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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff brings an overbreadth claim alleging South Dakota's disclosure law violates the First and Fourteenth Amendments on its face. (Doc. 19 at ¶¶ 55-63.) Plaintiff also wants to spend money on independent communications that concern a candidate, public office holder, ballot question, or political party without disclosing in an on-ad donor disclaimer their top five contributors and brings an as-applied and facial challenge that the on-ad donor disclaimer required by S.D. Codified Law § 12-27-16 violates the First and Fourteenth Amendments. *Id.* at ¶¶ 64-81. Lastly, Plaintiff alleges the on-ad donor disclaimer is void for vagueness. *Id.* at ¶¶ 82-93. Plaintiff has no standing to bring their claims and their challenges are meritless.

Plaintiff is a 501(c)(4) nonprofit frequently undertaking independent communication expenditures in South Dakota and in the next two years intends to engage in issue advocacy communications in South Dakota. *Id.* at ¶¶ 4, 10, 22. While the Plaintiff is not prevented from speaking nor having any ceiling imposed on their spending, they want to hinder South Dakota's interest in promoting an informed electorate by not disclosing the source of their funding in an on-ad donor disclaimer, contrary to the S.D. Codified Law § 12-27-16.

Instead, Plaintiff wants to cloak its top five contributors and their organization under the cover of darkness. Plaintiff wants to conceal their identity and the identity of their top five contributors so that they can anonymously spread messages without being connected to their message,

contrary to public interest. (See Doc. 19 generally.) The public interest favors disclosing the source of political information in independent communications so that voters can discern bias and detect manipulation. *Institute for Free Speech v. Jackley*, 340 F.Supp.3d 853, 862 (D.S.D. 2018) (citing *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 477-78 (7th Cir. 2022) and *Cal. Pro Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105-06 (9th Cir. 2003)). "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. Federal Elections Comm'n*, 558 U.S. 310, 371 (2010).

South Dakota is just one of many states that informs its electorate of which entities are spending money on independent communications. These government disclosure laws have a robust, long-standing, and constitutionally sanctioned history. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (upholding disclosure requirements); see also *Citizens United,* 558 U.S. at 371 (upholding disclosure requirements). "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. So important is election transparency that "the majority of circuits have concluded that such disclosure requirements are not unduly burdensome." *Yamada v. Snipes*, 786 F.3d 1182, 1195 (9th Cir. 2015) (citations omitted). South Dakota's disclosure statute fits within these well-tread constitutional parameters.

Even if Plaintiff has standing, South Dakota's on-ad donor disclaimer and the independent communication expenditure statement substantially

further a sufficiently important governmental interest, both pass constitutional muster. Defendants accordingly request Plaintiff's Complaint be dismissed.

STATEMENT OF FACTS

1. Statements and Disclaimers Regarding Independent Communication Expenditures.

South Dakota seeks transparency in its elections by requiring persons or entities that make a payment totaling more than $100 for an independent communication that concerns a candidate, public office holder, ballot question, or political party to append or include an on-ad disclaimer that identifies the person or entity making the independent communication. S.D. Codified Law § 12-27-16(1). The on-ad disclaimer must state the mailing address and if applicable, the website address of the person or entity and note the "Top Five Contributors" including a listing of the names of the five persons making the largest contributions to the entity during the twelve months preceding that communication. *Id.* A violation of S.D. Codified Law § 12-27-16(1) is a Class 2 misdemeanor and a subsequent violation is a Class 1 misdemeanor. *Id.*

An "independent communication expenditure" is a ". . . communication concerning a candidate or ballot question which is not made to, controlled by, coordinated with, requested by, or made upon consultation with that candidate, political committee, or agent of a candidate or political committee." S.D. Codified Law § 12-27-1(11). A political committee is "any candidate campaign committee, political action committee, political party, or ballot question committee." S.D. Codified Law § 12-27-1(18). There are exceptions

excluded from independent communications that encompass, among others, news articles, editorial opinions, or endorsements. S.D. Codified Law § 12-27-16(6).

Any person or entity making a payment totaling more than $100 for an independent communication must file an independent communication expenditure statement within forty-eight hours of the time the communication was disseminated identifying the person or entity making the contribution. S.D. Codified Law § 12-27-16(2). The statement is to include the mailing address and if an entity their website address if applicable. S.D. Codified Laws § 12-27-16(3)(a)(i)-(ii). The statement must also identify the independent communication expenditures incurred for the communication, the name of each candidate, public office holder, ballot question, or political party mentioned or identified in each communication, the amount spent on the communication, and a description of the content of each communication. S.D. Codified Law § 12-27-16(3)(a)(iii). In addition, an entity must also include the name and title of the person filing the report, the name of its chief executive, if any, and the name of the person who authorized the expenditures on behalf of the entity. S.D. Codified Law § 12-27-16(3)(b).

