No. 15-1234

In The Supreme Court of the United States

DELAWARE STRONG FAMILIES,
Petitioner,

V.

MATTHEW DENN, ATTORNEY GENERAL OF DELAWARE, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Americans for Prosperity Foundation (AFPF)[1] is a non-profit corporation organized under I.R.C. § 501(c)(3).[2] Its mission is to educate and train citizens to be courageous advocates for the ideas, principles, and policies of a free society — knowing that leads to the greatest prosperity and wellbeing for all — especially the least fortunate.

As a Section 501(c)(3) organization, AFPF is subject to the IRS's significant limitations on its speech in exchange for the privilege of permitting its donors to make tax-deductible contributions to it. The IRS prohibits AFPF from engaging in any speech or communications that constitute political campaign intervention.

AFPF funds its activities by raising charitable contributions from donors throughout the country. AFPF engages in activity nationwide and its multi-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for the parties received timely notice of the intent to file this brief and have consented to its filing.

[2] AFPF is a related organization to Americans for Prosperity, a 501(c)(4) organization. The organizations have distinct missions and purposes, and this brief is submitted solely on behalf of AFPF.

state operations are directly affected by the Third Circuit's decision at issue in this case. In fact, the Third Circuit's decision is simply the latest of many inconsistent court decisions across the country holding identical speech to different constitutional standards AFPF must take into account to comply with laws from state to state, and circuit to circuit. The *Delaware Strong Families* decision illustrates a multi-directional circuit split that directly impacts AFPF's activities and necessitates a grant of certiorari.

SUMMARY OF THE ARGUMENT

The phrase "electioneering communications" was first defined in federal law in the Bipartisan Campaign Reform Act. 116 Stat. 81. "Electioneering communications" at the federal level include those communications that mention or refer to a clearly identified federal candidate, are disseminated within 30 days of a primary or 60 days of a general election, are transmitted by television, radio, cable or satellite, and are targeted to the relevant electorate. *See* 52 U.S.C. § 30104(f)(3)(A)(i). Once a communication meets the definition of an "electioneering communication," and the entity making the electioneering communication spends in excess of $10,000 in the aggregate during a calendar year, it is subject to certain disclosure and disclaimer requirements. *See id.* § 30104(f)(1-2). The disclaimer requirements include, *inter alia*, the identification of the sponsoring organization on the screen and an accompanying audio statement. *Id.* § 30120(d)(2). The disclosure requirements include an event-driven filing with the Federal Election

Commission ('FEC') disclosing information about the disbursements related to the "electioneering communication" and the identification of certain donors to the organization who gave for the purpose of furthering the organization's electioneering communications. *See Citizens United v. FEC*, 558 U.S. 310, 366 (2010) ("That statement must identify the person making the expenditure, the amount of the expenditure, the election to which that communication was directed, and the names of *certain* contributors.") (emphasis added); *Van Hollen v. FEC*, 811 F.3d 486 (D.C. Cir. 2016) (pet. for reh'g *en banc* pending).

Originally, corporations and labor organizations were prohibited from making "electioneering communications" referring to federal candidates and officeholders. This Court upheld this prohibition against a facial challenge in *McConnell v. FEC*, 540 U.S. 93 (2003). Four years later, this Court struck down the prohibition on "electioneering communications" as-applied to communications that were not the "functional equivalent" of express advocacy in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ('*WRTL II*'). *WRTL II* did not address the disclosure and disclaimer requirements of the federal electioneering communications statutes.

Following *WRTL II*, the FEC engaged in a rulemaking that addressed the disclosure concerns of corporations and labor organizations that were now able to make certain "electioneering communications." The FEC adopted a regulation that required the disclosure of all donors who

donated $1,000 or more in the past calendar for the purpose of funding the electioneering communication. *Van Hollen*, 811 F.3d at 491.

