

**UNITED STATES DISTRICT COURT  
DISTRICT OF WYOMING**

WYOMING GUN OWNERS, a  
Wyoming nonprofit corporation

Plaintiff,

v.

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

Defendants.

Case No. 21-CV-108-SWS

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**DEFENDANTS' BRIEF IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

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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 (“State Officials”), submit this brief in support of their motion for summary judgment pursuant to Fed. R. Civ. P. 56(a).

**I. Introduction**

Plaintiff Wyoming Gun Owners (“WyGO”) filed a complaint seeking declaratory and injunctive relief against State Officials pursuant to 42 U.S.C. § 1983. (ECF No. 1, ¶ 1,

p. 18-19). Specifically, WyGO asserted that Wyo. Stat. Ann. §§ 22-25-101(c)(i) and (ii) and 22-25-106(h) were unconstitutional facially and as applied to WyGO. (ECF No. 1, ¶¶ 53-55, 57-58, 66, 69-72). Defendants filed a motion to dismiss the complaint, which this Court granted in part and denied in part. (ECF No. 38). Following this Court’s order, the only remaining claims are WyGO’s as-applied claims related to its radio advertisement against official capacity Defendants challenging: (1) whether WyGO’s radio advertisement could only be reasonably interpreted as an appeal to vote for or against a candidate or a ballot proposition; (2) whether the “commentary” exemption from the definition of electioneering communication under Wyo. Stat. Ann. § 22-25-101(c)(i)(B) is unconstitutionally vague; and (3) whether the phrase “relate to” in Wyo. Stat. Ann. § 22-25-106(h) is unconstitutionally vague. (ECF No. 38 at 30).

## II. Statement of Facts

1. WyGO is a non-profit corporation organized under Wyoming Law. (Ex. A ¶ 1, Stipulated Facts).
2. Aaron Dorr is the Treasurer and principal of WyGO. (ECF No. 30-1 ¶ 3).
3. Starting in June 2020, Wyoming State Senator Anthony Bouchard was in communication with Dorr regarding his primary challenger Erin Johnson. (Ex. B, text messages from Bouchard to Dorr).
4. On June 15, 2020, Dorr sent an email to Rick Shaftan, Neighborhood Research & Media, requesting “videos for the following races for the 8/18 GOP **primary** in Wyoming.” (Ex. C, Arron Dorr emails) (emphasis in original). Dorr stated that he needed these videos completed, with editing, no later than July 24, 2020. (*Id.*). In that email he

explained that Anthony Bouchard was being “primaried” by Erin Johnson and directed the Shaftan to “[h]it her as hard as possible, the whole state is watching.” (*Id.*).

5. On July 1, 2020, Dorr sent another email to Shaftan, stating:

I specifically said in my emails that I wanted to do one spot, approve it, and move on. I wanted to avoid this. Can this guy not read?

That being said, Bouchard approved, [remainder of email redacted by WyGO].

(*Id.*).<sup>1</sup>

6. In August 2020, WyGO paid \$1,229.10 to a radio station to run a 60-second advertisement in the Cheyenne radio market. (Ex. A ¶ 13). Aaron Dorr narrated the radio advertisement, which had the following script:

America is under attack. Violent thugs are rioting, looting, and vandalizing—pushing socialism for America. Only a few brave champions will stand against them and fight for your gun rights. One of those champions is Anthony Bouchard—a nationally known conservative leader who has always led the fight for Wyoming gun owners.

That’s why the Left hates him. And that’s why they are propping up liberal Erin Johnson in the August primary—hoping that this self-described country-club, chamber-of-commerce moderate will help them pass red-flag gun seizures in Wyoming.

We all know Anthony Bouchard has fought like hell for gun owners. But Erin Johnson won’t even mention gun rights on her website. That’s pathetic. But that’s Erin Johnson.

Tell Johnson that Wyoming gun owners need fighters, not country-club moderates who will stab us in the back the first chance they get.

