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 Response to Defendants' Motion to Dismiss**

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INTRODUCTION

Under the First Amendment, "debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). And freedom of speech under the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018) (cleaned up).

But South Dakota law forces nonprofit organizations to comply with reporting requirements and include a government-mandated message in any "communication concerning a candidate or ballot question"—even if the communication does not advocate for the election or defeat of a candidate and occurs *years* before any election. State law requires every such communication (that costs more than $100) to include a statement of the organization's five biggest donors from the past year. Worse, the law appears to go even further and require this mandatory statement even in communications about "public office holders" who are *not even* candidates for office. And, although ostensibly part of the state's election rules, it applies *all the time*—even when the next election is years away. An organization that fails to comply with these rules can be subject to criminal penalties, including fines and imprisonment.

This compelled speech scheme is overbroad: even if the government can require organizations to comply with disclosure rules and other campaign-finance regulations when they advocate for or against candidates shortly before an election, it cannot force them to comply with these rules simply because they *mention* a candidate (let alone a public office holder who is not a candidate) at any time.

The scheme also violates the First Amendment by forcing an organization to speak a government message about their donors—distracting from the organization's own message, and potentially subjecting the organization's donors to retaliation—without a sufficient justification.

The scheme is also unconstitutional because it is vague: it is unclear as to whether communications about "public office holders" who are not candidates can trigger its requirements, and it does not define what it means for a communication to be "concerning" candidates or ballot measures.

Plaintiff Students for Life Action—a non-profit advocacy group that communicates with the public in South Dakota about issues important to its mission—brings this lawsuit to protect its core First Amendment rights to free speech and association.

FACTUAL BACKGROUND

South Dakota's Speech Restrictions

Plaintiff Students for Life Action ("SFLA") challenges South Dakota's statutes that impose restrictions on organizations that make "independent communication expenditures."

State law first defines an "independent communication expenditure" to include any payment or other expenditure that a "person, entity, or political committee" makes "for a communication concerning a candidate or a ballot question which is not made, 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 Laws § 12-27-1(11); Compl. ¶ 24. Under the statute, such communications need not expressly advocate for a candidate or ballot question, or even serve as a functional equivalent of such advocacy. *Id.* at ¶ 25.

A subsequent provision of state law appears to expand the definition of "independent communication expenditures." It imposes rules on persons and entities that make "independent communication expenditures . . . related to communications concerning candidates, *public office holders*, ballot questions, or political parties." S.D. Codified Laws § 12-27-16; Compl. ¶ 26 (emphasis added).

An organization that pays more than $100 for such a communication must include, in each one, a statement of the organization's "Top Five Contributors"—that is, a list of the five persons who contributed the most money to the organization in the previous twelve months. S.D. Codified Laws § 12-27-16; Compl. ¶ 27. The organization must also file an "independent expenditure communication statement" with the state within 48 hours of communications' dissemination or publication. *Id.* at ¶ 28.

Although ostensibly an election rule, this requirement applies *all the time*—regardless of whether the next election is tomorrow or in four years. Failure to abide by these rules is a crime punishable by imprisonment, a fine, or both. *Id.* at ¶¶ 33–34.

Plaintiff Students for Life Action's Speech in South Dakota

As a nonprofit, Plaintiff SFLA engages in issue advocacy to train and mobilize leaders to impact public policy and achieve issue-specific results in key elections. Compl. ¶ 17. SFLA limits its communications with voters to information on candidates' positions on abortion-related issues or encouraging activism for pro-life policies; it does not tell voters which candidate to vote for or against. *Id.* at ¶¶ 19–20.

On the day before the June 2022 primary election, SFLA engaged in such advocacy in South Dakota by sending text messages informing voters of candidates' positions on abortion-related issues. Compl. ¶ 20 & Ex. 1. Some of the messages urged recipients to encourage a candidate who had taken a pro-life pledge to keep that pledge if elected. *Id.* Other text messages urged recipients to encourage candidates who had not taken a pro-life pledge to nonetheless vote for pro-life legislation if elected. *Id.* Each of these communications cost SFLA more than $100. *ID.* at ¶ 18. Also in 2022, Students for Life Action sent mailers to South Dakotans, urging them to contact their state legislators to encourage them to support pro-life legislation. *Id.* at ¶ 21 & Ex.

2. SFLA intends to continue to communicate with the public through similar advocacy about candidates and office holders, spending more than $100 for each message. *Id.* at ¶ 22.

Implications of the Law

Because 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. Compl. ¶ 38. This case comes amid a time of national reckoning with "cancel culture." *Id.* ¶ 42. Public identification with controversial causes and organizations can result in significant harassment and threats. *Id.* For example, when the identities of donors are disclosed to the public, they may become targets of cancel culture that has resulted in people getting fired, being driven out of restaurants while trying to eat, harassment of donors online. *Id.* at ¶ 44.

