

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STUDENTS FOR LIFE ACTION,	)	
	)	3:23-CV-03010-RAL
Plaintiff,	)	
	)	
vs.	)	
	)	
MARTY JACKLEY, IN HIS OFFICIAL	)	BRIEF IN SUPPORT OF MOTION
CAPACITY AS ATTORNEY	)	FOR SUMMARY JUDGMENT
GENERAL OF THE STATE OF	)	
SOUTH DAKOTA; AND MONAE	)	
JOHNSON, IN HER OFFICIAL	)	
CAPACITY AS SOUTH DAKOTA	)	
SECRETARY OF STATE,	)	
	)	
Defendants.	)	
	)	

Defendants, Attorney General Marty Jackley (hereinafter “Jackley” or “Attorney General”) and Secretary of State Monae Johnson (hereinafter “Johnson” or “Secretary”), by and through counsel Grant M. Flynn, Assistant Attorney General, hereby respectfully submit this brief in support of their Motion for Summary Judgment along with the corresponding Statement of Undisputed Material Facts.

INTRODUCTION

As an entity that engages exclusively in “issue advocacy”, Plaintiff lacks standing to challenge SDCL 12-27-16. The challenged on-ad disclosure requirements apply only to “contributions” as that term is used in South Dakota statute; and, to be a “contribution”, the donation must fund media advocating the election or defeat of a particular candidate or ballot measure. SDCL 12-27-1(6) and SDCL 12-27-16. Because Plaintiff does not engage in

such “express advocacy,” as defined by SDCL 12-27-1(6) or (9), their communications are not required to contain the on-ad disclosure. In addition, multiple states have statutes similar to South Dakota’s SDCL 12-27-16 without any off-ramp provisions, and these statutes have been routinely upheld. Plaintiff’s lingering claims are legally insufficient just as were the claims previously dismissed by this Court.

BACKGROUND

Under SDCL § 12-27-16(1), independent communications that cost more than one hundred dollars; that concern a candidate, public office holder, ballot question, or political party; and that are not made by a candidate, public office holder, political party, or political committee must include an on-ad disclaimer that identifies the top five contributors to the entity disseminating the communication. A violation of this statute is a Class 2 misdemeanor, and a subsequent violation is a Class 1 misdemeanor. SDCL § 12-27-16(1).

An “independent communication expenditure” is a “communication concerning a candidate or ballot question which is not made to, controlled by, coordinated with, requested by, or made upon consultation with that candidate, political committee, or agent of a candidate or political committee.” SDCL § 12-27-1(11). A political committee is “any candidate campaign committee, political action committee, political party, or ballot question committee.” SDCL § 12-27-17. There are exceptions excluded from independent communications that encompass, among others, news articles, editorial opinions, and endorsements. SDCL § 12-27-16(6).

A “contribution” is defined by SDCL 12-27-1(6) as

any gift, advance, distribution, deposit, or payment of money or any other valuable consideration, or any contract, promise or agreement to do so; any discount or rebate not available to the general public; any forgiveness of indebtedness or payment of indebtedness by another person; or any use of services or property without full payment or that is provided by any person or political committee whose primary business is to provide services or property, made for the purpose of influencing:

- (a) The nomination, election, or re-election of any person to public office; or
- (b) The placement of a ballot question on the ballot or the adoption or defeat of any ballot question submitted.

The term does not include services provided by a person as a volunteer for or on behalf of any candidate or political committee including the free or discounted use of a person's residence. Nor does the term include the purchase of any item of value or service from any political committee. The purchase price of the item may not exceed the fair market value and may not include an intent to contribute beyond the item's value. A contribution does not include administration and solicitation of a contribution for a political action committee established by an entity or its associated expenses, nor the use of an entity's real or personal property located on its business premises for such purposes. A contribution does not include nominal use of a candidate's real or personal property or nominal use of resources available at a candidate's primary place of business;

Plaintiff is a 501(c)(4) nonprofit social welfare organization dedicated to impacting public policy and influencing key elections by training and mobilizing pro-life leaders. (Doc. 24 at ¶¶ 10, 17.) Plaintiff engaged in advocacy in South Dakota on June 6, 2022, by sending “text messages informing voters of candidates’ positions on abortion-related issues” and sending mailers urging South Dakotans “to contact their state legislators to encourage them to support pro-life legislation.” *Id.* at ¶¶ 18, 20-21. In the next two years, Plaintiff intends to communicate with the public in South

Dakota through “issue advocacy” about candidates, and public office holders.

