IN THE UNITED STATES DISTRICT COURT
FOR THE 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.**	**Case No. 3:23-cv-03010** **Judge Roberto A. Lange**

AMICI CURIAE BRIEF OF ADVANCING AMERICAN FREEDOM, OTHER CONCERNED ORGANIZATIONS AND CITIZENS IN SUPPORT OF PLAINTIFF

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INTEREST OF PROPOSED AMICI CURIAE

Advancing American Freedom ("AAF") promotes and defends conservative policies and traditional American values that have yielded unprecedented prosperity at home and restored America's strength abroad. AAF believes that both individuals and organizations have the fundamental right to speak and associate freely, and that that freedom requires the ability to do so anonymously.

The following organizations and individuals also believe in the importance of protecting the First Amendment and freedom of association rights of organizations and their donors from compelled disclosure of donor information: 60 Plus Association; Alabama Policy Institute; Alaska Family Action; American Principles Project; Gary Bauer, President, American Values; Anglicans for Life; Catholics Count; Center for Political Renewal; Charlie Gerow; Center for Urban Renewal and Education (CURE); Concerned Women for America; The Family Foundation; Richard A. Viguerie, Chairman, FedUp PAC; Freedom Foundation of Minnesota; Global Liberty Alliance; International Conference of Evangelical Chaplain Endorsers; James G. Martin Center for Academic Renewal; Tim Jones, Missouri Center-Right Coalition; Mountain States Legal Foundation; National Apostolic Christian Leadership Conference; National Association of Parents (d/b/a "ParentsUSA"); National Center for Public Policy Research; National Religious Broadcasters; Nevada Policy; New Jersey Family Foundation; North Carolina Values Coalition; Palmetto Promise Institute; Project21 Black Leadership Network; Rio Grande Foundation; Russell Kirk Center for Cultural Renewal; Setting Things Right; The Justice Foundation; Upper Midwest Law Center;

Young America's Foundation.

INTRODUCTION

Both anonymous speech and political association are deep and abiding traditions in our Republic. The Federalist Papers and many antifederalist writings were published pseudonymously. Similarly, Alexis de Tocqueville noted that "[i]n America, the freedom of association for political ends is unlimited."[1] Today, these fundamental rights, so widely employed at the founding and after, are under attack at both the state and federal level. South Dakota compels organizations that engage in certain forms of political speech to violate both their own fundamental rights and the confidence of their most generous donors. Under South Dakota law, when "any person or entity" spends more than $100 on a given communication concerning "a candidate, public office holder, ballot question, or political party," the speaker must include in that communication "a listing of the names of the five persons making the largest contributions in aggregate to the entity during the twelve months preceding that communication." S.D. Codified Laws § 12-27-16(1) (2022).

The First Amendment prohibits Congress from making any law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." U.S. Const. amend. I. Further, the rights protected by that Amendment are incorporated against the states under the Fourteenth Amendment. According to the Supreme Court, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by

[1] 2 Alexis de Tocqueville, *Democracy in America*, 305 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010) (1835).

the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The fundamental right to free association includes the fundamental right to do so anonymously. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring in part and concurring in the judgement) ("The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously."). Today, however, both state and federal laws curtail that freedom by requiring disclosure of private associations, even in light of possible persecution.

Because South Dakota's disclosure law violates Students for Life Action's right to freely associate, that law must survive exacting scrutiny. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2383. "Exacting scrutiny is just what its name says—exacting. It is just short of strict scrutiny." *Dakotans for Health v. Noem*, 52 F.4th 381, 389 (8th Cir. 2021). Exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted)). Further, the policy must "be narrowly tailored to the government's asserted interest." *Id.* If the policy fails on any of these three counts, it is unconstitutional and thus must be set aside as an unconstitutional invasion of the First Amendment-recognized right to free association.

ARGUMENT

I. South Dakota's Policy is Not Narrowly Tailored to Achieve its Interest Because it is Both Over- and Underinclusive, and thus Cannot Survive Exacting Scrutiny.

