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**UNITED STATES DISTRICT COURT**
**DISTRICT OF WYOMING**

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| WYOMING GUN OWNERS, a Wyoming nonprofit corporation<br><br>Plaintiff,<br><br>vs.<br><br>EDWARD BUCHANAN, in his official capacity as Wyoming Secretary of State, KAREN WHEELER, in her individual and official capacities as Wyoming 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<br><br>Defendants. | Case No. 21-CV-108-SWS |

# DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants Edward A. Buchanan, Wyoming Secretary of State, Karen Wheeler, Wyoming Deputy Secretary of State, Kai Schon Election Division Director for the Wyoming Secretary of State, and Bridget Hill, Wyoming Attorney General, in their official capacities, and Karen Wheeler and Kai Schon in their individual capacities, hereby respond to and request the Court deny Plaintiff's Motion for Preliminary Injunction.

## I. Background

Plaintiff Wyoming Gun Owners (WyGO) filed its complaint under 28 U.S.C. § 1331 and 42 U.S.C. § 1983 asserting violations of its First Amendment rights. Specifically, WyGO asserts that Wyo. Stat. Ann. §§ 22-25-101(c)(i) and (ii) and 22-25-106(h) are unconstitutional and WyGO seeks to have these statutes enjoined. WyGO also separately moved for a preliminary injunction, seeking to prohibit Defendants from enforcing the statutes against WyGO or any other entity.

## II. Legal Standard

A preliminary injunction is an "extraordinary remedy that is granted only when the movant's right to relief [is] clear and unequivocal." *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1145 (10th Cir. 2017) (internal citation and quotation marks omitted). A party seeking preliminary relief must demonstrate: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (citation omitted).

The Tenth Circuit has recognized "three types of specifically disfavored preliminary injunctions[:] (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004). If a plaintiff seeks one of these disfavored categories of injunctions, the plaintiff's claims "must be more closely scrutinized to assure that the exigencies of the case support granting of a remedy that is extraordinary even in the normal

course." *Id.* In these cases, the plaintiff must "make a strong showing both with respect to the likelihood of success on the merits and with regard to the balance of harms." *Id.* at 976.

## III. Argument

The preliminary injunction WyGO seeks fits two disfavored categories. First, because granting the requested injunction would change how the State regulates campaign finance, granting an injunction in this case would alter the status quo. Second, because granting the injunction would allow WyGO to forego campaign finance disclosure and reporting requirements, granting it would afford WyGO all the relief that it could recover at the conclusion of a full trial on the merits. Because the relief WyGO requests is disfavored, WyGO must not only demonstrate its likelihood of success on the merits and that the balance of equities tips in their favor; it must make a "strong showing." *Id.* Because WyGO cannot make the required showing, this Court should deny its motion for preliminary injunction.

### A. Substantial likelihood of success on the merits

As explained in the previously filed brief in support of Defendants motion to dismiss, WyGO's 42 U.S.C. § 1983 claims against Defendants in their official capacity are barred by sovereign immunity. (ECF 24, at 6-9). Additionally, Individual Defendants Wheeler and Schon are entitled to qualified immunity for WyGO's § 1983 claims. (ECF 24, at 9-12). Because the Court lacks jurisdiction to hear those claims, this response will only address WyGO's remaining claims. For the reasons articulated in Defendants' motion to dismiss, WyGO's remaining claims should be dismissed for failure to state a claim upon which relief can be granted. This weighs strongly against granting a preliminary injunction in this case.

In its motion for preliminary injunction, WyGO asserts three claims involving the definition of electioneering communications and associated disclosure and reporting requirements.

First, WyGO claims the statutes are unconstitutionally vague facially and as applied. (ECF 30 at 7-17). Second, it appears WyGO asserts the statutes are unconstitutional facially and as applied to WyGO. (*Id.* at 17-22). Third, WyGO claims that statutes are overbroad. (*Id.* at 22-23). WyGO has not, and cannot, show that it is substantially likely to succeed on the merits of these claims.

***1. The electioneering communications statutes are not unconstitutionally vague.***

In support of its assertion that the electioneering statutes are unconstitutionally vague, WyGO presents four separate claims. First, WyGO asserts that Wyo. Stat. Ann. § 22-25-101(c) contains a "broad 'commentary' exception that swallows the rule." (*Id.* at 8). Second, WyGO claims the definition of electioneering communications is unconstitutionally vague because it "fails to define who are 'members' for purposes of the newsletter exception." (*Id.*). Third, WyGO asserts the statute "fails to define what contributions are to be considered 'related to' an electioneering communication." (*Id.*). Finally, WyGO alleges the statutes "fail[] to clearly demarcate between unregulated issue advocacy and regulated electioneering communications." (*Id.*).

