No. 22-8019/ 22-8021

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD BUCHANAN, in his official capacity as Wyoming's Secretary of State; KAREN WHEELER, in her individual and official capacities as Wyoming's 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-Appellants,

v.

WYOMING GUN OWNERS, a Wyoming nonprofit corporation,

Plaintiff-Appellee.

Appeal from the U.S. District Court for the District of New Mexico
Honorable Scott W. Skavdahl
Civil Action No. 2:21-CV-108-SWS

BRIEF AMICUS CURIAE OF CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLANTS AND URGING REVERSAL

ORAL ARGUMENT NOT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Campaign Legal Center is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of Campaign Legal Center.

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STATEMENT OF INTEREST

Amicus curiae Campaign Legal Center is a nonprofit, nonpartisan organization working for a more transparent, inclusive, and accountable democracy at all levels of government. *Amicus* submits this brief because it is concerned about the harm that could result from the arguments advanced by Plaintiff-Appellee Wyoming Gun Owners ("WyGO"), which run counter to long-settled precedent and could jeopardize numerous state disclosure laws.[1]

SUMMARY OF ARGUMENT

Before the Court is a standard campaign finance disclosure law, requiring groups that spend substantial amounts on "independent expenditures" and "electioneering communications" in Wyoming elections to report the expenditures they made and the contributions they received for such advertising. Wyo. Stat. § 22-25-106(h). Wyoming's law is analogous to the federal electioneering communications disclosure law that has been repeatedly upheld by the Supreme Court, requiring less extensive reporting while defining the universe of covered spending in materially similar terms. *Id*. §§ 22-25-101(c), 22-25-106(h)(iv).

Like its federal counterpart, Wyoming's disclosure statute advances the well-recognized governmental interest in providing the electorate with information "as to

[1] All parties have consented to the filing of this brief. No party or party's counsel authored any part of this brief, and no person, other than *amicus*, contributed money to fund its preparation or submission.

where political campaign money comes from" "in order to aid the voters in evaluating candidates" for office. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (per curiam). As the Supreme Court has emphasized, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices . . . is essential." *Id*. at 14-15.

Amicus submits this brief because it is concerned not only by the district court's decision below to hold Section 22-25-106(h) facially unconstitutional, but also by its reasoning—which potentially casts doubt on any transparency law that requires disclosure extending beyond those donors who expressly earmark their funds for electoral communications. Publicizing information about the true sources of money spent to influence voters' choices is the central purpose of electoral transparency laws, and the lower court's decision to scale back donor disclosure thwarts this critical objective.

And, as the federal experience demonstrates, limiting disclosure with unduly stringent earmarking restrictions often allows political groups to evade *any* disclosure of the sources of their funds on the pretext that no donors designated their funds for a specific electoral message. When the federal disclosure laws were narrowed in this manner by agency rule, disclosure in the succeeding election cycle

plummeted, and donors were reported in connection to only 10% of the total amount spent on electioneering communications.[2]

But the district court's decision not only threatens poor policy outcomes, but also runs counter to governing First Amendment precedent.

The lower court found that the law was not narrowly tailored in two respects: first, and principally, because the requirement that covered groups report "contributions which relate to an . . . electioneering communication" potentially would result in the disclosure of donors who did not give specifically to fund such communications, JA424-27; and second, because the law "lacks any timeline" to limit the contributions subject to reporting, JA501. Neither conclusion withstands scrutiny.

Amicus will focus on the first ruling to clarify that both the Supreme Court and many Circuits have found far broader donor disclosure requirements adequately tailored. The Supreme Court has upheld the federal electioneering communications disclosure statute three times although it lacks an "earmarking restriction"; it instead requires covered groups to disclose *all* of their donors unless they fund their

[2] *See* Outside Spending, Center for Responsive Politics, *2010 Outside Spending, by Groups*, http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=E&chrt=D (electioneering communications filter); *see also* Taylor Lincoln, *Disclosure Eclipse* 3, Public Citizen (Nov. 18, 2010), https://www.citizen.org/wp-content/uploads/eclipsed-disclosure11182010.pdf.

electioneering communications through a segregated bank account established exclusively for that purpose. *Citizens United v. Federal Election Commission (FEC)*, 558 U.S. 310, 369 (2010); *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. 310. The district court also ignored that the Supreme Court's comprehensive narrow tailoring analysis pays particular attention to whether a disclosure law requires only event-driven reporting, or instead demands registration of a political action committee ("PAC"). By reflexively concluding that Wyo. Stat. § 22-25-106(h) sweeps too broadly with respect to donor reporting, the lower court ignored many other tailoring aspects of the law, including its event-driven reporting and the absence of PAC registration and other formal organizational obligations.