Going hand in hand with cancel culture is "doxxing," a practice victimizing liberals and conservatives alike. *Id.* at ¶ 45. "Doxxing" includes publicly posting someone's personal information as a form of revenge or pubishment to promote harassment, violence, and intimidation. *Id.* Doxxing is used routinely to target pro-life supports—in 2021, for example, doxxing victimized a Texas Right to Life staffer after his home address was widely circulated on the internet. *Id.* at ¶ 46. Indeed, pro-lifers have seen "unprecedented levels of threats, vandalism and acts of destruction" nationwide since the leak of the Supreme Court's draft opinion in *Dobbs v. Jackson Women's Health Organization*. *Id.* at ¶ 47. The potential for such results discourages donors from making contributions to nonprofits like SFLA, for fear that their names will be disseminated to the public. *Id.* at ¶ 43.

STANDARD OF REVIEW

When considering a motion to dismiss under either Rule 12(b)(6) or 12(b)(1), the court accepts as true the well-pleaded allegations of the complaint, drawing all inferences in favor of

the plaintiff. *Perez v. Doe*, 931 F.3d 641, 646 (8th Cir. 2019). "A claim has sufficient facial plausibility to survive where the plaintiff has pled enough facts to allow the court to reasonably infer that the defendant is liable for the alleged misconduct." *Id.* (cleaned up) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A court may dismiss a complaint for failure to state only in "the unusual case" in which it is clear that no set of facts in support of plaintiff's claim would entitle him to relief. *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 545–46 (8th Cir. 1997). A complaint should not be dismissed "merely because the court doubts that plaintiff will be able to prove all the necessary factual allegations." *Id.* at 546.

ARGUMENT

I. SFLA has standing to bring its constitutional claims because it has alleged an injury in fact.

Contrary to the State's argument, Plaintiff Students for Life Action has standing to bring its constitutional challenges to South Dakota's compelled-speech scheme because it has alleged an injury in fact. *See* Dkt. 23, Memo. of Law in Supp. of Defs.' Mot. to Dismiss Plf.'s First Am. Compl. ("MTD") 9-13.

SFLA has alleged that S.D. Codified Laws § 12-27-16 injures SFLA because SFLA makes expenditures that subject it to the statute's reporting and disclosure requirements, particularly the top-five donor-disclosure requirement. Dkt. 24, First Amended Complaint ("Compl.") ¶¶ 38-39. As described above, SFLA has identified specific occasions on which it has engaged in such communications in the past. *Id.* ¶¶ 18-21. And SFLA has alleged that, "[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," and that "[t]hese intended communications will exceed $100 in value," subjecting them to the statute's requirements. *Id.* ¶ 22. SFLA has also alleged that being forced to comply with the statute injures SFLA because forced donor

disclosure violates its First Amendment rights. *Id.* ¶¶ 55-93. Thus, SFLA has alleged all that it must to establish an injury in fact that gives it standing to bring its constitutional challenges to the statute.

But the State argues that is not enough: it says SFLA must provide a "description of concrete plans" to speak in the future. MTD 10. According to the State, it is not enough for SFLA to state that it "'intend[s]' to engage in issue advocacy within the next two years"; apparently the State believes SFLA must allege that it "will" do so. MTD 10. The State further argues that SFLA has not sufficiently alleged that its speech will be chilled as a result of the statute; rather SFLA has only alleged that its donors' speech has been chilled, but SFLA nonetheless intends to continue to speak. MTD 12-13.

SFLA has standing based on its intention to engage in activity that will trigger the statute's requirements and subject SFLA to prosecution if it does not comply. A plaintiff has an injury in fact sufficient to support standing to bring a First Amendment claim when the "plaintiff alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Dakotans for Health v. Noem*, 52 F.4th 381, 386 (8th Cir. 2022) (cleaned up). Moreover, "[w]here a plaintiff alleges an intention to engage in a course of conduct that is clearly proscribed by statute, . . . courts have found standing to challenge the statute, even absent a specific threat of enforcement." *Iowa Right to Life Cmte., Inc. v. Tooker*, 717 F.3d 576, 604 (8th Cir. 2013) ("*IRTL*") (cleaned up). The Eighth Circuit has also held that a plaintiff "suffers Article III injury when it must either make significant changes to its operations to obey [a] regulation, or risk a criminal enforcement action by disobeying the regulation." *Minn. Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) ("*MCCL*").