2. Plaintiff's Complaint

Plaintiff is a 501(c)(4) nonprofit social welfare organization dedicated to impacting public policy and influencing key elections by training and mobilizing pro-life leaders. (Doc. 19 at ¶¶ 10, 17.) Plaintiff engaged in advocacy in South Dakota on June 6, 2022, by sending "text messages

informing voters of candidates' positions on abortion-related issues" and sending mailers urging South Dakotans "to contact their state legislators to encourage them to support pro-life legislation." *Id.* at ¶¶ 18, 20-21. In the next two years, Plaintiff intends to communicate with the public in South Dakota through "issue advocacy" about candidates, and public office holders. *Id.* at ¶¶ 4, 22.

Although they are free to communicate at present with proper on-ad disclaimers and reporting, Plaintiff wishes to do so anonymously without disclosing their top five contributors, speculating that they and their donors may face harassment for their speech. *Id.* at ¶¶ 38-39, 42-49. Plaintiff has accordingly brought this civil action against the South Dakota Attorney General and the South Dakota Secretary of State in their official capacities only. (Doc. 19.)

Plaintiff's Complaint includes one count that mounts an overbreadth constitutional facial challenge to South Dakota's on-ad donor disclaimer and further alleges no restrictions can be imposed on "issue advocacy" because South Dakota's law governing disclaimer and disclosure requirements is not narrowly tailored to serve a governmental interest. *Id.* at ¶¶ 55-63. In Count II Plaintiff alleges South Dakota's on-ad donor disclaimer requiring they list their top-five contributors is unconstitutional on its face and as applied, is content-based, and subject to strict scrutiny. *Id.* at ¶¶ 64–71, 80. If their strict scrutiny argument does not prevail, Plaintiff alleges South Dakota's on-ad disclosure is then subject to exacting scrutiny. *Id.* at ¶¶ 72-73. Plaintiff

further alleges South Dakota's on-ad donor disclaimer serves no informational interest and is not narrowly tailored. *Id.* at ¶¶ at 74-79. Lastly, Plaintiff in Count III alleges South Dakota's on-ad disclaimer is void for vagueness. *Id.* at ¶¶ 82-93.

STANDARD OF REVIEW

1. Rule 12(b)(1) Standard

Actions are subject to dismissal when the court lacks subject matter jurisdiction over the claims. Fed. R. Civ. P. 12(b)(1). *American Atheists, Inc. v. Rapert*, 507 F.Supp.3d 1057, 1062 (E.D. Ark. 2020) (citing *Johnson v. United States*, 534 F.3d 958, 964 (8th Cir. 2008)). "Because standing is a jurisdictional question, a motion to dismiss for lack of standing is properly analyzed under Rule 12(b)(1)." *Id.* (citing *Disability Support All. v. Heartwood Enters.*, LLC, 885 F.3d 543, 547 (8th Cir. 2018)). Plaintiff "bear[s] the burden of establishing, by a preponderance of the evidence, that jurisdiction exists." *Id.* (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). Courts must distinguish between a "facial attack" and "factual attack" in deciding a motion to dismiss for lack of subject-matter jurisdiction. *Id.* (citing *Carlsen v. Gamestop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016)). A court restricts itself to the face of the pleadings where a party brings a facial attack. *Id.* (citing *Osborn v. United States*, 918 F.2d 724, 727 n.6 (8th Cir. 1990)).

2. Rule 12(b)(6) Standard

The legal sufficiency of the claims stated in the complaint is tested under a Rule 12(b)(6) motion. *Id.* (citing *Peck v. Hoff*, 660 F.2d 371, 374 (8th Cir. 1981)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "[T]he allegations pleaded must show 'more than a sheer possibility that a defendant has acted unlawfully.'" *American Atheists, Inc.*, 507 F.Supp.3d at 1062 (citing *Iqbal*, 556 U.S. at 678).

Disclaimer and disclosure requirements are subject to exacting scrutiny which requires (1) "a substantial relationship between the disclosure requirement and a sufficiently important governmental interest" and (2) "that the disclosure requirement be narrowly tailored to the interest it promotes." *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373, 2385 (2021) (citations omitted). Exacting scrutiny "require[s] a fit that is not necessarily perfect, but reasonable." *Id.* at 2384 (quoting *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 218 (2014)).

ARGUMENT

First, Plaintiff does not have standing. Plaintiff must allege an injury in fact to have standing and have failed to do so. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).