After the FEC promulgated these regulations, this Court decided *Citizens United v. FEC*. 558 U.S. 310 (2010). There, the plaintiff, a 501(c)(4) advocacy group brought an as-applied challenge to the application of the speech prohibition, and the disclosure and disclaimer requirements, to its film *Hillary: The Movie*. *See id*. at 321. This Court rejected the as-applied challenge to the disclosure requirements. *See id*. at 368-70.

While this fight over the scope and scale of "electioneering communications" regulations proceeded at the federal level over the last 15 years, states have similarly adopted different variations of "electioneering communications" rules. These rules have varied in significant ways including the breadth of mediums of communications covered, the time frames covered, dollar thresholds for registration and reporting, and the scope and scale of the required disclosures. Courts across the country continue to grapple with the application of this Court's decisions to the wide variety of "electioneering communications" rules.

The decision of the Third Circuit here in *Delaware Strong Families* upholds one of the most expansive "electioneering communications" statutes in the country, and is in direct contrast to the decisions of this Court and other courts throughout the United States. *See Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 303, 307, 310-12 (3d. Cir.

2015). This Court should grant this petition for writ of certiorari to address the appropriate standards courts should apply when presented with as-applied challenges to "electioneering communications" laws. If this Court declines to grant this petition, then AFPF will continue to be subject to varying constitutional standards in the different states where it operates. States will be left unchecked in their efforts to require the disclosure of funding sources of persons who simply wish to exercise their First Amendment right to free speech, association, and right to petition their government.

In light of the recent finding by a federal court about the threats made to employees and donors of AFPF and the concerns about disclosure of its donors, *see Americans for Prosperity Foundation v. Harris*, (*AFPF*) No. 14-9448, 2016 U.S. Dist. LEXIS 53679 at *12-15, (C.D. Cal. April 21, 2016), AFPF believes that a clear, well-defined constitutional standard regarding what type of speech can constitute "electioneering communications" and the accompanying scope of the disclosure requirements is a critical matter for this Court to decide.

ARGUMENT

I. This Court Has Long Recognized The Burdens Imposed By Mandated Disclosure, And AFPF's Own Experience Illustrates The Dangers Of Unfettered Disclosure.

AFPF operates by raising charitable contributions from donors nationwide. These donors

support the organization's national mission for various reasons, personal to each individual or organization. However, while AFPF might perform the same activities across the country or perform its mission in the same manner, no matter which state it is active in, the broad sweep of "electioneering communications" laws appears to subject each donor's privacy interests to different constitutional standards in various regions and states in which AFPF operates.

In fact, many donors support the organization with no expectation that their privacy will be breached or divulged. It is at all times critical to AFPF's mission to protect the well-being and privacy interests of its donors, and as such, seeks to inform this Court on the damaging consequences maintaining the status quo would present for charitable organizations and the donors who support them.

AFPF recently prevailed in a federal district court decision following a trial concluding that disclosure of its donors can present a significant threat of harm to an organization's donors and employees. *See AFPF*, No. 14-9448, 2016 U.S. Dist. LEXIS 53679 at *12-15.[3] As that court noted in its

[3] *Americans for Prosperity Foundation v. Harris* was a challenge to the California Attorney General's demand for disclosure of donor names in what the California Attorney General's office claimed was a confidential filing related to its charitable solicitation registration requirements. Evidence at trial demonstrated that the Attorney General's

opinion, during the trial, "the Court heard ample evidence establishing that AFPF, its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." *Id.* at *12. The Central District Court of California noted very clearly in its opinion the serious dangers presented when donors and supporters are disclosed.