The lower court also erred in finding that the "related to . . . electioneering communications" language was unconstitutionally vague and "so indefinite" that it failed to meaningfully limit the expenditures and contributions subject to reporting. JA492. It is unclear how this alleged ambiguity gives rise to any cognizable constitutional harm, given that the Supreme Court and most courts of appeals have affirmed that an event-driven electoral disclosure law can require near-*plenary* donor disclosure—without the narrowing addition of any "relate to" language. But regardless, WyGO did not even attempt to show that the statute was vague in all or the "vast majority" of its applications, and there were no grounds for its facial

invalidation. *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006).[3]

The judgment of the district court that Wyo. Stat. § 22-25-106(h) was vague and did not meet exacting scrutiny should be reversed.

ARGUMENT

I. Electoral Transparency Laws Promote First Amendment Interests.

Campaign finance disclosure has been a cornerstone of American election law for over a century. *See* Federal Corrupt Practices Act, Pub. L. No. 61-274, §§ 5-8, 36 Stat. 822, 823-24 (1910). The Supreme Court has repeatedly recognized that such laws further vital governmental interests: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. The first of these, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369. These interests likewise sustain Wyoming's disclosure law.

The district court gave short shrift to these vital interests. But its more fundamental mistake was to perceive and review Wyoming's disclosure law only in terms of the burdens it imposes on speech. The Supreme Court has made clear that

[3] *Amicus* agrees with the district court's rejection of WyGO's vagueness challenge to the statute's definition of "commentary," Wyo. Stat. § 22-25-101(d)(ii)(B), and does not address it further in this submission.

disclosure also *advances* such freedoms, criticizing, for instance, the plaintiffs challenging a federal disclosure law for "ignor[ing] the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197 (citation omitted). These laws promote the right to self-government and ensure that officeholders remain responsive to the public—both core First Amendment values.

In our representative democracy, "self-government" means that we govern ourselves by collectively debating and voting on who will be our representatives. As the Supreme Court has explained, "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). To fully participate in the political process, however, voters need enough information to determine who supports which positions and why. Therefore, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339.

Closely related but distinct from the interest in self-government is the interest in ensuring that elected officials are responsive to the citizenry as they govern. "The maintenance of the opportunity for free political discussion to the end that

government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Regarding the particular information provided by campaign finance disclosures, the Supreme Court has long recognized the role that such disclosure plays in keeping officeholders responsive. *See, e.g.*, *Buckley*, 424 U.S. at 67 ("A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return."); *Citizens United*, 558 U.S. at 370 ("[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.").

By ensuring that Wyoming citizens have meaningful information about the groups seeking to influence their votes, the disclosure provisions here not only protect against corruption, but also actively promote core First Amendment values. It is impossible for "'uninhibited, robust, and wide-open' speech [to] occur when organizations hide themselves from the scrutiny of the voting public." *McConnell*, 540 U.S. at 197 (citations omitted). This is why "disclosure requirements have become an important part of our First Amendment tradition." *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1022 (9th Cir. 2010).

II. The Challenged Disclosure Law Is Narrowly Tailored to Wyoming's Vital Interest in Promoting an Informed Electorate.

The challenged statute is a tailored, event-driven disclosure measure that requires limited disclosure only of a group's expenditures and contributions that "relate to" independent expenditures and electioneering communications. Wyo. Stat. § 22-25-106(h). The district court expressed concern about the potential vagueness of the "relate to" language—holding that the donor disclosure it would require is overbroad and the statute failed to meet exacting scrutiny as a result. But the state defendants have made clear that the determination of reportable expenditures and contributions is left to the discretion of the reporting entity, using any reasonable accounting method. *See* JA336-37; JA445-46; JA505; *see also* Appellants' Opening Br. ("State Br.") 41, 44, 45. And governing precedent has upheld electoral disclosure laws requiring far broader donor reporting than Section 22-25-106(h), further confirming that Wyoming law is sufficiently tailored to the governmental interests here.