The vagueness doctrine is an outgrowth of the Due Process Clause of the Fifth Amendment. *United States v. Williams*, 553 U.S. 285, 304 (2008). A statute may be found impermissibly vague: (1) "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Faustin v. City and Cnty. of Denver, Colo.*, 423 F.3d 1192, 1201 (10th Cir. 2005) (citation omitted). "Perfect clarity and precise guidance" are not required. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

"The Supreme Court has cautioned that 'speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a state when it is

surely valid in the vast majority of intended applications.'" *Ward v. Utah*, 398 F.3d 1239, 1251 (10th Cir. 2005) (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). "Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, . . . the more important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Thus this Court must consider whether the challenged statutes lack fair notice or sufficient law-enforcement guidance.

**a) Commentary**

As it relates to WyGO's first claim, it asserts that almost all of its communication qualifies as "commentary" based on the dictionary definition of the term. (ECF 30 at 9). Moreover, WyGO states that it is in a difficult position because it does not know which of its political messages will invite third-party complaints or enforcement by the Secretary of State's Office. (*Id.* at 10-11).

The referenced exception to the electioneering communication definition provides that the following is not an electioneering communication:

> 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

Wyo. Stat. Ann. § 22-25-101(c)(ii)(B) (emphasis added).

WyGO's argument ignores the fact that the term "commentary" is part of the phrase "news report, commentary or editorial," which is itself one in a list of like items. "Commentary," therefore, should be read as the context demands and it is apparent that the subsection is intended to exempt reports by media outlets, not advertisements for or against specific candidates or issues.

*See id.* Simply because a communication contains an "expression of opinion" on a candidate or an issue does not mean the communication is exempted from the definition of electioneering communications based on Wyo. Stat. Ann. § 22-25-101(c)(ii)(B). Moreover, the exemption in does not depend on the type of entity engaging in the communication. Instead, it depends on the content of the communication. Defendants do not assert the type of entity making the communication is relevant—solely the content of the communication and the manner in which it is distributed. *Id.* Accordingly, WyGO's argument that the "commentary exception" is too broad that it makes the definition of electioneering communications too vague is without merit.

**b) Members**

Second, WyGO asserts that the definition of electioneering communications is unconstitutionally vague because it does not define the term "members" for purposes of the news "newsletter exception" in Wyo. Stat. Ann. § 26-25-101(c)(ii)(A). (ECF 30 at 11-12). Specifically, WyGO provides its own interpretation of who it considers to be a "member" but it asserts the statutes and Defendants' failure to define this term makes the statute unconstitutionally vague. (*Id.* at 12).

That referenced subsection provides: "A communication made by an entity as a component of a newsletter or other internal communication of that entity which is distributed only to **members** or employees of the entity" is not an electioneering communication. Wyo. Stat. Ann. § 26-25-101(c)(ii)(A) (emphasis added).

As discussed above, the test to determine whether a statute is void for vagueness is whether the statute provides a person of ordinary intelligence fair notice of what is prohibited. *Williams*, 553 U.S. at 304. Generally, a member of an organization is any person who belongs to that organization. Some organizations require members to pay a fee, while others allow for free

membership. While there may be some ambiguity depending on the specific organization and its structure, it is generally clear whether a person is a member of a specific organization such that a person of ordinary intelligence would know if they were a member of WyGO and similarly, the organization would know who its members are.

Contrary to its assertions in its motion for preliminary injunction, WyGO's website is telling about who it considers to be a member. Specifically, the link to "join" on its webpage lists four different "membership options"—Liberty Level Membership, Freedom Level Membership, Patriot Level Membership, and Lifetime Membership. (Attachment A). Similarly, on the "renew membership" tab on its webpage has the same four levels of membership. (Attachment B). Conversely, the link to "donate" contains a check box that states "I would like to receive text message updates/emails from WYGO." (Attachment C). There is no reference to "membership" or "member" by simply providing a donation through the link listed. (*Id.*). Further, WyGO's "Policies" explain how it considers membership. Specifically, it provides: "If you purchase gear, make a donation **or purchase a membership**, your information submitted is retained indefinitely, unless directed by you to remove it. This is so we can identify you as a donor **or member of our organization**." (Attachment D).

