

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 Reply Brief in Support of its
Motion for Summary Judgment**

Plaintiff, Students for Life Action, respectfully submits the following Reply Brief in support of its Motion for Summary Judgment.

INTRODUCTION

In the Introduction to their response—but nowhere else—Defendants assert that Plaintiff does not engage in issue advocacy and therefore lacks standing. Doc. 74 at 1–2. But Plaintiff engages in activity that Defendants regard as express advocacy. Doc. 66, Defs.' Mot. Summ. J. at 10. And Plaintiff intends to engage in such advocacy in the future by producing similar pamphlets. Doc. 75, Resp. Defs.' SOF ¶ 22. Because Plaintiff has engaged in—and will continue to engage in—advocacy plausibly subject to SDCL § 12-27-16(1)(c), its donors' speech is chilled, a sufficient First Amendment injury. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) ("Reasonable chill exists when a plaintiff shows 'an intention to engage in

a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution”) (citation omitted). Therefore, Plaintiff has standing.

Defendants state that they rely on the standing argument made more fully in their summary judgment brief. Doc. 74 at 2. Thus, Plaintiff incorporates its standing arguments set forth in its response to Defendants’ motion. Doc. 76 at 2–3.

SDCL § 12-27-16 is not narrowly tailored to serve the State’s informational interest. With no off-ramps or no meaningful limits, even small donors face disclosure. The law’s application to Plaintiff chills its donors’ speech in violation of the First Amendment. Although it is Defendants’ burden to demonstrate its need for the disclosure regime, Defendants fail to do so and instead attempt to shift the burden to Plaintiff. Defendants’ only attempt to meet this burden is to cite several statutes without off-ramp provisions—but they ignore those statutes’ other limiting features.

ARGUMENT

I. SDCL § 12-27-16 fails exacting scrutiny because, with no limiting provisions, it is not narrowly tailored.

Nothing less than exacting scrutiny applies to Plaintiff’s First Amendment challenge to SDCL § 12-27-16. *See* Defs.’ Resp. at 2–3. To survive exacting scrutiny the disclosure requirement must be substantially related to a sufficiently important governmental interest and be narrowly tailored to the interest it promotes. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021). Here, the state has a sufficiently important government interest in informing voters of who is financing

election-related speech, *see Citizens United v. FEC*, 558 U.S. 310, 369 (2010), but the disclosure requirement is not narrowly tailored to serve that interest.

A. SDCL § 12-27-16 is not narrowly tailored because it does not include *any* less intrusive tools available to the state.

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 met their burden here.

Instead, Defendants attempt to shift the burden to Plaintiff by claiming that, other than an opt-out provision, Plaintiff does not discuss “less intrusive tools” available to the state. Defs.’ Resp. at 4. This is false. Indeed, Defendants’ own Response acknowledges that the opt-out provision wasn’t the only element that Plaintiff cited as one that the state could have included in the disclosure regime to ensure it was narrowly tailored to support its interest. Defendants quote Plaintiff’s motion, stating that the on-ad disclosure rule is not narrowly tailored because it has no explicit opt-out provision for contributors to SFLA “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.” Defs.’ Resp. at 3 (quoting Doc. 67, Pl.’s Mot. at 6) (emphasis added). Defendants’ brief asserts that “[n]either element is necessary for SDCL § 12-27-16 to satisfy exacting scrutiny,” Defs.’ Resp. at 3 (emphasis added), a tacit acknowledgment that Plaintiff *did* discuss less intrusive tools other than an opt-out provision.

Further, in its Motion for Summary Judgment, Plaintiff discussed how “[c]ourts have found several ways” that states can survive narrow tailoring beyond opt-out provisions, “including thresholds on the amount of donations” and “temporal limits,” Pl. Mot. at 12, and targeting requirements, *id.* at 10–11. Plaintiff discussed the implementation of these provisions at length and how such requirements helped statutes to pass exacting scrutiny, or the lack of such requirements led to the court striking down the provision. *See* Pl.’s Mot. at 7–12.