This is Aaron Dorr and this ad is paid for by Wyoming Gun Owners.

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<sup>1</sup> WyGO did not include the referenced emails as part of their discovery responses..

(Ex. A ¶ 13; Ex. D, Ad Audio).

7. Wyoming held a primary election on August 18, 2020, followed by a general election on November 3, 2020. (Ex. A ¶ 9).

8. On October 12, 2020, the Wyoming Secretary of State's Office received a complaint from the Greater Cheyenne Chamber of Commerce alleging that WyGO violated Wyoming's campaign finance statutes. The Greater Cheyenne Chamber of Commerce provided several examples of communications it believed were electioneering communications subject to disclosure and reporting requirements, including the August 2020 radio advertisement. (Ex. A ¶ 15; ECF No. 30-5).

9. On October 14, 2020, Kai Schon, Election Division Director of the Wyoming Secretary of State, emailed Aaron Dorr, Executive Director of WyGO. (Ex. A ¶ 16; ECF No. 30-6). Mr. Schon informed Dorr that the Wyoming Secretary of State's Office determined that WyGO had caused electioneering communications in excess of \$500 during the election cycle and that WyGO failed to comply with the reporting provisions of Wyo. Stat. Ann. § 22-25-106(h). (Ex. A ¶ 16; ECF No. 30-6). The notice warned WyGO that it had twenty-one (21) days from the date of the notice to comply with the reporting requirements, or WyGO would be subject to a civil penalty of \$500.00. (*Id.*).

10. On October 21, 2020, WyGO's legal counsel wrote to Schon asserting that all of WyGO's 2020 activities were in furtherance of "WyGO's mission to defeat proposed legislation that would curtail gun rights and pass legislation that advances gun rights, *regardless of who wins a given election.*" (ECF No. 30-7 at 3) (emphasis in original).

11. On November 2, 2020, then-Assistant Attorney General James LaRock responded by letter to WyGO's legal counsel specifically directing him to the audio file of the radio advertisement at issue in this case. (Ex. A ¶ 19; ECF No. 30-8). The letter explained that the Secretary of State's Office determined the radio ad was an electioneering communication because it referred to two clearly identified candidates for office, Erin Johnson and Anthony Bouchard, and could only be interpreted as an appeal to vote against Erin Johnson and for Anthony Bouchard. (Ex. A ¶ 19; ECF No. 30-8).

12. WyGO never challenged the Office's October 14, 2020 finding that the radio advertisement was an electioneering communication through by seeking judicial review of agency action. WyGO also failed to file the required report. (Ex. A ¶ 21).

13. As a result of WyGO's failure to provide the required report, on December 2, 2020, Deputy Secretary of State Karen Wheeler signed a Final Order Imposing Civil Penalty for failing to comply with the requirements in Wyo. Stat. Ann. § 22-25-106(h). (Ex. A ¶ 20; ECF No. 30-9).

14. Wyoming Statute § 22-25-101(c)(i) defines electioneering communication:

(i) "Electioneering communication" means, except as otherwise provided by paragraph (ii) of this subsection, any communication, including an advertisement, which is publicly distributed as a billboard, brochure, email, mailing, magazine, pamphlet or periodical, as the component of an internet website or newspaper or by the facilities of a cable television system, electronic communication network, internet streaming service, radio station, telephone or cellular system, television station or satellite system and which:

(A) Refers to or depicts a clearly identified candidate for nomination or election to public office or a clearly identified ballot proposition and which does not expressly advocate the nomination, election or defeat of the candidate or the adoption or defeat of the ballot proposition;

(B) Can only be reasonably interpreted as an appeal to vote for or against the candidate or ballot proposition;

(C) Is made within thirty (30) calendar days of a primary election, sixty (60) calendar days of a general election or twenty-one (21) calendar days of any special election during which the candidate or ballot proposition will appear on the ballot; and

(D) Is targeted to the electors in the geographic area:

(I) The candidate would represent if elected; or

(II) Affected by the ballot proposition.