The contents of WyGO's website shows who it considers to be a "member" and is directly contrary to its statement that it "considers anyone who has contributed to it, in any amount, to be a member." (ECF 30 at 11). While WyGO maintains that it that the term "members" in Wyo. Stat. Ann. § 22-25-101(c)(ii)(A) is too vague to understand, it appears WyGO understands and has identified who it considers to be members of WyGO.

The statute only exempts newsletters or other internal communication from the definition of electioneering communications if the communication is "distributed **only to** members or

employees of the entity." Wyo. Stat. Ann. § 22-25-101(c)(ii)(A) (emphasis added). Comparing this to the requirement that an electioneering communication be "publicly distributed," it is apparent that communications solely within the organization are not characterized as electioneering communications whereas widespread, publicly distributed communications are electioneering communications. Wyo. Stat. Ann. § 22-25-101(c). It is worth noting that the challenged radio advertisement was not only communicated to WyGO's members, but instead broadcast in the Cheyenne radio market. (Compl. ¶ 18). WyGO again fails to demonstrate a person of reasonable intelligence would not understand what conduct constitutes electioneering communications, or how the statute encourages arbitrary and discriminatory enforcement. Thus, WyGO's second claim also fails.

**c) Contributions "related to" electioneering communications**

WyGO asserts that Wyo. Stat Ann. § 22-25-106(h) is unclear "which contributions must be reported." (ECF 30 at 12). In addition, WyGO asserts that its donors might not earmark their contributions for specific communications and it would be difficult or impossible to link a donation to a specific communication. (*Id.* at 13). WyGO also argues that it would have fewer donors if it was required to disclose its donors. (*Id.* at 15).

The reporting statute requires the contribution statement to list only "expenditures and contributions which relate to an . . . electioneering communication." Wyo. Stat. Ann. § 22-25-106(h)(iv). The contribution statement must include a full and complete record of contributions related to that communication. Wyo. Stat. Ann. § 22-25-106(h)(v). Specifically, for applicable contributions equal to or greater than $100, the contribution statement must include the name of the contributor, and the purpose of each expenditure shall be listed. *Id.* For applicable contributions under $100, the organization must report but need not be itemized. *Id.*

Simply because the statute does not require contributions to be earmarked, does not de facto mean that a statute requiring contributions that "relate to" an electioneering communication to be reported is void for vagueness. There are many different types of contributions that can be made to an organization and they can be made for many different purposes. If a donation is earmarked for a specific communication, it is clear that donation would "relate to" that communication. 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 organization's communications. An organization may not circumvent the statutory reporting and disclosure requirements by deciding not to allow for earmarking.

While "[p]erfect clarity and precise guidance" is not required, a person of ordinary intelligence would understand what type of contributions **relate to** a specific expenditure. *Ward*, 491 U.S. at 794; *Faustin*, 423 F.3d at 120. Moreover, WyGO has presented no factual allegations that the statute "authorizes or even encourages arbitrary and discriminatory enforcement. *Faustin*, 423 F.3d at 1201. As a result, WyGO's assertion that the phrase "relates to" makes the definitions of electioneering communications unconstitutionally vague fails.

WyGO's conclusory statement that the phrase makes a statute unconstitutionally vague lacks is insufficient to meet the pleadings requirements and allege a claim upon which relief can be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Further, in the complaint, WyGO does not allege facts sufficient to demonstrate widespread confusion or discriminatory application of the statutes to support its assertion that the electioneering communications statutes are facially unconstitutional. As a result, this claim lacks merit.

**d) Issue advocacy and electioneering communications.**

Finally, WyGO asserts that statutory definition of electioneering communication is vague as applied to WyGO. (ECF 30 at 15). Specifically, WyGO asserts its radio advertisement and email blasts could "not 'only be reasonably [interpreted] as an appeal to vote for or against the candidate[s]' mentioned." (*Id.*). WyGO's argument that the ad can "plausibly be interpreted as an attempt to influence the other candidate to take more pro-gun positions" or "as a request to either candidates to support gun rights" is unsupported by the documents attached to WyGO's motion. (*Id.* at 16).

