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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WYOMING GUN OWNERS, a Wyoming nonprofit corporation, *Plaintiff*, *v.* EDWARD BUCHANAN, in his official capacity as Wyoming's Secretary of State; KAREN WHEELER, in her individual and official capacities as Wyoming's Deputy Secretary of State; KAI SCHON, in his individual and official capacities as Election Division Director for the Wyoming Secretary of State; and BRIDGET HILL, in her official capacity as Wyoming Attorney General. *Defendants*.	Civil Action No. 21-CV-108-S **REPLY BRIEF IN SUPPORT OF WYOMING GUN OWNER'S MOTION FOR PRELIMINARY INJUNCTION** *Oral Argument Requested*

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REPLY ARGUMENT

1. Defendants' admission that the commentary exception is a content-based regulation is fatal to their defense.

In response to WyGO's assertion that the commentary exception favors speakers based on their status as members of the institutional media, Defendants assert that "the exemption does not depend on the type of entity engaging the communication. Instead, *it depends on the content* of the communication." ECF No. 33 at 6 (emphasis added).

The Supreme Court has a term for regulations that depend on the content of the communication: content-based. It also provides a consequence for such regulations: strict scrutiny. Defendants' admission is fatal to their disclosure regime's survival.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015) (citations omitted).

The "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id*. at 163 (internal quotation marks omitted). It does not matter whether a law does so by "defining regulated speech by particular subject matter," or by "defining regulated speech by its function or purpose." *Id.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163-64.

Indeed, Defendants' focus on WyGO's provocative language in the radio ad, as reflected in both LaRock's letter and defendant Wheeler's final order, betrays that Defendants are enforcing a content-based restriction. *See* ECF Nos. 30-8; 30-9 ¶ 11.

Content-based restrictions on political speech are subject to strict scrutiny. *Victory Processing, LLC v. Michael*, 333 F. Supp. 3d 1263, 1270 (D. Wyo. 2018). This requires the government to show that the statute's speech restrictions: (1) advance a compelling state interest and (2) are narrowly tailored to serve that interest. *Chandler v. City of Arvada*, 292 F.3d 1236, 1241 (10th Cir. 2002). In addition, "[i]f a less restrictive alternative would serve the [state's] purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

Defendants' admission means that strict scrutiny applies, not exacting scrutiny. They must show not merely an important government interest, but a *compelling* one. While the Tenth Circuit has recognized that providing the electorate with information, deterring corruption, and compliance interests are *important,* they are not generally recognized as *compelling. See Indep. Inst. v. Williams,* 812 F.3d 787, 792 (10th Cir. 2016); *Cf. Victory Processing,* 333 F. Supp. 3d at 1271 (recognizing that residential privacy from telemarketing calls is substantial, but not compelling). Defendants have also overstated the deterrence-of-corruption rationale, because the Tenth Circuit has followed the Supreme Court in holding that disclosure of independent expenditures (those, such as WyGO's, that are not coordinated with a candidate) have limited value in deterring corruption. *Citizens United v. Gessler*, 773 F.3d 200, 211 (10th Cir. 2014) ("We reject, however, the Secretary's assertion of an anticorruption rationale for reporting independent expenditures"). Moreover, the informational value of disclosure recedes when the speaker, like WyGO, is a repeat player with a well-known viewpoint. *Gessler,* 773 F.3d at 215-16.

The little that remains of Defendants' purported interests does not amount to compelling. Moreover, as discussed below, Defendants' proposed blanket-disclosure requirement is the opposite of narrow tailoring.

2. Defendants broadening construction of the related-to disclosure requirement amounts to blanket disclosure of all donors in violation of *AFPF v. Bonta*.

