were susceptible to government disclosure requirements in a way that pure issue advocacy was not. *Id.* at 44 n.52. The Supreme Court clarified the functional-equivalent standard in *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007). There, the Court explained that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469–70. And the Court most recently applied the standard in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). There, it decided that a movie critical of Senator Hillary Clinton, "[i]n light of historical footage, interviews with persons critical of her, and voiceover narration," amounted to "an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency" and was therefore "equivalent to express advocacy" to vote against Senator Clinton. *Id.* at 325.

WyGO alleges that Wyoming offers no guidance on when a communication can *only* be reasonably interpreted as an appeal to vote for or against a candidate. And beyond that ambiguity, it alleges that it clearly had *multiple* purposes in promoting its radio ad, like signaling to unnamed candidates that Wyoming Gun Owners would hold their feet to the fire.[3]

The Supreme Court expressly rejected the idea that the functional-equivalent test is impermissibly vague. *Id.* at 474 n.7. (This is no surprise: the Court created the test.)

[3] WyGO's argument on appeal alternates between alleging that the radio ad fell *outside* the functional-equivalent standard, which put the ad beyond the statute's reach, and alleging that the standard itself is vague as applied to the ad. Our analysis will suffice to resolve both arguments.

While this does not foreclose the possibility of a successful as-applied challenge, it also does not create favorable conditions for the challenge.

WyGO also rests on an implausible understanding of the standard. Its argument at least partially turns on the idea that a reasonable person could interpret the radio ad as serving *multiple* purposes, which conflicts with the qualifier, "can *only* be reasonably interpreted as an appeal to vote for or against the candidate." § 22-25-101(d)(i)(A)–(B) (emphasis added). But that overreads the statute. If we understand the test that way, then it seems unlikely that *any* ad could meet the functional-equivalent standard. Indeed, nearly any attentive listener could reason that nearly every advocacy ad has the additional purpose of satisfying existing donors, attracting new donors, educating the public, or gaining publicity. We therefore understand the functional-equivalent standard to require that the ad indisputably function as an appeal to vote for or against a candidate. That an ad might express a message *in addition* to that appeal does not immunize a communicating entity from liability.[4]

[4] The Supreme Court implicitly rejected WyGO's view of the standard when, "[u]sing *Wisconsin Right to Life*'s 'functional equivalent' test, [it] concluded that one advertisement—*Hillary: The Movie*—qualified as the functional equivalent of express advocacy because it was 'in essence . . . a feature-length negative advertisement that urges viewers to vote against Senator [Hillary] Clinton for President.'" *The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 551 (4th Cir. 2012) (citing *Citizens United*, 558 U.S. at 325). Like WyGO's radio ad, *Hillary: The Movie* could plausibly have been understood to communicate something beyond an appeal to vote against Hillary Clinton—perhaps as a message to other politicians not to emulate her. And yet, the Supreme Court found that the movie satisfied the functional-equivalent standard. WyGO's ad could similarly be understood to serve multiple purposes while still amounting to the functional equivalent of express advocacy.

Under the framework, we turn back to the radio ad:

> 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.

App. 343. We agree with the district court's conclusion that the radio ad amounts to the functional equivalent of express advocacy. The ad mentions two candidates; it celebrates one as a "brave champion," and assails the other as a "pathetic" back-stabber. It aired in the run-up to the primary election between the two candidates. No reasonable listener could deny that the ad—at least in part—exhorts listeners to vote for Mr. Bouchard and against Ms. Johnson.

The codified functional-equivalent standard is not vague as applied to the radio ad. We affirm the district court's dismissal.[5]

[5] We also affirm the district court's dismissal of WyGO's facial vagueness challenge to the functional-equivalent standard. In its briefing, WyGO conceded that the standard remains good law under federal precedent but wished to preserve its challenge.

3. "Relate to"

WyGO next contends that the phrase "relate to" is vague as-applied to WyGO. The statute requires disclosure of donors to the Secretary for donations that fund electioneering communications. Organizations should "[o]nly list those expenditures and contributions which *relate to* an independent expenditure or electioneering communication." § 22-25-106(h)(iv) (emphasis added). The district court concluded this provision is vague because it does not provide fair notice of the scope of donations plausibly covered.

We also conclude the phrase "relate to" is impermissibly vague. A statute can be vague if it "authorizes or even encourages arbitrary and discriminatory enforcement" against advocacy organizations. *Hill*, 530 U.S.at 732. "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the [statute] is so imprecise that discriminatory enforcement is a real possibility." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108–09.

On the facts presented, the "relate to" language authorizes arbitrary enforcement and does not inform WyGO "what is required of [it] so [it] may act accordingly." *Fox Television Stations, Inc.*, 567 U.S. at 253. Recall that WyGO pools all donations into one

of two accounts: one for online donations, and another for mail-in donations. WyGO's system does not allow earmarking and does not track the journey of each dollar spent. The statute does not direct advocacy groups to set up accounts any differently and does not provide guardrails to help the government determine which donors should have been reported for the dollars spent on an advertisement.