Wyo. Stat. Ann. § 22-25-101(c)(i).

15. Additionally, the statute expressly exempts the following from the definition of electioneering communication:

(A) A communication made by an entity as a component of a newsletter or other internal communication of the entity which is distributed only to members or employees of the entity;

(B) 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;

(C) A communication made as part of a public debate or forum that invites at least two (2) opposing candidates for public office or one (1) advocate and one (1) opponent of a ballot proposition or a communication that promotes the debate or forum and is made by or on behalf of the person sponsoring or hosting the debate or forum;

(D) The act of producing or distributing an electioneering communication.

Wyo. Stat. Ann. § 22-25-101(c)(ii).

16. If an organization spends more than \$500 on electioneering communications or independent expenditures during any primary, general, or special election, it is required to “file an itemized statement of contributions and expenditures” with the Secretary of State’s Office. Wyo. Stat. Ann. § 22-25-106(h). The report shall:

(i) Identify the organization causing the electioneering communication or independent expenditure to be made and the individual acting on behalf of the organization causing the communication or expenditure to be made, if applicable;

(ii) Be filed at least seven (7) days but not more than fourteen (14) days before any primary, general or special election. Any contribution received or expenditure made after the statement has been filed, through the day of the election, whether a primary, general or special election, shall be filed as an amendment to the statement within ten (10) days after the election;

...

(iv) Only list those expenditures and contributions which relate to an independent expenditure or electioneering communication;

(v) Set forth the full and complete record of contributions which relate to an independent expenditure or electioneering communication, including cash, goods or services and actual and promised expenditures. The date of each contribution of one hundred dollars (\$100.00) or more, any expenditure or obligation, the name of the person from whom received or to whom paid and the purpose of each expenditure or obligation shall be listed. All contributions under one hundred dollars (\$100.00) shall be reported but need not be itemized. Should the accumulation of contributions from a person exceed the one hundred dollar (\$100.00) threshold, all contributions from that person shall be itemized;

(vi) Be signed by both the chairman and treasurer of the organization, if those positions are present in the organization, or by the person who caused the independent expenditure or electioneering communication to be made.

*Id.*

17. WyGO filed this suit against Defendants Wyoming Secretary of State Edward Buchanan in his official capacity, Wyoming Deputy Secretary of State Karen Wheeler, in both her personal and official capacities, Election Division Director Kai Schon, in both his official and personal capacity, and Wyoming Attorney General Bridget Hill, in her official capacity. (ECF No. 1). WyGO made several claims regarding the constitutionality of the Wyoming Electioneering Communications statutes. (*Id.*).

18. State Officials filed a motion to dismiss on the basis of qualified immunity, sovereign immunity, and failure to state a claim. (ECF No. 23).

19. This Court granted in part and denied in part the motion to dismiss. (ECF No. 38).

20. In its Order, this Court dismissed the personal capacity claims against Defendants Wheeler and Schon. (*Id.* at 16). This Court also dismissed the official capacity claims against all State Officials brought under 42 U.S.C. § 1983. (*Id.* at 11). This Court allowed WyGO's declaratory judgment claims that words "relate to" in Wyo. Stat. Ann. § 22-25-106(h) and word "commentary" in Wyo. Stat. Ann. § 22-25-101(c)(ii)(B) are unconstitutional as applied to WyGO. This Court also allowed WyGO's claim that Wyo. Stat. Ann. § 22-25-106(h) is unconstitutional as applied to WyGO. (*Id.* at 30).

### **III. Legal Standard**

#### **A. Summary Judgment Standard**

Summary judgment is appropriate under Rule 56(a) when the movant shows "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine 'if there is sufficient



evidence on each side so that a rational trier of fact could resolve the issue either way,’ and it is material ‘if under the substantive law it is essential to the proper disposition of the claim.’” *Van Dam v. Town of Guernsey*, 2021 WL 1774137, at \*3 (D. Wyo. May 4, 2021) (quoting *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013)). When reviewing a motion for summary judgment, “the Court views the record and all reasonable inferences that might be drawn from it in the light most favorable to the party opposing summary judgment.” *Id.* (citation omitted).

