UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

DAKOTA RURAL ACTION, DALLAS GOLDTOOTH, INDIGENOUS ENVIRONMENTAL NETWORK, NDN COLLECTIVE, SIERRA CLUB, AND NICHOLAS TILSEN, Plaintiffs, vs. KRISTI NOEM, in her official capacity as Governor of the State of South Dakota, JASON RAVNSBORG, in his official capacity as Attorney General, and KEVIN THOM, in his official capacity as Sheriff of Pennington County, Defendants.	No. 5:19-cv-05026-LLP **PLAINTIFFS' OPPOSITION TO DEFENDANT THOM'S MOTION TO DISMISS**

INTRODUCTION

Plaintiffs are two individuals and four organizations that seek to engage in full-throated advocacy in protest of the Keystone XL Pipeline. They brought this facial and as-applied challenge to enjoin Defendant Pennington County Sheriff Kevin Thom, among others, from enforcing South Dakota Codified Laws §§ 22-10-6 and 22-10-6.1 (together, "Criminal Laws") and South Dakota S.B. 189, 2019 Leg. Session (S.D. 2019), to be codified in South Dakota Codified Laws § 20-9-1, *et seq*. ("Riot Boosting Act" or "Act") (collectively, "Challenged Laws" or "Laws"). Plaintiffs oppose the Challenged Laws on the grounds that they are content-based restrictions on expression that are not narrowly tailored to achieving any compelling government interest, they are overly broad, and they are impermissibly vague in violation of the First Amendment and the Due Process Clause of the Constitution.

Thom moves to dismiss this action not because he asserts that the Challenged Laws pass constitutional muster, but rather on the grounds of jurisdiction, citing Federal Rules of Civil Procedure 12(b)(1) (subject matter jurisdiction) and 12(h)(3) (dismissal for lack of subject matter jurisdiction). *See* Sheriff Thom's Motion to Dismiss ("Motion"), Dkt. 23; Memorandum in Support of Motion ("Mem."), Dkt. 24. Thom claims that the Court lacks jurisdiction because Plaintiffs have failed to allege an injury in fact or that the injury is fairly traceable to him. In addition, Thom seeks to dismiss the Complaint for failure to state a claim because he contends that his authority to enforce the Challenged Laws derives not from a county policy, but only from a state policy, and as such Plaintiffs have not adequately pled municipal liability under the requirements set forth in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) ("*Monell* claim").

Thom's arguments are fatally flawed. As discussed more fully below, Plaintiffs have standing because they have alleged an injury in fact—reasonable fear of arrest, prosecution and civil liability under the Challenged Laws for engaging in protected speech, and chilling of that speech—and they have alleged that their as-applied injury is fairly traceable to Thom because he is charged with enforcing the law. In addition, Plaintiffs have adequately pled a *Monell* claim because Thom's policies give him discretion in whether and how to enforce the Challenged Laws, and the vagueness of the Challenged Laws requires Thom to exercise discretion and make choices in enforcing the Laws. The words of the Laws, such as "advise," "encourage," and "solicit," are subject to interpretation. Each time Thom makes a choice about the Laws' meaning, as the highest official in the county for that action, he is doing so as a policymaker for Pennington County and exposes the County to liability each time. Because enforcement of the

Laws necessarily requires the exercise of discretion by Thom when being enforced, he is an appropriate defendant to this lawsuit and municipal liability has been adequately pled. As such, Thom's Motion to Dismiss should be denied.

LEGAL STANDARDS

A motion to dismiss for lack of subject matter jurisdiction may be granted only "if the plaintiff fails to allege an element necessary for subject matter jurisdiction." *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993) (citing *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731–32 (11th Cir.1982)). Pursuant to Federal Rule of Civil Procedure 8(a)(1), a complaint need only "contain a short and plain statement of the grounds upon which the court's jurisdiction depends." *Id.* "In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true[.]" *Id.* (citing *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir.1990)).[1] "The general rule is that a complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Osborn*, 918 F.2d at 729 n.6 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

In reviewing a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court considers all facts alleged in the complaint as true to determine if the complaint states a

[1] A complaint can be "challenged on its face or on the factual truthfulness of its averments." *Titus*, 4 F.3d at 593. Whether the challenge is facial or factual may determine the applicable standard for reviewing the complaint. Thom argues that both standards apply here. Mem. at 3. Because Thom "is not presenting matters outside the pleadings," *id.* at 3, and no "factual record [has been] developed" *Osborn*, 918 F.2d at 729, this is a facial challenge and so is governed by the standard set forth above. If Thom "seeks to make a factual challenge, the proper course is to request an evidentiary hearing on the issue. The motion may be supported with affidavits or other documents. If necessary, the district court can hold a hearing at which witnesses may testify." *Id.* at 730. Once evidence is presented, "if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *see also Osborn*, 918 F.2d at 729.

"'claim to relief that is plausible on its face.'" *Braden v. Wal–Mart Stores, Inc*., 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "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." *Iqbal*, 556 U.S. at 678. Therefore, at the motion to dismiss stage, Plaintiffs' complaint "'need not include detailed factual allegations.'" *Affordable Communities of Missouri v. Fed. Nat. Mortgage Ass'n*, 714 F.3d 1069, 1073 (8th Cir. 2013) (quoting *C.N. v. Willmar Public School*, 591 F.3d 624, 629 (8th Cir. 2010)). It must only contain facts stating a claim to relief that is "plausible" on its face, that is, "'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678).

ARGUMENT

I. This Court has Subject Matter Jurisdiction.

Thom argues that this Complaint should be dismissed on jurisdictional grounds, citing Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and requesting dismissal pursuant to Fed. R. Civ. P. 12(h)(3). Mem. at 4–7. This argument fails because Plaintiffs' claims are grounded in the Constitution, *see*, *e.g*., Compl, ¶¶ 1–5, 80–92, and, as Plaintiffs properly pled, see *id.* ¶ 6, pursuant to 28 U.S.C. § 1331, federal courts have "original jurisdiction of all civil actions arising under the Constitution[.]" 28 U.S.C. §1331; *see also Arbaugh*, 546 U.S. at 503; *Bell v. Hood*, 327 U.S. 678, 681–685 (1946).

Thom argues that this Court nevertheless lacks jurisdiction because Plaintiffs have not alleged facts that can satisfy Article III standing. Mem. at 4–7. To plead Article III standing, a plaintiff must allege (1) an "injury in fact," (2) a sufficient "causal connection between the injury

and the conduct complained of," and (3) a "likel[ihood]" that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Thom contends that Plaintiffs have failed to sufficiently allege (1) an injury in fact, Mem. at 4–6, or (2) that the injury is fairly traceable to Pennington County, *id.* at 6–7. Both arguments are meritless.

A. Plaintiffs have alleged an injury in fact.

When a challenged law "implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (citations omitted). "The leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact." *Id.* This element can be satisfied if Plaintiffs allege either "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute [under which] there exists a credible threat of prosecution,'" *id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)) or "that [they] self-censored," *id.* (citing *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011)). Plaintiffs need to satisfy only one of these formulations. As pled in the Complaint, Plaintiffs satisfy both.

i. Plaintiffs have adequately alleged reasonable fear of prosecution for engaging in protected speech.

First, Plaintiffs have alleged that they intend to engage in a course of conduct affected with a First Amendment interest and fear prosecution and civil liability under the Challenged Laws. *See* Compl. ¶¶ 67–70. Plaintiffs oppose construction of the Keystone XL pipeline. To express their views on this important issue, Plaintiffs intend to engage in a course of conduct affected with a First Amendment interest; specifically, to provide funding, training, and other

advice and encouragement to individuals who plan to protest the Keystone XL Pipeline. *Id.* ¶¶ 50–66.

Plaintiff Dakota Rural Action has funded, advised, and encouraged individuals to resist the pipeline and plans to organize and educate individuals to ask for denial of the pipeline's permit. *Id.* ¶¶ 53, 55–56. Plaintiffs Indigenous Environmental Network and Dallas Goldtooth are training communities along the route of the pipeline in peaceful civil disobedience and protest; funding travel for those who plan to peacefully protest the pipeline; and plan to encourage, advise, and train individuals who will set up prayer camps, protests on public highways, and use their bodies to peacefully resist the construction of the pipeline. *Id.* ¶¶ 57–59. Plaintiffs NDN Collective and Nick Tilsen have participated in and organized meetings about resisting the pipeline; are raising money to support Native-led resistance to the pipeline; and plan to promote the use of non-violent direct action, civil disobedience, prayer camps, and other forms of advocacy. *Id.* ¶¶ 61–65. Plaintiff Sierra Club has protested the construction of Keystone XL and other pipelines through non-violent civil disobedience, and Sierra Club plans to educate the public about the risks of Keystone XL; to organize lawful protests of and rallies against the pipeline; and to provide funding and other support to non-profit organizations that share its commitment to opposing the pipeline. *Id.* ¶ 66.