But even if Defendants were correct that Plaintiff had pointed to no less intrusive tools available to the state—which they are not—it is Defendants’ burden to demonstrate that the statute is narrowly tailored to serve an important governmental interest, not Plaintiff’s. *See Cornelio v. Connecticut*, 32 F.4th 160, 177 (2d Cir. 2022).

The only attempt that Defendants make to show that the disclosure requirement is narrowly tailored is its claim that “four states have passed statutes that contain no off-ramp provisions at all, either for earmarking contributions or minimum donation limits” and that “several of these statutes have been found constitutional.” Defs.’ Resp. at 4. Defendants again are wrong. Of the four statutes mentioned, only one statute—Alaska’s—has been found constitutional. *See Smith v. Helzer*, 614 F. Supp. 3d 668 (D. Alaska 2022). The “similar, but untested statutes of other states” do not “support the validity of SDCL § 12-27-16” but instead display the various other “less intrusive tools” available. Defs.’ Resp. at 5. Multiple state statutes have a high donation threshold before the on-ad disclosure requirement is triggered.

Oregon requires donors contribute over \$10,000 before the rule applies. Or. Rev. Stat. Ann. § 260.266 (West). Vermont’s on-ad disclosure rule only applies to donors who contributed more than \$2,000 *and also* contributed more than 25 percent of all contributions beginning in the two-year general election cycle in which the contribution was made. 17 V.S.A. § 2972(c)(1). Other states allow donors to direct how their donations are used, allowing them to protect their privacy and still contribute. *See* Rev. Code Wash. (ARCW) § 42.17A.350 and Me. Rev. Stat. Ann. tit. 21-A, § 1014 (allowing donors to earmark donations to avoid disclosure). These statutes illustrate less intrusive tools—high thresholds, time windows, and earmarking—available to South Dakota but absent from its statute.

Defendants also cite a case challenging a Massachusetts statute containing a top contributors on-ad disclosure requirement that applies only to donations above \$5,000 and to communications in the 90-day window preceding an election. *Mass. Fiscal Alliance v. Sullivan*, No. 18-cv-11872, 2018 U.S. Dist. LEXIS 189403 (Nov. 6, 2018) (challenging Mass. Gen. Laws ch. 55, § 18G). In upholding the law, the district court emphasized the “limited nature of the requirement,” pointing to the \$5,000 minimum donation and temporal restrictions—both absent from South Dakota’s statute. *Id.*, at *8. Defendants do not attempt to explain how *Sullivan* supports its claim that SDCL § 12-27-16—which contains no off-ramp provision, minimum donation requirement, or temporal restriction—is narrowly tailored to serve its interest.

B. Plaintiff's authority is relevant and persuasive.

Plaintiff discusses four helpful and relevant cases in this matter. First, Plaintiff considers *Wyoming Gun Owners v. Gray*, 83 F.4th 1224 (10th Cir. 2023).

Defendants claim that the *Wyoming Gun Owners* case is distinguishable because it concerned a reporting requirement rather than an on-ad disclosure requirement and because the court found the provision to be vague. But that does not make it irrelevant—both the Wyoming disclosure rule and the South Dakota disclosure rule face the same standard of scrutiny and must be narrowly tailored to the government's interest. The detriments of the Wyoming statute recognized by the Tenth Circuit are the same detriments that plague SDCL § 12-27-16. Both statutes “sweep in speakers” who may not support the communication or “perhaps wished to preserve their privacy or anonymity.” *Wyoming Gun Owners*, 83 F.4th at 1247. The Court suggests a less-intrusive tool available to Wyoming, noting that “the state could have outlined an earmarking system” which would “better serve[] the state’s informational interest.” *Id.* at 1248.

