INSTITUTE FOR FREE SPEECH

First Amendment Analysis: South Dakota Ballot Measures

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Introduction

South Dakotans face many decisions this November, including a proposed statute titled Initiated Measure 24[1] and a ballot measure to amend the state constitution, known as Amendment W.[2] Both implicate important First Amendment rights.

Initiated Measure 24 is an outright ban on speech—if a topic happens to be on the ballot, out-of-state speakers cannot spend money in South Dakota[3] on education efforts, campaigning or other means to support their point of view. Whether the topic is hotly debated, like abortion, or complex, like fracking policy, national groups often help inform voters of the policy implications of state ballot questions. Initiated Measure 24 would both silence these speakers and also prevent South Dakotans from hearing their information and opinions.

Also on the ballot is Amendment W. It would, among other things, lower contribution limits to candidates for state office per election cycle[4] and create a new State Government Accountability Board that will be made up of seven registered South Dakota voters appointed by the state Supreme Court, the Governor, and members of the Board itself.[5] The Board will have the authority to regulate concerning campaign finance, lobbyists, and state government ethics.[6]

The Institute for Free Speech,[7]—America's foremost experts on the political rights of speech, press, assembly, and petition—lends its expertise to analyze these ballot measures. Both raise grave constitutional concerns. We take each in turn.

Analysis of Initiated Measure 24

I. Initiated Measure 24's ban on out-of-state speech is unlikely to survive constitutional challenge.

Fences may make for good neighbors, but few homeowners would throw up multiple fortifications around their houses. It would make their homes extremely difficult to get to, and their yards all but useless. But this is what the supporters of campaign finance regulations regularly ask us to do with our freedoms of speech and association. And Initiated Measure 24 (the "Measure") proposes such a law.

a. The Measure encourages interstate intolerance and fetters the benefits of our federalist experiment.

The supporters of this Measure rely on the type of state against state intolerance that the Founders of our Republic feared. James Madison, the "Father of the Constitution,"[8] warned that "zeal for different opinions . . . concerning government, and many other points," even about "the most frivolous and fanciful distinctions," "have . . . divided mankind into parties,

1 *See* Ballot Questions, Initiated Measure 24, *available at*: http://sdsos.gov/elections-voting/assets/2018_IM_Petition_ProhibitBQContributions.pdf.
2 *See* Ballot Questions, Amendment W *available at*: https://sdsos.gov/elections-voting/assets/2018_CA_CampaignFinLobbyingLaws_Petition.pdf.
3 *Id.* at § 1.
4 Amendment W, *supra* n.2, at §§ 2(12), and 2(13).
5 *Id.* at § 2(15)(2).
6 *Id.* at § 2(15)(3).
7 The Institute is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. Originally known as the Center for Competitive Politics, the Institute was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. Its attorneys have secured judgments in federal court striking down laws in Colorado, Utah, and South Dakota on First Amendment grounds. We are also currently involved in litigation against California, Connecticut, Missouri, Massachusetts, Tennessee, and the federal government.
8 Library of Congress, "Who's the Father of the Constitution?", https://www.loc.gov/wiseguide/may05/constitution.html. In addition to his "pivotal role in the document's drafting as well as its ratification[,] Madison also drafted the first 10 amendments -- the Bill of Rights." *Id.*

inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good."[9] In particular, at the Constitutional convention, both James Madison and Edmund Randolph[10] noted that the Constitution would have to create federal courts to protect against "local prejudices," Mr. Randolph noting that they may "often place the General & local policy at variance," and Mr. Madison noting instances where Virginia and Maryland had given "preference to their own citizens in cases where the Citizens <of other states> are entitled to equality of privileges."[11] Here, however, the Measure would give in to such prejudices by allowing the state to pass laws affecting and even harming non-residents, while cutting off their ability to say anything about it.

Moreover, the Measure would dampen one of the advantages of our Republic's "federal system[,] that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). But these laboratories in democracy are rendered fruitless if we cannot share our results with one another. With the Measure, the citizens of South Dakota would forbid their brothers and sisters in other states from sharing the lessons they have learned.

Nor would the Measure keep out only the rich and powerful intent on exploiting the state, should such hypothetical individuals exist. Former Senator Russell Long once quipped that tax reform means "Don't tax you, don't tax me, tax that man behind the tree."[12] But, in the realm of campaign finance control, it is impossible to so neatly put the burdens on those we perceive as bad actors, while leaving the virtuous free to participate. Put differently, one person's civic group is another's faction or special interest. And many issues that we care about know no borders: the Sierra Club worries about threats to the environment, Planned Parenthood and the National Right to Life Committee concern themselves with abortion, the National Rifle Association combats gun control, and the AARP worries about the rights of older people, regardless of the location. As each group defines it, "[i]njustice anywhere is a threat to justice everywhere."[13]

Thus, the Measure cuts off allies as well as opponents, people who would inform debate and give additional solutions for seemingly intractable public problems.[14] And it does so by explicitly banking on "us vs. them" enmity, encouraging citizens to report speakers to the state,[15] and subjecting those speakers to substantial civil and criminal penalties – merely because they may be fellow Americans who live (or incorporate) just over the state line.[16]

b. The Measure fails First Amendment scrutiny.

