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-PAB **REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION**

INTRODUCTION

"[I]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy [is an] effective . . . restraint on freedom of association . . . ." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2021 U.S. Lexis 3569, at *16 (2021) ("*AFP*") (internal quotation marks omitted). Lakewood's electioneering communications regulations involve the compelled disclosure of affiliation, as well as compelled scripts on the face of the communications. Although those regulations may function differently as written in the municipal code and as the City applies them, their restraint on freedom of association is unconstitutional either way, despite Defendants' arguments to the contrary. *See* Defendants' Response ("Opp.") (ECF No. 17). As are Lakewood's independent expenditure regulations, as applied to Watchdog.

STANDARD OF REVIEW

In *Citizens United v. Federal Election Commission*, 558 U.S. 310, 366 (2010), the Supreme Court applied exacting scrutiny to disclaimers as well as disclosure. But the Court has more recently tightened its scrutiny of government-mandated scripts, even to lesser protected forms of speech than political expression. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371, 2374 (2018) (applying strict scrutiny); *cf. ACLU of Nev. v. Heller*, 378 F.3d 979, 987 (9th Cir. 2004) (applying "traditional strict scrutiny" to expanded disclaimer requirements before *Citizens United*). Regardless, even if exacting scrutiny applies to both disclosure and disclaimer

requirements, the Supreme Court has emphasized the strict nature of exacting scrutiny. *See AFP*, 2021 U.S. Lexis 3569, at *16-19. It requires not just "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," but that "disclosure regimes . . . be narrowly tailored to the government's asserted interest." *Id*. at *17, 19 (internal quotation marks omitted). Lakewood's regulations cannot survive such scrutiny.

ARGUMENT

As the City wrote them, Lakewood's electioneering communications provisions are unconstitutional because they cannot meet any informational interest and are overbroad. And the City's application of its electioneering communication provisions only amplifies their unconstitutionality: The City's application is unconstitutionally vague and underinclusive. Furthermore, any regulation of Watchdog's speech as express advocacy, under either the guise of electioneering communications or independent expenditures, would violate the strict requirements for express advocacy or its functional equivalent.

A. The electioneering communications provisions are not tailored to the informational interest.

The City failed to show that any Court has ever upheld as sweeping an electioneering communications law as Lakewood's. The Supreme Court has not done so in 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) (electioneering communications exemptions). And while the City attempts to reduce the entire case to a press exemption, and it asserts that the institutional media enjoys no special First Amendment protection owing to its identity, Opp. at 5, Watchdog does not argue otherwise. It is hardly novel to reject the proposition that someone could be above the law, always and in all circumstances, merely because of her identity as a member of the institutional media. The institutional media might well be able to truly engage in express advocacy. And that may be why

Congress did not exempt news stations owned by political parties. 52 U.S.C. § 30104(f)(3)(B)(i). But Watchdog is not asking for an exemption merely because *The Whole Story* is a newsletter or newspaper. Watchdog argues that Lakewood's electioneering communications provisions fail constitutional scrutiny because they are not narrowly tailored to any informational interest, as applied to news reporting. The courts have never addressed this—they have never needed to—and this Court must now address the lack of tailoring and stunning overbreadth of pure, unadulterated electioneering communications laws.

Courts are extremely protective of issue speech, erring on the side of caution rather than risking it be chilled. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("most fundamental First Amendment activities"); *id*. at 42-44, 51 (noting nebulous distinction between issue and political speech, narrowing statutory construction, and invalidating the narrowed statute). The Supreme Court allowed the encroachment on issue speech by electioneering communications laws only because the BCRA record demonstrated that, in the time right before an election, false issue ads "specifically intended to affect election results" proliferated. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 127 (2003). But news reporting critical of elected leaders' actions appears all year long, whenever relevant news is investigated and comes to light. And reporting at any given time includes stories on many topics, including but not limited to problems in government.

The Whole Story shares both tendencies of news reporting—a mixture of articles in any given issue, and articles pointing to problems in government in every edition across the year. *See* Smith Decl. ¶ 7 (describing range of articles in October 2019 edition); *id*. ¶ 13 (describing range of articles in Spring/Summer 2021 edition); *id*. ¶ 11 (noting that future editions will contain substantially similar content); Keefe Complaint at 11-18 (ECF No. 2-6) (October 2019 edition); Spring/Summer 2021 edition (ECF No. 2-11).

