IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE STRONG FAMILIES,	)	
	)	
Plaintiff,	)	No.1:13-cv-01746-SLR
	)	
v.	)	
	)	
JOSEPH R. BIDEN, III,	)	
	)	
and	)	
	)	
EILEEN MANLOVE,	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS
MOTION FOR PRELIMINARY INJUNCTION

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ARGUMENT

It has been decades since a government attempted to do what Delaware attempts here. Consequently, Plaintiff relies upon constitutional decisions of similar vintage. These include *Buckley v. Valeo*, 424 U.S. 1 (1976)and its explicit importation of *NAACP v. Alabama*, 357 U.S. 449 (1958), *Bates v. Little Rock*, 361 U.S. 516 (1960), and *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539 (1963)into the law governing campaign finance.Pl. Br. (D.I. 28) at 3-7; *Buckley v. Valeo*, 424 U.S. at 64.

While Defendants make passing reference to *Buckley* in their Opposition, they fail to even mention, let alone refute, these arguments. Rather, Defendants appear to believe that *McConnell v. FEC*, 540 U.S. 93 (2003) and *Citizens United v. FEC*, 558 U.S. 310 (2010),overruled, *sub silencio,*[1] some of the most revered decisions of the civil rights era. Such a position is improbable on its face. It is also mistaken.

Defendants' case hinges on a three-part theory of disclosure statutes, which can be briefly summarized as follows:

1. Disclosure is subject to exacting scrutiny, which, despite its name, is a rather relaxed form of constitutional analysis. Def. Br. (D.I. 30) at 8. (citing *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1242 (11th Cir. 2013) ("lower level of scrutiny"); *but see Worley*, 717 F.3d at 1249 ("[t]hough possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp.") (internal citation and quotation marks omitted).
2. "Disclosure," as the courts have used that term, encompasses any information requested by the state, without regard to the specifics of the demand. Def. Br. (D.I. 30) at 1, n. 1

[1] Defendants' brief is similarly silent, in that it does not so much as cite *NAACP v. Alabama* and its progeny.

(asserting that a list of cases involving various types of disclosure are all "similar" to Delaware's law).

3. Although even exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," *Citizens United v. FEC*, 558 U.S. at 366-367 (citations and quotation marks omitted), "disclosure" may be constitutionally imposed upon any speech which simply mentions any candidate for any office in a specified period before an election—regardless of the context in which the candidate is mentioned or the level of "disclosure" required. *Cf.* Def. Br. (D.I. 30) at 9 (asserting that the invocation of the public's informational interest is always sufficient to uphold disclosure laws, without noting that such laws must still be appropriately tailored to that interest).

Defendants have provided a significant number of citations—all but one of which come from outside this circuit[2]—and, irrespective of the Court's order limiting the scope of the parties' briefing, four expert declarations, and numerous exhibits in support of this theory.

But although the State argues that "multiple courts of appeals have relied on *Citizens United* to reject facial challenges to other similar laws," the State cannot point to even a single case which upholds the disclosure of *all* contributors, above a threshold amount, to a *charitable* organization, because it engages in genuine *issue* speech mentioning candidates. Def. Br. (D.I.

[2] For the proposition that disclosure is subject to less regulation than monetary limits on contributions or expenditures, Defendants perplexingly cite *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000). That pincite merely notes *Buckley*'s "broad acceptance [of] the FECA's reporting and disclosure requirements," and reiterates "the dangers of compelled disclosure of political activity," and "the strict test established by *NAACP v. Alabama*." (citations and quotation marks omitted).The *Mariani* court went on to upheld the longstanding federal ban on corporate direct contributions to candidates and the making of such contributions in the name of another. Neither of those bansis at issue here.

30) at 1. Meanwhile, there is an on-point, *en banc* decision of the D.C. Circuit Court of Appeals which would clearly invalidate the State's law—a case which the State's brief in opposition fails to even cite. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (*per curiam*); Pl. Br. (D.I. 28) at 15-16.

A. Defendants conflate all species of "disclosure."

The speaker involved in this case is no mystery. The nonprofit corporation Delaware Strong Families listed its involvement on the face of the 2012 Guide and would do so again this year.[3] DSF's federal tax filings are a matter of public record. But anyone requesting a copy of those forms would find the identity of DSF's contributors redacted. Their names and addresses are protected from public disclosure by federal law. 26 U.S.C. §6104(d)(3)(A). Indeed, revealing their identities carries significant civil and criminal penalties, even for state officials. 26 U.S.C. § 7213(a). Plaintiff's contributors are accorded this protection, in part, because § 501(c)(3) organizations are banned from engaging in political activity—federal, state, or local.[4] If the

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[3] Indeed, such a disclaimer is now required by the Act, under a provision DSF has not challenged. 15 *Del. C.* § 8021(b) (2014).

