IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

STUDENTS FOR LIFE ACTION, Plaintiff, v. 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.	No. 3:23-CV-3010-RAL

Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment

Plaintiff, Students for Life Action, respectfully submits the following Brief in Opposition to Defendants' Motion for Summary Judgment. Plaintiff has separately submitted its Response to Defendants' Statement of Undisputed Material Fact.

ARGUMENT

I. Plaintiff has standing because the statute chills the speech of its donors in violation of the First Amendment.

A. Whether Plaintiff's advocacy is express—for the purpose of influencing an election—is subject to the state's subjective determination.

The term "contribution" under SDCL § 12-27-1(6) must be made for the purpose of influencing either the "nomination, election, or re-election of any person to public office" or the "placement of a ballot question on the ballot or the adoption or defeat of any ballot question submitted." This Court has described this as "express advocacy." Doc. 44 at 13. But what constitutes express advocacy is less clear. The

Supreme Court introduced the concept of an express advocacy standard in *Buckley v. Valeo*, 424 U.S. 1 (1976), and further defined this standard in subsequent cases. *FEC v. Wisconsin Right to Life* clarified that the "functional equivalent of express advocacy" included such advocacy that had "no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. 449, 469–70 (2007); *see e.g.*, *Gaspee Project v. Mederos*, 13 F.4th 79, 86 (1st Cir. 2021) (holding that it could not "distinguish between express advocacy and issue advocacy with respect to election-law disclosure regimes").

Under varying interpretations, Plaintiff's communications could fall into the category of express advocacy—for the purpose of influencing an election—with texts and campaigns that highlight where a candidate stands on abortion ahead of an election. Decl. Whittington, ¶¶ 5–7; Ex. A to Pl.'s Mot. Summ. J. Although none of these communications told the recipients who they should or should not vote for, Decl. Whittington, ¶¶ 4, 7, they inform voters about incumbent legislators' voting records on abortion-related issues, id., ¶ 6, urge recipients to take a pro-life pledge if elected, *id.*, ¶ 7, urge recipients to encourage candidates to vote for pro-life legislation, *id.*, and urge recipients to contact elected officials to encourage them to support pro-life legislation, *id.*, ¶ 8. The state may conclude that encouraging recipients to urge candidates and legislators to sign a pro-life pledge and support pro-life legislation implies that those recipients should vote for candidates that do so and against those candidates that do not. And therefore, the state may attempt to enforce the statute against Plaintiff.

Plaintiff has also distributed pamphlets asking readers to "Vote 'No'" on a specific amendment, Ex. 9 to Defs.' Mot. Summ. J., which Defendants regard as express advocacy. Defs.' Mot. Summ. J. at 10. Plaintiff intends to produce similar pamphlets in the future. Resp. Defs.' SOF ¶ 22. Although Plaintiff intends these communications to advocate for the specific issues it cares about—abortion-related and pro-life issues—not to influence the outcomes of elections, Defendants believe such communications are subject to the statute.

Thus, Plaintiff's past communications and similar future communications may be interpreted as subject to the disclosure requirements in Section 12-27-16(1)(c).

B. The statute chills the speech of Plaintiff's donors.

Because Plaintiff's advocacy may be subject to the disclosure requirements of Section 12-27-16(1)(c), the statute chills Plaintiff's donors' speech. Such a "chilling effect of allegedly vague regulations, coupled with a range of potential penalties for violating the regulations, was, as other courts have held, sufficient 'injury' to ensure that [plaintiffs have] a personal stake in the outcome of the controversy." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 322 (5th Cir. 2020) (cleaned up); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). As the Supreme Court recognized, "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). When SFLA's donors are forcibly outed, their freedom of association is restricted—in other words, their speech chilled. Such a risk is "heightened in the 21st century" with increased ability for people to gather sensitive information about someone and post it publicly. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 617 (2021).

"[I]t is irrelevant" that some donors may not mind that their identities are disclosed. *Id.* at 624. The "unnecessary risk of chilling" created by the disclosure requirement violates the First Amendment. *Id.* The *risk* of suppressing speech through chilling by itself is sufficient harm. Such a risk is present here because one might interpret Plaintiff's advocacy as express—for the purpose of influencing an election.