"The First Amendment standing inquiry is lenient and forgiving," particularly with respect to the question of whether a plaintiff has alleged an injury in fact. *Dakotans for Health*, 52 F.4th at 386 (cleaned up). "And when, as here, threatened enforcement effort implicates First Amendment rights, the standing inquiry tilts dramatically toward a finding of standing." *Id.* (cleaned up); *see also Sec'y of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (recognizing a "lessening of prudential limitations on standing" for First Amendment claims, particularly those involving a danger of chilled speech).

Thus, there is no merit in the State's argument that SFLA has not alleged a sufficient injury because it has alleged that it "intend[s]" to engage in advocacy subject to the statute but not that it "will" do so. An *intention* is precisely what SFLA was required to allege. *See id*.

SFLA's inability to state now *exactly* what it will say, and when it will say it, is irrelevant: SFLA wishes to be free to engage in advocacy at any time, free from the burdens the statute imposes. That is enough to establish its standing. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) ("*WRTL*") (advocacy group bringing a First Amendment challenge to campaign-finance rules cannot—and need not—"predict what issues will be matters of public concern" on which it would like to speak in the future); *IRTL*, 717 F.3d at 604 (plaintiff had standing where it alleged that it "wishes to decide when and how to make its independent expenditures in the manner it deems appropriate").

Further, SFLA has standing to bring its facial challenge to the statute because the top-five donor-disclosure rule injures its donors by chilling their speech for fear of exposure and retaliation. Compl. ¶ 40. The Supreme Court has held that it is "appropriate" for an organization to bring a facial First Amendment challenge to a donor-disclosure statute because it "creates an unnecessary risk of chilling" its donors' exercise of their right to freedom of association.

Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387-88 (2021) ("*AFPF*"); *see also Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984) (plaintiff challenging a statute because it causes someone "not before the court to refrain from constitutionally protected speech or expression" presents a sufficient injury to confer standing).

II. SFLA has stated a viable claim that the statute violates the First Amendment because it is overbroad.

SFLA has stated a viable claim alleging that the statute violates the First Amendment because it is overbroad.

The State argues that the statute is constitutional, and not overbroad, because courts have upheld other statutes that have compelled organizations that engage in "election-related spending" to disclose their donors, citing examples. MTD 14-16. But that misses the point of SFLA's claim: even if *some* laws compelling disclosure of an organization's donors could survive constitutional scrutiny, *this* statute goes too far by sweeping in organizations based on speech for which such disclosure is *not* justified. That is what it means for a statute to be overbroad: "In the First Amendment context, . . . a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *AFPF*, 141 S. Ct. at 2383 (2021) (plurality opinion) (internal quotations omitted).

The Supreme Court has recognized that the compelled disclosure of an organization's donors "could be justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). But laws compelling such disclosures, or compliance with other campaign-finance rules, are not automatically deemed

constitutional, regardless of their details: they are subject to (at least)[1] exacting First Amendment scrutiny, which requires the government to show that its impingement on First Amendment rights is narrowly tailored to serve a sufficiently important interest. *AFPF*, 141 S. Ct. at 2384 (exacting scrutiny applies); *Free & Fair Election Fund v. Mo. Ethics Comm'n*, 903 F.3d 759, 763 (8th Cir. 2018) ("When a State restricts speech, it bears the burden of proving the constitutionality of its actions.") (cleaned up). "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive." *AFPF*, 141 S. Ct. at 2384 (cleaned up).

Here, South Dakota has not shown that its statute is narrowly tailored to serve the government's interest in providing the electorate with information about the sources of *election-related* spending. That is because the statute subjects an organization to its disclosure requirements even if the organization *has not engaged in election-related spending at all*. The statute's burdens appear to be triggered by communications "concerning" a "public official"—regardless of whether that official is, or ever will be, a candidate for office.[2] And it applies to communications "concerning" candidates and ballot questions at *all* times—even when an election is years away.

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[1] One Supreme Court justice has stated that strict scrutiny should apply, and two justices have stated that the Court's cases do not resolve whether strict or exacting scrutiny should apply. *AFPF*, 141 S. Ct. at 2389-90 (Thomas, J., concurring) (stating that strict scrutiny should apply); *id.* at 2391-92 (Alito and Gorsuch, .JJ., concurring) (noting case law suggesting strict scrutiny should apply). *See also Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) ("We question whether the Supreme Court intended exacting scrutiny [rather than strict scrutiny] to apply to laws" imposing campaign-finance rules on "associations that engage in minimal speech.").

[2] As discussed in Section IV below, regarding Plaintiffs' vagueness claim, the statute is unclear as to whether its requirements are triggered by expenditures concerning public office holders who are not candidates for office—but the State apparently takes the position that they are.