For instance, the court noted AFPF's Chief Executive Officer, Lucas Hilgemann's testimony that in 2013, AFPF security staff alerted him that a technology contractor with access to the organization's headquarters posted online that he could easily walk into Mr. Hilgemann's office and "slit his throat." *Id*. The same contractor was later found in AFPF's parking garage taking pictures of employees' license plates. *Id*. Furthermore, the court noted numerous physical attacks on supporters and donors, and death threats on several donors. *Id*. at *13-14. The threats and physical attacks became too severe for some donors who considered halting their contributions to AFPF as a result. *Id.* at *14. Indeed, the disclosure of donors is not a harmless

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Office had little or no need for the information they were seeking to conduct their oversight and enforcement responsibilities, and indicates that thousands of supposedly confidential filings from numerous organizations were made publicly available on the Internet by the California Attorney General. *See Americans for Prosperity Foundation v. Harris*, No. 14-9448 2016 U.S. Dist. LEXIS 53679 at *15-18, (C.D. Cal. April 21, 2016).

act. Very severe consequences can arise from disclosing donors.

The district court concluded, "And although the Attorney General correctly points out that such abuses are not as violent or pervasive as those encountered in *NAACP v. Alabama*, 357 U.S. 449 (1958) or other cases from that era, this Court is not prepared to wait until an [AFPF] opponent carries out one of the numerous death threats made against its members." *Id.* at *14-15 (internal citation omitted in the original).

A. Organizations Like AFPF Face Significant Limits On Their Speech Under The Internal Revenue Code And Are Permitted By Federal Law To Maintain The Confidentiality Of Their Donors.

As entities organized under 501(c)(3) of the Internal Revenue Code, AFPF and Delaware Strong Families ('DSF') are strictly prohibited from intervening in political campaigns. *See* 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii). Additionally, 501(c)(3) entities are limited in their ability to lobby. *See id.* § 1.501(c)(3)-1(a)(3)(i). In exchange for accepting these limitations on speech, donors to 501(c)(3) entities have a right to deduct their donations from their tax liabilities. Furthermore, although 501(c)(3) entities must disclose the names and addresses of those donors who donated $5,000 or more to the IRS, 26 U.S.C. § 6033(b)(5); *id.* § 507(d)(2)(A), 501(c)(3) entities have the right to keep the names and

addresses of their donors private. *See id.* § 6104(d)(3)(A).

To ensure that 501(c)(3) entities do not violate the campaign intervention prohibition, the IRS uses an extensive seven-factor facts and circumstances test. *See* Rev. Rul. 2007-41. These seven factors are:

1) Whether the statement identifies one or more candidates for a given public office;

2) Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;

3) Whether the statement is delivered close in time to the election;

4) Whether the statement makes reference to voting or an election;

5) Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;

6) Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and

7) Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder who also happens to be a candidate for public office.

These seven factors represent only the "key factors." All of the facts and circumstances must be weighed to determine whether an entity like DSF or AFPF engaged in prohibited political campaign intervention. *See* Rev. Rul. 2007-41; 2007 IRB LEXIS 495, *18-19 (I.R.S. 2007). Thus, 501(c)(3) entities, like DSF and AFPF, must avoid even approaching speech that could be characterized as campaign intervention lest they be required to pay excise tax or, worse, lose their tax-exempt status. *See, e.g., Branch Ministries, Inc. v. Rossotti,* 211 F.3d 137 (D.C. Cir. 2000). *See also* Laura W. Murphy and Marvin J. Johnson, *ACLU Letter to the IRS Expressing Concerns about Revenue Ruling 2004-6 with Regard to Political Speech and the Definition of What Is or Is Not an "Exempt Function"* ("Vagueness results in chilling of communications that may well NOT have tax consequences, simply because the cost to the organization of being wrong is too great. Vagueness encourages silence instead of robust debate.");[4] *see also Virginia v. Hicks,* 539 U.S. 113, 119 (2003) (noting that both the speaker and society are harmed when a speaker forgoes First Amendment protected speech to avoid the risk of litigation).

In Rev. Rul. 2007-41, the IRS provides several examples to illustrate how the facts and circumstances test operates in practice. For example, the IRS states that entities organized under

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[4] Available at https://www.aclu.org/letter/aclu-letter-irs-expressing-concerns-about-revenue-ruling-2004-6-regard-political-speech-and (last reviewed April 28, 2016).

