

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STUDENTS FOR LIFE ACTION,

Plaintiff,

vs.

MARTY JACKLEY, IN HIS OFFICIAL
CAPACITY AS ATTORNEY
GENERAL OF THE STATE OF
SOUTH DAKOTA; AND MONAE
JOHNSON, IN HER OFFICIAL
CAPACITY AS SOUTH DAKOTA
SECRETARY OF STATE,

Defendants.

3:23-CV-03010-RAL

DEFENDANTS' RESPONSE TO
PLAINTIFF'S STATEMENT OF
UNDISPUTED MATERIAL FACT
IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT

COMES NOW, the above-named Defendants, through undersigned counsel, Grant M. Flynn, Assistant Attorney General, and provide their response to Plaintiff's Statement of Undisputed Material Fact in Support of its Motion for Summary Judgment.

South Dakota's Law Regulating Communications Concerning a Candidate or Ballot Question

1. South Dakota law defines an "independent communication expenditure" as "an expenditure, including the payment of money or exchange of other valuable consideration or promise, made by a person, entity, or political committee for a communication concerning a candidate or a 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.” S.D. Codified Laws § 12-27-1(11).

RESPONSE: Undisputed.

2. South Dakota law imposes rules on persons and entities that make “independent communication expenditures . . . related to communications concerning candidates, public office holders, ballot questions, or political parties who are not controlled by, coordinated with, requested by, or made upon consultation with that candidate, political committee, or agent of a candidate or political committee.” S.D. Codified Laws § 12-27-16.

RESPONSE: Undisputed.

3. Persons and entities that pay, or promise to pay, more than \$100 for such a communication must “append to or include in each communication a disclaimer that clearly and forthrightly” states “Top Five Contributors,’ including a listing of the names of the five persons making the largest contributions in aggregate to the entity during the twelve months preceding that communication.” S.D. Codified Laws § 12-27-16(1)(c).

RESPONSE: Undisputed.

4. A person or entity who pays, or promises to pay, more than \$100 for such a communication must file an “independent communication expenditure statement” within 48 hours after the communication is disseminated or published. S.D. Codified Laws § 12-27-16(2).

RESPONSE: Undisputed.

5. The statute contains no time limitations; it is not limited to communications within a pre-election window. S.D. Codified Laws § 12-27-16.

RESPONSE: Undisputed. While SDCL 12-27-16 does contain time limitations with regard to the receipt of donations, requiring that only donations received within the twelve-month period prior to the donation must be disclosed, this fact is not material in that the time period for disclosure of donations is unlikely to affect the outcome of the suit. *Green v. City of St. Louis*, 134 F.4th 516, 523 (8th Cir. 2025).

6. A first violation of this section is a Class 2 misdemeanor; a subsequent violation within one calendar year is a Class 1 misdemeanor—both punishable by imprisonment, a fine, or both. S.D. Codified Laws § 12-27-16(1), § 22-6-2.

RESPONSE: Undisputed.

7. The law charges the Defendant Attorney General with enforcement by either bringing a criminal action or by filing a civil action seeking a civil penalty of up to \$10,000 per violation. S.D. Codified Laws § 12-27-35. And the law separately authorizes the Attorney General to bring actions for civil penalties of up to \$2,000 per violation for violations of Section 12-27-16. S.D. Codified Laws § 12-27-43.

RESPONSE: Undisputed.

Plaintiff Students for Life Action's Speech in South Dakota

8. Plaintiff SFLA is a 501(c)(4) social-welfare organization based in Fredericksburg, Virginia. It engages in issue advocacy nationwide to train and mobilize leaders to impact public policy and achieve issue-specific results in key elections. Exhibit 1, Declaration of Tina Whittington, ¶ 3.

RESPONSE: Undisputed.

9. SFLA limits its voter communications to candidates' positions on abortion-related issues and to encourage activism for pro-life policies; it does not tell voters which candidate to vote for or against. Decl. Whittington, ¶ 4.