That makes South Dakota's statute different from the statutes upheld in the cases on which the State relies, all of which regulated organizations based on communications *related to elections*—communications advocating for or against a candidate or ballot question, or referencing a candidate in close proximity to an election. In *Citizens United*, for example, the Court upheld a disclosure requirement for entities that spent more than $10,000 in one year on "electioneering communications," defined (in part) as communications that "refer[] to a clearly identified candidate for Federal office," "made within 30 days of a primary or 60 days of a general election." 558 U.S. at 310, 366-71. *See also IRTL*, 717 F.3d at 595-96 (upholding disclosure requirements for organizations that make communications advocating "the nomination, election, or defeat of a clearly identified candidate or the passage or defeat of a ballot issue"); *Gaspee Project v. Mederos*, 13 F.4th 79, 86-87 (1st Cir. 2021) (upholding disclosure law triggered by communications that refer to a candidate made within 60 days of a general election or 30 days of a primary election); *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 307 (3d Cir. 2015) (upholding disclosure law triggered by communications that refer to a candidate made 30 days before a primary election or 60 days before a general election); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) (upholding disclosure law for political committees that "accept contributions or make expenditures in excess of $3,000 'on behalf of or in opposition to' any candidate or ballot question."); *Nat'l Ass'n for Gun Rights v. Mangan*, 933 F.3d 1102, 1118 (9th Cir. 2019) (upholding disclosure law triggered by communications that refer to a candidate or ballot issue or question within 60 days of an election); *Yamada v. Snipes*, 786 F.3d 1182, 1190 (9th Cir. 2015) (upholding rules triggered by "communications that expressly advocate for a candidate or are 'susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate'); *Human Life of*

Wash., Inc. v. Brumsickle, 624 F.3d 990, 997 (9th Cir. 2010) (upholding disclosure law that applies to committees that make expenditures "to further electoral political goals" or have a "primary purpose" of "supporting or opposing candidates or ballot propositions"); *Smith v. Helzer*, 614 F.Supp.3d 668 (D. Alaska 2022) (denying preliminary injunction against disclosure rules for independent expenditures made in candidate elections), *appeal docketed*, No. 22-35612 (9th Cir. Aug. 3, 2022).

The government has no legitimate interest in compelling organizations to comply with campaign-finance rules—much less in compelling them to disclose their top five donors in all of their communications—simply because they engage in communications "concerning" public officials, or "concerning" a candidate, regardless of whether they advocate for or against the candidate's election, and regardless of whether they are made long before the next election. Under the statute's definition, a communication could be purely informational—and not even criticize or praise an official, explicitly or implicitly—and still trigger the statute's requirements. Courts have never approved such a burden on purely informational or political speech that is so unrelated to an election. And with good reason: "[t]he freedom of speech . . . guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *WRTL*, 551 U.S. at 469. This reflects the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Buckley*, 424 U.S. at 14 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

Even as it has upheld substantial campaign-finance restrictions, the Supreme Court has made clear that the government's informational interest only justifies disclosure for certain specific political activities—not just any public communications about politics or candidates. In *Buckley*,

the Court rejected the federal government's attempt "to achieve 'total disclosure' by reaching 'every kind of political activity' in order to ensure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." 525 U.S. at 76 (citations omitted). To avoid undue suppression of speech on political issues, the *Buckley* Court deemed mandatory disclosure appropriate only

> (1) when [organizations] make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, *and* (2) when [organizations] make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 80 (emphasis added). "The government may regulate in the First Amendment only with narrow specificity" because "broad and sweeping state inquiries" into "a person's beliefs and associations" will "discourage citizens from exercising rights protected by the Constitution." *AFPF*, 141 S. Ct. at 2384 (cleaned up).

For that reason, courts have not universally approved disclosure requirements for entities that make communications that refer to candidates. As the Seventh Circuit has explained, "it's a mistake to read *Citizens United*"—as the State does here—"as giving the government a green light to impose political-committee status [and its attendant obligations] on every person or group that makes a communication about a political issue that also refers to a candidate." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 836-37 (7th Cir. 2014). To do so could impose "a serious chill on debate about public issues." *Id.* at 837. These concerns are especially acute for "ordinary citizens, grass-roots issue advocacy groups, and § 501(c)(4) social-welfare organizations," which will tend to be less able than larger political players, such as political parties, to "afford campaign-finance lawyers to advise them about compliance with the rules." *Id.* Thus, obligations imposed on organizations that communicate about candidates are *not*

automatically valid simply because courts have approved similar obligations for certain groups in other contexts: "The First Amendment . . . overbreadth calculus must be calibrated to the kind and degree of the burdens imposed on those who must comply with the regulatory scheme." *Id.*

And under exacting scrutiny, it is the *government's* burden to show that its particular restrictions are narrowly tailored to serve the government's legitimate ends. *See Free & Fair Election Fund*, 903 F.3d at 763; *Jones v. Jegley*, 947 F.3d 1100, 1105-06 (8th Cir. 2020) (rejecting government's defense of campaign-finance restriction where it failed to support its justification with evidence). The State has not met that burden here, but has instead simply cited cases upholding different schemes regulating different types of speech under different circumstances. Thus, the State has not established that SFLA's overbreadth claim must be dismissed.