501(c)(3) are permitted to produce and disseminate voter guides so long as those guides are non-partisan. *See* Rev. Rul. 2007-41 at *3-6, 27-28. Thus the production and dissemination of non-partisan voter guides consistent with federal law cannot constitute electioneering or campaign intervention since 501(c)(3) organizations are prohibited from conducting those activities. *See* 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iii).

If AFPF and DSF comply with the IRS guidelines and produce only non-partisan voter guides, the identities of the donors to AFPF and DSF remain private. 26 U.S.C. § 6104(d)(3)(A). Until such time as AFPF or DSF decides that it needs to discuss state or local officials in states with "electioneering communications" laws requiring disclosure of their donors, nothing in federal law requires that organizations, like AFPF, publicly disclose their donors. Rather, it is the application of the various state law regimes discussed *infra*, that impose the disclosure requirements at issue here.

II. Electioneering Communications Definitions, Application And Court Decisions Vary Widely Across The Country.

Since *Citizens United,* the new uncertainty in the law results in identical speech being held to varied and inconsistent constitutional standards. While the states have always operated as laboratories of democracy and should have the flexibility to do so, states generally must apply federal constitutional rights such as those of speech and association consistently across the country.

A. State Definitions Of "Electioneering Communications" Are Widely Varied.

Numerous states have incorporated disparate time frames and communications mediums into their definitions of "electioneering communications" laws.

For instance, Florida, Hawaii, and Idaho have established timeframes within their electioneering communications laws that parallel the federal definition and confine electioneering communications to certain communications made within 30 days of a primary election or within 60 days of a general election. *See* Fla. Stat. § 106.011(8)(a); Haw. Rev. Stat. Ann. § 11-341(d); Idaho Code Ann. § 67-6602(f). Comparatively, Alabama defines "electioneering communications" as those made within 120 days of an election in which a candidate will appear on the ballot. Ala. Code § 17-5-2(a)(6). On the other hand, Massachusetts law defines electioneering communications as those that are made 90 days before an election in which a candidate is seeking election or reelection. Mass. Gen. Laws ch. 55, § 1. In like manner, California has defined electioneering communications as those made within 45 days of an election. *See* Cal. Gov. Code § 85310(a).

Many states have also incorporated various communications mediums into their electioneering communications laws, while other states have taken a contrasting approach. For instance, the State of Washington has determined that electioneering communications will parallel federal law and only capture those communications made through any

broadcast, cable, satellite television or radio transmission. Wash. Rev. Code. § 42.17A.005(19)(a). Washington State does not include phone calls or internet communications in its definition of electioneering communications. *Id.*

By contrast, the Florida electioneering communications laws are all-encompassing and include communications that are publicly distributed through television, radio, cable, satellite system, newspaper, magazine, direct mail, or telephone. Fla. Stat. § 106.011(8)(a). An even more sweeping definition is used by Idaho, which defines electioneering communications as including those which are broadcast by television or radio, printed in a newspaper or billboard, directly mailed or hand delivered to a personal residence, telephone calls to personal residences, or communications "otherwise distributed." Idaho Code Ann. § 67-6602(f).

Similarly, Maryland has defined electioneering communications as including only those communications that are broadcast on television, cable, or radio, delivered through mass mailings, text blasts, or e-mail blasts, or communicated through a telephone bank or an advertisement in a print publication. Md. Code Ann., Elec. Law § 13-307.

Different states have adopted different approaches to defining this category of speech. However, these varying approaches also offer no consistency in their reasoning on how including or excluding certain types of communications or the chosen time frames are tailored to meet the

objectives and purpose contemplated by this Court in *Buckley*. *See Buckley v. Valeo*, 424 U.S. 1, 66-67, 79-80 (1976); *see also WRTL II*, 551 U.S. at 478-79.

B. Certain States Have Incorporated A "Functional Equivalent" Requirement Into Their "Electioneering Communications" Statutes And Others Have Adopted Various Other Exclusions.