Defendants concede that Wyoming's regime does not contain an earmarking requirement. ECF No. 33 at 9 ("simply because a statute does not require contributions to be earmarked…"). They also double-down on their effort to expand Wyoming's regime to force blanket disclosure of *all* contributions. *Id.* ("If an organization does not provide for earmarking, then it is reasonable to presume that *any* donation to the organization would be in furtherance of the organization, including the organizations communications") (emphasis added). While some regulators apply narrowing constructions to avoid invalidation,[1] Defendants do the opposite: they broaden the construction to include all donations, not just those related to, or earmarked for, an electioneering communication. This broadening construction invites this Court to facially invalidate the regime.

Moreover, their construction cannot be squared with Defendants' assertion that the "related to" requirement is easily understood by those whom it seeks to regulate. Defendants' own response is telling. They don't know what it means either, so the best they can do is to advise: disclose it all.

Their disclose-it-all approach is also reflected in Defendants' reliance on *Yamada v. Snipes,* 786 F.3d 1182 (9th Cir. 2015). This out-of-circuit authority involved a noncandidate independent expenditure committee that was required to segregate

[1] "In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) (quoting *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n. 5 (1982)).

and disclose all donations. *Id.* at 1195. Importantly, the Tenth Circuit has already rejected the notion that spending $500 on an election can automatically convert an entity into a political committee. *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 679 (10th Cir. 2010). This is what Defendants are essentially calling for here.

Finally, defendants really don't have a good response to the narrow tailoring requirement recently articulated in *Ams. for Prosperity Found. v. Bonta*, Nos. 19-251, 19-255, 2021 U.S. LEXIS 3569, at *24 (July 1, 2021). There, the Supreme Court rejected California's blanket collection of donor information to police potential fraud in charitable giving, because it unduly burdened the associational rights of charities and donors. *AFPF* at *29-*30. Defendants similarly propose the blanket collection of all donor information. But such heavy handedness is not an appropriate cure to a poorly drafted statute. Just as the Supreme Court facially invalidated California's regime for lack of narrow tailoring, this Court should facially invalidate Wyoming's regime for the same reasons.

3. Defendants attempt to cure the vagueness of Wyoming's electioneering regime by reading new terms into the statutes.

WyGO set forth an extensive response to Defendant's arguments on vagueness in its recent brief responding to their motion to dismiss. ECF No. 31 at 15-20. In the interest of brevity, Plaintiff will only summarize those arguments here.

Defendants cite *Faustin v. City of Denver,* 423 F.3d 1192 (10th Cir. 2005) for the proposition that Wyoming's electioneering-communications regime is not vague, but that case involved a clear policy that precluded the display of signs or banners from freeway overpasses. The plaintiff "knew and had no doubt that the restriction applied to her[.]" *Faustin,* 423 F.3d at 1202. Conversely, in this case, Plaintiff's principal asserts that he cannot tell when the state's restrictions apply and how they apply. ECF No. 31-1 ¶¶ 49-54.

Similarly, Defendants' reliance on *Ward v. Rock Against Racism* is misplaced because that case did not involve political speech near an election. 491 U.S. at 800-01. That case dealt with managing noise complaints and involved a time, place, and manner restriction, not a restriction on core political speech by a longtime participant in civic affairs. *Id.* at 798-99.

Implicitly, Defendants seem to agree that the statutes are vague as written, because they read non-existent terms into the text to fill the gaps.

First, Defendants ask this Court to read new provisions into the commentary exception, limiting it to the institutional press. ECF No. 33 at at 5 ("the subsection is intended to exempt reports by media outlets"). But the statute does not say that. The plain text indicates that it protects commentary and "similar communications" protected by the First Amendment and makes no reference to the status of the speaker.