Id. at ¶¶ 4, 22.

As shown, Plaintiffs are not beholden to SDCL 12-27-16 because they engage in exclusively issue advocacy which is not regulated by the statute. Contrary to this Court’s previous ruling, Plaintiff maintains that SDCL 12-27-16 requires it to include on-ad disclosures on its communications. Plaintiff asserts that it wishes to distribute its communications without disclosing its top five contributors, speculating that it and its donors may face harassment for their speech. *Id.* at ¶¶ 42-49. Plaintiff has accordingly brought this civil action against the South Dakota Attorney General and the South Dakota Secretary of State, in their official capacities only, to prevent the enforcement of SDCL § 12-27-16. Doc. 24.

Plaintiff initiated the present suit on June 5, 2023, and filed an Amended Complaint on October 6, 2023. *See* Doc. 1, 24. Defendants filed a Motion to Dismiss the Amended Complaint also on October 6, 2023. Doc. 22. This Court entered an Order dismissing Plaintiff’s Amended Complaint in its entirety except for two narrow issues. Doc. 44, 42-43. “The question of whether SFLA is the sort of organization that receives a ‘contribution’ under SDCL § 12-27-1(6) and the absence of so-called ‘off ramps’ to on-ad disclaimers in the South Dakota statute...” remains; and, as such, one narrow, as-applied challenge survived Defendants’ motion to dismiss. *Id.*

ANALYSIS

The following analysis focuses on the narrow, as-applied challenge that survived Defendants’ initial motion to dismiss. In its Order, this Court left open for consideration two questions:

1. Whether SFLA is “the sort of organization that receives a ‘contribution’ under SDCL § 12-27-1(6),” and
2. The effect of “the absence of so-called ‘off-ramps’ to on-ad disclaimers.

Doc. 22, 42-43. Defendants address each of these issues in turn after recognizing the appropriateness of the previously applied standard of exacting scrutiny.

I. Exacting Scrutiny is the Proper Standard of Review.

This Court correctly held in its Order from August 27, 2024, that SDCL 12-27-16 should be considered under exacting scrutiny. Doc 44, 24-25. Exacting scrutiny requires that “there must be ‘a substantial relation between the disclosure requirement and a sufficiently important governmental interest.’” *Smith v. Helzer*, 614 F. Supp. 3d 668, 676–77 (D. Alaska 2022), *aff’d*, 95 F.4th 1207 (9th Cir. 2024) (quoting *Ams. for Prosperity Found. v. Bonta*, — U.S. —, 141 S. Ct. 2373, 2383, 210 L.Ed.2d 716 (2021)). *See also No on E v. Chiu*, 85 F.4th 493, 502 (9th Cir. 2023), *cert. denied sub nom. No on E, San Franciscans v. Chiu*, 145 S. Ct. 136 (2024). “That is, ‘the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.’” *Id.*

“While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be

narrowly tailored to the government's asserted interest.” *Id.* Meanwhile, “[n]arrow tailoring ‘require[s] a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’” *Id.* Disclaimer and disclosure laws are considered under exacting, rather than strict, scrutiny because, unlike other regulations of speech, they “impose no ceiling on campaign-related activities, and do not prevent anyone from speaking.” *Citizens United v. FEC*, 558 U.S. 310, 366 (2010).

II. Plaintiff lacks standing to bring its as-applied challenge to the on-ad disclosure requirement of SDCL 12-27-16 because it engages exclusively in issue advocacy.

In Count I of their Amended Complaint, Plaintiffs explain that they engage exclusively in issue advocacy, rather than express advocacy. Doc. 24, ¶ 61-63. As this Court previously determined, SDCL 12-27-1(6) addresses only express advocacy, not issue advocacy. Plaintiff lacks standing to challenge SDCL 12-27-16 as applied to its conduct because Plaintiff does not engage in the only type of advocacy regulated by the statute.

