IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

LAKEWOOD CITIZENS WATCHDOG GROUP, *Plaintiff*, v. CITY OF LAKEWOOD, COLORADO, a Colorado Home Rule Municipal Corporation, et al., *Defendants*.	No. 1:21-cv-1488 **MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION**

Plaintiff Lakewood Citizens Watchdog Group ("Watchdog") moves for a temporary restraining order and preliminary injunction enjoining Defendants from enforcing Lakewood's independent expenditure regulations against the Spring/Summer 2021 issue of *The Whole Story* and a preliminary injunction enjoining Defendants from enforcing Lakewood's electioneering communications regulations against the Fall 2021 issue. Watchdog fears that the city will use the regulations, found at Lakewood Mun. Code §§ 2.54.020, 2.54.030, and 2.54.070, to silence *The Whole Story*'s coverage of local news—often critical of local leaders—in Lakewood, Colorado.

Watchdog requests oral argument, with 30 minutes for each side.

STATEMENT OF FACTS

On January 14, 2019, the Lakewood City Council passed Ordinance O-2018-22, replacing Chapter 2.54 of the Lakewood Municipal Code. (Ex. A.) As City Councilor Dana Gutwein said, it enacted "a new rule that electioneering communications like the Watchdog must disclose who is paying for it, and include a disclaimer, reducing the influence of dark money on our local elections." Dana Gutwein, Facebook (Jan. 15, 2019) (Ex. B). Electioneering communications—those mentioning candidates within 60 days of an election, Lakewood Mun. Code § 2.54.020—must include disclaimers on communications costing $500 or more, *id.* at § 2.54.070(3), and must report donors who gave more than $250, as well as those donors' addresses, occupations, and employers, *id*. at § 2.54.070(1) (Ex. A at 2, 3, 15). Independent expenditures—express advocacy for or against a candidate that is not controlled by a candidate, *id*. at § 2.54.020—

must include similar disclaimers, *id*. at § 2.54.030(F)(3)(a), and speakers must make similar disclosures, *id.* at § 2.54.030(F)(1) and (2)(b)(I). There is no press exemption for news gathering and reporting.

On October 23, 2019, a campaign finance complaint was filed against Watchdog. Order at 1, *Keefe v. Lakewood Citizens Watchdog Group* (Lakewood Oct. 14, 2020) ("Keefe Order") (Ex. E). Lakewood's Administrative Hearing Officer determined that as a newsletter *The Whole Story* would not be entitled to a press exemption even if there were one, and that the newsletter was "the functional equivalent of express advocacy" because articles critical of town leaders "clearly and unequivocally favored certain candidates over other candidates." *Id*. at 2. It ordered Watchdog to pay $500 for the disclosure violation and $2,500 for the disclaimer violation. *Id*.

Watchdog intends to continue publishing its newsletter with materially and substantially similar content to previously published issues. Decl. ¶ 11. But it has silenced itself, fearing that the City will punish publication of its Spring/Summer 2021 issue (Ex. I) as an independent expenditure and publication of its Fall 2021 as an electioneering communication. Decl. ¶¶ 13-14.

ARGUMENT

Lakewood's regulation of newsletter reporting is unconstitutional and should be enjoined. A plaintiff "seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008) ("*NRDC*"); *see also Quinton Holdings Ltd. Liab. Co. v. Axys Golf Ltd. Liab. Co.*, No. 20-cv-01195-CMA-MEH, 2020 U.S. Dist. LEXIS 124336, at *6 (D. Colo. July 14, 2020) (noting same factors for temporary restraining orders). In the First Amendment context, 'the likelihood of success on the merits will often be the determinative factor' because of the seminal importance of the interests at stake." *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The

loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

I. WATCHDOG WILL SUCCEED ON THE MERITS

Lakewood's efforts to silence Watchdog through broad electioneering communications and independent expenditure regulations is not sufficiently tailored to any required governmental interests, and it is facially unconstitutional because of vagueness and overbreadth.