This lack of guardrails invites arbitrary enforcement. Under the above facts, it is far from clear how the Secretary could determine whether WyGO reported contributions related to its electioneering communication. The bare, standardless "relate to" language authorizes Wyoming to sanction WyGO for failing to adhere to the "best" method for deciding which contributions in an undifferentiated pool relate to some communication—whatever it decides is best on an "ad hoc and subjective basis." *Grayned*, 408 U.S. at 109. Wyoming could adopt the theory—as it did on appeal—that the statute obliges an organization in WyGO's position to disclose *all* contributions made during the election cycle as "related to" an ad. Another day it could find it proper for WyGO to pick and choose five donors whose contributions collectively amounted to the communication's cost. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). Such is the case here.

The Secretary relies on a handful of non-binding cases where a court found the phrase "relate to" sufficiently definite. In *United States v. Morrison*, 844 F.2d 1057 (4th Cir. 1988), the court found that, on the facts of the case, the phrase "relating to the

national defense" was not unconstitutionally vague. But that decision did not deal with the dangers of arbitrary enforcement; instead, it focused on fair notice concerns. *See id.* at 1070–75. And the court's analysis did not turn on the phrase "relate to," but rather the phrase "national defense." *Id.* at 1071. *Morrison* does not compel any particular outcome in this case.

The Secretary also points to *United States v. Portanova*, 961 F.3d 252 (3d Cir. 2020). There, the court considered the language of a sentencing enhancement statute that increased penalties for convictions where the defendant had prior convictions "relating to" several categories of sexual offenses against children. 18 U.S.C. § 2252(b)(1). The court found that the language gave the plaintiff fair notice under the circumstances. This case is unpersuasive. Again, the court conducted a fair notice analysis, not an arbitrary enforcement analysis. *Portanova*, 961 F.3d at 262–63. And again, the court's as-applied analysis concerned subject matter and law far flung from the world of campaign finance. *Id.* at 263. This is made clear by the fact that the bulk of the court's analysis concerned applying sentencing principles and Supreme Court precedent on the specific statute.

Nor do we think the provision is susceptible to a limiting construction. "[I]f a statute is readily susceptible to a narrowing construction that will remedy the constitutional infirmity, the statute will be upheld." *Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1194 (10th Cir. 2000). The argument is that we accept reading "relate to" as "for." If we accepted this construction, the statute would functionally require disclosure statements which "[o]nly list those expenditures and contributions which [*are for*] an independent expenditure or electioneering

communication." § 22-25-106(h)(iv) (emphasis added). This limiting construction does not allay our concerns that, as applied to WyGO, the government could fault WyGO for failing to follow shifting standards established on an ad hoc basis. The exact same problem—the arbitrariness behind any decision determining which contributions "relate to" a communication given WyGO's accounting system—arises under this proposed construction. We thus reject it.

We may be empowered to craft limiting constructions, but only within reason. "Even assuming that a more explicit limiting interpretation of the [statute] could remedy the flaws we have pointed out . . . we are without power to remedy the defects by giving the [statute] constitutionally precise content." *Hynes*, 425 U.S. at 622. The redlining required here is beyond our authority. "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States v. Locke*, 471 U.S. 84, 96 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

We recognize that we cannot expect "mathematical certainty" in statutes. *Grayned*, 408 U.S. at 110. But laws must "provide explicit standards for those who apply them," and in this context, the statute fails to provide those standards. *Id.* at 108. We affirm the district court.

4. Pre-enforcement challenges

WyGO next claims that the district court improperly dismissed its pre-enforcement vagueness challenges. The district court did not outright discuss pre-enforcement claims but concluded that "[b]ecause Defendants did not impose any disclosure requirements as

to those communications other than the radio advertisement, there can be no as-applied challenge." App. 271–72. On appeal, WyGO argues that it brought pre-enforcement challenges to the commentary exemption, the functional-equivalent standard, and the newsletter exemption. It asks us to reinstate (or outright decide) those claims, explaining that it "has standing to challenge the full range of possible applications of Wyoming's regime to plaintiff's historic and planned communications, including the regime's application to radio ads, emails, direct mail, white-board videos, news commentary, and social media advertising." 2nd Cx-App. Br. at 43.

Plaintiffs can occasionally secure judicial review of a law before the government applies it. Pre-enforcement review "provides law-abiding citizens with a middle road between facing prosecution and refraining from otherwise constitutional conduct." *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1350 (11th Cir. 2011). "[W]e review these claims when the vague law causes a separate injury: the litigant is chilled from engaging in constitutionally protected activity." *Id.* We often see pre-enforcement challenges in the First Amendment context. Typically, the plaintiff would like to speak on some matter but fears punishment. That amounts to "chilled speech," which satisfies the "injury-in-fact" prong for Article III standing. *Oliver*, 57 F.4th at 1160 (10th Cir. 2023) (internal citations and quotation marks omitted).

We apply a three-factor test to determine whether a plaintiff has sufficiently alleged a chilling effect that amounts to a cognizable injury. First, the plaintiff must present "evidence that in the past [he] [has] engaged in the type of speech affected by the challenged government action." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082,

1089 (10th Cir. 2006). But because "people have a right to speak for the first time," we do not police whether a plaintiff showed this factor with much gusto. *Id.* "Past relevant speech, where it exists, simply helps to differentiate the plaintiff's specific, concrete alleged injury from the general, hypothetical interest of the public." *Oliver*, 57 F.4th at 1163.