In addition to the putative overbreadth of the donor disclosure required, the district court also found that Section 22-25-106(h) was insufficiently tailored because it lacked a temporal period for calculating which donors gave contributions aggregating above the $100 reporting threshold. JA501-02. *Amicus* agrees that such a timeframe is generally necessary to the practical operation of a campaign spending reporting law. As the district court noted, however, the Secretary of State has

interpreted the statute to require reporting of transactions in reference to the "election cycle." JA502; State Br. 11-12. Given the technical nature of this issue, the district court erred in refusing to accept the reporting period used by the Secretary of State as a cure for any operational concerns.

Further, the district court did not even attempt to explain why this issue rose to the level of a First Amendment violation. Far from analyzing whether there was a "substantial amount of protected free speech" burdened by the statute due to the lack of an explicit reporting period, *see United States v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014) (quotation marks omitted), the district court made no findings that would suggest that this issue had any practical effect on WyGO or other covered groups. While it is perhaps hypothetically possible that a WyGO member *could* "donate[] $20 a year for five years" "related to" WyGO's electioneering communications and thereby be subject to disclosure, there was no finding that this improbable pattern of giving had in fact occurred. JA501-02. A single hypothetical does not warrant holding the statute unconstitutional.

A. The statute meets the exacting scrutiny standard that has long applied to electoral disclosure laws.

The parties do not dispute that "exacting scrutiny" applies to disclosure laws like Section 22-25-106(h); nor that the standard requires "'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,' and that the disclosure requirement be narrowly tailored to the interest it

promotes." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2385 (2021) ("*AFP*") (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010)).

But to meet exacting scrutiny, lawmakers are not obliged to adopt "the least restrictive means" or the narrowest possible donor disclosure. Indeed, to survive any form of heightened First Amendment scrutiny, a law need not be "perfect, but reasonable"; the legislature need not adopt "the single best disposition[,] but one whose scope is 'in proportion to the interest served.'" *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (plurality opinion) (citation omitted). Even under strict scrutiny, the First Amendment "requires that [a statute] be narrowly tailored, not that it be 'perfectly tailored.' . . . The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as" securing transparency in elections. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (citation omitted).

The Supreme Court's recent decision in *AFP* did not materially alter the exacting scrutiny standard and has little bearing on the constitutionality of Wyoming's electoral disclosure regime. *AFP* involved a non-public tax reporting rule that required all charities soliciting contributions in California to report their large donors to the state Attorney General. 141 S. Ct. at 2387. California asserted no interest in apprising the public of this information, and indeed, the reporting was found at trial to serve little more than the Attorney General's "administrative convenience." *Id*. Wyoming's law, by contrast, advances the vital and well-

established interest in an informed electorate. And unlike California's "blunderbuss approach" to reporting, *id*. at 2391 (Alito, J., concurring)—which required "universal production" from "tens of thousands of charities each year" regardless of their circumstances, *id.* at 2387—the disclosure requirements here are event-driven and tailored to reach only groups spending substantial amounts on election-related communications.

The district court nonetheless suggested that *AFP's* invocation of narrow tailoring was novel and casts doubt on earlier precedents endorsing disclosure. JA506 n.9. But *AFP* merely clarified that the "exacting scrutiny" applied in *Buckley*, *Citizens United*, and *Reed* "requires that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,' and that the disclosure requirement be narrowly tailored." 141 S. Ct. at 2385 (quoting *Reed*, 561 U.S. at 196). The Court did not purport to change the "exacting scrutiny" standard it applied in those cases. On the contrary, it suggested that narrow tailoring had long been the *de facto* standard, noting in particular that *Reed* had evaluated narrow tailoring when it considered "various narrower alternatives proposed by the plaintiffs" in reviewing the disclosure at issue there. *Id*.

Indeed, although narrow tailoring may represent an enhanced standard with respect to tax reporting laws, *cf. Regan v. Taxation With Representation of Wash*., 461 U.S. 540, 548-49 (1983), it marks little change in the arena of electoral

disclosure. Exacting scrutiny has always entailed an analysis of whether an electoral disclosure law is carefully tailored. *See, e.g.*, *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1249 (11th Cir. 2013) (describing tailoring inquiry as "more than a rubber stamp") (citation omitted). While some courts may have used slightly different terminology than *AFP*'s "narrow tailoring" language, in practice, their assessments of the "fit" and "balance" of electoral disclosure laws reflects a rigorous tailoring analysis. *See, e.g.*, *Independence Inst. v. Williams*, 812 F.3d 787, 789, 797 (10th Cir. 2016).