Because the statute regulates entities that do not engage in election-related speech at all—and thus, under the First Amendment cannot be so regulated—it is not narrowly tailored to serve the government's interest in providing the public with information about donors to organizations that *do* engage in election-related speech. It also is not narrowly tailored, even with respect to organizations that communicate about candidates, because it applies *all the time*, even when an election is years away. *Cf. Nat'l Ass'n for Gun Rights*, 933 F.3d at 1116-19 (noting that "electioneering disclosure laws that survive exacting scrutiny" share certain features, which include being "tied with precision to specific election periods"); *Human Life of Wash.*, 624 F.3d at 1019 (disclosure law served government's interest in informing voters "in the temporal window immediately preceding a vote"). And, as the cases the State has cited (listed above) illustrate, the government has an obvious alternative that is significantly less restrictive of First Amendment rights: imposing regulations only on groups that advocate for or against a candidate

or ballot measure, or that make communications referencing candidates in a period shortly before an election.

Thus, SFLA has alleged a valid First Amendment overbreadth challenge to the statute.

III. Plaintiff has stated a viable claim that the statute violates the First Amendment because it compels speech.

SFLA has also stated a viable First Amendment claim in Count II of the First Amended Complaint based on the top-five donor-disclosure rule's compulsion of speech.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The general rule is that the government may not compel a person "to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Compelled speech on the government's behalf is impermissible if it "affects the message conveyed." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995). Put another way, the government violates a speaker's First Amendment rights by "interfer[ing] with the [speaker's] ability to communicate its own message." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006).

"Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as other content-based laws. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In other words, such laws are "subject to strict scrutiny." *Id.* at 165.

The Supreme Court applied these settled principles in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), considering a California statute that

compelled clinics licensed to serve pregnant women to post a notice about abortion rights. Unlicensed clinics were required to post a notice that they were not licensed to provide medical services.

The Court concluded that the required notices for licensed clinics were compelled speech. The clinics had to "provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them." *Id.* at 2371 (cleaned up). And although the Court foucsed on the unlicensed clinic requirement's lack of tailoring, the Court characterized this requirement as "a government-scripted, speaker-based disclosure requirement." *Id.* at 2377.

NIFLA dooms South Dakota's top-five donor-disclosure rule. Like California's mandatory notice for licensed clinics, South Dakota's requirement that organizations like Plaintiff SFLA list their top donors in their communications imposes a "government-drafted script" whose wording is set by statute. Plaintiff is compelled to alter its speech to incorporate the government's message, just as the pregnancy centers in *NIFLA* were forced to alter their speech to incorporate the government's notice. By requiring crisis pregnancy centers to post a notice about California's state-sponsored abortion services, California's licensed clinic notice effectively altered the message of crisis pregnancy centers seeking to counsel pregnant women against having an abortion. Similarly, South Dakota's donor-disclosure requirement forces Plaintiff to alter its communications that seek to inform or convince people on a particular political issue, to also encourage viewers, listeners, or readers to consider Plaintiff's donors.

Indeed, Plaintiff and other organizations must not only deliver a government message but *change their own speech* to accommodate the government's mandated message. And this intrusion on speech is especially offensive to the First Amendment because it pertains to speech

about elections–an area "integral to the operation of our system of government," where the First Amendment should have "its fullest and most urgent application." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (cleaned up).

Contrary to the State's argument, MTD 21-22, the mandatory on-ad donor disclosure here is content-based. The State asserts that "[t]he 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," quoting the Eighth Circuit's 2013 decision in *Iowa Right to Life*, 717 F.3d at 602. But the Supreme Court has made clear in more recent decisions that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed—regardless of whether the government had a "benign motive, content-neutral justification, or lack of animus toward the ideas." *Reed*, 576 U.S. at 163, 165; *see also City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022). Those cases explain that, *in addition*, a regulation of speech that is facially content neutral could nonetheless be content based if it was adopted "because of disagreement with the message [the speech] conveys." *Reed*, 576 U.S. at 164.

Here, South Dakota's statute is a content based regulation of speech because it applies based on "the topic discussed" or the "message expressed": it compels organizations to disclose their top five donors in their communications only if their communications "concern[] candidates, public office holders, ballot questions, or political parties." S.D. Codified Laws § 12-27-16. For that reason alone, the statute is subject to strict scrutiny. *Reed*, 576 U.S. at 165.