A. The ordinance fails strict and exacting scrutiny as applied to Watchdog

1. *Strict or exacting scrutiny must apply*

Whether under the rigorous demands of strict or exacting scrutiny, Lakewood cannot show that its impositions on core political speech are tailored to a sufficiently important governmental interest. "First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and "debate on public issues should be uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). When confronted by "content-based regulation[s] of speech," such as "government-drafted script[s]" like Lakewood's disclaimer, courts must generally examine them for "strict scrutiny." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371, 2374 (2018) ("*NIFLA*"); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Campaign finance disclosure laws are also examined under the heightened standard of exacting scrutiny. Strict scrutiny demands that the City's "restriction furthers a compelling interest and is narrowly tailored to achieve that interest," *Reed*, 576 U.S. at 171 (internal quotation marks and citation omitted), while exacting scrutiny demands that the ordinance be substantially related to an important government interest, *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam); *see also id*. at 66 (calling "strict test" for "compelled disclosure"); *id*. at 75 (calling "strict standard"); *Wash. Post v. McManus*, 944 F.3d 506, 521 (4th Cir. 2019) (requiring "means narrowly tailored to achieve the desired objective" (cleaned up)).

2. *Only the informational interest applies to disclosure regulations*

The Supreme Court has recognized only three governmental interests for disclosure: fighting actual or apparent corruption, combatting circumvention of contribution limits, and the informational interest. *Buckley*, 424 U.S. at 66-68. Only the informational interest applies here, and the ordinance is insufficiently tailored to it. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010) ("*Citizens United*") (holding that the anticorruption interest does not apply to expenditures made independent of candidates); *Republican Party v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013) (rejecting any "freestanding" anti-circumvention interest where the anti-corruption interest does not exist); *compare* Gutwein, Facebook (Jan. 15, 2019) (Ex. B) (noting purpose of "reducing the influence" of some speakers), *with Buckley*, 424 U.S. at 48-49 (rejecting leveling interest), *and Davis v. Federal Election Commission*, 554 U.S. 724, 741-42 (2008) (same), *and Citizens United*, 558 U.S. at 355 (calling leveling interest an "aberration").

The informational interest is one in "increase[ing] the fund of information concerning those who support the candidates," to "help[] voters to define more of the candidates' constituencies," by "shed[ding] the light of publicity on spending that is unambiguously campaign related." *Buckley*, 424 U.S. at 81; *see also Citizens United*, 558 U.S. at 367 (noting that meant to "help citizens make informed choices in the political marketplace" (internal quotation marks omitted)). It is not an interest in knowing who supports the speaker, but in knowing who supports a candidate. *See Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 497 (D.C. Cir. 2016) (using cancer society example to explain earmarking requirement); *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) (noting importance of earmarking); *Indep. Inst. v. Fed. Election Comm'n*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (noting that fulfills tailoring because of earmarking requirement).

3. *The informational interest does not apply to* The Whole Story

Lakewood's ordinance does not serve the informational interest as applied to *The Whole Story*. Each edition of Watchdog's newsletter has many articles ranging across various topics.

Decl. ¶¶ 4, 5. The October 2019 edition, the subject of a previous complaint against Watchdog, had 33 articles covering diverse issues and matters of public concern, such as the recently approved slow growth initiative, use of TABOR refunds, coordination between city and county leaders in fighting ballot oppositions, and special interest donors, including government contractors. *See* Decl. ¶ 7; Keefe Complaint at 11-18 (Ex. D).

Cherry-picking statements from different articles, the City concluded that *The Whole Story*'s October 2019 edition contained electioneering communications. But the October 2019 edition can be construed as express advocacy only with statements shorn from the whole. Looking at the diverse topics across that edition's 33 articles, many not even mentioning any candidate, and the whole referring to a number of them, it would be difficult to construe the newsletter as a whole as advocacy for or against any particular candidate. The issue certainly would not be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Fed. Election Comm'n v. Wis. Right to Life, Inc.* ("*WRTL II*"), 551 U.S. 449, 470 (2007) (Roberts, C.J., controlling op.). And dealing with such a communication, the informational interest cannot be served. One cannot say whether a donor to Watchdog supported its reporting on Question 200, its discussion about county issues, or its reporting on city issues that puts current candidates in a bad light, or whether the donor supported Watchdog's website and not *The Whole Story*. Thus, donor reporting does not help voters better understand the constituency or financial supporters of any candidate mentioned in the newsletter.