This course of conduct is clearly "affected with a constitutional interest": the First Amendment. Plaintiffs' speech, which concerns public issues, "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913

(1982)). As speech about public affairs, Plaintiffs' plans reflect "more than self-expression; [they are] the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

Those who wish to engage in such speech but fear prosecution or civil liability for doing so "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt*, 442 U.S. at 298 (internal citations and quotations omitted). Plaintiffs "need not expose [themselves] to arrest or prosecution in order to challenge a criminal statute." *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006). They need only allege a threat of prosecution that "is not imaginary or wholly speculative" to have standing. *Babbitt*, 442 U.S. at 302.

Plaintiffs have done so here. Plaintiffs allege that "[t]he trainings, funding, and other support [they] have planned for anti-pipeline protests could, if carried out, violate the Challenged Laws. Plaintiffs all 'encourage' or 'advise' participation in protests [and] . . . any protest can erupt into a riot—without any intent by Plaintiffs. At those protests, perceived unlawful violence, acts of force, or arrests may occur, even violence perpetrated by law enforcement or pipeline employees." Compl. ¶ 68. This establishes a reasonable fear of prosecution under the Criminal Laws and Sections 2 and 4 of the Riot Boosting Act, which impose civil liability for the speech criminalized by the Criminal Laws and also for compensating or soliciting others "to be arrested."

Thom essentially argues that because Plaintiffs allege that they plan to engage in constitutionally protected conduct, the law would not operate to cause them to be arrested. Mem. at 5–6 ("Plaintiffs allege they are not inciting anyone to commit imminent violent or forceful action" and that, as a result, "[t]here is no 'realistic fear of prosecution[.]'"). Plaintiffs agree that they should not be prosecuted for their conduct and that it is constitutionally protected, but they

have brought this challenge precisely because the statute is written in such a way that it could be applied to the speech and conduct Plaintiffs plan to engage in.

This is true because the type of speech that the Challenged Laws prohibit—words that "encourage, advise, direct [and] solicit"—encompasses mere advocacy and is not limited to incitement. While Plaintiffs do not intend to incite violence, they do plan to vigorously oppose construction of the pipeline. "The mere tendency of speech to *encourage* unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (emphasis added). In fact, the Supreme Court "has made clear . . . that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982). Yet the Challenged Laws target such advocacy. Their prohibition on speech also depends on the reactions of listeners such that there is no way for Plaintiffs to know before they speak whether they will violate the Laws—whether, for example, their words will in fact encourage a listener. And the Laws are so vague that Plaintiffs cannot possibly tell what speech or conduct Defendants, including Thom, will find objectionable.

Fatally for Thom's motion, the Challenged Laws lack an intent requirement. While Thom is correct that Plaintiffs do not *intend* to incite any individuals to commit imminent violence or forceful actions and, to the contrary, plan to advocate against the use of violence, *see* Mem. at 5, the laws do not require intent. Moreover, "[a] First Amendment plaintiff does not always need to allege a subjective intent to violate a law in order to establish a reasonable fear of prosecution. *281 Care Comm. v. Arneson*, 638 F.3d 621, 629 (8th Cir. 2011). While no court has had occasion to consider a plaintiff's standing to bring a pre-enforcement challenge to a "riot boosting" law,

the Supreme Court and Eighth Circuit have considered individuals' standing to challenge laws that similarly ban words spoken in heated contexts without requiring intent. Those cases, discussed in turn below, hold that plaintiffs have standing in such circumstances and are instructive here.

In *Susan B. Anthony List v. Driehaus*, the Supreme Court held that Susan B. Anthony List ("SBA") had alleged a credible threat of prosecution under an Ohio statute prohibiting certain false statements during a political campaign notwithstanding SBA's insistence that its speech was factually true. In the proceedings below, the Sixth Circuit had reasoned that, because SBA "can only be liable for making a statement 'knowing' it is false," SBA's insistence that its speech is factually true "makes the possibility of prosecution for uttering such statements exceedingly slim." 573 U.S. at 163. This is essentially Thom's argument here. *See* Mem. at 5. The Supreme Court explicitly rejected this reasoning, explaining that standing was based not on whether the speaker subjectively believed his speech to be false under the challenged law, but rather whether the challenged law gave the government discretion to determine whether a speaker's speech was false. *Id.* The source of Plaintiffs' fear here is nearly identical: they fear arrest, prosecution, and/or civil liability not because they intend to violate the Challenged Laws, but because there is no way for Plaintiffs to tell what conduct Defendants will find objectionable.

Plaintiffs' standing is also supported by *Babbitt v. United Farm Workers*, in which the Supreme Court held that a union had standing to challenge a statute prohibiting "induc[ing] or encourag[ing]" consumers to boycott agricultural products "by the use of dishonest, untruthful and deceptive publicity" even though the union expressly did "not plan to propagate untruths." 442 U.S. 289, 301 (1979). The Supreme Court held that the union's "active[] engage[ment] in

consumer publicity campaigns in the past," its alleged "intention to continue to engage in boycott activities," the fact that "erroneous statement is inevitable in free debate," and the state's refusal to "disavow[] any intention of invoking the criminal penalty provision against unions that commit unfair labor practices" sufficed to establish the union's standing. *Id.*

Plaintiffs have alleged similar facts here. First, Plaintiffs have actively protested against the pipeline in the past and have alleged an intention to continue doing so in the future. Second, just as "erroneous statement is inevitable in free debate," *id.*, "[t]he language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969). Statements encouraging or advising use of force may well be uttered unintentionally in the context of heated advocacy and protest. Indeed, "advocates must be free to stimulate [their] audience[s] with spontaneous and emotional appeals for unity and action in a common cause." *Claiborne Hardware Co.*, 458 U.S. at 928. Because Plaintiffs credibly allege a threat of arrest or prosecution based on similar protected speech, *Babbitt* reinforces the conclusion that Plaintiffs have standing to bring this challenge.

Eighth Circuit precedent also supports Plaintiffs' standing here. In *281 Care Committee v. Arneson*, the Eighth Circuit held that the plaintiffs had standing to challenge a law that criminalized making a false statement about a proposed ballot initiative knowingly or with reckless disregard for the truth even though they did not allege that they wished to engage in conduct that actually violated that law. 658 F. 3d at 628. The Eighth Circuit recognized that "[t]he chilling effects of [the law] cannot be understood apart from the context of the speech it regulates." *Id.* In the context of "political speech about contested ballot initiatives," it held that there is "substantially more room for mistake and genuine disagreement" about what words are

spoken with "reckless disregard for the truth." *Id.* at 629–30. "The Supreme Court has made clear that, at least when intent is not an element of a challenged statute that prohibits some category of false speech, the likelihood of inadvertently or negligently making false statements is sufficient to establish a reasonable fear of prosecution under the statute." *Id.* at 629.

As a result, the court held that plaintiffs who did not intend to make false statements but did "desire to use political rhetoric, to exaggerate, and to make arguments that are not grounded in facts" had alleged a "reasonable worry that state officials . . . will interpret these actions as violating the statute." *Id.* at 629–30. Similarly, here, Plaintiffs do not intend to incite, or even advocate for, violence. But they do desire to vigorously oppose the pipeline and engage in public debate, which, as the Supreme Court has recognized, "should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Given their plans to vigorously protest, Plaintiffs' fears of prosecution cannot be deemed "imaginary" or "wholly speculative." *281 Care Comm.*, 638 F.3d at 630 (quoting *Babbitt*, 442 U.S. at 302).

Judge Kornmann's May 9, 2019 decision in *SD Voice v. Noem*, Civ. No 1:19-CV-01003-CBK (D.S.D. May 9, 2019), is particularly instructive.[2] There, as here, the plaintiffs mounted a pre-enforcement First Amendment challenge to a state statute on First Amendment grounds, and alleged in their complaint an intent to engage in conduct that could be perceived by state officials to violate a recently-enacted law. The court agreed that the plaintiffs had standing because they

[2] Because this opinion is not yet available on Lexis or Westlaw, Plaintiffs have attached a true and correct copy as Exhibit 1 to this memorandum.

had alleged a credible fear of prosecution. *See* Slip Op. at 14. In so holding, the court noted two significant facts that also exist here. First, the statute at issue contained an enforcement standard that was vague on its face and "not defined by [the statute] nor . . . elsewhere in South Dakota's [] laws," thus lending itself to arbitrary enforcement and chilling expression. *Id*. at 10–11. Second, the speaker could be held responsible for actions taken by a third party *over whom the speaker has no control. Id*. at 11 ("This ban on volunteer contributions is especially egregious when the ballot question committee is not affiliated with or able to supervise such out-of-state volunteers.")

Here, as in *SD Voice*, the Challenged Laws create a vague standard—"encourage, advise, direct [and] solicit"—not defined in state law. This standard invites arbitrary enforcement, thus chilling speech. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 499 (1982); *Stahl*, 687 F.3d at 1041. Second, any speaker who—in the opinion of Thom—has "encouraged" a third party to engage in a violent act can be arrested even if the speaker "is not affiliated with or able to supervise" the third party. For the same reasons the plaintiffs is *SD Voice* had standing, so do Plaintiffs here.