B. Following *McConnell* and *Citizens United*, state laws modeled on the event-driven federal electioneering communications disclosure law have been routinely upheld as well-tailored means to achieve electoral transparency.

The district court does not point to a single court of appeals decision to hold that an electioneering communications disclosure law like Wyoming's that requires only event-driven disclosure fails to meet exacting scrutiny. That is unsurprising since every court of appeals to consider a facial challenge to disclosure laws of this sort following *Citizen United*—including this Court—has upheld the disclosure law at issue. *See, e.g.*, *Independence Inst.*, 812 F.3d at 797-99. *See also Gaspee Project v. Mederos*, 13 F.4th 79, 95 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022); *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 2825 (2020); *Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 2376 (2016).

The Supreme Court has three times upheld the federal electioneering communication disclosure law, 52 U.S.C. § 30104(f), on its face and as-applied. *Citizens United*, 558 U.S. at 369; *McConnell*, 540 U.S. at 196-97; *see also Independence Inst. v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016) (three-judge court), *summarily aff'd*, 137 S. Ct. 1204 (2017). It has also made clear that disclosure requirements like Wyoming's "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S. at 64, and are inherently "the least restrictive means of curbing the evils of campaign ignorance." *Id.* at 68, 82; *see also McCutcheon*, 572 U.S. at 223-24.

The district court's criticism of the tailoring of Section 22-25-106(h) centers almost entirely on the supposed breadth of the donor disclosure it requires. This singular focus failed to account for other crucial tailoring features of the law—most crucially, its limited, event-driven reporting requirement—and moreover, disregards that both the Supreme Court and multiple Circuits have upheld laws requiring far broader donor disclosure than Wyoming.

In reviewing disclosure laws applicable to independent spending, both the Supreme Court and this Circuit have reiterated that event-driven laws like Wyoming's are inherently more closely tailored than "PAC" disclosure regimes, which generally entail comprehensive, ongoing reporting obligations alongside registration, formal organization, and record-keeping requirements. *See, e.g.*,

Independence Inst., 812 F.3d at 795 n.9 ("The obligations that come with political committee status, including reporting and auditing requirements . . . tend to be considerably more burdensome than disclosure requirements.") (citation omitted); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 675 (10th Cir. 2010) (noting that a PAC disclosure law requiring reporting of all receipts and expenditures "differs in a material respect from valid laws governing regulation of only election-related transactions"). As the Supreme Court has explained, PAC laws typically involve "the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, [and] to file periodic detailed reports"—burdens that "small entities may be unable to bear." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986).[4]

But Wyoming's disclosure law requires only event-driven reporting, with no attendant PAC registration, record-keeping, or organizational requirements. Section 22-25-106(h) requires only that an organization spending more than $500 on electioneering communications or independent expenditures file a one-time report within 14 days of the relevant election "[i]dentify[ing] the organization causing the

[4] Notably, however, even while recognizing the greater burdens entailed in a PAC reporting law, multiple Circuits have upheld such comprehensive regimes. *Worley*, 717 F.3d at 1240-1241, 1253-1255; *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir.), *cert. denied*, 577 U.S. 1007 (2015); *Justice v. Hosemann*, 771 F.3d 285, 287-89 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 1514 (2016); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 137-38 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 42, 56-58 (1st Cir. 2011).

electioneering communication or independent expenditure to be made" and listing only "those expenditures and contributions which relate to an independent expenditure or electioneering communication." Wyo. Stat. § 22-25-106(h)(i), (ii), (iv).

The district court's tailoring analysis completely disregards this crucial tailoring feature and ignores Supreme Court and Tenth Circuit precedent upholding analogous event-driven reporting laws. The thrice-upheld federal electioneering communications disclosure law required a covered group to disclose *all* donors over a threshold amount—unless it established a separate bank account that was formally segregated from its other accounts, and contained "funds contributed solely by individuals . . . directly to this account." 52 U.S.C. § 30104(f)(2)(E). The district court highlights a New Mexico electioneering communications law modeled on the "segregated account" structure of federal law and recognizes that this "the bifurcated scheme" would "withstand exacting scrutiny." JA507 (citing *Rio Grande Foundation v. Oliver*, No. 1:19-cv-1174, 2020 WL 6063442 (D.N.M. Oct. 14, 2020)). But this type of statute requires far *more* donor disclosure than Section 22-25-106(h)—or, alternatively, requires the establishment of a bank account and compliance with strict organizational and accounting requirements. Wyoming law, by contrast, requires disclosure of only those contributions "related to" the organization's electioneering communications, and leaves the determination of those

contributions to whatever reasonable accounting methodology the reporting group elects. *See* JA336-37; JA445-46; JA505.