The disclaimer requirement, applied to the whole, is just as nonsensical. Why would anyone expect a candidate to be authorizing an entire newsletter, on topics having nothing to do with her? It should be apparent that there was no candidate involved in authorizing all the newsletter's speech, such that a compelled disclaimer serves no function other than discouraging speech.

Furthermore, applying the disclosure and disclaimer requirements to individual articles

makes no more sense. Unlike campaign ads, the articles are not discrete communications by different parties attacking different candidates. They are all Watchdog's speech. So, decisions applying campaign finance laws, and the informational interest, to discrete ads do not apply here. Furthermore, disclosure and disclaimers would be unduly burdensome and misleading. Disclaimers on each article, for every candidate mentioned anywhere in the newsletter, would displace much of Watchdog's reporting, becoming a "substantial rather than merely theoretical restraint[] on the quantity and diversity of political speech." *Buckley*, 424 U.S. at 19. And such disclosure would be misleading. Any given donor might contribute in the hope that there was information about city government as a whole, a particular leader or candidate, or growth, or campaign finance laws, or any other issue facing Lakewood. Reporting that each and every donor supported advocacy for each and every candidate mentioned in an issue would not serve the informational interest.

Furthermore, the informational interest is already served given that viewers can evaluate *The Whole Story*'s "angle of news reporting over a period of time, and practice of publishing at regular intervals." *Citizens United v. Gessler*, 773 F.3d 200, 213-14 (10th Cir. 2014) ("*Gessler*") (quoting brief); *see also id*. at 215 ("But when the speaker belongs to the media, the electorate has ample means of making the evaluation."). There is no substantial relation between the informational interest and the disclaimers and disclosure demanded here.

4. *Lakewood's regulations are unconstitutionally underinclusive*

Lakewood's disclosure and disclaimer impositions also fail tailoring because they are underinclusive. They "cannot be regarded as protecting an interest of the highest order" when they "leave[] appreciable damage to" the informational interest unregulated. *Reed*, 576 U.S. at 172 (internal quotation marks omitted). In particular, the City cannot pick and choose "to disfavor certain subjects or viewpoints," nor can it make "restrictions distinguishing among different speakers" to accomplish the same. *Citizens United*, 558 U.S. at 340. Nonetheless, a

council member announced the city's new rule, declaring that Watchdog would now have to "disclose who is paying for it." Gutwein, Facebook (Ex. B). And the City then began exempting from its regulations all news sources other than *The Whole Story*.

Lakewood regulates as an "electioneering communication" any communication that "[u]nambiguously refers to any candidate without expressly advocating that candidate . . . within 60 days before a municipal election." Lakewood Mun. Code § 2.54.020 (Ex. A at 2). The plain language of this broad definition pulls in all news reporting before an election, explicitly noting that it covers communications that are *not* express advocacy. For favored news sources, however, the City has created exemptions that contradict the ordinance's express language.[1] That is, it dismissed complaints against favored sources because they were not express advocacy, even though the ordinance is directed precisely at non-express advocacy. *See* City of Lakewood, Dismissal of campaign finance complaint: City of Lakewood (March 24, 2020) (Ex. H); City of Lakewood, Dismissal of campaign finance complaint: West Suburban Community Media LLC dba Lakewood Sentinel (Apr. 22, 2020) ("Sentinel Dismissal") (Ex. G). And the City has likewise failed to use its authority under Lakewood Mun. Code 2.54.050(B)(1.3) (Ex. A at 12) to pursue complaints against other news sources that fit Lakewood's definition of electioneering communications. (*See* Exs. J-T).