Second, even if Plaintiff has alleged an injury in fact, they lack standing to bring a facial overbreadth claim. Plaintiff "must identify a significant difference between [their] claim that the statute is facially invalid on overbreadth grounds, and [their] claim that it is unconstitutional as applied to his particular activity." *Final Exit Network, Inc. v. Ellison*, 370 F.Supp.3d 995, 1014 (2019) (citations omitted). Plaintiff has failed to distinguish their facial and as applied challenges.

Third, even if the Court determines Plaintiff has standing, their facial and as applied challenges to S.D. Codified Law § 12-27-16 should be dismissed. Facial challenges are disfavored because they often rest on speculation. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). "[A] facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Id.* at 449. When courts look to determine "whether a law is facially invalid" they must not go "beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449-50. "[F]acial challenges leave no room for particularized considerations and must fail as long as the challenged regulation has any legitimate application." *Gaspee Project v. Mederos*, 13 F.4th 79, 92 (1st Cir. 2021) citing *Washington*

State Grange, 552 U.S. at 449. S.D. Codified Law § 12-27-16 has a legitimate application and is valid on its face.

Plaintiff alleges S.D. Codified Law § 12-27-16 "violates the First Amendment, incorporated against South Dakota through the Fourteenth Amendment, on its face and as applied to Plaintiff." (Doc. 19 at ¶ 80.) However, what Plaintiff really brings is only a facial challenge. An as applied challenge, challenges a statutes application "only as-applied to the party before the court". *Minnesota Majority v. Mansky,* 708 F.3d 1051, 1059 (8th Cir. 2013). Here all allegations in Plaintiff's Complaint apply equally to Plaintiff as they do to those not before the court.

1. Students for Life Action Does Not Have Standing Because They Allege No Injury in Fact.

"Article III standing is a threshold question in every federal court case." *U.S. v. One Lincoln Navigator 1998*, 328 F.3d 1011 (8th Cir. 2003). Article III Standing to sue is "an essential and unchanging part of the case-or-controversy requirement," and without it, a court lacks subject matter jurisdiction. *Lujan*, 504 U.S. at 560. "To establish Article III standing, plaintiffs must show (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury." *Animal Legal Defense Fund v. Vaught*, 8 F.4th 714, 718 (8th Cir. 2021) citing *Lujan* at 560-561.

"The party invoking federal jurisdiction bears the burden of establishing" 'standing.' *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-12 (2013) (quoting

Lujan, 504 U.S. at 561). "[P]laintiffs must allege sufficient facts to support a reasonable inference that they can satisfy the elements of standing." *Animal Legal Defense Fund,* 8 F.4th at 718 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); and *Stalley v. Cath. Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007)). When evaluating standing brought forth in a motion to dismiss, courts must accept as true all the material allegations of the complaint and construe the complaint in favor of the complaining party. *Warth v. Sledin*, 422 U.S. 490, 501 (1975).

Plaintiff's complaint fails to allege the elements of Article III standing. Despite believing South Dakota Codified Laws § 12-27-16 is unconstitutional, Plaintiff alleges they engaged in issue advocacy in the past and intend to do so again within the next two years. (Doc. 19 at ¶¶ 4 and 22.) "'[S]ome day' intentions – without any description of concrete plans, or indeed even any specification of when the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *Final Exit Network, Inc.*, 370 F.Supp.3d at 1010 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). "A party cannot show an injury in fact by mere '[a]llegations of possible future injury.'" *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 672 (8th Cir. 2012) citing (*Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Plaintiff does not state it "will" engage in issue advocacy, only that they "intend" to engage in issue advocacy within the next two years. (Doc. 19 at ¶¶ 4, 22.) A plaintiff must show that their injury is more than "imaginary or

speculative." *Missouri Roundatable for Life*, 676 F.3d at 672 citing (*Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). "An allegation of a future injury may suffice if the threatened injury is 'certainly impending,' or there is a substantial risk that the harm will occur." *Animal Legal Defense Fund v. Vaught*, 8 F.4th at 718 (citations omitted). Plaintiff has not alleged or shown in their complaint their alleged threatened injury is "certainly impending".

While Plaintiff may intend to engage in issue advocacy at some unknown future time, their requested relief concerns wholly prospective conduct for which they provide no details. Where "the requested relief concern[ed] wholly prospective conduct for which the details of time" and other factors were lacking plaintiff had no standing. *Missouri Roundtable for Life*, 676 F.3d at 674 citing (*Elend v. Basham*, 471 F.3d 1199, 1202-09 (11th Cir. 2006)).

A sister circuit court has held that for a claim of injury to be "concrete and particularized" based on a "chilling effect" on speech, a Plaintiff must show "(1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced." *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1089 (2006) (en banc).