Accordingly, a substantial relation cannot exist between the informational interest and

disclosure of Watchdog's donors and disclaimers in *The Whole Story*. *See* Mot. at 5-6 (ECF No. 2). If the Whole Story mentions multiple city leaders who happen to be candidates, triggering disclosure reports for each of those candidates, and each of those reports includes all of Watchdog's donors, such disclosure would tell voters nothing about the "spending that is unambiguously campaign related" in order to "increase[] the fund of information concerning those who support the candidates." *Buckley*, 424 U.S. at 81. And that is especially true where any given donor may give to support Watchdog's efforts to shine light on city government, or county government, or garbage collection, or growth, or many other issues. This disclosure would serve only to confuse the public. And the disclaimer requirement creates similar confusion with its government-mandated script. *See* Mot at 5-6.

Moreover, the plain language of the electioneering communications requirements extends not just to Watchdog, but to every news source—whether "by television or radio, printed in a newspaper or . . . transmitted by means of the internet." Lakewood Mun. Code § 2.54.020. The challenged provisions' ability to "broadly stifle" speech is staggering. *APF*, 2021 U.S. Lexis 3569, at *22. Newspapers possessing a statewide reach, like the Denver Post, will have to ensure that none of their articles mention Lakewood leaders running for office, or ensure that no copies are sold in Lakewood. Absent the ability to build a Faraday cage blocking electromagnetic waves from Lakewood,[1] television and radio stations will have to give up broadcasting anything about Lakewood's candidates. And internet sources like Ballotpedia will have to make sure that they no longer list Lakewood candidates for office, or that they wall off Lakewood IP addresses. And if other cities in Colorado take their cue from Lakewood, these news sources will have to cease reporting about city government and politics altogether. Applied evenhandedly, Lakewood's

[1] *See* Kristen Coyne, *Faraday Cage*, National High Magnetic Field Laboratory (last modified Dec. 16, 2016), https://bit.ly/3z1G6cN.

regulations are a threat to all reporting about government action, which is essential to a representative form of government. This is highly protected political speech, and Lakewood has not shown the tailoring necessary to pass the required scrutiny. Especially when more "narrowly tailored" options already exist for informing voters, *id*. at *23, namely, voters' familiarity with news sources' reputations and angles of reporting over time, *Citizens United v. Gessler*, 773 F.3d 200, 213-15 (10th Cir. 2014) ("*Gessler*").

B. The electioneering communications provisions are unconstitutionally overbroad.

Even if Watchdog did not engage in protected news reporting, it would be unconstitutional to regulate *The Whole Story* because of the electioneering communications provisions' overbreadth. Constitutional overbreadth is a facial doctrine that protects all those controlled by a law, not just those affected by the law's unconstitutional provisions. *See Virginia v. Hicks*, 539 U.S. 113, 118 (2003). As discussed above, and considering the sheer number of regulated papers and other news sources, *see* Mot. at 12-13, the overbreadth of Lakewood's electioneering communications law is "substantial, not only in an absolute sense, but also relative to the [law's] plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008) (emphasis removed).

C. The City's application exacerbates the provisions' unconstitutionality.

The City's manner of applying its electioneering communications provisions only amplifies their unconstitutionality. While the City attributes the law's unconstitutional application to the former clerk and independent hearing officers, Opp. at 9, it continues to hold to the interpretative method that required the mistaken, unconstitutional application in the first place.

After Congress created the first law defining and regulating electioneering communications, the Supreme Court allowed those electioneering communications requirements to stand, without any narrowing construction, only because Congress's definition "raise[d] none of the vagueness concerns that drove [the Court's] analysis in *Buckley*." *McConnell*, 540 U.S. at 194. That is, the

definition was clear and simple—it applied when a communication identified a candidate, within a narrow period before the election, and targeted a particular audience. *Id*. No vagueness allowed discriminatory enforcement against disfavored speech, or potentially caused speakers to silence themselves because they did not know the line between protected and punished speech. The government wades into unconstitutional waters, however, when it targets speech that it defines as "relative to a clearly identified candidate" or "for the purpose of . . . influencing an election." *Buckley*, 424 U.S. at 39-43, 79-80.