The single Eighth Circuit case that Thom cites to the contrary, *SOB, Inc. v. County of Benton*, is inapposite for several reasons. *See* Mem. at 6. As relevant here, in *SOB*, the Eighth Circuit considered the plaintiffs' challenge to an ordinance prohibiting "nudity and the fondling of genitals 'in a public setting or place,'" including hotels, on the grounds that it infringed their constitutional right to sexual privacy. 317 F.3d 856, 865. The Eighth Circuit held that the plaintiffs lacked standing because their alleged fear of prosecution and chill were "patently unreasonable" in light of Minnesota's canons of statutory construction, the fact that the relevant county attorney had declared that the ordinance did not prohibit any sexual activity in private

hotel rooms, and because their claim "d[id] not raise First Amendment issues." *Id.* In contrast, here, Thom has not argued that any canons of statutory construction make Plaintiffs' fear unreasonable, nor has the government disavowed prosecution of the Plaintiffs for protesting the pipeline. Perhaps most importantly, Plaintiffs' challenges in this case squarely raise First Amendment issues.

ii. Plaintiffs have adequately alleged chill.

Plaintiffs have also alleged an injury in the form of the current, ongoing chilling of their First Amendment rights, which is sufficient to state an injury in fact. Compl. ¶ 71. For example, Sierra Club has alleged that, because of the vague wording of the Challenged Laws, it is unsure about what speech is permissible and so will err on the side of curtailing its protected speech to steer clear of what the Laws prohibit. *Id.* ¶ 66. All of the "Plaintiffs must choose between encouraging and advising pipeline protestors, on the one hand, and exposing themselves to prosecution and civil liability under the Challenged Laws, on the other." *Id*. ¶ 70.

An allegation of self-censorship is sufficient to establish standing. *See, e.g*., *Missourians for Fiscal Accountability*, 830 F.3d at 794; *see also Virginia v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 393 (1988) (holding that plaintiffs had standing to bring pre-enforcement challenge in part because of injury of chilled speech); *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) (same). "[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Missourians for Fiscal Accountability*, 830 F.3d at 794. "The Supreme Court has also recognized that where plaintiffs challenge a statute that allegedly chills free speech, litigants 'are permitted to challenge a statute not because their own rights of

free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *SD Voice*, Slip Op. at 15 (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956–57 (1984) (internal quotations and citations omitted).

Here, as in *SD Voice*, Plaintiffs have standing because their complaint clearly alleges they must curtail their expression out of fear of prosecution. *See SD Voice*, Slip Op. at 15 (finding standing because "compliance with the law is coerced by threat of civil or criminal enforcement penalties, [and thus] plaintiffs' injury is actual or imminent.")

B. Plaintiffs have alleged that their injury is traceable to Thom.

Thom also contends that Plaintiffs have failed to allege that he is the source of their injury. Mem. at 6–7. This misreads the Complaint. As alleged in the Complaint, Thom "is the sheriff of Pennington County" and as such "is responsible for the prevention, detection, or prosecution of crimes [and] for the enforcement of the criminal . . . laws of the state[.]" Compl. ¶ 16 (citing SDCL § 22-1-2). Plaintiffs' injury is traceable to Thom because he is authorized and required to enforce the statute. "When a statute is challenged as unconstitutional, the proper defendants are the officials *whose role it is to administer and enforce the statute.*" *281 Care Comm.*, 638 F.3d at 631 (emphasis added). Here, Thom is that official for Pennington County.

In fact, the causation element of standing of a pre-enforcement, as-applied challenge requires Plaintiffs to name an individual, such as Thom, with the authority to enforce the challenged statute. *See Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) ("[W]hen a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority

to enforce the complained-of provision."); *Balogh v. Lombardi*, 816 F.3d 536, 543 (8th Cir. 2016) (same).

To support his argument that Plaintiffs lack a "jurisdictional basis" for their claims, Thom cites only *Odonnell v. Harris County*, 882 F.3d 528, 538 (5th Cir. 2018). Mem. at 7.[3] *Odonnell* is distinguishable from this case. In *Odonnell*, which was decided at the summary judgment stage, Plaintiffs challenged state bail-setting procedures that led to their incarceration because the bail procedures allowed county judges to ignore individualized review of a defendant's ability to pay, the charge, and community safety. 882 F.3d at 538. The Court found that there was a municipal policy that drove the alleged constitutional violations, but because the county judges had policymaking authority on this issue and the sheriffs did not have any authority on how bail was set and were "legally obliged to execute all lawful process and [could] not release prisoners committed to jail by a magistrate's warrant" the sheriff was not a policymaker for § 1983 purposes. *Odonnell v. Harris Co.*, 892 F.3d 147, 155–6. Thom stretches that holding to argue there is no municipal liability in this case because he does not have any discretion in how the Challenged Laws will be enforced.

As detailed in the following section regarding *Monell* liability, that argument is fatally flawed. These particular statutes demand interpretation in their enforcement. In this case, the constitutional injury—whether in the form of fear of arrest and prosecution or chilled speech—is necessarily derived from how the sheriff enforces the Challenged Laws.

[3] The opinion cited by Thom was withdrawn and superseded by *Odonnell v. Harris Co.*, 892 F.3d 147 (5th Cir. 2018), but the language cited remained at 892 F.3d 147, 156.

II. Plaintiffs Have Stated a *Monell* Claim

Plaintiffs' Complaint alleges that Thom has the "authority" and "duty" to enforce the Challenged Laws. Compl. ¶ 16. That allegation is sufficient to support a claim for liability under § 1983 in the context of this case. For claims arising under 42 U.S.C. § 1983, "a plaintiff must allege [1] the violation of a right secured by the Constitution and laws of the United States, and must show [2] that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Plaintiffs have alleged First Amendment violations and Thom is a person within the meaning of the statute.

"[Governmental] liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. at 469, 483 (1986). *See also Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941, 946 (8th Cir. 2017) (quoting *Pembaur* for this principle); *Malone v. Hinman*, 847 F.3d 949, 955 (8th Cir. 2017) (recognizing that a "policy" for purposes of governmental liability "'is an official policy, a deliberate choice or a guiding principle or procedure made by the municipal official who has final authority regarding such matters.'") (quoting *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999)).

A municipality or county may be liable under Section 1983 if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. *See Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 692 (1978). As Thom concedes, *see* Mem. at 7–8, the Eighth Circuit has expressly reserved the question of what circumstances may render a municipality "liable for enforcing state law." *Slaven v. Engstrom*,

710 F.3d 772, 781 n.4 (8th Cir. 2018); *see also Duhe v. City of Little Rock*, 902 F.3d 858, 863 n.2 (8th Cir. 2018) (again declining to "take up th[e] issue" of municipal liability for enforcing state law). The prevailing view "is that a local government's exposure to *Monell* liability for enforcing state law turns on the degree of discretion the local government retains and whether the locality has made its own deliberate choices with respect to the law." *Bruce & Tanya Assocs. v. Bd. of Supervisors*, 355 F. Supp. 3d 386, 400, n.6 (E.D. Va. 2018) (collecting cases).

As discussed in detail below, Pennington County's policies, South Dakota law, and the vague terms of the Challenged Laws all present Thom with alternatives on how to enforce the Criminal Laws and, in choosing how to enforce those laws, he is the ultimate policymaker for Pennington County.

A. Thom has Discretion Regarding Enforcement of the Challenged Laws.

Thom's argument boils down to his contention that there is no municipal policy here, but only a state law that he is required to enforce pursuant to SDCL 7-12-4. But Thom's own actions contradict his argument. Thom's office maintains a handbook of official policies, all of which were expressly approved by Thom. *See* Pennington County Sheriff's Office, *Law Enforcement Policies*, Policy 112-03: Criminal Process (Apr. 2, 2019), full document found at https://docs.pennco.org/docs/SO/policies/lepolicies.pdf, excerpt attached as Exhibit 2.[4] Arrest for violation of criminal laws in Pennington County is governed by Policy 112-03, which clearly

[4] The Court may consider the Pennington County Sheriff's Office's policies because they are public records, which may be considered when deciding a 12(b)(6) motion. *See, e.g., United States el rel. Kraxberger v. Kan. City Power & Light Co.*, 756 F.3d 1075, 1083 ("[I]n a motion to dismiss, a court may consider 'matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.'").

gives Thom's department discretion to enforce the law. Ex. 2, Handbook, p. 3. The Policy includes an entire section entitled "Use of Discretion." *Id.* It states, in full:

> 1. A deputy shall responsibly use the discretion vested in the position and exercise it within the law. The principle or [*sic*] reasonableness shall guide the deputy's determination and the deputy shall consider all surrounding circumstances in determining whether any legal action shall be taken.
>
> 2. Consistent and wise use of discretion, based on professional policing competence, will do much to preserve good relationships and retain the confidence of the public. There can be difficulty in choosing between conflicting courses of action. It is important to remember that a timely word of advice rather than arrest—which may be correct in appropriate circumstances— can be more effective means of achieving a desired end.