Second, the plaintiff must supply "affidavits or testimony stating a present desire, though no specific plans, to engage in such speech." *Walker*, 450 F.3d at 1089. "*Walker*'s second factor is not meant to be difficult to satisfy; affidavits stating a general desire suffice." *Oliver*, 57 F.4th at 1163–64. "A plaintiff need not show the specific content or likely timing of their desired speech." *Id.* at 1164. A court need only be able to reasonably infer that the plaintiff harbors a present desire to engage in constitutionally significant speech. *Peck v. McCann*, 43 F.4th 1116, 1131 (10th Cir. 2022).

And third, the plaintiff must make "a plausible claim that [he] presently [has] no intention to do so *because of* a credible threat that the statute will be enforced." *Walker*, 450 F.3d at 1089. "[T]he third *Walker* factor asks whether the alleged chill arise[s] from an objectively justified fear of real consequences." *Oliver*, 57 F.4th at 1164 (internal quotation marks omitted). In other words, the plaintiff must demonstrate that "the challenged law would plausibly deter a reasonable person in the plaintiff's position." *Id.* Additionally, a plaintiff cannot allege a chilling effect and then go on speaking. "[I]t is precisely such a choice that the third prong of the *Walker* inquiry demands." *Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956, 960 (10th Cir. 2021).

"If the plaintiffs satisfy these three criteria, it is not necessary to show that they have specific plans or intentions to engage in the type of speech affected by the challenged government action." *Walker*, 450 F.3d at 1089. In fact, plaintiffs need not satisfy the *Walker* factors at all to establish standing; they merely help us resolve the core question. *Oliver*, 57 F.4th at 1161. "The fundamental inquiry remains the one that pre-dates *Walker*: The chilling effect, to amount to an injury, must arise from an objectively justified fear of real consequences, which can be satisfied by showing a credible threat of prosecution or other consequences following from the statute's enforcement." *Id.* (internal quotation marks omitted).

Because the court disposed of this claim on motion to dismiss, in addition to establishing standing, the plaintiffs must also satisfy Fed. R. Civ. P. 12(b)(6) standards. That means filing a complaint that allows the court to "test[] the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994).

Finally, while a plaintiff "need not show the specific content or likely timing of their desired speech" to establish standing, *Oliver*, 57 F.4th at 1164, a plaintiff who explains the nature of his intended speech at a particularly "high level of generality . . . cannot prevail in [a] preenforcement challenge." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 37–38 (2010); *see also Preston v. Leake*, 660 F.3d 726, 737 (4th Cir. 2011) (holding that where a plaintiff "has offered no details about her specific activities" that would allegedly fall within statutory parameters, she has made her claim at too high a level of generality for a pre-enforcement challenge).

We move to consider whether the district court erroneously dismissed WyGO's pre-enforcement challenges to "the full range of possible applications of Wyoming's regime to plaintiff's historic and planned communications,"[6] with attention to the newsletter exemption, the commentary exemption, and the functional-equivalent standard. 2nd Cx-App. Br. at 43.

a. Newsletter Exemption

First, under the newsletter exemption, no disclosure is required for "[a] communication made by an entity as a component of a newsletter or other internal communication of the entity which is distributed only to members or employees of the entity." § 22-25-101(d)(ii)(A). In its complaint, WyGO alleged that "it is unclear how publicly distributed emails and mailings may be distinguished from speech that would fall under the exception for newsletters or other internal communications." App. 34 (cleaned up); *see also* App. 29. This is because WyGO does not know who counts as a "member." It worries that the Secretary will not accept its internal

[6] As discussed above, plaintiffs bring pre-enforcement challenges when "the litigant is chilled from engaging in constitutionally protected activity." *Bankshot Billiards, Inc.*, 634 F.3d at 1350. WyGO is not chilled from issuing its historic communications; it has already spoken. And the Secretary declined to pursue sanctions. "Pre-enforcement review" for an historic communication is an unconstitutional advisory opinion in disguise. *See Asbury Hospital v. Cass Cnty.*, 326 U.S. 207, 213–14 (1945) ("This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied."). The district court properly dismissed these claims.

definition of "member" and penalize the organization under some other definition. This vagueness chills WyGO's speech.

While the district court failed to consider the possibility of a pre-enforcement challenge to the newsletter exemption, we affirm its dismissal because WyGO did not plead a plausible void-for-vagueness claim. WyGO's chief allegation amounts to the claim that the Secretary might apply an esoteric definition of the term "member." Of course, the same allegation could be made of most words and phrases across any statute. And far from the boundless nature of the phrase "relate to," the word "member" does not readily invite a string of different applications that would encourage arbitrary or discriminatory enforcement. *See Hill*, 530 U.S.at 732. Also unlike the "relate to" problem, WyGO knows who its members are. App. 100. ("We consider anyone who donates to us in any amount to be a member.").

While not fatal to its pleading, WyGO argues that the state has provided "no guidance on whether an email or direct-mail piece that goes mostly to an organization's members . . . but that might include a few non-members" falls outside the exemption. 2nd Cx-App. Br. at 41. But Wyoming has provided that very guidance: the statute explicitly provides that exempted communications must have been "distributed *only* to members." § 22-25-101(d)(ii)(A) (emphasis added).