Second, with regard to the membership-communication exception, Defendants' brief focuses on how WyGO defines or does not define its members, or whether WyGO's members know that they are members, without actually addressing the one question that matters: how does the Secretary of State define who is a member for purposes of enforcing the exception? ECF No. 33 at 6-7.[2]

Defendants acknowledge that "generally" some organizations may require a fee and others may not. They further acknowledge "some ambiguity depending on the specific organization" but then assert that it is "generally clear" who is a member or

[2] Defendants attached a number of unauthenticated exhibits to their response brief, purporting to be screen shots from WyGO's website. *See* ECF Nos. 33-1-4. The potential existence of higher-tier memberships does not contradict WyGO's claim that it considers anyone who donates to be a member. Neither does the existence of website boilerplate. Moreover, even it does contradict WyGO, that only serves to create more confusion about who the membership exception applies to.

who is not. An ambiguous statute is a vague statute and Defendants' continuous hedging indicates that Defendants are not sure themselves what the statute means. Defendants use the language of someone who is trying to keep their options open. If Defendants have a standard for how they intend to enforce this provision with respect to emails and other communications, they have yet to tell us.

Third, Defendants now read the related-to requirement as requiring blanket disclosure of all donations to the speaking entity, even though the statutory text says nothing of the sort. Moreover, they then brazenly accuse WyGO of circumventing the disclosure requirements by "deciding not to allow for earmarking." ECF No. 33 at 9. But the statute neither provides for disclosure of all donors, nor does it require earmarking. On the one hand, Defendants waive away the Tenth Circuit's repeated focus on earmarking requirements, but then they accuse WyGO of deliberate circumvention for failing to implement a non-existent requirement. Apparently earmarking doesn't matter, unless it does.

They also acknowledge that there are "many different types of contributions that can be made to an organization and they can be made for many different purposes." *Id.* Indeed, WyGO would agree, but that is exactly the problem. Defendants are enforcing a statute that they now allege requires the disclosure of *all* contributions, even though the statute contains no such provision, while acknowledging that some donors now subject to disclosure may have intended their money to go for a non-electioneering purpose. Defendants' reading of the statute is as confusing as it is vague.

Fourth, Defendants claim that Wyoming's definition of electioneering communications incorporates the equivalent-of-express advocacy standard endorsed by a plurality of the Supreme Court, so it cannot be vague. ECF No. 33 at 10-11. But they barely address WyGO's argument that the standard was applied to the

radio ad in an arbitrary manner because it is not *only* a communication advocating for or against a candidate. It is also a message to those candidates and candidates in other races that WyGO's members care about gun rights, that it matters whether WyGO's policy survey is returned by candidates, and that WyGO will draw attention to candidates who back-track on gun rights after being elected. ECF No. 30-1 ¶¶ 16-20. In fact, this purpose for the radio ad is fully aligned with WyGO's publicly stated mission of exposing legislators who refuse to defend Second Amendment rights. *Id.* ¶ 6.

As a result, it is not enough for Defendants to say that the radio ad favors one candidate over the other because the ad has multiple intended messages and includes an audience that comprises candidates, not just the electorate. Defendants have not properly addressed these issues.

Moreover, Defendants continue to avoid addressing whether WyGO's email communications and mailer are electioneering-communications or not. We know the Chamber has already complained about these and may do so again in the future. From WyGO's perspective, many of its communications follow a similar format, discussing a candidate's record and questionnaire responses, without including an explicit call to vote for or against a particular candidate. *Id.* ¶¶ 16-20, 24-35. This format has been very effective for WyGO. Defendants' silence, combined with the Secretary of State's failure to explain its reasoning, issue guidance, or issue implementing regulations, leaves WyGO bereft of an understanding of where it crossed the line into an electioneering communication. The result is that WyGO may avoid speaking at election time altogether.

Finally, it bears consideration that one of the main concerns with vague statutes is that they will be enforced in an arbitrary manner. It is notable that Defendants have come forward with no other examples of any other organization that was

investigated or fined by the Secretary of State's office for making unreported electioneering communications. This absence of evidence is itself circumstantial evidence that WyGO was targeted for enforcement due to the effectiveness of the content of its messages. *See Sorrell v. IMS Health Inc.,* 564 U.S. 552, 580 (2011) ("The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do").