Further, the statue is subject to strict scrutiny because a law compelling speech is inherently content-altering. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988). "Since all

speech inherently involves choices of what to say and what to leave unsaid," *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion), the compelled speech requirement here harms Plaintiff by both restricting its ability to speak its preferred message and forcing it to speak a message it does not want to voice.

Plaintiff cannot use those portions of its advertisements that the government commandeers. Other cases considering content-based compelled speech have recognized such a feature as a "penalty" on speech. For instance, in *Miami Herald Publishing Co. v. Tornillo*, considering a statute that granted political candidates equal space in a newspaper to reply to criticism, the Court noted that this "compelled printing" imposed a "penalty" on publishers, including "the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print." 418 U.S. 241, 256 (1974). Here, similarly, the government's speech consumes ad time that displaces Plaintiff's preferred speech. Thus, the State's claim that "[d]isclosure laws do not limit speech," MTD 16, is incorrect with respect to the top-five donor-disclosure rule.

Further, the requirement here forces organizations like SFLA to speak the government's own message—even though they do not want to deliver that message in its communications. "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. And listeners' rights are harmed, too, by the distortion of Plaintiff's message. *Cf. Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas.").

The requirement also forces Plaintiff to change the subject of its communications: from informing or trying to convince viewers, listeners, or readers about a political issue, to talking

about Plaintiff's donors. The government's forced speech about the speaker's funding distracts the listener from the speaker's intended message. *Cf. Wash. Post v. McManus*, 944 F.3d 506, 515 (4th Cir. 2019) (noting that "many political advocates today also opt for anonymity in hopes their arguments will be debated on their merits rather than their makers," or in this instance their makers' funders).

The compelled disclosure is no less offensive because it compels statements of fact rather than a statement of opinion: the "general rule that the speaker has the right to tailor the speech[] applies not only to expression of value, opinion, or endorsement, but equally to statements of act." *Hurley*, 515 U.S. at 573. The problem is the government-mandated change in the content of one's speech, not whether the new content is neutral, factual, or otherwise non-ideological.

Thus, South Dakota's mandate is a regulation of "pure speech"—not merely a regulation of "the mechanics of the electoral process." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

The Ninth Circuit has recognized this "constitutionally determinative distinction between on-publication identity disclosure requirements and after-the-fact reporting requirements" in *ACLU of Nevada v. Heller*, 378 F.3d 979, 991 (9th Cir. 2004). The court found that "requiring a publisher to reveal her identity on her election-related communication is considerably more intrusive" because it "necessarily connects the speaker to a particular message directly." *Id.* at 992. In contrast, "[c]ampign regulation requiring off-communication reporting of expenditures made to finance communications does not involved the direct alteration of the content of a communication." *Id.* In that case, because the Nevada law at issue forced the ACLU to alter the content of its message, and not merely file information with the state after the fact, it was subject

to strict scrutiny. *Id.* South Dakota's mandate likewise requires speakers to alter the content of their messages and should therefore receive strict scrutiny.

Even if this Court were to subject the disclosure requirement here to exacting scrutiny, it would still fail. Because the statute regulates independent communications, it cannot serve any anti-corruption or regulatory avoidance interests. *Citizens United*, 558 U.S. at 357. The only state interest it could theoretically legitimately serve is an informational interest. And "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statement or disclosures she would otherwise omit," so the government's "informational interest is plainly insufficient." *McIntryre*, 514 U.S. at 348-49. Informational interests do not carry the same weight as, for example, "preventing fraud." *Id.* at 49; *accord Doe v. Reed*, 561 U.S. 186, 197 (2010) (refusing to rely on an "informational" interest); *id.* At 206-08 (Alito, J., concurring) (explaining why such an interest is weak); *id.* At 238-39 (Thomas, J., dissenting) (same). *See also Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010) (noting a purely informational disclosure requirement "has some value, but not that much").

This makes good sense. "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source" or its supporters. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978). Instead, "the best test of trust tis the power of the through to get itself accepted in the competition of the market." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 534 (1980) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

The statute's requirement that an organization reveal *its own* identity in its communications, S.D. Codified Laws § 12-27-16(1)(a), sufficiently serves any informational interest that might

exist. *Cf. Vote Choice v. Stefano*, 4 F.3d 26, 35 (1st Cir. 1993) (identifying ad's sponsor "will signify more about the candidate's loyalties than the disclosed identity of an individual contributor will ordinarily convey"); *Ark. Right to Life State PAC v. Butler*, 29 F.Supp.2d 540, 550 (W.D. Ark. 1998) (striking disclosure law requiring "disassociation message" where state failed to show "self-identification requirement is not enough to inform the electorate of the source[]"). Indeed, listing the organization's top five donors might *decrease* viewers' or readers' information by giving them a distorted view of the organization's overall donors.