To survive exacting scrutiny, a law must be narrowly tailored to achieve a sufficiently important interest. *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 ("[A] substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored."). Even if the state's interest in this case is sufficiently important to justify its invasion of the right to anonymous association, the law is not narrowly tailored to achieve its goal.[2] According to the Court, "[n]arrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (second alteration in original). Here, South Dakota is suffocating the First Amendment rights of organizations to freely and anonymously associate with their donors.

[2] The Supreme Court held that disclosure laws must be both substantially related to a sufficiently important interest and narrowly tailored, but then went on to suggest that substantial relation is subsumed by narrow tailoring. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2383-84 ("The United States and the Attorney General respond that exacting scrutiny demands no additional tailoring beyond the 'substantial relation' requirement noted above. We think that the answer lies between [substantial relation and the least restrictive means]. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.").

The test for narrow tailoring is not merely the severity of the harm caused by the law in question, but the breadth of its infringement on fundamental rights. *Ams. for Prosperity Found.*, 141 S. Ct. at 2384-85 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). "[A] reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring." *Id.* at 2385. A law is not narrowly tailored if it is either "hopelessly underinclusive," *See Reed v. Gilbert*, 576 U.S. 155, 171 (2015), or if it proscribes "more speech than necessary." *See Turner Broadcasting System, Inc. v. FCC.*, 520 U.S. 180, 189 (1997). The primary interest likely to be asserted by South Dakota in this case is the provision of information to the electorate about those engaging in political speech. The donor disclosure law at issue in this case is not narrowly tailored to achieve this interest because it is both over- and underinclusive.

The requirement is both over- and underinclusive because it determines what names must be disclosed based not on a donor's amount of giving or general influence, but simply on where that donor ranks among the organization's other donors. For a large organization, the five-donor rule could omit many highly influential donors who have given tens or hundreds of thousands of dollars to the organization and thus whose identity is ostensibly relevant to the communication's reliability. On the other hand, for a small entity's top five donors may well include local citizens simply trying to be heard on a sensitive topic without risking harassment, unemployment, or worse. The identity of such donors is likely to be of no value whatsoever in assessing the reliability of a communication. Thus, even if the government does have an interest in

forcing organizations to reveal their private associations for the sake of informing the electorate, requiring them to reveal the top five donors, regardless of the size of those donors' contributions or their general influence, is not narrowly tailored to that goal.

Further, a law that restricts fundamental personal liberties, even if it does so in pursuit of a legitimate government interest, is not narrowly tailored "when the end can be more narrowly achieved." *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 (quoting *Shelton*, 364 U.S. at 488) (internal quotation marks omitted). South Dakota's interest in providing a proxy through which voters can assess an organization's communication can be achieved through a less invasive means, namely, disclosure of the organization behind the communication. Whatever the constitutionality of such a requirement, such disclosure is much more likely to provide the electorate with useful information about the source of the communication than will disclosure of donor names. An interested voter will often learn much more about the political agenda of those sponsoring the communication by researching the organization than he would from researching the names of donors. Thus, because South Dakota's donor disclosure law is both over- and underinclusive, and because it could be more effectively achieved by a less invasive means, it cannot survive exacting scrutiny and thus must be struck down.

II. South Dakota's Donor Disclosure Requirement Undermines an Essential Element of Free Association and Does Not Provide Useful Information to the Electorate.

To survive exacting scrutiny, the law in question must exist to accomplish some "sufficiently important governmental interest." *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Reed*, 561 U.S. at 196) (internal quotation marks omitted). Further,

"the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (internal quotation marks omitted). "[E]ven a 'legitimate and substantial' government interest 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Id.* at 2384 (quoting *Shelton*, 364 U.S. at 488).