“Article III standing is a threshold question in every federal court case. *U.S. v. One Lincoln Navigator* 1998, 328 F.3d 1011 (8th Cir. 2003). Article III standing to sue is “an essential and unchanging part of the case-or-controversy requirement,” and without it, a court lacks subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “To establish Article III standing, plaintiffs must show (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable

decision will likely redress the injury.” *Animal Legal Defense Fund v. Vaught*, 8 F.4th 714, 718 (citing *Lujan*, at 560-561). “A plaintiff satisfies the injury-in-fact element if it alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.’” *Id.* (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)). “An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk that the harm will occur.’” *Id.* Here, Plaintiff suffers no injury as its intended conduct is not regulated by SDCL 12-27-16.

This Court has already determined that the term “contribution” under 12-27-1(6) contemplates only funds used for express advocacy. Doc. 44, 13. A “contribution” occurs when a donation is “made for the purpose of influencing: (a) [t]he nomination, election, or re-election of any person to public office; or (b) [t]he placement of a ballot question on the ballot or the adoption or defeat of any ballot question submitted.” SDCL 12-27-1(6). Meanwhile, SDCL 12-27-16(1)(c) requires that certain independent campaign expenditures include a list of the top five donors making the largest “contributions” to the entity distributing the communication. Accordingly, only those donations made for the purpose of “influencing” the nomination, election, or re-election of a person or the placement on the ballot, adoption, or defeat of a ballot measure constitute “contributions” subject to disclosure. Because Plaintiff does not

engage in such direct influence, none of the donations it receives constitute “contributions” that must be reported under SDCL 12-27-16.

South Dakota law specifically defines what it means to “expressly advocate” as

any communication that:

- (a) In context has no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, or public office holders, or the placement of a ballot question on the ballot or the adoption or defeat of any ballot question using explicit words of advocacy of election or defeat such as: vote, re-elect, support, cast your ballot for, reject, and defeat; or
- (b) If taken as a whole and with limited reference to external events, such as the proximity to the election, may only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates or public office holders, or the placement of a ballot question on the ballot or the adoption or defeat of any ballot question because:
 - (i) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
 - (ii) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or public office holders, or the placement of a ballot question on the ballot or the adoption or defeat of any ballot question or encourages some other kind of action;

SDCL 12-27-1(9). As this Court correctly noted, “contributions,” as used in SDCL 12-27-16, are limited to purposes of “express advocacy” as that term is defined by South Dakota statute. The provisions of SDCL 12-27-1(6) and 12-27-1(9) are synonymous. Both statutes limit the conduct governed to the nomination, election, or re-election of a particular candidate and the placement on the ballot, adoption, or rejection of a ballot initiative. *Compare* SDCL 12-27-1(6), *with* 12-27-1(9).

Defendants need not lend support to Plaintiff's claims and take Plaintiff at its word. Plaintiff espoused throughout its Complaint, specifically in Claim I, that it engages solely in issue advocacy and does not expressly advocate for or against any candidate or ballot measure. See SUMF, ¶22. Additionally, the portions of Plaintiff's communications already available to the Court support that Plaintiff only engages in issue advocacy. As this Court recognized, the text messages and mailers sent by Plaintiff, and referenced in its Complaint, do not advocate for nomination, election, or re-election of a particular candidate nor the placement on the ballot, adoption, or rejection of a ballot initiative. Doc. 44, 2-3.

Moreover, none of the additional documents disclosed by Plaintiff during the discovery process constitutes express advocacy communications as defined by SDCL 12-27-1(9). Plaintiff produced just under 3,000 pages of documents in discovery; the bulk of which constituted previously distributed advocacy communications. SUMF ¶ 4-5. None of those communications "expressly advocate" for either the nomination, election, or re-election of a particular candidate nor the placement on the ballot, adoption, or rejection of a ballot initiative. SUMF ¶ 6-17. Nowhere in Plaintiff's communications do they use the explicit words of advocacy set forth in SDCL 12-27-1(9), such as "vote, re-elect, support, cast your ballot for, reject, and defeat." *Id.* Nor do Plaintiff's communications directly advocate for or oppose specific ballot measures. *Id.*

As Plaintiff contends, its communications seek donations and support for its chosen agenda. SUMF ¶ 12. Plaintiff accomplishes this advocacy in a

myriad of ways. SUMF ¶¶6-16. It communicates directly with legislators, sends emails and letters to potential donors, and sends texts encouraging direct participation by citizens. *Id.* But these communications do not seek the election or defeat of specific legislators or ballot measures. *Id.*