But the Measure is just as unconstitutional as it is unwise. The purpose of the First Amendment is "to remove governmental restraints from . . . public discussion," leaving to us "the decision as to" which voices we will support and listen to "in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[17]

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9 James Madison, Federalist No. 10.

10 Mr. Randolph introduced and defended the Virginia plan at the Constitutional Convention. Before the Convention, he was a war-time aide to General Washington, delegate to the Continental and Confederation Congresses, and Attorney General and Governor of Virginia. *See* "Edmund J. Randolph," http://teachingamericanhistory.org/static/convention/delegates/randolph.html.

11 Max Farrand, ed., The Records of the Federal Convention of 1787, I. 124, II.46, and I.317 (New Haven: Yale Univ. Press, 1966) (footnote omitted) (alteration in original).

12 John H. Chushman, Jr., *Russell B. Long, 84, Senator Who Influenced Tax Law*, The New York Times, May 11, 2003, https://www.nytimes.com/2003/05/11/us/russell-b-long-84-senator-who-influenced-tax-laws.html.

13 Martin Luther King, Jr., "Letter from a Birmingham Jail," April 16, 1963, https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html. Similarly, the Ninth Circuit has stated that, although "it can be argued that pure localism affords better representation, one could argue to the contrary that a Representative acts on matters affecting the interests of all Americans, so all Americans should have the right to express themselves on who ought to be a Representative." *Whitmore v. Fed. Election Comm'n*, 68 F.3d 1212, 1216 (9th Cir. 1995). Regardless, "the Constitution [provides no] support for" the theory that there is a right "to representation by someone not beholden to any citizen of another state." *Id.*

14 *See, e.g.*, *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000) (invalidating law meant to curb non-resident's "influence on Illinois elections" because "[a]llowing citizens of the other forty-nine States to circulate petitions increases the opportunity for the free flow of political ideas. In some cases this might entail the introduction of ideas which are novel to a particular geographic area, or which are unpopular").

15 Section 2 states, "Any resident of South Dakota may report a violation . . . to the secretary of state, who shall investigate the alleged violation and determine whether a violation occurred."

16 Criminal penalties may be "imposed under 12-21-12,12-27-16(1), or 12-21-19." IM 24, § 2. In addition, a "court may impose" a "civil penalty equal to two hundred percent of the prohibited contribution" and "a civil penalty of five thousand dollars per violation to be deposited in the state general fund." *Id.*, §§1-2.

17 *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014) (Roberts, C.J., controlling op.). Unless otherwise noted, all *McCutcheon* citations are to the Chief Justice's controlling opinion.

i. Contribution limits implicate protected First Amendment speech and associational rights.

For over 40 years, the United States Supreme Court has maintained that "contribution . . . limitations operate in an area of the most fundamental First Amendment activities."[18] That is because contribution limits implicate both freedom of expression and freedom of association, as donors' contributions allow associations to "amplify[] the voice of their adherents, the original basis for the recognition of First Amendment protection of freedom of association."[19]

Unless the Constitution does no more than "protect[] . . . the individual on a soapbox and the lonely pamphleteer,"[20] however, the right to use and share money is itself necessary to and thus protected by First Amendment itself: "[B]ecause virtually every means of communicating ideas in today's mass society requires the expenditure of money," restrictions on money "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[21]

The United States Constitution protects the rights of non-residents, including their freedom of speech and association.[22]

ii. Bans on contributions like the Measure must meet strict scrutiny, not just closely drawn scrutiny.

Because the Measure limits protected speech, a court will find it unconstitutional unless the state can demonstrate that the law meets either strict or closely drawn scrutiny. Because contribution limits generally allow a "symbolic expression of support" without "infring[ing] the contributor's freedom to discuss candidates and issues," the state generally need only meet closely drawn scrutiny; it must show that the law serves a "sufficiently important interest" and that the law's requirements are "closely drawn to avoid unnecessary abridgement of associational freedoms."[23]

The Measure, however, would be subject to even greater scrutiny for two reasons. First, because the Measure is only the most extreme of several means meant to protect the electoral process from corruption. Second, because the Measure blocks even the "symbolic expression of support" normally allowed by contribution limits.[24] When the government layers on multiple levels of protection, what the Supreme Court has called a "prophylaxis-upon-prophylaxis," courts are required to "be particularly diligent in scrutinizing the law's fit."[25]

But the law here does not just stifle expression through layer after layer of protection—it eliminates even the "symbolic expression of support" that non-residents might show through their contributions—by banning their contributions altogether.[26] Accordingly, the Measure must meet strict scrutiny's requirements, that the ban must be narrowly tailored to a compel-

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18 *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam).