The district court objected to the proposition that the "related to" language served as a tailoring device analogous to an "earmarking" restriction for donor disclosure, holding it was too vague to serve this purpose. JA494-95. But even if this were the case—a point *amicus* disputes, *see infra* Part III—the language nevertheless serves to narrow the universe of donors that a reporting group must disclose, particularly given that the state has made clear that the determination of reportable donors is left to the covered group's accounting. The district court posited that this system may require the reporting group to "design specific bookkeeping systems to comply with the statute," JA505, but that critique is not supported by the record. The statute dictates no accounting method for reporting groups to use, *see, e.g.*, State Br. 41, 44-45, and the district court cites nothing to suggest that any particular practice was required. In any event, Wyoming accords reporting groups far more discretion and flexibility than either the federal or New Mexico laws—which both require groups to establish a bank account and formally segregate their funds to avoid plenary donor disclosure.

At base, the district court seemed to be concerned more with the supposedly "arbitrary" nature of a group's determination of which contributions "relate to" electioneering communications than with the potential breadth of the resulting

reporting. JA502. But this supposition rest on an absurd conception of organizational ignorance: who would better know which contributions are used for a group's electoral expenditures than the group itself? Why would the organization's identification of contributions related to its own electioneering communications be "arbitrary"? That information is uniquely within its knowledge. The problem is not that the statute requires an arbitrary determination of reportable contributions, but that WyGO does not want to make this determination at all. To its credit, WyGO all but admits as much, stating that even if the "related to" language was clear, its chief concern was that its "members tend to highly value their privacy" and may not contribute "should WyGO be required to disclose its donors." JA430. But this is not an argument that the donor disclosure is overbroad or arbitrary; this is an argument against any donor disclosure at all.

C. The First Amendment does not limit contributor disclosure to "earmarked" contributions.

As a result of its tailoring analysis, the district court effectively ruled that a disclosure law must restrict donor disclosure to "earmarked" contributions in order to pass muster under exacting scrutiny. JA505-06. The district court did not make this proposition explicit—because it runs contrary to the rulings of the Supreme Court and this Circuit. But because this premise is untenable, so too is the lower court's conclusion that Section 22-25-106(h) is not adequately tailored because it does not limit donor disclosure in this manner.

As discussed *supra* in Part II.B, the federal electioneering communications disclosure statute requires groups to disclose *all* of their donors if they do not fund electioneering communications through a segregated account established exclusively for that purpose. The FEC—by regulation—later provided that corporations and unions need disclose only those contributions earmarked for electioneering communications, but this regulation was adopted years after *McConnell* upheld the statute against facial challenge. *See* 11 C.F.R. § 104.20(c)(9); Electioneering Communications, 72 Fed. Reg. 72,899 (Dec. 26, 2007) (final rule); *McConnell*, 540 U.S. at 194-202. Though the regulation had been adopted by the time of *Citizens United*, it had already been challenged in court, and neither the parties nor the Supreme Court relied on it. The D.C. Circuit has accordingly rejected the contention that "the Supreme Court's holding was limited by" the earmarking regulation. *Van Hollen v. FEC*, No. 12-5117, 2012 WL 1758569, at *3 (D.C. Cir. May 14, 2012) (unpublished).[5]

Other courts of appeals have understood *McConnell* and *Citizens United* as confirming the constitutionality of statutes requiring organizations to disclose their

[5] Although the D.C. Circuit upheld the FEC's earmarking rule in *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016), that was an Administrative Procedure Act challenge, not a First Amendment one. Under deferential review, the court found that the FEC rule was a permissible construction of the statutory disclosure provision, *id*. at 493. But it did not suggest that the First Amendment requires this type of earmarking limitation, and in fact expressly "forestall[ed]" any constitutional questions "to some other time." *Id*.

contributors over a monetary threshold, regardless of whether the contributions were earmarked for campaign purposes. *See, e.g., Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 292 (4th Cir. 2013) (upholding disclosure requirement without earmarking limitation because "*McConnell* compels us to find that [it] is constitutional"); *Family PAC v. McKenna*, 685 F.3d 800, 803 (9th Cir. 2012). Indeed, the Fourth Circuit reversed a district court precisely for imposing an "earmarking" limitation to "cure" the alleged unconstitutionality of a disclosure requirement. *Tennant*, 706 F.3d at 292.

