

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

REPLY TO PLAINTIFF’S BRIEF IN
OPPOSITION TO DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT

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 Reply to Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Judgment.

INTRODUCTION

Observing that it failed to properly plead standing, Plaintiff now seeks to amend its Complaint via its response to Defendants’ Motion for Summary Judgment. This Court should resist these attempts. Plaintiffs have consistently asserted that they participate in exclusively issue advocacy, rather than express advocacy. Now that Plaintiff sees that its activities fall outside of the scope of SDCL 12-27-16’s enforcement, Plaintiff attempts to change its position, claiming to participate in both issue advocacy and express advocacy.

Plaintiff's transparent attempt to salvage its claims should be rejected as Plaintiff has made it clear that its conduct is not regulated by the challenged statute. Moreover, Plaintiffs have failed to demonstrate that an off-ramp provision is necessary for a disclosure scheme to survive exacting scrutiny. For these reasons, Plaintiff's claims fail, and summary judgment should be granted in favor of Defendants.

ANALYSIS

I. Plaintiff lacks standing to challenge SDCL 12-27-16.

Contrary to every claim it made up to this point, Plaintiff now asserts that it not only participates in express advocacy; but it also intends to do so more in the future. Doc. 76, 1-3. After recognizing that it lacks standing to bring its claims against SDCL 12-27-16, Plaintiff pivots, asserting that it engages in express advocacy sufficient to bring its activities under the umbrella of the disclosure requirement found in the statute. *Id.* Plaintiff is forbidden from amending its claims in this way at this point in the litigation; and, as such, Plaintiff lacks standing to support its Complaint.

A. Plaintiff may not amend their Complaint via Motion for Summary Judgment.

Plainly stated, “[i]t is improper for a plaintiff to raise new claims at summary judgment that have not been alleged within its complaint.” *MWG Enters., LLC v. ETS Wound Care, LLC*, 586 F. Supp. 3d 946, 960 (E.D. Mo. 2022).

While pleading under Federal Rule of Civil Procedure 8(a) requires district courts to construe complaints liberally, such “liberal” construction is “inapplicable after discovery has commenced” because

“[a]t the summary judgment stage, the proper procedure for [a] plaintiff [] to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a).”

Id. (quoting *WireCo WorldGroup, Inc. v. Liberty Mut. Fire Ins. Co.*, 231 F. Supp. 3d 313, 317-18 (W.D. Mo. 2017), *aff'd*, 897 F.3d 987 (8th Cir. 2018)). *See also* *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004); *N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004).

As the *MWG* Court notes, such a rule is sensible because “allegations in pleadings frame the scope of the dispute between the litigants.” *Id.* “Raising a new theory at summary judgment without prior amendment of the pleading deprives the opposing party of the fair notice that the federal pleading rules are designed to provide.” *Id.* *See also* *WireCo WorldGroup, Inc.*, 897 F.3d at 992-93; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

Such is the case here as Plaintiff attempts to entirely change the grounds of its Complaint through its response to Defendants’ Motion for Summary Judgment. In its response, Plaintiff alleges that its “communications *could* fall into the category of express advocacy...” Doc. 76, 2. (emphasis added). Plaintiff acknowledges the single communication it produced that could fall into the category of express advocacy and proclaims its intent “to produce similar pamphlets in the future” despite representing the opposite intent for the entirety of this litigation. *Id.* at 3.

Meanwhile, throughout its Complaint and Motion to Dismiss, Plaintiffs disavow participating in any express advocacy, affirming that they only

participate in issue advocacy. The following portions of Plaintiff's Complaint affirm Plaintiff's issue advocacy:

1. "South Dakota law forces nonprofit organizations engaged in pure issue advocacy to comply with reporting requirements..." Doc. 24, ¶ 2.
2. "These requirements apply to any issue advocacy that happens to mention any candidate for office. They are not limited to express advocacy..." Doc. 24, ¶ 3.
3. "South Dakota's compelled speech scheme violates the constitutional rights of Plaintiff Students for Life Action, which has engaged in advocacy about issues and office holders in South Dakota in the past and intends to do so again." Doc. 24, ¶ 4.
4. "[T]he scheme is unconstitutionally overbroad because it sweeps far beyond regulation of express advocacy or its functional equivalent to criminalize ordinary issue advocacy of the type in which Students for Life Action engages." "South Dakota has failed to do so, and thus unconstitutionally regulates issue advocacy." Doc. 24, ¶ 5.
5. "In the next two years, Students for Life Action intends to continue to communicate with the public in South Dakota through *issue* advocacy about candidates and public office holders." Doc. 24, ¶ 22. (emphasis added).
6. "S.D. Codified Laws § 12-27-16 unconstitutionally burdens Students for Life Action's speech because it imposes reporting and disclosure requirements on Students for Life Action based on its *issue* advocacy communications about officeholders that do not advocate for the election or defeat of a candidate." Doc. 24, ¶ 61. (emphasis added).
7. "Because it regulates communications that are not express advocacy or its functional equivalent, South Dakota's scheme is not narrowly tailored..." "Thus, South Dakota's law unduly and unconstitutionally burdens the *issue* advocacy speech of Plaintiff and others, which cannot be subjected to disclosure requirements." Doc. 24, ¶ 62.
8. "The law is not narrowly tailored because it applies at all times to all speech concerning public office holders, *including issue advocacy* not related to or close in time to an election." Doc. 24, ¶ 76. (emphasis added).