19 *Id*. at 22 (citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

20 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 373 (2010) (Roberts, C.J., concurring).

21 *Buckley*, 424 U.S. at 19.

22 *See, e.g., Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008) (noting that a residency requirement for circulators imposed "a severe burden on . . . out-of-state supporters' speech, voting and associational rights"); *Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002) ("The First Amendment protects [non-resident] Plaintiffs' right, 'not only to advocate their cause but also to select what they believe to be the most effective means for so doing.'") (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988)); *Warren v. Fairfax Cty*., 196 F.3d 186, 190 (4th Cir. 1999) (holding that law violating non-residents' right to use public forum failed strict scrutiny).

While the First Amendment, as applied to the states through the Fourteenth Amendment, directly protects the freedom of speech and association of non-residents, they are also protected from discrimination in withholding rights granted to residents through the Privileges and Immunities Clause of Article IV of the Constitution and through the Dorman Commerce Clause of Article I. *See, e.g., Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 387 (1978) (noting that with respect to fundamental rights like access to the courts, the Privileges and Immunities Clause requires that "the States . . . treat residents and nonresidents without unnecessary distinctions").

Furthermore, even if the law were one involving mere commerce, the Constitution nonetheless does not permit states "to discriminate against interstate commerce either on its face or in practical effect," without the state clearly demonstrating "that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citations omitted) (internal quotation marks omitted) (applying the powers of the dormant commerce clause). Even if a legitimate local purpose may be articulated, "then the question becomes one of degree . . . and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

23 *Buckley*, 424 U.S. at 21; *McCutcheon*, 572 U.S. at 197.

24 Importantly, the Supreme Court has held that contribution limits are unconstitutional in the context of ballot measures. *See Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 299 (1981) ("[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure. Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression."). As discussed below, this is because "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Id*. at 298 (alteration omitted).

25 *McCutcheon*, 572 U.S. at 221.

26 *Id*. at 197.

ling government interest.[27] Put differently, the state would be required to show that no less restrictive means is available to achieving the state's interests.[28]

iii. The Measure lacks a sufficiently important interest, much less a compelling one.

The Measure cannot meet any of the three standards: closely drawn scrutiny, the rigorous scrutiny for prophylactic measures, and especially not strict scrutiny. First, the state cannot demonstrate either a compelling or a sufficiently important interest.

1. There is no interest in fighting *quid pro quo* corruption or its appearance.

The only justification the U.S. Supreme Court has recognized as sufficient to permit restrictions on contributions is fighting *quid pro quo* corruption or the appearance of such corruption.[29] And *quid pro quo* corruption requires "the exchange of a thing of value for an 'official act.'"[30] Furthermore, "because the Government's interest in preventing the appearance of corruption is equally confined to the appearance of *quid pro quo* corruption, the Government may not seek to limit the appearance of mere influence or access."[31]

The Measure cannot be justified by the risk of actual or apparent corruption, however. Put simply, a donor cannot exchange a contribution for a favor from a ballot measure—a donor cannot even gain influence with a statute by contributing to it. Accordingly, "because of the absence of any risk of *quid pro quo* corruption," "[l]imits on contributions to ballot-issue committees . . . are unconstitutional."[32]

And—even if there were any risk of corruption in the ballot context—any argument that contributions from non-residents raised some risk not presented by contributions from residents would be "far too speculative."[33] And the Supreme Court has held that "mere conjecture" is never "adequate to carry a First Amendment burden."[34]

2. The anti-circumvention interest is no longer valid.

Furthermore, the Measure cannot be justified by reference to the anti-circumvention interest. As discussed in *Buckley v. Valeo*, the anti-circumvention interest exists as a corollary to the anti-corruption interest—to prevent circumvention of the base limits.[35] Where, as here, there cannot be a contribution limit in the first place—because there is no risk of apparent or actual corruption—there can be no interest in preventing circumvention of the base limits.

iv. The Supreme Court has held that no other interests can sustain contribution limits.

"The Supreme Court has concluded that 'preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'"[36] Any other purported objective "impermissibly inject[s] the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern."[37]

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27 *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 n.12 (1999) ("*Am. Constitutional Law Found.*") (noting "'now-settled approach' that state regulations 'imposing "severe burdens" on speech . . . [must] be narrowly tailored to serve a compelling state interest'"); *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000) ("By substantially reducing the number of potential solicitors, the Illinois 'requirement reduces the voices available to convey political messages.'") (quoting *Buckley*, 424 U.S. at 50).

28 *McCullen v. Coakley*, 573 U.S. ___, ___, 134 S. Ct. 2518, 2540 (2014).

29 *See Citizens United*, 558 U.S. at 345 (applying *Buckley*, 424 U.S. at 25); *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"); *see also Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118 (9th Cir. 2011); *SpeechNow.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010) (en banc); *Let's Help Florida v. McCrary*, 621 F.2d 195, 199 (5th Cir. 1980).