Pleading an adequate void-for-vagueness challenge requires something beyond merely claiming that a word is vague. Accordingly, we affirm the district court's dismissal of WyGO's pre-enforcement challenge to the newsletter exemption.

b. The Commentary Exemption and Functional-Equivalent Standard

WyGO argued in its complaint that

> [o]n its face and as-applied to Plaintiff WyGO, Wyoming's electioneering statute is unconstitutionally vague [because] . . . it is unclear which speech does or does not qualify as "electioneering," [and] . . . it is unclear whether WyGO's email communications and other publications qualify for the exemption as "commentary . . . or a similar communication, protected by the first amendment."

App. 34. It concludes that

> [t]he statute may trap the innocent by not providing fair warning or foster arbitrary and discriminatory application, and it can also chill speech by operating to inhibit protected expression. Moreover, the First Amendment does not require that you retain an attorney before knowing whether you can speak, and this regime requires that.

App. 35.

The complaint does not go far in alleging pre-enforcement void-for-vagueness claims as to either the commentary exemption or the functional-equivalent standard. But earlier in the complaint, WyGO describes various past emails, mailers, and videos. App. 25–26. It claims that it will continue airing "materially and substantially similar content" as it has in the past. App. 29. Eventually, WyGO requests pre-enforcement review for the functional-equivalent standard as applied to "speech," App. 34, and for the commentary exemption as applied to "communications," App. 29, "email communications," and "other publications," App. 34.

With this understanding, we conclude that the district court properly dismissed most of WyGO's pre-enforcement claims but should have entertained a pre-enforcement challenge to the commentary exemption as applied to email communications.

WyGO cannot request blanket review of its "speech," "communications," and "other publications." It must craft its complaint in a manner that allows the district court to test the sufficiency of its claims. *Mobley*, 40 F.3d at 340. This is especially true where, as here, "gradations of fact or charge would make a difference" as to liability. *Holder*, 561 U.S. at 25 (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)). WyGO must offer something beyond airy references to "speech" to allege a colorable as-applied pre-enforcement vagueness claim. *See id.* (rejecting pre-enforcement challenges that "described the form of [plaintiff's] intended advocacy only in the most general terms").

WyGO did, however, successfully plead its challenge to the commentary exemption as applied to planned email communications. We read WyGO's more specific "email communications" to reflect its earlier email blasts, described in sufficient detail in the complaint. App. 25. By describing a comparator that it alleges will be "materially and substantially similar" to planned emails, WyGO offers the court a colorable way to test the sufficiency of the vagueness claim.[7] App. 29. We also conclude that WyGO clears the "fundamental" standing inquiry: it pled that its chilled speech arose from an objectively justified fear of legal consequences that carry weight due to Wyoming's past threats and enforcement actions. *Oliver*, 57 F.4th at 1161. The Secretary does not seriously contest this.

[7] WyGO described other communications with some detail, too. For example, it offered a few sentences about "direct mail," App. 25, and "white-board videos." App. 26. But if it meant to invoke these comparators by referencing "speech," "communications," and "other publications," it failed to connect the dots.

Accordingly, we reverse the dismissal of the commentary provision pre-enforcement challenge as applied to WyGO's emails and affirm the dismissal of the remaining pre-enforcement claims.

B. Disclosure Requirements

The district court found the disclosure requirements unconstitutional for lack of narrow tailoring as applied to WyGO.

Campaign finance regulations implicate treasured freedoms central to political participation. At their best, these laws promote important governmental interests, like helping electors make "informed choices in the political marketplace," *Citizens United*, 558 U.S. at 369, and hampering quid pro quo corruption, *Citizens United v. Gessler*, 773 F.3d 200, 211 (10th Cir. 2014). But campaign finance laws typically only promote these interests at the expense of First Amendment rights.

Not all campaign finance laws implicate constitutional rights to the same degree. As a result, different standards of scrutiny govern different types of infringements. For example, the Supreme Court treats expenditure limitations differently because they "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Indep. Inst. v. Williams*, 812 F.3d 787, 791 (10th Cir. 2016) (quoting *Buckley*, 424 U.S. at 19). Because expenditure restrictions limit "core political speech," they must "satisfy strict scrutiny—a provision must be narrowly tailored to further a compelling governmental interest." *Id.* at 792.

But other regulatory tools are less troublesome and we approach them with a lower level of scrutiny. Disclosure laws are one such tool. To be sure, the "compelled disclosure of donors who make political contributions or expenditures . . . pose[s] a significant threat to associational freedom" by disincentivizing political activity that would trigger disclosure requirements and exposing citizens to public scrutiny. *Id.* "But unlike contribution and spending limitations, disclosure requirements 'impose no ceiling on campaign-related activities,'" *id.* (quoting *Buckley*, 424 U.S. at 64), and "do not prevent anyone from speaking," *Citizens United*, 558 U.S. at 366 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

Reflecting disclosure laws' lighter touch, we review their constitutionality under the "exacting scrutiny" standard of review. For decades we understood exacting scrutiny to require that the government show "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366 (internal quotation marks omitted). The substantial relation inquiry required us to consider whether "the strength of the governmental interest . . . reflect[ed] the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted).