To be sure, these holdings do not suggest that earmarking is *irrelevant* to a statute's tailoring. The Tenth Circuit, for example, found it "important to remember that the [plaintiff] need only disclose those donors who have specifically earmarked their contributions for electioneering purposes" when upholding Colorado's electioneering communications disclosure law. *Independence Inst.*, 812 F.3d at 797.[6] But neither this Circuit nor any other has held that earmarking is a constitutional mandate.

[6] It is implausible to suggest, however, that *Independence Institute* held that earmarking was required by the First Amendment. As the Tenth Circuit explained, the Colorado earmarking limitation arose from the manner in which the Colorado Secretary of State interpreted the regulations at issue, not from their text. *See* 812 F.3d at 789 n.1. In fact, the regulations had recently been amended to remove any explicit reference to earmarking. *See id.* at 797 n.12.

Instead, many circuit courts have upheld laws requiring near plenary donor disclosure. *Justice*, 771 F.3d at 289 (committees must itemize and report all contributions of $200 or more); *Vt. Right to Life*, 758 F.3d at 124 (committees must file reports "identifying each person who contributed more than $100"); *Worley*, 717 F.3d at 1251 (groups must disclose all donors starting from "first-dollar disclosure threshold"). The Third Circuit, for example, upheld a Delaware law requiring comprehensive, but event-driven, donor disclosure, reasoning that "[d]isclosure that is singular and event-driven is far less burdensome than the comprehensive registration and reporting system oftentimes imposed on political committees." *Del. Strong Families*, 793 F.3d at 312 n.10 (citation omitted) (upholding law requiring groups spending $500 or more on electioneering ads to disclose all contributors above $100 for the preceding four years). The lower court attempted to distinguish *Del. Strong Families* on the ground that it preceded *AFP*, but the Third Circuit carefully reviewed the tailoring of Delaware's law, including its decision to omit an earmarking restriction, *id*. at 312, and there is no reason to believe *AFP* would alter this approach. *See supra* Part II.A. Moreover, the First Circuit recently applied *AFP*'s "narrow tailoring" standard to uphold a Rhode Island disclosure law that requires groups spending more than $1,000 on electioneering communications to report all donors over a statutory threshold. *Gaspee Project*, 13 F.4th at 95; *see also* R.I. Gen. Laws § 17-25.3-1(b), (h). The district court suggests that this law was more

tailored than Section 22-25-106(h) because Rhode Island organizations need not disclose donors who "opt out" of having their donations used to fund electioneering communications. JA505-06. But Wyoming law is narrower still: the reporting group can track or earmark its incoming contributions by any reasonable accounting method, which certainly would permit the determination that contributors who "opt out" of funding electoral communications have not given contributions "related to" such communications. *See also* State Br. 39-40.

III. The Statute Is Not Vague.

The district court also erred in holding that the requirement that covered groups report "those *expenditures* and *contributions* which *relate to* an . . . electioneering communication," Wyo. Stat. § 22-25-106(h) (emphases added), was unconstitutionally vague because "[a] reasonable person could read the statute and have trouble deciphering what 'relate to' means." JA494. But speculation about what a person may have "trouble deciphering" is not grounds for the "strong medicine" of facial invalidation. *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988) (citation omitted). Only if a law is so vague that it suppresses otherwise permissible speech in virtually every application will it be struck down on its face as unconstitutional. *Col. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1155 (10th Cir. 2007) (rejecting facial relief because plaintiff did not demonstrate that

campaign finance statute, "in every application, 'create[d] an impermissible risk of suppression of ideas'"). No such showing was made here.

Indeed, much of the lower court's discussion of this language sounds less like a void-for-vagueness analysis and more like a repackaging of its tailoring concerns with respect to the scope of donor disclosure. Because a finding of facial overbreadth was unsustainable under governing precedent, *see supra* Part II, the lower court turned to unconstitutional vagueness to reach the same result. But the law is not vague; it provides people of ordinary intelligence with clear guidance on the disclosure it prescribes, and does so in a manner consistent with many analogous electoral disclosure statutes at the federal and state level.