“Once a prima facie showing is made, the burden shifts to the party opposing the motion to present specific evidence, not mere allegations or denials, showing that there is a genuine issue of material fact. *Id.* “Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another.” *Garcia v. Dep’t of Health and Social Servs.*, 2020 WL 5629784, at \*1 (D. Wyo. Aug. 25, 2020).

#### **IV. Argument**

WyGO asserts that Wyoming’s electioneering disclosure regime is unconstitutional as applied to WyGO’s radio advertisement. Specifically, WyGO asserts: (1) State Officials incorrectly determined that WyGO’s radio advertisement could only be reasonably interpreted as an appeal to vote for or against a candidate or a ballot proposition; (2) the “commentary” exemption from the definition of electioneering communication in Wyo. Stat. Ann. § 22-25-101(c)(i)(B) is unconstitutionally vague; and (3) the phrase “relate to” in Wyo. Stat. Ann. § 22-25-106(h) is unconstitutionally vague and is insufficient to inform

WyGO which communications must be reported. For the following reasons WyGO's constitutional claims should fail.

**A. WyGO's radio advertisement could only be interpreted as an appeal to vote for or against a certain candidate.**

WyGO asserts that State Officials violated its First Amendment rights because the radio advertisement can be interpreted as something other than an appeal to vote for or against a specific candidate. (ECF No. 1 ¶ 57). Specifically, WyGO asserts that its radio advertisement can “plausibly be interpreted as an attempt to influence the other candidate to take more pro-gun positions” or “as a request to either candidate to support gun rights, and not to backtrack in that support after the election.” (ECF No. 30 at 16). As a result, WyGO argues that its communication does not fall under the definition of an “electioneering communication” under Wyo. Stat. Ann. § 22-25-101(c)(i) and therefore, the Secretary of State's Office improperly determined it was subject to the reporting and disclosure requirements in Wyo. Stat. Ann. § 22-25-106(h). In support, WyGO has previously cited *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), but that case expressly affirmed regulating the functional equivalent of express advocacy.

In *Wisconsin Right to Life, Inc.*, the Supreme Court held that the Bipartisan Campaign Reform Act's (BCRA) prohibition on using corporate funds to finance electioneering communications was unconstitutional as applied because the advertisements at issue were not express advocacy or its functional equivalent. 551 U.S. at 481. The Court determined that “a court should find that an ad is the functional equivalent of express

advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 470. In *Wisconsin Right to Life*, the Court looked at the facts and circumstances of the advertisements and determined the ads were plainly not the functional equivalent of express advocacy. *Id.* The Court noted that the ads were consistent with a genuine issue ad, focused on a legislative issue, took a position on the issue, exhorted the public to adopt that position, and urged the public to contact their elected officials regarding the issue. *Id.* The Court also noted that the ads did “mention an election, candidacy, political party, or challenger; and they [did] not take a position on a candidate’s character, qualifications, or fitness for office.” *Id.*

The advertisement in this case is just the opposite of the type considered in *Wisconsin Right to Life*. This ad specifically noted the August 2020 primary, named both Bouchard and his primary opponent Erin Johnson, then took a position on both candidates’ character, qualifications, and fitness for office. (Ex. A ¶ 13).

As this Court previously noted:

The Plaintiff does not contest that the radio advertisement “described Senator Bouchard as a ‘brave champion’ who will ‘fight for your gun rights’ and ‘stand against’ the ‘violent thugs [who] are rioting, looting, and vandalizing.’ The ad referred to Johnson as ‘pathetic’ and warned that candidates like Johnson would ‘stab us in the back the first chance they get.’” (ECF No. 30-9 at 3.) Under an objective reading or listening of the advertisement, it can only be reasonably interpreted as an appeal to vote for Senator Bouchard and against [] Johnson. See Wyo. Stat. § 22-25-101(c)(i)(B). The words used to describe the two [candidates], combined with WyGO’s mission to strongly advocate for gun rights and candidates who support them, can be reasonably understood in no other way. Thus, it was appropriate for the Defendants to find the radio advertisement was an electioneering communication under Wyoming’s disclosure regime.