"In challenges to state initiative laws, plaintiffs typically show injury in fact through affidavits, whether as verified statements attached to the

complaint or sworn statements submitted later." *Missouri Roundatable for Life*, 676 F.3d at 674 citing (*Initiattive & Referendum Institute*, 450 F.3d at 1085). Initiative laws and on-ad disclaimers for independent communication expenditures are similar in that they both require filing, reporting, and conduct by persons to get their message out. All we have in Plaintiff's First Amended Complaint, which is unverified, is a bare-bones allegation Plaintiff has engaged in issue advocacy in the past and intends to at some unknown time in the next two years engage in issue advocacy with the public. (Doc. 19 at ¶¶ 4, 22.)

Further, Plaintiff has not alleged they "have no intention to engage in issue advocacy *because of* a credible threat that the statute will be enforced." *Initiative & Referendum Institute*, 450 F.3d at 1089. Plaintiff does the opposite and alleges in their First Amended Complaint that it "intends" to engage in "issue advocacy" about candidates. (Doc. 19 at ¶¶ 4, 22.) In the 8th Circuit, the Court found a complaint alleged Article III standing for three reasons. First, plaintiff "allege[d] that, but for the statute," they would have engaged in activities prohibited by the statute; Second, plaintiff alleged an intention to engage in conduct proscribed by the statute; and Third the complaint sufficiently alleged a credible threat of enforcement. *Animal Legal Defense Fund*, 8 F.4th at 718-19 (8th Cir. 2021).

Plaintiff, in its First Amended Complaint, has not alleged they would engage in issue advocacy "but for" S.D. Codified Law § 12-27-16 and does not allege self-censorship. Rather, Plaintiff has affirmed it intends to speak,

despite SDCL § 12-27-16. (Doc. 19 at ¶¶ 4 and 22.) Plaintiff never adequately alleged Article III standing in its First Amended Complaint.

A plaintiff needs to "establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute." Plaintiff has not alleged in its Complaint that its speech is chilled. Plaintiff only alleges their donor's speech is chilled. *Id.* at ¶ 40. To have standing Plaintiff needs to establish they are "chilled from doing so by the existence of the statute." *281 Care Committee v. Arneson*, 638 F.3d 621, 627 (2011).

Regardless, an element of a chilled speech injury is an actual intention not to speak. *Animal Legal Defense Fund*, 8 F.4th at 718; *Initiative and Referendum Institute*, 450 F.3d at 1089. Plaintiff has not alleged a fear of prosecution stopped them, instead, they allege they intend to continue to communicate despite the statute.

2. Plaintiff Lacks Standing to Bring a Facial Overbreadth Challenge.

Count I of Plaintiff's Complaint alleges S.D. Codified Law § 12-27-16 is overbroad on its face because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. (Doc. 19 at ¶¶ 58-60.)

"Courts generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Final Exit Network, Inc.*, 370 F.Supp.3d at

1013 citing *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 912 (8th Cir. 2017). "For a federal court to entertain a facial challenge pursuant to the First Amendment overbreadth doctrine, '[t]here must be a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the [c]ourt." *Id.* at 1014 citing *Josephine Havlak*, 864 F.3d 905, 912 (2017) (other citations omitted).

Courts have made it clear disclosure requirements for election-related spending survive First Amendment scrutiny. See, e.g., *Buckley*, 424 U.S. at 68 (upholding disclosure requirements); see also *Citizens United,* 558 U.S. at 371 (upholding disclosure requirements). "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. So important is election transparency, that "the majority of circuits have concluded that such disclosure requirements are not unduly burdensome." *Yamada*, 786 F.3d at 1195 (citations omitted).

Reporting requirements for election-related spending also clearly survives First Amendment scrutiny. Plaintiff is mistaken the reporting requirements are ongoing. S.D. Codified Law § 12-27-16 only requires reporting when more than one hundred dollars is paid for and independent communication. The reporting requirement is a one-time event-driven occurrence tethered to the spending of more than one hundred dollars. S.D. Codified Law § 12-27-16(2). Similar reporting laws in other states have been found constitutional. See, e.g., *Nat'l Ass,n for Gun Rights v. Mangan*, 933 F.3d 1102, 1118 (9th Cir. 2019)

(upholding Montana election law that required disclosure of groups that spent more than $250); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (stating Minnesota could require "reporting whenever money is spent"); *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 595-96 (8th Cir. 2013) (upholding Iowa's requirement for filing an independent communication statement and initial report within 48 hours).

S.D. Codified Law § 12-27-16 does not compromise recognized First Amendment protections. "Identification of the source of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected." *Citizens United*, 558 U.S. at 368 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792, n.32 (1978)). The interest in "'providing the electorate with information as to where political campaign money comes from' is sufficient to outweigh the possibility of infringement on First Amendment freedoms." *Gaspee Project*, 13 F.4th at 86-87 (citing *Buckley*, 424 U.S. at 66).