Lakewood can exempt news coverage, but doing so is an admission that the informational interest "is adequately satisfied" by other available information, such as a news source's "history

[1] The city justifies these exemptions by citing to an unnamed decision interpreting state campaign finance law, but that justification rings hollow. As Lakewood is a home rule municipality, any application of state campaign finance law is preempted. *See* Colo. Rev. Stat. § 1-45-116 (noting state requirements "shall not apply"); *In re Complaint Filed by City of Colo. Springs*, 2012 COA 55, ¶ 24, 277 P.3d 937, 942 (Colo. App. 2012) (same). Furthermore, even if state law applied, the "intent-based approach" the city draws from it would be unconstitutional. Sentinel Dismissal at 1 (Ex. G); *see WRTL II*, 551 U.S. at 467 (repeating its rejection of any "intent-and-effect test").

of reporting and offering opinions." *Gessler*, 773 F.3d at 215. Watchdog's "extended history of producing substantial work . . . is at least as accessible to the public as donor lists reported to the" City. *Id.*; *see* Decl. ¶ 4. Readers are aware of its efforts to shine light on the problems in Lakewood and Jefferson County. Decl. ¶ 4-5. And the newsletter follows the same format across issues. Decl. ¶ 4; *see Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 250-51 (1986) (distinguishing campaign materials from entity's regular news publications because of different masthead, staff, and circulation).

Regardless, the City's practice of exempting news coverage shows "that it does not have a sufficient informational interest to impose disclosure burdens on media entities," which also means that "it does not have a sufficient interest to impose those requirements on" Watchdog. *Gessler*, 773 F.3d at 216; *see Reed*, 576 U.S. at 172 (leaving damage to interest shows not protecting interest). Given this diminished interest, the ordinance must fail tailoring and the regulations are unconstitutional as applied to *The Whole Story*. *See Gessler*, 773 F.3d at 216.[2]

B. The electioneering communications regulations are unconstitutionally vague

Lakewood's electioneering communications requirements are "void for vagueness" because they "trap the innocent by not providing fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). And "[w]here First Amendment rights are involved," as here, "an even greater degree of specificity is required" than under the Due Process Clause. *Buckley*, 424 U.S. at 77 (internal quotation marks omitted).

With its electioneering communications law, Lakewood has created a Gordian knot that only this Court can cut. In one breath, the ordinance says that a communication is an electioneering

[2] Furthermore, if Lakewood incorporated or otherwise really did have to follow state law, then it would have to apply Colorado's media exemption. *See* Colo. Const. art. XXVIII, § 2(7)(b) and 2(8)(b); Colo. Rev. Stat. § 1-45-103(9) and (10). And, as with Citizens United in *Gessler*, that exemption would have to apply to news gathering and reporting entities like *The Whole Story*. *Gessler*, 773 F.3d at 215-18.

communication only if it "unambiguously refers to a[] candidate *without* expressly advocating" for him or her. Lakewood Mun. Code § 2.54.020 (emphasis added). In the next, the City tells those wishing to speak that a speaker's "intent . . . must be 'express advocacy' for or against a specific candidate" for a communication "to be an electioneering communication." Sentinel Dismissal at 1 (Ex. G). That is, the city can go after speech as an electioneering communication both if it is and if it isn't express advocacy for or against a candidate. And between its Scylla and Charybdis, the city can silence disfavored speakers. Speakers, on the other hand, being told that their speech will be regulated as an electioneering communication both when they use and don't use express advocacy, will have no clue when they may safely speak.

To make matters worse, the city has adopted an intent-based approach in determining whether speech is express advocacy. *See* Sentinel Complaint at 1 (Ex. F). The Supreme Court has repeatedly rejected any such intent-and-effect test. *See WRTL II*, 551 U.S. at 467. Such a test "open[s] the door to a trial" on every communication "on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned" some other type of issue. *Id*. at 468. It infects determinations with "a burdensome, expert-driven inquiry, with an indeterminate result." *Id* at 469. And it "lead[s] to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to" liability for the other. *Id*. at 468. Because such a "standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion,'" it is unconstitutional. *Id*. (quoting *Buckley*, 424 U.S. at 43). Rather, any test "must be objective, focusing on the substance of the communication," and it "must entail minimal if any discovery." *Id*. at 469.