(ECF No. 38 at 26-27).

The radio advertisement was an appeal for voters to vote for Bouchard and not for Johnson. The advertisement told listeners to “tell Johnson that Wyoming gun owners need fighters, not country-club moderates who will stab us in the back the first chance they get.” (Ex. A ¶ 13). The intent of the advertisement was for voters to give this message to Johnson when they went to the polls by voting for Bouchard. This was not an issue advertisement, or even an ad to encourage Johnson to take a stronger stand on gun rights and not to backtrack on that position after the election. Rather, this advertisement was an appeal for voters to vote for Bouchard against Johnson in the primary.

The nature of the ad is reinforced by the communications surrounding the ad’s genesis and development. Dorr specifically directed that the ad be completed by July 24, 2020 so that it would be available before the August 18, 2020 GOP primary in Wyoming. (Ex. B at WYGO0008). In fact, Dorr’s communications related to creating the ad indicate that Bouchard approved the ad before it ever aired. (Ex. C at WYGO0010). Starting in early June 2020, Bouchard sent Dorr text messages about Johnson’s entry into the primary race. (Ex. B at WYGO0015). In one message, Bouchard asked WyGO to make a “stink” about Dallas Tyrell working on Johnson’s campaign, suggesting that Dorr contact WyGO members to call Tyrell Motors and “ask why they are working to oust the most pro-gun senator WY has ever had . . . .” (*Id.* at WYGO0016).

While WyGO redacted much of the conversations between Dorr and Bouchard, it is clear that Bouchard continued to send Dorr information on Johnson’s campaign through June and July 2020. (*Id.* at WYGO0016-22). Again, a significant portion of the conversation is redacted, but on August 10, 2020, Dorr asks Bouchard if he is hearing the

radio ads in Cheyenne. (*Id.* at WYGO0023). Bouchard responds that Dorr has been “stiffed” because all that played just minutes ago was the last 7 seconds of ad. (*Id.*). Dorr tells Bouchard that his “guy is on it,” presumably meaning that his “guy” was in the process of determining why the ad did not play in its entirety. (*Id.* at WYGO0024).

There is no question in the case that the radio advertisement was the functional equivalent of express advocacy. *See Citizens United v. FEC*, 558 U.S. 310, 324-25 (2010) (holding that a communication that can only be reasonably interpreted as an appeal to vote for or against a specific candidate is the functional equivalent of express advocacy, which may be subject to reporting and disclosure requirements). The ad:

- Ran the week before the primary election,
- Mentioned the primary election,
- Named both Bouchard and Johnson, and
- Claimed that Bouchard was a champion who would fight for gun rights, while candidates like Johnson would stab them in the back the first chance they got.

(Ex. A ¶ 13). Moreover, the communications highlighted above conclusively show that the purpose of the ad was to assist Bouchard’s primary efforts against Johnson. It was appropriate for the State Officials to find that this ad could only be interpreted as an appeal to vote for Bouchard and against Johnson in the August 18, 2020 primary.

**B. The “commentary” exemption in Wyo. Stat. Ann. § 22-25-101(c)(ii)(B) is not unconstitutionally vague as applied to WyGO’s radio advertisement.**

WyGO also argues that the advertisement was “commentary” exempt from the definition of electioneering communication. (ECF No. 1 at 17). In its order on the motion

to dismiss, this Court agreed that the term “commentary” had no clear meaning and that it could be arbitrarily or discriminatorily enforced. (ECF No. 38 at 28). While any given word in isolation may be unclear, when reviewing the word “commentary” in context of the other words in the statute, the definition is not constitutionally vague.

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).

