UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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.	)	3:23-CV-3010-RAL

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Students for Life Action (SFLA) seeks to undo South Dakota's independent communication disclosure and disclaimer law ignoring that similar federal and state laws have been constitutionally upheld for decades. In their Motion to Dismiss, Defendants asserted the on-ad donor disclaimer fits well within the constitutional parameters of the First and Fourteenth Amendments. The on-ad donor disclaimer and reporting requirements are substantially related and narrowly tailored to important governmental interests. The standard of review for disclosure laws is exacting scrutiny.

1. South Dakota's statute is not overbroad.

SFLA misses a very fundamental concept that has pervaded case law since *Citizens United* and that is there is no distinction between express advocacy and issue advocacy when evaluating disclosure laws. *Gaspee Project v. Mederos*, 13 F.4th 79, 86 (2021) (citing *Citizens United v. Federal Election Com'n.*, 558 U.S. 310, 368-69 (2010). That is because "disclosure regimes do not limit political speech at all." *Gaspee Project*, 13 F.4th at 86.

The disclosure and disclaimer of S.D. Codified Laws § 12-27-16 only apply when a payment or promise of payment totaling more than $100 for an independent communication expenditure is made. "[T]his spending threshold helps to ensure that the electorate can understand who is speaking and, thus, to 'give proper weight to different speakers and messages' when deciding how to vote." *Id.* at 88 (citing *Citizens United v. Federal Election Com'n.*, 558 U.S. at 371 (2010).

SFLA ignores case law by stating "[t]he government has no legitimate interest . . . in compelling them to disclose their top five donors . . . ." There is an informational interest in the on-ad disclaimer requiring SFLA to disclose its top five contributors. There is no "more efficient tool for a member of the public who wishes to know the identity of the donors backing the speaker." *Gaspee Project*, 13 F.4th at 91. "Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin." *National Organization for Marriage v. McKee*, 649 F.3d 34 (2011). "The donor disclosure alerts viewers that the speaker has donors and, thus, may elicit debate as to both the extent of donor influence on the message and the extent to which the top five donors are representative of the speaker's donor base . . . ." *Gaspee Project*, 13 F.4th at 91.

The statute gives adequate warning of what activities it proscribes and for those who must apply it, explicit standards are set forth. *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973); S.D. Codified Laws § 12-27-16. The statute plainly sets forth when a disclaimer must be made regarding independent communications. S.D. Codified Laws § 12-27-16. A disclaimer must be made when an independent communication expense is made concerning a candidate, public office holder, ballot question, or political party.

SFLA argues because the law applies to candidates and ballot questions "at all times" it makes S.D. Codified Laws § 12-27-16 overbroad. However, by their very definition, it forecloses SFLA's argument. A candidate is "any person who seeks nomination for or election to public office." S.D. Codified Laws

§ 12-27-1(4). A ballot question is "any referendum, initiative, proposed constitutional amendment, or other measure submitted to the voters at any election." S.D. Codified Laws § 12-27-1(1). Independent communications only apply when the individual is seeking public office and when the ballot question is submitted to the voters. By its very nature, there is a limited time frame from which SFLA will be able to incur independent expenditures for a candidate or ballot question.

The earliest day for June primary or independent candidates to circulate nominating petitions for 2024 is January 1, 2024, and the last day is March 26, 2024. S.D. Codified Laws §§ 12-6-8 and 12-6-4. Absentee voting for primary elections begins on April 19, 2024. S.D. Codified Laws § 12-19-1.2. The 2024 general election is held on November 5, 2024. S.D. Codified Laws § 12-2-2. A ballot question must be filed by the first Tuesday in May of a general election year for the ballot question to be submitted to the voters at the next general election. S.D. Codified Laws §§ 2-1-1.1 and 2-1-1.2. Thus, there is a limited time frame by which S.D. Codified Laws § 12-27-16 would apply. It does not apply "at all times."

We are left with SFLA's final overbreadth argument that the statute's burden appears "to be triggered by public communications concerning a 'public official' – regardless of whether that official is, or ever will be a candidate for office." (Doc. 35 at 9). While SFLA quotes "public official" there is no such phrase in South Dakota Codified Laws. South Dakota's statute defines what a "public office holder" is. Expressly advocate means "to urge the election or

defeat of one or more clearly identified candidates, or public office holders or the placement of a ballot question on the ballot or the adoption or defeat of any ballot questions using explicit words of advocacy of election or defeat such as: vote, re-elect, support, cast your ballot for, reject, and defeat . . . ." S.D. Codified Laws § 12-27-1(9)(a).

A "public office" is "an elected position in government." S.D. Codified Laws § 12-1-3(16). A candidate is "a person whose name is on the ballot or who is entitled to be on the ballot to be voted upon for nomination or election at any election." S.D. Codified Laws § 12-1-3(1).