First, it is important to note that in issuing the Final Order Imposing Civil Penalty, the Secretary of State's Office determined that only the radio advertisement, not the "member newsletter" or other communications, constituted electioneering activities. (ECF 30-9 at 3). The radio advertisement described Senator Anthony Bouchard as a "brave champion" who will "fight for your gun rights" and "stand against" the "violent thugs [who] are rooting, looting, and vandalizing." (ECF 30-1 at 5). The ad also specifically mentioned Bouchard's primary opponent Erin Johnson and referred to her as "pathetic" and directed listeners to "tell Johnson that Wyoming gun owners need fighters, not country club moderates who will stab us in the back." (ECF 30-1 at 5).

The Secretary of State's Office determined that the advertisement did not merely contain issue advocacy but instead could "only be reasonably interpreted as an appeal to vote for" candidate Anthony Bouchard or against candidate Erin Johnson. (ECF 30-8 at 3). In this case, there is little doubt that the thesis of the advertisement was to support candidate Anthony Bouchard and not support his opponent Erin Johnson.

To be an electioneering communication, the statute requires that it "can only be reasonably interpreted as an appeal to vote for or against the candidate or ballot proposition." Wyo. Stat. Ann. § 22-25-101(c)(i)(B). The Supreme Court has held issue advocacy that can only be interpreted as a call to vote for or against a particular candidate to be the functional equivalent of express advocacy. *Citizens United v. FEC*, 558 U.S. 310, 324-35 (2010). If speech can be interpreted as something other than a call to vote for or against a particular candidate or ballot proposition, the communication is considered issue advocacy and does not fall within the definition of "electioneering communications." *See* Wyo. Stat. Ann. § 22-25-101(c)(i)(B). As such, the electioneering communications statute subjects communication that is the functional equivalent of express advocacy to reporting requirements. *Id.* As a result, the statute is in line with Supreme Court precedent and therefore, is not unconstitutionally vague.

***2. The electioneering communications statutes are constitutional both facially and as applied to WyGO.***

WyGO asserts that the definition of electioneering communications and the statute requiring disclosure and reporting if the organization expends more than $500 on electioneering communications during an election fails exacting scrutiny. (ECF 30 at 17). Specifically, WyGO asserts that the $500 statutory threshold to trigger disclosure and reporting requirements is unconstitutional because the monetary threshold is too low, it lacks an earmarking requirement, the "informational value of disclosing WyGO's donors is low, because the position and viewpoints of WyGO and its members are well known." (*Id.* at 21). In addition, WyGO asserts Wyoming's reporting and disclosure statues are not narrowly tailored to the government's interest. (*Id.* at 18).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. It also provides fundamental protections against contribution and expenditure limitations for political campaigns. *Republican Party of New Mexico v. King*, 741

F.3d 1089, 1092 (10th Cir. 2013). Unlike restrictions on campaign spending, disclosure and disclaimer requirements "impose no ceiling on campaign-related activities and do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366. "Government[s] may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Id.* at 319. Moreover, disclosure requirements have been held to be the "least restrictive means of curbing the evils of campaign ignorance and corruption that congress found to exist." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

The First Amendment also protects political association, as group association may enhance effective advocacy. *Id.* at 15. Because compelled disclosure may infringe on the rights to associational privacy and belief, disclosure requirements must survive "exacting scrutiny," which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.'" *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (citation omitted). To withstand exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (citation omitted).

The Supreme Court has recognized three governmental interests associated with reporting and disclosing campaign finances: compliance interests, anti-corruption interests, and informational interests. *Sampson v. Buescher,* 625 F.3d 1247, 1256 (10th Cir. 2010) (citing *Valeo*, 424 U.S. at 67). First, "reporting and disclosing campaign finance requirements 'are an essential means of gathering data necessary to detect violations of . . . contribution limitations.'" *Id.* (citing *Valeo*, 424 U.S. at 68). Second, "publicizing large contributions and expenditures can 'deter actual corruption and avoid the appearance of corruption' and can facilitate detection of post-election favoritism." *Id.* (citing *Valeo*, 424 U.S. at 67). Finally, disclosure of contributions and expenditures:

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

*Id.* (citation omitted).