30 *McDonnell v. United States*, 579 U.S. ___, ___, 136 S. Ct. 2355, 2372 (2016).

31 *McCutcheon*, 572 U.S. at 208.

32 *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010); *see also Citizens Against Rent Control*, 454 U.S. at 299 ("[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.") (internal citation omitted); *Day v. Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994) ("And the concern of a political *quid pro quo* for large contributions, which becomes a possibility when the contribution is to an individual candidate, . . . is not present when the contribution is given to a political committee or fund that by itself does not have legislative power." (citation omitted)).

33 *McCutcheon*, 572 U.S. at 210.

34 *Id.* (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)).

35 *Id.* at 211 (discussing circumvention theory of *Buckley*, 424 U.S. at 38).

36 *Thalheimer*, 645 F.3d at 1118; *see also NCPAC*, 470 U.S. at 496-97 ("We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."); *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir. 1998) (holding that "the state may abridge political speech in the form of campaign contributions only to address the reality or perception of undue influence or corruption attributable to large contributions").

37 *McCutcheon*, 572 U.S. at 192 (citation omitted).

In particular, the state might raise a type of anti-distortion interest, that the views from those outside the state should not be able to distort or influence the debates among its citizens. As discussed above, such a short-sighted objective would likely starve public debate of needed information and perspectives—no one should ever assume that they have cornered the market on truth.[38] Sometimes an outside perspective is helpful, such as when marchers in support of the Civil Rights movement came from outside Alabama to march in the historic Selma protests.[39]

More importantly, however, the Supreme Court has regarded the anti-distortion interest as so offensive to the First Amendment that it must be rejected wholesale:

> *[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[40]

Indeed, "the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections" is "antithetical to the First Amendment."[41]

v. The Measure fails the necessary tailoring.

1. The state could not show that there is no less restrictive means of achieving its interest.

Even if the state could demonstrate a compelling interest, it still could not show that the Measure was "narrowly tailored" to that interest.[42] Narrow tailoring requires that a law's provisions "be the least restrictive means of furthering" the Government's compelling interest.[43] And it is the State's burden "to prove that no other alternative, less intrusive of the right, can work."[44]

As the *McCutcheon* Court described in addressing the Federal Election Campaign Act's aggregate limits, the "comprehensive regulatory scheme[s]" imposed by the Federal and state governments over the last 40 years have introduced numerous alternative less restrictive of First Amendment rights than a complete ban on contributions.

Indeed, *McCutcheon* demonstrated that such less restrictive means are available and required even under the lower, but still "diligent,"[45] scrutiny required when the government erects multiple fences around its interests. As discussed above, there are multiple layers protecting against the *quid pro quo* corruption of our candidates and leaders (and, if such corruption were possible, or our laws). First, we trust to the general honesty of our candidates and leaders. As the Supreme Court has stated, "few if any contributions to candidates will involve *quid pro quo* arrangements."[46] Second, we have laws punishing, and thus

38 *See, e.g.*, John Locke, *A Letter Concerning Toleration*, 420, trans. William Popple, in *John Locke: Political Writings*, ed. David Wootton (New York: Mentor, 1993) ("For the truth certainly would do well enough if she were once left to shift for herself. She seldom has received and, I fear, never will receive much assistance from the power of great men, to whom she is but rarely known and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors, indeed, prevail by the assistance of foreign and borrowed succours. But if Truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.").

39 *See* "Selma to Montgomery March" Stanford U., The Martin Luther King, Jr. R. and Educ. Inst. https://kinginstitute.stanford.edu/encyclopedia/selma-montgomery-march.

40 *Buckley*, 424 U.S. at 48-49 (emphasis added) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1965)).

41 *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 742 (2008) (stating that "the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections" is "antithetical to the First Amendment" (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting))).

42 *See Am. Constitutional Law Found.*, 525 U.S. at 192 n.12 (noting "'now-settled approach' that state regulations 'imposing "severe burdens" on speech . . . [must] be narrowly tailored to serve a compelling state interest'").

43 *McCullen*, 134 S. Ct. at 2548 (Scalia, J. concurring and joined by Alito and Thomas, JJ.).

44 Erwin Chemerinsky, Constitutional Law: Principles and Policies 797 (3rd ed. 2006).

45 *McCutcheon*, 572 U.S. at 221.

46 *Id.* (quoting *Citizens United*, 558 U.S. at 357). As James Madison explained, the overriding fear that money from foreigners and other possibilities for corruption will inevitably overcome those we choose to represent us undermines the very possibility of republican government: such arguments:

> [R]enounce every rule by which events ought to be calculated, and . . . substitute an indiscriminate and unbounded jealousy, with which all reasoning must be vain. The sincere friends of liberty, who give themselves up to the extravagancies of this passion, are not aware of the injury they do their own cause.