The City, then and now, triggers enforcement with such a forbidden, vague standard. *See* Opp. at 8 (citing to *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962 (2006)); Sentinel Dismissal at 1 (ECF No. 2-9) (citing to standard used in the *Harwood* line of cases). The City, by its own admission, adopts *Harwood*'s standard of regulating any speech that "expresses 'electoral advocacy' and tends to 'influence the outcome of Colorado elections.'" *Harwood*, 141 P.3d at 966; *see* Opp. at 8 (stating that regulation triggered for "taking an active part in an election campaign; trying to sway public opinion"); Keefe AHO Order at 2 ("intended to advocate"). Black letter law for over 40 years has held that the City's "influencing" standard is unconstitutionally vague, *Buckley*, 424 U.S. at 77, 79, but the other language fares no better. What does it mean to take an active part in a campaign, or to try to sway public opinion, to intend to advocate, or tend to influence? This is all vague. A clerk or hearing officer could interpret almost any speech that mentions or insinuates a candidate as expressing advocacy or tending to influence an election. And all public speech attempts to sway public opinion.

Furthermore, the decision the City relies on unconstitutionally adopts an "intent-based approach in determining whether statements constitute 'electioneering communication.'" *Harwood*, 141 P.3d at 966; *see also* Keefe AHO Order at 2 ("intended to advocate"). The Supreme Court has squarely foreclosed any such intent-based test. *See Fed. Election Comm'n v.*

Wis. Right to Life, Inc., 551 U.S. 449, 467 (2007) ("*WRTL II*") (Roberts, C.J., controlling op.) (noting foreclosed since *Buckley*); *id*. at 468-69 (discussing problems with intent-based tests).

Apart from invalidation, the only solution to this unconstitutional vagueness is the narrowing construction applied in *Buckley* and its progeny, requiring that Lakewood's electioneering communications ordinance apply only to express advocacy or its functional equivalent. *See Buckley*, 424 U.S. at 43-44, 80. But that means that its electioneering communications provisions become redundant—that they are coterminous with the independent expenditure provisions.

Furthermore, the City's underinclusive application of its electioneering communications provisions renders them unconstitutional. The invention of an advocacy requirement for those provisions has made it so that the City can regulate disliked sources, *see* Gutwein Facebook posts (ECF Nos. 2-4 and 2-5), and leave favored sources free from regulation. Three different communications each met the City's simple standard by referring to a candidate, being distributed within 60 days of an election, and reaching the electorate, but that disliked by at least one commissioner was prosecuted, while the communications from other, more favored speakers were dismissed. *See* Lakewood Mun. Code § 2.54.020 (defining electioneering communications); Mot. at 6-8; *compare* Keefe AHO Order (ECF No. 2-7), *with* Sentinel Dismissal and Lakewood Dismissal (ECF Nos. 2-9 and 2-10).

In dismissing those other complaints, the City has decided that speech equivalent to Watchdog's—that is equivalent under the electioneering communications' definition or the constitutional test for express advocacy or its functional equivalent—should not be regulated. Regulating speech the City disfavors and not regulating speech that it favors is unconstitutional content- and viewpoint-based discrimination. *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (noting "blatant" discrimination (internal quotation marks omitted)). But more than that, the City "cannot be regarded as protecting an interest of the highest order" when it "leaves appreciable

damage to" the informational interest unregulated. *Reed*, 576 U.S. at 172 (internal quotation marks omitted). Either the City has no informational interest in such speech, or that interest is satisfied by the information already known about sources like Watchdog. *See Gessler*, 773 F.3d at 215; Mot. at 7-8. Either way, the electioneering communications provisions—including those for disclosure and disclaimers—cannot apply to *The Whole Story*.