A. The Distinction Between Issue Advocacy and Express Advocacy Does Not Apply to Disclosure Laws.

Even if Plaintiff has standing to bring their Count I claim, their claim in Count I of their First Amended Complaint should be dismissed. Plaintiff makes much ado about issue advocacy and express advocacy in Count I. (Doc. 19. at ¶¶ 56-62.) Their premise is S.D. Codified Law § 12-27-16 is not limited to express advocacy and therefore it unconstitutionally burdens their speech based on their issue advocacy communications.

It is clear the distinction between issue advocacy and express advocacy plays no role in determining if a disclosure law is unconstitutional. "In the election context, the Supreme Court has rejected the attempt to distinguish between express advocacy and issue advocacy when evaluating disclosure laws – even though the Court has deemed such a distinction relevant when evaluating limits on expenditures." *Gaspee Project*, 13 F.4th at 86 (citing *Citizens United*, 558 U.S. at 368-69).

Disclosure laws do not limit speech. *Gaspee Project*, 13 F.4th at 86. "[D]isclosure is a less restrictive alternative to more comprehensive regulations of speech." *Citizens United*, 558 U.S. at 369. Other circuits have also rejected Plaintiff's distinction between issue advocacy and express advocacy as to disclosure laws. See, e.g., *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304, 308 (3rd Cir. 2015); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1016 (9th Cir. 2010); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (2012). Given the case law the distinction between issue advocacy and express advocacy is irrelevant.

3. South Dakota's On-Ad Donor Disclaimer Fits Well Within the Constitutional Parameters of the First and Fourteenth Amendments.

Count II of Plaintiff's complaint alleging the "on-ad donor disclosure rule violates the First and Fourteenth Amendments" should be dismissed. (Doc. 19 at ¶¶ 64 – 81. "[I]t is clear beyond hope of contradiction that the state can require speakers to self-identify through disclosures and disclaimers." *Gaspee Project*, 13 F.4th at 92. South Dakota's on-ad donor disclaimer requirement for

the top five donors has a close relation to the public interest in the dissemination of information regarding the financing of political messages. *Id.* at 90. "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Citizens United*, 558 U.S at 368 (citing *Bellotti*, 435 U.S. at n. 32). "At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party." *Id.* "There is plainly an informational interest served by the on-ad disclaimer that identifies some of the speaker's donors . . ." *Gaspee Project*, 13 F.4th at 91.

That a disclosure statute furthers sufficiently important government interests is a conclusion so apparent that some constitutional challengers concede it. *Delaware Strong Families*, 793 F.3d at 309 ([Plaintiff] "acknowledges that Delaware's interest in an informed electorate is a sufficiently important governmental interest.") "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67. Disclosure permits citizens to make informed decisions and give proper weight to different speakers and messages. *Citizens United*, 558 U.S. at 371.

"Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Citizens United*, 558 U.S. at 368 (quoting *Bellotti* 435 U.S. at 792 n. 32). The government's interest in disclosure requirements

in the campaign-finance context is "well-accepted." *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 at 841 (7th Cir. 2014).

The Act furthers the State's informational interest by requiring an on-ad donor disclaimer of the organization's top five contributors. *Gaspee Project*, 13 F.4th at 92 (upholding disclaimer requirement for top-five-donors); *Smith v. Helzer*, 614 F.Supp.3d 668, 686 (Dist. Alaska) (upholding disclaimer for top-three donors) (appealed filed). "This is especially true in the age of new media, given the proliferation of speakers in the marketplace of ideas." *Gaspee Project*, 13 F.4th at 87 (citations omitted). Further, an on-ad disclaimer "may be more effective in generating discourse" because it "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." *Smith v. Helzer*, 614 F.Supp.3d 668, 686 (D. Alaska 2022) (citing *Gaspee Project*, 13 F.4th at 91).

Requiring Plaintiff to file a one-time, event-driven independent communication statement within 48 hours of making the communication, serves an important informational interest. *Iowa Right to Life Committee, Inc.*, 717 F.3d at 595. The statement required by South Dakota is an electronic statement that can be completed online and is filed with the South Dakota Secretary of State's office electronically. S.D. Codified Law § 12-27-16(2)-(3)(a)-(b). Requiring the completion of a short electronic statement within two days of making a statement "is not onerous." *Id.*

South Dakota's statement requires the identity of the person or entity making the statement, their mailing address, and if an entity, their website,

any expenditures made for communications during the current calendar year but not yet reported on a prior statement, and the name of each candidate, public office holder, ballot question, or political party identified in each communication including the amount spent on each communication and a description of the content. S.D. Codified Laws § 12-27-16(2), (3)(a)-(b,). "[B]asic contact information about the entity making the expenditures is necessary to further 'the public . . . interest in knowing who is speaking." *Iowa Right to Life Committee, Inc.,* 717 F.3d at 593 (citing *Citizens United*, 558 U.S. at 369). Providing this information "provides 'transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages.'" *Id.* (citing *Citizens United*, 558 U.S. at 371).