RESPONSE: Undisputed. While Plaintiffs issued one communication that appears to qualify as express advocacy by encouraging recipients to "Vote No" on Amendment G, this fact is not material as Plaintiffs have disavowed any intent to participate in this type of advocacy in the future, so one incident of past action is not likely to affect the outcome of this suit. See Doc. 66, ¶ 18-19, 21. See also *Green*, 134 F.4th at 523.

10. The SFLA has engaged in communications concerning candidates and office holders in South Dakota that cost more than \$100 on abortion-related issues and will continue to make similar communications costing more than \$100 in South Dakota in the future. Decl. Whittington, ¶ 5.

RESPONSE: Undisputed.

11. Those communications included text messages sent the day before the June 2022 primary election informing voters about roughly 12 incumbent legislators' voting records on banning chemical abortions and their

responses to candidate surveys. Decl. Whittington, ¶ 6, Exh. A. Each of these communications cost SFLA \$116.62. Decl. Whittington, ¶ 6.

RESPONSE: Undisputed.

12. Some of those text messages urged recipients to encourage a candidate who had taken a pro-life pledge to keep that pledge if elected; others urged recipients to encourage candidates who had not taken a pro-life pledge to nonetheless vote for pro-life legislation if elected. Decl. Whittington, ¶ 7, Exh. A. None of them told the recipients who they should or should not vote for. Decl. Whittington, ¶ 7.

RESPONSE: Undisputed.

13. Also in 2022, SFLA sent mailers to South Dakotans, urging them to contact their state legislators to encourage them to support pro-life legislation. Decl. Whittington, ¶ 8, Exh. B.

RESPONSE: Undisputed.

14. The SFLA's future expenditures, like its past expenditures, will fall within the definition of "independent communication expenditure" under S.D. Codified Laws § 12-27-1(11) because they will mention candidates and elected officials. They will, therefore, trigger Section § 12-27-16 requirements, including listing SFLA's largest donors on the communications. Decl. Whittington, ¶ 9.

RESPONSE: Defendants object to this statement as it is a legal conclusion rather than a statement of fact. As such, this statement is not admissible

as a statement of material fact pursuant to Federal Rule of Civil Procedure 56. *Custom Hardware Eng'g & Consulting, Inc. v. Dowell*, 919 F. Supp. 2d 1018, 1027 (E.D. Mo. 2013) (quoting *Weitlauf v. Parkway Sch. Dist.*, 2008 WL 3925162 at *3 (E.D. Mo. Aug. 20, 2008)). See also *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1100 (W.D. Ark. 2000), aff'd, 19 F. App'x 471 (8th Cir. 2001) (finding that “[a] party cannot dictate the court's ruling on legal issues by attempting to disguise “legal conclusions” as “statements of undisputed material facts...””). Plaintiff does not receive contributions as that term is used in SDCL 12-27-16 because it does not engage in issue advocacy. And, as a result, Plaintiff's communications are not regulated by SDCL 12-27-16, preventing it from experiencing an injury in fact as required for standing. See Doc. 65, pg. 6-11.

15. SFLA accepts donations that are earmarked by donors for certain uses.

Decl. Whittington, ¶ 10.

RESPONSE: Undisputed.

16. As a rule, SFLA does not disclose the names of its donors unless required to by law, because many of SFLA's donors find this anonymity important, or even vital, to their giving. Decl. Whittington, ¶ 11.

RESPONSE: Undisputed.

17. If SFLA were required to disclose its top five donors in a given year, even if those donors have made donations earmarked so those funds will not be used for communications concerning a candidate or ballot question in South Dakota, donors may reduce the amount of their donations or stop donating entirely. Decl. Whittington, ¶ 12.

RESPONSE: Undisputed.

--Signature on Following Page--

Dated this 16th day of October, 2025.

/s/ Grant M. Flynn

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