

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	)	RESPONSE TO
CAPACITY AS ATTORNEY	)	PLAINTIFF'S MOTION FOR
GENERAL OF THE STATE OF	)	SUMMARY JUDGMENT
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 Response to Plaintiff’s Motion for Summary Judgment along with the corresponding responses to Plaintiff’s Statement of Undisputed Material Facts submitted under separate cover.

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; and they lack standing to challenge the statute. 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.

In its memorandum to the Court, Plaintiff addresses the remaining claim that survived Defendants’ dismissal motion. Doc. 67, 1. As such Defendants confine the remainder of their response to addressing the sole issue of whether the lack of an “opt-out” provision is fatal to SDCL 12-27-16. As shown below, it is not. Defendants maintain their position that Plaintiff lacks standing because its issue advocacy is not regulated by SDCL 12-27-16 but will rely on analysis provided in Defendant’s Brief in Support of Motion for Summary Judgment and the forthcoming Reply for that proposition. See Doc. 65, 6-11.

ANALYSIS

I. Exacting scrutiny is the proper standard.

This Court already correctly determined that Plaintiff’s claims should be considered through the lens of exacting scrutiny. “Disclaimer and disclosure laws like SDCL § 12-27-16 ‘impose no ceiling on campaign-related activities, and do not prevent anyone from speaking up.’” Doc. 44, 25. (quoting *Citizens United v. FEC*, 558 U.S. 310, 366 (2010)). As such, these types of disclosure laws are subject to exacting scrutiny. *Id.* 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.* On-ad disclosures do not constitute compelled speech as Plaintiff suggests, and they are not subject to strict scrutiny.

II. *An opt-out provision is not necessary for SDCL 12-27-16 to survive exacting scrutiny.*

Plaintiff contends that SDCL 12-27-16’s on ad disclosure rule is not sufficiently narrowly tailored to the government’s important informational interest. Doc. 67, 6. According to Plaintiff, South Dakota’s statute contains no opt-out provision for individuals “who do not wish to fund its independent expenditures in South Dakota and because it requires the disclosure of SFLA’s top five contributors even if some of them give very small amounts of money.” Doc. 67, 6. Neither element is necessary for SDCL 12-27-16 to satisfy exacting scrutiny.

A. *SDCL 12-27-16 is sufficiently narrowly tailored to the government’s informational interests.*

“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.* The law’s on-ad disclosure requirement is reasonably related to the sufficiently important government interest of helping South Dakota citizens to “make informed choices in the political marketplace.” *Citizens United*, 558 U.S. 366-67.

Plaintiff asserts that, prior to enacting SDCL 12-27-16, the South Dakota Legislature must demonstrate that it “‘seriously undertook to address’ the problems it faces ‘with less intrusive tools readily available to it.’” Doc. 67, 6. (quoting *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 404 (6th Cir. 2022) (Sutton, C.J.). However, other than pointing to the lack of an opt-out provision, Plaintiff points to know “less intrusive tools” that were available to the state to address the problem of groups “hiding behind dubious and misleading names.” *Citizens United*, 558 U.S. 367.

As Defendants demonstrated in their summary judgment brief, four states have passed statutes that 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). Moreover, several of these statutes have been found 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. On-ad disclosure schemes similar to South Dakota's have been shown to be constitutional, and Plaintiff points to no other less intrusive tools that South Dakota should have implemented. South Dakota's statute is narrowly tailored.

B. Plaintiff's authority is distinguishable and unpersuasive.

Plaintiff relies primarily on four cases to convey that SDCL 12-27-16's lack of an opt-out provision is fatal to the constitutionality of the statute. Each of these cases is factually distinguishable and legally unpersuasive in relation to the present case.

Plaintiff first directs this Court to consider *Wyoming Gun Owners v. Gray*, 83 F.4th 1224 (10th Cir. 2023), in support of their premise that narrow tailoring requires "a way for donors to opt out of the disclosure scheme while maintaining the ability to speak." Doc. 67, 8. Plaintiff misinterprets the holding of *Wyoming Gun Owners* and fails to recognize key differences between the statutes at issue.