James Madison, Federalist No. 55. True belief in republican self-government requires a balanced view of human nature:

> As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us faithful likenesses of the human character, the inference would be, that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

Id.

deterring corruption.[47] Third, we have the base limits, which "themselves are a prophylactic measure."[48] By this point, there is no longer a corruption interest: the legislative "selection of a . . . base limit indicates [the] belief that contributions of that amount or less do not create a cognizable risk of corruption."[49]

And that is the point at which the Measure's proponents have fashioned their law, at a point at which there is no longer "a cognizable risk of corruption." Accordingly, it is impossible for the Measure to be narrowly tailored, or even closely drawn, to such an interest. And, "if a law that restricts political speech" thus cannot "'avoid unnecessary abridgement' of First Amendment rights, it cannot survive 'rigorous' review."[50]

2. Other courts have held similar restrictions on non-resident's rights unconstitutional.

Other courts have similarly held that restrictions on non-resident's political and First Amendment freedoms are unconstitutional, even when the laws were sustained by greater governmental interests. In *Vannatta v. Keisling*,[51] for example, the Ninth Circuit held that a law banning contributions from donors residing outside a candidate's district was unconstitutional, even though the law involved candidate rather than ballot contributions.[52] The *Vannatta* court held that Oregon's law failed tailoring because it was "both under-inclusive and over-inclusive."[53] Oregon's law prohibited even "non-corrupt out-of-district contributions," "ban[ning] all out-of-district donations, regardless of size or any other factor that would tend to indicate corruption."[54] The Measure would similarly "fail[] to pass muster," as insufficiently "drawn to advance the goal of preventing corruption."[55]

In *Whitmore v. Federal Election Commission*,[56] the Ninth Circuit likewise upheld the rights of non-residents. There, a third party candidate for Congress argued that the Federal Election Campaign Act violated her freedoms of "association, equal protection, and a republican form of government" by allowing non-residents to contribute to the candidates running against her, in part because the out-of-state donations could "drown out the campaign" of a candidate receiving only resident donations.[57]

The court first noted that the candidate's arguments were "foreign to our . . . tradition," that "[c]ampaign conduct is unrestricted, except to the extent that the law limits it."[58] The court held that there was no "support [for] the position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society."[59] To hold otherwise would have been "an unprecedented limitation on constitutionally protected freedom of political expression."[60]

Finally, in *Landell v. Sorrell*,[61] the Second Circuit similarly held that a law "limit[ing] out-of-state contributions to 25 percent of all candidate contributions" was unconstitutional.[62] Significantly, that law failed scrutiny even though it allowed some non-resident contributions, unlike the Measure. The Second Circuit noted that "non-residents have legitimate and strong interests in Vermont and have a right to participate, at least through speech, in those elections."[63] It found "no support" for the state's argument that it "ha[d] an important interest in singling out one class of contributors for limitations," including any "danger of out-of-state contributions."[64] And the law "prohibit[ed] small contributions from out-of-state sources once the 25 percent threshold has been reached, even though such contributions are no more likely to corrupt than in-state contributions."[65] The Second Circuit rejected the argument speech could be limited because "outsiders have bad motives and little to contribute to"

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47 *See, e.g., McDonnell*, 136 S. Ct. at 2375 (holding that properly tailored bribery laws "leave[] ample room for prosecuting corruption").
48 *McCutcheon*, 572 U.S. at 221.
49 *Id*. at 210.
50 *Id*. at 199 (quoting *Buckley*, 424 U.S. at 25).
51 151 F.3d 1215 (9th Cir. 1998).
52 *Id*. at 1217.
53 *Id*. at 1221 (Brunetti, J., concurring in part and dissenting in part). The panel adopted most of Judge Brunetti's opinion, leaving only "Parts IV(B) and V" as not the opinion of the court. *Id*. at 1216. Those sections discussed claims based on the "republican form of government" clause. *Id*. at 1222-25.
54 *Id*. at 1221.
55 *Id*. The panel here applied closely drawn rather than strict scrutiny because it was bound by a prior panel's decision. *See id*. at 1220-21. But, even under closely drawn scrutiny, a law with a greater governmental interest than that applicable to the Measure still failed scrutiny.
56 68 F.3d 1212 (9th Cir. 1995).
57 *Id*. at 1214.
58 *Id*. at 1215.
59 *Id*. at 1216 (quoting *Buckley*, 424 U.S. at 49 n.55) (internal quotation marks omitted).
60 *Id*.
61 382 F.3d 91 (2d Cir. 2002) *rev'd and remanded on other grounds sub. nom. Randall v. Sorrell*, 548 U.S. 230 (2006).
62 *Id*. at 146.
63 *Id*. at 147 (discussing the district court decision, *Landell v. Sorrell*, 118 F. Supp. 2d 459, 484 (D. Vt. 2000)); *id*. at 149 (affirming district court).
64 *Id*. at 147; *see also id*. at 149.
65 *Id*. at 147.

another state's "political discourse."[66] Even if that premise were true, just as in South Dakota, "the government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free rein, because it questions the value of what they have to say."[67]

Conclusion

Because the state could demonstrate no sufficiently important interest, much less a compelling one, to justify Initiated Measure 24, and because the Measure would fail the tailoring required under First Amendment scrutiny, the Measure would impose substantial costs on the state, which would be forced to engage in a fruitless defenses of inevitable legal challenges.