Notably, the Court points to another Tenth Circuit case, *Independence Institute v. Williams*—where Colorado’s statute in question was *not* found void for vagueness—where the Court “recognized the role earmarking can play in tailoring a disclosure law.” *Id.* (citing *Independence Inst. v. Williams*, 812 F.3d 787, 798 (10th Cir. 2016)). Colorado’s requirement that organizations only disclose donors who earmarked their donations for electioneering “helped render the statute’s scope ‘sufficiently tailored.’” *Id.* (quoting *Independence Inst.*, 812 F.3d at 797). The *Wyoming Gun Owners* Court recognized that the same analysis can be applied to a

disclosure regime regardless of whether that regime has been found void for vagueness—earmarking donations plays an important role in narrowly tailoring the statute in both circumstances. The Tenth Circuit continued to emphasize that “[i]t is no surprise that at least one of our district courts has found the absence of an earmarking provision central to concluding that a disclosure regime fails exacting scrutiny.” *Id.* Again, the court emphasized the critical role of earmarking without getting into the details of the disclosure regime—an earmarking provision is *central* to the exacting scrutiny analysis.

SDCL § 12-27-16 offers no earmarking option nor any way to meaningfully opt-out of disclosure. Without the ability to earmark the donations, donors in South Dakota may have their names appear on a publicly displayed ad with which they may not agree. SDCL § 12-27-16 does not allow donors the “importan[t]” ability “to ‘opt out’ of a disclosure scheme while maintaining the ability to speak.” *Wyoming Gun Owners*, 83 F.4th at 1249 (citing *Gaspee Project v. Mederos*, 13 F.4th 79, 89 (1st Cir. 2021)).

Defendants also argue that SDCL § 12-27-16’s requirements do not “impose unequal burden on any entity.” Defs.’ Resp. at 8. But equal burdens on entities do not make a statute narrowly tailored—that was simply a particular facet of the Wyoming statute. Instead, courts consider the “extent to which burdens” are necessary at all. *Wyoming Gun Owners*, 83 F.4th at 1244. The Tenth Circuit even suggested that Wyoming Gun Owners did not suffer “particularly outsized burdens” yet still found that the statute was *not* narrowly tailored. *Id.* at 1246. This is

because “beyond proving a balanced relationship between the disclosure scheme’s burdens and the government’s interests, the government must ‘demonstrate its need’ for the disclosure regime ‘in light of any less intrusive alternatives.’” *Id.* at 1247 (quoting *Bonta*, 594 U.S. at 613). South Dakota has not demonstrated the need for such an aggressive disclosure regime with no off-ramps, targeting requirements, or temporal limits. Instead, under SDCL § 12-27-16, donors must choose between anonymity and supporting non-candidate speech. The same ills that plagued the Wyoming statute also impact donors in South Dakota.

Next, Defendants argue that *Dinner Table Action v. Schneider* does not support Plaintiff’s case because the Maine statute at issue in that case required the reporting of all contributions, no matter the amount. Defs.’ Resp. at 8–9; *Dinner Table Action v. Schneider*, No. 1:24-cv-00430, 2025 U.S. Dist. LEXIS 134052, at *18 (D. Me. July 15, 2025). But with both the Maine statute and SDCL § 12-27-16, there is “no *meaningful* opportunity for anonymous contributions.” *Id.* at *14 (emphasis added). SDCL § 12-27-16 triggers at the very low threshold of \$100. Defendants claim that donors “retain the option to donate less than one hundred dollars and avoid disclosure,” Defs.’ Resp. at 9, but this is not a *meaningful* opportunity for an anonymous contribution, and the top five contributors could still include those who donate “very small amounts of money.” *Id.* at *12.

Defendants also assert that “the ease and relatively low cost of modern digital communication necessitates the donation threshold of one hundred dollars” because a higher threshold would allow groups to hide. Defs.’ Resp. at 9. But Defendants

point to no court that expressed such a concern; instead, courts have positively viewed higher donation thresholds as more narrowly tailored. *See Gaspee Project v. Mederos*, 13 F.4th 79, 89 (1st Cir. 2021) (“Taken together, these limitations on the Act’s reach only require disclosure of relatively large donors”) (referencing Rhode Island’s \$1,000 donor threshold for on-ad disclosures); *Mass. Fiscal Alliance v. Sullivan*, 2018 U.S. Dist. LEXIS 189403, *8 (Nov. 6, 2018) (emphasizing the “limited nature of the requirement” when determining it to be narrowly tailored, noting “it only applies to large contributions of over \$5,000 . . .”).