Initially, the disclosure scheme in *Wyoming Gun Owners* involved a reporting requirement to the Wyoming Secretary of State's Office rather than an on-ad disclosure. Compare SDCL 12-27-16(1)(c) with Wyo. Stat. Ann. § 22-25-106(h)(iv) and (v) (West). See also *Wyoming Gun Owners*, 83 F.4th at 1231. The Wyoming statute required public disclosure of every donor providing one hundred dollars or more to an organization that expends more than one

thousand dollars on independent expenditures or electioneering communications for a particular election. Wyo. Stat. Ann. § 22-25-106(h)(iv) and (v). Meanwhile, SDCL 12-27-16 requires on-ad disclosure of only the five largest donors to an entity if the donation amounts to one hundred dollars or more. This distinction is important because the breadth of the disclosure under SDCL 12-27-16 is much narrower than what was considered in *Wyoming Gun Owners*. Compare SDCL 12-27-16(1)(c) with Wyo. Stat. Ann. § 22-25-106(h)(iv) and (iv) (West). See also *Wyoming Gun Owners*, 83 F.4th at 1231. And as will become important further into this analysis, SDCL 12-27-16 is not susceptible to over disclosure.

More importantly, the narrow tailoring analysis from *Wyoming Gun Owners* relied on by Plaintiff addressed statutory language that was determined to be void for vagueness by the Court and which SDCL 12-27-16 does not share. The Court in *Wyoming Gun Owners* was particularly concerned that the vagueness of the statute would result in unnecessary disclosure. *Wyoming Gun Owners*, 83 F.4th at 1247. The Wyoming law required the disclosure of only those “expenditures and contributions which *relate to* an independent expenditure or electioneering communication.” *Wyoming Gun Owners*, 83 F.4th at 1237. (emphasis added). The Court determined that it was “far from clear how the Secretary could determine whether [a reporting entities] reported contributions related to its electioneering communication.” *Id.* at 1238.

To address this confusion, the Wyoming Secretary of State suggested that entities could simply report all contributions over one hundred dollars,

regardless of whether those contributions “relate to” in independent expenditure or electioneering communication. *Id.* at 1247. The Tenth Circuit held that such overdisclosure did not constitute “narrow tailoring.” *Id.* The State’s “overdisclosure solution would bear no relation to the government’s informational interest; it would necessarily sweep in speakers who may have been interested in supporting a different candidate or no candidate at all or perhaps wished to preserve their privacy or anonymity.” *Id.* The Court concludes that an “earmarking system” could serve as a less intrusive tool to accomplish the Government’s ends. *Id.*

Contrarily, South Dakota law does not suffer from the same vagueness deficiencies as the Wyoming law, nor does it risk the type of overdisclosure that the Tenth Circuit was trying to avoid. SDCL 12-27-16 requires that

If an independent expenditure is undertaken by an entity not including a candidate, public office holder, political party, or political committee, the following notation must be included: "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*. An independent communication expenditure made by a person or entity shall include the following: "This communication is independently funded and not made in consultation with any candidate, public office holder, or political committee.".

SDCL 12-27-16(1)(c) (emphasis added). The emphasized language appropriately identifies the contributions that must be noted as “Top Five Contributors.” Only those five individuals who have made the largest aggregate contributions in the previous twelve months need be listed in an on-ad disclosure. This well-delineated reporting requirement is not vague. And this

Court already dismissed all of Plaintiff's claims accusing the statute of vagueness. *See* Doc. 44, 43-44.

Moreover, Plaintiff's suffer no risk of overreporting of their donors because they need only disclose the top five contributors under the statute. The Court held that the Wyoming law placed greater burdens on smaller advocacy organizations like Wyoming Gun Owners due to the overdisclosure, preventing the law from being narrowly tailored. *Wyoming Gun Owners*, 83 F.4th at 1250. The same concerns are not present here as SDCL 12-27-16's requirements define clearly which donors must be included in an on-ad disclosure and does not impose an unequal burden on any entity. For these reasons, SDCL 12-27-16's on-ad disclosure requirement is narrowly tailored to address the State's important information interest of contemporaneously informing the public of the source of political statements, and South Dakota's important interest in an informed electorate is substantially related to the on-ad disclosure requirements found in SDCL 12-27-16. *Ctr. for Arizona Pol'y Inc.*, 258 Ariz. at 581-82; *Helzer*, 95 F.4th at 1215-16