Id. (emphasis added). This policy expressly recognizes "the discretion vested in" Thom's department and that his officers must "choos[e] between conflicting courses of action." *Id*. This applies to Thom's enforcement of the challenged Criminal Laws.

Additionally, Thom's policy manual strongly suggests that Pennington County has already developed, or is developing, written policies specific to the Challenged Laws. Policy 531-01: Unusual Occurrences Administration states "[t]he Pennington County Sheriff's Office will have written plans for responding to unusual occurrences," including "civil unrest" and "riot." Ex. 2, Handbook, p. 5. Assuming Thom follows his own publicly available policy handbook, he likely has developed "riot" and "civil unrest" policies relevant to the enforcement of the Challenged Laws, which policies will be produced in discovery. In addition, the fact that Thom's office can create such policies demonstrates that he is a policy maker under the *Monell* framework. The Handbook shows that "the locality has made its own deliberate choices with respect to the law." *Bruce & Tanya Assocs.*, 355 F. Supp. 3d at 400, n.6.

Further contradicting his argument that he is "required" to enforce all state laws without any exercise of discretion, Thom's office explicitly stated in the press – only a week before filing

his opposition brief in this case – that it will not follow opinions of the Attorney General with respect to CBD oil. *County prosecutor says he won't prosecute CBD oil cases*, Keloland.com, April 16, 2019, https://www.keloland.com/news/local-news/county-prosecutor-says-he-won-t-prosecute-cbd-oil-cases/1931540510 ("State Attorney General Jason Ravnsborg recently sent a release that said industrial hemp and all forms of CBD oil remain illegal in South Dakota. Pennington County State's Attorney Mark Vargo tells the Rapid City Journal that he came to his decision after speaking with Ravnsborg's staff and examining relevant state laws. Pennington County Sheriff Kevin Thom and Rapid City Police Chief Karl Jegeris say will be following Vargo's direction and won't arrest people for CBD oil.").[5] This strongly contradicts Thom's arguments regarding the "requirements" of SDCL 7-12-4.

In reality, Thom has wide discretion on whether and how those laws are enforced, placing him in the role of a policy maker. This comports with the state's "public duty doctrine," which broadly states that a municipality or city "owe[s] no duty to provide public services to particular citizens as individuals. Instead, ... the District's duty is to provide public services to the public at large" and "[b]ecause an officer's duty is to the public, his subsequent "failure to perform it, or an inadequate or erroneous performance, must be a public and not an individual injury, and must be redressed, if at all, in some form of public prosecution." *McGaughey v. D.C.*, 734 F. Supp. 2d 14, 18 (D.D.C. 2010) (internal citations omitted). South Dakota has not abrogated the public duty doctrine. *Gleason v. Peters*, 568 N.W.2d 482, 484–86 (S.D. 1997). Its function is to "protect[] government officials against a "novel sort of professional malpractice" by shielding *their*

[5] The Court may also consider the Pennington County Sheriff's Office's statements because they are matters of public record. *See, e.g.*, *Kraxberger*, 756 F.3d at 1083.

discretionary decisions and actions taken in an official capacity from suit." *McGaughey* at 18 (emphasis added). With the adoption of this doctrine, South Dakota recognizes that law enforcement decisions necessarily involve discretion.

B. Because the Challenged Laws are Vague, Pennington County Necessarily Must Adopt a Policy Regarding How to Enforce Them.

Plaintiffs allege that the Challenged Laws are unconstitutionally vague. Compl. ¶¶ 22, 44. To implement them, Thom may be called upon to make dozens if not hundreds of decisions, each one reflecting a choice that likely creates a municipal policy. Thom, for instance, may have to decide whether each person who urges others to attend an event opposing construction of the pipeline, including Plaintiffs, are "riot boosters" if the event turns violent. These laws are *not* clear on their face and they *require* interpretation.

For example, assume by way of hypothetical that Plaintiff Tilsen, a resident of Pennington County, encourages those in his county who live along the route of pipeline construction to join him in a protest in Pennington County and encourages them to bring friends. One of his neighbors, in turn, sends her nephew in Nebraska $25 to drive to the site to participate in the protest. At the protest, the nephew engages in violence and is arrested. Under the Challenged Laws, is Mr. Tilsen liable because he encouraged his neighbors to invite their friends? Is the aunt liable for having solicited her nephew to join the protest? The answer to those questions depends in the first instance on how Thom interprets the Challenged Laws. Regardless

of which choice Thom makes, he will create a *policy* based on *his interpretation* of state statutory law.[6]

Where municipal policymakers like Thom have discretion in interpreting and implementing a vague state law, the choices they make in doing so gives rise to municipal liability. *See Pembaur*, 475 U.S. at 483; *Soltesz*, 847 F.3d at 946. Even assuming that Thom's enforcement of the Laws is mandatory, *how* he chooses to enforce the Laws "still leaves room for [him] to set local policy"—for example, how he interprets "encourages" or "advises" and who he chooses to arrest, as illustrated by the example above. *See Snyder v. King*, 745 F.3d 242, 249 n.3 (7th Cir. 2014) (holding that "even if the [state] code provision authorizing county sheriffs to perform a strip search of all inmates entering a county jail is read to make a strip search mandatory, it still leaves room for the sheriffs to set local policy with respect to the level of intrusiveness involved and the manner in which the search is conducted."). Those "independent decisions . . . could easily be the difference between an unconstitutional [implementation] and one which was not." *Id.*

A single decision by a policymaker can subject the government to § 1983 liability. *Id.* at 480–81; *see also Soltesz*, 847 F.3d at 946 ("Thus a single decision by a municipal official can constitute official policy."). The fact that many of Thom's applications and interpretations of the Challenged Laws may be oral and not written does not impact municipal liability. *See Monell v.*

[6] This vagueness reinforces the concrete harms suffered by Plaintiffs that establish their standing. Due to the vagueness and potential breadth of the Challenged Laws, both Mr. Tilsen and the aunt in this hypothetical may reasonably fear prosecution and may engage in self-censorship. Indeed, the Riot Boosting Act was intended to create this type of intimidation based on a speaker's viewpoint. Compl. ¶ 28 ("The Act targets anti-pipeline protests and protestors. Governor Noem cited George Soros as an example of an out-of-state entity that the State wanted to shut down, and block from disrupting the construction of the pipeline, through the Act.")

Dep't of Soc. Servs. of New York, 436 U.S. 658, 694 (1978) (holding that a challenged policy must be "made by its lawmakers or by those whose edicts *or acts* may fairly be said to represent official policy[]") (emphasis added); *see also Pembaur*, 475 U.S. at 480–81 (holding that an "official policy" for purposes of § 1983 liability "refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time[]").

Plaintiffs are not only challenging the statutes on their faces, that is, as a matter of statutory construction, they are also challenging how the Laws will be applied to them at the county level. Those applications will be the result of implementations of county policy. *See Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1029 (D.S.D. 2014), *reversed on other grounds*, 904 F.3d 603 (8th Cir. 2018) (denying county official's motion to dismiss where the county instituted policies, practices and customs to implement the state law and had discretion with respect to how the state law was carried out).

C. The Cases Cited by Thom Address Compulsory, Not Discretionary Enforcement of State Law.

Each case Thom cites deals with municipalities acting under "compulsion of state law." *See* Mem. at 7. Because, as discussed at length above, Thom has discretion in whether and how to enforce the Challenged Laws, his reliance on these cases is misplaced.

In *Slaven*, decided under the summary judgment standard,[7] the "complaint essentially allege[d] that *[state] law, . . .*—not an independent [county] policy—caused the [constitutional]

[7] The summary judgment standard is whether the Defendant is entitled to judgment as a matter of law, versus the standard for a motion to dismiss, which is whether, taking the facts alleged by plaintiffs as true, the complaint fails to state a claim for relief.

violations." The court found that municipal officials had no choice but to enforce the law as it was written and so held that the plaintiffs needed to sue state, not county, officials. *Slaven v. Engstrom*, 710 F.3d 772, 780–81; *see also Slaven*, 848 F. Supp. 2d 994, 1006–07. Here, Plaintiffs are suing state officials for their *facial* challenge and are suing—and have a right to sue—Thom because he is mandated to interpret and apply these confusing and imprecise statutes in Pennington County.

Thom next cites *Vives v. City of New York*, 524 F.3d 346, 351 (2d Cir. 2008). *See* Mem. at 7–8. In that case, the Second Circuit decided that the existence of a municipal policy depends on "1) whether the City had a meaningful choice as to whether it would enforce [the state statute in question]; and 2) if so, whether the City adopted a discrete policy to enforce [the state statute in question] that represented a conscious choice by a municipal policymaker." *Vives*, 524 F.3d at 353. Thom has discretion under the Challenged Laws, triggering municipal liability. He also has the power to implement discrete policies to police riots that occur within Pennington County.