Florida and Hawaii have both incorporated a version of this Court's "functional equivalent" test into their "electioneering communications" regulatory regime. In Florida, electioneering communications are limited to communications that are not express advocacy but clearly identify a candidate for office and are susceptible of no reasonable interpretation other than an appeal to vote for a specific candidate. *See* Fla. Stat. § 106.011(8)(a)(1). Similarly, both Hawaii and Illinois limit their electioneering communication disclosure statutes to only those communications that are not otherwise susceptible to any reasonable interpretation other than an appeal to vote for a specific candidate. *See* Haw. Rev. Stat. Ann. § 11-341(d)(3); 10 Ill. Comp. Stat. 5/9-1.14; *see also* 17 Vt. Stat. Ann. tit. 17, § 2901 (6) (limiting application of electioneering communication statute to those communications that promote, support, attack, or oppose a candidate without using express advocacy).

West Virginia's "electioneering communication" regime contains two significant exclusions. *First*, West Virginia exempts communications that are

made while the legislature is in session and which urges persons to contact their legislature concerning the piece of legislation. *See* W. Va. Code § 3-8-1a(12)(B)(v). *Second*, West Virginia exempts voter guides that are done in a non-partisan manner. *See id.* § 3-8-1a(12)(B)(viii).

C. States Have Required Widely Varied Reporting And Disclosure Regimes On Electioneering Communications.

As demonstrated *supra*, many states have enacted varying time frames, incorporated many different communication mediums into their electioneering communications statutes, and adopted other provisions that include or exclude certain speech. Another inconsistency in state law is the scope of the reporting and disclosure requirements.

Some states have a disclosure threshold combined with a purpose requirement that appropriately limits public disclosure of donors. For example, Utah requires that whenever any person makes an electioneering communication, even though they would not otherwise be required to report as a "reporting entity", that person must file a report within 24 hours of making payment for the communication or entering into a contract to make such a payment. Utah Code Ann. § 20A-11-901. The report must include the name and address of each person contributing at least $100 for the purposes of disseminating the electioneering communication. *Id.*

Colorado requires any person who spends at least $1,000 per year on electioneering communications to

disclose the name, address, and occupation of any person who donates more than $250 or more *for the communication*. *See* Colo. Const. art. XXVIII, § 6(1); N.C. Gen. Stat. § 163-278.12C (a)(5) (requiring the disclosure of the names, addresses, and occupations of all donors who donated more than $1,000 *to further an electioneering communication*). These three state laws have purpose limitations similar to those found in the federal electioneering communication requirements. *See Citizens United*, 558 U.S. at 366; *Van Hollen*, 811 F.3d at 493.

But other states have adopted substantially lower disclosure thresholds without any purpose requirements. For instance, Florida requires that an electioneering communication organization report the full name and address of *anyone* making a contribution to the organization, regardless of the amount, and dating back to the organization's Statement of Organization. *See* Fla. Stat. §§ 106.0703(1)(b) and (3)(a)(1). Florida also requires the reporting of an individual's occupation for contributions in excess of $100. *See id.* § 106.0703(3)(a)(1). *See also* R.I. Gen. Laws § 17-25.3-1(h) (requiring disclosure of all donors who donated $1,000 or more in the aggregate during the election cycle regardless of donor's purpose).

Delaware, like other states, requires the filing of a "third-party advertisement report" when any person makes an expenditure in the aggregate of $500 within the election season. *See* Del. Code Ann. tit. 15 § 8031 (a). The filer must list the names and addresses of each person who has made contributions to the "person" in excess of $100

during the election period. *Id*. Under Delaware law, an election period looks back to the state's law general election, so for communications disseminated in an election year the disclosure of four years of donor information would be required. Del. Code Ann. tit. 15 §§ 8002(11)(d); 8031(a)(3); Del. Const. art. II, § 2

Indeed, this wide-ranging field of inconsistent and irreconcilable disclosure regimes makes it difficult, if not impossible, for any organization to properly identify how to best conduct their nationwide operations and maintain their donors' expectation of privacy.