Because the text and application of Lakewood's regulations are riddled with vagueness, the Court should either hold that it is unconstitutional or follow *Buckley* in imposing a limiting construction. *See Buckley*, 424 U.S. at 43-44, 61, 78-80. In particular, the Court should limit the

reach of Lakewood's electioneering regulations by requiring that regulated speech be express advocacy or its functional equivalent. *The Whole Story* passes either standard.

Examining the October 2019 edition of *The Whole Story*, the edition that the City held was "intended to advocate," Keefe Order at 2, one finds none of the "express words of advocacy." *Buckley*, 424 U.S. at 44 n.52. Nor is it "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 470. The October 2019 edition had 33 articles covering diverse issues and matters of public concern, including the recently approved slow growth initiative, use of TABOR refunds, coordination between city and county leaders in fighting ballot oppositions, and special interest donors, including government contractors. Decl. ¶ 7.

News gathering and reporting commonly shines light on leaders' bad decisions, necessarily mentioning them. The things they do and say are matters of public importance, affecting the most important issues of the day. "Discussion of [those] issues cannot be suppressed simply because the issues may also be pertinent in an election." *WRTL II*, 551 U.S. at 474. Or suppressed because leaders do not like to be criticized. *Cf. Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 754 (2011) ("the speaker is sovereign"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978) (government cannot decide subjects or speakers).

Viewed as a whole, Watchdog's newsletter cannot be considered express advocacy. Rather, across its articles it addresses "legislative issue[s] that [are] either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny." *WRTL II*, 551 U.S. at 474 (internal quotation marks omitted). In so doing, it provides "information [that] is needed or appropriate" for Lakewood residents to address their community's problems. *Id*. (internal quotation marks omitted). Given that *The Whole Story* is a newsletter discussing the important issues facing its city, comparable to other news gathering and reporting, there is a "reasonable

interpretation" of *The Whole Story* "other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 470.[3] But, even if this were a close question, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* at 474.

Accordingly, the Court should either hold that Lakewood's regulations are void for vagueness or impose a limiting instruction, and hold that *The Whole Story* is protected under it.

C. Applying the independent expenditure regulations would be unconstitutional

The City treated *The Whole Story* as the functional equivalent of express advocacy, contrary to the constitutional limits that the Supreme Court imposed on that term. Keefe Order at 2. Given the improper use of the term, and the ongoing efforts to silence Watchdog, it fears publishing any edition that could mention anyone who could possibly be running for office, including the Spring/Summer 2021 edition, as the City might pursue Watchdog's discussion of public issues as independent expenditures. The danger of such silencing led to *Buckley*'s express advocacy limits.

Because the inherently vague language used in regulating independent expenditures could silence issue speech, the Supreme Court limited any such regulation to express advocacy. *See Buckley*, 424 U.S. at 39-44, 78-80. While the Supreme Court may have extended regulation to speech that is the functional equivalent of express advocacy wherever the term "express advocacy is used," *Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 553 (4th Cir. 2012), the City's definition meets neither standard. As just discussed as to

[3] As Justice Scalia noted in *WRTL II*, even tests for determining the functional equivalent of express advocacy are too vague for the First Amendment. They depend on judgment about what is "'reasonable' . . . that is far from certain . . . [and tend] to distortion by reason of the decisionmaker's subjective evaluation of the importance or unimportance of the challenged speech." 551 U.S. at 493 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 494, 499 (urging a return solely to *Buckley*'s express advocacy test). Chief Justice Roberts's test, however, has been affirmed by the Supreme Court. *See Citizens United*, 558 U.S. at 324-25. Thus, while Watchdog preserves for appeal the argument that only *Buckley*'s express advocacy test, and not the test for its functional equivalent, should apply, Watchdog reiterates that Lakewood's regulations are unconstitutional as applied to *The Whole Story* under either standard.

electioneering communications, *The Whole Story*'s 2019 edition could not be express advocacy or its functional equivalent, when properly examined.