Thom also cites Seventh Circuit opinions in *Surplus Store & Exchange Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991) and *Bethesda Lutheran Homes & Services, Inc. v. Leean*, 154 F.3d 716 (7th Cir. 1998). Mem. at 7. Again, these cases were decided under the standard for summary judgment where the parties had an opportunity to develop the facts and they both articulate the rule that a county "cannot be held liable under Section 1983 for acts that it did *under the command* of state or federal law." *Id*. (emphasis added). Enforcement of the Challenged Laws is discretionary for Pennington County, not mandatory. The crucial fact of discretion afforded to Pennington County regarding its enforcement of the Challenged Laws triggers municipal liability.

CONCLUSION

For the reasons stated, Plaintiffs request that the Court deny Thom's Motion to Dismiss.[8]

Dated this 14th day of May, 2019

Respectfully submitted,

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[8] If the Court agrees with Thom's argument that the *Monell* claim does not include sufficient allegations of county policy, the Plaintiffs request that they be permitted to amend the Complaint to include specific allegations regarding Pennington County's discretion and intention to enforce the Challenged Laws against the Plaintiffs.

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Pennington County Sheriff's Office

Law Enforcement Policies

For restricted and public access

Revised 4-2-2019

112-03: Criminal Process

Chapter: Limits of Authority
Order No: LE 12-05
Effective: 08-01-2000
Revised: 11-16-2012
Approved by: Sheriff Kevin Thom
Reference:
Classification: Public

I. Policy

A. The Pennington County Sheriff's Office will provide guidance to deputies in unusual arrest and detention situations.

II. Definitions

A. **Arrest:** An arrest is defined as the taking of a person into custody in order that they may be forthcoming to answer for the commission of a crime.

B. **Probable Cause:** Probable cause means that based on all the facts and circumstances within the deputy's knowledge, and of which he has reasonable trustworthy information, there is sufficient evidence to warrant a reasonable and prudent person to believe that the person to be arrested has committed or is committing or attempting to commit a crime. The evidence required to make an arrest is more than suspicion, but less than that needed to support a conviction. Each deputy should be aware of the circumstances and information which may be used to help establish probable cause.

1. Direct observation by the deputy
2. Knowledge of prior criminal record or bad reputation of the person arrested
3. Evasive actions or flight from the scene by the suspect
4. Evasive answers and/or conflicting stories
5. Time of day or night
6. Past experience of the deputy in similar situations
7. The transfer of information or probable cause between deputies
8. Reliable hearsay information in the form of statements from victims, witnesses or informants

III. General Information

A. Deputies should make an arrest when appropriate. Deputies are encouraged to consider alternatives to arrest whenever possible (i.e., citations, summonses, referral,

informal resolution and warnings) to address the variety of problems they confront. Since the character of most arrestees is unknown to the deputy, preventative actions must be taken to protect citizens, deputies, prisoners and property from possible injury or destruction by the arrestee.

IV. Procedural Guidelines

A. Criminal Process

1. To constitute an arrest, there must exist intent on the part of the arresting deputy to take the person into custody and a corresponding understanding by the person arrested that they are in custody.

2. The test for determining the moment of arrest is whether, under all the circumstances, a reasonable person would believe that they are not free to leave.

B. Recommending Attorneys and Bail Bondsman

1. Deputies shall not suggest, recommend, advise or otherwise counsel the retention of any specific attorney or bail bondsman. This does not apply when a relative of the employee is seeking such service.

C. Use of Discretion

1. A deputy shall responsibly use the discretion vested in the position and exercise it within the law. The principle or reasonableness shall guide the deputy's determination and the deputy shall consider all surrounding circumstances in determining whether any legal action shall be taken.

2. Consistent and wise use of discretion, based on professional policing competence, will do much to preserve good relationships and retain the confidence of the public. There can be difficulty in choosing between conflicting courses of action. It is important to remember that a timely word of advice rather than arrest—which may be correct in appropriate circumstances—can be more effective means of achieving a desired end.

D. Special Arrest Situation/Class II Citations

1. Great care is recommended in the handling and supervision of unusual arrest situations. Arrest for class II misdemeanor allows deputies to issue citations under South Dakota Codified Law 23-5-4.

2. An arresting deputy should reasonably believe that the person arrested does not present a danger to themselves or others and will appear in response to a summons.

3. Reasonable caution in conjunction with proper identification should be used in making the determination when a citation should be issued.

4. Proper identification should include;

a. A valid driver's license

b. A valid address

c. Or other valid identification to include at least one photo ID

5. Deputies must check with dispatch to determine current warrant history of the offender.

6. If the arresting deputy determines that a class II arrest can be processed by issuing a summons, then a deputy is permitted to do so under the authority of SDCL 23-5-4. A summons may be used if the following information can be provided:

   a. Name of subject arrested

   b. Home address

   c. Date of birth

   d. Social security or driver's license number

   e. Telephone number

   f. Place of employment or school

7. All citizens arrest forms should be checked carefully by the deputy to ensure all the elements of the offense are included and it is complete and legible

8. For all other class II arrests, an addendum should be attached summarizing the event.

9. Deputies should try to avoid scheduling court appearances for adults on Monday or the day after a holiday

531-01: Unusual Occurrences Administration

Chapter: Unusual Occurrences & Special Operations Administration
Order No: LE 12-08
Effective: 08-01-2000
Revised: 12-19-2012
Approved by: Sheriff Kevin Thom
Reference:
Classification: Public

I. Policy

A. The Pennington County Sheriff's Office will have written plans for responding to unusual occurrences. The Rapid City/Pennington County Multi-Hazard Emergency Operations Plan will meet this requirement.

II. Definitions

A. **Unusual Occurrences:** Situations, generally of an emergency nature, that results from disasters--both natural and manmade--and civil disturbances.

B. **Civil Disturbances:** Large scale disorder or other ongoing law violations committed by a large group of people at the same time.

III. General Information

A. When the county is reasonably threatened by circumstances that may likely escalate into civil unrest or a riot, the Pennington County Sheriff's Office is responsible for maintaining civil order.

IV. Procedural Guidelines

A. **Unusual Occurrences Responsibility:**

1. The Sheriff, Chief Deputy or designee shall be responsible for planning the Sheriff's Office response to unusual occurrences, in addition to developing policy and procedures relating to general response situations. The Law Enforcement Chief Deputy may assign a staff officer as liaison to Rapid City/Pennington County Emergency Management and Pennington County Local Emergency Planning Committee. This person will be the principal advisor on unusual occurrences to the Sheriff.

2. Narrative reports will be written by all deputies participating in the incident. These reports will be coordinated and reviewed by the incident supervisors who will prepare a summary report of the incident.

3. A representative will be designated as liaison with the Pennington County Emergency Management Director.

4. A representative will be assigned to the Local Emergency Planning Committee (LEPC).

B. **Unusual Occurrence Command Authority:**

1. The Sheriff is responsible for designating an Incident Command System representative (IC). This representative initiates and supervises law enforcement responsibilities of any unusual occurrence incident.

2. The Law Enforcement Incident Command representative will exercise command and control over all law enforcement resources committed to any unusual occurrence operation within the jurisdiction of the Pennington County Sheriff's Office.

C. **Review of Emergency Operations Plans:**

1. The responsibility of the Chief Deputy in conjunction with the Pennington County Emergency Manager is to see that the Rapid City/Pennington County Multi-Hazard Emergency Operations Plan is in operational readiness at all times. The Chief Deputy shall plan for the Sheriff's Office response should an unusual occurrence incident occur.

2. Once each year, the Chief Deputy or designee will participate in a review of the Rapid City/Pennington County Multi-Hazard Emergency Operations Plan.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

SD VOICE and CORY HEIDELBERGER, Plaintiffs, vs. KRISTI G. NOEM, SOUTH DAKOTA GOVERNOR IN HER OFFICIAL CAPACITY; JASON RAVNSBORG, SOUTH DAKOTA ATTORNEY GENERAL IN HIS OFFICIAL CAPACITY; AND STEVE BARNETT, SOUTH DAKOTA SECRETARY OF STATE IN HIS OFFICIAL CAPACITY; Defendants.	1:19-CV-01003-CBK OPINION AND ORDER

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

SOUTH DAKOTA NEWSPAPER ASSOCIATION, SOUTH DAKOTA RETAILERS ASSOCIATION, SOUTH DAKOTA BROADCASTERS ASSOCIATION, SOUTH DAKOTA CHAMBER BALLOT ACTION COMMITTEE, THOMAS BARNETT JR., and AMERICANS FOR PROSPERITY, Plaintiffs, vs. STEVE BARNETT, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA SECRETARY OF STATE, and JASON RAVNSBORG, IN HIS OFFICIAL CAPACITY AS SOUTH DAKOTA ATTORNEY GENERAL, Defendants.	3:19-CV-03010-CBK OPINION AND ORDER

Plaintiffs in these two cases filed complaints seeking a preliminary and permanent injunction preventing the State of South Dakota from enforcing Initiated Measure 24[1] ("IM 24"), which was enacted by the South Dakota voters in the 2018 general election. IM 24 bans out-of-state contributions to South Dakota ballot question committees. Plaintiffs assert that IM 24 violates the First and Fourteenth Amendments and the Commerce Clause of the United States Constitution. The trial on the merits was advanced and consolidated with the hearing on the motion for a preliminary injunction as authorized by Fed. R. Civ. P. 65(a)(1).