The main issue SFLA has is with the meaning of "public office holder" when it comes to its overbreadth argument. (Doc 35 at 2). "[A]pplication of the [overbreadth] doctrine is strong medicine that should be employed sparingly and only as a last resort." *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 588 (8th Cir. 2013) (citing *Neely v. McDaniel*, 677 F.3d 346, 350 (8th Cir. 2012)). Courts vigorously "enforce the requirement that a statute's overbreadth be substantial, not only in an absolute sense but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 293 (2008). "This court can consider each challenged disclosure requirement in isolation, and if necessary, apply 'the normal rule that partial, rather than facial, invalidation is the required course.'" *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d at 588 (8th Cir. 2013) (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502-04 (1985). South Dakota's law is not overbroad and it

is narrowly tailored to serve an important governmental interest and survives exacting scrutiny.

SFLA alleges South Dakota's one-time event-driven report is the functional equivalent of political-committee status and its attendant obligations. (Doc. 35 at 12). Their comparison is far from the mark.

There are no cumbersome ongoing regulatory burdens required by South Dakota. The report is a simple disclosure form that ends as soon as the report is filed and is easily available on the South Dakota Secretary of State's website and is filed online. https://sdsos.gov/elections-voting/assets/CommunicationExpendituresFillable.pdf. No attorney is required to interpret or complete the form.

SFLA would need to fill in the blanks regarding their name, mailing address, website address, name and title of the person filing the report, name of the person who authorized the expenditure on behalf of the entity, and the name of the chief executive of the entity. S.D. Codified Laws § 12-26-16(3)(a). SFLA would also need to list the name of each candidate, public office holder, ballot question, or political party identified in each of their communications, the amount spent on the communication, a description of the content of each communication, and the date the communication was disseminated. *Id.* Lastly, they shall identify the mailing address and name of persons, partners, owners, trustees, beneficiaries, participants, members, or shareholders if the entity is comprised of twenty or fewer of the same. S.D. Codified Laws § 12-26-16(4)-(5).

https://sdsos.gov/elections-voting/assets/CommunicationExpendituresFillable.pdf. This is a simple one-time event-driven form that anyone can complete without the assistance of an attorney.

Unlike political committees, independent communication expenditure reporting requires no chair or treasure, no statement of organization, no campaign finance disclosure statement, no supplemental reports, and no records to be kept by a treasurer. S.D. Codified Laws §§§ 12-27-2, 12-27-3, 12-27-16, 12-27-22, 12-27-28, and 12-27-29. South Dakota's simple form and one-time reporting requirement serve a substantial informational interest. "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporation and elected officials accountable for their positions and supporters." *Citizens United*, 558 U.S. at 370.

2. South Dakota's statute is not void for vagueness.

"Many statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.'" *National Organization for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011) (citing *Rose v. Locker,* 423 U.S. 48, 49-50 (1975) (per curiam) (quoting *Robinson v. United States*, 324 U.S. 282, 286 (1945). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). "The mere fact that a regulation requires interpretation does not make it vague." *Ridley v. Mass. Bay Transp.*

Auth., 390 F.3d 65, 93 (1st Cir. 2004). "[A] statute is unconstitutionally vague only if it 'prohibits . . . an act in terms so uncertain that persons of average intelligence would have no choice but to guess at its meaning and modes of application.'" *United States v. Councilman*, 418 F.3d 67, 84 (1st Cir. 2005) (en banc) (quoting *United States v. Hussein*, 351 F.3d 9, 14 (1st Cir. 2003)).

South Dakota defines what a "communication" is not. S.D. Codified Laws §§ 12-27-1(11) and 12-27-16(6). It is not a news article, editorial endorsement, opinion, commentary writing, or letter to the editor. S.D. Codified Laws § 12-27-16(6)(a). Further, a communication is not an editorial endorsement or opinion aired by a broadcast facility, any communication by a person made in the regular course and scope of the person's business or ministry, any communication that refers to any candidate only as part of the popular name of a bill or statute, and any communication used for the purpose of polling if the poll question does not expressly advocate for or against a candidate, public office holder, ballot question, or political party. S.D. Codified Laws § 12-27-16(6)(b)-(e).

SFLA alleges for the first time in their response that "related to" is vague. This argument was not raised in SFLA's First Amended Complaint and should not be considered by the court. (Doc. 24). *Hutson v. Wells Dairy, Inc.*, 578 F.3d 823, 827 (8th Cir. 2009). Regardless, "related to" is limited by communication. S.D. Codified Laws § 12-27-16 sets forth what a "communication" is not. "Concerning" is limited by the narrower definitions of candidate and ballot questions. S.D. Codified Laws § 12-27-1(1) and (4). In other words, the

communication must apply to candidates and ballot questions. S.D. Codified Laws § 12-27-1(11). Candidates and ballot questions refer to someone or something that is going to be on the ballot soon. S.D. Codified Laws § 12-27-1(1) and (4).