In applying this provision, the Secretary must apply the law in a manner that is not arbitrary or capricious and in accordance with the legislative intent. In applying statutory construction, the Wyoming Supreme Court has said the goal is to effectuate the Legislature’s intent. *Wyo. Office of State Lands & Invs. v. Mule Shoe Ranch, Inc.*, 2011 WY 68, ¶ 13, 252 P.3d 951, 954 (Wyo. 2011) (quoting *Dorr v. Smith, Keller & Assocs.*, 2010 WY 120, ¶ 11, 238 P.3d 549, 552 (Wyo. 2010)). Statutory provisions must be interpreted in context with other statutes on the same subject or possessing the same general purpose. *Seherr-Thoss v. Teton Cty. Bd. of Cty. Comm’rs*, 2014 WY 82, ¶ 17, 329 P.3d 936, 944 (Wyo. 2014). Effect must be given to every component of each statute. *Dep’t of Revenue Taxation v. Pacifcorp*, 872 P.2d 1163, 1166 (Wyo. 1994). Related statutes will be construed in a manner to avoid conflicting with one another. *Seherr-Thoss*, ¶ 17, 329

P.3d at 944. “[A]ll portions of [the]act must be read in pari materia, and every word clause and sentence of it must be considered so that no part will be inoperative or superfluous.” *Hamline v. Transcon. Lines*, 701 P.2d 1139, 1142 (Wyo. 1985); *Rodriguez v. Casey*, 2002 WY 111, ¶ 10, 50 P.3d 323, 326 (Wyo. 2002).

The commentary exception is part of the definition section setting out what is an “electioneering communication” is and what is not. While, as this Court noted, commentary has several different dictionary definitions (ECF No. 30 at 28), in the context of the statute the term “commentary” is part of an exception for “news report, commentary or editorial or similar communications.” Wyo. Stat. Ann. § 22-25-101(c)(ii)(B). This exception is for commentary in the same vein of news reports and editorials in the media, not paid advertising for a specific candidate. Applying the definition of commentary as an “expression of opinion” or “a criticism or discussion of something” broadly, without any other context, would render meaningless the term “news report” or “other similar communication.” In this context “commentary” is included with “or editorial or a similar communication” so that that it is not just any commentary, but the type of commentary in a news report, editorial, or other similar communication.

Additionally, given that all electioneering communications could be considered an “expression of opinion” or a “criticism or discussion of something,” using such a broad definition would negate the entire definition of “electioneering communion” and would not give effect to the statute as a whole. *In re Woods*, 743 F.3d 689, 699 (10th Cir. 2014) (“[E]xceptions must not be interpreted so broadly as to swallow the rule.”). Rather, using the rules of construction, the definition of “commentary” in the exception is for media

outlets, not paid political advertisements. In the context of Wyo. Stat. Ann. § 22-25-101(c)(ii)(B), the term commentary is not unconstitutionally vague. A person of ordinary intelligence should realize that “communication consisting of a news report, commentary or editorial or a similar communication” does not include paid advertising of the nature of the radio ad at issue. See *United States v. Williams*, 553 U.S. 285, 304 (statute must provide person of ordinary intelligence fair notice of what is prohibited).

Accordingly, WyGO’s argument that the “commentary exception” is so broad that it makes the definition of electioneering communications unconstitutionally vague is without merit. Additionally, the radio ad was not commentary that was exempted by the statute.