The Supreme Court recently clarified the contours of our task in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021). There, the Court assessed the constitutionality of a California state disclosure law that empowered the state Attorney General to maintain a register of charitable organizations and seek information about

those organizations. Pursuant to the statute, the Attorney General required charities to disclose the names and addresses of donors who contributed over $5,000 in a given year. A collection of organizations worried that disclosing this information "would make their donors less likely to contribute and would subject them to the risk of reprisals," and challenged the law as an unconstitutional burden on their First Amendment right to association. *Id.* at 2380.

The Court agreed that the statute violated the charities' associational rights, but not without some disagreement on the proper standard of review. The three-Justice plurality opinion concluded that "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny," *id.* at 2383, Justice Thomas argued that strict scrutiny applied, *id.* at 2390 (Thomas, J., concurring), and Justice Alito, joined by Justice Gorsuch, opted to save the question for another day, *id.* at 2392 (Alito, J., concurring). Because the Court did not overturn its precedent applying exacting scrutiny to campaign disclosure requirements, we apply exacting scrutiny here. *See Citizens United*, 558 U.S. at 366.

A majority of the Court concluded the California law failed exacting scrutiny. Crucially, a majority also agreed that the Ninth Circuit conducted a deficient exacting scrutiny analysis by failing to require narrow tailoring. *Bonta*, 141 S. Ct. at 2385; *see also id.* at 2391 (Alito, J., concurring) ("I agree that the exacting scrutiny standard drawn from our election-law jurisprudence has real teeth. It requires both narrow tailoring and consideration of alternative means of obtaining the sought-after information.").

Bonta thus tightened our review of disclosure laws. *See Gessler*, 773 F.3d at 220 n.1 (distinguishing a case applying narrow tailoring as "more stringent than the exacting scrutiny we use to evaluate disclosure schemes"). While the government still must demonstrate a substantial relation between a disclosure scheme's burden and an important governmental interest, it must also show that the regime is "narrowly tailored to the government's asserted interest." *Bonta*, 141 S. Ct. at 2383. The narrow tailoring inquiry directs us to consider "the extent to which the burdens are unnecessary." *Id.* at 2385; *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.").

We therefore consider whether the Secretary has demonstrated a substantial relation between the disclosure system's burdens and an important governmental interest. We pay particular attention to whether Wyoming narrowly tailored the law to that interest. And because the Secretary appeals the district court's determination that the law is unconstitutional as applied to WyGO, we consider the law given the "particular circumstances of the case." *United States v. Carel*, 668 F.3d 1211, 1217 (10th Cir. 2011).

1. Substantial relation to an important governmental interest

The Secretary argues that Wyoming's disclosure regime is substantially related to an anticorruption interest and an informational interest.

The Supreme Court has long accepted the informational interest as an important one. "The *Buckley* Court identified important government interests that could meet the burden [of exacting scrutiny], including 'provid[ing] the electorate with information,'

'deter[ring] actual corruption and avoid[ing] the appearance of corruption,' and 'gathering the data necessary to detect violations of' other election laws." *Indep. Inst.*, 812 F.3d at 792 (quoting *Buckley*, 424 U.S. at 66–68). And the *Citizens United* Court reaffirmed that "disclosure could be justified based on a governmental interest in providing the electorate with information about the sources of election-related spending . . . [to] help citizens make informed choices in the political marketplace." 558 U.S. at 366 (internal citations and quotation marks omitted).

WyGO acknowledges that we have found the informational interest important but argues that the facts of the case make the interest significantly less compelling. It argues that it raises and spends so little that the burdens of the disclosure regime *must* outweigh any informational interest. And because everyone knows where WyGO and its donors stand on gun rights—it's in the name—disclosing WyGO's donors would not illuminate any surprising agendas or funding sources. Put differently, the government's informational interest is not particularly strong as applied to WyGO, which suggests that "the strength of the governmental interest" does not "reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 561 U.S. at 196.

WyGO relies primarily on *Citizens United v. Gessler*, 773 F.3d 200, to support its theory that WyGO's well-known brand precludes the government from having an important informational interest in compelling donor disclosure. There, Colorado attempted to justify a special provision for media institutions that exempted them from disclosing donors in certain circumstances. The government argued that "the electorate can properly assess a statement by the exempted media because of the familiarity with the

source," so it lacked an informational interest in compelling disclosure. *Id.* at 213. But *we* did not hold as much. Instead, we found that, given the government's rationale, it could not justify its failure to afford the plaintiff organization, who had an "extended history of producing substantial work," a similar exemption. *Id.* at 215. WyGO's reliance on *Gessler* is misplaced.

Lack of precedential support aside, WyGO's logic does not stand on its own. The informational interest is not as crabbed as it claims. "[T]he public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. Disclosure can "help[] voters to define more of the candidates' constituencies," *Buckley*, 424 U.S. at 81, and "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," *id.* at 67. "The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* And "[a]n appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another." *Hum. Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010).

On our understanding of the informational interest, the Secretary has demonstrated an important interest undiminished by WyGO's brand. The public still has an interest in knowing who speaks through WyGO. The public can benefit from gathering information on candidate constituencies beyond their interest in gun rights. *See Buckley*, 424 U.S. at 81. And it can benefit from knowing the number of donors speaking through WyGO,

insofar as it sheds light on the nature of a candidate's response to WyGO's advocacy. We also note that accepting WyGO's theory would foster the strange and perverse effect of shielding the most well-known (and likely most effective) advocacy organizations from disclosure laws. The public does not have a reduced interest in knowing who funds Planned Parenthood or the NRA, for example, because the organizations have a strong brand. The burdens of disclosure regimes are not best saved for upstart advocacy organizations.