3. Exacting scrutiny is the standard of review to be applied in this case.

SFLA chooses to ignore long-standing case law that exacting scrutiny is the standard of review for disclosure laws and continues to assert strict scrutiny is the standard of review. To support their argument that strict scrutiny applies, SFLA laboriously cites case precedent that is not applicable since *Citizens United* was decided. *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010). SFLA argues that South Dakota's on-ad donor disclaimer law is content-based and therefore strict scrutiny applies.

SFLA cites cases from 1994, 2015, and 2018 supporting its claim that laws that compel speakers to utter speech are subject to strict scrutiny. (Doc. 35 at 14). *Bonta* was decided in 2021 and reiterates the standard of review for donor and disclaimer requirements is exacting scrutiny. *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373, 2385 (2021). SFLA's obsession with arguing South Dakota law is content-based has caused them to put blinders on and ignore long-standing and recent case law governing disclosure and disclaimer requirements. The United States Supreme Court as recently as 2021 has held the standard they have settled on in challenges to compelled disclosure laws is "exacting scrutiny." *Id.* at 2383.

One case SFLA relies on is *ACLU of Nevada v. Heller* for the proposition that strict scrutiny applies to on-ad disclaimers. *ACLU of Nevada v. Heller*, 378 F.3d 979, 991 (9th Cir. 2004). However, later Supreme Court cases "made clear that exacting scrutiny, not strict scrutiny, applies to campaign finance disclosure requirements." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010); see *John Doe No. 1 v. Reed*, 561 U.S. 186, 196, (2010) (exacting scrutiny applies to a disclosure rule); *Citizens United*, 558 U.S. at 366-67 (exacting scrutiny applies to a rule mandating a disclaimer that takes up time or space in an advertisement).

SFLA does not want to provide their top-five contributors on their ads, instead, they wish to deprive the electorate "of information, knowledge, and opinion vital to its function." *Citizens United v. Federal Election Com'n*, 558 U.S. at 354 (2010) (citation omitted). SFLA ignores that nearly all fifty states have some type of disclaimer law requiring the publication of donors of organizations. https://www.ncsl.or/elections-and-campaigns/disclaimers-on-political-advertisements. Further, federal law has disclaimer laws relating to federal elections where this information is publicly available through a website and on-ad disclaimer requirements. 52 U.S.C. § 30104(f), 52 U.S.C. § 30104(i)(4), 52 U.S.C. § 30120. SFLA's interpretation of content-based laws requiring strict scrutiny would upend federal and state disclaimer laws across the nation.

SFLA relies on a 1995 United States Supreme Court case and a 9th Circuit case that South Dakota cannot require on-ad disclaimers. (Doc. 35 at

18). Both cases relied upon by SFLA were decided before *Citizens United* (2010) and *Bonta* (2021). *Citizens United* was familiar with content-based laws when it considered disclaimer and donor requirements of a federal law including its application to "a movie broadcast via video-on-demand." *Citizens United v. Federal Election Com'n*, 558 U.S. at 340 and 371 (2010). Courts have long applied exacting scrutiny to laws regulating campaign finance donor disclosures. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. at 2385 (2021).

Including an on-ad donor disclaimer of the top-five contributors not only serves an informational interest for the public but also provides an informational interest to SFLA shareholders. By publishing in an on-ad disclaimer SFLA's top-five contributors SFLA's shareholders can hold SFLA accountable for any message they may disagree with "through the procedures of corporate democracy." *Citizens United v. Federal Election Com'n.*, 558 U.S. at 370 (2010) (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978).

Lastly, SFLA tries to downplay the informational interest in on-ad donor disclaimer requirements citing *McIntyre v. Ohio Elections Comm'n.* (Doc. 35 at 19). SFLA again ignores subsequent case law. "[T]he informational interest alone is sufficient . . ." to justify on-ad donor disclaimers. *Citizens United v. Federal Election Com'n.*, 558 U.S. at 369 (2010). The informational interest applies to shareholders of SFLA and citizens of South Dakota.

CONCLUSION

For the above reasons and the reasons set forth in the Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, the Court should uphold South Dakota's disclosure and disclaimer law regarding independent communication expenditures and dismiss SFLA's Complaint.

Dated this 30th day of November, 2023.

/s/ Clifton E. Katz
Clifton E. Katz
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
Email: Clifton.Katz@state.sd.us

CERTIFICATE OF SERVICE

I hereby certify that on November 30th, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Central Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Clifton E. Katz
Clifton E. Katz
Assistant Attorney General