**a) The State has a sufficiently important governmental interest and the reporting and disclosure requirements are substantially related to furthering those interests.**

There is no dispute that the State has significantly important governmental interests in regulating campaign finance and establishing reporting requirements. The compliance interest does not apply here because the statutes at issue do not impose contribution limits on independent expenditures or electioneering communications. Wyo. Stat. Ann. § 22-25-106(h). But because the electioneering communication definition encompasses candidate advocacy as well as issue advocacy, the second and third governmental interests identified in *Sampson* support the reporting requirements established in Wyo. Stat. Ann. § 22-25-106(h). *See Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office*, 332 P.3d 94, 107 (Ariz. Ct. App. 2014) (holding that the anti-corruption interest was a sufficiently important interest supporting Arizona's disclosure requirements); *Indep. Inst. v. Williams*, 812 F.3d 787, 798 (10th Cir. 2016) (holding that the informational interest is a sufficiently important governmental interest in the context of candidate elections).

To satisfy exacting scrutiny, there must be a "substantial relation" between the disclosure and reporting requirements and the government interests identified above. *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2383 (2021) Courts generally look to the administrative burden the disclosure requirement imposes or the amount that triggers the disclosure requirement to

determine whether the disclosure requirement is substantially related to the government's interest. *See e.g.*, *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015).

In *Yamada*, the Ninth Circuit analyzed five Hawaii statutes, which imposed reporting and disclosure requirements on organizations that make or received contributions over $1,000 in an election cycle, among other things. 786 F.3d at 1185-86. The registration requirements included registering as a noncandidate committee, filing an organizational report, designating officers, disclosing bank account information, and maintaining records for five years. *Id.* at 1195. The reporting requirements included "disclosing contributions made and received, expenditures by the committee, and the assets on hand at the end for the reporting period." *Id.* The court found that the registration and disclosure requirements did not present an undue burden on noncandidate committees and were substantially related to Hawaii's interests in "informing the electorate, preventing corruption or its appearance, and avoiding the circumvention of valid campaign finance laws." *Id.* at 1194, 1201.

Here, the reporting and disclosure requirements in Wyo. Stat. Ann. § 22-25-106(h) only apply to organizations that spend more than $500 on electioneering communications or independent expenditures during any primary, general, or special election. Wyo. Stat. Ann. § 22-25-106(h). There is no dispute that the statute does not prohibit organizations, such as WyGO, from engaging in political speech. *See Citizens United*, 558 U.S. at 366 (holding disclosure and disclaimer requirements "do not prevent anyone from speaking."). Instead, the statutes only require the entity to identify the organization or individual causing the communication to be made; file within the required timeframe; list contributions that relate to an electioneering communication; and provide a record of contributions related to the electioneering communication. Wyo. Stat. Ann. § 22-25-106(h).

While the monetary threshold is lower in Wyoming than approved in *Yamada*, the burdens imposed by Section 106(h) are commensurately less onerous than those upheld by the Ninth Circuit. Requiring entities to "file an itemized statement of contributions and expenditures" directly furthers the State's interest in ensuring the electorate is provided with the necessary information to "insure that the voters are fully informed about the person or group who is speaking" and to "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages." *Free Speech v. FEC*, 720 F.3d 798 (quoting *Citizens United*, 558 U.S. at 371). Moreover, disclosure is the only way to inform the electorate about the person or group supporting the electioneering communication.

As it relates to the monetary trigger requiring disclosure, the Tenth Circuit has upheld a Colorado statute with a $1,000 trigger stating that "[s]maller elections can be influenced by less expensive communications." *Indep. Inst.*, 812 F.3d at 797-98. With a smaller electorate than Colorado, it is reasonable to conclude that less expensive communications reach a larger percentage of Wyoming's electorate. Thus the monetary threshold is substantially related to the governmental interests in disclosure and reporting requirements.

Next, WyGO's asserts that the informational value is low because WyGO's viewpoints are well known is insufficient to demonstrate a substantial relation between the requirement and the government interest. Accepting WyGO's position, the government's informational interest would be de minimis because most organizations have a cause and advocate for that specific cause. Additionally, in this case, it is worth noting that WyGO went beyond supporting a position or a cause (Second Amendment rights), to appealing to voters to support one candidate (Anthony Bouchard) against another candidate (Erin Johnson) in the Republican primary. WyGO's claim that the value of disclosing its donors is low has no factual or legal support.

Because the administrative burden imposed on organizations making electioneering communications is less than the burdens that have been upheld by other courts, and because Wyoming's elections routinely see far less spending than that in other states, Wyoming's reporting and disclosure requirements are substantially related to its important informational interest.