DECISION

Any judge must view with great deference any legislative enactment, especially when enacted by a majority of the voters of South Dakota, which is the case here. I do so here.

The South Dakota Constitution expressly reserves to the electorate the rights to initiative and referendum. S.D. Const. art. III, § 1. Initiated or referred laws are placed on the ballot only after the sponsor complies with the provisions of SDCL Chapter 2-1. Once a proposed measure complies with all laws required for placement on the ballot, the South Dakota Secretary of State oversees the collection of pro and con statements as well as the Attorney General's statement that will accompany the proposed measure on the ballot, in compliance with SDCL Chapter 12-13. The Secretary of State also oversees compliance with campaign finance laws, SDCL Chapter 12-27, applicable to, *inter alia*, ballot question committees.

In 2016, South Dakota voters passed Constitutional Amendment S, a crime victim's rights measure which was dubbed in the media as "Marsy's Law[2]," despite an extensive media campaign by opponents who complained it was entirely funded by an out-of-state interest. Marsy's Law was not the only measure on the 2016 ballot that was supported by out-of-state interests. According to then-Governor Dennis Daugaard in his published pro statement in

[1] Beginning with the 2004 general election, each proposed constitutional amendment is consecutively designated by a letter and each initiated measure or referred law is consecutively designated by a number. S.D. Codified Laws § 12-13-4. In the 14 years since the enactment of that rule, 26 constitutional amendments and 26 referred or initiated measures have been submitted to the Secretary of State and assigned letters or numbers. Scores more proposals from the electorate did not comply with requirements and were never assigned a letter or number.

[2] "Henry Nicholas founded the national group Marsy's Law for All to advocate for a list of certain crime victim rights called Marsy's Law, named after Nicholas' sister Marsalee Nicholas. Ballotpedia identified $29.7 million in total contributions to the support campaigns for the six Marsy's Law ballot measures that had been approved before 2018. The first was passed in California in 2008. The majority of all contributions supporting Marsy's Law measures—91 percent, or $27 million—came from Henry Nicholas." https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Y,_Changes_to_Marsy%27s_Law_Crime_Victim_Rights_Amendment_(June_2018) (visited May 7, 2019).

support of IM 24, six of the seven initiated measures on the 2016 general election ballot were urged by out-of-state interests who donated 97% of the $9.6 million spent on such initiatives.

> That year, out-of-state interests used South Dakota's low signature requirements and cheap media markets as a testing ground for their ideas. They have turned our state founders' intent completely on its head. Let's send their political business model somewhere else. Support initiated measure 24 to ban out-of-state financial contributions to ballot committees. Let's protect a SOUTH DAKOTAN's right to petition the people, but deny that privilege to New York, Massachusetts and California business interests. They don't have kids in our schools, they don't attend our churches, and you won't see them at the football game this weekend. That's because they don't live here. Let's limit their involvement unless they can demonstrate either residency or a legitimate business interest in South Dakota.

https://sdsos.gov/elections-voting/assets/2018BQPamphlet.pdf (visited May 7, 2019).

IM 24, which will be codified as part of South Dakota's campaign finance laws at SDCL 12-27-18.2 effective July 1, 2019, provides:

> Any contribution to a statewide ballot question committee by a person who is not a resident of the state at the time of the contribution, a political committee that is organized outside South Dakota, or an entity that is not filed as an entity with the secretary of state for the four years preceding such contribution is prohibited. If a statewide ballot question committee accepts a contribution prohibited by this section, the secretary of state shall impose a civil penalty equal to two hundred percent of the prohibited contribution after notice and opportunity to be heard pursuant to chapter 1-26. Any civil penalty collected pursuant to this section shall be deposited into the state general fund.

The prohibition on receipt of out-of-state contributions applies only to ballot question committees. No restriction on out-of-state contributions applies to candidates or candidate committees, political action committees, or political parties.

A person who is not a resident of South Dakota cannot donate to a statewide ballot question committee but no state law prevents an individual from making an independent communication expenditure, as defined by SDCL 12-27-1(11), to support or oppose a ballot initiative. An entity, defined by SDCL 12-27-1(15), that is not "filed" with the Secretary of State may not contribute to a ballot question committee but nothing prevents a foreign corporation organized under the laws of another state but registered with the Secretary of State to do business in South Dakota from contributing (as long as they have been so registered at least 4 years).

Further, an "entity" organized in South Dakota can freely contribute to a ballot question committee without regard to the source of the funds contributed.

The term "statewide ballot question committee" is not defined by IM 24 nor by South Dakota's campaign finance laws, SDCL Title 12-27, where IM 24 is to be codified.

Although ballot question committees must register with the Secretary of State, SDCL 12-27-3, and comply with state campaign finance rules, individuals, whether they are residents or non-residents, have no obligation to register their independent spending in support of or in opposition to a ballot measure.

DECISION

I. First Amendment Claims.

Plaintiffs contend that IM 24 violates their First Amendment right to engage in debate on public issues through contributions to fund advocacy efforts. Plaintiffs South Dakota Newspaper Association, et al. also contend that IM 24 prohibits their associational rights protected by the First Amendment.

The major purpose of the First Amendment "was to protect the free discussion of governmental affairs." Mills v. State of Ala., 384 U.S. 214, 218, 86 S. Ct. 1434, 1437, 16 L. Ed. 2d 484 (1966). This protection extends to the discussion of all matters related to political processes. *Id.* "The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Buckley v. Valeo, 424 U.S. 1, 14, 96 S. Ct. 612, 632, 46 L. Ed. 2d 659 (1976) (*quoting* Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957)). "The First Amendment protects political association as well as political expression" because "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Buckley v. Valeo, 424 U.S. at 15, 96 S. Ct. at 632–33.

The Supreme Court has long recognized that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* at 19, 96 S.Ct. at 635. "All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S. Ct. 876, 884, 175 L. Ed. 2d 753 (2010). A restriction on the amount of money a person or group can contribute to a campaign

"necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." Buckley v. Valeo, 424 U.S. at 19, 96 S.Ct. at 634. "Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." Buckley v. Valeo, 424 U.S. at 21, 96 S. Ct. at 636.

The Supreme Court has held that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others." Citizens United v. Fed. Election Comm'n, 558 U.S. at 340, 130 S. Ct.at 898. "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*, 130 S.Ct. at 899. "The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each." Citizens United v. Fed. Election Comm'n, 558 U.S. at 340–41, 130 S. Ct. at 899. IM 24 prohibits out-of-state persons from expressing their viewpoint through certain campaign contributions and instead favors in-state speech on ballot initiative issues. "When a state restricts speech, it bears the burden of proving the constitutionality of its actions." Missourians for Fiscal Accountability v. Klahr, 892 F.3d 944, 949 (8th Cir. 2018) (*quoting* McCutcheon v. FEC, ___ U.S. ___, ___, 134 S.Ct. 1434, 1452, 188 L.Ed.2d 468 (2014)) (cleaned up[3]).

The First Amendment includes, in addition to the right to engage in political speech, also the right to association. "The right to join together for the advancement of beliefs and ideas is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly or optimally effective." Buckley v. Valeo, 424 U.S. at 65–66, 96 S. Ct. at 657 (cleaned up).

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It 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 the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the

[3] "Cleaned up" is a new parenthetical used . . . when extraneous, residual, non-substantive information has been removed, in this case, internal quotation marks, brackets, additional quoting parentheticals and an ellipsis. United States v. Steward, 880 F.3d 983, 987 (8th Cir. 2018) (cleaned up).

> beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 460–61, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958) (internal citations omitted).

The Supreme Court in Buckley v. Valeo distinguished between contribution limits and expenditure limits, finding that expenditure limits represent substantial restraints on political speech while contribution limits entail only a marginal restriction on the contributor's ability to engage in political speech. Buckley v. Valeo, 424 U.S. at 19-20, 96 S.Ct. at 635. The Supreme Court thus applied a lower level of scrutiny to contribution limits, finding that they must only satisfy a "rigorous standard of review," *Id.* at 29, 96 S.Ct. at 640, requiring the government to demonstrate a sufficiently important interest and to employ "means closely drawn to avoid unnecessary abridgement of associational freedoms." McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 197, 134 S.Ct. 1434, 1444, 188 L.Ed.2d 468 (2014). However, expenditure limitations were subject to "exacting scrutiny," *Id.* at 44, 96 S. Ct. at 647, requiring the government to demonstrate that a regulation promotes a "compelling interest and is the least restrictive means to further the articulated interest." McCutcheon v. Fed. Election Comm'n, 572 U.S. at 197, 134 S. Ct. at 1444.