III. *Buckley* Limited The Reach Of Disclosure Requirements To Include Only Speech That Is Unambiguously Campaign Related.

Delaware's claimed sufficiently important interest is the informational interest. App. 14-15. But this interest satisfies exacting scrutiny only where the information educates the public about "[w]ho is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369; *see also Buckley*, 424 U.S. at 66-67 (noting that disclosure provides voters with information to assist in evaluating candidates for federal office). The Supreme Court limited the application of disclosure statutes to the following:

1. Candidate committees;
2. Committees with the major-purpose of nominating or electing candidates;

3. When persons make contributions earmarked for political purposes; or
4. When persons make independent expenditures.

See Buckley, 424 U.S. at 79-80. None of these situations are present here where an organization produces and disseminates a non-partisan voter guide.

This Court also recognized that in the "electioneering communications" context, "The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *WRTL II*, 551 U.S. at 469 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)). As this Court noted in *WRTL* II, "[W]e agree…on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate." *WRTL II*, 551 U.S. at 474 n.7 (emphasis in the original).

When ruling that the advertisements at issue in *WRTL II* could not be subject to a prohibition, the Court said:

> [T]o justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. ***Enough is enough. Issue***

> ***ads like WRTL's are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them. To equate WRTL's ads with contributions is to ignore their value as political speech.***

WRTL II, 551 U.S. at 478-79 (internal quotations omitted) (emphasis added).

This Court shifted its discussion slightly when discussing *Citizens United*'s as-applied challenge to the disclosure and disclaimer requirements of BCRA. This Court applied the "exacting scrutiny" standard in upholding those requirements. *See Citizens United*, 558 U.S. at 366-67.

As "electioneering communications" statutes and regulations were adopted in various states, legislators and courts seized on this portion of *Citizens United* that rejected the 501(c)(4)'s argument that disclosure requirements could only apply to speech that is unambiguously campaign related. *See id*. at 369. Legislators and some courts have taken this sentence to mean that any disclosure regime of any scope can be applied to communications they define as "electioneering communications" without any other boundary.

A. There Is A Split Among The Circuit Courts Of Appeals Concerning The Constitutional Limits Of Disclosure.

There are two critical points about *Citizens United*'s rejection of the appellants proposed limitation that some courts have acknowledged and others have disregarded or failed to consider. First, the scope of the disclosure required under the FEC's post- *WRTL II* regulations and later upheld in *Van Hollen* 811 F.3d at 493, provide for disclosure of only those contributions given for the purpose of furthering the electioneering communication. Second, it is critical to note that this Court had concluded that the speech at issue was the functional equivalent of express advocacy before overruling the organization's as-applied challenge to the disclosure regime.

This has resulted in inconsistent and contradictory analysis in the lower courts.

For example, the Seventh Circuit has twice engaged in substantial discussion concerning this issue. One case upheld a state statute and one declared a state statute unconstitutional. In *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014), the court noted that this Court's discussion was a brief one sentence statement that was dicta. This is so because the Court had already decided that *Hillary: The Movie* was the functional equivalent of express advocacy. *See id.* at 824-25.

The decision declared unconstitutional a Wisconsin statute that expanded political committee

registration and disclosure requirements to groups that only occasionally conducted express advocacy. *See id.* at 834-35. DSF and AFPF do not conduct *any* express advocacy.

An earlier opinion of the Seventh Circuit examined the same portions of *Citizens United* in reviewing the Illinois "electioneering communications" statute described above. That court in *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012), found two bases on which to uphold the Illinois law. First, the *Madigan* court seized on the single sentence from *Citizens United* to conclude "mandatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy…." *Id.* at 484. The *Madigan* court then found a second basis to uphold the Illinois statute because it included a "functional equivalent" test. *Id.* at 485. Although *Madigan* cited two grounds for upholding the Illinois statute, the only way to harmonize *Barland* and *Madigan* on this point is to rely on *Madigan's* second reason for upholding the Illinois statute because it contained a functional equivalent test. It appears, therefore, that the notion of some limitation on the application of disclosure requirements for "electioneering communication" needs to be applied in the Seventh Circuit.