4. WyGO's overbreadth argument has merit because the regime purports to regulate non-members who voluntarily sign up to receive WyGO's emails or visit their website to review content

Defendants do not fairly engage WyGO's argument that their regime is overbroad because it sweeps in those who voluntarily seek out WyGO's content without donating. ECF No. 33 at 19-20. First, Defendants carry the burden of showing that their regime is constitutional. Second, although they repeat the canard that Wyoming's regime does not suppress speech, it suffices that the regulations burden speech—they need not suppress all speech. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell,* 564 U.S. at 566.

The two emails complained of by the Chamber were also sent to non-members who had signed up to receive WyGO's emails. ECF No. 33-1 ¶¶ 26, 33. Moreover, anyone can view similar content, such as white-board videos, on WyGO's website *Id.* ¶¶ 33-36. Much of this content follows WyGO's typical format (discussion of gun rights, candidates' policy positions, voting records, and use of attention-getting language) and is freely accessible to non-members. If the radio ad, which had similar elements, is deemed an electioneering communication by Defendants, then it is not a stretch to assert that comparable communications distributed electronically to non-member might also be deemed by them to trigger reporting.

Defendants have not offered a substantive response on this point. If they believe that WyGO can post white-board videos on its website or send their policy emails to non-members who ask to receive their emails, then it would be helpful if Defendants explained why that is so. Alternatively, if the answer is more nuanced, they have not told us. This is precisely why the regime is overbroad.

5. WyGO's request for a preliminary injunction seeks to preserve the status quo and is not a disfavored injunction.

Defendants incorrectly assert that WyGO's motion for a preliminary injunction requires heightened proof because it is a disfavored injunction that seeks to alter the status quo and grant final relief. ECF No. 33 at 2-3. But WyGO is requesting pre-enforcement relief, so by definition, it is asking the Court to order Defendants to refrain from enforcing Wyoming's electioneering-communications regime against it in the future. *See Schrier v. Univ. of Colo.,* 427 F.3d 1253, 1260 (10th Cir. 2005) (explaining the difference between injunctions that alter the status quo and those that do not). Thus, this case is unlike *Schrier,* were the plaintiff sought reinstatement as a department chair. *Id.* at 1261. Instead, WyGO wishes to preserve the status quo; that is, to continue speaking to Wyoming residents about gun-rights issues in the same way that it has for many years.

Moreover, Defendants' assertion that a preliminary injunction would grant it final relief is not well taken because, as the name suggests, such an injunction is *preliminary,* and not final. *See Planned Parenthood v. Cline,* 910 F. Supp. 2d 1300, 1306 (W.D. Okla. 2012) (preliminary relief is not final and can be undone).

Even if WyGO must make a "strong showing" instead of merely a "likelihood of success," the injunction should issue because Defendants have failed to refute WyGO's central claims.

6. The official-capacity claims against Defendants fall squarely into the *Ex parte Young* exception to sovereign immunity.

Echoing their motion to dismiss, Defendants again claim that WyGO's official capacity claims are "barred by sovereign immunity." ECF No. 33 at 3. But if Defendants were correct, then the federal courts would be barred from considering the unconstitutional actions of state officials. *See EagleMed, Ltd. Liab. Co. v. Wyoming,* 227 F. Supp. 3d 1255, 1267 (D. Wyo. 2016). This lawsuit primarily seeks pre-enforcement injunctive and declaratory relief based on the First Amendment. As such, it falls squarely within the *Ex parte Young* doctrine. *See Hill v. Kemp*, 478 F.3d 1236, 1258-59 (10th Cir. 2007) (citing *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645-46 (2002)) (Gorsuch, J.); *EagleMed, Ltd. Liab. Co.,* 227 F.Supp. at 1266. Moreover, this Court should decline Defendants' invitation to consider the merits of the underlying claims for purposes of this analysis. *Verizon Md.*, 535 U.S. at 646 (**"**[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."). This Court has jurisdiction to hear claims that state officials are violating the U.S. Constitution.

CONCLUSION

WyGO's motion for a preliminary injunction should be granted.

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Respectfully submitted,

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