We also do not think that WyGO suffers particularly outsized burdens. WyGO points us to *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), where we determined that the financial burden of a Colorado disclosure law on a small issue committee did not substantially relate to the government's informational interest. There, the law required an issue committee that had collected $782.02 in contributions to disclose the names and addresses of contributors who had donated over $20. We held that "the financial burden of state regulation on Plaintiffs' freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions." *Id.* at 1261.

WyGO also relies on *Coalition for Secular Government v. Williams*, 815 F.3d 1267 (10th Cir. 2016). In *Coalition* we held that "the governmental interest in issue-committee disclosures remains minimal where an issue committee raises or spends $3,500." *Id.* at 1277. We explained that "the strength of the public's interest in issue-committee disclosure depends, in part, on how much money the issue committee has

raised or spent." *Id.* at 1278. And we ultimately explained that, while the relationship between the $3,500 contribution level in *Coalition* was not substantially tied to the informational interest, "[a]n issue committee raising or spending a meager $200 might still be required to disclose limited information without violating the First Amendment, but any reporting burdens must be measured against the government's interest in that disclosure." *Id.*

We came to a different conclusion in *Independence Institute v. Williams*, 812 F.3d 787. There, we reviewed another Colorado disclosure requirement, but one which concerned candidate—rather than issue—advocacy. It generally mimicked the features of the Wyoming disclosure regime. But the Colorado scheme's disclosure requirements were triggered by expenditures above $1,000 and required the disclosure of donors who contributed $250 or more. We found that the statute survived exacting scrutiny, observing that "[i]t is not surprising . . . that a disclosure threshold for state elections is lower [than BCRA's] . . . Smaller elections can be influenced by less expensive communications." *Id.* at 797.

Neither *Sampson* nor *Coalition* requires us to find that WyGO is particularly burdened by the disclosure regime, and *Independence Institute* counsels against that determination. *Sampson* and *Coalition* concerned issue groups that collected and spent small amounts of money—about $800 and $3,500, respectively. WyGO is regulated for the functional equivalent of express advocacy rather than issue advocacy and reports an annual budget somewhere between $50,000 and $100,000. Additionally, the Wyoming law does not set a terribly low disclosure trigger like the $20 amount in *Sampson*; instead,

the statute requires reporting donors whose contributions exceed $100. § 22-25-106(h);(v). While this amount is notably less than the $250 trigger in *Independence Institute*, "[s]maller elections can be influenced by less expensive communications." 812 F.3d at 797.

The Secretary has demonstrated a substantial relation between Wyoming's disclosure requirements and its informational interest, as applied to WyGO.

2. Narrow tailoring

Next, Wyoming must show that the statute's disclosure regime is also narrowly tailored to serve the informational interest. It fails to do so.

"A critical feature of [the narrow tailoring] inquiry turns on whether the [government] 'seriously undertook to address' the problems it faces 'with less intrusive tools readily available to it.'" *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 404 (6th Cir. 2022) (Sutton, C.J.) (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)). This means that, beyond proving a balanced relationship between the disclosure scheme's burdens and the government's interests, the government must "demonstrate its need" for the disclosure regime "in light of any less intrusive alternatives." *Bonta*, 141 S. Ct. at 2386. "It is the government's burden to demonstrate that the challenged law furthers important governmental interests and is narrowly tailored. If the government fails to make that showing, it cannot prevail." *Cornelio v. Connecticut*, 32 F.4th 160, 177 (2d Cir. 2022).

The government has not demonstrated a special need for the disclosure regime's unique burdens on WyGO and has failed to justify why it could not use less intrusive tools to further its interests.

The statute requires an organization that issues an electioneering communication to file a statement that reports "those expenditures and contributions which *relate to* an independent expenditure or electioneering communication." § 22-25-106(h)(iv) (emphasis added). The statement must also identify the name of whoever made the relevant contribution if the contribution exceeds $100. § 22-25-106(h)(v). Compliance with these requirements necessarily burdens WyGO's First Amendment right to association. *See Ward v. Thompson*, No. 22-16473, 2022 WL 14955000, at *3 (9th Cir. Oct. 22, 2022) (Ikuta, J., dissenting) ("As [*Bonta*] made clear, *whenever* the government compels disclosure of members' identities, it burdens the First Amendment right of expressive association.").

The "relate to" language in this context, in addition to its vagueness, creates additional burdens. As described above, identifying which contributions relate to an electioneering communication creates a challenge for advocacy groups like WyGO. Recall that WyGO does not maintain a sophisticated bookkeeping system. Instead, it manages two accounts; one for online donations, one for mailed-in donations. App. 101. WyGO's system does not have an earmarking mechanism that would allow donors to set aside contributions for one purpose or another. When WyGO needs to pay an expense—any expense—it pulls from one of two pools of undifferentiated contributions. *Id.* But it

has no way to know which donor contributions "relate to" that payment, which creates confusion.