The information required by the statement "is not overly burdensome" and "bears a substantial relation to a sufficiently important informational interest." *Iowa Right to Life Committee, Inc.,* 717 F.3d at 593-94. Plaintiff does not allege any facts that filling out a single online form is unduly onerous.

A. The On-ad Donor Disclaimer and Reporting Requirements are Substantially Related and Narrowly Tailored to Important Governmental Interests.

S.D. Codified Laws § 12-27-16's disclaimer and reporting requirement "need not reflect the least restrictive means available to achieve the [State's interest], but they need to achieve a reasonable fit." *Gaspee Project*, 13 F.4th at 88 (citing *Americans for Prosperity Foundation*, 141 S.Ct. at 2384).

First, S.D. Codified Law § 12-27-16 only applies to media used in South Dakota. Independent communication expenditures exclude news stories,

editorials, communications made by a person in the regular course and scope of the person's business, communications that refer to any candidate only as part of the popular name of the bill or statute, and any communication used for the purpose of polling. S.D. Codified Law § 12-27-16(6).

Second, S.D. Codified Law § 12-27-16 is only triggered when independent communication expenditures exceed $100.00. "[D]isclosure laws specifying a monetary threshold at which . . . expenditures trigger reporting requirements ensure that the government does not burden minimal political advocacy." *Nat'l Ass'n for Gun Rights*, 933 F.3d at 1118 (where Montana required reporting if an expenditure exceeded $250 on a single communication see pg. 1109). The acceptable threshold for triggering reporting requirements need not be high. *Id.* The amount of the monetary threshold is "'necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion'" such that courts "do not review reporting thresholds under the 'exacting scrutiny' framework." *National Organization for Marriage v. McKee*, 649 F.3d 34, 60 (2011) (quoting *Buckley,* 424 U.S. at 83*); see also Family PAC v. McKenna,* 685 F.3d 800, 810-11 (2012) ("[D]isclosure thresholds, like contribution limits, are inherently inexact; courts therefore owe substantial deference to legislative judgment fixing these amounts.") further citing *Minnesota State Ethical Practices Bd. v. National Rifle Ass'n,* 761 F.2d 509, 512 (8th Cir. 1985) (per curiam) (upholding a Minnesota law requiring disclosure of the name, address, and employer of each person who contributes $50 or more

in one year for legislative races or $100 or more per year for statewide races or ballot questions).

Third, S.D. Codified Law § 12-27-16 is tied to continued political spending. S.D. Codified Law § 12-27-16 only requires an on-ad donor disclaimer and reporting when independent communication expenditures are made regarding a candidate, public office holder, ballot question, or political party. S.D. Codified Law § 12-27-16(1)-(3); *Nat'l Ass'n for Gun Rights,* 933 F.3d at 1117 (disclosure laws tied to continued political spending are valid).

In sum, the S.D. Codified Law § 12-27-16 is narrowly tailored to further its important governmental interest of informing the public of who and what is engaging in political discourse and thus allowing the public to "give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371.

B. The On-ad Top-Five Donor Disclaimer is Not Content-based.

Plaintiff alleges the top-five donor disclaimer requirement is content-based because it only applies "to a communication that 'concerns a candidate, public office holder, ballot question, or political party.'" (Doc. 19 at ¶ 66.) The application of the on-ad top-five donor disclaimer is content neutral not content based. "The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys." *Iowa Right to Life Committee, Inc.*, 717 F.3d at 602 (citing *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 596 (8th Cir. 2005). "A regulation that

serves purposes unrelated to the content of expression is deemed neutral . . . ." *Id.*, (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The on-ad donor disclaimer of Plaintiff's top-five donors serves purposes unrelated to the content of Plaintiff's speech. The purposes served are many: 1) public interest in the dissemination of information regarding the financing of political messages, *Gaspee Project*, 13 F.4th at 90; 2) "[i]dentification of the source of advertising . . . so that the people will be able to evaluate the arguments to which they are being subjected", *Citizens United*, 558 U.S. at 368 citing *Bellotti*, 435 U.S. at 792, n. 32.; 3) the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party, *Id.* at 368; 4) an informational interest served by the on-ad donor disclaimer identifying some of the speaker's donors. *Gaspee Project*, 13 F.4th at 91.