As with the October 2019 issue, the Spring/Summer 2021 issue contains many articles on diverse issues, including developers' attempts to circumvent Question 200, candidate fundraising in past elections, City attempts to control garbage collection, marijuana advocacy, harassment claims involving city leaders, and current candidates. Decl. ¶ 13; *see* Ex. I. This issue's topics may illuminate leaders' bad decisions, but that is the purpose of the news, creating discussion of issues that are "pertinent" and "the subject of legislative scrutiny." *WRTL II*, 551 U.S. at 474.

Whether speech may be regulated "must be [an] objective" test. *Id*. at 469. And that is possible only if speech is examined as a whole, not cherry-picked and framed to whatever meaning will allow regulation. A court must "focus[] on the substance of the communication." *Id*. Doing so here, there is a "reasonable interpretation" of the Spring/Summer 2021 issue of *Whole Story* "other than as an appeal to vote for or against a specific candidate. *Id*. at 470. Accordingly, the Court should require that the City properly apply the express advocacy tests, declare *The Whole Story* is not express advocacy or its functional equivalent, and enjoin the city from applying its independent expenditure regulations against the Spring/Summer 2021 issue and similar future issues.

D. Disclosure and disclaimers for news reporting is overbroad

The Supreme Court has never addressed a law so broad. It did not in *Citizens United*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), *Buckley*, or any other case addressing FECA and BCRA, because both contain press exemptions. *See* 52 U.S.C. § 30101(9) and (17) (incorporating definition of and exclusions for expenditures); 52 U.S.C. § 30104(f)(3)(B). Thus, a court—this Court—is finally encountering the full overbreadth of electioneering communications laws, unexempted for favored speech. "According to . . . First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected

speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). In particular, a statute is unconstitutional if its "overbreadth [is] *substantial* . . . relative to [its] statute's plainly legitimate sweep." *Id*. (emphasis in original); *accord Jordan v. Pugh*, 425 F.3d 820, 828 (10th Cir. 2005).

By one reckoning there are 1,279 daily newspapers in the United States.[4] If each paper were to mention only one candidate each day in the 60 days before an election, that would be 76,740 communications regulated as electioneering communications. And that would not cover all the news communicated by radio and television. Closer to home, it could regulate a lot of reporting by the Denver Post or the Lakewood Sentinel/Jeffco Transcript.

Even though "debate on public issues [in general] should be uninhibited, robust, and wide-open," *N.Y. Times Co.*, 376 U.S. at 270, Lakewood's ordinance discourages not just any speech, but the political speech that is "integral to the operation of the system of government established by our Constitution," *Buckley*, 424 U.S. at 14. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted). That effect is amplified by attacking news reporting, as threats to the press "undercut[] the basic assumption of our political system that the press will often serve as an important restraint on government." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983). And because of the press's role in giving the public critical information about government, "a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment." *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971).

And this is true whether or not a news source is a regional or national, or one "engaged in high journalism," *Zinna v. Congrove*, 680 F.3d 1236, 1241 (10th Cir. 2012), or if it is a

[4] Amy Watson, "Number of daily newspapers in the U.S. 1970-2018," Statista, Mar. 3, 2020, https://www.statista.com/statistics/183408/number-of-us-daily-newspapers-since-1975/

newsletter or website. What matters is that, as with *The Whole Story*, it "report[s] on a plethora of local government issues to a sizable audience[,] . . . encouraging transparency and accountability among officials." *Id*.

Thus, sweeping electioneering communications laws like Lakewood's threatens a broad swath of critical, highly protected speech. At the same time, it serves little or no governmental interest: any informational interest the government may have is already served by the public's familiarity with a news source. *Gessler*, 773 F.3d at 212-15. And the lack of fit between the informational interest and disclaimer and disclosure provisions applied to news sources has been amply recognized by the federal, state, and local governments exempting the press.[5] Thus, given the substantial speech outside the ordinance's plainly legitimate sweep, Lakewood's regulations are facially unconstitutional.