Moreover, even if the government could show some important informational interest here, the top-five donor-disclosure rule is not narrowly tailored to that interest. "Narrow tailoring is crucial where First Amendment activity is chilled–even if indirectly–because First Amendment freedoms need breathing space to survive." *AFPF*, 141 S. Ct. at 2384 (cleaned up). A "reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are necessary." *Id.* at 2385. "Assessing the fit of a . . . restriction requires consideration of available alternatives that would serve the State's interest while avoiding unnecessary abridgements of First Amendment rights." *Free & Fair Election Fund*, 903 F.3d at 765; *MCCL*, 692 F.3d at 876-77.

If it were important for the government to provide the public with information about an entity's top five donors, the government could serve that interest by requiring entities to report that information to the state, which could then publish it online. *Cf. Missourians v. Klahr*, 892 F.3d 944, 949 (8th Cir. 2018) (noting that "[d]isclosure laws generally require registration, reporting information [to the government], or keeping necessary records"). This would still burden organizations' First Amendment rights, but at least they would not be required to devote a portion of their own public communications to a government message. *Cf. MCCL,* 692 F.3d at

876 (independent expenditure law "almost certainly fail[ed]" exacting scrutiny because the state could "accomplish any disclosure-related interests . . . through less problematic measures") (cleaned up).

The donor-disclosure requirement is also overinclusive. Many donors might give money to an organization for reasons unrelated to a particular communication. If donors were motivated to support an organization's advocacy in a state other than South Dakota, or because of its work on another issue or campaign, or to support general office operations rather than campaign-specific advertisements, they would be disclosed–yet their disclosure would not provide South Dakotans with particularly interesting or relevant information. *See Cal. Republican Party v. Fair Political Practices Comm'n*, No. CIV-S-04-2144, 2004 U.S. Dist. LEXIS 22160, *18-21 (E.D. Cal. Oct. 27, 2004). Some disclosed donors might even see their names listed on a message with which they disagree—potentially *misleading* voters.

Of course, organizations could voluntarily choose to disclosure their top five donors on advertisements—and citizens who care about such disclosure could reward them by favoring their messages. If that information were important to citizens, the marketplace of ideas would lead to disclosure.

Finally, the restriction is especially onerous because the required disclaimers will take up a significant portion of a communication. In the commercial context, courts have struck down mandatory warnings as compelled speech in situations where the requirement was only that the "warning occupy at least 20% of the advertisement." *Am. Bev. Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 754 (9th Cir. 2019); *accord R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1208 (D.C. Cir. 2012) (striking down tobacco warning labels that took up 20% of packaging). There is

no reason why courts should tolerate similar commandeering of communications in the political context.

The Court need not decide the merits of SFLA's claim at the motion-to-dismiss stage. At this stage, it is enough that SFLA has alleged a valid claim, and the State has not met its burden to show that the statute's compulsion of speech is narrowly tailored to serve a sufficiently important government interest. For that reason, the Court should deny the State's motion to dismiss with respect to Count II of SFLA's complaint.

IV. Plaintiff has stated a viable claim that the statute is void for vagueness.

Finally, the State's vagueness argument ignores half of the Plaintiff's claim and gets the other half wrong. The Fourteenth Amendment's Due Process Clause prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." A state "violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). "A vague [law] is constitutionally infirm in two significant respects": first, it "fail[s] to provide adequate notice of prohibited conduct," and second, it could lead to "arbitrary and discriminatory enforcement." *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997).

Moreover, "[a] law's failure to provide fair notice of what constitutes a violation is a special concern where laws abut upon sensitive areas of basic First Amendment freedoms because it inhibits the exercise of freedom of expression and inevitably leads [persons] to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Stahl v. City of St. Louis, Mo.*, 687 F.3d 1038, 1041 (8th Cir. 2012) (cleaned up). For that reason,

"[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity." *United States v. Freeman*, 808 F.2d 1290, 1292 (8th Cir. 1987) (cleaned up) (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)). And a vague law that affects First Amendment rights "is constitutionally invalid on its face." *Pursley v. City of Fayetteville*, Ark., 820 F.2d 951, 957 (8th Cir. 1987).

Here, all of the law's applications implicate protected speech. *See Barland*, 751 F.3d at 836 2014) ("In this context [of campaign finance laws], we don't need to ask whether the challenged law reaches a substantial amount of protected speech; by definition, it does, because all political speech is protected."). And the Plaintiff has alleged that South Dakota's law is vague in at least two respects. First, "[a]lthough the definition of 'independent communication expenditure' in § 12-27-1(11) does not encompass communications 'concerning' 'public office holders,' § 12-27-16 includes 'communications concerning . . . public office holders' among those it regulates." Compl. ¶ 85. To elaborate, § 12-27-1(11)'s umbrella definition of "independent communication expenditure" covers only expenditures "for a communication concerning a candidate or a ballot question." "Candidate" is defined as "any person who seeks nomination for or election to public office," with some specific thresholds. S.D. Codified Laws § 12-27-1(4). Thus, the umbrella definition of "independent communication expenditure" does *not* cover public office holders who are not currently candidates.