[4] Although the state dedicates much attention to the activities of DSF's affiliate organization, a § 501(c)(4) entity, this is irrelevant. The § 501(c)(4) is not involved in this case, and, in point of fact, undersigned counsel do not represent the § 501(c)(4) organization.

Moreover, § 501(c)(3) and § 501(c)(4) affiliations are common and recognized. *See Regan v. Taxation with Representation*, 461 U.S. 540, 544 (1983). "The IRS countenances colocation and office sharing, employee sharing, and coordination between affiliated organizations so long as each organization maintains separate finances, funds permissible activities, and pays its fair share of overhead...Many charities (501(c)(3)), social welfare organizations (501(c)(4)), business leagues (501(c)(6)), and electoral organizations (527) affiliate with each other while maintaining their corporate and organizational distinctiveness." STATEMENT OF REASONS OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSEN, IN THE MATTER OF CROSSROADS GRASSROOTS POLICY STRATEGIES (MUR 6396), at12 n. 51 (2013).

federal government changed this law, and sought to condition tax status for § 501(c)(3) organizations on publicizing an organization's donor list, it would likely face a credible constitutional challenge. *See Bates v. City of Little Rock*, 361 U.S. at 525 (successful challenge to municipalities' attempt to obtain names and addresses of nonprofit corporation's supporters as "an adjunct of their power to impose occupational license taxes").

Even if Defendants are correct, and this form of disclosure is subject to exacting scrutiny, the Court has recognized that "[d]isclaimer and disclosure requirements may burden the ability to speak" and that states must demonstrate "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-367 (internal citations and quotation marks omitted). This requires more than simply asserting an informational interest, or any other interest. *Buckley*, 424 U.S. at 64; *compare* Def. Br. (D.I. 30) at 9, *and* Marziani Decl., (D.I. 30) at 3-6. It also requires *tailoring*. And a court

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And the type of "chargebacks" present in Plaintiff's 2011 and 2012 tax returns at Schedule O are designed to ensure compliance with the tax code. The § 501(c)(4) entity pays for the full amount of shared §§ (c)(3)/(c)(4) expenses up front, and is then reimbursed for the § 501(c)(3)'s allocated share at a later time. This system ensures that tax-deductible money is not used to fund non-exempt activity (such as political advocacy).*See* WARD L. THOMAS AND JUDITH E. KINDELL, S. AFFILIATIONS AMONG POLITICAL, LOBBYING, AND EDUCATIONAL ORGANIZATIONS, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FY 2000 (1999) at 259 (available at: http://www.irs.gov/pub/irs-tege/eotopics00.pdf).

Moreover, DSF notes that Defendants' claim that "DSF's 2012 return, produced in discovery, does not indicate the amount of reimbursements to DFPC" is incorrect—they are produced on Schedule O of that return, which also explains the reimbursement system. Def. Br. (D.I. 30) at 6, n. 6.

Furthermore, Plaintiff's counsel would like to correct an inadvertent misstatement from its previous filings. If a candidate failed to respond to the DFPC questionnaire, DFPC, rather than DSF, "used publicly-available information to determine that candidate's position on the surveyed issues." Furthermore, candidates were aware that DFPC, not DSF, "would use this procedure." D.I. 21 at 2; D.I. 1 at ¶26.

cannot determine whether a state's disclosure regime is appropriately tailored without considering precisely what is being disclosed.

B. The U.S. Supreme Court has upheld two species of disclosure: general disclosure for those contributing to PACs, and disclosure of earmarked contributions for political advocacy performed by non-PACs.

Defendant notes that "*McConnell* and *Citizens United* both upheld BCRA's disclosure requirements even though they require disclosure of 'the names and addresses of *all* contributors' over a specified threshold." Def. Br. (D.I. 30) at 15 (emphasis Defendant's). While this citation is accurate, Defendants fail to give relevant context.

McConnell v. FEC facially upheld the electioneering communications disclosure regime, but expressly noted that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." 540 U.S. at 206, n. 88.[5] In other words, whether this type of communication can trigger *any* form of disclosure regime is an open question.

As importantly, in 2003, the "all contributors" language that Defendants cite did not apply to every corporation, including Plaintiff—corporations were generally banned from making electioneering communications. The "all contributors" language applied only to those permitted to engage in electioneering communications under BCRA. BCRA §§ 203(a), 203(3)(B); *McConnell v. FEC*, 540 U.S. at 204 ("Thus, under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose.").