* * * *

A statute is only deemed unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

The district court did not even attempt to apply this standard. Indeed, the lower court had already *rejected* WyGO's facial vagueness claim in ruling on the State's motion to dismiss, JA266-67, and then never undertook this inquiry on summary judgment, even as it reversed course and found Section 22-25-106(h)(iv) void-for-vagueness.

Most fundamentally, the district court erred because it reversed the applicable standard: instead of reviewing whether the statute was vague in all or most of its applications, the court looked to whether it was conceivable that the statute was ambiguous in *any* hypothetical applications. Furthermore, the lower court reached beyond the facts and legal issues in the case to opine on sections of Wyoming law that plaintiff had not even claimed were unconstitutionally vague. WyGO had focused on whether Wyoming's law "adequately define[d] which *contributions* 'relate to' an electioneering communication." JA427 (emphasis added); *see also* JA85; JA163. Yet the district court took it upon itself to also find that the law was vague with respect to which *expenditures* "relate to" electioneering communications, JA494, although WyGO professed no confusion on this point. No party had suggested that the reporting requirement extended beyond expenditures for the direct production and broadcast costs of the electioneering communication at issue. This was a statutory "ambiguity" entirely of the district court's invention.

Nor would a person of ordinary intelligence fail to understand which *contributions* "relate to" an electioneering communication. Courts have previously rejected vagueness challenges to similarly written campaign finance statutes. *See, e.g.*, *Center for Individual Freedom v. Madigan, Inc.*, 697 F.3d 464, 494-95 (7th Cir. 2012) (regulating contributions "in connection with" an election was not impermissibly vague because surrounding language provided adequate context); *cf.*

McConnell, 540 U.S. at 170 n.64 (citation omitted) (defining campaign ads with words like "'promote,' 'oppose,' 'attack,' and 'support' [a candidate] . . . 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'"). Indeed, federal law formulates its reporting requirement for "independent expenditures" in a manner materially similar to Section 22-25-106(h), requiring groups that spend more than $250 on independent expenditures to report, *inter alia*, "each person who made a contribution in excess of $200" to the reporting group "for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C).[7] It is unclear why language such as "in connection with," "promoting," or "furthering" is sufficiently clear, but "related to" is not.

The district court rests its analysis entirely on hypothetical and unchallenged applications of the statute it believes the "relates to" language may permit. JA494 (musing whether "money paid to the organization's full-time employees" or "expenses spent on gas driving to the Cheyenne radio station" would be reportable). But facial relief is a disfavored remedy that requires more than "speculation about possible vagueness in hypothetical situations not before the Court." *Ward v. Utah*,

[7] Far from finding this provision overbroad or vague, the D.C. Circuit recently found that an FEC regulation narrowly construing this provision was contrary to the intent of the statute. *Citizens for Responsibility & Ethics in Washington v. FEC*, 971 F.3d 340 (D.C. Cir. 2020).

398 F.3d 1239, 1251 (10th Cir. 2005) (citation omitted). And the lower court conceded that the principal category of transactions in which the state has an informational interest—"the funds paid for an electioneering communication"—is "undoubtedly encompass[ed]" by the statutory text. JA494. The statute is thus clear—and in fact, uncontroversial—in the "vast majority of its applications." This certainly does not meet the standard for facial invalidation. *Doctor John's*, 465 F.3d at 1157.

Nor is there any risk that the State has enforced or is likely to enforce Section 22-25-106(h) in an arbitrary or discriminatory manner. *Cf. Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (finding unconstitutional a statute that makes it "unlawful for three or more persons to assemble . . . in a manner annoying to persons" because the term "annoying" "contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.").

Certainly, there is no reason to believe that WyGO lacks notice of Wyoming's disclosure regime given that it filed far broader disclosures for years in connection to its political committee. From 2010 to 2016, WyGO PAC filed reports under the more demanding political committee disclosure regime, which requires comprehensive reporting of contributions and expenditures. *See*, *e.g.*, WYGO-

Wyoming Gun Owners Primary Report – 2010 (disclosing $2,600 of contributions and 13 individual contributors).[8] WyGO is thus fully capable of complying with Wyoming's modest disclosure requirements for electioneering communications, and its history casts doubt on the suggestion that it lacks internal bookkeeping mechanisms to track contributions and cannot establish a "practice of earmarking or otherwise specifying how donations will be utilized." JA429. WyGO's claims that it is too unsophisticated to understand the language of Section 22-25-106(h)(iv) are ungrounded in the record and belied by its own organizational history.