Only one document amongst Plaintiff's voluminous communications even approaches issue advocacy, and that is a pamphlet produced by Plaintiff opposing South Dakota's "Amendment G" in 2024. SUMF, ¶18. While this pamphlet instructs readers to "Vote 'No'" on "Amendment G", the pamphlet contains information about the proposed law and its effect on reproductive healthcare. SUMF, ¶ 18-19. More importantly, Plaintiff explicitly disavows any intent to engage in any further such "express advocacy" moving forward. SUMF, ¶ 21. While it is possible that this individual communication might have constituted express advocacy sufficient to necessitate the on-ad disclosure, it is an anomaly amongst Plaintiff's other communications, and Plaintiff has expressed that it has no intent to continue this type of advocacy in the future.

Because Plaintiff does not "expressly advocate" as that term is defined in SDCL 12-27-1(9) nor intend to do so in the future, it does not seek contributions as that term is used in SDCL 12-27-16. The donations Plaintiff receives do not seek to influence the nomination, election, or re-election of a particular candidate nor the placement on the ballot, adoption, or rejection of a ballot initiative. SDCL 12-27-1(6). Plaintiff's communications, therefore, do not fall under the umbrella of SDCL 12-27-16. If Plaintiff is not burdened by

the requirements of the statute, then it suffers no injury in fact and lacks standing to challenge it. *Animal Legal Defense Fund*, 8 F.4th at 718.

III. An off-ramp provision is not necessary for SDCL 12-27-16 to survive exacting scrutiny.

This Court also left open the question of what, if any, effect the lack of an off-ramp provision in SDCL 12-27-16 has on the constitutionality of the statute. The simple answer is it has no effect. The statute survives exacting scrutiny without the off-ramp provision, as have several other similar statutes. This Court acknowledge that “many on-ad donor disclosure statutes offer off-ramps for donors who do not want to be disclosed by allowing them to donate less than the triggering value and/or opting their donation out of use for electioneering communications.” Doc. 44, 43 n.11. While certain state statutes do include these provisions, several others have survived exacting scrutiny analysis without them.

One such statute was enacted in Alaska and subsequently challenged. The Alaska statute requires that certain political communications identify the three largest contributors during the twelve-month period prior to the communication. Alaska Stat. Ann. § 15.13.090 (West). This statute contains no minimum donation limit nor an avenue by which a donor can direct their funds away from electioneering to avoid the on-ad disclosure requirement. *Id.* The Ninth Circuit upheld this statute, rejecting all the challenges directed at it. *Smith v. Helzer*, 95 F.4th 1207, 1220 (9th Cir.), *cert. denied sub nom. Smith v. Stillie*, 145 S. Ct. 567 (2024). The *Helzer* Court disagreed that the Alaska statute dominated too much space on the ad or that it was not narrowly

tailored. *Id.* As have other Courts, the Ninth Circuit recognized that disclosure requirements are viewed under exacting scrutiny because they do not limit speech but simply inform the public. *Id.* at 1221.

Arizona requires that “[p]ublic communications by covered persons shall state, at a minimum, the names of the top three donors who directly or indirectly made the three largest contributions of original monies during the election cycle to the covered person.” Ariz. Rev. Stat. Ann. § 16-974. However, the individual receiving the donation must inform the donor that “they can opt out of having their monies used or transferred for campaign media spending by notifying the covered person in writing” Ariz. Rev. Stat. Ann. § 16-972. While it acknowledged that the opt-out notification provision further narrowed the scope of the Arizona law, the Arizona court also recognized that “the U.S. Supreme Court, applying exacting scrutiny, upheld a law requiring disclosures of contributions not expressly earmarked for electioneering communications.” *Ctr. for Arizona Pol’y Inc. v. Arizona Sec’y of State*, 258 Ariz. 570, 584, 560 P.3d 923, 937 (Ct. App. 2024), *review granted* (May 6, 2025) *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 194-95, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). The Arizona Court did not deem the opt-out notification requirement necessary for the statute to satisfy exacting scrutiny. *Id.*

California has similar requirements in state statute. *See* Cal. Gov’t Code § 84504 *et. seq.* California requires that independent communications include the “Ad Committee’s Top Funders.” Cal. Gov’t Code § 84503. This requirement applies to print ads, video ads, electronic media ads, and text messages. Cal.