**C. The phrase “relate to” in Wyo. Stat. Ann. § 22-25-106(h) is not unconstitutionally vague as applied to WyGO because WyGO knew or should have known which contributions should be reported.**

The phrase “relate to” is not unconstitutionally vague as applied to WyGO. Courts apply a strong presumption of validity when considering whether a statute is unconstitutionally vague. *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). A statute may be invalidated for vagueness only when 1) it fails to define the offense with sufficient certainty that an ordinary person can understand the conduct prohibited, or 2) encourages arbitrary, discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *F.C.C. v. Fox Tel. Stations, Inc.*, 567 U.S. 239, 253 (2012). Plaintiffs whose conduct is clearly forbidden by statute cannot raise a successful vagueness claim. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010)



The degree of vagueness permitted depends on the nature of the statute. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). For statutes implicating constitutional rights, courts will apply a “more stringent” test than ordinary civil statutes. *Hoffman Estates*, 455 U.S. at 499; *Fox Tel. Stations, Inc.*, 567 U.S. at 254-55 (noting chilling effect to be a concern in a First Amendment context when fair notice is not given). Perfect clarity and precise guidance have never been required where regulations restrict expressive activity. *Humanitarian Law Project*, 561 U.S. at 19 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

“Relate” means “to have some relation (often fol. by *to*).” Webster’s New Universal Unabridged Dictionary, 1626 (1996) (fourth definition). In turn, “relation” means “an existing connection; a significant association between or among things.” *Id.* (first definition). By its plain meaning, the statute requires that the required report list those expenditures and contributions that have an “existing connection” or “a significant association” between the expenditures or contributions and electioneering communications. *See* Wyo. Stat. Ann. § 22-25-106(h)(iv). The statute concerns itself with expenditures and contributions, and the criteria for reporting is set in dollars. *Id.* Accordingly, expenditures and contributions should be reported if they paid for any part of the electioneering communication. This is a rather mundane analysis: if the funds paid for an electioneering communication, the expenditure or contribution must be reported, assuming all other threshold requirements are met.

Courts have routinely upheld statutes employing a similar phrasing to Wyo. Stat. Ann. § 22-25-106(h) against facial and as-applied vagueness challenges. *See, e.g., United*

*States v. Morrison*, 844 F.2d 1057, 1074 (4th Cir. 1998) (criminalizing publications of documents “relating to the national defense”); *United States v. Portanova*, 961 F.3d 252, 263 (3d Cir. 2020) (enhancing criminal sentences for activities “relating to” the exploitation of minors); *United States v. Barton*, 418 F. Supp. 3d 134, 140 (E.D. La. 2019) (prohibiting “any drug or hormonal substance, chemically and pharmacologically related to testosterone”); *Jenkins v. New Jersey Dept. of Corrs.*, 989 A.2d 854, 864 (N.J. Super. Ct. App. Div. 2010) (prohibiting “possession or exhibition of anything related to a security threat group”). Broad, straightforward phrasing does not equate to unconstitutionally vague phrasing. *Portanova*, 961 F.3d at 263. For sophisticated actors operating within a particular space, such as WyGO, courts have inferred that the actor can discern what “relates to” a certain action based on expertise or experience. *Morrison*, 844 F.2d at 1074.

WyGO’s purported difficulties in determining what contributions “relate to” the radio advertisement are not because the statute is vague. Instead, WyGO has failed to institute internal recordkeeping practices that allow it to easily attribute individual contributions to specific expenditures. (Ex. E at 3-4, WYGO’s Answer to Discovery Requests). As a consequence of its practices, all contributions are commingled, and cannot be separated after the fact. Due to WyGO’s failure to designate particular income sources as electioneering communication funds and commingling all contributions, those contributions received before the expenditure is “related to” WyGO’s radio advertisement.

WyGO could have—and still may, if it wishes to avoid this issue in the future—implement a system that accounts for each contribution separately. Contributions used for electioneering communications would be reported, and those used for other purposes

would not. The same general principle applies for tracking expenditures. Many entities, including presumably WyGO's counsels' law firms, specifically track expenditures for certain activities or clients, including purchases and accounting for staff time and effort. These same methods can be used for apportioning the portion of salary and benefits, spent on electioneering communications.

None of these methods are unprecedented or particularly difficult. Attorney regulatory bodies expect lawyers to do something similar when maintaining client trust accounts beginning the day they are admitted to the Bar. *E.g.*, Wyo. R. of Prof. Conduct for Attys. at Law 1.15(g). Any federal grantee or sub-grantee is familiar with the time-and-effort documentation requirements that accompany federal awards. 2 C.F.R. § 200.430(i). Wyoming law simply expects the same of a sophisticated political actor like WyGO or any other political action committee (PAC).