C. Exacting Scrutiny Applies to Disclaimer and Disclosure Requirements.

Plaintiff alleges in Count II of its Complaint that laws compelling speech are subject to strict scrutiny. (Doc. 19 at ¶¶ 68-71.) However, exacting scrutiny "has been infused in the Court's approach to disclosure and disclaimer regimens for decades." *Gaspee Project,* 13 F.4th at 85. Plaintiff's allegation that disclosure and disclaimer laws are subject to strict scrutiny flies in the face of long-standing precedent that such laws be reviewed under exacting scrutiny. *Buckley*, 424 U.S. at 64 (1976); *Citizens United*, 558 U.S. at 366 (2010); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 744 (2008); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204

(1999) (finding that disclosure rules "fail[ed] exacting scrutiny" (internal quotation marks omitted)); *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010); *Americans for Prosperity Foundation*, 141 S.Ct. at 2383 (2021). The Eighth Circuit has also subjected disclaimer and donor requirements to exacting scrutiny. *Iowa Right to Life Committee,* 717 F.3d at 589-90 citing *Citizens United*, 558 U.S. at 366.

As noted above, there are several informational interests served by the on-ad donor disclaimer which allows the S.D. Codified Law § 12-27-16 to survive exacting scrutiny. Plaintiff "cannot plausibly dispute that on-ad donor information is a 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. "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 . . ." *Id.*

Exacting scrutiny requires a law or regulation to be narrowly tailored to serve a sufficiently important governmental interest. *Americans for Prosperity Foundation*, 141 S.Ct. at 2383; *Gaspee Project*, 13 F.4th at 85. Exacting scrutiny "require[s] a fit that is not necessarily perfect, but reasonable." *Americans for Prosperity Foundation*, 141 S.Ct. at 2384 (quoting *McCutcheon*, 572 U.S. at 218 (2014); *Gaspee Project*, 13 F.4th at 85. South Dakota's on-ad donor disclaimer and reporting requirement is narrowly tailored to serve a sufficiently important governmental interest.

"Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64; *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 201 (2003). "[T]he public has an interest in knowing who is speaking about a candidate shortly before an election." *Iowa Right To Life Committee, Inc.*, 717 F.3d at 591 (2013) (citing *Citizens United*, 558 U.S. at 369.) "This 'informational interest alone' can be sufficiently important to justify disclosure requirements." *Id.* (citing *Citizens United*, 558 U.S. at 369).

The public interest favors requiring disclosure of the source of the top five contributors' information so that voters can discern bias and detect manipulation. *Institute for Free Speech*, 340 F.Supp.3d at 862 (D.S.D. 2018) citing *Ctr. for Individual Freedom*, 697 F.3d at 477-78. "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371.

"[T]he majority of circuits have concluded that such disclosure requirements are not unduly burdensome." *Yamada*, 786 F.3d at 1195 (citations omitted). Disclosure requirements serve important governmental interests and are well accepted. *Wisconsin Right to Life, Inc.*, 751 F.3d at 841.

"The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791. "They may consider, in making their judgment, the source and credibility of the advocate." *Id.* at 791-92. "Requiring disclosure of

information related to subtle and indirect communications likely to influence voters' votes is critical to the State's interest in promoting transparency . . . ." *Nat'l Ass'n for Gun Rights*, 933 F.3d at 1114.

D. Plaintiff Have Alleged No Threats, Harassment, or Reprisals to Any of Their Donors or Themselves.

Plaintiff, in their Complaint, has not demonstrated that threats, harassment, or reprisals would be present in every application of their challenge to S.D. Codified Law § 12-27-16, making their claims speculative beyond the statute's facial requirements. There is no "dramatic mismatch" in the interests that South Dakota seeks to promote, including ensuring that the voters are fully informed about the person or group who is speaking, by requiring an on-ad donor disclaimer, and South Dakota's disclaimer and disclosure regime. *Gaspee Project*, 13 F.4th at 93 citing *Americans for Prosperity Foundation*, 141 S.Ct. at 2386. Without the on-ad donor disclaimer, persons or entities can hide their identities, and their political influence from the gaze of the public.

Nowhere in their Complaint does Plaintiff offer any evidence supporting their donors' speech was chilled for fear of exposure and retaliation. (See *Citizens United*, 558 U.S. at 370 (where the Court did not consider chilling of donations where Plaintiff identified no instance of harassment or retaliation to their donors). Plaintiff states the "law discourages donors from making contributions to nonprofits" and "[t]he loss of donors who are deterred by negative reactions to their publicly announced donations is an injury to"

Plaintiff. (Doc. 19 at ¶ 43.) Plaintiff then lists anecdotical articles to support their claim that donors to their organization may be deterred from making contributions but do not identify any of their donors who were deterred.