The Tenth Circuit concluded, in issuing an opinion in a case briefed and argued before *Citizens United* but decided after, "[w]e believe that requirement – that for a regulation of campaign related speech to be constitutional it must be unambiguously campaign related standard – as it

pertains to this case has not been changed." *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 676 n.4 (10th Cir. 2010). That case was an as-applied challenge – much like *Citizens United* – that involved mailings that denounced legislative initiatives, pointed out that the legislative sponsors of those initiatives relied upon certain organizations for funding, and that those legislators were bound to corporate interests. Those who received the letters were told to contact their legislators concerning the legislation and the legislators' contributions. *Id.* at 671-72.

Similarly, the Fourth Circuit held, in another opinion issued before *Citizens United*, that sweeping disclosure regulations could not be imposed on all activities by an organization that engages in political speech, even if the organization engaged in limited activity designed to influence elections. To expand the reach of registration and reporting requirements would "[c]ontravene both the spirit and the letter of *Buckley*'s 'unambiguously campaign related' test,...[and it would] subject a large quantity of ordinary political speech to regulation." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008).

In that decision, the Fourth Circuit reiterated *Buckley*'s limitations on a state's ability to regulate speech, so long as that speech is campaign related. *See id.* at 282-83. The Fourth Circuit identified this limitation as essential to maintaining First Amendment guarantees for core political speech, holding that "this requirement ensures that the constitutional regulation of elections—and the

financing of campaigns, in particular—does not sweep so broadly as to become an unconstitutional infringement on protected political expression" *Id.* at 287.

However, five years later, the U.S. Court of Appeals for the Fourth Circuit upheld West Virginia's electioneering communications disclosure statute. *See Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270 (4th Cir. 2013). There the plaintiffs, 501(c)(4) organizations, challenged, *inter alia*, West Virginia's exemption from the electioneering communication disclosure and disclaimer requirements for 501(c)(3) entities. *See id.* at 276, 278-79. West Virginia defined electioneering communications as any paid communication made by broadcast, satellite, cable, newspaper or magazine that refers to a clearly identified candidate within 30 days before a primary and 60 days before a general election and is directed at the relevant electorate. *See id.* at 281-82.

The court declared the exemption unconstitutional. *See id.* at 289. The court did so finding that IRS prohibitions and campaign finance regulations "*may*" not be coextensive. *Id.* Because of this, the exemption deprived West Virginia voters of information concerning the various 501(c)(3)s' "[e]lection-related activities." *Id.*

The Ninth Circuit takes a different approach. In *Brumsickle*, the court applied a two-prong analysis similar to *Madigan*. *See Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1017-19 (9th Cir. 2010). The U.S. Court of Appeals for the First Circuit later

adopted the second prong of *Brumsickle* analysis in *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011) ('NOM'). In *Brumsickle*, the Ninth Circuit concluded that the speech proposed by Human Life of Washington was the "functional equivalent" of express advocacy related to a ballot measure. The court then added a second tier to its analysis and concluded that "even if Human Life's proposed communications constitute unadulterated issue advocacy" this Court's single sentence in the as-applied analysis in *Citizens United* was controlling. The Ninth Circuit concluded that this Court actually held that "the government may impose disclosure requirements on speech" and that "the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable." *Brumsickle*, 624 F.3d at 1016.

The First Circuit, in *National Organization for Marriage v. McKee*, reviewed this same section of Citizens United and concluded that "[W]e find it reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *NOM*, 649 F.3d at 54-55. That court appears to have adopted only the second prong of the analysis applied by *Brumsickle* and *Madigan*. This decision failed to acknowledge that this Court's single sentence in *Citizens United* involved an as-applied challenge. It is a stunning conclusion – particularly in light of decisions from this court such as *NAACP v. Alabama,* 357 U.S. 449 (1958), and *McIntyre v. Ohio* 514 U.S. 334 (1995) – that a Circuit Court could conclude that the First Amendment "has no place" in

reviewing statutes that require substantial disclosures by an organization.