II. THE OTHER TRO AND RESTRAINING ORDER FACTORS FAVOR WATCHDOG

The remaining factors for temporary restraining orders and preliminary injunctions also favor Watchdog. The second factor—irreparable harm—always favors the movant in such cases because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Verlo*, 820 F.3d at 1127 (quoting *Elrod*, 427 U.S. at 373). The city has enforced its regulations in the past, and it will do so again if Watchdog attempts to speak.

The third and fourth factors likewise merge with the merits in First Amendment cases where the government is the opposing party. *See Id.* ("As to whether the preliminary injunction is in the

[5] *See, e.g.*, 52 U.S.C. § 30101(9) and (17); 52 U.S.C. § 30104(3)(B); Colo. Const. Art. XXVIII, Section 2; Del. Code Ann. tit. 15, § 8002; Fla. Stat. Ann. § 106.011; Haw. Rev. Stat. Ann. § 11-341; Aurora Ordinance 2020-58 (Nov. 16, 2020) (Ex. U) (electioneering communications); Colorado Springs Code of Ordinances, 5.2.202 (Ex. V) (expenditures); Denver Revised Municipal Code, Art. III § 15-32(j)(4) and (l)(1) (Ex. W); Fort Collins Municipal Code, Article V, Sec. 7-132 (definition of independent expenditure) (Ex. X).

public interest . . . it is always in the public interest to prevent the violation of a party's constitutional rights." (internal quotation marks omitted)); *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) ("But when the law . . . is likely unconstitutional, [the public's] interests do not outweigh [a plaintiff's] in having his constitutional rights protected."). Thus, given that Watchdog is likely to succeed on the merits, it is entitled to injunctive relief.

III. THE COURT SHOULD WAIVE THE SECURITY BOND

The Court should exercise its discretion to waive the security bond under Fed. R. Civ. P. 65(c). *See Winnebago Tribe v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). Watchdog has a high probability of succeeding on the merits, the City will not incur any monetary damages from an injunction, and withholding the temporary restraining order and preliminary injunction would harm Watchdog's constitutional rights. *Id*. (noting no harm); *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 (D. Utah 2017) (enforcing constitutional right).

CONCLUSION

For the forgoing reasons, this Court should grant a temporary restraining order and preliminary injunction, protecting the publication of *The Whole Story*'s Spring/Summer 2021 issue, and a preliminary injunction protecting the publication of the Fall 2021 issue, against application of Lakewood Ordinance §§ 2.54.020, 2.54.030, and 2.54.070.

Dated: June 2, 2021

Respectfully submitted,

s/ Owen Yeates

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CERTIFICATE OF ATTORNEY CONFERENCE

Pursuant to D.C.COLO.LCivR 7.1(a), I certify that on Friday, May 28, 2021, and Tuesday, June 1, 2021, I left voicemail messages and sent an email to the City Attorney, stating that we would file this action on Wednesday, June 2, 2021, and that we would file a motion for temporary restraining order and motion for preliminary injunction. I asked whether the City Attorney would represent the City and the City Clerk, for the best physical address for service, and an email address to send copies of the filings. On Tuesday, June 1, 2021, Alex Dorotik of the City Attorney's office returned my call and gave me his email address. The City Attorney does not know whether it will accept service, or whether the City and City Clerk will oppose the motion for temporary restraining order and for preliminary injunction, until it has reviewed the documents. In addition to serving the complaint and motion by process server, I will send electronic copies to Mr. Dorotik after filing them.

Dated: June 2, 2021

/s/ *Owen Yeates*
Owen Yeates
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify I caused the foregoing document to be served on the following:

City of Lakewood, Colorado
480 S. Allison Pkwy
Lakewood, CO 80226

Bruce Roome, City Clerk
City of Lakewood, Colorado
480 S. Allison Pkwy
Lakewood, CO 80226

Dated: June 2, 2021

/s/ *Owen Yeates*
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