Moreover, even if it were somehow constitutional, the Measure's provisions trample the rights of non-residents while serving no purpose. That is, the Measure provides no benefit when one considers the already existing prophylaxes protecting the state's electoral system from corruption. The increasing intrusion into protected rights by each new layer of protection—especially an outright ban—is simply too burdensome and violates protected speech and association.

And, finally, the Measure stifles ideas and options that may prove valuable to the people of South Dakota. They, at least, have the right to sift through out-of-state-supported speech to find what is right and helpful to them.

Analysis of Constitutional Amendment W

II. Amendment W is ineffective and unworkable.

Supporters of Amendment W believe it will fight corruption, increase accountability, and put the voters in charge.[68] Despite these good intentions, however, the law will infringe on important First Amendment rights, will be ineffective in combating corruption, and will create a board with too much power and responsibility without the necessary expertise to be effective.

a. Amendment W's proposed contribution limits are ineffective and not properly tailored to any state interest.

The overzealous nature of Amendment W raises troubling First Amendment concerns. The campaign contribution limits in Section 12 of Amendment W, most notably, infringe on the constitutional rights of individuals to give donations to candidates of their choosing in South Dakota and do not achieve the desired goal of eliminating political corruption.

Money enables speech[69] and allows citizens to associate with candidates who share their values. As the Supreme Court recently stated,

> There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can run for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a campaign, *and contribute to a candidate's campaign.*[70]

Accordingly, contribution limits implicate fundamental First Amendment interests.[71] Consequently, laws that limit campaign contributions must protect "a sufficiently important interest" and use closely drawn means to guard that interest "to avoid unnecessary abridgement of associational freedoms."[72]

Prevention of *quid pro quo* corruption, or the appearance of such corruption, is the only constitutional justification for candidate contribution limits.[73] The Supreme Court is clear: "Campaign finance restrictions that pursue other objectives [not aimed at preventing *quid pro quo* corruption or its appearance] . . . impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern."[74] Therefore,

66 *Id*. at 148.
67 *Id*.
68 *See e.g.*, Represent South Dakota, https://www.representsd.org.
69 *Buckley*, 424 U.S. at 19 ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money.").
70 *McCutcheon*, 572 U.S. at 191 (emphasis added).
71 *Buckley*, 424 U.S. at 14, 24-25.
72 *Id*. at 24-25.
73 *McCutcheon*, 572 U.S. at 192, 206-07; *Buckley*, 424 U.S. at 25.
74 *McCutcheon*, 572 U.S. at 192 (emphasis in original) (citation omitted) (internal quotation marks omitted).

"[a]ny regulation [justified under the anticorruption interest] must . . . target" the "direct exchange of an official act for money," *i.e.*, "dollars for political favors."[75]

Amendment W supporters cannot simply assert a "corruption" interest to justify a law that burdens the fundamental right to associate through campaign contribution limits.[76] This narrow interest requires that the government restrain itself from treating "nearly anything a public official accepts . . . as a *quid*; and nearly anything a public official does . . . as a *quo*."[77] Thus, in protecting against such corruption or its appearance, a law "may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford."[78]

Therefore, a campaign contribution limit law must be narrowly tailored to vindicate anti-corruption interests, otherwise it is unconstitutional. Unless a law is targeted toward a risk of corruption that is not already addressed by current contribution limits, the law is not closely drawn, and it unconstitutionally "intrude[s] without justification on a citizen's ability to exercise the most fundamental First Amendment activities."[79] The novelty and plausibility of the potential corruption will determine how much empirical evidence is required to justify the contribution limit law.[80] Contribution limits that are too low may also substantially burden First Amendment rights and render a state's contribution regime unconstitutional.[81] The federal $5,200 campaign contribution limit has withstood judicial scrutiny and is an amount that will avoid "a cognizable risk of corruption."[82]

Current South Dakota campaign contribution limits are considerably lower than the recognized $5,400 federal donation limit[83] to prevent corruption. Indeed, South Dakota currently limits contributions to $1,000 for legislative candidates and $4,000 for candidates seeking statewide office.[84] And a dollar doesn't go as far as it once did, with inflation robbing the power of the dollar every day.

In contrast to better-managed federal limits, which adjust for inflation, Amendment W significantly *decreases* contribution limits even more, and supporters of the law do not provide any empirical evidence to justify the reduction. Specifically, Amendment W decreases campaign contributions to candidates for state representative and local offices by 75%, candidates for state senate by 62.5%, candidates for statewide office other than governor by over 80%, and candidates for governor by 50%.[85] Accordingly, Amendment W raises serious First Amendment concerns about ratcheting the limits the wrong way.