B. The Split Among The Circuits Has Caused Confusion Among The Federal Trial Courts.

Federal trial courts have similarly been unclear on the scope of disclosure that may be permissible. As one trial court in South Carolina noted, "[B]ased on the Supreme Court's recent ruling in *Citizens United*, the Court is not prepared to conclude that South Carolina would be unable to impose *some level of disclosure requirement* on groups that disseminate communications which qualify under" an electioneering communications definition providing for 45-day pre-election windows for communications "regardless of whether the communication expressly advocates for or against a candidate." *South Carolina Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 727 (D.S.C. 2010) (citing S.C. Code § 8-13-1300(31)(c)). That Court did not reach a conclusion with respect to the permissible level of disclosure.

Prior to this Court's decision in *Citizens United*, a federal trial court in Florida struck down an expansive electioneering communications regime (very similar to the one upheld by DSF) that included disclosure of "all donors – even those who never intended their gift to go towards political speech." *Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning*, 2008 U.S. Dist. LEXIS 91591 (N.D. Fla. Oct. 29, 2008). That court declined to read *Buckley* or *McConnell* as permitting Florida

to capture all speech under Florida's expansive electioneering communication statute. *Id.* at *25. The district court also recognized that *WRTL II*'s functional equivalent of express advocacy test was a line of constitutional demarcation between speech that could be regulated and speech that could not. *See id.*

C. There Is Also Confusion Among The Trial Courts In Various States.

State appellate courts have held similarly. In a case before the intermediate appeals court in Arizona, that court concluded that speech that was the functional equivalent of express advocacy could be subject to the disclosure requirements of a political committee. *See Comm. for Justice & Fairness (CJF) v. Ariz. Sec'y of State's Office,* 235 Ariz. 347, 357-58 (Ariz. Ct. App. 2014). In the Vermont Supreme Court's review of that state's electioneering communications laws, the court there was presented with yet another as-applied challenge that the trial court had determined was "for the purpose of supporting or opposing one or more candidates." *State v. Green Mt. Future,* 2013 Vt. 87 (Vt. 2013). That court similarly read the single sentence in *Citizens United* to conclude that disclosure requirements are unlimited even where there is no express advocacy or its functional equivalent. *Id.* at 27. While concluding that *Buckley*'s "express advocacy" only test was overruled by *Citizens United* and *McConnell*, the court noted that the communications at issue before that court were the functional equivalent of express advocacy. *Id.* at 40 n.8.

Before this Court now is perhaps the first case to test the question of whether a communication that is not the functional equivalent of express advocacy can be subject to the disclosure requirements as substantial as – or perhaps more substantial than – political committee requirements for distributing voter guides and other non-partisan communications that mention or refer to candidates or officeholders.

This Court has an opportunity to clarify the applicable standards.

CONCLUSION

The Third Circuit's decision and lack of clarity following *Citizens United* results in identical speech being held to varied and inconsistent constitutional standards. It is imperative that the rights of association and speech guaranteed by the First Amendment are adhered to consistently across the country. Groups that operate by raising charitable contributions from donors nationwide are disproportionately affected by disclosure regimes that require the disclosure of names and other itemized information of donors.

In this case, Delaware has expanded its disclosure regime to ensnare communications that simply mention or refer to candidates but are not the functional equivalent of express advocacy. Once ensnared, those communications and the groups producing them in Delaware, are then subject to burdensome registration, reporting and disclosure requirements identical to, or perhaps more expansive than, those applied to political

committees. For the foregoing reasons, this Court should grant the petition and clarify the applicable standards when evaluating the permissible scope of disclosure laws.

Respectfully submitted,

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