The regulatory provision of § 12-27-16, however, says that certain requirements "apply to independent communication expenditures by persons and entities related to communications concerning candidates, *public office holders*, ballot questions, or political parties," on pain of criminal punishment (emphasis added). The vagueness problem is apparent: does § 12-27-16

cover expenditures that "concern[]" a public office holder who is not currently a candidate? Over and over, the state's memorandum suggests that it does. *See* MTD 4, 19, 21, 29. But the State never grapples with—or even acknowledges—the vagueness problem here. Yet if one inserts the umbrella definition of "independent communication expenditure" in § 12-27-1(11) into § 12-27-16, the resulting language would cover only an expenditure "for a communication concerning a candidate or a ballot question" "related to communications concerning candidates, public office holders, ballot questions, or political parties." Read literally, this language suggests that that law does not encompass public office holders who are not current candidates because they do not satisfy the first condition. But the State suggests the opposite. This ambiguity means that the law "fail[s] to provide adequate notice of prohibited conduct" and will lead to "arbitrary and discriminatory enforcement." *Stephenson*, 110 F.3d at 1308. Likewise, inserting the umbrella definition leaves it unclear what "a communication" "*related to*" a "communication concerning candidates, public office holders, ballot questions, or political parties" means. As discussed next, both "concerning" and "related to" give rise to another vagueness problem.

Beyond the confusion about public office holders, these statutory provisions are vague in another respect: They "do[] not define what it means for a communication to be 'concerning' a candidate or ballot question" (or public office holder). Compl. ¶ 83. A law is impermissibly vague if "it is unclear as to what fact must be proved" to show a violation. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Here, "concerning" is critical because it defines the scope of the regulation. But the term is undefined, and no precise definition is apparent from the statutory context.

The State's memorandum asserts that "concerning" "obviously indicates that the communication must relate to or is about a candidate, public office holder, ballot question, or

political party." Memo. 29. But replacing "concerning" with two equally imprecise terms highlights rather than alleviates the vagueness problem. What does it mean for a communication to be "concerning" or "related to" a person (or a ballot question)? Is an express reference necessary? Does the person or ballot question need to be the focus of the communication? How much of a focus? Does a picture suffice? How long does the picture need to be displayed for? Does a general reference to the subject area underlying a ballot question suffice? Would a discussion of a group of which the individual is a part—perhaps a family, business, or nonprofit organization—suffice? The State—and more importantly, the statute—has no answers to any of these critical questions.

The State insists that "concerning" "is a common word and has a common meaning," though the State does not articulate this meaning, provide any citation, or point to any law upheld against a similar challenge. Memo. 28. More precision is required for *legal* terms that subject individuals to criminal penalties. *See Johnson*, 576 U.S. at 595. Even in other areas of the law, "many courts" have held that "terms such as 'concerning' or 'relating to'" "are nearly always inappropriate because they are—by their plain meaning—vague and ambiguous." *TIC Park Ctr. 9, LLC v. Cabot*, No. 16-cv-24569, 2017 WL 3034547, at *5 (S.D. Fla. July 18, 2017) (collecting cases about discovery). If the term "concerning" is too vague for a discovery request, it is certainly too vague for a criminal law that affects speech protected by the First Amendment.

Because the Plaintiff has pled at least two fundamental vagueness defects in the challenged laws, its vagueness claim should go forward.

CONCLUSION

Defendants' motion to dismiss Plaintiff Students for Life Action's complaint should be denied.

Dated: November 10, 2023

Respectfully Submitted,

By: _____

Jacob Huebert
Noelle Daniel
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
Telephone (312) 263-7668
jhuebert@libertyjusticecenter.org
ndaniel@libertyjusticecenter.org

/s/ Aaron P. Pilcher

Aaron Pilcher
Pilcher Law Firm
79 Third Ave. SE
Huron, South Dakota 57350
Telephone: (605)554-1661
aaronpilcherlaw@gmail.com

Attorneys for Plaintiff Students for Life Action

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2023 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:

Clifton E. Katz	[ ]	U.S. Mail
Assistant Attorney General	[ ]	Hand Delivery
1302 East Hwy 14, Suite 1	[ ]	Facsimile
Pierre, SD 57501-8501	[ ]	Federal Express
Clifton.katz@state.sd.us	[X]	Case Management / Electronic Case Filing

/s/ Aaron P. Pilcher

Attorney for Plaintiff