Even disclosure regimes that only indirectly chill First Amendment speech will fail if not narrowly tailored to a compelling government interest—an important interest is "not enough" to give such speech "breathing space to survive." *Bonta*, 594 U.S. at 609 (cleaned up). Accordingly, "[e]very demand that *might* chill association . . . fails exacting scrutiny." *Id.* at 615 (emphasis added). And disclosure regimes with no disclosure to the public can still unconstitutionally chill association, though public disclosures—like the ones here—more evidently chill speech. *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). In *Americans for Prosperity v. Bonta*, just the "fear of disclosure" of donor identities to the government—not even the public—constituted chilled speech. 594 U.S. at 616 (citing *Talley v. California*, 362 U.S. 60, 65 (1960)).

At the very least, "[e]xacting scrutiny is triggered by state action which may have the effect of curtailing the freedom to associate, and by the possible deterrent effect of disclosure." *Id.* (cleaned up). A law that "chills speech can and must be invalidated where its facial invalidity has been demonstrated." *Citizens United v. FEC*, 558 U.S. 310, 312 (2010).

II. Because there is no off-ramp provision, the on-ad disclosure rule is not narrowly tailored and therefore cannot survive exacting scrutiny.

First Amendment challenges to donor disclosure laws involving speech related to elections are evaluated under exacting scrutiny. *Citizens United*, 558 U.S. at 366–67. "[E]xacting scrutiny 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 to the interest it promotes." *Bonta*, 594 U.S. at 611 (cleaned up).

Although the state has a sufficiently important government interest in informing voters of who is financing election-related speech, *Citizens United*, 558 U.S. at 369, the disclosure requirement of Section 12-27-16(1)(c) is not narrowly tailored to serve that interest. The government must "demonstrate its need" for the disclosure regime "in light of any less intrusive alternatives." *Bonta*, 594 U.S. at 613. Defendants have not done so here.

Precedent dictates that the on-ad disclosure rule cannot survive exacting scrutiny without an off-ramp provision. *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1248–49 (10th Cir. 2023) (statute held unconstitutional because it provided no way for donors to segregate donations that did not relate to a particular independent expenditure made by plaintiff); *Dinner Table Action v. Schneider*, No. 1:24-cv-00430, 2025 U.S. Dist. LEXIS 134052, at *18 (D. Me. July 15, 2025) (the disclosure requirement was not narrowly tailored to serve the government's informational interest because "it has 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").

Defendants argue that an off-ramp provision is not needed, pointing to eleven statutes in various states. Defs.' Mot. Summ. J. at 11–17. But only four of these statutes (Alaska, Hawaii, Connecticut, and California) contained no off-ramp provisions for donors, and only one of these laws has been challenged. The California statute has not been challenged, and Defendants instead point to a city ordinance upheld by the Ninth Circuit. Defs.' Mot. Summ. J. at 21. But this ordinance had a minimum threshold of $5,000 for the top three contributors disclosed—unlike South Dakota's provision which could include donors even if they donated small amounts. Only one provision survived scrutiny—Alaska's on-ad disclosure requirement. The remaining statutes that lack any off-ramp provisions have not been challenged. See Defs.' Mot. Summ. J. at 14. The Ninth Circuit is the only circuit court to uphold an on-ad donor disclosure law that contained no off-ramp provisions at all.

The remaining statutes mentioned by Defendants contained off-ramp provisions. Defs.' Mot. Summ. J. at 12. The Arizona provision discussed by Defendants varies significantly from the South Dakota provision. It only applies to a "covered person," defined as a "person or entity whose total campaign media spending in an election cycle exceeds $50,000 in statewide campaigns or $25,000 in other campaigns," and includes various exceptions. A.R.S. § 16-971(7). And "[d]onors who prefer to remain anonymous may opt out of having their contributions used for campaign media spending, ensuring their identities are never made public." *Ctr. for Ariz. Pol'y Inc. v. Ariz. Sec'y of State*, 258 Ariz. 570, 578 (2024); A.R.S. § 16-972(B). The South Dakota provision contains none of these safeguards. There is no minimum total dollar amount that protects Plaintiff from being covered by § 12-27-16(1)(c), no timeframe or mention of an election cycle, and no way for donors to remain anonymous with an opt-out. The Arizona law, with its multiple thresholds to protect organizations and donors, is not analogous here.

Maine's on-ad disclosure rule has not been challenged, but it allows the entity making the communication to protect the identity of donors by directing how the funds are used. Me. Rev. Stat. Ann. tit. 21-A, § 1014. It has not been challenged and contains an off-ramp provision.