The Supreme Court held in Citizens United v. Fed. Election Comm'n that laws that restrict a certain class of people from making political contributions and thus burden political speech are "subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Citizens United v. Fed. Election Comm'n, 558 U.S.at 340, 130 S. Ct. at 898 (cleaned up). The law at issue in Citizens United regulated independent expenditures by corporations. The Supreme Court did not discuss the expenditure/contribution dichotomy set forth in Buckley v. Valeo but instead came to the blanket conclusion that in the context of political speech, the Government may not impose restrictions on certain disfavored speakers. Citizens United v. Fed. Election Comm'n, 558 at 341, 130 S. Ct. at 899.

The Supreme Court in McCutcheon returned to the Buckley v. Valeo distinction between expenditures and contributions, applying the lower rigorous standard of review to a federal election law that set an aggregate limit on individual contributions to candidates or party committees. McCutcheon v. Fed. Election Comm'n, 572 U.S. at 197, 134 S. Ct. at 1444. The

Supreme Court declined to consider whether to uphold the Buckley v. Valeo distinction between the level of scrutiny applied to laws that limit contributions and expenditures because the aggregate limit law failed under even the closely drawn test. *Id.* at 198-199, 134 S. Ct. at 1445-46.

The United States Court of Appeals for the Eighth Circuit recently held that laws that regulate political contributions must be analyzed under the exacting scrutiny standard. Free & Fair Election Fund v. Missouri Ethics Comm'n, 903 F.3d 759, 763 (8th Cir. 2018). Laws that significantly interfere with protected rights of political association cannot be sustained unless "the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." Buckley v. Valeo, 424 U.S. at 25, 96 S. Ct. at 638; McCutcheon v. Fed. Election Comm'n, 572 U.S. at 197, 134 S. Ct. at 1444; Free & Fair Election Fund v. Missouri Ethics Comm'n, 903 F.3d at 763.

Defendants contend that the Court should reject exacting scrutiny and instead apply the rigorous standard of review to IM 24. IM 24 is unlike the contribution limits cases because it applies, not to candidates, but instead only to ballot committees. Further, IM 24 does not simply limit the amount of contributions an individual or entity may make to a ballot committee. It outright bans certain contributors from making any direct contribution to such a committee. The parties have not cited to any analogous cases.

The Supreme Court in Buckley v. Valeo recognized that "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21, 96 S.Ct. at 636. In Buckley v. Valeo there was no evidence "that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." 424 U.S. at 21, 96 S.Ct. at 636. The evidence received in this case is to the contrary. A substantial portion, if not all, of the contributions to the ballot committee supporting Macy's law were from an out-of-state donor. Further, SD Voice received in the past, and is currently receiving, a substantial portion of its funding from out-of-state contributors.

Given the nature of the ban at issue here, the strict scrutiny test used in Citizens United and Free & Fair Election Fund v. Mo. Ethics Comm'n should apply. IM 24 bans all direct political speech from one segment of society, a practice specifically struck down in Citizens

United. The total ban on certain out-of-state contributions cannot withstand scrutiny unless the defendants can articulate a compelling reason for the ban. As a matter of law, whatever test is applied results in a finding that IM 24 is unconstitutional.

Defendants contend that the "State's chief interest implicated by IM 24 is protecting its democratic self-government from those who cannot vote on a state ballot question." It is not clear to this Court how the defendants determined what the intended interest was of the 174,683 voters who voted in favor of IM 24. *See* http://electionresults.sd.gov/ (visited May 7, 2019). It is clear that the Governor of South Dakota urged voters to adopt IM 24 to further the interest of preventing non-residents from having any voice concerning South Dakota ballot issues in connection with ballot issue committees.

As set forth above, the Supreme Court specifically held that the First Amendment prohibits the government from imposing restrictions on the political speech of certain disfavored speakers. Citizens United v. Fed. Election Comm'n, 558 at 341, 130 S. Ct. at 899. Further, the Supreme Court has ruled that the government cannot limit political speech for any reason other than to "target what we have called 'quid pro quo' corruption or its appearance." McCutcheon v. Fed. Election Comm'n, 572 U.S. at 192, 134 S. Ct. at 1441. "Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government 'into the debate over who should govern.'" *Id.* The claimed interest in protecting democratic self-government does not constitute a compelling interest justifying interference with political speech and would not even be considered a sufficiently important interest under the lower level of scrutiny, as already noted.

Even if a ban on certain people participating in political speech were allowed, defendants cannot show that IM 24 is narrowly tailored to the claimed interest in self-government. "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby v. Schultz, 487 U.S. 474, 485, 108 S. Ct. 2495, 2503, 101 L. Ed. 2d 420 (1988). IM 24 seeks to target only out-of-state contributors who want to make contributions to fund speech about ballot issues. IM 24 does not prevent any non-resident person, corporation, or Political Action Committee from contributing to the campaign for a candidate. Most state laws are enacted by state legislators (as opposed to by initiative). Since political candidates who are elected are the usual lawmakers, state law can still be manipulated by non-residents who

contribute to the election of candidates who possess similar ideology or who have made campaign promises to support certain laws.

IM 24 does not prevent a non-resident from contributing to a South Dakota PAC (which may then contribute to a ballot question committee) or from contributing to some other South Dakota entity that makes contributions to ballot question committees. Interestingly, the major donor to the ballot question committee that supported Marsy's law was a South Dakota corporation (apparently funded by a California resident).

IM 24 is not designed to eliminate the "evil" of interference in self-governance.

> Where a regulation restricts a medium of speech in the name of a particular interest but leaves unfettered other modes of expression that implicate the same interest, the regulation's underinclusiveness may diminish the credibility of the government's rationale for restricting speech in the first place. In other words, underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094, 1100 (8th Cir. 2013) (cleaned up).

IM 24 restricts contributions to a statewide (whatever that is) ballot committee from a political committee organized outside of South Dakota. However, there is no prohibition on the residency of donors to other political committees that are organized in South Dakota. Thus, a South Dakota PAC could receive substantial sums from out-of-state donors and legally contribute those funds to a ballot committee. IM 24 does nothing to prohibit out-of-state individuals or corporations from making independent expenditures to purchase political ads from media outlets or disseminating political materials through the mail on their own behalf. Phillip Morris could purchase political ads urging South Dakotans to oppose an initiated measure banning smoking and neither IM 24 or any other South Dakota campaign finance law would prevent the expenditure. IM 24 would not have prevented the so-called evil it sought to target – independent spending by an out-of-state individual to support a South Dakota ballot issue.

IM 24 allows contributions to ballot question committees from "an entity" that is "filed as an entity with the secretary of state for the four years preceding" the contribution. "Entity" is defined by SDCL 12-27-1(15) as:

> any organized or unorganized association, business corporation, limited liability company, nonprofit corporation, limited liability partnership, limited liability limited partnership, limited partnership, partnership, cooperative, trust except for a trust account representing or containing only a contributor's personal funds, a

> business trust, association, club, labor union, or collective bargaining organization; any local, state, or national organization to which a labor organization pays membership or per capita fees, based upon its affiliation and membership; any trade or professional association that receives its funds from membership dues or service fees, whether organized inside or outside the state; any other entity of any kind, except a natural person that is, has been, or could be recognized by law; or any group of persons acting in concert that is not defined as a political committee in this chapter except, an entity is not a candidate, a public office holder, or a political committee.

There are of course thousands of such entities registered with the South Dakota Secretary of State who have been registered for over four years. Any of those entities could receive funds from out-of-state sources and donate to a ballot question committee. Thus, that exception does nothing to further the State's interest in preventing out-of-state money from influencing South Dakota ballot questions. What that exception does is prevent any entity newly formed from making contributions and participating in political speech. IM 24's ban is underinclusive, which diminishes the credibility of the State's rationale for restricting speech in the first place. In addition, as pointed out by the Chamber Committee, IM 24 discriminates against new business coming into South Dakota.

IM 24 bans political speech by certain speakers through its ban on certain contributions to ballot question committees. The ban violates the First Amendment because it is not narrowly tailored to a compelling government interest. IM 24 is not even closely drawn to avoid unnecessary abridgment of associational freedoms.

The right of initiative is very important in states like South Dakota where the dominant political party controls, and has for 26 years, the office of the governor, the state House and the State Senate. This so-called "trifecta" makes it more difficult for the opposition party to pursue its agenda in the state legislature. https://ballotpedia.org/Party_control_of_South_Dakota_state_government (visited May 7, 2019). The evidence presented in this case demonstrates how important out-of-state contributions are for the ballot question committees to pursue political speech. The State cannot enact restrictions that so completely prevent those pursuing unpopular laws from amassing the resources necessary for effective advocacy. Buckley v. Valeo, 424 U.S. at 21, 96 S.Ct. at 636.

Although not raised by the parties, IM 24 "raises serious problems of vagueness" which are "particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First

Amendment rights." Buckley v. Valeo, 424 U.S. at 76–77, 96 S. Ct. at 662. IM 24 is vague in that the measure bans contributions to "statewide ballot question committees" but that term is not defined by IM 24 nor is it defined elsewhere in South Dakota's campaign finance laws. Does the contribution ban apply only if a particular ballot question committee operates in all counties, a given number of counties, or only certain enumerated counties?