Gov't Code § 84504 *et. seq.* Like South Dakota, California's statutes do not include off-ramp provisions either for donors to direct the use of their contributions away from electioneering nor for minimum contributions. *Id.*

While the California on-ad disclosure provisions do not appear to have been directly challenged, a San Francisco ordinance with similar on ad disclosure provisions was also upheld by the Ninth Circuit. *No on E v. Chiu*, 85 F.4th 493, 511 (9th Cir. 2023), *cert. denied sub nom. No on E, San Franciscans v. Chiu*, 145 S. Ct. 136 (2024). The court determined that the ordinance requiring disclosure of the top three contributors of \$5,000 or more satisfied exacting scrutiny. *Id.* at 511. Importantly, the Ninth Circuit directly addressed the ordinance's lack of an "earmark" or off-ramp provision that would allow donors to direct their donations away from electioneering to avoid disclosure. *Id.* at 510. The court found that such a provision was not necessary for the disclosure requirement to survive exacting scrutiny. *Id.* The court noted that, while two out-of-circuit decisions had upheld statutes containing those provisions, neither court found such provision to be a necessary component of constitutionality. *Id.* (citing *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) and *Indep. Inst. v. FEC*, 216 F. Supp. 3d 176, 190–92 (D.D.C. 2016)).

Likewise, Hawaii requires the on-ad disclosure of the top three contributors to the entity disseminating the communication. Haw. Rev. Stat. Ann. § 11-393 (West). The Hawaiian law has neither an off-ramp for donations not intended for electioneering purposes nor donations below a minimum limit. *Id.* Hawaii's on-ad disclosure requirement has not been directly challenged

either.

Similar to California, Connecticut requires the on-ad disclosure of the five largest aggregate donors who donated more than \$5,000 in the twelve months prior to the communication. Conn. Gen. Stat. Ann. § 9-621 (West). Although not having analyzed this portion of the statute, the Connecticut Supreme Court applied exacting scrutiny to a previous version of the statute, which required disclosure of the entity responsible for an independent communication. *Seymour v. Elections Enft Comm'n*, 255 Conn. 78, 84, 762 A.2d 880, 884 (2000). The Connecticut court described the compelling interest of the state in requiring on-ad disclosures as follows:

Although an individual's right to free speech is well known and widely publicized, the state's obligation to safeguard the electoral process is frequently neglected, although it, too, is of great import. Because of the critical role that elections play in our democratic society, the Supreme Court has recognized “that a State indisputably has a compelling interest in preserving the integrity of its election process.... The Court thus has upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.... In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.”

Id. at 85-86 (quoting *Burson v. Freeman*, 504 U.S. 191, 198, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992)). Such a compelling interest also supports SDCL 12-27-16.

Maine has a unique statute that requires an on-ad disclosure of the top three funders of the entity making the independent expenditure. Me. Rev. Stat. Ann. tit. 21-A, § 1014. However, when determining which funders must be disclosed, the entity making the independent expenditure “may disregard any

funds that the entity can show were used for purposes unrelated to the candidate mentioned in the communication on the basis that funds were either spent in the order received or were strictly segregated in other accounts.” *Id.* Under the Maine statute, the individual making the donation cannot direct how the funds are used, but the entity making the communication may do so and, in turn, determine which donors shall be disclosed. *Id.* While the top funder portion of the Maine statute has not been challenged, the United States District Court of Maine found that the government’s interest in “allowing voters to know the person responsible for political communications so that they can judge a communications reliability...” satisfied exacting scrutiny. *Bailey v. Maine Comm’n on Governmental Ethics & Election Pracs.*, 900 F. Supp. 2d 75, 86 (D. Me. 2012).

Massachusetts requires that an independent expenditure include the top five contributors to the entity dispersing the communication, regardless of the purpose for which the funds were given. Mass. Gen. Laws Ann. ch. 55, § 18G (West). Only contributions exceeding \$5,000 within the twelve months preceding the communication need be disclosed. *Id.* The District Court of Massachusetts found that “on-message disclosure of the source of money behind the speaker is also an effective means for achieving voter understanding and knowledge . . .” and survived exacting scrutiny. *Massachusetts Fiscal All. v. Sullivan*, No. CV 18-12119-RWZ, 2018 WL 5816344, at *3 (D. Mass. Nov. 6, 2018).