Additionally, the court in *Dinner Table Action* found that there was no “explicit” opt-out provision for donors. This, and the inclusion of even small donations in the disclosure regime, led the court to find that the statute was not narrowly tailored. South Dakota’s provision suffers from both downfalls. *Id.* at *12. SDCL § 12-27-16 does not contain an explicit opt-out provision, and despite Defendants’ claims, the South Dakota statute provides no meaningful opportunity for anonymous contributions with a minimum donation threshold of only \$100. SDCL § 12-27-16(1)(c).

Next, Defendants misrepresent the holding of *Gaspee Project v. Mederos*. 13 F.4th 79 (1st Cir. 2021). Defendants state that “the court did not find” that an off-ramp provision “was necessary for it to satisfy exacting scrutiny.” Defs.’ Resp. at 10. But the court never stated that the off-ramp was *not* necessary and even noted the significance of such a provision: “importantly, the Act provides off-ramps for individuals who wish to engage in some form of political speech but prefer to avoid

attribution.” *Gaspee Project*, 13 F.4th at 89. The Court also discussed Rhode Island’s multiple provisions that narrowed the scope of its disclosure statute. *Id.* These included a \$1,000 spending threshold, pre-election temporal limits, and targeting requirements, all absent from SDCL § 12-27-16. *Id.* Thus, *Gaspee Project* displays other “tools” available to South Dakota to narrowly tailor the disclosure requirement with the State’s interests and emphasizes the importance of off-ramps.

Finally, Defendants downplay the relevance of *Rio Grande Foundation v. Oliver*, claiming that it is inapplicable because the provision at issue included express and issue advocacy. 727 F. Supp. 3d 988 (D.N.M. 2024); Defs.’ Resp. at 10. But this does not impact whether the law is narrowly tailored to the government’s informational interest—the analysis stays the same. The court found that the statute was narrowly tailored because it “only target[ed] large donors” and these donors could opt out by given written notice that their donations should not be used for independent expenditures. *Rio Grande Foundation*, 727 F. Supp. 3d at 1012. As Defendants admit, this opt-out provision “bolstered its narrow tailoring.” Defs.’ Resp. at 10. And once again, SDCL § 12-27-16 does not provide either of these options for donors in South Dakota.

CONCLUSION

Plaintiff has pointed to multiple avenues that South Dakota could take to narrowly tailor its statute, including earmarking donations, a high dollar threshold, temporal limits, and targeting requirements. Many states employ off-ramps, higher thresholds, temporal windows, and targeting limits. SDCL § 12-27-16(1)(c) is an

outlier: it offers no donor protections and forces a choice between speech and privacy.

The Court should grant Plaintiff's motion for summary judgment, declaring SDCL § 12-27-16(1)(c) unconstitutional as applied to Plaintiff and enjoin its enforcement.

Dated: October 30, 2025.

Respectfully Submitted,

By: /s/ Aaron P. Pilcher
Aaron P. Pilcher, Attorney at Law
79 3rd St. SE
Huron, SD 57350
T: (605) 554-1661 | F: (605) 554-1662
aaronpilcherlaw@gmail.com

By: *NDaniel*

Noelle Daniel
(Pro Hac Vice)
Jeffrey Schwab
(Pro Hac Vice)
Liberty Justice Center
7500 Rialto Blvd.
Suite 1-250
Austin, Texas 78735
T: 512-481-4400
jschwab@ljc.org
ndaniel@libertyjusticecenter.org

*Attorneys for Plaintiff Students for Life
Action*

Certificate of Service

I hereby certify that on October 30, 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:

Grant M. Flynn
Assistant Attorney General
1302 East Hwy 14, Suite 1
Pierre, SD 57501-8501
Grant.Flynn@state.sd.us

☐ U.S. Mail
☐ Hand Delivery
☐ Facsimile
☐ Federal Express
☒ Case Management/Electronic Case Filing

/s/ Aaron P. Pilcher
Attorney for Plaintiff