Furthermore, campaign contribution limits are ineffective in preventing corruption and harm the ability of citizens and political rivals to hold incumbent politicians accountable. A varied and extensive collection of academic research shows that:

> (1) there is "no strong or convincing evidence that state campaign finance reforms [including contribution limits] reduce public corruption";[86]
>
> (2) limits often do more harm to individuals' constitutionally-protected First Amendment rights to participate in the political system than is justifiable;[87]
>
> (3) contribution limits stifle the speech of political entrepreneurs – the individuals and organizations "who form and grow new political voices and movements";[88]

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75 *Id*. (internal quotation marks omitted).
76 *Shrink Mo.*, 528 U.S. at 392 ("We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . .").
77 *McDonnell*, 136 S. Ct. at 2372 (rejecting expansive view of *quid pro quo* in a federal criminal prosecution).
78 *McCutcheon*, 572 U.S. at 192.
79 *Id*. at 227 (internal quotation marks omitted).
80 *Shrink Mo*., 528 U.S. at 391.
81 *See Randall v. Sorrell*, 548 U.S. 230, 261-62 (2006) (Breyer, J., controlling op.).
82 *McCutcheon*, 572 U.S. at 210.
83 In 2002, Congress increased the candidate contribution limit to $2,000 per election and indexed it to inflation for future cycles. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 307(a), (d), 116 Stat. 81, 102-03 (codified as amended at 52 U.S.C. § 30116(a)(1)(A), (c)). The current limit was set by the Federal Election Commission last year. Fed. Election Comm'n, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10904, 10906 (Feb. 16, 2017).
84 S.D. Codified Laws §§ 12-27-7; 12-27-8.
85 *Compare* S.D. Codified Laws §§ 12-27-7; 12-27-8, *with* Amendment W § 2(12). Amendment W applies the limits per election cycle rather than by calendar year, thus simultaneously reducing the limit and requiring that it be stretched over a longer period.
86 Adriana Cordis and Jeff Milyo, *Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?* Mercatus Center at George Mason Univ., 1 (April 2013), http://mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf.
87 Melanie D. Reed, *Regulating Political Contributions by State Contractors: The First Amendment and State Pay-to-Play Legislation*, 34 Wlm. Mitchell L.R. 635, 637, 658 (2008), https://www.ifs.org/wp-content/uploads/2012/11/reed2007paytopay.pdf.
88 Jeffrey Milyo, *Keep Out: How State Campaign Finance Laws Erect Barriers to Entry for Political Entrepreneurs*, Institute for Justice, i (Sept. 2010), https://www.ifs.org/doclib/20101001_Milyo2010ContribReport.pdf.

(4) contribution limits have little impact on voter turnout[89] and, accordingly, fail to place more electoral power in the hands of everyday citizens;

(5) individuals, not so-called "special interests,"[90] are the main source of campaign contributions;

(6) contribution limits add to the inherent advantages of incumbency;[91] and

(7) campaign contributions do not "buy" politician's votes, as legislative voting patterns have been shown to remain stable over time.[92]

Proposals to limit campaign contributions must be approached with great caution. Contribution limits infringe upon the First Amendment's guarantee of freedom of speech and do not achieve supporters' anti-corruption goals. Indeed, one such study shows contribution limits increase the likelihood of corruption.[93] Research also shows that they have no effect on the quality of governance, and in fact suggests the opposite: states with the best quality of governance have no limits on the size or source of campaign contributions.[94]

Contributions do not "buy politicians' votes," and thus do not have the corrupting influence many opponents of free speech imagine.[95] Interestingly, research shows politicians' voting patterns are remarkably stable over time, regardless of who donates to a legislator's campaign.[96] Campaign contribution limits do not level the playing field, but rather distort it in other directions, benefitting certain groups over others, and incumbents over challengers.[97]

As drafted, then, Amendment W campaign contribution limits infringe on South Dakotans' First Amendment rights and are unlikely to meaningfully impact political corruption.

b. Amendment W's modifications to the State Government Accountability Board are unworkable and will introduce bureaucratic error.

Amendment W creates a new seven member State Government Accountability Board that will have the power to regulate state campaign finance laws, state lobbyists, and government ethics.[98] Two of the members cannot be attorneys.[99] A simple majority of the Board is needed to take final action on a matter.[100] But, surprisingly, only the vote of *three* members—less than a majority—is required to initiate investigations, including the issuance of subpoenas.[101] Accordingly, without the mandate of a majority of the members, the Board can investigate a potential violation of South Dakota law.

The Board's investigation and regulatory powers are very broad. It may investigate matters concerning: "bribery, theft or embezzlement of public funds, any violation of" Amendment W, "government ethics, campaign finance, lobbying, government contracts, or corruption by any elected or appointed official, judge," or state or local government employee.[102] Accordingly, the Board may investigate anyone from the Governor down to members of the local board of education. And the Board may enact regulations that govern campaign finance and government ethics laws.[103]

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89 *See, e.g.*, David M. Primo and Jeffrey Milyo, *The Effects of Campaign Finance Laws on Turnout, 1950-2000*, 2 (Feb. 2006), https://economics.missouri.edu/working-papers/2005/wp0516_milyo.pdf (noting effect on turnout in gubernatorial elections).