Oregon requires that “a communication in support of or in opposition to a clearly identifiable candidate . . .” include “the names of the five persons that have made the largest aggregate donations of \$10,000 or more to the person in the election cycle in which the communication is made.” Or. Rev. Stat. Ann. § 260.266 (West). These disclosures may exclude “[d]onations and grants received from foundations and other persons that may not be used to make a communication in support of or in opposition to a clearly identified candidate.” *Id.* The law clarifies that anonymous donations of \$1,000 or more “may not be used to make a communication in support of or in opposition to a clearly identified candidate.” *Id.* As such, Oregon law includes a minimum donation limit for disclosures but no opportunity for donations to be earmarked for non-electioneering activities. The on-ad disclosure portion of Oregon’s statute does not appear to have been challenged in federal court.

As this Court recognized, Rhode Island requires that independent expenditures and electioneering communications include the names of the top five donors to the entity making the communication. 17 R.I. Gen. Laws Ann. § 17-25.3-3 (West). *See also Gaspee Project v. Mederos*, 13 F.4th 79, 83 (1st Cir. 2021). Donors in Rhode Island may be exempted from reporting if they mutually agree with the communicating entity at the time the donation is made that the donation will not be used for independent expenditures, electioneering communications, or covered transfers. 17 R.I. Gen. Laws Ann. § 17-25.3-1 (West). While the First Circuit expressed that the off-ramp provisions of the Rhode Island law serve to further narrowly tailor the statute, the court did not

find that such a provision was a necessary component for the law to satisfy exacting scrutiny. *Gaspee Project*, 13 F.4th at 92.

Vermont requires

an electioneering communication paid for by or on behalf of a political committee, independent expenditure-only political committee, or political party shall contain the name of any contributor who contributed more than 25 percent of all contributions and more than \$2,000.00 to that committee or party since the beginning of the two-year general election cycle in which the electioneering communication was made to the date on which the expenditure for the electioneering communication was made.

Vt. Stat. Ann. tit. 17, § 2972 (West). This statute frames its disclosure requirements differently, requiring that only individuals who contributed more than 25 percent of the contributions to an entity and that person's contribution exceeded \$2,000.00, must be disclosed on the communication. *Id.* However, the statute contains no opportunity for a donor to direct how a donation is used. *Id.*

Under Washington law, the top five contributors must be identified in “all political advertising undertaken as an independent expenditure or an electioneering communication by a person or entity other than a bona fide political party . . .” Wash. Rev. Code Ann. § 42.17A.320 (West). This reporting obligation continues where one of the top five contributors is a political committee. Wash. Rev. Code Ann. § 42.17A.350 (West). In that case, the top three donors of that political committee must also be disclosed. *Id.* Disclosure is not required for “[c]ontributions to the sponsor or a political committee that are earmarked, tracked, and used for purposes other than the advertisement in question . . .” *Id.* The statute also includes a minimum

donation threshold for reporting. *Id.* It does not appear that the Washington statute has been the subject of a court challenge.

Of the eleven statutes referenced above, four contain no off-ramp provisions at all, either for earmarking contributions or minimum donation limits to avoid disclosure. Alaska Stat. Ann. § 15.13.090 (West); Cal. Gov't Code § 84504 *et. seq*; Conn. Gen. Stat. Ann. § 9-621 (West); Haw. Rev. Stat. Ann. § 11-393 (West). Two states have minimum donation provisions but no statutory avenue for donations to be directed away from electioneering or independent expenditures. Mass. Gen. Laws Ann. ch. 55, § 18G (West); Vt. Stat. Ann. tit. 17, § 2972 (West). Arizona law allows donors to earmark a donation to avoid disclosure but does not contain a minimum donation amount for reporting. Ariz. Rev. Stat. Ann. § 16-972. Maine's statute is unique in that it includes an off-ramp for donations not used for independent expenditures to be excluded from disclosure, but the use of the funds is at the discretion of the entity making the disclosure rather than the donor. Only Oregon, Rhode Island, and Washinton law include some form of an off-ramp provision for directing the use of donations for particular purposes and a minimum donation threshold. Or. Rev. Stat. Ann. § 260.266 (West); 17 R.I. Gen. Laws Ann. § 17-25.3-3 (West); Wash. Rev. Code Ann. § 42.17A.350 (West).