Lakewood thus faces a conundrum. The method it has used to protect favored speech from its electioneering communications regulations—limiting its regulation to what it decides is advocacy, taking part in a campaign, or trying to sway public opinion (which is the point of news reporting)—is unconstitutional. But, as discussed above, failing to exclude the institutional media from its electioneering communications laws also results in an unconstitutional ordinance, because the informational interest is not tailored to news reporting. Lakewood could, of course, follow federal and state law in creating an exemption for news reporting. *See, e.g.*, *Gessler*, 773 F.3d at 205-06 (noting that the Colorado constitution exempts "news articles, editorial endorsements, opinion or commentary writings . . . in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party" (quoting Colo. Const. art. XXVIII, § 2(8)(b))). But such an exemption must apply to publications by similar entities. *See id*. at 215-16. And the test the Tenth Circuit laid out would also apply to Watchdog. *See* Mot. at 7-8 & 8 n.2. Thus, despite the wishes of some council members, *see, e.g.*, Gutwein Facebook posts (ECF Nos. 2-4 and 2-5), the City cannot constitutionally regulate Watchdog or *The Whole Story*.

D. Regulating *The Whole Story* as express advocacy, either as an electioneering communication or an independent expenditure, is unconstitutional

Any attempt to regulate Watchdog's speech as express advocacy or its functional equivalent, whether under the guise of a narrowed electioneering communications provision or an independent expenditure provision, is unconstitutional. While the City asserts that it regulates only express advocacy in its independent expenditure and electioneering communications

provisions, Opp. at 3, Keefe Complaint at 2 (ECF No. 2-6), it ignores the strict limits on what may be considered express advocacy or its functional equivalent, Mot. at 4-5, 9-11. *The Whole Story* does not contain the express words of advocacy laid out in *Buckley*, 424 U.S. at 44 n.52, nor is its reporting "susceptible of no reasonable interpretation other than as an appeal to vote" under *WRTL II*'s test for the functional equivalent of express advocacy, 551 U.S. at 470.

Moreover, the Court should disregard the City's assertion that it left behind its unconstitutional ways. "Under the voluntary cessation exception to mootness, a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Prison Legal News v. Fed. Bureau of Prisons*, 944 F.3d 868, 880 (10th Cir. 2019) (internal quotation marks omitted). The City "must do more than offer a mere informal promise or assurance . . . that the challenged practice will cease or announce[] . . . an intention to change." *Id*. at 881 (internal quotation marks omitted) (alterations in original); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (noting "stringent" standard). The City "must undertake changes that are permanent in nature and foreclose a reasonable chance of recurrence of the challenged conduct," whether by withdrawing or altering its policies "through a formal process" or by "a declaration under penalty of perjury." *Prison Legal News*, 944 F.3d at 881 (citations and internal quotation marks omitted). And "it must be absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 702-03 (10th Cir. 2009) (internal quotation marks omitted).

The City has provided neither a declaration under penalty of perjury from City leaders nor any formal process showing a permanent change. To the contrary, the City has doubled down on the *Harwood* line of cases, which the City already used to unconstitutionally discriminate between *The Whole Story* and favored news sources, holding that the former was express advocacy that could be regulated while the latter was not. And, based on that standard, the City

held that *The Whole Story* is express advocacy, opening it to independent expenditure as well as electioneering communications complaints. Given that the City has abandoned this only in the course of litigation, and then in name only, Watchdog asks for a declaration not only that its communications are not electioneering communications, but also that they cannot be independent expenditures under the *WRTL II* standard, as well as injunctive relief. *See* Mot. at 11-12.

E. None of Watchdog's challenges is foreclosed

Nothing limits as-applied challenges to harassment and threats of reprisals. The Supreme Court has repeatedly held that its prior decisions do not foreclose further facial or as applied challenges. *See Citizens United*, 558 U.S. at 329-31 (explaining grounds for entertaining facial challenge); *McConnell*, 540 U.S. at 199 ("does not foreclose possible future challenges"); *Wis. Right to Life v. Fed. Election Comm'n*, 546 U.S. 410, 412 (2006) (does "not purport to resolve future as-applied challenges"); *see also Gessler*, 773 F.3d at 216 (rejecting analysis that would have "eliminate[d] the possibility of *as-applied* review," in case having nothing to do with harassment (emphasis in original)).

CONCLUSION

Watchdog respectfully requests that the Court declare that Lakewood's electioneering communications provisions are unconstitutional, facially and as applied to *The Whole Story*, as are the independent expenditure requirements as applied to its speech, and for the injunctive and other relief requested in its complaint.

Dated: July 15, 2021

Respectfully submitted,

s/ Owen Yeates

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed through the Court's CM/ECF system. A Notice of Docket Activity will be emailed to all counsel of record, constituting service on those parties they represent:

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