The Supreme Court has recognized an informational interest in disclosure to the voting public relating to electioneering communications. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 223-224 (2014) (plurality opinion). Thus, the state's interest in this case is arguably sufficient under the Court's exacting scrutiny standard. While the substantiality of South Dakota's interest is likely not dispositive for this Court, the importance of free, anonymous association and the ineffectiveness of donor disclosure requirements should be considered in tandem with the state's failure to narrowly tailor its law as discussed above.

A. South Dakota's disclosure law infringes the First Amendment-recognized right to free association.

Anonymous political communication is an American tradition. The Federalist Papers, among the most well known and most often cited discussions of the Constitution, were written pseudonymously. *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 343 n. 6 (1995). So were many of the antifederalists' writings opposing the adoption of the Constitution. *Id.* As the Supreme Court has recognized, "[a]nonymity is a shield from the tyranny of the majority." *Id.* at 357 (citation omitted). Anonymity thus "exemplifies the purpose behind the Bill of Rights, and of the First Amendment

in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.*

Association is also an American tradition. As Alexis de Tocqueville noted, early Americans made a habit of forming associations. Unlike in aristocratic societies where aristocrats hold the power and those beneath them carry out their will, in America, "all citizens are independent and weak; they can hardly do anything by themselves, and no one among them can compel his fellows to lend him their help. So they all fall into impotence if they do not learn to help each other freely."[3] Moreover, "[w]hen you allow [citizens] to associate freely in everything, they end up seeing in association the universal and, so to speak, unique means that men can use to attain the various ends that they propose."[4] In America, "[t]he art of association then becomes . . . the mother science; everyone studies it and applies it."[5]

Because "disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public,'" *Ams. for Prosperity Found.*, 141 S. Ct. at 2388 (quoting *Shelton*, 364 U.S. at 486 (alterations in original), disclosure laws not only threaten the ability of people to speak anonymously; they also threaten the right to associate freely with others. The South Dakota law at issue in this case goes a step further, demanding not only (at least theoretically confidential) disclosure to the

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[3] 3 Alexis de Tocqueville, *Democracy in America*, 898 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010) (1840).

[4] *Id.* at 914.

[5] *Id.*

government, but public disclosure of the names of donors with whom an organization associates.

B. Public disclosure of an organization's donor names does not provide useful information to the electorate.

That compulsory public disclosure of donor information provides useful information to the electorate is dubious. First, the claimed government interest in providing information to the public about those funding communication is merely a weaponization of the ad hominem fallacy. That an argument is made by an organization supported by a person who has been cast as the boogeyman by one's political allies is not a legitimate shortcut to the truth. That some people may take that shortcut is their own business. But the government cannot legitimately facilitate it at the expense of the rights of its citizens.

Second, even if using a donor's identity were a legitimate means of understanding the validity of an organization's communication, the identity of the donors disclosed is likely to be unknown, and thus unhelpful, to most voters. For example, one 2013 poll found that the biggest-name donors on the Right, the Koch brothers, and the Left, George Soros, had only a bare majority name recognition.[6] That is likely a ceiling for donor name recognition. Further, it is probable that the people who know the names of certain donors are also the people most informed and thus least in need of additional information about political communications. On the

[6] Ben Henderson, *Koch Brothers Better Known than George Soros*, YouGov (May 3, 2013, 4:09 PM), https://today.yougov.com/politics/articles/5978-koch-brothers-better-known-soros?redirect_from=%2Fnews%2F2013%2F05%2F03%2Fkoch-brothers-better-known-soros%2F.

other hand, those who could most use additional context for the communications they are receiving are the least likely to know the names of top donors. Thus, the supposed information that is being communicated to the electorate by South Dakota's disclosure law is of little value to few people and of no value to most people. Thus, while the Supreme Court has recognized such public disclosure as a substantial interest, the weakness of that interest ought to inform consideration of other aspects of the exacting scrutiny analysis.

CONCLUSION

Because South Dakota's law is not narrowly tailored to achieve its interest, it is unconstitutional. For that reason, it should be struck down by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31th day of October, 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:

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