**b) The reporting and disclosure requirements are narrowly tailored.**

There is no dispute that "[w]here exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Ams. for Prosperity Found.*, 141 S.Ct. at 2385. WyGO argues that Wyoming's lack of an earmarking requirement demonstrates the statute is not narrowly tailored and thus fails exacting scrutiny. (ECF 30 at 22). In support, WyGO cites *Independence Institute*, *Citizens United v. Gessler*, and *Americans for Prosperity Foundation v. Bonta*, however, each of those cases are distinguishable.

In *Independence Institute*, earmarking was only one of the factors the court considered in determining whether the statute was narrowly tailored, it was not dispositive. *Indep. Inst.*, 812 F.3d at 797. The Court also considered that the statute 1) "only demands disclosure for communications that unambiguously refer to a primary-election candidate within thirty days of a primary election or a general-election candidate within sixty days of a general election;" 2) that "[t]he message also must be targeted to the relevant electorate;" 3) that only certain means of communication were covered; and 4) the monetary amount triggering disclosure. *Id.* at 797-98. The Court held that while the disclosure requirements "undoubtedly chill potential donors to some extent, these requirements are sufficiently drawn to serve the public's informational interest and are less restrictive than other alternatives." *Id.* at 798. Based on *Independence Institute*, earmarking is a

factor that this Court can consider, but is not dispositive on whether the reporting and disclosure requirements are narrowly tailored.

Similarly, in *Citizens United v. Gessler*, the Tenth Circuit analyzed a Colorado regulation that required disclosing the donor if a donation was earmarked for an electioneering communication. *Citizens United v. Gessler*, 773 F.3d 200, 211-12 (10th Cir. 2014). But the Court's decision did not address whether the Colorado's disclosure regulations were narrowly tailored. *See generally id.* at 202-19. Instead, the decision focused on the governmental interests and whether the regulation was necessary to serve those interests. *Id.* at 210-19. Thus, WyGO's assertion that *Gessler* requires an earmarking requirement to be narrowly tailored is not supported by the opinion.

In *Americans for Prosperity Foundation*, California required charitable organizations to disclose IRS forms containing names and addresses of major donors as part of renewing their registration with the state Attorney General. *Ams. for Prosperity Found.*, 141 S.Ct. at 2380. In reviewing the requirements under exacting scrutiny, the Court found that while the state had a substantial governmental interest in protecting the public from fraud, requiring all entities to provide the required information did not further its fraud detection efforts. *Id.* at 2386. Moreover, the Court found that the record did not support the finding that a "pre-investigation collection" of the forms "did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." *Id.* Because the State failed to demonstrate "its need for universal production in light of any less intrusive alternatives," the Court found the regulation was not narrowly tailored. *Id.*

Unlike *Americans for Prosperity Foundation*, the disclosure requirement does not apply to all entities causing electioneering communications, but only to entities spending more than $500

on electioneering communications in an election. Given Wyoming's population is approximately 10% of the Colorado's population, is appropriate, this lower threshold is appropriate. *Indep. Inst.*, 812 F.3d at 797-98. ("Smaller elections can be influenced by less expensive communications."). Additionally, Wyoming's interest in the disclosures is in providing the electorate with information on who is funding the electioneering communication. The disclosure itself provides the information that directly furthers the State's informational interest. Thus, Wyoming's disclosure statutes are narrowly tailored to serve the state's informational interest and as a result, Wyo. Stat. Ann. § 22-25-106(h) satisfies exacting scrutiny. *Ams. for Prosperity Found.*, 141 S.Ct. at 2385.

**c) Wyoming's reporting and disclosure requirements are constitutional as applied to WyGO.**

As it relates to WyGO's as-applied challenge, the only occasion in which the statute has been enforced against WyGO resulted in the Secretary of State's Office imposing a $500 civil penalty for failing to file the required reports for a radio advertisement. (Compl. ¶ 40). Based on the contents of the radio advertisement, the Secretary of State's Office determined it could "only be reasonably interpreted as an appeal to vote for or against" a candidate and met the definition of an electioneering communication. (*Id.*); (ECF 30-8 at 3). As the functional equivalent of express advocacy, this type of speech may be regulated through reporting and disclosure requirements. *Citizens United,* 558 U.S. at 324-35. Because the disclosure requirements in Wyo. Stat. Ann. § 22-25-106(h) are substantially related to the State's important informational interest and the statute is narrowly tailored to serve that interest, the electioneering communications statutes satisfy exacting scrutiny and may be constitutionally applied to WyGO.