Massachusetts' on-ad disclosure law only applies to communications in the 90-day window preceding an election. Mass. Gen. Laws ch. 55, § 18G. It's "Top Contributors" requirement only applies to contributions that exceed $5,000. The South Dakota on-ad disclosure rule contains neither of these limitations, allowing it to apply regardless of the amount of time before an election or the size of the donation. While the district court upheld Massachusetts' law, it emphasized the "limited nature of the requirement (it only applies to large contributions of over $5,000, and . . . the narrow universe of 'electioneering communications')." *Mass.*

Fiscal Alliance v. Sullivan, 2018 U.S. Dist. LEXIS 189403, *8 (Nov. 6, 2018). Such "limited nature" is not present with SDCL § 12-27-16.

Next, Defendants look at Oregon's on-ad disclosure requirement, which only applies to persons who have donated over $10,000 in the election cycle in which the communication is made. Or. Rev. Stat. Ann. § 260.266 (West). This law has not been challenged. And rather than bolster Defendants' case, it demonstrates how most states have a specified donation minimum before the on-ad disclosure requirements apply.

Defendants also point to Rhode Island's on-ad disclosure requirement, which includes an off-ramp provision allowing donors to protect their privacy at the time of the donation. R.I. Gen. Laws § 17-25.3-1. This protection "ensure[s] the disclaimer provision is narrowly tailored." *Gaspee Project*, 13 F.4th at 92. The First Circuit upheld a facial challenge of the statute, noting that the outcome could be different in an as-applied challenge. *Id.*

Vermont has more protection for donors as well, applying its on-ad disclosure rule only to donors who donate more than $2,000 *and* who contributed more than 25 percent of all contributions beginning in the two-year general election cycle in which the communication was made. 17 V.S.A. § 2972(c)(1). This statute has not been challenged.

Finally, the Washington on-ad disclosure rule applies when the sponsor is a political committee, and "contributions to the sponsor or political committee that are earmarked, tracked, and used for purposes other than the advertisement in question should not be counted in identifying the top five contributors[.]" Rev. Code Wash. (ARCW) § 42.17A.350. This provision allows donors to be protected from disclosure by earmarking donations. This statute has not been challenged.

The volume of statutes that Defendants present with some sort of minimum triggering value and/or opt-opt provision speaks to the extreme nature of South Dakota's law. Unlike most on-ad disclosure provisions, it contains no triggering value, allowing the disclosure to apply to any monetary value. Additionally, donors have no opportunity to determine the use of their donations through an opt-out process, meaning that a donor's information could appear on an advertisement that he or she does not even agree with. As it stands, donors have no ability to opt out of the disclosure scheme while maintaining the ability to speak. *See Wyoming Gun Owners*, 83 F.4th at 1249. South Dakota does not even have time limitations—the on-ad disclosure requirement applies no matter when the next election takes place. Defendants' assertion that other state statutes that are "similar, but untested" somehow "supports the validity of SDCL 12-27-16," Defs.' Mot. Summ. J. at 19, is misguided. In reality, these other statutes contain provisions with protections for donors absent from the South Dakota statute and Defendants have only presented one similar provision (Alaska) that survived the Ninth Circuit's review.

For these reasons, the disclosure requirement of Section 12-27-16(1)(c) is not narrowly tailored to serve the government's sufficiently important government interest in informing voters of who is financing election-related speech.

CONCLUSION

Because Plaintiff's advocacy could be determined to be express—for the purpose of influencing an election—Plaintiff's donors face a serious risk of chilled speech in violation of the First Amendment. The on-ad top-five donor-disclosure requirement of SDCL § 12-27-16(1)(c) is an outlier among the many disclosure requirements of various states. Most state statutes include off-ramp provisions either in the form of earmarking donations or minimum dollar thresholds. South Dakota does not include any off-ramp provisions and has no temporal limitations. Thus, Section 12-27-16(1)(c) violates the First Amendment because it is not narrowly tailored to meet the government's informational interest. This Court should deny Defendants' Motion for Summary Judgment.

Dated: October 17, 2025.

Respectfully Submitted,

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Certificate Service

I hereby certify that on this 17th day of October 2025 a true and correct copy of the foregoing document was served upon the following person, by placing the same in the service indicated, addressed as follows:

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