

Nos. 22-8019, 22-8021

**In the United States Court of Appeals
for the Tenth Circuit**

CHARLES GRAY, et al.,

Defendants-Appellants / Cross-Appellee,

v.

WYOMING GUN OWNERS, INC.,

Plaintiffs-Appellees / Cross-Appellant.

Appeal from a Judgment of the United States District Court
for the District of Wyoming, The Honorable Judge Scott W. Skavdahl
(Dist. Ct. No. 2:21-CV-108-SWS)

APPELLEE/CROSS-APPELLANT'S MOTION FOR FEES ON APPEAL

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APPELLEE/CROSS-APPELLANT'S MOTION FOR FEES ON APPEAL

Appellee/Cross-Appellant, Wyoming Gun Owners (“WyGO”), respectfully moves for appellate attorney fees, expenses, and costs pursuant to 42 U.S.C. § 1988, 28 U.S.C. § 1920, and Tenth Circuit Rule 39.2 as the prevailing party on this appeal and requests that this Court remand the determination of total fees, expenses and costs to the district court. WyGO attempted to ascertain Cross Appellees’ (“Wyoming” or “the state”) position to this motion, but after three business days, Wyoming was unable to provide a definitive response. *See* 10th Cir. R. 27.1. WyGO is unwilling to risk waiver by delaying its motion further.

PROCEDURAL BACKGROUND

In 2022, WyGO appealed the district court’s judgment in WyGO’s challenge of Wyoming’s campaign finance laws. *See Wyo. Gun Owners v. Gray*, Nos. 22-8019, 22-8021, at 3, 9-10 (10th Cir. Oct. 11, 2023). This Court partly affirmed the lower court, holding, among other things, that Wyoming’s disclosure regime was insufficiently tailored to survive exacting scrutiny and that the “related” expenditures provision within this scheme was void for vagueness as applied to WyGO. *See id.* at 19, 44-45. But this Court also reversed in part, concluding that WyGO had successfully pled a pre-enforcement challenge in respect to its email communications and that § 1988 attorneys’ fees were available through

an exception to sovereign immunity. *Id.* at 29-30, 46. Accordingly, this Court remanded for an accounting of fees and assessment of costs. *Id.* at 3, 47.

This Court never expressly stated, however, if the district court should calculate appellate attorneys' fees and costs as well, or if the court was limited to fees and costs incurred at the district level. Under Tenth Circuit rules, moreover, "[a]bsent a statutory provision or court order to the contrary," parties requesting an award of appellate attorneys' fees must file a prompt motion before the appeals court. *See* 10th Cir. R 39.2(a); *see also In re Nat. Gas Royalties Qui Tam Litig.*, 845 F.3d 1010, 1024 (10th Cir. 2017) ("a district court lack[s] authority to award appellate-related fees to a prevailing party absent explicit statutory authorization. . . . The party must first apply to us for appellate-related attorney fees.") (citing *Hoyt v. Robson Cos.*, 11 F.3d 983, 985 (10th Cir. 1993)). WyGO, therefore, now moves for an award of appellate fees, expenses, and costs.

LEGAL BASIS FOR ATTORNEYS' FEES

WyGO seeks attorneys' fees, costs, and expenses under 42 U.S.C. § 1988. *See* § 1988(b) ("In any action or proceeding to enforce . . . [Section 1983], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs"). "[A]n award of reasonable attorneys' fees may include compensation for work

performed in preparing and presenting the fee application.” *United States v. \$114,700.00 in U.S. Currency*, Nos. 20-1387, 21-1301, 2023 U.S. App. LEXIS 594, at *7 (10th Cir. Jan. 10, 2023) (quotation omitted); see also *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 726 (10th Cir. 1993) (“a party may be awarded fees incurred in resolving the fee issue itself.”).

Although fees are discretionary, this discretion is “narrow” lest courts “seriously undermined the important principles at stake in the Civil Rights Attorney’s Fees Awards Act “by awarding insufficient funds.” *Robinson v. City of Edmond*, 160 F.3d 1275, 1278, 1280 (10th Cir. 1998). “The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances,” so “a prevailing plaintiff should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (cleaned up). Fee awards both enable victims to vindicate their rights and deter future violations. *Centennial Archaeology, Inc. v. Aecom, Inc.*, 688 F.3d 673, 679 (10th Cir. 2012). Indeed, this Court recognizes a “presumption in favor of awarding prevailing plaintiffs attorney’s fees.” *Browder v. City of Moab*, 427 F.3d 717, 721 (10th Cir. 2005).

This Court has already declared that WyGO is a prevailing party. *Wyo. Gun Owners* at 46 n.9 (discussing WyGO’s “prevailing claims” under § 1983). Plaintiffs prevail under § 1988 if “a material alteration

in the parties' legal relationship occurs" so that plaintiffs "succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit." *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1235 (10th Cir. 2011) (cleaned up). Not only did WyGO win injunctive relief on two of its claims at the district court, but also this Court reversed the lower court on two more issues in response to WyGO's cross-appeal, granting WyGO additional relief. *Wyo. Gun Owners* at 3, 10, 47. WyGO, thus, prevailed at both the district and appellate level and should be awarded reasonable attorney fees, expenses, and costs for both levels of the litigation.

CONCLUSION

WyGO respectfully requests that this Court award WyGO reasonable attorney fees, expenses, and costs for its appeal as well as for the litigation of this motion and any future litigation concerning this fee award. WyGO also asks this Court either to remand to the district court for the calculation of these fees, expenses, and costs or—if this Court prefers to retain—to issue a briefing schedule that provides parties with sufficient time to prepare submissions.

Dated: October 24, 2023

Respectfully submitted,

s/Endel Kolde

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A), because this document contains 875 words, as calculated by Microsoft Word; and

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Dated: October 24, 2023

s/Endel Kolde

CERTIFICATE OF SERVICE

I hereby certify that today I electronically filed this brief using the appellate CM/ECF system and that all participants are registered CM/ECF users and will be served via that platform.

Dated: October 24, 2023

s/Endel Kolde