***3. The electioneering communications statutes are not overbroad.***

WyGO claims that Wyoming's definition of "electioneering communications" is facially overbroad "in-so-far-as Defendants seek to regulate communications with non-members who have voluntarily signed up to receive WyGO's emails, but not donated to WyGO. (ECF 30 at 23).

A law that a state may constitutionally apply to an individual may still be invalid if it is unconstitutionally overbroad. *United States v. Stevens*, 559 U.S. 460, 473 (2010). Generally, facial challenges based on overbreadth are disfavored and statutes are presumed to be constitutional. *United States v. Brune*, 797 F.3d 1009, 1019 (10th Cir. 2014). In the First Amendment context, a law may be invalidated as unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep." *Stevens*, 559 U.S at 473 (citation omitted). Thus "even where a fair amount of constitutional speech is implicated, [courts] will not invalidate the statute unless **significant imbalance exists**." *Brune*, 767 F.3d at 1018 (emphasis added).

Additionally, the claimed overbreadth must also be real; hypothetical impermissible applications are not enough to demonstrate overbreadth. *Faustin*, 423 F.3d at 1199. "In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* at 1200 (citation omitted).

As discussed above, Wyo. Stat. Ann. § 22-25-106(h) does not suppress any speech, it merely creates reporting and disclosure requirements for organizations making electioneering communications over a specific monetary threshold. WyGO fails to show that a **substantial number** of applications of the definition of "electioneering communication" in Wyo. Stat. Ann. § 22-25-101(c) are unconstitutional. *Stevens*, 559 U.S at 473. Even if this Court was persuaded that the statutes implicate some constitutional speech, WyGO has wholly failed to demonstrate

that a "significant imbalance exists" that would justify invalidating the statute. *Brune*, 767 F.3d at 1018. Thus, WyGO's claims that the definition of electioneering communication is facially unconstitutionally vague fails to state a claim upon which relief can be granted.

In addition, WyGO's assertion that Wyo. Stat. Ann. § 22-25-106(h) is unconstitutional as applied also fails. WyGO simply asserts that the state has no legitimate interest in regulating whether state residents opt-in to receive information about state policies (ECF 30 at 23), but WyGO blurs the issues. There is no dispute that the state has significant governmental interests in disclosure and reporting requirements. *Sampson*, 625 F.3d at 1256. Moreover, the burden imposed on organizations making electioneering communications is low. It is unclear exactly how WyGO asserts the statute is unconstitutional as applied, but WyGO's claim is not persuasive and thus, WyGO's as-applied overbreadth claims fail.

**B. Irreparable harm**

"To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citations omitted). "[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Id*. (citation and quotation marks omitted). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)).

WyGO simply alleges that it will suffer irreparable injuries. (ECF 30 at 22-23). But, for the reasons discussed in section III.A, WyGO is unlikely to succeed on the merits and therefore, irreparable injury is not presumed and there is no loss of First Amendment freedoms to support a finding that WyGO will be irreparably harmed.

**C. Whether the threatened injury outweighs the injury the opposing party will suffer under an injunction**

"The third preliminary-injunction factor involves balancing the irreparable harms identified above against the harm that the preliminary injunction causes [Defendants]." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019). "Under the heightened disfavored-injunction standard, the Plaintiffs need to make a strong showing that the balance of harms tips in their favor." *Id*. Here, the balance of harms weighs in favor of the State.

***1. Granting the injunction will harm the State's campaign finance process.***

WyGO merely states that the State's interest in "disclosures about electioneering communication does not outweigh the burden on WyGO's right to speak about political issues during campaign season, and the electorate's right to hear their speech." (ECF 30 at 24). As discussed above, the challenged statutes do not prohibit WyGO from engaging in political speech, instead, WyGO is only required to report and disclose in accordance with Wyo. Stat. Ann. § 22-25-106(h) when it expense more than $500 on electioneering communications or independent expenditures in any primary, general, or special election. *Citizens United*, 558 U.S. at 319.