IM 24 bans "any" contribution to a statewide ballot question committee by a non-resident. Contribution is defined to include, *inter alia*, any gift or other valuable consideration, and the use of services or property without full payment. SDCL 12-27-1(6). The term "contribution" as used in SDCL Chapter 12-27 does not include volunteer services or the free use of a person's residence. SDCL 12-27-1(6). IM 24 does not just apply to a contribution, it applies to "any" out of state contribution. It is not clear whether the exception for volunteer services in 12-27-1(6) applies to non-resident volunteers. That issue was raised by the Court at the hearing in this matter. The defendants, through their representative from the Secretary of State's Office and through counsel, stated that IM 24 would ban contributions from non-resident volunteers coming here and incurring expenses in connection with a ballot issue.

IM 24 would ostensibly prohibit plaintiff Barnett, a former South Dakota resident who still maintains a law license in this state, and other non-residents from traveling to South Dakota to campaign, thus donating travel, lodging, and other expenses in support of a ballot question committee. Any ballot question committee who "accepts" such a contribution is subject to heavy civil and criminal penalties. This ban on volunteer contributions is especially egregious when the ballot question committee is not affiliated with or able to supervise such out-of-state volunteers. Volunteers could well subject any ballot issue committee to heavy civil and criminal penalties. Ballot issue committees could well be required to attempt to prevent non-resident volunteers from traveling to South Dakota or at least disclaiming the acceptance of such volunteers.

I find that IM 24 is an unconstitutional abridgment of the First Amendment to the United States Constitution.

B. Commerce Clause Claims.

The Commerce Clause grants to Congress the exclusive power "to regulate Commerce . . . among the several States." Art. I, § 8, Cl. 3. The Commerce Clause is a "positive grant of power to Congress" which implies a "negative command, known as the dormant Commerce

Clause" which prohibits the "States from discriminating against or imposing excessive burdens on interstate commerce without congressional approval." Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1794, 191 L. Ed. 2d 813 (2015). *See also,* Indep. Charities of Am., Inc. v. State of Minn., 82 F.3d 791, 798 (8th Cir. 1996) ("the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce"). The Supreme Court has expressed the limitations as two-fold: "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." South Dakota v. Wayfair, Inc., ___ U.S.___, ___, 138 S. Ct. 2080, 2091, 201 L. Ed. 2d 403 (2018). "A discriminatory law is virtually *per se* invalid and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338, 128 S. Ct. 1801, 1808, 170 L. Ed. 2d 685 (2008) (cleaned up).

Plaintiffs contend that IM 24 restricts interstate commerce by prohibiting financial contributions to cross state lines. There is no question that IM 24 is discriminatory on its face, in its purpose, and in its effect – it prohibits certain campaign contributions from non-residents and favors contributions from state residents. It further prohibits in-state ballot committees from soliciting and receiving contributions from non-residents. One question is whether campaign contributions constitute commerce. They do.

It is without question that the term "affecting interstate commerce," when used in the context of federal criminal law, encompasses financial transactions involving banks and other financial institutions. Campaign contributions likewise involve the use of banks and financial institutions. In that regard, any regulation that prohibits a person or entity from transferring money to another person or entity affects interstate commerce.

Two different standards have evolved for determining whether a state law impermissibly interferes with interstate commerce. If the law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Under the Pike test, the challenger of the law bears the burden of showing that there is no legitimate state interest or that the burden on interstate commerce is clearly excessive when compared to the local benefits. "When a state statute directly regulates or

discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 2084, 90 L. Ed. 2d 552 (1986).

The Supreme Court recognizes that "there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the Pike v. Bruce Church balancing approach. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 2084, 90 L. Ed. 2d 552 (1986). Wherever that line is drawn, it is clear that IM 24 is on the side of the line which is *per se* invalid because it was intended to discriminate against out-of-state interests. IM 24 without question violates the Commerce Clause and is unconstitutional.

C. Equal Protection.

The Fourteenth Amendment to the United States Constitution prohibits the State from enforcing "any law which shall abridge the privileges or immunities of a citizen of the United States" and from denying "to any person within its jurisdiction the equal protection of the laws." The Amendment "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985).

> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. at 440, 105 S. Ct. at 3254 (internal citations omitted). "Laws frequently classify persons with consequences that advantage some and disadvantages (sic) others. But certain classifications are impermissible because of who they effect and how." Schmidt v. Ramsey, 860 F.3d 1038, 1047 (8th Cir. 2017). "Unless a law burdens a fundamental right, targets a suspect class, or has a disparate impact on a protected class and was motivated by a discriminatory intent, we apply rational basis scrutiny to the challenged law." New Doe Child #1 v. United States, 901 F.3d 1015, 1027 (8th Cir. 2018). "If, on the other hand, a law . . . 'impinges on personal rights protected by the Constitution,' we

subject the law to 'strict scrutiny,' and we will uphold it only if it is 'suitably tailored to serve a compelling state interest.' Schmidt v. Ramsey, 860 F.3d at 1047.

Plaintiffs SD Voice and Heidelberger contend that IM 24 violates the Equal Protection Clause by excluding some people and groups from participating in the ballot initiative process and by creating rules restricting participation in the political process that apply only to ballot question committees. There is no need to reach these issues because I have previously found that plaintiffs have established the likelihood of success on the merits of their First Amendment and Commerce Clause claims.

D. Standing

Defendants challenge plaintiffs' standing to raise the issues set forth above. "It is well established that standing is a jurisdictional prerequisite that must be resolved before reaching the merits of a suit." City of Clarkson Valley v. Mineta, 495 F.3d 567, 569 (8th Cir. 2007). However, in this case I will resolve the standing issue last because plaintiffs' standing is dependent upon many of the facts set forth above.

District courts must evaluate three elements to determine whether a plaintiff has standing:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (cleaned up). Defendants contend that plaintiffs lack standing because they cannot show a particularized injury. One or more plaintiffs in each of the two cases satisfies the threshold inquiry as to their First Amendment and Commerce Clause claims.

Barnett and Americans for Prosperity clearly have standing to assert their First Amendment right to free speech and right of association claims. Plaintiffs have asserted "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." Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789, 794 (8th Cir. 2016). IM 24 interferes with concrete and particularized First Amendment rights to engage in political speech

and to associate with others to do so and their concern that the law will prevent them from engaging in protected conduct is actual and imminent.

The remaining plaintiffs also have standing to bring their First Amendment claims because they are all prohibited by IM 24 from accepting contributions to ballot issue committees from non-residents to fund their political speech. Such funding has historically been a major portion of the funds available to ballot committees to fund their speech. The Supreme Court has also recognized that where plaintiffs challenge a statute that allegedly chills free speech, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 956–57, 104 S. Ct. 2839, 2847, 81 L. Ed. 2d 786 (1984) (internal quotations and citations omitted).

Barnett and Americans for Prosperity clearly have standing to assert a Commerce Clause claim because IM 24 directly prevents them from making payments to any South Dakota ballot committee, as they have done in the past.

The Eighth Circuit has held that "in Commerce Clause jurisprudence, cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." S. Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003). Where, as here, the compliance with the law is coerced by threat of civil or criminal enforcement penalties, plaintiffs' injury is actual or imminent. Keller v. City of Freemons, 719 F.3d 931, 947 (8th Cir. 2013). SD Voice, Heidelberger, the South Dakota Newspaper Association, the South Dakota Retailers Association, the South Dakota Broadcasters Association and the South Dakota Chamber Ballot Action Committee all have standing to bring their Commerce Clause claim because IM 24 has a direct negative impact on their ability to receive out-of-state funding for their ballot endeavors.

CONCLUSION

IM 24 is unconstitutional because it violates First Amendment rights to engage in political speech and to associate with others to fund political speech. IM 24 is also unconstitutional because it violates the Commerce Clause by interfering with the free flow of money between persons or entities from another state and ballot questions committees in South Dakota. Attorney fees and costs, both statutory and non-statutory, should be awarded in both cases, all of which items will be determined later by the Court.

ORDER

Based upon the foregoing,

IT IS ORDERED that Kristi G. Noem, in her official capacity as Governor of South Dakota, Steve Barnett, in his official capacity as Secretary of State of the State of South Dakota, Jason Ravnsborg, in his official capacity as Attorney General of the State of South Dakota, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, are enjoined from carrying out, implementing, and enforcing the provisions of Initiated Measure 24, S.D.Codified Laws § 12–27–18.2, in any manner whatsoever, in accordance with this Memorandum Opinion and Order.

IT IS FURTHER ORDERED that counsel for plaintiffs shall present to the Court their properly documented affidavits as to attorney fees and all costs they have incurred in connection with these law suits and resistance to IM 24 after the passage of IM 24.

DATED this 9th day of May, 2019.

BY THE COURT:

Charles B. Kornmann

CHARLES B. KORNMANN
United States District Judge