The decision in *Dinner Table Action v. Schneider* similarly fails to support Plaintiff's contention that SDCL 12-27-16 fails absent an opt-out provision. Doc. 67, 9. *See Dinner Table Action v. Schneider*, No. 1:24-cv-00430, 2025 U.S. Dist. LEXIS 134052 (D. Me. July 15, 2025). As with the Wyoming statute at issue in *Wyoming Gun Owners*, the Maine statute at issue in *Dinner Table Action* required direct reporting of all contributions. *Id.* * 12. However, Maine's statute required that all contributions be reported "regardless of the

amount of the contribution.” *Id.* See also 21-A M.R.S.A. § 1019-B(4)(B). The District Court found that the Maine statute did not satisfy exacting scrutiny because it had “no explicit opt out provision for contributors who do not wish to fund independent expenditures, and, *most importantly*, it requires the disclosure of contributors who give even very small amounts of money.” *Id.* (citations omitted) (emphasis added). The Court determined that a disclosure requirement that “sweeps so broadly” with “no meaningful opportunity for anonymous contributions” is not narrowly tailored. *Id.* * 14.

SDCL 12-27-16 does not sweep so broadly and provides the opportunity for anonymous contributions. South Dakota’s on-ad disclosure requirement mandates only the disclosure of the top five contributors who donate one hundred dollars or more. SDCL 12-27-16(1) (c). Donors retain the option to donate less than one hundred dollars and avoid disclosure, unlike the Maine statute. *Dinner Table Action*, No. 1:24-cv-00430, 2025 U.S. Dist. LEXIS 134052, *14. In addition, the ease and relatively low cost of modern digital communication necessitates the donation threshold of one hundred dollars. A higher threshold would allow groups “hiding behind dubious and misleading names” to reach large numbers of voters through electronic communications while avoiding disclosure of who is responsible for the communication. In this way, SDCL 12-27-16’s on-ad disclosure requirement is narrowly tailored to address the State’s important information interest of contemporaneously informing the public of the source of political statements which is substantially

related to the on-ad disclosure requirements found in SDCL 12-27-16. *Ctr. for Arizona Pol'y Inc.*, 258 Ariz. at 581-82; *Helzer*, 95 F.4th at 1215-16.

As Defendants addressed the *Gaspee Project* case in their Brief in Support of Motion for Summary Judgment, we do not analyze it further here except to reiterate that, 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 necessary for it to satisfy exacting scrutiny. *See* Doc. 65, 16-21. *See also Gaspee Project v. Mederos*, 13 F.4th 79, 92 (1st Cir. 2021).

Finally, *Rio Grande Foundation v. Oliver* is likewise inapplicable to the present case because the law at issue in that case enveloped both “express advocacy” and “issue advocacy” which SDCL 12-27-16 does not. 727 F. Supp. 3d 988, 991 (D.N.M. 2024), *aff'd*, No. 24-2070, 2025 WL 2599790 (10th Cir. Sept. 9, 2025). In reference to the New Mexico statute, the State asserted that it had an important interest in disclosing donors to advertisements, even when the content of those ads constituted issue advocacy. *Id.* at 1001. Defendants make no similar claim here. While the district court never determined it to be necessary, it found that the opt-out provisions of the New Mexico law which allowed a donor to request that their donation not be used for independent expenditures bolstered its narrow tailoring. *Id.* at 1012-13. Alternatively, SDCL 12-27-16 is narrower than the New Mexico law without an opt-out provision because it only regulates express advocacy, not issue advocacy. *See* Doc. 44, 13 (acknowledging that SDCL 12-27-1(6) describes express advocacy).

See also Doc. 65, 6-11. For this reason, the Court's attention to an opt-out provision in *Rio Grande Foundation* is unpersuasive here.

The authority cited by Plaintiff's does not serve their intended purpose. These cases are factually and legally distinguishable from Plaintiff's present challenge to South Dakota's disclosure scheme. Plaintiff has, thus, failed to demonstrate that SDCL 12-27-16 is doomed without an opt-out provision to direct donations away from independent expenditures. South Dakota's disclosure provision survives exacting scrutiny and should be upheld. *Helzer*, 614 F. Supp. 3d at 676-77.

CONCLUSION

For these reasons, Defendants respectfully request that Plaintiff's Motion for Summary Judgment be denied, Defendants' Motion for Summary Judgment be granted in its entirety, 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 16th day of October, 2025.

/s/ Grant M. Flynn

Grant M. Flynn
Assistant Attorney General
1302 East SD Highway 1889, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: grant.flynn@state.sd.us