The Secretary attempts to address this confusion by offering a solution. WyGO should just disclose *all* contributions (over $100) received in the election cycle. App. 190. In other words, the Secretary resolves the burden of confusion that stems from the burden of the disclosure scheme with the burden of overdisclosure. This is not narrow tailoring.

Under our heightened standard of review, Wyoming owes its citizens precision. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). A disclosure statute that burdens an advocacy group with muddling through ambiguous statutory text that fails to offer guidance on compliance does not afford that precision. It offers only uncertainty. This uncertainty is particularly problematic in the First Amendment context. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Bonta*, 141 S. Ct. at 2384 (quoting *Button*, 371 U.S. at 433).

The Secretary exacerbates the burden caused by the statute's ambiguity by suggesting that WyGO take on an additional burden to cure it. But its proposed overdisclosure solution would bear no relation to the government's informational interest; it would necessarily sweep in speakers who may have been interested in supporting a different candidate or no candidate at all or perhaps wished to preserve their privacy or anonymity. This presents an unresolved problem for the Secretary, because "the

government must still justify the burden that exists. 'There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification.'" *Cornelio*, 32 F.4th at 176 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001)).

Perhaps the Secretary's fix would seem more reasonable if these burdens were inevitable. After all, the lodestar of the narrow-tailoring inquiry is the necessity of the burdens. *Bonta*, 141 S. Ct. at 2385. If the government "seriously undertook to address the problems it faces with less intrusive tools readily available to it," we cannot demand it try a bit harder. *Sisters for Life, Inc.*, 56 F.4th at 404 (internal quotation marks omitted). But less intrusive tools—tools that would not compound WyGO's initial statutory burden—were readily available, and the Secretary offers no reason why Wyoming could not have used them.

Rather than leave WyGO to twist in the wind, the statute could have outlined an earmarking system. We have already recognized the role earmarking can play in tailoring a disclosure law. In *Independence Institute*, we reasoned that a Colorado law's requirement that organizations "need only disclose those donors who have specifically earmarked their contributions for electioneering purposes," helped render the statute's scope "sufficiently tailored." 812 F.3d at 797. It is no surprise that at least one of our district courts has found the absence of an earmarking provision central to concluding that a disclosure regime fails exacting scrutiny. *See, e.g.*, *Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-CV-01488-PAB, 2021 WL 4060630, at *12 (D. Colo. Sept. 7, 2021). Instituting an earmarking system better serves the state's informational interest; it directly links speaker to content, whereas the Secretary's solution dilutes the

statutory mission. The Secretary does not explain why this solution is beyond Wyoming's reach.

The Secretary makes a few objections. First, he claims that the "relate to" provision works as a functional earmarking requirement by authorizing an earmarking system. But that again flips the burden back onto small advocacy groups to make sense of unclear statutory requirements, all while reintroducing the Secretary's burdensome "fix" for those groups who did not infer this requirement when the time to disclose comes. The Secretary has not justified its need for this approach "in light of any less intrusive alternatives." *Bonta*, 141 S. Ct. at 2386.

Second, the Secretary argues that the non-specific disclosure regime does not burden WyGO; rather, it provides flexibility. Instead of guiding WyGO's conduct, the statute allows WyGO to structure its internal accounting procedures however it sees fit. But flexibility can look a lot like uncertainty to small shops like WyGO. And uncertainty amidst the threat of sanction chills the exercise of First Amendment rights. We keep in mind that "associational rights must be 'protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Id.* at 2393 (Sotomayor, J., dissenting) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). What looks like flexibility at first pass amounts to a burden when speakers need certainty and direction.

Third, the Secretary points to cases that arguably cut in favor of finding the statute narrowly tailored. Consider *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021). There, the First Circuit found a similar disclosure law narrowly tailored despite the lack

of an earmarking provision. And it observed that any donor who wanted to avoid disclosure could just "contribute less than $1,000" in the covered time frame. *Id.* at 89. That, the Secretary argues, is also an option for Wyoming donors.

We do not understand *Gaspee Project* to be in tension with our analysis. The First Circuit plainly acknowledged the importance of allowing donors to "opt out" of a disclosure scheme while maintaining the ability to speak. *Id.* The absence of an earmarking provision did not matter[8] because "the Act provides ample opportunity for donors to opt out from having their donations used for . . . electioneering communications, even if the entity to which they contribute has not created a segregated fund." *Id.* For example, the statute provided guidance for following a specific carve-out procedure so donors could "opt out of having their monies used for . . . electioneering communications" and avoid disclosure. *Id.* The Wyoming statute does not offer similar guidance. Furthermore, the First Circuit's suggestion that wary donors should just contribute less than $1,000 strikes us as an unacceptable ask here, where the disclosure requirements trigger at a *$100* donation. § 22-25-106(h)(v).

Amicus highlights *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304 (3d Cir. 2015), as an example of a disclosure statute that survived exacting scrutiny despite the absence of a *Gaspee Project*-style opt-out. The Delaware disclosure law required advocacy shops that spent over $500 issuing an electioneering

[8] We do not hold legislatures must include an earmarking provision to survive narrow tailoring. But disclosure laws must offer sharp guidance on how advocacy shops—especially mom-and-pop operations with limited resources—can comply with its provisions. Failure to do so places unnecessary burdens on speakers' shoulders.

communication to disclose the names of donors who contributed over $100 during the election cycle. That law surely forced advocacy groups to bear the burden of overdisclosing donors despite a disconnect with an informational interest.