The State and the public's interests in disclosure and reporting requirements for electioneering communications is well-established. "[D]isclaimer requirements . . . .are necessary to provide the electorate with information and to insure that the voters are fully informed about the person or group who is speaking. Moreover, the disclosure requirements provide the transparency that 'enables the electorate to make informed decisions and give proper weight to different speakers and messages.'" *Free Speech*, 720 F.3d at 798 (quoting *Citizens United*, 558 U.S. at 371). "These disclaimer and disclosure requirements become even more essential and necessary to enable informed choice in the political marketplace following Citizen[s] United's change to the political campaign landscape with the removal of the limit on corporate expenditures." *Id.*

States adopt laws that create campaign finance disclosure requirements to ensure campaign finance compliance, ensure quid-pro-quo corruption of candidates does not occur, and to ensure citizens have appropriate information on who is spending money on elections. The Supreme Court has recognized these are sufficiently important governmental interests, sufficient to withstand exacting scrutiny. *Sampson,* 625 F.3d at 1256. Granting the proposed injunction and enjoining enforcement of the electioneering communications statute and reporting requirement against any person, would not merely permit WyGO to avoid providing campaign finance disclosures, but it would open the door to unregulated campaign finance related to electioneering communications. Thus the governmental interests would be harmed by granting WyGO's motion for preliminary injunction.

***2. Even if WyGO is harmed, denying the injunction will cause only minor harm.***

As articulated above, WyGO is unlikely to succeed on the merits and there is no loss of First Amendment freedoms to support a finding that WyGO's will be irreparably harmed. Since there is no harm to WyGO, this factor does not outweigh the State's compelling interests in campaign finance disclosure laws

The reporting requirements do not prohibit WyGO from expressing its positions. Indeed, the statutes simply require WyGO to disclose contributions for electioneering communications over $500 per election. This type of disclosure and reporting requirements have been held to satisfy exacting scrutiny. *Citizens United*, 558 U.S. at 366.

To the extent WyGO asserts a loss of privacy by disclosing donors (ECF 30 at 15), this issue present with every disclosure law. WyGO offers no evidence that its donors have a greater privacy interest than other organizations or why every disclosure law should be invalidated. *Rio Grande Found. v. City of Santa Fe*, 437 F. Supp. 3d 1051, 1070 (D. N.M., Jan 29, 2020) (General

concerns of chilled speech "do not de facto invalidate every disclosure law; rather, a court must consider the evidence of chilled speech and weigh the burdens against the legislative interests."). While disclosure requirements can chill association, the disclosure requirements is subject to review under exacting scrutiny, with an emphasis on narrow tailoring. *Ams. for Prosperity Found.* 141 S.Ct at 2384. As discussed above, Wyoming's reporting and disclosure requirements are narrowly tailored and withstand exacting scrutiny. *See Supra* Section III.A.

Plaintiffs' generalized allegations of harm and chilled speech that cannot establish the irreparable harm needed for a preliminary injunction. At the very least, WyGO has not made the required "strong showing" that this factor weighs in their favor. *Ashcroft*, 389 F.3d at 975-76. For these reasons, the balance of harms weighs in the Defendants' favor.

**D. Adversely affect the public interest**

The last preliminary injunction factor requires that the injunction not be against the public interest. *Free the Nipple-Fort Collins*, 916 F.3d at 807. In this case, the State has significant interests in regulating campaign finance and establishing reporting requirements. Specifically, these requirements further the State's interest in deterring corruption and avoiding the appearance of corruption, and also ensuring he electorate is provided with the necessary information to "insure that the voters are fully informed about the person or group who is speaking" and to "enable[] the electorate to make informed decisions and give proper weight to different speakers and messages." *Free Speech*, 720 F.3d at 798 (citations omitted).

Unlike WyGO's speculative and unsupported harms, the State and the public have a well-established interest in the transparency of electioneering communications. For the reasons explained above, granting WyGO a preliminary injunction would remove any reporting requirement for electioneering communications, which would allow entities to spend unlimited

funds on electioneering communications without disclosing the sources of the contributions. As a result, the electorate would have little to no information about the donors who contributed to the organization that made the communication and would be hindered in their ability to make informed decisions about various speakers and the messages created. Both of these results would be adverse to the public interest. This harm cannot be undone because the public will be in the dark as to the speaker behind the communications. For these reasons, the public interest weighs against granting a preliminary injunction.

## IV. Conclusion

The Court should deny WyGO's Motion for Preliminary Injunction.

**DATED** this 26th day of July, 2021.

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**CERTIFICATE OF SERVICE**

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