Four years later, *FEC v. Wisc. Right to Life*, 554 U.S. 449 (2007) ("*WRTL II*") demonstrated that at least *some* corporations were permitted to directly conduct electioneering communications under BCRA. Consequently, the Federal Election Commission stepped in and—

[5] Of course, the speech at issue in this case is not an "ad" in any regular sense of that term.

on a unanimous vote—protected donor identity for these new corporate speakers, such as § 501(c)(4) corporations, by implementing the earmark-only disclosure rule for corporations.11 C.F.R. § 104.20(c)(9); Agenda Document No. 08-01 at 3 (Jan. 24, 2008), available at: http://www.fec.gov/agenda/2008/approve08-01.pdf.[6] This was done, because open-ended disclosure of all contributors to nonprofit corporations had never been, and has never been, permitted.[7]

By contrast, the disclosure of most general contributors to PACs, without earmarking, is constitutional because of a direct link between the speaker and the speech being regulated. *Buckley* at 79 (disclosure of contributors justified because all PAC expenditures "are, by definition, campaign related"). The State's informational interest in discovering who funds a speaker depends on the type of speech involved and what sort of entity is speaking.

C. Disclosure of this kind has never been upheld for this form of speech.

Only one court has ever issued an opinion that is on point here. The D.C. Circuit' s*en banc* opinion in *Buckley v. Valeo* found that compelled disclosure based on a public communication "setting forth[a] candidate's position on any issue, [or] his voting record" failed

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[6] Defendants suggest that "[t]he FEC has since attempted to impose" earmark-only disclosure "by regulation."Def. Br. (D.I. 30) at 13, n. 17 In point of fact, there *is* such a regulation, and it was the law at the time of *Citizens United*, as the district court noted. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 ("Section 201 is a disclosure provision requiring that any corporation spending more than $ 10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes--among other things--the names and addresses of anyone who contributed $ 1,000 or more in aggregate to the corporation *for the purpose of furthering electioneering communications*." (citing §§ 434(f)(1), (2)(F); 11 C.F.R. § 104.20(c)(9)) (emphasis supplied).

[7] Defendants correctly note that the regulation is currently the subject of active litigation, but fail to note that, in rejecting a *Chevron* step one challenge, the D.C. Circuit has held that the regulation is not inconsistent with BCRA itself. *See Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

constitutional scrutiny. 519 F.2d at 869 (per curium).No U.S. Supreme Court case has disturbed this holding, and none of the out-of-circuit cases Defendants cite contravenes it.

The cases Defendants offer *all* reviewed statutes that would not have reached DSF's voter guide. This is for a variety of reasons. Some challenged statutes only regulated express advocacy or its functional equivalent, and not mere mention of a candidate.[8] One involved a statute that explicitly exempted § 501(c)(3) activity from disclosure.[9] Other cases involved a statute specifically exempting voter guides.[10]Those cases dealt with narrower, better tailored statutes—statutes that, unlike Delaware's, could pass the rigor of exacting scrutiny.

Moreover, *none* of Defendants' cases would have required the disclosure of general contributors to a § 501(c)(3) organization that engaged in the type of speech at issue in this case.[11]

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[8] *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 472 (7th Cir.) (electioneering communication statute limited its regulation to speech which was "unambiguously an 'appeal to vote' for or against a candidate, party, or ballot issue"); *Nat'l Org for Marriage v. McKee*, 649 F.3d 34, 67 (1st Cir. 2011) (relying on state election commission's narrowing of the phrase "influencing" to "being susceptible of no reasonable interpretation other than to promote or oppose the candidate"); *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (involving a challenge to an FEC definition of "express advocacy" which the Court found *narrower* than the functional equivalence test); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012) (same).

[9] *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) was a challenge to 10 ILL. COMP. STAT. ANN. 9/1.14 (LexisNexis 2014). Subsection (b)(4) of that statute specifically exempted § 501(c)(3) organizations from the regulations governing electioneering communications.

[10] *Center for Individual Freedom v. Tennant*, 706 F.3d 270 (4th Cir. 2012) (statute specifically exempted voter guides from regulation as electioneering communications), *see* W. Va. Code § 3-8-1a(12)(B)(viii) (2014); *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) (10 ILL. COMP. STAT. ANN. 5/9-1.14(b)(3) exempted "[a] communication made as part of a non-partisan activity designed to encourage individuals to vote or to register to vote").

[11] Def. Br. (D.I. 30) at 1, n. 1.

Indeed, by unmooring the term "disclosure" from its lengthy history as a campaign finance term of art, Defendants offer no limiting principle to the state's informational interest. If it is appropriate to demand disclosure of the name and address of a contributor who gives money to a § 501(c)(3) a year and a half before that (c)(3) publishes a nonpartisan voter guide, then what may the state *not* require? And, in the context of a § 501(c)(3) organization, if donor disclosure is so obviously acceptable, why is it banned by federal law?