Delaware Strong Families is a relic of pre-*Bonta* exacting scrutiny. The Third Circuit understood exacting scrutiny to require only that "the strength of the governmental interest . . . reflect[ed] the seriousness of the actual burden on First Amendment rights." *Doe*, 561 U.S. at 196 (internal quotation marks omitted). After *Bonta*, a court would surely take a closer look at the "extent to which the burdens are unnecessary." 141 S. Ct. at 2385. The *Delaware Strong Families* Court admittedly invoked the word "tailored" on several occasions, but it seemed to use the word interchangeably with the "substantial relation" language, and nowhere did it require the government to "demonstrate its need" for the disclosure regime's burden "in light of any less intrusive alternatives." *Id.* at 2386.

* * *

In sum, the Wyoming disclosure regime is not narrowly tailored as applied to WyGO. WyGO's internal-accounting mechanisms are in full compliance with the statute, but WyGO has no way to comply with Wyoming's reporting requirements without overdisclosing. Demanding that a small advocacy organization accept greater First Amendment burdens to remain in compliance with a "flexible" statute is not narrow tailoring. To comply with the First Amendment, a disclosure regime must offer appropriate and precise guidance, defining how actors—sophisticated or otherwise—should structure internal accounting mechanisms. "The First Amendment does not permit

laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324. Accordingly, we affirm the district court.

C. Attorney's Fees

WyGO sought attorney's fees below pursuant to § 1988, but the district court decided they were unavailable. It characterized attorney's fees as retrospective relief and reasoned that attorney's fees against defendants sued in an official capacity are barred by the Eleventh Amendment. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985) ("The Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court."). Accordingly, "the official capacity claims against Defendants for damages—other than prospective relief under *Ex Parte Young*—[could not] be maintained against any of the official-capacity defendants in this case," including the Secretary. App. 253. We disagree.

Section 1988 permits courts to award "a reasonable attorney's fee as part of the cost" to the prevailing party in a federal civil-rights action. "A plaintiff who succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit is a prevailing party." *Jane L. v. Bangerter*, 61 F.3d 1505, 1509 (10th Cir. 1995) (internal quotation marks omitted).

The Eleventh Amendment limits relief against the government, but the Supreme Court has recognized several workarounds. For example, plaintiffs can

often acquire *prospective* relief against the government. *See, e.g.*, *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). This typically takes the form of court injunctions against the application of an unconstitutional law. *See generally Ex Parte Young*, 209 U.S. 123 (1908) (finding that the Eleventh Amendment did not prohibit an injunction against a state Attorney General to prevent him from enforcing an allegedly unconstitutional state statute).

But attorney's fees sometimes count as prospective relief, too. "[A]n award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment." *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 279 (1989); *see also Graham*, 473 U.S. at 170 ("[W]hen a State in a § 1983 action has been prevailed against for relief on the merits, either because the State was a proper party defendant or because state officials properly were sued in their official capacity, fees may also be available from the State under § 1988.").

The attorney's fees requested by WyGO fall squarely into the exception recognized in *Agyei*. The Eleventh Amendment does not preclude WyGO from seeking § 1988 attorney's fees.[9]

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[9] The Secretary tries to sidestep precedent by characterizing WyGO's prevailing claims as *Ex Parte Young* claims rather than § 1983 claims. Because WyGO prevailed on only its *Ex Parte Young* claims, it cannot collect § 1988 fees, which are reserved for victors in § 1983 litigation. The Secretary confuses the issue. *Ex Parte Young* provides the theory or doctrine supporting prospective injunctive relief under § 1983. *See Harris v. Angelina Cnty.*, 31 F.3d 331, 337–38 (5th Cir. 1994) ("Under the authority of *Ex Parte Young* . . . a § 1983 action seeking prospective injunctive relief based on federal constitutional violations may be brought against state officials in their official capacities."); *see also Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171 (9th Cir. 2002) ("[U]nder the doctrine of *Ex Parte Young*, [the plaintiff's]

III. Conclusion

We affirm the district court's rejection of WyGO's vagueness challenge to the commentary provision as applied to the radio ad. We affirm its dismissal of WyGO's facial-vagueness challenge to the functional-equivalent standard, as well as its dismissal of the challenge to the standard as applied to the radio ad. We affirm the court's holding that "relate to" is unconstitutionally vague as applied to WyGO, and also affirm its holding that the disclosure regime is not narrowly tailored as applied to WyGO.

While we affirm the district court's dismissal of most of WyGO's pre-enforcement challenges, we reverse the dismissal as to WyGO's planned email communications. And we reverse the district court's holding that WyGO could not obtain § 1988 attorney's fees and remand for an assessment of costs.

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section 1983 claims seeking prospective injunctive relief from individual defendants are not barred by the Eleventh Amendment.").

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RE: 22-8019, 22-8021, Wyoming Gun Owners v. Gray, et al
Dist/Ag docket: 2:21-CV-00108-SWS

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length,

and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Tara Malloy
Megan Patricia McAllen

CMW/sds