90 Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder Jr., *Why is There so Little Money in U.S. Politics?*" 17 J. of Econ. Perspectives 108, 109 (2003), http://tinyurl.com/nlvrun9.

91 Joel M. Gora, *Buckley v. Valeo: A Landmark of Political Freedom*, 33 Akron L.R. 7, 24, 26-28 (1999).

92 Stephen G. Bronars and John R. Lott, Jr., *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 Journal of Law and Economics 317, 346-47 (1997), https://www.ifs.org/wp-content/uploads/2012/11/Bronars-1997-Money-And-Votes.pdf.

93 Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Making the Amount of Money that can be Offered Smaller Increases the Likelihood of Corruption in the Federal Legislature*, 25 American Business Law Journal (Feb. 2011), https://onlinelibrary.wiley.com/doi/full/10.1111/j.1744-1714.2010.01112.x.

94 Joe Albanese, *Do Lower Contribution Limits Produce "Good" Government?*, Center for Competitive Politics' Issue Analysis No. 6. (July 2017), https://www.ifs.org/wp-content/uploads/2013/10/2017-07-01_Issue-Analysis-6_Albanese_Do-Lower-Contribution-Limits-Produce-Good-Government.pdf.

95 Bronars and Lott, *supra* n. 92, at 346.

96 *Id.*

97 *See, e.g.*, Bradley A. Smith, Unfree Speech 79-83 (2001) (discussing other sorts of political power); id. at 151 (noting benefits to those already familiar with the process).

98 Amendment W, *supra* n.2, at § 2(15)(3).

99 *Id.* at § 2(15)(2)(4).

100 *Id.* at § 2(15)(2) and 2(15)(4).

101 *Id.* at § 2(15)(4).

102 *Id.* at § 15(3)(1).

103 *Id.* at § 15(3)(2).

Oversight of campaign finance, government ethics, and lobbying is important. But each subject matter requires its own expertise for oversight to be effective. Multiple individuals with specialized knowledge of the law in each topic are needed. Otherwise the oversight is incompetent, and incompetent regulation of political rights can easily lead to censorship, chill, and other First Amendment harms.

It is impractical and unwise for a single board to govern these three specialized areas of the law with only five attorneys on the Board. The federal government[104] and many states[105] separate out the oversight of campaign finance, lobbying and ethics rules to agencies with competencies in each area.

Indeed, the volume of responsibility for the potential Board is too vast for it to operate effectively. Specifically, there are 50 statutory sections that govern campaign finance.[106] There are 20 sections of the code that govern lobbyists.[107] And the current four member State Government Accountability Board already has a daunting task to investigate statewide office holders and employees of the executive branch for: (1) improperly spending public funds; (2) conflict of interest filings under South Dakota Codified Laws § 3-23 for members of a state authority, board, or commission or alleged violations relating to conflicts of interest; (3) direct or indirect interest in a contract in violations of state law; (4) malfeasance; (5) misappropriation of public funds; (6) use of false instruments to obtain public funds; (7) theft or embezzlement of public funds; (8) bribery; and (9) illegal use of public money.[108] That's a lot of work for one board, and the addition of campaign finance and lobbying will only make that job *more difficult*.

And while difficult, the job will involve substantial political temptations. Because a minority of the Board would be able to initiate burdensome—and likely public—investigations, it will be able to impose significant political harm without even obtaining majority support. The likelihood of politically motivated investigations, even if undertaken in good faith, and the very real danger that competing voting blocks on the commission will engage in a tit-for-tat that will consume the State's attention, advises caution.

Conclusion

The idea of placing the responsibility of enforcing these provisions of South Dakota law with a single board, combined with the fact that Amendment W allows anyone to anonymously lodge a complaint against anyone at any level of state government[109] and gives the Board the power to create even more laws,[110] is a recipe for a powerful but rudderless agency.

104 For example, the Federal Election Commission handles federal campaign finance. *See, e.g.,* 52 U.S.C. § 30106. The House of Representatives and Senate each require lobbyist registration pursuant to the Honest Leadership and Open Government Act of 2007. *See, e.g.,* 2 U.S.C. § 1603.

105 Colorado is one such state. Colo. Const. art. XXVIII § 9 (Colorado Secretary of State enforcement of campaign finance laws); Colo. Const. art. XXIX, § 5(1) (creation of Independent Ethics Commission).

106 *See* S.D. Codified Laws §§ 12-27-1 – 12-27-50.

107 *See* S.D. Codified Laws §§ 2-12-1 – 2-12-19.

108 *See* S.D. Codified Laws § 3-24-3.

109 *See* Amendment W §§ 2(15)(3)(1); 2(15)(5).

110 *Id.* at § 2(15)(7).

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