Not only do certain state statutes include neither off-ramp provisions for a donor to avoid disclosure, but several have been held to be constitutional. *See Helzer*, 95 F.4th 1207; *No on E*, 85 F.4th 493. *See also Massachusetts Fiscal All*, No. CV 18-12119-RWZ, 2018 WL 5816344 (holding that

Massachusetts's statute containing a minimum donation provision but no earmark provision survived exacting scrutiny.) These cases, as well as the similar, but untested, statutes of other states, support the validity of SDCL 12-27-16.

Simply put, South Dakota's statute furthers the important governmental interest of insuring there is an informed electorate. *Ctr. for Arizona Pol'y Inc.*, 258 Ariz. at 581 (holding that [t]he government has strong informational and anti-corruption interests, which are sufficiently important to justify the modest burden the Act places on donors' association rights."); *Citizens United*, 558 U.S. at 368 (holding that insuring voters are full informed about the person or group who is speaking is an important governmental interest); *Delaware Strong Fams. v. Att'y Gen. of Delaware*, 793 F.3d 304, 310 (3d Cir. 2015) (holding "that Delaware's interest in an informed electorate is sufficiently important . . ." for a reporting statute to satisfy exacting scrutiny); *Gaspee Project*, 13 F.4th at 86 (holding that "[t]he case law makes pellucid that the Board's interest in an informed electorate vis-à-vis the source of election-related spending is sufficiently important to support reasonable disclosure and disclaimer regulation."); *No on E*, 85 F.4th at 504 (acknowledging that "[c]ourts have long recognized the governmental interest in the disclosure of the sources of campaign funding."); *Seymour*, 255 Conn. at 85 (holding "that a State indisputably has a compelling interest in preserving the integrity of its election process") *Helzer*, 95 F.4th at 1215 (holding that "the government's interest in an informed electorate is 'sufficiently important' in the campaign

finance context to warrant disclosure requirements and satisfy the first prong of the exacting scrutiny test).

Moreover, South Dakota's important interest in an informed electorate is substantially related to the requirements of SDCL 12-27-16. As several courts have held, on-ad disclosure laws are an effective method of informing the public by notifying the voters who is truly responsible for a message. *See Ctr. for Arizona Pol'y Inc.*, 258 Ariz. at 582 (holding that "federal courts have held that laws requiring disclosure of the original source of election-related contributions substantially relate to a state's interests in informing the electorate."); *Helzer*, 95 F.4th at 1212, 1216 (requiring contributors to report the "true sources of the contribution" is "substantially related to the state's asserted informational interest"); *Gaspee Project*, 13 F.4th at 82, 88, 95–96 (holding that a law requiring disclosure of funding sources for electioneering communications bears a substantial relation to ensuring a well-informed electorate); *No on E*, 85 F.4th at 506 ("Because the interest in learning the source of funding for a political advertisement extends past the entity that is directly responsible, the challenged ordinance is substantially related to the governmental interest in informing the electorate."). And, as here, when the "informational interest alone is sufficient to justify' disclosure laws", Defendants need not present any additional interests. *Ctr. for Arizona Pol'y Inc.*, 258 Ariz. at 582 (quoting *Citizens United*, 558 U.S. at 369).

Finally, South Dakota's law is narrowly tailored to the State's informational interest. Regardless of an off-ramp provision, state statutes

similar to SDCL 12-27-16 are sufficiently narrowly tailored to satisfy exacting scrutiny. *See Helzer*, 95 F.4th at 1221 (holding that the Alaska disclosure statute containing neither an opt-out or minimum donation threshold was narrowly tailored); *No on E*, 85 F.4th at 510 (holding that the San Francisco ordinance was narrowly tailored even without an option to earmark donations for non-electioneering purposes.); *Delaware Strong Fams.*, 793 F.3d at 310 (holding that, despite lacking an earmarking provision, Delaware's reporting statute was sufficiently narrowly tailored to satisfy exacting scrutiny). Based on South Dakota's important interest in an informed electorate and because the provisions of SDCL 12-27-16 substantially relate to that purpose and are narrowly tailored, the statute survives exacting scrutiny despite not incorporating off-ramp provisions.

CONCLUSION

WHEREFORE, Defendants pray that the issues from Plaintiff's Amended Complaint that survived this Court's August 27, 2024, Order be dismissed with prejudice, that Defendants recover their costs and disbursements, and for such other and further relief that the Court deems proper and just.

Dated this 2nd day of September, 2025.

/s/ Grant M. Flynn

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