Likewise, Plaintiffs maintained its position that it engaged in exclusively issue advocacy in its subsequent filings. Plaintiff made similar assertions about its issue advocacy in response to Defendants' Motion to Dismiss:

1. "Plaintiff SFLA engages in issue advocacy to train and mobilize leaders to impact public policy and achieve issue-specific results in key elections." Doc. 35, 3.
2. Plaintiff further represented its intent to engage in "similar advocacy" in the future. Doc. 35, 4.
3. Plaintiff reaffirmed this contention, claiming "[b]ecause SFLA's expenditures fall under South Dakota's broadly inclusive definition of independent expenditure, its issue advocacy is subject to the State's reporting and disclosure requirements." Doc. 35, 4.
4. Plaintiffs realleged "[i]n the next two years, [it] intends to continue to communicate with the public in South Dakota through issue advocacy about candidates and public officeholders..." Doc. 35, 5.

Moreover, this Court recognized Plaintiff's intent to engage exclusively in issue advocacy. This Court acknowledged that "by their own admissions, [SFLA's communications] do not constitute express advocacy and are merely issue advocacy." Doc. 44, 8. The Court reiterated that "SFLA may not participate in express advocacy and only engages in issue advocacy.." when it noted that SDCL 12-27-16 does not distinguish between the two types of advocacy. Doc. 44, 10. But as the Court later recognized, the definition of "contribution" under SDCL Ch. 12-27 is limited to express advocacy "which SFLA disavows doing in South Dakota." Doc. 44, 12. In addition to Plaintiff's own statements, this Court found that the mailers included with Plaintiff's Complaint were "plainly" issue advocacy. Doc. 44, 42. And as Defendants

pointed out, this characterization is common to all of Plaintiff's communications with one solitary outlier. Doc. 66, ¶ 6-22.

Plaintiff's current position that "[under] varying interpretations, Plaintiff's communications could fall into the category of express advocacy..." is irrelevant. Doc. 76, 2. Plaintiff is limited to the claims and theories set forth in its Complaint. *MWG Enters., LLC*, 586 F. Supp. 3d at 960. There is no question under the present record that up to its most recent filing, Plaintiff's disavowed conducting any express advocacy whatsoever. Now that Plaintiff faces a compelling argument for dismissal of its Complaint for lack of standing, it changes course to assert that it may engage in express advocacy. Doc. 76, 2. Such a change in position without amending their Complaint denies Defendants "fair notice" as required by the rules of civil procedure. *MWG Enters., LLC*, 586 F. Supp. 3d at 960.

Finally, Defendants note that they would oppose any attempt by Plaintiff to amend their Complaint at this stage of the litigation. As noted in the Court's Scheduling Order, the Parties previously represented that they did not anticipate amending the pleadings. Doc. 48, ¶ 4. Further, Plaintiff's have not sought to amend their pleadings pursuant to D.S.D. Civ. LR 15.1. At this point, Plaintiff is on notice of the deficiency of its Complaint as this Court specifically requested briefing on the issue of "whether SFLA is the sort of organization that receives a 'contribution' under SDCL § 12-27-1(6)..." Doc. 44, 42. Plaintiff had ample opportunity to amend its Complaint to resolve this but has failed to do so. For this reason, any request by Plaintiff to amend their

Complaint should be denied. *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715 (8th Cir. 2008) (finding that failure to cure deficiencies by amendments previously allowed constitutes a compelling reason to deny a request to amend a Complaint.)

B. Plaintiff lacks standing as its conduct falls outside the purview of the statute.

Any attempt by Plaintiff to amend their Complaint to include express advocacy within their activities should also be denied on the basis of futility because the record is clear that Plaintiff, in fact, participates in exclusively issue advocacy. *Winco Fireworks, Inc.*, 532 F.3d at 715. None of Plaintiff's 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. Doc. 66, ¶ 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.* Although Plaintiff now claims an intent to produce express advocacy "Vote, 'No.'" pamphlets in the future, this claim directly contradicts all of its prior claims regarding its issue advocacy, and this self-serving claim should be attributed the weight it merits. *Compare* Doc. 76, 3. *with* Doc. 66, ¶ 21. Even if Plaintiff attempted to amend its Complaint to include a claim of express advocacy, the communications they've already provided, and their prior statements would refute this claim making it futile. *Winco Fireworks, Inc.*, 532 F.3d at 715.

II. An Off-Ramp is not necessary for SDCL 12-27-16 to survive exacting scrutiny.

Plaintiff spends considerable time in its response addressing each of the state statutes that Defendants referenced in their summary judgment brief. Doc. 76, 6-9. Plaintiff thoroughly reviews the differences between the various statutes and SDCL 12-27-16. *Id.* However, Plaintiff fails to demonstrate that an off-ramp provision is fatal to a disclosure statute. *Id.* At great lengths, Plaintiff recites the provisions of these statutes, claiming that they contain greater protections for donors. *Id.* at 9. But at no point does Plaintiff direct this Court to a single instance in which a statute was upheld solely because of an off-ramp provision, let alone struck down for not having one. *Id.* at 6-9. SDCL 12-27-16 is sufficiently narrowly tailored to satisfy exacting scrutiny. *See Helzer*, 95 F.4th at 1221; *No on E*, 85 F.4th at 510; *Delaware Strong Fams.*, 793 F.3d at 310.

CONCLUSION

For these reasons, Defendants respectfully request 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 29th day of October, 2025.

/s/ Grant M. Flynn

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