Indeed, it is unclear what type of adverse enforcement WyGO even fears will arise from the alleged "vagueness" of the reporting provision. The state defendants explained that the determination of which expenditures and contributions "related to" an electioneering communication was left to the accounting of the reporting group, so even if there was any ambiguity in the statutory language, it would be resolved in the favor of WyGO and other covered groups. And WyGO was fined here because it filed *no* report connected to its August 2020 advertising, JA133-35, JA485, not because it somehow misinterpreted the "relate to" language and reported wholly unrelated information in such a report.

[8] WyGO's PAC reports can be found by searching for filed reports of "terminated PACs" on the Secretary of State's website, at https://www.wycampaignfinance.gov/WYCFWebApplication/GSF_SystemConfiguration/SearchFilingPublic.aspx.

Moreover, the statute at issue here is not a prohibition, but a disclosure requirement. And there is no confusion about which *types* of campaign advertising trigger the reporting under Section 22-25-106 in the first instance, but rather only about certain information that must be included in these reports. This contrasts with the federal disclosure law questioned by *Buckley*—where the Court took issue with the statutory definition of "independent expenditure," which determined which communications were covered by the law, and by extension, which groups were potentially subject to federal disclosure. 424 U.S. at 79-80. The *Buckley* Court's concern was that the definition was so unclear that it "could be interpreted to reach groups engaged *purely* in issue discussion," *id.* at 79 (emphasis added)—*i.e.*, could reach groups engaged in *no* campaign-related spending—and thus vagueness would beget overbreadth. Obviously, subjecting groups with no electoral activity to disclosure does not serve the interest in an informed electorate, and thus the federal law, as originally drafted, would potentially regulate protected speech without constitutional justification.

Here, by contrast, WyGO cannot seriously dispute the clarity of the basic "electioneering communications" definition, Wyo. Stat. Ann. § 22-25-101(c), nor can it contest that groups making such communications are permissibly subject to disclosure. There is no allegation that Section 22-25-106(h) will somehow capture groups engaged "purely" in "issue discussion." The putative "injury" here is that

WyGO—a group that indisputably engages in electioneering activity—is required to determine which of its expenditures and contributions are reportable as "relating to" electioneering communications, and it would simply prefer not to do so. WyGO's complaint is not that it cannot understand these contributor reporting obligations, but that it does not want to report any contributors at all. *See* JA430 (conceding that even if it "could discern the meaning of 'related to'" nonetheless "WyGO's members . . . are particularly averse to having their names disclosed"). An aversion to transparency is not a basis for an facial vagueness claim.

Finally, even if the district court was correct that the "relate to" language was vague, it was obliged to consider a narrowing construction before holding Section 22-25-106(h)(iv) unconstitutional on its face. *See Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1194 (10th Cir. 2000). ("[A] federal court must uphold a statute if it is 'readily susceptible to a narrowing construction that would make it constitutional."). If, indeed, the "relate to" language offends, there are numerous federal and state reporting laws approved by the courts that could provide alternative formulations of this language. *See, e.g.*, 52 U.S.C. § 30104(c)(2)(C). In fact, by suggesting that money expended "*for* an electioneering communication" was clearly reportable under the statute, JA494, the lower court implicitly suggested its own narrowing construction. *Amicus* does not believe this phrasing would actually alter the scope of the plain language already in effect—but

the district court apparently perceived a distinction between expenditures "for" electioneering communications and expenditures "related to" electioneering communications—and therefore was obligated to consider this "readily" available construction for Section 22-25-106(h)(iv).

CONCLUSION

The district court decision should be REVERSED with respect to its invalidation of Wyo. Stat. § 22-25-106(h).

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Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32 because this brief contains 6,457 words, excluding the parts of the brief exempted by Rule 32(f).

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Dated: July 25, 2022

/s/ Tara Malloy
Tara Malloy

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I hereby certify that on July 25, 2022, I electronically filed a copy of the foregoing Brief *Amicus Curiae* using the CM/ECF system, which will send notification of this filing to all counsel of record.

Dated: July 25, 2022

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