In its filings, DSF has often cited older case law. Plaintiff has relied upon these precedents, because it has been decades since any government has so badly overreached in its attempt to regulate nonpartisan speech. Since 1976, it has been understood that Plaintiff's activities are public education—not electioneering—that privacy of donors is constitutionally protected absent express advocacy or earmarking, that § 501(c)(3) groups do not engage in politics, and that the tailoring demanded by exacting scrutiny prohibits a state from enacting so sweeping a statute.

D. Defendants misunderstand irreparable injury in the First Amendment context.

In this Circuit, "[f]our factors determine whether a preliminary injunction is appropriate:(1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest." *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 302 (3d Cir. 2013) (internal citation and quotation marks omitted); *see also N.J. Retail Merchs. Ass'n v.*

Sidamon Eristoff, 669 F.3d 374, 385-386 (3d Cir. 2012); *Iles v. de Jongh*, 638 F.3d 169, 172 (3d Cir. 2011).[12]

In this Circuit, "[i]t is well-established that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir. 1989) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976).[13] "[P]laintiffs who…show[] a likelihood of success on the merits of their First Amendment claim" are "entitled to preliminary injunctive relief" if "they could show a 'real or immediate' danger to their rights 'in the near future.'" *Conchatta, Inc. v. Evanko*, 83 Fed. Appx. 437, 442 (3d Cir. 2003) (citing *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997).

Defendants assert that "[t]he Court's February 6 scheduling order" which will enable this case to be decided on the merits before DSF must began preparing its voter guide "is sufficient ground to deny DSF's motion." Def. Br. (D.I. 30) at 19.[14] But this is not the law. "In *Elrod*, the Court found injunctive relief was clearly appropriate where First Amendment interests were either threatened or in fact being impaired *at the time [injunctive] relief was sought*." *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) (emphasis supplied); *Conchatta*, 83 Fed. Appx. at

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[12] Defendants suggest that *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) stands for the proposition that "likelihood" of success on the merits is different from "reasonable probability" on the merits. This is not correct. *Winter* prevented a Court from entering "a preliminary injunction…based only on a 'possibility' of irreparable harm." *Winter*, 555 U.S. at 21. In truth, as one might expect from the plain meanings of the words involved, "reasonable probability" and "likelihood" mean the same thing. *Iles v. de Jongh*, 638 F.3d at 172 (3d Cir. 2011) ("[D]istrict court must consider: (1) whether the movant has shown a *reasonable probability* of success on the merits"; "[T]he first element of the preliminary injunction standard [is]—the *likelihood* of success on the merits…") (emphasis supplied).

[13] Defendants correctly point out that DSF's citation to *Conestoga*, 724 F.3d 377,416 (Jordan, J., dissenting), improperly quoted the dissent as the court's holding. Plaintiff apologizes to the Court for this error.

[14] Of course, that same order also required both parties to brief this Motion, suggesting a certain circularity in Defendants' thinking.

442. The Act went into effect on January 1, 2013, threatening DSF's First Amendment associational and speech rights, and DSF first sought this Court's injunctive relief on January 14, 2014. Def. Br. (D.I. 30) at 1.

In this case, it is undisputed that if DSF attempts to publish its voter guide, Defendants will seek to enforce the law against it. Thus, absent injunctive relief, DSF intends to self-silence, itself a First Amendment injury.[15] *Hohe*, 868 F.2d at 73 ("[P]laintiffs must show 'a chilling effect on free expression") (internal citation and quotation omitted).

Defendants' citation to *Caplan v. Fellheimer Eichene Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) does not demonstrate that self-silencing evidences a lack of First Amendment expressive injury. That case dealt with a defendant who assigned a sexual harassment claim to an insurance company for its defense—giving that company the right to settle the case without consulting defendant. *Caplan*, 68 F.3d at 832. The resulting settlement prevented the defendant from filing a counterclaim for malicious prosecution, which, in an effort to void the settlement, it argued was an irreparable harm. *Id.* at 839. The Third Circuit found a preliminary injunction unnecessary because "the harm was self-inflicted...defendants contracted with [the insurer] to authorize [it] to settle th[e] litigation." *Id.* There was *no* First Amendment interest involved, and besides, in this case, DSF's self-censorship is *entirely* predicated on the actions of Defendants, who seek to enforce an unconstitutional statute against it.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order granting its motion for preliminary injunction.

[15] Plaintiffs' other choices would be (1) to comply with an unconstitutional statute; or (2) refuse to comply with the disclosure provisions of the Act and risk criminal penalties.

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