WyGO had abundant notice that it was about to embark on creating an electioneering communication, and it could have adjusted accounting procedures accordingly. WyGO knew as early as June 15, 2020 that Bouchard was being "primaried." (Ex. C at WyGO0008). And as discussed above, the advertisement that WyGO developed to support Bouchard is an electioneering communication intended to "[h]it [Erin Johnson] as hard as possible." (*Id.*). While it may not have been a perfect solution, WyGO could have taken the necessary first steps to limit the disclosures it would eventually have to make, but it did not. Alternatively, WyGO could have limited its expenditure for the radio advertisement to less than \$500.00, so as not to cross the threshold for reporting.

Given the plain meaning of “relate to” in this context, WyGO cannot claim to lack notice of what the statute requires. The statutory requirement for reporting electioneering communications became effective on July 1, 2019. 2019 Wyo. Sess. Laws 1-8. WyGO should have known the definition of electioneering communications and when reporting would be triggered going into the 2020 election. WyGO simply would prefer to avoid the consequences of its own choices in an accounting system.

There is also no evidence that the Secretary of State has arbitrarily or discriminatorily enforced the reporting requirements, or that the phrase “related to” would enable him to do so. This particular case arose from the Secretary receiving a complaint that WyGO had engaged in electioneering communications, but failed to file any reports required by law. (ECF No. 30-5).

The Secretary did not independently seek to enforce the statutes against WyGO. The Secretary received a complaint, investigated the complaint, and determined that WyGO’s radio advertisement constituted an electioneering communication that required reporting. (Ex. A ¶¶ 17, 20; ECF Nos. 30-6, 30-9). While WyGO may suggest unfair enforcement of the reporting statute, this was the only complaint the Secretary received related to an organization failing to file the required reports. (Ex. F at 7, State Officials’ Discovery Responses). There is no evidence suggesting that the Secretary treated WyGO arbitrarily.

## **V. Conclusion**

Based on the foregoing, there is no genuine question of material fact in this matter. As a matter of law, WyGO’s as-applied constitutional challenges to Wyo. Stat. Ann. §§ 22-25-101(c)(i) and (ii) and 22-25-106(h) fail. This Court should find that the Secretary

properly applied these statutes and dismiss WyGO's complaint and that WyGO was subject to electioneering communication reporting requirements in Wyo. Stat. Ann. § 22-25-106(h).

**DATED** this 28th day of January, 2022.

*/s/ Brandi Monger*

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Brandi Monger #6-3731  
Deputy Attorney General

Mackenzie Williams #6-4250  
James Peters # 7-57493  
Senior Assistant Attorneys General

Wyoming Attorney General's Office  
109 State Capitol  
Cheyenne, Wyoming 82002  
(307) 777-7886  
brandi.monger@wyo.gov  
mackenzie.williams@wyo.gov  
james.peters@wyo.gov

*ATTORNEYS FOR DEFENDANTS*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served this 28th day of January, 2022, by the following means:

Seth Johnson  
Slow and Steady Law Office, PLLC  
1116 W. Farm Ave.  
P.O. Box 1309  
Saratoga, WY 82331  
(307) 399-6060  
Turtle@SlowandSteadyLaw.com

VIA CM/ECF

Endel Kolde  
Institute for Free Speech  
1150 Connecticut Avenue, NW, Suite 801  
Washington, DC 20036  
(202) 301-1664  
dkolde@ifs.org

VIA CM/ECF

Stephen R. Klein  
Barr & Klein PPLC  
1629 K St. NW, Ste. 300  
Washington, DC 20006  
(202) 804-6676  
steve@barrklein.com

VIA CM/ECF

/s/ Jessica Curless  
Jessica Curless, Paralegal  
Office of the Wyoming Attorney General