To survive a motion to dismiss, a complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Plaintiff has shown no harm from harassment or retaliation but merely their donors may be subject to harassment or harm.

Plaintiff claims that because others have faced harassment, they may also be subject to harassment. (Doc. 19 at ¶¶ 42-49.) Arguably, the best evidence of whether there is a reasonable probability that an organization's donors would face threats and reprisals is what the donors have experienced in the past. *Rio Grande Foundation v. City of Santa Fe*, 437 F.Supp.3d 1051, 1073 (D.N.M. 2020).

The balancing act essentially pits the State's interest in transparency against Plaintiff's belief that organizations may be injured by threats, harassment, or reprisals. Plaintiff's chilled-speech claim is backed by anecdotal cases in the media rather than case law or previous harassment of their own organization (Doc. 19 at ¶¶ 42-49.) The *Buckley* Court rejected an argument that there was a serious infringement on First Amendment rights when any infringement was "highly speculative." *Buckley*, 424 U.S. at 69-70.

Plaintiff speculates that harassment towards other conservative and pro-life organizations that occurred outside South Dakota will translate to harassment of Plaintiff's donors, which may cause them to stop donating to

Plaintiff's organization. (Doc. 19 at ¶¶ 42-49.) Plaintiff has offered no evidence that its members may face similar threats or reprisals. *Citizens United*, 558 U.S. at 370. Plaintiff engages in advocacy nationwide including South Dakota. (Doc. 19 at ¶ 10.) Despite having engaged in independent communication expenditures in South Dakota and nationwide, they have not alleged one threat of harassment towards their donors or organization. "The substantial public interest in disclosure . . . outweighs the harm generally alleged." *Buckley*, 424 U.S. at 72.

4. The On-ad Donor Disclaimer is Not Void for Vagueness.

To comport with due process, a law must draw boundaries "'[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement."' *Skilling v. United States*, 561 U.S. 358, 402-403, (2010). Reasonable breadth in statutory language does not require that a law be invalidated on vagueness grounds. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

Plaintiff argues there is no definition in South Dakota law for "what it means for a communication to be 'concerning' a candidate, ballot question" or public office holder as set forth in S.D. Codified Law § 12-27-1(11) or S.D. Codified Law § 12-27-16. (Doc. 19 at ¶¶ 83, 86.)

Independent communication expenditure is "an expenditure, including the payment of money or exchange of other valuable consideration or promise, made by a person, entity, or political committee for a communication

concerning a candidate or a ballot question." S.D. Codified Law § 12-27-1(11) (emphasis added). S.D. Codified Law § 12-27-16 states "independent communication expenditures by persons and entities related to communications *concerning* candidates, public office holders, ballot questions, or political parties who are not controlled by, coordinated with, requested by, or made upon consultation with that candidate, political committee, or agent of a candidate or political committee" (emphasis added).

"Ballot Question" is defined by S.D. Codified Law § 12-27-1(1). "Candidate" is defined by S.D. Codified Law § 12-27-1(4). "Political Committee" is defined by S.D. Codified Law § 12-27-1(18). "Political Party" is defined by S.D. Codified Law § 12-27-1(19).

"Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned,* 408 U.S. at 110. To help with determining whether a statute is unconstitutionally vague courts have relied on the common usage of statutory language. *Stephenson v. Davenport Community School Dist.*, 110 F.3d 1303, 1309 (8th Cir. 1997) (citations omitted). "Under the void-for-vagueness doctrine, a law is unconstitutional if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages serious discriminatory enforcement'". *Musser v. Mapes*, 718 F.3d 996, 1000 (8th Cir. 2013) (citations omitted).

The word "concerning" is a common word and has a common meaning and is used in everyday language. When taken in context as set forth in S.D.

Codified Law § 12-27-1(11) or S.D. Codified Law § 12-27-16, "concerning" is used as a preposition and obviously indicates the communication must relate to or is about a candidate, public office holder, ballot question, or political party. A person of ordinary intelligence knows if a communication concerns a candidate as opposed to a race car driver, a bank teller, or an attorney. Plaintiff's void for vagueness claim should be dismissed.

CONCLUSION

S.D. Codified Law § 12-27-16 is constitutional on its face and as applied, ensures a better-informed electorate, and serves a narrowly tailored interest by informing the public who or what is speaking so that voters can discern bias and detect manipulation. For these reasons, Plaintiff's Complaint should be dismissed in its entirety.

Dated this 6th day of October, 2023.

/s/ Clifton E. Katz

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CERTIFICATE OF SERVICE

I hereby certify that on October 6th, 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